IN FACT AND IN LAW

Labour Law

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Current proposals to reform the *Québec Labour Code*

By Danielle Côté

Québec's Minister of Labour recently released a public consultation document entitled, "***Pour un Code de travail renouvelé*** [Towards a modernized Labour Code]", which gives a clear indication that the department is aiming towards a substantial review of the *Labour Code*.

In this article we summarize the various topics affected by the reform under consideration, and issue our comments on the Minister's proposals. The ministerial propositions being hypotheses, our comments must be considered within such as frame.

The Minister of Labour seeks to import into the *Québec Labour Code* certain provisions (inspired by those in force in other Canadian provinces or contained in the *Canada Labour Code*) favorable to unions while ignoring the provisions in these same acts which have a counter-balancing effect. Accordingly, under the guise of a stated wish to make our legislation consistent with other North American labour legislation, the Minister has apparently overlooked the fact the legislation in force in Quebec is already more pro-union than elsewhere in Canada or the United States.

The Minister has enunciated several commendable guiding principles, which unfortunately seem to have disappeared somewhere along the way.

Moreover, the proposed amendments appear to flow from the position that nothing can be gained without unionization, a position which we respectfully contend is somewhat outmoded in the year 2000. At the present time, governments everywhere should be encouraging employment initiatives and entrepreneurship with a view to create jobs. The proposed reform is considerable. The consequences could be significant. Expanded involvement of public servants in the administration and management of businesses is not, in our view, a desirable solution for the economic well-being of Québec.

In an effort to define the main problems to be resolved, the Minister of Labour declares relying on the following four **guiding principles.**

First Principle:

The *Labour Code* must remain the mechanism which ensures that employees can freely exercise their right to form an employee association for the purpose of determining their conditions of work through the collective bargaining process with their employer.

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Second Principle:

In a regime such as ours, the parties to collective labour relationships favour contractual approaches and wish to remain free to dispose of their future.

Third Principle:

Amendments to the *Labour Code* must take into account the North American context.

Fourth Principle:

The revision of the *Labour Code* must focus on seeking greater efficiency of the law and its administration while giving full consideration to our own legal habits and customs.

Accordingly, the Minister of Labour defines the reform's main orientations and objectives as follows:

- Accessibility and efficiency of the system;
- Collective labour relations;
- Necessary corrections to the law;
- Labour tribunals: constitution and powers.

We shall address each of these subjects, one by one.

Accessibility and efficiency of the system

The new class of employees

On this first point, the Minister of Labour discusses two phenomena to which according to her, changes would be required in order to reflect the prevailing situation: the proliferation of independent workers (self-employed persons) and triangular labour relationships.

First, the Minister notes the significant increase in self-employment, which, in her view, is not always the result of an entrepreneurial spirit on the part of the persons concerned. Because of their relative autonomy, the exclusion of independent workers from the traditional wage-earning class deprives them of access to the *Labour Code* model of collective labour relations.

A recent study on the working conditions of owner-truck drivers in the general transportation sector indicates that such persons - who at first glance appear to be "independent workers" - who work exclusively for a single client, have declared earnings sensibly lower than those of salaried truck drivers. The Minister contends, from a freedom-of-association perspective, that apart from the ownership of an expensive work tool, nothing distin-guishes the owner-truck driver in such an exclusive relationship from a salaried truck driver. Both are economically dependent on a sole client/employer.

Secondly, the Minister queries the phenomenon of the triangular work relationship, an increasingly common situation whereby a worker's services are obtained through a temporary employment agency. The person thus made available to a user company could be placed in the difficult situation of determining whether the agency or the company would be the employer covered by certification and hence the partner in the collective labour relationship.

Solution proposals

The Minister of Labour has made the following recommendations aimed at mitigating the problems encountered by certain categories of persons who are treated differently or excluded from the system, in respect of exercising their right to form an employee association and to have their conditions of work determined through the collective bargaining process:

1) a) broaden the concept of "employee" to encompass "dependent entrepreneurs", namely all persons who provide services or perform work under specific terms and conditions which place them in a situation of economic dependence with respect to the person employing them; and consequently,

   b) amend the concept of "employer" to define who is to be regarded as the employer of the dependent entrepreneur when the entrepreneur has an employment relationship with several employers; and

2) redefine the concept of "employer" to determine, in a triangular employment situation, that:

- the person in charge of providing access to work (the agency);

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- the user company; or
- both the agency and the user company (together a single employer)

are treated as such.

Our comments

The Minister has placed great emphasis on the increase in the number of self-employed persons and the disadvantages suffered by such independent workers given their exclusion from the traditional class of employees.

