SEXUAL EXPLOITATION AND THE *CRIMINAL CODE*

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I. INTRODUCTION

When a 19-year-old McDonald's cashier has consensual sex with the new 17-year-old employee he has been asked to show around and train, is this a case of normal teenage dating or a serious criminal offence warranting several years behind bars?[1] Under s. 153 of the *Criminal Code*, it is a straightforward case of "sexual exploitation" punishable by up to five years in prison.[2]

Since the 1980s, the *Criminal Code* has contained a prohibition on persons in positions of trust, authority or support[3] having sex with persons aged 14 to 17 (inclusive).[4] Under new legislation recently proposed in Parliament as Bill C-2,[5] the sexual exploitation offence would be expanded to include "a relationship with a young person that is exploitative of the young person"[6] and the penalty would be raised to up to ten years' imprisonment.[7]

Few people would disagree with the notion that minors of at least certain ages should be protected from sexual exploitation. As a government consultation paper put it, "[t]here will always be some people who seek out vulnerable children to satisfy their own dangerous impulses, frustrations, or need to dominate, in spite of the law and the disapproval of the vast majority of Canadian society."[8] Crown attorneys have successfully used s. 153 in several prosecutions against adults who have had sex with young persons.[9]

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1 A similar example is given in *R. v. Weston*, [1997] A.J. No. 263 at para. 60 (Q.B.) (QL) [*Weston*].

2 See *Criminal Code*, R.S.C. 1985, c. C-46, s. 153(1).

3 See *ibid.* More precisely, the relevant categories are "trust," "authority" and "dependency." Because the first two describe the adult in relation to the minor, while the third describes the minor in relation to the adult, I have from time to time for stylistic reasons used the corresponding word "support" in place of "dependency."

4 See *ibid.*, s. 153(2). Such persons are categorized as "young persons" and will be referred to as such throughout this comment. Because the general age of consent in Canada is 14, sexual contact by adults with persons younger than that age would be illegal even in the absence of relationships of trust, authority or dependency. See *ibid.*, s. 150.1.

5 After this article was written, Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004 [Bill C-2], won passage in Parliament and was granted Royal Assent on 20 July 2005, S.C. 2005, c. 32. The portions of Bill C-2 dealing with the crime of sexual exploitation (discussed in this comment) were not amended in committee and have been enacted into law.

6 *Ibid.*, cl. 4(1).

7 See *ibid.*, cl. 4(2). This penalty is the maximum for prosecutions that proceed by way of indictment. The offence is also punishable by summary conviction.

8 Canada, Department of Justice, *Child Victims and the Criminal Justice System: A Consultation Paper* (Ottawa: Department of Justice, 1999) at 1 [Department of Justice, *Consultation Paper*].

9 Several reported decisions will be discussed in subsequent sections of this comment. Although dated, one study indicated that 58 percent of sexual exploitation convictions in provincial courts resulted in incarceration. See Julian V. Roberts, "New Data on Sentencing Trends in Provincial Courts" (1995) 34 C.R. (4th) 181. A partial list of cases where prosecutions under s. 153 succeeded and failed, along with

No law review articles have been published to date on the scope and application of the *Criminal Code*'s sexual exploitation offence. The next few sections of this comment address the following questions: (1) what is the rationale for the sexual exploitation offence? (2) how have the courts interpreted "position of trust or authority" and other statutory language? and (3) is an expansion of the law necessary?

II. BACKGROUND

Parliament's decision to create a sexual exploitation offence is often linked to the 1984 publication of *Sexual Offences Against Children*, generally known as the Badgley Report.[10] The Badgley Report proposed making it an offence for persons in relationships of trust to have sexual contact with minors and set forth a long list of people that should be automatically deemed to be in positions of trust: parents, teachers, babysitters, employers and more.[11] One court summarized the general principle of the Badgley Report's sexual exploitation proposal as being that

> adults, and those in positions of influence or example, should not be permitted to take advantage of that influence or power for self-gratification; and ... young people, who are unable by immaturity or condition to make appropriate choices for their own behaviour, will be protected from those who may be inclined to take advantage of them.[12]

