

CANADA / JUDGMENT

R. v. J.B.

2026 ONCA 44

COURT

Court of Appeal for Ontario

DECIDED

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Fairburn, J. Michal; Zarnett, Benjamin; Wilson, Darla A.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. J.B., 2026 ONCA 44[1]

DATE: 20260123

DOCKET: COA-23-CR-1001

Fairburn A.C.J.O., Zarnett and Wilson JJ.A.

BETWEEN

His Majesty the King

Respondent

and

J.B.

Appellant

Matthew Gourlay and Jacob Roth, for the appellant

Emma Evans, for the respondent

Heard: February 19, 2025

On appeal from the convictions entered by Justice Gerald E. Taylor of the Superior Court of Justice, on February 10, 2023, and from the sentence imposed on July 25, 2023.

Fairburn A.C.J.O.:

A. overview [1] The appellant was an actor and theatre director. M.D. and S.H. were high school students actively involved in theatre and were part of their high school's art program. The appellant, on a volunteer basis, directed a play at the high school. Sometime after the appellant's volunteer role ended, he commenced relationships, first with M.D. and later S.H., which led to sexual touching.

[2] The appellant was convicted of two counts of sexual exploitation involving M.D. and S.H. He was also convicted, in relation to S.H., of (1) child luring; (2) making sexually explicit material available to a child; and (3) possession of child sexual abuse and exploitation material.[2] The appellant received a global sentence of five-and-a-half years.

[3] The appellant challenges all convictions except the conviction for possession of child sexual abuse and exploitation material. The focus of the appeal is the sexual exploitation convictions.[3] There is no dispute that the appellant was sexually involved with each complainant when each of them was a “young person” (i.e., 16 years of age or more but under 18 years of age).[4] The issue is whether the appellant was in a “position of trust” relative to each complainant for purposes of s. 153(1) of the Criminal Code when the sexual touching occurred.

[4] The appellant challenges the trial judge's application of the legal standard for sexual exploitation to the facts of the case: although the trial judge referred to the relevant factors for determining whether the appellant stood in a position of trust, he misapplied them and considered irrelevant factors. With one exception, the appellant does not challenge the trial judge's factual findings.

- [5] In the event he fails on his conviction appeal, the appellant seeks a reduction in his global sentence. If, on the other hand, he succeeds on his conviction appeal, he argues that his six-month sentence for possession of child sexual abuse and exploitation material is demonstrably unfit.
- [6] For the reasons that follow, I would allow the conviction appeal, dismiss the sentence appeal, and order a new trial.

B. BACKGROUND [7] I will briefly set out the relevant legal framework and then review the facts and the decision below. From there, I turn to my analysis.

1. Legal background: the offence of sexual exploitation [8] Pursuant to s. 150.1(1) of the Criminal Code, no one under the age of 16 years old can provide legal consent to sexual activity, except in certain statutorily-defined circumstances, such as those set out in ss. 150.1(2), (2.1) and (2.2) of the Criminal Code.[5] Therefore, in general, for purposes of the criminal law, those who have attained the age of 16 years old are legally capable of consenting to sexual activity with others.
- [9] Of course, there are exceptions to this general rule that sexual touching is not an offence if consent is obtained from a person who is 16 or more, and this appeal fixes on one of them. Section 153(1) of the Criminal Code sets out the offence of sexual exploitation, an offence that for all intents and purposes criminalizes sexual activity with a “young person” – 16 years of age or above but under 18 years of age – if the accused is in one of four types of relationships relative to the young person:

Sexual exploitation

153 (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, 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.
- [Emphasis added.]

- [10] As can be seen, the four types of relationships captured by s. 153(1) are: (1) positions of trust; (2) positions of authority; (3) relationships of dependency; and (4) exploitative relationships. As can also be seen, the offences found in ss. 153(1)(a) and (b) are the equivalent of sexual interference in s. 151 and invitation to sexual touching in s. 152 of the Criminal Code. This means that, by virtue of s. 153(1), sexual interference and invitation to sexual touching become offences when perpetrated against those who are 16 and 17 years old, if one of the four relationships exists between the young person and the accused. In

these circumstances, ostensible consent to the sexual activity is irrelevant.

- [11] The Criminal Code does not define “position of trust”. As discussed below, of all the relationships set out in s. 153(1), trust is the most difficult to define. The Supreme Court and this court have established a number of factors to assist in making that determination: *R. v. Audet*, [1996] 2 S.C.R. 171; *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183. Those factors include: (1) the age difference between the accused and the young person; (2) the evolution of their relationship; (3) the status of the accused in relation to the young person; (4) the degree of control, influence or persuasiveness exercised by the accused over the young person; and (5) the expectations of the parties affected, including the accused, the young person and the young person’s parents or guardians: *Aird*, at para. 28. As detailed below, the trial judge purported to apply these factors as summarized in *R. v. R.T.*, 2017 ONSC 2625.

