# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Samaroo v. Canada Revenue Agency,* 2018 BCSC 324

Date: 20180302
Docket: 12-1154
Registry: Victoria

Between:

**Tony Samaroo and Helen Samaroo**

Plaintiffs

And:

**Canada Revenue Agency, Brian David Jones, Brian D. Jones Law Corporation**

Defendants

Before: The Honourable Mr. Justice Punnett

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | S.M. Kelliher<br>D.C. Redman |
| Counsel for the Defendants: | D.J. Strachan, Q.C.<br>S.A. Lord<br>K.B. Baldwin |
| Place and Date of Trial: | Victoria, B.C.<br>December 5-9; 12-15, 2016;<br>and February 1-3, 2017 |
| Place and Date of Judgment: | Victoria, B.C.<br>March 2, 2018 |

## Introduction

[1] This is a case of alleged malicious prosecution. The plaintiffs, Tony and Helen Samaroo, claim that a Crown prosecutor, Brian Jones, and a senior investigator for the Canada Revenue Agency ("CRA"), Keith Kendal, intentionally and wrongfully violated two fundamental tenets of the criminal justice system: that a person not be charged with a crime unless on a lawful basis and that a prosecution will be conducted lawfully and fairly.

[2] The plaintiffs are husband and wife. They operated a restaurant (called the MGM in these reasons), a nightclub and a motel in Nanaimo, B.C. The CRA investigated the plaintiffs and their corporations for tax evasion during the years 2004-2006. They were charged with tax evasion and acquitted on all counts after a 19-day trial in Provincial Court.

[3] The defendants, and their alleged wrongful acts, fall into two overlapping groups and time periods. The claims advanced against the CRA begin with the investigation of the plaintiffs for tax evasion and continue through to charge approval and prosecution. The claim against Mr. Brian Jones and his law corporation arises from his role as an agent or "ad hoc" prosecutor from the end of the CRA investigation through charge approval and prosecution.

## Overview

[4] Mr. Samaroo immigrated to Canada over 30 years ago. He was a cook and at the time of trial was 68 years of age. Ms. Samaroo is also an immigrant to Canada. They have two children, now adults.

[5] On June 12, 2008 an indictment was issued against them and their closely held corporations under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and the *Excise Tax Act*, R.S.C. 1985, c. E-14, charging them with 21 counts of tax evasion. The plaintiffs were alleged to have skimmed $1.7 million from their restaurant between 2004 and 2005.

[6] In the Provincial Court prosecution, the Crown initially alleged that the Samaroos had failed to report one of three restaurant shifts by failing to provide the till tapes or ring offs for one shift to their bookkeeper. The restaurant operated three shifts, the day shift, the night shift, and the graveyard shift. At the end of each shift, an employee rang off the till to determine the amount made during the shift. This produced a till tape, also referred to in these reasons as a "z tape", and the total of the sales during the shift was recorded on a daily sales summary sheet. At the commencement of the trial the allegation was that the Samaroos gave their bookkeeper, Ms. Deborah Ferens, a single daily sales summary sheet for each day with three columns, marked "day", "night" and "days total". The allegation, as mentioned, was that the till

tape from one shift was not included in the figures set out on the daily sales summary sheet, and was not provided to Ms. Ferens.

[7] During the trial the Crown position changed from a failure to report one shift on the daily summary sheet to an allegation based on the evidence of a former restaurant employee, Ms. Diane Ye, that there was actually a second daily sales summary sheet that documented the graveyard shift income and that sheet was retained by the Samaroos and not provided to the bookkeeper.

[8] On April 6, 2011, following a 19-day trial, Judge Saunders acquitted the Samaroos and their closely held corporations of all 21 charges of tax evasion (*R. v. Samaroo*, 2011 BCPC 503). Judge Saunders found Mr. Samaroo a credible witness. She found that his demeanor was impressive and his explanations were plausible and consistent with significant and material aspects of the evidence. Judge Saunders accepted his evidence about the source of the funds in issue. She also accepted his explanation that the Samaroos used to use only one daily sales summary sheet to record all the sales from the restaurant and that Mr. Samaroo told Ms. Ye to record sales from the graveyard shift in the night shift column on the daily sales summary sheet because sales were so low for the graveyard shift.

[9] On March 29, 2012, the plaintiffs commenced this action for malicious prosecution against the CRA, Mr. Brian Jones and Brian D. Jones Law Corporation.

[10] The plaintiffs' case consisted of evidence from six witnesses: Lisa McLean, senior counsel with the Public Prosecution Service of Canada ("PPSC") who at the relevant times was an "Agent Supervisor", Professor Chris Tollefson, co-counsel for Helen Samaroo during the criminal trial, the plaintiffs, Tony and Helen Samaroo, and their two children, Tricia Miller and Kevin Samaroo. The plaintiffs also tendered in evidence several binders of documents, comprised primarily of correspondence between and among the defendants, work product of the defendants (much of which was disclosed during the criminal trial), the criminal trial transcripts and the decision of Judge Saunders of the Provincial Court.

[11] The defendants' case consisted of evidence from three witnesses: Mr. Kendal, Janna Hyman, senior counsel with the PPSC, and Mr. Brian Jones.

[12] Others involved included Ed Heese, the Samaroos' accountant, Mr. Alan Jones the investigative team leader at the CRA who eventually assigned the investigation to Mr. Kendal, Ms. Ferens, and Ms. Ye.

## Background

[13] As the plaintiffs' claim of malicious prosecution turns on the sequence of events leading

to, and during the Provincial Court trial, an overview of those events is necessary. I will first address the background respecting the investigation by the CRA, then the referral for charge approval, followed by the prosecution for tax evasion in the Provincial Court.

**Civil Audit by the Canada Revenue Agency and Referral for Criminal Investigation**

[14] In March 2006, after receiving a tip the CRA audited the plaintiffs. Glen Foster, a civil auditor with the CRA, was the first to contact the plaintiffs. On March 21, 2006 as part of the civil audit he interviewed Ms. Ferens. Ms. Ferens provided him with a copy of the daily sales summary sheet for the restaurant with the three columns described above ("day", "night" and "days total"). He recorded in his notes that Ms. Ferens told him:

> [T]he daily summary sheet used to only show 2 ring offs a day. The bookkeeper stated that she only posted 2 ring offs a day for the period under audit.

[15] During the civil audit the CRA determined that during the audit period substantial cash deposits had been made to the plaintiffs' business accounts. Those deposits and their source precipitated, and were the foundation for, the criminal prosecution.

[16] On May 29, 2006 Mr. Foster spoke to Mr. Heese and then to Mr. Samaroo. Both Mr. Heese and Mr. Samaroo explained to him that the source of the deposits to the business accounts was cash savings that Mr. Samaroo had accumulated over many years. Both Mr. Heese and Mr. Samaroo explained that Mr. Samaroo was afraid the bank would stop accepting old $100 bills, which made up a portion of his cash savings, so he had deposited the bills into the business accounts.

[17] In his notes dated June 23, 2006 Mr. Foster recorded:

> Tony is very adamant that the money deposited to the business accounts came from his savings over the past 35 years. And that he had only taken the money out of the safety deposit box over fear that the old $50 and $100 bills would not be accepted by the bank.

[18] On August 18, 2006, having completed his civil audit, Mr. Foster referred the case to the Enforcement Division of the CRA for a determination on whether or not a criminal investigation would be undertaken. Mr. Alan Jones authored a "Primary Report" dated October 30, 2006, recommending that the case proceed to a full investigation "with searches to be conducted at the residence, three business locations, the accountants' office and the auditor's desk".

[19] Mr. Alan Jones wrote in his report that two other factors justified the case being selected for a full investigation, aside from the results of the civil audit:

1. The restaurant and night club industries are those that have a high rate of non-compliance; and,

2. CRA has not prosecuted a business in the restaurant or nightclub industry in the Nanaimo area recently.

[20] Based on Mr. Alan Jones' recommendations, the CRA decided that the case against the plaintiffs should proceed to a full criminal investigation.

**The Criminal Investigation and Preparation of the Draft Prosecution Report**

[21] On January 4, 2007, the Information to Obtain ("ITO") was sworn. On January 24, 2007, the search warrants regarding the plaintiffs' residence, businesses and accountant's office were executed. Mr. Kendal was assigned as the officer in charge regarding the search of the plaintiffs' residence. Mr. Terry Finlay, another investigator with the CRA, was the officer in charge of the search of Mr. Heese's office.

[22] During the execution of the search warrant regarding Mr. Heese's office, Mr. Finlay, based on prepared written questions for the interview, interviewed Ms. Ferens. This was the second time she had been interviewed. Mr. Foster conducted the first interview. In the notes taken at the second interview, Mr. Finlay recorded that Ms. Ferens told him she did not post from the till tapes, or look at them, because the daily sales summary sheet provided to her was adequate. Mr. Finlay recorded these questions and responses in his notes of the interview:

7. What kind of summaries or sales records were provided to you for bookkeeping for MGM?

   I get a box of records each month. I get each days records including cash register tapes. Didn't post from the tapes because the daily sales sheet is adequate.

8. When did you notice the change in the number of ring-offs included for the daily summaries?

   It was a busy time when they switched to three shifts. Mostly it was two shifts.

[23] Following the execution of the search warrants, the case was assigned the next day, January 25, 2007, to Mr. Kendal. In direct examination Mr. Kendal testified that he knew before the case was assigned to him that the CRA had no till tapes. He testified that after the search warrants were executed the CRA searchers would have gathered for a "scrum" to discuss the searches and what information had been obtained. This probably would have included a review of the interview of Ms. Ferens and others that the CRA had hoped to interview. Mr. Kendal testified that to plan his investigation he then spent several weeks reviewing the fruits of the search to determine what information the CRA had and did not have.

[24] Mr. Kendal testified in cross-examination he understood Ms. Ferens' explanation to Mr. Finlay to mean she did not look at the till tapes being provided to her and could not say how

many till tapes she was receiving from the plaintiffs. She knew that she received till tapes, but could not say whether she received two or three till tapes, nor what shifts they related to:

> Q. …If I can take you back to paragraph 7, it's clear from paragraph 7 that Deborah Ferens never looks at the till tapes; correct?
>
> A. That's correct.
>
> Q. She has no idea how many till tapes she gets, does she?
>
> A. Well, I - she knows she gets till tapes.
>
> Q. Yes. How many till tapes?
>
> A. Well, there's till tapes in the box of records - monthly box of records given to her, so I - you know, anywhere from one to 90.

[25] In a working paper Mr. Kendal created approximately a month after the execution of the search warrants called "Investigations Plan - MGM", he wrote:

> Cannot show that only two ring ups [sic] were reported on 2004 & 2005. Have no daily cash summary sheets with attached till tapes.
>
> 3rd party witnesses: former employees on what issue? That they worked the 3rd shift? Cannot prove 3rd shift wasn't reported, so this would be meaningless.
>
> [Emphasis added.]

The defendants have formally admitted that Mr. Kendal authored this working paper and that at the time it accurately reflected his subjectively held view of the case.

[26] When Mr. Kendal made this note he knew of both the Foster and Finlay interviews of Ms. Ferens and he had seen the blank daily sales summary sheet provided by Ms. Ferens to Mr. Foster. Mr. Kendal testified this working paper reflected his notes of what information he had and what information he wanted to obtain during his investigation. He called it "a sort of to do list".

[27] Mr. Kendal also wrote in the working paper he was planning on issuing a Production Order for prior years "to deflect the defence of a lifetime of savings" and that he intended to "defuse Defence position: Accumulated 35 years of cash being deposited in these years?" [Emphasis added.]

[28] Mr. Kendal then prepared the draft Prosecution Report. He referred to the Report in his testimony as a "pre-draft" although no other draft report was created. In the Report he wrote:

> Interviews with the bookkeeper will show that she only received two till tapes per day from the Samaroos, not the three that were actually produced in the normal course of the business day.

[29] He then set out his theory of the case:

> Element #1: The accused knew that their restaurant business was open 24 hours a day and that there were three till tape ring offs per day. They only provided 2 till tapes to their bookkeeper at E.R. Heese Accountant: Deborah Ferens.
>
> …
>
> - Debbie Ferens has stated to the auditor that she only ever received two till tapes from the Samaroos to do the books of MGM (see witness report #1 for the auditor Glen Foster). Debbie Ferens will be contacted and interviewed to confirm this statement. In addition she will be contacted to confirm if she received 3 till tapes per day during the 2007 fiscal period of MGM.

**The Referral of the Draft Prosecution Report to the Public Prosecution Service of Canada**

[30] Mr. Kendal did not initially forward the Report to PPSC. Instead he provided it to Mr. Brian Jones. The first involvement of PPSC occurred on January 7, 2008 when Ms. McLean spoke to Mr. Brian Jones. Her notes of that conversation state:

> He will send a copy of the referral to me. He thinks it's incomplete. Alan Jones [s]ays will remedy deficiencies.
>
> …
>
> TP said $ from old country.
>
> …
>
> Staff interviewed, said 3 ring offs per day.
>
> Acct. only received 2 ring offs
>
> ...
>
> - what to do about [indec] nightclub.
> - cash register tapes were destroyed.
> - Did not seize cash register.
> - He will scan the Pros. Report & send.

[31] On January 9, 2008, at 4:52 p.m., Mr. Brian Jones wrote an email to Ms. McLean in which he wrote that: "I had occasion to speak with Al Jones this afternoon and he confirmed with Keith [Kendal] the investigator that the funds were intermingled".

[32] Ms. McLean also wrote notes recording a telephone conversation she had with Mr. Kendal on January 10, 2008, stating in part:

> - He does not think it's the graveyard shift not remitted.
> - He thinks it's one of [sic] bigger shifts, based on amt.
> - Cash from 3 shifts is mixed.

[33] Previously, on December 20, 2007 Mr. Kendal had interviewed by telephone Ms. Ye, the former employee of the plaintiffs. He recorded in his notes she had told him the total revenue regarding the graveyard shift at the MGM from Thursday to Saturday was about $1,500 to $2,000 per shift and from Sunday to Wednesday it was $1,000 to $1,500 per shift. In his note to himself he calculated that based on $2,000 per day, every day for a year the alleged amount skimmed would be approximately $700,000 (actually $730,000), which would be far short of the alleged $1,700,000 skimmed.[34] PM

[34] Ms. McLean's notes of her January 10, 2008 telephone call with Mr. Kendal continued under the heading "Personal Evasion" where she stated:

> He can show he's got it; can't really show when earned it.

[35] Then under the heading "Bkkpr" she wrote:

> He has not interviewed her.
>
> She takes z tapes and posts to spreadsheet.

[36] At the end of her notes she wrote:

> Issue 1) - extra income
>
> 2) - who to charge & with what amt?
>
> 3) - when to charge

[37] On January 10, 2008, Mr. Kendal faxed Ms. McLean a letter dated December 14, 2007 that Mr. George Jones, counsel for the plaintiffs had sent to him. In the letter, Mr. George Jones stated, in part:

> It must be remembered that Mr. and Mrs. Samaroo come from different backgrounds than most of us. They are new Canadians. Mr. Samaroo is a black West Indian, who has had Mr. Heese read his correspondence to him, and Mrs. Samaroo is Chinese Canadian.
>
> They had accumulated and saved a great deal of cash in their background before entering into these businesses and amongst some of the cash they had accumulated over the years and saved for a rainy day (as for so many immigrants is habit), were old $100.00 bills and when it was disclosed by the public that these bills were being discontinued and were being recalled because of forgery fears by the Government, they panicked and turned in a lot of those bills. No doubt corroboration for this can be obtained in time, but the problem which we criminal defence lawyers have is that when we are being threatened with a criminal prosecution, as we are here, where it seems to be the policy of the Department in the various criminal tax prosecution cases I've been involved in lately, the tactic of the Department is to have you admit to some sort of non-reporting of income while trying to figure out the exact amount and then turn the alibi which is being used into part of the basis for the criminal prosecution. This just doesn't make any sense and is no way to conduct litigation.

[38] Ms. McLean prepared a memorandum dated January 10, 2008 to Lisa Dumbrell, another lawyer with the PPSC, in which she wrote in part:

> I have reviewed the draft Report to Crown and spoken to the investigator and it appears to me that the charges should be approved. However, I will not be approving the charges exactly as referred to above. I will be preparing a charge approval memo and drafting the charges and will send these directly to our Nanaimo agent, Brian Jones.
>
> Brian Jones has already received a copy of the draft Report to Crown and has met with the investigator. I have spoken to Brian Jones about this matter and he is willing to take conduct of it.

[39] Ms. McLean's January 10 memorandum shows, on behalf of the PPSC, that in her view the prosecution should likely ultimately proceed. This was based on the information she had been provided by Mr. Kendal. She testified that her memorandum was an accurate and truthful recording of her views at that time.

[40] She then prepared a draft charge approval memorandum dated January 14, 2008. Ms. McLean testified that the charge approval memorandum served as a record of her thought process and position following her review of the draft Prosecution Report and after consultation with Bruce Harper and Janna Hyman. Mr. Harper was Ms. McLean's team leader and Ms. Hyman, as previously noted, was another lawyer with the PPSC. Ms. McLean testified that Mr. Harper and Ms. Hyman agreed with her views on the file.

[41] On page five of her draft charge approval memorandum, under the heading "Can we prove income not reported by MGM?" Ms. McLean wrote in part:

> Based on the evidence of the employees: that there were three Z tapes per day and the evidence of the bookkeeper, who has not yet been interviewed, that she only received two Z tapes per day, we can prove the scheme not to report some of MGM's income. [Emphasis added.]

[42] Ms. McLean also wrote in her memorandum she did not think that Ms. Samaroo should be charged in relation to the corporate evasion or that Ms. Samaroo should be charged with personal tax evasion. Ms. McLean testified that in her view there was insufficient evidence of Ms. Samaroo's involvement in the alleged tax evasion to warrant charges against her.

[43] Finally, in her draft charge approval memorandum Ms. McLean wrote:

> It is anticipated that there will be a request for return of documents. However, there is no forensic value in the originals and the CRA could copy and proceed with copies. Also the investigation is not complete:
>
> - the bookkeeper has not been interviewed.
> - the interviews of the employees have not been completed.
> - the Report to Crown is still in draft form.

> We should have the investigator complete the above before we approve charges even if that means proceeding with copies.
>
> [Emphasis added.]

[44] This was the status of the file when it was referred to Mr. Brian Jones. As further investigation was required charges had not yet been approved.

[45] Ms. Hyman testified that in the normal course Mr. Brian Jones would be provided with a copy of Ms. McLean's draft charge approval memorandum, however in direct examination Mr. Brian Jones denied ever having received it.

[46] Ms. McLean made notes as well of another telephone conversation she had with Mr. Kendal on January 14, 2008. In her notes she identified the following necessary investigative steps to be completed before charges could be approved and communicated them to Mr. Kendal during the conversation:

> Interview bookkeeper
>
> a) last person to see z tapes
>
> b) what did they show date & times. Breakdown by
>
> c) what did she do
>
> d) want to find out, did he suppress night shift, different shifts, the cash from more than 1 shift,
>
> e) did both ts and hs deal with her. What were their roles.
>
> He agrees with that. He will:
>
> 1) Will interview bookkeeper;
>
> 2) employees
>
> 3) finish RTCC
>
> Timeframe:
>
> - will carry on with civil
> - will contact bkkpr & try to set up. Next week.
> - Revise Report to Crown
> - BF for 3 wks. I will call him then if I have not heard from him - I will let Brian Jones know.

[47] Ms. McLean was operating on the assumption, based on the information she received from Mr. Kendal, that Ms. Ferens did see the till tapes and could confirm that not all income from the restaurant was being reported. Her notes also confirm the thrust of the allegations against the plaintiffs was that they were failing to report income from one or more shifts based on unreported till tapes.

[48] On January 15, 2008 Ms. McLean emailed Mr. Brian Jones:

> Hi Brian,
>
> I have considered the draft Report to Crown, spoke with Keith Kendal, and discussed it with Bruce and Janna. Although it is difficult to prove the amount of the corporate evasion by the restaurant since we don't have the z tapes. We are presently of the view that: we can approve charges in relation to the corporate evasion by the restaurant by basing the amount on what the employees will say was the minimum amount of sales on each shift; and the amount of the personal evasion should match the amount of the corporate evasion.
>
> However, there is more work that needs to be done: the interview of the bookkeeper, finishing the employee interview; and finalizing the report to Crown. Since we could proceed with copies of the documents if there was an application for return of the originals, we decided that this work should be done before charges are approved. [Emphasis added.]

[49] Three senior lawyers in the PPSC were of the opinion that no charges should be approved until the above tasks were completed. In addition, the amounts the corporations were to be charged with were to be calculated on a specific basis.

[50] It should be noted here that Ms. McLean went on leave on February 15, 2008, and Ms. Hyman took over conduct of the Samaroo file for the PPSC after that time.

