

Court of Queen's Bench of Alberta

Citation: R v Baltazar, 2021 ABQB 879

Date: 20211109
Docket: 190727180Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Dennis Baltazar

Accused

**Reasons for Decision on Sentencing
of the
Honourable Mr. Justice W.T. de Wit**

Introduction

[1] This matter is before the court for sentencing. Mr. Baltazar was convicted of eleven offences of sexual assault contrary to section 271 of the *Criminal Code*. The Crown proceeded by indictment on these charges. Each of these convictions involved Mr. Baltazar, who was a registered massage therapist, touching the genitals of his adult male clients while performing massages on these clients. The manner and intrusiveness of the touching in question differ between the victims. Sexual assaults can involve a significantly diverse type of sexual touching, which can cause varying opinions with respect to the seriousness of the offence in question. In this case the defence asks for a sentence of two years less a day to be served by way of a

conditional sentence in the community followed by two to three years of probation. The Crown asks for a penitentiary term of three and a half years to four years' incarceration. These divergent positions require this court to consider a number of issues regarding the appropriate sentence, as well as the constitutionality of section 742.1(1)(f)(iii) of the *Criminal Code*, which does not allow for a conditional sentence in cases of sexual assault that are prosecuted by indictment.

Charter Challenge

[2] Mr. Baltazar challenges the constitutionality of section 742.1(1)(f)(iii) of the *Criminal Code*, which does not allow for the imposition of a conditional sentence for convictions of sexual assault where the Crown has proceeded by indictment. The defence argues that section 742.1(1)(f)(iii) infringes section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* which guarantees the right not to be deprived of liberty except in accordance with the principles of fundamental justice. The defence further argues that the section in question infringes section 7 because it is overbroad by not allowing for a conditional sentence in circumstances where the sexual assault is on the less serious end of the spectrum for such offences.

[3] In the circumstances of this case, there are significant issues with respect to whether a conditional sentence is appropriate when considering the nature of the offences and whether a sentence of two years less a day or less meets the principles of sentencing. The Crown argues that judicial economy should be considered in cases involving the constitutional challenges to the Conditional Sentence regime and where a conditional sentence could not be granted, the court should not engage in a hypothetical exercise that could not affect the actual sentence imposed. Mr. Baltazar takes the position that no one should be subject to an unconstitutional law and if the only way to challenge an unconstitutional law were based on specific facts before the court these bad laws may remain on the books indefinitely: See *R v Lloyd*, 2016 SCC 13.

[4] In *R v Nur*, 2015 SCC 15, the accused were convicted of offences related to the possession of loaded prohibited firearms, which again called for mandatory minimum sentences. Those sections called for a mandatory minimum period of incarceration of three years if the Crown proceeded by way of indictment but the mandatory minimum period of incarceration was reduced to one year if the Crown proceeded by summary conviction. The sentencing judge determined that the sentences to be imposed would be greater than the mandatory minimums if the Crown proceeded by indictment. In the *Nur* case, at para 51, the court stated that any impugned provision need not contravene the rights of the actual claimant in order for that provision to be struck down as unconstitutional, because it is the “nature of the law, not the status of the accused that is an issue.”

[5] Both parties refer to the *Lloyd* decision when arguing whether this court should consider the *Charter* challenge. In *Lloyd*, the accused was convicted of drug charges and was subject to a mandatory minimum sentence of one-year imprisonment and the Provincial Court judge imposed that sentence. Nonetheless the Provincial Court judge considered the constitutionality of the section and determined that it was in breach of section 12 the *Charter*. The defence points to the comments of Chief Justice McLachlin, in *Lloyd* at para 16, where she states that no one should be sentenced under an invalid statute and that “provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing.” However, Chief Justice McLachlin goes on to state at para 18 of *Lloyd*:

[...] it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied.

[6] There can be no doubt that a sentencing judge has discretion as to whether they wish to consider the constitutionality of a provision when the constitutionality will not affect the actual sentence imposed. The Crown refers to the case of *R v Alphonse*, 2020, BCSC 1882, where the sentencing judge was asked to make a determination of constitutionality with respect to the mandatory minimum sentences regarding the offence of discharging a firearm. The court in *Alphonse* cited paragraph 18 in *Lloyd* and stated at para 167:

Regarding the principle of judicial economy, Bennett J.A. addressed circumstances where the sentencing judge may wish to engage in the analysis regardless of the effect on the individual before the court, particularly where the superior court of inherent jurisdiction has an opportunity to prevent “leaving unconstitutional provisions on the books”: see *R. v. E.O.*, 2019 YKCA 9 (Y.T. C.A.). In my view, her concerns do not arise in the circumstances presented here.

[7] In *R v Bear*, 2021 SKQB 26, the accused was found guilty of sexual assault, where he inserted his finger into the vagina of a sleeping female victim, and the defence asked the court to find section 742.1(1)(f)(iii) unconstitutional. The sentencing judge stated at paras 22-23:

Although the primary focus at the Charter hearing was on the complex and technical arguments respecting the constitutionality of the *Criminal Code* section that removes conditional sentences as an option for sexual assault cases, as a practical matter, it is more appropriate, in my view, to first determine whether a conditional sentence would be within the range of reasonable alternatives available to the court considering all of the circumstances. If so, it would then be incumbent to complete the analysis and determine the constitutionality of the impugned provision.

[8] However, if a conditional sentence is not a realistic option, regardless of whether it could possibly be ordered, is it necessary and/or appropriate for this court to embark on what would then be a hypothetical exercise?

[9] The court in *Bear*, then went on to find that a period of actual incarceration was needed and the circumstances of that case and dismissed the *Charter* application on the basis of mootness.

[10] The defence points to the case of *R v Chen*, 2021 BCSC 697, where the accused was found guilty of a single count of trafficking in drugs in which case the Crown sought a sentence of four years’ imprisonment but where the defence sought a conditional sentence of two years less a day. The court found that a proper sentence would be three years and eight months’ incarceration, but nonetheless held that he would consider the *Charter* application. The court

found that a *Charter* challenge based on section 7 would be an analysis of the effects of the legislation in light of its purpose. The court stated at para 144:

At the end of the day, what tips the balance in favour of hearing this application, despite the fact that it will not benefit Mr. Chen, is that it has been fully prepared and argued by all of the necessary participants (without objection by the Attorney General of B.C. or Crown counsel until their actual submissions were provided), and the previously scheduled sentencing date was adjourned to accommodate it.

