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CANADA / JUDGMENT

## R. v. Schouw

2020 BCCA 232

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COURT

British Columbia Court of Appeal

DECIDED

7 August 2020

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2020 BCCA 232 R. v. Schouw

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Schouw,

2020 BCCA 232

Date: 20200807

Docket: CA44433

Between:

Regina

Respondent

And

Brendan James Schouw

Appellant

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

On appeal from: An order of the Provincial Court of British Columbia, dated  
January 31, 2017 (R. v. Schouw, Vancouver Docket 931-1).

Oral Reasons for Judgment

The Appellant, appearing in person on July 29, 2020 and via videoconference on August 7, 2020):

B.J. Schouw

Counsel for the Respondent, (and appearing via videoconference on August 7, 2020):

R. Leong

S. Manery

Place and Date of Hearing:

Vancouver, British Columbia

July 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 7, 2020

Summary:

The appellant appeals his conviction for wilfully evading remittance of Goods and Services Tax ("GST") contrary to s. 327(1)(c) of the Excise Tax Act, R.S.C. 1985, c. E-15, arguing the judge erred by applying an objective, rather than subjective, test for the mens rea of the offence and by disregarding evidence of equity that was available to pay the GST liability, if necessary. Held: Appeal dismissed. The judge correctly applied a subjective mens rea test and drew reasonable inferences that were available on the evidence regarding the appellant's state of mind in connection with his GST obligations. The judge did not err in disregarding evidence that the appellant may have been able to pay the GST liability in the future because the relevant time for assessing mens rea was the time when the GST obligation became due and owing.

[1] DICKSON J.A.: The appellant, Brendan James Schouw, appeals his conviction for wilfully evading remittance of Goods and Services Tax ("GST"), contrary to s. 327(1)(c) of the Excise Tax Act, R.S.C. 1985, c. E-15 [ETA]. He acknowledges that he failed to pay GST due on the transfer of two strata lots, but contends the trial judge erred by applying an objective, rather than subjective, test for the mens rea element of the offence and by disregarding evidence of substantial equity in one of the lots that was available to pay his GST liability, if necessary. Based on those alleged errors and the nature of the evidence, he asks this Court to grant the appeal, set aside the conviction and enter an acquittal in its place.

[2] For the reasons that follow, I would dismiss the appeal.

## Background

- [3] Mr. Schouw is a designer and property developer. At the material time, he was the sole shareholder and director of Grace Residences Ltd. ("Grace"), a company he incorporated to develop a high-rise condominium building located at 1280 Richards Street in Vancouver, British Columbia. He was also the sole shareholder and director of Drake Street Residences Ltd. ("Drake"), through which he developed an adjacent low-rise condominium building located at 499 Drake Street. The two buildings are architecturally complementary and related by a single strata plan.
- [4] The Drake development completed in 2004. That year, while construction was still in progress, Grace began entering into purchase and sale contracts for its strata lots. The pre-sale contracts listed Grace and Drake as the seller and Mr. Schouw signed them on behalf of both companies. All but five of the sales of Grace strata lots completed between August and December of 2008.
- [5] Unfortunately, in September 2008, the global credit crisis developed. The consequences for Grace and some of its purchasers with respect to financing were significant. As the effects of the crisis deepened, Mr. Schouw recognized that, as with many real estate development projects at the time and despite his ongoing efforts to find financing, there was a real threat that Grace properties could be lost to foreclosure.
- [6] Grace and Drake were both registered with the Canada Revenue Agency ("CRA") for the purpose of reporting and remitting GST and both were required to file monthly GST returns. When sales of Grace strata lots completed between August and December of 2008, Grace collected GST of approximately \$2.7 million from third-party purchasers and deposited the funds into its operating account, but did not remit the GST to the CRA as required. By the end of December 2008, Grace had spent most of the GST funds collected from the third-party purchasers. By January 30, 2009, Grace's operating account was overdrawn and Mr. Schouw's efforts to find financing for the project had not been successful.
- [7] Mr. Schouw was eventually charged with evading remittance of GST in connection with Grace strata lot sales to the third-party purchasers in 2008, but the trial judge acquitted him. The tax evasion charge with which we are concerned on this appeal involved two Grace strata lots that he transferred to himself the following year.
- [8] The first strata lot Mr. Schouw transferred to himself was Lot 55, which his close friend had agreed in 2004 to purchase. However, by 2009, his friend was experiencing financial difficulties and, on January 23, 2009, Mr. Schouw arranged for Grace to transfer ownership of Lot 55 to himself in an effort to protect his friend's investment. The transfer was a "paper transaction" only, with no cash exchanged, no GST collected, reported or remitted and no record of the sale entered into the general ledger of Grace or Drake.

