Employment Law and the Mentally Handicapped

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Mental handicaps affect a surprisingly large part of the community. If the handicapped cannot make themselves self-sufficient, they become a great economic burden whereas they may have the potential of being contributors to society. This paper will examine aspects of the law relating to employment opportunity and certain social service structures, and question the extent to which they further a handicapped person's goal of fulfilling his employment potential. Field research was done only in the Halifax area, but the analysis is pertinent across Canada because the statutory provisions, social services and social assistance structures found in Halifax are on the whole similar to those found across Canada.

I. Scope of the Problem

It is difficult to deal with the employment problems of the mentally handicapped because there has been so little empirical research on the topic. There has not even been a serious investigation of what should be the definition of a mental handicap for the purposes of eligibility for employment. Are developmental disabilities1 such as autism, cerebral palsy and epilepsy to be classified as mental handicaps? Can a mental handicap be termed a physical handicap if it is due to structural brain damage as is the case in Downs syndrome? Can conditions such as schizophrenia or manic depression, which have a chemical basis, be termed physical handicaps? We are involved here with more than semantics, for the answer will affect whether the handicapped person is within the scope of particular pieces of legislation. The question is initially one for medical experts but there is no reason why definitions developed for medical purposes should limit the scope of modern social welfare legislation.

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Whatever the definition of mental handicap, whether relating to mental retardation or to various types of mental illness, statistics are always sparse. There are no statistics relating to the potential of the handicapped for employment. The absence of statistics is due to more than simply the lack of research. It is difficult, if not impossible, to quantify in this area because so much of a mentally handicapped person's eligibility for employment is affected by variables that are almost impossible to exclude or control, such as his self-image, the attitudes of those around him, including fellow employees, and co-existing physical, mental, psychological, economic and social problems.

The only existing statistics that give some idea of the number of people affected are those which show the incidence of mental retardation and mental illness in the general population. Mental retardation is determined on the whole by I.Q. scores. This is a highly questionable means of categorization, but it is the only means available. According to traditional modes of determination it is clear that an unexpectedly large percentage of the population is affected by mental retardation, and that an overwhelming number of mentally retarded are capable of performing a useful function in society. Mental disorder, as well, is far more prevalent than most people realize. The following figures give some idea of the extent of the problem. In 1977, 60,000 Canadians were hospitalized for mental illness; upward of one-third of the population has suffered some temporary disability because of emotional problems; between one-third and two-thirds of the population in three communities studied showed symptoms of disorder recognizable by psychiatrists. The last statistic is an indication of the difficulty of defining mental illness in a meaningful way.

2. Statistics Canada, C.A.M.R. and C.M.H.A. do not keep statistics on the employment of the handicapped. They can not be traced through provincial funding or services as funding is based on an approved budget not the number of "clients" (interview with Norma Lloyd, supervisor of Special Projects, Department of Social Services, Province of Nova Scotia).
3. See Appendices I and II
5. Mentioned in a 1976 fund-raising pamphlet for Mental Health, Ottawa
6. M. G. Reinhardt, "The Incidence of Mental Disorder" (1972), 6 Studia Caronica 209, at 220-221. The three communities studied were in rural Sweden, rural Canada and New York City.
The experiences of Goodwill Industries of America, the Canadian Association of the Mentally Retarded, and the Canadian Mental Health Association provides the basis for an estimate of the incidence of mental handicaps sufficiently severe to affect employment.\(^7\) Application of the model to the Metropolitan Area of Halifax, Dartmouth and Halifax County, having a population of 271,768, resulted in an estimate of 258 mentally retarded persons and 865 psycho-socially disabled\(^8\) persons in need of vocational services. The number of mentally handicapped in need of vocational services is at least as great as the number of similarly physically handicapped. Another local survey indicated that the need for special vocational training is even greater in that those who have "overcome" their mental illness have had enormous difficulty in obtaining employment.\(^9\) Of the population studied 41.7% were employed prior to hospitalization, 30.0% looked for work after discharge, but only 15.5% were actually working.

It is with these people, who have mental handicaps severe enough to render them presently "unemployable", but who have the potential for rehabilitation that the law relating to employment must be especially concerned. In other words, the special challenge to the law to respond fairly is presented by those who have undergone periods of institutionalization for mental illness\(^10\) and by the mentally retarded who are neither very severely nor very mildly retarded. But the "Moyer Report" disclosed that in 1977 of the approximately 1000 psycho-socially disabled, or mentally ill, in the Halifax Metropolitan area not in hospitals, only 620 received any type of service. Vocational/educational services were the most neglected: such services were received by only 3% (14) of those not living in institutions and by 15% (91) of the total 620.\(^11\) The situation does not appear to have changed significantly since 1977.

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7. See Appendix III
8. Ad Hoc Committee on Community Activity Programs, "Proposal to Metropolitan Mental Health Planning Board re: Comprehensive Services for the Psycho-Socially Disabled" (1977) (hereinafter referred to as the "Moyer Report"), at p. 2. The "Moyer Report" defines psycho-socially disabled people "to include at least those who are not able to function at an optimum level because of a psychiatric illness, and who require some type of rehabilitative service."
10. Even if the chronically ill recover sufficiently to be released they probably will not be able to achieve competitive employment. See note 148
11. "Moyer Report", supra note 8, at 4
In March 1979 it was estimated that approximately 90 mentally retarded, most of them moderately retarded, were receiving vocational/educational services in the Halifax Metropolitan area (and 16 or 17 of them are learning basic living, not employment skills).\(^{12}\)

It is reasonably clear: (i) that a larger proportion of the population is affected to some degree by mental retardation or mental illness than one would suspect and (ii) that while most could be gainfully employed in some capacity, vocational/educational services are essential for them to achieve their potential and such services are not readily available, especially for the mentally ill. This is particularly regrettable for the mentally ill when one realizes that it is theoretically possible for them, unlike all but the most mildly mentally retarded, to be "cured" of their handicap and thus enabled to compete in the employment market: Both public attitudes and the law contribute to this situation.

II. *Inability To Form Contract*

The usefulness of a contractual analysis of the employment of the mentally handicapped is highly questionable. If a person's mental ability is sufficiently impaired to prevent him from having the capacity to be a party to a contract of employment he is unlikely to seek employment. This probably accounts for the fact that most Contract Law texts have no more than a few paragraphs on the subject of the ability of a mentally handicapped person to form a contract of employment. Perhaps there is no greater claim for a purely contractual analysis of the employment relationship in this context than that it is of some technical *legal* significance,\(^ {13}\) but the principles on which the law rests do demonstrate the way that society views the mentally handicapped.

Because the ordinary rules of law presuppose the existence of a normal individual they do not apply to those whose mental functions are limited due to infancy, mental illness or mental retardation. If any of these conditions exist special rules apply.\(^ {14}\) A contract of a

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12. George Matthews, Director of Department of Social Services, Province of Nova Scotia. It should be noted that according to Clarie Edwards-Doherty, Director of the Adult Services Centre, the clients are mainly moderately retarded.


mentally handicapped may be avoided on the basis of: (i) mental incapacity to contract at the time of the offer or (ii) supervening insanity between the time of making the offer and acceptance.

A. Incapacity at the Time of the Offer

The first of these grounds, which is the more relevant to the employment contract, is replete with inconsistencies, because ‘justice’, not logic, has shaped the law. Since Imperial Loan Co. Ltd. v. Stone in 1892, the common law has generally required a person who alleges that he was insane at the time of contracting to establish: (i) that at the time of contracting he did not know what he was doing and (ii) that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. Critics of the second requirement allege that it is not only overly stringent but deviates from the earlier common law. They hoped that two cases in the early 1900's would open the way for discarding it. However, Imperial Loan was confirmed by the Court of Appeal in 1925 and appears to have been widely accepted in Canada.

A 1961 Nova Scotia case does however raise some doubts as to the applicability of the second requirement in this jurisdiction. Although the case could have been decided on the alternate ground of undue influence and the point was not argued by counsel, the majority was willing to set aside the agreement without even mentioning the second requirement and the minority, in agreement on this point, argued that the second requirement should not be imposed on voluntary dispositions.

15. See Part IIC for details
16. [1892] 1 Q.B. 599
22. Id., at 238
23. Id., at 260-262 (per Ilsley, C. J.)
Where a mental incompetent seeks thus to avoid a contract he appears to have the onus of proving both his own incapacity and the other's knowledge of this. The common law has always been concerned with commitment to a mental institution and previous adjudgements of incompetency. Although in Nova Scotia the process for appointment of a guardian of a person's estate, on the face of it, is restricted to insane persons or lunatics or habitual drunkards, in other jurisdictions it is possible for the following to be the subject of incompetency or similar proceedings: dependent adults, the mentally infirm, the mentally ill, drug addicts, alcoholics, incompetents, epileptics, deficients, spend-thrifts and others. In most jurisdictions institutional commitment facilitates an examination of incompetency.

In attempting to establish the incapacity to understand a particular transaction the following types of evidence should be presented to the court on behalf of an alleged incompetent: the nature and complexity of the transaction in issue, prior adjudications of incapacity, hospitalization, lay and expert (on I.Q. or mental condition) opinion testimony. It is hard to determine the evidential value and weight of each of these factors as the courts' decisions are

24. G. A. Coutts, "Contracts of Mental Incompetents" (1963), Special Lectures of the Law Society of Upper Canada 49, at 63, citing Imperial Loan Co. v. Stone, supra note 16. However in Corkum, by her Guardian, Montreal Trust Company and Douglas v. The Nova Scotia Trust Company, supra note 21, at 262, Ilsley pointed out that there are several cases which raise at least a doubt as to whether this is so.

25. Incompetent Persons Act, R.S.N.S. 1967, c. 135, subs. 1(b), 2(2), 8, as am.
26. Inebriates' Guardianship Act, R.S.N.S. 1967, c. 144, ss. 1, 2, 12, as am.
27. Dependent Adults Act, S.A. 1976, c. 63, subs. 1(d), 6, 25, as am.
28. Patients' Estate Act, S.B.C. 1962; c. 44, subs. 3(1), as am. by S.B.C. 1976, c. 33, s. 104; Infirm Persons Act, R.S.N.B. 1973, c. 1-8, s. 39; Mental Incompetency Act, R.S.O. 1970, c. 271, s. 39; The Mentally Disordered Persons Act, R.S.S. 1965, c. 346, s. 42, as am. by S.S. 1972, c. 71. The legislation in Manitoba, Newfoundland, Prince Edward Island and Quebec was not surveyed.
30. Dependent Adults Act, S.A. 1976, c. 63, s. 50, as am.; Patients' Estate Act, S.B.C. 1962, c. 44, ss. 2, 12, 13, as am. by S.B.C. 1964, c. 36, ss. 2, 6; S.B.C. 1965, c. 32, ss. 3, 4; S.B.C. 1968, c. 36, ss. 2, 3; S.B.C. 1976, c. 33, s. 104; Public Trustee Act, S.N.S. 1973, c. 12, s. 7, as am. by S.N.S. 1976, c. 16, s. 18; The Mental Health Act, R.S.S. 1965, c. 345, s. 21, as am. by S.S. 1970, c. 43, s. 12; S.S. 1972, c. 76, s. 3; S.S. 1976, c. 35, s. 5
31. Mental Health Act, R.S.N.B. 1973, c. M-10, subs. 36 (1); Hospitals Act, R.S.N.S. 1967, c. 249, s. 47, as am. by S.N.S. 1977, c. 45, ss. 1, 8; The Mental Health Act, R.S.O. 1970, c. 269, s. 32, as am. by S.O. 1978, c. 50, s. 13
often influenced by innate principles of fairness and justice. They may also confuse the issue of incapacity with the issue of whether a lesser form of mental disability should influence them to grant equitable relief on grounds of misrepresentation, undue influence, unconscionable transaction or fraud.

