

Covering in Canada: Potential to Animate Human Rights

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Abstract

This paper seeks to situate Kenji Yoshino's thesis from *Covering: the hidden assault on our civil rights* within the Canadian human rights context. The main research question is whether his thesis is of any practical utility within the Canadian human rights statutory framework – that is, if there is room for improvement in the current legislation. After examining the case law, one course of action in the Canadian law context is to protect gender expression to gender identity in jurisdictions that have not already chosen to do so. Instead of only protecting the most blatant covering demands related to gender expression, it would be beneficial to apply the protection of gender expression in a very broad manner. "Covering" as defined by Yoshino is an issue applicable to the Canadian legal context under many different protected grounds of discrimination, such as place of origin and sex.

Keywords: Kenji Yoshino, discrimination, gender identity, administrative law, homophobia

*It is a fact that persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large ... This process will be referred to as covering.*¹

To "cover" is to tone down a disfavoured identity to fit into the mainstream. Sociologist Erving Goffman coined the term in his writings on stigma and social identity. Covering is different from "passing," because when one is covering, they are not trying to entirely hide the marginalized aspect of their identity, but to tone it down. A famous example of covering is how Franklin D. Roosevelt would always arrive at cabinet meetings early to be obscure his disability behind

a desk. He was not trying to keep his disability a secret, as members of his cabinet knew about it, yet he was still trying to tone it down.

This paper seeks to situate Kenji Yoshino's thesis from *Covering: The Hidden Assault on Our Civil Rights* ("Covering") within the Canadian human rights context. Yoshino argues that everyone has covered, whether consciously or not, and sometimes at great personal cost.² He asserts that the fact that everyone has covered means that the conception of "the mainstream" is a myth.³ Yoshino states that Americans have, for the most part, come to a consensus that people should not be penalized for dimensions such as race,

¹ Erving Goffman, *Stigma: Notes on the Management of a Spoiled Identity*, (New Jersey: Prentice-Hall, 1963).

² Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights*, (New York: Random House Trade Paperbacks, 2006) at Preface [Covering].

³ *Ibid* at 25.

national origin, sex, religion or disability.⁴ However, that consensus “does not protect individuals against demands that they mute those differences.”⁵ The main goal of this paper is to determine which areas of the current Canadian human rights statutory framework can be improved, and whether Yoshino’s thesis is of any practical utility in addressing these needs.

After examining the case law, it would appear that the best way to take action in the Canadian context is to protect gender expression and gender identity in the workplace, in jurisdictions that have not already chosen to do so. On the British Columbia Human Rights Tribunal’s website, gender expression is described as “how a person presents their gender” and gender identity is described as “a person’s sense of themselves.”⁶ In addition to protecting against covering demands that blatantly discriminate based on gender expression, it would be beneficial to protect against seemingly trivial or unimportant covering demands related to gender expression. Once an individual has presented a *prima facie* violation of gender expression, the onus would then shift to the employer to prove that it is in fact a *bona fide* occupational requirement.

The status quo in Canadian human rights case law is not entirely unfavourable for complainants who are trying to fight covering. In cases where an individual is trying to fight a dress code that does not allow them to follow requirements from an organized religion, tribunals have been fairly responsive.⁷ However, when there is not an organized religion backing one’s clothing choices, tribunals are more likely to consider the complaint trivial. Similarly, only the most blatantly sexist gendered dress codes seem to be recognized by human rights bodies.

If law around gender expression could develop in an expansive and broad manner, it would then be advantageous to consider explicitly recognizing the *expression* of other prohibited grounds. Using the test(s) developed for determining a violation of gender expression, one could imagine the protection of the expression of sexual identity or the protection of the expression of place of origin, for example.

Human rights tribunals should consider demands for covering in the workplace to be “adverse treatment” for the purposes of the test for discrimination as set out in *Moore v*

British Columbia (Education).⁸ While demands for covering are sometimes caught under the ambit of harassment, the effects of covering demands generally are serious enough that they should be explicitly recognized as being adverse treatment under the *Moore* test for discrimination.⁹

Yoshino calls for the building of a “new civil rights paradigm.”¹⁰ He does not provide specifics about what this paradigm would look like but views it as one that protects the behaviour of individuals instead of only protecting people who cannot meet mainstream standards due to immutable characteristics. He acknowledges, however, that there can be value in assimilation, as it is often necessary for fluid social interaction.¹¹ It can be difficult to know how much agency an individual is exercising when they are intentionally covering a stigmatized aspect of their identity.

Yoshino argues that the remedies for covering demands will be primarily non-legal in focus. Yoshino has stated that his main goal for this work is to introduce the term “covering” into popular vernacular, similar to other terms like “coming out of the closet” or “passing.”

On the whole, concerns about demands for covering have the potential to create a new dimension to human rights law. Recognizing the harms of covering is consistent with the fundamental premise of domestic human rights law: that people’s individual and group characteristics should not prevent them from participating meaningfully in society.

Literature Review of *Covering*

The results of a literature review relating to *Covering* were, for the most part, positive. Jo Braithwaite praises *Covering* for succeeding in “demonstrating how links may be drawn between the experiences of gay men and women and those of other groups, especially as regards shared experiences of covering.”¹² Another example of a positive review reads: “His argument is appealing and significant because it articulates a substantive vision of civil rights that probes beneath surface discrimination to unearth layers of subtle

⁴ *Ibid* at Preface.

⁵ *Ibid* at Preface.

⁶ BCHRT, “Personal Characteristics Protected in the BC Human Rights Code”, BCHRT, online: <www.bchrt.bc.ca/human-rights-duties/characteristics.htm>.

⁷ See *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256; *Saadi v Audmax Inc.*, 2009 HRTO 1627, 68 CHRR D/442; *Sehdev v Bayview Glen Junior Schools Ltd.* (1988), 9 CHRR. D/4881 (Ont Bd Inq).

⁸ 2012 SCC 61 at para 33, [2012] 3 SCR 360 [“*Moore*”]. While the *Moore* test was developed in the context of the provision of a service, it has since been used by the Supreme Court of Canada in the employment context in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, [2017] 1 SCR 591, 411 DLR (4th) 1.

⁹ *Ibid*. See also *Brooks v Total Credit Recovery Ltd*, 2012 HRTO 1232 (CanLII); *Lee v NCR Leasing Inc.*, 2016 HRTO 1440 (CanLII).

¹⁰ *Covering*, *supra* note 2 at Preface.

¹¹ *Ibid*.

¹² Jo Braithwaite, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2008) 71:4 Mod L Rev 656.

discrimination that lie fertile.¹³ His “discourse-centred model further promotes a deliberative democracy in which individuals join in thoughtful dialogue to reach understanding on matters important to who they are and why they care.”¹⁴

A common critique in the literature reviewing Yoshino’s work is that *Covering* is not a comprehensive manifesto for enacting social change. However, it not meant to be. In an interview with the *Washington Post*, he clarifies that his main goal is to introduce the term “covering” into the collective cultural vernacular, similar to terms such as “passing” and “coming out of the closet”.¹⁵

Another critique of Yoshino’s thesis is that he does not specify exactly *who* is making demands for covering.¹⁶ Louis Tietje and Steven Cresap argue “Yoshino seems to reflect a common misconception that any kind of social disapproval, influence or pressure is equivalent to coercion.”¹⁷ The authors illuminate a question logically resulting from Yoshino’s thesis: if “the mainstream is a myth,”¹⁸ then who exactly is making these covering demands, as the answer cannot be simply “the mainstream”?¹⁹ What Tierje and Cresap do not take into account are the hegemonic power structures at play in the workplace. For example, an LGBTQ individual does not have to be personally fired from their job to know that flaunting behaviour can result in homophobic harassment or other negative consequences, such as being passed up for a promotion.

