**IN THE MATTER OF AN ARBITRATION BETWEEN**

**GLEN KRELLER and THE ESTATE OF MARION KRELLER**

(the **"Claimants"**)

- and -

**KRELLER ENTERPRISES LTD., ST. CITY ROASTERS LTD., TREVOR MOWBREY, and PAUL BIGLIN**

(the **"Respondents"**)

# ARBITRATION AWARD

**Arbitration Hearing of August 15, 16 and 17, 2011**

Issued by

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**LOCATION OF HEARING**

Witten LLP
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2500, 10303 Jasper Avenue
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**ARBITRATOR**

Schuyler V. Wensel, Q.C.
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**DEFINITIONS**

1. In this Award, the following definitions shall apply:

"**ABCA**" means the Alberta *Business Corporations Act*, RSA 2000, c B-9;

"**ABCI**" means Alberta Barbeque Company Inc.;

"**BIA**" means *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3;

"**Bankruptcy**" means the Matter of the Bankruptcy of Edward Trevor Mowbrey, Summary Administration; Leon Miller Group Inc., Trustee in Court of Queen's Bench of Alberta in Bankruptcy, Judicial Centre of Edmonton, Court File #24-1517565;

"**CRA**" means Canada Revenue Agency;

"**Danks**" means Gregory Danks;

"**Glen**" means Glen Albert Kreller;

"**KEL**" means Kreller Enterprises Ltd.;

"**Legal Proceedings**" means Court of Queen's Bench of Alberta, Judicial Centre of Edmonton Action No. 0903 07313;

"**Macrae**" means Ken Macrae, C.A., CMA;

"**Marion**" means Marion Kreller;

"**Matt**" means Matthew Mowbrey;

"**Nelson**" means Heather Nelson;

"**Paul**" means Paul Biglin;

"**Restaurant**" means KEL doing business as the Coffee Cup Restaurant in St. Alberta, Alberta;

"**SCR**" means St. City Roasters Ltd.;

"**SPA**" means the Share Purchase Agreement dated March 15, 2008 among KEL, Glen, Marion and SCR;

"**TD**" means the TD Canada Trust bank located at 12645 – 142 Avenue, Edmonton, Alberta;

"**Trevor**" means Edward Trevor Mowbrey;

"**USA**" means the Unanimous Shareholders Agreement dated March 15, 2008 among KEL, Marion and SCR;

"**WCB**" means Workers' Compensation Board of Alberta.

**DURATION OF ARBITRATION HEARING**

2. This Arbitration Hearing commenced at 9:00 a.m. on Monday, August 15, 2011 for the full day and continued on Tuesday, August 16, 2011. The hearing was concluded at noon on Wednesday, August 17, 2011.

**JURISDICTION**

3. At the commencement of the hearing, no objection was taken to my jurisdiction to hear this matter. The Application to Arbitrate and Reply to Application to Arbitrate documents filed by the Claimants and the Respondents acknowledged my jurisdiction as well as the Rules of Arbitration that apply. Furthermore, this matter was originally the subject of a dispute in the Legal Proceedings, and pursuant to the Order of the Honourable Justice T. D. Clackson dated Monday, May 31, 2010 and filed June 11, 2010, I was appointed as the sole Arbitrator, the particulars of which are contained within that Order. Pursuant to those documents, the parties confirmed: their agreement to proceed to Arbitration to determine the issues referred by virtue of the Order of Justice Clackson; that I shall have jurisdiction for the Arbitration; and that my Award shall be final and binding upon all parties. Leon Miller Group Inc. is the Trustee in the Bankruptcy for Trevor (Bankrupt) and Leon Miller has been kept informed of the Arbitration proceedings.

4. I confirm that I have no conflict of interest which might affect my independence or impartiality with respect to the hearing of this matter. It was confirmed that no recording of the evidence would be made and that my notes taken in the proceedings are my own and not available to the parties whatsoever.

5. Pursuant to the Application to Arbitrate and Reply to Application to Arbitrate documents signed and acknowledged by the Claimants and Respondents, it was understood and agreed that the Arbitration would be conducted in accordance with the Rules provided by the Arbitrator to the parties or their legal counsel.

**NON-APPEARANCE OF RESPONDENTS TREVOR, SCR AND KEL**

6. SCR filed a Reply to Application to Arbitrate dated August 26, 2010 which document indicated it would not attend nor would it contribute any funds to the Arbitration. It agreed to my jurisdiction to hear this matter and that my Award would be final and binding on all parties. It further advised that a Receiver-Manager had been appointed by a secured creditor and that all the assets of SCR had been seized by a civil enforcement agency. No further submissions or appearance were made by SCR or its Receiver-Manager, the identity of whom was never determined. Nothing was ever filed by KEL nor did anyone appear on its behalf despite notice to it, though Glen was obviously a former director of KEL and one of its shareholders.

7. With respect to the Respondent Trevor, his Reply to Application to Arbitrate is dated September 13, 2011 and Trevor was subsequently represented by counsel, namely David Wolanski of Hustwick Hodgson & Payne. As counsel for Trevor, Mr. Wolanski filed a Brief of Law and other documents as well as submitted the documents of Trevor. On June 27, 2011, David Wolanski provided notice to me that he ceased to act. Notice was provided to Trevor both through his counsel and at the forwarding address provided by his counsel for the hearing to be conducted on August 15 to 18, inclusive. Despite notice having been given, Trevor did not attend. As indicated above, Trevor's trustee in the Bankruptcy was kept informed.

8. Due to failing to respond or failing to pay the required Arbitration deposit, the Respondents KEL, SCR and Trevor were noted in Default in the within proceedings. Subsequent to this, we received notice from Leon Miller Group Inc. that Trevor had made an assignment in Bankruptcy. I advised Mr. Gaffney and Mr. Loewen that any Award I might otherwise grant against Trevor would be stayed by the provisions of section 69 of the BIA. As a result of such advice, Mr. Gaffney obtained an Order from the Court, in the matter of the Bankruptcy from Registrar L. A. Smart, Q.C. dated August 11, 2011 indicating that sections 69 to 69.31 of the BIA no longer operated with respect to Glen. The Order of Registrar L. A. Smart, Q.C. was filed in the within proceedings as Exhibit "2" and is also attached as Schedule "1".

**SWORN TESTIMONY OF WITNESSES**

9. All witnesses appearing before me placed their hand on the Bible and swore affirmatively to the following:

> "Do you swear that the evidence that you are about to give regarding the matters in question in this Arbitration Hearing will be the truth, the whole truth and nothing but the truth so help you God?"

None of the witnesses required an Affirmation. When the testimony of a witness was interrupted by a break, the witness confirmed he was still under oath when testimony resumed.

**PRELIMINARY MATTERS**

10. During the course of the proceedings on Tuesday, August 16, 2011 at 10:15 a.m., the issue of the nature and extent of the evidence to be given by Macrae was raised by counsel. There was no issue with respect to Macrae providing evidence about the financial statements he prepared for KEL, however Mr. Gaffney also wanted to introduce financial projections for KEL. Mr. Loewen objected on the basis that such evidence would be opinion evidence and since he had only received notice of it at the time of the hearing, he could not respond appropriately. Mr. Gaffney advised that Macrae was the financial advisor for KEL and could tender such evidence.

11. It was my ruling that financial projections by Macrae would be in the nature of expert opinion evidence. Counsel agreed such was the case. That left me with several choices:

    a) Adjourn to allow counsel to adequately prepare;

    b) Allow the expert testimony but accord weight as I see fit; or

    c) Reject the testimony.

    The costs associated with the delay and retaining opposing expert opinion would be substantial. It would prejudice both sides and significantly increase time and costs. The parties were intent on using the scheduled time for the hearing as much as possible. It is not likely that a trial judge hearing the matter would allow an adjournment and delay a scheduled trial. Allowing the testimony would put Paul and his counsel in a difficult position as they would not have time to properly prepare. The grey area of my placing weight as I see fit does a disservice to both sides and it really does not provide an effective answer to the issue.

12. Macrae was disclosed as a witness at the time of the Application to Arbitrate almost one year ago. The issue of the financial performance of the business after it was sold to SCR has been well known for a long time. Projections of what the financial performance of the Restaurant might have been is clearly opinion evidence. If the evidence was required, notice of it should have been given well in advance of the hearing with projections provided so Paul and his counsel could respond appropriately. To allow the evidence now would be too prejudicial and therefore, it was my ruling that Macrae would only be allowed to testify as to his knowledge of the actual financial statements prepared by him and provided to both sides prior to the hearing.

13. Mr. Gaffney confirmed that Glen was the personal representative of the Estate of Marion Kreller and that pursuant to the probate of that Estate, he was the successor shareholder of the 40 (i.e. 40%) shares that Marion held in KEL.

**EXCLUSION OF WITNESSES**

14. With the exception of Glen and Paul, who are parties, all other witnesses (Macrae and Nelson) were excluded until it was time for them to give their evidence.

**OPENING STATEMENTS**

15. Mr. Gaffney made his opening statement at the commencement of the proceedings outlining his intended submissions. Mr. Loewen chose to make his opening statement immediately after Mr. Gaffney.

**SUMMARY OF EXHIBITS**

16. Prior to the hearing, counsel agreed to provide me with a binder of documents all indexed and tabbed for convenience of reference during the course of the hearing, which could be entered as one Exhibit in order increase the efficiency of the hearing rather than marking numerous individual exhibits. This substantially reduced the number of exhibits in the hearing to the following:

    - Exhibit "1" –Agreed binder of documents with individual documents tabbed #1 to 134 inclusive. It is to be noted that not all of these documents were referred to during the course

of the hearing but those that were referred to were identified by counsel and presented to the witnesses during the course of the hearing;

- Exhibit "2" – the Order of Registrar in Bankruptcy L. A. Smart, Q.C., dated August 11, 2011, filed in Bankruptcy August 11, 2011;

- Exhibit "3" – Series of emails by or among Paul or Glen dated Saturday, November 8, 2008 and Sunday, November 9, 2008 (three pages in total);

- Exhibit "4" – letter of Nelson to Matt, Paul and Glen dated July 17, 2008;

- Exhibit "5" – Gmail response to Matt email 1 and 2, dated Thursday, September 10, 2009 among Paul and Matt with handwritten notes of Paul throughout; pages 1 - 6, inclusive, were produced and counsel agreed that the balance of pages 7 - 25 were not relevant and therefore not produced;

- Exhibit "6" – Gmail re: Alberta BBQ Co. email, dated Tuesday, May 18, 2010, pages 1 – 5 inclusive with earlier emails attached by and among Matt, Paul, and Nigel David Mansfield.

**WITNESSES**

17.

| | |
|---|---|
| Glen | For the Claimants |
| Nelson | For the Claimants |
| Macrae | For the Claimants |
| Paul | For the Respondent Paul Biglin |

**DIRECT TESTIMONY OF GLEN**

18. Glen testified that he was previously employed by the RCMP and that his specialty was field and forensic science duties. He retired in 1988 with the rank of Staff Sergeant.

19. During 2004, he was looking for a business and through their company, KEL, he and Marion bought the Restaurant and paid $72,000.00 for the assets. Glen and Marion operated the Restaurant until Marion was diagnosed with cancer. She was treated but passed away in June 2010.

20. Due to Marion's illness, the Restaurant was put up for sale in Fall of 2007 and there were negotiations among Glen, Danks and Trevor. Trevor and Danks represented SCR which is a company that specialized in roasting and blending specialty coffee beans and supplying their products to numerous restaurant and retail businesses.

21. There were discussions and emails which eventually led to the acquisition of the Restaurant by way of a share purchase transaction which culminated in the SPA and USA, both dated March 15, 2008. SCR acquired majority control of KEL resulting in SCR holding 60 of the outstanding voting shares of KEL and Marion holding the balance of 40 voting shares.

22. The purchase price for the shares pursuant to the SPA was $75,000.00 with a small amount paid in advance and the balance paid over time after the shares were transferred. The SPA also acknowledged the outstanding shareholders' loan due to Glen and Marion, which at the time was

in the amount of $116,000.00 and which would remain a liability of KEL. The shareholders' loan as a result of a capital injection into KEL by Glen and Marion, which was financed through a mortgage of their home.

23. The USA confirmed that SCR held 60 shares and Marion held 40 shares, thereby giving SCR majority control of KEL. Pursuant to paragraph 1.5 of the USA, Macrae was to remain as the accountant for KEL unless expressly changed in writing by SCR and Marion. Paragraph 2.1 indicates that without the written consent of the shareholders, the board of directors of KEL would consist of two directors, namely Trevor and Glen. There are also other terms in the USA which limited expenditures and dispositions in excess of $5,000.00 without the written consent of the Shareholders. There was also a limitation on incurring indebtedness in excess of $10,000.00 and KEL's bank was to remain as TD unless a change was unanimously approved by the shareholders.

24. Paragraph 2.01 of the USA confirmed the Officers of the corporation as:

    a) President: Trevor;

    b) Secretary: Danks;

    c) Treasurer: Glen;

    until a change be approved by the Board of Directors.

25. Glen testified that sometime in late November and December of 2008 or early 2009, without either his or Marion's consent, a series of transactions occurred which caused the Restaurant operations to be terminated, the business to be closed, and eventually to be reopened as a retail store for the sale of SCR products. Contrary to section 2.8 of the USA, Glen received notice that the accountant for KEL was changed without his consent as a Director or the consent of Marion as a shareholder.

26. With respect to the operation of KEL's business chequing account at TD, there were numerous changes which effectively gave signing authority of the account to Glen and representatives of SCR (Danks and Paul).

27. Within three months of the SPA and the takeover of the Restaurant operations by SCR, Danks left SCR and Paul became more involved with the operations of the Restaurant.

28. Glen testified that pursuant to section 2.13 of the USA, there was never to be a cash call for additional funding without the prior determination of both Marion and SCR that such additional funding was required. There never was any such determination despite Glen's requests for records to justify any request for additional funding. Glen said there was never any notice given to Marion or him with respect to a notice by SCR to acquire Marion's shares.

29. Glen testified that there were discussions between him and Trevor about SCR going public and Glen had also invested in SCR as a shareholder sometime in Fall of 2007. At the time of that investment, Glen dealt with Danks, Trevor and Paul.

30. After March 15, 2008, Glen stopped working at the Restaurant but would come in from time to time to help out. He said Paul was involved in the Restaurant operations as well as Trevor. Due to ill health, Marion had no role in the Restaurant after March 15, 2008. It was not long after March 15, 2008 when the payments required to be made by SCR under the SPA could not be made, and

the SPA was amended by a subsequent agreement whereby article 2 of the SPA was amended (Exhibit 1, Tab 5). The document is not dated but appears to have been completed on or about July 31, 2008.

