R. *v.* Audet, [1996] 2 S.C.R. 171

Her Majesty The Queen *Appellant*

v.

Yves Audet *Respondent*

Indexed as: R. *v.* Audet

File No.: 24653.

1996: January 25; 1996: May 30.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major JJ.

on appeal from the court of appeal for new brunswick

Criminal law -- Sexual offences -- Persons in position of authority -- Teachers -- Elements of offence of sexual exploitation -- Meaning of terms "position of authority" and "position of trust" -- Criminal Code, R.S.C., 1985, c. C-46, s. 153(1).

The accused, a 22-year-old teacher, was charged, under s. 153(1) of the *Criminal Code*, with touching a young person for a sexual purpose while in a position of trust or authority towards her. The accused went to a nightclub with a friend a few weeks after the summer holidays began. By chance, he there

encountered the young person, then 14 years of age, whom he had taught during the school year when she was in Grade 8. She was accompanied by two of her cousins, both in their twenties. At about two o'clock in the morning, at the suggestion of the accused's friend, the group went to a cottage. The young person stated during her testimony that the accused complained of a headache and went to lie down in a room containing two beds. Shortly thereafter, the young person joined the accused and lay down in the same bed. She also fell asleep. During the night, the accused and the young person woke up and engaged in oral sex. In a statement to the authorities that was adduced in evidence at trial, the accused admitted that he had initiated the touching. At the time of the incident, he had already been informed that his contract of employment had been renewed for the following year and that he would again be teaching students in Grades 7, 8 and 9 at the young person's school. The accused was acquitted on the ground that he was not in a position of trust or authority towards the young person at the time of the incident. The Court of Appeal affirmed the acquittal in a majority decision.

Held (Sopinka and Major JJ. dissenting): The appeal should be allowed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.: Parliament passed s. 153 of the *Criminal Code* to protect young persons who are in a vulnerable position towards certain persons because of an imbalance inherent in the nature of the relationship between them. To obtain a conviction under this provision, the Crown must prove beyond a reasonable doubt that the complainant is a young person within the meaning of s. 153(2), that the accused engaged in one of the activities referred to in s. 153(1) and, finally, that at the time the acts in

question were committed the accused was in a position of trust or authority towards the young person or the young person was in a relationship of dependency with the accused. The Crown must also prove that the accused had the *mens rea* required for each element of the offence. It does not have to prove, however, that the accused actually exploited his or her privileged position with respect to the young person. To attain its objective in passing s. 153(1), Parliament chose to criminalize the sexual activity itself, regardless of whether it is consensual (s. 150.1(1) of the *Code*), in so far as it involves a person who is in a position or relationship referred to in s. 153(1) with respect to the young person. In this case, it is clear from the trial judge's reasons that he assumed the Crown had to prove that the accused had abused or exploited his particular position towards the young person. The trial judge and, incidentally, the Court of Appeal therefore erred in law in incorrectly assessing the nature of the constituent elements of the offence set forth in s. 153(1).

The words "authority" and "trust" used in s. 153(1) must be interpreted in accordance with their ordinary meaning and the term "position of authority" must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. In declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual contact with a young person, Parliament intended to direct the analysis to the nature of the relationship between the young person and the accused rather than to their status in relation to each other. The definition of the terms "position of authority" and "position of trust", like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective

pursued by Parliament. It will be up to the trial judge to take into account all the factual circumstances relevant to the characterization of the relationship between the two in order to determine whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the offence. Although teachers are not in a *de jure* position of trust or authority towards their students, they are in fact in such a position in the vast majority of cases given the importance of the role entrusted to them by society. In the absence of evidence raising a reasonable doubt in the mind of the trier of fact as to the existence of a position of trust or authority, to conclude that a teacher is not in such a position towards his or her students would be an error of law. This approach, which imposes an evidential burden on the accused, does not violate the presumption of innocence, since in the absence of such evidence, the unknown fact (the existence of a position of trust or authority) follows inexorably from the basic fact (the fact that the accused is the teacher of the complainant, his or her student). In such circumstances, there is no possibility that the accused will be convicted despite the existence of a reasonable doubt. Finally, such an approach does not have the effect of making the crime of sexual exploitation an absolute liability offence. The Crown is not relieved of its obligation to prove beyond a reasonable doubt that the accused had the *mens rea* required for each element of the offence, which is a specific intent offence.

In this case there is no circumstance relevant to the determination of the nature of the relationship between the accused and the young person that could raise a reasonable doubt in the mind of the trier of fact as to the accused's position of trust towards the young person. Even though the incident took place during the

summer holidays, those holidays had just begun and it appeared from the circumstances that the accused would be the young person's teacher once again. He was therefore at the very least in a position of trust towards her. This Court is accordingly justified in exercising the power conferred on it by s. 686(4) of the *Criminal Code* to set aside the verdict of acquittal entered by the trial judge and substitute a verdict of guilty, since it is clear that the accused would have been found guilty but for the trial judge's error in law. Furthermore, the trial judge made all the findings necessary to support a verdict of guilty.

Per Sopinka and Major JJ. (dissenting): In enacting s. 153(1) of the *Code*, Parliament did not intend that teachers be conclusively presumed to be in positions of trust or authority. Rather, it intended that each case be examined on its facts to determine whether an accused in fact occupied a position of trust or authority towards a young person. In light of the importance of their role in our society, in most cases teachers will have established a nurturing relationship with their students, and the degree of dependency necessary to establish a position of trust will exist. In each case, however, that position of trust should be based on the nature of the relationship between the particular teacher and the particular student and not simply on the teacher's status. To create as a matter of law a presumption of fact that teachers are automatically and in all circumstances in positions of trust or authority would make sexual exploitation an absolute liability offence in circumstances where the accused is a teacher. Any absolute liability offence when paired with the potential for imprisonment violates s. 7 of the *Canadian Charter of Rights and Freedoms*. In addition, this approach would place an obligation on the accused teacher to disprove that a position of trust and authority existed. This is a burden that an accused in our system should not bear. The right to be presumed

innocent guaranteed by s. 11(*d*) of the *Charter* is paramount and should not be compromised, whether by presumption of fact or otherwise.

On the facts of this case, the trial judge concluded that the accused was not in a position of trust or authority at the time of the sexual touching. There was sufficient evidence in the circumstances of this case to reach that conclusion. That finding of fact was supported by the majority in the Court of Appeal and should not, and cannot, be interfered with by this Court. To overturn an acquittal the Crown must demonstrate with a reasonable degree of certainty that the verdict would not necessarily have been the same had the judge, without a jury, properly instructed himself. Since the trial judge did not commit any error of law, the Crown has not met its onus.