As a preliminary remark, it should be noted that according to an inquiry conducted by the Canadian Federation of Independent Business (Quebec branch), 87% of independent workers became self-employed by choice and wish to remain self-employed.

That being said, despite the fact that the description of the situation seems to be limited to the case of entrepreneurs working exclusively for a single client, the Minister has extended her review -taking into account the proposed amendment to the concept of "employer" - to the case of an entrepreneur doing business with several employers. In that latter case, the Minister recommends that only one of these employers be designated as the "employer".

Therefore, the client risks being an "intermittent employer" or "unwitting employer" taking into account the unknown variables of duration and size of contracts entered into between the entrepreneur and his or her various clients and further taking into account the lack of control these clients have over such unknown variables.

According to the Minister's recommendation, the mere fact for an entrepreneur to be in a situation of exclusivity imposed by the client will confer the status of "employee" upon the entrepreneur.

This new concept of "dependent entrepreneur" also risks rendering the outsourcing clauses stipulated in many collective agreements useless and without effect.

The Minister's proposals run the risk of creating numerous conflictual situations, whereas current case law already grants the status of "employee" to "pseudo" independent entrepreneurs which the Minister would like to protect. An example of such case law is the judgement recently rendered by the Court of Appeal in the Natrel case.

Furthermore, even in the context of a triangular employment relationship, how can one reconcile the notion that two distinct entities, each totally independent of the other, could simultaneously be the employer of a single person?

Union democracy

The Minister of Labour also stresses the importance of unions' compliance with the rules of democratic process. In her view, the current rules do not cover all situations. For example, a union may decide in its sole discretion to submit or not to its members the employer's proposals on the collective agreement. Negotiations may therefore remain at a standstill indefinitely, without the employer being given the opportunity to submit its draft version of the collective agreement to its employees.

Solution proposals

To fill in this gap, the Minister suggests that the Code grant employers the right to request that the employees vote on the employer's proposed version of the collective agreement. The employer would only be able to exercise this right once per round of negotiations and only under the supervision of a labour tribunal.

Our comments

In our opinion, the Minister's analysis of the situation and her proposal demonstrate the seriousness of the problem faced by the employer given the disproportionately broad interpretation given to section 12 of the Labour Code (complaint of interference).

The reform should provide for a formal acknowledgement of the employer's right to freedom of expression (a right already enshrined in Québec's Charter of Human Rights and Freedoms). The relevant amendment could, for example, include the employer's right to directly contact its employees in certain stipulated situations.

In our view, the proposal is commendable. It would allow the employer to counter any union misinformation, if such were the case. However, the employer's right to request a vote should not be limited to a one-time exercise. Furthermore, to ensure that the vote is effective, the Minister should stipulate that the vote be held by secret ballot.

Efficient Administration of the System

The Minister of Labour also wishes to speed up the handling of files. She deplores the fact that intervention by certification agents is restricted to the non-contentious part of the process. Among other things, the Minister queries the labour commissioner's obligation to hold a formal inquiry in the presence of the associations and the employer involved in a matter, before ruling on the dispute. She is very critical of the fact that in practice, commissioners do not have the power to compel a complainant to provide details before the matter is handled in greater depth.

Besides, the Minister wishes that labour tribunals be given the power to adopt and make public policy statements on the law's application. According to the Minister, this would ensure that the parties are properly informed without there being any need to seek the services of certain rare specialist practitioners.

The Minister also criticizes the fact that there is no systematic holding of pre-hearing conferences or filing of stated cases. In the Minister's view, as the situation now stands, neither party is in a position to understand and assess the position of the other party.

Solution proposals

The Minister is considering the following:

1) to grant certification agents additional powers, among them:
   - the power to attempt to reconcile the parties or resolve an impasse regarding a certification unit or the persons covered in that unit;
   - the power to grant certification once the disagreement has been resolved;
   - the power to order a vote when two associations are present and where the dispute deals only with their respective membership strengths;
2) to institute the systematic holding of pre-hearing conferences and the filing of stated cases before presentation of evidence at hearing;
3) to adopt and publish policy statements pertaining to the application of the *Labour Code*.

Our comments

The third proposal would have the advantage of making accessible all the rules that currently apply but which are somewhat difficult to interpret. Any such policy statements on the Labour Code should not, however, be so narrow as to prevent further case law developments.

