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53719-2-C;
53801-2-C

Registry: Vernon

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

STEPHEN WITVOET

PUBLICATION BANS Pursuant to sections 486.4(1) and 517 of the *Criminal Code*

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE J. GUILD

Counsel for the Crown:	J. O'Quinn
Counsel for the Defendant:	G. Verdurmen
Place of Hearing:	Vernon, B.C.
Dates of Hearing:	May 21, 22, 23 and October 28, 2019
Dates of Submissions:	December 9, 2019 and January 27, 2020
Date of Judgment:	July 8, 2020

INTRODUCTION

[1] After extensive negotiations that occurred mid-trial, Stephen Witvoet ("Mr. Witvoet") a physiotherapist, pled guilty to nine offences of sexually assaulting female patients during their treatment. The assaults involved directly massaging patients' breasts and, for three women, having their vaginal area touched or rubbed. Crown and defence provided a joint submission on sentence. At this point, the issue is whether the proposed sentence for each offence, a concurrent 18-month conditional sentence followed by two years' probation, would bring the administration of justice into disrepute or otherwise be contrary to the public interest. This decision was scheduled to be delivered on March 20, 2020, but has been delayed due to the consequences of the COVID-19 pandemic. The pandemic and its consequences are factors that I must take into account, but they have not changed my original conclusions.

SUMMARY

[2] Mr. Witvoet is a physiotherapist in Vernon who owned and operated Thrive Physiotherapy. He was originally charged with two offences alleging he massaged the breasts of two female patients for no therapeutic or valid reason during the course of their treatment in 2015 and 2016. There were three days of trial in May of 2019. The trial did not finish and more time was to be scheduled for its continuation. On June 7, 2019, before the further dates were scheduled, Mr. Witvoet was charged with two new offences of sexual assault. On June 12, 2019, the media published a police request for any other potential victims to come forward. Several made reports to police and Mr. Witvoet was charged with 12 more similar offences, with each charge relating to a different person. Media coverage of the charges and trial increased substantially. Further trial dates were scheduled.

[3] Extensive discussions between Crown and defence led to an agreement that the Crown would proceed summarily, Mr. Witvoet would plead guilty to several offences, and there would be a joint submission on the appropriate sentence. The proposed sentence is a Conditional Sentence Order (CSO) of 18 months, the maximum jail time possible for each offence, followed by two years of probation.

[4] A joint submission is when Crown and defence negotiate and agree to recommend a specific sentence in exchange for the accused pleading guilty. Joint submissions would not be possible if the parties did not have a high degree of confidence that they will be accepted by the court.

[5] On October 28, 2019, Mr. Witvoet pled guilty to nine offences, including one from the trial. The Crown outlined the agreed facts for each offence, the fact that there had been extensive discussions, and the joint submission. The sentence hearing was adjourned twice for the parties to provide more details about the basis for and case law in support of their recommended sentence. The Crown's main considerations were the strength and weaknesses in evidence in respect of each offence, but primarily the victims' wellbeing and wishes. Overall, the victims preferred not having to go through the ordeal of a trial. Mr. Witvoet gave up his presumption of innocence and accepted the consequences, which, in addition to being sentenced, include personal repercussions with his family, his standing in the community, and significant professional repercussions.

[6] At this point, the sentence I might impose is irrelevant. A trial judge must follow the joint submission unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I summarize my four main considerations.

[7] First, the joint submission was the result of extensive discussions and significant concessions by Crown counsel and Mr. Witvoet, through his lawyer. Both lawyers are very experienced, acutely aware of their responsibilities, and the importance of the reputation and proper functioning of the justice system.

[8] The Crown's task is not simply to obtain a conviction when someone is charged with an offence, but to ensure that justice is done. The Crown usually possesses and considers more information than is put before the court or made public. That includes the victims' perspectives, who are usually told what resolution is being proposed and why. In the end, Crown counsel make a judgment call as to what is, overall and bearing

in mind all the relevant facts, the best result for the victims and the public. In this case that decision was the joint submission.

[9] For Mr. Witvoet, a certain but fair outcome was very valuable, in part because it would tend to decrease his personal stress and provide a measure of certainty. But the guilty pleas were also important for him as an acceptance of his responsibility, and an acknowledgment that he did wrong and that the victims were right. The guilty pleas help make sure justice is done from the victims' perspectives.

[10] Second, the fundamental principle of sentencing is proportionality. Each sentence must be tailored to the facts of the case and the person being sentenced, but a sentence should also be similar to other sentences imposed for similar offending. For Mr. Witvoet, there is no minimum sentence and the maximum is 18 months in jail. Fortunately, there are relatively few instances where professionals abuse their position of trust and sexually assault those in their care. The existing case law does not suggest that the proposed sentence is clearly outside the appropriate range.

[11] Third, even if the proposed sentence might be considered unusually lenient, the Supreme Court of Canada has made it clear that a joint submission can make what might otherwise be an unfit sentence a proper one. In part that is because without guilty pleas, the justice system would likely fail. Negotiated guilty pleas avoid that potential disaster, which is in the public interest. In this case, there could have been four trials. The trial where Mr. Witvoet was charged with 12 offences would be complicated and take considerable time. In that respect, by pleading guilty, Mr. Witvoet has contributed to the proper functioning of the justice system.

