

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Barabash, 2015 SCC 29, [2015] 2 S.C.R. 522 | **Date:** 20150522  **Docket:** 35977, 36064 |

Between:

Donald Jerry Barabash

Appellant

and

Her Majesty The Queen

Respondent

And Between:

Shane Gordon Rollison

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Canadian Civil Liberties Association, Beyond Borders and Canadian Centre for Child Protection Inc.

Interveners

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 63) | Karakatsanis J. (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner, Gascon and Côté JJ. concurring) |

R. *v.* Barabash, 2015 SCC 29, [2015] 2 S.C.R. 522

Donald Jerry Barabash Appellant

v.

Her Majesty The Queen Respondent

- and -

Shane Gordon Rollison Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Canada,

Attorney General of Ontario,

Canadian Civil Liberties Association,

Beyond Borders and

Canadian Centre for Child Protection Inc. Interveners

**Indexed as: R. *v.*** Barabash

2015 SCC 29

File Nos.: 35977, 36064.

2015: January 16; 2015: May 22.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for alberta

*Criminal law — Child pornography — Defences — Private use exception — Accused charged with child pornography offences — Accused arguing in defence that sexual activity lawful and consensual and that recordings held for private use* — *Crown challenging lawfulness of sexual activity on basis of girls’ exploitation* — *Whether private use exception requires separate and additional exploitation inquiry or whether exploitation included under lawfulness inquiry* — *In acquitting accused,* whether trial judge properly interpreted exception *— Criminal Code, R.S.C. 1985, c. C-46, s. 163.1.*

Two girls, age 14, were runaways from a treatment centre. They stayed with the accused B, age 60, whereas the other accused, R, age 41, was a regular visitor. The girls were involved in sexual activity, which was depicted on video and in photographs, with each other and with R. At the time the videos and photographs were made, 14-year-olds could legally consent to sexual acts with adults. Both B and R were charged with making child pornography, contrary to s. 163.1(2) of the *Criminal Code*. B was also charged with one count of possessing child pornography, contrary to s. 163.1(4). B and R were tried together. The trial judge found that all of the elements of the offences were established; however, the accused raised in defencethe private use exception outlined in R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45. The judge concluded that the Crown had failed to disprove the exception beyond a reasonable doubt. The Court of Appeal allowed the appeals, substituted guilty verdicts and remitted the case for sentencing.

*Held*: The appeals should be allowed and a new trial ordered.

The private use exception outlined in *Sharpe* serves as a defence to the offence of making or possessing child pornography, contrary to s. 163.1 of the *Criminal Code*. This private use exception requires a determination that the sexual activity depicted in recordings is lawful, that the recording of the sexual activity is also consensual and that the recordings are held exclusively for private use. In *Sharpe*, the Court did not mandate a separate and additional exploitation inquiry. Adding such a step would be unnecessary, as exploitation is already captured under the lawfulness inquiry. Section 153 of the *Criminal* *Code* makes sexual exploitation of a young person a crime. Thus, where the Crown seeks to rely on s. 153 to negate the legality of the sexual activity depicted, the judge must consider whether it occurred in the context of an exploitative relationship. If so, the sexual activity is not lawful, and the private use exception does not apply.

Where s. 153 is engaged, the consent of the young person to the sexual activity cannot render it lawful. Thus, where an accused raises the private use exception and the Crown seeks to challenge the lawfulness of the sexual activity on the basis of exploitation, a trial judge must look beyond whether or not consent was given and holistically examine the nature and circumstances of the relationship between the young person and the accused. Section 153(1.2) provides a non-exhaustive list of indicia from which a trial judge may infer that the relationship between the accused and a young person is exploitative: “(*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”. It is not necessary that the person accused of making or possessing child pornography be charged separately under s. 153(1) in order for a judge to undertake this inquiry. The lawfulness of the sexual activity is independently assessed as part of the defence.

In this case, the trial judge did not consider whether the relationship between the girls and the accused was exploitative within the meaning of s. 153, despite the fact that, at the time, s. 153 applied to young persons between the ages of 14 and 17. Where the trial judge did consider evidence that would be relevant to exploitation, he did so in isolation, looking at the factors one at a time. For example, he identified the girls’ age and the substantial difference in age between them and the accused, but found this was an insufficient basis for concluding that this difference was exploitative. However, he did not assess this age difference in light of other aspects of the relationship, such as the impact of the girls’ addictions, their need for shelter, or their past and ongoing experiences with homelessness and prostitution. In short, he did not consider the specific factors in light of the broader context or whether they cumulatively resulted in an exploitative relationship.