31. The result of the amended agreement was that the $75,000.00 purchase price under the SPA was adjusted so that it accounted for the previous payments and interest, and the balance of $44,250.00 was to be paid by way of 36 blended payments of principal and interest in the amount of $1,407.14 (9% interest rate) commencing August 15, 2008 with a final payment on July 15, 2011. The balance of $25,000.00 was payable by way of a convertible promissory note (Exhibit 1, Tab 4).

32. Glen testified that at the time the amended payment schedule was agreed to, Trevor and Paul did not mention any set off or deductions arising out of the transactions from March 15, 2008. Later, Trevor tried to have numerous substantial deductions made from the purchase price under the SPA.

33. Glen testified that Paul and Trevor wanted to have a board of directors meeting of KEL and that he responded by email on October 25, 2008 (Exhibit 1, Tab 6) indicating that before there could be a board meeting, it would be necessary for him to receive financial information so he could review it in advance of the meeting. Particulars of the financial information that he required were expressed in the email.

34. Glen testified about an email dated October 27, 2008 from Paul to him (Exhibit 1, Tab 7), however this email was subject to controversy later in the hearing as Paul testified that he was not the author of this email and that his email account had been compromised and used by someone other than him, and suggested that this may have been Trevor or Matt. Glen testified that on or about the time of this email, Paul never advised him that he was not the author of this email and it was only recently in the within proceedings that he was advised by Paul that he did not send the email and someone else had done so. The controversial email raises issues about adjustments from the SPA, the write-off of substantial uncollectable debts, a potential cash call, and the hostilities among people.

35. The next email referred to was one from Trevor to Glen with a copy to Paul dated October 27, 2008 (Exhibit 1, Tab 8). Glen disputed many of statements in that email message, including many claims for liabilities that Trevor claimed should be set off against any balance owed to Glen and Marion pursuant to the SPA. There was a reference that the required payment of $1,407.14 to Glen for October 2008 had bounced but would be replaced the next day. Glen continued to press for bookkeeping records for the Restaurant so that he could properly assess the situation before agreeing to a board of directors meeting.

36. Glen then referred to an email he sent to Paul dated November 17, 2008, indicating that they had not received the November 15, 2008 cheque for the payment due under the SPA (Exhibit 1, Tab 10). There was also mention about Glen and Marion considering having SCR purchase the remaining 40% interest in KEL. Paul responded to Glen in a subsequent email that same day and advised Glen and Marion that he tendered his resignation from the board of directors of KEL and copied Trevor with the message. Glen testified that he was surprised that Paul had resigned as a director because he had no knowledge of any meeting of the shareholders of KEL to appoint Paul as a director, and it would also have been contrary to the terms of the USA which only permitted Trevor and Glen to be directors of KEL, unless otherwise changed in writing by the Shareholders of KEL. Glen said he assumed SCR had appointed Paul as a director in place of Trevor. There was a follow-up message from Glen to Paul with a copy to Trevor on the same day indicating that Glen assumed Trevor would reply to the series of messages.

37. Glen testified with respect to a series of emails on November 17, 2008 among Trevor, Glen and Paul (Exhibit 1, Tab 11). The emails discuss a series of offsets to the purchase price in the SPA and Glen explained how Nelson was the manager and used the previous system of an American Express credit card in her name for purchases of restaurant supplies at Costco. There was a minor adjustment outstanding for one of the American Express bills, but that was an adjusted liability that should not have posed a problem and Glen said the extensive adjustments claimed by Trevor, were not justified and had not been previously mentioned. He testified that the last payment he received under the SPA was in December 2008 in the amount of $1,407.14 and no further payments were received after that date. The email has a paragraph where Trevor purported to trigger a cash call upon Marion and Glen for $8,000.00 and that if it was not met, they would lose their voting rights. The context of the email indicates that Trevor was the one responsible for financial matters concerning KEL.

38. Glen then testified that he and Marion received a letter from SCR dated January 13, 2009 (Exhibit 1, Tab 12) entitled "Re: Shareholder Meeting". The letter advised that SCR was suspending share purchase payments until Marion agreed to have a shareholders' meeting. The letter was from Trevor in his capacity as President of SCR. Glen testified that he refused to meet and discuss matters until such time as he received adequate financial information. An email by Glen to Trevor dated January 18, 2009 (Exhibit 1, Tab 17) indicates that Glen provided Trevor with the financial statements as prepared by Macrae to March 15, 2008 and that he and Marion would be prepared to meet upon receipt of KEL financial statements for the period of March 15, 2008 to October 31, 2008, together with other monthly financial reports. Trevor responded to Glen on January 19, 2009 about the financial information. His email was addressed to Marion and indicated that the meeting would be for only shareholders, which would include Marion and Trevor as a representative of SCR. He further advised that he could send out a formal request advising of the date and time of the meeting with three weeks' notice. This was at a time when Marion was suffering from cancer and under medical care.

39. Glen then referenced the financial statements for KEL as at March 15, 2008 as prepared by Macrae and noted that the balance sheet indicated a shareholders' loan due to Marion and Glen in the amount of $117,159.00, which is still outstanding. He also referred to note 2 of the financial statements which indicated that the capital assets of KEL had been acquired at a cost of $82,035.00. By sometime in March 2009, the business operations of the Restaurant had been shut down and SCR had suspended making any further payments under the SPA. This was the subject of a series of emails on January 22, 2009 (Exhibit 1, Tab 18). Trevor continued to assert rights of offset under the SPA which was disputed in a series of emails dated January 22, 2009 (Exhibit 1, Tab 19). Glen testified that Trevor continued to assert rights of offset under the SPA which, according to the terms of the SPA, were not justified at the time Trevor asserted rights of offset to the extent of $34,000.00.

40. Glen then referred to a Notice of Annual Meeting of Shareholders to be held February 14, 2009 (Exhibit 1, Tab 20), which notice was dated January 23, 2009 and purported to give notice of numerous things including a change of accountants; review and approval of financial statements; the election of a board of directors with candidates being Glen and the other position vacant; review of the SPA and treatment of rights of offset; cash call and other things. There was also a proposal about alternatives for relinquishing control of the Restaurant and transferring its business operations or rebranding the Restaurant as "Death by Chocolate". Glen disputed many of the things in the notice and said it was done completely by Trevor without any discussion with him or Marion prior to the drafting of the notice.

41. Glen then testified that certain cheques were provided to him through his counsel Mr. Gaffney by SCR letter dated February 18, 2009 (Exhibit 1, Tab 21). The letter requested that Glen sign

various cheques. Glen testified that he was not able to sign cheques as he was not a signing authority for cheques for the account of KEL at TD. He also said that he never got the reference T-4's for review. Mr. Gaffney returned 13 cheques, which had been initialed and approved but not signed by Glen as he was not prepared to sign any cheques when he did not have authority to do so and was not aware of the balance of the TD account to understand whether there were sufficient funds in the account of KEL. Mr. Gaffney's letter of February 19, 2009 also indicated that he and Glen were prepared to meet to discuss the dire financial situation at everyone's earliest mutual convenience (Exhibit 1, Tab 22).

42. There was a break in the testimony of Glen and when the hearing resumed, Mr. Loewen advised that he had received an email from David Holt (a lawyer involved with ongoing issues concerning SCR) and that there was ongoing litigation among the shareholders and directors of SCR. There was some suggestion that information could be obtained from David Holt about the insolvency status of SCR, but Mr. Holt could not provide any additional information to Mr. Loewen due to the status of the litigation and Mr. Holt's role a counsel. The insolvency of SCR is somewhat of a mystery. A bankruptcy search of SCR was done and as at August 25, 2011 and the Office of the Superintendent of Bankruptcy advised there are no records regarding a bankruptcy of SCR.

43. By late February 2009, Glen was relying on Mr. Gaffney to help resolve matters with respect to KEL, outstanding amounts payable under the SPA and the rights and obligations pursuant to the USA. Glen referred to the letter of Mr. Gaffney dated February 20, 2009 (Exhibit 1, Tab 23), addressed to Trevor care of SCR. This letter made it clear that all further communications with respect to the outstanding issues were to be directed to Mr. Gaffney and there was to be no contact with either Glen or Marion. By that time, Paul had resigned and the Restaurant had been closed. There was also a further request for more information from the records of KEL.

44. Glen then referred to an email dated February 21, 2009 from Trevor to Mr. Gaffney (Exhibit 1, Tab 25). Glen indicated he did not agree with the closure of the Restaurant and that he was unaware of the losses for the Restaurant because when he and Marion turned it over on March 15, 2008, it was a viable business. The email of Trevor indicates that he is the one representing SCR.

45. Glen then referred to the email of Trevor to him with a copy to Mr. Gaffney dated February 22, 2009 (Exhibit 1, Tab 26). Glen testified that this was the first time he was aware that former employees of the Restaurant had organized themselves to have a complaint made to Labour Standards about not having been paid the wages they were due. The email mentions that Glen was the only one with signing authority on the TD account but Glen indicates that this was not the case as he had no signing authority. Trevor seems to blame Glen as the sole director of KEL by hamstringing the officers. However, pursuant to the USA, both Glen and Trevor were the directors and the shareholders still were Marion and SCR.

46. Glen then referred to Mr. Gaffney's letter of February 24, 2009 (Exhibit 1, Tab 30), the most notable aspects of which are the inclusion of Glen's resignation as a director of KEL; the likelihood of rent not having been paid to the landlord of the Restaurant premises; and the fact that KEL was very likely insolvent. Glen then referred to the SCR letter of February 23, 2009 address to Mr. Gaffney (Exhibit 1, Tab 28) which indicates that Paul had sent a letter to TD requesting his name be deleted as a signing authority for the KEL account. The letter indicates there is a dispute about who can and cannot sign cheques on behalf of the KEL account at TD bank. Glen testified that up until the advice received in this letter, he was aware that Paul could sign cheques, but he did not know when that started. His understanding was that SCR as majority shareholder could add and subtract signing authorities for the account as it saw fit. Glen testified that he could not sign cheques and would not do so as he had no operational knowledge regarding

the issuance of the cheque or the funds available in the TD account. The cheques that had been forwarded to Glen were returned.

47. Glen then referred to the email of Trevor to Mr. Gaffney dated February 28, 2009 (Exhibit 1, Tab 31) wherein Trevor advised Mr. Gaffney to leave the cheques for pickup and that he would make arrangements with TD to get signing authority. Glen testified that he was not aware of what was done for signing authorities.

48. Glen then referred to a Notice of Special Meeting of Shareholders to be held March 17, 2009 issued by Trevor on behalf of SCR on February 23, 2009 (Exhibit 1, Tab 33). Glen acknowledged receiving this notice but all of the information with respect to the financial affairs of KEL previously requested still had not been provided so Glen testified that he was not prepared to attend unless he got the information in advance. At this stage, due to illness, Marion could not deal with the affairs of KEL and Glen assumed responsibility for doing so. Glen further testified that this notice was the first he had received about rebranding the Restaurant as a "Death by Chocolate" business. The Notice of his removal from the board of directors was confounding from the perspective that the USA required the unanimous consent of both SCR and Marion to make any change. The issue at that point in time was moot as the letter of Mr. Gaffney dated February 24, 2009 (Exhibit 1, Tab 30) indicated that Glen had resigned as a director. By way of response to the Notice of Special Meeting of Shareholders, Glen referred to the letter of Mr. Gaffney dated March 11, 2009 (Exhibit 1, Tab 34) where it was made clear that Glen had already resigned due to the personal liability for priority creditors such as CRA and WCB. The letter further asserted the fact that without Marion's approval, directors cannot be changed. The letter further requested particulars of the alleged $14,000.00 deficiency and the cash call for $12,000.00. Glen then referred to the notice of CRA for its claim in the amount of $15,574.41 (Exhibit 1, Tab 46) dated April 27, 2010. Glen testified that as at March 15, 2008 when the Restaurant business of KEL was turned over to the control of SCR, all source deductions and GST were completely paid up to date and that he kept them current while he operated the Restaurant.

49. Glen referred to the minutes of the annual general meeting of shareholders of KEL held on February 14, 2009 (Exhibit 1, Tab 37) and advised that neither Marion nor he attended the meeting, so the resolutions purportedly passed at the meeting were not effective. He said there was never any discussion or agreement for any of the things mentioned in the minutes of this meeting. The minutes had apparently been prepared by Trevor.

50. Glen then testified that he learned that the Restaurant had been closed and that there was a sign posted above the door indicating there were plans to reopen as an SCR factory outlet. A photograph of the signage was taken (Exhibit 1, Tab 38). Glen testified that the Restaurant closure was on or about March 14, 2009. It was shortly thereafter sometime in May of 2009 that the Legal Proceedings were commenced.

51. Glen referred to the balance sheet and other financial statements of KEL as at October 31, 2008 (Exhibit 1, Tab 39) which he acknowledged receiving sometime in Spring of 2009 during a meeting among Glen, Mr. Gaffney, Paul, Darren Price, Trevor and others at the law offices of Bryan & Company. He noted that the current liabilities to priority creditors such as CRA and WCB amounted to $21,340.63, which was the first time he became aware of these liabilities.

52. Glen referred to Paul's email to Glen dated October 22, 2008 (Exhibit 1, Tab 40), which was later the subject of controversy as Paul denies being the author of this email and would not 'cc' himself with the email, nor would he write it in the style which is apparent from the email. Glen denied the reference in the email for indebtedness to SCR in the amount of $16,164.25 as he

never received any information as to how that could have been calculated and disputed the liability generally. Glen referred to the paragraph at the middle of the second page of the email where there is reference to "we agreed as Directors" and came to the conclusion that Paul had characterized himself as a director. The last paragraph of the email suggested "we convene a Directors' meeting of The Coffee Cup next week and decide as a Board the direction". Based on this, Glen assumed Paul was a director and wanted a meeting of directors.

53. Glen referred to the letter of Brad Cody, Barrister & Solicitor, dated July 26, 2010 to KEL care of Paul (Exhibit 1, Tab 47). Brad Cody had been the lawyer for KEL and Glen indicated that he was not aware of the change of legal counsel from Mr. Cody to Hladun & Company, nor was he aware that the minute book for KEL had been signed out by Nigel Mansfield, who was an employee of SCR. The minute book for KEL was not produced in this arbitration.

54. Glen then referred to Government of Alberta Personal Property Registry Searches for SCR dated October 1, 2010 which indicated that Norman Hebert of Coquitlam, B.C., was a secured creditor of SCR, holding a general security agreement with an all present and after acquired personal property charge (Exhibit 1, Tab 50). The search results further indicated that there was a seizure by a civil enforcement agent with respect to the property of SCR, which included property formerly owned by KEL. Glen was not aware of the seizure until August 4, 2010.

