Court of Queen's Bench of Alberta

Citation: R v Dockman, 2019 ABQB 149

Date:
Docket: 150100550S1
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Michael Louis Dockman

Appellant

Memorandum of Decision
of the
Honourable Madam Justice S.L. Hunt McDonald

Appeal from the Conviction and Sentences by
The Honourable Judge W. J. Cummings
(2017 ABPC 112 and 2017 ABPC 310 Docket 150100550P1)

Introduction

[1] Michael Louis Dockman appeals both his convictions and his sentences issued by The Honourable Judge W. J. Cummings of the Provincial Court of Alberta in two written Judgments: 2017 ABPC 112 (the "Reasons") and 2017 ABPC 310 (the "Sentencing Reasons").

Summary of the Convictions

[2] Mr. Dockman was an owner/operator of a water treatment and distribution plant providing drinking water and irrigation water to a community of residential acreages. He was

convicted of contravening various provisions of Enforcement Order EO-2013/03-SR (the "Enforcement Order") issued under the authority of the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 as amended ("*EPEA*"). The Enforcement Order was issued and served on both Mr. Dockman and Dockman & Associates Ltd. (the "Corporation"), of which Mr. Dockman was the sole director and voting shareholder. Mr. Dockman was solely convicted on each of the following counts on the Information, which alleged the following offences contrary to s 227(g) of the *EPEA*:

a) Providing water through the Waterworks System that failed to meet the fluoride concentration limit of treated water, in contravention of the Enforcement Order (count one);

b) Providing water through the Waterworks System that failed to meet the pH limit of treated water, in contravention of the Enforcement Order (count two);

c) Failing to collect and analyze samples of treated water for fluoride concentration five days per week, in contravention of the Enforcement Order (count three);

d) Failing to collect and analyze samples of treated water for pH levels five days per week, in contravention of the Enforcement Order (count four);

e) Failing to submit electronically in writing certain information required to be provided by clause 5 of the Enforcement Order (count five); and

f) Failing to immediately report by telephone any contravention of any of the clauses of the Enforcement Order to the Director (count six).

[3] The trial judge denied Mr. Dockman's preliminary application for a stay of proceedings and entered a conviction on each count.

Factual Background

[4] The full agreed statement of facts as before the trial judge are reproduced at Appendix I to these reasons. In summary, they are as follows.

[5] Mr. Dockman operated a water treatment system known as the East Airdrie Waterworks System (the "Waterworks System") which provided and distributed both potable and irrigation water to the residential subdivision of Sharp Hill, near Airdrie, Alberta. The raw groundwater obtained from certain wells contained relatively high concentrations of fluoride, and a reverse-osmosis filtering system was used by the Waterworks System to remove this excess fluoride. This process involved injecting chlorine into the potable water as a disinfectant to ensure it was free of pathogens while in the distribution system.

[6] An approval was issued by the predecessor to Alberta Environment and Parks ("AEP") to the Corporation for construction, operation and reclamation of the Waterworks System on June 11, 2002 (the "Approval"). The Approval provided all of the limits and actions needed to ensure the plant was operated in a safe, reliable manner and to ensure it was providing safe, potable water. The Approval expired on June 1, 2012 and was initially extended for another year. The terms and conditions of the original Approval were to be followed until June 1, 2013 or until a new approval was issued.

[7] On May 30, 2013, AEP issued and served the Enforcement Order on both Mr. Dockman and the Corporation. The Enforcement Order was required to provide the legal authority for the operation of the Waterworks System, as the extended Approval was set to expire.

[8] Over the course of the first Approval extension, no application had been submitted by Mr. Dockman to AEP. According to Mr. Craig Knaus, an AEP director, at the time the Enforcement Order was issued, he was of the opinion that there had been deficiencies and violations of the Approval in contravention of the *EPEA*. The Enforcement Order contained certain requirements to ensure the continued safety of the water the Waterworks System was producing.

[9] The Enforcement Order was amended on September 20, 2013, apparently in response to the fact that the Waterworks System would not be accessing the Rocky View Water Co-op. The amendments reflected this fact and the balance of the terms of the original Enforcement Order remained intact.

[10] There were a number of key differences relating to the monitoring and reporting requirements between the Approval and the Enforcement Order. In regards to fluoride concentration, the frequency for monitoring under the Approval was once per week, but under the Enforcement Order it was increased to five days per week. The frequency for monitoring the pH concentration of treated water under the Approval was once daily, and under the Enforcement Order this was decreased to five days per week.

[11] The Enforcement Order also required the operator to submit monthly reports containing particular information to a specific employee of AEP, an inspector named Leslie Miller (the "Monthly Reports"). The monitoring results were to be included in the Monthly Reports. While operating under the Approval, the Monthly Reports merely needed to be generated and maintained for inspection. However, under the Enforcement Order, the reports actually had to be submitted monthly.

[12] The Enforcement Order further required the operator to immediately report any contravention of the Order to an AEP Director by telephoning the provincial Co-ordination and Information Centre ("CIC"). In addition, the Order stipulated that within seven days of reporting to the Director, the Waterworks System's operator was required to submit a "seven day report" including a description of the contravention, the circumstances surrounding it, the corrective action taken, and any steps to prevent a recurrence.

[13] The Crown took the position that the appellant failed to abide by the terms of the Enforcement Order, in contravention of section 227(g) of the *EPEA*. The appellant was charged with the specific infractions as outlined above.

[14] The trial judge denied Mr. Dockman's preliminary application for a stay of proceedings and ultimately concluded that the Crown had proven the *actus reus* of each of the above counts, and that Mr. Dockman had failed to establish a defence of due diligence.

[15] Mr. Dockman was sentenced to fines in the global amount of $49,000 plus a victim surcharge allocated on each count. In the event of default of payment of the fines or surcharges on any one count, the trial judge ordered that Dockman be incarcerated for a period of 25 days on each count, all such days to be served consecutively.

[16] In addition, an order was imposed prohibiting Mr. Dockman from operating, being employed by, or holding a controlling interest in, any organization that operates a facility for the

treatment or distribution of either drinking water or wastewater for a period of three years from December 12, 2017.

Grounds for Appeal

[17] The appellant takes the position that the trial judge erred by:

a) declining to grant a stay of prosecution on the ground that evidence relevant to the defence had been destroyed by a third party;

b) rejecting the defence of due diligence; and

c) failing to correctly apply the established sentencing principles.

[18] On the basis of the above errors, the appellant seeks that his convictions be overturned and an acquittal on all counts be entered, or in the alternative that a new trial be ordered. If such relief is not granted, he seeks an order reducing the fines and time in default for each conviction.

Ground One: Did the trial judge err in declining to grant a stay of prosecution on the ground that evidence relevant to the defence had been destroyed by a third party?

[19] The appellant alleges that the trial judge erred in denying his application for a stay of proceedings on the ground that evidence relevant to his defence had been stolen or destroyed by a third party. The appellant takes the position that the totality of the documents would have assisted him in demonstrating a defence of due diligence, and that as a result of the loss of the documents he was denied the right to make full answer and defence, thus depriving him of a fair trial.

[20] The trial judge accepted Mr. Dockman's evidence that as a result of a break-in which occurred at the facility's office in February of 2016, the entirety of the Waterworks System's records, which spanned over 11 years of operations, were lost. Specifically, he accepted that all of the records located in the office had been stolen, including, according to Mr. Dockman:

1. several training and policy manuals;
2. a copy of the Approval;
3. copies of the "seven day reports" to the Director;
4. the original Monthly Records for April and May, 2013;
5. a copy of the Enforcement Order;
6. records of the de-commissioning of the Waterworks System's well five; and
7. the appellant's records of his phone calls to the Alberta Environment call centre concerning pH excess and fluoride and other matters.

[21] Mr. Dockman does not dispute that the records were his own documents and were within his own possession and control at the time of the loss.

