

CANADA / JUDGMENT

R. v. Plehanov

2017 BCSC 2176

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2176 R. v. Plehanov

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Plehanov,

2017 BCSC 2176

Date: 20171031

Docket: X077990

Registry: New Westminster

Regina

v.

Aleksandr Plehanov

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the Criminal Code restricting publication, broadcasting or transmission in any way of evidence that could identify the complainant. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of this judgment was corrected at paragraph 52 on January 4, 2018.

Before: The Honourable Mr. Justice Blok

Oral Reasons for Sentence

Counsel for the Crown:

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M. Fingas

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Place and Date of Trial:

New Westminster, B.C.

September 6, 7 and 8, 2017

Place and Date of Judgment:

New Westminster, B.C.

October 31, 2017

- [1] THE COURT: I wish to make two preliminary remarks. First of all, I remind those present that there is a publication ban in this matter, which restricts the publication, broadcasting, or transmission in any way of information that could identify the complainant.
- [2] Secondly, the reasons I am about to give are oral reasons for judgment and, as with all oral reasons for judgment, should a transcript be ordered I reserve the right to edit it to correct any minor errors and to add such things as headings and case citations. In that editing process I will not, of course, change any of the underlying reasoning or the ultimate result.

I. Introduction

- [3] On January 8, 2016, Aleksandr Plehanov was convicted of the sexual assault of a six-year-old girl, contrary to s. 271 of the Criminal Code. He is now before the court for sentencing.
- [4] The Crown and defence take widely differing positions on sentence. The Crown says a fit sentence would be between 12 and 15 months' jail, plus three years' probation. The defence submits that an appropriate sentence would be a two-year suspended sentence with strict conditions.
- [5] By way of a notice of constitutional question filed shortly after conviction, Mr. Plehanov challenged the applicable mandatory minimum sentence of one year imprisonment prescribed by s. 271(a) of the Code on the basis that it violated s. 12 of the Charter. By the time of this sentencing hearing, the same issue had already been addressed by Madam Justice Beames in *R. v. E.R.D.R.*, 2016 BCSC 684, who upheld the constitutional challenge and declared the one-year mandatory minimum sentence in s. 271(a) to be of no force and effect. The question then arose whether it ought to be revisited in this case. The Crown said it should be revisited; the defence submitted that I should decline to revisit the issue on the basis of judicial comity. In a ruling given on September 7, 2017, I concluded that I ought not revisit the issue.

- [6] One of the key issues on sentencing was the risk of reoffending. The evidence on this issue was given, for the defence, by Mr. Plehanov's treating psychiatrist, Dr. Alexander Levin, and for the Crown by forensic psychologist Dr. Randall Kropp of the Forensic Psychiatric Services Commission. I will summarize these opinions later in these reasons.
- [7] In addition to those reports, the court also had the benefit of a pre-sentence report dated August 26, 2016, prepared by a probation officer.

II. Circumstances of the Offence

- [8] In my earlier reasons for judgment, which may be found at 2016 BCSC 322, I described the context leading up to the offence as follows (and I make the parenthetical note that in those reasons I refer to the six-year-old complainant as "X"):
- [5] The father and his wife have a large family with children ranging in age from toddlers to teenagers. They are long-time, active members of a local church. The church has a type of mentorship program and this is how the father came to know Mr. Plehanov, or at least how he came to know him better, as Mr. Plehanov was already attending services at the church. Through this mentoring relationship, Mr. Plehanov joined the family on three or four outings and visited their home on perhaps five occasions.
- [7] The events in question took place on March 31, 2013, which was Easter Sunday. The family attended a church service in the morning and in the afternoon they gathered at the father's parents' house in Surrey for what is their traditional Easter gathering. I will refer to this residence as the Grandparents' home. Mr. Plehanov attended that family gathering. Earlier, he parked his car at the family's home and he then travelled to the Grandparents' home in the family's 15-passenger van. X's mother, that is, the father's wife, did not attend. She stayed home with their young infant child. The family gathering was an event for extended family, and the father's siblings, their spouses and their children attended. The adults socialized and the children played or did other activities together. The event lasted from mid-afternoon until late in the evening.
- [8] The father testified that these family gatherings tend to run later than his family prefers and they often leave earlier than other family members. This can create a challenge in getting their own children to leave, because events involving the children are still going on.
- [9] The father said that he started the process of leaving around 9:00 p.m. His children -- that is, those children who attended -- at that time ranged from ages three to 12 so he focused on getting the three youngest ones out first, leaving the several older ones watching television with their relatives. He asked the adults who were present to send out his older children when the show they were watching ended.

