

## Report on Mental Disability in Canadian Law

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Résumé de l'article

Ceci est le Rapport canadien sur la loi réglementant l'incapacité mentale dans le droit canadien, préparé en vue du XIII<sup>e</sup> Congrès de l'Académie Internationale du Droit Comparé tenu à Montréal en août 1990. Le rapport a été mis à jour afin de prendre en considération les modifications subséquentes dans le droit des provinces de common law et dans le nouveau *Code Civil du Québec*.

En conformité aux instructions données aux rapporteurs nationaux lors du Congrès ci-haut mentionné, le rapport décrit premièrement en profondeur le droit traitant des effets civils de l'incapacité mentale, comme la nomination des gardiens ou des curateurs pour administrer la propriété et pour prendre d'importantes décisions personnelles concernant la personne souffrant d'incapacité mentale. Le rapport discute ensuite de la loi réglementant l'internement involontaire des incapables dans des institutions de santé mentale.

Le rapport soulève des traits communs dans le droit du Québec et celui des provinces de common law. En ce qui concerne la nomination des gardiens ou curateurs, la tendance est de s'éloigner des déclarations judiciaires d'incapacité totale, afin d'encourager l'autosuffisance et la guérison des incapables et afin d'accorder à la personne en charge seulement les pouvoirs absolument nécessaires pour la protection de l'incapable. En ce qui concerne l'internement involontaire dans des institutions de santé mentale, les législateurs ont eu à affronter le problème de réglementer la décision de priver une personne de sa liberté sur la base d'un jugement sur sa condition mentale et ses besoins futurs, et non sur la base de la commission d'une infraction criminelle ou d'une infraction à toute autre loi. La solution législative fut de clarifier les standards et les critères qui doivent être pris en considération avant d'interdire une personne et afin de fournir une plus grande sauvegarde procédurale dans la prise de cette décision de même que plus d'opportunités de révision et d'appel de cette décision.

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# Report on Mental Disability in Canadian Law\*

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## ABSTRACT

*This is the Canadian Report on the law regulating mental disability in Canadian law, prepared for the XIII<sup>th</sup> Congress of the International Academy of Comparative Law held in Montréal in August 1990. The Report has been brought up to date to take account of subsequent changes in the law of the Canadian common law provinces and in the new Civil Code of Québec.*

*In accordance with the instructions given to the national reporters in the above mentioned Congress, the Report first describes at length the law dealing with the civil effects of mental disability, such as the appointment and powers of guardians or curators to administer the property and take important personal decisions for persons with mental disabilities. The Report then discusses the law regulating the involuntary commitment of the*

## RÉSUMÉ

*Ceci est le Rapport canadien sur la loi réglementant l'incapacité mentale dans le droit canadien, préparé en vue du XIII<sup>e</sup> Congrès de l'Académie Internationale du Droit Comparé tenu à Montréal en août 1990. Le rapport a été mis à jour afin de prendre en considération les modifications subséquentes dans le droit des provinces de common law et dans le nouveau Code Civil du Québec.*

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\* Report prepared for the XIII<sup>th</sup> Congress of the International Academy of Comparative Law, Montréal, 19-24 August 1990. I am grateful to my Dean, Peter Mackinnon and to Michael Finley, Legal Research Officer, Law Reform Commission of Saskatchewan, who read an earlier version of this paper and made useful suggestions. All errors and omissions are mine.

mentally disabled to mental health institutions.

The Report discerns common trends in the law of Québec and of the Canadian common law provinces. With regard to the appointment of guardians or curators the trend is to move away from judicial declarations of total incapacity, to encourage the self-reliance and cure of the disabled and to grant to the person in charge only those powers absolutely necessary for the protection of the disabled. With regard to the involuntary commitment to mental health institutions, the legislators have been faced with the problem of regulating a decision to deprive a person of her liberty on the basis of a judgment about her mental condition and her future needs, and not on the basis of the commission of a crime or the violation of any law. The legislative solution has been to clarify the standards and criteria which have to be considered before committing a person and to provide more procedural safeguards in the reaching of that decision as well as more opportunities to review and to appeal that decision.

discute ensuite de la loi réglementant l'internement involontaire des incapables dans des institutions de santé mentale.

Le rapport soulève des traits communs dans le droit du Québec et celui des provinces de common law. En ce qui concerne la nomination des gardiens ou curateurs, la tendance est de s'éloigner des déclarations judiciaires d'incapacité totale, afin d'encourager l'auto-suffisance et la guérison des incapables et afin d'accorder à la personne en charge seulement les pouvoirs absolument nécessaires pour la protection de l'incapable. En ce qui concerne l'internement involontaire dans des institutions de santé mentale, les législateurs ont eu à affronter le problème de réglementer la décision de priver une personne de sa liberté sur la base d'un jugement sur sa condition mentale et ses besoins futurs, et non sur la base de la commission d'une infraction criminelle ou d'une infraction à toute autre loi. La solution législative fut de clarifier les standards et les critères qui doivent être pris en considération avant d'interdire une personne et afin de fournir une plus grande sauvegarde procédurale dans la prise de cette décision de même que plus d'opportunités de révision et d'appel de cette décision.

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## INTRODUCTION

In the last twelve years, the legislation applicable to mental disability in Canada has been subjected to considerable study and change. In the Canadian common law provinces, the legislation regulating the appointment of guardians to take care of the property or the person of the mentally disabled has been the subject of a number of studies and two provinces have adopted new legislation.<sup>1</sup> In 1987 and 1989, the legislature of the province of Québec amended those articles of the *Civil Code of Lower Canada* dealing with the appointment of curators to protect persons with certain disabilities.<sup>2</sup>

In the common law provinces, the statutes regulating the involuntary commitment of the mentally disabled to mental health institutions has also been re-examined in a number of studies. A Uniform Act, intended as a model for future legislation, has been drafted, and several provinces have amended their committal legislation.<sup>3</sup> In Québec, the new Civil Code sets some general principles applicable to civil commitment: It is expected that the legislation regulating civil commitment in detail will also be amended to make it correspond with the new provisions of the Civil Code.<sup>4</sup>

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1. See part I. A. of this report.  
2. See part I. B. of this report.  
3. See part II. A. of this report.  
4. See part II. B. of this report.

The studies of mental health law and the new legislation have been motivated in part by changes in the law of other commonwealth jurisdictions and in the United States.<sup>5</sup> They have also been inspired by a growing concern for the civil liberties of persons with mental disabilities. This growing awareness has coincided with the adoption and implementation of human rights legislation by all provinces and the federal government<sup>6</sup> and with the enactment in 1982 of the *Canadian Charter of Rights and Freedoms*.<sup>7</sup> After the advent of the Charter, government representatives<sup>8</sup> and critics have wondered whether existing guardianship and committal statutes complied with section 7 of the Charter, which provides that everyone has the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice, and with section 15, which guarantees the mentally disabled equality before and under the law.<sup>9</sup> More generally, critics of provincial mental health legislation have long been concerned that it violates traditional assumptions about the rule of law, as under that legislation a person can be deprived of her liberty without having violated any law or engaged in any proscribed conduct, merely on the basis of a judgment about the person's condition, mental abilities and future needs.

The new legislation regulating the appointment of guardians and civil commitment has not, however, responded to these concerns by enacting clear rules setting out in advance the types of conduct which will trigger official responses. The new statutes continue to envisage a decision on the status of a person on the basis of a judgment on the state or condition of that person and her future needs.

The new statutes have responded to the concern for the liberty and autonomy of the persons affected by them in a number of ways. First, they have set out in clear language the standards or criteria which have to be considered when the application of the statutes is being considered. For example the

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5. See R.M. GORDON & S.N. VERDUN-JONES, "Mental Health Law and Law Reform in the Commonwealth : The Rise of the 'New Legalism' ?" in D.N. WEISSTUB, ed., *Law and Mental Health : International Perspectives*, Vol. 2, New York, Pergamon Press, 1986, c. 11.

6. See generally, W.S. TARNOPOLSKY and W.F. PENTNEY, *Discrimination and the Law*, Rev. Ed., Toronto, DeBoo, 1985 ; G.L. GALL, ed., *Civil Liberties in Canada : Entering the 1980s*, Toronto, Butterworths, 1982 ; D. VICKERS and O. ENDICOTT, "Mental Disability and Equality Rights" in A.F. BAYEFSKY and M. EBERTS, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985.

7. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.) c. 11, proclaimed in force April 17, 1982 except for section 15, which came into force in April 1985.

8. See for example, Discussion Paper, "Compliance of Saskatchewan Law with the Canadian Charter of Rights and Freedoms", Regina, Department of Justice, 1984.

9. Sections 9, 10 and 12 of the Charter are also relevant to statutes dealing with mental disability. Section 9 states that everyone has the right not to be arbitrarily detained or imprisoned, section 10 sets out the rights that everyone has on arrest or detention and section 12 states that everyone has the right not to be subjected to cruel and unusual treatment or punishment.

Ontario *Mental Health Act* and the *Uniform Mental Health Act*<sup>10</sup> require that a person be considered dangerous or in danger of “impending serious physical impairment”, before she can be involuntarily committed to a mental hospital. Secondly, the new statutes have created a more complex system of procedural safeguards and provide ample opportunities for reviews and appeals of the applications of the standards. Thirdly, the new statutes make clear that decisions to commit a person or to appoint a guardian should be made only in extreme or very serious circumstances in which those measures are considered to be absolutely necessary. Finally, the new statutes indicate that the measures taken under them should be the least restrictive and intrusive on the liberty of the person subject to the requirement that they achieve the desired purpose. For example, the new legislation dealing with the appointment of guardians states that they should be granted only those powers strictly necessary to meet the needs of the dependent adults.<sup>11</sup>

In the pages that follow, this report will describe and discuss the law applicable to the issues suggested by the general reporter. Because of those guidelines and space limitations, this report will not deal with the effects of mental disability in Canadian criminal law,<sup>12</sup> or with a number of interesting related issues, such as the validity of the legislative provisions under the Canadian Charter, or the right to refuse medical treatment.<sup>13</sup>

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10. See the discussion under heading II.A.2.

11. See the discussion under heading I.A.1.b) (ii) and (iii).

12. See generally R.M. GORDON & S.N. VERDUN-JONES, “The Trials of Mental Health Law : Recent Trends and Developments in Canadian Mental Health Jurisprudence”, (1988) 11 *Dalhousie L. J.* 833, pp. 843, 857 ; G.B. ROBERTSON, *Mental Disability and the Law in Canada*, Toronto, Carswell, 1987, pp. 369-372 ; H. SAVAGE & C. MCKAGUE, *Mental Health in Canada*, Toronto, Butterworths, 1987, Chapter 2, pp. 31-70. In the preparation of this report, I have relied on these two books, especially on the first one, prepared by Professor G.B. Robertson of the Faculty of Law, University of Alberta. The interest in Canadian mental health law is demonstrated by the publication of two books on the subject in 1987, and by the fact that many of the statutes they refer to have been amended since their publication, so that, only two years later, both books require a second edition.

13. See generally R.P. KOURI, “Le Consentement aux soins médicaux à la lumière du projet de loi 20”, (1987) 18 *R.D.U.S.* 27 ; R.M. GORDON & S.N. VERDUN-JONES, “The Right to Refuse Treatment : Commonwealth Developments and Issues”, (1986) 6 *Int. J.L. & Psych.* 57 ; D. MORRISON, “Le droit de refus de traitement chez le patient involontaire : considérations médico-légales”, (1985) 30 *Can. J. Psych.* 60 ; D. MORRISON, “The Right to Refuse Treatment in Québec”, (1985) 5 *Health L. Can.* 1985 ; D. GERVAIS, “Le droit de refuser un traitement psychiatrique au Québec”, (1985) 26 *C. de D.* 807 ; M.A. SOMERVILLE, “Refusal of Medical Treatment in ‘Captive’ Circumstances”, (1985) 63 *Can. Bar Rev.* 59 ; J.-L. BAUDOUIN, “Le droit de refuser d’être traité” in R.S. ABELLA & M.L. ROTHMAN, eds. *Justice Beyond Orwell*, Cowansville, Yvon Blais, 1985 ; T. WELLSCH, “The Right of the Civilly Committed Mental Patient to Refuse Treatment”, (1983/84) 48 *Sask. L. Rev.* 269.

## I. CIVIL EFFECTS OF MENTAL DISABILITY

All Canadian provinces regulate separately the effect which mental disability may have on a person's capacity to manage her own affairs and the commitment of the mentally disabled to a mental health institution for treatment.<sup>14</sup>

The first part of this report will discuss the effect that mental disability may have on a person's civil status. The second part will analyze the law applicable to civil commitment. In both parts, the law of the province of Québec and of the common law provinces will be treated separately.

### A. COMMON LAW PROVINCES

The law of the Canadian common law provinces provides for both continuous and occasional protection of the mentally disabled. A person with a mental disability may have a guardian appointed to make financial or personal decisions for her. Even if a guardian has not been appointed to manage the affairs of a person, that person's mental disability may affect the validity of her contracts or of her will, or her liability in tort. In this report the appointment of a guardian and its legal effects will be treated separately from the effects of mental disability on a person who does not have a guardian.

#### 1. Persons formally declared to be mentally disabled

There is a discernible trend in the legislation of the common law provinces applicable to the appointment of guardians to take care of the affairs of the mentally disabled. For many years, all the common law provinces have had similar statutes, based on the English *Lunacy Act*,<sup>15</sup> which provided for

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14. In practice, all Canadian provinces have adopted the principle which is stated in article 490-1 of the French Civil Code in the following terms: "The methods of medical treatment, notably as to the choice between hospitalization and care at home, are independent of the regime of protection applied to civil interests. Reciprocally, the regime applicable to civil interests is independent of medical treatment". *The French Civil Code*, Translated with an Introduction by J.H. CRABB, South Hackensack, New Jersey, F.B. Rothman, 1977. In *Re Young* [1942] 3 D.L.R. 185 (Ont. C.A.) Robertson C.J.O. stated at p. 187: "A declaration by the Court under the provisions of the *Mental Incompetency Act* [...] that a person is mentally incompetent is quite a different matter from admitting a person certified to be mentally ill to a mental hospital under the *Mental Hospitals Act* [...]".

