**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**(Toronto Region)**

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

**-and-**

**OMAR KALAIR and YUSUF PANCHBHAYA**

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**SUBMISSIONS OF OMAR KALAIR**

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# I. Introduction & Overview

1. In 2005, United Muslims Financial Inc. (hereinafter referred to as “UM”) introduced to Canadians for the first time, the concept of Sharia compliant home financing. It was a landmark achievement in the field of Islamic Finance and proved to be wildly popular amongst Muslim Canadians.
2. Sharia compliant home financing requires a complete overhaul of the traditional mortgage lending business model. It requires dedicated, open-minded and knowledgeable entrepreneurs. Mr. Kalair was such an entrepreneur.
3. UM began as a charity and Mr. Kalair was a director. The charity was dedicated to advancing the interests of the Muslim Canadian community and providing them with services unique to their faith.
4. Mr. Kalair began to develop the UM Sharia mortgage business plan in 2003 by researching similar successful business models in other countries of the world. Mr. Kalair knew that a venture like this one would require a lot of capital. He approached over seventy financial lending institutions looking for the right partner. He settled on the Credit Union Central of Ontario (hereinafter referred to as “CUCO” or its successor, Central One or “C1”) and worked with their management for almost two years to develop the business model. His main point of contact at CUCO was Mr. Jens Lohmueller.
5. There are many business-lending models in the field of Islamic Finance, but the driving theme, which governs them all, is the prohibition against earning interest. UM, in concert with CUCO, decided to pursue a “Mudarabah” limited partnership model and “Musharakah” partnership model. The Mudarabah partnership existed between UM and CUCO and the Musharakah between UM and the consumer of the product, otherwise known as the homeowners. Both partnerships had to be Sharia compliantfor the product to be in accordance with Islamic law.
6. CUCO worked actively with UM to formulate contracts that accord with Islamic law, whether that meant changing the traditional terminology, waiving traditional processes, or taking other steps that would have been viewed as unconventional to traditional creditor/debtor models but were necessary in a sharia-compliant model. UM was proud to be working with CUCO and lauded the unique creative relationship often on their website and in media articles. CUCO’s early documents during the product development and launch phase leave no doubt that the foundational concepts of their relationship with UM were rooted in Islamic Law and Sharia compliance.
7. While CUCO and UM negotiated the terms of their product, UM hired a Sharia Ethics Board (hereinafter referred to as the “SEB”) who were to issue religious rulings, known as “fatwas”. A fatwa is circulated to the community and signals to them the legitimacy and Sharia compliancy of the product. The SEB is required to review every contract on a line-by-line basis at the beginning of the business venture and must stay involved over the lifetime of the business to ensure ongoing Sharia compliancy. Over the years they would have spent hundreds of hours of their time engaged in meetings and analysis on behalf of UM to ensure that the CUCO/UM partnership was religiously valid to its end consumers – the homeowners.
8. CUCO, UM and the homeowners relied on the fatwas and, for a while, the Sharia compliant mortgage business was profitable to all parties. In two years, CUCO advanced nearly 100 million dollars to UM for approximately 500 homeowner mortgages. Mr. Kalair was even presenting the successful Sharia compliant finance model at international conferences while awarding regular ‘tombstone’ trophies to staff at CUCO to acknowledge their mutual achievement. [[1]](#footnote-1)
9. When the credit crisis hit in 2007, the relationship took a disastrous turn for the worse. CUCO made the unilateral decision not to finance any new mortgages. They reneged on their 49 million dollar commitment letter that UM had relied upon in renewing their lease and hiring additional staff. Even worse, CUCO – now known as C1 – clawed back the profit margin that UM had been earning on existing mortgages to the point where UM was left servicing many mortgages essentially for free.[[2]](#footnote-2)
10. Unsurprisingly, UM was devastated by the turn of events. Their bank account was disintegrating, and their workload remained crushing. They were unable to afford basic services such as an accountant or auditor to ensure that their bank accounts and financials were under control.[[3]](#footnote-3) Although there were efforts to transfer the mortgage portfolio to over alternative financial lenders, this was without success.
11. In November 2010, C1, advised that they would be terminating the relationship.[[4]](#footnote-4) Not only was UM not able to acquire new business, they could not continue to profit off the business already in their pipeline.
12. In 2011, C1 made the decision to file for notice of receivership.[[5]](#footnote-5) Mr. Kalair, on behalf of UM, was spending all of his waking hours attempting to find an alternative funder. The very few employees who were left at UM were finding it increasingly difficult to keep up with day to day operations, lump sum payments, and mortgage closings. Money was slowly building in the UM bank account as a result.[[6]](#footnote-6)
13. As was always Mr. Kalair’s understanding, in accordance with Islamic finance and the rules of a Mudarabah, the money in UM’s bank account was available to UM to pay for the expenses of the joint venture. The start of the legal receivership process in 2011 added significant legal expenses to UM’s already strained budget.
14. Meanwhile, the SEB had still not been paid for the work they had done since the inception of UM in 2004. Although the SEB’s main concern, like UM’s, was to ensure that the mortgages remained Sharia compliant for the sake of the homeowners, the SEB was also growing worried that their work would never be paid.
15. Acting under instructions from the SEB as expressed by Mr. Panchbhaya, Mr. Kalair made substantial (but incomplete payment) on a an invoice prepared on behalf of the SEB in their newly constituted corporate from is the Multicultural Consultancy of Canada (“MCC”). UM and C1 always understood that there was a price to pay for sharia compliancy and this price would include UM’s scholarly costs on behalf of its SEB. Payment was to be calculated at market rates for their services. Precious metals were obtained by Kalair to effect payment in the form requested by the SEB. With MCC having been hastily incorporated, the SEB had no bank account in which to receive cash payments.[[7]](#footnote-7) Gold and silver, specifically, are asset clauses with unique cultural and religious significance within Islam (a more expansive discussion of the role of precious metals in Islam follows). Although Kalair was aware that there were both local and international scholars who required payment, he did not know, and did not think it was his business to know, how that payment would be allocated. The SEB was an independent body and UM had followed their direction since day one.[[8]](#footnote-8)
16. In paying this expense, Mr. Kalair believed he was acting in accordance with the legal contracts that governed UM and in accordance with the mudarabah joint venture that bound UM and CUCO together. The contracts permitted Kalair to pay expenses related to the UM business venture from the UM bank account **before** he was obligated to remit any funds to Central 1.
17. As will be demonstrated in a further review of the facts and law, there existed a fundamental rift between the understanding of C1 (following the departure of Mr. Lohmueller) and the understanding of UM as to what the contracts permitted and the impact of Sharia law on the contractual relationship. What the Crown characterizes as a fraudulent intention, the defence says is a product of a traditional lending agent, with no prior experience in Islamic finance, being unable, unwilling or incapable of understanding the unique nature of the original sharia relationship.
18. Therefore it is not surprising, and not a result of any malicious or criminal intent, that the parties were often speaking at cross-purposes, perhaps not even realizing the depth of the misunderstanding. The parties even had different conceptions about the consequences of a receivership. UM treated it as the unilateral unwinding of a mudarabah venture by one party, triggering a requirement to clear all the mudarabah expenses and apportion profits, if any. In the event of a loss – as was clearly to be the case by this point in time, mudarabah principles placed the full weight of that loss on the funding partner – C1. C1 however had been blindly treating the relationship as a traditional commercial lending agreement and failed to see itself as a partner in an investment whose funds would be used to cover the costs of the joint venture.
19. The Crown alleges that Mr. Kalair has an animus towards Central 1 because of the failure of their relationship and that this animus is the motive underpinning the fraud. There is no doubt Kalair felt mistreated and aggrieved by C1’s actions, yet even years after the receivership, his actions demonstrate a relentless effort to secure alternative sources of financing that would allow him to repay any claim by Central 1 and continue a Sharia compliant mortgage business to the benefit of the homeowners.
20. Mr. Kalair’s constant overriding principle was ensuring that homeowner mortgages remained Sharia compliant. He was always, and continues to be, an advocate for Muslim Canadians and a champion for the integration Islamic finance in Western banking relationships. Every homeowner was left whole and neither lost funds, nor risked losing funds, throughout the venture. If C1 suffered loss, it was the result of business conditions in a failed partnership and not as a result of theft, fraud or misappropriation.

# II. Position of the Defence

1. The Crown has repeated in law the errors Central 1 (“C1”) has made in fact. The seminal importance of Sharia Law has been entirely discounted, diminished and ignored. The relationship between C1 and UM was from beginning to end structured by, and governed in accordance with, Sharia Law principles. C1 intentionally or through negligent inadvertence unilaterally changed that relationship.
2. The defence concedes the physical transfer of money and precious metals took place, but denies any suggestion of deceit, dishonesty, falsehood or fraud. The Crown has failed in its burden to prove the *mens rea* beyond a reasonable doubt for each and every count. Even if Mr. Kalair’s understanding of the application of Sharia Law was wrong in law, he at all times honestly believed, and had reasonable grounds to believe, that such was the case. In dealing with the alleged misappropriated funds, Mr Kalair acted with colour of right and he dealt with said funds in a way that was lawfully consistent with that colour of right.
3. With respect to all charges under the *Bankruptcy and Insolvency Act* (BIA), the evidence establishes that Mr. Kalair took all reasonable steps under the circumstances to discharge statutory duties. The Crown has failed to prove an absence of due diligence on the part of Mr. Kalair.

## The Charges

1. The defence submits that the charges can be conceptually separated into two distinct groups.
2. The first group consists of counts one through six (theft x2, fraud x2, money laundering and fraudulent disposition under the BIA). All of these charges turn on the same facts. The defence submits these facts reveal a clear intention by C1 and UM to enter into a Mudarabah relationship governed by the principles of Islamic Finance, operating within the over-arching structure of Ontario corporate law.
3. Contracts were drafted, edited, and finalized with a clear intention to respect and incorporate the Islamic Finance framework necessary to satisfy the unique clientele seeking out the new C1/UM product. C1 and UM were to be engaged in a form of joint venture or limited partnership rather than a traditional debtor/creditor relationship. That structure created an accepted risk of loss on the part of C1 while simultaneously recognizing that there would be expenses borne by UM to ensure Sharia compliance and certification of the venture. These costs included, amongst other things, industry standard payments to UM’s Sharia Ethics Board (SEB).
4. Payments by homeowners to UM were contractually permitted to be utilized by UM to pay C1 its share of the profits (if any), to pay UM its share of the profits (if any) and to pay the various expenses of the joint venture including those associated with the SEB. So long as there was a continuing pipeline of new homeowners, UM was prepared to defer some profits and the SEB was prepared to defer payment of its expense. However, C1’s unilateral business decision to curtail the project mid-stream created a cascade failure that triggered the abrupt end of the mudarabah. This left Mr. Kalair in an impossible position. He faced demands for payments from the SEB (later incorporated as MCC), demands for payment from C1 (who refused to account for either their responsibility for the venture’s failure, nor for their share of the losses that would be caused by unilaterally withdrawing funding), and demands from homeowners who had an expectation that the financial product they had purchased remained at all times sharia-compliant.
5. Mr. Kalair struggled mightily to balance these competing demands in an increasingly challenging and chaotic environment. Kalair utilized funds in the UM account which consisted of accumulated profits and a portion of homeowner funds to cover the costs associated with closing out the mudarabah venture. The vast majority of these costs related to paying UM’s commitment to the shariah scholars (both at home and abroad to Kalair’s knowledge). Kalair at all times understood that the mudarabah authorized him to use funds in the UM account to cover these expenses. If this generated a shortfall, in accordance with the rules of Islamic Finance, that shortfall would be borne by the funding partner in the mudarabah – C1. Even if Kalair was *wrong* in his interpretation or application of sharia law, if he held an honest but mistaken belief that he was acting appropriately under the circumstances, he must be found not guilty of of counts one through six.
6. The second group consists of the remaining two charges under the Bankruptcy and Insolvency Act: failure to perform the duties of a bankrupt and unlawful refusal or neglect to answer fully and truthfully. The merits of these charges will be dealt with by reference to the evidence of Mr. Dupont, Mr. Thompson and Mr. Kalair. The defence submits that Kalair adequately performed the duties of a bankrupt and answered all questions posed to him to the best of his ability. Kalair took all reasonable steps under very trying circumstances to discharge his duties under the BIA.

