

Tattoos and Police Dress Regulations

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And the sign said, “long-haired freaky people need not apply”
So I tucked my hair up under my hat, and I went in to ask him why
He said, “You look like a fine upstanding young man, I think you’ll do.”
So I took off my hat, I said, “Imagine that, huh, me working for you.”
“Signs” (1970), The Five Man Electrical Band

I. INTRODUCTION

On October 15, 2012, Scotland Yard Police Commissioner Bernard Hogan-Howe issued a directive banning all officers and staff from getting tattoos that cannot be covered by everyday clothing as they “damage the professional image” of the force. The directive also required all employees to register details of their currently “visible” tattoos with their supervisors before November 12, 2012 or risk discipline – including dismissal.¹

Police dress regulations play a vital role in enhancing both the public image of the police and the internal morale or *esprit de corps* of its members. Police officers are issued a specific uniform and are expected to conform to a significant list of physical appearance standards. Traditionally the showing of tattoos is not among this list. However, with more and more people entering the workforce with tattoos, it is not surprising that some amount of control on this type of expression is starting to be regulated.

In fact, the Scotland Yard directive is not unique as a number of other police agencies in the United Kingdom, the United States, and other

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¹ “Tattoo ban for Metropolitan Police officers”, *BBC News* (October 17, 2012) online: [BBC News <http://www.bbc.co.uk/news/uk-england-london-19974694>](http://www.bbc.co.uk/news/uk-england-london-19974694).

common-law countries have recently passed regulations either banning the display of tattoos completely or limiting their display subject to the discretion of the Chief of Police. Such bans are intended to maintain a public image of neutrality and bias free policing.²

In late 2007 Menno Zacharias, then Deputy Chief of the Winnipeg Police Service, recommended the Service explore drafting such a policy but the recommendation was not acted upon. According to Zacharias:

Image and branding are important in both the private and public sector. Organizations such as police agencies should and are concerned with the public image they project. The use of uniforms and the stress placed on uniformity of action by members of the organization are intended to project a particular image that not only projects the authority of the position but also reinforces the values of the community police serve. Criminal gangs have long projected their image by decorating themselves with tattoos. Police officers openly displaying tattoos in my view undermines the image police agencies should be trying to project.³

With the coming into force of the new Manitoba *Police Services Act* on June 2, 2012, and the creation of municipal police boards that are empowered to establish policies for the effective management of the police service and to ensure that police services are delivered in a manner consistent with community needs, values and expectations,⁴ the intent of this paper is to review the issues that have arisen, or could arise, as a result of such a directive being put forward again. The intent is not, however, to provide an in-depth analysis of all the substantive and procedural rights and remedies involved.

² A sample policy from the East Palo Alto P.D. can be found online at <<http://paloaltofreepress.com/wp-content/uploads/2010/06/East-Palo-Alto-Police-Tattoo-Policy.pdf>>. Similar “no show” policies exist in Los Angeles (CA), San Diego (CA), Honolulu (HI), Houston (TX), Baltimore (MD), Dallas (TX), St. Louis (MO), Huntsville (AL), New York State (NY), Des Moines (IA) and Orland Park (IL) to name a few. Rules in all 43 police forces in England and Wales prevent officers showing tattoos which could cause offence to colleagues or the public. Similar regulations were recently introduced in several Australian states as well.

³ Menno Zacharias, personal communication, October 25, 2012.

⁴ *Police Services Act*, SM 2009, c 32, CCSM c P94.5 ss 28(1)(a) and 28(2)(c). For background on the Act see Jason E Roberts, “*Bringing the Thin Blue Line into Line: Bill 16, The Police Services Act*” (2010) 34:3 Man LJ 72.

II. TATTOOS AND THE CURRENT GENERATION

Tattoos date back thousands of years and reflect an affinity for humans to mark their bodies to reflect their social, cultural and individual identities. They also reflect one of the earliest known forms of communication. A tattoo could identify the wearer with a certain group while distinguishing him from others. Moreover, the tattoo could symbolize or reflect status and place within the society. While it may simply be “body art”, it could also be a means by which people express their cultural or religious identity, their sense of individuality or their personal thoughts, opinions and beliefs.

While only a few generations ago tattoos were associated with criminals, gang members, and other delinquent or marginalized groups,⁵ 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.

In 2010, the Pew Research Center released the results of a comprehensive survey into how the current generation in the United States viewed their lives, futures and politics, which found that nearly four-in-ten (38%) of Millennials (adults coming of age in 2000 or later) have at least one tattoo. In that same report, thirty-two percent of Gen Xers reported having tattoos, while only 15% of Baby Boomers and 6% of Silents (adults born before 1946) had tattoos.⁶

⁵ See e.g. Mark Burgess & Louise Clark, “Do the ‘Savage Origins’ of Tattoos Cast a Prejudicial Shadow on Contemporary Tattooed Individuals?” (2010) 40 *J App Soc Psych* 746 at 746-747 and Margo DeMello “Not Just for Bikers Anymore: Popular Representations for American Tattooing”, (1995) 29 *J Pop Culture* 37.

⁶ The Pew Research Centre, *Millennials: A Portrait of Generation Next* (February 2010) online: <<http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>>. See also “One in Five U.S. Adults Now Has a Tattoo”, *The Harris Poll* (February 2012) online: <http://www.harrisinteractive.com/vault/Harris%20Poll%2022%20Tattoos_2.23.12.pdf>, which found that 30% of American adults aged 25-29 and 22% of those aged 18-24 had tattoos, while only 11% of those aged 50-64 and 5% of those over 65 did [Pew Research Centre].

The survey also found that nearly 70% of those adults with tattoos had more than one, with a full 18% having six or more. However, of adults aged 30 and older who had tattoos, nearly half (47%) had just one. Most adults with tattoos, regardless of age, didn't display them publicly with the vast majority (72%) indicating that their tattoos were not usually visible.⁷

Police departments are always recruiting. They target the current generation, actively looking for outgoing, creative and enthusiastic young adults to fill the ranks being vacated by retiring Baby Boomers. In fact the majority of police officers serving today have less than ten years in the police workplace, with the vast majority of them working front line uniform duties. While there is a comprehensive scheme to regulate almost every other facet of an officer's appearance, tattoos are completely absent from most police dress regulations in Canada.

A. Police Dress Regulations

Many workplaces have rules about dress, physical appearance and some even specify the wearing of a particular uniform. Most police dress regulations state that dress and deportment play a vital role in enhancing both the public image of the police and the internal morale or *esprit de corps* of its members.