In fact, a new offence of sexual exploitation was proposed at least as far back as 1978 when the Law Reform Commission of Canada released its *Report on Sexual Offences*.[13] The Commission suggested that Canada retain its general age of consent at 14 but enact a new offence prohibiting sexual contact with young persons "whose consent was obtained by the exercise of authority or the exploitation of dependency."[14]

Although the details of the offences proposed by each report differed substantially, they had a similar rationale for criminalizing sex in relationships of trust, authority or dependency, and this rationale was adopted by Parliament in s. 153. As the Supreme Court put it, "[i]t 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."[15] To a large degree, the rationale for preventing

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a summary of the caselaw, is provided in Anna Maleszyk, *Crimes Against Children: Prosecution and Defence*, looseleaf ed. (Aurora, Ont.: Canada Law Book, 2005) at 11:20.3ff.

10 Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children*, 2 vols. (Ottawa: Minister of Supply and Services Canada, 1984) (Chair: Robin F. Badgley) [Badgley Report]. See *e.g. R.. v. Audet*, [1996] 2 S.C.R. 171 at para. 14 [*Audet*]: "Section 153 of the *Criminal Code* ... was passed by Parliament in response to the Badgley Committee's recommendations in a report made public a few years earlier"; *R. v. P.S.*, [1993] O.J. No. 704 at para. 26 (Ct. J. (Gen. Div.)) (QL) [*P.S.*], aff'd [1994] *sub nom. R. v. Sharma*, O.J. No. 3775 (C.A.) (QL).

11 See *P.S.*, *ibid.* at paras. 34-35.

12 *R. v. C.P.O.* (1993), 124 N.S.R. (2d) 366 at para. 19 (S.C. (T.D.)) [*C.P.O.*].

13 Law Reform Commission of Canada, *Report on Sexual Offences* (Ottawa: Minister of Supply and Services Canada, 1978).

14 *Ibid.* at 22.

15 *Audet*, *supra* note 10 at para. 14. See also *R. v. Galbraith* (1994), 18 O.R. (3d) 247 at 254 (C.A.) [*Galbraith*], leave to appeal to S.C.C. refused, [1994] 3 S.C.R. ix: "Sexual relations are prohibited in relationships of trust, authority and dependency because the nature of the relationship makes the young

adults in positions of trust, authority or support from having sex with the young persons in their care is the same as the rationale for penalizing (either civilly or criminally) certain adults in positions of power for having sex with other adults who may be vulnerable. This latter power dynamic arises in cases involving doctors and their patients or lawyers and their clients.[16] The argument is that, in each case

> [e]xploitation occurs when the "powerful" person abuses the position of authority by inducing the "dependent" person into a sexual relationship, thereby causing harm.... [C]onsent is suspect [in] that it may be the result of an implicit or explicit threat creating an apparent inability to reject the sexual advances of the powerful person.[17]

The presumption that young persons or adults are unable to give legitimate consent when involved in power-dependent relationships has been strongly disputed,[18] but appears to be well entrenched in Canadian law.

III. INTERPRETING SECTION 153

At first glance, s. 153 appears to be a fairly straightforward provision. The Crown need simply prove three elements: a defendant has (1) for a sexual purpose touched or invited touching by (2) a young person (defined as at least 14 but under 18) and (3) the defendant is in a "position of trust or authority" towards the young person, or the young person "is in a relationship of dependency" with the defendant.[19]

As mentioned above, consent by a young person to have sex with a person in a position of trust, authority or support is ineffective and irrelevant to a sexual exploitation charge.[20] Courts have also interpreted s. 153 to mean that the Crown need not show that a defendant

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person particularly vulnerable to the influence of the other person. Under these circumstances it has been determined that any sexual activity, even where it is consensual, involves taking advantage of a person in need of protection and merits society's condemnation."

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

17 *Ibid.* at 96-97.

18 See Alan D. Gold, "Case Comment on *R. v. Audet*" (1996) 39 Crim. L.Q. 145 at 149-50: "These vulnerable misguided complainants (aged up to 18 years) who can presumably decide between 'yes' and 'no' in every other context, in dealing with males in a position of authority or power or trust are presumed to mean 'no' even when they say 'yes'! They must be protected even from themselves! The debate has gone beyond 'no means no' to '*even yes* means no'!"