55. Glen referred to Exhibit 3, which is the same disputed email referenced earlier (Paul says that he did not author this email message). Glen relied on this email for his understanding that Paul had become a director of KEL. Reference was made to another version of this email (Exhibit 1, Tab 72) where Trevor sent a shortened version to Paul on November 9, 2008. Glen then referred to Paul's letter to TD dated February 14, 2009 (Exhibit 1, Tab 93) pursuant to which Paul resigned as a signing authority for KEL's current TD account. Glen did not know why this had been done and did not know Paul was even a signing authority.

56. Glen then referred to Trevor's email to various directors of SCR dated February 15, 2009 (Exhibit 1, Tab 95). This email references the fact that Trevor tried to have an annual general meeting for KEL on February 14, 2009 but neither Marion or Glen attended. The email further states that Trevor was positioning SCR to get out of the Restaurant and that Marion needed to put up $12,000.00 to match the $18,000.00 put in by SCR since November 1, 2008. The email went on to give various alternatives for a change of control of KEL. Glen testified that he did not know if $18,000.00 was actually put into KEL by SCR and he was not prepared to put in $12,000.00 without further information.

57. Glen then referred to the email of Trevor to Mr. Gaffney dated February 21, 2009 (Exhibit 1, Tab 25) which references comments about not wanting to trample on the minority shareholder rights of Marion. The string of emails is not clear, but by the time of this email message, the Restaurant had been closed as a result of an apparent unilateral decision of Trevor.

58. Glen referred to his resignation as a director of KEL dated February 23, 2009 (Exhibit 1, Tab 99) and testified that this was done to minimize his exposure to statutory creditor liabilities. This resignation was delivered to Trevor under cover of Mr. Gaffney's letter of February 24, 2009 (Exhibit 1, Tab 100).

59. Glen referred to a letter by Trevor to Cody Law Office dated March 4, 2009 (Exhibit 1, Tab 104) which enclosed payment for an annual return invoice together with advice about the sequence of directors of KEL, which is reproduced as follows:

> *"a) March 15, 2008 to March 31, 2008 – Trevor and Glen;*

b) *April 1, 2008 to April 30, 2008 – Danks and Glen (Danks made ALCB application as Director);*

c) *May 1, 2008 to November 12, 2008 – Paul and Glen (Danks and Glen disagreement);*

d) *November 13, 2008 to February 14, 2009 – Glen (Paul and Glen disagreement);*

e) *February 14, 2009 to February 23, 2009 – Trevor and Glen (AGM);*

f) *February 24, 2009 to Present – Trevor (Glen and Trevor disagreement).”*

60. Glen testified that he was unaware of all of these changes and they confounded him because the USA only allowed him and Trevor to be the two designated Directors of KEL unless otherwise appointed in writing by unanimous agreement of Marion and an authorized representative of SCR, which to his knowledge never occurred.

61. Glen tried to reduce his losses and instructed Mr. Gaffney to send a proposal to SCR, Trevor and Paul which was sent under cover of Mr. Gaffney’s letter of March 5, 2009 (Exhibit 1, Tab 105), however no reply was ever received and he was unsure if the board of SCR had even received and considered it. Glen instructed Mr. Gaffney to send a subsequent letter which was sent on March 6, 2009 to Trevor (Exhibit 1, Tab 106) extending the date for acceptance of the proposal in the March 5, 2009 letter to April 9, 2009. There were other terms in the letter which amended the initial letter. There never was a response from SCR regarding the proposal.

62. Glen testified that he received the letter of Nelson dated July 17, 2008 (Exhibit 4). There was subsequently a meeting among Glen, Paul, Nelson and perhaps Marion, the result of which Nelson withdrew her letter of resignation and eventually stayed to work as a manager of the Restaurant until she eventually resigned sometime in September 2008.

63. Glen then referred to the email exchanges dated March 10, 2009 and March 13, 2009 (Exhibit 1, Tab 107) among Ameen Tejani (lawyer with Bryan & Company), Trevor and Jocelyn Shulhan which concerned the assignment of KEL’s lease for the Restaurant to SCR and the arrangements that had to be made with counsel for the landlord. Glen testified that he did not agree to the transfer and assignment of the Restaurant lease from KEL to SCR.

64. Glen referred to an email from “finance@stcityroasters.com” dated July 14, 2009 (Exhibit 1, Tab 117), which he believed to be Trevor’s email address to numerous individuals, many of whom are directors of SCR. Glen testified that the Restaurant business had been successful, but subsequent to the takeover by SCR, it deteriorated rapidly. The email references the commencement of legal proceedings, outstanding liabilities and many other things to which Glen took exception. It appears that this may have been the first instance where the directors of SCR came to realize the serious nature of the difficulties with respect to KEL. The email was dated July 14, 2009 and it was very close to this time that the employment of Trevor as president of SCR was terminated.

65. Glen referred to emails dated September 16, 2009 (Exhibit 1, Tab 133) which indicate that Nigel Mansfield told Mr. Gaffney the news about Trevor’s employment having been terminated and there is a reference in the email that a “major stumbling block has been removed”, presumably in reference to the removal of Trevor. The email indicates that the directors of SCR would prefer to resolve things amicably rather than through litigation.

66. The direct testimony of Glen ended at 2:09 p.m. on August 15, 2011.

**CROSS-EXAMINATION OF GLEN BY BRENT LOEWEN**

67. The cross-examination of Glen by Mr. Loewen was commenced at 2:12 p.m. on August 15, 2011.

68. On cross-examination, Glen testified that after his retirement from the RCMP in 1988, he owned a variety of other businesses and returned to the RCMP on a contract basis in 1999 through to March 2004. KEL was established in 1988 as a holding company for the various business ventures and Glen has been a director since its inception through to February 2009. He understood the fiduciary obligations he had as an officer and director of KEL.

69. From the time of acquisition of the Restaurant, Glen was involved in its day-to-day operations. He had access to the TD account and was a signing officer until February 23, 2009. Online access was available to him from March 15, 2008, although he stopped getting TD bank statements after March 15, 2008.

70. In reference to the USA, Glen acknowledged that pursuant to section 2.10, he was one of the officers of KEL and designated as treasurer. Although he was designated as treasurer, he said he did not act as a treasurer. He knew he had fiduciary obligations as the treasurer but let Danks and Trevor deal with the financial matters including issuing cheques. He did not get any reports about the financial status of KEL and was not concerned until the cash call of October 2008, which alarmed him and then he tried to get financial information. He admitted he did not contact TD to get the records nor did he go online to get the information.

71. After March 15, 2008, Glen was not involved in the day-to-day operations of the Restaurant and merely visited there from time to time to get his morning coffee or once in a while, he worked on busy days such as Farmers' Market day. He did not keep track of the daily records of the operation of the Restaurant like he did when he was running it.

72. Glen testified that he knew he was a director of KEL but in terms of looking after its Restaurant business operations, all he did was drop by the business from time to time to stay in touch. When he realized the Restaurant business was failing, he admitted that he did not try calling a directors' meeting. He insisted on getting financial information from Trevor or Paul prior to making any commitment to attend a meeting of the directors, or attend a meeting of shareholders on behalf of Marion.

73. When asked what Paul did to act in the supposed role of a director, Glen said that Paul was involved in the termination of Nelson's employment and the choice of coffee for use in the Restaurant, which reduced customers. When asked if he had any documents verifying Paul agreed to be a director, he responded that he did not. He also testified that he relied upon Mr. Gaffney to obtain the minute book for KEL and admitted that he did not see the minute book of KEL until June 2011. The minute book for KEL was never produced as a document in this Arbitration hearing.

74. When asked if there are any directors' resolutions signed by Paul, Glen admitted that he has not seen any, and also admitted that he has not seen any document where Paul consented to act as a director of KEL.

75. Glen acknowledged section 2.1 of the USA (Exhibit 1, Tab 3) stated that it was agreed by the shareholders that the only two directors of KEL could be Glen and Trevor unless otherwise designated by the unanimous written consent of Marion and SCR.

76. With respect to the appointment of Danks as a director, Glen testified that he verbally agreed since it was necessary for an ALCB requirement. He admitted that the appointment of Danks was not done with the written consent of Marion and KEL, and that he just agreed on behalf of Marion.

77. When asked if Marion agreed to Paul being a director, Glen replied "no" as he was not aware Paul was a director. He further testified that the only directors were to be Glen and Trevor except for a short time period when Danks was allowed to be a director for the ALCB.

78. When asked about the appointment of a new accountant which was contrary to the terms of the USA, Glen testified that he was not aware of this until February 2009, and he further testified that he did not have any knowledge of Paul being involved in the change of accountant for KEL.

79. When asked about the changes in the signing authorities for the KEL account at TD, Glen stated that he was involved as well as Marion agreed to Paul becoming a signing authority for the TD account when Danks left KEL and SCR. No records relative to the various changes in the signing authorities for the TD KEL account were ever introduced as evidence in the proceedings.

80. Glen was questioned about the amendment to the SPA dated of July 2008 (Exhibit 1, Tab 5) and why the longer term was agreed to by him and Marion. He testified that the same amount remained payable but with reduced monthly payments over a longer term. Glen said that he did this to help the cash flow situation for KEL in response to Paul and Trevor's assertions that the Restaurant was not making enough money to make the higher payments. There were no payments subsequent to March 15, 2008 at all and the reduced payments started in August 2008. The last payment received was in December 2008. When asked if there was any evidence of Paul being responsible for the stoppage in payments, his answer was no and that Trevor made the financial decisions. However, Glen says that Paul was responsible for making financial decisions for KEL and that Trevor was responsible for the finances of SCR. Glen believed this was the case because Paul was signing cheques for KEL.

81. When asked if he had any evidence that Paul signed cheques for KEL which were improper, Glen replied no because he did not look at the cheques or records. He says he got some cheques and had no issues with them other than a cheque for $3,000.00 payable to SCR. He testified that he made inquiries but did not get any information. When asked if he could point to any evidence that Paul signed cheques that were improper and fraudulent, Glen replied no. Glen's complaint was that there were general circumstances of insolvency and cheques not going out to the proper parties.

82. In reference to the USA, Glen admitted that he knew Trevor would be an officer and director of KEL as well as an officer of SCR. He admitted there was no plan in place with respect to this apparent conflict of interest.

83. When asked if he ever considered calling a meeting of the directors of KEL himself, he insisted that he was not prepared to either call a meeting or attend one unless he got the financial disclosure he required. He also admitted that he did not consider court action to get the records. When asked about his position as treasurer of KEL, Glen stated that he never thought the position of treasurer was relevant and assumed he was a minority shareholder without control.

84. With respect to the Notice of Annual Meeting of Shareholders (Exhibit 1, Tab 20) scheduled for February 14, 2009, he admitted that he got it prior to the meeting but was not prepared to attend without financial information for KEL being provided to him before the meeting.

85. He admitted that with respect to the USA, the only directors were he and Trevor, and that Paul was not. Glen testified that he felt SCR was trying to push him aside to deal directly with Marion and that Trevor was behind this strategy. He admitted there was no evidence that Paul tried to participate in this strategy.

86. When asked about Mr. Gaffney's letter of March 11, 2009 (Exhibit 1, Tab 34), he admitted that he read it and that Mr. Gaffney was authorized to represent him and send the letter on behalf of KEL. He also admitted that he understood there could only be two directors of KEL and they were himself and Trevor.

87. When asked about his involvement in the operation of the Restaurant subsequent to March 15, 2008, Glen testified that he would drop by for morning coffee, help out with Farmers' Market days and generally be involved on a more informal basis. Sometimes Marion attended the Restaurant and from time to time, each of them would offer instructions to staff.

88. Cross-examination ended at 3:25 p.m. on Monday, August 15, 2011, and there was no redirect by Mr. Gaffney.

**DIRECT TESTIMONY OF NELSON**

89. Nelson's testimony began on Tuesday, August 16, 2011 at 8:55 a.m.

90. Nelson testified that she was employed at the Restaurant from September 6, 2006 to September 19, 2008. She had attempted to resign from the Restaurant effective July 31, 2008, but was convinced to continue her employment.

91. After March 15, 2008, her position changed to manager/server and she received a commensurate raise in pay effective June 2008. She stated there was not much involvement with Trevor and that most of her dealings were with Paul. There were weekly staff meetings which were attended by either one or both of Paul and Trevor, and that Glen did not attend except for very few meetings.

92. Dissatisfied with her working situation, Nelson tendered her resignation letter dated July 17, 2008 (Exhibit 4), which was addressed to Matt, Paul and Glen. One of the problems was that she had an arrangement whereby she held an American Express card to be used at Costco which was used as a supplier of goods for the Restaurant. Nelson would do the shopping, pay for the supplies with the American Express card, and then be reimbursed. When Glen was operating the Restaurant, the reimbursement operated satisfactorily and efficiently. After the change of control in the Restaurant, she was reimbursed slowly for the expenses incurred for the Restaurant on her personal American Express card and she became very concerned that she would be stuck with a large liability.

93. After the July 17, 2008 resignation letter, there was a meeting between her and Paul in which Paul advised that he wanted her to stay. Ultimately, she was convinced to stay and things seemed to improve with her reimbursements for her American Express card for Restaurant expenses.

94. Ultimately, Nelson's employment was terminated on September 19, 2008 pursuant to a meeting late in the day with Paul which was done at the boardroom of SCR. She was advised that her termination was due to the corporate restructuring and a new direction for KEL. She received severance pay that was satisfactory to her to the end of October 2008.

95. Subsequent to the termination of her employment, there were ongoing issues with respect to obtaining a Record of Employment, and a reference letter and being paid for outstanding

expenses on the American Express card in the amount of $203.39 (Exhibit 1, Tab 134 – email November 6, 2008). There were also issues about her severance having some conditions about Nelson not contacting employees of the Restaurant and staying away from the Restaurant. Ultimately, Nelson was able to resolve her claim for employment insurance without the Record of Employment and she never did receive the reference letter.

**CROSS-EXAMINATION OF NELSON BY BRENT LOEWEN**

96. The cross-examination began on Tuesday, August 16, 2011 at 9:15 a.m.

97. Nelson testified that prior to March 15, 2008, Glen was very involved as a full-time owner, manager and operator of the Restaurant but subsequent to March 15, 2008, his involvement was greatly reduced to only occasional days when he worked in the Restaurant to help out such as Farmers' Market days. She testified that Danks was directly involved with the operation of the Restaurant and looked after bank deposits, ordering, helping and generally being involved in a managerial capacity. She thought he was an effective manager, but she was stressed because she did not feel she was supported by management.

98. With reference to Exhibit 4, Nelson explained that "cashing off" involved doing the daily tally of the cash and reconciling that with sales to ensure they balanced. She was then responsible for doing the bank deposit. She said she did not require Glen's assistance and that she was capable of doing all of this by herself.