2. Factual background a. The appellant

- [12] The appellant was a well-known actor and director in the theatre community in the city where the complainants went to high school. The complainants were both involved in theatre and were enrolled in a special arts program in their high school.
- [13] A drama teacher at the high school asked the appellant, who was 37 years of age at the time, [6] to help direct a play at the school. M.D. thought that no one at the school, other than the drama teacher, was aware that the appellant was working on the production. She thought that the appellant did not get paid for the project and was just doing it as a “personal favour” for the drama teacher.
- [14] When the appellant’s work on the school play commenced, M.D. was already cast in it. S.H. never participated in the play. The appellant’s work on the play was time limited. Although the dates are not entirely clear from the record, the appellant likely began work on the play in or around December 2013 and finished before mid-March 2014.
- [15] After assisting with this school play, the appellant did not work on another production at the school. The sexual relationships with the complainants did not commence until after his work on the school play was done.

b. M.D.

- [16] Although M.D.’s birth date was never elicited at trial, there is no dispute that the Grade 11 student was 16 years of age in December 2013. M.D. met the appellant for the first time when she worked on the school play with him.
- [17] During their time working together on the school play, M.D. and the appellant would text each other. These texts were typically directed at scheduling and other matters. None of them were sexual in nature.
- [18] During March break in 2014 (after the school play was done), M.D. volunteered at a drama league festival. As it turned out, the appellant was also volunteering at that same festival. The festival was independent of the school but organized by the school’s drama teacher. At

trial, M.D. accepted that she and the appellant were on “equal footing” as volunteers at the festival. They chatted and texted during that time. The topic of the texts shifted from theatre to personal matters and eventually began to include sexual matters. M.D. could not recall who initiated the sexualized texting, but she testified that they texted “all day, every day.” She was excited to think that the appellant was interested in her.

- [19] During the drama festival, the appellant stayed in a hotel nearby. One evening, he invited M.D. to his room, but she declined to go.
- [20] Around this same time, both M.D. and the appellant had acting roles in a community production that was also independent of the school, and which ended on Easter weekend in April 2014 (one month following the drama festival). M.D. agreed that she did not obtain her role in the community production by virtue of her relationship with the appellant. She agreed that she obtained the role on her own merit and that it resulted from her “capabilities as an actor and a singer”. As with the drama festival, M.D. saw herself and the appellant as equals in the production.
- [21] One week after the drama festival and during rehearsals for the community production, M.D. accepted an invitation to go to the appellant’s home. She did not tell her mother she was going as she thought her mother would be upset given the age gap between the appellant and M.D. She also thought that the appellant would be in trouble if others learned of their soon-to-be sexual relationship.
- [22] On this occasion, M.D. and the appellant had their first sexual interaction, which began with kissing and ended in M.D. fellating the appellant. M.D. returned to the appellant’s home three to four more times, and they had oral sex and vaginal intercourse, always without a condom. On one occasion, she stayed at his home overnight and lied to her mother by telling her that she had stayed at a friend’s home.
- [23] M.D. believed that she and the appellant were in a relationship and that they felt the same way about each other. The appellant suggested to her that they not make the relationship public until she was 18, but she wanted to wait until she was 20 “so that people wouldn’t be suspicious about the origins of [their] relationship.” M.D. thought that her drama teacher at high school would be upset if he learned about the relationship. She was “paranoid” about others finding out about her relationship with the appellant because of their large age gap and the circumstances of their meeting.
- [24] The appellant would sometimes tell M.D. that she could select her own roles in plays he directed, although he did not offer her any roles during their relationship. He also encouraged her to “be creative” and “think about the things [she would] like to do” as he might be able to make them happen.

- [25] After the community production was complete in April 2014, M.D. ended the relationship because she had connected with someone closer to her age. She believed that the appellant was “speaking to other girls” and they had started to argue. They continued to text, though, through to her graduation from high school the following year, in 2015, and into the beginning of her undergraduate studies in another city.
- [26] M.D. agreed in cross-examination that when she and the appellant were involved in a sexual relationship, she thought that they were in love and that the sexual contact was just a “natural extension of [their] relationship.”
- [27] In 2020, M.D. went to the police and reported what happened, resulting in charges against the appellant.
- c. S.H.
- [28] In the 2013-14 school year, S.H. was 16 years old and in Grade 11. She went to the same high school and was in the same specialized arts program as M.D. and the two were friends.
- [29] Although S.H. may have met the appellant “briefly ... in passing” before his involvement at the school, they had no interaction at the school aside from perhaps “passing [each other] in the hallway”.
- [30] Just like M.D., S.H. volunteered at the drama festival during the March break of 2014. It was there that she had her first meaningful conversation with the appellant, mainly about theatre. S.H. knew that the appellant and M.D. were sending one another text messages and that he had invited M.D. to his hotel room that week.
- [31] Also, like M.D., S.H. had a role in the community production that followed the drama festival, which was independent of their high school. Prior to that time, she had not interacted with the appellant aside from their “crossing of paths” at the school and the “short conversations at the [drama] festival”.
- [32] It was during the community production that S.H. became close with the appellant. They started texting, and they chatted about theatre and life. She felt he was older and wiser than she was and was pushing her in the right direction. She believed he “really cared about [her] and that felt really good.”
- [33] The appellant would advise S.H. on the productions she should audition for, and his support made her feel special. She believed that they were dating and in love; she thought he was smart, funny, and made her feel “important”, and that they had good conversations.
- [34] The first sexual contact between the appellant and S.H. was in June 2014 and involved kissing inside his house. Then, in April 2015, one year after the community production, S.H. returned to the appellant’s home to obtain a monologue to use in an upcoming audition. There was more sexual contact on that occasion.

