# COURT OF QUÉBEC

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL
LOCALITY OF MONTREAL
"Criminal and Penal Division"

NO.: 500-01-088108-136

DATE: September 18, 2018

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**PRESIDING: THE HONOURABLE PIERRE DUPRAS, J.C.Q.**

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**HER MAJESTY THE QUEEN**

Prosecutor

v.

**SYLVAIN FOURNIER**

Accused

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## SENTENCING DECISION

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[1] On March 1, 2018, the Court declared Sylvain Fournier guilty of the manslaughter of Gilles Lévesque.

[2] The facts are explained in detail in the decision on the merits; therefore, the Court, at this stage, will simply summarize them.

[3] On April 3, 2012, Gilles Lévesque was working for S. Fournier Excavation Inc., a business whose president is the offender. Both of them were replacing a sewer pipe when the trench at the bottom of which they were working collapsed. The Court concluded that the trench had not been shored as is requested by section 3.15.3 of the

*Safety Code for the construction industry*[1]. The collapsing of the banks of the trench caused Mr. Lévesque's death and severely injured Mr. Fournier.

[4] Naturally, the Court is sensitive to Gilles Lévesque family's sorrow and recognizes that nothing can remedy this tragedy; however, the Court hopes that the family can find soothing and serenity despite all that.

## THE EVIDENCE

[5] During the sentencing proceedings, the defence summoned three witnesses whereas the Crown submitted a few documents and had Karine Gallant-Lévesque, daughter of the victim, read a statement.

[6] In brief, besides Ms. Gallant-Lévesque's statement, the Crown submitted the offender's judicial record and two sets of documents pertaining to previous regulatory offences committed by the business of the offender.

[7] The defence summoned Mr. Fournier's mother, one of his sisters, and an occupational health and safety consultant to testify. The offender did not testify at this stage; however, it should be noted that he appealed his conviction to the Court of Appeal.

## ANALYSIS

[8] Sentencing is obviously one of the most difficult and delicate exercises in which a Court must engage[2]. "Although this task is governed by section 718 and seq. of the *Criminal Code* […] and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves [...] the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing"[3].

[9] We are also reminding that in connection with the analysis performed for the purpose of sentencing, such objectives are not subject to normative hierarchy[4].

[10] That being said, the Crown suggests that the appropriate sentence, in light of the circumstances, would be a term of incarceration of 3 years and a half. The position of the Crown, which recognizes the absence of *ad rem* precedent in Quebec, is mainly supported by two decisions, one from Ontario[5] and one from Quebec[6].

[11] Hence, basing itself on the principles of denunciation and general deterrence, and relying for the most part on the Ontarian decision in *Kazenelson*, the Crown is demanding this severe penitentiary sentence. For the record, Kazenelson was acting as site manager when a working platform on which he was standing with 6 other employees of Metron collapsed, with the result that five of them fell a 100 feet to the ground. Based on what Kazenelson knew and saw, of all the individuals standing on the platform, only one was attached to a safety line in compliance with the regulation in effect, and that individual survived. It appears that Kazenelson was miraculously able to climb on a balcony and hence save his life. Four workers died and the last one obviously suffered severe injuries.

[12] Kazenelson was not harmed in this sad story.

[13] The defence, for its part, suggests a combination of measures with the main components being a term of incarceration of 90 days to be served intermittently and a

three years' probation involving 240 hours of community work. Moreover, the proposed probation provides for a $5000 donation to a charity and a follow-up supervised by the occupational health and safety consultant mentioned in paragraph 6.

[14] The defence supports its position with a number of leading decisions, which will be addressed below, particularly the decision of our Court of Appeal in *Czornobaj*[7].

[15] With respect to aggravating factors, the Crown proposed the following set of factors:

- The objective seriousness of the offence;
- The existence of a judicial record;
- The breach of trust in the employer/employee relationship;
- The fact that the victim had been an employee of the offender since 2004 even though the offender had knowledge that the victim did not possess the required qualification cards;
- The offender's total responsibility in a context where this type of work is heavily regulated because of the dangers inherent to these excavations.

[16] With respect to mitigating factors, the defence proposed to take the following into account:

- The existence of a dependent person;
- The relative significance of the judicial record;
- The fact that the offender has never been incarcerated;
- The stigma that is brought to the Accused by the mere fact of being convicted.

[17] The Court adds to this list another factor to consider, namely the severe injuries suffered by the offender on April 3, 2012, which are described in paragraph 18 of the decision on the merits. These injuries do not constitute aggravating or mitigating factors *per se,* since they are not directly linked to the gravity of the offence or the degree of responsibility of the offender, but they are nonetheless linked to the offender's personal situation[8].