Where it does exist, the right to avoid the contract may be said, generally, to be for the protection of the mental incompetent. However, where mental capacity is a fundamental part of the contract the other party may apply to have the contract avoided, and in this case he should not know of the incapacity. An employer, for instance, might well wish to, and probably could, avoid a contract of employment in these circumstances. This exception may, of course, be incidentally advantageous to an employee because after the contract is cancelled the court will not enforce any obligations under it, such as, for example, a restraint of trade clause.

Once an allegedly mentally incapable employee has established the two requirements to the court’s satisfaction, or once the employer has established that at the time of contracting he was not aware of the employee’s mental incapacity and that mental capacity was a fundamental part of the contract, the contract is voidable, not void. The court, therefore, will not cancel the contract if the party seeking to avoid the contract is the mentally incapable employee and he has affirmed it in a sane interval, or if the party seeking to avoid the contract has obtained a benefit that can not be restored to the other party. In the normal employment situation it will be the employee who has given part performance without receiving a benefit (as wages are normally paid on a periodic basis) so if the employee is the party asking that the contract be cancelled, the court would probably have no hesitation in doing so, although

33. Coutts, supra note 24, at 64 suggests that if he actually knew of the incapacity it may be a fraud to enter into the contract.
35. Coutts, supra note 24, at 65-67 states that Wilson v. R., supra note 20, is the sole exception to the rule requiring a mentally incompetent to restore any benefits that he has received before he may have the contract set aside. Although Coutts does not extend this requirement to situations where the other party is requesting equitable cancellation, it seems reasonable to do so.
presumably it will wish to make the cancellation equitable.

No matter who is seeking to avoid the contract the important question will be whether the employer will be obliged to pay for any benefit from the employee’s part performance. Unless there is overriding legislation any benefit will have to be compensated for on a *quantum meruit* basis, although the court will look to the terms of the contract for guidance. It is submitted, moreover, that the Apportionment Act of each Canadian province is overriding legislation and would be applicable to the employment contract of a mental incompetent because the terms of the contract would be considered to have been in force until the contract was cancelled. In Nova Scotia it has been judicially determined that the effect of the Apportionment Act is that “subject to any agreement to the contrary, the person who earns a salary acquires a claim to it from day to day and the person who has to pay it acquires an obligation to pay it from day to day, as earned.” Thus it would seem that under the Apportionment Act an employer, even one who had received no benefit from part performance, would be required to pay the employee’s accrued salary upon cancellation.

Under English and Canadian law separate rules apply to the person for whom an adjudgement of incompetency is still outstanding. A public body or a private body will have been

36. R.S.N.S. 1967, c. 10
37. Lee v. MacDonald; Board of School Commissioners for the City of Dartmouth, Garnishee (1970), 12 D.L.R. (3d) 404, at 408
38. Coutts, *supra* note 24, at 61. Many U.S.A. jurisdictions treat mental incompetency as only one evidential factor in establishing mental incapacity on the grounds that it is conclusive only of the mental incompetent’s state of mind at the time of the proceeding and that the proceeding is not *in rem* (“Mental Illness and Contracts”, *supra* note 32, at 1043-1044.)
39. Dependent Adults Act, S.A. 1976, c. 63, ss. 33, 34, 52, as am. [Public Trustee]; *Patients’ Estate Act*, S.B.C. 1962, c. 44, s. 7, as am. by S.B.C. 1964, c. 36, s. 3; S.B.C. 1976, c. 33, s. 104 [Public Trustee]; Mental Health Act, R.S.N.B. 1973, c. M-10, ss. 36, 37, as am. by S.N.B. 1979, c. 41, subs. 80(3) [Administrator of Estates]; Public Trustee Act, S.N.S. 1976, c. 12, ss. 4, 5, 7, as am. by S.N.S. 1976, c. 16, ss. 17, 18 [Public Trustee]; The Mental Health Act, R.S.O. 1970, c. 269, ss. 32-34, as am. by S.O. 1978, c. 50, s. 13 [Public Trustee]; The Administration of Estates of Mentally Disordered Persons Act, R.S.S. 1965, c. 347, s. 4, as am. [Administrator of Estates]
40. Dependent Adults Act, S.A. 1976, c. 63, ss. 26, 52, as am. by S.A. 1977, c. 93, subs. 2 (3) [Trustee]; *Patients’ Estate Act*, S.B.C. 1962, c. 44, ss. 7, 10, 14, as am. by S.B.C. 1964, c. 36, ss. 3, 7; S.B.C. 1965, c. 32, s. 5 S.B.C. 1976, c. 33, s. 104 [committee]; Infirm Persons Act, R.S.B. 1973, c. 1-8, ss. 3, 10, as am. by S.N.B. 1979, c. 41, subs. 66 (2) and Mental Health Act, R.S.N.B. 1973, c. M-10, ss. 36, 37, as am. by S.N.B. 1979, c. 41, subs. 80(3) [committee]; Incompetent Persons Act, R.S.N.S. 1967, c. 135, subs. 2(2), as am. [guardian];
appointed to manage the estate of a person declared incompetent to do so. From this function of the court-appointed body stems the theory that contracts of the mentally incompetent which purport to dispose of his property will not bind him or his estate since they would interfere with the court's control of his property.\(^4\) As long as the formal order remains the mental incompetent is incapable of entering into such contracts,\(^4\) but such a contract would bind the other party.\(^4\)

The extent to which an adjudgement of incompetency would affect a contract of employment is debatable. Although some assert that the doctrine is restricted to contracts for the disposal of property, two arguments support its extension to the employment contract. First, all contracts create a potential liability to pay damages and therefore necessarily interfere with the court's control of the property. Second, if it is accepted that incompetency proceedings are *in rem*, the employer will be deemed to have notice of the incompetent's incapacity to contract; he will be prevented from instituting proceedings to have the contract terminated,\(^4\) and any mentally incompetent employee who is attempting to have the contract terminated need not prove the second requirement (the employer's actual knowledge).

Although people may be found mentally incompetent for a variety of reasons this area of the law is of particular relevance to the mentally ill. While admittance to a psychiatric institution does not mean that the patient's estate is automatically managed by a guardian, it does precipitate an investigation into incompetency. The Hospitals Act requires an "examination of a person in a hospital by a psychiatrist to determine whether or not that person is competent to administer his estate", lists the criteria that the psychiatrist must consider and provides a procedure for initiating, where necessary, the appointment of the Public Trustee.\(^4\) Statutes

The Mental Health Act, R.S.O. 1970, c. 269, subs. 33(2), as am. by S.O. 1978, c. 50, s. 13 and The Mental Incompetency Act, R.S.O. 1970, c. 271, s. 12 [committee]; *The Administration of Estates of Mentally Disordered Persons Act*, R.S.S. 1965, c. 347, ss. 4, 10, as am. and *The Mentally Disordered Persons Act*, R.S.S. 1965, c. 346, as am. by S.S. 1972, c. 71 [committee]


42. Id.

43. *Baldwyn v. Smith*, [1900] 1 Ch. 588

44. Coutts, *supra* note 24, at 62; 14 Col. L. Rev. 675 (1914)

of other jurisdictions have similar provisions.\(^{46}\)

Another relevant provision is subs. 8 (4) of the Public Trustee Act\(^ {47}\) under which a patient who is not incompetent may agree to have the Public Trustee act as a guardian of his estate while he is in a psychiatric facility. Can such a person make contracts which interfere with this guardianship? It is submitted that as he has never been found incapable of managing his affairs he probably can. However, with the rare exception of the patient who has not terminated the agreement but, because he is almost ready for discharge, is allowed to obtain regular employment while living at the institution,\(^ {48}\) this will not be a practical problem.

**B. Intervening Insanity**

Insanity occurring between the time of the making of the offer and the acceptance of the offer may be a ground for holding that there was no contract. The basic rationale behind the rule is that the insanity is equated with death and that supervening death of the offeror or offeree will make acceptance impossible. The relevancy of this doctrine to employment law is limited because, with the exception of unilateral offers, the period of time between the making and the acceptance of the offer of employment is normally short. It may, however, be worth arguing where the party wishing to escape the contract cannot meet the more stringent tests necessary to have the contract terminated on the ground of inability to contract at the time of the offer. As the employee may be either offeror or offeree the law appropriate to both offeror and offeree in the context of the employment contract will be considered.

The law will prevent a person with knowledge of another's supervening insanity from acting as if he was not so aware, in the case of the offeree, accepting the offer and in the case of the offeror, treating the acceptance as binding. The crux of the matter then is the effect of supervening insanity of which the other party is unaware. In general the law is not interested in the actual state of a person's mind. However, it is argued that the destruction of the offeree or the offeree's mind will frustrate the intention to contract, as "an offer, unless made to the public at large, assumes the continued existence

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\(^{46}\) See notes 30 and 31  
\(^{47}\) S.N.S. 1973, c. 12  
\(^{48}\) Laurie Webber, Industrial Therapy Co-ordinator at Abbie J. Lane Memorial Hospital stated that approximately 2 out of 120 patients were so employed.
of a particular offeree.” \(^{49}\) Of more relevance to employment contracts, where the continued sanity of the offeror or offeree is normally assumed to be a vital condition of the contract, is the theory that for such contracts the offeror’s supervening insanity will revoke the offer and the offeree’s supervening insanity will prevent him from accepting. For this reason in an employment contract, if intervening insanity can be proved, it will be a cogent argument. \(^{50}\)

C. Summary

It is apparent from this brief survey of the capacity of the mentally handicapped to contract, that the common law is in a confused state. In this area the application of contractual theories to the employment contract seems particularly artificial and strained. Although the actual decisions seem to provide a just balance between the conflicting policies of protection of the mentally handicapped and stability of transactions, \(^{51}\) they have resulted in theoretical illogicalities.

The requirement that the other contracting party know of the incapacity is criticized on both subjective and objective grounds: subjective theorists argue that even without it there is no consensus *ad idem* and objective theorists argue that lack of capacity to contract, without more, should be sufficient to vitiate the contract. \(^{52}\) There are, however, less abstract grounds for criticizing the law. The test for determining the existence of mental incapacity is whether there was mental incapacity to such a degree as would prevent the party from substantially understanding the nature and effect of the transaction into which he was entering. \(^{53}\) The compartmentalized view of a person’s mind involved in looking to the understanding requisite for a particular transaction is based on outmoded psychiatric views, not the modern conception of man as a totality. \(^{54}\) Further, the traditional ‘‘understanding’’ test does not

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50. *Coutts*, *supra* note 24, at 58-60
51. *Id.*, at 74-75; “Mental Illness and Contracts”, *supra* note 32, at 1025-1026, 1082
52. *Brown*, *supra* note 14, at 600-602, 613
provide relief for one who intellectually understands the transaction but who lacks effective control of his conduct.55

By requiring an incompetent's lack of understanding to have been known to the other party the common law favours the security of transactions at the expense of the protection of the mentally weak. As a further demonstration of inconsistency it must be noted that this requirement is not imposed upon infants, even those who appear to be of legal age.56 One author has made the following incisive comment on the discrepancy:

Inasmuch as the policy of the law of England is to protect infants, on the ground of their immaturity of reason, much more is it to be expected that the law would protect lunatics who have no reason at all, especially when it is recollected that in no other legal system is the principle of protecting infants carried to such an extreme extent as is done in English Law.57

The policy of the law appears to have been enunciated by Bramwell, L. J. when he stated that "it must be recollected that insanity is not a privilege, it is a misfortune, which must not be allowed to injure innocent persons."58 On these grounds, infancy, in marked contrast, appears to be a privilege that entitles infants to demand sacrifices from the rest of society.

One commentator has proposed a radical overhaul of this whole area of law and institution of an insurance or bankruptcy scheme to distribute the losses.59 It would seem more realistic to ask the legislature to rationalize and codify the law.

