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The Delicate Balance of Sentencing: The Application of the Totality Principle in Regulatory Offences

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Case Commented On: *Alberta (Health Services) v Bhanji*, 2017 ABCA 126 (CanLII)

Chief Justice Lamer succinctly described the sentencing process and the sentencing judge's role in that process in *R v M(CA)*, [1996] 1 SCR 500 (CanLII):

> The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly. (at para 91)

In the recent split decision of the Alberta Court of Appeal in *Alberta (Health Services) v Bhanji*, the court considered the "delicate" balance needed in determining a fit global sentence in quasi-criminal or regulatory offences where the only sanction available is a monetary one. Specifically, in *Bhanji*, the penalty provision in section 73 of the Public Health Act, RSA 2000, c P-37 was at issue. However, in an arena where public safety is paramount and sanctioning limited, this "delicate" balance is difficult to maintain. Indeed, the response tends to be a pure mathematical exercise, an apportioning of blame through numbers. The *Bhanji* decision is an excellent reminder that regulatory behavior does matter and that sentencing is not mere number crunching, nor is it simply "the cost of doing business" (at para 17). Rather, regulatory sanctioning must be an even-handed reflection of society's disapprobation for public welfare misconduct. In an era where the health and welfare of the "community" is becoming increasingly more important to societal well-being and sustainability, regulatory responses must keep pace with this priority.

The facts of *Bhanji* describe an all too familiar scenario. The motel at issue in the case was owned by a married couple through a closely held numbered corporation. The motel was part of a family inheritance and the couple, who did not live in the area, employed a manager for the property. The facility was inspected by public health officials and on June 6, 2011 the corporation was ordered to repair the facility, which was in a derelict condition, posing public health and safety hazards. Renovation work was started but some long-term residents remained on site despite the poor condition. The remedial repair efforts continued for a lengthy period, causing the health officials to issue an Order for closure of the motel on June 8, 2012. Finally, on October 4, 2012, the corporation, the couple, and their seventy-two-year-old uncle, who was helping with the renovations, were charged with 144 offences under the *Public Health Act* covering the period from June 27, 2011 to September 6, 2013. During some of the time covered in the Information, although the facility was not in compliance with the *Act*, there were no real risks to the public as there were no residents (at para 17).

The offences were narrowly framed, pertaining to several specific violations in each motel unit. Many of the offences overlapped by relating to similar violations for closely connected items of disrepair. For instance, two charges for the same unit engaged the same issue of bathroom disrepair and involved the same problem, a lack of proper waterproofing of the shower/bath area: one offence was a failure to maintain the wooden shower frame and the other offence alleged inadequate caulking. Every individual motel unit which suffered the same deficiency was the subject of a separate charge. In the majority's view, this type of "doubling up" of charges resulted in "over charging" for the number of offences arising out of the same transaction and the number of closely related parties charged (at para 76).

The sentencing principles engaged in the regulatory sentencing process would be familiar to any criminal lawyer making sentencing submissions in the criminal courts. Section 3 of the *Provincial Offences Procedure Act*, RSA 2000, c P-34 incorporates applicable *Criminal Code* provisions, to the extent the provisions are not inconsistent with the *Act* or regulations, effectively importing the "Purpose and Principles of Sentencing" as found in sections 718 to 718.2. Of note, and not referenced in *Bhanji* is a further sentencing section, 718.21, added to the *Code* in 2003, on factors to consider in sentencing an "organization." The term "organization" is defined under section 2 of the *Code* and includes a "body corporate" or any business association such as a company or partnership. I will return to these sentencing factors later in this post. The section that is discussed in *Bhanji* is the fundamental sentencing principle as codified under section 718.1, that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

