

Tax Evasion – Doing Taxes Is Complicated, Evading Taxes Is Criminal

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April 30 is just around the corner and every Canadian (hopefully) knows what that means. It's tax season and most Canadians must have their income tax returns filed by that date.

Many are aware, to some degree, that taxes are filed based on an "honour system" where the taxpayer is expected to honestly report all their revenues and relevant tax information. But what is the law when one tries to weasel their way through the system? Are you considering leaving out a T4, a statement of income, revenues from an alternative source, or anything you know you should include in your return? You better think twice!

The law distinguishes between tax evasion and tax avoidance. The Canadian Revenue Agency (CRA) defines each as follows:¹

Tax avoidance results when actions are taken to minimize tax, while within the letter of the law, those actions contravene the object and spirit of the law.

Tax evasion typically involves deliberately ignoring a specific part of the law. For example, those participating in tax evasion may under-report taxable receipts or claim expenses that are non-deductible or overstated. They might also attempt to evade taxes by wilfully refusing to comply with legislated reporting requirements.

The CRA further states that "Tax evasion, unlike tax avoidance, has criminal consequences. Tax evaders face prosecution in criminal court."² Tax evasion has been described as "a species of fraud and is the statutory offspring of the common law offence of cheating the public revenue"³. Yet, fraud is a different charge altogether for the most egregious cases, falling under s. 380(1) of the *Criminal Code of Canada*, with the accused facing significantly severer penalties (up to 14 years in prison).

Of particular interest for this blog submission is tax evasion with criminal consequences, since more people are susceptible to this type of crime. Here we discuss: What constitutes the crime of tax evasion? It is interesting that a charge of tax evasion, although not in the Criminal Code of Canada, falls within the ambit of the criminal law (See *Knox Contracting Ltd. v Canada*, SCC at paras 14-15 which ruled on the criminal nature of tax evasion)⁴.

Section 239(1) of the Income Tax Act provides that:⁵

Every person who has

¹ Government of Canada, "Tax Avoidance" (23 December 2013), online: *Government of Canada* <https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/tax-alert/tax-avoidance.html#q2> [<https://perma.cc/F7H3-NQP4>] [*GC Tax*].

² *Ibid.*

³ *R v Klundert*, 242 DLR (4th) 644 at para 32 [*Klundert*].

⁴ *Knox Contracting Ltd. v Canada*, [1990] 2 S.C.R. 338 at paras 14-15 [*Knox*].

⁵ *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), s 239(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, ...

[other provisions] ...

(d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act ...

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 239(1)(f) and imprisonment for a term not exceeding 2 years.

Here, we enter into a discussion of s 239(1)(d). In *R v. Patry* (2018), the British Columbia Supreme Court affirmed other leading authorities in Canada on what constituted the *actus reus* and the *mens rea* of tax evasion. In particular, the court summarized the meaning of *actus reus* and *mens rea* in relation to tax evasion according to *R v. Klundert* (SCC):

“... the *actus reus* of tax evasion offences is an act or course of conduct which has the effect of evading or attempting to evade payment of taxes actually owed under the taxation statute in question. ...

The fault, or *mens rea*, component of the offence of tax evasion is found in the word “wilfully” ... The accused must know that the tax is owing under the Act and the accused must intend to avoid, or intend to attempt to avoid, payment of that tax. An accused intends to avoid, or intends to attempt to avoid, payment of taxes owing under the Act where that is his purpose, or where he knows that his course of conduct is virtually certain to result in the avoiding of tax owing under the Act ...”⁶

These two elements must be proven beyond a reasonable doubt.⁷

One might think that only those who avoid extremely large amounts of money in a given year are susceptible to being charged with tax evasion. However, a recent case shows otherwise. In *R v Tyskerud*, the defendant, Mr. Gradon Tyskerud, failed to report taxable income of \$109,837.52 for the period between December 31, 2002 to June 18, 2007 “and thereby wilfully evading the payment of taxes ... in the amount of \$14,186.22”.⁸ The court found him to be guilty of tax evasion. To put it into perspective, consider the fact that \$100,000 over five years is \$20,000 per year on average. It’s not a huge amount, in such a context, but Mr. Tyskerud was still found guilty.

Mr. Gradon Tyskerud’s son was also charged in the same case and was found guilty as well: “... for the taxation years 2004 to 2006 inclusive, of failing to report taxable income of \$53,588.07, and he did thereby wilfully evade the payment of taxes thereon in the amount of

⁶ *R v Patry*, 2018 CarswellBC 2350 at para 104, 2018 BCSC 1524 [*Patry*].

⁷ *Ibid* at para 107

⁸ *R v Tyskerud*, 2013 CarswellBC 2976 at para 2(a).

\$3,320.82, contrary to s. 239(1)(d) of the ITA.”⁹ That is a little over \$26,000 per year on average of tax evasion. The evasion was for 2 years.

One would be well served to avoid violating the integrity of the Canadian tax system. For anyone who is considering not filing taxes or is thinking about withholding relevant information from the CRA – it’s better to follow the law. File those taxes and do not withhold relevant information!

⁹ *ibid* at para 3.