To this end members are issued a specific uniform and are expected to conform to a significant list of physical appearance standards dealing with everything from the colour of an officer's socks to their hair length (including the length and size of beards, sideburns and moustaches), use of makeup, wearing of jewelry and even mirrored sunglasses. Usually these policies state that officers may only wear those articles of clothing and equipment approved by the Chief of Police and while in uniform will not wear pins, badges, ribbons or any adornments on their uniform which are not approved by the Chief of Police.⁸

⁷ Pew Research Centre, *supra* note 6 at 57-58.

⁸ See e.g. Vancouver Police Department, *Regulations and Procedures Manual*, Policy 5.4.7, s 14 (2009) online: <<http://vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>>, which states that "Exceptions to the provisions of "Personal Grooming and Appearance" as specified in this section may occur with permission of the Chief Constable or designate for valid reasons (for example medical or religious grounds)."

Such anti-adornment policies are common in policing and were designed to establish a convention of neutrality – that the police are free from bias or partisan influences. While such policies do not deal with the display of tattoos – which can also convey meaning such as group affiliation or the values, beliefs, thoughts or opinions of the wearer – the main body of these regulations date back many years when the then current generation had neither tattoos nor body piercings. Furthermore, considering tattoos are not adornments to a member’s uniform, they are not likely to be captured by the comprehensive dress regulation scheme without a specific amendment.

To date tattoos have been the subject of only one police grievance arbitration in Canada.⁹ However, based on recent labour law arbitrations regarding the display of body piercings in some private sector workplaces in Canada and the move to ban the display of tattoos in several US and common-law police forces, it is anticipated that it will become the subject of a future grievance as more of the current “tattooed” generation become police officers, while the non-tattooed generation hold senior management (rule-making) positions.

In fact, in a recent study by Mark Burgess and Louis Clark, the authors found that people who were not tattooed and who were not considering getting a tattoo displayed a strong association with the traditional delinquent tattoo stereotype.¹⁰

As police officers are representative of their community, this paper could be seen as a preview to a possible labour grievance where the nature of a member’s tattoo results in a policy change because of (a) a public complaint; (b) an internal complaint; or (c) a preemptive move by senior management based on negative stereotypes to avoid such a complaint, whether or not such a move is based on any particular officer.

In fact, this is what happened within the Ontario Provincial Police (OPP). In April 2010 a policy was adopted that required members to cover up any tattoos that compromised the professional image of the department. Shortly thereafter, on April 21, 2010 Constable Jason Soblcowicz was ordered to cover up his tattoos after a visiting police inspector reported seeing “what looked like a ‘gangbanger’ who had put

⁹ *Ontario Provincial Police and Ontario Provincial Police Association (Tattoo Policy Grievance)* (2 August 2011), (Arbitrator Randi Abramsky).

¹⁰ Mark Burgess & Louise Clark, *supra* note 5 at 761.

on a uniform and stolen a cruiser.” Constable Soblocowicz complied with the order and subsequently filed a personal grievance while his union filed a policy grievance.

During the arbitration hearing Provincial Commander for Corporate Services Noreen Alleyne testified that the provincial police uniform was an identifier, a symbol, a brand, and that employees should look the same in it. Appearance was important because it conveyed trustworthiness:

There was a general concern [at the Results Driven Policy Committee meeting] that members displaying tattoos were less than professional. There was concern that the public might have a negative impression of an officer “totally covered in tattoos” [and that] such tattoos were likely to raise questions of confidence and trust by the public and did not reflect a professional appearance. She recalled stating that, as a civilian and an older, vulnerable adult, if she were stopped by an officer at night in an unmarked car who had visible tattoos, she would be concerned if he or she was truly a police officer or not.¹¹

While Arbitrator Abramsky found the objective of the policy was reasonable (that of promoting a professional image of the department to the public) it conflicted with the officers’ competing interest in his own appearance. “Tattoos are also a form of self-expression... they may comprise a fundamental part of the identity of the employee or have personally philosophical significance to the employee.”¹²

Ultimately Arbitrator Abramsky found the policy to be invalid. Not only because of the expressive nature of tattoos, but also because of the stigma attached to having to cover them up; the lack of demonstrative evidence showing the adverse effect tattoos had on the business enterprise – especially when officers had worn tattoos for many years (even decades) without incident or complaint; and the failure to show such policies existed anywhere else in the police world.¹³

¹¹ *Supra* note 9 at 3.

¹² *Ibid* at 17, citing *Re Thrifty (Canada) Ltd and Office and Professional Employees International Union, Local 378* (2002), 106 LAC (4th) 420 (available on WL Can) and (2001), 100 LAC (4th) 162 (available on WL Can) (BC Arb Brd), in regard to some items of attire.

¹³ *Ibid*. See also *Calgary Co-operative Ltd. v Union of Calgary Co-op Employees* (2006), 145 LAC (4th) 296 (available on WL Can), in which a uniform dress code requiring all shirts be tucked in was successfully challenged by larger employees who felt humiliated by the requirement. Arbitrator Ponak agreed, finding the employer had failed to establish any business rationale for the policy and did little or no market research showing a nexus between the “tuck-in rule” and its business strategy.

Considering that several major police departments in the world, including the Vancouver Police Department,¹⁴ do have such policies in effect, with more being added yearly, suggests we are merely at the beginning of the wave and that Arbitrator Abramsky's decision may not be the last word on this topic in Canada as tattoos become more prominent and diverse in mainstream society.

III. DRESS CODES AND EMPLOYMENT

A. Human Rights Issues

Generally, workplace dress codes do not contravene the *Human Rights Code*¹⁵ so long as they do not impose a burden, obligation or disadvantage on an individual or group not imposed on others. Basically, *the Code* was not intended to address issues of personal convenience or individual preference. However, any dress standard set by an employer should advance the business purpose while considering the dignity of the employee and the right of the employee, as far as possible, not to have to make a permanent change to their personal appearance.

However, certain uniform job requirements or dress codes may still come into direct conflict with religious or cultural dress requirements. While discrimination based on a number of enumerated characteristics is prohibited in employment,¹⁶ human rights legislation across Canada does

¹⁴ *Supra* note 8 at Policy 5.4.9.

¹⁵ All provinces and the Federal government have enacted similar Human Rights Codes. The *Manitoba Human Rights Code*, SM 1987-88, c 45, CCSM c H-175 [*the Code*] will be used as an example.

