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Engaging the Criminal Justice System Through *JH v Alberta Health Services*

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Case Commented On: *JH v Alberta Health Services*, [2019 ABQB 540 \(Can LII\)](#)

We often assume the contours of the criminal justice system are clearly delineated in law and in fact. For a lawyer, every criminal case is immediately identifiable by its style of cause, the ubiquitous “*Regina v*”. For the non-lawyer, criminal law is a standout in media reports, providing eye catching headlines and a riveting Saturday morning read. We may not know every criminal offence abounding in Canadian law, even though s 19 of the *Criminal Code*, [RSC 1985, c C-46](#) – which provides that ignorance of the law is no excuse – suggests we should, but we certainly know crime when we see it. What we are less successful at identifying are those situations where the criminal justice system merely lurks in the background chatter of a decision or when the factual matrix does not involve overtly criminal behaviour. In those less obvious scenarios, the case narratives do not engage our interest so readily. In short, we miss the criminal law-ness of the situation. Yet, in these cases, the criminal justice system is, in fact, fully engaged but we criminal law observers simply miss the connection. By missing this connection, we may not appreciate the impact of the case. Instead, we misfile the decision or, worse yet, dismiss the decision as unimportant or inapplicable. By failing to read between the lines, we are missing out on the richness offered by interdisciplinary case law. The recent Alberta Queen’s Bench decision of Madam Justice Kristine Eidsvik in *JH v Alberta Health Services*, [2019 ABQB 540](#), is a good example of a case that transcends the purported area of interest – it is a mental health law decision that engages larger issues borrowed from the criminal justice system. In *JH*, the criminal justice system is fully engaged and plays a vital role in the outcome.

Justice Eidsvik’s decision, firmly based in the administrative health law arena, reads, sounds, and acts like a true criminal law case. Admittedly much of this criminal law-ness is suggested by the application of the *Charter*. But the *Charter* is acting at the behest of the criminal justice system when Eidsvik J. finds that the involuntary committal regime of the *Alberta Mental Health Act*, [RSA 2000, c M-13](#) (*MHA*) violates sections 7, 9, 10(a) and 10(b) of the *Charter* (at para 140). In striking down these provisions, Eidsvik J. is engaging the full force of the criminal justice system. Through this decision, health law becomes criminal law as legal rights familiar to the criminal justice system – such as arbitrary detention and the right to know the reasons for that detention – become the central issues in the case. In this way, the *JH* decision identifies as pure criminal law with all of its emotive and authoritative qualities.

Emotion permeates a criminal file. The factual narrative makes us direct witnesses to the event evoking the shame, pain and sorrow felt by all the people involved. True, the legalistic language attempts to deaden us to those painful circumstances. Nevertheless, an emotional response is acceptable and part of the criminal law-ness. In this same way, the *JH* decision provokes us.

Reading the decision, we are shocked, saddened, indignant or just plain angry. The case makes us want to call out our administrative officials to “do better” and to text our government representatives to fix things quickly. The decision does this in different ways; it offers a purely legalistic view of statutory power, yet it does so by placing a mirror to societal conceptions of how “normal” people must and should act. It is a symbol of the universality of our justice system as pressing and persistent mental health issues span the globe. It is also a muscular *Charter* decision, requiring swift but thoughtful government action. For all these reasons, the *JH* decision represents the need to modernize our laws as a response to the marginalization of those individuals in our justice system with perceived differences. It is also an exemplar of the power of the *Charter*, which is increasingly a tool for change.

For an excellent overview of the initiating factual and legal underpinnings of this decision, read [Professor Lorian Hardcastle’s 2017 ABlawg commentary](#) of the quashing of the mental health certificates in this case. See also, a [follow-up ABlawg discussion](#) on the constitutionality of the *MHA* sections written by then law student Kaye Booth and [Alberta Civil Liberties Research Centre](#) Human Rights Educator, [Heather Forester](#). This earlier action was the individualized response to the improper actions that authorized JH’s detention in a mental health facility. The recent decision offers the flipside of the event, wherein the Court considers and applies the *Charter* to the systemic issues enabled by the *MHA* legislative framework. The two decisions can be read separately but we must recognize they flow one from the other. It is the human price paid that precipitates the Court-ordered remedial response.