Another criticism of *Covering* is that it does not mention intersectionality²⁰ – a term coined by Kimberlé Crenshaw meaning “the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.”²¹ Yoshino focuses on one axis of identity at a time. However, his narrated experience as a gay

Japanese-American man describes covering of both racial and sexual identity. For example, Yoshino discusses the difficulty of navigating his identity as a gay law professor, and how he has to fight the urge to tone down that aspect of his identity.

Related to the lack of intersectional analysis in *Covering* is the fact that he also does not touch on aspects of identity and covering involving wealth, privilege and social status.²² Paul Horwitz speculates that this might be because class “is not one of the traditionally protected identity traits that are the special concerns of this book, or perhaps he considers class to be a trait that is more intractable, and less reducible to identifiable traits, than such qualities as race and gender.”²³

Rebecca K. Lee questions Yoshino’s suggestion that inner searches for the authentic self is “the most important work we can do.”²⁴ While the “quest for authenticity” may be important for people like Yoshino, it is unclear that this search is of equal concern for other people.²⁵ For example, other people grapple with more urgent problems, such as poverty, violence, and sickness.²⁶

World-renowned philosopher Martha Nussbaum scrutinized *Covering* in great detail in her review in *The New Republic*.²⁷ She calls the main project suggested by the work – that is, “thinking about how we can produce a society where people are free to be themselves” – a “helpful and important idea”.²⁸ While talking about how to make Yoshino’s project a reality in the United States, Nussbaum found it important to note that the country is much more accepting of public differences of many sorts than other societies.²⁹ Nussbaum also points out the term “civil rights” usually refers to enforceable legal rights – something Yoshino argues is distinct from covering demands.³⁰ Perhaps “human rights” could be a more accurate term than “civil rights.” However, human rights might also by definition require legal recognition. The Aristotelian concept of “human flourishing” as an aspirational framework might be a preferable term.

¹³ Rebecca K Lee, “Assimilation at the Cost of Authenticity”, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2006) 15 *Asian Am. Pol’y Rev* 59 at 61.

¹⁴ *Ibid* at 62.

¹⁵ Kenji Yoshino, “Gay and Lesbian Civil Rights in Context; Yoshino on ‘Covering: The Hidden Assault on Our Civil Rights’”, *Washington Post* (27 February 2006), online: <www.washingtonpost.com/wp-dyn/content/discussion/2006/02/22/DI2006022201514.html>.

¹⁶ Louis Tietje & Steven Cresap, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2006) 40:4 *Journal of Value Inquiry* 505.

¹⁷ *Ibid* at 509.

¹⁸ *Covering*, *supra* note 2.

¹⁹ Tietje & Cresap, *supra* note 16 at 506.

²⁰ Braithwaite, *supra* note 12.

²¹ *The Oxford English Dictionary*, 2nd ed, *sub verbo* “intersectionality”.

²² Paul Horwitz, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2007) 105:6 *Mich L Rev* 1283 at 1295.

²³ *Ibid*.

²⁴ *Covering*, *supra* note 2.

²⁵ Lee, *supra* note 13 at 61

²⁶ *Ibid*.

²⁷ Martha Nussbaum, “The Prohibition Era”, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2006) March 20 *The New Republic* at 21.

²⁸ *Ibid* at 22.

²⁹ *Ibid* at 23.

³⁰ *Ibid* at 27.

Agreeing with Yoshino that the solutions to the problem of covering will largely be non-legal in nature, Nussbaum argues for further measures.³¹ While Yoshino calls for public debate and reasoned conversation, Nussbaum advocates for works of both high and popular art to help touch the public imagination and inspire empathy regarding relationships that are currently viewed with hatred.³² In her opinion, Yoshino's work makes a "lyrical and thought provoking" contribution, but is far from the last word on the subject.³³

Russell K. Robinson advises scholars to pay greater attention to individual psychological differences in negotiating covering norms.³⁴ This is important because framing such issues as coming entirely from majority coercion can ignore the question of the responsibility of an individual to question or test her perceptions of a norm.³⁵ It is important to recognize the level of agency exercised by individuals in the face of covering demands. Additionally, people change over time and across different contexts, so someone's "authentic self" is a highly malleable concept.

The notion of an "authentic self" is, of course, a site of considerable discord. Yoshino argues that part of the strength of his theory is that it includes the "angry white man." Individuals, while straight white men, may have diverse interests, political convictions or religious beliefs that they feel the need to "cover." Robinson has doubts about this radically inclusive framework. He hypothesizes about a man who feels the need to cover his racist beliefs at work, contrary to his "authentic self."³⁶

However, Yoshino does not advocate for people to exhibit their "authentic" selves all the time. He simply wants there to be a legitimate reason for covering demands – he wants what he calls "reason-forcing conversations" to occur.³⁷ Striving to recognize the full humanity of members of other races by suppressing racist speech seems to be a legitimate reason for the individual who has racist beliefs to cover his "authentic self." While Robinson's hypothetical does bring to light the expansiveness and ambiguity of Yoshino's framework, he does not deliver a fatal blow.³⁸

³¹ *Ibid* at 28.

³² *Ibid*.

³³ *Ibid*.

³⁴ Russell K Robinson, Book Review of *Covering: The Hidden Assault on our Civil Rights* by Kenji Yoshino, (2007) 101:4 Nw UL Rev 1809 at 1849.

³⁵ *Ibid*.

³⁶ *Ibid* at 1848.

³⁷ *Covering*, *supra* note 2.

³⁸ Robinson, *supra* note 34 at 1848.

While many authors have ably critiqued Yoshino's work, *Covering* still holds up as a jumping-off point for social and legal change. By bringing Goffman's term into popular discussion, Yoshino has introduced a concept that is simple enough for most people to comprehend, yet theoretically rich enough to serve as a base for other scholars looking to wrestle with some of its more challenging aspects.

Case Law from Canadian Human Rights Bodies

The instances where dress codes have been brought into issue in human rights cases tend to fall into a few broad categories. One such category is where female employees are expected to dress in a provocative or so-called "attractive" manner in order to perform the duties of their job. Another category is discriminatory dress codes against religious headwear, either in schools or the employment context. A third category is purporting to deny individuals entry into a place of business due to *ad hoc* "dress code violations" while actually denying them entry on the basis of their race. The final category is in sexual harassment cases, where the perpetrator makes inappropriate comments on the employee's attire or uses "dress code violations" as a reason to terminate an employee's job as retaliation for making a complaint.