**Completion of the Final Prosecution Report**

[51] Mr. Kendal continued his investigation. On February 8, 2008, he interviewed Katrina Rekers, the graveyard shift supervisor at the MGM restaurant. She told him that the graveyard shift would make up to $1,200 to $1,400 on busy nights (Friday to Sunday) and less than $500 a night on slower nights (Monday to Thursday). She also told him the cash sales were about 33% of total sales.

[52] On February 4, 2008 Mr. Kendal contacted Mr. Heese and Ms. Ferens by telephone to arrange interviews with them. The day before the interviews were to take place Mr. Heese sent a letter dated February 6, 2008 to Mr. Kendal stating that he had been advised by Mr. George Jones not to meet with Mr. Kendal and that all future requests for information should be directed to Mr. George Jones.

[53] In direct examination Mr. Kendal testified that Mr. Heese and Ms. Ferens had outright refused to be interviewed. When Mr. Heese's letter was brought to his attention he said he did not want to proceed in that manner and that he only wanted to interview Ms. Ferens in person. He gave no reason for taking that position.

[54] On February 11, 2008 Mr. Kendal had a telephone discussion with Ms. McLean and she noted that he told her that the bookkeeper did not want to be interviewed. He did not tell her

that the bookkeeper would answer questions through counsel. In addition, Mr. Kendal again did not disclose that Ms. Ferens had already been interviewed, nor did he tell Ms. McLean that Ms. Ferens had been clear that she could not provide evidence that a shift was unreported or, if that was the case, which one.

[55] Despite no further interview of Ms. Ferens occurring, and contrary to what was known from Ms. Ferens' second interview, on March 20, 2008 the CRA sent a letter to the PPSC for charge approval. Mr. Kendal testified that he authored the letter. That letter also enclosed the Final Prosecution Report drafted by Mr. Kendal, and witness documents. The letter states:

> It is alleged that Tony Samaroo and his wife, Helen Samaroo, appropriated $1,754,812 from their corporate businesses during the years 2004 to 2006 and failed to report these amounts on their personal income tax returns.
>
> We allege that sales belonging to the MGM Restaurant Ltd. was suppressed by the Samaroos failing to provide all the till tapes. Only two till tapes were provided each day. The restaurant operated three shifts each day, each shift with its own ring-off. We allege that not all the till tapes were reported for Samaroo Holdings Ltd. operating as Club Malibu.
>
> [Emphasis added.]

[56] In the Final Prosecution Report, dated March 18, 2008, Mr. Kendal set out the CRA's theory against the plaintiffs under the heading "Part V-Theory of the Case":

> Scheme 1: Tony & Helen Samaroo operated three regular shifts at the MGM restaurant and each shift produced a rung off till tape. The Samaroos under reported sales revenue & the related GST from MGM Restaurants Ltd. By not providing one of the three daily till tapes to their bookkeeper resulting in a personal enrichment of about $50,000 per month.

[57] Mr. Kendal testified in cross-examination that the theory set out in Scheme 1 above was the "overriding theory of the prosecution". He also testified this theory did not change at any point during the prosecution. Ms. Hyman from PPSC testified this was the *actus reus* of the alleged offences. In direct, however, Mr. Brian Jones testified this was only the CRA's theory and that it was not entirely complete or accurate.

[58] Mr. Kendal testified that the theory in Scheme 1 was and remained a valid theory. He testified that the CRA is proceeding in the Tax Court against the plaintiffs on the same basis.

[59] Ms. Hyman testified in cross-examination she believes the theory is meritorious and still believes the plaintiffs committed the alleged offences. She testified that if given the chance, she would do the same thing again.

[60] In the Prosecution Report, Mr. Kendal wrote as follows under "Element 3" of the CRA's

theory of the case:

> Element #3: A "Daily Sales" summary sheet template for recording of revenue receipts based on two till tapes per day up.
>
> · The bookkeeper Debbie Ferens (witness #4), will be able to explain that she received a filled out preformatted "Daily Cash Report" summary sheet for each day of the month with till tape #1 sales data, till tape #2 sales data and a summary column of those two days till tapes, and this is attached with the till tapes for that month as provided to her by Tony Samaroo. [Emphasis added.]
>
> · Debbie Ferens will be able to explain that from each completed "Daily Cash Report" summary sheets, she would post the sales data to her monthly spreadsheet: "Daily Sales Summary Sheet". From this monthly spreadsheet she would post the GST and revenue summaries for the month to the general ledger of MGM for the 2004, 2005 & 2006 fiscal years.

[61] Mr. Kendal also wrote as follows under "Element 4":

> Element #4: The accused provided only two of the three daily till tapes to their bookkeeper Debbie Ferens to February 28, 2006.
>
> · Debbie Ferens (witness #4) will be able to attest to having met the CRA auditor, Glen Foster on March 21st of 2006, and informed him that she has only ever received two MGM till tapes per day from Tony Samaroo for the period under audit. [Emphasis added.]

[62] Knowing that he had not carried out the investigatory steps requested by Ms. McLean, and knowing that Ms. Ferens could not provide evidence proving that only two till tapes from two shifts were reported, Mr. Kendal nonetheless proceeded and in doing so provided incomplete and erroneous information to those who would rely upon and act upon this Prosecution Report. They did so and the matter proceeded to charge approval.

**Charge Approval and Drafting of the Information**

[63] On March 25 and 26, 2008, Mr. Brian Jones, Ms. Hyman and Mr. Alan Jones discussed by email the status of the Samaroo file and charge approval. Ms. Hyman testified that the PPSC always approves charges and that such is never the responsibility of an *ad hoc* agent. She stated that the PPSC will approve charges based on the likely or anticipated evidence. She testified that charge approval occurred when Mr. Brian Jones was formally appointed as the agent *ad hoc* prosecutor on the file on January 22, 2008. She stated on direct that:

> They had been approved. Our office had made the decision that charges were appropriate. Mr. Jones had a responsibility to essentially draft them, to put them together, to do a final review of the evidence to ensure that anything Ms. McLean had red flagged or anything he saw himself didn't change that view.

[64] However, communications between Ms. Hyman and Mr. Brian Jones on March 25 and 26, 2008 put the apparent clarity of that assertion in question. On plainly reading the emails

between them, it is evident they decided Mr. Brian Jones would “do charge approval”. But, that apparently plain reading is contested, with the defendants arguing that the language used must be read in the context of the roles of the participants and what they say they actually intended.

[65] The emails are:

> **March 25, 2008, 5:47 p.m.**:
>
> Brian Jones to Alan Jones.
>
> > I have Binder ‘F’ in my desk. Does this mean that the matter has been submitted to Janna for charge approval? If so, I shall call her for an update.
>
> **March 26, 2008, at 7:34 a.m.**:
>
> Alan Jones to Brian Jones.
>
> > My instructions were to send you and Janna both a copy. I asked for this because I remember seeing a letter from PPSC assigning the case to you back in February. I have not asked Keith if he did this yet. Presumably he has so a call to Janna may be in order.
>
> **March 26, 2008 at 5:30 p.m.:**
>
> Brian Jones to Janna Hyman.
>
> > I understand you have a revised prosecution report on this matter. I take it you will review for charge approval and then, if charges are approved, you will let me know what they are. Is there anything you want me to do on the file right now?
>
> **March 26, 2008 at 5:34 p.m.**:
>
> Janna Hyman to Brian Jones.
>
> > Actually, I was assuming that you would do so! So, it’s a good thing you emailed, otherwise we would both be sitting here waiting for the other!
> >
> > Did you also get the report? If not, I will send it to you ...
>
> **March 26, 2008 at 5:42 p.m.**:
>
> Brian Jones to Janna Hyman.
>
> > Thanks Janna. I have a copy. And I will work up the charges. I have Lisa’s comments from the first go round so it should be okay. We had agreed the restaurant was a go but we needed the CRA to interview more people for the bar and motel business. So I will open my copy and see where we are.
>
> **March 26, 2008 at 5:45 p.m.**:
>
> Brian Jones to Alan Jones.
>
> > I spoke with Janna as you suggested. She thought I was doing charge approval and I thought she was. So your suggestion proved helpful. I will be doing charge approval. [Emphasis added.]

[66] Despite the apparent clarity of these emails respecting who would do charge approval Mr. Brian Jones and Ms. Hyman both testified in direct that the charges had been approved by the time they had the above discussion. Ms. Hyman testified that although they used the term “charge approval”, they both actually meant “drafting the information”.

[67] Ms. Hyman prepared no written analysis of the case or a memorandum of any sort and had no record of having communicated her views to Mr. Brian Jones. Mr. Brian Jones stated at his examination for discovery he had no discussions with Ms. Hyman about the legal reasoning behind the charges laid. On cross-examination Ms. Hyman conceded she did not receive the file from Ms. McLean until February 15th, which was 24 days after the file was referred to Mr. Brian Jones.

[68] As a result the status of the file when referred to Mr. Brian Jones was as set out in Ms. McLean’s charge approval memorandum agreed to by Ms. Hyman and her superior Mr. Harper. Ms. Hyman’s ultimate evidence was that when the file was referred to Mr. Brian Jones, the PPSC had made the determination that “charges were appropriate”.

[69] On his examination for discovery Mr. Brian Jones also testified that he had “assumed” Ms. Hyman had approved the charges against the plaintiffs when he received the letter of referral appointing him as *ad hoc* prosecutor on January 22, 2008. He testified that Ms. Hyman had made “the decision to prosecute” and that although he and Ms. Hyman used the term “charge approval” he actually meant that he would just draft the Information.

[70] Mr. Brian Jones’ original testimony in cross-examination was that he concluded that the charges had been approved when he received the Final Prosecution Report. That Report was finished on March 18, 2008 and on March 25, 2008 Mr. Brian Jones told Mr. Alan Jones by email he had Binder “F” which contained the Final Report. However when confronted with his examination for discovery evidence, he adopted his previous testimony that charges had been approved when he received the letter of referral.

[71] Mr. Brian Jones requested a precedent Information from Mr. Alan Jones to be used by Ms. Marsha Down, an associate in his office, to draft the Information. That precedent was not received until after the Information was prepared. He also communicated with Ms. Hyman about whether to proceed summarily or by indictment and about consolidating the counts in the Information provided by the CRA. He left the drafting of the Information to Ms. Down. He acknowledged that he prepared no written analysis and provided no written information to Ms. Down to assist her in drafting the Information.

[72] The discussions between Mr. Brian Jones and Ms. Hyman respecting whether to proceed summarily or by indictment are relevant and are set out below:

**April 24, 2008, 3:05 p.m.:**

Brian Jones to Janna Hyman.

> Hi Janna,
>
> I have met with the investigator and although there is still work to be done before charge approval can be completed, we are getting close. My question to you is should we be going by indictment or by summary conviction? For the two Samaroos, each has unreported income totaling $911,000 over two years. The tax evaded is $260,000 for each person. As well their corporations had approximately $1,750,000 in unreported income, evading approximately $365,000 in tax, as well as $113,000 in GST.

**April 24, 2008, 3:30 p.m.:**

Janna Hyman to Brian Jones.

> On the bubble for indictment ...
>
> Let me discuss with the group. If we proceed by indictment, we will require written consent from Bob Prior.
>
> I take it that further interviews have tightened up the evidence on the quantum?

**April 24, 2008, 3:31 p.m.:**

Janna Hyman to the email address: “VAN PPSC-SPP Regulatory and Economic Prosecutions”.

> [She is forwarding the e-mail from Mr. Brian Jones asking whether to proceed summarily or by indictment]
>
> Indictment or not?

**April 24, 2008, 4:25 p.m.:**

Joyce Henderson to Janna Hyman.

> Any of the other factors set out in the desk book present?

**April 24, 2008, 6:26 p.m.:**

Janna Hyman to Joyce Henderson.

> I am not sure I remember them all, but probably not ...

**April 28, 2008, 9:21 a.m.:**

Janna Hyman to Brian Jones.

> We don’t have a magic number here but we usually go indictably for tax of over $1 million ... if you charge each with being a party to the other’s personal evasion and charge them with the two corporate offences, the tax is almost $1 million each.
>
> So, this is right on the bubble. You could still get a decent sentence (over two years) by going summarily because there is authority supporting consecutive sentences in these cases. Do you want to risk a local jury - who probably all hate paying tax? And a prelim?

**April 28, 2008, 3:47 p.m.:**

Brian Jones to Janna Hyman.

> Hi Janna
>
> I have no fear of juries being impatient with the tax man - I think most of them grasp the idea that if Samaroo doesn't pay his fair share, they will pay it, especially if Mr. Samaroo earns many times more than the average juror, even if he paid all his taxes. But the logistics of a jury on an evasion trial must be daunting, especially explaining some of the concepts involved in this particular case, like shareholder loans. I barely grasp it myself.
>
> On the other hand, getting serious time on one of these prosecutions is a goal I have yet to achieve.

[73] Mr. Brian Jones testified during his examination for discovery that his reference to getting serious time being a goal was a reference to previous prosecutions where he could not get the sentence being sought by the PPSC imposed. He confirmed this testifying that this reference was regarding his previous inability to "have a court" impose the sentence the PPSC had suggested. He stated that in his view if you "want serious time" then you would be more likely to get it by proceeding by indictment. He said:

> So in the evasion cases I've handled for PPSC in the past, I've never been able to have a court impose the sentence that Ms. Hyman suggested would be appropriate. And that's what I meant by getting serious time is an object that I've yet to achieve, but the -- if you went by indictment, penalties would be higher. So if you want serious time on these charges, you're more likely to get it by going by indictment.

[74] On April 28, 2008 Mr. Brian Jones wrote an email to several members of his firm stating: "Samaroo is not yet approved".

[75] By email dated May 28, 2008, 9:25 a.m., Mr. Kendal and Mr. Alan Jones provided Mr. Brian Jones with a copy of an 88 count Information they had prepared. Mr. Brian Jones responded:

> **May 28, 2008, 5:09 p.m.**:
>
> Brian Jones to Alan Jones.
>
> > Hi Al
> >
> > Thanks very much for preparing that information. Is the number of counts due to the GST reporting periods? I guess I will see it when it arrives. What do you think about consolidating the GST counts into a "between this date and that date" kind of charge? 88 may be a few too many.
>
> **May 28, 2008, 8:25 a.m.:**
>
> Alan Jones to Brian Jones and Keith Kendal.
>
> > Yes the number is due to monthly GST filing by 2 corps - 36(a) charges and 1(c) charge each. I was trying to think how to do 327(1)(a) charges globally like the 327(1)(c) charges but we will have to leave that to your ingenuity. Besides, after

> 85 charges, doesn't a guilty verdict call for a guillotine? [Emphasis added.]

[76] Ms. Hyman testified that she had never seen and was unaware of the 88-count Information prepared by the CRA and provided to Mr. Brian Jones. It became the basis of the final Information. She also testified that it was unlikely she ever reviewed the final Information before it was sworn.

[77] Following receipt of the draft 88 count Information, Mr. Brian Jones wrote to Ms. Hyman on May 28, 2008 at 5:43 p.m. to ask for her advice regarding the number of counts in the Information.

[78] Ms. Hyman replied to Mr. Brian Jones on May 28, 2008 at 5:52 p.m. and said: "We are big fans of multiplicitous informations here!" Ms. Hyman also wrote: "And I assume both Samaroos would be charged on all of the above, including as parties to each other's personal evasion" [emphasis added].

[79] Mr. Brian Jones then provided this advice to Ms. Down, who later asked him to send her some precedents because she found "the wording used by the CRA folks a little strange". Ms. Down also stated:

> I guess you know that it's going to be harder to prove the charges relating to the night club - we don't know how many till receipts there were per day. I guess we'll just have to rely on the net worth assessment and proceed with charges anyway.

[80] On June 5, 2008, Mr. Brian Jones emailed Ms. Down to say he had received a call from the CRA and wanted to inquire when the Information would be ready so he could pass it on to them. On June 6, 2008 Ms. Down wrote to him and asked him several questions relating to her drafting of the Information. Mr. Brian Jones forwarded the email to Mr. Alan Jones asking him to answer the questions relating to the figures.

[81] Mr. Brian Jones then wrote to Sybil Banks, a paralegal in his office, on June 10, 2008:

> Sybil
>
> Marsha is coming in to draft up the information with you. Al Jones will speak with you directly as to the right amounts (Marsha doesn't feel she can speak with Al directly). I think I covered off with Marsha some of the questions below.

[82] On June 10, 2008 Mr. Kendal emailed Ms. Down and Mr. Alan Jones to respond to Ms. Down's emailed questions from June 6, 2008, which Mr. Brian Jones had forwarded to Mr. Alan Jones. Mr. Kendal also provided an attachment called "Charges MGM Draft no 2.doc".

[83] A "Charge Approval" form created regarding the plaintiffs was written, and there was a

note attached saying: “Brian: For charge approval. THX. SB”. This note was incorrectly dated January 10, 2008, when the correct date was June 10, 2008.

[84] Another draft of the Information was printed off, and another note was attached to it dated June 11, 2008 at 3:24 p.m. (the day before the Information was sworn). The note reads: “Keith called and made a few changes. SB”. In addition, another note was written, this one also dated June 11, 2008, 3:25 p.m., which reads: “Brian: Keith would like you to email him tonight if the information is OK to swear tomorrow. Thx. Sybil”.

[85] Another form, also called “Charge Approval” was created, dated June 11, 2008, which refers to an enclosed 21-count information. Ken Paziuk of Mr. Brian Jones’ office signed it. Mr. Kendal swore the final 21-count information on June 12, 2008 at Nanaimo, British Columbia.

[86] Mr. Brian Jones testified in cross-examination that he “may have been” on vacation when the final Information was prepared and sworn. He said he “would have” reviewed it before it was sworn, but could not recall when he did so. He said he “thought” he had. The plaintiffs submit that he probably did not see it nor approve the final Information before it was sworn.

[87] On August 27, 2008, Christopher Gibson of Brian Jones’ office emailed Mr. Kendal a copy of the newspaper coverage of the charges published in the Nanaimo Daily News. The next day, on August 28, 2008, Mr. Alan Jones wrote to Mr. Brian Jones and said: “Front page of Wednesday’s Nanaimo Daily News. I can’t wait to read the edition after the guilty verdict”.

**Further Events**

[88] In early 2010, Mr. Brian Jones and Mr. Kendal had Ms. Ferens and Ms. Ye interviewed again, each for a third time. Will-say statements for both interviews were prepared. Ms. Ferens had been interviewed on March 21, 2006 and January 24, 2007. Ms. Ye had been interviewed on December 20, 2007, and on June 24, 2008.

[89] The prosecution in Provincial Court in Nanaimo commenced on September 20, 2010 and continued over various dates until February 24, 2011 with judgment on April 6, 2011, a total of 19 days. The will-say statements created regarding the 2010 interviews of Ms. Ferens and Ms. Ye were not disclosed until the second day of the trial. In addition, the 2007 interview of Ms. Ferens by Mr. Finlay, in which she said that she did not look at the till tapes, and had no idea how many she received, did not result in a will-say statement being created, nor were Mr. Finlay’s notes in the witness statement binder provided to the plaintiffs.

[90] The plaintiffs’ allegation that the defendants did not provide them with proper disclosure relates to the evidence of Ms. Ferens and Ms. Ye, and to the actions of Mr. Kendal and Mr.

Brian Jones both before and during the Provincial Court trial. The plaintiffs' allegations, and the circumstances surrounding them, will be discussed in greater detail below under the heading "Discussion of the Disclosure Issues."

## Positions of the Parties

### Position of the Plaintiffs

[91] As briefly mentioned, the plaintiffs submit that Mr. Brian Jones and Mr. Kendal intentionally and wrongfully violated two fundamental tenets of the criminal justice system: that a person is not to be charged with a crime unless there is a lawful basis to do so and that a prosecution will be conducted lawfully and fairly. They assert that the power of the State to prosecute an individual for a criminal offence is not to be engaged unless an independent, impartial, quasi-judicial minister of justice, a Crown prosecutor, objectively determines there is sufficient evidence to support a conviction. They note that while this is a minimum standard, the PPSC has a slightly higher standard of a "reasonable prospect of conviction" and that British Columbia has an even higher standard of "a substantial likelihood of conviction". In addition, both the PPSC and British Columbia require that the prosecution be in the public interest.

[92] The plaintiffs submit that Mr. Brian Jones failed in his duty as a prosecutor by not bringing an independent mind to the charge approval and sentence sought, and simply did the bidding of the CRA. They also say he did so while in a conflict of interest, given his financial motivation to obtain a conviction based on his contracted employment as an *ad hoc* PPSC prosecutor.

[93] Finally, the plaintiffs allege that the CRA has an interest in the outcome of tax prosecutions such as these in part to encourage voluntary compliance by the restaurant sector of the economy. Mr. Kendal, they say, on behalf of the CRA, suppressed exculpatory evidence and was fuelled by a desire to secure a conviction despite the evidence.

