The Regulation of Physical Appearance in the Canadian Workplace as a Human Rights Issue

by

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LLM, Université Laval, 2009
LLB, Université Laval, 2006

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ABSTRACT

This dissertation takes an employee-centred approach to explore the power that employers have to regulate the physical appearance of their employees in the Canadian workplace. Specifically, it analyzes the limitations and potential of existing human rights instruments for protecting the appearance interests of employees in Canada, with primary focus on British Columbia, Ontario, and Quebec. Appearance matters a great deal in the North American context. Scholars of sociology have established that as a social and identity marker, as well as a powerful means of expression, appearance should be considered as fundamental to an employee's identity, sense of self, and personhood. In particular, these studies show that appearance choices (such as tattoos, piercings, grooming practices, and clothes) are important to an employee's sense of self; they are therefore worthy of legal protections. Yet, under the current state of law in Canada, workplace appearance regulation is legal, with limits for the most part dependent on whether or not employees are unionized. This dissertation takes up the question of how to address employees' appearance in the workplace as a human rights issue by offering two frameworks of analysis—the anti-discrimination approach and the fundamental rights at work approach. Physical appearance is not a protected ground of discrimination in Canada. As such, approaching the question of workplace appearance policies and practices through an anti-discrimination lens offers some considerable challenges for employees in a private employment relationship in most Canadian provinces. In Quebec, the Quebec *Charter of human rights and freedoms* protects a wide range of fundamental rights and freedoms applicable to private employment relationships, including the right to dignity, the right to privacy, and the right to freedom of expression. Quebec employees have successfully raised these rights in order to challenge workplace appearance regulation. Quebec employers are thus more limited regarding appearance policies than their counterparts in the rest of Canada, because of the fundamental rights at work framework, which offers a balanced approach to employers' and employees' competing interests. With a careful review of both frameworks, I argue that legislative changes could enable shifts in cultures of work, and I conclude with some modest proposals to achieve better protections for employees broadly, and more specifically with respect to the importance of appearance in the workplace.

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LIST OF ABBREVIATIONS

ALS	*Act respecting labour standards* (Quebec)
AHRC	Alberta Human Rights Commission
BCCLA	British Columbia Civil Liberties Association
BCHRC	British Columbia Human Rights Council
BCHRT	British Columbia Human Rights Tribunal
BFOQ	*Bona fide* occupational qualification
BFOR	*Bona fide* occupational requirement
CCQ	*Civil Code of Québec*
CCRO	Civil Code Revision Office
CDPDJ	Commission des droits de la personne et des droits de la jeunesse
CHRA	*Canadian Human Rights Act*
CHRR	Canadian Human Rights Reporter
CLAD	Canadian Labour Arbitration Decisions
CLAS	Canadian Labour Arbitration Summaries
CNESST	Commission des normes, de l'équité, de la santé et de la sécurité du travail
CPSLRB	Canada Public Service Labour Relations Board
CQLR	Compilation of Quebec Laws and Regulations
CRT	Commission des relations du travail
CT	Commissaires du travail
DTE	Droit du travail Express
ESA	*Employment Standards Act*
HRTO	Human Rights Tribunal of Ontario
HRTQ	Human Rights Tribunal of Quebec
IER	Individual employment relationship
JCQ	JurisClasseur Québec
LAC	Labour Arbitration Cases
MHRC	Manitoba Human Rights Commission
OHRC	Ontario Human Rights Commission
OHSA	*Occupational Health and Safety Act*
RCMP	Royal Canadian Mounted Police
SAG	Sentences arbitrales de griefs
SCC	Supreme Court of Canada

SCR	Supreme Court Reports
SHRC	*Saskatchewan Human Rights Code*
TA	Tribunal d'arbitrage
TAT	Tribunal administratif du travail
TDP	Tribunal des droits de la personne
WCA	*Workers Compensation Act*
WWR	Western Weekly Reports

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DEDICATION

To Lily & Fernand

To Francis

CHAPTER 1
INTRODUCTION

1.1 REGULATION OF PHYSICAL APPEARANCE IN THE WORKPLACE

Employees of a large hospital challenge their employer's dress code banning excessive body piercing and large tattoos.[1] Alleging that the threat of discipline amounts to reprisal, an employee of a smelting plant shaves his mustache and goatee to comply with the company's strict clean-shaven policy.[2] In addition to the obligation to cover their tattoos while at work, police officers are required to obtain prior approval from their employer when they want to get a tattoo.[3] A part-time supermarket cashier is suspended after showing up at work with pink hair, while her colleague who wears an eyebrow piercing experiences the same fate.[4] Employees of a car rental company are suspended for refusing to remove items of facial jewellery.[5] A bus driver is transferred to another position because of the Maori warrior tattoo he wears on the right side of his face.[6] A restaurant dress code is modified in order to force waitresses to denude themselves and parade in front of customers dressed in a way that highlights their sexual attributes.[7] Employees of an IT department who have no direct contact with customers complain about the employer's policy of no jeans at work.[8] All of these examples, derived from Canadian case law, involve different sorts of restrictions on workers' autonomy; and all these are issues related to the regulation of physical appearance in the workplace.

Employers often impose strict policies on dress and grooming of their employees for a number of different reasons, including the protection of health and safety of the workers and the

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1 *Re Ottawa Hospital and Canadian Union of Public Employees, Local 4000* (2013), 229 LAC (4th) 14 (Ont Arb) [*Ottawa Hospital*].

2 *Browne and Sudbury Integrated Nickel Operations*, 2016 HRTO 62 [*Browne*].

3 *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu et Ville de St-Jean-sur-Richelieu*, DTE 2016T-929 (Qc Arb) [*Policiers de St-Jean-sur-Richelieu*].

4 *Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 500 et Maxi & Cie, Provigo Distribution Inc, division Maxi (St-Jérôme)*, DTE 2002T-31 (Qc Arb) [*Maxi St-Jérôme*].

5 *Thrifty (Canada) Ltd v OPEU, Local 378* (2001), 100 LAC (4th) 162 (BC Arb) [*Thrifty* 2001].

6 *Syndicat des chauffeurs de la STL et Société de transport de Laval*, DTE 2009T-92 (Qc Arb) [*STL*].

7 *Commission des droits de la personne et des droits de la jeunesse c 2632-1661 Québec Inc (Restaurant La Courtisane)*, DTE 97T-872 (Qc TDP) [*Restaurant La Courtisane*].

8 *Boissons gazeuses Guy H Mainville Inc et Union des routiers, brasseurs liqueurs douces et ouvriers de diverses industries, local 1999*, DTE 82T-662 (Qc Arb) [*Boissons gazeuses Mainville*].

public, as well as for the creation and protection of their corporate image. In a society marked by diversity and the valuing of individuality, the growing range of appearance choices can generate major conflict in the workplace between the employer's desire to maintain full control over the company's image and the employee's wish to display an appearance that fully reflects their[9] personality without being negatively treated because of their looks. What interests must prevail in such circumstances: the freedom of the worker or the entrepreneurial freedom of the employer?

The following section presents the topic of my dissertation by introducing the issue of workplace appearance regulation in Canada. It provides contextual information to illuminate the general considerations associated with this issue, with an emphasis on human rights as it is the focus of my argument. The definitions of key terms used in this dissertation are also provided in order to fully appreciate the scope of my dissertation, which will be discussed in the next section.

1.1.1 Background and Context

Appearance plays a major role in western society,[10] and, thus, it is not surprising that employers would want to control the appearance of their staff. But apart from a few exceptions, an employee's physical appearance has generally nothing to do with their skills; there is no correlation between appearance and performance for most jobs. So why do we keep reading stories in the

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9 Throughout this dissertation, I use the singular pronoun "they" (and its derivative forms "them," "their," "theirs," "themself," and "themselves") to be inclusive of nonbinary individuals. See Bailey Moody, "Deconstructing Sex and Gender Essentialism: Protecting Transgender, Nonbinary, and Gender Non-Conforming Employees from Discrimination in the Context of Sexed and Gendered Dress Codes and Grooming Policies" (2018) 1:1 Soc Justice & Equity LJ 109 at 145. This gender-neutral language is particularly recommended by the Government of Canada's Department of Justice. See Canada, "Legistics Singular 'They'" (last modified 7 January 2015), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p32.html>.

10 The parameters of this dissertation focus on Canada and Canadians. As Canadians' culture and history have been influenced by western European values and traditions, the terms "western society" and "westerners" in this dissertation refer to its common understanding, namely people living in North America or western Europe, which broadly includes Canadians from all provinces and territories. In addition, the majority of the reviewed literature in this dissertation focuses on western countries and westerners' appearance in general. Unless specifically mentioned, western therefore refers to North America and western Europe.

media about businesses seeking a pretty and handsome sales force,[11] female[12] restaurants' and bars' workers who are required to adhere to sexualized dress codes,[13] employees facing adverse employment action because of their tattoos and piercings,[14] female employees fired for being too attractive,[15] and stories about how appearance can affect employees' remuneration and working

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11 See e.g. Barbara Herman, "The Unbearable Whiteness of Abercrombie & Fitch" (28 February 2015), online: *International Business Times* <https://www.ibtimes.com/unbearable-whiteness-abercrombie-fitch-multicultural-era-can-branding-still-work-1830958>; Harriet Williamson, "Model Workers: The Clothes Shops that Only Hire Beautiful People" (18 July 2014), online: *NewStatesmanAmerica* <https://www.newstatesman.com/culture/2014/07/model-workers-clothes-shops-only-hire-beautiful-people>; David Doorey, "Moxies: Where 'Uglies' Need Not Apply?" (23 May 2011), online (blog): *Law of Work* <http://lawofwork.ca/?p=2994>; Diane E Lewis, "Suit focuses attention on alleged bias against attire, beauty on the job" (27 March 2005), online: *Boston Globe* <http://archive.boston.com/jobs/globe/out_field/archive/032705.shtml>; Steven Greenhouse, "Going for the Look, but Risking Discrimination" (13 July 2003), online: *The New York Times* <http://www.nytimes.com/2003/07/13/us/going-for-the-look-but-risking-discrimination.html>.

12 In this dissertation, when I use the terms "female," "woman," or "women," I am inclusive of those who self-identify as female or women. This includes people assigned the sex female at birth and transgender women. Similarly, when I use the terms "male," "man," or "men" I am inclusive of those who self-identify as male or men. However, when I am addressing the unique concerns of transgender or non-binary people, I will be specific. For a discussion of inclusive terminology, see Katherine Jenkins, "Amelioration and Inclusion: Gender Identity and the Concept of Woman" (2016) 126:2 Ethics 394.

13 See e.g. Nicole Ireland, "Women and dress code discrimination: 3 cases that made it to human rights tribunals" (5 March 2016), online: *CBC News* <https://www.cbc.ca/news/business/women-dress-codes-human-rights-1.3476964>; Lindsay Sample, "Restaurant dress codes: Sexy outfits for female staff may be discriminatory" (4 March 2016), online: *CBC News* <https://www.cbc.ca/news/business/marketplace-gender-specific-dress-codes-1.3474289>; Pete McMartin, "By Human Rights, Do you Mean that Includes Bleached Blonds, Too?" (23 September 2010), online: *Vancouver Sun* <http://www2.canada.com/vancouversun/columnists/story.html?id=b1d6b82e-2020-4478-b71c-db437f866329&p=2>; Todd Coyne, "Former Shark Club Bartender Claims Sex Discrimination" (17 September 2010), online: *Richmond Review* <http://www.bclocalnews.com/richmond_southdelta/richmondreview/>.

14 See e.g. Carri-Ann Taylor, "Woman sacked from dream job after 30 minutes because of tattoos" (25 September 2015), online: *Metro* <https://metro.co.uk/2015/09/25/woman-sacked-from-dream-job-after-30-minutes-because-of-tattoos-5407767/>; Jamie Henry, "Executive fired for foot tattoo" (25 July 2014), online: *HRD* <https://www.hcamag.com/ca/news/general/executive-fired-for-foot-tattoo/125918>; "Tattooed Ottawa Convention Centre workers locked out" (30 May 2014), online: *CBC News* <https://www.cbc.ca/news/canada/ottawa/tattooed-ottawa-convention-centre-workers-locked-out-1.2659848>; Randy Dotinga, "Branded in the Workplace" (13 September 2004), online: *The Christian Science Monitor* <http://www.csmonitor.com/2004/0913/p13s02-wmgn.html>. See also Aryana Kamelian & Melanie Ziment, "Argument in the Office: Tattoos in the Workplace" (7 February 2019), online: *Daily Nexus* <http://dailynexus.com/2019-02-07/argument-in-the-office-tattoos-in-the-workplace/>; "Research reveals how your tattoos affect your chances of getting the job" (10 June 2014), online: *Workopolis* <https://careers.workopolis.com/advice/research-reveals-how-your-tattoos-affect-your-chances-of-getting-the-job/>.

15 See e.g. Ben Chapman, "Women says she was dismissed from London TV job for being too good looking" (20 February 2017), online: *Independent* <https://www.independent.co.uk/news/business/news/woman-emma-hulse-dismiss-job-too-good-looking-london-unit-tv-catwalk-soho-manager-a7589321.html>; Marisa Meltzer, "You're Cute and Fired" (29 November 2013), online: *The New York Times* <https://www.nytimes.com/2013/12/01/fashion/Some-women-are-fired-for-being-too-attractive.html>; Michael Kimmel, "Fired for Being Beautiful" (17 July 2013), online: *The New York Times* <https://www.nytimes.com/2013/07/17/opinion/fired-for-being-beautiful.html>; Maureen Dowd, "Dressed to Distract" (5 June 2010), online: *The New York Times* <http://www.nytimes.com/2010/06/06/opinion/06dowd.html?adxnnl=1&adxnnlx=1313178489-7spHhsDfABrt4t7+o7vzdA>. See also Neil Senturia, "The bias against beautiful women at work" (13 December 2019), online: *The San Diego Union-Tribune* <https://www.sandiegouniontribune.com/business/story/2019-12-16/the-bias-against-beautiful-women-at-work>; David Doorey, "Can an Employer Fire an Employee for 'being too sexy'?" (7 June 2010), online (blog): *Law of Work* <http://lawofwork.ca/can-an-employer-fire-an-employee-for-being-too-sexy/>.

conditions?[16] In 2019, three female BC legislature employees were told that their sleeves were too short to be worn in the Speaker's corridor, in a controversy about women's "right to bare arms" that received significant attention.[17] Later the same year, a female Member of the National Assembly ("MNA"), who usually wears a t-shirt and Doc Martens boots, was barred from the Quebec National Assembly for wearing an orange hooded sweatshirt.[18] Meanwhile, several companies, such as McDonald's, Tim Hortons, and Starbucks, have relaxed their Canadian dress codes in recent years to accept visible "tasteful" or "non-offensive" tattoos.[19] Some employers might show more openness to body modifications and appearance choices in general, yet these initiatives cannot be said to be representative of most workplaces. Why does appearance matter so much? If employees' dress and grooming are so important to employers, the latter can always impose a uniform requirement and pay for the required uniforms. However, in many workplaces, employers impose dress codes and

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16 See e.g. Chun Zhang, "Attractive people don't always get ahead at work" (29 September 2019), online: *Fast Company* <https://www.fastcompany.com/90410480/attractive-people-dont-always-get-ahead-at-work-research-shows>; Tomas Chamorro-Premuzic, "It's Time To Expose The Attractiveness Bias At Work" (17 July 2019), online: *Forbes* <https://www.forbes.com/sites/tomaspremuzic/2019/07/17/its-time-to-expose-the-attractiveness-bias-at-work/#3df2213b1324>; Daniel S Hamermesh, *Beauty Pays: Why Attractive People Are More Successful* (Princeton, NJ; Oxford: Princeton University Press, 2011); Stephanie Armour, "Your Appearance, Good or Bad, Can Affect Size of Your Paycheck" (20 July 2005), online: *USA Today* <http://www.usatoday.com/money/workplace/2005-07-19-bias-usat_x.htm>; Virginia Postrel, "Economic Scene; Like it or not, appearance counts in the workplace" (28 December 2000), online: *The New York Times* <https://www.nytimes.com/2000/12/28/business/economic-scene-like-it-or-not-appearance-counts-in-the-workplace.html?searchResultPosition=1>.

17 See Richard Zussman, "B.C. legislature modernizes dress code following 'bare arms' controversy" (1 April 2019), online: *Global News* <https://globalnews.ca/news/5118439/c-legislature-dress-code-bare-arms-controversy/>; Mike Smyth, "Women working in B.C. legislature told to cover their bare arms" (29 March 2019), online: *Vancouver Sun* <https://vancouversun.com/news/local-news/women-working-in-b-c-legislature-told-to-cover-their-bare-arms>; Richard Zussman, "The right to bare arms: Women in B.C. legislature fight for changes to 'outdated' dress code" (28 March 2019), online: *Global News* <https://globalnews.ca/news/5107612/bc-legislature-bare-arm-dress-code/>.

18 See Peter McCabe, "Female MNA barred from National Assembly after clothing deemed inappropriate" (11 November 2019), online: *Montreal Gazette* <https://montrealgazette.com/news/quebec/female-mna-barred-from-national-assembly-after-clothing-deemed-inappropriate>; "After complaints over her clothes, Quebec MNA Catherine Dorion pressured out of National Assembly" (8 November 2019), online: *National Post* <https://nationalpost.com/news/canada/here-are-the-clothes-that-led-to-mna-catherine-dorions-exit-from-quebecs-national-assembly>; Allison Hanes, "Quebec has no place in the wardrobe of the nation" (7 November 2019), online: *Montreal Gazette* <https://montrealgazette.com/opinion/columnists/hanes-quebec-has-no-place-in-the-wardrobes-of-the-nation>.

19 See Lisa Wright, "Tattoos, piercings okay at Starbucks" (20 October 2014), online: *The Star* <https://www.thestar.com/business/2014/10/20/tattoos_piercings_okay_at_starbucks.html>; Lauren La Rose, "As more workers get inked, some companies easing rules on visible tattoos" (7 October 2014), online: *CTV News* <https://www.ctvnews.ca/lifestyle/as-more-workers-get-inked-some-companies-easing-rules-on-visible-tattoos-1.2042732>; "Tim Hortons adding 5,000 employees, revises tattoo policy" (24 September 2014), online: *QSR Web* <https://www.qsrweb.com/news/tim-hortons-adding-5000-employees-revises-tattoo-policy/>.

often ambiguous guidelines that prevent workers from looking, dressing, and grooming themselves as they please at work.

Indeed, there seems to be a general consensus among human resources management and employment consultants on the fact that employers are free to set reasonable standards regarding the physical appearance of their staff. A quick search on the Internet on workplace appearance regulation yields many articles and blog posts stating that employers have the prerogative to adopt restrictive dress and grooming codes, as long as they do not discriminate on a protected class.[20] A brief look at provincial human rights commissions' websites in Canada also confirms this finding. For instance, the Alberta Human Rights Commission[21] offers a one-page information sheet asserting employers' right to establish appearance standards "that they believe are necessary for the safe or effective conduct of their business,"[22] unless these standards discriminate on a protected ground under the applicable human rights legislation.[23] As for the Manitoba Human Rights Commission,[24] it

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20 See e.g. Lisa Guerin, "Your Work-Related Appearance: What Are Your Rights?" (last visited 27 February 2020), online: *Lawyers.com* <https://www.lawyers.com/legal-info/labor-employment-law/employment-discrimination/your-work-related-appearance-what-are-your-rights.html>; "Dress Codes and Grooming" (last visited 27 February 2020), online: *Workplace Fairness* <https://www.workplacefairness.org/dress-codes-grooming>; "Can my employer tell me what to wear at work?" (last visited 27 February 2020), online: *Steps to Justice – Your guide to law in Ontario* <https://stepstojustice.ca/questions/employment-and-work/can-my-employer-tell-me-what-wear-work>; "Tattoos and Piercings In The Workplace" (14 October 2019), online: *KCY at Law* <https://www.kcyatlaw.ca/tattoos-piercings-workplace-canada/>; Wendy Woloshyn, "Workplace Dress Codes: What Employers Should Know" (last modified October 2019), online: *Kent Employment Law* <https://kentemploymentlaw.com/2016/3950/>; Steven Pearlman, "'Professional Appearance' In The Workplace Under Scrutiny" (24 September 2019), online: *Forbes* <https://www.forbes.com/sites/stevenpearlman/2019/09/24/professional-appearance-in-the-workplace-under-scrutiny/#69cf2b9c3412>; Todd Weisberg, "What Not to Wear: An Employer's Guide to Dress Codes and Personal Appearance Policies" (30 January 2017), online: *Shields O'Donnell MacKillop* <https://www.somlaw.ca/blog/blog-post/blog/2017/01/30/what-not-to-wear-an-employer%27s-guide-to-dress-codes-and-personal-appearance-policies>. See also Jessica Bungay, "Canada: Appearance In The Workplace: Can It Be Regulated By The Employer?" (26 May 2015), online: *Mondaq* <https://www.mondaq.com/canada/Employment-and-HR/399996/Appearance-In-The-Workplace-Can-It-Be-Regulated-By-The-Employer>; David Doorey, "Should Employers Be Permitted to Discriminate on the Basis of Appearance?" (14 October 2014), online (blog): *Law of Work* <http://lawofwork.ca/?p=7688> [Doorey, "Should Employers"].

21 "Appearance and Dress Codes – Information Sheet" (October 2017), online: *Alberta Human Rights Commission* <https://www.albertahumanrights.ab.ca/Documents/AppearDressCode.pdf> [AHRC, "Appearance and Dress Codes"].

22 *Ibid*.

23 It should be noted that in 2017, the Ontario Human Rights Commission published a report and a policy on sexualized and gender-based dress codes that challenge employers' prerogatives over appearance issues and significantly limit employers' discretion. Here again, the limits to workplace appearance regulation lie in anti-discrimination provisions, but these protections are interpreted broadly. See Chapter 2, section 2.1.2, *below*.

24 "Services/Employment: Dress Codes" (25 February 2005), online: *Manitoba Human Rights Commission* <http://manitobahumanrights.ca/v1/education-resources/resources/policies-pages/policies-a-7.html> [MHRC, "Dress Codes"].

only states that it has no authority over dress code issues, unless they are discriminatory. It should be mentioned at the outset that appearance is not a prohibited ground of discrimination under the current legislation in Canada. Besides, many online publications are addressed to employers on how to design or enforce a dress code.[25] But why are employers entitled to do this?

The employment relationship is considered inherently unequal[26] as it allows the employer to direct and control the employee's work and sanction any breaches that may occur in the context of this relationship. This subordination is legal and is premised on the implied duty of an employee to obey an employer's lawful orders. Although the forms and methods for implementing the contract of employment have "evolved substantially,"[27] subordination remains the fundamental characteristic of the employment relationship. This results in the employer's exercise of a wide power of direction in relation to the employee's person:

> The creation of the relationship of subordination signifies that the employee agrees both that the employer must make necessary decisions in the business's interest and that his or her own work must be performed in a manner consistent with those decisions and with the guidance they provide.[28]

In *Cabiakman*, the Supreme Court of Canada (SCC) asserted that the employer's power "is an integral part of any contract of employment."[29] Because of this power, in Canadian law, employers are entitled to adopt various policies and regulations to administer their enterprise, including dress codes and appearance policies, as a component of their management rights. Employers are often

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25 See e.g. Arthur Zaczkiewicz & Marc Zimmerman, "Dress Code Red: That Policy May Need a Makeover" (7 November 2019), online: *WWD* <https://wwd.com/business-news/business-features/dress-code-policies-think-tank-1203364068/>; "How To Implement A Dress Code In The Workplace" (22 October 2019), online: *Paycor* <https://www.paycor.com/resource-center/how-to-implement-a-dress-code-in-the-workplace>; Susan M Heathfield, "Sample Dress Code Policy for Business Attire" (30 September 2019), online: *The balance careers* <https://www.thebalancecareers.com/simple-sample-dress-codes-for-business-attire-1917931>; Parisa Nikfar jam, "Don't be dressed down by a decision maker: how to successfully impose a dress code" (12 November 2015), online: *Rubin Thomlinson* <https://rubinthomlinson.com/how-to-successfully-impose-a-dress-code/>; Steve Oppermann, "Is a Dress Code An Anachronism or Useful Tool in Protecting an Agency's Image?" (22 May 2007), online: *FedSmith.com* <https://www.fedsmith.com/2007/05/22/dress-code-anachronism-useful-tool-projecting/>; Barbara L Jones, "Keeping up appearances: How to advise your employer clients on" (20 August 2005), online: *The CBS Interactive Business Network* <http://findarticles.com/p/articles/mi_qn4185/is_20050820/ai_n14916495/>.

26 See e.g. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 55 [*Saskatchewan Federation of Labour*]; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 84 [*Health Services*].

27 *Cabiakman v Industrial Alliance Life Insurance Co*, 2004 SCC 55 at para 55 [*Cabiakman*].

28 *Ibid.*

29 *Ibid* at para 62.

concerned about the image of their company—or their corporate brand[30]—which can be conveyed through employees' physical appearance. Employers' regulations—particularly in unionized workplaces—generally have to be reasonable, non-discriminatory, and adopted in good faith, as set out in labour law jurisprudence.[31] Thus, as a general rule, the information found on the Internet reported above is accurate, as Canadian law recognizes the employer's prerogative to adopt policies and regulations regarding grooming standards and dress codes at work.[32] But how far can an employer go in the regulation of its[33] employees' clothing and grooming choices? What is the legal basis for the employer's right to control its employees in Canadian law?

While my dissertation will examine the legal sources of the employer's management rights in Canadian law, it is important to understand that the employee's moral and physical subjection or, as some call it, the commodification of labour, is not absolute. As the widespread slogan "labour is not a commodity"[34] reminds us, employees should not be treated like commodities; "workers are

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30 Devon Carbado, Catherine Fisk & Mitu Gulati, "Foreword: Making Makeup Matter" (2007) 14:1 Duke J Gender L & Pol'y 1 at 6.

31 See generally Donald JM Brown & David M Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thomson Reuters, 2019) (loose-leaf) at 7-3550; David J Doorey, *The Law of Work—Complete Edition* (Toronto: Emond, 2017) at 617 [Doorey, *The Law of Work*]; Ronald M Snyder, *Collective Agreement Arbitration in Canada*, 6th ed (Toronto: LexisNexis, 2017) at 708, n 200; Morton Mitchnick & Brian Etherington, *Labour Arbitration in Canada*, 2nd ed (Toronto: Lancaster House, 2012) at 14.1. For more on this principle, see Chapter 4, section 4.1.2, *below*.

32 See e.g. Brown & Beatty, *supra* note 31 at 7-3550; Jean-François Pedneault et al, *Les droits de la personne et les relations du travail*, 2nd ed (Cowansville, QC: Yvon Blais, 2017) (loose-leaf) at 20.327; Linda Bernier et al, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs du travail*, 2nd ed (Cowansville, QC: Yvon Blais, 2009) (loose-leaf) at 3.575; Commission des droits de la personne et des droits de la jeunesse, *Les exigences des employeurs et des établissements de service sur la tenue vestimentaire et l'apparence personnelle*, by Maurice Drapeau (Montreal: Direction de la recherche, 1993) at 7 [CDPDJ (Drapeau)]; Claude D'Aoust & Louis Leclerc, *La jurisprudence arbitrale québécoise en matière de congédiement* (Montreal: École des relations industrielles de l'Université de Montréal, 1978) at 126.

33 In the contemporary employment relationship, the employer is most frequently a corporation, although managed by humans (Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) at 36 [Freedland, *The Personal Employment Contract*]). Following Freedland's argument that we mistakenly equate employers with individuals, this dissertation uses "it" to refer to the employer.

34 This is also the motto of the International Labour Organization (ILO) expressed in the Preamble of its founding documents (ILO, 26th Sess, *Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)* (1944), being Annex 1(a) to the *ILO Constitution*, online: *ILO* <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>). On the principle of "labour is not a commodity," see generally Judy Fudge, "'Labour is Not a Commodity': The Supreme Court of Canada and the Freedom of Association" (2004) 67:2 Sask L Rev 425 at 446-452; David M Beatty, "Labour is Not a Commodity" in Barry J Reiter & John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 313.

people, not things"[35] and should be treated as human beings.[36] To reinstate equilibrium between the parties, labour, employment, and anti-discrimination laws aim to establish limits to the employee's legal subordination.

A goal of this dissertation is to shine a light on the needs of, in particular, vulnerable and precarious workers likely to face discrimination in the workplace on the basis of their appearance. The conclusion of an employment contract does not imply the waiving of the employee's fundamental rights.[37] In the second half of the twentieth century, human rights laws have been enacted everywhere in Canada, at the federal, provincial, and territorial levels, and this important legislation has a major impact on the employment relationship. With the enactment of the *Canadian Charter of Rights and Freedoms*[38] in 1982, fundamental rights and freedoms have become increasingly influential in Canadians' everyday lives, and this effect can be particularly observed at work. Human rights legislation has come to regulate relationships between employers and employees, thereby limiting employers' powerful management rights.[39] The regulation of appearance in the workplace does not escape this rising impact of human rights on the employer's power of control. Indeed, in the twenty-first century in Canada, when issues involving appearance at work are not exclusively analyzed as human rights disputes—like in Quebec, for instance, with minor exceptions—they often refer to human rights concerns to various degrees.[40] But the approaches in the Canadian jurisprudence considerably differ depending on the jurisdiction,

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35 Hugh Collins, *Employment Law*, 2d ed (New York: Oxford University Press, 2010) at 3 [Collins, *Employment Law*].

36 It is important to note that I am not, in any way, advocating for human supremacism in this dissertation. When I refer to human rights and human beings, I am simply talking about humans, without making any assumptions about other species (see section 1.1.3, *below*). While I strictly focus on humans in this dissertation, I acknowledge that humans are but one of many species in the world and that nonhuman animals are workers, too. For an enlightening study of the diversity of work done with, by, and for nonhuman animals, see Kendra Coulter, *Animals, Work, and the Promise of Interspecies Solidarity* (New York: Palgrave Macmillan, 2016). See also Charlotte E Blattner, Kendra Coulter & Will Kymlicka, eds, *Animal Labour: A New Frontier of Interspecies Justice?* (New York: Oxford University Press, 2019).

37 See e.g. *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 [*Etobicoke*]; *Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN) c Trudeau*, DTE 99T-846 at 30 (Qc CA) [*Bridgestone/Firestone*].

38 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*].

39 See Christian Brunelle, Michel Coutu & Gilles Trudeau, "La constitutionnalisation du droit du travail: un nouveau paradigme" (2007) 48:1/2 C de D 5 at 32.

40 See Chapter 6, section 6.2.1, *below*.

because of the differences in the federal, provincial, and territorial statutory human rights protections.[41]

In Quebec, the provincial human rights statute—the *Charter of human rights and freedoms*[42]—offers protection of a broad range of fundamental rights and freedoms, including the right to dignity, privacy, and freedom of expression, which have been raised successfully by employees to challenge workplace dress and appearance codes.[43] However, in the rest of Canada, federal, provincial, and territorial human rights statutes generally only protect the right to equality, which provides a protection against discrimination based on prohibited grounds, such as sex, race, and religion. Thus, these anti-discrimination laws do not provide any protection of other fundamental rights and freedoms, such as the right to privacy and freedom of expression, with the exception of Saskatchewan and Yukon—which both protect the right to freedom of expression in the private domain.[44] Therefore, when employees in a private employment relationship challenge their employer's dress codes in most common law provinces, they can only raise concerns of discrimination (when applicable) or use the traditional vehicles of labour law regarding the reasonableness of the employer's management rights—if they are "lucky enough" to work in unionized workplaces, which provide a labour arbitration process. Besides, the consequences of this lack of protection are borne disproportionately by vulnerable and precarious employees.

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41 Since the *Canadian Charter* only applies to government action, it is not applicable to the majority of employment relationships, which fall under the federal, provincial, or territorial human rights legislation. See Chapter 4, section 4.3.1.4, *below*.

42 CQLR c C-12 [*Quebec Charter*].

43 See Chapter 6, section 6.2.2, *below*.

44 *Saskatchewan Human Rights Code*, SS 2018, c S-24.1, s 5 [*Saskatchewan Human Rights Code* or SHRC]; Yukon *Human Rights Act*, RSY 2002, c 116, s 4 [Yukon *Human Rights Act*]. It should be noted that in addition to its provincial human rights statute, Alberta also has a separate statute that protects traditional civil liberties against the action of government, including a protection of the freedom of speech (*Alberta Bill of Rights*, RSA 2000, c A-14, s 1(d) [*Alberta Bill of Rights*]). Because the *Alberta Bill of Rights* is characterized as "virtually identical" to the *Canadian Bill of Rights* (SC 1960, c 44 [*Canadian Bill of Rights*]), it is the object of restrictive interpretation (see John Helis, *Quasi-constitutional Laws of Canada* (Toronto, Irwin Law, 2018) at 26, 217). Moreover, the *Alberta Bill of Rights* only applies to the laws of Alberta (see s 2; Peter Bowal & Dustin Thul, "Bills of Rights in Canada" (2013) 37:3 L Now 29 at 30) and is arguably not applicable to employment relationships in this province; it therefore could not be utilized to protect Albertan employees' appearance in the way that I am advocating for. On a final note, I must emphasize that these three jurisdictions that arguably offer hybrid instruments to protect the right to freedom of expression fall outside the chosen scope of my dissertation, which aims to focus primarily on British Columbia, Alberta, and Quebec (see section 1.2.2, *below*).

This means that under the current state of law in Canada, employers are legally entitled to adopt and enforce appearance policies, and the limits to this prerogative depend on whether or not employees are unionized.[45] In a unionized workplace, employers' management rights are limited by the principle of reasonableness, which means that dress codes and appearance policies must be reasonable in order to be valid and legal.[46] In addition to establishing the reasonableness of the policy, arbitrators can draw upon human rights—whether anti-discrimination protections in most provinces, and fundamental rights in Quebec—in order to determine the legality of the disputed appearance standard. However, in a non-unionized environment, the reality for most Canadian employees is that employers have considerably more freedom to impose dress and grooming codes. Since the principle of reasonableness only applies in unionized contexts in labour arbitration, workplace appearance regulations that are not reasonable can rarely be challenged legally. The main limit to appearance policies in non-unionized workplaces is found in human rights legislation, which basically translates to anti-discrimination statutes everywhere in Canada except for Quebec. But when employees' appearance cannot be successfully tied to a protected class in the applicable legislation, they are simply left without legal redress.[47]

As mentioned above, Quebec employees—even if they are not unionized—have access to additional legal redress (unavailable to employees in the majority of the rest of Canada) because of the vast array of fundamental rights and freedoms that are protected in the *Quebec Charter*. They can first raise discrimination concerns—just like their counterparts in other Canadian jurisdictions. But even when they are unable to connect their appearance claim to a protected ground, they have another option to challenge a workplace appearance regulation. They can raise quasi-constitutional fundamental rights and freedoms, such as the rights to privacy and freedom of expression. While

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45 I use "unionized" in this dissertation to refer to workers who are represented by a certified bargaining unit and covered by a collective labour agreement, and "non-unionized" for workers who are not.

46 See Chapter 4, section 4.1.2.2, *below*.

47 In the American context, legal scholar Karl E. Klare observes that "the lack of adequate monitoring systems in the nonunion sector and the general inefficacy of employee bargaining power as a counterweight to employer abuse combine to produce a suboptimal appearance regulation regime." (Karl E Klare, "Power/Dressing: Regulation of Employee Appearance" (1992) 26:4 New Engl L Rev 1395 at 1442). See also generally Gilles Trudeau, "Vie professionnelle et vie personnelle: Tâtonnements nord-américains" (2004) 1 Dr social 11 [Trudeau, "Vie professionnelle"].

these non-unionized employees will sometimes have to seek legal redress in the civil courts at their own expense[48]—which is arguably not ideal,[49] costly, and time consuming[50]—they still have access to a legal recourse to seek a remedy if they are subject to adverse employment action because of an illegal appearance requirement.[51]

Therefore, as with many other conditions of employment, human rights legislation offers boundaries to employers' discretion and can protect employees from unjustified workplace appearance regulation. But there is definitely something special about appearance that sets it apart. Appearance is a very sensitive and personal issue, while at the same time it involves the public presentation of the self. It is an inescapable concern for most individuals living in western society—even for people who consider themselves as wholly unconcerned with their own appearance and with the appearance of others.[52] Both employers and employees have a particular interest in the regulation of appearance that they do not have in relation to other working conditions. An individual's appearance is known to be the basis for first impressions. Perceived characteristics such as intelligence, competence, and success are often inferred from one's physical appearance, and can thus be the source of stereotypes and prejudices.[53] Employers, as a result, have a real concern with regulating their workforce's image as their employees represent the company and are seen to contribute to its business success, among other things. Yet employees may also care about their appearance because of all the information that can be inferred from it.

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48 When they meet the statutory criteria, Quebec employees with two years of employment can benefit from free legal recourse against unjust dismissal under the *Act respecting labour standards*, CQLR c N-1.1 [*Act respecting labour standards* or ALS]. See Chapter 4, section 4.1.1.2, *below*.

49 Non-unionized employees can arguably be reluctant to bring their current employer to civil courts to challenge a workplace appearance regulation because of the fear of losing their job. See Chapter 6, section 6.3.1, *below*.

50 For an interesting analysis of the problems of access to justice in civil matters, see Jasmine Laroche, *L'accès à la representation juridique en matière civile: un droit constitutionnel?* (LLM Thesis, Université Laval, 2019) [unpublished]. See also Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, by Trevor CW Farrow et al (Toronto: Canadian Forum on Civil Justice, 2016); Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93:3 Can Bar Rev 639.

51 The civil law and the common law both provide remedies (when the employer fails to provide the employee with reasonable notice of termination) to wrongfully dismissed employees that can theoretically be used in a case of discharge because of the employees' appearance. However, these recourses have not been used to formally challenge workplace appearance regulation or look into this issue in detail. See Chapter 4, section 4.1.1, *below*.

52 See generally Chapter 3, *below*.

53 See Chapter 3, section 3.1.4.3, *below*.

Moreover, appearance is an employee's expression of their personal autonomy. Individuals want to control their own appearance for many other reasons, but more importantly because appearance is, for many, central to their sense of self and to their personhood.[54] Having control over their own appearance is often at the core of an individual's sense of identity and freedom,[55] particularly because choices regarding appearance are never completely free and are strongly influenced by society.[56] Appearance-related decisions, which are always an ongoing process of choice, are "part of everyone's process of self-definition. Whatever someone's choice, to require [them] to dress in a way that feels fundamentally contrary to [their] preferences is to ask [them] to project an inauthentic self."[57] Hence, workplace appearance regulation, among other concerns, interferes with how employees—and in particular, vulnerable employees—want others to perceive them when they are performing their work, which can amount to a significant part of their lives. Employees' choices over appearance questions should therefore be protected, particularly when employers have no legitimate justification to constrain them.

As several scholars have indicated, many legal actors see the topic of workplace appearance regulation as superficial and "silly,"[58] which might partly explain why it has not been the subject of abundant literature in Canada.[59] I disagree. Work is of paramount importance for many individuals; not only does it occupy a considerable portion of their time and life, it also provides workers "with a means of financial support and […] a contributory role in society."[60] When employers enforce regulations that touch intimate and personal matters such as their employees' physical appearance,

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54 It is important to note that throughout my dissertation, I am not using the concept of "personhood" in its legal definition or in the sense of "being a legal person," but rather in the lay sense, meaning "sense of self" or "self-identity." Relying on Yofi Tirosh's concept of personhood, I argue that appearance is central to individuals' sense of self, self-identity, and personhood. See Chapter 3, section 3.2, *below*.

55 Gowri Ramachandran, "Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing" (2006) 66:1 Md L Rev 11 at 36 [Ramachandran, "Freedom of Dress"].

56 See Chapter 3, section 3.1.2, *below*.

57 Catherine L Fisk, "Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy" (2006) 66:4 La L Rev 1111 at 1146.

58 See e.g. Carbado, Fisk & Gulati, *supra* note 30.

59 See Chapter 2, section 2.1, *below*.

60 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 91 [*Alberta Reference*].

they can impede directly on their subordinates' personal life, dignity, privacy, fundamental choices, and freedom of expression.[61]

In the chapters that follow, I will argue that, in addition to the anti-discrimination framework, workplace appearance policies must in part be treated in the light of the fundamental rights and freedoms enjoyed by Canadians. As an illustration of this assertion, an interesting approach was proposed by Arbitrator Larson in the *Thrifty*[62] case in British Columbia—a jurisdiction where fundamental rights find no formal protection in the legislation. He argued that personal appearance cases should "start from the premise that employees have a personal right to groom and attire themselves as they wish."[63] While this approach seems compelling, I do not argue for a specific "right to appearance," but rather for the use of fundamental rights and freedoms to protect employees' interests regarding their appearance. Hence, my argument will be that an individual's physical appearance serves to define their sense of self and personhood, and therefore the employer's regulations, which might impinge on such an important matter, need to be legally circumscribed.

1.1.2 Definition of Physical Appearance

My research revolves around the concept of physical appearance. As appearance[64] is a vast notion and can be somewhat elusive, this term must be defined. I choose to use *physical appearance* as a generic term encompassing both dress and personal appearance. Dress includes clothing in general, either items of clothes that employees choose to wear for personal or other reasons—e.g. religious or labour motives—or clothing that is imposed on them or prohibited—e.g. uniforms, proper attire, dress codes, etc. Meanwhile, the concept of personal appearance refers to everything concerning the body, its grooming, and its adornment. These include observable physical

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61 See Chapter 6, section 6.1, *below*.
62 *Thrifty* 2001, *supra* note 5.
63 *Ibid* at para 24.
64 Unless otherwise specified, I use "physical appearance" and "appearance" interchangeably in this dissertation to refer to the concept defined in this section.

characteristics of the body or traits such as weight, height, body shape, facial features, skin tone, hair, eye colour and shape, birth marks, scars, disfigurement, and outward disability; as well as everything that concerns the naked body with or without alteration or modification, including hair style, length, and colour; facial hair; cosmetics and makeup; body modifications, such as body piercing and tattoos; accessories and jewellery; and medical altering devices, such as orthodontics and glasses.

Throughout my dissertation, the term physical appearance will therefore be used to refer to all of these aspects. Whether an aspect of appearance is the result of the worker's choice or not, namely, whether it is a mutable or immutable characteristic, I contend that all aspects of an individual's physical appearance can serve to define their sense of self or personhood in some way.[65] However, while my general definition of physical appearance includes all of these aspects, my dissertation will particularly focus on aspects of appearance that involve some degree of choice. These particularly include tattoos and piercings; hair colour, style, and length; beards; makeup; and clothing. Except for Quebec, these appearance markers, such as tattoos, are not legislated as human rights under the current state of law in Canada, unless they can be related to a protected ground of discrimination in the statutory legislation.

1.1.3 Human Rights Terminology and Approach

Two different approaches will be highlighted in this dissertation regarding the analysis of workplace appearance regulation: the anti-discrimination approach and the fundamental rights at work approach. A brief examination of terminology is essential in order to understand the propositions in the following chapters. The *anti-discrimination approach* refers to an analysis based on the right to equality; this right is protected in all federal, provincial, and territorial human rights legislation in Canada, without any exception. The right to equality in Canada entails a protection against discrimination, which can be defined as the prejudicial or disadvantageous treatment of an

[65] See generally Chapter 3, *below*.

individual based on their perceived or actual affiliation to a certain group or category because of an identifiable characteristic such as race, sex, age, religion, and the like.[66] It is important to note, however, that Canadian human rights laws do not offer a general protection against all forms of discrimination in every situation, but rather they protect equality with respect to statutory enumerated grounds (with the exception of the *Canadian Charter*, which also prohibits discrimination based on analogous grounds).[67] Therefore, employers can legally discriminate against employees on the basis of several characteristics, such as intelligence and charm, unless a protected ground is involved. While appearance is not a prohibited ground under any Canadian legislation, employers who use appearance as a proxy for race, gender, or disability, for instance, may be liable for violation of the law. The anti-discrimination approach will be analyzed in Chapter 5, in which I argue that, while it can be useful to employees to challenge workplace appearance regulation—when they are able to connect their appearance claim to the protected grounds in the applicable legislation—this approach would be more effective to improve appearance diversity in the workplace if appearance was formally included as a protected ground of discrimination in Canadian human rights legislation.

The *fundamental rights approach* involves the various fundamental rights and freedoms that can be raised by employees to challenge workplace dress and grooming codes. Fundamental rights include, amongst others, the right to privacy, the right to liberty, the right to inviolability, the right to dignity, and the fundamental freedoms of expression, religion, and association. While these rights should not be confused with a formal individual right to dress or groom oneself as they wish or right to appearance—which does not exist in Canadian law—they can all offer, to some extent, a protection for employees' appearance in the workplace.[68] However, the fundamental rights approach does not include the right to equality, in order to draw a clear distinction between these two human rights frameworks. This exclusion also helps to highlight one of the propositions of this dissertation:

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66 See Chapter 5, section 5.1.1, *below*.

67 In addition, even when a protected ground (or analogous ground under the *Canadian Charter*) is implicated and a *prima facie* case of discrimination is proven, some discrimination can still be justified in employment contexts if employers can demonstrate that the violation of equality rights is a *bona fide* occupational requirement (BFOR) under provincial, territorial, and federal human rights statutes; or a reasonable limit under s. 1 of the *Canadian Charter* when applicable. See Chapter 5, section 5.1.1, *below*.

68 See Chapter 6, section 6.1, *below*.

the fundamental rights framework could be more suited to questions of appearance in the workplace than the current anti-discrimination framework—which does not include appearance as a protected ground—particularly for elements of appearance that can be related to a certain degree to the worker's choice. Nevertheless, most Canadian human rights laws do not offer any protection of these fundamental rights and freedoms, except for the *Canadian Charter*—which is generally not applicable in private employment relationships—and the *Quebec Charter*.[69] I will analyze the fundamental rights at work framework in Chapter 6, in which I argue that the *Quebec Charter* does offer better protection than any other Canadian human rights legislation to employees' appearance choices in the context of employment.

Lastly, the term *human rights* covers all the rights included in both approaches: the right to equality as well as all the other fundamental rights and freedoms mentioned above. This clarification is important as it might seem unusual for some legal actors in common law jurisdictions, since human rights usually have a strong association with the anti-discrimination approach. In addition to this imperative classification, I should note that I use "human rights legislation" or "human rights laws" to refer to the provincial, federal, and territorial human rights statutes, including the three provincial human rights laws that are the focus of my dissertation, namely the BC *Human Rights Code*,[70] the Ontario *Human Rights Code*,[71] and the *Quebec Charter*. Unless otherwise specified, the terms "human rights legislation" or "human rights laws" do not include the *Canadian Charter*.

I must address two final points regarding the general approach to human rights I use in this dissertation. I acknowledge that there is a large body of critical scholarship[72] on the dominant liberal discourses that animate the present human rights model on which I rely. In particular, some feminist,

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69 As previously noted, to a lesser extent, Saskatchewan and Yukon also include a protection of the right to freedom of expression in their respective human rights statutes, and Alberta has a Bill of Rights that protects freedom of speech—although it is not applicable to private employment relationships. See note 44.

70 RSBC 1996, c 210 [BC *Human Rights Code*].

71 RSO 1990, c H.19 [Ontario *Human Rights Code*].

72 For a summary of some of the main critical perspectives on human rights, see David Chandler, "Contemporary Critiques of Human Rights" in Michael E Goodhart, ed, *Human Rights: Politics and Practice*, 3rd ed (Oxford: Oxford University Press, 2016) 110. See also Paul O'Connell, "On the Human Rights Question" (2018) 40:4 Hum Rts Q 962.

queer, anti-racist, decolonial, post-colonial, and post-humanist legal scholars (and others) are wary of human rights projects because of their liberal frame; they argue that such models can never be progressive, and that the freedom and equality they promise are "disingenuous, false or simply unrealizable."[73] Critiques of human rights also condemn the indeterminacy of human rights, the fact that they do not address the "deeper, structural issues" and the causes of injustices and inequality,[74] and that they serve to reinforce the position of the economically and politically privileged while excluding people that are already marginalized and considered non-dominant.[75] While it is important to recognize this valuable work and be mindful of these concerns, as some have argued, "the abuse of human rights for great-power ends need not necessarily disqualify them as emancipatory tools."[76] Human rights can still play an important role in social and political struggles,[77] and history shows that the enactment of human rights legislation across the country *has* generated positive results to advance some inequalities[78]—although I am aware that much still needs to be done. Hence, for the purpose of protecting appearance autonomy and diversity, I am grounding my analysis in the human rights framework, as it has helped to equalize the power imbalance in the employment relationship in the past decades. In particular, I argue in this dissertation that the *Quebec Charter* has proven to be a helpful instrument in the protection of employees' appearance.

Another important criticism I want to address are those of animal studies scholars. They strongly condemn the anthropocentricism of the current human rights model, in which human rights are protected at the expense of the well-being of nonhumans animals.[79] They are particularly wary

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73 See Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Northampton, MA: Edward Elgar, 2018) at 1 [Kapur, *Gender, Alterity and Human Rights*]; Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" (2006) 28:4 Sydney L Rev 665.

74 See O'Connell, *supra* note 72 at 976-978.

75 See e.g. David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" in Rob Dickinson et al, eds, *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 19; Wendy Brown, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism" (2004) 103:2/3 South Atlantic Q 251. But see Christine Bell, "Human Rights and the Struggle for Change: A Study in Self-Critical Legal Thought" in Rob Dickinson et al, eds, *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 217.

76 Robin Blackburn, "Reclaiming Human Rights", Book Review of *The Last Utopia: Human Rights in History* by Samuel Moyn, (2011) 69 New Left Rev 126 at 130.

77 See O'Connell, *supra* note 72 at 975.

78 See e.g. Chapter 4, section 4.3.1, *below*.

79 See Will Kymlicka, "Human rights without human supremacism" (2018) 48:5 Can J Philosophy 763.

of human rights and liberalism not only because animals and nonhumans are completely disregarded in these accounts,[80] but also because human rights that are grounded in human dignity actually reproduce anthropocentrism by focusing on the dignity of humans only, therefore advocating for human supremacism.[81] It is crucial for me to emphasize here that I do not wish to reassert species hierarchy in this dissertation; I do not link human rights to human supremacism and it is not my intention to affirm that humans are superior to other species or more deserving of respect than nonhuman animals.[82] Philosophy scholar Adam Etinson has stated very clearly my position in this debate in his analysis of human dignity: "talk about human dignity is simply talk about the kind of dignity attributable to human beings; it need not make any assumptions, positive or negative, about the kind of dignity attributable to other animals."[83] Therefore, when I advocate in favour of human rights for employees, I am not making any claim about the rights other species deserve and I am not asserting that a component of human rights (and human dignity) is tantamount to asserting the superiority of humans over nonhuman animals.

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80 Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27 CJWL 47 at 48-49; Maneesha Deckha, "Intersectionality and Posthumanist Visions of Equality" (2008) 23:2 Wis JL, Gender & Society 249 at 266 [Deckha, "Intersectionality"]. See generally Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18:2 Animal L 207.

81 Kymlicka, *supra* note 79.

82 I am also aware that the category of "human" as an identity is in itself placed under doubt by many scholars. I acknowledge that separating human beings from all other nonhuman animals could suggest that there is something distinctive about all humans or essential to them in comparison to the plethora of all other animal species, and that many posthumanist and critical animal studies scholars strongly contest this assumption. For instance, Megan H. Glick explores the human-nonhuman boundary as she considers "the 'human' itself as a central problem in rights frameworks," arguing that the biological and cultural positive category of the human is implicated in generating inequalities and exclusions not just between human and nonhuman animals, but also between races, sexes, sexualities, disabilities, and the like (Megan H Glick, *Infrahumanisms: Science, Culture, and the Making of Modern Non/personhood* (Durham: Duke University Press, 2018) at 7, 12). While I acknowledge this important critique, the interesting question of the rejection of human as a category falls out of the scope of my dissertation, in which I take on a general understanding of humans as including all human beings. I must stress that my use of the concept of "humans" does not make any assumption about other species nor does it claim that humans are more deserving of rights than other species, but simply that they are beings deserving of rights.

83 Adam Etinson, "What's So Special About Human Dignity?" (December 2019) at 2 [forthcoming, cited with permission of the author]. See also Deckha, "Intersectionality", *supra* note 80 at 261.

1.2 RESEARCH AIMS AND APPROACH

In this section, I explain the main objectives of my research, by presenting the research questions this dissertation takes up and providing the arguments that I will develop. I then define the scope of my dissertation, as the subject of workplace appearance regulation is very broad and needs to be confined. Lastly, I describe the methodology of my dissertation in the last part of this section.

1.2.1 Objectives of the Dissertation

At the outset, it is important to understand that I recognize that in some situations, employers may have valid and legal interests in controlling their employees' appearance.[84] General and inclusive guidelines for employees' appearance are acceptable and should remain legal in most workplaces, such as requirements of cleanliness as well as any uniform or reasonable appearance standard that is consistently and uniformly applied, and is truly justified by health and safety concerns or legitimate business purposes. As others have observed, however, I am concerned with the fact that some employers "routinely abuse their power and impose [appearance] restrictions that cannot be justified on productivity, safety, or any legitimate grounds."[85] The main objective of this study is therefore to understand how human rights can be employed to limit employers' appearance regulations in Canada.

From a legal perspective, the issue of physical appearance has two key components: first, it involves the employee's "right" to choose their clothing and personal appearance when carrying out their work; and, second, it raises the issue of appearance discrimination, that is, a distinction imposed on the employee in the course of employment because of an apparent personal characteristic related to physical presentation.[86] As appearance is such a prominent issue in society,

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84 See also Klare, *supra* note 47 at 1430.

85 *Ibid*.

86 Others have also categorized the issue of workplace appearance regulation in similar terms. See e.g. D J Viviers, "Dress codes, Grooming Standards and South African Employment Law: Comparative Insights on Workplace Discrimination Based on Mutable Appearance Characteristics" (2016) 133:4 SALJ 897; Klare, *supra* note 47 at 1431. See also Jessica A Moldovan, "Authenticity at Work: Harmonizing Title VII with Free Speech Jurisprudence to Protect Employee Authenticity in the Workplace" (2019) 42:4 NYU Rev L & Soc Change 699; Fisk, *supra* note 57 at 1112-1113.

it comes as no surprise that employers want to regulate their employees' dress and grooming. However, with few exceptions,[87] the appearance of an employee is generally unrelated to their abilities to perform their work—in most cases, appearance is irrelevant to job performance. Many employees, too, want to control their own appearance while in the workplace, as appearance contributes to the definition of their selves. The result is a "battle of competing rights" in which employees' rights to self-expression and to equality are in contestation with employers' rights to control their employees.[88] The guiding research question for my dissertation is: How far can employers go in enforcing a dress and grooming code that regulates their employees' physical appearance in Canada? Specifically, my dissertation will analyze how human rights can protect employees' interests regarding their appearance in the workplace in Canada.

In order to answer this question, several sub-questions need to be addressed. What is the legal basis of employers' management rights, which allow them to adopt and enforce various appearance regulations in the workplace? As in the case of many other conditions of employment, human rights laws offer boundaries to employers' discretion and can protect employees from unjustified workplace appearance regulation. But why should human rights protect employees' choices regarding appearance? What is so particular about employees' appearance that is different than other working conditions? Why does appearance matter that much, and especially in the workplace? Should employees have a right to dress and groom themselves as they please? How does anti-discrimination law across the country—and in British Columbia, Ontario, and Quebec in particular—limit employers' prerogatives regarding workplace appearance regulation? If the current anti-discrimination law does not sufficiently protect employees regarding their appearance, is there a way that it could be improved? Is there another approach founded on human rights that would offer protection of employees' choices regarding their appearance in the workplace?

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87 Occupations for which a specific physique or a particular look is required are intentionally excluded, such as models or actors. See e.g. *von Rotsburg v Urban Casting Inc*, 2012 BCHRT 9 at para 29 [*Urban Casting*]; *von Rotsburg v Bottomley*, 2012 BCHRT 36 at para 41 [*Bottomley*].

88 See Carbado, Fisk & Gulati, *supra* note 30 at 6.

I argue that because employers' management rights generally stem from the subordination that is inherent to the employment contract, these rights must give way to human rights, which have precedence because of their quasi-constitutional status. This special and preeminent status of human rights laws is conferred because of their protective character and the nature of rights they protect—rights that are considered fundamental, essential, and inherent to all human beings.[89] Of course, this does not mean that employers' discretion regarding their employees' appearance is completely eradicated, but it does mean that the exercise of employers' management rights should be analyzed through human rights principles, values, and limits. For instance, anti-discrimination legislation provides a *bona fide* occupational requirement (BFOR) exception, which allows employers to impose appearance requirements that could be discriminatory but are reasonably necessary for the performance of a job. Human rights have been enacted in Canada to provide protections for employees in particular, and employees' appearance should benefit from this protection.

Appearance matters a great deal to individuals in western society, and to employees in particular, as some spend a significant portion of their lives in the workplace. Relying on sociological studies, I argue that appearance is a powerful means of expression as well as a social and identity marker, and as such, it should be considered as fundamental to employees' sense of self. I also emphasize that the legal treatment of workplace appearance should not limit appearance to identity, but rather focus on how appearance is important to employees in the definition of their selves. As such, I argue that personhood, as opposed to identity, is a more appropriate notion when discussing appearance,[90] as it allows for considering appearance-related issues not only in terms of discrimination, but also in terms of fundamental rights and freedoms. Besides, because appearance is fundamental to self-identity and personhood, it should not be considered a mutable characteristic. Instead, when appearance relates to personal characteristics that can only be changed at

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89 I must emphasize here again that I do not wish to articulate an anthropocentric reading of human rights in this dissertation. My argument is simply that humans are deserving of fundamental rights and freedoms without marginalizing the issue of other species' rights.

90 Yofi Tirosh, "Adjudicating Appearance: From Identity to Personhood" (2007) 19:1 Yale JL & Feminism 49 [Tirosh, "Adjudicating Appearance"].

unacceptable cost to personal identity—even if appearance is the result of a personal choice—it should be constructed as constructively immutable and protected by human rights legislation.

The most accessible human rights framework in Canada, as it is protected in all jurisdictions, is the anti-discrimination approach. My dissertation argues that the anti-discrimination framework can be useful to employees to challenge workplace appearance regulation, when employees are able to relate their appearance issue to a protected ground in the applicable legislation. However, under the current state of law in Canada, because appearance is not a protected ground of discrimination, this approach is not always successful. Besides, the anti-discrimination framework particularly fails to protect employees' appearance that is related to some degree of choice or characterized as mutable, as appearance has yet to be theorized in the legal literature as constructively immutable. I argue that one solution would lie in the formal inclusion of "physical appearance" as a protected ground in human rights legislation. As such, "physical appearance" should be defined broadly and receive a generous and liberal interpretation, as per human rights principles, to include appearance choices such as tattoos, piercings, hair colour, and the like.

Another solution to offer better protection of employees' appearance through human rights can be found in the fundamental rights at work framework, which, as mentioned above, is only applicable in Quebec under the current state of law. This approach involves fundamental rights and freedoms, which are expressly protected by the *Quebec Charter*, such as the right to dignity, the right to privacy, and the right to freedom of expression. All these rights have been successfully raised by employees in Quebec to challenge workplace appearance regulation.[91] Under this framework, a sociological analysis of the importance of appearance is also valuable, as it supports why these fundamental rights can protect questions of appearance as fundamental to personhood and as a

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[91] The regulation of physical appearance in the Canadian workplace is the subject of my doctoral dissertation. This project expands upon the work I undertook for my LLM thesis, "Le contrôle de l'apparence physique du salarié à la lumière de la *Charte des droits et libertés de la personne*"—The control of employees' physical appearance in light of the Quebec *Charter of human rights and freedoms*, which was published in 2010 (Anne-Marie Delagrave, *Le contrôle de l'apparence physique du salarié* (Cowansville, QC: Yvon Blais, 2010) [Delagrave, *L'apparence physique du salarié*]). In my LLM thesis, I analyzed several fundamental rights and freedoms protected by the *Quebec Charter* that could limit workplace appearance regulation in the province of Quebec.

means of expression. I argue that the fundamental rights at work approach, as applied in Quebec via the *Quebec Charter*, yields the most satisfactory results for employees who seek to have control over their appearance in the workplace. While echoes of fundamental rights can be found in arbitral jurisprudence in the rest of Canada—where these rights do not have a formal foundation in the legislation—common law jurisdictions would benefit from an expressed protection in human rights legislation and should follow Quebec's example.

As for the implications of this study, there is a dearth of legal literature on the subject of physical appearance in the workplace in Canada. In addition to a few articles, one can only find short passages in general labour or employment law publications that describe the outcome of arbitration awards.[92] Besides, most of the relevant decisions on this question come from administrative tribunals, and higher courts have never adjudicated the issue in depth.[93] However, employees' physical appearance raises important issues in the workplace. The subject is of undeniable interest in Canadian society marked by the increasing recognition of diversity and personal autonomy, which are often reflected in the appearance of individuals. Furthermore, Canada is a pluralistic society and its citizens have multiple identities shaped by their country of origin, culture, language, belief, history, and ethnicity. My study is also topical and current, since tattoos and piercings, for instance, are becoming increasingly common at work.[94] Yet, while the subject of workplace appearance regulation involves a myriad of situations and appearance markers, I chose to focus on particular aspects of workplace appearance as I clarify in the following section.

1.2.2 Scope of the Dissertation

My dissertation investigates the implications of human rights legislation for the regulation of physical appearance in the context of employment in Canada, with a particular focus on comparing

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92 See Chapter 2, section 2.1.1, *below*.

93 See *Manitoba Human Rights Commission v Canada Safeway Ltd*, [1985] 1 WWR 479 (Man CA), leave to appeal to SCC refused, 19181 (11 February 1985) [*Canada Safeway* 1985]; *Canada Safeway Ltd v Manitoba Food and Commercial Workers Union, Local 832*, [1981] 2 SCR 180.

94 See John Burchill, "Tattoos and Police Dress Regulations" (2012) 36:1 Man LJ 193 at 193.

Quebec and the rest of Canada—British Columbia and Ontario specifically. My study concentrates on using the law in a formal sense, and human rights in particular, to protect employees' deliberative freedom or choices about their appearance while at work. However, the objective of my dissertation is not to provide a detailed analysis of the procedural rights and remedies involved as they relate to human rights issues, but rather to analyze the substantive fundamental rights and freedoms that can be raised in Canada to limit workplace appearance regulation.

To begin with, my dissertation focuses on employees' interests rather than employers' interests. There is no doubt that employers have legitimate concerns regarding their employees' appearance. As mentioned above, employers defend their workplace appearance codes either on the basis that they have a legal obligation to protect the health and safety of the workers and the public or on their "need to create a corporate brand, a distinctive image to market to consumers."[95] From the employer's perspective, employees' appearance must be carefully monitored as their reputation and business success depend on it. While these assumptions are debatable and do deserve attention, they are not the focus of my research. Because employers hold much more power in the unbalanced employment relationship, I am interested in employees' interests in order to counterbalance employers' prerogatives.

Furthermore, the issue of workplace appearance can be analyzed through lookism[96] and discrimination based on attractiveness—or unattractiveness. While these themes have generated an important body of literature,[97] they are beyond the scope of my dissertation. The main reason is

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95 Carbado, Fisk & Gulati, *supra* note 30 at 6.

96 Or "looksism," as Bonnie Berry calls bias against people based on their physical appearance (Bonnie Berry, *The Power of Looks: Social Stratification of Physical Appearance* (Aldershot: Ashgate, 2008) at 2 [Berry, *The Power of Looks*]). While "lookism" can also be related to appearance-based discrimination in general, it is particularly associated with attractiveness and often refers to discrimination based on beauty. See e.g. Peter Waring, "Keeping up Appearances: Aesthetic Labour and Discrimination Law" (2011) 53:2 J Industrial Relations 193 at 193; Hannah Fleener, "Looks Sell, but Are They Worth the Cost: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination" (2005) 83:4 Wash ULQ 1295; Louis Tietje & Steven Cresap, "Is Lookism Unjust? The Ethics of Aesthetics and Public Policy Implications" (2005) 19:2 J Libertarian Studies 31 at 32-33.

97 See e.g. Jessica Fink, "Madonnas and Whores in the Workplace" (2016) 22:2 Wm & Mary J Women & L 255; Sarah E Friedricks, "Sexy Sex Discrimination: Why Appearance-Based Discrimination Is Sex Discrimination" (2015) 40:2 J Corp L 503; Bethany A Corbin, "The Goldilocks Dilemma—Why Being 'Too Hot' Isn't 'Just Right': An Analysis of Sex Discrimination in Light of *Nelson v. Knight* and the 'Irresistible' Employee" (2014) 23:2 Tex J Women & L 95; Enbar Toledano, "The Looking-Glass Ceiling: Appearance-Based Discrimination in the

that they do not really fit the category of appearance that I am interested in, that is aspects of appearance that involve some degree of choice. They also involve different—albeit interesting—sociological questions about the definition of beauty and attractiveness that could not be adequately analyzed given the scope of my study.[98]

As well, two important categories of aspects of appearance that involve some degree of choice were intentionally not covered by my research, again because the scope of my dissertation did not allow for in depth examinations that actually deserve a dissertation on their own. First, appearance regulation in employment contexts undeniably involve the issue of religious discrimination. For instance, a Muslim female worker may wish to wear her hijab while at work; a Jewish male worker may need to work while wearing his kippah; and a Sikh worker's beard might preclude his ability to wear a safety mask, while his turban impedes the wearing of a safety hat. These are only a few illustrations of aspects of appearance worn for religious reasons that could violate workplace dress and grooming codes. While religious appearance is included in my broad and general definition of appearance, I deliberately chose not to discuss this very delicate, sensitive, complex, and controversial issue in detail in my dissertation, one that has been the subject of numerous studies in Canada and around the world.[99] I briefly discuss workplace appearance

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Workplace" (2013) 19:3 Cardozo J L & Gender 683; Mila Gumin, "Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination" (2012) 96:5 Minn L Rev 1769; William R Corbett, "Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law" (2011) 60:3 Cath U L Rev 615 [Corbett, "Hotness Discrimination"]; Chris Warhurst et al, "Lookism: The New Frontier of Employment Discrimination?" (2009) 51:1 JIR 131; Heather R James, "If You Are Attractive and You Know it, Please Apply: Appearance Based Discrimination and Employers' Discretion" (2008) 42:2 Val U L Rev 629; James J McDonald, "Civil Rights for the Aesthetically-Challenged" (2003) 29:2 Employee Relations LJ 118; Lynn T Vo, "A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law" (2002) 26:2 S Ill ULJ 339 at 357.

98 For a comparative study on lookism and attractiveness in French and American labour and employment law, see Rhéa E Jabbour, *La discrimination à raison de l'apparence physique (lookisme) en droit du travail français et américan – approche comparatiste* (Doctoral Thesis, Université Panthéon-Sorbonne Paris 1, 2013) [unpublished].

99 See e.g. Kendyl L Green, "Courts Rule Too Narrowly Regarding the Right to Wear Religious Clothing in Public" (2018) 29:2 Hastings Women's LJ 261; Monique Deveaux, "Appeals to choice and sexual equality: Debates over religious attire" in Marie-Claire Foblets, Michele Graziadei & Alison Dundes Renteln, eds, *Personal Autonomy in Plural Societies* (London: Routledge, 2017) 80; Simon Pelsmakher, "State Neutrality in Religious Affairs – Civil Servants & Religious Dress" (2017) 41 Can-USLJ 141; Jonnette Watson Hamilton & Jennifer Koshan, "The Role of Choice in Women's Freedom of Religion Claims in Canada" (2017) 36:2 Religious Studies & Theology 171; Kelly A Harrison, "Hiding Under the Veil of 'Dress Policy': Muslim Women, Hijab, and Employment Discrimination in the United States" (2016) 17:3 Geo J Gender & L 831; Nida Alvi, "Dressed to Oppress? An Analysis of the Legal Treatment of the First Amendment and its Effect on Muslim Women who

regulation in relation to religious discrimination in Chapter 5,[100] including the recent *Bill 21*[101] controversy in Quebec, but it is important to emphasize that my dissertation does not aim to study religious clothing and grooming in detail.

Second, appearance issues in the workplace can involve union insignia or appearance-related pressure tactics. For instance, Quebec police officers have sported neon camouflage pants instead of their regular uniform for several years as a pressure tactic, since they do not have the right to strike.[102] Employees' right to wear union insignia (such as buttons, decals, caps, or any other

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Wear Hijabs" (2015) 21:3 Cardozo J L & Gender 785; Dallan F Flake, "Image is Everything: Corporate Branding and Religious Accommodation in the Workplace" (2015) 163 U Pa L Rev 699; Amina Haleem, "Covernance: Feminist Theory, the Islamic Veil, and the Strasbourg Court's Jurisprudence on Religious Dress-Appearance Restrictions" (2015) 5:1 DePaul J Women, Gender & L 1; Kristina Benson, "The Freedom to Believe and the Freedom to Practice: Title VII, Muslim Women, and *Hijab*" (2014) 13 UCLA J Islamic & Near EL 1; Fred Dufresne, *Le port de signes religieux dans l'espace public: Une réflexion à partir du droit international et d'une comparaison entre le Canada, les États-Unis, la France et la Suisse* (LLM Thesis, Université de Montréal, 2013) [unpublished]; D Wendy Greene, "A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair" (2013) 8 Fla Intl U L Rev 333 [Greene, "A Multidimensional Analysis"]; Joan Squelch, "Religious Symbols and Clothing in the Workplace: Balancing the Respective Rights of Employees and Employers" (2013) 20:2 Murdoch UL Rev 38; Anissa Hélie & Marie Ashe, "Multiculturalist Liberalism and Harms to Women: Looking Through the Issue of 'The Veil'" (2012) 19:1 UC Davis J Intl L & Pol'y 1; Dawinder S Sidhu, "Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion" (2012) 36 NYU Rev L & Soc Change 103; Sadia Aslam, "Hijab in the Workplace: Why Title VII does not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance" (2011) 80:1 UMKC L Rev 221; Geoffrey Bindman, "Keeping the Faiths" (2006) 58 European Lawyer 62; Cécile Laborde, "State Paternalism and Religious Dress Code" (2011) 10:2 Intl J Constitutional L 398; Danielle Gold, "Seeking Religious Validity for Body Piercings and Tattoos: How the Church of Body Modification Should Gain Recognition as a Religion in the Modern Era" (2011) 13 Rutgers JL & Religion 139; Kiran Preet Dhillon, "Covering Turbans and Beards: Title VII's Role in Legitimizing Religious Discrimination Against Sikhs" (2011) 21 S Cal Interdisciplinary LJ 215; Sami Hasan, "Veiling Religion in the Force: The Validity of 'Religion-Neutral Appearance' as an Employer Interest" (2010) 9 UCLA J Islamic & Near EL 87; Nicholas Gibson, "Faith in the Courts: Religious Dress and Human Rights" (2007) 66:3 Cambridge LJ 657; Niraj Nathwani, "Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights" (2007) 25:2 Nethl QHR 221; Richard W Bauman & Sarah LM Weingarten, "Keeping Religious Fundamentalism Under Wraps: The Clothing Controversy in Selected European Countries" (2006) 15:1 Const Forum Const 1; Tabassum F Ruby, "Listening to the Voices of Hijab" (2006) 29:1 Women's Studies Intl Forum 54; Elizabeth Campbell, *Freedom of Religion in the Workplace: Legislative Protection*, Current Issues Series (Kingston, Ont: Industrial Relations Centre, Queen's University, 1993).

100 See Chapter 5, section 5.1.2, *below*.

101 *Act respecting the laicity of the State*, CQLR c L-0.3 [*Bill 21*].

102 See Canadian Press, "Why cops in Montreal still want to wear their camouflage pants" (6 September 2017), online: *National Post* <https://nationalpost.com/news/quebec-police-officers-still-want-to-wear-camouflage-pants>; Graeme Hamilton, "Harmless protest or threat to public safety? Quebec city wants to force police officers to ditch outrageous pants" (14 August 2014), online: *National Post* <https://nationalpost.com/news/canada/harmless-protest-or-threat-to-public-safety-quebec-city-wants-to-force-police-officers-to-ditch-outrageous-pants>. However, this particular pressure tactic is no longer allowed under the current legislation, as the Quebec government enacted *Bill 133* in 2017, which makes wearing the full uniform "without substituting any other element" mandatory for police officers and special constables in the performance of their duties (*Police Act*, CQLR c P-13.1, s 263.1).

particular item of clothing) has long been recognized as a legitimate form of union activity.[103] It has also been the subject of numerous arbitration awards across the country.[104] These manifestations of union activity are recognized as legal forms of expression and protected by freedom of expression and association, but they are not explored in this dissertation. As I focus on aspects of appearance that are fundamental to the employee's individual definition of the self, union emblems go beyond the scope of my dissertation as they are usually worn with a collective purpose and indicate an association to a union that cannot be interpreted as individual forms of self-definition. Moreover, this topic would require a distinct sociological analysis and could also be the subject of its own dissertation.

Finally, while I study workplace appearance regulation in Canada, my dissertation focuses on British Columbia, Ontario, and Quebec. These provinces are the three largest jurisdictions in Canada, the most populated, and the provinces where there is the most legal activity. They also represent different geographical, sociological, and ideological contexts, and thus are fairly representative of the situation applicable to a majority of Canadians. I purposely chose to include the province of Quebec in my research, as my dissertation relies on the comparison of this jurisdiction with the rest of Canada. As mentioned above, Quebec's human rights legislation—the *Quebec Charter*—is unique and substantially different than any other human rights statute elsewhere in Canada, for it protects various fundamental rights and freedoms in addition to the right to equality that can be used to challenge workplace appearance regulation. It should also be noted

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103 See Brown & Beatty, *supra* note 31 at 9:1410.

104 See e.g. *Régie intermunicipale de sécurité incendie de la Vallée-du-Richelieu et Syndicat des pompiers et pompières du Québec, section locale Régie intermunicipale de sécurité incendie de la Vallée-du-Richelieu*, 2020 QCTA 32 (Qc Arb) [*Vallée-du-Richelieu*]*; Air Canada and IAMAW District Lodge 140* (2019), 300 LAC (4th) 436 (Can Arb) [*Air Canada* 2019]; *Syndicat des pompiers du Québec, section locale Sainte-Thérèse et Ville de Ste-Thérèse*, DTE 2016T-393 (Qc TAT); *Ville de Châteauguay et Fraternité des policiers de Châteauguay Inc*, 2014 QCCRT 0693; *Société canadienne des postes et Syndicat des travailleuses et travailleurs des postes*, DTE 2013T-800 (Qc Arb) [*Société canadienne des postes* 2013]; *Bartlett v Canada (Treasury Board – Border Services Agency)* (2012), 216 LAC (4th) 393 (CPSLRB) [*Bartlett*]; *Syndicat de la fonction publique du Québec et École nationale de police du Québec*, 2010 QCCRT 0042; *Telus v Telecommunications Workers Union* (2007), 163 LAC (4th) 221 (Can Arb) [*Telus*]; *Overwaitea Food Group Ltd Partnership v United Food & Commercial Workers, Local 1518* (2006), 149 LAC (4th) 281 at para 21 (BC Arb) [*Overwaitea*]; *White Spot Ltd v Food & Service Workers of CAIMAW, Local 112* (1991), 21 LAC (4th) 421 (BC Arb) [*White Spot*]; *Canada Post Corp v CUPW* (1986), 26 LAC (3d) 58 (Can Arb) [*Canada Post*].

that this dissertation mainly focuses on provincial law, unless specifically mentioned, as merely ten percent of the Canadian workforce falls under federal employment and labour law,[105] and because the federal human rights statute[106] that is applicable to private employment relationships under federal jurisdiction resembles the BC and Ontario human rights codes, only offering a protection against discrimination.

1.2.3 Methodology

Examining employment and human rights laws in Canada presents a significant challenge as both federal and provincial levels of government have jurisdiction over employment and labour issues. Compounding the fact that the law applicable to a company may fall under federal or provincial jurisdiction depending on the industry, employment and human rights laws across Canada differ in each province and territory. In addition to these challenges, exploring legal issues at a national level in Canada requires conducting research into multiple legal systems, primarily the civil law system in Quebec and the common law system in the rest of Canada. While my dissertation focuses on civil law and common law, I acknowledge that Canada is a multi-juridical country, with current and ongoing recognition and revitalization of Indigenous legal orders—which also go beyond the scope of my research. My dissertation will therefore draw on a comparative law methodology, as employment law differs depending on whether it falls under common law or civil law. These two legal systems present major differences, but their underlying principles is what make them so distinct. The main feature of the common law is that it "is not created by means of legislation but is based mainly on case law," whereas civil law is contained in civil codes or statutes and is "largely classified and structured and contains a great number of general rules and principles."[107] However,

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105 Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville, QC: Yvon Blais, 2014) at 499.

106 *Canadian Human Rights Act*, RSC 1985, c H-6 [*Canadian Human Rights Act* or CHRA].

107 Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 VUWLR 817 at 819.

this comparative methodology will enable me to show in Chapter 4 that the particular fields of employment and labour law share core principles that are quite similar.

In order to examine workplace appearance regulation from a legal perspective in Canada, I want to compare two legal components: employment law in Quebec and the rest of Canada, and human rights law in Quebec and the rest of Canada. This choice can be justified because of the differences between the civil law and common law systems, but more importantly because of the distinctive role of the *Quebec Charter*—which protects many quasi-constitutional rights and freedoms that find no protection in other provinces—and its significant effects in employment contexts.[108] Deemed a "unique document in the Canadian legislative history,"[109] the *Quebec Charter* is one of the most progressive and elaborated provincial human rights laws, due to the extent of the fundamental rights and freedoms it protects alongside its expanded scope of application. In fact, the *Quebec Charter* is a legislative instrument that finds no equal in the rest of Canada; other provinces mostly have anti-discrimination laws, but none of these laws protect the fundamental rights and freedoms as does the *Quebec Charter*.[110]

For my LLM thesis, I originally limited the scope of my investigation to the province of Quebec.[111] In my doctoral dissertation, I go much farther in my study of workplace appearance regulation, by 1) undertaking an exhaustive analysis of the legal literature on this subject in Canada and the United States; 2) conducting extended sociological research on appearance choices in particular; 3) analyzing and comparing the question through employment and labour law at a national level, focusing on British Columbia, Ontario, and Quebec; 4) analyzing and comparing human rights statutes applicable to workplace appearance regulation at a national level, focusing on British Columbia, Ontario, and Quebec; 5) conducting a thorough analysis of the anti-discrimination approach in Canada regarding workplace appearance regulation, including a proposal to include

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108 See Brunelle, Coutu & Trudeau, *supra* note 39.

109 André Morel, "La Charte québécoise: un document unique dans l'histoire législative canadienne" (1987) 21:1 RJT 1 at 1 [translated by author].

110 Human rights statutes in both Saskatchewan and Yukon, as well as the *Alberta Bill of Rights*, also protect several fundamental rights, including the right to freedom of expression. See note 44 and accompanying text.

111 See Delagrave, *L'apparence physique du salarié*, *supra* note 91.

physical appearance as a protected ground in the legislation nationwide; and 6) developing an extensive analysis of the fundamental rights and freedoms that can be used to challenge workplace appearance regulation, using the province of Quebec as an example.

Although there has been a growing interest in comparative law methodology since the end of the twentieth century, there seems to be no conclusive definition of what exactly comparative law is, and what a comparative law methodology involves.[112] This research method encompasses a number of distinct approaches, such as "comparative law and legal history," "comparative law and jurisprudence," "comparative law and culture," "comparative law and economics," and "critical comparative law."[113] I use a "comparative law and legal history" approach, particularly to identify the origins of employers' management rights in both the civil and common law systems. This provides the basis for understanding the history of employers' prerogatives, and whether they differ depending on the legal system within Canada.

A "comparative law and jurisprudence" approach has also been used in my dissertation, as a way to compare the results of legal challenges to employers' policies. I examine how adjudicators have treated cases involving workplace appearance regulation in the three provinces under study.[114] This comparison first shows a general concordance, which is that the case law mostly comes from arbitration tribunals across the country. This means that the issue of workplace appearance is mostly treated through the principles of labour law, in which the reasonableness of the policy is analyzed similarly through the *KVP* test[115] in British Columbia, in Ontario, as well as in Quebec. This case law comparison also shows that in the last few decades, Quebec arbitration awards almost always analyze the legality of workplace appearance regulation through the *Quebec Charter*'s fundamental rights and freedoms, an approach that generally yields positive results for employees.[116] In contrast,

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112 See Reinhold Fahlbeck, "Comparative Labor Law – Quo Vadis?" (2003) 25:7 Comp Lab L & Pol'y J 7 at 8; Esin Orucu, "*Unde Venit, Quo Tendit* Comparative Law?" in Andrew Harding & Esin Orucu, eds, *Comparative Law in the 21st Century* (London; Boston, MA: Kluwer Law International, 2002) 1.

113 Orucu, *supra* note 112 at 3-5.

114 The nature of researching the law is that it is constantly shifting. The comprehensive review of the jurisprudence for this dissertation is current until March 2020.

115 See Chapter 4, section 4.1.2.3, *below*.

116 See Chapter 6, section 6.2.2, *below*.

arbitration awards from British Columbia and Ontario occasionally refer to fundamental rights,[117] but the lack of legal grounds in the legislation results in less cases involving workplace appearance.

As for the benefits of using a comparative method, it has been said that it "enables us to distinguish basic principles more readily and to understand them better. […] When we see how easily another system […] can deal with a given problem, we become aware of inadequacies in our own solutions."[118] Justice Gonthier argues that the common law and civil law approaches are drawing much more closely together, an observation with which I concur. He suggests that both systems in the Canadian legal regime are influencing each other, and that this "convergence of the two systems provides an opportunity to benefit from the combined wealth of thinking and experience of both systems, comparing their solutions, their reasoning and their experiments, providing another point of reference to assess the most appropriate answer."[119] In comparing how issues of workplace appearance regulation are addressed in civil law and common law, I argue that there seems to be a desire on the part of common law adjudicators to treat the question as one of fundamental rights, similarly to the Quebec case law.

In addition, I draw on a traditional exegetical analysis, a research-based analysis, and case law and legislation interpretation. I identify and analyze applicable laws, case law, and secondary sources in Canada that deal with physical appearance, employment law, and human rights law, which allows me to establish a clear portrait of the legal situation of workplace appearance regulation in Canada under the current law and the proposals for legal reform that could improve the situation.

Finally, my dissertation is also guided by an interdisciplinary methodology. To put into context the issue of physical appearance in the workplace, I investigate the literature on appearance and identity, performativity, and the sociology of clothing and grooming, with a particular focus on aspects of appearance that involve some degree of choice. This theoretical sociological research

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117 See Chapter 6, section 6.2.1, *below*.

118 Charles D Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1992-1993) 21 Can Bus LJ 323 at 325.

119 *Ibid* at 330-331.

allows me to consider the law as a social phenomenon. An interdisciplinary approach is necessary in order to analyze the various issues that arise from one's private desire to dress and present a self-image consistent with one's tastes and personality. My sociological analysis is also crucial in demonstrating that physical appearance, including appearance choices, should be considered as fundamental to self-identity and personhood, and therefore protected by anti-discrimination laws as well as fundamental rights and freedoms.

1.3 CHAPTER OUTLINE

After establishing the background and current context in which workplace appearance regulation occurs in Canada in this introduction, my dissertation begins with a review of the legal literature on this topic in Chapter 2. Although issues of workplace appearance are debated on a fairly regular basis in front of arbitral tribunals, appearance questions in the workplace have not been the subject of extensive legal research or analysis in Canada, as my literature review will show. However, the questions related to the regulation of physical appearance in employment contexts have interested many legal scholars (and others) in the United States and abroad, and this issue is widely covered in American scholarly articles in particular. Most of the reviewed literature takes a human rights approach and provides an analysis of different arguments designed to prohibit appearance-based discrimination in the workplace. The recurring rationale for prohibiting appearance discrimination rests upon the idea that appearance or looks, along with sex, race, age, and disability, cannot predict the ability to perform job duties. While most of the articles discuss the issue of workplace appearance through discrimination based on sex and gender, several pieces treat the question as race discrimination. A few articles move away from the anti-discrimination approach to analyze the question of workplace appearance as an invasion of privacy and freedom of expression, which is particularly relevant to my analysis. In this chapter, I also review several recurring themes in the literature, which are: immutability; conformism and community standards; power and managerial prerogatives; corporate branding; and legal indeterminacy. This chapter ends

with an overview of the various solutions proposed by scholars to improve the legal treatment of workplace appearance, including proposals for legal reform.

When employees enter into an employment relationship, they concede to the employer a significant power of direction over their work. So why would one argue that employers cannot control their employees' physical appearance at will? What is so particular about appearance? To answer this question, I analyze in Chapter 3 the sociological literature on the importance of appearance for individuals, in which I argue that individuals' physical appearance matters because, in various ways, it defines their sense of self or personhood—a concept derived from studies of identity. Moreover, appearance choices cannot be understood as completely free, as social forces strongly influence individuals in their everyday clothing and grooming decisions. Individuals' agency regarding their appearance should therefore be protected, and this is particularly true for some employees, who want to express their true self in the workplace—a space of fulfilment for many, where they spend a great portion of their time. Also, since it provides extensive information and data about individuals, appearance should not be deemed a silly concern and should be considered of fundamental importance to employees.

The sociological analysis I undertake in this chapter, which highlights that appearance choices can be very important to individuals' and employees' sense of self—as an identity maker and marker, a social marker, and a means of expression—will support my argument that the law should protect employees' interests regarding their appearance. The last part of this chapter ties the legal to the sociological analysis, in explaining how the intricate relationship between appearance and identity in sociology should be understood as an intimate and important relation between appearance and *personhood*. The concept of personhood redirects the focus of a rights analysis on the meaning of appearance for an individual's sense of self—as protected by dignity, autonomy, and privacy—instead of concentrating on relating appearance to protected characteristics of identity, such as sex, gender, race, and the like. I argue that tying appearance to personhood also helps to illuminate appearance as fundamental to employees' sense of self and changeable only at

unacceptable costs, which should be protected by anti-discrimination legislation and fundamental rights and freedoms as well.

Chapter 4 sets out the legal principles and settings that are required for the legal analysis that will follow in Chapters 5 and 6. This chapter first analyzes the fundamentals of employment and labour law in Canada, exploring the principles governing the individual employment relationship and the collective bargaining regime in both common law and civil law jurisdictions. Since employees' appearance in Canada is mostly analyzed in arbitral jurisprudence, I examine the applicable principles regarding the adjudication of workplace appearance regulation, mainly the analysis of the reasonableness of employers' management rights and the *KVP* test. But why do we allow this employer prerogative? I take up the argument that there seems to be a general assumption that employers naturally hold the prerogative to control their employees' appearance. In the second part of this chapter, I investigate the legal basis of employers' management rights—which allow them to enforce workplace appearance regulation—and conclude that the foundation of employers' power lies in the subordination inherent to the contract of employment. A brief overview of the legal history of the employment relationship will also reveal its transformation from the master and servant regime to the employment contract, which shifted from a legal system of discipline to one of protection of workers—including protection through human rights laws.

When conflicting with employees' appearance interests, employers' management rights—which have no particular status in the hierarchy of legal sources—should give way to employees' quasi-constitutional fundamental rights and freedoms. In the last part of Chapter 4, I briefly examine the history of human rights in Canada and compare human rights statutes in common law jurisdictions with respect to the *Quebec Charter* and the *Canadian Charter*. This illuminates the respective protections that human rights legislation offers across the country—which focus on the right to equality—and explain why the anti-discrimination approach is relevant to workplace appearance issues in the current legal context. I also demonstrate in this chapter that the *Quebec Charter* is a unique human rights statute that exceeds the sole protection of the right to equality, providing a protection of various fundamental rights and freedoms, such as the right to inviolability,

the right to dignity, fundamental freedoms—expression, religion, and association—and the right to privacy, just to name a few. In this sense, the *Quebec Charter* offers an extended protection of fundamental rights that employees can use to oppose workplace appearance regulation.

In Chapter 5, I analyze the anti-discrimination framework as a limit to appearance regulation in employment contexts. The general philosophy underlying the right to equality in the workplace is that employees must be treated according to their individual merit and not in terms of immutable personal characteristics. While physical appearance is not a protected ground of discrimination in Canada, anti-discrimination legislation can still be used to challenge workplace appearance regulation, when employees are able to tie their appearance to a protected class, such as sex, gender, pregnancy, race, religion, disability, and the like. The case law on equality and workplace appearance that I document in this chapter shows that the anti-discrimination approach can yield positive results for employees, albeit limited ones. One of the problems associated with appearance-based discrimination is that is includes a wide range of characteristics that may, but most of the time do not, fit under the traditional grounds of anti-discrimination laws. Moreover, adjudicators seem to have difficulty in recognizing appearance issues as an infringement of the right to equality, as appearance is often considered mutable. However, relying on the sociological analysis I undertake in Chapter 3, I argue that appearance, as fundamental to an individual sense of self and personhood, should be understood as constructively immutable. As such, I conclude this chapter with a proposition to include physical appearance as a protected ground in human rights legislation everywhere in Canada, which would allow for a better protection of employees' appearance choices.

In Chapter 6, I analyze the fundamental rights at work approach, which also offers a better protection of employees' appearance and provides a limit to employers' management rights. This approach recognizes that employees have individual rights to dignity, privacy, inviolability, liberty, and fundamental freedoms (religion, expression, and association), even when they are performing their work. Chapter 6 focuses on the three most relevant rights regarding employees' appearance—dignity, privacy, and freedom of expression. While most of the fundamental rights and freedoms find no formal protection in the statutory legislation applicable in common law jurisdictions to private

employment relationships, they are formally recognized in Quebec in the *Quebec Charter*. I analyze the Quebec case law in this chapter to demonstrate the value of this approach. I also assess arbitration awards from common law jurisdictions—mostly from BC and Ontario—that include references to human rights and freedoms in the evaluation of the reasonableness of appearance policies, even when such rights find no formal protection in the legislation. I argue that the fundamental rights at work framework allows for a more appropriate analysis of appearance questions than the anti-discrimination approach, particularly regarding aspects of appearance that are the focus of my dissertation—aspects of appearance that involve a degree of choice—and conclude this chapter with a succinct proposal for legal reform.

Chapter 7 concludes my dissertation. In this chapter, I review my main arguments and I identify new avenues for future research on workplace appearance regulation in Canada. While my dissertation is focused on human rights and using the law in a formal sense to protect workers' appearance choices, I suggest other directions to accomplish this objective.

The main objective of my dissertation is to understand how human rights in Canada can protect employees' interests regarding their appearance in the workplace. I argue that physical appearance, as fundamental to employees' sense of self and personhood, should be considered constructively immutable, when appearance choices relate to personal characteristics that can only be changed to unacceptable cost to personal identity. As such, appearance choices should be protected by human rights legislation and the *Canadian Charter*—when applicable—under the anti-discrimination approach, but also under the fundamental rights at work framework, following Quebec's example. Before investigating the theoretical and analytical foundations of these arguments, the next chapter will review the literature on workplace appearance regulation in Canada and the United States, as Canada's legal literature on this subject is quite scant and further research is needed. This literature review shows in particular a strong commitment to the anti-discrimination approach from legal actors writing on workplace appearance.

CHAPTER 2
REVIEW OF THE LITERATURE ON APPEARANCE IN THE WORKPLACE

Introduction

When it comes to appearance regulations in the workplace, both employers and employees have legitimate interests at stake. Whether for reasons of health and safety of the workers or the public, or to create and protect their corporate image, employers often choose their staff on the basis of their appearance and enforce dress and grooming codes at work. Employees, too, may have genuine concerns about the appearance they convey when performing their work, particularly when their employer imposes on them an image that is not consistent with their sense of self. Whose interests must prevail in such circumstances: the employee's freedom or the employer's entrepreneurial freedom? While the answer to this question is very context-dependent, my dissertation argues that Canadian law should include a protection of employees' appearance and therefore contends that the employer's freedom—and power—should not be unlimited when it comes to dress and grooming codes.

An important step in any major research project is to review the literature in order to better understand what other scholars have written on the topic. Because I am examining the legal issue of appearance regulation in the context of employment in Canada, I first conducted exhaustive research on the Canadian legal literature on this subject. Given the lack of Canadian legal materials on the regulation of appearance in the workplace, I expanded my research to the United States (US) and other western English-speaking countries. I realized that the questions related to appearance at work have interested many legal scholars (and others) in the United States and that this issue is widely covered in the American literature. This review is therefore divided in two parts: the Canadian literature review and the review of the literature outside of Canada. This review shows how my research yielded limited results in Canada, and how the rich information found in the literature outside of Canada, and particularly in the US, shaped my dissertation's research questions.[120]

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[120] For an elaboration of my dissertation's research questions, see Chapter 1, section 1.2.1, *above*.

2.1 AN "UNSUCCESSFUL" REVIEW OF THE CANADIAN LITERATURE

Having already conducted some research on the subject—mostly in French language materials—in the province of Quebec for my LLM thesis,[121] I was cognizant that the regulation of appearance in the workplace can refer to many different situations and can be analyzed through various themes and approaches. In Quebec, the issue has been mostly discussed in arbitral jurisprudence—in awards reviewing the reasonableness of appearance regulations—and has been increasingly referring to human rights in the last few decades. Aspects of employees' physical appearance that are the most common subjects of litigation in the workplace include beards, hair style and colour, facial or body piercings, tattoos, safety equipment, religious symbols, union emblems, perceived markers of disability, and extra physical weight or obesity. Although the subject of many workplace disputes, employees' appearance has not generated a lot of scholarly work in Canada, as my first general investigation of the legal literature in Canada on appearance in the workplace yielded no results.

2.1.1 Legal Articles on Appearance in the Workplace

A further review of the Canadian literature on law and workplace appearance[122] yielded only a few English-language articles that were devoted to the topic[123] and several blog posts.[124] In

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121 Delagrave, *L'apparence physique du salarié*, *supra* note 91.

122 The databases most likely to be relevant for the search of Canadian legal materials related to the issue of physical appearance in the workplace were investigated in the following order: HeinOnline – Law Journal Library, LexisNexis Quicklaw – Journals, Scott Index to Canadian Legal Periodical Literature, and SOQUIJ (Azimut) – Banque Doctrine. The following keywords (and their translation in French) were used: "appearance," "physical appearance," "personal appearance," "dress," "dress code," "grooming"; in order to generate maximum retrieval, these words were all alternately searched in combination with one of the following keywords: "work," "workplace," "employment," "labour," "regulation," "policy," "discrimination," "legal," and "law."

123 Burchill, *supra* note 94; Holly Reid & Nida Hussain, "Fashion Faux-Pas: Dress and Appearance Policies and Human Rights" (2008-2009) 18 ELLR 117; Ed Bosveld, "Loopholes and the Law: Facial Jewelry, Personal Expression, and the Regulation of the Workplace" (2007) 11 CLELJ 351; Linda McKay-Panos, "Gender Discrimination in the Workplace: Dress Codes" (2004) 29:3 L Now 69; C Gordon Simmons, "Arbitral *Stare Decisis*: An Unheralded but Important Doctrine in Canadian Arbitral Jurisprudence" (1986) 11:2 Queen's LJ 347 (Simmons discusses the result of "personal grooming" cases as an illustration of the principle of *stare decisis* in labour arbitration).

124 See e.g. France Rivard, "Le port du pantalon plutôt que celui du bermuda… sécurité du travail ou question esthétique?" (29 January 2020), online (blog): *Le blogue par Soquij* <https://blogue.soquij.qc.ca/2020/01/29/le-port-du-pantalon-plutot-que-celui-du-bermuda-securite-du-travail-ou-question-esthetique/>; Lisa Stam, "'Avoid seductive styles' – Telling your employees how to dress" (12 June 2019), online (blog): *Employment & Human*

Quebec, apart from my LLM thesis—which was published[125]—only one legal article is directly related to this topic.[126] In addition, I only found concise passages on the subject in general labour law and employment law publications that describe the outcome of arbitration decisions.[127] These monographs briefly address the subject from a collective bargaining perspective, but there was no literature that specifically covered the individual employment relationship context. I was disappointed to find only three English-language Canadian scholarly articles on workplace appearance in general and only one French-language article on the topic.[128]

Among the three English-language articles, which are case focused, it is interesting to observe that there is a clear evolution on the approach used to discuss appearance cases, depending on when they were published. Gordon Simmons' article was published in 1986. While it briefly mentions that human rights legislation can be used to challenge workplace appearance

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Rights Law in Canada <https://www.canadaemploymenthumanrightslaw.com/2019/06/avoid-seductive-styles-telling-your-employees-how-to-dress/>; France Rivard, "L'apparence personnelle" (May 2018), online (blog): *Le blogue par Soquij* <https://blogue.soquij.qc.ca/2018/05/01/lapparence-personnelle-1-de-3-shabiller-conformement-aux-politiques-de-lemployeur/>; "Discrimination & Dress Codes: Can My Employer Make Me Wear Make-up?" (26 March 2018), online (blog): *Molyneaux Law* <https://www.molylaw.com/2018/03/dress-code-discrimination-make-up/>; France Rivard, "Le code vestimentaire sexualisé peut-il être contesté?" (20 February 2018), online (blog): *Le blogue par Soquij* <https://blogue.soquij.qc.ca/2018/02/20/code-vestimentaire-sexualise-etre-conteste/>; Jill Lewis, "No Shorts? No Jeans? No Legitimate Reason For a Policy on Work Attire!" (29 January 2016), online (blog): *Nelligan Law* <https://nelliganlaw.ca/article/labour-law/no-shorts-no-jeans-no-legitimate-reason-for-a-policy-on-work-attire/>; "Speaker's Corner: Ontario needs case law on sexy dress codes" (8 June 2015), online (blog): *Law Times* <https://www.lawtimesnews.com/archive/speakers-corner-ontario-needs-case-law-on-sexy-dress-codes/261754>; David Harris, "Sexy Servers – Offside the Human Rights Code?" (1 June 2015), online: *CanLII Connects* <https://canliiconnects.org/en/commentaries/37230>; Doorey, "Should Employers", *supra* note 20; "Pregnant Employee Terminated as a Result of New Form-Fitting Staff Uniform" (17 July 2013), online (blog): *Minken Employment Lawyers* <https://www.minken employmentlawyers.com/ blog/pregnant-employee-terminated-as-a-result-of-new-form-fitting-staff-uniform/>; David Doorey, "Can an Employer Prohibit Tattoos and Piercings?" (15 January 2013), online (blog): *Law of Work* <http://lawofwork.ca/?p=6119>; Jim Anstey, "Movember in the Workplace" (24 November 2014), online (blog); *Nelligan Law* <https://nelliganlaw.ca/blog/labour-law/movember-in-the-workplace/>; Ann Sophie Del Vecchio & Pierrick Bazinet, "Le code vestimentaire et les limites à la liberté d'expression" (22 November 2011), online (blog): *CRHA* <https://ordrecrha.org/ressources/TBD/Archives/Vigie-RT/le-code-vestimentaire-et-les-limites-a-la-liberte-d-expression>; David Doorey, "Can your Employer Fire You For Shaving Your Hair Off" (28 January 2011), online (blog): *Law of Work* <http://lawofwork.ca/?p=2666>; David Doorey, "Can Hooters Require Servers to be "Slim and Fit?" (27 August 2010), online (blog): *Law of Work* <http://lawofwork.ca/?p=2026>; Brian Kenny, "Limits of a workplace dress code and appearance policy" (2 December 2009), online (blog): *Canadian HR Reporter* <https://www.hrreporter.com/employment-law/news/limits-of-a-workplace-dress-code-and-appearance-policy/317384>.

125 Delagrave, *L'apparence physique du salarié*, *supra* note 91.

126 CDPDJ (Drapeau), *supra* note 32.

127 See e.g. Brown & Beatty, *supra* note 31; Bernier et al, *supra* note 32; Pedneault et al, *supra* note 32; Snyder, *supra* note 31; Mitchnick & Etherington, *supra* note 31.

128 Only substantial articles that are more than two-pages long were considered in this review.

policies, it mainly reports on appearance cases under the reasonableness approach,[129] in accordance with the arbitral jurisprudence at that time. In their articles, published in 2007 and 2012 respectively, Ed Bosveld and John Burchill consider human rights arguments when adjudicating workplace appearance issues. This shows an increased sensitivity to human rights concerns in recent years that is aligned with the argument I am making in this dissertation.

In the first article,[130] Simmons argues that, although there is no formal doctrine of *stare decisis* in labour arbitration, labour arbitrators strongly tend to follow precedent—or principles established in previous labour arbitration decisions—in their awards. The article is not about appearance at work *per se*, but the author uses personal grooming cases in order to make his point. He explains how these cases emerged in the 1970s with young male employees wanting to wear beards and long hair, a social change in grooming to which older members of Canadian society objected. These older members, generally holding managerial positions, "attempted to manifest their objections to these changes at places of work through the establishment of rules pertaining to dress and personal grooming."[131] When employees challenged these rules in arbitration, the issues were decided on the reasonableness of employers' policies. Simmons demonstrates at length that a clear principle rapidly emerged from the personal appearance or grooming cases, in which legitimate business interests of the employer had to be established based on objective evidence in order to find the rule reasonable.

The second article,[132] by Bosveld, is a commentary in a peer-reviewed journal that seems mainly intended for labour relations practitioners. This commentary focuses on facial jewellery (piercings) and interestingly discusses employees' self-expression, and particularly freedom of expression. Even though the article does not offer an in-depth analysis of the issue of appearance in the workplace, the author reports the ground-breaking reasoning in the *Thrifty* cases.[133] In these

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129 See Chapter 4, section 4.1.2.2, *below*.
130 Simmons, *supra* note 123.
131 Simmons, *supra* note 123 at 353.
132 Bosveld, *supra* note 123.
133 *Thrifty* 2001, *supra* note 5; *Thrifty (Canada) Ltd And OPEIU, Local 378* (2002), 106 LAC (4th) 420 (BC Arb) [*Thrifty* 2002].

two related awards, Arbitrator Larson "observed that even easily-removable items might constitute a fundamental part of an employee's identity and could, in certain cases, have philosophical or religious significance. […] [H]e reasoned that the starting-point must be a recognition of employees' basic right to attire and groom themselves as they please, without having to prove that their choices have social validity."[134] Bosveld also notes the "generational aspect of personal appearance disputes,"[135] as appearance social norms tend to follow trends. As appearance social standards are "ever-changing" from one generation to the next, he asserts, they "create unique challenges in striking a proper balance between the employee's right to personal expression and the employer's right to regulate the workplace."[136] In reporting that employees might have a right to express their individuality through their appearance, the author takes a compelling approach and suggests guidelines to deal with employee-employer disputes over workplace appearance regulation, in which an effective balance between competing interests must be achieved.

In the third English-language article,[137] Burchill discusses appearance codes for police officers, focusing on tattoos. Generally intended to enhance "both the public image of the police and the internal morale or *esprit de corps* of its members,"[138] police appearance regulations have been regularly challenged in the jurisprudence.[139] At the time the article was written (in 2012), tattoos were not regulated in most police dress codes in Canada—which are usually fairly comprehensive given the importance of the police force's image—and only one arbitration case had dealt with tattoos.[140] Burchill therefore offers a review of the issues that he predicted would arise—a projection that was

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134 Bosveld, *supra* note 123 at 355.

135 *Ibid* at 358.

136 *Ibid*.

137 Burchill, *supra* note 94.

138 *Ibid* at 193.

139 See e.g. *Mosher v West Vancouver Police Department*, 2006 BCHRT 86 [*Mosher*]; *Commission des droits de la personne et des droits de la jeunesse c Sûreté du Québec*, DTE 2000T-634 (Qc TDP) [*Sûreté du Québec*]; *Waterloo Regional Police Services Board v Waterloo Regional Police Association* (1999), 85 LAC (4th) 227 (Ont Arb), aff'd 2000 CarswellOnt 2101 (WL Can) (Ont Div Ct) [*Waterloo Regional Police*]; *St-Lambert (Ville de) et Fraternité des policiers de St-Lambert*, DTE 89T-806 (Qc Arb) [*Policiers de St-Lambert*]; *Fraternité des policiers de la Communauté urbaine de Montréal Inc c Conseil de sécurité publique de la Communauté urbaine de Montréal*, [1976] CS 1513 [*Policiers de CUM*]. See also, regarding the RCMP: *Grant v Canada (Attorney General)*, [1995] 1 FC 158, aff'd [1995] ACF no 830 (FCA), leave to appeal to SCC refused, 24890 (15 February 1996) [*Grant*].

