WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15, c. 43, s. 8;2010, c. 3, s. 5;2012, c. 1, s. 29.

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Williamson, 2014 ONCA 598
DATE: 20140819
DOCKET: C55167

Rosenberg, MacPherson and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Kenneth Gavin Williamson

Appellant

John H. Hale, for the appellant

Jamie C. Klukach, for the respondent

Heard: May 28, 2014

On appeal from the decision of Justice Gary W. Tranmer, released October 7, 2011, dismissing an application for a stay of the proceedings pursuant to ss. 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*, with reasons reported at 2011 ONSC 5930, and from the judgment of Justice Tranmer, sitting with a jury, dated December 20, 2011.

Lauwers J.A.:

[1] The appellant was found guilty after a trial with a jury of buggery, indecent assault and gross indecency under ss. 155, 156 and 157 of the *Criminal Code*, R.S.C. 1970, Chap. C-34, for numerous sexual acts he committed on a boy over 30 years ago. He was sentenced to a total of four years imprisonment.

[2] The appellant advanced two grounds of appeal in oral argument: first, that the trial judge erred in refusing to grant a stay of the proceedings based on unreasonable delay in the case coming to trial, under ss. 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*; and second, that the trial judge erred in not excising segments of the video recorded interview the appellant had with the police, or, alternatively, by not providing a caution to the jury on the use to which they might put those segments.

[3] The appellant did not pursue in oral argument two other grounds of appeal raised in his factum: that the appellant's statement to police was not voluntary and should have been excluded; and that the Crown Attorney's manner of cross-examining the appellant was prejudicial to his fair trial interests.

A. BACKGROUND FACTS

[4] In 1979, when the complainant was 12 years old, he met the appellant, who was then 26 years old, through a juvenile diversion program. The appellant was in a one-year program at Queen's University, studying to become a teacher, and was assigned to be the complainant's mentor/advocate, in what was described as a "big brother" type of relationship. The appellant and complainant would meet often for various activities, and the complainant would often visit the appellant at his university dormitory. On one such visit, the complainant missed his bus home and stayed overnight in the appellant's room.

[5] The complainant testified that when he went to bed, the appellant joined him in the bed, and began to rub up against him and then engaged in anal intercourse with him. The complainant did not want this to occur.

[6] The complainant testified that after this incident he continued to visit the appellant a few times per week, and the appellant continued to engage him in similar sexual activity, usually involving anal sex. Occasionally, the appellant forced the complainant to perform oral sex on him, and there were occasions of genital touching. The following summer, the complainant began to visit the appellant at his family home in Ottawa. The complainant testified that on each visit at the family home, the appellant would engage in anal intercourse with him.

[7] The complainant confirmed that the appellant never threatened, hit or struck him in any way. The complainant testified that he did not disclose these incidents to anyone during the course of his contact with the appellant because he was embarrassed. The complainant first disclosed the abuse to his first wife years later, and later to his current wife, his therapist and his doctor. In 2008, he told his probation officer about the abuse, and then reported it to police.

[8] On January 6, 2009, Detective Cahill of the Kingston Police arrested the appellant at the school where he worked as a teacher. On arrest, he told the appellant that he was being arrested for historical sexual assault. He advised the appellant of his right to counsel. The appellant chose not to exercise this right.

[9] After being taken to the police station, the appellant was interviewed by Detective Cahill, which was video recorded. The appellant initially stated that he had no idea why he was arrested. He then repeatedly denied any sexual contact with the complainant. Detective Cahill advised the appellant that his friends and family would have to be contacted. The appellant eventually admitted to Detective Cahill that sexual activity had occurred with the complainant. He described an account of sexual activity which he claimed was initiated by the complainant, but denied that anal intercourse had ever occurred, and denied that the complainant had ever performed oral sex on him. The appellant's account differed markedly from the complainant's.

[10] The trial judge found the appellant's statements in the video recorded interview to be voluntary. The video was admitted into evidence and played for the jury at the trial.

[11] At trial, the appellant denied any sexual activity with the complainant. He testified that the complainant stayed overnight in his dormitory on one occasion, when they realized that the complainant had missed the bus. The complainant went to bed first. When the appellant returned to his room, he found that the complainant was in his bed rather than on the air mattress he had set up for him. The appellant therefore slept on the air mattress himself. According to the appellant, the complainant visited him in Ottawa three times. There was no sexual activity and the two did not share a room.