# III. The Law

1. The Crown, in paragraphs 37 to 81 of their written submissions, has laid out the actus reus and mens rea for the charges before the Court. However, the Crown has underestimated and downplayed both the *mens rea* component and the applicability of colour of right to the facts of this case. If Mr. Kalair is found to have acted with colour of right, or with an honest but mistaken belief that his actions were permissible, he cannot be found guilty of counts one through six.

## THEFT, FRAUD & MONEY LAUNDERING

1. These three sets of charges are closely inter-related both in their facts and the applicable law. The charges of theft rely on taking or converting “fraudulently ***and without colour of right”*** the property of another. The charge of money laundering is reliant on both proof that the money was obtained by crime (“in this case fraud” as noted by the Crown at paragraph 64 of their submissions), and that Mr. Kalair *knew or believed* the money had been obtained by crime – namely fraud. Thus, much of the legal analysis hinges on an understanding of both the criminal act and the criminal intent necessary to establish fraud.

### The Actus Reus

1. As outlined at paragraph 38 of the Crown’s submissions, the *actus reus* of fraud requires proof of a prohibited act (deceit, falsehood or other fraudulent means) AND proof of deprivation caused by that same prohibited act. This deprivation may be an actual loss or the mere placing of the victim’s pecuniary interests at risk.
2. Thus, it is first incumbent upon the Crown to establish, beyond a reasonable doubt, that Mr. Kalair engaged in a prohibited act of deceit, falsehood or other fraudulent means. If this Honourable Court is left in reasonable doubt as to the lawfulness of UM’s entitlement to utilize the funds in question to pay the Mudarabah expenses in the manner they did, there *is no prohibited act* and thus no need to make any further legal assessment.
3. Even if this Court finds, beyond a reasonable doubt, the commission of a prohibited act, the Court must also be satisfied, against the same strict standard, that this prohibited act placed a victim’s pecuniary interests at risk. This second stage of the *actus reus* assessment presents an additional hurdle for the Crown.
4. There are two possible parties who could be characterized as alleged victims. It was established conclusively at trial that the homeowners suffered *no loss* whatsoever. The Crown suggests that there was a “risk of loss” had their mortgages not been discharged but such “risk” would require criminality not on the part of Mr. Kalair, but on the part of GTL and C1. Both through the records of UM, and through the independent records of the individual homeowners, there was ample documentary evidence to establish payments made in good faith by the homeowners in satisfaction of their Musharaka mortgage requirements. Mr. Kalair took no steps to block the accounting of these payments nor to prevent the discharge of their mortgages – on the contrary; by all accounts Kalair expected the payments of homeowners would be honoured by C1 and/or GTL with discharges granted while ensuring that the Sharia-compliant nature of the remained intact. The only way the homeowners *could* have lost money would have been if either GTL or C1 refused to accept evidence of the payments they made and moved to enforce on the mortgage security even with the full knowledge that UM, as C1’s partner and agent, had been paid.
5. This raises the question of whether C1 can be construed as a “victim” whose pecuniary interests were put at risk. To answer that question in the affirmative, this Court would need to find, beyond a reasonable doubt, that C1’s relationship with UM was that of a traditional debtor/creditor. These submissions will highlight key portions of the evidence (including the history of UM and C1’s relationship as related in the documentary record and through Vickie Sacco, the testimony of Mark Thompson on behalf of GTL, the evidence of Mr. Kalair himself and, most importantly, the expert opinion of Abdulkader Thomas) which suggest that the true legal relationship between UM and C1 is a Sharia-compliant Mudarabah – more accurately viewed as a joint venture or limited partnership. In such a structure, the possibility of an investment loss to C1 is both possible and contemplated and such an *investment* loss cannot be fairly characterized as resulting from the criminality of fraud or theft. C1 assumed, or was paid out on, the outstanding UM mortgages upon conclusion of the receivership. Thus C1 continued to receive principal and interest payments from former UM clients, and earned ongoing profit from this arrangement. The loss, if any, is limited to those investment funds UM expended to pay the Sharia expenses of the Mudarabah venture – these included legal fees and the precious metals purchases allocated to the SEB/MCC.

### Mens Rea

1. Only if the *actus reus* is proven beyond a reasonable doubt must the court proceed to an analysis of the requisite *mens rea* to prove fraud. This requires a two-part test in which it must be proven that Mr. Kalair had *subjective* knowledge of the prohibited act AND that Kalair had *subjective* knowledge that a consequence of his prohibited act was a risk of placing the victim’s pecuniary interests at risk. If this Court is left in reasonable doubt as to Mr. Kalair’s subjective belief regarding *either* what he was prohibited from doing *or* the pecuniary risks to the victims of what he did, then he must be acquitted of fraud, theft and money laundering.
2. The Crown relies on *Regina v. Zlatic[[9]](#footnote-9)* to define the offence of fraud. This case is indeed an excellent starting point and is utilized in *R. v. Castro[[10]](#footnote-10),* which provides further analysis and explanation that is helpful to an understanding of our case. In *Castro*, the Castro brothers worked together as paralegals, maintaining a general, trust and personal account for their firm. Although the firm carried roughly 80 files in a given year, in six of those cases, settlement awards owing to clients of the firm were diverted from the trust account and converted to personal use by one of the brothers for a period of time. Justice Belobaba reviewed the *Zlatic* definition of fraud accepting that “fraudulent means” has at its heart “the wrongful use of something in which another person has an interest, in such manner that his other’s interest is extinguished or put at risk. A use is ‘wrongful’ in this context if it constitutes conduct which reasonable and decent persons would consider dishonest and unscrupulous”. Justice Belobaba continued by holding that Carlos’ practice of converting portions of settlement cheques to his personal use, causing delayed or entirely lost payments for clients, was a “dishonest business practice” and “a wrongful use of funds that had been entrusted to the Carlos firm by the client and amounted to conduct which reasonable and decent persons would consider dishonest and unscrupulous”.[[11]](#footnote-11) This satisfied the *actus reus* component of the charge.
3. In analysing the two-pronged test for *mens rea*, the Court found the first branch met as Justice Belobaba rejected the claim by Carlos that he honestly believed he could treat client’s money deposited into trust as his own to be used for his own purposes and paid back as and when available.[[12]](#footnote-12) [We note parenthetically at this point that Carlos – in contrast to Kalair, as will be discussed later, – made no claim as to colour of right or honest but mistaken belief and thus raised no air of reality to his bald assertion that he believed he could use client’s trust money as his own. Mr. Kalair on the hand, had ample reason to honestly believe his actions were honest and scrupulous.]
4. However, the Court found the second prong of the *mens rea* test failed:

“Crown counsel has not been able to establish on the evidence led at trial that Carlos Castro subjectively knew that the prohibited act (converting and using the client’s money even on a temporary basis) could result in deprivation, i.e. that it could result in the client’s loss or risk of loss of this money…I am therefore unable to conclude that when he converted the complainant’s settlement proceeds and chose not to pay these five clients in a timely fashion that Carlos subjectively knew that his actions could result in the client’s deprivation because of eventual non-payment or the risk of non-payment.”[[13]](#footnote-13)

1. Castro was therefore acquitted of all fraud counts.
2. The *Castro* case bears many similarities to that of Mr. Kalair’s in that all the evidence suggests that Mr. Kalair had *no subjective* belief that his appropriation of the funds from the UM bank account could create even the possibility of loss to the homeowners. Any “loss” the use of such funds might cause to C1 cannot be said to be as a result of a “prohibited act” (and surely not an act that Kalair subjectively *believed and knew* to be prohibited) as Mr. Kalair was operating under the assumption that UM’s relationship with C1 was a joint-venture Mudarabah partnership in which investment losses were an acknowledged possible outcome should the venture fail.

***Colour of Right***

1. The term "colour of right" generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject matter of the alleged offence. It is used to denote an honest belief in a state of facts, which, if it actually existed, would at law justify or excuse the act done.[[14]](#footnote-14)
2. The test for the determination of the presence of an honest belief is subjective rather than objective[[15]](#footnote-15) (emphasis added):

Possibly some of the strongest beliefs held by human beings might be found by other minds to be completely destitute of reasonable grounds. ... A man may be ever so much mistaken in his reasoning processes and yet be honest, though you would not accept his mere statement of opinion unless there was some colour in the circumstances for his entertaining the opinion he claims to have had.

1. To put the defence of colour of right in play, an accused bears the onus on a balance of probabilities of showing that there is an "air of reality" to the asserted defence - i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right. Once this threshold is surpassed, the burden falls on the Crown to disprove the defence beyond a reasonable doubt.[[16]](#footnote-16) The trier of fact must determine whether, upon all the evidence, the proper inference to be drawn would be that the accused held an honest belief in the legitimacy of his actions.[[17]](#footnote-17)
2. The honest belief does **not** have to be reasonable. Instead, “the reasonableness of the belief is a factor to consider in assessing whether the belief was an honest one”.[[18]](#footnote-18)
3. In a 1963 case from the Ontario Court of Appeal, the accused, a municipal treasurer and tax collector, was charged with unlawfully converting to her own use $10,000, which was property of the municipal corporation. The accused admitted to taking the money, intentionally destroying records of the transaction, and giving the money to the Mayor in accordance with his orders. She testified that she felt justified in following the Mayor's orders. The Court said as follows (emphasis added)[[19]](#footnote-19):

In discussing fraudulent intent the learned trial judge told the jury that if the "accused honestly thought she was obliged to take this money" as ordered by the mayor upon the authorization of the municipal council, they ought to acquit. In effect this instruction is to acquit only if the jury found that the appellant believed that she was under a legal compulsion to obey the mayor's orders. I think it sufficient if she honestly believed that she was justified in following the mayor's orders even though not bound to do so and even if that belief was without foundation.

1. Although the Supreme Court of Canada restored the conviction,[[20]](#footnote-20) they did so on the basis that on the particular facts, “there could be no honesty or honest opinion of right in these transactions”.[[21]](#footnote-21) They did not interfere with the ONCA’s strong language set out above and the test remains whether an accused has an honest subjectively held belief in the permissibility of their conduct. Kalair honestly believed he was required to follow the orders, instructions and requests of the SEB. An SEB holds a position of unique power and authority in Islamic Finance relationships. Culturally, religiously, and in accordance with Sharia law, Kalair was under an obligation to show deference to the requests and instructions of the SEB, including as directed by Mr. Panchbaya. The relationship between SEBs and their Islamic Finance Institutions (IFIs) was the subject of expert opinion via Abdulkader Thomas (whose evidence will be reviewed in greater detail below). Kalair’s actions were not only motivated by the instructions and directions he received from the SEB, but they were also impacted by his understanding of the C1/UM contracts being structured to create a Mudarabah partnership.
2. Even in cases where there is some element of deceitful behaviour, reasonable doubt as to a mistake of fact of one’s legal entitlement must result in an acquittal. In *R v Ilcyzsynn,[[22]](#footnote-22)* the ONCA upholds the acquittal of a mother on charges of child abduction. It was not disputed that, at law, the child was subject to a custody order in favour of the husband who had been awarded sole custody while the mother was incarcerated for an unrelated offence. Upon her release from custody, the mother resumed cohabitation with the husband and child though the custody order was never altered or varied. The cohabitation arrangement between the parents broke down and the mother took custody of the child, flying him to Toronto and then Hamilton (hours from the father’s home in Sault Ste. Marie) and maintaining custody of the child in violation of the order for five weeks before she was apprehended. The mother took custody of the child in clear contravention of the court order by attending at the babysitter’s home and lying to the caregiver, stating she was bringing the child to see the father when in fact she had already made arrangements to apprehend the child and fly out of town.
3. Despite this act of deception on the part of the mother, the unanimous court concluded:

“In most cases, the fact that an accused knew the terms of a custody order and in fact acted in contravention of its terms would be sufficient to persuade a trier of fact beyond a reasonable doubt that he or she intended to do so. However, in an unusual case such as the one before us, where the accused, although knowing the terms of the order, truly believed on reasonable grounds that it was no longer in existence, there could be no intent to contravene a valid and subsisting order.”[[23]](#footnote-23)

