<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *R. v. Fraser and Gardner,* 2020 NSSC 223

Date: 20200817
Docket: Halifax, CRH No. 475184
Registry: Halifax

Between:

Her Majesty the Queen
v.
Special Constable Dan Fraser
and
Special Constable Cheryl Gardner

DECISION ON SENTENCING

Judge:	The Honourable Justice Kevin Coady
Jury Trial:	October 28, 29, 30, 31, November 5, 6, 7, 8, 9, 10, 2019, in Halifax, Nova Scotia
Oral Submissions:	August 12, 2020
Oral Decision:	August 17, 2020
Counsel:	Christian Vanderhooft, Crown Counsel David Bright, Q.C., Counsel for Dan Fraser Ronald Pizzo, Counsel for Cheryl Gardner Joel Pink, Q.C., Counsel for Cheryl Gardner

By the Court:

[1] On April 4, 2018, the Director of Public Prosecutions preferred an indictment against Special Constables Dan Fraser and Cheryl Gardner, pursuant to s. 577 of the *Criminal Code of Canada*. It alleged:

> that they, on or about the 15th day of June, 2016, at or near Halifax, in the Province of Nova Scotia, did by criminal negligence cause the death of Corey Rogers, contrary to section 220 of the *Criminal Code.*

After a two-week trial a jury convicted both Defendants. Sentencing was adjourned to this date to allow for the preparation of presentence reports, victim impact statements and argument. The Crown advocates for a two-year penitentiary sentence for both. The Defendants argue in favour of suspended sentences followed by a period of probation.

Background:

[2] The record indicates that Corey Rogers suffered from alcoholism and had a lengthy history of admissions to Halifax Regional Police's Prisoner Care Facility, commonly referred to as "booking".

[3] On June 14, 2016, Mr. Roger's partner gave birth to a son at the IWK Hospital in Halifax. Later that day Mr. Rogers arrived at the hospital intoxicated and argumentative. He was denied entry. The police were called to contain the disturbance. The IWK security personnel described Mr. Roger's condition at that time as "very intoxicated" and "belligerant".

[4] Upon arrival, the police observed Mr. Rogers "downing" a half-bottle of Fireball whiskey. They encouraged him to come with them "for a few hours" and that he could return to the hospital the following day. Mr. Rogers was arrested for public intoxication. He resisted cuffing and placement in the police vehicle and some force was required. On the way to booking Mr. Rogers was hitting his head on the silent partner, uttering threats and spitting. The plan was to lodge him for the night so that he could "sleep it off".

[5] The police cruiser arrived outside booking within five minutes. Some force was required to get Mr. Rogers out of the back seat. One of the arresting officers

determined it would be advisable to put a spit hood on Mr. Rogers as soon as he exited the vehicle. The evidence establishes that Mr. Rogers was unable or unwilling to walk into booking and, as a result, the officers carried him into the booking area by grasping his arms and legs, with his head facing downward. He was still in handcuffs. Upon entry he was placed on the floor and searched. It was at this point that Mr. Rogers came into contact with Special Constables Dan Fraser and Cheryl Gardner.

[6] The arresting officers wanted Mr. Rogers to move to a cell but he either refused or could not move as directed. While on the floor, he was making loud, cryptic utterances. He was still handcuffed and wearing the spit hood. The arresting officers then dragged Mr. Rogers by the arms, facing down, approximately 20 feet to the holding cell. While these Defendants had no physical contact with Mr. Rogers, they were in a position to observe events to that point in time. The actions of the arresting officers was captured by security cameras.

[7] The arresting officers dragged Mr. Rogers into a "dry cell", which is a cell designed to limit physical harm by falling. He was turned over on his stomach, a position referred to as a "recovery position". Once in the cell, the handcuffs were removed but the spit hood remained in place. The three officers exited the cell and, from that point, Mr. Rogers was in the custody of Special Constables Fraser and Gardner. They were then responsible for Mr. Rogers' incarceration.

[8] Approximately two hours later Mr. Rogers was still in the cell on his stomach, but was unresponsive. Special Constable Fraser contacted Constable Pothier, a superior officer, requesting assistance. Upon arrival, Constable Pothier found Special Constable Fraser standing atop Mr. Rogers stating, "I think he is dead." Constable Pothier confirmed he was deceased. He observed a spit hood behind Mr. Rogers' head with "liquid material" beside it. The scene was then contained by senior officers.