15. 53 & 54 Vict., c. 5, The Law Reform Commission of Saskatchewan has stated that the first Saskatchewan statute dealing with mental disability was the *Lunacy Act*, adopted in 1919 (S.S. 1918-1919, c. 58), that this Act was based on the English *Lunacy Act* of 1890, which amended and consolidated provisions of earlier "lunacy" Acts, and that the Saskatchewan Act has remained virtually unchanged apart from being renamed *The Mentally Disordered Persons Act*. See LAW REFORM COMMISSION OF SASKATCHEWAN, *Proposals for a Guardianship Act, Part I: Personal Guardianship*, Saskatoon, 1983, p. 7. The Supreme Court of Canada stated in *Re Wright*, [1951] 4 D.L.R. 290, p. 302 that the Ontario *Mental Incompetency Act* was based on the British *Lunacy Act* of 1890, 53 Vict., c. 5.

formal declarations of mental incompetence and for the appointment of guardians. These statutes have been subjected to considerable criticism and two provinces have adopted new legislation embodying a different philosophy. In the pages that follow, this report will analyze the provisions of the old statutes with special references to one of them, the Ontario *Mental Incompetency Act*,<sup>16</sup> as well as the two new Acts passed in the provinces of Alberta and Saskatchewan, which are both called the *Dependent Adults Act*.<sup>17</sup> In addition to the appointment of guardians after judicial declarations of incompetence, other provincial statutes provide for the non-judicial appointment of guardians, especially when a person without a guardian enters a mental health facility. This non-judicial appointment of a guardian will be discussed separately.

*a) Judicial appointment of guardians under the old Acts*

The common law and statutes of the Canadian common law provinces distinguish between incapacity to make personal decisions and incapacity to administer property or to manage financial affairs. In the case of a person held incapable of managing her property or financial affairs a judge may appoint a “trustee”, “guardian”, or “committee” “of the estate”.<sup>18</sup> Most of the provisions of the old Acts deal with this type of guardianship. However these Acts also provide that, in the case of a person who is found incompetent to reach decisions of a personal nature, such as where to live, whether to work or study or whether to consent to medical treatment, a court may authorize the appointment of a “committee” or “guardian” “of the person”. In this report, a person appointed to deal with financial matters will be called a “property guardian”, while a person appointed to make decisions of a personal nature for a mentally disabled person will be called a “personal guardian”.<sup>19</sup>

The old Acts do not contemplate different degrees of incapacity or different types of personal or property guardians. Under them either a person is incompetent or she is not, and if she is held to be so, the courts will grant her guardian the same powers as any other guardian. In other words, apart from the distinction between personal and property guardians, the old statutes do not contemplate different protective regimes as is common in civil law jurisdictions.<sup>20</sup>

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16. R.S.O. 1980, c. 264, s. 7(2) ; re-en. *Equality Rights Statute Law Amendment Act*, 1986, S.O. 1986, c. 64, s. 35 (hereinafter referred to as “the Ontario Act”).

17. S.A. 1980, c. D-32, as am. ; 1989 S.S., c. D-25.1, respectively.

18. See G.B. ROBERTSON, *op.cit.*, footnote 12, p. 7, “Terminology”.

19. This is the terminology adopted by the most recent statute, the *Dependent Adults Act*, S.S. 1989, c. D-25.1.

20. See the discussion of the law of Québec below. In *Clark v. Clark*, (1983) 40 O.R. 383, Matheson J. stated at p. 384 : “There is no middle ground which might envisage a limited guardianship such as there appears to be in some other jurisdictions”.



One commentator has suggested that, as under the old Acts the courts have the power to impose restrictions on the guardians' authority, it has been possible for the courts to develop different types of protective regimes in order to adapt guardianship to the different needs of the mentally disabled. However, that author was able to find only one case in which a property guardian was given a limited authority.<sup>21</sup> There appears to be no reported case limiting the authority of a personal guardian. For this reason, several authors have characterized the approach of the old Acts as "the all or nothing approach".<sup>22</sup>

Under the old Acts, a family member or other interested person may apply for a judicial order, while medical doctors will normally be required to give evidence as to the mental health of the respondent. It is clear, however, that only a judge can decide whether a person is mentally incompetent. For example, it has been held that it is not sufficient for the affidavits of the doctors to state simply the conclusion that a person is incompetent or insane. The affidavits must refer to any available facts evidencing insanity so that the judge may come to his own conclusion on whether the person is mentally incompetent or incompetent to manage her own affairs.<sup>23</sup>

In Ontario, an application to start mental incompetency proceedings may be made by any one or more of the next of kin of the alleged mental incompetent, by his or her spouse, by a creditor or another person.<sup>24</sup>

The Ontario Act does not deal with service of notice of the application but the general rules of civil procedure apply and the case law has required service on the alleged incompetent.<sup>25</sup>

The documents usually filed with an application include affidavits of the applicant and of two medical professionals (often the family doctor of

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21. See G.B. ROBERTSON, *op.cit.*, footnote 12, p. 102. In that case, which is unreported, the guardian was given the authority to manage the capital but not the income of a disabled person and the judge referred to his "somewhat unusual order".

22. See for example P. MCLAUGHLIN, *Guardianship of the Person*, Downsview, Ontario, National Institute on Mental Retardation, 1979, p. 71 ; M.E. HUGHES, "Personal Guardianship and the Elderly in the Canadian Common Law Provinces : An Overview of the Law and Charter Implications", in M.E. HUGHES and E.D. PASK, eds., *National Themes in Family Law*, Toronto, Carswell, 1988, 138, p. 142.

23. *Re Schmidt*, [1935] O.W.N. 439 (C.A.) ; In *Re Young*, *supra*, footnote 14, Robertson C.J.O. stated : "It has not been the practice of the Court to make such declarations upon the affidavits of two medical practitioners alone, but to require in addition the evidence of some person or persons, if possible friends of the afflicted person whose acquaintance has extended over some considerable period, and who is able to swear to facts within his or her own knowledge that will assist the Court in forming some judgment of its own as to the mental condition of the alleged mentally incompetent person".

24. The Ontario Act, *supra*, footnote 16, s. 35.

25. *Re Morrison*, (1919) 15 O.W.N. 338 (H.C.) ; *Re Fleulling* [1973] 3 O.R. 735 (H.C.) ; The Supreme Court of Canada has held that the court has the jurisdiction to dispense with service when the evidence shows that such notice would be against the best interest of the alleged mental incompetent, see *Re Wright*, [1951] 4 D.L.R. 290 (S.C.C.).

the alleged incompetent and a psychiatrist) and consent from the alleged incompetent's relatives supporting the application.<sup>26</sup>

The Ontario Act defines "mentally incompetent person" as :

a person

(i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or ;

(ii) who is suffering from such disorder of the mind that he requires care, supervision and control for his protection and the protection of his property ;<sup>27</sup>

One commentator has remarked that the "[...] these criteria are less than objective and reflect the paternalistic model that has existed for many years in most provinces".<sup>28</sup> Under the above definition, a person will be declared to be mentally incompetent not for having done any specific act or engaged in any proscribed behaviour, but on the basis of a judgement about her need for protection brought about by her mental disability.<sup>29</sup>

It should be noted that the expression used in the Act is a "mentally incompetent person" and that the statutory definition of this expression requires that the alleged incompetent person be suffering from an "incomplete development of the mind" or from a "disorder of the mind". From the use of these words, courts have concluded that mere proof that a person is spendthrift, *i.e.* that she is acting in a financially irresponsible manner, is not sufficient to declare a person mentally incompetent.<sup>30</sup> Because of the statutory language, the courts have also refused to declare incompetent persons suffering only from physical handicaps. For example in *Clark v. Clark*<sup>31</sup> Matheson J. stated :

It is to be noted that this is a trial confined then to the single issue of Justin Clark's alleged *mental* incapacity. It does not address the question of his *physical* incapacity. Cotton L.J. [...] declared in 1888 :

In my opinion we ought not, upon the evidence before us, to come to the conclusion that this gentleman is unable to act from infirmity of

26. See B.A. SCHNURR, "Appointment of a Committee in Ontario", (1982) 6 *E. & T.Q.* 26 ; P. BARTLETT, *Mental Health Law, The Advocate's Manual*, 2<sup>nd</sup> ed., Toronto, Community Legal Education Ontario, 1988, p. 6.9 ; J.T. WEIR, "Mental Incompetency Applications", [1963] *Special Lectures L.S.U.C.* 19.

27. *Supra*, footnote 16, s. 1(e).

28. G. SHARPE, "Guardianship : Two Models for Reform", (1983) 4 *Health L. Can.* 13, p. 15.

29. As indicated in the text, the courts require proof of facts upon which they can form the opinion that the person in question is suffering from "arrested or incomplete development of the mind" or "disorder of the mind". Obviously these are legal labels and not facts. In addition, the Ontario statute requires that the judge form the opinion that the need for "care, supervision and control" is caused by the mental disability, see P. BARTLETT, *op.cit.*, footnote 26, p. 6.10.

30. For example, in *McNeal v. Few*, (1975), 63 B.C.L.R. 281 (C.A.) the court refused to declare a person mentally incompetent because there was no evidence of mental illness, even though the trial judge had found that the person had used her money in a reckless manner.

31. *Supra*, footnote 20, p. 385.

the mind. He may be incapacitated from acting, but his incapacity does not appear to arise from infirmity of mind.

If the court is satisfied beyond a reasonable doubt on the basis of the affidavits accompanying the application that the respondent falls within the statutory definition of “mentally incompetent person”, it may issue an order so finding. However, if in the opinion of the court the affidavit evidence does not establish the alleged mental incompetency beyond a reasonable doubt, or there is a real contest of the allegation of incompetency, or for any other reason the court considers it expedient to do so, the court may order that the issue be tried in open court. A person alleged to be mentally incompetent is entitled to demand that this trial be a trial by jury.<sup>32</sup>

It is interesting to note that the Ontario statute requires that a court’s declaration of incompetence be made only “if the court is satisfied that the evidence establishes **beyond a reasonable doubt** that he is a mentally incompetent person”.<sup>33</sup> The use in this context of the burden of proof used in criminal cases shows the legislator’s concern for the liberty and autonomy of the person. But it is questionable whether proof beyond a reasonable doubt can ever be achieved in an application for a declaration of mental incompetency. In criminal law cases the Crown has to prove that the accused engaged in some specific conduct in the past. In a declaration of incompetence, an applicant does not have to prove that the person has engaged in any proscribed behaviour, but only that a person is suffering from a mental disability and that because of it such person “requires care, supervision and control for his protection or the protection of his property”.<sup>34</sup> It seems clear that, although the statute is drafted in the present tense, a declaration of incompetence will necessarily entail an opinion about the future and, therefore, strictly speaking, “mental incompetency” cannot be proved beyond a reasonable doubt.<sup>35</sup> In any case, the statutory language clearly indicates the legislator’s concern with the weight of the evidence and that the Act requires proof of a high degree of likelihood of future need of protection because of a mental disability before a declaration of mental incompetency can be made.

In addition to appointment of a property and personal guardian when somebody is held to be mentally incompetent, the old Acts provide for the appointment of a property guardian when a person is held to be “incapable

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32. *Id.*, s. 9. This section also provides there shall be no trial by jury if the court is satisfied by personal examination of the person that she is not mentally competent to form a wish for trial by jury and the court so declares by order.

33. The Ontario Act, *supra*, footnote 16, s. 7(1) (emphasis added).

34. *Supra*, footnote 16, s. 1(e).

35. For a discussion of this issue in the context of dangerous offenders legislation see E. COLVIN and T.L. QUIGLEY, “Developments in Criminal Law and Procedure: The 1987-88 Term”, (1989) *S.C. Law Rev.* 165, pp. 218-221.

of managing her affairs". Section 39 of the Ontario Act provides in part as follows :

- (1) The provisions of this Act relating to management and administration apply to every person not declared to be mentally incompetent with regard to whom it is proved, to the satisfaction of the court, that he is, through mental infirmity, arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs.
- (2) This section applies although the person is not a mentally incompetent person.

The language of this section makes clear that a person's inability to manage her own affairs must arise from her mental infirmity, drunkenness or use of drugs. Consequently, just as in the case of mental incompetence, a person who is merely financially irresponsible or suffers only from some physical illness cannot be declared incapable of managing her affairs. It is also clear from the statutory language and from the case law<sup>36</sup> that when a person is declared incompetent to manage her own affairs, the court can choose to appoint a property guardian only and not a personal guardian.

A declaration that a person is "incapable of managing her affairs" does not carry the same stigma as a declaration that she is a "mentally incompetent person". Moreover, while the Ontario Act requires that the fact that a person is mentally incompetent be proved beyond a reasonable doubt,<sup>37</sup> the Act is silent on the burden of proof applicable in a declaration that a person is incapable of managing her affairs. The courts have held that the lower burden of "the balance of probabilities", the normal burden in civil cases, is applicable to this declaration.<sup>38</sup> Therefore, a declaration that a person is incapable of managing her own affairs seems to be easier to obtain than a declaration of mental incompetency and by applying only for this declaration the harsher procedural requirements which have to be followed for a declaration of mental incompetency, and which protect the liberty of the subject, can be circumvented.

The Ontario statute provides that the alleged mentally incompetent person and any person aggrieved or affected by an order declaring that a person is incompetent or incapable of managing her own affairs has the right to appeal from that order.<sup>39</sup> In addition to the right of appeal granted by the statute, under general principles of administrative law, an order can be set aside if it is proved that there was non-compliance with procedural requirements.<sup>40</sup>

The appointment of a property guardian does not deprive the mentally disabled of their property ; it merely removes their legal capacity to

36. See for example *In Re Burton*, [1965] 1 O.R. 125 (H.C.) and *Re West*, (1978) 87 D.L.R. (3d) 192 (N.B.C.A.).

37. *Supra*, footnote 16, s. 7(1).

38. *Re West*, *supra*, footnote 36, p. 703.