[12] Fourth, the proposed sentence is a jail sentence, albeit in the community. Over 20 years ago the Canadian government recognized that too many people were incarcerated and not enough attention was paid to restorative justice, the object of which is to reduce the negative effects of crime on victims, offenders, and the public. Parliament's remedy was the conditional sentence. It can provide significant denunciation and deterrence, especially where there has been media coverage of the offender. A conditional sentence better achieves the restorative objectives of a

sentence. Those objectives are rehabilitation, making amends to victims and the community, and promoting a sense of responsibility in an offender. In this case, there is a need for punishment and restorative objectives, which suggests that a conditional sentence is the best option.

[13] In reviewing a reasoned and principled joint submission, I cannot be a Monday morning quarterback. The bar is much higher than that. I have to be able to say the negotiated position of experienced lawyers is definitely wrong, while bearing in mind reasonable people can reasonably disagree.

[14] Would the joint submission in this case bring the administration of justice into disrepute from the perspective of a reasonable person? I cannot say it would.

FACTS

Background

[15] In July of 2015, N attended several appointments with Mr. Witvoet for treatment. She said that on the last appointment, during the course of treatment and without her consent, Mr. Witvoet massaged both of her breasts under her sports bra with his hand. Not long after the end of that treatment session, she went to the RCMP detachment in Vernon and gave a statement about what happened. N was not sure if she wanted to proceed with charges against Mr. Witvoet. Ultimately, she told police she did not at that time. She wanted Mr. Witvoet warned about her complaint, but if someone else came forward with a similar complaint, she wanted Mr. Witvoet charged for what she said happened to her. In September of 2015 police spoke with Mr. Witvoet about N's complaint.

[16] In November 2016, CH went to see Mr. Witvoet for treatment about her left wrist. She also received some treatment for her left shoulder. She says during that treatment Mr. Witvoet massaged her breasts and that she did not consent to it. She made a complaint that day to the police in Vernon and gave a statement to Cst. Albright, who started an investigation. N was contacted and told there was another complaint against Mr. Witvoet.

[17] On December 27, 2017, Mr. Witvoet was charged on Information 52489-1 with two counts of sexual assault against N and CH. The offences were originally charged by indictment, but with agreement of the defence, the Crown proceeded summarily pursuant to s. 786(2) of the *Criminal Code*. The trial started on May 21 and continued until May 23, 2019, as scheduled. Evidence was led, including from the victims, and a *Charter* argument was made with respect to lost evidence. Although I found that Mr. Witvoet's rights under s. 7 of the *Charter* were violated, the stay of proceedings he sought was not an appropriate remedy. Mr. Witvoet testified but his evidence was not completed and the trial was adjourned to schedule a further 1.5 days of trial time.

[18] Two other complaints were made to police that resulted in Mr. Witvoet being charged on June 7, 2019, with sexual assault of SR in 2015[1] and sexual assault of AG in 2016.[2] On June 12, 2019, media reported a police request for any other potential victims to come forward. On June 19, Mr. Witvoet applied to adjourn the trial continuation scheduled for June 27 – 28, 2019. Crown was not opposed. Shortly after, Mr. Witvoet was arrested and granted bail on the above-noted new charges and Information 53801-2-C, which charged him with 12 counts of sexual assault on different victims. Media coverage of the charges and trial increased substantially.

Offences

[19] On October 28, 2019, Mr. Mr. Witvoet appeared before me on all Informations. Again pursuant to s. 786(2) of the *Criminal Code,* Crown proceeded summarily and Mr. Witvoet pled guilty to nine charges on three of the Informations.

[20] On Information 52489-1, the matter in mid-trial, he pled guilty to count 2, sexual assault of CH, who was 32-years-old. The agreed facts were that CH booked an appointment online for a shoulder injury after having heard of Thrive from a co-worker. She went to the clinic and no one else was there. Mr. Witvoet asked her to remove her blouse for assessment, massaged her chest area, including pectorals, and cupped her left breast and then her right breast. He massaged all over her breasts but not her nipples. He had placed a small towel under her neck so she could not see where he touched. He also asked during treatment if she liked going to raves. After she had left

Thrive, she got a text from Mr. Witvoet, hoping she felt good. He never asked permission to touch her breasts and she never consented to it.

[21] On Information 53719-2-C, he pled guilty to sexual assault between September 4 and November 9, 2015. SR attended Thrive for a right-shoulder injury. On one occasion, her shirt was removed and her bra strap pulled over her shoulder. Mr. Witvoet put a towel on her so she could not see what he was doing. She felt Mr. Witvoet place his right hand inside her bra and touch both her breasts. He never asked for permission and she never gave any. She was 53-years-old and filed a Victim Impact Statement with the court.

[22] On Information 53801-2-C, Mr. Witvoet pled guilty to seven counts. Count 1 related to SB. Between June 1 and April 30 2019, she saw Mr. Witvoet for flat feet and a bad back. She was 18-years-old. He greeted her when she called and told her to come alone. He never explained the proposed treatment to her. On one occasion, he pulled her pants below her hip bones and tucked her underwear under her shorts and began to rub her pubic bone and groin area. He also lifted her shirt and put his hand under her bra and rubbed both her breasts. No permission was sought and none was given.

