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Book Review: Mental Disability and the Law in Canada, by Gerald B. Robertson

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MENTAL DISABILITY AND THE LAW IN CANADA

BY GERALD B. ROBERTSON

Lawyers representing the mentally disabled are not without statutes to fall back upon. Every common law jurisdiction has statutes dealing with one aspect or another of mental disability. The problem lies in trying to set meaningful precedents in the absence of a coherent, principled approach to the effect of mental disability on legal rights and liabilities. What are the fundamental principles that should guide our understanding of mental disability? What should the fundamental, guiding principles be for taking legal control of a mentally disabled person's financial or personal affairs? The way we exercise and acquire this control should reflect the way a free and democratic society values the lives of its mentally disabled citizens.

Also problematic has been the lack of a comprehensive, principled and contemporary analysis of the existing statutes and caselaw relevant to those rights and liabilities. That crucial need has been met with the publication of Gerald B. Robertson's *Mental Disability and the Law in Canada*.[1]

Robertson's book is a national compendium of the relevant civil statutes and caselaw affecting the mentally disabled. It makes this area of law clear and coherently accessible. This is not an insignificant achievement when one considers the disparate statutes and caselaw which had to be pulled together and thematically presented.

It also provides a concise procedural account of the commencement and defence of litigation, making the book an invaluable source of reference for the practitioner. Robertson avoids the polemics of an activist campaigning for reform. The reader does not confront the personal, civil

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1 Gerald B. Robertson, *Mental Disability and the Law in Canada* (Toronto: Carswell, 1987) 423 pp.

libertarian ethos found in Savage and McKague's recent work.[2] The prose style is spare, lucid and detached. While he does not admit to a civil libertarian bias, his principled analysis is squarely focused on the *Charter of Rights and Freedoms*. This is as it should be. But when discussing the principles of guardianship, Robertson accurately notes their invasive potential without suggesting how to minimize it. He presents both sides of the issue without taking one. This leaves some crucial issues surrounding the appointment criteria for guardianship unresolved. While Robertson may be correct in stating that Alberta's *Dependent Adult's Act*[3] will be the model for future reform in Canada, one cannot assume that it is the only way to go. Ontario has been working towards its own guardianship model since 1985.[4] It will be interesting to compare the Alberta model with the legislative proposal of the Ontario Fram Committee. While the Committee's final report has not yet been made public, it does contain draft legislation which attempts to minimize the invasive potential of limited guardianship.

The fundamental principle emphasized thorughout the book "is that there is no such concept as "total" or "global" legal incapacity arising from mental disability. The principles which determine the legal effect of mental disability vary significantly between different areas of the law, and must be applied with specific reference to the particular subject-matter or legal issue in question. Incapacity in one area does not necessarily imply incapacity in another."[5]

Part I (chapters 2-6) deals exhaustively with committees of estate and personal guardians. The chapters on financial committeeship discuss court appointed and statutory committees, and contain a much needed critical evaluation of the latter.

With respect to court appointed committees, Robertson notes that aside from Alberta, the appointment criteria for committees of estate are "substantially similar" in all Canadian common law jurisdictions. The

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2 Harvey Savage, Carla McKague, *Mental Health Law in Canada* (Toronto: Butterworths, 1987), 355 pp.

3 R.S.A. 1980, C. D-32.

4 Interministerial Advisory Committee on Substitute Decision Making for Mentally Incapable Persons. Also known as the Fram Committee after its chairman, Stephen V. Fram, legal counsel in the Ministry of the Attorney General, Policy Development Division.

5 Robertson, *supra*, note 1 at 3.

"common theme" uniting these criteria "is that the person is unable to take care of his own affairs because of some mental disorder or infirmity."[6] Financial irresponsibility alone is not sufficient reason for appointing a committee of estate. The Alberta *Dependent Adults Act* requires the court to be satisfied that the person is an adult who is *unable* to make *reasonable* judgements regarding the management of all or part of his estate and is in need of a trustee.[7] The court will order the appointment of a committee of estate if it is satisfied that this would be in the person's best interests. This notion of "reasonableness" does not require that the adult's alleged inability to manage his or her estate result from a diseased, disordered, or infirm mind. Robertson notes that these criteria give the Alberta courts "much greater flexibility than in other jurisdictions to act in the person's best interests".[8] This "greater flexibility" entails potentially greater power to limit one's right to self-determination. The extent to which such criteria may allow for an unduly paternalistic limitation of a person's right to make his or her own bad decisions is not fully explored.

