

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Williamson, 2016 SCC 28, [2016] 1 S.C.R. 741 | **Appeal heard:** October 7, 2015  **Judgment rendered:** July 8, 2016  **Docket:** 36112 |

Between:

Her Majesty The Queen

Appellant

and

Kenneth Gavin Williamson

Respondent

- and -

Attorney General of Alberta,

British Columbia Civil Liberties Association and

Criminal Lawyers’ Association (Ontario)

Interveners

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

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| **Joint Reasons for Judgment:**  (paras. 1 to 39)  **Reasons Concurring in the Result:**  (paras. 40 to 42)  **Dissenting Reasons:**  (paras. 43 to 86) | Moldaver, Karakatsanis and Brown JJ. (Abella and Côté JJ. concurring)  McLachlin C.J.  Cromwell J. (Wagner and Gascon JJ. concurring) |

R. *v.* Williamson, 2016 SCC 28, [2016] 1 S.C.R. 741

Her Majesty The Queen Appellant

v.

Kenneth Gavin Williamson Respondent

and

Attorney General of Alberta,

British Columbia Civil Liberties Association and

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**Indexed as:** R. ***v.*** Williamson

2016 SCC 28

File No.: 36112.

2015: October 7; 2016: July 8.

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

on appeal from the court of appeal for ontario

*Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of nearly three years between charges and end of trial — Whether accused’s right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for determining s. 11(b) infringement applied.*

W was charged in January 2009 for historical sexual offences against a minor. His trial ended in December 2011. W applied for a stay of proceedings due to the delay. The trial judge dismissed the application and W was convicted. The Court of Appeal allowed the appeal and entered a stay.

Held (Cromwell, Wagner and Gascon JJ. dissenting): The appeal should be dismissed.

*Per* Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: Applying the new framework established in the companion appeal of *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, W’s right to be tried within a reasonable time under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* was infringed.

The delay between the charges and the end of trial was approximately 35.5 months. W did not waive any of this delay, and solely caused only one and a half months of it. Subtracting this defence delay leaves 34 months. This is still above the 30‑month presumptive ceiling established in *Jordan* for cases going to trial in the superior court. The delay is therefore presumptively unreasonable. Here, the Crown has failed to discharge its burden of showing that the delay is reasonable. The record does not disclose any delay caused by discrete, exceptional circumstances, and the case does not remotely qualify as exceptionally complex.

In addition, since W was charged before the release of *Jordan*, the transitional exceptional circumstance established in *Jordan* may apply. As stated in *Jordan*, the transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the previous legal framework, upon which the parties reasonably relied.

While this is a close case, the transitional exceptional circumstance does not apply. In other words, the *Morin* framework cannot justify the nearly three years it took to bring W to trial on relatively straightforward charges. Although W did not suffer significant prejudice, the case was simple, the Crown did little to combat the substantial institutional delay, and W was reasonably proactive in attempting to move the matter along. Therefore, while the crimes committed by W are very serious, the balance weighs in favour of his interests in a trial within a reasonable time, over the societal interest in a trial on the merits. At nearly three years, this straightforward case took far longer to try than it should have.

*Per* McLachlin C.J.: Applying the revised *Morin* framework (*R. v. Morin*, [1992] 1 S.C.R. 771) proposed by the minority in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, the Court of Appeal did not err in entering a stay of proceedings.

*Per* Cromwell, Wagner and Gascon JJ. (dissenting): This is a close case of excessive delay that is not clearly unreasonable. This is the sort of case in which a balancing of interests is critical in assessing unreasonable delay. Even in such a case, the new framework developed by the majority in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, for determining whether a person’s right under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* to a trial within a reasonable time has been violated, does not allow for consideration of the strong societal interest in resolving the serious charges against W on their merits. The new framework does not permit the sort of balancing of interests that is inherent in the concept of reasonableness.

A reasonable period for this type of case to be prepared and tried was assessed at seven months. The reasonable institutional delays for both levels of court totalled 18 months, based on the upper end of the range under the guidelines in *R. v. Morin*, [1992] 1 S.C.R. 771. The reasonable time requirements of this case were therefore 25 months. The case in fact took 35.5 months. Five of those months should not be counted against the state: two months were fairly attributed to the defence and three months resulted from a scheduling issue at the preliminary inquiry stage. The difference between the 30.5 months which count against the state and the 25 months reasonably required for a case of this nature exceeds the reasonable time requirements of a case like this one by 5.5 months.

While this is not an insignificant period of time, it is not clearly unreasonable and the final balancing of relevant factors is therefore critical. For the trial judge, that balancing resulted in a finding that the delay was not unreasonable. He found that there was no actual prejudice, and there was no basis for the Court of Appeal to take a different view of this matter; the concept of “inferred prejudice” is not a useful one and, in any event, the trial judge’s analysis of this issue under the then‑existing law contained no error. The trial judge also found that there was a very high societal interest in having W tried on the merits for these very serious charges. This is not to say that the societal interest in resolution on the merits can ever justify what is otherwise a clearly unreasonable delay. But in a case like this one, in which the delay is excessive but not so long as to be clearly unreasonable, it is one of the considerations that should be taken into account. The jurisprudence has been clear that societal interests underlie the concept of reasonableness. The trial judge also accepted the impact of the temporary and exceptional pressure on the dockets of both the provincial court and the superior court at the relevant time. This sort of pressure is a factor that should result in the *Morin* guidelines being applied flexibly.

