R. v. Lahiry, Unreasonable Delay, and How Life Imitates the Planet Pluto

by Frank Addario and Megan Savard

I. Introduction

Nothing in Canadian law illustrates the adage "there is no free ride" better than judicial attempts to explain the speedy trial right. Twenty years ago the Supreme Court told trial judges the minimum remedy for a violation was a stay of proceedings. The prospect of giving some customers a free ride paralyzed many ticket masters. Some criticized the owner's business decisions to underfund the program but gave him time to fix it before giving away a free ride. Some decided the free ride was best put out of reach by numbing, "aliteral" interpretations of law. Others, perhaps inspired by giddy Enron-era accountants, classified and reclassified delay until it was unrecognizable as a rights-based event—which brings us to *Lahiry*[1], the latest example in a long line of cases showing the judicial attitude toward the speedy trial right.

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II. What Was *Lahiry* About?

Lahiry was one of four accused charged with drinking and driving. In each case, the trial judge had stayed the proceedings based on a s. 11(b) violation. Code J. allowed all four Crown appeals in a single judgment. In doing so, he stated the following principles:

- The neutral intake period includes judicial pre-trials.[2]
- "Getting ready for trial" is an inherent time requirement; the institutional delay clock only starts to run after a trial date is set and counsel's unavailability is subtracted.[3]
- Adjournments and continuation dates required by the "expanding needs of the case" are inherent time requirements.[4]

The idea that pre-trials are a part of "neutral intake" assumes they are ordinarily helpful and timely.

- Defence counsel should not refuse to set a trial date based on outstanding disclosure unless it prevents the accused from making "crucial" decisions such as election or plea.[5]
- Defence counsel should create an evidentiary record to assist the judge in deducting neutral "getting ready" time.[6]
- The trial judge should only infer prejudice from "a very long and unreasonable" and "unjustified" delay. This is defined as total delay minus defence delay and neutral delay.[7]

The Court of Appeal and several lower courts have adopted *Lahiry* as an authoritative judgment regarding the allocation of so-called neutral time.[8]

III. How *Lahiry* Has Changed the section 11(B) Analysis: Some Observations

a. *It Expands the Neutral Intake Period*

Lahiry reclassified pre-trial discussions into the intake period.[9] The idea that pre-trials are a part of "neutral intake" assumes they are ordinarily helpful and timely. Many post-*Lahiry* courts make this assumption, finding pre-trial discussions inherently "useful," "necessary," "beneficial" or "fruitful."[10] Some recognize this assumption is unrealistic.[11] Court policies often require counsel to take these steps even where they have no benefit—and many courthouses are so backed up that it takes several weeks to do so. Broadly categorizing this part of the proceeding as "neutral" discourages Crown counsel and the police from formulating and communicating a resolution position quickly.[12] The approach that assigns a single value to this sometimes useful, sometimes wasteful step reveals a relaxed attitude toward the speedy trial guarantee.

b. *Lahiry Questions the Applicability of the Morin Guidelines*

Lahiry suggests that the Supreme Court only intended the *Morin* guidelines to apply to "short efficient high-volume summary trials." It questions whether courts should apply different guidelines depending on the complexity of the case. If correct, this would expand the eight to ten months of tolerable delay in the Ontario Court. In a recent decision, Nordheimer J. doubted whether *Askov* and *Morin* could support this interpretation.[13]

c. *Lahiry Turns Some Institutional Delay Into "Inherent Time Requirements"*

Lahiry established "neutral" as the default category for delay. In many cases, the true causes of a period of delay will be unclear. Where the evidence supports different possible explanations, *Lahiry* suggests the trial judge should describe the delay as neutral.[14]

d. *That 80s Show is Back*

Lahiry puts an onus on defence counsel to create an evidentiary basis to establish unreasonable delay. Posturing in set date court is back in style! When setting trial dates, counsel must provide details of their schedule and explain how long it will take to get ready. In contrast, Nordheimer J. pointed out in *Sikorski* that the *state* and not defence counsel should be held responsible for institutional delay.[15]

If disclosure is outstanding, the defence must set a date unless counsel can show the missing disclosure is essential to a "crucial" decision. Failure to do this supports an inference that the defence is either unprepared or deliberately delaying.

Defence counsel tailor their schedules to accommodate the court's unavailability. The reverse is not true.