¹⁶ *Ibid*, s 9(2). These characteristics include:

- (a) ancestry, including colour and perceived race;
- (b) nationality or national origin;
- (c) ethnic background or origin;
- (d) religion or creed, or religious belief, religious association or religious activity;
- (e) age;
- (f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- (g) gender identity;
- (h) sexual orientation;
- (i) marital or family status;

allow for certain limitations or restrictions on those rights if they are based on a *bona fide* occupational requirement, or a *bona fide* justification. For example, the *Code* provides that:

14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation.¹⁷

Therefore, when dress codes or uniform policies conflict with the enumerated characteristics under section 9(2), there is a duty on employers to accommodate the person unless discrimination is reasonable in the circumstances for that person's employment or occupation.¹⁸

While the policy of the Manitoba Human Rights Commission is that they do not have authority with respect to dress codes unless there is an allegation that the existence or application of the dress code discriminates on the basis of a protected activity or characteristic,¹⁹ the Ontario Human Rights Commission specifies a number of factors that should be considered when promulgating a dress code *vis-à-vis* religious observances:

- i. What is the exact nature of the religious observance?
- ii. What is the reason for the uniform or dress code?
- iii. What measures can be taken to accommodate the person? Are there alternatives?
- iv. Are there health or safety factors involved?
- v. If so, do they involve the health or safety of the employee alone, or are there consequences for other employees?
- vi. If so, has the employer shown that to accommodate the employee would create a health or safety hazard that would amount to undue hardship for the employer?

As a rule, uniforms such as school uniforms and work uniforms that have no health or safety rationale can be modified easily to permit the person concerned

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- (j) source of income;
 - (k) political belief, political association or political activity;
 - (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;
 - (m) social disadvantage.

¹⁷ *Ibid*, s 14(1).

¹⁸ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54, 176 DLR (4th) 1 [Meiorin].

¹⁹ Manitoba Human Rights Commission, *Policy and Procedures Manual*, Policy #L-22 (February 25, 2005), online: <http://www.manitobahumanrights.ca/publications/policy/policy_services-employment-dress-codes.html>.

to wear the required item(s) of clothing. Clothing or gear with a health or safety rationale may constitute a reasonable occupational requirement. Nevertheless the employer is obliged to accommodate the employee, for example, by seeing whether the gear can be modified to permit the person to wear the religious dress safely (subject to the undue hardship test), or by examining whether the employee can be transferred to another job that may be available in the company that does not require the clothing or gear.²⁰

In addition to human rights statutes the *Charter of Rights*²¹ also has application to government employers. Specifically sections 2, 7 and 15 provide that everyone has the freedom of religion, thought, belief, opinion and expression; the right to life liberty and security of the person; and freedom from discrimination based on a number of enumerated and analogous grounds similar to those found in human rights statutes.

As tattoos can convey meaning whether or not they are of any religious or cultural significance, they may also be captured by section 2(b) of the *Charter*. However, such rights do not exist in a vacuum, but are shaped and formed both by the particular context in which they are exercised and the rights of others. Speaking of hate speech, in *R v Zundel*, a majority of the Supreme Court stated:

The purpose of s. 2(b) is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view.²²

However, free speech does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. In cases where it is not possible to walk away, the form of expression must be compatible with the function or intended purpose of the place or forum of the expressive activity.²³

²⁰ Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances* at 11 (December 2009), online: <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_creed_and_the_accommodation_of_religious_observances.pdf>.

²¹ *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 ("Charter").

²² *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202.

²³ See also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 171 NBR (2d) 321 and *R v Keegstra*, [1990] 3 SCR 697, 184 AR 217 where anti-Semitic views were

For example, in 1989 the RCMP instituted a change in their dress policy that allowed practicing members of the Sikh religion to wear a turban and other religious items. A court challenge was subsequently launched by members of the RCMP Veterans Association challenging the constitutional validity of the incorporation of religious symbols in the significant (or dress) uniform of the RCMP pursuant to sections 2, 7 and 15 of the *Charter*.

The Veterans Association felt that the neutrality of the RCMP was undermined if the public were obliged to accept a police officer wearing a religious symbol as part of their uniform. However, at trial, Justice Reed of the Federal Court of Canada held that the interaction of a member of the public with a police officer who carries an identification of his religious persuasion as part of his uniform does not constitute an infringement on the former's freedom of religion as there is no necessary religious content to the interaction between the individuals and there is no compulsion or coercion to participate in, adopt or share the officer's religious beliefs or practices. Furthermore, it was noted that the British Army for years had allowed Sikh's to wear turbans and beards.

The matter was subsequently referred to the Federal Court of Appeal which unanimously upheld the trial judge's decision, stating that:

Furthermore, we are not persuaded that the incorporation of the turban by itself created a reasonable apprehension of bias. Whether or not there is a convention of neutrality in policing [...] if the appellant's argument were fully accepted, it might lead to the absurd situation that a Christian police officer could interact only with other Christians, a woman police officer could only interact with other women, a Black police officer only with other Blacks, a Native Canadian only with other Native Canadians, and, presumably, a White only with other Whites. This could not be tolerated in this country.

[...]

The RCMP is a great Canadian institution with a proud and respected tradition. By adjusting the uniform to take into account the concerns of the Sikh community, the Commissioner was not seeking to weaken the institution but to strengthen it. The expressed purpose of the change was to facilitate recruitment of minorities, to enable the Sikh community to exercise its religious freedom and to reflect the newer multicultural nature of Canada. The Commissioner obviously felt that with proper selection, training, supervision, and discipline,

found to be incompatible with the position of public school teacher.

individuals of all religious persuasions could serve in the RCMP impartially and that the force would be made stronger by this program.²⁴

Although the challenge to the RCMP's dress code was made pursuant to the *Charter*, it is obvious from the judge's ruling that the argument would have failed whether it was under the *Charter* or the federal Human Rights Act as the benefits of accommodating the Sikh religion far outweighed those of the police dress code in the courts opinion.

More recently in *Multani v Commission Scolaire Marguerite-Bourgeoys*, the Supreme Court set aside a decision of the Quebec Court of Appeal that had upheld a school division's right to prohibit a Sikh student from wearing his kirpan (a religious object similar to a dagger and made of metal) on school grounds. While the school's decision to prohibit the wearing of the kirpan was motivated by a pressing and substantial objective to ensure a reasonable level of safety at school, it could not be justified as minimally impairing the student's rights. In part the Court held that there was no evidence to support the argument that the kirpan was a symbol of violence and that it should be prohibited because it sent a message that using force was necessary to assert one's rights and resolve conflict:

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating [the student] and allowing him to wear his kirpan ... demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.²⁵

²⁴ *Grant v Canada (Attorney General)*, (1995) 125 DLR (4th) 556, at 557-59, 184 NR 346. Also see *Fraternal Order of Police Lodge No 12 v Newark Police Department* (1999), 170 F 3d 359 (available on WL) (3d Cir) in which the court found that a complete ban on beards negatively affected the religious beliefs of two Sikh officers. That decision was followed in *Riback v Las Vegas Metropolitan Police Department* (2008), 104 Fair Empl Prac Cas 34, 2008 WL 3211279 (Nev Dist Ct), which granted summary judgment to an officer whose beard conflicted with the department's no-beard policy but whose religious practices (Orthodox Jew) required him to have one. However, the Court confined their ruling to the officer's current position which did not involve public contact. Furthermore it did not grant summary judgment regarding his request to wear a Yarmulke, which was not allowed under the department's uniform headgear policy.