This key concept of proportionality is central to the *Bhanji* decision as it directly engages the further sentencing concept of "totality." The concept of totality, arising both from common law and statute, requires that the global or total sentence imposed on an accused, or in the regulatory sense, the defendant, must not be, in the words of section 718.2(c) of the *Criminal Code* "unduly long or harsh." This sentencing concern was at issue in *Bhanji* as multiple parties were charged with multiple offences resulting in a total fine of some magnitude. The four defendants entered a plea of guilty to count one in the Information, which was an offence of failing to comply with the remedial work orders for 801 days pursuant to section 73(2) of the *Act*. Under that provision, an offender is liable to a fine of not more than $100 for each day of non-compliance, resulting in a potential maximum fine for each of the defendants of $80,100. Considering the close relationship of the defendants, the Bhanji family would be liable for a maximum fine of $320,400 on that count. The defendant corporation entered pleas of guilty to 40 of the further 143 charges with each charge having a maximum fine of $2000, amounting to a total maximum fine of $80,000 for the 40 offences. These further counts related to specific deficiencies identified in the original inspection. There was, therefore, an overlapping of the *actus reus* or prohibited acts, as delineated in these original violations, with count one, which was the failure to comply with the subsequent order to remediate those deficiencies. The total potential fine for all counts and for all defendants was $400,400.

At the sentencing hearing, the prosecutor urged the trial judge to impose a global monetary penalty that was not simply "a cost of doing business" and reflected the sentencing principle of deterrence (at para 9). The prosecutor grouped the 41 offences into three categories: general maintenance issues, items relating to public health, and more serious violations involving risks to the safety or lives of the guests and tenants. On count one, where the maximum global fine

would be $320,400, the prosecutor submitted the "starting point" would be half the amount or $160,200 divided evenly between the four defendants, $40,050 per defendant (at para 10). For the remainder of the corporate convictions, the prosecutor suggested the maximum fine for the seven offences in the most serious category and the balance of the offences should attract a fine of $1000 each, again 50% of the maximum, for a total fine of $47,000. In real terms this would be a global fine of $207,200.

The defendants' counsel, who acted for all four parties, submitted that the penalty should consider the defendants' actions to remediate and should recognize that for a part of the period of non-compliance, the facility was without tenants. Counsel also identified the potential for "over-charging" through multiple counts against multiple closely related parties. Additionally, the motel, due to its poor state, was not profitable. In other words, the fines would not be merely a "cost of doing business" but would be a very real penalty to the defendants. Counsel submitted the fine on count one should be $2500 for Mr. and Mrs. Bhanji and $1000 for the uncle. For the corporation, the global fine should be $52,250 with a "global discount" for totality, bringing it down to $22,250. The final amount for all defendants would be $28,250, close to 14% of the fine suggested by the prosecutor.

The sentencing judge acknowledged that the sentencing principles engaged in the case involved deterrence, proportionality and totality. On count one, involving non-compliance with remedial work orders, the court imposed $20,000 fines on Mr. and Mrs. Bhanji separately and a $3000 fine on the uncle. The corporation was fined $50,000 plus the maximum fine of $2000 for seven of the most serious breaches and $1000 for each of the remaining 33 charges for a total of $97,000. The global fine for all counts on all defendants equaled $140,000 (at paras 18-19).

On appeal the Summary Conviction Appeal Judge found that the global fine, based on precedent, was not proportionate to the gravity of the offence and the culpability of the various offenders and that therefore the sentencing judge had imposed an unfit sentence (at para 21). Further, the sentencing judge failed to appreciate the mitigating factors that the defendants were not in flagrant or deliberate violation of the work orders and that the motel was empty for much of the non-compliance period. Additionally, although the sentencing judge referred to the correct sentencing principles, there was no indication of how the judge applied the concept of totality to the global fine. Ultimately, the sentence as it stood was unduly harsh and excessive.

The Summary Conviction Appeal Judge allowed the appeal, reduced the sentence on count one to $5000 each to Mr. and Mrs. Bhanji and $25,000 to the corporation, the entity primarily responsible for the offences. For the 40 corporate offences, the sentence was reduced to $25,000. The total fine on all defendants was $63,000. The appeal judge did not adjust the global amount further as the sentence, globally, was fit and appropriate in the circumstances.