- [35] From April 5, 2015 to October 13, 2016 (S.H. turned 18 in the summer of 2015), S.H. and the appellant sent text messages back and forth, including photos of S.H.'s exposed breasts and vaginal area, photos of the appellant's erect penis and sexualized messages. Although S.H. was not comfortable sending naked photos of herself to the appellant, she did it because she wanted to be seen as alluring and attractive.
- [36] In a text message exchange on May 10, 2015, when S.H. was still 17 years of age, the appellant told S.H. that "it'll be a while before we can go public" but reassured her that age gaps in relationships were common in the arts community. He cautioned, though, that they had to be clandestine for the time being and that it would be "disastrous" to disclose their relationship, especially given the age gap. He suggested they could reveal it when she turned 18. On another occasion around this time, S.H. and the appellant texted about him coaching her for an upcoming audition, in response to which he said, "Yes, I wouldn't just be all over you, if that's what you think." As he said, his "girlfriend" had to be the "best" and, therefore, he was going to "push [her] ahead" as he expected she would do for him.
- [37] In June 2015, the appellant and S.H. engaged in more kissing and sexual touching while fully clothed. Sexual intercourse only started after S.H. turned 18 years of age. She then went to university and, eventually, stopped contact with the appellant.
- [38] In 2020, after M.D. went to the police and reported what had happened, the police interviewed S.H., after which the appellant was charged.
3. Reasons for conviction [39] Following his review of the facts, the trial judge reviewed the law, including the Supreme Court's decision in *Audet*. As for the relevant factors to be considered in determining whether the accused was in a position of trust, he drew upon the list set out in *R.T.*, at para. 36. This list, which is similar, although not identical, to this court's list in *Aird*, reads as follows:
- The age difference between the accused and the young person – the higher the age difference, the more likely it is that the relationship is a trust relationship.
 - The status of the accused – the more formal the status (teacher, father figure, big brother, mentor, etc.), the more likely it is that the relationship is a trust relationship.
 - The degree of control, influence or persuasiveness exercised by the accused over the young person.
 - The expectations of the parties affected, including the accused, the young person and the young person's parents.
 - The vulnerability of the young person – i.e. his or her level of intelligence, sophistication, independence, and maturity and relationship with his or her parents.

- Any grooming, pressuring, or incentivising behaviour on the part of the accused – i.e. denigrating the young person’s parents; engaging in sexual discussions and sexualizing the young person; and offering benefits, particularly things the young person cannot get or do at home (drugs, alcohol, etc.)
- [40] I would pause here to note that although the last factor mentioned in this list – grooming, pressuring and incentivising – was broken out into a separate category for consideration in R.T., and then repeated in the trial judge’s rendition of the law, one is left wondering about the need for this category. In *Aird*, Laskin J.A. reinforced the need to consider whether the accused exercised “control, influence or persuasiveness” over the young person. Although nothing turns on it in this appeal, grooming, pressuring and incentivising is all part and parcel of the *Aird* factor involving control, influence and persuasiveness. I would also note that this list of factors leaves out, perhaps by oversight, one of the *Aird* factors previously reviewed in these reasons, specifically, the evolution of the relationship.
- [41] Having reviewed the law, the trial judge went on to apply the law to the facts as he found them.
- a. Age differential
- [42] First, he pointed to the fact that there was a 20-year age difference between the appellant and the complainants, finding it to be a “significant age differential.”
- b. Status of the accused
- [43] Second, he noted that although the appellant was not a teacher at the high school, he was brought into the school by the drama teacher, and this was the “catalyst” that brought him into contact with both complainants. (The appellant challenges the finding that school was the “catalyst” that brought him into contact with S.H., who did not participate in the school play.)
- [44] As well, the trial judge noted that both complainants were enamoured by the appellant’s “status” in the local theatre community. M.D. testified that she thought working with the appellant as a director would look good on her resume. S.H. testified that she knew of the appellant and considered him a well-respected actor and director even before he helped at the high school. Further, in May 2015, S.H. and the appellant discussed an upcoming audition, and he suggested that he could coach her. For the trial judge, these factors were “evidence of the status of [the appellant] as viewed from the perspective of [M.D.] and [S.H.]” (emphasis added). Although the relationships were “informal”, both complainants “thought [the appellant] was in a position to positively influence their careers.” The trial judge noted that “[a]t a minimum, [the appellant] did nothing to disabuse them of this idea, and it could be considered that he welcomed the adulation.”
- c. Expectations of the parties

[45] Third, the trial judge considered the expectations of the parties. He found it significant that both complainants testified that they knew their relationships with the appellant were “wrong” and that their mothers would be “upset” if they found out about the relationships. Both complainants had discussions with the appellant about when it would be appropriate to make their relationships public. In both cases, he suggested doing so when they turned 18. The trial judge found that the appellant’s text message to S.H. in May 2015, indicating that it would be “disastrous” if their relationship became publicly known, was evidence that the appellant “was aware that the relationships were wrong.”

