CITATION: R. v. Williamson, 2011 ONSC 5930
COURT FILE NO.: 285/10
DATE: 07Oct2011

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Megan Williams, for the Crown
	)	
	)	
– and –	)	
	)	
	)	
Kevin Gavin Williamson	)	Sean May and Carey Allen, for the Respondent
Respondent	)	
	)	
	)	
	)	**HEARD:** September 7 and 15, 2011 at Kingston

TRANMER, J.

DECISION ON s. 11(b) APPLICATION

[1] Mr. Williamson is charged that between January 1, 1978 and December 31, 1982 at the City of Kingston did commit buggery, contrary to section 155 of the *Criminal Code*, indecent assault, contrary to section 156 and gross indecency, contrary to section 157. The offences are alleged to have been committed against a single complainant who was a young boy between the ages of 10 and 12 years at the time.

[2] Mr. Williamson was arrested at the end of the school day at the school where he was teaching on January 6, 2009. On that date, he was interviewed by the investigating police officer

which interview was audio and video recorded. He was held in custody until January 12, 2009 when he was released on bail.

[3] The information was sworn January 7, 2009. The matter proceeded through a preliminary inquiry in the Ontario Court of Justice. Mr. Williamson elected trial by judge and jury in the Superior Court of Justice. That trial has been set to commence the week of December 12, 2011 and to continue the week of December 19, 2011 to completion.

[4] In this application, Mr. Williamson seeks a stay of the proceedings on the basis that his right to be tried within a reasonable time under section 11(b) of the *Charter of Rights and Freedoms* has been breached in view of the considerable period of time between the original information and his trial. Both counsel agree this period of time is 35 months and 5 days, to the commencement date of his trial.

THE EVIDENCE

[5] Mr. Williamson filed an affidavit in support of his application and also testified before this court.

[6] He filed the transcripts of the proceedings which took place in the Ontario Court of Justice and in the Superior Court of Justice. The Crown filed an affidavit of the Superior Court of Justice trial coordinator and e-mails between the Crown's office and victim witness office.

[7] In his affidavit, Mr. Williamson stated that as a result of the charges he has been suspended from teaching, with pay. He treats himself as on call on short notice by his school board and each school day he readies himself to go to work, should he be called in. He has only

been called upon 2 times. He also maintains that his bail condition that he have no contact with persons under the age of 16 has adversely affected his relationship with his 14 year old nephew. His nephew lives in Toronto. Further, he swore that during this timeframe, he has relocated to Ottawa and that as a result, he has lost touch with his former teaching colleagues. He alleges that he has been subject to media attention and professional scrutiny as a result of the charges.

[8] In his testimony, Mr. Williamson indicated that his parents are elderly and that his father died in 2009. He indicated that the last thing his father said was in anger. He has two sisters who live overseas and a brother who lives in Toronto. He testified that they have a very close family and get together a couple of times each year. His bail requires that he not be in the presence of children under the age of 16 years of age unless accompanied by a responsible adult. He testified that his brother is heartbroken about this restriction which impacts his son. A letter was written to the Crown Attorney requesting a variation of this condition. The Crown did not consent to this request and advised that an application should be made to the court in this regard with supporting documentation. Mr. Williamson testified that his brother and sister-in-law were unable to take time off work for this purpose. There was no evidence given before me as to why affidavit evidence from the brother and sister-in-law could not have been tendered on such application.

[9] Mr. Williamson testified that he moved to Ottawa because of his father's deterioration and to help care for his parents. He testified that the move isolated him from his colleagues. He testified that he continues to receive support from his family and friends. He complains that he has been unable to forge new relationships.

[10] He testified that he feels like he has been under house arrest for the last 2½ years. Furthermore, the adjournment of two dates set for preliminary inquiry were stressful, caused him emotional upset, and increased his legal costs.