These are relevant considerations and there was no error in the judge’s weighing of them. Taking all of these considerations into account, there was also no error in the trial judge’s ultimate conclusion that the delay here was not unreasonable. In this case, staying these charges would be more publicly disreputable for the administration of justice than tolerating an inordinate trial delay. The judgment of the Court of Appeal should therefore be set aside and the convictions entered at trial reinstated.

**Cases Cited**

By Moldaver, Karakatsanis and Brown JJ.

**Applied:** *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **referred to:** *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. D. (R.)*, 2008 BCCA 339, 235 C.C.C. (3d) 28; *R. v. MacPherson*, 2015 ABCA 139, 323 C.C.C. (3d) 428; *R. v. Scott*, 2015 SKCA 144, 333 C.C.C. (3d) 310; *R. v. MacMunn*, 2008 ONCA 520, 173 C.R.R. (2d) 242.

By McLachlin C.J.

**Applied:** *R. v. Morin*, [1992] 1 S.C.R. 771; **referred to:** *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

By Cromwell J. (dissenting)

*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Ralph*, 2014 ONCA 3, 299 C.R.R. (2d) 1; *R. v. Steele*, 2012 ONCA 383, 288 C.C.C. (3d) 255.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 11(*b*).

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, MacPherson and Lauwers JJ.A.), 2014 ONCA 598, 324 O.A.C. 231, 314 C.C.C. (3d) 156, [2014] O.J. No. 3828 (QL), 2014 CarswellOnt 11147 (WL Can.), setting aside a decision of Tranmer J., 2011 ONSC 5930, [2011] O.J. No. 4423 (QL), 2011 CarswellOnt 10327 (WL Can.). Appeal dismissed, Cromwell, Wagner and Gascon JJ. dissenting.

Eric H. Siebenmorgen and Tracy Kozlowski, for the appellant.

John H. Hale, for the respondent.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Tim A. Dickson and Martin Twigg, for the intervener the British Columbia Civil Liberties Association.

Frank Addario and Erin Dann, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