19 See *Criminal Code*, *supra* note 2, s. 153.

20 See *ibid.*, s. 150.1(1): "Where an accused is charged with an offence under ... subsection 153(1) ... it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge." See also *Audet*, *supra* note 10 at para. 16: "[A] person charged under s. 153(1) cannot raise the young person's consent as a defence"; *R. v. Hann (R.D.)* (1992), 100 Nfld. & P.E.I.R. 339 at para. 17 (Nfld. S.C. (C.A.)) [*Hann*]: "[O]nce an adult comes within the relevant parameters of the section, the *Code* clearly stipulates that consent has no bearing upon guilt." As Gold notes, *supra* note 18 at 149, it is important to differentiate between the descriptive use of "consent" in the case law and the legal or moral use of "consent" which is irrebutably presumed not to exist in cases of sexual exploitation. In other words, judges will often mention in passing in s. 153 cases that a young person consented to the sex even though the theoretical justification for the sexual exploitation offence is that real consent simply could not have existed because of the power imbalance inherent in the relationship.

actually invoked or used his or her superior position to gain sexual favours.[21] Instead, s. 153 "imposes an absolute bar with respect to any sexual intimacy with respect to a person who is in a position of trust towards the young person who might be the object of the sexual attention."[22] The authorities agree, however, that a mere difference in age, no matter how large, is not enough to create an exploitative relationship.[23]

The key words in s. 153 are "trust," "authority" and "dependency," and controversy over what these terms mean drives most of the jurisprudence in this area: of the approximately 30 cases I examined for this comment, 17 turned at least in part on whether or not there was a relationship of trust, authority or dependency,[24] and in only six cases was this conceded by the defendant.[25] The reason these terms are so contentious is that, in enacting s. 153, Parliament decided against the Badgley Report's recommendation that sexual exploitation be defined with reference to specific societal roles like parents, teachers, employers, *etc.*[26] Instead, the statute requires only a factual finding by the trier of fact that a relationship of trust, authority or dependency existed at the time of the sexual contact.[27] None of the three terms is defined in the statute.[28] This expands the scope of s. 153 beyond the traditional

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21 See *R. v. Dunk* (1991), 117 A.R. 161 at para. 4 (C.A.) [*Dunk*]: s. 153 "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" (referred to and agreed with in *R. v. G.(T.F.)* (1992), 11 C.R. (4th) 221 at para. 6 (Ont. C.A.) [*G.(T.F.)*], leave to appeal to S.C.C. refused, [1992] 3 S.C.R. ix).

22 *R. v. V.K.*, [2001] O.J. No. 2317 at para. 8 (Sup. Ct. J.) (QL) [*V.K.*]. This is in contrast to the normal offence of sexual assault, where consent is ineffective only when "the accused induces the complainant to engage in the activity by *abusing* a position of trust, power or authority" (*Criminal Code*, *supra* note 2, s. 273.1(1)(c) [emphasis added]).

23 See *e.g. R. v. L. (D.B.)* (1995), 25 O.R. (3d) 649 at 653 (C.A.); *R. v. Dennison* (2002), 208 N.S.R. (2d) 230, 2002 NSSC 222 at para. 65 [*Dennison*].