[9] Dr. Marnie Wood is a Forensic Pathologist associated with the Medical Examiner's office. She conducted an autopsy. Dr. Wood was qualified to give opinion evidence on the manner and cause of death. She determined that the cause of death was "asphyxiation due to suffocation". Essentially, she was stating that Mr. Rogers got sick and his vomit pooled in the spit hood, blocking his access to air. She further testified that, due to his level of intoxication, he was unable to remove the spit hood. Dr. Wood testified that Mr. Rogers' blood/alcohol reading was 0.367, four times the limit for driving a motor vehicle. She described this

level of intoxication as a "reduced level of consciousness" but not a fatal level. Dr. Wood also testified that there were no other possible causes of death. She found no evidence of physical injury, save for a few superficial scrapes to the head.

[10] These are the facts that underline these convictions. I am satisfied the above findings are consistent with Justice Beveridge's directions in ***R. v. Landry,* 2016 NSCA 53.**

The Offence of Criminal Negligence:

[11] Section 219 of the *Criminal Code* defines the offence of criminal negligence:

> (1) Everyone is criminally negligent who
>
> (a) in doing anything, or
>
> (b) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purpose of this section "duty" means a duty imposed by law.

Criminal negligence can arise from either acts or omissions if the accused was under a legal duty to do the omitted act. If the act or omission shows a wanton or reckless disregard for the lives or safety of other persons, this makes out criminal negligence. It does not require proof of intention or deliberation; indifference being sufficient. Criminal negligence requires conduct that constitutes a marked and substantial departure from what a reasonably prudent person would do under the same circumstances.

[12] The *actus reas* of criminal negligence is the conduct itself and is to be measured by looking exclusively at that conduct and whether, viewed objectively, it is dangerous. The *mens rea* is described as a modified standard which seeks to determine whether the accused's conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. In the case of death, the Crown must prove that the criminal negligence caused that death.

Theory of the Crown:

[13] It is apparent that the jury, in convicting the Defendants, accepted the theory advanced by the Crown. It is therefore helpful to review the Crown's position in determining a fit and proper sentence. It will also inform the Court on the Defendant's culpability for Mr. Roger's death. High risk behaviour is more culpable than a momentary lapse in judgment. Further, post-offence conduct can inform culpability.

[14] The acts/omissions alleged by the Crown address three specific areas of conduct. They are as follows:

1. That the Defendants committed criminal negligence by accepting Mr. Rogers into custody without having him assessed medically.

2. That the Defendants committed criminal negligence by failing to adequately check on Mr. Rogers after he was placed in the dry cell.

3. That the Defendants committed criminal negligence by leaving the spit hood on Mr. Rogers while he was in cells.

It is impossible to determine whether the convictions were based on one or more areas of conduct. It would not be speculation to state that the spit hood issue dominated the trial, as it was the cause of death. For the purpose of sentencing, I am proceeding on the basis that all three areas of conduct were in play in the jury's verdict.

<u>Acceptance Into Custody</u>:

[15] The video evidence from the IWK Hospital shows that Mr. Rogers was combative around the time of his arrest. However, that type of conduct lessened as he arrived at booking. The booking video evidence indicates that Mr. Rogers was extremely intoxicated when he arrived. The arresting officers essentially carried or dragged him from the police vehicle into the dry cell. They conveyed to the Defendants their opinion that Mr. Rogers was "playing possum", a term used to describe passive resistance.

[16] Sergeant Steven Gillette is a 30-year veteran of Halifax Police Services. At the time of the trial he was in charge of internal oversight. He testified about policies around the operation of the booking facility at the time of Mr. Rogers' death.

- When Mr. Rogers was brought into booking, the booking officers have responsibility for him as soon as he is placed in a cell.

- Booking officers have questions they must ask of prisoners to determine if they are "fit" to be placed in cells.

- If the prisoner cannot answer the questions asked, he should be sent to a hospital for a medical assessment.

- It is the booking officer's responsibility to determine if a prisoner is fit for the cells and, if not deemed fit, there are procedures to follow.

- If the prisoner is high risk, the booking officer should err on the side of caution and send them to hospital.

The video evidence clearly establishes that Mr. Rogers was highly intoxicated and non-responsive upon admission to booking. The *viva voce* evidence establishes that the arresting officers and the Defendants anticipated he would "sleep it off" and be released the next morning. Unfortunately, that is not how it played out.

Prisoner Checks:

[17] Sergeant Gillette gave evidence about the "4-Rs Observation Checklist". This protocol was in place at the time of Mr. Rogers' death and can be described as follows:

- ***Rousability***. Can they be woken?

  Go into the cell.

  Call their name.

  Shake Gently.

- ***Response to Questions.***

  Can they give appropriate answers to questions such as:

  What's your name?

  Where do you live?

Where do you think you are?

- ***Response to Commands.***

  Can they respond appropriately to commands such as:

  Open your eyes.

  Lift one arm, now the other arm.

- ***Remember.***

  Take into account the possibility or presence of other illnesses, injury or mental condition.

  A person who is drowsy and smells of alcohol may also have the following:

  Diabetes, Epilepsy, head injury, drug overdose or stroke.