99. There were weekly staff meetings with Paul, Trevor and various Board members of SCR from time to time which were held most often at the premises of SCR. Glen did not attend the weekly staff meetings but may have attended one or two meetings at SCR when there was a tour of the renovations at SCR.

100. When asked about paying for supplies by way of cash from the register, she testified that a few suppliers were paid in cash as they delivered goods such as Grandin Bakery, which amounted to perhaps $200.00 per week. There were also a small number of other suppliers that were paid directly from cash at the time of delivery.

101. With respect to the termination of her employment, she thought it was amicable and that she had been dealt with fairly other than the follow-up issues involving the Record of Employment and reference letter. She admitted that she never thought of asking Glen for a reference letter, but considered Glen to be a friend. She knew that Glen was a member of the board of directors of KEL but never really differentiated between the boards of KEL and SCR and regarded them as one and the same.

102. With respect to any dealings she may have had with Matt, she testified that she had minimal dealings with Matt.

103. The cross-examination ended on Tuesday, August 16, 2011 at 9:32 a.m.

**RE-DIRECT TESTIMONY OF NELSON BY HARRY GAFFNEY, Q.C.**

104. Nelson testified that Danks was involved with the Restaurant for only two or three months, and after he was gone it fell upon her to manage the Restaurant.

105. Re-direct ended on Tuesday, August 16, 2011 at 9:38 a.m.

**DIRECT TESTIMONY OF KEN MACRAE**

106. The issue of the opinion evidence proposed to be given by Macrae was dealt with earlier in this Award.

107. The testimony of Macrae began on August 16, 2011 at 10:50 a.m.

108. At the commencement of testimony by Macrae, counsel agreed there was no issue of a conflict of interest on the part of Macrae due to him having done some tax returns for Paul and his parents.

109. Reference was made to Macrae's qualifications (Exhibit 1, Tab 51) and Mr. Loewen accepted Macrae's accounting qualifications as both a Chartered Accountant and a Certified Management Accountant.

110. The financial statements (Exhibit 1, Tab 52) for KEL were prepared by Macrae on a Notice To Reader limited engagement basis with all of the financial information having been prepared by Glen on behalf of management. Macrae had been engaged by KEL for a number of years prior to March 15, 2008.

111. With respect to the balance sheet, the effective date of change of control was March 15, 2008 and Macrae testified that a change of control triggers a year end, thus necessitating financial statements to be prepared for the time period ending March 15, 2008. This created a stub year of September 1, 2007 to March 15, 2008 so the financial statements reflect a full year of operations for 2007 and 6.5 months for the time period designated as 2008.

112. The financial statements indicated there was a shareholders' loan due to Glen and Marion in the amount of $111,405.00. He further testified that in the notes to the financial statements, note #2 indicated that the assets purchased for the operation of the Restaurant amounted to $82,035.00 which was comprised of the initial cost of $70,000.00 plus an additional $12,035.00.

113. Reference was made to Schedule 1.1 of the financial statements with year ending August 31, 2007 (Exhibit 1, Tab 54) which represented a full year of business operations of the Restaurant. In reference to the income statement, the revenue total for 2007 was $194,328.00 and in the subsequent year, which was only for a period of 6.5 months, the revenue was $115,475.00.

114. Macrae testified that the Restaurant was bought by KEL in August 2004 for a cost of $70,000.00.

115. With respect to the closing of the share sale transaction on March 15, 2008, Macrae testified that he relied upon Glen. There were few post-closing items for adjustment including some American Express expenses relating to Costco and other small suppliers for a total of about $2,741.00 which were not reflected in the financial statements. He did not regard these adjustments as being significant.

116. Macrae testified that subsequent to preparing the 2008 financial statements, he was not requested to do any further financial statements by Paul or anyone else. He was also not contacted by any other accountants, which is usually customary as an ethical matter between accountants.

117. Macrae testified that he has known Trevor since about 1995 when Trevor was a business loans officer with Bank of Nova Scotia and subsequently with another bank. Macrae had an expectation that Trevor knew how to read financial statements. Macrae testified that he had no dealings with Paul.

118. As at March 15, 2008, the financial statements indicated that the assets did not exceed liabilities but if you discount the shareholders' loan then assets would exceed liabilities.

119. Direct examination ended on Tuesday, August 16, 2011 at 11:14 a.m.

**CROSS-EXAMINATION OF MACRAE BY BRENT LOEWEN**

120. Cross-examination of Macrae began on Tuesday, August 16, 2011 at 11:15 a.m.

121. Macrae was referred to the Statement of Loss and Deficit and acknowledged that he knew the Restaurant was operated by Glen. He was asked if any of the expenses included salary for Glen and Marion and Macrae responded that Glen and Marion did not take a salary. He knew this from the financial information provided by KEL as well as from preparing the personal tax returns for Glen and Marion. Glen and Marion did not take any significant salary from the business. If salaries to Glen and Marion had been paid there would be an operational loss.

122. In preparation of the financial statements, Macrae testified that he did not inspect any of the equipment and only relied on Glen's advice and information. He further testified that his was a limited engagement and accordingly, financial statements would have been based upon the information and advice provided by Glen as well as the working papers generated in reviewing financial matters.

123. Cross-examination ended on Tuesday, August 16, 2011 at 11:18 a.m. and Mr. Gaffney had no questions for Macrae on redirect.

124. Mr. Gaffney did not call any more witnesses.

**TESTIMONY OF PAUL**

125. Earlier, Mr. Loewen had provided his opening statement so he proceeded with the direct testimony of Paul.

126. Paul testified that he was employed by SCR in March 2008 and his duties included marketing, communications, barista training and selling coffee to numerous restaurants and retail stores. The business of SCR was to import raw coffee then roast, blend, package and distribute it. He indicated that his duties at SCR took about 50-60 hours a week and he was also a member of the board of directors of SCR.

127. The Restaurant was a customer of SCR. Trevor, in his capacity as President of SCR in combination with Danks, the roast master, had an idea to acquire the Restaurant as part of the business operations of SCR. They thought it would be a good way to feature SCR products.

128. When referred to the SPA (Exhibit 1, Tab 2), Paul said he had no involvement in negotiating it and stated the same was the case with respect to the USA (Exhibit 1, Tab 3). Paul did indicate that he had authority to sign cheques on behalf of KEL for its TD current account. Paul testified that he had obtained his authority for the TD account when he went with Glen and Marion to make arrangements directly at the TD branch. He also testified that he was not responsible for the day-to-day management of the Restaurant and that it was Danks who was involved as manager of the Restaurant.

129. Danks left the employment of SCR on June 30, 2008 which left only Paul and Glen as the signing authorities for the KEL TD account, and he did not know if Glen was signing cheques or not. He

relied upon Trevor to prepare the cheques for his signature but did not inquire as to the nature and extend of the details for each cheque.

130. When asked if he ever agreed to be a director, employee or officer of KEL, he replied no to all three and it was his understanding that only Glen and Trevor were the Directors of KEL.

131. When referred to an email dated October 27, 2008 from Paul to Glen, Cc Paul (Exhibit 1, Tab 7), he said he did not write this email. When referred to the last paragraph on page 1 of the email, he stated that he does not understand it and did not write it. He also stated that the style of the email is quite unusual and is not typical of how he would write an email message. He testified that he did not authorize the email to be written or sent on his behalf and commented that the "Cc" to himself was weird as why would he copy an email to himself.

132. Paul testified that he left his laptop open throughout the day and did not take it with him on his extensive daily travels to visit customers as he did not need it. He said that others, including Trevor and Matt, could have had access to his computer. His last access to any email using the "stcityroasters.com" domain ended when his employment was ended with SCR.

133. Reference was then made to an email dated Sunday, November 9, 2008 (Exhibit 1, Tab 72) and Exhibit 3 for comparison purposes. This was also to be compared with Exhibit 1, Tab 134. Although Exhibit 3 appears to have been sent from Paul's email account at SCR, he says that he did not send it. There seemed to be an issue about the same email being sent from different senders.

134. Reference was made to several emails found at Exhibit 1, Tab 10 on or about November 17, 2008. Paul acknowledged sending the middle message and indicating that it was sent because he had an argument with Trevor and sent the email to advise of his resignation from the board of directors of KEL. He testified that he had never agreed to be on the board of directors of KEL and whether in fact this was the case or not, he decided out of an abundance of caution to tender his resignation in any event. He was not sure how or why he may have been made a director of KEL by Trevor, but he wanted to protect himself and resign.

135. With respect to cheques signed for KEL on the TD account, he only signed cheques for payroll, suppliers and other normal business expenses.

136. Paul testified that he knew Nelson and did some training work with her for the Restaurant. He became involved with dealing with Nelson as a result of the Kijiji ad placed by Matt (Exhibit 4) when Nelson decided to quit, but he talked with her and convinced her to remain employed with KEL. Apparently, there was a second planned location for a restaurant on Calgary Trail to be called "Death by Chocolate" and Nelson misconstrued the nature of the Kijiji ad. Ultimately, Trevor made a decision to terminate Nelson's employment but relied on Paul to meet with Nelson and implement the decision, which he did.

137. Reference was made to a series of emails over November 6 and 7, 2008, which Paul acknowledged, however he said that it was not his responsibility to deal with the operations of the Restaurant and that was to be done by Matt or Trevor.

138. Adjournment at noon and continuation of direct examination of Paul resumed on Tuesday, August 16, 2011 at 1:18 p.m.

139. Prior to the resumption of the direct testimony of Paul, there was an issue about two documents to be entered into evidence and ultimately it was agreed by counsel that they would review the documents overnight and make submissions to me the next morning about the documents.

140. Direct examination of Paul resumed at 1:29 p.m.

141. Reference was made to an email of October 27, 2008 (Exhibit 1, Tab 9) with reference to a cash call. He said that he was not responsible for financial matters and that this was the responsibility of Trevor, so he is not capable of responding to the message. Reference was then made to an email of January 22, 2009 (Exhibit 1, Tab 18) from Glen to Trevor and Paul testified that he was not involved in suspending share purchase payments and had no knowledge of any of this. Reference was then made to the Notice of Annual Meeting of Shareholders of KEL (Exhibit 1, Tab 20) and Paul testified that he had no knowledge of the meeting and had no knowledge of the board of directors of KEL as he was not a part of either.

142. Reference was made to an email dated Sunday, February 15, 2009 from Trevor to Paul as well as others (Exhibit 1, Tab 95) who appear to have been members of the board of directors of SCR. Paul acknowledged having received this message and this was his first knowledge about the cash call or the potential closing of the Restaurant. Given the circumstances, Paul testified that he sent a letter dated February 14, 2009 to TD (Exhibit 1, Tab 93) resigning as a signing authority for the TD account and he wanted no part of it. He had an argument with Trevor and said he was overworked just dealing with his SCR duties and had no time to deal with the Restaurant.

143. Paul was then referred to a letter dated April 3, 2009 to Mr. Gaffney by Trevor (Exhibit 1, Tab 113). In reference to the second last paragraph of the letter about SCR's board being furious with Marion and Glen, Paul testified that as a director of SCR, he and the other directors were not furious with Glen and Marion, but very frustrated by the inability of Glen and Trevor to resolve issues regarding the operation of the Restaurant. Paul then testified that Trevor's employment with SCR ended on or about October 2009 due to his business behavior and irregular accounting practices. No documents were tendered as evidence but Paul testified that there was an audit of SCR which showed accounting irregularities between KEL and SCR.

144. Direct examination of Paul adjourned on Tuesday, August 16, 2011 at 2:41 p.m. subject to the resumption of direct examination of Paul by Mr. Loewen when new documents are tendered the next morning and subject to the direct examination being limited to those documents alone.

**CROSS-EXAMINATION OF PAUL BY HARRY GAFFNEY, Q.C.**

145. Cross-examination of Paul Biglin began on Tuesday, August 16, 2011 at 2:42 p.m.

146. Paul was asked about the status of the lease for the Restaurant and how it was assigned from KEL to SCR. Paul replied that he was not involved with the assignment of the lease. He was also asked about the transfer of the assets from KEL to SCR and he said he had no knowledge of that either.

147. Paul testified that he was a director of SCR on March 1, 2009 but did not believe or could not recall whether he was an officer of SCR.

148. When the shares of KEL were first acquired pursuant to the SPA (Exhibit 1, Tab 2), the agreement was brought to the board of SCR and approved, but he did not recall the meeting, discussions or what amount was paid. He also said that he did not know about the shareholders' loan of Glen and Marion in KEL and did not have any knowledge about the financial statements

attached to the SPA. When asked about the accounting information on the disc referenced at paragraph 16 of Exhibit 1, Tab 1, Paul testified that he was unaware of any of this information.

149. When questioned about the balance sheet of KEL as at October 31, 2008 (Exhibit 1, Tab 39), he said he was unaware of the liabilities to CRA for source deductions and taxes.

150. In reference to Exhibit 1, Tab 1, paragraph 17 and 19 concerning outstanding liabilities, he indicated he had no knowledge of these liabilities. At paragraph 20, there is a reference to the Restaurant changing to a new business operation on May 1, 2009 as an outlet of SCR. At the time he was a director of SCR, but he was not involved in that business operation as he was fully busy selling coffee for SCR and doing training. He testified that he had no involvement in the reopened business and that it was up to Matt, Trevor and Nigel Mansfield to operate the business. When asked about how long the new business operation of SCR subsisted after the closure of the Restaurant, Paul could not answer how long it lasted because his employment was terminated on July 31, 2009. He ceased to be a director of SCR near the end of October 2009, but from July 31 to the end of October 2009, he did not attend any directors' meetings of SCR.

151. When referred to the signage change at the Restaurant premises from operating as the Coffee Cup to an outlet for SCR (Exhibit 1, Tab 38), Paul recognized the notice and thought it had been put up by Matt.

152. When referred to the email of Trevor to Ameen Tijani of March 13, 2009 (Exhibit 1, Tab 109), Paul testified that he recognized the names but said the lease assignment was not discussed by the board of SCR and he did not recall any assignment of the lease of KEL to SCR at all. He understood that Glen and Trevor were the directors of KEL. He testified that he knew that Glen had resigned as a director, but he could not recall when.

153. Mr. Gaffney asked Paul about Marion's medical condition concerning cancer, and Paul indicated that he knew about it but does not recall when he first learned of it. Paul said that up to the time of the closing of the sale for the shares of KEL, Glen was the full time general manager of the Restaurant, but after that, Glen and Marion went on vacation and when they returned, Glen would come to the Restaurant from time to time and sometimes Marion would as well.

154. Paul indicated that he did attend weekly management meetings as the meetings for KEL and SCR were combined meetings and the Restaurant was handled as a department of SCR.