Generally, as the mental ability of the employee is normally essential to the performance of the contract of service and the courts will only declare a person mentally incapable in cases of serious disorder, it is his mental ability to perform the contract, not the technical legal problem of the formation of employment contracts by the mentally incapable, which controls the relationship.

56. Cook, supra note 17, at 439
57. Id.
58. Drew v. Nunn (1879), 4 Q.B.D. 661, at 668
59. Cotton, supra note 54, at 270-271
III. Rights and Duties of the Mentally Handicapped Employee

Once a party has formed a legally binding contract his mental ability to understand the transaction goes only to his ability to perform according to the terms. Where performance need not be personal the guardian of the mentally handicapped may complete the transaction but in an employment contract performance by the party himself is understood to be essential. At common law mental impairment may be sufficiently debilitating to cause the contract to be automatically terminated under the doctrine of frustration or to provide "just cause" for the employer to summarily dismiss the employee for breach of condition or wrongful repudiation. Otherwise the employer must give the employee the requisite notice of termination and failure to do so will give rise to an action for wrongful dismissal. The common law has, however, been supplemented in most jurisdictions by legislation which provides statutory relief if certain minimum requirements are not observed. While such legislation does not abrogate the employee's rights at common law, it may exempt the employer from compliance with the notice requirement if the contract is terminated due to just cause or frustration, as it may well be if a person's mental handicap is

60. Board of Industrial Relations, Order No. 61 (1975) Governing Notice of Termination of Employment made under authority of The Alberta Labour Act, 1973, Alta. Reg. 53/76; The Employment Standards Act, R.S.M. 1970, c. E-110, ss. 35, 35.1, as am. by S.M. 1972, c. 52, ss. 4, 5; S.M. 1977, c. 56, ss. 3-7; S.M. 1976, c. 33, s. 4; The Labour Standards Act, S.N. 1977, c. 52, ss. 47-54; Labour Standards Code, S.N.S. 1972, c. 10, ss. 67-74, as am. by S.N.S. 1975, c. 50, ss. 4, 5; S.N.S. 1976, c. 41, ss. 15-17; The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40, as am.; Labour Act, R.S.P.E.I. 1974, c. L-1, s. 79, as am.; The Labour Standards Act, 1977, S.S. 1976-77, c. 36, s. 43, as am.; Canada Labour Code, R.S.C. 1970, c. L-1, ss. 60.4 - 60.8, as am.; Quebec Civil Code, Art. 1668


debilitating. Legislation governing the employment relationship specially affects the mentally handicapped in another way; it will generally allow an employer to pay a handicapped employee below the minimum wage if he has the specific permission of the Minimum Wage Board.

A. Payment Below the Minimum Wage

In all jurisdictions except Quebec, an employer may pay an employee with a mental or physical handicap below the minimum wage if he has the specific permission of the administrators.63 This provision is presumably designed to enable a "handicapped person to be gainfully employed."64 However valid this desire, an exemption from this basic right of employment is only theoretically and morally acceptable if, as required by section 16 of The Construction Industry Wages Act of Manitoba,65 it is based upon a finding that the work of the handicapped person is less valuable than that of the average employee. Administrators of services such as the Adult Services Center in Halifax think it important that a mentally handicapped person find employment that he is capable of

63. Legislation which allows a handicapped employee to be paid below the minimum wage is: The Alberta Labour Act, 1973, S.A. 1973, c. 33, subs. 32(3) ("where an employee is handicapped"); General Minimum Wage Order, Minimum Wage Order 1 (1975), B.C. Reg. 724/75 subs. 2(2) which refers to the Minimum Wage Act, R.S.B.C. 1960, c. 230, s. 7, as am. by S.B.C. 1976, c. 32, s. 13A ("employee classified by the Board as handicapped"); Employment Standards Act, R.S.M. 1970, c. E-110, s. 13 ("handicapped employee"); Regulation Respecting Minimum Wages and Wages Working Conditions under the Employment Standards Act, M.R.R. 1971, Reg. E-110-R1, subs. 5(1), as am. ("employee's physical or mental handicap"); The Construction Industry Wages Act, R.S.M. 1970, c. C190, s. 16, as am., ("an employee who because of mental or physical disability is unable (a) to perform all work usually performed by employees in the class of employees within which he falls; or (b) to perform such work with as much skill as those other employees"); Minimum Wage Act, R.S.N.B. 1973, c. M-13, subs. 8(2) ("handicapped . . . employees"); The Labour Standards Act, S.N. 1977, c. 52, s. 29 ("handicapped employees"); Minimum Wage Order General N.S. Reg. 84/77, R.N.S. Vol. I, No. 3, p. 53, s. 14; Labour Standards Code, S.N.S. 1972, c. 52, subs. 48(3) ("employee who is handicapped"); The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 24, as am. ("handicapped person"); Order No. 2-78 made pursuant to Labour Act, P.E.I. Reg. No. EC894/78, s. 8 ("handicapped person"); The Labour Standards Act, S.S., 1976-77, c. 36, s. 16, as am. ("handicapped employee"); Canada Labour Code, R.S.C. 1970, c. L-1, s. 37, as am. ("handicapped person").

64. The Employment Standards Act, 1974, c. 112, s. 24, as am.; Labour Act, R.S.P.E.I. 1974, c. L-1, subs. 63(6), as am.; Canada Labour Code, R.S.C. 1970, c. L-1, subs. 37(1), as am.

65. R.S.M. 1970, c. C 190, as am.
performing so that he will not be deprived of his right to the minimum wage. 66

In Nova Scotia the large majority of current permissions were granted due to mental handicaps. 67 As the Minimum Wage Board wishes to avoid difficult issues such as whether mental illness prevents a person from adequately performing the job, they have granted the permission if the person has had a history of mental retardation which has been determined by seeing whether the person has received services designed for the mentally retarded. While the Board sets a wage as close to the minimum wage as possible 68 and permission has been infrequently granted, this provision and its application are still of concern. First, mental retardation does not per se establish a person's inability to perform and, in particular, the Board should not decide the issue by whether or not a person has been labelled as mentally retarded. Second, although the Board tries to update the permissions, there is no provision for a review procedure, and a handicapped employee may well learn to perform the job after a period of time which is perhaps lengthier than normal. Third, it can be argued that the mere existence of such a provision encourages a paternalistic attitude to the handicapped; in today's competitive market it would probably be better for all concerned if such persons are employed in jobs which they are capable of performing with adequate training.

These criticisms apparently apply to all jurisdictions as none prescribe a review procedure, the stipulations in The Manitoba Construction Industry Wages Act are unique, and pragmatic considerations probably cause all administrators to use criteria similar to those used by Nova Scotia's Minimum Wage Board.

B. Summary Dismissal

There has been a recent tendency to restrict the right of employers to summarily dismiss their employees. The courts have restricted the doctrine by applying the general common law principles of repudiation and breach of condition to the traditional categories of conduct for which summary dismissal is justified. 69 A mental

66. Sandy Leim, Work Procurement Officer at the Adult Services Centre
67. A binder, at the Labour Standards Division, containing these permissions disclosed that out of fifteen such permissions, ten were based solely on mental handicap.
68. Mr. Ross Mitchell, Director of Labour Standards Division
69. Freedland, supra note 13, at 194
handicap may cause behaviour falling into any one of these categories (neglect and disobedience, misconduct, incompetence, illness and disability) and it is a question of fact whether it will justify summary dismissal. In determining the question the courts will examine the nature and terms of the contract, the severity of the handicap and the length of the handicap.\textsuperscript{70}

It is important to realize that a mentally handicapped person’s inability to perform a job may be caused not so much by a lack of a certain level of vocational skills or by him being forced to stay at home due to illness but to his inability to conform to the general employment situation. For instance, due to a lack of basic living and social skills he may find it difficult to follow orders, be regular and punctual in attendance, co-operate with fellow employees.\textsuperscript{71} These problems are not, of course, generic to all the mentally handicapped and they are not entirely internal; they are often caused by the attitudes of fellow employees to someone who is obviously "different", or by the pressures of work. The importance of this perception lies in understanding that a mentally handicapped employee’s behaviour may fall into any one of the traditional categories of conduct justifying summary dismissal, not just illness or incompetence.

In deciding whether dismissal is justified the courts will take into account the causes of the employee’s actions. No employer is entitled to expect 100 percent performance from his employee at all times. If an employee’s erratic behaviour is due to his difficulty in coping with the pressures of work and his environment, the employer should and probably will be expected to take this into account, particularly if the employee has a long history of reliability and ability.\textsuperscript{72}

In practice, issues relating to summary dismissal are probably of greater relevance to employees who become mentally ill than to the retarded, who generally have "good" work records.\textsuperscript{73} In either case

71. See Part VII, para. 2
73. Honourable Bud Cullen, Minister, Department of Manpower and Immigration appearing as a panel member in “Proceedings of the Seminar on the Employability of the Handicapped” (Toronto, 1976) published by Social Services Division, Department of National Health and Welfare in 1977, at 62
where there is no element of fraud on the part of the employee the courts will probably be slow to find him to be at fault.\textsuperscript{74} The employee who would not have been employed if he had not lied about his psychiatric history may, however, be held to be guilty of fraud and have difficulty obtaining the sympathy of the court, especially if full disclosure on the employment application is considered a condition of employment.\textsuperscript{75}

C. Frustration

A party can successfully allege that a contract is terminated due to frustration if it appears that the "employee's incapacity, looked at before the purported dismissal, [was] of such a nature, or did . . . appear likely to continue for such a period, that further performances of obligations in the future would either be impossible or would be a thing radically different from that [agreed upon]"\textsuperscript{76} and if he is not at fault.

The most common cause of inability of the employee to perform is permanent disabling illness,\textsuperscript{77} or injury. It would seem logical to extend the principles enunciated in the cases on physical illness to mental handicaps, particularly mental illness. The leading case of \textit{Marshall v. Harland and Wolff Ltd.}\textsuperscript{78} indicates that in deciding this question of fact the court was unwilling "to concede a wide scope to the doctrine of frustration in the context of employment." The five factors that they considered in applying the doctrine tend to militate against frustration in the case of the reasonably well established employee employed for an indefinite period terminable by notice.\textsuperscript{79} This approach attempts to preserve the employee's right to due notice where he has a vested interest in the job.

The party alleging termination on the basis of frustration must not have deliberately, or perhaps, negligently\textsuperscript{80} induced the frustrating event. The issue will not often arise as normally the employer will be the one seeking to have the contract terminated, and he cannot be reasonably accused of inducing an employee's mental handicap.

\textsuperscript{74} Freedland, \textit{supra} note 13, at 200-202
\textsuperscript{75} \textit{Id.}, at 206-208
\textsuperscript{77} \textit{The Dartmouth Ferry Commission v. Marks} (1904), 34 S.C.R. 366
\textsuperscript{78} \textit{Supra} note 76
\textsuperscript{79} Freedland, \textit{supra} note 13, at 309, discussing \textit{Marshall v. Harland and Wolff Ltd.}, \textit{supra} note 76.
\textsuperscript{80} \textit{Id.}, at 321-322
However, on the infrequent occasions where it is the employee who is alleging frustration of the contract there may be a problem if his employer can successfully prove that the employee should have foreseen the frustrating event. This is particularly relevant to those who have some history of psychiatric disorder. While it seems unreasonable to require disclosure of an isolated nervous breakdown, particularly as it may hinder chances of obtaining employment, if there is a pattern of disability which might be reasonably expected to affect his performance and the person lies about this, the frustrating event may be termed self-induced. Apart from the question of foreseeability at the time of the agreement, it is a difficult question of fact whether the frustrating event may be termed self-induced if the undue consumption of alcohol or drugs contributed to it.