1. Mr. Kalair at all times was aware of the source of the funds he possessed, which were utilized to make expense payments and purchase precious metals on behalf of the SEB. He was similarly aware of the terms of the various contracts and commitment letters governing the relationship between C1 and UM. However, there is ample evidence to conclude that, at all times, Kalair truly believed on reasonable grounds that the Mudarabah venture granted him full authority to utilize those funds in the manner he did. There was no intent to steal, defraud or deprive.
2. The Crown points to discrepancies between Mr. Kalair’s evidence and Mr. Thomson’s or Mr. Kalair’s evidence and Mr. Durst’s with respect to the nature and purpose of the appropriated funds. However, just as the admitted dishonesty of the mother in *R v Ilcyzsynn* did not alter her lack of intent to contravene the court order, alleged inconsistent explanations offered by Mr. Kalair to third parties cannot alter the fact that he acted at all times in accordance with his reasonably held belief that the funds were his to use for the Mudarabah project. (It should be noted that the defence does *not* concede that Kalair was dishonest in these conversations. A comparative analysis between Kalair’s evidence and that of Thompson’s and Durst’s can be found later in their respective witness sections.]
3. Moreover, colour of right is informed by cultural practices and traditions. In *R v Potts[[24]](#footnote-24),* the accused was an indigenous Chief who was charged with mischief after blocking a road that was to be extended onto property that was the subject of a land claim issue. The Chief and his people believed they had a moral right to the land. The Court carefully discussed the distinction between an objective versus subjective view of colour of right as follows (emphasis added):

From a purely objective point of view, from the point of view of an informed legal mind, and on the basis of English and Canadian law standards and concepts, it is clear that the accused, Chief Gary Potts could not be said to have any semblance of "colour of right". But from an appropriate "subjective" point of view, having regard to his knowledge and belief which it must be said were based not only on some layman's appreciation of the legal system with which he was dealing, but also based on his beliefs founded on his knowledge of his ancestry and kinship, and their respective aboriginal traditions, the answer is not so readily attainable…

Chief Potts was required to provide some evidence, which he did, to demonstrate to the Court, that there was some colour in the circumstances for his entertaining the opinion he claims to have had, and to still have…

The ultimate burden is on the Crown and the critical question is whether Mr. Potts can be said to have had no honest belief in his right to take the action that he did. In this case, and in these circumstances, I have a doubt that I must resolve in favour of the accused (pg 9)

1. After conducting a subjective assessment of the honestly held beliefs of Chief Potts, and properly placing the burden to disprove colour of right beyond a reasonable doubt on the Crown, the Court acquitted the defendant. It did not matter that Chief Pott’s land claim was not legitimately enforceable in Canadian law. The defining characteristic of the case was Chief Pott’s honestly held belief, rooted in his aboriginal cultural traditions, that his actions were morally sound. If this court is left in reasonable doubt as to Mr. Kalair’s subjective honestly held belief of his right to deal with UM funds in the manner in which he did pursuant to his understanding of Sharia law, then he is not guilty in Canadian law of fraud, theft, or misappropriation of funds and money laundering.
2. It is respectfully submitted that Mr. Kalair had an honest belief in his claim to the funds in question. Kalair was so confident in his belief of the lawfulness of his actions that he launched a $50M civil action to recover damages he believed were owing to him arising out of C1’s alleged unilateral breach of the mudarabah contracts. Kalair went to great lengths to maintain the viability of this action, attempting to assign it to the SEB’s successor (MCC) in the hopes that the claim would survive UM’s insolvency and be adjudicated on the merits. Ultimately, Kalair was outflanked by C1 and Grant Thornton (GTL), acting in concert, to ensure that the claim was never heard.
3. If the Crown cannot prove that Mr. Kalair lacked entitlement, and that ***he knew*** he lacked entitlement, then the Crown fails to establish the necessary deceitfulness to support convictions. The Crown’s burden is particularly challenging in light of the absence of any evidence demonstrating that Kalair personally benefitted from the allegedly misappropriated funds. While the Crown points (at paragraph 6 of its submissions) to a handful of VISA expenses totalling $20,081.20 (out of a supposed $4M fraud), Kalair explained in his evidence that these sundry electronics items were purchased for the business and were indeed still present in the business office at the time of the receivership.[[25]](#footnote-25)
4. If Mr. Kalair honestly and genuinely believed that the homeowner funds were to be used in accordance with Islamic Finance rules to cover expenses (including those of the SEB/MCC), there is nothing inherently deceitful or dishonest about his behaviour and the necessary elements for counts one through six cannot be made out.

# Admissibility of Expert Evidence

## Testimony of Abdulkader Thomas

1. The Crown has entirely misconstrued the expert opinion of Mr. Thomas. The purpose of Mr. Thomas’s testimony was not to opine on Mr. Kalair’s credibility as a witness. That is a matter for the trier-of-fact. The true purpose of Mr. Thomas’s expert evidence was to provide background and knowledge about what is normative in the context of Islamic Finance. Without expert evidence on the rules and functioning of Islamic Finance, it is impossible for a trier-of-fact to fairly assess Kalair’s conduct against the appropriate backdrop. In the simplest example, an unwillingness to pay conventional interest on a loan would appear bizarre and lack the hallmarks of credibility and honesty, appearing at first glance to be deceitful, until one learns that the payment of interest is considered a serious sin in the Islamic faith and violates a central pillar of sharia law. This issue applies across the full range of Kalair’s activities which cannot be fairly assessed as being honest versus deceitful unless one has an expert understanding of the Islamic Finance rules under which he is operating.
2. Mr. Thomas’s evidence cannot be taken to say, “Mr. Kalair should be believed”. That is the Court’s responsibility. However, Mr. Thomas’s evidence assists in educating the Court on industry standards, against which standard, Mr. Kalair’s behaviour must be measured and understood.
3. Mr. Thomas’s evidence provides an alternative to North American Finance and allows the trier of fact to view the contracts and relationships in the context of typical Islamic Finance companies. His evidence assists in assessing numerous important facts that may colour the actions of Mr. Kalair. These include:
4. The core principles of a mudarabah and how such a relationship may be formed using traditional western legal contracts;
5. What deference, if any, is typically accorded by IFIs to their SEBs;
6. Whether it is normative to pay SEB members;
7. How much SEB members are paid;
8. Whether SEB members would defer receipt of payment;
9. Whether SEBs could be paid in precious metals;
10. The cultural significance of gold in Islamic Finance
11. Whether SEBs can impose fines; and
12. Other material elements that are necessary to conduct a fair assessment of Mr. Kalair’s conduct in the circumstances of this case.
13. The Crown further contends that Mr. Thomas was not sufficiently independent, credible or reliable to be permitted to provide an expert opinion. The Crown’s concerns relate to both qualifications and documents reviewed.

### Qualifications

1. Crown’s submissions at paragraph 216 suggest that Mr. Thomas overstated his prior experience as an expert witness. Mr. Thomas did serve as an expert witness in an ongoing bankruptcy case in the Second District Court of New York. It is grossly unfair to suggest otherwise. Thomas testified that he was hired for his expertise and provided expert advice and reports to one of the parties. The issue of qualification never arose as the case had not gone to trial.[[26]](#footnote-26)
2. Paragraph 217 of the Crown’s submissions suggests that Thomas is not suitable as an expert as he is opining on his own “Guidance Model”. The defence agrees that Mr. Thomas developed the “Guidance Model” and that he opined on it in the course of his testimony. This fact only enhances his status as an expert witness, making his evidence all the more credible. This is analogous to a doctor testifying about a medical procedure that she herself developed. It would be absurd to suggest that she was not an expert on the procedure simply because she herself invented, designed and perfected something that had become standard practice within her specialized field.
3. Similarly, at paragraph 220 the Crown is critical of Mr. Thomas for not having a credential that he himself created and teaches. The inventor of a credential is unlikely to be accredited in something that he himself created, but it would be foolish to suggest one who teaches and certifies students in an internationally recognized credentialled program is not himself qualified to speak to those credentials.
4. The defence also agrees that Mr. Thomas does not have any experience working within the Canadian Islamic banking context, but this fact has no bearing on his qualification as multiple witnesses have testified (Mr. Thomas, Mr. Siddiqui and Mr. Kalair) that there was **no** Islamic Finance industry in Canada prior to the incorporation of UM. The very absence of a mature, comprehensible and pre-existing Canadian example of Islamic Finance is a factor the Court should consider when assessing whether Mr. Kalair acted upon an honest belief in his interpretation and understanding of his Sharia obligations throughout this case. Kalair was at all times operating in an untested poorly understood field with Canadian business partners who were entirely naïve to the expectations and conduct that were normative within this field.

### Documents Reviewed

1. At paragraph 223 of the Crown’s submissions, it is suggested that Mr. Thomas demonstrated improper conduct by an expert in his review and reliance on certain documents and his decision to ignore other materials. There is no contradiction between what documents Mr. Thomas enumerated in his report and the documents he received. Mr. Thomas reviewed the relevant documents provided by counsel and testified that he expressly declined to review potentially self-serving materials sent to him by Mr. Kalair or the untested examination of a witness (Joseph Adam) who could not, and would not, be called at trial. He formed his opinion without being tainted by such evidence. This is demonstrative of the scrupulous commitment to neutrality and fairness expected of an expert witness, a commitment not shared by Crown experts such as Sergeant Scott (which will be addressed in greater detail, *infra*).
2. As a neutral expert, Thomas was willing and available to review any additional materials the Crown felt relevant and answer questions. The Crown chose to provide none yet now raises objections without having availed itself of the opportunity to utilize the expert in whatever manner they saw fit.

## Testimony of Shazhad Siddiqui

1. The Crown objected to Mr. Siddiqui’s qualifications to provide his opinion with respect to payment of SEBs. However, the evidence offered by Mr. Siddiqui in this area was not intended to be an expert opinion but rather a direct observation made by someone who has worked in and studied Islamic Finance. Siddiqui’s testimony as to his understanding of SEB remuneration is akin to a hospital administrator’s evidence about the approximate salary of a doctor. It is not “expert” nor “opinion” but rather a relevant statement of fact based upon the witnesses’ observations.
2. This evidence is substantially bolstered by that of Mr. Thomas, an expert in Islamic Finance, which should alleviate any concerns the Court might have in relying solely on Siddiqui’s non-expert evidence on this point.

## Testimony of Sergeant Scott

1. The defence concedes that Sergeant Scott was qualified as an expert at a pre-trial motion by the Honourable Mr. Justice Dambrot. However, having now heard his testimony, the defence respectfully cautions the Court on the very limited weight to be given to his evidence. The Court should be particularly wary of his independence, qualifications and the necessity of his evidence, which dramatically limits its probative value.
2. Sergeant Scott’s independence was undermined when it was discovered that he was employed by the Alberta Central 1 Credit Union, a member of the larger Central 1 Credit Union Company.[[27]](#footnote-27) He is contracted and paid by the key complainant in this case; a very curious coincidence. This Court should consider the nature and vociferousness of the potential objection raised by the Crown had Mr. Thomas turned out to be a paid consultant to a UM-related company. Extreme caution should be exercised in assessing the weight of this evidence.
3. Moreover, Sergeant Scott was qualified as an expert in money laundering, specifically laundering in precious metals. Although he has ample experience in the area of money laundering in cash currency, he admits to having very little expertise in the area of precious metals.[[28]](#footnote-28) In fact, this case was the “first and only time” that he has testified as a precious metals money laundering expert.[[29]](#footnote-29)
4. Like many other Crown witnesses, Sergeant Scott was naive to, or ignorant of, the significance of Islamic Finance and Sharia Law in this case. Although he was aware that the case involves an Islamic Finance company and purported Sharia compliance, he conducted no research whatsoever into the cultural and religious significance of gold in those fields.[[30]](#footnote-30) In fact, he went so far as to suggest that the same general principles of finance apply in any culture[[31]](#footnote-31):

Q…I'm going to suggest that when you prepared your report and conducted your analysis, you weren't aware of the particular significance of the role of gold, physical gold in Islamic finance?