Moldaver, Karakatsanis and Brown JJ. —

1. Introduction
2. The respondent, Mr. Williamson, says his right to be tried within a reasonable time under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* was infringed. The trial judge found no s. 11(*b*) infringement. The Court of Appeal disagreed and entered a stay of proceedings.
3. In the companion appeal of *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, we stated a new framework for determining whether s. 11(*b*) has been infringed. Applying that framework in this case, including its transitional features, we conclude Mr. Williamson’s right to be tried within a reasonable time was infringed. We would therefore dismiss the appeal.
4. Facts
5. Mr. Williamson was charged in January 2009 with historical sexual offences against a minor. He elected trial by judge and jury, and a preliminary inquiry was set for November 2009. Three days before the preliminary inquiry was to begin, Crown counsel learned that a continuation of another matter had been set for the same date and the assigned judge would not be able to conduct Mr. Williamson’s preliminary inquiry. The Crown cancelled its witnesses, but neglected to inform Mr. Williamson of this development.
6. Mr. Williamson appeared in court with his counsel on the date scheduled for the preliminary inquiry. He learned that the continued matter had been given priority, but that the assigned judge was nevertheless available to conduct his preliminary inquiry that afternoon. However, since the Crown had cancelled the witnesses, the preliminary inquiry was rescheduled to February 2010. Shortly after this adjournment, defence counsel wrote to Crown counsel stating: “We continue to be anxious to move forward in this matter which regrettably could not proceed today due to administrative and institutional delay.”
7. The parties all appeared for the scheduled preliminary inquiry date in February 2010, but a mix-up led them to believe that the assigned judge and the investigating officer were not available. The preliminary inquiry was rescheduled for May 2010.
8. At the preliminary inquiry, by agreement of the parties, the only evidence heard was that of the complainant. The Crown and defence agreed that this was the only evidence relevant to committal. They jointly submitted to the court that in order to use time “effectively”, the Crown would make the police witnesses available to the defence to be examined out of court. The preliminary inquiry was completed in May 2010 and Mr. Williamson was committed for trial in the Superior Court of Justice.
9. Matters in the Superior Court proceeded slowly. In October 2010, trial dates were set for December 2011. No earlier trial dates were available because Mr. Williamson had elected trial by jury in Kingston, where one of the two jury courtrooms was already monopolized by a long and high-profile multiple-murder trial.
10. Mr. Williamson was released on bail soon after his arrest in January 2009, and he remained on bail until the start of trial in December 2011. His bail conditions were as follows: in addition to the standard conditions, he was prohibited from contacting the complainant; from being in the presence of anyone under the age of 16 without another adult present; and from seeking or maintaining active employment where such employment would require him to be in a position of trust or authority with a person under the age of 16 years.
11. Mr. Williamson complained that his bail conditions made it difficult for him to maintain a relationship with his 13-year-old nephew. He wrote to the Crown in November 2010 to request a variation of his bail conditions to enable him to spend time alone with his nephew. The Crown opposed the request and Mr. Williamson did not pursue the matter by way of a formal application.
12. Mr. Williamson indicated he had been suspended from his job as a teacher with pay while the charges were pending. A term of this suspension required Mr. Williamson to remain available and ready to work each day in the event that his employer required him. This left him unable to find other employment or volunteer opportunities.
13. Mr. Williamson’s father became ill during the time that these charges were pending, and he moved to Ottawa to care for his parents. He also stated that, though he enjoyed support from his family, friends and colleagues, he felt isolated and had difficulty maintaining relationships while he was awaiting trial. The charges against him were publicized in the media, which caused him to suffer additional stress and anxiety.
14. Judgments Below
    1. Ontario Superior Court of Justice, 2011 ONSC 5930
15. The trial judge heard the s. 11(*b*) *Charter* application several months before the jury trial was scheduled to begin. He determined that the total length of delay from the time of the charges to the anticipated end of the trial was 35 months. The Crown and defence agreed that Mr. Williamson had not waived any of the periods of delay. The trial judge found that there were approximately eight months of inherent delay, one month of delay attributable to the Crown, and 26 months of institutional delay. Approximately 12 months of this institutional delay occurred in the Ontario Court of Justice, primarily due to the fact that the preliminary inquiry was adjourned twice. Thirteen and a half months of this institutional delay occurred in the Superior Court, chiefly due to the difficulty in scheduling a jury trial in Kingston throughout 2010 and 2011.
16. The trial judge rejected Mr. Williamson’s assertion that he had suffered actual prejudice as a result of the delay. He found that most of the negative effects that Mr. Williamson had testified to resulted from the fact of being charged or from Mr. Williamson’s own decisions. The judge did, however, note that Mr. Williamson suffered stress as well as emotional and financial costs as a result of the two adjournments to the preliminary inquiry. The trial judge considered whether he should infer prejudice based on the length of the delay alone. He inferred some, but found that it was not significant.
17. The trial judge ultimately found that Mr. Williamson had not proved an infringement of his s. 11(*b*) right, and he declined to enter a stay. Mr. Williamson was subsequently convicted of buggery, indecent assault, and gross indecency.
    1. Ontario Court of Appeal, 2014 ONCA 598, 324 O.A.C. 231
18. Mr. Williamson appealed his convictions and the decision denying a stay. The Court of Appeal found that the trial judge had correctly attributed the delay, save for two months, which the Court attributed to the defence based on defence counsel’s unavailability. It varied the total institutional delay to 25 months, and noted that the Crown delay was one month.
19. The Court of Appeal agreed with the trial judge that Mr. Williamson did not establish any actual prejudice. It determined, however, that the trial judge gave insufficient weight to the inferred prejudice, given the length of the delay. The Court of Appeal had inferred prejudice for similar periods of delay in prior cases. Based on these cases, the trial judge should have inferred significant prejudice. In balancing the prejudice against society’s interest in having the case heard on the merits, the Court of Appeal noted that the charges were serious, there was no actual prejudice, Mr. Williamson was on bail but “was not subject to particularly onerous restrictions” (para. 66), he was being paid his salary for the entire time the charges were pending, and there was no prejudice to his ability to make full answer and defence.
20. The Court of Appeal nevertheless held that the trial judge erred in refusing a stay since the inferred prejudice was significant, the institutional delay exceeded the guidelines in *R. v. Morin*, [1992] 1 S.C.R. 771, the prosecution was “straightforward” (para. 67), not complex, and the defence had been diligent in attempting to move the matter to trial quickly. It found that Mr. Williamson’s interest in a trial within a reasonable time outweighed society’s interest in having the matter tried on its merits, and the Court of Appeal entered a stay of proceedings.
21. Analysis
22. This case was heard at the same time as the companion appeal in *Jordan*. The new framework for assessing whether there has been a breach of s. 11(*b*) of the *Charter* that we outlined in *Jordan*, including its transitional features, must be applied in this case to determine whether Mr. Williamson’s right to be tried within a reasonable time has been infringed.
23. As we said in *Jordan*, the first step in deciding a s. 11(*b*) application is to ascertain the total length of time between the charge and the actual or anticipated end of trial. Mr. Williamson was charged on January 7, 2009, and his trial was completed on December 20, 2011. The total delay was approximately 35.5 months.
24. The next step is to determine whether any of this delay was waived by the defence or solely caused by the defence, and to subtract any portions of such delay. The trial judge found that Mr. Williamson did not waive any of the delay and the Court of Appeal affirmed this finding. We see no reason to interfere with this conclusion.