Leave to appeal this sentence to the Court of Appeal was permitted on a narrow basis, which the majority called "unfortunate" (at para 31), as it was based on a specific question of law. The question on appeal asked the court to consider the approaches to the application of totality in two previous Alberta Summary Conviction Appeal decisions, *R v Goebel*, 2003 ABQB 422 (CanLII) and *R v 50737 Alberta Ltd*, 2009 ABQB 476 (CanLII) to determine if they "overlap, compete with, or duplicate each other, so that full application of both may improperly overcompensate or double deduct for totality" (at para 29). The majority decided that to adequately answer this

question, the court needed to consider the broad implications of applying totality in regulatory sentencing where a fine was imposed.

In *Goebel*, Justice Slatter, who was then on the Court of Queen's Bench and was a member of the majority in *Bhanji*, overturned the sentence as the sentencing judge inappropriately imposed a global sentence based on the "condition of the building" as opposed to imposing a fit sentence on each count and then adjusting for totality. In effect, the sentencing judge erred as he imposed a sentence without regard to the nature and severity of the breach. The court found that the approach of the sentencing judge to sentence globally was "not an appropriate way of initially setting a sentence in the case of multiple convictions on multiple counts" (*Goebel* at para 86). The appropriate approach, according to Justice Slatter, was to impose an appropriate sentence for each count and then to review the global sentence to ensure it was not unduly harsh or excessive. As the sentencing judge "never turned his mind to the appropriate sentence for each count" and gave no "express reasons" for the decision, the matter was remitted to the sentencing court to do so (*Goebel* at para 89). It should be noted that the offender in *Goebel* was an individual charged with several *Public Health* Act violations, some of which were failures to comply with work orders (*Goebel* at paras 83-84). This case did not engage concerns with sentencing closely-related multi-parties with overlapping multi-charges.

The sentencing approach and the type of defendant in *R v 50737 Alberta Ltd.* were much different than in *Goebel* and more akin to the scenario in *Bhanji*. There, Justice Burrows was reviewing the sentence of three closely-related defendants, a husband and wife and a closely held corporation, for 54 violations of the *Public Health Act*. The sentencing judge applied the approach recommended by Justice Slatter in *Goebel* but, according to Justice Burrows, imposed demonstrably unfit sentences in relation to some of the counts by failing to consider multiple charges arising from the same breach in multiple housing units, namely guardrails not to code and deteriorating concrete. It was therefore an error to impose the same fine for each count of the same violation even before consideration of totality of the sentence. In Justice Burrows' view, "the moral blameworthiness of a violation in respect of 15 balconies is not 15 times the moral blameworthiness of a violation in respect of one balcony when all violations occur at the same time" (*50737* at para 33). Instead, the sentencing judge, in considering the totality principle, should have considered a graduated fine for the multiple charges based on the same prohibited act and arising from multiple units (*50737* at paras 35-38).

In effect, Justice Burrows considered these types of offences as engaging the criminal law concept of ordering sentences of imprisonment on multiple charges to be served at the same time or concurrently. By employing this power, the sentencing court, in a criminal case, ensures the global sentence adheres to the principle of totality. The imposition of concurrent terms is particularly appropriate where multiple charges arise from the same subject matter or the same series of events. In the regulatory field, where often a monetary penalty is the only sanctioning option, as in the *Public Health Act*, fines cannot be imposed concurrently but can be imposed pursuant to the spirit of that concept by utilizing graduated fines for similar offences. In *R v Great White Holdings Ltd.*, 2005 ABCA 188 (CanLII), Justice Côté commented on this anomaly and emphasized the duty on the court to review the sentence for its global cogency, especially when arising out of the same set of facts (paras 26, 29). Not only can fines not be imposed concurrently, but they must also be paid as a global amount. Totality is therefore a controlling feature of sentencing fine-only offences where there are multiple counts.