²⁵ *Multani v Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 79, [2006] 1 SCR 256. Although this is a school decision, like policing it is also a tightly controlled environment.

In light of such decisions many police departments across Canada changed their uniform dress policies to accommodate the wearing of religious symbols. As such, accommodation for items that are required to be worn by a member's religion or culture (i.e. clothing, jewelry, hairstyle), is provided for in most police regulations. However, tattoos are not.

This is not just a narrow police issue as other public service agencies have also been looking at restricting tattoos in their dress and grooming policies – from military personnel,²⁶ to firefighters,²⁷ nurses and other healthcare practitioners.²⁸

In fact, on January 14, 2013, Arbitrator Slotnick declared a policy that restricted tattoos at the Ottawa Hospital to be void and unenforceable.²⁹ As a result of an amendment to the hospital's dress code prohibiting visible, excessive body piercings or large uncovered tattoos, by employees during working hours, a policy grievance was filed by the Canadian Union of Public Employees. At the hearing several witnesses testified that their tattoos or piercings were a "significant part of their identity and mode of expression".

The hospital argued that tattoos and piercings could undermine a patient's confidence in an employee's professionalism, which in turn would negatively impacted health care outcomes. However, like the OPP, the hospital was unable to produce any objective evidence to support this proposition and, considering the hospital wouldn't accede to a patient's negative views about an employee's race or ethnic background, Slotnick

²⁶ Lance Bacon, "Troops voice anger over new grooming rules", *Army Times* (May 19, 2012), online: <http://www.armytimes.com/news/2012/05/army-troops-voice-anger-new-grooming-rules-051912w/>. The actual tattoo policy can be found at s 1-8(e) of Army Regulation 670-1 (Wear and Appearance of Army Uniforms and Insignia), RAR issue date: 11 May 2012, online on line at <http://www.apd.army.mil/jw2/xmldemo/r670_1/head.asp>.

²⁷ Jane Jerrard, "LAFD Inks Groundbreaking Policy on Tattoos", *FireRescue Magazine* (September 2008), online: <<http://www.firefighternation.com/article/news-2/lafd-inks-groundbreaking-policy-tattoos>>.

²⁸ Aedan Helmer & Kelly Roche, "Ottawa hospital staff told to hide tattoos", *Toronto Sun* (April 15, 2011), online: <<http://www.torontosun.com/news/canada/2011/04/16/18015946.html>>.

²⁹ *Ottawa Hospital v CUPE Local 4000*, 2013 CanLII 643 (ON LA). *Contra Baldetta v Harborview Medical Center*, 116 F 3d 482, 1997 WL 330648 (9th Cir CA) [*Baldetta*]. See also Heather V Westerfield et al, "Patients' Perceptions of Patient Care Providers with Tattoos and/or Body Piercings" (2012) 42:3 *J Nurs Adm* 160.

queried why should it accept them regarding an employee's bodily adornment that reflected "the diversity that anyone would expect in a big-city hospital"? In the end, Slotnick found that the hospital had "attempted to fix a problem that does not exist" and declared the policy void and unenforceable.

A similar situation arose when in 2009, Nadine Bélisle, a daycare worker, was successful in overturning an order to cover up a tattoo of a dragon on her right shoulder by her employer, the CPE La Pirouette daycare. Justice Bouchard of the Quebec Superior Court agreed that the tattoo ban violated her rights for freedom of expression. While the daycare's ban was initially upheld by a labour arbitrator, Justice Bouchard wrote that the ban rests on prejudices. "Tattooing nowadays is a phenomenon that cuts across all levels of society. If it was once associated with delinquents, that's no longer the case."³⁰

B. Collective Agreements

In *Parry Sound v OPSEU*³¹ the Supreme Court held that extrinsic statutes such as the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. As noted by Justice Iacobucci:

[I]t is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the Human Rights Code are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, 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.³²

Similarly, where no management rights clause is inserted into a collective agreement, it is usually deemed to exist. For example many collective agreements between a municipality or police board and its local police association do not contain a specific management rights clause; however, the right of management to make rules for the control,

³⁰ *Syndicat des travailleuses des Centres de la petite enfance du Saguenay-Lac-St-Jean-FSSS-CSN c Girard*, 2009 QCCS 2581 at para 29 (available on WL Can), aff'd 2011 QCCA 1620 (available on WL Can).

³¹ *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 SCR 157.

³² *Ibid* at para 23.

governance, well-being and efficiency of its police service is often explicitly assigned to the Chief of Police by statute.³³

Therefore police agencies that have implemented a tattoo policy may claim that it is management's right to do so and that it is not subject to arbitration. However, this absolute right is tempered in Manitoba by section 80(2) of the *Labour Relations Act*³⁴ and the principles laid out in *KPV Co Ltd v Lumber and Sawmill Workers' Union*, which state that any rule unilaterally introduced by a company, not subsequently agreed to by a 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 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.³⁵

Like the OPP tattoo policy grievance mentioned earlier, many agencies take the position that tattoos do not support the corporate image of neutrality and bias free policing, claiming that the restriction is justified in the interests of fostering harmonious race relations both within the department and within the community. The policy is clear and unequivocal, it was brought to the attention of all employees through the

³³ For example see *The City of Winnipeg Charter*, SM 2002, c 39, s 166(4) and the City of Winnipeg, by-law, No 783/74, *Winnipeg Police Service By-law*. Police Service By-law #783/74, s 2, which states that the Winnipeg Police Service "shall obey all lawful directions and be subject to the orders of the Chief of Police."

³⁴ *The Labour Relations Act*, SM 1987 c L10, CCSM c L10, s 80(2). This section states that every Collective Agreement shall be deemed to contain the following provision: "In administering this agreement, the employer shall act reasonably, fairly, in good faith, and in a manner consistent with the agreement as a whole". This is not a typical provision in labour statutes and, in the absence of such a provision elsewhere; it is a matter of interpretation whether there is an implied reasonableness qualification.

³⁵ *Lumber and Sawmill Workers' Union, Local 2537 v KPV Co Ltd* (1965), 16 LAC 73 (available on WL Can) (Ont Arb Brd) [KPV].

routine directive notification system and that it applies to all members equally and without discrimination.

