RACIAL DISCRIMINATION IN EMPLOYMENT

CANADA'S FIRST CASE

By Gerald W. F. Charness, B.A. B.C.L., Advocate

Although there are statutes prohibiting discrimination in employment in seven of Canada's provinces as well as a Federal statute, and although some of these laws date back as far as 1952, the first case that was actually taken to court occurred only in 1965. It occurred in the province of Quebec, the most recent province to enact anti-discriminatory legislation. The case involved a Negro and the largest hotel in the city of Montreal, the metropolis of Canada.

THE LAW

The law upon which the charge was based was one that came into effect on September 1, 1964. It is entitled "An Act Respecting Discrimination in Employment", and is the first piece of legislation in this country which specifically defines the term discrimination. Discrimination in this act is defined as follows - "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, national extraction or social origin, which have the effect of nullifying or impairing the equality of opportunity or treatment in employment or occupation; but any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

The act goes on to say "that no employer, or person acting on behalf of an employer or employers' association shall resort to discrimination in hiring, promoting, laying off or dismissing an employee or in the conditions of his employment". The act further prohibits an association of employees or an association of employers from resorting to discrimination in admitting, suspending or expelling a member. Its prohibits the publishing by an employer in connection with the hiring of an employee of any advertisement which suggests discrimination. It forbids an employer to require information respecting race, colour, religion, national extraction or social origin. It prohibits the display by any employer of any notice or symbol implying or suggesting discrimination.

And the act concludes "every person who infringes this act shall be liable, on summary conviction to a fine of $25.00 to $100.00 or, in the case of an employers' association or an association of employees
to a fine of $100.00 to $1,000.00". The act however, states that no prosecution for an offense under the act maybe instituted without the written authorization of the Minister of Labour, and the Minimum Wage Commission is charged with the carrying out of the act.

We shall later see that this piece of legislation, inspiring though it may seem at first glance, has a number of weaknesses. For the moment let us go back to September 2, one day after this act came into force.

THE FACTS

As the evidence was later to emerge in trial, on September 1, 1964 Miss Pauline Tisseur a young French Canadian Montreal nurse saw an advertisement in a local newspaper advertising the fact that the Queen Elizabeth Hotel required a full-time and part-time bilingual graduate nurse. The ad stated that these were permanent positions with excellent working conditions carrying a good salary and fringe benefits, and required that applicants apply in person to the personnel department at a given address.

That very day Miss Tisseur went down to the hotel and filled out an application for the full-time position. She was told that the doctor was absent and that she was to return on September 4 in order to see him. From the conversations with the man she took to be the personnel director she understood that the part-time position was still open as well.

When she returned from the hotel she telephoned a young Negro nurse, Mrs. Gloria Baylis, whom she knew was also looking for employment.

Acting on the information of her friend Mrs. Baylis went down to the hotel on September 2. She too filled out an application form and met the same man as Miss Tisseur had met, one Helmut Hoermann. According to Mrs. Baylis, Mr. Hoermann took her application form, immediately looked at her and said "I am sorry, the job is filled". Surprised, she asked him whether both jobs were filled as she was interested only in the part-time position. He assured her that they were both filled.

Mrs. Baylis returned to her home and phoned Miss Tisseur to tell her that she had been at the hotel and had learned that both positions were taken. Miss Tisseur said that this was impossible in view of the fact that she had been given an appointment with the doctor for September 4 and she had understood clearly that no decision would be taken until the doctor's return on that date.
Becoming suspicious, at ten o'clock the following morning, September 3, Mrs. Baylis phoned the hotel and asked for the employment office. She was, according to her, put on to the lady at the employment office and she asked if the two jobs that had been advertised in the newspaper had been filled. She was told that they were not. She repeated the question and asked again whether if she came down she could still make an application for these jobs. She was told that she could.

It was at this point that she called the Negro Citizenship Association, an organization founded in 1962 to organize, promote and encourage the social, civic and economic advancement of the coloured population of the province of Quebec. She spoke to an officer of the association, Mr. Charles Milton Hogg.

That afternoon Mr. Hogg telephoned the Queen Elizabeth Hotel and also asked for the personnel department. He told the department that he had read the advertisement in the newspaper and wanted to know whether the positions were still vacant as he had someone who was interested in the job. According to Mr. Hogg he was told that the positions were still vacant and that the hotel was still accepting applications. He was furthermore told that the positions would not be filled before Friday, September 4 in the afternoon because the medical director was out of the city and he would have to interview the applicants.