[22] Counsel for Mr. Dockman made no oral submissions to this Court regarding his request for a stay of proceedings. When asked if he was abandoning that ground of appeal, he replied that he was relying on the submissions made in his Appeal Brief pertaining to this argument.

The Standard of Review

[23] The parties agree that the applicable standard of review for a question involving a *Charter* breach is correctness, in that a reviewing court must ensure that the correct legal

principles were identified and that there was no misdirection in their application. While a trial judge's factual findings are entitled to deference, and should be respected absent palpable and overriding error, a reviewing court must ensure that the facts as found satisfy the applicable legal test: see *R v Grant*, 2009 SCC 32 para 129, *R v Shepherd*, 2009 SCC 35 para 20, *R v Kenowesequape*, 2018 ABQB 135 para 11.

Analysis

[24] Sections 7 and 11(d) of the *Charter* guarantee an accused person the opportunity to make full answer and defence and, more broadly, operate to ensure a fair trial. Where evidence which is relevant and material is lost or destroyed, and where that destruction has deprived an accused of the right to make full answer and defence, a stay may be ordered.

[25] Both before this Court and before the trial judge, the appellant relied upon *R v O'Connor*, [1995] 4 SCR 411, and upon a quote by Justice L'Heureux-Dube (dissenting) in *R v Carosella*, [1997] 1 SCR 80, in support of his argument that the lack of availability of the records hindered his ability to make full answer and defence. The Crown relied on *R v Grimes*, 1998 ABCA 9, in arguing that no *Charter* breach had been established.

[26] Factually, the case at bar is rather unique. The trial judge expressly noted that the appellant acknowledged that all of the documents he claims were required to make full answer and defence were in his own possession, and not in the possession of the Crown or some third-party agent of the Crown: see Reasons para 49-51. As such, the present case does not involve Crown disclosure obligations, nor is it about production from third parties.

[27] In cases involving lost evidence, the defence must satisfy the trial judge on the balance of probabilities that the lost evidence is of such major importance to the defence case that a fair trial cannot be held without it, or that the loss of the evidence deprived the accused of the opportunity to make full answer and defence. As noted by the trial judge, in reviewing *Grimes*, not every loss or destruction of evidence will result in a finding that the right to a fair trial and to full answer and defence has been breached: Reasons para 43.

[28] In instances where documents are immaterial to an accused's ability to make full answer and defence, a *Charter* breach will not be made out: *O'Connor* at para 74. In the case at bar, the trial judge analyzed the relevance and materiality of the information contained in the records in relation to Mr. Dockman's case. Of note, he found that even if the stolen documents were relevant to the appellant's case, some of the documents would have been recoverable from other sources. For example, certain documents would have been delivered to AEP over the course of the Waterworks System's operation. Similarly, he found that the labs to which the samples had been provided may have certain of the sample records the appellant claimed were relevant to establishing due diligence.

[29] Moreover, the trial judge correctly noted that the appellant conceded that certain of the stolen documents formed part of the record, as per his admissions in the agreed statement of facts. For example, a copy of both the Approval and the Enforcement Order were tendered by the Crown and admitted as exhibits, as were the original Monthly Reports for the time period June 1, 2013 to January 17, 2014. As noted by the trial judge, the Monthly Reports predating the Enforcement Order, would have had marginal, if any, relevance.

[30] In turning to Mr. Dockman's telephone call records, the trial judge noted that the CIC call sheets were in evidence and it was difficult to see how the appellant's disorganized personal

records of phone calls to the CIC concerning pH and fluoride levels could contradict any admissions made in this agreed exhibit.

[31] Finally, the trial judge found that any stolen records in relation to well five – and in particular when it stopped working – were not relevant to the appellant's defence, as the real issue in relation to a defence of due diligence related to the actions taken by Mr. Dockman to bring the well back into service.

[32] In my view, the above findings do not demonstrate any error on the part of the trial judge.

[33] The law also states that in the absence of proof of abuse of process, prejudice must be demonstrated to establish a breach of an accused's right to make full answer and defence: *Grimes* para 8, *R v La*, [1997] 2 SCR 680 para 25, per Sopikna J. The trial judge was alive to this requirement: Reasons para 44.

[34] On the facts before him, as outlined above, the trial judge concluded that the appellant's blanket assertion that the stolen contents of the filing cabinets, as well as the specific materials which he asserted would have assisted in his defence, were insufficiently relevant to establish actual prejudice in making full answer and defence: Reasons at para 59. In my view, his conclusion on this point is unassailable.

[35] Thus, the appellant's argument can be disposed of on the basis of the trial judge's incontrovertible findings regarding relevance and prejudice.

[36] In addition, the trial judge then went on to determine that even if actual prejudice *had* been demonstrated, the appellant failed to take reasonable steps to ensure the care of the records. The trial judge rejected Mr. Dockman's argument that absent a court order, the appellant was under no obligation to preserve or produce evidence. Counsel for the appellant provided no authority in support of the appellant's proposition for this questionable argument.

[37] Again, the trial judge was alive to the fact this was not a disclosure case. The documents in issue were in the exclusive possession of the appellant at the time of the break-in. The Crown's obligation to preserve relevant evidence was not engaged. This fact was clearly stated at para 70 of the Reasons, where the trial judge concluded that:

> Even in the widest sense, the Crown's obligations simply cannot reach as far as imposing a duty upon them to preserve an accused's records from a loss resulting from theft or destruction while those records were in the accused's sole possession.

[38] After finding that there was an implied obligation on the appellant to demonstrate that he took reasonable steps to care for the documents, the trial judge reviewed the steps taken by the appellant to preserve the files. He noted that the doors to the buildings were secured by a lock to which Mr. Dockman, and two other individuals, had a key. These individuals were his stepson and certified operator of the Waterworks System, Nico Mattucci, and Jackie Godlien, an individual who provided assistance in taking the plant's water measurements and acted as a courier running water samples to labs. Both individuals were called by the Crown as witnesses.

[39] The trial judge reviewed the evidence and found that even when the facility was operational, it did not have 24-hour on-site supervision. Ms. Godlien averaged an attendance at the facility approximately twice per week – sometimes with Mr. Dockman – and Mr. Mattucci attempted to get to the plant daily, but this would fluctuate with his trucking schedule.

[40] The trial judge further found that Mr. Dockman left the Waterworks System facility in a vulnerable state following his decision in the fall of 2013 to relocate to Edmonton in order to pursue a degree at the University of Alberta.

[41] Importantly, the trial judge found that Mr. Dockman was aware that the files stored on site might be required to support his position in relation to the charges levelled against him. He would have known the nature of the charges over a year prior to the break-in, and yet failed to take any steps to adequately protect the records. The trial judge concluded that Mr. Dockman had not taken any steps to identify the records in his possession nor to reasonably safeguard them. Furthermore, he did not use any efforts to reconstruct them from known sources once he had learned of their disappearance. The trial judge concluded that given the lack of care Mr. Dockman displayed in attempting to preserve the files, he essentially became the author of his own misfortune. This conclusion was clearly open to the trial judge on the facts before him.

[42] In sum, I find that the trial judge correctly stated the law in relation to the appellant's right to a fair trial, and to make full answer and defence to the charges brought against him. He reiterated, at para 72 of his Reasons, that the onus falls upon the accused to establish an infringement or denial of a *Charter* right: *R v Luong*, 2000 ABCA 30 at para 9. He concluded, at paras 72-73 of his Reasons that:

> ...Applying *Grimes*, I am not satisfied on the balance of probabilities the documents Dockman describes and claims were stolen falls into the category of them, being of such major importance to his defense that a fair trial could not be conducted without them thus depriving him with the opportunity to make full answer and defence. Overall, there is insufficient evidence of materiality and importance of the records to establish actual prejudice.
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> Even if actual prejudice had been established, I am not satisfied Dockman took reasonable care to preserve his own records to avoid their theft or destruction.