[94] Therefore, the plaintiffs say that both Mr. Brian Jones and Mr. Kendal are guilty of malicious prosecution as set out in *Miazga v. Kvello Estate,* 2009 SCC 51 at para. 3, because they initiated a prosecution against the plaintiffs that ultimately terminated in the plaintiffs' favour, and they did so without reasonable and probable grounds and with malice.

### Position of the Defendants

[95] The defendants submit there is no evidence that can support a finding of malicious prosecution. Regarding the second stage of the *Miazga* analysis, the defendants accept that the proceeding was terminated in favour of the plaintiffs. The defendants also concede that the

first stage of the *Miazga* test is met regarding Mr. Brian Jones and his law corporation. However, the defendants argue that Mr. Kendal and the CRA did not initiate the proceedings.

[96] Regarding the third and fourth steps set out in *Miazga*, the defendants say there is no evidence that displaces the presumption that reasonable and probable cause existed, nor is there evidence that the defendants acted for a purpose other than to place the case before the court for adjudication. That is, there was no evidence capable of supporting a finding that Mr. Brian Jones of the PPSC initiated or continued the prosecution due to malice or for an improper purpose.

[97] The note as well that malicious prosecution does not address tactics or conduct before the court as such issues fall not within prosecutorial discretion but rather within the inherent jurisdiction of the court to control its own processes once the prosecutor enters that forum.

## Relevant Law

### Law on Tax Evasion

[98] As a prosecution for tax evasion is a criminal matter the Crown must prove beyond a reasonable doubt both the *actus reus* and the *mens rea* elements of the offence. In *R. v. Porisky,* 2012 BCSC 67 (this decision was appealed because there had not been a proper election of a judge-alone trial and the Court of Appeal ordered a new trial), the court found that the *actus reus* and *mens rea* elements of the offence of tax evasion are:

> [13] The conduct which the Crown is required to prove is:
>
> ... that the accused voluntarily performed an act or engaged in a course of conduct that avoided or attempted to avoid payment of tax owing under the [*Income Tax*] *Act***.**
>
> *R. v. Klundert* (2004), 187 C.C.C. (3d) 417, 242 D.L.R. (4th) 644 (Ont. C.A.) at p. 654 ("*Klundert #1*").
>
> [14] Turning to intent, the Ontario Court of Appeal in *Klundert #1* stated, at para. 46:
>
> Although I would avoid the use of the phrase "ulterior motive", I agree with Bayda J.A. that the word "wilfully" in s. 239(1)(d) signals that culpability will follow only where the accused engages in conduct intended to avoid the payment of tax owing under the Act. More precisely, I think the fault component in s. 239(1)(d) is twofold. First, the accused must know that tax is owing under the Act and second, 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: see *Buzzanga*, supra, at 383-385.
>
> In the following paragraph the Court of Appeal set out a jury charge for both the *actus reus* and *mens rea*:
>
> In most cases of tax evasion, the trial judge will adequately describe the

> elements of the offence by instructing the jury that they must be satisfied beyond a reasonable doubt that the accused:
>
> - did something or engaged in a course of conduct that avoided or attempted to avoid the payment of tax imposed by the Act**;**
> - knew there was tax imposed by the Act; and;
> - engaged in the conduct for the purpose of avoiding or attempting to avoid payment of tax imposed by the Act or knowing that avoiding payment of tax imposed by the Act was a virtual certain consequence of his actions**.**

[99] The defendants submit that the Crown must show that the amounts in issue are taxable income and that the *actus reus* for the offence of tax evasion will be satisfied where the accused is found to have unreported taxable income, relying on *R. v. Klundert*, [2004] 5 C.T.C. 20 (Ont. C.A.) at para. 42. They note that where the intent to evade tax is present, then the "manner" in which the intent is carried out is not important, as the plain words of s. 239(1) of the *Income Tax Act* specify it may be done "in any manner", citing *R. v. Paveley*, [1976] 3 W.W.R. 577, 1976 (Sask. C.A.) (W.L.) at para. 47.

[100] To reiterate the *mens rea* of tax evasion was described by the Ontario Court of Appeal in *Klundert* at para. 46:

> [46] ... I think the fault component in s. 239(1)(d) is twofold. First, the accused must know that tax is owing under the Act and second, 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. …

[101] The Crown must lead evidence that the *actus reus* and the *mens rea* coexisted during the offence period: *R. v. Balla,* 2009 BCPC 136 at para. 139.

[102] The fault requirement of an offence under s. 239(1)(d) of the *Income Tax Act* may be negated by a mistaken belief: *Klundert* at para. 49. Mistake or ignorance regarding a liability to pay tax under the *Income Tax Act* may negate the fault requirement regardless of whether it is a factual mistake, a legal mistake, or a combination of both: *Klundert* at para. 55*.*

[103] Wilful blindness will satisfy the knowledge component for the *mens rea* of tax evasion: *R. v. Breakell,* 2009 ABCA 173 at para. 18; *R. v. Tyskerud*, 2013 BCPC 27 at para. 245; and *R. v. Kennedy,* 2004 BCCA 638 at para. 13.

[104] Party liability for corporate tax evasion may apply to a corporate officer: *Income Tax Act*, s. 242. Although the Crown need not prove *mens rea*, it must establish the corporation's guilt and the defendant's participation: *R v. Swendson*, [1987] 2 C.T.C. 199 (Alta. Q.B.). Due

diligence is the only defence: *R. v. Gibbs*, 2003 BCPC 526.

[105] The obligation of the Crown is to prove the elements of the offence, not to negative a defence: *Balla* at para. 108.

**Law on Malicious Prosecution**

[106] To succeed for malicious prosecution the plaintiffs must prove each of these four elements against each defendant, as set out by the Supreme Court of Canada in *Miazga* at para. 3:

a) the defendant initiated or continued the prosecution against them;

b) the prosecution terminated in the plaintiffs' favour;

c) the prosecution was undertaken without reasonable and probable cause; and

d) the prosecution was motivated by malice or a primary purpose other than that of carrying the law into effect.

[107] Elements (a) and (b) are not in issue with respect to Mr. Brian Jones and his law corporation. Element (a) is in issue regarding the CRA and elements (c) and (d) are in issue regarding all defendants.

[108] The thrust of the plaintiffs' claim is, as described at para. 45 of *Miazga*, "an after-the-fact attack on the propriety of the prosecutor's decision to initiate or continue criminal proceedings against the plaintiff".

[109] I will now turn to a discussion of the relevant legal principles under the four elements of the test for malicious prosecution.

***Initiation of the Prosecution***

[110] The Supreme Court in *Miazga* stated that generally the initiation element of the test for malicious prosecution identifies those who were "actively instrumental" in setting the law in motion:

> [53] Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were "actively instrumental" in setting the law in motion that may be held accountable for any damage that results: *Danby v. Beardsley* (1880), 43 L.T. 603 (C.P.), at p. 604. As against a Crown prosecutor, the initiation requirement will be satisfied where the defendant Crown makes the decision to commence or continue the prosecution of charges laid by police, or adopts proceedings started by another prosecutor: *Clerk & Lindsell on Torts* (19th ed. 2006), at

> p. 979; *J. G. Fleming, The Law of Torts*, (9th ed. 1998), at p. 677.

[111] Besides *Miazga* the plaintiffs rely on *Hewer v. Paquette*, 1990 CanLII 1488 (B.C.S.C.), where two RCMP Constables were charged with, and found liable for, malicious prosecution. This was in part because they prepared Reports to Crown counsel that omitted critical information related to the arrest of the plaintiff. The court in *Hewer* did not explicitly address whether the Constables initiated the prosecution. However, the authority that the court cited for the test for malicious prosecution set out initiation as a required element of the tort (*Carpenter et al. v. MacDonald et al.*, 1978 91 D.L.R. (3d) 724, 1978 CanLII 2104 (Ont. Dist. Ct.) at 742). It can be implied that the court determined that that element of the test was met.

[112] The plaintiffs also rely on *Casey v. Auto Renault Canada Ltd.*, [1965] S.C.R. 607, for the assertion that the initiation requirement of the tort is met where an individual swears an information. The primary issue in *Casey* was whether the prosecution was ever commenced against the appellant. The respondent company swore an information charging the appellant with theft. No further steps were taken, and the respondent withdrew the charges. In discussing what constitutes a prosecution, Justice Martland found that "the essence of the matter … was the filing of an information …" (p. 621). He went on to state at p. 623:

> ... as the respondent had caused everything to be done which could be done wrongfully to set the law in motion against the appellant on a criminal charge, an action for malicious prosecution lay against the respondent, the other required elements of that tort being established.

[113] The Ontario Court of Appeal came to a similar conclusion in *Romegialli v. Marceau*, [1964] 2 C.C.C. 87 (Ont. C.A.) (W.L.):

> [4] … Here, not only was the information laid, but not content with merely having a summons issued to the plaintiff, the defendant caused a warrant to be issued for his arrest. He was apprehended under the warrant and detained in custody for a period of one to one-and-a-half hours before his release on bail. We are all of the opinion that the learned Judge erred in finding that there had been no criminal proceedings launched against the plaintiff by the defendant …

[114] Both *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 and *Pate v. Galway-Cavendish (Township)*, 2011 ONCA 329, address initiation of a claim by a private individual making a complaint to the police. In *Pate*, the Ontario Court of Appeal said this:

> [47] It is well-established that a defendant may be found to have initiated a prosecution even though the defendant did not actually lay the information that commenced the prosecution. Although this court has not determined "all the factors that could, in any particular case, satisfy the element of initiation", it has held that a defendant can be found to have initiated a prosecution where the defendant knowingly withheld exculpatory information from the police that the police could not have been

> expected to find and did not find and where the plaintiff would not have been charged but for the withholding: *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 (Ont. C.A.) at para. 52.

[115] This test is not inconsistent with the "actively instrumental" test for initiation set out in *Miazga*.

***Termination in Favour of the Plaintiffs***

[116] The defendants concede that the tax evasion prosecution terminated in favour of the plaintiffs therefore no further discussion on this point is necessary.

***Reasonable and Probable Cause***

[117] The standard of belief for this aspect of the malicious prosecution test is "probable guilt", which means, "the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law" (*Miazga* at para. 63).

[118] Reasonable and probable cause relates not to the prosecutor's personal views respecting the guilt of the accused, but rather to the prosecutor's professional assessment of the legal strength of the case. This is because, as the Supreme Court said in *Miazga*, in a public prosecution, the ability of a plaintiff to succeed on this stage of the malicious prosecution test simply by proving that the prosecutor did not personally believe there was reasonable and probable cause is problematic. The Court stated at para 73:

> [73] The prosecutor's mere lack of subjective belief in sufficient cause, where objective reasonable grounds do in fact exist, cannot provide the same determinative answer on the third element in the context of a public prosecution. Unlike the situation in a purely private dispute, the public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. Consequently, where objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked. Further, as discussed above, the decision to initiate or continue the prosecution may not entirely accord with the individual prosecutor's personal views about a case as Crown counsel must take care not to substitute his or her own views for that of the judge or the jury. Therefore, in the context of a public prosecution, the third element of the test necessarily turns on an objective assessment of the existence of sufficient cause. As we shall see, the presence or absence of the prosecutor's subjective belief in sufficient cause is nonetheless a relevant factor on the fourth element of the test, the inquiry into malice. [Emphasis added.]

[119] The role of the court in a malicious prosecution case when assessing reasonable and probable cause in a public prosecution was described in *Miazga*:

> [75] If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or

> continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. See, e.g., *Al's Steak House & Tavern Inc. v. Deloitte & Touche* (1999), 45 C.C.L.T. (2d) 98 (Ont. Ct. (Gen. Div.)), at paras. 11-13.
>
> [76] In carrying out the objective assessment, care must be taken in retroactively reviewing the facts actually known to the prosecutor at the relevant time -- that is, when the decision to initiate or continue the proceeding was made. The reviewing court must be mindful that many aspects of a case only come to light during the course of a trial: witnesses may not testify in accordance with their earlier statements; weaknesses in the evidence may be revealed during cross-examination; scientific evidence may be proved faulty; or defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.

[120] To summarize, the test to be applied is whether as a matter of law, based on circumstances actually known to the defendants when the prosecution was initiated and/or continued, there existed objective reasonable and probable cause to believe that guilt could properly be proved beyond a reasonable doubt.

[121] The Supreme Court in *Miazga* also discussed the application of Crown policy manuals. At para. 64, the Court observed that Crown policy manuals often require a higher standard than reasonable and probable cause. The Court stated that generally these manuals advise not to initiate or continue a prosecution "unless there exists a reasonable prospect of conviction and it is in the public interest to pursue the criminal proceeding" (para. 64). However, the Supreme Court said "there is nothing discordant about a lower standard grounding civil liability" (para. 64).

***Reasonable and Probable Cause for an Investigator***

[122] The defendants take issue with the test for reasonable and probable grounds insofar as the conduct of the investigator Mr. Kendal is concerned. They submit that the reasonable and probable grounds test set out in *Miazga* does not apply to an investigator. In doing so they submit that investigators do not have to evaluate evidence, as would a prosecutor.

[123] The defendants rely on *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 at para. 50, where the Supreme Court noted that while police are required to some extent to weigh evidence, the task of evaluating the evidence according to legal standards rests with the prosecutors, defence attorneys and judges. They submit that the fact that the CRA made a referral to the PPSC and to Mr. Brian Jones does not equate to the CRA initiating the prosecution due to the division of responsibilities noted in *Hill*. As a result they submit that investigators, like Mr. Kendal, do not have to assess whether the evidence establishes reasonable and probable cause before referring a case to a prosecutor who will decide whether to proceed with charges.

[124] Regarding the apparent inconsistency between *Hill* and *Miazga, Hill* was decided prior to *Miazga* and addressed the emerging tort of negligent investigation by police officers. In *Hill* the Court discussed the appropriate standard of care for an investigation, and noted that the possibility of holding police civilly liable for negligent investigation "does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect" (para. 50).

[125] However, the Court in *Hill* at para. 68 also noted that the "particular conduct" required of police, that is, the standard of care, is informed by the stage of the investigation and the applicable legal considerations:

> [68] A number of considerations support the conclusion that the standard of care is that of a reasonable police officer in all the circumstances. First, the standard of a reasonable police officer in all the circumstances provides a flexible overarching standard that covers all aspects of investigatory police work and appropriately reflects its realities. The particular conduct required is informed by the stage of the investigation and applicable legal considerations. At the outset of an investigation, the police may have little more than hearsay, suspicion and a hunch. What is required is that they act as a reasonable investigating officer would in those circumstances. Later, in laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty: since the law requires such grounds, a police officer acting reasonably in the circumstances would insist on them. The reasonable officer standard entails no conflict between criminal standards (Charron J., at para. 175). Rather, it incorporates them, in the same way it incorporates an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight. In all these ways, it reflects the realities of police work. [Emphasis added.]

[126] The defendants also rely on *McNeil* and *Pate*, both noted above, to support what they say is the test for "reasonable and probable grounds". However, they rely on portions of those cases that address initiation of a claim by a private individual who makes a complaint to the police, not reasonable and probable grounds. As a result they do not assist on the issue of reasonable and probable grounds.

[127] In *Miazga* the court elaborated on the meaning of the definition of "reasonable and probable grounds to believe the suspect is guilty" in a malicious prosecution where the focus is not on the police investigation but on initiating a prosecution. In contrast to a negligent investigation, the tort of malicious prosecution "targets the decision to initiate or continue with a criminal prosecution" (para. 6).

[128] As a result in my view the defendants' reliance on *Hill*, *McNeil* and *Pate*, is misplaced as applied by them to a malicious prosecution and reasonable and probable grounds.

[129] The defendants also submit that where a Crown prosecutor determines there is a reasonable prospect of conviction, it is implicit those involved in the investigation and laying of charges had grounds to do so, citing *Pitney v. Toronto (City) Police Services Board*, 2016

ONSC 1013 at para. 35 and *Franklin v. Toronto Police Services Board,* [2008] O.J. No. 5237 (Ont. S.C.J.) at paras. 39, 60, and 65. They say that where an investigator recommends charges and the prosecutor agrees, the investigator is considered to have had evidence sufficient to found a conviction.

[130] However the proper test for reasonable and probable grounds to be applied to the tort of malicious prosecution is as summarized by the Supreme Court in *Miazga*:

a) The tort of malicious prosecution “targets the decision to initiate or continue with a criminal prosecution” (para. 6);

b) The tort of malicious prosecution is “designed to provide redress for losses flowing from an unjustified prosecution” (para. 42);

c) The elements of the tort are the same no matter the parties: para. 44;

d) The “initiation” requirement identifies the appropriate target of the suit: para. 53.

e) Given the burden of proof in a criminal trial, “probable guilt” means that, on an objective assessment, based on the existing state of circumstances, proof beyond a reasonable doubt could be made out in a court of law: para. 63.

f) Reasonable and probable cause is a question of law to be decided by the judge: para. 74. This means that the subjective state of mind of the defendants is not a relevant consideration hence there is no unfairness in applying the same test to both an investigator and prosecutor. The question is whether the prosecution was properly initiated.

g) There is no “sliding scale” for reasonable and probable cause depending on who the defendants are. The test is the same in any public prosecution.

h) If the court determines that no objective grounds existed for the prosecution at the relevant time then the court must consider the fourth element, that of malice: para. 77.

***Malice***

[131] The concept of malice relates to the defendant’s mental state as it applies to the prosecution: *Miazga* at para. 78. The Court discussed malice further at para. 78:

> [78] … Malice is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose". In *Nelles*, Lamer J. explained the meaning of "improper purpose" in this context (at pp. 193-94):

> To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, *and* malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct.
>
> [Emphasis in original.]

[132] If the prosecutor has an honest professional belief that proof beyond a reasonable doubt can be made out but that belief is mistaken then the claim for malicious prosecution will fail: *Miazga* at para. 79. However, the opposite of this assertion is not true in that “absence of a subjective belief in sufficient grounds, while a relevant factor, does not equate with malice” (*Miazga* at para. 80). The plaintiffs must prove that the prosecutor acted “wilfully” to pervert or abuse the office of the Attorney General: *Miazga* at para. 80.

[133] The Supreme Court in *Miazga* elaborated at para. 81:

> [81] As discussed earlier, a demonstrable "improper purpose" is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.

[134] This means that, as the Supreme Court held in *Proulx v. Québec (Attorney General)*, 2001 SCC 66, “[t]he malicious use of the office may not have been accidental: it must be deliberate” (para. 216). The Court in *Proulx* described the burden of proof as “very high” (para. 215) and “clear” (para. 217). The burden “must be applied strictly” in order to “avoid any interpretation that leaves any room for uncertainty in its application” (para. 217). The Court in *Proulx* noted the benefits of this high burden of proof at para. 218:

> [218] Thus a Crown attorney will not be personally uncertain as to whether a violation has occurred and his independence to decide and act according to his good judgment and the means available will be protected. Moreover, individuals will be spared involvement in pointless legal proceedings that could interfere with the proper administration of justice.

[135] The Court in *Miazga* summarized the malice test as follows:

> [89] In summary, the malice element of the test for malicious prosecution will be made out when a court is satisfied on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries of the office of the Attorney General. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose.

**The Role of Crown Counsel**

[136] As lawyers Crown counsel have the responsibilities shared by all members of the Bar. However, they also hold unique responsibilities because of their position. They are quasi-judicial ministers of justice hence are more than simply advocates. In that role they are not to seek to obtain a conviction: *Boucher v. The Queen,* [1955] S.C.R. 16 at pp. 23-24. They act on behalf of the Attorney General of Canada to “administer justice”: *Nelles v. Ontario*, [1989] 2. S.C.R. 170 at p. 191.

[137] The power exercised by individual Crown counsel to decide whether to initiate a prosecution flows from the powers vested in the Attorney General’s office. As the Supreme Court found in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para. 62, citing *Krieger v. Law Society of Alberta*, 2002 SCC 65, “[a] decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government”. They perform a public service and are to be held to the highest standards of conduct as persons vested with exercising a public trust: *Nelles* p. 195.

[138] A wrong, let alone a deliberately wrongful decision to approve charges risks the wrongful conviction of innocent persons, and undermines the public’s confidence in the administration of justice.

[139] The PPSC acts as “prosecutor” in all matters prosecuted by the Attorney General of Canada on behalf of the Crown. They employ both in-house prosecutors who are employees of the Department of Justice as well as engaging the services of private sector lawyers as standing agent prosecutors. Although private sector lawyers are contractually engaged by the PPSC they are at law agents of the Attorney General of Canada.

