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Canadian Health Law & Policy

Timothy Caulfield & Jocelyn Downie, editors.
Butterworths, 438 pp.

Reviewed by: Julie A. Godkin

There are few areas of Canadian law that have grown as rapidly and as extensively as health law and policy in the past decade. The far-reaching areas studied in health law are unknowingly familiar to many Canadians, for the media has followed the controversial stories of Henry Morgentaler, Sue Rodriguez, Robert Latimer, and more recently in Nova Scotia, the Nancy Morrison case and the plight of the Camerons. Health law is a unique field, for it encompasses professionals in the health sciences, government agencies as well as those in the legal profession. As this has been such a burgeoning field of study in recent years, a general text to introduce students and professionals alike to the diverse and contentious issues in health law has been greatly needed. This academic void has largely been filled with the new *Canadian Health Law and Policy*,¹ edited by Timothy Caulfield and Jocelyn Downie. Butterworths could not have chosen two more qualified editors for this project, as both Caulfield and Downie are leaders in research and policy contributing to Canadian health law, and they have put together a strong cast of contributors in their text. Among the contributors are Colleen Flood, Sandra Rodgers, H. Archibald Kaiser, Gerald Robertson and Barney Sneiderman, who together successfully integrate their individual areas of expertise into a thorough and well-researched book which will serve students and professionals alike who are interested in this expanding discipline.

This collection will provide a great impetus for classroom debate. *Canadian Health Law and Policy* is an outstanding read. The subjects covered and the contributors' styles permit individuals beyond the editors' target law student audience to understand the fundamentals of many areas of health law. This book will be a useful resource for those who are outside the legal profession and those that are interested in

¹ (Toronto: Butterworths, 1999).

health law and policy. This is an important achievement. Health law is a dynamic and inter-disciplinary field, and as the editors note, “there are a number of scientific, social, economic, legal, philosophical and political reasons for the dynamism of health law.”² While this text is written largely by legal scholars, the many approaches to the numerous subjects from various disciplines introduce the reader to different perspectives whether it is economic, philosophical, feminist or a politicized explication of contentious legal issues.

As is inevitable with health law, there is considerable overlap in the areas the different contributors cover, yet all of these scholars have successfully navigated the confines of their topic without detracting from the contributions of one another. The first and second chapters of the book provide a broad overview of the legal and regulatory framework governing the structure of the Canadian health system. The middle chapters cover issues at the core of health law. These include negligence and malpractice, the fundamentals of consent, and the confidentiality of health information. The remainder of the book introduces the reader to more specialized topics, such as discussions of the law governing minors, mental disability law, state intervention in the lives of pregnant women, an introduction to the regulation of reproductive technologies, genetics, research involving humans, and decision-making at the end of life. In its entirety, the text is an encompassing look at the laws, policies, and issues at the core of the Canadian health care system. The material is presented in such a way as to encourage students to challenge the theoretical underpinnings of our health care structure. Furthermore, it serves as a stimulus for further reflection of contentious moral, personal and political dilemmas confronted by our courts and politicians and to consider whether there are alternative approaches to these contemporary issues than those taken.

As the contributors have taken diverse approaches in presenting their respective areas in health law and policy, chapters from each of the three areas of study will be reviewed. These chapters merit individual attention because of the strength of their contribution to the overall text and the style in which their topic area has been explored.

² *Ibid*, at 2.

Colleen Flood sets the framework for the text in her chapter, “The Structure and Dynamics of Canada’s Health Care System”, which provides an excellent introduction to the institutional structure governing Canada’s health care system. Flood’s law and economics approach to this area of health law grants insight into a number of areas: the workings of the regulatory regime governing our health care system, specific problems the system is facing, the provision of health services, and devolution and deinstitutionalization as examples of health care reform initiatives. The reader is also given a greater understanding of the context in which the health care provider – patient relationship exists. This allows readers to better appreciate the text’s subsequent chapters highlighting issues that arise within that relationship. Flood’s critique of the physicians’ role within the health care system also provides a good foray into the second chapter of the text regarding the regulation of professionals.

Linette McNamara and Erin Nelson’s contribution, “The Regulation of Health Care Professionals” provides the reader with an introduction to the policy issues and legislation governing the health care professions. The authors survey the forms of regulation, including the integral topic of self-regulation and examine different policy initiatives. Read in concert with Colleen Flood’s chapter, these contributions provide students of law and other disciplines with a firm understanding of the intricacies of Canada’s health care system. These writings further provoke questions in readers’ minds about areas that are in need of reform. These include the best way to regulate health care providers and whether the present Canadian health care system is the optimum method of attending to our aging population. McNamara and Nelson should be also commended for their chapter because they are the only scholars who have addressed the issue of complementary health measures. This is the one substantively important and contentious topic that is not mentioned in this text. McNamara and Nelson should be recognized for addressing the issue. While their examination of complementary health measures is brief, the authors do provide references for further reading which will serve students well who seek further information in this area.³

³ Linette McNamara and Erin Nelson, “Regulation of Health Care Professionals”, note 133 in *ibid.* The authors provide a brief list of current publications which address this contentious area of law.