- [10] The father thus had with him X, the six year old girl in question, as well as two younger siblings, who I will refer to as "Y" and "Z". Mr. Plehanov was going to be riding back with them in the family van, so when he saw the father heading out he offered to help carry things out to the van.
- [13] The father had asked his siblings to send out the older children but realized at a certain point that this was not happening and so he was going to have to get them himself. Although he had concerns about leaving Mr. Plehanov with the children, he left Mr. Plehanov to mind them while he went back to the house. When the father left the van, Mr. Plehanov was standing outside the opened hinged doors on the right side of the van.
- [9] When the father went back to the house, X, the six-year-old girl, moved from her seat in the van, but lost her balance in the area of the side door. I pause here to note that she was wearing yoga-type pants and a top. In my earlier reasons, I came to the following conclusions about what happened next:
- [69] From this evidence, I conclude that Mr. Plehanov caught X during a fall and subsequently rubbed X's buttocks over her pants two separate times. I am satisfied, as well, that at some point after catching X, Mr. Plehanov's fingers were hooked into the front area of her pants, his fingers were touching the area above X's groin and his palm was touching her groin over her pants. I accept X's evidence that the touching occurred after the near-fall, in that X's evidence was that the touching associated with the hooking of the fingers did not occur as Mr. Plehanov caught her, but instead occurred subsequently.
- [70] The father's evidence, which I accept, helps to establish the overall duration of the events. His first observations, from the sundeck of the Grandparents' home, were of Mr. Plehanov and X standing facing each other and in close proximity. He watched from the sundeck for perhaps 20 seconds, and then bolted to the van. At the van, he observed two incidents of bum-rubbing, lasting three to five seconds each, over a period of time lasting between 30 and 60 seconds.
- [71] On this point, I note that the defence characterized the events in question as being all part of "one transaction", that being X's loss of balance and an associated rescue by Mr. Plehanov. The evidence does not support that characterization. First of all, X said that Mr. Plehanov caught her at the hips and then moved to what she called her "bum" and her "bottom". Second, according to X the touching occurred over a 20-second period, timed at 12 to 13 seconds, much longer than seemingly necessary if merely part of catching X and helping her to recover balance. Third, the father's evidence shows that the touching occurred over a relatively long period of time. Mr. Plehanov and X were already in close proximity facing each other when the father first saw them from his vantage point on the sundeck. Twenty seconds elapsed during this period of observation, then more time as the father dashed to the van, then another period of time between 30 and 60 seconds, and Mr. Plehanov was rubbing X's buttocks even then. The duration of the events is too long for the touching to still be associated with Mr. Plehanov catching X from a near-fall.

III. Impact on the Victim

- [10] X's mother provided a victim impact statement. She said that this offence introduced X to sexual behaviour prematurely and in a negative way. The child had enjoyed Mr. Plehanov's company and she felt betrayed, confused by the ensuing consequences, and she felt guilty about getting him into trouble. The court proceedings caused X anxiety and stress and, because she was a witness, she was unable to talk to her family about it.
- [11] After testifying in court, X expressed fear of the same event happening again with Mr. Plehanov.
- [12] The mother noted that her seven other children have had to process all that has gone on and it has been hard on them too. The mother said it has also been very hard on her. She has had to respond to difficult questions from the children and has had to deal with her own feelings of anger and sadness. This has caused her to have anxiety and difficulties with sleep.
- [13] The mother is concerned how this event will affect X as she approaches puberty. She feels her daughter's innocence has been taken away from her.

IV. Circumstances of the Offender

- [14] Mr. Plehanov, now 43 years old, was born and raised in the former Soviet republic of Kyrgyzstan. He seems to have had a relatively normal upbringing. Although his parents separated when he was six and he was then cared for by his mother, he continued to have a relationship with his father.
- [15] He obtained a degree in electrical engineering from a university in Kyrgyzstan, and thereafter obtained employment with the government and then with a Swiss consulting company. He obtained a degree in education in 2002.
- [16] Mr. Plehanov emigrated to Canada that same year. He left Kyrgyzstan because it was unstable. In Canada, he obtained work as a security guard. He worked in that field until 2007. In 2004 and 2005, he took courses to upgrade his education credentials to meet Canadian requirements. In 2009, he obtained a master's degree in education, with a speciality in mathematics. He took further courses in applied science starting in 2011 and obtained a master's degree in that field in 2015. He is now a Canadian citizen.
- [17] From 2007 to 2010, he worked as a teacher on call in the local school district. This employment ceased upon the reports of incidents of inappropriate behaviour, described as "boundary issues", that resulted in criminal charges. He was subsequently acquitted of all charges relating to these events.
- [18] I have mentioned these latter events, even though they resulted in acquittals, because they are relevant to comments made by the experts who assessed Mr. Plehanov for sentencing purposes. I wish to make clear that Mr. Plehanov has no criminal record and, in coming to my sentencing decision today, I am sentencing him as a first-time offender.

- [19] Mr. Plehanov has not had regular employment since 2010. He has been diagnosed with major depression with anxiety and somatization, which I will address more fully later. He is on disability assistance. He supplements that income with income from adult tutoring.
- [20] Mr. Plehanov lives with his mother. She is dependent on him generally, but in particular because she does not speak English. She provided a letter of support that I will summarize shortly.
- [21] I noted the following items in the pre-sentence report:
- a) he told the probation officer he does not have any friends, that he spends most of his time at home. While he feels lonely at times, he also said he is something of an introvert and tends to keep to himself;
 - b) his last romantic relationship ended in 2010; and
 - c) he denied having any attraction to children.
- [22] The author of the pre-sentence report said the following about remorse and rehabilitation:
- The subject did indicate he felt "sorry" for the victim given her required involvement with the trial. However, Alek placed much of the blame for the charges on the father of the victim, indicating the father created a situation in which he could accuse the subject of the sexual assault against his daughter.
- The subject has been compliant while under bail supervision for the current matter. He reports largely when directed. Mr. Plehanov advised he does not feel he needs to attend any type of counselling, as he maintained he did not do anything wrong towards the victim. However, the subject conceded [that] he would attend counselling, including the Forensic Sex Offender Program, if the Court deemed it necessary.
- [23] Mr. Plehanov's mother provided a letter of support, translated from Russian. She describes her son as highly educated, intelligent, and hard-working. She says he has always been very caring, kind, and trusting. She notes that her son has been diagnosed with severe depression and suffers from anxiety and frequent headaches, among other things. The legal proceedings have been hard on him.
- [24] His mother is 69 years old and suffers from various health issues that flare up from time to time. She and her son have no other relatives in Canada. If he is jailed, there will be no one else to take care of her when she is sick. She pleads with the court to allow her son to serve his sentence in the community.