[43] The trial judge neither misstated the law nor did he err, in any manner in which this Court can discern, in applying the law to the facts.

[44] The decision of whether or not to grant a remedy under s 24(1) of the *Charter* is a discretionary one. As Sopinka J in *Carosella* noted, at para 48:

> The trial judge found that a stay of proceedings was the appropriate remedy in the circumstances of this case. Section 24(1) of the *Charter* confers upon the court a discretionary power to provide "such remedy as the court considers appropriate and just in the circumstances". See *R. v. Simpson,* [1995] 1 S.C.R. 449. The appropriate standard of review of the exercise of a discretionary power was addressed by Gonthier J. in *Elsom v. Elsom,* [1989] 1 S.C.R. 1367, at p. 1375. Speaking for the Court, Gonthier J. stated:
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> > The principles enunciated in the *Harper* case [[1980] 1 S.C.R. 2], indicate that an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. In my opinion, neither of these two circumstances are present in this case.

> This Court has affirmed on a number of occasions that the standards of deference applicable in reviewing the decisions of trial judges generally apply equally to the remedial provisions of s. 24. See *R. v. Duguay*, [1989] 1 S.C.R. 93; *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 783; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Silveira*, [1995] 2 S.C.R. 297.

[45] As more recently noted in R v Donnelly, 2016 ONCA 988 at para 44:

> ...in connection with to decisions pursuant to s. 24(1) of the *Charter*, a deferential standard of review has arisen from recognition of it as a broad discretionary remedy. Deference is owed unless the trial judge has misdirected himself or herself in law, committed a reviewable error of fact or rendered a decision so clearly wrong as to amount to an injustice.

[46] Once again, a review of the trial judge's Reasons demonstrate that he was well-versed in the law in this area. As per *O'Connor*, the law is clear that a judicial stay of proceeding is an appropriate remedy under s 24(1) only in "the clearest of cases": para 68. The trial judge correctly stated the law on this point: Reasons paras 46-47. Given the trial judge's findings regarding the lack of relevance and the lack of prejudice, he concluded that the missing evidence was not of such major importance that a fair trial could not be obtained without it, nor was the appellant prejudiced in his ability to make full answer and defence. There is no indication that the trial judge misdirected himself, nor is this an instance where his decision not to grant a stay one which would result in an injustice.

Conclusion on Ground One

[47] It is nonsensical to speak of granting a remedy in order to cure a prejudice that has not been suffered. There is nothing in Mr. Dockman's Appeal Brief evidencing that the trial judge committed a reviewable error in finding that this case fell short of the "clearest of cases" in which a stay of proceedings was an appropriate remedy.

[48] Accordingly, this ground of appeal is dismissed.

Ground Two: Did the trial judge err in rejecting the defence of due diligence?

[49] Mr. Dockman argues that he took all reasonable steps in his efforts to follow the terms of the Enforcement Order and the learned trial judge erred in concluding otherwise.

Standard of Review

[50] The appellant again relies on *Shepherd* in arguing that the applicable standard of review for this issue is correctness.

[51] The applicable standard of review was discussed by this Court in *R v XI Technologies Inc*, 2012 ABQB 549 (aff'd 2013 ABCA 282) at paras 13-15:

> Our Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), summarized the applicable standards for appellate review. In *Housen*, the majority confirmed that questions of law are reviewable on a correctness standard and on pure questions of law, an appellate court is free to replace the opinion of the trial judge with its own: para 8.

> The standard of review for questions of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": para 10.
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> When a matter involves the application of a legal standard to a set of facts, it is a question of mixed fact and law. As such, where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact: *Housen* para 28. While questions of mixed fact and law lie along a spectrum, those questions from which no legal issue can be extricated are subject to a more stringent standard and should not be overturned absent palpable and overriding error: para 36.

Analysis

[52] I begin by noting that Mr. Dockman does not appeal the trial judge's finding that the Crown had proven the *actus reus* of each offence beyond a reasonable doubt: see Reasons, paras 170-226. The evidence clearly establishes that the appellant contravened the Enforcement Order in the manner referenced above. That is, the appellant does not dispute the finding that he provided water containing levels of fluoride and with pH limits outside of those set by the Enforcement Order, that he failed to collect and analyze samples for fluoride and pH limits within the schedules provided in the Enforcement Order, and that he failed to provide required information and immediately report contraventions as required by the Enforcement Order.

[53] Rather, Mr. Dockman asserts, that his conviction should be overturned because he took all reasonable steps to comply with the Enforcement Order. The appellant argues that because he intended to comply with the Enforcement Order to the best of his ability and resources, he should not have been found liable for any infraction. In his oral submissions the appellant argued that although he may not have complied with the strict terms of the Order, he complied with the spirit of the Order.

[54] Mr. Dockman raises a number of points which he suggests warrant consideration by this Court. He submits that he was misled into believing that the terms and conditions contained in the Approval would not be altered by the Enforcement Order. He suggests that when presented with the Enforcement Order, he was unlawfully detained until he agreed to sign it. He states that he had reservations about continuing to operate the Waterworks System, but was talked into doing so by AEP staff. He asserts that the preamble to the Enforcement Order itself recited disputed facts (including citing the absence of Mr. Mattucci as an operator on certain days preceding the issuance of the Order, and whether certain arrangements had been made with the Rocky View Water Co-op). The appellant asserts that it is important to note that at no time during trial, was evidence tendered by the Crown to support the allegations contained in the preamble to the Enforcement Order. He further points to the fact that the only evidence concerning potential harm from exceeding the fluoride limits and pH levels over the period of the Enforcement Order came from Aaron Janzen, which confirmed that there was no harmful effect on any of the recipients of the potable water.

[55] With respect, it is difficult to see how the above assertions are relevant to whether the trial judge erred in evaluating a defence of due diligence. The fact of the matter is that the Enforcement Order was issued and served, and the appellant was convicted of contravening

terms contained within the Order. The question of whether the terms of the Enforcement Order were based upon an inaccurate understanding of what was occurring at the Waterworks System, or whether the terms of the Approval should have been reflected in the Enforcement Order, are matters internal to the *EPEA* approval and compliance process, and are not germane to this appeal. Moreover, the trial judge dealt with and rejected these arguments, as discussed below, and his finding on each point is entitled to deference: see in particular, Reasons, at paras 259-260. The trial judge found that the appellant was subject to the terms of a valid Enforcement Order and this finding has not been appealed from: Reasons para 133.

[56] The issue is whether the trial judge erred in determining that the appellant had failed to establish that he exercised due diligence.

[57] There is no question that an accused charged with violating s 227(g) of the *EPEA* (namely, contravening an enforcement order) can avoid liability if they are able to establish a defence of due diligence. I note that s 229 of the *EPEA* provides that no person shall be convicted of an offence under s 227(g) if they establish, on a balance of probabilities, that they took all reasonable steps to prevent its commission. The trial judge referenced s 229 of the *EPEA* in his Reasons.

[58] The trial judge reviewed the applicable legislative scheme concerning compliance in detail: see Reasons paras 112-123. There is no indication that the trial judge erred in either citing or applying an incorrect test for establishing due diligence. The trial judge outlined the law concerning 'the defence of due diligence' at paras 241-249 of his Reasons. He in no way misstates the law. As he noted, at para 243:

> In *Sault Ste. Marie*, the Supreme Court of Canada better defines the nature of strict liability offences. At page 1326 Justice Dickson comments as follows:
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> > Offenses in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defense will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offenses may properly be called offenses of strict liability.

