

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Hills 2007 NSPC 27

**Date:** 2007 May 29

**Docket:** 1625518

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**Registry:** Halifax

Her Majesty the Queen

v.

Wayne Hills

**Judge:** The Honourable Judge Castor H. Williams

**Decision:** May 29, 2007

**Charge:** 239(1)(e) Income Tax Act  
239(1)(e)  
239(1)(e)  
239(1)(e)  
239(1)(a)  
239(1)(d)  
239(1)(a)  
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239(1)(d)

**Counsel:** Devon Peavoy for the Crown  
Gerard Tompkins for the Defendant

## **Introduction**

[1] The accused, Wayne Hills, hereinafter referred to as “Wayne,” earned professional income from his dental practice and other income from an investment portfolio ostensibly managed by his brother Howard Hills, hereinafter referred to as “Howard.” As a result of a tax audit of Wayne’s account the Canada Revenue Agency, hereinafter referred to as the “Agency,” has disallowed certain losses as invalid and considered certain commodity receipts as income and consequently, reassessed him. He has filed objections on which an adjudication is yet to be heard.

[2] Although Wayne, through counsel, has admitted filing the returns containing the false or deceptive statements, he has denied that he did so with any malice aforethought and as a result he has committed no crime. Nonetheless, the Agency has charged him and Howard with conspiracy to file false statements and to evade taxes with respect to his tax account. Additionally, the Agency has charged him with filing false tax statements and willfully evading the payment of taxes.

## **Summary of Relevant Evidence**

[3] The evidence disclosed that Wayne had no involvement with a trading company known as T&F Commodities Trading Ltd. that was owned by Howard. Howard, however, represented several clients under this account that he cleared, as an introducing broker, through EDF Man a clearing firm in Chicago. Consequently, Wayne earned no income nor suffered any losses concerning any trading activities conducted by this company. However, in 1995, 1996, 2000, 2001 and 2002 Howard allocated to him losses and income that he, Howard, received from EDF Man. These losses and income affected Wayne's tax liability.

[4] Additionally, Wayne and Howard had individual accounts with a company called LFG, a brokerage firm in Chicago. However, Howard, under an executed Power of Attorney, managed this account for Wayne but, Wayne was at risk with respect to trading activities and was responsible for any tax liability on income received. LFG generated monthly statements stipulating profits or losses, over the course of the year and these were sent to Wayne with a copy to Howard as the introducing broker. Funds would be

sent directly to Wayne by LFG on the direction of Howard after he had discussions with Wayne. In any event, Wayne did not include the profits amounts as income for the period 1999 to 2002.

[5] In addition, Wayne would request help from Howard to assist him to pay taxes. On those occasions Howard would allocate him funds from a master account that he, Howard, held with EDF Man, in Chicago. For example, in 1995 when Wayne advised that he needed money to pay his taxes, Howard allocated him US\$50000.00 in losses with the knowledge that he would allocate him US\$50000.00 in profits in 1996. This process Howard considered being a tax deferral for a year to allow Wayne to “get his feet back under him.” A similar allocation was done again in 2000 notwithstanding the fact that Wayne neither suffered any losses nor accrued any gains from the trading on this EDF Man account.

[6] The same situation arose in 2000 and 2001. Then, Howard would allocate some of his profits and losses to Wayne but would pay the required taxes on his portion and Wayne would either pay the taxes or show the losses when things balanced out. All taxes would eventually be paid but not in the

actual year when the tax liability would have occurred.

[7] There was no formal partnership between Wayne and Howard but they acted as if a common law partnership existed. Howard was teaching Wayne how to deal in the commodities market as Wayne had never placed a trade and apparently relied upon Howard's experience and knowledge as a broker. In the process of allocating funds to Wayne, Howard would go through his commodities trading activities statement with EDF Man and selectively pick winning and losing trades and format them in a manner to arrive at the amount that Wayne required and then he allocated them to him as if it were Wayne's actual trade. To support the allocation, Howard would prepare statements showing the selected trades and gave these statements to Wayne. The EDF Man account was an omnibus account that had several clients that were managed by Howard who had done similar allocations to other clients as a means of tax deferral.