[46] Also of significance to the trial judge was that both complainants wished to develop long-term relationships with the appellant. He had given them both pet names, and S.H. testified that she and the appellant had expressed their love for one another. The trial judge found this to be evidence of the complainants’ “expectations of the relationships” and that the appellant did nothing to disabuse them of such expectations.

d. Vulnerability of the complainants

[47] Fourth, the trial judge turned to what can be interpreted as an assessment of the complainants’ vulnerability. He noted that although both M.D. and S.H. were 25 years old at the time of trial and both seemed intelligent and confident, he thought that they had both matured greatly in the intervening years and stressed that they were 16 years of age and in Grade 11 when their relationships with the appellant began.

e. Degree of control, influence or persuasiveness

[48] Finally, the trial judge found that, once the texting between the appellant and the complainants began, it “quickly became sexual in nature.” The appellant “willingly participated in the evolution of the relationships from appropriate conversations to sexual intercourse.” The trial judge agreed with defence counsel that there was “little or no evidence of control, influence or persuasiveness” exercised by the appellant over either complainant.

f. Conclusion

[49] The trial judge concluded as follows:

[The appellant] took advantage of his position in the way he was seen by [M.D.] and [S.H.]. He took advantage of them for his own sexual gratification. He was the adult. It was his responsibility to set appropriate boundaries. He did exactly the opposite. [Emphasis added.]

C. DISCUSSION 1. Positions of the parties [50] The appellant maintains that whether an accused is in a position of trust is a question of mixed law and fact. In this case, says the appellant, the trial judge committed extricable errors of law in articulating and applying the legal standard and so his decision is reviewable on a correctness standard.

- [51] The appellant concedes that during the time he was directing the school play he was in a position of trust relative to M.D., who participated in the play. The problem, however, is that the trial judge failed to explain how a relationship of trust persisted after the school play was over and how it spilled over to S.H., who was not involved in the school play.
- [52] Relying on the Supreme Court's decision in *Audet*, at para. 35, the appellant says that for a person to be in a position of trust, the accused must have assumed some responsibility or obligation over the young person. By way of illustration, the appellant points to the model jury charge that lists parents, teachers, employers, caregivers, coaches and youth group leaders as examples of people who may be in positions of trust: David Watt, *Watt's Manual of Criminal Jury Instructions*, 2024 ed. (Toronto: Thomson Reuters, 2024), at p. 522 (Final 153-A). Adults who assume such roles have some responsibility toward the young person, such that the young person is entitled to rely on the adult. According to the appellant, the trial judge ignored this responsibility/reliance feature of a position of trust. Instead, the trial judge focused largely on the complainants' subjective impressions of the appellant.
- [53] A second feature of a relationship of trust, says the appellant, is that the young person must be especially vulnerable in relation to the accused, a vulnerability that derives from the accused's position: *Audet*, at para. 33. That said, the mere existence of a power imbalance – which exists in so many relationships, including ones that have no trust element – is not enough to ground criminal liability under s. 153(1).
- [54] As for the *Audet/Aird* factors, they are not a test but rather an attempt to identify indicia or markers of a trust relationship. The appellant argues that, in considering those factors, the court must not lose sight of the fact that an adult who has assumed no responsibility toward a young person will not be in a "position of trust" and that vulnerability alone is insufficient to impose liability.
- [55] Here, says the appellant, the trial judge did not view the factors through a principled lens. Instead, he misconstrued the notion of "status" and relied on tangential or irrelevant factors, largely rooted in the complainants' subjective impressions of the appellant to find a position of trust.
- [56] In contrast, the respondent maintains that the trial judge considered and applied the correct criteria, and the appeal should be dismissed. Based on established case law, a trial judge must undertake a contextual analysis to assess whether an accused was in a position of trust. The status of the accused is just one factor to be considered. Other important factors include the opportunity to persuade or influence. The appellant's two-pronged analysis renders the balancing of factors redundant, is inconsistent with existing case law and risks conflating a position of trust with a position of authority.
- [57] The respondent agrees that when a position of trust exists, the accused has a responsibility or obligation toward the young person. For the respondent, though, the responsibility or obligation does not give rise to the position of trust but arises from an existing position of trust. That responsibility or obligation reflects nothing more than an undertaking not to

engage in sexual activity with the young person because of the position of trust. Here, says the respondent, the appellant entered into what amounted to a mentoring or coaching relationship with the complainants after the appellant's stint at the high school, which placed him in a position of trust.