140 *Ontario Provincial Police v Ontario Provincial Police Association* (2011), 110 CLAS 352 (Ont Arb) [*Ontario Provincial Police*].

accurate[141]—as he argued "tattoos become more prominent and diverse in mainstream society."[142] Describing tattoos as "one of the earliest known forms of communication," Burchill affirms that tattoos can serve to express one's identity and individuality, as well as "personal thoughts, opinions and beliefs."[143] He also notes the generational divide regarding tattoos' acceptance:

> While only a few generations ago tattoos were associated with criminals, gang members, and other delinquent or marginalized groups, several recent surveys have shown that tattoos have become mainstream in today's society, particularly among the current generation. Tattoos are to this generation what long hair was to their grandparent's generation. But like those generations before them such self-expression has been viewed by some as 'freaky' and unacceptable in some workplaces—conveying with it unacceptable images of laziness, disrespect and/or unprofessionalism.[144]

Analyzing Canadian and American jurisprudence, this article offers a valuable contribution to the study of workplace appearance regulation—particularly regarding tattoos—asserting that employers should present objective evidence to support their restrictions on employees' appearance in order to maintain a tattoo prohibition.

The only French-Canadian article[145] on appearance in the workplace was written for the Quebec Human Rights Commission—the Commission des droits de la personne et des droits de la jeunesse (CDPDJ)[146]—by Maurice Drapeau. Reflecting how the jurisprudence is divided between two approaches when adjudicating appearance cases, the article discusses the labour law approach—strictly focused on the reasonableness of the employer's policy—and the human rights approach—under the *Quebec Charter*. Drapeau argues that the employer's justification should be

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141 See e,g. *Fraternité des policiers et policières de Longueuil et Ville de Longueuil*, 2019 QCTA 105 (Qc Arb) [*Policiers de Longueuil*]; *Policiers de St-Jean-sur-Richelieu*, *supra* note 3.

142 Burchill, *supra* note 94 at 199.

143 *Ibid* at 195.

144 *Ibid* [footnotes omitted].

145 CDPDJ (Drapeau), *supra* note 32. It is important to note that a 2005 article from the CDPDJ amends the Commission's position regarding appearance and freedom of expression. It replaces Drapeau's section on freedom of expression to conclude that this fundamental liberty does not cover attire, unless someone intends to convey meaning with their clothes (Commission des droits de la personne et des droits de la jeunesse, *Codes vestimentaires et uniformes dans les écoles publiques*, by Daniel Carpentier (Montreal: Direction de la recherche, 2005) [CDPDJ (Carpentier)].

146 The title of the Commission is not officially translated in English, even in the English version of the *Quebec Charter*, but it translates as the "Quebec Human Rights and Youth Rights Commission." See *Quebec Charter*, s 57. I use "CDPDJ" or "Quebec Human Rights Commission" in this dissertation when referring to the Commission des droits de la personne et des droits de la jeunesse.

analyzed with greater scrutiny when human rights are raised, given the particular status of the *Quebec Charter*. The article concludes that dress codes can violate an employee's fundamental rights and can result in discrimination on the basis of sex, religion, and disability. It also analyzes grooming standards (especially beards and hairstyles) in relation to the right to personal inviolability and sex discrimination, although the article's argument regarding beards and discrimination is not the most convincing. However, it is important to note that this study was written more than twenty-five years ago and might not reflect the principles set out by Charter jurisprudence in the past decades. Nevertheless, Drapeau provides a useful review of some Canadian cases on workplace appearance regulation.

Finally, my research generated a few articles on discrimination based on obesity,[147] which is related to the issue of appearance-based discrimination, as issues tied to what is considered excessive weight are visible and physical personal characteristics. In a law reform piece, Emily Luther argues for expanding the existing anti-discrimination legislation to include weight or body size as a prohibited category, asserting weight should be recognized as an analogous ground of discrimination under s. 15 of the *Canadian Charter*, "and read into human rights legislation accordingly."[148] Examining the case law on obesity, she points out that there have been significant and positive developments for individuals classified as obese since 2000 with the *Boisbriand*[149] and *Granovsky*[150] cases, in which the SCC expanded the definition of disability to include obesity.[151]

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147 See e.g. M Neil Browne & Nancy K Kubasek, "Alcohol and Obesity Law in Canada, the United Kingdom, and Australia" (2013) 21:3 Cardozo J Intl & Comp L 653; Emily Luther, "Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada" (2010) 48:1 Alta L Rev 167; Harriet Nowell-Smith & Hugh O'Reilly, "A Triumph of Substance over Form in How Discrimination Law Treats Obesity" (2003) 82:3 Can Bar Rev 681; Harris L Zwerling, "Obesity as a Covered Disability Under Employment Discrimination Law: An Analysis of Canadian Approaches" (1997) 52 IR 620; J Paul R Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17 Adv Q 338. Zwerling and Howard offer an interesting analysis of obesity and its associated issues and stigmas, but their articles are both out of date since the SCC expanded the definition of disability to include obesity in 2000. For a comprehensive analysis of the use of legal interventions to address obesity in Canada, see Nola M Ries & Barbara Von Tigerstrom, "Legal Interventions to Address Obesity: Assessing the State of the Law in Canada" (2011) 43:2 UBC L Rev 361.

148 Luther, *supra* note 147 at 188.

149 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 [*Boisbriand*].

150 *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 [*Granovsky*].

151 See also Nowell-Smith & O'Reilly, *supra* note 147.

However, she contends that the actual legislation only protects the medically obese but does not do enough for individuals considered overweight, since discrimination based on someone's weight is often driven by "simple distaste for the appearance of larger people," instead of actual perceived disability.[152] This strengthens my contention that physical appearance—which includes weight and body size—should be recognized as a protected characteristic in the legislation, as it could also help people of size.

2.1.2 Other Commentary on Appearance in the Workplace

Given that the only article in Quebec on workplace appearance regulation comes from the CDPDJ,[153] I conducted an exhaustive search on the subject in other Canadian provincial human rights commissions'—and tribunal[154]—websites. Most websites discuss appearance in information sheets about discrimination based on gender identity or gender expression,[155] two prohibited grounds that were added to the statutory legislation everywhere in Canada in the last decade. In particular, gender expression is defined as "how a person publicly presents their gender," and includes "outward appearance such as dress, hair, [and] make-up."[156] However, one should note

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152 Luther, *supra* note 147 at 181. For similar insights in the US context, see Jennifer Bennett Shinall, "Distaste or Disability: Evaluating the Legal Framework for Protecting Obese Workers" (2016) 37:1 BJELL 101 [Bennett Shinall, "Distaste or Disability"].

153 See CDPDJ (Drapeau), *supra* note 32.

154 From 2002 to 2019, there was no provincial Human Rights Commission in British Columbia. In September 2019, a Human Rights Commissioner was appointed—with the objective of opening to the public in the spring of 2020. The main role of the newly created Office of the Human Rights Commissioner is to promote and protect human rights "through education, research, policy development and public investigations into issues of systemic discrimination in the province"—but the BC Human Rights Tribunal is still responsible for receiving human rights violation complaints. See "About the Office" (last visited 27 February 2020), online: *Office of the Human Rights Commissioner* <https://bchumanrights.ca>.

155 See e.g. "Policy on preventing discrimination because of gender identity and gender expression" (14 April 2014), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/book/export/html/11169> [OHRC, "Policy on preventing discrimination because of gender identity and gender expression"]; "Guideline on Gender Identity or Expression" (May 2017), online: *New Brunswick Human Rights Commission* <https://www2.gnb.ca/content/dam/gnb/Departments/hrc-cdp/PDF/Guideline-on-gender-identity-or-expression.pdf>; "Guidelines Regarding Gender Identity and Gender expression" (last visited 27 February 2020), online: *Newfoundland and Labrador Human Rights Commission* <https://thinkhumanrights.ca/education-and-resources/guidelines/guidelines-regarding-gender-identity-and-gender-expression/>; "Gender Identity and Gender Expression" (June 2018), online: *Prince Edward Island Human Rights Commission* <http://www.gov.pe.ca/photos/original/GIGE_Aug2018.pdf>.

156 OHRC, "Policy on preventing discrimination because of gender identity and gender expression", *supra* note 155.

that until this day, gender expression has not been interpreted to protect cisgender people.[157] Apart from these short documents, the only relevant information that I found on appearance in the workplace pertained to Alberta, Manitoba, and Ontario. The Alberta Human Rights Commission[158] offers a one-page information sheet on employers' rights regarding appearance and grooming policies, basically stating that employers are entitled to adopt various policies establishing appearance, grooming, and dress standards that are appropriate to their business goals, as long as these regulations do not interfere with an employee's religious beliefs, gender, disability, or any other protected ground in anti-discrimination law. As for the Manitoba Human Rights Commission, it simply states that it has no authority over dress codes, unless there is discrimination on the basis of a protected characteristic.[159]

In addition to its "Policy on preventing discrimination because of gender identity and gender expression,"[160] the Ontario Human Rights Commission (OHRC) has published three policies that are related to workplace appearance regulation. The first one is a "Policy on height and weight requirements,"[161] both physical characteristics being included in my definition of physical appearance. The OHRC policy states that height and weight criteria in employment may result in discriminatory practices based on sex or race—as women and members of racialized groups may be physically smaller, on average, than members of the majority population group—and the Commission "urges employers who still use height and weight criteria in the employment recruitment process to discontinue the practice."[162] The second policy is the "Policy on Creed and the Accommodation of Religious Observances,"[163] which briefly mentions that dress codes can adversely affect employees because of religious requirements, and that "[w]hen this happens, the

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157 See *Browne*, *supra* note 2 at paras 36-37. See also Chapter 5, section 5.1.2, *below*.

158 AHRC, "Appearance and Dress Codes", *supra* note 21.

159 MHRC, "Dress Codes", *supra* note 24.

160 OHRC, "Policy on preventing discrimination because of gender identity and gender expression", *supra* note 155.

161 "Policy on height on weight requirements" (December 2009), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_height_and_weight_requirements.pdf>.

162 *Ibid* at 5.

163 "Policy on creed and the accommodation of religious observances" (December 2009), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_creed_and_the_accommodation_of_religious_observances.pdf>.

obligation to accommodate the individual, based on the needs of the group, is triggered under the [Ontario *Human Rights*] *Code*."[164]

The last policy is the "OHRC policy position on sexualized and gender-specific dress codes."[165] It is based on the idea that sexualized dress codes in employment contexts—such as requiring women to wear high heels, short skirts, and tight-fitting clothing—"reinforce stereotypical and sexist notions about how women should look"[166] and may be discriminatory. Although applicable to all companies across Ontario, the OHRC policy emerged after concerns started appearing in the media in 2015 about restaurant dress codes. The OHRC policy emphasizes that "[f]emale employees should not be expected to meet more difficult requirements than male employees, and they should not be expected to dress in a sexualized way to attract clients," as sexualized dress codes "undermine women's dignity and may make them more vulnerable to sexual harassment from other staff, customers and management." [167] The OHRC also offers FAQs, a dress code checklist for employers, and examples of dress code requirements that may violate the Ontario *Human Rights Code*. In addition, it published in 2017 a report on its inquiry regarding restaurant dress codes,[168] in which the OHRC describes the discriminatory effects of sexualized and gender-based dress codes and the OHRC initiatives to identify, prevent, and eliminate these discriminatory policies. Although somewhat concise, which can be explained by the format of the OHRC's website, this information definitively helps to raise awareness on some of the issues related to appearance in the workplace.

In the light of these findings, it seems clear that it is generally accepted that employers have the right to control their employees' physical appearance, but that they have to be careful to avoid regulating aspects of appearance that could fall under legally prohibited grounds of discrimination.

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164 *Ibid* at 10.

165 "OHRC policy position on sexualized and gender-specific dress codes" (2017), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/book/export/html/17016> [OHRC, "Policy on sexualized and gender-specific dress codes"].

166 *Ibid* at 1.

167 *Ibid*.

168 "Not on the menu: Inquiry report on sexualized and gender-based dress codes in Ontario's restaurants" (2017), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/not-menu-ohrc-inquiry-report-sexualized-and-gender-based-dress-codes-restaurants> [OHRC, "Not on the menu"].

That said, there has been little legal scholarly work done in Canada on physical appearance or appearance-based regulation in the workplace. The articles on the subject generally take a human rights approach. In addition, there are some academic articles and commentaries on the topics of religion, disability, and gender expression that indirectly deal with the question of appearance at work, but the issue is only considered as a peripheral topic in anti-discrimination discussions. These findings could serve as a proxy for appearance issues. However, a pressing question comes to mind: why should employees have to find a connection to one of the prohibited grounds of discrimination when the real reason they are discriminated against is because of their physical appearance? Although appearance is very important in society, there is a dearth of academic writing on the personal right of an individual to self-determine how to look in the workplace in Canada. One of the major findings of the Canadian literature review is that, currently, the legal question of the regulation of appearance in employment contexts is not really considered to be a serious academic topic.

Another interesting finding from this research is the broader coverage of the topic in relation to schools and students' rights, again looking at the question from a human rights lens. These articles[169] could serve as a proxy for employment, but the academic environment is very different from the workplace context and, thus, the results in the academic context cannot be applicable *mutatis mutandis*. It is fascinating that scholars are interested in the question of physical appearance at school, but not at work, as if employees shed their fundamental rights when entering the workplace.

The lack of legal literature on the topic is quite surprising, given the significant number of cases related to appearance in the workplace adjudicated in Canada[170] and the extensive and

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169 See e.g. Wendy J Harris & Audrey Ackah, "Freedom of Religion and Accommodating Religious Dress in Schools" (2011) 20 Educ & LJ 211; CDPDJ (Carpentier), *supra* note 145; Ghislain Otis & Christian Brunelle, "La *Charte des droits et libertés de la personne* et la tenue vestimentaire à l'école publique" (1995) 36:3 C de D 599; Commission des droits de la personne et des droits de la jeunesse, *Le port du foulard islamique dans les écoles publiques – Aspects juridiques*, by Pierre Bosset (Montreal: Direction de la recherche, 1994); Howard McConnell & Joe Pyra, "The Impact of Some Aspects of the Constitution and the Canadian Charter of Rights and Freedoms on Education" (1990-1991) 2 Educ & LJ 1; A Wayne MacKay, "The Canadian Charter of Rights and Freedoms: A Springboard to Students' Rights" (1984) 4 Windsor YB Access Just 174; Douglas A Schmeiser & Roderick J Wood, "Student Rights under the Charter" (1984) 49:1 Sask L Rev 49; Gilmour G Sweezey, "Free Speech and the Student's Right to Govern His Personal Appearance" (1970) 7:3 Osgoode Hall LJ 293.

170 See Chapters 4, 5, and 6, *below*.

recurrent media coverage of this issue,[171] especially in situations involving female employees dealing with dress codes or requirements that accentuate their bodies. Furthermore, the subject is of undeniable interest in a Canadian context increasingly marked by the recognition of diversity and personal autonomy, which is also reflected in the appearance of individuals. In other words, Canada is a pluralistic society and its citizens have multiple identities shaped by their country of origin and their culture, gender, language, beliefs, history, and ethnicity. Not only are religious symbols becoming increasingly common at work, but so, too, are tattoos and piercings. Given the general gap in the legal secondary literature in Canada and the timeliness of this "hot" topic, the research I conducted for this dissertation is both relevant and important.

2.2 A REVIEW OF THE LEGAL LITERATURE OUTSIDE OF CANADA

Given the silence in the Canadian literature, it seemed imperative to expand my search for legal writings on the regulation of appearance at work. Although my dissertation examines the issue in the Canadian context, I investigated legal work done on the topic outside of Canada.[172]

There is a lot of scholarly legal literature published on appearance in the employment context[173] outside of Canada and especially in the United States. In the latter case, this was

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171 See notes 11-18 and accompanying text.

172 The search for English-language legal materials related to the regulation of appearance in the workplace was similar to what I did when researching domestic materials and was conducted on several databases: HeinOnline – Law Journal Library, Index to Legal Periodicals – Full Text, WestlawNext Canada – Legal Journal Index, and Index to Foreign Legal Periodicals. The following keywords were used: "appearance," "physical appearance," "personal appearance," "dress," "dress code," "grooming," and "grooming code"; in order to generate maximum retrieval, these keywords were alternately searched in combination with one of the following words: "work," "workplace," "employment," and "discrimination." "legal," and "law." While this search yielded over 250 legal articles from the United States and about another 50 from other English-speaking countries, the following review of the English-language literature is selective rather than exhaustive. I focus on the legal literature that specifically addresses the question of appearance regulation in the context of employment. I selected articles that were substantial in terms of length and I concentrated on materials that were not simply describing or reporting the case law, but tried to question and analyze the complex issues associated with workplace appearance regulation.

173 Legal scholarship on appearance regulation is not limited to the employment context, as students have challenged school dress and grooming codes as well. However, since there is already a lot of information on appearance in the workplace in the United States, and given that the employment context is the focus of my dissertation, the literature on the regulation of appearance in academic settings was not included in this review. Yet it is interesting to note that this topic has been the subject of numerous articles in the United States starting in the 1970s. Nevertheless, the school environment is very different from the workplace and thus the findings emerging from this literature should not be applicable to my dissertation *mutatis mutandis*. See e.g. Deborah Ahrens & Andrew Siegel, "Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture"

expected. The US is probably one country that is most concerned with appearance and attractiveness. While some scholars talk about an obsession[174] with appearance, others claim that the premium American society places on appearance is intensifying.[175] Although appearance is very important in the US and can generate bias and prejudice particularly in employment contexts, several commentators point out that courts have a tendency to treat dress, grooming, and appearance matters as frivolous or "legally insignificant."[176] One scholar rightly suggests that "[s]uch

(2019) 54:1 Harv CR-CLL Rev 49; Stephan Wah, "Boys Will Be Boys, and Girls Will Get Raped: How Public School Dress Codes Foster Modern Day Rape Culture" (2016) 23:1 Cardozo J L & Gender 245; Meredith Johnson Harbach, "Sexualization, Sex Discrimination, and Public School Dress Codes" (2016) 50:3 U Rich L Rev 1039; Laurel Grbach, "Transgender Student Dress: Free Speech and Protection of Expression in Public Schools" (2013) 22:2 Temp Pol & Civ Rts L Rev 526; Jeremiah R Newhall, "Sex-Based Dress Codes and Equal Protection in Public Schools" (2013) 12:2 Appalachian JL 209; Patrick Eoghan Murray, "Constitutional Challenges to Gender-Restrictive School Dress Codes in the Ninth Circuit" (2013) 8:1 Mod Am 18; Natalie Smith, "Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference (2012) 41:1 JL & Educ 251; "Constitutional Law – Free Speech Clause – Fifth Circuit Upholds Texas School District's Dress Code Under Intermediate Scrunity – *Palmer v. Waxahachie Independent School District*, 579 F.3d 502 (5th Cir. 2009), Cert. Denied, 130 S. Ct. 1055 (2010)" (2010) 123:8 Harv L Rev 2088; Jennifer L Greenblatt, "Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation" (2009) 13:2 UC Davis J Juvenile L & Pol'y 281; Cindy Lavorato & John Saunders, "Public High School Students, T-Shirts and Free Speech: Untangling the Knots" (2006) 209 W Ed Law Rep 1; Justin T Peterson, "School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source? (2005) 2005:3 Mich St L Rev 931; Todd A DeMitchell, Richard Fossey & Casey Cobb, "Dress Codes in the Public Schools: Principals, Policies, and Precepts" (2000) 29:1 JL & Educ 31; Christopher B Gilbert, "We Are What We Wear: Revisiting Student Dress Codes" (1999) 1999:1 BYU Educ & LJ 3; Amy Mitchell Wilson, "Public School Dress Codes: The Constitutional Debate" (1998) 1998:1 BYU Educ & LJ 147; Mary Julia Kuhn, "Student Dress Codes in the Public Schools: Multiple Perspectives in the Courts and the Schools on the Same Issues" (1996) 25:1 LJ & Educ 83; Wendy Mahling, "Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools" (1996) 80:3 Minn L Rev 715; Higinio Gamez, "Son, Get a Haircut or Leave My School – Hair Length Restriction for Make Students Upheld by Texas Supreme Court in *Barber v. Colorado Independent School District*" (1996) 21:3 T Marshall L Rev 185; John D Ingram & Ellen R Domph, "The Right to Govern One's Personal Appearance" (1981) 6:2 Okla City UL Rev 339; Dale Jay Galvin, "*Olff v. East Side Union High School District*: School Hair Regulations and the Right of Privacy" (1972) 8:2 Willamette LJ 277; James J Carroll, "The Legality of Dress Codes for Students" (1971) 20:1 DePaul L Rev 222; Martin L Steinberg, "A Short History and Future Developments Regarding School Dress and Grooming Codes" (1970) 31:2 Ohio St LJ 351.

174 See Jane M Siegel, "Thank You, Sarah Palin, for Reminding Us: It's Not About the Clothes" (2009-2010) 17:1 Va J Soc Pol'y & L 144 at 144; James, *supra* note 97 at 629; Ritu Mahajan, "The Naked Truth: Appearance Discrimination, Employment, and the Law" (2007) 14:1 Asian Am LJ 165 at 166; Michael Selmi, "The Many Faces of Darlene Jespersen" (2007) 14:1 Duke J Gender L & Pol'y 467 at 480; Stacey S Baron, "(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty" (2005) 46:2 BCL Rev 359 at 361; Jennifer Fowler-Hermes, "The Beauty and the Beast in the Workplace: Appearance-based Discrimination Claims Under EEO Laws" (2001) 75:4 Fla BJ 32 at 32.

175 Deborah L Rhode, "The Injustice of Appearance" (2009) 61:5 Stan L Rev 1033 at 1034 [Rhode, "The Injustice of Appearance"].

176 See e.g. Elizabeth Malcom, "Looking and Feeling Your Best: A Comprehensive Approach to Groom and Dress Policies Under Title VII" (2009) 46:2 San Diego L Rev 505 at 521-522; Gretchen Adel Myers, "Why Personal Presentation in the Workplace is Not Trivial: Performativity Theory Applied to Title VII Sex-Dependent Appearance Standards Cases" (2008) 7:1 Dukeminier Awards: Best Sexual Orientation & Gender Identity L Rev 173 at 174; Carbado, Fisk & Gulati, *supra* note 30 at 1; Julie A Seaman, "The Peahen's Tale, or Dressing Our Parts at Work" (2007) 14:1 Duke J Gender L & Pol'y 423 at 460; Katherine T Bartlett, "Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality" (1994) 92:8 Mich L

treatment mirrors the cultural stereotype that interests in fashion and appearance are superficial and non-serious, and that these are mainly 'female' concerns."[177] As several critics have observed, this reductionist view has allowed "courts to trivialize personal appearance while at the same time legitimizing its regulation,"[178] paradoxically assuming "that dress and appearance are trivial to employees while simultaneously reinforcing their importance to an employer['s] business."[179] In a nation consumed with appearance and governed by the at-will employment doctrine,[180] it comes as no surprise that workplace appearance receives significant attention in the legal literature.

At the outset, appearance-based discrimination[181] is currently lawful in most jurisdictions in the United States unless the discrimination is indirectly based on characteristics such as sex, race, religion, or disability, which are protected by various human rights and civil rights laws. In particular, Title VII of the *Civil Rights Act of 1964*,[182] a federal law[183] that prohibits discrimination in employment on the basis of race, colour, religion, sex, or national origin, is the most frequently cited legislation to challenge workplace appearance regulation. Since appearance is not among the prohibited categories, "the only way appearance-based discrimination claims make it to courts is through the

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Rev 2541 at 2580; Klare, *supra* note 47 at 1419. See also Paulette M Caldwell, "A Hair Piece: Perspectives on the Intersection of Race and Gender" (1991) 1991 Duke LJ 365 at 372, n 15.

177 Seaman, *supra* note 176 at 460.

178 Malcom, *supra* note 176 at 522; Mary Whisner, "Gender-Specific Clothing Regulation: A Study in Patriarchy" (1982) 5 Harv Women's LJ 73 at 74. See also Ramachandran, "Freedom of Dress", *supra* note 55 at 44; Klare, *supra* note 47 at 1401.

179 Erica Williamson, "Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace" (2006) 56:2 Duke LJ 681 at 704. See also Whisner, *supra* note 178 at 74.

180 The at-will doctrine is the general rule of employment in the United States, in which the employer can dismiss an employee without having to establish a just cause for termination, as long as the termination is not illegal or in contravention to statutory rights (such as anti-discrimination rights). Employment at will means that both employer and employee can terminate the relationship at any time, without any reason, and without giving notice. See Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 95 [England, *Individual Employment Law*].

181 Throughout this dissertation, I use the term "appearance-based discrimination" to include all bias that is related to a physical aspect of someone's visible body and adornments. Others use the expression "lookism," "looks-based discrimination," or "aesthetic labour," but I prefer to avoid these terms, as they are particularly associated with attractiveness—which is not the focus of my dissertation. See e.g. Waring, *supra* note 96 at 193; Fleener, *supra* note 96; Tietje & Cresap, *supra* note 96 at 32-33.

182 Title VII of the *Civil Rights Act of 1964*, 42 USC § 2000e (2012) [Title VII].

183 It should be noted that American employees have access to remedies under both state and federal anti-discrimination legislation "at the same time," whereas Canadian employees will generally fall under provincial *or* federal jurisdiction in "employment-related human rights matters, depending on whether the employer's enterprise itself is within federal or provincial jurisdiction." Sheila Osborne-Brown, "The Right to Sue as Access to Justice: Discrimination in Employment before the Courts in Canada and California" (2014) 18:1 CLELJ 291 at 295.

'fitting' phenomenon—an appearance-based discrimination claim that 'fits' under another expressly protected characteristic."[184] As a result, some argue that appearance-based discrimination complaints under Title VII create a double burden for plaintiffs: they "must battle all of the traditional challenges discrimination plaintiffs face while also overcoming the obstacle of trying to 'fit' [their] claim into a recognized cause of action."[185] Additionally, others have observed that this fitting process is particularly difficult in situations of intersectional discrimination,[186] as "the compartmentalization of each of these issues has resulted in uneven protections for employees whose intersectional identities and identity performance leave them vulnerable to discrimination as a result of their marginalization within different protected classes."[187]

However, while discrimination based on appearance or looks is not illegal *per se* according to federal law in the United States, a growing list of states, counties, and municipalities have adopted legislation which bans several forms of such discrimination[188]: Prince George's County (Maryland),[189] Howard County (Maryland),[190] Madison (Wisconsin),[191] the state of Michigan,[192]

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184 Friedricks, *supra* note 97 at 508 [footnotes omitted]. See also Thomas Pagliarini, "It Can't Get That Ugly: Why Employers Should Be Able to Take Aesthetics into Consideration" (2014) 19:1 Roger Williams U L Rev 277 at 282; William R Corbett, "The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law" (2007) 14:1 Duke J Gender L & Pol'y 153 at 158 [Corbett, "The Ugly Truth"].

185 Friedricks, *supra* note 97 at 512.

186 For instance, Gowri Ramachandran argues "that intersectionals are especially likely to experience these conflicts because they experience multiple identity performance demands simultaneously, thereby increasing the chance for such demands, if not truly evenhanded, to conflict with each other and restrict their choices in a more visible and tangible manner." (Gowri Ramachandran, "Intersectionality as 'Catch 22': Why Identity Performance Demands Are Neither Harmless Nor Reasonable" (2005) 69:1 Alb L Rev 299 at 303-304 [Ramachandran, "Intersectionality"]).

187 Katherine E Leung, "Racial Identity Performance and Employment Discrimination Law" (2017) 24:1 Va J Soc Pol'y & L 57 at 74.

188 For a comprehensive analysis of the particularities, differences, and enforcement mechanisms of these ten laws, see Jennifer Bennett Shinall, "Less Is More: Procedural Efficacy in Vindicating Civil Rights" (2016) 68:1 Ala L Rev 49 [Bennett Shinall, "Less Is More"].

189 Prince George's County, Md, Code of Ordinances § 2-185 (1972) (prohibiting discrimination in employment based on "personal appearance").

190 Howard County, Md, Code of Ordinances § 12.200 (II) (1975) (prohibiting discrimination in employment based on "personal appearance").

191 Madison, Wis, Code of Ordinances § 39.03 (1975) (prohibiting discrimination in employment based on "physical appearance").

192 *Elliot-Larsen Civil Rights Act*, Mich Comp Laws § 37.2102 (1976) (prohibiting discrimination in employment based on "height" and "weight").

Harford County (Maryland),[193] Washington (District of Columbia),[194] Urbana (Illinois),[195] Santa Cruz (California),[196] San Francisco (California),[197] and Binghamton (New York).[198] These statutes offer a glimmer of hope regarding appearance-based discrimination, but they seem to have generated relatively limited results.[199] In the context of employment, this overall legislative framework means that "[r]easonable grooming standards, or employer regulations of employees' dress and other controllable aspects of employees' physical appearance, are [usually] permissible unless they discriminate by having a disparate impact on a protected class."[200] Many scholars' focus regarding workplace appearance in the US is therefore on demonstrating Title VII's insufficiency in protecting employees' expression of their self,[201] arguing there is no adequate avenues of redress available to them.

On the basis of the legal literature published in the US and other English-speaking countries, this literature review aims to identify what scholarly work has already been done on the topic of appearance in the workplace, how the subject has been approached, and what the key legal issues

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193 Harford County, Md, Code § 95-1 (1976) (prohibiting discrimination in employment based on "personal appearance").

194 *District of Columbia Human Rights Act*, DC Code Ann § 2-1401.01 (West, 1977) (prohibiting discrimination in employment based on "personal appearance").

195 Urbana, Ill, Code of Ordinances § 12-37 (1979) (prohibiting discrimination in employment based on "personal appearance").

196 Santa Cruz, Cal, Municipal Code § 9.83.010 (1992) (prohibiting discrimination in employment based on "weight" and "physical characteristics").

197 SF, Cal, Administrative Code § 12A (2000) (prohibiting discrimination in employment based on "weight").

198 Binghamton, NY, Municipal Code § 45-2 (2008) (prohibiting discrimination in employment based on "weight").

199 Deborah L. Rhode notes that the few cases based on these statutes might partly be explained by some of the statutes' limited enforcement activity and limited possible remedies. However, she also observes that "a substantial number of cases have ended up with reasonable negotiated settlements, and the existence of the laws may have deterred unjust bias." (Deborah L Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford; New York: Oxford University Press, 2010) at 17, 126-127 [Rhode, *The Beauty Bias*]). Although not specifically discussing these state and local statutes, another legal scholar notes, regarding an Australian law prohibiting discrimination on the basis of "physical features," some possible explanation for the limited results yielded by the inclusion of appearance as a protected ground: "The relatively small number of complaints based on the prohibited reason 'physical features' is not necessarily indicative of the merit of this provision. More probably, it reflects the embarrassment complainants may experience in bringing these matters forward as well as the evidentiary burden of proving that an employer has relied upon the prohibited reason in making employment decisions." (Waring, *supra* note 96 at 200).

200 Fleener, *supra* note 96 at 1295, n 4; Karen Zakrzewski, "The Prevalence of 'Look'ism in Hiring Decision: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace" (2005) 7:2 U Pa J Lab & Employment L 431 at 443.

201 See e.g. Jennifer L Levi, "Misapplying Equality Theories: Dress Codes at Work" (2008) 19:2 Yale JL & Feminism 353 [Levi, "Misapplying Equality Theory"]; Fisk, *supra* note 57; Zakrzewski, *supra* note 200; Elizabeth M Adamitis, "Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment" (2000) 75:1 Wash L Rev 195; Klare, *supra* note 47.

are. The definition of physical appearance covers many characteristics,[202] and thus the topics covered in the literature are numerous. The reviewed articles mainly cover discrimination based on:

[202] See Chapter 1, section 1.1.2, *above*.

physical attractiveness[203]—especially "unattractiveness,"[204] sex and gender,[205] transgender,[206] race,[207] religion,[208] and to a lesser extent, sexual orientation[209] and disability.[210] In addition, the

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203 See e.g. Fink, *supra* note 97; Friedricks, *supra* note 97; Corbin, *supra* note 97; Ashley Robin Brown, "Mirror, Mirror On the Wall, Who Are You to Say Who Is Fairest of Them All?" (2013) 13:1 Va Sports & Ent LJ 54; Toledano, *supra* note 97; Gumin, *supra* note 97; Corbett, "Hotness Discrimination", *supra* note 97; Warhurst et al, *supra* note 97; James, *supra* note 97; Mahajan, *supra* note 174; Vo, *supra* note 97.

204 See e.g. Pagliarini, *supra* note 184; Gumin, *supra* note 97; James Desir, "Lookism: Pushing the Frontier of Equality by Looking Beyond the Law" (2010) 2010:2 U Ill L Rev 629; Baron, *supra* note 174; Fleener, *supra* note 96; Zakrzewski, *supra* note 200; McDonald, *supra* note 97; "Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance" (1987) 100:8 Harv L Rev 2035 [Harvard Law Review, "Facial Discrimination"].

205 See e.g. Alessandro Botta Blondet, "The Court's Undue Burden: A Look at Jespersen and It's Inconsistencies" (2018) 87:2 U Cin L Rev 523; Jessica Moran, "Appearance Standards and Arbitrators: Assessing Disciplinary Actions Pursuant to Grooming Policies in Arbitration" (2017) 19:1 Geo J Gender & L 113; Charlotte Werner, "To What Extent Should the Law Do More to Address Gendered Discrimination in Workplace Dress Codes" (2017) 44 Exeter L Rev 192; Bennett Shinall, "Distaste or Disability", *supra* note 152; Deborah L Rhode, "Appearance as a Feminist Issue" (2016) 69:4 SMU L Rev 697; Holly C Frey, "The Borgota Babes Case: The Weighty Matter of Appearance Standards" (2015) 21:1 Widener L Rev 95; Friedricks, *supra* note 97; Corbin, *supra* note 97; Yi-fan C Everett, "'Professional Appearance' or 'Gender-Stereotyped Appearance'? Have Workplace Appearance Codes Crossed the Line? A Proposed Procedural Framework to Solve the Current Issue" (2014) 15:3 Geo J Gender & L 641; Zachary A Kramer, "Three Tales of Female Masculinity" (2013) 13:2 Nevada LJ 458; Edieth Y Wu, "Cross-Cultural Patriarchal Demands on Women's Dress-Appearance" (2012) 33:2 Women's Rts L Rep 169; Siegel, *supra* note 174; Natasha Caldwell, "Workplace Appearance Standards: Undressing the Law" (2009) 15:1 Canterbury L Rev 1; Malcom, *supra* note 176; Levi, "Misapplying Equality Theories", *supra* note 201; Amy Lifson-Leu, "Enforcing Femininity: How *Jespersen v. Harrah's Operating Co.* Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination" (2008) 42:3 USF L Rev 849; Myers, *supra* note 176; Dianne Avery, "The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work After *Jespersen v. Harrah's Operating Company, Inc.*" (2007) 42:2 USF L Rev 299; Alexis Conway, "Leaving Employers in the Dark: What Constitutes a Lawful Appearance Standard After *Jespersen v. Harrah's Operating Co.*?" (2007) 18:1 Geo Mason U Civ Rts LJ 107; Alison J Hartwell, "Makeup for Success: Why *Jespersen v. Harrah's* Stifles Diversity by Promoting Stereotypes in Employment" (2007) 13:2 Cardozo JL & Gender 407; Marybeth Herald, "Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes" (2007) 41:3 USF L Rev 299; Ann C McGinley, "Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes" (2007) 14:1 Duke J Gender L & Pol'y 257 [McGinley, "Babes and Beefcake"]; Jennifer C Pizer, "Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders" (2007) 14:1 Duke J Gender L & Pol'y 285; Seaman, *supra* note 176; Patrick S Shin, "Vive La Difference? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming" (2007) 14:1 Duke J Gender L & Pol'y 491; Allegra C Wiles, "More than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace" (2007) 57:3 Syracuse L Rev 657; "Title VII – Gender Discrimination – Ninth Circuit Holds That Women Can Be Fired for Refusing To Wear Makeup – *Jespersen v. Harrah's Operating Co.*" (2006-2007) 120:2 Harv L Rev 651 [Harvard Law Review, "Title VII – Gender Discrimination"]; Allison T Steinle, "Appearance and Grooming Standards as Sex Discrimination in the Workplace" (2006-2007) 56:1 Cath U L Rev 261; Eileen Boris, "Desirable Dress: Rosies, Sky Girls, and the Politics of Appearance" (2006) 69 Intl Labor & Working-Class History 123; Hillary J Bouchard, "*Jespersen v. Harrah's Operating Co.*: Employer Appearance Standards and the Promotion of Gender Stereotypes" (2006) 58:1 Me L Rev 203; Megan Kelly, "Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in *Jespersen v. Harrah's Operating Co.*" (2006) 36:1 Golden Gate UL Rev 45; William M Miller, "Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII" (2006) 84:4 NCL Rev 1357; Serafina Raskin, "Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping" (2006) 17:2 Hastings Women's LJ 247; Kate Sablosky, "Probative 'Weight': Rethinking Evidentiary Standards in Title VII Sex Discrimination Cases" (2006) 30:2 NYU Rev L & Soc Change 325; E Williamson, *supra* note 179; David B Cruz, "Making Up Women: Casinos, Cosmetics, and Title VII" (2004) 5:1 Nev LJ 240; Kimberly A Yuracko, "Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination" (2004) 92:1 Cal L Rev 147 [Yuracko, "Private Nurses"]; Kimberly A Yuracko, "Trait Discrimination as Sex Discrimination: An Argument Against Neutrality" (2004) 83:1 Tex L Rev 167 [Yuracko, "Trait Discrimination"]; Paul Skidmore, "Dress to Impress: Employer Regulation of Gay and Lesbian

Appearance" (1999) 8:4 Soc & Leg Stud 509; Garry Bastin, "Equity Varies with the Length of the Applicant's Hair" (1997) 2:2 J Civ Liberties 115; Leo Flynn, "Gender Equality Laws and Employers' Dress Codes" (1995) 24:3 Indus LJ 255; K Bartlett, *supra* note 176; David B Ezra, "Separate but Not Equal: Gender-Specific Dress Codes and Employment Discrimination" (1994) 3:1 Western State UJL 119; Joanne Bal, "Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory" (1993) 1993 U Chicago Legal F 211; Klare, *supra* note 47; Rhonda Blond-Rosen, "Christine – The Craft Without an Anchor: *Craft v. Metromedia*" (1984) 3:1 Cardozo Arts & Ent LJ 181; Jacqueline H Lower, "The Pregnant Employee's Appearance As a BFOQ Under the Pregnancy Discrimination Act" (1982) 14:1 Loy U Chicago LJ 195; Whisner, *supra* note 178; Craig Weinlein, "Flight Attendant Weight Requirements and Title VII of the Civil Rights Act of 1964" (1980) 45:2 J Air L & Com 483; Susan Hillary Loeb, "Disparate Dress Codes as Sex Discrimination in Violation of Title VII" (1980) 56:4 Chi-Kent L Rev 1249; Peter F Ziegler, "Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964" (1973) 46:3 S Cal L Rev 965.

206 See e.g. Moody, *supra* note 9; Greeny V Valbuena, "De-Segregating Attire: How Appearance Has Guided History" (2018) 7:2 DePaul J Women, Gender & L 103; Ashlee Johnson, "From Jespersen to Jenner: Exploring Grooming Policy Standards in the Age of Gender Nonconformity" (2017) 7:2 Wake Forest J L & Policy 607; Mary Ann Case, "Legal Protections for the 'Personal Best' of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of *Price Waterhouse v. Hopkins*, and the Prospect of ENDA" (2014) 66:6 Stan L Rev 1333; Brian P McCarthy, "Trans Employees and Personal Appearance Standards Under Title VII" (2008) 50:3 Ariz L Rev 939; Joel Wm Friedman, "Gender Nonconformity and the Unfulfilled Promise of *Price Waterhouse v. Hopkins*" (2007) 14:1 Duke J Gender L & Pol'y 205; Jennifer L Levi, "Some Modest Proposals for Challenging Established Dress Code Jurisprudence" (2007) 14:1 Duke J Gender L & Pol'y 243; Stan Malos, "Appearance-based Sex Discrimination and Stereotyping in the Workplace: Whose Conduct Should We Regulate?" (2007) 19:2 Employee Responsibilities & Rights J 95; Jennifer L Levi, "Clothes Don't Make the Man (Or Woman), but Gender Identity Might" (2006) 15:1 Colum J Gender & L 90 [Levi, "Clothes Don't Make the Man"]; Robert Wintemute, "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes" (1997) 60:3 Mod L Rev 334.

207 See e.g. Kaili Moss, "Black Hair(tage): Career Liability or Civil Rights Issue" (2018) 25:1 Wm & Mary J Women & L 191; Crystal Powell, "Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward" (2018) 2018:4 BYUL Rev 933; April Williams, "My Hair is Professional Too!: A Case Study and Overview of Laws Pertaining to Workplace Grooming Standards and Hairstyles Akin to African Culture" (2018) 12 Southern J Policy & Justice 141; Taylor Mioko Dewberry, "Title VII and African American Hair: A Clash of Cultures" (2017) 54 Wash UJL & Pol'y 329; Leung, *supra* note 187; Venessa Simpson, "What's Going on Hair: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection" (2017) 47:1 Sw L Rev 265; Dawn D Bennett-Alexander & Linda F Harrison, "My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII" (2016) 22:3 Cardozo J L & Gender 437; Greene, "A Multidimensional Analysis", *supra* note 99; Angela Onwuachi-Willig, "More Hair-Raising Decisions, and How Professor Wendy Greene Combs Through their Flaws" (2013) Jotwell: The J of Things We Like Lots 375 [Onwuachi-Willig, "More Hair-Raising Decisions"]; D Wendy Greene, "Black Women Can't Have Blonde Hair… in the Workplace" (2011) 14:2 J Gender Race & Just 405 [Greene, "Black Women"]; Angela Onwuachi-Willig, "Another Hair Piece: Exploring New Strands of Analysis Under Title VII" (2010) 98:4 Geo LJ 1079 [Onwuachi-Willig, "Another Hair Piece"]; D Wendy Greene, "Title VII: What's Hair (and Other Race-Based Characteristics) Got to do with It" (2008) 79:4 U Colo L Rev 1355 [Greene, "Title VII"]; Barbara J Flagg, "An Essay for Keisha (and A Response to Professor Ford)" (2007) 14:1 Duke J Gender L & Pol'y 179; Laura Morgan Roberts & Darryl D Roberts, "Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work" (2007) 14:1 Duke J Gender L & Pol'y 369; Ashleigh Shelby Rosette & Tracy L Dumas, "The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity" (2007) 14:1 Duke J Gender L & Pol'y 407; Camille Gear Rich, "Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII" (2004) 79:4 NYUL Rev 1134; Michelle L Turner, "The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of *Rogers v. American Airlines*" (2001) 7:2 Cardozo J L & Gender 115; P Caldwell, *supra* note 176.

208 See e.g. Green, *supra* note 99; Deveaux, *supra* note 99; Harrison, *supra* note 99; Alvi, *supra* note 99; Flake, *supra* note 99; Haleem, *supra* note 99; Benson, *supra* note 99; Greene, "A Multidimensional Analysis", *supra* note 99; Squelch, *supra* note 99; Hélie & Ashe, *supra* note 99; Sidhu, *supra* note 99; Aslam, *supra* note 99; Bindman, *supra* note 99; Laborde, *supra* note 99; Gold, *supra* note 99; Dhillon, *supra* note 99; Hasan, *supra* note 99; N Gibson, *supra* note 99; Nathwani, *supra* note 99; Bauman & Weingarten, *supra* note 99; Ruby, *supra* note 99.

209 See e.g. Case, *supra* note 206; Angela Clements, "Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & An Argument for Inclusion" (2009) 24:2 Berkeley J Gender L

following characteristics are the main focus of selected articles: makeup,[211] tattoos and piercings,[212] hair,[213] weight,[214] height,[215] and appearance codes in specific occupations.[216]

& Just 166; Malos, *supra* note 206; Kenji Yoshino, "Covering" (2002) 111:4 Yale LJ 769; Skidmore, *supra* note 205; Wintemute, *supra* note 206.

210 See e.g. Bennett Shinall, "Distaste or Disability", *supra* note 152; Isaac B Rosenberg, "Height Discrimination in Employment" (2009) 2009:3 Utah L Rev 907; Kari Horner, "A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination" (2005) 54:2 Cath U L Rev 589; Elizabeth Kristen, "Addressing the Problem of Weight Discrimination in Employment" (2002) 90:1 Cal L Rev 57; Jeffrey Garcia, "Weight-Based Discrimination and the Americans with Disabilities Act: Is There and End in Sight?" (1995-1996) 13:1 Hofstra Lab LJ 209; Harvard Law Review, "Facial Discrimination", *supra* note 204.

211 See e.g. Pizer, *supra* note 205. See also Herald, *supra* note 205.

212 See e.g. Wendy Rima, "The Human Body: The Canvas for Tattoos; The Public Workplace: An Exhibit for a New Form of Art?" (2018) 66:3 Drake L Rev 705; Kelly-Ann Weimar, "A Picture Is Worth a Thousand Words: Tattoos and Tattooing under the First Amendment" (2014) 7:4 Ariz Summit L Rev 719; Hannah H Porter, "Tattooist v. Tattoo: Separating the Service from the Constitutionally Protected Message" (2012) 2012:3 BYUL Rev 1071; Gold, *supra* note 99; Alicen Pittman, "Tattoos and Tattooing: Now Fully Protected as 'Speech' Under the First Amendment" (2011) 38:2 W St U L Rev 193; Jon D Bible, "Tattoos And Body Piercings: New Terrain For Employers And Courts" (2010) 61:3 Lab LJ 109; Lisa A Baker, "Regulating Matters of Appearance: Tattoos and Other Body Art" (2007) 76:2 FBI L Enforcement Bull 25; Lucille M Ponte & Jennifer L Gillan, "Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine" (2007) 14:1 Duke J Gender L & Pol'y 319; Michael W Fox, "Piercings, Makeup, and Appearance: The Changing Face of Discrimination Law" (2006) 69:6 Tex BJ 564; Ronald J Kramer, "Generation Y: Tattoos, Piercings, and Other Issues for the Private and Public Employer" (2006) 38:3 Urban Lawyer 593.

213 See e.g. Moss, *supra* note 207; Powell, *supra* note 207; Williams, *supra* note 207; Cortney Bryson, "'*Hair*' Today, Gone Tomorrow: How Immutable Traits May Become the New Face of Discrimination as Interpreted in *Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*" (2017) 39:2 NC Cent L Rev 166; Dewberry, *supra* note 207; Simpson, *supra* note 207; Bennett-Alexander & Harrison, *supra* note 207; Greene, "A Multidimensional Analysis", *supra* note 99; Onwuachi-Willig, "More Hair-Raising Decisions", *supra* note 207; Greene, "Black Women", *supra* note 207; Onwuachi-Willig, "Another Hair Piece", *supra* note 207; Greene, "Title VII", *supra* note 207; Rosette & Dumas, *supra* note 207; Turner, *supra* note 207; Bastin, *supra* note 205; P Caldwell, *supra* note 176; Weinlein, *supra* note 205; David P Troup, "Long Hair and the Law: A Look at Constitutional and Title VII Challenges to Public and Private Regulation of Male Grooming" (1975) 24:1 U Kan L Rev 143; Mark M Tucker, "Arbitration of Labor Disputes Involving Hair" (1974) 10:2 Willamette L Rev 258; Ziegler, *supra* note 205.

214 See e.g. Bennett Shinall, "Distaste or Disability", *supra* note 152; Bennett Shinall, "Less Is More", *supra* note 188; Frey, *supra* note 205; Michael L Huggins, "Not 'Fit' for Hire: The United States and France on Weight Discrimination in Employment" (2015) 38:3 Fordham Intl LJ 889; Dargan Ware, "Against the Weight of Authority: Can Courts Solve the Problem of Size Discrimination?" (2013) 64:5 Ala L Rev 1175; Yofi Tirosh, "The Right to Be Fat" (2012) 12:2 Yale J Health Pol'y, L, Ethics 264 [Tirosh, "The Right to Be Fat"]; Teri Morris, "States Carry Weight of Employment Discrimination Protection: Resolving the Growing Problem of Weight Bias in the Workplace" (2010) 32:1 W New Eng L Rev 173; Sablosky, *supra* note 205; Horner, *supra* note 210; Kristen, *supra* note 210; Elizabeth E Theran, "'Free to be Arbitrary and... Capricious': Weight-based Discrimination and the Logic of American Antidiscrimination Law" (2001) 11:1 Cornell J L & Pub Pol'y 113; Garcia, *supra* note 210; Robert J Paul & James B Townsend, "Shape Up or Ship Out? Employment Discrimination Against the Overweight" (1995) 8:2 Employee Responsibilities & Rights J 133; Karol V Mason, "Employment Discrimination Against the Overweight" (1982) 15:2 U Mich JL Ref 337. For an annotated bibliography on weight discrimination in the United States, see Yasmin Sokkar Harker, "Fat Rights and Fat Discrimination: An Annotated Bibliography" (2015), online (pdf): *City University of New York Academic Works* <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1095&context=cl_pubs>.

215 See e.g. I Rosenberg, *supra* note 210.

216 See e.g. Elizabeth B Cooper, "The Appearance of Professionalism" (2019) 71:1 Fla L Rev 1 (legal profession members); Karen DaPonte Thornton, "Parsing the Visual Rhetoric of Office Dress Codes" (2015) 12 Leg Communications & Rhetoric JALWD 173 (legal profession members); Mark R Bandsuch, "The NBA Dress Code and other Fashion Faux Pas Under Title VII" (2009) 16:1 Vill Sports & Ent LJ 1 [Bandsuch, "NBA Dress Code"]

Before delving into the legal periodicals, two fairly recently published American books on appearance and the law are worth mentioning. In *The Beauty Bias: The Injustice of Appearance in Life and Law*,[217] published in 2010, Deborah L. Rhode unveils the sensitive issue of appearance discrimination, by exploring the social, biological, market, and media forces that contribute to appearance-related problems. In this provocative study, Rhode takes up the "silly" questions related to appearance and attractiveness and convincingly argues that the effects of our preoccupation with appearance are anything but inconsequential. She raises feminist challenges and responses to appearance through American history and demonstrates how appearance particularly penalizes women, racialized people, and people from lower social classes. Rhode sees discrimination against people based on what they look like as a serious problem that should and can be addressed by law. She convincingly argues for a law that would prohibit discrimination based on appearance and succeeds in establishing its necessity.[218]

In the second book, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes*[219], published in 2013, Ruthann Robson also rejects the trivialization of individuals' appearance. Investigating the numerous—and sometimes unnoticed—implications of constitutional law on appearance choices and practices, Robson asserts that constitutional considerations both restrict and reinforce these personal and daily choices. In this thorough legal study, Robson examines the sociological, historical, and economical implications of dress and grooming, forcefully arguing that "the legal regulation of dress is ubiquitous."[220] Although not

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(National Basketball Association players); Max N Panoff, "Black, Tie Optional: How the NBA's Dress Code Violates Title VII" (2009) 8:2 Va Sports & Ent LJ 275 (National Basketball Association players); Baker, *supra* note 212 (police officers); John P Jurden, "Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards" (2005) 184 Mil L Rev 1 (military service members); Paul Andrew Burnett, "Fairness, Ethical, and Historical Reasons for Diversifying the Legal Profession with Longhairs, the Creatively Facial-Haired, the Tattooed, the Well-Pierced, and Other Rock and Roll Refugees" (2002) 71:1 UMKC L Rev 127 (legal profession members).

217 Rhode, *The Beauty Bias*, *supra* note 199.

218 For a review of the book, see Hannah Alsgaard, Book Review of *The Beauty Bias: The Injustice of Appearance in Life and Law* by Deborah L Rhode, (2012) 27:1 Berkeley J Gender L & Just 142; Anne-Marie Delagrave, Book Review of *The Beauty Bias: The Injustice of Appearance in Life and Law* by Deborah L Rhode, (2011) 23:1 CJWL 359.

219 Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge: Cambridge University Press, 2013) [Robson, *Dressing Constitutionally*].

220 *Ibid* at 1.

exclusively focused on employment contexts,[221] Robson analyzes First Amendment protection of expression and religion, as well as questions of equality on the basis of gender, race, and sexuality, with regards to appearance.[222]

Instead of focusing on elements of physical appearance that can generate conflict at work, this review is organized around the major themes and approaches found in the American and other legal literature on the regulation of appearance in the context of employment. Most of the reviewed materials take on employees' interests,[223] as they discuss issues of appearance in terms of challenging employers' regulations or arguing for more protection of employees' appearance—whether immutable visible characteristics or dress and grooming choices. Most of the articles rely on the anti-discrimination approach, as it is often the only legal recourse available to US private employees[224]—which is the same for most Canadian private employees in common law jurisdictions. Of these pieces, the vast majority are case-based and argue for more protection against discrimination based on sex and gender or race to include appearance related prejudices. Sex/gender and race discrimination will therefore be briefly examined in the following sections. I will next consider articles that offer a different theoretical framework, analyzing workplace appearance regulation with regards to fundamental rights, namely autonomy, privacy, and freedom of expression. Recurring themes in the workplace appearance literature will then be briefly discussed: immutability, power and managerial prerogatives, conformism and community standards, corporate branding and the employer's image, and legal indeterminacy. Finally, this review of the literature outside of Canada, focusing mainly on the US, concludes with an overview of the proposed solutions to better protect employees from unfair and biased appearance regulations.

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221 Robson analyzes constitutional implications on appearance in the workplace, but also in schools, in prisons, and on the streets.

222 For a review of the book, see Ann C McGinley, "Reconsidering Legal Regulation of Race, Sex, and Sexual Orientation" (2015) 50:2 Tulsa L Rev 341 at 360-364; Yofi Tirosh, Book Review of *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hair to Our Shoes* by Ruthann Robson, (2014) 12:2 Intl J Constitutional L 494 [Tirosh, Book Review of *Dressing Constitutionally*].

223 But see Flake, *supra* note 99; Pagliarini, *supra* note 184; James, *supra* note 97; Conway, *supra* note 205; Vo, *supra* note 97; Marc A Koonin, "Avoiding Claims of Discrimination Based on Personal Appearance, Grooming, and Hygiene Standards" (1999) 15:1 Lab Lawyer 19; Ziegler, *supra* note 205.

224 See e.g. Friedricks, *supra* note 97 at 506.

While several authors briefly examine why appearance matters through a sociological perspective, a handful of legal scholars discuss workplace appearance through the semiotics of appearance or focus on the meaning of appearance for individuals in general, and employees in particular, in a more theoretical manner.[225] They explore the sociological question of why appearance matters in more depth and therefore these studies are discussed in Chapter 3.

2.2.1 The Anti-Discrimination Approach

The dominant legal analysis of workplace appearance regulation has been through the lens of anti-discrimination, and many of the reviewed articles analyze the different arguments for prohibiting appearance-based discrimination in the context of employment. For instance, an often-cited note published in the *Harvard Law Review* argued "that appearance, like race and gender, is almost always an illegitimate employment criterion, and that it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit."[226] The recurring rationale for prohibiting appearance-based discrimination at work rests on the idea that appearance or looks, along with sex, race, age, and disability, cannot predict the ability to perform job duties; "no correlation exists between appearance and performance for most jobs."[227] It seems unacceptable that individuals should "suffer employment penalties for unchangeable aspects of their person,"[228] especially in the employment context. In addition, several commentators argue that people who are considered unattractive should not "face differential and unequal treatment in situations in which their appearance is unrelated to their qualifications or abilities."[229] However, as many scholars have

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225 See Janet Ainsworth, "What's Wrong with Pink Pearls and Cornrow Braids? Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace" in Anne Wagner & Richard K Sherwin, eds, *Law, Culture and Visual Studies* (Dordrecht; London: Springer, 2013) 241; Myers, *supra* note 176 at 186-191; Tirosh, "Adjudicating Appearance", *supra* note 90; Yoshino, *supra* note 209. See also Rafael Gely, "The Law and Economics of Identity" (2007) 14:1 Duke J Gender L & Pol'y 229; Seaman, *supra* note 176; K Bartlett, *supra* note 176 at 2548-2551; Klare, *supra* note 47 at 1430-1437.

226 Harvard Law Review, "Facial Discrimination", *supra* note 204.

227 Adamitis, *supra* note 201 at 212. See also Friedricks, *supra* note 97 at 511; Mahajan, *supra* note 174 at 170; Selmi, *supra* note 174 at 480; Zakrzewski, *supra* note 200 at 434. *Contra* Pagliarini, *supra* note 184 at 293; James, *supra* note 97 at 668 (James advocates for more protection of employers' rights to make employment decisions based on appearance, stating that "appearance is often a legitimate factor in hiring.").

228 Fleener, *supra* note 96 at 1316.

229 Harvard Law Review, "Facial Discrimination", *supra* note 204 at 2037.

noted, "appearance often functions as an illegitimate basis on which to deny people jobs for which they are otherwise qualified."[230] These articles generally give an overview of the subject, discuss how it has been treated in court decisions and analyzed in the literature, and conclude with a proposal designed to improve the situation.[231]

Many of the legal articles are case-focused and discuss at least one of three well-known anti-discrimination cases on appearance at work in the United States, namely the *Rogers*[232] case, the *Price Waterhouse*[233] case, and the *Jespersen*[234] case. These cases illustrate some problems with the actual anti-discrimination framework under Title VII, particularly regarding the gendered aspects of women's appearance. The last two cases involve claims of discrimination based on sex and gender—which is the subject of a majority of the reviewed literature[235]; as such, this type of discrimination is discussed first. The second part of this section examines articles on discrimination based on race, most of them reporting the *Rogers* case.

2.2.1.1 Discrimination Based on Sex and Gender

Discrimination based on sex and/or gender is prominently raised in workplace appearance disputes, as appearance-based discrimination particularly affects women.[236] Dress and grooming

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230 *Ibid*.

231 See e.g. Botta Blondet, *supra* note 205; Moody, *supra* note 9; Williams, *supra* note 207; Dewberry, *supra* note 207; Johnson, *supra* note 206; Bill Visone, "Cramping Your Style: Personal Appearance in the Workplace" (2016) 30:2 Geo Immigr LJ 359; Frey, *supra* note 205; Friedricks, *supra* note 97; Everett, *supra* note 205; Morris, *supra* note 214; Siegel, *supra* note 174; Malcom, *supra* note 176; I Rosenberg, *supra* note 210; Lifson-Leu, *supra* note 205; McCarthy, *supra* note 206; Mahajan, *supra* note 174; Avery, *supra* note 205; Steinle, *supra* note 205; Levi, "Clothes Don't Make the Man", *supra* note 206; Miller, *supra* note 205; Raskin, *supra* note 205; Horner, *supra* note 210; Zakrzewski, *supra* note 200; McDonald, *supra* note 97; Fowler-Hermes, *supra* note 174; Turner, *supra* note 207; Adamitis, *supra* note 201; Garcia, *supra* note 210; Gregory B Reilly, "Employees' Personal Appearance" (1995) 11:2 Lab Lawyer 261; Loeb, *supra* note 205; Lynn Nicholas Maffly, "Constitutional Validity of Employer Dress and Grooming Codes" (1975) 9:3 USF L Rev 515.

232 *Rogers v American Airlines Inc*, 527 F Supp 229 (SDNY 1981) [*Rogers*].

233 *Price Waterhouse v Hopkins*, 490 US 228 (1989) [*Price Waterhouse*].

234 *Jespersen v Harrah's Operating Co*, 444 F (3d) 1104 (9th Cir 2006) [*Jespersen*].

235 This trend in the literature reflects the proportion of appearance-related employment discrimination cases in the United States that involve sex discrimination from 1970 to 2008, which is 58.7%, according to Trautner and Kwan. Mary Nell Trautner & Samantha Kwan, "Gendered Appearance Norms: An Analysis of Employment Discrimination Lawsuits, 1970-2008" in Christine L Williams & Kirsten Dellinger, eds, *Gender and Sexuality in the Workplace* (Bingley: Emerald Group, 2010) 127 at 135.

236 See e.g. Rhode, "The Injustice of Appearance", *supra* note 175 at 1055; Steinle, *supra* note 205 at 264; Miller, *supra* note 205 at 1363; Klare, *supra* note 47 at 1398.

regulation is “an obvious means of enforcing gender differentiation” and it also perpetuates and sanctions sexual objectification.[237] Hence, commentators often note that appearance-based discrimination “reinforces stereotypical gender roles and a patriarchal culture” and “constitutes sex discrimination by another name.”[238] In addition, appearance requirements can sometimes lead to the sexual harassment of employees,[239] but this critical theme is beyond the scope of my dissertation and is therefore not covered in this literature review.[240]

The first wave of legal articles dates from the early 1970s, contemporaneously with the emergence of litigation involving dress and appearance codes as sex discrimination,[241] although not raised by female employees but instead related to males’ hair-length regulation and facial hair growth.[242] These articles generally provide summaries of cases pertaining to dress and grooming codes and interpret them through the provisions contained in Title VII. They take a human rights approach and, in many cases, focus on sex discrimination. For example, with regard to long-haired men, the argument has been that employers’ grooming standards are applied differently to male and female employees (requiring shorter hair for men, but often imposing no specifications for women’s hair); this, therefore, amounts to discrimination on the basis of sex.[243] But as commentators have pointed out, the courts often validated the employer’s policy because it was either “neutral” or

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237 Whisner, *supra* note 178 at 76-77. See also Baron, *supra* note 174 at 383. Jessica Fink also discusses the “double bind” that women face at work: “They must be *feminine enough* to satisfy their employers’ expectations regarding how a woman should appear and behave at work, but not so overtly sexual and overly feminine so as to distract their fellow employees.” (Fink, *supra* note 97 at 278 [emphasis in original, footnotes omitted]).

238 Friedricks, *supra* note 97 at 511 [footnotes omitted]. See also Wu, *supra* note 205; N Caldwell, *supra* note 205 at 3.

239 See Theresa M Beiner, “Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?” (2007) 14:1 Duke J Gender L & Pol’y 125; Deborah Zalesne, “Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes” (2007) 14:1 Duke J Gender L & Pol’y 535; Jeannie Sclafani Rhee, “Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses” (1997) 20 Harv Women’s LJ 163.

240 For an in-depth study of sexual harassment in the restaurant industry in British Columbia, including sexualized dress codes, see Kaitlyn Matulewicz, *Law, sexual harassment, and restaurants: exploring the experiences of women working in the British Columbia restaurant sector* (PhD Dissertation, University of Victoria, 2017) [unpublished].

241 The earliest reported court decision in this area goes back to 1971, as reported in Ziegler, *supra* note 205 at 973. It is interesting to note that personal appearance cases started to emerge at the same time in Canada. See Simmons, *supra* note 123.

242 See Linda R Hirshman, “‘No Right to Be a (Long Haired) Policeman’: The Constitutional Dimensions of Public Employment Under the Burger Court” (1977) 2:3 Indus Rel LJ 351 at 354; Maffly, *supra* note 231; Troup, *supra* note 213. See also Koonin, *supra* note 223; Blond-Rosen, *supra* note 205 at 184-187.

243 Troup, *supra* note 213 at 162.

reasonably adopted[244] on the grounds of business image or customer satisfaction,[245] or because the distinction was not based on an immutable characteristic or a fundamental right.[246] During the early stages of appearance discrimination cases being heard in the courts, attention was also focused on airline companies, which were criticized for their appearance and weight policies that targeted women workers, particularly imposing beauty requirements on female flight attendants.[247] Again, the issue was analyzed as discrimination based on sex under Title VII, but here the focus was on women's appearance.

Roughly forty years later, the issue of appearance in the workplace is widely covered in the legal literature in the United States. In January 2007, the *Duke Journal of Gender Law & Policy* published a special issue exclusively on "Makeup, Identity Performance & Discrimination." The inclusion of "makeup"—instead of appearance—in the title of this special issue was intentionally provocative,[248] but it also referred to the *Jespersen* case heard in 2006.[249] This civil action involved a female bartender who was terminated because of her refusal to comply with a casino's mandatory and elaborate makeup rule. The policy required female employees, but not male employees, to wear a substantial amount of makeup (including foundation, blush, mascara, and lipstick) and to have their hair "teased, curled, or styled every day"[250] at work in addition to their uniform. Most of the articles included in this special issue focus on the *Jespersen* case or at least refer to it. Thus, sex and gender stereotypes, makeup, casinos, the service/entertainment industries, and appearance-based discrimination in the workplace based on sex, gender, and, to a lesser extent, race, are recurring themes in this issue.

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244 Maffly, *supra* note 231 at 537.

245 Although the EEOC (US Equal Employment Opportunity Commission) "generally determined that mere customer preference [could] not warrant the application of the BFOQ exception." (Weinlein, *supra* note 205 at 488).

246 See e.g. *ibid* at 506; Lawrence Allen Katz, "Personal Appearance Regulations in Public Contact Jobs Under Title VII of the Civil Rights Act of 1964" (1976) 1976:1 Ariz St LJ 1 at 13.

247 During the same period, airline companies were also brought to court under sex discrimination from male applicants who were excluded for the position of flight cabin attendant. See Steinle, *supra* note 205 at 271; Ziegler, *supra* note 205 at 966. See also Boris, *supra* note 205; Klare, *supra* note 47 at 1423.

248 See Carbado, Fisk & Gulati, *supra* note 30 at 3.

249 *Jespersen*, *supra* note 234.

250 Harvard Law Review, "Title VII – Gender Discrimination", *supra* note 205 at 651.

Several of the articles included in this special issue approach the question of appearance at work through identity and identity performance,[251] a theme that I also analyze in Chapter 3. With regards to the concept of gendered and racialized identity performance—"one of the ways in which our identities are socially produced"[252]—the example of a Black woman who performs her identity through traditional African clothing, braided hair, and an "image of resistance to white supremacy"[253] is often invoked. Appearance choices become "an important component of identity performance, as they signify workers' cultural orientations and willingness to conform to corporate codes."[254] While asserting that some identity performances are valued and others are chastened, Devon Carbado, Catherine Fisk, and Mitu Gulati argue that "[i]ndividuals do not behave in isolation but rather act as a function of societal pressures and constraints. […] the social norms of society drive identity performances, which in turn instantiate the social norms."[255] In addition to examining questions of sex, gender, and racial stereotyping, a number of the *Duke Journal of Gender Law & Policy* articles also analyze issues related to immutability, corporate branding, employers' and employees' competing interests, and legal indeterminacy.

A great number of other scholarly articles on workplace appearance regulation focus on Darlene Jespersen's story.[256] Jespersen lost her case and this decision did not generate a positive

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251 See Carbado, Fisk & Gulati, *supra* note 30; Flagg, *supra* note 207; Friedman, *supra* note 206; Gely, *supra* note 225; Ponte & Gillan, *supra* note 212; Roberts & Roberts, *supra* note 207; Rosette & Dumas, *supra* note 207; Selmi, *supra* note 174. See also Ramachandran, "Intersectionality", *supra* note 186.

252 Carbado, Fisk & Gulati, *supra* note 30 at 3.

253 Flagg, *supra* note 207 at 202.

254 Roberts & Roberts, *supra* note 207 at 370.

255 Carbado, Fisk & Gulati, *supra* note 30 at 4.

256 See e.g. Botta Blondet, *supra* note 205; Johnson, *supra* note 206; Peter Brandon Bayer, "Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII, Literalism, Congressional Intent, and Kantian Dignity Theory" (2015) 89:2/3 St John's L Rev 401 [Bayer, "Debunking Unequal Burdens"]; Frey, *supra* note 205; Case, *supra* note 206; Onwuachi-Willig, "Another Hair Piece", *supra* note 207; Malcom, *supra* note 176; Lifson-Leu, *supra* note 205; Myers, *supra* note 176; Levi, "Misapplying Equality Theories", *supra* note 201; Avery, *supra* note 205; Jon D Bible, "In a Class by Themselves: The Legal Status of Employee Appearance Policies Under Title VII After *Jespersen v. Harrah's Operating Co.*" (2007) 32:4 Employee Relations LJ 3; Hartwell, *supra* note 205; Herald, *supra* note 205; Malos, *supra* note 206; Pizer, *supra* note 205; Wiles, *supra* note 205; Harvard Law Review, "Title VII – Gender Discrimination", *supra* note 205; Steinle, *supra* note 205; H Bouchard, *supra* note 205; Kelly, *supra* note 205; Levi, "Clothes Don't Make the Man", *supra* note 206; Miller, *supra* note 205; Raskin, *supra* note 205; E Williamson, *supra* note 179; "Title VII – Sex Discrimination – Ninth Circuit Holds That Women Can Be Required to Wear Makeup as a Condition of Employment – *Jespersen v. Harrah's Operating Co.*" (2004-2005) 118:7 Harv L Rev 2429; Cruz, *supra* note 205. See also Ainsworth, *supra* note 225 at 248-251.

response from legal scholars.[257] Jespersen was fired after twenty years of good service as a bartender in a large casino, after she refused to comply with the company's new extended makeup policy. She argued "that the [employer's] appearance standards imposed unequal burdens on women and required women to conform to gender stereotypes,"[258] which resulted in sex discrimination prohibited under Title VII.

In its ruling, the Ninth Circuit Court of Appeals held that the lack of evidence regarding the costs of mandatory makeup requirements (particularly in money and time to apply it)[259] could not support a finding that one gender was burdened more than the other. This construal of the unequal burdens test has caused great turmoil, as critics vehemently denounce that sex-differentiated appearance policies are inherently discriminatory and paternalistic and therefore violate Title VII. As one critic argues, this interpretation "allows the most offensive sex discrimination to go unchecked so long as employees of the other gender are subjected to comparable time and cost burdens."[260] In addition, many commentators argue that the unequal burdens test fails to consider if dress and grooming policies perpetuate harmful stereotypes. In fact, the mandatory makeup policy promoted outdated ideas of what a woman should look like and "forced compliance with the stereotype that women should adorn their faces to be more attractive and to appear more feminine."[261] The grooming standards, which were clearly inconsistent with Jespersen's own self-image, "forced women to project an image of femininity that many […] would find offensive and degrading."[262] However, Jespersen's "injuries were personal in nature," and she "was not discriminated against

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257 But see Conway, *supra* note 205; Selmi, *supra* note 174.

258 Harvard Law Review, "Title VII – Gender Discrimination," *supra* note 205 at 652.

259 The Ninth Circuit Court of Appeals refused "to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short." (*Jespersen*, *supra* note 234 at 1110). However, in its dissent, Judge Kozinski mentions that the majority should have taken such judicial notice: "[I]s there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees. Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. […] It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts." (*ibid* at 1117, Kozinski J, dissenting).

260 Miller, *supra* note 205 at 1361-1362.

261 *Ibid* at 1364.

262 *Ibid* at 1365. See also N Caldwell, *supra* note 205 at 10-17.

because she was a woman but because she chose to express her womanhood in a particular way."[263] The Court also found in this case that Jespersen failed to provide evidence that her employer adopted the makeup requirement based on sex stereotypes, and therefore, the Court could not conclude that the employer's appearance policy constituted impermissible sex stereotyping. Although not decided in Canada, this notorious case highlights some potential inadequacies of the anti-discrimination framework regarding workplace appearance regulation, particularly concerning appearance choices.

Another important appearance-based discrimination case in the employment context that is frequently cited[264] is *Price Waterhouse*, which also involves sex and gender discrimination under Title VII. In this case, the Supreme Court of the United States ruled that Ann Hopkins was turned down for partnership because she was not feminine enough and did not act the way the partners believed a woman should; her failure to conform to gender stereotypes, including "dressing more femininely," was considered to be unlawful sex discrimination.[265] Many critics note that this successful ruling should have positively guided Jespersen's case, and they argue that instead, courts generally ignore the implications of *Price Waterhouse* by up-holding sex-differentiated appearance policies.[266] As one commentator observes, "the evidence presented by Jespersen is precisely the kind the Supreme Court used in its original *Price Waterhouse* decision: an employee's failure to act feminine in an environment where femininity is detrimental to job performance."[267] A recurring critique in the literature is that this straightforward sex discrimination case has been

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263 Z Kramer, *supra* note 205 at 462-463.

264 See e.g. Botta Blondet, *supra* note 205; Valbuena, *supra* note 206; Johnson, *supra* note 206; Frey, *supra* note 205; Case, *supra* note 206; Levi, "Misapplying Equality Theories", *supra* note 201; Friedman, *supra* note 206; Hartwell, *supra* note 205; Herald, *supra* note 205; Malos, *supra* note 206; Wiles, *supra* note 205; Steinle, *supra* note 205; H Bouchard, *supra* note 205; Kelly, *supra* note 205; Raskin, *supra* note 205; E Williamson, *supra* note 179; Ramachandran, "Intersectionality", *supra* note 186; Yuracko, "Trait Discrimination", *supra* note 205.

265 "In order to improve her chances for partnership," one partner advised Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." (*Price Waterhouse*, *supra* note 233 at 235).

266 See e.g. H Bouchard, *supra* note 205; Miller, *supra* note 205; Kelly, *supra* note 205.

267 Steinle observes that "The Ninth Circuit distinguished *Jespersen* from *Price Waterhouse* because *Jespersen* involved a "subjective reaction" to an "overall policy" that applied to both men and women. However, this rationale ignores the central holding of *Price Waterhouse*: gender must be irrelevant to an employment decision unless it falls under the BFOQ exception." (Steinle, *supra* note 205 at 287 [footnotes omitted]). See also Case, *supra* note 206 at 1357-1358.

valuable to transgender and lesbian/gay plaintiffs, but it "has proven far less useful for nontransgender litigants."[268] Although this case is widely discussed in appearance-based discrimination articles, it has been noted that "no one has ever successfully invoked the decision in a traditional grooming case."[269]

These two widely covered cases and the idea that appearance-based discrimination imposes greater burdens on women partly explain the extent to which feminist (and others) legal scholars have written on the topic.[270] As illustrated in the *Jespersen* case and often reiterated, "female employees are being increasingly objectified at work through uniforms and dress codes."[271] As one scholar notes, "I take it as obvious that the burdens of societal appearance expectations fall most heavily on women"; societal expectations regarding female appearance can be and frequently are "profoundly destructive to women's economic fortunes, social opportunities, and self-esteem."[272]

2.2.1.2 Discrimination Based on Race

Title VII also prohibits employment discrimination based on race, and several appearance-based discrimination claims have been filed under this category, as "race is closely associated with, if not largely defined by, certain physical characteristics."[273] Although it may be shocking that courts would uphold grooming policies that involve racial discrimination, many commentators report such case law—particularly regarding African Americans' hair—and argue for a more contextual and intersectional analysis. Race, they argue, "encompasses more than just one's skin color."[274]

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268 Levi, "Misapplying Equality Theories", *supra* note 201 at 379.
269 E Williamson, *supra* note 179 at 700.
270 See e.g. Siegel, *supra* note 174; Steinle, *supra* note 205; Raskin, *supra* note 205; K Bartlett, *supra* note 176; Whisner, *supra* note 178.
271 Steinle, *supra* note 205 at 296.
272 Klare, *supra* note 47 at 1421.
273 Fleener, *supra* note 96 at 1311.
274 Greene, "Title VII", *supra* note 207 at 1358.

Many articles[275] focusing on racial discrimination discuss the case of *Rogers v. American Airlines*,[276] in which the plaintiff, an African American woman, claimed that her employer's prohibition of braided hairstyles discriminated against her as a Black woman. In this case, the court treated race and sex as alternative bases, and found for the employer, concluding the plaintiff failed to make a claim of discrimination on either ground.[277] The court dismissed her claim of sex discrimination, as the company's grooming policy was applied to men and women alike; it also dismissed her claim of racial discrimination because the rule applied to all races. In addition, the court held in *Rogers* that an all-braided hairstyle was "not the product of natural hair growth but artifice,"[278] distinguishing between immutable aspects of race and mutable characteristics such as hairstyles. Paulette Caldwell explains this distinction:

> Natural hairstyles—or at least some of them, such as Afros—are permitted because hair texture is immutable, a matter over which individuals have no choice. Braids, however, are the products of artifice—a cultural practice—and are therefore mutable; i.e., the result of choice. Because the plaintiff could have altered the all-braided hairstyle in the exercise of her own volition, American [the employer] was legally authorized to force that choice upon her.[279]

The mutability aspect of braided hairstyles was thus a major factor for upholding their ban. Commentators criticize this distinction between mutable and immutable characteristics—or the "status/conduct divide"[280]: "In dress and grooming disputes involving race and ethnicity, courts have been largely unwilling to allow employees to perform their racial and cultural identities through voluntary choices (conduct) in grooming and dress, unless the conduct can be attached to some

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275 See e.g. Moss, *supra* note 207; Powell, *supra* note 207; Bryson, *supra* note 213; Dewberry, *supra* note 207; Simpson, *supra* note 207; Bennett-Alexander & Harrison, *supra* note 207; Greene, "A Multidimensional Analysis", *supra* note 99; Greene, "Black Women", *supra* note 207; Onwuachi-Willig, "Another Hair Piece", *supra* note 207; Greene, "Title VII", *supra* note 207; Turner, *supra* note 207; P Caldwell, *supra* note 176. See also Ainsworth, *supra* note 225 at 245-248.

276 *Rogers*, *supra* note 232.

277 P Caldwell, *supra* note 176 at 377. See also Roberts & Roberts, *supra* note 207 at 393.

278 *Rogers*, *supra* note 232 at 232.

279 P Caldwell, *supra* note 176 at 378-379 [footnotes omitted]. See also Greene, "Black Women", *supra* note 207 at 428.

280 Rich, *supra* note 207 at 1203.

biological or immutable trait (status)."[281] But as Caldwell rightly observes, stereotypes arise "most often not from immutable traits but from negative associations with those traits."[282]

Although the *Rogers* case was decided almost forty years ago, several recent articles[283] report that courts still generally deny protection to hairstyles associated with Black culture, such as braids and dreadlocks, because they consider these hairstyles to be mutable or voluntary, ignoring the distinct biological and cultural differences in hair textures. For instance, the Eleventh Circuit Court of Appeals applied the immutability doctrine in 2016,[284] in a case in which the plaintiff was not hired for a position that did not involve public interactions because of her refusal to cut her dreadlocks.

What most qualify as a lack of understanding from the courts on the uniqueness of black hair, and Black women's hair in particular, is often condemned in the reviewed articles. Critics observe that courts fail to recognize that African American hair is fundamentally different from all other types of hair "in its basic shape and composition,"[285] as it is "kinky, wooly, or tightly curled,"[286] as well as "thicker, drier to the touch than other hair textures, extremely difficult to over-condition, and very fragile."[287] Because of the size and shape of the hair follicles of black hair, which amount to a "unique curliness," Black women consequently "are unable to wear their hair down and in its natural state, unless it is weighed down by locks, twists, or braids."[288] Black hair is also particularly prone to breakage; to grow and maintain healthy black hair, "protective styles" such as braids, twists, cornrows, and dreadlocks "are vital to [B]lack women."[289] Since these protective hairstyles "complement the natural texture of black hair,"[290] it is a mistake to consider that they are simply

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281 Ponte & Gillan, *supra* note 212 at 333.
282 P Caldwell, *supra* note 176 at 387.
283 See e.g. Moss, *supra* note 207 at 216-217; Powell, *supra* note 207 at 934; Williams, *supra* note 207 at 168; Bryson, *supra* note 213 at 167; Simpson, *supra* note 207; Bennett-Alexander & Harrison, *supra* note 207 at 448; Greene, "Black Women", *supra* note 207 at 411.
284 *Equal Employment Opportunity Commission v Catastrophe Mgmt Sols*, 852 F (3d) 1018 (11th Cir 2016) [*Catastrophe Mgmt Sols*].
285 Simpson, *supra* note 207 at 265. See also Ainsworth, *supra* note 225 at 247.
286 Rosette & Dumas, *supra* note 207 at 411.
287 Williams, *supra* note 207 at 172 [footnotes omitted].
288 Onwuachi-Willig, "Another Hair Piece", *supra* note 207 at 1112.
289 Simpson, *supra* note 207 at 266.
290 Rosette & Dumas, *supra* note 207 at 411.

voluntary or mutable and not worthy of legal protection. Furthermore, imposing mainstream—or white—standards of acceptable hairstyles on Black women can amount to significant expenses in time and money, as well as causing potential health risks associated with "wearing relaxers, weaves, and heated hairstyles."[291] As Angela Onwuachi-Willig asserts, "the law is unfairly based upon […] an assumption that it is reasonable for an employer to make implicit demands on [B]lack women to relax or strengthen their hair—in other words, to place requirements on [B]lack women to change their physical structure and texture of their hair."[292]

Hair colour can also lead to adverse employment action for racialized women, as courts have upheld bans on blonde hair for Black women. Wendy Greene explains that by restricting Black women from wearing hair colours that denote whiteness, while at the same time prohibiting certain hairstyles associated with Black culture, US courts "have obscured the unique marginalization that Black women encounter in the workplace"; "with respect to hair, Black women's freedom, choice, and privilege in the workplace are severely constrained."[293] Kaili Moss adds that grooming policies restricting hairstyles and colours are particularly unfair to Black women, because "[w]hite women are able to wear their hair in its natural state, whereas Black women are oftentimes criticized, or in some cases fired, for doing the same."[294] Besides, it is interesting to note that a few articles discussing African Americans' hair are quite personal, as they report, among other things, the authors' personal experience with their hair—articulating the particularity of Black people's hair and the specific and sometimes onerous care this type of hair requires—and the inevitable "hair dilemma"[295] they faced at some point in their lives in professional contexts.[296] These personal accounts emphasize that appearance really matters to individuals, as I demonstrate in Chapter 3.

Nevertheless, African American male employees have been more successful in proving that no-beard policies amount to racial discrimination, as the requirement to shave facial hair can cause

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291 Williams, *supra* note 207 at 173.
292 Onwuachi-Willig, "Another Hair Piece", *supra* note 207 at 1131.
293 Greene, "Black Women", *supra* note 207 at 428. See also Moss, *supra* note 207 at 203.
294 Moss, *supra* note 207 at 212 [footnote omitted].
295 Rosette & Dumas, *supra* note 207 at 1183.
296 See e.g. Williams, *supra* note 207; Greene, "Title VII", *supra* note 207; P Caldwell, *supra* note 176.

them to suffer from pseudofolliculitis barbae (PFB). This condition, also known as "razor bumps,"[297] is a "painful skin disorder resulting from ingrown hairs that is scientifically proven to be 'unique or at least almost unique to [B]lacks'."[298] In addition, discrimination based on race was also somewhat successfully raised in *Gonzalez*,[299] a class action lawsuit against Abercrombie & Fitch (A&F) that resulted in 2004 in an approximately fifty million dollars settlement with fourteen named plaintiffs representing several racialized groups, including African Americans, Latinos, and Asian Americans.[300] The complaint alleged that the clothing retailer's sales floor positions needed to conform to a "classic American style," which was "'preppy,' 'pretty' and 'handsome'," but also "virtually all-white," "predominantly 'blond' and 'blue-eyed'",[301] therefore excluding racialized people. Hence, this concise review of the literature on race discrimination and workplace appearance regulation shows that this framework has yielded inconsistent results in the United States and particularly unsatisfying outcomes for aspects of appearance that involve some degree of choice, such as hairstyles.

2.2.2 Moving Away from the Anti-Discrimination Approach: Privacy and Freedom of Expression

Although the literature is generally quite scarce on this approach,[302] a few authors analyze workplace appearance regulation through autonomy, privacy, and freedom of expression—as part

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297 Williams, *supra* note 207 at 176.

298 Onwuachi-Willig, "Another Hair Piece", *supra* note 207 at 1099 [footnote omitted]. See also Koonin, *supra* note 223 at 37-38.

299 *Gonzalez v Abercrombie & Fitch Stores Inc*, Case No CV-0404731 SI (ND Cal 2004); "EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch" (18 November 2004), online: *US Equal Employment Opportunity Commission* <https://www.eeoc.gov/newsroom/eeoc-agrees-landmark-resolution-discrimination-case-against-abercrombie-fitch>. Several other appearance-related discrimination claims have been filed against Abercrombie's "look policy" over the years. See e.g. Sarah Kaplan, "The Rise and Fall of Abercrombie's 'Look Policy'" (2 June 2015), online: *The Washington Post* <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/02/the-rise-and-fall-of-abercrombies-look-policy/>. See also Margaret Talbot, "Abercrombie's Legal Defeat—and its Cultural Failure" (5 June 2015), online: *The New Yorker* <https://www.newyorker.com/news/daily-comment/abercrombie-fitch-samantha-elauf-discrimination-supreme-court>.

300 See Fleener, *supra* note 96 at 1295-1298. See also Desir, *supra* note 204 at 633-634; Dianne Avery & Marion Crain, "Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism" (2007) 14:1 Duke J Gender L & Pol'y 13 at 22-23; M Fox, *supra* note 212 at 566; Zakrzewski, *supra* note 200 at 431, n 1.

301 Fleener, *supra* note 96 at 1296-1297.

302 Articles that examine tattoos, piercings, and body art generally discuss fundamental rights—such as liberty, freedom of expression, and freedom of religion—but these comments do not offer an in-depth analysis. See

of the fundamental rights at work framework.[303] These articles are more theoretical, as they offer an alternative approach to the one usually discussed in workplace appearance literature—they are therefore relevant and significant for this dissertation. They are generally aligned with one of my dissertation's arguments—that the anti-discrimination framework, as it is now under the current state of law in Canada, sometimes fails to provide adequate remedies to employees who suffer prejudice from appearance regulations at work, and that the fundamental rights at work framework embodies great potential in this regard. These theorists go beyond the anti-discrimination approach to advocate for a broader right of freedom to express one's identity or personality through physical appearance. Instead of engaging with the anti-discrimination approach and the employees' right not be differentially treated because of their appearance, they focus on the employees' right to express themselves through their appearance in the workplace, which is not strictly protected under the current legal framework in the United States. Their propositions also incorporate sociological studies on the importance of appearance for individuals, and for employees, in particular.[304]

Catherine L. Fisk analyzes appearance at work through the lens of autonomy and privacy. Because clothes and appearance are so important to individuals—they define "who they are,"[305] employers' dress and grooming codes represent an invasion of the self that denies their privacy. For Fisk, the way people dress and groom themselves are deliberate choices for most people, albeit "heavily constrained by social forces."[306] Since choosing how to appear "is part of everyone's process of self-definition […] the right to define your *self* is at the very core of what the right of privacy should protect."[307] Among the advantages of considering the question of workplace appearance through a privacy analysis, Fisk maintains that this legal theory "is available to anyone who is significantly oppressed by an unreasonable workplace dress code."[308] She also contends that the

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e.g. Rima, *supra* note 212; Weimar, *supra* note 212; Porter, *supra* note 212; Pittman, *supra* note 212; Baker, *supra* note 212; M Fox, *supra* note 212; R Kramer, *supra* note 212.

303 See Chapter 6, section 6.1, *below*. In contrast, a few scholars argue that the workplace is not a forum for expressing one's identity and sense of self (see e.g. Selmi, *supra* note 174 at 486-490).

304 See Chapter 3, *below*.

305 Fisk, *supra* note 57 at 1111.

306 *Ibid* at 1122.

307 *Ibid* at 1146 [emphasis in original].

308 *Ibid* at 1113.

privacy analysis "would help courts distinguish between dress codes that humiliate and those that do not," in addition to allowing adjudicators to "understand that a dress code can be generally valid but cannot be enforced against a particular employee who might find a particular dress requirement exceptionally humiliating or offensive."[309] She rejects the anti-discrimination approach as an appropriate framework to analyze workplace appearance regulation, as she argues that it "fails to capture many of the reasons why employees object to particular appearance regulation."[310] Fisk's work is particularly relevant to my own study, as I, too, argue that a privacy analysis is an effective way of protecting employees' appearance autonomy.

Another framework for analyzing physical appearance and the law is offered by Gowri Ramachandran. She proposes a legal right to free dress, which would cover clothing, hair, jewellery, makeup, tattoo, and piercing choices. This framework would provide a more "accurate account of the importance of self-representation" for individuals, "drawing on its unique location at the blurry border of the personal (as an exercise of control over the physical self) and the political and cultural (as the performance of social identity)."[311] According to Ramachandran, considering freedom of dress as a fundamental right—returning to a rights-based approach—is a better way to deal with appearance than anti-discrimination law and free speech law, describing the latter established areas of law as inappropriate protections of the freedom of dress.[312] While I do not argue for a formal protection of appearance choices as a fundamental right *per se*—but rather for the use of dignity, privacy, and freedom of expression to protect these choices—Ramachandran's work is aligned with many arguments I make in this dissertation, including the importance of appearance for individuals and employees, as well as the insufficiency of the existing anti-discrimination framework to protect appearance choices.

309 *Ibid*.
310 *Ibid* at 1135.
311 Ramachandran, "Freedom of Dress", *supra* note 55 at 11.
312 *Ibid* at 17.

Gwyneth Pitt and Gina Clayton examine the question of appearance at work through the lens of freedom of expression in the British context[313] and their arguments are also aligned with some of the observations I make in this dissertation. They argue that "choices of dress and appearance are significant expressions of individual autonomy and identity"[314] and should be covered by the right to freedom of expression, contending it is a better way to deal with the subject than the anti-discrimination framework. They assert that "framing claims in the context of discrimination prevents courts addressing the wider questions of the individual and social value of freedom of expression."[315] Back to the American context, Jessica A. Moldovan also analyzes freedom of expression—or more specifically the Free Speech Clause of the First Amendment to the United States Constitution—regarding employee authenticity, which includes—but is not limited to—employees' appearance.[316] She contends that employees nowadays want to work in diverse and inclusive environments in which they can freely express their "authentic" selves. Acknowledging the limited scope of free speech protection to public employees—an observation that also applies to most Canadians working in common law jurisdictions—she argues that "the values of self-determination and authenticity that animate free speech theory and jurisprudence do not and should not disappear when someone enters the [private] workplace."[317]

Lastly, although not completely rejecting the anti-discrimination analysis, Karl E. Klare—a self-proclaimed "partisan of appearance autonomy and cultural diversity[318]—mentions at the outset of his article that "[a]ppearance autonomy is not an insignificant aspect of the freedom to make self-realizing choices."[319] Klare provides an overview of the legal rules applicable to clothing and grooming in employment contexts—mainly discussing the liberty interest, fundamental rights (free speech and free exercise of religion), and the right to equality of employment opportunity. He also investigates the meaning and social significance of appearance and appearance regulation.

313 Gwyneth Pitt & Gina Clayton, "Dress Codes and Freedom of Expression" (1997) 1 Eur HRL Rev 54.
314 *Ibid* at 56.
315 *Ibid* at 70.
316 Moldovan, *supra* note 86.
317 *Ibid* at 699, 704.
318 Klare, *supra* note 47 at 1430.
319 *Ibid* at 1397.

Criticizing the common justifications[320] for considering dress and grooming codes as lawful gender discrimination, among other things, Klare states that appearance law "is obviously based upon and reinforces stereotypical, gendered views about appearance."[321] "By normalizing gender," he asserts, "law therefore reinforces gender inequality, male domination, and the subordination of women."[322] Klare sketches a law reform proposal to re-empower employees regarding issues of appearance, including an interesting market reconstruction in which employers could "purchase a right of control over employee appearance under certain ground rules."[323]

2.2.3 Recurring Themes in the Legal Literature on Appearance in the Workplace

Whether on the anti-discrimination approach or on the fundamental rights framework, the reviewed literature covers several themes regarding appearance regulation in the workplace. The following section offers an abstract of some of the recurring themes: the notion of immutability, the ideas of conformism and community norms, employers' power and management rights, employers' image and corporate branding, and the notion of legal indeterminacy.

2.2.3.1 Immutability

Many authors, especially the ones adopting an anti-discrimination approach, condemn the "immutability doctrine" (also referred to as the "mutability doctrine" or the "immutability approach") under which dress and grooming regulations cannot violate Title VII because appearance is alterable. They note that on the argument that Congress only intended Title VII to protect immutable

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320 Klare summarizes the three most common rationales that are offered to justify appearance standards as lawful gender discrimination: "The first is that reasonable, "community standards" dress codes are not terribly burdensome and so create no real barrier to or impairment of employment opportunity. This argument is singularly unconvincing, given how strongly employees feel about these matters and how staunchly the courts defend employer prerogative. The second argument is that productive efficiency requires deference to managerial discretion. This is casually stated as a premise, with little effort being made in the cases to persuade that it is actually true. The third rationale is the most important for gender ideology. The argument is that gender-based appearance requirements do not really constitute disparate treatment of the genders but equal treatment. Both sexes are held to the same, sex-neutral standard, namely the standard of what the community expects of each sex, respectively. This argument is laughable." (*Ibid* at 1419).

321 *Ibid* at 1419-1420.

322 *Ibid* at 1432.

323 *Ibid* at 1448.

categories—characteristics that cannot be changed—US courts frequently uphold appearance regulations involving mutable aspects of appearance, such as hair length policies.[324] Peter Brandon Bayer also contends "the more ostensibly mutable the affected trait, the more likely the courts are to conclude the challenged discrimination is legal. Therefore, mutable characteristics theory surely remains a silent yet inappropriately influential partner in grooming case analysis."[325] However, rejecting this immutability approach, some critics argue that aspects of appearance that are usually considered mutable—such as dress and grooming choices—are in fact an integral part of identity performance and therefore deserve legal protection.[326] According to this view, "purely mutable identity characteristics do not exist: One's public expression of identity is inextricably linked to one's self-concept, and discrimination based on appearance is a violation of one's rights."[327] My dissertation concurs with this argument, and the performance of identity—and personhood—through appearance will be analyzed in Chapter 3.

Besides, it is sometimes difficult to categorize the many visible characteristics of one's physical appearance; "[d]ue to scientific advances […] it is not always clear what traits are mutable."[328] One could argue that although cosmetic surgery may be available to an individual in order to change an aspect of their appearance, this possibility does not make this characteristic automatically mutable, because of the expenses involved in undergoing risky, painful, and often expensive surgery. A commentator notes that "mutable physical traits associated with protected categories and looks both raise the common question of how to allocate the burdens between employers and employees when procedures are available to change one's appearance but pose

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324 "The mutability doctrine was widely adopted by courts in the decade following the passage of Title VII": Malcom, *supra* note 176 at 517-518. See also Bryson, *supra* note 213 at 166; Toledano, *supra* note 97 at 708; Myers, *supra* note 176 at 181; Herald, *supra* note 205 at 316; E Williamson, *supra* note 179 at 692; Rich, *supra* note 207 at 1220. For a detailed analysis of the immutability doctrine, see Peter Brandon Bayer, "Mutable Characteristics and the Definition of Discrimination under Title VII" (1987) 20:4 UC Davis L Rev 769.

325 Bayer, "Debunking Unequal Burdens", *supra* note 256 at 421.

326 Bandsuch, "NBA Dress Code", *supra* note 216 at 18; Greene, "Title VII", *supra* note 207 at 1359; Myers, *supra* note 176 at 193; Rich, *supra* note 207 at 1139.

327 Roberts & Roberts, *supra* note 207 at 392.

328 Fleener, *supra* note 96 at 1317; Zakrzewski, *supra* note 200 at 460. See also Rhode, "The Injustice of Appearance", *supra* note 175 at 1067; Corbett, "The Ugly Truth", *supra* note 184 at 158; Ramachandran, "Freedom of Dress", *supra* note 55 at 38; Rich, *supra* note 207 at 1203.

various degrees of cost, invasion, and risk to the individual."[329] In addition, while hairstyles are typically considered easily changeable, some argue that courts fail to acknowledge that natural hairstyles, such as dreadlocks, should be viewed as immutable traits as they are very difficult to change.[330] One scholar rightly notes: "In today's society, [B]lack women can change their noses and skin tones, just as they can change their hair, but the law would never uphold a restriction that implicitly required Blacks to modify either their skin tone or nose width."[331]

It has also been argued that the immutability doctrine "wrongly assumes that the only purpose of Title VII is to provide equal access to the job market," which led courts to conclude that Title VII is not violated when employees have the choice "to accept or reject the grooming requirement along with the job."[332] Moreover, critics note that the immutability doctrine often steers courts to consider appearance issues as unimportant, and therefore, not deserving legal protection.[333]

When examining possible solutions, should a formal protection against appearance discrimination only be granted to immutable visible characteristics? Critics are divided on this question. Lynn T. Vo suggests that the protection should only be conferred to immutable characteristics, "meaning characteristics that an individual has no control over" or "are not reasonably changeable."[334] She argues that it should not cover voluntary or easily mutable characteristics, such as "outrageously dyed hairstyles, tattoos, [and] visible bodypiercing."[335] Karen Zakrzewski, too, insists on protecting only immutable traits related to appearance, asserting that "granting protection for appearance traits that are fully within the control of the individual will undermine the entire purpose of Title VII."[336] In contrast, others, like Rhode, maintain that the prohibition against appearance-based discrimination should include "not only physical

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329 Fleener, *supra* note 96 at 1317.
330 See e.g. Moss, *supra* note 207 at 206; Bryson, *supra* note 213 at 167.
331 Onwuachi-Willig, "Another Hair Piece", *supra* note 207 at 1087.
332 Malcom, *supra* note 176 at 520.
333 See e.g. *ibid* at 523; E Williamson, *supra* note 179.
334 Vo, *supra* note 97 at 357. See also Fleener, *supra* note 96 at 1328; Zakrzewski, *supra* note 200 at 454-455.
335 Vo, *supra* note 97 at 357.
336 Zakrzewski, *supra* note 200 at 455. See also Desir, *supra* note 204 at 644.

characteristics but also grooming and dress that reflect core values and that are not inconsistent with reasonable business needs"[337]; a position with which I concur in this dissertation.[338] One scholar rightly explains:

> Just as biological sex, national origin, race, or religion are central components of individual identity, other characteristics or traits that involve the presentation of self, such as appearance, language, and lifestyle, regardless of their mutability or immutability, are similarly essential to an individual's sense of self and self-worth. Consequently, these aspects of individuality are no less deserving of statutory protection. Minimizing their importance by characterizing them as 'mutable' or 'non-fundamental' is, therefore, inconsistent with the overarching objective of anti-discrimination law, i.e., the elimination of arbitrary obstacles to full participation in the employment arena.[339]

Nevertheless, the mutability of many dress and grooming choices is often raised to exclude them from anti-discrimination protections. I argue in this dissertation that appearance choices, although alterable, should be considered "constructively immutable." As I demonstrate in Chapter 3, some of these choices are changeable only at unacceptable cost to personal identity. Chapter 5 will subsequently analyze the concept of immutability under the anti-discrimination approach in order to understand that in Canadian law, immutability can include constructively immutable characteristics.

2.2.3.2 Conformism and Community Standards

Several authors address, at some point, community norms, as they observe that the courts take socially accepted standards into account in their assessment of the legality of appearance policies. The common critique is that "community norms are too discriminatory to provide a satisfactory benchmark for defining workplace equality."[340] While some of the reviewed articles briefly discuss issues of conformism and community standards,[341] others explore these themes in more depth.[342]

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337 Rhode, "The Injustice of Appearance," *supra* note 175 at 1097. See also Malcom, *supra* note 176.
338 See Chapter 5, sections 5.1.3 & 5.3, *below*.
339 Friedman, *supra* note 206 at 209.
340 K Bartlett, *supra* note 176 at 2543-2544.
341 See e.g. Malcom, *supra* note 176; Hartwell, *supra* note 205 at 421-423; Levi, "Clothes Don't Make the Man", *supra* note 206; Miller, *supra* note 205; Klare, *supra* note 47.
342 See e.g. K Bartlett, *supra* note 176.

For many employees, conforming to dress codes or to dominant social norms of appearance in general is unproblematic. But some critics argue that respecting these community standards is extremely difficult for some individuals, as "not everyone shares prevailing social norms."[343] For instance, Mary Whisner asserts that compliance with socially accepted norms of appearance can turn "into a difficult choice between employment, for example, and the right to present one's chosen image to the world."[344] Jennifer L. Levi also explains the "severe" harm some employees suffer with regards to dress codes requiring a particular gender-stereotypical appearance: "having to appear stereotypically feminine or stereotypically masculine is so discordant with their identities that it may result in a total inability to remain employed in a particular workplace."[345] In addition, Katherine E. Leung argues that "[c]oncepts of professionalism that are rooted in conventional beauty standards […] are also inherently rooted in whiteness and place an obligation on people of color to assimilate to those standards."[346] Nevertheless, Vo observes that "[w]hen physical appearance requirements have some foundation in commonly accepted social norms and reasonably relate to an employer's business needs, they will not necessarily be considered wrong."[347] In this way, appearance regulation becomes "a method of reinforcing social norms."[348]

One of the foundational theoretical articles on appearance-based discrimination was written by Katharine T. Bartlett and published in 1994.[349] As she affirms that courts justify workplace appearance policies referring to community norms, she examines the scholarly criticisms of these judicial rationalizations. She rejects the concept of "community norms" as a basis for rationalizing discriminatory standards, arguing that "reliance on community norms constitutes an acceptance or legitimation of the very gender stereotypes that Title VII was established to eliminate."[350] Bartlett also claims that appearance expectations are socially constructed and will endure even in the

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343 Levi, "Clothes Don't Make the Man", *supra* note 206 at 98.
344 Whisner, *supra* note 178 at 118 [footnotes omitted].
345 Levi, "Misapplying Equality Theories", *supra* note 201 at 365.
346 Leung, *supra* note 187 at 70.
347 Vo, *supra* note 97 at 344.
348 Hartwell, *supra* note 205 at 409. See also Klare, *supra* note 47 at 1420.
349 K Bartlett, *supra* note 176.
350 *Ibid* at 2544. See also Malcom, *supra* note 176 at 527.

absence of compulsory dress and grooming codes. She uses a feminist approach as she maintains that dress and appearance codes tend to subordinate women to men, for they create different burdens depending on the employee's gender. Bartlett calls for the development of strategies to eliminate oppressive gender-role expectations, arguing that "[e]fforts to address dress and appearance standards must be focused on improving meanings, rather than eliminating them."[351] Although she advocates for a rejection of community norms to validate dress codes and grooming standards, Bartlett expresses reservations about the assumption that community norms have to be rejected altogether and she proposes "a more deliberate focus on them,"[352] in order to distinguish between appearance policies based on benign social norms and those that are founded on harmful stereotypes.[353]

Several other critics assert that courts rely on community norms to validate employers' dress and grooming regulations and that these socially accepted standards of appearance are often based on harmful stereotypes. They argue that when questioning whether a particular appearance requirement falls "within the normal range of social convention,"[354] courts perpetuate these stereotypes and allow them to thrive.[355] Instead, courts should question these socially accepted norms and critically examine if they are based on discriminatory attitudes and biases. The fact that mainstream society accepts or tolerates "a certain type of behavior as normal does not mean that such behavior is healthy, fair,"[356] or that it should remain legal; the flood of "stereotypes in society is an insufficient justification for their judicial reinforcement."[357] Courts should also "focus on whether the stereotype reinforces gender inequality [or other forms of inequality] and limits employment opportunities."[358] However, this is not an easy task, as judges are humans who live in this world of

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351 K Bartlett, *supra* note 176 at 2582.

352 *Ibid* at 2545. See also Mark R Bandsuch, "Dressing Up Title VII's Analysis of Workplace Appearance Policies" (2009) 40:2 Colum HRLR 287 at 318; Fisk, *supra* note 57 at 1136.

353 See also Miller, *supra* note 205 at 1370.

354 Hartwell, *supra* note 205 at 422.

355 Malcom, *supra* note 176 at 528. See also Hartwell, *supra* note 205 at 422; Herald, *supra* note 205 at 331; Miller, *supra* note 205 at 1370; Baron, *supra* note 174 at 383.

356 Baron, *supra* note 174 at 388.

357 Steinle, *supra* note 205 at 290.

358 Malcom, *supra* note 176 at 532.

societal norms and often conform to them, without necessarily experiencing the harms associated with forced conformity.[359] Noting that judges can sometimes be "more confident of their abilities to disregard biases than they should be," Marybeth Herald contends that they "are not immune from decision-making biases that afflict humans generally."[360] Therefore, an awareness of stereotyping mechanisms is important to avoid the propagation of offensive and biased ideas of what "normal" employees should look like.

2.2.3.3 Power and Management Rights

Since this review—aligned with my dissertation—focuses on employment contexts, an inevitable topic is the employer's power, which is particularly evident in relation to employees' appearance. Almost all authors agree that employers do have a legitimate right to control their employees' appearance—albeit not without limits. But as some rightly put it, "the fact that contract law gives the employer the power to do something is not a reason to forbear from questioning it."[361] Agreeing with this assertion, I explore the legal basis of employers' management rights in Canada in Chapter 4.

As several commentators observe, appearance cases "exemplify the hierarchical relationship between employer and employee."[362] Although this assertion is surprisingly not shared by all,[363] the employment relationship is indeed characterized by a power imbalance,[364] in which

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359 See Levi, "Clothes Don't Make the Man", *supra* note 206 at 98.