[18] That being said, section 718.1 of the *Criminal Code* sets out sentencing's fundamental principle and states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[19] Our Supreme Court expressed the following in that regard[9]:

> [42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused […]Whatever the rationale for proportionality,

> however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
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> [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case […] No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to **the** overarching guidelines and principles in the *Code* and in the case law [10].

[20] Following its drafting rationale, the Court now wants to refer to two decisions of our Court of Appeal that remind an important consideration that must also serve as a guideline when engaging in such a balancing exercise as it is engaging in. They are the *Paré*[11] and *Brais*[12] judgments.

[21] In the first case, Justice Doyon, in an exegesis of the concept of general deterrence, made the following observations :

> [48 In short, ordinary citizens ["*Monsieur et Madame Tout-le-Monde*"] must be deterred from committing such offences and, to ensure that the message strikes home, the appellant's sentence should be harsh, despite the many mitigating circumstances and the fact that his [translation] "social reintegration presents no problem". In other words, the appellant must be punished harshly so that non-criminals will think twice before driving in that condition. In my opinion, this view of sentencing is inconsistent with the principle of the individualization of sentences. Moreover, the objectives of denunciation and general deterrence can be achieved without the imposition of increasingly harsh prison sentences. Surely, for example, a penitentiary sentence is dissuasive and sufficient in itself to denounce the crime and deter an ordinary person from committing it. I doubt that ordinary citizens would remain undeterred if they knew that they could receive a penitentiary sentence. There is no need to increase the quantum of such sentences for this reason alone. Indeed, the quantum of the sentence should not be determined solely on the basis of public perception.
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> […]
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> [51] Indeed, it is rather well established that the harshness of a sentence is only a mild deterrent. Rather, this effect is achieved through the likelihood of being arrested and punished. For example, in *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death*, an important report prepared for the Canada Safety Council in February 2005, Professors David M. Paciocco and Julian Roberts made the following comment at page 49:

> However, when a correlational analysis is performed on crime rates and average sentence lengths the same result emerges: no significant relationship between sentence severity (in the case average sentence length) and crime (impaired driving) rates.
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> If the severity to penalties has little marginal deterrent effect, how then can offenders be deterred? Consistent with earlier reviews, the authors of the Cambridge review concluded that the certainty of penalties is most likely explanation for deterrent effect. […] In other words, making offenders aware of the likelihood of apprehension and conviction is the most effective way of preventing crime through general deterrence.
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> […]
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> [58] It is not a matter of arguing that general deterrence is not an appropriate objective and can never be achieved through harsh sentences. Instead, it must be recalled that the empirical data does not clearly identify the effects of harsh sentences, and, in any event, deterrence cannot be the only objective, the golden rule being the quest for proportionality.
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> [59] Il It should also be noted that deference is required when detention is based on the objective of general deterrence. […]

[22] This call to moderation has more recently been updated by Justice Vauclair in *Brais*, the other decision mentioned in the preceding paragraph:

> [TRANSLATION]
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> [19] I adopt the words of Justice Doyon in *Paré*, without quoting them in their entirety. It is worth recalling that caution must be exercised when implementing these objectives. Beyond the impressions and convictions have that the exercise of penal force sends a clear, if not strong, message, we cannot sweep aside the knowledge acquired in the field of criminal science. The findings of multiple studies, both Canadian and foreign, are striking. If, as a general rule, the penal sanctions operate as deterrents, it is by no means given that the severity of the sanctions help achieve this objective. On this point, research has produced mixed results and has shown that harsh sentences aimed at deterring a particular behaviour have failed.
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> […]
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> [23] Given this observation and the duty of the courts to take into account these diffuse objectives, for which impacts are hard to measure, the best answer resides in moderation. In recent years, the legislator required that it be given greater consideration by the courts when determining certain sentences, and the courts necessarily moved in that direction. Determining what is necessary, however, still remains a question of balance and still remains a question to be answered by the courts.

[23] These statements having been emphasized, the Court now intends to balance the factors, objectives and principles applicable to this case.

[24] Achieving the objective of social reintegration of the offender is not an issue. With the exception of one conviction for impaired driving in 2017, his judicial record is old and of no real relevance. He has only been fined. The offender appeared to be a small contractor who followed his father's footsteps professionally speaking and was

always an asset to society. In this panorama, to which we must add the fact that he is a father, nothing suggests that there could be any difficulties in that regard.

[25] Also, with respect to the offender's awareness of his responsibility, the decision on the merits has already, in our opinion and despite the appeal, necessarily elicited a thinking process in that regard; it is, however, the Court's intent to impose a sentence that encourages the achievement of this objective.

[26] As for the denunciation and deterrence imperatives, beyond what has been mentioned above, the Court adds that there is manifestly no basis for any concern regarding individual deterrence in the case of Mr. Fournier; the proceedings are, in and of themselves, producing such effect.

[27] What remains to be considered, naturally, are the denunciation and general deterrence objectives.