2. Position of trust: the legal framework [58] It is important in a case of this nature to distinguish between general morality and the criminal law. The criminal law does not exist to criminalize immorality: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 23. Although the two will frequently overlap, there are situations where the criminal law does not track with precision contraventions of societal moral norms.
- [59] Here, there is no question that many would consider the appellant's conduct worthy of moral condemnation. Even the appellant, through counsel on appeal, is prepared to acknowledge, in hindsight, that his conduct in relation to M.D. and S.H. is worthy of societal condemnation – a man in his mid-30's having sexual relations with 16- and 17-year-old high school students. The question, though, is not whether he engaged in morally offensive conduct, a question that most would find easy to answer here. Rather, the question is whether he engaged in criminal conduct.
- [60] In answering that essential question, it is critical to bear in mind that the criminal law insists not only upon restraint, but also upon certainty, predictability and fair notice. There must always remain a clear and ascertainable line between criminal and non-criminal conduct: *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at paras. 69 and 135; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 42. Quite simply, the stakes are high, and people need to know where the line is so that they have a chance of knowing when they are about to cross it.
- [61] As already discussed, a 16- and 17-year-old can consent to sexual activity, but there can be no consent if the relationship between the young person and the accused falls into one of the four categories of relationships governed by s. 153(1) of the Criminal Code. Parliament criminalized sexual activity in the context of those relationships because it is accepted that 16- and 17-year-olds are still at a tender time in their lives, and thus in a heightened state of vulnerability in certain relationships involving power imbalances: *Aird*, at para. 28; *Audet*, at para. 14. In determining whether one of those relationships exists, it is irrelevant "[t]hat the young person consents, does not appear vulnerable, or does not subjectively view the relationship as one of trust, authority, or dependency or as exploitative": *Aird*, at para. 24.[7]
- [62] Of all the relationships set out in s. 153(1), relationships of trust are the most difficult to define: Jeremy Patrick, "Sexual Exploitation and the Criminal Code" (2006) 43:4 *Alta. L. Rev.* 1057, at pp. 1062-1063. Parliament elected to not define "position of trust" or to enumerate the specific categories (e.g., teacher) that would give rise to a position of trust under s. 153(1). This is likely because of the varied circumstances in which such relationships can arise and because of the "very fact specific nature of such an inquiry": *Aird*, at para. 27, citing *R. v. P.S.*, [1993] O.J. No. 704 (Gen. Div.), at para. 31; *aff'd R. v. Sharma*, [1994] O.J. No.

3775 (C.A.).

- [63] In the absence of a statutory definition of “trust”, the Supreme Court considered its meaning for purposes of sexual exploitation. La Forest J. noted its primary meaning: “[c]onfidence in or reliance on some quality or attribute of a person or thing, or the trust of a statement”: Audet, at para. 35. He then noted that the word “confidence” is defined as the “mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith.” [8] As La Forest J. put it, the definition of “position of trust” must be understood in light of the purpose pursued by Parliament, namely protecting the interests of young persons who are, by virtue of the relationships in which they find themselves, “in a position of vulnerability and weakness in relation to those persons” [emphasis in original]: at para. 36. Similarly, the purpose of s. 153(1) should infuse the determination in each case.
- [64] In an attempt to provide more concrete guidance on how to recognize when an adult’s position relative to a young person has crystalized in a position of trust, La Forest J. in Audet listed three factors that would act, in “many cases”, as relevant indicia of such a position: (1) the age difference between the accused and the young person; (2) the evolution of their relationship; and (3) “above all” the status of the accused: Audet, at para. 38.
- [65] Building upon the Audet criteria in Aird, Laskin J.A. pointed to two additional factors: (1) the degree of control, influence or persuasiveness exercised by the accused over the young person; and (2) the expectations of the parties affected, including the accused, the young person and the young person’s parents or guardians: at para. 28.
- [66] Importantly, these factors are not a legal test or a mechanical checklist (e.g., three or more factors equals a position of trust). Rather, they are relevant considerations that include indicia or hallmarks of relationships of trust for purposes of s. 153(1). They also include other relevant considerations. No one consideration is determinative of a trust relationship, and all are to be interpreted in accordance with the primary meaning of “trust”: Audet, at para. 35; Aird, at para. 29. What follows is a brief review of the Audet/Aird factors and how they assist in determining those relationships that are positions of trust for purposes of s. 153(1).

a. Status

- [67] The first and foremost factor is the question of “status”. I say first and foremost because in Audet, at para. 38, La Forest J. was clear that, in most cases, the status of the accused would be “above all” relevant in determining whether the accused stood in a position of trust vis-à-vis the young person. In other words, although “status” is not determinative of a position of trust, it will be highly relevant in most cases.

- [68] As reflected in the case law[9] and Watt’s Manual of Criminal Jury Instructions, “status” envelops the accused’s role vis-à-vis the young person. The role may be a formal one or an informal one, but the accused’s status is highly germane to identifying a trust relationship founded on confidence in and reliance upon the adult not to exploit the privileged position they have assumed.
- [69] Generally speaking, where the adult has taken on a formal role – such as a teacher, a coach, a choir director, a tutor, etc. – it is more likely that they will be in a position of trust: R.T., at para. 36. As stated in Audet, “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”: at para. 40. Teachers, for example, generally occupy positions of trust as they are entrusted with the responsibility of educating students, are inextricably linked to the integrity of the school system, exercise influence over students and may be perceived to be “wearing their teaching hats even when off duty”: at para. 41.
- [70] Determining whether an adult was in a position of trust can become more difficult where the adult was not in a formal role relative to the young person, where the adult’s role changed or where the adult had more than one role. These cases fall along a spectrum and, of course, each must be considered on its particular facts.
- [71] Where an adult has undertaken an obligation or responsibility relative to the young person, the adult may be more likely to be in a position of trust. The fact that an adult has an obligation or responsibility toward the young person at the time of the sexual encounter may increase the power imbalance between them, and the young person or their parents or guardians may be more likely to rely on and have confidence in that adult.
- [72] That said, contrary to one of the appellant’s submissions, an adult may be in a position of trust even if the adult has no obligation or responsibility. In Audet, the accused had been the young person’s teacher. But the sexual encounter took place with the young person during the summer vacation. The majority did not identify any obligations or responsibilities undertaken by the teacher relative to the young person while school was out. But in light of the short period of time between the end of the school term and the sexual encounter, and the likelihood that the accused would again be the young person’s teacher when school resumed in the fall, the majority found a position of trust to exist at the time of the sexual encounter. In other words, the position of trust persisted despite the official teacher role being on pause. This conclusion aligns with the purpose of s. 153(1) – to protect young people where there is a power imbalance.
- b. Degree of control, influence or persuasiveness