Negligence and malpractice is arguably one of the most thoroughly covered areas in health law. Gerald Robertson provides a concise overview of the law governing medical negligence, the legal liability of doctors as well as that of hospitals. There are numerous texts that address these issues specifically. This text does not attempt to supplant the role of these books, but merely summarizes and comments on the current developments in this area and points the reader to other references for a more thorough analysis.⁴ Robertson successfully provides a detailed yet succinct look at this core area of health law. While this chapter is not the most substantial contribution in the text, it provides students with a clear and comprehensive introduction to this enormous body of jurisprudence. Robertson has admirably addressed this complex body of law in an uncomplicated manner.

Health law is unique among legal disciplines, because as mentioned, it is an area that allows various approaches to scholarship an opportunity to flourish. This is best recognized in this text by Sandra Rodgers' highly politicized contribution, "State Intervention in the Lives of Pregnant Women." Rodgers provides an historical look at the ways in which the state has scrutinized and interfered with women's reproductive lives. In addition, it proceeds to review the law governing women's access to abortion and state interference in pregnancies where there is a perceived threat to the interests of the fetus. Rodgers unabashedly condemns Canada's historically belittling attitude toward women's expertise in these areas, and laments the fact that Canadian women have "been acted upon but not seen as reliable autonomous actors."⁵ Her discontent with the legal analysis used to assess the appropriateness of state intervention in women's reproductive lives is evident, but she does, nonetheless, acknowledge that women's reproductive autonomy has been recognised by the state, albeit not in terms she relishes. Rodgers offers little confidence in women's future roles and input in the state machinery that has such control over their reproductive lives. Yet her thorough research and detailed historical account raises the reader's attention to this litigious subject that has

⁴ For a thorough analysis on this area, see E. Picard and G. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed. (Toronto: Carswell, 1996).

⁵ Sandra Rodgers, "State Intervention in the Lives of Pregnant Women" in *supra* note 1 at 300.

feminists across the political spectrum questioning women's successes in this arena to date.

For all of *Canadian Health Law and Policy's* achievements, there is one notable shortcoming in this text. With the exception of the brief analysis in Chapter Two, there is no mention of complementary health measures in the book. Alternative medicine is an area that overlaps with almost all of the chapters in this book, yet it is curiously absent from the contributors' writing. The editors explicitly acknowledge that it is impossible for this general text to cover all areas of health law.⁶ Yet it is interesting that there is no explanation for the noticeable gap on complementary health measures, especially since this is such a contentious issue in the law and policy governing the health care system and its professionals presently. Alternative medicine has provoked substantial legislative action in almost all provinces in the past few years, with naturopaths, chiropractors and many other alternative practitioners being the subject of legislative initiative.⁷ This subject has also merited attention in the physicians' *Code of Ethics*.⁸ In relation to the topics explicitly addressed in this text, alternative health measures and the corresponding legal issues it raises overlap with many chapters, notably consent, the standard of care and the regulation of the professions. Thus, one would suggest that this topic deserves at the very least, a recognition of its absence from the text and an explanation for this void, or more appropriately, a small introduction to this area for students. Regardless of the best approach to this contentious area, this reviewer would suggest that four pages do not do justice to the debate currently being waged over complementary medicine.

⁶ *Supra* note 1 at 3-4.

⁷ For example: *Chiropractic Act*, S.O. 1991, c. 21; *Chiropractors Act*, R.S.B.C. 1996, c. 48; *Chiropractic Act*, R.S.N.S. 1989, c. 69; *Chiropractic Act*, R.S.M., 1987, c. 184; *Chiropractic Act* R.S. Nfld. 1990, c. C-14; *Chiropractic Act*, S.P.E.I. c. C-7; *Chiropractic Profession Act*, S.A. 1984, c. C-9.1; *Chiropractic Act*, S.S. 1994, c. C-10.1; *Chiropractic Act*, R.S.Q. 1997 C-16; *Drugless Practitioners Act*, R.S.O. 1990, c. D-18; *Naturopathics Act*, R.S.B.C. 1996, c. 332; *Naturopathic Act*, R.S.M. 1987, c. C-184; *Naturopathy Act*, R.S.S. 1978, c. N-4; *Midwives Regulation*, B.C. Reg. 103/95; *Acupuncturists Regulation*, B.C. Reg. 271/98; *Massage Therapists Regulation*, B.C. Reg. 484/94; *Medicine Amendment Act*, S.O. 1997, c. 126

⁸ Canadian Medical Association, *Revised Code of Ethics* (Ottawa: Canadian Medical Association, 1996) see specifically, sections 5, 6, 12, 29 and 42.

This text brings many key areas of health law together in a single publication. The diversity of the selections will serve health law professors and students well, as well as act as an catalyst for further reading by all who come in contact with its covers. It highlights the complexities at the heart of some of Canada's most contentious court battles and is an excellent contribution to legal scholarship by its combination of historical, economic, philosophical, political and legal analysis in tracing the evolution of health law in Canada. The selection and placement of the chapters serve to educate the reader and provide a thorough introduction to this area by illuminating the development of health law and the issues that have given rise to its now prominent place in law faculties, firms and on governmental agendas. This text deserves a place in any classroom that is examining Canadian health law.