Cases Cited

By La Forest J.

Distinguished: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; **referred to:** *Léon v. La Reine*, [1992] R.L. 478; *R. v. L.A.M.* (1993), 86 Man. R. (2d) 179; *R. v. P.S.*, [1993] O.J. No. 704 (QL); *R. v. Palmer*, [1990] O.J. No. 51 (QL); *R. v. Hann (No. 2)* (1990), 86 Nfld. & P.E.I.R. 33; *R. v. Dunk* (1991), 117 A.R. 161; *R. v. G. (T.F.)* (1992), 11 C.R. (4th) 221, leave to appeal refused, [1993] 3 S.C.R. ix; *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade-Marks*, [1898] A.C. 571; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Dussiaume* (1995), 98 C.C.C. (3d) 217, leave to appeal refused, [1995] 4 S.C.R. vi; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. MacKenzie*, [1993] 1 S.C.R. 212; *R. v. Cassidy*,

[1989] 2 S.C.R. 345; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Forde*, [1992] O.J. No. 1698 (QL); *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

By Major J. (dissenting)

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).

Criminal Code, R.S.C., 1985, c. C-46, ss. 150.1(1) [ad. c. 19 (3rd Supp.), s. 1], 153 [rep. & sub. *idem*], 265(3), 271 [am. *idem*, s. 10; am. 1994, c. 44, s. 19], 272 [repl. 1995, c. 39, s. 145], 273 [am. *idem*, s. 146], 273.1 [ad. 1992, c. 38, s. 1], 686(4) [am. c. 27 (1st Supp.), s. 145(3)], 693(1)(*a*) [*idem*, s. 146].

Authors Cited

Bryant, Alan W. "The Issue of Consent in the Crime of Sexual Assault" (1989), 68 *Can. Bar Rev.* 94.

Canada. Committee on Sexual Offences Against Children and Youths. *Sexual Offences Against Children*. Ottawa: Minister of Supply and Services Canada, 1984.

Coleman, Phyllis. "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 *Alb. L. Rev.* 95.

Grand Robert de la langue française, 2e éd. Paris: Le Robert, 1986, "autorité", "confiance".

Oxford English Dictionary, 2nd ed. Oxford: Oxford University Press, 1989, "authority", "confidence", "trust".

APPEAL from a judgment of the New Brunswick Court of Appeal (1995), 155 N.B.R. (2d) 369, 398 A.P.R. 369, affirming the acquittal of the accused by McIntyre J. (1993), 142 N.B.R. (2d) 382, 364 A.P.R. 382, on a charge of sexual exploitation of a young person contrary to s. 153(1) of the *Criminal Code*. Appeal allowed, Sopinka and Major JJ. dissenting.

François Doucet, for the appellant.

Anne E. Bertrand and *Paul A. Bertrand*, for the respondent.

English version of the judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. delivered by

1 LA FOREST J. -- For the first time, this Court has the opportunity to analyse the meaning and scope of s. 153(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, which prohibits every person who is in a position of trust or authority towards a young person or with whom a young person is in a relationship of dependency from engaging in any sexual activity described in paras. (*a*) and (*b*) with that young person -- even, according to s. 150.1(1) of the *Code*, where the activity is consensual. The instant appeal raises a number of issues concerning the nature of the constituent elements of the offence of sexual exploitation and the meaning and scope of the terms “position of authority” and “position of trust”.

I. Background

2 On July 8, 1992, the respondent, a 22-year-old physical education teacher, went to a club in Campbellton, New Brunswick with a friend, Serge Maltais. By chance, he there encountered the complainant, whom he had taught during the 1991-92 school year when she was in Grade 8. The complainant, who had just turned 14 ten days earlier, was accompanied by two of her cousins, both in their twenties. The respondent did not hide his surprise at seeing one of his young students at a place where minors were not allowed. The respondent, Mr. Maltais, the complainant and her two cousins spent the evening together at the club. The complainant drank a few beers offered to her by her cousins.

3 The respondent did not testify at trial. The complainant stated during her testimony that later in the evening, at Mr. Maltais' suggestion, the three young women accompanied the two young men to a cottage near Val-d'Amour. The respondent complained of a headache and decided to lie down in a room where there were two beds. Shortly thereafter, the complainant joined him and lay down next to him in the same bed. She also fell asleep. During the night, the respondent and the complainant woke up and engaged in oral sex. The complainant became increasingly uncomfortable and entreated the respondent to stop, which he did immediately. In a statement to the authorities, which was later adduced in evidence at trial, the accused admitted that he had initiated the touching. The respondent then asked the complainant to say nothing about the incident and told her that they might see each other again before the beginning of the next school year. He had in fact been informed 16 days before the incident that his contract of

employment as a physical education teacher had been renewed for the 1992-93 school year. He had also been told that he would again be teaching students in Grades 7, 8 and 9 at the complainant's school.

4 The respondent was subsequently formally charged with touching the complainant for a sexual purpose while in a position of trust or authority towards her, thereby contravening s. 153(1) of the *Criminal Code*. He was acquitted at trial, a decision affirmed by the New Brunswick Court of Appeal on the ground that he was not in a position of trust or authority towards the complainant at the time of the incident. However, the Court of Appeal was divided on this issue. Ayles J.A. felt that the respondent was indeed in such a position towards the complainant and would have entered a verdict of guilty. In accordance with s. 693(1)(*a*) of the *Code*, the Crown appealed as of right to this Court on April 6, 1995.

Court of Queen's Bench (1993), 142 N.B.R. (2d) 382

5 First of all, McIntyre J. was persuaded by the evidence that the incident had occurred at the place and time alleged in the indictment and that the complainant was at that time a young person within the meaning of s. 153(2) of the *Criminal Code*. He stated that the only real issue was whether the accused was a person in a position of trust or authority towards the complainant at the time of the incident.