360 Herald, *supra* note 205 at 303 [footnotes omitted].

361 Pitt & Clayton, *supra* note 313 at 55. See also Olga Hay & Sam Middlemiss, "Fashion Victims, Dress to Conform to the Norm, or Else? Comparative Analysis of Legal Protection against Employers' Appearance Codes in the United Kingdom and the United States" (2003) 6:1 Intl J Discrimination & L 69 at 71.

362 Robson, *Dressing Constitutionally*, *supra* note 219 at 85. See also Ainsworth, *supra* note 225 at 257-258.

363 In the Canadian context, for instance, see the dissenting opinion of Rothstein and Wagner JJ in *Saskatchewan Federation of Labour*, *supra* note 26 at para 125, in which they repudiate the majority's understanding of workplace justice that acknowledges the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context: "Employers and the public are equally as entitled to justice as employees—true workplace justice looks at the interests of all implicated parties."

364 See e.g. Skidmore, *supra* note 205 at 520 (Skidmore calls for an acknowledgement of power inequalities in the employment relationship when analyzing workplace appearance regulations: "This approach which recognises pre-existing power relationships helps to build a theoretical justification as to why the assumed individual rights to autonomy and to equal treatment should be allowed at times to limit the employer's prerogative to manage"); Klare, *supra* note 47 at 1438.

employers hold all the power and employees have much less, leaving the latter in a weaker position. Many assert that employers regularly abuse their power and impose dress and appearance regulations that are unjustified by legitimate grounds; they argue for giving workers more power.[365] Referring to the *Jespersen* case, Michael Selmi explains:

> The real issue was not that she [Jespersen] was being required to be someone she was not, to be dolled up with makeup, to look like a clown as she claimed, *but that she did not have the power and the status to fight the employer's dress code*. No one would tell a judge to wear makeup or establish a formal dress code for professors because of their status and power. But there is little restraint when it comes to low-level, low-prestige jobs.[366]

Likewise, Matthew W. Finkin argues that Jespersen's objection rested "in the power [her employer] assumed to control the manner in which she chose to present herself, in an infringement of what she felt to be a private matter, felt so deeply as to lose her job over it."[367] For Fisk, questioning employers' appearance policies is perceived "as a major challenge to their authority,"[368] as she claims that "appearance codes do more than screen and signal, they are a battleground of social power."[369] She contends that when employees refuse to comply with appearance regulations, they are actually asserting their status "as beyond the power of the employer to demand conformity."[370] Similarly, Klare asserts that "[t]he primary social function of appearance law is to empower employers […] to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms."[371] Klare also notes that in this "system of domination," the power imbalance unfairly benefits employers regarding questions of appearance,[372] as it is not always easy for employees to find other employment if they refuse unacceptable appearance codes.[373] This comment is particularly relevant in the United States, with the employment at-will doctrine that results in a lack of bargaining power for employees; under this American default rule of employment,

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365 See *ibid* at 1430. See also generally Fisk, *supra* note 57.
366 Selmi, *supra* note 174 at 488 [emphasis added].
367 Matthew W Finkin, "Some Further Thoughts on the Usefulness of Comparativism in the Law of Employee Privacy" (2010) 14:1 Employee Rts & Employment Pol'y J 11 at 14.
368 Fisk, *supra* note 57 at 1115.
369 *Ibid* at 1120. See also Klare, *supra* note 47 at 1420.
370 Fisk, *supra* note 57 at 1119.
371 Klare, *supra* note 47 at 1398.
372 *Ibid* at 1438. See also Selmi, *supra* note 174 at 484.
373 See Rich, *supra* note 207 at 1245.

"employers can fire an employee for a good reason, a bad reason, or no reason at all."[374] Yet this observation is also pertinent in the Canadian context, because even if employment at-will does not prevail here, employees have considerably less power than employers, particularly in non-unionized workplaces.

A few articles discuss appearance regulation in the labour arbitration context,[375] asserting that employers' management rights are more limited in unionized workplaces—which is also true in Canada. While acknowledging that only a small proportion of American employees are unionized (13.7% of all US workers in 2006)[376] and that unions are majoritarian institutions, Michael J. Yelnosky argues that unions increase employees' autonomy and agency regarding appearance issues.[377] Although collective bargaining agreements generally include a management rights clause, which allows employers to impose appearance regulations, these clauses often impose a requirement of reasonableness on such policies.[378] In addition to reasonableness, appearance requirements in unionized environments must not discriminate against protected categories under federal, state, or local legislation. Because most collective agreements include an anti-discrimination provision, Jessica Moran urges arbitrators to be mindful that sex stereotypes are harmful to employees and that appearance standards perpetuate these stereotypes in a "pernicious way."[379]

2.2.3.4 Corporate Branding and Company's Image

Employers, too, have an "appearance interest"[380] in expressing themselves through their employees' appearance. Although the employer's interests are not the focus of my dissertation,[381]

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374 Bennett Shinall, "Distaste or Disability", *supra* note 152 at 107. See also Whisner, *supra* note 178 at 118.

375 See e.g. Moran, *supra* note 205; Michael J Yelnosky, "What Do Unions Do About Appearance Codes?" (2007) 14:1 Duke J Gender L & Pol'y 521; Reilly, *supra* note 231; Tucker, *supra* note 213. See also Klare, *supra* note 47 at 1425-1430.

376 Yelnosky *supra* note 375 at 529. In 2019, the percentage of workers represented by a union was 11.6% in the United States ("Union Members – 2019" (22 January 2020), online: *US Bureau of Labor Statistics* <https://www.bls.gov/news.release/union2.nr0.htm>).

377 Yelnosky, *supra* note 375 at 532-534. See also Friedricks, *supra* note 97 at 505-506; Klare, *supra* note 47 at 1427, 1428, 1448. But see Turner, *supra* note 207 at 119.

378 Moran, *supra* note 205 at 124; Yelnosky, *supra* note 375 at 527; Tucker, *supra* note 213 at 258.

379 Moran, *supra* note 205 at 134.

380 K Bartlett, *supra* note 176 at 2553.

381 See Chapter 1, section 1.2.2, *above*.

they are inevitably discussed in the reviewed literature. Workplace appearance codes are often justified by employers' need to create a brand or corporate branding, "a distinctive image to market to consumers"[382]; some have gone as far as describing a company's image as "one of its most valuable assets."[383] Since employees generally "form the face of the company," "[o]ne of the most critical components of corporate image is the appearance and conduct of frontline employees who interact with the company's various stakeholders."[384] However, branding can become an invasion of employees' private life as it "operates upon the bodies and psyches of employees in ways that certainly follow employees when they leave the workplace."[385] Nevertheless, businesses "brand" their workers by adopting appearance codes as part of a marketing strategy in order to make greater profit. Corporate branding, or a desire to create and protect the business' image, is often reiterated—and upheld—as a justification for employers' dress and grooming policies. Hence, some authors note that US "courts have been deferential to employer business judgment, stressing the importance of allowing companies to regulate their employees in order to project a professional image when representing the company and its interests."[386]

An illustration of this employer's concern can be found in the aforementioned Abercrombie & Fitch case, in which the American retailer was hiring "college students who resembled its brand image: young, attractive, white, male, and preppie—'walking billboards' who sported 'the A&F look'."[387] Aside from discrimination issues, this type of corporate branding is often criticized, as the legal enforcement of such appearance policies "authorizes employers to convert cultural stereotypes into a form of property—separate and distinct from the workers' actual physical and mental labor—and to seize the profits."[388] United Parcel Service (UPS) is also frequently cited in the literature to exemplify the use of "uniforms as a manner of branding," as UPS's "drab brown uniforms worn by

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382 Avery & Crain, *supra* note 300 at 15.
383 Flake, *supra* note 99 at 702.
384 *Ibid* at 721.
385 Avery & Crain, *supra* note 300 at 15. See also Flake, *supra* note 99 at 723.
386 Raskin, *supra* note 205 at 248.
387 Avery & Crain, *supra* note 300 at 22-23.
388 *Ibid* at 121. *Contra* Pagliarini, *supra* note 184.

men and women alike are an important part of the company's identity and have created something of a cult following."[389]

To justify discriminatory considerations of appearance in their business decisions, employers have to establish a *bona fide* occupational qualification (BFOQ) or business necessity defence, which are not always easy to establish.[390] This exception allows employers to present factual evidence that the discriminating grooming standard is reasonably necessary for the normal operation of their enterprise.[391] The essence of the business[392] is thus scrutinized in order to determine the validity of the employer's policy. For instance, employers can make hiring decisions strictly based on appearance when such a characteristic is *essential* to their business: "[w]hen physical appearance is the 'essence of the business involved,' then it is a valid criteria for use in hiring practices."[393] However, employers are usually not successful in proving that attractiveness is a necessary qualification for their enterprise when it is not the essence of the business involved, as in the case of family restaurants, airlines companies, and clothing stores.[394]

Finally, when it comes to customer preferences, US courts generally hold that "preferences or prejudices of the customers" are inappropriate to justify discriminatory measures,[395] an observation that also applies in the Canadian context. Yet critics observe that customers' preferences have served to justify employers' appearance requirements,[396] but employers must be careful with this rationalization as customers' expectations should be reviewed in relation to the actual service or commodity provided.[397] It is important to note that corporate branding is illegal if it interferes with statutory prohibited grounds of discrimination—unless justified by a BFOQ—and

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389 Selmi, *supra* note 174 at 485.
390 See James, *supra* note 97 at 663.
391 See Zakrzewski, *supra* note 200 at 436.
392 For a detailed analysis of US courts' interpretation of the "essence of a business," see Yuracko, "Private Nurses", *supra* note 205 at 160-175.
393 Vo, *supra* note 97 at 344.
394 See James, *supra* note 97 at 630; Yuracko, "Private Nurses", *supra* note 205 at 158.
395 Zakrzewski, *supra* note 200 at 439. See also James, *supra* note 97 at 642. But see McGinley, "Babes and Beefcake", *supra* note 205 at 258 (McGinley notes three situations in which courts recognize the BFOQ defence to protect consumer preferences).
396 See e.g. Emily Gold Waldman, "The Preferred Preferences in Employment Discrimination Law" (2018) 97:1 NCL Rev 91 at 125-130.
397 K Bartlett, *supra* note 176 at 2575.

appearance policies based on business image should always be directly and closely related to the nature of work to be performed.[398]

2.2.3.5 Legal Indeterminacy

Legal indeterminacy is also discussed in the literature, as dress and grooming policies are difficult to theorize and the legal outcomes of workplace appearance regulation challenges are sometimes qualified as indeterminate.[399] Among other concerns, legal indeterminacy is raised regarding the extent to which employers can "incorporate the sale of female employees' sex appeal into their business plans."[400] As mentioned above, employers can generally justify discriminatory appearance requirements when they establish that these policies are essential to their business. Critics note that the essence of the business is sometimes an elastic concept and that it is not always clear to what extent companies that do not primarily sell sexual titillation should be allowed to use employees' sex appeal to entertain their customers. In addition, the *Jespersen* case is a good illustration of legal indeterminacy, as many commentators note that following the precedent of *Price Waterhouse* would have led to the conclusion that Jespersen contested makeup requirement is sex stereotyping and thus, discrimination based on sex or gender—which is not the conclusion to which the Ninth Circuit came to in this case.[401]

Legal indeterminacy is also particularly raised regarding the plaintiff's evidentiary burden to prove that an appearance policy is discriminatory under the current legislation in the United States. Recall again that Jespersen lost her case because she failed to present sufficient evidence that her employer's makeup requirement burdened women more than the appearance requirements imposed on male employees burdened men.[402] Moreover, if appearance was formally added as a prohibited ground of discrimination in the legislation, the evidence needed to prove appearance

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398 *Contra* Pagliarini, *supra* note 184.
399 See e.g. Yuracko, "Trait Discrimination", *supra* note 205 at 192-196.
400 Carbado, Fisk & Gulati, *supra* note 30 at 7.
401 See notes 266-267 and accompanying text.
402 See Carbado, Fisk & Gulati, *supra* note 30 at 7.

discrimination would also be difficult to determine,[403] particularly in cases involving attractiveness or beauty: "[d]iscrimination that is based on either real or perceived attractiveness or unattractiveness is difficult, if not impossible, to assess and compare."[404] It can indeed be difficult to precisely define what an "unattractive person" is, as physically unattractive people "do not constitute a cohesive group; a thin person with an unattractive face […] may feel little kinship with an obese person."[405] As some note, attractiveness is ill-suited to legal protection: "whereas age and religion provide neat, distinct boxes for members to check, the infinite combinations of physical traits across the human race result in a spectrum of physical attractiveness, rather than discrete clusters."[406] As a result, "because the unattractive do not constitute a coherent, readily identifiable unit,"[407] it seems difficult to envision a protection of unappealing-looking individuals under the existing laws. Nevertheless, some argue that the subjectivity inherent in attractiveness—or in appearance in general—should not preclude appearance from legal protection, as "[c]ourts have ruled on subjective areas in many types of cases."[408] While attractiveness falls beyond the scope of this dissertation, and although there are a number of problems that can be identified in relation to the inclusion of appearance as a protected ground of discrimination, "this should not mitigate against a regulatory response to prevent unjust behaviour."[409]

2.2.4 Proposed Solutions

While a majority of the reviewed articles condemn the current treatment of appearance-based discrimination and call for a change, most of the proposed solutions advocate for the adaptation of existing anti-discrimination law to appearance bias instead of a legislative reform

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403 See James, *supra* note 97 at 661-662; Fleener, *supra* note 96 at 1321. See also Sam Middlemiss, "Beauty's Only Skin Deep? Legal Liability of Employers for Discrimination of the Ground of Physical Appearance? A Comparative Analysis" (2006-2007) 8 Contemporary Issues L 18 at 25.

404 Vo, *supra* note 97 at 341. See also Zakrzewski, *supra* note 200 at 456. *Contra* Fleener, *supra* note 96 at 1319 (arguing that studies show that physical attractiveness is objective and measurable).

405 Harvard Law Review, "Facial Discrimination," *supra* note 204 at 2037.

406 Toledano, *supra* note 97 at 708.

407 Zakrzewski, *supra* note 200 at 453.

408 *Ibid* at 456. See also Daniel S Hamermesh, "Ugly? You May Have a Case", *New York Times* (28 August 2011) SR12, cited in Toledano, *supra* note 97 at 705.

409 Waring, *supra* note 96 at 198.

proposition *per se*.[410] Authors often suggest a wider interpretation of the existing prohibited grounds of discrimination[411] (e.g. sex, gender, race, or disability)[412] instead of revisiting the law to include appearance as a separate and additional protected ground. Let us recall that employees who believe they have been discriminated against on the basis of appearance must attempt to frame their claim as a case of another type of prohibited discrimination. One critic suggests that the current state of law "forces plaintiffs to contrive looks-based discrimination incidents into claims that fail to reach the root of the harm. Where the application of an antidiscrimination provision does not reflect 'the real nature of the prejudice,' it risks leaving vulnerable some class members whom the law should protect."[413] Hence, the proposal to extend anti-discrimination law to appearance-based discrimination relies largely on the fact "that negative stereotypes associated with looks are perpetuated by the same process and carry the same dangers as those associated with race and sex."[414]

Many proponents of a prohibition on appearance-based discrimination thus "argue for an expansion of existing law" instead of creating a "new legally protected category."[415] For instance, regarding discrimination against the "unattractive," Hannah Fleener suggests using disability-based anti-discrimination law, "which targets employer misconceptions about an individual's ability to perform job duties without requiring the individual to fit into a strictly defined category of protection."[416] It is also argued that existing legislation prohibiting discrimination on the basis of physical disabilities should protect people from discrimination on immutable characteristics of bodily or facial appearance, "using the same case-by-case analysis of the individual's impairment and

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410 Except for scholars using the fundamental rights at work framework.

411 See e.g. Moss, *supra* note 207; E Williamson, *supra* note 179; Fleener, *supra* note 96; Zakrzewski, *supra* note 200; Turner, *supra* note 207. *Contra* James, *supra* note 97 at 668 (who argues that the "current laws provide sufficient redress and [that] there is no need to alter the laws to provide less attractive individuals more protection"; "employers' rights need more protection"). See also (*contra*) Corbett, "The Ugly Truth", *supra* note 184; Middlemiss, *supra* note 403; Vo, *supra* note 97 at 346.

412 See e.g. Siegel, *supra* note 174 at 175; Malcom, *supra* note 176; Greene, "Title VII", *supra* note 207.

413 Fleener, *supra* note 96 at 1325 [footnotes omitted].

414 *Ibid* at 1315. See also Waring, *supra* note 96 at 198; Rhode, "The Injustice of Appearance", *supra* note 175 at 1059; Zakrzewski, *supra* note 200 at 434. *Contra* Pagliarini, *supra* note 184 at 290; Corbett, "The Ugly Truth", *supra* note 184 at 173.

415 Fleener, *supra* note 96 at 1328.

416 *Ibid*.

employment situation that is generally used in handicap law."[417] Expanding the law to protect looks, Fleener argues, would "increase diversity in the workplace, further contributing to individuals' self-acceptance and productivity."[418]

Since dress and grooming practices are related to employees' autonomy and sense of self, some critics argue for an approach that would recognize that employees hold "a special interest in their grooming and appearance that they do not have in other terms and conditions of employment,"[419] suggesting that the solution lies in a more balanced analysis of employers' and employees' interests.[420] Some also recommend that courts should take into account the "emotional costs of complying with an appearance policy"[421] in order to evaluate its discriminatory nature. Another proposed solution is to narrow employer defences[422] by restricting the business necessity defence to "the very few" occupations in which the employee's appearance "actually interfere[s] with the execution of the job," i.e. businesses who genuinely sell looks or sex, such as models, actors, and exotic dancers.[423]

However, some US legal scholars advocate for the formal inclusion of appearance as a protected category under anti-discrimination laws.[424] They argue that existing laws limit victims of appearance-based discrimination, and that they should not be obliged to fit into narrow categories in order to win their case. For instance, Elizabeth M. Adamitis suggests that state and local statutes

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417 Harvard Law Review, "Facial Discrimination", *supra* note 204 at 2036.

418 Fleener, *supra* note 96 at 1327.

419 E Williamson, *supra* note 179.

420 See e.g. Everett, *supra* note 205; E Williamson, *supra* note 179.

421 Malcom, *supra* note 176 at 536. See also Frey, *supra* note 205 at 115.

422 Although the Supreme Court of the United States has held that the *bona fide* occupational qualification (BFOQ) is to be interpreted narrowly (see *UAW v Johnson Controls, Inc*, 499 US 187, 201 (1991), cited in Moran, *supra* note 205 at 119), an even more restricted interpretation is called for.

423 See Gumin, *supra* note 97 at 1793. See also Moran, *supra* note 205 at 119; Frey, *supra* note 205 at 112, 116; Myers, *supra* note 176 at 196; McGinley, "Babes and Beefcake", *supra* note 205; Fleener, *supra* note 96 at 1329. *Contra* Pagliarini, *supra* note 184 at 293 ("aesthetics may be a legitimate criterion upon which to base employment decisions throughout all job types").

424 See e.g. Williams, *supra* note 207; Visone, *supra* note 231; Friedricks, *supra* note 97 at 517-518; Rhode, *The Beauty Bias*, *supra* note 199 at 154-155; Desir, *supra* note 204; Rhode, "The Injustice of Appearance," *supra* note 175; Raskin, *supra* note 205; Zakrzewski, *supra* note 200 at 452; Adamitis, *supra* note 201. *Contra* Toledano, *supra* note 97 (rejecting legal reform as a solution, although largely focusing on discrimination based on unattractiveness—and not on appearance in general); Corbett, "Hotness Discrimination", *supra* note 97; James, *supra* note 97; Corbett, "The Ugly Truth", *supra* note 184; Vo, *supra* note 97; Robert Post, "Prejudicial Appearances: The Logic of American Antidiscrimination Law" (2000) 88:1 Cal L Rev 1.

should include appearance as a prohibited ground, covering physical characteristics as well as dress and grooming "that is associated with some already-protected category" or "that has some other cultural or historical significance."[425] Although Adamitis argues that all aspects of physical appearance would then be covered,[426] one is left wondering about the extent of this protection and the interpretation of cultural significance. Others argue for the inclusion of appearance as a protected class under Title VII, because appearance-based discrimination weakens individuals' employment opportunities.[427] This solution would offer a more uniform protection against appearance-based discrimination than disparate state laws.[428] Nevertheless, as one critic notes, "the utility of discrimination law does not simply lie in the mechanisms for redress but also in the signal it sends to the community about the type of conduct that will not be tolerated."[429] Therefore, a ban on appearance discrimination would help to "combat the use of prejudices and stereotypes, and the misperceptions that result."[430]

A final solution that is proposed in the literature does not concern a law reform but rather focuses on social mobilization. By addressing the problem at its source,[431] some authors contend that the solution lies ultimately in changing mentalities in society regarding appearance.[432] For instance, Rhode suggests that individuals should focus "on the tolerance they show for others and their support for changes in social attitudes and policies toward appearance."[433] If people change their attitudes towards appearance and its prominence in society, it would become more difficult for employers to enforce strict dress and grooming codes that humiliate their employees. A rise in "society's moral consciousness"[434] about appearance-based discrimination and the stereotypes that it involves would also help to prevent its harm.

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425 Adamitis, *supra* note 201 at 220.
426 *Ibid*.
427 See e.g. Visone, *supra* note 231 at 376-378; Zakrzewski, *supra* note 200 at 454.
428 See e.g. Zakrzewski, *supra* note 200 at 452.
429 Waring, *supra* note 96 at 200. See also Rhode, *The Beauty Bias*, *supra* note 199 at 18.
430 Adamitis, *supra* note 201 at 213.
431 Toledano, *supra* note 97 at 714.
432 See e.g. Rhode, *The Beauty Bias*, *supra* note 199; Desir, *supra* note 204; Baron, *supra* note 174. See also Toledano, *supra* note 97.
433 Rhode, *The Beauty Bias*, *supra* note 199 at 148.
434 See Desir, *supra* note 204 at 652.

Conclusion

As a general observation, the literature review on the legal treatment of workplace appearance regulation shows that there is quite a gap in the Canadian literature on this issue and that the question is widely covered in other jurisdictions using a human rights approach. Since most of the articles come from the US, where anti-discrimination laws often offer the only remedy,[435] the dominant articulation of appearance-based prejudice is through sex or gender discrimination and racial discrimination. It is clear that except for jurisdictions where appearance is protected in the legislation,[436] plaintiffs have to connect their appearance claim to one of the protected categories of discrimination, which presents some challenges that this review exposed. Some scholars advocate for the inclusion of physical appearance as a prohibited ground of discrimination under anti-discrimination laws, that is, a statutory protection for appearance, while others suggest a more inclusive and wider interpretation of the existing grounds in order to protect against appearance-based discrimination via the existing anti-discrimination laws. While adding appearance as a statutory prohibited ground would help prevent and sanction unreasonable dress and grooming regulations, protecting appearance autonomy through the fundamental rights at work framework would also further this goal, as I contend in this dissertation. But before analyzing the two different approaches to workplace appearance regulation in Canada, an inquiry into the sociological implications of appearance for individuals is needed and will therefore follow in the next chapter.

435 This observation also applies to most common law jurisdictions in Canada.
436 See notes 189-198 and accompanying text.

CHAPTER 3
WHY APPEARANCE MATTERS

Introduction

In contemporary western culture, appearance has come to take a prominent space in people's everyday lives, as some get obsessed with what fashion theorist Llewellyn Negrin terms "the aestheticization of the self."[437] But why does appearance matter so much in society? And, for the purpose of this dissertation, why does appearance matter that much to some employees? If we only listen to popular maxims—*Beauty is only skin deep*, *Beauty is in the eye of the beholder*, and *Don't judge a book by its cover*—just to name a few, appearance should not be an important concern. But these common sayings, although inspired by noble values—a desire to escape superficiality and to make substance triumph over looks—are misleading as indicators of western values. "Perceptions of individuals can be influenced by how they dress," would be more accurate, as reflected by the maxims *Clothes make the man* and *Dress for success*.[438] As it "affects our place in the world," appearance can be a major source of bias and an "unchangeable form of inequality."[439] Appearance *is* important, and it does matter a great deal in Canadian society. The increased importance placed on the cultivation of appearance is evidenced by the media focus on fashion, health, body modifications, and body alterations. Along with various scholars, I argue that Canadians' concern with appearance has grown in intensity and magnitude, and it now seems evident that bodily appearance is deemed a central marker of identity and an expression of the self.

The treatment of the body and the creation of physical appearance are an important feature of humankind, and clothing in particular has been known to distinguish human beings from

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437 Llewellyn Negrin, *Appearance and Identity: Fashioning the Body in Postmodernity* (New York: Palgrave Macmillan, 2008) at 13.

438 *Re BC Assessment Authority and CUPE, Local 1767* (2015), 258 LAC (4th) 361 at para 19 (BC Arb) [*BC Assessment Authority*].

439 Berry, *The Power of Looks*, *supra* note 96 at 2, 9.

nonhuman animals,[440] as humans renew their daily attire[441] and "refuse to let nature alone dictate their appearance."[442] The preparation and adornment of the body, albeit as simple as dressing minimally, is a universal phenomenon: all people from all cultures prepare the body in some way and construct their appearances, "be it through clothing, tattooing, cosmetics or other forms of body painting."[443] Although the different ways of preparing and decorating the body vary from culture to culture, and even within a culture,[444] it is a basic aspect of human experience to create, consciously or unconsciously, a physical appearance for the world to see on a daily basis.[445] Hence, the body is considered a "medium of culture," as it "is the surface on which prevailing rules of a culture are written."[446]

For several decades, physical appearance has been considered not worthy of serious scholarly research. Academic scholarship,[447] and particularly legal scholarship,[448] is only starting to measure the striking impact of appearance in life and law. Sociological analyses, albeit fruitful and prolific on the study of the body, have also taken some time to question the importance of appearance (including dress, grooming choices, and fashion) for individuals. However, in the late twentieth century, the interaction of the body with clothing and grooming started to attract scholarly

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440 See Kate Soper, "Dress Needs: Reflections on the Clothed Body, Selfhood and Consumption" in Joanne Entwistle & Elizabeth Wilson, eds, *Body Dressing* (Oxford; New York: Berg, 2001) 13 at 17.

441 See Catherine Joubert & Sarah Stern, *Déshabillez-moi: Psychanalyse des comportements vestimentaires* (Paris: Hachette, 2005) at 8.

442 Erica Reischer & Kathryn S Koo, "The Body Beautiful: Symbolism and Agency in the Social World" (2004) 33 Annual Rev Anthropology 297 at 297.

443 Joanne Entwistle, *The Fashioned Body: Fashion, Dress & Modern Social Theory*, 2nd ed (Cambridge, UK; Malden, MA: Polity, 2015) at 6 [Entwistle, *The Fashioned Body*].

444 *Ibid*.

445 It should be noted that this creative act of dressing and adorning the body can often be heavily circumscribed inter-societally and does not necessarily enable self-expression for all peoples. For instance, people living in poverty in the global South can have very restricted means of fashioning their appearance. As mentioned in Chapter 1 (see note 10), this dissertation focuses on Canadians and westerners in general, but the accessibility to resources in creating one's appearance may vary greatly even amongst them.

446 Debra L Gimlin, *Body Work: Beauty and Self-Image in American Culture* (Berkeley: University of California Press, 2002) at 3 [footnotes omitted].

447 See Negrin, *supra* note 437 at 1.

448 See Chapter 2, *above*, for a review of the literature on appearance and the law.

attention,[449] and there are now a multitude of studies on the dressed body in sociology, but also across various disciplines, such as fashion theory, philosophy, and cultural studies.[450]

Scholars generally agree that the way people "present themselves to the world often implicates core values and cultural identities."[451] As a vehicle for the definition of personal and social identity,[452] "[a]n individual's personal appearance may reflect, sustain, and nourish [their] personality and may well be used as a means of expressing [their] attitude and lifestyle."[453] The construction of individuals' appearance as a manifestation of the self is indeed influenced by their personality, but scholars emphasize that it is also and foremost a social construction.[454] Appearance involves how others identify individuals, but it also projects in some way how individuals think of themselves; it is therefore both a social and intimate activity, as fashion theorist Joanne Entwistle asserts: "not only is our dress the visible form of our intentions, but in everyday life dress is the insignia by which we are read and come to read others."[455] Both as a social construction and as a social marker, physical appearance provides a multitude of data about an individual: "A significant amount of […] visual information is provided by dress, hairstyle, jewellery, tattoos, etc. If this were not the case, employers presumably would not attempt to use dress to convey a message to their employees and customers."[456] Most people will conform to the social and professional dress and grooming requirements of their respective workplaces; "[a]cceptance of the social norms of physical appearance is probably the most commonly adopted strategy"[457] in appearance management. But some employees must contend with conforming to the employer's vision of appropriate appearance

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449 See Ian Burkitt, *Bodies of Thought: Embodiment, Identity and Modernity* (London: SAGE Publications, 1999) at 1; Entwistle, *The Fashioned Body*, *supra* note 443 at 9.

450 Before that, scholars from various disciplines were focusing on either the body *or* dress, without really considering the relation between the two. Fashion studies focused on clothes and trends, without discussing their important relationship to the body, and sociology generally studied the body on its own, omitting to discuss the dressed body and its implications, and overlooking the idea that bodies must appear appropriately dressed in general.

451 Rhode, *The Beauty Bias*, *supra* note 199 at 99.

452 See Alejandro Nestor García Martínez, "The Proliferation of Fashion and the Decline of Its Code of Meanings" in Ana Marta González & Laura Bovone, eds, *Identities through Fashion: A Multidisciplinary Approach* (Oxford; New York: Berg Publishers, 2012) 94 at 94.

453 *Kelley v Johnson*, 425 US 238 at 250-251 (1976), cited in Adamitis, *supra* note 201 at 195.

454 See e.g. Gimlin, *supra* note 446 at 3. See also Klare, *supra* note 47 at 1407.

455 Entwistle, *The Fashioned Body*, *supra* note 443 at 35.

456 Pitt & Clayton, *supra* note 313 at 56.

457 Berry, *The Power of Looks*, *supra* note 96 at 109.

while at work and displaying an appearance consistent with their personality. When employers cannot justify their appearance policies on legitimate grounds allowed by the governing legislation, they should not abuse their power (which comes from their management rights)[458] and should respect their employees' desire to control, to some extent, their own appearance.

This chapter aims to add to the impressive interdisciplinary scholarship on dress, fashion, and the body, by querying the sociological and legal meaning of appearance for individuals, and employees in particular.[459] I will analyze this multidisciplinary literature in order to understand why appearance matters to individuals in the construction and maintenance of their sense of self and personhood, a concept derived from identity. To do this, and because my dissertation focuses on aspects of appearance that involve some control, I explore the question of choice with regards to appearance, in order to situate the significance of agency, autonomy, and freedom in the choices individuals, and in particular employees, make with respect to their clothes, style of hair, grooming practices, and so on. I argue that because appearance choices are strongly influenced by the social context in which they are made, the room that is left for agency in these choices can deeply matter to individuals in the definition of their self. Grasping appearance choices both as socially constructed and essential to employees' sense of self will help highlight the need to limit employers' power over these personal choices and set the stage for the legal analysis and propositions in this dissertation.

This chapter therefore analyzes the intricate relationship between appearance and identity or personhood in a western conceptualization. It first explores the definition of identity in social studies, as an understanding of this concept is needed to fully grasp the three segments of this chapter's study of why appearance matters: because appearance choices are complicated, but matter to self-identity; because appearance in general serves as a source of identity formation; and

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458 See Chapter 4, section 4.2, *below*, on the employer's management rights in Canadian employment and labour law.

459 As mentioned in Chapter 1, this dissertation focuses on why appearance should be protected in a legal framework, and therefore this chapter analyzes the importance of appearance from the employee's perspective. Appearance also matters to employers—as they would not try to control their employees' image if it was not the case—but the analysis presented in this dissertation aims to limit the employers' prerogative and thus focuses on the sociological and legal meaning of appearance to employees. See Chapter 1, section 1.2.2, *above*.

because appearance can communicate identity to others. Therefore, after defining identity, this chapter analyzes how individuals make their daily choices regarding dress and grooming, which is a combination of both structure and agency. It then moves to the study of appearance as a source of identity formation, as the literature stresses how the observable characteristics and adornments of individuals contribute to the construction of their identity, their personality, and their personhood. As appearance is also deemed a means of expression, it can serve to communicate some aspects of their identity. Finally, relying on legal scholar Yofi Tirosh's approach, I move from the sociological to the legal in order to understand how appearance should be understood as fundamental to personhood in a legal framework, and not solely in terms of identity. The concepts of sense of self or personhood, which are more open than identity in legal terms, are consequently more appropriate when dealing with appearance to frame the legal analysis that will follow in the rest of this dissertation.

3.1 APPEARANCE AND IDENTITY IN SOCIAL STUDIES

I argue that appearance matters because its meaning and social significance are closely connected to identity and personhood. As a social marker, appearance reveals one's position in society, but it also contributes to defining one's identity. As a means of expression, appearance can communicate, voluntarily or not, countless data about "who one is"—what one does, where one lives, what position one holds in society, and the list goes on. Appearance is generally deemed interconnected with identity in sociological studies,[460] but the association between appearance and identity is not always clear. This section aims to unpack and make visible the nuances of the intricate relationship between appearance and identity, in an effort to understand how they are closely connected, but cannot be simply and directly inferred from one another. The first part of this section briefly defines identity in its postmodern[461] western conception, a definition that is crucial to

[460] But see Colin Campbell, "The Modern Fashion Pattern, its Functions and Relationship to Identity" in González & Bovone, *supra* note 452, 9 at 16-19 [C Campbell, "The Modern Fashion Pattern"].

[461] In this theoretical analysis of the importance of appearance for individuals, and the relation between appearance and identity in particular, I use a postmodernist approach, which rejects the modernist claim about there being

understanding the complex meaning of appearance. The second part explores the notions of structure and agency and their contextual influence on appearance choices. The third part discusses appearance as a site of identity definition and construction and explains how individuals perform their identities through appearance. The last part analyzes appearance as a means of expression, which can serve to communicate individuals' identities, but can also be used to form the basis of stereotypes. This section aims to comprehend the sociological significance of appearance to individuals in general, and to employees in particular, in order to emphasize why appearance matters and deserves legal attention.

3.1.1 Defining Identity

Before discussing the complex and shifting connection between appearance and identity, I will offer a working definition of the term *identity*.[462] There is no clear definition of identity in the social sciences literature, nor a consensual understanding of what this notion includes. However, it is generally understood to designate "a person's conception and expression of individuality"[463] and identity is "used widely and loosely in reference to one's sense of self and one's feelings and ideas about oneself."[464] The common definition of identity refers to "the quality or condition of being a *specified* person or thing."[465] In this sense, identity refers to what makes a person unique[466]—i.e.

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one universal explanation of society. A postmodern understanding of appearance relies on the diversified experiences of individuals and allows for an inclusion of the many differences one can observe in social actors. Postmodernism emphasizes on "plurality, diversity, and relativity" in the promotion of "a wider reconstruction of thought." See John Scott, ed, *A Dictionary of Sociology*, 4th ed (Oxford: Oxford University Press, 2014) sub verbo "post-modernism").

462 The postmodern understanding of identity is used in this section to grasp the significance of appearance for individuals. However, as discussed in the last section of this chapter, I choose to use the terms "sense of self" or "personhood" instead of identity in the rest of the dissertation, as the concept of identity is too heavily connected to the anti-discrimination framework in the legal analysis of appearance (see section 3.2, *below*). Nevertheless, the definition of personhood inevitably includes identity, and for the sake of preserving the social sciences literature's terminology in this interdisciplinary analysis, I use the term identity for the following discussion.

463 Shridhar Sharma, "Self, Identity and Culture" in Sangeetha Menon, Anindya Sinha & B V Sreekantan, eds, *Interdisciplinary Perspectives on Consciousness and the Self* (New York; New Delhi: Springer, 2014) 117 at 117.

464 J Scott, *A Dictionary of Sociology*, *supra* note 461 sub verbo "identity".

465 Katherine Barber, ed, *The Canadian Oxford Dictionary*, 2nd ed (Oxford: Oxford University Press, 2004) sub verbo "identity" [emphasis added].

466 Sharma, *supra* note 463 at 119.

the multiple characteristics that define a distinctive individual, such as race, gender, sexuality, age, status, occupation, and so on. Identity generally includes "a sense of continuity, a sense of uniqueness from others and a sense of affiliation."[467] But this simple definition of identity is not sufficient to grasp its social, political,[468] and legal implications. From the outset, identity must be understood as negotiating "the relation between self and the Other," as "setting boundaries which demarcate an 'inside' from an 'outside', as 'self' from an 'other'."[469] In this sense, identity should be seen as "a process of negotiated positions where members define their belonging out of the cultural materials available to them—rather than as a process of reification of permanent properties."[470]

Identity is simultaneously "uniquely personal" and "inevitably social": "no one else has the same set of attributes, experiences, and emotional reactions," while these attributes, experiences, and reactions "count as potentially constitutive of identity" as "a matter of contingent social systems of meaning."[471] Every human being is engaged, to various degrees, in a continuous process of self-constitution,[472] as identity is a "developmental process," and "identity formation is a universal feature of human experience."[473] In a postmodern conception of identity, as opposed to an essentialist approach, the inner-self is not predetermined or fixed[474]; there is no authentic self or essence that can be discovered or found,[475] but rather the self is socially produced[476] and constructed: "Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected"; it "is a cultural creation, not a biological given."[477] Identity is "a site to be constantly struggled over and

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467 *Ibid* at 119-120.

468 Identity is, among other things, a deeply political concept which has another whole set of meanings in that context.

469 Efrat Tseëlon, "Is Identity a Useful Critical Tool?" (2010) 1:2 Critical Studies Fashion & Beauty 151 at 151 [Tseëlon, "Is Identity a Useful Critical Tool?"].

470 *Ibid* at 152.

471 Ainsworth, *supra* note 225 at 243.

472 See Christine M Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford: Oxford University Press, 2009) at 42.

473 Sharma, *supra* note 463 at 118.

474 See Douglas Kropp, "'Categorial' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23:1 Queen's LJ 201 at para 17.

475 See Susan Kaiser, "Minding Appearances: Style, Truth, and Subjectivity" in Entwistle & Wilson, *supra* note 440, 79 at 90. See also Negrin, *supra* note 437 at 2; Tirosh, "Adjudicating Appearance", *supra* note 90 at 116.

476 See Sharma, *supra* note 463 at 122. See also Roberts & Roberts, *supra* note 207 at 379; Ramachandran, "Freedom of Dress", *supra* note 55 at 40.

477 Allan C Hutchinson, "Identity Crisis: The Politics of Interpretation" (1992) 26:4 New Engl L Rev 1173 at 1192. See also Jill Marshall, *Human Rights Law and Personal Identity* (Abingdon, UK: Routledge, 2014) at 193.

frequently transformed; it is not a psychic space of the authentic self to be repaired to or moved toward."[478] Psychiatrist Shridhar Sharma explains this rejection of a natural self, asserting that the self is rather influenced and shaped by social and cultural contexts:

> The human self exists at the interface between body and the social system. Social and cultural systems define identities, and the human acquires selfhood in order to function in these systems. Self begins with the physical body, with acting and choosing as a unity, and as a point of reference distinct from others, and it acquires meaningful content by participating in the social system. The self is not contained in the brain, but rather the human brain learns to operate a self.[479]

Moreover, as identities are dynamic and somewhat mutable,[480] a person can have and display multiple identities at the same time. Social theorist Michel Foucault advocated the possibility of inhabiting multiple identities, as "different discourses generate particular and often divergent positions for agency and identity"[481]; therefore, discourses (or social influences) can produce various identities, and "often contradictory versions of the self."[482]

Hence, identity refers to individuals' unique sense of self and it describes who they are; yet the self is never fixed but rather constructed by social interactions and contexts—the self is "fragmentary, decentered, and constantly mutating."[483] Cultural theorist Efrat Tseëlon forcefully argues that identity should be understood "as shifting, as a process of becoming rather than being, a discursive practice rather than a given."[484] In relation to appearance, which is also socially constructed, this definition of identity helps us to understand the difficulty of grasping one's sense of self in the construction—and the interpretation—of appearance, as the creation of appearance is a complicated process involving the individual's perception of their own self, and the external presentation (and reception) of this self to (and from) other social actors.

With this in mind, a somewhat contradictory finding emerges from the literature on appearance and identity: while appearance is said to reveal one's identity, it is, at the same time,

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478 Hutchinson, *supra* note 477 at 1216.
479 Sharma, *supra* note 463 at 123.
480 Gely, *supra* note 225 at 233.
481 J Scott, *A Dictionary of Sociology*, *supra* note 461 sub verbo "identity".
482 *Ibid*.
483 Negrin, *supra* note 437 at 10.
484 Tseëlon, "Is Identity a Useful Critical Tool?", *supra* note 469 at 153.

considered as a source of identity formation. In order to unravel this paradox, the next section analyzes how individuals construct or fashion their appearance—how social forces impact how people make their appearance choices about what to wear and how to groom themselves on a daily basis.

3.1.2 Appearance-Based Decisions as Personal Choices

As set out in Chapter 1, this dissertation focuses on elements of appearance that involve a certain notion of choice—visual and physical aspects of appearance that individuals can change or control to some extent. In legal and human rights jargon, these aspects refer to the traditional category of *mutable* characteristics, as opposed to *immutable* characteristics, with only the latter ordinarily being protected as prohibited grounds of discrimination under statutory legislation.[485] Appearance choices, such as daily clothing and grooming preferences, are often perceived as very personal, internal, and individual decisions. As such, appearance choices are an individual's expression of their personal autonomy. The notion of choice is considered a fundamental aspect of autonomy and well-being for individuals, as it "defines the self because [it] is both the engine of independence and the mark of independence."[486] However, it seems generally accepted in the legal community that elements of appearance that are deliberately chosen do not deserve legal protection or constitutional attention. After all, if an employee does not want to lose their job, they should conform to the appearance that is expected of them; it is fairly simple, most people do it.

Yet, I advocate for a greater acceptance of appearance diversity, and I challenge this assumption by suggesting that even though employees might have a certain degree of control or choice over some aspects of their appearance, appearance choices—even the very personal decisions regarding easily modifiable characteristics—are never completely deliberate or free, as

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485 See Chapter 2, section 2.2.3.1, *above*. Further discussion of the immutability doctrine with regards to appearance in the Canadian context can also be found in Chapter 5, section 5.1.3, *below*.

486 Hazel Rose Markus & Barry Schwartz, "Does Choice Mean Freedom and Well-Being?" (2010) 37 J Consumer Research 344. The authors of this article challenge the assumption that choice is a universal aspiration and they assert that too much choice can produce negative impacts on some individuals. Their definition of choice, however, is aligned with a constricted form of agency, embedded in social constraints.

they are influenced by the social context in which they are made. Nevertheless, I demonstrate in the following sections that there is still room for agency in individuals' appearance choices, and this exercise of agency greatly matters to individuals' sense of self. Because appearance choices are not totally free but also related to identity and individuals' sense of self—they deserve legal protection. The next section therefore explores how structure and agency are both involved in appearance choices. Integrating these two sociological concepts, I then discuss how appearance should be understood as a situated bodily practice, a conception developed by Entwistle that considers clothing and grooming decisions as socially constructed. Entwistle's theory explains how appearance choices involve some agency, while they are at the same time embodied and contextualized, and always moulded by social and cultural structures. The last part of this section considers how personal preferences and various other considerations also impact appearance choices.

3.1.2.1 Structure and Agency

In sociology, the divide between structure and agency in shaping people's behaviour has always been a controversial issue. Agency is a synonym for autonomy or voluntary action, implying the "undetermined nature"[487] of peoples' action; it refers to the capacity of individuals to act freely and to make their own choices. In contrast, structure refers to "any recurring pattern of social behaviour"[488] that can influence or constrain the choices available to individuals. Basically, the tension between structure and agency resides between, on the one hand, the belief that individuals have the capacity to act freely and independently, and to make intentional and individual choices based on their freedom; and on the other hand, the assertion that individuals have no freedom or free-will, but rather that individuals act and make choices that are inevitably determined by "structures, society, and the individual's environment."[489] Although these two concepts—structure

487 J Scott, *A Dictionary of Sociology*, *supra* note 461 sub verbo "agency".
488 *Ibid* sub verbo "structure".
489 Jonathan Wyatt, "Agency", in Ronald L Jackson & Michael A Hogg, eds, *Encyclopedia of Identity* (Thousand Oaks, Cal: SAGE Publications, 2010) 18 at 18.

and agency—seem to be poles apart, I argue that appearance choices are influenced by both structure and agency: they are socially constructed, but individuals can still make decisions under these constraints. The landmark and extremely influential work of social theorists Erving Goffman and Pierre Bourdieu facilitates the understanding of this idea.

Goffman's theory helps to conceptualize how structure and agency both play their part in appearance choices in everyday life. Aligned with the postmodern definition of identity discussed above, Goffman conceives of the self as "a changeable formula for managing oneself during"[490] events; the self is "situationally and interactively defined," "a social product which does not have existence outside an interaction."[491] The dressed body constitutes the "vehicle of identity," an identity that must be "managed in terms of the definitions of the social situation which impose particular ways of being on the body."[492] In *The Presentation of Self in Everyday Life*,[493] Goffman uses theatrical performances as a metaphor to explain how people act in their daily interactions. When individuals are engaged in social interactions, they attempt to guide the impressions others will have of them, just as actors would do on stage, by controlling or adjusting the observable characteristics of their being—their "expressive equipment"—which include appearance and manner, but also facial expressions, bodily gestures, speech patterns, and the like.[494] Appearance performs a prominent role in this play, as appearance often guides first impressions.[495] Goffman explains that during social encounters, individuals want to "discover the facts of the situation"—i.e. "the actual outcome or end

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490 Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Cambridge, Mass: Harvard University Press, 1974) at 573.

491 Efrat Tseëlon, "Is the Presented Self Sincere? Goffman, Impression Management and the Postmodern Self" (1992) 9:2 Theory, Culture & Society 115 at 121. In this article, Tseëlon persuasively argues that "impression management theory" (IM)–which traces its roots to Goffman's dramaturgical metaphor—and Goffman's interactionist concept should not be confused. For IM theorists, there is an authentic self that can be hidden in public appearances, whereas Goffman's actor has no interior or exterior, that is, no fixed or true self, but only different faces that actors put on in front of different audiences.

492 Joanne Entwistle, "The Dressed Body" in Entwistle & Wilson, *supra* note 440, 33 at 47 [Entwistle, "The Dressed Body"].

493 Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, NY: Doubleday, 1959) [Goffman, *The Presentation of Self*].

494 *Ibid* at 24.

495 "The essence of self presentation according to Goffman (1959) is that it is just as important to represent oneself as possessing a certain quality as to actually possess a quality one is claiming." (Efrat Tseëlon, "Self Presentation through Appearance: A Manipulative vs. a Dramaturgical Approach" (1992) 15 Symbolic Interaction 501 at 502 [Tseëlon, "Self Presentation"]).

product of the activity of the others during the interaction, as well as their innermost feelings concerning" them.[496] Because all this information is not readily and instantly available, individuals must rely on appearance to communicate impressions.[497]

Furthermore, when individuals are in contact with other people—when they enter "the presence of others"[498]—their performance is often focused on conveying a positive and normal impression of themselves.[499] Individuals are altering their expressive equipment, which can include all aspects of physical appearance, in an effort to adjust to the settings they find themselves in, by interacting with other social actors. The situation and social context greatly impact how people present themselves: "the individual feels a social and moral imperative to perform their identity in particular ways," which "includes learning appropriate ways of dressing."[500] Individuals are "always obliged to cope with a variety of characters,"[501] who perform in different situations and spaces involving different ways of appearing correctly. Hence, for Goffman, the workplace, the spaces of the streets, the grocery store, and social events "operate with different rules and determine how we present ourselves and how we interact with others."[502] Individuals are therefore engaged, intentionally or unintentionally, in a series of negotiations between social norms and the information they want to communicate about themselves.

In an effort to reconcile the dualism between agency and structure, Bourdieu also sees these two concepts as complementary forces: structures influence individuals' behaviour, while individuals have the capacity (agency) of changing the social structures they inhabit. For Bourdieu, "structures are self-sustaining, productive, and active forms that function outside human agency," but individuals are able "to go beyond structure through the conscious choice to act."[503] The internalization of structures by individuals is defined by the term *habitus*, which corresponds to the individuals' social

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496 Goffman, *The Presentation of Self*, *supra* note 493 at 249.
497 *Ibid*.
498 *Ibid* at 1.
499 See Entwistle, *The Fashioned Body*, *supra* note 443 at 11.
500 Entwistle, "The Dressed Body", *supra* note 492 at 47.
501 Laura Bovone, "Fashion, Identity and Social Actors" in González & Bovone, *supra* note 452, 67 at 72.
502 Entwistle, *The Fashioned Body*, *supra* note 443 at 33.
503 Wyatt, *supra* note 489 at 19.

response to a diversity of social influences; habitus is "a system of lasting, transposable dispositions which, integrating past experiences, functions at every moment as a matrix of perceptions, appreciations and actions."[504] When they act, that is, when they choose how to dress and groom their bodies, individuals do not calculate consciously or voluntary, but rather act according to their habitus. Entwistle acknowledges the value of Bourdieu's work in understanding "dress as lived practice," which "is not the outcome of either oppressive social forces on the one hand, or agency on the other"[505]:

> The potential of the habitus as a concept for thinking through embodiment is that it provides a link between the individual and the social: the way we come to live in our bodies is structured by our social position in the world but these structures are reproduced only through the embodied actions of individuals. Once acquired, the habitus enables the generation of practices that are constantly adaptable to the conditions it meets.[506]

Entwistle also explains how Bourdieu's habitus "predisposes individuals to particular ways of dressing." She points out, for instance, that "the middle-class notion of 'quality not quantity' generally translates into a concern with quality fabrics such as cashmere, leather, silk which, due to cost, may mean buying fewer garments."[507] As social class in particular immensely influences individuals' behaviour for Bourdieu, it is tied to the notion of habitus, which can generally predict how people will dress. Although habitus cannot totally and completely determine individuals' appearance, "since the structures and rules of a situation only set the parameters of dress,"[508] this leaves space for a form of agency, which can be exercised contextually.

3.1.2.2 Appearance as a Situated Bodily Practice

Drawing on Goffman and Bourdieu, among other theoretical approaches, Entwistle sees dress as a "situated bodily practice," with the outcome being the dressed or adorned body.[509] She

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504 Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977) at 83.
505 Entwistle, "The Dressed Body", *supra* note 492 at 51.
506 Entwistle, *The Fashioned Body*, *supra* note 443 at 36.
507 Entwistle, "The Dressed Body", *supra* note 492 at 51.
508 *Ibid*.
509 Entwistle, *The Fashioned Body*, *supra* note 443 at 38.

considers dress as "always particular, contingent and context specific"[510]; her framework relies on the idea that "individuals/subjects are active in their engagement with the social and that dress is thus actively produced through routine practices directed towards the body."[511] Individuals make appearance decisions based on the social spaces in which they are likely to find themselves, where they are going, if there is a dress code they have to abide by, who they are likely to meet, what activities they will engage in, and how visible they want to be—if they "want to stand out in the crowd or blend in."[512] Simultaneously a social and personal experience,[513] clothing and grooming practices are extremely contextual, and never completely deliberate or free:

> The options open for the performance of identity are not unconstrained. How we perform our identity has something to do with our location in the social world as members of particular groups, classes, cultural communities. The clothes we choose to wear represent a compromise between the demands of the social world, the milieu in which we belong, and our own individual desires.[514]

Her idea about fashion and dress as situated bodily practices also reconciles structure and agency: "structures such as the fashion system impose parameters around dress; however, within these constraints, individuals can be creative in their interpretations of fashion and their practices of dress."[515]

Understanding dress and grooming as situated bodily practices implies that these personal choices cannot operate outside the social realm. [516] Individual motivations—such as the desire to attract attention, for instance—influence appearance choices, but the search for a certain aesthetic is not only the work of individual actors; it is also determined by a system of social representations, norms, and values.[517] In fact, sociologist Bonnie Berry notes that "[m]ost of us cannot, as social actors, be unaffected by social dictates, social norms, and social mirrors unless we are totally

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510 *Ibid* at xii.
511 Entwistle, "The Dressed Body", *supra* note 492 at 34.
512 Entwistle, *The Fashioned Body*, *supra* note 443 at 34.
513 Entwistle, "The Dressed Body", *supra* note 492 at 35.
514 Entwistle, *The Fashioned Body*, *supra* note 443 at 114. See also Ramachandran, "Freedom of Dress", *supra* note 55 at 31.
515 Entwistle, *The Fashioned Body*, *supra* note 443 at 40.
516 See Éric Sommier, *Essai sur la mode dans les sociétés modernes* (Paris: L'Harmattan, 2007) at 74.
517 See Michèle Pagès-Delon, *Le corps et ses apparences – L'envers du look* (Paris: L'Harmattan, 1989) at 143.

isolated, and maybe not even then."[518] In addition, individuals' appearance choices do not simply reflect "exogenous appearance preferences," but can be swayed and manipulated by the media and the fashion industry,[519] among many influences. This idea involves "socially and culturally constricted choices"[520] that lie behind individuals' concerns about appearance and fashion. For instance, a young adult may consider their facial piercings simply as a manifestation of their individuality, but the trendiness of this body modification practice might more adequately explain why they chose to express their personality in this way, even if they are not aware of this social force. This person might agree to take off some of their piercings when visiting their very conservative grandmother once a month, but refuse at the same time to take them off altogether to go to work. Appearance choices are contextual and influenced by an infinite number of social forces.

Goffman, Bourdieu, and Entwistle's theories converge to define appearance choices as both "subjective and social experiences."[521] Even when individuals do have a certain degree of control over some aspects of their appearance—or perceive themselves to have such self-determination—I argue that this "control" is never completely free; these choices are influenced and shaped by inescapable and powerful social forces[522]: "Actors do not behave or decide as atoms outside a social context, nor do they adhere slavishly to a script written for them by the particular intersection of social categories that they happen to occupy. Their attempts at purposive action are instead embedded in concrete, ongoing systems of social relations."[523] Sociologist Sophie Woodward argues similarly, claiming that "[c]lothing choices are constrained by particular social expectations, and yet still, through the act of dressing and assemblage, there is space for contestation and individual agency."[524]

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518 Berry, *The Power of Looks*, *supra* note 96 at 109.

519 See Klare, *supra* note 47 at 1434-1436.

520 Klare, *supra* note 47 at 1435.

521 Karen Tranberg Hansen, "The World in Dress: Anthropological Perspectives on Clothing, Fashion, and Culture" (2004) 33 Annual Rev Anthropology 369 at 372.

522 Klare, *supra* note 47 at 1436. See also K Bartlett, *supra* note 176 at 2548. For an interesting study on the influence of social context and structure on choice and human action in general, see Mark Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 Am J Soc 481.

523 Granovetter, *supra* note 522 at 487.

524 Sophie Woodward, *Why Women Wear What They Wear* (New York: Berg, 2007) at 20. See also Reischer & Koo, *supra* note 442 at 308.

Although various degrees of autonomy are involved in appearance choices, individuals are always influenced by the social context in which their body will be presented.[525] Some particular contexts, however, compel us to be more thoughtful and intentional in our grooming and clothing choices, like attending a wedding or participating in a job interview.[526] This is particularly true for employees, who might consider the "workplace as a primary venue for the realization and projection of their authentic selves," and "not just the place where employment duties are carried out."[527] The workplace generally requires a minimal degree of presentability, to which employees put a little more thought in the way they appear than other settings, such as their private homes, the grocery store, and the gym. It is a particular social context in which employees will often have the majority of their meaningful social interactions (outside of their private lives); a physical space where some "spend the majority of their waking hours"[528]; and a site where they leave varying degrees of lasting or somewhat permanent impressions on other social beings (as opposed to other places where their interactions with strangers are ephemeral). Moreover, "work is far more than a paycheck; people derive self-worth from working—they associate work with dignity, respect, independence, and civic participation."[529] Work provides employees "with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution"[530] of employment. It is therefore understandable that some employees would think of the workplace as a prime and crucial venue to perform their identity and sense of self.

Ultimately, it is important to keep in mind that appearance choices are affected by social and cultural environments; nevertheless, individuals, and employees, can still exercise some agency in their individualized choices about the way they present themselves in the public sphere and at work. As appearance choices cannot be understood as completely voluntary, but rather socially

525 See Gimlin, *supra* note 446 at 3.
526 Entwistle, "The Dressed Body", *supra* note 492 at 49.
527 Ainsworth, *supra* note 225 at 255.
528 *Ibid*.
529 Moldovan, *supra* note 86 at 716.
530 Beatty, *supra* note 34 at 324.

constrained, the space that is left for individuals'—and employees'—autonomy in the control of their appearance is very important to their sense of self and this is why employers should not be allowed to add unjustified limits and constraints to these choices. After having clarified how social forces greatly influence appearance choices, I briefly examine in the next section some of the considerations that shape these choices, including some practical and external factors as well as the notion of personal preferences.

3.1.2.3 Other Considerations and Personal Preferences

In addition to the many social forces that shape appearance choices, other considerations also shape these choices. First, biological conditions or predispositions inevitably influence how individuals dress and adorn their bodies: "the play with appearance cannot be understood independently of its grounding in the materiality of the body."[531] Individuals' physical bodies can limit their choices over the clothes they can wear (shapes and fabrics), the colour and styling of their hair, their ability to shave on a daily basis, the shoes they can walk in, and so on. Second, time can also be understood as a constraint in the preparation of one's appearance; it can take a lot of time (and effort), especially for some women,[532] to get ready for specific occasions, to apply makeup, style their hair, choose their accessories, and create a coherent and fashionable appearance. Third, the media and the fashion industry also influence the degree of agency exercised by individuals in their appearance decisions "in a world where advertisers and celebrities, more than ever before, are the trendsetters in matters of style."[533] Hence, particular trends or body practices that are en vogue shape individuals' tastes or their perceptions of their range of choices. Fourth, resources, that is, the money to buy items of clothing, shoes, hair and body products, accessories, and makeup definitely constrain appearance choices.

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531 Negrin, *supra* note 437 at 4.

532 Although the majority of the Ninth Circuit in the infamous *Jespersen* case would not agree with this (*Jespersen*, *supra* note 234). See note 259 and accompanying text.

533 Negrin, *supra* note 437 at 5.

In addition, sociologist Colin Campbell pragmatically and convincingly argues that individuals should be careful in interpreting people's clothing choices, as he challenges this very notion of conscious choice in selecting and displaying items of clothing.[534] Campbell argues that practical considerations can affect—and significantly limit—the range of individuals' options in the construction of their appearance. For instance, one might be limited by the items of clothing that can be found in their wardrobe (or that are not in need of washing or mending); the items that still fit (for children, ill people, or individuals experiencing weight loss or gain); and the people who select and buy the clothes (some people leave this task to others, such as children, elderly people, people with disability, or anyone who leaves shopping duties to their partners or even to professional stylists), just to name a few factors.[535]

Moreover, the expression of personal taste and preferences constitutes an obvious influence on appearance choices. Although personal choices in the construction of physical appearance cannot operate outside of the social realm,[536] individuals generally make daily choices about their appearance that they *believe* express their personal preferences. But social psychologists Hazel Rose Markus and Barry Schwartz note that choices might not express personal preferences for everyone.[537] They assert that social class influences people's attitude toward choice, as they note that middle-class individuals usually see choice as an expression of their individuality—"their independent self", whereas working-class individuals "are likely to use choice to signal what they have in common with others—their interdependent self."[538] In addition to the obvious relation between class and available resources, this association between social class and the expression of preferences through choices emphasizes how context is important in determining the degree of agency as well as the importance of the concept of self in shaping one's appearance choices.

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534 Colin Campbell, "The Meaning of Objects and the Meaning of Actions: A Critical Note on the Sociology of Consumption and Theories of Clothing" (1996) 1:1 J Material Culture 93 [C Campbell, "The Meaning of Objects"].

535 *Ibid* at 97-98.

536 See Sommier, *supra* note 516 at 74.

537 Markus & Schwartz, *supra* note 486 at 349.

538 *Ibid* at 350.

Individuals should not think of themselves as free agents when it comes to how they decide to appear in social contexts; free-will over appearance should never be assumed. Of course, some critics might argue instead that individuals have a lot of freedom over dress and grooming choices. For instance, they could assert that an employee with pink hair has complete freedom to dye their hair to a natural colour in order to conform to a workplace dress code that allows only natural hair colours. However, this simplistic reasoning does not take into account the reasons why this particular employee would want to sport pink hair. It could be because the employee feels that pink hair reflects more adequately their personality; it could be because they had worn pink hair their entire life and cannot feel themselves without it, or on the contrary, that pink hair is a new way to express their individuality. Many motivations could be advanced, but the problem sociologists highlight is that it is impossible to identify the many different structures—or influences—that shape one's particular appearance preferences.[539] Appearance choices are thus very "hard to articulate"; "[i]t is often impossible to rationalize one's hairstyle choice, or why one does not feel comfortable wearing makeup."[540] The reasons to adopt a specific way of dress and grooming are various, complex, and contextual,[541] but they are also particularly obscured by different social forces and experiences. The pink haired employee might not know exactly why their hair colour is so important to them—or have a hard time articulating their reasons in a legal argument—but they know that changing it could be detrimental to their sense of self.

To summarize this first section on appearance-based decisions as personal choices, although individuals might think that they have a lot of decision-making power over their appearance, sociological studies show that this power is quite limited. In fact, the choices available to individuals in their everyday clothing and grooming decisions are restricted in many situations. There are a diverse set of forces that so strongly influence people's daily lives that can be difficult—if

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539 Klare also argues that individuals' intent is very complex: "People have many motives for appearance choices besides the desire to reflect personal values. People sometimes act 'strategically' in making appearance choices (for example, they dress in a way that violates their values but will spare them the costs of nonconformity). Sometimes people lack competence in deploying the cultural code, and so dress in a way that sends a different message that what was intended." (Klare, *supra* note 47 at 1410).

540 Tirosh, Book Review of *Dressing Constitutionally*, *supra* note 222 at 498.

541 See Ramachandran, "Freedom of Dress", *supra* note 55 at 23. See also Fisk, *supra* note 57 at 1135.

impossible—to identify, yet consciously or unconsciously, individuals feel the pressure to obey to them.[542] Factors beyond individuals' control, such as social encounters, cultural expectations, resources, space, time, and biological conditions, just to name a few, are all constraints that shape appearance decisions and need to be acknowledged. Nevertheless, individuals can still exercise some level of agency, and make choices—albeit socially and culturally influenced choices—about their appearance in their everyday life. Some of these choices are of fundamental significance for their sense of self. Given that appearance-based decisions can never be characterized as completely free, I argue that the freedom over dress that individuals *do* enjoy—as fundamental to their sense of self—must be preserved within the statutory limits of human rights legislation. Having established that appearance choices are socially constrained, the next section will examine how these choices can serve as a site for identity construction.

3.1.3 Appearance as a Source of Identity Formation

I mentioned above that identities are not fixed or predetermined but rather perpetually constructed. Among many influences, physical appearance is said to contribute to the formation of these identities, as a "means by which identities are marked out and sustained."[543] Although what the dressed and adorned body expresses about one's identity might be ambiguous and unclear,[544] many scholars consider one's appearance as a "reflexive project of identity construction."[545] As sociologist Joanne Finkelstein argues, "fashioning the body becomes a practice through which the individual can fashion a self."[546] Through practices of dress, makeup, and grooming, individuals express their distinctiveness[547] and construct themselves in particular ways[548]: their bodies become

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542 Korsgaard, *supra* note 472 at 2.
543 Entwistle, *The Fashioned Body*, *supra* note 443 at 117.
544 See section 3.1.4.2, *below*, for more on this topic.
545 See e.g. Woodward, *supra* note 524 at 23; Paul Sweetman, "Shop-Windo Dummies? Fashion, the Body, and Emergent Socialities" in Entwistle & Wilson, *supra* note 440, 59 at 73.
546 Joanne Finkelstein, *The Fashioned Self* (Philadelphia: Temple University Press, 1991) at 50.
547 Bayer, "Debunking Unequal Burdens", *supra* note 256 at 489.
548 Woodward, *supra* note 524 at 21.

"canvas[es], with clothes [and other body adornments] acting as the paint"[549] in the creation of a physical identity. Fashioning appearances in particular ways enables the outer expression of individuals' personal understanding of their selves,[550] but it also facilitates creative strategies in the reconstruction and negotiation of individual subjectivities.[551] While I argued in the previous section that appearance choices are socially constrained, I also stressed that there is still some space for individuals' agency, and this exercise of autonomy and freedom through the creation of appearance is said to contribute—albeit to different levels depending on individuals—to the construction and definition of their identities.

The first part of this section explores how individuals construct their identities through appearance, in an era when appearance is so important that it is sometimes considered as the only source of identity formation. The second part discusses the way through which individuals perform their identities, relying on Goffman's and poststructuralist and feminist philosopher Judith Butler's performative theories. The last part focuses on the definition of the self through appearance practices and the various strategies used in this social process.

3.1.3.1 The Cult of Appearance

In contemporary western society, with individualism at its peak, people are witnessing what some describe as a "widespread disillusionment with, and disbelief in, the legitimacy of traditional structures of authority."[552] As religion, social structures, and political narratives no longer seem to create a shared system of meanings, postmodern "individuals have turned toward the body as a foundation on which to reconstruct a reliable sense of self."[553] In an era when individuals are no longer defined as much by their social position or occupation, but rather by their image (created via various strategies, including goods consumption, clothes, and brand loyalty), appearance now

549 Jessica L Neumann, *Fashioning the Self: Performance, Identity & Difference* (MA Thesis, University of Denver, 2011) at 42 [unpublished].
550 *Ibid* at 52.
551 Kaiser, *supra* note 475 at 83; Sweetman, *supra* note 545 at 73.
552 Negrin, *supra* note 437 at 15.
553 *Ibid*.

defines a significant portion of individuals' identity.[554] Appearance has thus become central in the definition of the self, a projection of one's sense of identity; this certainly explains our increasing focus on the body, which "can be interpreted as the remaining source of identity."[555] Therefore, Negrin explains that identity and the self are now increasingly "defined primarily in aesthetic terms—that is, in terms of how one *looks* rather than in terms of what one *does*."[556] In this sense, appearance constitutes some kind of a "tentative truth claim about identity."[557]

In addition, Negrin points out that with the postmodern definition of identity—which is not fixed but mutable—society witnesses a proliferation of body modification techniques, such as dieting, exercise, and plastic surgery; the body in turn is "seen as completely malleable, able to be altered at will in accordance with one's desires."[558] She also adds that permanent techniques of body marking—i.e. tattoos and piercings—can be used to provide their wearers "a coherent and stable sense of self" "by permanently emblazoning [some parts of their identities] on the surface of their bodies."[559] In this sense, tattoos and piercings "can provide some people with an anchor for their identity—a way to satisfy the need for stability, predictability, and permanence."[560] In particular, the quasi immovability—or quasi immutability—character of tattoos enables individuals to consciously stabilize their identity: "Tattoos are meant to be permanent markings on a person's body. Unlike clothing or other accessories, they cannot be easily taken off or changed when a person gets bored or moves on to a new style or phase. Tattoos become a part of a person's story and identity that stays with [them] over time […] tattoos are painful to receive and difficult to remove."[561] This observation is particularly relevant to this dissertation, as tattoos and piercings have become widespread trends that can be problematic in contemporary workplaces and increasingly difficult for employers to forbid.

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554 *Ibid* at 14.
555 Ana Marta González, "Fashion, Image, Identity" in González & Bovone, *supra* note 452, 23 at 41.
556 Negrin, *supra* note 437 at 9 [emphasis added].
557 Kaiser, *supra* note 475 at 80.
558 Negrin, *supra* note 437 at 13.
559 *Ibid* at 29-30.
560 Rima, *supra* note 212 at 720.
561 *Ibid* at 721 [footnotes omitted].

Negrin goes farther in her analysis of appearance and identity, asserting that one's identity is now entirely reduced to one's look.[562] She argues that physical appearance has come to be overvalued as "the *only* source of identity formation,"[563] as "the cult of appearance is privileged over all other modes of self-definition,"[564] while social class, gender relations, and other traditional modes of identity construction seem to have disappeared.[565] Challenging the reductionist conception of self as image, she explains that the greatest concern in contemporary culture lies:

> in the tendency to elevate fashion to a dominant position in everyday life where the cultivation of one's physical appearance supplants all other sources of identity formation. Once primarily the province of women, in contemporary culture, the importance of appearance in defining one's self is becoming more ubiquitous, with men, as well as women, being increasingly image-conscious.[566]

While Negrin's argument on the "aesthetic cult of the self" is a bit radical, as I believe other aspects of people's lives still contribute to the construction of their identity—sex and gender, race, nationality, age, religious affiliations, occupation, marital status, and the like—she is persuasive in maintaining that appearance is extremely important in today's society as "an inescapable aspect of our identity as social beings,"[567] which is aligned with my contention that appearance does matter and should be taken seriously, particularly when tied to work.

3.1.3.2 The Self as a Performer

Individuals' appearance is said to reflect a choice that symbolizes their freedom over their existence, even if this freedom is limited to some extent. The construction of appearance provides an opportunity to make decisions and express one's conception of one's own body and preferences,[568] although I have emphasized in the last section that these choices are strongly influenced by social forces and social expectations. Individuals will inevitably consider—albeit

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562 But see Elizabeth Wilson, "A Response to Llewellyn Negrin" (2000) 17:5 Theory, Culture & Society 121 at 123.
563 Negrin, *supra* note 437 at 32 [emphasis added].
564 *Ibid* at 2.
565 Sweetman, *supra* note 545 at 64.
566 Negrin, *supra* note 437 at 5.
567 *Ibid*.
568 See Pagès-Delon, *supra* note 517 at 143.

sometimes unconsciously—the specific social context and situation for which they are preparing their bodies, among other concerns. Fashioning appearances constitutes a never-ending process through which individuals "attempt to convince others that they are a particular kind of person"[569]; when they do so successfully—i.e. when others perceive them to actually *be* this kind of person—appearances are deemed an extension of the self. In accordance with Goffman's theory, identity therefore turns into "a theatrical performance in which one's self is constituted by, and transformed in accordance with, the costume that one assumes"; "for the postmodern self, appearances do not mask reality but *are* reality."[570] This leads to a new conception of the self—"the self as performer"[571]—where individuals can choose the identity they want to project and perform, through appearance strategies, and particularly through dress and fashion choices:

> Fashion choices, in particular, are linked to the fragmented identity and strategies of the performer, who is always obliged to cope with a variety of characters. It is an opportunity for distancing oneself from one's official role, for giving the other roles an opportunity to emerge. Clothing is a basic element of the particular 'situated system of activity', of the peculiar interaction moment in which the actor establishes the character he will play, makes his choice for one of his 'multiple self-identifications' or, better, decides which self-identification he should privilege in a particular situation.[572]

Hence, individuals are actively involved in the daily construction of their identities as social individuals when they make appearance choices, which are based on their interpretation of social constraints and on how they position themselves in relation to these constraints.[573]

Aligned with this idea of the self as a performer, Butler introduced the performative theory of gender identity.[574] As she rejects the essentialist assertion that identities are permanent and unalterable, Butler insists on the fact that gender does not express an "essential self." In her influential work, she criticizes the feminist assumption about the distinction between biological sex

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569 Woodward, *supra* note 524 at 12.
570 Negrin, *supra* note 437 at 25 [emphasis added].
571 *Ibid* at 9.
572 Bovone, *supra* note 501 at 72.
573 Pagès-Delon, *supra* note 517 at 135.
574 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) [Butler, *Gender Trouble*]; Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993); Judith Butler, *Undoing Gender* (New York: Routledge, 2004).

and cultural gender,[575] and instead refers to the "constructed character" of sex and gender as "unnatural."[576] Butler's theory of gender performativity implies that gender is not defined by "a set of characteristics that individuals possess,"[577] but it is rather discursively constructed through a constrained and repetitive series of acts that individuals perform. Butler suggests that gender can only be real "to the extent that it is performed"[578]; "because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all."[579] Gender is a sequence of acts that someone "does," but it is not something that one "is"; it is "a verb rather than a noun, a 'doing' rather than a 'being.'"[580]

The idea of repetition or reiteration is firmly embedded in the theory of gender performativity. Although Butler argues that bodies are gendered from the moment of birth through other people's perceptions (e.g. when the doctor claims "It's a girl!"), she points out that it is the succession of repetitive acts that strengthens the identity,[581] such as dressing and grooming on a daily basis. Using the phenomenon of drag, "where there is a disjunction between the anatomy of the performer and the gender that is being performed,"[582] Butler asserts that sex and gender identities are not fixed and can be changed, albeit not easily, to a certain extent. As she popularized the term "identity performance," Butler's consideration of the social construction of gender has been since expanded "to refer to the intentional and unintentional behaviors that communicate one's identity and status in a social group."[583]

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575 For an explanation of this distinction, see Ruth Fletcher, "Feminist Legal Theory" in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) 135 at 138-143.

576 Sarah Salih, *Judith Butler* (London; New York: Routledge, 2002) at 46-47.

577 Negrin, *supra* note 437 at 144.

578 Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" in Sue-Ellen Case, ed, *Performing Feminisms: Feminist Critical Theory and Theatre* (Baltimore: John Hopkins University Press, 1990) 270 at 278 [Butler, "Performative Acts"].

579 Butler, *Gender Trouble*, *supra* note 574 at 140.

580 *Ibid* at 25.

581 Butler, "Performative Acts", *supra* note 578 at 274.

582 Negrin, *supra* note 437 at 145.

583 Roberts & Roberts, *supra* note 207 at 380.

In this way, identity can be conceptualized as "constituted in time through […] 'corporeal style' consisting of repeated and rehearsed public acts."[584] Gender is one of the pre-eminent aspects of identity articulated by fashion and appearance, "since clothes are the visible social marker of gender difference."[585] Gender is socially constructed through appearance,[586] and in particular, clothes play an important part in the performance of gender; "[t]his performance takes place in a climate of social expectations regarding correct dress codes, and when women conform to these they both cite the norms and reinforce them."[587] Legal scholars Carbado, Gulati, and Ramachandran point out that in this context, women can exercise a certain degree of agency "to signal their willingness or refusal to comply with gender normative standards and behavior," as the terms "wear" and "dress up" figuratively suggest this possibility for agency.[588] As noted above, the workplace is a primary site for the public performance of one's gender and more generally of one's identity, as the quotidian recurrence of social interactions with workplace social actors reinforces the importance of this venue for employees' definition of their selves.

3.1.3.3 Defining the Self Through Appearance

The relationship between appearance and identity as a project of defining oneself is a contradictory one, "situated between differentiation and imitation"[589]: while some individuals have a desire to express their individuality through their appearance—and therefore, distinguish themselves from the crowd—the construction of others' appearance is concurrently driven by a desire to fit in.[590] Some individuals use appearance to express their sense of uniqueness, to differentiate themselves from others—and "from what others would more obviously expect from" them[591]—and sometimes to

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584 Efrat Tseëlon, "From Fashion to Masquerade: Towards an Ungendered Paradigm" in Entwistle & Wilson, *supra* note 440, 103 at 107.

585 Entwistle, *The Fashioned Body*, *supra* note 443 at xxii.

586 See Efrat Tseëlon, "What is Beautiful is Bad: Physical Attractiveness as stigma" (1992) 22 J Theory Soc Behaviour 295 at 295 [Tseëlon, "What is Beautiful"].

587 Woodward, *supra* note 524 at 17.

588 Devon W Carbado, G Mitu Gulati & Gowri Ramachandran, "Makeup and Women at Work" in Joel W Friedman, ed, *Employment Discrimination Stories* (New York: Foundation Press, 2006) 1 at 15.

589 Entwistle, *The Fashioned Body*, *supra* note 443 at 115.

590 See Negrin, *supra* note 437 at 16; Soper, *supra* note 440 at 29.

591 Bovone, *supra* note 501 at 72.

reject social dictates through a form of resistance or rebellion.[592] But conformism is also unavoidable[593] as a strategy in the cultivation of physical appearance. As a widespread tactic in the fashioning of the body, conformism allows individuals to maintain their membership in a social group and blend in the crowd, by complying with the commonly accepted social aesthetic to appear a certain way. As a result, daily appearance choices reflect the conflict "between the social conventions we deem necessary for our social life and the self-expression we deem necessary for personal realization."[594] Physical appearance is a way to position and distinguish oneself in society; it simultaneously meets the needs of belonging and differentiation.

However, individuals' appearance does not always contribute to identity formation. On some occasions, social pressures will compel individuals to cover or accentuate some aspects of their identities in a quest for conformity, "especially when those aspects […] are devalued or stigmatized within society."[595] Legal scholar Kenji Yoshino[596] refers to "covering" as "the intentional nonperformance or underperformance of a core aspect of one's identity."[597] Borrowing from Goffman's modes of assimilation in his theory of performance,[598] Yoshino contrasts covering from "passing," which refers to the strategy of hiding an aspect of one's identity.[599] For instance, someone who is gay might use "passing" as a strategy to persuade others that they are straight, and therefore construct their appearance accordingly. This person might instead "cover" their sexual orientation by engaging in a series of actions that will downplay their homosexuality or simply not perform their sexuality, and try to appear as straight, without completely lying about being gay. Legal scholar Janet Ainsworth asserts that covering—"as an interactional strategy [that] is not always […] freely chosen"—can be used by racial minorities when overt demands by other social actors ask them to

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592 See Berry, *The Power of Looks*, *supra* note 96 at 109.
593 Ann Margaret Brach, "Identity and Intersubjectivity" in González & Bovone, *supra* note 452, 48 at 48.
594 González, *supra* note 555 at 35.
595 Ainsworth, *supra* note 225 at 243.
596 Yoshino, *supra* note 209.
597 Ainsworth, *supra* note 225 at 243.
598 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice-Hall, 1963) at 102-104.
599 Yoshino, *supra* note 209 at 769.

make appearance choices that do not emphasize their racial identities.[600] She also discusses Yoshino's "reverse covering" strategy, in which individuals may be asked to accentuate their identity markers, such as women might be asked to dress and appear "in ostentatiously feminine ways"[601] in order to convince others that they acknowledge—and respect—traditional gender norms.[602]

These tactics can definitely be considered as discriminatory, particularly in the workplace, as "they do not impose similar appearance requirements on members of the hegemonic group."[603] Ainsworth argues that both covering and reverse covering are appearance strategies that might result in a loss of self-esteem, when there is "a lack of congruence between role identity performance and internal identity commitments" (or the self-perceived internal identity commitments): "Identity covering thus makes difference invisible, whereas reverse covering makes difference manifest. What both covering and reverse covering have in common is that in both practices, the actor's identity performance is at odds with the individual's sense of authentic self."[604] While the subjective sense of authentic self should not be confused with an essential self (as I argue that there is no such thing), it should rather be understood as a self-perceived set of internal identity commitments through which the individual feels genuine and unconstrained. With that in mind, some commentators contend that "increased employee authenticity correlates to increased employee well-being," noting that a certain protection of employees' appearance and expression of their "authentic self" generates positive impacts for individuals and for organizations.[605]

Many scholars contend that appearance and identity only coincide when the fashioning of appearance is successful, when the body is dressed and adorned the "right way."[606] Relying on her fieldwork on how women make their appearance choices on a daily basis, Woodward, for example, reports many instances where women failed to project "the person they thought they could through

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600 Ainsworth, *supra* note 225 at 243.
601 *Ibid*.
602 Yoshino, *supra* note 209 at 909.
603 Tirosh, "Adjudicating Appearance", *supra* note 90 at 56.
604 Ainsworth, *supra* note 225 at 243. See also Moldovan, *supra* note 86 at 711.
605 Moldovan, *supra* note 86 at 714, 715.
606 See e.g. Entwistle, *The Fashioned Body*, *supra* note 443 at 8.

clothing," contending that clothing does not simply and straightforwardly reveal identity.[607] Along with Ainsworth, who argues that a "mismatch" between individuals' "privately felt authentic self and its public performance" can be alienating and even humiliating,[608] Entwistle also notes that "dressed inappropriately we are uncomfortable; we feel ourselves open to social condemnation."[609] As people generally try to avoid possible social embarrassment, the various strategies adopted in the fashioning of one's appearance are characterized by a "precarious balancing act between individuality and conformity,"[610] which can definitely lead to a misinterpretation of their physical appearance—and their associated invisible characteristics—by others, but also in a loss of a sense of self for individuals engaged in it. In addition, Susan Kaiser rightly points out that "not all individuals are equally creative," nor "do they have equal access to commodities or images" in the cultivation of personal appearance.[611] Therefore, gaffes and missteps in dress and appearance can result from one's unwary or unfortunate choices, which can lead to a lack of self-confidence, but they can also stem from limited resources and knowledge of appearance construction, which can be equally damaging.

The cultivation of appearance should not only be deemed to have a negative impact on the individuals actively engaging in it. Appearance can help to boost one's self-esteem and confidence[612] in particular contexts, and thus wearing particular types of clothes can contribute to one's positive and satisfying definition of the self. Historically, feminist scholarship has severely critiqued appearance concerns and fashion as expressions of subordination and patriarchal oppression.[613] However, there is no consensus among contemporary feminists, as some, and especially third wave feminists, embrace fashion and appearance as sources of pleasure.[614] Attention to one's appearance can be enjoyable and gratifying, and should no longer be seen merely

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607 Woodward, *supra* note 524 at 157.
608 Ainsworth, *supra* note 225 at 244.
609 Entwistle, *The Fashioned Body*, *supra* note 443 at 8.
610 Negrin, *supra* note 437 at 16.
611 Kaiser, *supra* note 475 at 96.
612 See Tseëlon, "Self Presentation", *supra* note 495 at 511.
613 See Elizabeth Wilson, *Adorned in Dreams*, 2d ed (London: IB Tauris & Co, 2003) at 13.
614 See Rhode, *The Beauty Bias*, *supra* note 199 at 69-89.

in terms of "a way of enhancing one's appeal in the eyes of others."[615] As Negrin also points out, as beauty products are more than ever promoted as means of self-gratification, a "concern with one's appearance is [now] presented as something one does for one-self rather than in order to please" others.[616]

To conclude this section on appearance as a source of identity formation, although I would not go as far as Negrin in her assertion that appearance is now considered as the *only* source of identity construction, appearance certainly contributes to one's definition of the self— particularly in the workplace as it is such an important venue for employees to express their personhood.[617] Employees are engaged in a continuous process of self-definition through their appearance choices in their workplace, which can be an important site of individual fulfillment and a space where some spend most of their waking hours. When employers impose strict dress and grooming codes in the workplace, they may impede their employees' ability to define their identities or personhood, which can be seen as an encroachment on their dignity and autonomy. Moreover, particular aspects of appearance can be considered as fundamental to an employee's self-definition, and limiting these choices could be seen as an invasion of privacy.[618] Appearance matters to individuals and employees' lives, as it contributes to their identities; it is also a powerful means of expression, as discussed in the next section.

3.1.4 Communicating Identity Through Appearance

Although appearance is seen as a source of identity formation, it is also, somewhat paradoxically, considered to be communicating an individual's identity, as "a statement of who one is."[619] As mentioned in the last section, while the way people dress and groom themselves can help to define who they are—an assertion that does not seem obvious at first—the assumption that

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615 Negrin, *supra* note 437 at 19.
616 *Ibid*.
617 See Marshall, *supra* note 477 at 194.
618 See Chapter 6, section 6.1.3, *below*.
619 Negrin, *supra* note 437 at 25.

appearance *expresses* their identity and their inner self is widely accepted and well established,[620] albeit to varying degrees. In this way, appearance is said to function as a "greeting card,"[621] revealing an individual's inner personality. In fact, the expression of an individual's identity is deemed necessary for the self to be completely realized: "the interior self must be expressed congruently in its outward manifestations through a complex set of social semiotic codes."[622] While the previous sections established that appearance choices are influenced by both structure and agency, and that appearance serves to define individuals' identity, this section analyzes appearance as a means of communication of the self to others.

The first part of this section explains how copious amounts of information are conveyed through individuals' appearance. I then go on to argue that one must be extremely careful when reading others' appearance, since we assist to what some scholars call the weakening of the code of appearances. Last, as misinterpretation is a common problem when trying to decipher others' appearance, the pervasive negative effect of communicating through appearance is discussed, that is, appearance is a significant source of bias and stereotypes.

3.1.4.1 The Exchange of Information Through Appearance

Physical appearance provides information about how individuals see themselves and how they "construct [themselves] for the rest of the world to see."[623] But there are various conceptions of how appearance accurately communicates one's identity, in particular to what extent one can precisely read someone's identity or personality through their appearance—their clothes, their hair, their accessories, the way they groom themselves, etc. On the one hand, some scholars argue that appearance is the mirror of an individual's identity, and at its extreme, this approach considers all appearance signs to be straightforwardly read and interpreted so that one can know who people are

620 See Efrat Tseëlon, "How Successful is Communication via Clothing? Thoughts and Evidence on an Unexamined Paradigm" in González & Bovone, *supra* note 452, 109 at 119 [Tseëlon, "How Successful"].
621 María Elena Larraín, "Adolescence: Identity, Fashion and Narcissism" in González & Bovone, *supra* note 452, 138 at 151.
622 Ainsworth, *supra* note 225 at 243.
623 Fisk, *supra* note 57 at 1111.

only by looking at their appearance.[624] According to this view, "the choices of the shapes, colours and textures we put onto our body" communicates "intensely personal statements of who we are."[625] On the other hand, there is a large body of literature discussing the end of the signifier/signified paradigm, arguing that in the postmodern western world, appearance and clothes do not communicate clearly, as these signs do not have a fixed meaning. Therefore, because the meanings associated with appearance are "contextual, complex and contingent and negotiated within a context,"[626] one can no longer accurately and instantly interpret people's appearance as revealing who they are. While the latter approach convincingly warns against biases associated with observable physical characteristics, it contributes to the ambiguous understanding of appearance and its social repercussions, but nevertheless furthers the assertion that appearance definitely matters. In this sense, it is important to allow individuals to control their own appearance with little interference as possible.

The body and its appearance produce meaning and disseminate large amounts of information, some of which is intentional and some of which is unconscious. Every person both "sends" an appearance and "receives" the appearance of others; an exchange of information and impressions is thus created in daily interactions between individuals.[627] This exchange occurs in all encounters between two individuals—in the workplace, at the grocery store, during casual or formal social events, with friends, as well as with closest family members—but this informational trade is particularly observable when two strangers first encounter each other. When individuals face a stranger, they are inevitably influenced by their observable characteristics and appearance, i.e. their body and its physical presentation. Along with Goffman's conception of social interactions, individuals usually consider strangers' appearance as a source of information about them, from which they can infer their personality, their personal preferences, their social position, their

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624 See e.g. Alison Lurie, *The Language of Clothes* (New York: Random House, 1981).

625 Pitt & Clayton, *supra* note 313 at 56.

626 Tseëlon, "How Successful", *supra* note 620 at 113. See also Ramachandran, "Freedom of Dress", *supra* note 55 at 47.

627 See Marie-Thérèse Duflos-Priot, "Le maquillage, séduction protocolaire et artifice normalisé" (1987) 46 Communications 245 at 245.

occupation, their marital status, and so on. In this way, appearance is a form of social language[628] or social communication, in which the sender transmits a message—often unwittingly—to be decoded by the receiver, who is also generally unaware of the exercise. Unlike popular sayings that looks do not matter, people are influenced by others' appearance on a daily basis, conferring substantial significance to visual initial impressions: "The first impression that we read from a person's appearance […] carries inordinate weight; it contextualizes and guides our subsequent interactions, often unconsciously."[629] First impressions are definitely important, and while individuals "must rely on them to start any kind of relation,"[630] the relationship between who one is and how others perceive this person during a single encounter leaves much room for misinterpretation.

In this sending and receiving reciprocal paradigm, individuals "transmit" their appearance for others to read; they convey a particular image that is said to communicate who they are—or who they want others to believe they are—at least to some extent. An individual's physical appearance is not accidental,[631] in that some efforts—whether socially constructed or a manifestation of agency—are made to shape the body through clothing, accessories, and adornment. Some will put an incredible amount of effort, time, and resources in the creation of a satisfying appearance, one that they believe displays their "true" identity—or, in postmodernist terms, an appearance that they consider reveals aspects of some of their identities. These efforts can be deliberate in order to convey a particular image, and the choices made in the construction of an intended appearance will usually require some agency to express something particular about the wearer's identity. In some situations, as mentioned in the last section, individuals will also put a lot of effort into covering some aspects of their identities, or enhancing a specific aspect of an identity they believe they should possess—or that they want others to believe they possess.[632] In other cases, however, appearance can be constructed rather unconsciously. For instance, some individuals can put negligible effort into their appearance by displaying drab clothes and minimal grooming, but even then, appearance

628 N Caldwell, *supra* note 205 at 1.
629 Nina G Jablonski, *Skin: A Natural History* (Berkeley: University of California Press, 2013) at 160-161.
630 Bovone, *supra* note 501 at 72.
631 See C Campbell, "The Meaning of Objects", *supra* note 534 at 99.
632 See section 3.1.3.3, *above*.

can tell something about their definition of the self: they may "see themselves as free of vanity and superficiality, and they participate in the creation of a subculture that rejects obvious attention to appearance,"[633] keeping away from fashion and its shallowness. Therefore, it is very difficult—if impossible—for individuals to escape this nonverbal communication of personal information about themselves (their identity, their personality, their social position) through the way they appear: "Dress is never neutral and meaningless but is inextricably culturally coded."[634]

Some appearance choices are displayed consciously and purposely, and these choices consequently become, on a personal level, a quintessential form of expression. Negrin points out that "individuals themselves, when speaking of their fashion choices, see them primarily as an act of self-expression."[635] As a means of expression,[636] some scholars argue that choices about appearance and dress "can, like words, communicate ideas and statements."[637] For instance, some individuals will dress in a particular way to signify their support for a cause or their dissatisfaction with a situation—one can think of a t-shirt bearing a written message, like "Black Lives Matter."[638] In this case, the message is quite explicit, and the t-shirt definitely constitutes a means of expression. This can also be the case with symbols associated with particular groups, like the racist swastika or the red square[639] worn by Quebec students protesting during the Maple Spring ("Printemps érable"). Piercings and tattoos are likewise generally considered as important means of expression.[640] A tattoo, in particular, is a way through which individuals are "able to express their past and present selves"; "it is a piece of art permanently worn on the person's body intended to say something about

633 Ainsworth, *supra* note 225 at 244; Fisk, *supra* note 57 at 1112.
634 Ainsworth, *supra* note 225 at 244.
635 Negrin, *supra* note 437 at 19.
636 See Jeanette C Lauer & Robert H Lauer, *Fashion Power: The Meaning of Fashion in American Society* (Englewood Cliffs, NJ: Prentice-Hall, 1981) at 4.
637 Ramachandran, "Freedom of Dress", *supra* note 55 at 46.
638 See e.g. Scott Jaschik, "The Law Professor Who Answered Back" (12 July 2016), online: *Inside Higher Ed* <https://www.insidehighered.com/news/2016/07/12/law-professor-responds-students-who-complained-about-her-black-lives-matter-shirt>.
639 See e.g. *Société canadienne des postes et Syndicat des travailleuses et travailleurs des postes*, DTE 2014T-13 (Qc Arb) [*Société canadienne des postes* 2014].
640 See Mark Burgess & Louise Clark, "Do 'Savage Origins' of Tattoos Cast a Prejudicial Shadow on Contemporary Tattooed Individuals?" (2010) 40 J App Soc Psych 746 at 746-747; Margo DeMello, "Not Just for Bikers Anymore: Popular Representations for American Tattooing" (1995) 29:3 J Popular Culture 37.

who that person is."[641] Appearance and clothing styles are also commonly considered as ways of sending messages. Laura Bovone concludes from her field work with female students that these modes of communications "can be a privileged means for expressing the most secret part of themselves that they are not able to put into words."[642]

The exchange of information through appearance can never be achieved unilaterally; an interaction with another person—the "reader" or the "receiver"—is necessary for the identity of the sender to be revealed. The person interpreting the appearance is very important in the process, as personal experience, history, social position, and many other characteristics can influence how they decipher the appearance of others.[643] Although physical appearance is shaped by various social codes and conventions, how receivers interpret the information will vary from one person to another, depending on the interpreter's socio-cultural affiliations and experience.[644] Erica Reischer and Kathryn S. Koo assert that "[o]ur bodies transmit a dizzying array of complex information about ourselves, with or without our intention, and we and other members of our culture tend to be expert at reading those culturally specific meanings almost instantaneously."[645] People do infer an incredible amount of information from one glance at a person's image, whether they admit it or not; individuals "are all inveterate hermeneuticians engaged in a never-ending round of conjecture and refutation"[646] on the interpretation of appearance. But to be able to decode the meanings of appearance, "one needs to be 'in the know': like all signs, dress depends upon the cultural knowledge of the reader in order for it to be meaningful."[647]

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641 Rima, *supra* note 212 at 720 [footnote omitted].
642 Bovone, *supra* note 501 at 76.
643 Tseëlon, "How Successful", *supra* note 620 at 118.
644 See Pagès-Delon, *supra* note 517 at 11.
645 Reischer & Koo, *supra* note 442 at 300.
646 William J F Keenan, "Dress Freedom: The Personal and the Political" in William J F Keenan, ed, *Dressed to Impress: Looking the Part* (Oxford; New York: Berg, 2001) 179 at 181-182.
647 Entwistle, *The Fashioned Body*, *supra* note 443 at 134.

3.1.4.2 The Weakening of the Code of Appearances

As discussed above, social forces greatly influence people's daily appearance choices. Furthermore, the expression of appearance—and interpretation thereof—do not operate in a vacuum and are particularly influenced by social conventions: "the codes through which identity is communicated must be created and mediated through shared cultural conventions of meaning."[648] As Ainsworth rightly asserts, "[w]ithout shared social conventions as to what particular aspects of dress and grooming might signify, an individual's choices cannot communicate identity."[649] Various standards and norms, often unwritten, determine what is appropriate and what is not, and what meaning can be inferred from one particular image. These conventions of appearance "transform flesh into something recognizable and meaningful to a culture; a body that does not conform, that transgresses such cultural codes, is likely to cause offence and outrage and be met with scorn or incredulity."[650] Therefore, for the dressed and adorned body to communicate something about an individual and "articulate particular identities,"[651] "a common vocabulary, a common symbol set, is needed to decipher those meanings."[652] In this way, Entwistle[653] refers to Bourdieu's habitus to describe how subcultures "depend upon particular forms of knowledge and behaviour and require particular ways of being"; "subcultures produce their own particular practices which are in part bodily orientations or ways of moving, walking and talking which are worn like a 'second skin' on the body of the skinhead, punk, raver."[654] However, if such a "socially shared clothing code" exists, many scholars argue that it is "rather elusive."[655]

Relying on the literature on the ambiguous nature of the semiotics of appearance, it is important to be cautious about the direct association between appearance and language. While it can be true that appearance can convey clear meaning like words on some occasions—such as the

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648 Ainsworth, *supra* note 225 at 244.
649 *Ibid*.
650 Entwistle, *The Fashioned Body*, *supra* note 443 at 8.
651 *Ibid* at 137.
652 Reischer & Koo, *supra* note 442 at 300. See also K Bartlett, *supra* note 176 at 2548.
653 Entwistle, *The Fashioned Body*, *supra* note 443 at 137. See also García Martínez, *supra* note 452 at 96.
654 Entwistle, *The Fashioned Body*, *supra* note 443 at 137.
655 Tseëlon, "How Successful", *supra* note 620 at 130.

example of wearing a t-shirt bearing a message—it is rarely the case that the ideas, statements, and information communicated through appearance can be unambiguously interpreted.[656] This contemporary indeterminacy of meanings is explained by sociologist Fred Davis as a loosening of the relationship between signifier and signified in appearance signs.[657] In fact, elements of appearance, and especially clothes, are "loaded with significance," but "what they say is never entirely clear."[658] With the exception of aspects of appearance displaying a clear symbol or a written statement, "[n]o single type or article of clothing can be taken alone as an indication of identity"; "[m]ost people wear different types of clothing for different occasions, each of which relates to only one aspect of who they are. […] The identity of a person cannot be reduced to a single aspect, certainly not to a single type of clothing."[659] The context indeed greatly affects the interpretation of people's appearance—one can think of cornrows or dreadlocks, for instance, which can mean different things when worn by an African-American woman and by a Caucasian woman.[660] In this instance, Ramachandran explains how cornrows on a white woman could be "culturally meaningless, culturally insensitive, or exoticizing"; it could also "express a respect for and solidarity with African-American women"; or it might "express the fact that the woman we thought was white is in fact, like many people, of mixed racial heritage."[661] Without communicating directly with the wearer through a common language, one cannot speculate on the significance of their appearance and should interpret personal markers with caution.[662]

Hence, aspects of appearance can communicate, but they are "now seen as free-floating signifiers that are infinitely commutable since they are no longer associated with any external referents."[663] The various messages communicated through appearance may involve individual affirmation, belonging to a group, or rejection of societal values, among many other meanings, but

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656 *Ibid* at 115. See also Tirosh, "Adjudicating Appearance", *supra* note 90 at 83-89.
657 Fred Davis, *Fashion, Culture, and Identity* (Chicago: University of Chicago Press, 1992) at 5-15.
658 Keenan, *supra* note 646 at 181.
659 Brach, *supra* note 593 at 56.
660 Ramachandran, "Freedom of Dress", *supra* note 55 at 22. See generally Chapter 2, section 2.2.1.2, *above*.
661 Ramachandran, "Freedom of Dress", *supra* note 55 at 22.
662 See García Martínez, *supra* note 452 at 94; Tirosh, "Adjudicating Appearance", *supra* note 90 at 81.
663 Negrin, *supra* note 437 at 21.

they will invariably depend on the context and the social conventions involved.[664] Some may even use appearance to express solidarity "with a group to which [they] do not actually belong", like "wearing green on St-Patrick's Day even if one is not Irish."[665] With this is mind, it is reasonable to argue, along with those who report the end of the signifier/signified paradigm, that there is no longer *a single* "set of tacit understandings and significances,"[666] as a shared common code of appearance weakens.[667] As Entwistle puts it, "fashion can never be said to communicate messages in the simple way that some academic (and popular) analysis would have it. It is far too subtle to allow for direct communication of an 'agenda'."[668] In the context of employment, this means that employers must be careful in imposing appearance policies that might impinge on their employees' rights. With reference to the example of the cornrows mentioned above, employers could be accused of discrimination when such a marker can be linked to a prohibited ground, race in this instance.[669] But since the meaning of personal markers cannot be deciphered in a straightforward way, the corresponding discrimination or impingement of fundamental rights[670] is not always obvious.

In addition, as the rules of appearance and their meanings are neither permanent nor predetermined, they are subject to change from culture to culture. Reischer and Koo point to the unsettled meaning of clothes across cultures with the example of the colour white. A white dress can be profoundly associated with marriage in many Eurocentric cultures but indicates, for example, widowhood for Hindu women in India.[671] Moreover, they assert that the changeable nature of appearance conventions can also be observed within a single culture during different periods of time. They discuss the relationship between class and obesity, which has changed over time: "Whereas in many [w]estern cultures a large, plump body once connoted prosperity, health, and

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664 See Ramachandran, "Freedom of Dress", *supra* note 55 at 45; Klare, *supra* note 47 at 1408.
665 Brach, *supra* note 593 at 54.
666 García Martínez, *supra* note 452 at 96.
667 *Ibid* at 105.
668 Entwistle, *The Fashioned Body*, *supra* note 443 at xx.
669 See Chapter 2, section 2.2.1.2, *above*, for an overview of the literature discussing appearance discrimination based on race.
670 See Chapter 5 on "The Anti-Discrimination Framework" and Chapter 6 on "The Fundamental Rights at Work Framework", *below*.
671 Reischer & Koo, *supra* note 442 at 300.

high social ranking, this same body now signifies quite the opposite: poverty, ill health, and low socioeconomic status."[672] As aspects of appearance no longer have a fixed meaning,[673] it becomes difficult to unmistakably read their wearer's occupation, ethnicity, age, social class, and the like.

While this chapter does not intend to review the history of appearance, in the past, the way in which someone dressed was "an indication of […] social identity,"[674] a social marker par excellence, and a way of "expressing class distinction."[675] Historically, statutory legislation was adopted to ensure that people would dress and appear according to their position in the social hierarchy, at a time when many occupations or class status were visible through clothes[676]; this was an era when "dress was a direct and unambiguous indicator of a social identity connected directly with social standing."[677] Sumptuary laws, reaching their climax in the beginning of the sixteenth century,[678] had the purpose of "ensuring that individuals dressed (and behaved) in a manner consonant with their social position"; the objective of this legislation "was to patrol and enforce this link and thereby prevent individuals from trying to claim an identity they did not possess by 'dressing above their station'."[679] During the twentieth century, a lot of these social markers have disappeared, and one can no longer unmistakably distinguish between someone from a working class or upper class background by glancing at their clothes: "[i]n contemporary western culture class is no longer so readily apparent to the eye through dress alone."[680] Entwistle adds that while there is no longer a clear code of class identity visible through physical appearance, "smaller details can still mark out

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672 *Ibid*. See also Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley: University of California Press, 2004) at 195.

673 See Negrin, *supra* note 437 at 21.

674 C Campbell, "The Modern Fashion Pattern", *supra* note 460 at 15.

675 González, *supra* note 555 at 30.

676 See Entwistle, *The Fashioned Body*, *supra* note 443 at 115.

677 C Campbell, "The Modern Fashion Pattern", *supra* note 460 at 15. See also Ramachandran, "Freedom of Dress", *supra* note 55 at 40-41.

678 Robson, *Dressing Constitutionally*, *supra* note 219 at 10. For a detailed analysis of sumptuary laws, see Ruthann Robson, "Beyond Sumptuary: Constitutionalism, Clothes, and Bodies in Anglo-American Law, 215-1789" (2013) 2:2 Brit J Am Leg Studies 477.

679 C Campbell, "The Modern Fashion Pattern", *supra* note 460 at 15.

680 Entwistle, *The Fashioned Body*, *supra* note 443 at 115, 134.

distinctions"; she explains that, for instance, quality is still a "key distinguisher of class: such fabrics as cashmere, linen and leather are associated with 'quality', as are good seams and proper lining."[681]

Appearance, which I argued in this section serves to communicate one's identity or sense of self to others, can therefore be considered a means of expression, which can be protected, to some extent, by freedom of speech or freedom of expression, when employers limit their employees' right to express themselves through their appearance.[682] More importantly, however, scholars agree on the fact that a common code of appearance no longer exists, and one must be careful when interpreting others' dress and grooming in an attempt to grasp who they are—or, in the context of employment, in an attempt to ascertain if they possess the qualities required by the work they will perform. Although individuals might be "driven to look for what motivations and personality traits lie under the appearance,"[683] they should refrain from doing so as much as possible, as appearance is deceiving. In the next section, I discuss the perverse effect of communicating through appearance, that is, bias and stereotypes that result too often from physical appearance.

3.1.4.3 Catalyzing Bias and Stereotypes

While some will try to express who they are through appearance choices, or communicate "a message about the self,"[684] others will refrain from doing so as much as they can; however, no one is immune to someone reading their appearance. While dress and grooming can reveal a plethora of information about their wearers, they can also form the basis for prejudicial social judgments and stereotypes.[685] Visible features of an individual are often considered to reveal invisible characteristics that this individual possesses,[686] and the interpretation of this individual's appearance can result in preconceived ideas about them.[687] For instance, one's failure to take care

681 *Ibid* at 134.
682 See Chapter 6, *below*.
683 Tirosh, "Adjudicating Appearance", *supra* note 90 at 84, n 103.
684 Reischer & Koo, *supra* note 442 at 300.
685 See Tseëlon, "What is Beautiful", *supra* note 586 at 296.
686 Duflos-Priot, *supra* note 627 at 246.
687 See Adamitis, *supra* note 201 at 197.

of one's appearance can often be "seen as a sign of moral laxity."[688] In professional workplaces, some employers go as far as assuming that employees' dress and grooming decisions epitomize their business judgment.[689] Moreover, people of size are "negatively stereotyped or stigmatized,"[690] often assumed to lack self-control, be lazy, incompetent, and unproductive.[691] In this sense, obesity, which has "most often been received as evidence of abnormality or pathological deviance"[692] in the literature, is another example of a condition that is socially constructed. Susan Bordo argues that, in contemporary western culture, "the firm, developed body has become a symbol of correct *attitude*," which is thought to reveal "willpower, energy, [and] the ability to 'shape your life'."[693] Similarly, attractive people are usually judged positively, confirming the idea that what is beautiful is necessarily good.[694]

Tattoos and body piercings have long been associated with gang members, bikers, and criminality in general.[695] While these body modification practices still connote membership in marginalized or stigmatized subcultural groups—particularly for older generations—tattoos and piercings are now mainstream and can no longer be said to signify a certain group allegiance.[696] An awareness of looks-bias, which occurs early on,[697] is now much needed in an increasingly diverse society, although some authors argue that society is far from achieving this goal: "Unlike our dealings with the other 'isms' (racism, and so on), the social awareness we have of appearance bias is shallow, infantile in its development, and mostly acceptable as a given and unchangeable form of

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688 Negrin, *supra* note 437 at 9.