[73] Another key factor to be considered is the degree of control, influence or persuasiveness exercised by the adult. As a consequence of the confidence and reliance at the core of a relationship of trust, the adult is in a privileged position to influence, persuade or control the young person. Section 153(1)'s very purpose is to safeguard a young person against the abuse of such a position.

c. Expectations of the parties

[74] Another important factor is the expectations of the parties. This includes not just the expectations of the young person but also the expectations of the adult and, if relevant, the expectations of the young person's parent(s) or guardian(s). As noted, an adult may be in a position of trust even if the young person does not subjectively view the relationship as one of trust. Accepting that subjective expectations may nonetheless be relevant in some cases, an element of objectivity must come into play. For instance, in *Aird*, at para. 36, where the accused was a student teacher hired to tutor the complainant, Laskin J.A. noted that the complainant and her mother "looked to the appellant for his help and guidance." In the circumstances, the complainant was "entitled to trust that he would not take advantage of his position and use it to start a sexual relationship with her": *Aird*, at para. 36 (emphasis added). In other words, the complainant and her mother had a reasonable basis to trust or rely upon the accused to not abuse his privileged position. Conversely, the accused ought to have known that the complainant and her mother were relying upon him to maintain a professional relationship.

d. Age difference

[75] To state the obvious, s. 153(1) liability typically only arises where an adult invites sexual touching or engages in sexual touching with a young person. The fact that there is an age difference is not determinative since it is not illegal for an adult to engage in consensual sexual touching or to invite sexual touching with a young person unless the adult falls within one of the four s. 153(1) categories. That said, as the case law recognizes, a large age difference between the adult and young person may be important, as it may suggest a greater reason for the young person to have confidence in and place reliance on the adult, and in turn give the adult a greater ability to persuade, control and influence the young person.

e. Evolution of the relationship

[76] Finally, as *Audet* and *Aird* recognize, relationships may change and evolve over time. The question for the trier of fact is whether a position of trust existed at the time of the sexual touching. The answer to the question will be influenced by what position the adult held relative to the young person before the sexual touching, and also by the parties' expectations, reasonably derived, as to the future relationship. This case illustrates why the "evolution of [the] relationship" is a relevant factor.

f. Summary

- [77] In summary, the key factors that can assist in determining whether an adult is in a “position of trust” for purposes of s. 153(1) are the accused’s status, their ability to persuade, influence or control the young person (which may arise from their status), and the expectations of the parties (which may be shaped by the accused’s status). In assessing those factors, the age gap and the evolution of the relationship may be relevant. An adult who has undertaken an obligation or responsibility relative to a young person may be more likely to be in a position of trust than one who has not done so. In considering the relevant factors, the trier of fact must not lose sight of the ultimate question the factors are to inform—whether the adult was in a relationship founded on notions of confidence and reliability, which are the essentials of a position of trust, at the time of the sexual touching. Parliament elected not to criminalize sexual relationships between those who are 16 or 17 and adults, based solely on age or because of society’s disapproval. Rather, s. 153(1) targets categories of relationships that render the young person particularly vulnerable to sexual exploitation.
- [78] I now return to the trial judge’s reasons in this case.
3. The trial judge erred in law in analyzing whether the appellant was in a position of trust [79] I agree with the appellant that the trial judge erred in his analysis. Respectfully, his reasons demonstrate that he lost sight of what a relationship of trust is really about. I say this for several reasons.
- [80] The first relates to his assessment of the appellant’s status relative to M.D. and S.H. at the time he engaged in sexual touching with them, which was after he completed his stint as a director of the school play.
- [81] The trial judge found that the appellant’s work on the play at the high school was the “catalyst that brought [the appellant] into contact with [M.D.] and [S.H.].” That is certainly true when it came to M.D. who acted in that play.
- [82] As for S.H., although the appellant alleges a misapprehension of the evidence on this point, I do not see it that way. The fact is that the appellant was in S.H.’s high school to produce the play. They had no contact at the school, although according to S.H., they may have crossed paths in the hallway. In my view, the reference to the school being the catalyst that brought him “into contact” with S.H., was simply an awkward turn of phrase. The trial judge was not suggesting they had actual contact at the school, only that his volunteer work at the school was the first step that brought them into the same orbit. Although a bit of a stretch when it comes to S.H., as at most the appellant and S.H. only passed in the hallway, the fact is that he was in her orbit by being at the school that she attended.