IV. Job Related Social Welfare Rights of the Mentally Handicapped

A. Rights of the Employee Upon Termination

Unless the contract of employment is declared void its termination may entitle the employee to certain rights, whether it is terminated because of incapacity to contract at the time of the offer, frustration or just cause. He will probably not be eligible for Workmen's Compensation as the right to compensation is confined to personal injury by accident arising out of and in the course of employment. While the word "accident" is given a liberal interpretation by the Workmen's Compensation Board of Nova Scotia, it will be difficult to prove that the employment caused, wholly or in part, the mental handicap. However, under the Unemployment Insurance Act, 1971, a disabled person can receive the initial benefits if he has the

81. The Worker's Compensation Act, S.A. 1973, c. 87, subs. 16(1); Workmen's Compensation Act, S.B.C. 1968, c. 59, subs 6(1), as am. S.B.C. 1972, c. 64, subs. 4(a); The Workers Compensation Act, R.S.M. 1970, c. W200, subs. 4(1), as am. S.M. 1974, c. 49, s. 1; Workmen's Compensation Act, R.S.N.B. 1973, c. W-13, subs. 7(1); The Workmen's Compensation Act, R.S.N. 1970, c. 403, subs. 6(1); Workmen's Compensation Act, R.S.N.S. 1967, c. 343, subs. 7(1), as am. S.N.S. 1968, c. 65; The Workmen's Compensation Act, R.S.O. 1970, c. 505, subs. 3(1), as am. S.O. 1973, c. 173, s. 1; Worker's Compensation Act, R.S.P.E.I., 1974, c. W-10, subs. 6(1), as am. S.P.E.I. 1976, c. 34, s. 1; The Worker's Compensation Act, 1974, S.S. 1973-74, c. 127, subs. 31(1)

82. Mr. Nelson, Assistant Director of Claims, Workmen's Compensation Board of Nova Scotia, has seen only one such claim. It was refused because causation could not be proved. The Quebec provisions, while slightly broader, still require causation to be proved [Workmen's Compensation Act, R.S.Q. 1964, c. 159, subs.
requisite number of insurable weeks and is not working by reason of "prescribed illness, injury or quarantine." Illness has been interpreted as including both physical and emotional illness. After a maximum of fifteen weeks the person's benefits will expire and unless he has become "capable and available" for work he cannot receive extended benefits. Until a recent legislative clarification, the prohibition against an inmate of an institution "supported wholly or partly out of public funds" receiving sickness benefits, while aimed at prison inmates, could have included inmates of facilities available to the mentally retarded or mentally ill.

The Canada Pension Plan entitles a person who is "suffering from a severe and prolonged mental or physical disability" to receive a disability pension if he has made the required contributions for the minimum qualifying period. A person is not disabled within the meaning of the Act if he is able to regularly pursue any substantially gainful occupation. Payments of the disability pension are based on a small flat rate, plus primarily, 75 percent of the amount of the contributor's retirement pension. They do not begin until the fourth month following the month in which the applicant became disabled. A claim for benefits may be made on behalf of a disabled contributor's child.

B. Modification by Contract

In determining the rights of the employee individual employment contracts are frequently far more relevant than the common law. While the contract will not jeopardize his minimum statutory rights, in large companies there are intricate benefit plans that provide for

3(1), as am. S.Q. 1969, c. 52, s. 1] As of December, 1978, neither this nor any of the provisions in footnote 81 had been judicially considered.
83. S.C. 1970-71-72, c. 48, subs. 25(b) as am. by S.C. 1974-75-76, c. 80, s. 7; S.C. 1976-77, c. 54, s. 36
84. Judy Whitman, Public Liaison Officer, Unemployment Insurance Commission of Canada, Halifax
85. S.C. 1970-71-72, c. 48, subs. 22(3) as am. by S.C. 1976-77, c. 54, s. 34
86. S.C. 1970-71-72, c. 48, s. 36 as am. by S.C. 1976-77, c. 54, s. 41
87. S.C. 1970-71-72, c. 48, s. 45 as am. by S.C. 1974-75-76, c. 80, s. 17
88. B. B. Swadron, Mental Retardation — The Law-Guardianship (Toronto: National Institute on Mental Retardation), at 74
89. Canada Pension Plan, R.S.C. 1970, c. C-5, subs. 43(2), as am.
90. Id., Mr. Tom Weir, District Manager, Halifax District Office, Income Security Program
91. Canada Pension Plan, R.S.C. 1970, c. C-5, subs. 54 (1), as am.
92. Canada Pension Plan, R.S.C. 1970, c. C-5, s. 70, as am. by S. C. 1974-75-76, c. 4, s. 35
almost every eventuality that may befall the employee. The terms of
these plans may vary from company to company but their essence is
generally the same.

Two of these plans (sick leave and long term disability) are of
particular concern to the mentally handicapped employee who is no
longer able to perform his job. A survey of seven major firms in the
Metropolitan area revealed that all those questioned on the point had
insurance for their employees which included a sickness plan and long
term disability plan with provisions contemplating eligibility due to
mental handicap, normally mental illness. The eligibility requirements
varied from company to company and were determined by the length of
the employee’s illness/disability. For the first few months of illness the
company would pay the sick (physically, mentally or emotionally)
employee part of his salary. After this period, the employee would be
eligible for long term disability benefits which would be paid by the
insurance company who administered the scheme. All plans required,
at the minimum, a physician’s statement that the employee was unable
to perform his job. After two years a more stringent test was applied.
All but two of the plans demanded that the employee’s handicap
prevented him not only from performing his own job but any job at all.
The remaining two stopped payments unless the employee was
hospitalized. The length and the amount of benefits payable varied
but frequent determinants were the employee’s salary and his length
of service.

If a person is receiving monies under a long term disability plan,
he will still be eligible to receive the full benefits under the Canada
Pension Plan as eligibility is based on contribution, not need. However,
if the insurance company’s payments are classified as earnings his
benefits under the Unemployment Insurance Act will be reduced. The
effect of these payments on provincial and municipal assistance will
be discussed in the next section.

An employee of a large company will frequently have far greater

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93. Over the period of February 9, 1979 to March 9, 1979 I questioned Benefit
Plan Officers of Dalhousie University, Maritime Tel and Tel, Volvo Canada Ltd.,
and Nova Scotia Power Corporation on the sickness and long term disability plans
available to their employees, and Maritime Life Assurance Co., National Sea
Products Ltd. and H. H. Marshall Ltd. on just the long term disability plan
available to their employees.
94. Tom Weir, supra note 90
am.
rights than those granted to him by common law or by statute. The fact that the benefits are influenced by length of service and salary is consistent with the view of a job as a valuable asset. The major criticism is that the requirement of hospitalization is unnecessarily restrictive.

C. Provincial and Municipal Social Assistance

Persons who are unemployed due to a mental handicap are but one of many classes of people who may be eligible to receive provincial assistance designed for those with needs of a prolonged nature and/or municipal assistance, which is intended to be short-term or supplementary. Current statistics indicate that the mentally handicapped are a significant client group of the City of Halifax and particularly, the Province of Nova Scotia. The substantial cost of the assistance is not borne totally by the level of government which administers the program.

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96. Family Benefits Act, S.N.S. 1977, c. 8, s. 3
97. Mr. Stewart, Social Assistance Administrator, City of Halifax; these aims are made clear by the policy, procedure and forms in the “Metropolitan Halifax Regional Municipal Social Services: Policy, Procedure and Information Manual”, effective June 1, 1977, as am. (hereinafter referred to as “Halifax Social Services Manual”), parts 1.2.3, 1.2.3.1, 1.2.4, 1.2.5.1, 1.2.6, 1.2.8, 1.2.15.
98. The data, obtained from Municipal Social Assistance Statistics, City of Halifax Social Planning and Recreation Department, for May 1979 is as follows:

<table>
<thead>
<tr>
<th>Mental Health</th>
<th>Physical Health</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>No. of Cases</td>
<td>1,118</td>
</tr>
<tr>
<td>Cost</td>
<td>$249,100</td>
</tr>
</tbody>
</table>

The “Halifax Social Services Manual”, Id., part 1.2.15.1 defines short term mental health as “a mental condition which prevents the client from being employable for a period diagnosed to be less than 6 months” and long term mental health as “a mental condition which prevents the client from being employable for a period diagnosed to be in excess of 6 months”. The definitions of short term physical health and long term physical health correspond.

99. In June 1979, of the $4,7000,000. paid to a total caseload of 18,661, $2,100,000. was paid to a caseload of 10,109 disabled (which Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5 p. 109, subs. 4(g), as am., defines as “unemployable by reason of having a major physical or mental impairment or a combination of mental impairment and physical impairment that is likely to continue for at least twelve months.”). If the ratio of physical health to mental health cases is the same as the municipal ratio then the mental health caseload is approximately 4,650. Data obtained from Mr. Gorsline Chief Supervisor of Family Benefits, Social Services Department, Province of Nova Scotia.

100. Mr. Stewart, supra note 97, stated that the provincial government reimburses
Mentally handicapped persons who wish to receive provincial or municipal assistance must meet several requirements before they are eligible. They must provide medical proof of disability\(^{101}\) and exhaust all other feasible sources of income.\(^{102}\) Payments for disability from sources such as Unemployment Insurance Commission, Canada Pension Plan, Workmen’s Compensation and insurance companies will be charged as income at 100 percent and will be used in calculating the budget deficit, if any.\(^{103}\) The municipality will also charge Provincial Social Assistance payments at 100 percent.\(^{104}\) The budget deficit is used in determining a person’s benefits.\(^{105}\)

There are certain rules and regulations which are likely to particularly affect the mentally handicapped. These include: requirements that the client be willing to participate in vocational rehabilitation in order to remain eligible for assistance;\(^{106}\) provisions resulting in the client losing most of his benefits if he is a patient in a hospital;\(^{107}\) provisions for the appointment of a trustee

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\(^{101}\) "Halifax Social Services Manual", supra note 97, parts 1.2.8., 1.2.15.; Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 7(g), 8(g), as am.

\(^{102}\) "Halifax Social Services Manual" id., parts 1.2.8., 1.2.15; Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 9 (2), as am.

\(^{103}\) "Halifax Social Services Manual", id., parts 1.2.4, 1.2.6; Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 4(n), 35(2) (g), as am.

\(^{104}\) "Halifax Social Services Manual", id., parts 1.2.6, 1.2.6.4

\(^{105}\) This is the sole criterion for the municipality ["Halifax Social Services Manual", ibid., parts 1.2.3, 1.2.4, 1.2.4.1, 1.2.4.2.; Mr. Stewart, supra note 97]. However the province will only pay the disabled person his budget deficit if this is less than the maximum benefits. [Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2, No 5, p. 109, subs. 18(2), 18(8), as am.].

\(^{106}\) "Halifax Social Services Manual", id., part 1.2.15; Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2, No. 5, p. 109, subs. 13(2), as am.

\(^{107}\) The reason that municipal assistance recipients will not receive their benefits is not that they are ineligible, but that their only expenses are personal ones. [Mr. Stewart, supra note 97]. For this they receive a comfort allowance of $20.00. ["Halifax Social Services Manual", id., part 1.3.21.8]. Provincial social assistance recipients become ineligible at the Director’s discretion. [Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2, No 5, p. 109, subs. 11(1), as am.]. This discretion allows him to grant a comfort allowance of $40.00 or pay for a patient’s continuing obligations, e.g. his family’s continuing needs if the patient is the head of the household. [Mr. Gorsline, supra note 99].
to administer the assistance for the benefit of the client if he has demonstrated that he is not able to manage it.\textsuperscript{108} A mentally handicapped person’s vocational rehabilitation will probably be influenced by incentive programs and the methods for determining income and eligibility as these will affect the financial “rewards” received for progressing along the path to independence. These effects will be discussed later.