[23] Count 2 related to JB, who was a massage therapy student. Mr. Witvoet was her mentor/teacher. She was 25. In March of 2015, she injured her hip. Mr. Witvoet approached her and offered treatment. She wore shorts with a built-in panty liner in the crotch area, and underwear under them. During treatment, the accused put his fingers under her shorts and panties and touched the opening of her vagina, though there was no penetration. No permission was sought and none was given.

[24] Count 5 related to AB who had a shoulder injury and went to see Mr. Witvoet for treatment. She was 27-years-old. Her mother went to most treatments with her but on the third treatment, she was alone. During that treatment session, Mr. Witvoet put his hands under her clothing and inside her bra, and rubbed up and down on her breasts. Mr. Witvoet then worked on her hip, apparently with no explanation as to why that was required for a shoulder injury. While doing so, he slid his hand under her underwear and touched her vagina. No permission was sought and none was given.

[25] Count 6 related to CM, a 43-year-old woman who had seen Mr. Witvoet for treatment for some time with respect to her neck. During her last treatment in March of 2018, Mr. Witvoet massaged her breasts in her bra, toward her nipples. No permission was sought and none was given.

[26] Count 7 related to NB, who was 45-years-old and saw Mr. Witvoet for a broken shoulder. She saw him four times. On the last session, she was on her back when he slid his hand into her bra, touched her nipples and rubbed back and forth across her breasts. No permission was sought and none was given.

[27] Count 9 related to KB who was 39-years-old. In July of 2015 she saw Mr. Witvoet for three sessions for a left wrist injury. He indicated she should have her shoulder worked on, though no explanation was given as to how that related to her wrist. During that treatment, Mr. Witvoet put his hands into her bra and massaged both her breasts and nipples. No permission was sought and none was given.

[28] Count 12 related to CC, who was referred by her physician to get physiotherapy treatment for lockjaw. She went to Thrive and saw Mr. Witvoet. He started massaging her collarbone and was standing behind her when he put his hands into her bra and touched her breasts and nipples. No permission was sought and none was given.

Mr. Witvoet's Personal Circumstances

[29] Mr. Witvoet was born in Toronto, Ontario, and was 47-years-old at the time of submissions. His parents live in Ontario and are retired teachers. He has four brothers and sisters. He is close to his family. He had a good upbringing and excelled in physical activity. After high school, he attended Calvin College in the USA and received a Bachelor's Degree in Education. He then received a Bachelor's of Science in Physiotherapy in 2005. He is married and has two children in their teens. Unsurprisingly, these charges have put his family under pressure, so he and his wife separated. He has attended some counselling and they may reunite after these proceedings have concluded.

[30] He was raised as a religious Christian and those beliefs are a foundation for most of his life, including being a good father, involved with his children and their activities. He worked as a volunteer at BMX racing and helped others as a physiotherapist for a Paralympic team. He has been a member of the BC College of Physiotherapists since 2005 and taught anatomy for eight years at physiotherapy school. He started his own clinic - Thrive Physiotherapy & Sports Injury Clinic, and employed others. In January of 2017 after complaints were made, his practice was restricted and supervised, though I note that at least one offence was committed after supervision had commenced. He has now lost his practice that he built up.

[31] Although Mr. Witvoet originally questioned the complaints, he realizes he lied to himself, his family and his friends. He now takes full responsibility for his offending, is remorseful and recognizes that he abused his position of trust. The publicity has left him feeling like a pariah. He may have to find a new career. He has been working in construction to make ends meet and support his family.

LEGAL PRINCIPLES and ANALYSIS

Joint Submissions

[32] Plea resolutions do not always result in Crown and defence agreeing what sentence should be proposed and even if they do agree, it is not necessarily a joint submission. A true joint submission requires the parties to come to a full agreement as to sentence in exchange for the accused pleading guilty to one or more charges, and involves each side making substantive concessions and receiving real benefits. The meaning of “full agreement” seems apparent, yet the phrase “joint submission” is sometimes used where Crown and defence have not fully negotiated a resolution, or the parties differ on some aspects of a sentence, but agree on the form and length of it.

[33] There can be significant differences in the terms of a conditional sentence and probation, with vastly different effects. For example, a curfew of 10:00 p.m. to 6:00 a.m. is very different from house arrest with electronic monitoring, where the offender is only allowed to be out of their residence for limited exceptions and their movements are

continually monitored. What are commonly referred to as ancillary orders, for example, victim fine surcharges, are part of the penalty and must be considered when having regard to the total sentence imposed.[3] In my view, a true joint submission requires agreement on each and every aspect of a sentence. If not, there is no “full agreement”.

[34] In *R. v. Anthony-Cook,*[4] the Supreme Court of Canada set out the test and the approach judges must take when faced with a contentious joint submission, that is, where the parties are in full agreement as to the appropriate sentence and it appears to be unduly lenient or severe, so that the judge is considering departing from it.

[35] The proposal must be considered as is, without variation. The public interest test is that a joint submission must be followed unless doing so would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. It is a high threshold. The proposed sentence must be so inappropriate that reasonable people, aware of all the circumstances of the case, the principles and objectives of sentencing and the importance of promoting certainty in resolution discussions, would think that the justice system had truly broken down, leading them to lose confidence in the courts.

[36] The concessions made and benefits given must be put before the court and considered. A lenient sentence where conviction is inevitable is very different from the same sentence where there are problems with the evidence. Public explanation of the factors that led to the joint submission helps ensure that justice is seen to be done.

