



SUPREME COURT OF CANADA

CITATION: R. v. Godin, 2009 SCC 26, [2009] 2 S.C.R. 3

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BETWEEN:

Marcel Godin
Appellant
and
Her Majesty The Queen
Respondent

CORAM: McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 42)

Cromwell J. (McLachlin C.J. and Binnie, Deschamps,
Abella, Charron and Rothstein JJ. concurring)

R. v. Godin, 2009 SCC 26, [2009] 2 S.C.R. 3

Marcel Godin

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Godin

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File No.: 32740.

2009: February 12; 2009: June 4.

Present: McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Right to be tried within reasonable time —
Thirty-month delay between date accused charged and date set for trial — Straightforward criminal
case — Whether accused's right to be tried within reasonable time violated — Canadian Charter*

of Rights and Freedoms, s. 11(b).

In May 2005, the accused was charged with sexual assault, unlawful confinement, and threatening to kill his ex-girlfriend. The Crown elected to proceed summarily. In mid-September, the trial dates were fixed for mid-February 2006. Four days before the trial, the Crown received the forensic report indicating that the DNA profile of the spermatozoa swab obtained from the complainant did not match the accused. In response to this new evidence, the Crown and defence agreed that the Crown would re-elect to proceed by indictment in order to give the defence the opportunity to explore the complainant's evidence and the forensic report at a preliminary inquiry. The earliest day available was September 2006. Defence counsel wrote to the court and the Crown proposing several earlier alternative dates on which he would be available. The Crown did not respond. The September preliminary inquiry was adjourned for want of sufficient court time. It was re-scheduled to February 5, 2007 because defence counsel was unavailable at a December date proposed by the Crown. The trial was set for November 2007, 30 months after the charges were laid. In June 2007, the accused successfully brought an application for a stay of proceedings on the ground that his right to be tried within a reasonable time guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms* was violated. The majority of the Court of Appeal set aside the stay and remitted the matter to trial, holding that the trial judge had erred in his analysis of the conduct of the defence and of prejudice to the accused.

Held: The appeal should be allowed. The accused's s. 11(b) right was violated.

Although this was a straightforward case with few complexities and requiring very

modest amounts of court time, the delays far exceeded the *Morin* guidelines. Virtually all of the delay, in particular the nine-month delay in obtaining and disclosing the forensic analysis and the delay resulting from the adjournment of the preliminary inquiry, was attributable to the Crown. These delays were unexplained, let alone justified. Furthermore, defence counsel tried unsuccessfully to move the case ahead faster; the Crown, however, failed to explain why his request for an earlier date for the preliminary inquiry was ignored and why more priority was not given to this case which, by then, was in obvious s. 11(b) difficulty. [2] [4-6] [13-14]

Defence counsel did not significantly contribute to the delays. Although the defence agreed to the Crown re-election, had the Crown obtained the forensic evidence within a reasonable amount of time, the re-election to proceed by indictment and the subsequent preliminary inquiry could have happened much sooner. The accused was entitled to timely disclosure, and he did not receive it. There is also no suggestion that defence counsel was unreasonable in rejecting the earliest date offered to reschedule the preliminary inquiry. While scheduling requires reasonable availability and reasonable cooperation, it does not require defence counsel to hold themselves in a state of perpetual availability for s. 11(b) purposes. [20] [23]

In the absence of specific evidence of prejudice to the accused's liberty and security interests or his interest in a fair trial, 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 charges had been hanging over the accused's head for a long time and it was reasonable to infer, as the trial judge did, that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice. The accused had also been on judicial interim release for more than two years and,

although bail conditions were relaxed as the delay lengthened, this consideration was properly taken into account as one relevant aspect of the trial judge's assessment of whether the long delay was unreasonable. Lastly, there was evidence of a risk of prejudice to the accused's defence because of the delay and weight should be accorded to this risk. [31-32] [34-35]

Cases Cited

Applied: *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Askov*, [1990] 2 S.C.R. 1199.

Statutes and Regulations Cited

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

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson and Cronk JJ.A. and Glithero R.S.J. (*ad hoc*)), 2008 ONCA 466, 237 O.A.C. 324, 173 C.R.R. (2d) 209, [2008] O.J. No. 2316 (QL), 2008 CarswellOnt 3457, setting aside the stay of proceedings ordered by Gordon J., 2007 CarswellOnt 5364. Appeal allowed.

