MENTAL DISABILITY AND THE LAW IN CANADA. By Gerald B. Robertson. Carswell, 1987. Pp. 518. ($72.00)

The author of this book tells us in its preface that "its purpose is to provide a detailed discussion and analysis of the legal effects of mental disability in the common law provinces and territories of Canada". The discussion is detailed. For example, there are twelve pages dealing with the rules governing the effect of mental incapacity on the running of limitation periods. The work has been meticulously researched. The Table of Cases runs to thirty-five pages; the Table of Statutes another thirty-seven.

Surprisingly, however, the author deals with the meaning of "mental disability" in a single page. There is no attempt to make certain that the reader understands the main distinction within this catch-all phrase, namely the distinction between intellectual impairments (sometimes referred to as mental retardation or developmental disability) and the conditions of behavioural/emotional disorder, which are the focus of the medical specialty of psychiatry. Lawyers (who are clearly the primary intended readers) are often confused about this important distinction. Furthermore, even if this main distincton is properly understood, it is also necessary to grasp the extremely vast range of differences among those to whom these labels have been applied. The labelling of people with ill-defined categorizations which include the adjective "mental" may, in fact, give rise to more legal issues than do their actual disability conditions. This is certainly the case in the sphere of anti-discrimination law.

The author deserves credit, however, for his own recognition that the concern is not with some fixed phenomenon of mental disability which affects people in a uniform way. In fact, he repeatedly reminds us that, even with respect to a given individual, generalizations ought not to be made from one situation to another. In other words, if a person has been found to lack the mental capacity required to make an informed decision about one thing (say, whether to enter into a contract), it ought not be assumed that he or she could not be self-determining about other things (such as executing a valid will or consenting to medical treatment).

Part I of the book deals with the legal procedures for empowering other persons to make substitute decisions for individuals who have a mental disability. Lawyers will find the practical "how-to-do-it" guidance very helpful. One would feel more at ease if these first chapters offered more to assist people in coming to grips with "whether-to-do-it" and "why-to-do-it".

The existing scheme for establishing committeeship of estates and personal guardianship is set out systematically and largely uncritically.[1]

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[1] On a cynical note, one wonders why it was necessary to devote the initial ninety or so pages to the law dealing with the property of persons who have a mental disability when so few of such persons have any property.

For example, the author speaks of "medical evidence indicating mental incapacity or infirmity"[2] as though it were only natural that we should turn to physicians to assist us in assessing whether an individual is able to make a decision about where he would like to live, how she will spend her money and so on. Are there not alternative (and often better) sources of such evidence? Physicians receive very little training in the functional assessment of mental disability.

Professor Robertson does rightly criticize the archaic state of guardianship law in most Canadian provinces. It so happens that he lives in the only province to have undertaken a far-reaching revision of such law, resulting in the Alberta *Dependent Adults Act*[3] of 1978. This statute, which incorporates such reforms as partial (as opposed to plenary) guardianship, the principle of the least restrictive alternative and periodic review of guardianship orders, is held up as a model for other provinces to follow. One feels that a word of caution is in order however. Sometimes a seemingly less intrusive interference with the autonomy of an individual becomes a greater intrusion because it appears benign. If Justin Clark had lived in Alberta, rather than in Ontario, the judge at his trial may have felt less restrained about giving his parents some "partial" control over his life than was the case under Ontario law which essentially removes every element of self-determination.[4]

In the context of the powers and duties of guardians, the book provides a succinct, yet comprehensive, guide to current Canadian law on the sterilization of persons with mental disability. Professor Robertson argues that in the land-mark case, *Re Eve*,[5] the Supreme Court of Canada places sterilization on the consent of a third party beyond reach, even in Alberta. The *Dependent Adults Act* authorizes substitute consent for "any procedure undertaken for the purpose of preventing pregnancy[6]. . . that is in the best interests of the dependent adult".[7] But in Robertson's words, "the Supreme Court of Canada has ruled that non-therapeutic sterilization without the patient's consent cannot be said to be in the patient's best interests".[8]

A few matters in the book have already become outdated, in spite of an obvious and generally successful attempt to incorporate new developments in the law up to the last possible date before press time. One

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[2] P. 33.

[3] R.S.A. 1980, c. D-32.

[4] Pp. 32, 35; *and see Clark* v. *Clark* (1982), 40 O.R. (2d) 383, 3 C.R.R. 342 (Co. Ct.). In that case, the parents of Justin Clark, who has a severe physical disability, opposed their son's expressed wish to move from an institution into a community residence. The Judge directed a trial on the issue of 20 year old Justin Clark's mental competence and held that he was mentally competent and there was no legal role to be played by his parents in decisions affecting Justin's life.