Racially Motivated Covering Demands

In the 2012 Ontario case *Brooks v Total Credit Recovery Ltd.*, the Tribunal found that the complainant had been discriminated against on the basis of race and colour. The complainant was an African-Canadian male originally from the east coast of Canada.³⁹ Total Credit Recovery had a "business casual" dress code, with Fridays and weekends referred to as "casual days."⁴⁰ On one of the casual days, the complainant wore an Adidas soccer jersey, which had the Kenyan team crest on the back and a small crest on the front. He was also wearing a pair of black loose fitted jeans and Nike running shoes.⁴¹

The complainant's co-worker, a senior manager, repeatedly said the complainant looked "ghetto."⁴² The Tribunal noted: "This usage of the term "ghetto" is negative and derogatory and is used to denote a place that is run-down, undesirable or shabby."⁴³ They also held that the use

³⁹ *Brooks v Total Credit Recovery Ltd*, 2012 HRTO 1232 at para 2 (CanLII).

⁴⁰ *Ibid* at para 7.

⁴¹ *Ibid* at para 8.

⁴² *Ibid* at para 10.

⁴³ *Ibid* at para 30.

of the term "ghetto" by a member of management in the workplace to refer to the attire of an African Canadian male carries with it a powerful derogatory message that is associated with race and colour.⁴⁴

The respondent was ordered to pay the complainant \$2 500 as compensation for "injury to dignity, feelings and self-respect."⁴⁵ One of the considerations for the amount awarded was the fact that the comments came from a "very senior manager."⁴⁶ The complainant had sought an award of \$20 000, but did not put forward any evidence of "medical, health or psychological issues arising from this incident" which likely would have increased the amount of damages.⁴⁷

A relatively recent example of public calls for covering comes from the religious headwear debate in 2013 with the *Charte des valeurs québécoises* (Quebec Charter of Values) or Bill 60. The Bill's most controversial proposal was banning the wearing of "conspicuous" religious symbols for all public employees.⁴⁸ The wearing of kippahs, turbans, burquas, hijabs and "large" crosses would all be included in the prohibition.⁴⁹ Bernard Drainville, the minister in charge of the charter, was quoted as saying: "If the state is neutral, those working for the state should be equally neutral in their image."⁵⁰ Bill 60 died on the order paper when the 2014 provincial election was called.⁵¹

Similarly, in 2011 Jason Kenney, the Canadian immigration minister at the time, announced a new rule banning face coverings for people taking the Canadian citizenship oath.⁵² Zunera Ishaq, a Pakistani woman living in Ontario, challenged that law on the basis that it violated her rights under the *Charter of Rights and Freedoms*.⁵³ A Federal Court judge ruled in February 2015 that law allows women

to wear the niqab while taking the citizenship oath.⁵⁴ The federal government appealed this decision, only to have their appeal dismissed at the Federal Court of Appeal.⁵⁵ Bill 60 and the citizenship oath are both explicit covering demands being made in law related to the prohibited grounds of race and religion. These examples show how serious the effects of covering demands can be: an individual could potentially have their career opportunities be limited, or be denied the opportunity to become a citizen.

A 2009 Ontario Human Rights Tribunal case dealt with similar subject matter. In *Saadi v Audmax Inc.*, the complainant was found to have been discriminated against on the basis of ancestry, ethnic origin, creed and sex.⁵⁶ The complainant was a Muslim Bengali-Canadian and wore a hijab as part of her religious convictions. The company's official dress code policy required "business attire" at all times, providing examples of what was permitted: "suits, dresses, skirts, dress pants, dress shoes, nylons/socks, blazers, dress shirts, turtlenecks and sweaters."⁵⁷ What was listed as forbidden included "jeans of any colour, running shoes and socks."⁵⁸

The complainant was called into a meeting and reprimanded for a number of violations of the office dress code.⁵⁹ At a meeting later that month, she was called into a disciplinary meeting about computer use, microwaving food, and professional ethics. A month later, the respondents "believed they had enough evidence of unprofessional and disloyal conduct by the applicant to terminate her", and fired her with cause (though they could have fired her without cause at that point).⁶⁰ They only told her that she was being fired because she was not an "organizational fit," giving no further reasons.⁶¹

The respondents argued that enforcing a "neutral dress code" amounted to a *bona fide* occupational requirement.⁶² The Tribunal disagreed, and found that the respondents' "enforcement of the dress code in relation to the applicant, as well as the manner of that enforcement, violated the applicant's right to be free from discrimination pursuant to s. 5 of the *Code*."⁶³

⁴⁴ *Ibid* at para 32.

⁴⁵ *Ibid* at para 47.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at paras 39, 43.

⁴⁸ Jonathan Montpetit, "Hijabs, Burkhas and Burkinis: The Revival of Quebec Identity Politics", *CBC News* (5 September 2016), online: <www.cbc.ca/news/canada/montreal/caq-quebec-charter-of-values-identity-politics-1.3748084>.

⁴⁹ CBC News, "Charter of Quebec Values Would Ban Religious Symbols for Public Workers", *CBC News* (10 September 2013), online: <www.cbc.ca/news/canada/montreal/charter-of-quebec-values-would-ban-religious-symbols-for-public-workers-1.1699315>.

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

⁵² CBC News, "5 Head-covering Controversies in Canada", *CBC News* (28 February 2015), online: <www.cbc.ca/news/canada/5-head-covering-controversies-in-canada-1.2975181>.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 194 (CanLII).

⁵⁶ *Saadi v Audmax Inc.*, 2009 HRTO 1627 (CanLII) [*Saadi*].

⁵⁷ *Ibid* at para 53.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at para 17.

⁶⁰ *Ibid* at para 22.

⁶¹ *Ibid*.

⁶² *Ibid* at para 52.

⁶³ *Ibid* at para 58.

In addition to their discriminatory dress code policy, the employer was also found to have a discriminatory policy around use of microwaves.⁶⁴ The complainant argued that “the policy, which allowed the heating up of some foods, effectively operated as a ban on heating foods with an ethnically identifiable odour, without providing the opportunity to be accommodated.”⁶⁵ She had been found to be in violation of the policy at least twice.⁶⁶ The policy banned the microwaving of “certain” foods, which the complainant took to mean certain ethnic foods.⁶⁷ The Tribunal found that “in a diverse workplace serving members of the public from a variety of ethnic backgrounds, such ambiguity leads to arbitrariness and the conditions for discriminatory enforcement.”⁶⁸ This principle had previously been applied in British Columbia, when the British Columbia Human Rights Tribunal (“BCHRT”) found in *Chauhan v Norkam Seniors Housing Cooperative Assn.* that the preparation of cooked foods in one’s home is “an expression ethnicity and ancestry.”⁶⁹ In *Saadi*, the same was held to be true in the workplace.⁷⁰

In the 2009 case *Syed v Starbucks Corp.*, the complainants alleged that the coffee chain discriminated on the basis of their race, ancestry, place of origin, and sex by imposing a dress code not allowing them to wear a nose ring.⁷¹ Unfortunately, the BCHRT did not rule on the merits of the case and only made an order regarding third-party disclosure from the Canadian Broadcasting Corporation.⁷²