[11] In cross-examination, Mr. Williamson conceded that he had no documentation to confirm the media and professional scrutiny about which he complained. He confirmed the media attention occurred at the time he was charged, but did not detail the factual allegations. His concern is that such information remains available to anyone electronically. He confirmed that one of his concerns is that should the matter proceed to trial all of those details could be made public. It was clear from his evidence, as a whole, that his on-call readiness at home has been self-imposed. He has a cell phone, the number for which is known to his school board.

[12] He confirmed that until he moved to Ottawa, he did remain in touch with his colleagues, but that changed as a result of the move.

[13] In re-examination, he confirmed that what media coverage there had been elicited comments of disbelief from people who knew him. He assumed that a great many persons read the initial media coverage which included newspaper and TV and radio, including hundreds of former and current students.

[14] I will recite here the undisputed facts concerning the setting of a date for preliminary inquiry in the Ontario Court of Justice and the adjournment of two such dates. 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.

[15] On April 28, 2009, in the Ontario Court of Justice, the date of November 9, 2009 at 10:00 AM was set for a focus hearing. At the same time, the full day of November 23, 2009 at 10:00 AM was set for the preliminary inquiry in the matter.

[16] The following exchange of e-mails took place between the office of Victim Witness and the office of the Crown, but were not brought to the attention of defence until the course of the present application. On October 26, 2009, Victim Witness wrote to the Crown to confirm that this preliminary inquiry would proceed on the set date. The Crown advised that there had been a continuation of another matter put to that date which would proceed first. The next day, the Crown advised Victim Witness that the other matter would proceed first and that the Williamson matter would likely get started by 2:00 PM.

[17] On November 9, 2009, the focus hearing took place with the justice assigned to hear the preliminary inquiry. There was no indication of a problem with the day set for the preliminary inquiry.

[18] On November 20, 2009, the Crown's office was advised by the court that the assigned judge would be attending a funeral on the afternoon of November 23, and therefore, the Williamson matter would not be reached at all as the other matter had been definitely given priority. Based on that e-mail, the Crown's office cancelled the witnesses. Defence counsel did not know of this.

[19] On November 23, 2009, the accused and his counsel were present in court expecting to proceed with the preliminary inquiry. The assigned judge was also present. The witnesses had been cancelled. The indication was that another continuing preliminary inquiry had been given

priority. Counsel was offered and accepted the date of February 22, 2010 at 10:00 AM for the Williamson preliminary inquiry with the full day set aside. Defence counsel thereafter confirmed by letter that just prior to the commencement of proceedings on this date the Crown advised him that the assigned judge would be attending a funeral that afternoon. In fact, on that date, the assigned judge was present and available to conduct the preliminary inquiry. The defence was then advised that the Crown had cancelled the witnesses already and that a lengthy continuing matter would be proceeding.

[20] On February 22, 2009, the accused and his counsel attended in court for the preliminary inquiry. On that date, they were advised that the assigned judge and the investigating police officer were not available and therefore, the preliminary inquiry would not commence. The record indicates the assigned justice was, in fact, in attendance. Although earlier dates for preliminary inquiry were offered, Defence counsel accepted May 7, 2010 and the record was endorsed that a full day was required and the matter was marked for priority.

[21] On May 7, 2010, the preliminary inquiry commenced. The first witness was the complainant. His evidence ended at 3:40 PM. 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. Mr. Williamson was committed to trial. Earlier dates in the Superior Court of Justice were offered, but in order to accommodate the discovery and a family matter that Mr. Williamson had to attend, the date of August 4, 2010 was accepted by defence for the pre trial.