[59] In citing *R v Imperial Oil Ltd*, 2000 BCCA 553 and *R v Rio Algom Ltd* (1988), CCC (3d) 242 (Ont CA), the trial judge agreed with the Crown's submissions that because the case involved specific contraventions of the Enforcement Order, an accused relying on the defence of due diligence must demonstrate targeted efforts to comply with the Order's specific provisions. That is, the trial judge found that for the defence to succeed, Mr. Dockman had to establish, on a balance of probabilities, that he took all reasonable steps to comply with the particular terms of the Enforcement Order. Again, the appellant does not argue that the trial judge misstated the law in this regard.

[60] In my view, the appellant has failed to identify, in either oral or written argument, an extricable error of law reviewable on the correctness standard. Rather, the appellant appears to

argue that the trial judge erred in applying the law to the facts. Namely, the appellant's argument appears to be that the trial judge erred by not finding that the actions taken by the appellant to ensure compliance with the Enforcement Order satisfied the obligation to take all reasonable steps to avoid non-compliance.

[61] The appellant is not arguing that the trial judge failed to properly articulate the test for due diligence, or that he engaged in a flawed application of this test. He is, in my view, arguing about the application of a legal principle to a set of facts. As noted by this Court in *R v Lonkar Well Testing Ltd*, 2009 ABQB 345, at para 34:

> ...Assuming the proper test has been applied, the determination as to whether an employer has established a defence on a balance of probabilities is a question of mixed fact and law and therefore subject to review only for palpable and overriding error.

[62] I am unable to conclude that the trial judge made any error in applying the law to the facts of this case, let alone a palpable an overriding error.

[63] The trial judge clearly contemplated Mr. Dockman's submissions as to his defence, specifically, that the Waterworks System was a small operation staffed by busy, part-time individuals, that although testing and reporting was not done to the strict terms of the Enforcement Order, it was nonetheless performed, and that the instances of breach resulted in no harmful effects to the individuals receiving the potable water.

[64] The trial judge commenced his analysis by reviewing certain considerations which the appellant suggested informed on the issue. He noted the evidence with regard to Mr. Mattucci's role as operator in the facility, coupled with as Mr. Dockman's related support and supervision, as well as Mr. Dockman's attempts to tie the Waterworks System into the Rocky View Water Co-op. The trial judge found that these measures were simply general measures which, while furthering broad compliance with the Enforcement Order, did not constitute specific steps taken to ensure compliance with the express provisions of the Order: Reasons para 252.

[65] The trial judge continued on to address the more specific factors which Mr. Dockman contended established due diligence on his part. These factors included the theft of the records, the foreseeability of harm, Mr. Dockman's stated intention to cease operating the Waterworks System, Mr. Dockman's efforts to supply reports after September 20, 2013, and his attempts to fix a failed "O" ring in one of the reverse osmosis filters in November of 2013.

[66] The trial judge addressed each of these factors as paras 254-275 of his Reasons. Without reviewing his findings in any great detail, the trial judge dismissed certain of these factors as being irrelevant to the question of whether Dockman took all reasonable measures to ensure that the specific terms of the Enforcement Order had been complied with (namely the arguments concerning foreseeability of harm, and Mr. Dockman's expressed desire to cease operations). Specifically, the trial judge found that any suggestion that Mr. Knaus was trying to force Mr. Dockman into an unwanted course of action to be irrelevant. He expressly rejected the invitation to draw any inference that Mr. Dockman was unsophisticated and had been forced by Alberta Environment into continuing the operation of the facility.

[67] The trial judge found that while other factors (namely the post-September 2013 reporting and the steps taken to rectify the "O" ring failure) were relevant, generally, to Mr. Dockman's efforts to remain in contact with Alberta Environment and address operational problems within

the plant, they did not address specific steps taken by Mr. Dockman to avoid particular non-compliance with the Enforcement Order.

[68] Finally, in regard to the theft of the records, the trial judge found that for all of the reasons he had provided in denying the accused's application for a stay, the loss of the records in no way set-off Mr. Dockman's need to demonstrate due diligence in relation to the alleged contraventions. Again, this finding is entitled to deference.

[69] The trial judge then went on to examine any evidence of due diligence in relation to each specific count: Reasons, paras 276-322.

[70] Overall, he found a lack of evidence demonstrating that Mr. Dockman had taken any steps over the life of the Enforcement Order to ensure compliance within the prescribed fluoride limits and pH levels. Any steps taken by Mr. Dockman over the course of the Order to improve the Waterworks System or deal with breakdowns were not shown to be specifically targeted toward restoring the water to within the stated limits. In specific regard to the pH levels, while the issues with respect to well five had been noted and conveyed, the trial judge found that Mr. Dockman failed to provide evidence demonstrating what efforts were being made to repair the well and correct the imbalance.

[71] The trial judge found that the evidence as to the monitoring and reporting frequencies as required under the Enforcement Order demonstrated a disjointed and ad hoc approach toward compliance. As an example, although the Order called for pH level reporting five days out of seven, Mr. Mattucci's job was to test four out of seven days. The trial judge rejected Mr. Dockman's assertion that he believed that it was Mr. Mattucci's responsibility to contact Alberta Environment in the event that an excess of fluoride or pH levels were detected, as being contrary to Mr. Dockman's statement that he was the one who dealt with Alberta Environment. Mr. Dockman was also aware of Mr. Mattucci's busy trucking schedule and attempted to provide him with support, although this was not always practicable as Mr. Dockman was dividing his time between the Waterworks System and his schooling in Edmonton.

[72] The trial judge also found that there was no clear evidence that either Mr. Mattucci or Ms. Godlien had a clear understanding of the requirements of the Enforcement Order, nor was there any monitoring of their performances. There was no standard operating procedure for Mr. Mattucci or Ms. Godlien to follow, nor any daily instructions. There was no formal scheduling system to ensure that the fluoride and pH monitoring was done as required, nor was there a system to ensure that the Monthly Reports were properly emailed, nor to ensure that any contraventions reported to Alberta Environment were adequately being dealt with. In specific reference to the obligation to send the Monthly Reports, the trial judge found on the evidence that Mr. Dockman largely ignored this requirement.

[73] Lastly, in regard to the allegation that Mr. Dockman failed to immediately report contraventions, the trial judge found that when Mr. Mattucci became aware of an issue, he would alert Mr. Dockman and Mr. Dockman would do the reporting. The trial judge found that Mr. Dockman's interpretation of the word "immediate", and his decision to group reports and submit them within seven days of an occurrence, did not, on any reasonable interpretation, amount to compliance under the Enforcement Order. The trial judge inferred from the evidence that Mr. Dockman's choice to report in this manner was based solely on his own personal convenience. The trial judge further found that there were numerous contraventions that were simply not reported.

[74] A review of the trial judge's very thorough Reasons indicated that while Mr. Dockman demonstrated an awareness of what was occurring at the Waterworks System, including operational problems, he failed to take reasonable steps to fulfill his obligations under the Enforcement Order.

[75] The trial judge engaged in an analysis examining whether Mr. Dockman established that he took all reasonable care, which involved considering what a reasonable man would have done in the circumstances. The trial judge found that the facts before him did not amount, at law, to a defence of due diligence. Absent an extricable legal error, the appellant must demonstrate that the trial judge made a palpable and overriding error in applying the law to the facts, which he has not done.

[76] It is not the role of an appellate court to re-hear or re-try a case. Yet I find this is precisely what Mr. Dockman is encouraging. The appellant encouraged this Court to reconsider number of factors which he submits established due diligence on his part. Specifically, the appellant pointed to the impact of increased reporting requirements on Mr. Mattucci's already-busy schedule, Mr. Dockman's failed attempt to secure an agreement with the Rocky View Water Co-op, Mr. Dockman's attempt to deal with the issues surrounding the "O" ring failure, Mr. Dockman's stated wish to discontinue the Waterworks System, the theft of the records, as well as highlighting the monitoring, sampling, and reporting actually carried out by Mr. Dockman, as evidence of Mr. Dockman's having taken all reasonable steps to avoid non-compliance with the Order.