This decision is framed and filled in by JH, who is represented by initials to protect his privacy and dignity, yet who was stripped of both within the mental health system. Like [Joseph K.](#) in the literary fictional world of [Kafka](#), JH could be any one of us and is, in fact, all of us as he finds himself in the hospital as a result of being a victim of a hit and run accident (at para 11). It is his physical well-being which needs treatment but as we know all too well, the physical often collides with the mental as the less tangible mental well-being of JH becomes the centre of medical attention. To be clear, all participants are acting with the best of intentions. Everyone is trying to “help.” However, like [The Trial](#), which resides in the genre of “[bureaumancy](#)” where the surreal is found in the mundane, the story of JH unwinds incrementally, frame by frame, compounded by a series of everyday actions. Actions which transform JH’s sojourn in the physical treatment-side of the hospital into a long-term stay in the mental health side of the facility. Actions which lead inexorably to the penultimate decision rendered by Justice Eidsvik (see *JH v. Alberta Health Services*, [2017 ABQB 477 \(CanLII\)](#)).

To the medical authorities JH checks all the boxes needed for an involuntary certification: he is homeless; he is cognitively deficient; he is prone to drink; he is uncooperative; he lacks community support; he is unwell. But there is an alternate story here: JH is homeless because hospitalization made him so; he is not cognitively perfect but how many of us are; his propensities are just that – inert possibilities; he does not co-operate because he knows he does not need this kind of treatment; he lacks community support because he does not “mentally” fit the criteria for a community treatment order; he is unwell because he is, against his will, being treated for a mental health issue that does not in fact exist. To end the recitation is the glaring fact that JH is a member of Canada’s First Nations and subject to all of the preconceptions residing within that identification. In short,

JH is on the “other” side of society and needs the insiders help. This paternalistic view of JH can be found in many criminal law cases.

We have not exhausted JH’s life story or his deep frustration with an imperfect system, but the story now moves from the private to the public. It is time to consider the criminal law stance of this legal story. The first indication of the criminal law-ness of this decision is apparent in the initial 2017 determination by Eidsvik J. on the potential mootness of the *Charter* application (see 2017 ABQB 477). This is the “why bother” question the Crown raises on the basis that JH is out of custody. But the Court nicely responds to that question by underlining the societal impact of the *MHA* and the constitutional importance of her gatekeeper function that protects us all from legislative overreach (at paras 27 and 28). In this decision, *JH* has moved from an individual’s quest for justice to the overall integrity of the justice system. A similar journey occurs in criminal cases. This is the first indication that in the *JH* decision, the criminal justice system is fully engaged. The parallels are obvious. Unlawful detention and a lack of due process are familiar criminal law themes. In *JH* we experience the mental health justice system through those criminal law tropes. The veneer of non-criminal law does not matter. It may file the *JH* case under “health law” or “administrative law” or even “*Charter* rights” but it is still a case involving legal protections and rights afforded to all individuals when faced with state-like authority.

Another way this decision parallels the criminal justice system is in the finer details. The decision is reminiscent of the use of the hypothetical offender in [s 12 *Charter*](#) litigation. A sanction or punishment is “cruel and unusual” under s 12 if it is “grossly disproportionate” to fundamental sentencing principles (see *R v Boutilier*, [\[2017\] 2 SCR 936](#) at para 52). In this analysis, the hypothetical offender represents the potential reasonable scenarios in which the application of the impugned legislation could breach the *Charter*. In considering the effect such provisions would have on the hypothetical person, the court moves away from the particulars of the individual before them to test the constitutionality of the legislation in the broader context. Such a litmus test brings the legislation into sharper focus as the overall *Charter* cogency of the section is at issue. To quote the then Chief Justice McLachlin in *R v Nur*, [\[2015\] 1 SCR 773](#), hypothetical scenarios are not merely limited to the “bounds of a particular judge’s imagination” but are delineated by the “reasonable reach of the law” to understand the “reasonably foreseeable impact” of that law (at para 61). As in *JH*, perspective is everything.