GENERAL PRINCIPLES

[22] The test for consideration of delay is set out by the Supreme Court of Canada in *R v. Morin*, [1992] 1 S.C.R. 771. The four factors which are to be considered on an application for a stay of proceedings based on unreasonable delay are as follows:

a. The length of delay: an inquiry into the unreasonable delay is triggered only where the gross delay is sufficiently long to raise an issue as to its reasonableness. The guidelines set out in *Morin* are 8 to 10 months in the Ontario Court of Justice and 6 to 8 months in the Superior Court of Justice.

b. Waiver by the accused: if the accused waived in whole or in part, his or her right to complain of the delay, then the waived time must be deducted from the total.

c. The reasons for delay: these are the inherent time requirements of the case, the actions of the accused, the actions of the crown, limits on institutional resources and other reasons for delay. These categories are not meant to assign blame, but serve as a means by which delay can be considered.

d. Prejudice to the accused: prejudice maybe proved by the accused or inferred from the length of delay. The presence of prejudice, however, is not dispositive of the application. Prejudice is just one factor, albeit an important one, in the overall determination of reasonableness.

[23] When determining whether delay in a particular case is unreasonable, a court must balance the societal interest in adjudication on the merits with the length and causes of delay and

its corresponding impact on the accused. The interests of an accused are to be balanced against society's interest in law enforcement. As the seriousness of the offence increases, so does the societal interest in ensuring a trial on the merits. Likewise, increased prejudice militates in favour of a stay of proceedings. In the end, the ultimate determination of reasonable mass is decided on the facts of each case in light of the particular accused and the circumstances leading to the delay being challenged.

[24] The court in *Morin* established guidelines for what may constitute reasonable systemic or institutional delay, namely 8 to 10 months in the Ontario Court of Justice and 6 to 8 months in the Superior Court of Justice. However, the guidelines are not limitation periods and were not intended to be applied strictly. In *R v. Godin*, [2009] 2 S.C.R. 3, the Supreme Court of Canada clarified that delay in excess of the *Morin* guidelines does not in and of itself render the delay unreasonable. The delay must be assessed in light of the explanations for delay, prejudice to the accused, and society's interest in adjudication on the merits.

LENGTH OF DELAY

[25] The relevant time frame in the present case is from January 7, 2009 until December 23, 2011 which is 35 months and 15 days. Such a timeframe warrants judicial scrutiny.

WAIVER BY THE ACCUSED

[26] Crown and defence counsel both agree there has been no waiver by the accused of his section 11(b) rights.

REASONS FOR DELAY

[27] The Defence and Crown have characterized the relevant timeframe as follows:

	ONTARIO COURT OF JUSTICE	**DEFENCE**	**CROWN**
1.	January 7, 2009 – April 28, 2009 Information – date set for preliminary inquiry	Intake except for 1 month, 4 days Crown delay in disclosure	Intake
		3 months, 21 days	
2.	Apr 28, 2009 – Nov 23, 2009 (first date of preliminary inquiry)	Institutional	Institutional
		6 months, 26 days	
3.	**Nov 23, 2009 – Feb 22, 2010 (second date for preliminary inquiry)**	**Institutional**	**Neutral**
		3 months	
4.	**Feb 22, 2010 – May 7, 2010 (preliminary inquiry commenced**	**Institutional**	**Neutral**
		2 months, 15 days	

	SUPERIOR COURT OF JUSTICE	**DEFENCE**	**CROWN**
5.	May 7, 2010 – Aug 4, 2010 Committal – pre-trial in SCJ adjourned	Inherent	Inherent
		3 months	
6.	**Aug 4, 2010 – Sept 29, 2010 (pre-trial in SCJ**	**Inherent**	**Defence**
7.	**Sept 29, 2010 – Oct 22, 2010 (Assignment Court in SCJ)**	**Inherent**	**Defence**
		2 months, 15 days	
8.	Oct 22, 2010 – Sep 6-9, 2010 Pre-trial motions by Accused	Institutional	Institutional
		10 months, 15 days	
	Nov 7, 2010 **Pre-trial motion by Accused**	**Institutional**	**Defence**
	Dec 12 – 23, 2010 **Trial in SCJ**	**Institutional**	**Defence**
		3 months, 6 days	

[28] While counsel agree in the characterization of certain time periods, I must decide those that are in dispute.