[77] The trial judge dealt with each of the above factors as discussed above, and absent a finding of palpable and overriding error, it is not open to this Court to decide differently.

[78] The appellant also argued that the trial judge should have preferred Mr. Dockman's evidence over that of Mr. Krause, in cases of a discrepancy. The appellant alleges that Mr. Krause was evasive during cross-examination on issues surrounding the attempted tie-in to Rocky View Water Co-op, as well as in regard to what occurred during the May 30, 2013 meeting concerning the issuance of the Enforcement Order and the September 20, 2013 meeting where the possibility of closing the facility was discussed.

[79] The trial judge had the advantage of being able to observe each of the witnesses in person. To the extent that the appellant is mounting an argument as to credibility, this Court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown: *R c Gagnon*, 2006 SCC 17 para 10. No such error has been demonstrated in this case.

[80] I note that in specific relation to any dispute over what was stated regarding Mr. Dockman's intention to close the Waterworks System, the trial judge expressly rejected the argument that any discussions about ceasing to operate the system served to alleviate Mr. Dockman's continued obligations to comply with the Enforcement Order. Furthermore, the trial judge found that credibility was not an issue before him, in that what might have been discussed in regard to discontinuing operations did nothing to address Mr. Dockman's continued obligations to comply with the terms of the Enforcement Order: see Reasons, paras 265-266.

[81] Finally, Mr. Dockman suggests that the trial judge erred in failing to draw an adverse inference as a result of the Crown's failure to call Larry West, an employee of Alberta Environment with whom the appellant says he had substantial contact with and who had substantial knowledge of the events at the Waterworks System during the period in question, and

who was involved in an onsite inspection concerning the broken "O" ring. The trial judge noted as follows, at para 232:

> Last, [the accused] argue Dockman displayed due diligence by continuing to submit a series of reports after September 20th, 2013, by addressing a mechanical problem in November and by Dockman keeping a departmental inspector, Larry West, fully apprised of the problems over the period. They argue the fact that Dockman and Mattucci maintained contact with the department through West until the plant was shut down on January 20th, 2014 all goes to due diligence.

[82] The trial judge concluded that although these steps reflected an effort to maintain communications with Alberta Environment and to fix an operational issue at the plant, they again did not constitute specific steps taken by Mr. Dockman to avoid a particular non-compliance with the Enforcement Order, and therefore did not demonstrate due diligence: Reasons para 275.

[83] Given the trial judge's finding that Mr. Dockman's interactions with Mr. West would have only demonstrated continued communications with Alberta Environment and an intention to address an operational failure, it is difficult to see why an adverse inference should be drawn. It did not appear that the trial judge believed that Mr. West would have had relevant information pertaining materially to the issue of due diligence. The appellant did not direct this Court to where, on the transcripts, the issue was raised at trial. Nor did he provide an explanation for why he failed to call Mr. West as a witness for the defence.

Conclusion on Ground Two

[84] In sum, the appellant failed to identify any extricable legal error in the trial judge's analysis and findings on the issue of whether a defence of due diligence was established. Nor was he able to identify a palpable and overriding error in the trial judge's application of the law to the facts. Rather, his argument was essentially that the trial judge came to the wrong conclusion given the law and facts before him, and that this Court should view the evidence differently. This is not the role of an appellant court. There is simply no indication that the trial judge erred by making palpably unreasonable findings of fact unsupported by the evidence and using those facts to support an erroneous conclusion that the appellant had failed to exercise due diligence.

[85] Accordingly, this ground of appeal is dismissed.

Ground Three: Did the trial judge err by failing to correctly apply the established sentencing principles?

[86] In finding Mr. Dockman guilty, the trial judge imposed the following sentence:

a) On count one (contravention of fluoride concentration limits), a fine in the amount of $7,000;

b) On count two (contravention of pH limits), a fine in the amount of $7,000;

c) On count three (failing to collect/analyze water samples for fluoride concentration as stipulated), a fine in the amount of $5,000;

d) On count four (failing to collect/analyze water samples for pH limits as stipulated), a fine in the amount of $5,000;

e) On count five (failing to submit reports as stipulated), a fine in the amount of $12,500; and

f) On count six (failing to immediately report contraventions), a fine in the amount of $12,500.

[87] The global amount of the fines totalled $49,000. The trial judge further imposed a fifteen percent provincial fine surcharge for each respective fine on each respective count. The ultimate fine therefore comes to $56,350. I note that the Crown sought a global fine in the range of $41,000 to $59,000, plus the victim fine surcharge, while the appellant submitted that a fine within the range of $12,000 to $18,000, plus the fine surcharge, was appropriate.

[88] In the event of default on payment of any of the fines or surcharges on any one count, the trial judge ordered that the appellant be incarcerated for a period of 25 days on each count, to be served consecutively. As such, should the appellant fail to pay the fines on each count, he would face a period of incarceration totalling 150 days, or approximately 5 months.

[89] Finally, the trial judge imposed an order prohibiting Mr. Dockman from operating, being employed by, or holding a controlling interest in any organization which operates a wastewater or drinking water facility for a period of three years, pursuant to s 234(1)(a) of the *EPEA*.

[90] The appellant alleges that the trial judge erred in imposing the sentence. Specifically, he alleges that the trial judge either failed to consider relevant factors, or unduly emphasized certain factors.

Standard of Review

[91] The parties agree as to the applicable standard of review for this ground of appeal. Namely, that absent an error in principle, a failure to consider a relevant factor, or an overemphasis of an appropriate factor impacting the sentence, an appellate court should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit: *R v M(CA)*, 1996 SCC 230, para 90; *R v Ipeelee*, 2012 SCC 13 at para 38, *R v Lefebvre*, 1999 ABQB 523 at paras 8-9.

[92] As more recently stated by Moldaver J., for the majority in *R v Suter*, 2018 SCC 34, at paras 23-24:

> It is well established that appellate courts cannot interfere with sentencing decisions lightly: see *R. v. Shropshire,* [1995] 4 S.C.R. 227 (S.C.C.), at para. 48; *R. v. W. (L.F.)*, 2000 SCC 6, [2000] 1 S.C.R. 132 (S.C.C.), at para. 25; *R.v. M. (L.)*, 2008 SCC 31, [2008] 2 S.C.R. 163 (S.C.C.), at para. 14; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 (S.C.C.), at para. 46; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 (S.C.C.), at para 39. This is because trial judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*Lacasse*, at para. 39).
>
> In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate

> court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.

[93] Unless one of the above-mentioned situations has been demonstrated, this Court is not to intervene.

Analysis

[94] The appellant argues that the trial judge erred by focusing too heavily on punishment, to the exclusion of the remaining sentencing principles. He appeared to focus on the following arguments: first, that the trial judge failed to appropriately consider Mr. Dockman's position that he consistently attempted compliance with the Enforcement Order; second, that the recipients of the water were not at risk for physical harm; third, that the trial judge failed to consider Mr. Dockman's financial and personal circumstances, and lastly, that the trial judge failed to correctly apply the totality principle.

[95] A review of the Sentencing Reasons indicates that trial judge was clearly aware of the sentencing principles and objectives codified in sections 718 to 718.2 of the *Criminal Code*: see Sentencing Reasons paras 67–69. He also addressed the applicable penalty provisions under the *EPEA*, notably section 228(2) which provides that a person who commits an offence referred to in section 227(g) is liable, in the case of an individual, to a fine of not more than $50,000, and section 231, which renders an offender liable on conviction for each day on which the offence occurs or continues.

[96] In addition to noting the sentencing principles and objectives contained in the *Criminal Code*, the trial judge expressly stated that the sentencing framework specific to environmental offences as set out in *R v Terroco Industries Ltd*, 2005 ABCA 141 was considered and applied. The Court of Appeal in *Terroco* set out a number of considerations to be applied in crafting a sentence for environmentally-related offences.