V. Expert Assessments

- [25] As noted earlier, Mr. Plehanov was assessed by Dr. Levin and Dr. Kropp. Both prepared reports and both testified at the sentencing hearing.

A. Dr. Alexander Levin

[26] Dr. Levin is Mr. Plehanov's treating psychiatrist. He has been treating Mr. Plehanov since July 2010. He has seen Mr. Plehanov fairly consistently up to the present day. Dr. Levin prepared a report dated July 14, 2017.

[27] Dr. Levin also prepared a report dated August 23, 2016, discussing Mr. Plehanov's diagnoses and his risk of reoffending, which he described as "low, if any". He is also the treating psychiatrist of Mr. Plehanov's mother. As to the latter, Dr. Levin noted the mother is entirely dependent on Mr. Plehanov and most likely would not be able to live on her own should Mr. Plehanov be incarcerated.

[28] Dr. Levin's 2017 report is more extensive. He described his initial impressions and diagnosis from 2010, and his course of treatment since that time. He said:

Mr. Plehanov presented with a fluctuating course of his major depressive disorder with prominent anxiety and somatization features.

He said Mr. Plehanov "remains compliant with his psychopharmacological regimen and makes regular visits to my office".

[29] In his report, Dr. Levin said he assessed Mr. Plehanov for risk of sexual violence using both actuarial tools and structured clinical judgment. He began with a clinical assessment tool, the Risk for Sexual Violence Protocol ("RSVP") and then augmented his clinical findings through three actuarial tools: the Static 2002R ("Static"), the Sex Offender Risk Appraisal Guide ("SORAG"), and the Hare Psychopathy Checklist Revised ("Hare"). In his testimony, Dr. Levin explained that the three actuarial tools use certain populations as their base on which to predict future behaviour.

[30] The RSVP risk factors are divided into five major areas: (1) history of sexual violence; (2) psychological adjustment; (3) mental disorder; (4) social adjustment; and (5) manageability. Dr. Levin said that, in his opinion, Mr. Plehanov did not present with any of these risk factors.

[31] I will not detail all of Dr. Levin's findings, but instead I will select a few excerpts.

[32] Under the general heading of psychological adjustment factors, which itself has a number of items, Dr. Levin said:

In my clinical opinion, Mr. Plehanov presented with a certain degree of minimization and denial of his sexual offence. However, such minimization in and of itself does not represent a significant risk factor for re-offending in the future as Mr. Plehanov expressed genuine, in my opinion, regret, regarding the events and [the impact on the victim].

- [33] In his report, Dr. Levin explained that Mr. Plehanov's "minimization and/or denial" is not "extreme", and is not such that it would significantly affect his future risk of reoffending. Dr. Levin also said Mr. Plehanov's minimization or denial should be viewed in the context of his pre-existing significant depression, anxiety and somatoform disorder. These disorders themselves have no effect on his future risk and might, in fact, be viewed as protective in nature since patients with major depression usually have low libido.
- [34] Dr. Levin said his conclusion reached using the RSVP clinical assessment protocol was that "Mr. Plehanov most likely represents a low or very low risk for sexual violence in the future".
- [35] As noted earlier, Dr. Levin assessed the accuracy of his RSVP-based conclusion by utilizing three actuarial tools. These all confirmed his earlier conclusions.
- [36] Dr. Levin concluded as follows:

In conclusion, I would like to reiterate that overall [] Mr. Plehanov's risk for future sexual violence seems to range between low and very low. Mr. Plehanov does not present with any complicating psychiatric factors [] that would complicate his rehabilitation process in the community. I would like to emphasize that in accordance with Mr. Plehanov's clinical presentation in my office for the past six or seven years, he does not present with any symptoms suggestive of any underlying paraphilic disorder (such as pedophilia). In my clinical opinion, Mr. Plehanov most likely realizes that his touching of the victim represented a criminal act and he is painfully aware of the consequences of such behaviour. Mr. Plehanov expressed genuine empathy towards the victim and her negative experiences as a result of his index offence. However, it is also important to note that Mr. Plehanov has been experiencing significant psychological, emotional and physical suffering since the index offence. From a clinical perspective, such a prolonged period (more than four years) of pre-trial psychiatric limitations and legal restrictions (bail conditions) could also represent a mediating factor reducing Mr. Plehanov's future risk for re-offending.

[Italics in original.]