JANUARY 7, 2009 – APRIL 28, 2009

[29] The record indicates that as late as March 13, 2009, the Crown had still not disclosed the two critical audio/visual recorded interviews of the complainant conducted in October or November 2008, the basis for the charges and of the accused conducted January 6, 2009. I agree with the defence that 1 month, 4 days of this time is Crown delay.

NOVEMBER 23, 2009 – FEBRUARY 22, 2010

[30] The defence was given no notice until the morning of the first date for preliminary inquiry, November 23, 2009, that it would not be proceeding. It did not proceed because a continuation was given priority and because the Crown cancelled the witnesses thinking, in error as it turned out, that the assigned judge would not be available.

[31] This is institutional delay in my opinion.

FEBRUARY 22, 2010 – MAY 7, 2010

[32] On the morning of the second date set for preliminary inquiry, counsel were informed by the Court that the assigned judge was not available to conduct the preliminary inquiry.

[33] No explanation for this has been given. The record indicates the assigned judge presided when the matter was spoken to. He was not seized of the matter. This situation is therefore quite distinct from the *MacDougall* case where the judge seized with the sentencing took ill and from

the *Roncaioli* case where the one and only necessary expert witness returned for the matter became unexpectedly unavailable. (*R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Roncaioli*, [2011] O.J. No. 2167 (C.A.))

[34] This is institutional delay in my view.

MAY 7, 2010 – AUGUST 4, 2010

[35] Both counsel agree this delay is inherent intake to the Superior Court of Justice, therefore, I make no finding otherwise.

[36] However, I would comment that two earlier dates were available in the Superior Court of Justice, but declined by defence. Those two months could well be attributed to the defence.

AUGUST 4, 2010 – OCTOBER 22, 2010

[37] On the first date set for pre-trial in the Superior Court of Justice, defence sought an adjournment because the assigned Crown counsel was not available to attend. The Crown before me submitted that the work load of her office often prevented the assigned Crown from attending the pre-trial of his or her assigned case. I think the defence 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.

[38] The pre-trial was rescheduled to September 29, 2010, when Ms. Williams, the assigned Crown, was able to attend. Although earlier pre-trial dates were available, there is no evidence as to Ms. Williams' availability.

[39] On September 29, 2010, the matter was adjourned by the presiding justice to the next Assignment Court, October 22, 2010, to set the dates for trial and for prior to trial applications.

[40] I agree with defence counsel that this is inherent delay.

SEPTEMBER 6, 2010 – DECEMBER 12-23, 2010

[41] The Crown attributes this time frame to defence delay because defence brought prior to trial applications which he wished scheduled 90 days prior to trial.

[42] These applications were serious and substantive, namely third party records, s. 11(b) and ss. 10(a) and (b). The Crown also brought its own application for a ruling as to the voluntariness of the accused's audio/video recorded statement.

[43] The hearing and adjudication of such applications prior to jury selection facilitates a jury trial. It is disruptive to hold off on such applications until after the jury is selected and the first day or days of trial are then required for them.

[44] I consider the scheduling of the prior to trial applications in this case to be good practice and a necessary part of the trial scheduling as a whole.

[45] I find this time frame to be institutional delay.

SUMMARY OF DELAY

[46] As either agreed upon by counsel or as decided by me, I characterize the time from the swearing of the information, January 7, 2009, to the start of the jury trial, December 12, 2011, estimated to go into a second week as follows:

	OCJ	**SCJ**
Inherent	2 months, 17 days	5 months, 15 days
Actions of Accused		
Actions of Crown	1 month, 4 days	
Institutional	12 months, 11 days	13 months, 15 days
Other		
(*Morin* guidelines	8-10 months	6-8 months)

[47] In addition to the reasons for the delay which I have considered, a further reason in Mr. Williamson's case that caused institutional delay, at both levels of courts, is the impact of a multiple murder victim and accused case that drew upon the institutional resources.

