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## *Jordan* Ceilings: Particular Application to White Collar Crime

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In a case successfully argued by Davies, the Court of Québec concluded that the prosecution infringed the right of the accused to be tried within a reasonable time and, as a result, ordered (published in French) a stay of proceedings and charges. This is an important decision in that it deals with the application of the principles established by the Supreme Court of Canada in *R v Jordan* to white collar crime and clarifies the notion of “*complexity of the case*” in that context. Furthermore, the Court of Québec stressed that the prosecution must analyze the evidence and elaborate a “*concrete management and trial plan*” before laying charges in such matters.

This judgment follows through on the decision handed down in the same case in December 2019 that, for the first time, set out the conditions that must be met for the electronic disclosure of evidence to be “*reasonably accessible*,” respectful of the fundamental rights of the accused and consistent with the Crown’s disclosure duties and the principles of the *Jordan* decision.

### The Facts

On May 10, 2017, the prosecution, being the Québec Revenue Agency, served statements of offence on the defendant, alleging an infringement of paragraphs 62(1)(a) and (d) of the *Tax Administration Act* for the 2014, 2015 and 2016 taxation years and, more specifically

- i. had made false or misleading statements or had participated in, assented to or acquiesced in the making of such statements in the return filed under section 1000 of the *Taxation Act* by claiming non-deductible amounts in respect of a tax shelter when computing its total income; and
- ii. had evaded or attempted to evade compliance with the *Taxation Act* or the payment or remittance of a fee under such Act by claiming non-deductible amounts in respect of a tax shelter when computing its total income.

Between May 24, 2017, and April 19, 2018, the defendant sent no fewer than nine requests for disclosure of evidence, including relating to the accessibility of electronic disclosure.

Nearly a year later, on April 24, 2018, the prosecution declared that it had completed the disclosure of the evidence without responding to most of the defendant’s requests, including those relating to electronic disclosure. The defendant subsequently brought a motion for disclosure of evidence, which was granted by the above-mentioned judgment of December 2019. This judgment ordered the prosecution to produce proper electronic disclosure by February 21, 2020.

In April 2020, the accused filed a motion for a stay of proceedings for unreasonable delay.

### The Decision

In an extensive decision, the Court determined the net delay attributable to the prosecution by deducting any delay attributable to the defence or to discrete events. The net time thus calculated exceeded the 18-month ceiling laid down by the *Jordan* decision. This time frame was therefore deemed to be unreasonable, and the onus was on the prosecution to demonstrate that it was justified by exceptional circumstances relating, in particular, to the exceptional complexity of the case.<sup>1</sup>

In this regard, the prosecution argued that the very nature of tax evasion charges demonstrated the particularly complex nature of the matter, as well as the volume of evidence in the file.<sup>2</sup> Dissecting the notion of a complex case involving tax fraud charges, the Court rejected these arguments. While acknowledging that tax fraud cases “*occupy a higher level on the complexity scale of regulatory cases*

than cases involving a violation under the Highway Safety Code,” [translation]<sup>3</sup> the Court noted that “it must be borne in mind that the ceilings set by *Jordan* already accommodate complex cases, which already offer a greater challenge than the case at bar. The ceilings were not intended only for cases of minimal complexity.” In short, the prosecution had to establish that the case was not only *particularly complex*, but also that it justified exceeding the presumed ceiling.<sup>4</sup> Just because it is a tax fraud case, it does not automatically follow that it is a complex case; the criteria set out by *Jordan* in this regard must be applied.

Applying these principles, the Court held that “the prosecution cannot claim that the complexity of a case is an exceptional circumstance that justifies exceeding the established ceiling where it has not adopted a prosecution plan allowing it to shorten delays as much as possible.”<sup>5</sup> Thus the investigation should have been completed before charges were laid, “which implies that the prosecution is in possession of all the evidence in the file and is already in control of it.”<sup>6</sup> Furthermore, when such evidence is voluminous, the prosecution must adopt “a concrete prosecution plan allowing it to minimize as much as possible delays related to the volume of evidence.”<sup>7</sup> This duty applies even more so to tax fraud charges: “Although the volume of evidence in such cases is a major obstacle, when choosing to initiate proceedings of such complexity, the prosecution has a duty to develop a concrete management and trial plan to reduce to a minimum the delays caused by such complexity.”<sup>8</sup>

Thus the Court held that, in the case at bar, the prosecution had failed to fulfill its duties. Rather, this was “a case that the prosecution has unnecessarily complicated or continues unnecessarily to complicate.”<sup>9</sup> As a result, “[i]n a case where the applicable ceiling is 18 months,” the Court found “concerning that the evidence disclosure process unfolded over a period in excess of 11 months,” which suggested a “lack of a concrete plan, timetable and strategy.”<sup>10</sup>

In this judgment, the Court of Québec reiterated that all stakeholders, including the defence, had a stake in implementing all necessary measures for the timely conduct of the proceedings.<sup>11</sup> Thus the Court attributed certain delays to the defence, which were subtracted from the calculation of the net delay.<sup>12</sup>

However, since the time elapsed in this case still exceeded 18 months, even after deducting the periods attributable to the defence, and since the prosecution had demonstrated no exceptional circumstances, the Court of Québec granted the defendant’s motion and stayed the proceedings.

## The Impact

In rendering this judgment, the Court of Québec has affirmed that the principles set out in the *Jordan* case apply with full force in matters of white collar crime and that the prosecution cannot merely invoke the nature of the charges to seek to establish exceptional circumstances and thus justify non-compliance with the ceilings established under *Jordan*.

This is an important judgment for the fundamental rights of all persons subject to the law. It stresses and details the duties of the prosecution in the management and organization of its cases, particularly in matters of white collar crime. Thus, when confronted with a case of this nature, the prosecution must imperatively and immediately develop an orderly prosecution plan, allowing the case to be handled in a timely manner, including providing the effective disclosure of evidence.

<sup>1</sup> Para. 98.

<sup>2</sup> Para. 102.

<sup>3</sup> Para. 106; note that all quotes from the Court judgment in this bulletin have been translated here.

<sup>4</sup> Para. 118.

<sup>5</sup> Para 127.

<sup>6</sup> Para 129.

<sup>7</sup> Para 129.

<sup>8</sup> Para 75.

<sup>9</sup> Para 130.

<sup>10</sup> Para 73.

<sup>11</sup> Para 55.

<sup>12</sup> *Ibid.*

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