- [37] In his testimony at trial, Dr. Levin agreed that he assessed the "minimization" factor differently than did Dr. Kropp. Dr. Levin said he did not see Mr. Plehanov's minimization as "extreme", as the factor requires. He also said he saw Mr. Plehanov a year after Dr. Kropp did and found that Mr. Plehanov accepted that he was guilty and expressed compassion for the victim. Dr. Levin felt Mr. Plehanov "had come a long way" to accepting it.
- [38] Dr. Levin said he felt his assessment of Mr. Plehanov was more accurate because it was based on seven years of treatment and because he used four different assessment tools, rather than relying on just one.
- [39] In cross-examination, Dr. Levin said:
- He conceded that most of his forensic work since 2000 has been personal injury work;

- He agreed that there is a difference between psychiatric treatment and forensic assessment and that the professional associations discourage treating psychiatrists from doing assessments. The concern is that it might discourage a patient from being open with his treating psychiatrist. Dr. Levin said this was only a caution from the associations, as it cannot be avoided at times;
- He did not feel there was denial here. Mr. Plehanov did not deny the event; instead he minimized it. Dr. Levin agreed, however, that Mr. Plehanov had said he "did nothing wrong";
- He felt Mr. Plehanov expressed genuine regret because he said he was sorry that it had affected the girl in this way and in her having to come to court;
- He agreed that in his discussions, Mr. Plehanov blamed the girl's father, insofar as Mr. Plehanov expressed the view that it was possible he had been framed by the father;
- He also agreed that in his discussions with Mr. Plehanov, Mr. Plehanov denied that he had any sexual intent during the event in question;
- He felt Mr. Plehanov's minimization was related to his anxiety, in the sense that this disorder would tend to make him minimize the events;
- Though he agreed Mr. Plehanov was socially isolated to some extent, he did not feel that social isolation was a risk factor, and in fact it was mitigating because Mr. Plehanov was not going out;
- He was aware that Mr. Plehanov saw a counsellor about appropriate "boundaries" as a result of certain events that occurred while Mr. Plehanov was a teacher on call. He did not agree that this history was relevant because he said the environments between the two events were completely different; and
- He acknowledged that in 2016, he provided a letter for use in court at Mr. Plehanov's request in which he said that Mr. Plehanov does not represent any risk for violence. He said that this was a clinical opinion and not an opinion given as a result of the formal assessment he did later.

B. Dr. Randall Kropp

- [40] Dr. Kropp is a forensic psychologist with Forensic Psychiatric Services Commission. He wrote a report dated August 19, 2016.
- [41] In his report, Dr. Kropp noted that most of the background information he obtained was provided by Mr. Plehanov. Mr. Plehanov told him he was isolated and did not have any friends or relatives (with the exception of his mother, who did not speak English), who might otherwise provide collateral information.
- [42] On the matter of the offence in question, Mr. Plehanov told Dr. Kropp that the entire matter is a "misunderstanding" and the father of the child "overreacted" to the situation. He denied intending to touch the girl in a sexual way. Mr. Plehanov theorized that the father might have had "other intentions" in making the allegation and that perhaps he had been "set up". He adamantly denied any wrongdoing or sexual motivation.

- [43] Dr. Kropp noted that Mr. Plehanov was the subject of 11 charges relating to his behaviour with five girls during his time as a teacher with a local school district. He was acquitted of all charges in 2012. As a result, however, Mr. Plehanov was not permitted to return to work as a teacher. He told Dr. Kropp that he believed the charges arose "because the 'boundaries' of appropriate teacher-student contact were unclear to him because he grew up in a 'different culture'". At the time of the charges, he saw a psychologist on referral from the school district. According to Mr. Plehanov, "we talked a lot about boundaries".
- [44] Dr. Kropp reported that Mr. Plehanov does not view himself as a sex offender and does not believe he needs to attend a sex offender treatment program. He denied having any interest in prepubescent children.
- [45] In his summary, Dr. Kropp noted that Mr. Plehanov presents as "a rather lonely and unhappy man who is resentful of his current circumstances". Dr. Kropp also noted Mr. Plehanov suffers from chronic symptoms of depression and anxiety.
- [46] Dr. Kropp said he used the RSVP assessment tool or assessment protocol in considering Mr. Plehanov's risk for sexual violence. He said:

The most significant risk factor in this case is Mr. Plehanov's complete denial of the index offence. He has clearly taken the stance that he is innocent of the sexual assault, and he places the blame for the accusations on the victim's father. Denial is a common psychological defense mechanism in sexual offenders, and it is often related to shame, embarrassment, and the associated social and legal implications. It is problematic from a risk perspective since it is related to poor response to treatment and treatment dropout. Other risk factors in this case include (a) Mr. Plehanov's self-identified history of misunderstanding appropriate "boundaries" in adult-child relationships; (b) his mental health problems that could interfere with his ability to make good decisions in the future; and (c) his social isolation which results in an impoverished support network and absence of appropriate sexual outlets. On a more positive note, Mr. Plehanov appears to be intelligent, capable of gainful employment, and generally prosocial. Overall, it is my impression that, without specific treatment for sexual offending, he represents a moderate risk for sexual touching in the future. The most likely recidivistic scenario would involve Mr. Plehanov inappropriately touching a pre-pubescent girl under his care or supervision. It appears less likely that Mr. Plehanov would be involved in a predatory offence or violence that is more severe in nature.