The Association decided that it would be of public benefit to test the new legislation and prevailed upon Mrs. Baylis to file a complaint with the Minimum Wage Commission. It should be stressed at this point that at no time during the lengthy proceedings which followed did Mrs. Gloria Clark Baylis stand to make any personal gain whatsoever. Soon after she had been turned down by the hotel she was engaged by one of the large hospitals in the city of Montreal with a minimum two year security and is perfectly happy with her new position.

On September 30, accompanied by Mr. Hogg and Miss Tisseur, Mrs. Baylis swore a formal complaint at the offices of the Minimum Wage Commission. Mr. Hogg and Miss Tisseur also signed separate statements. The next day Mr. Charles Belanger, general secretary of the Minimum Wage Commission, accompanied by his assistant Mr. Gérard Simard, without warning called the office of the personnel director of the hotel. They learned that his name was Victor Taylor. After ascertaining that the hotel had published the advertisement questioned, they asked who had obtained the position and were informed that a certain Miss Plante had been awarded the part-time job. They asked to see Miss Plante's application and discovered that her application
was dated September 4, 1964. The hotel had Mrs. Baylis' September 2 application on file. Mr. Belanger asked how it was that Mrs. Baylis had been told on September 2, two days before Miss Plante had even applied, that the position was filled. It should be noted at this point that the application form of Miss Plante which was dated for September 4 bore a notation on its reverse side in pen containing the words "August 27, 1964, refer to Doctor Schock".

According to the testimony that both Mr. Belanger and Mr. Simard later gave in court, neither the personnel manager Mr. Taylor, nor Mr. Hoermann, whom they were told had been merely filling in for Taylor in the latter's absence, were on October 1, some 4 weeks after the event, able to explain how it was that Mrs. Baylis had been told that the position had been taken.

Thus was laid the basis for the trial which was ultimately to take some eight days and in which some twenty witnesses were heard.

THE TRIAL

The trial commenced on March 23, 1965, before Judge Marcel Gaboury of the Court of Sessions, in the New Court House at Montreal. The Crown called four witnesses, the personnel manager of the hotel, Mrs. Baylis, Mr. Hogg and Miss Tisseur. The defense then asked that the case be thrown out of court for want of evidence. The court ruled that although it would not qualify the evidence before it at that time, it had sufficient evidence to force the defense to defend itself. The case was put over to April 1.

As the trial developed, new facts came to light. The Crown produced a number of witnesses, some of whom were found only after lengthy private investigation by the Negro Citizenship Association, who testified that they had been told as late as September 9, that the part time position was still open. They were told this by Mr. Hoermann. Witnesses were produced to show that as late as September 4 they were told that the full time position was open. Evidence was introduced that all the applicants were given an opportunity to see the medical director. The Crown was slowly building its way to prove that only Mrs. Gloria Clark Baylis was told that both the part-time position and the full-time position were filled. Only she was not given an opportunity to see Dr. Shock. Only she was not told that her name would be kept for future reference. Proof of race was of course necessary since the accusation was racial discrimination, and one of the most dramatic moments of the trial took place when Mrs. Baylis stood up in the witness stand and in answer to a question by me said proudly, "I am a Negro".
The hotel attempted to establish three major lines of defense. In the first place, the hotel argued, the position of part-time nurse was indeed filled when Mrs. Baylis applied. The Personnel Director, supported by Mr. Hoermann, testified that although Miss Planté's application was dated September 4, the notation on it meant that she had been referred to Dr. Schock, the Medical Director on August 27, 1964. Miss Planté, the successful applicant, as well as Mr. Taylor, the Personnel Director, both testified that on August 27 Miss Planté presented herself late at the personnel office and was handed a blank application form. She had claimed that she knew the Medical Director, had worked with him previously, and therefore was qualified for the position. Since the hour was late, she was handed the form in blank with a notation on its reverse side, "referred to Dr. Shock" and the date.