24 *R. v. A.G.N.*, [2003] B.C.J. No. 1226, 2003 BCPC 168 (QL); *Dennison*, *ibid.*; *R. v. G.J.G.* (2002), 254 N.B.R. (2d) 131, 2002 NBCA 99 [*G.J.G.*]; *V.K.*, *supra* note 22; *R. v. J.B.M.* (2000), 145 Man. R. (2d) 91 (C.A.); *R. v. W.J.M.* (2000), 194 Nfld. & P.E.I.R. 38 (Nfld. S.C. (T.D.)) [*W.J.M.*]; *Weston*, *supra* note 1; *Audet*, *supra* note 10; *R. v. T.R.*, [1996] O.J. No. 4945 (Ct. J. (Gen.Div.)) (QL); *R. v. Dussiaume* (1995), 98 C.C.C. (3d) 217 (Ont. C.A.), leave to appeal to S.C.C. refused, [1996] 4 S.C.R. vi; *Galbraith*, *supra* note 15; *P.S.*, *supra* note 10; *C.P.O.*, *supra* note 12; *R. v. R.H.J.* (1993), 86 C.C.C. (3d) 354 (B.C. C.A.), leave to appeal to S.C.C. refused, [1994] 1 S.C.R. x; *R. v. LeBlanc* (2000), 187 N.S.R. (2d) 91, 2000 NSCA 94; *R. v. Edwards* (2003), 172 C.C.C. (3d) 313, 2003 BCCA 47; *R. v. Chisholm*, [1995] O.J. No. 3301 (Ct. J. (Gen. Div.)) (QL). *Cf. R. v. D.B.L.* (1995), 25 O.R. (3d) 649 (C.A.) (same issue arising under *Criminal Code*, *supra* note 2, s. 150.1(2)).

25 *Hann*, *supra* note 20; *G. (T.F.)*, *supra* note 21; *Dunk*, *supra* note 21; *R. v. Robinson*, [1994] A.J. No. 105 (C.A.) (QL); *R. v. R.T.M.* (1996), 151 N.S.R. (2d) 235 (C.A.); *R. v. Hazel* (1991), 116 A.R. 153 (Prov. Ct.).

26 See *Audet*, *supra* note 10 at paras. 53-54, Major J., dissenting: "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. It is notable that Parliament did not accept that recommendation when drafting s. 153(1)"; *V.K.*, *supra* note 22 at para. 40: "If [P]arliament had wished to simply define a number of categories, even without exhausting all possibilities, it could have done so. Instead the definition was left somewhat open and arguably ambiguous."

27 See *Audet*, *supra* note 10 at para. 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" (also quoted and commented on in *G.J.G.*, *supra* note 24 at paras. 20-26).

28 See *Audet*, *supra* note 10 at para. 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*."

categories and allows it to potentially apply to situations such as a father having sex with his daughter's best friend,[29] or a man having sex with his neighbour's sister.[30]

The major reference point for courts attempting to understand the meaning of these three key words is the 1996 Supreme Court of Canada decision in *R. v. Audet*.[31] *Audet* involved a 22-year-old high school teacher who had sex with a former student (who was still underage) during summer vacation; the question for the Court was whether or not he was still in a position of trust or authority over her when the encounter took place.[32] In the course of finding that a relationship of trust did exist at the time,[33] the Court discussed the scope of "authority," "trust" and "dependency" in s. 153.

Justice La Forest wrote for the majority. In discussing the meaning of "authority," he relied heavily on the Quebec Court of Appeal's judgment in *Léon c. R.*[34] Justice La Forest stated that he was "in complete agreement" with the "entirely appropriate"[35] definition of "authority" given in *Léon*:

> 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.[36]

He found it much more difficult to come up with an adequate definition of "trust"[37] and there was no separate discussion of the meaning of "dependency." Importantly, however, La Forest J. set forth three non-exclusive factors to be considered by the trier of fact when deciding whether a position of authority, trust, or dependency existed: "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."[38] In a controversial part of the judgment (heavily criticized by the dissent), La Forest J. stated that "common sense" required a strong presumption that teachers were in positions of trust or authority, unless in "exceptional factual circumstances" the defence could show otherwise.[39]

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29 Compare *G.J.G.*, *supra* note 24 (convicted) and *C.P.O.*, *supra* note 12 (convicted) with *W.J.M.*, *supra* note 24 (acquitted).

30 See *Dennison*, *supra* note 23 (acquitted).

31 *Supra* note 10. *Audet* is briefly discussed in two casenotes: Gold, *supra* note 18 and Maurice A. Green, "Once a Teacher, Always a Teacher—Sexual Exploitation Charges Made Easier for Crowns" (1996) 7 Educ. & L.J. 301.

32 See *Audet*, *ibid.* at paras. 2-3.

33 See *ibid.* at paras. 46-47.

34 [1992] R.L. 478 [*Léon*]. See *Audet*, *ibid.* at paras. 33-34.

35 *Audet*, *ibid.* at para. 34.