While the agency position would be that the dress regulations fall outside the collective agreement, most officers are provided with a uniform that they are expected to wear. Furthermore, every officer is entrusted “with the responsibility for maintaining a high standard of dress and deportment. Uniformity is desirable and conformity to Department standards is required.”³⁶ As such the dress regulations may be incorporated into the collective agreement, if not explicitly then inferentially as to what a presentable appearance is. If the policy is unreasonable it may thus properly be the subject of the grievance process.³⁷

Furthermore, most collective agreements also contain a grievance procedure which is broad in scope, sufficient to include any dispute over terms and conditions of employment. For example Article V(2) of the Collective Agreement between the City of Winnipeg and the Winnipeg Police Association states:

The word “grievance” used throughout this Article shall mean a complaint involving any matter relating to wages, hours of work, other terms or conditions of employment, or any other working condition of a member of the Police Service, and shall include, without restricting the generality of the foregoing, any difference between the parties to the meaning, interpretation, application, or alleged violation of this Agreement, or any part thereof.³⁸

In addition, as previously outlined by Arbitrator Abramsky, the rationale for bringing forward the policy may be unreasonable in the first place if it was designed to target a specific officer; it failed to show a rational connection between the policy and the intended health or safety hazard it was trying to prevent; and that officers with tattoos could not be accommodated in a less drastic way without undue hardship to the employer.

³⁶ *Supra* note 14 at 5.4.4.

³⁷ See *Audmax Inc v Ontario (Human Rights Tribunal)*, 2011 ONSC 315 at para 61, 328 DLR (4th) 506. Although not a labour arbitration case, the issue was with respect to a dress code and whether “tight short skirt and leggings”, an anklet that “jingled”, open-toed “slippers” and a “cap” (“Hijab”), were consistent with the company’s dress code that explicitly required the wearing of “business attire” at all times.

³⁸ Collective Agreement between the City of Winnipeg and the Winnipeg Police Association (2010-2012), as cited in the *City of Winnipeg (Winnipeg Police Service) v The Winnipeg Police Association* (23 August 2011), Winnipeg (Arbitrator Arne Peltz) at 74.

While a less stringent policy had previously been adopted by the OPP in which only tattoos deemed illegal, offensive, immoral, or presenting an unprofessional appearance had to be covered up, such a policy was too subjective and it was changed as the force did not want to become the arbiter of good taste and morality. However, as previously noted, while most Dress Regulations allow an officer to seek an exemption from the Chief of Police to wear special clothing, jewelry or hairstyles that are required for religious or cultural reasons – the public display of tattoos is generally not required for religious or cultural reasons.³⁹

Furthermore, the position of many agencies is that tattoos are analogous to wearing adornments or pins and that a police officer's uniform is not a forum for fostering public discourse or expressing one's personal, political or cultural beliefs. For example, the City cited *Re Treasury Board and Almeida & Capizzo*, in which an arbitration panel upheld the disciplining of two Custom's officer who refused to remove union pins from their uniform. The officers argued, in part, that the wearing of the pins was a fundamental freedom protected by section 2(b) of the *Charter*. In dismissing their argument the arbitrator found management's position reasonable:

[Customs officers] are peace officers; there is a very good reason for them to be uniformed, easily recognizable, to exude the appearance of authority and control. It can only be supportive of that role not to have that appearance diminished, or subject to debate or question by the general public ... [the message on the buttons] could well have drawn the grievors' into public debate with those who may, for one reason for another, have chosen to take an opposing view ... [with] the potential for bringing the operations of the employer into public confrontation or debate.⁴⁰

³⁹ However see *EEOC v Red Robin Gourmet Burgers, Inc*, 2005 WL 2090677 (WD Wash Aug 29, 2005). In that case an employee claimed to practice an Egyptian-derived faith known as Kemet. As a rite of passage he obtained tattoos encircling his wrists made up of a verse from Egyptian scripture. Although Red Robin prohibited employees from having visible tattoos, the employee claimed that intentionally covering his tattoos was a religious sin. No complaints had been received about the employee and the court found no evidence that Red Robin could not accommodate the employee. The court rejected Red Robin's argument that visible tattoos were inconsistent with the company's goals of presenting a family-friendly image. The case was ultimately settled with Red Robin entering into a consent decree paying the employee \$150,000 and making substantial policy and procedural changes.

⁴⁰ *Re Treasury Board (Revenue Canada – Customs & Excise) and Almeida & Capizzo* (1989), 3

In a similar ruling, the 5th Circuit Court of Appeals upheld the Arlington Police Department's no-pins policy requiring that an officer remove a gold cross pin from his uniform. The Court determined the City's uniform standards were proper and that the City was unable to reasonably accommodate the officer's needs without undue hardship (i.e. the department's need to appear neutral outweighed the officer's right to outwardly express his beliefs):

Although the First Amendment protects an individual's right, for example, to shout, "Fire!" while riding a surfboard on the Pacific swells, it offers no such protection to the same speech uttered in a crowded theater. Visibly wearing a cross pin - religious speech that receives great protection in civilian life - takes on an entirely different cast when viewed in the context of a police uniform. Although personal religious conviction - even the honestly held belief that one must announce such conviction to others - obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of "public concern"⁴¹

C. Legitimate Business Interests

While a police Association might concede that the Chief of Police has the statutory authority to manage the workforce, in accordance with *KPV* the Chief still has the obligation to exercise that discretion reasonably. As noted *Re Scarborough and IAFF*, an employer has no authority to impose its personal views of appearance or dress upon an employee except in matters of health and safety or for a legitimate business interest:

[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. There are exceptions to that general proposition ... [However] I am of the view that an employee should only be subjected to the imposition of such standards not on speculation, but on the

LAC (4th) 316 at 324-25 (available on QL).

⁴¹ *Daniels v City of Arlington* (2001), 246 F 3d 500 at 504 (available on WL) (5th Cir CA). See also *Rodriguez v City of Chicago* (1998), 156 F 3d 771 at 779 (7th Cir CA): "The importance of public confidence in the neutrality of its protectors is so great that a police department or a fire department ... should be able to plead "undue hardship" and thus escape any duty of accommodation"; *Riggs v City of Fort Worth* (2002), 229 F Supp 2d 572 at 581 (available on WL) (ND Tex) [*Riggs*]: "Courts have long held that the city though its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias".

basis of 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.⁴²

The decision in *Re Scarborough* was affirmed and applied in *Re Waterloo Police Services Board and WRPA*, holding that an absolute prohibition on officers with beards could not be sustained where no objective rationale for the policy had been demonstrated.⁴³

A similar ruling was made in *Francis (and Brown) v Keane* in which the United States District Court refused to dismiss a lawsuit against the New York State Department of Correctional Services regarding a grooming policy that forbade correctional officers from having dreadlocks. The Department of Corrections maintained the policy was necessary to maintain safety, discipline, and an *esprit de corps* among uniformed corrections officers. However, the court found there was no objective evidence or rationale for the policy and concluded that the hairstyle was neither inappropriate nor a safety risk:

These are the kind of unsupported and conclusory statements that courts consistently reject as insufficient to overcome a free exercise challenge ... Here, it is not at all apparent how the plaintiffs' modified dreadlocks implicated the concerns that the defendants claim the directive is meant to address – namely, safety, discipline and *esprit de corps* ... The defendants have not provided the Court with any evidence to support their argument that the directive, as it has been applied to the plaintiffs, even advances their interest in safety ... Similarly, the defendants have failed to provide any evidence that the directive fosters discipline or *esprit de corps*.⁴⁴

⁴² *Scarborough (Borough) v International Association of Fire Fighters, Local 626 (Cousins Grievance)* (1972), 24 LAC 78 at 83-84 (available on QL). Also see *Re Du Pont Canada Inc, Ajax Works and Teamsters' Union, Local 1166* (1982), 8 LAC (3d) 24 at 29-30 (available on QL).