Even though McLachlin CJC went on to characterize the scenarios as tools of statutory interpretation, the hypothetical offender is much more than simply a compendium of factoids used to illustrate unconstitutionality. Such hypothetical “people” are not the offender before the court, but they do exist. For instance, in striking down the mandatory minimum sentence of six months imprisonment for the possession of marijuana plants, the court in *R v Elliott*, [2017 BCCA 214 \(Can LII\)](#) (at paras 47, 48, 69 and 70) considers the not so hypothetical offender who attends university, lives in a basement apartment and grows 6 potted marijuana plants for home use. A 6-month jail sentence imposed in those circumstances would be “clearly disproportionate and shocking to the Canadian conscience” (see McLachlin, J in dissent in *R v Goltz*, [\[1991\] 3 SCR 485](#) at 532).

Similarly, in *JH* we have no need for the hypothetical person to shock our sense of moral right and wrong, but a real person caught in a shockingly familiar scenario (as suggested by Dr Baillie’s expert opinion evidence and by the evidence-based arguments advanced by the Intervenor, Calgary

Legal Guidance at paras 3, 57, 154, 227 and 228). Turning again to the criminal law, in the most recent decision from Ontario, *R v Luke*, [2019 ONCJ 514 \(Can LII\)](#), striking down the mandatory minimum sentence for impaired driving, Justice Burstein also has no need to turn to a hypothetical scenario. Ms. Luke is an exemplar of the devastating effects of colonialism and the justice system's failure to respond to Indigenous heritage as well as a youthful first offender with "strong rehabilitative potential" (at para 45). The same sense of criminal justice permeates the *JH* decision. Granted my parallelism argument depends on a s 12 *Charter* specific analysis but in many ways *JH*'s treatment is "punishment" for being someone who is perceived as "outside" of the norm. Of course, being labelled and then being contained apart from the rest of society should not and cannot determine the applicability or availability of basic rights.

Further analogies to the criminal justice system can be found in the way the *MHA* regime parallels with other mental health regimes engaged by the criminal justice system. For example, after an individual is found not criminally responsible (NCR) for an offence, the mental health system takes over with a decidedly criminal law flavour. In that regime, the criminal conduct constantly frames the response. Another parallel can be found in dangerous offender applications, which are decidedly hybrid in nature. In those criminal sentencing hearings, the risk of harm and dangerousness is driven by mental health assessments and treatment potentials. Notably, these regimes, NCR and dangerous offender, have been *Charter* tested (see *R v Swain*, [\[1991\] 1 SCR 933](#) and *R v Lyons*, [\[1987\] 2 SCR 309](#) respectively). In the case of NCR, the regime was legislatively re-fashioned to ensure compliance with *Charter* principles of fundamental justice including "ensuring the dignity and liberty interests" of an individual in that system (see *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [\[2006\] 1 SCR 326](#) at para 26).

Even with this constitutional tune-up, there are continuing issues with the *Criminal Code*'s [s 16](#) mental disorder test and the ensuing NCR label. I have discussed these issues in [episode 18](#) of my podcast series on the *Criminal Code*. In that podcast, I comment on the historical basis for the NCR defence, which is virtually the same as the original 1843 [M'Naughten Rule](#) fashioned by the House of Lords, some say, at the behest of Queen Victoria who did not take kindly to the acquittal of M'Naughten for his delusional killing of the PM's secretary. A nice recitation of the history of that case and subsequent rule can be found on the [CBC website](#).

In my post, I also mention the continual drive to change NCR as a result of public and political influence such as the changes contemplated in the [now defunct Bill C-54](#), which sought to implement stricter conditions on those found NCR as a result of public push back on the [Vince Li](#) case. Vince Li, who was suffering from schizophrenic episodes at the time of his killing of a fellow bus traveller, showed excellent signs of recovery after treatment resulting in a loosening of his treatment conditions. Notably, section 8 of the *MHA*, providing the criteria for involuntary committal, was amended in 2010 in an effort to implement better controls over those suffering from schizophrenia (*JH* at para 179). Loved ones dealing with the disease found the dangerousness requirement for involuntary admission as a "too little, too late" response preferring the criteria of "harm" to self or others or requiring an even less restrictive finding of "substantial mental or physical deterioration or serious physical impairment." Ironically, "dangerousness" was originally added to the criteria to provide more protections for those vulnerable to involuntary committal and was touted as "a significant safeguard" by the implementing government (at para 176). This change in statutory criteria from dangerousness was significant and although implemented with all good