155. When asked about implementing a new accounting system subsequent to March 15, 2008 for KEL, Paul did not have any knowledge of this and did not know where the records were kept as he was not involved in accounting duties for KEL. He said that cheques for KEL were prepared by Trevor and needed one or two signatures, and the process was that he was given cheques to sign for KEL and he signed them as long as they were preapproved by Trevor. He did not prepare the cheques for signing. He did not ask about the status of the TD account and assumed that when he was presented with a cheque for KEL on the TD account that there were sufficient funds.

156. When referred to Nelson's letter of July 17, 2008 (Exhibit 4), Paul indicated that he had no knowledge about the American Express issues and when he made inquiries and asked Matt to figure out what it was all about, he was told Trevor was dealing with it. He did not follow up further and assumed that Trevor and Matt would take care of it. He further stated that he had no knowledge of the cashing off duties as he was not involved. After receiving Nelson's letter of July 17, 2008, Paul said that he and Glen met with Nelson and explained the mistake and impression created by the Kijiji ad. She subsequently agreed to stay and he attended various management meetings that were either at the boardroom of SCR or at the Restaurant.

157. With respect to the emails between Paul and Nelson dated November 7, 2008 (Exhibit 1, Tab 134), he could not confirm if a reference letter was ever given as he was not involved with it or the Record of Employment.

158. When asked about Trevor's letter to Cody Law Office dated March 4, 2009 (Exhibit 1, Tab 104), Paul testified that he did not know Brad Cody, had never seen any minutes for a meeting held on February 14, 2009, and was unaware of any of the changes of directors including ones which indicated that he was a director of KEL. When asked about his letter to TD dated February 14, 2009 (Exhibit 1, Tab 93), Paul acknowledged the letter as being his resignation as a signing officer for the TD account for KEL and that this was initially set up in early April 2008 and he signed cheques for KEL from that point forward until his resignation on February 14, 2009.

159. Paul was then referred to minutes of a meeting of the directors of SCR dated April 8, 2009 (Exhibit 1, Tab 114) and stated that he could not recall whether or not he signed these minutes. He also indicated that he did not recall what was discussed in the meeting minutes. The other individuals listed at the bottom of the Exhibit are the other directors of SCR. Paul stated that Trevor was not a director of SCR but was the President of SCR. He also stated that Trevor had been a director of SCR until he became a director of KEL.

160. Paul was then referred to an email from Trevor to Matt re: "cover my ass" with attached email from Malea Siemens (director of SCR) to Trevor, Paul with Cc to the other directors (Exhibit 1, Tab 122). Paul acknowledged having received this message but at this point in time, while still remaining a director of SCR, Paul's employment with SCR had been terminated. There was a reference to Spirit Bear Coffee Company ("SBCC"), which Paul said was a subsidiary of SCR. He was required to move to Vancouver, BC, to run the business operations of SBCC. The string of emails contained within this Exhibit indicates a number of things, but Paul acknowledged that Trevor was President of SCR and SBCC and that he was also a director of both of those companies. Paul acknowledged that he was a director of SBCC. With reference to page two, #1 of the message, Paul testified that he had no idea of the "Ponzi" issues and said that Trevor was trying to deflect responsibility. Regarding the credit cards for Nigel Mansfield referred to at #2 on page two of the message, Paul indicated that he had no knowledge of any such credit cards. Paul indicated that Trevor's employment with both SCR and SBCC was terminated in October 2009.

161. Paul was referred to a series of other emails dated September 15, 2009 (Exhibit 1, Tab 130) and stated that he received these emails but had no role in the litigation and was trying to determine what solutions may be found.

162. Paul was then referred to a series of emails in late August and mid-September 2009 (Exhibit 1, Tab 133), however he stated that he did not know much about what was going on at the time because he was in Vancouver for the SBCC business operations. He assumed that the remaining directors of SCR would try to find a solution for the dispute with Glen.

163. Paul was referred to the email of Trevor to him dated August 28, 2009 (Exhibit 1, Tab 126) and Paul acknowledged having received it. Paul could not confirm if the amounts referred to in the message were correct or not as he was not involved. He said that Trevor terminated his employment and it could have been around August 24, 2009. He disagreed with other statements in the email message.

164. Paul was asked about email messages dated August 22 and August 24, 2009 by and among Trevor, Paul and others. Paul said that Trevor was aware of all of the cheques and receipts for SBCC so his questioning him about them was nonsensical because Trevor knew all about them himself. Paul was asked about the email of October 27, 2008 by Trevor to Glen with a copy to

Paul (Exhibit 1, Tab 8) and he acknowledged having received it. He stated he did nothing because he was not the manager of the Restaurant. Any inquiries with respect to the Restaurant, Paul referred to Trevor. Paul stated he found it strange that Glen relied on him as he was not involved with finances or anything with respect to finances and that financing a cash call were left to Trevor.

165. Paul was referred to the email of Sunday, November 9, 2008 from Trevor to Paul and says that he got it but they did not discuss it and he recalls only providing the staffing schedule found near the middle of the first page of the message. There was a comparison of Exhibit 3 to Exhibit 1, Tab 72 and the changes that occurred from page one to page three. Paul denied sending this message and only recognized the schedules for employees, which was sent by Paul to Trevor in an earlier email. He further stated that he never works on Sundays, so it would have been highly unusual for him to write email messages on a Sunday. With respect to the references to Brad Cody (lawyer for KEL), Paul said that he never had any dealings with him, did not know him and that only Trevor knew him and had dealings with him.

166. There were submissions by counsel with respect to when Paul disclaimed authorship of the email messages contained within Exhibit 1, Tab 72 and Exhibit 3, with Mr. Gaffney saying that this was only a recent occurrence. However, Mr. Loewen responded that there was earlier advice disclaiming Paul's authorship of the message. The credibility of Paul's denial of sending this email is an issue for consideration.

167. Paul was then referred to the email message of Trevor dated Sunday, February 5, 2009 to the directors of SCR (Exhibit 1, Tab 95) which was a brief report to the board of SCR. Paul said he did not know what the attachments to this message were and that he and the other board members of SCR regarded this as just being kept informed.

168. When asked about Trevor's email to Mr. Gaffney dated February 21, 2009 (Exhibit 1, Tab 96), Paul could not recall this being brought up to the board of SCR.

169. When referred to the February 23, 2009 resignation of Glen (Exhibit 1, Tab 99), Paul recalled seeing it but does not remember when and did not know why it had been sent.

170. Paul was asked about Mr. Gaffney's letter to Trevor dated February 24, 2009 (Exhibit 1, Tab 100), but Paul stated that this was not brought to the board of SCR and he did not have any discussions with Trevor about it.

171. Paul was referred to an email Trevor had sent to Mr. Gaffney's assistant on March 5, 2009 (Exhibit 1, Tab 103) but Paul disclaimed any knowledge of this message. When asked about any difficulties in getting cheques signed during March 2009, he said he refused to sign cheques at that time because by then, he had resigned as a signing officer for the TD account. Paul was referred to Mr. Gaffney's letter to Trevor dated March 2, 2009 (Exhibit 1, Tab 32) regarding returned cheques but he could not recall the letter or the cheques.

172. Paul was referred to his own affidavit filed in the Legal Proceedings (Exhibit 1, Tab 41). With respect to paragraph 11(a), he was familiar with the Restaurant espresso machine being very slow, not being able to keep up with the volume and being beyond repair so it was necessary for a new one to be purchased. With respect to paragraph 11(b) of the affidavit, he recalls that this was for outstanding American Express liabilities for Nelson regarding purchasing supplies for the Restaurant from Costco. He recalls that she was ultimately reimbursed but did not recall ever discussing the matter with Glen. When Mr. Gaffney asked Paul about his knowledge of paragraph 11(d) of his prior affidavit (re: failure to pay wages of employees), Paul indicated that he did not

have particulars of the unpaid wages. Paul was referred to Trevor's affidavit filed in the Court of Queen's Bench action (Exhibit 1, Tab 42) and asked about paragraph 12 of Trevor's Affidavit. Paul said that the liabilities referenced in Schedule "D" of the Affidavit was prepared by Trevor and he did not have the particulars of the "Kreller purchase offset" and did not know how approximately $27,000.00 was calculated. Mr. Gaffney asked further questions about Exhibit 1, Tabs 43, 44 and 45, and there was an objection from Mr. Loewen about the relevance which was overruled. Mr. Gaffney stated that this evidence confirms that Paul was involved at a high level with respect to his authority and the Legal Proceedings. The documents evidence that Paul and Trevor seemed to be working together to prepare for court.

173. Paul was directed to Glen's email to him dated October 25, 2008 (Exhibit 1, Tab 6) and Paul acknowledged receiving this message but directed it to Trevor because he was the one involved in handling financial matters. Paul did not follow up with either Trevor or Glen to determine if the request was ever satisfied.

174. Paul was directed to an email under his name to Glen with a Cc to Paul dated October 27, 2008 (Exhibit 1, Tab 7). Paul denied writing this email. Paul says that he advised his counsel that he denied sending this email but does not know when that advice may have been communicated to Mr. Gaffney. Paul said that the message is not in the style and format of what he would typically do in writing an email and disclaimed having sent it.

175. Paul was then referred to Mr. Gaffney's letter to Trevor and Paul dated March 11, 2009 (Exhibit 1, Tab 34) and admitted receiving the letter. He testified that he was not aware of any problems with source remissions not having been paid to CRA and this and other matters raised in the letter were referred to Trevor to resolve. Paul assumed that Trevor would do so. Paul was referred to CRA's letter of April 27, 2010 (Exhibit 1, Tab 46) regarding $15,574.41 for outstanding source remission deductions for KEL. He said that he asked Trevor about this issue and was advised that it would be taken care of by Trevor. When asked about financial information and the balance sheet of KEL as at October 31, 2008 (Exhibit 1, Tab 39), Paul indicated that he had no access to information like this as it was all within Trevor's control. Paul was referred to the minutes of the annual general meeting of shareholders of KEL dated February 14, 2009 (Exhibit 1, Tab 37). Paul testified that he did not attend and did not have any knowledge about who did. He verified Trevor's signature at the bottom of the document. As a director of SCR, he testified that he did not see any of the financial statements of KEL. He also stated that he did not ask Trevor about KEL financial statements. Paul says that he and the other directors of SCR never saw this document.

176. Part of Exhibit 1, Tab 37 is a document called "Minutes of Special Meeting with Shareholder" held on March 14, 2009. Paul says he and the other directors never saw this document and were unaware that there was to be any kind of disposition of the assets of KEL. Paul was unaware of the issues raised in this March 14, 2009 document, apparently signed by Trevor. Paul testified that he did ask Trevor from time to time about the status of resolving matters for KEL and was assured by Trevor that it would be resolved.

177. Paul was referred to Mr. Gaffney's letter to Trevor dated February 20, 2009 (Exhibit 1, Tab 23) and he confirmed by reference to the letter that the Restaurant was closed on or about February 20, 2009. Paul stated that he did not receive the letter but was familiar with some of the things said in the letter.

178. Paul was referred to an email under his name to Glen with Cc to himself dated October 22, 2008 (Exhibit 1, Tab 40) and Paul denied either sending or being the author of this message.

179. Paul was asked of his knowledge of the USA (Exhibit 1, Tab 3) and the Promissory Note (Exhibit 1, Tab 4) but Paul testified he was unaware of either of these documents.

180. Paul was referred to a letter written by Brad Cody of Cody Law Office to KEL, Attention: Paul Biglin, dated July 26, 2010 (Exhibit 1, Tab 47) but Paul said he did not receive the letter as his employment with SCR was terminated the year before and he was working in Vancouver at the time.

181. Paul was referred to Mr. Gaffney's letter of February 19, 2009 (Exhibit 1, Tab 24) and specifically the issues that existed at that time due to lack of signing officers. Paul said that he did not know who had signing authority and had also stated that the board of SCR did not deal with the problem relating to signing authority for the TD account of KEL.

182. Paul was referred to a Notice of Special Meeting of Shareholders from March 17, 2009 (Exhibit 1, Tab 33) but said he had no knowledge of this notice and neither did the board of directors of SCR. He said that the first time he saw it was when it was attached to an Affidavit of Glen in the Legal Proceedings. When he became aware of it, Paul said he left it up to Trevor to resolve.

183. Paul was referred to a copy of the website of "Mowbrey & Associates" (Exhibit 1, Tab 53) and specifically the testimonial section of the website which has an endorsement by Paul on behalf of ABCI. Paul says that when he learned of this testimonial, he asked Trevor and Matt to remove it because it was not authorized and would be false and misleading to people reading it.

184. Paul was referred to the evidence relating to the registration of a security interest by Norman Hebert referenced in a PPR search (Exhibit 1, Tab 50), however even though he was a director of SCR, he was unaware of the general security agreement that had been granted by SCR to Norman Hebert. Paul was aware that Norman Hebert was a shareholder of SCR. Paul also said that he was aware there was a seizure, but did not know the details. He said there was an audit of the financial records of SCR and this led to the termination of Trevor due to accounting irregularities. Paul testified that he did not know if details pertaining to the accounting irregularities were ever communicated to Glen.

185. Paul was referred to Trevor's letter to Mr. Gaffney dated April 3, 2009 (Exhibit 1, Tab 113). He said that the board of directors of SCR met monthly but did not recall when the issues pertaining to KEL were first raised. The minutes of the board of directors of SCR were never produced as evidence. Paul was asked why he kept going to Trevor instead of dealing with the issues himself and Paul testified that his job was marketing coffee for SCR and not to deal with Glen or the Restaurant. He said that the board of SCR was frustrated but trusted Trevor to resolve the issues.

186. The cross-examination of Paul ended on Tuesday, August 16, 2011 at 5:30 p.m. to be resumed the next day, but confined to specific email exhibits.

**DIRECT EXAMINATION OF PAUL**

187. The further direct examination of Paul Biglin began on Wednesday, August 17, 2011 at 9:02 a.m.

188. Pursuant to discussions between counsel, an email dated September 10, 2009 from Trevor to Paul and from Paul to Trevor with 6 of 25 pages was admitted as Exhibit 5. Counsel agreed that pages 7 through 25 inclusive were irrelevant. Counsel also agreed to the entry of emails dated May 18 and June 3, 2010 from Trevor to Paul, including reply as Exhibit 6.

189. Paul acknowledged Exhibit 5 and the handwritten notes "PAUL" beside certain portions of the message were his writing and his method for tracking what was necessary for him to respond to by way of reply. The email raised the issue about Matt breaking into his account and Paul regarding this as a major invasion of his privacy. Paul indicated that SCR employees had laptops without any central server.

