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JH v Alberta Health Services: The Constitutional Implications of Indefinite Psychiatric Detention

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Case Commented On: *JH v Alberta Health Services*, 2017 ABQB 477 (CanLII)

In 2015, JH appealed a decision by a Review Panel, appointed to determine the need for his continued detention under the *Mental Health Act*, RSA 2000, c M-13 (Alberta MHA), that he should be held indefinitely in the care of the Foothills Hospital (*JH v Alberta Health Services*, 2015 ABQB 316 (CanLII)). JH had come to the Foothills with a fever and an infected knee injury the year prior, and was then kept there against his will, based on the Review Panel's determination. The Review Panel's conclusion that JH should continue to be detained was based on its view that JH lacked insight into his medical needs and exhibited poor judgment, both of which might put him at risk of harm. The outcome of the case and whether JH would continue to be held in detention was contingent on whether JH fit the criteria for detention set out in section 8(1) of the Alberta MHA, namely that he: (a) suffered from a mental disorder; (b) was likely to cause harm to himself or others, or to suffer substantial physical or mental deterioration if not kept in detention; and (c) was unable to continue at the facility other than as a formal patient. JH's consulting psychiatrist testified that it was his opinion that JH fit these criteria, as he suffered from a neurocognitive disorder which manifested itself as poor judgment and memory, and that without mental health support in the form of psychiatric detention, JH would deteriorate both mentally and physically. However, an assessment completed by another doctor concluded that JH only had mild memory impairment, and that he understood his health problems enough to maintain health treatment on his own. Justice Eidsvik of the Alberta Court of Queen's Bench considered JH's steady employment history prior to the car accident that had left him with cognitive issues, his ability to obtain help both financially and medically on his own, and his commitment to continue on his medication. Based on this evidence, the Court concluded that Alberta Health Services (AHS) failed to prove that JH should continue to be detained, and that any risks to him were not severe enough to justify constraints on his liberty and self-determination.

In addition to arguing that his continued detention did not satisfy the statutory conditions under the Alberta MHA, JH also argued that his continued detention violated his rights under the *Canadian Charter of Rights and Freedoms* (*Charter*). These arguments were adjourned to allow AHS time to prepare counter-arguments. However, because of the constraint on JH's freedom in the meantime, and considerations that delaying the case would further impair his liberty and wellbeing, the Court heard the administrative and statutory arguments first, which led to the Court's decision to release him.

This brings us to the present case, heard by Justice Eidsvik in July of 2017. The issue before the Court was whether it was able to hear the aforementioned constitutional arguments for JH's release, or whether the arguments were now moot due to the fact that JH had been released. JH's

position was that the constitutional arguments should be heard by the Court regardless of his release, based on his assertion that the issues to be determined were a matter of public interest. AHS argued that JH's release rendered the issues moot, and that hearing the arguments would be a waste of court resources. Calgary Legal Guidance was given intervenor status to make submissions supporting the claim that the issues were of public interest. The Court ruled in favour of JH, finding that the issue of whether or not involuntary detention under the Alberta MHA was justified under the *Charter* was a matter of public interest on the basis that it would impact the liberty of future patients in JH's position (at para 27). Furthermore, given that written briefs outlining the arguments had already been submitted, it would be a waste of resources *not* to hear the arguments (at para 26).

Issues in respect of the fairness of the administrative process under which the Review Panel decided that JH should be detained, as well as an in-depth analysis of the legislation, were discussed in a previous ABlawg post by Professor Lorian Hardcastle. This post will consider whether JH's detention violated the *Charter*, in particular, the section 7 right to life, liberty, and security of the person and the right not be deprived thereof in accordance with the principles of fundamental justice and the section 15(1) right to equality.