A. I will – yeah, I'll concede that. I did not specifically know Islamic finance, but general finance has the same characteristics apply in terms of finances in, in any culture. I mean, it has that intrinsic value it's, it's transportable, it's, it's easily moved and so on. So, it can apply to Islam as much as it can apply to Catholicism, anything else.

1. The witness was confronted with lettered exhibit J, which includes various facts about gold’s role in Islamic Finance including that:
2. Gold has a deep and historical connection with Islamic civilizations[[32]](#footnote-32);
3. Gold is one of the six staples mentioned in the hadith, which is a source for religious law and moral guidance[[33]](#footnote-33);
4. Gold exhibits little or no correlation with most other asset clauses[[34]](#footnote-34);
5. Gold is the ultimate safe haven asset during times of market stress or political stress[[35]](#footnote-35); and
6. Gold is a Sharia-compliant asset clause[[36]](#footnote-36);
7. Sergeant Scott was not familiar with any of the above principles and as such, could not have taken those principles into account when coming to the conclusion that money laundering had occurred in this case.
8. Qualifications aside, most of what Sergeant Scott could tell the Court was well within the routine knowledge of any layperson. His evidence was not required to assist the trier-of-fact. In accordance with the *Mohan* principles, an expert opinion should be limited to educating the trier-of-fact as to information outside the everyday knowledge of a layperson. It is common knowledge that gold has an intrinsic value, that there is a limited supply in the world, that it is heavier but less bulky than cash, and that it has substantial value relative to its size. No expertise is required to understand these concepts. Reliance on Sgt. Scott’s evidence to support what is obvious to any layperson can only serve to apply a false patina of expertise to the Crown’s money laundering allegation.
9. Finally, the defence takes issue with one of the central tenants of Sergeant Scott’s report, that gold is “entirely untraceable and anonymous”[[37]](#footnote-37) This expert opinion is not only completely unsupported, but is in fact contradicted, by the evidence. A gold bar with a unique, identifiable serial number was introduced into evidence[[38]](#footnote-38) as representative of the bars at issue in this case. The gold bars purchased by Mr. Kalair were in fact traced by serial numbers, which were provided by both Scotiabank and Bendix upon request[[39]](#footnote-39). Each bar noted the original manufacturer and was easily traceable through the financial system by resort to its serial number. Only if a bar were to be melted down and re-formed would its source be obscured.
10. Sgt. Scott was unable to say whether the funds used to purchase the precious metals were sourced in a crime.[[40]](#footnote-40) He testified that confidentiality is a central tenant of money laundering[[41]](#footnote-41) yet the evidence from BNS and Bendix is unequivocal. Mr. Kalair makes no effort to shield his identity. He attends in-person, providing legitimate government-issued identification (driver’s license and passport), along with a business card and some media articles.[[42]](#footnote-42) A portion of the gold is even referenced in a draft commitment letter that was provided to one of the largest non-bank commercial lenders in Canada (Romspen). Sergeant Scott agreed that this was not typical money laundering behaviour.[[43]](#footnote-43) In his own description of the ‘stages of money laundering’, Sgt. Scott agreed that ‘stage three’ had no application to this case and stages five and six lacked any evidence.[[44]](#footnote-44)
11. For all the above reasons, Sgt. Scott’s evidence should be highly constrained, provided very little weight, and abjectly fails to prove the offence of money laundering beyond a reasonable doubt.

# V. Summary of the Facts

## Crown Evidence

### Evidence of Vickie Sacco (Central 1)

#### The Ultimate Misunderstanding

1. In 2005, Central 1, known as CUCO at the time, entered into a commercial partnership with UM. The CUCO point of contact was originally Mr. Jens Lohmueller, who was Manager of Commercial Lending and Product Development.[[45]](#footnote-45) Mr. Lohmueller worked with UM to develop the business model. On August 26, 2005, he wrote a letter on CUCO letterhead explaining the Islamic principles that were to govern the relationship.[[46]](#footnote-46) The subject line of the letter is “UM Financial Shariah Board Ruling.” Of importance are the following passages (emphasis added):

“The residential mortgage contract between the client and UMF are based on the Islamic concept of Murabahah. Under the Murabahah concept, UM Financial purchases a residential real estate for a client and sells it to the client with a pre-agreed upon profit. The underlying mortgage contract does not contain interest.

AND

Credit Union Central of Ontario is making financing available to UM Financial to assist in the purchasing of said residential real estate. This relationship was formed based upon the concept of Mudarabah. The financing contract is based on a pre-agreed upon profit sharing ratio between both parties and proceeds are shared after the occurrence on a monthly basis. The underlying financing contract does not contain interest.”

1. Ms. Sacco was delegated to administer the credit lending facility and she administered the relationship right up until the receivership.[[47]](#footnote-47) Shockingly, Ms. Sacco testified that she had never seen the above-noted letter signed by Mr. Lohmueller until it was shown to her at trial.[[48]](#footnote-48)
2. Sacco testified that she was never given any indication by anyone at C1 that UM was anything but a traditional interest-bearing commercial loan company: (emphasis added)

Q. So, you keep making that distinction with their clients, but I’m going to suggest to you that it was equally important that the relationship between Central and UM be a Sharia-compliant relationship.

A. In all my time, I’ve never heard that ever reference that our relationship with UM was based off any kind of Sharia.

Q. That’s interesting. So, no one, none of your supervisors or any of the other staff in all of your years of dealing with UM Financial, did you ever receive notice or information that says, we’ve got to make sure we’re in Sharia compliance with this client?

A. Absolutely not, no. Yeah, no.

1. Ms. Sacco was not provided a historical background of the company and was not told about the uniqueness of this specific business relationship.[[49]](#footnote-49) Most disturbingly, Sacco asked her superiors outright whether or not C1 had Sharia compliancy obligations. Her evidence was as follows (emphasis added)[[50]](#footnote-50):

Q. I see. So, at some point as you were more involved in the, sort of, managing these loans, I guess by that point you had seen a lot more Sharia related words, words like Mudarabah, Musharaka, and you started to wonder is there anything Sharia compliant I need to be worried about representing Central, correct?

A. I just – it was probably just a general off the cuff question, you know.

Q. Do you recall what the – I know you’re not going to get the exact word of the question, right?

A. No, no, I just – yeah, I just – I think I just said, you know, is – “These aren’t Sharia compliant from our end, right?” Something to that effect.

Q. I see. So, basically say, look on our side the bank or the credit union, we don’t have to do this Sharia compliance stuff, right? That’s problem.

A. Something very probably off the cuff, yeah.

Q. Okay. And the answer you got, to your recollection, was no, you don’t have to worry about Sharia compliance.

A. Probably, yes, something similar, yeah.

Q. And that, I would suggest then, explains why you didn’t have to take any steps to talk to Sharia Scholars or to get clarity from anyone internally or externally on Islamic finance, correct?

A. That’s correct.

1. Ms. Sacco was further unaware of the multiple edits to the original commitment letters that had been drafted to ensure that the contracts themselves were Sharia compliant. Ms. Sacco was asked to compare the executed commitment letter with the draft version (shown to her as a lettered exhibit at the time, but ultimately entered into evidence as Exhibit 56) where terminology was changed from traditional mortgage terms such as “borrower” and “lender” to “credit facility utilizer” and “credit facility provider”, terms that are not industry standard, but satisfy the requirements of Sharia law.[[51]](#footnote-51)
2. Mr. Kalair testified that Lohmueller accepted these changes because he understood that the relationship was predicated on Sharia law and Sharia compliance.[[52]](#footnote-52) Mr. Kalair believed, and had reason to believe, that Mr. Lohmueller would have communicated such things to other Central 1 employees, particularly to those that would be working directly with UM.
3. Although Ms. Sacco is not to blame for the gaping communications failure separating C1 and UM, she is a symptom of that colossal miscommunication which left a yawning chasm between the factual realities understood by Kalair on behalf of UM as contrasted with the factual realities as understood by Sacco on behalf of C1 in the post-Lohmueller era. Sacco’s view of the calculated and purposeful use of language in the contracts was that it “doesn’t make it, in my opinion, like, a Sharia thing. It’s just using different terminology in the contract”. In her mind, they were “just words”.[[53]](#footnote-53)
4. This unilateral change in viewpoint was never communicated to Mr. Kalair.
5. Years later, Mr. Kalair continued to speak in the language of sharia law, while Ms. Sacco spoke in the language of traditional finance. This ‘tower of Babel’ phenomenon is the source of much of the friction in the C1/UM relationship and is critical to understanding and assessing the honesty of Kalair’s belief in the righteousness and lawfulness of his actions.

#### The Contracts

1. The relationship between Central 1 and UM was governed by multiple contracts including the Master Mortgage Sale and Administration Agreement (MMSAA)[[54]](#footnote-54) and the Master Mortgage Assignment Security Agreement (MMASA).[[55]](#footnote-55) These contracts are unfailingly vague and their terms can be read and interpreted in different ways. If viewed as a sharia contract, the terms would be read one way, but if viewed as a traditional commercial contract, the terms may be read in another. The differing perspectives of the reader are yet another important factor in assessing the honesty of Mr. Kalair’s conduct. Mr. Kalair cannot be criminally convicted for misinterpreting his contractual rights and obligations.
2. For example, on page seventeen of the MMSAA, subsection Q reads as follows (emphasis added):[[56]](#footnote-56)

“Remit to the Assignee (C1) all Collections received or collected by the Assignor (UM) from time to time under the Purchased Mortgages on a daily basis by pre-authorized payment from the Collections Trust Account. The Assignor may deduct, at its option, expenses and fees authorized pursuant to this agreement and shall not be required to remit amounts collected for the purposes of paying realty taxes but shall apply those sums in payment of applicable realty taxes”

1. The MMASA has similar wording in sections 2.1:[[57]](#footnote-57)

“Unless specified otherwise, all costs and expenses including, without limitation, the fees and disbursements of legal counsel incurred in connection with the agreement and the transactions contemplated hereby, shall be paid by the party incurring such expenses”

1. It is not clear exactly which expenses are contemplated in these sections, but it is certainly open to interpretation. Someone viewing this contract through the lens of Sharia law would understand this section to mean any operating expense incurred by UM, including any cost related to ensuring the company remains Sharia compliant such as payment to the SEB.
2. Ms. Sacco ultimately agrees with that suggestion[[58]](#footnote-58):

Q. And I don’t know if you know this, but I’m going to suggest to you that one of the requirements to make this Sharia-compliant, meant that they also had an expense to pay Sharia Scholars. Did you have any knowledge about the Sharia-compliance costs...

A. No.

Q. ...of this...

A. None.

Q. ...project?

A. No.

Q. Okay. But, if there were such costs, your expectation would have UM has to pay them, correct?

A. I would assume so, yes.

Q. And obviously, those payments are anticipated to come out of the UM’s side of the profits of this arrangement, right?

A. I would assume so.

1. The MMSAA and the MMASA are again vague when it comes to how pre-payments should be managed (emphasis added):[[59]](#footnote-59)

“If a purchased mortgage is prepaid, in whole or in part, as a result of sale of the Mortgaged Premises, expropriation, damage of the Mortgaged Premises by fire or other similar cause, the Assignor (UM) shall receive any such prepayment, including any penalties provided for in the Mortgage or the Credit and Collection Policy or any loan document underlying the Mortgage, in trust of the Assignee (C1), initially deposit same into the Collections Trust Account, and then forthwith deliver such funds to the Assignee (C1).”

1. The above language seems to suggest that only in the enumerated circumstances, should prepayments be forwarded to C1 and therefore in any circumstance not covered by section 8.7, UM is permitted to keep the prepayments, presumably until the mortgage is paid off in full.
2. Even where the sharia interpretation may not be the most plausible explanation, it is respectfully submitted that the Court must consider – taking into account the evidence of Mr. Kalair and the expert opinion of Mr. Thomas – whether there is ambiguity giving rise to an air of reality to Kalair’s claim of colour of right.
3. The complex question of the legally correct interpretation of the ambiguous sections in the key documents would have been a central feature of the civil trial on UM’s $50M claim against C1. However, due to C1’s machination with GTL to purchase and abandon that claim as part of the insolvency, those questions will never be answered.