689 See DaPonte Thornton, *supra* note 216 at 179.

690 Thomas Perks, "Physical Capital and the Embodied Nature of Income Inequality: Gender Differences in the Effect of Body Size on Workers' Incomes in Canada" (2012) 49 Can Rev Sociology 1 at 8.

691 Adamitis, *supra* note 201 at 197; Esther D Rothblum et al, "The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization" (1990) 37 J Vocational Behavior 251 at 252.

692 Reischer & Koo, *supra* note 442 at 303.

693 Bordo, *supra* note 672 at 195 [emphasis in original].

694 Jean-François Amadieu, *Le poids des apparences – Beauté, amour et gloire* (Paris: Odile Jacob, 2002) at 44; Gordon L Patzer, *The Physical Attractiveness Phenomena* (New York: Plenum Press, 1985) at 15. But see Tseëlon, "What is Beautiful", *supra* note 586 at 296-297.

695 Rima, *supra* note 212 at 719; Burgess & Clark, *supra* note 640 at 746-747; DeMello, *supra* note 640.

696 Negrin, *supra* note 437 at 20; Michael Atkinson, "Tattooing and Civilizing Processes: Body Modification as Self-Control" (2004) 41:2 Can Rev Sociology & Anthropology 125 at 125. See also *Ottawa Hospital*, *supra* note 1 at paras 82-84; *Syndicat des travailleuses des centres de la petite enfance du Saguenay—Lac-St-Jean-FSSS-CSN c Girard*, 2009 QCCS 2581 at para 29, aff'd 2001 QCCA 1620 [*Girard*].

697 See Berry, *The Power of Looks*, *supra* note 96 at 23.

inequality."[698] As the dressed and adorned body is too often understood to "signify the moral state of the individual,"[699] it becomes all the more important to protect employees whose bodies could be interpreted negatively.

Furthermore, many scholars also account for the relationship between physical appearance, and especially attractiveness, to social power.[700] Most of these writings start by acknowledging that contrary to most assumptions, beauty is not subjective but is rather objective; it is defined socially, generally but not exclusively, by symmetry in facial features and a young, thin, and healthy appearance. Although measures or standards of attractiveness may change over time and varies across cultures, "the dominant culture in any society determines what good looks are and are not."[701] Berry asserts that appearance and physical traits determine (at least to a certain extent) the social power of people, both economically and socially.[702] In particular, feminist theories contend that the social pressure is greater for women to be more attractive and well-groomed than it is for men.[703] The resources (money, time, and energy) women deploy to make their appearance more suitable and to gain social and economic power are out of proportion when compared to those spent by their male counterparts, although these trends are shifting, as men become a significant consumer market

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698 *Ibid* at 2.

699 Reischer & Koo, *supra* note 442 at 300.

700 See e.g. Entwistle, *The Fashioned Body*, *supra* note 443; Rhode, *The Beauty Bias*, *supra* note 199; Rhode, "The Injustice of Appearance", *supra* note 175; Berry, *The Power of Looks*, *supra* note 96; Bonnie Berry, *Beauty Bias: Discrimination and Social Power* (Westport, CT; London: Praeger Publishers, 2007) [Berry, *Beauty Bias*]; Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used against Women* (New Work: Perennial, 2002); Entwistle, "The Dressed Body", *supra* note 492; Kirsten Dellinger & Christine L Williams, "Makeup at Work: Negotiating Appearance Rules in the Workplace" (1997) 11 Gender & Soc'y 151; Linda A Jackson, *Physical appearance and gender: sociobiological and sociocultural perspectives* (Albany: State University of New York Press, 1992); Tseëlon, "What is Beautiful", *supra* note 586; Wendy Chapkis, *Beauty Secrets: Women and the Politics of Appearance* (Boston: South End Press, 1986).

701 Berry, *Beauty Bias*, *supra* note 700 at 3.

702 Berry, *The Power of Looks*, *supra* note 96 at 23.

703 See e.g. Ainsworth, *supra* note 225 at 249; Rhode, *The Beauty Bias*, *supra* note 199; Berry, *The Power of Looks*, *supra* note 96 at 31; Gimlin, *supra* note 446 at 4; Tseëlon, "What is Beautiful", *supra* note 586.

in the beauty industry.[704] These findings emphasize my point that appearance is of paramount importance for individuals.[705]

In summary on the communication of identity through appearance, appearance can be considered as a means of expression and can communicate some aspects of one's identity, but it generally does not do so unambiguously. In interpreting others' appearance, individuals should be mindful of the indeterminacy of signs and of the context in which they find themselves, but it is particularly important that they remain conscious of reading others' appearance through their own lenses. Along with Finkelstein,[706] Entwistle rightfully observes the fundamental contradiction in our understandings of appearance and identity:

> while we look to read the other through appearance and hope we can do so accurately, at the very same time we are aware that 'appearances can be deceptive'. This awareness of the problematic nature of appearance does not stop us from attempting to control how we look and calculate our appearance in order to 'put our best face forward' or 'make a good impression', and we employ a whole host of strategies to enhance our appearance.[707]

Whether they admit it or not, most people are influenced by appearance to varying degrees. Reading appearance can also lead to adverse and devastating bias and stereotypes, which should never occur in society in general, and particularly in the workplace. It is therefore not surprising that sociologists emphasize that physical appearance plays a major role in individuals' lives and can have a significant impact. Having discussed the intricate relationship between appearance and identity in sociological studies, the next section moves on to the legal field, where appearance should not be understood solely through identity, but rather as important to personhood.

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704 See Berry, *The Power of Looks*, *supra* note 96 at 51. But see Rosemary Ricciardelli, "Masculinity, Consumerism, and Appearance: A Look at Men's Hair" (2011) 48 Can Rev Sociology 181 (on the growing concern of men about appearance).

705 Although the majority of these studies discuss attractiveness, beauty standards, and discrimination against the non-aesthetically pleasing, which, as stated in Chapter 1, are not the central themes of this dissertation (see Chapter 1, section 1.2.2, *above*).

706 Finkelstein, *supra* note 546.

707 Entwistle, *The Fashioned Body*, *supra* note 443 at 113.

3.2 TRANSCENDING THE IDENTITY TRAP IN LEGAL CLAIMS: APPEARANCE IS IMPORTANT TO PERSONHOOD

In the last sections, relying on sociological studies, I have contended that appearance really matters because it is intrinsically connected to identity, albeit in a complex way. Appearance choices individuals make on a daily basis can be defined as socially constructed, that is, influenced by the social context in which they are made. However, there is still room for agency in individuals' personal choices about their outward appearance; these choices matter to the individuals' sense of self and should therefore be protected by legislation, particularly in employment contexts, where employees find themselves in an unbalanced relationship. It is also particularly important to protect individuals' personal appearance choices while they are at work, as work can be of paramount importance for individuals for it occupies a considerable portion of their time and life and can be a fundamental source of personal fulfillment, as it provides them with a means of financial support as well as a way of contributing in society.[708] I have emphasized that appearance serves as a source of identity formation, as dress and grooming choices can contribute to one's sense of self. Every individual performs their identity—or identities—in some way through their appearance, and thus appearance also functions as a means of communicating some of their identities. But the interpretation of personal markers of appearance is never an easy task, as these markers cannot be straightforwardly read in a contemporary diverse society. The interpretation—or misinterpretation—of appearance can often lead to bias and stereotypes, and one should consequently be cautious in interpreting others' appearance.

As discussed in the literature review on appearance and the law in Chapter 2, most of the current legal scholarship on appearance focuses on the anti-discrimination framework, which examines the connection between personal markers of appearance and prohibited statutory grounds of discrimination. In other words, the legal treatment of appearance as indicated in the literature is generally dedicated to grasping the prejudicial effects of appearance bias through the lens of the right to equality, that is, through an approach that would allow individuals to seek remedy for

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[708] See *Alberta Reference*, *supra* note 60 at para 91.

discrimination based on appearance. But the anti-discrimination framework has inherent limits,[709] one of the most blatant being the fact that in a case of discrimination, the plaintiffs have to link the prejudice they experience to one of the prohibited grounds of discrimination in the legislation. Depending on the jurisdiction, these grounds are generally limited to characteristics that have attracted historical stereotyping, and as mentioned, all statutory laws in Canada exclude appearance as a ground of discrimination. Therefore, in order to succeed in a claim of discrimination based on appearance under the current legal framework, Canadian employees (outside of Quebec)[710] must fit[711] their situation to one of the specific prohibited grounds, such as race, sex or gender, age, religion, disability, and the like. This requirement implies that in such cases, employees must explain how the prejudicial treatment they suffered is related to a prohibited characteristic, and often, these employees have to demonstrate how their appearance is related to a "protected" identity—such as race, sex or gender, age, religion, disability, and so on.

Tirosh critiques this current legal trend as too closely connected to identity[712]—and I would add, to the anti-discrimination framework.[713] She condemns the current legal treatment of appearance in case law, arguing that inquiring about the extent to which individuals' appearance "accurately and stably" reflect their identities is "flawed, since it relies on unattainable conceptions of the nature of identity and the meaning created by appearance."[714] She also notes that the current scholarship mainly treats appearance cases in the context of "minority" rights, whereas "the vulnerability and complexity of appearance are part of the universal human experience and not just

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709 See Chapter 5, section 5.1.4, *below*.

710 In addition to the protection against discrimination in various domains, including employment contexts, the *Quebec Charter* offers protection of many rights and freedoms (such as freedom of speech, freedom of religion, dignity, liberty, privacy) that are not protected in the human rights codes in the rest of Canada. Therefore, Quebec employees are not limited to the anti-discrimination framework and they can invoke many statutory rights to challenge their employer's management rights with regards to appearance regulation in the workplace. For more on the specificity of the *Quebec Charter* and its differences with other human rights statutes, see Chapter 4, section 4.3.2, *below*.

711 See notes 184-185 and accompanying text for an explanation of the "fitting" phenomenon.

712 Tirosh, "Adjudicating Appearance", *supra* note 90.

713 See Chapter 5, *above*, for my discussion of the anti-discrimination framework in the treatment of appearance issues in the workplace.

714 Tirosh, "Adjudicating Appearance", *supra* note 90 at 49.

the plight of minorities."[715] While she acknowledges that appearance regulation can often be the "plight of marginalized groups," she asserts that the problems of appearance and identity "have been unnecessarily conflated."[716]

Tirosh proposes an alternative theoretical framework in which she suggests understanding appearance[717] as the poetics of personhood, an approach that focuses on the meaning of appearance for individuals' sense of self, as protected by dignity, autonomy, and privacy. She advocates for a normative shift from querying about the extent to which appearance is connected to individuals' identity, to questioning the significance of appearance to the individuals' sense of self or personhood. It is important to note that Tirosh's concept of personhood is not related to the legal definition of the term and does not mean "being a legal person," but is rather related to individuals' subjective sense of self and self-identification. Thus, she defines personhood in this way:

> I juxtapose 'identity' and 'personhood' in order to stress the way in which the latter term pertains to the more universal aspects of human experience. Personhood refers to the general experience of being human and having a sense of self (which is not, of course, a process detached from society, but depends upon social recognition and interaction). As the Greek origin of the word suggests, personhood is entangled in the experience of appearing, of having a concrete shape, body, and perceived presence. Personhood also relates to individuality, to being socially recognized as somebody, or as a distinct human entity.[718]

Her alternative approach therefore moves away from identity issues towards understanding appearance as important to personhood, in order to fully engage with the very complex nature of appearance in legal terms.[719] As Tirosh's framework is completely aligned with this chapter's discussion on the postmodern significance of appearance for individuals, I adopt her approach to understand appearance as important to personhood as an analytical tool for the legal treatment of

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715 *Ibid*.

716 *Ibid* at 94.

717 Tirosh's definition of appearance is wider than the common usage of the word and broader than the definition of appearance I use in this dissertation (see Chapter 1, section 1.1.2, *above*). In addition to visible markers such as hair, clothes, and makeup, her definition includes personal markers such as names, manner of speech, and language. While I do not intend to expand my definition, her wider definition of appearance does not pose any problems in the application of her theoretical framework in my dissertation. See Tirosh, "Adjudicating Appearance", *supra* note 90 at 52, n 4.

718 *Ibid* at 53, n 8.

719 *Ibid* at 52.

appearance choices. This last section will hence review Tirosh's concept of personhood and discuss her rationale for moving away from identity in appearance cases.

Tirosh asserts that appearance cases[720] should be about appearance, not about identity[721]; she urges that the legal treatment of appearance "remain[s] on the level of appearance *itself*."[722] One of the main rationales behind her argument is related to the nature of identity presented in the beginning of this chapter, which is never fixed, but rather unstable and dynamic, and socially constructed.[723] She advocates for a conception of identity as "an ongoing project, not a static fact,"[724] and she calls for a focus on "the self's texture and ways, styles and habits, and not its internally fixed core essence."[725] As appearance does not necessarily reflect a pre-existing underlying identity,[726] she argues instead, agreeing with the analysis discussed above, that appearance plays a prominent role in shaping social identity and maintaining identity through repeated social interactions.[727] Tseëlon had similarly questioned the use of identity as a tool for understanding appearance, as reifying categorical and essentialist thinking:

> In order to maintain a critical discourse it may be better to replace the notion of identity (with its essentialist legacy) with concepts that refer to ongoing processes instead of entities. While in metaphysics, the term 'essentialism' originally implies the belief that an object has a certain quality by virtue of which it is what it is; in contemporary critical discourse the term is used more loosely to imply, most commonly, an unwarranted generalization about identity.[728]

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720 In her article "Adjudicating Appearance: From Identity to Personhood" (*supra* note 90), Tirosh analyses several cases involving aspects of appearance (according to her wide definition of the term, which includes languages and names) in various areas, including asylum application, access to bank services, and employment. The cases she examines "in a comparative context" come from Canada, the United States, and Israel. Although she briefly acknowledges the similarities and differences between these three jurisdictions, she does not really compare cases, but rather uses them as examples to support her arguments.

721 Tirosh uses identity "in the political sense of group affiliation, mainly of minority, marginalized, underrepresented, or oppressed groups. In the United States today, this includes groups divided according to race, ethnicity, nationality, gender, sexual orientation, or (dis)ability." (Tirosh, "Adjudicating Appearance", *supra* note 90 at 53, n 7).

722 *Ibid* at 82 [emphasis in original].

723 *Ibid* at 78.

724 *Ibid* at 117.

725 *Ibid* at 106.

726 *Ibid* at 71.

727 *Ibid* at 54, 76.

728 Tseëlon, "Is Identity a Useful Critical Tool?", *supra* note 469 at 157.

Tirosh's rejection of identity as a tool to adjudicate appearance claims relies on her observation that the law seems to only protect appearances that correctly reflect their bearers' underlying identity.[729] For instance, she uses the example of the infamous *Rogers* case, in which a Black airport operations agent refused to comply with her employer's policy that prohibited all-braided hairstyles (or cornrows).[730] Because the plaintiff was not able to establish to the judge's satisfaction that cornrows are a reliable indicator of race, her race discrimination claim was rejected. Tirosh contends that the plaintiff should have won in this particular case, and that the legal analysis of appearance should move "away from the *truthfulness of the information* that the marker conveys about its bearer to the marker's *meaning and significance* for its bearer."[731]

Tirosh also advocates for her alternative framework because of the instability of personal markers or aspects of appearance, an issue I discussed in section 3.1.4.2. Along with my findings, she argues that personal markers, such as dress, hair, and body modifications "create meaning in a suggestive, tentative, and unstable way, thus leavings courts puzzled as to the appropriate significance that should be attributed to them."[732] She claims that personal markers should not be considered as clear and reliable conveyers of a person's identity or essence:

> The fundamental problem in the prevailing legal treatment of personal appearance is a preoccupation with the extent to which it corresponds to the reality that supposedly lies beneath it. A more apt understanding of markers would have to account for their intermediate nature, as neither purely contingent nor fully intentional. Furthermore, it is futile to treat markers as either inherent/natural (and thus reliable representations of their bearer's identity) or disconnected/artificial (and thus potentially superficial and misleading with regard to the bearer's identity).[733]

Tirosh contends that "the law reflects a misunderstanding of the way in which appearance acquires meaning,"[734] as she notes a major issue with appearance cases: "Either a marker is telling the truth about one's identity and is thus worthy of protection, or it is false or insufficiently stable, and thus

729 Tirosh, "Adjudicating Appearance", *supra* note 90 at 58.
730 *Rogers*, *supra* note 232.
731 Tirosh, "Adjudicating Appearance", *supra* note 90 at 100 [emphasis in original].
732 *Ibid* at 55.
733 *Ibid* at 104.
734 *Ibid* at 84.

unworthy of legal recognition."[735] It should be reminded that in the *Rogers* case, the plaintiff lost because she did not successfully prove that her cornrows were an indicator of race. She convincingly asserts "that the extent to which a sign is a reliable conveyer of its bearer's identity is simply irrelevant for resolving appearance disputes."[736] In this way, I agree with Tirosh that various aspects of appearance "do not translate into a clear-cut identity claim,"[737] and that the legal analysis should frame appearance issues around the meaning of personal markers for their bearers, rather than focusing on the direct connection between one's appearance and one's identity. In addition, Tirosh calls for a contextual interpretation of personal markers, emphasizing that these markers "vary according to cultural context" and that the law should "relate to the meaning of appearance within the social settings in which it transpires."[738]

Although Tirosh's approach does not specifically discuss aspects of appearance that involve some degree of choice—personal markers that are the central focus of this dissertation—her argument is founded on insights quite akin to mine, and she, too, advocates for an approach that would include appearance cases that do not only involve members of historically marginalized groups. She claims that "[u]nderstanding appearance as an aspect of personhood rather than of minority identity would enable courts to concentrate on the role of appearance itself in the lives of social actors, rather than on the role of appearance as a proxy for identity."[739] As she rejects identity as *the* analytical tool in appearance cases, she suggests grasping appearance as important to personhood, in her alternative theoretical framework that she calls the "poetics of personhood":

> The analogy to poetic language is helpful here because it enables us to recognize that appearance is never just appearance; it is never a matter of form and not content, an external and insubstantial issue. The language of poetry functions not merely to deliver information or develop an argument. Rather, it is a language that calls attention to itself. In poetry, the medium is inseparable from the meaning. It is impossible to rephrase a poem, or to sum up its content in a way that will fully capture what is does, because part of a poem's effect is produced through texture, rhythm, sound, and connotation. Similarly, asking a legal subject to articulate his or her

735 *Ibid* at 82.
736 *Ibid.*
737 *Ibid* at 108.
738 *Ibid* at 107.
739 *Ibid* at 57.

> appearance in a clear and simple identity claim misunderstands the way appearance operates in relation to personhood.[740]

According to this approach, "appearance can be a significant part of one's personhood even if it is not anchored in a recognizable identity category."[741] This new understanding takes into account the complex nature of appearance and the various and fluctuating meanings attached to personal markers.

Finally, Tirosh's conception of personhood does not completely eradicate identity, as she claims that identity sometimes "plays a significant role in one's sense of person,"[742] but she considers that identity is not the answer to the legal framework of appearance. As will be discussed in the next chapters, while I agree with many points that Tirosh makes and I fully adopt her conception of appearance as important to personhood, I do not completely reject the identity approach—or in my terms, the anti-discrimination framework. I argue that this approach can be useful when an employee's personal marker can be successfully tied to a protected class, and since it is, for most Canadian employees, the only available remedy, it is important to keep this recourse when applicable, if only for practical reasons. But for most of the aspects of appearance that are the focus of this dissertation, that is markers that involve some degree of choice and are considered as mutable characteristics, I argue that the anti-discrimination framework under the current legislation is not enough, and framing appearance issues in relation to personhood is more appropriate.[743] This would enable adjudicators to frame their analysis "not so much around *who one is* as much as about *how one is perceived*."[744] Tirosh's approach, which would analyze the plaintiffs' experience of prejudice or persecution "with reference to the social response towards [their] perceived identity" rather than with reference to their identity, is more suited to some of the considerations I advance in this dissertation, namely the defence of employees' appearance through the fundamental rights at

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740 *Ibid*.
741 *Ibid* at 114.
742 *Ibid* at 53.
743 See Chapters 5 and 6, *below*.
744 Tirosh, "Adjudicating Appearance", *supra* note 90 at 115 [emphasis in original].

work framework—which protects the rights to dignity, privacy, autonomy, freedom of expression, and the like.

Conclusion

In conclusion, appearance matters and deserves legal protection. As one legal scholar rightly puts it, "contrary to prevailing judicial perceptions, individuals' choice of dress, grooming, and other indicia of appearance are not trivial decisions, but rather are worthy of respect."[745] Appearance autonomy and appearance choices can be extremely important to individuals: while they are largely socially constructed, they are also shaped by individuals' agency—which materializes in personal preferences. In particular, many of these agentic choices matter to employees' sense of self and therefore, they deserve protection from their employer's power over appearance regulation. Furthermore, appearance matters because appearance serves as a source of identity formation, and often involves employees' core values and personality. Appearance also matters significantly because it is a powerful means of expression, and as such, it can often trigger bias and stereotypes. It should follow that the workplace does not unreasonably limit the expression of employees' personhood through their appearance. Because employees' work can be fundamental to their sense of self, as "an essential component of [their] identity, self-worth and emotional well-being,"[746] appearance autonomy should be particularly protected in the workplace. Workplace appearance regulation can cause "significant and palpable harm by requiring individuals, as the price of employment, to subvert their personhoods by complying with chauvinistic employers' stereotypical conceptions of how"[747] employees should look.

Although appearance has been considered an identity marker, a social marker, and a means of expression in sociological studies, it should not be analyzed only through the concept of identity, but instead through the poetics of personhood. Hence, relying on Tirosh's proposed framework, the

745 Bayer, "Debunking Unequal Burdens", *supra* note 256 at 478.
746 See *Alberta Reference*, *supra* note 60 at para 91.
747 Bayer, "Debunking Unequal Burdens", *supra* note 256 at 491.

legal adjudication of appearance should focus on "people's characteristics—the ones that make them who they are both to themselves and to the world—and not about the general categories to which they belong (such as age, race, sex, occupation, etc.)"; the legal analysis should be "about the self's texture and ways, styles and habits, and not its internally fixed core essence."[748] In Tirosh's view, with which I concur, legal scholars and adjudicators should recognize "that some of what is real to us and about us is inexpressible (at least through general categories), but that such inexpressibility cannot free our political and legal arrangements from attending to those 'circles of experience.'"[749] Although it may be difficult to describe the importance of a personal marker to its bearer "in concrete and functional terms," this challenge should not mean that appearance remains "completely extralegal."[750]

748 Tirosh, "Adjudicating Appearance", *supra* note 90 at 106.
749 *Ibid* at 105.
750 *Ibid*.

CHAPTER 4
LEGAL SETTINGS TO THE STUDY OF APPEARANCE IN THE WORKPLACE IN CANADA

Introduction

The literature review in Chapter 2 showed how legal scholars—mostly coming from outside of Canada[751]—address appearance issues in the workplace, generally relying on the anti-discrimination framework. The legal environment and the statutory legislation applicable in the jurisdiction of the authors (predominantly from the United States) certainly have something to do with this finding, as anti-discrimination laws seem to be the only available and existing remedy for non-unionized American employees who face problems at work because of their appearance (with the exception of fundamental freedoms such as freedom of speech and freedom of religion, which only benefit public employees). In Chapter 3, I have set out why appearance matters to individuals and to employees—because appearance is a source of identity formation, a means of expression, and most importantly because appearance is fundamental to personhood. As many employees spend a majority of their waking hours at work, the workplace becomes a central site of social interactions and personal fulfillment, and a particular place where they can perform their self-identity and personhood. Because appearance is essential in the definition of individuals' sense of self, I argue in this dissertation that it deserves legal protection. It is important to reiterate here that I do not advocate for a complete eradication of employers' control over their employees' appearance. Rather, my contention is that some employers abuse their power when dealing with appearance issues, and that this power should be limited to appearance regulations and decisions that are justified by legitimate grounds.

In order to support this, an understanding of the legal framework in Canada is needed, before delving into the two approaches that are at the centre of this dissertation in Chapters 5 and 6. Therefore, the present chapter first sets out the fundamentals of employment and labour law in Canada, offering a brief overview of the legal framework for employment matters and exposing the

751 See Chapter 2, section 2.2, *above*.

legal principles governing the individual employment relationship and the collective bargaining regime in the common law provinces and in Quebec. As the Canadian case law on workplace appearance regulation mostly comes from arbitration awards, a review of the major principles guiding the judicial treatment of this issue will help to illuminate how workplace appearance is treated in labour law, when questions of human rights are not necessarily raised. In the second part of this chapter, I analyze the legal basis of employers' management rights, as these rights are at the foundation of the employers' power over appearance issues, in unionized and non-unionized workplaces alike. Employers' management rights generally stem from the subordination inherent to the employment contract, a legal source that has no particular status in the hierarchy of legal sources. Finally, the third and last part of this chapter turns to the legislative protection of human rights in Canada; it analyzes its history, the main applicable statutory laws in British Columbia, Ontario, and Quebec, and the preponderance of quasi-constitutional human rights legislation over employers' management rights.

4.1 EMPLOYMENT AND LABOUR LAW IN CANADA

Employment law in Canada generally refers to the law governing the individual employment relationship, that is, the relationship of an individual employee to an employer. In contrast, labour law (or "collective labour law")[752] refers to the law governing unionized workplaces, which are characterized by collective bargaining relationships. As both fields are regulated by a plurality of sources[753]—which might differ depending on the employee's jurisdiction—constitutional observations are needed here before examining the main features of employment and labour law in common law provinces and in Quebec, in order to understand the legal framework governing appearance issues in the workplace in Canada.

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752 England, *Individual Employment Law*, *supra* note 180 at 2.

753 See Guylaine Vallée, "Labour Law in Canada as a Site of Legal Pluralism" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht; New York: Springer, 2013) 145 at 145 [Vallée, "Labour Law"]; Michel Coutu, "Crise du droit du travail, pluralisme juridique et souveraineté" (2007) 12 Lex Electronica 1.

Canada is a parliamentary democracy and a constitutional jurisdiction under the sovereignty of the United Kingdom (UK). As a federal state, it has two distinct jurisdictions of political authority and governing power: the federal government and the provincial governments. The existence of federalism as a main feature of the Canadian constitution was expressively stated for the first time in a 1892 Privy Council decision:

> The object of the Act [the *Constitution Act, 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative […] But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.[754]

The *Constitution Act* of 1867[755] created the federation of Canada and outlines the division of legislative powers between the federal and provincial governments at ss. 91 and 92. The powers of the Parliament of Canada concern matters of national interest and are enumerated in ss. 91 and 92(10) of the *Constitution Act, 1867*. As for the exclusive powers of provincial legislatures, they concern matters of a local nature and are enumerated in ss. 92, 92(a) and 93 of the *Constitution Act, 1867*.

Although ss. 91 and 92 of the *Constitution Act, 1867* list in detail the specific matters pertaining to this division of powers, they do not expressly assign "labour relations"[756] or "employment" to either the federal government or the provinces. Facing the silence of the Constitution on this matter, the Judicial Committee of the Privy Council ruled in 1925[757] that labour

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754 *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*, [1892] AC 437 at 441-442 (PC), cited in Louis Sormany, "La portée constitutionnelle du préambule de l'Acte de l'Amérique du Nord britannique" (1977) 18:1 C de D 91 at 139.

755 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (formerly the *British North America Act* of 1867) [*Constitution Act, 1867*].

756 As Stacey R. Ball rightly observes, "[w]hen the courts refer to "labour relations" in decisions on the constitutionality of legislation, they are often discussing concepts which are more consistent with phrases such as "working conditions" or "employment relations". Consequently, constitutional decisions on hours of work or human rights legislation often refer to "labour relations" when what the courts really mean is that the matter deals with the broader concept of employment law." (Stacey Reginald Ball, *Canadian Employment Law* (Aurora, Ont: Canada Law Book, 2008) at 2-1 [Ball, *Canadian Employment Law*]).

757 *Toronto Electric Commissioners v Snider*, [1925] AC 396 (PC).

relations fell within the provincial exclusive jurisdiction over "property and civil rights in the province," pursuant to s. 92(13) of the *Constitution Act, 1867*. The SCC and the Privy Council repeatedly confirmed this judicial interpretation over the years,[758] and it is now well established in Canadian law that provincial legislative assemblies have general jurisdiction over employment matters.[759] While labour relations are presumptively a provincial matter,[760] this general provincial legislative authority over employment and labour law is not exhaustive.[761] In 1955,[762] the SCC confirmed that the federal Parliament has exceptional, but exclusive jurisdiction over labour relations in industries or areas of activities that fall under its jurisdiction (such as banks, postal services, radio and television broadcasting, air transportation, and businesses involved in inter-provincial or international transportation),[763] or businesses that are essential, vital, or integral to such a core federal business or undertaking.[764] Therefore, the general rule is that provincial legislatures have jurisdiction over labour relations, while the exception is that federal Parliament has legislative power regarding labour relations in federal businesses or undertakings.[765] Yet it should be reiterated that because this dissertation mainly focuses on provincial law, federal employment and labour law will not be discussed, except when relevant.

The following sections briefly analyze employment and labour law in Canada. On the one hand, employment law in Canada is founded on similar principles in common law provinces and in Quebec, but as the major difference between the two jurisdictions lies in their legal tradition, the

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758 See e.g. *Re Legislative Jurisdiction over Hours of Labour*, [1925] SCR 505; *Canada (AG) v Ontario (AG)*, [1937] AC 326 (PC); *CPR v Attorney General for British Columbia*, [1950] AC 122 (PC); *Bell Canada v Quebec (CSST)*, [1988] 1 SCR 749.

759 See Robert P Gagnon & Langlois Kronström Desjardins, sencrl, *Le droit du travail au Québec*, 7th ed (Cowansville, QC: Yvon Blais, 2013) at no 3; Ball, *Canadian Employment Law*, *supra* note 756 at 2-2; S Wynton Semple, "Parliament's Jurisdiction over Labour Relations" (1977) 11:2 UBC L Rev 232 at 233.

760 *Tessier Ltée v Quebec (CSST)*, 2012 SCC 23 [*Tessier*]; *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45. See Michel Coutu et al, *Droit des rapports collectifs du travail au Québec,* vol 1, 3rd ed (Cowansville, QC: Yvon Blais, 2019) at para 25.

761 Ball, *Canadian Employment Law*, *supra* note 756 at 2-3.

762 *Re Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] SCR 529.

763 For a helpful (but not exhaustive) definition of "federal work, undertaking, or business," see s. 2 of the *Canada Labour Code*, RSC 1985, c L-2 [*Canada Labour Code*].

764 *Tessier*, *supra* note 760; *Northern Telecom v Communication Workers*, [1983] 1 SCR 733; *Commission du Salaire Minimum v Bell Telephone Company of Canada*, [1966] SCR 767.

765 See Gilles Trudeau, "Fascicule 1: Aspects constitutionnels du travail salarié" at no 9-14, in Guylaine Vallée & Katherine Lippel, eds, JCQ *Rapports individuels et collectifs du travail*.

employment contract in common law and civil law is presented in separate sections. A concise overview of the legal framework of each legal tradition is offered, with a focus on sources and key features of employment law, as well as the very narrow remedies available through this regime for employees facing appearance issues in the workplace. On the other hand, as labour law presents greater similarities in all Canadian provinces, the main features of collective bargaining in the context of appearance issues at work will be analyzed together, without formal comparative review between common law provinces and Quebec. This analysis will show that labour law principles offer a better protection—albeit not without limits—against unreasonable workplace appearance regulation than individual employment law, as the latter provides employees little legal recourse to challenge appearance policies.

4.1.1 The Individual Employment Relationship (IER)

For the individual employment relationship to exist, the two parties need to answer to the definition of "employer" and "employee," two terms that correspond to the traditional "master and servant" relationship.[766] However, as Mark Freedland rightfully observes, the employment relationship should no longer be conceptualized as a personal and bilateral relationship between two *individuals*, the employer and the employee. The master and servant relationship was converted into the contract of employment between an employer and an employee, but this does not always reflect current realities, as the employer is often an incorporated company. As Freedland notes, "[t]he contracting parties are identified and conceptualized according to a set of assumptions that employment relations are organized on a particular personal and bilateral basis; it is a view which makes only very occasional contact with contemporary realities."[767]

Determining whether an individual is an "employee" (as opposed to an independent contractor) is of central importance in Canadian law, as the employment relationship involves

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766 Ball notes that although the word "servant" is "objectionable," courts and some authors still frequently use this term today (Ball, *Canadian Employment Law*, *supra* note 756 at 3-1). For a brief review of the evolution of the master and servant relationship to the employment relationship, see section 4.2.1.1, *below*.

767 Freedland, *The Personal Employment Contract*, *supra* note 33 at 36.

particular rights and obligations; the application of most of the protective employment legislation will depend on this legal status.[768] The parties' characterization of the relationship is not conclusive at law, and the legal determination of the employee status must be made on the evidence of actual conduct.[769] In determining employee status, adjudicators use several tests and balance a variety of factors.[770] Although all aspects of the relationship must be examined, three elements are generally determinative: 1) the employer must have substantial control over the employee's work; 2) the employee must be economically dependent on the employer; and 3) the employee must be integrated or form an integral part of the employer's business.[771] The control test is generally the most common method in defining the employee, as the employer's control (or its related component, the employee's subordination to the authority of the employer) is considered the crucial characteristic of the employment relationship,[772] which materializes in the employer's management rights that are the focus of this chapter's next section.

The following parts offer a brief presentation of the individual employment relationship in common law provinces—focusing on British Columbia and Ontario[773]—and in Quebec. Although the primary sources of law vary between common law provinces and Quebec, the general principles that govern the employment relationship are roughly similar in both regimes. The applicable employment protective legislation presents some similarities in all provinces, albeit some minor procedural differences, but a few jurisdictions, including Quebec, provide a specific legal recourse in a case of unjust dismissal that could be useful for employees unfairly discharged because of their appearance. However, both systems are quite silent on the regulation of the employee's appearance in the workplace, and an inquiry into the foundation of management rights (in the next section) is therefore needed to understand how these rights can be limited.

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768 See England, *Individual Employment Law*, *supra* note 180 at 16.
769 See Ball, *Canadian Employment Law*, *supra* note 756 at 3-1.
770 See England, *Individual Employment Law*, *supra* note 180 at 20.
771 *Ibid*.
772 See Carol Jobin, "Fascicule 8: Statuts de salarié et d'employeur dans les lois du travail" at no 34, in Vallée & Lippel, *supra* note 765; Ball, *Canadian Employment Law*, *supra* note 756 at 3-6.
773 As stated in Chapter 1, my dissertation focuses primarily on British Columbia, Ontario, and Quebec. For an explanation of this choice, see Chapter 1, section 1.2.2, *above*.

4.1.1.1 The IER in Common Law Provinces

In Canadian common law, employment law has two primary sources of law, which are the common law contract of employment and the protective employment legislation. In addition to these legal sources, a formal contract of employment may be concluded between the employer and the employee to provide for specific terms of the relationship. When there is such a written contract, the express and negotiated terms of the contract are enforced by the courts "according to their literal meaning,"[774] and might differ from the implied obligations under the common law of contracts—but note that these contracts must always respect the protective employment legislation.[775] However, the contract of employment does not need to be written in order to be valid,[776] and a majority of non-unionized Canadian employees are not bound by a written agreement.[777] Nevertheless, regardless of whether it is written or not, every employment relationship is a contractual relationship[778] in its common law understanding.

As the employment relationship is based on a contract, the general contract law rules are applicable to the contract of employment, such as the principle of freedom of contract. Several authors[779] have highlighted the difficulty of applying such a principle to a relationship that is not actually free, as employers generally have much more bargaining power than their employees. In order to address this imbalance of power, some commentators note that since World War II, courts have tried to take into account the uniqueness and complexity of the employment relationship when applying the traditional principles of contract law.[780] For instance, Justice Anderson observed in

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774 England, *Individual Employment Law*, *supra* note 180 at 51.

775 See Steward D Saxe & Lisa Stam, *Ontario Employment Law Handbook: An Employer's Guide*, 10th ed (Markham, Ont: LexisNexis, 2011) at 73.

776 With the exception of certain types of employment contracts that need to be in writing as required by law, such as apprenticeship agreements. See England, *Individual Employment Law*, *supra* note 180 at 36.

777 Numerous publications designed for employers strongly advocate for a well-drafted contract, which reduces risks of misunderstandings and uncertainty. See e.g. Paul Wearing, *Employment and Labour Law Toolbox: What Ontario Employers Need to Know* (Toronto: Irwin Law, 2015) at 10**;** Kathryn J Filsinger, *Employment Law for Business and Human Resources Professionals*, 3rd ed (Toronto: Emond Montgomery Publications, 2015) at 96-97.

778 Saxe & Stam, *supra* note 775 at 73.

779 See e.g. Ball, *Canadian Employment Law*, *supra* note 756 at 6-1; England, *Individual Employment Law*, *supra* note 180 at 105; Stacey R Ball, "Bad Faith Discharge" (1994) 39:3 McGill LJ 568. See also Beatty, *supra* note 34 at 326-330.

780 See England, *Individual Employment Law*, *supra* note 180 at 3.

Campbell v. MacMillan Bloedel Ltd. that the contract of employment cannot be addressed "as though that relationship consisted of a single contract with fixed terms and conditions"; instead, he notes that courts should "not apply the principles of contract law as though in a vacuum, but review […] the history of the relations between the parties in its entirety so as to arrive at a rational solution in each particular case."[781]

Another problem Freedland identifies with applying the common law general principles of contracts to the modern contract of employment concerns the subordination embedded in the employment relationship: "[t]he individual and bilateral approach to the contract of employment both depends upon and imposes a view of the employment relation as a one-step hierarchy between the employer or employing entity as hierarchically superior and the worker as hierarchically inferior. That is the sense in which it is a *legal* relation of subordination."[782] The subordination in the employment relationship is thus imposed by law and is not simply a reflection of inequality in bargaining power. In the contemporary context of the employment relations, however, the degree of actual subordination may vary:

> During the evolution of the law of the contract of employment, that legal relation has been regarded as corresponding to a human or personal subordination of the worker to the employer. In the modern law of the contract of employment, that subordination may be a purely formal or structural one; it may but does not have to consist of or involve a real social and economic submission of one human being to the will or control of another or of a corporate organization.[783]

The fact that the employer is often a legal corporate person as opposed to an individual illustrates the gap between legal subordination and factual subordination.

Furthermore, the contract of employment is particular and unique, as it entails "more than an agreement to provide work for remuneration."[784] In addition to implying the mutual obligations of the employee to perform work in exchange of the payment of wages by the employer, the employment contract includes reciprocal promises to employ and be employed, "at least until

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781 *Campbell v MacMillan Bloedel Ltd*, [1978] 2 WWR 686 at 690-691 (BCSC).
782 Freedland, *The Personal Employment Contract*, *supra* note 33 at 46 [emphasis in original].
783 *Ibid* at 47.
784 Ball, *Canadian Employment Law*, *supra* note 756 at 6-1.

reasonable notice is provided."[785] The contract of employment should therefore be understood as a "relational" contract, encompassing "mutual undertakings that the relationship will continue," and it should be seen as a contract "in which there is an implied obligation of mutual co-operation."[786]

As a particular and distinctive contract subject to the principles of contract law, the employment contract is also governed by common law implied contractual obligations. The courts have thus developed multiple standardized implied terms that reflect what they perceive the employer and employees' rights and obligations should be, "unless expressly stated otherwise in the agreement."[787] Among these implied terms,[788] employees are generally bound by a duty to obey, to perform the work in good faith, and to advance the employer's business interests; employers have a corresponding duty to pay and to provide work, which implies the employer's obligation to provide notice of termination or payment in lieu of notice for a dismissal without cause (or wrongful dismissal). This means that for a great majority of non-unionized employment contracts, the employer has the right to terminate the contract without cause "at any time by giving the employee notice of the termination."[789] None of the common law implied terms of the individual contract of employment directly cover the issue of the regulation of employees' appearance.

Nevertheless, among other breaches of express or implied terms, one could imagine that an employee could seek remedy through civil litigation for being wrongfully dismissed (that is, for being terminated without notice or payment in lieu of) because of their appearance,[790] and therefore

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785 *Ibid*.

786 *Ibid*.

787 Filsinger, *supra* note 777 at 97.

788 For a review of the employer's and the employee's common law obligations under the contract of employment in Canada, see England, *Individual Employment Law*, *supra* note 180 at ch 4 & 5.

789 Doorey, *The Law of Work*, *supra* note 31 at 155.

790 The common law provides remedies—albeit limited—to wrongfully dismissed employees that can be used in theory in a case of discharge because of employees' appearance. However, these recourses have not, to my knowledge, been used to successfully challenge workplace appearance regulation or to look into this issue in detail. In the rare instances that a dress code violation, on its own, supported the employee's dismissal, the employee's appearance or policy violation was only briefly mentioned and the ruling focused on insubordination; these cases were therefore not relevant to my analysis. See e.g. *Hatherly v Zapata Restaurants Inc*, 1984 CarswellOnt 2623 (WL Can) (Ont Prov Ct). See also *Hodgkin v Town of Aylmer*, 1996 CarswellOnt 4343 (WL Can) (Ont Ct J (Gen Div)); *Essery v John Lecky & Co*, 1986 Carswell PEI 69 (WL Can) (PEI SC). But see *Moni v Ferguson*, 2002 BCHRT 41 (While this case was not founded on common law principles and rather involves a claim of discrimination—which is dismissed—the Tribunal found that the real reason for the employee's termination was not discrimination but their failure to follow the employer's dress code).

claim damages[791] in civil courts (in Ontario, to the Ontario Superior Court of Justice or the Small Claims Court; in British Columbia, to the British Columbia Supreme Court or the Small Claims in the Provincial Court). Common law remedies are generally limited to the compensation of the employer's failure to give reasonable notice of termination,[792] and the objective "is not to make whole the employee's losses flowing from the dismissal."[793] In addition to the limited remedies available to wrongfully dismissed employees, a major problem with common law employment remedies is the high cost of civil litigation. Even if an employee holds rights under the employment contract, these rights "are frequently unobtainable in practice because the high cost of civil litigation is beyond the pocket of many low- and middle-level employees."[794] In other words, the common law contract of employment provides few—if any—remedies when employees face problems at work because of their appearance. Geoffrey England notes that the access to justice problem offers an explanation for "why most of the reported cases on wrongful dismissal involve relatively senior managers, professionals, and technicians," and why protective employment statutes often provide to employees with limited resources "the only means for securing their employment rights."[795] As I will argue in the next section, this observation is also applicable to Quebec non-unionized employees.

Protective employment legislation is thus the second overarching source of employment law in common law provinces—as well as in Quebec; therefore, the following discussion also concerns the French language province. In order to address the imbalance of power that is inherent to the employment relationship, all Canadian provinces have enacted a statutory framework that establishes a floor of minimum standards and minimum rights regarding the core aspects of the employment relationship.[796] Most statutes apply generally to non-unionized and unionized

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791 James T Casey, ed, *Remedies in labour, employment and human rights law* (Scarborough, Ont: Carswell, 1999) at 4-1.

792 See *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701.

793 England, *Individual Employment Law*, *supra* note 180 at 395.

794 *Ibid* at 3. For an elaboration of the problems of access to justice in civil matters, see Laroche, *supra* note 50; Canadian Forum on Civil Justice, *supra* note 50; N Semple, *supra* note 50.

795 England, *Individual Employment Law*, *supra* note 180 at 3.

796 *Ibid* at 114.

employees alike, although many categories of employees are expressly excluded from the legislation, such as students, agricultural workers, and domestics employed in a private residence—depending on the specific legislation and jurisdiction.[797] The floor of rights these protective statutes establish cannot be undermined by the terms of an employment contract or a collective agreement—although they may "be improved upon in such instruments."[798] The protective employment legislation is generally constituted, for each jurisdiction, of a plethora of different statutes, some of the most important applicable to individual employment relationships being:

- Employment or Labour Standards Acts[799];
- Occupational Health and Safety Legislation[800];
- Privacy Legislation[801];
- Human Rights Legislation.[802]

As the scope of this dissertation does not allow for an extensive review of the protective legislation,[803] I focus here on the legislation that could offer some protection to employees facing appearance issues in the workplace, even if this protection is very limited.

Among this impressive body of law, the statutes most likely to cover the issue of appearance at work are employment standards legislation and human rights legislation[804]—the latter is further

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797 *Ibid* at 121.

798 *Ibid* at 114.

799 See e.g. *Employment Standards Act*, RSBC 1996, c 113 [BC ESA] (British Columbia); *Employment Standards Act*, SO 2000, c 41 (Ontario); *Act respecting labour standards*, *supra* note 48 [ALS] (Quebec).

800 See e.g. *Workers Compensation Act*, RSBC 2019, c 1 [BC WCA] (British Columbia); *Occupational Health and Safety Act*, RSO 1990, c O.1 [*Occupational Health and Safety Act* or Ont OHSA] and *Workplace Safety and Insurance Act*, SO 1997, c 16, Sched A (Ontario); *Act respecting occupational health and safety*, CQLR c S-2.1 [Qc AOHS] and *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001 (Quebec). See generally NA Keith, *Canadian Health & Safety Law: A Comprehensive Guide to the Statutes, Policies and Case Law* (Aurora, Ont: Canada Law Book, 1997) (loose-leaf).

801 See e.g. *Personal Information Protection Act*, SBC 2003, c 63 (British Columbia); *Personal Health Information Protection Act*, SO 2004, c 3 (Ontario); *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (Quebec).

802 See section 4.3, *below*.

803 For further detailed elaboration on the protective employment legislation, see England, *Individual Employment Law*, *supra* note 180 at ch 6; Geoffrey England, Innis M Christie & Peter Barnacle, *Employment Law in Canada*, 4th ed (Markham, Ont: LexisNexis, 2005) (loose-leaf) at ch 8.

804 Note that although a few jurisdictions have enacted specialized statutes aimed at safeguarding employees' privacy, none of these acts specifically protect a right to autonomy-privacy or a right to make fundamental choices, but rather focus on the use and disclosure of personal information. These acts are therefore not relevant to employees facing appearance issues in the workplace.

discussed in the last section of this chapter. Although minimum standards can vary significantly across Canada, the major substantive rights covered by this legislation include: minimum wage; payment of wages; working hours and scheduling; holidays and annual vacations; personal leaves of absence; termination notice; and termination pay. Unfortunately, none of these laws address the question of appearance in the workplace, with the exception of statutory provisions regulating the financial and practical aspects of uniforms and special clothing in provincial Employment Standards Acts, such as British Columbia and Quebec.[805] These provisions can be useful for employees to claim the payment and upkeep of uniforms and special clothing, but are useless to challenge workplace appearance policies.

Enforcing employment rights under the protective legislation for employees engaged in an individual employment relationship is usually done through special administrative procedures contained in the statutes, although some of these laws expressly preserve the employees' civil remedies through court actions.[806] Usually, employees who are seeking remedies for infringement of their rights will file a personal complaint to the provincial department of labour.[807] The procedure varies across the country depending on the provincial or federal applicable Employment Standards Act, for instance. Generally, however, "settling complaints voluntarily by conciliation conducted by the departmental inspector" will be preferred, "but formal adjudication and even criminal sanctions can be deployed where conciliation is not possible."[808] The protective employment legislation normally "establishes fast-track, cheap, and informal administrative machinery for enforcing statutory entitlements," which is easier for employees than engaging in a civil action. However, England argues that these statutory mechanisms "too often do not operate efficiently, rendering the legislation of little practical use"[809]; he forcefully asserts that "[a] body of substantive rights, no matter how generous, is only as good as the procedures for enforcing it."[810]

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805 See BC ESA, s 25; LSA, s 85.
806 England, *Individual Employment Law*, *supra* note 180 at 275.
807 *Ibid* at 115. See also Doorey, *The Law of Work*, *supra* note 31 at 251.
808 England, *Individual Employment Law*, *supra* note 180 at 115.
809 *Ibid* at 13.
810 *Ibid* at 12.

It is noteworthy that in most Canadian jurisdictions—except for Quebec, Nova Scotia, and at the federal level[811]—the employment standards legislation does not provide any legal recourse to challenge employees' unjust dismissal.[812] Theoretically, this statutory scheme could have provided a remedy for employees unjustly discharged because of their appearance, as I will briefly discuss in the next part, but its absence in common law provincial legislation excludes this option for British Columbia and Ontario employees. As England notes, "it is unlikely that unjust dismissal schemes will be introduced […] in the near future."[813] Therefore, with regards to general remedies when faced with a breach of the common law contract of employment or the protective employment legislation, non-unionized employees see themselves with little power and recourse, when compared to unionized employees, to challenge workplace appearance regulation.

4.1.1.2 The IER in Quebec

Quebec is officially the only francophone province in Canada, and it is the only province that has a dual legal system, derived from both the civil law and the common law traditions. Although civil law is applicable to private matters—which characterize most employment relationships—the founding principles of the individual employment relationship in Quebec are quite similar in terms of structure and values to those of the common law provinces discussed above. As in the common law, employment law in Quebec has two primary sources of law: the *Civil Code of Québec* (CCQ)[814] (which is also referred to as "ordinary law") and the protective employment legislation. In Quebec,

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811 S. 240 of the *Canada Labour Code* allows non-unionized employees of federally-regulated businesses to file a complaint for unjust dismissal. Under this provision, a few cases have analyzed complaints alleging discharge because of appearance. In the rare instances that the employees' appearance or dress code violation is examined in depth, adjudicators have generally applied the principles emanating from labour arbitration on workplace appearance regulations (see e.g. *Re Fidelity Van and Storage Co and de Haan*, 1993 CarswellNat 3782 (WL Can) (Can Adjudication)). In other instances, a dress code violation was alleged, but only briefly mentioned as the ruling focused on insubordination (see e.g. *Bureau c Pascan Aviation Inc*, 2011 CarswellNat 6067 (WL Can) (Can Arb); *Overall v Sybarite Investments Ltd*, [1985] CLAD No 85 (Can Arb)). For these reasons, and because federal legislation falls outside the scope of my dissertation, these cases were not included in my analysis.

812 For an explanation of the reasons why most jurisdictions deliberately chose not to provide unjust dismissal statutory protections, including public costs and a desire to maintain employers' flexibility in dismissing employees, see England, *Individual Employment Law*, *supra* note 180 at 364-365.

813 *Ibid* at 365.

814 *Civil Code of Québec*, CQLR c C-12 [CCQ].

the CCQ substitutes the common law, and provides written and codified legislation regulating the individual employment relationship. The employment relationship in Quebec is also always a contractual one, whether written or oral,[815] and it obeys the CCQ common rules of contracts.[816] In addition to contract law principles, the particular nature of the contract of employment discussed in the last section is similarly recognized in Quebec law, as it is subject to special rules governing the nominate contracts of employment at arts. 2085 to 2097 CCQ.[817]

The contract of employment under Quebec civil law is defined as "a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer."[818] Specific provisions of the CCQ stipulate employers' and employees' duties and obligations, which are similar to those under common law: employees' duty to obey,[819] to perform the work with prudence and diligence, to act faithfully and honestly, and to avoid the use of confidential information obtained in the course of the work[820]; employers must in turn allow the performance of the work and pay the remuneration agreed upon, but also must "take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee."[821] Similar to the common law model, under the civil law regime, the employer cannot dismiss an employee without cause, unless notice of termination or payment in lieu of notice is provided.[822] This allows the employer to unilaterally terminate a contract of employment for no reason, as long as the employee is provided with reasonable working notice of their dismissal or a severance package (for payment in lieu of notice). In a case of termination

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815 Guylaine Vallée, "Fascicule 2: Lois du travail (objet, effet, mécanismes d'application) et droit commun" at no 13, in Vallée & Lippel, *supra* note 765 [Vallée, "Lois du travail"].

816 Art 1377 CCQ; Gagnon & Langlois, *supra* note 759 at no 96.

817 Vallée, "Lois du travail", *supra* note 815 at no 21.

818 Art 2085 CCQ.

819 Art 2085 CCQ.

820 Art 2088 CCQ.

821 Art 2087 CCQ. For a review of employers' and employees' respective obligations under the contract of employment in Quebec law, see Gagnon & Langlois, *supra* note 759 at nos 108-1151; Fernand Morin et al, *Le droit de l'emploi au Québec*, 4th ed (Montreal: Wilson & Lafleur, 2010) at ch II-3. See also Guylaine Vallée & Katherine Lippel, eds, JCQ *Rapports individuels et collectifs du travail* at fascicules 19-23.

822 Art 2091 CCQ. Note that art. 2092 CCQ provides that this protection is of "public order": "The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive."

because of appearance[823] (without other cause and without reasonable notice), an employee could claim damages for wrongful dismissal to civil courts (either to the Small Claims Division of the Court of Quebec, the Civil Division of the Court of Quebec, or the Superior Court, depending on the amount at stake).[824] The employer's duty to protect the dignity of its employees codified at art. 2087 CCQ could also be of use,[825] although in practice, because the right to dignity is entrenched under s. 4 of the *Quebec Charter*—which is of quasi-constitutional status[826]—the latter is most likely to be invoked.[827] The observations made in the last section on the high cost of civil litigation are also applicable in Quebec, and even if individuals choose to undergo such a lengthy and expensive judicial process, civil law duties and obligations will inevitably be raised as a secondary argument to human rights protections—which I argue in Chapter 6 are stronger. In other words, even if the CCQ theoretically protects some employees' rights, employees are most likely to invoke the *Quebec Charter*'s rights and freedoms when an issue involving workplace appearance arises.

As for the second source influencing the employment contract in Quebec—the protective employment legislation—a great number of statutes govern the employment relationship, similarly to common law provinces.[828] With the exception of human rights legislation, most of the protective employment statutes do not specifically protect non-unionized employees' rights regarding their appearance at work. However, Quebec is one of the only Canadian jurisdictions that provides a legal recourse against unjust dismissal through its *Act respecting labour standards* (ALS), which can be of use to employees discharged because of their appearance.[829] S. 124 of the ALS specifies

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823 A majority of the rare cases found in the jurisprudence using this recourse generally briefly mention a dress code violation as one of the reasons for the dismissal, but cases where the discharge is solely founded on the employee's appearance are exceptional. See e.g. *Alary c 9067-7154 Québec inc (Envol des langues)*, 2006 QCCQ 3052 (CQ civil (div pet cré)).

824 See Vallée, "Lois du travail", *supra* note 815 at no 147-148; Coutu et al, *supra* note 760 at para 24.

825 See e.g. *Kirkham et Bill Edward's Cheers – Cheers Management (Pointe-Claire) Inc*, DTE 2002T-303 (Qc CT) [*Kirkham*] (although in this case, both art. 2087 CCQ and s. 4 of the *Quebec Charter* are raised against the employer's mandatory see-through uniform).

826 See section 4.3.1.3, *below*.

827 See e.g. *Verreault et 9075-7154 Québec inc*, 2003 QCCRT 0342 [*Verreault*]; *Bouchard et 9019-6718 Québec inc*, DTE 2000T-1198 (Qc CT), aff'd DTE 2001T-435 (Qc CS) [*Bouchard*].

828 For a detailed discussion of the protective employment laws that are applicable in Quebec, see generally Vallée, "Lois du travail", *supra* note 815; F Morin et al, *supra* note 821 at ch III-1-III-7.

829 See e.g. *Kirkham*, *supra* note 825; *Bouchard*, *supra* note 827; *Gagnon et 2753-3058 Québec inc*, DTE 95T-750 (Qc CT) [*Gagnon*]. See also *Verreault*, *supra* note 827.

that to benefit from this recourse, non-unionized employees must be "credited with two years of uninterrupted service in the same enterprise"; they should believe they have "not been dismissed for a good and sufficient cause";[830] and another "remedial procedure, other than a recourse in damages" must not be available to them.[831] When the employee meets all the criteria, they can file a complaint to the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), who can represent the employee during the exercise of the recourse.[832]

This recourse is very valuable for Quebec employees, for it offers free representation and extended remedies (including reinstatement and compensation for any losses resulting from the dismissal).[833] This recourse is also particularly interesting as it cancels the employer's ability to unilaterally terminate its employee with reasonable notice.[834] Generally, to succeed in such a complaint regarding a dismissal based on appearance or based on a dress code violation, the dismissal must be solely founded on the employee's appearance, and the employer must have failed in establishing that this particular appearance was not a legitimate employment requirement. This recourse presents great hope for non-unionized employees who meet the strict statutory criteria (particularly the two years of service condition), but it must be emphasized that all the cases found using this legal remedy also raised fundamental rights and freedoms to support the claim of unjust dismissal. Therefore, these cases are considered under the human rights analysis I conduct in Chapters 5 and 6, and this finding supports my argument that non-unionized employees have better chance of challenging workplace appearance regulation through human rights.

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830 It is important to note that s. 124 of the ALS is only open to employees who have been dismissed. A legitimate permanent layoff (for economic, technical or administrative reasons) is considered a good and sufficient cause and therefore does not meet the recourse's criteria. Nevertheless, the employer cannot use the pretext of a permanent layoff to get rid of an employee when the real motive for the termination is the employee's appearance. For the difference between a dismissal and a permanent layoff in the context of s. 124 of the ALS, see Gagnon & Langlois, *supra* note 759 at no 268.

831 ALS, s 124. For a detailed analysis of this recourse, see Sandra Daudelin & Gilles Trudeau, "Fascicule 26: Rupture à l'initiative de l'employeur pour des motifs tenant au salarié" at nos 50-87, in Vallée & Lippel, *supra* note 765; Gagnon & Langlois, *supra* note 759 at nos 262-276; Nathalie-Anne Béliveau, *Les normes du travail*, 2nd ed (Cowansville, QC: Yvon Blais, 2010) at 495-693.

832 ALS, s 126.1.

833 ALS, s 128.

834 Trudeau, "Vie professionnelle", *supra* note 47 at 19.

In the individual employment relationship, civil law and common law provide remedies to wrongfully dismissed employees that could theoretically be used in a case of termination because of the employees' appearance. However, these recourses are rarely used to formally challenge workplace appearance regulation or look into this issue in depth, undoubtedly because of the problems associated with access to justice for individual employees mentioned above. This leaves non-unionized employees from common law jurisdictions with little recourse when they are the object of adverse employment action because of their appearance, with the exception of a discrimination complaint when applicable under human rights legislation, which will be analyzed in Chapter 5. As for Quebec non-unionized employees who cumulate two years of employment, they benefit from a statutory recourse against unjust dismissal if they have been discharged because of their appearance and they believe it is not a good and sufficient cause. While s. 124 of the ALS only offers protection in a case of termination—and does not provide a broad legal redress as does labour arbitration for unionized employees—this constitutes a significant protection against unreasonable workplace appearance regulation, particularly when combined with the *Quebec Charter* protections.

4.1.2 Collective Bargaining and Labour Arbitration

There were about 4.9 millions unionized workers in Canada in 2019, representing around 30% of total public and private employment.[835] Provincial labour laws[836] or the *Canada Labour Code* govern unionized employees and their collective agreements,[837] depending on whether a business is regulated by the provincial or the federal jurisdiction. When a collective agreement comes into effect, the individual contract of employment vanishes and the collective agreement becomes the only source of rights and obligations between unionized employees and their employer, with the

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835 "Union status by industry" (last modified 20 April 2020), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013201&pickMembers%5B0%5D=2.3&pickMembers%5B1%5D=4.1>.

836 See e.g. *Labour Relations Code*, RSBC 1996, c 244 (British Columbia); *Labour Relations Act*, SO 1995, c 1 (Ontario); *Labour Code*, CQLR c C-27 (Quebec).

837 See generally Brown & Beatty, *supra* note 31; Coutu et al, *supra* note 760.

exception of legislation.[838] Thus, labour standards acts, human rights statutes, and occupational health and safety laws are still applicable in unionized workplaces, with some exceptions.

Canadian labour relations legislation is rooted in the American *Wagner Act* of 1935, although the Canadian system now differs significantly from the United States.[839] The major differences involve the statutory "requirement that collective agreements provide for arbitration of disputes arising during their term, and that there be no strikes or lockouts during that time."[840] Another important feature of Canadian labour law is the Rand formula, which makes the payment of trade union fees mandatory, regardless of the employee's union status.[841] The procedure for union certification—the process through which a union gains the exclusive right to represent a group of employees—varies across Canada, depending on the jurisdiction. But in all jurisdictions, when a trade union is certified, it becomes the only entity allowed to bargain with the employer over terms and conditions of employment, which form the collective agreement—or the common contract of employment of all unionized employees in the bargaining unit.

The provisions of collective agreements, which are required to be in written form,[842] vary greatly "with the nature, the size and complexity of the industry," as well as with "the concerns that the parties bring to the negotiations."[843] Generally, collective agreements are quite extensive, and expressly provide for a number of specific rights, obligations, and remedies in case of a breach of the agreement—generally arbitration. Typical provisions of a collective agreement include grievance and arbitration procedures, union rights but also management rights, which are often explicitly recognized in the agreement. Regarding management rights, unions can challenge the reasonableness of workplace regulations in arbitration, which may be used to contest dress and grooming codes, as analyzed in the next part.

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838 See *St Anne Nackawic Pulp & Paper Co Ltd v CPU Local 219*, [1986] 1 SCR 704; England, *Individual Employment Law*, *supra* note 180 at 2.
839 Brown & Beatty, *supra* note 31 at 1:1000.
840 *Ibid* at 1:1000.
841 *Ibid* at 9:1200; Coutu et al, *supra* note 760 at para 333.
842 Brown & Beatty, *supra* note 31 at 4:1000.
843 Saxe & Stam, *supra* note 775 at 103.

In Canada, arbitration has a central role in unionized workplaces, as it is compulsory by law. Therefore, unionized employees can seek remedies through their unions, such as invalidating regulations that are unreasonable. This process has been used by unions to challenge appearance regulations; this is why I argue that employees covered by a collective agreement have greater access to remedies than non-unionized employees through the arbitration process. The following sections briefly analyze workplace appearance regulation in labour arbitration. The first section comments on the methodology I used for retrieving the relevant case law for this dissertation—these methodology notes therefore also apply to my discussion of the jurisprudence in Chapters 5 and 6. At the outset, it is important to note that my analysis of the arbitration cases regarding workplace appearance regulation is not completely exhaustive, as it focuses on the most influential arbitration awards. It should be emphasized that the legality of appearance policies will vary on a case-by-case basis, depending on each particular workplace. Also, since my dissertation focuses on human rights issues, the following sections offer an examination of the general principles in employees' appearance arbitral jurisprudence, particularly in common law jurisdictions, but they do not aim to present a complete legal analysis of this question. Thus, I discuss the evaluation of the reasonableness of employers' management rights—and the corresponding *KVP* test—which is the approach arbitrators use to determine the validity of dress and grooming codes. Then, I examine the "personal appearance" exception to the rule "obey now, grieve later," often discussed in arbitration awards, followed by an analysis of the employer's evidence to prove the reasonableness of appearance regulations. This section ends with a short discussion of the employer's justifications, which generally fall under health and safety concerns or the protection of the corporate image.

4.1.2.1 Notes on Case Law Research Methodology

The jurisprudence research revealed that the judicial treatment of workplace appearance disputes falls under two main categories: first, cases coming from provincial and federal human

rights tribunals, analyzing the question under the right to equality;[844] and second, arbitration awards, which form the majority of the selected cases, mostly using a reasonableness approach. This means that there is another ground for challenging workplace appearance regulation that does not necessarily involve human rights and freedoms, but that is rather linked to the exercise of employers' management rights. The role of unions is thus clearly important in the legal challenge to workplace appearance regulation. Even if this dissertation focuses on workplace appearance regulation as a human rights issue, it is important to sort out the main labour principles when adjudicating dress and grooming codes.

In terms of methodology, the case law research to identify the relevant cases was conducted through the major databases in Canadian employment and labour law research: LexisNexis Quicklaw, WestlawNext Canada, SOQUIJ, Labour Arbitration Cases (LAC), and CanLII.[845] While I conducted extensive research to retrieve as many cases as possible,[846] it is important to note that the cases I selected are only a cross-selection of all those that were decided on the issue of

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844 See Chapter 5, section 5.2, *below*.

845 My investigation started with a leading secondary source in labour law, Brown & Beatty's *Canadian Labour Arbitration*, which offers extensive references to arbitration awards involving appearance in the workplace (see Brown & Beatty, *supra* note 31). Then I searched through the LabourSource database (previously Labour Spectrum Essential), an electronic research tool available on WestlawNext Canada that includes online access to Brown & Beatty and all Labour Arbitration Cases (LAC). I looked at the whole LAC collection for cases involving appearance issues in the workplace in British Columbia and Ontario. This resource covers leading precedent-setting labour cases from all common law provinces and territories and cases of general interest from Quebec, from 1948 to present. The LAC collection is a prime reference source for Canadian labour case law. As for the Quebec jurisprudence, I mainly looked into the SOQUIJ electronic database, with a focus on Droit du travail express (DTE—until December 2016) and Express Travail, which provide summaries of leading or noteworthy labour and employment law cases. After having researched the arbitral jurisprudence, I looked at both WestlawNext Canada and LexisNexis Quicklaw electronic database, as they are the most comprehensive and current legal databases. They both offer flexibility in sorting and grouping search results, a feature that was found useful because of the variety of terms used in the cases involving appearance in the workplace.

846 On account of the large scope of the definition of physical appearance used in this dissertation, I did extensive research to retrieve as many cases as possible. Therefore, the following keywords (and their translation in French) were alternatively used for the three provinces under study: "personal appearance," "physical appearance," "dress," "dress code," "appearance code," "grooming code," "appearance discrimination," "appearance-based discrimination," "tattoo," "piercing," "obesity or obese or overweight," "height or weight," "hair, hair style, or hairstyle" "beard," "clothing," "uniform," "earring or jewellery or jewelry," and "short or skirt or jeans." To narrow my research to appearance issues in employment contexts, these keywords were searched in combination with "work," "workplace," or "employment." Given the large coverage of the terms used in this research, a lot of cases were discarded, many of them including the payment for uniform (clothing allowance) and sexual harassment complaints (including scarce comments on the complainant's appearance). While I looked at more than 600 decisions in the course of this research, around 180 were selected as relevant cases addressing workplace appearance issues.

appearance in the workplace. For instance, the LAC collection only covers arbitration awards that were selected by the editors as precedent-setting cases. In addition, many arbitration awards are not reported. While my selection of cases is not exhaustive—because they mostly are the reported cases—they were selected because they are easily accessible and thus likely the most influential.

Also, the database research I conducted focused on cases from British Columbia, Ontario, and Quebec, but all relevant precedents from other common law jurisdictions that courts or tribunals considered in deciding the selected cases were also kept for analysis in this dissertation, even if they did not originate from the provinces under study. Although this process did not result in a comprehensive coverage of workplace appearance cases, it allowed for the retrieval of the leading cases on this issue.

One of the main challenges of this case law research was the variety of terms used in the jurisprudence involving appearance issues. First, not all cases involving appearance use the term "appearance" or "dress code." Some of the cases only discuss the particular issue at stake and do not mention the word appearance,[847] making it difficult to identify them as appearance cases. Also, many decisions mention the terms "dress code" or "appearance codes," without really discussing these aspects of employees' regulation. In some cases, I found that the complainant was disciplined or dismissed for many reasons, one of them being for breach of dress code, but the dress code violation alone was not decisive or was not a prominent reason for the sanction.[848] In other cases, the employee's sanction was based on appearance violations, but the cases only analyzed the issues in terms of insubordination, without any discussion on the merits of the employers' appearance regulations.[849] I only selected cases where dress code violations were a major reason justifying the disciplinary measure or dismissal and where this issue was analyzed in some depth.

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847 See e.g. *Mottu v MacLeod*, 2004 BCHRT 76 [*Mottu*].

848 See e.g. *Re Insurance Corporation of British Columbia and Canadian Office & Professional Employees' Union, Local 378* (2015), 248 LAC (4th) 416 (BC Arb); *Greater Victoria Hospital Society and Hospital Employees' Union*, [1998] BCCAAA No 333 (BC Arb).

849 See e.g. *York BRT Services LP v ATU, Local 113* (2010), 195 LAC (4th) 137 (Ont Arb).

4.1.2.2 The Reasonableness of the Employer's Management Rights

As I argue in section 4.2 below, rule-making is a legitimate exercise of employers' management rights, but this power is not absolute. Early on in appearance cases, there was a general understanding that employers were not entitled, under their managerial prerogatives, to unilaterally impose dress and grooming codes: "[*P]rima facie*, as long as the employee performs the job or the work for which he has been hired the employer has no authority to impose his personal views of appearance or dress upon the employee. *There is no absolute right in an employer to create an employee in his own image*."[850] While this quote was written nearly fifty years ago and is quite compelling in terms of advancing employees' interests, it should be noted that it did not represent all the arbitrators' position on workplace appearance regulation at that time and for the decades that would follow.

Nevertheless, a number of principles developed in labour arbitration impose limitations on the employer's rule-making power, particularly requiring that unilaterally promulgated regulations or policies "must not be inconsistent with the terms of the collective agreement, their enforcement not be unreasonable, and they must be brought to the attention of those intended to be regulated by them."[851] These general principles have been set out in the repeatedly cited *KVP* test, which was established in *KVP Co*,[852] in 1965. Most of the selected workplace appearance cases in common law jurisdictions are thus challenging the employer's rule as an unreasonable exercise of managerial prerogative. The reasonableness requirement implies that the employer's policy "is necessary to protect the employer's interests in operating the [business], in preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner."[853] In assessing whether employers' policies are reasonable, their impact upon the employees' interests must be

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850 *International Association of Fire Fighters, Local 626 v Scarborough (City)* (1972), 24 LAC 78 at para 23 (Ont Arb) [*Scarborough Fire Fighters*] [emphasis added].
851 Brown & Beatty, *supra* note 31 at 4:1520.
852 *KVP Co v Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 LAC 73 (Ont Arb) [*KVP Co*].
853 Brown & Beatty, *supra* note 31 at 4:1524.

weighed, especially when the rules affect the employees' private lives.[854] A balancing of the employer's interests and the employees' "rights as individuals in a democratic society" is required "to determine the reasonableness of the rules."[855]

As for most Quebec arbitral decisions, while some cases strictly refer to the reasonableness of appearance rules—particularly arbitral decisions preceding the enactment of the *Quebec Charter* or in the decade following its adoption[856]—a great majority now analyze workplace appearance regulations through the *Quebec Charter* fundamental rights and freedoms.[857] Therefore, several Quebec arbitration awards are included in the following discussion when relevant, but most of the Quebec cases are analyzed in Chapter 6.

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854 *Ibid* at 4:1524; *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 [*Association of Justice Counsel*]; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34 at para 27 [*Irving Pulp & Paper*].

855 *Ottawa Hospital*, *supra* note 1 at para 79. See also *Re Revera Inc and Southwestern Ontario Health Care and Service Workers Union, CLAC, Local 303* (2018), 292 LAC (4th) 435 at para 18 (Ont Arb) [*Revera*]; *BC Assessment Authority*, *supra* note 438 at para 65; *Moosonee District School Area Board v Elementary Teachers' Federation of Ontario* (2012), 110 CLAS 340 (Ont Arb) [*Moosonee*]; *Calgary Co-operative Association v Union of Calgary Co-Op Employees* (2006), 145 LAC (4th) 296 at para 53 (Alta Arb) [*Calgary Co-op*]; *Walfoods Ltd v United Food & Commercial Workers International Union, Locals 175 & 633* (2005), 144 LAC (4th) 272 at paras 44-45 (Ont Arb) [*Walfoods*]; *Westfair Foods Ltd v United Food and Commercial Workers Union, Local 401* (2005), 82 CLAS 49 at para 137 (Alta Arb), aff'd 2006 ABQB 103 [*Westfair Foods*]; *United Food and Commercial Workers Union, Local 175 & 633 v Zehrs Markets Inc* (2003), 116 LAC (4th) 216 at para 62 (Ont Arb) [*Zehrs Markets*]; *National Steel Car Ltd v United Steel Workers of America, Local 7135* (1998), 76 LAC (4th) 176 at para 36 (Ont Arb) [*National Steel Car*]; *Sudbury Public Library Board v Canadian Union of Public Employees, Local 207* (1996), 55 LAC (4th) 219 at para 62 (Ont Arb) [*Sudbury Public Library*]; *Canadian Freightways Ltd v Office & Technical Employees' Union* (1995), 49 LAC (4th) 328 (BC Arb) [*Canadian Freightways*].

856 In 1993 (almost twenty years after the enactment of the *Quebec Charter*, see section 4.3.1.3, *below*), writing for the CDPDJ, Drapeau notes that "it is quite surprising that labour arbitrators did not raise more often the *Quebec Charter* fundamental rights and freedoms to determine the validity of workplace appearance regulation, including uniforms" (CDPDJ (Drapeau), *supra* note 32 at 11) [translated by author]. However, on the general question of the use of the *Quebec Charter* by arbitrators, Vallée observes that a transformation was perceptible in arbitral jurisprudence "starting from 1999, when recourse to the [*Quebec Charter*] and to associated jurisprudential notions appeared to become more important, at least with respect to certain grounds of discrimination" (Vallée, "Labour Law", *supra* note 753 at 154-155).

857 While most Quebec arbitration awards regarding workplace appearance now refer to the *Quebec Charter*, in a very recent case, Arbitrator L'Heureux explains that there are two analytical frameworks regarding workplace appearance regulation in Quebec. The first is strictly based on the reasonableness of the rule and the *KVP* test (when no fundamental rights and freedoms are involved, which is rare, but possible), and the second approach being founded on the *Quebec Charter*'s rights and freedoms (*Policiers de Longueuil*, *supra* note 141 at para 52). See also *Syndicat de l'enseignement de Lanaudière et Commission scolaire des Samares*, DTE 2012T-862 at paras 68-76 (Qc Arb) [*Commission scolaire des Samares*]; *Caisse Desjardins Thérèse-de-Blainville et Syndicat des employées et employés professionnels et de bureau, section locale 575*, DTE 2011T-672 at paras 103-107 (Qc Arb) [*Caisse Desjardins*].

4.1.2.3 The *KVP* Test

Arbitration awards involving a challenge to employers' appearance regulations or policies have historically been decided under the *KVP* test, designed to determine if the employer's rule is "reasonable," among other considerations. The *KVP* test, which was reiterated and endorsed by the SCC in 2017 in *Association of Justice Counsel*,[858] has now become universally recognized in arbitral decisions,[859] providing the following principles:

> *Characteristics of Such Rule*
>
> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
>
> 2. It must not be unreasonable.
>
> 3. It must be clear and unequivocal.
>
> 4. It must be brought to the attention of the employee affected before the company can act on it.
>
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
>
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.
>
> *Effect of Such Rule re Discharge*
>
> 1. If the breach of the rule is the foundation for the discharge of an employee such rule is not binding upon the board of arbitration dealing with the grievance, except to the extent that the action of the company in discharging the grievor, finds acceptance in the view of the arbitration board as to what is reasonable or just cause.
>
> 2. In other words, the rule itself cannot determine the issue facing an arbitration board dealing with the question as to whether or not the discharge was for just cause because the very issue before such a board may require it to pass upon the reasonableness of the rule or upon other factors which may affect the validity of the rule itself.
>
> 3. The rights of the employees under the collective agreement cannot be impaired or diminished by such a rule but only by agreement of the parties.[860]

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858 *Supra*, note 854 at paras 20-24. See also *Irving Pulp & Paper*, *supra* note 854 at paras 24-26.
859 Brown & Beatty, *supra* note 31 at 4:1520; Burchill, *supra* note 94 at 206; Bosveld, *supra* note 123 at 359.
860 *KVP Co*, *supra* note 852 at para 34.

Generally, arbitrators balance the employer's legitimate justifications (whether supported by health and safety concerns or business image) and the employees' rights to privacy or to "personal freedom to express their individual identities"[861] in order to determine if dress and appearance regulations are reasonable. The conclusion as to whether a particular appearance rule is the result of reasonable exercise of managerial prerogative will vary in each case depending on the specific set of facts and circumstances—especially on the nature of the workplace, the employee's tasks, the employer's business, and the interests at stake.[862] As one arbitrator asserts, "[t]here is no single cookie cutter approach or one size fits all application in these matters."[863]

Even if it was established in a 1965 decision, the *KVP* test can be found in a majority of the common law jurisdiction arbitration cases discussed in this dissertation.[864] In a 2013 award,[865] the employer (a hospital that implemented a strict dress code—including a ban on large tattoos) challenged the authority of the *KVP* test, which it argued was out-dated. The hospital argued that the principles set out in the test needed to be revisited, as they "are neither possible to meet in a dress code or in the context of a large organization with thousands of employees, nor they recognize the priority the hospital places on patient needs over employee freedom."[866] Arbitrator Slotnick

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861 Brown & Beatty, *supra* note 31 at 7:3550. See e.g. *West Lincoln Memorial Hospital v Christian Labour Association of Canada, Local 302* (2004), 126 LAC (4th) 52 at para 14 (Ont Arb) [*West Lincoln*].

862 Brown & Beatty, *supra* note 31 at 7:3550. See also Burchill, *supra* note 94 at 212.

863 *Kitchener-Waterloo Record v Communications, Energy and Paperworkers Union* (2006), 147 LAC (4th) 417 at para 23 (Ont Arb) [*Kitchener-Waterloo Record*].

864 See e.g. *Revera*, *supra* note 855; *BC Assessment Authority*, *supra* note 438; *Ottawa Hospital*, *supra* note 1; *Moosonee*, *supra* note 855 at para 53; *Ontario Provincial Police*, *supra* note 140 at para 25; *Maple Leaf Consumer Foods Inc v Schneider Employees' Association* (2008), 170 LAC (4th) 382 (Ont Arb) [*Maple Leaf*]; *Calgary Co-op*, *supra* note 855; *Kitchener-Waterloo Record*, *supra* note 863; *Westfair Foods*, *supra* note 855; *Zehrs Markets*, *supra* note 855; *Canada Safeway Ltd v United Food and Commercial Workers, Local 1518* (1998), 74 LAC (4th) 306 (BC Arb) [*Canada Safeway* 1998]; *National Steel Car*, *supra* note 855; *Sudbury Public Library*, *supra* note 855; *Brinks Canada Ltd v Independent Canadian Transit Union, Local 1*, [1995] BCCAAA No 411 (BC Arb) [*Brinks* 1995]; *Canadian Freightways*, *supra* note 855; *International Simultaneous Translation Services Inc v NABET* (1993), 33 LAC (4th) 179 (BC Arb) [*International Simultaneous Translation*]; *Empress Hotel v Canadian Brotherhood of Railway Trainmen, Local 726* (1992), 31 LAC (4th) 402 at 408 (BC Arb) [*Empress Hotel*]; *University of British Columbia Health Sciences Centre Hospital Society v Hospital Employees' Union, Local 180* (1985), 21 LAC (3d) 132 (BC Arb) [*UBC Hospital*]; *Pacific Western Airlines Ltd v Canadian Airline Employees' Association* (1981), 29 LAC (2d) 1 (Can Arb) [*Pacific Western Airlines*]; *Air Canada v Canadian Airline Flight Attendants' Association* (1975), 9 LAC (2d) 254 (BC Arb) [*Air Canada* 1975]; *JM Schneider Ltd Meatpackers v Schneider Employees' Association* (1975), 10 LAC (2d) 283 (Ont Arb) [*Schneider*]; *North Vancouver (District) v International Association of Fire Fighters* (1974), 6 LAC (2d) 203 (BC Arb) [*North Vancouver Fire Fighters*]; *Allied & Technical Workers, District No 50 v Dominion Stores Ltd* (1972), 23 LAC 257 (Ont Arb) [*Dominion Stores* 1972]; *Scarborough Fire Fighters*, *supra* note 850.

865 *Ottawa Hospital*, *supra* note 1.

866 *Ibid* at para 71.

considered the employer's contention "that there be a new test in the hospital context in which perceived patient interests must trump those of employees unless physical harm to the employee can be shown,"[867] but found no need to revisit the *KVP* test.

4.1.2.4 The "Personal Appearance" Exception to the Rule "Obey Now, Grieve Later"

While employees pursue their rights through an arbitration process to dispute the validity of an appearance policy, they are usually required to conform to the employer's rule, unless they can demonstrate that doing so would cause them a serious harm.[868] The general principle, which is well established in labour arbitration, is that employees who challenge their employer's orders or policies must first comply with these directives and contest their reasonableness only afterwards through the grievance process. This principle is known as the "obey now, grieve later" rule—also called "work first and grieve later"—and it lies "in the employer's need to be able to control and direct its operations, to ensure that they continue uninterrupted even when controversies arise, and […] to maintain such discipline as may be required to ensure the efficient operation of the enterprise."[869] However, this rule may not apply "when adequate redress cannot be secured through the grievance and arbitration process,"[870] when complying with the employer's directive involves health and safety concerns, or when the employer's order involves a criminal or otherwise illegal action.[871]

In particular, workplace appearance cases—also called "personal appearance cases" in the case law—have generated an exception to the "obey now, grieve later" rule, when employees refuse

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867 *Ibid* at para 72.

868 *Thrifty* 2002, *supra* note 133 at 424; Brown & Beatty, *supra* note 31 at 7:3550. See also Snyder, *supra* note 31 at 648-660.

869 Brown & Beatty, *supra* note 31 at 7:3610.

870 *Ibid* at 7:3610. See also Mitchnick & Etherington, *supra* note 31 at 13.2.4.

871 *Thrifty* 2002, *supra* note 133 at 424; *Kirkham*, *supra* note 825 at para 76; *York Farms Ltd v Canadian Food & Allied Workers, Local P430* (1981), 2 LAC (3d) 112 at para 22 (BC Arb) [*York Farms*]. See also Pedneault et al, *supra* note 32 at 20.431; Fernand Morin & Rodrigue Blouin, *Droit de l'arbitrage de grief*, 6th ed (Cowansville, QC: Yvon Blais, 2012) at no IX.59. It should be noted that one arbitrator from Quebec mentioned that the "obey now, grieve later" rule does not apply when an appearance policy is in contravention with the *Quebec Charter*, in a case in which the rule should have otherwise applied—the prohibition of a t-shirt bearing a religious message (*Syndicat des métallos, section locale 9414 et Transformateurs Delta inc*, DTE 2009T-744 at para 51 (Qc Arb) [*Transformateurs Delta*]).

to comply with dress or grooming codes.[872] For instance, when disobeying the appearance rule does not cause any prejudice to the employer[873] and when the policy affects the employee's freedom over their appearance during off-duty hours,[874] the employee could be able to take advantage of this exception and refuse to conform to the appearance rule before the end of the arbitration process. In particular, this exception has been applied in labour arbitration when the rule interferes with the employee's personal life—such as the "no beards" rule or the obligation to cut hair—as the employee cannot be adequately compensated through the grievance procedure. In deciding on this exception, every case must be decided on its particular set of circumstances, and the employer's interests must be balanced against the employee's interests of self-expression through their appearance in the workplace.[875] However, when appearance policies only affect employees while on duty—when employees only have to wear or buy a certain type of clothing, remove a piece of jewellery or a button, or tie up their hair—they generally have to conform to the "obey now, grieve later" rule.[876]

4.1.2.5 Employers' Evidence

To defend their appearance regulations, employers have the burden of establishing that their rules are reasonable and adopted for legitimate reasons regarding business image or health and safety concerns. In the evaluation of the reasonableness of a policy, employers must prove that their alleged concern is more important than the employees' interests "in all the circumstances."[877] The jurisprudence in appearance cases has developed a distinction between "attire cases" (or dress and

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872 See e.g. *Montréal (Ville de) et Association des pompiers de Montréal Inc*, DTE 90T-323 at 6 (Qc Arb) [*Pompiers de Montréal* 1990]; *Etobicoke (City) v International Association of Fire Fighters, Local 1137* (1974), 6 LAC (2d) 251 at para 9 (Ont Arb) [*Etobicoke Fire Fighters*].

873 See e.g. *Dominion Stores* 1972, *supra* note 864 at 18.

874 See Mitchnick & Etherington, *supra* note 31 at 13.2.4.

875 *Brinks* 1995, *supra* note 864 at para 106. See also *Thrifty* 2002, *supra* note 133 at 425.

876 Brown & Beatty, *supra* note 31 at 7:3624. See e.g. *CHSLD La Maison Rose-Blanche et SQEES, section locale 298*, 2015 QCTA 162 at para 28 (Qc Arb); *Syndicat québécois des employées et employés de service, section locale 298 et Société de réadaptation et d'intégration communautaire*, DTE 2013T-365 (Qc Arb) [*Société de réadaptation*]; *Syndicat des employés d'hôpitaux de Val-D'Or et Centre hospitalier de Val-D'Or*, (2002) AZ-02145000 (SOQUIJ) (Qc Arb); *Thrifty* 2002, *supra* note 133 at 427; *Re Health Employers Association of British Columbia and Hospital Employees' Union*, [1998] BCCAAA No 52 at para 15 (BC Arb); *Brinks* 1995, *supra* note 864 at para 107; *Union des employés de commerce, section locale 500 et Steinberg Inc*, DTE 85T-218 at 16 (Qc Arb) [*Steinberg*].

877 *Thrifty* 2001, *supra* note 5 at para 26.

uniform cases) and "hair and beard cases," establishing that in the former, "the onus is relatively low, and significant deference is given to the [e]mployer's assessment of its image."[878] However, the hair and beard cases "have attracted a higher onus on the employer because of the impact rules concerning hair length or beards have on an employee's private life,"[879] as "[a]n employee cannot shave a beard and cut his hair for work and re-grow it after his shift ends."[880] This distinction is based on the effect of the policy on the employee's off-duty life, as attire cases are a lesser infringement on employees' personal freedom or personal life. When items of clothing can be changed after work or the employee's off-duty appearance remains untouched outside the workplace, appearance rules are more easily considered reasonable.[881]

Thus, "where the off-shift life style of the employee may not be seriously affected, because the employee can simply take the clothing off,"[882] the employer's burden of proof would be less onerous. "The greater the harm to the employees off duty life, the greater must be the employer's interest and the more stringent the burden of proof upon the employer."[883] But in *Thrifty*,[884] Arbitrator Larson stated that one should be cautious on such a distinction, as sometimes the impact on the employees' off-duty life is not so obvious:

> [I]n many situations, while articles of attire are usually capable of being removed, it may be that to do so could impinge on one's religion or belief system and, if not that, could affect one's self esteem and personal image. I accept that there is always a balance to be drawn and that the interests of the employer must always be weighed against those of the employee but I am not prepared to accept that in the clothing type of cases that an employer is not required to demonstrate on clear and convincing evidence that a policy is likely to be effective. It is not sufficient, even in those kinds of cases, to demonstrate that there is a rational connection between the policy and what it seems to achieve.
>
> […]

878 *Ontario Provincial Police*, *supra* note 140 at para 25. See also *National Steel Car*, *supra* note 855 at para 36; *Canadian Freightways*, *supra* note 855 at para 66; *Canadian Newspaper Co v Victoria Newspaper Guild, Local 223,* [1991] BCCAAA No 147 at para 63 (BC Arb) [*Canadian Newspaper*]; *UBC Hospital*, *supra* note 864; *Pacific Western Airlines*, *supra* note 864 at para 20; *York Farms*, *supra* note 871.

879 *Ontario Provincial Police*, *supra* note 140 at para 29.

880 *Calgary Co-op*, *supra* note 855 at para 49.

881 See e.g. *Canadian Newspaper*, *supra* note 878; *Pacific Western Airlines*, *supra* note 864.

882 *Thrifty* 2001, *supra* note 5 at para 22.

883 *Canadian Newspaper*, *supra* note 878 at para 63.

884 *Thrifty* 2001, *supra* note 5.

> It may well be that, as a general matter of principle, in those cases where a policy would have a minimal impact on the off-shift life style of the employee, it may not require a lot of proof to justify it but, what must be constantly borne in mind is that the onus of proof resides with the employer to convince the arbitrator that the policy is necessary, based upon good and generally accepted business practices.[885]

Thus, in this case, the fact that the "no piercings and earrings" policy did not affect the employees' private lives after work was not a decisive concern.[886] The employer's evidence, which consisted "of the sound business judgement of management, based on years of experience,"[887] as well as the practices and policies of other car rental companies which prohibited piercings, was not persuasive enough for the arbitrator to conclude that the policy was "necessary to preclude a loss of business or otherwise to attract the broadest range of customers."[888] "Without solid evidence that a policy will be effective to support a legitimate business objective," the arbitrator concluded, "no point can be served in restricting the employees' personal right to groom and attire themselves."[889]

In *Ottawa Hospital*, the lack of evidence from the employer was also noted as detrimental: "Aside from [the employer's representatives] own assertions, there was no evidence supporting this alleged link between patients' health outcomes and their possibly negative impressions about a staff member's tattoo or piercing."[890] The personal opinion of the hospital's senior managers was not sufficient to meet the test of reasonableness, in absence of patients' complaints or objective evidence:

> It is hard not to conclude that the hospital has attempted to fix a problem that does not exist. The hospital has not shown that there is any legitimate reason for the employer to control the exposure of tattoos and piercings to the extent the dress code does. Where no harm can be shown to either patients or employees or the hospital itself, the restrictions are an infringement of the employees' right to present themselves as they see fit.[891]

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885 *Thrifty* 2001, *supra* note 5 at paras 23-24. See also *Calgary Co-op*, *supra* note 855 at para 64.

886 But see *Calgary Co-op*, *supra* note 855 at para 49 (considering facial piercing in the beard cases category: "an employer policy prohibiting […] facial jewellery at work has the effect of precluding employees from having […] nose studs off the job as well, thereby affecting their private lives."). See also *Westfair Foods*, *supra* note 855 at para 139.

887 *Thrifty* 2001, *supra* note 5 at para 21.

888 *Ibid* at para 49.

889 *Ibid*. See also *West Lincoln*, *supra* note 861 at para 16; *Sudbury Public Library*, *supra* note 855. But see *Canada Safeway Ltd v United Food and Commercial Workers Union, Local 832* (1997), 63 LAC (4th) 256 (Man Arb) [*Canada Safeway* 1997].

890 *Ottawa Hospital*, *supra* note 1 at para 84.

891 *Ibid* at para 94.

Arbitrators generally consider that employers' evidentiary burden needs to rely on objective evidence of prejudice;[892] "mere speculation and subjective impressions are not enough."[893] Consumer opinion surveys[894] and complaints from the public[895] are often required as objective evidence. However, customer surveys must be adequate and convincing,[896] in that they must show that the policy is necessary to avoid loss of business. In a New Brunswick case regarding a cooperative retail store policy prohibiting male employees from wearing earrings, the employer conducted a survey in which 72% of the interviewed customers were not in favour of male employees wearing an earring while on duty.[897] Because the employer had not attempted to demonstrate that male clerks with earrings would have a negative economic impact on its business,[898] but instead interviewed customers to find out if they liked this particular trend, the grievance was allowed. In addition, the wording of the questions in a customer survey matters significantly. In several arbitration awards dealing with piercings or beards on grocery store employees, the grievance was allowed because of the employer's unconvincing evidence, as the wording of the surveys may have resulted in respondents imagining employees with multiple piercings or bushy beards—instead of employees "otherwise well-groomed, with one small nose stud" or a "well-trimmed beard."[899]

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892 See e.g. *Moosonee*, *supra* note 855 at para 54; *Ontario Provincial Police*, *supra* note 140 at 48, 52; *Kitchener-Waterloo Record*, *supra* note 863 at para 23; *Thrifty* 2001, *supra* note 5 at para 29; *Waterloo Regional Police*, *supra* note 139 at para 72; *Wardair Canada Inc v Canadian Air Line Flight Attendants' Association* (1987), 28 LAC (3d) 142 (Can Arb), aff'd 1988 CarswellOnt 1029 (WL Can) (Ont Div Ct) [*Wardair*]; *Air Canada* 1975, *supra* note 864 at para 48; *Schneider*, *supra* note 864 at para 24; *Dominion Stores* 1972, *supra* note 864; *Scarborough Fire Fighters*, *supra* note 850 at para 25. See also Bosveld, *supra* note 123 at 360-361.

893 Brown & Beatty, *supra* note 31 at 7:3550; *International Simultaneous Translation*, *supra* note 864 at 73. See also *Auto Haulaway Inc v Teamsters Union, Local 880* (1997), 69 LAC (4th) 275 at para 21 (Ont Arb) [*Auto Haulaway*]; *Scarborough Fire Fighters*, *supra* note 850 at paras 25-26.

894 See e.g. *Calgary Co-op*, *supra* note 855; *Westfair Foods*, *supra* note 855; *Canada Safeway* 1997, *supra* note 889; *Canadian Freightways*, *supra* note 855; *Co-op Centre Ltd v Retail, Wholesale and Department Store Union, Local 1065* (1990), 17 LAC (4th) 186 (NB Arb) [*Co-op* 1990].

895 See e.g. *Auto Haulaway*, *supra* note 893 at para 22; *Air Canada* 1975, *supra* note 864 at para 46; *Canadian Food & Allied Workers v William Neilson Ltd* (1972), 24 LAC 206 at para 20 (Ont Arb) [*William Neilson*]; *Dominion Stores* 1972, *supra* note 864; *Scarborough Fire Fighters*, *supra* note 850 at para 26.

896 See e.g. *STL*, *supra* note 6 at para 115; *Calgary Co-op*, *supra* note 855; *Westfair Foods*, *supra* note 855; *Maxi St-Jérôme*, *supra* note 4; *Canada Safeway* 1998, *supra* note 864; *Dominion Stores Ltd v United Steelworkers of America* (1976), 11 LAC (2d) 401 (Ont Arb) [*Dominion Stores* 1976]. But see *Syndicat des travailleuses et travailleurs de l'Hôtel Reine Élizabeth et Hôtel Reine Élizabeth*, DTE 2005T-159 (Qc Arb) [*Reine Élizabeth*].

897 *Co-op* 1990, *supra* note 894.

898 *Ibid* at para 27. See also *Calgary Co-op*, *supra* note 855; *Wardair*, *supra* note 892.

899 *Westfair Foods*, *supra* note 855 at para 151; *Maxi St-Jérôme*, *supra* note 4; *Dominion Stores* 1976, *supra* note 896.

Objective evidence supporting the appearance policy can also take the form of financial records that show an actual or probable loss of business.[900] But objective evidence must not *always* take the form of financial statements and customer surveys,[901] when the employer's justification relies on "something that [can be] considered to be obvious as being with the experience of most people,"[902] such as the fact that a uniform policy in a hospital would assist in controlling infections[903] or a new car transportation company's policy of long pants or coveralls for drivers would prevent the soiling of cars.[904]

4.1.2.6 Employers' Justifications

When a rule is considered an infringement on employees' private lives or expression of their selves, in order to establish its reasonableness, the employer must demonstrate a "substantial connection with its legitimate interests."[905] Appearance policies generally fall within the employer's reasonable exercise of management rights, if they are justified by the safe and efficient operation of the enterprise or the protection of its corporate image.

Health and Safety Concerns

As Canadian legislation generally holds employers responsible and liable for the health and safety of their employees[906] and the public, some appearance policies can be justified on these grounds. For instance, an arbitrator ruled that for safety reasons, employers may impose the wearing of protective clothing under hazardous conditions or the obligation of employees with long hair to

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900 See e.g. *Calgary Co-op*, *supra* note 855 at para 49; *Scarborough Fire Fighters*, *supra* note 850 at para 25.
901 See e.g. *Canadian Newspaper, supra* note 878 at paras 73-74.
902 *Thrifty* 2001, *supra* note 5 at paras 35-36.
903 See e.g. *UBC Hospital*, *supra* note 864 at paras 9-10.
904 See e.g. *Auto Haulaway*, *supra* note 893 at para 5.
905 Brown & Beatty, *supra* note 31 at 4:1524.
906 For instance, in British Columbia and Ontario, employers have a common law duty to make the workplace reasonably safe (see England, *Individual Employment Law*, *supra* note 180 at 100-101); they also have a general statutory obligation to ensure the health and safety of all workers (see BC WCA, s 21; Ont OHSA, s 25). Quebec employers also have a general obligation to ensure the health and safety of their employees (see Qc AOHS, s 9, 51; *Quebec Charter*, s 46; art 2087 CCQ).

wear hairnets when their work involve contacts with dangerous machinery.[907] Over the years, health and safety concerns have thus justified many workplace appearance policies, and this rationale is generally more acceptable than justifications based on the employer's image. But when employers' appearance rules are rationalized based on matters of health and safety of the employee, of other employees, and of the public, employers must provide evidence of a "real element of risk"[908] to uphold the reasonableness test.[909]

For instance, the "no beards" policies are usually considered reasonable in terms of health and safety concerns, particularly for fire-fighters,[910] paramedics,[911] and flight-attendants[912] who have to wear a mask that could be improperly sealed because of facial hair.[913] No beards rules have also been found to be reasonable in food production or service industries, on the grounds of protecting the consuming public or eliminating the problem of contamination caused by human hair in the products,[914] for instance. However, a real risk must be objectively established; otherwise these rules are found unreasonable.[915] Hence, in the absence of a risk to the health and safety, a "no-sideburns" policy was found unreasonable, because the griever's sideburns—a firefighter—would not affect the

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907 *Scarborough Fire Fighters*, *supra* note 850 at para 24.

908 *Walfoods*, *supra* note 855 at para 35; *Brinks* 1995, *supra* note 864 at para 76; *Kellogg Salada Canada Inc, London Plant v American Federation of Grain Millers, Local 154* (1984), 17 LAC (3d) 106 at para 19 (Ont Arb) [*Kellogg*]; *DuPont Canada Inc v Teamsters' Union, Local 1166* (1982), 8 LAC (3d) 24 at para 16 (Ont Arb) [*DuPont*]. See also *Syndicat international des peintres et métiers connexes, vitriers et travailleurs du verre, section locale 1135 et Jeld-Wen du Canada inc*, 2019 QCTA 333 (Qc Arb); *Unite Here Local 40 v Harrison Hot Springs Resort & Spa*, [2012] BCCAAA No 68 (BC Arb).

909 See e.g. *West Lincoln*, *supra* note 861 at paras 16-17; *Montréal (Ville de) et Association des pompiers de Montréal inc*, DTE 97T-510 (Qc Arb); *Etobicoke Fire Fighters*, *supra* note 872 at para 12; *Koehring-Waterous Ltd v International Association of Machinists, Lodge 1105* (1974), 6 LAC (2d) 83 at para 13 (Ont Arb); *North Vancouver Fire Fighters*, *supra* note 864. See also *Denison Mines Ltd v United Steelworkers, Local 5762* (1973), 2 LAC (2d) 186 (Ont Arb).

910 See e.g. *Ville d'Aylmer c Syndicat des pompiers du Québec, section locale Aylmer*, DTE 92T-1014 (Qc CS) [*Pompiers d'Aylmer*]; *North Vancouver Fire Fighters*, *supra* note 864 at para 30.

911 See e.g. *Wheatley v British Columbia (Emergency & Health Services Commission)*, 2009 BCHRT 106 [*Wheatley*].

912 See e.g. *Re Wardair Canada (1975) Ltd and CALFA* (4 January 1982) [unreported], cited in *DuPont*, *supra* note 908 at paras 12, 17.

913 See also *Rebuts solides canadiens inc et Syndicat des cols bleus regroupés de Montréal*, DTE 2014T-33 (Qc Arb); *Maple Leaf*, *supra* note 864; *Pannu v Skeena Cellulose Inc*, 2000 BCHRT 56; *Baymag v BBF, Local D331* (1994), 43 LAC (4th) 87 (Alta Arb); *Kellogg*, *supra* note 908; *DuPont*, *supra* note 908.

914 See e.g. *Agropur, Coopérative agro-alimentaire et Syndicat national des produits laitiers de Sherbrooke*, DTE 89T-334 (Qc Arb) [*Agropur* 1989]; *Agropur, Coopérative agro-alimentaire et Union des ouvriers de laiterie, local 521*, DTE 85T-217 (Qc Arb); *William Neilson*, *supra* note 895.

915 See e.g. *Zehrs Markets*, *supra* note 855; *Dominion Stores* 1976, *supra* note 896. See also *Hôtel-Dieu de Montréal et Syndicat national des employés de l'Hôtel-Dieu de Montréal*, DTE 87T-441 (Qc Arb) [*Hôtel-Dieu de Montréal*].

seal of the mask; the arbitrator concluded no risk was proven as only slight reference to safety issues was made in the evidence.[916] For the same reasons, a prohibition of stud earrings[917] and beards[918] for armoured car drivers, a ban on facial jewellery for dietary aides in a hospital,[919] and a prohibition of facial piercings and non-dangling earrings for cafeteria and kitchen workers[920] were deemed unreasonable.

Company's Image

On occasions, dress and grooming codes are considered essential in order to protect the business image, especially in companies where the staff has regular contact with the public. An arbitrator described the preservation and protection of the company's image as "a somewhat elusive concept, [but nonetheless] a real and valuable corporate asset worthy of protection."[921] It was also recognized as such in an early appearance case in 1968: "Companies providing a service to the public still have the right to protect their image. To the degree that that image is based on the appearance of its employees dealing with the public, the company has the right to establish rules and standards of personal appearance."[922] However, the onus of proof will generally be heavier for the employer in justifying its appearance rule based on image concerns than when health and safety considerations are involved:[923] when "the issue involves the general appearance of an employee whose employer wishes to project a certain image, the standard may be somewhat more difficult for the employer to achieve."[924]

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916 *Scarborough Fire Fighters*, *supra* note 850 at para 24. See also *Ville de Laval et Association des pompiers de Laval*, DTE 93T-282 (Qc Arb) [*Pompiers de Laval*] (the prohibition of long hair for male fire-fighters is unreasonable in the absence of objective evidence of a risk).

917 *Brinks* 1995, *supra* note 864 at para 92.

918 *Secur Inc c Union des opérateurs de machinerie lourde, local 791*, DTE 88T-626 (Qc Arb) [*Secur*].

919 *West Lincoln*, *supra* note 861.

920 *Walfoods*, *supra* note 855. See also *Union des employés de la restauration, syndicat des métallos, section locale 9400 et Aliments Olympus (Canada) inc*, 2015 QCTA 353 (Qc Arb), aff'd 2017 QCCA 813 [*Aliments Olympus*].

921 *International Simultaneous Translation*, *supra* note 864 at para 57.

922 *United Parcel Service v Teamsters, Local 396* (1968), 52 LA 1068, cited in *Dominion Stores* 1972, *supra* note 864 at para 10.

923 See CDPDJ (Drapeau), *supra* note 32 at 10; *Empress Hotel*, *supra* note 864 at para 32.

924 *Re Air Canada and Canadian Airline Pilots' Association* (14 August 1974) [unreported], cited in *Empress Hotel*, *supra* note 864 at para 32.

When the employer's rationale is based on its legitimate business interest, an arbitrator also explained that because the rules may be invading on the employee's basic individual rights and liberties, the employer's evidence must rely on "legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance or are adversely affecting the employer's business."[925] In this "sideburns" case, the arbitrator commented on the notion of business image in these words:

> 'Image' is an intangible concept about which there is much debate; it is an elusive matter held in high repute by some and looked at with considerable cynicism by others. The matter of image is a legitimate business interest under which a company may act, but again a Board of Arbitration should not act on a simple subjective view of what an employer conceives to be his image, because the matter of image is no longer a question of individual opinion. Modern social science has enabled the measurement of image by objective evidence, and as I have indicated it would be preferable if parties would submit such evidence at an arbitration.[926]

Careful consideration must therefore be given to the evaluation of the evidence based on the protection of the business image.

In the rise of appearance cases in the late sixties, when most cases were dealing with hair length and beards, rules affecting the company's image were usually found reasonable for employees who were "highly visible" and whose appearance could affect the company's commercial interests. However, employees "who carry their function in obscurity" could more easily claim an "unjustifiable intrusion into their private life," especially when those policies would affect them after their working hours.[927] A "no shorts for men" employees—including the office staff—rule was thus found reasonable in a general freight carrier, as the evidence showed that all male employees, who had some regular contact with the public, were part of "the employer's overall business image."[928] In contrast, a "no shorts rule" for employees of a public library was found unreasonable in the

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925 *Scarborough Fire Fighters*, *supra* note 850 at para 25.