[11] The defence in this case also argues that the comments made by Justice McLachlin, in *Lloyd*, were made with respect to provincial court judges and not superior court judges and that concerns about judicial economy are different when assessing applications made to provincial court as opposed to superior court. The defence argues that the cases of *Alphonse* and *Bear* do not consider the differences between provincial courts and superior courts and the inability of provincial courts to render the law of no force and effect. Therefore, the defence argues that there is an inherent value in superior courts determining constitutional issues and the comments of Supreme Court in *Nur* and *Lloyd* about the courts not allowing unconstitutional sections to remain on the books, should be given extra credence.

[12] In my view judicial economy is an important issue and is becoming even more important as of late. I cannot say whether this issue is of more importance in provincial courts as opposed to superior courts. However, I would assume that it is equally important in both levels of court. There is no doubt that each individual case must be determined on its own merits as to whether the necessity of a constitutional determination outweighs the resources being used to make such a determination. The Crown concedes that this court has the inherent jurisdiction to consider the *Charter* issue. The court in *Chen*, certainly had the ability to take the path that it did. However, I do not find the argument that counsel had already fully prepared and argued the constitutional issue as a compelling reason for the court to then use judicial resources to rule on the constitutional argument that will not change the determination of the sentence imposed. Judicial economy, requires the court to cut the wheat from the chaff when considering matters that come before superior courts. Considering how much effort the Crown and defence have put into arguments is not, in my view, a significant reason for determining whether a *Charter* application is moot in the circumstances of a sentencing case. I find the words of Justice Popescul in *Bear* apt when he states at para 27: “it is not an effective or appropriate use of judicial resources to embark on a hypothetical exercise which would produce a result that is irrelevant to the outcome.”

[13] As a result, I will first determine whether the proper sentence to be imposed would allow for a conditional sentence before determining the constitutionality of section 742.1(1)(f)(iii).

Sentencing Principles

[14] As stated in *R v Friesen*, 2020 SCC 9 at paras 30-32 and in section 718.1 of the *Criminal Code*,” all sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The principle of parity, as set out in section 718.2(b) of the *Criminal Code*, is that offenders who commit similar offences in similar circumstances should receive similar sentences, and this is an expression of proportionality. Section 718 of the *Criminal Code* sets out the purposes of sentencing including denunciation and deterrence, rehabilitation, separating from society when necessary. There is no

doubt that the overriding purpose of sentencing in sexual assault cases is denunciation and deterrence. Section 718.2 of the *Criminal Code* states that the court should consider the aggravating and mitigating factors of the offence or offender to increase or reduce the sentence. Section 718.2 also instructs courts to use the principle of restraint and not deprive an offender of liberty if less restrictive sanctions are appropriate and even if incarceration is necessary that the term of incarceration be the least possible in the circumstances.

[15] The gravity of the offence becomes an important consideration in any sentencing case. In the circumstances of this case there are divergent positions between the Crown and defence with respect to the gravity of the offences in question. Before considering the case law and mitigating and aggravating factors I wish to examine the jurisprudence related to determining the seriousness of a particular sexual offence.

Seriousness of Sexual Assault

[16] The offence of sexual assault includes a vast variety of actions ranging from a kiss to sexual intercourse. In the circumstances of this case there is a significant difference between the Crown and defence with respect to their positions regarding the seriousness of the offences in question in this case.

[17] The Alberta Court of Appeal, in *R v Sandercock*, 1985 ABCA 218, set out a starting point sentence of three years' imprisonment for what it defined as a major sexual assault. In that case, at para 13, a major sexual assault was defined according to the physical acts of rape, attempted rape, fellatio, cunnilingus and buggery which would cause physical or lasting emotional or psychological harm. The court stated that it could be assumed that such harm would occur in the case of a major sexual assault.

[18] In the case of *R v Arcand*, 2010 ABCA 363, the Court of Appeal placed more emphasis on the effects of the sexual assault on the victim and stated at para 171 that a major sexual assault was of the "nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs." The court went on to state that a major sexual assault was not limited to nonconsensual vaginal intercourse, anal intercourse, fellatio and cunnilingus. The court in *Arcand* also recognized that a major sexual assault was a serious violation of a person's body, sexual autonomy and freedom of choice. The court also recognize that emotional or psychological harm may be equally or even more serious than physical harm, but less obvious although it must be considered when sentencing.

[19] In the recent case of *Friesen*, the Supreme Court of Canada dealt with the offence of sexual assault pertaining to children. However, the court also made a number of comments with respect to the offence of sexual assault in general, that are pertinent to the sentencing of sexual offences where the victim is an adult: see also *R v Pettitt*, 2021 ABQB 773. Although the court recognized that the degree of physical interference is a recognized aggravating factor and may increase the risk of harm, the court went on to say that there was a danger to defining a sentencing range based on penetration or the specific type of sexual activity at issue: *Friesen*, at para 140. The court, in *Friesen*, went on at paras 141-146 to explain that a court should "not assume that there is any clear correlation between the type of physical act and the harm to the victim." The court also stated that any form of sexual assault involved "sexual violence" and there was no hierarchy of physical acts to be used for determining the degree of physical

interference. The court in *Friesen*, specifically stated: “it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus or penetration.” As stated in *Friesen*, sexual violence that does not involve penetration is not “relatively benign” and is still “extremely serious.”

[20] Both the Crown and defence agree that the facts of the counts in this case are not “major” sexual assaults, as defined by *Arcand*, but this does not mean that these offences are not serious. *Friesen* stated at para 76, in the context of offences against children, that “it is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender’s actions and the consequential harm to children and their families, caregivers and communities.” In my view this statement is also applicable to sentencing of offenders who have committed sexual offences against adults. The sentences for sexual offences have clearly risen in the last number of years as the courts and society in general have come to understand the significant and lasting effects of sexual assaults on victims. As stated in *R v Goldfinch*, 2019 SCC 38 at para 37: “As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens.” Any sexual assault which involves the touching of genital areas is serious and the sentence must reflect the seriousness of such offences.