#### The Demonstrable Loss

1. Ms. Sacco was unable to quantify the loss to Central 1. The calculation is complicated by her admission that Central 1 is still realizing on profits today as they continue to receive monthly mortgage payments and lump sum payments from a small number of the UM homeowners who remained C1 clients after the receivership.[[60]](#footnote-60) These clients elected to accept a traditional non-sharia compliant financing and accepted the payment of interest at the rate specified in the contracts.
2. To sustain a conviction for fraud or theft, the Crown need not prove a specific quantum but can rely on the mere creation of a risk of deprivation. However, that risk cannot be something contemplated and agreed to by the parties to the venture if it is to be the basis of a criminal charge. A joint venture or partnership that subjects one partner to a risk of loss (or actual loss) is not a crime – it’s simply a bad investment. That is precisely the unfortunate result of C1’s abrupt withdrawal from the mudarabah partnership at time when, taking into account expenses of the venture, there were insufficient profits to cover liabilities.
3. With respect to the homeowners, there as no lost in actuality nor any risk of loss. Payments by homeowners to UM were recorded, accounted for, and credited by GTL using the very documents provided by UM in answer to the receivership Order. The shortfall caused by UM’s needs to cover such things as legal expenses the payment to the SEB at the dissolution of the mudarabah never threaten the assets of the homeowners. They are, in accordance with sharia law and the original contracts, a debt of the mudarabah to be dealt with between UM and its funding partner, C1.

### ii. Evidence of the Homeowners

1. The homeowners are comprised of religiously devout Muslims who were relying on UM and Mr. Kalair to ensure that their mortgages were Sharia compliant and that the Sharia compliant components of their contracts remained in good force and effect. The homeowner evidence, although not directly probative of the issues in this trial, is very helpful in understanding the relationship between UM and Central 1.
2. The Court heard evidence from four different homeowners. Of those four homeowners, three of them advised that they did not lose any money. In fact, we know that no homeowner lost any of the money, as they were reimbursed for any demonstrable payment made towards their mortgage.[[61]](#footnote-61)
3. Mr. Abdul-Hamid was the only homeowner to claim a loss. However, contrary to the Crown’s contention that the loss was as a result of his reliance on the materials received from the mystery email address, Mr. Abdul-Hamid’s evidence reveals that his loss arose out of a legal battle that cost him hundreds of thousands of dollars. Abdul-Hamid fought that battle for precisely the same reasons that Kalair fought C1 for so long during the receivership – both were working to preserve the critical centrality of sharia compliance within the failing mortgage agreement.
4. When UM went into receivership, the homeowners made independent decisions about how they would proceed. Some homeowners paid out their mortgages completely, others, who would have preferred that their mortgages remained Sharia compliant, dealt with non-Sharia compliant financers and the remaining few, such as Mr. Abdul-Hamid stood their ground and paid the price.
5. Many homeowners were angered by Central 1’s decision to push UM into receivership. A dissident homeowner group was formed and would host meetings to discuss a plan of action. Mr. Khattab actually attended some of those meetings. Not only were these homeowners attempting to complain to Ms. Sacco directly, they resorted to retaining legal counsel who sent a letter to Ms. Sacco threatening a class action[[62]](#footnote-62):

“Our clients’ grievances stem from information available to them that Central 1 Credit Union and UM Financials Inc. are contemplating discontinuing the structured Sharia compliant financing scheme under which scheme they got financing for the purchase of their homes…should Central 1 Credit Union and or UM Financial Inc. discontinue the Sharia compliant financing scheme our clients will be faced with the following issues...”

1. Each homeowner was aware of the SEB and the role it played in ensuring Sharia compliance. It is contrary to all the evidence to suggest that the SEB was not relied upon for their knowledge and guidance in structuring and administering the contracts in accordance with Sharia law. Mr. Abdul-Hamid testified that the SEB members were under-qualified citing an e-mail from Mr. Kalair in which the SEB was described as “just local imams”.[[63]](#footnote-63) The Crown seeks to distort this comment to suggest that Kalair was conceding the lack of expertise of his own SEB and therefore demonstrating proof of dishonesty. A fair reading of the e-mail and Abdul-Hamid’s testimony indicates that Abdul-Hamid was seeking a sharia expert who could testify in a Canadian courtroom to bolster his law suit. By that point in time, an insolvency court had already rejected the proffered intervention of Mr. Panchbaya on behalf of the SEB. Kalair knew that what Abdul-Hamid needed was not a religious expert such as Mr. Panchbaya or any of the SEB scholars, but rather a business and academic expert skilled in Islamic Finance such as Abdulkader Thomas. The scholars of the SEB, even Mufti Panchbaya, did not fit that bill.

### iii. Evidence of Mark Thompson (Grant Thornton Limited - Receiver)

1. From the very first moments of cross-examination, Mr. Thompson on behalf of GTL proved himself to be short-tempered, angry and needlessly confrontational.
2. His attitude, in combination with his apparent conflict of interest, dramatically undermines the weight and credibility that should be afforded to his evidence.

#### Aggressiveness

1. Mr. Thompson was examined-in-chief for almost a day and a half. During that time he was calm, respectful and patient.
2. Minutes into cross-examination by defence counsel for Mr. Kalair, Mr. Thompson became visibly frustrated. In response to initial questions about whether the receiver credited the homeowners for demonstrable payments, something entirely within his knowledge as receiver, Mr. Thompson responded with the following[[64]](#footnote-64):
3. So I don’t know. I’ve answered your question, and I don’t know. I don’t know

….

1. You can suggest all you like, I don’t know the answer.

Q. Mr. Thompson, we are 60 seconds into what might be a longer examination. There’s no reason for this to be adversarial. I am just indicating…

A. There is if you’re asking me to confirm things that I am not confirming. And so I said: It was seven years ago, I do not remember, and that is my answer.

1. This anger, hostility and sarcasm were present all the way through the cross-examination. The following examples, although not exhaustive, are demonstrative:

**Exchange 1:[[65]](#footnote-65)**

Q. Okay and I am going to suggest to you that one of the duties included in that court order, in the responsibility, is to run the business, correct?

A. If you read the court order, perhaps you can educate yourself on what the duties of the receiver are.

Q. Sir, you may find this surprising, but I am capable of reading a court order. I’ve done it a few times.

A. So then perhaps you should read it.

Q. But sir, again…

A. Why don’t you read the section on the duties and the powers of the receiver as set out in the court order instead of wasting my time asking these questions.

**Exchange 2[[66]](#footnote-66)**

Q. Okay. What I’m asking you is, you see the distinction now though, right, that if you were stepping into the shoes of a meat-packer, and you as the receiver –

A. I actually don’t see the distinction. I think that a kosher meat-packer is very different than a residential mortgage company. And I think that the laws that are applicable to residential mortgages in Canada are dealt with by Canadian law, so I don’t understand your questions, and I don’t understand your analogy, and I don’t have anything further to say about that.

**Exchange 3**

A. Okay, what are you asking me?

Q. Well, let me tell you what I am not asking you first.

A. No, please tell me what you are asking me.

Q. You know what -

A. I would like to answer a question.,,

Q. Great.

A. …and move on.

**Exchange 4:[[67]](#footnote-67)**

Q. Do you not – you don’t know whether your office booked a room at the Royal York for a couple of hours for those meetings?

A. Do I know about the administrative functions that happened 7 years ago? No I don’t

#### Conflict of Interest

1. The rights, duties and obligations of a receiver were set out in Exhibit 13. A receiver is to act as an officer of the court and owes a fiduciary duty to all of the stakeholders. In this case, the stakeholders included the secured creditors, the unsecured creditors, the debtor company and the homeowners. As Mr. Thompson understands it, “anyone impacted by the receivership would be a stakeholder”.[[68]](#footnote-68)
2. Receivers are further expected to act with utmost good faith, complete disclosure and scrupulous avoidance of conflict of interest towards all parties to a receivership or bankruptcy and to act in the best interests of all parties.
3. GTL did not abide by their legislative duties as a neutral arbitrator and trustee. GTL was originally retained by C1. GTL borrowed up to 1.5 million dollars from C1 so that they were paid while they executed their duties as receiver.[[69]](#footnote-69) Thomson conceded that GTL had been retained and working for C1 even before their appointment as Receiver though he could not say how much GTL was paid for its pre-receivership work.[[70]](#footnote-70) GTL orchestrated the sale of the $50 million dollar claim (Exhibit 15) to C1, notwithstanding that C1 was the named defendant and that it may have been in the interests of the other stakeholders to sell it to a party interested in pursuing rather than abandoning the claim.[[71]](#footnote-71) Similarly, UM’s mortgage portfolio was sold to C1 seemingly without any regard to the importance of finding a new sharia-compliant financial entity willing to manage the portfolio in a manner consistent with the original intent of the homeowners – a key stakeholder group.
4. It is clear that GTL corporately, and Mr. Thompson personally, perceived their sole loyalty as being to C1.
5. The homeowners were clearly a very important stakeholder in the receivership. UM’s collapse had the potential to jeopardize what was, for most, their single largest personal asset – their homes. Although Mr. Thompson claims to have listened to the concerns of homeowners intently, he was completely unable to comprehend or articulate their fears that the appointment of the receiver could negatively affect the sharia compliance of their mortgages.[[72]](#footnote-72) GTL’s interest in the homeowners went no further than what was required to maximize value for the entity they perceived as their real and only client – C1.
6. Mr. Thompson acknowledged that UM was not a traditional residential mortgage business but rather a Sharia compliant mortgage business.[[73]](#footnote-73) However, GTL admittedly took no steps to consult with the existing SEB members or independent Sharia experts in order to understand the nature of UM’s business.[[74]](#footnote-74) Mr. Thompson’s explanation was eerily similar to that of Ms. Sacco:

“…But it seems to me that, since it is Canadian law, there might be no reason to consult with Sharia experts, because we are not Sharia experts, and the law at hand for the receivership is Canadian law.”[[75]](#footnote-75)

1. MCC was left to their own devices and retained legal counsel for the purpose of providing the court with a Sharia perspective during the receivership process. The true interests of the homeowners and the SEB were not heard, considered or defended by GTL and the unique Sharia component of UM was entirely ignored. GTL made no effort to “step into the shoes of the debtor company”. It never even made a passing attempt to understand the core of UM’s business – sharia compliant financing – nor the unique needs of the homeowners.

#### Credibility

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1. Thompson’s combative and adversarial demeanour undermines his credibility and usefulness as a witness. The damage is compounded by Thompson’s own admission that his testimony was limited to reading a document and confirming what is says. It appeared that he had no independent recollection of the events that took place seven years prior to his testimony.[[76]](#footnote-76)
2. In fairness to him, it is understandable that Thompson would have a poor recollection of events. UM’s receivership was just one of many Thompson would have worked on for GTL. Thompson was not even the partner in charge of the file but rather a mid-level employee. His recollection is reliant on documents that were, for the most part, written cooperatively by other GTL employees all of whom, Thompson included, had no knowledge of sharia law and Islamic Finance concepts.
3. Thompson’s recollection must be contrasted with Mr. Kalair’s. The receivership was a seminal moment in Mr. Kalair’s life and certainly the most shocking moment of his business career. The details would stand out to him and he is not dependent on reference to documents prepared by committee. Where Mr. Kalair’s evidence differes from that of Mr. Thompson’s, Kalair’s should be preferred when considering the details of events surrounding the receivership.
4. This sets the stage for a critical analysis of the events of October 7, 2011 when the GTL team, including Thompson, first attended at UM’s offices. Thompson’s recollection is reliant upon the memorandum prepared collectively by the team who attended.[[77]](#footnote-77) GTL spent the full day at UM staying on site for approximately seven hours and seizing thousands of documents and gigabytes of digital data.
5. Mr. Thompson’s evidence was that Mr. Kalair advised him of $2.1 million dollars that was set aside for the SEB to establish a fund held by the board to cover future fines.[[78]](#footnote-78) Mr. Kalair’s evidence on this issue was that, although he mentioned the SEB and their ability to impose fines, he explained that the $2.1 million dollars was for outstanding payment to cover years of sharia consulting by the SEB for UM.[[79]](#footnote-79) Mr. Thomas’s expert evidence (discussed below) explains the authority of the SEB to impose fines. One plausible explanation for the discrepancy between the evidence of Thompson and Kalair is that Thompson was relying on a team memorandum and had no independent recollection of the discussions with Kalair, or indeed whether he himself (rather than another member of the team) even spoke with Kalair on this subject. It is possible that Thompson has conflated two disparate issues. Having observed Thompson’s animus towards the defence throughout his cross-examination, this Court should tread with caution and remain cognizant of Thompson’s penchant for gravitating towards whatever explanation would paint Mr. Kalair in the worst possible light.