190. In reference to Exhibit 7, Paul indicated that ABCI was his company which had been in existence for 12 or 13 years providing catering services to customers. Trevor was involved in ABCI for the last year or two. Paul testified that in January 2009, his father passed away and he became very busy taking care of his mother who had health issues. Paul testified that he did not have enough time to continue to operate ABCI. Paul testified that in January 2009, he tendered his resignation to SCR but subsequently was talked out of it. He shut down ABCI and did not want to continue to operate it with Trevor. The email indicates Paul's proposal to sell his half of the company to Trevor.

**CROSS-EXAMINATION OF PAUL BIGLIN BY HARRY GAFFNEY, Q.C.**

191. Paul testified that he was not aware of the testimonial in the Mowbrey & Associates website (Exhibit 1, Tab 53) until relatively recently and it was only then that he asked that it be retracted. Trevor became a director of ABCI in about February 2009 and Paul signed over ABCI to Trevor around the end of May 2010. Paul had difficulty dealing with Trevor and Matt in terms of getting the testimonial off of the Mowbrey & Associates website. Paul testified that he wanted nothing further to do with Trevor and was not prepared to continue doing business with him.

192. In reference to Exhibit 6, Paul said that the email was initiated by Matt. Matt's employment had been terminated by the board of SCR. The board of SCR had assured Matt that he would be paid but Trevor had cancelled the bank account for KEL.

193. With respect to Exhibit 5 and specifically page four of the email message, Paul indicated that he raised the issue of his email messages so the first mention of this invasion and unauthorized use of emails was in the time frame of September 10, 2009.

194. The cross-examination of Paul ended on Wednesday, August 17, 2011 at 9:35 a.m. and there was no redirect questioning by Mr. Loewen.

**ARGUMENT OF THE CLAIMANTS**

195. Mr. Gaffney referred me to his extensive brief and arguments contained under cover of his letter of June 17, 2011 and his shorter letter and enclosures of August 10, 2011.

196. Mr. Gaffney says that Mr. Loewen's comment that Trevor was a lone rogue was not true and that Paul acted with him. Glen's position is that KEL was a healthy company up to the time of change of ownership by way of share sale and there is no evidence to the contrary. He says that Paul's evidence is exculpatory, self-serving and incomplete. Glen is both a creditor and a shareholder of KEL and all the things that were done to him by Trevor and others after the change of control amounted to oppression, which should result in sactions pursuant to the provisions of section 242 of the ABCA. Pursuant to the SPA, Glen and Marion were only paid $13,798.20, leaving a balance of $61,201.80 plus the full amount remaining due under their shareholders' loan. Mr. Gaffney says that Paul did not pay attention to his duties as a director of SCR and delegated too much responsibility to Trevor.

197. Mr. Gaffney says that Macrae's evidence was that at most, $2,700.00 may have been an adjustment which should have been made between the parties at the time of the SPA and there is no evidence that there was any kind of offset approaching $25,000.00.

198. Mr. Gaffney says that to have a board meeting, you need proper information and Glen was entitled to request and require all relevant information before agreeing to attend a Board meeting. He says that Paul's evidence about his having minimal involvement with the Restaurant was not credible. He says that the emails which Paul denied sending were real and that Paul lied about not sending them. He questioned how Paul could resign as a director if he never was a director, and says that this amounts to evidence that he was, in fact, a director of KEL by way of inference. Mr. Gaffney pointed to several documents which give this inference.

199. Mr. Gaffney also says that if there were substantial readjustments to the purchase price under the SPA, then why were these things not brought to everyone's attention at the time the payments were readjusted and new payments were made in November and December 2008. There was no indication of any problems, so he says any claimed offsets were just not justified.

200. Mr. Gaffney argued that: the failure to provide accounting information; the arbitrary assignment of the lease; closing the business; not paying CRA; terminating the employees; transferring the assets of KEL to SCR and not conducting proper meetings of shareholders and directors, all amount to oppressive conduct. He says that no doubt Trevor was involved in all of this, but he also says that Paul's disclaimer of any involvement in these things is not plausible. He says there has never been any satisfactory explanation of what happened to the property of KEL other than it appears to have been seized by a secured creditor of SCR.

201. Mr. Gaffney says that Paul's signing of cheques is indicative of knowing a lot more about the finances of KEL and that his claim to be only involved in marketing is not credible and that he had a much more extensive involvement in the business operations of the Restaurant. He further says that Paul's acceptance of emails which are neutral or helpful to him but denial of others is not credible. He says that Paul and Trevor worked together for many years, not only with respect to KEL but also SCR, SBCC and ABCI.

202. With respect to the issue of Trevor's bankruptcy, Mr. Gaffney referred me to the Order of Registrar L. A. Smart, Q.C., and that I have the authority to make an award as against Trevor.

203. The relief sought by the claimants is as follows:

a) An award against KEL in the amount of $111,405.00 representing the shareholders' loan;

b) An award against SCR in the amount of $83,199.10 representing the amount due with respect to the purchase of the shares pursuant to the SPA;

c) An award against Trevor and Paul, jointly and severally, in the amount of $300,000.00, representing:

| | |
|---|---|
| Purchase price for the shares | $83,199.10 |
| Shareholders' loan | $111,405.00 |
| Punitive and exemplary damages | $100,000.00 |
| TOTAL | $294,599.10 (rounded to $300,000.00) |

d) Costs on a solicitor/client basis.

204. With respect to punitive and exemplary damages, Mr. Gaffney referred me to section (vi) on page 12 of the submissions made with his letter of June 17, 2011.

205. Mr. Gaffney agreed that the misappropriation of the value of KEL would be confined to the property of the Restaurant and the revenue subsequent to March 15, 2008, less bona fide business expenses up to the time of closure of the Restaurant.

206. Mr. Gaffney says that at the time of the SPA, the value of the shares for a 60% interest in KEL was $75,000.00 and accordingly, the value of the shares for a 100% interest would be $125,000.00. He says that the amount of the shareholders' loan should be added to the $125,000.00 for an overall claim of $236,405.00.

207. Mr. Gaffney referred me to his letter of August 24, 2011 where he makes the argument that SCR and KEL are affiliates pursuant to sections 1 and 2 of the ABCA. If they are affiliates combined with the fact that Paul was a director of SCR then section 2 of the ABCA would apply to him. He then referred me to the decision of Madam Justice J. B. Veit in *James v. Oraas*, 2005 ABQB 539. Mr. Gaffney says Paul and Trevor were the controlling minds of both SCR and KEL and that Paul facilitated the wrongful acts of Trevor.

## ARGUMENT OF THE RESPONDENT PAUL

208. Mr. Loewen's argument on behalf of Paul is contained in his written closing submissions dated August 17, 2011. He says this is a dispute about the breach of the SPA and USA. The USA provides that the only two directors of KEL could be Trevor and Glen, and it further provides that the officers of KEL were Trevor as president, Danks as secretary, and Glen as treasurer. No changes to the directors could be made without the unanimous approval of the shareholders and no changes could be made to the officers without the unanimous approval of the directors. Mr. Loewen says that Paul did not act as either a director or officer of KEL, nor did he consent to be a director or officer of KEL, and that there is simply no documentary evidence to prove otherwise. Also, there is no evidence that Paul was an employee of KEL.

209. Mr. Loewen says that Paul was asked by the directors of KEL to perform certain tasks including signing cheques and terminating an employee. Paul says that he relied at all times upon Trevor who was the president and the director of KEL to determine whether he should sign cheques. There was no evidence of any cheques being signed by Paul that were improper.

210. There were many emails produced throughout the proceedings, but with respect to the most critical ones which may have given some inference that Paul was a director, there is evidence that Paul denied being the author of such emails. He also says that the form and content of these emails are not typical of the other emails which Paul did write.

211. Mr. Loewen says that statutory remittances for wages and GST were the responsibility of Trevor and it is clear that subsequent to the SPA and March 15, 2008, these payments were never made by Trevor. In order to deflect responsibility and liability, Mr. Loewen says that Trevor had motive to improperly appoint Paul as a director in place of himself in order to avoid liability for statutory remissions.

212. Mr. Loewen says that eventually the board of directors of SCR realized all of the accounting irregularities perpetrated by Trevor and terminated his employment.

213. Mr. Loewen summarized the issues as follows:

a) Was Paul duly appointed as a director of KEL;

b) If Paul was duly appointed as a Director of KEL, at what time period did Paul serve as a director of KEL;

c) Did Paul fail to act in accordance with section 122 of the Act;

d) If Paul was duly appointed as a director of KEL, did Paul oppress the Claimants contrary to section 242 of the Act;

e) Can the Claimants rely upon section 248 of the Act for the relief sought?

214. Mr. Loewen says there is insufficient evidence to show that Paul was a duly appointed director of KEL and inferences that he may have been a director are not enough. There were no documents to either establish his consent to be a director or any resolutions of the shareholders of KEL confirming him as such. Furthermore, any appointment of Paul by Trevor unilaterally was contrary to the terms of the USA and void. If Paul was appointed as a director of KEL, it was done so without his knowledge or consent.

215. If Paul was appointed as a director of KEL, what was the relevant time? Mr. Loewen says there is evidence to show that Paul resigned as a director on November 17, 2008 immediately after he was advised by Trevor, for the first time, that he was a director of KEL. Mr. Loewen says that if there were any instances of oppression, they did not occur during the alleged tenure of directorship. If Paul was a director, did he fail to meet the requirements of section 122 of the Act? Mr. Loewen says there is no evidence to show that Paul did anything as a director other than sign cheques and terminate one employee during a short tenure of alleged directorship. Mr. Loewen also says that Paul was one of five directors of SCR and there is no evidence to suggest that Paul breached his fiduciary duties as a director of SCR.

216. With respect to the applicability of section 242(1) of the Act in relation to Paul, Mr. Loewen says at no time was Paul a director of KEL and as a result, section 242 of the Act is inapplicable as against him. Furthermore, even if Paul was a director sometime between March 15 and November 17, 2008, as alleged, there is no evidence that he exercised any power as a director of KEL and there are no corporate documents or resolutions tendered as evidence to suggest Paul did anything as a director. To show oppression, the Claimants must show that Paul acted as a director of KEL and exercise powers of a director which were oppressive or unfairly prejudicial. Mr. Loewen says there is no evidence that supports such an allegation.

217. In conclusion, Mr. Loewen says that the failure of the Claimants to prove oppression on the part of Paul is tantamount to alleging fraud without proving it and as a result, Paul ought to be awarded costs on a solicitor and client basis. In the alternative, Paul ought to be awarded $10,000.00 in costs and disbursements relating to the significant expense that he has incurred for preparation of and attendance at the hearing.

218. In reply to Mr. Gaffney's letter of August 24, 2011 and the argument that SCR and KEL are affiliates thereby binding Paul, Mr. Loewen provided his email of August 24, 2011. He says that section 2(2) of the ABCA relates to control and a majority shareholder may exercise control but in these circumstances the USA prevented such control from being exercised. Under the USA, Glen and Marion maintained control of both the appointment of directors and officers so Paul never had any chance as a director of SCR to exert control. With respect to the case of *James v.*

*Oraas*, supra, there is no evidence Paul attempted to exercise control over KEL and no evidence he committed any wrongful acts and that he did not knowingly provide assistance to perpetrate wrongful acts.

**REBUTTAL OF CLAIMANTS**

219. Mr. Gaffney says that Paul was actively involved in KEL and was more involved than the other directors of SCR as he was also an employee of SCR. Due to the fact that Trevor and Paul worked together, they had plenty of opportunity to discuss things from day to day.

220. With respect to the allegations concerning the application of section 69 of the BIA and the suspension of the stay with respect to any award I may make as against Trevor, Mr. Gaffney advised that he is relying on the relevant sections of *Holden and Morowetz* regarding breach of fiduciary capacity and misrepresentation but not fraud. Mr. Gaffney referred me to his letter of August 10, 2011 with reference to the relevant law.

221. The arbitration hearing concluded on Wednesday, August 17, 2011 at 12:00 p.m.

**ISSUES**

222. The issues are as follows:

#1. There is no issue that Glen and Trevor were directors of KEL, but is there sufficient evidence for me to find that Paul was a director of KEL?

#2. If there is sufficient evidence to find Paul was a director of KEL, then what was the effective time frame for his directorship?

#3. During the time determined from Issue #2 above, did Paul participate in acts which would be considered contrary to section 122 and 242 of the ABCA?

#4. If there were breaches of sections 122 and 242 of the ABCA, then which directors are responsible pursuant to section 248 of the ABCA?

#5. Given the Order of Registrar L. A. Smart, Q.C. (Exhibit 2), to what extent can an award be made against Trevor which survives his current Bankruptcy?

#6. What is the proper calculation of the quantum of any award I may make with respect to any one or more of the Respondents?

**ISSUE #1**

223. **There is no issue that Glen and Trevor were directors of KEL, but is there sufficient evidence for me to find that Paul was a director of KEL?**

224. Marion was a 40% shareholder of KEL and SCR held the other 60% of KEL. Marion, SCR and KEL were parties to the USA and section 2.1 of the USA states:

*"2.1 Board of Directors*

> *The parties agree that except with the written consent of the Shareholders, the board of directors shall consist of* ***two*** *directors who shall be* ***Trevor Mowbrey*** *and* ***Glen Kreller****."*

The bold print was part of section 2.1 and no emphasis was added.

225. I have reviewed the extensive testimony and evidence of Glen and Paul, but there is no written documentation to show that the shareholders, Marion and SCR, ever appointed Paul as a director of KEL. There is no resolution of the Shareholders and there is no consent to act as a director signed by Paul. Mr. Gaffney admits that there is no documentary evidence, but says that the numerous emails and letters referred to in the evidence, as well as the testimony of Glen and Paul, give a strong inference that Paul was a director.

226. Paul could not be appointed as a director unilaterally by either shareholder. The consent of both Shareholders was required but there is no evidence that this ever occurred. Glen knew and understood section 2.1 of the USA and it is not enough for him to say that he thought Paul could be appointed as a director because SCR had majority control. Trevor was the president of SCR, but he was not a member of the board of directors of SCR. There is no evidence that the board of directors of SCR ever attempted to appoint Paul as their director of KEL in substitution for Trevor. There could only be two directors of KEL and they were designated in writing as being Trevor and Glen.

227. There was extensive testimony about the authenticity of various emails and Paul disputed that he sent them. No forensic evidence was introduced with respect to the creation and tracking of these email messages, however my reading of them gives me pause when the form and substance of them are compared to other email messages which were sent by Paul.

228. Glen was well aware of section 2.1 of the USA and the fact that there could only be two directors, and they were limited to Glen and Trevor. Glen's refusal to meet with Trevor without getting financial information in advance of meeting was understandable, but SCR was the majority shareholder and it had a board of directors who were well known to Glen. Glen was also a shareholder of SCR. Given the circumstances of Marion's battle with cancer, it is easy to understand why Glen may not have taken all of the steps he might have to rectify the situation. When Glen did not make any progress with Trevor in terms of getting financial information, he could have made an effort to contact the board of directors of SCR and this could have been done any time after the first payment was not made under the SPA.