36 *Léon*, *supra* note 34 at 483, cited and trans. in *Audet*, *ibid.* at para 33. Justice La Forest explained this as meaning that "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" (*Audet*, *ibid.* at para. 34).

37 See *Audet*, *ibid.* at para. 37: "[T]he 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."

38 *Ibid.* at para. 38.

39 *Ibid.* at para. 43. Justice Major, in dissent, wrote that "in each case [the] 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" (*ibid.* at para. 60). See also Green, *supra* note 31 at

Based on *Audet* and other case law, the meaning of "authority" seems largely clear: it involves a power of command or an ability to enforce obedience, whether or not this power is formally granted by law.[40] In the vast majority of cases, determining whether there is a relationship of authority should be easy: were there any tangible consequences if the young person refused to do what the defendant said or refused to consent to sex? For example, it will be easy to find that employers are in positions of authority over their employees because employers control wages, hours and duties. Similarly, babysitters will normally be in a position of authority over the children they are watching over. A position of authority does not necessarily mean an ability to punish, but it does mean the right or habit of giving orders and expecting obedience.

Since *Audet*, courts have rarely discussed the meaning of "dependency" for the purposes of s. 153.[41] Presumably, relationships of dependency will carry objective indicators, such as the provision of food, shelter, money or other forms of assistance. In most common cases, relationships of dependency will also be relationships of trust or authority, such as the relationship between a parent and child. Much more difficult issues will arise if "dependency" is expanded beyond the necessaries of life to include simply an emotional reliance or bond.

Dependency and authority appear to be manageable concepts for the purposes of s. 153 insofar as each one relies upon independent criteria: dependency upon whether the young person received important goods from the defendant, and authority upon whether the defendant had a legal right or customary power to give orders and be obeyed.

The concept of "trust," then, seems to be the most difficult to define. According to the normal rules of statutory interpretation, it should have an independent meaning and not simply be synonymous with "authority" or "dependency."[42] As two lower courts have noted, the Supreme Court's judgment in *Audet* did little to clear up the confusion. The New Brunswick Court of Appeal stated that "the majority decision in *Audet* neatly skirted the factual problems relating to 'trust' by the interjection of a fiduciary relationship between teachers and their students."[43] Similarly, a trial judge in Alberta said:

> Now, we certainly ... have clear guidelines from the Supreme Court of Canada [on] what a position of authority is. Unfortunately, I cannot say the same for the position of trust. I defy anyone, I defy any legally trained person to come up with a workable definition of a position of trust from Audet. It's impossible to do

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305: "The basic message for educators should by now be clear. Teachers who engage in sexual activity with any of their students who are under the age of 18 will almost invariably be convicted of the offence of sexual exploitation."

40 See *e.g. Weston*, *supra* note 1 at paras. 21-23: "So there's an ability to give orders, an ability to have people comply with directions.... They must have the power or right to enforce obedience."

41 The closest case is *Galbraith*, *supra* note 15. In *Galbraith*, a 27-year-old man was acquitted of having an exploitative relationship with a 14-year-old runaway girl who lived with him and relied upon him for food and money. The Court found that the facts did not establish a relationship of dependency. Statements in the case implying that coercion or a *quid pro quo* relationship was necessary for a finding of dependency, that economic dependency alone could not be sufficient and that "dependency" was an elaboration of "trust or authority" instead of an independent ground for sexual exploitation make the holding in this case doubtful after *Audet*.

42 See *Audet*, *supra* note 10 at para. 16: "[T]he offence applies to three separate categories of persons."

43 *G.J.G.*, *supra* note 24 at para. 21.