Collective Labour Relations

The Transfer of Rights and Obligations

Under section 45 of the Québec Labour Code*, it is up to specialist tribunals to determine whether or not section 45 applies to a variety of possible situations and to settle practical problems resulting from the application of the section. It is the Minister of Labour's view that before a labour commissioner can intervene in the matter, there must be evidence of "insurmountable" difficulties.*

The Minister favours a more flexible application of section 45 in the hope that it will have a more positive effect on labour relations. For example, the labour commissioner would be able to intervene even where there is no evidence of "insurmountable" difficulties, in order to avoid a situation where a new employer must apply two collective agreements negotiated with two different unions in order to cover two groups of a single category of employee.

Solution proposals

The Minister of Labour recommends the following:

1) to specify in section 45's text that survival of the certification and of the collective agreement may not occur where to do so would be tantamount

to ignoring two basic principles of our system of collective representation: the voluntary nature of membership in an employee association and the monopoly on representation granted to the majority association;

2) to grant the labour commissioner, despite no finding of insurmountable difficulties or evidence to that effect, the power to order that a vote be held to designate a single union representative for a given group of employees, so that ultimately only one collective agreement would apply;

3) to allow a labour commissioner, where a business has been transferred in respect of a non-union workplace, to verify, for example, if the majority of new employer's employees wish to be represented by the association benefiting from the application of section 45;

4) to omit from section 45 the exception of application to transfers by way of judicial sale; and

5) to ensure that section 45 applies to the transfer of a business accompanied by a transfer of federal legislative competence to Québec.

Our comments

The proposals would render the application of section 45 more complex.

In our view, applying section 45 to a judicial sale is an approach that may have serious consequences, and specifically, is one that would discourage potential purchasers from buying bankrupt companies. Therefore, in seeking to protect union certifications, the proposal would have the undesired side-effect of increasing the incidence of closing down of businesses and resulting in an increase in the number of jobs lost.

As for the fifth proposal, it would only be appropriate for it to be adopted since the Canada Labour Code has adopted a similar provision for the opposite situation whereby we have a transfer of legislative competence from Québec towards the federal government. This provision contemplates the situation where a company now falls under a different jurisdiction while remaining geographically within Québec. However, the Minister's proposal would require the adoption of provisions that allow for the necessary adjustments since the Canada Labour Code and the Québec Labour Code are not always compatible.

It is regrettable that sub-contracting is not specifically excluded from the application of section 45 of the Québec Labour Code, especially given the fact that the effect of such an exclusion would be merely to bring the Québec Labour Code in line with the principles enunciated by the Supreme Court of Canada.

Furthermore, no amendments should be made to the Code without bearing in mind the problems created by the reforms to municipal structures recently announced by Louise Harel, Minister.

Drawn-out disputes

The Minister feels powerless in the face of long, drawn-out disputes. She would like to be able to offer parties solutions for resolving impasses.

Solution proposals

The Minister recommends the following solutions in the case of long-standing disputes:

1) to provide for the initial holding of a vote (after decision to that effect by the Minister of Labour) of the employees in the bargaining unit on the content of a mediator's recommendations made after the mediator has requested that the parties state their final positions;

2) to grant the Minister of Labour or a specialist tribunal (Board or Commission) thereafter, the discretion to submit the dispute to arbitration:

   - to which the parties would not be granted access merely on request, so as not to interfere with genuine negotiations; and
   - which could take the form of block arbitration of proposals which each side considers final; and

3) to provide for a mediation-arbitration procedure in which the criteria binding the mediator-arbitrator would be the same as those applicable to the arbitration of the first collective agreement.

Our comments

It would first be necessary to correctly define the concept of "drawn-out disputes". In her exposé of the situation, the Minister appears to have arbitrarily considered such disputes to be those lasting 100 business days or longer. This standard based on number of days is arguable, since the impact of a strike will vary depending on the size of the company. While the 100-day rule may be appropriate for a large-scale business, it may be a disaster for a small business or one that, regardless of size, rapidly risks losing its unserviced customers.

Furthermore, recourse to arbitration could have the effect of authorizing the specialist tribunal to interfere in the management of the company. The specialist tribunal could theoretically be invested with the power to determine the operating budget of a company. For example, if the specialist tribunal decided that employer's agreement should include a clause guaranteeing a minimum number of jobs in the employer's Québec plant, while no such clause applies to the company's other plants outside Québec, the employer would be deprived of any freedom to reorganize. Such a clause could ultimately force a company to continue activities that it would otherwise prefer to terminate.

In addition to the foregoing, the recommended approach threatens to do away with productive bargaining.

How can the Minister seriously submit such a proposal when the government itself has always refused to submit to compulsory arbitration in the event of disputes?

The labour dispute at Montreal's Place des Arts is a flagrant example of the unbalanced situation caused by anti-scab provisions which exist only in Québec legislation and nowhere else in North America.