Additionally, the *Public Health Act* contemplates fine-only penalties within a very specific range. In criminal sanctioning, the options for sentencing an individual offender are varied, providing for a range of sentencing options and for the imposition of a combination of those options. For instance, under section 734(1) of the *Criminal Code*, a court can order a fine in addition to another sentencing option such as probation or imprisonment. Under section 735, an organization, when convicted of a summary conviction offence, is subject to a maximum fine of one hundred thousand dollars, in lieu of imprisonment. As an aside, traditionally, there were few sentencing options for a corporation convicted of a criminal offence other than monetary sanctions, however the *Code* amendments which came into force in 2004 provided for the imposition of probation orders on offender organizations. The conditions of these orders can have a profound impact on the corporate culture of an organization by requiring the establishment of "policies, standards and procedures" to reduce the likelihood of further offences (see section 732.1(3.1)(b) of the *Criminal Code*). For more discussion of these changes in the *Code*, read *A Plain Language Guide to Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*.

Although criminal law principles are applicable, the court recognized that there are very real differences between regulatory and criminal offences, which must modify the general sentencing approach to proportionality and totality (at para 32). Regulatory offences are not constitutionally required to be full *mens rea* offences. The presumptive *mens rea* for regulatory offences, per *R v Sault Ste Marie*, [1978] 2 SCR 1299 (CanLII), is strict liability, a form of civil negligence. This parliamentary presumptive intention can be rebutted by Parliament in favour of absolute liability, requiring a "no fault" element. However, in accordance with section 7 of the *Charter* and our principles of fundamental justice, an absolute liability offence is only viable where there is no potential loss of liberty. In other words, where the penalty is fine-only. The fact, therefore, that the public health sanctioning system is purely monetary may suggest that these offences require no proof of a blameworthy state of mind or even no inference of such a fault requirement from the proof of the prohibited act. The concept of proportionality then, that the sanction be consistent with the gravity of the offence and the blameworthiness of the offender, may not have the same *gravitas* as in the case of an offence where an element of fault is required. However should the offender facing an absolute liability offence have an intention to commit the offence or, in other words, be found blameworthy, that would certainly be a factor aggravating the sentence.

In *R v Maghera*, 2016 ABQB 50 (CanLII), Justice Jeffrey commented on this aspect of sentencing for absolute liability regulatory offences. The defendant in that case entered pleas of guilty to offences under the Alberta Fair Trading Act, RSA 2000, c F-2, which did attract penalties of incarceration. Nevertheless, Justice Jeffrey noted that "typically the degree of moral blameworthiness will be less than in criminal offences, as will be also the gravity of the offence" (*Maghera* at para 12). On that basis, there is a different approach to regulatory sentencing which does not require proof of a blameworthy state of mind. The primary sentencing objective in those cases is the "balancing" of "competing considerations in favor of rehabilitation of the offender and protection of the public" (*Maghera* at para 13). This shift, from individual interests to public interests or from denunciation to the protection of the public from harm, is in a sense the hallmark of a regulatory offence as opposed to a criminal one. It is the consequences of the behavior being sanctioned as opposed to the culpability of the offender being punished. However, the more serious the regulatory offence, as evidenced by the fault requirement, which in turn is proportionate to the possible punishment, the closer that regulatory behaviour comes to

criminal law. In the end, much regulatory behaviour, as in the *Public Health Act*, is concerned with the potential or risk of harm as opposed to actual harm. Sentencing for risk or the potentialities of the conduct is inherent in much regulatory sanctioning (*Maghera* at para 14).

The majority in *Bhanji* found no inconsistency between the *Goebel* and *50737* decisions. In their view, each case applied the same principles but in differing fact situations. In sentencing, a judge could use either or both approaches depending on the case providing the judge did not "double count" or use totality as a double deduction of the appropriate sentence (at para 78). The majority goes further to give an excellent survey of the sentencing principles to be employed in the case (at para 79). This paragraph gives clear direction for sentencing in this area where totality is engaged.