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Not surprisingly, many lawyers either resist disclosure on principle or gravitate to the mushy middle, providing vague or incomplete evidence

about their schedules or state of readiness. When this happens, the trial judge cannot determine the delay's true cause or length. She must rely on best estimates based on judicial experience.[18] Several judges have recognized and complained about the arbitrariness of this process.[19]

e. Lahiry Makes it Harder to Prove Inferred Prejudice

In determining whether delay supports an inference of prejudice, the Supreme Court told trial judges to consider the "total time" it took to get the case to trial and the extent of the accused's contribution.[20] *Lahiry* seems to take a different approach. Instead of evaluating the effect of total delay, Code J. considered whether prejudice could be inferred from Crown and institutional delay.[21]

Post-*Lahiry* courts are understandably confused. A few, including the Ontario Court of Appeal in *Steele* and *Tran*, continue to infer prejudice based on total delay.[22] Most, however, adopt the *Lahiry* method, subtracting neutral and defence delay and using the remaining time to determine the degree of inferred prejudice.[23]

This is a debatable approach. Attributing prejudice from "net" delay is only contrary to the accepted notion that risks to trial fairness and security of the person increase over time regardless of whether the delay is caused by the Crown, the judge, a co-accused or a long intake period.[24] *Lahiry* invites the conclusion that inferred prejudice doesn't accrue when the state is not directly to blame.

f. Lahiry v. Godin

In *Godin*, the Supreme Court emphasized the need for a holistic approach to delay. It reminded trial judges "not to lose sight of the forest for the trees" while engaging in this detailed analysis."[25] Post-*Lahiry* case law suggests a tree-oriented approach is alive and well. As one commentator put it; "It is disheartening to see how frequently courts conducting a section 11(b) analysis still refer back twenty years to *Morin* rather than taking *Godin* as the source of fresh guidance it was meant to be."[26] With its emphasis on mathematics, *Lahiry* does not reinforce the holistic *Godin* approach.[27]

IV. How section 11(B) is Like the Planet Pluto and Other Random Thoughts

Recently, Pluto was demoted from planet status to simple membership in the Kuiper Belt. Some astronomers call it a "dwarf planet". Many lame explanations have been offered for this downgrade.[28] It could be argued s. 11(b) has received similar treatment, a "dwarf right" demoted from the constitution to unexceptional procedural rule. Defence counsel interested in preserving what's left of it might consider the following:

- Enjoy set date court. You are going to be there a few minutes longer. You have an obligation to create a detailed record of your availability. If this seems silly given the pervasiveness of institutional delay in your jurisdiction, don't worry. Someone else imposed this regime on you.
- Remember that the time you take to prepare will be evaluated later on. If you are ready to go before a trial date is set or a judicial pre-trial is held, say so. This type of assertion by counsel can be pivotal.[29]
- If for some reason you cannot address the *Lahiry* factors on the record, explore other options.[30]
- Discuss with your client the importance of documenting prejudice. Explain that the rules do not reward prejudice from the charge itself. If the defendant has prejudice, it must be linked to the delay. Likewise, you must discuss the importance of being impatient to get to trial. It is not enough to say you want an early trial date: your conduct must show your discontent with the pace of the litigation.[31] Many clients will enthusiastically endorse a push for an early trial date if they have discussed this option and its implication with their lawyer.
- Seek s. 11(b)-specific disclosure, such as Crown and judicial policies requiring a JPT in certain cases regardless of whether counsel want one.[32] Ensure the record reflects this information.
- When making your delay argument, remind the court that the inference of prejudice should be based on any delay *that the accused did not want*—not just delay caused by unacceptable Crown and institutional limits. Co-accused delay, witness illness and long intake periods should not be subtracted from the total.
- If you lose your 11(b), you can still rely on the delay and the showing of prejudice as a mitigating factor on sentence.[33]

One final point. Section 11(b) attracts extrinsic agendas like iron filings to a magnet. If the "free ride" remedy is the motive for s. 11(b)'s tortured juridical history, the popular press has concluded the villain is the *Charter*.[34] You follow? The *Charter* is responsible for violations of the *Charter*.

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NOTES:

[1] 2011 CarswellOnt 12516, 283 C.C.C. (3d) 525, 90 C.R. (6th) 90 (Ont. S.C.J.)

[2] *Lahiry, ibid* at paras. 19, 116.