Mr. Taylor then testified that the next day he was told by Dr. Schock that the Medical Director was satisfied with Miss Planté and therefore he, Mr. Taylor, was satisfied that she had been hired. Mr. Taylor informed Mr. Hoermann and therefore Mr. Hoermann advised Mrs. Baylis that the position was taken. Dr. Schock could not testify, having died in the interim. Thus, the first line of defense was that the position was taken and, therefore, far from being discriminated against, Mrs. Baylis was simply being told the truth when she was told that the job was filled.

The hotel argued further in law that in any event Mr. Hoermann was only a trainee and not really assigned to the personnel department, nor was he a person in authority. On almost the last day of the trial, the hotel attempted to establish that the true replacement for Mr. Taylor, in his absence, was a Mrs. Kilbride. Mr. Hoermann was simply being trained in a number of positions and was not truly a hotel representative, and therefore, argued the defense attorneys, his action could not bind the hotel. In other words, the hotel, they said, could not be found guilty because of the actions of a man who was not strictly speaking in authority.

A third line of defense was that the general policy of the hotel, as well as that of Hilton, generally was violently anti-discrimination. An attempt was even made to get the book "Be My Guest" by Conrad Hilton, filed into evidence in the case. The attempt failed. A number of witnesses were called by the defense, however, to show that Negroes had worked for the hotel at least since 1958 and were, at the time of the trial, still working for the hotel. Moreover, said the hotel, there was a definite and distinct policy of non-discrimination and if there were not many Negroes employed by the hotel, it was because there were not many applicants.
Under cross examination the hotel was obliged to admit that its application forms, still, at the time of trial contained a question asking for the place of birth of applicants.

Notwithstanding the fact that Mr. Belanger of the Commission had suggested that such a question was no longer legal, the Hotel argued that it had received a contrary opinion from its own attorneys and that it would therefore continue to use the question.

There was lengthy evidence to explain how it was that, although the position was filled, the personnel department was still giving answers that the position was vacant. Essentially, the explanations were to the effect that, because of the procedural arrangements in the personnel department, it was quite possible that a position would be filled without the people answering the phone knowing about it. Mr. Hoermann himself was at great pains to explain that on the instances when he said the position was filled he honestly believed it to have been filled and in the instances where he said the position was vacant he honestly believed that it was still available. The Hotel also brought a union leader to testify that there was no discrimination in the Hotel.

In rebuttal, the Crown called only one witness, Mrs. Gloria Clarke Baylis, who had sat through the trial from the very beginning, from March 23 to June 15. She had heard all the evidence and had heard Mr. Hoermann's version of the interview with her. She had heard Mr. Hoermann say in open court that her French was inadequate, with its implication that although this was not the reason that she was told that the position was filled, nonetheless this might have gone against her. She had heard him tell that he had assured her that her application would be kept for future reference. On June 15, 1965, Mrs. Baylis stood for the last time in the witness box and there was no question but that the trial had been tiring for her. The constant publicity in the press, telephone calls, the questions, had all begun to take their toll. Nevertheless, this brave woman took the stand without hesitation and without hesitation reiterated what she had said on the first day of the trial.

Once again she swore that she had been told both positions were filled and that she had not been told that her application would be kept on record. She had not been referred to Dr. Shoch and she revealed for the first time that insofar as her French was concerned, she had worked for two years in a French hospital in the French language.

The trial closed with a ringing declaration from the judge, "In Canada, there has existed and continues to exist equality of opportu-
nity without discrimination by reason of race, national origin, religion or sex".

THE JUDGEMENT

Both sides submitted lengthy arguments in writing. On October 4, 1965, almost a year after the incident which had led up to this trial had occurred, judgement was rendered. In a thirty-three page written judgement, Judge Marcel Gaboury outlined the salient facts of the case. He noted that while Mrs. Baylis had had but one interview for employment, namely that with the Queen Elizabeth Hotel, prior to her taking the position which she held at the time of the trial; both Mr. Hoermann and Mr. Taylor admitted that they had processed in the personnel department scores of interviews per day for various positions. He noted that the explanations that were provided by Mr. Taylor and Hoermann at the trial were explanations that they could not furnish to Mr. Belanger only one month after the event. He noted further that it appeared to him that it might well be argued that the Hotel was not really seriously interested in obtaining a nurse as a result of its ad in the newspaper because, on the basis of the evidence before him, it would appear that Miss Planté was hired sometime before the advertisements were ever placed in the newspapers. Judge Gaboury felt, as a personal opinion, that this was indeed the case and that "all applicants were mechanically and derisively told to follow the routine of filling out an application, then were interviewed by Mr. Hoermann and were all told, with one exception, to seek an interview on Friday with Dr. Shock - all, with one exception, Mrs. Baylis.