Mark C. Halfyard, for the appellant.

Alexander Alvaro, for the respondent.

The judgment of the Court was delivered by

I. Introduction

[1] This appeal concerns the right to be tried within a reasonable time as guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The trial judge stayed the prosecution for unreasonable delay, but the majority of the Court of Appeal set aside that decision. The appeal comes to the Court as of right by virtue of the dissent in the Court of Appeal.

[2] For the reasons that follow, I would allow the appeal and restore the stay of proceedings entered by the trial judge. This is a straightforward case and needed only modest amounts of court time, yet the delays far exceeded the guidelines set out by the Court in *R. v. Morin*, [1992] 1 S.C.R. 771. Virtually all of this delay was attributable to the Crown, and no explanation was offered for it. There was some evidence of prejudice to the appellant and, when defence counsel tried to get earlier dates, his correspondence was ignored. In the result, what had started out as a summary conviction prosecution had not yet gone to trial more than two years later. In all of the circumstances, the trial judge in my respectful view was correct to conclude that this delay was unreasonable.

II. Overview of the Facts

[3] In May of 2005, the appellant was charged with sexual assault, unlawful confinement, and threatening to kill his ex-girlfriend. The Crown elected to proceed with these charges

summarily. In mid-September, the trial dates were fixed for three days in mid-February of 2006, some nine months after the appellant was charged. That delay would not have been unreasonable had the case proceeded as scheduled. Unfortunately, it did not.

[4] Three critical elements contributed to the delays which beset this case: a long delay in obtaining, and therefore in disclosing, potentially important forensic evidence; failure to acknowledge or respond to defence counsel's effort to obtain earlier dates; and the need to adjourn the long-delayed preliminary inquiry because there was not sufficient court time for it to proceed on the date set. The result was that a one-day preliminary inquiry was not completed until 21 months after the charges had been laid.

[5] Before reviewing the facts in more detail, it will be helpful to place them in the context of the guidelines set out in *Morin*. Those guidelines refer to periods of 8 to 10 months for institutional delay in the provincial courts and of 6 to 8 months from committal to trial, for a total guideline period of between 14 and 18 months. It is clear that these guidelines were substantially exceeded in this case. That, on its own, does not make the delay unreasonable. The difficulty in this case, in my view, arises from the considerable delay coupled with three additional facts: (1) the case is a straightforward one with few complexities and requiring very modest amounts of court time; (2) virtually all of the delay is attributable to the Crown and is unexplained, let alone justified; and (3) defence counsel attempted, unsuccessfully, to move the case ahead faster.

(I) *The Late Disclosure*

[6] A vaginal swab was taken from the complainant the day after the alleged offences were committed, in May of 2005. However, it was not until nearly nine months later and only four days before the trial was scheduled to begin in mid-February of 2006 that the Crown received a report from the Centre for Forensic Sciences (“CFS”) setting out the results of its DNA analysis. No explanation has been advanced at any point in these proceedings for the nine-month delay in obtaining and disclosing this analysis.

[7] The Crown, very properly, promptly disclosed this information to the defence. But given its potential importance and the proximity of the trial dates, it was agreed that the trial could not proceed as scheduled. It will be helpful to explain why the evidence was potentially important in the context of the case against the appellant.

[8] The complainant’s allegations are as follows. When she left her workplace late on the evening of May 8, 2005, she was surprised to find the appellant, her ex-boyfriend, awaiting her in his car in the parking lot. He convinced her to get into the car but became threatening and violent after she did. The inside door handle of the car was not working, preventing her from leaving the vehicle. The appellant started to drive, hitting the complainant on the head and choking her as he did so. He stopped the car. When she refused to perform oral sex, he forcibly removed her clothing and sexually assaulted her, including forced vaginal penetration. After threatening her and her loved ones with death should she tell the police, the appellant drove her back to her workplace.

[9] The record discloses that the next day, the complainant went to the hospital and was examined and interviewed. The examination did not produce any physical evidence corroborating

the complainant's allegations that she had been hit on the head and choked. Before taking a semen swab, the nurse asked the complainant a series of questions and filled out a questionnaire. In response to a question about the "date and time of last previous intercourse", the complainant's response was "three days prior to [the] assault".