[140] Section 5 of the *Department of Justice Act*, R.S.C. 1985, c. J-2, provides:

> Powers, duties and functions of Attorney General
>
> 5. The Attorney General of Canada
>
> (a) is entrusted with the powers and charged with the duties that belong to the

> office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867,* came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;
>
> (b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;
>
> (c) is charged with the settlement and approval of all instruments issued under the Great Seal;
>
> (d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and
>
> (e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.
>
> [Emphasis added.]

[141] Section 9.3.1 of the *Federal Prosecution Service Deskbook* (Ottawa: Department of Justice, 2005), ("FPS Deskbook") warns Crown counsel to ensure that the responsibilities of the office of the Attorney General are carried out with integrity and dignity, and advises that counsel may fulfill this duty: "by not becoming simply an extension of a client department or investigative agency". It also states, in s. 9.4, that Crown counsel are to make preventing wrongful convictions a "constant priority" and that a wrongful conviction is a "failure of justice in the most fundamental sense".

[142] Chapter 2, s. 2.1-1(b) of the *Code of Professional Conduct for British Columbia* (The Law Society of British Columbia: Vancouver, 2013) ("BC Code"), provides that when acting as Crown counsel, a lawyer's primary duty is:

> When engaged as a Crown prosecutor, a lawyer's primary duty is not to seek a conviction but to see that justice is done; to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.

In addition, in Chapter 5, s. 5.1-3, the *BC Code* provides:

> When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

[143] The Federation of Law Societies of Canada's *Model Code of Professional Conduct* (Ottawa, updated 2017), provides this guidance in respect to the role of Crown counsel in chapter 5, commentary to s. 5.1-3:

> When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence. [Emphasis added.]

**Prosecutorial Discretion**

[144] The concept of prosecutorial discretion is closely related to the role of Crown counsel set out above. The Court in *Miazga*, relying on *Krieger*, described prosecutorial discretion:

> [45] The decision to initiate or continue criminal proceedings lies at the core of prosecutorial discretion, the nature and contents of which were described by this Court in *Krieger* as follows (at paras. 43 and 46-47):
>
> > "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
> >
> > ...
> >
> > Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.
> >
> > Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.
> >
> > [Emphasis in original.]

[145] The Supreme Court in *Miazga* recognized the constitutional value of independence of

prosecutors, meaning generally judicial intervention in the prosecutorial exercise of their discretion does not occur. However, that is not an absolute. At paras. 47-52 the Court said this:

> [47] In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi-judicial* role as "ministers of justice": *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), at p. 25, *per Locke J.* In *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616, L'Heureux-Dubé J. acknowledged the importance of limiting judicial oversight of Crown decisions in furtherance of the public interest:
>
> > [T]he Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision.
>
> Thus, the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals.
>
> [48] That said, the general rule of judicial non-intervention in the prosecutorial exercise is not absolute. In the public law context, this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128, unanimously affirmed the availability of the doctrine of abuse of process in criminal proceedings, but (at p. 137) strictly limited judicial discretion to stay proceedings as a result of abuse of process to the "clearest of cases". In *Power*, L'Heureux-Dubè J. for a majority of this Court described the high threshold that must be met to justify judicial interference with a Crown attorney's decision to prosecute an accused (at pp. 615-16):
>
> > I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
> >
> > To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice … Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.
>
> [49] As stated earlier, the question of whether the Attorney General and Crown attorneys enjoy absolute immunity from a suit for malicious prosecution in the private law context was answered in the negative by this Court in *Nelles.* As the Court explained, the question was ultimately one of policy. The Court concluded that when a prosecutor

> acts maliciously, in fraud of his or her professional duties, that prosecutor steps outside his or her proper role as "minister of justice", and as a result, immunity from civil liability is no longer justified. Where an accused is wrongly prosecuted as a result of the prosecutor's abusive actions, he or she may bring an action in malicious prosecution. Like the test for abuse of process, however, there is a stringent standard that must be met before a finding of liability will be made, in order to ensure that courts do not simply engage in the second-guessing of decisions made pursuant to a Crown's prosecutorial discretion.
>
> [50] … In *Proulx*, at para. 4, the Court reiterated the stringent test for malicious prosecution established in *Nelles*:
>
> > Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles* affirmed unequivocally the public interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances.
>
> [51] Thus, the public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.
>
> [52] The respondents and some of the interveners in the present appeal urge that the test for malicious prosecution be amended such that malice under the fourth element may be inferred solely from a finding of lack of reasonable and probable grounds under the third element. They argue that to require independent evidence of malice presents too high a barrier for any wrongly prosecuted person to obtain a remedy against a Crown prosecutor. In my view, these arguments are ill-conceived and do not account for the careful balancing established in *Nelles* and *Proulx* between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing: Philip H. Osborne, *The Law of Torts*, (3rd ed. 2007), at p. 245. As this Court made plain in *Nelles*, the "inherent difficulty" in proving a case of malicious prosecution was an intentional choice by the Court, designed to preserve this balance (p. 199). [Emphasis in original.]

**Law on Disclosure**

[146] The Crown is bound to make full and timely disclosure of all information to the defence. As the Supreme Court of Canada stated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at p. 333, “the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done”. This obligation exists whether the information is inculpatory or exculpatory and whether or not the Crown intends to introduce it into evidence (*Stinchcombe*

at p. 343). This obligation of disclosure is a constitutional right of every accused in Canada and guarantees an accused's ability to make full answer and defence and ensures that the innocent are not convicted: *Henry* at para. 67.

[147] Section 18.2 of the *FPS Deskbook* advises Crown counsel that:

> In all cases, whether a request has been received or not, Crown counsel shall disclose any information tending to show that the accused may not have committed the offence charged. With respect to this narrow category of disclosure, the obligation is a mandatory one. …

[148] Regarding the disclosure of will-say statements, s. 18.3.3 of the *FPS Deskbook* guides Crown counsel on what will-say information must be disclosed:

> Copies of the text of all written statements concerning the offence which have been made by a person with relevant information to give; where the person has not provided a written statement, a copy or transcription of any notes that were taken by investigators when interviewing the witness; if there are no notes, a "will-say" or summary of the anticipated evidence of the witness. This requirement includes statements provided by persons whether or not Crown counsel proposes to call them as witnesses …

[149] Finally, the *FPS Deskbook* provides the following regarding the disclosure of information obtained during witness interviews by the Crown in s. 18.3.17:

> Crown counsel has an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted by Crown counsel in preparation for trial. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, i.e. recantations. Such information should be promptly disclosed to the defence or an unrepresented accused, subject to any limitations contemplated by s. 18.5. To avoid the possibility of Crown counsel being called as a witness, interviews should be conducted in the presence of a police officer or other appropriate third person, where practical to do so.

[150] Also relevant is *R. v. R.,* 1997 CanLII 14376 (N.S.S.C.), in which the Court found that Crown counsel had an obligation to provide pre-charge, fact finding interview notes not protected by work product privilege. The Court in *R. v. R.,* at p. 7, citing p. 471 of the Supreme Court of Canada decision in *R v. O'Connor*, [1995] 4 S.C.R. 411, found that work product is ordinarily exempt from disclosure "provided that it contains no material inconsistencies or additional facts not already disclosed to defence".

## Discussion on Malicious Prosecution

### Discussion of the Disclosure Issues

[151] The non-disclosure issue relates to the evidence of Ms. Ye and Ms. Ferens and the actions of both Mr. Kendal and Mr. Brian Jones. The plaintiffs allege that the defendants intentionally suppressed critical evidence to mislead the Court and the defence about Crown's

case in an effort to obtain a conviction.

[152] The second interview of Ms. Ferens by Mr. Finlay in which she stated she did not look at the till tapes and had no idea how many she received as she simply posted from the daily sales summary sheets did not result in a will-say statement. As indicated there was no mention of her second interview in either the draft or the Final Prosecution Report nor did Mr. Kendal disclose its existence to Ms. McLean or Ms. Hyman. He testified that Mr. Brian Jones was "presumably" aware of the Finlay interview but denied telling him about it. Mr. Brian Jones testified that he was aware of it.

[153] Mr. Kendal chose not to disclose the notes of Mr. Finlay's interview with Ms. Ferens in the witness statement binder provided to the plaintiffs. Instead it was placed in a large binder of search materials referred to at the Provincial Court trial as "Binder D". There was no reference to the interview or the notes in the table of contents to that binder. There were 88 binders of disclosure in the criminal trial. As the plaintiffs note, unless there was an issue related to the search, which there was not, there would be no reason to review Binder D. The plaintiffs also submit that the entire treatment of the second interview of Ms. Ferens was misleading as its "disclosure" was buried and that along with that Mr. Kendal did not mention it during the criminal trial in either direct examination or cross-examination. The plaintiffs say this indicates Mr. Kendal deliberately attempted to conceal its existence.

[154] In early 2010 Mr. Brian Jones instructed Mr. Kendal to interview Ms. Ferens again. Mr. Kendal prepared 41 pages of questions before that interview, which occurred on January 22, 2010. Those questions first asked Ms. Ferens why the daily sales summary sheet had only two columns and then as if anticipating she would respond that she did not know asked whether she recalled stating to Mr. Foster she only received two till tapes of data. As indicated earlier she never said that and Mr. Kendal knew it. Her evidence to Mr. Foster was that she received a sheet that to her included only two ring offs. The questions have the appearance of Mr. Kendal seeking to obtain from Ms. Ferens the evidence he wanted from her and had already attributed to her.

[155] Ms. Ferens told Mr. Kendal in the January 22, 2010 interview she thought the daily sales summary sheet had two columns because it reflected information from two shifts but she repeated what she had told Mr. Finlay in the second interview: that she never looked at the supporting till tapes. Ms. Ferens also confirmed in this second interview what she had told Mr. Foster that in the first interview.

[156] The will-say statement of the January 22, 2010 interview was not typed until February 9, 2010.

[157] Moving to Ms. Ye's evidence, in the will-say of Ms. Ye prepared regarding her first two interviews Mr. Kendal wrote:

> She can state that as part of the recording process the till tape totals for the day are posted to a control sheet called the "Daily Cash Report". This report only had a provision for two daily till tapes to be included: the "Day" tape and the "Night" Tape.

[158] Of note is that Ms. Ye in the first two interviews had stated there was a single daily sales summary sheet. Further, the summary sheet actually referred to two columns labelled "day" and "night" not to "till tape #1" and "till tape #2" sales data, which is Mr. Kendal's editorial comment in the Prosecution Report, and is not the evidence of Ms. Ye, Ms. Ferens, or the sample daily sales summary sheet. There is no evidence that Ms. Ye referred to a second daily sales summary sheet in her first two interviews or whether she was asked if the "night" column combined both the evening and the graveyard shifts.

[159] The third interview of Ms. Ye occurred on February 16, 2010, after the will-say of Ms. Ferens was typed. The interview took place at Mr. Brian Jones' office in the presence of Mr. Gibson, a lawyer in that office. A will-say was created in which for the first time Ms. Ye said that she would use one daily sales summary sheet to record the till tapes for the day and the afternoon shift and a second daily sales summary sheet to record the till tape from the graveyard shift. Judge Saunders, in the Provincial Court decision, characterized Ms. Ye's new evidence in this regard as follows:

> [39] Diane Ye worked at the MGM from 1994 to 2005 … She was responsible for filling out the daily summary for all three shifts and stated that there were two sheets of paper and not one that she filled in, and that the second sheet contained the daily summary for the graveyard shift.

[160] The will-say created for Ms. Ye read in part as follows:

> She would post the afternoon/evening shifts sales receipts on the second column of the sheet. ... She can state she also performs a reconciliation for the previous graveyard overnight shift till tape. She would take a blank preformatted daily sales sheet similar to what was used for recording the other two shifts for the day and cross out "night" in the header of the second column of this report and write "overnight" as the header description.

[161] This evidence was significant because the Crown theory until this point was that Ms. Ferens received two of three till tapes but that theory now became that Ms. Ferens only received one of two daily sales summary sheets and that the second sheet for the graveyard shift was not provided by the plaintiffs.

[162] Mr. Kendal testified that the first time the existence of a second daily sales summary

sheet entered his mind was when Ms. Ye disclosed it during the February 16, 2010 interview. However, while the February 9, 2010 interview notes of Ms. Ferens show she was never asked about a second sheet, the will-say arising from that interview and typed up on February 9, 2010 states she only ever received one sheet. In other words, before Mr. Kendal interviewed Ms. Ye. Mr. Kendal however testified that he did not know about the second daily sales summary sheet before his interview with Ms. Ye and after he was told about the existence of a second sheet he went back and altered Ms. Ferens' will-say to include the corroborative statement she only received one sheet. Mr. Kendal seemed to think this was perfectly acceptable.

[163] On March 3, 2010 at 9:57 a.m. Mr. Kendal emailed Mr. Gibson and Mr. Brian Jones attaching copies of the will-says of Ms. Ferens and Ms. Ye along with copies of his interview notes of both interviews. A copy of Ms. Ye's will-say was placed in the Crown file. The words "For Disclosure" are written on the bottom of the email attaching Ms. Ye's statement.

[164] Mr. Kendal testified that he was responsible for disclosure during the prosecution and that he had prepared and disclosed all 88 binders provided to Crown and defence including every will-say statement and all notes taken during every interview of all the witnesses. Despite that he did not disclose to the defence the 2010 interview notes or will-say statements of Ms. Ferens and Ms. Ye. Instead, for reasons not explained, he testified in cross-examination that the decision to disclose them was not his but rather it was the Crown's "property" and Mr. Brian Jones was responsible for its disclosure, not him.

[165] As noted earlier the disclosure of such notes and will-says did not occur until the second day of trial, months later.

[166] Mr. Brian Jones' time sheet for March 3, 2010 shows he spent 1.5 hours reviewing these documents and then discussing them with Mr. Kendal. Mr. Brian Jones said he received them on March 3, 2010 and "probably" reviewed them. He said however he could not recall the substance of his subsequent call with Mr. Kendal. He testified that he made the decision not to disclose them.

[167] Mr. Brian Jones knew that the February 9, 2010 will-say of Mr. Ferens was the first and only will-say created for her and that Ms. Ferens was one of the Crown's principal witnesses. Mr. Jones, as noted in para. 152, testified that he was aware that Ms. Ferens was interviewed by a CRA investigator aside from Mr. Foster, (though he stated that he could not remember the name of that investigator, nor when the interviewed occurred). When asked in cross-examination whether or not he thought the defence would want to have disclosure of the 2010 interview statements and notes he responded:

> Q. Mm-hmm. Sir, did you think that defence counsel might be interested in having in their possession before the date of trial the 41-page statement and 16-page witness report of one of your principal witnesses?
>
> A. I can't speak for defence counsel. I would assume they would have liked to have seen my entire brief if they could.

[168] Mr. Brian Jones testified that he did not disclose the statements or interview notes because they were counsel's notes and work product. He initially testified that they were Mr. Gibson's work product but then conceded that Mr. Gibson's notes had not been disclosed, even after the other disclosure made on the second day of the criminal trial. His justification for saying they were work product was that Mr. Gibson "was present" at the interviews.

[169] However, he had testified under oath at his examination for discovery that the first time he learned about Ms. Ye's "second sheet" evidence was when she was testifying during the criminal trial. Under cross-examination he said that he "[didn't] know" if that was false, but conceded that his previous sworn testimony "may have been inaccurate".

[170] The criminal trial began on September 20, 2010. Mr. Brian Jones outlined the Crown's case. Regarding the evidence of Ms. Ferens he told the Court:

> Now, Mr. Foster meets with the bookkeeper and the bookkeeper told Mr. Foster, and will tell this court, I anticipate, that Tony Samaroo delivered to her daily cash reports from the restaurant and those cash reports showed sales from two shifts per day. Now these daily sales summaries that Mr. Samaroo gave to Ms. Ferens were used to construct a monthly revenue spreadsheet. She then returned the records, which would include the two cash register tapes per day, to Mr. Tony Samaroo**.** [Emphasis added.]

He continued:

> So then the question becomes well, where does this cash come from?
>
> And Mr. Kendal and with some evidence from Ms. Ferens and other employees will show that when the auditor starts his field work back in March he is told there are three ring offs from the cash register in each 24 hour period; however, the bookkeeper until the audit is announced receives only two ring offs each day prior to the audit. [Emphasis added.]

[171] In his opening, he did not mention Ms. Ye and her evidence of a second daily sales summary sheet, simply stating:

> And then there are various employees. They will confirm that there were three shifts.

[172] Following the Crown's opening, the defence applied for particulars, which Judge Saunders summarized:

> [3] Mr. Kelliher has summed up the request that the particulars sought are what are

> the overt acts for Tony Samaroo and Helen Samaroo that constitute evasion in Counts 3, 9, 13, 17, and 21.

The Court also found:

> [13] Mr. Jones for the Crown tells me that those particulars are indeed provided, but they are scattered all over the binders which have been provided to defence counsel.

[173] During Mr. Brian Jones' submissions on the disclosure issue, the following exchange took place:

> The Court: Are you saying that there has been disclosure of what is being sought by defence counsel at this stage?
>
> Brian Jones: Oh yes indeed. It is all in there.

[174] In referring to the Crown's theory of the case, Mr. Brian Jones said to the Court:

> Brian Jones: So it is my respectful submission that the documentation that they have been given clearly shows the scheme. They have been given the Prosecution report which sets out prior to me getting on my feet this morning, sets out the Crown's theory and the theory of the Canada Revenue Agency.
>
> …
>
> The Court: ... And if you say that that disclosure has been made and those particulars have been provided to defence counsel is it not a simple matter of just zoning in on exactly either where it can be found to answer those questions or simpler still to say well this is what my theory is as it is disclosed in all of these -- these books.
>
> Brian Jones: Exactly.
>
> The Court: This is what I say is the case we have so that at least they know what it is they have to meet around *actus reus* and *mens rea.*
>
> Brian Jones: No, I have no problem with that Your Honour I have already disclosed in giving my friends a copy of the Crown brief -

He also stated to the Court:

> If the Crown confines itself by particularizing it, and then fails to satisfy the Court on those particulars, even though we have proved evasion, then we have a problem.

[175] Judge Saunders ruled on the application:

> [15] Accordingly, I am going to order that the Crown provide Particulars in respect of the overt acts of Tony Samaroo and Helen Samaroo that constitute evasion as set out in Counts 3, 9, 13, 17, and 21**.**

[176] The following day, the Crown filed particulars as ordered by Judge Saunders, which included paragraph 6:

> 6. Either Tony Samaroo or Helen Samaroo, for the benefit of each other, reported the cash sales received for only two of the three shifts of the MGM Restaurant during the years 2004 and 2005.

[177] This response did no more than repeat what the Crown had throughout put forward as its theory based on missing till tapes. It did not particularize the overt acts.

[178] Immediately following filing of the above particulars, Mr. Brian Jones disclosed, for the first time, the existence of the February 2010 interviews and will-say statements of Ms. Ferens and Ms. Ye. As he handed their statements to defence counsel, Mr. Brian Jones said to the Court:

> Brian Jones: This year, yes. Seems a long time ago. So either just before or during that first week witnesses that the Crown was going to call were interviewed by Mr. Gibson of my office, along with Mr. Kendal. The notes of those interviews were not disclosed. It's not usually the Crown practice to disclose such interviews. These are seen as work product. However, I've reconsidered that. As I was preparing this particulars matter it came to my attention that Mr. Heese had refused a formal interview. He had been interviewed apparently by Mr. Foster.
>
> The Court: Right.
>
> Brian Jones: So I thought as a -- I thought these interviews should be disclosed and I'm having them prepared and they should be in my friends' hands today. I'm having the notes of Mr. Kendal given to my friends first. Since both Mr. Gibson and Mr. Kendal were sitting in the same room, I don't imagine there's any difference. I was assured that the contents of these statements are no different than what's in the Crown brief as to their anticipated evidence. [Emphasis added.]

He continued:

> ... [As far] as I'm aware, there's nothing contradictory or exceptionally new but they ought to have it, notwithstanding. And the same, I suppose, applies for the other witnesses. They don't, as far as I'm aware, change anything but they should, in my view, all go out at this point.

[179] It is the plaintiffs' submission that Mr. Brian Jones used language such as, "I am assured" and "as far as I am aware" in an effort to distance himself from knowledge of the contents and significance of this disclosure, knowing that he had misrepresented the Crown's position the previous day and for the past seven months. The plaintiffs submit these words represent evidence of extreme malice. This allegation of malice will be addressed below.

[180] In cross-examination in this trial, Mr. Brian Jones testified that his comments to the Court "did not go so far" as to suggest he had not read Ms. Ferens' and Ms. Ye's statements. He testified that he had no idea why he would tell the Court what he did, other than to say it was an "off-hand comment" that "obviously" was not accurate. The plaintiffs submit that they were deliberate falsehoods designed to effect a wrongful conviction.

[181] Mr. Brian Jones then submitted to Judge Saunders:

> The original will-say was in the Crown brief and the original anticipated evidence of Ferens and Heese was based on their conversations with Mr. Foster.