[3] *Ibid* at paras. 34, 37. 60, 117-118. For a more flexible post-*Lahiry* approach to "preparation time," see *R.*

v. Steele, 2012 ONCA 383, 2012 CarswellOnt 7063, 93 C.R. (6th) 348 (Ont. C.A.) at para. 20, where Rosenberg J.A. adopted *Lahiry* but found that pre-JPT preparation time satisfied the "getting ready for trial" requirement.

[4] *Ibid* at paras. 63, 64, 69.

[5] *Ibid* at paras. 106-115.

[6] *Ibid* at paras. 36, 60, 117-118.

[7] *Ibid* at paras. 8, 16, 37-39, 73, 99-100, 122-124 ,126, 147.

[8] See *R. v. Tran*, 2012 ONCA 18, 2012 CarswellOnt 509 (Ont. C.A.) at paras. 30-40.

[9] Prior to *Lahiry*, there was conflicting case law about whether the time required to set and conduct a JPT was institutional or neutral delay: *R. v. G. (C.R.)*, 2005 CarswellOnt 4254, [2005] O.J. No. 3764 (Ont. C.A.) suggested it was institutional delay while *R. v. M. (N.N.)*, 2006 CarswellOnt 2721, [2006] O.J. No. 1802 (Ont. C.A.) called it neutral. Our Court of Appeal has since endorsed the *Lahiry* approach in *Tran*, supra note 8 at paras. 33-37.

[10] *R. v. Nowak*, 2013 CarswellOnt 1532, [2013] O.J. No. 650 (Ont. C.J.) per Renaud J.; *R. v. Emanuel*, 2012 ONSC 1132, 2012 CarswellOnt 2093 (Ont. S.C.J.) at para. 14; *R. v. Nguyen*, 2012 CarswellOnt 9741, [2012] O.J. No. 3752 (Ont. C.J.) per Harris J.; *R. v. Robson*, 2012 CarswellOnt 9337, [2012] O.J. No. 3789 (Ont. C.J.) per LeRoy J.; *R. v. Gosbovskyy*, 2012 CarswellOnt 7557, [2012] O.J. No. 2661 (Ont. S.C.J.) per Kelly J.

[11] See, for example, *R. v. Horsley* (November 28, 2012), Wong J., [2012] O.J. No. 5998 (Ont. C.J.) at paras. 20-24; *R. v. Ajise* (September 14, 2012), Bielby J., [2012] O.J. No. 5051 (Ont. S.C.J.) per Bielby J. at para. 28; *R. v. Vendittelli*, 2012 CarswellOnt 6390, [2012] O.J. No. 2282 (Ont. C.J.) per Oleskiw J. at paras. 21-22. Ironically, strict rules requiring resolution meetings and judicial pre-trials undermines another well-established s. 11(b) principle: the assumption that counsel are presumed to know what is important about their case and how long it will take to litigate the relevant issues.

[12] Note that courts, including the court in *Lahiry*, recognized "dilatory" Crown practices as a real concern: *Lahiry, supra* note 1 at para. 114; *R. v. Nguyen*, 2012 CarswellOnt 9741, [2012] O.J. No. 3752 (Ont. C.J.) at para. 35.

[13] *R. v. Sikorski*, 2013 ONSC 1714, 2013 CarswellOnt 4193 (Ont. S.C.J.) at paras. 68-69.

[14] For an illustration of this approach, see *R. v. Sivanandamoorthy*, 2012 CarswellOnt 7802, [2012] O.J. No. 2859 (Ont. S.C.J.) per Kelly J. at paras. 5-12. The summary conviction appeal court allowed a Crown appeal, finding that where the record revealed two possible explanations for delay — one "neutral" and one "institutional" — the time should be characterized as "neutral."

[15] *Sikorski, supra* note 13 at paras. 87-97. This allocation places the risk on those who make business decisions to provide resources, as Cory J. noted in *Askov*.

[16] See *Tran*, *supra* note 8 at para. 39. See also Code J.'s subsequent decision in *R. v. Rutherford*, 2012 CarswellOnt 6397, [2012] O.J. No. 2306 (Ont. S.C.J.) at paras. 43-46.

[17] One judge has repeatedly commented that requiring counsel to provide a full evidentiary record effectively puts the lawyers "on trial" and risks causing serious damage to the adversarial system: *R. v. Kim*, 2013 CarswellOnt 1481, [2013] O.J. No. 649 (Ont. C.J.) per Harris J. at para. 6; *R. v. Nguyen*, 2012 CarswellOnt 9741, [2012] O.J. No. 3752 (Ont. C.J.) per Harris J. at paras. 17-20, 23.