Evidence in This Case

[21] The findings of fact in this case are set out in the trial decision at *R v Baltazar*, 2021 ABQB 177. However, I will review briefly the circumstances of the counts for which Mr. Baltazar is being sentenced. In addition, there are victim impact statements and a community impact statement that also form part of the evidence in this case. The defence has also provided character references, and a risk assessment report. I will review the contents of all of these forms of evidence.

Facts of Offences

[22] Mr. Baltazar has been convicted of 11 counts of sexual assault contrary to section 271 of the *Criminal Code*. None of these offences involved penetration and were all sexual touching of varying degrees. I will briefly describe the specific actions of each sexual assault.

A. Count #3

[23] This count involved the victim, D.E., who while receiving a massage was touched in the genital area of his scrotum and penis. D.E. was wearing no underwear while the massage took place and there was skin to skin contact between Mr. Baltazar’s hand or arm and the tip of D.E.’s penis and testicles. The contact occurred ten times every two to three seconds while Mr. Baltazar was performing a massage movement, and D.E. testified that he was counting the times that it occurred. After the massage had ended Mr. Baltazar gave D.E. a hug.

[24] D.E.’s profession is a firefighter/paramedic, and in his victim impact statement he indicated that when the offence occurred he was emotionally confused. He indicated that no subject was taboo with respect to his coworkers, but that he felt violated and helpless and did not wish to disclose what happened to him to his coworkers. When he did disclose what had happened to him to his coworkers there was ridicule and immediate teasing. He indicates that he

had to live with this since the time the offence occurred. He also indicated that he now avoids the use of massage services and this has negatively affected him.

B. Count #4

[25] This count involved the victim, J.L., and occurred while J.L.'s genitals were covered by athletic boxer shorts which he was wearing. J.L.'s penis and genital area were grazed by Mr. Baltazar's forearm more than ten times while Mr. Baltazar was performing the massage in question.

C. Count #5

[26] This count involved the victim D.V. who was wearing boxer shorts, but they had moved so that his genitals were exposed. D.V. testified that he could feel cold air on his penis. During the massage in question the back of Mr. Baltazar's hand made contact with the penis and testicles of D.V. two to three times and the contact was skin on skin. D.V. testified that his penis became erect and that Mr. Baltazar then took a hold of his penis and testicles with his hand and rubbed them directly and then moved his penis to the side. D.V. also testified that Mr. Baltazar rubbed his face and hair and D.V. then said "that is enough, that's it it's done," ending the massage.

D. Count #8

[27] This count involved the victim D.M. and there were two occurrences, one August 28, 2018 and one September 5, 2018. During the first massage, at the beginning, Mr. Baltazar indicated to D.M. that he had a great physique. During the massage, D.M. was wearing underwear and Mr. Baltazar used one hand to push the penis and scrotum to the side, over the underwear, while using the other hand to massage D.M.'s groin. During the second massage D.M. was not wearing underwear and Mr. Baltazar again used one hand to massage while using the other hand to push D.M.'s genitals to the side by making skin on skin contact. D.M. also recounted that Mr. Baltazar was rubbing, and not squeezing, the tip of D.M.'s penis with his fingers and thumb and this lasted for a number of minutes. This ended when D.M. stated to Mr. Baltazar: "I am uncomfortable that is enough in this area."

[28] In his victim impact statement, D.M. indicated that when Mr. Baltazar was arrested, his first reaction was one of panic, because he knew that what had happened to him would now be made public where he had decided to keep it private. He indicated that he felt shame when this happened to him and feared being socially embarrassed. He also indicated that he worried about whether he had done something to invite the assault which left him with self-doubt, anxiety and shame. He further indicated that he suffered from nightmares, flashbacks and intrusive images which negatively affected his sleep and left him frequently exhausted. He recounted frequently ruminating in the middle of the night about what has happened to him. D.M. is an airline pilot and he indicated that as a result of the sexual assault against him, he had a hard time concentrating and focusing which made work challenging and gave him anxiety regarding concentrating when piloting an aircraft. D.M. has emotional injuries that he finds hard to overcome. He indicates that he finds himself increasingly distrustful of people and very guarded. He also indicates that the sexual assault increased his isolation, loneliness and depression and that when he meets new people he is very reserved and withdrawn.

[29] In his victim impact statement, D.M. indicated that after he left the clinic at the end of the last massage he felt incredibly violated, disgusted and mad for putting himself in that situation.

He indicated that for a long time after the final massage, he did not want to be close to his wife both intimately or emotionally. DM. indicated that it was bad enough mentally rustling with his violation immediately after the massage, but he was reminded of it because of news articles, court dates and the writing of the victim impact statement. As a result of D.M. being sexually assaulted by Mr. Baltazar, getting a massage was no longer an experience he could trust and it hindered his recovery from the accident that initiated the massages.

E. Count #9

[30] This count involved the victim D.A.M. D.A.M. was not wearing any underwear when the massage took place. Initially Mr. Baltazar's fist and fingers were making contact with D.A.M.'s genitals as Mr. Baltazar was massaging the groin area using an inward and up-and-down motion. Near the end of the massage Mr. Baltazar put his hand on D.A.M.'s penis and testicles and played with them in his hand. D.A.M. testified that he could feel Mr. Baltazar's fingers moving individually on his penis and testicles and that this lasted three to four seconds.

F. Count #10

[31] This count involved the victim G.B. Mr. Baltazar was massaging G.B.'s groin area and made contact with G.B.'s right testicle. As a result, G.B. shifted his hips to move his lower body away from Mr. Baltazar's hand which resulted Mr. Baltazar stating: "we'll get back to that area in a minute." Later in the massage, Mr. Baltazar began massaging in the area just above G.B.'s penis and then took his hand and cupped G.B.'s penis and testicles so that Mr. Baltazar's hand was around the penis and testicles. G.B. stated that the cupping was not a squeezing motion and that while Mr. Baltazar's hand, was cupping his penis and testicles, the hand was on a "downward slide." G.B. testified that there was a second cupping of his penis and testicles and when this occurred he sat up on his elbows and stated in a loud voice: "hey I don't like that."

[32] In his victim impact statement, G.B. indicated that it was difficult for him to admit to himself that he was a victim of sexual assault and that he was shocked that this happened to him. He wished to have privacy with respect to what happened to him and had not been able to discuss the circumstances of the sexual assault with his friends, because he feared the stigma which attaches to a sexual assault. He further indicated that he had placed his trust in Mr. Baltazar and that trust had been violated and that he would never have another massage with a male provider. He indicated that being involved in the sexual assault investigation, such as providing a statement, being interviewed by the police, and giving evidence as witness was stressful for him.