[37] If the judge is still not satisfied with the proposed sentence, then the parties should be allowed to make further submissions justifying it. If concerns remain after those submissions, a judge may permit an accused to withdraw their guilty plea. Finally, if that is not possible or does not occur, the judge must provide full reasons as to why the proposed sentence was rejected.

[38] I initially had some concerns with respect to the proposed sentence in this case, in particular because there seemed to be very little punitive aspect to it. In response to my questions to clarify that part of the sentence, it appeared that the parties had not

agreed on all aspects of the proposed sentence, raising a concern that it was not a true joint submission, notwithstanding the extensive discussions. I was also unsure what the appropriate range of sentence was. That led to proceedings being adjourned so counsel could made further submissions. They did, providing more case law in support of the proposed sentence, with all terms agreed upon, as well as setting out fully the concessions and benefits exchanged.

[39] In *Anthony-Cook*, the Supreme Court made it clear the question is not what I think a fit sentence would be or what sentence I might impose. My task at this point is solely to determine whether the public-interest test has been met.

Principles of Sentence

[40] In 1996, Parliament created a framework in the *Criminal Code* for sentencing an offender that judges must follow,[5] found in sections 718 to 718.2. Section 718 describes the fundamental purpose and objectives of a sentence:

> 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 acknowledgment of the harm done to victims or to the community.

[41] Denunciation reflects society's condemnation of the crime committed. It is different from revenge or vengeance, which relate to the emotional demands of the victim. Understandably, they are frequently motivated by anger and other emotions. Their desires can be unmeasured and disproportionate to the crime.[6]

[42] Deterrence reflects the hope that the sentence imposed will discourage the offender and others in society from committing the offence. Especially for first-time offenders, denunciation and deterrence may be achieved before any sentence is imposed, especially where the public humiliation and stigma associated with a conviction are significant.[7] Rehabilitation will be an important objective where the offender is genuinely prepared to undergo treatment to address the factors leading to their offending.

[43] Some facts that exist in this case were deemed aggravating by 2019 amendments to the *Criminal Code*. However, they do not apply to Mr. Witvoet because an offender is entitled to the benefit of the lesser punishment that exists at the time of the commission of the offence or at the time sentence is imposed.[8]

[44] There is a difference between the objectives and principles of sentencing. Objectives are the general goal of and justification for the sentence. Principles give judges guidance on how to weigh the various objectives and individualize the sentence for the offender and offences.[9]

[45] The core principle in crafting a sentence so it fulfils its objectives is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[10] Other principles relevant to this case are the gravity of the offence; that a sentence must be increased or reduced to account for aggravating or mitigating factors,[11] that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances,[12] that the total sentence where there are consecutive sentences should not be unduly long or harsh,[13] and that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.[14]

Gravity of Offences

[46] All crimes are significant, but some are more serious than others. Parliament has gauged the relative seriousness of an offence by setting out any minimum penalty and the maximum sentence. For Mr. Witvoet, there is no minimum sentence and the

maximum sentence that can be imposed on each count is 18 months' jail followed by three years' probation. Many offences have much higher potential penalties, placing the offences Mr. Witvoet committed at the lower end of the spectrum. The sentence does not have to be scaled down from what it might have been if the Crown had proceeded by indictment.[15]

Mitigating and Aggravating Factors

[47] The mitigating factor identified by Crown and defence is that Mr. Witvoet pled guilty. Because it does not relate to the offence or the offender,[16] it is not a mitigating factor under s. 718.2(a) of the *Criminal Code*. However, a guilty plea is generally considered a mitigating factor,[17] and in this case the guilty pleas have had a broad and significant impact on the administration of justice.

[48] First, the Crown made extensive submissions with respect to how the guilty pleas had a very positive and significant impact in the victims, such that many of the objectives of sentencing were largely accomplished by the guilty pleas. Many of the victims had not disclosed to their partners and family what had happened to them. Testifying would result in a significant intrusion into their lives in a very public way, given the media attention these proceedings have engendered. The knowledge that something had happened to each victim would not just be revealed to family: a publication ban would not prevent their having to take time off work, so employers would know. Friends would likely know. Being spared the necessity of testifying helped protect their privacy and save them from embarrassment. That was one of the main goals in the Crown arriving at the joint submission.

[49] Second, the investigation was not complete. To prove the charges, many justice-system participants would have had more work. Police would have had to obtain search warrants, each requiring approval by a judge or justice. Mr. Witvoet's offices would have been searched, computers seized and searched, increasing the potential evidence police gathered. It would have to be vetted by Crown, then disclosed and reviewed by defence. His guilty pleas allow justice-system participants to focus on other work.

[50] Third, the Crown elaborated on the difficulty in prosecuting these offences and identified several problems. There was only one witness to each allegation - the victim. That is not to say that prosecutions cannot be successful in those circumstances, but it can be more difficult for the Crown to prove all elements of an offence beyond a reasonable doubt where there is little or no corroborating evidence. There was a delay in reporting the assaults to police. Some reporting was spurred by media coverage, with the attendant risk of fabrication - some people make false complaints. There was no suggestion that occurred in this case, but it could be a factor at a trial. In some cases, even though the victims knew that what Mr. Witvoet did was wrong, they returned for treatment after being sexually assaulted. They did so for various reasons, including that he also gave appropriate, successful treatment. They were getting better.