39. Sections 7(3), 39(5).

40. *Re Craig*, (1983) 148 D.L.R. (3d) 425 ; See G.B. ROBERTSON, *op.cit.*, footnote 12, p. 46.

manage or administer it.<sup>41</sup> The Ontario Act contains provisions dealing with the powers which the court may grant to the property guardian to manage or administer the property,<sup>42</sup> although, as we have seen,<sup>43</sup> courts seem to grant all of them to property guardians.

The old Acts do not deal in detail with the powers of personal guardians apart from stating that they have custody of the mentally incompetent persons.<sup>44</sup> A Canadian commentator has described the powers of a personal guardian in the following terms :

There are a number of matters where it is fairly clear that a guardian can act on behalf of another. Examples include consent to medical treatment in the best interests of the person lacking mental capacity, admission to therapy, rehabilitation and training programs, residential accommodation [...] and litigation on matters relating to the person. On the other hand, there are other legal acts that we consider so personal that we will not allow a guardian to act for the person who lacks mental capacity. We do not allow a guardian to make a last will and testament, to take custody of a child, to contract a marriage, or to vote for another person. In between, there is a vast grey area. For example, the law does not clearly say whether a guardian can refuse to consent to life-endangering surgery [...] or consent to an organ donation or sterilization.<sup>45</sup>

Section 14 of the Ontario Act sets out the duties of the property guardian. It states in part :

The powers conferred by this Act as to the management and administration of a mentally incompetent person's estate are exercisable in the discretion of the court *for the maintenance or benefit of the mentally incompetent or of his family* [...].<sup>46</sup>

Section 18 of the Ontario Act contains a list of eighteen powers which can be conferred in the order of appointment or in subsequent orders.<sup>47</sup>

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41. In *Re Lunacy Act ; Re Barron*, (1953) 9 W.W.R. (N.S.) 218 (B.C.S.C.), Wilson J. stated at p. 219 : “[...] the quasi-committee is merely a statutory agent. She is not a trustee [...]. The property of the lunatic remains his property and stands in his name ; the authority of the quasi-committee is to exercise such powers over the property as she is given by the court ; for the exercise of these powers it is neither necessary nor permissible that the estate be vested in her”.

42. *Id.*, ss. 14, 16-18. For a general discussion of the powers of property managers see G.B. ROBERTSON, *op.cit.*, footnote 12, pp. 71-87.

43. See text accompanying footnotes 20 to 22.

44. S. 4(2) of the Ontario Act merely states : “The court may make orders for the custody of mentally incompetent persons [...]”.

45. P. MCLAUGHLIN, *op.cit.*, footnote 22, pp. 55-56.

46. *Mental Incompetency Act*, *supra*, footnote 16, s. 14, (emphasis added). For a judicial statement of the duties of property guardians. See *Re Young*, [1942] 3 D.L.R. 185 (Ont. C.A.), pp. 188-189.

47. See generally G.B. ROBERTSON, *op.cit.*, footnote 12, pp. 74-77 for the different provincial approaches to the property guardians' powers.

In spite of the absence of legislative directives as to the duties of the personal guardian, it is a well established common law principle that a personal guardian's most important duty is to act in her ward's best interest.<sup>48</sup>

*b) Judicial appointment of guardians under the new Acts*

(i) Criticism of the old Acts

Over the years, Canadian commentators have levelled a number of criticisms at the old Acts. For example, in its *Tentative Proposals for a Guardianship Act*,<sup>49</sup> the Law Reform Commission of Saskatchewan stated: "The procedures of the present Act are cumbersome, its provisions inadequate and its language archaic".<sup>50</sup> In the same vein, P. McLaughlin states:

Not only are the individual words used in guardianship law objectionable, the ways they are combined into sections are objectionable too. Statutory language is often confusing, overly complex, vague and inconsistent.<sup>51</sup>

A second criticism of the old Acts is that, although they draw a distinction between personal and property guardians,<sup>52</sup> they deal mainly with property management. Moreover, it has been alleged that in practice Canadian courts, acting under the old Acts, have almost ignored the appointment of personal guardians. McLaughlin states:

There is very little in the *Mental Incompetency Act* that deals directly with guardianship of the person. Of the 39 sections of the Act, only two even refer to it.<sup>53</sup>

The excessive property orientation of the law affects practice as well. Courts are well prepared to supervise the administration of estates and are familiar with the procedures in relation to such responsibility. However, they are unfamiliar with guardianship of the person.<sup>54</sup>

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48. In *Re Wright*, [1951] 4 D.L.R. 290, pp. 294, 302, the Supreme Court of Canada approved the following statement of Lord Davey in *Re McLaughlin*, [1905] A.C. 343 at p. 343: "It must be remembered that this particular jurisdiction exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application".

49. LAW REFORM COMMISSION OF SASKATCHEWAN, *Tentative Proposals for a Guardianship Act, Part I: Personal Guardianship*, Saskatoon, 1983, p. 2.

50. *Id.*, p. 3, footnote omitted. The Act referred to in the quoted text was *The Mentally Disordered Persons Act*, R.S.S. 1978, c. M-14.

51. P. MCLAUGHLIN, *op.cit.*, footnote 22, pp. 50-51.

52. See text accompanying footnote 18.

53. P. MCLAUGHLIN, *op.cit.*, footnote 22, p. 42. McLaughlin is referring to the Ontario *Mental Incompetency Act*, *supra*, footnote 16.

54. *Id.*, p. 36.

The Law Reform Commission of Saskatchewan stated :

The Act is property orientated. Court records do not disclose any orders having been made only for custody of the person and very few orders which provide for management of the estates of mentally disordered persons include a provision for custody of such persons.<sup>55</sup>

A third major criticism of the old Acts is their dichotomous approach to incompetency and to the powers of the guardians. As we have already seen,<sup>56</sup> under the old Acts, a person is found to be fully incompetent or fully competent, and consequently potential guardians are given all powers or no powers. McLaughlin states :

Despite revolutionary advances in our knowledge about mental retardation, the law has generally retained the concepts that mental incompetency is an absolute reality, without degrees, changes over time or situationality ; that a person may on medical or some other form of professional evidence be determined by courts to be either wholly mentally competent, and not in need of a guardian, or wholly mentally incompetent, and in need of a guardian ; that there are no grey areas between the two extremes ; and that once persons have been found to be mentally incompetent, they should be under a blanket of legal disability that prevents the exercise of *any* civil rights [...].

There is no factual basis for the concept of mental capacity that underlies the all-or-nothing view of mental incompetence. Mental incompetence is not a discrete state that one is either in or not in. There are gradations of capacity, ranging from full capacity through degrees of impairment of capacity (which occur in all of us at various times in our lives, whether from accident, drugs, alcohol, pain, disease, or whatever), to substantial impairments of capacity [...].<sup>57</sup>

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55. SASKATCHEWAN LAW REFORM COMMISSION, *Proposals for a Guardianship Act, Part I : Personal Guardianship* Saskatoon, 1983, p. 8.

56. See text accompanying footnotes 20 to 22.

57. P. McLAUGHLIN, *op.cit.*, footnote 22, pp. 70-71. It is interesting to note that the provisions of the *Napoleonic Civil Code* which were changed by the law of January 3<sup>rd</sup>, 1968 were subjected to the same criticism. J. Carbonnier states :

il est bon de se rappeler qu'à l'inverse, le droit antérieur, le combiné Napoléon-Esquirol, était critiqué pour sa rigidité excessive [...] c'étaient surtout les psychiatres qui se plaignaient de notre droit civil. Un régime uniforme d'incapacité globale devait à priori mal convenir à tant de cas cliniques foncièrement différents [...]. Souplesse, individualisation, les qualités d'un traitement médical seraient-elles déplacées dans un traitement juridique ? Pour mieux dire, il fallait en arriver à une législation où à chaque malade sa dose de capacité put être prescrite sur ordonnance du médecin. Car la psychiatrie moderne insiste sur cette espérance : une participation aux actes juridiques peut avoir des vertus de psychothérapie. Il y a sans doute un bon usage du droit. J. CARBONNIER, "Essais sur les lois", *Répertoires du Notariat Defrénois*, Paris, 1979, p. 57.

In its *Proposals for a Guardianship Act*,<sup>58</sup> the Law Reform Commission of Saskatchewan recommended a more flexible approach. It stated :

[...] implicit in modern notions of personal guardianship is the idea that orders appointing personal guardians should be “tailor-made” to the needs and capabilities of those persons who are capable of making some, but not all, of their personal care decisions.

One of the purposes of a “tailor-made” personal guardianship order is to protect the protected from being over-protected. “Protective over-kill” is a major concern of those who recommend greater use of personal guardianship as a “protective service”. By its very nature, personal guardianship not only imposes the obligation of protection on the guardian, but also provides the opportunity for exploitation. The exercise of personal guardianship in a paternalistic manner, out of the best motives, may in the end result, not be an exercise in the best interests of the ward.<sup>59</sup>

(ii) The Alberta *Dependent Adults Act*<sup>60</sup>

This Act, which went into effect in December 1978, was passed to deal with many of the criticism of the old Acts mentioned above. It provides that any “interested person” may apply to the Surrogate Court of Alberta for the appointment of a guardian<sup>61</sup> and that the applicant must serve a copy of the application on a list of six persons. Included in this list are the person in respect of whom the application is made, her nearest relative and the Public Guardian.<sup>62</sup> The Alberta Act regulates separately the appointment, powers and duties of personal guardians and of property guardians. Section 6(1) sets out the criteria which should be taken into account by courts in the appointment of personal guardians and is worth quoting at length. It states :

6(1) When the Court is satisfied that a person named in an application for an order appointing a guardian is

- (a) an adult, and
- (b) repeatedly or continuously unable
  - (i) to care for himself, and
  - (ii) to make reasonable judgments in respect of matters relating to his person

the court may make an order appointing a guardian.

(2) The Court shall not make an order under subsection (1) unless it is satisfied that the order would

- (a) be in the best interests of, and
- (b) result in substantial benefit to the person in respect of whom the application is made.<sup>63</sup>

58. *Supra*, footnote 55.

59. *Id.*, p. 10.

60. R.S.A. 1980, c. D-32 am., 1985 c. 21 (hereinafter referred to as “the Alberta Act”).

61. *Id.*, s. 2(1).

62. *Id.*, s. 3.

63. *Id.*, s. 6.



Section 25(1) sets out the criteria for the appointment of property guardians. They are expressed in slightly different language from that of section 6(1). It states :

25(1) When the Court is satisfied that a person named in an application for an order appointing a trustee is

- (a) an adult,
- (b) unable to make reasonable judgments in respect of matters relating to all or any of his estate, and
- (c) in need of a trustee,

the Court may make an order appointing a trustee.

(2) The Court shall not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made.

A number of comments can be made about these provisions of the Alberta Act. First, unlike the Ontario *Mental Incompetency Act*,<sup>64</sup> the new Alberta Act avoids the use of pejorative language such as “mental incompetency” or “mental disorder”.<sup>65</sup> As Robertson states :

This represents more than simply the abandonment of outdated terminology. It involves the adoption of what many commentators have advocated, namely, a functional approach to assessing an individual’s need for guardianship. Attention is focused not 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.

While this feature of the Alberta model is commendable in many respects, its inherent dangers must be recognized.<sup>66</sup>

The vagueness of the criteria for appointment of a guardian can be illustrated by considering whether a person who shows financial irresponsibility falls within the scope of the Alberta Act.<sup>67</sup> We saw above that under the old statutes such a person cannot be considered to be a “mentally incompetent person” because she is not suffering from a “disorder of the mind” or from “a condition of arrested or incomplete development of the mind”.<sup>68</sup> It is arguable

64. *Supra*, footnote 16.

65. Contrast the language of section 1(e) of the Ontario *Mental Incompetency Act* reproduced in the text accompanying footnote 27.

66. G.B. ROBERTSON, *op.cit.*, footnote 12, p. 104, footnotes in the text omitted.

67. Compare the approach of the old Acts discussed in the text accompanying footnotes 30 to 37.

68. See *McNeal v. Few*, *supra*, footnote 30. In that case the trial judge found that Miss D. had decided to lend half of her property to a religious institution. The trial judge stated : “The most superficial investigation would have disclosed that as an investment her loan of \$ 275,000 to the Divine Light Mission was an act of sheer folly. The alleged leader of the Divine

that under the Alberta Act a spendthrift could be found to be an adult “unable to make reasonable judgments in respect of matters relating to all or any part or his estate” and “in need of a trustee”.<sup>69</sup>

It seems clear that the Alberta Act, in order to achieve the goal of a guardianship which will encourage the self-reliance and normalization of the mentally disabled person,<sup>70</sup> has adopted a more open-ended standard to decide whether to appoint a guardian<sup>71</sup> and it has also abandoned some of the procedural requirements of the old Acts designed to protect the freedom and autonomy of the person in question.<sup>72</sup> Because of these changes some Canadian authors have stated that the Alberta Act represents a move from a legalistic to a social work model of guardianship.<sup>73</sup>

In an article describing the Alberta Act, the Public Guardian of the Province of Alberta has stated :

Since much of the information given to the judges is functional and somewhat subjective in nature, the office of the public guardian commissioned a study to identify which functional factors were highly correlated with a person's inability to make decisions. The resulting assessment instruments are currently being used to gather information to be presented to the courts.<sup>74</sup>

We can see the approach taken under the new legislation. The statute uses open-ended standards such as “inability to make reasonable judgments”<sup>75</sup> and the administrators of the Act decide what meaning can be

Light Mission is a boy of 17 years of age who bears the title Guru Maharaj Ji. The evidence before me is that his way of living does not correspond to the ideals of the traditional Indian Guru [...]. There is some doubt whether in the first instance Miss D. considered that she was making a gift rather than investment [...]. For Miss D. to propose to hand \$ 275,000 to this organization on a vague promise to look after her constitutes an act of irresponsibility so great as to raise a serious question of her capacity to manage her affairs”. *Re D.*, (1976) 57 D.L.R. 724, p. 724. In spite of these damaging comments by the trial judge the British Columbia Court of Appeal held that it had no authority to order Miss D. to submit to a medical examination and that in the absence of evidence showing that Miss D's financial irresponsibility was due to mental disability or illness she could not be declared incompetent.

69. This is also the opinion of G.B. ROBERTSON, *op.cit.*, footnote 12, p. 35.

70. See generally, W. WOLFENBERGER, *Normalization : The Principle of Normalization in Human Services*, Toronto, National Institute on Mental Retardation, 1972.