[8] Howard did not think that he was breaking the law or that it was illegal as he had prepared statements showing the trading allocations that were verifiable. The trades were legitimate and the losses that were allocated to

Wayne were genuine and actual and Howard paid the taxes on what he declared. Also, as these trades were genuine, legitimate and not fictitious or fraudulent ones, Howard advised Wayne, who relied upon him, that it was proper to use these allocations to manage his tax account.

[9] From Howard's perspective he was allocating profit and losses that were valid but which would affect both their tax liabilities. Even so, they each would eventually pay the taxes even if not in the year it was due. Although Wayne would not actually suffer the losses, he benefited from the allocation of the losses made by Howard on his request. Howard would pay the taxes on the amount he retained in the year it was due and Wayne would pay the taxes due at a later time when he was able to do so and when the offsetting trading profits were allocated to him by Howard.

[10] It was only when they were charged with these offences that they realized that what they thought was a legal and legitimate activity was not considered to be the case by the Agency. This revelation was in September 2005 after discussions with Agency personnel. During the period in question, Howard had assured Wayne that the allocations were legitimate and even at

the time of trial, the Agency had not reassessed Howard in relation to these allocations.

## **Issues**

[11] This case raises the issues of:

- (a) Whether there existed conspiracies to wilfully evade the payment of taxes or to make false or deceptive statements in a return, and
- (b) whether Wayne made false and deceptive statements in his tax returns for the specified years, and
- (c) whether Wayne wilfully evaded the payment of taxes for the specified years.

## **Relevant Legislation**

**[12] *Income Tax Act*, R.S.C. 1985, c1 (5<sup>th</sup> Supp.), as amended, s.239:**

### **239(1) Other offences and punishment**

Every person who has

1. (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,  
  
(b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,  
  
(c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,  
  
(d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or  
  
(e) conspired with any person to commit an offence described by paragraphs (a) to (d),  
is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to  
  
(f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or  
  
(g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.

## **Analysis**

[13] It seems to me that to constitute the crime of conspiracy it is not sufficient that Howard and Wayne agree. They must agree to do something that is known to both of them as unlawful. Mere knowledge of, discussion of or passive acquiescence by Wayne in what Howard did or planned, which he,



Howard, thought was lawful is not of itself sufficient to ground criminal conduct on the part of Wayne. A conspiracy is more than a common intention as its existence requires that both parties consent and agree to do something that they know is unlawful and they cooperate to attain that unlawful end. See: **R.v. McNamara et al (No.1)** (1981), 56 C.C.C. (2d) 193 (Ont. C.A.). at pp. 452-453.

[14] Furthermore, in my opinion, the *actus reus* of the crime of conspiracy would be an agreement, between Howard and Wayne to act together in pursuit of a mutual criminal objective and where they would both act together to achieve a common goal. There must be a meeting of their minds to achieve a common criminal objective. See; **R v. H.A.**, [2005] O.J. No. 3777 (C.A.), at paras. 46-48. Thus, as the nature and character of the crime of conspiracy are determined by the intention of the parties committing it, if one of them did not have in mind any criminal intention there can be no agreement evidencing a common design and as a result a criminal conspiracy does not exist. See. **R.v. O'Brien** (1954), 110 C.C.C. 1(S.C.C.).

[15] Likewise, following the evidentiary procedures propounded in **R.v.**

**Carter**, [1982], 1 S.C.R. 938, concerning the conspirator's exception to the hearsay rule, which in this case is attracted to Howard's testimony, before I deal with the issue of Wayne's guilt, I must be satisfied beyond a reasonable doubt that the alleged conspiracy, in fact, existed. If I so find, I must review all the evidence directly admissible against Wayne and decide on the balance of probabilities that he is a member of the conspiracy. Finally, if I conclude, on the balance of probabilities that Wayne was a member of a conspiracy I must then decide, considering the acts and declarations of Howard, done in furtherance of the object of the alleged conspiracy, whether the prosecution has proved Wayne's membership in the conspiracy beyond a reasonable doubt.