> so, at least I could not state, or I cannot today state what a position of trust is or what the Supreme Court of Canada seems to feel a position of trust is.[44]

Additional confusion results when one closely examines the three factors the Court in *Audet* suggested should be considered in determining whether a position of trust existed. The first one, the age difference between the parties, does not appear particularly relevant as to whether or not a relationship of trust *actually* existed, unless we are to presume that young persons are more likely to trust older people than people nearer their own age. It also raises the spectre that mere moral disapprobation of sexual relationships between persons of very different ages (demonstrated frequently in celebrity relationship gossip) could lead to a conviction.[45] The second factor, the "evolution of their relationship" is simply vague on its face. If the defendant has sex with a young person shortly after meeting him or her, is that more or less exploitative than sex after a long friendship or romance? In other words, without a clearer explanation of which types of "evolution" are good and which types are bad, this factor probably provides little help to judges or juries. Finally, the last factor, the "status of the accused in relation to the young person," appears to be begging the question, because the entire point of the exercise is to determine whether the accused had the status (position) of trust, authority or support. A "factor" that is simply a restatement of the original question is not likely to help clarify a difficult legal issue.

This difficulty in producing an adequate definition of "trust" is a direct result of Parliament's decision to disregard the Badgley Report's approach of listing relationships where trust would be conclusively presumed. In the absence of significant amendments, however, judges must try to craft a definition of trust that carries out Parliament's goal in preventing exploitation while not creating an overbroad definition that, in effect, raises the age of consent to 18 or simply duplicates "authority" or "dependency."

In my opinion, such a definition should contain at least three essential elements. The first element is subjective: did the young person place significant reliance on the defendant for guidance, decision making, physical security or economic support? The second element is objective: was this reliance reasonable in the context of the defendant's words and conduct? Third, did this reliance exist *before* the sexual/romantic relationship began? The first factor addresses the rationale for criminalizing sex in trust relationships: the young person's reliance on the defendant may make true consent impossible. The second factor protects the defendant from becoming culpable for having sex with a young person who may have

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44 *Weston*, *supra* note 1 at para. 25, Sanderman J. Prior to *Audet*, two lower courts described similarly vague notions of trust. See *C.P.O.*, *supra* note 12 at para. 12: "Trust, it seems to me, is a value that the young person is entitled to put on the relationship. It's a relationship that develops by natural evolution over a period of time and, as I suggest, it involves the trust held by the victim in the good judgment and good intentions of the recipient of that trust"; and *P.S.*, *supra* note 10 at para. 37:

> I take a "position of trust" to be somewhat different than a "position of authority." The latter 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.... A position of trust may, but need not necessarily, incorporate these characteristics. It is founded on notions of safety and confidence and reliability that the special nature of the relationship will not be breached.

45 See *e.g. Galbraith*, *supra* note 15 at 254-55: "My instinct tells me that the charges in the instant case arose out of the traditional view that the age disparity between the parties made the relationship unnatural."

unreasonably or privately placed a great deal of trust in the defendant, and provides a type of fair warning to the defendant as to what types of words or actions could be problematic. Finally, the last factor is necessary to distinguish the improper sexual exploitation of a trust relationship from the trust that may naturally develop after a romantic or sexual relationship has already begun. Importantly, these elements help distinguish relationships of trust from relationships of authority (where the power or habit of giving orders exists) and relationships of dependency (where the defendant provides the necessaries of life or other significant financial support).

IV. PROPOSALS FOR EXPANSION

In each of the last three sessions of Parliament, a bill has been introduced that would expand s. 153's sexual exploitation offence.[46] A government press release introduced the current proposal, designated as Bill C-2:

> The legislation would create a new category of sexual exploitation that better protects young persons between 14 and 18 years of age. Under the proposed reform, courts may infer that a relationship is exploitative of the young person based on its nature and circumstances, including the age of the young person, any difference of age, the evolution of the relationship, and the degree of control or influence exercised over the young person. This new category focuses the court's determination on the conduct or behaviour of the accused, rather than the on the consent of the young person to the sexual activity.[47]

In operation, Bill C-2 would simply add a fourth category to s. 153 to go along with the currently prohibited relationships of trust, authority and dependency. The new category is relationships that are "exploitative of the young person."[48] A new provision instructs judges that a finding of exploitation can be made

> from the nature and circumstances of the relationship, including
>
> (a) the age of the young person;
> (b) the age difference between the person and the young person;
> (c) the evolution of the relationship; and
> (d) the degree of control or influence by the person over the young person.[49]

These factors should be familiar: they are very similar to the ones identified by the Supreme Court in *Audet* as relevant factors in defining relationships of trust. In effect, Parliament has

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46 Bill C-2, *supra* note 5 (introduced 8 October 2004); Bill C-12, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 3d Sess., 37th Parl., 2004 (introduced 12 February 2004); Bill C-20, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2d Sess., 37th Parl., 2002 (introduced 5 December 2002).