G. Count #11

[33] This count involved the victim J.P. Mr. Baltazar was massaging J.P.'s groin area and J.P. was not wearing any underwear and his genitals were exposed. Mr. Baltazar's elbow and forearm were brushing J.P.'s penis while the massage was taking place. Mr. Baltazar then put his fingers on the foreskin of J.P.'s penis and pulled down two or three times. J.P. described this pulling down motion as a stroke. Mr. Baltazar then stated, after the stroke: "this is a special treatment for you, we're friends." Mr. Baltazar also stated: "it is a big one." J.P. stated to the accused: "Whoa, whoa, I'm good, need to move on."

H. Count #12

[34] This count involved the victim D.W. D.W. testified that there were two massages where his genitals were touched by Mr. Baltazar. During the first incident on August 7, 2018, D.W. was

naked and Mr. Baltazar was massaging his upper thigh muscles when he brushed up against D.W.'s penis and genitals over the sheet which was covering D.W.'s genitals. Mr. Baltazar then moved to massaging in the perineum area and Mr. Baltazar's hand touched D.W.'s penis and testicles through the sheet five times. Mr. Baltazar then moved up to the shoulder and neck muscles and massaged D.W.'s face. Mr. Baltazar then asked D.W. if he could massage inside D.W.'s mouth and D.W. responded by stating: "we're not going to do that Dennis, no thanks." During the second massage, D.W. indicated that there were again incidents where Mr. Baltazar's hands or arm touched his genitals during a massage motion and this occurred seven to ten times. In this last massage, Mr. Baltazar put his hand on D.W.'s penis and stroked his penis by putting his hand on the base of the penis and then making an upward motion towards the tip of the penis. This stroking motion only occurred once.

I. Count #15

[35] This count involved the victim K.S. K.S. was not wearing any underwear during the massage in question. Mr. Baltazar was performing a massage on K.S.'s groin and was grazing K.S.'s testicles. Mr. Baltazar asked K.S. if he could graze his testicles and K.S. said it was okay. K.S. indicated that this grazing took place while Mr. Baltazar was performing a massage movement.

J. Count #16

[36] This count involves the victim L.R. L.R. was wearing boxer briefs during the massage. During the massage, Mr. Baltazar's hand was grazing L.R.'s testicles over top of the boxer shorts. Mr. Baltazar at one point during the massage used his palm to push across from the right hip to the other side and Mr. Baltazar's hand or fingers made contact with the tip of L.R.'s penis underneath his underwear. L.R. counted thirteen such contacts and then he stopped counting. L.R. testified that the contact was more than a graze and was clearly obvious.

[37] In his victim impact statement, L.R. indicates that he has played down the circumstances of the assault when discussing events with his friends and family, but indicates that what happened to him has had an emotional impact on him. He indicates that he does not want those who care for him to worry about him, but that the whole ordeal made him question himself and his own judgment. He indicates that he feels embarrassed and weak for not having said something to stop what was happening. He also indicated that the actions of Mr. Baltazar angered him.

K. Count #17

[38] This count involves the victim L.B. Mr. Baltazar had performed a number of massages on L.B. During these massages, L.B. Was wearing boxer shorts and he indicated that he had moved his boxer shirts and genitals to the side on one occasion, and that during these massages Mr. Baltazar brushed or graze his testicles. On February 17, 2018, L.B. had gone to a different massage room that had been used in the past and during that last massage, Mr. Baltazar had instructed him to remove his boxer shorts so that he was in the nude. During the massage, Mr. Baltazar was massaging L.B.'s groin area with his palm and knuckles and he again brushed and grazed L.B.'s testicles. Mr. Baltazar then cupped L.B.'s testicles with his hand and massaged his testicles in what L.B. described as something separate from the massage. This massaging of the testicles lasted less than one minute. Mr. Baltazar asked L.B. if "that was all right," and L.B. responded by saying that this was not a painful area and was not an area he wanted Mr. Baltazar

to work on. After the massage ended and after L.B. had gotten dressed and Mr. Baltazar came back into the massage room and gave L.B. a hug.

[39] Although only five of the eleven victims provided victim impact statements, these statements show that touching which is nonconsensual and sexual can also have a significant negative impact. The victim impact statements in this case provide insight into how some victims are affected by their victimization in this case which is an important consideration under the proportionality principle and the purpose of sentencing under section 718 of the *Criminal Code*, including promoting a sense of responsibility in offenders. Section 722 of the *Criminal Code* instructs courts to consider victim impact statements in determining the proper sentence and, as stated earlier, the decisions in *Friesen* and *Arcand* make it clear that the effect of a sexual assault on the victim is an important consideration during sentencing and will make the offence more serious.

Community Impact Statement

[40] In this case, a community impact statement was entered as part of exhibit 3. The community impact statement was written by Tyson Plesuk and Louise Taylor who were the co-owners of the Movement Sports Clinic where Mr. Baltazar worked for the majority of the sexual assaults which occurred in this case. The community impact statement was made on behalf of not only the Movement Sports Clinic, but also healthcare practitioners in general and members of the public seeking healthcare services. The statement indicated that the clinic included physiotherapists, physicians and massage therapists and the reputations of all of these professionals has been negatively affected by the actions of Mr. Baltazar. The statement provides that all of Mr. Baltazar's colleagues trusted that the patients would be treated with reverence and respect and not abused and taken advantage of. They describe the betrayal of the highest order and being "unforgivable." Not only were the reputations of the clinic and its practitioners negatively impacted, but because of the media coverage of this case a negative spotlight has been focused on the actions at the clinic. According to the statement, Mr. Baltazar's betrayal of public trust has had a ripple effect in the community that impacts not only massage therapists, but all healthcare practitioners. The clinic has found it difficult to promote massage therapy services within the clinic while having to deal with the subsequent media coverage involved in this case. Lastly, the impact statement indicated that Mr. Baltazar's actions have caused some patients to question their safety while receiving treatment from massage therapists and other healthcare practitioners which not only affects the clinic in its business, but because certain patients have forgone needed therapy, it has ultimately harmed their physical well-being.