D. \textit{Summary}

It is clear that to an employee who becomes substantially affected by a mental handicap, the most important rights are not the rights to wages or temporary unemployment insurance benefits, but the continuing benefits arising from disability, whether based upon contribution or need. Provincial and municipal assistance will probably not be of concern to the former employee of a large company but are of crucial importance to those who were never employed, and to former employees of smaller companies which could not afford comprehensive benefit schemes.

V. \textit{The Right to Equality of Opportunity}

The mentally handicapped person’s lack of self-confidence, and of employment and socialization skills, means that he has enough problems finding jobs without having to contend with discrimination. However he is likely to encounter discrimination from employers because of prejudice or, more likely, misconceptions.

Few employers actively practice a policy of discrimination against the mentally handicapped. Even if they did, it would be hard to identify as they could often justify not hiring the person on the basis of lack of qualifications, as long as the qualifications required were not too outrageously high.\textsuperscript{109} It is more common to discover that the reason for not hiring a mentally handicapped person who appears capable of performing the job is the fear that the individual will disrupt the work situation because he is accident-prone,\textsuperscript{110} cannot co-operate with his fellow employees,\textsuperscript{111} or, in the case of

\begin{footnotes}
  \footnotetext[108]{*Halifax Social Services Manual*, id., part 1.2.20; Mr. Stewart, \textit{supra} note 97; Family Benefits Act, S.N.S. 1977, c. 8, s. 10; Family Benefits Regulation, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, s. 40, as am.}
  \footnotetext[109]{Ed Russell, Information Officer at the Nova Scotia Human Rights Commission}
  \footnotetext[110]{B. B. Swadron, \textit{supra} note 88, at 72-73}
  \footnotetext[111]{Laurie Webber, \textit{supra} note 48}
\end{footnotes}
the post-mentally ill, cannot cope with responsibility. It is a question of fact whether there is a valid basis for these fears, but frequently they will be caused by misunderstanding rather than a true appreciation of the situation.

However bona fide the beliefs and actions of the employer, the mentally handicapped person is justified in believing that he suffers from stigmatization. The post-mentally ill person may respond to the situation by attempting to hide his illness. This is a dangerous game to play; if discovered it may give the employer the right to summary dismissal and will probably result in an uncomfortable work relationship. All too often the reaction of both the post-mentally ill and the mentally retarded is simply not to actively seek jobs.

"Tools" especially suited to combatting this particular effect of the public’s attitude to the mentally handicapped include union pressure, affirmative action programs aiming to reduce qualification standards that are too high, government programs providing economic incentives for introducing the mentally handicapped into competitive work situations, increased use of on-the-job training and human rights legislation, which is an important means of protecting the rights of any minority group. While the legislation’s effectiveness depends upon the vigour with which it is enforced and the public’s acceptance of the protected right, it does provide a means for formal enforcement.

At present the rights of the mentally handicapped are not entrenched in any human rights legislation in Canada. The Nova Scotia Human Rights Commission, however, accepts complaints and attempts to deal with them on an informal basis, with varying degrees of success. In 1978 they accepted twenty such complaints, most of them concerning employment and some of

113. An example of such a program is Canada Manpower Industrial Training Program (hereinafter referred to as CMITP). For a discussion of the program see note 155a. It was suggested by Dr. Rocher, panel member, in “Proceedings of the Seminar on the Employability of the Handicapped”, supra note 73, at 41-42 that such a system is preferable to a quota system (such as the one proposed in Special Report to Parliament incorporating recommendations from the National Conference “Human Rights in Canada, The Years Ahead” held in Ottawa, Dec. 8-9-10, 1978” (January, 1979. Canadian Human Rights Commission) at 10 (hereinafter referred to as “Human Rights Report”).
114. Ed. Russell, supra note 109
them not legitimate.\textsuperscript{116} The Federal Human Rights Commission has not yet received a complaint but is prepared to deal with it on an informal "good office basis."\textsuperscript{116} It has been suggested that in those jurisdictions which have prohibited discrimination in employment on the basis of physical handicap\textsuperscript{117} most complaints by the mentally handicapped regarding employment could be treated on a formal basis by giving a broad interpretation to the words "physical handicap".\textsuperscript{118} Although the New Brunswick Human Rights Commission takes that approach,\textsuperscript{119} to date the administrators of the Nova Scotia Human Rights Act have felt that political constraints prevented them from classifying mental handicaps with a physical basis, such as schizophrenia (chemical) and Downs Syndrome (birth defect), as physical handicaps.\textsuperscript{120}

There is a strong movement afoot to include mental handicap within human rights legislation in Canada to bring it into accord with the international human rights covenants that Canada has ratified.\textsuperscript{121} Until this occurs Canadian human rights commissions will have to continue with their present methods of statutory interpretation and affirmative action programs\textsuperscript{122} as the means of enforcing the mentally handicapped person's right to be eligible for employment which he is capable of performing.

\textsuperscript{115} Examination of the records by Leslie Dolan, librarian at the Nova Scotia Human Rights Commission

\textsuperscript{116} Statement by Gordon Fairweather, Chief Commissioner, Canadian Human Rights Commission, in a letter contained in a file entitled "Mental Handicap-General", in the federal Human Rights Commission office in Halifax.

\textsuperscript{117} The Human Rights Act, S.M. 1974, c. 65, C.C.S.M., c. H175, s. 6, as am. by S.M. 1977, c. 46; Human Rights Code, R.S.N.B. 1973, c. H-11, s. 3, as am. by S.N.B. 1976, c. 31, s. 2; Human Rights Act, S.N.S. 1969, c. 11, s. 11, as am. by S.N.S. 1974, c. 46, s. 1; Human Rights Act, S.P.E.I. 1975, c. 72, R.S.P.E.I. 1974, H-12.2, s. 11; Canadian Human Rights Acts, S.C. 1976-77, c. 33, ss. 3, 7-10

\textsuperscript{118} Physical handicap or disability may be caused by bodily injury, birth defect or illness and includes epilepsy and, but is not limited to . . . For definitions see: The Human Rights Act, C.C.S.M., ch175 enacted by S.M. 1974, c. 65, s. 1 as am. by S.M. 1977, c. 46, s.1; Human Rights Code, R.S.N.B. 1973, c. H-11, s. 2 as am. by S.N.B. 1976, c. 31, s. 1; Human Rights Act, S.N.S. 1969, c. 11, s. 11 as am. by S.N.S. 1974, c. 46, s.1; Human Rights Act, S.P.E.I. 1975, c. 72, R.S.P.E.I. 1974, H-12.2, s.11, Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 20

\textsuperscript{119} Gordon Fairweather, supra note 116

\textsuperscript{120} Ed. Russell, supra note 109

\textsuperscript{121} "Human Rights Report", supra note 113, at 5

\textsuperscript{122} The Human Rights Commission in Saskatchewan had has particular success in persuading employers to employ the mentally handicapped by using economic incentives. (Ed. Russell, supra note 109)
VI. Legislation Affecting Employment Skills

A mentally handicapped person's lack of employment skills is probably his greatest liability in attempting to obtain employment. As previously mentioned, lack of skills generally prevents the issue of discrimination from arising, and it deters the afflicted person from seeking a job. The legislation considered in this section affects the important employment skills of self-reliance and initiative as well as education and professional and technical qualifications. Legislation concerning vocational rehabilitation services will also be considered.

Over-protection of the mentally handicapped is a major pitfall in the legislation. Although municipal and provincial social assistance legislation aims to promote independence and vocational rehabilitation, it authorizes the appointment of a trustee without requiring an adjudication of incompetency. Further, the trustee is charged only with the administration of the trust monies, not with the encouragement of the client to take as much responsibility as possible nor with determination of the point at which the client no longer needs a trustee. Alberta appears to be the only jurisdiction in which the incompetency legislation strives to allow the person to retain as many rights as he is capable of handling. While most jurisdictions permit an adjudication that an individual is incapable of managing his person and/or his estate, and allow the court to restrict the powers of the trustee or committee of the estate, the tone of the acts encourages comprehensive control. This is echoed in legislation which authorizes an

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123. See Part IV, para. 1 and note 106
124. See note 108
125. The legislation in Manitoba, Newfoundland, Prince Edward Island and Quebec was not surveyed.
126. Patients' Estate Act, S.B.C. 1962, c. 44, ss. 2, 16, as am. S.B.C. 1964, c. 36, ss. 2,9; S.B.C. 1965, c. 32, ss. 1,7; S.B.C. 1968, c. 36, s.2; S.B.C. 1976, c. 33, s. 104; Infirm Persons Act, R.S.N.B. 1973, c.I-8, ss. 6,9, as am. by S.N.B. 1979, c. 41, s. 66; Mental Incompetency Act, R.S.O. 1970, c. 271, ss. 8, 12; The Mentally Disordered Persons Act, R.S.S. 1965, c. 346, ss. 3, 6, as am. by S.S. 1972, c. 71. [Nova Scotia is the notable exception. See Incompetent Persons Act, R.S.N.S. 1967, c. 135, s. 2, as am.]
127. Infirm Persons Act, R.S.N.B. 1973, c.I-8, ss. 11,39, as am.; Mental Incompetency Act, R.S.O. 1970, c. 271, ss. 12, 14, 18, 39; The Mentally Disordered Persons Act, R.S.S. 1965, c. 346, ss. 14, 18, 42, as am. by S.S. 1972, c. 71
128. The acts do not list the powers of the guardian of the person and do not emphasize that the trustee of the estate may have only partial control. This is particularly true of the Patient's Estate Act, S.B.C. 1962, c. 44, as am. While the
investigation into the competency of a patient to manage his
estate. Over-protection of the mentally handicapped is undesira-
ble not only because it inhibits them from realizing their potential,
but because it is unjust to deprive a person of rights that he is
capable of exercising.

A person's educational qualifications greatly influence his
eligibility for employment. While the focus here is on adults it must
be noted that the education received by those under sixteen years of
age significantly affects their employment prospects, especially the
mildly retarded who are often termed "slow" simply because they
receive a poor start in life due to economic or social
disadvantage(s). Increasing the services available to the mentally
handicapped in the regular education system would reduce the
likelihood of them being stigmatized by the public, prospective
employers and the administrators of the minimum wage
legislation.

A person's right to practice certain occupations or professions
may be cancelled or suspended in the event of unsoundness of mind,
mental illness or insanity, or any conduct that may constitute or
demonstrate incompetency, misconduct or conduct detrimental to
the public interest. For example, a barrister who is "too ill,
physically, mentally or emotionally, to practise [may if] the public
interest so requires be suspended from practice." There are many
other acts with similar provisions. The vagueness of the wording
means that there is wide administrative discretion.

Although various levels of government are very involved in

Mental Incompetency Act, R.S.O. 1970, c. 271, is slightly better than the others,
even it stands in marked contrast to Dependent Adults Act, S.A. 1976, c. 63, ss. 1,
6, 9, 10, 27 (2), as am. These sections attempt to preserve as many rights of the
dependent adult as possible by requiring a review of the trusteeship order and
emphasizing that full guardianship should only be granted if partial powers are
insufficient to meet the needs of the person. This statute appears to be more realistic
in another sense: although as of December 1978 it had not been judicially
considered, it would seem that the guardian of the person, not the trustee of the
estate, would determine the dependent adult's eligibility for employment. This is
because the guardian may have control over work, education and vocational or
other training (ss. 9, 10), while actions on the employment contract are not
specifically included in the trustee's powers (ss. 29, 30).