Moreover, block arbitration of the final proposals of each side means that the parties risk being required to adopt and defend final positions that do not give them any room to manoeuver.

Necessary corrections to the Code

Problems of application

The Minister of Labour's objectives under this heading are as follows:

1) to clarify the Code in order to facilitate comprehension thereof by the persons subject to the jurisdiction of the tribunals; and

2) to eliminate the problems that impede or that may impede the proper functioning of the system.

Solution proposals

To clarify the law, the Minister makes the following recommendations:

1) to ensure that one labour-related statute does not use the same expression when it intends to define the person ("employee", "worker"), in relation to some other piece of labour-related legislation;

2) to stipulate that where an employee has more than one recourse under several statutes, the employee must make an election among recourses, or that only one forum has exclusive jurisdiction over all available recourses; and

2) to consolidate, simplify and publish the substantive, operating and procedural rules to be followed or applied by the decision-making bodies in labour matters.

Regarding the problems of substance, the Minister recommends a single solution for two specific problems without however wanting to restrict the discussion to these two problems. The solutions currently proposed are the following:

1) to ensure that the arbitrator of a dispute involving municipal police officers and firefighters has jurisdiction to rule on the normative content of a collective agreement, even if the sentence can only cover the period already elapsed since more than three years have elapsed since the expiry of the collective agreement; and

2) to standardize the treatment under the Code of similar situations, such as the maximum term of an arbitration sentence of a "voluntary" dispute and that of sentence pertaining to police officers and firefighters.

Our comments

Any proposal to clarify the law, if that is the end result, is most commendable.

The structure of the *Code* and the antiquated nature of certain provisions

The Minister notes that the *Code* is increasingly beginning to resemble a hodgepodge of parts which do not dovetail harmoniously and, in certain cases, is clearly outmoded.

The Minister queries whether it is appropriate for the *Code* to group together substantive rules (namely specific rules which create rights and obligations) with the administrative rules pertaining to the day-to-day administration of decision-making bodies and the procedural rules that must be followed by the persons seeking to exercise their rights under the *Code*.

The Minister also queries the relevance of retaining certain out-of-date provisions.

Solution proposals

To mitigate the problems related to the legislative structure of the *Code* and the outmoded nature of many of its provisions, the Minister suggests the following:

1) to limit the provisions of the *Code* to substantive rules that create rights and obligations for the parties involved in the collective bargaining process;

2) to undertake a complete review of the substantive rules for the purpose of repealing out-of-date or useless provisions; and

3) to adopt provisions in the form of regulations which deal separately with the rules relating to the day-to-day administration of bodies responsible for administering the law and those pertaining to the procedure which must be followed by the persons governed by the *Code* seeking to exercise their rights thereunder. In the Minister's view, given that the regulation-adopting process is more flexible than that for enacting legislation, it would therefore be simpler and quicker way to adjust administrative and procedural issues.

Our comments

These are valid solutions. However, the enactment of regulations may prevent the achievement of the Minister's stated objective of providing the public with greater access to the legislative regime pertaining to labour relations.

Labour tribunals: constitution and powers

The Minister of Labour seeks, as it exists everywhere but in Québec:

1) that an administrative rather than a judicial approach be promoted in respect of the bodies responsible for applying the law and therefore, specifically powers to intervene and make orders of a compensatory rather than punitive nature and the shortening of delays for processing cases be supported;

2) that labour commissioners be granted broad discretionary powers to appreciate or decide matters such as:

   - whether a person is an employer or a dependent entrepreneur, even if that person has all the attributes of an employer;
   - whether or not its decisions may be filed in court to render them executory;

3) that all powers be concentrated in a single decision-making body, thereby eliminating appeals from decisions. The only possibility for review would exist within the structure of the decision-making body and only under certain well-defined conditions. In the Minister's view, this would result ultimately in a unified vision of labour issues in any given sector.

Solution proposals

Accordingly, the Minister proposes the following:

1) that a single decision-making body be created, with increased powers and that there be no appeals from its decisions allowed;

2) that the Labour Tribunal become an employment tribunal with full jurisdiction over individual labour relations thereby limiting collective

labour relations to the above-mentioned body; and

3) that the Labour Tribunal be abolished and that within the above-mentioned body a specialist division be created with jurisdiction over individual labour relations.

Our comments

The effect of these proposals would be to grant public servants jurisdiction to rule on disputes, proposals which in many cases risk having a significant financial impact on the employer's business without giving the employer a right of appeal or review (with the recourse to judicial review becoming increasingly restricted). In our view, this approach also bear very serious consequences.

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