[41] The understandable impact of Mr. Baltazar's actions on the community of sports clinic and healthcare professionals, such as massage therapists, is an important consideration in determining the seriousness of the offences in question and a determination of the ultimate sentence in this case.

Risk Assessment

[42] The risk assessment report was entered into evidence, as Exhibit 2, in this sentencing hearing. The report was completed by Patrick Higgins, a registered social worker whom Mr. Baltazar's counsel retained to prepare the report. Although the risk assessment report was obtained to provide evidence to the court that Mr. Baltazar was not a danger to the community,

which is one of the prerequisites for a conditional sentence, this report also provides useful information regarding Mr. Baltazar's history and personal life. However, Mr. Baltazar does not accept responsibility for the convictions against him and maintains that he did not intentionally touch any of the victims and any touching that might have happened were accidental. In the report, Mr. Higgins indicated that Mr. Baltazar stated: "to the complainants, who felt discomfort and the stress of what happened, I feel bad for that too. I told the owner I can apologize, and I take responsibility if they felt bad for what happened. My sincere apologies, if they feel discomfort, to make them feel like that was not my intention. I just wanted to give them the best treatment possible. I never wanted to that thing to happen to them." Mr. Baltazar continues to contest the facts in the case and continues to claim that certain actions that were described by the victims, and could not have been accidental, simply did not happen. The report indicated that Mr. Baltazar was able to identify adverse outcomes faced by the victims and identified: "that if these individuals had historically experienced traumatic events, the negative impact of this experience might have been exacerbated." In the report Mr. Baltazar went on to state: "They'll feel violated. They have this feeling of discomfort. If the previous issues from before may be from childhood or family community."

[43] In my view, the comments of Mr. Baltazar in the risk assessment report, portray him as having no insight into his actions or the effect of his actions on the victims. As stated by the Crown, Mr. Baltazar need not admit to the offences in question, but his failure to do so skews the risk assessment and the conclusions of Mr. Higgins that Mr. Baltazar was a low risk to reoffend. Therefore, I do not find the risk assessment report to be useful with respect to the proper length of the sentence or whether it should be served in the community or by way of actual incarceration.

Character References

[44] Mr. Baltazar provided a number of character references which were collectively marked as Exhibit 1 in these sentencing proceedings. These character references included a letter from Leslie Anne Dela Cruz, a friend of Mr. Baltazar and his family; Robert Schwartz, the brother-in-law of Mr. Baltazar; Ross Ferby, a member of the church which Mr. Baltazar attends; Marilyn Baltazar, Mr. Baltazar's wife; Ronald Munoz, a childhood friend of Mr. Baltazar's; David Allen, a friend and member of the church choir that Mr. Baltazar attends; Marilyn Baltazar-Schwartz, the sister of Mr. Baltazar; Juliet Haynes, another member of the church choir that Mr. Baltazar is a member of; and Manni Fink-Fraser, Mr. Baltazar's real estate agent. These character references all describe Mr. Baltazar as being a hard-working, humble individual who is a great father to his family and is involved in the Catholic Church. These character references all provide evidence that Mr. Baltazar's actions were out of character. They also indicate that Mr. Baltazar has support in the community from both friends and family.

[45] Good character is a recognized potential mitigating factor in most cases. However, cases of sexual assaults are usually committed in private settings and circumstances where friends, family and associates would have no knowledge of the acts. The case law shows that sexual offenders come from a spectrum of "character", are often successful in their vocation and are involved in community and family events. The character of the offender will, in most cases, not reduce the need for denunciation and deterrence with respect of the sentencing of sexual offences. Therefore, character references have diminished value in cases of sexual assault and

provide little mitigation. I find that is so in the context of this case See: *R v Profit*, [1993] 3 SCR 637, *Arcand* at para 136, *R v Shrivastava*, 2019 ABQB 663 at paras 90-93.

Personal Antecedents

[46] The risk assessment and character references provide information about Mr. Baltazar's personal antecedents. Mr. Baltazar is forty-two years of age. He was born in the Philippines and relocated to Canada at the age of thirty-two. He is now a Canadian citizen. He was raised by his biological mother, and aunt and uncle and there are seven siblings in the family. Mr. Baltazar is married and has two children aged six and one year and three months old. Mr. Baltazar's six-year old child suffers from autism which requires that he be under constant care.

[47] Mr. Baltazar completed postsecondary education in the Philippines graduating from Lyceum -Northwestern University, and received a Bachelor of Science in Physical Therapy. He began physical therapy in the Philippines on an in-home basis. However, this employment did not allow him to earn enough money and he began working for McDonald's, fast food chain. Mr. Baltazar then relocated to Canada in May 2007 and continued to be employed by McDonald's until 2014.

[48] While working at McDonald's, Mr. Baltazar also furthered his education by enrolling at Mount Royal College in the massage therapy program. Mr. Baltazar then quit the McDonald's franchise and worked for another fast food company, while continuing his education and graduated from Mount Royal College with a diploma in massage therapy. Mr. Baltazar then began working at the Calgary Family Wellness Clinic and eventually also began working at the Movement Sports Clinic and the Chinook Chiropractic and Massage Clinic. Once the investigation into these matters began, Mr. Baltazar lost his ability to practice massage therapy and after being unemployed for approximately one month, he obtained employment within the fast food restaurant industry and worked at three different restaurants. According to the risk assessment report, Mr. Baltazar has outstanding educational loans, financial obligations to his family overseas and he is the primary provider for his family here in Canada.

[49] Mr. Baltazar had been a member of the St. Cecilia Catholic Church in Calgary and sang in the choir. A number of members of the church provided character references and provide significant support for Mr. Baltazar.

[50] Having reviewed the evidence in this case, I now turn to the consideration of the relevant aggravating and mitigating factors in this case.

Aggravating and Mitigating Circumstances

[51] As stated above a court must consider the aggravating and mitigating circumstances with respect to the offence or the offender. The Crown, in their submissions indicates that there are no significant mitigating factors and that the usual factors such as no prior criminal record and previous good character should not affect the range of sentence in this case. The defence raises that there are collateral circumstances relating to Mr. Baltazar's family, his loss of employment, that would result if he was incarcerated. In addition, the defence indicates that individualized sentencing requires that the court consider the personal circumstances of the accused such as his lack of a criminal record, the effect of a criminal conviction on his livelihood and his family situation.