[16] Nonetheless, there must be, in my opinion, independent evidence admissible against Wayne which would show that he shared the common intention with Howard. Moreover, in my opinion, the fact that Howard has pleaded guilty to some of the conspiracy counts, on the Information before me, is not admissible evidence against Wayne as proof of his participation in a conspiracy with Howard. There is no inconsistency with this position. See: **R.v. Barrow**, [1987] 2 S.C.R. 694. , paras. 76-77.

[17] Another aspect of the analysis based on the wording of the charges is that it is incumbent on the Crown, to prove beyond a reasonable doubt that (a) the profit and losses allocated by Howard to Wayne were not properly attributed to Wayne, (b) that the profits and losses were taxable income, (c) Wayne conspired with Howard to understate his, Wayne's income and (d) they did so to willfully evade the payment of taxes owed by Wayne.

[18] Proof that Howard allocated some of his income and losses to Wayne and that Wayne reported them as his own, if shown to be done with the intention of evading the payment of taxes imposed upon Wayne by virtue of the provisions of the ***Income Tax Act***, in the absence of an explanation, I think, could support a finding that Wayne was in breach s. 239(1)(d) of the said ***Act***. However, if the "allocations" were genuine trades and, in time, were reported and accounted for, it seems to me that such conduct could be more consistent with an innocent intention rather than a failure to account by either or both of them which would then be fraudulent.

[19] I say so because the word "wilfully" means that *mens rea* is an essential element of an offence against s. 239(1)(d) of the ***Income Tax Act***.

Furthermore, as pronounced by Cartwright J.A. in **R.v. Ciglen** [1970] S.C.R.

804:

It is trite law that a taxpayer is free to so arrange his affairs as to attract as little liability to tax as possible provided that in so doing he does not employ unlawful means. Of course guilty intent may be inferred from the actions of an accused but the question whether or not the guilty intent exists is one of fact. This is expressly stated in the judgment of this Court in *Lampard v. The Queen* [[1969] S.C.R. 373, 3 C.C.C. 249, 4 D.L.R. (3d) 98.].

[20] Thus, in my view, Wayne could adopt a position that would attract little or no taxes as opposed to evading payment of the tax imposed by the **Act**. If such a course is open to him as it was apparent that was their view, and particularly of Howard, it would, in my opinion, have an impact on whether or not they had the requisite guilty minds to ground a conviction for conspiring to evade the payment of the imposed taxes.

[21] Furthermore, as was put by O' Hearn J., in **R.v. Hefler**, [1980] N.S.J. No.111 (Co.Ct.) , at paras.31- 32 and 38 -39:

31 What is in issue is the defendant's intent. In evading or attempting to evade the payment of taxes imposed by the Act, the defendant must do so 'wilfully'. In that regard, the analysis and reconciliation of the cases dealing with 'wilfully' in criminal law, proposed by Bayda, J.A. in *Paveley*, supra, seems, with respect, to be that most consistent with the mass of case law on that troublesome word. Bayda, J.A. held that in s. 239(1)(d) the word meant that proof was required 'of a specific intent, that is to say, proof that the act

which constituted the 'manner' was done with a particular purpose -- the purpose of evading the payment of tax.' This is consistent with other cases, such as *R. v. Lundy* (1972), 72 D.T.C. 6093, B.C. Prov. Ct., and *Hawrish v. M.N.R.* (1976), 76 D.T.C. 6455, Fed. C.A. In *Lundy* it is true that Johnson, Prov. J., said, at p. 6116, "... I am satisfied beyond any reasonable doubt that Lundy if he did not know then he should have known that the profits from the sale of his shares in Sterling and Paragon was income to him and should have been reported as such ...'. This imports an objective standard of knowledge that is not appropriate to criminal law in most cases, but it is possible that the learned judge was using 'should have known' to impute the wilful blindness that Dickson, J. included in his definition of mens rea in *R. v. Sault Ste Marie*, supra.

