Women Under Quebec Labour Law

Roy L. Heenan*

The contradictions in Quebec Labour law concerning the status of women can only be understood in an historical perspective. After all, it was only in 1927 that the Supreme Court of Canada unanimously ruled that a woman was not even a "Person" (*In the matter of a reference as to the meaning of the word "Persons" in Section 24 of the British North America Act, 1867*,[1] and was not therefore eligible for appointment to the Senate. If Quebec law has finally acknowledged that women are persons and even announced a policy prohibiting discrimination in employment matters on the basis of sex, several major statutes retain historical restrictions which render equality of treatment illusory.

At the time of writing the *Employment Discrimination Act*[2] is still law. Officially, there is to be no discrimination on the basis of sex in the hiring, promoting, laying-off or dismissing of an employee or in the conditions of his (*sic*) employment,[3] and a union is forbidden from discriminating in admitting, suspending or expelling a member.[4] While discrimination is defined broadly as

> any distinction, exclusion or preference made on the basis of ... sex ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation,[5]

the practical effect is considerably tempered by the provisions that a distinction "based on the inherent requirements" (not defined) of a particular job is not deemed to be discrimination.[6] Even more telling, any management position is excluded from the scope of the Act.[7]

The practical import of the Act is thus considerably restricted.

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* Member of the Bar of Quebec, Lecturer on Labour Law at the Faculty of Law, McGill University.

[1] [1928] S.C.R. 276, rev'd by [1930] A.C. 124 (P.C.).

[2] R.S.Q. 1964, c.142.

[3] *Ibid.*, s.2.

[4] *Ibid.*, s.3.

[5] *Ibid.*, s.1(a).

[6] *Ibid.*

[7] *I.e.*, any "person employed as manager, superintendent, foreman, or representative of the employer in his relations with his employees". *Ibid.*, s.1(2)(c)(1).

In addition, its application is left to the Minimum Wage Commission which must investigate complaints and report to the Minister of Labour and Manpower. Prosecutions can only be instituted with the latter's consent and fines range from $25 to $100.[8] Cumbersome administrative procedures coupled with the minimal fines have done little to ensure the enforcement of an otherwise well intentioned piece of legislation. Indeed, the Act has been largely ignored and has had little, if any, practical effect on discriminatory practices.

In spite of the Act, it has not been unusual to find job classifications specifically referred to as "male" or "female" in collective agreements, and even more common to find different seniority lists based on sex — in order to make quite sure that a female could not displace a male in times of lay-off. Both unions and management being party to these agreements, it is perhaps not surprising that prosecutions have not been taken under the Act against such contractual provisions. Possibly the Minister of Labour has been further discouraged by the finding of a Judge of the Court of Sessions of the Peace, in the case of *R.* v. *Lafferty*,[9] that the Act was *ultra vires* the Provincial legislature because it created a criminal offence.

Similar provisions to those of the *Employment Discrimination Act* may also be found in the *Manpower Vocational Training and Qualification Act*,[10] which prohibits discrimination

> based on ... sex ... in selecting candidates for apprenticeship or for vocational training, in carrying out such programmes for apprenticeship or vocational training or in the examination for certificates of qualification.[11]

However, as in the *Employment Discrimination Act*, distinctions may be made on the basis of particular job requirements.[12]

The provisions of both the *Employment Discrimination Act* and the *Manpower Vocational Training and Qualification Act*, imperfect though they may be, point to the legislators' theoretical desire to avoid discrimination on the basis of sex. Such an avowed policy might be taken more seriously if the labour laws themselves were not riddled with discriminatory provisions paternalistically aimed

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[8] *Ibid.*, ss.5 and 6. Higher penalties are provided in the case of an association of employers or employees and range from $100 to $1,000 (s.6).

[9] (1969) 8 C.R. (N.S.) 70; 70 C.L.L.C. 14,004. An appeal from the decision has not been finally disposed of.

[10] S.Q. 1969, c.51.

[11] *Ibid.*, s.46.

[12] *Ibid.*

at protecting a woman either from the employer or other workers or, more simply, from herself.

The most flagrant example of this legislative thoughtfulness, based on the presumed weakness of the female sex, is to be found in the *Professional Syndicates Act*[13] where a married woman is equated with "minors of sixteen years of age" and graciously allowed to join a professional syndicate, unless her husband objects, in which case she is protected from her rashness and cannot join. The specific provision reads as follows:

> Minors of sixteen years of age and married women, except when the husbands object, may be members of a professional syndicate.[14]

This provision has been brought to the attention of the Minister of Labour who has expressed the intention of amending the legislation, but at the time of writing it continues to be law.

The provision is a carry-over of more general legislation which, in employment matters, required the husband's consent to a wife's employment. It should be remembered that as recently as 1964 a wife could not become a public trader without express or implied authorization from her husband.[15] Although the Code was silent on the need for such authorization when a wife wished to exercise a profession or seek employment, such silence was interpreted as requiring marital authorization before she could do so.[16] Indeed, in the case of *Dame Langstaff* v. *The Bar of the Province of Quebec*[17] it was held that a woman could neither be admitted to the study of law nor to the practice of the legal profession. To add insult to injury, it was further held that if she was married she could not, in any event, be admitted to the practice of law without the authorization of her husband or a judge.