- [9] Land Titles Office documents showed the consideration for the transfer of Lot 55 from Grace to Mr. Schouw as \$1,809,523.81. As a result of the transfer, the GST triggered and collectible on the transfer was \$90,476.19, with the net GST payment to CRA due on February 28, 2009. Grace did not pay the GST obligation.
- [10] The other strata lot Mr. Schouw transferred to himself was Lot 71, which he had agreed in 2004 to purchase personally. On May 25, 2009, as with Lot 55, he arranged for Grace to transfer ownership of Lot 71 to himself, the sale was a paper transaction only, no cash was exchanged, no GST was collected, reported or remitted and no record of the sale was entered into the general ledger of Grace or Drake. Mr. Schouw assumed approximately \$3 million in debt attached to the title for Lot 71 in connection with the transfer. He also executed a GST certificate acknowledging that the sale was subject to GST payable by the buyer to the seller, with the latter responsible for remitting the GST to the CRA.
- [11] Land Titles Office documents showed the consideration for the transfer of Lot 71 from Grace to Mr. Schouw as \$2,252,134.50. Again, the obligation to pay GST was triggered by the transfer. In this instance, the amount of GST collectible was \$112,606.73, with the net GST payment to CRA due on June 30, 2009. Again, Grace did not pay the GST obligation.
- [12] In the period that followed, Mr. Schouw continued to try hard to obtain financing, but he was unsuccessful. Eventually, both Lots 55 and 71 were lost to foreclosure.
- [13] Mr. Schouw was charged on a six count information with several offences. Counts 1 and 2 alleged that he made false statements in connection with the Grace strata lot sales to third parties in 2008. Count 3 alleged that he evaded the remittance of GST imposed with respect to those sales and Count 4 alleged that he evaded the remittance of GST with respect to the Grace strata lot sales of Lots 55 and 71 to himself in 2009. Counts 5 and 6 concerned income tax. Mr. Schouw was acquitted on all counts except Count 4.

## Reasons for Judgment

- [14] Near the outset of his reasons, the judge identified the essential elements of the offence of tax evasion, as described in *R. v. Klundert* (2004), 242 D.L.R. (4th) 644 (O.N.C.A.) and adopted by this Court in *Samaroo v. Canada Revenue Agency*, 2019 BCCA 113 at paras. 52-54. In particular, he noted that the mens rea component of tax evasion has two elements: i) the accused knows tax is owing; and ii) the accused intends to avoid, or intends to attempt to avoid, payment of the tax that is owing. He also noted that the second criterion may be met in one of two ways: i) where the purpose of the accused is to avoid the payment of tax; or ii) where the accused knows that his course of conduct is virtually certain to result in avoiding payment of the tax that is owing. Then he reviewed and considered the evidence and applied the law to the facts.
- [15] The judge found that Mr. Schouw was an honest witness. He accepted his testimony regarding the creation of false GST returns and acquitted him on Counts 1 and 2. He also acquitted him on Count 3 because he was left with a reasonable doubt that Mr. Schouw

intended, in December 2008, to evade the remittance of GST when Grace used the GST funds collected for another purpose. However, he convicted Mr. Schouw of evading the remittance of GST on Count 4, the transfers from Grace to himself of Lots 55 and 71. In concluding that Mr. Schouw was guilty on Count 4, he analysed each of the two transactions.