To elucidate the principle of totality and the approaches used, the majority referred to some previous Alberta Court of Appeal decisions in criminal cases but did not refer to their most recent decision, *R v Meer*, 2016 ABCA 368 (CanLII). Coincidentally, Justice Watson, the other member of the *Bhanji* majority, was a member of this panel. Although it was a criminal case, the appellant in *Meer* argued that the appropriate approach in a case of multiple charges, some of which are related factually, is to group those offences into like categories and then apply the totality principle on each group or category of offences. Then, the sentencing judge, as a "last look," should review the total global sentence imposed to ensure the global sentence is appropriate. This requirement for an "intermediate totality adjustment" was soundly rejected by the Court of Appeal (*Meer* at paras 17-19). However, the court did find the sentencing judge erred by not applying the statutory totality requirement under section 718.2(c) of the *Code* as required in the earlier Alberta Court of Appeal decision of *R v May*, 2012 ABCA 213 (CanLII), (at paras 13-14), a decision which is referenced in *Bhanji*.

In the *May* decision, and as echoed in *Bhanji*, totality engages the principles of proportionality and of restraint (see *R v Proulx*, [2000] 1 SCR 61 (CanLII), at para 90, Lamer CJ), both of which must be balanced, indeed "delicately" balanced, in arriving at a just and appropriate sentence. Restraint, returning to Chief Justice Lamer in *M(CA)*, is an underlying tenet of our sanctioning system which tempers the potentially heavy hand of retributive justice by fashioning a fair and human sentence which "invigorates" (see *May* at para 14) public confidence in the justice system and thereby is consistent with the community's sense of justice. The comments in *Proulx* are specifically directed to incarceration as the "last" resort as recognized under section 718.2(d). The sentencing judge, although not required to apply intermediate totality, was required to apply totality globally. In *M(CA)* Chief Justice Lamer explains the purpose of totality is "to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender" (at para 42). In this paragraph, Lamer CJ approves of the description of totality as requiring "a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is 'just and appropriate'."

However, the *Bhanji* majority does refer to the case of *R v Elliot*, 2012 ABCA 214 (CanLII), on the totality issue. *Elliot* is not referenced in the *Meer* case but is a decision rendered on behalf of the court by Justice O'Ferrall, the dissenter in *Bhanji*, as a Memorandum from the Bench. Of interest, Justice Watson, a member of the majority in *Bhanji*, was also on the *Elliot* panel. In *Elliot*, Justice O'Ferrall, for the court, outlines the totality approach to multiple counts, again, as

consistent with the earlier case of *Goebel* and the later decision of *Meer* (at para 7). Individual sentences must be fit and appropriate, then the court considers which sentences should be concurrent or consecutive based on similarities in the fact situation, and then a final review of the global sentence to ensure compliance with section 718.2(c). If the global sentence is unduly long or harsh, then the judge should reduce the individual sentence, even though in isolation the sentence is fit, or direct that some consecutive sentences be served concurrently. I would add to this discussion that the court in determining concurrent sentences must also be mindful of the direction under section 718.3(4)) to consider imposing consecutive terms under certain circumstances, including where the offences do not arise out of the same series of events or where the accused was on judicial release at the time an offence was committed or where the offences were committed while fleeing from police. The clear tension between the approach to totality and this statutory requirement suggests that sentencing judges must clearly and explicitly articulate how they are crafting a sentence where totality is an issue.

In the end, the majority, after a thorough discussion of the relevant sentencing principles engaged in the case and after due consideration of the aggravating and mitigating circumstances, found the Summary Conviction Appeal Court Judge did not error in overturning the sentencing judge's disposition and reducing the global fines (at paras 21, 24). Nor did they find, as urged by the appellant, that the appellate judge "double counted" or improperly applied totality concepts in imposing the individual sentences and in the final "last look" (at para 76). As discussed above, the majority was not satisfied that in the unique circumstances of regulatory sentencing, where there is no option to impose concurrent sentences, and where there is a suggestion the offences "overlap" both factually and by relationship of offenders, the original sentence was globally appropriate. The sentencing judge did not merely fail to adequately compensate for totality, the judge also failed to adequately consider the mitigating features of the offence as well as the multi-party/multi-offences conundrum (at para 76). The Summary Conviction Appeal Judge therefore properly reconsidered the matter by considering all relevant sentencing principles.