[51] Those were areas where the victims would be extensively cross-examined. Undoubtedly, there were others. Fortunately, most people do not know how difficult testifying can be. Everything can be questioned: memory; integrity; privacy. No matter how much preparation there is, testimony often does not come out as expected, leading to a reasonable doubt and an acquittal, a doubt that anything really did happen to the victim. That can create anxiety about testifying.

[52] Anxiety and fear of testifying cause people to react differently. Some do not come to court or stop testifying because it is too difficult. Some change their story because they start to doubt their recollection. Some fear it may look like they are not telling the truth, or that they look foolish. These factors can make a reasonable doubt more likely. That is not to discredit the victims, the Crown, defence counsel, or the justice system. Our system of justice has worked well for centuries, ensuring as far as possible that the innocent are not convicted and an offender’s guilt is certain. But, those are all matters properly considered by the Crown when considering a joint submission.

[53] Fourth, the guilty pleas eradicated those difficulties and ended any fears. They confirmed the victims were right and that they are indeed victims, which promoted their healing and recovery. The guilty pleas created finality and certainty for the victims. That was a significant benefit to them.

[54] Fifth, the media coverage of this case will provide deterrence to others who might consider abusing their positions of trust. The guilty pleas might give other victims the strength to report what happened to them if there are other similar cases. It also led to a significant impact on Mr. Witvoet.

[55] Sixth, the guilty pleas saved 16 victims and other witnesses from testifying in at least four different trials where there would have been pre-trial applications and preliminary inquiries. That resulted in saving a very significant amount of court time. That is important because it lets other cases - family, criminal and civil - be heard in a more timely fashion.

[56] Seventh, the guilty pleas allow Mr. Witvoet to move forward with his rehabilitation and life. I was told rehabilitation will be his focus. It has started and will continue under the proposed sentence. As will be seen, rehabilitation is a significant factor in sentencing Mr. Witvoet. In the end, if he finds out why he offended and deals with what led to his offending behaviour, society will be safer.

[57] An aggravating factor is that Mr. Witvoet was in a position of trust.[18] In *Norberg v. Wynrib*,[19] McLachlin, J. said:

> … I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship -- trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires. …

[58] The victims went to see Mr. Witvoet for pain relief. They trusted him. He abused that trust. A further aggravating factor is that he had been warned by police about the first reported incident, yet offended after that.[20] Other aggravating features are that there were multiple victims over a significant period, three of them had their vaginal area touched or rubbed, two in addition to their breasts.

[59] Every victim was offered the opportunity to file a victim impact statement.[21] Victim services was actively involved. In the end, three victim impact statements were filed. That does not mean that there was no impact on other victims - rather, some chose to not set out in a public way the impact of Mr. Witvoet's offending on them. That is entirely understandable and is itself an impact on the victims.

[60] Without identifying how the victims who provided a statement were impacted, each was impacted in various ways: emotionally; physically; and financially. Impacts included embarrassment, shame, guilt, depression, panic attacks, loss of ability to concentrate and function at work, decreased trust in others, fear for other family members, fear of treatment from professionals, difficulties in relationships with family and friends, attending counselling and psychiatrists, loss of employment, headaches and muscle pain from stress and anxiety, and feeling like they were mere sexual objects, rather than patients.

[61] The aggravating factors indicate that denunciation and deterrence are significant factors in sentencing Mr. Witvoet. The mitigating factors suggest rehabilitation must also be an important consideration in his sentence.

Parity

[62] This principle helps create consistency in sentencing. The underlying concept is that similar offenders who commit similar offences should receive similar sentences and be treated consistently. That does not mean every sentence must be the same.[22] There are far too many variables in the offending and the offender from one case to the next to have uniformity, but case law helps define a range of sentences that have been imposed in the past. Ranges are not binding because each sentence must be individualized.[23] Since no two cases are alike, comparing precise facts may provide little guidance. What may be more helpful in determining a fit sentence in a particular case is a consideration of the "*meaningful common factors and sentencing principles that influenced the sentences that were ultimately imposed*"[24] in other cases.

[63] In *R. v. Buna,* [25] a chiropractor was charged with 10 offences and after trial he was convicted of five counts of sexual assault. He appealed those convictions. The main issue at trial was whether the contact was inadvertent in the course of acceptable treatment or a sexual assault. Similar to this case, there was an initial complaint that resulted in police setting up a tip line, which led to the remaining nine complaints. The Court of Appeal allowed his appeal on two counts, resulting in his conviction for three offences.

[64] The impugned conduct was similar to Mr. Witvoet's. He touched his patients' breasts, both under and over clothing, made inappropriate remarks, and he caressed one patient's buttocks. His trial had attracted considerable publicity. He was sentenced to a nine-month conditional sentence and two years' probation for each offence, to be served concurrently. For the first six months he had a curfew from 6:00 p.m. to 6:00 a.m., while he was working. When he was not working, the curfew was 3:00 p.m. to 9:00 a.m. For the last three months, the curfew was 9:00 p.m. to 6:00 a.m. everyday.

[65] The Court of Appeal found that his sentence was not unfit, but a slight variation to the curfew was made so that he could continue his practice.[26] The Court of Appeal stated that his sentence for the five offences was at the low end of the range when compared to other similar cases, and that there was no basis for decreasing that sentence on appeal for the three convictions that remained. Unfortunately, it does not appear that the decision of the trial court has been reported, so the factors leading to the sentence cannot be examined.