### iv. Evidence of Michael Durst

1. The evidence of Mr. Durst relates primarily to Mr. Kalair’s purchase of gold and silver on August 30, 2011. Mr. Durst was a Scotiabank Branch Manager at the time. He was familiar with UM’s business model and with Mr. Kalair personally as he had dealt with them for years. When Mr. Kalair attended at the branch and requested to purchase 15 kilograms of gold, it was Mr. Durst who suggested that Kalair go downtown to the Scotiabank main branch. It was also Mr. Durst who authorized the debiting of UMs account in the purchase amount.
2. Mr. Kalair approached Durst again the next day, requesting to purchase an additional 18 kilograms of gold. Durst inquired of Kalair as to why he was interested in purchasing the gold. It was Durst’s evidence that the reason Mr. Kalair provided for the purchase related to an investor who wanted to diversify his five million dollar portfolio because of the potential increase in the value of gold. Mr. Kalair clarified in his testimony that Durst was correct about his recollection of a discussion of five million dollars, but that he was incorrect about the context. According to Kalair, the five million dollar figure relates to a discussion of UM Real Estate (UMRE), a related company to UM which also held an account at the same branch.[[80]](#footnote-80)
3. Kalair’s request to make a second large gold purchase is rebuffed by Durst, though he assists by providing Kalair with a referral to Bendix. It is at this time that Durst prepares the “unusual transaction report”.[[81]](#footnote-81) Whatever Durst’s concerns, they were clearly not so urgent as to stop him from referring Kalair elsewhere nor did Durst articulate any concerns to Kalair directly. Durst continued to work with UM and his bank made no change to its relationship with UM, maintaining all accounts and services, right through to the moment of receivership.

### v. Evidence of Shazhad Siddiqui

1. Once the receivership commenced, both UM and MCC retained counsel in an attempt to protect their interests and more importantly, to protect their clients’ sharia compliant mortgage contracts.
2. Siddiqui was clear that he was retained by, and took instructions from, MCC and Mr. Panchbhaya. [[82]](#footnote-82) Although Mr. Kalair had an obvious vested interest in Siddiqui’s work on behalf of MCC, neither Kalair nor UM were ever the client. Mr. Kalair was CC’d or BCC’d on many communications entered into evidence, but was also excluded on many and not privy to numerous calls and in-person meetings between Siddiqui and Panchbhaya.
3. At the time of his involvement with MCC, Siddiqui was a junior lawyer fresh off recent studies in the field of Islamic Finance. He had a bonafide desire to see Islamic Finance expand and succeed in Canada.
4. When Mr. Panchbhaya first retained him in July of 2011, Siddiqui’s instructions were to get the SEB a seat at the insolvency table. The transformation into the incorporated entity of MCC was designed, in part, to enhance legitimacy and improve the SEB’s chances of intervening in court. MCC sought to harmonize Canadian and Sharia law and to maintain sharia compliance of the mortgage product in the face of pending receivership.[[83]](#footnote-83) Siddiqui employed multiple strategies in his attempts to serve the needs of MCC. These included attempts to negotiate a holdback of precious metals to protect MCC’s claims for payment and communicating threats to C1 that MCC could bypass UM and communicate directly to UM’s clients to advise them that their mortgages would no longer be Sharia compliant.[[84]](#footnote-84) Siddiqui referred to such tactics as “litigation strategies” designed to motivate C1 and GTL to negotiate with MCC.
5. However, as the situation deteriorated, Siddiqui was receiving pressure both publicly, in media stories, and internally from counsel for GTL and C1.[[85]](#footnote-85) The pressures no longer had to do with the intervener application. Mr. Siddiqui became more concerned with protecting his own reputation and insulating himself from any allegations of professional wrongdoing. He expressed this in an email to Mr. Kalair and his associate, Tariq[[86]](#footnote-86):

“I am not doing further work on this file today as we have been fighting fires all day. This is primarily due to the inappropriate action of sending the pay-out letters to the clients and circulation to the wider community. Respected lawyers in the community are now asking us if this is a joke and our name is being smeared.”

1. As the pressure on Siddiqui mounted, Siddiqui adopted a ‘self-preservation mode’. He was motivated to gloss over the particulars of transactions, asking few questions of his client and even fewer, if any, of Kalair, who was peripheral to his retainer. Near the end as the bankruptcy proceedings mounted, his goal was to find the most expeditious way to remove himself as counsel on the file.
2. It is with this context in mind that the defence addresses Siddiqui’s evidence that he questioned Kalair about the whereabouts of the gold to which Kalair is alleged to have caused Siddiqui to understand that,“if I knew, I would have to disclose it”.[[87]](#footnote-87) It is highly unusual that Siddiqui, concerned as he was at this time about his own professional obligations and reputation, made no reference to such a critically inculpatory exchange anywhere in his vast array of e-mails, letters, or file memos. Such a suspicious exchange would surely have been meticulously documented. Mr. Siddiqui agreed:[[88]](#footnote-88)

Q. So I suggest to you that, first of all, the context of writing both a type-written e-mail like this and a hand-written addendum to it, you'd agree with me this is because now there's media on this, people are asking questions, and you're concerned that people, frankly, will ask questions about your conduct and your involvement too, right?

A. Right.

Q. And perhaps the worst scenario is, or one of the worst scenarios, is exactly what ended up happening, which is that you're here, instead of at your practice doing work, years later answering questions about what you did seven years ago on this file.

A. Right.

Q. And it would therefore be important to include whatever critical information you could on such a memorative file to memorialize your recollection of an important meeting, correct?

A. Yes.

Q. And you'd agree with me that neither in the type-written component nor in the hand-written component do you make any reference to asking anyone, whether it's Mr. Panchbhaya or Mr. Kalair who's got the gold? Where is the gold? Those questions are not memorialized in either the hand writing or the type-written component of this memo, correct?

A. Yes.

1. It is evidence that is self-serving, not corroborated in the documents, and arises for the very first time seven years after the fact. The defence submits, in accordance with Kalair’s evidence on this point, that Siddiqui never inquired as to the whereabouts or details of the gold. It is not – as Siddiqui now wants it believed – that Kalair refused to tell him. Rather, it is that Siddiqui never wanted to know in the first place. By this late stage, Siddiqui was operating under the assumption that the fewer questions he asked the better and the less he knew the sooner he would be able to extricate himself from a client (MCC) who was causing him increasing reputational harm.

### vi. Evidence of Roch Dupont

1. As discussed above, the charges against Mr. Kalair can be broken down into two distinct groups. The evidence of Mr. Dupont relates to the second group: failure to perform the duties of a bankrupt and unlawful refusal or neglect to answer fully and truthfully. Both charges are under the Bankruptcy and Insolvency Act. The defence submits that the evidence of Mr. Dupont in combination with the evidence of Mr. Thompson, demonstrates unequivocally that Mr. Kalair adequately performed the duties of a bankrupt and answered fully and truthfully the questions posed to him during his bankruptcy examination of February 14, 2013.

#### Charge 1: Failure to Perform Duties of a Bankrupt

1. At paragraph 35 of their submissions, the Crown effectively alleges that Mr. Kalair failed to perform the duties of a bankrupt in four different ways, failing to attend before the Official Receiver as required, failing to deliver to the trustee all books, records and documents and property relating to the bankrupts affairs, failing to disclose to the trustee all property disposed of within a year of the initial bankruptcy and failure to attend at the first meeting of creditors.
2. **Failure to attend before the Official Receiver as required**
3. On January 24, 2012, Mr. Dupont sent a formal Notice of Examination to Mr. Kalair’s home address.[[89]](#footnote-89) Mr. Kalair was directed to attend for examination on February 8, 2012. The Crown alleges that he did not attend without adequate reason. The evidence suggests otherwise.
4. The Notice of Examination was sent only two weeks prior to the scheduled examination. This date was set without consultation with Mr. Kalair and without any consideration of his schedule.
5. When Mr. Kalair received the Notice, he immediately took steps to retain counsel and obtain advice with respect to his legal obligations. On February 1, 2012, Mr. Harvin Pitch of Teplitsky Colson LLP wrote directly to Mr. Dupont.[[90]](#footnote-90) Mr. Pitch advised him that Mr. Kalair “intends to co-operate with your request in accordance with his obligations”.[[91]](#footnote-91)
6. However, in saying that, it was Mr. Pitch’s position that because Mr. Kalair had resigned as Director of UM as of October 6, 2011 and because he had already been examined thoroughly by counsel for the receiver on November 25, 2011, that “the further attendance of Mr. Kalair is unnecessary”.[[92]](#footnote-92) In order to assist Mr. Dupont in determining whether the previous examination would be sufficient, Mr. Pitch attached a transcript of said examination.
7. Despite having received this letter, Mr. Dupont issued a Notice of Failure to Attend the Examination on February 10, 2012. Mr. Dupont “believed” he responded to Mr. Pitch’s letter, but no documentary evidence was provided to support this belief.[[93]](#footnote-93) However, it is unlikely Dupont responded to Pitch even by telephone as Pitch indicates in his letter that he was out of the country from February 2-February 10th, the day in which the Notice for Failure to Attend would have been administered.
8. According to Mr. Dupont’s evidence, what transpired after February 10th is as follows:

**February10-July 3:** Dupont makes no attempt to reschedule the examination. In fact, there is no contact between Dupont and Kalair at all.

**July 2012-September 2012:** After hearing nothing for almost six months, Kalair reaches out to Dupont by email, explaining that he can return home “if” he was still required to attend, which suggests both that Kalair was out of country and that he was not sure whether or not the examination was still necessary. Dupont suggests that Kalair pick a date. Kalair asks for list of questions. Dupont sends a summary.[[94]](#footnote-94)

**November 2012:** Tentative examination scheduled in Ottawa. Kalair asks that it be rescheduled to mid December. Dupont raises no objection.

**December 2012:** Kalair has some urgent issues to address; asks to reschedule until January 2013. There is nothing in Dupont’s response to indicate that the rescheduling was problematic. Examination set for Jan 11, 2013 and but switched to Jan 25, 2013.

**January 2013:** Kalair proposes another date but says he is flexible. Dupont says he is fine with Feb 14, 2013.

**Feb 14, 2013:** Examination takes place.

1. It was Mr. Dupont’s evidence that the examination is a routine procedure and that it was certainly nothing urgent. He testified that the original February 8, 2011 date was flexible. Nothing about the email communications between Mr. Kalair and Mr. Dupont suggest that requesting an adjournment of the meeting was problematic. The tone of the emails was very cordial. Mr. Dupont did not state that he would not accept the delay and he did not provide Mr. Kalair with a deadline. By analogy, this would be like changing a dentist appointment with no indication that the dentist would report you to the RCMP for failure to comply.