This protocol was prominently posted within the booking area at the time of Mr. Rogers' death.

[18] Sergeant Gillette gave the following evidence as to the application of the "4-R" protocol and whether it was followed in Mr. Rogers' case:

- 4-R checks are to be done every 15 minutes. If the prisoner improves after two hours, the checks may occur every 30 minutes.

- Booking officers are trained on the 4-R policy.

- There were no 4-R checks done on Mr. Rogers during the two hours he was in the dry cell.

- After watching the booking video, Sergeant Gillette determined that both Defendants walked by the cell on several occasions without entering and without following the detailed procedure outlined in the 4-R checklist.

- Booking officers have in the past complained to him that, due to limited resources, it was impossible to implement the full 4-R protocol. He testified he sent those complaints up the chain of command but nothing changed in the way the booking department operated.

Unfortunately, the first time anyone entered Mr. Rogers' cell was after he had died.

The Spit Hood:

[19] The evidence established that it was not uncommon to see spit hoods on arrested people. They are designed to protect police officers from the insult and from communicable diseases. They fit over the prisoner's head without any cinching mechanism. Most prisoners can easily remove them as soon as they are uncuffed.

[20] Sergeant Gillette gave the following evidence respecting the use of spit hoods generally:

- Spit hoods are usually kept in the supply closets at booking, where officers may ask for them.
- At the time of Mr. Rogers' death there was no training in the use of spit hoods.
- There are written instructions on the spit hood packaging that state: "Do not leave on unattended."
- It is not normal to leave spit hoods on a prisoner.

The evidence indicates that Mr. Rogers' death resulted in the development of policies around the use of spit hoods. Until that time they were not viewed as a dangerous police tool but, rather, as a benign piece of protective equipment.

The Defence Evidence:

[21] Special Constable Dan Fraser testified at trial. He stated he became a booking officer in 2004 and received one week of training. He defended his decision to accept Mr. Rogers into cells as follows:

- He did not send Mr. Rogers to the hospital because he accepted the arresting officers' opinion that he was "playing possum".
- Mr. Rogers was not bleeding and was talking to the arresting officers.

- He was not concerned that Mr. Rogers' level of intoxication was an indication of a high-risk prisoner.

Clearly, Special Constable Fraser's assessment of Mr. Rogers was an error in judgment and the jury found it to be criminally negligent conduct.

[22] Special Constable Fraser offered the following evidence about the 4-R Check policy:

- He is familiar and supportive of the 4-R Policy. However, it is impossible to implement with existing staff levels.

- Checks are done every 15 minutes. Observation of movement and breathing amounts to sufficient and realistic compliance.

- It was his experience that booking officers never went into a cell alone. If it became necessary, backup was requested.

- Mr. Rogers was passively resisting the arresting officers so he was not concerned about him lying on the cell floor to "sleep it off".

- He was told by a supervising officer that 4-R Checks were only required for high-risk prisoners.

Given that the *mens rea* for criminal negligence is objective, it is obvious that the jury was not swayed by these subjective considerations.

[23] Special Constable Fraser offered the following evidence about the use of spit hoods:

- He has observed prisoners put in cells with a spit hood on and usually they would take it off as soon as the handcuffs were removed.

- He has never had to remove a spit hood from a prisoner in his 12 years of service.

- He did not observe the spit hood on Mr. Rogers by watching the video monitor. He thought it was a t-shirt or some other article of clothing. He testified that he did not think he had a spit hood on until he went in the cell.

- He had never read the warning notice on any spit hood.

Obviously, the jury concluded that Special Constable Fraser failed to properly check on Mr. Rogers while he was in custody and this amounted to criminal negligence.

[24] Special Constable Cheryl Gardner also testified at trial. At the time of Mr. Rogers' death she had been a booking officer for six years. She took a two-week training course in advance of that employment. She offered the following evidence on admitting prisoners to the cells and about Mr. Rogers' admission.

- She determined fitness to be placed in a cell through observation and any information supplied by the arresting officers.

- It was not her practice to call EHS every time an intoxicated person came into booking.

- When Mr. Rogers was first brought into booking he was moaning but saying "no" to an arresting officer.

- When she attempted to ask medical questions an arresting officer told her, "He's not going to answer questions." She concluded that Mr. Rogers was drunk and did not want to answer questions. On earlier admissions she found him to be both verbally aggressive and passively aggressive.

- She observed no distress or injury. She concluded Mr. Rogers was fit for cells, as she observed "nothing out of the ordinary".

Notwithstanding this evidence, the jury obviously concluded that her assessment of Mr. Rogers' condition was criminally negligent.

[25] Special Constable Gardner offered the following testimony about the 4-R Check policy:

- She supports the idea of checks every 15 minutes but it is not always possible to comply fully with the policy.