[52] I accept that there are a number of aggravating factors such as the location and vulnerability of each of the victims, the number of victims, the duration of time over which the offending behaviour persisted the actual physical, emotional and psychological harm suffered by his multiple victims, and the position of trust he held vis-à-vis each victim. As I have already discussed, these aggravating factors increase the seriousness of the offences in question and therefore require an increase sentence. However, in my view the most significant aggravating factor is the abuse of a position of trust between Mr. Baltazar and the victims.

Position of Trust

[53] Section 718.2 of the *Criminal Code*, states that his sentence should be increased or reduced to account for relevant aggravating or mitigating circumstances relating to the offence or the offender. The section then lists a number of aggravating factors that the court should specifically consider including section 718.2(a)(iii), which states: “that the offender, in committing the offence abused a position of trust or authority in relation to the victim.” This is a significant aggravating factor in sexual assault cases where the assailant is in a position of trust. In *Friesen*, the Supreme Court stated that any breach of trust was likely to increase harm to the victim and the gravity of the offence, and was aggravating because it increases the offender’s degree of responsibility: at paras 126 and 129.

[54] Many cases have been provided to the court involving sexual assaults committed by assailants whose job is to provide care to individuals who became their victims. Massage therapists, nurses, doctors and chiropractors all have a duty of care towards their patients or clients. Many times, these clients will be in a state of undress and vulnerable when being treated as was the situation in the vast majority of the counts in the case. These victims are clearly in a vulnerable state. They trust that the massage therapist will not do anything untoward. As stated by the expert witness at the trial in this matter, Janet Mwamburi, the penis and testicles of a client should never be touched and massage therapists are trained to use proper draping to ensure that such touching would never occur. Mr. Baltazar was a registered massage therapist and knew that he was professionally accountable for any violation of that position of trust: see *R v Aguas*, 2015 ONSC 5732.

[55] The actions of Mr. Baltazar portrayed predatory conduct by showing a pattern of taking advantage of vulnerable clients who trusted him. All of the eleven incidents in this case involves sexual touching in the midst of a massage. In my view this makes the breach of the position of trust more serious and increases Mr. Baltazar’s moral blameworthiness in the circumstances of this case: see *Pettitt* at paras 84-88.

[56] Not only does the fact that Mr. Baltazar was in a position of trust make the sexual assaults in this case more serious, it also requires that the sentence imposed adequately condemn the conduct in question and deter those who may take advantage of vulnerable and essentially defenseless victims: see *R v West*, 2007 ABCA 67 at para 13; *R v Vigon-Campuzano*, 2020 ONSC 5702. Mr. Baltazar’s position of trust is a significant aggravating factor in this case and makes his actions much more serious and requires a sentence that significantly denounces and deters Mr. Baltazar’s actions.

Mitigating Circumstances

[57] Where an offender has no previous criminal record, this is not a mitigating factor but is a neutral factor and it assumes that an offender will have a better chance at rehabilitation and reduces the need for specific deterrence: see *R v JJM*, 2021 ABCA 170.

[58] Mitigating factors such as a guilty plea and remorse, can reduce a sentence, but in the circumstances of this case, Mr. Baltazar did not plead guilty and does not have insight into his actions as he denies that he had any intent for the convictions in this case. He did make a statement to the court apologizing to the victims and asking for their forgiveness. However, these are not mitigating factors although they are not aggravating to any degree.

[59] In this case, the evidence clearly sets out that Mr. Baltazar had a very good work ethic when not performing massages and a good employment record. A good employment record could potentially be a mitigating factor, but can be diminished by the nature of the offence. A good employment record generally suggests that an offender has more promising rehabilitative prospects. However, where the offender's actions are related to his employment, this can greatly reduce the mitigating effect of a good employment record especially where that employment involved a breach of trust. In the circumstances of this case, the aggravating effect of the breach of trust is much more serious than the mitigating effect of a good work ethic and good employment record.

Collateral Circumstances

[60] There is no doubt that individualized sentencing is the law in Canada and that collateral circumstances can affect sentence. Collateral circumstances include consequences that arise from the commission, conviction or sentence imposed, that impacts the offender. These impacts will often include loss of employment, financial consequences, loss of reputation in the community and negative effects on the offender's family. Collateral consequences are not mitigating or aggravating factor as they do not speak to the gravity of the offence or the responsibility of the offender. However, they are relevant to the principles of individualization and parity and are a consideration in sentencing: see *R v Suter*, 2018 SCC 34 at paras 46-49; *R v Pham*, 2013 SCC 15.

[61] As stated in *Shrivastava*, at paras 60-69, collateral consequences should not result in the imposition of an inappropriate and artificial sentence and should not be the dominant consideration in sentencing. The weight of collateral circumstances will vary according to the facts of the case and the seriousness of the offence. When consequences can be expected as a result of the commission of the offence the weight given to collateral consequences will be reduced. However, as stated in *Suter* at para 49, "collateral consequences do not need to be foreseeable" and "where the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished."

[62] Although the role of the collateral circumstances in this case is greatly reduced, I still take into consideration the fact the convictions in this case have affected Mr. Baltazar's employment, his ability to sponsor his mother to come to Canada and will have significant impact on his young family.

[63] Before a court can properly apply mitigating and aggravating factors, which increase or reduce the appropriate sentence, a court must first determine a range of sentence for the offences in question.

Range of Sentence

[64] The Crown and defence have agreed that the sexual assaults in this case are not major sexual assaults, as defined in *Sandercock* and *Arcand*. Both Crown and defence also agree that in this case the offences, perpetrated on different victims, were separate and do not arise out of the same event, such that the sentence for each offence must be served consecutively: section 718.3 of the *Criminal Code*. This requires the court to consider the totality principle which I will discuss in due course.

[65] The Crown takes the position that a sentence of six months' imprisonment should be imposed for counts 5, 8, 11, and 12; that a sentence of five months' imprisonment should be imposed for counts 9, 10, 15 and 17; and that a sentence of four months' imprisonment should be imposed for counts 3, 4, and 16, for a total of fifty-six months.