6 McIntyre J. quoted and approved passages from the reasons of Proulx J.A. of the Quebec Court of Appeal in *Léon v. La Reine*, [1992] R.L. 478, with respect to the purpose of the prohibition enacted by Parliament in s. 153(1) and the meaning of the terms "position of authority" and "relationship of dependency". At p. 481,

Proulx J.A. explained the origins of s. 153(1), which was passed after the tabling of the Report of the Committee on Sexual Offences Against Children and Youths (the "Badgley Committee"), *Sexual Offences Against Children* (1984) (the "Badgley Report"), for the purpose of [TRANSLATION] "suppressing the sexual exploitation of young people by persons who are in a position of trust or authority towards the young person or with whom the young person is in a relationship of dependency". Further on, at p. 483, Proulx J.A. wrote that a position of authority stems primarily from the adult's role in relation to the young person, but also extends to any [TRANSLATION] "lawful or unlawful power to command which the adult may acquire in the circumstances". In his view, the term "relationship of dependency" refers to a relationship -- originating from biological, legal or social ties or even specific circumstances -- in which the young person is subject, related or tied to the adult in such a way that he or she loses independence or freedom of action.

7 McIntyre J. specifically identified the facts that he considered relevant to characterizing the accused's position towards the complainant in the instant case. It is helpful to reproduce them in full (at pp. 388-89):

> [TRANSLATION] In my view, the relevant facts are, first of all, that Mr. Audet did not invite or encourage [the complainant] to meet him at the club. He in no way encouraged her, either by dancing with her or by buying her alcohol. The three beers that she drank were, according to her own testimony, procured for her by her cousins who, in my opinion, were older and in a position of authority towards her at that moment. It was not the accused who suggested going to the cottage but, rather, his friend, Serge Maltais.
>
> According to [the complainant's] own testimony, Audet made no sexual pass at her but, rather, complained of tiredness and a headache. He went to bed and fell asleep. A little later, [the complainant] went to join him in the bedroom and, even though there were two beds in the room, she chose to lie down beside him in the same bed.

> . . . I noticed that during her testimony, [the complainant] alternately used "Mr. Yves" and simply "Yves" when referring to the accused. In several parts of her statement which were referred to in cross-examination, she said "Yves" when referring to the accused. I draw the inference from this evidence as well as from the rest of the evidence that [the complainant] showed a familiarity towards the accused which is uncommon or unusual as between a student and her former teacher.
>
> It must also be recalled that Mr. Audet was only 22 years old. In my view, there is an enormous difference between a 22-year-old teacher and a teacher, let's say, who is 52 years old, and a young girl 14 years old. In my opinion, it is reasonable to conclude that a young 14-year-old girl feels more comfortable with a young man 22 years old than with a 52-year-old man.

On the whole, McIntyre J.'s opinion was that the accused was neither in a position to exercise some sort of power over the complainant nor in a position of trust within the meaning of s. 153(1) of the *Code*. He added the following at p. 389:

> [TRANSLATION] Even though [the complainant] afterwards regretted participating in these acts, the evidence does not establish that at the time of her participation, she was aware of some authoritative power which in some way obliged her to submit to the accused's advances.

McIntyre J. also took account of the fact that the incident occurred during the summer holidays and thus, in his view, outside the framework of the teacher-student relationship.

New Brunswick Court of Appeal (Angers and Rice JJ.A., Ayles J.A. dissenting) (1995), 155 N.B.R. (2d) 369

8 The majority, *per* Angers J.A., described the offence provided for in s. 153(1) of the *Criminal Code* as follows (at pp. 372-73):

> [TRANSLATION] The purpose of s. 153 of the *Criminal Code* is to protect young persons from sexual exploitation by persons who have some degree of power over them thus creating a situation of trust, authority or dependency. The father-child or, as in the present case, the teacher-student relationship, does not in and of itself create such a relationship of trust, authority or dependency. Of course, it would be a very important factor and, I have no doubt, a material factor in the majority of cases. However, it is only by examining all of the facts of each case that a judge can determine whether, at the time of the alleged act, the accused was in a position of trust, authority or dependency.

Relying on *R. v. L.A.M.* (1993), 86 Man. R. (2d) 179 (Q.B.), and *R. v. P.S.*, [1993] O.J. No. 704 (Gen. Div.), the majority held that characterizing a person's position towards a young person is a question of fact to be determined by the trial judge.

9 In the case at bar, the majority's view was that McIntyre J. had correctly analysed the evidence and had relied on the relevant facts in characterizing the relationship that existed between the accused and the complainant. It thus showed deference to McIntyre J.'s conclusion. Angers J.A. wrote the following at pp. 374-75:

> [TRANSLATION] The judge reviewed the particular circumstances of the case: the school year was over, the cousins were in a position of authority towards [the complainant] that evening and there was no exploitation by the accused. Having observed [the complainant] during her testimony, the judge found that she was not aware of "some authoritative power which in some way obliged her to submit to the accused's advances". Finally, the judge ruled that the Crown had not established beyond a reasonable doubt that at the time of the incident, the accused was in a position of trust or authority towards [the complainant].

10 Ayles J.A. saw matters differently. He began by noting the difference between the English and French versions of s. 153(1). Finding that the term "*situation*" in the French version was ambiguous, he inferred the following from the term "position" in the English version (at p. 377):

> [TRANSLATION] . . . the relationship between this teacher and this student cannot be described in terms of a relationship of power (authority/subjugation) but, rather, in terms of the relative status of two parties in relation to one another.

Ayles J.A. then considered the accused's relationship with the complainant in the instant case. Drawing a parallel with this Court's decision in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, he affirmed that teachers have a fiduciary relationship with their students. He also referred to the comments of Cosgrove Dist. Ct. J. of the Ontario District Court in *R. v. Palmer*, [1990] O.J. No. 51, and of Woolridge J. in *R. v. Hann (No. 2)* (1990), 86 Nfld. & P.E.I.R. 33 (Nfld. S.C.), and found that teachers are in a position of trust towards young persons.

11 Ayles J.A. further stated that the complainant's consent to the acts is irrelevant in the context of a charge of sexual exploitation and that the courts have consistently held that the Crown need not establish any nexus between the person's position and the alleged sexual activity: *R. v. Dunk* (1991), 117 A.R. 161 (C.A.), and *R. v. G. (T.F.)* (1992), 11 C.R. (4th) 221 (Ont. C.A.).

II. Analysis

12 The difference of opinion between the majority and the dissent lies in determining the analytical approach that should be taken in dealing with charges of sexual exploitation. The trial judge and the majority of the Court of Appeal based their analysis on the immediate circumstances of the offence in order to determine whether those circumstances showed, in addition to the existence of some imbalance between the young person and the accused that established a position of trust or authority or a relationship of dependency within the meaning of

s. 153(1) of the *Criminal Code*, that the accused had actually exploited his or her privileged position with respect to the young person. For his part, Ayles J.A. was of the view that s. 153(1) requires a comprehensive analysis of the nature of the relationship between the young person and the accused, regardless of the question of exploitation. His view differed because he felt that all young persons are in a relationship of dependency with teachers because of the fiduciary relationship that exists between them, which derives from the role conferred on teachers by society.