229. With respect to the argument that Paul should be considered a director or the directing mind of KEL because he was a director of SCR, and KEL and SCR are affiliates, I reject that argument. The terms of the USA did not give effective control of KEL to SCR because Marion, or Glen by extension, had as much say in the appointment of directors and officers of KEL as SCR did. I have reviewed *James v. Oraas,* supra., and I cannot find sufficient evidence that Paul was a guiding mind of either KEL or SCR nor could I find any evidence of negligence or malfeasance on his part. Furthermore, there is no evidence that Paul attempted to exercise control over KEL and in fact the evidence is that he and SCR's board usually deferred to Trevor and let him make the decisions. There is also no evidence that Paul knowingly committed any wrongful acts by way of oppression of Glen or Marion's rights nor is there any evidence he provided assistance for the commission of wrongful acts.

230. As a result, I find that there is insufficient evidence to support the allegation that Paul was ever a Director of KEL.

**ISSUE #2 AND #3**

231. **If there is sufficient evidence to find Paul was a director of KEL, then what was the effective time frame for his directorship?**

232. **During the time determined from Issue #2 above, did Paul participate in acts which would be considered contrary to section 122 and 242 of the ABCA?**

233. Having found that Paul was never a director of KEL, I need not deal with Issue #2 or #3.

**ISSUE #4**

234. **If there were breaches of sections 122 and 242 of the ABCA, then which directors are responsible pursuant to section 248 of the Act?**

Sections 122, 239, 242 and 248 of the ABCA are reproduced as follows:

***Duty of care of directors and officers***

***122*** ***(1)*** *Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties* shall

*(a) act honestly and in good faith with a view to the best interests of the corporation, and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*

***(2)*** *Every director and officer of a corporation shall comply with this Act, the regulations, articles, bylaws and any unanimous shareholder agreement.*

***(3)*** *Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.*

***(4)*** *In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.*

*1981 cB-15 s117*

***Definitions***

***239*** *In this Part,*

*(a) "action" means an action under this Act or any other law;*

*(b) "complainant" means*

*(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,*

*(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,*

*(iii) a creditor*

*(A) in respect of an application under section 240, or*

*(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or*

*(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.*

*1981 cB-15 s231; 2000 c10 s3*

***Relief by Court on the ground of oppression or unfairness***

***242*** ***(1)*** *A complainant may apply to the Court for an order under this section.*

***(2)*** *If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates*

*(a) any act or omission of the corporation or any of its affiliates effects a result,*

*(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or*

*(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.*

***(3)*** *In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:*

*(a) an order restraining the conduct complained of;*

*(b) an order appointing a receiver or receiver-manager;*

*(c) an order to regulate a corporation's affairs by amending the articles or bylaws;*

*(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;*

*(e) an order directing an issue or exchange of securities;*

*1981 cB-15 s234*

***Compliance or restraining order***

***248*** *If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation contravenes this Act, the regulations, the articles or bylaws or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right the complainant or creditor has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make any further order it thinks fit.*

1981 cB-15 s240

235. Section 239 and following of the ABCA are about oppression remedies for specific parties who claim they have been treated unfairly with respect to the business of a corporation. That was the subject of the Legal Proceedings and ultimately, there was an Order of the Court by Justice Clackson for a determination of the rights and remedies of the parties pursuant to the above noted relevant sections of the Act.

236. With respect to section 239(b), Glen qualifies as a "complainant" as he was both a director of KEL and a creditor by virtue of the outstanding shareholders' loan. I have restated the relevant sections of the ABCA above so they could be clearly referenced in applying them to this particular fact situation.

*"It is the wording of the Act that is the touchstone for an oppression action".*

*Envirodrive Inc. v. 8364442 Alberta Ltd.*, 2005 ABQB 446 [71] Slatter, J. A.

*"The cases hold that in assessing whether there has been oppression, the court can look at the overall relationship between the parties, the history of the corporation, and the broader context in which the parties operated".*

*Envirodrive,* supra *[72] Slatter, J. A.*

237. The reasonable expectations of Marion, and Glen by proxy from Marion, should be considered in determining whether KEL was operated in an oppressive manner.

> *"The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by the oppressive acts of a corporation or its directors. This remedy gives the Court a broad jurisdiction to enforce not just what is legal, but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play"*
>
> *BCE Inc. v. 1976 Debentenure Holders,* [2008] 3 SCR 560, 2008 SCC 69 [45]
>
> *"Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly."*
>
> *BCE Inc.*, supra [81-83]
>
> *"Section 242 of the Act is to protect minority shareholders from unfair treatment without usurping the function of the Board of Directors and without supplanting the legitimate exercise of control by the majority."*
>
> *864789 Alberta Ltd. v. Haas Enterprises Inc.*, 2008 ABQB 555 Shelley J. [44]
>
> *"The oppression remedy was enacted to provide broad, remedial discretion to the Courts with section 242 to be given a liberal interpretation in favour of complainants without however, the Courts venturing into management of corporation. So while majority rule of corporations remain fundamental to corporate law, it is clear the majority must act fairly. In determining whether oppression has occurred, the Courts should look beyond strict legal rights to the relationship between the parties."*
>
> *864789 Alberta Ltd*, supra, Shelley J. [45]

238. Under the oppression remedy, the onus is on the Claimants to prove that the acts of Trevor were oppressive, unfairly prejudicial or unfairly disregarded Marion's shareholder interest, the interest of Glen as a director and the interests of both of them as creditors. The standard of proof is on a balance of probabilities.

> *McAteer v. Devoncroft Developments Ltd.*, 2001 ABQB 917 Rooke, J. [297]
>
> *"The Act provides for three categories of prohibited conduct which would give rise to an oppression remedy, namely:*
>
> > *Oppressive conduct;*
> >
> > *Conduct which is unfairly prejudicial; or*
> >
> > *Conduct which unfairly disregards the rights of one of the groups specific in the Act."*

*McAteer*, supra, Rooke, J. [401]

239. At paragraph [412], Rooke, J. summarized the expectations which are considered to be reasonable and worthy of protection:

> *" a) shareholders are entitled to a reasonable expectation that directors will fulfil their fiduciary duty and act lawfully;*
>
> *b) shareholders have a reasonable expectation that their corporate contractual obligations will be adhered to;*
>
> *c) a fundamental reasonable expectation of a shareholder is for management to maintain basic records and not comingle corporate funds with those of non-related enterprises; and*
>
> *d) the legitimate expectation of shareholders is that the business will not fail and will not liquidate. Therefore, the company has a duty of prudent management to forestall that event. It can be brought to account if it strips the company of its assets or adopts a liquidation policy."*

240. Trevor was a director of KEL and he effectively was the instrument of SCR as the majority shareholder. The fact that SCR and its board of directors did little to properly monitor the KEL situation is unfortunate, but nonetheless, Trevor had a duty to act in the best interests of KEL in his capacity as director of KEL as well as being the president and senior officer pursuant to his appointment under section 2.10 of the USA.

> *"In assessing a claim for oppression, a court must answer two questions: 1) Does the evidence support the reasonable expectation asserted by the Claimant?; and 2) Does the evidence establish that the reasonable expectation was violated by the conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. The second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under section 241."*

*BCE Inc.*, supra. [68][72][89][95]

241. After reviewing the evidence, there are numerous instances where the evidence shows that Trevor committed oppressive acts to the detriment of: the minority shareholder, Marion; Glen in his capacity as director; and both Marion and Glen in their capacity as creditors. These include:

(a) Expenditures of capital without the consent of either Glen as a director, or Marion as a shareholder, contrary to section 2.2 of the USA (i.e. acquisition of new equipment);

(b) Creation of excess indebtedness beyond $10,000.00 contrary to section 2.4 of the USA, including not paying employee source remissions and GST to Canada Revenue Agency (see Exhibit 1, Tab 46 – CRA demand for $15,574.41) thereby exposing the Directors to personal liability;

(c) Changing the accountant of KEL from Macrae to Grant Thornton without unanimous consent of the shareholders contrary to section 2.8 of the USA;

(d) Failing to provide financial information to Glen and Marion despite numerous requests contrary to section 2.12 of the USA;

(e) Demanding a cash call for additional funding contrary to the terms of section 2.13 of the USA;

(f) Arbitrarily imposing a set off of unsubstantiated liabilities pursuant to the SPA;

(g) Attempting to ratify the acts of directors unilaterally without there ever having been a meeting to discuss and review the acts in the first instance and failing to have monthly meetings of directors, all contrary to section 2.14 of the USA;

(h) Attempting to appoint directors of KEL unilaterally contrary to section 2.1 of the USA;

(i) Materially changing the nature of the business of KEL from a restaurant operation to a retail distribution point for SCR coffee contrary to the necessary approvals required pursuant to section 2.1 of the USA;

(j) Unilaterally making a determination to cease carrying on the business of the Restaurant without the consent and direction of either the shareholders or directors contrary to section 2.1 of the USA; and

(k) Allowing the assets of KEL to be comingled with those of SCR and subsequently allowing them to be unlawfully seized by a secured creditor of SCR.

242. I find that Trevor was a director of KEL as required by section 248 of the ABCA and that pursuant to section 248, he contravened the ABCA and the terms of the USA. I find that Glen qualifies as a complainant under section 239 of the Act. I further find that the oppressive acts referred to above are contrary to section 242 of the Act. Trevor, in his capacity as director of KEL, exercised his authority in a manner that was oppressive or unfairly prejudicial and unfairly disregarded the interests of Marion in her capacity as a shareholder, Marion and Glen in their capacity as creditors, and Glen in his capacity as both an officer and a director.

243. Counsel agreed that where the relevant sections of the ABCA referred to above make reference to "the Court" my jurisdiction extends to make an Award in the same capacity as the Court may so Order and that I may make any further order that I see fit.

**ISSUE #5**

244. **Given the Order of Registrar L. A. Smart, Q.C. (Exhibit 2), to what extent can an award be made against Trevor which survives his current bankruptcy?**

245. Mr. Gaffney has provided me with his letter of August 10, 2011 which included references to the 2011 Annotated *Bankruptcy and Insolvency Act* by *Holden and Morowetz*, as well as several cases and information about the duties and liabilities of directors. Mr. Loewen provided me with his email message of August 23, 2011 in response.

246. Pursuant to the Order of Registrar L. A. Smart, Q.C. (Exhibit 2, now attached and marked Schedule 1 for convenience of reference), sections 69 to 69.31 of the BIA no longer operate with

respect to Glen. As a result, any financial award made by me against Trevor may not be stayed and could survive his bankruptcy administration upon hearing Trevor's application for discharge from the Bankruptcy, subject to the determination of the Court. A review of this award by the Court may assist the Court in determining if this Award should survive and subsist as against Trevor. It should also be noted that Leon Miller Group Inc., the Trustee for the administration of the Bankruptcy, did not make an appearance in the Arbitration hearing and neither consented nor objected to these arbitration proceedings. Mr. Leon Miller did advise me that it will be up to the discretion of the Court in the Bankruptcy to determine if an award against Trevor should survive at the time Trevor's application for discharge is heard by the Court. I agree with this advice and have stated so above.

247. Before I proceed with any determination as to whether or not an award should be made against Trevor, I must determine if the pleadings have made out a proper case for oppression. Having reviewed the Application to Arbitrate filed by the Claimants dated July 9, 2010 as well as the Originating Notice filed in the Legal Proceedings, I find that the pleadings sufficiently include breach of fiduciary duties and misappropriation of property and money while Trevor was acting in a fiduciary capacity. Mr. Gaffney made it clear in his submissions that he was not alleging fraud against Trevor with respect to the application of section 69 of the BIA.

> *"The breach of a fiduciary duty does not, however, of itself lead to the survival of a debt or liability following a discharge; there must, in addition, be fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity."*
>
> *Holden and Morowetz,* page 811 at paragraph 2

248. Since Mr. Gaffney has eliminated fraud from his allegations against Trevor, then it must be shown there was a misappropriation while acting in a fiduciary capacity.

249. Section 178(1)(d) of the BIA provides:

> *"178. (1) An order of discharge does not release the bankrupt from…*
>
> *(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;"*
>
> *"Misappropriation" in section 178(1)(d) is qualified by the phrase "while acting in a fiduciary capacity". Misappropriation is the act of misappropriating or turning to a wrong purpose. For misappropriation, the following elements must be proven:*
>
> *(a) The money taken by the debtor to create the debt must have belonged to someone other than the debtor;*
>
> *(b) The taking must involve wrongful use of the money; and*
>
> (c) *The debtor must have received the money as a fiduciary.*
>
> *Holden Morowetz*, supra, page 813 (v. Misappropriation)

> *"Misappropriation while acting in a fiduciary capacity requires some element of dishonesty, wrongdoing or misconduct, and breach of a fiduciary obligation alone is not sufficient."*
>
> *Holden and Morowetz*, page 813 (v. Misappropriation)

250. In his judgment in *Valastiak*, the Honourable Chief Justice Finch at paragraph [31] stated:

> *"I would not be prepared to apply Smith more broadly than what it expressly decided in relation to the meaning of the word 'defalcation'. I would limit its authority to the proposition that either negligence or incompetence is 'sufficient to bring the liability under the expression 'defalcation while acting in a fiduciary capacity''. I would, therefore, construe 'misappropriation' in its ordinary sense to connote some element of wrongdoing, improper conduct or improper accounting."*
>
> *Valastiak v. Valastiak*, 2010 BCCA 71
> (2010) Carswell BC, 307, 63 C.B.R. (5th) 188

251. The question then is whether there can be a finding that Trevor's mismanagement of the Restaurant amounted to a misappropriation in the sense that it connoted some element of wrongdoing, improper conduct or improper accounting.

252. I have referenced the oppressive acts in paragraph 241 above. There is more than sufficient evidence for me to find that there was never a proper accounting of the money that was earned in the Restaurant and it was clear that numerous liabilities were not paid including obligations to CRA for employee source remissions and GST. The business was shut down and its assets comingled with those of SCR. The business was then converted to an SCR distributorship and eventually the creditors of SCR realized on all of the assets of SCR including those which had been taken from KEL. All of this was done at a time when Trevor was acting in the fiduciary capacity as a director. He made the decisions with respect to all of the oppressive actions which were taken without properly consulting with either Glen in his capacity as a director, Marion in her capacity as a shareholder, or SCR in its capacity as a Shareholder of KEL. Trevor, as a director of KEL, owed KEL a duty of good faith which was not met by the numerous examples of oppressive conduct, wrongdoing, improper conduct and improper accounting.