71. See section 6 reproduced in the text above.

72. For example, under the new Alberta Act, it is no longer necessary to prove beyond a reasonable doubt that a person is suffering from a mental illness and that because of it such person requires the appointment of a guardian.

73. See P. MCCLAUGHLIN, *op.cit.*, footnote 22, pp. 53-70 ; D. POIRIER, “Models of Intervention for the Guardianship and Protection of Elderly Persons in Canada,” in M.E. HUGHES and E.D. PASK, eds., *National Themes in Family Law*, Toronto, Carswell, 1988, p. 157.

74. J. CHRISTIE, “Guardianship in Alberta, Canada” in T. APOLLONI & T. COOKE, eds., *A New Look at Guardianship*, Baltimore, Brookes, 1984, p. 187. For a shorter version of this article see J. CHRISTIE, “Guardianship : The Alberta Experience : A Model for Change”, (1982) 3 *Health L. Can.* 58.

75. See sections 6(1) and 26(1) reproduced in the text above.

given to those general standards in the different circumstances by “identifying functional factors” and preparing “assessment instruments” which will determine what evidence is relevant and should be presented before the courts.

The Alberta Act contains a number of provisions dealing with reviews and appeals of guardianship orders. The dependent adult or any interested person on her behalf may apply to the court for a review of the guardianship order<sup>76</sup> and every guardianship order has to be reviewed every six years.<sup>77</sup> Section 68(1) provides for appeals to the Court of Appeal on questions of law in respect of any guardianship order.

In addition to a detailed and extensive regulation of the appointment and activities of personal guardians the Alberta Act adopts a flexible approach to their powers. Section 10 of the Alberta Act states in part :

(1) When the Court makes an order appointing a guardian, the Courts shall grant to the guardian only the powers and authority referred to in subsection (2) that are necessary for him to make or assist in making reasonable judgements in respect of matters relating to the person of the dependent adult.

(2) In making an order appointing a guardian, the Court shall specify whether all or any one or more of the following matters relating to the person of the dependent adult are to be subject to the power and authority of the guardian.

Section 10 then outlines a list of ten separate subsections which include the power to decide where the dependent is to live and with whom, and whether the dependent should work or participate in educational or vocational training.

It is clear from the statutory language that the legislator wants to encourage judges to grant guardians only those powers strictly necessary and to prepare “tailor-made” orders of guardianship adapted to the specific needs of the dependents. This policy of minimal interference with the liberty of the dependent is also reflected in section 11 of the Alberta Act which states that the guardian shall exercise her powers “in the least restrictive manner possible” and “in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person”.

Another important innovation of the new Alberta Act is the creation of the Office of the Public Guardian.<sup>78</sup> The Public Guardian ensures the protection of dependent adults. He is one of the persons who have to be notified every time that an application for guardianship<sup>79</sup> or for a review of a guardianship<sup>80</sup> is made. The Public Guardian must apply for an order of guardianship if he thinks that somebody requires a personal guardian and there

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76. See sections 8, 15, 23(2), 27, 35, 52.

77. See ss. 8(a), 27(2)(a).

78. Sections 12 to 14.

79. S. 3.

80. S. 15(2)(e).

is no other person “ready, willing and suitable”<sup>81</sup> to be appointed as personal guardian. Likewise, if in an application for guardianship the court concludes that the person proposed as a personal guardian does not meet the requirements of the Act it may appoint the Public Guardian as the personal guardian. In addition, the Public Guardian investigates complaints about guardians and gives them advice and assistance.<sup>82</sup>

(iii) The Saskatchewan *Dependent Adults Act*<sup>83</sup>

This Act, which was assented to on July 17<sup>th</sup> 1989, is based on the Alberta Act<sup>84</sup> and some of the recommendations of the Saskatchewan Law Reform Commission.<sup>85</sup> The new Saskatchewan Act contains sections corresponding to those of the Alberta Act mentioned above.<sup>86</sup> It regulates in different parts the appointment powers and duties of personal guardians and of property guardians. It states that an application for a guardianship order may be made by any person who, in the opinion of the court, has a sufficient interest in the personal or financial affairs of a person with respect to whom the application is made,<sup>87</sup> and provides that a copy of the application must be served on the person with respect to whom the application is made and on a list of five other persons, including the nearest relative of the person in question.<sup>88</sup>

Section 5(4) sets out the criteria which should be taken into account by a court in the appointment of a personal guardian and it differs in part from the corresponding section of the Alberta Act.<sup>89</sup> It states :

5(4) The court may make an order pursuant to this Part if the court is satisfied based on the evidence submitted to it that the person with respect to whom the application is made is :

- (a) an adult, whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person lacks the capacity :
  - (i) to care for himself or herself ; or
  - (ii) to make reasonable judgments with respect to matters relating to his or her person ; and
- (b) in need of a guardian.<sup>90</sup>

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81. S. 33.

82. See the description of the functions of his office made by the Public Guardian of Alberta, *loc.cit.*, footnote 74.

83. 1989 S.S., c. D-25.1 (hereinafter referred to as “the new Saskatchewan Act” or “the Saskatchewan Act”).

84. *Supra*, footnote 60.

85. See footnote 55.

86. See text under heading (ii).

87. Sections 3(1) and 16(1).

88. Sections 4(1) and 17(1).

89. See section 6(1) of the Alberta Act reproduced in the text accompanying footnote 63.

90. S. 5(4). Section 18(4) sets out the same criteria for the appointment of a property guardian when “the person lacks the capacity to make reasonable judgments with respect to matters relating to all or any of his or her estate”.

It is interesting to note that the Saskatchewan Act declares that an order can be made when the court is satisfied that, for the same functional reasons as in the Alberta Act, the person "lacks the capacity" to manage her personal or financial affairs. It was intended that the use of the word "capacity" will refer the courts to the common law dealing with lack of capacity and which requires some type of mental or physical disability which prevents communication. This requirement may exclude from the application of the Act persons who do not suffer any disability but who in the opinion of the courts are "unable to make reasonable judgments in respect of matters relating to all or any of his or her estate".<sup>91</sup> The Saskatchewan Act discourages the unnecessary appointment of guardians by making one of the requirements for their appointment that the adult be "in need of a guardian".<sup>92</sup> The Act also discourages the granting to the guardian of more powers than strictly necessary to meet the needs of the dependent person.<sup>93</sup> Moreover the Saskatchewan Act states that personal guardians are precluded from making decisions on certain issues without authorization of a court. These issues include consent to withdrawal of a life-support system, consent to an *intervivos* gift of an organ and consent to a purely contraceptive sterilization.<sup>94</sup>

The main drawback of the Saskatchewan Act is that it does not create the Office of the Public Guardian as done by the Alberta Act. We saw that under the Alberta Act the Public Guardian can be appointed the guardian of a person when no other person is willing, able or suitable to be appointed<sup>95</sup> and that he performs the function of an ombudsman by looking after the interests of dependent adults. It is unfortunate that the government of Saskatchewan, concerned with the costs of the new office, has not followed the Alberta precedent.

### c) *Non-judicial appointment of guardians*

Most provinces have legislation authorizing the appointment of the Public Trustee<sup>96</sup> as the property guardian of a person who is admitted to a

91. S. 26(4)(a).

92. S. 4(1)(b) ; section 18(1)(c) also requires that a court be satisfied that the person is "in need of a property guardian".

93. Ss. 7(2) and 20(2).

94. The Saskatchewan Act, *supra*, footnote 83, s. 7(6).

95. The Alberta Act, *supra*, footnote 60, s. 33.

96. For general discussions of the duties and powers of Public Trustees see W.A. MCTAVISH, "International Conferences of Public Trustees and Official Guardians", (1989) 23 *L.S.U.C. Gazette* 160 ; P. POLDEN, "The Public Trustee in England, 1906-1986 : The Failure of an Experiment ?", (1989) 10 *J. Leg. Hist.* 228 ; P. BARTLETT, "Reform of the Ontario Office of the Public Trustee", (1986) 24 *Univ. West. Ont. L. Rev.* 79 ; A.J. MCCOMISKEY, "Managing the Estates of Mentally Incompetent Individuals", (1983) 4 *Health L. Can.* 6 ; L.M. ALTER, "Administration by the Public Trustee of Estates of Mental Incompetents", (1977) 3 *Est. & Tr. Q.* 67 ; J.W.G. THOMPSON, "The Public Trustee : Official Administration of Mental Incompetents' Estates", [1963] *Special Lectures L.S.U.C.* 35.

mental health facility. For example section 36 of the Ontario *Mental Health Act*<sup>97</sup> provides as follows :

36(1) Forthwith upon the admission of a patient to a psychiatric facility, a physician shall examine the patient to determine whether or not he is competent to manage his estate.

(2) The attending physician may examine a patient and a physician may examine an out-patient at any time to determine whether or not the patient or out-patient is competent to manage his estate.

[...]

(4) A physician or attending physician who performs an examination under subsection (1) or (2) and who is of the opinion that the patient or out-patient is not competent to manage his estate shall issue a certificate of incompetence in the prescribed form and the officer in charge shall transmit the certificate to the Public Trustee.

The issue of certificates of incompetence, which leads to the appointment of the Public Trustee as a property guardian, was originally limited to patients who entered mental health facilities and who did not have court-appointed guardians.<sup>98</sup> It should be noted however that under subsection (2), a certificate of incompetence may also be issued by a regular physician after an examination of an out-patient at a mental health facility.<sup>99</sup>

In Ontario, the appointment of a non-judicial guardian is terminated when a medical doctor certifies that the patient is no longer incapable of managing her affairs.<sup>100</sup> Before a patient is discharged from a mental institution, she must be examined in order to see whether she is capable of managing her affairs.<sup>101</sup>

It would seem apparent that there is a conflict between the system set up under the old Acts for the judicial appointment of guardians and the parallel system, created by the mental health legislation, for the appointment of public guardians by virtue of certificates of incompetence signed by two medical doctors. It is interesting to note that the second system, which was developed to ensure payment of hospital and medical expenses prior to the adoption of medicare in Canada, is presently used to facilitate the endorsement of Canada Pension Plan and Old Age Security cheques issued in favour of residents of homes for the elderly to pay for the expenses of such homes.<sup>102</sup>

97. R.S.O. 1980, c. 262 as am. S.O. 1987, c. 37.

98. See articles at footnote 96.

99. In Saskatchewan, a chief psychiatrist may decide to make arrangements for the examination of any person (irrespective of whether she is a regular patient or out-patient) in order to determine whether that person is competent to manage her affairs. See *The Mentally Disordered Persons Act*, *supra*, footnote 15, s. 38.3. For a detailed analysis of the law relating to certificates of incompetence in Ontario see generally P. BARTLETT, *op.cit.*, footnote 26, p. 6.12.

100. *The Mental Health Act*, *supra*, footnote 97, s. 21 ;

101. *Id.*, s. 41.

102. See SASKATCHEWAN LAW REFORM COMMISSION, *op.cit.*, footnote 55.

## 2. Persons not formally declared to be mentally disabled

Mental disability may affect a person's liability in contracts or torts even if they have not been declared to be incompetent and a guardian to take care of their affairs has not been appointed. Space limitations will prevent a detailed analysis of the applicable common law.<sup>103</sup> Generally speaking, Canadian common law has been more concerned with the interest of the persons who deal with or are affected by the conduct of the person suffering from a mental disability than with the excuse of these persons from their obligations in contracts or torts.

In the law of contracts, it is clear that proof of mental disability is not sufficient to avoid a contract, unless the person alleging it can also prove that it was known to the other person at the time of entering the contract. Many Canadian cases have cited with approval the following statement on the validity of contracts entered into by the mentally disabled :

When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.<sup>104</sup>

It can be asserted that the above statement reflects the law of the Canadian common law provinces on contracts entered into by the mentally disabled.<sup>105</sup> What is not so clear is whether a mentally disabled person, in addition to having the contract set aside on the basis of incapacity known to the other party, can also do so by proving that the contract is unfair, even if the

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103. See "The Effects of Mental Disability in Specific Legal Areas" in G.B. ROBERTON, *op.cit.*, footnote 12, pp. 153-305.

104. *Imperial Loan Co. v. Stone*, [1892] 1 Q.B. 599, p. 601 (Lord Esher).

105. The effect of mental disability on contracts is often discussed in articles which also analyze the capacity of minors. For Canadian and English writings on this subject see ONTARIO LAW REFORM COMMISSION, *Report on Amendments of the Law of Contract*, Toronto, Ministry of the Attorney General, 1987, Chapter 10 : Minors' Contracts ; A.H. HUDSON, "Mental Incapacity in the Law of Contract and Property", [1984] *Conveyancer* 32 ; P. MATTHEWS, "Contracts for Necessaries and Mental Incapacity", (1982) 33 *N. Ireland L.Q.* 148 ; ENGLISH LAW REFORM COMMISSION, *Working Paper on Minors' Contracts* (1982) ; J. MCCAMUS, "Restitution of Benefits Conferred Under Minors' Contracts", (1979) 28 *U.N.B.L.J.* 89 ; D.R. PERCY, "The Present Law of Infants' Contracts", (1975) *Can. Bar Rev.* 1 ; J. DEBICKA, "Infants, Liability in Contract : Recovery of Property", [1970] *Pitblado Lectures* 1 ; M. MACKAY, "Infants and Real Property", (1970) *Pitblado Lect.* 21 ; J.D. PAYNE, "The Contractual Liability of Infants", (1966) 5 *Western L. Rev.* 136 ; J.A. COUTTS, "Contracts of Mentally Incompetents, [1963] *Lectures L.S.U.C.* 49 ; LAW REFORM COMMISSION OF BRITISH COLUMBIA, *Report on Minors' Contracts*, Vancouver, (1973) ; P.S. ATIYAH, "The Liability of Infants in Fraud and Restitution", (1959) 22 *Mod. L. Rev.* 273 ; M. BROWN, "Can the Insane Contract ?", (1933) 11 *Can. Bar Rev.* 600 ; N.G.H. COOK, "Mental Disability and the English Law of Contract", (1921) 21 *Col. L. Rev.* 424 ; H. GOUDY, "Contracts by Lunatics", (1901) 17 *L.Q. Rev.* 147.

other party was not aware or could not have been aware of her incapacity. A number of Canadian cases have held that contracts can be set aside in such circumstances.<sup>106</sup> However in a case decided in 1985,<sup>107</sup> the Privy Council overruled a number of New Zealand cases which, like the Canadian cases, had held that such contracts could be set aside on the basis of unfairness. It would seem that the reasoning in the Privy Council decision<sup>108</sup> would be applicable in Canada.<sup>109</sup>

Every Canadian common law province has sale of goods legislation based on the English *Sale of Goods Act, 1983*.<sup>110</sup> The provincial legislation has a section which deals with a sale of goods to a mentally disabled person and provides that they have to pay a reasonable price for “necessaries”. For example, sections 4(2) and (3) of the Saskatchewan *Sale of Goods Act* state :

(2) Where *necessaries* are sold and delivered to an infant or minor or to a *person who by reason of mental incapacity or drunkenness is incompetent to contract* he must pay a reasonable price therefor.