13 In my view, the appeal must be allowed and a verdict of guilty entered. First of all, McIntyre J.'s position, with which the majority of the Court of Appeal agreed, implies that the Crown must prove, as a constituent element of the offence of sexual exploitation, that the accused actually exploited his or her position of trust or authority towards the young person or the young person's relationship of dependency with the accused. An analysis of the means chosen by Parliament to meet the objective it was pursuing by creating the offence of sexual exploitation and of the legislative context of s. 153(1) shows that this approach is incorrect and contrary to previous judgments on this matter. I therefore find that the trial judge erred in law. Further, I am of the view that the circumstances of the case at bar warrant this Court's exercise of the power conferred on it by s. 686(4) of the *Criminal Code* to set aside the verdict of acquittal entered by the trial judge and substitute a verdict of guilty.

A. *The Error of Law Committed by the Trial Judge*

(1) Section 153 of the *Criminal Code*: Objective, Rationale and Constituent Elements of the Offence of Sexual Exploitation

14 Section 153 of the *Criminal Code* came into force on January 1, 1988. It was passed by Parliament in response to the Badgley Committee's recommendations in a report made public a few years earlier. It reads as follows:

> **153.** (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
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> (*a*) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
>
> (*b*) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

Although, as the Earl of Halsbury L.C. recognized at the end of the last century in *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade-Marks*, [1898] A.C. 571 (H.L.), at p. 575, the courts may use a commission report like the Badgley Report to identify Parliament's objective in enacting a given piece of legislation, I see no need to refer to it in the case at bar. It is evident that Parliament passed s. 153 of the *Criminal Code* to protect young persons who

are in a vulnerable position towards certain persons because of an imbalance inherent in the nature of the relationship between them. This is merely stating the obvious, and it would not be helpful, nor is it necessary, for the purposes of this appeal to elaborate on the extent and scope of the social aspect of the problem.

15 However, while the purpose of the provision and the objective being pursued are relevant in interpreting s. 153(1), great care must be taken to distinguish them from the means chosen by Parliament to achieve this purpose and meet this objective.

16 First, the offence applies to three separate categories of persons: those in a position of trust towards a young person, those in a position of authority towards a young person and those with whom the young person is in a relationship of dependency. The *Code* prohibits every person in such a position or relationship with respect to a young person from engaging in any of the sexual activities described in paras. (*a*) and (*b*) of s. 153(1). As well, contrary to the situation that exists with respect to a charge of sexual assault, a person charged under s. 153(1) cannot raise the young person's consent as a defence (s. 150.1(1) of the *Criminal Code*). To obtain a conviction under s. 153(1), the Crown must prove beyond a reasonable doubt that the complainant is a young person within the meaning of s. 153(2), that the accused engaged in one of the activities referred to in s. 153(1) and, finally, that at the time the acts in question were committed the accused was in a position of trust or authority towards the young person or the young person was in a relationship of dependency with the accused. Of course, the Crown must also prove the *mens rea* required for each of these elements.

17 In this Court, the respondent argued that, to find that an accused was in such a position towards or relationship with a young person, the Crown must necessarily show that the accused abused or exploited his or her position of trust or authority towards the young person or the young person's relationship of dependency with the accused. In support of these arguments, the respondent referred this Court to my reasons in *Norberg v. Wynrib*, *supra,* and the two-step analytical approach I there discussed. I wrote the following at p. 256:

> It must be noted that in the law of contracts proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special "power dependency" relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation.

18 In my view, the accused is in fact arguing that there is another constituent element to the offence of sexual exploitation, namely that the accused, in performing the alleged acts, abused his or her special position *vis-à-vis* the young person, a position deriving from the fact that the accused was in a position or relationship referred to in s. 153(1).

19 In my view, the respondent's argument is incorrect. This interpretation cannot be reconciled with s. 150.1(1) of the *Criminal Code*, which provides that the young person's consent is not a defence to a charge of sexual exploitation, because requiring such proof of exploitation would amount to implicitly recognizing that the quality of consent is somehow relevant in such a context. The interpretation

proposed by the respondent suggests that the means chosen by Parliament to meet its legislative objective was to criminalize the abuse or exploitation by persons in a position or relationship mentioned in s. 153(1) of their position for the purpose of engaging in one of the prohibited activities. This is not the case. Adopting such an interpretation would make the offence of sexual exploitation totally irrelevant by confusing the objective of the provision and the standard adopted by Parliament.

20 The relative positions of the parties have always been relevant to the validity of consent under Canadian criminal law. The common law has long recognized that exploitation by one person of another person's vulnerability towards him or her can have an impact on the validity of consent (see the historical review prepared by A. W. Bryant, "The Issue of Consent in the Crime of Sexual Assault" (1989), 68 *Can. Bar Rev.* 94, at pp. 127-31; *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 740; and my comments in *Norberg v. Wynrib*, *supra*, at pp. 250 and 252).

21 Moreover, in 1983 Parliament passed what is now s. 265(3) of the *Criminal Code*. This provision, which lists certain circumstances that may vitiate consent (*Norberg v. Wynrib*, *supra*, at p. 251), reads as follows:

> **265.** . . .
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
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> (*a*) the application of force to the complainant or to a person other than the complainant;
>
> (*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (*c*) fraud; or

(*d*) the exercise of authority. [Emphasis added.]

Parliament also adopted a similar provision dealing specifically with consent to sexual assault, sexual assault with a weapon and aggravated sexual assault. Section 273.1 was added to the *Criminal Code* in 1992:

> **273.1** (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
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> (*a*) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (*b*) the complainant is incapable of consenting to the activity;
>
> (*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity. [Emphasis added.]

22 The *Code* thereby specifically provides that, for the purposes of ss. 271, 272 and 273, the exercise of authority (s. 265(3)(*d*)) and the abuse of a position of trust, power or authority (s. 273.1(2)(*c*)) will vitiate consent. While conscious of the minor differences in terminology in s. 153(1), s. 265(3)(*d*) and s. 273.1(2)(*c*), I note that in most if not all cases in which the evidence shows that an accused in a position or relationship referred to in s. 153(1) with respect to the complainant actually abused his or her position in relation to the complainant to obtain the alleged sexual favours, the accused will at least have committed a sexual assault

-- a more serious offence -- against the young person, since ss. 265(3)(*d*) and 273.1(2)(*c*) provide that there is no consent in such a situation. The interpretation proposed by the respondent therefore leads to a rather absurd situation. The offence provided for in s. 153(1) would be rendered totally irrelevant, since almost all the situations covered by s. 153(1) of the *Criminal Code* would in any event be covered by s. 271, 272 or 273, as the case may be. The offence of sexual exploitation would ultimately add nothing. Moreover, a person in a position of trust or authority towards a young person, or with whom the young person is in a relationship of dependency, would commit a <u>less serious</u> offence by abusing his or her privileged position to obtain sexual favours from a young person than by doing the same thing in relation to an adult. It is patently obvious that such an interpretation is totally at odds with Parliament's objective in passing s. 153 of the *Code*.