[182] On the following day of the trial, September 22, 2010, the defence applied for further particulars arising out of the disclosure of the will-say statements of Ms. Ye and Ms. Ferens. The Crown resisted further particularization. Mr. Jones told the Court:

> The position of the Crown is and always has been that it's Mr. Samaroo giving these [sic] only two till tapes instead of three to Ms. Ferens, the bookkeeper, knowing that that raw data will be transferred into a monthly sales statement, monthly revenue statement, that will be transferred into an annual revenue statement, which will find its way into eventually a tax return. That's always been the Crown's position. That's always been what this disclosure previously has been about.

[183] Mr. Jones then read from the Prosecution Report:

> Now, I have a theory as to how they did it and that theory -- that theory was put in writing, in black and white, in the Crown brief that was given to defence at or about the first appearance in court of Mr. Samaroo. That was years ago. Can I just read, if I may, from the Crown brief that was given to defence. Part 5, theory of the case. And for my friends' benefit, it's at page six of 50 of Tab 1, binder F, the prosecution report. Part 5, theory of the case [as read in]:
>
> > Scheme 1. Tony and Helen Samaroo operated three regular shifts at the M.G.M. Restaurant and each shift produced a rung-off till tape. The Samaroos under-reported sales revenue and the related GST from M.G.M. Restaurants Limited by not providing one of the three daily till tapes to their bookkeeper, resulting in a personal enrichment of about $50,000 per month.
>
> The theory of the Crown, black and white, given to defence years ago. So it's not just me standing on my two feet today, Your Honour, stating what the theory is. Always been the theory.
>
> And that theory -- that Scheme 1 is then broken down into various elements, talking about what we understood people were doing. But the theory's always been there.

[184] After confirming the Crown theory in this fashion Mr. Brian Jones said to the Court:

> And I submit the Crown has freedom, based on Justice Romilly's case, to run the case as it sees fit, to have the flexibility to deal with things as they arise. And if I have to somehow construct another theory when all the evidence comes out, then that's what I'll have to do. So I would submit that the law allows me that freedom. [Emphasis added.]

**Discussion on Charge Approval**

[185] As noted above, Ms. Hyman testified that charges were approved when Mr. Brian Jones was appointed as the *ad hoc* prosecutor on January 22, 2008. Mr. Jones initially testified that he thought charges were approved when he received the final Prosecution Report dated

March 18, 2008. However, when presented with the conflicting evidence that he gave at his examination for discovery, he adopted that testimony instead and agreed with Ms. Hyman that charges were approved in January 2008.

[186] I find Ms. Hyman and Mr. Brian Jones' testimony that charges were approved in January 2008 to be in direct contradiction to the evidence presented in this case.

[187] First, Ms. McLean's charge approval memorandum of January 14, 2008, and her email to Mr. Brian Jones on January 15, 2008, clearly state that while the PPSC thought charges were appropriate, they should not be approved until certain steps were taken, including an interview of Ms. Ferens. Ms. Hyman testified that she was aware of these views, and Ms. McLean discussed them with her.

[188] Next, on March 25 and 26, 2008, Mr. Brian Jones, Mr. Alan Jones, and Ms. Hyman exchanged a series of emails in which Mr. Brian Jones said to Ms. Hyman, "I take it you will review [the revised prosecution report] for charge approval, and then, if charges are approved, you will let me know what they are". Mr. Jones and Ms. Hyman subsequently agreed that Mr. Jones "[would] work up the charges" instead. Mr. Brian Jones then told Mr. Alan Jones that he would be "doing charge approval". However Ms. Hyman and Mr. Brian Jones testified, as noted, that when they said "charge approval" in this conversation they really meant, "drafting the Information".

[189] By late April 2008, the PPSC and Mr. Brian Jones had still not determined whether the plaintiffs would be charged summarily or by indictment. In a series of emails between Mr. Brian Jones and Ms. Hyman in April, Mr. Jones said, "I have met with the investigator and although there is still work to be done before charge approval can be completed, we are getting close". He then asked her whether they should proceed by summary or indictment, and Ms. Hyman asked her group at the PPSC. On April 28, 2008, Mr. Brian Jones emailed members of his firm saying, "Samaroo is not yet approved".

[190] As described earlier in these reasons, the process of finalizing charges and drafting the Information continued. What is clear from this process is that even by June 10, 2008, the amount of the tax evasion that the Samaroos were to be charged with had not yet been finalized. On June 10, Mr. Brian Jones emailed his paralegal, Ms. Banks, and said "Al Jones will speak with you directly as to the right amounts" to include in the Information.

[191] This evidence calls into question the interpretation that Ms. Hyman and Mr. Brian Jones ask the Court to apply to their email conversation of March 25 and 26, 2008. It is difficult to say why, if charges had been approved, Mr. Jones requested on March 26, 2008 that Ms. Hyman "let [him] know" what the charges were once she had reviewed the Prosecution Report (that is,

as he said, if the charges were approved at all). If all the two were talking about was finalizing and drafting the Information, Mr. Jones would have known what the charges were and would have known whether they were “approved”.

[192] In addition, while Ms. Hyman and Mr. Brian Jones testified that they knew that they both meant, “drafting the Information” in this conversation, it is unclear whether the members of Mr. Jones’ firm who received his April 28, 2008 email in which he said, “Samaroo is not yet approved” would have known this. This email would likely have been interpreted to mean exactly what it says, that charges had not yet been approved against the Samaroos.

[193] In any event, I cannot conclude that charges were approved in January 2008 when in April 2008 it had not yet been determined whether to proceed by summary or indictment, and in June 2008, the quantum of the charges was still being finalized.

[194] Furthermore, if for the sake of argument I were to accept that charges were approved in January 2008 when Mr. Jones was assigned as *ad hoc* prosecutor, given the evidence of Ms. Hyman that the PPSC is always responsible for charge approval that approval could not have been done by anyone other than Ms. McLean. Ms. Hyman testified that after Ms. McLean went on leave, she did not receive the Samaroo file until February 15, 2008, over two weeks after charge approval allegedly occurred. And, if Ms. McLean was responsible for approval, it is difficult to conclude that she approved the charges given that she clearly stated more work was to be done before she would do so.

[195] Instead, I find that the charges against the Samaroos were not approved until Mr. Kendal swore the Information in June 2008. This means that in the charge approval process, neither Ms. Hyman, nor Mr. Brian Jones, prepared any written analysis of the case nor did the two ever discuss the legal reasoning of the case. Instead, it appears they relied on Mr. Kendal and the CRA to gather the evidence, draft the final Information, and essentially, do charge approval. While Mr. Jones approved the charges proceeding, it appears the extent of his actual contribution to charge approval was determining whether to proceed summarily or by indictment.

**Discussion on Initiation**

[196] Mr. Kendal, on behalf of the CRA, was clearly “actively instrumental” in the prosecution of the plaintiffs for tax evasion: *Miazga* at para. 53.

[197] There is an abundance of evidence that supports this conclusion, which I will state here only briefly. Mr. Kendal was in charge of the CRA’s criminal investigation into the plaintiffs, and he was the one who ultimately determined who to charge, with what offence, and in what amount. In addition, not only was he in direct correspondence with lawyers in the PPSC and

Mr. Brian Jones throughout the investigation and criminal prosecution, he suppressed evidence and supplied them with an intentionally misleading Prosecution Report that formed the basis of the overriding theory of the case. Mr. Kendal also drafted the Information and swore it, without the final draft having been reviewed by anyone in the PPSC or, it seems, by Mr. Brian Jones. Mr. Kendal was also in charge of conducting the third and final interviews of two of the Crown's primary witnesses, Ms. Ferens and Ms. Ye.

[198] In short, Mr. Kendal and therefore his employer the CRA "caused everything to be done which could be done wrongfully to set the law in motion" against the Samaroos: *Casey* at p. 623. I find that the defendant CRA initiated the prosecution.

**Discussion of Reasonable and Probable Grounds**

[199] As noted the defendants allege that the plaintiffs and their corporations, MGM Restaurants Ltd. and Samaroo Holdings Ltd ("SHL"), evaded tax in 2004 and 2005. To prove that the plaintiffs were guilty of this offence, the Crown had to prove both the *actus reus* and the *mens rea* of the offence beyond a reasonable doubt.

[200] There is no dispute regarding the elements of the offence or the law. However, the parties part ways on whether the evidence relied on by the Crown addressed the *actus reus* required to prove there were reasonable and probable grounds for the resulting prosecution.

[201] The defence provided a 40 page written submission that canvased the legal issues raised. Curiously in both their written and oral submissions the defence chose not to address any of the facts that support the plaintiffs' claim of malicious prosecution nor did they address the key issue of the mechanics of the *actus reus*. Instead in their written submission they simply stated:

> There is no evidence in this case that displaces the presumption that reasonable and probable cause existed. Nor is there any evidence that any defendant acted for a purpose other than placing the case before the court for adjudication.

[202] Generally, the defendants submitted that the overt act, the *actus reus*, was the plaintiffs providing an intentionally false report of their income to their accountant, knowing that it would eventually end up in their tax report. In other words, that the *actus reus* was the plaintiffs wilfully engaging in conduct that they knew would result in a false reporting of their taxable income. This means, according to the defence, the manner in which that false reporting was done is irrelevant, whether it was by not disclosing one of the three daily till tapes, or by not providing a second daily sales summary sheet.

[203] The defendants point to various "material facts" which they allege prove their version of the *actus reus*:

a) The plaintiffs provided the revenue information from their businesses to their bookkeeper on a daily sales summary sheet. The bookkeeper used the information provided by the plaintiffs on the summary sheets for MGM and SHL to prepare a monthly summary of revenues;

b) The monthly summary was the source of the information for the tax returns reporting the incomes of the plaintiffs and their companies;

c) There were cash deposits of $661,164 into the personal bank accounts of the plaintiffs in 2004 and 2005;

d) There were cash deposits of $498,788 into the corporate bank accounts of the plaintiffs in 2004 and 2005;

e) Cash payments of $594,788 were made for liquor, wages and suppliers for MGM between January 1, 2004 and December 31, 2005;

f) There were no cash withdrawals from any bank accounts;

g) There were no cash payments recorded by the corporations to the Samaroos;

h) A comparison of the periods before and after March 2006 when the audit by the CRA began revealed:

i. The daily sales summary sheet for MGM provided to the bookkeeper began to reflect three columns of data instead of two, and the amounts recorded on the sales sheet for MGM increased by about $50,000 per month, approximately $1,500 for each of three shifts;

ii. Food costs for MGM remained about the same before and after March 2006;

iii. Menu items and prices at MGM remained about the same;

iv. Make-up and volume of customers of MGM remained about the same;

v. The amounts deposited to the plaintiffs' accounts from merchant cards (Visa, MasterCard, etc.) remained constant;

vi. The ratio of cash sales to merchant card sales for MGM increased from between 24% and 35% in the three years prior to March of 2006 to 51% of sales after March 2006;

vii. The reported revenue on the tax return of MGM for the taxation year ending

February 28, 2007 was approximately $500,000 higher than the previous two years;

viii. The reported cost of sales on the tax return of MGM for the taxation year ending February 28, 2007 was approximately the same as in the previous two years;

ix. The reported revenue on the tax return of SHL for the taxation year ending February 28, 2007 was approximately $85,000 higher than the previous year with slightly lower operating expenses; and

x. Monthly reported sales receipts for SHL increased by 33% over the previous years' average after the audit began.

[204] The defendants assert that the difference in income before and after the audit started supports the inference that after the audit the plaintiffs suddenly started reporting their complete income. This is similar, they say, to using net worth assessments to prove tax evasion. The defendants submit that these factors, in addition to the wording in s. 239(d) of the *Income Tax Act* which states that tax evasion is a wilful act that can be carried out "in any manner", establish reasonable and probable grounds.

[205] At the criminal trial, Judge Saunders addressed many of the defendants' "material facts":

> [17] The Crown alleges that it was impossible for the Samaroos to accumulate so much money based on the net worth analysis done by Keith Kendal for the period 1980 to 2003. He did not interview the Samaroos before doing the net worth analysis and did not include the cash on hand which was in the form of savings and inheritances nor did he factor in capital cost allowance over the years involved. He relied on historical data, the seized documents and his own notional figures to determine their net worth to support his theory that they could not have saved over a million dollars.
>
> …
>
> [30] [Mr. Kendal] conceded in cross examination that he and Foster came up with completely different numbers on their analysis of the MGM shareholder account. Kendal also conceded that he had not factored in capital cost allowance in his calculations which could account for almost one million dollars (Transcript November 17, 2010, page 84 lines 37 to 44). He conceded that he had completely forgotten to do so. He also conceded that he had not factored in the inheritances and savings or cash on hand that the Samaroos may have had during the operative years between 1980 and 2003 as he did not interview them before he did the net worth analysis.
>
> [31] He had some difficulty explaining his theory of how Tony Samaroo was taking cash each day from the cash sales at the MGM and could only say that one ring off was not being reported. Of note, each till tape for each shift, records cash, debit, credit and cheque sales. He could not say what the average sales for one till tape was because of too many variables to account for but he believed that there was about $2400 of cash per day being stolen over two years to arrive at the figure of $1.6 million. He was also

challenged that Diane Ye filled in the daily sales summary sheets so Tony Samaroo would have had to change the sheets in order to skim off the cash. He also conceded that the skimming of cash could have occurred over many years outside the period in the indictment.

[32] He was told that there had been a provincial audit done of the night club for the period from 2003 to 2005 and no problem regarding taxes or unreported cash was found which, surprisingly, he did not appear to consider to be relevant. He was also challenged that he could have been completely wrong in his assumptions around liquor sales at the nightclub by up to 34% on the tax calculation.

…

[67] Kendal chose not to look at the possibility that Tony Samaroo's explanation about the source of the funds could be true. He chose instead to look at the paper trail and extrapolate back using reported cash sales to attribute unreported revenues at the MGM and nightclub. The extrapolation is based on assumptions and is only as good as the underlying assumptions, which, if they are flawed because some or all of the relevant variables are not factored in, such as an increase in food sales due to more customers, or internal controls reducing theft, spillage and breakage, or fluctuating prices due to "bar wars", render the final conclusion unreliable.

[68] Kendal did not consider these variables. He was far off the mark as with the percentage markup at the nightclub by 34%. As a result, the enormous markups of up to 393% for the MGM and nightclub which he seeks to use to establish unreported cash are equally suspect and ought not be relied on.

…

[69] The Crown's theory that Tony Samaroo skimmed cash off one till tape per day for two years is flawed in significant respects. Keith Kendal could not explain how this was done and changed his evidence when he realized how he had miscalculated, to include the possibility that they had been taking cash for many years, well beyond the indictment period. He also failed to do an analysis of the shareholder account and his evidence is at odds with Glen Foster's evidence regarding the amount of the shareholder account in March, 2006.

…

[82] The Crown's theory is that the Samaroos could not have amassed $1.7 million dollars between 1982 and 2003. Tony Samaroo's evidence, which I accept, is that he started saving in 1970. A further flaw in the Crown's theory is that the figure of $1.7 million as alleged in the indictment is undoubtedly completely incorrect as the capital cost allowance would, according to Keith Kendal, amount to a significant discrepancy and reduce the figure significantly. Likewise, the inheritances and cash on hand, even if those funds were lower than Tony Samaroo states, would still lead to a different figure which is anybody's guess. As Mr. Kelliher puts it, the Crown has engaged in "voodoo accounting" to come up with the numbers to support the charges.

[83] With the significant flaws in the net worth analysis, the discrepancies between the evidence of Glen Foster and Keith Kendal regarding the shareholder loan accounts, the unreliable extrapolation regarding sales at the MGM over a three month period and the enormous mark up calculated by Keith Kendal, which is too hypothetical to rely on and based on shifting variables, the Crown's case is weak and the numbers alleged are highly uncertain.

…

> [87] More specifically, Keith Kendal failed to include the capital cost allowance into his net worth analysis which could account for up to a million dollars of the $1.7 million that the Crown alleges the Samaroos misappropriated. He did not factor in the combined inheritances of almost $400,000 that Tony and Helen received and consequently he started the analysis with completely inaccurate assumptions.
>
> [88] Even if I did not find Tony Samaroo to be credible, the Crown cannot rely on the calculations of Keith Kendal to prove its case beyond a reasonable doubt by virtue of the principles enunciated in *R. v. Zuk*.

[206] It is evident that Judge Saunders rejected most, if not all of the defendants' "material facts". In addition, these facts have not been proven in this trial. The defence has not shown that the plaintiffs' additional income was due to sudden reporting versus any number of other factors, such as, for example, increased sales due to two other restaurants in the area closing, or reduced expenses after the plaintiffs followed the advice of their accountant and monitored their expenses more carefully.

[207] As the plaintiffs point out, and I agree, even if one accepts that the additional $50,000 a month earned by the plaintiffs is suspicious it comes no where near meeting the evidentiary requirement of proving that within the alleged time frame the money was skimmed from the restaurant. It is a theory, a suspicion, and convictions are not entered on theories or suspicions.

[208] The defendants' submission that the difference in income before and after the audit is sufficient to prove the *actus reus* of the offence and is enough to establish reasonable and probable cause is flawed. The difficulty with their position is that it ignores how the *actus reus* was to be proved – that is, the actual mechanics of the alleged evasion. As I said above, the defendants' submission is a theory. To say that the plaintiffs did not report income cannot be the *actus reus*. What they did, or did not do, in order to avoid paying taxes must be shown to establish reasonable and probable grounds. That is why during the investigation the evidence about the number of unreported till tapes, shifts and/or daily summary sheets was so important.

[209] The position taken by the defendants about the nature of the *actus reus* at this trial is also problematic because it is at odds with the position taken by Ms. McLean and adopted by Ms. Hyman and Mr. Harper at the PPSC. That is, that the *actus reus* had to be proven before charges were to proceed, and that it was to be proven through Ms. Ferens' evidence respecting the till tape theory. They clearly recognized that the so-called suspicious alleged "material facts" did not justify the charges proceeding.

[210] In this way, this case is similar to *Proulx*, where the prosecution proceeded when it was clear that a key witness would have to be relied upon to prove identity and the prosecutor

admitted that the witness had never identified the appellant and that it was impossible for him to do so. Despite knowing he had to prove identification beyond a reasonable doubt, and despite it being obvious he could not do so, the prosecutor proceeded with the prosecution. As Justices Iacobucci and Binnie noted at para. 18:

> The prosecutor may have been persuaded of the appellant's guilt. The question for him in March 1991 was whether he could prove it.

[211] The same issue is raised here – how were Mr. Kendal and Mr. Brian Jones intending to prove that which they suspected and apparently believed? In other words, on the basis of circumstances actually known to Mr. Kendal and Mr. Jones when they initiated and continued the prosecution, was there reasonable and probable cause for them to believe the plaintiffs' guilt could be proved beyond a reasonable doubt? For the reasons that follow, I find that there was not.

[212] First I turn to Mr. Kendal and the CRA. Originally, as noted, the prosecution proceeded on the basis that the income from one shift was not being reported and that Ms. Ferens would testify she was only given the till tapes from two shifts. That is what Mr. Kendal said in the Prosecution Report, and what he told PPSC he could prove.

[213] Ms. Ferens was interviewed three times. She told Mr. Foster, in her first interview, that the summary sheet used to show only two ring-offs per day for the period under audit. It appears she assumed each column was a single ring-off. She was not asked if she looked at the till tapes, nor whether she received two or three till tapes.

[214] On October 30, 2006 Mr. Alan Jones prepared his Primary Report recommending the case proceed to a full investigation and relied on the evidence from Mr. Foster. On January 4, 2007 the Information to Obtain was sworn and on January 24, 2007 the search warrants were executed.

[215] However, when Ms. Ferens was interviewed for a second time on January 24, 2007 by Mr. Finlay, she informed him she did not post from the till tapes, but rather relied on the daily sales summary sheets. Hence as of January 24, 2007, the CRA knew that Ms. Ferens did not look at the till tapes and could not say whether the summary sheet included income from two or three shifts. At this point the CRA also knew that they did not have the till tapes or summary sheets for 2004 and 2005.

[216] Mr. Kendal was assigned to the investigation one day later, on January 25, 2007. Notwithstanding the evidence given by Ms. Ferens in her second interview, he stated as follows in his Prosecution Report:

> Element #3: A "Daily Sales" summary sheet template for recording of revenue receipts

based on two till tapes per day up.

- The bookkeeper Debbie Ferens … will be able to explain that she received a filled out preformatted "Daily Cash Report" summary sheet for each day of the month with till tape #1 sales, till tape #2 sales data and a summary column of those two days till tapes, and this is attached with the till tapes for that month as provided to her by Tony Samaroo.