926 *Ibid* at para 28.

927 See e.g. *North Vancouver Fire Fighters*, *supra* note 864 at para 22. See also *Steinberg*, *supra* note 876; *Boissons gazeuses Mainville*, *supra* note 8; *Schneider*, *supra* note 864; *National Association of Broadcast Employees & Technicians v British Columbia Television Broadcasting System Ltd* (1971), 24 LAC 68 (BC Arb).

928 *Canadian Freightways*, *supra* note 855 at para 86.

absence of cogent evidence of a threat to the employer's image.[929] In another case,[930] a newspaper dress code prohibiting blue jeans, among other things, was found reasonable for a certain category of employees, but unreasonable for employees in the circulation department and reporters. Although they did have substantial contact with the public, blue jeans were considered appropriate for the nature of their work. The employees' interests to be able to wear appropriate clothes to perform their duties had more weight in the balance against the employer's desire to enhance its image of a conservative and efficient business.[931] However, a dress code requiring dietary servers of a long term care home to wear black pants and a white shirt was found reasonable, in order to project an image of cleanliness and a restaurant-like atmosphere.[932]

In the absence of sound evidence of a threat to the company's image, rules prohibiting earrings for male employees have been considered unreasonable on several occasions (e.g. for flight attendants, a technical operator for a simultaneous translation service, and security guards in a casino).[933] As men wearing earrings becomes a question of taste, employers in unionized workplaces have to be careful not to impose too strict of an appearance policy without evidence; "the company's view of the impact on the company of the grievor wearing the stud earring is more an impression or speculation."[934] The absence of proof of economic loss for the company or any complaints by the public was also detrimental for an airline rule requiring short hair for male flight attendants,[935] for a short hair rule for a busperson at the Empress Hotel,[936] as well as for a shirt tuck-

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929 *Sudbury Public Library*, *supra* note 855 at para 65.

930 *Canadian Newspaper*, *supra* note 878. But see *Boissons gazeuses Mainville*, *supra* note 8.

931 *Canadian Newspaper*, *supra* note 878 at para 79. See also *Centre hospitalier de l'Université de Montréal et Alliance du personnel professionnel et technique de la santé et des services sociaux* (26 June 2017), Arbitrator Noël Mallette (Qc Arb) [unreported] [*CHUM*]; *BC Assessment Authority*, *supra* note 438; *Moosonee*, *supra* note 855; *Kitchener-Waterloo Record*, *supra* note 863; *Auberge Gray Rocks Inc et Association des employés de l'Auberge Gray Rocks*, DTE 89T-644 (Qc Arb). But see *Syndicat des employées et employés du marché Maxi Alma (CSN) et Provigo Distribution inc*, DTE 2004T-300 (Qc Arb).

932 *Revera*, *supra* note 855 at para 19.

933 See *Casino Niagara v Ontario Public Service Employees Union*, Local 278 (2005), 142 LAC (4th) 78 (Ont Arb); *International Simultaneous Translation*, *supra* note 864; *Wardair*, *supra* note 892. See also *Co-op* 1990, *supra* note 894. But see *Reine Élizabeth*, *supra* note 896.

934 *International Simultaneous Translation*, *supra* note 864 at 73.

935 *Air Canada* 1975, *supra* note 864.

936 *Empress Hotel*, *supra* note 864.

in policy in a grocery store that made larger employees feel personally humiliated and suffer emotional stress.[937]

An analysis of appearance cases over the years clearly reveals an evolution in fashion trends, community norms, and social diversity. As sideburns for male employees were unbearable for many employers in the 1960s, it is difficult to imagine that it would be a problem in the workplace nowadays; the same goes for pants for female employees.[938] Society's acceptance of earrings for male employees, too, has evolved over time; as an arbitrator acutely observed: "I cannot help but notice that the custom of males wearing earrings has become relatively common particularly amongst younger males. It may be that the majority of the members of the [e]mployer when asked to make a personal decision on this issue would react negatively. I somehow doubt that the majority of their children would have the same reaction."[939] Likewise, in the twenty-first century, tattoos and piercings have become mainstream in society, but people holding management position—often older individuals—are not always comfortable with such trends, which generates conflicts about dress and grooming policies,[940] as evidenced from this concise case law examination.[941] As one arbitrator noted, "often intergenerational differences and fashion fads influence management to make rules limiting employee freedom of choice in order to maintain or define an image the employer wishes to project."[942]

In conclusion, most of the selected cases involving appearance in the workplace in Canada are decided in arbitration, and this shows that unionized workers have a legal channel to challenge workplace appearance regulation that is simply not available for their non-unionized counterparts.

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937 *Calgary Co-op*, *supra* note 855 at para 64.

938 An arbitrator rightly notes: "within a society that evolves very quickly in its mores, particularly in terms of dress, haircut, beard, mustache, jewellery and other accessories, what might have been deemed inappropriate or improper in 1980 might not necessarily be so in the dawn of the 1990s." (*Pompiers de Montréal* 1990, *supra* note 872 at 10-11 [translated by author]).

939 *Co-op* 1990, *supra* note 894 at 191.

940 See e.g. *Policiers de Longueuil*, *supra* note 141; *Policiers de St-Jean-sur-Richelieu*, *supra* note 3; *Ottawa Hospital*, *supra* note 1; *Ontario Provincial Police*, *supra* note 140; *Girard*, *supra* note 696; *Maxi St-Jérôme*, *supra* note 4; *Thrifty* 2001, *supra* note 5; *Parent c 9000-5489 Québec Inc*, DTE 97T-665 at 6 (CQ civil (div pet cré)) [*Parent*].

941 See generally Burchill, *supra* note 94 at 195.

942 *BC Assessment Authority*, *supra* note 438 at para 67.

Thus, it is very difficult for non-unionized employees to challenge their employer's appearance-related policies, particularly in common law provinces. In arbitration awards from common law jurisdictions, appearance regulations' challenges are generally analyzed under a reasonableness test, where the employer's interests in keeping the disputed rule are balanced against the employees' personal rights. Although fundamental rights and freedoms are not specifically protected by law in the two common law jurisdictions under study, references to employees' privacy, self-expression, and personal freedom can be increasingly found in several arbitration cases when evaluating the reasonableness of appearance policies. As Chapter 6 covers the fundamental rights at work framework, these cases will be analyzed in this latter chapter.

4.2 THE EMPLOYER'S MANAGEMENT RIGHTS IN CANADA

Having set out the fundamentals of employment and labour law in the first section, an important question related to appearance in the workplace still remains: why employers are entitled to regulate their employees' appearance, which in legal terms raises the question of the source of the employer's management rights. There seems to be a general assumption[943] that the employer naturally holds the prerogative to control its employees' appearance as a result of its management rights, which allow the employer to adopt various workplace policies and regulations. The employer's management rights,[944] also called "management prerogatives," "employer's prerogatives," or "power of direction and control," imply the right of the employer to manage its business as it sees fit. These rights include all of the employer's rights to make decisions and guidelines for the direction, administration, and management of a company. The employer's management rights are exercised

943 But see Hay & Middlemiss, *supra* note 361 at 69-70; Simmons, *supra* note 123 at 363, citing *DuPont*, *supra* note 908 at para 17.

944 The term "employer's management rights" is a direct translation for both "les droits de direction de l'employeur" and "les droits de gérance de l'employeur." Guylaine Vallée and Julie Bourgault point out that there is a difference in terminology between the two terms ("droits de direction" and "droits de gérance"), stressing that the employer's "droits de gérance" relate to the management of a company, which concerns employees' day-to-day, regular, and individual activities, but do not include decisions falling under the *administration* or the *direction* of the company (Guylaine Vallée & Julie Bourgault, "Droits de direction" in Patrice Jalette, Mélanie Laroche & Gilles Trudeau, eds, *La convention collective au Québec*, 3rd ed (Montreal: Chenelière Éducation, 2018) 91 at 92).

through three components: business management; production management; and direction of the work itself.[945] I will focus on the latter element, as it is this component that allows the employer to control and direct the employees' working conditions and to manage the staff in general, including the implementation of regulations or policies regarding employees' physical appearance.

Managements rights exist in all companies, unionized or not,[946] but their source is not always clear. This section focuses on the basis and nature of the employer's right to manage its business under both civil and common law systems. Investigating the history and sources of the employer's management rights will reveal the legal origins and current status of management rights, which will then be useful to understand their limits vis-à-vis the control of employees' appearance. Thus, the analysis of the legal basis of management rights in common law provinces and in Quebec will help to illuminate the extent of the employer's power over questions of appearance, and will serve to establish the hierarchical position these rights hold when confronted with human rights at the end of this chapter.

4.2.1 The Legal Basis of the Employer's Prerogative to Control its Employees in Canadian Employment and Labour Law

In order to answer how far employers can go in the regulation of their employees' clothing and grooming choices, it is important to question the legal basis of the employer's right to control its employees. The spontaneous answer is that management rights are rooted in the subordination that is inherent in the employment relationship. This subordination can be traced to the master and servant relationship in the United Kingdom, as Canadian common law derives from the English common law tradition. However, this relationship has evolved substantially, and it now seems difficult to justify an unlimited and unidirectional model of control under the modern contract of employment.

945 *Ibid* at 93.
946 *Ibid* at 92.

4.2.1.1 History and Evolution of the Employment Relationship

Until the nineteenth century in the United Kingdom, the relationship that is now known as the employment contract between employers and employees was regulated by the master and servant model; its origins can be traced back to the fourteenth century with the adoption of the first labour laws enacted to "ensure stable and cheap supply of labour" in response to labour shortages.[947] The master and servant relationship was a private "contract" of personal service between two individuals, which implied an agreement for work and wages, and entailed the employer's right to control and the worker's duty to obey.[948] Hence, the duty to obedience, which was not clearly stated in the medieval period, was formally introduced by the master and servant model.[949] Labour relations under the master and servant regime were based on paternalism, which implied that the superior was responsible for the subordinate's interests in exchange for obedience;[950] "authoritarian control" was thus predominant in this asymmetrical relationship.[951] This "hierarchical model of service"[952] was established to enforce discipline and to ensure the master's authority[953] among the multiplying labourers in manufacturing industries by introducing the notion of personal subordination of the worker to the employer.[954] To make "labor supply and performance more reliable,"[955] the master and

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947 Randall Scott Echlin, "From Master and Servant to *Bardal* and Beyond: 200 years of Employment Law in Ontario, 1807-2007" in The Law Society of Upper Canada, ed, *Employment Law* (Toronto: Irwin Law, 2007) 1 at 7-8.

948 Douglas Hay & Paul Craven, eds, *Masters, Servants, and Magistrates in Britain & the Empire, 1562-1955* (Chapel Hill: The University of North Carolina Press, 2004) at 1 [Hay & Craven, *Masters & Servants*]. See also Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005) at 106.

949 Deakin & Wilkinson, *supra* note 948 at 63.

950 Alan Fox notes that prior to the enactment of the 1747 British *Master and Servant Act*, the master was theoretically bound by the duty to protect and care for the servant, in exchange for the servant's basic obligation to obey; however, the subordinate was always held to obedience even if the superior did not fulfill their obligations (Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (Winchester, Mass: George Allen & Unwin, 1985) at 4). Deakin and Wilkinson assert that the master's previous duty of protection and care for the servant did not follow in the mid-eighteenth-century master and servant regime, which was characterized by a "lack of contractual reciprocity" (Deakin & Wilkinson, *supra* note 948 at 66, 71).

951 A Fox, *supra* note 950 at 3.

952 Deakin & Wilkinson, *supra* note 948 at 1.

953 Hay & Craven, *Masters & Servants*, *supra* note 948 at 35.

954 Deakin & Wilkinson, *supra* note 948 at 61-62. Servants and labourers in general were subject to the application of the Master and Servant Acts, but this legislation did not apply to "higher status employees"—clerks, agents, managers (*ibid* at 65).

955 Hay & Craven, *Masters & Servants*, *supra* note 948 at 35.

servant regime provided penal and criminal sanctions, always in the masters' interests,[956] such as the "punishment of the uncooperative worker" by "whipping, imprisonment, forced labor, fines," and "the forfeit of all wages earned."[957]

This model strongly shaped employment law in Canada, by implementing a common law concept of employment relationship as well as several labour statutes, both favouring the employers. In the nineteenth century, most people lived and worked on farms, and a working class only appeared later with urbanization and the emergence of factory work.[958] In the mid-nineteenth century, even though English law was arguably in force in the colony,[959] Canadian provinces started to enact master and servant statutes that were quite similar to the British statutes.[960] While imprisonment for breach of the employment contract was uncommon and exceptional in Canada,[961] master and servant statutes greatly favoured the employers, providing distinct mechanisms for breaches of the employment contract. Masters were liable to civil remedies, while servants could be charged with a criminal offence punishable by law,[962] emphasizing the imbalance of the relationship.

In England, criminal sanctions for insubordinate workers were eventually abolished, but civil remedies for breach of contract—mostly used by employers—remained intact.[963] The modern contract of employment emerged from a legislative settlement made in 1875, as the name of the *Master and Servant Act* of 1867 was changed to the *Employers and Workmen Act*.[964] This shift reflected a growing movement toward putting employers and workers on equal legal grounds,[965]

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956 Douglas Hay, "Master and Servant in England: Using the Law in the 18th and 19th Centuries" in Willibald Steinmetz, ed, *Private Law and Social Inequality in the Industrial Age* (Oxford: Oxford University Press) 227 at 231. See also Echlin, *supra* note 947 at 7.

957 Hay & Craven, *Masters & Servants*, *supra* note 948 at 1-2.

958 Echlin, *supra* note 947 at 4.

959 See Echlin, *supra* note 947 at 8-11; Paul Craven, "The Law of Master and Servant in Mid-Nineteenth-Century Ontario" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981) 175.

960 Craven, *supra* note 959 at 183.

961 Douglas Hay & Paul Craven, "Master and Servant in England and the Empire: A Comparative Study" (1993) 31 Labour/Le Travail 175.

962 Craven, *supra* note 959 at 190.

963 Simon Deakin & Gillian S Morris, *Labour law* (Oxford; Portland, Or: Hart Publication, 2005) at 21. See also A Fox, *supra* note 950 at 155.

964 (UK), 38 & 39 Vict, c 90.

965 Deakin & Morris, *supra* note 963 at 19.

arising out of a combination of working-class agitations and ruling-class reactions to them. Gradually, reciprocity and mutuality of obligation started to influence the contractual model of employment.

In Canada, the Canadian Parliament officially repealed the criminal sanctions in master and servant legislation in 1877, but following this amendment, "no changes were made for several decades."[966] The common law provided a "legal fiction" of a balanced employment relationship "governed by freedom of contract," but many implied terms in the contract still significantly favoured the employers, as did the master and servant legislation.[967] However, in the twentieth century, Canadian employees gained increasing employment protections from the courts and from statutory legislation, with a variety of legislative protections enacted in the second half of the twentieth century.[968]

Various social and economic forces contributed to the decline of the master and servant model based on paternalism and the emergence of modern notions of the employment contract. These included the rise of free-market capitalism and industrialization, collective bargaining, and the advent of the welfare state. Under expanding capitalist forces, workers were no longer treated as servants with some minimal protections, but were treated as industrial commodities.[969] In this context, labour was understood as a relation of production whose efficiency could and should be maximized for profit.[970] Within expanding capitalist economies, workers' need for protection intensified, with the aim being to "make up for […] the inherent inferiority of the bargaining power of the worker."[971] While workers' desire to enhance their power fostered the shift towards the contractual underpinnings of employment, the duty to obey remained central to the modern employment relationship.

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966 Echlin, *supra* note 947 at 16.
967 *Ibid* at 18-19.
968 *Ibid* at 24.
969 A Fox, *supra* note 950 at 113.
970 *Ibid* at 54.
971 Pierre Verge, "Canadian Labour Law: Mirror of the New Realities of Work?" in Janice R Bellace & Max G Rood, eds, *Labour Law at the Crossroads: Changing Employment Relationships* (The Hague, Boston: Kluwer Law International, 1997) 235 at 236.

Although the modern contract of employment developed in the nineteenth century, some argue that its practical application can be traced mainly to the twentieth century.[972] The state levied income taxation and social security contributions to fund welfare services, allowing for the distribution of economic risks throughout the workforce.[973] With the enactment of social legislation, such as social insurance, worker's compensation, employment protections, and human rights under the twentieth-century welfare state, the concept of reciprocity in the contract of employment—that workers and employers owe each other duties and obligations—was strengthened. Therefore, some authors argue that the social welfare legislation and institutions changed the contract of employment in a way that makes it truly akin to our contemporary system.[974] This improvement shows a major shift in the purpose of employment law, which went from maintaining discipline over workers to protecting their welfare.[975] As one author notes, in the twenty-first century, "a real concern for the protection of vulnerable employees" "is now firmly embedded in Canadian employment law."[976]

4.2.1.2 The Employer's Management Rights in the Common Law Contract of Employment

As the contract of employment is considerably influenced by the law of contracts in common law, many of its values and principles are shared with the broader domain of contracts. As a general analysis, Freedland identifies five major principles embodied in the personal contract of employment: 1) mutuality and reciprocity; 2) care and co-operation; 3) trust and confidence; 4) loyalty and freedom of economic activity; and 5) fair management and performance.[977] The first three principles derive from the general notion of mutuality of obligation, which is embedded in the broad category of contracts:

> As a broad concept in the general law of contract, mutuality of obligation can best be thought of as a way of expressing the requirement of consideration in the language of promissory obligations. In order for an exchange of promises to constitute a valid

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[972] Deakin & Morris, *supra* note 963 at 21. See also Deakin & Wilkinson, *supra* note 948 at 36.
[973] Deakin & Wilkinson, *supra* note 948 at 16.
[974] Deakin & Wilkinson, *supra* note 948 at 16-19.
[975] Freedland, *The Personal Employment Contract*, *supra* note 33 at 7-8.
[976] Echlin, *supra* note 947 at 43.
[977] Freedland, *The Personal Employment Contract*, *supra* note 33 at 127-128. While Freedland's observations are specific to the British context, they also apply more generally to common law contracts of employment.

> contract supported by consideration, each party must make promises which amount to the taking on of contractual obligations; there must be mutuality of obligation.[978]

The concept of mutuality of obligation is thus a basic requirement for a valid employment contract and must infuse the relationship from its beginning to its end.[979] The principle of care and co-operation obliges "each of the parties to take reasonable care of the other's physical and economic interests, and to co-operate with each other in realizing the objectives of the personal work or employment contract in question."[980] This notion implies that the employing entity has the obligation of care for the employee's health and safety, as well as taking care of the employee's welfare and well-being.[981] As for the obligation of co-operation, it falls more upon the worker than on the employing entity. Mutual trust and confidence are fundamental to the employment relation, but their nature, content, and scope are not fully defined.[982] A modern understanding of these term generally implies the protection of the dignity, autonomy, personal security, and integrity of the employee.[983]

Despite the concept of mutuality, the main obligation embedded in the employment relationship remains the employee's duty to obey to the employer. In the early nineteenth century, this obligation entailed a duty "to obey any and every lawful order of their masters."[984] In this way, the modern contract of employment incorporated an important part of master and servant law—the duty of obedience—while relieving employers of the obligation to care for employees when it is not profitable for them to do so.[985] The master and servant regime has had a significant impact on the evolution of the employment relationship, as the notion of obedience was implied by common law, while the obligation to care for employees was not. However, with the advent of the welfare state and the statutory obligations found in many laws, the modern employment relationship has in some

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978 *Ibid* at 100.
979 *Ibid* at 117.
980 *Ibid* at 141.
981 *Ibid*.
982 *Ibid* at 154.
983 *Ibid* at 170.
984 Mark Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976) at 199.
985 See Gillian Demeyere, "The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom" (2015) 38:1 Dal LJ 1 at 7.

ways revived the employer's obligation to care for employees—but the employer is still "presumed to be free to manage as it best sees fit."[986]

Thus, management rights are central to the employment relationship, compelling employees to respect the employer's authority. Employers are entitled to issue lawful and reasonable orders[987] according to their management rights to pursue the enterprise's business goals. The employer's right to command its employees is upheld by the courts who "imply a term into all employment contracts obliging the employee to act in the best interests of the firm, as determined by the employer, in carrying out his or her duties."[988] The employee's duty to obey the employer's lawful and reasonable orders is inscribed in the implied obligation to "further the employer's interests."[989] The employer's management rights include the right "to decide what is to be done, when, where and by whom,"[990] which includes the right to enact various policies regulating employees' physical appearance at work. In the specific context of unionized workplaces, management rights are often discussed in labour arbitration, particularly regarding the reasonableness of the exercise of these rights, as analyzed in the first section of this chapter. It is also noteworthy that although management rights' foundation is external to the collective agreement, most collective agreements provide an express clause asserting managerial prerogatives.[991]

As subordination is still at the core of the contract of employment, the employment relationship is in part characterized by the employer's power to control or command and the correlative employee's duty to obey. However, as suggested, the employer's prerogative is not absolute and is now limited. Adapting to the demands of the economy and those of the workers, the contract of employment allows employers to expect obedience from their employees, but

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986 *Ibid* at 9.

987 "The employee is impliedly bound to carry out the employer's orders so long as they are lawful, reasonable, and within the scope of employment. […] an order would not be "lawful" if it would infringe on the employee's personal legal rights under employment standards or health and safety legislation—for example, an order to perform unsafe work." (England, *Individual Employment Law*, *supra* note 180 at 59).

988 *Ibid* at 58.

989 *Ibid*.

990 George W Torrence, *Management's Right to Manage* (Washington, DC: Bureau of National Affairs, 1959) at 1, cited in John Storey, *Managerial Prerogative and the Question of Control* (London: Routledge & K Paul, 1983) at 99.

991 Vallée & Bourgault, *supra* note 944 at 102. See also *Association of Justice Counsel*, *supra* note 854 at para 18.

increasingly protects their dignity by imposing limits on the commodification of labour. In addition to legislated employment restrictions on the employer's power—payment of wages, working time, health and safety—human rights laws also impede the employer's management rights to adopt various workplace appearance regulations.

In Canada, as I will show in the last section of this chapter, human rights legislation prohibiting discrimination, including in the area of employment, has been enacted at the federal and provincial levels. One of the most influential effects and central features of human rights legislation in employment contexts is the duty of reasonable accommodation, "which obliges employers to attempt to rearrange work schedules, job assignments, and other facets of the production process up to the point of causing the firm 'undue hardship,' in order to avoid disadvantaging protected employees."[992] As England rightly asserts, "this duty goes to the very heart of the employer's managerial prerogatives, allowing human rights tribunals to dictate how much economic harm the employer must sustain in order to safeguard an employee's personal rights."[993] In the same vein, I will argue in the next chapters that human rights do limit employers' management rights regarding workplace appearance regulations. Accordingly, the employer's management rights are now limited in Canadian common law. Having set out the legal basis of the employer's management rights in common law provinces, I now turn to the foundation of management rights in Quebec law.

4.2.2 The Employer's Management Rights in Quebec Civil Law

The history and evolution of the employment relationship in Quebec law is different than the rest of Canada's common law jurisdiction—with its French origins and civil law system—but subordination also remains the foundation of employers' management rights in Quebec labour and employment law.

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992 England, *Individual Employment Law*, *supra* note 180 at 214.
993 *Ibid*.

4.2.2.1 History and Evolution of the Employment Relationship

France was an imperial power in North America from the founding of Quebec in 1608 to the ceding of Canada to Britain in 1763. In New France—the area that in part became the province of Quebec—the contract of employment was part of the legal fabric of the colony from the beginning of colonization. In the beginning of the seventeenth century, the King of France, Henri IV, began the project of colonial expansion in New France through the use of private companies.[994] The colonization process required a workforce, which entailed various forms of hiring. Starting in 1627, with the formation of the Compagnie des Cent-Associés (or Company of One Hundred Associates), a seigneurial system was consolidated in New France; estates were granted to lords with the obligation to allocate land to settlers.[995] In order to increase the population and develop the new land, two types of workers were hired: volunteers (hired once they arrived in the colony) and "engagés" (hired by recruiters in France). The engagés were usually hired under three-year contracts as indentured servants to farmers or traders. They signed a formal notarial contract before their departure to New France. Although it was not considered a condition of validity for employment, the signing of a formal contract of employment was a common practice at the time of colonization. The engagés' contracts generally provided the terms of remuneration, duration of employment, and nature of work, with the expressed obligation to "work in the service of" or to "go serve" whomever hired them.[996] A relationship of subordination was thus engrained very early in the French contract of employment.

After England conquered New France, British authorities decided in 1763 that British law would apply in criminal and civil matters. In response to the extreme discontent this generated among the French population, the *Quebec Act*[997] of 1774 reinstated French law in civil matters. One of the major differences between Quebec and British North America and then Canada was—and

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994 Jacques Lacoursière, Jean Provencher & Denis Vaugeois, *Canada-Québec: synthèse historique, 1534-2000* (Sillery, QC: Septentrion, 2000) at 44.

995 Marcel Trudel, *Les débuts du régime seigneurial au Canada* (Montreal: Fides, 1974) at 2; Stanley Bréhaut Ryerson, *Les origines du Canada* (Montreal: VLB, 1997) at 138-143.

996 Marcel Trudel, *Histoire de la Nouvelle-France,* t 2, vol 3 (Montreal: Fides, 1963) at 57-69.

997 *Quebec Act 1774* (UK), 14 Geo III, c 83.

still is—the presence of notaries in Quebec, a legacy of the French civil law system.[998] One of the principal duties of notaries was to draft and witness various contracts; in the context of employment, they prepared the contracts that defined the terms of the master and servant relationship.[999] Again, many contracts were informal verbal agreements, but the institution of apprenticeship, for instance, which was particularly formal, often involved written contracts.[1000] The master and servant relationship was a legal relationship that took many forms, but always inscribed the servant's obligation to obey their master and avoid any damage to their master's interests during their service.[1001]

The *Civil Code of Lower Canada*—which was amended in 1994 to become the *Civil Code of Québec*—was adopted and came into force on 1 August 1866. It restored French civil law and incorporated some elements of English law that had been enforced in Lower Canada. In 1885, the Quebec Assembly enacted the first statute in the labour field, the *Manufacturers Act*, which covered individuals employed by manufacturers.[1002] In 1894, this act was repealed and replaced by the *Industrial Establishments Act*, which applied to all establishments in the industrial sector.[1003] During the twentieth century, many laws came into force to limit employers' powers in order to protect Quebec employees.[1004] Although there is a dearth of literature on the master and servant relationship in Quebec and the emergence of the contract of employment to replace it, one thing remains certain: subordination was central to the relationship, as it was written into contracts beginning in the early seventeenth century in New France, and became a prominent element in Quebec civil law pertaining to employment relationships.

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998 "A notary—not to be confused with a notary public in common law systems—is a civil law jurist who specializes in matters related to immovable property" (Ian C Pilarczyk, "'Too Well Used by His Master': Judicial Enforcement of Servants' Rights in Montreal, 1830-1845" (2001) 46:2 McGill LJ 491 at 499).

999 *Ibid*.

1000 *Ibid* at 500.

1001 *Ibid* at 501.

1002 The scope of the *Manufacturers Act* was quite limited, as it only applied to businesses of more than twenty workers and it lacked inspectors to enforce it. See John A Dickinson, "La législation et les travailleurs québécois, 1894-1914" (1986) 41:2 RI 357 at 357.

1003 *Ibid* at 363.

1004 See Vallée, "Labour Law", *supra* note 753 at 152.

4.2.2.2 The Employer's Management Rights in the Civil Law Contract of Employment[1005]

In Quebec civil law, the legislative silence on the foundations of employers' management rights and the absence of rules governing the exercise of such powers are somewhat confusing. The fact remains that management rights, which are omnipresent in all workplaces, are rarely challenged or questioned.[1006] In the 2004 *Cabiakman* decision, the SCC emphasized that the employer's power of direction is "an integral part of any contract of employment,"[1007] but the legal basis of management rights in Quebec law remains unclear. Quebec and French literature on the subject indicates that there are five main theses with respect to the legal basis of the employer's management rights. They rest on the right of ownership, usage or custom, the capacity of natural persons or legal entities to exercise rights, subordination as inherent in the contract of employment, and on the institutional approach to the enterprise.[1008]

The first foundation—and probably the earliest justification for management rights—is based on the employer's right of ownership (or the right to property).[1009] Owner of one *thing*—a business, the company's field, the physical workplace—the employer can unilaterally regulate individuals attending or using this *thing* or "regulate all forms of activities within this *thing.*"[1010] However, this explanation is questionable in the contemporary employment relationship, because of the dissociation between the owner and the employer that is increasingly common in many companies. In modern corporate structures, there is often the presence of agents who perform the daily control of employees, but these agents are accountable for their management performance to shareholders

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1005 This section is an updated and condensed version of a section of my LLM thesis (Delagrave, *L'apparence physique du salarié*, *supra* note 91).

1006 Fernand Morin, *Fragments sur l'essentiel du droit de l'emploi* (Montreal: Wilson & Lafleur, 2007) at O.2.

1007 *Cabiakman*, *supra* note 27 at para 62.

1008 The foundations of management rights, which include both regulatory and disciplinary powers, have been mainly theorized in terms of disciplinary powers in the Quebec legal literature. The following theories are presented as a basis of the employer's management rights in general, although the arbitration tendency to obscure the origins of normative powers is deplorable. See Andrée Lajoie, *Disciplinary Authority and testing in the workplace: pluralism or illegality*, coll Industrial Relations, No 27 (Cowansville, QC: Yvon Blais, 1995) at 21.

1009 The right of ownership is codified in art. 947 CCQ.

1010 Daniel Mockle, "Ordre normatif interne et organisations" (1992) 33:4 C de D 965 at 975 [translated by author; emphasis added]. Challenging this basis for management's right to manage, Gérard Dion explains the reasoning of the property rights theory in the following terms: "Does not owner of the means of production, he who has invested capital into a business, have the right to make all decisions by himself?" Gérard Dion, "Property and Authority in Business Enterprise" (1961) 16:1 RI 30 at 30.

or the board of directors.[1011] In addition, property or ownership relate to possessions and not people, which constitutes the second drawback of this theory.[1012] Because the employer is not the owner of the workforce, this approach seems inadequate.[1013]

The second proposed foundation for the employer's management rights is usage or custom,[1014] defined as "an ancient practice, constant and usual, known and accepted by everyone in a given environment, even if it is not in writing."[1015] According to this theory, the obligations embedded in a contract are not only those expressly stipulated or agreed on by the parties involved.[1016] Workplaces are often governed by unwritten rules, customs and traditions, or implicit norms specific to each company. While some (but by no means all) authors argue that the foundation of management rights is rooted in usage or custom,[1017] it is unclear how it applies to company regulations with respect to third parties, and unsatisfactory to fully explain the legal foundation of the employer's power.

Other scholars maintain that the legal origins of management rights are rooted in the ability of natural or legal persons to exercise rights.[1018] The sources of the employer's normative powers would lie in laws granting legal capacity to legal entities in an incorporated company (arts. 298, 301, and 303 CCQ), and in legislation conferring legal capacity to natural persons (arts. 1 and 4 CCQ) when the employer is an individual.[1019] Andrée Lajoie explains:

> To achieve their own ends, and within the limits derived therefrom, incorporated companies indeed enjoy, by virtue of their corporate status, powers—expressed or implied—to implement their goals. As such, they hold a hierarchical authority called 'management power,' which allows them to assign certain functions to their employees and give them the necessary orders to carry out these functions.[1020]

1011 See Vallée & Bourgault, *supra* note 944 at 97.
1012 See Mockle, *supra* note 1010 at 976-977; Dion, *supra* note 1010 at 39; Paul Durand & R Jaussaud, *Traité de droit du travail*, t 1 (Paris: Dalloz, 1947) at 424.
1013 See Claude D'Aoust & Gilles Trudeau, *L'obligation d'obéir et ses limites dans la jurisprudence arbitrale québécoise* (Montreal: École des relations industrielles de l'Université de Montréal, 1979) at 15-16.
1014 Usage is codified in art. 1434 CCQ, which provides that "A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law."
1015 Vallée & Bourgault, *supra* note 944 at 98 [translated by author].
1016 See Marie-France Bich, "Le pouvoir disciplinaire de l'employeur–fondements civils" (1988) 22:1 RJT 85 at 95.
1017 See e.g. *ibid* at 99.
1018 See e.g. Lajoie, *supra* note 1008 at 6.
1019 *Ibid*.
1020 *Ibid* at 8 [translated by author].

Under this approach, the employment contract is a necessary condition, but not the source, of the employer's management rights;[1021] they are instead founded in the legislation.[1022] While this theory is interesting, it does not have broad support in the literature.

A fourth foundation that emerges from the literature relates to the subordination that is inherent in the contract of employment, similar to what was found under the common law contract of employment. According to this theory, the employment contract involves an implicit acceptance of the employer's power of direction,[1023] and in this context, management rights constitute the company's control measures. These control methods are invoked in explicit terms in art. 2085 CCQ, which defines the employment contract in Quebec civil law:

> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and *under the direction or control* of another person, the employer.[1024]

Thus, all Quebec employees tacitly consent to the employer's management rights via their employment contract.[1025] Most scholarly works refer to the principle of subordination inherent in the contract of employment as the basis of an employer's management rights.[1026] However, this explanation is not entirely satisfactory. First, workplace policies and regulations that are added over time can present challenges to employees hired prior to their adoption.[1027] Moreover, this theory does not solve the problem of regulations applicable to third parties, such as persons who are not employees of the company, but who interact with it (suppliers, customers, etc.).[1028] These limitations have led scholars to propose alternative foundations of management rights, but it is generally

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1021 *Ibid* at 9.

1022 Vallée & Bourgault, *supra* note 944 at 99.

1023 Philippe Waquet, "Le pouvoir de direction et les libertés des salaries" (2000) 12 Dr Soc 1051 at 1054.

1024 [Emphasis added]. It is interesting to note that the English version of art. 2085 CCQ is even more explicit on the employer's power of direction and control than the French version.

1025 Vallée & Bourgault, *supra* note 944 at 98.

1026 See Claude D'Aoust, Louis Leclerc & Gilles Trudeau, *Les mesures disciplinaires: étude jurisprudentielle et doctrinale* (Montreal: École des relations industrielles de l'Université de Montréal, 1982) at 47; D'Aoust & Trudeau, *supra* note 1013 at 15.

1027 D'Aoust, Leclerc & Trudeau, *supra* note 1026 at 48. See also Vallée & Bourgault, *supra* note 944 at 98; Bich, *supra* note 1016 at 95.

1028 Mockle, *supra* note 1010 at 996. See also Vallée & Bourgault, *supra* note 944 at 98.

accepted, at least in part, that the basis of the employer's power of direction lies in the very nature of the contract of employment and can be inferred from art. 2085 CCQ.[1029]

The last theory points to the institutional approach to the enterprise. It grounds the employer's management rights in the natural existence of the company[1030] rather than in the employment contract.[1031] According to this approach, the company is a separate entity from the employer, and as a metaphorically living organism, the company produces its own norms and its own mode of operation.[1032] When an employee gets hired, they adhere to "a structured organization that has its own rules and its own disciplinary regime,"[1033] as suggested by the SCC in *Cabiakman*:

> The existence and acceptance of this relationship of subordination mean that the employee recognizes that he or she is an integral part of a whole, namely the business run by the employer, and that the employee accepts the employer's power of decision and the need for his or her work to be consistent with the purpose of this whole. The acceptance of this power is an implied condition of the function of the contract of employment that therefore becomes a part of the contract's content. The creation of the relationship of subordination signifies that the employee agrees both that the employer must make necessary decisions in the business's interest and that his or her own work must be performed in a manner consistent with those decisions and with the guidance they provide, subject to any express or implied agreements between the parties.[1034]

According to this institutional approach, the entrepreneur holds the necessary powers to ensure the effectiveness of the organization,[1035] which do not have to be expressly recognized in law.[1036] The business owner can adopt various internal policies and regulations applicable in the establishment and necessary to its proper functioning—in accordance with the interests and goals of the company.[1037] This theory has been advanced as an alternative explanation of the employment relationship, moving beyond the contract in employment law.[1038] The institutional approach may

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1029 Vallée & Bourgault, *supra* note 944 at 100-101.

1030 "It is, therefore, the very nature of the enterprise which demands an organization of the cooperation of many individuals for the realization of the common end. What forms the basis of authority, then, is the common aim, the end for which the enterprise is constituted." Dion, *supra* note 1010 at 40.

1031 See D'Aoust & Trudeau, *supra* note 1013 at 16.

1032 Vallée & Bourgault, *supra* note 944 at 99.

1033 D'Aoust, Leclerc & Trudeau, *supra* note 1026 at 49 [translated by author].

1034 *Cabiakman*, *supra* note 27 at para 55.

1035 D'Aoust & Trudeau, *supra* note 1013 at 16.

1036 Durand & Jaussaud, *supra* note 1012 at 424.

1037 Mockle, *supra* note 1010 at 967. See also *Cabiakman*, *supra* note 27 at para 58.

1038 Pierre Verge & Guylaine Vallée, *Un droit du travail ? Essai sur la spécificité du droit du travail* (Cowansville, QC: Yvon Blais, 1997) at 81-82.

seem simplistic, particularly in so far as it identifies the entrepreneur's powers as "natural." It has also been criticized because it is incompatible with the established legal framework, and because under this approach, employees are offered few guarantees.[1039]

Though these theories all have some explanatory value, none have received unanimous support from decision makers and legal commentators. As a result, it is difficult to precisely identify the foundations of the employer's management rights in Quebec law, especially with respect to the employer's normative or regulatory power. Despite this lack of consensus, it is nonetheless possible to observe that the subordination inherent to the contract of employment remains the predominant theory, with the institutional rationale a distant yet notable secondary explanation, particularly given the latter's approval by the SCC. Whether found in the logic of contract or institutions, management rights give employers extended powers to direct and control an employee's work under Quebec law.

In conclusion, in both common law and civil law systems, Canadian employers hold a prerogative of direction and control over their employees, which is derived from their management rights. This power, arguably, gives them the right to regulate their employees' physical appearance. Under the common law system, subordination is a distinctive feature of the employment relationship and can be traced back to the British master and servant relationship. In Quebec civil law, subordination has also always been a central element of the employment relationship, and was expressly written in employment contracts during the period of colonization. Employers' management rights stem from the subordination that is inherent in employers-employees contracts, but these rights are not without limits. Contemporary human rights legislation protects human rights in the workplace and should supersede employers' management rights, particularly regarding workplace appearance regulation, as I will argue in the next section.

[1039] Bich, *supra* note 1016 at 89.

4.3 THE LEGISLATIVE PROTECTION OF HUMAN RIGHTS IN CANADA

This section examines the statutory protection of human rights in Canada. While the foundation of Canadian employers' right to adopt various policies and rules regulating their employees' appearance was examined in the last section, the following developments focus on how human rights legislation can limit this employer's prerogative. I begin here by providing a concise history of human rights legislation in Canada, from 1900 to 2020, with a particular focus on the second half of the twentieth century, when the provinces started to enact various human rights laws.[1040] Prior to the adoption of human rights statutes, considerations of equality and dignity did not seem to be very popular amongst Canadians, who rarely discussed employees' fundamental rights at work, let alone a "right" to physical appearance.

After briefly reviewing some of the discriminatory practices that occurred in the beginning of the twentieth century, I examine the history of the adoption of provincial human rights codes in the rest of Canada, the adoption of the *Quebec Charter*, and the enactment of the *Canadian Charter*. This historical overview of human rights in Canada is important to understand the choices made by legislators: "[b]y examining our history, we can understand better what kind of world must be created to foster human rights and fundamental freedoms."[1041] This inquiry also helps to explicate the overt differences in human rights legislation across the country. The similarities and differences between the *Quebec Charter* and human rights statutes in the rest of Canada are then analyzed, with a particular focus on comparing provincial human rights laws of the three jurisdictions at the centre of this dissertation: the BC *Human Rights Code*, the Ontario *Human Rights Code*, and the *Quebec Charter*. Finally, this chapter ends with an explanation of human rights' preponderance over employers' management rights, which supports this dissertation's contention that employers' rights

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1040 For a chronological review of the historical development of the protection of human rights in Canada, see "Human Rights in Canada: A Historical Perspective" (last visited 2 April 2020), online: *Canadian Human Rights Commission* <http://www.chrc-ccdp.ca/en/index.asp>.

1041 Thomas R Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1981) at xii.

over their employees' appearance should be limited when considerations of human rights are involved.

4.3.1 History of Human Rights Legislation in Canada

The *Constitution Act, 1867* did not explicitly include any charter of rights or protection of human rights and freedoms. British law, which was somewhat incorporated in the preamble of the *Constitution Act, 1867*,[1042] did not contain any codified protection against discrimination either.[1043] At the same time, the effect of the preamble of the *Constitution Act, 1867* was that Canada adhered to the principle of Parliament sovereignty—or parliamentary supremacy.[1044] This doctrine provides "that the Parliament is omnipotent, it may adopt and repeal any law, […] it is superior to all other institutions in the country, including the Crown, the cabinet or the judges, and nobody has the power to invalidate or disobey the laws it enacts. […] It is legally possible for the Parliament to do everything" and courts must enforce the laws it enacts just as they were adopted.[1045] However, because of the federal nature of the Canadian constitution, federal and provincial legislatures were subject to the courts' rulings on division of powers. Unlike the United Kingdom, Canada is not a unitary system but is a federal system, which means that its provincial legislatures have extended powers, providing that they keep within proper jurisdictional matters as set out in ss. 91 and 92 of the *Constitution Act, 1867*.[1046]

1042 The preamble of the *Constitutional Act, 1867* refers to "a Constitution similar in Principle to that of the United Kingdom." See Ian Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" in Mark L Berlin & William F Pentney, eds, *Human Rights and Freedoms in Canada* (Toronto: Butterworths, 1987) 110 at 122.

1043 Nevertheless, several guarantees of human rights and civil liberties can be found in the Act: a required general election every five years (s. 50); the protection of denominational schools for religious minorities (s. 93); the independence of the judiciary—tenure of office during good behaviour (s. 99); and the use of both French and English in federal and Quebec judicial and legislative proceedings (s. 133). See Glenn Anthony Patmore, *An inquiry into the norm of non-discrimination in Canada* (Kingston: Queen's University Press, 1990) at 7.

1044 Sormany, *supra* note 754 at 100.

1045 François Chevrette & Herbert Marx, *Droit constitutionnel: notes et jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982) at 83 [translated by author] [Chevrette & Marx, *Droit constitutionnel*]. See also Patmore, *supra* note 1043 at 8.

1046 W F Bowker, "Basic Rights and Freedoms: What Are They?" (1959) 37:1 Can Bar Rev 43 at 44.

Without any formal guarantees of protection from discrimination in both federal and provincial legislation,[1047] Canadian citizens and permanent residents relied solely on Parliament's and provincial legislatures' wisdom in the area of fundamental rights and freedoms. But history shows that legislatures and the courts have not always been examples of sagacity.[1048]

4.3.1.1 Discrimination in Private and Public Spheres Prior to the Enactment of Human Rights Legislation

Canadian history is replete with examples of human rights being sacrificed in the name of freedom of commerce, contractual freedom, and property rights. The courts have long accepted discriminatory practices based on race and colour, sex, religion, and political convictions in both the private and public sectors. Prior to the adoption of contemporary human rights legislation, discriminatory attitudes and practices were considered socially acceptable as illustrated by several cases and laws. Although the instances that follow are deplorable and might seem more serious than contemporary issues faced by employees because of their appearance, it is important to keep in mind that appearance stereotypes and discrimination are pernicious and can be very harmful.

In the private sphere, the most striking cases of discrimination in the early twentieth century involved Black Canadians[1049] who were refused service because of the colour of their skin, which was not, according to the courts, "contrary to good morals or public order."[1050] Complete freedom of commerce was a guiding principle of law[1051] prevailing over racial equality and human rights, as exemplified in these cases where racialized individuals were discriminated against in theatres, taverns, and restaurants in Quebec, Ontario, and British Columbia.[1052] Business owners had the right to conduct their businesses as they pleased, "even if that meant discriminating against patrons

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1047 Patmore, *supra* note 1043 at 29.

1048 Walter S Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46:4 Can Bar Rev 565 at 566 [Tarnopolsky, "The Iron Hand"].

1049 It is interesting to note that there were not a lot of discriminatory laws *per se* against Black people in the first half of the twentieth century because there were relatively few people from African origin in Canada during that period. See Alexandre Morin, *Le droit à l'égalité au Canada* (Montreal: Lexis Nexis, 2008) at 12.

1050 *Christie v York Corp*, [1940] SCR 139 at 144 [*Christie*].

1051 Patmore, *supra* note 1043 at 20.

1052 See e.g. *Loew's Montreal Theatres Ltd v Reynolds*, (1919) 30 BR 459; *Franklin v Evans*, (1924) 55 OLR 349 (KB); *Christie*, *supra* note 1050; *Rogers v Clarence Hotel Co Ltd*, [1940] 3 DLR 583 (BC CA).

solely because of race or colour."[1053] These cases illustrate that discriminatory practices based on race were considered acceptable behaviour at that time, given that there was no specific legislation to outlaw them. Canadian courts considered racial discrimination "as neither immoral nor illegal," favouring "a code of mercantile privilege rather than a code of human rights."[1054]

Moving to the public sphere, the situation was no better as the legislation frequently neglected the human rights of specific social groups. Numerous federal and provincial laws upheld discrimination based on sex, colour, race, religion, and ethnic origin in the nineteenth and twentieth centuries in Canada.[1055]

First, women have been subject to systemic discrimination in Canadian history. Prior to the mid-nineteenth century, women did not have the same rights as men; when they married, they basically lost their property rights.[1056] The enactment of laws conferring legal capacity to married women started in 1851 in New Brunswick and most provinces slowly followed until the beginning of the twentieth century,[1057] but it was only in 1964 that Quebec amended the *Civil Code* to give married women full legal and property rights.[1058] It is also noteworthy that the definition of "person" under s. 24 of the *Constitution Act, 1867* did not include women, and it was only in 1929 that the Privy Council, on appeal of a 1927 unanimous SCC decision,[1059] ruled that women were to be considered persons under the law.[1060] Another blatant example of discrimination on the ground of sex can be found in the history of women's suffrage.[1061] In 1916, the Manitoba government finally bowed to women's lobbying and became the first province of Canada to grant white women the right to vote in provincial

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1053 Ian Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in R St J Macdonald & John P Humphrey, eds, *The Practice of freedom* (Toronto: Butterworths, 1979) 77 at 79 [Hunter, "The Origin of Human Rights"].

1054 *Ibid*.

1055 For a review of many discriminatory federal and provincial laws, see François Chevrette & Herbert Marx, "Uniformité et efficacité des garanties en matière de libertés publiques" (1979) 20:1/2 C de D 95 at 100-104; Joseph F Krauter & Morris Davis, *Minority Canadians: Ethnic Groups* (Toronto: Methuen, 1978).

1056 Constance B Blackhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6:2 L & Hist Rev 211 at 213.

1057 See generally *ibid*.

1058 *An Act respecting the legal capacity of married women*, SQ 1963-1964, c 66.

1059 Patmore, *supra* note 1043 at 16.

1060 *Edwards v Canada (AG)*, [1930] AC 124 (PC).

1061 S. 41 of the *Constitution Act, 1867* provided that the franchise was generally granted to "Male British Subject[s], age Twenty-one Years or upwards, being a Householder."

elections.[1062] Between 1916 and 1925, most provinces and the federal government followed and adopted laws conferring voting rights on this group of women.[1063] As a very latecomer, Quebec only conferred suffrage rights to women in 1940.[1064] Although women gained important rights at that time, sex equality persisted and still lingers in many areas today, particularly in the area of appearance bias and stereotypes.

Discrimination based on race and colour was also evident in Canadian legislation of the late nineteenth and early twentieth centuries. This was particularly the case of Indigenous peoples who were subjected to the federal government's assimilationist policies from 1867 to the 1970s.[1065] Indigenous people were not granted the right to vote until 1960, largely because they were not considered "'civilized' or fit to exercise the franchise."[1066] The 1876 and subsequent versions of the *Indian Act*[1067] contained many of the discriminatory policies that directly affected Indigenous peoples; the French title of the Act can be translated as "Act of Savages" (Acte des sauvages). In addition, Indigenous peoples were not included in the definition of "person" in the Act; at s. 3(12), the term "person" is defined as "an individual other than an Indian." As they were deemed inferior, the Act included "prohibitions and penalties that would have been ruled illegal and unconstitutional

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1062 *An Act to amend the Manitoba Election Act*, SM 1916, c 36.

1063 See, in chronological order of enactment: *An Act to Amend the Statute Law*, SS 1916, c 37 (Saskatchewan); *The Equal Suffrage Statutory Law Amendment Act*, SA 1916, c 5 (Alberta); *Provincial Elections Act Amendment Act,* SBC 1917, c 23 (British Columbia); *An Act to amend the Ontario Election Act*, SO 1917, c 6 (Ontario); *An Act to confer the Electoral Franchise upon Women*, SC 1918, c 20 (Canada); *An Act to amend and consolidate the Acts in respect to the Electoral Franchise*, SNS 1918, c 2 (Nova Scotia); *An Act to extend the electoral franchise to women, and to amend the New Brunswick Electors Act*, SNB 1919, c 63 (New Brunswick); *An Ordinance respecting Elections*, SY 1919, c 7 (Yukon); *The Election Act*, SPEI 1922, c 5 (Prince Edward Island); *An Act to amend Chap 3 of the Consolidated Statutes of Newfoundland (Third Series) entitled "Of the Election of Members of the House of Assembly"*, SN 1925, c 7. See generally Michel Morin, "L'évolution du mode de scrutiny dans les colonies et les provinces de l'Amérique du Nord britannique" (2008-2009) 39 RDUS 153; Robert E Hawkins, "Lilian Beynon Thomas, Women's Suffrage and the Return of Dower to Manitoba" (1999) 27:1 Man LJ 45; Catherine L Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1974). It should also be noted that only women who were not included under Indigenous or racial exclusions won the right to vote in common law provinces and to federal elections through these statutes (see Richard H Bartlett, "Citizens Minus: Indians and the Right to Vote" (1980) 44:2 Sask L Rev 163 at 164).

1064 *An Act granting to women the right to vote and to be eligible as candidates*, SQ 1940, c 7. However, it is only in 1951 that white women everywhere in Canada had the right to vote to provincial and federal elections, with the enactment of *An Ordinance respecting the Franchise of Electors and the Election of Members to the Council of the Northwest Territories*, SNWT 1951, c 18.

1065 A Morin, *supra* note 1049 at 16.

1066 During the House of Commons debates in 1885, members of the House used terms like "'the low and filthy Indians of the reserves,' 'barbarians,' 'ignorant and barbarious,' 'brutes,' 'dirty, filthy, lousy Indians,' and 'savages,' in seeking to deny the Indian people the franchise." (R Bartlett, *supra* note 1063 at 164, 175).

1067 *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18.

if applied to other Canadians."[1068] These are examples of profound violations of human rights in the legislation, but it should be reminded that discrimination and violence against Indigenous peoples affected *all* aspects of their lives and was foundational to what became Canada. As Pearl Eliadis puts it, "[e]quality has been elusive for [Indigenous] peoples—many have lost their children, their lands, their languages, and their cultures."[1069]

Canadian citizens of Asian descent were also denied the right to vote in the beginning of the twentieth century, particularly on the west coast.[1070] Moreover, racial discrimination against Asian immigrants was very strong in western Canada and this was reflected in provincial legislation.[1071] For instance, in *Union Colliery* (1899)[1072] the Privy Council examined s. 4 of the British Columbia *Coal Mines Regulation Act*,[1073] which specifically prohibited "Chinamen of full age" from employment in underground coal workings. The provision was invalidated on the grounds that it was *ultra vires* of the provincial legislature to enact laws for the exclusion of aliens,[1074] s. 91 (25) of the *Constitution Act, 1867* extending the exclusive legislative authority of "naturalizations and aliens" to the Parliament of Canada.[1075] Like many other cases involving questions of discrimination in the late nineteenth and early twentieth centuries, the ruling in this case revolved around the division of powers between the federal and provincial governments, and not on equality considerations.

Access to citizenship and employment was extremely difficult for Asian immigrants as they were, among other things, subject to several additional taxes in order to become Canadian citizens.[1076] Many discriminatory laws were enacted to limit their entry to Canada,[1077] such as the

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1068 Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 231.

1069 Pearl F Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montreal & Kingston; London; Ithaca, NY: McGill-Queen's University Press, 2014) at 5.

1070 See e.g. *Provincial Elections Act*, SBC 1907, c 6 (British Columbia); *Municipal Elections Act*, SBC 1908, c 14, s 13(1) (City of Victoria); *Provincial Elections Act*, SBC 1939, c 16, s 5 (British Columbia).

1071 See Chevrette & Marx, *Droit constitutionnel*, *supra* note 1045 at 1502.

1072 *Union Colliery Co of BC v Bryden*, [1899] AC 580 (PC) [*Union Colliery*].

1073 *Supra*, SBC 1890, c 32.

1074 Patmore, *supra* note 1043 at 10.

1075 *Union Colliery Co*, *supra* note 1072 at para 9.

1076 Chevrette & Marx, *Droit constitutionnel*, *supra* note 1045 at 1502.

1077 Canada, *Report of the Royal Commission on Chinese Immigration*, by J A Chapleau & J H Gray (Ottawa: Printed by order of the Commission, 1885); A Morin, *supra* note 1049 at 15.

federal *Chinese Exclusion Act*,[1078] prohibiting the immigration of anyone from China. In addition, premised on the discriminatory notion that Asian men constituted a threat to white womanhood, some provinces instituted legislation designed to "protect" white women from the "corrupting influence of Asian men" by prohibiting Asians from employing white women. In Saskatchewan, a Canadian restaurant owner of Chinese origin was convicted for hiring two white women to work as waitresses in his restaurant, therefore breaching Chapter 17 of the *Statutes of Saskatchewan*, 1912, which stated that no "white" woman can work in a business owned by a "Chinaman"; through this verdict the provincial statute was validated.[1079] This discriminatory stipulation could also be found in the Ontario *Factory, Shop and Office Building Act*.[1080]

Japanese people were also not exempt from discriminatory governmental practices. In 1940, during World War II, the federal government passed the *Defence of Canada Regulations* under the authority of the *War Measures Act*.[1081] This legislation allowed the federal government to evacuate people of Japanese origin from an area within 100 miles of the Pacific coast, to confiscate their property, and to force them to live in internment camps.[1082] This gross violation of human rights originated "in racial prejudice against Orientals in British Columbia which began in the nineteenth century, with the founding of British Columbia itself."[1083] As one author rightly notes, this highlights the "double standard of the war"[1084]; while Canada was fighting overseas against racism and fascism in Europe, its federal government was interning people of Japanese origin.

During the same period, repressive legislation against communism represented another illustration of discrimination in the public realm, as the federal government passed an order-in-

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1078 *Chinese Immigration Act*, SC 1923 (13-14 Geo V), c 38.
1079 *Quong-Wing v The King*, (1914) 49 SCR 440.
1080 *Act to Amend Factory, Shop and Office Building Act*, SO 1914, c 40.
1081 (1914) 5 Geo V, c 2 [*War Measures Act*].
1082 Chevrette & Marx, *Droit constitutionnel*, *supra* note 1045 at 1515. "The Cabinet had ordered the removal of all Japanese Canadians from [the west coast], despite that senior military and Royal Canadian Mounted Police officials opposed such a measure on the grounds that the Japanese minority was no threat to security" (William A Schabas, "Canada and the Adoption of the *Universal Declaration of Human Rights*" (1998) 43:2 McGill LJ 403 at 410).
1083 Berger, *supra* note 1041 at 93.
1084 R Brian Howe, "The Evolution of Human Rights Policy in Ontario" (1991) 24 Can J Political Science 783 at 789.

council to ban the Communist Party.[1085] Although Communists were prosecuted everywhere in Canada, the hostility towards them was particularly strong in the province of Quebec. Under Premier Maurice Duplessis (1936-1939 and 1944-1959)—a period called the "Great Darkness" ("Grande Noirceur") because of the conservative policies undertaken by the provincial government—several anti-communist and anti-union laws were enacted, including the "Padlock Law,"[1086] which allowed for the closure of any place suspected of promoting communism or Bolshevism.[1087] Also treated very harshly under Duplessis' governance were the Jehovah's Witnesses. Discrimination against the Jehovah's Witnesses began in 1918, when the Canadian government banned two of their publications and "began an all-out campaign of persecution" against them.[1088] In Quebec between the 1920s and the 1950s, they were prosecuted and fined "on charges of disseminating literature without a license and for sedition."[1089] In 1940, they were outlawed by a federal government order-in-council under the *War Measures Act*.[1090] In 1946, Premier Duplessis even "declared war" on Jehovah's Witnesses; for him, "atheism was 'the twin brother of communism,' and since in his view Jehovah's Witnesses could be compared to atheists, they should be prosecuted under the Padlock law."[1091] For Duplessis, religious freedom did not exist; nevertheless, in the 1950s, the SCC rendered a series of decisions that condemned the Quebec authorities' abuses against Jehovah's Witnesses.[1092]

In the light of these discriminatory laws and cases, it is evident that prior to the adoption of contemporary human rights legislation and before the Second World War, the "courts provided little,

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1085 Berger, *supra* note 1041 at 144.

1086 *An Act to protect the Province against communistic propaganda*, SQ 1937, c 11.

1087 Interestingly, the terms "communism" and "Bolchevism" were not defined in the law. The Padlock Law would later be invalidated in *Switzman v Elbing and Quebec (AG)*, [1957] SCR 285.

1088 James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses*, 2nd ed (Toronto: University of Toronto Press, 1997) at 55. For a history of the Jehovah's Witnesses, see also James Penton, *Jehovah's Witnesses in Canada: Champions of Freedom of Speech and Worship* (Toronto: Maclean-Hunter Press, 1976).

1089 James Penton, "Jehovah's Witnesses and the Second World War: Resistance to Militarism and to Alternative Service" (2007) 25 J Mennonite Studies 75 at 81; *Brodie and Barret v the King,* [1938] SCR 118; *Duval et al v the King,* (1938) 64 QC KB 270.

1090 Chevrette & Marx, *Droit constitutionnel*, *supra* note 1045 at 79.

1091 *Ibid* at 80.

1092 *Roncarelli v Duplessis*, [1959] SCR 121; *Chaput v Romain*, [1955] SCR 834; *Saumur v Quebec (City of)*, [1953] 2 SCR 299; *Boucher v R*, [1951] SCR 265.

if any, protection against discrimination on the basis of race or sex"[1093] as well as other grounds. In fact, a kind of "social laissez-faire approach to discrimination" characterized federal and provincial policies and Canada's public philosophy; equality "was seen at best as an ideal requiring voluntarism and good will, not as a right requiring laws restricting individual freedom."[1094] The emergence of laws prohibiting discrimination emerged in the 1940s and 1950s, when "social rights began to emerge as a serious principle."[1095] This wave of change transformed the landscape of Canadian legislation.

4.3.1.2 Human Rights Statutes in Common Law Jurisdictions

Besides the cautious breakthroughs beginning in the 1930s in a few provincial laws that included anti-discrimination provisions,[1096] the first anti-discrimination statutes emerged in Canada at the end of the Second World War and were the result of provincial initiatives.[1097] They arose within the context of new awareness "stimulated by the international struggle against fascism and by new postwar standards of human rights."[1098] In Canada, the principle that emerged was "that it was the responsibility of the state, through law and through an administrative commission, to counter discrimination and provide for the social right to equal opportunity."[1099] It became clear that governmental intervention into private relationships was necessary in order to effectively promote and protect human rights.[1100]

In addition to the international shock precipitated by the atrocities of World War II, Maxwell Cohen identifies several reasons why this new interest in the concept of human rights emerged and resulted in the enactment of anti-discrimination protection in all Canadian jurisdictions. First, human

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1093 Patmore, *supra* note 1043 at 30.

1094 Howe, *supra* note 1084 at 788. See also R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto; Buffalo; London: University of Toronto Press, 2000) at 4-5.

1095 Howe, *supra* note 1084 at 788.

1096 See e.g. *Unemployment Relief Act*, SBC 1932, c 58 (which prohibited discrimination in employment based on political affiliation, race, or religion in British Columbia); *Ontario Insurance Act*, SO 1932, c 24, s 4 (which made an offence to assess someone as high risk on the ground of race or religion in Ontario); *Libel Act*, SM 1934, c 23 (which prohibited libel against race or creed in Manitoba). See A Morin, *supra* note 1049 at 26.

1097 A Morin, *supra* note 1049 at 26.

1098 Howe, *supra* note 1084 at 787.

1099 *Ibid*.

1100 Tarnopolsky, "The Iron Hand", *supra* note 1048 at 565.

rights ideas fostered anti-colonial movements internationally, which "shaped basic attitudes and affected political alignments, decisions and systems as well as domestic social and legal policy."[1101] Cohen also suggests that "the confrontation of colour" was a factor, in that because the white population came to be seen as a political and numerical minority on the planet, there was a need to "accommodate and adjust […] to the great non-white majority."[1102] The third element is, what Cohen terms, "the revolution of rising expectations"; that is, an "appropriate level of expectations, a minimum standard for all" in the conception of the notion of equality.[1103] As a consequence, there was a shift in mentality as Canadians realized that a laissez-faire approach was not enough to ensure respect for human rights.

After World War II, the emergence of international norms and treaties for the protection of human rights and fundamental freedoms also influenced the enactment of anti-discrimination laws in Canada.[1104] On 24 October 1945,[1105] the *Charter of the United Nations*[1106] was enacted as the foundational treaty of a new international organization, the United Nations. The promotion of and respect for human rights and fundamental freedoms "for all without distinction as to race, sex, language, or religion" was specifically stated as one of the purposes of the organization,[1107] and this marked the "birth of a new paradigm"[1108] for the protection of human rights. In joining the United Nations, Canada declared its commitment to the principles included in the *Charter of the United Nations*.[1109]

1101 Maxwell Cohen, "Human Rights: Programme or Catchall? A Canadian Rationale" (1968) 46:4 Can Bar Rev 554 at 555.

1102 *Ibid*.

1103 *Ibid* at 556.

1104 A Morin, *supra* note 1049 at 25; Jacques-Yvan Morin, "Propos liminaires" in Alain-Robert Nadeau, ed, *La Charte québécoise: origines, enjeux et perspectives* (2006) R du B (special thematic issue) xix.

1105 "Charter of the United Nations – Introductory Note" (last visited 2 April 2020), online: *United Nations* <https://www.un.org/en/sections/un-charter/introductory-note/index.html>.

1106 26 June 1945, Can TS 1945 No 7 [*Charter of the United Nations*].

1107 *Ibid*, arts 1(3) and 55(c).

1108 A Morin, *supra* note 1049 at 25 [translated by author].

1109 Walter S Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: McClelland and Stewart, 1975) at 10 [Tarnopolsky, *Canadian Bill of Rights*].

Three years later, on 10 December 1948[1110] the United Nations General Assembly adopted the *Universal Declaration of Human Rights*.[1111] The Declaration states that "[a]ll human beings are born free and equal in dignity and rights"[1112] and that "[e]veryone is entitled to all the rights and freedoms set forth in [the] Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[1113] The *Universal Declaration of Human Rights* provides for the protection of a number of fundamental rights and freedoms, including: the right to life, liberty, and security (art. 3); the right to equality before the law and to equal protection of the law without any discrimination (art. 7); freedom from arbitrary interference with privacy, family, home, and correspondence (art. 12); freedom of thought, conscience, and religion (art. 18); freedom of opinion and expression (art. 19); and freedom of association (art. 20). It is interesting to note that Canada was quite slow to recognize and support the work of the United Nations in this area. When it was time to vote for the adoption of the Declaration, Canada first abstained from voting.[1114] After realizing that it was standing in embarrassing company (other abstaining countries included Saudi Arabia, South Africa, and the Soviet Union), Canada finally voted reluctantly for the adoption of the Declaration at the General Assembly.[1115] Although Canada may have shown some restraint in endorsing the international protection of human rights, the *Universal Declaration of Human Rights* initiated a significant transformation in both the provincial and federal legislative landscape in the second half of the century.

1110 Schabas, *supra* note 1082 at 405.

1111 GA Res 217A (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 [*Universal Declaration of Human Rights* or UDHR].

1112 *Ibid*, art 1.

1113 *Ibid*, art 2.

1114 "In a speech to the General Assembly, External Affairs Minister Lester B. Pearson explained the decision as a federal concern about infringing provincial jurisdiction. Even at the time, many […] found the story hard to accept. […] Canadian hesitation was principally due to discomfort in the Federal Cabinet with substantive norms enshrined in the Declaration, including freedom of religion and of association. [Schabas argues] that provincial jurisdiction was little more than a pretext for federal politicians who wanted to avoid international human rights commitments." (Schabas, *supra* note 1082 at 403).

1115 *Ibid* at 437.

The first province to adopt an anti-discrimination law was Ontario, when it enacted the *Racial Discrimination Act* in 1944[1116] (considered the "first human rights statute of the contemporary era").[1117] The Act only prohibited discrimination based on race and religion in the limited area of the publication of notice or symbol.[1118] The Act mainly targeted "Whites only" and "No Jews or Blacks Allowed" signs that were once prevalent in public spaces.[1119] For the first time, the Ontario legislature was sending a message to the courts so that "the judiciary could not simply subordinate human rights to commerce, contract, or property."[1120]

Some scholars argue, however, that it was really the province of Saskatchewan that "took the pioneering step of enactment of a human rights code in 1947"[1121] when it introduced the *Saskatchewan Bill of Rights Act*.[1122] This legal instrument was not only the first anti-discrimination statute in Canada that prohibited general discrimination, but it was also designed to protect a broad range of human rights and civil liberties. Its scope was much wider than mere legislation against racial legislation; the Act prohibited discrimination on the grounds of race, creed, religion, colour, and ethnic or national origin in the areas of accommodation, employment, occupational associations, land transactions, education, business and enterprises.[1123] It also provided protection of freedom of speech, conscience and religion, assembly and association, in addition to freedom from arbitrary arrest or detention.[1124] Although it has been suggested that the *Saskatchewan Bill of Rights Act* did not constitute the most effective way to protect human rights, Carmela Patrias maintains that it was

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1116 *An Act to prevent the Publication of Discriminatory Matter Referring to Race or Creed*, SO 1944, c 51.

1117 Hunter, "The Origin of Human Rights", *supra* note 1053 at 79.

1118 A Morin, *supra* note 1049 at 26.

1119 Howe & Johnson, *supra* note 1094 at 5; Hunter, "The Origin of Human Rights", *supra* note 1053 at 80. See also Eliadis, *supra* note 1069 at 7.

1120 Hunter, "The Origin of Human Rights", *supra* note 1053 at 80.

1121 Schabas, *supra* note 1082 at 410. It should be noted that in 1946, the province of Alberta adopted the *Alberta Bill of Rights Act*, SA 1946, c 11, which was promptly declared unconstitutional because several of its provisions infringed on federal jurisdiction (see *Alberta (AG) v Canada (AG)*, [1947] AC 503 (PC)). The current version of the *Alberta Bill of Rights*, which is still in force to protect fundamental rights and freedoms applicable to the Alberta legislature only, was first enacted in 1972 (see Richard W Bauman, "Living in a Material World: Property Rights in the Charter" (1992) 3:3 Const Forum Const 49 at 50). Although the current *Alberta Bill of Rights* protects the right to freedom of expression, it arguably does not apply to employment relationships. See note 44.

1122 SS 1947, c 35 [*Saskatchewan Bill of Rights Act*]. The *Saskatchewan Bill of Rights* remains in force today as part 2 of the *Saskatchewan Human Rights Code*, and particularly protects the right to freedom of expression.

1123 *Saskatchewan Bill of Rights Act*, s 8-14.

1124 *Ibid*, s 3-6.

an "important landmark in Canadian history"; she notes that the Bill "played a central role in the campaigns to combat racial and religious discrimination during the 1940s and 1950s."[1125] It has also been argued that the enactment of the Bill and the discussions that emerged around its shortcomings paved the way toward more effective safeguards of minority rights, and prepared the ground for the future national bill of rights in 1960 and later, the *Canadian Charter of Rights and Freedoms*.

Although better than no legislation, these two pioneer laws had several shortcomings. As Walter Tarnopolsky observes, both the Ontario *Racial Discrimination Act* and the *Saskatchewan Bill of Rights Act* "were quasi-criminal statutes in that certain practices were declared illegal and sanctions were set out."[1126] Tarnopolsky discusses the weaknesses of such legislation in the following terms:

> There is reluctance on the part of the victim of discrimination to initiate the criminal action. There are all the difficulties of proving the offence beyond a reasonable doubt, and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one. There is reluctance on the part of the judiciary to convict, probably based upon a feeling that a discriminatory act is not really in the nature of a criminal act. Without extensive publicity and promotion, many people are unaware of the fact that human rights legislation exists. Members of minority groups who have known discrimination in the past, tend to be somewhat sceptical as to whether the legislation is anything more than a stop to the conscience of the majority. Finally, the sanction in the form of a fine, does not really help the person discriminated against in obtaining a job or home or service in a restaurant.[1127]

As a result, the two laws were rarely used in the courts. For instance, only three cases were filed under the *Saskatchewan Bill of Rights Act* in the decade after its adoption.[1128] Another explanation for the ineffectiveness of this provincial bill was the government's reluctance to resort to the courts in cases of discrimination, mainly because they were afraid that prosecutions would be seen "as expressions of excessive state power."[1129] The Ontario government opposed enacting a bill of rights similar to that of Saskatchewan because "a bill of rights would impair parliamentary sovereignty by

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1125 Carmela Patrias, "Socialists, Jews, and the 1947 Saskatchewan Bill of Rights" (2006) 87 Can Historical Rev 265 at 292.

1126 Tarnopolsky, "The Iron Hand", *supra* note 1048 at 568. See also Howe & Johnson, *supra* note 1094 at 7.

1127 Tarnopolsky, "The Iron Hand", *supra* note 1048 at 568-569 [footnote omitted].

1128 Patrias, *supra* note 1125 at 283.

1129 *Ibid* at 289.

giving greater power to the courts."[1130] As Patrias points out, these two concerns about extending extensive human rights protection show a certain distrust toward governmental power.[1131]

Fair employment and accommodation practices acts were then adopted in an attempt to overcome the shortcomings of quasi-criminal legislation, emulating the American experience.[1132] "Piecemeal" legislation, protecting one right at a time, targeting specific areas, activities, and grounds of discrimination, and creating commissions as enforcement mechanisms, was adopted to "heighten public awareness and act as deterrents."[1133] In 1951, Ontario was the first province to enact the *Fair Employment Practices Act*[1134] and the *Female Employees Fair Remuneration Act*.[1135] The Acts respectively prohibited discrimination based on race, creed, colour, nationality, ancestry, or place of origin in employment and provided women with equal pay for work of equal value. They were inspired by legislation passed in the State of New York and they provided "for assessments of complaints, for investigation and conciliation, for the setting-up of commissions or boards of inquiry when conciliation [was] unsuccessful, and only as last resort, for prosecution and the application of sanctions."[1136] Between 1952 and 1964, most of the other provinces followed Ontario's lead and enacted similar Equal Pay Acts or provisions[1137] and Fair Employment Practices Acts.[1138] In 1953, the federal government enacted the Canada *Fair Employment Practices Act*,[1139] prohibiting

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1130 *Ibid* at 290.
1131 *Ibid*.
1132 Howe & Johnson, *supra* note 1094 at 7-8.
1133 Patrias, *supra* note 1125 at 291.
1134 SO 1951, c 24.
1135 SO 1951, c 26.
1136 Tarnopolsky, "The Iron Hand", *supra* note 1048 at 569. See also Karen Schucher, "Pathways to the Iron Hand and the Velvet Glove: Historical Underpinnings of the Ontario Human Rights Commission as Law Enforcer" (2014) 18:1 CLELJ 71 at 75.
1137 See e.g. Saskatchewan (*Equal Pay Act*, SS 1952, c 104); British Columbia (*Equal Pay Act*, SBC 1953 (2nd Sess), c 6); Nova Scotia (*Equal Pay Act*, SNS 1956, c 5); Manitoba (*Equal Pay Act*, SM 1956, c 18); Alberta (*An Act amending the Alberta Labour Code*, SA 1957, c 38, s 41); Prince Edward Island (*Equal Pay Act*, SPEI 1959, c 11); New Brunswick (*Female Employees Fair Remuneration Act*, SNB 1960-61, c 7). "Although Quebec has no Equal Pay Act, in June, 1964, legislation was enacted to give a "married woman full equal capacity as to her legal rights, subject only to such restrictions as arise from a matrimonial regime." (Tarnopolsky, "The Iron Hand", *supra* note 1048 at 570).
1138 See e.g. Manitoba (*Fair Employment Practices Act*, SM 1953 (2nd Sess), c 18); Nova Scotia (*Fair Employment Practices Act*, SNS 1955, c 5); New Brunswick (*Fair Employment Practices Act*, SNB 1956, c 9); British Columbia (*Fair Employment Practices Act*, SBC 1956, c 16); Saskatchewan (*Fair Employment Act*, SS 1956, c 69); Quebec (*Discrimination in Employment Act*, SQ 1964, c 46).
1139 SC 1952-1953, c 19.

discrimination in employment and membership in trade unions on the grounds of race, national origin, colour, or religion among federal employees and all sectors within federal jurisdiction, and in 1956, it adopted the *Female Employees Equal Pay Act*,[1140] making discrimination in wages on account of sex illegal.

The province of Ontario also led the way by passing the first *Fair Accommodation Practices Act*,[1141] which provided equality of access to "the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, colour, nationality, ancestry or place of origin."[1142] Later, the scope of the Act would be expanded to include broader types of commercial and residential accommodations.[1143] While many provinces again followed with the adoption of similar acts in the late 1950s and early 1960s,[1144] other provinces enacted analogous provisions in their more comprehensive human rights acts.[1145] While they presented a great improvement over the quasi-criminal legislation, Tarnopolsky asserts that the efficiency of Fair Accommodation and Fair Employment Practices Acts was still limited, as both types of laws were restricted to employment and public accommodation, and they had ineffective enforcement mechanisms. Tarnopolsky notes that "very few complaints [were] made" while "very little enforcement [was] achieved."[1146]

In this context of provincial enactment of human rights legislation and under the significant influence of the *Universal Declaration of Human Rights*, the Canadian Parliament adopted the first expression of human rights at the federal level, the *Canadian Bill of Rights* in 1960.[1147] Before its

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1140 SC 1956, c 38.
1141 SO 1954, c 28.
1142 *Ibid*, s 2.
1143 The Act "was amended several times in the 1960s and by 1967 it covered 'self contained dwelling units.'" (Patmore, *supra* note 1043 at 31-32).
1144 See e.g. Saskatchewan (*Fair Accommodation Practices Act*, SS 1956, c 68); New Brunswick (*Fair Accommodation Practices Act*, SNB 1959, c 6); Nova Scotia (*Fair Accommodation Practices Act*, SNS 1959, c 5); Manitoba (*Fair Accommodation Practices Act*, SM 1960, c 14); British Columbia (*Public Accommodations Practices Act*, SBC 1961, c 50). As for Quebec, "[a]lthough there [was] no Fair Accommodation Practices Act in Québec, a section of the *Hotels Act* forbid[ed] discrimination in hotels, restaurants, and camping grounds" (Tarnopolsky, "The Iron Hand", *supra* note 1048 at 570).
1145 See Tarnopolsky, *Canadian Bill of Rights*, *supra* note 1109 at 2-5.
1146 Tarnopolsky, "The Iron Hand", *supra* note 1048 at 571.
1147 *Canadian Bill of Rights*, *supra* note 44.

enactment, there were discussions across the country beginning in the 1940s on the best method to respect and protect civil liberties, or human rights and freedoms, in Canada. Two opposing schools of thought prevailed: some promoted the idea that non-legislative intervention was the best protection of rights[1148]; and others supported the belief that a national bill of rights was the only solution to safeguard civil liberties. Arguments favouring the enactment of the *Canadian Bill of Rights* included the following: first, fundamental rights and freedoms were considered immutable and minorities needed special protection; second, consistent with the "international doctrine of the United Nations," the protection of these rights was "binding upon Canada as a signatory"[1149]; third, bills of rights were proven to be effective in the protection of fundamental rights and freedoms; fourth, other Commonwealth countries had already included these rights in their constitutions; and lastly, "a clear and authoritative declaration of the general principles would be of value in attaining their recognition."[1150] Then Prime Minister John G. Diefenbaker successfully introduced the *Canadian Bill of Rights* in 1960, after fifteen years of relentless work,[1151] and the *Canadian Bill of Rights* was passed on 10 August 1960. The federal bill protected numerous rights, including the right to life, liberty, security of the person, and enjoyment of property; limited equality rights; freedom of religion, speech, and association; and judicial rights.

Unfortunately, the effectiveness of the *Canadian Bill of Rights* was very limited. It was never taken seriously by the courts and was regarded at best as a mere interpretative aid, subject to a

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1148 "The arguments which were put forward at that time against a Bill of Rights can probably be summarized as follows: 1) Fundamental rights and freedoms which are universal and immutable do not exist. History shows that they are subject to change. 2) Many of the countries which signed the Universal Declaration of Human Rights have not put them into effect and deny these very rights. 3) Experience shows that Bill of Rights are not as effective for safe-guarding these freedoms as the traditional methods which have been used. 4) A general definition of these values tends to limit them. […] 5) The federal general power of disallowance provides all the protection we need against provincial encroachments, whereas Parliament will not infringe these rights except in times of emergency, and then even a Bill of Rights will not help. 6) A Bill of Rights is a denial of the practical sovereignty of Parliament. Such a fundamental change is not justified. 7) It would place in the hands of the judiciary the power of deciding grave issues of policy. […] 8) A Bill of Rights introduces rigidity into the constitution." (Tarnopolsky, *Canadian Bill of Rights*, *supra* note 1109 at 10 [footnotes omitted]).

1149 *Ibid*.

1150 *Ibid*.

1151 Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 45.

restrictive interpretation.[1152] Because it was an ordinary federal statute and was not entrenched in the constitution,[1153] the federal government could repeal it at any time. The authority of the bill was limited to federal matters and only applied to federal laws, having no application to provincial laws. The language of the statute was also characterized as "ambiguous and unfortunate"[1154] and in general, the federal bill was "technically and professionally [considered] a failure.[1155] Given these limitations, the later adoption of a constitutionally entrenched charter in the 1980s became necessary.[1156]

Human rights activists and minority groups advocates played an important role in developing human rights legislation, but they also helped "reform ideas about the nature of Canadian society and helped make its institutions more responsive to, and reflective of, the diversity of Canada's people."[1157] Attitudes were shifting as these groups lobbied for a greater and more effective protection against discrimination.

The year 1962 marked the birth of human rights codes in Canada, when Ontario adopted the Ontario *Human Rights Code*.[1158] It is considered the first comprehensive human rights code in the country to be administered by a Human Rights Commission.[1159] The Code prohibited discrimination based on race, creed, colour, nationality, ancestry, or place of origin—but not sex initially. The province repealed most of its human rights laws to "make way for" the human rights code. The Ontario *Human Rights Code* was based on the idea advocated by Frank Scott, namely "to provide for rights against discrimination not only through a Bill of Rights, but also through a

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[1152] See Helis, *supra* note 44 at 5, 219-225; Thomson Irvine, "Saskatchewan, the Patriation of the Constitution and the Enactment of the *Charter*: Looking Back and Looking Forward" (2015) 4:2 Can J Human Rights 259 at 275-276.

[1153] Although entrenching the *Canadian Bill of Rights* in the Constitution was discussed and advocated by many, it was not accepted. See Tarnopolsky, *Canadian Bill of Rights*, *supra* note 1109 at 88.

[1154] Cohen, *supra* note 1101 at 562.

[1155] *Ibid*.

[1156] MacLennan, *supra* note 1151 at 161; Patmore, *supra* note 1043 at 49.

[1157] Carmela Patrias & Ruth A Frager, "This Is Our Country, These Are Our Rights" (2001) 82:1 Can Historical Rev 1 at 35.

[1158] SO 1961-1962, c 93.

[1159] The Ontario Human Rights Commission replaced the Anti-Discrimination Commission established a year earlier (Tarnopolsky, "The Iron Hand", *supra* note 1048 at 571).

positive human rights policy based on the use of state power."[1160] Brian Howe identifies three factors that contributed to the approach adopted in the Ontario *Human Rights Code* of 1962. The first factor was "favourable structural change,"[1161] characterized by the heavy inflow of immigrants into Ontario in the 1950s and the growing number of women in the work force. This created "an important social basis for anti-discrimination legislation."[1162] The second factor was an "incrementalist approach to legislative change," by which specific and limited laws were enacted and "used as a justification to go further."[1163] The third factor was "a relatively modest human rights policy centring on conciliation and education."[1164]

In the 1960s, most other provinces gradually enacted various human rights acts or codes. In 1963, Nova Scotia enacted the *Human Rights Act*,[1165] which, just like Ontario, consolidated the province's human rights legislation into one Act. However, Nova Scotia only established a commission in 1967.[1166] Alberta adopted its *Human Rights Act*[1167] in 1966 with a commission to administer the Act. In 1967, New Brunswick passed the *Human Rights Act*[1168] that also set up a Human Rights Commission. In 1968, Prince Edward Island enacted the *Human Rights Act*[1169] and the creation of a Human Rights Commission followed in 1975. In 1969, Newfoundland was the sixth province to adopt a comprehensive *Human Rights Act*[1170] and a commission was created in 1974.

In 1969, British Columbia consolidated its human rights laws into one code, the *Human Rights Act*,[1171] and established a Human Rights Commission. The British Columbia Civil Liberties Association (BCCLA) emerged in the 1960s and was founded "from a concern over excessive police

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1160 Howe, *supra* note 1084 at 790; F R Scott, "Dominion Jurisdiction over Human Rights and Fundamental Freedoms" (1949) 27:5 Can Bar Rev 497.
1161 Howe, *supra* note 1084 at 790.
1162 *Ibid* at 791.
1163 *Ibid*.
1164 *Ibid* at 790.
1165 SNS 1963, c 5.
1166 Tarnopolsky, *Canadian Bill of Rights*, *supra* note 1109 at 380.
1167 SA 1966, c 39; Tarnopolsky, "The Iron Hand", *supra* note 1048 at 571.
1168 SNB 1967, c 13.
1169 SPEI 1968, c 24.
1170 SN 169, c 75.
1171 SBC 1969, c 10.

powers and the state repression of an unpopular minority group."[1172] The BCCLA was critical of the 1969 Code, arguing that the commission was under-funded and was not effectively promoting human rights in the province. In 1973, the New Democratic Party government passed a more expansive *Human Rights Code*, with a separate human rights branch to process complaints.[1173] In 1970, Manitoba followed the other provinces and adopted the *Human Rights Act*,[1174] which created a Human Rights Commission to ensure compliance with the law. At this time, Quebec did not yet have any provincial statutory protection for human rights.

4.3.1.3 The Quebec *Charter of human rights and freedoms*

In the mid 1970s, the province of Quebec did not yet have any real legislation defending human rights apart from the *Discrimination in Employment Act*, which prohibited discrimination in employment on the grounds of race, colour, sex, religion, and national or social origin.[1175] The only protection of human rights was vested in the provisions of the *Civil Code*.[1176] Discussions over the enactment of a charter had started in 1958,[1177] but it was in 1963 that Professor Jacques-Yvan Morin offered a real proposal for a provincial statute protecting human rights, arguing that Quebec had the relevant legislative powers to adopt such legislation.[1178] In 1968, the Civil Code Revision Office (CCRO) suggested entrenching fundamental rights under private law in the code to "establish the centrality of the person in private law" and presented a Declaration of Civil Rights.[1179] This document, which represents the first real step in the enactment of the *Quebec Charter*, was largely inspired by international documents protecting human rights, such as the *Universal Declaration of Human Rights* and the *European Convention*.[1180] In 1971, Robert Bourassa's Liberal government followed the

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1172 Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982* (Vancouver: UBC Press, 2008) at 61.
1173 SBC 1973, c 119.
1174 SM 1970, c 104.
1175 *Act respecting discrimination in employment*, SQ 1964, c 46, s 1-2.
1176 Madeleine Caron, "Le Code civil québécois, instrument de protection des droits et libertés de la personne?" (1978) 56:2 Can Bar Rev 197 at 230.
1177 Émile Colas, "Les droits de l'Homme et la constitution canadienne" (1958) 18 R du B 317.
1178 Jacques-Yvan Morin, "Une Charte des droits de l'Homme pour le Québec" (1963) 9:4 McGill LJ 273 at 300.
1179 Morel, *supra* note 109 at 5.
1180 *Ibid* at 6.

CCRO recommendation and created the Scott-Crépeau Commission to prepare a bill on rights and freedoms. This bill reproduced the CCRO Declaration of Civil Rights; it also included protection for fundamental freedoms and an enhanced discrimination prohibition, inspired by the *International Covenant on Civil and Political Rights*,[1181] the *International Convention on the Elimination of All Forms of Racial Discrimination*,[1182] and the Ontario *Human Rights Code*.[1183] Three years passed before the government acted on the Scott-Crépeau Report, and it was only in 1974, after much pressure and intervention from the Ligue des droits de l'Homme (Human Rights League), that a bill was formally introduced into the National Assembly.

Bill 50, entitled *Charter of human rights and freedoms*, was "undeniably a text which had no equivalent in Canadian legislative history."[1184] Not only did it include extended protection for the right to equality, it also contained protection for the following fundamental rights and freedoms of the individual: the right to life and to personal security, inviolability, and freedom; the right to assistance; freedom of conscience and freedom of expression; the right to the safeguard of one's dignity; the right to respect for one's private life; the right to the protection of one's property, and to right to professional secrecy. The bill also recognized certain political rights, judicial rights, economic and social rights, and established a Human Rights Commission[1185] (then the Commission des droits de la personne—which is now the CDPDJ).

Why did Quebec want to enact such a comprehensive law, instead of simply regulating discriminatory practices like most other provinces? André Morel contends that Quebec never intended to enact a human rights law that would be limited to the protection against discrimination.[1186] During the debates preceding the adoption of *Bill 50*, it was argued that the proliferation of State intervention into the lives of individuals and communities and the expansion of

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1181 16 December 1966, 999 UNTS 171.
1182 21 December 1965, 660 UNTS 195.
1183 Morel, *supra* note 109 at 7.
1184 *Ibid* at 9 [translated by author].
1185 *Charter of human rights and freedoms*, 2nd Sess, 30th Leg, Quebec, 1974 (Explanatory notes) [*Bill 50*].
1186 Morel, *supra* note 109 at 16-17.

governmental powers both justified the need for such a law.[1187] It was also suggested that the province of Quebec, "as a distinct society in a federal State," wished "to protect the rights and freedoms according to the needs and aspirations of its society."[1188] On 27 June 1975, the Quebec legislative assembly enacted the *Charter of human rights and freedoms*, a unique legislative instrument that, as noted above, not only protected the right to equality, but various fundamental rights and freedoms. The *Quebec Charter* would come into effect a year later, on 28 June 1976.

It is difficult to understand why Quebec waited so long to follow the other provinces, as nothing in the history of social movements in Quebec explains the absence of legislative protection for fundamental rights and freedoms, or at least for the right to equality.[1189] In fact, the existence of human rights movements beginning in the 1930s in Quebec shows that there was a real interest in human rights.[1190] Although Quebec took quite a long time before enacting human rights legislation, the outcome was worth the wait as it significantly exceeded all other statutory human rights protections in Canada.

4.3.1.4 The *Canadian Charter of Rights and Freedoms*

A year later, in 1977, the federal government enacted the *Canadian Human Rights Act* (CHRA), which is a federal law that prohibits discrimination in areas of federal jurisdiction; that is, the federal government itself, as well as federally regulated businesses and industries.[1191] The CHRA, an anti-discrimination law that only protects the right to equality, was meant to complement the *Canadian Bill of Rights*. After a few amendments, the CHRA now prohibits discrimination at the federal level on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual

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1187 Quebec, National Assembly, *Official Report of Debates (Hansard)*, 30th Leg 2nd Sess, No 15 (29 October 1974) at 2741 (Jérôme Choquette), cited in Morel, *supra* note 109 at 10.

1188 Morel, *supra* note 109 at 17 [translated by author].

1189 Some have argued that the most likely explanation for this reluctance was the issue of languages rights: "Any attempt to pass a bill of rights would invariably mire the government in a debate on language rights, and most politicians in Québec were not interested in doing this until the timing was propitious." (Clément, *supra* note 1172 at 104).

1190 Quebec, Commission des droits de la personne et des droits de la jeunesse, *Après 25 ans, la Charte québécoise des droits et libertés*, by Pierre Bosset et al (Montreal: Direction de la recherché et de la planification, 2003) at 3.

1191 *Canadian Human Rights Act*, s 2.

orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.[1192] An interesting feature of the CHRA is that it also expressly prohibits multiple or intersectional discrimination, as s. 3.1 specifies that "a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds." Finally, the CHRA also resulted in the creation of the Canadian Human Rights Commission[1193] to ensure the safeguard of equality and for the administration of the CHRA.[1194]

After decades of debating the feasibility of a constitutional human rights bill, the federal government detached itself somewhat from the constitutional theory of parliamentary supremacy[1195] and adopted the *Canadian Charter* in 1982. The decline of parliamentary supremacy can be attributed to three international phenomena, namely Canada's progression toward autonomy and distancing from the United Kingdom; a "dramatic escalation of ethnicity and nationalism"[1196] since the end of World War II; and the "emergence of a global ideology of human rights."[1197] Therefore, "historical international and particular national movements of certain countries played a part in the drafting of the *Charter*."[1198] It is important to note, however, that parliamentary supremacy as a constitutional theory was not discarded, but it was only modified.[1199]

1192 *Ibid*, s 3(1).

1193 *Ibid*, s 26.

1194 The CHRA is a federal anti-discrimination statute that only protects the right to equality, like most of the other provincial and territorial human rights statutes. As mentioned in Chapter 1, section 1.2.2, *above*, my dissertation focuses primarily on three provinces—British Columbia, Ontario, and Quebec—and therefore concentrates on the provincial legislation. The *Canadian Human Rights Act* and federal human rights laws' features are only discussed when relevant.

1195 Patmore, *supra* note 1043 at 40.

1196 Alain C. Cairns explains that "in the post-imperial international order," Canada saw a "heightening of racial and ethnic identities, emergence of an independence-seeking nationalism in Quebec, and more liberal immigration requirements that further added to our ethnic heterogeneity." (Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal; Buffalo: McGill-Queen's University Press, 1992) at 30-31).

1197 *Ibid* at 30.

1198 Patmore, *supra* note 1043 at 43.

1199 *Ibid* at 60.

Unlike other similar human rights laws—including the *Quebec Charter*[1200]—the enactment of the *Canadian Charter* happened in an exceptionally tumultuous political climate. Two domestic political factors contributed to its enactment. On one hand, the constitutional reform was motivated by the conviction that the Charter would "better protect" and even "guarantee" fundamental rights and freedoms, and on the other hand, it was meant to reinforce national unity as a unifying symbol, as some believed that "centrifugal forces […] threaten the survival of Canada as a unified country."[1201] However, the entrenchment of the Charter lacked provincial support, as provinces did not see it as the best way "to secure the interest of all people."[1202]

Prime Minister Pierre Trudeau, elected to Parliament in 1965, was one of the major supporters of an effective constitutional bill of rights that would offset the *Canadian Bill of Rights*' limitations. When negotiations between the federal and provincial governments were not leading to an agreement, Trudeau even threatened to unilaterally include the Charter in the constitutional reform, without provincial support; he "would risk dividing the country in order that it might become more united."[1203] However, in the *Patriation Reference*,[1204] the SCC held that a substantial degree of provincial consent was required by constitutional convention for the amendment of the Canadian Constitution. Trudeau's pursuit of the provinces' agreement was persistent, and this finally resulted in the agreement between the federal government and nine provinces, excluding Quebec,[1205] and with it, the enactment of the *Constitution Act, 1982*.[1206] The *Canadian Charter* was thus granted superior and constitutional status with its constitutional entrenchment, as it formed the first part of the *Constitution Act, 1982*.

1200 Morel, *supra* note 109 at 3.

1201 Peter H Russell, "The Political Purposes of the *Canadian Charter of Rights and Freedoms*" (1983) 61:1 Can Bar Rev 30 at 31.

1202 Patmore, *supra* note 1043 at 45.

1203 Russell, *supra* note 1201 at 35.

1204 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753.

1205 Although the province of Quebec did not support the Charter and the amendment of the Constitution, the *Canadian Charter* is still applicable in Quebec as all provinces are bound by the Constitution.

1206 Patmore, *supra* note 1043 at 49. See also Irvine, *supra* note 1152 at 265-274.

The *Canadian Charter* guarantees civil and political rights to Canadians and protects them from actions of all areas and levels of government. As such, the *Canadian Charter* only restricts government action, and therefore does not apply to private party disputes[1207]; in the context of employment, this means that the Charter can only be used to protect government employees and offers no protection to employees in private employment relationships. However, England notes that "[t]he enactment of the *Canadian Charter* […] although it does not apply directly to the terms of private employment contracts, has nonetheless fuelled the expectation of all workers for greater 'rights' in their employment relationships."[1208] The constitutional protections of the Charter include fundamental freedoms (conscience, religion, expression, and association), democratic rights, mobility rights, legal and judicial rights, equality rights, and language rights. S. 15 of the *Canadian Charter* guarantees equality before and under the law and equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. This list of nine enumerated[1209] grounds is not exhaustive, as additional grounds can be considered if they are analogous[1210] to those enumerated in s. 15 and worthy of Charter protection; this is a particular feature of the *Canadian Charter* that other human rights codes do not share.

4.3.2 A Comparison of the *Quebec Charter* and Human Rights Statutes in the Rest of Canada

This section examines the main differences between the *Quebec Charter* and human rights codes in the rest of Canada, with regards to the statutory rights and freedoms that employees can raise to challenge workplace appearance regulation. It specifically compares human rights

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1207 *Canadian Charter*, s 32; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at paras 33-35 [*Dolphin Delivery*]; Anne McLellan & Bruce P Elman, "To Whom Does the Charter Apply? Some recent cases on s. 32" (1986) 24 Alta L Rev 361 at 367.

1208 England, *Individual Employment Law*, *supra* note 180 at 213. See also Geoffrey England, "The Impact of the *Charter* on Individual Employment Law in Canada: Rewriting an Old Story" (2006-2007) 13 CLELJ 1.

1209 As many scholars note, while the word "enumerated" can be misleading since the list of protected grounds in the *Canadian Charter* is "open-ended" and not actually enumerated, this term "is the prevailing one used to describe the express grounds of prohibited discrimination in s 15(1)." (Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50:3 Osgoode Hall LJ 637 at 642).

1210 For more on analogous grounds under s. 15 of the *Canadian Charter*, see Chapter 5, section 5.1.1, *below*.

legislation that covers the three major jurisdictions in Canada: the BC *Human Rights Code*, the Ontario *Human Rights Code*, and the *Quebec Charter*.

Although these three human rights laws are different in terms of the nature of the rights they protect, they do have a number of similarities. First, because of the status of the rights they protect, the provincial human rights laws are all considered quasi-constitutional and take precedence over other pieces of legislation and other sources of law.[1211] Courts constantly recognize human rights legislation's privileged position in the hierarchy of legal norms because of their fundamental character, "thus ensuring [their] supremacy of principle over ordinary laws."[1212] In 1982, the SCC ruled for the first time on the human rights codes' special and privileged status in *Heerspink*, where Justice Lamer stated that a human rights statute should not be considered "as another ordinary law of general application. It should be recognized for what it is, a fundamental law."[1213] Since then, the SCC has repeatedly recognized the prominent status of all human rights legislation.[1214] In the context of labour and employment law, human rights laws enjoy preeminence over the provisions of collective agreements, contracts of employment, as well as regulations established by the employer under its management rights.[1215]

In addition, unlike the *Canadian Charter*, which is structured to be limited to the public sphere,[1216] the scope of the three provincial human rights statutes is much broader and covers relations between citizens and the State as well as public relationships among private parties. All three laws bind provincial governmental action—acts of public administration as well as those of the provincial courts; however, they only apply to work and services covered by provincial jurisdiction.

1211 BC *Human Rights Code*, s 4; Ontario *Human Rights Code*, s 47(2); *Quebec Charter*, s 52.

1212 *Boisbriand*, *supra* note 149 at para 27.

1213 See *Insurance Corporation of British Columbia v Heerspink et al*, [1982] 2 SCR 145 at 158.

1214 See e.g. *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 18; *Béliveau St-Jacques v Fédération des employées et employés de services publics inc*, [1996] 2 SCR 345 at paras 42, 116 [*Béliveau St-Jacques*]; *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3 at para 20; *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at para 8; *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1135-1136; *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at para 12 [*O'Malley*]; *Winnipeg School Division No 1 v Craton*, [1985] 2 SCR 150 at para 4 [*Craton*].

1215 See *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at para 23 [*Parry Sound*].

1216 See section 4.3.1.4, *above*.

As for private relations and actions in employment and labour contexts, it is important to note that the three statutes apply directly to employer-employee relationships, whether they fall under a collective agreement or an individual employment relationship.

As they all emanate from provincial jurisdictions, the three laws under study generally do not apply to federally regulated activities or federal undertakings. According to the doctrine of the division of powers, provincial legislation only applies to federal undertakings when its impact does not *impair* an essential or vital part—the core—of federal power, in what makes these undertakings specifically of federal jurisdiction.[1217] The concept of impairment is essential, because provincial legislation will be applicable even if it only affects or touches the core of federal power according to the ancillary powers doctrine.[1218] This principle derives from a jurisprudential shift made by the SCC in 2007 in *Canadian Western Bank*[1219] and *Lafarge*.[1220] Federally regulated activities and federal undertakings are thus subject to the *Canadian Human Rights Act* when provincial human rights legislation impairs an essential part of federal power.

However, the similarities between the three provincial statutes end there, since the *Quebec Charter* covers many more rights and offers an extended protection for a great number of fundamental rights and freedoms. Regarding the issue of workplace appearance regulation, the *Quebec Charter* protects the right to equality for every person in employment situations, such as "hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment" (s. 16). S. 10 of the Charter lists the personal characteristics that constitute grounds for prohibited discrimination, which are: "race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap, or the use of any means to palliate a handicap"—this list is closed and analogous grounds cannot

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1217 Brun, Tremblay & Brouillet, *supra* note 105 at 979-980.
1218 *Ibid*.
1219 *Canadian Western Bank v Alberta*, 2007 SCC 22.
1220 *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23.

be added. The anti-discrimination provision can be limited by s. 20, which reads as follows: “A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.”

The fundamental freedoms and rights that can be raised by employees to challenge workplace appearance regulation are provided in Chapter I of the *Quebec Charter*. Depending on the element of physical appearance involved, they are: the rights to inviolability and individual freedom (s. 1); the fundamental freedoms of religion and expression (s. 3); the right to the safeguard of dignity (s. 4); and the right to respect for private life (s. 5). All these fundamental freedoms and rights can be limited by the exercise of someone else’s rights and freedoms (in the case of workplace appearance regulation, the employer’s), which is stated at the first paragraph of s. 9.1 of the Charter: “In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.” The most relevant rights regarding workplace appearance regulation and their limits through s. 9.1 are analyzed in Chapter 6.

As stated above, the BC *Human Rights Code* only guarantees protection against discrimination. At s. 11, it prohibits discrimination in employment advertisements based on “race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age,” unless “the limitation, specification or preference is based on a bona fide occupational requirement.” It also protects the right to equality in employment at s. 13, with a *bona fide* occupational requirement limiting the prohibition:

> 13. (1) A person must not (a) refuse to employ or refuse to continue to employ a person, or (b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because

> that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
>
> (3) Subsection (1) does not apply (a) as it relates to age, to a bona fide scheme based on seniority, or (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.[1221]

S. 5 (1) of the Ontario *Human Rights Code* also offers a similar protection against discrimination in employment contexts based on the following prohibited grounds: "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability." This equality provision can also be limited, as s. 11 provides:

> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where, (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> (3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.[1222]

Both human rights codes therefore prohibit discrimination in public and private employment contexts on specific grounds, none of which expressly includes physical appearance. However, several

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[1221] BC *Human Rights Code*, s 13.
[1222] Ontario *Human Rights Code*, s 11.

grounds can be used as proxies in some cases of appearance discrimination, and the anti-discrimination framework is therefore analyzed in Chapter 5.

4.3.3 Human Rights Primacy over Management Rights

The Constitution of Canada, which includes the *Constitution Act, 1867* and the *Constitution Act, 1982*, is the supreme law of the country. The *Canadian Charter*, which was enacted in 1982, constitutes Part 1 of the *Constitution Act, 1982* and stands at the top of the hierarchy of sources of law. In order of authority, the Charter is followed by: 1) human rights legislation, which is now considered quasi-constitutional; 2) other legislation; 3) regulations; 4) case law from higher courts—e.g. the Supreme Court of Canada; 5) other case law; 6) contracts and collective agreements; and 7) secondary sources of law, such as doctrine.[1223] Generally, the hierarchically lower source should be interpreted and applied in compliance with the higher source.[1224]

As discussed in this chapter, employment and labour law is governed by a multitude of sources, from a perspective of legal pluralism. All these influencing sources do not have the same weight, and it is thus important to be mindful of the hierarchical order of legal sources when faced with appearance issues in the workplace, which involve two competing interests and rights: the employers' management rights and the employees' human rights—which are protected by quasi-constitutional legislation. As stated in the previous section, the legal foundations of management rights are not formally determined[1225] but rather stem from the subordination inherent to the employment relationship, and positive law does not clearly and directly sanction the exercise of the employer's authority, albeit in unionized workplaces through arbitration. It must be emphasized that employers' management rights generally originate from common law or ordinary law, and therefore do not enjoy any "special" or prominent status, unlike human rights and freedoms, which benefit from a hierarchically higher status because of their quasi-constitutional nature.

[1223] See Coutu et al, *supra* note 760 at para 40-52.
[1224] *Ibid* at para 41.
[1225] F Morin et al, *supra* note 821 at 374.

Therefore, when employees challenge appearance regulations on the basis of their fundamental rights and freedoms, these rights will theoretically supersede the employers' management rights. In fact, the SCC confirmed the supremacy of human rights legislation when compared to other sources of employment and labour law: "the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes."[1226] Employers' management rights must comply with the anti-discrimination provisions of all provincial, federal, and territorial human rights codes, as well as the fundamental rights and freedoms contained in the *Quebec Charter*.[1227] The next chapters are devoted to these two categories of rights, which form the two main frameworks to the study of workplace appearance regulation as a human rights issue.

As seen in legal cases and pieces of legislation dating from the beginning of the twentieth century, social and legal discrimination against various groups abounded in Canada. A shift in social values and Canadians' general mentality sparked the enactment of piecemeal legislation starting in the 1940s, with laws prohibiting discrimination based on race and religion in specific areas and activities. In the 1960s, most provinces adopted human rights codes, which were mostly anti-discrimination laws with an extended list of prohibited grounds of discrimination, including sex. As a latecomer, Quebec only adopted its human rights legislation in 1975, but it exceeded the sole protection of the right to equality. The *Quebec Charter* is a comprehensive human and civil rights statute, inspired by the *Canadian Bill of Rights* and the *Universal Declaration of Human Rights*. It is similar in its protection to the *Canadian Charter of Rights and Freedoms*, but its scope is much broader as it can also be used in private employment contexts—which are the most frequent environments where workplace appearance regulation occurs. In the rest of Canada, human rights

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1226 *Parry Sound*, *supra* note 1215 at para 23.

1227 See e.g. *Vallée-du-Richelieu*, *supra* note 104 at para 48 ("There are two competing rights in the present case. On the one hand, the employer's right to the compliance of the collective agreement (mandatory uniform) and, on the other hand, firefighters' freedom of expression. The Tribunal considers that it must give precedence to the right enshrined in [s. 3 of the *Quebec Charter*], and this, by virtue of the principle of the hierarchy of sources of law. This conclusion may certainly lead to a certain floating or instability in contractual relationships prevailing between the parties, but this is the consequence of the rule of law." [translated by author]).

codes mostly offer anti-discrimination protections, inspired by the United States legislation. As both the BC *Human Rights Code* and the Ontario *Human Rights Code* only protect the right to equality, it is clear that these two laws do not offer a comprehensive protection of other fundamental rights and freedoms as the *Quebec Charter* does, but human rights nevertheless should precede the employer's management rights regarding workplace appearance regulation.