129. See notes 30 and 31
130. See note 67
131. Barristers and Solicitors Act, R.S.N.S. 1967, c. 18, s. 32 as am. by S.N.S.
1977, c. 23, s. 5; S.N.S. 1978-79, c. 11, s. 5
132. B.B. Swadron, The Law and Mental Disorder, (Toronto: The Canadian
Mental Health Association, 1973), at 84-91
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Attempts to increase the employment skills of citizens the only legislation dealing specifically with the problems of the disabled is the federal *Vocational Rehabilitation of Disabled Persons Act*, which authorizes federal-provincial agreements, and the resulting provincial legislation. One of the components of the provincial vocational rehabilitation program which will be eligible for the federal reimbursement of 50 percent is the utilization of "the services of voluntary organizations that are carrying on activities in the Province in the field of vocational rehabilitation of disabled persons." Under this mandate the Province of Nova Scotia has enacted legislation regarding the funding of these activities and presently funds workshops to the extent of 65 percent of an approved budget. The Province is required to "establish an appropriate administrative organization within the Province to administer and to co-ordinate all activities in the Province relating to the vocational rehabilitation of disabled persons", which encompasses seeking out disabled persons, giving them counseling, guidance and assessment, and supplying or arranging for necessary vocational rehabilitation services. These services will be examined in the next section. Although the province has attempted to fulfill its mandate, in view of the frequent criticism that there is a lack of co-ordination of services it would be informative if statistics were available allowing one to assess its success.

VII Services Affecting Employment Skills

A recurring theme of advocates of the rights of the mentally ill and the mentally retarded is that the mentally handicapped must be

133. R.S.C. 1970, c. V-7, s. 3, as am.
134. Vocational Rehabilitation of Persons Agreement Between The Government of Canada and the Province of Nova Scotia, s. 2 (hereinafter referred to as the "Fed.-Prov. VRDP Agreement"). Because the "Fed.-Prov. VRDP Agreement" is in a standard form, the agreements with the other provinces probably have identical terms.
135. "Fed.-Prov. VRDP Agreement", id., subs. 4(c)
137. Mr. George Matthews, *supra* note 12, stated that the proportion of funding was determined by ministerial discretion and that provincial funding was instituted in 1969 at a rate of 50 per cent and increased in 1974/75 to the present 65 per cent. See note 194 for details.
138. "Fed.-Prov. VRDP Agreement", *supra* note 134, s. 7
139. Peggy Sandford, Coordinator of Rehabilitation Services, Department of Social Services, Province of Nova Scotia
entitled to develop to the fullest extent their capabilities to perform productive work. It is given moral support by inclusion in the 1971 United Nation’s “Declaration on the Rights of Mentally Retarded Persons”, Article III, and economic and governmental support by the federally and provincially accepted theory that vocational rehabilitation is desirable because it would restore disabled persons “to usefulness . . . so that as far as possible they are enabled to contribute to Canada.” In Halifax, it receives municipal endorsement because encouraging “the individual to use his skills and personal resources towards independence” is one of the goals of the City of Halifax Social Planning and Recreation Department.

The mentally handicapped’s lack of skills is the most obvious factor hampering his eligibility for employment. The extent to which proper education and training can reduce their limitations is not widely realized. Although the needs of each mentally handicapped person are unique there is a basic difference between the mentally retarded and the mentally ill, or the post-mentally ill. The mentally retarded are regarded as having limited abilities, at least to some extent (it has been suggested that not only may their abilities be increased with education, but that they may be oriented to specific tasks), while the mentally ill are thought of as having a curable disease. The ability of both groups to become productive members of society may be hampered by factors that have contributed to their handicap or be a result of it, such as, economic and cultural deprivation, reliance on drugs or adjustment to a therapy oriented institution rather than a competitive society. For these reasons a vocational rehabilitation program is frequently only one part of a plan designed to help the mentally handicapped person to “cope”. Such a program will attempt, for example, to ensure that he has accommodation suited to his needs and to teach him leisure and socialization skills, including the employment skill of being able to recognize that a superior is an authority, not a support figure.

140. See Appendix IV
141. This theory is part of the preamble to the “Fed.-Prov. VRDP Agreement”, supra note 134.
143. B. B. Swadron, supra note 88, at 60
144. Marie Kavanaugh, Social Worker at the Abbie J. Lane Memorial Hospital, Halifax, Nova Scotia
administration schemes governing them have repercussions on vocational rehabilitation, the focus of this section will be on vocational rehabilitation. For practical reasons, field research was confined to Halifax.

A. Overview

Organizations that provide vocational services for the mentally handicapped recognize that not all of their clients will be able to achieve full self-sufficiency in the sense of being able to compete in the open labour market. They attempt to include in their spectrum of services programs which will allow such individuals to live as “normal” a life as possible; that is, the services will, to the greatest extent possible, be non-institutional and emphasize traditional work values such as punctuality, regular attendance and gainful occupations. Of course they also aim to provide the means whereby those who are capable of achieving self-sufficiency may do so.145

This inquiry into the vocational rehabilitation services in Halifax that are designed for the mentally handicapped revealed, unfortunately, that while plans which appear impressive have been formulated,146 they have not been realized.147 The Abbie J. Lane Memorial Hospital prepares patients for discharge by in-patient and out-patient services. The Industrial Therapy Co-ordinator helps the very few patients ready for discharge find jobs.148 The Abbie Lane

145. Bill Grant, Coordinator of Citizen Advocacy Program, Canadian Association for the Mentally Retarded, Halifax Branch; Sandy Leim, supra note 66; “Moyer Report”, supra note 8
146. C. Edwards Doherty, “On-the-Job-Training” (a description of the program prepared for C.A.M.R.’s internal use) states that on-the-job training is designed to bridge the gap between sheltered workshops, or sheltered industry, and competitive community employment. The Program may operate in three ways: (i) work crews or teams (ii) work stations or adapted industry (iii) job tryout/adjustment, with the last type most resembling the competitive employment situation. The “Moyer Report, id., at p. 3 develops a program for the post-mentally ill that has a similar structure although the terminology and aims differ somewhat. The facilities include work training centres (similar to sheltered workshops) and sheltered workshops (similar to sheltered industry). There are two services that are notably different from those proposed by the C.A.M.R.: adapted industry (a relatively competitive situation providing a meaningful job history) and more emphasis on vocational rehabilitation and support services.
147. See Part I
148. Until recently the Abbie Lane’s patients were the chronically ill. For a variety of reasons, including severity of mental illness, institutionalization and loss of skills very few chronically ill patients are ever able to maintain competitive employment.
Social Work Department, which handles the out-patient services for the ex-psychiatric patients of all hospitals in Halifax, uses seminars and individual counselling services to help approximately twenty-nine people increase their living, including employment, skills. Many of these people need training as their institutionalization has lowered their level of skills.\textsuperscript{149} At present there are only two vocational programs designed specifically for the post-mentally ill which serve a few people who are highly eligible for employment.\textsuperscript{150}

The services available to the mentally retarded in the Halifax area suffer from different deficiencies. Although they reach a larger percentage of those in need, the most common service is workshops\textsuperscript{151} which are notably unlike the normal work situation, although they are becoming less like activity centres;\textsuperscript{152} the Adult Services Centre is conducting some training outside the workshop by competing for building cleaning contracts.\textsuperscript{153}

The only other programs available to the non-institutionalized\textsuperscript{154} mentally handicapped are workshops designed for all handicapped

\textsuperscript{149} Marie Kavanaugh, and Steve Bormeman, Social Workers at the Abbie J. Lane Memorial Hospital, Halifax

\textsuperscript{150} One of these programs is Domestic Appliance Repair Centre which provides a service. It was designed as a sheltered workshop but due to its financial and vocational rehabilitational success, it is now an almost self-sufficient adapted industry run by Human Resource Development Association. Rebound Industries was designed as an adapted industry requiring a fairly high level of skill from its employees, who manufacture high quality wooden toys on a small construction line basis. Each facility employs approximately five people. [Marie Kavanaugh and Steve Bornemen, \textit{id.}; Yvonne Blanchard, in charge of Special Projects in the City of Halifax Social Planning and Development Unit.]

\textsuperscript{151} See Part I for figures. Also, there are presently no sheltered industries in Nova Scotia (Norma Lloyd, \textit{supra note 2} and data on the numbers in on-the-job training is unavailable.

\textsuperscript{152} Activity centres are no longer part of the vocational rehabilitation services as their goal of keeping the adults "busy" is not consistent with increasing their eligibility for employment. Workshops are placing increasing emphasis on task-related training and on obtaining contracts which are at least marginally profitable. George Matthews, \textit{supra note 12}; Sandy Leim \textit{supra note 66}; Mr. McRae, Parliamentary Secretary to Federal Minister of Health and Welfare, "Proceedings of the Seminar on the Employability of the Handicapped," \textit{supra note 73}, at 55

\textsuperscript{153} Sandy Leim, \textit{id.}

\textsuperscript{154} A person in an Adult Residential Centre or Regional Rehabilitation Centre will receive some training, although the amount and type will depend upon which category of institution he is in. Homes for Special Care Regulations, N.S. Reg. 127/77, R.N.S. Vol. I No. 6, p. 2; Ken Jupp, in charge of Adult Institutional Services for the Mentally Handicapped, Social Services Department, Province of Nova Scotia
such as Goodwill Industries, New Leaf Enterprises, part-time work arranged by the municipality (Project 50),\(^{155}\) formal training such as that provided by municipal adult education and Canada Manpower Institutional Training, on-the-job training placements arranged through Canada Manpower (CMITP)\(^{155a}\) or through the Services Department of the Province of Nova Scotia. While this is an impressive array of names, the value of these services to the mentally handicapped is questionable.

Workshops which serve the physically, mentally and emotionally handicapped are not efficient. Not only will they not realize their goal of helping a person reach his occupational potential but, because they are not geared to the client’s particular needs, they may actually be dysfunctional, causing the individual’s problems to multiply.\(^{156}\) A moral argument against them is that “lumping” all the handicapped together “smacks of keeping them out of sight and out of mind.” Formal classroom training will only be of benefit to well-adjusted individuals who lack an employment qualification. This is obviously not the case with the mentally handicapped. The usefulness of Project 50 has been questioned on the grounds that because it is not a realistic facsimile of the normal situation, it serves simply as a source of extra income, not as a means of instilling in the individual the traditional work values necessary for his vocational rehabilitation.\(^{157}\) However, as with most opportunities for the mentally handicapped it can be justified on the grounds that it is “better than nothing”. Employment in sheltered

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155. Project 50 arranges part-time (up to 25 hours per month) work for recipients of municipal social assistance who are not classified as able bodied unemployed. They receive training from employers in the community and $50 per month from the municipality. “Halifax Social Services Manual”, \textit{supra} note 97, parts 1.2.6.9, 1.3.21.7; Yvonne Blanchard, \textit{supra} note 150

155a. CMITP is employer-centered training for which the employer is partially reimbursed by the Commission. It attempts to increase the employment opportunities available to “clients with special needs” (i.e. those with mental, emotional, social, psychiatric or physical problems) by reimbursing the employer or 85% of their wage costs (in contrast to a reimbursement of 40% for training the employed and 60% for training those unemployed or threatened with unemployment). It is more suited to the mentally handicapped than the Institutional Training Program. [Information obtained from “Basic Facts on Social Security Programs” (1978) prepared by the Welfare Information System Branch of Health and Welfare Canada, at pp. 23-27 and Mr. Fader, Industrial Training Consultant, Nova Scotia legion.]

56. Bill Grant, \textit{supra} note 145 states that transfers of deviancies occur in these situations.

57. Laurie Webber, \textit{supra} note 48
industry and on-the-job training, services which would be of great assistance to the mentally handicapped who are capable of becoming fully competitive members of society, are the ones which serve the fewest.\textsuperscript{158}

B. \textit{The Legal Status of the Work of the Mentally Handicapped in Workshops and Institutions}

Both the mentally ill and the mentally retarded often perform work for which they do not receive the normal advantages of employment, that is the right to payment of at least minimum wage and to participation in government plans such as Canada Pension Plan, Unemployment Insurance and Workmen’s Compensation. The major reasons for this are that the workshops and institutions do not regard them as employees, and that the government has allowed this view to prevail. This section will examine and critically analyze the reasons for the existing situation that are advanced by the administrators of the institutions and of the applicable legislation.