[10] The CFS forensic analysis concluded that the DNA profile of the semen obtained from the medical examination of the complainant did not match the appellant. She testified at the preliminary inquiry that if the semen did not match the appellant's DNA, then the source of the semen must have been her boyfriend. She could not recall when they last had intercourse before the assault but knew that they had not had intercourse between the time of the assault and the taking of the swabs. According to the CFS reports, the semen had been present for at most 24 hours before the sample was taken. Thus, this forensic evidence could be important to the defence because it was potentially inconsistent with the complainant's statement at the hospital that she had not had intercourse for three days before the alleged assault.

[11] Given the possible inconsistencies between the complainant's statement and the forensic evidence, the Crown quite properly did not question the potential importance of the evidence or attempt to force the trial on notwithstanding its last-minute disclosure. There is no suggestion that Crown counsel delayed disclosure or was otherwise at fault for this delay. Nevertheless, the resulting delay is attributable to the Crown. It is responsible for bringing an accused person to trial and for the provision of facilities and staff to see that accused persons are tried in a reasonable time: *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1225. The Crown bears the burden of explaining unusual delays caused by the forensic investigators. It offers no explanation in this case.

(ii) *Preliminary Inquiry*

[12] In response to this new evidence, Crown and defence agreed that the Crown would re-elect to proceed by indictment in order to give the defence the opportunity to explore the complainant's evidence and the CFS report at a preliminary inquiry. The result, however, was that the proceedings were substantially delayed. Even though only one day was required for the preliminary inquiry (as opposed to the three days which had been originally set for trial), the court in February of 2006 could not offer a date earlier than the following September, a period of about 7 months.

[13] The defence was concerned about the delay. The charges had been laid in May of 2005. With the preliminary inquiry fixed for September of 2006, the appellant was facing a delay of 16 months for a one-day preliminary inquiry. In late February, a few days after the September 2006 hearing had been set, defence counsel wrote to the court and the Crown requesting an earlier date. Defence counsel proposed 31 alternative dates on which he would be available. He received no response to this request. The Crown has given no explanation for why this request to expedite the matter was ignored.

(iii) *The Preliminary Inquiry Does Not Proceed*

[14] On the scheduled date for the preliminary inquiry (September 15, 2006), the case was nearly 16 months old and therefore substantially outside the *Morin* guidelines. Unfortunately, the

preliminary inquiry could not proceed as scheduled. The case was not reached until well into the afternoon as a result of other matters on the court's docket. Insufficient court time remained to proceed with the preliminary inquiry and it had to be postponed. Eventually, the preliminary inquiry was held on February 5, 2007, roughly 21 months after the charges had been laid. This period is more than double the *Morin* guideline for institutional delay in the provincial courts. No explanation has been offered about why more priority was not given to dealing with this matter which by then was in obvious s. 11(b) difficulty.

[15] Following committal in February of 2007, trial was set in Superior Court for November 2007, roughly 30 months from the laying of the charges. The trial judge stayed the proceedings for unreasonable delay in June of 2007.

[16] To sum up: this was a straightforward case requiring only modest amounts of court time; the delays substantially exceeded the *Morin* guidelines; virtually all of the delays are attributable to the Crown and virtually none of them to the appellant; and the Crown offered no explanation of the three critical elements that accounted for most of the delay which is attributable to it.

III. Analysis

[17] The majority of the Court of Appeal set aside the trial judge's stay of proceedings on two main bases. It held that the trial judge had erred in his analysis of the conduct of the defence and of prejudice to the accused: 2008 ONCA 466, 173 C.R.R. (2d) 209. Respectfully, my view is that the majority of the Court of Appeal erred in these respects and there is, therefore, no basis to

set aside the trial judge's finding that the delay was unreasonable.