Conclusion

This chapter presented the legal settings for the study of workplace appearance regulation as a human rights issue in Canada. On the one hand, while employment law differs in common law jurisdictions and in Quebec, non-unionized employees generally share a lack of legal recourse to challenge workplace dress and grooming codes. I first argued that Quebec's unique protective employment legislation can, however, be used to challenge workplace appearance regulation in non-unionized employment contexts for employees with two years of employment who are unjustly dismissed because of their appearance. Yet as I observed in this chapter, the case law shows that this legal vehicle is, most of the time, used simultaneously with the *Quebec Charter*'s fundamental rights and freedoms. It is also only open in a case of termination because of appearance, and cannot be used to simply oppose appearance policies. On the other hand, all Canadian unionized employees benefit from a protection against unreasonable workplace appearance regulation, but most Canadian employees work in non-unionized environments and find themselves with little remedy when it comes to unjust appearance regulations. However, employers' management rights, which allow them to enact various appearance policies, should be limited, particularly through human rights protections—whether found in anti-discrimination provisions or in fundamental rights and freedoms of the *Quebec Charter*. Human rights are indeed quasi-constitutional rights that should precede the employer's power within the limits of human rights legislation. The following chapters study workplace appearance regulation through a human rights analysis, which I argue leads to more balanced and respectful outcomes for employees, and should benefit non-unionized and unionized employees alike everywhere in Canada.

CHAPTER 5
THE ANTI-DISCRIMINATION FRAMEWORK

Introduction

Andrei is a racialized male full-time technical operator in a company that provides technical equipment and related services in hotels and conference centres in London, Ontario. The company's dress code is very conservative and particularly prohibits the wearing of earrings by men, while women are allowed to wear earrings. Andrei has been wearing a stud earring on his left ear for years, but usually removes it while on duty, which frustrates him as he does not feel he is being himself without it. He started to wear his earring while at work and got disciplined after two days of dress code contravention.[1228] Michelle is a racialized woman living in Montreal, Quebec, who wears her hair in neat dreadlocks. After decades of chemical straightening, she has been wearing her hair in dreadlocks for about ten years, as she finds this hairstyle the best to suit and protect her natural black hair texture. She was recently hired in a customer service representative position, for which she would have had no contact with the public as her duties would have only been performed over the phone. However, her job offer was withdrawn when she refused to cut off her dreadlocks; dreadlocks, the manager feared, "tend to get messy."[1229] Roberta is a forty-two years old white female restaurant waitress who works full-time in Victoria, British Columbia. The restaurant dress code required that she wears black fitting and feminine clothes—ideally a skirt, high heels, makeup, and her hair down at all times during her shifts. As the restaurant was facing major economic losses due in part because of fierce competition from big chains, Roberta's employer imposed a new uniform, including a mini-skirt and a sexually revealing top exposing at least three inches of the mid-section. When Roberta objected to the new dress code, she got terminated right away.[1230] These three fictional employees provide examples of workplace appearance regulation that can be

[1228] This example is inspired from actual facts reported in *International Simultaneous Translation*, *supra* note 864.
[1229] This example is inspired from actual facts reported in *Catastrophe Mgmt Sols*, *supra* note 284.
[1230] This example is inspired from actual facts reported in *Restaurant La Courtisane*, *supra* note 7.

challenged under the existing anti-discrimination framework in Canada, although successful outcomes for employees are not necessarily guaranteed.

While setting the stage in the previous chapters, I have conceptualized the interests—particularly employees' interests—that are at stake when issues of employees' appearance arise in the workplace. On the one hand, I argued in Chapter 3 that appearance matters to employees, because appearance is a source of identity formation, a powerful means of expression, but most of all, appearance is important to certain employees as it relates to their sense of self and to their personhood. As choices concerning one's appearance are socially constructed, the space that is left for employees' agency becomes a way to reclaim their bodies, and these important choices should be protected and taken seriously when it comes to workplace regulations and policies. In this chapter, tying the sociological analysis to the legal, I argue that employees' appearance choices, although not immutable *per se*, should be understood as constructively immutable as they can relate to personal characteristics that can only be changed at unacceptable cost to personal identity and personhood.[1231] On the other hand, employers, who enjoy greater power than employees in the employment relationship—which is often unbalanced, by its very nature[1232]—have legitimate concerns with respect to their employees' appearance, too. Employers can therefore adopt various appearance rules for their employees in order to protect and enhance their business' image or for reasons of health and safety. They can do so on account of their management rights, which generally derive from the subordination that characterizes the employment relationship as discussed in Chapter 4. In other words, appearance is important to employees as it is related to their personhood, but it also matters to employers, as employees' appearance can reflect on their corporate image and reputation.[1233]

[1231] See section 5.1.2, *below*.

[1232] See Chapter 4, section 4.2, *above*.

[1233] It will be remembered that this dissertation focuses on the employees' interests; the employers' concerns regarding employees' appearance are therefore not examined in detail and are beyond the scope of this dissertation.

A common argument with regards to appearance is that if someone wants a job, they should conform to the appearance standards set by the industry in which they want to work.[1234] But the fact that employment and labour law gives employers the authority to control their employees is not a reason to refrain from questioning it.[1235] In fact, employers' power must be limited, as employees are not merchandise but should be treated as beings deserving of rights. Therefore, as I have demonstrated in Chapter 4, employment laws and human rights laws have been enacted in Canada to prevent the dangers presented by the employers' discretionary powers and ensure that managerial prerogatives cannot be used to override an employee's basic liberties and rights.[1236] As I mentioned previously, employees do not waive their fundamental rights when they enter into an employment contract. In recent decades, as demonstrated in Chapter 4, human rights legislation has come to regulate the employers' and employees' relationship, thus restricting the extent of employers' powerful management rights. As for many other conditions of employment, these laws offer boundaries to employers' discretion and can protect employees from unjustified workplace appearance regulation.

I stressed in Chapter 1 that from a legal perspective, the issue of workplace appearance regulation has two components: first, it involves appearance discrimination, that is, a distinction imposed on the employee in the course of employment because of a visible characteristic; and second, it involves the employee's autonomy and freedom to choose their clothing and personal appearance when carrying out their work—although it is clear that expressing one's self through one's appearance is not considered a fundamental right in Canadian law. The first component, involving appearance discrimination, is the focus of this chapter, while the fundamental rights at work framework will be analyzed in Chapter 6. Although the anti-discrimination framework entails much more than the protection against stereotypes,[1237] individuals' appearance is undoubtedly known to

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[1234] See Pitt & Clayton, *supra* note 313 at 54; CDPDJ (Drapeau), *supra* note 32 at 27. See also Malcom, *supra* note 176 at 520.

[1235] See Pitt & Clayton, *supra* note 313 at 54-55.

[1236] Collins, *Employment Law*, *supra* note 35 at 11.

[1237] See section 5.1.1, *below*.

create the basis for first impressions and is the source of biases and stereotypes on a daily basis.[1238] In this sense, appearance discrimination can be an invidious form of discrimination. Furthermore, just as employers may want to control their employees' appearance to have a hold over their company's image and reputation, employees, too, may care about the information that is conveyed through their appearance, whether appearance requirements are imposed by their employers or chosen as a means of expression of their selves.

Therefore, this chapter explores what the anti-discrimination framework entails in Canadian law and how human rights legislation[1239]—and, to a lesser extent, the *Canadian Charter*—can be useful to employees to challenge workplace appearance regulation. The first part of the chapter examines the anti-discrimination framework as applied to appearance issues in the workplace—what the right to equality comprises, a discussion of the immutability doctrine, and the limitations and benefits of this framework. I then move to analyze the jurisprudence in common law provinces that specifically addresses appearance issues through the right to equality, focusing on discrimination based on sex/gender and disability, before analyzing the Quebec jurisprudence.[1240] Finally, I argue in the last part of this chapter for the inclusion of "physical appearance" as a protected ground of discrimination in Canadian law, as appearance is not, in the actual state of the legislation, a statutorily prohibited ground.

5.1 THE ANTI-DISCRIMINATION FRAMEWORK AND APPEARANCE IN THE WORKPLACE

The literature review outside of Canada and particularly in the United States shows that the question of appearance regulation in the workplace is mainly analyzed under the anti-discrimination

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1238 See Chapter 3, *above*.

1239 I use "human rights legislation" to refer to the provincial, federal, and territorial human rights statutes, including the three provincial human rights laws that are the focus of this dissertation, i.e. the BC *Human Rights Code*, the Ontario *Human Rights Code*, and the *Quebec Charter*. As mentioned in Chapter 1, section 1.1.3, *above*, the term "human rights legislation" does not include the *Canadian Charter*.

1240 As I explain in section 5.2.2, *below*, because the *Quebec Charter* protects other fundamental rights and freedoms that are generally more effective to challenge workplace appearance regulation, there are not so many cases of discrimination related to this topic in Quebec. Although the principles of the anti-discrimination approach are quite similar in common law jurisdictions and in Quebec, I decided to keep the case law analysis separate to highlight some particularities related to British Columbia, Ontario, or Quebec.

framework.[1241] Most of the studies relate the question to the right to equality, mainly because human rights laws in the United States—and as seen in Chapter 4, in most Canadian jurisdictions generally—only offer a statutory protection of the right to equal treatment with respect to enumerated protected grounds in the area of employment. In the employment context, the anti-discrimination framework is founded on the idea that all individuals have the right to be treated equally regardless of personal characteristics that have nothing to do with their competence and ability to perform their work.

It should follow, therefore, that with regards to appearance, the anti-discrimination framework should aim to protect all individuals from being treated differentially because of a personal *apparent* or *visible* characteristic that has nothing to do with their ability to meet reasonable standards of work performance. As explained in the following section, the right to equality as it is protected under current legislation can be useful to employees who are the object of discrimination based on an apparent characteristic that is expressly protected by statutory legislation, such as race, sex, religion, gender expression, and disability. However, it can be problematic to apply equality theory to appearance issues in the workplace for many reasons, and in particular, for the reasons that appearance is not a protected ground under Canadian law. And, even more problematically, the right to equality becomes more difficult to employ when an issue, like appearance, is constructed as something that is "mutable" or easily changed—although I argue that it should rather be constructed as "constructively immutable."[1242]

Before investigating workplace appearance regulation as appearance-based discrimination, a clarification about attractiveness is needed. The issue of appearance in the workplace is often discussed with regard to lookism and attractiveness—"in reference to the prevailing, socially constructed images of beauty"[1243]—that is, when employees are sanctioned or excluded from employment because they are not considered attractive enough. Lookism, which can be defined as

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[1241] See Chapter 2, section 2.2, *above*.
[1242] See section 5.1.3, *below*.
[1243] Klare, *supra* note 47 at 1421.

a "prejudice or discrimination on the basis of looks or appearance,"[1244] often refers to discrimination based on attractiveness. Many authors refer to this situation when discussing the general problem with appearance at work,[1245] and the example of Abercrombie & Fitch, a clothing store from the United States that has been repeatedly alleged to only hire young, "beautiful," and Caucasian applicants for sales clerks, is often cited.[1246]

For some particular occupations, such as fashion models, actors, and exotic dancers, appearance is constructed as essential to the job, so that attractiveness can be considered a reasonable hiring criterion. For these particular occupations, discrimination based on attractiveness could be lawful,[1247] as "minute attention to the smallest aspects of personal appearance is not demeaning because appearance is so integral to the job."[1248] In fact, appearance can therefore be considered as a *bona fide* occupational requirement (BFOR)[1249] or business necessity, for "a core function of modeling and acting is to have the body co-opted for the purpose of communicating and expressing on behalf of the employer."[1250] For acting and modeling, for instance, because these jobs are fundamentally about using the body for communicative and expressive purposes, employers can argue that employees' appearance is directly connected to their job performance and therefore, a legal hiring criterion.

But what happens with all the other jobs? Some employers may claim their employees are actors or models, while the core function of their job is in fact customer service, such as waitresses, bartenders, and retail assistants. To identify occupations for which appearance is integral to the job, employers can bring evidence to prove that employees' appearance is directly related to their business, such as "market research to determine what customers are willing to pay money for, or what brings the customers to an employer's business" (which are different from customers

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1244 Barber, *The Canadian Oxford Dictionary*, *supra* note 465 sub verbo "lookism".
1245 See the works cited in notes 203-204.
1246 See e.g. Greene, "Black Women", *supra* note 207; Waring, *supra* note 96; James, *supra* note 97; Avery & Crain, *supra* note 300; Fleener, *supra* note 96; Zakrzewski, *supra* note 200.
1247 See e.g. James, *supra* note 97 at 629.
1248 Fisk, *supra* note 57 at 1123.
1249 See e.g. *Urban Casting*, *supra* note 87 at para 29; *Bottomley*, *supra* note 87 at para 41.
1250 Ramachandran, "Freedom of Dress", *supra* note 55 at 64.

preferences).[1251] Although many employers argue they can control their employees' bodies for their business purposes, "there are only a few instances in which that co-opting is actually part of the core activity the employee is engaged to perform."[1252] When appearance is unrelated to the employer's business, i.e. most of the time, it seems discriminatory to prefer to hire an applicant that the employer finds more attractive "because society taught [us] to associate beauty with other favorable characteristics."[1253] Furthermore, as attractiveness is arguably subjective, immutable, and generally unrelated to job performance, it should follow that the right to equality protects less attractive individuals from adverse employment action. But discrimination based on attractiveness seems, among other concerns, very difficult to prove,[1254] and under existing Canadian provincial and federal legislation, it is simply not considered as an infringement to the right to equality. As explained in Chapter 1, although discrimination based on attractiveness is part of the issue of appearance regulation at work, it is not the focus of this dissertation, which particularly focuses on aspects of appearance that involve some degree of choice.

In order to fully grasp the anti-discrimination framework's usefulness to challenge appearance regulations at work, the first part of this section explores its implications and the right to equality with regards to dress and grooming policies. In the second part, I briefly analyze the immutability doctrine that is engrained in the anti-discrimination framework and I argue that appearance should be understood as constructively immutable. Finally, the third and fourth parts of this section respectively analyze the limitations and benefits of the equality framework. I argue that although it is sometimes difficult for employees to fit their appearance claim into existing statutory protected grounds, the anti-discrimination approach can still be useful to challenge some appearance policies, as the case law already supports—at least partly—some appearance claims. Moreover, for non-unionized employees, the anti-discrimination approach may be the only available

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1251 *Ibid* at 66.

1252 *Ibid* at 64. *Contra* Pagliarini, *supra* note 184 at 293.

1253 James, *supra* note 97 at 629-630.

1254 See Chapter 2, section 2.2.3.5, *above*. For a general analysis of the evidence required to prove discrimination, albeit unrelated to appearance discrimination, see Colleen Sheppard & Marie-Louise Chabot, "Obstacles to Crossing the Discrimination Threshold: Connecting Individual Exclusion to Group-Based Inequalities" (2018) 96:1 Can Bar Rev 1.

remedy, which is furthermore facilitated in some jurisdictions through human rights commissions and legal assistance.

5.1.1 The Anti-Discrimination Framework and the Right to Equality

The right to equality, which is protected through anti-discrimination policies and laws, is one of the legal limits to workplace appearance regulation—and, as previously stated, one of the most discussed in the literature. The concept of equality "has long been a feature of [w]estern thought"[1255]; it is central to human rights and is the most widely recognized fundamental right in North American legislation, as the most provided for in statute. Equality does not mean that all individuals are equal[1256]; "[n]o two humans are born with equal attributes; we all differ from each other, sometimes radically, with respect to intelligence, physical capabilities, appearance, social and economic status, and every other personal characteristics."[1257] Instead, the right to equality embodies the idea that all human beings are entitled to equality of treatment, "precisely because all human beings are *not* born equal in their actual potentialities."[1258] But referring to "equality of treatment" is misleading; Canadian law adheres to the principle of *substantive equality*[1259] as contrasted with formal equality, which means that the concept of equality "does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality."[1260] Although the SCC's interpretation of the right to equality has undergone significant changes since the landmark *Andrews* case in 1989,[1261] the Court has consistently reiterated its commitment to substantive

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1255 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164 [*Andrews*].

1256 Although, as Dale Gibson notes, the American Declaration of Independence proclaims "absurdly" the "self-evident truth" that "all men are created equal." Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 57.

1257 *Ibid*.

1258 *Ibid* [emphasis in original].

1259 Initially termed "true equality" in *Andrews*, *supra* note 1255 at 169, McIntyre J. See Beverley Baines, "Equality, Comparison, Discrimination, Status" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 73 at 75.

1260 *R v Kapp*, 2008 SCC 41 at para 15 [*Kapp*]; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 17 [*Taypotat*]. See also Baines, *supra* note 1259.

1261 The right to equality—and particularly the proper approach to s. 15 of the *Canadian Charter*—is still arguably the object of fundamental disagreements amongst the SCC's justices, as illustrated in *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 25 [*CSQ*] and *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25 [*APP*]. For a detailed analysis of these two recent decisions, see Jonnette Watson Hamilton &

equality.[1262] "[B]ased on the idea of equal outcomes or results"[1263] (instead of equal treatment), substantive equality—which is the common purpose[1264] of both human rights legislation and the *Canadian Charter*—"entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[1265]

In *Quebec v A*, Justice Abella, writing for the majority, reminds us of the purpose of anti-discrimination law in general that was originally stated in *Andrews*: "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available."[1266] While anti-discrimination law's purpose and definition have been the object of countless analyses and debates, Sophia Moreau offers a cogent articulation of the purpose of anti-discrimination law, which "is to prevent the unfair subordination of certain members of society and to create a climate in which people publicly recognize each other as deserving of equal respect."[1267] She also argues that discrimination involves "a failure to recognize [people's] equal standing as fellow members of society."[1268] In this respect, this is aligned with the SCC's definition of discrimination:

> [A] distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge

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Jennifer Koshan, "Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1 [Watson Hamilton & Koshan, "Equality Rights"]. It is also argued that the continual "restatement" of the right to equality by the SCC in recent cases has created general confusion in lower courts and tribunals (Mel Cousins, "Pregnancy as a Personal Circumstance: Miceli-Riggins and Canadian Equality Jurisprudence" (2015) 4:2 Can J Human Rights 237). See also Alicja Puchta, "*Quebec v A* and *Taypotat*: Unpacking the Supreme Court's Latest Decisions on Section 15 of the *Charter*" (2018) 55:3 Osgoode Hall LJ 665. See generally Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 [Koshan & Watson Hamilton, "The Continual Reinvention"].

1262 See e.g. *CSQ*, *supra* note 1261 at para 25; *APP*, *supra* note 1261 at para 25; *Taypotat*, *supra* note 1260 at para 17; *Quebec (Attorney General) v A*, 2013 SCC 5 at para 325 [*Quebec v A*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2 [*Withler*]; *Kapp*, *supra* note 1260 at para 16.

1263 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 8 [Sheppard, *Inclusive Equality*].

1264 Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63:2 SCLR 261 at 264.

1265 *Andrews*, *supra* note 1255 at 171.

1266 *Quebec v A*, *supra* note 1262 at para 319.

1267 Sophia Moreau, "Equality and Discrimination" in John Tasioulas, ed, *The Cambridge Companion to Philosophy of Law* (Cambridge University Press) [forthcoming in 2020] at 2.

1268 *Ibid* at 11.

> of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[1269]

In employment relationships,[1270] the right to equality aims to "eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job."[1271] On account of the SCC's oft-quoted definition of equality, one could think that the right to equality should definitely protect employees who are sanctioned or excluded in the workplace because they display an appearance that can lead to prejudices and stereotypes, such as tattoos, piercings, non-traditional hair colours, and so on. Furthermore, the majority of the SCC acknowledged in its recent jurisprudence that legal protections against discrimination are not only meant to combat prejudice and stereotyping, which reflect negative attitudes, but they are intended to "capture discriminatory conduct of effects, even those that are unintentional."[1272]

However, equality protections do not apply so easily to appearance-related adverse employment actions. It is of fundamental importance to understand that Canadian law does not recognize a "general guarantee of equality"[1273] against all distinctions. Central to the equality framework is the claimant's requirement to prove that the challenged act or policy is founded on one of the statutory grounds of the applicable legislation[1274] (and enumerated and analogous grounds under the *Canadian Charter*). Provincial, federal, and territorial human rights laws present some similarities in terms of the statutory prohibited grounds of discrimination. Thus, under the three provincial human rights statutes under study—the BC *Human Rights Code*, the Ontario *Human*

1269 *Andrews*, *supra* note 1255 at 174-175. This definition has been repeatedly cited in SCC decisions, particularly the first sentence. See e.g. *Quebec v A*, *supra* note 1262 at para 322; *Withler*, *supra* note 1262 at para 29; *Kapp*, *supra* note 1260 at para 18.

1270 For a critical overview of the law governing the prohibition against discrimination in employment in Canada, see Susan Chapman, *Understanding Discrimination in Employment Law* (Toronto: LexisNexis, 2017).

1271 *Boisbriand*, *supra* note 149 at para 36.

1272 Jennifer Koshan, "Under the Influence: Discrimination under Human Rights Legislation and Section 15 of the *Charter*" (2014) 3 Can J Human Rights 115 at 134 [Koshan, "Under the Influence"], referring to *Quebec v A*, *supra* note 1262 at paras 328, 333. See also *APP*, *supra* note 1261 at paras 19-20; *Taypotat*, *supra* note 1260 at paras 19-20.

1273 *Andrews*, *supra* note 1255 at 163. See also Christian Brunelle & Mélanie Samson, "Les droits et libertés fondamentaux" in École du Barreau du Québec, *Droit public et administratif*, vol 7 (Montreal: Yvon Blais, 2019) 15 at 88 [Brunelle & Samson, "Les droits et libertés fondamentaux"].

1274 Sheppard, *Inclusive Equality*, *supra* note 1263 at 32.

Rights Code, and the *Quebec Charter*—the right to equality in employment[1275] is protected without discrimination based on race, colour, ethnic or national origin (or place of origin), religion (or creed), physical and mental disability (or handicap), sex (which includes pregnancy), sexual orientation, gender identity, gender expression, and age.[1276] In addition to these characteristics, in British Columbia, discrimination because of ancestry, political belief, marital and family status, and criminal conviction unrelated to employment are prohibited in employment.[1277] In Ontario, discrimination in the area of employment is also illegal when founded on ancestry, citizenship, marital and family status, and record of offences.[1278] Finally, Quebec adds political convictions, civil status, language, social condition,[1279] and criminal offences[1280] to the list of prohibited grounds of discrimination in employment.

Under quasi-constitutional human rights legislation, discrimination is prohibited under a "closed" list of grounds,[1281] and it is not possible to benefit from these laws' protection when the distinctive treatment in employment is related to a characteristic that is not enumerated in the

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1275 Colleen Sheppard notes that "[t]he vast majority of statutory human rights complaints arise in the employment context." (Colleen Sheppard, "Canada" in Marie Mercat-Bruns, David B Oppenheimer & Cady Sartorius, eds, *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* (Cham: Springer, 2018) 83 at 99 [Sheppard, "Canada"]).

1276 *Ibid* at 105-107. See also Eliadis, *supra* note 1069 at 43-49.

1277 BC *Human Rights Code*, s 13(1): "(1) A person must not (a) refuse to employ or refuse to continue to employ a person, or (b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person."

1278 Ontario *Human Rights Code*, s 5(1): "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability."

1279 *Quebec Charter*, ss 10(1) and 16: "10(1). Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap." "16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment."

1280 *Quebec Charter*, s 18.2: "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence."

1281 *Andrews*, *supra* note 1255 at 175. See also Koshan, "Under the Influence", *supra* note 1272 at 119; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37 at 38; Sheppard, "Canada", *supra* note 1275 at 91.

applicable statute. However, the *Canadian Charter* is not limited in this way, as it protects the right to equality before and under the law without discrimination particularly based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability,"[1282] but also based on *analogous* grounds. The *Canadian Charter* arguably offers a wider protection of the right to equality in terms of covered grounds, because of the possibility to invoke an "analogous ground" to found a claim of discrimination. However, it is important to note that appearance, to date, has never been considered an analogous ground in Canadian jurisprudence, but the potential to include it as such will be discussed in the last part of this chapter.

In Canada, all provincial, federal, and territorial human rights statutes, as well as the *Canadian Charter*, protect the right to equality, but their respective scope of application differ greatly. While the *Canadian Charter* only applies vertically between the State and individuals,[1283] human rights legislation apply broadly to public and private actors,[1284] such as an employer and its employees.[1285] Therefore, although the *Canadian Charter* is a constitutional legal instrument on top of the hierarchy of legal sources in Canada, its scope of application restricts its use and consequently, the Charter will generally not be used directly[1286] to challenge workplace appearance regulation in Canada—except for governmental employees. The focus of this dissertation is therefore on provincial human rights codes,[1287] although the discussion will include references to the *Canadian Charter* when relevant, particularly in the last part of this chapter.

1282 *Canadian Charter*, s 15(1).

1283 *Canadian Charter*, s 32; *Dolphin Delivery*, *supra* note 1207 at paras 33-35. See Chapter 4, section 4.3.1.4, *above*.

1284 See Koshan, "Under the Influence", *supra* note 1272 at 141.

1285 See Chapter 4, section 4.3.2, *above*.

1286 Although the Charter is not used directly, Bosveld suggests using this constitutional law as an inspiration for arbitrators in cases relating to appearance in the workplace. See Chapter 6, section 6.3.1, *below*.

1287 However, in the context of this dissertation, it is important to note that the *Canadian Charter* could still be applicable in an employment relationship between the State and an individual. Although no case was found in the jurisprudence using s. 15 of the *Canadian Charter*'s right to equality to challenge workplace appearance regulation, it remains a possibility. Besides, the *Canadian Charter* has been used in several employment cases involving government employees' freedom of expression to challenge appearance regulations, particularly regarding union emblems—which fall outside the scope of this dissertation. See e.g. *Société canadienne des postes* 2014, *supra* note 639; *Société canadienne des postes* 2013, *supra* note 104; *Société canadienne des postes et Syndicat des travailleuses et travailleurs des postes* (2012), AZ-50830487 (SOQUIJ) (Qc Arb).

Despite some differences between Canadian jurisdictions, human rights legislation generally relies on the same paradigm for recognizing unlawful acts of discrimination, although the statutory test for discrimination has been the object of much debate in recent years.[1288] Applying *O'Malley*,[1289] the SCC reaffirmed the statutory test for discrimination in *Moore*[1290] in 2013.[1291] To demonstrate a *prima facie* case of discrimination,[1292] the complainant must establish that 1) they have a characteristic (ground) protected from discrimination set out in the legislation; 2) they experienced an adverse impact with respect to an area of activity set out in the legislation, such as employment; and 3) the protected characteristic was a factor in the adverse impact.[1293] Then, the onus shifts to the respondent—in the case of appearance at work, it is generally the employer—to establish a *bona fide* occupational requirement (BFOR) and undue hardship.[1294] In order to justify an impugned rule

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1288 Over the years, there has been (and still is) a major controversy around the proper tests for discrimination under human rights legislation and the *Canadian Charter*. While lower courts have integrated constitutional requirements to the statutory test for discrimination, some commentators have argued for keeping the approaches under human rights legislation and the *Canadian Charter* distinct. They argued particularly "for shielding human rights analysis from some of the stricter requirements under section 15 of the *Charter*" and for keeping the traditional *prima facie* approach under human rights legislation." Koshan, "Under the Influence", *supra* note 1272 at 117, 139. See also Benjamin Oliphant, "*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?" (2012) 9 JL & Equality 33; Denise Réaume, "Defending the Human Rights Codes from the *Charter*" (2012) 9 JL & Equality 67 [D Réaume, "Defending"]; A Wayne MacKay, "The Marriage of Human Rights Codes and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in both Theory and Practice" (2013) 64 UNBLJ 54; Leslie A Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter" in Faraday, Denike & Stephenson, *supra* note 1259, 373. But see Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 JL & Equality 103. However, some observe a tendency in recent years from the SCC to converge the constitutional and statutory tests for discrimination in a way that is promising for constitutional claimants, alleviating the claimants' burdens to allow more space for respondents' defences and justificatory arguments. See Ryder, *supra* note 1264.

1289 *Supra* note 1214. Jennifer Koshan notes that the SCC surprisingly does not refer to *O'Malley* in *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] (Koshan, "Under the Influence", *supra* note 1272 at 129).

1290 *Supra* note 1289. See also *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 24 [*Stewart*].

1291 Some commentators have argued, however, that *Moore* did not resolve the question of the appropriate test for discrimination under statutory human rights legislation. See Koshan, "Under the Influence", *supra* note 1272 at 130. *Contra* Ryder, *supra* note 1264 at 285.

1292 In Quebec, the test is slightly different as s. 10 of the *Quebec Charter* only protects equality in the exercise of another fundamental right or freedom, unlike other statutory anti-discrimination provisions in the rest of Canada. However, "[n]otwithstanding this difference, both frameworks require evidence of some connection between the protected characteristic or ground of discrimination and the alleged adverse impact." See Sheppard & Chabot, *supra* note 1254 at 13.

1293 *Stewart*, *supra* note 1290 at para 24; *Moore*, *supra* note 1289 at para 33. See also Ryder, *supra* note 1264 at 283.

1294 Koshan explains that "[h]uman rights legislation has been framed and traditionally interpreted in a way that puts the onus on the respondent to disprove a *prima facie* case of discrimination and it is only if the respondent fails to do so that substantive discrimination is made out. This differs significantly from the current approach under section 15 of the *Charter* where proof of substantive discrimination is on the claimant and is relatively onerous." Koshan, "Under the Influence", *supra* note 1272 at 140.

or decision—a BFOR—the employer must in turn establish three requirements: 1) that its rule was adopted for a purpose rationally connected to job performance; 2) that the rule has been adopted in an honest and good faith belief[1295]; and 3) that the rule is reasonably necessary to the accomplishment of the legitimate work-related purpose, in the sense that it is impossible for the employer to accommodate individual employees without undue hardship.[1296] The SCC recently reiterated that "[a] duty to accommodate has been found under all of Canada's human rights statutes prohibiting discrimination."[1297]

Finally, from 1999 to 2008, the SCC required that in order to make a *prima facie* case of discrimination under the *Canadian Charter*, the claimant must prove that their human dignity was infringed by the challenged discriminatory measure.[1298] This dignity portion of the test was considered to place an additional unreasonable burden on a person seeking to prove a violation of their right to equality,[1299] and was removed from the test in *Kapp*. Because human dignity is an abstract and subjective notion, it was too confusing and difficult to apply, and so the SCC ruled that it was no longer a requirement to prove discrimination in Canadian law.[1300] *Kapp* did not completely resolve the issue on the proper test for discrimination under the *Canadian Charter*, however, as it

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1295 In Quebec, this requirement to prove that the rule has been adopted in good faith is no longer necessary in employment contexts, since the terms "required in good faith" have been removed from art. 20 of the *Quebec Charter*. However, Brunelle and Samson note that this Quebec peculiarity seems to have escaped the SCC in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras 13-14. See Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 82.

1296 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

1297 *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at para 30, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39.

1298 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 51-54 [*Law*]. See Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 209.

1299 Sheppard observes that using human dignity "as the touchstone for discrimination" resulted in the pernicious effect that under this approach, courts rejected equality claims "[i]n case after case." "The nature of the harm [equality claimants] experienced was not considered sufficiently severe to meet the human dignity violation standard. Though perhaps used as an excuse to deny claims that judges were not inclined to accept for a range of reasons, human dignity became an amorphous barrier to success in equality cases." (Sheppard, *Inclusive Equality*, *supra* note 1263 at 42). See also Ryder, *supra* note 1264 at 271.

1300 *Quebec v* A, *supra* note 1262 at 329; *Kapp*, *supra* note 1260. See Sophia Moreau, "*R. v. Kapp*: New Directions for Section 15" (2008) 40:2 Ottawa L Rev 283 at 293 [Moreau, "*R. v. Kapp*"]. See also Koshan & Watson Hamilton, "The Continual Reinvention", *supra* note 1261 at 37; Sheppard, *Inclusive Equality*, *supra* note 1263 at 40, 43.

added the establishment of the perpetuation of a disadvantage through the operation of prejudice or stereotyping, until the SCC revised the test again in *Quebec v A* in 2013. The majority clarified that prejudice and stereotyping were not necessary to prove discrimination,[1301] as "[s]uch an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact."[1302] It now seems that the proper test for discrimination under the *Canadian Charter* operates in two parts: "Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, and, if so, does it impose 'burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating […] disadvantage', including 'historical' disadvantage?"[1303]

5.1.2 Appearance-Based Discrimination in the Workplace

None of the four human rights laws under study[1304]—just like all Canadian human rights statutes—provides a protection against discrimination based on appearance in the workplace. Therefore, under the anti-discrimination framework, when employees want to prove that they experienced discrimination based on their physical appearance, they have to connect or "fit" their situation to a statutory prohibited ground. Although physical appearance is not a prohibited ground of discrimination in Canada, appearance discrimination can be claimed through other closely connected grounds via an argument of indirect/adverse effects. In fact, employers who use appearance as a proxy for a prohibited ground of discrimination, such as race, sex, or disability, may find themselves in violation of human rights laws.[1305] Thus, in the jurisdictions under study, discrimination based on sex/gender, pregnancy, gender identity, gender expression, sexual orientation, race/colour, ethnic and national origin, religion and creed, political belief, age, and

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1301 See *Stewart*, *supra* note 1290 at para 45; *Quebec v A*, *supra* note 1262 at para 325, citing Moreau, "*R. v. Kapp*", *supra* note 1300 at 292. See also Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dal LJ 473 at 489 [Koshan, "Inequality and Identity at Work"].

1302 *Quebec v A*, *supra* note 1262 at para 327 [emphasis in original].

1303 *CSQ*, *supra* note 1261 at para 22, citing *Quebec v A*, *supra* note 1262 at paras 323-324, 327; *Taypotat*, *supra* note 1260 at paras 19-20, quoted in Watson Hamilton & Koshan, "Equality Rights", *supra* note 1261 at 9.

1304 The BC *Human Rights Code*, the Ontario *Human Rights Code*, the *Quebec Charter*, and the *Canadian Charter*.

1305 See e.g. AHRC, "Appearance and Dress Codes", *supra* note 21; OHRC, "Policy on sexualized and gender-specific dress codes", *supra* note 165; MHRC, "Dress Codes", *supra* note 24.

disability can theoretically be alleged with regards to appearance at work, depending on the circumstances. Intersectional or multiple discrimination could also be involved in a case of appearance discrimination,[1306] as the lived experience of and prejudice against a Black and tattooed woman employee can be very different from the one of a male tattooed employee or a white tattooed woman, for instance. In the context of appearance, I examine here how the equality protection is carried out and the grounds that are the most likely to be invoked.

Some cases of appearance-based discrimination first involve discrimination based on sex/gender, which is protected in all three of the provincial human rights laws under study, as well as in the *Canadian Charter*. The SCC defined sex/gender discrimination in the context of employment as "practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender."[1307] The widely-cited *Jespersen*[1308] case in the United States provides an illustration of sex/gender discrimination—although it was not held as such.[1309] Darlene Jespersen was dismissed when she refused to comply with her employer's new makeup and grooming policy. Although Jespersen lost her case in 2006, I argue it could be possible to challenge the employer's mandatory makeup policy under Canadian law, as the makeup rule imposed unequal burdens on women, compelling women employees to wear full makeup while simply requiring men employees to shave their beards. The burden imposed on women (particularly in money and time) could be considered a discriminatory policy based on sex/gender, because Jespersen's termination following her refusal to wear full makeup perpetrated a stereotype that women can only look presentable if wearing makeup, while men are allowed to look "natural."

1306 See OHRC, "Policy on sexualized and gender-specific dress codes", *supra* note 165; Katell Berthou, "Première affaire sur la discrimination fondée sur l'apparence physique" (2008) 2 RDT 106 at 107; Ramachandran, "Intersectionality", *supra* note 186; Devon W Carbado & Mitu Gulati, "The Fifth Black Woman" (2001) 11:2 J Contemp Leg Issues 701.

1307 *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1279.

1308 *Jespersen*, *supra* note 234.

1309 For a discussion of the *Jespersen* case, see Chapter 2, section 2.2.1.1, *above*.

The Ontario Human Rights Commission, in a recent report on sexualized and gender-based dress codes in Ontario's restaurants, specifically targets this type of makeup policy as discriminatory, among other appearance requirements. In its report, the OHRC states that "makeup, nail polish and jewelry—traditional expectations of women—are not related to a person's ability to perform the job," and that "[a]ny rule or restriction that has a different impact based on sex […] may violate the [Ontario *Human Rights*] *Code*."[1310] In addition, the OHRC policy on sexualized and gender-specific dress codes particularly states that "[f]emale employees should not be expected to meet more difficult requirements than male employees, and they should not be expected to dress in a sexualized way to attract clients."[1311] According to OHRC guidelines, I argue that Jespersen could have won her case under Canadian law. This is a good illustration of the usefulness of the anti-discrimination framework to provide legal redress as applied to an employee's appearance choices, namely, the choice not to comply with a strict workplace makeup policy.

Also, sexist employment policies related to female attributes, such as sexualized uniforms and breast size requirements, can be considered as discrimination based on sex/gender when they perpetuate sexual stereotypes and prejudices, as held by the Human Rights Tribunal of Quebec, for instance:

> Some people think that a person is not a woman unless she meets the stereotyped image they have of women. For them, a woman is a person whose physical attributes and sexual characteristics are particularly evident. Inversely, these same people will believe that a person who is not likewise 'equipped' is not a 'real woman.' This point of view is based on prejudices and stereotypes and leads to a form of discrimination based on sex. If an employee was excluded from a job because they were not 'white enough,' 'Catholic enough' or 'French enough,' no one would dispute the connection between the exclusion and their colour, their religion or their ethnic or national origin.[1312]

Sexually based dress code requirements can violate the right to equality,[1313] particularly when the requirements are demeaning to one sex. For instance, Roberta's situation (described in the

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1310 OHRC, "Not on the menu", *supra* note 168 at 16, 20.

1311 OHRC, "Policy on sexualized and gender-specific dress codes", *supra* note 165.

1312 *Restaurant La Courtisane*, *supra* note 7 at para 36 [translated by author].

1313 *Mottu*, *supra* note 847; *Restaurant La Courtisane*, *supra* note 7; *Giouvanoudis v Golden Fleece Restaurant and Carras* (1984), 5 CHRR D/1967 (Ont Bd Inquiry) [*Giouvanoudis*]; *Ballantyne v Molly 'N' Me Tavern* (1982), 4

beginning of this chapter) could definitely found a claim of sex discrimination, as her employer fired her when she refused to wear the new sexualized uniform. One can also think of bikini tops for female bartenders, sexual costumes in businesses that are not ordinarily oriented on sex, and meticulous attention regarding weight requirements for female waiters (such as daily weigh ins on a scale before starting to work). In many businesses, such as restaurants, bars, and casinos, employees' dress codes require female workers to wear tighter clothes and high heels, and pay careful attention to hair and grooming, while male workers are allowed to wear comfortable clothes that are not revealing, without any additional appearance requirement. Along with Moreau, I argue that these dress codes are "standard examples of direct discrimination," as they "mark women out as inferior," and impose on them "additional physical and health burdens […] both through the tight clothes that restrict their movement and through the high heels that cause foot and back pain."[1314] The OHRC also condemned such sexualized and gender specific dress codes, reporting that their impact on workers "can be significant" as women employees described "feeling physically uncomfortable, embarrassed, excluded and/or exposed"[1315] because of these kinds of appearance requirements.

Other workplace appearance policies establish a distinction between male and female employees, such as the prohibition against men to have long hair, to wear earrings, and to wear a skirt, and the proscription of pants for women; these policies could also be considered as discrimination based on sex/gender.[1316] Andrei's case described above is a good illustration of discrimination based on sex, when the permission to wear earrings is strictly contingent on gender. However, not all distinctions between men and women workers will be automatically considered discriminatory,[1317] as the SCC repeatedly held that substantive equality commands to take

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CHRR D/1191 (Ont Bd Inquiry) [*Ballantyne*]; *Doherty v Lodger's International Ltd*, [1981] NBHRBID No 3 [*Doherty*]. See also *Molos v Café Mirage Inc*, 2012 HRTO 851 [*Molos*].

1314 Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (New York: Oxford University Press, 2020) at 44 [Moreau, *Faces of Inequality*].

1315 OHRC, "Not on the menu", *supra* note 168 at 4.

1316 See OHRC, "Not on the menu", *supra* note 168. See also McKay-Panos, *supra* note 123; CDPDJ (Drapeau), *supra* note 32 at 16.

1317 See *Sûreté du Québec*, *supra* note 139 at para 58.

difference into account.[1318] As Fisk rightly asserts, "when it comes to appearance requirements, one can see that sometimes equal treatment is humiliating and sometimes different treatment is."[1319] For instance, prohibiting all employees from wearing their hair long, regardless of gender, could be humiliating; yet the imposition of a uniform for all female bank workers while their male counterparts are asked to wear appropriate business attire is humiliating to women.[1320] It is often a question of context.[1321]

In addition to discrimination based on sex/gender, discrimination based on pregnancy could also be alleged with regard to physical appearance, particularly if a pregnant employee cannot meet a uniform or dress requirement because of the changes that occur in a woman's body during pregnancy.[1322] With regards to sexualized dress codes, pregnant women can be "disproportionately burdened" when they are not able "to fit into a tight-fitting uniform" because of their pregnancy, and "face the difficulty of having to tell their employer sooner than they would have liked."[1323]

The recent addition of gender identity and gender expression as protected grounds in human rights legislation[1324] could also be of use to employees who experience differential treatment in employment if they do not look feminine or masculine enough, if their appearance reflects a failure to conform to gender norms, or for transgender individuals,[1325] who often face discrimination because of their appearance. In particular, transgender workers "may have to pigeon-hole themselves into the uniform for one gender or the other, even if this does not express their current gender identity,"[1326] which can be discriminatory to them. In addition, gender expression is especially

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1318 See e.g. *Meiorin*, *supra* note 1296 at para 81.

1319 Fisk, *supra* note 57 at 1124.

1320 This example is drawn from *Carroll v Talman Fed Sav & Loan*, 604 F (2d) 1028 (7th Cir 1989), cited in Fisk, *supra* note 57 at 1125.

1321 "Contextualism" is important in human rights law and is a privileged constitutional methodological approach for the SCC. As Sheppard notes, its origins "are usually traced to Justice Wilson's judgment in *Edmonton Journal v Alberta (Attorney General)* [[1989] 2 SCR 1326 at para 52], where she explained that 'a right or freedom may have different meanings in different contexts.'" Sheppard, *Inclusive Equality*, *supra* note 1263 at 65.

1322 See e.g. *McKenna v Local Heroes Stittsville*, 2013 HRTO 1117.

1323 Moreau, *Faces of Inequality*, *supra* note 1314 at 49.

1324 For a general overview of the protection of gender identity and expression in Canadian law, see Brenda Picard, "Gender Identity: Developments in the Law and Human Rights Protections" (2018) 69 UNBLJ 126.

1325 For literature on workplace appearance and transgender discrimination in the United States, see the works cited in Chapter 2, note 206, *above*.

1326 Moreau, *Faces of Inequality*, *supra* note 1314 at 49.

related to appearance as it is defined as "how a person publicly presents their gender," and includes "outward appearance such as dress, hair, [and] make-up."[1327] However, despite this general definition, gender expression has not yet been interpreted to protect cisgender people,[1328] at least not to the extent of protecting "the ability of cisgendered (sic) men to grow beards."[1329] The protected ground of sexual orientation can also be raised in appearance discrimination, when an employee's look does not conform to the construct of heterosexuality,[1330] for instance. Yet I argue that these three grounds (gender identity, gender expression, and sexual orientation) are not really problematic with regards to appearance discrimination, as a prejudicial treatment based on appearance that can be linked to one of the three characteristics is likely to be considered as discrimination by Canadian courts, because of the historical pre-existing disadvantage and vulnerability attached to these characteristics. Therefore, in these particular cases, the anti-discrimination framework, as protected under current human rights legislation, can provide legal redress to employees who suffer appearance-based discrimination.

The same observation can be applied to appearance that involves an employee's race, colour, and ethnicity. Discrimination based on colour could also be invoked with regard to appearance discrimination, when employees are discriminated against because of the colour of their skin, for being Black or Brown, for instance.[1331] In this case, it is difficult to imagine how courts could uphold such discrimination. Race, ethnic origin, and national origin can also come into play when particular clothing or grooming choices are related to a person's cultural and ethnic background and are prohibited at work, such as traditional clothes and accessories; particular hairstyles—cornrows, dreadlocks, shaved head; and facial hair grooming—beards and sideburns, just to name a few.[1332] For instance, Michelle's case (described in the introduction of this chapter) whose job offer got

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1327 See e.g. OHRC, "Policy on preventing discrimination because of gender identity and gender expression", *supra* note 155.

1328 *Browne*, *supra* note 2 at paras 36-37.

1329 *Ibid* at paras 41-43.

1330 See generally Yoshino, *supra* note 209.

1331 For an enlightening analysis of colour as a ground of discrimination in Canadian law, see Joshua Sealy-Harrington & Jonnette Watson Hamilton, "Colour as a Discrete Ground of Discrimination" (2018) 7 Can J Human Rights 1.

1332 See e.g. OHRC, "Not on the menu", *supra* note 168 at 16.

rescinded after she refused to cut off her dreadlocks could constitute such discrimination. Despite the question of evidence, these grounds generally should not pose a real problem, as the aforementioned characteristics are clearly protected in statutory human rights laws everywhere in Canada, and generally include expressions of racial or ethnic identity. In addition, there are no particular issues with the scope and definition of these prohibited grounds and they can easily include visible characteristics that are covered in the definition of appearance I use in this dissertation. Therefore, for racialized employees that are the object of adverse employment action because of afros, dreadlocks, or cornrow braids, although employees' appearance would clearly be involved, I argue that it would be a case of racism, and race discrimination is not as difficult to prove as appearance discrimination in Canadian law.[1333]

In the United States, however, the cornrow braids illustration actually has been litigated in a decision which upheld the employer's firing of an airport operations female agent for her all-braided hairstyle, enforcing the airline grooming policy forbidding such cornrow hairstyles.[1334] Despite the employee's assertion that cornrow braids were a cultural symbol[1335] of Black women's identity, the district court found that she failed to establish that her all-braided hairstyle was associated exclusively or even predominately with Black women. Under Canadian law, however, prohibiting such hairstyles that relate to a prohibited ground of discrimination should be considered discriminatory. In its inquiry report on restaurant dress codes, the OHRC specifically uses the requirement not to wear hair "in braids or deadlocks" as an example of dress code rule that may violate the Ontario *Human Rights Code*.[1336] The OHRC mentions that because employees "may have different lengths or textures of hair,"[1337] hairstyle requirements can amount to discrimination;

1333 Although not in the context of employment, discrimination claims involving appearance have been found in Canadian law. See e.g. *Randhawa v Tequila Bar & Grill Ltd*, 2008 AHRC 3, in which the complainant (of Sikh religion wearing a turban) was denied entry to a nightclub because of his skin colour and turban. The panel found that the complainant was subjected to discrimination on the basis of ancestry or place of origin, race or colour, and religious beliefs.

1334 *Rogers*, *supra* note 232.

1335 See Pothier, *supra* note 1281 at 69.

1336 OHRC, "Not on the menu", *supra* note 168 at 20.

1337 "While an employer may reasonably expect employees to present a well-groomed appearance, employees of any gender may have different lengths or textures of hair. Hair length and style preferences may relate to sex,

the OHRC therefore suggests companies allow an inclusive range of hairstyles. Furthermore, in accordance with human rights principles as set out by the SCC,[1338] grounds of discrimination are to be given a broad and liberal interpretation,[1339] which means that race and ethnic origin should encompass the visible expression of such characteristics. Also, unlike in the US where arguments of intersectionality do not seem to produce consistent and successful results for employees, Canadian jurisprudence does, and will accept arguments of intersectional discrimination.[1340] Even if the aspect of appearance provided in this example entails a degree of choice, I argue that Canadian courts should refrain from considering it mutable and instead, delve into the particular meaning of such cultural hairstyle, that is, an expression of racial identity for Black women.[1341]

In addition, discrimination based on disability could be raised in some circumstances involving employees' appearance. As an illustration of the broad and liberal interpretation of protected grounds of discrimination,[1342] the definition of disability was expanded twenty years ago in *Granovsky*[1343] and *Boisbriand*,[1344] when the SCC recognized that "handicap" should not be limited to an individual's biomedical condition, but instead courts should adopt a multidimensional approach that considers the socio-political dimension of "handicap." Justice L'Heureux-Dubé explained:

> The objectives of the *Charter*, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually

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gender expression, race, ancestry, ethnic origin, creed (religion) or other *Code* grounds." (OHRC, "Not on the menu", *supra* note 168 at 16).

1338 See e.g. *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62; *Boisbriand*, *supra* note 149; *Meiorin*, *supra* note 1296; *Béliveau St-Jacques*, *supra* note 1214; *University of British Columbia v Berg*, [1993] 2 SCR 353; *O'Malley*, *supra* note 1214; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295; *Hunter et al v Southam Inc*, [1984] 2 SCR 145.

1339 See Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 30-31; Helis, *supra* note 44 at 30; Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80:3 Can Bar Rev 893 at 895 [Sheppard, "Grounds of Discrimination"].

1340 See e.g. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 72 [*Corbiere*]; *Law*, *supra* note 1298 at para 93. See also *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 at 645-646, L'Heureux-Dubé J, dissenting; *Egan v Canada*, [1995] 2 SCR 513 at 563, L'Heureux-Dubé J, dissenting.

1341 See e.g. Moss, *supra* note 207; Powell, *supra* note 207; Dewberry, *supra* note 207; Simpson, *supra* note 207; Bennett-Alexander & Harrison, *supra* note 207; Greene, "Title VII", *supra* note 207; Rosette & Dumas, *supra* note 207; Turner, *supra* note 207; P Caldwell, *supra* note 176.

1342 See Helis, *supra* note 44 at 39-40; Sheppard, "Grounds of Discrimination", *supra* note 1339 at 900.

1343 *Supra* note 150.

1344 *Supra* note 149.

> impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer. [...]
>
> I am, therefore, of the view that the *Charter*'s objective of prohibiting discrimination requires that 'handicap' be interpreted so as to recognize its subjective component. A 'handicap', therefore, includes ailments which do not in fact give rise to any limitation or functional disability.[1345]

As Colleen Sheppard rightly notes, the Court thus recognized that discrimination "is embedded in a process of social construction."[1346] Under this wide definition, obesity—which is not itself a prohibited ground under any human rights legislation—can be considered as a disability or handicap,[1347] when it is characterized as a real or perceived disability. Justice L'Heureux-Dubé specifically included obesity as ailments recognized as "handicap" in the jurisprudence, albeit in *obiter dicta*.[1348] Obesity and larger body size directly involve appearance-based discrimination, because of the perceptions and stereotypes that are conveyed through the body considered overweight, as discussed in Chapter 3.[1349]

However, as noted in Chapter 2,[1350] Luther argues that the SCC's expanded definition of disability did have positive jurisprudential developments for larger individuals,[1351] but it is not "enough to combat the deep and ingrained prejudice society continues to hold against larger people, nor does it come close to remedying the disadvantages they face."[1352] It is true that under the current state of law, it is no longer a problem to prove that medical obesity is a disability for anti-discrimination purposes. But the situation is different for individuals, and in the context of this dissertation, for employees who are larger than average, but are not medically obese. Employees considered overweight are particularly vulnerable to discrimination in the workplace,[1353] but their

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1345 *Boisbriand*, *supra* note 149 at paras 39-41.
1346 Sheppard, "Grounds of Discrimination", *supra* note 1339 at 903.
1347 See Luther, *supra* note 147; Nowell-Smith & O'Reilly, *supra* note 147; Zwerling, *supra* note 147.
1348 *Boisbriand*, *supra* note 149 at para 48. See Nowell-Smith & O'Reilly, *supra* note 147 at 692.
1349 See Chapter 3, section 3.1.4.3, *above*.
1350 See Chapter 2, section 2.1.1, *above*.
1351 See e.g. *McKay-Panos v Air Canada*, 2006 FCA 8.
1352 Luther, *supra* note 147 at 168.
1353 See e.g. Sharona Hoffman, "The Importance of Immutability in Employment Discrimination Law" (2011) 52 Wm & Mary L Rev 1483 at 1531.

protection against discrimination is not complete under Canadian law,[1354] as shown in the jurisprudence discussed below.[1355]

Luther reports that weight discrimination in general can be linked to two causes that are not necessarily related to a perceived disability or incapacity to perform the work. First, discrimination against larger people happens "because of a mistaken assumption that it is [larger people's] fault that they are heavy and that, as a result, they have some underlying character flaw."[1356] Weight is often constructed as a chosen characteristic—or a characteristic that individuals have control over—yet many studies refute this assumption; "science increasingly suggests 'hormonal factors, metabolism, and genetics are all factors that predetermine one's weight and impede attempts to lose it."[1357] Second, disability discrimination can fail to cover the situation of larger employees because people have a "distaste for the appearance of larger people or, especially in the service industry, the perception that customers will share this distaste and prefer to be served by a thin person."[1358] In addition, body size discrimination has a disproportionate effect on women[1359] and racial minorities and amplifies the harm they suffer.[1360] Weight discrimination is still difficult to prove under the current legislation, and this is why Luther, along with many other body size advocates, call for the formal inclusion of weight or body size as a protected ground, for it is clear that this characteristic involves a historical disadvantage and conveys biases and stereotypes.[1361] This legislative amendment proposal will be discussed in the last part of this chapter.

1354 See Dale A Rosenberg, "Is obesity considered a physical disability, and thus a prohibited ground of discrimination pursuant to human rights legislation?" (last modified 20 December 2019), online: *WestlawNext Canada* (CARS1MEMO-ONM 9916).

1355 See section 5.2.1.2, *below*.

1356 Luther, *supra* note 147 at 180. See also Tamar Kricheli-Katz, "Choice-Based Discrimination: Labor-Force-Type Discrimination Against Gay Men, the Obese, and Mothers" (2013) 10:4 J Empirical Leg Stud 670 at 675; Tirosh, "The Right to Be Fat", *supra* note 214 at 279-281; Lucy Wang, "Weight Discrimination: One Size Fits All Remedy?" (2008) 117:8 Yale LJ 1900 at 1924.

1357 Jessica A Clarke, "Against Immutability" (2015) 125:1 Yale LJ 2 at 57. See also Tirosh, "The Right to Be Fat", *supra* note 214 at 285-288.

1358 Luther, *supra* note 147 at 181. See also Bennett Shinall, "Distaste or Disability", *supra* note 152; Maureen J Arrigo-Ward, "No Trifling Matter: How the Legal System Supports Persecution of the Obese" (1995) 10:1 Wis Women's LJ 27.

1359 Bennett Shinall, "Distaste or Disability", *supra* note 152 at 104-105.

1360 Luther, *supra* note 147 at 185-186; Theran, *supra* note 214 at 137.

1361 Luther, *supra* note 147 at 182-185.

Nevertheless, the ground of disability can be used to protect an employee's appearance on the basis of other characteristics, such as skin conditions—which can impede on employees' capacity to shave or wear makeup, for instance. It should also be noted that the definition of disability under the Ontario *Human Rights Code*[1362] and the *Canadian Human Rights Act*[1363] explicitly includes disfigurement, which is also definitely related to physical appearance. Accordingly, when a disability—either perceived or real—manifests itself within employees' appearance, they may raise discrimination based on disability.

Finally, some issues of appearance in the workplace definitely concern discrimination based on religion. In recent years, religious clothing and grooming practices have been the subject of great controversy and debate in courts, in politics, and in the media. Within the contemporary climate of fear that results from terrorism around the world, the public display of religious symbols has been repeatedly questioned (and the questioning is far from over). In particular, Quebec passed a highly controversial secularism law in June 2019,[1364] banning public sector employees from wearing religious symbols—such as hijabs, kippahs, turbans, and crucifixes.[1365] The list of public workers affected by this ban includes police officers, judges, and elementary and high school teachers.[1366] Although the Quebec government used a blanket notwithstanding clause to override both the *Canadian Charter* and the *Quebec Charter*,[1367] several legal challenges to this controversial statute are currently in front of the courts.[1368] This Quebec law is still in effect despite vehement criticism

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1362 S 10(1).

1363 S 25.

1364 *Bill 21*, *supra* note 101.

1365 It is not the first time that such controversy around the wearing of religious symbols for public sector employees is introduced to the Quebec National Assembly. In 2013, the Parti Québécois (PQ) tried to pass a "Charter of Quebec Values" which would have, among other things, banned religious symbols for public sector employees. The bill died when PQ's minority government called an early election, and the Charter of Quebec Values was arguably a contributing factor in the PQ's defeat. See Pelsmakher, *supra* note 99 at 146-149; Rachel Lau, "Quebecers ready to put charter of values to rest" (8 April 2014), online: *Global News* <https://globalnews.ca/news/1258029/quebecers-ready-to-put-charter-of-values-to-rest/>.

1366 *Bill 21*, Schedule II.

1367 *Bill 21*, ss 33-34.

1368 *Bill 21* is currently challenged in four separate lawsuits, three of which are scheduled to be heard together on the merit by the Quebec Superior Court in October 2020 ("Supreme Court won't hear bid to suspend Quebec's secularism law" (9 April 2020), online: *CBC News* <https://www.cbc.ca/news/canada/montreal/supreme-court-bill-21-appeal-1.5527355>). For a discussion of the legal arguments to challenge *Bill 21*, see Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum Const 19; Maxime St-Hilaire, "Dérogation aux droits dans le projet de loi sur la laïcité de l'État: la synthèse" (5 February 2020), online

from scholars, politicians, human rights advocates, and the public. As a supporter of human rights, diversity, and open-mindedness, I am personally astonished and deeply saddened by this course of events in my home province, and I hope that human rights triumph in the end with the abolition of this ludicrous law.[1369]

In fact, as freedom of religion, the right to equality, and multiculturalism all constitute fundamental rights and values of Canadian society which are entrenched in the *Canadian Charter*, I argue that any aspect of religious observance, including religious dress and grooming practices, should be protected *a priori* by human rights legislation everywhere in Canada. With regards to aspects of appearance that can involve religious discrimination, one can think of the Islamic veil (headscarf), the Sikh turban, the Christian cross, Sikh uncut hair and beard, and Jewish sidelocks, just to name a few. In *Bhinder*,[1370] the SCC highlighted the discriminatory nature of the requirement to wear a hard hat for a Sikh employee who could not wear anything on his head other than a turban because of his religion,[1371] although the Court upheld the requirement as a BFOR for security reasons.[1372] Also, a Muslim saleswoman in a clothing store could possibly claim discrimination based on religion or creed against her employer who would deny her the right to wear the Islamic headscarf at work. When an aspect of an employee's appearance is related to the exercise of their religious convictions, discrimination based on religion may be raised.[1373] However, while issues of

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(blog): *À qui de droit* <https://blogueaquidedroit.ca/2020/02/05/la-loi-quebecoise-sur-la-laicite-la-derogation-aux-droits-et-largument-base-sur-larticle-28-de-la-charte-canadienne-lecture-materielle-dune-disposition-interpretative/>; Louis-Philippe Lampron, "Déroger aux chartes n'interdira pas les contestations" (29 March 2019), online (blog): *Droits de la personne et démocratie* <http://www.contact.ulaval.ca/article_blogue/laicite-deroger-aux-chartes-nempechera-pas-les-contestations>.

1369 For an analysis of some of the legal and political issues with *Bill 21*, see Louis-Philippe Lampron, *Le projet de loi no 21: dialoguer et convaincre plutôt qu'interdire et déroger*, Brief tabled under the order to the Committee "Special Consultations and Public Hearings on Bill 21", Quebec (8 May 2019). For an examination of *Bill 21* as a question of personal appearance—as opposed to a question of religious expression—see Josh Freed, "Nose rings and other contradictions of Bill 21" (11 May 2019), online: *Montreal Gazette* <https://montrealgazette.com/opinion/columnists/josh-freed-nose-rings-and-other-contradictions-of-bill-21>.

1370 *Bhinder v CN*, [1985] 2 SCR 561 [*Bhinder*].

1371 See also *Grant*, *supra* note 139, in which the Federal Court confirmed the right of the RCMP Commissioner to allow the wearing of religious symbols—in this case, a Sikh turban—as part of the RCMP uniform.

1372 *Bhinder*, *supra* note 1370. See also *Singh v Montreal Gateway Terminals Partnership*, 2019 QCCA 1494, leave to appeal to SCC refused, 38916 (30 April 2020); *British Columbia Maritime Employers Association v International Longshore and Warehouse Union* (2006), 152 LAC (4th) 257 (Can Arb).

1373 See e.g. *Grewal v Checker Cabs Ltd* (1988), 9 CHRR D/4855 (Alta Bd Inq); *Khalsa v Co-op Cabs* (1988), 1 CHRR D/167 (Ont Bd Inq).

workplace appearance regulation can definitely involve religious discrimination, as mentioned in Chapter 1, the issue of religious symbols and clothing is beyond the scope of this dissertation.[1374]

Yet, succeeding in establishing the claimant's appearance case as a *prima facie* case of discrimination is not always enough to hold the employer's regulation or decision unlawful. Although I provided illustrations of appearance discrimination that can be tied to a protected class in the legislation, it cannot be forgotten that some requirements in the context of employment can be considered a *bona fide* occupational requirement.[1375] An employer can thus refuse to hire a person if the job has a BFOR that cannot be modified to accommodate a person's disability, sex, pregnancy, religion, and the like. For instance, if someone's disability prevents them from climbing ladders, the employer may have the right to refuse to hire that person. In the context of appearance at work, if an employer can prove that the applicants must be of a certain look in order to do the job efficiently, the employer might have the right to refuse to hire someone who does not fit the hiring criterion, generally for reasons of health and safety or due to concerns related to the business's image. For example, being clean shaven for paramedics who need to wear a respirator in emergency medical situations can legitimately justify a "no-beards" rule.[1376] Likewise, a movie casting agency could justify the refusal of an actress who would sport visible tattoos on her hands, neck, and face if it was casting for the role of a non-tattooed character and the complete concealing of the tattoos was impossible. However, the BFOR defence has to be applied narrowly,[1377] and the employer must always be able to prove that the requirement is reasonably necessary and cannot be modified without undue hardship.

Ultimately, my argument here is that the anti-discrimination framework can be useful to protect employees from appearance regulations when they are able to link their particular appearance marker to a protected ground under the current legislation. However, tying appearance to a protected class may not always be an easy task, and this is why I argue that appearance should

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[1374] See Chapter 1, section 1.2.2, *above*.
[1375] *Meiorin*, *supra* note 1296. See e.g. *Wheatley*, *supra* note 911 at paras 187-199.
[1376] See e.g. *Wheatley*, *supra* note 911 at paras 192-199.
[1377] See England, *Individual Employment Law*, *supra* note 180 at 228.

be added as a prohibited ground of discrimination in statutory human rights legislation and considered as an analogous ground under the *Canadian Charter*. I will discuss this legal reform proposal in the last part of this chapter. Meanwhile, some considerations around the immutability doctrine, which could be considered as a deterrent for the recognition of appearance as a protected ground, are analyzed in the next section, followed by a discussion on the limitations and benefits of the anti-discrimination framework.

5.1.3 The Immutability Doctrine

As mentioned above, appearance discrimination is not prohibited *per se* in Canadian law, unless it involves one of the statutory protected grounds of discrimination. The fact that discrimination is only illegal when it is founded on at least one of the specifically listed grounds in the legislation explains why appearance discrimination is currently legal, as appearance does not make the list of such protected characteristics in any of the statutory human rights laws in Canada. One of the main arguments for employers to be legally allowed to discriminate on the basis of appearance is founded on the fact that many aspects of appearance are constructed as "mutable" characteristics, i.e. characteristics that are alterable or easily changeable, while anti-discrimination laws should only protect immutable[1378] characteristics (which are not chosen or not subject to change), such as sex, race, and age.

It is important to note at the outset that immutability should not be understood in its literal sense—i.e. unalterable traits over which an individual has no control—but rather as inclusive of aspects that are fundamental to identity and personhood. This broad definition of immutability, which includes characteristics that may not be entirely fixed, is in fact accepted by the SCC. When referring to s. 15 of the *Canadian Charter*, the Court specifically mentions that prohibited grounds of discrimination under Canadian law "have in common […] the fact that they often serve as the basis

[1378] References to the concept of immutability in relation to analogous grounds originally appeared in *Andrews*. Justice La Forest, dissenting in part, defined analogous grounds as personal characteristics "typically not within the control of the individual and, in this sense, […] immutable." (*Andrews*, *supra* note 1255 at 195).

for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or *changeable only at unacceptable cost to personal identity*" [1379]; analogous grounds are "based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment."[1380] In her concurring reasons, Justice L'Heureux-Dubé specifies that these personal characteristics refer to fundamental traits that are important to individuals' identity, personhood, and belonging.[1381] According to this definition, "constructively immutable"[1382] characteristics may thus be chosen by individuals.[1383] Justice Wagner (as he then was) argued that the essential inquiry should focus on "the magnitude of the choice—or non-choice—that someone would *experience* when it comes to *changing* the relevant personal characteristic."[1384] Therefore, physical appearance—which is fundamental to an individual sense of self—should also be protected under anti-discrimination laws in Canada.

Furthermore, the control over some aspects of appearance is often wrongfully assumed, albeit all sociological concerns regarding structure and agency in appearance choices as discussed in Chapter 3. While it is true that in theory, individuals can change their appearance "through grooming choices or even surgical interventions," some "may not actually be able to do so because of financial constraints or because their natural appearance is fundamental to their sense of self"[1385]—or sense of personhood. Furthermore, even for aspects of appearance that are constructed as "chosen," such as tattoos, the procedure to remove permanent marks on the skin is sometimes costly and painful, and may even be impossible to get rid of without large visible scars; tattoos would then become physically unalterable characteristics, in addition to being difficult to change with respect to unacceptable cost to personal identity. As noted in Chapter 3, tattoos are

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1379 *Corbiere*, *supra* note 1340 at para 13 [emphasis added]. See also *Quebec v A*, *supra* note 1262 at para 335; *Withler*, *supra* note 1262 at para 33.

1380 *Corbiere*, *supra* note 1340 at para 13. For a discussion on the proper approach to identifying analogous grounds under s. 15 of the *Canadian Charter*, see Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37.

1381 *Corbiere*, *supra* note 1340 at para 60.

1382 *Ibid* at para 13.

1383 Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equaliy 69 at 87.

1384 Richard Wagner, "How Do Judges Think About Identity? The Impact of 35 Years of Charter Adjudication" (2017) 49:1 Ottawa L Rev 45 at 50.

1385 Hoffman, *supra* note 1353 at 1532.

generally seen as body modification techniques designed to anchor or stabilize one's identity and personhood, and tattoos are meant to be permanent, as they cannot be easily taken off or changed.[1386] Although not referring to the anti-discrimination framework, one arbitrator noted: "tattoos are a relatively permanent part of a person and cannot be physically changed as an individual moves between work and non-work time. […] tattoos remain part of the employee's appearance at all times. They also reflect an important aspect of an individual's self-identity."[1387] More importantly, considering the importance of appearance as fundamental to personhood in general, as demonstrated in Chapter 3, allows for an understanding of appearance as something that one may alter, but that is so fundamental to their self that they should not be asked to alter it for employment reasons. The nature of appearance choices, which in Chapter 3, were considered socially constructed, also calls for a broader understanding of immutability.

Thus, the scope of human rights legislation, and the choices that were made by legislators in deciding which characteristics required legal intervention, often brings up the discussion of immutability as a unifying criterion for prohibited grounds of discrimination.[1388] But other statutory protected grounds of discrimination are not completely unalterable, such as religion, marital status,[1389] or citizenship.[1390] So why would employers be forbidden to make employment decisions based on heart disease, but not on weight, while both are constructed as involving a behavioural component?[1391] More generally, why are employers prohibited from considering marital status when

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1386 Some could argue that immutability should apply before the tattoo, and not after, referring to the "accident of birth" paradigm. I argue that this understanding of immutability is not aligned with the SCC's definition, as immutability includes not only "actually immutable" characteristics, but also "constructively immutable" characteristics, i.e. characteristics changeable only at unacceptable cost to personal identity. It is clear that religion is considered as "constructively immutable" (see *Corbiere*, *supra* note 1340 at para 13), and it is also undeniable that individuals do not necessarily have to be "born with" their religion in order for this characteristic to be protected under anti-discrimination laws. Besides, some protected traits or conditions, such as HIV positive and other diseases, are characteristics that individuals may not be born with and may rather get rid of, but are still considered as a disability and consequently, immutable. Therefore, individuals should not have to be "born with" a tattoo for it to be constructed as a constructively immutable characteristic, as tattoos are arguably physically difficult to alter and can be changeable only at unacceptable cost to personal identity.

1387 *Ontario Provincial Police*, *supra* note 140 at para 43.

1388 See e.g. Clarke, *supra* note 1357 at 10; Hoffman, *supra* note 1353.

1389 See *Quebec v A*, *supra* note 1262 at paras 241, 417, 423; *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 39 [*Hodge*]; *Miron v Trudel*, [1995] 2 SCR 418 at 489 [*Miron*].

1390 See *Lavoie v Canada*, 2002 SCC 23 at para 39 [*Lavoie*]; *Andrews*, *supra* note 1255.

1391 See Clarke, *supra* note 1357 at 10.

they make employment decisions in British Columbia and Ontario, for example, but not on appearance?

Alternative unifying principles for the protected grounds have been submitted, such as the fact that protected classifications are founded on "discrete and insular minorities with a history of discrimination."[1392] Although the SCC clearly states that a historical disadvantage can help to prove discrimination,[1393] Sheppard argues that protected grounds are not all framed with "reference to historical patterns of social disadvantaging."[1394] These factors do not apply to all the protected classes, as employment law also protects "white, male, and Christian" workers.[1395] Another rationale for the protected grounds in employment contexts is based on the fact that employment discrimination law aims to protect individuals "who are well-qualified for a job" and "to eliminate biased considerations of attributes […] that are irrelevant to job performance,"[1396] but Sharona Hoffman also rejects this principle because of the reasonable accommodation and disparate impact provisions in statutory human rights legislation. For Hoffman, the contentious immutability doctrine should remain a guiding rationale to understand what brings the protected grounds of discrimination together,[1397] when immutability does not refer to "entirely fixed" or "accident of birth" attributes, but rather broadly defines traits that are "either unchangeable in absolute terms or so fundamental to identity or conscience that individuals effectively cannot and should not be required to change it."[1398] According to this definition, immutability "embraces the idea that certain characteristics are core to an individual's sense of self and thus must be deemed unalterable."[1399]

1392 Hoffman, *supra* note 1353 at 1500. See also Luther, *supra* note 147 at 185.

1393 See e.g. *CSQ*, *supra* note 1261 at para 22; *Taypotat*, *supra* note 1260 at para 20; *Quebec v A*, *supra* note 1262 at para 332.

1394 Sheppard, *Inclusive Equality*, *supra* note 1263 at 41.

1395 Hoffman, *supra* note 1353 at 1502-1503. See also Dixon, *supra* note 1209 at 658-659; Sheppard, *Inclusive Equality*, *supra* note 1263 at 41; Sheppard, "Grounds of Discrimination", *supra* note 1339 at 908; JM Balkin, "The Constitution of Status" (1997) 106:8 Yale LJ 2313 at 2366.

1396 Hoffman, *supra* note 1353 at 1504-1505. See also Clarke, *supra* note 1357 at 86-91.

1397 But see Clarke, *supra* note 1357; Tamar Kricheli-Katz, "Choice, Discrimination, and the Motherhood Penalty" (2012) 46:3 L & Soc'y Rev 557.

1398 Hoffman, *supra* note 1353 at 1509.

1399 *Ibid* at 1513.

Under a strict and out-dated definition of immutability, protected characteristics would only be related to accidents of birth. Consequently, any traits for which individuals are "accountable" constitute "appropriate bases for discrimination,"[1400] which means that choice, in some sense, legitimizes discrimination. An awareness of this "moral intuition that discrimination against those who are blameworthy is fair,"[1401] which no longer stands in Canadian law, helps to illuminate the controversy around immutability and its implications under the anti-discrimination framework—but it must be rejected. While I still argue that appearance choices are not completely free and should be protected, it is important to stress that choice should not matter when it comes to issues of discrimination. In *Quebec v A*, Justice Abella explains that "choice [is] *irrelevant* to the question of discrimination," arguing that the SCC "has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination."[1402] She cites Chief Justice McLachlin and Justice L'Heureux-Dubé in *Lavoie*, who "were even clearer in rejecting choice as justifying discriminatory treatment":

> […] the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's 'choice' not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1).[1403]

Also considering choice as irrelevant to discrimination, Moreau stresses that what should matter is the "burdens that result from [the trait] are not ones that we believe its possessors should have to factor into their deliberations in these particular social contexts."[1404]

1400 Clarke, *supra* note 1357 at 9.

1401 *Ibid* at 10.

1402 *Quebec v A*, *supra* note 1262 at 336 [emphasis in original].

1403 *Ibid* at 337, citing McLachlin CJ and L'Heureux-Dubé J in *Lavoie*, *supra* note 1390 at para 5 (In *Lavoie*, Chief Justice McLachlin and Justice L'Heureux-Dubé are dissenting, but they agree with Justice Bastarache, writing for the majority, on the point of rejecting choice as justifying discrimination).

1404 Sophia Moreau, "What Is Discrimination?" (2010) 38:2 Philosophy & Public Affairs 143 at 156 [Moreau, "What Is Discrimination?"].

Appearance fits in the expanded understanding of immutability, as a personal characteristic that is difficult to change or changeable only at unacceptable cost to personal identity. Moreover, appearance choices constitute voluntary or performed markers of personhood and should also be protected under anti-discrimination laws in Canada as fundamental to an individual's sense of self. Although appearance would fit this broad definition of immutability required in the anti-discrimination framework, it has never been ruled as such by a Canadian court.

5.1.4 Limitations of the Anti-Discrimination Framework

One of the main problems associated with appearance-based discrimination is that it includes a wide range of characteristics that may, but most of the time do not, fit under traditional grounds of anti-discrimination laws in Canada.[1405] It can therefore be very difficult for an employee who is the object of appearance discrimination to link their particular situation to one of the statutory prohibited grounds of discrimination, when the real reason for the discrimination is their appearance.[1406] As mentioned above, too often, employees are the object of adverse employment actions for aspects of their appearance, but these situations cannot be considered discrimination under the current legislation. For instance, let's take the example of Alice, a fifty-year-old white female employee who has been working in a clothing store for about a year and who is asked to go back home when she presents herself to work after her hair salon appointment, where she got red highlights that are slightly brighter than usual.[1407] Her employer argued that she did not respect the company's "natural hair colour" policy. A few days later, Alice goes back to her hairdresser, who tries to camouflage the red by adding blonde and black highlights. Her employer acknowledges Alice's efforts, but considers that it is not enough to allow her to work. This time, the employer alleges that Alice's hair should be "uniform in colour" to comply with the company's policy. Is this

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1405 Sheppard rightly notes that "[l]egal categories are rarely adequate to address the myriad social problems to which they are applied." (Sheppard, "Grounds of Discrimination", *supra* note 1339 at 894). For a critique of the "categorial" approach of Canadian equality jurisprudence, see Kropp, *supra* note 474.

1406 See Moldovan, *supra* note 86 at 729-730; Fisk, *supra* note 57 at 1139.

1407 This example is reported in Marie-Pier Duplessis, "Milieu de travail: miroir, miroir… mon look est-il 'acceptable'", *Le Soleil* (3 August 2013), online: <www.lesoleil.com/affaires>.

discrimination? No, because hair colour or physical appearance are not protected grounds under the existing legislation.

In this example, one could wonder if the same treatment would have been applied to a particularly attractive twenty-year old employee. Moreover, the repetitive character of the sanctions could conceal a desire to get rid of this older employee. But the employment sanctions were imposed strictly because of appearance, and it would be difficult—if impossible—to prove age discrimination in this case without further evidence.

In addition to the simple fact that appearance is not a protected ground, this example highlights two important problems with appearance-based discrimination, namely, the problem of evidence and the issues of personal taste and socially accepted standards of appearance. First, appearance discrimination can be difficult to prove, particularly when employers justify their measures on such neutral policies. In this particular instance, Alice's age might have influenced the employer's appraisal of her bright red highlights, but it would be impossible to prove it without other evidence. In addition, even if appearance was included in the legislation as a protected ground, the case law indicates that it is not always easy to prove a *prima facie* case of discrimination.[1408]

Second, and more importantly, Alice's case shows how dominant social norms of appearance[1409] can influence employers' tolerance of employees' appearance. This observation would also apply to Michelle's case described above, as her potential employer refused to hire her because of a personal aversion to dreadlocks. As mentioned earlier in this dissertation, community norms can be based on harmful stereotypes; accepting appearances that only fall "within the normal range of social convention"[1410] perpetuates these stereotypes. Questions of appearance inevitably involve some degree of personal appreciation on proper appearance, and it can be difficult for employers to avoid being influenced by their own tastes in the evaluation of their employees' appearance. Community norms play their part in this assessment, and too often serve as

[1408] See section 5.2, *below.* See also Sheppard & Chabot, *supra* note 1254.
[1409] See Chapter 2, section 2.2.3.2, *above*.
[1410] Hartwell, *supra* note 205 at 422.

justifications for refusing particular grooming practices that are simply set aside because of personal distaste—it is hairstyle and hair colour in this case, but one can also think of tattoos and piercings, to which this observation particularly applies. This problem with social conventions of appearance would inevitably emerge even if appearance was a protected ground,[1411] and it would be essential for adjudicators to maintain awareness of community norms and their potentially harmful effects.[1412] If appearance was a protected ground, courts should focus on the harm suffered by the employee and focus on whether the particular judgment over appearance limits employment opportunities.[1413] In Alice's example, would her adverse employment action be fair, assuming the only thing she did was showing up at work with slightly brighter highlights than the day before?

Adjudicators also seem to have difficulty grasping the particular nature of appearance-based discrimination. Fisk argues that the anti-discrimination framework is not always the right solution to challenge grooming and appearance codes, as it can be "artificial"[1414]:

> It fails to capture many of the reasons why employees object to particular appearance regulation. Men in the 1960s did not grow their hair long in order to look like women, and the offense of making them cut their hair was not that they were not allowed to wear their hair like women but that they were not allowed to express the non-gendered message that long hair connoted. […] The make-up requirement to which Darlene Jespersen[1415] objected is more obviously a case of gender discrimination in that wearing make-up is clearly about feminine sexuality. But even women who are happy to wear make-up when they choose might be offended by being forced to wear a certain quantity and to have their compliance checked.[1416]

Forcing employees to connect their claim to a statutory prohibited ground of discrimination can result in missing out on the real issues at stake, as Tirosh also asserts.[1417] Appearance is often about choices, which are more related to the rights to privacy and autonomy in general. But when the right to equality is the only available claim, it becomes difficult to challenge appearance regulation of mutable characteristics and it might ultimately result in the rejection of the claim.

1411 See Ramachandran, "Freedom of Dress", *supra* note 55 at 23-24.
1412 This problem can in fact be observed in arbitral jurisprudence. See notes 938-942 and accompanying text.
1413 See Malcom, *supra* note 176 at 532.
1414 Fisk, *supra* note 57 at 1135.
1415 For a summary of Jespersen's case, see Chapter 2, section 2.2.1.1, *above*.
1416 Fisk, *supra* note 57 at 1135.
1417 See Chapter 3, section 3.2, *above*.

The example of the "no beards rule" for male employees in grocery stores provides another interesting illustration of the failure of the anti-discrimination framework in some cases involving challenges to workplace appearance regulation. In a short article, one author submits that "wearing beards does not lead to the sexualization of men" and thus should not be considered as an unlawful requirement, while a sexy uniform imposed on female employees would constitute an illegal dress requirement because of its contribution "to systematic discrimination against women."[1418] It is true that beard bans have been challenged as sex discrimination and the case law shows that employees have not been successful on this ground.[1419] Although employees' objection against beard bans is not always motivated by a skin disease, let us not forget that sometimes, disability discrimination could be successfully raised in a case of pseudofolliculitis barbae, particularly for Black men[1420]; in this case, the anti-discrimination framework could definitely be useful.[1421] Nevertheless, along with Fisk and Collins,[1422] I suggest that a challenge to the requirement to be clean-shaven would be more effective if founded on the argument that the requirement violates the employee's right to autonomy and privacy, as I argue in Chapter 6, instead of trying to prove its discriminatory nature. Some requirements, such as prohibiting beards in the workplace, constitute a flagrant violation of the employee's autonomy and privacy, especially when the result of the employer's policy is that the employee is limited in their choices about appearance not only during their working hours, but also in their private life.[1423]

Furthermore, the *Rogers* case[1424]—although decided in the United States—highlights two additional problems with the anti-discrimination framework: the identity trap and the immutability

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1418 McKay-Panos, *supra* note 123 at 39.

1419 See e.g. *Browne*, *supra* note 2 at paras 20-33; *Canada Safeway* 1998, *supra* note 864; *Canada Safeway* 1985, *supra* note 93.

1420 See Chapter 2, section 2.2.1.2, *above*.

1421 See e.g. *Re Canadian Pacific Forest Products Co and Pulp, Paper and Woodworkers of Canada, Local 11* (1991), 26 CLAS 145 (BC Arb) [*Canadian Pacific Forest Products*].

1422 Collins, *Employment Law*, *supra* note 35 at 232; Fisk, *supra* note 57.

1423 See e.g. Collins, *Employment Law*, *supra* note 35 at 232; Hay & Middlemiss, *supra* note 361 at 73; CDPDJ (Drapeau), *supra* note 32 at 25; *Union des employés du transport local et industries diverses, local 931 et Brinks Canada Ltée*, DTE 83T-616 at 7 (Qc CS) [*Brinks* 1983]; *Dominion Stores* 1976, *supra* note 896 at para 13. See also Chapter 6, section 6.1.3, *below*.

1424 For a summary of the *Rogers* case, see Chapter 2, section 2.2.1.2, *above*.

doctrine. These two issues relate to the last section of Chapter 3, where I argued, along with Tirosh, that the anti-discrimination framework can be flawed when it comes to appearance issues, as it forces individuals to clearly and accurately link their appearance to protected grounds related to identity,[1425] and also because it sometimes fails to grasp the particular nature of appearance and its fundamental importance to the sense of self or personhood. The anti-discrimination framework expects "individuals to isolate and highlight one aspect of their identity as the explanation for the discriminatory treatment,"[1426] but it can fail to recognize the harm particularly caused by appearance regulations in the workplace. As Tirosh suggests understanding appearance as fundamental to personhood, and not to identity, her approach allows for a postmodern conception of identity that is not fixed or predetermined, and whereby a claimant does not have to clearly fit in the predetermined categories of equality legislation.

As I mentioned above, Rogers failed to convince the tribunal that her cornrow braids were an expression of her racial identity, and as a result her dismissal was confirmed, as she was not able to prove that her hairstyle was linked to her race.[1427] This is where the anti-discrimination framework becomes problematic, if one gets past the fact that appearance is simply not a prohibited statutory ground in current Canadian law. Even when employers use appearance as a proxy for protected grounds, employees always have to prove how their appearance is linked with listed characteristics, and it opens possibilities for mistakes as appearance is elusive and difficult to theorize. This puts forward a narrow interpretation of grounds—instead of a large and liberal interpretation—which can be prejudicial to complainants. Moreover, in *Rogers*, as Ainsworth rightfully observes, "[b]ecause the court considered Rogers' braided hairstyle a matter of choice rather than an immutable characteristic, it found that the airline was free to impose on Rogers its

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1425 Sheppard also notes: "The enumeration of prohibited grounds of discrimination in anti-discrimination laws and constitutional documents has reinforced a 'categorical' approach to human rights protection that often fails to capture the lived reality of membership in multiple groups or self-identification in terms not contemplated by the law." (Sheppard, *Inclusive Equality*, *supra* note 1263 at 32).

1426 *Ibid*; Sheppard, "Grounds of Discrimination", *supra* note 1339 at 911.

1427 As mentioned earlier, although the *Rogers* case was decided almost forty years ago, several recent articles report that American courts still generally deny protection to hairstyles associated with Black culture because of the mutable nature of these hairstyles. See Chapter 2, section 2.2.1.2, *above*.

preferred choice of hairstyle."[1428] This example shows the necessity to broadly protect appearance that is fundamental to a person's sense of self in Canadian law, even when the particular aspect of appearance involves some degree of choice or can be considered mutable.

As for the law as it stands today, some commentators have pointed out that there seems to be confusion about the jurisprudence in the United States on the treatment of appearance disputes at work under the anti-discrimination framework,[1429] which could apply to the Canadian context. In addition to the difficulty of actually winning a case of appearance discrimination, some note that courts' precedents are unclear, which leads to an inconsistent jurisprudence. As a result of this indeterminacy issue, employers and employees are left unsure about their respective rights and obligations regarding appearance at work.[1430] For instance, Erica Williamson claims that in order for the anti-discrimination framework to be successful, "courts must adopt a consistent, doctrinally clear approach to its use. This approach cannot be developed until courts and scholars understand the cases with which they are currently working."[1431] These observations are applicable in Canadian law, as first, it is true that adjudicators inevitably use their own experience and understanding of appearance in their ruling, which can amount to uncertain precedents because of the very particular nature of appearance. As mentioned above, appearance involves a high degree of personal appreciation and this opens the possibility for different views and opinions leading to different results. Fisk also points out that when courts believe an appearance policy is socially acceptable—or based on community norms—they tend to conclude that there is no violation of the right to equality or that the discrimination is justified by a BFOR on the basis of the employer's or consumers' preferences,[1432] which might lead to inconsistent precedents.

Moreover, Williamson's comments resonate within the Canadian context, as shown in this dissertation. Because several approaches and different forums are sometimes available to

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1428 Ainsworth, *supra* note 225 at 246. See also Moldovan, *supra* note 86 at 724-725; Ramachandran, "Freedom of Dress", *supra* note 55 at 22.

1429 Or "Title VII framework," as some commentators call it (see e.g. E Williamson, *supra* note 179).

1430 *Ibid* at 683.

1431 *Ibid*.

1432 Fisk, *supra* note 57 at 1132.

employees facing issues of appearance at work (either the anti-discrimination framework through human rights tribunals or civil courts, fundamental rights and freedoms in Quebec through civil courts, unjust dismissal recourse in Quebec under the *Act respecting labour standards* through a statutory tribunal, and grievance arbitration for employees under a collective agreement),[1433] the consistency of ruling is at risk and can be observed depending on the jurisdiction.

Finally, there are several issues with the anti-discrimination framework that contribute to its mitigated results regarding appearance issues in the workplace, the most important being that, as argued thus far, appearance is not a protected ground under current legislation in Canada, which "leaves vulnerable those employees who either do not find or cannot prove that their objection to a dress code is based on a protected characteristic."[1434] The inclusion of appearance as a statutory protected ground would solve this particular problem, as I argue in the last section of this chapter.

5.1.5 Benefits of the Anti-Discrimination Framework

One of the main advantages of the anti-discrimination framework is that appearance discrimination can sometimes be connected to one of the statutory protected grounds under the current human rights legislation. When a complainant is able to link their appearance issue to a prohibited characteristic, the anti-discrimination undeniably offers legal redress that would otherwise be unavailable to non-unionized employees. Therefore, for some statutory protected grounds that are closely linked to appearance, a claim founded on the right to equality as it is protected today in the legislation is sometimes simply an adequate way to challenge workplace appearance codes, as some successful outcomes for employees have been observed in the jurisprudence.[1435] For aspects of appearance that are related to sex/gender, gender identity and expression, race, colour, ethnicity, age, religion, and disability, the anti-discrimination framework can be useful to employees. These

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[1433] For instance, for an analysis of the different jurisdictions available to adjudicate human rights claims in employment contexts in Ontario (namely, the Human Rights Tribunal of Ontario, the courts, and labour arbitrators), see Michelle Flaherty, "Trends in Human Rights Damages: Courts, Statutory Tribunals and Labour Arbitration" (2017) 20:2 CLELJ 355.

[1434] Fisk, *supra* note 57 at 1139.

[1435] See section 5.2, *below*.

cases can expand upon the well-rooted jurisprudence on discrimination, particularly given the broad and liberal interpretation of grounds commanded by the SCC for quasi-constitutional statutes.[1436] For example, when the prejudicial appearance policy can be related to disability or race, or even sex/gender in some cases, the recourse to provincial, federal, and territorial human rights laws is useful and can work effectively to challenge workplace appearance related decisions or policies. Besides, it is undeniable that the anti-discrimination framework would be very useful for employees if appearance was formally included as a protected ground in the legislation, as I argue at the end of this chapter.

As explained in Chapter 4, most Canadian provinces and territories—except Quebec, Saskatchewan, and Yukon—as well as the federal jurisdiction only offer a protection of the right to equality in their human rights legislation applicable to private party disputes. These statutes protect individuals in the private domain against discrimination in a wide range of contexts, including employment. As most common law human rights statutes—including the BC *Human Rights Code* and the Ontario *Human Rights Code*—do not offer any protection of fundamental rights at work other than the right to equality, the anti-discrimination framework often remains the only solution to challenge workplace appearance regulations, policies, or appearance-related decisions with regard to human rights.

Although it is not a perfect system,[1437] another major benefit of the anti-discrimination framework is that some Canadians enjoy a comprehensive anti-discrimination complaint system created by statutory legislation.[1438] For instance, federal (the *Canadian Human Rights Act*) and Quebec legislation (the *Quebec Charter*) both created a commission—respectively the Canadian

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1436 For a discussion of the particular status of human rights legislation in Canada, see Chapter 4, section 4.3.2, *above*.

1437 The human rights commission model has faced several difficulties, particularly in terms of funding and significant time delays. See e.g. Eliadis, *supra* note 1069 at 51-52. In addition, Sheppard notes that as a result of these obstacles, some jurisdictions have reformed the human rights complain process, such as British Columbia and Ontario, in which a direct access to the human rights tribunal was introduced (Sheppard, "Canada", *supra* note 1275 at 84-85). See also Ontario Ministry of the Attorney General, *Report of The Ontario Human Rights Review 2012*, by Andrew Pinto (Queen's Printer for Ontario, 2012) [*Pinto Report*]; England, *Individual Employment Law*, *supra* note 180 at 246-247; Howe & Johnson, *supra* note 1094.

1438 See generally Maxime St-Hilaire, "The Codification of Human Rights in Canada" (2012) 42:3 RDUS 505 at 558-565.

Human Rights Commission and the CDPDJ—and human rights tribunals to deal with complaints of discrimination in employment. Under this system, in place in all but three provinces and territories (British Columbia,[1439] Nunavut, and Ontario),[1440] the process of complaint to the commission is usually easier for the complainant and most of the time, if the commission considers the evidence to be sufficient, complainants will have access to free legal representation for their claim in front of a human rights tribunal, regardless of their income or access to other legal representation. For complainants "who would not otherwise be able to afford legal costs," this system offers "a more accessible and cost-effective forum."[1441] In British Columbia[1442] and Ontario,[1443] claims of discrimination can be filed directly to the provincial human rights tribunal, which will help the parties to find a settlement or hold a hearing on the merits. In British Columbia, complainants can get free legal assistance and representation from the BC Human Rights Clinic to file a complaint if they qualify,[1444] while Ontario "applicants"[1445] can get legal advice and assistance through the Human Rights Legal Support Centre.[1446]

In conclusion, this section has shown how the anti-discrimination framework can be used to challenge workplace appearance policies, when aspects of appearance can be linked to a statutory protected ground. However, this approach has shown some flaws, as it can be difficult for employees to relate their appearance to a protected trait such as sex or race, when the real issue is that appearance is fundamental to their sense of self or personhood and should be protected as such. In addition, the fact that appearance choices are often constructed as mutable can be an obstacle

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1439 Although a Human Rights Commissioner was appointed in September 2019 in British Columbia, the Human Rights Tribunal of British Columbia is still responsible for receiving human rights violation complaints. See note 154.

1440 Anita Anand & Gita Anand, "Direct Access in Ontario: A Call to Re-Examine" (2014) 18:1 CLELJ 123 at 130; Eliadis, *supra* note 1069 at 36.

1441 Eliadis, *supra* note 1069 at 153.

1442 See Heather MacNaughton, "Lessons Learned: The BC Direct Access Human Rights Tribunal" (2010), online: *Yukon Department of Justice* <http://www.justice.gv.yk.ca/pdt/HeatherMacNaughtonArticle.pdf>.

1443 See Anand & Anand, *supra* note 1440 at 132; Canadian Association of Counsel to Employers, *Cross-Canada Guide to Human Rights Law in Employment* (Toronto: Thomson Reuters, 2014) at 138-139. See generally *Pinto Report*, *supra* note 1437.

1444 "Legal Services" (last visited 10 February 2020), online: *BC Human Rights Clinic* <www.bchrc.net>.

1445 Schucher, *supra* note 1136 at 72.

1446 "About Us – Our Services" (last visited 10 February 2020), online: *Human Rights Legal Support Centre* <www.hrlsc.on.ca>.

to the recognition of discrimination, but I argued that considering these choices as constructively immutable should generate positive results for employees who suffer adverse employment action because of their appearance. Besides, the construction of appearance choices as constructively immutable would facilitate its recognition as a protected ground in the legislation. Nevertheless, one of the main benefits of the anti-discrimination framework is that the right to equality *is* protected everywhere in Canadian law, and it can be useful to employees when they are able to connect their appearance to existing grounds of discrimination, particularly in cases of sexualized and gender-based dress codes. The following section analyzes how Canadian courts, in common law provinces and in Quebec, have ruled on appearance-based discrimination.

5.2 JURISPRUDENCE IN COMMON LAW PROVINCES AND QUEBEC[1447]

This section analyzes how the issue of appearance in the workplace is adjudicated in the jurisprudence in the common law provinces and in Quebec, under the anti-discrimination framework; the case law on appearance regulation under the fundamental rights at work approach is analyzed in Chapter 6. The common law jurisprudence analysis focuses on the two major common law jurisdictions in Canada—British Columbia and Ontario—while Quebec jurisprudence is analyzed in a separate part. This section examines employees' challenges to workplace appearance regulation that have led to a judicial decision founded on the right to equality. This section is divided in two parts: the first part analyzes appearance cases as human rights complaints in common law provinces, under two of the most frequently raised grounds of discrimination in appearance issues: dress code requirements as sex/gender discrimination and discrimination based on disability; the second part discusses the equality theory as applied to appearance issues in Quebec.

[1447] For a discussion of the methodology I employed to gather the jurisprudence on workplace appearance regulation, see Chapter 4, section 4.1.2.1, *above*.

5.2.1 Appearance and Equality Jurisprudence in Common Law Provinces

It should be noted at the outset that for unionized employees, allegations of discrimination can be adjudicated through grievance arbitration.[1448] However, as demonstrated in Chapter 4, issues of workplace appearance regulation are generally analyzed under the reasonableness framework in unionized workplaces, which allows more flexibility for arbitrators to determine the validity of such policies; considerations of discrimination are therefore rarely analyzed in depth in arbitration awards.[1449] As for non-unionized employees, the reasonableness test does not apply, which explains why they have to turn to other arguments to challenge workplace appearance regulation.[1450] My research revealed several discrimination complaints that were related to workplace appearance regulations and policies in British Columbia and in Ontario. In the following two parts, I critically examine a key selection of human rights tribunal cases analyzing the employees' right to equality under the Ontario *Human Rights Code* (freedom from discrimination being protected by s. 5) and under the BC *Human Rights Code* (discrimination in employment being prohibited by s. 13 (1) and (2)). As I have argued in this dissertation thus far, appearance is not a protected ground in Canadian law, and thus, under the anti-discrimination framework, complainants who feel discrimination because of their appearance have to link their situation to one of the statutory prohibited grounds of discrimination—which is not always an easy task. In the two common law provinces under consideration, the prohibited grounds of discrimination that can serve as proxies for appearance are: race, colour, ethnic origin or place of origin, creed/religion, sex, gender identity and expression, sexual orientation, age, and disability.

Although the list of possible grounds of discrimination to challenge workplace appearance regulation is quite extensive, my research did not generate as many cases as expected that were

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[1448] In 2003, the SCC ruled that human rights statutes are incorporated into all collective agreements. See *Parry Sound*, *supra* note 1215. See also Osborne-Brown, *supra* note 183 at 303-304.

[1449] For instance, a no-earring policy for male employees in a grocery store was found unreasonable by a New Brunswick arbitrator on the grounds of reasonableness and discrimination prohibited by the collective agreement. Because of this finding, the arbitrator held that it was unnecessary to deal with the argument of the violation of the *Human Rights Act*. See *Co-op 1990*, *supra* note 894.

[1450] See e.g. *Macdonnell v Waterloo (Regional Municipality)*, 2019 HRTO 1586 at para 47 [*Macdonnell*].

directly related to appearance. While selecting the relevant cases for this section, I found that many of the appearance cases before the British Columbia Human Rights Tribunal (BCHRT) or the Human Rights Tribunal of Ontario (HRTO) were applications to dismiss under s. 27 of the BC *Human Rights Code* and s. 45 of the Ontario *Human Rights Code* respectively.[1451] Most of these applications to dismiss were successful because they would not, in the adjudicator's opinion, further the human rights codes' purposes,[1452] while many of the applications to dismiss that failed never led to a hearing.[1453] As explained in a BCHRT decision involving a claim of discrimination on the grounds of colour, religion, and race based on comments on an employee's physical appearance (particularly on his beard and turban) against a consumer electronics retail store, "[i]t is not enough that the Complainant be a member of a protected group and experience adverse treatment […]. The facts alleged must be capable of supporting a reasonable inference that the adverse treatment alleged is related, in whole or in part, to a prohibited ground of discrimination."[1454] In addition, the HRTO recently held that "it does not have a general power to deal with allegations of unfairness."[1455] Therefore, I kept for analysis the cases that were either tried on the merits or that directly analyze appearance regulations as discrimination. These cases tend to fall under two categories: dress code requirements as sex discrimination and discrimination based on disability; these two grounds, which are the most subject to interpretation, are probably the most contentious with regards to appearance issues.

As repeatedly mentioned in the case law, employers are entitled to adopt and enforce appropriate and reasonable dress and grooming codes, as long as these policies are not

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1451 It is noteworthy that British Columbia and Ontario have a direct access system to their respective human rights tribunal, which means that they do not have a commission or other body to screen the complaints. See section 5.1.5, *above*.

1452 See e.g. *Willie v King Insurance Services Ltd*, 2019 BCHRT 200 [*King Insurance*]; *Singh v Best Buy Canada*, 2013 BCHRT 172 [*Best Buy*]; *Urban Casting*, *supra* note 87; *Bottomley*, *supra* note 87; *Callahan v Capilano Suspension Bridge Ltd*, 2009 BCHRT 127 [*Callahan*]; *Mosher*, *supra* note 139.

1453 See e.g. *Bil v Northland Properties Corp (Shark Club Richmond)*, [2010] BCHRTD No 234; *Dahl v Chuong*, 2008 BCHRT 196. See also *Choi v Black Sheep Pub*, 2016 BCHRT 2; *Cooper v Buck & Ear Bar & Grill*, 2016 BCHRT 180; *Molos*, *supra* note 1313.

1454 *Best Buy*, *supra* note 1452 at para 28, citing *Ingram v British Columbia (Workers' Compensation Board)*, 2003 BCHRT 57 at para 20.

1455 *Macdonnell*, *supra* note 1450 at para 50.

discriminatory "on their face (e.g., no hijab allowed) or indirectly through the application of a neutral rule that has an adverse impact on a member of a protected group (e.g., no head coverings allowed), unless they can show the rule is a necessary requirement of the job that cannot be accommodated short of undue hardship."[1456] As mentioned above, race and religious discrimination generally include the expression of visible characteristics, which can cover appearance. Therefore, when aspects of appearance relate to race, religion, or other statutory protected grounds, the liberal approach to human rights that guides Canadian tribunals should allow for a greater acceptance of appearance diversity under the existing anti-discrimination framework, unless the employer can demonstrate a BFOR.

5.2.1.1 Appearance Requirements as Sex Discrimination

As noted above, appearance regulations that establish a distinction between women and men—such as the proscription of pants for female employees, the prohibition of earrings for male employees, and sexist policies related to feminine attributes—can be sanctioned as sex discrimination under Canadian human rights legislation. But not all distinctions based on sex and gender are considered discrimination. In particular, no beards policies escape the sex discrimination realm, as recently confirmed in a HRTO ruling.[1457] In *Browne*, the HRTO reviewed the Canadian case law on the prohibition of facial hair in the workplace and concluded that "wearing a beard or other facial hair is a matter of style or grooming, and is *not a matter of sufficient social significance to warrant protection under human rights legislation*, once again absent any connection to a matter of religious observance or perhaps a different protected ground other than sex."[1458] Among other

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1456 *Saadi v Audmax Inc*, 2009 HRTO 1627 at para 59, rev'd 2011 ONSC 315.

1457 In *Browne*, *supra* note 2 at para 43, the HRTO also finds that "the ground of 'gender expression' under the Code does not protect the ability of cisgendered (sic) men to grow beards." See also *Canada Safeway* 1998, *supra* note 864.

1458 *Browne*, *supra* note 2 at para 33 [emphasis added]. In this case, the HRTO particularly concludes that it is bound by the SCC's *obiter dictum* in *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1249-1250, in which the Court "has endorsed the result reached by the Manitoba Court of Appeal on the basis that the growing of facial hair cannot be elevated to a right protected under human rights legislation." For the HRTO, the *Brooks* ruling "is determinative of the issue that the respondent's 'clean shaven policy' cannot be regarded as amounting to discrimination because of sex." (*Browne*, *supra* note 2 at para 32).

considerations, the HRTO based its decision on the 1985 *Canada Safeway* case,[1459] in which the SCC dismissed an application for leave to appeal, confirming the Manitoba Court of Appeal's conclusion that a supermarket no beards rule was reasonable and "definitely not a matter of sexual discrimination."[1460] While I do not agree with the 2016 HRTO's conclusion that the choice to wear facial hair is not worthy of human rights protection, I argue that the no beards rule should be analyzed under the fundamental rights at work framework, as discussed in Chapter 6, unless appearance were to be included as a protected ground in statutory legislation.

Common law provinces' jurisprudence recognizes that sexually based dress code requirements can amount to sex discrimination,[1461] particularly when the requirements are demeaning to one sex. The requirement that a woman be dressed in a way that reveals her body to keep her job is discrimination based on sex. In a case that is regularly cited in the media regarding dress code discrimination,[1462] the BCHRT held that a nightclub female server who refused to wear a bikini top to work during a special event was discriminated against in the terms of her employment based on her sex.[1463] The employer disciplined her and "relegated [her] to a degrading and inferior job"[1464] after she "chose not to wear an outfit that was gender specific and that she believed was sexual in nature."[1465] This obligation for female workers to wear a bikini top was considered a discriminatory condition of employment, as are dress code requirements driven by sexist behaviour, such as stripping waitresses who are made to parade before guests in a way that highlights their sexual characteristics. In fact, the Ontario Human Rights Board of Inquiry found that a complainant was discriminated against because of her sex when she was not hired for refusing to work "topless"

1459 *Canada Safeway* 1985, *supra* note 93.

1460 *Manitoba Human Rights Commission v Canada Safeway Ltd*, [1985] 1 WWR 479 at para 4 (Man CA).

1461 *Mottu*, *supra* note 847; *Giouvanoudis*, *supra* note 1313; *Ballantyne*, *supra* note 1313; *Doherty*, *supra* note 1313. See also *Molos*, *supra* note 1313.

1462 See e.g. Ireland, *supra* note 13; Postmedia Network, "'Servers Are Encouraged to Not Wear Underwear'" (4 March 2016), online: *Toronto Sun* <https://torontosun.com/2016/03/04/servers-are-encouraged-to-not-wear-underwear/wcm/5ba96a9e-b83d-4d1b-a59c-aff07c716346>; Howard Levitt, "It's sexual bias if women must dress provocatively", *Calgary Herald* (10 December 2015) B2; Riannon Westall, "Restaurant dress codes open to sexual discrimination complaints" (31 March 2015), online: *CBC News* <https://www.cbc.ca/news/canada/restaurant-dress-codes-open-to-sexual-discrimination-complaints-1.3012522>.

1463 *Mottu*, *supra* note 847.

1464 *Ibid* at para 40.

1465 *Ibid* at para 41.

to perform duties as a tavern waitress.[1466] This condition of employment was considered discriminatory in nature as it "imposed more burdensome obligations on female members of the serving staff than were to be imposed on male members of the staff engaged in the same work."[1467] The Board held that "the subjection of female employees engaging in work essentially similar to that of male employees to become, in effect, entertainers by virtue of a requirement to wear immodest dress"[1468] was objectionable under the Ontario *Human Rights Code*.