[12] At trial, the appellant attempted to explain his statement to police. The appellant testified that he thought Detective Cahill had already made up his mind about the allegations, and sensed that he was in a lose-lose situation. He felt that he needed to satisfy Detective Cahill to avoid remaining in jail for violent sexual offences and, out of desperation, fabricated an account of sexual activity that would support lesser charges.

[13] The jury's verdicts show they did not accept the appellant's exculpatory evidence, it did not raise a reasonable doubt, and they were persuaded beyond a reasonable doubt that the sexual acts did occur. In his reasons for sentence, in accordance with the jury's verdicts, the trial judge found that from the fall of 1979 until August of 1980 the appellant committed in excess of 50 incidents of anal intercourse with the complainant, nine or ten incidents in which he forced the complainant to perform oral sex on him, a couple of occasions when the appellant touched the complainant's penis and several occasions when the complainant touched the appellant's penis.

B. ISSUES

(1) Did the trial judge err by refusing a stay of proceedings under ss. 11(b) and 24(1) of the *Charter*?

(a) Procedural History

[14] The appellant was arrested and interviewed on January 6, 2009. The Information, charging the appellant, was sworn the following day. He was held in custody until January 12, 2009, when he was released on bail.

[15] The appellant elected to have a preliminary inquiry and to be tried by a judge and jury in the Superior Court of Justice (SCJ). The preliminary inquiry was adjourned twice in the Ontario Court of Justice (OCJ), before it commenced and the appellant was committed for trial the same day. The undisputed events surrounding those adjournments can be summarized as follows:

- On April 28, 2009, in the OCJ, the date of November 23, 2009, was set for the preliminary inquiry. The Crown later learned that another matter was scheduled to continue on that date which would proceed first. On November 20, 2009, the Crown learned that the assigned judge would be unavailable on November 23. As such, the Crown cancelled their witnesses. Defence counsel was not informed of this and attended in court on November 23 expecting to proceed with the preliminary inquiry. The assigned judge was, in fact, present, but the witnesses had already been cancelled.

- The preliminary inquiry was rescheduled for the full day of February 22, 2010. The appellant and his counsel attended in court on that day and were informed that the assigned judge and investigating police officer were not available. The record indicates, however, that the assigned judge was present and available to conduct the inquiry.

- The preliminary inquiry was rescheduled a second time for May 7, 2010, and proceeded on that date. The complainant testified for most of the day. Although the Defence and Crown had agreed the police officers would be available for cross-examination at the preliminary inquiry, the Defence agreed to proceed by way of discovery with regard to these officers on a later date. The appellant was committed to trial. Earlier dates were offered, but the pre-trial in the SCJ was scheduled for August 4, 2010, to accommodate discovery and a family matter the appellant needed to attend.

[16] Although he ultimately refused to grant a stay, the trial judge was troubled by the fact that the first two preliminary inquiry dates were lost, and noted in his Decision on the s.11(b) Application, reported at 2011 ONSC 5930:

> The accused and his lawyer travelled from Ottawa on both of these dates without prior notice that the proceedings would be adjourned. This is most unfortunate and of concern to this court and relevant to the 11(b) application.

[17] On August 4, 2010, the judicial pre-trial conference in the SCJ was adjourned because the assigned Crown counsel was not present. Although earlier dates were available, there was no evidence about whether Crown counsel was available earlier than September 29, 2010, when Crown counsel attended and the pre-trial conference took place. The matter was then adjourned to the assignment court on October 22, 2010, when the pre-trial applications and jury trial were scheduled.

[18] A number of pre-trial applications were brought by both the Crown and defence. The jury trial began on December 12, 2011 and ended on December 20, 2011.

[19] Prior to the trial, on July 21, 2011, the appellant filed his Notice of Application for a stay under ss. 11(b) and 24(1) of the *Charter*. The application was heard on September 7 and 15, 2011, and dismissed on October 7, 2011.

[20] The appellant's primary complaints in his s. 11(b) application were that: (1) the preliminary hearing was rescheduled twice and took place almost five months after it was originally scheduled; and (2) the trial took place over a year after it was scheduled.