[48] The institutional delay in this case is well beyond the reasonable interpretation of the *Morin* guidelines. It is not a complex case. There are two key witnesses, the complainant and the accused.

[49] One issue that arose during this application concerned the affidavit sworn by the Superior Court of Justice trial coordinator which was obtained and filed by the Crown. The affidavit identified Assignment Court dates that were available on certain dates, as well as trial dates, and indicated available trial dates assigned to named cases at certain Assignment Courts. The relevant point to this case was that had Mr. Williamson sought a pre-trial in the Superior Court of Justice on an earlier occasion, and not elected a jury trial, and not brought substantive prior to trial applications, he could have been given an earlier trial date. I have considered the affidavit, but filing such an affidavit is a practice that should not be encouraged. The content of such an affidavit and of any cross-examination thereon, without limitation, can venture into highly irrelevant information, for example, concerning judge's schedules to name one concern. There are no limits in place to my knowledge. Another concern is the appearance of justice. In

Kingston, the Crown's office and the office of the trial coordinator for the Superior Court of Justice are in the same building. There are no defence counsel offices in that building. This is an item of evidence rarely submitted. The relevant evidence is readily available through the transcripts of Assignment Courts.

PREJUDICE TO THE ACCUSED

[50] With the above periods and causes of delay in mind, this Court must balance any actual or presumed prejudice suffered by the accused with society's interest in adjudication on the merits.

[51] I find that the accused has not proven the actual prejudice that he claimed to have suffered.

[52] His house arrest is self-imposed.

[53] His nephew lives in Toronto and therefore, there would be limited opportunities to visit. In any event, the presence of a responsible adult is not onerous. It was the accused's brother who was heartbroken, on the evidence, yet he was too busy to swear an affidavit or travel to Kingston for court.

[54] Mr. Williamson's move to Ottawa was to help his parents, not charge or delay related.

[55] The media attention and professional scrutiny was as a result of the fact that he was charged, not to any delay. In any event, his evidence is that his colleagues support him.

[56] The delay due to the unexpected adjournment of his preliminary inquiry on two occasions is most unfortunate and most inappropriate on the facts before me. The defence did not receive

notice of priority being given to another case or of the Crown cancelling witnesses on the first occasion. There was no explanation for the second occasion. While the stress, emotion and financial cost to the accused that resulted is most regrettable, I do not find it to amount to significant prejudice. The accused has not filed any medical evidence on the issue of prejudice as has been done in other s. 11(b) cases cited by counsel.

[57] However, that is not the end of the prejudice inquiry. Proof of actual prejudice is not invariably required to establish a s. 11(b) violation.

[58] The comments of Cromwell, J. in *R. v. Godin,* [2009] 2 S.C.R. 3 at para. 39 and 40 are applicable. The delay in Mr. Williamson's case, 35 months, from date of charge to commencement of trial is a basis from which to infer prejudice to him.

[59] As Cory, J. stated is *R. v. Askov,* [1990] 2 S.C.R. 1199, at para. 75:

> There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

[60] Justice Code of this Court quotes as follows:

> [32] Sopinka J. made it clear in *Morin, supra* at pp. 19-20, that the "guidelines" for systemic delay are "neither a limitation period nor a fixed ceiling" and they are not to be applied "in a purely mechanical fashion". Indeed, the "guidelines" for systemic delay are really more in the nature of a sliding scale as they can

move up or down, depending on the presence or absence of actual prejudice. As Sopinka J. put it in *Morin, supra* at pp. 21, 24-5 and 28:

> The application of a guideline will also be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact.
> …
> As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.
> …
> While I have suggested that a guideline of eight to ten months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice. [Emphasis added]

[33] The *Morin* case itself illustrates the flexibility of the "guideline" as there were twelve months of systemic delay in that case, some two months over the top end of the "guideline", but there was no evidence of actual prejudice. In these circumstances, it was held that there was no violation of s. 11(b).