The fact that this legislation speaks of one's ability to make reasonable decisions as opposed to one's willingness does not obviate the issue. Who will determine whether one's decisions are reasonable? Clearly, the people who determine whether one needs a committee of estate. This implies a normative standard of reasonableness that will presuppose how one ought to manage one's estate. This standard will be applied to how one actually does manage one's estate.

What exactly is this standard and why must people be able to conform to it? One can argue that people should only be held able to make decisions regarding the management of thir estates, as opposed to making decisons which conform to someone else's notion of reasonable estate management.

The reasonableness standard is flexible to the point of relativity. I am hopefully free to work out my own ideas on estate management and able to make my decisions accordingly. As long as I am able to make these decisions, I submit that the laws governing mental disability should permit no interference with them. Surely I am allowed the dignity of risk to make a bad decision. Robertson points out that in fact, the Alberta courts "are still primarily concerned with the person's

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6 *Ibid.* at 32.

7 *Dependent Adults Act*, s. 25 [am. R.S.A. 1980, c. 6 (Supp.), s. 20].

8 Robertson, *supra*, note 1 at 35.

mental capacity to look after his own affairs" since "a medical or psychological report must accompany the application."[9] He notes that most of the circumstances held to justify the appointment of a committee of estate in Alberta would justify the same appointment in other jurisdictions. Nonetheless, the "reasonableness" standard begs more questions than it answers and Robertson does not address its potential invasiveness for those who may not choose to conform to it.

Robertson is much less inclined to avoid the actual invasiveness of statutory committeeship. His critical analysis is especially relevant to those practitioners representing patients in mental health facilities.

In some jurisdictions, the appointment of a statutory committee for psychiatric patients is automatic. In others, the Public Trustee's appointment depends on the patient being declared to be financially incompetent. Either way, Robertson contends that the appointment procedures do not accord with the principles of procedural fairness. They do not require a hearing, do not afford the patient an opportunity to make representations except on appeal, contain no statutory notice requirements about the actual examination and in all but three provinces there is no statutory duty to inform the patient that a certificate of financial incompetence has been issued. The high standards of procedural fairness employed in the court appointments are not met for statutory appointments. Robertson states that they likely violate Section 15 (1) of the *Charter* since they discriminate against those who are patients in psychiatric facilities as opposed to those who are not.[10]

Statutory appointments also discriminate against those who are declared to be financially incompetent since they usually allow the Public Trustee more extensive powers over the patient's affairs than are found in court appointments. While the duties are much less onerous, these powers usually include exclusive control over litigation. Robertson contends that they are probably inconsistent with Section 7 of the *Charter*.

"The patient is therefore left with no control over his financial affairs; he is deprived of his legal capacity to make contracts and gifts; and he is denied personal access to the courts. This goes well

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9 *Ibid.*

10 *Ibid.* at 65.

beyond mere interference with property rights."[11] Robertson argues that it deprives the patient of his liberty and security of the person.

As for Section 1 of the *Charter*, "the real question is what justification, if any, exists for singling out psychiatric patients as the only group whose right to manage their own affairs can be taken away without a court hearing."[12]

Chapter four covers the powers, duties, remuneration and expenses of the committee of estate. While much of the material in the first four chapters of Part I has been discussed elsewhere, Robertson's elucidation is noteworthy for its concise acuity. Chapters five and six cover guardianship of the person.

Excepting Alberta's *Dependent Adults Act*, the law of personal guardianship is unfocussed, inaccessible and "pitifully unclear with respect to some basic issues."[13] This results in a disturbing lack of coherence in the legal rules governing when and how a person's right to control his/her life can be removed. This lack of coherence also extends to the legal rules governing the powers and duties of those who act as substitute decision-makers.

Robertson cogently summarizes the existing grounds and basic procedures for appointing a personal guardian. His criticism further defines his principled approach: limited mental disability can be met with limited forms of guardianship. Imposing limited guardianship reflects the principle of the least restrictive alternative. This principle holds that if the state has a justifiable purpose for restricting an individual's rights, the restriction should be no greater than necessary to achieve that purpose.

While personal guardianship can be a justifiable response to the needs of a mentally disabled person, it is still a serious constraint on personal liberty. Since even limited guardianship is intrusive, Robertson argues that the law must provide clear and well reasoned appointment criteria, effective procedural safeguards and a clear definition of the guardian's powers and duties. "Measured by these standards, the present Canadian law of guardianship fails miserably."[14]

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11 *Ibid.* at 63.

12 *Ibid.* at 67.

13 *Ibid.* at 101.