Covering Demands on LGBTQ Canadians

In Canada, it does not seem to be politically advantageous to espouse an explicitly anti-LGBTQ message. However, Brad Trost, Member of Parliament and former leadership candidate for the Conservative Party of Canada, is one of the few politicians who publicly opposes the “gay lifestyle.”⁷³ In late March 2017, Trost sent out an

email where he pledged to never attend a pride parade.⁷⁴ His campaign manager, Mike Patton, subsequently released a video update. Patton explained that Trost is “not entirely comfortable with the whole gay thing.”⁷⁵ However, Patton reassures the audience that “what you do in private is your business.”⁷⁶

Trost, through his campaign manager, is explicitly calling for members of the LGBTQ community to cover. Patton emphatically asserts, “what you literally do in the middle of the street needs to conform to some basic community standards.”⁷⁷ Trost’s main concern with pride parades is that they can “become so overly sexualized.” He calls some of the antics at pride parades as “behaviour which is so inappropriate for public viewing that it is just unbelievable at this point.”⁷⁸

Trost, through Patton uses an “othering” tactic – distinguishing LGBTQ people from “taxpayers”, as though LGBTQ people are not also taxpayers. Scholar Iris Marion Young notes, “since the dominant group’s cultural expressions are the only expressions that receive wide dissemination, the dominant groups construct the differences and some groups exhibit as lack and negation in relation to the norms, and those groups become marked out as “other.”⁷⁹ Although heterosexual couples “flaunt” their sexuality all the time in public – through racy advertising campaigns and public displays of affection – the similar displays by the LGBTQ community are set apart as “other.” “Cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out and noticed as different.”⁸⁰

Patten asserts, “If you want to have a parade, have a parade. But don’t ask taxpayers to subsidize it. The fact that we are going out and borrowing money that future generations are going to have to pay back to subsidize a parade makes no sense to Brad.” It would be interesting to find out if Trost is opposed to other government-subsidized parades, such as Canada Day celebrations, or the Calgary Stampede Parade, for example. The “fiscal conservatism” reasons for opposing pride parades could be colourable.

⁶⁴ *Ibid* at para 48.

⁶⁵ *Ibid* at para 40.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at para 42.

⁶⁸ *Ibid* at para 48.

⁶⁹ *Chauhan v. Norkam Seniors Housing Cooperative Assn*, 2004 BCHRT 262 at para 126 (CanLII).

⁷⁰ *Saadi*, *supra* note 56 at para 45.

⁷¹ *Syed v Starbucks Corp*, 2007 BCHRT 337 at para 1 (CanLII).

⁷² *Ibid* at para 10.

⁷³ Brad Trost, “Brad Trost Campaign Update for Tuesday March 28th - Gay Pride.” (28 March 2017), online: YouTube <<https://www.youtube.com/watch?v=MSHWxuMmiDs>>.

⁷⁴ Tabatha Southey, “The Conservatives’ Unease about the ‘whole Gay Thing’”, *The Globe and Mail* (31 March 2017), online: <www.theglobeandmail.com/opinion/the-conservatives-unease-about-the-whole-gay-thing/article34547164/>.

⁷⁵ *Supra* note 73.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ Iris Marion Young, “Five Faces of Oppression” in Thomas E Wartenberg ed, *Rethinking Power* (New York: SUNY Press, 1992) at 78.

⁸⁰ *Ibid*.

In Martha Nussbaum's critique of *Covering*, she points out that calls for LGBTQ people to cover could stem from a feeling of disgust towards gay sex itself.⁸¹ According to Nussbaum:

Since Yoshino's tone is romantic, and poetically discreet, his book never really talks about sex. But if sex between men is what the panic is all about, as I think on the whole it is, then romantic talk will not reach the problem. In this way, Yoshino's narrative is quite unlike *Brokeback Mountain*, because it lets readers have an easy time of it: they can, if they want, imagine Yoshino as a disembodied spirit, and they are not forced to think about sex acts that many Americans find revolting. A significant part of the problem of gay life in America goes unaddressed, since anti-gay feeling is not just about difference, it is centrally about sex.⁸²

Trost is not the only policy maker who makes explicit covering demands for LGBTQ people. Senator Lynn Beyak was quoted praising her gay friends who were quiet about their gay identity and said those individuals never faced any kind of discrimination because they were not seeking attention.⁸³

While Trost's campaign manager does say "what you do in private is your business", there is also an implicit sense of disgust around gay sex acts in general. After all, Trost's issue with pride parades are that they encourage LGBTQ people to flaunt their sexuality. Trost has also been openly against marriage equality, holding that the "traditional family is the bedrock of society."⁸⁴ He stated in 2016 that "homosexual marriage, gay marriage is wrong and I'll be public about it."⁸⁵ While Trost is clearly making covering demands on LGBTQ people, he seems to also be making "passing" demands as well.

Another politician making passing demands on LGBTQ people is former Member of Parliament and leader of Alberta's United Conservative Party, Jason Kenney.

Kenney recently advocated for Alberta schools to be required to inform parents when their child joined a Gay-Straight Alliance (GSA), which would effectively out students who were not open about their sexual orientation with their parents.⁸⁶ Instead of calling for students to simply not act flamboyantly or flaunt their sexuality, Kenney is either explicitly or implicitly demanding that youth stay "in the closet," unless they are in a situation where they have already come out to their parents.

Despite members such as Trost and Kenney, the Conservative Party of Canada removed their official position opposing marriage equality in 2016.⁸⁷ Trost's competitors for the leadership seemed to be outwardly supportive of the LGBTQ community. When VICE News emailed several other contenders for the party's leadership, they received responses in favour of pride parades.⁸⁸ Michael Chong, Kellie Leitch, Lisa Raitt, Maxime Bernier and Kevin O'Leary all affirmed their support of pride parades and the LGBTQ community generally.⁸⁹

The cultural climate on this issue in Canada seems markedly different than that of the United States. It was not until 2015 that the United States Supreme Court ruled that state-level bans on same-sex marriage are unconstitutional in *Obergefell v Hodges*. Marriage equality was recognized in Canada a decade earlier, upon the passage of the *Civil Marriage Act*.⁹⁰ Individuals like Trost and Kenney would be more commonplace figures in the United States.

Demands for "Reverse Covering"

"Reverse-covering" is when a group outside the mainstream, most often women, is forced to play up the stigmatized aspect of their identity. Seemingly neutral grooming policies or dress codes can force people to cover or reverse-cover their identities, especially when the dress code is different for men and women.

⁸¹ Nussbaum, *supra* note 27 at 24.

⁸² *Ibid.*

⁸³ Tabatha Southey, "Senator Scores Canada a Late-game Medal in the Wingnut Olympics", *The Globe and Mail* (10 March 2017), online: <<http://www.theglobeandmail.com/opinion/senator-scores-canada-a-late-game-medal-in-the-wingnut-olympics/article34266112/>>.

⁸⁴ Brad Trost, "MP Brad Trost - Why I Still OPPOSE Same Sex Marriage In 2016 | Homosexual Marriage Equality", (7 September 2016), online: YouTube <https://www.youtube.com/watch?v=tq7SKir_dug>.

⁸⁵ *Ibid.*

⁸⁶ *Supra* note 74.

⁸⁷ Steven Chase, "Conservatives Vote to End Official Opposition to Gay Marriage", *The Globe and Mail* (29 May 2016), online: <<http://www.theglobeandmail.com/news/politics/conservatives-end-official-opposition-to-gay-marriage/article30197721/>>.