It is worth pausing at this case which, in the following passages, reflects the attitudes of the time:

> As might well be expected, the Bar of the Province of Quebec is strenuously opposing the granting of the conclusions of her petition.[18]

> ... I would put within the range of possibilities though by no means a commendable one, the admission of a woman to the profession of solicitor or that of *avoué*, but I hold that to admit a woman and more particularly a married woman, as a *barrister*, ... would be nothing short of a direct

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[13] R.S.Q. 1964, c.146.

[14] *Ibid.*, s.7.

[15] Art.179 C.C., repealed by S.Q. 1964, c.66 (Bill 16).

[16] Ouellette, *Condition juridique de la femme mariée en droit québécois* (1970) 5 R.J.T. 189, 193.

[17] (1915) 47 C.S. 131.

[18] *Ibid.*, 132.

> infringement upon public order and a manifest violation of the law of good morals and public decency.
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> Let us for a moment picture to ourselves a woman appearing as defending or prosecuting counsel in a case of rap[e] and putting to the complainant the questions which must of all necessity be asked in order to make proof of the acts which are of the essence of the crime or which are equally necessary to meet and repeal the charge.
>
> No woman possessing the least sense of decency could possibly do so without throwing a blur upon her own dignity and without bringing into utter contempt the honor and respect due to her sex.[19]
>
> ... After what I have said above, she will no doubt understand that her ambition in life should be toward the seeking of a field of labour more suitable to her sex... .[20]

Comparatively, at least, we have come a long way.

Under Bill 16 in 1964[21] positive recognition was given to the fact that a married woman could carry on a trade or calling distinct from that of her husband and, obviously, without the necessity of his consent.[22] The word "calling" has a wider connotation than "profession". As Germain Brière commented, the effect of the new law was that:

> La femme mariée peut donc ... exercer toute profession, libérale ou non, tout métier, tout emploi, en somme toute activité professionnelle sans le consentement et même nonobstant l'opposition de son mari.[23]

This was so accepted by 1970 that the legislators did not see the need to reproduce the former article 181[24] in the 1970 amendments to the Code.[25] However, in the present article 1291a C.C. the last vestiges of the restrictions are found in the stipulation that a wife common as to property who carries on a trade or a calling despite her husband's opposition, only binds the community to the extent of the benefit it derives from such trade or calling.

The provision contained in the *Professional Syndicates Act*[26] that a woman cannot join a professional syndicate in the face of her husband's objections, remains as the last of these series of provisions requiring the husband's consent on employment matters, and undoubtedly like the rest, will soon be relegated to history.

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[19] *Ibid.*, 139-140.

[20] *Ibid.*, 145.

[21] *An Act respecting the legal capacity of married women*, S.Q. 1964, c.66.

[22] Former arts.181 and 182 C.C. Art.181 C.C. read as follows: "A married woman may engage in a calling distinct from that of her husband."

[23] Brière, "Le nouveau statut juridique de la femme mariée" in *Lois nouvelles* (1965), 7, 10.

[24] *Supra*, f.n.22.

[25] *An Act respecting matrimonial regimes*, S.Q. 1969, c.77 (Bill 10).

[26] *Supra*, f.n.13.

Of greater practical significance were the provisions under the *Industrial and Commercial Establishments Act.*[27] In framing laws to protect women at work, the legislators created a situation where discrimination would obviously result. For instance, until 1968, the employment of women at night was prohibited in industrial and commercial establishments.[28] This was in keeping with the international conventions of the time[29] which set out the general principle that women should not be employed during the night. The practical effect of this prohibition was, of course, to restrict employment opportunities for women.

As a result of this, in Quebec the prohibition which existed previously was removed in 1968 and provision was made in the Act for the possibility of employment of women at night. However, such employment was made conditional on several factors:[30]

1. A permit for such work had to be granted by the Minister of Labour who had to be satisfied "that the nature of production, market conditions and other special circumstances so require";
2. The certified union had to be consulted by the Minister prior to granting a permit, and in fact, although not in law, a permit was seldom if ever given if the union was opposed;
3. The work could not start before eleven o'clock in the evening or after midnight;
4. There were special rest requirements;
5. The hours of the shift could not be more than eight;
6. The safety of women who had to leave their work before 7 a.m. had to be ensured by the employer who was required to provide them with a safe and convenient means of transport home;

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[27] R.S.Q. 1964, c.150, as am. by S.Q. 1968, c.46 and *An Act to amend the Industrial and Commercial Establishments Act,* Bill 27, 3d Sess., 30th Leg., Que. Nat. Ass., 1975, assented to June 27, 1975.

