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New Era, New Disclosure Obligations

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In a case argued by Davies, the Court of Québec rendered a judgment on December 10 setting out, for the first time, the conditions that must be met for the electronic disclosure of evidence by the Crown to be "reasonably accessible", respectful of the accused's fundamental rights and consistent with the Crown's disclosure obligations as well as with the principles set out in *Jordan*.

The Facts

On May 10, 2017, the prosecution, the Agence du revenu du Québec, served a statement of offence on the defendant, accusing him of breaching paragraphs 62(1)(a) and (d) of the *Tax Administration Act* for the 2014, 2015 and 2016 tax years – namely:

a. that he made or participated in, assented to or acquiesced in the making of false or deceptive statements in a return or report filed or made as required by section 1000 of the *Taxation Act*, by claiming non-deductible amounts in respect of a tax shelter in computing his total income; and

b. that he evaded or attempted to evade compliance with the *Taxation Act* or payment or remittance of a duty imposed under the *Taxation Act* by claiming non-deductible amounts in respect of a tax shelter in computing his total income.

Between July 19, 2017, and May 15, 2018, on six successive occasions, the prosecution proceeded with the disclosure of evidence, which included 7 CDs/DVDs and 3 USB sticks. The USB sticks contained respectively 19.2 GB, 7.15 GB and 8.65 MB of data. At each wave of disclosure, the defendant complained that the disclosure was both incomplete and inadequate. He requested that the information provided by the prosecution be disclosed again in an electronic format, but in an organized and accessible manner – in particular with proper search engines that would allow for a single search by keyword or field. The prosecution refused to comply. In light of the prosecution's intransigence, the defendant had no choice but to ask the Court to order the prosecution to disclose the evidence in a reasonably accessible electronic format.

The Judgment[1]

First, the Court reminded the parties that it is "the manner in which the elements and information are organized and electronically formatted [that] determines whether or not the electronic disclosure is accessible."[2] In this case, the Court concluded that these principles had not been met. Although approximately 50,000 documents were disclosed in electronic format, many of them in PDF format, "the search engine that the defendant must use is based on the 'Control F' key on the keyboard of his computer."[3] The Court noted from the prosecution's evidence that the investigator was able to navigate this voluminous electronic disclosure only because he had been in charge of the investigation since 2014 and had "'a good memory,' which is not necessarily the case for the defendant."[4]

Furthermore, for the first time, the Court set out the principle applicable to any voluminous disclosure of evidence, affirming that it requires "an electronic disclosure indexed in an organized manner," together with "a search tool that makes it possible to (1) perform a single search covering all the elements contained in the disclosed database (2) perform searches by keyword or search field and (3) preserve the links between files and parent documents."[5] With respect to the prosecution's argument that the data from the defendant's tablet did not have to be disclosed to him with a search engine, the Court found that it was problematic[6] and was "contrary to the constitutional standards imposed on the prosecution"[7] in terms of disclosure. Indeed, the prosecution's disclosure obligations exist regardless of the source of the disclosed data.

Applying this principle to the facts of this case, the Court found that the prosecution's electronic disclosure was "ineffective and inadequate."[8] It comprised "specific deficiencies or significant technical difficulties," compromised the defendant's ability to "make full answer and defence" and was contrary to "the Supreme Court's concerns"[9] regarding the right to be tried within a reasonable time, as expressed in *Jordan* and *Cody*.

Therefore, the Court ordered the prosecution to disclose the electronic evidence again "in a reasonably accessible manner" – that is, "with software, search engines or management systems" that allow the defendant to:

"(a) [p]erform a single search covering all of the data";
"(b) [p]erform keyword searches throughout the text of the documents or searches by field, including by date, author, recipient, source and subject";
"(c) preserve the parent links between the documents disclosed".[10]

The Court further ordered the prosecution to provide the defendant with "an intelligible and effective indexation of the information, documents and files disclosed." The Court gave the prosecution 75 days to comply with the judgment.[11]

Impact

In *R v Antoine*,[12] the Superior Court of Québec had noted that "electronic disclosure is meaningful if the disclosure materials are reasonably accessible," with no further clarification. In this case, and unlike the Superior Court of Ontario in *R v Dunn*,[13] the Court clearly affirmed, for the first time, the general principle that "in all cases where voluminous disclosure is made," the prosecution has an obligation to provide the defence with the necessary tools adapted to the volume of evidence disclosed, including adequate software or search engines and organized indexation.

Also for the first time, the Court established a clear link between this obligation of the prosecution and compliance with the principles established in *Jordan* and *Cody*: "At the dawn of the year 2020…", "[a]cting otherwise makes the task difficult and tedious for the defence and may compromise the holding of trials within a reasonable time."[14]

To summarize, the Court has just ensured the right of accused persons to accessible disclosure of evidence so that their right to make full answer and defence is not rendered moot by the prosecution's inadequate disclosure practices.

[1] The judgment was rendered in French. The following excerpts in English are our unofficial translation.
[2] Para 30.
[3] Para 32.
[4] Para 33.
[5] Para 36.
[6] Para 37.
[7] *Ibid.*
[8] *Ibid.*
[9] Para 38.
[10] Para 42.
[11] *Ibid.*
[12] 2016 QCCS 5047, para 39.
[13] 2009 CanLII 75397 (ON SC). The Superior Court of Ontario ordered electronic disclosure based on similar conditions, but without making it a general principle and within the framework of a specific facts.
[14] Para 39.

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