[18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, “[t]he general approach . . . is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”

(I) *Conduct of the Defence*

[19] Three aspects of the conduct of the defence are relevant here. The first concerns the agreement to have the Crown re-elect to proceed by indictment in order to permit a preliminary inquiry to be held. The second relates to the impact of defence counsel's unavailability on the attribution of responsibility for delay. The third arises from the fact that defence counsel on occasion appeared by agent and had to seek a brief adjournment of the ultimate trial date because of a scheduling conflict.

a. Crown Re-election

[20] The majority of the Court of Appeal found defence counsel's consent to the Crown re-election and the fact that the resulting preliminary inquiry "enured significantly to the [appellant's] benefit" pointed against counting the resulting delay as unreasonable (MacPherson J.A., at para. 38). I respectfully disagree. Had the Crown obtained the forensic evidence within a reasonable amount of time, the re-election and preliminary inquiry could have happened much sooner. It may well have been beneficial to the appellant to have a preliminary inquiry. But, respectfully, that is not the point. The appellant was entitled to timely disclosure, he did not receive it, and no explanation for the failure to provide it has been advanced. I do not see anything in this which undercuts the appellant's position that this delay was unreasonable.

b. Available Dates

[21] The majority in the Court of Appeal found defence counsel responsible for about a month and one-half of delay because he was not available for the first offered date for the rescheduled preliminary inquiry. With respect, I agree with Glithero R.S.J. (*ad hoc*), dissenting in the Court of Appeal, that this placed too great a responsibility on defence counsel in the circumstances of this case.

[22] The earliest date offered to the defence to reschedule the preliminary inquiry was December 22, 2006, over three months from the original September date. Defence counsel was unavailable on that date. The record does not reveal the earliest date offered by the defence to the Crown and court. The preliminary inquiry was ultimately set for February 5, 2007, one and a half months after the earliest proffered date and nearly a year after the originally scheduled trial date.

The trial judge found that the first three months of this period of delay were attributable to the Crown. He also noted that even if the additional one and a half months of delay were attributed to the defence, because that period of delay could have been avoided by the defence had it accepted the earliest offered date, there had still been a delay of 10 months in conducting the preliminary inquiry.

[23] The majority of the Court of Appeal took this as a finding by the trial judge, with which it agreed, that the defence had waived this one and a half month period. Respectfully, I do not agree that the trial judge ruled in this way and I do not agree that it would have been correct to do so. Like Glithero R.S.J., I do not read the trial judge's reasons as accepting the proposition that this period should be attributed to the defence. Rather, the trial judge simply recognized the argument and said that even if it were accepted, the delay was still excessive. Moreover, I respectfully disagree that this period of delay should be treated as waived by the defence in the circumstance of this case. Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability. Here, there is no suggestion that defence counsel was unreasonable in rejecting the earlier date. Indeed, his prior conduct in seeking earlier dates for the preliminary inquiry — efforts which were ignored — suggests that he wished to proceed expeditiously. I respectfully agree with Glithero R.S.J., dissenting in the Court of Appeal, at para. 53, that: "To hold that the delay clock stops as soon as a single available date is offered to the defence and not accepted, in circumstances where the Crown is responsible for the case having to be rescheduled, is not reasonable."

c. Other Matters

[24] It is worth noting briefly that the Court of Appeal mentions two additional periods of delay which, by virtue of defence counsel's conduct, in its view weighed strongly against the appellant's claim of unreasonable delay.

[25] The periods in question book-ended the proceedings. The first period involved two hearings in June of 2005 which were held in order to schedule the judicial pre-trial. In both cases, defence counsel was represented by an agent, and the appellant did not appear. The Provincial Court was nevertheless able, at the second hearing, to schedule the pre-trial. The other "book-end" highlighted by the Court of Appeal occurred during defence counsel's submission at the hearing of the s. 11(b) *Charter* application on June 20, 2007. At the outset of the hearing, defence counsel notified the court that he had inadvertently scheduled the November trial in this case for dates on which he was already committed to be at a trial on Manitoulin Island. He asked the court to adjourn the trial for one additional month. The Court of Appeal found this troubling — defence counsel was arguing that the proceedings had already gone on for too long, but was at the same time asking for a further adjournment.

[26] I respectfully disagree that these two "book end" events should weigh against the appellant's claim of unreasonable delay. The first had no appreciable impact on the progress of the matter and the second, while perhaps ironic, is irrelevant. By the time that scheduling conflict arose, the case had already, as the trial judge found, been unreasonably delayed.

[27] It should be remembered that the only person who appears to have made any effort to move this matter ahead more quickly was defence counsel. He complained about the long delay to

the first date set for the preliminary inquiry and provided 31 earlier dates on which he was available. As counsel for the appellant put it during oral argument, this effort was met by “radio silence”.

[28] In summary, I respectfully disagree with the majority of the Court of Appeal that there is anything in the conduct of the defence which undercuts the appellant’s claim of unreasonable delay.