32 From the foregoing and the case law generally, it is apparent that to constitute an offence against s. 239(1)(d) the conduct of the defendant, which may be otherwise blameless in criminal law, must be the product of an intent to evade tax that the defendant knows or believes to be payable (knowledge here, including 'wilful blindness'). Such an intent has been characterized in some of the cases as 'deceitful', 'fraudulent', 'evil' or 'corrupt'. No doubt the intention described is any or all of these, but it is sufficiently defined without recourse to these words, as long as it is kept in mind that it is a specific intent and the conduct may be blameless if the intent is not present. It might thus be popularly described as an intent to defraud the Revenue. Accordingly, it differs from an attempt to arrange one's affairs so that they do not attract tax, as such an intent would be based on the belief that no tax would then be payable.

38 A fraudulent intent is, of course, a specific intent, as discussed by Bayda, J.A. in *R. v. Paveley*, supra. The principle that an honest belief in a course of action, although mistakenly based upon an error in law is a defence to a crime of fraudulent intent or other specific intent of an analogous nature, seems to be akin to the defence of lack of specific intent discussed in *D.P.P. v. Beard*, [1920] A.C. 479, H.L. In the instant case the defence appears to have been taken for granted by the parties and the court.

39 A specific criminal intent is an intent that gives a criminal character to conduct that would otherwise not be criminal in that respect. To be non-criminal, the conduct might be indulged in with some other intent or it might be the result of no particular intent or purpose at all. In the instant case, the omission to include gross income and details of expenses in the income tax returns -- the conduct that constituted the transactions in both types of charge -- was, according to the findings of the learned trial judge, the result of

ignorance and not of any specific intent to deceive or defraud.

[22] Here, there is no direct evidence of the making of the agreement charged in the Information before me. Even so, the Crown submitted that I can infer the making of the agreement from the facts as it alleges that Wayne and Howard actually committed the offence that they contemplated.

[23] But, as stated by Doherty J.A., in *R.v. Klundert*, 2004 D.T.C 6609 (Ont. C.A.), at para.41 and 55:

41 The authorities that require that the evasion be deceitful or underhanded confuse the conduct component of the crime of tax evasion with the fault component of that crime. Fault rests in the state of mind that accompanies the doing of the prohibited conduct. It is the culpable state of mind that distinguishes the legitimate tax planner from the dishonest tax evader. Both may engage in the same course of conduct that can aptly be described as a deliberate attempt to avoid payment of tax. The difference lies in their respective states of mind. Unlike the tax evader, the tax planner does not intend to avoid the payment of a tax that he or she knows is owed under the Act, but rather intends to avoid owing tax under the Act .

55 Section 239(1)(d) is part of an Act which is necessarily and notoriously complex. It is subject to ongoing revision. No lay person is expected to know all the complexities of the tax laws. It is accepted that people will act on the advice of professionals and that the advice will often turn on the meanings to be given to provisions in the Act that are open to various interpretations. Furthermore, it is accepted that one may legitimately structure one's affairs so as to minimize tax liability. Considered in this legislative context, I have no difficulty in holding that a mistake or ignorance as to one's liability to pay tax under the Act may negate the fault requirement in the provision, regardless of whether it is a factual mistake, a legal mistake, or a combination of both.

### **Application of Principles to the Case at Bar**

[24] On the evidence that I accept I find that Wayne did speak to Howard about some assistance to pay his taxes. I think that because he relied upon Howard's brokerage expertise and that the trades were at times lucrative, the idea was to borrow against the profits or losses of the trades with the intention to balance things in a good year. It would appear and I find that Howard agreed to help Wayne in what he thought to be a tax deferral arrangement. There was no agreement to something that either of them thought was improper or illegal. There was no evidence before me that "tax deferral" was illegal and that they both knew what they contemplated to do was unlawful.