Thus, Judge Gaboury could not find that she had been discriminated against because she was not given the job. Many others were interviewed and also not given the position.

Rather he found that unlike all other applicants, her application form was not endorsed and was not referred to the medical director, and she herself was not asked to interview the medical director, and that these facts and these facts alone constituted a difference in treatment justifying her complaint of discrimination.

Moreover, the judgement concludes, while the court has "no doubt as to the sincerity of Mr. Taylor, past president of the Canadian Legion and in charge of the personnel department of the Queen Elizabeth Hotel, when he swears that the Hotel authorities have definitely instructed him that there must be no discrimination, ... the trouble is that he was not present on September 2, 1964, and since the 28th of August had left an apprentice in charge of interviewing the applicants. So proclamations on policy by Mr. Taylor and by all his superior officers, right up to the president, cannot affect this case any more than
if the manager of a trucking or taxi cab company came before the court and said, 'I have told all my drivers to obey the law. Therefore, you cannot prosecute us because one of our employees went through a red light'. Mr. Hoermann being merely an apprentice or trainee, being negligently placed in authority and told to direct traffic by Mr. Taylor, has been unable to shake the corroborated story of Mrs. Baylis and therefore the defendant at the sole operation of law, by which, according to the statute, the employer is held responsible for the act of its employees, must be found guilty as charged.

At this was the first case of its kind the court felt that it had to impose the minimum fine which it did.

SIGNIFICANCE OF THE JUDGEMENT

For the first time in Canadian history an institution was found guilty, criminally, of discrimination in employment because of race. The amount of the fine is not important. What is important is that it has been established clearly that this is an offense, and that the statute on which it was based is a statute that has teeth and can be enforced.

What has also been established is that a defendant cannot escape liability by pleading that an act of discrimination was practiced only by a minor employee. An employer will be held liable for the acts of its employee.

The newspaper, press and television coverage of this trial will have, I believe, a marked therapeutic effect on employment practices in Canada. The feeling in this country is against discrimination, and when those who do discriminate have the full glare of public attention focussed upon their acts and know that this glare will be focussed upon their acts because their acts will be brought into the open under the legislation, they will hesitate and hesitate long before practising discrimination. The importance of a law such as this is not so much that it provides a punishment for those who are guilty but rather that it provides a deterrent to those who, but for it, would be guilty.

WEAKNESSES OF THE LAW

There are two striking and startling weaknesses in the law as passed by Quebec, however. The first is that for a reason which I find inexplicable, an "employer" who is covered by the law does not include anyone who has fewer than five employees; and an "employee" who is covered by the law does not include a manager, superintendent, foreman or representative of the employer in his relations with his employees, director or officer of a corporation.
Thus, under the act respecting discrimination in employment in the Province of Quebec it is apparently perfectly legal to practice discrimination in the hiring of a manager, superintendent or other important employee. The employer is only forbidden to practise discrimination against lowly employees, but it becomes legal to practise it against employees holding more responsible positions. This is an anomaly which every effort must be made to correct.

The second major weakness is, of course, the smallness of the penalty. Although such cases normally would be well publicized, publicity is not guaranteed. The act should have provided its own deterrent irrespective of the action of the press.

Serious thought should be given to increasing the penalty to a maximum of $1,000.00 and increasing beyond that in the case of repeated offences by the same employer.

Gerald N.F. Charness

Gerald N.F. Charness, B.A., B.C.L., was born in Toronto and presently resides in Montreal. He graduated from McGill University in 1952 with a B.A. degree, and 1955 with a B.C.L. degree. He was admitted to the Quebec Bar in 1956 and is currently practising under the firm name of Charness and Charness.

He was elected to the City Council of Montreal in October 1960 and re-elected in October 1962. Gerald N.F. Charness is a member of the Board of Directors of the Negro Community Centre, B'Nai B'Rith, Centre de Recherches des Relations Humaines, Joint National Committee on Public Relations of Canadian Jewish Congress and B'Nai B'Rith.