(3) “Necessaries” in this section means goods suitable to the condition in life of the infant or minor or other person and to his actual requirements at the time of the sale and delivery.<sup>111</sup>

The Canadian common law of negligence has been more concerned with the compensation of plaintiffs’ losses than with the excuse of defendants who allege they were suffering from a mental disability when they committed a tort. Courts have achieved this result by using an objective standard of care of the reasonable person and ignoring the defendants’ mental disability in setting that standard.<sup>112</sup>

A number of provincial statutes contain special provisions dealing with their application to persons with mental disabilities who have not been formally declared to be mentally disabled. For example section 6 of the Saskatchewan *Limitation of Actions Act*<sup>113</sup> suspends the running of a limitation period when a person who has a right to start legal proceedings is “by reason of mental disorder not competent to manage his affairs or state” and does not have a guardian. Likewise Rule 46 of the Saskatchewan *Queen’s Bench Rules*

106. See G.B. ROBERTSON, *op.cit.*, footnote 12, p. 160.

107. *Hart v. O’Conner*, [1985] A.C. 1000 ; [1985] 2 *All E.R.* 880 (P.C.).

108. *Ibid.*

109. However, after a thorough analysis of the authorities Professor Robertson does not reach the same conclusion and states : “The present Canadian position can therefore be summarized as follows. A contract is voidable if one party is mentally incapable of understanding its nature and effect, and either the incapacity is known to the other party or the contract is unfair”. See G.B. ROBERTSON, *op.cit.*, footnote 12, p. 162.

110. 56 & 57 *Vict.*, c. 71.

111. *Sale of Goods Act*, R.S.S. 1978, c. S-1, s. 4 (emphasis added).

112. See the excellent analysis of this issue in G.B. ROBERTSON, *op.cit.*, footnote 12, pp. 199-206.

113. R.S.S. 1978, c. L-15.



provides for the appointment of a person as the "litigation guardian" of a person under a mental disability who has no guardian. Finally, section 90 of the Saskatchewan *Public Health Act*<sup>114</sup> sets a procedure whereby physicians or dentists may provide medical or dental services to persons who are "incapable by reason of mental or physical disability of understanding and consenting" to the medical or dental services.

## B. QUÉBEC

Just as the Canadian common law provinces, the province of Québec regulates the commitment of mentally disabled persons to mental health institutions separately from the civil effects of mental disability.<sup>115</sup> In the preceding section, we saw that the law of the Canadian common law provinces regulating the civil effects of mental disability is in a process of change. We saw the old Acts, based on the Lunacy Acts passed in England in the nineteenth century<sup>116</sup> and the new legislation passed recently in Alberta and Saskatchewan.<sup>117</sup> The Québec law applicable to the civil effects of mental disability is in a similar process of change. At the time of writing and presentation of this report, the law in force was contained in articles 324 to 351 of the *Civil Code of Lower Canada*,<sup>118</sup> which was passed in 1866. However, a number of bills changing those and other articles of the Civil Code have been introduced in the Québec legislature<sup>119</sup> and the Code was finally amended in 1990.<sup>120</sup> In December 1991, the Québec legislature took the historical step of

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114. R.S.S. 1978, c. P-37. See also s. 248(2) of the Saskatchewan *Land Titles Act*, R.S.S. 1978, c. L-5 which provides that when "an infant, idiot, mentally incompetent person or lunatic" has no property guardian, a court may appoint a guardian to perform transactions under the Act.

115. In 1972, the province of Québec adopted *The Mental Patients Protection Act* which regulates civil commitment. (See S.Q. 1972, c. 44. See now R.S.Q., c. P-41.) The civil effects of mental disability are regulated in the Québec Civil Code, see text below.

116. See footnote 15.

117. See text accompanying footnotes 60 to 95.

118. In addition, some of the articles applicable to tutors of minors were made applicable to curators of persons subject to interdictions. For example, article 343 gave to the curator of an interdict the same powers which a tutor has over a minor.

119. The first bill (Bill 106) was tabled on December 17<sup>th</sup>, 1982 and it was never passed. See : *Projet de loi 106 : Loi portant réforme au Code civil du Québec du droit des personnes*, Éditeur officiel du Québec, 1982. For a comment on this Bill see E. DELEURY, "Le projet de loi n° 106 et les droits de la personnalité : perspective et analyse prospective", (1984) 25 *C. de D.* 699. A second bill (Bill 20) was passed in 1987, see "An Act to add the reformed law of persons, successions and property to the Civil Code of Québec", S.Q. 1987, c. 18. Some portions of Bill 20 have been enacted by Bill 145, footnote 120. For a description of the strange manner in which some portions of Bill 20 were enacted see M. OUELLETTE, "La loi sur le curateur public et la protection des incapables", (1989) 3 *C.P. du N.* 1, p. 9, no 3.

120. See Bill 145 : *An Act Respecting the Public Curator and Amending the Civil Code and Other Legislative Provisions*, S.Q. 1989, c. 54. This Act was passed on June 21<sup>st</sup>, 1989, assented to on June 22<sup>nd</sup>, 1989, and went into effect on April 15<sup>th</sup>, 1990.

adopting a new Civil Code.<sup>121</sup> The new *Civil Code of Québec* reproduces the recently adopted articles regulating the “protective supervision of persons of full age”.

In the pages that follow, this report will deal first with those provisions of the *Civil Code of Lower Canada* which regulated the civil effects of mental incapacity and then with the articles of the new *Civil Code of Québec*<sup>122</sup> which cover the same subject.

### 1. The *Civil Code of Lower Canada*<sup>123</sup>

The *Civil Code of Lower Canada* started with a presumption in favour of capacity,<sup>124</sup> but had a procedure leading to interdiction,<sup>125</sup> which was the civil sanction for incapacity and which in turn led to the appointment of a curator<sup>126</sup> or a judicial adviser.<sup>127</sup> Article 351 outlined the functions performed by a judicial adviser. It stated :

If the powers of the judicial adviser be not defined by the judgment, the person to whom he is appointed is prohibited from pleading, transacting, borrowing, receiving moveable capital and giving a discharge therefor, as also from alienating or hypothecating his property without the assistance of such adviser.

The Code drew some differences between a curator to the person and a curator to the property.<sup>128</sup> Normally the curator to the person had powers over both the person and the property of the interdict. However in the case of an interdiction for prodigality or habitual drunkenness, the curator had only powers over the property of the interdict.<sup>129</sup>

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121. Bill 125 : *Civil Code of Québec*, sanctioned December 18, 1991, L.Q. 1991, c. 64. At the time of printing, the sanctioned English version of the Code was not yet available. It is expected that the new *Civil Code of Québec* will not go into effect until the beginning of 1993.

122. *Id.* As already indicated, although the *Civil Code of Québec* has not gone into effect at the time of writing, the articles under discussion have become law by virtue of Bill 145. See footnote 120.

123. See generally, V. BERGERON, *L'attribution d'une protection légale aux malades mentaux*, Montréal, Yvon Blais Inc., 1981 ; Y. BELZILE, “L'interdiction”, *Procédure non contentieuses*, doctrine, document 5, *Répertoire de Droit*, P.N.C.2. 1055 Chambre de notaires du Québec, Montréal, SOQUIJ, 1978 ; M. BUCHS, “Incapables Majeurs”, *Répertoire Pratique de droit privé*, 2, 1982. A. BERNARDOT et R.P. KOURI, *La Responsabilité Civile Médicale*, Sherbrooke, Éd. Rev. Droit Univ. Sh., 1980 ; J. PINEAU, *La Famille*, Montréal, PUM, 1972 ; A. MAYRAND, *L'inviolabilité de la personne humaine*, Montréal, Wilson et Lafleur Ltée, 1975.

124. C.C., art. 18 and 985.

125. C.C., art. 325 to 336. See generally *Dupré c. Papillon*, (1936-37) 40 R.P. 321 (C.S.).

126. C.C., art. 338.

127. C.C.P., art. 881, C.C. art. 349.

128. See art. 337, 338 and 347.

129. C.C., art. 343. See *Répertoire de Droit*, *loc.cit.*, footnote 123, p. 15, nos 49-50.

The Code set out the criteria for interdiction : a habitual state of imbecility, insanity or madness,<sup>130</sup> an excessive condition of prodigality,<sup>131</sup> habitual drunkenness<sup>132</sup> and the use of opium, morphine or other narcotics.<sup>133</sup>

Article 327 set out a list of persons who could demand the interdiction of another person. It stated :

Every person has the right to demand the interdiction of anyone related or allied to him, who is prodigal, mad, imbecile or insane. Husband or wife, likewise, may demand the interdiction of the other.

Article 336(b) added that a friend could demand the interdiction of a habitual drunkard who had neither a consort nor anyone else related or allied to him. It was held that the list of persons who could demand an interdiction was restrictive and that, consequently, a creditor was not entitled to demand the interdiction of his debtor, and a person could not demand her own interdiction.<sup>134</sup> The procedure to be followed in the case of a request for interdiction was set out in articles 877 to 884 of the Québec *Code of Civil Procedure*. The motion started by one of the persons entitled to demand the interdiction had to be served on the respondent personally, on a member of the respondent's family and on the Public Curator.<sup>135</sup> Such motion was generally accompanied by a certificate of a psychiatrist or medical doctor in which he made a diagnosis of the mental condition of the patient on the basis of his own examination.<sup>136</sup>

If the judge or prothonotary decided that it was advisable to continue with the interdiction proceedings, he convoked the family council<sup>137</sup>

130. C.C., art. 325.

131. C.C., art. 326.

132. C.C., art. 336a.

133. C.C., art. 336r. P.B. Mignault wrote in 1896 "[I]l y a quatre classes d'interdits dans notre droit : 1° les personnes atteintes d'imbécillité, de démence ou de fureur ; 2° les prodiges ; 3° les ivrognes d'habitude ; 4° ceux qui font usage d'opium ou autre narcotique". : P.B. MIGNAULT, *Le droit civil canadien*, t. 2, Montréal, Théodoret, 1896 p. 275. He also stated : "L'imbécillité, c'est l'absence d'idées ou l'idiotisme, c'est-à-dire cette faiblesse d'esprit qui fait que l'homme peut à peine concevoir les idées les plus communes. La démence provient, non de la faiblesse de l'esprit, mais d'un dérèglement d'idées qui ôte l'usage de la raison. La fureur, c'est la démence exaltée, qui pousse à des actions dangereuses". (*Id.*, p. 271.) Most of the pejorative words and expressions used above are abandoned in the new *Québec Civil Code*. As M. Ouellette states : "Le Code Civil fait référence désormais à la personne "inapte", c'est-à-dire à celle qui ne peut prendre soin d'elle même et administrer ses biens". See M. OUELLETTE, *loc.cit.*, footnote 119, p. 12, no 13.

134. V. BERGERON, *op.cit.*, footnote 123, p. 265 ; *Répertoire de Droit, loc.cit.*, footnote 123, p. 6, no 7.

135. C.C.P. art. 877, 877.1.

136. *Répertoire de Droit, loc.cit.*, footnote 123, p. 9 nos 19-25.

137. The composition of the family council was regulated by the Civil Code in the articles dealing with tutorship for minors, see art. 251 to 254. The family council was formed by a minimum of seven near relatives of the person in question. For the composition of the family council in interdiction applications see *Répertoire de Droit, loc.cit.*, footnote 123, pp. 10-11, nos 35-38.

and interrogated the respondent personally.<sup>138</sup> This examination of the respondent by the judge or prothonotary had to take place before the meeting of the family council. If it was not possible to bring the respondent to the court, the practice was that the judge or the prothonotary went to the respondent's residence accompanied by an official stenographer who wrote down the examination which was later submitted to the family council.<sup>139</sup> The role of the family council was limited to giving the judge or prothonotary its opinion on whether there should or should not be an interdiction of the respondent.

The judge rendered judgment deciding whether interdiction and appointment of a curator were warranted.<sup>140</sup> Such judgment could later be cancelled following the same formalities prescribed for obtaining interdiction.<sup>141</sup>

Just as the statutes of the common law provinces,<sup>142</sup> the Québec *Public Curatorship Act*<sup>143</sup> provided for the non-judicial appointment of a curator.<sup>144</sup> Section 6 of that Act stated that the Public Curator should be the curator *ex officio* to every mental patient who was not provided with a tutor or curator and whose incapacity to administer his property was attested by a certificate issued by two medical doctors. The Public Curator then had the same powers and obligations as a tutor.<sup>145</sup>

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138. No interrogation of the respondent had to take place when she was in "closed treatment" in a mental institution and a certificate from a psychiatrist concluding that the person was incapable of administering her property had been issued in accordance with sections 7 and 12 of *The Mental Patients Protection Act*, S.Q. 1975, c. P-41. In such a case, the deliberations of the family council did not have to be presided by the judge or prothonotary but they were presided by a notary who would take the minutes of the deliberations and would send them to the judge. See generally *Répertoire de Droit, loc. cit.*, footnote 123, pp. 7-9, nos 17-18. Even though the procedure was simplified in the case of a patient who was in a mental institution the final decision on interdiction was always taken by a judge.