A workshop for the mentally retarded, the Adult Services Centre in Halifax, pays their clients $7.50 for a 30-hour week.\textsuperscript{159} This is not contrary to the provincial minimum wage legislation since their clients are exempted as they are classified as “persons receiving training under government approved plans”.\textsuperscript{160} Inmates of mental institutions, such as the Abbie J. Lane Memorial Hospital in Halifax, who receive 20-30 cents per hour\textsuperscript{161} would probably be similarly exempted under the theory that work therapy is training.\textsuperscript{162} In those jurisdictions which do not have a similar exemption in their minimum wage legislation\textsuperscript{163} this practice would

158. See note 151. Also, although data on the numbers in on-the-job training is unavailable, it is well known that there are not many, e.g. CMITP only aims to have 10 percent of its participants be “clients with special needs”. Mr. Faderm \textit{supra} note 155a
159. Sandy Leim, \textit{supra} note 66
160. Minimum Wage Order General, N.S. Reg. 84/77, R.N.S. Vol. 1, No. 3, p. 53, sub. 1(f); Ross Mitchell, Director of Labour Standards Division, Province of Nova Scotia. For a discussion of the possible reasons underlying this exemption see note 180.
161. Laurie Webber, \textit{supra} note 48
162. Ross Mitchell, \textit{supra} note 160
163. Other provinces which have excluded from the operation of the minimum wage legislation categories of workers which could include handicapped patients or trainees are: British Columbia (by numerous regulations, e.g. B.C. Reg. 290/73 excluding “mentally retarded trainees . . . at the Nanaimo Association for the Mentally Retarded, Nanaimo, B.C. for the period expiring February 28th 1974.”) Manitoba (by the \textit{Employment Standards Act}, R.S.M. 1970, c. E 110, subs. 2(g)
only be acceptable if it could be said that the minimum wage legislation did not apply to the patients or trainees because they did not fall within the statute’s definition of an employee or if the institution had obtained the specific permission of the administrators of the legislation.

Neither the Abbie Lane nor the Adult Services Centre believe that they are taking advantage of their patients or clients. The major reason is that they do not believe that these people are employees because the programs are designed to benefit them, by providing work therapy for the patients and skills training for the clients. Both institutions also advance two practical reasons. The Abbie Lane argues that the remuneration need only be small, as a form of incentive, since the hospital pays all the patient’s expenses and the work is of no benefit to the hospital as it has sufficient staff to operate without patient labour. The Adult Services Centre supports its position on the grounds that the aim of the workshop is to break even, or make a small profit which is channelled back into their training program, and that if the trainees earned too much it would adversely affect their social assistance. Although I believe these justifications to be bona fide, under the present circumstances, this institutional practice may be criticized on both moral and legal grounds.

Even if a workshop does not consciously keep skilled, productive workers so that the workshop can make some profit to contribute to the proportion of their expenses that C.A.M.R. must fund, it
could be paying a client far too little. This could be due to an insufficient emphasis on job placement and to constrictions (actual or perceived) of the provincial and municipal social assistance plans' benefits.

The unrestricted operation of institutional work therapy programs has been frequently criticized in the United States by lawyers, psychologists, psychiatrists and the courts, on the ground that too often the aim of the work is not therapy but the performance of menial, time-consuming tasks essential to the functioning of the institutions. Whether or not this situation exists in Canada may well be worth investigating. Even if it does not, it can be argued that the patient should receive closer to the minimum wage because justice and frequently the statutory authority for depriving a non-criminal of his freedom bestow a right to treatment upon such a patient; this encompasses a right to programs which offer work closely parallel to normal work, that is, meaningful jobs with substantial compensation.

The institutions' attitude can be criticized on the legal ground that the patients and clients are employees. While no test for distinguishing employees from trainees has been established, Lord Thankerton's test in *Short v. Henderson Ltd.*¹⁷⁴ is the most appropriate as it does not emphasize the distinction between a contract of service and a contract for service, but simply the distinguishing criteria of the contract of service itself. They are: (a) the master's power of selection of his servant; (b) the payment of

¹⁶⁸. Bill Grant, *supra* note 145

¹⁶⁹. See Part VIIC for details


¹⁷¹. M. J. Perlin *id.*

¹⁷². B. B. Swadron, *supra* note 132, at 45; for example, it can be argued that the Hospitals Act, R.S.N.S. 1967, c. 249, impliedly grants a patient the right to treatment. A patient may be admitted to a facility for observation or remain as an informal patient only if a qualified practitioner believes that he requires the in-patient services provided by the facility (subs. 27, 28, 34(1)). Therefore a formal patient whose detainment is compulsory because he "suffers from a psychiatric disorder and is a danger to his own safety or the safety of others (subs. 34(2)) should have an even stronger right to treatment. This is supported by the authority of the Governor in Council to make regulations "with respect to any matters that he considers necessary or desirable to insure high standards of treatment and care of patients". (subs. 15(r)).

¹⁷³. M. J. Perlin, *supra* note 170, at 322

¹⁷⁴. (1946), 62 T.L.R. 427 (H.L.), at 429
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wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal. As the essential element of the contract of service is the right to control, the contract may still exist if some of these elements are absent altogether or present only in an unusual form. In one of the Canadian cases which applied this test, it was stated that the surrounding circumstances as well as the contract are to be taken into account.\textsuperscript{175} Frequently all four elements of the test are present, to at least some degree, in the work of the patient and client of the institutions under consideration. While defining such people, especially patients, as employees may well be extending the definition to a non-traditional area,\textsuperscript{176} it will not be distorting it, and the Minimum Wage Board is willing to fully consider the matter if it arises.\textsuperscript{177} The validity of viewing a client as an employee is strengthened by their similarity to apprentices, who have traditionally been regarded as a special type of employee.

Recognition of patients and clients as employees may not increase their wages due to their exemption from minimum wage legislation,\textsuperscript{178} or specific permissions\textsuperscript{179} but an open discussion of the issue\textsuperscript{180} may lead to more supervision, by the funding bodies or the Minimum Wage Board, and should result in reassessment of the reasons for their low wages.

At present neither the Abbie Lane nor the Adult Services Centre participates in Unemployment Insurance, Canada Pension Plan or Workmen's Compensation on behalf of its patients or clients. Again the justification is that they are not employees.\textsuperscript{181} The necessity for

\textsuperscript{175.} Earthworm Red River Ltd. v. Underwood, Mclellan & Assoc. Ltd. [1972] 1 W.W.R. (Man. Q.B.) 362, at 370, aff'd without comment [1973] 2 W.W.R. 576. This test was also applied in Marine Pipelines and Dredging Ltd. v. Canadian Fina Oil Ltd. (1964), 48 W.W.R. 462 (Alta. S.C.A.D.). \textsuperscript{176.} Ross Mitchell, supra note 160, stated that the Minimum Wage Board would not examine relationships such as these, which have traditionally not been regarded as employment relationships, unless the question arose in a complaint made by one of the parties to the relationship. \textsuperscript{177.} Id. \textsuperscript{178.} See notes 160 and 163 \textsuperscript{179.} See note 63 \textsuperscript{180.} Although I have not discovered the reasons for this exemption in the Minimum Wage Order, I agree with Ross Mitchell, supra note 160, that the exemption is probably due to administrative convenience, the trainees' nonattachment to the traditional workforce, and the belief that the funding body supervises the program. In this case no such supervision occurs, as the Department of Services believes that this falls within the discretion of the local board of the association that is managing the program. [George Matthews, supra note 12] \textsuperscript{181.} Sandy Leim, supra note 66 and Laurie Webber, supra note 48
contributions is decided by Revenue Canada, not in accordance with a general ruling but on the basis of the individual employer/employee relationship, and this issue only arises if a government auditor or an employee queries the practice. Although Revenue Canada will not disclose this confidential information, it seems reasonable to conclude that non-participation has never been questioned. If it were questioned a conclusion that patients or clients have a contract of service would in itself bring them within these various employment statutes. They may not work for the minimum number of hours necessary to contribute to the U.I.C. (20 hours per week) and may not earn enough to contribute to the C.P.P. ($21.15 per week), and terming them employees for this purpose would be inconsistent with classifying them as incapable of work and thus eligible for social assistance benefits.

In determining whether the mentally handicapped may participate in the Workmen’s Compensation Plan, the attitude of the provincial administration is important. Although the handicapped often may face obstacles due to the erroneous belief that they are “high risk”, the Nova Scotia Workmen’s Compensation Board has granted coverage to a workshop for post-mentally ill patients who were receiving the minimum wage. It is even willing to deem the trainees at the Adult Services Centre to be earning the minimum wage and to cover them at the relatively low rate (45¢ per $100 of wages) common to all welfare organizations which provide this type of training. This type of coverage is desirable because it will be consistent with viewing the trainees as employees, it is often required by the owners of the buildings in which some of the trainees clean, and the benefits are frequently greater than those provided by provincial and municipal assistance. It is thus

182. Bonnie Mercer, Ruling Officer for C.P.P. and U.I.C. at Revenue Canada Taxation
184. Canada Pension Plan Regulations, amendment, S.O.R./78-935
185. See Section IVA
186. The California Workmen’s Compensation Board refused to cover blind and deaf employees who were operating saws. When an accident occurred, it was to a supervisor, not a handicapped person. “California Bigots” The Touchstone (ed. by Steve Freygood) of Halifax, Nova Scotia (May 1979) Vol. 2, No. 5, at 19
187. Yvonne Blanchard, supra note 150. The workshop was the Domestic Appliance Repair Centre described in note 150.
188. Mr. MacAuley, Chief Assessment Officer, Workmen’s Compensation Board of Nova Scotia
189. Claire Edwards-Doherty, Director of Adult Services Centre, Halifax
190. The normal benefit paid by Workmen’s Compensation is 75% of the worker’s
unfortunate that the Adult Services Centre cannot afford the premiums. The question of insuring patients who participate in a work therapy program has not arisen. If it did arise, they would probably be treated in the same manner as the trainees, if the Workmen’s Compensation Board gave its approval.

The present practices of the Abbie Lane and the Adult Services Centre, based on their apparently unquestioned assumption that their patients and clients are not employees, and the difficulty that the Adult Services Centre is experiencing in obtaining private accident coverage for its trainees while they are working outside the workshop, are further illustrations of society’s historical misunderstanding of or lack of concern for the mentally handicapped’s needs and abilities. Even if they are not classified as employees, if the mentally handicapped receive the normal benefits of employment, particularly higher compensation, it will probably increase the success of the training or therapy. The Adult Services Centre’s concern with financial restrictions and with the effect of income on the trainee’s social assistance demonstrates the importance to vocational rehabilitation services of funding and of the provincial and municipal social assistance.

C. Some Ramifications of Legislation

The Adult Services Centre’s lack of funds is occasioned by the fact that the only governmental financial support that they receive is the free use of their building, from the municipality, and 65 percent of an approved budget, from the province. However, two types of institutions which provide rehabilitation services are 100 percent government financed. These are Regional Rehabilitation Centres wage [Workmen’s Compensation Act, R.S.N.S. 1967, c. 343, ss. 32, 33, as am. by S.N.S. 1968, c. 65]. In this case the injured trainee will receive $330 per month. If he is single, the maximum that he can receive from provincial assistance is $267 per month and the municipality will only supplement this is he has a budget deficit based on his allowable needs and he has a budget deficit based on his allowable needs and his income. [See Section IVC, para 2, notes 103-105.] Thus the single worker will generally gain from Workmen’s Compensation and, in any case, he will suffer no detriment.