…

Element #4: The accused provided only two of the there till tapes to their bookkeeper Debbie Ferens to February 28, 2006.

- Debbie Ferens will be able to attest to having met the CRA auditor, Glen Foster on March 21st of 2006 and informed him that she has only ever received two MGM till tapes per day from Tony Samaroo for the period under audit.
- Debbie Ferens will not be able to state that she knew which till tape shift she received during the periods leading up to February 2006: the morning, the evening or the graveyard shifts, as she only posted the data from the filled out daily sales sheet summary provided to her with the till tapes from Tony Samaroo.

[217] Mr. Kendal did not reference Ms. Ferens' second interview, nor did he mention that she could not say how many till tapes she received. Mr. Kendal also did not reference the second interview in his January 10, 2008 telephone call with Ms. McLean. Her notes indicate that the CRA could prove the plaintiffs had additional income after the audit period, but could not prove if and when the funds were skimmed, or from which corporation, or how the plaintiffs did so. When Mr. Kendal wrote what he did in the Prosecution Report, all the CRA had was the evidence of cash deposits and payments made by the plaintiffs in 2004 and 2005, and Mr. Samaroo's explanation about where the extra income came from. The CRA could also not explain how the plaintiffs could alter the daily sales summary sheets to skim cash but still account for the debit and credit card sales.

[218] Mr. Kendal testified that he knew Mr. Alan Jones had "probably" created a series of pre-typed questions before the search to be used to interview Ms. Ferens and Mr. Heese. Mr. Kendal testified that it would be the CRA's normal practice to prepare questions in advance, and that they had hoped to interview both Ms. Ferens and Mr. Heese. Mr. Kendal also testified that he knew it would be Mr. Finlay or another individual who would conduct the interviews of Mr. Heese and Ms. Ferens.

[219] Mr. Kendal attempted to explain his statements in the Report by stating that he wrote what he thought Ms. Ferens would say. The following exchange during cross-examination is relevant:

Q. Let's just deal with bullet there 1 under "Element 3" again: She'll be able to

> explain that she received a filled-out daily cash report summary sheet for each day of the month, with till tape number 1 sales data, till tape number 2 sales data, and a summary column.
>
> Where did you get that information?
>
> A. That's my own words, saying "till tape number 1" and "till tape number 2," "sales data."
>
> Q. Right.
>
> …
>
> A. So the first column would be "till tape number 1," the second column would be "till tape number 2," in my words.
>
> Q. Right. And when you say – when you preface that, you don't say, "Oh, these are my words," do you? Does that appear somewhere in the bullet?
>
> A. Well, you know what, this 50-page report is my words.
>
> Q. All right. In this bullet, do you say, "I'm going to say this; I can say this"?
>
> A. No.
>
> Q. Do you say that in there? No?
>
> A. I've said all along this is a draft witness report for Deborah Ferens, who I haven't interviewed at this point in time. I'm anticipating her saying this.

[220] I do not accept Mr. Kendal's explanation that he wrote what he thought Ms. Ferens would say. He did not explain why he would anticipate her saying something that he knew was contradicted by what she had said in her second interview conducted by Mr. Finlay. Mr. Kendal's statements in the Prosecution Report are not true and are misleading.

[221] I find that Mr. Kendal hoped that if he interviewed Ms. Ferens for a third time, he could obtain the evidence from her that he required to establish the basis for his theory of the case. Indeed, when he structured his written questions for the 2010 interview it is clear that he anticipated getting her to say that she only got two till tapes for each day. The questions he asked are illuminating, given his previous failure to properly state Ms. Ferens' evidence.

[222] For example, as noted previously regarding what information was contained in the daily sales summary sheets, Mr. Kendal first asked Ms. Ferens why the document had only two columns. Then, as though anticipating her response that she did not know, the next question he asked was whether she recalled stating to the auditor, Mr. Foster, that she had only ever received two till tapes of data. However, she did not tell Mr. Foster she only received two till tapes and Mr. Kendal knew that. This is the evidence that Mr. Kendal wrongly attributed to her in his Prosecution Report. Instead, she told Mr. Foster she received a sheet that in her mind showed only two ring offs, and showed the auditor a sales summary sheet with two columns but no designation of ring-offs or till tapes.

[223] These are written questions prepared in advance when the author, Mr. Kendal, knew she had never said she only received two till tapes. It has the appearance of seeking to obtain from the witness evidence already wrongfully attributed to her. It is also of note that Mr. Kendal failed to refer to the Finlay interview of Ms. Ferens despite the obvious importance of her answers in that interview.

[224] It is also telling that earlier in the investigation he had reported that Ms. Ferens had refused to be interviewed which was not correct as she only sought questions to be provided to her counsel. I conclude that it was important to him to interview her personally as he sought to support the evidence he had attributed to her throughout.

[225] To reiterate, Mr. Kendal knew of Ms. Ferens' evidence given to Mr. Foster and clarified in her second interview with Mr. Finlay. He knew that she could not say how many till tapes she received, or what information was included on the summary sheets. By as early as 2007, he knew he could not show what shifts were included in the summary sheets for 2004 and 2005.

[226] Despite this, Mr. Kendal continued to facilitate the prosecution, and continued to suppress the evidence from Ms. Ferens' second interview.

[227] Neither Mr. Kendal nor Mr. Brian Jones mentioned Mr. Finlay or his interview in the criminal trial. Even in this malicious prosecution trial Mr. Kendal did not mention the existence of the second interview with Ms. Ferens in his direct testimony. Instead, he testified that in preparing his Reports, he relied on Ms. Ferens' remarks to Mr. Foster:

> Q. Where did you get all of this information that you're reporting to the PPSC about Deborah Ferens?
>
> A. I'm getting this information from my interviews with the auditor that goes into finalizing his witness report and this T2020 notes as the starting point.

[228] He also admitted in cross-examination that he did not mention Mr. Finlay's interview with Ms. Ferens in his direct testimony, despite having reviewed Mr. Finlay's notes in the week prior to this trial:

> Q. Mm-hmm. Have you read the Terry Finlay notes of Deborah Ferens' interview prior to attending court and testifying in chief?
>
> A. I have read all these binders that you provided for me -
>
> Q. Yes or no, sir, if you could?
>
> A. Yes, I read through every tab of information provided to me.
>
> Q. All right. So the existence of the Terry Finley interview of Deborah Ferens was fresh in your mind at the time you took the stand; correct?
>
> A. It wasn't fresh in my mind, but I had read it in the prior week.

[229] His explanation for his failure to mention Ms. Ferens' second interview at any time in the criminal prosecution was that he had other evidence he considered sufficient, which I take to mean the "material facts" set out above. These facts amount to no more than a suspicion, a theory, and cannot be said to constitute reasonable and probable grounds for Mr. Kendal to believe he could prove the plaintiffs' guilt beyond a reasonable doubt.

[230] I conclude that despite what he said in his Prosecution Report, Mr. Kendal understood that the theory that only two till tapes were being reported could not be proved by the sales summary sheets and that Ms. Ferens could not testify to that. He clearly appreciated that the summary sheets could include information from three ring-offs or shifts. In his evidence he confirmed that he knew the daily sales summary sheet showed two columns of data but did not know how many till tapes it represented and in particular whether it represented two or three till tapes or shifts.

[231] I am satisfied this conduct is consistent with Mr. Kendal's earlier misstatement of Ms. Ferens' evidence and demonstrates his continued attempts to conceal the existence of the Finlay interview because its exposure would destroy the Crown theory. The evidence of Ms. Ferens was required to prove the funds in question were unreported income. Her evidence was essential to prove the *actus reus*, that is the overt acts of the alleged offences of tax evasion. Mr. Kendal knew that he did not have reasonable and probable cause to believe that guilt could be proved beyond a reasonable doubt based on the evidence he wrongly attributed to Ms. Ferens.

[232] However, it is also important to address Ms. Ye's evidence because, as mentioned, at trial the defendants' characterization of the *actus reus* changed. Since the evidence of Ms. Ferens would not prove the Crown's case, Mr. Kendal turned to Ms. Ye.

[233] I have previously outlined the sequence of interviews of Ms. Ye by Mr. Kendal. During the first two interviews, Ms. Ye only mentioned the use of a single daily sales summary report sheet with columns labelled "day", "night" and "days total". Ms. Ye did not mention anything about a second daily summary sheet in those interviews.

[234] However, in her third interview in February 2010, Ms. Ye apparently changed her story and said there were two daily sales summary sheets prepared each day, leading to the implication that the plaintiffs were not reporting a second sheet setting out the graveyard shift income.

[235] Mr. Kendal testified in cross-examination that the first time the existence of the second daily summary sheet entered his mind was when Ms. Ye disclosed it during this interview. However, in cross-examination Mr. Kendal was confronted with the 2010 will-say of Ms.

Ferens, which was typed up before Ms. Ye's third interview, and in which Ms. Ferens was purported to have corroborated Ms. Ye's new evidence by saying she only ever received one daily summary sheet for each day. The notes of Ms. Ferens' final interview with Mr. Kendal disclose that she was never asked how many daily sales summary sheets she received.

[236] Mr. Kendal attempted to explain this problem by testifying that after he was told about the existence of a second sheet, he went back and altered Ms. Ferens' will-say to include the corroborative statement. This is a misrepresentation of Ms. Ferens' testimony. It appears to have been an attempt to corroborate the evidence of Ms. Ye respecting the new theory that there were two daily sales summary sheets.

[237] If this new theory were true and Ms. Ferens only received one of two daily summary sheets, the result would be that it was the income from the graveyard shift that was not being reported, as opposed to the more lucrative day and afternoon shifts. This is problematic because it means it would be impossible for the defendants to prove the plaintiffs evaded taxes in the amount set out in the Information and the Prosecution Report.

[238] I find that Mr. Kendal continued to pursue the prosecution based on a theory he knew that he could not prove, and then by proceeding on a theory that could not be corroborated he significantly overstated the degree of the plaintiffs' alleged tax evasion. I conclude that objectively Mr. Kendal did not have reasonable and probable grounds to believe that he could prove the *actus reus* of the offence of tax evasion against the plaintiffs beyond a reasonable doubt.

[239] Turning now to Mr. Brian Jones. Mr. Jones testified that after learning of Ms. Ye's new evidence respecting the "missing sheet", he did not think this meant the graveyard shift was likely not being reported. He said he did not turn his mind to how that would have affected the calculation of the quantum alleged to have been evaded. It is difficult to understand how he could have not concluded that it was the graveyard shift that was not being reported based on Ms. Ye's new allegation.

[240] As I have said, the allegation made by the defendants all along was that the plaintiffs and their corporations evaded tax in the tax years 2004 and 2005 by failing to provide one of the three daily till tapes to Ms. Ferens, resulting in a personal enrichment of about $50,000 per month. When Mr. Brian Jones learned of Ms. Ye's new evidence, it should have been apparent that he could no longer prove the charges as they were alleged. This also should have been clear given Mr. Jones knew of the Finlay interview.

[241] As is evident from these reasons, when the charges were laid the defendants lacked evidence of the overt acts or *actus reus* of tax evasion. The only inculpatory evidence of the

*actus reus* that Mr. Kendal included in the Prosecution Report were his own views of what he hoped Ms. Ferens would say. Unfortunately, this lack of evidence was not remedied throughout the course of the investigation and prosecution. The defendants did not have the till tapes or daily sales summary sheets from tax years 2004 and 2005. They did not have evidence that Ms. Ferens only received two out of three till tapes. In 2010, they had Ms. Ye's evidence that allegedly there were two daily summary sheets, but even then had no means with which to corroborate or substantiate this allegation, nor to reconcile it with the quantum of the plaintiffs' alleged evasion.

[242] As Ms. McLean recorded in her notes of her telephone call with Mr. Kendal dated January 10, 2008: the CRA could prove the plaintiffs had the money, but not anything about whether it was skimmed, when it was skimmed, from which corporation it was skimmed, nor how the plaintiffs did so. The theory of the prosecution was founded on an assumption, which could not be proved. Neither the CRA nor Mr. Brian Jones ever advanced a theory of *how* Mr. Samaroo may have altered the summary sheets to skim the cash component, but still account for debit and credit sales. When Mr. Brian Jones told the court that Mr. Samaroo did so with "magic", his failure to have properly assessed his ability to prove the mechanics of the *actus reus* of the offences is apparent.

[243] In addition I note there was never an explanation given as to how Ms. Helen Samaroo may have been involved in this alleged scheme of evasion.

[244] To summarize, the defendants had no evidence to prove, and knew they could not prove, whether the plaintiffs were providing only two of the three till tapes to Ms. Ferens, or which of the three till tapes. This meant they could not prove the *actus reus* of the offence of tax evasion, nor could they ever hope to prove the quantum of the evasion. As in *Proulx,* the charges against the Samaroos were founded on an assumption, and grounded in mere suspicion and hypotheses, which did not and could not constitute reasonable and probable cause as that term is uniquely defined in the tort of malicious prosecution.

[245] This prosecution should never have proceeded. It was undertaken without reasonable and probable cause. The third element required by *Miazga* is satisfied as against all defendants.

**Discussion of Malice**

[246] The plaintiffs submit that the defendants were motivated by malice or they had a primary purpose other than carrying the law into effect.

[247] The claim of malice starts with Mr. Kendal's initial response to the investigation. From its inception he rejected the explanations of the plaintiffs for their accumulation of cash. He

rejected the explanation of their accountant, Mr. Heese. His response to their explanations was to plan “to deflect the defence of a lifetime of savings” and to “defuse” their position. He did not start from a neutral position and then see where his investigation might take him. Rather, he had his mind made up from the beginning and set out to have the plaintiffs charged and convicted. His sole interest was to collect incriminating evidence and to discount or ignore evidence that did not support his prejudgment. He saw his investigative task as not to fairly examine and report the evidence of the plaintiffs but instead to discredit it.

[248] I am satisfied that he was and remains convinced that the plaintiffs had misappropriated $50,000 per month in revenue from their restaurant. He testified that he still believes the plaintiffs are guilty of tax evasion and would, if given the chance, prosecute them again on the same theory and the same evidentiary basis:

> Q. Sir, today is it your belief that the Samaroos are guilty of the offences set out in the information that was before the provincial court judge?
>
> A. The information you mean as charges sworn?
>
> Q. Yes.
>
> A. Yes.
>
> Q. Sir, you have absolutely no remorse for what you’ve done, do you?
>
> A. I have objectively done the job that’s assigned to me.
>
> Q. Is that “No, I have no remorse”?
>
> A. I have no remorse.

[249] Mr. Kendal developed a theory of how the tax evasion had occurred. That theory was that one shift’s income was not being reported. He determined that was being done by means of only two till tapes representing two shifts being provided to Ms. Ferens. He became aware however there was a problem proving that only two till tapes were being provided given the statement Ms. Ferens provided to Mr. Finlay. As I noted above in the discussion on reasonable and probable grounds, it was clear that allegation could not be proven through her, based on the Finlay interview which Mr. Kendal failed to disclose to the PPSC and intentionally tried to supress.

[250] In this way, Mr. Kendal misled Ms. McLean by telling her that the bookkeeper had yet to be interviewed on the issue of proof of her only receiving two till tapes. Ms. McLean had asked him to interview the bookkeeper and seek answers to some very specific questions respecting the till tapes. He agreed to do so.

[251] When he sought to interview Ms. Ferens and Mr. Heese in February 2008, Mr. Heese wrote to him saying that such requests for information should be directed through their lawyer.

As I mentioned earlier, Mr. Kendal's evidence in direct was that Mr. Heese and Ms. Ferens outright refused to be interviewed. When asked about submitting the request through their lawyer he stated he did not want to proceed in that manner. Given the very specific questions asked by Ms. McLean Mr. Kendal provided no good reason for not submitting such questions to Ms. Ferens through her lawyer.

[252] When informing Ms. McLean of the situation Mr. Kendal only told her that Ms. Ferens did not want to be interviewed. He did not mention the offer to provide the information through her lawyer. He also continued to fail to disclose the second interview of Ms. Ferens. Mr. Kendal's concealment of the second interview is reflected in his reports not only to the PPSC and defence counsel but also to his own team leader, Mr. Alan Jones. Mr. Kendal's conduct was inexcusable. He was well aware of the reliance that would be placed on his investigation and resulting report yet subverted the prosecution by supressing evidence and attributing evidence to others that he created.

[253] I find that Mr. Kendal attempted to conceal the existence of the Finlay interview during his testimony before this Court for two reasons:

a) First, to mitigate the negative affect the evidence would have on the Crown's case; and,

b) Second, to conceal his own wrongdoing in investigating and initiating the prosecution of the plaintiffs.

[254] That failure was further exposed by the manner in which he dealt with the 2010 witness statements of Ms. Ye and Ms. Ferens. As noted above, he altered Ms. Ferens' will-say to reflect the new evidence given by Ms. Ye in her third interview. He forwarded these will-says to Mr. Brian Jones on March 3, 2010.

[255] In addition to the above the evidence of Mr. Kendal raised more general concerns. Those concerns relate to his credibility generally and his views of the guilt of the plaintiffs.

[256] Mr. Kendal had a curious approach to witness interviews stating he writes down what he expects the witness to say and as noted above will update earlier witness statements where appropriate without further discussion with the witness. This fundamentally undermines the purpose of a witness statement, that is, to record the evidence of a witness.

[257] Proof of malice requires proof on a balance of probabilities that in the role of an investigator, Mr. Kendal acted deliberately to subvert and abuse his office. I find that he did so. He did so by supressing evidence and attributing evidence to witnesses that was not accurate. He had decided from the beginning of his involvement with the Samaroos that they were guilty and set out to prove that was the case even if to do so required a breach of his proper role and

responsibilities. He knowingly misstated evidence essential to the proof of the *actus reus* despite being aware of its importance, filed a misleading report knowing it would be relied upon to authorize the prosecution and then having achieved that end swore the Information all in the hope of convicting the plaintiffs. His purpose was improper. I am satisfied that malice has been vicariously established as against the CRA as a result of the conduct of Mr. Kendal.

[258] As a witness, I found Mr. Kendal to be argumentative, evasive, inflexible and reluctant to concede what clearly should have been conceded. He wrote the Prosecution Report as an advocate not an investigator. He presented the evidence in a way designed to mislead both the PPSC and Mr. Brian Jones. His clear intent was to see that criminal charges were laid. The presumption of innocence appeared to be meaningless to him. The manner in which he approached the evidence was not objective. He had his theory and he then sought to prove it.

[259] There is also evidence that Mr. Kendal's approach may indicate an unfortunate culture within the CRA. For example:

a) Mr. Alan Jones wrote in his Primary Report that two other factors related to the case being selected for a full investigation:

    i. The restaurant and night club industries were those with a high rate of non-compliance; and,

    ii. CRA had not prosecuted a business in the restaurant or nightclub industry in the Nanaimo area recently.

b) Then, when the charges were laid and reported in the local paper on August 27, 2008, Christopher Gibson of Mr. Brian Jones' office emailed Mr. Kendal a copy of the newspaper coverage of the charges published in the Nanaimo Daily News. The next day, on August 28, 2008, Mr. Alan Jones wrote to Mr. Brian Jones and said: "Front page of Wednesday's Nanaimo Daily News. I can't wait to read the edition after the guilty verdict".

c) In email correspondence between Mr. Alan Jones and Mr. Brian Jones respecting the number of counts in the information Mr. Alan Jones wrote:

    Besides, after 85 charges, doesn't a guilty verdict call for a guillotine?

d) The CRA seeks to publicize convictions for tax evasion: "to draw attention to the consequences of tax evasion and fraud" (Canada Revenue Agency, *The Criminal Investigations Program*, online: Compliance <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/criminal-investigations-program.html>) On the same website page, the CRA boasts under the

> heading “Getting [R]esults” that in 2016-2017 federal prosecutors working with the CRA’s criminal investigations department had an 89% conviction rate. The CRA also advertises that from April 1, 2016 to March 31, 2017, the CRA obtained convictions of 37 taxpayers, and court sentences totaling about $10 million in fines and 50.6 years of prison time. One can even “subscribe” to receive enforcement notifications from the CRA, and they will email you when they add or update an enforcement notification on their website (Canada Revenue Agency, *Enforcement Notifications: Compliance Actions*, online: CRA Newsroom <https://www.canada.ca/en/revenue-agency/news/newsroom/criminal-investigations-actions-charges-convictions.html>).

[260] I turn next to the alleged malice of Mr. Brian Jones.

[261] As discussed Mr. Brian Jones prosecuted the tax evasion charges in the Provincial Court of B.C. He is an experienced criminal lawyer having practiced in the field since 1977. The plaintiffs’ allegations against Mr. Jones are that he failed to bring an independent mind to charge approval and to the sentence sought should a conviction be obtained. The plaintiffs submit that he simply used his position to do the bidding of the CRA and failed to stand as an independent officer between the wishes of the CRA and the criminal justice system. They allege as well that he subverted the office of the Attorney General for financial gain.