⁴³ *Re Regional Municipality of Waterloo Police Services Board and Waterloo Regional Police Association* (2000), 85 LAC (4th) 227 at 252 (available on WL Can), *aff'd* (2000), 135 OAC 86 (available on WL Can) (Ont Div Ct). See also *Ontario Provincial Police*, *supra* note 9. See, however, *Constable Matthew Jeary and the Waterloo Regional Police Service* (April 5 2000), 00-05, online: OCPC <[http:// www.ocpc.ca/](http://www.ocpc.ca/)>, in which the Ontario Civilian Commission on Police Services upheld a conviction for insubordination where the officer refused to comply with an order from his supervisor to trim his beard. Also see *Fraternal Order of Police Lodge No 12 and Riback v Las Vegas Police Department*, *supra* note 24.

⁴⁴ *Francis (and Brown) v Keane*, 888 F Supp 568 (SDNY 1995) at 575-76. Also see *Booth v State of Maryland* (2003), 327 F 3d 37 (4th Cir CA), *rev'ing in part* 207 F Supp. 394 (D

Similarly, in *Zehrs Markets Inc v UFCW*, an Ontario Arbitration Board canvassed the jurisprudence concerning the application of the reasonableness criteria from *KVP Co Ltd* to company rules concerning dress and appearance and adopted the comments of Arbitrator Shime as the best summary of those criteria:

First all the cases are in agreement that a company may promulgate rules concerning the dress and appearance of employees provided that the rules are reasonable. Secondly arbitrators recognize 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 interests of the employer. Although the personal freedom of an employee is a concern it is not absolute. Thirdly the legitimate concerns of the employer involve both image and actual loss of business and those two concepts are obviously interrelated. Permeating all the cases is the suggestion that an employer must demonstrate that the grievor's appearance has resulted in a threat to its image and consequent financial loss or at the very least that on the balance of probabilities the employee's appearance threatens its image and therefore threatens a loss of business to the company.... Fourthly many arbitrators have alluded to changing standards or marked shift in public attitudes or to evolving hair styles and I too am of the opinion based on the references in the cases and my own personal observations that it is appropriate for me to take official notice that in the community there is an evolving standard of dress and hair styles and that the community has grown more tolerant in its attitudes. Even since the earlier cases where these issues arose there have been not only further changes in dress and hair styles but there has been an increasing community tolerance for the variety of life styles that are manifest in personal dress and appearance. Fifthly the cases have distinguished industries where the employees come into contact with the public and those where there is no public contact and apart from issues of health and safety tend to be more tolerant in those situations where the employee does not have any contact or has minimal contact with the members of the public. Sixthly there seems to be a further distinction between hair styles which are neat and well trimmed and those hair styles which are unkept or create the impression of being dirty or unsanitary.⁴⁵

Md), where a uniformed Rastafarian correctional officer wore his hair in short braided dreadlocks. This hairstyle was in violation of the dress code. While the District Court upheld the grooming policy as facially neutral and rationally related to the Division's goals of promoting safety, uniformity, discipline, and *esprit de corps* among the correctional staff at the facility, the Appellate Court nevertheless found that it was applied in an unconstitutional manner as it did not grant the officer an exemption on religious grounds.

⁴⁵ *Re Zehrs Markets Inc and UFCW, Local 175 & 633* (2003), 116 LAC (4th) 216 at 245

As noted by the Arbitration Board the nature of the balancing will vary depending on the nature of the employer's business; the duties of the affected employees; the degree of contact of the employee with the public; the degree of the risk and severity of the danger presented by the employee's appearance; and the nature of the interference with the employee's personal appearance caused by the policy. In all cases, arbitrators required employers to demonstrate at least the likely prospect of damage to one of its legitimate business interests. However, the mere allegation of possible damage to their image was not sufficient and there had to be proof of significant complaints or consumer surveys to indicate the likely prospect the employer would lose business if it was not able to maintain the policy.⁴⁶

More recently, in *United Food and Commercial Workers v Westfair Foods Ltd*, the Alberta Court of Appeal upheld an arbitrator's decision that a policy prohibiting all visible facial piercings and tattoos was unreasonable, substituting it with a revised policy permitting discreet piercings where the parties could not agree on an acceptable policy.⁴⁷

In part the arbitrator found that Westfair Foods had failed to establish that their policy was reasonable. While Westfair Foods claimed all visible facial piercings (and tattoos) were detrimental to their business image and competitive advantage, other food chains allowed discrete facial piercings (even food chains owned by the same parent company). Furthermore management was unable to provide any objective evidence that consumers responded negatively to facial jewelry. However, without any evidence at all on the impact of facial jewelry on consumer behaviour, the arbitrator was reluctant to go any further than implementing a policy that allowed for discrete facial piercings (i.e. nose studs).⁴⁸

As such, even though a police department policy might be clear and unambiguous, issues of adverse or detrimental reliance may arise in

(available on WL Can), citing *Re Dominion Stores Ltd and USWA* (1976), 11 LAC (2d) 401 at 403-404 (available on QL) (Ont Arb Bd) [*Dominion Stores*].

⁴⁶ *Ibid* at paras 61-62.

⁴⁷ *United Food and Commercial Workers Union, Local 401 v Westfair Foods Ltd*, 2008 ABCA 335, 440 AR 249. While the policy also prohibited the display of tattoos, the grievors in this case only had facial piercings.

⁴⁸ *Ibid*. Also see *Re Thrifty (Canada) Ltd*, *supra* note 12, in which an arbitrator found that Thrifty's policy prohibiting facial piercings did not respond to any normal objectively verifiable exigencies of reputation and image and, therefore, were not reasonable.

implementing such a policy until it can be arbitrated where years of silence on behalf of the department regarding the display of tattoos has led union members to obtain subsequently prohibited tattoos on the basis they could do so without penalty.⁴⁹ Such may be the case where the Winnipeg Police considered such a policy, but then decided against it.