- Generally, she would not enter a cell alone, as a prisoner's reaction is unpredictable. She usually listened for noise or signs of distress.

- At the time of Mr. Rogers' death there was no policy on performing 4-R checks safely.

- She has never been disciplined for her approach to "4-R" checks.

- She had raised her concerns about safety with the chain of command but no action followed.

- She acknowledged she never entered Mr. Rogers' cell and that her checks involved calling his name, kicking the bars of the cell, and looking for breathing and movement. She testified that, on the checks she did perform, Mr. Rogers appeared to be breathing and moving his shoulder.

Special Constable Gardner took no issue with the suggestion that her checks did not fully comply with the "4-R" Policy.

[26] Special Constable Gardner offered the following evidence on the use of spit hoods generally and in relation to Mr. Rogers:

- The arresting officers placed Mr. Rogers in the dry cell with the spit hood on.

- She had no training on the use of spit hoods and was never instructed not to leave a spit hood on a prisoner.

- Mr. Rogers never tried to get the spit hood off. She acknowledged that usually prisoners remove these hoods as soon as they are uncuffed.

- She has no recollection of ever seeing the warning/instructions on any spit hood. She stated, "We were always told it was not dangerous."

Special Constable Gardner testified she was trying to do her best on the night Mr. Rogers was admitted to booking. The jury found that her best fell below the criminal negligence threshold.

[27] Special Constable Gardner's counsel advanced the following position at para. 64 of his sentencing brief:

> The booking officers were left to their own devices; abandoned to do the best they could do in a flawed and antiquated booking facility.

Special Constable Gardner's Pre-Sentence Report provides insight into her view of this prosecution:

> Upon reflection of the current matter before the Court, Ms. Gardner offered, 'I truly felt I was doing my best at the time in doing my job, but after this, I became more hyper aware. If I was doing my best and this happened, I thought about what I could do better. I really reflected on that. There was a time I was on the other side, and now I'm on this side of the counter. I have more of an understanding of what going through this experience is like, with regards to the process. Every day his family are in the forefront of my mind, and I cannot imagine looking at my own son, hearing the news they were given that night. I reflect on that often. It will never leave my mind, it's every day.'

These comments do not surprise the Court. They are consistent with my observations throughout the trial.

Denunciation/General Deterrence:

[28] The maximum penalty for criminal negligence causing death is a life sentence. In many cases the consequences of criminally negligent conduct are dire and the accused presents as a most sympathetic individual. In many cases the accused pleads guilty. Regardless of this dynamic, Courts have stressed denunciation and general deterrence, which usually resulted in custodial sentences. In many of these cases there is no need for specific deterrence or rehabilitation. The prosecutions against criminally negligent police officers result in more serious custodial sentences.

Moral Culpability:

[29] Criminal negligence *mens rea* is objective, yet the cases on point suggest that an offender's moral culpability determines where they land on the sentencing spectrum. In ***R. v. C.A.M.***, [1996] 1 S.C.R. 500, Chief Justice Lamer spoke about denunciation at para. 81:

> Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

Chief Justice Lamer went on to state that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear.

[30] In ***R. v. Gary Kenneth Read***, 2016 BCCA 111, the Court commented, at para. 51, that: "Planned and deliberate acts, in turn, inform a sentencing Court's assessment of the moral culpability of an offender." There is nothing in the evidence that suggests these Defendants' actions/omissions were planned. At worst this is a case of complacency.

[31] ***R. v. Bauman***, 2019 ONCJ 569, is a most tragic case where a father's negligence around farm machinery resulted in the death of his young son. Justice Morneau recognized the role culpability plays, at para. 29:

> However, Mr. Bauman's conduct, in the words of Justice Rosenburg in *Linden*, is at the lowest end of the spectrum of 'deliberate endangerment'. I [*sic*] should not be taken to mean that Steven's life was not valuable. It was. He was an innocent child enjoying time with his father and brother in the late summer just before school was to start when he died.

Mr. Bauman was sentenced to a suspended sentence plus three years' probation.

[32] In ***R. v. Lilgert***, 2013 BCSC 1329, the Court commented as follows, at para. 36:

> The offence of criminal negligence causing death can be committed in so many ways, it defies the rangesetting exercise. Thus the focus is on the circumstances of the offence, the circumstances of the offender, and the degree of moral culpability rather than on a general range.

[33] In ***R. v. Linden***, [2000] O.J. No. 2789, Justice Rosenberg commented as follows, at para. 3:

> The only principle that can be stated with assurance concerning this offence is that, where the offence involves not only reckless driving conduct but the consumption of alcohol, the sentences have tended to increased severity over the past twenty years. Otherwise, the particular offence is very much driven by individual factors, especially the blameworthiness of the conduct. The more that the conduct tends toward demonstrating a deliberate endangerment of other users of the road and pedestrians, the more serious the offence and the more likely that a lengthy prison term will be required.