In other words, the trial judge’s analysis focused primarily on the voluntariness of the sexual activities, instead of on the nature of the relationship between the parties. While the voluntariness of sexual activities is an important aspect of lawfulness, it does not end the inquiry. The trial judge was also required to holistically assess the nature and circumstances of the relationship to determine whether the sexual activity was rendered unlawful under s. 153. By failing to consider whether the underlying relationship between the girls and the accused was exploitative, the trial judge erred in law. This error had a material bearing on the accused’s acquittals and requires a new trial.

**Cases Cited**

**Applied:** *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; **referred to:** *R. v.* *Cockell*, 2013 ABCA 112, 553 A.R. 91, leave to appeal refused, [2013] 3 S.C.R. x; *R. v. L.W.* (2006), 208 O.A.C. 42; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Morin*, [1988]2 S.C.R. 345.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 2(*b*).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 150.1, 151, 152, 153, 155, 160(3), 163.1, 173(2), 265(3), 271 to 273, 273.1, 686(4)(*b*)(ii).

*Tackling Violent Crime Act*, S.C. 2008, c. 6.

APPEALS from a judgment of the Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.), 2014 ABCA 126, 572 A.R. 289, 98 Alta. L.R. (5th) 125, 10 C.R. (7th) 350, [2014] 8 W.W.R. 69, 310 C.C.C. (3d) 360, 306 C.R.R. (2d) 299, 609 W.A.C. 289, [2014] A.J. No. 322 (QL), 2014 CarswellAlta 489 (WL Can.), setting aside the acquittals entered by Thomas J., 2012 ABQB 99, 532 A.R. 364, 59 Alta. L.R. (5th) 369, 284 C.C.C. (3d) 62, [2012] 10 W.W.R. 104, [2012] A.J. No. 191 (QL), 2012 CarswellAlta 434 (WL Can.). Appeals allowed and new trial ordered.

Peter J. Royal, Q.C., for the appellant Donald Jerry Barabash.

Diana C. Goldie and Thomas Slade, for the appellant Shane Gordon Rollison.

Jolaine Antonio and Julie Morgan, for the respondent.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Christine Bartlett-Hughes and Lisa Henderson, for the intervener the Attorney General of Ontario.

Alexi N. Wood and Kate Southwell, for the intervener the Canadian Civil Liberties Association.

David Matas and *Monique St. Germain*, for the interveners Beyond Borders and the Canadian Centre for Child Protection Inc.