intentions, resulted in the involuntary detention of JH as someone who could possibly be a harm to himself or deteriorate if he started consuming alcohol. JH's situation emphasizes the importance of that hypothetical scenario as a yardstick for statutory change. Instead of applying this test after the fact, all legislation should be subject to a reasonable hypothetical test to ensure the legislation's effects do not capture those who should not be captured or in the *JH* case, should not be detained at all.

Having engaged the criminal justice system as the contextual template in which this decision arises, the legal analysis is more easily applied. This unhinging of the criteria from dangerousness meant that the grounds for involuntary detention was not anchored in the objective and purpose of the *MHA*, which, according to Eidsvik J was for the temporary detention of "acutely mentally ill persons for the purpose of treatment and release back into the community" (at para 189). The purpose was not long-term warehousing as exemplified by JH himself, who was detained for some 9 months. Another statutory authority was available for long-term concerns under the *Adult Guardianship and Trustee Act*, [SA 2008, c A-4.2](#) (at para 189). There was no grounding of the loss of liberty to a valid and beneficial objective in the legislative criteria. This glaring gap in the legislative criteria was apparent upon review of other provincial mental health statutes. For instance, the Ontario *Mental Health Act*, [RSO 1990, c M.7](#), connects involuntary committal to previous history of mental disorder, previous successful treatment of that disorder and the need to treat that disorder at the time of the application. Importantly, these provisions were placed in the Ontario legislation after the decision in *PS v. Ontario*, [2014 ONCA 900 \(Can LII\)](#), which found earlier sections unconstitutional.

The statutory interpretation not only closes the legislative gap in the *MHA* but also gives closure to the injustice suffered by JH. Criminal law cases often turn on statutory interpretation and the principle of legality, which "affirms the entitlement of every person to know in advance whether their conduct is illegal" (see *R v Lohnes*, [\[1992\] 1 SCR 167](#) at p 180, McLachlin J) and constrains the power of the state (see *R v Levkovic*, [\[2013\] 2 SCR 204](#) at paras 32 to 33). Here too, the authority given by the law to public health facilities must be constrained and people subject to that authority must understand how their mental well-being can engage that power.

Finally, the *JH* reasons resonate like a criminal justice system decision because of the societal context that runs like a thread in the in-between spaces of this decision. Mental health issues are no longer hidden inside the hospitals but are discussed frankly in public in an effort to destigmatize individuals who may appear to be on the "outside" of society. More public airing of these issues promotes understanding and lessens the fear of "harm" from those struggling with these issues. Systemic institutions must be part of the answer and part of the conversation if we are to move forward to a less aggressive and more supportive response to those members of our community who need our help. The *JH* decision tells us that those who are at risk of losing their life and liberty need our special attention. It is now up to the government, who has one year in which to remedy the *MHA*, to provide the leadership towards the fulfillment of this goal. This should not be a difficult task. Justice Eidsvik, in suspending the finding of invalidity to allow the law makers a 12-month grace period in which to revise the *MHA* and make it *Charter* compliant, gave detailed directions to the government on exactly how to do it (at para 317). There should be no time spent in considering the next steps – the steps have already been mapped out with care through the careful consideration of the Court

But let's not forget the personal story. The crux of this story is about JH and how we are conditioned to react to certain people and certain behaviours. Like a children's fable, the *JH* story reminds us that the emperor's new clothes can be created from thin air or a princess can be hidden in plain view until we finally decide to really look. The case also reveals a deeper truth about these fables: that such narratives are often built on a certain view of what the world should look like and how it should be peopled with those who conform to the old tales. But this is real life in 21st century Canada and our commitment or promise to each other, and more importantly to the Indigenous peoples of Canada, must be to treat each other with dignity, respect and understanding. And the law, as the *JH* decision has shown, has a role to play in accomplishing this.

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