Section 7 is normally argued in the context of criminal matters, but also applies in other contexts, including health care cases (see, for example, *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC)). Liberty interests have been found to be engaged not only when government actions impose physical restraints but also when they impose restraints on a person's right to make fundamental choices about their health and wellbeing (see *Carter v Canada*, 2015 SCC 5 (CanLII)). In this case, it seems clear that AHS's actions imposed both kinds of restraint, and it likely would be difficult for AHS to argue otherwise, based on the following evidence put forward in the 2015 court hearing (at paras 12, 13, 15, 17, and 25). JH was aware and understood his health issues, and appeared to have the ability to maintain medication intake on his own. At the time of detention, JH had been working with a social worker to obtain ID, find housing, and return to work that he had been forced to leave because of a previous car accident. JH was eager to work hard to restart his life and make positive strides to improve his work conditions, health, and wellbeing. JH's ability to proceed with these personal developments was obstructed by his psychiatric detention, as was his autonomy and ability to take control over his life. This evidence supports the argument that JH's continued detention in the hospital not only deprived him of his physical liberty, but also his fundamental right to make decisions regarding his health, lodging and future.

The Alberta MHA lacks provisions or procedures requiring the periodic review of the involuntary detention of patients in psychiatric care such as JH, which means that, in practice, patients are detained indefinitely. The indefinite detention of persons who are found not criminally responsible by reason of mental disorder (NCRMD) under the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*) was found to violate section 7 of the *Charter* in *R v Swain*, [1991] 1 SCR 933, 1991 CanLII 104 (SCC). Like the Alberta MHA, the *Criminal Code* provided that persons found NCRMD could be detained in custody, but lacked provisions requiring that their detention be periodically reviewed. The Supreme Court held that custodial detention without opportunities for review amounted to indefinite, and therefore arbitrary, detention contrary to the *Charter* section 7. In response to *Swain*, the federal government amended the *Criminal Code* to require courts or review boards making disposition orders in respect of persons found NCRMD to order a disposition that is the "least onerous and least restrictive" to the accused (see former section 672.54 of the *Criminal Code*). The amendments also required annual reviews of

disposition orders. Subsequent Supreme Court of Canada decisions upheld the constitutionality of these amendments: see *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 1999 CanLII 694 (SCC); *Pinet v St. Thomas Psychiatric Hospital*, 2004 SCC 21 (CanLII); and *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, 2004 SCC 20 (CanLII). In July 2014, the federal Conservative government amended the foregoing *Criminal Code* provisions under Bill C-14, *The Not Criminally Responsible Reform Act*. The amendments replaced the requirement for the "least onerous and least restrictive" disposition with one that is "necessary and appropriate". The requirement for annual reviews was maintained (see section 672.81(1)) except in the case of high risk offenders, a new category of prisoners now subject to greater restrictions, including a provision allowing disposition order reviews to be held every 36 months as opposed to every 12 months (see section 672(1.31)). These amendments have been criticized on a number of grounds including that the removal of the requirement for "least onerous and least restrictive" disposition orders and the restrictions on the rights of high risk offenders contravene section 7 of the *Charter*: see Lacroix, O'Shaughnessy, McNiel and Binder, "Controversies Concerning the Canadian Not Criminally Responsible Reform Act" (2017) 45(1) Journal of the American Academy of Psychiatry and the Law at 44-51.

In *PS v Ontario*, 2014 ONCA 900 (CanLII), the Ontario Court of Appeal ruled that involuntary psychiatric detention, imposed because of a threat of "harm", was analogous to detention of persons who are found NCRMD under the *Criminal Code* and that the indeterminate detention of long-term patients under the Ontario *Mental Health Act*, without adequate procedural protection of their liberty interests, violated their section 7 *Charter* rights.