23 Clearly, Parliament wanted to afford <u>greater</u> protection to young persons. It chose harsher means by criminalizing the activity itself, <u>regardless of whether it is consensual</u> (s. 150.1(1) of the *Code*), in so far as it involves a person who is in a position or relationship referred to in s. 153(1) with respect to the young person. As Woolridge J. eloquently stated in *Hann (No. 2)*, *supra*, at p. 36:

> The implication from the wording of s. 153 is that notwithstanding the consent, desire or wishes of the young person, <u>it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person</u>. [Emphasis added.]

It thus seems evident to me that the respondent's argument is incorrect and that the Crown does not have to establish that the accused actually abused his or her

position towards or relationship with the young person in order to obtain the young person's consent to the alleged sexual activities.

24 As well, I would like to make it clear that the two-step analytical approach I adopted in *Norberg v. Wynrib*, *supra*, cannot be unthinkingly applied in the context of a charge of sexual exploitation. That case is distinguishable from the case at bar, in that the whole argument there revolved around the validity of consent given by a patient to sexual relationships entered into with her physician. The legal context was very different, since unlike the situation here, the validity of the consent was relevant, the question having been raised in the context of civil proceedings for the tort of battery.

25 Finally, it is important to note, as Ayles J.A. did, that the courts have up to now consistently rejected any argument similar to that proposed by the respondent. In *G. (T.F.)*, *supra*, the Ontario Court of Appeal, referring to the Alberta Court of Appeal's decision in *Dunk*, *supra*, expressed its complete agreement with this at pp. 222-23:

> Counsel for the appellant concedes that, on the facts of this case, the appellant was in a position of authority with respect to the complainant. He contends, however, that under s. 153 there must be a nexus between the position of authority and the giving of consent by the young person to the sexual activity; and since there was no proof of any such nexus in this case, the appellant should not have been convicted. With respect we do not agree.
>
> The purpose of s. 153 is to make it clear that a person in a position of authority or trust towards a young person is not to engage in sexual activity with that person, even though there is apparent consent. We agree with the interpretation of the section given by Mr. Justice Kerans speaking for the Alberta Court of Appeal in *R. v. Dunk*, an unreported judgment dated June 3, 1991, (now reported at (1991), 117 A.R. 161, 2 W.A.C. 161) where he said:

> "The section under review commands citizens dealing with children in a relationship of trust or authority not to act on apparent consent of that child to any sexual activity. That duty is not limited to cases where the Crown can show some relationship between the trust and consent. Therefore, the learned trial judge was correct not to charge the jury to assess the significance of the factor on the question of consent."
>
> Since, on the appeal against conviction the appellant raised only the one point that we have rejected, the appeal against conviction must be dismissed. [Emphasis added.]

Leave to appeal to this Court was refused: [1992] 3 S.C.R. ix. The Ontario Court of Appeal reiterated its position in *R. v. Dussiaume* (1995), 98 C.C.C. (3d) 217, at p. 219, leave to appeal refused, [1995] 4 S.C.R. vi. To the same effect, see also *L.A.M.*, *supra*.

26 Accordingly, I decline to find that the Crown is required to prove, for the purposes of s. 153(1) of the *Code*, that the accused abused his or her position of trust or authority towards or relationship of dependence with the young person.

(2) The Position of the Trial Judge and the Majority of the Court of Appeal

27 It is clear from the trial judge's reasons that he assumed the Crown had to prove that the accused had abused or exploited his particular position towards the complainant. This, in my view, led the trial judge to consider facts that were in no way relevant to determining the respondent's criminal liability under s. 153(1). For example, he noted that the accused had neither provided the complainant with the alcohol she drank during the evening nor encouraged her to go with him to the cottage. He also focused on the fact that the complainant had voluntarily chosen to lie down in the same room and, moreover, in the same bed as the respondent

even though there was another unoccupied bed in the room. Moreover, I do not think the following passage from his reasons, which I quoted earlier, can be explained in any other way (at p. 389):

> [TRANSLATION] Even though [the complainant] afterwards regretted participating in these acts, the evidence does not establish that at the time of her participation, she was aware of some authoritative power which in some way obliged her to submit to the accused's advances. [Emphasis added.]

28 The trial judge, and, for that matter, the Court of Appeal, erred in law in incorrectly assessing the nature of the constituent elements of the offence set forth in s. 153(1) of the *Criminal Code*. In light of this error, it must now be determined whether the appeal should nevertheless be dismissed or should instead be allowed and, in the latter case, whether a verdict of guilty should be entered or a new trial ordered.

B. *Appropriate Order in the Case at Bar*

29 As I stated at the beginning of the analysis, I am of the view that this Court should enter a verdict of guilty by exercising the power conferred on it by s. 686(4) of the *Criminal Code*. I will begin by reviewing the powers of a court of appeal ruling on an appeal from a verdict of acquittal.

(1) Powers of a Court of Appeal on an Appeal from an Acquittal

30 The powers of a court of appeal ruling on an appeal from a verdict of acquittal are stated in s. 686(4) of the *Criminal Code*, which provides as follows:

> **686.** . . .
>
> (4) Where an appeal is from an acquittal, the court of appeal may
>
> (*a*) dismiss the appeal; or
>
> (*b*) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Even where a court of appeal finds that the trial judge erred in law, it will not necessarily mean that the appeal should be allowed. In *R. v. Morin*, [1988] 2 S.C.R. 345, Sopinka J. noted that the onus rests on the Crown to show that the trial judge's error affected the outcome of the trial in some way (at p. 374):

> The onus resting on the Crown when it appeals an acquittal was settled in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277. It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.
>
> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do. [Emphasis added.]