[97] In applying the *Terroco* factors, the trial judge noted the Court of Appeal's pronouncement that culpability should be a dominant factor in sentencing for environmental offences: see *Terroco* at para 35. He then went on to analyze Mr. Dockman's culpability in specific relation to each count, while grouping the offences together under similar categories, being counts one and two (instances where either the fluoride content or pH limits fell outside the specified range), counts three and four (contravening the monitoring frequencies required by the Enforcement Order) and counts five and six (the communication/reporting requirements). The trial judge concluded that offences within each similar category should attract a similar sentence. He further concluded that the third category of offences, being the communication/reporting requirements, "strike at the heart of Dockman's obligations under the Enforcement Order and constitute the most serious category of all of these offences": Sentencing Reasons para 149. Given the increased gravity of the offences in this category, these two counts attracted the largest fine.

[98] Crucial to the trial judge's sentencing analysis was his conclusion as to the appellant's culpability, where he found at paras 151-156, that (emphasis added):

> The purpose of Dockman's reporting under the Enforcement Order was to allow the Regulator to determine what investigative and remedial steps, if any, might be required following his reporting. From a public safety perspective, without acting in full compliance with the Order, the Regulator's ability to become aware of, and

properly react to possible contraventions in the operation of this plant had been significantly compromised.

Mr. Dockman was not a novice in the operation of water treatment plants, far from it. He had more than eleven years operational experience with this plant and three or more prior years of experience with an unrelated water co-op.

I emphasize one very important common aspect to all of these contraventions: they all relate to the treatment of an entire acreage community's drinking water supply. The nature and sheer number of contraventions running through these individual counts over a period of seven or eight months near the end of Mr. Dockman's eleven year tenure with this plant leads me to conclude this goes well beyond mere sporadic carelessness. Mr. Dockman unquestionably should have known better. All of this is aggravating to his eventual sentence.

There is no suggestion Dockman acted to either actively falsify records or mislead the Regulator, actions which might have immediately placed him at the highest end of the culpability scale.

But even then, Mr. Dockman's departure from the requirements placed upon him under various provisions of the Enforcement Order constituted much more than just a few trifling "near misses" as characterized in *Terroco*. The contraventions identified on each count stand on their own merits, but their cumulative effect is of considerable concern to the Court. **The collection of these contraventions over time amounts to a pervasive, continuing and serious systemic failure in the operation of this water treatment plant by a very experienced owner and operator.**

Overall, these contraventions fall much closer to recklessness than they do near misses. Mr. Dockman's blameworthiness on the sliding scale of culpability referred to in *Terroco* is nearer the top end of the scale than the bottom, a factor which is clearly aggravating to the ultimate sentence on all six counts.

[99] In discussing the "cumulative effect" of the infractions, the trial judge highlighted that between June 1, 2013 and mid-January 2014, there were 77 separate occasions where the water did not meet the required fluoride concentration limits, 159 occasions where the water did not meet the required pH levels, and 64 instances where monitoring frequencies were not complied with. With respect to Dockman's failure to submit certain information electronically in writing, the trial judge reiterated that Dockman effectively took no steps to comply with this requirement, and in fact, simply ignored the requirement.

[100] After noting that the appellant's lack of a prior record constituted a neutral factor, the trial judge carefully detailed his findings concerning any evidence of Mr. Dockman's acceptance of responsibility or remorse. He essentially concluded that the appellant failed to comprehend the gravity of the offences and attempted to blame others (including Mr. Mattucci, individuals at Alberta Environment, and his customers) rather than demonstrating any willingness to take responsibility for the contraventions. After hearing from Mr. Dockman on this point, the trial judge concluded, at para 165:

> Mr. Dockman has gone nowhere near convincing me he either understands the gravity of the responsibility imposed upon him in his operation of this facility or the extent of his responsibility for these offences. That is a significant aggravating factor and speaks directly to the need for specific deterrence in this case.

[101] In arguing before me, Mr. Dockman stressed his position that while he did not report to the fine letter of the Enforcement Order, he nonetheless reported. The appellant stressed that because he attempted to follow the Order to the best of his ability, and because he was honest in what was reported, the fines imposed were too high. That is, the trial judge should have viewed Mr. Dockman's attempts at compliance as a mitigating factor, and his failure to do so resulted in an unfit sentence. With respect, this argument fails to address the trial judge's express finding in his initial Reasons that Mr. Dockman did not take reasonable steps to comply with the Enforcement Order. As noted above, the appellant did not demonstrate that the trial judge made a palpable and overriding error in so finding.

[102] Furthermore, in his Sentencing Reasons, the trial judge found that Mr. Dockman's actions did not constitute a 'near miss' but rather that Dockman's numerous, repeated failures in the operation of the plant came much closer on the spectrum to 'recklessness'. As discussed above, this factual finding is supported by the evidence.

[103] The appellant further argues that the trial judge erred in his analysis of damage/harm as one of the *Terroco* factors. Before this Court, the appellant stressed that the Crown's witness, Mr. Janzen, admitted that the recipients of the water suffered no harmful effects as a result of the fluoride and pH level inconsistencies. This argument was squarely in front of the trial judge, who dealt with it in some detail. While the trial judge acknowledged that the lack of actual harm constituted a neutral factor, he ultimately concluded that the threat of harm to the community receiving the potable water was an aggravating factor: see Sentencing Reasons paras 166 and 175. In so determining, the trial judge noted that the residents demonstrated considerable concern for their own safety as a result of the appellant's management and operation of the plant. As noted by the trial judge, *Terroco* provides that the potential for harm is a relevant consideration on sentencing: para 48.

[104] In concluding his analysis of the *Terroco* factors, the trial judge found that both specific and general deterrence constituted an important consideration in sentencing for environmental matters. Again, our Court of Appeal in *Torroco* noted that deterrence was a key component of sentences imposed for breaches of environmental protection statutes: para 53. The trial judge noted Mr. Dockman's evidence that he was experiencing financial difficulty in continuing to operate the Waterworks System. He found that absent sufficient operating capital, any risks associated with the operation of the facility had been placed at the feet of the community receiving the potable water. The trial judge determined that the undercapitalization of the plant was one of the contributing causes to the Enforcement Order contraventions. He concluded that it was foreseeable that financial hardship would reduce the plant's efficiency and would lead to unwanted consequences. This, he concluded, demonstrated a level of culpability and constituted an aggravating factor: Sentencing Reasons para 179.

[105] In further discussing deterrence, the trial judge relied on Mr. Janzen's evidence that self-reporting is fundamental to the regulation of water treatment systems, and that prompt reporting allows for an appropriate response by the Regulator. He found that the appellant's failure to monitor and self-report as required "severely limited the Regulator's ability to manage the

associated risks and undermined the integrity of the regulatory scheme under which this plant operated": Sentencing Reasons, para 181. Again, he found that in the circumstances, a fit sentence must reflect both specific and general deterrence. While the objective of deterrence was clearly considered as a relevant factor, the appellant has failed to demonstrate that the trial judge placed undue emphasis upon this factor, given the pronouncement that it should constitute a key component in sentencing for environmental offenses.

[106] The appellant acknowledged the importance of the self-reporting requirement and reiterated the argument that he continually made an effort to report as required, although not always within the terms of the Enforcement Order. In so arguing, Mr. Dockman stressed that the trial judge erred by failed to account for the fact that at no time did he ever falsify information in a report, attempt to mislead AEP, or instruct his employees to do so. I find no such error. The trial judge expressly acknowledged this fact and found that had Mr. Dockman done so, the penalty imposed would have been even harsher: see Sentencing Reasons para 154. The trial judge noted, at para 127 of his Sentencing Reasons, that cases involving dishonesty were the "most serious" and resulted in various length gaol sentences. This factor was clearly considered by the trial judge.