Similarly, the *Doherty* case involved a new uniform for female waitresses in a cocktail lounge and supper club in New Brunswick.[1469] While the New Brunswick Board of Inquiry could not characterize the uniform as "sexually revealing" or "provocative,"[1470] it described the short and tuxedo costume as:

> [A] uniform clearly designed for and intended to be worn by female persons, according to commonly accepted norms of social behaviour—by this remark I mean that a male might choose to wear it, but he would not be acting within generally established societal norms. It is equally clear that the uniform is designed and intended, at least in part, to accentuate or draw attention to the sexuality of its wearer; that is, to emphasize that the wearer is female. Again, the uniform is not flagrant or blatant; in order to be 'sexually revealing' the uniform would have to disclose some sexual characteristics unique to the female—legs do not meet that test.[1471]

This description demonstrates that appearance is exposed in a large measure to subjective appreciation or personal opinions. However, in this case, the complainants were successful in proving that the new uniforms amounted to sex discrimination, as they accentuated their "female sexuality" and drew attention to it.

In a similar case,[1472] however, the complainants were not as successful. On appeal, the majority of the Ontario Divisional Court confirmed the Board of Inquiry's decision to dismiss the complaints of two female disco bar cocktail waitresses who were required to wear a harem or genie

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1466 *Ballantyne*, *supra* note 1313.
1467 *Ibid* at 1.
1468 *Ibid* at 20.
1469 *Doherty*, *supra* note 1313.
1470 *Ibid* at para 52.
1471 *Ibid* at para 53.
1472 *Allan v Riverside Lodge* (1987), 9 CHRR D/4516 (Ont Div Court).

outfit, while male employees also had to wear a specific dress—which consisted of black trousers and a shirt bearing the restaurant's logo (qualified as normal street attire). In his dissent, Justice White describes the female cocktail waitresses' mandatory dress as "not particularly 'revealing or risqué' or 'excessively sexy," but accentuating "female characteristics," "exotic," "not conventional, informal or contemporary female attire."[1473] He considered that the female employees' attire "would qualify as a "costume," while "[t]he attire of male employees at the disco would not."[1474] Because female employees were required to wear a uniform as a condition of employment and male employees were not, the dissenting judge would have allowed the appeal and found that the uniform imposed constituted sex discrimination. But the majority did not agree.

Another category of discriminatory dress code requirements on the ground of sex can be found in policies that differentiate between men and women employees. Dress and grooming codes should usually be applied equally on both sexes.[1475] When dress codes or appearance codes impose a heavier burden on one gender, they could amount to sex or gender discrimination. Hair length and no-earrings policies for male employees are two types of appearance regulations that have been brought before human rights tribunals under a claim of sex discrimination, but most of these claims were not successful. However, with the evolution of appearance diversity and the development of human rights particularly with regard to gender expression, it is arguable that these kinds of policies could be deemed discriminatory.

In the analysis of an appearance policy prohibiting earrings for male employees,[1476] the BCHRT held that "the law allows some latitude for minor distinctions based on sex."[1477] In this case, a male employee of the Capilano Suspension Bridge, a "historical"[1478] tourist attraction, argued that

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1473 *Ibid* at para 14.

1474 *Ibid*.

1475 *Callahan*, *supra* note 1452 at para 18.

1476 The BCHRT did not rule on the merits in this case, because it dismissed the complaint pursuant to s. 27(1)(d)(ii) of the BC *Human Rights Code* as "it would not further the purposes of the Code." (*Callahan*, *supra* note 1452 at para 20).

1477 *Ibid* at para 18. See also *Canada Safeway* 1998, *supra* note 864.

1478 In this case, the employer argued that it operated a historical site "intentionally designed and/or maintained to immerse visitors within a 'turn of the century' historical experience," and that "men did not normally wear earrings" at the turn of the century in Vancouver, which justified its no-earring for male employee policy. (*Callahan*, *supra* note 1452 at paras 7, 9).

his earrings were meaningful to him; that they were "a significant personal choice;" and a part of his personal identity.[1479] The Tribunal found that the policy clearly made a distinction based on sex, but did not amount to discrimination, as the prohibition of earrings did not create an arbitrary or adverse impact on the claimant. The Tribunal specifically identified hair length and earrings as exceptions to the principle that workplace dress codes should be applied equally without distinctions based on sex,[1480] which is questionable; one can wonder how this would be decided in 2020. Relying on *Mosher*,[1481] it dismissed the complaint because, among other reasons, the employee failed to describe an impact on his dignity resulting from the distinction based on sex.[1482]

Yet on the argument of the impact on the complainant's dignity, as noted above, given the evolution in SCC's jurisprudence on equality,[1483] such evidence should no longer be required in order to prove a *prima facie* case of discrimination. For example, in *Kapp*, the majority held that the purpose of the *Canadian Charter* equality guarantee was no longer to ensure human dignity, as set out in another leading discrimination case,[1484] but instead to ensure substantive equality.[1485] Thus, as human dignity has proven "to be an *additional* burden on equality claimants,"[1486] the Court eliminated "human dignity" as a legal test for discrimination under the *Canadian Charter*. Some commentators[1487] have argued that, by analogy, proving the impact of the distinction on the complainant's dignity should no longer be required in order to make a *prima facie* case of discrimination under statutory human rights legislation. In addition, some have asserted that the distinctive nature of human rights legislation, when compared to the *Canadian Charter*, calls for a different and less burdensome test in order to prove discrimination, one that is founded on the

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1479 *Ibid* at paras 10, 17.
1480 *Ibid* at para 18. But see *Co-op* 1990, *supra* note 894; *Wardair*, *supra* note 892.
1481 *Supra* note 139.
1482 *Callahan*, *supra* note 1452 at para 19. This is not the only case post-*Kapp* where a court required proof of a violation of human dignity in order to find discrimination. See e.g. *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, cited in Koshan, "Under the Influence", *supra* note 1272 at 137.
1483 See particularly *Kapp*, *supra* note 1260.
1484 *Law*, *supra* note 1298 at para 52.
1485 *Kapp*, *supra* note 1260 at para 25.
1486 *Ibid* at para 22 [emphasis in original].
1487 See e.g. Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 80.

evidence of a *prima facie* case of discrimination.[1488] Therefore, the dignity inquiry should not constitute a separate evidentiary requirement in statutory contexts.[1489]

In the *Mosher* case, the BCHRT did not find that a different hair-grooming standard for female and male officers of the West Vancouver Police Department amounted to sex discrimination. The complaint was dismissed under s. 27 of the BC *Human Rights Code*, as the proceeding of the complaint would not further the purposes of the *Code*. The Tribunal member found that the differential standard for female and male employees did "not constitute an impediment to [the complainant's] ability to participate fully in the economic, social, political or cultural life of British Columbia [or] impact on his dignity."[1490] The *Mosher* case exemplifies the trivialization of appearance questions, particularly when allegations of discrimination are involved. In addition, *Callahan* and *Mosher* offer two illustrations of the problems related to the test for discrimination, and cases where complainants would arguably have been more successful under the fundamental rights at work approach if the Court had focused on the meaning of the particular appearance marker for these two employees' expression of their personhood.

Employers sometimes still impose different grooming standards for women and men, particularly regarding hair length, jewellery, and gendered or sexualized attire—although the OHRC, for instance, expressly advises against it.[1491] Even when tattoos and piercings are involved, the aspect of appearance is regarded differently and carries different meanings about its wearer depending on their gender,[1492] as, for example, the case of a female employee wearing a full "sleeve tattoo" (a large tattoo that covers most or all of an arm from wrist to shoulder). However, while many cases of workplace appearance regulation could amount to sex or gender discrimination, a majority of the cases under study were arbitration awards and thus were not considered under the anti-

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1488 See e.g. Koshan, "Under the Influence", *supra* note 1272 at 123; Oliphant, *supra* note 1288 at 45-49; D Réaume, "Defending", *supra* note 1288 at 80-82; L Reaume, *supra* note 1288 at 374-376.

1489 L Reaume, *supra* note 1288 at 376.

1490 *Mosher*, *supra* note 139 at para 10.

1491 See OHRC, "Not on the Menu", *supra* note 168.

1492 See e.g. Burchill, *supra* note 94 at 216.

discrimination framework.[1493] Is that because the evidentiary burden is too cumbersome to prove a *prima facie* case of discrimination? Depending on the circumstances, a challenge solely based on the reasonableness of the policy can sometimes be more successful than allegations of discrimination in general,[1494] as demonstrated in Chapter 4. It is important to remember, however, that this framework is only open to unionized employees, who form a small proportion of Canadian workers.

5.2.1.2 Discrimination Based on Disability Because of Appearance

As seen above in this chapter, the SCC's definition of disability, which applies to the *Canadian Charter* as well as human rights statutes across the country, can protect individuals who have no limitations at all in everyday life "other than those created by prejudice and stereotypes."[1495] Under this wide definition of disability, obesity[1496] and being overweight[1497] could found a claim of discrimination based on physical disability. While successful cases finding employment discrimination based on disability because of weight are relatively rare, a few complainants were able to prove that obesity or being overweight is a perceived disability in British Columbia, before and after the *Boisbriand* case.

For instance, an employee's size and weight (which fluctuated between 290 and 330 pounds) was considered a perceived disability in *Cominco*.[1498] After being laid off due to a major shutdown, the complainant—a plant worker with more than six years of employment—was not rehired and the evidence showed that it was only because of his weight. The employer failed to establish that the complainant's size was a BFOR, as the complainant was qualified as a good

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1493 See e.g. *Thrifty* 2001, *supra* note 5.
1494 See e.g. *Calgary Co-op*, *supra* note 855.
1495 *Boisbriand*, *supra* note 149 at para 77.
1496 See e.g. *King Insurance*, *supra* note 1452 at para 48; *Haley v Johnson's Landing Retreat Center*, 2015 BCHRT 23 at para 15; *Calgary Co-op*, *supra* note 855 at para 46. See also Luther, *supra* note 147; Nowell-Smith & O'Reilly, *supra* note 147; Zwerling, *supra* note 147.
1497 See e.g. *Gatto v Interior Health Authority*, 2005 BCHRT 452 at para 1.
1498 *Hamlyn v Cominco Ltd* (1989), 11 CHRR D/333 (BCHRC).

worker able to perform the work required of him. The BCHRT followed this reasoning in *Dalgliesh*,[1499] finding that the complainant, who travelled from Saskatchewan to British Columbia for a job as a carnival worker, was discriminated against because of his size—around 300 pounds—which was perceived as a disability. The evidence showed that the only reason the employer refused to hire the complainant was "because he was 'too big and too heavy' for the carnival's fast-paced lifestyle, and that there were no uniforms large enough to fit him."[1500] In another case,[1501] although the BHCRT's member mentioned that in her view "simply being overweight is not sufficient to constitute a disability for the purposes of the *Code*,"[1502] she found that the complainant's weight was *perceived* as a disability. This perception was a factor in the employer's decision not to offer the complainant work as a traffic flagger, which constitutes discrimination in employment based on physical disability.

Citing the *Boisbriand* ruling, the BCHRT found that an employee of a road construction and maintenance contractor was discriminated against on the basis of physical disability when he was sent home by his employer for being unfit to work, suffering from a form of arthritis.[1503] The complainant succeeded in his complaint, proving that he did not have a disability, but that his employer perceived him "to suffer from a significant, long-term physical impairment in his ability to perform the work" because of the complainant's physical appearance and weight.[1504] In these cases, the evidence was quite clear that the complainants' size prompted the discrimination they suffered, but the evidentiary burden is not always easy for complainants in cases of size or weight discrimination.[1505] Luther also points out that these cases were successful because the BC *Human Rights Code* "does not contain a definition of disability, and thus did not require any proof of the obesity's underlying causes."[1506]

1499 *Rogal v Dalgliesh*, 2000 BCHRT 22.
1500 *Ibid* at para 32.
1501 *Johnson v D & B (Diane & Brenda) Traffic Control*, 2010 BCHRT 287.
1502 *Ibid* at para 49.
1503 *Davidson v O'Brien Road and Bridge Maintenance Ldt*, 2013 BCHRT 123.
1504 *Ibid* at paras 30-31.
1505 See generally Luther, *supra* note 147.
1506 *Ibid* at 171.

However, the Ontario *Human Rights Code* does provide a definition of disability, which is limited, for physical conditions, to "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness."[1507] In an extensive analysis of weight discrimination in the context of employment in *Vogue Shoes*,[1508] the Ontario Board of Inquiry took note of this limited definition of disability (called "handicap" in the *Code* at the time) and concluded that it did not include obesity or "the appearance of obesity."[1509] In this case, the complainant, a shoe salesperson who had been working for her employer for seventeen years, left her employment after being told she needed to lose thirty-five pounds within six weeks.[1510] The Board recognized that obese individuals face discrimination on the basis of their weight, but this is not sufficient to constitute a disability within the *Code*.[1511] The Board found that the definition of physical disability "does not encompass every physical attribute or condition on the basis of which an individual is unfairly treated" and "provides only limited protection to those who are discriminated against on the basis of appearance alone."[1512] Some commentators have argued that considering the SCC's expanded definition of disability discussed above and its indication in *Granovsky* that disability is not necessarily immutable,[1513] the causation-based definition of disability should be read out in future cases.[1514] But the HRTO held in 2011 that obesity was not a disability under the Ontario *Human Rights Code*, "unless caused by bodily injury, birth defect or illness,"[1515] keeping with the *Vogue Shoes*' ruling in this regard. The formal protection of obesity and body size therefore remains unclear, despite the SCC's definition of disability.

This broad definition seems to be applied with more tolerance in the case of other types of physical ailments. For instance, the BCHRT found that a complainant was denied employment

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1507 Ontario *Human Rights Code*, s 10 (1).
1508 *Ontario (Human Rights Commission) v Vogue Shoes* (1991), 14 CHRR D/425 (Ont Bd Inq) [*Vogue Shoes*].
1509 *Ibid* at paras 75-76.
1510 *Ibid* at para 2.
1511 *Ibid* at para 75.
1512 *Ibid* at paras 71, 75.
1513 See *Granovsky*, *supra* note 150 at para 27.
1514 See Luther, *supra* note 147 at 175; Nowell-Smith & O'Reilly, *supra* note 147 at 696-698. See also D Rosenberg, *supra* note 1354.
1515 *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 at para 24.

because of her physical disability, a cleft palate, which constituted unjustified discrimination.[1516] The Tribunal held that the employer "made assumptions based on his perception of disability and his assumptions were 'impressionistic' in a negative sense with no regard to the Complainant's ability and qualifications."[1517]

However, in a beard case, in which a paramedic was challenging the employer's requirement that he be clean-shaven, the BCHRT found that a skin condition that was irritated by shaving did not constitute a physical disability under the BC *Human Rights Code*.[1518] The complaint did not invoke a perceived disability but rather an actual physical disability. After mentioning that not every medical problem or condition is a disability, the Tribunal held that the complainant's skin condition did not entail a certain measure of severity, magnitude, or persistence required in the definition of disability, and that there was no evidence of injury to his dignity.[1519] Relying on the evidence at trial, the Tribunal concluded that the complainant's refusal to shave had more to do with a personal preference than a functional limitation due to dermatitis, but indicated that "[t]his is not to say that a skin condition could not be a disability under the Code either based on credible medical evidence as a functional disability, or due to perception alone."[1520] Finally, the BCHRT ruled that even if the complainant had established the elements of a *prima facie* case of discrimination, the employer would have made out a *bona fide* occupational requirement case, as the requirement for paramedics to be clean-shaven "where the respirator comes in contact with the face is necessary to achieve" the employer's goal of insuring "the safety of Paramedics, the safety of the patients treated by the Paramedics and the safety of the public at large, by ensuring that the emergency medical fleet can provide efficient service even if there is an outbreak of a contagious airborne disease."[1521]

In another case, however, pseudofollicutis barbae was recognized as a medical condition—and therefore a disability—preventing an employee to be clean-shaven, and the BC arbitration board

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1516 *Lindhal v Auld-Phillips Ltd*, [1986] BCCHRD No 8.
1517 *Ibid* at para 41.
1518 *Wheatley*, *supra* note 911.
1519 *Ibid* at para 185.
1520 *Ibid*.
1521 *Ibid* at para 192.

found that this was a case representing an appropriate circumstance for the application of the doctrine of reasonable accommodation.[1522] According to the anti-discrimination framework, the limits to the employees' right to equality are usually brought up by employers under *bona fide* occupational requirements. Hence, employers can justify their appearance-related decisions or policies by claiming that they are based on a BFOR (s. 13(4) of the BC *Human Rights Code* and s. 11(1)a) of the Ontario *Human Rights Code*). In certain situations, employers have a duty to accommodate the employee objecting to the dress code based on a prohibited ground of discrimination, unless doing so would result in an undue hardship.

5.2.2 Appearance and Equality Jurisprudence in Quebec

The *Quebec Charter* protects the right to equality with respect to several protected grounds in s. 10 and it prohibits discrimination in employment under s. 16. As I have established in Chapter 4, the *Quebec Charter* does not only offer a protection against discrimination in employment; it also protects many fundamental rights and freedoms that can be raised by employees to challenge workplace appearance codes, such as the right to the safeguard of dignity, respect for private life (privacy), freedom of expression, freedom of religion, and freedom of association, among others. I will demonstrate in Chapter 6 how these fundamental rights have been successfully interpreted in relation to questions of appearance at work. Meanwhile, it is important to understand at the outset that these other statutory rights, as protected by the quasi-constitutional *Quebec Charter*, are generally more effective to protect employees' expression of their self through their physical appearance. Therefore, there are not as many cases assessing questions of appearance through the anti-discrimination framework in Quebec, as other fundamental rights and freedoms can be more successfully invoked, particularly when the aspect of appearance involves some degree of choice. Appearance markers that employees choose are thus less analyzed through the right to equality in

[1522] *Canadian Pacific Forest Products*, *supra* note 1421.

Quebec, although employees can definitely exercise agency when refusing their employer's dress code that they consider discriminatory.

It should be noted again that the *Quebec Charter* establishes a human rights commission (CDPDJ) which is mandated to receive discrimination complaints.[1523] Filing a complaint through the CDPDJ is free, and when the Commission finds that there is sufficient evidence to support the complaint, it can bring cases of discrimination to the Human Rights Tribunal of Quebec (HRTQ), providing legal assistance and representation throughout the judicial process. The Tribunal's jurisdiction, which is dependent on the CDPDJ's jurisdiction,[1524] is essentially limited to complaints of discrimination. Hence, both administrative bodies are not competent to handle claims of violation of *other* fundamental rights and freedoms of the *Quebec Charter*—such as the right to privacy or freedom of expression—unless the right to equality is involved. Provided that the complaint process to the CDPDJ offers the only free legal recourse for non-unionized employees—with the exception of the s. 124 of the ALS recourse against unjust dismissal[1525]—this can explain why raising discrimination in appearance issues can be an appealing option. Thus, the right to equality can be of use to Quebec employees when they face discriminatory sanctions at work because of an aspect of appearance that can be linked to a statutorily protected ground. The following characteristics can serve as proxies for appearance in Quebec: race, colour, sex, gender identity or expression, pregnancy, sexual orientation, age, religion, political convictions, ethnic or national origin, and handicap. Notwithstanding race, colour, ethnic or national origin, and religion, which are beyond the scope of this dissertation, the most frequently raised grounds are sex and disability—handicap in the *Quebec Charter*[1526]—similar to the case law in the rest of Canada.

[1523] Filing a complaint to the CDPDJ is not mandatory, as Quebec complainants can choose to "bypass the commission entirely and file complaints directly with the courts, although, since this route is expensive, it is rarely used." (Eliadis, *supra* note 1069 at 51). See also Canadian Association of Counsel to Employers, *supra* note 1443 at 105.

[1524] *Quebec Charter*, s 111; Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 127-128.

[1525] See Chapter 4, section 4.1.1.2, *above*.

[1526] See s 10 of the *Quebec Charter*.

First, discrimination based on sex/gender was found in several cases involving "sexy" uniforms or requirements perpetuating sexual stereotypes in Quebec. In *Restaurant La Courtisane*,[1527] a female restaurant server was fired for complaining about the new dress code, which included shorter skirts, tight fitting tops, and high heels. Such sexist requirements, making women workers parade in front of customers dressed to highlight their sexual attributes, were considered as illegal discriminatory practices by the HRTQ. The Tribunal similarly found, in another case,[1528] that the dismissal of a female restaurant server because of her small breasts constituted sex discrimination. Also, in *Gagnon*,[1529] three female servers in a pub were fired because they did not fit the new image the pub wanted to project—which included a uniform similar to a bathing suit. In this case, the labour commissioner found that the unjust dismissal of the three waitresses was founded on age and physical appearance. A similar case involving a sexualized dress code was found in violation of the right to dignity[1530]—as such requirements impinge on workers' self-respect and pride—this case will be discussed in Chapter 6.

Policies that differentiate between men and women employees are also analyzed in Quebec jurisprudence, but very few cases focus on discrimination alone. For instance, a male police officer refused to cut his hair to comply with the employer's policy, which required different hair lengths for male and female officers. However, the Human Rights Tribunal of Quebec could not conclude that this distinction constituted discrimination, finding that the simple fact of establishing different standards between men and women could not in itself constitute discrimination.[1531]

As for discrimination based on handicap, it has not been the subject of an abundant jurisprudence in Quebec with regards to appearance. In one case,[1532] an arbitrator found that not having teeth for a police officer did not constitute a handicap. The police officer, who was not wearing

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1527 *Supra* note 7.
1528 *Commission des droits de la personne et des droits de la jeunesse c Beaublanc inc*, DTE 99T-640 (Qc TDP) [*Beaublanc*].
1529 *Supra* note 829.
1530 See *Kirkham*, *supra* note 825.
1531 *Sûreté du Québec*, *supra* note 139 at paras 58, 66.
1532 *Policiers de St-Lambert*, *supra* note 139.

his dental prosthesis while on duty, in violation of his employer's policy, was rightfully sanctioned. In another case,[1533] however, the HRTQ found that the refusal to hire a nurse suffering from eczema constituted discrimination based on handicap, as the employer, a public hospital, did not convince the Tribunal that it could not accommodate the employee without suffering undue hardship. In other words, the Tribunal did not consider that being eczema-free was a BFOR for a nurse.

The *Quebec Charter* does not include any definition of handicap that could narrow the application of this ground—as does the Ontario *Human Rights Code*, as seen in the last section—and obesity is now also considered a handicap in Quebec law.[1534] For instance, an arbitrator found that the morbid obesity of a nurse in an operating room was in fact a handicap pursuant to s. 10 of the *Quebec Charter*.[1535] However, the arbitrator held that the employer could not accommodate the employee's disability—her morbid obesity and a significant sweating problem—without suffering undue hardship because of the safety and asepsis standards needed to avoid the risk of contamination in the operating room.[1536] It is also interesting to note that in one case[1537] involving an overweight hotel receptionist who was fired for failing to comply with the image of a young, thin, and attractive employee, the adjudicator's analysis did not rely on a potential discrimination based on handicap or disability, but rather on dignity, as it is expressly protected under s. 4 of the *Quebec Charter*. This case will be examined in Chapter 6, along with the case law analyzing appearance regulations in the workplace through fundamental rights and freedoms.

1533 *Commission des droits de la personne et des droits de la jeunesse c Centre hospitalier de l'Université de Montréal, Pavillon Notre-Dame*, DTE 2000T-1006 (Qc TDP).

1534 See e.g. *Commission des droits de la personne et des droits de la jeunesse c Bathium Canada inc*, 2015 QCTDP 13 at para 66; *Société des alcools du Québec et Syndicat des travailleuses et travailleurs de la Société des alcools du Québec, section locale 3535*, DTE 2004T-381 (Qc Arb).

1535 *Centre hospitalier des Vallées de l'Outaouais et Syndicat des infirmières et infirmiers du Centre hospitalier régional de l'Outaouais*, DTE 2008T-129 (Qc Arb).

1536 *Ibid* at paras 226-227.

1537 *Bouchard*, *supra* note 827. See also *Verreault*, *supra* note 827.

5.3 THE POSSIBLE INCLUSION OF "APPEARANCE" AS A PROHIBITED GROUND OF DISCRIMINATION

As appearance is not a protected ground under current Canadian legislation, it is difficult to avoid thinking of the inclusion of appearance in the list of statutory protected grounds as a solution. Although some American critics have argued that this would not be a viable solution,[1538] appearance stands among protected grounds of discrimination in several jurisdictions in the United States[1539] and in other countries.[1540] France, for instance, has already included physical appearance as one of the prohibited grounds of discrimination in the *Labour Code*.[1541] Since November 2001, French law has been offering a greater[1542] protection to employees against employment discrimination based on appearance, which not only covers individuals' physical characteristics such as their nose, their mouth, and their chin, but also their "body dressed in decent clothes."[1543] In the following sections, I examine the arguments that have been raised for and against the formal inclusion of appearance as a protected characteristic; I then argue for adding appearance as a protected ground in statutory human rights legislation everywhere in Canada. I also argue that considering appearance as an analogous ground under the *Canadian Charter* would allow for a more balanced relationship between employers and employees.

1538 See e.g. Toledano, *supra* note 97; Corbett, "Hotness Discrimination", *supra* note 97; James, *supra* note 97; Corbett, "The Ugly Truth", *supra* note 184; Vo, *supra* note 97; Post, *supra* note 424.

1539 For a list of American jurisdictions that have enacted a statutory protection against appearance-based discrimination, see notes 189-198 and accompanying text.

1540 For instance, the State of Victoria in Australia prohibits discrimination based on "physical features" in the *Equal Opportunity Act* (*Equal Opportunity Act* (Vic), 2010/16, s 6(j)). France also prohibits discrimination based on physical appearance in employment contexts (*Code du travail* (France), art L1132-1 [C trav]).

1541 Art L1132-1 C trav (France), replacing art L122-45 *Code du travail* (France).

1542 I should use the term "greater" cautiously; although physical appearance has been specifically introduced as a prohibited ground of discrimination in employment discrimination law since 2001, the French provision has not been subject to significant developments in the jurisprudence. See France, Défenseur des droits, *Décision-cadre relative aux discriminations fondées sur l'apparence physique*, No 2019-205 at 3 (2 October 2019; report by Jacques Toubon).

1543 Philippe Waquet, "Le bermuda ou l'emploi" (2003) 9 Dr Soc 808 at 812 [translated by author]. See also Berthou, *supra* note 1306 at 106. For more on the French protection of physical appearance in the workplace, see generally Éric Pélisson, ed, *L'apparence physique motif de discrimination – Colloque du 16 novembre 2009 à Lille* (Lille: Science Po Lille, 2009).

5.3.1 Arguments For and Against the Inclusion

Among several other legal commentators,[1544] Rhode suggests, in a well-documented study,[1545] including appearance as a prohibited ground in the existing anti-discrimination legislation in the United States. Rhode argues that appearance-related bias is insidious and pervasive. While some of the cases of appearance-based discrimination may be covered under existing discrimination and disability laws, most of them are not. As a matter of fact, discrimination based on appearance is lawful in the US—as it is in most other countries, including Canada. Rhode establishes that there are three major justifications for banning appearance-based discrimination, which apply to the Canadian context. First, such bias affronts principles of equal opportunity and dignity, as "individuals should be judged on merit and performance, not irrelevant physical characteristics"; second, appearance-based discrimination reinforces disadvantages based on other protected characteristics, such as gender, race, class, age, and sexual orientation; and third, the regulation of appearance constrains self-expression and cultural identity.[1546]

Rhode also examines the arguments against a law that would prohibit appearance-based discrimination. One concern is that appearance may actually be relevant to job performance or that it influences the employer's image. But Rhode's response is that consumers' preferences are generally rejected as a justification for discrimination in other contexts.[1547] In addition, I argue that appearance may indeed be relevant to job performance or to corporate image in some circumstances, but the BFOR defence in Canadian law is sufficient to protect employers' interests in this regard. If employers justify their appearance policies on business necessity, they can demonstrate that these policies are justified under the BFOR criteria well established in employment equality jurisprudence. Another argument against the inclusion of appearance as a protected ground is that it may risk trivializing other forms of discrimination, undermine human rights laws'

1544 See e.g. Williams, *supra* note 207; Visone, *supra* note 231; Friedricks, *supra* note 97 at 517-518; Desir, *supra* note 204; Raskin, *supra* note 205; Zakrzewski, *supra* note 200 at 452; Adamitis, *supra* note 201.

1545 Rhode, *The Beauty Bias*, *supra* note 199.

1546 *Ibid* at 93.

1547 *Ibid* at 106.

effectiveness, and generate a floodgate of frivolous claims and litigations. Again, Rhode offsets these fears, convincingly arguing that such concerns were raised for other forms of discrimination in the past (using race and sexual orientation as illustrations), and that "[p]roviding legal forums to expose injustice […] has helped to transform cultural perceptions and practices."[1548] She also observes that against concerns about an abundance of claims, the experience in American jurisdictions that currently protect against appearance discrimination shows modest enforcement. Yet another apprehension is that the law is not the answer to appearance discrimination, as appearance preferences are too deeply rooted to eliminate. To that, Rhode replies that prejudice based on appearance is not more deeply rooted than other bias—such as racial, gender, and disability biases—and such concerns should not justify the prevailing tolerance of appearance-based discrimination.[1549] In Canada, while the issue of appearance does not seem to be a significant preoccupation in the legal literature,[1550] this does not mean that people do not care about appearance-based prejudice; numerous initiatives have been launched for a legal reform, which will be discussed in the next section.

Conceptually, the anti-discrimination framework can be useful when a worker is discriminated against on the basis of how they look. But practically, this framework entails some issues that need to be addressed, particularly regarding indeterminacy, the definition of appearance, and the claimant's burden of proof.

If appearance were included in the legislation as a statutory prohibited ground, there would be a general problem of legal indeterminacy. It would be difficult to define what appearance covers, and the extent to which something visible on the human body can be encompassed by the definition. Although issues of definition concerning grounds of discrimination have been dealt with in the past in Canadian law, such as with disability,[1551] for example, and even if there could be efforts towards a definition related, in some ways, to appearance that emanates from or generates stereotypes, the

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[1548] *Ibid* at 112
[1549] *Ibid*.
[1550] See Chapter 2, section 2.1, *above*.
[1551] *Boisbriand*, *supra* note 149; *Granovsky*, *supra* note 150.

very broad aspects that could enter the definition of appearance could be an issue. While I acknowledge such difficulty, I argue that including a definition of physical appearance in the legislation that would encompass all aspects of appearance that are important to one's sense of self or personhood could solve this problem. This would mean that not all aspects of an individual's appearance would be covered, but only those that are significant to a person's definition of their self. The definition of appearance could include an open list of appearance markers that are connected to one's sense of self (such as tattoos, for instance). Appearance markers' meaning and importance could also be established by claimants, in the same manner as the sincerity of belief can be demonstrated when freedom of religion is involved,[1552] for instance. In addition, Klare argues that while some indeterminacy concerns regarding the protection of appearance are legitimate—because the meaning and the content of the protected class would mainly rely on the course of judicial and administrative interpretation—"[t]his is true of all rights, and is not a reason to abandon the rights form."[1553]

In defining appearance as a protected ground, would it include mutable characteristics—i.e. aspects of appearance related to choices, as I argue—or would the definition only cover immutable characteristics, aligned with the traditional anti-discrimination framework? It is difficult to forecast how Canadian adjudicators would interpret appearance, and if they would accept the position defended in this dissertation—that appearance is fundamental to one's sense of self and that it should, therefore, be considered as an immutable ground. And what about aspects of appearance that are in between? A clear definition would definitely be needed in the legislation, but the problem with the interpretation of this ground seems inevitable. Moreover, one can only foresee the difficulty with the claimant's burden of proof and how to establish a *prima facie* case of appearance discrimination, when the employer does not clearly state that adverse employment action is enforced because of appearance—which likely means, most of the time. This would be particularly true with regard to the evidentiary burden this would place on complainants in cases of discrimination based

[1552] See e.g. *R v NS*, 2012 SCC 72 at para 13; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 46.
[1553] Klare, *supra* note 47 at 1445.

on attractiveness. It should also be noted that individuals might not want to claim that they have been discriminated against because of their unattractiveness, because of the additional and harmful embarrassment this might entail. While I recognize that this is an issue that legislators would need to address, it is beyond the scope of this dissertation, as I mainly focus on appearance choices. Nevertheless, the indeterminacy critique is one that is difficult to avoid as legal results would seem hard to constrain by the enactment of appearance as a prohibited ground of discrimination in human rights legislation.

Finally, Fisk argues that the anti-discrimination framework is exposed to the fears of the extreme argument, that is, that this approach "would prohibit employers from requiring employees to adhere to conventions for professional dress (men must wear suits and ties; women can and sometimes must wear suits but not neckties)."[1554] I argue that this concern should not prevent the protection of employees' appearance, as legitimate business purposes could still justify workplace appearance regulation; in addition, only appearance that is related to employees' sense of self should conflict with employers' interests, which does not mean that all appearance policies would be deemed illegal. Another fear related to the extreme argument is that the anti-discrimination approach would force employers to hire applicants not suited for the job and that appearance-related norms would be rejected altogether. However, a protection against appearance-based discrimination does not mean that competence and professional qualifications would suddenly disappear as employment criteria. Yet a majority of these concerns deserve some thought and attention, but should not prevent the inclusion of appearance as a protected ground of discrimination.

5.3.2 Appearance as a Prohibited Ground of Discrimination Under Human Rights Legislation

Regarding traits that should be recognized as protected grounds of discrimination, Moreau forcefully contends that each prohibited "ground reflects a judgement that people have a right to make decisions in these social contexts in a manner that is insulated from the burdens imposed by

[1554] Fisk, *supra* note 57 at 1136.

these traits, or by other people's assumptions about them."[1555] I argue that physical appearance is such a trait, particularly when it is related to individuals' sense of self, and that it deserves to be protected as a prohibited ground under Canadian human rights legislation. While the arguments presented in the previous section should be carefully considered, this should not impede the inclusion of "physical appearance" as a protected ground under statutory provincial, federal, and territorial human rights laws. I argue that this formal addition to human rights statutes would allow for a better protection of employees' appearance and would further the general goal of a greater acceptance of appearance diversity in Canada. My proposition concerns all human rights statutes that prohibit discrimination in employment contexts, and particularly in private employment relationships—as well as public employment relationships—in order to protect as many employees as possible. The inclusion of this statutory ground would only require a simple modification to the existing legislation by the appropriate legislator, which is not that complicated, as, for instance, all jurisdictions have modified their human rights legislation in recent years to include "gender identity"[1556] as a protected ground of discrimination.[1557] In order to facilitate the proposed amendment, an understanding of appearance as fundamental to individuals' sense of self and personhood, as demonstrated in Chapter 3, would help to counter the immutability doctrine arguments.

The proposed legal reform would inevitably include a clear definition of physical appearance in the legislation, which should help avoid any indeterminacy obstacles and critiques. The District of Columbia in the United States is one of the jurisdictions that formally protects against discrimination based on "personal appearance" and defines this trait as "the outward appearance of any person,

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[1555] Moreau, "What Is Discrimination?", *supra* note 1404 at 157.

[1556] In 2020, all jurisdictions also explicitly include "gender expression" as a protected ground, with the exception of Manitoba and Saskatchewan. Nonetheless, the Saskatchewan Human Rights Commission's website states that discrimination because of gender expression is against the law in Saskatchewan ("Human Rights of Transgender People" (22 August 2016), online: *Saskatchewan Human Rights Commission* <https://saskatchewanhumanrights.ca/education-resources/information-sheets/human-rights-of-transgender-people/>). Similarly, the Manitoba Human Rights Commission "interprets gender identity broadly, to include the concept of gender expression" ("Discrimination Based on Gender Identity" (October 2016), online: *Manitoba Human Rights Commission* <http://www.manitobahumanrights.ca/v1/education-resources/resources/gender-identity.html>).

[1557] See generally Picard, *supra* note 1324 at 138.

irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards."[1558] Because this wide definition protects a wide range of visible characteristics that formally include mutable aspects of appearance or appearance choices, I argue that this definition should inspire Canadian legislators. In addition, the definition of personal appearance in the District of Columbia *Human Rights Act* includes that personal appearance:

> shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.[1559]

Such a limit to the protection of appearance-based discrimination seems reasonable, and could help to avoid the "floodgates of litigation" that some critics are concerned about. However, I argue that the "reasonable business purposes" defence should be analyzed in the justification of a *prima facie* case of discrimination, as the burden of proof should rely on the employer, and not the employee. The analysis of such reasonable business purpose should therefore happen in the evaluation of a *bona fide* occupational requirement, which is provided in all human rights statutes in Canada.

My proposition for legal reform is mainly founded on the fact—which I repeated several times in this dissertation—that employees who are the object of adverse employment action because of appearance often have difficulties proving a *prima facie* case of discrimination in connection with the existing statutory grounds, when the real reason they suffer discrimination is because of appearance. For all the fictional employees I discussed in this chapter, a protection of physical appearance as a prohibited ground of discrimination in the statutory legislation would provide clearer legal remedies—whether the aspect of appearance concerns earrings, hairstyle, hair colour, or sexualized uniforms. My proposal is supported by some jurisprudence inconsistencies, but also notably by numerous initiatives, which reinforce the need for a formal inclusion of appearance as a

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[1558] *District of Columbia Human Rights Act*, *supra* note 194, § 2-1401.02(22).
[1559] *Ibid*.

protected ground in the legislation. Thus, in recent years, several Canadians have launched online petitions to seek public support for the addition of physical appearance as a protected ground of discrimination under human rights legislation, arguing that such protections are needed as appearance-based discrimination can have devastating consequences.

The majority of these initiatives were particularly raised to combat discrimination based on body size, arguing that weight discrimination is a systemic and harmful form of bias and stereotypes, yet so "commonplace" and "widespread" in society "that many people take it for granted."[1560] As I established in section 5.2.1.2, the case law regarding discrimination based on weight is unclear, despite the SCC's broad definition of disability. Online petitions were particularly launched to advocate for adding body size and physical appearance as protected grounds in the Ontario *Human Rights Code*,[1561] the BC *Human Rights Code*,[1562] the *Saskatchewan Human Rights Code*,[1563] the *Alberta Human Rights Act*,[1564] the Manitoba *Human Rights Code*,[1565] and the *Canadian Human Rights Act*.[1566] In addition to these public petitions, other more formal initiatives for legal reform have emerged. In Manitoba, several bills were introduced to add size and weight as protected grounds of

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1560 See Luther, *supra* note 147 at 167.

1561 Jill Andrew & Body Confidence Canada Awards, "#SizeismSUCKS! Help Make Size & Appearance-Based Discrimination Illegal in Ontario" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/sizeismsucks-you-can-help-make-size-appearance-based-discrimination-illegal-in-ontario-bodyconfidence?source_location=movement&lang=en-CA>; "#SIZEISMSUCKS" (last visited 10 February 2020), online: *Body Confidence Canada* <https://www.bodyconfidencecanada.com/sizeismsucks>; "Should it be illegal to discriminate based on body size?" (29 April 2016), online: *CBC News* <https://www.cbc.ca/radio/the180/safe-spaces-are-not-scholastic-a-call-to-end-tipping-and-a-lesson-in-arabic-for-air-travel-1.3558942/should-it-be-illegal-to-discriminate-basedon-body-size-1.3559246>.

1562 Cheryl Ann Webster, "Let's end size & physical appearance discrimination in BC today!" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/end-size-physical-appearance-discrimination-in-bc>.

1563 "Woman starts petition to end appearance-based discrimination in Sask." (22 February 2017), online: *CTV News* <https://saskatoon.ctvnews.ca/woman-starts-petition-to-end-appearance-based-discrimination-in-sask-1.3297139>.

1564 RSA 2000, c A-25.5. See Constance Levitsky, "End Sizeism in Alberta #SizeismSUCKS" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/alberta-human-rights-commission-end-sizeism-in-alberta-sizeismsucks>; Emily Mertz, "Edmonton woman wants size discrimination included in Alberta Human Rights Act" (21 February 2017), online: *Global News* <https://globalnews.ca/news/3264137/edmonton-woman-wants-size-discrimination-included-in-alberta-human-rights-act/>.

1565 CCSM c H175 [Manitoba *Human Rights Code*]. See Lindsey Mazur, "Urge the Manitoba Government to END Size & Weight Discrimination NOW" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/urge-the-manitoba-government-to-end-size-weight-discrimination-now-sizeismsucks>.

1566 Jill Andrew, "Why Canada must make sizeism illegal" (18 October 2016), online: *This* <https://this.org/2016/10/18/why-canada-must-make-sizeism-illegal/>.

discrimination under the Manitoba *Human Rights Code* since 2016.[1567] The last attempt for legal amendment, *Bill 216*, died in committee in October 2018,[1568] but body size advocates are still campaigning for legal reform.[1569] Very recently, in November 2019, the founder of a website that shares information on "fatphobia"[1570] submitted an online petition on the National Assembly of Quebec website, sponsored by Quebec Solidaire co-spokesperson Manon Massé.[1571] This petition asks the Quebec government to modify the *Quebec Charter* to include physical appearance, including body weight and size, to the list of prohibited grounds of discrimination.[1572]

Other proposals have been specifically aimed at preventing discrimination based on body modifications or physical appearance in general, including tattoos, piercings, and hair colour, arguing that these characteristics also generate pernicious stereotypes, particularly in employment

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1567 See Steve Lambert, "Manitoba Liberals want to have weight discrimination in human rights code" (23 November 2016), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/manitoba-liberals-weight-human-rights-1.3864788>; Samantha Samson, "'This is a human rights issue': Local dietitian creates campaign against weight stigma" (18 November 2016), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/manitoba-weight-discrimination-1.3855774>; Canadian Press "Obesity should be protected under human rights code, says Manitoba MLA" (7 October 2016), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/manitoba-obesity-human-rights-bill-1.3796013>.

1568 Steve Lambert, "Manitoba Tories reject private member's bill on weight, height discrimination" (1 November 2018), online: *National Post* <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/manitoba-tories-reject-bill-on-weight-and-height-discrimination>.

1569 Lindsey Mazur, "Bill 2016 'Killed' tonight: We need to act NOW" (1 November 2018), online: *change.org* <https://www.change.org/p/urge-the-manitoba-government-to-end-size-weight-discrimination-now-sizeismsucks/u/23520281>.

1570 See Edith Bernier, "À propos" (last visited 2 May 2020), online: *Grossophobie.ca – Infos & référence* <grossophobie.ca>.

1571 "Petition: Modification de la Charte des droits et libertés de la personne afin d'y inclure la discrimination basée sur tout critère lié à l'apparence physique" (last visited 2 May 2020), online: *Assemblée nationale du Québec* <https://www.assnat.qc.ca/en/exprimez-votre-opinion/petition/Petition-8145/index.html>. When the signing period closed on 25 February 2020, the petition had gained 1114 signatures.

1572 Roberto Wakerell-Cruz, "Quebec fat activist starts petition to have fat rights in Charter of Rights and Freedoms (29 November 2019), online: *The Post Millenial* <https://thepostmillennial.com/quebec-fat-activist-starts-petition-to-have-fat-rights-in-charter-of-rights-and-freedoms/>; "Montreal woman wants weight discrimination to be added to Quebec charter" (28 November 2019), online: *CBC News* <https://www.cbc.ca/news/canada/montreal/fatphobia-charter-petition-1.5376488>; Canadian Press, "National Assembly petitioned to recognize body weight discrimination" (28 November 2019), online: *Montreal Gazette* <https://montrealgazette.com/news/local-news/national-assembly-petitioned-to-recognize-body-weight-discrimination/>; Amy Luft, "Quebecer wants to add weight discrimination to Charter of Rights and Freedoms" (28 November 2019), online: *CTV News* <https://montreal.ctvnews.ca/quebecer-wants-to-add-weight-discrimination-to-charter-of-rights-and-freedoms-1.4706622>.

contexts.[1573] Finally, an online petition has also been launched to stop sexist dress codes in Ontario restaurants,[1574] an issue that has also retained the attention of the OHRC.[1575]

These initiatives definitely show that a protection against appearance-based discrimination is required and it supports my argument that statutory human rights laws everywhere in Canada should include physical appearance as a protected ground. The official enactment of protections against appearance-based discrimination would provide legal remedies to employees who are the object of adverse employment action because of their appearance. As some commentators have noted,[1576] it would also raise awareness on this issue and signal that appearance-based discrimination should no longer be tolerated in society, which could help to achieve greater acceptance of appearance diversity and lead to progressive changes in the workplace.

5.3.3 Appearance as an Analogous Ground Under the *Canadian Charter*

Unlike human rights legislation, which has a closed list of protected grounds of discrimination, the *Canadian Charter* protects the right to equality on the basis of an "open-ended list" of characteristics.[1577] As Sheppard argues, [t]he potential to provide protection against discrimination on the basis of analogous grounds provides a mechanism for inclusivity in the face of new problems of inequality."[1578] As many scholars contend, appearance-based discrimination can

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1573 Kendra Behringer, "Make it illegal and classed as discrimination to not hire someone based on hair colour, haircut, tattoos, or piercings" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/canadian-employers-canadian-goverment-make-it-illegal-and-classed-as-discrimination-to-not-hire-someone-based-on-hair-colour-haircut-tattoos-or-piercings?source_location=movement>; Lauren La Rose, "Pétition contre la discrimination basée sur tatouages et perçages" (7 October 2014), online: *La Presse* <https://www.lapresse.ca/actualites/national/201410/07/01-4807248-petition-contre-la-discrimination-basee-sur-tatouages-et-percages.php>; Lauren La Rose, "Petition urges Ottawa to make it illegal to discriminate on tattoos, piercings" (7 October 2014), online: *CTV News* <https://www.ctvnews.ca/business/petition-urges-ottawa-to-make-it-illegal-to-discriminate-on-tattoos-piercings-1.2042747>.

1574 Amy McGimpsey, "Stop sexist dress codes in restaurants" (last visited 10 February 2020), online: *change.org* <https://www.change.org/p/stop-sexist-dress-codes-earlsrestaurant-moxies-official-jack-astors-joeyrestaurants>.

1575 See e.g. OHRC, "Policy on sexualized and gender-specific dress codes", *supra* note 165; OHRC, "Not on the menu", *supra* note 168.

1576 See Chapter 2, section 2.2.4, *above*.

1577 Sheppard, "Grounds of Discrimination", *supra* note 1339 at 906.

1578 *Ibid*.

be as harmful as other types of recognized discrimination[1579] and can have devastating consequences. The simple fact that employees can lose their job over appearance issues demonstrates the prejudice that can result from appearance-based discrimination. Moreover, I argued in this chapter that appearance, as fundamental to individuals' sense of self and personhood, should be considered constructively immutable; it should therefore be recognized as an analogous ground of discrimination. Some other characteristics have been rejected as analogous grounds of discrimination in Canadian constitutional law, such as homelessness; there is a refusal to consider this trait as immutable and it is considered too vague to constitute a protected class.[1580] I argue, however, that appearance can be circumscribed and defined to avoid such criticism. In addition, it seems clear that many of the aspects of appearance that are chosen by individuals can involve negative biases, which is sometimes precisely why they are not tolerated by employers in the workplace. For instance, one could argue that tattooed employees are the object of prejudice and stereotypes, and a prohibition of tattoos in the workplace would reinforce, perpetuate, or exacerbate this disadvantage (using the SCC's recent test for discrimination under s. 15 of the *Canadian Charter*).[1581] While the recognition of appearance as an analogous ground would only formally benefit government employees, some have argued,[1582] according to the principles established in *Vriend*,[1583] that the recognition of appearance as an analogous ground could be read into human rights legislation accordingly. This could help to avoid amending all human rights statutes across the country, although I believe official legislative amendments in all jurisdictions, with the legislative process and debates it involves, would be beneficial in generating greater awareness of appearance diversity in the workplace, and in society in general.

1579 See Chapter 2, section 2.2.4, *above*.
1580 See Skolnik, *supra* note 1383.
1581 See section 5.1.1, *above*.
1582 See Luther, *supra* note 147 at 181, 188.
1583 *Vriend v Alberta*, [1998] 1 SCR 493. In *Vriend*, the SCC showed a readiness "to rely on the inclusive possibilities of the *Canadian Charter* to extend protection in human rights legislation, despite explicit legislative intent to deny protection." (Sheppard, "Grounds of Discrimination", *supra* note 1339 at 907).

Conclusion

Individuals perform their gender, race, and many other aspects of their self-identity and personhood through appearance, and sometimes, dress codes or workplace regulations discriminate on the basis of statutorily protected grounds. When they do so, they should be considered a violation of the right to equality and deemed illegal under the current legislation. Moreover, the formal inclusion of appearance as a protected ground of discrimination in statutory legislation as well as an analogous ground under the *Canadian Charter* would help to recognize that appearance choices, which can be fundamental to personhood, can generate harmful stereotypes that should be avoided in society, and particularly in the workplace. However, while the anti-discrimination approach is useful to cover appearance-based discrimination, it does not sufficiently address the employer's prerogative to control its employees' appearance, and the conflicting employees' "right" to control their own appearance while at work. As Fisk puts it, "[c]onsidering appearance regulations from the standpoint of anti-discrimination law misses a fundamental part of why employers impose them, why employees find them objectionable, and why the law should restrict it."[1584] I argue that in this sense, the fundamental rights at work framework offers interesting avenues to challenge questionable appearance regulations.

[1584] Fisk, *supra* note 57 at 1139.

CHAPTER 6
THE FUNDAMENTAL RIGHTS AT WORK FRAMEWORK

Introduction

Alex is a racialized non-binary clerk who has been working full-time in a large hospital in Ottawa, Ontario for the past twelve years. They have many tattoos, including about half a dozen on their arms; they consider their tattoos as a significant part of their personhood and mode of self-expression. After they received two written notices from their employer, Alex was warned that they would be disciplined if they refused to conform to the new dress code—which required that employees cover up visible tattoos while at work.[1585] Kwang is a racialized female part-time cashier in one of the largest grocery retailer of a big supermarket chain in a suburb of Toronto, Ontario. She recently got suspended after showing up at work with pink hair, contrary to the supermarket dress code—which only allows for natural or traditional hair colour.[1586] William is a white male customer service representative working full-time in a car rental company in Vancouver, British Columbia. He has been wearing a hoop earring in each ear for many years, long before his hiring. He lost work as a result of implementation of a new grooming policy—prohibiting visible facial and body piercings.[1587] These three fictional employees provide illustrations of workers who are not protected under the existing anti-discrimination framework in Canada. Unless they work under a collective agreement[1588]—in which case they could argue that their employer's policy is unreasonable[1589]—they would be left without any legal recourse against their employer's intrusion in their appearance choices under the current law. However, if the same employees lived in Quebec, they could likely and successfully challenge their employer's policy under the *Quebec Charter*.

In Chapter 5, I examined the usefulness of the anti-discrimination framework to deal with employees' appearance issues. When the aspects of appearance at stake can be linked to a

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1585 This example is inspired from actual facts reported in *Ottawa Hospital*, *supra* note 1.
1586 This example is inspired from actual facts reported in *Maxi St-Jérôme*, *supra* note 4.
1587 This example is inspired from actual facts reported in *Thrifty* 2001, *supra* note 5.
1588 A minority of workers in Canada—around 30% in 2019. See note 835 and accompanying text.
1589 See Chapter 4, section 4.1.2, *above*.

statutory prohibited ground of discrimination (sexist or gender specific, transgender, religious, and ethnic or racial-related appearance aspects, for example), I argued that this approach can be useful, depending on the circumstances. For instance, William's fictional colleague Shamir, a racialized male jockey working for the same car rental company, could seek remedies against his employer in the event that he would be fired because of his earrings. Indeed, as a member of the Hindu faith, Shamir could argue that the employer's no-earring policy is discriminatory on the ground of religion,[1590] as he has been wearing a pair of earrings since he was five years old following the karnavedha spiritual ritual.

But when aspects of appearance cannot be linked to one of the protected grounds—as in the case of Alex, Kwang, and William—the anti-discrimination framework, without any legislative amendment, does not constitute the best legal remedy and can even leave employees deprived of any recourse. The sometimes-narrow interpretation of statutory grounds, which are the categories protected from discrimination, can partly explain this situation.[1591] In fact, some employees might not be able to convincingly connect their appearance to a specific prohibited ground, when the real reason they experience differential treatment in employment is because of their appearance. Several cases discussed in this dissertation[1592] illustrate these problems, while highlighting that although sociological research considers appearance as fundamental to identity and personhood, the legal community is sometimes unwilling to take seriously the real issues posed by appearance in our society, and particularly at work.

More importantly, I argued in Chapter 5 that physical appearance should be included in the anti-discrimination legislation as an expressly protected ground because it is constructively immutable, following the SCC's explanation of what prohibited grounds of discrimination have in common. In *Corbiere*,[1593] the Court stated that the protected grounds (enumerated in s. 15 of the

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1590 This example is inspired from actual facts reported in *Thrifty* 2001, *supra* note 5.

1591 See Chapter 5, *above*.

1592 See e.g. *Browne*, *supra* note 2; *Callahan*, *supra* note 1452; *Wheatley*, *supra* note 911; *Mosher*, *supra* note 139; *Sûreté du Québec*, *supra* note 139; *Vogue Shoes*, *supra* note 1508. In the American context, see also *Catastrophe Mgmt Sols*, *supra* note 284; *Jespersen*, *supra* note 234; *Rogers*, *supra* note 232.

1593 *Corbiere*, *supra* note 1340.

Canadian Charter) "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or *changeable only at unacceptable cost to personal identity*. […] To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or *constructively immutable*, like religion."[1594] Refusing to consider appearance traits as characteristics that are changeable at an unacceptable cost to personal identity goes against the sociological research[1595] on this question, as I argued that appearance is no less constructively immutable than religion, marital status,[1596] and citizenship.[1597] Including physical appearance as a prohibited ground of discrimination in Canadian human rights legislation—and considering physical appearance as an analogous ground under s. 15 of the *Canadian Charter*—would allow for a better use and strengthen the remedy against discrimination, as employees would no longer be forced to pigeonhole their appearance issues.

However, it should be possible for Alex, Kwang, and William to legally counterbalance their employer's management rights over appearance matters. There is more to human rights than the sole protection of the right to equality.[1598] A consideration of the fundamental rights at work framework could be the answer enabling these three employees to assert their personal interests in their appearance, as appearance is fundamental to their sense of self and personhood. Founded on the assumption that employees do not leave their fundamental rights and freedoms at the door of their workplace,[1599] the fundamental rights at work approach allows for a recognition of employees' individual rights to dignity, privacy, liberty, and fundamental freedoms (religion, expression, and association), even while they are at work. This approach therefore provides another limit to the employees' personal subordination in the employment relationship. This chapter analyzes the rights that employees can raise in order to challenge appearance-based policies or decisions in the

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1594 *Ibid* at para 13 [emphasis added].

1595 See Chapter 3, *above*.

1596 See *Quebec v A*, *supra* note 1262 at paras 241, 417, 423; *Hodge*, *supra* note 1389 at para 39; *Miron*, *supra* note 1389 at 489.

1597 See *Lavoie*, *supra* note 1390 at para 39; *Andrews*, *supra* note 1255.

1598 Although for most Canadians (except for Quebecers, Saskatchewanians, and Yukoners), the right to equality is the only right protected in the statutory human rights legislation applicable to private contexts. See Chapter 4, section 4.3, *above*.

1599 See *Bridgestone/Firestone*, *supra* note 37 at 30; *Etobicoke*, *supra* note 37.

workplace, focusing on the three most relevant rights—dignity, privacy, and freedom of expression. However, it should be noted that other fundamental rights could be raised to challenge workplace appearance regulation, depending on the circumstances, such as the right to inviolability, the right to liberty, and the fundamental freedoms of religion and association. While the latter two are beyond the scope of my dissertation,[1600] the right to inviolability and the right to liberty are scarcely covered or discussed in the workplace appearance case law; I therefore chose to focus on the three most relevant fundamental rights that could generate positive results for employees. This chapter particularly contends that the fundamental rights framework allows for an appropriate analysis of appearance questions with regards to mutable aspects of appearance in employment contexts.

While I argue in this chapter that the fundamental rights at work framework is a suitable approach to deal with workplace appearance issues, it is important to understand at the outset that this framework would not be easy to implement in common law jurisdictions. In fact, except for Quebec—and to a lesser extent, Alberta, Saskatchewan and Yukon—none of the Canadian jurisdictions under the existing legislation offer a statutory protection for individual rights such as the right to dignity, the right to privacy, and the right to freedom of expression. For this approach to be effective and successful in the rest of Canada, a legislative amendment would be necessary, as I will discuss in the last part of this chapter. Nonetheless, it is possible to find some echoes of fundamental rights arguments in the common law jurisdictions' jurisprudence on workplace appearance, echoes that I will argue resonate with a more respectful treatment of employees. As for the province of Quebec, as fundamental rights and freedoms are the subject of specific rights embedded in the *Quebec Charter*, no legislative amendment in this regard is necessary, but an increased sensitivity to Charter arguments and mechanisms—which can be observed in the recent jurisprudence—is desirable.

The first part of the chapter analyzes the fundamental rights at work framework as applied to appearance issues in the workplace, beginning with a clarification regarding the distinction

[1600] See Chapter 1, section 1.2.2, *above*.

between the "right" to choose your appearance and the statutory human rights and freedoms that can be raised in order to challenge appearance regulations. It exposes this approach's content, mechanisms, and principles, before discussing the three main individual rights that can be involved in appearance issues: the right to human dignity, the right to privacy, and the fundamental freedom of expression. The second part of the chapter examines the jurisprudence in common law provinces and in Quebec separately; while the Quebec legislation expressly protects these individual rights, human rights statutes in the rest of Canada do not. For unionized employees, however, a growing consideration of individual rights seems to emanate from the arbitral jurisprudence—although the legal basis of these rights is not perfectly clear, as will be discussed in the common law case law review. Finally, this chapter discusses the limitations and benefits of the fundamental rights at work framework with regards to workplace appearance issues, and discusses the possibility for legal reform in common law provinces, as individual rights—other than the right to equality—find no legal basis in most Canadian jurisdictions for private matters, such as a majority of employment relationships.

6.1 THE FUNDAMENTAL RIGHTS AT WORK FRAMEWORK AND APPEARANCE IN THE WORKPLACE

The fundamental rights at work framework aims to analyze employment law issues in terms of the workers' individual rights and therefore "facilitate[s] a strong emphasis on the interests and needs of workers for protective legislation."[1601] As Hugh Collins explains, dealing with legal issues in the workplace through the prism of rights generates immense benefits for employees:

> The splicing together of the moral sense of rightness and the legal sense of entitlement enables the rhetoric of rights to provide a powerful and persuasive discourse. Furthermore, the assertion of a right tends to foreclose other policy arguments that may weaken employees' claims. Arguments about promoting competitiveness and fairness, for instance, tend to present a balance of policy considerations that propel the law towards measured interventions in the labour market. Once the language of rights is invoked, however, it tends to trump these other policy considerations.[1602]

[1601] Collins, *Employment Law*, *supra* note 35 at 210.
[1602] *Ibid*.

This approach involves the recognition of employees' individual rights in order to limit employers' management rights. Aligned with this approach, the *Quebec Charter* specifically includes a legislative protection of fundamental rights and freedoms that can be raised by workers to challenge workplace appearance regulation, particularly when mutable characteristics are involved. The *Canadian Charter* also offers a protection of many rights and freedoms that could be invoked according to this framework,[1603] but although the *Canadian Charter* is part of the Constitution and therefore overrides all other sources of law in the country, it is of less use in private employment contexts for it is only applicable when a governmental actor is implicated.[1604]

It should be noted at the outset that it is not enough to claim a breach of a fundamental right in order to declare the employer's appearance policy invalid or illegal. In fact, not all interferences with fundamental rights and freedoms are deemed illegal; only the "unlawful"[1605] interference or violation will be. According to Charter principles, a "two-step process"[1606] or "two components"[1607] analysis must be conducted when someone alleges a breach to their fundamental rights and freedoms.[1608] First, the burden of establishing a violation is on the party alleging it. The definition of the specific protected right—for instance, dignity, privacy, or freedom of expression—is useful during this first step in order to determine if there was in fact an infringement of a fundamental right. After the breach of a fundamental right is established, the defendant then bears the onus of establishing that the violation is justified under the particular statute's justificatory provision.[1609] In the context of appearance in the workplace, the employee will generally be the applicant, plaintiff, or complainant (depending on the legal forum) and the employer, the respondent, will then have the onus of establishing that the violation of a fundamental right is justified. I argue that this two-step analysis

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1603 Particularly, the fundamental freedom of expression (s. 2b)), the fundamental freedom of religion (s. 2a)), the fundamental freedom of association (s. 2d)), the right to liberty of the person (s. 7) and the right to security of the person (s. 7).

1604 See Chapter 4, section 4.3.1.4, *above*.

1605 *Quebec Charter*, s 49.

1606 *Boisbriand*, *supra* note 149 at paras 65-66.

1607 *R v Oakes*, [1986] 1 SCR 103 at para 60 [*Oakes*].

1608 See *O'Malley*, *supra* note 1214 at para 28; *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at para 11; *R v S (RJ)*, [1995] 1 SCR 451 at 565. See also Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 48.

1609 See *UFCW, Local 1518 v KMart Canada*, [1999] 2 SCR 1083 at para 34 [*KMart*].

allows for a better balance of employers' and employees' rights and generates solutions that may not always be in employees' favour, but that are more respectful of fundamental rights and freedoms' principles. To be clear, I am not arguing for a blanket protection of *all* appearance choices in the workplace, but rather for appearance autonomy that can only be restricted for legitimate business purposes.

Another important principle to consider under the fundamental rights at work approach is that the content of rights and freedoms must be interpreted liberally[1610] and generously.[1611] This principle of statutory interpretation has been repeatedly upheld by the SCC over the years and should not be overridden regarding appearance cases. Close attention to context is also very important in establishing the rights' content, but also in determining their limits[1612]—the specific factual and social context will be particularly important in the examination of the employer's justification. This explains why some aspects of appearance will be deemed acceptable in some employment contexts, but not in others. In addition, the Court has mentioned on several occasions that "human rights legislation must conform to constitutional norms, including those set out in the *Canadian Charter* […] when a statutory provision is open to more than one interpretation, it must be interpreted in a manner consistent with the provisions of the *Canadian Charter*."[1613] This means that while the *Canadian Charter* may not be applicable to private employment relationships, the interpretation of the fundamental rights and freedoms it protects can be useful to establish the content of human rights legislation, such as the *Quebec Charter*.

Finally, it is the particular status of fundamentals rights and freedoms that makes the fundamental rights at work framework so interesting. As mentioned in Chapter 4, human rights legislation holds a quasi-constitutional status, because of the nature of the important rights it protects. The SCC rightly affirms: "human rights legislation is public and fundamental law of general application and prevails where there is a conflict with other specific legislation unless an exception is

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1610 See e.g. *Meiorin*, *supra* note 1296 at para 44.
1611 See e.g. *KMart*, *supra* note 1609 at para 22.
1612 See *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 87.
1613 *Boisbriand*, *supra* note 149 at para 42.

created."[1614] Of a "protective nature,"[1615] human rights legislation then "prevails over other legislation,"[1616] and I argued it also prevails over other sources of law, except for the Constitution. Then, because of the fundamental nature of these important rights, a violation can only be justified under the specific terms of the legislation—namely, a justificatory provision. For instance in Quebec, regarding workplace appearance issues, this means that a violation of an employee's right to privacy can only be justified under s. 9.1 of the *Quebec Charter*. The employer cannot simply invoke that the appearance rule was adopted to respect its corporate image; a detailed argumentation on the importance of its objective and a proportionality test will be needed.

In the province of Quebec, the *Quebec Charter* presents a tremendous potential for the fundamental rights at work framework because of its "quasi-constitutional" status,[1617] the great number of rights and freedoms it covers,[1618] and its wide scope of application.[1619] The *Quebec Charter* is a legislative instrument of choice to protect fundamental rights and freedoms that can be mobilized against workplace regulations. Unlike most of the Canadian federal and provincial human rights codes, the *Quebec Charter* protects numerous rights and freedoms, which can be violated by workplace appearance policies depending on the circumstances and the aspect of appearance involved. The *Quebec Charter* also contains a justificatory provision in s. 9.1, of which the first paragraph—applicable in private matters—reads as follows: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec." This justificatory provision has

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1614 *Craton*, *supra* note 1214 at para 4.

1615 *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 19.

1616 *Boisbriand*, *supra* note 149 at para 27.

1617 S. 52 of the *Quebec Charter* reads: "No provision of any Act, even subsequent to the *Charter*, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the *Charter*." As the Supreme Court of Canada repeatedly acknowledges, the fundamental and quasi-constitutional status of human rights legislation makes them prevail over other "ordinary" legislation. See Chapter 4, section 4.3.2, *above.*

1618 The *Quebec Charter* is a legal instrument that finds no equal elsewhere in Canada. Other provinces also have quasi-constitutional human rights statutes, but most of them only provide anti-discrimination protections. See Chapter 4, section 4.3.2, *above.*

1619 Unlike the *Canadian Charter*, the scope of the *Quebec Charter* is extensive as it covers private relationships as well as relationships between the State and private entities. Private parties involved in an employment relationship can thus benefit from the protection of the *Quebec Charter*.

been interpreted as corresponding to s. 1 of the *Canadian Charter* [1620] and is therefore subject to a similar test of rational connection and proportionality as established in *Oakes*,[1621] when the source of the infringement of a fundamental right is a norm or standard of general application—such as a company appearance policy. To justify the policy, the purpose of the violation thus must be sufficiently important to justify a violation of the employee's fundamental rights, and the means chosen (the appearance policy) must be proportionate to this important purpose, meaning that the means must be rationally connected to the purpose, constitute a minimal violation of the fundamental right, and must not impair the right in a manner out of proportion to the purpose to be achieved. In this approach, employees' individual rights are balanced against the employer's business needs, with a focus on the objective of the appearance rule and its proportionality.

In addition to the right to equality,[1622] which I discussed in the last chapter, the right to personal freedom,[1623] the right to personal inviolability,[1624] freedom of religion,[1625] freedom of expression,[1626] freedom of association,[1627] the right to the safeguard of dignity,[1628] and the right to respect for private life—also known as the right to privacy[1629]—can be useful to challenge workplace appearance regulation in Quebec. In fact, these fundamental rights and freedoms have all been raised by Quebec employees to challenge appearance codes. In the present chapter, I focus on three fundamental rights—the right to human dignity, the right to privacy, and the right to freedom of expression—under which the fundamental rights at work approach has been mostly theorized.

1620 See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 90 [*Saguenay*]; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 104 [*Godbout*]; *Ford v Quebec (AG)*, [1988] 2 SCR 712 at para 63 [*Ford*]. See also *Girard*, *supra* note 696 at paras 25-26; *Section locale 143 du Syndicat canadien des communications, de l'énergie et du papier c Goodyear Canada inc*, 2007 QCCA 1686 at para 18 [*Goodyear*].

1621 *Oakes*, *supra* note 1607.

1622 *Quebec Charter*, s 10.

1623 S. 1 of the *Quebec Charter* reads as follows: "Every human being has a right to life, and to personal security, inviolability and freedom."

1624 *Ibid*.

1625 S. 3 of the *Quebec Charter* reads as follows: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

1626 *Ibid*.

1627 *Ibid*.

1628 S. 4 of the *Quebec Charter* reads as follows: "Every person has a right to the safeguard of his dignity, honour and reputation."

1629 S. 5 of the *Quebec Charter* reads as follows: "Every person has a right to respect for his private life."

These rights deserve careful consideration, as I argue that they generally form the more successful option to challenge appearance regulation (particularly the right to privacy) especially when the claim involves mutable characteristics such as tattoos, piercings, hair colour, length and style, dress, and general grooming.

6.1.1 The Difference Between the Right to Groom Yourself as You Please and the Statutory Rights that Can Be Invoked

Before discussing the fundamental rights at work framework, it is important to understand that I do not suggest that Canadian legislation should formally protect a legal right to freedom of dress and grooming or a legal statutory right to appearance. To begin with, one should recall that the existing legislation does not recognize the right of individuals to dress or groom themselves as they wish. Whether in federal, provincial, or territorial human rights legislation, public law or private law, and common law or civil law, the right to choose and control your own appearance while at work is simply not established in Canada. It is important to make a distinction here between the "right" of an employee to choose their appearance and the statutory human rights that can be used to protect such appearance. The rights-based approach I propose to apply is based on statutory fundamental rights and freedoms in the existing legislation, or a suggestion to expand what already exists in the *Quebec Charter* and the *Canadian Charter* to the rest of the country.

Although her study is of great value to the theoretical analysis of appearance regulations, Ramachandran's proposition of a legal right to free dress is not considered here a viable and applicable solution in the Canadian legal context. In a detailed article analyzing appearance in public schools, private workplaces, prisons, and in the streets, Ramachandran proposes a legal right to free dress, that is, "the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry, and other adornments that make up the public image of our sometimes private persons."[1630] As she claims that equality rights, privacy rights, and freedom of speech do not provide an adequate framework to deal with appearance issues, she argues that the approach she

[1630] Ramachandran, "Freedom of Dress", *supra* note 55 at 13.

proposes—a legal right to free dress—would provide "an accurate account of the importance of self-representation" for individuals.[1631] According to Ramachandran, considering freedom of dress as a fundamental right is a better way to deal with identity, which she thinks is really "what is at stake"[1632] when it comes to physical appearance in the context of employment. Without providing an exact proposal of how to protect the freedom of dress in the legislation, Ramachandran focuses on *why* it should be included in American law.

But although her argument is appealing, a statutory protection of free dress does not seem like a feasible option in the foreseeable future in the Canadian legal context—let alone in the American context as she proposes it. There are two major drawbacks to Ramachandran's approach: first, the common critique that "rights-on-the-books do not always translate into rights-in-practice" for many reasons; and second, the general problem of indeterminacy, as to the definition of the right, its interpretation, the contours of its legal protection, and so on.[1633] Quebec already offers a protection for many rights and freedoms that can be effectively used to challenge unreasonable workplace appearance regulation, without formally protecting the freedom of dress. But all the other provinces do not offer such a legal protection, and I believe it would be easier to convince the rest of Canada to follow Quebec's example—enact provincial laws that would protect the right to privacy and freedom of expression, for instance—instead of enacting a statutory protection for free dress. As many commentators have characterized appearance issues as silly—although I obviously do not agree—it seems difficult to foresee a statutory standalone right to free dress in the Canadian context. Moreover, as the right to work is not explicitly recognized in Canadian law,[1634] the right to free dress seems difficult to attain. That being said, it is not because freedom of dress and a right to control your appearance do not officially exist in the legislation that other avenues cannot protect such interests. I argue that in Quebec, many rights and freedoms can be interpreted to include a protection

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1631 *Ibid* at 11.

1632 *Ibid* at 93.

1633 See Klare, *supra* note 47 at 1445.

1634 But Dominic Roux argues that the right to work, although not explicitly recognized in the legislation, is a general principle of law and a constitutional principle applicable in Quebec (Dominic Roux, *Le principe du droit au travail: juridicité, signification et normativité* (Montreal: Wilson & Lafleur, 2005)). See also Hugh Collins, "Is There a Human Right to Work?" in Virginia Mantouvalou, ed, *The Right to Work* (Oxford: Hart Publishing, 2015) 17.

from unreasonable workplace appearance regulation, and this fundamental rights at work framework adequately balances both employers' and employees' interests. As I will discuss in the last part of this chapter, I also propose that all jurisdictions should enact human rights legislation that protects fundamental rights and freedoms in private matters.

When offering an alternative approach to the anti-discrimination framework, the literature generally refers to the right to privacy and freedom of expression—or freedom of speech. Hence, the right to privacy and the right to freedom of expression, as part of the fundamental rights at work framework, are analyzed in the following sections. The fundamental right to human dignity is also examined, as it is also often referred to when talking about employees' appearance. It is however important to keep in mind that in the Canadian legal framework as it is today, most human rights laws do not offer a protection of these rights to employees, except for the right to equality. Hence although I argue that this approach is the most suitable for workplace appearance codes' challenges, it is only open for now to Quebec employees as well as government workers, when the *Canadian Charter* is applicable.

6.1.2 Appearance Regulation as a Violation of Human Dignity

Although there is a general principle against a formal hierarchy of human rights,[1635] the concept of human dignity is one of the most fundamental and core values underlying all other human rights and freedoms.[1636] The *Universal Declaration of Human Rights* explicitly enshrines the fundamental nature of human dignity in its preamble, stating in particular: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

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[1635] See e.g. *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877. But see Louis-Philippe Lampron, *L'existence d'une hiérarchie juridique favorisant la protection des convictions religieuses au sein des droits fondamentaux canadiens* (LLD Thesis, Université Laval, 2011) [unpublished].

[1636] I should stress again, as I explained in Chapter 1, that my discussion about human dignity is only about the dignity attributable to human beings, without marginalizing the issue of dignity for nonhumans, such as nonhuman animals. I do not wish to articulate an anthropocentric reading of human dignity—or human rights in general—and I am not asserting here that humans are more deserving of dignity than nonhuman animals, but I am simply arguing that all humans deserve the right to the safeguard of their dignity. See Chapter 1, section 1.1.3, *above*.

foundation of freedom, justice and peace in the world."[1637] While the Ontario *Human Rights Code* and the *Quebec Charter* have similar provisions in their preambles,[1638] the BC *Human Rights Code* declares the promotion of "a climate of understanding and mutual respect where all are equal in dignity and rights" as one of the main purposes of the Code.[1639] In fact, in Canadian law, human dignity is also referred to as the basis and source of every fundamental right and freedom,[1640] and the SCC has repeatedly mentioned that respect for "the inherent dignity of the human person" is one of the most important "values and principles essential to a free and democratic society."[1641] Although most provincial[1642] human rights statutes in Canada refer to the inherent dignity of the person as a member of the human family, only the *Quebec Charter* expressly protects the safeguard of human dignity as an autonomous fundamental right: "Every person has a right to the safeguard of his dignity, honour and reputation."[1643] None of the human rights statutes in the rest of Canada protect dignity as the subject of a specific statutory right. As for the *Canadian Charter*, it does not recognize the respect for human dignity as an independent constitutional right[1644] and does not even mention the term "dignity." The SCC, however, consistently contends that the "protection of all of the rights

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1637 1st preamble of UDHR. It should be noted that some scholars object to this conception of human beings' inherent dignity and strongly criticize the exclusionary dynamics of dignity. See e.g. Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects" (2003) 66:3 Modern L Rev 346 at 358-361.

1638 See respectively 1st preamble of the Ontario *Human Rights Code* and 3rd preamble of the *Quebec Charter*.

1639 BC *Human Rights Code*, s 3(b).

1640 See e.g. *Kapp*, *supra* note 1260 at para 21; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 120.

1641 *Oakes*, *supra* note 1607 at para 64. See also *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 592; *R v Morgentaler*, [1988] 1 SCR 30 at 166 [*Morgentaler*]; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 512.

1642 At a federal level, only the *Canadian Bill of Rights* refers to dignity in its preamble.

1643 *Quebec Charter*, s 4. Article 2087 of the *Civil code of Quebec* (CCQ) also offers a protection of the right to dignity, yet this provision only benefits to employees: "The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and *dignity of the employee*." [emphasis added]. I argue that because of its quasi-constitutional status, the *Quebec Charter* offers a more compelling protection of employees' dignity than the CCQ.

1644 As Lorraine E. Weinrib notes, "the House of Commons rejected a proposal to insert dignity into section 1 of the Charter late in the drafting process. The Conservative opposition unsuccessfully proposed amendments to s. 1 that would have added the words 'dignity and worth of the human person'." (Lorraine E Weinrib, "Human Dignity as a Rights-Protecting Principle" (2004) 17 NJCL 325 at 325). See also Christian Brunelle, "Le droit à la dignité: un vecteur de la citoyenneté au travail" in Michel Coutu & Gregor Murray, eds, *Travail et citoyenneté: Quel avenir?* (Quebec: Presse de l'Université Laval, 2010) 273 at 288 [Brunelle, "Le droit à la dignité"].

guaranteed by the [Canadian] *Charter* has as its lodestar the promotion of human dignity."[1645] Human dignity, thus, is an important value amongst fundamental rights and freedoms in Canada.

Yet human dignity's fundamental nature does not correlate with clarity, as dignity is a complex concept to delineate and there is no specific definition of human dignity in Canadian legislation.[1646] Human dignity is generally understood as the respect every human being deserves for belonging to the human family. Dignity is based on the idea that all people have "inherent value […] and that their interests therefore ought to be protected."[1647] Albeit in the context of the *Canadian Charter*'s right to equality—in which the concept of dignity was central to the analysis until 2008, being considered as s. 15's purpose[1648]—the SCC defines human dignity in *Law*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.[1649]

Although this definition has been criticized for its lack of rigorous historical and philosophical inquiry,[1650] ideas of self-respect and self-worth shed light on the elusive concept of dignity, which was defined as s. 15's purpose and not as an autonomous subjective right. Nevertheless, the Human Rights Tribunal of Quebec expressly embraces this articulation of human dignity as defining s. 4's right to the safeguard of dignity under the *Quebec Charter*.[1651] In *St-Ferdinand*,[1652] the SCC

1645 *Kapp*, *supra* note 1260 at para 21.

1646 See Dominique Goubau, "Dignity in Canadian Law, a Popular but Ambiguous Notion" in Brigitte Feuillet-Liger & Kristina Orfali, eds, *The Reality of Human Dignity in Law and Bioethics: Comparative Perspectives* (Cham: Springer International Publishing, 2018) 191 at 193.

1647 R James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70:1 Sask L Rev 1 at 2. See also Denise Réaume, "Dignity, Choice, and Circumstances" in Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: Oxford University Press, 2013) 539 at 540 [D Réaume, "Dignity, Choice, and Circumstances"]; Denise G Réaume, "Discrimination and Dignity" in in Faraday, Denike & Stephenson, *supra* note 1259, 123 at 144-148 [D Réaume, "Discrimination and Dignity"].

1648 See Chapter 5, section 5.1.1, *above*.

1649 *Law*, *supra* note 1298 at para 53.

1650 See e.g. Fyfe, *supra* note 1647 at 10.

1651 *Beaublanc*, *supra* note 1528.

1652 *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211.

establishes that s. 4 of the *Quebec Charter*'s right to the safeguard of dignity "addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself."[1653] Again, the Court uses notions of respect and self-respect to define the protection of the safeguard of dignity. Discussing s. 4's provision, the HRTQ explains what dignity entails: "The inherent dignity of every human being is part of their rich heritage as a child of the human family. This dignity, universally recognized, stems, among other things, from the fact that every human being is invested with the sacred mission of making a plethora of choices freely and daily that eventually lead to their self-fulfilment."[1654] Ideas of choice and autonomy are thus deeply connected to human dignity; "[r]espect for dignity includes respect for agency as fundamental to our notion of personhood."[1655]

Some authors note that one important conception of human dignity—dignity-as-liberty[1656]—relies on the Kantian idea that every human being should be treated as an "end in itself" and never as a "mere means."[1657] In this way, the protection of human dignity is particularly relevant in labour and employment law to offset the historical conception of workers as commodities, as dignity implies treating workers as beings deserving of rights. With regards to employees' appearance, one could conceivably argue that employers use employees as "means" when they force the latter to wear a uniform or look a certain way just to convey a specific business image to customers,[1658] particularly when this "look" has nothing to do with the work employees are required to perform.

1653 *Ibid* at para 105.

1654 *Restaurant La Courtisane*, *supra* note 7 at para 37 [translated by author].

1655 D Réaume, "Dignity, Choice, and Circumstances", *supra* note 1647 at 539; Denise G Réaume, "Dignity, Equality, and Second Generation Rights" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007) 281 at 286 [D Réaume, "Dignity, Equality"].

1656 Fyfe, *supra* note 1647 at 3.

1657 See e.g. Bayer, "Debunking Unequal Burdens", *supra* note 256 at 480-487; Isabelle Martin, "Corporate Social Responsibility as Work Law: A Critical Assessment in the Light of the Principle of Human Dignity" (2015) 19:1 CLELJ 255 at 267-268; Marshall, *supra* note 477 at 32-33; Brunelle, "Le droit à la dignité", *supra* note 1644 at 290-291; Christian Brunelle, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambigüité d'une notion fondamentale" (2006) R du B (special issue) 143 at 152 [Brunelle, "La dignité"]. See also *Beaublanc*, *supra* note 1528 at para 38.

1658 Delagrave, *L'apparence physique du salarié*, *supra* note 91 at 64.

When the employer's rule amounts to unjust treatment of an employee which results in "dehumanisation, discredit, humiliation or lack of respect of the human person,"[1659] the right to the safeguard of dignity can be used to challenge workplace appearance regulation. It can be argued that human dignity is violated when appearance policies conflict with uncontrollable aspects of an employee's appearance, such as their weight,[1660] their height, their features, their attractiveness—or unattractiveness, etc. For instance, terminating an employee for the sole reason that they have a large body size or are too short is arguably humiliating and infringes the respect to which every human being is entitled. For employees of size, in particular, the right to dignity is particularly appropriate—when protected, as in Quebec—and more effective than the existing anti-discrimination framework. While it remains unclear that body size is covered in the definition of disability under Canadian law (as opposed to medical obesity),[1661] losing employment because of one's weight may constitutes a violation of human dignity, when body size has nothing to do with job performance.[1662] Nevertheless, physical aspects of appearance that employees have no control over may indeed be linked to the right to the safeguard of dignity, such as weight, height, skin colour, body shape, and the like. It is interesting to note that employees' sanctions based on many of these aspects of appearance could also give rise to legal recourses based on the right to equality in the current state of the law.[1663] Yet it is no surprise that dignity and equality have been interconnected for years in the Canadian legal landscape.[1664]

1659 Brunelle, "Le droit à la dignité", *supra* note 1644 at 293 [translated by author]; Brunelle, "La dignité", *supra* note 1657 at 171.

1660 As I mentioned in Chapter 5, weight is not a characteristic that people have complete control over. While some individuals may be able to manipulate their weight at will, science indicates that many factors can influence the degree of control people have over their weight. See note 1357 and accompanying text.

1661 See Chapter 5, sections 5.1.2 & 5.2.1.2, *above*.

1662 See e.g. *Verreault*, *supra* note 827; *Bouchard*, *supra* note 827. See also *Calgary Co-op*, *supra* note 855.

1663 See Chapter 5, *above*.

1664 See e.g. D Réaume, "Dignity, Equality", *supra* note 1655 at 281; Christopher Essert, "Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15" (2006) 19:2 Can JL & Jurisprudence 407; D Réaume, "Discrimination and Dignity", *supra* note 1647. For a recent critique of the use of dignity in anti-discrimination cases decided at the SCC, see Caroline Hodes, "The Limits of Dignity at the Intersection of Autonomy, Identity and Affect: A Cautionary Tale from the Supreme Court of Canada" (2020) 28 Fem Leg Stud 61.

However, I argue that human dignity can also be useful to challenge workplace appearance codes even when they infringe upon aspects of appearance that employees have a certain control over. For instance, enforcement of a sexualized dress code could be interpreted as violating an employee's right to the safeguard of their dignity, as these particular attire policies could be humiliating and result in a lack of respect for employees.[1665] Employers could argue that sexy dress codes are necessary for their business, but they would bear the onus of proving such a necessity. To establish the business necessity of sexualized outfits under human rights legislation—such as the *Quebec Charter*—employers would have to demonstrate that the purpose of the potential infringement to dignity is sufficiently important to justify violating employees' right to human dignity, and that the means chosen (the sexualized dress code) is proportionate to this purpose. The right to the safeguard of dignity would therefore lead to a more balanced employment relationship, one that is respectful of employees.

Some have argued that respect for an employee's identity (or personhood) would be one of the essential attributes of their human dignity.[1666] Denise Réaume asserts that "respect for identity is crucial to respect for dignity, and to demean characteristics integral to identity is a key form of indignity"; she also argues that dignity is in part about choice.[1667] "Our conception of human dignity," she contends, "includes the idea that individuals should have control over basic decisions affecting their person and the quality of their lives. Respect for autonomy, in this context, therefore includes the inherent worth of persons."[1668] Ramachandran more directly points out that "control over our own bodies is essential to human dignity"; "it strikes many of us as intrusive and unwarranted when someone tells us what to wear, how to cut our hair, or whether we can have a tattoo."[1669] In this way, employers' policies regarding controllable aspects of appearance such as clothes, hair, jewellery,

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1665 See e.g. cases discussed in section 6.2.2.1, *below*. See also *Mottu*, *supra* note 847 at para 49.

1666 See e.g. D Réaume, "Dignity, Choice, and Circumstances", *supra* note 1647 at 543; Olivier De Tissot, "Pour une analyse juridique du concept de « dignité » du salarié" (1995) 12 Dr Soc 972 at 976.

1667 D Réaume, "Dignity, Choice, and Circumstances", *supra* note 1647 at 539, 543; D Réaume, "Dignity, Equality", *supra* note 1655 at 284.

1668 D Réaume, "Dignity, Equality", *supra* note 1655 at 288.

1669 Ramachandran, "Freedom of Dress", *supra* note 55 at 36. See also Bayer, "Debunking Unequal Burdens", *supra* note 256 at 488-493.

makeup, and body modifications could create amongst employees a feeling of dispossession and thereby violate the safeguard of their dignity.[1670] Yet some appearance choices are more important than others to one's sense of self and some appearance policies are more humiliating than others. It therefore follows that a violation of dignity should be found in appearance regulations that are disrespectful to employees or that result in a denial of employees' choice that make themselves feel disrespected or humiliated.

Under this conception, the fictional employees described in this chapter's introduction, Alex, Kwang, and William, could allege that their employer's appearance requirement is a violation of their human dignity. While I believe some kind of disrespect must be established to demonstrate a violation of human dignity, I argue that denying an employee's freedom of choice regarding their appearance can result in a lack of respect for their dignity.[1671] As seen in Chapter 3, appearance plays a central role in the definition of the self, and denying the full potential of the expression of this self or personhood without legitimate justifications could be an infringement of the right to dignity. In this context, human dignity as an autonomous right could definitely be of use to employees who suffer penalties at work because they are forced to look a certain way that is incompatible with how they want to appear in the world, and at work. Dignity shares some similarities with the right to privacy, as they are both, in some ways, connected to an individual's autonomy, as explained in the following section.

[1670] See e.g. Bayer, "Debunking Unequal Burdens", *supra* note 256 at 493; Brunelle, "Le droit à la dignité", *supra* note 1644 at 293; McKay-Panos, *supra* note 123 at 71.

[1671] I have mentioned in previous work (see Delagrave, *L'apparence physique du salarié*, *supra* note 91 at 64) that I was not so keen on this argument, particularly because in Quebec, under the *Quebec Charter*, many other rights can be used to challenge workplace appearance rules that infringe upon employees' interests in their appearance. In the context of this dissertation, as fundamental rights are not formally protected in most jurisdictions under study, I argue that human dignity could be invoked when the contested appearance rule is a denial of employees' freedom of choice in presenting their self that makes them feel disrespected or humiliated.

6.1.3 Appearance Regulation as an Invasion of Privacy

Privacy is an essential and fundamental value in modern societies and the right to privacy is particularly embedded in the *Universal Declaration of Human Rights*.[1672] The SCC uttered the paramount importance of privacy in a democratic state in these words, qualifying privacy as "[a]n expression of an individual's unique personality or personhood"[1673]: "[g]rounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual."[1674] There are many justifications for considering privacy as a human right:

> privacy is a condition or state that provides the individual with a retreat from the conformist pressures of social norms. Privacy protects the individual from interferences in the personal decision-making process, which can result from ridicule, hostile reactions, and demands to conform. Privacy is essential to the promotion of individualism, and in particular, individual autonomy and independence.[1675]

The concept of privacy implies a certain "right to be let alone,"[1676] and it also involves the "right to be free from intrusion or interference."[1677] Although the right to privacy lacks a precise definition and is quite hard to circumscribe,[1678] it is generally known to include three areas: personal privacy, territorial privacy, and informational privacy.[1679] In the context of employment in recent years, the right to privacy is often analyzed with regards to workplace monitoring and surveillance.[1680] In

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1672 *Universal Declaration of Human Rights*, art 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

1673 *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 65 [*Dagg*].

1674 *R v Dyment*, [1988] 2 SCR 417 at para 17 [*Dyment*].

1675 John DR Craig, "Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355 at 360.

1676 Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193 at 195, cited in Craig, *supra* note 1675 at 358.

1677 *R v Edwards*, [1996] 1 SCR 128 at para 50.

1678 Christian Brunelle & Mélanie Samson, "L'exclusion de preuve obtenue en violation du droit à la vie privée des salariés: à chacun sa vérité?" (2013) 54:2/3 C de D 223 at 228; Lisa M Austin, "Privacy and Private Law: The Dilemma of Justification" (2010) 55:2 McGill LJ 165 at 168; Richard B Bruyer, "Privacy: A Review and Critique of the Literature" (2006) 43:3 Alta L Rev 553 at 555-556; Benoît Pelletier, "La protection de la vie privée au Canada" (2001) 35:1 RJT 485 at 519; Craig, *supra* note 1675 at 380; Karim Benyekhlef, "Les dimensions constitutionnelles du droit à la vie privée" in Pierre Trudel & France Abran, eds, *Droit du public à l'information et vie privée: deux droits irréconciliables?* (Montreal: Thémis, 1992) 17 at 19.

1679 See *R v Patrick*, 2009 SCC 17 at para 26; *R v Tessling*, 2004 SCC 67 at para 24; *Dyment*, *supra* note 1674 at para 19. See also Marta Otto, *The Right to Privacy in Employment: A Comparative Analysis* (London: Bloomsbury Publishing, 2016) at 170; Canada, *Report of the Task Force established by the Department of Communications/Department of Justice: Privacy and Computers* (Ottawa: Information Canada, 1972) at 12-15 [Canada, *Privacy and Computers*].

1680 See e.g. Moira Paterson, "Regulating Surveillance: Suggestions for a Possible Way Forward" (2018) 4 Can J Comparative & Contemporary L 193; Chris Hunt & Corinn Bell, "Employer Monitoring of Employee Online

general, the right to privacy is also mostly protected in terms of an individual's data and personal information, which is covered by numerous specialized privacy acts in Canadian legislation and is much more discussed in the legal literature than personal privacy.[1681] Yet it is particularly the personal aspect of the right to privacy that is relevant, as personal privacy includes the protection of the body, of intimacy, and of autonomy[1682] through fundamental choices.[1683]

Accordingly, the SCC states in *Godbout*[1684] that the right to privacy guarantees a sphere of personal autonomy within which individuals must be free to make their own fundamentally private choices, and to make these fundamentally personal decisions free from unjustified external interference. The Court specifies that only and solely "those choices that are of a fundamentally private or inherently personal nature will be protected."[1685] In the given case, as a condition to obtain

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Activities Outside the Workplace: Not Taking Privacy Seriously" (2015) 18:2 CLELJ 411; Emma Phillips, "The Changing Dimensions of Privacy in the Workplace: Legal Rights and Labour Realities" (2015) 18:2 CLELJ 467; Eloise Gratton & Patrick Gingras, "Accéder ou ne pas accéder au matériel informatique de son employé, telle est la question" in Formation continue du Barreau du Québec, *Développements récents en droit du travail (2014)* (Cowansville, QC: Yvon Blais, 2014) 31; Geneviève Beaudin & Stéphane Fillion, "Les frontières entre la vie privée et la vie professionnelle: revue jurisprudentielle" (2013) 54:2/3 C de D 255; Melanie R Bueckert, *The Law of Employee Monitoring in Canada* (Markham: LexisNexis, 2009).

1681 See e.g. Michael Power, *The Law of Privacy*, 2nd ed (Toronto: LexisNexis, 2017); Otto, *supra* note 1679 at 121-171; England, *Individual Employment Law*, *supra* note 180 at 204-208.

1682 The right to autonomy *per se*—an individual's capacity for self-determination—is not a standalone right in Canadian law (see generally Karim Benyekhlef & Pierre-Luc Déziel, *Le droit à la vie privée en droit québécois et canadien* (Montreal: Yvon Blais, 2018) at 445-461). It is often linked with the right to dignity, as discussed in section 6.1.2, but autonomy is also particularly associated with the right to liberty in s. 7 of the *Canadian Charter* (as I discuss at the end of the present section). However, when the right to liberty (or freedom) and the right to privacy are both protected in the legislation—such as in the *Quebec Charter*—autonomy is arguably better read within the right to privacy with respect to fundamentally personal decisions. In *Godbout*, the SCC specifically analyzed choices of a fundamentally private or personal nature—described as a sphere of personal autonomy—to fall under s. 5 of the *Quebec Charter* right to privacy (instead of the s. 1 right to freedom): "In light of this, I am of the view that *matters involving personal autonomy and privacy*—such as choosing where to establish one's home—*will normally be more appropriately addressed under s. 5.* This is not necessarily to say that s. 1 does not protect personal autonomy at all; rather, it is simply to say that since s. 5 is, by its very terms, aimed directly at protecting individuals' private lives, *matters that implicate privacy and personal autonomy will generally be better dealt with there*. Since I am of the view that the right asserted by the respondent in this case is protected by s. 5, I find it unnecessary to address the arguments made in respect of s. 1." (*Godbout*, *supra* note 1620 at para 95, La Forest J, concurring minority reasons, writing for the majority on this point [emphasis added]). This conception of the right to privacy protecting a sphere of personal autonomy has been reiterated in the case law, and particularly in the Quebec jurisprudence on workplace appearance regulation (see section 6.2.2.2, *below*). Similarly, the concept of privacy in the United States includes a conception of "autonomy privacy" that can be defined as "An individual's right to control [their] personal activities or intimate personal decisions without outside interference, observation, or intrusion." (Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (St Paul, MN: Thomson Reuters, 2014) sub verbo "autonomy privacy").

1683 Canada, *Privacy and Computers*, *supra* note 1679 at 13; Bruyer, *supra* note 1678 at 561-562.

1684 *Godbout*, *supra* note 1620. See also *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 51.

1685 *Godbout*, *supra* note 1620 at para 98.

permanent employment, a municipal worker had signed a declaration stating she would reside within the city's boundaries. The declaration also provided that she would be terminated if she moved out of the municipality, which unfortunately happened approximately one year after she became a permanent employee when she purchased a new house in a neighbouring municipality. The majority held that the city's residence requirement unjustifiably violated the employee's right to privacy enshrined in s. 5 of the *Quebec Charter*:

> by virtue of both the intimately personal considerations that factor into one's choice as to where to live and the very significant effects that choice inevitably has on one's personal affairs, the right to be free from unjustified interference in making a decision as to where to establish and maintain one's home seems […] to fall squarely within the scope of the Quebec *Charter*'s guarantee of 'respect for [one's] private life.[1686]

Therefore, the right to privacy protects individuals' and employees' autonomy, enabling them to make choices that are *fundamentally* private in nature. All human behaviour does not deserve such protection and all individual choices may not necessarily be covered.[1687] But for the considerations discussed in Chapter 3, I contend that physical appearance can be of fundamental significance for individuals. Thus, the right to privacy should *a priori* cover such employees' dress and grooming choices. In fact, the right to privacy has been successfully raised in Quebec to challenge workplace appearance policies,[1688] and I argue that it represents one of the best available legal claims, especially when a mutable aspect of the employee's appearance is at stake or when the policy affects the employee during their off-duty hours.

One simplistic objection to considering employees' appearance as protected by the right to privacy is the "public" nature of appearance choices, which would be contingent on the contemplation of others "to gain their full import."[1689] But "privacy should be about autonomy, rather

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1686 *Ibid* at para 99.

1687 For instance, in *Association of Justice Counsel*, *supra* note 854 at para 50, the SCC concludes that "the ability of the lawyers—for two to three weeks per year—to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s. 7 [of the *Canadian Charter*]." It also notes that "a taste for fatty foods, an obsessive interest in golf and gambling addiction are not afforded constitutional protection" under s. 7, citing its previous decision in *R v Malmo-Levine*, 2003 SCC 74 at para 86. However, the SCC ruling in *Association of Justice Counsel* has been criticized as interpreting the scope of s. 7's liberty interest too narrowly, a position with which I concur. See e.g. Hamish Stewart, "Assn. of Justice Counsel: The Section 7 Liberty Interest in the Context of Employment" (2019) 88:2 SCLR 295.

1688 See section 6.2.2.2, *below*.

1689 Ramachandran, "Freedom of Dress", *supra* note 55 at 31, n 76.

than secrecy."[1690] As the SCC has stressed, the right to privacy benefits people, not places; it is not confined to the home[1691] as it follows individuals in public spaces,[1692] including the workplace. Employees maintain their right to privacy when they are at work,[1693] as the subordination inherent to the contract of employment does not entail any waiver of fundamental rights.[1694]

Fisk is one of the few American legal scholars who suggests analyzing workplace appearance requirements through the lens of privacy.[1695] Although she studies the question in the United States, her argument is relevant to the Canadian context and particularly aligned with my dissertation. She argues that appearance regulations are invasions of the self that deny employees' privacy. Appearance has a lot to do with choices, and workplace appearance regulation actually jeopardizes employees' autonomy to choose what is fundamental to the presentation of their self. Fisk asserts that having control over your own appearance is very important for individuals: "There is a world of difference in choosing to wear something and being forced to wear it. Choosing to wear something is to experience the power to present a self to the world, even if the choice is heavily constrained by social forces and reflects only a decision to blend in by wearing something you would never otherwise choose to wear."[1696] Similarly, Lisa Austin views privacy as protecting "one's capacity for identity formation,"[1697] a conception that helps to conceive how privacy can protect appearance choices as fundamental to one's sense of self as demonstrated in Chapter 3. Thus, a privacy analysis helps us identify the situations in which employers should be allowed to control their

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1690 Fisk, *supra* note 57 at 1139.

1691 See e.g. *Dyment*, *supra* note 1674 at para 20.

1692 See *Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591 [*Aubry*] ("The right to one's image is an element of the right to privacy under s. 5 of the Quebec *Charter*. If the purpose of the right to privacy is to protect a sphere of individual autonomy, it must include the ability to control the use made of one's image. There is an infringement of a person's right to his or her image and, therefore, fault as soon as the image is published without consent and enables the person to be identified" at 592).

1693 See Trudeau, "Vie professionnelle", *supra* note 47 at 21. See also Stéphane Lacoste & Catherine Massé-Lacoste, "Les développements récents en droit de la vie privée appliqués au droit du travail québécois" in Formation continue du Barreau du Québec, *Développements récents en droit du travail (2019)* (Montreal: Yvon Blais, 2019) 89; Benyekhlef & Déziel, *supra* note 1682 at 625.

1694 See *Labourers' International Union of North America, Local 625 v Prestressed Systems Inc* (2005), 137 LAC (4th) 193 at para 32 (Ont Arb) [*Prestressed Systems*]; *Bridgestone/Firestone*, *supra* note 37 at 31. See also *Siemens Canada ltée et Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleuses et travailleurs du Canada (TCA-Canada)*, DTE 2010T-645 at para 93 (Qc Arb) [*Siemens*].

1695 Fisk, *supra* note 57.

1696 *Ibid* at 1122.

1697 Austin, *supra* note 1678 at 168-169.

employees' choices about their appearance, and when the employers' exercise of power should rather be considered illegal for its offensiveness to freedom.[1698] Therefore, the right to privacy should protect appearance choices that are of fundamental importance to employees. Some dress and grooming decisions are important and fundamental to their sense of self for many people, and because the right to privacy includes a protection of fundamental and inherently personal choices, I argue, along with Fisk, that "the right to define your *self* is at the very core of what the right of privacy should protect."[1699]

Aligned with the SCC's definition of autonomy-privacy reiterated in *Godbout*, Fisk argues that analyzing workplace appearance regulation through the lens of privacy would take into account "the right of employees to have a sphere, whether it is the contents of their desk, the content of their thoughts, the contents of their weekend calendar, or the style of their hair that is free from employer control absent a strong justification."[1700] She also asserts that the privacy approach does not come with one of the heavy burdens of the anti-discrimination framework, that is, the immutability of the disputed aspect of the employee's appearance, for it "is the *mutability* of appearance and the *choices* that each person makes about how to express themselves through their appearance that make workplace dress worthy of legal protection."[1701] Even if I argue that appearance choices should be considered as constructively immutable, I agree with her that the right to privacy does not entail this additional burden. A privacy analysis is thus much more suited to deal with workplace appearance regulation as it recognizes that appearance matters and has a significant impact on employees' sense of self and personhood, as I demonstrated in Chapter 3.

Fisk contends that a privacy analysis is more suitable than the anti-discrimination framework that has dominated the literature, as it is not only available to legally protected groups, but generally to all employees who feel invaded by workplace appearance regulation. The right to privacy

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[1698] Fisk, *supra* note 57 at 1125.
[1699] *Ibid* at 1146 [emphasis in original].
[1700] *Ibid* at 1138.
[1701] *Ibid* at 1139 [emphasis in original].

emanates “from the employees’ status as people,” not from “their status as members of a group.”[1702] Indeed, a privacy analysis provides a protection for the individuality of all people, without having to connect their situation to a legally protected group; a “privacy theory is available to any employee who can convince a court that some aspect of a dress code is offensive to their authentic self.”[1703] The privacy approach shifts the focus from group membership to individuality, i.e. to what is really at stake when it comes to appearance.

Fisk also argues that a privacy analysis is more efficient than the anti-discrimination framework for balancing competing employers’ and employees’ interests “by calibrating the strength of the employer interest in regulating appearance to the degree of autonomy infringement that regulation causes.”[1704] The right to privacy approach commands “flexibility and nuance” to distinguish appearance policies that are legally admissible from those that are not.[1705] The doctrinal structure of privacy allows more nuances in the evaluation of the employers’ justifications for appearance regulations that invade privacy, compared to the anti-discrimination analysis where policy justifications can only be analyzed through the BFOR defence.[1706] This observation is applicable to the Canadian context, where the two-step approach to a fundamental rights analysis discussed above would allow for a proportional and balanced analysis of employers’ and employees’ interests. It is also the approach that Quebec adjudicators are actually using under the *Quebec Charter* when analyzing a violation of the right to privacy through s. 9.1, a justificatory provision similar in its purpose and effect to s. 1 of the *Canadian Charter*.

For Fisk, the right to privacy originates from the tort of invasion of privacy, which concentrates on how some actions can “assault a person’s autonomy by affronting their dignity or psyche.”[1707] Her analysis does not focus on the legal source of the right to privacy, but rather explores how privacy can be extended to cover the employees’ right to choose their appearance when a protection

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1702 *Ibid* at 1137.
1703 *Ibid* at 1138.
1704 *Ibid* at 1136.
1705 *Ibid* at 1113.
1706 *Ibid* at 1137.
1707 *Ibid* at 1126.

for privacy does exist—whether through tort law, constitutional law, or statutes. She acknowledges the weakness and sometimes the absence of privacy rights in the workplace in most states in the United States, an observation that can be applied to the Canadian context.

In fact, there is no protection of the right to privacy in statutory human rights laws in the rest of Canada, and invasion of privacy is still yet to be commonly accepted as a common law tort. The Court of Appeal for Ontario accepted in 2012 that Ontario common law recognizes a tort of invasion of privacy (intrusion upon seclusion),[1708] but the Supreme Court of British Columbia clearly rejected this development and stated that "[t]here can be no doubt that there is no common law tort of invasion or breach of privacy in British Columbia […]. Any alleged breach of privacy is only actionable under the *Privacy Act*."[1709] Like a few other provinces, British Columbia does indeed have a specific privacy act that makes it a statutory tort to "wilfully and without claim of right" violate the privacy of a person,[1710] but none of these general statutes provide a precise definition of an invasion of privacy. England notes that these acts are rarely used in employment contexts, suggesting it is probably because of the high costs of civil litigation.[1711] Whether from statute or common law, it should be emphasized that a tort of violation of privacy generally involves the intentional infringement of the right,[1712] while a violation of privacy as a fundamental right—such as the *Quebec Charter*'s right to privacy, for instance—does not include this additional requirement. As employers arguably do not *intentionally* violate their employees' privacy when they adopt appearance policies, a tort of

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1708 *Jones v Tsige*, 2012 ONCA 32 [*Jones*]; Chris D L Hunt, "Privacy in the common law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v. Tsige*" (2012) 37:2 Queen's LJ 665. See also *Stevens v Walsh*, 2016 ONSC 2418; *McIntosh v Legal Aid Ontario*, 2014 ONSC 6136.

1709 *Ladas v Apple Inc*, 2014 BCSC 1821 at para 76. See also *Ari v Insurance Corporation of British Columbia*, 2013 BCSC 1308 at paras 63-65.