- [16] As to Lot 55, the judge accepted Mr. Schouw's evidence that his purpose in taking title was to protect his friend's investment. However, he noted the surrounding circumstances described above and found that "given the precarious financial position of Grace in January, 2009 and the fact that Mr. Schouw by then was well aware of the credit issues and limitations caused by the financial crisis" the transaction "should have been structured to include the collection of GST by Grace and its remittance". He also found that Mr. Schouw "knew by this point in time that not doing so was virtually certain to result in the non-payment of GST": at para. 45.
- [17] As to Lot 71, the judge accepted that Mr. Schouw was entitled to the benefit of equity built up since 2004, when he agreed to purchase the unit for a stated price of \$2,421,650, including GST. He also accepted that the equity was likely substantial, which may have explained, at least in part, why he was willing to assume the nearly \$3 million in liabilities attached to the title. Nevertheless, he went on to say this:
- [48] Although Mr. Schouw may not have specifically made a conscious decision to not pay the GST on this transaction, it would have been patently obvious to him in May, 2009 that his course of conduct was virtually certain to result in the non-payment of GST. He was unsuccessful at obtaining financing at that time. He did not advance any cash toward this transfer and he was aware of the fragile financial condition of Grace. He could no longer reasonably have expected to obtain financing from which the GST could be paid. I find that at the time of this transfer, the evidence establishes beyond a reasonable doubt that Mr. Schouw wilfully evaded the payment of GST which should have been collected and remitted by Grace.

## On Appeal

- [18] Mr. Schouw contends that the judge erred by applying an objective, rather than subjective, test to the mens rea component of the offence of tax evasion. In his submission, this error is apparent from his statement at para. 48 that "it would have been patently obvious to him in May, 2009 that his course of conduct was virtually certain to result in the non-payment of GST". He says the judge's use of the words "would have" at para. 48 imported an objective measure into his mens rea analysis and contrasts sharply with his statement at para. 45 that he "knew by [January 2009] that not [collecting and remitting GST] was virtually certain to result in the non-payment of GST". He says this difference underscores the objective nature of the test erroneously applied by the judge when assessing his intention with respect to the transfer of Lot 71.

- [19] Mr. Schouw also contends that the judge's application of this erroneous objective test highlights the illogical nature of the inference he drew regarding his intention when he completed the transfers. According to Mr. Schouw, given the approximately \$5 million in available net equity in Lot 71 in 2009, when the two transfers triggered the tax liability, it was more likely that he believed the GST would be paid than it was that he believed it would not be paid. This is so on an objective analysis, he says, because, it was reasonable to infer on the evidence that he believed if financing could not be obtained despite his ongoing efforts he could sell Lot 71 and use the proceeds to pay the entire outstanding GST liability, including the \$203,082.92 outstanding in respect of the transfers. However, he says, the judge overlooked this important aspect of the evidence and its implications for the mens rea analysis.
- [20] In support of his position, Mr. Schouw emphasizes the judge's finding that he was an honest witness. He also emphasizes the fact that the focus of the evidence and argument at trial was his efforts to find financing, which were ultimately, but not necessarily predictably, unsuccessful. In his submission, that focus may help to explain why the judge apparently disregarded and failed to account for the reasonable possibility that, if necessary, Lot 71 could have been sold to pay the outstanding GST and failed to incorporate that reasonable possibility into his mens rea analysis. In any event, he says, regardless of why the judge failed to recognize that a reasonable inference inconsistent with his guilt was available, that failure was plainly a legal error.

## Discussion

- [21] Despite Mr. Schouw's clear and well-presented submissions, I am not persuaded that the judge erred in his mens rea analysis by applying an objective test or by disregarding relevant evidence and failing to consider an alternative reasonable inference. In my view, his reasons, read as a whole, do not contain any legal errors and his finding of guilt was reasonable.
- [22] As the judge correctly noted, the essential elements of the offence of tax evasion are outlined in Klundert. To establish liability under s. 327(1)(c) of the ETA, the Crown was required to prove beyond a reasonable doubt that Mr. Schouw: i) did something or engaged in a course of conduct that avoided or attempted to avoid the payment of tax imposed by the ETA; ii) knew there was tax imposed by the ETA; and iii) engaged in the conduct for the purpose of avoiding or attempting to avoid the payment of tax imposed by the ETA or knowing that avoiding payment of tax imposed by the Act was a virtually certain consequence of his actions. The only live issue at trial was whether the third element of the offence was established beyond a reasonable doubt.
- [23] As noted, Grace was registered as a monthly GST filer with the CRA. Accordingly, it was required by law to file monthly GST returns and the net GST payable was due on or before the return filing deadline. Pursuant to s. 238(1)(b) of the ETA, Grace's returns were due within one month after the end of the reporting period and pursuant to s. 228(2)(b), the net

tax payable for a reporting period was to remitted at the same time as the returns. Pursuant to s. 330 of the ETA, as a director of Grace, Mr. Schouw was a party to any offence it committed in respect of a failure to comply with its GST obligation.