139. See *Répertoire de Droit, loc. cit.*, footnote 123, p. 10, no 28.

140. C.C. art. 341.

141. C.C.P. art. 884.

142. See text under the heading "Persons not Formally Declared to be Mentally Disabled", Part I.A.2.

143. R.S.Q., c. C-80, repealed by Bill 145, *supra*, footnote 120.

144. The origins of the Public Curatorship of Québec have been described in the following terms: "Cette institution de la Curatelle publique aurait été l'aboutissement de la législation consacrée à la protection des intérêts des internés non interdits. Elle tire son origine, prétend-on, de la loi française des aliénés édictée le 30 juin 1838, qui confie les intérêts de ces internés, dès leur introduction dans un asile ou établissement pour aliénés, aux Commissions administratives ou de Surveillance de ces institutions". J. HOULE, "Loi de la curatelle publique", (1963) 65 *R. du N.* 394. See also R. LAMARCHE, "La nouvelle loi sur le curateur public", (1989) 3 *C.P. du N.* 45, pp. 53-54, nos 1-9 ("Bref rappel historique"). See also Y. BEAUDOIN, "Propos sur la loi de la curatelle publique du Québec", [1967] 70 *R. du N.* 182; (1968) 28 *R. du B.* 595;

145. See s. 7 of that Act and article 343 of the *Civil Code of Lower Canada*. As an author stated: "The Public Curator law falls short of due process. There, a psychiatrist fills out a declaration of incompetency to administer one's property and affairs. No judge is involved in the process. The Public Curator becomes the legal guardian for *person* and property". D. MORRISON, "The Right to Refuse Treatment in Québec", (1985) 5 *Health L. Can.* 1985.

## 2. The new *Civil Code of Québec*<sup>146</sup>

Under the *Civil Code of Lower Canada*, the curator of an interdict had all the powers which a tutor had over a minor.<sup>147</sup> Under the new Code a curator will be granted only those powers absolutely necessary for the protection of the disabled person.<sup>148</sup> Just as the new Alberta and Saskatchewan Acts,<sup>149</sup> the new Code is concerned with promoting the self-reliance and normalization of the disabled person. For example, article 260 states :

In selecting the form of protective supervision, consideration is given to the degree of the person's inability to care for himself or administer his property.

The same policy is promoted by article 276 which states that, when a court is called upon to establish protective supervision it should take into consideration, among other things, the degree of autonomy of the person in question. Likewise, article 258 states that every decision concerning a person under protective supervision must safeguard her autonomy.

Article 259 sets out the general criteria for the establishment of protective supervision. It states :

A tutor or curator shall be appointed to represent, or an advisor to assist, a person of full age who is unable to care for himself or to administer his property by reason, in particular, of illness, deficiency or debility due to age which impairs his mental faculties or his physical ability to express his will.

A tutor or an adviser may also be appointed to a prodigal who endangers the well-being of his spouse or minor children.

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146. See footnote 121. See generally P. BEAUDOIN et C. LACAILLE, "Interdiction et tutelle", (1988) 4 *C.P. du N.* 235. See also the articles reproduced under the general heading "Première Conférence Marcel Guy 'La réforme du droit des personnes'", (1987) 18 *R.U.D.S.*, pp. 1-111. See especially E. DELEURY, "La protection des incapables et la réforme du Code civil", (1987) 18 *R.D.U.S.* 57. See also M. OUELLETTE, "De la capacité des personnes", (1988) 1 *C.P. du N.* 133 ; P. BEAUDOIN et C. LACAILLE, "Interdiction et tutelle", (1988) 4 *C.P. du N.* 211. "Perspectives canadiennes et européennes des droits de la personne", sous la direction de D. TURP et G.A. BEAUDOIN, *Actes des Journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures*, 1984, Cowansville, Yvon Blais inc., 1986.

147. C.C., art. 343. Curators of habitual drunks or prodigal persons only had power over their property, see art. 343.

148. As M. Ouellette states : "le législateur québécois accorde à l'incapable une protection proportionnée à l'incapacité dont il souffre. Plus réaliste, mieux dosée, la protection est graduée ; cela peut sembler paradoxal, mais les régimes de protection entendent, d'abord et avant tout, préserver l'autonomie. En permettant un choix entre les différents régimes, l'on met en œuvre la protection la moins aliénante", *loc.cit.*, footnote 146, p. 188, no 167. The reference "la protection la moins aliénante" is reminiscent of another paradoxical statement : "[T]oute protection des aliénés, en un sens, les aliène, par cela seul qu'elle les suppose étranger à l'univers raisonnable. Si bien que, procédant des meilleures intentions, une législation protectrice ne fera qu'ajouter de son métal à cet appareil répressif par lequel les sociétés modernes, avec des hypocrisies variables, rejettent de leur sein ceux qui ont le malheur d'avoir de mécanismes mentaux dissidents". J. CARBONNIER, *loc.cit.*, footnote 57, p. 63.

149. *Supra*, footnote 17.

Under the new Code there will be three protective regimes which will vary depending on the person's degree of inability to care for herself or to administer her property.<sup>150</sup> First by, when a person's inability to take care of herself or to administer her property is permanent and total she will be subject to the regime of **curatorship**,<sup>151</sup> which will give her representative all the powers necessary for the full administration of her estate.<sup>152</sup> Secondly, when a person's inability is partial or temporary, she will be subjected to a **tutorship**<sup>153</sup> regime and her representative, called a tutor, will have the simple administration of her estate<sup>154</sup> and the powers of the tutor to a non-emancipated minor. This second protective regime is quite flexible and the court will be able to adjust the powers of the tutor depending on the capacity of the protected person.<sup>155</sup> Thirdly, when a person of full age is habitually able to care for herself and administer her property but requires "for certain acts or for a certain time, to be assisted or advised in the administration of his property" the court shall appoint an **adviser to the person**<sup>156</sup> to give her assistance but not to administer her property.<sup>157</sup> In the absence of specific directions by the tribunal the adviser to the person shall have the same powers as the tutor to an emancipated minor.<sup>158</sup>

The list of persons who can apply for the institution of protective supervision is considerably expanded. Under the new Code, in addition to the close relatives and the relatives by marriage, the person herself and "any person showing a special interest in the person or any other interested person, including the public curator, may apply for the institution of protective supervision".<sup>159</sup> Therefore, under the new Code a creditor and the person herself will be entitled to apply for the institution of protective supervision, something they cannot do under the current law.

Articles 155 and 268 of the new Code<sup>160</sup> set out the important principle that only judges will decide on issues of personal capacity. They state :

155. In no case may the capacity of a person of full age be limited except by express provision of law or by a judgment ordering the institution of protective supervision.

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150. See article 260 reproduced in the text above. The articles of the *Civil Code of Québec* on this matter are similar to the articles of the French Civil Code, dealing with the same subject, as amended by Law no. 68-5 of January 3rd, 1968.

151. Art. 280.

152. See generally A. FRENETTE, "La gestion des biens des incapables", (1987) 18 *R.D.U.S.* 81.

153. Art. 284.

154. See art. 290. For a discussion of the meaning and scope of "simple administration" see A. FRENETTE, *loc.cit.*, footnote 152, p. 85.

155. See art. 287. The protected person under this regime will preserve the administration of the proceeds of her work unless the court decides otherwise, see art. 288.

156. Art. 290.

157. Art. 291.

158. Art. 292.

159. Art. 269.

268. The institution of protective supervision of a person of full age is awarded by the court.

The new procedure for the institution of protective supervision is similar to the one contained in the *Civil Code of Lower Canada* described above.<sup>161</sup>

The old *Public Curatorship Act*<sup>162</sup> provided for the non-judicial appointment of the Public Curator as the curator of a person on the basis of a certificate of incompetence.<sup>163</sup> Section 6 of the Act stated :

The public curator shall be curator *ex officio* to every mental patient who is not provided with a tutor or curator and whose incapacity to administer his property is attested by a certificate of the director of professional services or any physician authorized by him where such patient is treated.

This type of non-judicial appointment of a curator was inconsistent with the principles of the new civil Code<sup>164</sup> and it was replaced by article 270 of the new civil Code and section 14 of the new *Public Curatorship Act*.<sup>165</sup> They provide that when the director general of an institution in which a person of full age is resident or receives treatment is of the opinion that such person needs protective supervision, he should inform the public curator and he in turn may propose to the prothonotary the appointment of a person to represent the resident or patient in the institution. The public curator is required to file the report of disability with the court and to notify the persons qualified to apply for protective supervision that the report has been filed.

The new Code will contain a new approach to the review of protective supervision. Unless the court fixes an earlier date, the appointment of a tutor or an adviser has to be automatically reviewed every three years and the appointment of a curator every five years.<sup>166</sup> All types of protective supervision can be reviewed upon request at any time.<sup>167</sup>

The new Code states that protective supervision ceases by a judgment of release or by the death of the protected person.<sup>168</sup> It also imposes the duty on the person exerting protective supervision to submit the protected person to

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160. See footnote 121.

161. See text accompanying footnotes 123 to 143. The composition of the family council has been changed and it has been renamed the "tutorship council". See E. DELEURY, *loc.cit.*, footnote 146, p. 77 and footnote 119, 708 fn. 43.

162. R.S.Q., c. C-80.

163. We saw that the mental health legislation of the Canadian common law provinces contains similar legislation, see text accompanying footnotes 98 to 104.

164. See articles 155 and 268 reproduced in the preceding text.

165. *Supra*, footnote 143. See R. LAMARCHE, *loc.cit.*, footnote 144, p. 62, no. 50.

166. Art. 278, para. 1.

167. See article 277.

168. Art. 294.

a medical or psycho-social evaluation and to submit the results to the tribunal if they warrant the end or the review of the supervision.<sup>169</sup>

We see then that Québec is moving in a similar direction as the common law provinces (or vice versa). The provisions of the new civil Code will allow judges to declare persons to be incompetent on the basis of general standards such as “inability to care for himself or to administer his property”.<sup>170</sup> However the new civil Code will make clear that the courts should choose the regime of protective supervision best adapted to the person’s needs.<sup>171</sup>

## II. COMMITMENT OF THE MENTALLY DISABLED TO MENTAL HEALTH FACILITIES

### A. COMMON LAW PROVINCES

Canadian legislation dealing with compulsory confinement to mental institutions has been subject to considerable study and change in recent years.

In 1979, the Manitoba Law Reform Commission released a report entitled *Report on Emergency Apprehension, Admissions and Rights of Patients under “The Mental Health Act”*.<sup>172</sup> In 1983, the province of Alberta released a report entitled *Report of the Task Force to Review the Mental Health Act*,<sup>173</sup> which had been prepared by a special committee under the chairmanship of R.B. Drewry. Finally, the Law Reform Commission of Saskatchewan released in 1985 a report entitled *Proposals for a Compulsory Mental Health Care Act*.<sup>174</sup>

With regard to legislative changes, Ontario amended its *Mental Health Act*<sup>175</sup> in 1978,<sup>176</sup> 1983<sup>177</sup> and 1985.<sup>178</sup> The province of Alberta adopted a new *Mental Health Act* in 1988.<sup>179</sup> Finally, the province of Manitoba amended

169. Art. 278, para. 2.

170. Art. 259-260.

171. Art. 259.

172. Winnipeg, Queen’s Printer, 1979.

173. Edmonton, Social Services and Community Health, 1983.

174. Saskatoon, 1985. This report was preceded by a working paper issued in 1981 by the LAW REFORM COMMISSION OF SASKATCHEWAN entitled *Tentative Proposals for a Compulsory Mental Health Care Act*, Saskatoon, 1981, as well as by another report of a more general nature, see D. de VLEGLER (Chairman), *Report of the Commission on Rights in Relation to Health Care*, Regina, Government of Saskatchewan, 1977.

175. R.S.O. 1970, c. 269 as am. S.O. 1987, c. 262.

176. *Mental Health Amendment Act*, S.O. 1978, c. 50 ; For an analysis of the amending Act and the reasons for its adoption see R. ANAND, “Involuntary Civil Commitment in Ontario : The Need to Curtail the Abuses of Psychiatry”, (1979) 57 *Can. Bar Rev.* 250.

177. *Mental Health Amendment Act*, S.O. 1983, c. 75. See also S.O. 1987, c. 37.

178. *The Mental Health Services Act*, 1984-85-86 S.S., c. M-13.1.

179. *Mental Health Act*, S.A. 1988, c. M-13.11.



its *Mental Health Act* in 1987<sup>180</sup> and 1988.<sup>181</sup> The changes in the mental health legislation of Alberta and Manitoba have been influenced by the work of the Uniform Law Conference of Canada. At its 1984 annual meeting, the Conference agreed to draft uniform mental health legislation dealing with involuntary committal and treatment, with particular regard to the Charter of Rights.<sup>182</sup> Although the final draft of the Uniform Act was not officially adopted until August 9<sup>th</sup>, 1988,<sup>183</sup> it is clear that the new legislation of Alberta, Manitoba and the North-West Territories has been influenced by early drafts of the Uniform Act.

Given that the most recent amendments to the mental health legislation have been based on the *Uniform Mental Health Act*<sup>184</sup> and that such Uniform Act appears to have been influenced by the Ontario *Mental Health Act*,<sup>185</sup> this report will refer mainly to its provisions.<sup>186</sup>

The recommendations for reform and the amendments to the civil commitment legislation follow similar directions. First by, they have concentrated on outlining the procedure for commitment. The process of civil commitment may be set in motion by a police officer, by a judge or a medical doctor, and it will lead to a decision on commitment made by two medical doctors one of whom is a psychiatrist. Secondly, the recommendations and the statutes have clarified the standards for commitment by outlining the criteria which have to be considered by those doctors when they take a decision on commitment. Thirdly, they have provided a number of reviews and appeals whereby the decisions of the two doctors can be reconsidered. Finally, they provide for short periods of commitment after which the patient should be released or a new decision to continue the commitment, subject to a consideration of the committal criteria, should be taken. These latter provisions are premised on the assumption that hospitalization is ordinarily a crisis intervention and that long periods of commitment are unnecessary and should be discouraged.<sup>187</sup>

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180. (1987-88) S.M., c. 56.