- [83] In any event, the appellant appropriately concedes that when he was involved in directing the school play, he was in a position of trust relative to M.D., who was in the play. However, he emphasizes that there is no indication in the reasons for judgment as to why the appellant's status continued past the point of his volunteer work at the school. Nor, he notes, is there any indication as to why the appellant's status in relation to S.H. had any relevance to what was to come, other than perhaps passing in the hallway at the school.
- [84] Although the appellant's work at the school may have been, as described by the trial judge, the "catalyst" that brought him into the complainants' orbits, the question was how his status evolved after his volunteer role at the school ended and, ultimately, what his status was at the time the sexual touching happened. Unfortunately, the trial judge did not specifically address this point. This, respectfully, was an error. Instead, in assessing the appellant's "status", the trial judge simply noted the "catalyst" that had earlier brought the complainants into contact with the appellant and then turned to focus on the complainants' subjective views of the appellant.
- [85] To this end, the trial judge recited what he saw as "evidence of the status of [the appellant] as viewed from the perspective of [M.D.] and [S.H.]" (emphasis added). The trial judge noted that: (1) both were enamoured by the appellant's "status" or stature within the local theatre community; (2) M.D. thought working with the appellant as a director would look good on her resume; (3) S.H. thought the appellant was a well-respected actor and director; and (4) "both thought [the appellant] was in a position to positively influence their careers", and he did nothing to disabuse them of that idea. The trial judge also mentioned that the appellant offered to coach S.H., although it is important to note that this offer was not made until around one year after the appellant and S.H. had first engaged in sexual touching.
- [86] Later in his reasons, the trial judge stated: "[the appellant] took advantage of his position in the way he was seen by [M.D.] and [S.H.]" (emphasis added). In other words, the appellant's status was not defined by any formal or even informal role he had assumed relative to the complainants, including the role he had while a volunteer at the school play. Essentially, his role or status was in the eye of the beholder.
- [87] As discussed, although "status" is not determinative, in most cases it "above all" will be relevant in determining whether an accused was in a position of trust. The focus of the inquiry must be on what role the accused assumed in relation to the young person. The accused's status or role cannot be determined solely from the subjective perspective of the young person.
- [88] Here, the trial judge did not identify what, if any, role the appellant had assumed relative to the complainants at the time of the sexual encounters. Instead, the trial judge focused on the complainants' perceptions of the appellant's stature within the local theatre community and what they thought he might be able to do to help them careerwise. Although the appellant's stature in the local community might well go to the issue of the complainants' vulnerability – they were high school students interested in having a career in theatre and

he was a well-known actor and director in the community – vulnerability alone cannot give rise to a position of trust.

- [89] Unfortunately, the balance of the trial judge’s analysis includes consideration of largely irrelevant or tangential facts.
- [90] First, the trial judge considered the fact that the complainants both testified that they knew their relationships with the appellant were “wrong” and that the appellant had shared with S.H. sentiments suggesting that he too knew that his relationship with her was “wrong”. Indeed, the appellant said that it would be “disastrous” if his relationship with S.H. became publicly known. As the trial judge put it, “[t]his was evidence showing that [the appellant] was aware that the relationships were wrong.” Accepting that was the case, the fact that a relationship is viewed as socially unacceptable or morally wrong does not mean that it necessarily crosses the line for purposes of s. 153(1). A relationship between a 16-year-old or 17-year-old and an older adult that does not fall within one of the categories under s. 153(1) may also be viewed as “wrong” or socially unacceptable.
- [91] Second, the trial judge relied on the fact that the complainants wanted the relationships to be long-term. He noted that the appellant gave M.D. and S.H. “pet names”, and the appellant and S.H. professed their “love for one another”. The trial judge characterized this as evidence of their “expectations of the relationships”. With respect, this focus on romantic expectations misunderstands the relevance of “expectations of the parties”. As noted, this factor is focused on expectations as to whether the young person could rely on the adult not to take advantage of their privileged position. It is difficult to see how the complainants’ hope for romantic long-term relationships and evidence of romantic words and gestures are relevant to the specific question of whether there existed a position of trust, since those factors also exist in relationships that do not run afoul of s. 153(1).
- [92] Third, the trial judge agreed with the respondent that there was “no evidence that [the appellant] was anything other than a willing participant” in all of the sexual discussions and sexual activities between him and the complainants. Willing participation in a relationship is not an indicator of a position of trust. This factor could also describe sexual relationships not involving a position of trust.
- [93] Fourth, the trial judge noted that, at a minimum, “[the appellant] willingly participated in the evolution of the relationships from appropriate conversations to sexual intercourse.” Although it is relevant and important to consider the “evolution of the relationship”, this factor is aimed, for example, at assessing how a relationship between a young person and an adult came about as a consequence of the adult’s status: Audet, at para. 40. Especially when the accused’s role has changed, the trier of fact is required to consider whether the evolution was away from a previously existing position of trust, or the continuation or creation of one. The trial judge did not analyze this factor that way. It is difficult to see how the fact that the appellant willingly participated in the evolution of the relationships is relevant to whether the appellant was in a position of trust at the relevant time.

