

## Tax

# Ottawa owes apology to B.C. couple after malicious tax prosecution ruling: lawyer

By **Ian Burns**

(March 12, 2018, 1:06 PM EDT) -- A B.C. Supreme Court justice has ordered the Canada Revenue Agency (CRA) to pay more than \$1 million after he ruled the agency was responsible for the malicious prosecution of a couple for alleged tax evasion, a decision experts say speaks to an underlying culture of distrust at the national tax collector which needs to be addressed.

In his ruling in *Samaroo v. Canada Revenue Agency* 2018 BCSC 324, Justice Robert Punnett said the CRA was liable for the actions of senior investigator Keith Kendal and other staff as it pursued a case of criminal tax evasion against Tony and Helen Samaroo, calling its conduct "high-handed, reprehensible and malicious." He said the charges "should never have proceeded" and were "founded on an assumption, and grounded in mere suspicion and hypotheses, which did not and could not constitute reasonable and probable cause."

"The conduct of Mr. Kendal was reprehensible. Evidence was concealed," he said. "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."

The genesis of the case dates to June 2008, when Tony and Helen Samaroo, who operated a restaurant, nightclub and motel in Nanaimo, B.C., were charged with 21 counts of tax evasion, with allegations they skimmed \$1.7 million from their restaurant between 2004 and 2005. During a civil audit the CRA determined substantial cash deposits had been made to the plaintiffs' business accounts. This led to a trial in April 2011 when they were acquitted of all charges (*R. v. Samaroo* 2011 BCPC 503).

During the original trial the court heard that the Samaroos gave bookkeeper Deborah Ferens a single daily sales summary sheet for each day with three columns, marked "day," "night" and "days total." The allegation was that the cash register till tape from one shift was not included in the figures set out on the daily sales summary sheet, and was not provided to Ferens.

After their acquittal, the Samaroos pursued a case of malicious prosecution, claiming Kendal and Crown prosecutor Brian Jones intentionally suppressed critical evidence to mislead the court and the defence about the Crown's case in an effort to obtain a conviction. According to court documents, Kendal chose not to disclose notes to the defence in which Ferens said she did not look at the till tapes, which Justice Punnett said would "destroy the Crown theory." Ferens told the CRA she did not post from the till tapes, or look at them, because the daily sales summary sheet provided to her was adequate.

Justice Punnett said "the evidence of Ms. Ferens was required to prove the funds in question were unreported income," adding, "This meant [the CRA] could not prove the *actus reus* of the offence of tax evasion, nor could they ever hope to prove the quantum of the evasion."

During the trial the Crown presented evidence based on an allegation from a former restaurant employee, Diane Ye. She said 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 Ferens.

A will-say of Ferens' interview shows she was never asked about a second sheet, but Justice Punnett noted after Kendal was told about the existence of a second sheet he went back and altered the will-

say to include the corroborative statement that she only received one sheet.

"Mr. Kendal seemed to think this was perfectly acceptable. This is a misrepresentation of Ms. Ferens' testimony," said Justice Punnnett. "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."

The behaviour of Kendal respecting the suppression and misstatement of evidence "deserves rebuke" and "offends the court's sense of dignity," said Justice Punnnett.

"Mr. Kendal knew that the necessary evidence was not available from Ms. Ferens. [His behaviour] was a marked departure from conduct expected of an individual in Mr. Kendal's position and an agency such as the CRA," he said.

Justice Punnnett said proof of malice on the part of Kendal "requires proof on a balance of probabilities that in the role of an investigator, [he] acted deliberately to subvert and abuse his office."

"I find that he did so," he said. "He did so by suppressing 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."



Steven Kelliher, Kelliher & Turner

Justice Punnnett ordered damages against the CRA of \$347,731.74 for legal fees, \$300,000 each to the Samaroos for aggravated damages and \$750,000 in punitive damages in the decision released March 2. He dismissed the claims against Jones, saying the prosecutor "failed to independently assess the proposed charges in accordance with the obligations of Crown counsel" but "it has not been established that [he] intentionally sought to abuse or distort the role of a Crown prosecutor."

Justice Punnnett said the case has "irrevocably" damaged the reputation of the Samaroos.