[107] The appellant strenuously argued that the trial judge erred by failing to consider Mr. Dockman's personal and financial circumstances in imposing the fines. I find that the trial judge did consider these circumstances, and addressed them in some detail. In regards to Mr. Dockman's personal circumstances, the trial judge simply did not accept the appellant's attempt to portray himself as someone who "did all he could in a difficult situation". The trial judge was aware that Mr. Dockman had stated a desire to shut down the plant prior to relocating to Edmonton to attend university. In the trial judge's view, Mr. Dockman:

> ...chose a half-measure by continuing to operate on the basis of his own perception there might be some continuing value in doing so, but without having the necessary resources in place. In doing so, he compromised his obligations to both the Regulator and to his customers. All of this constitutes an aggravating factor on sentencing (Sentencing Reasons, para 163).

[108] The trial judge thoroughly reviewed Mr. Dockman's financial circumstances at paras 10-42 of his Sentencing Reasons. Counsel's argument that the trial judge failed to properly characterize Mr. Dockman's financial position is not borne out on a review of these paragraphs.

[109] Rather, the trial judge was aware of Mr. Dockman's broad assertion that he lacked the ability to pay fines, but found that such an assertion was not supported on the evidence. I note that Mr. Dockman addressed his financial situation by giving *viva voce* evidence to the Court and by preparing financial statements relating to both his personal and his business finances. The trial judge reviewed both of these statements in great detail, but did not place any real weight on them for the following reasons.

[110] In relation to the business statement, the trial judge expressed a concern that Mr. Dockman provided no foundation for his figures and approximations by way of expert opinion, valuation, audit, approval or the like, to assist the Court in assessing his asset value calculations. The trial judge concluded that Mr. Dockman's unsubstantiated opinions rendered the reliability of his business statement questionable.

[111] In relation to Mr. Dockman's personal statement, the trial judge questioned how Mr. Dockman could provide a precise calculation of income tax liability when he had failed to file income tax returns for several years. The trial judge opined that if such a figure was an estimate, this fact was not disclosed. The trial judge was well aware of Mr. Dockman's position that he was a university student with limited income and student loan obligations, and that he had to utilize/deplete personal finances in an attempt to buoy up the Waterworks System. However, he was not convinced that the evidence provided by Mr. Dockman accurately depicted his financial situation. The trial judge noted a number of circumstances (including the quantum of alleged tax liability, funds from the "Legacy" share buyout, Mr. Dockman's contract work for the Federal Government, his ability to incur substantial legal fees in relation to litigation involving the Sharp Hill residents, and Mr. Dockman's position before the Court that a fit global sentence would be in the range of $12,000-$18,000) which he believed undermined the position taken by Mr. Dockman. The trial judge concluded, at para 39 of the Sentencing Reasons that:

> I have considered Mr. Dockman's testimony concerning his financial position, but I am not at all convinced it provides me with any sort of a reliable basis to conclude he is simply an impecunious university student with little income and no recoverable assets, financing his education largely on student loans resulting in him having little, or no ability to pay large fines, as he has maintained throughout this sentencing.

[112] Of even greater note is the trial judge's correct determination that ability to pay is only one of a series of factors to be considered in crafting a fit sentence. He referenced *R v Great White Holdings*, 2005 ABCA 188, where our Court of Appeal considered how an offender's financial position may impact sentencing. The Court of Appeal, stated, at para 21:

> In my view, the wealth or poverty of the convicted person or company can be a relevant factor in limiting or not limiting the size of the penalty, but it cannot impose a floor. **In other words, the prime consideration is the proportion of the penalty to the gravity of the offence** (and the offender's previous record). Limited assets or income in some circumstances (which we need not detail in this appeal) may help to reduce the monetary penalty. But great wealth does not justify a penalty disproportionate to the gravity of the offence (and the offender's previous record): *R v. Fairbairn* (1980), 2 Cr. App. R. (S.) 315 (Eng. C.A.). [emphasis added]

[113] The trial judge thus concluded, at para 42, that:

> I remain entirely skeptical Mr. Dockman's description of his difficulties surrounding his financial circumstances but even if I were not, those circumstances would constitute only one of other factors at play in arriving at a fit sentence in this case and would not, on their own account, determine the outcome.

[114] The trial judge carefully outlined the reasons why he questioned the financial picture painted by Mr. Dockman. It is clear that the trial judge believed that Mr. Dockman's evidence on this point was non-comprehensive and was therefore less than reliable. He further correctly concluded that an offender's financial circumstances are not the sole consideration in crafting a fit sentence. I see no error in his reasoning.

[115] The trial judge was aware of the requirement that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The trial judge reviewed a number of cases presented by both Crown and the defence and noted the respective charges, sentences, and analysis provided in each case: see Sentencing Reasons paras 119 – 125.

[116] From this compendium he noted that the range of sentences in each case went from fines ranging from $5,000-$10,000 per count, to a period of incarceration. He noted that while each case was distinguishable, they suggested that the highest fines were reserved for offenders (such as the appellant) who supervised or operated drinking water – as opposed to wastewater – facilities. He was also aware of the distinction drawn between the comparative range of sentences for individuals as opposed to corporations: Sentencing Reasons para 114.

[117] As a part of his overall argument that the fines imposed by the trial judge were excessive, the appellant suggests, in his Appeal Brief, that the trial judge failed to apply the 'totality principle'. Any such assertion is unfounded. The trial judge was clearly aware of the principle of totality in the context of global sentences, and in particular the cumulative effect of fines, as per his express reliance on *Alberta (Health Services) v Bhanji*, 2017 ABCA 126. The concept of totality in respect of multiple fines is discussed in depth at paras 70-81 of his Sentencing Reasons.

[118] Paragraphs 185-192 of the Sentencing Reasons delineate the application of this principle. The trial judge concluded that given his analysis, each count might attract at, or above, the mid-point of their respective range. After noting that following this approach, the combined global sentence would result in fines of over $60,000 ($69,000 including the surcharge) the trial judge then went on to review the total global sentence, to ensure the total effect was neither unduly harsh nor excessive.

[119] The trial judge initially found that counts one and two (category one) would attract fines in the amount of $9,000 each, counts three and four (category two) would attract fines in the amount of $7,000 each, and counts five and six (category three) would attract fines in the amount of $14,000 each. He then adjusted these figures to the ones described above in accordance with the totality principle, finding that as the most serious offences were those in the third category, the majority of the adjustments should come largely through the other two. This adjustment demonstrates an adherence to both the totality and the proportionality principle.

[120] There is no indication that the trial judge somehow erred in his application in this regard.

[121] In addressing default of payment, the trial judge found that given the nature and overall seriousness of the offences and given the fact that they arose due to a contravention of provincial environmental protection legislation, a "built-in imperative" was required to ensure the appellant's payment of the fines. He thus determined that incarceration, as opposed to judgment, was required in the circumstances. The trial judge ordered that Mr. Dockman be incarcerated for a period of 25 days should he default on payment of the fines, to be served consecutively.

[122] The appellant argues that the time in default is excessive. The trial judge found that while the *EPEA* does not provide for a period of incarceration upon default, the *Provincial Offences Procedure Act*, RSA 2000, c P-34 ("*POPA*") did address this point. Specifically, s 7(2) provides that in the event of default of payment of a fine, an offender may be imprisoned for a period of not more than six months. The trial judge provided counsel with the ability to address the Court

on the time required to pay the fines. According to the Endorsement, six months was given on each count.

[123] As Mr. Dockman's fines totaled approximately $50,000, I do not find a global sentence of 150 days imprisonment in lieu of payment to be excessive. Nor does this calculation offend the provisions in *POPA*. As noted by this Court in *R v Goebel*, 2003 ABQB 422 at para 76, there is no fixed formula to calculate days in lieu in *POPA*, which provides a sentencing judge with discretion, up to the six-month limit. The appellant has failed to demonstrate that the trial judge's imposition of days in lieu of payment in the circumstances was demonstrably unfit. Again, the trial judge stressed that given the nature of the offences, a "built-in imperative" was required to ensure the payment of the fines, as opposed to judgment. Our Court of Appeal recently discussed the use of the imposition of jail time in lieu of payment as a method of compelling or motivating payment of the fine: see *R v Peers*, 2015 ABCA 407 para 12.

