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## PUBLIC GUARDIANS: A DOUBLE-EDGED SWORD

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### A. Public Guardianship and Elder Abuse

Guardianship is the substitute decision-making mechanism for people who are unable to exercise reasoned decisions for the management of their personal or financial affairs. It is implemented through judicial process whereby a court determines a person legally incompetent and appoints a surrogate with the authority to make binding decisions on behalf of the ward. The ward, disempowered, loses the exercise of his rights which is transferred to the guardian who assumes the duty to act in the ward's best interests. It is intended as a means of protecting vulnerable people and their property.

Usually a relative or close acquaintance is appointed as guardian however sometimes there is no one available, willing or appropriate for the task. To fill the vacuum, states devised a public substitute decision making service. The first public guardian office was established in New Zealand in 1873. The novel concept, also called the Public Trustee or the Public Curator, rapidly spread to most developed countries. In Canada, the first public guardian office was established in Ontario in 1919 and gradually was adopted by all provinces.

With greatly extended life expectancy and the incidence of chronic disability increasing sharply with age, today, a large number of decisionally-impaired people are elderly. In Canada in 1991 an estimated 252,000 people 65 years and over suffered from dementia to which must be added seniors with psychoses, neuro-muscular afflictions and severe brain injury. Some not having been adjudicated incompetent by a court have no guardians, others have private guardians and the remainder are wards of public guardians. In Quebec, in 2001-02 the average age of the 10,654 adult wards under public curatorship was 57. The Ontario Public Trustee and Guardian looks after almost 9,000 wards of which 58% are over 60 years old. In British Columbia, the Public Trustee and Guardian is responsible for 3,500 wards of whom 58% are 65 years old and over. Public guardianship is largely an elders issue.

Despite public guardians exercising imperial powers over so many seniors and their property, the relationship between public guardians and elder abuse has been given scant attention in Canada. We will examine the situation in the three most populous provinces for indications of systemic abuse, starting with a brief review of the performance of public guardianship in Quebec over the past 25 years and then seeing how it measures up in Ontario, in British Columbia and at the federal level

## B. Scope and Sources

Our study is limited to the segment of the diverse elders population that is incompetent and under public guardians. It is based on documents that examined the population under public guardianship globally however there is no reason to believe that treatment was any different between age groups since public guardians operate as bureaucratic entities guided by systemic policies, directives and practices. For reasons of space and professional reserve, we have avoided detailing sensational or dramatic examples of maltreatment but that should not be taken as lacking - there were no shortage of unsettling instances of fortunes squandered and gross abuse of the person.

Public guardians conduct their work outside public view, hidden behind confidentiality laws. For the most part, they submit annual reports but, not disinterested in the image projected, their information leaves many sceptical. Indeed, the Quebec Ombudsman dismissed the Public Curator's annual reports as self-serving exercises in public relations rather than models of public accountability. For reliable information, we had to look elsewhere. A recent development proved fortuitous. In the last 25 years, the nature of audits of public entities transformed from simple financial verifications that figures balanced and funds were not misused to performance reviews concerned with realization of goals, quality of services and efficient use of resources. In addition, occasional reports emanated from inquiries by outside bodies such as commissions and courts. Except for the odd internal audit, we chose to rely mainly on reports from independent examiners.

## C. Public Guardianship in the Province of Quebec

In Quebec the Public Curator was established in 1945 as an independent state agency. The record over the two decades up to 1997 reveals a relentless cascade of criticism, 18 in 20 years. We will examine the two most prominent ones.

A comprehensive 1986 study of the Public Curator entitled "La Curatelle publique: une institution fortement critiquée" commissioned by the Minister of Justice concluded the Public Curator had not exercised its powers in the best interests of its wards and in this regard failed in its mission of protecting incapable people and their property. Another 1986 inquiry, the Shadley Commission, after having looked into the administration and operation of Rivière-des-Prairies Hospital, a facility housing many hundreds of intellectually handicapped persons, called for administrative corrections and legislative modifications to the Public Curator after having noted that it was too distant from its wards and poorly informed about them making it unable to carry out its responsibilities on a concrete basis and leading it to leave decisions to hospital staff who were in a conflict of uninterest position.

Growing discontent prompted authorities to act. On Nov. 22, 1997 the Quebec Ombudsman submitted to the National Assembly a special investigative report cataloguing a lengthy list of abuse and making 43 recommendations. In a nutshell, he concluded that the Public Curator was unable to protect the rights of the province's incapable wards and no less than a transformation in its mentality, a change in the corporate culture would suffice. Not six months later, on May 14, 1998, the Auditor General, who for years had been thwarted in efforts to perform a quality audit of the Public Curator's office, finally completed his own investigation in which he found the Public Curator deficient in every sector, at every level, in some cases for more than thirty years. Among the specific findings, the Public Curator was unable to account for the whereabouts of 34 wards and another had been dead for 25 years. The government did not contest the scathing findings. During a National Assembly committee hearing one wag was heard to refer to the Public Curator as the Poubelle publique (public garbage can). A solemn engagement was made to correct the situation and repair the past.

For the greater part it was left to the Public Curator to take care of the redress and the reform however, continually in denial, it never provided any apology or acknowledgement for the massive mismanagement. A victims' compensation scheme set up cavalierly without consultation with wards or their families and carried out secretly without publicity or transparency did not meet the guidelines for reparation of victims of institutional abuse proposed by the Law Commission of Canada. The investigations and reparation intended as steps toward correcting a perilous situation only led to revictimization.