**b) Failure to produce and deliver all of the books, records, documents and property of the bankrupt to the Trustee**

1. Mr. Thompson acknowledged that when GTL attended at the UM offices for the first time on October 7, 2011, they could have taken as many as twenty banker’s boxes of documents.[[95]](#footnote-95) In addition, a number of laptops were mirrored and digital documentation was obtained. Mr. Kalair instructed his IT staff to make the passwords available for any of the electronics that were password-protected.[[96]](#footnote-96) He even made his in-house legal counsel available.[[97]](#footnote-97)
2. In the days after that first visit, Mr. Kalair was responsive by email and telephone while the GTL team made numerous requests for further documents and property.[[98]](#footnote-98) He made further boxes of documents available.[[99]](#footnote-99) As we can see from the correspondence, if Mr. Kalair was unable to attend at a meeting or respond to a request, he communicated same to GTL and would try make himself available by telephone.[[100]](#footnote-100) Although not accepted, he even offered his services to GTL on an engagement basis to assist in managing the sharia compliancy obligation of the mortgage portfolio – an expertise with which, by Thompson’s own admission, GTL had no familiarity.
3. On October 18, 2011, Mr. Kalair’s efforts were communicated very clearly to counsel for GTL by Kalair’s counsel, David Ullman:[[101]](#footnote-101)

Mr. Kalair has met his obligations, if any such obligation exists, to assist the Receiver. He has advised me that he has provided all the books and records in his possession to the Receiver. He has advised me that he has provided the Receiver with access to the former business premises of UMF and UMC and provided the Receiver with all the records of the Companies located at that location. He has provided copious emails and computer files. He has liaised between the Receiver and former staff of the Companies. He has taken several meetings and telephone calls with the Receiver. He has no further obligation to submit himself to repeated meetings or questioning from the Receiver nor does the Appointment Order grant the Receiver such authority. It is the Receiver’s responsibility to review the materials in its possession and reach its own conclusions, not to continuously seek the gratuitous assistance of Mr. Kalair. Even in a bankruptcy, which this is not, this conduct would not be appropriate or allowed on such a free ranging basis.

1. Both Thompson and Dupont acknowledged that bankrupt companies are not at their best and that it is common to see that the bankrupt company has poor financial controls and poor record keeping.[[102]](#footnote-102) The consideration of whether Mr. Kalair failed in his duty to provide the books, records, document and property of UM must include a consideration of the realities of the man-power shortages at the time of those requests. At the time of the receivership, there had been a string of departures by key UM employees ultimately leaving Mr. Anwar Pathan, the intern, as Kalair’s most senior remaining employee.[[103]](#footnote-103) The company lacked funds and could not afford to pay to outsource responsibilities such as an accounting.
2. The standard expected of a designated person under the BIA is not one of perfection. Kalair is to be held to the standard of a reasonable person in similar circumstances. Kalair was not the CEO of a Fortune 500 company, in charge of hundreds of employees with an army of professionals to assist him in executing his BIA duties. Kalair was a lone man, trying desperately to respond to the imminent sinking of his corporate ship, trying all the while to find a life raft. In all of the circumstances, it is not reasonable for a receiver to expect receipt of 100% of tens of thousands of documents accompanied by perfectly recorded explanations. It is even less reasonable to expect perfection would be delivered in an immediate time frame. Mr. Kalair was doing all that he could to reasonably comply and he must be judged not against the standard of GTL, a professional receiver, but against the standard of a reasonable person in the circumstances that he found himself in.

**c) Failing to disclose to the Trustee all property disposed of within a year of the initial bankruptcy**

1. The defence is perplexed by this allegation. If the allegation relates to disclosing the 2.1 million dollars converted to gold to pay for the scholar’s invoice, it is abundantly clear, from GTL’s memo, that Mr. Kalair attempted to disclose this on their very fist visit to UM:[[104]](#footnote-104)

“According to Kalair, upon the sale of 12 portfolio properties (the “unpaid mortgages”) UMF/UMC received $2,124,025 to discharge 1st mortgages in favour of Central 1. Instead of paying these funds to Central 1, UMF turned these funds over to the SEB to establish the fund required by the SEB.”

1. Although the explanation for the payment was misconstrued (see para 87 above), the dollar amount and the intended party are consistent.

**d) Failure to attend at the First Meeting of Creditors.**

1. At paragraph 202, the Crown submits “the First Meeting of Creditors took place on December 13, 2011. Mr. Kalair was advised of the timing of this meeting, but nonetheless did not attend”. This is a gross mischaracterization.
2. On December 12, 2011, Mr. Pitch, counsel for Mr. Kalair, writes to counsel for GTL to advise that “due to a prior commitment to be out of the country at a conference, and other business meetings taking place out of the county, our client cannot attend tomorrow December 13, 2011 at the meeting of the inspectors. His schedule was set some time ago”.[[105]](#footnote-105)Mr. Pitch goes a step further and offers up an alternative representative from UM, Mr. Anwar Pathan, whom GTL had interviewed two months prior.
3. Notwithstanding the above, the meeting goes ahead as scheduled. GTL spares no expense and books the Royal Ballroom at the Fairmont Royal York. The meeting lasts five minutes. C1 us the sole attendee. No members of the public, no homeowner, and no other alleged creditors are present.[[106]](#footnote-106)
4. If GTL was truly concerned with having the opportunity to hear from the insolvent company, they would have rescheduled to a date when Kalair was available (just as the OSB later did) or would have accepted the alternative representative that had been offered. They did neither.

#### Charge 2: Failure to Answer Fully and Truthfully

1. The Crown alleges that Mr. Kalair did not answer fully and truthfully the questions posed to him by Mr. Dupont about the purchase and disposition of the precious metals and also failed to acknowledge his misappropriation of homeowner’s payments.
2. Providing full and truthful answers to the standard questions posed by the OSB is not predicated on the OSB liking the answers they receive. The duty of the bankrupt is to respond to questions to the best of his knowledge at the given time. That is what Mr. Kalair did. Kalair has remained consistent in his understanding of the C1/UM relationship and his duties under that relationship in light of the mudarabah nature of the contracts. Kalair provided essentially the same explanations to GTL in Nov. 2011 as he did to Dupont and the OSB in Feb. 2013, and as he did at this trial in 2018.
3. While it is true that the answers provided by Mr. Kalair may not have aligned with Dupont’s expectations, that should come as no surprise considering that it was GTL who prepared the background document, known as the “Statement of Affairs”, which formed the core of Dupont’s knowledge of the case prior to questioning Kalair. There was nothing objective or neutral about this examination. Dupont had been forwarding materials to the RCMP since September of 2012, five months before the examination had even taken place.[[107]](#footnote-107) Kalair was not privy to communications between GTL (working first and foremost for C1 as has been demonstrated previously) and the OSB, nor was he advised that a criminal investigation was underway.

## 

## DEFENCE EVIDENCE

### Evidence of Abdulkader Thomas

1. Mr. Thomas is an adjunct professor at DePaul University in Chicago and the IE Business School in Madrid where he teaches courses on Islamic Finance, he has conducted Sharia audits, provided Sharia advice, been a member of sharia ethics boards and sharia supervisory boards, is a co-editor of an Islamic Finance Qualification and has developed a declining balance partnership model for home finance very similar to the Musharakah agreements utilized by UM.[[108]](#footnote-108) He is more than qualified to provide the Court with an expert opinion on Islamic Finance and the application of Sharia law to financial contracts.
2. The relevant evidence of Mr. Thomas can be summarized as follows:

#### Islamic Finance

1. The central tenant of Islamic Finance is that interest, otherwise known as “riba”, is forbidden[[109]](#footnote-109). Riba is narrowly defined as the return of money on money. It can be avoided by the creation of partnerships, an investment partnership and a leasing partnership[[110]](#footnote-110). The two classic instruments of Islamic finance that are relevant to this case are the Mudarabah and the Musharakah.

**a) Mudarabah**

1. A Mudarabah, similar to a limited partnership, is the relationship that exists between the Mudarib, UM, and the “Rabb al mal” (owner/supplier of the funds)[[111]](#footnote-111), Central 1. Practically speaking, Central 1 supplies capital to UM and UM manages that capital.
2. A Mudarabah is a true partnership and as such, the Rabb al mal bears some form of financial risk or variable income risk[[112]](#footnote-112). In the realm of Islamic Finance, this is justified because the Mudarib manages the enterprise while the Rabb al mal only invests and puts up cash.
3. According to Mr. Thomas, the relationship between UM and Central 1 was premised on a Mudarabah. A representative from Central 1 (Mr. Lohmueller) stated as much on C1 letterhead in 2005 when the relationship was first developed.[[113]](#footnote-113) This letter is bolstered by the contracts that govern the relationship, regardless of the fact that they read like traditional financial instruments[[114]](#footnote-114). Mr. Thomas would have preferred that the parties were firmer in their drafting but he was steady in his opinion that “it’s not at all unusual for transactions between conventional and Islamic counterparties to be termed in lay terminology for different reasons - This could happen out of laziness. This could happen out of a desire to preserve tax positioning…”[[115]](#footnote-115). It could also be because Central 1 was uncomfortable with using such non-traditional language and terminology, particularly if it risked raising flags in the highly regulated environment of Canadian banking.[[116]](#footnote-116)

**b) Musharakah**

1. The Musharakah is the partnership agreement entered into between the fund provider and the consumer, the homeowner. The first step is co-ownership of property, the second is a tenancy or a leasing of the property and the third is a rental payback and eventual buy-back of the property. In this case, the purchaser gains ownership of the property by paying UM a monthly rental fee, similar to a traditional mortgage payment, until they were able to buy back the property entirely. This type of partnership agreement is considered Sharia compliant because rather than earning ‘money on money’, UM’s profit is derived from the homeowner’s use of the shared property and as such, it is ‘money on property’[[117]](#footnote-117).
2. The same letter on Central 1 letterhead that recognizes that the relationship between UM and Central 1 as a Mudarabah, recognizes that the relationship between UM and the homeowners is a Musharakah. In case there was any confusion, the contracts signed by the homeowners are titled “Musharakah Home Agreement”.

**c) How the Mudarabah and Musharakah work together**

1. Under the Musharakah agreements entered into with the homeowners, UM receives various monthly lease payments. UM has an obligation to repatriate some of those payment funds back to Central 1 under the Mudarabah agreement. That quantum depends on the contracts that govern their relationship. Under a typical Mudarabah relationship, the Mudarib is permitted to pay expenses related to the Mudarabah or the Musharaka(s) before they pay the Rabb al mal. The Mudarib then takes their share of the profits (known in this case as UM’s “servicing fee”), and the balance is paid to the Rabb al mal[[118]](#footnote-118).
2. The essential governing contracts between UM and Central 1 include the MMASA and the MMSSA. Both contracts include provisions about the payment of expenses. As indicated earlier, these provisions are disturbingly vague. According to Mr. Thomas, unless the contracts explicitly rule out certain expenses, the Mudarib would reasonably believe that they could pay for whatever expenses they feel are critical to the mission of performing its job, in this case the creation and selling of Sharia compliant mortgages[[119]](#footnote-119). According to Mr. Thomas, if Central 1 did not agree with this interpretation, they ought to have challenged or clarified how expenses would be handled.[[120]](#footnote-120)
3. Mr. Thomas explained that paying an SEB is clearly a necessary expense critical to the Mudarabah venture and therefore, would qualify as an expense that could legitimately be paid prior to paying Central 1[[121]](#footnote-121).
4. In terms of any prepayments received from homeowners under the Musharakah agreements, Mr. Thomas explained that according to the rules of Islamic Finance, in the absence of specific guidance in the Mudaraba, the Mudarib could repatriate those funds to the Rabb al mal whenever they felt it was appropriate[[122]](#footnote-122).
5. The contracts that govern the relationship between UM and Central 1 only provide guidance about pre-payments received in very specific circumstances: as “a result of sale of the Mortgaged Premises, expropriation, damage of the Mortgaged Premises by fire or other similar cause”. There is absolutely no guidance as to what UM must do with the prepayments that are received under any other circumstance.