(b) The Decision under Appeal

[21] The trial judge's decision correctly set out the analytical framework to be applied in an application under s. 11(b) of the *Charter*, taken from *R. v. Morin*, [1992] 1 S.C.R. 771, *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, and a number of other decisions, including the decision of this court in *R. v. Tran*, 2012 ONCA 18, 288 C.C.C. (3d) 177, which approved the approach Code J. took in *R. v. Lahiry*, 2011 ONSC 6780, 109 O.R. (3d) 187.

[22] The factors to be assessed are: (1) the overall length of delay from the laying of charges until the trial concludes; (2) the waiver of any individual time periods; (3) the reasons for the various periods of delay; and (4) the prejudice to the particular interests of the accused that are protected by s. 11(b). The court is then obliged to consider whether the delay is unreasonable, and in doing so, to balance the interests of the accused and the societal interest in a trial on the merits: see *Lahiry,* at para. 9; *Tran,* at para. 24; *Morin*, at pp. 786-803.

[23] On the first factor, the length of delay, the trial judge found that the relevant time frame to be assessed was between January 7, 2009, when the Information

was sworn, and December 23, 2011, when the trial was set to end. This was a period of 35 months and 16 days. He found that "[s]uch a time frame warrants judicial scrutiny." I agree.

[24] It is common ground that the second factor did not apply in this case, as the appellant did not waive any periods of delay. The two factors in serious dispute were the third and fourth factors, the reasons for delay and the prejudice to the accused.

[25] The trial judge's characterization of the various periods of delay can be summarized as follows:

1. From January 7, 2009, when the information was sworn, to April 28, 2009, when the preliminary inquiry was set, was 3 months, 21 days. The trial judge characterized this period as inherent intake, except for 1 month, 4 days, which he attributed to the Crown for delay in providing disclosure.

2. From April 28, 2009, when the preliminary inquiry was set, to November 23, 2009, when the first preliminary inquiry was scheduled, but did not proceed, was 6 months, 26 days. In accordance with counsel's agreement, the trial judge characterized this period as institutional delay.

3. From November 23, 2009, when the first preliminary inquiry did not proceed, to February 22, 2010, when the second preliminary inquiry was scheduled, but also did not proceed, was 3 months. The trial judge characterized this delay as institutional.

4. From February 22, 2010, when the second preliminary inquiry did not proceed, to May 7, 2010, when the third preliminary inquiry proceeded and the appellant was committed for trial, was 2 months, 15 days. The trial judge characterized this delay as institutional.

5. From May 7, 2010 when the appellant was committed for trial, to August 4, 2010, the first appearance in SCJ, was 3 months. In accordance with counsel's agreement, the trial judge characterized this delay as inherent intake in the SCJ, although he commented that two months of this delay could well have been attributed to the defence, because earlier dates in the SCJ were offered but declined.

6. From August 4, 2010, the first appearance in the SCJ, to October 22, 2010, when the pre-trial motions and trial were set, was 2 months, 18 days. The trial judge characterized this delay as inherent and noted that the original judicial pre-trial conference was adjourned from August 4 to September 29 because the assigned Crown was not available.

7. From October 22, 2010, when the pre-trial motions and jury trial were scheduled, to December 12, 2011, when the trial began, was 13 months, 20 days. The trial judge characterized this delay as institutional, noting that the applications were serious and substantive, and scheduling of the pre-trial applications in advance of a jury trial is good practice.

[26] The trial judge's total allocation can be summarized:

Category of Delay	**Trial Judge's Totals**
Intake/Inherent	8 months (2 months, 17 days in OCJ, and 5 months, 15 days in SCJ)
Defence Delay	None
Institutional	26 months (12 months, 11 days in OCJ, and 13 months, 20 days in SCJ)
Crown Delay	1 month, 4 days

[27] The *Morin* guidelines for the suggested periods of institutional delay are eight to ten months in the provincial courts, and six to eight months in the superior courts: see *Morin*, p. 799. The trial judge acknowledged that the institutional delay in this case was well beyond the guidelines. However, he concluded that the appellant had not established the actual prejudice that he claimed to have suffered, and that although the court could infer prejudice, the inferred prejudice to the appellant was not significant. The trial judge also found a very high societal interest in trying the appellant on the merits, and dismissed the application.