These cases support the proposition that denunciation and deterrence in criminally negligent deaths can be accomplished with a sentence short of incarceration. Moral culpability plays a significant role in these outcomes.

Principles of Sentencing:

[34] The purpose and principles of sentencing are codified at s. 718 through s. 718.2 of the *Criminal Code*. Section 718 states as follows:

> 718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

This section of the *Criminal Code* sets out the "purposes" underlining the sentencing process. A review of many sentences for criminal negligence causing death indicates that denunciation and general deterrence significantly factor into these outcomes. This case is no different in that the Crown seeks a two-year period of incarceration in a federal institution.

[35] This is not a sentence that must reflect specific deterrence. Neither Special Constable Fraser nor Special Constable Gardner need to be deterred from committing further offences. They have lived pro-social lives and will continue to do so into the future. This is supported by the Pre-Sentence Reports for both and the many letters filed in support of Special Constable Gardner and Special Constable Fraser.

[36] The overall aim of sentencing is to protect society, either through punishment or rehabilitation. Section 718(c) indicates that a sentencing Court separate offenders from society when necessary. It is not necessary to separate these Defendants in order to protect society. The only factors driving incarceration are denunciation and general deterrence. These Defendants have no history of conflict with the law.

[37] Rehabilitation is always in play but, in this case, it represents a minimal consideration. There is nothing to suggest that these Defendants require rehabilitation. In cases requiring subjective *mens rea* the need for rehabilitation is greater than cases requiring objective *mens rea*. A review of similar cases involving similar offenders demonstrates that the greater the offender's moral culpability, the greater is the need for rehabilitation.

[38] Section 718(e) allows for reparations to be made to a victim or to the community. I do not consider this purpose to be particularly relevant to this case. Section 718(f) does have relevance. It requires this Court to consider the offenders' acceptance of responsibility for an offence. In this one area, the Defendants stand apart. Special Constable Gardner is extremely remorseful and accepting of responsibility. Special Constable Fraser initially did not accept responsibility and maintained his view that he did nothing wrong until the sentencing hearing.

[39] Section 718.1 of the *Criminal Code* is termed a "fundamental principle" and states as follows:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[40] In ***R. v. Lacasse***, [2015] 3 S.C.R. 1089, the Supreme Court of Canada discussed "proportionality" at paras. 11 and 12:

> [11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia*, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts. With respect, I am of the opinion that the Court of Appeal was wrong in this case to reduce the sentence imposed by the trial judge by basing its intervention on the fact that he had departed from the established sentencing range.

The Supreme Court stated that the principle of parity of sentences is secondary to the fundamental principle of proportionality.

[41] Proportionality was earlier discussed by the Supreme Court in ***R. v. Nasogaluak***, [2010] 1 SCR 6, at paras. 40-42:

> [40] The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be 'proportionate to the gravity of the offence and the degree of responsibility of the offender'. Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating the mitigating circumstances, the principles of parity and totality, and the instruction to consider 'all available sanctions other than imprisonment that are reasonable in the circumstances', with particular attention paid to the circumstances of aboriginal offenders.
>
> [41] It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1996), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
>
> [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 [*sic*]' 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. Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, 'Introduction to Sentencing and Parole', in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). 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.

It is especially important to keep proportionality in mind in criminal negligence causing death cases because the offence has no set sentencing range due to it encompassing an endless variety of acts or omissions with varying degrees of blameworthiness.

[42] Other sentencing principles are set forth in s. 718.2 of the *Criminal Code*:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
>> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
>>
>> (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
>>
>> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>>
>> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
>
> (v) evidence that the offence was a terrorism offence, or
>
> (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act;*
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

There is nothing before me to suggest these Defendants' conduct or omissions were motivated by any of the factors set forth in sub-sections (a)(i), (a)(ii) or (a)(iii).

[43] I have concluded that booking officers occupy a position of trust and authority in relation to prisoners in their care. However, I find that this factor has limited application in this sentencing. Offences committed by persons in positions of trust usually involve a conscious exploitation of subordinates by virtue of their authority. These offences usually involve subjective *mens rea* and a higher degree of blameworthiness than is apparent in this case.

[44] The death of Mr. Rogers and its impact on his family and friends is a significant aggravating factor in this sentencing. This is neither an organized crime

nor a terrorism offence. These Defendants were not subject to any court order at the time of the commission of the offence. They do not have criminal records.

[45] Section 718.2(b) requires me to impose a sentence that reflects parity. This is not a case that involves totality. Section 718.2(d) is very much in play.