⁸⁸ Justin Ling, "Where the Conservative Leadership Candidates Stand on Gay Pride", *VICE News* (31 March 2017), online: <<https://news.vice.com/story/where-the-conservative-leadership-candidates-stand-on-gay-pride>>.

⁸⁹ *Ibid.*

⁹⁰ *Civil Marriage Act*, SC 2005, c 33.

Reverse-Covering Demands Made on Female Employees

One of the highest-profile instances of a reverse-covering demand for women in the workplace was when President Donald Trump required his female staff to “dress like women.”⁹¹ This sparked global outrage and the hashtag #dresslikeawoman went viral on Twitter, with women posting photos of themselves in a variety of different workplaces. According to the report, men working for Trump are also expected to dress in conformity with his gendered expectations.

In the Canadian context, female servers in chain restaurants such as Joey Restaurant and Earls have pushed back against requirements to wear high heels, tight clothing and makeup. An Edmonton woman received media attention when her feet became bloodied during a training session at Joey.⁹² According to the instructions she received both verbally and in the training manual, women are required to wear a one-inch heel at minimum.⁹³ She reportedly spoke with her manager after her first shift about her concerns with wearing heels, to which the manager responded with “invest in a better pair of heels.”⁹⁴ After her feet were swollen and bloody on her second shift, the former employee again spoke with her manager. The manager told her that only a doctor’s note would waive the requirement to wear heels.

One case with facts relevant to a discussion of reverse-covering requirements at work is the 2016 BCHRT case *Cooper v Stevenston Hospitality Services Ltd.* The complainant, Brittany Cooper, alleged that after new management came in, she was required to wear a “sexualized dress code...meant to accentuate the attractiveness of young female servers.”⁹⁵ While female servers were required to wear the form-fitting uniforms, male co-workers were not.⁹⁶

Ms. Cooper said that as time went on, the managers began assigning more hours to the recently hired servers who were young women who “looked good” in the new

uniform while she and other older female servers, who had either complained about the uniform or for whom the uniform was less “flattering”, were assigned fewer hours.”⁹⁷

Unfortunately, the 2016 decision was primarily about whether the complaint could succeed despite potentially being outside the limitation period. The complaint was accepted for filing against the company, but not against the two individual respondents. The end of the 2016 decision simply encouraged the parties to take advantage of the Tribunal’s mediation services. There is no subsequent decision.

The *Cooper v Stevenston Hospitality Services Ltd.* case is interesting because the complainant complained to the managers about the reverse-covering demands being made on her and other female servers. Unfortunately, she received responses of a hostile and retaliatory nature.

Yet another example of a sexist dress code being considered discriminatory can be found in the 2004 BCHRT case *Mottu v McLeod*. The complainant had been required to wear a bikini top at her place of work, a nightclub.⁹⁸ The complainant had not been present at the staff meeting where the dress code for the event was determined.⁹⁹ The owner of the nightclub had phoned the complainant and another server and told them “they could choose to work the shift and wear the attire, which included a bikini top, or not work the shift, and not be paid.”¹⁰⁰ The other server chose not to work the shift and was not paid.

The complainant said she would be willing to wear a bikini top to her shift, so long as she was allowed to wear a summer dress over top.¹⁰¹ The owner told her that he wanted “all the servers dressed the same way, in bikini tops, and if she had a problem with that, he would find someone else to work the shift.”¹⁰² She made the choice to work the shift, because she knew from past experience that she would earn a lot of tips.

The complainant showed up to the event in a bikini top and a sweater. She had already phoned her union representative and the Human Rights Commission about the dress code.¹⁰³ The club owner was angry about the complaints made about the dress code and retaliated against the complainant by not allowing her to sell the drink special.¹⁰⁴ The BCHRT found that the uniform for that

⁹¹Marilisa Racco, “Donald Trump’s Dress Code Allegations Spark Furor, Give Rise to #DressLikeAWoman”, *Global News* (7 February 2017), online: <www.globalnews.ca/news/3229950/donald-trumps-dress-code-allegations-spark-furor-give-rise-to-dresslikeawoman/>.

⁹²Tamara Baluja, “Restaurant’s Training Session in High Heels Left Woman’s Feet Bloody before She Quit”, *CBC News* (11 May 2016), online: <www.cbc.ca/news/canada/edmonton/joey-heels-facebook-post-1.3577885>.

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵*Cooper v Stevenston Hospitality Services Ltd.*, 2016 BCHRT 180 at para 9 (CanLII).

⁹⁶*Ibid.*

⁹⁷*Ibid* at para 12.

⁹⁸*Mottu v McLeod*, 2004 BCHRT 76 at para 10 (CanLII).

⁹⁹*Ibid.*

¹⁰⁰*Ibid.*

¹⁰¹*Ibid.*

¹⁰²*Ibid* at para 11.

¹⁰³*Ibid* at para 12.

¹⁰⁴*Ibid* at para 40.

evening contravened the *Code* as it was gender-specific, and the complainant believed it to be sexual in nature.¹⁰⁵ The Tribunal compared it to the fact the male staff members were not required to wear something that was gender specific or carried sexual connotations.¹⁰⁶

In the 2016 Ontario case *Lee v NCR Leasing Inc.*, the complainant asked the store manager to “explain the wardrobe policy for females in the summer months.”¹⁰⁷ She alleges that the manager responded, “The shorter the skirt the better, and she should ‘show cleavage’.”¹⁰⁸ The Tribunal found that the store manager answered the complainant’s question about the store’s summer dress code in a manner which violated the *Code*. The Tribunal awarded \$3 000 in damages for “injury to dignity, feelings and self-respect”, and ordered the personal respondent to complete the Commission’s online training manual.¹⁰⁹ The Tribunal held that “while the applicant has not established a course of conduct, the Tribunal has previously found that a single comment may constitute a violation of the *Code*.”¹¹⁰ So while the complainant was not able to prove she was *required* to wear short skirts or cleavage at work, the store manager’s comment was considered sufficiently discriminatory to merit a violation of the *Code*.¹¹¹

The Tribunal wrote: “While the breach in this case was a single remark, it was a demeaning remark which caused the applicant to feel degraded due to her gender.”¹¹² The complainant requested that the store manager be reprimanded, but the Tribunal did not find that to be an appropriate course of action as the “remedial authority of the Tribunal is not punitive.”¹¹³

In *Kumornik v SIR Corp.*, the complainant worked as a “busser” at Jack Astor’s Bar & Grill. She alleged that “the dress code/uniform policy made her feel she was selling herself and...that a note about hair styles was sexist”.¹¹⁴ The Human Rights Tribunal of Ontario refused to add the individual manager as a respondent and refused to order a summary hearing.¹¹⁵ There was no further decision by the Tribunal.