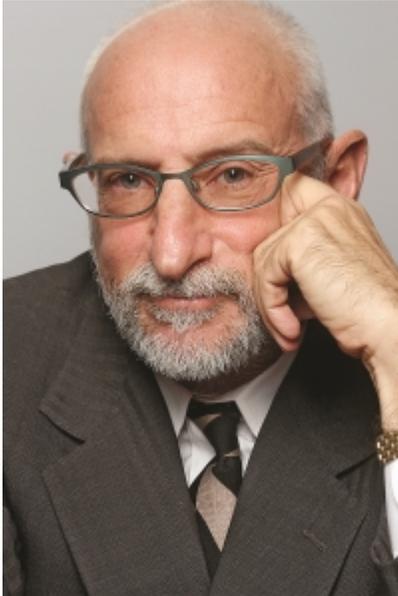
"It brought to an end their desire and ability to pursue further development and growth of their businesses," he said. "The plaintiffs are entitled to substantial compensation for their suffering with respect to their humiliation, loss of self-confidence, loss of self-esteem, stress, damage to their reputations and the like and the impact that has had on their business and personal lives."

Steven Kelliher of Kelliher & Turner, who represented the Samaroos in their malicious prosecution case, said his clients are owed an apology from Revenue Minister Diane LeBouthillier, who is responsible for the CRA.

"[She should] apologize to the Samaroos for what her people have put them through and to make a statement to the Canadian public and to assure them that this will not continue, that the culture of predation that is through and through the CRA will be dealt with," he said.

The Samaroos are also facing an action in the Tax Court of Canada on the same charges. Kelliher said, in light of Justice Punnett's decision, those charges should be dropped.

"They're not shifting the goalposts — it is exactly the same case that they're pursuing [as before]," he said. "They didn't seem to respect the decision of the provincial court judge [in the original criminal trial], but I certainly hope they respect the decision and the findings of Mr. Justice Punnett."



David Rotfleisch, [taxpage.com](http://taxpage.com)

David Rotfleisch, a tax lawyer with [taxpage.com](http://taxpage.com), said he could not recall any successful malicious prosecution cases dealing with a tax issue before, but said the decision was "a punch in the face" for the CRA.

"If you go through the whole history [of the Samaroo case], it's a typical case where a CRA person makes up their mind — and that's it, they've made up their mind about what's going on and they're not prepared to entertain any other options," he said. "In general I have to say that I have seen outrageous behaviour in many cases by CRA people and clients often enquire about whether they have the ability to sue CRA."

Rotfleisch said there is a cultural problem that some individuals at the CRA "make up their minds about what is going on and you cannot budge them with any type of analysis or facts."

"What the CRA needs to do from the audit level up is have policies in place that taxpayers get the benefit of the doubt and they have to use reason in analyzing situations," he said. "Yes, we have cash deposits but there is a reasonable explanation for the cash deposits — and the fact that you don't think it's reasonable doesn't mean it didn't happen."



Bradley Bryan, University of Victoria's faculty of law

Bradley Bryan, an assistant professor at the University of Victoria's faculty of law, said Justice Punnett's decision is "pretty illuminating in terms of high-handed conduct" by the CRA investigator.

"The accounting procedures used by CRA were brought into question in the original trial, and so on that front you might imagine someone would say sorry, we got this one wrong," he said. "It's not only that there's no regret, remorse, a sense that they maybe they were a little too forceful — in some ways it's embarrassing, it's embarrassing to taxpayers to think that this is how people would be treated."

Bryan said the CRA has been good work in recent years in public outreach, but in light of Justice Punnett's judgment "clearly there is some other ethos inside that agency that needs to be examined."

"It's just not common to have gross negligence with extreme punitive damages awarded against a public official," he said. "And if that agency isn't taking steps to figure out what went wrong there, I think that's a question that needs to go to a higher level."

CRA spokesperson Etienne Biram would not comment on the case, saying in an e-mailed statement the CRA "undertakes a review of all court decisions in order to ensure that its programs and services are held to the highest standard."

"The CRA has 30 days to appeal the decision, from the date of the judgment. It would be inappropriate to comment further at this time," he said.

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