[28] *Ibid.,* s.16. An industrial establishment is defined as including "manufactories, works, workshops, workyards and mills of all kinds..." and a commercial establishment as meaning "any place where merchandise is sold"; *ibid.,* ss.2(3) and 2(4) respectively.

[29] The Night Work (Women) Convention 1919, The Night Work (Women) Convention (Revised) 1934 and the Night Work (Women) Convention (Revised) 1948; see The Geneva International Labour Office, *Conventions and recommendations adopted by the International Labour Conference 1919-1966* (1966).

[30] *Industrial and Commercial Establishment Act, supra,* f.n.27, s.18a, and *General regulations respecting industrial and commercial establishments,* Q.S.R. 5-421, s.99(2) and (3), repealed by *An Act to amend the Industrial and Commercial Establisments Act, supra,* f.n.27.

7. During the whole of the shift there had to be at least one female supervisor, nurse or first aid attendant to see to the health of the female staff;
8. There had to be at least two women per workroom or workshop on the night shift, besides the female supervisor.

Further, distinctions were made in the Act on the basis of sex. For instance, by sections 15 and 16 no girl or woman, or boy of less than eighteen years, could be employed in an industrial establishment for more than nine hours in one day or fifty hours in one week, or more than fifty-four hours a week in a commercial establishment. Such restrictions did not exist for men. Specific hours were also set down for the commencement and end of the work in which women were employed. Further, it was discretionary to the Lieutenant Governor in Council to prohibit entirely the employment of women and girls in certain industrial establishments or parts thereof "which he may deem dangerous or harmful to their health".[31] It is not surprising under the circumstances that employers avoided the restrictions, for instance by not applying for a permit and hiring only men for the night shift.

The recently introduced legislation[32] eliminates entirely these restrictions in the Act with respect to employment of women. The stated intent of the legislation is to "remove the distinctions between men and women with respect to work, while retaining special conditions of employment with respect to youth".[33]

A more blatant example of discrimination remains in the *Mining Act*,[34] section 259 of which provides that:

> No woman or girl shall work underground in a mine, except as an engineer or geologist.

At the present time there is no legislation pending to rectify this situation.

Traditionally and historically, it has been accepted that women are the weaker sex, who need to be protected by legislation differently from men regarding their conditions of employment. The very protections, however, serve in many instances to deny equality of opportunity to women. The traditional concepts are running directly into the theoretically espoused principle of equality. Ultimately, the legislators must make a choice: Will they opt for protection on the basis of sex, or equality?

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[31] *Supra*, f.n.27, s.6(3).

[32] *An Act to amend the Industrial and Commercial Establishments Act, supra*, f.n.27.

[33] *Journal des Débats, Assemblée nationale*, 14 mai, 1975, vol.16, no28, 771.

[34] S.Q. 1965, c.34.

The passage of the *Charter of human rights and freedoms*[35] as well as the amendment to the *Industrial and Commercial Establishments Act* discussed above,[36] offer some indication of the legislators' choice. The Charter will repeal the *Employment Discrimination Act*.[37] In its place, the Charter purports to provide for sweeping equality in the area of employment, labour relations, and working conditions. This policy is embodied in section 16 which provides:

> No one may practice discrimination in respect of the hiring, apprenticeship, vocational training, promotion, laying-off, dismissal or conditions of employment of a person, or in respect of the admission, enjoyment of benefits, suspension or expulsion of a person to, of or from an association of employers or employees or any professional corporation or association of persons carrying on the same occupation.

The steps taken by the legislature within the last few months are significant.

The Charter also provides for equal pay for equal work.[38] However, the effect is somewhat diluted by the provision that this rule applies "to the members of [the employer's] personnel who perform equivalent work at the same place". Furthermore:

> A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel.

The practical consequences of the new policy are put still further in doubt in view of the fact that the provisions of the Charter are overridden by existing law. Sections 51, 52 and 53 provide:

> 51: The Charter shall not be so interpreted as to extend, limit or amend the scope of a provision of law except to the extent provided in section 52.
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> 52: Sections 9 to 38 prevail over any provision of any subsequent act which may be inconsistent therewith unless such act expressly states that it applies despite the Charter.
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> 53: If any doubt arises in the interpretation of a provision of the act, it shall be resolved in keeping with the intent of the Charter.

If the legislators really wish to give practical effect to their choice of equality of the sexes in labour legislation, they must still relegate to history the remaining statutory provisions which continue to reflect the preoccupations of a bygone age. Women for some time have been called to the Quebec Bar, which is no longer "strenuously opposing"[39] their admission. Hopefully, they soon will be able to join a professional syndicate — whether or not their husbands object.

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[35] Bill 50, 3d Sess., 30th Leg., Que. Nat. Ass., 1975, assented to June 27, 1975.

[36] *Supra*, f.n.32.

[37] *Supra*, f.n.35, s.91. In addition, s.93 will repeal section 46 of the *Manpower Vocational Training Act, supra*, f.n.11.

[38] *Ibid.*, s.19.

[39] *Supra*, f.n.17, 132.