- [47] In his testimony at trial, Dr. Kropp said that he does not do treatment, although he has done it in the past. Instead, his practice is focused on assessments. He said he has done perhaps 200 assessments in the last five years.
- [48] Dr. Kropp said he has also been involved in developing some of the assessment methods used. He has developed measures for sexual violence, intimate violence, stalking, and honour-based crimes, and he was a co-author of the RSVP diagnostic tool.

- [49] Dr. Kropp said he has used the actuarial tools referred to by Dr. Levin, for example the Hare and SORAG assessment tools, but he does not currently use them.
- [50] Dr. Kropp discussed each of those as follows:
- a) Hare: this is a test of psychopathy. He said it was initially a research tool to identify psychopaths. Dr. Kropp felt this was not applicable to Mr. Plehanov's case which involved a situation of relatively low seriousness of violence. He noted that a person could be at high risk for sexual reoffending without being a psychopath.
 - b) SORAG: this test was developed as a tool associated with general violence and, later, for general violence in sex offenders. It was not developed for sexual offences as such. Again, it is not a helpful diagnostic tool here because the index offence was not one of overt violence.
 - c) Static: he noted that this diagnostic tool has several versions. The one used by Dr. Levin is the Static 2002R. Its predecessor is the Static 1999R. Dr. Kropp noted that different predictions can result from the use of the different versions. He said the 1999R version has the better research behind it and its scores are more stable. He noted that the 1999R is the version used by Corrections and the sex offender programs.
- [51] The RSVP is the diagnostic tool that he helped develop. It is a hybrid between unstructured clinical assessment and actuarial assessment (of which the Hare, Static and SORAG are examples). The RSVP lists 22 risk factors and uses three different time frames. Dr. Kropp found 10 of those factors to be present or possibly present in Mr. Plehanov's case. He considered the following factors to be "present": extreme minimization or denial, major mental illness, problems with intimate relationships, and problems with employment. He considered the following to be "possible": chronicity of sexual violence; existence of attitudes condoning the behaviour; problems with insight, stress, and coping; problems with non-intimate relationships; and problems with treatment.
- [52] Dr. Kropp said he did not consider Mr. Plehanov's major mental health issues to be protective factors in any way because Mr. Plehanov was in fact suffering from these when he offended. Accordingly, Dr. Kropp did not see how these could be seen as protective.
- [53] Dr. Kropp said that denial is an issue here, because it creates issues with treatment and is a strong indicator for treatment drop-out or treatment attrition.
- [54] Dr. Kropp said he concluded Mr. Plehanov is at moderate risk of reoffending, and his opinion remains the same today because nothing has come to his attention that has changed his opinion since he gave his opinion in 2016.
- [55] In cross-examination, Dr. Kropp said:
- He expects a certain defensiveness or reluctance with any offender, but will only note it if he is concerned about it. He agreed that sex offenders facing sentencing are often defensive;

- Psychopathy does not necessarily increase risk. It goes more to the severity of the violence than the likelihood of reoffending;
 - He has concerns about the appropriateness of using SORAG as a diagnostic tool. This was a tool designed to consider the likelihood of offending violently generally and it does not say anything about sexual violence in particular. Additionally, this actuarial tool is based on a very high-risk mentally ill population;
 - He was not particularly concerned about why there was extreme minimization or denial on Mr. Plehanov's part. The point was that there was denial and this presents problems for treatment. While this does not itself predict future offending directly, it strongly predicts treatment drop-out, which in turn is a strong correlative factor; and
 - Mr. Plehanov told him he was willing to go to treatment, but only to "talk about boundaries".
- [56] Dr. Kropp said that an assessment of Mr. Plehanov as "low risk to reoffend" would mean there would be no problem leaving Mr. Plehanov with unsupervised access to children. However, in a case such as his, Corrections would most certainly apply some risk assessment strategies. "Moderate" was the correct assessment.

VI. Positions of Crown and Defence

A. Crown

- [57] As noted earlier, the Crown's position is that an appropriate sentence would be 12 to 15 months' jail, plus three years' probation. There should also be a five-year order pursuant to s. 161 prohibiting Mr. Plehanov from attending locations where children are likely to be present.
- [58] Counsel noted that the offence in question was committed on a vulnerable child by a person in a position of trust. In these circumstances, the Criminal Code requires that the court give primary consideration to denunciation and deterrence.
- [59] The Crown said the court should reject the opinion of Dr. Levin and should instead accept the opinion of Dr. Kropp that Mr. Plehanov is at moderate risk to reoffend. Crown gave several reasons why the court should come to that view. Crown said the central issue between the experts focused on the denial and extreme minimization issue on the part of Mr. Plehanov. Crown said that Dr. Levin's opinion on that issue is effectively unsupported.
- [60] On the issue of denial, the Crown notes that Mr. Plehanov has said he does not need treatment, merely counselling on boundaries, but Mr. Plehanov has had that counselling in the past and yet he still committed the index offence.

- [61] Crown referred to a number of cases on the range of sentence: *R. v. O.C.M.*, [2012] B.C.J. No. 2924; *R. v. F. (M.G.)*, 2010 ABCA 102; *R. v. Safaee*, 2009 BCCA 367; *R. v. W.E.M.*, 2014 ABQB 10; *R. v. S.P.C.*, 2008 ABCA 280; *R. v. E.M.Q.*, 2015 BCSC 201; *R. v. E.R.D.R.*, 2016 BCSC 684; *R. v. Roller* (1991), 6 B.C.A.C. 234; *R. v. Savage*, 2011 ONCA 107; *R. v. Michelin*, 2013 SKQB 390; *R. v. C.C.*, 2015 ONSC 5425; and *R. v. Tom* (1991), 3 B.C.A.C. 175.
- [62] In answer to a question from the bench, Crown said that in the absence of a mandatory minimum, the proper sentencing range was between 90 days and 12 months in jail for this offence and this offender.