[5] (1986), [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1.

[6] R.S.A. 1980, c. D-32, s. 1(h)(ii).

[7] R.S.A. 1980, c. D-32, s. 10(2)(h), *as am.* S.A. 1985, c. 21, s. 11(1).

[8] P. 187.

example is Robertson's treatment of abortions performed on women who lack the capacity to make informed decisions. He suggests that since the *Criminal Code*[9] only countenances therapeutic abortions in any case, substitute consents are appropriate (whereas they would be subject to question if the procedure were non-therapeutic). At the time of this review, the *Morgentaler*[10] decision in the Supreme Court of Canada on January 29, 1988 has removed the "therapeutic" requirement from the *Code*. Perhaps Robertson would now suggest a "best interests" test to determine whether a substitute consent to abortion would be legally valid.

Professor Robertson cites, in a brief paragraph on page 142, the British Columbia Supreme Court decision in the *Stephen Dawson*[11] case and the English Court of Appeal decision in *Re B*[12] as examples of the courts exercising their power to override the decisions of legal guardians. In both cases, the issue was whether a child who had (or would likely have) a mental handicap should receive necessary surgical treatment to correct life-threatening physical defects, notwithstanding the refusal of the parents to authorize the surgery. Because it was found in each case that it was in the "best interests" of the child to receive the needed medical care, the courts were entitled to remove the decision-making power from the parents. For this reviewer, the *Dawson* case is an outstanding land-mark in Canadian jurisprudence and one would have thought that it merited more detailed discussion, if not here, then at some other point in the book. Surely the underlying principles by which "best interests" are determined (and by which they are found to outweigh other interests) are a critical aspect of the law in the area which this book addresses.

Part II takes us into matters where the questions revolve around the legal capacity of persons with mental disabilities to act on their own. These matters include, *inter alia*, entering into contracts, marriage, custody of children and voting in elections. Typically, Professor Robertson's coverage of the law on these questions in the common law provinces is thorough and reliable, although we are not told what rules pertain to the solemnization of marriages in Saskatachewan, New Brunswick, Newfoundland, Nova Scotia and Yukon. In his discussion of voting rights, Professor Robertson lists those jurisdictions which have responded to the *Charter*[13] by removing from their elections legislation the disqualifications based on mental disability (Saskatachewan, Ontario and Northwest Territories). A similar amendment is included in a bill to amend the *Canada Elections Act*[14] currently before Parliament, but which was introduced too late to be included in this book.

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[9] R.S.C. 1970, c. C-34, s. 251.

[10] *Morgentaler* v. *The Queen* (1988), [1988] 1 S.C.R. 30, 82 N.R. 1.

[11] *Re S.D.* (1983), 145 D.L.R. (3d) 610, [1983] 3 W.W.R. 618 (B.C.S.C.).

[12] (1981), [1981] 1 W.L.R. 1421, 80 L.G.R. 107 (C.A.).

[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[14] R.S.C. 1970 (lst Supp.), c. 14.

In discussing the issue of the education rights of children who are mentally handicapped, Professor Robertson praises Ontario's recently enacted due process provisions, saying that "they represent a major initiative towards ensuring that decisions affecting the education of handicapped children are made fairly and openly".[15] In the actual experience of the parents of such children, nothing could be farther from the truth. After discovering that the process under the *Education Act*[16] is heavily weighted against them, more and more parents are turning to the courts and to the Ontario Human Rights Commission in order to gain access for their children to appropriate educational services in their community schools. Professor Robertson sets out the guiding principles which these parents hope the courts will acknowledge. Sadly, such principles have not often been applied in the decisions of the various appeal bodies established under the Ontario legislation.