14 *Ibid.*

There are four major problems to be addressed. The criteria for appointing a personal guardian are obscure and little or no guidance is given to defining the scope of the guardian's authority. Most of the legislation relating to mental disability is property oriented and existing legislation fails to provide for limited guardianship. Again, Robertson cites the principle of the least restrictive alternative as the "underlying philosophy" of the *Alberta Dependent Adults Act*. "It recognizes that to the extent that the dependent adult is capable of making his own decisions and taking care of himself, he should be given the opportunity to do so. This is reinforced by the requirement that the guardian exercise his power and authority 'in the least restrictive manner possible'."[15] Under the *Act*, a person is in need of a personal guardian when "he is repeatedly or continuously unable to care for himself and to make reasonable judgements in respect of matters relating to his person."[16] The court must also be satisfied that a guardianship order would be in the person's best interests and be of substantial benefit to him.[17] Robertson duly notes that the "appointment criteria" have been criticized as being open to subjective interpretation, making the *Act* potentially applicable to a wider range of persons than was originally intended.[18] Robertson notes this criticism without determining whether the appointment criteria could be revised. He ignores the implications of the "reasonableness" standard. He notes that those criteria do not focus on whether the person falls within a specified diagnostic category, but rather on his "ability to take care of himself and to make decisions affecting his personal welfare."[19] But it is not enough that the person be able to make decisions affecting his personal welfare. The *Act* specifies "reasonable" decisions. A mentally competent person is allowed wide latitude to make bad decisions and mistakes. Are the mentally disabled allowed the same latitude under this *Act*, or must their decisions always conform to a higher standard of reasonableness? The standard of reasonableness may limit the principle of the least restrictive alternative. One can argue that the principle is reflected even further in appointment criteria which avoids the standard of reasonableness.

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15 *Ibid.* at 104, citing the *Dependent Adults Act*, s. 1 [am. R.S.A. 1980, c. 6 (Supp.), s. 11].

16 *Ibid.* at 104, citing the *Dependent Adults Act*, s. 6 (1) [re-en. 1985, c. 21, s. 7].

17 *Ibid.* at 115, citing the *Dependent Adults Act*, s. 6 (2) [re-en. 1985, c. 21, s. 7].

18 *Ibid.* at 104-5.

19 *Ibid.* at 104.

One should also remember that limited guardianship has an intrusive potential of its own. Savage and McKague have noted that judges "may be more willing to impose a limited constraint on individual liberty than to invoke the draconian remedy of plenary guardianship, and may inquire less assiduously into the person's need for a substitute decison-maker."[20]

Part II (chapters 7-13) examines the effect of mental disability in the following areas: contracts and property, succession, tort liability, family law, elections and discrimination. The chapter on litigation covers the commencement and defence of proceedings, instructing counsel, evidence, limitation of actions and the enforcement of judgements.

Part III (chapters 14-15) focuses exclusively on patients in mental health facilities. This is the shortest of the book's three parts and in many respects the most tentative. The key issues are involuntary commitment and non-consensual treatment.

As to the former, Robertson notes that aside from "*obiter* comments at the appellate level, the [Canadian] cases dealing with civil commitment have all been first instance decisions and cannot be regarded as determinative."[21] His analysis is a welcome reminder that the existence of review boards for civilly committed patients is not a panacea for legislative defects.[22] The key issue is whether the committal criteria are just.[23]

He cites the vagueness of the committal criteria in many provinces, the surviving remnants of the welfare test (or civil commitment in the absence of dangerousness) and the often lengthy duration of confinement as the areas which jeopardize the legislation's compatibility with the *Charter*.[24]

Robertson also mentions "the absence of mandatory periodic review and the serious delay inherent in the review process in many provinces" as problems to be judicially addressed.[25] He could also have

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20 Savage and McKague, *supra*, note 2 at 195.

21 Robertson, *supra*, note 1 at 366.

22 *Ibid.* at 367.

23 *Ibid.*

24 *Ibid.* at 368.

25 *Ibid.*

mentioned the value and cursory quality of some of the provincial review board's written reasoning.

As to the latter, the *Charter* is the strongest basis on which to challenge provisions authorizing non-consensual treatment.[26] Where the common law recognizes "the fundamental right of all competent persons to refuse medical treatment, even where that treatment would be in their best interests", mental health legislation often creates "a subgroup of people who are deprived of that right."[27] The issue to be determined is whether the patient has capacity to consent. "If an involuntary patient possesses this capacity he is in the same position as any other competent patient and should be treated no differently."[28]

Robertson's book will likely become a cornerstone for research into the law of mental disability. The bibliography alone is an excellent source of reference for any of the topics discussed. His espousal of limited guardianship and the principle of the least restrictive alternative will hopefully be critically reinforced in future legislative reform.

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26 *Ibid.* at 403.

27 *Ibid.*

28 *Ibid.*