(c) Analysis

[28] The appellant argues that the delay in this case beyond the *Morin* guidelines is excessive and that a stay was warranted under ss. 11(b) and 24(1) of the *Charter.* The Crown takes issue with certain aspects of the trial judge's attribution of the delays in this case.

i. Standard of Review

[29] As this court noted in *R. v. Konstantakos*, 2014 ONCA 21, 298 C.R.R. (2d) 310, at para. 5:

> The characterization of periods of delay, and the ultimate decision concerning the reasonableness of a period of delay, is reviewable on a standard of correctness: *R. v. Tran*, 2012 ONCA 18, 288 C.C.C. (3d) 177, at para. 19. The underlying findings of fact are reviewable on a standard of palpable and overriding

error: *R. v. Schertzer*, 2009 ONCA 742, 248 C.C.C. (3d) 270, at para. 71.

ii. The Attribution of Delays

From committal to first appearance in the SCJ

[30] The Crown urges this court to attribute two months of the delay between May 7, 2010, the date of committal, and August 4, 2010, the date of the appellant's first appearance in the SCJ, to the defence. The trial judge noted that the Crown and defence agreed that this timeframe was SCJ intake delay. However, because two earlier dates were available in the SCJ, but declined by the defence, the trial judge commented that: "two months could well be attributed to the defence." As this court held in *Tran*, at para. 31: "[T]he court is not bound by erroneous concessions by the Crown in allocating periods of delay [cit. omit.]." In my view, the trial judge's comment was correct and, despite counsel's agreement in the application before the trial judge, I would attribute two months of this delay to the defence.

From the first appearance in the SCJ to setting dates for pre-trial applications and trial

[31] On August 4, 2010, the first date set for pre-trial in the SCJ, the defence sought an adjournment of the pre-trial conference because Crown counsel assigned to the case was not available. The trial judge indicated:

> I think the defence's position of seeking the presence of assigned Crown was reasonable. In my view, to ensure a full and effective pre-trial hearing, it is necessary that counsel with carriage of the matter attend at pre-trial.

[32] September 29, 2010, was the second scheduled judicial pre-trial date and the assigned Crown appeared. The matter was then put over to assignment court on October 22, 2010. The trial judge categorized this entire period of delay as inherent.

[33] Before this court, the Crown argues that it is not the practice of the Kingston Crown's office to ensure that the assigned trial Crown is present at the pre-trial. Nevertheless, I agree with the trial judge's concern about the importance and utility of judicial pre-trial conferences, and agree with him that in this case the delay in this timeframe is therefore inherent.

From setting dates to trial

[34] At the assignment court on October 22, 2010, dates were set for pre-trial applications and the jury trial. December 12, 2011, was the first date scheduled for trial. The trial judge categorized this entire period as institutional delay.

[35] The Crown argues that the trial judge made two errors in characterizing this entire period as institutional delay. First, the Crown submits that the significant pre-trial motions proposed by the defence required preparation time

which should be classified as inherent delay, not institutional. The Crown proposed that three to five months be attributed to preparation.

[36] The attribution of delay for preparation purposes was addressed by this court in *Tran*, at para. 32:

> [P]arties should not be deemed automatically to be ready to conduct a hearing as of the date a hearing date is set. Counsel require time to clear their schedule so they can be available for the hearing as well as time to prepare for the hearing. These time frames are part of the inherent time requirements of the case. Institutional delay begins to run only when counsel are ready to proceed but the court is unable to accommodate them. [Internal citations omitted.]

[37] Although *Tran* was released after the 11(b) decision in this case, in my view, given the scope of the motions, preparation time of one month would appear reasonable to be reclassified as inherent rather than institutional delay: see *R. v. Florence* 2014 ONCA 443, at para. 63; *R. v. Ralph* 2014 ONCA 3, 299 C.R.R. (2d) 1, at para. 12.

[38] Second, the Crown relies on the language in *Morin*, at pp. 799-800, in which the Supreme Court indicated, with respect to the guidelines for institutional delay:

> These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to

> time to reflect changing circumstances. The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province.