(ii) *Prejudice*

[29] The Court of Appeal disagreed with the trial judge’s analysis of prejudice and found that any prejudice to the accused’s interest in a fair trial was too speculative to be considered. Partly on this basis, the Court of Appeal found that the delay was not unreasonable. I respectfully disagree. In light of the length of the delay, of the Crown’s failure to explain the multiple delays adequately, and of the prejudice to the accused’s liberty and security interests — if not also to his interest in a fair trial — the delay in this case was unreasonable.

[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. See *Morin*, at pp. 801-3.

[31] The question of prejudice cannot be considered separately from the length of the delay.

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.

[32] This approach was reflected in the trial judge’s reasons, where he wrote that the delay in this case was “well beyond any reasonable interpretation of the [*Morin*] guidelines” (2007 CarswellOnt 5364, at para. 20) and that the appellant had suffered prejudice as a result. The judge referred specifically to the fact that the charges had been hanging over the appellant’s head for a long time and that he was subject to “fairly strict” bail conditions (para. 22).

[33] The Court of Appeal disagreed with the sequence in which the trial judge addressed the issue of prejudice, noting that the trial judge only turned to his consideration of prejudice after he had already concluded that s. 11(b) had been infringed. Respectfully, I cannot accept that the trial judge erred in this regard. It is in my respectful view clear from reading the judge’s reasons as a whole that he considered the relevant factors.

[34] The majority of the Court Appeal acknowledged that these charges had been hanging over the appellant’s head for a long time. It was reasonable, in my view, to infer as the trial judge did that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice. The majority of the Court of Appeal appears to have given no weight to this consideration. The majority of the Court of Appeal also disagreed with the trial judge’s findings

relating to prejudice flowing from restrictive bail conditions. The appellant had been on judicial interim release for more than two years. It is true that his bail conditions were relaxed as the delay lengthened, but the trial judge did not err in the circumstances of this case by taking this consideration into account as one aspect relevant to his overall assessment of whether the long delay was unreasonable.

[35] The majority of the Court of Appeal rejected as speculative the appellant's contention that his ability to make full answer and defence had been prejudiced. There was evidence, however, that there was a risk of prejudice to his defence because of the delay. In my respectful view, the majority of the Court of Appeal erred by failing to accord any weight to this risk of prejudice.

[36] The nature of the risk to the appellant's ability to make full answer and defence was well set out by Glithero R.S.J., dissenting in the Court of Appeal, at paras. 69-74. He noted that the case was likely to turn on credibility and, in particular, on cross-examination of the complainant and her boyfriend in light of the DNA test results and prior statements. The dissenting judge concluded that the extra passage of time made it more likely that the ability of the appellant to cross-examine effectively had been diminished.

[37] It is difficult to assess the risk of prejudice to the appellant's ability to make full answer and defence, but it is also important to bear in mind that the risk arises from delay to which the appellant made virtually no contribution. Missing from the analysis of the majority of the Court of Appeal, in my respectful view, is an adequate appreciation of the length of the delay in getting this relatively straightforward case to trial. As noted already, prejudice may be inferred from the length of the delay.

[38] Moreover, it does not follow from a conclusion that there is an unquantifiable risk of prejudice to the appellant's ability to make full answer and defence that the overall delay in this case was constitutionally reasonable. Proof of actual prejudice to the right to make full answer and defence is not invariably required to establish a s. 11(b) violation. This is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.

IV. Conclusion

[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. Critical evidence was disclosed some nine months after the tests which produced it, the appellant's request for earlier dates was ignored, and when the case was clearly in s. 11(b) trouble, the matter was not proceeded with on the date set for the long-awaited preliminary hearing. The length of the delay and the evidence supported the trial judge's inference that some prejudice to the appellant resulted from the delay.

[40] As McLachlin J. (as she then was) put it in her concurring reasons in *Morin*, at p. 810, "[w]hen trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice."

[41] Of course, there is a strong societal interest in having serious charges tried on their merits. However, the progress of this case was delayed to such a degree that the appellant's constitutional right to be tried within a reasonable time was violated. In my respectful opinion, the Court of Appeal erred in reversing the trial judge's conclusion to that effect.

[42] I would allow the appeal and restore the order of the trial judge.

Appeal allowed.

Solicitors for the appellant: Pinkofskys, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.