The judgment of the Court was delivered by

1. Karakatsanis J. — These appeals concern what happens when teenagers participate in sexual recordings as part of relationships that may involve exploitation. They examine the “private use exception” outlined in this Court’s decision of *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45. The private use exception acts as a defence to the offences of making and possessing child pornography, contrary to s. 163.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. The exception covers visual recordings that do not depict unlawful sexual activity, were created with the consent of the persons depicted, and are held exclusively for private use (*Sharpe*,at para. 128).
2. In this case, the Court is asked to clarify the elements of the exception, and in particular where the concept of exploitation fits in the analysis.
3. I conclude that the test articulated in *Sharpe* requires a determination that the sexual activity depicted is lawful ― and thus did not arise in the context of an exploitative relationship. As the trial judge did not consider this specific question, I would allow the appeals and order a new trial.
4. Facts
5. In early 2008, two 14-year-old females, K and D, ran away from an adolescent treatment centre in High Prairie, Alberta. The two teenagers had difficult pasts, with experiences of drug addiction, criminal history, family issues, and, in K’s case, a history of prostitution. K described herself as a “street child” with ongoing troubles with drug abuse.
6. After leaving the treatment centre, K and D travelled to Edmonton, where they went to stay at the appellant Donald Barabash’s residence. D had known Mr. Barabash for about a year, as a drug dealer and a friend of her father’s. The other appellant, Shane Rollison, was a friend of Mr. Barabash’s who was regularly at the residence and was also involved in drugs. At trial, K described the place as a stereotypic “crack house” with a wide variety of people visiting to sell, buy, and use various illegal drugs.
7. During the time K and D stayed at the Barabash residence (K two to three weeks, D one week), they were involved in the creation of video recordings and still images with the appellants, using a computer webcam in the basement. In the recordings and images, K and D appear nude and engage in explicit sexual activity.
8. The police began investigating the appellants after receiving complaints about a still photograph posted to Nexopia, a social networking site. The photograph depicted two young women, one of them topless. The police identified K and D as the two women depicted in the image and searched the Barabash residence. There they located a number of video recordings and still photographs that they identified as child pornography. The videos and photographs depicted K and D engaged in various explicit sexual activities, both with each other and with Mr. Rollison. Mr. Barabash generally operated the camera, although K and D did so at times. At the time the videos and photographs were made, 14-year-olds were able to consent to sexual acts with adults. (This has since been raised to 16.) K and D were both 14 at the time, while Mr. Barabash was 60, and Mr. Rollison was 41.
9. The appellants were both charged with making child pornography contrary to s. 163.1(2) of the *Criminal Code*. Mr. Barabash was also charged with one count of possessing child pornography contrary to s. 163.1(4).
10. Decisions Below
    1. Alberta Court of Queen’s Bench, 2012 ABQB 99, 532 A.R. 364
11. The appellants were tried together before Thomas J., sitting alone. The trial judge found the Crown had proven beyond a reasonable doubt that both appellants made child pornography contrary to s. 163.1(2) of the *Criminal Code*. He also found the Crown had proven beyond a reasonable doubt that Mr. Barabash was in possession of child pornography contrary to s. 163.1(4). The core issue, however, was the availability of the private use exception from *Sharpe* as a defence to the charges.
12. The trial judge reviewed the private use exception and concluded that, according to *Sharpe*, three requirements must be met for the exception to be made out: (1) the sexual activity must be legal; (2) the recording must be made with the consent of the persons depicted; and (3) the recording must be held for private use. He rejected the Crown’s submission that, in addition to these three requirements, private use material must possess aspects of “self-fulfilment and self-actualization” and must not result in the “exploitation or abuse of children” (para. 163, citing *Sharpe*, at paras. 120 and 116). The trial judge found that all three requirements set out in *Sharpe* were met on the facts of this case and entered acquittals.
    1. Alberta Court of Appeal, 2014 ABCA 126, 572 A.R. 289
13. The Crown appealed the acquittals on the ground that the trial judge erred in his interpretation of the private use exception. The majority of the Court of Appeal agreed and allowed the appeals, relying on that court’s decision in *R. v.* *Cockell*, 2013 ABCA 112, 553 A.R. 91, leave to appeal refused, [2013] 3 S.C.R. x. *Cockell* held that the private use exception also contained a standalone requirement that there be no exploitation or abuse involved in the creation of the recording, and a requirement that the parties intended the pornographic material to be for the private use of all those involved in its creation.
14. Applying *Cockell* to the present case, the majority found that, for the purposes of the exception, the sexual activity must not involve “child exploitation or abuse as cognizable in law generally, not just crimes under the *Code*”, and that “it was not outside the scope of judicial notice to find that considerably more than a ‘nominal risk of harm’ was inflicted on these two damaged kids” (para. 36). The majority therefore found that, with the correct law applied to the trial judge’s findings of fact, convictions of the appellants were inevitable. It accordingly substituted guilty verdicts and remitted the case for sentencing.
15. Berger J.A., writing in dissent, would have dismissed the appeals. While he agreed with the majority that the trial judge erred, he disagreed with the majority’s view of the private use exception test and found that exploitation is properly subsumed within the lawfulness analysis. That is, he did not believe that *Sharpe* created a separate and distinct requirement related to factual exploitation. He found that the private use exception was made out on the facts as found by the trial judge.
16. Analysis
    1. R. v. Sharpe and the Criminal Prohibition on Child Pornography
17. Section 163.1 of the *Criminal Code* establishes a number of prohibitions related to the making, possession, distribution and accessing of child pornography. The child pornography in this case is defined in s. 163.1(1)(*a*):

**163.1** (1) In this section, “child pornography” means

(*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

1. In *Sharpe*, McLachlin C.J., writing for the majority of this Court, concluded that while s. 163.1 infringed the constitutional right to freedom of expression protected by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, this infringement was, for the most part, justified under s. 1 of the *Charter* because of the important government objective of protecting children from harm. However, the majority found that two categories of privately held material captured by the criminal prohibition did not strike the proper balance between preventing harm to children and protecting freedom of expression. The two categories are (1) self-created expressive material, and (2) private recordings of lawful sexual activity. These types of private material engage values related to the development of thought, belief, opinion and expression, while posing “no reasoned risk of harm to children” (para. 100).
2. To remedy this constitutional defect, the Court read in two exceptions to the prohibition. Each of these exceptions operates as a defence to prosecution under s. 163.1(2), which prohibits making child pornography, and s. 163.1(4), which prohibits its possession. The first exception addresses expressive material created and held by a single person and protects “deeply private expression, such as personal journals and drawings, intended solely for the eyes of their creator” (*Sharpe*, at para. 128). The second exception, termed the “private use exception”, protects a narrow category of recordings:

The second exception protects a person’s possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted. [Emphasis in original; *ibid.*]

Only this latter exception is relevant for the purposes of the present appeals.