The complainant in this case filed a complaint alleging discrimination on the basis of “gender identity in vocational association and reprisal.”¹¹⁶ The Tribunal found that the complainant was actually alleging discrimination on the basis of sex, not based on gender identity.¹¹⁷ The complainant was ordered to file a certain form in order to properly set out the scope of her application.¹¹⁸

Pregnancy

To establish a *Code* violation, the Tribunal only needs “to find that the applicant’s pregnancy was one factor in the applicant’s termination, among other considerations.”¹¹⁹ In a case involving a sports bar, *McKenna v Local Heroes Stittsville*, there was a new dress code introduced after a change in management. The new shirts required to be worn by female staff members were form fitting, and the complainant expressed concerns with management that the new shirt would “highlight her already visible pregnancy.”¹²⁰ The complainant relied on the manager’s representation that it would be fine for her to not abide by the dress code. However, the complainant was not scheduled for any new shifts – partly as a result of not following the dress code. The Human Rights Tribunal of Ontario ordered the respondents to pay compensation for lost income and \$17 000 as compensation for “injury to dignity, feelings, and self respect.”¹²¹

This case differs from some other cases involving form fitting dress codes in that the complainant was pregnant, which is closer to an immutable (albeit temporary) characteristic than simply not wanting to follow a sexist dress code for personal reasons. The Tribunal likely awarded her such a high amount of compensation for the injury to her dignity, feelings, and self respect because she could not change her pregnancy status. The Tribunal seems concerned not that the dress code is itself sexist, but that a pregnant person would be forced to follow it.

Another Ontario case involving a pregnant complainant is *Peart v Distinct HealthCare Services Inc.* The Tribunal ordered the respondent to pay the complainant for her loss of earnings and \$12 500 as compensation for injury to dignity, feelings and self-respect.¹²² In this case, the

¹⁰⁵ *Ibid* at para 41.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Lee v NCR Leasing Inc.*, 2016 HRTO 1440 at para 25 (CanLII).

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at para 111.

¹¹⁰ *Ibid* at para 102.

¹¹¹ *Ibid* at para 101.

¹¹² *Ibid* at para 107.

¹¹³ *Ibid* at para 110.

¹¹⁴ *Kumornik v SIR Corp.*, 2014 HRTO 463 at para 2 (CanLII).

¹¹⁵ *Ibid* at paras 20, 22.

¹¹⁶ *Ibid* at para 1.

¹¹⁷ *Ibid* at para 10.

¹¹⁸ *Ibid* at paras 9, 11.

¹¹⁹ *Peart v Distinct HealthCare Services Inc.*, 2013 HRTO 305, at para 84 (CanLII) [*Peart*].

¹²⁰ *McKenna v Local Heroes Stittsville*, 2013 HRTO 1117 at para 2 (CanLII).

¹²¹ *Ibid* at para 43.

¹²² *Peart*, *supra* note 119 at para 101.

respondent made many snide remarks about the complainant's appearance, offering in many instances to "buy her, presumably appropriately professional, maternity wear."¹²³

An employer will not violate the *Code* if they merely adopt and enforce neutral workplace policies or standards such as professional attire or attendance requirements.¹²⁴ However, there was a lack of evidence in the *Peart* case regarding a "neutral workplace policy", and it appeared to the Tribunal that "the only time the "office dress code policy" was raised was with respect to the applicant alone and only during the latter stages of her pregnancy."¹²⁵ This case differs from the *McKenna* case in that here, the dress code was not itself problematic (if there could even be said to be a dress code), but that the respondent was using the imagined dress code violations as an excuse to harass the complainant.

"Reason Forcing Conversations"

In the 2009 BCHRT case *Callahan v Capilano Suspension Bridge Ltd.*, the complainant argued that his employer's dress code discriminated against him by not allowing him to wear small earrings at work.¹²⁶ The complainant worked in a gift store known as the "Trading Post", where he was required to follow a costume policy with specific requirements to help create a "turn of the century" historical experience.¹²⁷ The policy had restrictions on items such as hair styles, jewellery, make-up, sunglasses, and shoes.¹²⁸

The employer says its policy was developed based on historical research of dress and jewellery at the turn of the century. The results of that research showed that men did not normally wear earrings at that time in Vancouver.¹²⁹ The complainant said he had been wearing earrings since age 12, and that they are "meaningful" to him.¹³⁰ The Tribunal alluded to the complaint perhaps being of a *de minimus* nature, despite the fact that the complainant called the earrings "part of his personal identity."¹³¹

The BCHRT based their analysis on the test of whether the restriction would have any "substantive interference in his ability to participate fully in the economic, social, political and cultural life of British Columbia".¹³² This test sounds highly discretionary, with the Tribunal members replacing their own judgement for the complainant's in a manner similar to the "reasonable person" standard that often appears in Canadian law. A case from 1984 was cited - *Safeway Ltd v Manitoba (Human Rights Commission)*, where the Court of Appeal held that a "no beards" grooming policy did not constitute sex discrimination.¹³³ Additionally, in *Mosher v West Vancouver Police Department*, the BCHRT found that a grooming policy differentiating between acceptable hair length for male and female officers was not discriminatory for the purposes of the *Code*.¹³⁴ British Columbia did not add "gender expression" and "gender identity" as protected grounds under its *Code* until 2016.¹³⁵ It would be interesting to see if the analysis or result of this case would be any different if the applicant had based his complaint on gender expression instead of sex. While Bill 27 was passed with transgender people in mind, there could perhaps be increased freedoms afforded to people who do not necessarily identify as transgender but who do not fit into the strict binary imposed by gendered dress codes.¹³⁶

This case is striking as the employer arguably has a good reason for imposing restrictions on how employees dress at work. Instead of vague reasons like "customer preference" or uniformity in general, the policy is based on location-specific historical research. In terms of "reason-forcing conversations," this seems like an easily justifiable reason. Additionally, the complainant lives and works in Vancouver, an area with a population of over two million people.¹³⁷ He would have likely been able to find a different retail job in the city that would have allowed him to wear earrings at work.

Another example of a "reason-forcing conversation" can be found in the 2012 BCHRT case *Wollenberg v North*

¹²³ *Ibid* at para 19.

¹²⁴ *Ibid* at para 16. See also *Re Canada Safeway Ltd and Steel* (1984), 13 DLR (4th) 314, [1985] 1 WWR 479, 29 Man R (2d) 154 (CA), leave to appeal to SCC refused, [1985] 1 SCR x.

¹²⁵ *Mosher v West Vancouver Police Department*, 2006 BCHRT 86 (CanLII).

¹²⁶ British Columbia Ministry of Justice, News Release, "B.C. Human Rights Code to Include Explicit Protection for Gender Identity, Expression" (25 July 2016), online: <<https://news.gov.bc.ca/releases/2016JAG0025-001352>>.

¹²⁷ *Ibid*.

¹²⁸ The Canadian Press, "Population of Metro Vancouver Outpaced National Growth Rate", *Vancouver Sun* (08 February 2017), online: <<http://vancouversun.com/news/local-news/new-census-data-population-of-metropolitan-area-of-vancouver-outpaced-national-growth-rate>>.

¹²³ *Ibid* at para 78.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

¹²⁶ *Callahan v Capilano Suspension Bridge Ltd*, 2009 BCHRT 127 (CanLII).

¹²⁷ *Ibid* at para 7.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* at para 9.

¹³⁰ *Ibid* at para 10.

¹³¹ *Ibid* at paras 17-18.