There is also an argument that the involuntary and indeterminate detention of patients suffering from physical or mental health conditions violates patients' equality rights under section 15(1) of the *Charter*, which guarantees equality on, among other grounds, physical or mental disability. This was unsuccessfully argued in *Swain*, where the Court ruled that while detention under a NCRMH determination constituted differential treatment based on an enumerated ground of the *Charter*, the detention had a "remedial" as opposed to a "punitive" purpose, which did not engage section 15(1) *Charter* rights. This conclusion has been questioned. Sheldon, Spector, and Perez argue in their article "Re-Centering Equality: The Interplay between Sections 7 and 15 of the Charter in Challenges to Psychiatric Detention" (2016) 35(2) National Journal of Constitutional Law 193-234 that this characterization ignores the lived experiences of those who are kept in psychiatric detention. Mental health detainees are likely to experience their detention as punitive, even if a court characterizes the purpose of the detention as remedial. The article suggests that because issues of liberty and equality are clearly often intertwined, *Charter* sections 7 and 15 should not be seen as "watertight compartments", but should be integrated. Because mental illness is an enumerated ground under section 15(1), and it is only those living with mental illness that are detained under the Alberta MHA, there is an argument that section 15(1) is engaged in cases of psychiatric detention. In *Eldridge v British Columbia*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC), the Court ruled that the government is sometimes required to take special steps to accommodate disadvantaged groups who may otherwise experience adverse effects of a law that is neutral on its face. JH and other patients who are involuntarily admitted into psychiatric detention under the Alberta MHA face financial, psychological and other disability-related barriers to challenging both their initial detention and any subsequent review of their detention by a review panel, which are not experienced by persons who do not suffer from mental illness. As mentioned in Professor Hardcastle's previous post, if a patient under psychiatric detention wishes to challenge the decision of a review board, their only option is to try and obtain a second medical opinion, which the director of the mental health facility need

only “consider”. The patient in question would need the emotional resources and the mental capacity to understand that this was an option in the first place, which may not be possible for the patient depending on their mental state. In such circumstances, discrimination under section 15(1) of the *Charter* can further exacerbate a restriction of liberty under section 7. Support for this argument is found in *PS v Ontario*, where the Court held that a violation of section 15(1) can increase the gravity of a section 7 violation. Sheldon, Spector, and Perez go farther and assert that equality itself should be considered a principle of fundamental justice, and that a violation of the right to equality that deprives a person of his or her liberty would in turn violate section 7. The authors argue that where detention is experienced as punitive in the mind of a detainee, it can be characterized as discriminatory under section 15(1).

The fact that “harm” is not defined under the Alberta MHA also raises the possibility for *Charter* violations. The Review Panel’s decision to put someone in psychiatric detention rests heavily on the likelihood that they will cause “harm to [themselves] or others”. The lack of a definition of “harm” opens the door for review panels to define “harm” differently from case to case, making the application of the Alberta MHA arbitrary and potentially exposing patients who do not pose a significant risk of harm to themselves or others to indefinite detention. The principles of fundamental justice prohibit the limitation of individual rights through the application of arbitrary laws that bear no relation to or are inconsistent with the law’s objective; vague laws that lack a clear and understandable interpretation; and overbroad laws that unnecessarily restrict individual rights in the pursuit of a legitimate purpose (see e.g. *Carter v Canada*).

The involuntary detention provisions of the Alberta MHA are intended to protect individuals suffering from mental illness and the public from harm. Review boards and those in the mental healthcare profession are tasked with the responsibility of making decisions about whether individuals are capable of exercising their rights to liberty without this risk of harm. However, a patient’s and the public’s rights under the Alberta MHA must be balanced with the patient’s right not to be unlawfully deprived of life, liberty and security of the person under section 7 and to equality under section 15(1) of the *Charter*. The psychiatric profession is cognizant of this fact as is evidenced in the recent article by Lacroix, O'Shaughnessy, McNiel and Binder. Where the decisions of mental healthcare professionals or MHA review panels result in patients being arbitrarily detained for indeterminate time periods, there is a strong argument that their section 7 rights are violated. Where patients are unable to effectively exercise their rights to review and appeal such decisions due to economic, cognitive, mental or other disability-related barriers resulting from their health condition, this may also violate their right not to be discriminated against on the basis of mental or physical disability contrary to section 15(1) of the *Charter*. A decision clarifying the section 7 and section 15(1) *Charter* rights of individuals subject to detention under the Alberta MHA is in the public interest of all Albertans, particularly those who presently, or who may in the future, suffer from mental illness.

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