Denunciation Applied:

[46] Denunciation can be achieved by sentences short of incarceration. In ***R. v. Baxter***, 2018 ONCJ 608, Justice O'Donnell commented on point at para. 24:

> The fact that deterrence and denunciation are key elements of sentencing in cases involving the unlawful use of force by the police, however, is not by any means the same as saying that any particular form of sentence is called for in order to achieve those objectives.

And further:

> *R. v. Proulx*, 2000 SCC 5 (S.C.C.), makes it clear that there are no watertight compartments between different forms of sentence when it comes to satisfying the objectives of sentencing such as denunciation, general and specific deterrence, rehabilitation, reparations, etc. Put alternatively, jail does not have a monopoly on achieving the 'harder' objectives of sentencing such as denunciation and deterrence. The Supreme Court in *Proulx* also recognizes that the efficacy of incarceration as a mechanism of general deterrence is based on a rather tenuous empirical basis and that elements of a sentence such as community service orders can have a deterrent effect.

[47] In ***R. v. Nasogaluak, supra,*** the Supreme Court of Canada discussed sentencing options at para. 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.

Moral blameworthiness factors significantly into crafting a fit sentence. Planned and deliberate acts inform a sentencing Court's assessment of the moral culpability of an offender. Individualized sentencing is always paramount.

[48] The facts in ***R. v. Bauman***, ***supra***, are truly tragic. The Court settled on the facts at para. 2:

> [2] The facts, though tragic, are not complicated. Mr. Bauman let his 2 young sons ride in the bucket of his skid steer as he worked on his farm. The skid steer was pulling a heavy metal dump style trailer and while it was dumping its load Steven, aged 4, fell from the bucket. At the time of the fall Mr. Bauman was looking back on the load as the skid steer continued to move forward. Mr. Bauman did not see Steven fall from the bucket. Nor did Luke, aged 7, who was also riding in the bucket. The skid steer struck Steven's head and he died later that day at Sick Children's Hospital in Toronto.

Mr. Bauman pled guilty to criminal negligence causing death. The Crown requested a denunciatory sentence of two years less a day followed by three years' probation. The defence recommended a suspended sentence and probation. Justice Morneau found in favor of Mr. Bauman and stated, at para. 32:

> [32] However when I consider all of the sentencing considerations I am satisfied that a fit and just sentence in these unique circumstances is a suspended sentence with probation for 3 years. I am satisfied that the principle of denunciation is addressed by the conviction itself.

The moral culpability of Mr. Bauman significantly factored into this outcome.

[49] The stigma of trial and conviction is a major deterrent and may, in appropriate cases, satisfy the requirements of denunciation.

[50] In ***R. v. Orders***, 2014 BCSC 771, Justice Joyce settled on the following facts, at paras. 1-3:

> [1] On April 28, 2012, Ms. Lenami Godinez-Avila embarked on what was supposed to be an exciting but safe experience. She was to take a tandem ride on a hang glider in the care of Mr. Orders, an experienced hang glider pilot and instructor. Sadly, seconds into the flight the event turned in what would be the most tragic of outcomes.

> [2] The harness that Ms. Godinez-Avila was wearing had not been attached to the hang glider by Mr. Orders. After trying desperately for about 90 seconds to hang on to Mr. Orders and the control bar of the hang glider, Ms. Godinez-Avila lost her grip and fell to her death.
>
> [3] Ms. Godinez-Avila's death was not merely a tragic accident; it was the result of a criminal act on the part of Mr. Orders. He has pleaded guilty to criminal negligence causing death of Ms. Godinez-Avila.

Justice Joyce commented on the role of denunciation at para. 58:

> [58] It has also been accepted by our Court of Appeal that the principles of denunciation and deterrence may be advanced by the stigma that society imposes on persons who have a criminal record. In *R. v. D.E.S.M.,* [1993] B.C.J. No. 702 (C.A.), the Court said this at para. 20:
>
>> [20] Quite recently, the Supreme Court of Canada has expressed itself quite strongly on the importance of stigma as a consequence of criminal proceedings. The Court has been saying what most lawyers and criminologists have known all along, that a public charge, trial and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct.

Justice Joyce concluded that, when dealing with a first time offender, "if imprisonment is required, the term should be as short as possible and tailored to the individual circumstances of the accused." He sentenced Mr. Orders to five months' incarceration plus three years' probation.

[51] Special Constable Fraser and Special Constable Gardner come before the Court for the first time. They are part of the peace officer community and culture. Absent this conviction they have lived unblemished lives. The preferred initial Information is dated November 17, 2017. They have lived under this cloud for in excess of two years. This prosecution and trial have garnered a great deal of interest in the community. The video evidence at trial was reproduced in the local press and on television with great impact. The possibility of incarceration has, no doubt, taken its toll on both Defendants.