181. S.M. 1988-89, c. 24. See also The *Mental Health Act* of the North-West Territories, S.N.W.T. 1985 (2nd), c. 6. ordered in force January 1<sup>st</sup>, 1988.

182. See UNIFORM LAW CONFERENCE OF CANADA, *Uniform Mental Health Act* (hereinafter referred to as "the Uniform Act"), Proceedings of the Sixty-Ninth Annual Meeting, August, 1987, pp. 28, 262 (Appendix F).

183. *Id.*, p. 28.

184. *Supra*, footnote 182.

185. See *supra*, footnote 177.

186. Representatives of the provinces of Ontario, British Columbia, Québec, New Brunswick and Newfoundland, participated in the drafting of the Uniform Act (see *supra*, footnote 182, p. 262). The amendments to the mental health legislation of some of those provinces have been influenced by the Uniform Act.

187. See commentary after section 14 of the Uniform Act, *supra*, footnote 182. See also L.R.C.S., *Tentative Proposals ... op.cit.*, footnote 174, p. 33.

## 1. Procedures for commitment

Under the Uniform Act,<sup>188</sup> there are basically two ways in which a person may enter a psychiatric facility: she may enter as a voluntary patient,<sup>189</sup> or as an involuntary patient. The basic procedure for admission of involuntary patients is the decision by two medical doctors that a person fulfills a number of criteria set out in the statute. The procedure may be set in motion in several ways. First by, a medical doctor who examines a person and is of the opinion that she fulfills a number of requirements, which will be analysed below, may “recommend involuntary psychiatric assessment of the person” by a second medical doctor in a psychiatric facility.<sup>190</sup> Secondly, any person may go to a judge and make a written statement under oath requesting an order for the involuntary examination of another person by a medical doctor. If the judge has reasonable cause to believe that the other person fulfills a number of statutory requirements discussed below he may issue an order for the involuntary examination of the other person.<sup>191</sup> Thirdly, a police officer who has reasonable cause to believe that a person fulfills a number of statutory conditions to be discussed below may take the person into custody and transport her to a place for involuntary examination by a medical doctor.<sup>192</sup>

When the commitment procedure is started by a judge or police officer the person in question is taken to a first medical doctor who in turn may recommend an involuntary psychiatric assessment by a second medical doctor in a psychiatric facility. This second medical doctor may either issue a certificate of involuntary admission to a health facility<sup>193</sup> or release the patient.<sup>194</sup> The Act also provides a procedure for changing the status of a voluntary patient to that of an involuntary patient,<sup>195</sup> and vice versa.<sup>196</sup>

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188. *Supra*, footnote 182.

189. Section 11(2) of the Uniform Act states that a person may be admitted as a voluntary patient “if the physician is of the opinion that the person is suffering from mental disorder, is in need of the psychiatric treatment provided in the psychiatric facility and is suitable for admission as a voluntary patient”. It is not clear what is meant by the requirement that the person be “suitable for admission as a voluntary patient”. Presumably it could mean that the person, in spite of suffering from a mental disorder, has the capacity to consent and is not subject to duress or coercion. See generally G.B. ROBERTSON, *op.cit.*, footnote 12, pp. 312-317.

190. See Uniform Act, *supra*, footnote 182, s. 3.

191. *Id.*, s. 4.

192. *Id.*, s. 5.

193. *Id.*, s. 11(1).

194. *Id.*, s. 11(3).

195. *Id.*, s. 12. The Saskatchewan Law Reform Commission commented on the danger of abuse of such provision. It stated that in practice the statutory provision dealing with voluntary admissions “may amount to a procedure for commitment which permits a doctor, by retaining the fiction of consent, to compel hospitalization without applying the admission criteria applicable to other forms of committal” L.R.C.S., *op.cit.*, footnote 55, p. 24. In another legal field, child welfare legislation, it has been shown that social workers have moved from the use of court orders toward the “voluntary” parental surrender of custody or guardianship. The same

## 2. Criteria for involuntary commitment

Section 11(1) of the Uniform Act sets out the criteria for involuntary commitment. It provides that a medical doctor may issue a certificate of involuntary admission if

(a) the physician is of the opinion that the person is suffering from a **mental disorder** that, unless the person remains in the custody of a psychiatric facility, **is likely to result in,**

(i) **serious bodily harm** to the person or to another person, **or**

(ii) the person's **impending serious physical impairment** ;

and

(b) the physician is of the opinion that the person is not suitable for admission as a voluntary patient.<sup>197</sup>

The expression "mental disorder" used in subsection 11(1)(a) of the Uniform Act<sup>198</sup> is defined in section 1 in the following terms :

'mental disorder' means a **substantial** disorder of thought, mood, perception, orientation or memory that **grossly** impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life.<sup>199</sup>

Similar criteria to those reproduced above are included in the sections dealing with the recommendation of involuntary psychiatric assessment issued by the first medical doctor,<sup>200</sup> in the section dealing with a judge's order for the involuntary examination by a first doctor,<sup>201</sup> and in the section dealing with the arrest of a person by a police officer and the taking of that person to a first medical doctor for an involuntary examination.<sup>202</sup> Space limitations preclude a detailed analysis of the criteria contained in all those sections. A major difference between the criteria in those sections and the criteria for the issue of a certificate of involuntary admission by the second medical doctor is that the first medical doctor, the policeman or the judge are required to have recent evidence of actual or threatened bodily harm or of physical impairment arising from the mental disorder, while the second doctor has to be of the opinion that without involuntary commitment the mental disorder "is likely to

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development is possible in the area of "voluntary" commitment. See D. POIRIER, "Social Worker Enforcement of Child Welfare Legislation : An Increasing Potential for Abuse of Power", (1985) 5 *Can. J. Fam. L.* 215, pp. 222-233.

196. See Uniform Act, *supra*, footnote 182, s. 16.

197. *Id.*, s. 11(1) (emphasis added).

198. *Ibid.*

199. *Id.*, s. 1 (emphasis added).

200. *Id.*, s. 11(1).

201. *Id.*, s. 4(3).

202. *Id.*, s. 5.

result” in serious physical harm or physical impairment before he can issue a certificate of involuntary admission.<sup>203</sup>

A number of comments can be made about the criteria for commitment contained in the Uniform Act. First by, the Uniform Act does not adopt a set of rigid rules to regulate the decision of commitment, but a set of flexible standards.<sup>204</sup> As a result, the judgment of the two physicians reaching a commitment decision will not be governed by “clearly defined, highly administrable general rules”, but by “equitable standards producing *ad hoc* decisions with relatively little precedential value”.<sup>205</sup> Moreover, the values traditionally associated with rules *i.e.* “restraint of official arbitrariness and certainty”<sup>206</sup> may be seen as lacking in the criteria for commitment.

Secondly, the Uniform Act adopts a functional rather than a diagnostic definition of “mental disorder”. The reasons for this approach were explained by the Law Reform Commission of Saskatchewan in the following terms :

It is probably undesirable to include a definition of mental disorder that is based on diagnostic criteria in committal legislation. Commitment is not justified because a patient’s problems can be pigeon-holed according to a diagnostic manual. Not only is the classification of mental illness accepted by psychiatrists and clinical psychologists apt to change over time, but a diagnosis in itself does little to suggest whether commitment is appropriate or not.<sup>207</sup>

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203. *Id.*, s. 11(1)(a).

204. A good description of the distinction between rules and standards has been made by P. Schlag : “It is possible to look at positive law (constitutions, statutes, judicial opinions, and administrative orders) as a series of directives. The formula for a legal directive is ‘if this, then that’. A directive thus has two parts : a ‘trigger’ that identifies some phenomenon and a ‘response’ that requires or authorizes a legal consequence when that phenomenon is present [...]. Corresponding to the two parts of a directive, there are two sets of oppositions that constitute the rules v. standards dichotomy : The trigger can be either empirical or evaluative and the response can be either determined or guided. The paradigm example of a rule has a hard empirical trigger and a hard determinate response. For instance, the directive that ‘sounds above 70 decibels shall be punished by a ten dollar fine’, is an example of a rule. A standard, by contrast, has a soft evaluative trigger and a soft modulated response. The directive that ‘excessive loudness shall be enjoined upon a showing of irreparable harm’, is an example of a standard”. P. SCHLAG, “Rules and Standards”, (1985) *UCLA L. Rev.* 379, pp. 381-383, (footnotes in the text omitted). See also colloque, “Les standards dans les divers systèmes juridiques”, *Revue de la Recherche Juridique — Droit Prospectif*, N° 3, D’Aix-Marseille, Presses Univ., 1988-4.

205. D. KENNEDY, “Form and Substance in Private Law Adjudication”, (1976) 89 *Harv. L. Rev.* 1685, p. 1685. As P. Roubier has stated : “Le standard ne lie pas étroitement le juge, il constitue seulement une directive générale qui, en indiquant le but poursuivi, guide le juge dans l’administration du droit [...] ; ainsi donc le “standard” ne tend pas à une délimitation objective de ce qui est permis et de ce qui est défendu, comme le font les règles [...]” quoted by J.L. BERGEL in “Avant-Propos, Les standards dans les divers systèmes juridiques”, *loc.cit.*, footnote 204, p. 807.

206. D. KENNEDY, *loc.cit.*, footnote 205, p. 1688.

207. L.R.C.S., *op.cit.*, footnote 174, p. 11.

Thirdly, just as in the legislation regulating the appointment of guardians, the Uniform Act does not focus on the harmful or unlawful conduct of the person, but on her condition or status.<sup>208</sup> The Uniform Act requires that the committing doctors both label the person in question as suffering from a “mental disorder”<sup>209</sup> and that they conclude that such a mental disorder “is likely to result” in serious bodily harm or physical impairment unless the person is committed. It seems clear from such language that a person will be committed, not for what she has done in the past, but on the basis of a judgment as to her condition in the present, and as to what she is likely to do in the future.

Fourthly, by referring to a mental disorder which is likely to result in “serious bodily harm to the person or to another person” the Act adopts the criterion of “dangerousness”, which had been advocated by numerous writers as being the least restrictive of the liberty of the subject.<sup>210</sup> However, dangerousness to others or to the person herself are not the only criteria for commitment. When the Uniform Act, after referring to “serious bodily harm to the person or to another person”, adds “or the person’s impending serious physical impairment”, it adopts as an alternate criterion the welfare of the patient. Therefore, under the Uniform Act a person can still be committed even if, strictly speaking, she is not considered to be dangerous.<sup>211</sup>

Fifthly, the Uniform Act uses language which clearly indicates that a decision on commitment should not be taken lightly. It defines mental disorder as a “substantial” disorder which “grossly” impairs judgment ; the mental disorder must be “likely to result” in “serious” harm or “impending serious” impairment ; the contemplated harm or impairment must be “bodily” or “physical”, not just psychological. Even if the standards for commitment lack the certainty and predictability traditionally associated with the use of rules, those standards make clear that commitment is a grave decision which

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208. For the distinction between the approach of the criminal law to punishment and the approach of an “instrumentalist theory of social control” to civil commitment see G.P. FLETCHER, “The Right Deed for the Wrong Reason : A Reply to Mr. Robinson”, (1975) *UCLA Law Rev.* 293.

209. For an excellent discussion of “labelling theory” see M. MINOW, “When Difference Has its Home : Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference”, (1987) 22 *Harv. Civ. Lib. L. Rev.* 111.

210. See generally P. MACKINNON, “Civil Commitment in Saskatchewan : A Reform Proposal”, (1980-81) 15 *Sask. L. Rev.* 203 ; M.A. SOMERVILLE, “Changes in Mental Health Legislation as Indicators of Changing Values and Policies” in M. ROTH and R. BLUGLASS, eds, *Psychiatry, Human Rights and the Law*, Cambridge, Cambridge University Press, 1985, p. 156.

211. In her interpretation of the equivalent provisions of the Ontario Mental Health Act, M.A. Somerville suggests that the Ontario provisions “can be interpreted as requiring in all cases, that the person be dangerous to himself or others, if ‘dangerousness’ is given a slightly extended meaning [...] as applying to the situation in which the patient is dangerous to himself, but through ‘lack of competence to care for himself’ rather than from an overt act threatening bodily harm to himself”, *loc. cit.*, footnote 210, p. 159, footnote in the text omitted.

should not be reached in every case of mental disability but only in very serious ones, *i.e.* in those involving dangerousness or impending physical impairment.

In an article dealing with juvenile law it has been argued that a standard which indicates that it should be applied only in very serious cases may create more certainty in fact than a clear rule which is not enforced in a uniform manner.<sup>212</sup> Maybe the same result will be achieved by the restrictive language of the Uniform Act.

### 3. Reviews and appeals

The Uniform Act contains a number of procedural safeguards designed to protect the freedom of the person in question. First, the Act states that when a person is taken to a first medical doctor “the examination shall take place forthwith”,<sup>213</sup> that a certificate of involuntary admission has to be issued within 48 hours of the person’s detention and that otherwise the person should be released.<sup>214</sup>

The Uniform Act also sets time limits on the validity of the initial and subsequent certificates, so that all the decisions to commit will have to be reassessed automatically by the mere passing of time. A certificate of involuntary admission is valid for a maximum of two weeks and then a first certificate of renewal, valid for no more than one additional month may be issued. A second certificate of renewal will be valid for no more than two additional months and a third and subsequent certificate of renewal will be valid for no more than three months.<sup>215</sup> Each certificate of renewal is subject to the same requirements as the original certificate of involuntary admission.

The Uniform Act provides for the appointment of Psychiatric Review Boards<sup>216</sup> which will have jurisdiction to review certificates of

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212. “Precision of language in PINS [Persons in Need of Supervision] laws also has the effect of increasing the law’s intrusiveness into individual careers rather than of limiting such intrusion as the rule of law contemplates. The more definite the formulation, the more this is true. Under a standard of unconditional obedience [to parental commands], any instance of defiance by the child, however trivial or atypical it may be, is sufficient to authorize societal intervention if the parent chooses to complain [...]. An inquiry directly into dangerousness, by contrast, may despite its lack of guidance to actors and officials, provide a greater range of autonomy to children than do incorrigibility statutes which attempt to comply with the rule of law. The dangerousness formulation itself conveys no particular duty to children and it can further be assumed that actual intervention [...] will be limited to children with a significant history of ungovernable behavior or who engage in some particularly serious but isolated kind of misconduct”. A. KATZ & L.E. TEITELBAUM, “PINS Jurisdiction, The Vagueness Doctrine and the Rule of Law”, (1977/78) *Indiana L.J.* 1, p. 32.