47 Canada, Department of Justice, News Release, "Key Highlights of Proposed Amendments to Protect Children and Other Vulnerable Persons" (8 October 2004), online: <www.canada.justice.gc.ca/en/news/nr/2004/doc_31248.html>. Although outside the scope of this article, Bill C-2 also introduced significant changes to the *Criminal Code*'s child pornography provisions.

48 See Bill C-2, *supra* note 5, cl. 4(1).

49 *Criminal Code*, *supra* note 2, s. 153(1.2).

lifted a judicially created test meant to help flesh out a vague term and used it to create an entirely new offence.

Because this new category, by its own terms, applies to relationships that are *not* those of trust, authority or dependency, its potential scope is extraordinarily broad. The rationale for the new category is unclear as well. Giving evidence respecting Bill C-2 at a Parliamentary Standing Committee meeting, Minister of Justice Irwin Cotler noted only that "we do want to address predatory, exploitative situations whereby the vulnerable, between the ages of 14 and 18, are vulnerable to that kind of predatory practice and sexual exploitation"[50] without elaborating how the new category would aid this effort. Another witness testified that "[t]he concern, of course, is that if you have people, as we are now starting to find, who are in their thirties, forties, and fifties becoming sexually involved with young adolescents, that is inherently an exploitative relationship."[51] In fact, it appears that the best explanation is the one provided by the Library of Parliament's legislative summary of Bill C-2: the new category is "an alternative to raising the age of consent in all cases."[52] Canada's general age of consent (14) has been the subject of frequent criticism for decades[53] and, even at the hearings on Bill C-2, much attention was given to the question of whether it should be raised.[54]

I would like to suggest that the new category of sexual exploitation has taken the worst part of *Audet* and elevated it into statutory form. Although the fourth factor helps to some degree, the remaining three factors remain extraordinarily vague and difficult for a trier of fact to apply.[55] Additionally, they require a searching judicial inquiry into the entire course of every relationship as opposed to what could be a more hands-off analysis of the roles assumed by the young person and the defendant. Finally, and perhaps worst of all, they offer no clear guidelines of acceptable conduct. As Kent Roach has noted, "[a]lthough the words used in statutes to define criminal acts cannot provide certainty, they should provide some boundaries of permissible and non-permissible conduct."[56] Defendants having sex with

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50 Canada, House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness [Standing Committee], Meeting No. 022 (22 February 2005) at 0950 (Irwin Cotler), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=126974> [Cotler].

51 *Ibid.*, Meeting No. 026 (24 March 2005) at 0950 (Nicholas Bala), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=126986> [Bala].

52 Canada, Library of Parliament, Legislative Summary to Bill C-2 (13 October 2004, rev. 16 June 2005), online: <www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=38&Ses=1&ls=C2&source=Bills_House_Government>.

53 For example, the issue is discussed in the Law Reform Commission of Canada's *Report on Sexual Offences*, *supra* note 13 at 19 and Department of Justice, *Consultation Paper*, *supra* note 8.

54 See Bala, *supra* note 51; Cotler, *supra* note 50; Standing Committee, *supra* note 50, Meeting No. 027 (5 April 2005) (Marc David), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=125271> [David]; *ibid.*, Meeting No. 029 (7 April 2005) (Harold Stead), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=1254263; *ibid.*, Meeting No. 031 (12 April 2005) (Mark Warawa), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=125251>.