D. Objectively Verifiable Exigencies

Nevertheless some tattoos can express a foreign language, shape, number or other symbol that may be inflammatory, offensive or have criminal significance which is unknown to management. For example in *Inturri v City of Hartford*, five officers with spider web tattoos on their arms appealed the Chief's order that they cover their tattoos, contending that their equal protection rights were violated and that the regulations were vague and overbroad. While the officers claimed the tattoos were merely decorative and were not intended to express any meaning whatsoever, after consulting various sources, the Chief ordered the tattoos covered while the officers were on duty because the tattoo was well known as a symbol of a white supremacist group.

While the Chief never suggested the officers' were racist or that they displayed the tattoos as part of any racist or anti-Semitic philosophy or statement, his concern was that such tattoos may be interpreted as racist and could therefore result in an explosive situation, endangering both the officers and the community if not covered. In reaching his conclusion the Chief considered the following:

- 1 A visual database of extremist symbols, logos and tattoos maintained by the Anti-Defamation League (ADL), which included the spider web design and an explanation that it was favored by "racist convicts" (although the ADL did note that some individuals obtained the tattoo for the look, being unaware of its racist connotations);

⁴⁹ Estoppel by silence would generally not apply. While silence or inaction may constitute a representation, for the purpose of an estoppel, the representation must be a legal (not a mere moral or social) duty. As the Supreme Court stated in *Ryan v Moore*, 2005 SCC 38 at para 76, [2005] 2 SCR 53: "estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure..."

- 2 The racial composition of the City of Hartford (which was almost seventy percent non-Caucasian);
- 3 A history of troubled race relations between the population of Hartford and members of the police department;
- 4 The racial composition of the police department;
- 5 A consent decree entered into by the department in *Cintron v Vaughan* to prevent racially discriminatory practices after allegations of systemic racism were made about the police towards racial minority groups;
- 6 Article XII of the department's Code of Conduct, which addresses discriminatory acts by police officers; and
- 7 Information from the FBI on racist groups.⁵⁰

The court affirmed the Chief's decision, finding that the order was rationally related to the department's legitimate interest in fostering harmonious race relations both within the department and within the community. The court also rejected the claim that the regulation was vague or overbroad either facially or as applied. The officers had sufficient notice to cover their tattoos and that the burden of covering them with a sweatband-type material was minimal.

As public employees, the officers were subject to special restrictions on free expression as were reasonably necessary to promote effective government, and the police department had a reasonable interest in not offending or appearing unprofessional. The order was not unconstitutionally vague because it specifically told the officers that their spider web tattoos must be covered. Similarly, the order did not violate the officers' rights to equal protection. As public employees, the officers had no fundamental liberty interest in their personal appearance, and the order requiring covering the spider web tattoos, which could reasonably have been perceived as a racist symbol, was rational.⁵¹

⁵⁰ *Inturri v City of Hartford*, 165 Fed Appx 66, 2006 WL 231671 (2d Cir), aff'ing 365 F. Supp. 2d 240 (D Conn. 2005) [*Inturri*]. Also see *Rathert v Village of Poetone* (1990), 903 F 2d 510 (7th Cir CA) where the make-up of a small conservative community was a significant factor in upholding a policy banning earrings worn by policemen. However, in terms of human rights, such arguments are generally rejected in Canada where they are based on perception and there is no evidence of detrimental impact. C.f. *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772.

⁵¹ *Inturri*, *supra* note 50.

Based on the objective evidence presented by the City of Hartford, it could not be said that the policy was unreasonable. Conversely, where no evidence is presented, simply taking the position that tattoos in general can convey an unacceptable meaning could be seen as vague, overly broad and therefore unreasonable. For example, in *Stephenson v Davenport School District*⁵² the 8th Circuit Court of Appeals found that a school district's policy against tattoos was vague and overly broad.

In that case, the school district introduced a regulation to suppress gang activity by banning all gang related activities such as display of 'colors,' symbols, signals, signs, etc., on school grounds. The policy further stated that students in violation of the policy would be suspended from school and/or recommended for expulsion.

Prior to the passage of the policy Brianna Stephenson, an eighth grade student in the Davenport Community School District, tattooed a small cross between her thumb and index finger. The tattoo was a form of 'self expression' and she did not consider it a religious symbol. She also did not intend the tattoo to communicate gang affiliation. By all accounts, Stephenson was a conscientious and diligent student with no record of disciplinary problems. However, a school-police liaison officer determined that it was a gang symbol and the school ordered Stephenson to have it altered or removed otherwise they would initiate disciplinary procedures, including expulsion from school. Stephenson chose not to alter the tattoo because she did not want a larger tattoo and feared school administrators or police would also classify it as a gang symbol anyways. As a result she had it removed.

While the court did not find that the tattoo was protected by her right to freedom of expression (by her own admission it had no meaning), it found the policy to be vague and overly broad. Sadly, noted the court:

gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing.

...

As this litigation demonstrates, common religious symbols may be considered gang symbols under the District regulation. The meaning of Stephenson's tattoo, a cross, is contested by the parties as Stephenson considers it simply a form of "self-expression" while appellees believe it is a gang symbol. A significant portion

⁵² *Stephenson v Davenport School District* (1997), 110 F 3d 1303 (available on WL) (8th Cir CA).

of the world's population, however, views it as a representation of their Christian religious faith. Indeed, the list of "prohibited" materials under the regulation includes other potential religious symbols [for example] ... the six-pointed star is a symbol of Judaism as well as of the gangs affiliated with the Folk Nation. The District regulation, then, sweeps within its parameters constitutionally protected speech.⁵³

To treat someone differently than others based on assumptions about the person's behaviour or some characteristic associated with the group to which the person belongs (i.e. those with tattoos) is a common form of discrimination. For example in *Hub Folding Box Co, Inc v Massachusetts Commission Against Discrimination*,⁵⁴ a female employee was ordered to cover a tattoo of a heart on her forearm because, in her employer's eyes, a woman with a tattoo was putting her sexual immorality on display. The tattoo was not visible when the employee was hired, but became visible when she began to wear short-sleeved shirts in the summer months. Her supervisor, noticing the tattoo, demanded she cover it up or face discharge. The employee refused to cover her tattoo and was fired. As a result the Court found that the employee had suffered because of an outdated and illegitimate stereotypical gender view of her tattoo.