[39] The Crown submits that this court ought to take into account the fact that the defence decided to elect trial by jury in Kingston, where there are only two courtrooms able to accommodate jury trials, one of which was already dedicated to a murder trial involving multiple murders and accused, which demanded significant institutional resources. The trial judge considered this issue at para. 47 of his reasons. However, the Crown did not have any explanation for why no one approached the Regional Senior Justice to see what other arrangements could be made to accommodate this trial under those circumstances, such as utilizing other venues in the Eastern Region of the Superior Court of Justice.

[40] Further, the Crown argues that this court should account for the fact that the accused chose to bring complex *Charter* motions. I reject this argument. As Rosenberg J.A. noted in *Ralph,* at para. 14: "[T]he appellant was not required to give up his *Charter* right to a jury trial to vindicate his *Charter* right to a trial within a reasonable time." Likewise, this appellant was not required to give up his pre-trial *Charter* applications, which the trial judge characterized as "serious and substantive", to vindicate his *Charter* right to a trial within a reasonable time.

[41] The appellant argues that the trial judge ought to have taken the Supreme Court's approach in *Godin.* There, the court restored the trial judge's stay of charges for sexual assault, unlawful confinement and threatening death. As Cromwell J. noted, at para. 39:

> This was not a complex case. A delay of 30 months in bringing it to trial is striking, given that the delay was virtually entirely attributable to the Crown or institutional delay and was largely unexplained.

[42] The Crown submits that the Supreme Court's reasoning in *Godin* is not applicable. The Crown submits that in *Godin* the Crown failed to explain the multiple delays, but in this case the Crown has provided explanations. That, in my view, is an insufficient basis on which to distinguish *Godin*. It is the substance of the explanations that counts. In the present case, the trial Crown and the court were both well aware when the trial date was set that the defence intended to bring a stay application based on delay and that the trial of the case was in jeopardy. In these circumstances, I do not find the Crown's explanations to be sufficient. The Eastern Region of the Superior Court has plenty of locations and judges; the trial could have been accommodated earlier.

[43] Lastly, the trial judge treated this entire period as institutional. This is arguably not consistent with this court's approach in *Tran,* at para. 32, to account for preparation time. As noted, *Tran* was released after the 11(b) decision in this case. The further difficulty in this case is that there is no evidence as to any

earlier availability of defence counsel during that long delay. There was no fresh evidence tendered to this court on these issues. It is therefore difficult to establish the date on which counsel were ready to proceed, but the court was unable to accommodate them.

[44] That said, in this relatively simple case in which counsel had prepared three times for the preliminary inquiry, I would attribute virtually no time to trial preparation. As the real driving force behind this period of delay was the other more complex murder trial the trial judge noted, which was limiting the institutional resources in the jurisdiction, I am not persuaded to attribute notional credit for preparation time to counsel. I would not reduce the trial judge's attribution of the delay as institutional any further.

[45] Based on the foregoing, I would adjust the trial judge's allocation of delays to the following:

Category of Delay	**Totals**
Intake/Inherent	7 months (2 months, 17 days in OCJ and 4 months, 15 days in SCJ)
Defence Delay	2 months
Institutional	25 months (12 months, 11 days in OCJ and 12 months, 20 days in SCJ)
Crown Delay	1 month, 4 days

[46] The institutional delays as I would attribute them in this case exceed the *Morin* guidelines by more than two months in the OCJ, and by more than four months in the SCJ. The added Crown delay, of one month and four days, results in an overall excess of about eight months. The total institutional and Crown delay is about 26 months.

[47] In *Ralph,* Rosenberg J.A. made the following comments, at para. 16:

> On the trial judge's findings a substantial amount of that time, some 26 months, was either Crown or institutional delay. If that finding held and given the failure to give the case priority when it was adjourned in October, I might well have found a violation of s. 11(b) requiring a stay of proceedings.