55 See Part III above. The vagueness of the factors listed was also noted by the Canadian Bar Association in its testimony on Bill C-2. See David, *ibid.*

56 Kent Roach, *Criminal Law*, 2d ed. (Toronto: Irwin Law, 2000) at 71. See also Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, 4th ed., looseleaf (Scarborough, Ont.: Thomson Carswell, 1997) at 44.16(a): "A vague law offends two values that are fundamental to the legal system. First, the law does not provide fair notice to persons of what is prohibited, which makes it difficult for them to comply

young persons are unlikely to engender much sympathy even if the law is vague, but several law enforcement advocates have criticized the new provision as well. For example, one MP, a former prosecutor, stated that "[t]his bill is simply going to make a very complicated test available to them, and most prosecutors will simply say, look, we're simply not going to use it."[57] Another experienced prosecutor stated:

> We don't know what goes on inside private relationships. We are very bad at characterizing the private, intimate relationships of other people. This bill, by setting an exploitation standard, is asking a judge to do exactly that. It won't work. It's an invitation to an ineffective law.[58]

The four factors used to define the new offence in Bill C-2 amount to little more than "it's legal, except when it's illegal." While the proper age of consent for sexual activity is a difficult and contentious issue, if a legislative change must be made it seems a bright line rule of 16 or even higher would be far preferable to an amorphous, shifting prohibition that mystifies both defendants and prosecutors.[59]

V. CONCLUSION

Confusion over the correct interpretation of s. 153 will likely continue until adequate definitions of "trust," "authority" and "dependency" are found. When defendants are teachers, employers and parents, a finding of an exploitative relationship is usually straightforward. The hard cases are those at the margins — family friends, teachers who are retired or on break, older co-workers, *etc.* Current judicial interpretation of "authority" and "dependency" appears to be sufficiently precise, but the Supreme Court's attempt to give content to "trust" has been found lacking in subsequent lower court decisions. An adequate definition of "trust" should include, at the least, a subjective reliance by the young person on the defendant for guidance, decision making, physical security or economic support, along with actions or words by the defendant making that reliance reasonable, and a finding that the reliance began before the romantic or sexual relationship.

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with the law. Secondly, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement." In other words, although ignorance of the law is no excuse, there is clearly a problem when reasonable persons in good faith who make a sincere effort are still unable to understand the scope of a criminal prohibition.

57 Standing Committee, *supra* note 50, Meeting No. 034 (21 April 2005) at 0950 (Vic Toews), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=125295>. On 6 February 2006, Prime Minister Stephen Harper appointed Vic Toews as the Minister of Justice and Attorney General. See online: Canada, Department of Justice <http://canada.justice.gc.ca/en/mag/index.html>.

58 *Ibid.*, Meeting No. 033 (19 April 2005) at 0930 (David Butt), online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=126990>.

59 See *e.g.* Bala, *supra* note 51 at 0950: "It's much better for everyone, including adults, to say that we're going to have some clear lines around this.... Just get this very clearly in advance: if you're an adult, you're not going to be sexually involved with someone who is under the age of 16." Because the tenor of the debates circulating around the new proposal seems to encompass a large degree of simple moral disapproval over adults having sex with young persons, another possible solution would be to create a fixed aged differential without moving the general age of consent. For example, a statute could create a four-year "buffer" for sex with a young person — a 14-year-old could have sex with someone up to 18 years old, while a 16-year-old would be limited to persons 20 or younger. Of course, all changes to age of consent laws would also need to be made consistent with provincial and territorial marriage laws, some of which allow young persons to marry.

Should the sexual exploitation offence be expanded? There does not seem to be any need for doing so, as most reported s. 153 cases result in conviction. In addition, there certainly has not been a demonstration that young persons are being sexually exploited in a way that s. 153 is powerless to prevent — and if they are, the method of expansion proposed recently in Bill C-2 appears hopelessly vague. Now that Bill C-2 has passed, the jurisprudence around s. 153 will become even more confused.[60]

[60] Just prior to publication, the Government of Canada introduced Bill C-22, *An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act*, 1st Sess., 39th Parl., 2006, which purports to raise the age of consent in all cases to 16 years of age. It should be noted that in order to "help ensure that teenagers who engage in consensual sexual activity are not criminalized, the legislation includes a close-in-age exception, which would permit 14 and 15 year old youth to engage in sexual activity with a partner who is less than five years older" (Department of Justice, News Release, "Age of Protection Legislation Will Better Protect Children From Sexual Exploitation" (22 June 2006), online: Department of Justice <http://canada.justice.gc.ca/en/news/nr/2006/doc_31830.html>).