[18] See, for example, *Steele, supra* at paragraph 19; *Tran, supra* note 8 at paragraphs 31–40; *R. v. Krywucky*, 2013 CarswellOnt 2336, [2013] O.J. No. 915 (Ont. S.C.J.) per Goodman J; *R. v. Nowak*, 2013 CarswellOnt 1532, [2013] O.J. No. 650 (Ont. C.J.) per Renaud J.; *R. v. Shukla*, 2012 CarswellOnt 15787, [2012] O.J. No. 5911 (Ont. C.J.) per McArthur J.

[19] See: *R. v. MacArthur*, 2013 CarswellOnt 2000, [2013] O.J. No. 773 (Ont. C.J.) per Nadel J at paras. 20, 30; *Kim, supra* note 17; *Nguyen, supra* note 17; *R. v. Shea*, 2012 CarswellOnt 6883, [2012] O.J. No. 2489 (Ont. C.J.) per Nakatsuru J. at para. 36; *R. v. Vendittelli*, 2012 CarswellOnt 6390, [2012] O.J. No. 2282 (Ont. C.J.) per Oleskiw J. at paras. 26-27.

[20] *R. v. Godin* at para. 18.

[21] *Lahiry*, *supra* note 1 at paras. 8-9, 37-39, 73, 99-100, 122-124. This approach invites circular reasoning, suggesting that courts can only infer prejudice if they have already found a violation of s. 11(b) based on length of delay alone. As Stephen Coughlin puts it, "In *Morin* the Supreme Court said 'eight months is the reasonable goal.' The approach here takes *Morin* to say 'missing the goal by eight months is reasonable.'" See Coughlin's annotation on *Lahiry* in (2012) 90 C.R. (6th) at 90.

[22] *Tran, supra* note 8 at para. 23; *Steele, supra* at para. 34. In *Steele*, the OCA following *Godin*, held that although the total institutional and Crown delay was only 26 months, prejudice could be inferred from "the 35 months it took to bring him to trial." *R. v. Steele*, 2012 CarswellOnt 7063, 93 C.R. (6th) 348, [2012] O.J. No. 2545 (Ont. C.A.) at para. 34. For lower court judgments that took a similar approach, see: *R. v. Krywucky*, 2013 CarswellOnt 2336, [2013] O.J. No. 915 (Ont. S.C.J.) per Goodman J; *R. v. Morou*, 2012 CarswellOnt 14006, [2012] O.J. No. 5227 (Ont. C.J.) per Taylor J.; *R. v. Hung* (June 14, 2012), Robertson J., [2012] O.J. No. 4018 (Ont. C.J.) per Robertson J.; *R. v. Vella*, 2012 CarswellOnt 5208, [2012] O.J. No. 1876 (Ont. C.J.) per Ray J.

[23] See, for example, *R. v. Nowak*, 2013 CarswellOnt 1532, [2013] O.J. No. 650 (Ont. C.J.) per Renaud J.; *R. v. Ahmed*, 2013 CarswellOnt 1468, [2013] O.J. No. 670 (Ont. C.J.) per McArthur J.; *R. v. Charles*, 2013 CarswellOnt 27, [2013] O.J. No. 24 (Ont. S.C.J.) per Strathy J.; *R. v. Shukla*, 2012 CarswellOnt 15787,

[2012] O.J. No. 5911 (Ont. C.J.) per McArthur J.; *R. v. Horsley* (November 28, 2012), Wong J., [2012] O.J. No. 5998 (Ont. C.J.) per Wong J.; *R. v. Lo* (September 14, 2012), Doc. CR-12-30000491-0000, [2012] O.J. No. 5918 (Ont. S.C.J.) per Code J. at para. 20; *R. v. Afise* (September 14, 2012), Doc. CRIM (F) 3911/09, [2012] O.J. No. 5051 (Ont. S.C.J.) per Bielby J.; *R. v. Boateng*, 2012 CarswellOnt 15977, [2012] O.J. No. 6096 (Ont. S.C.J.) per Seppi J.; *R. v. Ta*, 2012 CarswellOnt 8624, [2012] O.J. No. 3195 (Ont. S.C.J.) per Fragomeni J.; *R. v. Robson*, 2012 CarswellOnt 9337, [2012] O.J. No. 3789 (Ont. C.J.) per LeRoy J.; *R. v. Sivanandamoorthy*, 2012 CarswellOnt 7802, [2012] O.J. No. 2859 (Ont. S.C.J.) per Kelly J.; *R. v. Richards*, 2012 CarswellOnt 7578, [2012] O.J. No. 2783 (Ont. S.C.J.) per Kelly J.; *R. v. Lu*, 2012 CarswellOnt 8051, [2012] O.J. No. 2917 (Ont. C.J.) per Brown J.; *R. v. Shea*, 2012 CarswellOnt 6883, [2012] O.J. No. 2489 (Ont. C.J.) per Nakatsuru J.