1710 *Privacy Act*, RSBC 1996, c 373, s 1(1). Three other common law provinces also have similar privacy statutes: Manitoba (*Privacy Act*, RSM 1987, c P125), Saskatchewan (*Privacy Act*, RSS 1978, c P-24), and Newfoundland and Labrador (*Privacy Act*, RSNL 1990, c P-22). See Otto, *supra* note 1679 at 121.

1711 England, *Individual Employment Law*, *supra* note 180 at 208. See also Jeremy de Beer, "Employee Privacy: The Need for Comprehensive Protection" (2003) 66:2 Sask L Rev 383 at 400.

1712 This requirement for the "wilful" violation of privacy can be found in most specific privacy acts, but not in Manitoba. See *Jones*, *supra* note 1708 at paras 52, 71; Jeff Berryman, "Breach of Privacy in Canada" in Jason NE Varuhas & Nicole A Moreham, eds, *Remedies for Breach of Privacy* (Portland, Or: Hart Publishing, 2018) 323 at 325. See also Benyekhlef & Déziel, *supra* note 1682 at 588-591.

privacy—when such a tort exists in common law—is of limited value for employees to challenge dress and grooming codes.[1713]

Besides, particularly relying on a 2013 SCC case,[1714] some[1715] have argued that employees now enjoy an inherent right to privacy in Canadian law, as the SCC extensively analyzed "the harmful impact on employees' privacy rights"[1716] without any statutory protection of this right or reference to a common law tort of privacy. The SCC's reference to employees' right to privacy was indeed surprising in *Irving Pulp & Paper*, but the context must be taken into account. This case, initiated in labour arbitration, concerns the legality of the employer's right to conduct random alcohol testing of employees holding safety-sensitive positions. As per labour arbitration principles, the SCC confirms that the proper approach to analyze this question is the reasonableness of the employer's policy, which involves, as mentioned in Chapter 4, a balance of the employer's and the employees' interests.[1717] In this context, employees' right to privacy is stated in the absence of a statutory or collective agreement protection, which is not completely uncommon in arbitral jurisprudence—and in workplace appearance arbitral jurisprudence in particular—as I demonstrate in section 6.2.1. This recognition of a right to privacy for unionized employees had also been expressly discussed in *Prestressed Systems*, where Arbitrator Lynk concluded that unionized employees have an implied right to privacy in Ontario.[1718] Therefore, while the argument is compelling, one should be careful to directly conclude that all Canadian employees now enjoy a formal fundamental right to privacy.

Although the province of Quebec has been a latecomer in the enactment of human rights legislation in general,[1719] it is considered a precursor in terms of privacy protection in North

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1713 See Doorey, *The Law of Work*, *supra* note 31 at 443.

1714 *Irving Pulp & Paper*, *supra* note 854. See also *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62.

1715 See Phillips, *supra* note 1680 at 479-482. But see Amanda Clarke & Benjamin Piper, "A Legal Framework to Govern Online Political Expression by Public Servants" (2018) 21:1 CLELJ 1 at 8-9; Doorey, *The Law of Work*, *supra* note 31 at 445-446.

1716 *Irving Pulp & Paper*, *supra* note 854 at para 4.

1717 See Chapter 4, section 4.1.2.2, *above*.

1718 *Prestressed Systems*, *supra* note 1694 at paras 31-38. See also *Toronto (City) v Canadian Union of Public Employees, Local 79* (2004), 128 LAC (4th) 217 at para 16 (Ont Arb); *Centenary Health Centre v Canadian Union of Operating Engineers* (1999), 77 LAC (4th) 436 (Ont Arb).

1719 See Chapter 4, section 4.3.1, *above*.

America.[1720] Not only does it include a statutory protection of the right to privacy in the *Civil Code of Québec*,[1721] but the right to respect for private life is also enshrined in the *Quebec Charter* as a subjective fundamental (and preeminent) right.[1722] Since appearance can be of fundamental importance for individuals, I argue that the right to privacy can definitely cover appearance-related choices when they involve decisions of a fundamentally private or inherently personal nature.[1723] The Quebec jurisprudence is aligned with this position.[1724] Moreover, appearance regulations can represent a blatant violation of the right to privacy, especially when they affect employees during their working hours, but also after their working shifts. Because they interfere "with the lifestyle and choices of an individual outside the workplace,"[1725] appearance requirements concerning beards, hair length, and hair style, for instance, certainly intrude in an employee's private life.

While there is no explicit protection of the right to privacy in the *Canadian Charter*, the SCC has interpreted on multiple occasions that the s. 7 right to liberty of the person includes a protection of the right to privacy in its autonomy dimension.[1726] In *Godbout*, the appeal was founded on both the *Quebec Charter* and the *Canadian Charter*.[1727] The Court reiterated that the right to liberty in s. 7 of the *Canadian Charter* includes a similar protection to the right to respect for private life of s. 5 of the *Quebec Charter*:

> [T]he right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. […] [T]he autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature,

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1720 Craig, *supra* note 1675 at 360; Paul-André Comeau & André Ouimet, "Freedom of Information and Privacy: Québec's Innovative Role in North America" (1995) 80:3 Iowa LR 651 at 651.

1721 Arts 3, 35 & 36 CCQ.

1722 *Quebec Charter*, s 5.

1723 See also Lacoste & Massé-Lacoste, *supra* note 1693 at 173; Benyekhlef & Déziel, *supra* note 1682 at 660; Pedneault et al, *supra* note 32 at 20.329.

1724 See especially *Policiers de Longueuil*, *supra* note 141; *Policiers de St-Jean-sur-Richelieu*, *supra* note 3; *Siemens*, *supra* note 1694; *Girard*, *supra* note 696; *Maxi St-Jérôme*, *supra* note 4.

1725 Collins, *Employment Law*, *supra* note 35 at 232.

1726 *Godbout*, *supra* note 1620; *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 368-369 [*Children's Aid Society*]; *Morgentaler*, *supra* note 1641; *R v Hebert,* [1990] 2 SCR 151; *R v Broyles,* [1991] 3 SCR 595; *Dagg*, *supra* note 1673 at paras 65-66; *R v O'Connor*, [1995] 4 SCR 411 at para 110. See also Power, *supra* note 1681 at 266; Otto, *supra* note 1679 at 128-130.

1727 Even though not all judges agreed on the application of the *Canadian Charter* to municipalities.

> they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.[1728]

This conception referred to Justice La Forest's definition of liberty in the case of *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[1729] in which the Court had to decide whether the right to liberty of s. 7 protected the parents' right to make decisions regarding their children's medical care. As he asserted: "liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[1730] This position also originated from Justice Wilson's conception of liberty in *Morgentaler*, noting liberty was rooted in the concepts of human dignity, personal autonomy, privacy, and choices regarding an individual's fundamental being. Citing herself in a previous decision,[1731] she stated:

> the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric—to be, in today's parlance, 'his own person' and accountable as such.[1732]

This definition of liberty as autonomy seems very appropriate to cover employees' personal appearance choices, as these choices can be deeply related to their sense of self and personhood. Therefore, albeit the limited scope of application of the *Canadian Charter* to state action—which means in employment contexts that it is only applicable to public workers—and even if the term "privacy" does not formally appear in the legal text, it seems clear that the *Canadian Charter* offers a protection of individual autonomy.

Appearance can be an employee's expression of their personal autonomy, which is a protected aspect of the right to privacy. As the right to privacy precisely covers the right to make personal choices that are of fundamental importance to an individual, I argue it generates a proper framework to deal with appearance issues. In jurisdictions where the right to privacy is actually

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1728 *Godbout*, *supra* note 1620 at para 66.
1729 *Supra* note 1726.
1730 *Ibid* at 368.
1731 *R v Jones*, [1986] 2 SCR 284 at 318-319.
1732 *Morgentaler*, *supra* note 1641 at 166.

covered by legislation, it represents one of the best claims for employees to challenge workplace appearance policies, especially when the employer's regulation involves mutable aspects of physical appearance, such as clothing, hairstyle, piercings, tattoos, beards, jewellery, just to name a few. It is also particularly appropriate to challenge appearance regulations that limit employees in their appearance decisions not only during working hours, but also in their private lives—such as beards, hair length, colour and style, piercings, tattoos, and the like. Thus, the right to privacy, when formally protected in the legislation—like in Quebec—represents a better approach to deal with workplace appearance issues than the anti-discrimination framework in its current state in Canadian law. The right to privacy grasps the significance of appearance for employees' sense of self, it is open to all individuals (as opposed to members of a designated group) and it generates a claim for many employees who are denied the right to equality.

6.1.4 Appearance Regulation as a Violation of Freedom of Expression

Another framework for analyzing appearance regulation in the workplace is to consider it as a question of expression. The fundamental freedom of expression, also enshrined in the *Universal Declaration of Human Rights*,[1733] refers to the freedom of all individuals to express their opinions in all forms and ways—although it can be limited, as for all other rights. As an essential foundation of Canadian parliamentary democracy,[1734] freedom of expression is among the most fundamental rights possessed by Canadians. It is freedom of expression that "makes possible our liberty, our creativity and our democracy," and it "rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images."[1735] The SCC identified three underlying values that the protection of freedom of expression is intended to promote: participation in social

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[1733] Art 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[1734] *Dolphin Delivery*, *supra* note 1207 at para 15.

[1735] *R v Sharpe*, 2001 SCC 2 at para 21 [*Sharpe*].

and political decision-making, the pursuit or search for truth, and individual self-fulfilment and human flourishing.[1736] Physical appearance as a means of expression would fall under the protection of individual self-fulfilment. Thus, freedom of expression protects individuals' freedom to communicate in public, which is not limited to the "forms of language-dependent communication" but includes a "whole range of symbolic acts," such as wearing particular clothes.[1737] As "Canadians are increasingly inclined to express themselves through 'body art'," [1738] which includes tattooing and piercing, freedom of expression may constitute a good legal basis to challenge workplace appearance regulation. Therefore, I argue that physical appearance, when it is a means of expression, is protected by the Canadian interpretation of freedom of expression in some cases, although the violation of such freedom may still be justifiable if the infringement is proportional to the employer's serious objective.

A few legal commentators have examined workplace appearance regulation through the lens of freedom of expression. In the British context, Pitt and Clayton contend that freedom of expression includes freedom to choose one's own appearance.[1739] Employees' choices related to dress and appearance are important and meaningful expressions of individual autonomy and identity; "[t]he choices of the shapes, colours and textures we put onto our body are intensely personal statements of who we are."[1740] These choices should warrant protection, for one of the main purposes of freedom of expression is to avoid denying their humanity to human beings by protecting their freedom and autonomy.[1741] Pitt and Clayton also claim that appearance is not just a matter of individual taste, but a symbolic and public way of participating in culture.[1742] Their argument is based on Joseph Raz's[1743] contention that freedom of expression does not merely benefit to individuals but

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1736 See *Ibid* at para 23; *R v Butler*, [1992] 1 SCR 452 at 499; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 [*Irwin Toy*]; *Ford*, *supra* note 1620 at para 56.
1737 Joseph Raz, "Free Expression and Personal Identification" (1991) 11:3 Oxford J Leg Stud 303.
1738 Bosveld, *supra* note 123 at 351.
1739 Pitt & Clayton, *supra* note 313. See also Collins, *Employment Law*, *supra* note 35 at 232.
1740 Pitt & Clayton, *supra* note 313 at 56.
1741 *Ibid*.
1742 *Ibid* at 58.
1743 Raz, *supra* note 1737 at 306-309.

is rather a public good, and thus appearance related choices should not be unjustifiably restrained in a pluralistic society.[1744] Their line of reasoning can be summarized as follows:

> Dress and grooming are significant means of individual self-expression which should be accorded some protection as a weak case of freedom of expression, giving way to competing rights in suitable cases. Dress expresses participation in a culture. By being publicly portrayed a culture, identity or lifestyle is validated. In a pluralistic society this is a positive benefit, to so great an extent that achieving such validation can be used as an argument for the importance of freedom of expression.[1745]

For them, the analysis is misplaced under the anti-discrimination framework, when there is a need to show "how an employee belonging to one group is treated unfairly by comparison with an employee of another group, rather than showing how the employee is being treated unfairly in the context of social values which the system claims to uphold."[1746]

Moldovan argues for the protection of employees' "authentic" selves, including their appearance, through freedom of expression under the lens of the Free Speech Clause of the First Amendment to the United States Constitution. As mentioned above,[1747] while the Free Speech Clause is limited to public employees—such as s. 2b) of the *Canadian Charter*, which protects freedom of expression in Canada—she contends that the values animating freedom of expression should be protected in private employment settings.[1748] The expression of employees' sense of self is very important in the workplace, as Moldovan stresses the value of work to individuals' lives,[1749] an argument that also resonates with mine.

In Canada, a few legal authors contend that employees' appearance should be protected by the right to freedom of expression.[1750] While this position is undertheorized, it generally stresses that 1) some aspects of appearance could be protected by freedom of expression in the workplace—particularly tattoos and piercings; 2) the aspect of appearance must convey meaning to be granted

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1744 Pitt & Clayton, *supra* note 313 at 59.
1745 *Ibid*.
1746 *Ibid* at 70.
1747 See Chapter 2, section 2.2.2, *above*.
1748 Moldovan, *supra* note 86 at 704.
1749 *Ibid* at 716-719.
1750 See e.g. Burchill, *supra* note 94 at 201; Bosveld, *supra* note 123 at 352; CDPDJ (Drapeau), *supra* note 32 at 11-13. But see CDPDJ (Carpentier), *supra* note 145 at 8-9.

protection; and 3) the employer can always justify a violation of freedom of expression if its objective in enforcing the appearance policy is important and the policy is proportional to the objective.

Alongside this viewpoint, I argue that the Canadian definition of the fundamental freedom of expression can include freedom to choose one's own appearance, but only in *some* circumstances. Dress and grooming codes generally limit the ways in which employees can present themselves as individuals and, as such, could interfere with their freedom of expression. But in *Irwin Toy*, the Court stated that in Canada, freedom of expression protects any human activity that is *expressive*, that is, if it conveys or attempts to convey meaning:

> [I]f the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning.[1751]

Hence, to benefit from the protection of freedom of expression, employees must be able to prove that they at least attempt to convey meaning by the disputed aspect of appearance involved.[1752]

It is generally accepted that tattoos and piercings are protected forms of expression.[1753] As forms of art, these activities are deemed inherently expressive; the SCC indicated that "writings, drawing and other forms of visual expression may well be of importance to self-fulfilment."[1754] The Quebec jurisprudence is consistent with this interpretation, considering tattoos as expressive markers protected by the fundamental freedom of expression.[1755] In particular, it is worth mentioning that tattoos clearly have an expressive purpose, and unlike other aspects of appearance, there is generally "no other functional, nonexpressive purpose of a tattoo."[1756]

1751 *Irwin Toy*, *supra* note 1736 at 969.
1752 See Pedneault et al, *supra* note 32 at 20.328.
1753 See e.g. Burchill, *supra* note 94 at 201; Bosveld, *supra* note 123 at 352.
1754 *Sharpe*, *supra* note 1735 at para 107. See also *Aubry*, *supra* note 1692 at para 55.
1755 See e.g. *Policiers de Longueuil*, *supra* note 141; *Policiers de St-Jean-sur-Richelieu*, *supra* note 3; *Girard*, *supra* note 696; *Parent*, *supra* note 940. See also *STL*, *supra* note 6.
1756 Rima, *supra* note 212 at 716.

In this sense, for aspects of appearance that serve other purposes—such as clothes covering the body—and that do not have another meaning than the mere expression of personal taste or preferences for one particular style or fashion, there continue to be different perspectives presented in the literature as well as in the Quebec case law.[1757] On the one hand, some argue that all appearance markers are expressive by nature, as people express their selves and their personality through their clothing and grooming choices. As appearance conveys a message of who the wearer is, they argue, all aspects of appearance should be covered by freedom of expression.[1758] On the other hand, others contend that according to the *Canadian Charter* jurisprudence—which is the reference on freedom of expression—the necessity to allege that the particular aspect of appearance attempts to convey meaning is a requirement to benefit from the protection of freedom of expression.[1759]

I argued in Chapter 3 that according to sociological research, all elements of appearance can be expressive by nature, as means of communicating an individual's identity.[1760] Nevertheless, I adhere to the latter position, as I argue that from a legal point of view, the right to freedom of expression can protect appearance choices, but employees must attempt to convey meaning through the particular aspect of appearance involved to get this protection. In other words, it should not be taken for granted that all aspects of employees' appearance are protected by freedom of expression; rather, freedom of expression protects appearance when employees are trying to convey something with their dress, their grooming choices, their hair colour, etc. Of course, appearance markers that are expressive by nature—such as tattoos, piercings, and clothing bearing a symbol or written message—are *a priori* protected by freedom of expression. For instance, a worker can rightfully challenge their dismissal for wearing a t-shirt with the slogan "There Is No God," as it clearly conveys meaning, as shown in a 2009 Quebec

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1757 See section 6.2.2.3, *below*.

1758 See e.g. Moldovan, *supra* note 86; *Syndicat canadien de la fonction publique, section locale 4628 et Centre jeunesse de Montréal—Institut universitaire*, DTE 2012T-336 at para 162 (Qc Arb) [*Centre jeunesse de Montréal*]; *Caisse Desjardins*, *supra* note 857 at paras 115-116; Pitt & Clayton, *supra* note 313; René Laperrière & Nicole Kean, "Le droit des travailleurs au respect de leur vie privée" (1994) 35:4 C de D 709 at 769; CDPDJ (Drapeau), *supra* note 32.

1759 See e.g. Pedneault et al, *supra* note 32 at 20.328; Robson, *Dressing Constitutionally*, *supra* note 219 at 110, 121; CDPDJ (Carpentier), *supra* note 145. See also Lacoste & Massé-Lacoste, *supra* note 1693 at 177; *CHUM*, *supra* note 931 at para 186; Ramachandran, "Freedom of Dress", *supra* note 55; Otis & Brunelle, *supra* note 169 at 623.

1760 See Chapter 3, section 3.1.4, *above*.

decision.[1761] It should therefore fall on the employee to establish that by wearing a particular item of clothing, for example, they are attempting to convey meaning. This meaning could simply be that a particular aspect of appearance conveys who they are—which would not be very difficult to establish—but to warrant freedom of expression protection, I argue that this requirement is necessary. This standpoint would mean that freedom of expression could not be invoked to challenge a policy banning jeans in general for all employees, for instance,[1762] while a particular employee could raise their freedom of expression to claim that in their case, wearing jeans is fundamental to the expression of their self.

It is worth reminding the reader that when an appearance marker is protected by freedom of expression, it does not necessarily mean that a workplace policy prohibiting it would automatically be invalid or illegal. None of the fundamental rights and freedoms is absolute. As mentioned above, the issue is likely to turn on a proportionality test of justification for the employer's policy. Regarding tattoos for example, while a general ban is difficult to justify nowadays, one can easily imagine that an employer could legitimately justify prohibiting offensive or racist tattoos, such as a Nazi swastika. Another illustration stems from one of the rare arbitration awards applying s. 2b) of the *Canadian Charter*, in which a postman from Canada Post—a public employee—was rightfully disciplined for wearing a red square—a symbol worn in support of Quebec students protesting during the Maple Spring.[1763] After considering that the employer's rule to ban red squares violates the employee's fundamental freedom of expression, the arbitrator concludes that the rule is justified, in order to avoid the public perception that the employer endorses a highly controversial political issue or action.

In Quebec, the fundamental freedom of expression is enshrined in s. 3 of the *Quebec Charter* and thus Quebec private employees can challenge workplace appearance regulation when the disputed element of appearance attempts to convey meaning. However, most of the other Canadian

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1761 *Transformateurs Delta*, *supra* note 871.

1762 See *Centre jeunesse de Montréal*, *supra* note 1758 at para 158. By this, I do not mean that employees should be left without any remedy to claim the right to wear jeans, but instead I argue that freedom of expression is simply not the appropriate legal basis to found this claim, at least when employees cannot claim that jeans means something particular to them. The right to privacy would be more appropriate to challenge a general policy banning jeans. See section 6.1.3, *above*.

1763 *Société canadienne des postes* 2014, *supra* note 639.

provinces and territories do not protect the right to freedom of expression in their human rights statutes—as they are mostly anti-discrimination statutes. The only exceptions are Saskatchewan and Yukon,[1764] both specifically protecting freedom of expression in their respective *Bill of Rights*, embedded in the human rights statutes. Private employees[1765] in these two jurisdictions could accordingly raise this fundamental freedom to challenge workplace appearance regulation, but these jurisdictions fall out of the scope of my dissertation. Finally, the *Canadian Charter* also expressly protects the fundamental freedom of expression in s. 2b), but has been argued, the *Canadian Charter* is only applicable to public employees and is therefore not as significant in the day to day lives of most workers.

6.2 JURISPRUDENCE IN COMMON LAW PROVINCES AND QUEBEC[1766]

In this section, I analyze the case law on workplace appearance regulation with regards to the fundamental rights at work approach. This section is divided in two parts. The first part examines arbitration awards in common law jurisdictions, focusing on British Columbia and Ontario. While fundamental rights are not protected in these provinces' human rights legislation, several cases on appearance policies discuss employees' rights in terms that are related or akin to fundamental rights and freedoms. In the second part, I review the Quebec jurisprudence analyzing dress and grooming codes as fundamental rights issues, focusing on the right to dignity, the right to privacy, and the right to freedom of expression.

1764 *Saskatchewan Human Rights Code*, s 5; Yukon *Human Rights Act*, s 4. It should be reminded that the *Alberta Bill of Rights* also protects freedom of speech, but this fundamental freedom is arguably only applicable to the Alberta legislature (see note 44).

1765 See Ryan Rempel, "Fundamental Freedoms, Private Actors and the Saskatchewan Bill of Rights" (1991) 55:2 Sask L Rev 263 at 265.

1766 For a discussion of the methodology I employed to gather the jurisprudence on workplace appearance regulation, see Chapter 4, section 4.1.2.1, *above*.

6.2.1 References to Fundamental Rights in Common Law Arbitral Jurisprudence

Most common law jurisdictions only protect the right to equality in their human rights statutes, as established in Chapter 4, which means that they do not protect any other fundamental rights and freedoms such as the human rights examined in the first section of this chapter. British Columbia and Ontario are no exception in this regard. However, some arbitration awards on workplace appearance regulation refer to employees' fundamental rights or associated concepts, like self-expression, personal expression, and private choices. In fact, one of the most interesting findings of the workplace appearance case law in common law jurisdictions resides in these references by arbitrators when weighing employees' interests, in the evaluation of the reasonableness of appearance policies.[1767] This finding is surprising, as fundamental rights and freedoms—other than the right to equality—do not benefit from a statutory protection in most common law provinces. Despite this lack of formal protection, some arbitrators seem sensitized to limiting employees' commodification through some sort of natural rights arguments. For example, in a labour case[1768]—although not appearance-related—an arbitrator indeed explains that it is generally accepted by arbitrators that employees have certain basic personal rights that limit the employer's managerial prerogatives, at least unless the employer can demonstrate a negative impact on its business interests.[1769] He also mentions notions of choice and privacy in these terms:

> [E]mployers have no authority to regulate employees in the way they chose to live their personal lives and if, for example, *they wish to wear their hair long or grow a beard, that is as matter of personal choice*; and *when they come to work they continue to have that right* unless the employer can demonstrate that it will affect its legitimate business interests. In a similar manner, employees have *certain rights of privacy* which cannot be easily proscribed by an exercise of management rights.[1770]

Therefore, even in the absence of any statutory protection for these fundamental rights and freedoms, references to freedom of expression, free expression or self-expression[1771]; privacy or

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1767 See Chapter 4, section 4.1.2.2, *above*.

1768 *Fording Coal Ltd (Fording River Operations) and United Steelworkers of America, Local 7884* (1998), 70 LAC (4th) 33 (BC Arb) (ban on cellular phones at the employer's mine site upheld for safety considerations).

1769 *Ibid* at para 19.

1770 *Ibid* [emphasis added].

1771 See e.g. *Revera*, *supra* note 855 at para 20; *Ottawa Hospital*, *supra* note 1 at paras 19, 88; *Ontario Provincial Police*, *supra* note 140 at para 39; *Westfair Foods*, *supra* note 855 at para 11; *Walfoods*, *supra* note 855 at para

private life[1772]; and individual or personal freedom[1773] can be found in a number of arbitration awards related to workplace appearance issues.

In an award justifying the dismissal of an employee who refused to wear the hospital's mandatory uniform introduced to enhance security and control the spread of infection, the arbitrator admits that "[a]lmost every rule requiring the wearing of a uniform can be characterized as an infringement of individual freedom, or as being insensitive to individual pride, at least to some degree."[1774] In the 1976 *Dominion Stores* case, in which an employee was suspended for wearing a beard commonly referred to as a "goatee," the arbitrator also asserts that "there is an ingredient of personal freedom involved in this type of issue and since the rules concerning 'hair' are such that they also affect the employees' off-duty hours, arbitrators have been careful to balance the employees' personal rights against the legitimate interest of the employer."[1775] In *Scarborough Fire Fighters*, in which a firefighter who grew sideburns was demoted, the arbitrator explicitly made a reference to workers' human rights and freedoms as he asserts that by regulating the employee's appearance, the employer "may be infringing on the basic individuals rights and liberties of the employee and may also be jeopardizing his employment, his work record and his compensation."[1776] In *Wardair*, the arbitrator also found that the employer's limit on employees' "freedom to express themselves in what for them is an important and personal way,"[1777] which prohibited earrings for male flight attendants, was unreasonable.

In *Walfoods*, the arbitrator found a rule prohibiting facial piercings and non-dangling earrings unreasonable, after balancing the employees' "right to freely express themselves"[1778] against the employer's objective to ensure food safety in its operations of providing food to various outlets,

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41; *West Lincoln*, *supra* note 861 at paras 14, 16, 17; *National Steel Car*, *supra* note 855 at para 46; *Wardair*, *supra* note 892 at paras 19, 21.

1772 See e.g. *Westfair Foods*, *supra* note 855 at para 11.

1773 See e.g. *Wardair*, *supra* note 892 at paras 19, 23; *UBC Hospital*, *supra* note 864 at para 14; *Dominion Stores* 1976, *supra* note 896 at para 13. See also *Scarborough Fire Fighters*, *supra* note 850 at para 25.

1774 *UBC Hospital*, *supra* note 864 at para 14.

1775 *Dominion Stores* 1976, *supra* note 896 at para 13.

1776 *Scarborough Fire Fighters*, *supra* note 850 at para 25.

1777 *Wardair*, *supra* note 892 at para 21.

1778 *Walfoods*, *supra* note 855 at para 44.

including cafeterias, schools, hospitals, and airports. The arbitrator considered the employees' "rights" in these terms:

> The workers' entitlement to free expression is a freestanding right with its own intrinsic value. There must be cogent operational reasons to abrogate it. As Union counsel submits, some workers wear jewellery and make-up to look attractive; some wear wedding bands as an affirmation of their marriage bond; wearing the accoutrements increases their sense of self-worth and helps to express who they are as individuals. The employees like to present themselves to the world in a particular way, and, unless there are telling reasons to stop them, they should be free to do so.[1779]

As careful consideration was conferred to the employees' interests, the arbitrator's conclusion led to a successful outcome for workers.

In *Ottawa Hospital*, the grievance was allowed because the new dress code provisions, especially the ones requiring employees to cover up large tattoos while at work and prohibiting visible and excessive body piercing, did not meet the test of reasonableness. Arbitrator Slotnick found in favour of the union, who argued that these requirements were "an unreasonable infringement on employees' rights to express themselves in their appearance, unjustified by any health or sanitation concerns, or any complaints by patients."[1780] In his reasons, he makes an astute remark that supports the argument of this dissertation:

> This is not a human rights case. But there are echoes of old human rights debates here. The employer's argument is explicitly based on its willingness to accept and acquiesce to patients' perceived prejudices and stereotypes about tattoos and piercings, even as it offers no evidence that these have any impact on health outcomes. The employer suggests in its argument that the union wishes to 'force' patients to deal with hospital workers flaunting their self-expression through tattoos and piercings. But while tattoos and piercings are not protected under human rights laws, *the evidence in this case was clear that many of the employees regard those aspects of their appearance as an important part of their identity*. The hospital could not and would not accede to the wishes of a patient who might be uncomfortable with a care provider based on the employee's race or ethnic identity, even though some patients might harbour those types of prejudices. However, the hospital seems willing to comply with other types of prejudices and stereotypes that have no link to the quality of the health care received by the patient. Thus, in my view, the patient is not being 'forced' to accept tattoos and piercings; the patient is merely receiving care from workers who reflect the diversity that one would expect in a big-city hospital. That includes employees who choose to decorate their bodies in ways that will not appeal to everybody. It is not patients who are being 'forced,' but rather

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[1779] *Ibid* at para 41.

[1780] *Ottawa Hospital*, *supra* note 1 at para 2.

> employees who are being told to suppress aspects of their identity that are important to them.[1781]

While referring to prejudices and stereotypes, Arbitrator Slotnick articulates an argument for considering tattoos and piercings as discrimination issues. As seen in Chapter 5, some aspects of appearance can be linked to other immutable characteristics that form the analogous prohibited grounds of discrimination in human rights legislation, as they are difficult to change—or, as the SCC puts it in *Corbiere*, "changeable only at unacceptable personal cost."[1782] These aspects should not matter when it comes to someone's livelihood, as someone's race, sexual orientation, or disability should never justify a differential treatment in employment.[1783] In addition, Arbitrator Slotnick asserts that tattoos and piercings are no longer confined to "sailors, stevedores and strippers," and that negative connotations and impressions associated with these aspects of appearance should not, on their own, justify a policy prohibiting them.[1784]

In *Thrifty* 2001, Arbitrator Larson also suggests approaching appearance cases on the premise that particular items of attire "may comprise a fundamental part of the identity of the employee."[1785] Three employees were suspended for failing to remove piercings or jewellery that the employer, a car rental company, qualified as offensive. The arbitrator referred to personal or fundamental rights of employees as a serious consideration in balancing the employer's interests in the no-piercing policy:

> I consider that the proper approach that must be taken in these kinds of cases, is to start from the premise that *employees have a personal right to groom and attire themselves as they wish*. In the ordinary course of events, they are not required to justify their manner of dress or to prove that the way in which they choose to live has social validity.
>
> *The right to live without those kinds of constraints derives from the fundamental rights of citizenship that individuals have in a just and democratic country, a right*

1781 *Ibid* at para 88 [emphasis added].

1782 *Corbiere*, *supra* note 1340 at para 60.

1783 *Contra Canada Safeway* 1998, *supra* note 864 at para 91 (In this case, Arbitrator Kelleher held that a grocery store "no beards" policy was reasonable and not discriminatory. Although the arbitrator concedes that the policy potentially limits personal choices and may be burdensome, he concludes that "[w]earing a beard is a matter of style or grooming. While men may feel strongly about the freedom to grow beards, their conviction alone does not make the issue one of social import and worthy of legislative protection.").

1784 *Ottawa Hospital*, *supra* note 1 at paras 82-84.

1785 *Thrifty* 2001, *supra* note 5 at para 24. See also *Ontario Provincial Police*, *supra* note 140 at para 39.

> *which is not easily left at the factory gate*, the point being that it is not the employee who must justify his life style but the employer who seeks to constrain it, even in cases of attire which is removable.[1786]

The employer in this case also argued that its management rights must precede the employees' interests, a postulate the arbitrator did not take for granted:

> Is it more important to preserve the individual right to groom and attire oneself as one wishes or to advance the business interests of the employer? The interest of the employer cannot be presumed to be more important because one must always be prepared to consider such things as discriminatory effect, or illegality, amongst other things, which must be weighed in the balance.[1787]

Suggesting a diversity of appearances and a "wide variety of cultural traditions" among the workforce could even be a competitive advantage, particularly at the employer's airport locations,[1788] this decision is yet another example of consideration of employees' rights and freedoms in the evaluation of the reasonableness of dress and appearance codes.

It should also be noted that although it does not constitute an express reference to fundamental rights, the consideration of appearance regulations' impact on employees' off-duty hours can be found in numerous arbitration awards. Considering whether the employee is affected in their private life is related to some of the principles emerging from the right to privacy. I reported in Chapter 4 that arbitrators generally distinguish between regulations that have an impact on employees after their work is done, such as hair and beard cases—to which some have rightly assimilated piercings cases as well[1789]—and appearance policies that only affect employees during their shift, such as a mandatory uniform. Arbitrators have to be more careful, in cases affecting employees' off-duty lives, in balancing their personal rights against the legitimate interests of the employer.[1790] The employer's onus to prove that the contested appearance policy is justified is therefore much higher in cases where the employee is limited in their appearance choices not only during working hours, but also after in their private lives.[1791]

1786 *Thrifty* 2001, *supra* note 5 at paras 24-25 [emphasis added].
1787 *Ibid* at para 31.
1788 *Ibid* at para 49.
1789 See e.g. *Calgary Co-op*, *supra* note 855 at para 49; *Westfair Foods*, *supra* note 855 at para 139.
1790 See e.g. *Dominion Stores* 1976, *supra* note 896 at para 13.
1791 See Chapter 4, section 4.1.2.5, *above*.

Although the *Canadian Charter* is generally not applicable to the cases under study for it does not apply to private sector employees, arbitrators have considered fundamental Charter values in some cases, as "collective agreements should be interpreted in the context of the value system prescribed by the Charter."[1792] Employees' freedom of expression has especially been taken into account in cases involving union emblems: "the freedom to express one's view is such an important right that it should not be seen to be left at the plant gate or the store door."[1793] Accordingly, some rules prohibiting union insignia have been considered unreasonable because of the importance of employees' right to express themselves,[1794] but as stated in Chapter 1, union emblems and appearance-related pressure tactics fall out of the scope of this dissertation.

6.2.2 Jurisprudence in Quebec

In Quebec, the fundamental rights and freedoms are specifically protected in the *Quebec Charter*, which is applicable to a majority of workers in the province. Quebec employees can therefore raise these subjective rights when their control over their own appearance is limited in the workplace, depending on the circumstances. The case law on this question shows that employees are quite successful under this approach, when employers do not have legitimate reasons to impinge on their appearance interests, as the fundamental rights and freedoms protected in the *Quebec Charter* benefit from a quasi-constitutional status and should trump employers' management rights when in conflict.[1795] Many rights have been raised in the case law—or could theoretically be raised—to challenge workplace appearance regulation,[1796] but this review focuses on the three most relevant fundamental rights: the right to dignity, the right to privacy, and the right to freedom of expression. Therefore, the following rights are not discussed in this section: the right to liberty and the right to

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1792 *Overwaitea*, *supra* note 104 at para 21. See also *St Mary's Hospital v Hospital Employees Union* (1997), 64 LAC (4th) 250 at para 9 (BC Arb) [*St Mary's Hospital*]; *Doman Forest Products Ltd v IWA, Local 1-357* (1990) 13 LAC 275 at paras 19, 27 (BC Arb) [*Doman Forest Products*].

1793 *Overwaitea*, *supra* note 104 at para 21.

1794 See e.g. *Air Canada* 2019, *supra* note 104; *Telus*, *supra* note 104; *Overwaitea*, *supra* note 104; *White Spot*, *supra* note 104; *Canada Post*, *supra* note 104. See also *Bartlett*, *supra* note 104.

1795 See Chapter 4, section 4.3.3, *above*.

1796 See generally Delagrave, *L'apparence physique du salarié*, *supra* note 91.

inviolability (because in the rare instances they are invoked in the Quebec workplace appearance case law, it is only briefly, without substantial analysis)[1797]; and the fundamental freedoms of religion and association (because they both fall out of the scope of this dissertation).[1798] It should also be noted that the following sections do not aim to present an exhaustive review of the Quebec case law on workplace appearance cases, but rather focuses on the most influential, recent, and noteworthy decisions.

6.2.2.1 The Right to the Safeguard of Dignity

As mentioned in section 6.1.2, the safeguard of a person's dignity is the subject of a specific right in s. 4 of the *Quebec Charter*. As such, any violation of the respect to which employees are entitled simply because they are human beings can be deemed an infringement of human dignity under Quebec quasi-constitutional legislation. It is interesting to note that unlike most other fundamental rights that are raised to challenge workplace appearance regulation, all the cases discussed about the right to dignity do not come from arbitration tribunals. Because other fundamental rights and freedoms can be raised to challenge appearance rules in Quebec, the right to the safeguard of dignity has been mainly used in the case law to challenge sexualized dress codes or employment penalties related to employees' weight or body shape.

In *Restaurant La Courtisane*,[1799] a small restaurant's owner experiencing a clientele drop decided to change the waitresses' dress code—asking for shorter skirts, tight fitting tops, and high-heeled shoes—in order to be more competitive with neighbouring restaurants. The Human Rights Tribunal of Quebec held that the real motive for a waitress's dismissal was that she did not possess the physical attributes to advantageously wear the new waitress attire. In addition to sex discrimination, her termination was found to be a violation of her right to the safeguard of dignity:

1797 See e.g. *Pompiers de Laval*, *supra* note 916; *Pompiers d'Aylmer*, *supra* note 910; *Agropur* 1989, *supra* note 914; *Secur*, *supra* note 918; *Policiers de CUM*, *supra* note 139; *Régie de la Place des Arts c Syndicat de l'Alliance internationale des employés de scènes et de théâtres et des opérateurs de projecteurs de cinéma des USA et du Canada, local B 56*, [1974] SAG 1673 (Qc Arb).

1798 See Chapter 1, section 1.2.2, *above*.

1799 *Supra* note 7.

"When we impose on a person, in order to keep her job as a restaurant waitress, to parade in front of customers dressed in an attire whose sole purpose is to highlight her physical attributes and sexual characteristics, we are undermining her freedom and violating her dignity."[1800] In finding a violation of human dignity, the Tribunal holds that the waitress experienced an infringement of the respect to which she was entitled as an employee and as a human being.[1801]

In another sex discrimination case,[1802] the same Tribunal found that a restaurant's requirement for a waitress to have large breasts and her termination for not being able to do so also violated her right to the safeguard of dignity. The HRTQ assessed that the waitress had felt "insulted, shocked and distressed" when she learned that she was dismissed because of her physical attributes—the size of her breasts; it noted that the waitress was "outraged" and felt "like an object."[1803] Considering this lack of respect and humiliation the claimant experienced, the Tribunal eloquently concludes: "Learning that one is dismissed for the simple reason that one does not correspond to the imposed physiological requirement or to a narrow vision of women is profoundly humiliating, it is a serious violation of human dignity, of a woman's dignity, a violation that cannot be tolerated and that is against [Quebec] Charter's requirements."[1804] Similarly, in *Kirkham*,[1805] a labour commissioner upheld two barmaids' refusal to comply with a new dress code, which included a tight, see-through t-shirt that exposed their bras; the new requirement was found to be a violation of the right to the safeguard of their dignity.[1806]

Finally, the requirement to avoid any weight gain for female workers has been deemed a violation of human dignity in two wrongful dismissal cases. In *Bouchard*,[1807] a hotel receptionist was dismissed after five years of service because she was considered overweight—but not obese. Her competence and the quality of her work performance were very satisfying, but the employer

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1800 *Ibid* at para 38 [translated by author].
1801 *Ibid* at para 39.
1802 *Beaublanc*, *supra* note 1528.
1803 *Ibid* at para 40 [translated by author].
1804 *Ibid* [translated by author].
1805 *Supra* note 825.
1806 *Ibid* at para 104.
1807 *Supra* note 827.

preferred a young, attractive, and thin receptionist to welcome customers in its new hotel. Invalidating her termination, the labour commissioner finds that "[b]eing fired because of one's physical appearance constitutes an unlawful interference to [the complainant's] dignity."[1808] Likewise in *Verreault*,[1809] a bar waitress was terminated because she was considered overweight and did not meet the bar's requirement of being "thin and sexy." Her dismissal was also cancelled, as the labour commissioner considered that she was terminated because of her physical characteristics,[1810] which was in violation of her right to the safeguard of her dignity. Although it can sometimes be difficult to prove that the real reason one was dismissed is because of appearance, in both cases, the employer disclosed unambiguously that the complainant lost her job because of her weight and general appearance. The fact that both employers clearly uttered that the workers' appearance was bad for their business, without being able to prove this argument, literally adds insult to injury and leads to the conclusion that a violation of human dignity is tantamount to disrespect.

6.2.2.2 The Right to Respect for Private Life (The Right to Privacy)

The right to privacy is formally protected in s. 5 of the *Quebec Charter*, and as discussed in section 6.1.3, it covers employees' right to make personal decisions and personal choices which are of fundamental importance to them. Largely coming from arbitration tribunals, Quebec case law on personal appearance at work shows that employees have successfully raised the right to respect for their private life to challenge workplace appearance decisions, particularly when aspects of appearance are considered mutable, i.e. aspects that employees choose or over which they have a certain control. In fact, the case law shows that privacy is the most suited statutory right to raise in opposition to employers' management rights regarding appearance regulations, as it precisely protects employees' right to make personal choices about appearance—which I argued in Chapter 3 are of fundamental significance for their self and their personhood. However, it is important to keep

[1808] *Ibid* at para 17 [translated by author].
[1809] *Supra* note 827.
[1810] *Ibid* at para 53.

in mind that it does not mean that while appearance choices are protected by the right to privacy, they are automatically permitted at work. According to *Quebec Charter* principles, employers can always try to justify their appearance rules through the explicit justificatory provision contained in s. 9.1 of the *Quebec Charter*. The adjudicator will then contextually analyze if the rule is necessary for the employee's specific work, which allows for a better balance of employers' and employees' rights.

While this proper way of addressing fundamental rights—in a two-part analysis—is increasingly present in the Quebec jurisprudence—and in particular, in arbitral jurisprudence—it has not always been the case.[1811] In early appearance cases, and even in some more recent—but sporadic—cases, arbitrators have found that some mutable aspects of employees' appearance are protected by the right to privacy, without any in-depth analysis or without mentioning s. 9.1 of the *Quebec Charter*. I mentioned in previous work that Quebec case law was somewhat chaotic regarding workplace appearance regulation and the *Quebec Charter*,[1812] but the recent jurisprudence is generally more aligned with a proper and balanced analysis of fundamental rights and freedoms, as demonstrated below.[1813] In addition, like the common law jurisprudence, references were seldom made to fundamental rights before the *Quebec Charter* was enacted; for instance, an arbitrator found that a hospital's prohibition of beards for male nurses was covered by their right to privacy.[1814] After the enactment of the *Quebec Charter*, the same conclusion was drawn regarding beards for dietary aides working in a hospital[1815] and employees of money transportation

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1811 On the application of the *Quebec Charter* by arbitrators more generally, an analysis of arbitration awards between 1992 and 1999 revealed that the collective agreement constituted the most frequently employed source used by arbitrators to adjudicate grievances related to discrimination (instead of the *Quebec Charter*) (Guylaine Vallée, Michel Coutu & Marie-Christine Hébert, "La norme d'égalité en milieu de travail: étude empirique de la mise en oeuvre de la norme d'égalité par le Tribunal des droits de la personne et les tribunaux d'arbitrage" in Guylaine Vallée et al, eds, *Le droit à l'égalité: Les tribunaux d'arbitrage et le Tribunal des droits de la personne* (Montreal: Thémis, 2001) 19 at 43-45. See also Denis Nadeau, "L'arbitrage de griefs: vecteur d'intégration des droits de la personne dans les rapports collectifs du travail" in Barreau du Québec & Tribunal des droits de la personne, eds, *La Charte des droits et libertés de la personne: pour qui et jusqu'où?* (Cowansville, QC: Yvon Blais, 2005) 153 at 161).

1812 Delagrave, *L'apparence physique du salarié*, *supra* note 91 at 118-120.

1813 Vallée comes to a similar conclusion regarding the application of the *Quebec Charter* by arbitrators more generally. See Vallée, "Labour Law", *supra* note 753 at 153-156.

1814 *Syndicat national des employés de l'Hôpital Notre-Dame-de-la-Merci et Hôpital Notre-Dame-de-la-Merci*, [1973] SAG 1480 at 1482 (Qc Arb).

1815 *Hôtel-Dieu de Montréal*, *supra* note 915 at 11.

businesses.[1816] Now, according to the case law, the right to privacy covers a large spectrum of chosen appearance markers, from long hair for male firefighters[1817] to wearing jeans for hospital employees.[1818]

It is important to note that Quebec case law also makes a distinction concerning workplace appearance requirements that affect employees in their "off-duty" life, especially in relation to the right to privacy. This is particularly true for the requirement to be clean shaven at work, as Justice Martineau explains in *Brinks* 1983: "Prohibiting the wearing of beards goes beyond employees' dress and appearance requirements; uniforms can be removed once the working day is over, but beards cannot be restored at will as one can easily change clothes."[1819] An arbitrator also rightly affirms that one cannot wear a beard at home or during the weekend and simultaneously be clean shaven at work, and that one cannot have dyed hair at home, but not in the workplace.[1820] When employees are limited in their appearance choices not only during working hours, but also after work in their private life—such as the prohibition of beards and requirements on hair length, colour, and sometimes style—adjudicators should conclude *a priori* that there is a violation of the right to privacy. The same goes for tattoos and piercings.

One of the most notable—and most cited—cases involving mutable aspects of appearance and the right to privacy is *Maxi St-Jérôme*,[1821] in which two supermarket employees were disciplined. Relying on *Godbout*,[1822] Arbitrator Dubé finds that facial jewellery—in this case, an eyebrow piercing—and non-traditional hair dye—in this case, pink hair—fall into the "sphere of personal autonomy" protected by the right to privacy and both affect decisions that are of a "fundamentally private or inherently personal nature."[1823] In this progressive and thorough decision, the arbitrator

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1816 *Secur*, *supra* note 918 at 10-11; *Brinks* 1983, *supra* note 1423 at 7.
1817 *Pompiers de Montréal* 1990, *supra* note 872 at 7.
1818 *CHUM*, *supra* note 931 at para 186.
1819 *Brinks* 1983, *supra* note 1423 at 7 [translated by author].
1820 *Siemens*, *supra* note 1694 at para 91.
1821 *Supra* note 4.
1822 See section 6.1.3, *above*, for more detail on the SCC decision in *Godbout*.
1823 *Maxi St-Jérôme*, *supra* note 4 at 17 [translated by author].

concludes that the SCC's and the Court of Appeal of Quebec's jurisprudence[1824] on the broad and liberal interpretation to be conferred on the right to privacy makes the past case law on employees' appearance obsolete.[1825] Finding a violation of the two employees' right to privacy, the arbitrator then rightly considers the employer's arguments to conclude that this violation is not justified under s. 9.1 of the *Quebec Charter*. Although the employer, a supermarket in the outskirts of Montreal, presented a customer survey to prove that the two contested aspects of appearance would have a prejudicial effect on its corporate image, the evidence was deemed "totally insufficient, if not non-existent."[1826] This award, which showcases a sound and rigorous analysis based on privacy, guided the subsequent workplace appearance case law in Quebec,[1827] as a majority of the recent cases either refer to *Maxi St-Jérôme* or present a detailed two-part analysis while considering restrictions on mutable aspects of appearance as violations of the right to privacy.

In *Girard*,[1828] a Superior Court of Quebec judicial review struck down an arbitration award and found a daycare facility's prohibition of visible tattoos in violation of the right to privacy and freedom of expression. Although not referring to *Maxi St-Jérôme*, but relying on *Godbout* and *Aubry*, Justice Bouchard states that "there is no doubt that a person's choice to have their skin pierced and to wear a permanent mark on their body is part of these decisions falling under the sphere of personal autonomy protected by the right to privacy."[1829] The court found that the daycare facility's policy was based on prejudices and stereotypes and that the employer did not bring any evidence to justify its policy's necessity. While it could have ended here, the court briefly examined whether the violation of the right to privacy and freedom of expression were justified under s. 9.1 of the *Quebec Charter*, finding that it was not. This ruling is particularly interesting as it demonstrates a

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1824 See especially *Bridgestone/Firestone*, *supra* note 37; *Aubry*, *supra* note 1692; *Godbout*, *supra* note 1620.

1825 *Maxi St-Jérôme*, *supra* note 4 at 19.

1826 *Ibid* at 22.

1827 But not in *Caisse Desjardins*, *supra* note 857, in which the arbitrator goes against the jurisprudence to focus instead on the reasonableness of the employer's policy. In this case, the arbitrator finds that the employer's mandatory jacket requirement does not infringe on the employees' privacy. In doing so, Arbitrator Fabien asserts that the *Quebec Charter*'s right to privacy should be interpreted in the light of art. 36 CCQ, a position that seems to forget the quasi-constitutional status of the *Quebec Charter* and its precedence over the CCQ.

1828 *Supra* note 696.

1829 *Ibid* at para 18 [translated by author].

good analysis of Charter principles; it is one of the few cases emanating from a superior tribunal that focuses on workplace appearance; and it puts forward a progressive argument about tattoos in particular: "Tattooing, nowadays, is a widespread phenomenon that cuts across all levels of society. If it was once associated to people with links to delinquency, this is no longer the case."[1830]

In *Siemens*, an electrical panel manufacturing company enforced a new policy banning, among other things, all jewellery for all employees. Arbitrator Lussier finds that "for sure," the prohibition of jewellery is relevant to a person's physical appearance, and although the *Quebec Charter* does not protect appearance and image as such, it protects the right to privacy of which physical appearance and image are attributes.[1831] "This includes," he affirms, "the ornamental aspects, jewellery for example, which are considered by many people as part of their identity."[1832] Carefully examining the employer's justification—based on health and safety concerns in the plant—under s. 9.1 of the *Quebec Charter*, the arbitrator found that the policy was an unlawful interference with the fundamental right to privacy, mainly because it was too general in terms of the jewellery that was prohibited but also in terms of the too many employees to which it applied.

In *Commission scolaire des Samares*,[1833] the union contested a school board dress code for employees teaching professional training in health sector programs. Relying on the new case law, Arbitrator Flynn finds that the prohibition of dyed hair, the general restrictions on jewellery, the mandatory white coat in theoretical courses, and the ban on jeans all violate the employees' right to privacy. The arbitrator also conducts a detailed two-part analysis to establish that the violation is not justified under s. 9.1 of the *Quebec Charter*. She concludes that the employer's policy includes several requirements that infringe on employees' fundamental rights and that the scope of these requirements is sometimes incoherent and disproportionate with its objective—to educate students about the importance of appropriate dress in their future work environments.

1830 *Ibid* at para 29 [translated by author].
1831 *Siemens*, *supra* note 1694 at para 90.
1832 *Ibid* at para 100 [translated by author].
1833 *Supra* note 857.

In *UPS* 2012,[1834] the package delivery company's[1835] long-standing appearance policy was disputed, particularly regarding the hair length requirement. It is important to note that unlike most appearance cases, employees agreed to the policy at the time of their hiring, which means that the policy was entirely integrated to the obligational content of their employment contract.[1836] In a lengthy award, Arbitrator Rousseau concurs on the fact that employees' appearance is covered by the right to privacy and freedom of expression. However, because the union agreed to the policy for decades, the policy is deemed reasonable, without any real analysis under s. 9.1 of the *Quebec Charter*.

In *Aliments Olympus*,[1837] a restaurant cook got disciplined because of his eyebrow piercing. Holding that the employer could not ask its employee to remove his piercing, Arbitrator Gagnon finds that the employer's policy violates the employee's right to privacy and freedom of expression. Even if the employer's policy was based on the Quebec *Food Products Act*[1838] and the *Regulation respecting food*[1839]—an argument of health and safety—the arbitrator concludes that because the cook's piercing could not fall into the food products,[1840] it was not proscribed by the legislation.

Finally, Arbitrator L'Heureux came to similar conclusions in two cases involving tattoos for police officers, in 2016[1841] and 2019,[1842] holding that the employers' restrictions on tattoos were invalid, as unjustified violations of the right to privacy and freedom of expression. In *Policiers de St-Jean-sur-Richelieu*, the employer argued that the policy was justified to protect its image as the

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1834 *Teamsters Québec, section locale 931 et United Parcel Service Canada ltée (UPS)*, DTE 2013-451 (Can Arb) [*UPS* 2012].

1835 Although UPS is under federal jurisdiction—as a transportation company that involves crossing provincial and international borders—the arbitrator found that the *Quebec Charter* and the CCQ both apply to UPS. While applying Quebec legislation on employment relations to UPS and its employees does have an impact on the management of the company, he found, this impact does not impair UPS to carry out its enterprise in what makes it specifically of federal jurisdiction. See *ibid* at 60.

1836 It is not the first time that employees tried to challenge UPS's appearance policy. In 2003, relying on s. 7 of the *Canadian Charter*, Arbitrator Foisy concluded that the policy was an unjustified violation of the employees' right to privacy. However, because the arbitrator exceeded his jurisdiction, the Superior Court of Quebec repealed the award, after several court proceedings. See *Employés du transport local et industries diverses, section locale 931 et United Parcel Service Canada*, DTE 2003T-1129 (Qc Arb), rev'd 2006 QCCS 1466 [*UPS* 2003].

1837 *Supra* note 920.

1838 CQLR c P-29.

1839 CQLR c P-29, r 1.

1840 Arbitrator Gagnon notes several times in the award that her decision only concerns the employee's specific eyebrow piercing, that she qualifies as "fixed," mentioning that it could only be removed by a professional. See *Aliments Olympus*, *supra* note 920 at para 62.

1841 *Policiers de St-Jean-sur-Richelieu*, *supra* note 3.

1842 *Policiers de Longueuil*, *supra* note 141.

police force, which must be reassuring and neutral for the public. Arbitrator L'Heureux proceeds with a detailed analysis of the violation's justification under s. 9.1 of the *Quebec Charter*, noting that the evidence "did not demonstrate that tattoos are, today, in Quebec, a social nonconformist marker. On the contrary, there is clear and preponderant evidence that tattoos, over the years, have become something common and trivialized."[1843] Confirming that some tattoos can be banned—with a sexist or racist connotation, inciting violence, or promoting drugs or alcohol—she concludes that the association between tattoos (that are not offending) and a loss of confidence in the population towards police officers is "very speculative and does not meet the test established in *Oakes*, especially because of the significant restrictions imposed."[1844] In the end, this award also cancels one of the employer's contested requirement that police officers obtain prior approval from their employer when they want to get a tattoo, as "the decision to get a tattoo is a personal decision."[1845]

In *Policiers de Longueuil*, Arbitrator L'Heureux was asked to determine the legality of a policy on tattoos and piercings for police officers. As it now seems clear that a tattoo ban at work is a violation of the right to privacy and freedom of expression, a detailed analysis was again conducted under s. 9.1 of the *Quebec Charter* in order to establish if the violation was justified with the sufficiently important objective of protecting the image of the police service to maintain public confidence. Not all tattoos were banned under the contested policy, and so the arbitrator proceeds to examine the rational connection between the police force's objective and the prohibited type of tattoo. In this award, Arbitrator L'Heureux finds that several types of tattoos can be banned for police officers under the *Quebec Charter*: visible tattoos with extremist, blasphemous, or violent connotations; visible tattoos with an image or symbol associated with criminality; and tattoos on a police officer's face. However, she also finds that the prohibition of a "visible tattoo with a characteristic that goes against one of the police service's values namely the service to the public,

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1843 *Policiers de St-Jean-sur-Richelieu*, *supra* note 3 at para 90 [translated by author].
1844 *Ibid* at para 108 [translated by author].
1845 *Ibid* at para 113 [translated by author].

professionalism, respect, integrity and loyalty"[1846]; the prohibition of tattoos on hands; and the ban on piercings are illegal as they do not respect s. 9.1 of the *Quebec Charter*.

These cases show that an analysis of workplace appearance regulation based on the *Quebec Charter*'s right to privacy—particularly when there is a substantial analysis under the justificatory provision of s. 9.1— generally leads to balanced solutions and positive outcomes for employees. This jurisprudence review also shows that the fundamental rights at work framework is a good approach to limit the employer's management rights and to deal with the issue of appearance at work.

6.2.2.3 The Right to Freedom of Expression

Freedom of expression protects individuals' right to express themselves. Considering the conclusions of Chapter 3—that appearance is a strong means of self-expression—it could be argued that all aspects of appearance be covered by the fundamental freedom of expression. However, I also noted in Chapter 3 that communicating through appearance is not as easy as it seems, as some sociological scholars have observed a weakening of the code of appearances and the misinterpretation—which can lead to bias and stereotypes—that can too often happen when trying to read someone's identity or personhood through their appearance.[1847] Although it is clear in the sociological literature that appearance can serve to communicate one's self, it is not as clear in the Quebec jurisprudence that this communication is always protected by the right to freedom of expression. As mentioned in section 6.1.4, in legal terms, establishing the expressive content of the contested aspect of appearance should be necessary, as the fundamental right to freedom of expression protects any activity that conveys or attempts to convey meaning.

Some adjudicators might have concluded too hastily in finding violations of freedom of expression in a few cases, particularly regarding beards and hair length. In these cases, the

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[1846] *Policiers de Longueuil*, *supra* note 141 at para 98 [translated by author].
[1847] See Chapter 3, section 3.1.4.3, *above*.

interference with freedom of expression was quickly established, without any real analysis of the requirement to prove the transmission of a message or meaning—although this requirement has always been present in the SCC jurisprudence.[1848] In *Policiers de CUM*,[1849] the prohibition of beards was considered an infringement of freedom of expression—before the *Quebec Charter* was enacted. In *Brinks* 1983[1850] and *Secur*[1851] (two armoured car companies), beards were also deemed protected by freedom of expression, without any real analysis of the content of this fundamental freedom. In *UPS* 2003,[1852] although it was quashed in judicial review, the prohibition of beards and long hair for male employees was considered in violation of the employees' freedom of expression (among other rights) in a package delivery company. All these cases involve facial hair, and although one could easily argue that beards can be very important to some employees' identity, it might be more difficult to explain what message or meaning the beard wearer is trying to convey, besides a message of "this is who I am." While it could be successfully argued, it was never explicitly demonstrated in the jurisprudence. Moreover, when it comes to beards and hair, the case law has proven itself more respectful of employees' rights when the issue is regarded as an infringement of privacy. In fact, the right to privacy is still more compelling as it protects the right to make personal choices about your appearance, such as the decision to grow and maintain a beard. The right to privacy is also even more relevant when it comes to mutable aspects of appearance that are affected during employees' off-duty life, such as beards.[1853]

An illustration of this controversy can be observed in *Centre jeunesse de Montréal*,[1854] in which dress and appearance policies were challenged by the employees' union in a youth center, particularly regarding restrictions on clothing, tattoos, hair colour and length, piercings, and beards. In a lengthy award, Arbitrator Jobin frequently mentions the chaotic nature of the union

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1848 See e.g. *Irwin Toy*, *supra* note 1736.
1849 *Supra* note 139 at 1515.
1850 *Supra* note 1423 at 7.
1851 *Supra* note 918 at 14.
1852 *Supra* note 1836 at para 76.
1853 See e.g. Collins, *Employment Law*, *supra* note 35 at 232; Hay & Middlemiss, *supra* note 361 at 73; CDPDJ (Drapeau), *supra* note 32 at 25; *Brinks* 1983, *supra* note 1423 at 7; *Dominion Stores* 1976, *supra* note 896 at para 13.
1854 *Supra* note 1758.

representative's arguments, which might have affected his decision. He concludes that while the contested policies violate the employees' fundamental rights—freedom of expression and right to personal inviolability (integrity)—they are justified under s. 9.1 of the *Quebec Charter*, as employees in this particular context are role models for a young, vulnerable, and impressionable clientele. Interestingly, the arbitrator recognizes that some legal authorities suggest that restrictions on clothing cannot violate freedom of expression if the clothes do not convey meaning.[1855] However, relying on another arbitration case—which found that the mandatory jacket policy for female employees of a credit union violated their freedom of expression, but was justified under s. 9.1[1856]—he finds that clothing and dress codes should be analyzed through freedom of expression and not through the right to privacy, holding that privacy has a limited impact on employees when they are at work—a position that I disagree with, as mentioned above.

As discussed above, however, the uncertainty around freedom of expression and appearance should not involve items of appearance that are clearly expressive, such as clothing bearing a written message and symbols of support for a particular cause.[1857] The ambiguity does not apply to tattoos and piercings, as the case law now seems clear that they both are covered by freedom of expression. In one small claims case,[1858] in which a camp counselor was fired because of his tattoos on his arms and chest, Judge Poirier finds that tattoos are protected by s. 3 of the *Quebec Charter* freedom of expression. After a thorough analysis of the sociological aspects of tattoos, he concludes that tattoos are undoubtedly a form of art that is communicative by nature, and that they are forms of expression fully covered by the right to freedom of expression. He then conducts a careful analysis of the employer's justification under s. 9.1 of the *Quebec Charter*, to conclude that the infringement of the applicant's freedom of expression was not justified.

In the last two decades or so, freedom of expression has often been raised along with the employees' right to privacy in workplace appearance cases. This might be partly explained by the

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1855 *Ibid* at paras 157-158.
1856 *Caisse Desjardins*, *supra* note 857.
1857 See e.g. *Société canadienne des postes* 2014, *supra* note 639; *Transformateurs Delta*, *supra* note 871.
1858 *Parent*, *supra* note 940 at 6.

simultaneous references in *Maxi St-Jérôme*, a case that is frequently cited in Quebec workplace appearance jurisprudence. However, in this case, Arbitrator Dubé mentions that the contested aspects of appearance—an eyebrow piercing and pink hair—are *probably* protected by freedom of expression, but he refuses to analyze the question, as having already concluded that a violation of the right to privacy has occurred.[1859] In *Girard*, in which the requirement to cover any tattoo was deemed invalid partly because it infringes on employees' right to privacy, Justice Bouchard finds that the employer's policy is also in violation of freedom of expression in these terms: "Regarding tattoos, the Tribunal therefore has no hesitation in seeing a form of expression in this practice of adorning one's body with signs or drawings."[1860] Lastly, in both *Policiers de St-Jean-sur-Richelieu* and *Policiers de Longueuil*, discussed in the previous section, Arbitrator L'Heureux finds that restrictions on tattoos violate employees' freedom of expression,[1861] but the employer in these cases did not dispute the fact that a violation of the right to privacy and freedom of expression were both established.

In *Société de réadaptation*,[1862] a ban on sunglasses for employees within a residence for people with mental health issues is also considered in violation of freedom of expression (in addition to the right to privacy), but the employer's requirement is deemed valid and legal as the violation is justified under s. 9.1 of the *Quebec Charter*. Arbitrator Gagnon thus qualifies the violation of the employee's freedom of expression as "minimal,"[1863] concluding that "the minimal impairment to [the employee's] freedom of expression is justified under the circumstances."[1864] In this case, the evaluation of the fundamental right's violation and its justification are carefully analyzed and indeed generate a balanced outcome; wearing sunglasses *may* express one's personality—although in a rather feeble manner—while wearing sunglasses indoors may not generate the best social interventions in a context of residents suffering from mental health issues.

1859 *Maxi St-Jérôme*, *supra* note 4 at 18.
1860 *Girard*, *supra* note 696 at para 21 [translated by author].
1861 *Policiers de Longueuil*, *supra* note 141 at para 61; *Policiers de St-Jean-sur-Richelieu*, *supra* note 3 at para 64.
1862 *Supra* note 876.
1863 *Ibid* at para 61.
1864 *Ibid* at para 62 [translated by author].

This review of the Quebec case law on workplace appearance and freedom of expression demonstrates that a violation of this fundamental right is sometimes rapidly established, and this may have something to do with a popular conception of appearance as expressing individuals' sense of self. But freedom of expression can be raised by Quebec employee to challenge workplace appearance regulation in many cases, and should not be overlooked when such policies interfere with an appearance marker that attempts to convey meaning. This jurisprudence can also be rich in lessons for jurisdictions where the only relevant fundamental right that is protected in statutory human rights legislation is in fact the right to freedom of expression, such as Saskatchewan and Yukon.

6.3 THE IMPLEMENTATION OF THE FUNDAMENTAL RIGHTS AT WORK FRAMEWORK IN CANADA

Under the fundamental rights at work framework, employees can raise fundamental rights and freedoms—particularly the right to human dignity, the right to privacy, and freedom of expression—to challenge workplace appearance regulation. The definition and content of the three fundamental rights discussed in this chapter serve to better illuminate their use in appearance issues, and the Quebec case law offers illustrations of concrete applications. The following section analyzes the limits and the benefits of the fundamental rights at work framework and finishes with a proposition for legal reform in the rest of Canada.

6.3.1 Limitations of the Fundamental Rights at Work Framework

Because most of the federal and provincial human rights laws in Canada only offer a protection of the right to equality (aligned with the anti-discrimination framework), there is no statutory right to human dignity, privacy, or freedom of expression in private domains, that is, in a majority of Canadian employment relationships. Without being able to refer directly to the statutory legislation, which would protect fundamental rights at work, non-unionized employees who want to challenge workplace appearance regulation are left with nothing more than the existing anti-

discrimination legislation.[1865] This, alone, is a major drawback for the fundamental rights at work framework, as except for Quebec (and to a lesser extent, Saskatchewan and Yukon), this approach is not grounded on any legal instrument.

When the employment relationship involves the government, the *Canadian Charter* can certainly be of use with its constitutional supremacy and the many rights and freedoms it protects. Technically, the *Canadian Charter* only benefits public sector employees, for only they can bring a claim against their employer—a state actor. But it seems that the Charter presents greater potential even for private sector employees. Even if it is clear that this legislation does not apply directly to private party disputes,[1866] Bosveld notes that the *Canadian Charter* is increasingly influencing arbitrators in their decisions on workplace disputes, as they have been more "willing in recent years to take into consideration 'fundamental Charter values'."[1867] Thus, the Charter should have an impact on the way workplace appearance regulation claims are decided even for private sector workers, "by means of its 'indirect effect'"[1868] on Canadian law. Following SCC's principles, Gilles Trudeau also argues that Canadian courts, including labour arbitrators, "must apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the [*Canadian Charter*]."[1869] Collins supports a similar view with regard to the indirect effect of the *Human Rights Act 1998* on UK law.[1870] He explains "that courts are bound to try to apply an interpretation that respects [the Act's] rights as far as possible" when interpreting national legislation in private

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1865 In Quebec, employees with two years of employment who are dismissed because of their appearance can also file a complaint to the CNESST, but if they are otherwise sanctioned (but not dismissed) or if they simply want to oppose their employer's appearance policy, the s. 124 of the ALS recourse is not open. In most other jurisdictions, there is no equivalent to this recourse. See Chapter 4, section 4.1.1.2, *above*.

1866 See Chapter 4, section 4.3.1.4, *above*.

1867 Bosveld, *supra* note 123 at 352. See e.g. *Telus*, *supra* note 104 at paras 45-46; *Overwaitea*, *supra* note 104 at para 21; *St Mary's Hospital*, *supra* note 1792 at para 9; *Doman Forest Products*, *supra* note 1792 at paras 19, 27.

1868 Collins, *Employment Law*, *supra* note 35 at 214.

1869 Trudeau, "Vie professionnelle", *supra* note 47 at 16, citing the SCC in *Dolphin Delivery*, *supra* note 1207 at para 39.

1870 Collins, *Employment Law*, *supra* note 35 at 214. See also KD Ewing, "The Human Rights Act and Labour Law" (1998) 27 ILJ 275.

disputes, which means that although the Act only applies to public sector workers, private sector workers could also indirectly benefit from it.[1871]

Hence, Bosveld suggests that workplace appearance regulation must in part be treated in the light of the fundamental rights and freedoms enjoyed by Canadians, as Arbitrator Larson rightly asserts in the *Thrifty* case.[1872] In this award, Arbitrator Larson recognized the need to balance employers' and employees' interests. In examining the validity and the reasonableness of the employer's policy, he proposes to recognize that employees have a "basic right to attire and groom themselves as they please," [1873] and that they should not have to demonstrate that their appearance choices are grounded in socially accepted norms. Bosveld argues that this view, although implicitly, endorses "the consideration of fundamental Charter values."[1874] Aligned with this position, several other arbitrators arguably consider fundamental Charter values, considering the frequent references to fundamental rights in workplace appearance cases discussed in section 6.2.1. Bosveld also notes Arbitrator Larson's interesting contention that "the citizens of a just and democratic country have the right to express themselves through their appearance, and that employees therefore do not have to justify their appearance; rather, employers who seek to impose restrictions on expression must justify their actions."[1875] Finally, Bosveld's suggestion to take inspiration from fundamental rights and freedoms of the *Canadian Charter* in arbitral decisions and employment cases seems desirable and feasible in the present day context with the existing legislation. Of course, the amendment of statutory human rights laws in the rest of Canada to include fundamental rights and freedoms just like the *Quebec Charter* would be even more appealing, but less of a foreseeable solution in the near future.

Lastly, one practical downside of the fundamental rights at work framework is worth mentioning with regards to the *Quebec Charter*. The possibility of filing a complaint to the CDPDJ is

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1871 Collins, *Employment Law*, *supra* note 35 at 213-214.
1872 *Thrifty* 2001, *supra* note 5 at 169.
1873 Bosveld, *supra* note 123 at 355.
1874 *Ibid* at 353.
1875 *Ibid* at 362.

only open to cases of discrimination within the meaning of s. 10 to 19 of the *Quebec Charter*.[1876] Therefore, the sphere of investigation of the Commission is limited to violations of the right to equality, and so for all other fundamental rights and freedoms, including the right to privacy and freedom of expression, the claim cannot be facilitated through the Commission. After investigating the claim, if the Commission decides to represent a complainant in court, the recourse is free for the complainant, but again this is only open to discrimination cases. So a major downside of the fundamental rights at work framework, even when it is implemented in the legislation as it is in Quebec, is that non-unionized employees who want to challenge their employer's appearance regulation in court will often face access to justice problems, such as the high costs of civil litigation mentioned in Chapter 4.[1877] Seeking remedy through small claims courts remains possible to raise fundamental rights against adverse employment action founded on appearance,[1878] and can be less expensive than usual courts—depending on the jurisdiction—but the remedies remain limited to a certain amount. For Quebec employees, the claim thus remains easier to make (and free) if they raise a violation of their right to equality to challenge workplace appearance regulation.

More importantly, without a formal protection of employment for non-unionized employees, even if fundamental rights and freedoms were protected in statutory human rights laws, employees would arguably be reluctant to challenge an appearance policy in civil courts against their current employer without the fear of losing their job.[1879] As mentioned in Chapter 4, in all Canadian jurisdictions, employers can legally and unilaterally terminate their employees if they give them reasonable notice.[1880] This reasonable notice of termination, which exists for employment contracts of indefinite term, allows employers to dismiss employees without any cause and can often be paid in wages in lieu of the notice period.[1881] One can easily imagine that non-unionized employees would

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1876 *Quebec Charter*, s 71(1). According to this provision, the CDPDJ is also competent for issues related to equal access to employment programs of s. 86, as well as a violation of the right of aged or handicapped persons against exploitation enunciated in s. 48.

1877 See Chapter 4, sections 4.1.1.1 & 4.1.1.2, *above*.

1878 See e.g. *Parent*, *supra* note 940.

1879 See Phillips, *supra* note 1680 at 468; Trudeau, "Vie professionnelle", *supra* note 47 at 17.

1880 See Chapter 4, sections 4.1.1.1 & 4.1.1.2, *above.*

1881 For more on the termination of an employment contract by due notice or wages in lieu thereof in common law jurisdictions, see England, *Individual Employment Law*, *supra* note 180 at 289-323. For the termination of an

fear the consequences of challenging any appearance-related decision in front of the courts, in addition to the access to justice problems. In Quebec, s. 124 of the ALS offers a protection of employment for employees with two years of service who are the object of unjust dismissal,[1882] but as stated in Chapter 4, there is no equivalent in other provinces. Therefore, while a formal statutory protection of the three rights discussed in this chapter—the right to dignity, the right to privacy, and the right to freedom of expression—would theoretically provide employees with a new avenue for protecting their appearance in the workplace, such protection should be complemented by other legal mechanisms of enforcement. For unionized employees, however, a formal protection of fundamental rights would strengthen their position in the balance of their interests against those of the employer,[1883] and this could lead to more successful outcomes in labour arbitration when analyzing workplace appearance policies' reasonableness.

6.3.2 Benefits of the Fundamental Rights at Work Framework

There are several advantages in considering appearance questions under the fundamental rights at work framework. First, this approach does not consider appearance issues through equality lenses, and therefore avoids the problems related to the anti-discrimination framework discussed in Chapter 5.[1884] Instead of having to fit their situation into statutory protected grounds, the proposed framework allows employees to focus their claim on the real issue at play: their appearance as integral to their sense of self. Considering questions of appearance in the light of fundamental rights and freedoms enables an analysis focused on the person of the employee, particularly on the meaning and the importance of the contentious aspects of appearance they attach to their self, their identity, and their personhood. As I demonstrated in Chapter 3, an individual's physical appearance matters greatly in our contemporary western society, as it is considered an important source of

employment contract by notice or compensation in Quebec, see Gagnon & Langlois, *supra* note 759 at nos 171-172.

1882 See Chapter 4, section 4.1.1.2, *above*.

1883 See Trudeau, "Vie professionnelle", *supra* note 47 at 17.

1884 See Chapter 5, section 5.1.4, *above*.

identity formation, a powerful means of expression, and a favoured way to exercise agency. Appearance choices are also socially constructed and can be a source of prejudices and stereotypes, yet their sources and outcomes vary greatly contextually from one individual to another.

The fundamental rights approach is also interesting in that it does not involve the debate on the immutability of appearance markers. Although I argued in Chapter 5 that appearance should be understood as constructively immutable, as many aspects of appearance can be considered personal characteristics that are difficult to change or changeable only at unacceptable cost to personal identity,[1885] this argument is yet to be accepted by Canadian courts. Fundamental rights and freedoms do not entail the immutability requirement, as they can cover immutable visible characteristics, as well as mutable ones.

Moreover, the existing anti-discrimination framework is problematic for challenging workplace appearance policies, as it was initially conceived to protect group identities instead of individual identities. Framing appearance issues in terms of fundamental rights then allows for the recognition of a remedy for *all* employees who suffer unjustified appearance-related sanctions, as they should all enjoy a protection of their dignity, privacy, and freedom of expression. As Fisk explains, "the legal protection is extended to every person because of their individuality, not only to members of those groups who are protected by antidiscrimination law and who can convince a court that a dress code treats some groups better than others."[1886] Anti-discrimination remedies and efforts are still much needed in Canadian society, but their current legal mechanisms and scope of application prevent them from being the best answer to appearance issues in the workplace, especially when the aspect of appearance at stake is somewhat chosen or changeable.

Besides, since the fundamental rights that employees can invoke are numerous and cover many situations, the fundamental rights at work framework allows for more suitable and customized remedies. As my dissertation focuses on employees' interests, this could translate in successful

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[1885] See Chapter 5, section 5.1.3, *above*.
[1886] Fisk, *supra* note 57 at 1136.

challenges of employers' management rights in an effort to improve "the deep inequalities that structure the relationship between employers and employees."[1887] As Klare puts it, "weakening the grip of employer control [over employees' appearance] will enhance welfare and autonomy."[1888]

The fundamental rights at work framework also allows for a contextual and balanced analysis, at least if Quebec's example is followed. In fact, even if an employee can prove that an appearance regulation violates their dignity, for instance, this assessment does not directly lead to the conclusion that the policy is illegal. According to the mechanism and structure of the *Quebec Charter*, the employer may still have the chance to demonstrate that the policy is justified, generally through the specific work to be accomplished. Under the *Quebec Charter*, this justification can be demonstrated through s. 9.1, under which the employer must prove that the purpose of the violation—the business necessity—is important enough to justify an infringement to the employees' fundamental rights, and that the means chosen—the appearance policy—is proportionate to the important business necessity.

To be proportionate, the means must be rationally connected to the purpose, constitute a minimal impairment to the fundamental right, and must not impair the right in a manner which is out of proportion to the purpose to be achieved. The minimal impairment requirement particularly allows questioning if there are other ways to achieve the purpose with a lesser infringement to employees' rights. As mentioned above, this test corresponds to the *Oakes* test established by the SCC under s. 1 of the *Canadian Charter* and has been endorsed by the Court under the *Quebec Charter*.[1889] It would arguably be the same under similar human rights statutes that would be enacted in common law provinces.[1890] Hence, the justification of a fundamental right violation under the *Quebec Charter* does not include the burden of proving a *bona fide* occupational requirement (which entails the duty to accommodate employees without undue hardship); instead, this justification does not necessarily

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1887 *Saskatchewan Federation of Labour*, *supra* note 26 at para 55. See also *Health Services*, *supra* note 26 at para 84.

1888 Klare, *supra* note 47 at 1442.

1889 See *Saguenay*, *supra* note 1620 at para 90; *Godbout*, *supra* note 1620 at para 104; *Ford*, *supra* note 1620 at para 63. See also *Girard*, *supra* note 696 at paras 25-26; *Goodyear*, *supra* note 1620 at para 18.

1890 See Rempel, *supra* note 1765 at 282.

have to be focused on an individual employee but can rather be more generalized. It therefore provides employers the opportunity to prove that their appearance policy is justified by a legitimate business necessity that is adequately balanced against employees' fundamental rights.

6.3.3 A Proposal for Legal Reform

As the fundamental rights at work framework is only applicable where fundamental rights and freedoms are formally protected in the statutory legislation, an inescapable proposition is to amend the existing human rights legislation in order to protect the right to dignity, the right to privacy, and freedom of expression everywhere in Canada in private matters. While I recognize that this is not a minor modification of the legislation but rather a major legal reform that would be needed in most Canadian jurisdictions—except Quebec[1891]—it is one option to better serve employees facing employment problems because of their appearance, but also, in a larger context, it would better serve Canadians in their employment relationships and their everyday lives. This would lead to a greater recognition of employees' rights while at work and equalize the power between employees and employers in the inherently unbalanced employment relationship. Also, as human rights statutes are ordinary law, a simple modification by the appropriate legislative assembly would be needed. I concede that the viability of this proposition to amend all human rights statutes to include a protection of fundamental rights is difficult to envision in the near future, particularly considering the recent failure of the proposal to add weight as a protected ground under the Manitoba *Human Rights Code*, for instance.[1892] The main objective of this dissertation is not a proposal for legal reform *per se* but rather to analyze how human rights can protect employees' interests regarding their appearance in the workplace in Canada. As I demonstrated thus far, a statutory protection of fundamental rights and freedoms, such as the one offered by the *Quebec Charter*, leads to balanced outcomes that are

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[1891] And also with the exception of Saskatchewan and Yukon, regarding the right to freedom of expression, which is already protected in the *Saskatchewan Human Rights Code* and the Yukon *Human Rights Act*. As mentioned previously, the *Alberta Bill of Rights* also includes a protection of the freedom of speech, but it is only applicable to the Alberta legislature and therefore, it arguably cannot protect employees from employers' unreasonable workplace appearance regulations. See note 44.

[1892] See Chapter 5, section 5.3.2, *above*.

respectful of employees' interests; it therefore follows that I suggest that other common law jurisdictions would benefit from such a protection.

In drafting the proposed legal amendment, the *Quebec Charter* should be taken as an example, as it adequately protects a wide range of fundamental rights and freedoms. The statutory rights of human dignity, privacy, and freedom of expression should be embedded in human rights legislation, and their interpretation, as per *Canadian Charter* principles, should be broad, liberal, and generous. The *Saskatchewan Human Rights Code* could also set an example for common law jurisdictions, as it includes a *Bill of Rights* in part 2 of the Code, which protects the right to freedom of conscience (s. 4), the right to free expression (s. 5), the right to free association (s. 6), the right to freedom from arbitrary imprisonment (s. 7), and the right to elections (s. 8). While the right to freedom of expression is the only relevant right for the purposes of this dissertation, it shows an illustration of the inclusion of other fundamental rights directly in a human rights statute that is otherwise centered on the right to equality. In Saskatchewan, the right to human dignity and the right to privacy could be added to this *Bill of Rights* to offer a wide protection of fundamental rights and freedoms to employees regarding questions of appearance. In other provinces, such a Bill of Rights could be enacted in the applicable human rights statute.

Yet as none of the fundamental rights should be absolute, a justificatory provision, similar to s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*, would need to be included in the amended legislation for greater clarity. This could allow for legal impairments of fundamental rights when the context is adequate and avoid the unfounded assumptions that a legal reform could open the door to abuses. This would also serve to reassure employers, whose concerns might be that a statutory protection of fundamental rights would overly limit their management rights.

Nevertheless, while a formal protection of fundamental rights and freedoms in statutory human rights legislation could have great benefits—if only to raise people's awareness on the importance of the rights to human dignity, privacy, and freedom of expression—one should be mindful of the fact that such a legal reform would not necessarily mean a direct and immediate

protection for all Canadian employees' appearance. As Sheppard eloquently puts it: "It is important […] to resist the assumption that the inclusion of human rights in legal documents means that those rights are respected and protected in reality. One of the major challenges of human rights in our times is the persistent and significant gap between human rights on paper and human rights in reality."[1893] Therefore, proper, effective, and inexpensive enforcement mechanisms should be established to resolve disputes, in order to ensure a real protection of fundamental rights and freedoms for non-unionized employees.

Despite the fact that human rights commissions are often severely criticized, partly because of their long delays, a relatively simple way to ensure the implementation and enforcement of the fundamental rights at work framework would be to allow employees to file a complaint to their respective human rights commission, where such an institution exists, or to the human rights tribunal. This process would be similar to complaints of discrimination under human rights statutes, but the appropriate body would be competent in fundamental rights as well. This would avoid the problems mentioned above regarding the fear of employees of bringing their current employer to civil courts, and it would also solve the costs problems, as these enforcement mechanisms are usually free for complainants.

In the province of Quebec, a legal amendment would also be needed in this regard.[1894] As mentioned above, the Commission and the Human Rights Tribunal of Quebec are only competent in questions of discrimination.[1895] Therefore, when a person believes they were the object of an unlawful interference of their right to privacy in Quebec, for instance, they cannot file a complaint to

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[1893] Colleen Sheppard, "Critical Engagement with Human Rights Discourse" in François Crépeau & Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013) 27 at 28. See also Vallée, "Labour Law", *supra* note 753 at 15. On the more general critique of the limits of liberalism and of the human rights model, which is said to be inherently exclusive, see Kapur, *Gender, Alterity and Human Rights*, *supra* note 73.

[1894] In Saskatchewan, the Human Rights Commission seems to have jurisdiction for *Bill of Rights* complaints, such as a violation of the right to freedom of expression, but there seems to be a confusion around the possibility of filing a complaint when discrimination is not involved. See Saskatchewan Human Rights Commission, *Administration of Human Rights Complaints*, by Donalda Ford & William Rafoss (Saskatchewan Legal Education Society seminar "Human Rights Issues in the Workplace", 20-21 November 1997) at 2; Rempel, *supra* note 1765 at 267-268; *Fink v Saskatoon* (1986), 7 CHRR D/3431 at paras 27370-27414 (Sask Bd Inq).

[1895] *Quebec Charter*, ss 71, 111. See Brunelle & Samson, "Les droits et libertés fondamentaux", *supra* note 1273 at 122-135.

the Commission. When it is not a question of discrimination, the CDPDJ and the HRTQ are simply not competent. This means that for non-unionized employees in Quebec, even if fundamental rights and freedoms are formally protected in the quasi-constitutional legislation, the only open forum to seek legal remedy is through civil courts, which can be expensive, in addition to the observation above that employees might fear losing their job if they bring their employer to the court to challenge an appearance policy. A legislative amendment that would broaden the Commission's and the HRTQ's jurisdiction would allow non-unionized employees with appearance issues to complain to the Commission and seek proper remedies when appearance codes violate their fundamental rights, and it would also arguably make employers more attentive and inclusive in the first place.

Conclusion

In conclusion, although not all provinces offer a statutory protection for the right to human dignity, the right to privacy, and the right to freedom of expression, these fundamental rights should be taken into account when examining the reasonableness of workplace appearance or grooming codes, at least in labour arbitration through the reference to *Canadian Charter* values. Other rights and freedoms could also be raised depending on the circumstances, such as the right to inviolability, the right to liberty, and the fundamental freedoms of religion and association, but I analyzed in this chapter the three fundamental rights that are the most discussed in the literature and the most effective in the Quebec case law. The fundamental rights at work framework seems more adequate to deal with workplace appearance regulation than the current anti-discrimination approach for many interrelated and important reasons raised in this chapter. In particular, the fundamental rights are open to all individuals, and therefore all employees, and not only members of protected groups; the definition of fundamental rights often directly covers the situation of employees with appearance issues, whereas the anti-discrimination framework does not as precisely; and fundamental rights allow a more reasonable solution to balance employers' and employees' interests, instead of focusing on a BFOR and accommodation issues, just to name a few benefits. But again, the fundamental rights at work framework is, at present, only open to Quebec employees and public

sector workers in Canada. In the rest of Canada, because of the limited protection of the human rights statutes, employees simply cannot use this framework directly to challenge workplace appearance codes. Considering employment law in the light of the fundamental rights and freedoms of the *Canadian Charter*—even if these rights are not applicable in private employment relationships—is definitely attractive, but I argued that it is still a less enviable solution than the one offered to Quebec employees because of the *Quebec Charter*.

CHAPTER 7
CONCLUSION

The objective of this dissertation was to understand how human rights in Canada can legally circumscribe employers' management rights regarding workplace appearance regulation and be used to protect employees' appearance choices in the workplace. As I identified that employers' power stems from the subordination inherent to the contract of employment in both common law and civil law—albeit with minor particularities—management rights hold no particular status in the hierarchy of legal sources and should therefore give way to employees' human rights when applicable. It should follow that the quasi-constitutional and preeminent status of human rights precedes employers' interests, when employers cannot justify their appearance policies through human rights justificatory provisions.

While many other working conditions can impede on employees' human rights and deserve attention, I chose to focus on appearance regulation because it has not received significant attention and has been undertheorized in Canadian legal literature. I particularly wanted to explore the assumption that employers can impose whatever appearance policy they wish in non-unionized contexts, unless there is discrimination on a statutorily protected ground—a statement that can be found on several Canadian human rights commissions' websites.[1896] While it is generally true for non-unionized employees in the rest of Canada, employers are actually more limited in this regard in unionized workplaces and in the province of Quebec. Moreover, the paradox around the significance of appearance is fascinating and partly explains my interest in the subject: while it plays a prominent role in western society, it is often deemed to be a trivial concern. In the employment context, clothing and grooming are regarded as insignificant concerns for employees, while at the same time they are considered so important to employers that they justify, from their perspective, adverse employment action.

[1896] See Chapter 2, section 2.1.2, *above*.

Yet I argued that appearance is more than just hair or makeup or dress: it is fundamental to individuals' sense of self as a significant identity marker—it simultaneously serves to define and express individuals' identity. Being able to choose and control their appearance through dress and grooming choices can be very important to employees while performing their work, as some spend a significant amount of time in the workplace, but more importantly, work is one of the most fundamental and significant aspects of individuals' lives. The SCC has recognized that work is an essential component of individuals' "sense of identity, self-worth and emotional well-being."[1897] As much of individuals' daily human interactions can occur in the workplace,[1898] it can be of central importance as a site to perform personal identity; some employees thus care very deeply about controlling their appearance in the context of employment.

I therefore argued in this dissertation that because appearance can be so significant to employees' sense of self and personhood, it should be considered as a constructively immutable trait, following the SCC's immutability definition—as a personal characteristic that can only be changed to unacceptable cost to personal identity.[1899] This would facilitate recognizing physical appearance as a protected ground in anti-discrimination legislation, as it is not a prohibited characteristic in any of the current Canadian human rights statutes. While the anti-discrimination framework can sometimes be useful to employees as a mechanism to challenge workplace appearance regulation, the examples provided by the three fictional workers in Chapter 6 (Alex, Kwang, and William)[1900] show that this framework, which is the most accessible under existing legislation, would be of little assistance to them. When aspects of appearance cannot be linked to the statutory protected grounds—and especially when these aspects are chosen or mutable, such

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1897 Koshan, "Inequality and Identity at Work", *supra* note 1301 at 477-478; *Alberta Reference*, *supra* note 60 at para 91.

1898 It should be noted that this dissertation was written before the global pandemic and revised in the Spring 2020. With the COVID-19 virus forcing people to stay home, an increased number of employees have been working remotely. It is reasonable to forecast that the creation of more work-from-home options will be a lasting effect of the pandemic, and that many employees might no longer interact in physical workplaces. This will be an interesting development to follow as employment will likely experience significant changes, although many workplaces, particularly in the service industry, will arguably remain physical sites of human interactions where employers impose workplace appearance regulation.

1899 See *Corbiere*, *supra* note 1340 at para 13.

1900 See Chapter 6, Introduction, *above*.

as tattoos, piercings, and hair colour—anti-discrimination laws are of little use to most Canadian employees who are the object of adverse employment action because of their appearance. However, recognizing physical appearance as a prohibited ground would allow Alex, Kwang, and William to file a complaint of discrimination to the appropriate body and challenge their employers' appearance regulation, a recourse with considerable chances of success since similar policies have been considered unreasonable in unionized contexts.

This relatively simple legislative amendment would also benefit to Alice,[1901] another fictional worker I discussed in Chapter 5 who was sent home after she showed up at work with red highlights slightly brighter than usual. She could claim that she was discriminated against because of her hair colour—which should be covered by the ground of physical appearance if it was explicitly protected in the legislation. The only way for her employer to counter this discrimination claim would be to prove a BFOR, which would arguably be difficult to establish in this instance. As for the other fictional employees mentioned in Chapter 5 (Andrei, Michelle, and Roberta),[1902] while their circumstances would already allow them to file a complaint of discrimination (respectively on the grounds of sex, race, and sex), their complaint would be facilitated if appearance was recognized in the legislation. The inclusion of appearance as a protected ground in human rights statutes across Canada would benefit employees facing employment sanctions because of a variety of appearance markers.

Another effect of including appearance in Canadian anti-discrimination laws would be to raise people's awareness about appearance discrimination, and to send the message that it should no longer be accepted without legitimate justifications. Appearance bias and stereotypes are deeply rooted, and appearance discrimination is widely practiced and accepted.[1903] As it is not a prohibited ground, appearance discrimination is sometimes thought as one of the last permitted forms of discrimination. Appearance-based judgments are often made unconsciously, and this is why raising society's consciousness about this issue is important. As it can be harmful and is not founded on

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[1901] See Chapter 5, section 5.1.4, *above*.
[1902] See Chapter 5, Introduction, *above*.
[1903] See Rhode, *The Beauty Bias*, *supra* note 199 at 142.

individuals' capacities and worth, appearance discrimination should not be accepted, particularly in the workplace, in the absence of reasonable and lawful justifications. A recognition of appearance autonomy, whether through the anti-discrimination framework or through the fundamental rights at work approach, could "shake things up in a productive manner and get people talking about, and hopefully reconsidering, prevailing attitudes about appearance."[1904] A legislative amendment could also help raise employers' awareness about appearance prejudice and encourage them to adopt more inclusive and respectful workplace appearance policies, even in the event of limited legal enforcement.[1905] If Canadian society was more mindful of appearance discrimination's harms and wrongs, it would be more difficult for employers to enforce strict appearance policies. This could enable shifts in cultures of work, as it could change employers' and employees' attitudes towards appearance regulation and contribute to a greater diversity of appearance in employment contexts.

As repeatedly stressed in this dissertation, appearance autonomy is fundamental to an individual's sense of self and personhood, especially as appearance choices are never completely free but rather socially constructed. Having control over their physical appearance can be particularly important to employees. As existing anti-discrimination laws do not currently protect numerous choices related to appearance, I argued that the fundamental rights at work framework offers a desirable approach to protect employees' interests regarding their dress and grooming decisions. This approach, which is fully implemented in Quebec under the *Quebec Charter*, allows employees to challenge workplace appearance regulation particularly through the right to human dignity, the right to privacy, and the right to freedom of expression. As the case law review has shown, Quebec workers have done so with great success in the past decades.[1906] While this approach allows for outcomes that are respectful of employees' interests, I must stress again that I am not arguing for an unlimited protection of employees' appearance. Rather, I argue that employers' justifications for

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1904 Klare, *supra* note 47 at 1445.

1905 For instance, Rhode observes that there have been limited successful claims in US jurisdictions that specifically prohibit appearance-based discrimination, but she notes that in some cases, "complaints have raised public awareness of the costs of discrimination and the importance of focusing on health and fitness, rather than just body image." (Rhode, *The Beauty Bias*, *supra* note 199 at 140).

1906 See Chapter 6, section 6.2.2, *above*.

appearance regulations that violate fundamental rights should be validated through human rights specific limits—s. 9.1 in the case of the *Quebec Charter*. Through the principle of proportionality, they can justify their policies with respect to human rights principles, resulting in balanced solutions between employers' and employees' interests.

Meanwhile, as fundamental rights and freedoms find no formal protection in statutory legislation in most other Canadian jurisdictions for private employment relationships, I have noted that references to human rights considerations can be found in several labour arbitration cases. Although it does not benefit non-unionized employees, it shows an openness to considerations of employees' interests that are founded on fundamental rights and freedoms. While I did not elaborate on a detailed proposition, it seemed logical to suggest that Canadian employees' appearance choices would be better protected if a formal protection of fundamental rights and freedoms was included in statutory human rights codes across the country, taking the *Quebec Charter* as an example. However, such a major legal reform might be difficult to contemplate in the foreseeable future. Following the *Saskatchewan Human Rights Code*—which includes a particular section in its anti-discrimination code for the protection of five fundamental rights and freedoms—could be more feasible. This would mean that Canadian jurisdictions could include a protection of the right to dignity, the right to privacy, and the right to freedom of expression in a separate section in their human rights statutes.

While it was not the objective of this dissertation to provide a comprehensive analysis of the procedural rights and remedies involved that are related to human rights issues, I nevertheless noted that without a formal legislative amendment in human rights statutes across the country, non-unionized employees outside from Quebec are left with little recourse to challenge an unjust appearance policy.[1907] Legal reform was therefore proposed—to either include physical appearance as a prohibited ground of discrimination in human rights statutes across the country and/or enact a

[1907] Quebec non-unionized employees are also arguably less protected than unionized employees, but they nevertheless enjoy a formal protection of fundamental rights and freedoms that they can invoke in civil courts, notwithstanding the access to justice problems. See Chapter 6, section 6.3.3, *above*.

protection of fundamental rights and freedoms, following Quebec's example. As my propositions were rather succinct, further research and development on the enactment of such legal reforms would be needed to assist legislative bodies in the evaluation of the proposed legal amendments.

As my dissertation was focused on using the law in a formal sense to challenge workplace appearance regulation, exploring other avenues beyond a rights-based approach could also make a difference going forward. Several commentators have suggested mechanisms to implement workplace strategies to counter unreasonable or unjust appearance policies. Rhode, for instance, recommends giving workers a greater role in developing dress and grooming policies, which "could help raise awareness of the injustice of discrimination and the values of self-expression."[1908] Involving employees in the adoption of workplace appearance regulation would enhance corporate cultures, in which both workers and organizations would benefit from increased employees' expression of their selves and authenticity.[1909] In a similar vein, Klare proposes to increase workers' effective bargaining power over appearance regulation.[1910] He also interestingly suggests allowing employers "to purchase a right of control over employee appearance under certain ground rules," in which employers would pay a wage premium to impose strict appearance policies, with the hope "that employers would eventually learn it isn't worth it."[1911] Under this model, employment contracts would include a written limited waiver—to be interpreted narrowly—to appearance autonomy. These alternative solutions aimed at putting an end to unjust appearance policies are definitely worth further examination and could help to better understand the lived practice of workplace appearance regulation.

As I analyzed workplace appearance regulation in Canada focusing on the three most populous and litigious jurisdictions—British Columbia, Ontario, and Quebec—the analysis could be pushed to other jurisdictions for an exhaustive portrait of the issue at a national level. For instance, Saskatchewan protects the right to freedom of expression in its *Bill of Rights*, which is included in

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1908 Rhode, *The Beauty Bias*, *supra* note 199 at 152.
1909 See Moldovan, *supra* note 86 at 713-714.
1910 Klare, *supra* note 47 at 1446-1448.
1911 *Ibid* at 1448.

the *Saskatchewan Human Rights Code* (SHRC). I did not conduct exhaustive research in Saskatchewan, but noticed that there is very little that has been written on the subject of fundamental rights in private party disputes in the province, let alone on workplace appearance regulation using these rights.[1912] Further research comparing the SHRC and the *Quebec Charter* could be interesting, as both provincial human rights statutes provide a protection of fundamental rights that extends beyond anti-discrimination provisions.

In addition, as I did not conduct a thorough analysis on enterprises falling under federal jurisdiction, further research could be conducted to produce a comprehensive study of workplace appearance regulation in Canada. At a federal level, the human rights statute—the *Canadian Human Rights Act* (CHRA)—is an anti-discrimination law that only protects the right to equality. In this sense, the CHRA is similar to the BC *Human Rights Code* and the Ontario *Human Rights Code*, but it establishes a Commission to receive complaints of discrimination. The *Canada Labour Code* also provides for a specific recourse against unjust dismissal[1913] similar to s. 124 of the ALS in Quebec, which is arguably more protective of federal employees. Although fundamental rights and freedoms are not protected at a federal level, a complete analysis could enrich the study of workplace appearance in Canada. In addition, while I specified in Chapter 1 that I would not discuss Indigenous legal orders, I recognize that in a multi-juridical country like Canada, thinking about the role that Indigenous laws play in regulating dress in relationship to individuals' sense of self is important for a comprehensive review of Canadian laws pertaining to appearance.

This dissertation focuses on employees' interests, but employers have an interest in their employees' appearance, too. Another way the analysis could be developed would be to evaluate workplace appearance regulation from employers' point of view, examining in more depth their legitimate business needs and justifications for implementing such policies. Whether for reasons of

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[1912] Although no comprehensive research was conducted in this province, email communications with members of the Saskatchewan legal community lead me to think that it might not be possible to raise the s. 5 of the SHRC's right to freedom of expression to challenge workplace appearance regulation in private employment relationships in Saskatchewan unless discrimination is involved. This, too, is an issue that demands further interrogation and consideration.

[1913] See *Canada Labour Code*, s 240.

health and safety, to create or promote a corporate image or to enhance company culture, employers' motivations to impose dress and grooming codes are numerous. Ainsworth has identified two particular incentives for corporations in developing a solid workplace culture—and a strict conservative dress code—which include "cultivating a sense in employees of loyalty to the company and its values," and emphasizing cohesion and homogeneity to promote "a harmonious and efficient working environment," free of worker conflict and workers' displays of identity.[1914] In this sense, "[a]ppearance codes promote employee conformity in order to increase their worker's identification with the employer and to make their identity as employees visually primary."[1915] Employers' justifications in this regard would be very interesting to explore. Moreover, from a human rights perspective, organizations can benefit from the right to freedom of expression. But would this right grant companies a prerogative to express themselves through their employees' appearance? Do employers' rights allow them to put their faces before the world through the faces of their employees?[1916] If so, what would be the limits to this expression? When employers' and employees' respective rights collide, what interests should prevail? The employers' right to express themselves through their employees' appearance, or the employees' individual fundamental rights and freedoms—dignity, privacy, and freedom of expression? These questions deserve attention, and the analysis from the employer's perspective could be enlightening, although I would still argue that employees' individual fundamental rights and freedoms should trump employers' rights, unless a legitimate justification is established.

Under the current state of law in Canada, Quebec employers are theoretically more limited than employers in the rest of Canada in the regulation of their employees' appearance, because of the greater protection of fundamental rights and freedoms included in the *Quebec Charter* discussed at length in this dissertation. Although unionized employees in the rest of Canada have a mechanism to challenge workplace appearance regulation through the reasonableness of the policy in labour

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[1914] Ainsworth, *supra* note 225 at 256.
[1915] *Ibid* at 257.
[1916] Fisk, *supra* note 57 at 1140.

arbitration, the protection is still stronger for unionized employees in Quebec due to the *Quebec Charter*. As the analysis based on reasonableness involves a balance of competing interests, the proportionality analysis required in questions of fundamental rights entails less discretion from adjudicators and demands stronger scrutiny. Yet this dissertation's conclusions are largely based on the case law. As mentioned above, it is quite rare that non-unionized employees will challenge appearance policies in front of the courts—partly because of the fear of losing their job. The case law involving non-unionized employees and appearance regulation is therefore quite scarce. The actual implementation of appearance policies in non-unionized environments could hence be illuminated through an empirical analysis of different dress and grooming policies across Canada, which could push the exploration and understanding of workplace appearance regulation forward.

As I introduced the issue of workplace appearance regulation in Chapter 1,[1917] I noted several examples in which employers seemingly use their power to enforce objectionable appearance policies and decisions. I also mentioned that some corporations have been loosening their dress and grooming codes in recent years to be more tolerant and inclusive of appearance diversity, which presents great hopes for employees' interests in this regard. The evolution of the jurisprudence in recent years seems aligned with this observation in increasingly recognizing unconventional appearance choices and acknowledging employees' interests concerning these fundamental choices.[1918]

Despite this progress, some have argued that "employers and employees still stand in relation to each other as masters and servants,"[1919] with a major power imbalance that still characterizes the employment relationship. As power relations definitely influence the question of workplace appearance regulation,[1920] this issue is also much about class and status. Employees that are subjected to appearance policies are often vulnerable, entry level workers, occupying part time jobs for low wages. In fact, choosing one's appearance at work is quite different for a part-time

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1917 See Chapter 1, section 1.1.1, *above*.
1918 See Chapter 6, section 6.2, *above*.
1919 Robson, *Dressing Constitutionally*, *supra* note 219 at 152.
1920 See generally Fisk, *supra* note 57. See Chapter 2, section 2.2.3.3, *above*.

sales clerk than for a law faculty professor, for instance. This disparate impact of status and class on compliance with appearance codes was also powerfully raised in the dissenting opinion of Judge Kozinski in the *Jespersen* case (from the United States): "Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way."[1921] Therefore, while there is some evolution in workplace appearance tolerance, it is important to keep in mind that status often affects workers' capacity to object to dress and grooming policies, and I must stress again that it is much more difficult for vulnerable employees to challenge unreasonable regulations in non-unionized environments. As Klare notes, a formal reform of appearance regulation law would then "alter power relations in a desirable way by increasing the power of employees as against employers."[1922]

The 2017 Ontario Human Rights Commission's report and policy on sexualized and gender-based dress codes discussed in this dissertation also indicate long overdue movement on workplace appearance.[1923] Another fairly recent development that shows improvement concerns the restriction on high-heeled shoes due to health and safety concerns in several provinces.[1924] In 2017, the BC government amended the *Occupational Health and Safety Regulation*,[1925] to require safe footwear in the workplace, except in the performing arts industry—a requirement enacted with the objective of banning mandatory high heels in the workplace. The same year, Ontario followed with the amendment of the *Occupational Health and Safety Act*,[1926] which explicitly bans mandatory

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1921 *Jespersen*, *supra* note 234 at 1118, Kozinski J, dissenting. See also Bayer, "Debunking Unequal Burdens", *supra* note 256 at 493-495.

1922 Klare, *supra* note 47 at 1442.

1923 See OHRC, "Policy on sexualized and gender-specific dress codes", *supra* note 165; OHRC, "Not on the menu", *supra* note 168.

1924 See e.g. Canadian Press, "Alberta takes steps to ban mandatory high heels in the workplace" (30 November 2018), online: *National Post* <https://nationalpost.com/news/canada/alberta-takes-steps-to-ban-mandatory-high-heels-in-the-workplace>; Joyanne Pursaga, "Manitoba workplaces can no longer demand women wear high heels" (24 May 2018), online: *Winnipeg Sun* <https://winnipegsun.com/news/provincial/manitoba-workplaces-can-no-longer-demand-women-wear-high-heels>; "Footwear Requirements in the Occupational Health and Safety Act" (January 2018), online: *Ontario Ministry of Labour, Training and Skills Development* <https://www.labour.gov.on.ca/english/hs/pubs/footwear.php>; Amy Judd, "Mandatory high heels banned in all B.C. workplaces: Regulation changed" (7 April 2017), online: *Global News* <https://globalnews.ca/news/3364484/mandatory-high-heels-banned-in-all-b-c-workplaces-regulation-changed/>.

1925 BC Reg 296/1997, s 8.22.

1926 S 25.1.

“footwear with an elevated heel” for workers, unless they work “as a performer in the entertainment and advertising industry.” While this still leaves some workers subjected to mandatory high heels according to the exceptions provided in the legislation, this is a step forward in the battle against the sexualization of women in the workplace. It also reveals a general awareness that some appearance requirements should no longer be acceptable at work in the twenty-first century. Alongside all that I have argued in this dissertation, shifts like these generate hope that moving forward we will see, across the board, substantive changes in Canadian workplace appearance regulation.

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