The dissent of Justice O'Ferrall offers a different perspective, finding there was no error in principle made by the sentencing judge and that effectively the Summary Conviction Appeal Judge substituted his own opinion on a sentence in which there was no clear error. The dissent does not share the multi-party totality concerns that the majority found to be engaged. Indeed, Justice O'Ferrall questions whether the principles of totality as conceived in criminal law even have a place in the regulatory context when monetary fines are the norm (at paras 85, 94, 108, 109). Neither the approach in *Goebel* nor in *50737 Alberta Ltd.*, in Justice O'Ferrall's opinion, was therefore applicable. There was no "discretion" to forgive any of the 801 days of non-compliance and the sentence should reflect that. In finding the original penalty fit, Justice O'Ferrall viewed the aggravating and mitigating features of the case in a much different light than the Summary Conviction Appeal Judge and the majority decision. His position emphasizes the regulatory nature of the sentencing and the overarching objective of regulation to, in the words of Justice Blair of the Ontario Court of Appeal decision in *R v Cotton Felts Ltd*, (1982), 2 CCC (3d) 287, "enforce regulatory standards by deterrence." The complexities of sentencing are further reinforced by the special nature of organizations and those peculiar factors that must be considered in sentencing such an offender as evidenced by the *Criminal Code* sentencing factors in section 718.21. However, it should be noted that some of those factors are more applicable to a large corporation, one less closely held than the case at bar.

The *Bhanji* decision, despite its specific application, does remind us of the difficulties in crafting an appropriate sentence in any area of criminal or quasi-criminal law. The disjunction between the majority and dissent decisions exemplifies the inherent obstacles found in the "delicate art" of sentencing and helps explain the panoply of decisions, at all level of courts, on the proper approach to those principles. This "delicate" balance of sentencing becomes more fragile and at risk when a confluence of common law and statutory sentencing principles is engaged. In *Bhanji*, there are issues of proportionality, totality, consecutive terms, multi-parties, multitude of counts, corporations, and closely related offenders superimposed on the strictures of regulatory liability and regulatory sanctioning. In the end, the sentencing judge's "last look" must, colloquially, "do the right thing." But how? How does a court reflect society's desire to protect with the law's commitment to principle? Do we simply graft onto the regulatory process the punitive sanctioning principles from criminal law and from those principles craft regulatory principles consistent with the uniqueness of the regulatory arena as a quasi-criminal process? Is that even simply done? These are in fact the difficult issues at the heart of the *Bhanji* case.

Although the court in *Bhanji* is rightly concerned with this delicate balance, when reading through this case and the other cases engaged in this issue, one realizes that perhaps, as suggested by Justice O'Ferrall's dissent, this "last look" loses meaning when applied to the regulatory field. To be sure, the courts have it right in terms of principle but the ultimate question may engage whether those principles themselves are appropriate considering the heightened importance of regulation and the deepening moral values we attach to proper regulatory conduct. There is a tension there between what we once thought regulatory behaviour to be - consequence-based conduct which is not inherently wrong - as opposed to what we feel now - conduct which has the great potential to be inherently wrong. In a sense, it is our initial approach to these cases which deserves a second look, including a move away from straight monetary penalties to more "creative" sentencing as found in other regulatory statutes and even as envisioned under section 732.1(3.1) of the *Criminal Code*, dealing with possible probationary terms on organizations. To end with Lamer CJ's metaphor in *M(CA)*, the "delicate art" of sentencing needs artists who are fully equipped for their task.

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