253. The question arises as to whether or not there is an exception to the general rule that a director's obligations are solely to the corporation. Such exceptions have arisen when there was "either a family relationship or a special relationship of trust and dependency". This kind of special relationship may exist when a company has only two shareholders.

*Valastiak*, supra at paragraph [50]

254. The decision of the Court of Appeal of British Columbia in *Valastiak*, supra, is analogous to our facts as it involved the operation of a restaurant. Mr. Valastiak controlled the business, ran it into the ground and used the money for himself. The distinction we have in the fact situation in this arbitration hearing is that there is no clear evidence as to what happened to the money from the operation of the Restaurant. The evidence clearly indicates that Trevor was a director as well as the senior officer of KEL and the evidence shows that he was responsible for the financial affairs of KEL. Glen abdicated his position as an officer and designated "Treasurer" of KEL. To bring Glen within the protection of section 178(1)(d), it must be established that 1) Trevor owes a debt or liability; 2) the debt arises out of misappropriation or defalcation; and 3) the misappropriation or defalcation occurred while Trevor was acting in a fiduciary capacity.

*Valastiak*, supra, at paragraph [20]

255. In *Valastiak*, the court found that there was a special relationship of trust and dependency where there were only two shareholders and Mr. Valastiak was the sole director. The court found Mr. Valastiak was acting in a fiduciary capacity.

256. In the facts of this case, Glen and Marion wanted to retire and sell the business of the Restaurant. Marion was suffering from cancer and they needed to give up the business to allow more time for both of them to cope with Marion's health issues. Glen and Marion relied on Trevor to run the Restaurant properly and fairly as they had done.

257. Trevor, as a director, owed Marion (and now Glen by proxy and inheritance) a fiduciary obligation. Trevor was acting as a director of KEL and was therefore acting in a fiduciary capacity in relation to Glen and Marion as well as KEL and its assets.

258. In the circumstances of this case, Trevor's liability arises from his oppressive actions and misappropriation of KEL's assets while he was in a fiduciary relationship as director of KEL which is further exacerbated by the fact that he was also the senior officer and president of KEL and was responsible for directing all of the decisions of KEL. In my view, there is sufficient authority to hold that in the circumstances of this case there was a special relationship of trust and dependency where Trevor owed Marion and Glen, as shareholders, a fiduciary obligation. Trevor's conduct was oppressive, wrongful and improper. Accordingly, I find that Trevor's liability subsists pursuant to section 178(1)(d) of the BIA and does not release him from his liability to satisfy the amount owing, which will be determined below.

> *"Misappropriation while acting in a fiduciary capacity requires some element of dishonesty, wrongdoing or misconduct, and breach of a fiduciary obligation alone is not sufficient."*
>
> *Holden and Morowetz*, page 813 (v. Misappropriation)

**ISSUE #6**

259. **What is the proper calculation of the quantum of any award I may make with respect to any one or more of the Respondents?**

260. The relief sought by the Claimants is summarized at paragraph 203 above. The claims are for various amounts against one or more of the Respondents. From the evidence, it seems clear that KEL and SCR are insolvent and out of business but an award can still be made against them and it will be up to the Claimants to determine how any such award may be satisfied. No award can be made against Paul since I have determined pursuant to Issue #1 that he was not a director, and accordingly he cannot be held liable. However, with respect to Trevor, pursuant to Issue #5, I have found that an award can be made against him notwithstanding his personal bankruptcy.

261. The financial impact in terms of damages as a result of the oppressive conduct by Trevor is difficult to determine because there is only limited evidence as to revenue and expenses for the operation of the Restaurant subsequent to March 15, 2008. We also do not have any accounting for the KEL assets that were unlawfully seized in the realization of assets of SCR by a secured creditor of SCR. We do have some financial statements for KEL prepared by Macrae dated March 15, 2008 (Exhibit 1, Tab 16); the financial statements for KEL for the period ending August 31, 2007 (Exhibit 1, Tab 54); KEL financial statements as at October 31, 2008 (Exhibit 1, Tab 39) and KEL financial statements as at February 13, 2009 (Exhibit 1, Tab 39) without any indication as to whom may have prepared these financial statements. What can we learn from these financial statements as they are the best evidence available?

262. In the Claimants' final argument, it was stated that Marion's shares in KEL should be valued at $1,250.00 per share with the total of all shares being valued at $125,000.00. The actual amount claimed with respect to the outstanding amount due with respect to the purchase price for the shares pursuant to the SPA was $83,199.10. There is a certain amount of risk with someone selling their shares in a company but only retaining a minority shareholder interest and no collateral security by way of a general security agreement to enforce payment if necessary. There is simply not enough evidence to make a realistic assessment of the value of the shares. There is consistency between the financial statements for the period ending March 15, 2008 and October 31, 2008 regarding the amount due to shareholders. That amount is $111,405.00. KEL is indebted to Glen with respect to this amount.

263. There is very limited evidence for any kind of determination of the financial impact the oppressive conduct had on the value of the shares or the tangible value of the assets owned by KEL. There is only limited evidence about the revenue and expenses of the Restaurant subsequent to March 15, 2008. In the notes to the financial statements of March 15, 2008, the capital assets were initially valued at $82,035.00 but their net book value at the time of preparation of the financial statements was $34,678.00. There were no notes to the October 31, 2008 financial statements, but the total for the capital assets was indicated to be $38,869.38. Also included at Exhibit 1, Tab 39 was a financial statement for the period ending February 13, 2009, which indicates total capital assets as $42,455.78. This last financial statement was for the period of November 1, 2008 to February 13, 2009. A review of the income statements for all of these financial statements shows year end deficits as follows: 2007 ($66,796.00); 2008 ($74,942.00); March 15, 2008 to October 31, 2008 ($18,588.68); November 1, 2008 to February 13, 2009 ($21,857.69). It appears that KEL was consistently losing money. There was also the evidence of Glen that during the time he operated the Restaurant, he worked very hard as a general manager but did not draw any salary which would have further exacerbated the year end deficit position of KEL.

264. Regardless of the profitability of KEL, the SPA required SCR to pay $75,000.00 for the purchase of the shares. This amount was to be paid by a combination of payments and a convertible promissory note (Exhibit 1, Tab 4). No payments were made until July, but then there was an agreement to change the terms of payment (Exhibit 1, Tab 5) and included with that exhibit was an amortization schedule which dealt with 36 blended monthly payments of principal and interest in the amount of $1,407.14 for a principal loan amount of $44,250.00 and an interest rate of 9% per annum. This did not include the $25,000.00 convertible promissory note which had interest payable at the rate of 10% per annum.

265. There was evidence that payments were only made for July through December 2008, inclusive, therefore the first date of default would have been January 1, 2009. This would have left a balance of $37,676.24 according to the amortization schedule with interest at 9% from and including January 1, 2009 until the date of this award. The per diem interest is $9.29, which would apply from January 1, 2009 through to and including the date of this award. The amount due on the promissory note is $25,000.00 plus interest at 10% with a per diem interest rate at $6.85 from January 1, 2009 through to and including the date of this award. The total amount of indebtedness pursuant to the SPA and the promissory note is $62,676.24 plus interest from January 1, 2009 at the combined per diem rate of $16.14 ($9.29 + $6.85) to the date of this Award for a total of $78,525.72.

266. There is evidence by Glen that KEL acquired the assets of the Restaurant from the previous owner for the amount of $70,000.00 in 2004. After reviewing the financial statements which have been provided, which are the only evidence of value, it appears that the net book value of KEL's assets for March 15, 2008 was $34,678.00; for the period ending October 31, 2008, the amount of

$38,869.38; and for the period ending February 13, 2009, the amount of $42,455.78. Averaging these amounts works out to $38,667.72.

267. We have heard the evidence of Glen and Paul that sometime in the Spring of 2009, the business operations of the Restaurant were completely shut down, and for a period of time the Restaurant was closed while SCR, under the direction of Trevor, proceeded to rebrand the location as a distributorship for SCR products. The redundant assets of KEL were moved to storage under the care of SCR. Eventually, SCR became the subject of seizure proceedings by Norman Hebert as a secured creditor and all the personal property of SCR, including that which was owned by KEL, was seized by Norman Hebert realizing on his security. Evidence of the seizure proceedings are found at Exhibit 1, Tab 50. There was no evidence about the ultimate disposition of this property, but it appears that any property which had been owned by KEL was lost in the insolvency of SCR. There is no evidence about whether or not KEL filed an objection to the seizure proceedings and it appears the seizure of KEL's property was unlawful. The oppressive conduct of Trevor caused the property of KEL to be comingled with the property of SCR. Had KEL's property not been comingled, then at best Norman Hebert, in realizing on his general security agreement, would only have had a claim upon the shares which SCR owned in KEL.

268. The best evidence available about the value of KEL's property prior to the comingling with SCR's property is the amount of $38,667.72.

269. Trevor is liable for the loss of the property owned by KEL but not the amount claimed for the purchase price of the shares or the shareholders' loan, which are the responsibility of SCR and KEL, respectively.

270. The Claimants have also made a claim for punitive damages. Punitive damages are only available in exceptional circumstances.

*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, as referred to in *Envirodrive*, supra at paragraph [157]

271. In these circumstances, the Claimants have not been fully compensated for their losses but there does not appear to be a pressing need for retribution, deterrence or denunciation to justify an award of punitive damages.

*Envirodrive*, supra, at paragraph [157]

272. Although Trevor was responsible for breaching his fiduciary duties as a Director of KEL, that in itself does not justify an award of punitive damages.

*Envirodrive*, supra at paragraph [161]

**FINANCIAL AWARD**

273. With respect to Kreller Enterprises Ltd., I hereby make an Award against it in the amount of $111,405.00 with respect to the outstanding indebtedness for the shareholders' loan plus costs as indicated below in the amount of $18,039.27 ($10,312.44 + $7,726.83) for a total of $129,444.27 in favour of the Claimants.

274. With respect to St. City Roasters Ltd., I hereby make an Award against it in the amount of $78,525.72 with respect to the outstanding amount due and payable for the purchase of the shares pursuant to the SPA plus costs as indicated below in the amount of $18,039.27 ($10,312.44 + $7,726.83) for a total of $96,564.99 in favour of the Claimants.

275. With respect to Edward Trevor Mowbrey, I hereby make an Award against him in the amount of $38,667.72 plus costs as indicated below, in the amount of $18,039.27 ($10,312.44 + $7,726.83) for a total of $56,706.99 in favour of the Claimants. Normally this would be apportioned on a 60%/40% basis; however, in light of the fact that the benefit of these assets went to SCR or its creditors, I am awarding the full amount to the Claimants.

276. With respect to Glen Albert Kreller, I hereby make an Award against him for costs as indicated below in the amount of $4,975.61 in favour of Paul Biglin.

277. With respect to Edward Trevor Mowbrey, Kreller Enterprises Ltd. and St. City Roasters Ltd., I hereby make an award of costs as indicated below in the amount of $10,126.83 as against each of them on a joint and several basis in favour of Paul Biglin.

278. All such Awards shall have interest run from the date of this Award in accordance with the provisions of the *Judgment Interest Act*.

**COSTS**

279. Rules 11.01 and 17.02 of the Rules of Arbitration governing this matter deal with costs as follows:

> *"11.01 The Parties to the arbitration proceedings may be represented or assisted by any person during the arbitration. Subject to any written agreement to the contrary by the Parties and acknowledged by the Arbitrator, the costs associated with retaining anyone to represent or assist a Party shall be borne solely by the Party retaining such representation or assistance without any right of recovery from any other Party."*
>
> *"17.02 Taking into consideration the relative success of the Parties as well as other relevant circumstances, the Arbitrator shall determine who shall pay all or a portion of the following costs of the arbitration proceedings:*
>
> *(a) the Arbitrator's fees and disbursements including the fees and disbursements of expert witnesses;*
>
> *(b) any other costs incurred in the course of conducting the arbitration proceedings, except the cost of any person representing either Party which shall be borne by the respective Parties in accordance with Paragraph 11.01 unless otherwise agreed.*"

280. Rules 11.01 and 17.02(b) (emphasis added) make it clear that the solicitor and client legal costs of each party shall be borne by the party. As a result, it is the relative success of the parties which determines who shall pay all or a portion of the costs of the arbitration proceedings. The Claimants were successful in their claims with respect to KEL and SCR, but not with respect to Paul. Since calculation of solicitor and client costs are deleted from my discretion, I can make an award only with respect to my Arbitrator's fees and disbursements and any other costs incurred during the course of conducting the Arbitration proceedings. There were no expert witnesses, however there were some extraordinary costs with respect to Paul and his counsel, Brent Loewen, having to travel from Vancouver to Edmonton, return, including several days accommodations

and meals. Rather than asking for specific receipts from Mr. Loewen and Paul, I have estimated that the expenses for each of them would be approximately $1,200.00 per person.

281. Glen contributed $10,312.44 towards the costs of these Arbitration proceedings and Paul contributed $10,302.44. Trevor contributed $1,500.00. SCR and KEL have contributed nothing. As a result of Glen's successful claims against Trevor, SCR and KEL, there shall be an award of costs as against each of them in the amount of $10,312.44 on a joint and several basis in favour of Glen.

282. Glen was not successful in his claim against Paul and accordingly, I make an award of costs against Glen in favour of Paul in the amount of $2,575.61 ($10,302.44 ÷ 4 [representing all four respondents] = $2,575.61), for a total award of costs in favour of Paul to be paid by Glen in the amount of $2,575.61. I further make an Award of costs in favour of Paul in the amount of $7,726.83 ($10,302.44 x ¾ [re: Trevor, KEL and SCR] = $7,726.83 for a total of $7,726.83) as against each of Trevor, KEL and SCR on a joint and several basis. I make an award of costs against Glen, Trevor, KEL and SCR in favour of Paul in the amount of $2,400.00 for travelling, meals and accommodation expenses on a joint and several basis.

283. I will render my account and pay it from the money held in trust. To the extent that the costs for the Arbitration exceed the amount of security held, the balance due shall be paid equally between Paul and Glen.

**RETENTION OF JURISDICTION**

284. I retain jurisdiction to deal with the specific things which still must be resolved in any outstanding issues noted above or to deal with the correction any minor errors or omissions in this Award which may be subsequently determined.

**DECLARATION**

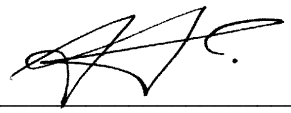
285. I, SCHUYLER V. WENSEL, Q.C., hereby confirm that I have no conflict of interest with any interested party or witness to this Arbitration. This Award is final and binding on the parties.

**CERTIFICATION**

286. This Award is certified as an original executed copy of this Award.

DATED as of the 9th day of September, 2011.

Respectfully submitted,



SCHUYLER V. WENSEL, Q.C.,
Arbitrator
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