B. Defence

- [63] Defence counsel notes that the touching in question was over the clothes, was of short duration, and was not premeditated. If there was any element of "position of trust", it was a very limited position for a limited time. Counsel says that the fact that Mr. Plehanov was acquitted of the count charging him with the specific intent offence of sexual touching shows that specific sexual intent on Mr. Plehanov's part was not proven.
- [64] Counsel noted that Mr. Plehanov has no criminal record. He has also been on bail with strict conditions for nearly four years. These have had a significant effect on his ability to go to public areas, a church, or even go to the gym. He has been compliant and so this demonstrates he would be suitable for a sentence involving court-ordered conditions.
- [65] Defence counsel emphasizes that these criminal proceedings have been very hard on Mr. Plehanov. His conviction was reported in a local newspaper. He may have difficulty in becoming a member of a professional association. Counsel argued that this is evidence on which the court might find "humiliation and ruin", a factor noted in some sentencing authorities.
- [66] Defence counsel dealt with the expert evidence about reoffending. He noted Dr. Kropp's assessment was from 2016 and was thus a year old, and Dr. Kropp only used one risk assessment measure, instead of the four assessment tools used by Dr. Levin. He noted the method used by Dr. Kropp is essentially subjective, whereas the other tools provide a scientific actuarial assessment basis.
- [67] Counsel noted that Dr. Levin has spent years with Mr. Plehanov and understands him. His opinion should be preferred. Ultimately, counsel said the best approach is not to reject either opinion, but to consider them together and come to the conclusion that his risk to reoffend ranged from low to moderate.
- [68] As for the principles of sentencing to be applied in this case, counsel agreed with the general principles articulated by the Crown, but said although denunciation and deterrence must be considered, the court should still consider the objectives of rehabilitation and restraint. The court should impose a sentence that provides the least restrictive sanction on Mr. Plehanov. Counsel argued that a sentence appropriate for this offence and this offender

would be a suspended sentence of two to three years, with strict terms including attendance at a sex offender program, six to 12 months of strict conditions akin to house arrest, and a substantial number of hours of community work service. There should also be a s. 161 order.

- [69] Counsel said that an appropriate sentence ranged from a conditional discharge or a suspended sentence to 15 months in jail. Counsel cited the following cases on range of sentence, again I am not going to do the citations: *R. v. Maxmenko*, 2015 BCSC 2224; *R. v. Adubofour-Poku*, 2017 BCPC 192; *R. v. J.L.B.*, 2017 BCPC 24; *R. v. L.S.B.*, 2017 BCSC 458; *R. v. Careen*, 2012 BCSC 918; *R. v. S.J.P.*, 2016 NSPC 50; *R. v. M.L.*, 2016 ONSC 7082; and *R. v. Gumban*, 2017 BCPC 226.

VII. Discussion

A. Statutory Provisions

- [70] Section 271 of the Criminal Code establishes a maximum sentence of 14 years for a sexual assault committed against a person under the age of 16. There is no suggestion here that this maximum is engaged, but nonetheless this indicates the seriousness with which Parliament views these types of offences.
- [71] The Criminal Code sets out a number of general sentencing principles. Section 718 sets out the fundamental purposes of sentencing, being:
718. 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;
 - (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 and to the community.
- [72] Other sections of the Code declare the fundamental principles that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender, and that a sentence should be increased or reduced to account for any aggravating or mitigating circumstances of the offence or the offender.
- [73] Two Criminal Code provisions address the abuse of children. Section 718.01 says that:

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[74] Section 718.2 of the Code says that if an offender has abused a person under 18 or abused a position of trust or authority, these are deemed to be aggravating circumstances in sentencing.

B. The Offence

[75] During submissions, counsel for Mr. Plehanov suggested the touching in question was as little as two instances lasting three seconds each and was confined to X's buttock area. In my earlier reasons for judgment, I did not state a definite duration of the touching. Defence counsel's submission is based on the father's evidence only, restricted to the father's observations once he was peering through the back window of the van, and does not take into account X's own testimony. From the evidence, I conclude that the touching lasted longer than that, though it was certainly less than a minute and most probably in the range of 20 to 30 seconds. The touching involved both the groin and the buttock area, though mostly the latter.

[76] As noted in *R. v. J.L.C.*, 2012 BCSC 623, at para. 30, "the authorities make clear that the sexual abuse of children is an abhorrent socially damaging act which warrants strong condemnation by the courts". In *R. v. Allen*, 2012 BCCA 377, at para. 59, the court said "Parliament has made it very clear that the protection of children is a basic value of Canadian society which the courts must defend."

[77] All sexual assaults are serious offences. Sexual assaults of children are even more serious. However, within the spectrum of sexual assaults of children, this offence falls at the lesser end.

C. Risk of Reoffending

[78] As noted earlier, the experts disagreed on Mr. Plehanov's risk of reoffending. The central point of disagreement was whether Mr. Plehanov met the RSVP factor of "extreme minimization or denial".