[28] Paraphrasing what has been retained from Justice Doyon's words and quoted in paragraph 20, the use of incarceration, when it is supported by general deterrence, must be pursued under the banner of moderation. Moreover, a penitentiary sentence is in itself inherently capable of discouraging anyone from committing offences without having to increase its quantum for this sole reason.

[29] With respect to denunciation, the Court considers that the above comments also apply to the review that must be conducted with respect to this objective, as well as to the logic behind it, and also concludes that moderation must be exercised.

[30] In sum, the Court considers that the balancing of the aforementioned elements is supportive of a penitentiary term of imprisonment. However, it hastens to add that there is a whole set of factors that it has not yet considered in its determination of an appropriate sentence to impose to the offender. These factors will be addressed in the following paragraphs.

[31] For the record, in paragraph 18 of the March 1, 2018 judgment, the Court presented a summary of the injuries suffered by the offender when the trench collapsed: "he sustained fractures on both legs, was hospitalized for approximately ten days, some of which in intensive care...due to complications, he was in a coma for two days".The Court adds to this description the fact that the offender specified he now had weakness in both legs.

[32] These facts are of significance with respect to the determination of an appropriate sentence. Their relevance results, in part, from the application of the sentencing principles of individualization and parity[13].

[33] Justice Moldaver, in the recent decision of our Supreme Court in *Suter*[14], stated the following:

> [47] There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself […]In his text *The Law of Sentencing* (2001), Professor Allan Manson notes that they may also flow from the very act of committing the offence: <u>As a result of the commission of an offence</u>, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or

> burdens imposed by the state after a finding of guilt, they are often considered in mitigation. […] I agree with Professor Manson's observation, much as it constitutes an incremental extension of this Court's characterization of collateral consequences in *Pham*. In my view, a collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.

[34] The Crown, however, made a point of mentioning to the Court that Justice Moldaver goes on saying that the "the attenuating effect of an injury on the sentence imposed will likely be lessened where the injury is so directly linked to the offence as to be almost inevitable"[15].

[35] These modulations having been made, the Court, taking into account all of the circumstances, including, this time, the serious injuries and sequela suffered by the offender, considers, following the required balancing exercise, that the appropriate sentence is, in this case, a term of incarceration of 18 months. For the Court, this sentence, which lies at the conflux of both perspectives on proportionality, is a sentence that denunciates the offence committed while punishing the offender within the limits of what is necessary.

[36] This sentence will be supplemented by the probation and orders whose content is described below.

## FOR THESE REASONS, THE COURT:

**IMPOSES** to the offender, with respect to the second count, a term of incarceration of 18 months;

**ORDERS,** pursuant to section 109 of the *Criminal Code*, that the offender be prohibited from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for a period of 10 years, and from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life;

**AUTHORIZES,** for genetic analysis purposes deemed necessary, the taking of samples of bodily substances from the offender, pursuant to section 487.051 of the *Criminal Code* with respect to this second count, which falls within the meaning of "primary designated offence";

**ISSUES**, pursuant to section 731 of the *Criminal Code*, a probation order of two years with supervision, with the following conditions:

- keep the peace and be of good behaviour, appear before the court when required to do so by the court, notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
- report to a probation officer within five days of being released from prison and, thereafter, when required by the probation officer and in the manner directed by the probation officer;

**IMPOSES** to the Accused, pursuant to section 737 of the *Criminal Code*, the payment of the victim surcharge.

**PIERRE DUPRAS, J.C.Q.**

Mtre Sarah Sylvain-Laporte
*Director of Criminal and Penal Prosecutions of Quebec*
For the prosecution

M^tre^ Brigitte Martin
For the Accused

[1] S-2.1, r.4.
[2] *R. v. Lacasse*, 2015 CSC 64 (CanLII), paragraph 1.
[3] *Ibid*.
[4] *Fontaine v. R.*, 2017 QCCA 1730 (CanLII), paragraph 42.
[5] *R. v. Vadim Kazenelson*, 2016 ONSC 25 (CanLII) and 2018 ONCA 77 (CanLII).
[6] *R. v. Fréchette and al.*, 2016 QCCQ 761 (CanLII) and 2017 QCCA 1286 (CanLII).
[7] *Czornobaj v. R.*, 2017 QCCA 907 (CanLII).
[8] *R. v. Suter*, 2018 CSC 34 (CanLII), at paragraph 50.
[9] *R. v. Nasogaluak*, 2010 CSC 6 (CanLII).
[10] The references have been omitted in these quotes.
[11] *R. v. Paré*, 2011 QCCA 2047 (CanLII).
[12] *R. v. Brais*, 2016 QCCA 356 (CanLII).
[13] *Supra*, note 8 at paragraph 48.
[14] *Supra*, note 8 at paragraph 47.
[15] *Supra*, note 8 at paragraph 50.