1. The majority in *Sharpe* reasoned that private recordings may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity. It noted that “two adolescents might arguably deepen a loving and respectful relationship through erotic pictures of themselves engaged in sexual activity”, thus concluding that the cost of criminalizing such materials on the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children (para. 109).
   1. Elements of the Private Use Exception
2. As this Court explained in *Sharpe*, there are three elements to the private use exception, all of which must have a basis in the evidence for the exception to apply: (1) the recording must depict lawful sexual activity; (2) the persons depicted must consent to the recording; and (3) the recording must be held for private use.
3. In order for this defence to go to a jury, the accused must raise an air of reality with respect to all three elements of the defence (*Sharpe*, at para. 116). Once this evidential burden is met, the Crown then bears the persuasive burden to disprove the defence beyond a reasonable doubt. Since all three elements are necessary for the defence to succeed, the Crown need only disprove one element beyond a reasonable doubt.
   * 1. Lawfulness
4. First, the recorded sexual activity must be lawful. That is, the sexual activity cannot itself be a crime. Consent is a prerequisite to the lawfulness of the sexual activity. Children under the age of 12 cannot validly consent to sexual activity. At the time the offences are alleged to have been committed in this case, the circumstances under which young persons under the age of 14 could validly consent to sexual activity were restricted, depending upon the age of the other participants (*Criminal Code*,s. 150.1(1) and (2)). A young person under the age of 14 could not consent to sexual activity with another person unless that person was less than two years older. In addition, consent of young persons under 14 to sexual activity would not apply where the other participant was in a position of trust or authority towards them, where the relationship was one of dependency or where the relationship was exploitative (s. 150.1(2)(*c*) and (3)). These limits on consent had, and still have, broad application, including sexual touching and invitation, incitement or counselling to sexual touching, as well as other sexual offences.[[1]](#footnote-1)
5. Young persons aged 14 to 17, inclusively, could at that time validly consent to sexual activity with partners of any age. However, as with younger children, the sexual activity would be unlawful where the relationship is based on exploitation, dependency, trust or authority (s. 153(1)). At any age, consent remains invalid if obtained by means of fraud, duress, or abuse of authority, among other things (*Criminal Code*, ss. 265(3) and 273.1).
6. In 2008, Parliament amended the *Criminal Code* to effectively raise the age of consent from 14 to 16 years (S.C. 2008, c. 6). Young persons aged 14 and 15 may now only consent to sexual activity with another person where they are either close in age to that person or married to that person (s. 150.1(2.1)).
7. In the context of a child pornography prosecution, these legislative limits on minors’ consent restrict the circumstances in which the underlying sexual activity will be lawful. In so doing, they restrict the circumstances in which a person charged under s. 163.1 can rely on the private use exception as a defence. Thus, subject to those exceptions explicitly permitted in the *Code*, the consent of a person under the age of 14 (now 16) would not be valid and the defence would not be available. Nor will the private use exception apply where the Crown proves beyond a reasonable doubt that the relationship between those involved is tainted by exploitation, dependency, or abuse of authority or of a position of trust, as those offences are described in s. 153(1). Of course, the exception does not apply to any activities that are themselves offences, regardless of consent, such as incest (s. 155).
8. In summary, the private use exception can never be available as a defence to child pornography involving children under the age of 12. For young persons aged 12 or 13, the circumstances where the exception may be available are defined narrowly by the *Criminal Code*. Otherwise, at the time of the alleged offences in this case, the private use exception was only available where the young person involved in the sexual activity was between 14 and 17 years of age, inclusively; today, this is restricted to those aged 16 or 17 years.
   * 1. Consent to Recording
9. Second, all participants must consent to the recording of the lawful sexual activity. Particularly in the digital age, the recording itself can create a risk of harm, quite separate from the underlying sexual activity. The consent requirement protects an individual’s privacy by ensuring only consensual sexual expression falls within the exception to the prohibition on making or possessing child pornography.
   * 1. Privacy
10. Third, as this Court held in *Sharpe*, “[t]he recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein” (para. 116; see also para. 118). The moment such privacy is breached, the recording falls outside the ambit of the private use exception. This ensures that cases such as *R. v. L.W.* (2006), 208 O.A.C. 42, where the accused distributed consensually made images of himself and his 15-year-old girlfriend after their relationship ended, would not fall under the private use exception.