[66] I was provided with the same cases that the Court of Appeal referred to in its decision. They are: *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163; *R. v. Ashely-Pryce*, 2004 BCCA 531, 204 B.C.A.C. 186; *R. v. Green*, 2003 BCCA 51, 177 B.C.A.C. 43; *R. v. Bedard*, 2001 CanLII 8536 (ONCA), 146 O.A.C. 179, [2001] O.J. No. 1894; *R. v. West*, 2007 ABCA 67, 401 A.R. 320; and *R. v. Gavrilko*, 2007 BCSC 1473. For the purposes of these reasons, the Court of Appeal's conclusions are sufficient, so I will not review those cases.

[67] In *R. v. Chen,*[27] the offender was a piano teacher who, after a trial, was convicted of and sentenced for five sexual offences committed against five young students. He was sentenced to four concurrent 21-month Conditional Sentence Orders and a consecutive 75-day jail sentence for one offence because a conditional sentence was not available for it. The sentence was upheld on appeal. The court stated that his sentence was at the low end for non-invasive sexual assaults where the offender was in a position of trust.

[68] The offending consisted of touching his students' breasts over their clothes and, for two students, under their clothes. Two students were kissed by Mr. Chen. Four offences occurred between 1994 and 2003 and one in 2013. The latter offence led to the discovery of the earlier offences. Paramount considerations for the trial judge were deterrence and denunciation. Mr. Chen was in a position of trust. He was 69-years-old and suffered from major depression because of his convictions. He had also suffered shame and humiliation in his community.

[69] In *R. v. Haugo,*[28] the offender was in a position of trust and pled guilty to four offences: two counts of touching for a sexual purpose, one count of sexual assault, and one count of indecent assault. There were four victims. He was their track and field coach. The victims were young females. He took them to a secluded place for their stretching and warm-up exercises. Under the pretext of assisting them, he touched their breasts or genital area. Sexual touching included digital penetration.

[70] He was 69-years-old. He was highly regarded as a coach and also in his former working capacity as a psychiatric nurse. A psychological evaluation indicated that he had been warned and told to stop coaching before some of the offending. He did not stop, but coached only adults for a period. However, he eventually returned to coaching young people. The psychiatrist described his conduct as impulsive, despite being aware it was inappropriate. He expressed extreme remorse and was an excellent candidate for treatment. He was at a very low risk to reoffend.

[71] Denunciation, deterrence and rehabilitation were the primary objectives in formulating his sentence. Aggravating factors included that there was some

premeditation and planning, a breach of trust, the harm done to the victims in the sporting community, and the nature of the offending, which was not low-level touching. Mitigating factors were his guilty pleas and remorse, his age and health, including depression and suicidal ideation, his lengthy history of employment and volunteer work, the publicity resulting in community condemnation and his very low risk of reoffending.

[72] The victims indicated impacts similar to the victims in this case. He had no criminal record. He was sentenced to a conditional sentence of two years less a day, concurrent for each offence, including a term of house arrest for the first 12 months, and a curfew of 6:00 p.m. to 6:00 a.m. for the remainder. That was followed by a period of probation for three years.

[73] In *R. v. Matthews*,[29] the offender was found guilty after a trial, having sexually assaulted his victim in 2013. He was a lay pastoral counsellor and his victim was a client. He touched and rubbed the victim's vagina in the course of what he said were exercises intended to assist her with orgasmic dysfunction, despite his not having any training or qualification in respect of sexual dysfunction. He was 67. He had no criminal record and had lived a pro-social life. His offending resulted in being divorced and estranged from his children and five grandchildren. He lost his employment.

[74] The trial judge found that although in a position of trust, it was less of a breach than a situation involving a medical practitioner or therapist. Denunciation and deterrence were given the greatest weight. The maximum sentence was the same as in this case, 18 months. He was given a conditional sentence of six months, followed by three years' probation, including a curfew from 10:00 p.m. to 6:00 a.m., seven days a week.

[75] In *R. v. A.I.*,[30] after a trial the offender was found guilty of sexually assaulting two female patients while he gave nursing care to them when they were on a hospital ward in 2012. As part of their care, they had received opioid medications sedating them. The offender kissed the victims and touched the victims' breasts. On one occasion the victim awoke to find him lying in her bed with his face between her breasts. He was 35-years-

old, married with two children, well regarded in his church community and had no criminal record. The victim suffered consequences similar to those suffered in this case.

[76] He was in a position of power and responsibility over his victims and they were vulnerable. He was a low risk for reoffending, was willing to engage in treatment and participated in treatment by the time his sentence was imposed. He was well regarded in his community and had worked extensively as a volunteer. He had been sexually assaulted as a child. The maximum sentence for each offence was 18 months' jail. He was sentenced to a concurrent six-month Conditional Sentence Order, including a term of house arrest for the entire sentence, followed by an 18-month period of probation. The primary factors were denunciation, deterrence and rehabilitation.

[77] I also reviewed two cases that had more aggravating features than this case. In *R. v. Tyers*,[31] the accused, a chiropractor, was convicted after a trial of sexually assaulting a patient in 2011. The victim had attended for treatment. He suggested "alternate" treatment. He convinced the victim that kissing would help with her emotional issues. He applied hand pressure to her inner thigh, breasts and vagina, and put his mouth to her breast. He asked her to masturbate him and she refused.