In *R. v. MacKenzie*, [1993] 1 S.C.R. 212, this Court recognized that this standard can be expressed in different ways. I there wrote at p. 248:

> A test of "might have been different" seems to me to simply be the converse of "would not necessarily have been the same," and stating the proposition in this way does not, of course, mean that the onus somehow shifts away from the Crown. I would note that the first of Chipman J.A.'s impugned statements is a virtual duplicate of an alternative expression of the majority's formulation in *Vézeau*, *supra*, at p. 291. These statements are simply different ways of saying the same thing. As such, I must reject the appellant's submission that the court below in some way misstated the standard of appellate review.

31 In *R. v. Cassidy*, [1989] 2 S.C.R. 345, this Court, *per* Lamer J. (as he then was), described the circumstances in which it is appropriate to enter a verdict of guilty when a court of appeal decides that an appeal must be allowed. He stated at pp. 354-55:

> The Crown replies that the Court of Appeal may allow a Crown appeal against an acquittal entered by a trial judge and substitute a verdict of guilty where the Crown establishes that an error of law was committed at trial, satisfies the Court of Appeal that, had there been a proper application of the law, the verdict would <u>not</u> have been the same, and further demonstrates that the accused should have been found guilty but for the error of law. In this respect, the principle that has been established at common law is that all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue (*Vézeau v. The Queen*, [1977] 2 S.C.R. 277, at pp. 291-92, and *R. v. Courville* (1982), 2 C.C.C. (3d) 118 (Ont. C.A.), at p. 125, aff. *sub nom., Courville v. The Queen*, [1985] 1 S.C.R. 847). [Emphasis in original.]

He continued as follows at p. 355:

> In view of the appellant's right to a fair hearing, it is important that the test established at common law be strictly applied.

(2) Application to the Case at Bar: Appropriate Order

32 To apply these principles correctly to the case at bar and to determine whether, but for the trial judge's error, there is a reasonable degree of certainty that the verdict would have been different, and if so, whether a verdict of guilty should be entered, it is necessary to consider the meaning and scope of the terms "position of authority" and "position of trust" used by Parliament in s. 153(1).

(a) *"Position of Authority" and "Position of Trust"*

33 The courts have had little to say on a theoretical level about the scope of these expressions, which are nowhere defined in the *Criminal Code*. Proulx J.A. wrote the following about the "position of authority" concept in *Léon*, *supra*, at p. 483:

> [TRANSLATION] In its primary meaning, the notion of authority stems from the adult's role in relation to the young person, but it will be agreed that in the context of this statutory provision, to be in a "position of authority" does not necessarily entail just the exercise of a legal right over the young person, but also a lawful or unlawful power to command which the adult may acquire in the circumstances.

For his part, Blair J. made the following comment in *P.S.*, *supra*:

> . . . [a position of authority] invokes notions of power and the ability to hold in one's hands the future or destiny of the person who is the object of the exercise of the authority. . . .

Finally, Blair J., also in *P.S.*, wrote the following about the term "position of trust":

> One needs to keep in mind that what is in question is not the specialized concept of the law of equity, called a "trust". What is in question is a broader social or societal relationship between two people, an adult and a young person. "Trust", according to the Concise Oxford Dictionary (8th ed.), is simply "a firm belief in the reliability or truth or strength of a person". Where the nature of the relationship between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts of reliability and truth and strength are put to the test. Taken together, all of these factors combine to create a "position of trust" towards the young person. [Emphasis added.]

34 In the absence of statutory definitions, the process of interpretation must begin with a consideration of the ordinary meaning of the words used by Parliament. *Le Grand Robert de la langue française* (2nd ed. 1986) defines the French word "*autorité*" as a [TRANSLATION] "[r]ight to command, power (recognized or unrecognized) to enforce obedience", which is, at least in substance, quite similar to the definition proposed by Proulx J.A. It adds that another meaning of "*autorité*" is [TRANSLATION] "[s]uperiority of merit or seductiveness that compels unconstrained obedience, respect, trust". *The Oxford English Dictionary* (2nd ed. 1989) suggests similar definitions for the English word "authority": "[p]ower or right to enforce obedience" and "[p]ower to influence the conduct and actions of others". I am in complete agreement with Proulx J.A. that the meaning of the term must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. As can be seen from these definitions, the ordinary meaning of the word "authority" or "*autorité*" does not permit so restrictive an interpretation. Furthermore, the comments of Proulx J.A. are entirely appropriate in view of the express intention of Parliament, which, in declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual

contact with a young person, intended to direct the analysis to the nature of the relationship between the young person and the accused rather than to their status in relation to each other. I will return to this.

35 The French word "*confiance*", according to *Le Grand Robert*, is a belief in or firm expectation of something, or faith in someone, and the confidence that results therefrom. In English, the word "trust" can have various meanings, especially in a legal context. However, considering that Parliament used the word "*confiance*" in the French version, I doubt that the word "trust" as used in s. 153(1) refers to the concept as defined in equity. I therefore agree with the reservations expressed by Blair J. "Trust" must instead be interpreted in accordance with its primary meaning: "[c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement". The word "confidence" is defined as follows: "[t]he mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith".

36 I would add that the definition of the words used by Parliament, like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament of protecting the interests of young persons who, due to the nature of their relationships with certain persons, are in a position of vulnerability and weakness in relation to those persons.

37 Even in light of these definitions, the concept of a "position of trust" is difficult, perhaps even more than that of a "position of authority", to define in the abstract in the absence of a factual context. For this reason, it would be inappropriate for

this Court to try to precisely delineate its limits in a factual vacuum, especially since very few judicial decisions have so far commented on this relatively recent provision of the *Criminal Code.* The fact that this appeal was brought as of right and that the issue was not fully argued in this Court makes this even more compelling.

38 It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the alleged offence. One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the "position" or "relationship" in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.

39 In this context, it should, as I have mentioned, be noted that Parliament did not elect to prohibit sexual contact with a young person by referring to the status of the accused in relation to the young person, so this factor cannot be decisive in itself. For example, as Ayles J.A. concluded in the case at bar, a teacher is not in a *de jure* position of trust or authority towards his or her students.

40 However, it would be excessively formalistic to refuse to recognize that certain persons, by reason of the role entrusted to them by society, will in fact and in the

vast majority of cases come within the ambit of s. 153(1) by reason of their status *vis-à-vis* the young person and, in particular, the relationship they are engaged in with that young person as a consequence of such status. In *Norberg v. Wynrib*, *supra*, at p. 255, I referred to the work of Professor Coleman, who in an article entitled "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 *Alb. L. Rev.* 95, identified a number of types of relationships, including that of a teacher and student, in which a "power dependency" relationship is inherent.