West Athletics Inc. The complainant in that case was a member of a gym with a strict dress policy. He had a tendon injury, and required shoes with extra supports (hiking boots) to complete some of his exercises. When those particular exercises were completed, he would change back into typical gym shoes.¹³⁸ Within two weeks of joining the gym, he decided to “explain his circumstances and seek an exemption with respect to his footwear”.¹³⁹ His request for accommodation was rejected after a manager’s meeting decided on the matter.¹⁴⁰

The complainant in this case seems to be an ideal candidate for having a successful reason-forcing conversation. He sought to break the rules in the most minimal way possible (he would change back into regular gym shoes right after those particular exercises were finished) and was proactive in his approach to getting his request accommodated (he did not wait until after another member had complained about his footwear).

While the complainant was a member of a protected group (persons with a physical disability), his case shows how Yoshino’s reason-forcing conversations could take place for individuals who are not necessarily in a protected group. The person making covering or reverse-covering demands would simply be expected to make *some* acceptable reason for the demand. The Tribunal awarded the complainant \$1 000 for injury to dignity and self-respect.

Customer Preference

One example of a reason that could be provided by an employer during a “reason-forcing conversation” for covering or reverse-covering demands is “customer preference.” In the 1989 case *De Jong v Horlacher Holdings Ltd*, the employer informed the complainant that customers “were being offended” and “worried about AIDS, gonorrhoea and syphilis” due to the complainant’s acne.¹⁴¹ The employer alleged that he had received complaints “for several months.” The complainant received an award for the “hurt and humiliation” she experienced as the result of the contravention.¹⁴²

The *De Jong* case is interesting because it is possible that customers did in fact complain for several months about the complainant’s acne. But because acne is something the complainant does not have control over, her

“physical disability” is not a sufficient reason for termination, even if it does affect the business.¹⁴³

One could imagine the complainant in that case having tattoos instead of acne. Tattoos are within the realm of control of the employee (because people can choose whether or not to get tattoos). Is customer preference a good enough reason to terminate the employee? What if the tattoos had cultural and spiritual connotations? These are the ambiguities of basing management decisions on the basis of customer preference.

Sincere Religious Belief

It is important to note that reasons for not wanting to cover that are mandated by organized religions seem to gain more traction in the law than non-religious ones. If an individual is a member of an organized religion, it can be easier to justify their resistance to covering due to a likely pre-existing body of evidence that the behaviour in question is tied to their religious belief or tradition.

While it is important to protect religious groups, especially those that have faced persecution historically, it stands to reason why justifications for refusals to cover that are based on organized religion should be prioritized over other sincerely held personal beliefs. Giving credence to the idea that deeply held personal convictions are important could potentially transform human rights legislation. By the same token, doing so could also be said to open a Pandora’s box of litigation.

There must be a middle ground between well-established religious tenets and fleeting personal whims. This is made problematic by the fact that there is no scholarly consensus that a distinguishable “authentic self” exists. People’s personal views change over time. Perhaps the measure for whether an individual’s belief rises to the level of a deeply held conviction would, by necessity, be subjective.

Rabbi Barry Levy was an expert witness for the *Syndicat Northcrest v Amselem* case that later reached the Supreme Court of Canada. The case was about the construction of succahs on balconies to fulfill the biblical obligation of Succot. Rabbi Levy testified that “there is no religious obligation requiring practicing Jews to erect their own succahs” and that “there is no commandment as to where they must be erected.”¹⁴⁴

The majority decision in the Supreme Court held that “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry

¹³⁸ *Wollenberg v North West Athletics Inc*, 2012 BCHRT 178 at para 11 (CanLII).

¹³⁹ *Ibid* at para 14.

¹⁴⁰ *Ibid* at para 17.

¹⁴¹ *De Jong v Horlacher Holdings Ltd* (1989), 10 CHRR D/6283 at 44684 (BCCHR).

¹⁴² *Ibid* at 44694.

¹⁴³ *Ibid*.

¹⁴⁴ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 22, [2004] 2 SCR 551, 241 DLR (4th) 1.

appropriate for courts to make.¹⁴⁵ At the first stage of a religious freedom analysis, the applicant must show:

(1) He or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and

(2) He or she is sincere in his or her belief.¹⁴⁶

A dissenting opinion by Justice Bastarache, meanwhile, held that "A religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established."¹⁴⁷

Religious leaders such as Levy may not support the outcome of the *Amselem* case. The idea that a person can develop their own unique interpretations about the obligations of an organized religion, so long as the individual is sincere in their belief could be seen as a watering-down of what is required to adhere to a religious faith.

Bona Fide Occupational Requirements

In the context of discrimination on the basis of disability, the Supreme Court of Canada has determined that once a *prima facie* case of discrimination has been made out, the burden falls on the respondent to justify the apparent discrimination.¹⁴⁸ Part of the *prima facie* test for discrimination on the basis of disability is that the applicant must have suffered adverse or differential treatment.

"The distinction between direct and indirect discrimination was based on the recognition that there can be discrimination without an intention to discriminate. Ostensibly neutral job requirements are often developed without consideration of their impact on members of particular groups...Human rights legislation makes mandatory a duty to accommodate if it

can be done without undue hardship to the employer or other employees. Facially neutral rules...will not be upheld as "bona fide occupational requirements" if the employee can be accommodated without undue hardship pursuant to human rights law."¹⁴⁹

In *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, the Supreme Court of Canada articulated a new three-stage test for deciding whether a standard which appears to be discriminatory in fact a *bona fide* occupational requirement.¹⁵⁰

The Supreme Court of Canada has held that, to justify a rule that has an adverse effect based on a *Code* ground, the respondent must show that the rule:

(1) was adopted for a purpose or goal that is rationally connected to the function being performed;

(2) was adopted in good faith, in the belief that the rule is necessary for the fulfillment of the purpose or goal; and

(3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate without undue hardship.¹⁵¹

Gender Expression

Canadian human rights law is different across provinces and territories. For example, "gender expression" is a protected ground against discrimination in eight Canadian jurisdictions, and "gender identity" is a protected ground in eleven. Saskatchewan recently added "gender identity" to its list of prohibited grounds for discrimination.¹⁵² The province did not choose to add "gender expression", despite calls to do so.¹⁵³ Many other Canadian jurisdictions protect gender identity *and* gender expression:

Canadian Human Rights Act:¹⁵⁴ ss. 2, 3(1)

¹⁴⁹ Irwin Law, *Labour and Employment Law: Cases, Materials and Commentary*, 8th ed (Toronto: Irwin Law Inc, 2011).

¹⁵⁰ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1, [1999] 10 WWR 1.

¹⁵¹ *Ibid* at paras 71-72.

¹⁵² *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

¹⁵³ CBC News, "Ken Norman Wants Saskatchewan Laws to Protect Gender Expression", *CBC News* (26 March 2014), online: <<http://www.cbc.ca/news/canada/saskatoon/ken-norman-wants-saskatchewan-laws-to-protect-gender-expression-1.2586963>>.

¹⁵⁴ *Canadian Human Rights Act*, RSC 1985, c H-6.

¹⁴⁵ *Ibid* at para 43.

¹⁴⁶ *Ibid* at para 56.

¹⁴⁷ *Ibid* at para 135.

¹⁴⁸ *Moore, supra* note 8 at para 33.