[66] The defence takes the position that a sentence of six months' imprisonment should be imposed for counts 11 and 12; that a sentence of three months' imprisonment should be imposed for counts 3, 5, 8, 9, 10, and 17; and that six months' probation should be imposed for counts 4, 15, 16, for a total of thirty months' imprisonment with eighteen months' probation.

[67] Counsel have provided me with numerous cases involving offenders analogous to caregivers who have been convicted of sexual assaults involving victims who were their clients or patients. These cases include *Vigon-Campuzano, R v Bedard*, [2001] OJ No 1894; *R v Norris*, 2016 ONSC 2482; *West, R v Poon*, 2012 SKCA 76; *R v Buna* 2010 BCCA 53; *R v Alasti*, 2010 BCPC 442, aff'd 2011 BCSC 824; *R v Witvoet*, 2020 BCPC 128; *R v Zhou*, 2015 ONSC 3557; *R v Zolman*, [2020] OJ No 16 (the conviction was reversed and a new trial ordered) 2020 ONSC 6611, *Aguas Pettitt*. These cases set out a range of sentence, for individual counts of sexual assault in circumstances somewhat similar to the circumstances of this case, of two to twelve months' incarceration per offence. Some of these cases involved digital penetration, which would normally call for much higher sentences.

[68] I will discuss the case of *Bedard*, in more detail because at first blush, it may seem more comparable because in that case there were nine victims of sexual assault by a chiropractor. The circumstances of the assaults were fondling of breasts, genital manipulation, digital penetration of the vagina and in one case digital penetration of the rectum. The initial sentence was an eighteen months' conditional sentence plus three years' probation. The Court of Appeal for Ontario indicated that a conditional sentence was not appropriate and imposed a twelve-month jail sentence as was requested by the Crown. Mr. Bedard was given credit for serving three months of his jail sentence conditionally and was only required to serve another nine months. However, the Court of Appeal made it clear that they only imposed that sentence because the Crown had only asked for a sentence of twelve months' incarceration which the Court of Appeal said was "extremely lenient." The Court of Appeal indicated that the sentencing judge did not appreciate the principles of general denunciation and deterrence and that the sentence imposed was "manifestly inadequate." The Court of Appeal went on to state that criminal conduct of this nature calls for severe punishment and would normally attract a penitentiary sentence. When one also considers that this case occurred in 2001, and subsequent case law has made it clear that

sexual assault is a serious offence that results in significant harm to the victims and requires a significant sentence, in my view the precedential effect of this case is greatly reduced. There can be no doubt that a sentence of a little more than one month per count would not be a proper precedent for the case at bar and I have not included this case in the range of sentence mentioned above.

[69] In their submissions, Mr. Baltazar's counsel referred to the cases of *Buna*, *Alasti*, *Witvoet*, *Zolman* and *Norris*. However, in *Buna* the conduct involved was touching of the breasts of three female patients and nonetheless, the court imposed was nine months' incarceration per count to be served concurrently and in the community by way of a CSO order. Nine months is a higher sentence than any proposed in this case by either the Crown or defence, although conditional sentences can often be of longer duration than actual incarceration for the same crime.

[70] In *Alasti*, the offender was a massage therapist and there were two victims. One of the victims was subject to digital penetration which resulted in a twelve-month sentence of incarceration. The second victim was subject to having her breasts and nipples touched underneath her hospital gown and a sentence of six months' incarceration was ordered on that count. The touching of the breasts, nipples and vagina is less intrusive than digital penetration.

[71] In *Witvoet*, the offender was a physiotherapist and pled guilty to two counts of sexually assaulting patients. The assaultive behaviour involved massaging breasts and touching and rubbing the vagina areas of the victims. The sentence imposed was an eighteen-month CSO by way of a joint submission. In my view, this case is of little precedential use since it was a guilty plea and a joint submission and yet a sentence of nine months was imposed per count.

[72] In *Zolman*, the offender was a seventy-five-year-old acupuncturist and he was convicted of two counts of sexual assault. The assaultive behaviour involved the offender telling the victims that masturbation would be a necessary part of treatment. The offender stimulated victim number one, who was eighteen years of age, for two to three minutes. With respect to the second victim, the offender again indicated that masturbation was part of the treatment but when he attempted to touch second victim she pulled away and left the area. The judge imposed a six-month sentence of imprisonment concurrent on the two counts.

[73] In *Norris*, the offender was a sixty-three-year-old unlicensed practitioner of healing therapies. There were five victims and the offending actions were the touching of breasts, and the vaginal and anal areas, as well as masturbating on the feet of one of the victims. He was sentenced to fourteen months' incarceration followed by three years' probation.

Analysis

[74] Although the cases provided include a number of sentences in the range of twelve months for touching of genital areas, the Crown has not argued that such a sentence would be appropriate with respect to any of the counts against Mr. Baltazar. The highest sentence suggested by the Crown is six months' imprisonment and the lowest is four months' imprisonment. The defence also suggests a high sentence of six months and a low of three months' incarceration, although they argue that some offences deserve probation only. No cases have been provided to me where a term of probation was ordered for a single offence involving sexual assault and a breach of trust. In my view, a probationary term is not appropriate for any of the counts against Mr. Baltazar.

[75] I take into consideration the seriousness of sexual assault offences, as well as the emotional and psychological impact of such offences, the different types of touching in each count and the aggravating circumstances, mitigating circumstances, and the personal and collateral circumstances of the offender. I have ranked the offences from the least serious to the most serious and would sentence Mr. Baltazar to the following sentences for each count.

[76] In my view, the least serious touching was in Count #4 where there was touching of the genitals over the underwear during a massage motion. In my view, the appropriate sentence is two months' incarceration.

[77] Count #15 involved the grazing of the victim's bare testicles during a massage motion where Mr. Baltazar had indicated to the victim that he may graze his testicles and the victim said okay. In my view, the proper sentence is two months' incarceration.

[78] Count #3 involved the touching the bare tip of the victim's penis and testicles while performing a massage movement. The victim provided a victim impact statement which set out the negative effects of the offence on his emotional and psychological state. In my view, a proper sentence is three months' incarceration.

[79] Count #16 involved the grazing of the victim's genitals over the underwear and the touching, by Mr. Baltazar, of the tip of the victim's penis underneath the underwear and these contacts all occurred during a massage motion. This victim also provided a victim impact statement setting out the negative emotional effects of Mr. Baltazar's actions. In my view, an appropriate sentence is three months' incarceration.