41 In my view, no evidence is required to prove that teachers play a key role in our society that places them in a direct position of trust and authority towards their students. Parents delegate their parental authority to teachers and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development. In the recent case of *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, this Court had occasion to discuss the role and social status of teachers. The following comments are relevant as an illustration and explanation of why teachers will, apart from exceptional circumstances, be in a position of trust and authority towards their students. I there wrote, at paras. 43-44:

> Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole. Allison Reyes considers the importance of teachers in the education process and the impact that they bear upon the system, in "Freedom of Expression and Public School Teachers" (1995), 4 *Dal. J. Leg. Stud.* 35. She states, at p. 42:

> Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher).

. . . teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. Reyes affirms this point in her article, *supra*, at p. 37:

> The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. [Emphasis added by Reyes.]

I find the following passage from the British Columbia Court of Appeal's decision in *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 21 B.C.L.R. (2d) 93, at p. 97, equally relevant in this regard:

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system.

In *R. v. Forde*, [1992] O.J. No. 1698 (Gen. Div.), a physical education and music teacher was convicted under s. 153(1) after having sexual relations with two of his students. In sentencing him, Cosgrove Dist. Ct. J. had this to say about the role of teachers in our society:

> Insofar as persons in the profession of the accused, teachers, it's quite apparent that they hold a special role in the life of young people. In our society the role of the teacher is second in importance only to the parent. I dare say that the parent views the teacher as being in his or her place while the child is away from the control of the parent. The parent entrusts the teacher with the parent's responsibilities, preparing the youths to compete and to contribute and to develop their individual talents in this very difficult world, both in our own community, in our national community and in the international community, an extremely

> difficult time for young people and their parents. The role, therefore, of the teacher, in my opinion, has to be seen in the context of what challenges face teachers and young people in our community in the context to which I've just referred.

(See also *Palmer*, *supra*.)

42 It is also revealing that when teachers are charged under s. 153(1) with touching their students, the courts have no difficulty finding that they had a relationship with their students to which s. 153(1) directly applies. See, for example, *Hann (No. 2)*, *supra*, *Dussiaume*, *supra*, *Forde*, *supra*, *Palmer*, *supra*, and *S.P.*, *supra*.

43 In short, I am of the view that in the vast majority of cases teachers will indeed be in a position of trust and authority towards their students. It must also be recognized that there may be situations where, owing to exceptional factual circumstances, this is not the case because, even though the accused has the status of a teacher, his or her relationship with a particular student is such that the element of trust or authority is totally absent. I will refrain from speculating and suggesting hypothetical examples to illustrate this. However, in the absence of evidence raising a reasonable doubt in the mind of the trier of fact, it cannot be concluded that a teacher is not in a position of trust and authority towards his or her students without going against common sense.

44 My colleague Justice Major writes, at para. 56, that the effect of such an interpretation is to create a presumption about teachers that makes the crime of sexual exploitation an absolute liability offence. It is true that my interpretation of the meaning and scope of the terms “position of trust” and “position of authority” does to some extent establish a presumption. It seems to me that it

would be incorrect in law, in view of the wording of s. 153(1) and the social role of teachers, to find that a teacher is not in a position of trust or authority in relation to his or her students where none of the evidence adduced at trial raises a reasonable doubt in the mind of the trier of fact as to the existence of a position of trust or authority. In my opinion, this approach in no way undermines the presumption of innocence. As this Court has stated, a presumption that imposes an evidential burden on the accused -- that is, a presumption requiring the trier of fact to draw a conclusion from proof of a basic fact if no evidence raising a reasonable doubt is adduced by either the Crown or the accused -- does not violate the presumption of innocence if the unknown fact follows inexorably from the basic fact. In such circumstances, there is no possibility that drawing this inference will result in the accused being convicted despite the existence of a reasonable doubt. My analysis indicates that in the absence of evidence raising a reasonable doubt on this point, teachers are necessarily in a position of trust and authority towards their students. (See the comments of Cory J. in *R. v. Downey*, [1992] 2 S.C.R. 10, at pp. 22 *et seq.*, where he analyzed the other relevant decisions on this question, *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, and *R. v. Whyte*, [1988] 2 S.C.R. 3.)

45 Finally, I disagree with my colleague's assertion that such a presumption has the effect of making the crime of sexual exploitation an absolute liability offence. An absolute liability offence is one in respect of which the Crown is not obliged to prove the existence of *mens rea*, as Dickson J. (as he then was) wrote in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299. I do not see how my analysis of the scope of s. 153(1) relieves the Crown of its obligation to prove beyond a reasonable doubt that the accused intended, for example, to engage in one of the

activities described in paras. (*a*) and (*b*) or that the accused did so "for a sexual purpose", the offence of sexual exploitation being a specific intent offence.

(b) *Application to the Case at Bar*

46 An analysis of the trial judge's findings of fact and the uncontested evidence leaves me in no doubt that entering a verdict of guilty is appropriate and desirable in the present case. When the acts alleged were committed, the respondent was 22 years old whereas the complainant had just celebrated her fourteenth birthday. During the school year that had ended just a few days earlier, he had been her physical education teacher. The respondent was aware that according to all indications he would be her teacher once again in the following school year, and he even mentioned this to the complainant after having the alleged sexual relations with her.

47 I find that there is in the case at bar no circumstance relevant to the determination of the nature of the relationship between the respondent and the complainant that could raise a reasonable doubt in the mind of the trier of fact as to the respondent's position of trust towards the complainant. The respondent was the physical education teacher of the complainant, his 14-year-old student. Even though the incident took place during the summer holidays, which could have raised a reasonable doubt in the trial judge's mind as to the element of authority, I have no doubt that, since the holidays had just begun and at any rate it appeared from the circumstances that the respondent would be the complainant's teacher once again, he was at the very least in a position of trust towards her. In my view, the disclosure by the School Board representative on cross-examination that there was

a slight possibility the respondent might not teach one of the Grade 9 classes and that the complainant might be in that class is not convincing.

48 While conscious of the fact that this Court's power to enter a verdict of guilty in circumstances such as these must be exercised only in the clearest of cases, I am satisfied that the respondent would have been found guilty but for the trial judge's error in law. Furthermore, to repeat the wording used in *Cassidy*, *supra*, the trial judge made all the findings necessary to support a verdict of guilty. This Court is therefore justified in this case in exercising the discretion conferred on it by s. 686(4) of the *Criminal Code* and entering a verdict of guilty.

