

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Cromwell*, 2015 NSPC 99

Date: November 13, 2015
Docket: 2365376 - 2365484
Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

V.

CHRISTOPHER CROMWELL and 3020636 NOVA SCOTIA LIMITED

SENTENCING DECISION

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD: November 10 and 13, 2015

DECISION: November 13, 2015

CHARGES: section 239(1)(d) of the *Income Tax Act* and section 327(1)(c) of the *Excise Tax Act*

COUNSEL: Constantin Draghici-Vasilescu, for the Crown
Bruce Russell, Q.C., representing Christopher Cromwell and 3020636 Nova Scotia Limited

By the Court:

Facts

[1] On October 5 I convicted Mr. Cromwell and his numbered company of willfully evading the payment of taxes by failing to declare income contrary to section 239(1)(d) of the *ITA* (Counts 3 and 4) and of willfully evading the remittance of HST contrary to section 327(1)(c) of the *ETA* (Counts 29 through 52). I convicted Mr. Cromwell of committing offences contrary to section 239(1)(d) of the *ITA* by willfully evading the payment of taxes in 2004 and 2005. (Counts 56 and 57)

[2] The evidence supporting the convictions and my reasons are laid out in my decision of October 5 (2015 NSPC 64).

[3] I found in my decision that Mr. Cromwell acted in a systematic, deliberate fashion to evade the payment of taxes. I described in paragraphs 195 and 196 of my reasons how Mr. Cromwell evaded the payment of taxes, by providing his accountant with false information. As I said:

[195] The evidence supports only one reasonable inference: Mr. Cromwell knowingly supplied false information to Mr. Beno, that is, he supplied a deliberately incomplete picture of his income. He knew the information he provided to Mr. Beno would be used to prepare his corporate and personal income tax returns. He relied on Mr. Beno using the information he was given. Income that should have been reported was deliberately concealed to evade the payment of tax. Mr. Cromwell's efforts achieved what he intended, the payment of less tax than he owed on the business income he had earned in 2004 and 2005.

[196] The same goes for Mr. Cromwell's HST returns. As I have already found, he calculated HST on only some of his hairstyling income. He deliberately prepared his HST returns without factoring in income he knew should be taken into account.

Calculation of the Amount of Tax Evaded

[4] The Crown has calculated the amount of tax evaded by Mr. Cromwell and 3020636 Nova Scotia Limited in relation to each of the charges for which convictions have been entered. Mr. Cromwell does not dispute those calculations.

They total \$23,084.03.

The Fine Penalty for Tax Evasion and the Position of the Parties

[5] Section 239(1) of the *ITA* establishes that the fine for tax evasion is to be not less than 50 percent and not more than 200 percent.

[6] The Crown seeks a fine of 100 percent of the amount of taxes evaded, that is, a fine of \$23,084.

[7] Mr. Cromwell proposes a fine that is 75 percent of the taxes evaded and asks for two years to pay.

[8] 75 percent of the evaded taxes is \$17,313.

The Applicable Legal Principles

[9] Mr. Draghici-Vasilescu provided me with a decision of Judge Wayne Gorman of the Newfoundland and Labrador Provincial Court - *R. v. Atlantic Technologist Limited*.

[10] In *Atlantic Technologist Limited*, Judge Gorman noted the purpose and principles of sentencing as set out in the *Criminal Code* which apply to a sentencing for tax evasion. He referenced the Supreme Court of Canada's summary of the sentencing principles from **R. v. L.M.**, [2008] S.C.J. No. 31 at paragraph 17 where the Court said:

... To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the *Criminal Code*:

- the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgement of and reparations for the harm they have done (s. 718 *Cr. C.*);
- the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1 *Cr. C.*); and
- the principles that a sentence should be increased or reduced to

account for aggravating or mitigating circumstances, that a sentence should be similar to other sentences imposed in similar circumstances, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered (s. 718.2 *Cr. C.*).

[11] Judge Gorman put the crime of tax evasion into context at paragraphs 29- 32 of his decision. He found that the primary principles of sentencing are denunciation and general deterrence. Referencing a 2005 decision from the British Columbia Provincial Court – *R. v. Valley Heavy Equipment Ltd.*, he said that the essence of tax evasion is “blatant dishonesty and the pillaging of the public purse. The sentence that the court imposes should be such that it expresses society’s condemnation of such conduct.”