BC:¹⁵⁵ ss. 7(1), 8(1), 9, 10(1), 11, 13(1), 14, 41(1), 42(1)
 Ontario:¹⁵⁶ ss. 1, 2, 3, 5, 6, 7
 Nova Scotia:¹⁵⁷ s. 5(1)(nb)
 Newfoundland:¹⁵⁸ preamble
 PEI:¹⁵⁹ preamble, ss. 1(1)(d), 6(4), 13, 18(b)
 Alberta:¹⁶⁰ preamble, ss. 3(1), 4, 5, 7(1), 8(1), 16(1)
 Quebec:¹⁶¹ s. 10
 Yukon:¹⁶² s. 7(f.01)

Jurisdictions that do not protect gender expression:

New Brunswick¹⁶³
 Nunavut¹⁶⁴
 NWT¹⁶⁵ (does mention gender identity)
 Manitoba¹⁶⁶ (does mention gender identity)
 Saskatchewan¹⁶⁷ (does mention gender identity)

Analysis

This paper ultimately looked at the question of whether the main thesis of *Covering* has any utility in the Canadian context of domestic human rights law. Given the number and content of reported decisions that the author was able to find, the answer appears to be yes.

One of the questions raised by a few authors in the literature review was who is making covering demands, and in what form? It appears (from a cursory glance) that covering demands can take different forms:

(1) Dress codes that are explicitly discriminatory on their face (i.e. they are directly asking some individuals to cover – one example would be the Quebec Charter of Values)

(2) Dress codes that are not overtly discriminatory on their face (they appear “neutral”, but are sufficiently vague as to be applied in a discriminatory manner (as we saw in the *Saadi v Audmax Inc* case)

(3) Indirect covering demands – can take the form of derogatory comments which have a coercive effect (such as the “ghetto” comments in *Brooks v Total Credit Recovery Ltd.*). Arguably, other colleagues being rewarded for adhering to the status quo could be said to be a very indirect form of a covering demand.

In his work *The Anatomy of Power*, John Kenneth Galbraith argues that there are three different forms of power: condign, compensatory and conditioning. Each of these forms of power is relevant to our discussion on covering and Canadian human rights law.

The first type of power is condign power. Condign power “wins submission by inflicting or threatening appropriately adverse consequences.”¹⁶⁸ While condign power is the “stick”, compensatory power is the “carrot”. Compensatory power “wins submission by the offer of affirmative reward.”¹⁶⁹ According to Galbraith, for condign and compensatory power, “the individual is aware of his or her submission – in one case compelled and the other for reward.”¹⁷⁰ The third type, conditioned power, is in contrast “exercised by changing belief.”¹⁷¹ “Persuasion, education or the social commitment to what seems natural, or proper, or right causes the individual to submit to the will of another or of others.”¹⁷²

In the employment context, employers quite clearly exercise condign and compensatory power in an explicit way. Employers will reward good behaviour with payment of one’s salary or perhaps a promotion. They also have the ability to terminate the employment relationship or make their employee’s time at work unpleasant. In terms of dress and grooming codes, employers can punish employees who do not conform to them through disciplinary measures, and can reward adherence to them by promoting someone or giving a glowing performance review.

Conditioning power is less obvious in its role in workplace dress and grooming codes. It is conditioning power that creates what is considered an ideal

¹⁵⁵ *Human Rights Code*, RSBC 1996, c 210.

¹⁵⁶ *Human Rights Code*, RSO 1990, c H.19.

¹⁵⁷ *Human Rights Act*, RSNS 1989, c 214.

¹⁵⁸ *Human Rights Act*, 2010, SNL 2010, c H-13.1.

¹⁵⁹ *Human Rights Act*, RSPEI 1988, c H-12.

¹⁶⁰ *Alberta Human Rights Act*, RSA 2000, c A-25.5.

¹⁶¹ *Charter of Human Rights and Freedoms*, CQLR c C-12.

¹⁶² *Human Rights Act*, RSY 2002, c 116.

¹⁶³ *Human Rights Act*, RSNB 2011, c 171.

¹⁶⁴ *Human Rights Act*, SNU 2003, c 12.

¹⁶⁵ *Human Rights Act*, SNWT 2002, c 18.

¹⁶⁶ *The Human Rights Code*, CCSM c H175.

¹⁶⁷ *The Saskatchewan Human Rights Code*, *supra* note 152.

¹⁶⁸ John Kenneth Galbraith, *The Anatomy of Power*, (London, England: Transworld, 1985).

¹⁶⁹ *Ibid* at 5.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* at 5-6.

“professional” worker. The ideal of the professional worker is impacted by societal perceptions of race and gender. When a worker does not match up with the professional worker ideal, conditioning power will come into play. Each person’s bias is often based on factors beyond their comprehension or control.

Legal tests from human rights law regarding disability could be potentially useful because disability can also have mutable characteristics (similar to the expression of other protected grounds):

Unlike the predominantly fixed character of most other protected grounds, such as race or gender, the condition of disability is potentially quite mutable...In the case of most protected grounds, accommodations can be accomplished through a change in policies or programs, together with a campaign to reform social attitudes. The responses necessary to ameliorate the social disadvantages of disablement, however, will frequently be more diverse, more individually tailored, more reliant on technology and probably more costly. This will often require more creativity and cooperation, and will likely necessitate a greater number of long-lasting alterations and commitments.¹⁷³

One of Yoshino’s points, that we *all* cover, carries less weight after reading the above cases. While we all may cover some aspect of our so-called “authentic selves”, it is clear that not all covering is comparable. Yoshino mentions how straight white men may cover their unique interests or hobbies. While trying to move in the direction of less covering may function as a general ideal, in practical terms, some forms of covering are more serious and should be treated as such. A public worker who is not allowed to wear her hijab to work is in a much more precarious position than a straight white male who secretly enjoys Dungeons & Dragons.

In *Vriend v Alberta*, the Supreme Court of Canada noted that “[p]erhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem.”¹⁷⁴ It is important to remember who has the most to lose from covering demands in the workplace and how the demands can affect them.

The best course of action to take would be to advocate that gender expression be included in the human rights legislation in every jurisdiction in Canada. Once included, human rights bodies should interpret gender expression in a broad and expansive manner, putting the onus on the employer to justify why they are asking their employee to cover or reverse-cover. Reasons such as “uniformity” or “customer preference” should not be accepted at face value, and better reasons should be demanded. Once gender expression has satisfactory legal tests developed in case law, the expression of other prohibited grounds should also be similarly protected.

Human rights tribunals should also consider covering demands relating to prohibited grounds of discrimination to be “adverse treatment” for the purposes of the *Moore* test for discrimination. Covering demands can overlap with behaviour that is considered harassment for the purposes of human rights law. However, covering demands are sufficiently unique to merit their own term or category under “adverse treatment.”

Ultimately, Yoshino is correct in saying that the main ways covering demands could be stopped would not be legal in focus. Expecting a top-down change to happen overnight would be unrealistic. However, legislative change in conjunction with social activism is better than simply waiting for things to change without intervention.

Acknowledgements

My professor, Ken Norman, and the editors at USURJ.

¹⁷³ Irwin Law, *Labour and Employment Law: Cases, Materials and Commentary*, 8th ed (Toronto: Irwin Law Inc, 2011) at 823.

¹⁷⁴ *Vriend v. Alberta*, [1998] 1 SCR 493 at para 102, 156 DLR (4th) 385, 212 AR 237.

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