[79] I felt Dr. Levin himself minimized the various statements from Mr. Plehanov that plainly demonstrated complete or near-complete minimization and denial. Dr. Levin acknowledged the various minimizing statements reported in Dr. Kropp's report, including Mr. Plehanov's claim that he "did nothing wrong", but insisted that Mr. Plehanov's attitude towards the offence had changed. He did not, however, articulate any real basis for this assertion and did not point to any statements by Mr. Plehanov indicating such a change in attitude. Indeed, he conceded he did not ask Mr. Plehanov directly if he now felt any differently about it. Instead, Dr. Levin used such expressions as Mr. Plehanov "most probably knows" what he has done is wrong and "I felt he came a long way to accepting it", as well as the conclusory statement,

"his attitude has changed".

- [80] Dr. Levin also said that Mr. Plehanov expressed "genuine regret", but I note that this was not regret for the offence, but instead this was focused on the fact that he was sorry the girl had to come to court to testify.
- [81] Dr. Levin agreed there was minimization on Mr. Plehanov's part, but considered it stemmed from Mr. Plehanov's anxiety issues. That is to say, he made a link between Mr. Plehanov's mental disorder and his minimizing of the offence. Yet at the same time, Dr. Levin did not regard "major mental illness" as being present as an additional RSVP factor, instead discounting Mr. Plehanov's diagnosed mental health conditions as being "protective" in nature. I found this to be inconsistent. In any event, I fail to see how the identification of a cause for Mr. Plehanov's minimization makes his minimization of the offence any better.
- [82] I was also not persuaded that Dr. Levin's use of additional population-based assessment tools added to the accuracy of his assessment. Instead, I conclude that those additional tools were essentially unhelpful for the reasons given by Dr. Kropp, reasons with which I agree.
- [83] For these reasons, I consider Dr. Kropp's opinion to be the more accurate and reliable. I therefore conclude that Mr. Plehanov is at moderate risk to reoffend.

D. Aggravating and Mitigating Factors

- [84] The fact that this offence involved a child is a statutorily-mandated aggravating circumstance. The fact that Mr. Plehanov was left to care for X and her brothers while the father fetched the other children means that Mr. Plehanov was in a position of trust to some extent, although this position of trust was limited, both in scope and duration: see *R. v. Lonegren*, 2009 BCSC 1678. This, too, is an aggravating factor.
- [85] Mr. Plehanov has no criminal record. This is a factor in Mr. Plehanov's favour, though I do not consider that it is a mitigating factor so much as it is the absence of an aggravating factor.
- [86] It is convenient to mention under this subject the defence argument that Mr. Plehanov's conviction has had negative collateral effects akin to "humiliation and ruin", a factor mentioned in some sentencing cases. These cases have taken into account the humiliation and ruin that the offender has brought down upon himself, not in mitigation, but instead on the sentencing objectives of denunciation and deterrence, as recognition of the significant price an offender may have already paid for his conduct: see *R. v. Maxmenko*, 2015 BCSC 2224 at paras. 36-37, citing *R. v. Bunn*, 2000 SCC 9 at para. 23.
- [87] The collateral effects in this case, though significant to Mr. Plehanov, are little different than those for any other offender in Mr. Plehanov's situation. They fall far short of "humiliation and ruin". In any event, I agree with the Crown that, leaving aside the publication of his conviction in the community newspaper, a good deal of Mr. Plehanov's social isolation and impaired employment prospects dates from his earlier issues when employed as a teacher. I

conclude that this is not a mitigating factor or a factor that otherwise ought to reduce an otherwise fit sentence.

E. Sentencing Range

- [88] Both Crown and defence cited cases involving a relatively wide range of facts, including cases involving adult victims, offenders who pleaded guilty, offenders with related and recent criminal records, including lengthy records for predatory behaviour, cases where the Crown proceeded summarily, and other cases with facts quite different from those in the present case. No case cited by counsel involved facts directly comparable to those in the present case, but I found the most helpful cases to be O.C.M., C.(C.), M.L., E.M.Q., S.J.P., and E.R.D.R. From my review of all of the cited cases, I am satisfied that the appropriate range of sentence is from three to 12 months' imprisonment.
- [89] Mr. Plehanov argues that a suspended sentence with strict conditions would satisfy the sentencing objectives of denunciation and deterrence, while still meeting the objective of rehabilitation. He notes that suspended sentences have been imposed even in cases of manslaughter: see, for example, the cases cited in *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.). He refers as well to *R. v. Voong*, 2015 BCCA 285. In that case, the Court of Appeal considered four drug trafficking cases where suspended sentences had been imposed. The court noted (at para. 39) that "a suspended sentence has been found to have a deterrent effect in some cases". Mr. Plehanov argues that, similarly, deterrence can be served in this case through a suspended sentence.
- [90] The Crown concedes that a suspended sentence can serve the sentencing objective of deterrence in an appropriate case, but notes that drug trafficking offences do not have denunciation and deterrence as statutorily-mandated primary considerations. The Crown also notes that Voong reserves suspended sentences for cases involving "exceptional circumstances".
- [91] I agree that the provisions of s. 718.01 of the Criminal Code, which requires that denunciation and deterrence be primary considerations when sentencing offenders who have abused persons under 18 years, makes a suspended sentence less likely to be imposed in these types of cases as compared to drug trafficking cases. In addition, Voong itself requires a case – a drug trafficking case – to have "exceptional circumstances" in order to depart from the usual range of six to 18 months' imprisonment for a first-time offender.
- [92] In *R. v. Tuffs*, 2012 SKCA 6, the court overturned a suspended sentence imposed on an offender who got into the sleeping adult complainant's bed, put his hand down her pants and touched her vagina. The court instead imposed a 12-month jail sentence, saying that "sexual assaults of this nature should draw a period of incarceration" (at para. 10). While that case is not binding on this court, it is nonetheless persuasive. By reason of s. 718.01 of the Code, a suspended sentence must be even more inappropriate in most cases involving the abuse of a child.