III. Disposition

49 I would allow the appeal, set aside the verdict of acquittal, enter a verdict of guilty and order that the matter be remitted to the trial court to impose the appropriate sentence on the respondent.

The reasons of Sopinka and Major JJ. were delivered by

50 MAJOR J. (dissenting) -- This appeal involves the lives of two young people. The accused is a male physical education teacher, 22 years of age. The complainant is a young female, age 14 years. The appeal as of right by the Crown is restricted to a question of law only.

51 The accused was acquitted, by the trial judge and a majority in the New Brunswick Court of Appeal on concurrent findings of fact, of an offence alleged under s. 153(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. Section 153 reads:

> **153.** (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
>
> (*a*) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
>
> (*b*) for a sexual purpose, invites, counsels or incites a young person to touch directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

52 Section 153 was enacted by the Parliament of Canada in response to the report of the committee on sexual assault against children and youths entitled *Sexual Offences Against Children* (1984) (the “Badgley Report").

53 The Badgley Report recommended that teachers, along with some other classes of people, be conclusively presumed to be those in positions of trust or authority.

54 It is notable that Parliament did not accept that recommendation when drafting s. 153(1). It would appear obvious that Parliament thereby intended that each case be examined on its facts to determine whether an accused in fact occupied a

position of trust or authority towards a young person in the circumstances of the case giving rise to the allegation.

55 In light of the demonstrated legislative intent that was present in passing s. 153(1) it would be inappropriate for the Court to create as a matter of law a presumption of fact that teachers are automatically and in all circumstances in positions of trust or authority. That recommendation was before Parliament in the Badgley Report and rejected by it as evident by the words of s. 153(1).

56 My colleague's interpretation of s. 153(1) creates a presumption that teachers are automatically in positions of trust and authority. This makes sexual exploitation an absolute liability offence in circumstances where the accused is a teacher. Any absolute liability offence when paired with the potential for imprisonment violates s. 7 of the *Canadian Charter of Rights and Freedoms* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486) and should be avoided.

57 In addition this approach to s. 153(1) removes the obligation of the Crown to prove that an accused teacher was in a position of trust or authority, and places the obligation on the accused to disprove that such a position existed. This is a burden that an accused in our system should not bear. The accused's right in s. 11(*d*) of the *Charter*, to be presumed innocent, is paramount and should not be compromised, whether by presumption of fact or otherwise.

58 It is necessary in this appeal to determine whether on the facts before the trial judge, he could reasonably conclude that the degree of dependency necessary to establish a position of trust or authority was missing.

59 The importance of the role of teachers in our society is well established. In most cases, teachers will have established a nurturing relationship with their students and the degree of dependency necessary to establish a position of trust will exist.

60 However, in each case that position of trust should be based on the nature of the relationship between the particular teacher and the particular student and not simply on the fact that the occupation of one is a teacher.

61 That an accused is a teacher is a factor that a judge must consider when assessing the nature of the relationship between the accused and a young person to determine if the accused occupied a position of trust or authority in that respect.

62 As in my opinion the question of whether an accused is in a position of trust or authority towards a young person within the meaning of s. 153(1) is one of fact, a summary of the facts before the trial judge is useful in determining whether his findings are entitled to the usual measure of deference accorded to such findings.

63 The respondent, Yves Audet, taught physical education, a compulsory course for Grades 7, 8 and 9, at the school Domaine des Copains in Balmoral in the school year 1991-92. The complainant, J.S., was in Grade 8 and a physical education student.

64 The school term ended around June 20, 1992. On June 23, 1992, the respondent signed a new contract for the following year. Indications were that he would be teaching the same physical education course to the same grades.

65 On July 8, 1992, J.S., who was 14 years old, went to the Flagship, a bar in Campbellton, New Brunswick with her cousins, Joanne and Nathalie, aged 27 and 25 respectively. J.S. lied to her parents, telling them that she was spending the night at her friend's place.

66 The three cousins arrived at the bar at about 11:00 p.m. J.S. managed to enter the bar notwithstanding the fact that she was a minor. Nathalie was expecting to see a man she had met on the beach the day before named Serge Maltais. Nathalie phoned him from the bar, and a short time later he arrived with a friend, the respondent.

67 The respondent expressed his surprise at meeting J.S. in the bar, knowing she was under age. She explained that she was with her cousins. The adult cousins supplied J.S. with the beer she consumed that evening. The respondent, and presumably the others, also drank varying amounts of beer during their stay at the Flagship.

68 Around 2:00 a.m., the bar closed, and Nathalie offered Maltais and the respondent a ride. Maltais suggested that the group go to a friend's cottage, which they did. Shortly after they arrived at the cottage, Nathalie and Maltais went to the car, leaving the respondent in the cottage with J.S. and Joanne, the complainant's 27-year-old cousin.

69 For some unexplained reason, Joanne became angry and left the cottage. The respondent, feeling ill, left the living room and went to a bedroom with two single beds. He fell asleep in one of the beds. J.S. was alone in the living room.

70 Some time later, Nathalie and Maltais came back to the cottage. After repeated urging from Nathalie to go see what the respondent was doing, J.S. went to the bedroom and, notwithstanding that the other bed in the room was empty, got into bed beside the respondent and went to sleep.

71 In the early hours of July 9 when J.S. awoke, she was partially nude. At that time, she and the respondent engaged in consensual sexual touching. The respondent had not initiated or encouraged any type of intimacy between himself and J.S. at any time prior to waking and finding J.S. in his bed.

72 Approximately four months later in November 1992, following an inquiry by the school, not initiated by J.S., the respondent lost his job. He was forced to move to Louisiana, in the U.S., in order to find work.

73 The respondent was later charged with having touched a young person for a sexual purpose while being in a position of trust or authority, contrary to s. 153(1)(*a*) of the *Criminal Code*.

74 The trial judge concluded on the facts that the respondent was not in a position of trust or authority at the time of the sexual touching. In the circumstances of this case there was sufficient evidence to reach that conclusion. That finding of fact was supported by the majority in the Court of Appeal and should not and cannot be interfered with by this Court.

75 It bears repeating that the onus on the Crown to overturn an acquittal is a heavy one or substantial one. The Crown must demonstrate with a reasonable degree of

certainty that the verdict would not necessarily have been the same had the judge, without a jury, properly instructed himself. In this case, the trial judge did not commit any error of law. It follows that the Crown has not met its onus.

Disposition

76 I would dismiss the appeal.

Appeal allowed, SOPINKA *and* MAJOR JJ. *dissenting.*

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Solicitors for the respondent: Bertrand & Bertrand, Fredericton.