11. Although it does not arise on the facts of this case, the trial judge and two interveners addressed the question of what happens when a participant in a recording under the private use exception demands that the recording be returned or destroyed. The trial judge concluded that once a recording is created, a participant retains the ability to demand its return or destruction, on the basis that effective control by each participant is a necessary element that must be established for a recording to be privately held. In his view, effective control is lost “where the owners of private use materials are unable to demand the return of the private use materials or their destruction” (para. 186; see also paras. 187 and 271-74).
12. The intervener the Attorney General of Ontario argued that *Sharpe* implicitly requires that a child must have either ongoing access or *de facto* control over the material, so as to destroy or direct the destruction of the material in circumstances where the child comes to regret his or her participation in its creation (factum, at paras. 20-25). The intervener the Canadian Civil Liberties Association submitted that the privacy branch “implicitly enables an owner to unilaterally demand that a recording be destroyed” (factum, at para. 18).
13. *Sharpe* did not include any reference to ongoing control, or to the right to the return or destruction of the recording, in the exception that the Court “read in” so that the legislation would strike an acceptable constitutional balance. This Court recognized an exception only for recordings of lawful sexual activity that are “privately created” and “kept in strict privacy . . . and intended . . . for private use by the creator and the persons depicted therein” (paras. 76 and 116). However, the exception relates not only to consent to the creation of the recording, but also to the ongoing nature of the possession. This imports notions of privacy and control in the creation, use, and ongoing possession of the recording.
14. It may well be that the right of a young person who participates in the recording to demand the return or destruction of the recording is also implicit in *Sharpe*’s weighing of the harm of child pornography against the values of self-expression and self-actualization (paras. 102-10). In my view, the balance struck between the right of free expression and preventing harm to children in *Sharpe* suggests that young persons who participate in a sexual recording caught by the private use exception retain the ability to ensure its return or destruction. This understanding of the exception would provide protection for young persons who may suffer anxiety or distress from the knowledge that another person possesses such material and could unlawfully share it. It would serve to address circumstances in which the risk of harm outweighs the expressive value of the recording, contrary to the principles articulated in *Sharpe*. However, since the question of a right to access or destruction is not relevant on the facts of these appeals, I would not make any final pronouncement about it.
    1. What Is the Role of Exploitation in the Private Use Exception?
15. In the present case, the Court of Appeal found that *Sharpe* mandates an additional element to the private use exception: the absence of factual exploitation. With respect, this interpretation of *Sharpe* is incorrect. While alleged exploitation plays an important role in determining whether the private use exception is an available defence to child pornography charges, this consideration is already captured as a part of the *Sharpe* analysis. As I explain below, there is no need to add another layer of exploitation inquiry to the existing test.
16. The Crown advanced a modified version of this argument in oral submissions before this Court. In its view, exploitation must be considered directly when assessing whether there was consent to the recording. As I will explain, this issue may arise in another case; however, it does not arise in this case, and the common law of consent was not fully argued in the courts below or in written submissions to this Court.
    * 1. Exploitation Would Render the Consensual Sexual Activity Unlawful
17. As noted above, sexual activity is unlawful in the absence of consent. Where an accused faces prosecution for making or possessing child pornography, the absence of consent precludes the availability of the private use exception as a defence. However, even if the young person consents to the sexual activity, it may nonetheless be unlawful in certain circumstances. As noted above, a child under 12 can never validly consent, and the validity of the consent of a young person between the ages of 12 and 15, inclusively, is now limited to those close in age or to spouses.
18. Section 153 of the *Code* addresses sexual exploitation of a young person 16 or 17 years of age. (Today, 14- and 15-year-olds are similarly protected under s. 150.1(2.1)(*a*).) At the time of the alleged offences in this case, s. 153 covered persons between the ages of 14 and 17, inclusively. Section 153 would thus have applied to K and D. This section criminalizes a broad range of sexual activities and communications arising from certain types of relationships with young persons:

**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.

1. Thus, the private use exception will not be available where the Crown can prove beyond a reasonable doubt that the sexual conduct depicted (even if consensual) occurred in the course of one of the relationships described in this provision. Where this section is engaged, the consent of the young person to the sexual activity cannot render it lawful.
2. Where an accused raises the private use exception and the Crown seeks to challenge the lawfulness of the sexual activity on the basis of exploitation, a trial judge must look beyond whether or not consent was given and holistically examine the nature and circumstances of the relationship between the young person and the accused. Section 153(1.2) provides a non-exhaustive list of indicia from which a trial judge may infer that the relationship between the accused and a young person is exploitative:

(*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.

It is not necessary that the person accused of making or possessing child pornography be charged separately under s. 153(1) in order for a judge to undertake this inquiry. The lawfulness of the sexual activity is independently assessed as part of the defence.

* + 1. Is There a Separate and Additional Requirement That the Judge Find the Absence of Exploitation?

1. The parties agree that exploitation must be considered in order to determine whether or not the recorded sexual activity is lawful. However, throughout these proceedings the Crown argued that, in addition to the three elements identified above, *Sharpe* requires a further inquiry into whether factual exploitation occurred as a prerequisite to the availability of the private use exception. The trial judge rejected this argument, finding that this Court did not mandate an additional exploitation analysis in *Sharpe*.
2. At the Court of Appeal, the majority and dissent diverged on whether or not an additional exploitation analysis is required, with the majority concluding that the private use exception was only available where the absence of factual exploitation or abuse is established, separately from the inquiries into lawfulness and consent to recording. The Court of Appeal had based this conclusion on this Court’s statement, at para. 116 of *Sharpe*, that the sexual activity “must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children”.
3. To the extent they relied upon para. 116 of *Sharpe* to suggest that factual exploitation is an additional requirement of the private use exception, the Court of Appeal majority misreads *Sharpe*. The Supreme Court’s summary of the exception, at para. 128 of *Sharpe*, contains no such separate requirement. The relevant part of para. 116 reads as follows:

The second category would protect auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only. It would also extend to protect the recording of lawful sexual activity, provided certain conditions were met. The person possessing the recording must have personally recorded or participated in the sexual activity in question. That activity must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. [Emphasis added.]