25. With respect to delay caused solely by the defence, the Court of Appeal attributed it two months. The reason for this attribution requires some explanation. Mr. Williamson was committed to stand trial in the Superior Court on May 7, 2010. The parties then discussed dates for his first appearance. The clerk offered four dates: June 23, July 7, July 21, or August 4, 2010. Mr. Williamson had a family commitment, so the defence selected August 4, 2010 for the first appearance in the Superior Court. Since the court could accommodate the matter as early as June 23, the Court of Appeal attributed the delay from June 23 to August 4 to the defence.
26. We agree with the Court of Appeal that the period from June 23 to August 4, 2010 is delay caused solely by the defence because it is time where the court was available and ready to proceed but the defence was not, and the delay was not associated with legitimate defence preparation time. However, since the period of time from June 23 to August 4, 2010 is exactly six weeks, the defence is only responsible for one and a half months of delay.
27. Subtracting one and a half months of defence delay leaves a total delay of 34 months. This is still above the 30-month ceiling established in *Jordan* for cases going to trial in the superior court. The delay is therefore presumptively unreasonable. The Crown bears the onus of showing that the delay is reasonable, having regard to the presence of exceptional circumstances. The record does not disclose any delay caused by discrete, exceptional circumstances in this case, and the case does not remotely qualify as exceptionally complex.
28. However, since Mr. Williamson was charged before the release of *Jordan*,we must consider whether the transitional exceptional circumstance applies. As we said in *Jordan*, the transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the previous legal framework, upon which the parties reasonably relied. The assessment is necessarily contextual, and should account for the manner in which that framework was applied.
29. In our view, although this is a close case, the transitional exceptional circumstance does not apply and, therefore, the delay is unreasonable. A variety of factors support this conclusion.
30. First, the case against Mr. Williamson was straightforward. It involved the evidence of one complainant, one police officer, a videotaped police interview of Mr. Williamson, and the testimony of Mr. Williamson himself. His trial ultimately took 13 days — six days for pre-trial applications (two of which were devoted to the s. 11(*b*) application), and seven days for the trial proper. This was by no means a complex case. Indeed, the trial judge estimated the total inherent time requirements of the case as being approximately eight months.
31. Second, the 25-month institutional delay found by the Court of Appeal exceeded the upper end of the *Morin* guidelines by roughly seven months. Specifically, in the Provincial Court, Mr. Williamson twice attended preliminary hearing dates, only to be turned away because of scheduling issues — even though the Crown appears to have been aware of some of them in advance. The trial judge was rightly concerned about the loss of the two preliminary inquiry dates, about which he wrote: “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 s. 11(b) application” (para. 14 (CanLII)). All told, it took approximately a year to complete the preliminary inquiry.
32. In the Superior Court, while it was reasonable to expect some additional delay in scheduling the trial due to the shortage of jury trial courtroom time in Kingston, the Crown appears to have been content to accept the resulting institutional delay, demonstrating no effort to mitigate it. This is particularly troubling because significant delay had already elapsed in bringing this matter to trial: the problems in the Superior Court transpired directly following the considerable difficulties experienced in the Provincial Court. In this regard, we note that for pre-trial applications — which consumed about half of the total trial time — a jury courtroom was not required. The record does not disclose whether the Crown could have been successful if it had attempted to expedite the trial. However, the point is simply that the Crown made no effort. As the Court of Appeal wrote, “the Crown . . . [did not take] seriously the obligation to bring this relatively straightforward case to trial in a reasonable time” (para. 67).
33. Third, the Crown’s lack of initiative is in contrast to Mr. Williamson’s repeated efforts to expedite the proceedings. As mentioned, defence counsel wrote to Crown counsel after the preliminary inquiry was first adjourned in November 2009, stating that the defence was anxious to move forward with the matter. Defence counsel raised the delay issue again when the preliminary inquiry was adjourned a second time in February 2010. Further, the defence sought earlier dates for the preliminary inquiry, indicating its desire to move forward expeditiously. The defence also cooperated with the Crown to streamline the evidence and to use court time efficiently during the preliminary inquiry. All of these facts demonstrate that, as the Court of Appeal observed, “the defence was diligent in attempting to move the matter along” (para. 67).
34. Ultimately, we agree with the Court of Appeal that, while the s. 11(*b*) question in this case is “very difficult” (para. 64), looking at the big picture, the previous state of the law cannot justify the nearly three years it took to bring Mr. Williamson to trial on relatively straightforward charges. As the Court of Appeal observed, while the crimes committed by Mr. Williamson are very serious, “the balance weighs in favour of [his] interests in a trial within a reasonable time, over the societal interest in a trial on the merits” (para. 68). Although Mr. Williamson did not suffer significant prejudice, the case was simple, the Crown did little to combat the substantial institutional delay that plagued the prosecution, and Mr. Williamson was reasonably proactive in attempting to move the matter along. Not even the absence of significant prejudice to Mr. Williamson’s *Charter*-protected interests can stretch the bounds of reasonableness this far.
35. Before concluding, we wish to comment briefly on our colleague Justice Cromwell’s use of the following two factors to justify his conclusion: Mr. Williamson’s guilt; and the seriousness of his offences.
36. At the beginning of his reasons, Cromwell J. references Mr. Williamson’s guilt (paras. 43-44). This is troubling, as the ultimate question of guilt or innocence has *nothing* to say about whether the time taken to try him was reasonable. At the time of his s. 11(*b*) application, Mr. Williamson was presumptively innocent. It is wrong to give after-the-fact effect to his convictions when the only question presented by this appeal is whether his right to be tried within a reasonable time was infringed at the time the application was brought.
37. Our colleague’s analysis also demonstrates the difficulties that stem from considering the seriousness of the offence as an analytical factor in the s. 11(*b*) analysis.
38. First, a person’s right to a trial within a reasonable time cannot be diminished based solely on the nature of the charges he or she faces. As this Court wrote in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 40, “*Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences.” Many appellate courts across the country, including this one, have stayed serious charges, even when the total delay (minus defence delay) was *less* than that in this appeal.[[1]](#footnote-1)
39. In this regard, we note that s. 11(*b*) guarantees the right “to be tried within a reasonable time”. It does not admit of gradients of reasonableness where the charges are serious. For example, it does not guarantee the right to be tried within “somewhat longer” than a reasonable time, or within a time that is “excessive but not so long as to be clearly unreasonable” when the charges are serious (Cromwell J., at paras. 43 and 80). Delay is either unreasonable, or it is not. As a result, our point of departure with our colleague is on what we consider reasonable. In short, we have different perspectives on a subjective standard.
40. Second, while our colleague uses the seriousness of the offence to dilute the constitutional right to a trial within a reasonable time, we consider that the *Charter* right is respected, and the public interest is best served, by trying serious charges on their merits in a timely fashion. These are *precisely* the cases that should be heard promptly, on the strongest possible evidence.
41. Third, the seriousness of the offence does not sit comfortably with the notion of reasonable *time*. Some grave charges require very little time to be tried, while some less serious charges require more time.
42. We agree with our colleague that the charges against Mr. Williamson are grave. Like the Court of Appeal, we reach our conclusion “with great reluctance” (para. 68). The victim underwent the ordeal of a criminal trial, and Mr. Williamson was eventually convicted by a jury of his peers. But as we discussed in *Jordan*, timely justice is one of the hallmarks of a free and democratic society. This case is an example of how delay works to the detriment of everyone. Conversely, timely justice accrues to the benefit of all.
43. Conclusion
44. Whether we apply the pre-*Jordan* test or the new framework, we find that the delay is unreasonable. At nearly three years, this relatively straightforward case took far longer than it reasonably should have. We would therefore dismiss the appeal.