[12] Judge Gorman noted at paragraph 32 of his reasons that any sentence imposed for tax evasion must “clearly indicate to the public that violations of the *Income Tax Act* are real, substantial and serious crimes.” He also quoted from the Supreme Court of Canada decision in *R. v. Knox Contracting Limited*, [1990] S.C.J. No. 74 where that Court stated:

17 It is fitting and appropriate that the s. 239 offences be considered as criminal law. The *Income Tax Act* is a major source of funds for the federal government. Its provisions are applicable to most adult Canadians. The vast majority pay their income tax by way of payroll deduction with little or no opportunity for evasion or misstatement. Those who do evade the payment of income tax not only cheat the State of what is owing to it, but inevitably increase the burden placed upon the honest taxpayers. It is ironic that those who evade payment of taxes think nothing of availing themselves of the innumerable services which the State provides by means of taxes collected from others.

18 The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed. All taxpayers have the right to know that it is a criminal violation to commit any of the offences described in s. 239. The Act imposes a public duty. A breach

of that fundamentally important public duty should constitute a criminal offence.

Determining the Appropriate Amount of the Fine

[13] In this case there is little in the way of mitigating factors. Mr. Cromwell did not plead guilty. This is not an aggravating factor as he was entitled to have the Crown prove its case against him beyond a reasonable doubt, which it did. But it means the mitigating effect of a guilty plea and an acceptance of responsibility is absent from the variables I have to consider.

[14] Mr. Russell has submitted that had Mr. Cromwell been able to afford a lawyer to represent him, perhaps there would have been a negotiated plea or a more effective defence. That is not what happened. Mr. Cromwell defended on the basis that it was others who caused the problems that led to this prosecution. He chose not to negotiate with the Crown to resolve the matter. He cannot now expect those choices to have any mitigating effect.

[15] It is a mitigating factor that Mr. Cromwell and the numbered company have no prior record. This is a case of a first offender.

[16] But weighed against the status of Mr. Cromwell and the numbered company as first offenders and any mitigating effect that might have is the deliberate, calculated nature of the offending. In *Atlantic Technologist Limited*, Judge Gorman noted that none of the offenders had previous convictions but that did not cause him to conclude that a fine less than 100 percent of the evaded taxes would satisfy the paramount sentencing principles of denunciation and deterrence. He found at paragraph 37 of his decision that a fine fixed at 100 percent of the evaded taxes “will normally constitute an eminently fit and proportionate fine.”

[17] Proportionality is a fundamental principle of sentencing. (section 718.1, *Criminal Code*) It contemplates a calculation of the gravity of the offence and the degree of responsibility of the offender. Deliberately evading taxes, personal, corporate and HST, over a two year period constitutes a very serious offence. Mr. Cromwell's moral culpability for the tax evasion is high. He orchestrated the evasion very deliberately. He knew what he should have been submitting as income and HST and he chose to act dishonestly. He was the directing mind of the numbered company and his dishonesty led to tax evasion by the company as well. It was an ongoing scheme. Mr. Cromwell achieved a direct benefit by paying less tax than he should have.

[18] Mr. Russell has indicated that Mr. Cromwell is currently facing a very substantial civil liability as a result of his tax evasion with onerous penalty and interest aspects. In Mr. Russell's submission this affects Mr. Cromwell's ability to pay a fine. Mr. Cromwell has indicated through Mr. Russell that his hairstyling business is doing much less well than it used to. No financial documentation has been provided but the submission is that Mr. Cromwell has a compromised ability to pay a fine set at 100 percent of the amount of tax evaded.

[19] The Crown seeks to have Mr. Cromwell pay a fine in the amount of the taxes he evaded paying. The civil assessment process is entirely separate. This is the criminal process. The emphasis in a case like this must be on denunciation and deterrence. These paramount sentencing principles are not satisfied by a 75 percent fine. The circumstances in this case do not justify leniency in sentencing. I find that Mr. Cromwell should not be able to use his civil liability for evading taxes to alleviate the penalty that is intended to primarily serve the principles of sentencing in the criminal context. It also does not seem appropriate to me to permit Mr. Cromwell and his company to leverage a benefit from his deliberate decision over two years to evade the payment of taxes.

[20] I am not satisfied that Mr. Cromwell does not have the ability, over time, to pay \$23,084. I have no way of knowing what he will do in relation to his civil liability. According to the Crown his options can include erasing the liability through bankruptcy. The civil liability issue will play out separately from the criminal process. I have not been persuaded that Mr. Cromwell's civil liability should have any bearing on my assessment of the appropriate penalty for the convictions for tax evasion.

[21] I find that the appropriate fine in this case is 100 percent of the evaded taxes. The fine is therefore fixed at \$23,084. It will be broken down according to the amounts associated with the convictions on each relevant count in the Information.

[22] Mr. Cromwell was seeking two years to pay 75 percent. I am satisfied that is a reasonable amount of time for the payment of the fine I have imposed.

Derrick, P.C.J.