[48] In *Ralph*, the delay was ultimately found to be not 26 months of institutional and Crown delay, but 19 months. Rosenberg J.A. noted, at para 17: "While this is still a significant delay, it is a delay that only slightly exceeds the upper range of the *Morin* guidelines, of 14 to 18 months of institutional delay." The excess delay in this case is considerably more, at more than eight months. As Sopinka J. stated in *Morin*, at p. 807, "deviations of several months in either direction can be justified by the presence or absence of prejudice."

iii. Prejudice

[49] In *Godin*, Cromwell J. considered three forms of prejudice, at para. 30:

> Prejudice in this context is concerned with the three interests of the accused that s. 11(b) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence.

[50] He went on to say that both actual prejudice and prejudice "inferred from the length of the delay" were relevant, noting, at para. 31:

> As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn." Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.

Actual Prejudice

[51] The trial judge found, on the evidence, that the appellant had not established actual prejudice. He based this conclusion on factual findings set out in his reasons. The terms of the appellant's release were not onerous, and his concept of house arrest "was self-imposed." His inability to associate with persons of a certain age could have been overcome on a motion. The appellant's move from Kingston to Ottawa was not related to the charges, but was based on

his desire to help his elderly parents. The media scrutiny that he experienced was the result of the fact that he was charged and did not flow from any delay. The same would be true of the professional scrutiny that he was under and the fact that he was unable to work as a teacher, although he continued to be paid. Further, the trial judge found that the appellant's professional colleagues continued to support him. The appellant submitted no medical evidence of prejudice. There was no difficulty preserving evidence. None of these findings were challenged on appeal, let alone proven to suffer from any palpable and overriding error.

[52] The Crown relied on the same points as mitigating any prejudice to the appellant.

[53] Given these facts, I agree with the trial judge that the appellant did not make out actual prejudice on the evidence.

Inferred Prejudice

[54] As the trial judge noted, "[P]roof of actual prejudice is not invariably required to establish a s. 11(b) violation." He referred to *Godin,* and noted that a 35-month delay from the date of the charge to the commencement of the trial "is a basis from which to infer prejudice". Ultimately, however, he found, that the inferred prejudice to the appellant was "not significant."

[55] The appellant argues that the trial judge gave insufficient weight to inferred prejudice. A similar issue arose in *Ralph,* where Rosenberg J.A. made the following comments, at para. 16:

> The appellant adduced no evidence of actual prejudice. The trial judge accepted that inferred prejudice had to be taken into account but he described the inferred prejudice as a "modest amount of inferred prejudice". When an accused has had to wait almost three years for trial, even a trial as relatively complex as the appellant's, it is proper to infer significant prejudice: see *Godin*, [cit.omit.].

[56] In *R. v. Steele,* 2012 ONCA 383, 288 C.C.C. (3d) 255, this court substituted a stay of proceedings, largely because the trial judge failed to appropriately weigh the inferred prejudice that the accused suffered as a result of the 35 month delay in bringing him to trial. Of that delay, 26 months were attributable to institutional and Crown delay. Rosenberg J.A. held that, despite the seriousness of the offences and society's interest in a trial on the merits, the length of the delay and the unsatisfactory explanation for it were simply inexcusable. The delay in *Steele* was nearly identical to that in the present case. Also see: *R. v. H.(B.),* 2009 ONCA 731, 200 C.R.R. (2d) 262.

[57] Based on such cases having very similar delays, in my view, it must be inferred that the appellant has experienced significant prejudice. The trial judge erred in deeming it to be "not significant". As Cory J. observed in *R. v. Askov*

[1990] 2 S.C.R. 1199, at p. 1219, the time awaiting trial can be “exquisite agony”. The stigma of being under a public cloud should not be lightly dismissed.

iv. Balancing the Interests

[58] The next step in the analysis is to balance the interests of the appellant and the societal interest in a trial on the merits. The appellant argues that the balance in this case is in favour of granting a stay because the cumulative delay is just too long.

[59] The trial judge held:

> There is a very high societal interest in having Mr. Williamson tried on the merits for these very serious charges. Society's interest in protecting vulnerable children is very high.

He relied on the decision in *R. v. G.A.G.,* (2006) 206 O.A.C. 131, in which this court, in an endorsement, upheld the trial judge’s decision to refuse a stay, and the accused was found guilty; and *R. v. S.H.,* [2008] O.J. No. 5736, at para. 74. In *S.H.,* Boswell J. refused a stay, finding that there were several mitigating factors, similar to those in this case, that reduced the actual prejudice experienced by the accused.