[124] I note that the appellant did not mount any significant argument with respect to the prohibition order under s 234(1)(a) of the *EPEA*.

[125] Lastly, at para 72 of his brief, counsel for Mr. Dockman lists 14 additional factors that he states the trial judge should have taken into consideration as being mitigating factors in crafting the sentence. With respect, the appellant does not indicate just how the trial judge is alleged to have failed in considering these factors. Moreover, a review of the Sentencing Reasons clearly reveals that each of these factors was, in fact, considered. An appeal on sentence is not simply an opportunity to have a party's arguments considered anew.

Conclusion on Ground Three

[126] In order to be successful on appeal, Mr. Dockman must establish that the trial judge made an error in principle, failed to consider a relevant factor or overemphasized an appropriate factor (and that this error had an effect on the sentence imposed), or that the sentence was demonstrably unfit. I find he has failed to do so.

[127] The trial judge emphasized Mr. Dockman's culpability, which, again, he found to be closer to the 'recklessness' end of the spectrum. The principle of proportionality requires that the degree of responsibility of the offender be taken into account. The trial judge correctly noted that culpability should be a dominant factor in sentencing environmental offences. He further stressed the importance of deterrence in cases involving environmental offences. The appellant has failed to demonstrate that the trial judge erred in principle in placing an emphasis on these two factors.

[128] Neither has the appellant demonstrated that the trial judge failed to consider a relevant factor. Rather, I find that in each instance where the appellant alleged a failure to address a relevant or mitigating factor, a review of the Sentencing Reasons demonstrates that each such factor was indeed addressed, in many cases in some detail. Again, I specifically reference the trial judge's analysis of Mr. Dockman's efforts at compliance, his evidence of remorse, and his evidence pertaining to his financial situation. Many of the issues raised by the appellant are essentially factual issues as found by the trial judge. The deferential standard of review for sentencing matters means that an appellant court is not free to intervene absent a demonstration of the type of error as outlined in *Suter*.

[129] Mr. Dockman's sentence for each count fits comfortably within the range as identified by the trial judge given his review of the authorities presented by the parties. As discussed above, given the high degree of culpability as found by the trial judge (informed in part by the sheer

number of contraventions) and the nature of the offences, there is nothing indicating that the sentence was demonstrably unfit. Again, formulating a sentence is a highly subjective process, with a trial judge having broad discretion to impose the sentence they consider appropriate within the limits established by law.

[130] Again, the appellant has not demonstrated any error in principle, failure to consider a relevant factor or overemphasis of an appropriate factor. Nor has he shown the sentence to be demonstrably unfit. This ground of appeal is dismissed.

Conclusion

[131] Mr. Dockman's appeal on each ground is dismissed.

Heard on the 6th day of September, 2018.
Dated at the City of Calgary, Alberta this 4th day of March, 2019.

S.L. Hunt McDonald
J.C.Q.B.A.

Appearances:

John Anderson
for the Appellant

Brian Holtby, QC
for the Respondent (Crown)

Appendix I

As described by the trial judge at para 12 of his Reasons, the operative contents of the Agreed Statement of Facts are as follows:

1. A signed copy of this Statement of Agreed Facts, tendered by the prosecution as Exhibit 1, contains facts admitted pursuant to s. 655 of the Criminal Code of Canada for the purpose of dispensing with the formal proof thereof and is admissible as a full exhibit.

2. At all relevant times Michael Louis Dockman was the sole director and shareholder of Dockman & Associates Ltd. (the "Corporation"). A copy of an Alberta Corporate Registries Search pertaining to Dockman & Associated Ltd. and tendered by the prosecution as Exhibit 2 is admissible as a full exhibit.

3. At all relevant times, Mr. Dockman operated a water treatment and distribution system known as the East Airdrie (Sharp Hill) Waterworks system (the "Waterworks System"). The Waterworks System treated and distributed potable and irrigation water to its customers in the Sharp Hill subdivision near Airdrie, Alberta.

4. The Sharp Hill subdivision consists of residential parcels and was developed by 692591 Alberta Ltd. A copy of an Alberta Corporate Registries Search pertaining to 692591 Alberta Ltd. and tendered by the prosecution as Exhibit 3 is admissible as a full exhibit.

5. On June 11, 2002, Alberta Environment (now Alberta Environment and Parks or AEP) issued Approval No. 151716-00-00 (the "Approval") to the Corporation for construction, operation and reclamation of the East Airdrie Waterworks System. A copy of the Approval tendered by the prosecution as Exhibit 4 is admissible as a full exhibit.

6. The Approval expired in June 2002. AEP extended the Approval to June 1, 2013 by means of a letter dated June 12, 2012. A copy of this letter tendered by the prosecution as Exhibit 5 is admissible as a full exhibit.

7. The Corporation held a license to divert groundwater from wells and treated the water to make it potable, while mixing the reject water from the treatment process with storm water in order to deliver irrigation water and potable water in separate pipes to each residential lot.

8. The raw ground water obtained from the wells contained relatively high concentrations of fluoride and a reverse-osmosis filtering system was used by the Waterworks System to remove excess fluoride from the raw groundwater. The treatment system injected chlorine into the drinking water as a disinfectant to ensure it was free of harmful pathogens while in the distribution system.

9. On May 30, 2013, AEP issued Enforcement Order EO-2013/03-SR (the "Enforcement Order") to Michael Dockman and the Corporation. The Enforcement Order was served on Michael Dockman and the Corporation on the same day. A copy of the Enforcement Order tendered by the prosecution as Exhibit 6 is admissible as a full exhibit.

10. On September 20, 2013, AEP amended the Enforcement Order to remove clauses 14 to 20. The Amended Enforcement Order was served on Michael Dockman and the Corporation on the same day. A copy of the amended Enforcement Order tendered by the prosecution as Exhibit 7 is admissible as a full exhibit.

11. The Enforcement Order expired on January 20, 2014.

12. Monthly log sheets entitled "Monthly Reports" were maintained at the Waterworks System on which were recorded the results of monitoring for parameters including pH and fluoride. The original Monthly Reports for the time period June 1, 2013 to January 17, 2014, tendered by the prosecution collectively as Exhibit 8, are admissible as a full exhibit.

13. Michael Dockman was one of the individuals who made entries in the Monthly Reports.

14. Health Canada publishes Guidelines for Canadian Drinking Water Quality ("Drinking Water Guidelines") which contain a Table 2 prescribing Maximum Acceptable Concentrations for Chemical and Physical Parameters in Canadian drinking water based on health or aesthetic objectives. At the time the Enforcement Order was in effect, the relevant Drinking Water Guideline was the version issued in August 2012. A copy of the Summary Tables from the August 2012 Drinking Water Guidelines, tendered by the prosecution as Exhibit 9 is admissible as a full exhibit.

15. Telephone calls to 1-780-422-4505 are answered by staff in the course of their duties at the provincial Co-ordination and Information Centre (CIC) operated by Alberta Transportation. When a call is answered, staff contemporaneously record the information given by the caller on an electronic Call Information Form and a unique reference number is generated. The staff then forward the Call Information Form to the appropriate agency for either emergency or compliance response and a copy of the Form is archived. The role of CIC staff is limited to collecting appropriate information and ensuring that it is passed along. Copies of archived Call Information Forms generated by CIC as a result of contravention reports by or on behalf of Michael Dockman and Dockman and Associates Ltd. under the Enforcement Order for the time period June 1, 2013 to January 31, 2014 and tendered by the prosecution collectively as Exhibit 10 are admissible as a full exhibit.