[25] On the total evidence, I have no difficulty in holding that they both made a mistake, factually and legally, or were ignorant of each liability to pay the taxes in the year that it became due rather than defer the taxes to a year when they could catch up, so to speak. It would appear that Wayne was structuring his affairs so as to minimize his tax liability, but not to avoid paying all the taxes at some point in time.

[26] I do not doubt that the profit and losses allocated to Wayne from the EDF Man account were improperly attributed to him. Further, I do not doubt that the allocated profits and losses were taxable as income or expenses. However, I am not satisfied beyond a reasonable doubt, on the evidence before me and that which I accept, and on the authorities cited above, that a criminal conspiracy existed.

[27] I say so because although, at first blush, it might appear that Wayne was deliberately avoiding the payment of taxes, on a closer scrutiny, I find that he was arranging his affairs by planning and intending to pay the taxes that he knows he owed under the **Act** with no intention to avoid their payment. Thus, in my opinion, it cannot be said, on the total evidence, that Wayne had any criminal intent in mind, when he asked Howard to help him to pay his taxes. The allocations were genuine trades that were verifiable; they were reported and accounted for either by Wayne or Howard and taxes were eventually paid.

[28] Therefore, in my view, without any criminal intent in Wayne when he contacted Howard for help, no conspiracy can exist. Additionally, Howard



genuinely believed that what he was doing by way of the allocations was lawful. He did not agree to do anything that, to him, was improper or illegal. I find that what he agreed to do was to help out his brother with what he honestly believed was a tax deferral arrangement in which Wayne would eventually pay all the taxes that he, Wayne, was liable to pay. Thus, I find that he was not agreeing with Wayne to wilfully avoid the payment of Wayne's taxes.

[29] Consequently on the issue of conspiracy to evade the payment of taxes, on the authorities cited and the above stated reasons and analysis, I find that the Crown has not proved beyond a reasonable doubt that such a conspiracy consisting of Wayne and Howard existed. Consequently, I find the accused, Wayne Hills, not guilty of the offences averred to in counts 2,4,6, and 8 on the Information tried before me.

[30] On the issue of the conspiracy to make false and deceptive statements on Wayne's returns the mental element is somewhat different under s.239(1)(a). Here, the Crown must prove beyond a reasonable doubt that they both agree to present the statements that they both knew was false and deceptive with the intent that the Agency would act on them as if they were

true.

[31] Howard testified that the information that he gave to Wayne was genuine and were actual transactions. He did not agree to give Wayne any bogus false or misleading information. There was no evidence that in Howard's mind that he was doing anything improper. The statements that he gave Wayne were verifiable. His intention was to give genuine statements and that was what he did. However, Wayne knew or must have known as a reasonable person apprised of all the facts, that to him Wayne, their use would determine whether or not they were false and deceptive. Wayne's use of the information, on the evidence, was not something over which Howard had any control. Thus, in my opinion, it cannot be said, beyond a reasonable doubt, that he agreed with Wayne to present false or deceptive statements.

[32] Consequently, I am not satisfied that the Crown has proved beyond a reasonable doubt that there existed a conspiracy consisting of Wayne and Howard to present false and deceptive statements. Any presentation, in my opinion, was an unilateral conduct. In the result, I find the accused, Wayne Hills not guilty on the offences averred to in counts 1, 3, 5 and 7 in the

Information tried before me.

[33] On the evidence, Wayne had income from his LFG account that he did not claim or brought to his accountant's attention. He also knew or must have known that he had no trades with EDF Man and therefore could not accrue any profits or losses from the trading activities conducted by this company. Therefore, when he received statements from Howard concerning EDF Man showing losses or profits he knew or must have known that these amounts were not his trades but that they belonged to Howard.

[34] Nonetheless, knowing the true facts, he presented these figures as if they were his knowing full well that, with respect to his own tax account, they were false. The Agreed Statement of Facts, Exhibit 9, in my opinion, tacitly admitted that he understated his income for the subject years and the total evidence, again in my opinion, disclosed that his intention was that the Agency would rely on the information that he presented. The Agency did rely on the statements presented.