- [94] As for other factors, the trial judge agreed with the defence that there was “little or no evidence of control, influence or persuasiveness”. Although this was a factor that could suggest that the appellant was not in a position of trust at the relevant time, the trial judge never grappled with that finding or considered how the absence of evidence of control, influence or persuasion impacted his analysis as to whether there was a position of trust.
- [95] Instead, he went on to immediately conclude that despite, the absence of control, influence or persuasiveness, the appellant had taken “advantage of his position in the way he was seen by [the complainants]” and used them for his own “sexual gratification.” The appellant “was the adult” and “[i]t was his responsibility to set appropriate boundaries.”
- [96] Determining whether an adult was in a position of trust is a qualitative, contextual exercise. Sometimes that makes it challenging to draw the legal line between criminal and non-criminal conduct. Unfortunately, in this case the trial judge erred in law in that line-drawing exercise and the matter must be sent back for a new trial.[10]
4. Sentence appeal [97] In light of my conclusion on the appeal from conviction, all that remains of the sentence appeal is the appellant’s six-month sentence for possession of child sexual abuse and exploitation material.
- [98] The appellant argues that the trial judge’s reasons for sentence on this count were blended into the findings relating to the sexual exploitation counts. Taking the latter counts out of the equation, he argues that a six-month custodial sentence “for receiving explicit images in a legal relationship” is demonstrably unfit. On this basis, he asks this court to convert this six-month term to a conditional sentence. He also asks that the possession of child sexual abuse and exploitation material offence be removed from the trial judge’s order that he comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 (“SOIRA”).
- [99] The respondent argues that the six-month custodial sentence for the possession of child sexual abuse and exploitation material is fit even if the appellant’s appeal from conviction is allowed. The respondent stresses that the appellant is an adult and not close in age to the victim, and that he kept multiple images of S.H. on his electronic devices for many years. Accordingly, although a conditional sentence is legally available for this offence, the respondent submits that a denunciatory sentence is warranted.
- [100] I would not interfere with this sentence. Whether the appellant is ultimately found guilty of sexual exploitation in relation to S.H. or not, the possession of these images is a serious offence on its own. This is a freestanding offence that undoubtedly had a grave impact on the complainant.
- [101] In my view, a six-month custodial sentence for this offence is entirely appropriate.
- [102] As for the SOIRA order, the appellant was sentenced during the transitional period before Bill S-12, An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act, S.C. 2023, c. 28, came into force. A 20-year SOIRA order was made. At that time, the order was mandatory in respect of a

conviction for possessing child sexual abuse and exploitation material. Section 490.04 of the Criminal Code sets out the procedure for seeking an exemption from an order made under s. 490.012 before the coming into force of Bill S-12. The panel has been provided with no reason why the sentencing judge erred in imposing the 20-year term. If the appellant wishes to avail himself of the procedure in s. 490.04, he may do so.

D. conclusion [103] The conviction appeal is allowed, the convictions (other than the conviction for possession of child sexual abuse and exploitation material) are set aside and a new trial is ordered. Leave to appeal sentence (as it relates to the remaining conviction for possession of child sexual abuse and exploitation material) is granted but the sentence appeal is dismissed.

Released: January 23, 2026 JMF

“Fairburn A.C.J.O.”

“I agree. B. Zarnett J.A.”

“I agree. D.A. Wilson J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Although the indictment was framed as possession of “child pornography”, this term has recently been replaced in the Criminal Code with the term “child sexual abuse and exploitation material”: see, by way of example, s. 163.1 of the Criminal Code.
- [3] The parties agree that if the appellant succeeds on the sexual exploitation count involving S.H., his convictions for luring and making sexually explicit material available to a child must also be set aside because the latter counts were allegedly committed “for the purpose of” committing the sexual exploitation of S.H.
- [4] See s. 153(2) of the Criminal Code. In the case of S.H., the sexual activity continued past the age of 18 years old.
- [5] The age of consent was increased from 14 to 16 years old in 2008: see Tackling Violent Crime Act, S.C. 2008, c. 6.
- [6] Although the sentencing judge found that the appellant was 38 years old in March 2014, he was in fact 37 years old in March 2014. Nothing turns on this fact.
- [7] Just a word about terminology. Although, theoretically, a person who is not an adult could stand in a position of trust relative to a 16- or 17-year-old young person, except in the most rare of circumstances, it is hard to imagine a young person in a position of trust relative to a complainant in the same age group or a young person in a position of trust who is younger than the complainant. Although I would not rule out the possibility of this occurring, it would be highly unusual: see, for example, *R. v M.(J.L.)*, 2003 CanLII 48100 (NL PC). Accordingly, as in Audet, I have opted to use the shorthand “adult” in these reasons.

- [8] Similarly, Blair J. (as he then was) saw notions of “safety and confidence and reliability that the special nature of the relationship will not be breached” as grounding positions of trust: P.S., at para. 37.
- [9] See e.g., *R. v. Gal*, 2023 ONSC 3867 and *R. v. Howell*, 2012 ONSC 846, *aff’d* 2015 ONCA 728 (spiritual leaders); *R. v. M. (J.B.)* (2000), 145 Man. R. (2d) 91 (C.A.) (drug treatment facility intern); *R. v. D.E.*, 2009 CanLII 23378 (ON SC) (family member); and *R. v. V.K.*, [2001] O.J. No. 2317 (music teacher).
- [10] The appellant has requested as his remedy a new trial on the M.D. counts and an acquittal on the S.H. counts. In my view, the various counts on this indictment were linked and should be kept together. Accordingly, and as requested, as the remedy on the M.D. counts is a new trial, all counts (except the possession of child sexual abuse and exploitation material count) will be returned to a new trial.

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