- [93] Though Mr. Plehanov's counsel has said everything that could possibly be said in favour of a suspended sentence in this case, I conclude that it would be inappropriate here, because of the nature of the offence, the fact that it involved the abuse of a child, the fact that there was a limited position of trust between offender and victim, and because there are no exceptional circumstances that would warrant a departure from the custodial sentence that such an offence would usually attract. A custodial sentence is called for in this case.
- [94] The case authorities establish various factors to be taken into account in sentencing in cases involving sexual offences against children. These include the age of the victim, the nature, duration, and frequency of the sexual assaults, whether forced threats or grooming were used, whether the offender was in a position of trust, the criminal record of the offender, the effect on the victim, an early guilty plea sparing a child from testifying, an expression of remorse, the offender's insight into his behaviour, including any treatment taken or attitude toward treatment, and matters of that sort.
- [95] Here, the offence was at the lesser end of the spectrum of this serious type of offence and the event was relatively brief. Mr. Plehanov was in a position of limited trust, but a position of trust nonetheless. The victim was very young and vulnerable, and his insight into and understanding of his offending seems very limited.

VIII. Imposition of Sentence

- [96] Mr. Plehanov, would you please stand. For the offence for which you have been convicted, the sexual assault of [X], a person under the age of 16, I sentence you to six months' imprisonment. You may be seated while I impose other parts of your sentence.
- [97] In addition to that custodial sentence, you will be subject to a probation order lasting 24 months. The terms of that probation order are as follows. There is some modification to the Crown's suggested conditions that I will describe. Otherwise, they are similar:
- a) You shall keep the peace and be of good behaviour.
 - b) You shall appear before the court when required to do so by the court.
 - c) You shall notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change in employment or occupation.
 - d) You shall report in person to the probation office located at 4425 Ledger Avenue in Burnaby, B.C., within one business day of completing your jail sentence, and thereafter as and when directed.
 - e) You shall reside at [XXX], and not change that address without the prior written approval of the probation officer. In the event that your mother no longer resides at [XXX], you will inform your probation officer within three working days and thereafter you shall reside as directed by your probation officer.

- f) For so long as you reside in an apartment building or other multi-family living accommodations, you will not loiter or linger in any common areas of that building when a child under 16 years of age is present.

Crown's suggested condition (g) is modified:

- g) You shall have no contact, direct or indirect, with [X], her father, or any member of that immediate family.
- h) You shall not attend any place of residence, employment, or any educational institution or any place of worship of [X], her father, or any member of their immediate family.
- i) You shall advise your probation officer of any employment that you have arranged. You must not change your employment without prior notification to your probation officer.
- j) You shall advise your probation officer of any church, religious institution, or place of worship that you wish to attend.
- k) You shall have no contact, direct or indirect, with anyone under the age of 16, unless you are in the company of another adult approved of in writing by your probation officer.
- l) You shall attend, participate in, and complete any assessment, treatment, counselling, or program as directed by your probation officer, including but not limited to the sex offender treatment program and sex offender maintenance program.

And an additional term derived from a statutory provision:

- m) For the term of your probation, you are prohibited from attending a public park, community centre, or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school yard, or playground, unless you are accompanied by an adult who has been approved in advance by your probation officer.

[98] That concludes the terms of probation.

[99] In addition to that probation order, I am making several ancillary orders.

[100] First, an order under 161(1)(b) of the Criminal Code. For a five-year period that follows your release from imprisonment, you are prohibited from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years.

[101] There will be a DNA order. Because sexual assault is a primary designated offence listed under s. 487.04 of the Criminal Code, pursuant to s. 487.051(1) of the Code, there will be an order in Form 5.03 authorizing the taking of samples of bodily substances for the purposes of forensic DNA analysis.

- [102] There will also be a SOIRA order. Because sexual assault is a designated offence listed in s. 490.011 of the Criminal Code, pursuant to s. 490.012(1)(a) of the Code, there will be an order in Form 52 requiring you, Mr. Plehanov, to comply with the Sex Offender Information Registration Act for a period of 20 years, a period of time that is prescribed by s. 490.013(2) (b) of the Criminal Code.
- [103] Finally, there will be a victim surcharge of \$200 imposed in accordance with s. 737 of the Code.
- [104] Those complete my sentencing reasons. Are there any matters that require clarification?
- [105] MS. VIZSOLYI: No, My Lord, not on the part of the Crown.
- [106] MR. FERGUSON: No, My Lord.
- [107] THE COURT: All right. Thank you very much.
- "Blok J."

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