[78] He was 44-years-old with a wife and two children. He had no criminal record and was well thought of in the community. A psychological assessment indicated he was a low-to-moderate risk to reoffend with sexual violence in the future. He denied his offending but indicated he would comply with any legal requirement. The risk to reoffend was to be treated with a degree of caution because of his denial. The victim suffered impairment of her relationships and trust, as well as feeling shame. The Crown had proceeded indictably so a conditional sentence was not available and the maximum sentence was 10 years.

[79] The key objectives identified by the judge were denunciation and deterrence, as well as rehabilitation, providing reparations for the harm done to the victim and promoting a sense of responsibility in him. He had breached his position of trust as a professional healthcare provider, it was planned, and the victim was vulnerable. He was sentenced to 12 months' imprisonment followed by two years' probation.

[80] In *R. v. Anthony*,[32] the offender, a psychologist, was convicted by a jury of sexually assaulting a female patient in 2010. The victim had gone to him for his professional assistance. He sexualized the therapy sessions and groomed the victim to take advantage of her vulnerabilities for a number of months. He urged the victim to take “alternative therapy” and took other steps to try to ensure she would not disclose what he was doing. The sexual acts became more invasive over time during the alternative therapy. He touched her breasts and vagina, digitally penetrated her and performed cunnilingus. He attempted penile penetration but was unable to do so. His offending had a significant impact on the victim, including emotional and physical consequences, not dissimilar to those felt by the victims in this case.

[81] He was 61-years-old, had been married twice and had two children although one had passed away tragically. He had strong community support, no criminal record and a good reputation. There was considerable publicity. He lost his good standing in the community and his ability to work as a psychologist. He denied having committed the offence. A conditional sentence was unavailable. The Crown had sought a sentence of 12-to-18 months, the defence, a sentence of nine months.

[82] The aggravating factors were the “shocking breach of trust by a professional” for a vulnerable person. It had caused the victim significant harm and was highly invasive. His behaviour was manipulative, calculated, well planned, and repeated over about three months. The assault was at the serious end of the spectrum. He was at a very low risk to reoffend because his offending occurred in a very specific context. He could no longer be in the same position of power, trust, or authority.

[83] General deterrence and denunciation were major factors in determining an appropriate sentence, although attenuated to some degree by the loss of his professional status and financial security, and the public shaming in his community. But for those factors, a higher sentence would have been imposed. After reviewing a number of cases, the judge imposed a sentence of two-years-less-a-day incarceration, followed by a two-year probationary term.

[84] The cases I reviewed are suitable comparators. For Mr. Witvoet, the maximum sentence is 18 months. There are nine victims. They were vulnerable. He was in a significant position of trust and took advantage of that vulnerability, although his acts do not appear premeditated or planned. There was no penetration, putting the sexual assaults at the lower end of the spectrum of offending, although the three instances of vaginal touching are more serious than the others, because the degree of physical interference is an aggravating factor. The impact on the victims is similar to that in other cases, as is the public notoriety.

[85] Mr. Witvoet pled guilty and is at a low risk to re-offend. He is, and will be, precluded from preying on potential victims should he be able to resume treating patients. The principles of denunciation, general deterrence and rehabilitation are the main factors in sentencing him. In my view, the proposed sentence is at or just below the low end of the appropriate range, without having regard to it being a joint submission.

Restraint

[86] Mr. Witvoet does not have a criminal record. In my view that is the absence of an aggravating factor, at least in this case, because Mr. Witvoet's offending was not an isolated incident. However, the lack of record is demonstrative of a generally good character. Clearly, his character is flawed, having committed so many offences over a significant timespan, some after having been warned about his conduct. But he recognizes that and he is a first-time offender. Offences that occurred after the first offence date are not, in law, subsequent offences. They are all treated the same - as a first offence - because this is the first time he will be convicted and sentenced.[33]

[87] The principle of restraint in sentencing a first-time offender is founded on the notion that before the offending, they were a law-abiding citizen and somehow went "*off the rails*".[34] A first offender *"should not receive custodial sentence[s] unless no other sentence is commensurate with the gravity of their offence".*[35] That remains true for Mr. Witvoet, and he has been, overall, a contributor to society in various ways. Imprisonment, if any, should be as short as possible and tailored to his circumstances.[36]

Totality

[88] This principle applies when an offender is sentenced for more than one offence at the same time. Judges must ensure that the total sentence is not excessive, having regard to the overall culpability of the offender. Ultimately, it must be proportionate, just, and must not discourage rehabilitation.[37] Here, there are nine offences, unrelated to each other and committed at different times, which suggests that the sentences should be consecutive to one another.[38] If so, the total sentence would be 13 ½ years. That is far outside the range of sentence for this kind of offending. It would be a crushing sentence, hindering Mr. Witvoet's prospect of rehabilitation, one of the primary goals in sentencing him.

[89] Accordingly, the total sentence would have to be reduced, either by reducing each individual sentence, or by making them concurrent. If they were consecutive and equal, it would reduce the sentence for each offence to two months, which would not properly reflect the principles and goals of sentence. Although I might apportion the sentence differently, as stated before, that is not the point. The question is whether the proposed approach to totality is inappropriate. I cannot say it is.