[52] Special Constable Gardner's Pre-Sentence Report is a very positive document. It not only describes her life, but also addresses the impact of this prosecution. After being charged she was moved out of booking and provided with an administrative position. Upon conviction she was suspended from the

police force and her future is uncertain. I accept that she, as a daughter of a former RCMP officer, has experienced a great deal of embarrassment and isolation.

[53] Special Constable Fraser's Pre-Sentence Report is also a positive document. This prosecution has had great impact on him and his family, including his spouse of 28 years. She reported that her husband has been "struggling" since being charged. She told the author that he has "good days and bad days" and that he continues to suffer from nightmares and will often cry for no apparent reason. She described him as a "different person after the offence". She states her husband has lost interest in many regular activities. She noted their marriage has "suffered" and "the kids have been traumatized by his offence." She described her husband as a "rule follower". Special Constable Fraser was recently diagnosed with a major depressive disorder and is undergoing therapy. I conclude that this prosecution has shaken him and eroded his confidence in the values he relied on over his lifetime.

The Suspended Sentence:

[54] Section 731 of the *Criminal Code* authorizes the application of a suspended sentence:

> 731(1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> > (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
> >
> > (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.
>
> (2) A court may also make a probation order where it discharges an accused under subsection 730(1).

Criminal negligence causing death meets the technical requirements of s. 731.

[55] In ***R. v. Bursey***, [1991] 104 N.S.R. (2d) 94 (NSCA) the Court upheld a suspended sentence for a break and enter and stated as follows, at para. 14:

> Applying the relevant principles, we see that an experienced trial judge has reviewed in his decision the relevant circumstances of the offender and the

> offence. He has concluded that in these somewhat unusual circumstances, the respondent should be given one more chance. We are not able to say that Judge Kimball imposed a clearly inadequate sentence in relation to the offender and the offence. Properly administered, a suspended sentence can have substantial consequences.

[56] In ***R. v. Scott***, 1996 NSCA 165, the accused was convicted of robbery. The Court overturned a sentence of two years less a day for a first-time offender and imposed a suspended sentence with three years' probation. In doing so, Justice Pugsley stated, at para. 18:

> I agree with counsel's submission and add that the approach of the sentencing judge, in addition, ignored the deterrent effect of a suspended sentence, implying that deterrence could only be reflected in a custodial sentence.
>
> The sentencing judge was quite right in noting that cases involving robbery with violence in this province generally attract a three year sentence. There are exceptions, however, to every norm, and I am convinced this case falls within that class.
>
> Chief Justice MacKinnon cautioned against in inflexible approach in *Grady,* he said at p. 266:
>
>> It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear at times that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case, on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.

[57] In ***R. v. Barrons***, 2017 NSSC 216, the accused was convicted of what is often called a "home invasion". Mr. Barrons kicked in the door of a former domestic partner and seriously assaulted her new boyfriend. Aside from this incident, his life was impeccably lived. Justice Arnold commented at para. 56:

> Considering the time Mr. Barrons had been subject to release conditions, a period of probation for an additional three years will give the justice system control over him for a full six-year period. Deterrence and denunciation are, of course, of paramount importance, but our Court of Appeal has instructed that denunciation

> and deterrence can be accomplished by way of a suspended sentence. I therefore sentence Mr. Barrons to a suspended sentence for three years with the following conditions:
>
> . . .

[58] I recognize that a Probation Order, as part of a suspended sentence, is primarily a rehabilitative sentencing tool. In ***R. v. Duguay***, 2019 BCCA 53, the Court commented, at para. 61:

> While the primary purpose of a probation order is rehabilitative rather than punitive, its conditions will inevitably entail some restriction of liberty. As Bennett J.A. noted in *R v. Voong*, 2015 BCCA 285, at paragraph 37, probation orders are designed not only to reintegrate offenders into the community, but to protect society. The conditions imposed in pursuit of that goal will frequently be experienced by the offender as entailing 'negative' consequences. What is prohibited is the imposition of a term of probation for a primarily punitive purpose.

[59] In suspending a sentence and imposing a term of probation, a judge punishes the accused insofar as the accused must comply with the terms of the order, some of which are strict and demanding. Moreover, probation is consistent with deterrence in that an accused may be resentenced on a breach of a Probation Order.

Aggravating and Mitigating Factors:

[60] Criminal negligence causing death defies range-setting given the multitude of ways it can be committed and the varying degrees of moral blameworthiness. Consequently, aggravating and mitigating factors can result in everything from a community-based rehabilitative sentence to a federal term of imprisonment.

[61] As in the majority of criminal negligence causing death cases the most common, and often only aggravating factor, is the *actus reas* of the offence. The offenders usually do not have a criminal record or a history of risk-taking. Their crime is often the only time they come into conflict with the courts. Special Constables Fraser and Gardner are no different. The fact of the matter is that Mr. Rogers died as a result of their criminal negligence and that is the most aggravating factor. I cannot see any other aggravating factor at play. The Crown has advanced a number of factors but I find they are all subsumed in the elements of the offence.