[262] The manner in which charge approval proceeded has been explained. I am satisfied that Mr. Brian Jones failed to independently assess the proposed charges in accordance with the obligations of Crown counsel. As noted earlier no memorandum addressing the applicable requirements was prepared. Instead the drafting of the Information was primarily left to the CRA, Mr. Alan Jones and Mr. Kendal. The manner in which the charges were finalized and pursued appears contrary to the *FPS Deskbook* warning referred to earlier that counsel should fulfill their duty “by not becoming simply an extension of a client department or investigative agency”.

[263] The plaintiffs submitted there are inherent dangers that arise where prosecutors are hired on contract as opposed to being full-time government employees. They note the risk that hired agents will be motivated to maximize profit and that they will face competing duties to the department they are dealing with and their obligations as Crown counsel. They note that Mr. Brian Jones and his firm’s billings for their work as Crown agents for the years 2008-2015 represented 100% of their work during those years. Those billings ranged from a low of $1.2 million per year to a high of $2.7 million per year. They submit as a result Mr. Brian Jones had an incentive to conduct prosecutions to increase his profits and to satisfy the PPSC and the CRA who had the power to refer or not refer cases to him depending on his performance. They note it was Mr. Kendal who actually approved Mr. Jones’ accounts for payment.

[264] Thus the plaintiffs rely on the allegation that because Mr. Brian Jones relinquished his independence, was in a financial position of conflict of interest and suppressed key evidence, his conduct falls at the highest end of the spectrum of blameworthiness and constitutes malice. They submit he sought to secure a conviction at any cost by misleading the court and the defence and that he did so by putting his office to the service of the CRA.

[265] I turn first to the allegation that Mr. Brian Jones supressed critical evidence.

[266] In his closing submissions to the Provincial Court Mr. Brian Jones did not mention Ms. Ferens' unreported till tape theory that had so recently, and for the previous two years, been the clear, "black and white" theory of the Crown and for the first time took the position that the overt acts being alleged by the Crown were now based on the evidence of Ms. Ye:

> Mr. Brian Jones: Well, I'm sorry, Your Honour, I haven't -- obviously I haven't been effective in advising you what the theory about this all came about is, as it's -- it's our theory that there were three shifts –
>
> The Court: And three columns?
>
> Mr. Brian Jones: There were two separate pieces of paper.
>
> The Court: And you're basing that on what Ms. Ye has to say?
>
> Mr. Brian Jones: I am.
>
> The Court: And so you're saying that they came and removed the proceeds from the third shift and the second piece of paper, that's what the Crown's theory is, that the Samaroos took all the proceeds from the third shift, cash, debit, credit, all those, cheques and everything else, and removed the second piece of paper so that they could take all of those proceeds? It doesn't make sense because surely the debit and the credit has to match up with the bank statements and all of that sort of thing.
>
> Mr. Brian Jones: They do.

[267] In an effort to explain the overt acts by which the Samaroos were alleged to have committed tax evasion Mr. Brian Jones submitted it was "magic":

> Now, it's true that Ms. Ferens received one bag per day, but there were three bags going into the back office, which was where Mr. Samaroo did his magic with the cash.

[268] Troublingly, Mr. Brian Jones testified in cross-examination that in his mind there was no difference between the information set out in the Prosecution Report regarding the evidence of Ms. Ye and Ms. Ferens, and the contents of their 2010 will-say statements and interview notes. He testified that he did not turn his mind to the concept of whether the Crown could prove that Ms. Ferens only received two of the three till tapes without the evidence attributed to her by Mr. Kendal in the Prosecution Report. Nor did he turn his mind to the implications of the maximum cash that could have been misappropriated if it were the graveyard shift that was being unreported. He went so far as to testify that Ms. Ye's evidence did not mean that it was

probably the graveyard shift that was not being reported.

[269] When put to him that if it was the graveyard shift not being reported that would only account for about $500 per day or $240,000 unreported income over these years he stated:

> Q. All right. So on the Ye evidence you could prove a misappropriation of a total of $240,000; right? On the Ye evidence?
>
> A. If I was going just on her evidence and not on the analysis done by Mr. Kendal with all the bank records?
>
> Q. Right.
>
> A. I don't know. I never approached it from that angle.
>
> Q. But when you were aware what she was going to testify to, didn't you say to yourself, "Where in the world am I going to come up with the $1.7 million? Where did the money come from?"
>
> A. No, I didn't have that thought in my head.
>
> Q. Where did you think the money came from?
>
> A. The money came from the underreporting of income from the restaurant, payment for wages, and supplies in cash.
>
> Q. No, sir. Where did it come from? How did they take it from the restaurant? How did they take $1.7 million over two years from that restaurant?
>
> A. The actual mechanics, it's – we know that Deborah Ferens didn't get all the information from the restaurant. She did enter the information she received into her spreadsheet, which found its way into the tax returns. Mr. Kendal in his analysis was able to show there was a lot more money coming into the corporation, going into the personal accounts – by money I mean cash, so we didn't have anything in terms of source documents from the audit period. So we knew what had happened. Precisely how it had happened, I don't think we had that information.
>
> Q. So you knew there was $500 -- approximately $500,000 cash going into the personal account, $500,000 going into the corporate account, but you couldn't prove exactly how it came from the restaurant to get there; is that right?
>
> A. Well, we – we could show that the information came from Mr. Samaroo via the daily cash report to Ms. Ferens, and Ms. Ferens took that information and put it into the tax return. We can show that.
>
> Q. Right. You could show the information came from Samaroo to Ferens?
>
> A. Yes.
>
> Q. It came from Samaroo to Ferens, we know, on the cash sales summary sheet. We know from Ye that it was only the graveyard shift that wasn't being reported; correct?
>
> A. No, I wouldn't go that far.

[270] What was required to prove the *actus reus* based on the evidence of Ms. Ferens was clearly a problem for the prosecution. However, Mr. Jones' reliance on the "analysis" of Mr.

Kendal obscured the problem of proving the mechanics of the *actus reus*. In addition it was equally clear that suddenly relying on the new "second sheet" theory completely undermined the theory of $50,000 a month not being reported given it depended on non-reporting of the graveyard shift which produced approximately $500 per day in cash sales. Yet again the reliance on Mr. Kendal appears to have caused Mr. Jones to believe that they could still prove the case in a manner similar to the defence position on this trial.

[271] Mr. Brian Jones had opened the Provincial Court trial and conducted the trial on the basis that there was a missing till tape not delivered to Ms. Ferens. It was only on the last day of trial in his closing that Mr. Brian Jones asked the court to prefer the evidence of Ms. Ye.

[272] The plaintiffs submit that the reason Mr. Brian Jones proceeded to trial on the till tape theory was to set the stage for the excuse, when he ultimately relied on Ms. Ye's evidence, that he had first heard her new theory when she testified, which is what he said during his examination for discovery. The plaintiffs submit that Mr. Jones answered in the way that he did because he had prepared this answer for Judge Saunders in anticipation of being asked why, after all his previous assurances that the Crown was relying on the missing till tape theory, he was now advancing the missing sales summary sheet theory.

[273] As I have noted Ms. McLean was really the only one who recognized from the beginning the need for proof of the *actus reus*. Because of Mr. Kendal and his misleading Report, those eventually responsible for authorizing the charges were lulled into a complacent acceptance of his Report as sufficient to justify the charges. Simultaneously there was a failure to properly assess the matter and to fulfill the charge assessment and approval obligations of the Crown.

[274] Regarding Mr. Brian Jones and the issue of disclosure that arose during the trial the plaintiffs submit that the particulars eventually provided in that context were designed to obscure rather than particularize the overt acts that the Crown was required to prove. The plaintiffs submit this was done in the hope that Ms. Ye's evidence would form a basis for a conviction without having to disclose the existence of either Ms. Ferens' or Ms. Ye's 2010 interview statements. The allegation is that Mr. Brian Jones knew full well that he was at that point going to rely on the missing sales summary sheet rather than the missing till tape theory. The plaintiffs submit this was a deliberate deception of both the Court and the defence and as such is evidence of malice.

[275] It is difficult to understand how Mr. Brian Jones could plausibly have learned about Mr. Ye's evidence and not conclude that if any shift was not being reported, it was the graveyard shift. The plaintiffs submit that Mr. Jones' testimony in this regard is not true and that Mr. Jones was prepared to pursue a conviction against the Samaroos on the original theory of the case, no matter the evidence or the cost to the Samaroos. As such they submit this is also evidence

of malice.

[276] The plaintiffs also refer to an incident that occurred while the trial was ongoing. Ms. Ye testified in the criminal trial on December 13, 2010. Professor Chris Tollefson, co-counsel for Helen Samaroo at the criminal trial, testified that on the morning of December 13, before Ms. Ye had testified, defence counsel attempted to interview her at the Nanaimo Courthouse in an interview room. During the interview, Mr. Brian Jones abruptly entered the interview room and interrupted the interview, stating words to the effect of “What’s going on here? She’s *my* witness!” [Emphasis added.] In cross-examination, Brian Jones said that he did not recall saying those words but he would not deny that he had interrupted the interview or said those words.

[277] The inconsistencies and apparent poor recollection of Mr. Jones are concerning and undermine the reliability of his evidence. The evidence reveals a casual inattention to exercising his prosecutorial role and responsibilities. I find that he too readily left control of the prosecution, disclosure and decision making to his client, the CRA. In addition, it appears he may not have had a full understanding of this case. In an email to Ms. Hyman Mr. Brian Jones said that he “barely grasp[ed]” the “concepts involved in this particular case, like shareholder loans”.

[278] I am not satisfied that his conduct was the result of his status as an *ad hoc* agent and his financial dependence on such employment. The plaintiffs relied on materials from the United States respecting the issue and I am not satisfied that the concerns expressed apply to the use of *ad hoc* Crown in British Columbia or to the circumstances of this case. In any event I conclude it has not been established that Mr. Brian Jones pursued the prosecution for such an improper purpose.

[279] As was noted in *Miazga* at para. 8:

> [8] The high threshold for Crown liability was reiterated in *Proulx*, where the Court stressed that malice in the form of improper purpose is the key to proving malicious prosecution. In the context of a case against a Crown prosecutor, malice does not include recklessness, gross negligence or poor judgment. It is only where the conduct of the prosecutor constitutes "an abuse of prosecutorial power", or the perpetuation of "a fraud on the process of criminal justice" that malice can be said to exist (paras. 44 and 45).

[280] In my view it has not been established that Mr. Brian Jones intentionally sought to abuse or distort the role of a Crown prosecutor. This prosecution proceeded on the investigation and reports of Mr. Kendal, and as a result of changes in responsibility for the file at the PPSC as well as Mr. Brian Jones’ failure to fulfill all of his obligations respecting the charge approval process, charges were “approved” without the PPSC or Mr. Brian Jones

fulfilling their respective prosecutorial responsibilities.

[281] In addition, while Mr. Brian Jones failed to disclose the 2010 will-say statements of Ms. Ferens or Ms. Ye, and changed his argument during the trial from one based on missing till tapes to one based on missing summary sheets, I do not think that he had an improper motive in doing so, nor that this conduct rose to the level of malice. He struck me as a lawyer, who, through negligence or otherwise, gave up control of the prosecution to Mr. Kendal and the CRA and in so doing risked a miscarriage of justice. However, a failure to act properly as a result of negligence or a lack of understanding of the issues or a failure to properly exercise prosecutorial discretion does not in itself amount to malice.

[282] In summary, I conclude the plaintiffs have not established the necessary element of malice as against Mr. Brian Jones and his corporation.

**_Charter_ Claim**

[283] The plaintiffs submit that Mr. Kendal and the CRA intentionally sought to prosecute and convict the plaintiffs in breach of their rights under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

[284] The defendants submit that where s. 7 *Charter* claims are made on the same facts as a malicious prosecution claim they stand or fall together: *Skandarajah v. Canada (Attorney General)* (2001), 109 A.C.W.S. (3d) 403 (Ont. Ont. S.C.J.) at para. 33; and *Oniel v. Toronto (Metropolitan) Police Force* (1998), 39 W.C.B. (2d) 503 (Ont. Gen. Div.) at paras. 49 and 51.

[285] Section 7 of the *Charter* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[286] The interests protected by s. 7 of the *Charter* were described by Justice Lamer in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123 at pp. 1172-3:

> The state can deprive individuals of life, liberty and security of the person if it is done in accordance with the principles of fundamental justice. In my view, the principles of fundamental justice can provide an invaluable key to determining the nature of the life, the liberty and the security of the person referred to in s. 7. The principles of fundamental justice are principles that govern the justice system. They determine the means by which one may be brought before or within the justice system, and govern how one may be brought within the system and thereafter the conduct of judges and other actors once the individual is brought within it. Therefore the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration.

[287] Those rights guaranteed by s. 7 are part of broader, more general values which underlie all of the rights guaranteed by the *Charter*. This was stated by the Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

[288] In the context of a malicious prosecution, the Court in *Nelles* stated at p. 194:

> Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*.

[289] As I have found the CRA initiated the prosecution of the plaintiffs when it was wrongful to do so, their s. 7 *Charter* rights have been breached. Mr. Kendal suppressed exculpatory evidence from the defence, and created inculpatory evidence in an effort to secure a conviction. The CRA used the powers of the State in the form of a criminal prosecution to wrongfully and maliciously prosecute the Samaroos.

## Damages

[290] The plaintiffs seek special damages of $347,731.74 for out-of-pocket expenses including legal fees to defend themselves against the malicious prosecution, aggravated damages of $500,000 each, punitive damages of $6,000,000 or *Charter* damages of $6,000,000. Those sums are premised on findings of malicious prosecution against both the CRA and Mr. Brian Jones and his corporation. As a result their damages claim is a total of $7,347,731.74.

### Findings of Fact Relating to Damages Claim

[291] The impact of the tax evasion charges and the resulting publicity on the plaintiffs and their children was significant and long lasting.

[292] Their daughter Tricia Miller testified that she grew up in Nanaimo and that the family home was very lively and "joyous" growing up. It was a hub of family activity for their extended family. The charges changed that. She withdrew from people and stopped using the surname Samaroo because of its association with the criminal charges. She said her parents became

very quiet and depressed and that her mother showed signs of anxiety. She noted that the restaurant had a special section for RCMP officers and first responders who frequented it but after the charges they stopped coming. Her father ceased working as much and became quiet and reclusive and drank more. She described how the acquittal had no appreciable effect on her parents. Her father has become lethargic, will not socialize and has started chain-smoking. In summary she described the significant negative impact on her parents and the destruction of the life they had built together both in their businesses and home.

[293] Kevin Samaroo, the plaintiffs' son, confirmed his sister's evidence noting that his father deteriorated and his mother was extremely embarrassed by the charges. He described how the family name despite the acquittals was forever damaged. He described his mother as a shell of who she was before, as she would not go to work and would stay in bed all day as she was too embarrassed to go to work or out in public.

[294] Helen Samaroo testified that her life was turned upside down by the charges. She felt that others now looked at her differently and she felt embarrassed to go to the restaurant and visit with her customers. She said she had worked hard to build up her reputation as a reputable nightclub operator and felt that the charges had ruined her reputation. She testified that the charges had a significant impact on her husband who became stressed and got quieter and quieter and over time worked less and less and stopped socializing. He had cut down on drinking before the charges but began again after they were laid. She said he was smoking more and had lost weight. She said that the charges had a profound effect on their family life and their house ceased being a hub of family life and became quiet. After the acquittal she had a breakdown and she took to bed for about six months. She said that even with the acquittal she will never feel the same again.

[295] Tony Samaroo testified that because of the charges he had to spend $347,731.74 for him and his wife and their corporations' legal expenses defending themselves. He testified that he has lost his spirit and his strength. He explained how he used to be very ambitious and worked to grow and expand the businesses. He said that as a result of the charges everything was put on hold. While he had spent years building a good credit rating, after the charges he tried to take out a loan to upgrade the motel but was refused and was told his credit was "shot". He confirmed that his wife has never been the same since the charges and he now feels like a different person as well.

[296] He testified that after the acquittal things did not get better and he does not believe he will ever regain his strength. He spends his days watching TV and no longer socializes. He is drinking and smoking more. He prefers to keep to himself. He and Ms. Samaroo no longer live together.

**Law of Damages**

[297] The defendants refer to a number of cases illustrating the range of damages awarded in malicious prosecution cases, noting that such cases often address general, aggravated and punitive damages. They referred to: *Simon v. Toronto Police Services Board*, [2002] O.J. No. 5933 (Ont. S.C.J.); *Parsons v. Woodfine* (2009), 178 A.C.W.S. (3d) (Ont. S.C.J.); *Griffin v. City of Summerside et al*, 2006 PESCTD 15, aff'd, 2008 PESCAD 14; *Johnson v. Coppaway*, 2004 CanLII 9755 (Ont. S.C.J); *Dix v. Canada (Attorney General)*, 2002 ABQB 580; *Oniel v. Toronto (Metropolitan) Police Force* (2001), 102 A.C.W.S. (3d) 832 (Ont. C.A.); *Proulx v. Quebec (Attorney-General)*, 2001 SCC 66; *Klein v. Seiferling*, [1999] 10 W.W.R. 554 (Sask. Q.B.); *Ferreria v. Marcos*, 2015 ONSC 1536; *Pearson v. Mian* (2006), 153 A.C.W.S. (3d) 112 (Ont. S.C.J.); and *Fedorowicz v. Pace Marathon Motor Lines Inc*. (2006), 145 A.C.W.S. (3d) 445 (Ont. S.C.J.).

[298] The defence relies on these cases to establish what they say are the various ranges of damages in malicious prosecution cases. The range established by these cases for general or aggravated damages is $4,000 to $250,000, with most cases falling between $25,000 and $50,000. For punitive damages the range established by these cases is $5,000 to $200,000.

[299] In each case, the court made an award of damages based on the specific facts of that case, and none of the cases are factually analogous to the case at hand.

[300] The defence submits that relevant factors considered in assessing damages include:

a) The nature of the charges and their seriousness and the social stigma arising;

b) Whether the charges were known to be false;

c) Whether the plaintiff was arrested, where it occurred and who was present;

d) The time spent in custody and its effects;

e) The impact of the charges on the mental state of the plaintiff;

f) How widely information about the charges was publicized;

g) Whether the charges were disposed of by stay or acquittal and the length of time those charges were outstanding without reasonable and probable cause;

h) The impact of the charges on the accused's family, work and social relationships;

i) Other amounts awarded under different heads of damage; and

j) The conduct of the defendant towards the plaintiff.

[301] The defendants submit that the relevant factors to be applied in assessing damages for each plaintiff in this case are therefore:

a) Tax evasion charges, while serious, do not carry the social stigma that violent offences do;

b) The plaintiffs were not arrested;

c) The plaintiffs did not spend any time in custody;

d) The time from the laying of charges to acquittal was about 35 months, however depending on the findings of the court as to when the malicious prosecution arose, this time frame may be shorter;

e) While the fact that the plaintiffs were charged was publicized, so was their acquittal;

f) There are no allegations that the information in the Prosecution Report about the differences in income between the pre- and post-audit period was false;

g) There are no allegations that the information in the Prosecution Report that cash used and deposited by the plaintiffs did not come from bank accounts or shareholder repayments by the companies was false;

h) There are no allegations that the information given by Mr. Samaroo at the trial as to the source of cash funds was known to any of the defendants beyond his statement, provided by himself and his representatives, that he had historic savings;

i) There is no evidence that the defendants were aware that Mr. Samaroo and Ms. Ye had an affair before that information came out in cross-examination at trial (this factor related to Ms. Ye's credibility as assessed by the Provincial Court Judge);

j) The allegations did not affect the plaintiffs' ability to continue their businesses; and

k) There is no evidence of express malice towards the plaintiffs.

[302] The plaintiffs, for their part, rely on the following cases respecting the award of damages sought (among others): *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130;

*Arsenovski v. Bodin*, 2016 BCSC 359; and *Henry v. British Columbia (Attorney General)*, 2016 BCSC 1038. In *Hill*, the Supreme Court awarded $300,000 in general damages, $500,000 for aggravated damages, and $800,000 for punitive damages. In *Arsenovski*, the plaintiff was awarded $30,000 in general damages and $350,000 in punitive damages against ICBC. In *Henry*, the court awarded $530,000 in compensatory damages pursuant to s. 24(1) of the *Charter*, and $7,500,000 to address the vindication and deterrence functions of a s. 24(1) damages remedy.

***Special Damages***

[303] Special damages are pecuniary damages designed to compensate a plaintiff for their out-of-pocket expenses. In *Arsenovski*, Justice Griffin, as she then was, awarded the plaintiff her legal fees and disbursements arising from defending herself in the criminal case (para. 362).