Collateral Consequences

[90] Collateral consequences are a factor in considering whether a sentence is proportionate.[39] A collateral consequence includes repercussions for an offender that results from his conviction or sentence. There are repercussions for Mr. Witvoet. His ability to practice his profession will be restricted, if it is not over, practically and professionally speaking. He will be subject to a review by his professional body. It is expected his ability to practice will be severely restricted, possibly terminated. The notoriety of his offending has had practical repercussions. People do not want to see him for treatment and others paying rent at his practice have left. I am told he faces financial jeopardy as a result. He has separated from his family.

Considerations for a Conditional Sentence Order

[91] A conditional sentence is a jail term that is served in the community. Since it was first enacted, Parliament has incrementally restricted its availability for various kinds of offences. The fact that a CSO is still available as a sentence for Mr. Witvoet is a reflection of Parliament's view of the severity of the offences he committed and the fact that it remains an appropriate sentencing option for sexual assault. Accordingly, where a jail sentence is appropriate, it must be considered.[40] If jail is not an appropriate sentence, a CSO should not be used.[41]

[92] Assuming jail is appropriate, there are two steps in considering whether a Conditional Sentence Order is appropriate. The first step is to see if it is available as a sentence, and second, if the appropriate range for the offence is less than two years. Those steps are met in this case. The second step requires that the safety of the community would not be endangered and that a CSO would be consistent with the objective and principles of sentencing.[42] In this case, there is no suggestion that the community would not be safe. Mr. Witvoet's offending was restricted to his practice. That is no longer possible and the proposed terms would also restrict it. As noted, it is also consistent with the objectives and principles of sentence.

Conclusion

[93] The joint submission is that Mr. Witvoet should be sentenced to an 18-month conditional sentence, followed by a period of two years' probation. The CSO and probation terms include a provision that he is not allowed to treat female patients, which protects the public. The primary punitive aspect is that he will be under house arrest for the first six months, and a curfew from 10:00 p.m. to 6:00 a.m. for the remaining 12 months. Given the notoriety of his offending, his neighbours and the community will know of his restrictions. It is the maximum jail sentence for each offence. A community jail sentence provides considerable denunciation and deterrence and those objectives perhaps have more impact because of the notoriety. There has been a great benefit to the victims and the administration of justice. Even if the proposed sentence was below the appropriate range, the fact it comes as a joint submission is a compelling factor.

[94] Having regard to all of the considerations, I am unable to say that the proposed joint submission would bring the administration of justice into disrepute or is contrary to the public interest.

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The Honourable Judge J. Guild
Provincial Court of British Columbia

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[1] Information 53719-2-C
[2] Information 53724-1
[3] *R. v. Boudreault*, 2018 SCC 58
[4] 2016 SCC 43
[5] *R. v. Arcand*, 2010 ABCA 363
[6] *R. v. M(CA),* [1996] 1 SCR 500 ; *R. v. Oliver*, [1977] BCJ No 932 (CA)
[7] *R. v. Ewanchuk*, 2002 ABCA 95; *R. v. Kneal*, [1999] OJ No 4062 at para 35
[8] s. 11(i) *Canadian Charter*; *R. v. Poulin*, 2019 SCC 47
[9] *R. v. Nasogaluak*, 2010 SCC 6
[10] s. 718.1 *CC*
[11] s. 718.2(a) of the *CC*; *R. v. Suter*, 2018 SCC 34
[12] parity, s. 718.2(b) *CC*
[13] totality, s. 718.2(c) *CC*
[14] restraint, s. 718.2(d) and (e), *CC*
[15] *R. v. Solowan*, 2008 SCC 62; *R. v. Volk*, 2018 BCPC 58
[16] *Suter,* supra
[17] *R. v. Wong*, 2018 SCC 25
[18] s. 718.2(a)(iii) *CC*
[19] [1992] 2 S.C.R. 226 at p. 486
[20] *R. v. Taylor,* 2012 BCSC 2209
[21] Pursuant to s. 722 of the *CC*
[22] *R. v. Williams*, 2019 BCCA 295, at para's. 57-58
[23] *R. v. Smith*, 2017 BCCA 112 at para. 35.
[24] *R. v. Rosario*, 2018 BCSC 2483 at para 77
[25] 2010 BCCA 53
[26] *R. v. Buna*, 2010 BCCA 53.
[27] 2017 BCCA 426
[28] [2006] B.C.J. No. 1540, (BCPC)
[29] [2016] B.C.J. No. 470 (BCPC)
[30] [2014] B.C.J. No. 2172 (BCPC)
[31] 2014 BCPC 140
[32] 2014 BCSC 2132
[33] *R. v. Pete,* 2019 BCCA 244
[34] *R. v. Lindsay*, (1998) 112 BCAC 250 at para. 32

[35] *MacMillan Bloedel Ltd. v. Brown*, [1994] 7 WWR 259 at para. 118
[36] *R. v. Ansari*, 2008 BCSC 1709
[37] *R. v. M(CA),* [1996] SCJ No 28 (SCC)
[38] *R. v. K.V.E*., 2013 BCCA 521
[39] *R. v. Suter*, 2018 SCC 34
[40] *R. v. Lynch*, 2015 BCCA 140
[41] *R. v. Proulx*, 2000 SCC 5
[42] s. 742.1 *CC*