1. Paragraph 116 situates exploitation firmly within the lawfulness analysis, which is one of the three elements required for the defence to succeed.
2. This does not mean that exploitation is not an important part of the inquiry. Indeed, where there are indicia of exploitation, the Crown will likely raise these facts in order to prove, on the basis of s. 153, that the activity was unlawful beyond a reasonable doubt.
3. Faced with such evidence, a trial judge must be alive to Parliament’s direction in s. 153 that consent not be taken merely at face value where a young person is concerned. Properly interpreted and applied, exploitation must be determined by looking at the relationship between the complainant and the accused, and the entire context of their interactions.
4. This does not mean that “factual exploitation”, divorced from any of the three prongs set out in *Sharpe*, is a separate part of the private use exception. I agree with the appellants that this proposed additional step is redundant. It is not required by this Court’s decision in *Sharpe*, nor is it required to ensure that those who exploit young people do not benefit from the private use exception. The inquiry into lawfulness of the underlying sexual activity already permits a robust analysis of exploitation.
   * 1. Is There a Requirement to Assess Exploitation in Relation to Consent to Recording?
5. In oral submissions before this Court, the Crown modified the position it took before the courts below. The Crown argued that exploitation must also be considered when determining whether or not the complainant consented to the recording. In other words, the court should examine how exploitation may influence a young person’s consent to being recorded, separately and apart from the question of consent to the underlying sexual activity. Although the *Criminal Code* restricts consent to sexual activity in circumstances such as incapacity, coercion and abuse of authority, no such protections apply to the consent to record.
6. The Crown anchored this view in what it sees as the limited scope of s. 153, which it argues may not cover situations where no sexual touching occurs or where the touching is not invited, counselled or incited. The only example the Crown could suggest was that of nude posing by a young person aged 16 or 17, which could occur in the context of an exploitative relationship but nonetheless fall outside the ambit of s. 153.[[2]](#footnote-2) In the Crown’s view, only an additional exploitation analysis with respect to consent to the recording itself could properly capture recordings that are beyond the scope of s. 153.
7. The concerns raised by the Crown’s example can only arise where the subject of the recording does not involve any touching or invitation to touching that would be caught by s. 153. As the Attorney General of Ontario submitted in these proceedings, it is quite possible that s. 153 could apply to the example of the still photos of nude posing. The language in s. 153 is broad and captures any invitation to sexual touching of others or oneself. It is not clear that there would be many instances where a still photograph is taken by the dominant person in the context of an exploitative relationship that did not involve any invitation to sexual touching. In such circumstances, consent to the sexual activity and to the act of recording will often be intertwined, and thus captured by s. 153.
8. This is not to say that where the recording is concerned the young person’s consent is necessarily a simple question of yes or no. Should a case arise in which no underlying sexual activity exists that could be caught by the *Criminal Code*’s provisions related to sexual exploitation, it may be that an exploitative relationship would be relevant to the common law rules of consent in the context of consent to recording.
9. However, this is not the case to decide whether an exploitative relationship can vitiate consent to the recording. Circumstances where the exploitation is not captured in the lawfulness analysis are not likely to arise frequently ― and they do not arise in this case. The extent to which an exploitative relationship may vitiate consent generally under the common law was not clearly developed in the courts below or in the factum of the Crown. I think it best to leave this question about the common law principles of consent to a case with a proper record and argument. The implications may be far reaching.
10. In short, any exploitation in the relationship between K and D and the appellants in this case is properly considered in the lawfulness analysis with respect to s. 153 of the *Criminal Code*.
    * 1. Is Mutuality of Benefit a Prerequisite to Availability of the Private Use Exception?
11. The Crown argues that *Sharpe* also requires that there be a “mutuality of benefit” among all individuals captured by the recording (transcript, at p. 53). In support of this argument, the Crown cites this Court’s discussion in *Sharpe* of the significance that recordings of sexual activity may have for “adolescent self-fulfilment, self-actualization and sexual exploration and identity” (para. 109). In the Crown’s view, such expressive values can only be achieved where all individuals depicted, including any minors, actually derive a proven benefit from the recording. Such a requirement is characterized as a necessary bulwark against exploitation.
12. The Alberta Court of Appeal agreed, concluding that a “[p]rerequisite to the availability of the private use defence is evidence that the parties intended the pornographic material for the private use of [the complainant] as well as that of the appellant, sometimes called a mutuality of benefit” (para. 13, citing *Cockell*,at para. 36).
13. I cannot accede to this interpretation of this Court’s decision in *Sharpe*. *Sharpe* does not refer to mutuality of benefit as a standalone requirement for the private use exception. Rather, *Sharpe* says that the material must be “intended exclusively for private use by the creator and the persons depicted” (para. 116). I do not read this as establishing “mutuality of benefit” as a requirement for the private use exception. It simply establishes that private use is limited to use by the creator and the persons depicted, and nobody else. This requirement leaves the determination regarding possible benefits to the consenting individuals. Adding a “mutuality of benefit” requirement to the analysis would unnecessarily complicate the private use exception test while providing little benefit.
14. To conclude, the private use exception established in *Sharpe* is available only where (1) the sexual activity is lawful, (2) all participants consented to the recording, and (3) the recording is created and retained strictly for the private use of those involved. In determining the lawfulness of the sexual activity, the sexual activity recorded cannot be considered in isolation. Where the Crown seeks to rely on s. 153 to negate the legality of the sexual activity depicted, the judge must also determine whether it occurred in the context of an exploitative relationship. If so, the sexual activity is not lawful, and the private use exception does not apply.