***Discussion***

[304] Although initially in dispute the defence conceded the legal fees billed related to the criminal defence. The legal fees and disbursements of the plaintiffs expended in defending themselves on the tax evasion trial totalled $347,731.74. The plaintiffs are entitled to special damages in that sum against the CRA.

***General and Aggravated Damages***

[305] In *Pearson*, referred to by the defendants above, the court assessed damages on an award for malicious prosecution of a police officer. The officer sought damages for emotional shock and distress, damages to his dignity, reputation and emotional injury and for the risk of imprisonment because of the false accusations made against him. The court thus considered general damages in the context of a malicious prosecution claim:

> [27] Three heads of general damages for malicious prosecution were established by Holt C.J. in the case of *Savill v. Robert* (1698), 1 Ld. Raym. 374 at 378; 91 E.R. 1147 at 1149. They are:
>
> a) damages to a person's "good name, fame, credit and esteem";
>
> b) damages to the person which include an emotional reaction to the prosecution and the risks attendant thereto; and
>
> c) damages to property, which generally refers to financial loss due to mounting a defense or loss of earnings.
>
> [28] General damages for malicious prosecution are awarded in a manner similar to general damages for defamation. Where a case of malicious prosecution is established, those who advance the malicious prosecution are liable for compensation for the moral damage caused both by the false charge and by the false arrest, in addition to compensation for the Plaintiff's monetary losses.

[29] The appropriate quantum for general damages must be determined on its own merits by taking into account the particular facts of each case. For the purpose of determining the appropriate measure of damages based on these particular facts, I have reviewed other cases where a Plaintiff has successfully sued for malicious prosecution and compared the harm suffered by the plaintiffs in those cases, with the facts in the case at hand.

[30] Mr. Danson suggested that the damages awarded in this case should be comparable to the damages jury awarded by the jury to Casey Hill (as he then was) in *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 as, in his view, this allegation of police brutality motivated by racial hatred was "as bad as it gets".

[31] I do not agree. The materials facts in the *Hill* case are distinctly different from the facts in this case, and entirely distinguishable.

[32] The allegation in the *Hill* case was that a young Crown attorney had mislead a judge and had participated in or aided and abetted others in the opening and inspection of documents which, to his knowledge, were to remain sealed.

[33] In the *Hill* case, long before he gave evidence to the OPP in connection with the matters in issue, Scientology kept a file on Hill and had labelled him "Enemy Canada".

[34] A press conference was held on the court house steps. The CFTO broadcast was seen by approximately 132,000 people. The CBC broadcast was seen by approximately 118,000 people. Approximately 108,000 copies of a Globe and Mail article were circulated. All repeated the allegations.

[35] Even after contempt charges against Hill were dismissed, Scientology moved to disqualify Hill, suggesting that he would use his position to further his private interest. Scientology continued its attack throughout the trial.

[36] At paragraph 184, Cory J., for the majority held that:

> In considering and applying the factors pertaining to general damages in this case, it will be remembered that the reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The insidious harm of the orchestrated libel was indeed spread widely throughout the community.

[37] The jury granted a large award for general damages because of the wide dissemination of the false information and the fact that despite their knowledge of its falsity, the appellants continued to publish the libel. As stated by Cory J. at paragraph 187, "This particular case is in a class by itself."

[38] In *Botiuk v. Toronto Free Press Publications Ltd.* [1995] S.C.J. No. 69 (S.C.C.), on the other hand, the Supreme Court of Canada upheld an award of combined general, aggravated and present value future pecuniary loss in the amount of $140,000 where a lawyer had reached "a high pinnacle of success" and the attack upon his reputation had severely damaged his health, family relationships, practice, professional and business connections, and social life. The trial judge found Botiuk had been known for twelve years and would be known for many years yet, as "the lawyer who took or kept $10,000 from that community".

[39] In the trial judgment of *Proulx c. Quebec (Procureur général)*, [1997] R.J.Q. 2516 (C.S. Que), Letarte J. awarded general damages of $250,000.00 (which were ultimately affirmed by the Supreme Court of Canada). In that case, the Plaintiff was a high profile broadcaster whose present and future career were ruined.

> [40] In *Naseiro v. Creighton*, [1999] O.J. No. 1549 (Ont. Gen. Div.) criminal charges were laid against a bookkeeper by her clients. The charges alleged that she had taken client records and threatened to destroy them unless she was paid. Naseiro spent three days in jail before she could arrange bail. The defendants ultimately withdrew the charges four months later. In that case, Sachs J. awarded $25,000 damages for malicious prosecution.
>
> [41] In *McTaggart v. Ontario*, [2000] O.J. No. 4766 (Ont. S.C.J.), the Plaintiff was jailed for 20 months after having been wrongfully convicted of robbery. General damages of $150,000.00 were awarded for breach of *Charter* rights, along with an additional $20,000.00 in punitive damages. In that case, the Plaintiff called expert psychiatric evidence which established that he was suffering from post-traumatic stress disorder.
>
> [42] In *Klein v. Seiferling*, [1999] 10 W.W.R. 554 (Sask. Q.B.), four plaintiffs were wrongfully charged with second degree murder. The plaintiffs were in custody for approximately two weeks. The charges were stayed. The Court determined that all of the plaintiffs suffered humiliation, loss of liberty, confinement, mental anguish, stress, and loss of reputation. In this 1999 decision, the plaintiffs were awarded general damages of $50,000.00, $35,000.00, $30,000.00, and $25,000.00, based on the degree of suffering experienced.
>
> [43] In *Fedorowicz v. Pace Marathon Motor Lines Inc.*, [2006] O.J. No. 344 (Ont. S.C.J.), Ms. Fedorowicz was charged with a serious criminal offence. The Crown indicated to her that on conviction it would be seeking a custodial sentence unless there was a guilty plea. The criminal charges caused Ms. Fedorowicz' existing condition to regress. These charges were held to be particularly damaging to her name and reputation. The charges remained outstanding for approximately 22 months. The charges went directly to her integrity, reputation and ability to work as a bookkeeper. In that case, she was awarded damages for malicious prosecution in the amount of $35,000.

[306] Aggravated damages address the intangible losses suffered by a party. As such they are a form of non-pecuniary damages. They compensate for the effect of the defendant's conduct on the aggrieved party: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1099.

[307] In the context of an intentional tort the Ontario Court of Appeal in *Weingerl. v. Seo* (2005), 140 A.C.W.S. (3d) 400 (Ont. C.A.), said this at para. 69:

> [69] … The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive, and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering. …

[308] Such damages may be awarded where the defendant's conduct is high-handed or oppressive. In *Hill* the court said:

> [188] Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd*., supra, in these

words at p. 111:

> Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

[189] These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

[309] In *Bob v. Bellerose*, 2003 BCCA 371, aggravated damages were described as follows:

> [30] Lord Devlin explained the concept of aggravated damages in *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.) at 407:
>
> > ... it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

[310] In *Pearson* the court said this respecting aggravated damages:

> [44] Aggravated damages are rarely awarded in cases of malicious prosecution. As stated by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, at paragraph 190:
>
> > If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.
>
> [45] The general nature of aggravated damages has been described in *Huff v. Price* (1991), 51 B.C.L.R. (2d) 282 at 299-300 (C.A.), in the following terms (at paras. 299 and 300):
>
> > ... [A]ggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life,

> can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's highhanded conduct.

***Discussion***

[311] The plaintiffs as noted seek $500,000 each for aggravated damages. In support they rely on *Hill* where in 1995 the court awarded that sum to the plaintiff for aggravated damages, additional to $300,000 in general damages.

[312] In *Hill* the professional and personal reputation of a Crown attorney was attacked. In this case the business and personal reputations of the plaintiffs were attacked. In the case at bar the conduct of the defendant CRA forms the basis for and justifies an award for aggravated damages.

[313] The prosecution has irrevocably damaged the reputation of the plaintiffs. It brought to an end their desire and ability to pursue further development and growth of their businesses. It significantly strained their family life and while there were other issues between the plaintiffs such as certain human rights complaints against Mr. Samaroo, food labelling violations, tax appeal proceedings and Ms. Samaroo's personal health issues as well as Mr. Samaroo's affair with Ms. Ye, I am satisfied that such matters were relatively minor in comparison to the devastation wrought by the prosecution in this case. The plaintiffs are entitled to substantial compensation for their suffering with respect to their humiliation, loss of self-confidence, loss of self-esteem, stress, damage to their reputations and the like and the impact that has had on their business and personal lives.

[314] The defendants argue that the range for general or aggravated damages in malicious prosecution cases is $25,000 to $75,000, and this case belongs in the lower end of that range. The award ordered in *Hill* however undermines that assertion of such a range. What is clear for each of the cases cited by the parties is that each case is unique and is to be assessed on its facts.

[315] The prosecution of the plaintiffs has had a devastating impact on their lives both personally and financially. The tax prosecution irreparably harmed their reputations. In *Arsenovski* Justice Griffin noted:

> [365] Even after a stay of proceedings, it is commonly assumed that "where there's smoke, there's fire". A wrongly prosecuted person's emotional injuries can continue past the disposal of the criminal proceedings.

[316] I am satisfied that both of the plaintiffs have suffered emotionally from the tax

prosecution and continue to suffer. While there may be some public vindication as a result of this decision that is unlikely to dispel the profound impact of the prosecution on them, an impact that they will likely never completely recover from.

[317] While the plaintiffs were not arrested or held in jail the charges were publicized in their community. Their businesses lost clientele. Their lives were disrupted and the impact on them was significant. The prosecution proceedings extended over a period of 35 months.

[318] I am satisfied that an award of aggravated damages of $300,000 to each of the plaintiffs is appropriate.

***Punitive Damages***

[319] Punitive damages as the name indicates have the purpose of punishing a defendant rather than compensating a plaintiff. As described by the Supreme Court in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, citing *Hill* at para. 196, they may be awarded against a defendant "in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency.'" This test "thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour" (*Whiten*, also at para. 36).

[320] Such damages relate to the level of blameworthiness and are governed by the concept of proportionality. In *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147, Justice Fenlon, as she then was, said this:

> [130] The governing rule in determining the appropriate quantum of punitive damages is *proportionality*. The overall award, *i.e.* compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74.
>
> [131] Proportionality in punitive damages has six dimensions, which were set out in *Whiten* at paras. 111-126 and reviewed by the Alberta Court of Appeal in *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112 at para. 82, 510 A.R. 1. The award of punitive damages must be:
>
> (i) Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
>
> (ii) Proportionate to the degree of vulnerability of the plaintiff -- the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a

defendant, is highly relevant where there is a power imbalance.

(iii) Proportionate to the harm or potential harm directed specifically at the plaintiff.

(iv) Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.

(v) Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.

(vi) Proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[Emphasis in original.]

[321] Also, as stated by the Supreme Court in *Whiten* the following considerations are relevant to this matter:

> [114] The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, for example, speaking of a physician who had used his access to drugs to purchase sex from a female patient, McLachlin J. (as she then was) stated, at p. 276:
>
> > Society has an abiding interest in ensuring that the power entrusted to physicians by us, both collectively and individually, not be used in corrupt ways. …
> >
> > A similar point was made by Laskin J.A. in the present case (at p. 659):
> >
> > [V]indicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes.

And at para. 116:

> [116] Second, it must be kept in mind that punitive damages are not compensatory. Thus the appellant’s pleading of emotional distress in this case is only relevant insofar as it helps to assess the oppressive character of the respondent’s conduct. Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff’s feelings by reprehensible or outrageous conduct on the part of the defendant. Otherwise there is a danger of “double recovery” for the plaintiff’s emotional stress, once under the heading of compensation and secondly under the heading of punishment.

[322] In *Arsenovski* a recent immigrant to Canada and her husband were involved in a motor vehicle accident in which they were struck as pedestrians. Ms. Arsenovski initiated a personal injury claim with ICBC, and she was subsequently unsuccessfully prosecuted for allegedly

making a false statement in support of it. The prosecution arose from a staff member at ICBC essentially inventing the allegation. Ms. Arsenovski succeeded in her malicious prosecution claim. Justice Griffin provided a useful review of the law relating to punitive damages awards as follows:

> [397] In setting an appropriate amount of punitive damages, it is very difficult to find and compare cases.
>
> [398] Generally speaking, the courts are not hesitant to make significant awards when someone's professional reputation is damaged by reprehensible conduct, as in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 [*Hill*]. In *Hill*, the prosecutor who was maliciously defamed by the defendants was awarded $300,000 general damages; $500,000 aggravated damages; and $800,000 punitive damages.
>
> [399] Enormous harm can be done by falsely accusing a person of dishonesty, as it strikes at the very heart and dignity of a person. Mrs. Arsenovski expressed it well: it hurt her in her heart and soul.
>
> [400] In *Hill*, the Court provided a historical review of the significance of false accusations of dishonesty, including the following:
>
> > [107] ... Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.
> >
> > [108] Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.
>
> See also paras. 109-117.
>
> [401] The fact that Mrs. Arsenovski was not a public figure or a professional does not mean that her reputation was deserving of less respect or protection. In many ways, she was all the more susceptible to harm than an established professional person, given that she was a recent migrant to the country, on social assistance, likely unaware of her rights or how to access justice.
>
> [402] Community standards can be gauged in part by the jury award of $1 million for punitive damages against an insurance company which had wrongly accused the insured homeowners of burning down their own house, an award upheld by the Supreme Court of Canada in *Whiten*.
>
> [403] The Ontario Court of Appeal in *Whiten* had reduced the jury award of punitive damages to $100,000. The Supreme Court of Canada, in restoring the $1 million jury award of punitive damages, noted:
>
> > One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.
>
> [404] The *Whiten* jury award sent a strong message that ordinary members of the community consider an insurance company's malicious conduct to be worthy of severe

sanction.

[405] The punitive damages award in *Whiten* likely recognized that the insurance company's conduct continued for over two years, directly affected the very ability of the plaintiff's family to have shelter, and put the plaintiff through an eight-week trial on a trumped up charge of arson. These more aggravating facts distinguish that case from the present. However, the conduct of the insurance company in *Whiten* did not include malicious prosecution, and the direct threat of criminal sanctions, which are aggravating factors here.

[406] In *Proulx*, the plaintiff was awarded just over $1.1 million in damages for malicious prosecution. In that case the plaintiff was initially prosecuted for murder, went through a trial, and was convicted before this was overturned by the Quebec Court of Appeal. The Supreme Court of Canada upheld the subsequent civil liability for malicious prosecution, but did not comment on or criticize the damages awarded. The basis for the damages awarded in that case, however, might not be considered directly parallel to common law principles regarding punitive damages.

[407] Without a doubt the charge of murder made against the plaintiff in *Proulx* was more serious than the charge against Mrs. Arsenovski in this case. Also, the wrongful conduct continued into the conduct of the criminal trial, another factor more aggravating than in the present case.

[408] In *Kelly*, the Court awarded punitive damages of $100,000 for egregious allegations and misconduct made by an employer against an employee dismissed without cause. The allegations were in the nature of fraud and incompetence, and included the wrongful withholding of sums of money due to the employee to increase the employee's vulnerability. In that case the allegations were asserted for seven years without foundation (at para. 132), a factor more aggravating than in the present case. However, the facts did not go so far as alleging a criminal offence and did not result in criminal charges, unlike the present case.

[409] In the case of *Pate Estate*, Mr. Pate had been wrongfully dismissed from a public service job and then subjected to a malicious prosecution by his former employer. His case attracted significant publicity, and resulted in a four-day trial before he was acquitted. He remained in the public eye with respect to the wrongful dismissal and criminal charges for over three years. The Ontario Court of Appeal noted that the conduct at issue was sustained over a period of approximately ten years. Other factors included the fact that the defendant municipality was a public body, and it never apologized.

[410] In *Pate Estate*, the total punitive damages awarded by the trial judge of $550,000 were reduced to $450,000 on appeal, taking into account that significant general damages were also awarded totaling $132,513, as well as substantial indemnity costs of just over $74,000 (at paras. 207, 215).

[411] The present case does not involve facts as aggravating as the several years of publicity in *Pate Estate* and the combination of wrongful dismissal and malicious prosecution. Nevertheless, similar to that case the corporate defendant here is a public corporation with duties to the public. Also similar to that case, the defendants did not draw to my attention any apology made by them to Mrs. Arsenovski and it can be assumed no such apology has been made.

[323] She was awarded $350,000 in punitive damages and $30,000 in general damages. No

award of aggravated damages was made because while plead they were not argued (see para. 375).

***Discussion***

[324] The CRA is tasked with the enforcement of the Canadian tax laws. It is expected to act in good faith and deal with the citizens of Canada fairly and objectively. Its employees are expected to do the same. It has available to it the powers of the State and can, as was the case here, bring criminal charges against individuals and companies.

[325] The CRA is vicariously liable for the conduct of Mr. Kendal and its employees. Its conduct in this case was high-handed, reprehensible and malicious. The behaviour of Mr. Kendal respecting the supressing and misstating of evidence deserves rebuke. It offends this Court's sense of decency and was a marked departure from conduct expected of an individual in Mr. Kendal's position and an agency such as the CRA.

[326] The conduct was highly blameworthy as it engaged core values in our society and the checks and balances that exist when invoking the power of the State against the individual. As noted earlier the charges should never have proceeded given it was clear prior to charge approval that additional evidence was required to meet the charge approval standard. Mr. Kendal knew that the necessary evidence was not available from Ms. Ferens. The conduct of Mr. Kendal was reprehensible. Evidence was concealed. Inculpatory evidence was created.

[327] Here the CRA employees looked forward with unprofessional glee to the plaintiffs' anticipated conviction and sentencing and their resulting ruination. It is appalling that the incarceration of the plaintiffs would be joked about. While I appreciate people may joke about serious matters the comments of Mr. Alan Jones went far beyond that in the context of this case.

[328] In addition, the CRA's advertising of its successes indicates a deeply troubling approach to its duties. No doubt the average citizen would find it objectionable if a police force advertised, on a government website, how many people they incarcerated each year.

[329] In the circumstances of this case I do not accept the submission of the defence that a finding of malicious prosecution itself will have the effect of deterrence, denunciation and repudiation. A monetary award must in my view be made to bring home the seriousness of the defendant CRA and Mr. Kendal's conduct.

[330] I view the circumstances of this case as significantly more aggravating than those in *Arsenovski*, in that a government agency maliciously used the criminal justice system to pursue the plaintiffs, and its wrongful conduct continued into the criminal trial itself. The CRA

was seeking substantial terms of imprisonment and significant penalties. The manner in which the prosecution was initiated and carried out was egregious. It must be denounced. It affected the reputations of the plaintiffs, their professional lives and their family lives. It involved the concealment of exculpatory evidence. It involved the power imbalance of the State over the individual. It violated fundamental rights and was highly reprehensible. A prosecution was initiated and pursued when Mr. Kendal knew he lacked necessary evidence, the need for which had been specifically noted by Ms. McLean.

[331] The CRA and Mr. Kendal do not acknowledge their wrongdoing or their violation of professional standards. They expressed no apology and were without remorse. Given the opportunity they would pursue the plaintiffs again on the same basis. An award of punitive damages, while governed by the principle of proportionality, must punish the defendants.

[332] The plaintiffs seek an award that will recognize the power imbalance between the plaintiffs and the CRA and will not amount to an award that would have the effect of licensing or condoning and thereby encouraging the behaviour of the CRA. They submit the evidence shows systemic problems where the type of behaviour evidenced is accepted and even encouraged.

[333] No amount of punitive damages will cause the CRA financial hardship. At the same time the award must address the purpose of punitive damages and bring home to the CRA and its employees that conduct such as has occurred here is not acceptable.

[334] I am mindful of the amounts I have awarded for aggravated damages. I award punitive damages to the plaintiffs in the aggregate of $750,000 against the defendant CRA.

***Charter Damages***

[335] Section 24(1) of the *Charter* provides:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[336] The Court in *Vancouver (City) v. Ward,* 2010 SCC 27, found that s. 24(1) is broad enough to encompass claims for damages as a result of *Charter* breaches.

[337] The plaintiffs seek $6,000,000 in *Charter* damages as an alternative to punitive damages, alleging that award is warranted for the same reasons that a high punitive damages award is justified. As I have awarded the plaintiffs punitive damages, I decline to order damages under s. 24(1) of the *Charter.*

**Conclusion**

[338] In summary the plaintiffs are awarded damages against the Canada Revenue Agency as follows:

a) $347,731.74 for legal fees and disbursements incurred in the defence of the tax evasion charges plus pre-judgment interest;

b) $300,000 to each of Tony Samaroo and Helen Samaroo for aggravated damages;

c) $750,000 in punitive damages.

[339] The claims against Brian David Jones and Brian D. Jones Law Corporation are dismissed.

**Costs**

[340] As requested by counsel costs may be spoken to at a date and time to be arranged through Scheduling.

"R.D. Punnett, J."
The Honourable Mr. Justice Punnett