[80] Count #9 involved Mr. Baltazar massaging the nude victim's groin and making contact with the victim's genitals. At the end of the massage, Mr. Baltazar cupped the victim's genitals and used his fingers to touch the genitals for three to four seconds. In my view, a proper sentence would be four months' incarceration.

[81] Count #5 involved the victim, who was wearing boxer shorts, having his genitals exposed and Mr. Baltazar making contact two to three times with his genitals during a massage motion. The victim then developed an erection and Mr. Baltazar took hold of the victim's penis and testicles and rubbed them directly and moved the penis to the side. Mr. Baltazar also massaged the victim's face and hair. In my view, a proper sentence would be four months' incarceration.

[82] Count #8 involved Mr. Baltazar telling the victim he had a great physique and while the victim was wearing underwear using one hand to push on the genitals while massaging the groin with the other hand. At a second massage where the victim was not wearing underwear, Mr. Baltazar again used one hand to push the victim's genitals to the side and the other hand to massage the groin. At the second massage, Mr. Baltazar also rubbed the tips of the victim's penis with his fingers and thumb. This victim also provided a victim impact statement that described the significant emotional effects of the offender's behaviour on him. In my view, a proper sentence would be four months' incarceration.

[83] Count #10 involved Mr. Baltazar making contact with the victim's genitals during a massage motion. In addition, Mr. Baltazar twice used his hand to cup the victim's penis and testicles and on one occasion moved his hand downwards in a stroking motion while cupping the genitals. This victim provided a victim impact statement that indicated that his involvement in this prosecution had been stressful and that he felt stigmatized. In my view, a proper sentence would be four months' incarceration.

[84] Count #17 involved Mr. Baltazar massaging the victims groin area with his palm and knuckles and grazing the victim's testicles. Mr. Baltazar then cupped the victim's testicles with his hand and massaged his testicles. The victim indicated to Mr. Baltazar that this was not a painful area and not an area he wanted worked on. In my view, a proper sentence would be four months' incarceration.

[85] Count #11 involved Mr. Baltazar massaging the victim and making contact with the victim's genitals during a massage movement. In addition, Mr. Baltazar took a hold of the victim's penis foreskin with his fingers and pulled down on the foreskin two or three times in a stroking motion. Mr. Baltazar also indicated to the victim that this is a special treatment for him and described the victim's penis as a "big one." In my view, the appropriate sentence would be six months' incarceration.

[86] Count #12 involved two massages. During the first massage, Mr. Baltazar brushed up against the victims covered genitals while massaging his upper thigh. He also made contact with the victim's covered genitals when he was massaging the perineum area. Mr. Baltazar then massaged the victim's face and asked if he could massage inside the victim's mouth which the victim declined. During the second massage, Mr. Baltazar's hands or arm touch the victim's genitals during a massage motion. In addition, Mr. Baltazar put his hand on the base of the victim's penis and made an upward motion to the tip of the penis in a stroking motion. In my view, the appropriate sentence would be six months' incarceration.

[87] These sentences must be served consecutively which results in a sentence of forty-two months' incarceration before the application of the totality principle.

Totality Principle

[88] The totality principle requires that where sentences for multiple offences are to be served consecutively, a court must first determine the proper sentence for each of the multiple offences perpetrated against the individual victims. A court must then apply the totality principle to determine whether the combined sentence is unduly long or harsh and disproportionate to the gravity of the offences and the degree of responsibility of the offender. If the total sentence would be unduly harsh a court must determine to what extent the combined sentence should be reduced to achieve a proper sentence. As stated in *R v White*, 2016 ABQB 24, there is no consistency in the approach to global sentencing such as a suggestion of a percentage reduction. A court must consider all of the principles of sentencing in determining a proper global sentence.

[89] When I consider all of the principles of sentencing, in my view, a sentence of forty-two months' incarceration would be unduly harsh. Mr. Baltazar has a young family and he has no prior record and rehabilitation should be a consideration. Therefore, by taking into consideration all of the principles of sentencing and the totality principle I would reduce the total sentence to thirty one months' incarceration.

Charter Challenge

[90] A thirty-month sentence would not allow for a conditional sentence in the circumstances of this case. In addition, in my view, it would be a rare case where a conditional sentence would be granted in which there was a sexual assault by a person who was in a position of trust towards

their victim, even if the sentence was under two years less a day. In the case of *West* which involved the sexual assault of a nurse on a patient, the Court of Appeal stated at para 13:

With respect, the sentencing judge erred in this case. The conditional sentence does not serve to adequately condemn the conduct and to deter those in a position of trust relative to vulnerable and essentially defenseless victims. While emphasizing the consequences of the conviction for the respondent, the judgment is deficient in its analysis of his moral blameworthiness. Finally, the judgment is outside the range of sentences given in comparable cases.

[91] In *Zolman*, the accused was a seventy-five-year-old acupuncturist who sexually assaulted an eighteen-year-old patient and her mother. As mentioned above, a sentence of six months' imprisonment with two years' probation was imposed. However, the court indicated that a conditional sentence was not appropriate and stated at paras 30 and 33:

I recognize that a conditional sentence is available. However, in the circumstances of this case, I do not find that a conditional sentence would properly address the gravity of the breach of trust that occurred here

[...]

The need for denunciation of Mr. Zolman's manipulative conduct and the need to send a strong message of general deterrence to other health professionals is accordingly very high. In my view, a conditional sentence is not adequate to the task here.

[92] In my view, a conditional sentence in the circumstances of this case with eleven victims and a significant breach of trust, would not adequately denounce and deter the conduct in question. As I have previously stated, judicial economy is an important issue and, in my view, proceeding with a *Charter* challenge that is academic to the actual result in this case, is not an efficient use of judicial and court time. Therefore, decline to determine the section 7 *Charter* argument and whether conditional sentence should be available for sexual assault cases where the Crown proceeds by indictment.

Conclusion

[93] In conclusion, I sentence Mr. Baltazar to thirty-one months' imprisonment.

Heard on the 4th, 5th and 26th days of October, 2021.

Dated at the City of Calgary, Alberta this 9th day of November, 2021.

W.T. de Wit
J.C.Q.B.A.

Appearances:

Donna Spaner
for the Crown

Jennifer Ruttan
for the Accused