The following are the reasons delivered by

1. The Chief Justice — Applying the revised *Morin* framework (*R. v. Morin*, [1992] 1 S.C.R. 771) proposed by Cromwell J. in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (released concurrently), I cannot conclude that the Court of Appeal erred in entering a stay of proceedings.
2. I am not persuaded that the Court of Appeal erred: (1) in assessing the total institutional and Crown delay at 26 months (yielding an “excess delay” of at least 8 months); or (2) in holding that the Crown bears the burden of showing that despite docket delay, it took or even considered feasible steps to bring the case to trial within a reasonable time. Nor am I persuaded that societal interests justify the delay. As this Court has stated repeatedly, all accused persons — even those charged with heinous criminal offences — benefit from the guarantees of the *Canadian* *Charter of Rights and Freedoms*.
3. For the foregoing reasons, I would dismiss the appeal.

The reasons of Cromwell, Wagner and Gascon JJ. were delivered by

Cromwell J. (dissenting) —

1. Introduction
2. The majority of the Court finds that Kenneth Gavin Williamson, a person convicted by a jury of sexually abusing a child, must go free because his trial took somewhat longer than what would have been a reasonable time. This case is, as the majority notes, a close one; it is close in the sense that the delay was excessive — the case took longer than it should have — but that excessive delay is not clearly unreasonable. In short, this is the sort of case in which a balancing of interests is critical in assessing unreasonable delay. But even in a close case like this one, the new framework developed by the majority in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, released concurrently, does not allow for consideration of the strong societal interest in resolving these serious charges on their merits. The new framework does not permit the sort of balancing of interests that is inherent in the concept of reasonableness. In my respectful view, the Constitution does not mandate this sort of analysis or require the result it produces in this appeal.
3. Mr. Williamson, the respondent on this Crown appeal, was convicted by a jury of buggery, indecent assault, and gross indecency. The offences involved “gross sexual misconduct” by Mr. Williamson when he was 26 years old against a 12-year-old complainant with whom Mr. Williamson was in a “big brother” type relationship: 2011 ONSC 5930, at para. 66 (CanLII). The alleged abuse involved multiple forced sexual acts that occurred repeatedly over a “significant period of time”: *ibid.* At the time in question, Mr. Williamson was assigned to be a mentor-advocate to the complainant through a juvenile diversion program.
4. The Court of Appeal set aside these convictions and entered a judicial stay of proceedings: 2014 ONCA 598, 324 O.A.C. 231. The court concluded that, contrary to the view of the trial judge, Mr. Williamson’s right under the *Canadian Charter of Rights and Freedoms* to a trial within a reasonable time had been violated. The trial took about five months longer than it reasonably should have and the trial judge found as a fact that Mr. Williamson had not suffered any actual prejudice.
5. The Crown appeals. The only issue in this Court concerns unreasonable delay.
6. In my respectful view, the Court of Appeal erred in law in reversing the trial judge’s conclusion that this trial was conducted within a reasonable time. I would therefore set aside the judgment of the Court of Appeal and reinstate the convictions entered at trial.
7. Facts and Judicial History
   1. Ontario Superior Court of Justice
8. Justice Tranmer of the Ontario Superior Court of Justice dismissed Mr. Williamson’s application for a stay of proceedings for unreasonable delay.
9. First, he found that the relevant time period for the Williamson matter, from the initial charge to the conclusion of the trial, totalled 35 months and 15 days. He then classified the periods of delay as follows:

* Inherent requirements: 8 months (2 months, 17 days in provincial court; 5 months, 15 days in superior court)
* Defence delay: none
* Institutional delay: 26 months (12 months, 11 days in provincial court; 13 months, 20 days in superior court)
* Crown delay: 1 month, 4 days

1. The judge attributed one month and four days to Crown delay for the period leading up to setting the preliminary inquiry and focus hearings, because the Crown delayed disclosure of two critical audio-visual recorded interviews of the complainant. He attributed the delay caused by the rescheduled preliminary inquiry to institutional delay, presumably because there was no explanation for this difficulty in scheduling. The parties agreed that the months before the hearings before the superior court were inherent delay. Tranmer J. accepted this agreement, but also wrote that two of those months “could well be attributed to the defence” given that the defence declined two earlier dates for these hearings: para. 36. He then attributed the pre-trial conference delays to inherent delay, even though the defence requested the adjournments, because Crown counsel was unavailable to attend or there was limited evidence as to Crown availability. Finally, the trial judge characterized the time frame whereupon the defence brought forward many pre-trial motions to institutional delay, because scheduling such motions prior to trial is “good practice” and “a necessary part of the trial scheduling as a whole”: para. 44.
2. The trial judge next considered whether Mr. Williamson had suffered prejudice. In his affidavit before the trial judge, Mr. Williamson claimed that he suffered prejudice given that he was suspended from teaching with pay and had to constantly be available on short notice in case he was called in to work, that his bail conditions negatively affected his relationship with his brother and his nephew, that he has lost touch with former colleagues having since moved to Ottawa, and that he was subject to media and professional scrutiny and now suffers from stress and emotional upset: paras. 7-10. The trial judge rejected these arguments, stating that these matters were either caused by the charge itself (not the delay), or were self-imposed.
3. He did, however, find that the “unexpected adjournment[s]” of the preliminary inquiry were “most unfortunate and most inappropriate” on the facts before the court: para. 56. He did not, however, find that these adjournments amounted to much prejudice. He also noted that the accused had not filed any medical evidence of prejudice.
4. Overall, the trial judge found that 35 months of delay was a sufficient basis upon which to infer prejudice to Mr. Williamson. However, this prejudice was minimized because accounts were preserved in reliable forms in this case. Overall, the trial judge concluded that Mr. Williamson had not proven actual prejudice, and that he did not suffer significant inferred prejudice.
5. The trial judge considered the facts that the total institutional delay in this case exceeded the midpoint of the guidelines in *R. v. Morin*, [1992] 1 S.C.R. 771, by 10 months, despite the relative simplicity of the case; there was no actual prejudice and no significant inferred prejudice; and the very high societal interest in protecting vulnerable children and in prosecuting serious charges against Mr. Williamson in this case. Despite being a “borderline case”, the trial judge found that Mr. Williamson’s s. 11(*b*) claim failed: para. 75.
   1. Ontario Court of Appeal
6. On appeal, Mr. Williamson argued that the trial judge erred in refusing to grant his application for a stay under s. 11(*b*). The Court of Appeal agreed, overturned the trial judge’s decision, and granted him a stay.
7. Justice Lauwers for the court re-characterized the trial judge’s attributions of delay, and overall, reclassified one month as inherent instead of institutional, and two months as defence-caused instead of inherent.
8. With respect to the period from committal to the first appearance before the Superior Court of Justice, the Court of Appeal reclassified two months of the delay to the defence. The trial judge had written that “two months could well be attributed to the defence”, given that two earlier available dates before the Superior Court were declined by the defence: C.A. reasons, at para. 30.
9. The trial judge classified all the period from setting the dates for the pre-trial applications through to the trial as institutional delay. The Court of Appeal reclassified one month of this delay as inherent delay to account for the fact that the parties had to prepare for the pre-trial motions.
10. The Crown also argued that some of this delay should be re-characterized as defence-caused, given that the defence chose to elect trial by jury in Kingston, which had limited resources. The Court of Appeal found that the Crown should have sought alternative arrangements in response to the institutional delay caused by this election: “The Eastern Region of the Superior Court has plenty of locations and judges; the trial could have been accommodated earlier” (para. 42).
11. The Court of Appeal found that the trial judge erred in treating the time leading up to trial as wholly institutional; some of this time should have been classified as inherent delay to account for preparation time. No evidence was tendered, however, on the issue as to defence counsel’s availability for trial. Given that this was a “relatively simple case”, the court attributed “virtually no time to trial preparation”: para. 44.
12. The institutional delay in this case exceeded the *Morin* guidelines by more than two months in provincial court, and by more than four months in superior court. With the added Crown delay of one month and four days, the overall excess over the guidelines was eight months. The total institutional and Crown delay was approximately 26 months: C.A. reasons, at para. 46.
13. On the issue of prejudice, the Court of Appeal agreed with Mr. Williamson’s submission that the trial judge erred in failing to appropriately weigh the inferred prejudice he suffered given the length of the delay. Given the similar delays in *R. v. Ralph*, 2014 ONCA 3, 299 C.R.R. (2d) 1,and *R. v. Steele*, 2012 ONCA 383, 288 C.C.C. (3d) 255, “it must be inferred that the appellant has experienced significant prejudice”: C.A. reasons, at para. 57. The court found that the trial judge erred in finding that this delay was “not significant”, citing the “exquisite agony” of awaiting trial and the stigma involved: *ibid.*
14. The Court of Appeal balanced the high societal interest of prosecuting “especially despicable” crimes (para. 66) like those with which Mr. Williamson was convicted against the accused’s constitutional rights: paras. 58-68. However, the court concluded that the trial judge erred in refusing a stay because the inferred prejudice suffered by Mr. Williamson was significant. The institutional and Crown delay of 26 months was not justified. The Crown did not take sufficient steps to bring this simple case to trial, while the defence was diligent in moving the proceedings along.
15. It may be helpful to summarize the trial judge’s and the Court of Appeal’s conclusions respecting the various types of delay in a table:

|  |  |  |
| --- | --- | --- |
| Delay Category | Trial Judge’s Totals | Court of Appeal’s Totals |
| Intake/Inherent Time Requirements | 8 months (2 months, 17 days in provincial court; 5 months, 15 days in superior court) | 7 months (2 months, 17 days in provincial court; 4 months, 15 days in superior court) |
| Defence Delay | None | 2 months |
| Institutional Delay | 26 months (12 months, 11 days in provincial court; 13 months, 20 days in superior court) | 25 months (12 months, 11 days in provincial court; 12 months, 20 days in superior court) |
| Crown Delay | 1 month, 4 days | 1 month, 4 days |

1. Analysis
2. The judgments in the Superior Court of Justice and the Court of Appeal, of course, did not apply the revised *Morin* framework that I set out in *Jordan*. However, those findings can fairly easily be considered within it.
   1. An Inquiry Into Delay Was Justified
3. I agree with the trial judge that the delay of 35.5 months from charge to the end of the scheduled trial is sufficient to trigger an inquiry as to whether the delay was unreasonable.
   1. What Is a Reasonable Time for the Disposition of a Case Like This One?
      1. Inherent Time Requirements
4. The trial judge identified the periods of combined inherent delay present in the provincial and superior courts as being eight months. I agree with the Court of Appeal’s reclassification of some of the institutional delays as inherent, to account for the preparation involved in the pre-trial motions and for the trial.
5. While neither court explicitly approached this calculation according to this new framework, the courts did objectively determine many of the periods of inherent delay by estimating the reasonable time for preparation given the type of case before them.
6. I find no reason to interfere with the Court of Appeal’s assessment of seven months as a reasonable period for the case to be prepared and tried.
   * 1. Institutional Delay
7. This case proceeded through both provincial and superior courts in Ontario. Under the *Morin* administrative guidelines, the reasonable institutional delays for both levels of court total between 14 and 18 months. Mr. Williamson was not in custody during any of this period of institutional delay and the trial judge did not consider the conditions of his release to be onerous. I will therefore use the upper end of the range under the guidelines for total institutional delay.
   * 1. Conclusion on Reasonable Time for This Case
8. It follows that totalling the inherent time requirements and reasonable institutional delay lead to the conclusion that a reasonable period for the disposition of this type of case would be 25 months.
   1. How Much of the Delay That Actually Occurred Counts Against the State?
9. The trial judge determined that the disposition of Mr. Williamson’s case took 35.5 months. To determine the amount of time that counts against the state we must subtract any of this period attributable to the defence and any period of unusual or unforeseen delay not fairly counted against the Crown.
   * 1. Delay Attributable to the Defence
10. Both lower courts determined that there was no issue as to waiver in this case, and the parties have not raised this issue on appeal.
11. The Court of Appeal reclassified two months of the delay as being attributable to the defence, given that the defence declined two earlier dates for these hearings. I accept the Court of Appeal’s conclusion that two months should be attributed to the defence. While the Court of Appeal found that “the defence was diligent in attempting to move the matter along”, this diligence was nonetheless marked by some delay attributable to the defence: para. 67.
    * 1. Exceptional or Unavoidable Delay
12. There is one matter to consider here. The judge assigned to preside at the preliminary inquiry on November 23, 2009 had expected to be unavailable because of a funeral: para. 18 of the trial judge’s reasons. As a result, the witnesses were called off, but by mistake, the defence was apparently not advised. In the result, the judge was in fact available and was sitting; but because of other priority matters scheduled for the same time, the Williamson matter could not be dealt with in any event and was adjourned from November 23, 2009 until February 22, 2010: para. 19. While the failure to advise the defence that the matter would not proceed was improper and regrettable, this scheduling mishap, which it seems would have occurred even if the witnesses had not been called off, is the sort of exceptional delay that, in the particular and unusual circumstances disclosed in the record, should not be weighed against the state.
13. This three-month period, in my view, should be counted as exceptional delay that is not fairly counted against the state.
    1. Was the Delay That Counts Against the State Unreasonable?
14. As previously stated, the reasonable time requirements of the case were 25 months. The case in fact took 35.5 months. Five of those months, however, should not be counted against the state: two months were fairly attributed to the defence and three months resulted from a scheduling issue at the preliminary inquiry stage. The difference between the 30.5 months which count against the state and the 25 months reasonably required for a case of this nature certainly requires careful consideration: it exceeds the reasonable time requirements of a case like this one by 5.5 months. While this is not an insignificant period of time, it is not clearly unreasonable and the final balancing of relevant factors is therefore critical.
15. For the trial judge, that balancing resulted in a finding that the delay was not unreasonable. He found that the delay was not “extreme”, that there was no actual prejudice, and that any “inferred” prejudice was not significant: paras. 71-72. He also found that there is a “very high societal interest in having Mr. Williamson tried on the merits for these very serious charges”: para. 73. As the trial judge pointed out, Mr. Williamson began his career as a teacher in 1980, a time within the period of the charges. Those charges