213. Uniform Act, *supra*, footnote 182, s. 6(1).

214. *Id.*, s. 11(5).

215. *Id.*, s. 12(4).

216. *Id.*, s. 29.

involuntary admission and of renewal.<sup>217</sup> In every application before a review board the applicant, the patient and the attending physician are parties,<sup>218</sup> and any one of them may appeal to a court of competent jurisdiction on any questions of law or fact or both.<sup>219</sup> The Act also provides that in every proceeding before the Review Board or on appeal the board or the court “**may** direct that legal representation be provided for him or her”.<sup>220</sup>

## B. QUÉBEC

### 1. The *Mental Patients Protection Act*<sup>221</sup>

This statute, which was passed in 1972, regulates civil commitment to mental institutions in Québec. It does not define mental disorder or mental illness, but it establishes that a person can be subjected to involuntary commitment when “his mental condition might endanger his health or security or the health or security of others”.<sup>222</sup>

The Québec Act regulates in detail the procedures for mandatory psychiatric examinations and commitment. A mandatory psychiatric examination may be ordered by a medical doctor,<sup>223</sup> or by a judge, if they think that a person shows signs of mental disorder.<sup>224</sup>

If the person in question refuses to submit to the psychiatric examination a judge can order her to submit to it. Such an order may be obtained upon summary motion by any interested person who swears to the truth of facts of which she has personal knowledge.<sup>225</sup>

217. *Id.*, s. 30(1)(a).

218. *Id.*, s. 30(3).

219. *Id.*, s. 33.

220. *Id.*, s. 35(b), emphasis added. For discussions of the important issue of legal representation of the mentally disabled see D.A. GALBRAITH, “Advocacy for Patients: Are Outsiders Necessary? : A Psychiatric Hospital Perspective”, (1988) 8 *Health L. Can.* 108; A. KAISER, “Legal Services for the Mentally Ill: A Polemic and a Plea”, (1986) 35 *U.N.B.L.J.* 89; T. TURNER, “The Ontario Patient Advocacy Programs”, (1985) 1 *Can. Human Rights Advocate No.* 8: 13; T. TURNER, M.F. MADILL, & D. SOLBERG, “Patient Advocacy: The Ontario Experience”, (1984) 7 *International Journal of Law and Psychology* 329; S. POSEORSKI, “Advocates for the disabled”, (1984) 8 *Can. Lawyer* 2: 13; R.M. GORDON, “Legal Services for Mental Health Patients: Some Practical and Theoretical Observations on Canadian and Australian Developments”, (1982) 1 *Australian Journal of Law and Society* 101; S.S. HERR, “Legal Advocacy for the Mentally Handicapped”, (1980) 3 *Int. J. L. & Psychiatry* 61;

221. R.S.Q. 1977, c. P-41 as am. See A. LAJOIE, F. MOLINAR, & J.M. AUBY, *Traité de droit de la santé et des services sociaux*, Montréal, P.U.M., 1981, pp. 222-229, 295-296, 311-312, nos 363-378, 480, 507-510.

222. *Id.*, s. 11. See generally P. BEAUDOIN et C. LACAILE, *loc.cit.*, footnote 146, pp. 247-248, nos 4-9.

223. Ss. 4, 5.

224. S. 6.

225. *Id.*, s. 14.

Before issuing an order for a compulsory psychiatric examination the judge must question the person except when such person cannot be found or the judge considers it advisable not to do so because of the health or safety of the person or of another person.<sup>226</sup>

A psychiatric examination under the Act must be followed by a written report signed by the medical doctor who made the examination and stating whether or not commitment is necessary.<sup>227</sup> If the report indicates the necessity of commitment the patient may be admitted for treatment in a hospital, but the decision to commit must be confirmed by a second report issued by a psychiatrist within 96 hours of admission.<sup>228</sup>

Under section 21 of the Québec Act, a director of professional services of a hospital centre or a physician working in it may admit a person without examination if they consider that the mental state of such person “poses a serious and immediate threat for such person or others”. However the person must undergo a psychiatric examination within 48 hours of admission.

## 2. The new *Civil Code of Québec*

The *Civil Code of Québec*<sup>229</sup> will include a new section<sup>230</sup> which contains some basic principles applicable to civil commitment. One of those principles is stated in the first paragraph of article 26 :

No one may confine a person in a health or social services establishment in order to undertake a psychiatric examination or as the result of a report of a psychiatric examination without his consent or without the permission of a court.

We saw that under the new Code any decisions affecting a person’s capacity will have to be taken by a judge. The same principle will be adopted with regard to civil commitment.

Articles 28 and 29 deal with mandatory psychiatric examinations and with the preparation of a report to be sent to a court.

Articles 30 and 31 deal with the content and effect of the medical reports issued after psychiatric examinations which will be addressed to the courts. They set out the criteria for commitment and state as follows:

30. The report of the physician shall deal in particular with the necessity of confining the person in an establishment if he is a grave danger to himself or to others, with the ability of the person who has undergone the examination to care for himself or to administer his property and, as the case may be, with the advisability of instituting protective supervision of the person of full age.

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226. *Id.*, s. 17.

227. *Id.*, s. 7.

228. *Id.*, s. 12.

229. See *supra* footnote 121.

230. Section II., entitled “Confinement in an Establishment and Psychiatric Examination” and covering articles 26 to 31.



31. Where the reports finds that it is necessary to confine the person in an establishment, there shall be no confinement without the required consent, except by authorization of the court.

The procedure for commitment presently in force in Québec under the *Mental Patients Protection Act*<sup>231</sup> clearly contradicts the above quoted articles of the *Civil Code of Québec*. Furthermore, it is arguable that such procedure violates the principles contained in civil rights legislation.<sup>232</sup> Therefore it is expected that the *Mental Health Protection Act* will be amended to accord with the principles embodied in the amended Code.

The new civil Code will not apply the principle of commitment by judicial order to cases of emergency. According to article 13 consent to medical care is not necessary when the life of the person is in danger or its integrity menaced and her consent cannot be obtained at a convenient time.<sup>233</sup>

### CONCLUSION

In its report on legislation dealing with civil commitment<sup>234</sup> the Law Reform Commission of Saskatchewan stated :

The recommendations in the report are premised on the belief that it is possible to strike a satisfactory balance between facilitating effective treatment of seriously disordered individuals, and protection of the civil liberties of those persons.

It is doubtful whether the different groups interested in mental health legislation will agree that the Uniform Act or any other statute regulating

231. See A. LAJOIE, F. MOLINARY and J.M. AUBY, *op.cit.*, footnote 221.

232. See text accompanying footnotes 5 to 9.

233. Article 13 was not contained in Bill 145. It embodies a principle already contained in article 43 of the *Law on the Protection of Public Health*, R.S.Q., c. P-35. According to this latter article a physician or an institution are under a duty to act to save a life even if it has not been possible to obtain consent. (See generally A. LAJOIE, F. MOLINARY and J.M. AUBY, *op.cit.*, footnote 221.) For an equivalent provision in a common law jurisdiction see text accompanying footnote 114. Commitment without judicial order in emergency situations has been justified by the Saskatchewan Law Reform Commission in the following terms :

Since the majority of patients who are committed to institutions remain for relatively short periods of time, court procedures might result in a longer term of institutionalization, whether the patient is ultimately found to have required it or not [...]. Many of the objections to judicial intervention can be alleviated by making a clear distinction between emergency committals and long-term continuation of commitment. It is one thing to provide for emergency commitment in a summary fashion which does not involve an application to the courts, and another to continue a committal indefinitely without an application to the courts. The Commission believes this distinction to be crucial.

LAW REFORM COMMISSION OF SASKATCHEWAN, *op.cit.*, footnote 174, pp. 14-16. There is still a danger that the elaborate statutory safeguards created to prevent arbitrary commitment could be circumvented by the use of the provisions allowing commitment without judicial supervision in cases of emergencies.

234. *Supra*, footnote 174, p. 7.

civil commitment reaches a satisfactory balance between its different goals. First by, to groups concerned with the civil liberties of the mentally disabled, a decision to commit or to remove powers to administer property, even though no violation of any public norm has been committed is contrary to the very idea of the rule of law.<sup>235</sup> Second by, to those groups concerned with civil liberties, a decision to commit a person because two doctors are of the opinion that, although she is not dangerous, she is suffering from a mental disorder which is likely to result in “the person’s impending serious physical impairment”,<sup>236</sup> is both paternalistic and intrusive. Third by, to the persons concerned with the mental health of the patient, legal barriers to commitment will be perceived as unnecessary formal impediments to the performance of their professional duties and to the cure and well-being of the patients.<sup>237</sup> Fourth by, to the person concerned with the protection of the public, the fact that a mentally disabled person can only be committed when she is suffering from a mental disorder which is “likely to result in serious bodily harm to another person”<sup>238</sup> is an objectionable restriction on the measures necessary to assure public safety.<sup>239</sup>

The approach that the new mental health legislation has taken is clear. Rather than returning to formalism and attempting to describe, like a criminal statute, the kinds of behaviour which will trigger official intervention,

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235. See A. KATZ & L.E. TEITELBAUM, “PINS Jurisdiction, The Vagueness Doctrine and the Rule of Law”, (1977/78) *Indiana L.J.* 1, pp. 4-16, 27-28. As J.S. Navarro has stated : “Entre les standards et les règles de droit, il existe assurément une différence de domaine d’application [...] les règles de droit régiraient les institutions dans les cadres desquelles domine le besoin de sécurité juridique (telles les questions d’incrimination [...]). À l’inverse, les standards auraient pour domaine les institutions en constante évolution et qui seraient de nature économique et de nature sociale”. See “Les standards dans les divers systèmes juridiques”, *loc. cit.*, footnote 204, p. 833 at pp. 842-843.

236. See the *Uniform Mental Health Act*, *supra*, footnote 182.

237. “The most compelling argument against the traditional legal approach to psychiatry is that it is essentially negative and reactive ; the law reacts to events and attempts to control them once they have occurred, but it cannot shape or influence them in a positive way [...]. The law is often perceived as concerned more with punishment, together with formal procedural protection against unjustified punishment, than with therapeutical ideals”. L. GOSTIN, “Contemporary Social Historical Perspectives of Mental Health Law Reform”, (1983) 10 *J.L. & Soc.* 47, pp. 48-49. See also the critique of the Uniform Act by a medical doctor, A.D. MILLIKEN, “The Uniform Mental Health Act : a Clinician’s Questions”, (1987) 7 *Health L. Can.* 76 ; See also the critique of mental health legislation by the Executive Director of “Ontario Friends of Schizophrenics”, J. C. BEEBY, “The Committal of Schizophrenics : Are New Laws Necessary ?”, (1988) 9 *Health L. Can.* 5.

238. See s. 11(1) of the *Uniform Act*, *supra*, footnote 182.

239. As a well-known American author has stated : “New procedural safeguards for the mentally ill increase the risk that the dangerous mentally ill will go free. The significance of procedural safeguards is to increase the burden of the state in making its case for confinement”. A.A. STONE, “The Social and Medical Consequences of Recent Legal Reforms of Mental Health Law in the U.S.A. : The Criminalization of Mental Disorder in M. ROTH and R. BLUGLASS, eds, *Psychiatry, Human Rights and the Law*, Cambridge, Cambridge University Press, 1975.

the new legislation has clarified the standards to be applied<sup>240</sup> and it has increased the procedural safeguards and methods of review in order to prevent abuses or error in the application of those standards. Some of these standards can be seen as competing with, or even contradicting, one another. They will have to be weighed or balanced by the decision makers, who will have to make a choice as to the one which should prevail in each particular case.<sup>241</sup> This type of choice is similar to the one that has to be made in other areas of the law, such as sentencing.<sup>242</sup> Even though neither the *Dependent Adult Acts* nor the *Uniform Mental Health Act* set out an order of priorities between the different legislative purposes, their language makes clear that the decision makers should adopt the measures which are the least restrictive of the liberty of the mentally disabled persons. These legislative directives may in fact lead to a greater protection of the liberty of the persons in question than that achieved by the previous legislation.<sup>243</sup>

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240. The use of standards rather than rules has been considered particularly appropriate for reaching decisions on a person's mental disability. As S. Rial has stated : "Le standard vise à permettre la mesure de comportements et de situations en termes de normalité [...]". S. RIAL, *Le Juge administratif français et la technique du standard*, Paris, Librairie générale de droit et de jurisprudence, 1980, quoted by D. PINARD, "Le droit et le fait dans l'application des standards et la clause limitative de la Charte canadienne des droits et libertés", *R.R.J.* 1988-4, 1069, p. 1074.

241. One of the most debated issues in contemporary North American jurisprudence is whether choices between competing values made by adjudicators are based merely on their personal moral and political commitments or on some rational basis. See J.W. SINGER, "The Player and the Cards : Nihilism and Legal Theory", (1984) *Yale Law J.* 1 ; J. STICK, "Can Nihilism be Pragmatic ?", (1986) 100 *Harv. L. Rev.* 332.

242. An interesting approach to the problem of conflicting goals is recommended in *Sentencing Reform : A Canadian Approach*, REPORT OF THE CANADIAN SENTENCING COMMISSION, Ottawa, Queen's Printer, 1987. The report recommends the adoption of a "Declaration of Purpose and Principles of Sentencing" which "establishes a clear order of priority with regard to its sentencing policy. The fundamental goal of sentencing takes precedence over the content of all other sections of the Declaration with regard to sentencing. As it is explicitly stated in sub-section 4(a), proportionality is the paramount consideration governing the determination of the sentence. There is no order of priority between the considerations listed in sub-section 4(d). However all these considerations are subject to the application of the sentencing principles formulated in sub-sections 4(a), (b) and (c). They must also be invoked in strict conformity with the fundamental goal of sentencing". *Id.*, pp. 152-153.

243. A. KATZ and L.E. TEITELBAUM, *loc. cit.*, footnote 212, p. 32.