[35] In the result, I do not doubt that Wayne made false and deceptive

statements on his returns for the specified years as noted on the Information. Consequently, I am satisfied that the Crown has proved beyond a reasonable doubt that the accused, Wayne Hills, did file false and deceptive statements and I find him guilty of the offences averred to in counts 9 and 11 on the Information tried before me.

[36] The Crown submitted that Wayne was wilfully blind, as he knew or ought to have known that his acts of omission and commission would affect his tax liability and that was his desire. Furthermore, he was wilfully blind as to the accuracy of his business income that he declared. But, has the Crown proved beyond a reasonable doubt the fault component of the offence?

[37] What was the purpose of Wayne's conduct? As he did not testify, which he is not compelled to do nor can his silence be used against him, the evidence suggested that he was depressing his income not to avoid the payment of taxes but rather to delay the payment of taxes when due. I find that he must have known that there was a tax imposed by the **Act** and what he did, in my opinion, on the total evidence, had the effect of evading the payment of the tax without him necessarily doing so for the purpose of

evading the payment of the tax.

[38] Moreover, it is not clear from the evidence that Wayne's taxability is obvious, clear cut and indisputable to say, without a doubt, that he was wilfully evading the payment of taxes imposed by the **Act**. He has filed valid objections relating to the Notices of Reassessment that the Agency served on him as a result of the tax audit. These Objections are being held in abeyance and have yet to be determined. Consequently, I adopt the words of Bergeron J, in ***R.v. Redpath Industries Ltd., et al.***, (1984), 84 D.T.C.6349 (Q.S.C.) at 6351:

A criminal court is not the forum to determine income taxability and to make determinations as to rights to tax assessment or absence of rights of assessment involved. In a tax evasion charge, it must appear prima facie from the evidence that the taxability is clear-cut, obvious, indisputable, unquestionable from lack of reporting, before entering the examination of the other facts of the charge, e.g. whether the undisputable taxability, based on income gained proven and undeclared, leads to a conclusion beyond a reasonable doubt that it was wilfully omitted by a taxpayer in his tax returns.

If such basis is not present and there exists an obligation to enter into the examination of the merit of a possible assessment in respect of a declared income in order to weigh whether a taxpayer is susceptible to taxation or not, may or may not take advantage of claimed exemptions a criminal court usurps its function and appropriates itself of a jurisdiction which it does not possess.

[39] The allocations were not fictitious and Howard testified that he had

assured Wayne that the losses were based on legitimate trades and that they were a form of tax deferral. Also, Howard provided documentation to the Agency concerning the trades. Furthermore, as the reassessment appeals, which have been held in abeyance, could resolve in Wayne's favour, it seems to me that the Crown has not, beyond a reasonable doubt, laid the basis or foundation that the taxes are indeed payable and that Wayne has intentionally avoided payment. Therefore, on the total evidence, I am not satisfied that the Crown has proved beyond a reasonable doubt that the accused, Wayne Hills, has contravened the provisions of s.239(1)(d) of the *Income Tax Act* and I find him not guilty as charged on the offences averred in counts 10 and 12 of the Information tried before me.

## **Conclusion**

[40] On the total evidence, and as I have reasoned, I am not satisfied that the Crown has proved beyond a reasonable doubt that there existed a conspiracy consisting of Wayne and Howard to wilfully evade the payment of taxes by understating Wayne's income for the specified years. Likewise, I am not satisfied that the Crown has proved beyond a reasonable doubt that there was

a conspiracy consisting of Wayne and Howard to make false and deceptive statements in Wayne's returns for the specified years. Consequently, as I have reasoned I find Wayne not guilty of all the offences averred in counts 1 through 8 inclusive, on the Information tried before me.

[41] Additionally, for the reasons stated, I find him guilty of counts 9 and 11 and not guilty of the offences averred in counts 10 and 12. In short I find him guilty of only counts 9 and 11 on the Information tried before me.

J.