191. Claire Edwards-Doherty, supra note 189
192. Mr. Murray, Supervisor of Assessments, Workmen’s Compensation Board of Nova Scotia
193. Claire Edwards-Doherty, supra note 189
194. George Matthews, supra note 12, stated that the approved budget would include most actual expenses but not fund-raising costs or payments to the provincial or national organizations. See also note 137
(emphasizing short-term care and rehabilitation, including vocational), which are totally supported by the provincial government, and Adult Residential Centres (for those in need of long-term care) which are reimbursed by the provincial government for $66\frac{2}{3}$ percent of their expenses\textsuperscript{195} and by the municipality for the remainder.\textsuperscript{196} This funding pattern does not seem consistent with the provincial and municipal goal of promoting independence, as it is well accepted that normalization is most likely to occur in a non-institutional setting. The explanation would seem to be rooted in the historical fact that charities, such as the Canadian Association for the Mentally Retarded which manages the Adult Services Centre, have never been fully funded by the government. Similarly, tradition accounts for the greater municipal financial involvement in Adult Residential Centres than Regional Rehabilitation Centres.\textsuperscript{197} Such costly policy decisions should not be unquestioningly determined by past practice. Clearly, non-institutional vocational rehabilitation services should be encouraged by increased government funding, with a corresponding increase in supervision over such matters as wages paid to the trainees.

Municipal and provincial assistance legislation contains incentive programs and eligibility requirements which affect, both directly and indirectly, by encouraging the workshops to pay low wages, a recipient’s desire to achieve vocational rehabilitation. The municipal government’s policy is to allow their clients only a $20.00 incentive,\textsuperscript{198} but their policy is much more flexible and incentive-oriented than it seems; projects such as Project 50, “Pre-Training Placement” and “Employability Preparation Project”, which attempt to stimulate independence, have obtained specific approval and have unique incentive programs.\textsuperscript{199} The provincial assistance program, which affects a greater number of the mentally handicapped than the municipal assistance does,\textsuperscript{200}

\textsuperscript{195} Ken Jupp, \textit{supra} note 154, stated that these amounts were determined by ministerial decision. The Minister has this authority under the Homes for Special Regulations, N.S. Reg. 127/77, R.N.S. Vol. 1 No. 6, p. 2
\textsuperscript{196} Mr. Stewart, \textit{supra} note 97
\textsuperscript{197} Ken Jupp, \textit{supra} note 154, stated that the municipalities traditionally had responsibility for poor houses, the forerunners of the Adult Residential Centres, but that the more extensive Regional Rehabilitation Centres have arisen only recently, from the health system’s concept of a right to treatment.
\textsuperscript{198} “Halifax Social Services Manual”, \textit{supra} note 97, part 1.2.6
\textsuperscript{199} Id., parts 1.3.21.6, 1.3.21.7, 1.3.21.13, 1.3.21.14
\textsuperscript{200} See notes 98 and 99
appears to be more progressive as it only includes as income “twenty-five percent of net wages earned while the applicant or recipient is disabled and the wages result from participation in a rehabilitation program . . . .”.\textsuperscript{201} However, a disabled recipient whose gross wages or salary are over $100 per month will not be able to receive family benefits unless he is engaging in vocational rehabilitation and has the specific permission of the Director.\textsuperscript{202} This provision and the specific approvals granted by the municipality illustrate the importance of knowledge of the legislation and of administrative cooperation. However, the provincial regulations are inflexible in one important way: a disabled person who earns over $100 per month for a period exceeding four months will not be eligible to receive benefits.\textsuperscript{203} The rationale for this appears to be that he is then no longer regarded as unemployable.\textsuperscript{204} This is not realistic as four months may be too short a period in which to determine if a job placement is successful. Further, a person working full-time may well be performing work which is valued at $100 per month yet not be “employable”. This unrealistic and inflexible regulation, coupled with the municipality’s requirement that the person attempt to establish eligibility for provincial assistance,\textsuperscript{205} and the difficulties in doing so,\textsuperscript{206} encourages work for the disabled which pays only nominal wages.

The provincial government should either raise the ceilings on a disabled recipient’s allowable earnings so that they are in accord with reality, or abolish these threshold requirements and limit the Director’s discretion only by the factors that he must take into

\textsuperscript{201} Family Benefits Regulations, N.S. Reg. 50/78 R.N.S. Vo. 2 No. 5, p. 109, subs. 35(2) (b), as am. Ivor Hambling, Director of Family Benefits, Social Services Department, Province of Nova Scotia, stated that in calculating net wages they will deduct from the gross wages any employer deductions and the actual cost, if reasonable, of such necessary items as day care, special clothing and transportation.

\textsuperscript{202} Family Benefits Regulations, N.S. Reg. 70/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 35(4), as am.

\textsuperscript{203} Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 35(4), as am.

\textsuperscript{204} Mr. Gorsline, supra note 99. This is reinforced by the primary requirement that a person must establish unemployability in order to be classified as disabled. [Family Benefits Regulations, N.S. Reg. 50/78, R.N.S. Vol. 2 No. 5, p. 109, subs. 4(g), as am.]

\textsuperscript{205} See note 102

\textsuperscript{206} Mr. Stewart, supra note 97 and Yvonne Blanchard, supra note 150, stated that this procedure was both lengthy and formal.
account. However, without awaiting such legislative change, the first priority should be to promote increased awareness among recipients and those concerned with their welfare\textsuperscript{207} of the existing flexibility so that they can fully avail themselves of the benefits provided in the present legislation. Organizations which provide vocational rehabilitation services would be further encouraged to base the trainees' salaries on their productivity if the province fully reimbursed them for this cost. While the administrative cooperation required is considerable, this could probably be accomplished without undue cost to the province by increasing the percentage of the wages counted as income as the wages increased. Although the trainee's income would not be dramatically increased, their vocational rehabilitation should be furthered by increased self-confidence and belief in the value of their work.

D. Summary

As the problems, and rights, of the mentally handicapped, particularly those concerning employment, are just achieving recognition it is understandable that the vocational rehabilitation services appear to be largely \textit{ad hoc}. Such services should be increased, rationalised and coordinated; flexible counselling services, similar to those available through the Social Development and Rehabilitation Division of the Services Department, should be readily accessible to the individual. The work of patients and trainees should come under government supervision, and its legal status should be clarified. Vocational rehabilitation services are frequently only one form of government assistance that unemployed mentally handicapped individuals are receiving, thus all services, administrative agencies and enabling legislation should be examined to ensure that they do not hamper the overall objective of enabling the individual to achieve the greatest possible degree of self-sufficiency.

VIII. Conclusion: Summary and Recommendations

The public's lack of awareness of the mentally handicappeds' needs and rights has resulted in judge-made law, legislation, and social services which have either been inadequate or have hindered the

\textsuperscript{207} Organizations' lack of awareness of the governing legislation was demonstrated when the Work Procurement Officer at the Adult Services Centre mentioned that he did not have a copy of the Family Benefits Regulations.
mentally handicapped in their attempt to increase their eligibility for employment. The mentally ill have been particularly neglected as they do not have such committed advocates for their rights as the mentally retarded. 208

In particular, the law determining capacity to contract is not consistent with modern psychiatric theory and is even more restrictive than the law relating to infants, who may be regarded as another minority with impaired reasoning. Federal and provincial human rights legislation does not entrench the civil rights of the mentally handicapped while other legislation unjustifiably deprives them thereof. Rehabilitation services are not comprehensive or coordinated; only good vocational rehabilitation can allow a mentally handicapped person to become, if not a fully productive member of, at least a minimum drain upon, society.

There should be more research into the problems and needs of the mentally handicapped in order to rationalize the law and services affecting them. Funding is needed to provide these necessary services. All of this demands an enlightened and cooperative public attitude which can only be created if advocates of the rights of the mentally handicapped make them a politically “hot” minority. All the formal and informal means of effecting social change: the media, test cases, class actions, political lobbying by voluntary organizations, by unions and by organs of government (such as the Office of the Ombudsman and human rights commissions), must be fully utilized to increase public recognition of this problem.

208. The mentally ill seldom have a support figure comparable to the parents of the mentally retarded.
APPENDIX I

Table

<table>
<thead>
<tr>
<th>Level of Retardation</th>
<th>I.Q.</th>
<th>% of Mentally Retarded Pop.</th>
<th>% of General Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mild</td>
<td>53-69</td>
<td>89.00</td>
<td>2.670</td>
</tr>
<tr>
<td>Moderate</td>
<td>36-52</td>
<td>6.00</td>
<td>0.180</td>
</tr>
<tr>
<td>Severe</td>
<td>20-35</td>
<td>3.50</td>
<td>0.105</td>
</tr>
<tr>
<td>Profound</td>
<td>0-20</td>
<td>1.50</td>
<td>0.045</td>
</tr>
</tbody>
</table>

Key

Mild (educable mentally retarded): can attain a state of self-sufficiency as adults by special educational techniques, can hold simple jobs.

Moderate (trainable mentally retarded): can learn to take care of their personal needs and to perform many useful tasks and manual skills in the home or in a sheltered working situation.

Severe: can learn self-care but their potential economic production is severely limited

APPENDIX II

Potential (with Education) | % of Retarded Children
---------------------------|------------------------
Self-sufficiency (employment in ordinary labour market) | 83.34
Self-sufficiency (employment in a sheltered environment) | 13.33
Self-care | 3.33

APPENDIX III

Population Projections: Implications for a Regional Vocational Services System

Goodwill Industries of America (G.I.A.) have stated:

B “Conservative estimates indicate that at least 2% of the population of the average community is considered "unemployable" by business and industry,
C even in a time of prosperity. One-fourth to one-half of this number can be rehabilitated and/or employed in Goodwill Industries.”

G.I.A. experience nationally suggests that the primary disabilities of trainees and employees are distributed as follows:

<table>
<thead>
<tr>
<th>Limiting Disability</th>
<th>% of Total Served</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neuro-Mental-Social-Retarded</td>
<td>41.0</td>
</tr>
<tr>
<td>Orthopedic</td>
<td>15.7</td>
</tr>
<tr>
<td>Cardio-Respiratory</td>
<td>9.9</td>
</tr>
<tr>
<td>Visual</td>
<td>4.9</td>
</tr>
<tr>
<td>Hearing and Speech</td>
<td>7.0</td>
</tr>
<tr>
<td>Age</td>
<td>21.5</td>
</tr>
<tr>
<td></td>
<td>100.0</td>
</tr>
</tbody>
</table>

E Respective claims of CMHA and CAMR suggest that those limited by a mental illness outnumber those limited by mental retardation at a rate of 10:3.

<table>
<thead>
<tr>
<th></th>
<th>D</th>
<th>E</th>
<th>F</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>41%xC</td>
<td>10/13xD</td>
<td>D-E</td>
</tr>
<tr>
<td>B</td>
<td>2%xA</td>
<td>50%xB</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>1,130</td>
<td>356</td>
<td>107</td>
</tr>
<tr>
<td>Halifax</td>
<td>113,036</td>
<td>2,261</td>
<td>271,768</td>
</tr>
<tr>
<td>Dartmouth</td>
<td>64,452</td>
<td>1,289</td>
<td>5,436</td>
</tr>
<tr>
<td>County</td>
<td>94,280</td>
<td>1,886</td>
<td>2,718</td>
</tr>
</tbody>
</table>

212. "Moyer Report" supra note 8, Table 3
APPENDIX IV

"Declaration On the Rights Of Mentally Retarded Persons"^{213}

List Of Rights:

1. "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

2. "The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. "The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work, or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. "Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.

5. "The mentally retarded person has a right to a qualified guardian when this is required to protect his personal wellbeing and interests.

6. "The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offense, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. "Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."