15. Application to This Case
16. The trial judge found that the sexual activity in this case was lawful. In so doing, he relied on an apparent concession by the Crown regarding lawfulness. This concession arose in the context of the Crown advancing an erroneous legal framework for analyzing the private use exception, both at trial and on appeal. Of course, a trial judge is not bound by concessions of law if those concessions are erroneous (*R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 27; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at paras. 62-64; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45). However, while the Crown’s position was wrong in law, the fact that exploitation was advanced for consideration at trial (albeit as a separate element in the *Sharpe* test) overcomes any prejudice to the appellants resulting from the erroneous legal position taken by the Crown. That is, despite how the Crown framed the legal test in this case, it is clear the Crown took the position that the private use exception was not available because of an exploitative relationship between the two appellants and K and D. In determining whether the private use exception was available as a defence, the trial judge was required, in these circumstances, to consider whether that relationship was exploitative within the meaning of s. 153.
17. Reviewing the trial judge’s findings, it is apparent that he did not turn his mind to whether or not the broader relationship was one of exploitation within the meaning of s. 153. Where the trial judge did consider evidence that would be relevant to exploitation, he did so in isolation, looking at the factors one at a time. For example, he identified the age of the complainants and the substantial difference in age between them and the appellants, but found this was an insufficient basis for concluding that this difference was “intrinsically exploitive or abusive” (para. 226). However, he did not assess this age difference in light of other aspects of the relationship, such as the impact of the complainants’ addictions, their need for shelter, or their past and ongoing experiences with homelessness and prostitution. In short, he did not consider the specific factors in light of the broader context or whether they cumulatively resulted in an exploitative relationship.
18. The trial judge’s analysis focused primarily on the voluntariness of particular *activities*, instead of on the nature of the *relationship* between the parties. While the voluntariness of sexual activities is an important aspect of lawfulness, it does not end the inquiry. The trial judge was also required to holistically assess the nature and circumstances of the relationship to determine whether the sexual activity was rendered unlawful under s. 153. By failing to consider whether the underlying relationship between the complainants and the appellants was exploitative, the trial judge erred in law.
19. Thus, while the Court of Appeal erred in law in its approach to the case, I am nonetheless of the view that the trial judge erred by failing to consider whether the sexual activity was unlawful by virtue of s. 153 of the *Code*. Given the trial judge’s findings of fact, however, I am not persuaded that Mr. Barabash and Mr. Rollison would have been found guilty but for the trial judge’s error in law (*Criminal Code*, s. 686(4)(*b*)(ii)). I therefore would not uphold the Court of Appeal’s decision to enter convictions. This is especially true since the trial judge’s legal error was induced in part by an erroneous Crown concession at trial.
20. The acquittals should be restored unless the Crown shows that the trial judge’s legal error has a material bearing on the acquittals (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14; *R. v. Morin*, [1988]2 S.C.R. 345, at p. 374). The appellants submit that regardless of this legal error the trial judge’s factual findings would inevitably have led him to find no exploitation in this case and that therefore the acquittals should be restored. With respect, I cannot agree.
21. For example, the trial judge found that both K and D may have been under the influence of drugs and alcohol at the time the recorded sexual activities occurred, but that they were nevertheless aware of and consented to their nudity, the sexual activities in which they engaged, and the recording of those activities. He found that the complainants were not coerced and that they did not exchange sex or nude posing for drugs. On the contrary, he found that they “initiate[d] and direct[ed] many of the activities” and “willingly consented to and participated in the making of the recordings” (para. 100).
22. The judge also accepted that K believed she would have a better prospect of sharing drugs if she engaged in sexual activities with Mr. Barabash and Mr. Rollison. Indeed, he referred to K’s testimony that while “no formal exchange arrangement existed”, drugs would be provided and used “[w]hen she engaged in sex with Barabash and Rollison” (para. 37). K further indicated she may have engaged in sexual activities with the intention of obtaining drugs. However, the judge did not consider the implications of this conclusion on the question of whether the relationships between the complainants and the appellants were exploitative. He also did not consider whether the complainants’ willingness to participate in sexual activities was influenced by any dependence on Mr. Barabash for shelter or drugs. Fundamentally, the trial judge failed to consider the extent to which the appellants ― two older men ― may have exercised control over two vulnerable, deeply troubled and runaway girls.
23. Thus, the trial judge’s factual findings do not adequately establish whether the appellants were in positions of trust or authority towards the complainants, whether the complainants were dependent upon them, or whether the relationships were exploitative of K and D, as required by s. 153.
24. As a result, I am satisfied that the trial judge’s error had a material bearing on the acquittals. The trial judge’s failure to properly address whether the sexual activity was lawful within the meaning of s. 153 as part of the private use exception analysis requires a new trial.
25. Remedy
26. I would allow the appeals and direct that a new trial be held.

*Appeals allowed and new trial ordered.*

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Solicitors for the intervener the Canadian Civil Liberties Association: Davis, Toronto.

Solicitors for the interveners Beyond Borders and the Canadian Centre for Child Protection Inc.: David Matas, Winnipeg; Canadian Centre for Child Protection Inc., Winnipeg.

1. These limits on consent applied to the following offences: s. 151 (sexual interference); s. 152 (invitation to sexual touching); s. 160(3) (bestiality in presence of or by child); s. 173(2) (exposure); ss. 271 to 273 (sexual assault). [↑](#footnote-ref-1)
2. Similar considerations would apply to the operation of the s. 152 invitation to sexual touching provision for those under the age of 16. [↑](#footnote-ref-2)