- [24] It was open to the Crown to prove the requisite mens rea for tax evasion by either direct or circumstantial evidence. In other words, the Crown was entitled to prove the mens rea component of the offence by inviting the judge to draw reasonable inferences from Mr. Schouw's conduct. In analysing Mr. Schouw's conduct, the judge was not required to find that the evasive act alleged by the Crown was deceitful or underhanded: *Samaroo* at para. 56. Rather, the relevant determination was whether the Crown had established beyond a reasonable doubt each of the essential elements of tax evasion in connection with the 2009 transactions.
- [25] As Justice Cromwell explained in *R. v. Villaroman*, 2016 SCC 33, a judge's reasons must be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'": at para. 15. As he also explained, an inference of guilt drawn from circumstantial evidence must be the only reasonable inference that the evidence permits and any "blanks" in the evidence must not be filled in by overlooking reasonable alternative inferences. Rather, available inferences "must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" and a trier of fact should consider all other plausible theories and reasonable possibilities which are inconsistent with guilt. However, the Crown need not negate every possible conjecture, no matter how fanciful, which might be consistent with innocence and the other reasonable possibilities considered must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation: at paras. 30, 37.
- [26] In my view, when the judge's reasons are read as a whole, it is clear that he applied the foregoing principles in his mens rea analysis. He was fully alive to the need to consider and account for all reasonable possibilities inconsistent with Mr. Schouw's guilt when he transferred Lots 55 and 71 and thus triggered a GST obligation, and he did so. However, the possibility that, if necessary, he could eventually sell Lot 71 and use the proceeds of sale to pay the GST liability if he failed to obtain financing to do so was not a reasonable possibility inconsistent with Mr. Schouw's guilt. As the judge recognized, the relevant time for mens rea purposes was the time when the GST obligation became due and owing, namely, February and June of 2009. Although, as the Crown concedes, Mr. Schouw may well have hoped and expected to be able to pay the GST at some future time, that could not amount to a defence to the charge of tax evasion. It follows that the judge did not err in disregarding evidence with respect to such a possibility or failing to consider it in drawing an inference as to Mr. Schouw's relevant intention.

- [27] Nor, in my view, did the judge err by applying an objective, rather than subjective, test in his analysis of the mens rea component of the offence of tax evasion. His finding that Mr. Schouw knew by January 2009 that not collecting and remitting GST was virtually certain to result in the non-payment of GST constituted an unambiguous finding regarding his subjective state of mind in connection with the GST obligation triggered by the transfer of Lot 55. This was an available reasonable inference on the evidence.
- [28] Read in the context of his reasons as a whole, in my view, the same is true of the judge's finding in connection with Lot 71 that "it would have been patently obvious to him in May, 2009 that his course of conduct was virtually certain to result in the non-payment of GST". Bearing in mind his recitation of the correct legal test for the mens rea component of tax evasion and his application of that test with respect to the Lot 55 transaction, this also constituted an available finding regarding Mr. Schouw's subjective state of mind, in this instance in connection with the GST obligation triggered by the Lot 71 transfer. The judge's use of the words "would have been" did not connote the application of an objective test of knowledge where the offence required subjective knowledge. Rather, as in *R. v. Barrett* (R.J.) (1998), 108 B.C.A.C. 231, it amounted to "no more, and no less, than an inference drawn by the trial judge from the evidence": at para. 25.

## Conclusion

[29] For these reasons, I would dismiss the appeal.

[30] HUNTER J.A.: I agree.

[31] GRIFFIN J.A.: I agree.

[32] DICKSON J.A.: The appeal is dismissed.

"The Honourable Madam Justice Dickson"

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Prepared on 27 October 2026 · Esheria