[60] The Crown argues that the trial judge did not err, citing *R. v. Seegmiller*, (2004) 191 C.C.C. (3d) 347 (Ont. C.A.), and *R. v. Hussey*, 2008 ONCA 86, 168

C.R.R. (2d) 252, both involving sexual assaults. In both cases, the trial judge's decision to impose a stay was reversed by this court.

[61] The role of the societal interest in the balancing effort was set out by Cronk J.A. in *Seegmiller*, at para. 25:

> Where the nature of the allegation establishes a heightened societal interest in a trial on the merits, the absence of prejudice (particularly to the accused's fair trial interests) takes on added significance in the s. 11(b) calculus. The applications judge found that the suggested prejudice to Seegmiller was deserving of little weight, but failed to appreciate the significance of that assessment in a case like this one, where the societal interest in a trial on the merits is high. The applications judge also observed that "the degree of prejudice to the accused is not such as to require that the period of acceptable delay be shortened". This observation correctly recognizes that real prejudice can shorten the period of acceptable delay in a proper case; however, it fails to also recognize that the absence of meaningful prejudice can lengthen the period of delay that is constitutionally tolerable.

[62] On the other hand, society's interests should not permit the accused's "constitutional rights to be eviscerated": see *S.H.*, at para. 74.

[63] This point was discussed in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, in a different context, where the Supreme Court was dealing with the possible exclusion of illegally obtained evidence, under section 24(2) of the *Charter*. At para. 40, the Court endorsed the reasoning of Cronk J. A., who was in dissent in this court:

> As Cronk J.A. put it, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 150). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences.

[64] This is a very difficult case.

[65] As the Supreme Court said in *Morin* and *Godin,* the approach to assessing the reasonableness of delay is not mathematical, but requires balancing of the appellant's *Charter* protected interests with society's interest in prosecution of the offences on the merits. The difficulty in appeals of cases where no stay was granted by the trial judge is that, while the motion is heard and determined before the trial, when the presumption of innocence applies, the appeal is heard and determined after a fair trial on the merits in which the appellant was found guilty, often by a jury of peers. Would the judicial imposition of a stay be more publicly disreputable for the administration of justice by letting a plainly guilty person like the appellant go free, than tolerating an inordinate trial delay?

[66] The crimes committed by the appellant are serious; indeed, they are especially despicable. Certain factors militate against the appropriateness of a stay. There is no actual prejudice. There are mitigating factors. The appellant was out on bail and was not subject to particularly onerous restrictions. He was

being paid his salary. The digital evidence was preserved and, given that the abuse took place over 30 years ago, an additional eight months did not materially impact the appellant's ability to cross-examine the complainant.

[67] Despite these factors, in my view, the trial judge erred in refusing a stay. While there is no actual prejudice, the inferred prejudice is significant. There is no doubt that 26 months of institutional and Crown delay is significant and exceeds the *Morin* guidelines by eight months. The excessive delay is explained but not justified. In anticipation of an application under s. 11(b) of the *Charter,* neither the Crown nor the Superior Court took seriously the obligation to bring this relatively straightforward case to trial in a reasonable time. By contrast, the defence was diligent in attempting to move the matter along, and attended prepared for preliminary hearing dates not once, but twice, only to be turned away because of scheduling errors, even though the Crown was apparently aware of these issues in advance and failed to inform defence counsel.

[68] Applying the Supreme Court's words in *Harrison*, "*Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences," I conclude, with great reluctance, that the balance weighs in favour of the appellant's interests in a trial within a reasonable time, over the societal interest in a trial on the merits. A stay should have been ordered in this case.

[83] But for my conclusion on the first issue, I would dismiss the appeal on the second issue advanced in oral argument. In light of my conclusion on the first issue, it is not necessary for me to address the other issues raised in the appellant's factum, but not pursued in oral argument.

C. DISPOSITION

[84] Accordingly, I would allow the appeal, set aside the convictions, and enter a stay of the proceedings, pursuant to ss. 11(b) and 24(1) of the *Charter*.

Released: August 19, 2014 (PL)

"P. Lauwers J.A."
"I agree M. Rosenberg J.A."
"I agree J.C. MacPherson J.A."