[24] *R. v. Morin*, supra at para. 61; *R. v. Satkunananthan*, 2001 CarswellOnt 824, 152 C.C.C. (3d) 321, 42 C.R. (5th) 220, [2001] O.J. No. 1019 (Ont. C.A.) at para. 58.

[25] *Godin, supra* at para. 18.

[26] Janine Benedet et al., *Anniversary of the Canadian Charter of Rights and Freedoms: The Impact on Criminal Justice*, (2012) 91 C.R. (6th) 71.

[27] If you go for numbers, you'll want to note that in *Lahiry*, Code J. relied heavily on *Morin* (55 references) while mentioning *Godin* only three times.

[28] See, for example: http://www.how-stuffworks.com/pluto-planet.htm

[29] See *Steele*, *supra* at para. 20 and our comment at FN 2; see also *Horsley supra* at FN 10.

[30] For example: Send a letter to the trial coordinator advising that you have set a trial, that you are seeking an earlier one because of the prejudice to your client, that you wish to be placed on a "ready list" should the court have one — see *Lahiry* at paras. 42-43 — that you require "xx" days of preparation given the issues involved and the other demands on your time. Provide all your available dates. Keep a copy of your letter and the trial coordinator's response. Include it in your s. 11(b) application record.

[31] *R. v. Seegmiller*, 2004 CarswellOnt 5134, [2004] O.J. No. 5004 (Ont. C.A.) at para. 18, leave to appeal refused 2005 CarswellOnt 2597, 2005 CarswellOnt 2598, [2005] S.C.C.A. No. 64 (S.C.C.), *R. v. Kovacs-Tatar*, 2004 CarswellOnt 4805, [2004] O.J. No. 4756 (Ont. C.A.) at para. 38; *R. v. Harper* (August 19, 2009), Greene J., [2009] O.J. No. 3499 (Ont. C.J.), per Greene J.

[32] See *R. v. Lof*, 2005 CarswellOnt 7324, 36 C.R. (6th) 393, 28 M.V.R. (5th) 150 (Ont. S.C.J.) at paras. 44-48 for a good statement of the law relating to the Crown's positive obligation to disclose relevant "institutional delay" data.

[33] *R. v. Nasogaluak*, 2010 SCC 6, 2010 CarswellAlta 268, 2010 CarswellAlta 269, 19 Alta. L.R. (5th) 1, 72 C.R. (6th) 1, 90 M.V.R. (5th) 1, [2010] 4 W.W.R. 1 (S.C.C.); *R. v. Spencer*, 2004 CarswellOnt 3215, 72 O.R. (3d) 47, 22 C.R. (6th) 63 (Ont. C.A.) at para. 41, leave to appeal refused 2005 CarswellOnt 2591, 2005 CarswellOnt 2592 (S.C.C.); *R. v. Leaver*, 1996 CarswellOnt 4228, 3 C.R. (5th) 138 (Ont. C.A.) at paras 2-6; *R. v. Virani*, 2012 ABCA 155, 2012 CarswellAlta 876, 68 Alta. L.R. (5th) 45, 34 M.V.R. (6th) 70 (Alta. C.A.); *R. v. Steadman*, 2010 BCCA 382, 2010 CarswellBC 2439 (B.C. C.A.).

[34] As one columnist recently reminded us, "the bulk of responsibility for the length of time it takes ordinary criminal cases to get to trial lay with defence lawyers who then were filing a barrage of pre-trial motions alleging violations under the *Canadian Charter of Rights and Freedoms*. . .The appeal court, Judge Moldaver said [in his 2005 CLA address], had noticed "that pre-trial motions regularly last two to three times longer than the trial itself," and that most often, "these motions are initiated by the defence." See: http://full-comment.nationalpost.com/2013/05/03/the-long-delay-in-getting-to-trial-has-lost-its-charm/