Succession law with regard to the obligation to make provision for a son or daughter who has a mental disability is an area of confusion. Professor Robertson shows that the courts in the various provinces are more or less evenly split on the question of whether dependent's relief provisions justify a challenge to a will which leaves nothing to a person who, because of disability, is a recipient of social assistance. Where the will creates a discretionary trust, on the other hand, out of which money can be paid from time to time for the incidental benefit of a person who continues to qualify for a disability pension, Professor Robertson tells us that it is now settled law that such a trust "will not result in a reduction in social benefits, nor will it provide a source from which the State can recover the cost of maintaining the beneficiary".[17] In Ontario, at least, this remains open to question, since the Ontario Court of Appeal will be hearing a case precisely on that point later this year on an appeal by the Director of Income Maintenance from a decision of the Divisional Court.[18]

Chapter 13 of the book deals with litigation. It opens with a discussion of the rules of court which stipulate that an individual who has a committee or guardian must act through that person in order to retain and instruct counsel. The exceptions are when the person wishes to challenge the decision to place him or her under a legal disability, or wants to have the committee's appointment terminated, or is seeking a writ of *habeas corpus*. One would have expected Professor Robertson to have criticized these limitations more vigorously than he did, given his frequent insistance throughout the book on a functional approach to the question of the capacity of persons labelled mentally handicapped to make their own decisions. Why are these rules not fair game for a *Charter* challenge?

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[15] P. 260.

[16] R.S.O. 1980, c. 129.

[17] P. 190.

[18] *Director of Income Maintenance* v. *Henson* (December, 1987), (Ont. Div. Ct.) [unreported].

Chapter 13 also includes a review of the rules of evidence pertaining to witnesses who have a mental disability. Professor Robertson says that there is no "statutory provision enabling an adult witness to give unsworn evidence, unlike the case of children of tender years".[19] This is no longer the case. Bill C-15 proclaimed on January 1, 1988, repealed the former section 16 of the *Canada Evidence Act*, replacing it with a provision that "a person whose mental capacity is challenged" and "who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth".[20]

On a closely related point, the book seems to be in error in saying "that affirmation cannot be used as a means of admitting evidence from a witness who is mentally incapable of understanding the nature of an oath".[21] While this reviewer personally prefers Professor Robertson's statement, Mr. Justice G. Arthur Martin ruled otherwise in *R.* v. *Dobson*.[22] With the concurrence of both of his fellow Justices of Appeal, Mr. Justice Martin wrote: "In my view, [the trial judge], having found the complainant mentally competent to testify, erred in not having the witness affirm under s. 14 of the *Canada Evidence Act*, if he concluded that she did not understand the nature of an oath."[23] This dictum, of course, pre-dated the above-mentioned amendments to section 16, so that now, in matters under federal jurisdiction, the option of having the witness with a mental handicap simply promise to tell the truth might be preferred over that of having the person recite the required formula for a solemn affirmation.

Part III of the book consists of two chapters dealing with voluntary and involuntary admissions to mental health facilities and with the rights of the patients once admitted. Professor Robertson is appropriately critical of the potential for injustice within provincial mental health legislation and the failure, to this point, of Canadian courts to confront adequately the injustices that have been brought before them. Admitting that his work focuses chiefly on civil, rather than criminal law, he provides a brief and far less critical outline of the sections of the *Criminal Code* which embody the current Lieutenant-Governor's Warrants regime for accused persons unfit to stand trial or not guilty by reason of insanity. This is an area which has attracted strong criticism in recent years. The government of Canada has responded by preparing draft legislation which will correct many of the abuses, particularly indeterminate detention without judicial discretion to grant release from custody in appropriate cases and the absence of genuine due process protections. A leading case in this area, *R.* v. *Swain*,[24] will shortly be argued in the Supreme Court

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[19] P. 282.

[20] R.S.C. 1970, c. E-10, s. 16, *as am.* S.C. 1987, c. 24, s. 18.

[21] P. 284.

[22] (1987), 22 O.A.C. 119.

[23] *Ibid.* at 125.

[24] *R.* v. *Swain* (1986), 24 C.C.C. (3d) 385, 50 C.R. (3d) 97, *leave to appeal to S.C.C. granted* (1987), 55 C.R. (3d) xxxii.

of Canada on *Charter of Rights* and other constitutional grounds. The Minister of Justice will intervene in this case, not to defend the *status quo*, but to inform the Court of the reforms that are being planned.

Professor Robertson's book is impressive in its scope and in the thoroughness of its scholarship. Presenting, as he does, such a massive quantity of information, it is inevitable that some of what he writes will be incorrect, usually because events have overtaken his research. He maintains a careful balance between objectivity and criticism of those aspects of the law which perpetuate inequality and the denial of the basic human rights of persons perceived to be mentally disabled. While one might have wished for the balance to be further towards advocacy, one must respect a work which has other motives besides axe-grinding. My criticisms, to the extent that they have merit, are probably justified by the author's too heavy reliance on the law as written and his apparent lack of familiarity with the law as experienced by persons who have mental disabilities. In addition to the assistance of his student researchers, he could have benefited by some consultation with practitioners in the field.

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