involve[d] gross sexual misconduct by an accused in his mid-twenties . . . 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. [para. 66]

1. These are relevant considerations and I see no error in the judge’s weighing of them. I also, with respect, see no basis for the Court of Appeal taking a different view of the matter of prejudice than the one adopted by the trial judge. The concept of “inferred prejudice”, on which the Court of Appeal placed so much emphasis, is not a useful one and, in any event, the trial judge’s analysis of this issue under the then-existing law contained no error.
2. This is not to say that the societal interest in resolution on the merits can ever justify what is otherwise a clearly unreasonable delay. But in a case like this one, in which the delay is excessive but not so long as to be clearly unreasonable, it is one of the considerations that should be taken into account in the final balancing process. The jettisoning of this consideration as irrelevant is, in my view, one of the most unsatisfactory aspects of the majority’s new template for assessing unreasonable delay in *Jordan*. The jurisprudence has been clear that societal interests, both those mirroring and those adverse to the interests of the accused, underlie the concept of reasonableness in assessing whether the right to trial within a reasonable time has been violated. Far from diminishing the right, this approach requires the sort of balancing that is the essence of reasonableness.
3. Another relevant consideration, in my view, is the temporary and exceptional pressure on the dockets of both the provincial court and the superior court in Kingston at the relevant time. This was the result of a “multiple murder victim and accused case that drew upon the institutional resources”: trial judge’s reasons, at para. 47. The trial judge accepted this impact. No issue as to the Crown’s failure to approach the Regional Senior Justice to explore other possibilities was raised before the trial judge or in the arguments advanced in the Court of Appeal. However, the Court of Appeal was critical of the Crown for the absence of an explanation for this failure.
4. While the precise impact of this temporary and exceptional pressure on delay is not specified in the record, this sort of pressure on judicial resources is a factor that should result in the *Morin* administrative guidelines being applied flexibly. The Court of Appeal’s comments about possible alternative arrangements were, in my view, both procedurally unfair to the Crown and speculative given that the trial judge had accepted the effect of the trial in question on the institutional resources in Kingston and that there was no evidence that there were any alternatives or that they could have been effective.
5. Taking all of these considerations into account, I see no error in the trial judge’s ultimate conclusion that the delay here was not unreasonable.
6. The Court of Appeal asked itself whether staying these charges would be more “publicly disreputable for the administration of justice” than “tolerating an inordinate trial delay”: para. 65. In my view, and with respect to the Court of Appeal’s contrary conclusion, the answer to that question in this case is yes.
7. In my respectful view, the Court of Appeal was wrong to interfere with the trial judge’s conclusion that the delay in all of the circumstances of this case was not unreasonable.
8. Disposition
9. I would allow the appeal and restore the convictions entered at trial.

*Appeal dismissed,* Cromwell*,* Wagner *and* Gascon JJ. *dissenting.*

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Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the British Columbia Civil Liberties Association: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the Criminal Lawyers’ Association (Ontario): Addario Law Group, Toronto.

1. See, e.g., *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3 (charges of sexual assault, unlawful confinement and threatening death, when the total delay, comprised of largely Crown and institutional delay, was roughly 30 months); *R. v. D. (R.)*, 2008 BCCA 339, 235 C.C.C. (3d) 28 (charges against the father of the alleged victim of sexual assault and touching a person under the age of 14 for a sexual purpose, with a total delay of 28.5 months); *R. v. MacPherson*, 2015 ABCA 139, 323 C.C.C. (3d) 428 (charges relating to two armed robberies, with a total delay of 20.5 months); *R. v. Scott*, 2015 SKCA 144, 333 C.C.C. (3d) 310 (charges of sexual assault and sexual interference involving a child, with a total delay (excluding defence delay) of 31 months); *R. v. MacMunn*, 2008 ONCA 520, 173 C.R.R. (2d) 242 (charges of accessing, possessing and making child pornography, with a total delay of 27.5 months). [↑](#footnote-ref-1)