Predictably, that did not solve matters. Figures in the Ombudsman's 2002 annual report revealed that during the 2001-2002 fiscal year the rate of well-founded complaints was 32% whereas in 1998-1999 it had been 28%. An exasperated Auditor General lamented that her experts were baffled in their efforts to decypher the financial statements supplied by the Public Curator to its wards on the management of their property. It is no wonder that in its 2001 annual report the Public Curator quietly announced the completion of the overhaul originally scheduled in three years by 2001 was being delayed to 2004 - more than six years after the release of the first major report. Plus ca change, plus ca demeure pareil.

#### D. Public Guardianship in the Rest of Canada

We have seen that elder abuse by the public guardian is a persistent phenomenon in Quebec, but is this an aberration reflective of conditions specific to that province or is it replicated elsewhere?

In Ontario, unpublicized and largely unnoticed, the Attorney General's in-house audits in 1986 and 1989 detected serious flaws within its Public Trustee division.

An inkling of brewing problems first emerged publicly in 1988. In his annual report, the Auditor General having noted administrative errors and poor servicing of clients' files by the Public Trustee, understatedly suggested "improved administration was required". Yet, little changed. In 1992, when the Public Trustee was managing the property of 17,000 mentally incompetent persons, of 175 files examined at random by the Auditor General, 55% revealed deficiencies.

What was previously hinted at became clear not long after. In his 1999 annual report the Auditor General addressed in greater depth the status of Public Trustee services painting a disastrous picture rivaling the catastrophe in Quebec.

Shifting to British Columbia, as a foretaste, the Auditor General brought to light poor management by the Public Trustee over the property of incompetent wards in 1984-85. By the following year, shortcomings had still not been remedied.

Moreover, reports on two institutions where significant numbers of wards resided commented incidentally on the Public Trustee. The principal psychiatric facility, Riverview Hospital, was the object of scrutiny by the provincial Ombudsman. There, in mid-1993, the Public Trustee represented 171 patients, many in the Geriatric Psychiatry Program. After remarking that: "Since it (guardianship) involves the formal removal of decision-making authority from an adult, it can be a source of abuse and needs adequate monitoring", the Ombudsman was concerned that despite few private individuals having become guardian of their relative at Riverview, the Public Trustee had not sought to become guardian of person, except in unusual circumstances. Decidedly, wards' needs had been neglected.

An administrative review completed in August 2001 examined patients' files between 1975 and 1992 at Woodlands School, a custodial facility which housed adults and minors with mental disabilities, as many as 1,000 in 1975, until being closed in 1996. Although the commissioner noted that not only conditions made it easy for mistreatment to happen but confirmed actual instances of abuse, the Public Trustee was never mentioned as having acted on behalf of its wards. Misconduct evident to the inquiry had never been seen by the Public Trustee all those years.

#### E. Federal Guardianship Services

Under the Canadian federal system, guardianship is generally a provincial concern. Nevertheless, at least two federal agencies administer affairs of special classes of incapable people. Indian Affairs acts in a guardianship role over mentally incompetent natives. We do not have information on the number administered by the Department of Indian Affairs nor the quality of service in looking after their affairs specifically, however the department dispensed the same trust services for the management of unclaimed estates of deceased Indians and the property of native minors. The Auditor General of Canada in 1986 ascertained significant mismanagement of trust property belonging to those clients.

In addition, a number of disabled aging military personnel are cared for in veterans' hospitals over whom guardianship powers are exercised by Veterans Affairs Canada. A 1995 internal audit found serious mistreatment not only of wards' property but of the person also.

One such failing was the basis of a class action suit launched in 1998 on behalf of an aged veteran. Between 1916 and 1990, funds of hospitalized incapable veterans were kept in the government's Consolidated Revenue Fund without bearing interest. After a 1986 report of the Auditor General warned the government could be liable, legislation was passed in 1990 prohibiting anyone from suing it for any failure to have invested these funds. On October 11, 2000, the Ontario Superior Court invalidated the law because it violated the Canadian Bill of Rights and ruled that the Crown's failure to have invested the funds constituted a breach of its fiduciary duty to its wards making it liable for the lost income. The decision, confirmed in appeal, is presently pending before the Supreme Court of Canada.

#### F. Conclusions

It has often been observed that guardianship is at the intersection of medicine, law and social work. Adding the unlikely field of auditing to the mix, we discerned some thought-provoking patterns. While elders are becoming the principal clients of public guardians, vertical and horizontal reviews demonstrate that in Canada over the past quarter century abuse by public guardians has been persistent and widespread, the dimension and incidence at a worrisome level, repeatedly inviting intervention by public authorities. Devised for the purpose of protecting decisionally impaired people who have no one to help them, public guardianship, paradoxically, has added to the fold a heretofore unsuspected abuser.

It is noteworthy that, with few exceptions, over years of verification in-house auditors never saw anything amiss and the full scope and gravity of maltreatment by public guardians was exposed only by outside examiners. Besides blissful blindness, public guardians are in perpetual denial. No matter how egregious and vast the mistreatment, we found no instance where a public guardian ever cared enough to face up to the dismal reality and offer an apology or express a word of remorse to victims. This augurs poorly for faith in mere internal reforms.

It would be too hasty and drastic to suggest that public guardianship ought to be scrapped, however the results invite questions on why public guardianship in Canada fails so often and whether public guardianship as currently structured is an appropriate model for substitute decision making. While those questions are being studied and debated, because of the large number of elderly wards, their vulnerability and a 25 year history of unremitting failings, public guardians must be closely supervised internally and intensively scrutinized from outside. More research and critical thought should also be directed to this venerable but still obscure area. These are win-win proposals from which seniors, the community at large and public guardians themselves can only benefit.