R. v. Richards 2010 ONSC 6202

[61] Proof of actual prejudice was a determinative factor in cases cites by the defence:

R. v. G.(B.J.), (1995) CarswellOnt 3644
R. v. Romano, (1995) CarswellOnt 3005
R. v. Bisoon, (1995) CarswellOnt 5
R. v. Gregorovich, (2005) O.J. No. 111
R. v. H.(B.), (2009) 200 C.R.R. (2d) 262

[62] In the first three cases, the Court found actual prejudice based on medical evidence. There is no such evidence in Mr. Williamson's case. Code, J. also pointed out that inferred prejudice due to fading witness memories is minimized where such accounts have been

preserved in reasonably reliable forms such as videotaped statements and preliminary inquiry testimony (para. 54).

[63] That has been done in Mr. Williamson's case.

[64] I find that Mr. Williamson has not proven actual prejudice, and that the inferred prejudice to him is not significant.

SOCIETAL INTEREST

[65] As well as protecting an individual's rights to security of the person, to liberty and to a fair trial, s. 11(b) is also intended to protect society's interest in a trial on the merits. This interest is particularly significant where the accused is charged with very serious offences.

[66] The allegations against Mr. Williamson are very serious. They involve gross sexual misconduct by an accused in his mid-twenties at the time, in a position of authority, against a grade school boy, aged 10-12 years. It is alleged that the accused was in a "big brother" position with respect to the complainant. The abuse is alleged to have occurred repeatedly over a significant period of time. The abuse is alleged to include fellatio, anal penetration, simulated anal sex and other sexual activity.

[67] The accused began his career as a teacher in 1980. That is within the period of the charges. He was arrested at Gananoque Secondary School where he was working as a teacher. At the time of arrest, he was coaching students after the end of the school day.

[68] Caselaw has recognized that teachers are held in a high position of trust, second only to parents. (*R. v. Byford,* [2000] O.J. No. 2134 (S.C.J.: Gauthier, R.S.J.))

[69] The total institutional delay of 26 months in this case exceeds the midpoint of the guidelines by 10 months. It is not a complex case. There is mainly one Crown witness and the police interview of the accused which was audio-video recorded (if admissible). The delay resulted on both levels of court, but this is not a case where the Williamson matter was placed at "the back of the shelf" as in *R. v. R.(W.G.),* (2009) CarswellOnt 773.

[70] It is also not as extreme a case as was before Code, J. in *R. v. Richards, supra* where a May 2010 trial date was adjourned to April 2011.

[71] The length of the delay is well beyond the norm, but not extreme.

[72] As I have found, there is no actual prejudice proven. The inferred prejudice is not significant given the preservation of the evidence as I have stated.

[73] 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.

[74] The Ontario Court of Appeal in *R. v. G.A.G.,* [2006] O.J. No. 67 affirms these principles. To the same effect is the decision of Boswell, J. of this Court in *R. v. S.H.,* [2008] O.J. No. 5736, para. 74. Justice Boswell identified factors mitigating any prejudice to the accused in that case (para.73). Those factors are present in Mr. Williamson's case.

CONCLUSION

[75] This is a borderline case, but balancing the factors and interests that are applicable to this s. 11(b) application, I find that the accused has not proven, on a balance of probabilities, that his right to a trial within a reasonable time has been breached.

[76] Society's interests in seeing the offences tried on the merits overcome the delay of this case.

[77] The application is dismissed.

Tranmer, J

Released: October 7, 2011

CITATION: R. v. Williamson, 2011 ONSC 5930
COURT FILE NO.: 285/10
DATE: 07Oct2011

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

Kenneth Gavin Williamson

DECISION ON S. 11(B) APPLICATION

Tranmer, J.

Released: October 7, 2011