[62] In ***R. v. Doering, supra,*** Justice Pomerance, in her conviction decision, found aggravating factors secondary to the offence. She stated, at paras. 122 and 124:

> Having carefully considered the issue, I must conclude that Cst. Doering knowingly misled the OPP. There is no other rational interpretation of the evidence. Cst. Doering admitted telling the OPP that EMS had 'looked at' Ms. Chrisjohn. When confronted with that statement in cross-examination, Cst. Doering insisted that what he meant was that Mr. Hill had, in the literal sense, viewed Ms. Chrisjohn through the police cruiser's front windshield and plexiglass divider. That assertion stretches the bounds of credulity.
>
> Cst. Doering's statements created the risk that the OPP would not appreciate the gravity of Ms. Chrisjohn's condition, and that medical assistance would be even further delayed. This increased the risk to Ms. Chrisjohn's life and represented a wanton and reckless disregard for her wellbeing. I am satisfied that this conduct was a marked and substantial departure from the standard of care of a reasonably prudent police officer.

In addition, Justice Pomerance found that Cst. Doering was overly anxious to get rid of Ms. Chrisjohn and was more focused on possible cruiser damage than the well-being of his prisoner. I am unable to conclude that any similar factors are at play in this case. Both Defendants' credibility is substantially intact and there is no aggravating post-offence conduct.

[63] I find the following mitigating factors in relation to Special Constable Fraser:

- Prior to this conviction he did not have a criminal record.
- He is 62 years old with several health issues.
- There is much family and community support, including support from the police community.
- There are no issues around alcohol and/or drug use.
- He has lost his job as a booking officer and is unlikely to be employed by Halifax Police Services into the future.
- He has lived a pro-social lifestyle which will continue once this matter is concluded.

- He and his family have been subjected to much publicity and stigma around this prosecution. This is exacerbated by his status as a Special Constable with Halifax Police Services.

I was particularly struck by Ms. Fraser's comment in the Pre-Sentence Report that her husband is a "rule follower". That is how I've observed him. The fact that he stands before the Court convicted of a serious criminal offence is, for him, a cruel irony.

[64] I find the following mitigating factors in relation to Special Constable Gardner:

- Prior to this conviction she did not have a criminal record.

- She has much family and community support including support from the police community. I have been provided with 17 letters of support, 16 of which are from police officers.

- She is experiencing great remorse.

- There are no issues relating to alcohol and/or drug use.

- She has lost her job as a booking officer, a career she cherished.

- She has lived a pro-social lifestyle which she will continue once this matter is concluded.

- She has been subjected to much publicity and stigma around this prosecution. This is exacerbated by her status as a Special Constable with Halifax Police Services.

- She has suffered health consequences as a result of the impact of this prosecution and conviction.

- She has made contributions to her community such as volunteering with the Elizabeth Fry Society, the Women in Prison program, and Victim Services.

[65] The numerous letters of support provide insight into Special Constable Gardner's character. I was particularly struck with the comments of Sergeant Robinson, one of her supervisors. He described her as follows:

- Incredibly conscientious, diligent and deeply compassionate.

- A person who has strived in her life to be a good person.

- A person who advocated for homeless men and women and for those suffering from addiction.

Perhaps most poignant and impressive were Sergeant Robinson's additional comments painting a fulsome picture of Special Constable Gardner's character as follows:

> However, a tragedy has occurred. The death of Corey Rogers, a friend, son, partner and father. To those people affected, I am truly sorry and deeply empathize with their loss. What cannot be forgotten is that Ms. Gardner too has suffered, having started her sentence the day Mr. Rogers died. She has lost her beautifully-charming sense of humour; faded by the weight and burden of conscience she wakes with every morning. Ms. Gardner has endured isolation, anxiety, trauma, nearly endless tears, turmoil and depression with her grief. She will lose her career, reputation and possibly her freedom. She has lost her personal dreams and plans she has made for her future, plans that she created and earned living a life of kindness and compassion.

Conclusion:

[66] After a great deal of consideration, I have concluded that the goals of denunciation and general deterrence can be achieved without incarceration. Consequently, I am suspending the passing of sentence and placing both Defendants on probation for three years. The following conditions will apply:

- Keep the peace and be of good behaviour.

- Attend court if and when required.

- Report to a probation officer before Friday, August 21, 2020, and thereafter as directed.

- Attend for, participate in and complete any assessment, counselling or treatment as directed by a probation officer, including mental health counselling.

- Complete 200 hours of community service, to be completed within 18 months following the date of this decision. This community service is to be organized through your probation officers.

Coady, J.