In affirming its decision, the state Court of Appeals followed a similar line of reasoning as in *Riggs v City of Fort Worth* that employers either provide equal workplace treatment or offer a valid, nondiscriminatory business reason for their policies. In that case a police officer with extensive tattoos on his arms and legs was ordered to wear long pants and a long shirt to cover his tattoos because his appearance was deemed to be unprofessional. After he suffered from heat exhaustion from the long pants and shirt, he was moved to a desk job and then to another unit. He subsequently filed a grievance that he was singled out in part because of his expressive conduct (i.e. his tattoos).⁵⁵

Although the court did not believe his tattoos were a form of expression protected by the Constitution, assuming it was they held that

⁵³ *Ibid* at 1308.

⁵⁴ *Hub Folding Box Co, Inc v Massachusetts Commission Against Discrimination* (2001), 52 Mass App Ct 1104, 2001 WL 789248.

⁵⁵ *Riggs*, *supra* note 41 at 575. The court took notice that his tattoos included a Celtic tribal band, a Celtic design that included his wife's name, a mermaid, a family crest, the cartoon character Jessica Rabbit, and a two foot by two foot full color rendering on his back of St. Michael spearing Satan.

the officer was still not entitled to any protection as the Las Vegas Police Department had a legitimate interest in promoting the efficiency of its public service through its employees and that a police officer's uniform was not a forum for fostering public discourse or expressing ones personal beliefs:

Courts have long held that the city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias.⁵⁶

Even where an argument could be made that a tattoo was expressive, a hospital's cover-up order of an employee's "HIV positive" tattoo was upheld where the hospital's interest in facilitating patient recovery outweighed the employee's expressive rights:

Even with the greater protections given to speech on a matter of public concern, [the hospital's] interests in facilitating their patients' recovery outweigh Baldetta's interest in displaying the tattoo. Several doctors questioned by [the hospital] concluded that display of the tattoo would cause stress in severely injured or ill patients which could hinder their recovery. Given the precarious state of their patients' health, [the hospital] have made "a substantial showing that the speech is, in fact, likely to be disruptive" [and the] district court did not err in granting summary judgment to [the hospital] on Baldetta's First Amendment claim relating to his tattoo.⁵⁷

Similarly, in *Swartzentruber v Gunite Corp*, an employee was not successful in convincing the court that his membership in the "Church of the American Knights of the Ku Klux Klan" entitled him to display one of the church's seven sacred symbols tattooed on his arm (a robed figure standing by a "fiery cross"). The Court held that whether or not the KKK and the display of its "sacred symbol" was a bona fide religious requirement, holding that even if it was, allowing him to display the tattoo could contribute to a hostile work environment and therefore would create an undue hardship on the employer if it were allowed.

Summary judgment still would be proper even if Mr. Swartzentruber had made out a prima facie case, because Gunite has shown that it reasonably accommodated his asserted religious observance or practice. As "some would certainly view a burning cross as 'a precursor to physical violence and abuse against African-Americans and ... an unmistakable symbol of hatred and violence

⁵⁶ *Ibid* at 581.

⁵⁷ *Baldetta*, *supra* note 29.

based on virulent notions of racial supremacy,” the court agrees with Gunitite that any greater accommodation would cause it an undue hardship. Gunitite demanded that Mr. Swartzentruber cover his tattoo because it violated Gunitite’s racial harassment policy and offended other employees. Gunitite accommodated his tattoo depiction of his religious belief that many would view as a racist and violent symbol by allowing him to work with the tattoo covered; [the Civil Rights Act] doesn’t require more.⁵⁸

IV. CONCLUSION

Tattoos are becoming mainstream in today’s society and many professional employers, including the police, are looking at restricting their public display as part of their workplace dress codes. While challenges could be made to these “no-show” policies under human rights legislation, adverse or detrimental reliance may apply to officers who had obtained a subsequently prohibited tattoo on the basis it was allowed by years of silence. Permitting the public display of tattoos and knowing it is a facet of the current generation, yet implementing such policies as a knee jerk reaction to a singular event or in anticipation of a perceived event, are likely to fail where no research has been done on public attitudes and the impacts of tattoos on the profession.

However, where a tattoo does have a potential negative image that is incompatible with the employer’s legitimate policing interests, requiring an officer to cover it up would be a reasonable requirement if not *bona fide* occupational requirement of any dress code. Furthermore, like the City of Winnipeg Police Service By-law and *Inturri v City of Hartford*, Chiefs of Police are responsible for the control, governance, well-being and efficiency of their police service and are well paid to make difficult decisions regarding what is incompatible with legitimate policing interests – albeit founded on objectively verifiable business principles and community standards.

Policing is a highly regulated field. Should a tattoo policy be implemented by or pursuant to the Manitoba *Police Services Act*, police officers should be mindful of the disciplinary decision in *Trembley v Metro Toronto Police*, where the Ontario Court of Appeal held that:

The practice of a [policing] is a privilege. The law grants to certain groups a monopoly to carry on certain well-defined activities and imposes upon the

⁵⁸ *Swartzentruber v Gunitite Corp* (2000), 99 F Supp 2d 976 (available on WL) (ND Ind).

members of those groups an obligation to prevent abuse and to ensure that the monopoly will be exercised for the public good. It is normal that those who enjoy these privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. This discipline is peculiar to them and is not part of penal law.

...
[B]y joining the Force, [the member] has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfillment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behavior which is not forbidden him as a citizen.⁵⁹

As such, because of the nature of policing as a profession, officers are expected to submit to certain coercive measures and other restrictions upon their freedom. With that said, an absolute prohibition on the display of tattoos goes beyond what is required to promote the image of a disciplined, identifiable and impartial police force while maintaining the department's uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias. As noted previously by the Ontario Arbitration Board, there is "an increasing community tolerance for the variety of life styles that are manifest in personal dress and appearance."⁶⁰ Even Barbie now sports neck and shoulder tattoos.⁶¹

As the arbitrator in *Inturri v City of Hartford* noted, the policy did not prohibit all tattoos, only those deemed to be offensive, immoral, or presenting an unprofessional appearance. Such a policy was consistent with that department's Code of Conduct and similarly would be consistent with any collective agreement or harassment policy regarding the "display" of any "disrespectful" printed material. Even then the officers in that case were required to cover them up but not to remove them, thus minimizing any restriction on their personal freedom of thought, opinion and belief.

⁵⁹ *Trembley v Metropolitan Toronto Police Force* (1986), 55 OR (2d) 570, 29 DLR (4th) 557 (CA), aff'd (1987) 2 SCR 577, 45 DLR (4th) 318.

⁶⁰ *Dominion Stores*, *supra* note 45 at 404.

⁶¹ Elmira Bayrasli, "The Ink on Tattoo Barbie, So What?" *Forbes Magazine* (October 24, 2011), online: <<http://www.forbes.com/sites/elmirabayrasli/2011/10/24/the-ink-on-tattoo-barbie-so-what/>>.