**d) Mudarabah Breakdown**

1. Unlike many of the Crown witnesses, Mr. Thomas was able to identify the cultural chasm that delineates the relationship between UM and Central 1:

“…there’s no evidence that UM, at least that I saw, thinks that the relationship is any different. They feel that they’re being pressured to give up more of the profits, but they don’t appear to understand that they’re being treated as a, a borrower. Whereas it, it seems that Central was taking a harder and harder view that this is purely a borrower/lender relationship[[123]](#footnote-123)”

1. In the case of a Mudarabah breakdown, all of the accumulated money should first be allocated towards any outstanding or unpaid obligations of the Mudarabah (SEB included) while the remainder should ultimately go back to the Rabb al mal.[[124]](#footnote-124)
2. In this case, although there was a breakdown of the Mudarabah, the Musharaka’s were still in working order. The homeowner’s were making their payments in accordance with the contracts and were prepared to continue making those payments. In accordance with the rules of Islamic Finance, the Musharakah agreements should have continued to operate. It was up to Central 1 to step into the shoes of UM and work with the homeowners in coming to a Sharia compliant solution. As Mr. Thomas eloquently stated:

“Once UM was out of the picture, I would have thought that the musharakah arrangements would continue to be in place and that Central would honour those agreements by themselves. In the absence of UM, it would strike me that article 17 of the document prepared by – or reviewed by Mufti (indiscernible) requires mediation and in the absence of UM, Central should have mediated with the community members who had purchased their houses under musharakah if they wanted to change things, but this seems not to have happened.[[125]](#footnote-125)

#### Sharia Ethics Boards (SEBs)

1. An SEB is a group of advisors or scholars who are experts in Sharia law. Their role is to give advice to organizations like UM or to the broader Muslim community who will be utilizing the services/products of the organization, as to whether or not a particular service/product is Sharia compliant.[[126]](#footnote-126)
2. SEBs are comprised of scholars who resonate with the local community that they are servicing. They are a signal of legitimacy and form a bridge from the organization to the consumer. Mr. Thomas explained that it is important to find scholars that connect with, and are appealing to, the local community even if such persons might lack deep experience in finance[[127]](#footnote-127). In fact, if the scholars are sufficiently known to the local community, they might be considered by the target market as even more trustworthy than scholars who enjoy international recognition.[[128]](#footnote-128)
3. When an organization hires an SEB, they are actually “hiring their new compliance.” Management of the organization often feels that they are obliged to defer to the superior knowledge of the Sharia board in matters that relate to the Islamic faith[[129]](#footnote-129). Members of the management team would be highly motivated to follow the SEB’s rulings, opinions and requests.[[130]](#footnote-130) UM’s shifted entire financing model and product development were designed under the guidance of their SEB. A transformation of that nature would have required considerable detailed work and engagement[[131]](#footnote-131).
4. The members of an SEB collectively issue one or more fatwas, which is a ruling or determination that a transaction or an activity is either permissible or not permissible from an Islamic perspective. It tells Muslim-Canadians that the product/service as structured under Canadian law complies with the rules of Sharia law or Islamic jurisprudence.[[132]](#footnote-132) It is not unusual that local scholars will seek the advice of their peers, including more well known international scholars.[[133]](#footnote-133)

**Payment of SEB Scholars**

1. When a new product is introduced in a country that has a traditional interest-based financial system, such as the introduction of Sharia compliant home financing in Canada, an SEB would be required to spend significant time and resources trying to understand the documentation and trying to find resources that support the legitimacy of the product[[134]](#footnote-134). SEB members are not volunteers; they expect to be paid for their time. Payment arrangements can be quite informal where there is no written contract but that does not supersede an expectation that payment will be made.[[135]](#footnote-135). It is not particularly strange to find that the management company generates the invoice for the scholar(s) as they often require assistance in defining the terms of payment. Thus, Kalair’s limited involvement in formalizing and preparing the MCC invoice does not stand out as a red flag.[[136]](#footnote-136)
2. SEBs are often willing to defer their compensation, particularly when the management company is a start-up.[[137]](#footnote-137) Thomas opined that in an ideal world, the MCC invoice would have been more specific, but noted that there are some scholars who do not issue invoices at all[[138]](#footnote-138).
3. In terms of quantum, Mr. Thomas provides an annual income range of $5000.00 to $210,000.00 USD per year[[139]](#footnote-139). In speaking about the amount paid to MCC, Mr. Thomas said the following:

“Well, when I do the simple math and divide the number by the number of years that the scholars were active with UM, the number is not, is not a terrifying or exceptionally high number. When I look at the relative obscurity of the Canadian Scholars, they’re just not the most famous guys in Islamic finance and the total (indiscernible) the Egyptian Scholars, the number seems high. Mr. Kalair was would not easily seek to negotiate or re-negotiate if posed with a, a particular number or (indiscernible) from there. There are elders that (indiscernible) and particular religious leaders. So, is it high? I think so. Unusually high? No… But is it a situation where many managers who (indiscernible) difficulty to push back? Yes. Is it a situation where many managers would not be comfortable pushing back, especially having let it go for 10 years or more”.[[140]](#footnote-140)

1. In light of Mr. Thomas’s comment that Guidance Financial, another North American Islamic Finance entity, is paying its scholars significantly more than MCC, the invoice amount seems well within the normative range.[[141]](#footnote-141)
2. An SEB also has the ability to issue a fine against the organization if they feel that the organization has engaged in a procedural misstep that is contrary to Sharia law. Generally, they would direct that the fine be paid to an independent charity however, should the misstep result in direct harm to the consumer, they would direct that the fine to be paid back to the consumer who suffered the harm.[[142]](#footnote-142)

#### Gold and Islamic Finance

1. There is a cultural attraction to gold in Islamic communities. Gold has an ancient religious connection to Islam as one of the six staple goods mentioned in the Quran.[[143]](#footnote-143) Recent history has seen a collapse of the currency in Iran, Libya, Syria, Iraq and, most importantly for our purposes, in Egypt[[144]](#footnote-144). With that in mind, when asked about the payment of the MCC scholars in gold, Mr. Thomas responded, “from a Sharia perspective on permissibility it’s totally permissible. From a business perspective it’s completely unusual[[145]](#footnote-145).

#### Romspen Commitment Letter

1. In paragraph 309 the Crown alleges, “Mr. Kalair’s willingness to accept non-Shariah compliant alternate funding [Romspen commitment letter] belied his claim that he believed his agreements with Central 1 must be interpreted as Mudarabah.”
2. To the contrary, the Romspen agreement is perfectly Sharia compliant. The Crown has conveniently ignored the documents entered into evidence[[146]](#footnote-146) and shown to Mr. Thomas. These supporting documents and agreements which include the Gowlings opinion letter, the Musharaka agreement, the memo and the fatwas signed by international scholars would have also been sent to Romspen along side the commitment letters. According to Mr. Thomas, in the realm of Islamic Finance it is not unusual to have conventional documents with side agreements and Thomas stated that the Romspen agreement was perfectly sharia compliant when analyzed as part of the complete documentary package.[[147]](#footnote-147)

#### Expert Conclusion

1. According to Mr. Thomas, UM and Central 1’s execution of a Canadian Sharia compliant Mudarabah were not in accordance with best practice. Although genuine efforts were made, “they were not the world’s sterling example of the best way to do things[[148]](#footnote-148).” That said, it is his conclusion that a Mudarabah did exist and that the documents support that conclusion.
2. Failing to execute a successful Sharia compliant business with a comprehensive and specific Mudarabah contract is not a criminal offence. The evidence of an expert in Islamic Finance and the application of Sharia law to contracts supports Mr. Kalair’s claimed understanding of his obligations in his relationship with Central 1. An Islamic interpretation of the contracts relied upon at the time suggests:
3. Mr. Kalair was permitted to pay legitimate business expenses, including legitimate fees owed to their SEB, prior to remitting those funds to Central 1; and
4. Mr. Kalair was permitted to use the homeowner prepayments to be held and utilized for accrued expenses, legal fees, consultancy fees from the SEB etc.

Thomas’ evidence provides the necessary contextual backdrop against which to assess whether there is an air of reality to Kalair’s claimed justification for his actions. In light of the expert sharia evidence, it is impossible to dismiss Kalair’s subjectively held believe that he was acting in a permissible manner throughout his interactions with C1 and the homeowners.

### Evidence of Omar Kalair

#### Background

1. Mr. Kalair received both a Bachelor in Business Economics and a graduate degree in business administration from Wilfred Laurier University.[[149]](#footnote-149) His commitment to the Canadian Islamic Community began as a student. He was a member of the Muslim Student Association and helped in the creation of the University’s first prayer room. Once he graduated, he regularly attended at Muslim community events and spent time with various Islamic scholars, including Mr. Panchbhaya.[[150]](#footnote-150) Mr. Kalair has known Mr. Panchbhaya since he was ten years old. At that age, he was attending at Mr. Panchbhaya’s home for religious education, otherwise referred to as “Sunday school”.[[151]](#footnote-151)
2. When Mr. Kalair was around twenty-five years old, he became a Director of a Canadian charitable organization by the name Miftahul Uloom of Canada, which had a goal of “adding value to the Muslim community”.[[152]](#footnote-152) The charity began by starting the first Islamic radio show, but was ultimately responsible for the organization of many community events during the years 2000-2004. During such time, Mr. Kalair and Mr. Panchbhaya worked closely.[[153]](#footnote-153) It was actually under the name of this charity that Mr. Kalair and Mr. Panchbhaya had their first meeting with Central 1, known at that time as CUCO.[[154]](#footnote-154) They explained to the credit union the huge untapped market of Muslim Canadians who were seeking sharia-compliant home financing.[[155]](#footnote-155)
3. In the early 2000s, there was visible growth in the field of Islamic finance in both the United States and the United Kingdom.[[156]](#footnote-156) Mr. Kalair looked to the business models used by his international counterparts to come up with a business plan that he could present to the credit union. The intention was to embark on the business venture in the capacity of a non-profit. The goals were not monetary at the time but rather to provide a valued service to the Muslim community in Canada.
4. CUCO assigned their new product development manager, Mr. Lohmueller, to work directly with UM. Mr. Kalair and his team explained to Mr. Lohmueller the various models of Islamic home finance.[[157]](#footnote-157) According to Kalair Mr. Lohmueller was himself an immigrant open to a new approach because he felt that “credit unions are here to be more involved in the community”.[[158]](#footnote-158) Kalair believed that Lohmueller did his own research on Islamic finance and championed the product internally.[[159]](#footnote-159) It was Mr. Lohmueller who signed the CUCO letter that defines the relationship between UM and CUCO as being based on a Mudarabah and the relationship between UM and the homeowners as being based on a Musharakah. This same letter was posted to the UM website and shared with potential clients.[[160]](#footnote-160)
5. CUCO advised that due to market regulations, they could not develop their own Islamic home finance product. Instead, they suggested that UM acquire from the CUCO commercial division and create the product themselves.[[161]](#footnote-161) It was at CUCOs request that UM incorporate.[[162]](#footnote-162) Such was the birth of UM.[[163]](#footnote-163)

#### The SEB and their Fatwas

1. It was at this time that UM looked to form an independent SEB who could approve of the business relationship between CUCO and UM.[[164]](#footnote-164) Ultimately, UM had to be Sharia compliant on both the front end (relationship with homeowners) and the back end (relationship with CUCO).[[165]](#footnote-165) UM reached out to various Islamic scholars, including the most well known scholar internationally, Mufti Taqi Usmani. According to Kalair it was Mufti Usmani who suggested that UM make Mr. Panchbhaya the Chairman of their SEB.[[166]](#footnote-166) Mr. Panchbhaya and Mufti Usman Patel were the only two Muftis in the Canadian Muslim community who were giving consistent fatwas. Both Muftis agreed to work for the SEB. [[167]](#footnote-167)
2. The SEB met on many occasions as is evidenced by the various meeting minutes filed as exhibits.[[168]](#footnote-168) The SEB requested that UM management send them monthly reports so that they could stay informed of what was happening with the business. They also reviewed the draft commitment letters, otherwise referred to as the Mudarabah documents, on a line-by-line basis to ensure that every detail was Sharia compliant.[[169]](#footnote-169) Changes, comments or questions of the SEB would be canvassed with Mr. Lohmueller of CUCO and the commitment letters would be edited to reflect those discussions. In fact, on some occasions, Mr. Lohmueller met with members of the SEB directly.[[170]](#footnote-170)
3. Exhibit 56 shows these handwritten changes to the proposed contract, varying the language to ensure Sharia compliancy. These changes would have been penciled in by Mr. Kalair on the advice of the SEB, communicated to Mr. Lohmueller and ultimately, adopted into the final contracts.[[171]](#footnote-171) Although Mr. Lohmueller was generally agreeable to these changes, CUCO’s regulating body did not permit the explicit use of Islamic terminology.[[172]](#footnote-172) This is why the term “Mudarabah” is not found anywhere in the contracts.
4. The SEB was paid for their travel expenses up front, but in recognizing that UM was a start up with little to no capital, they agreed to a deferral of market-rate payment that would eventually be paid for their expertise.[[173]](#footnote-173)
5. The SEB issued five fatwas.[[174]](#footnote-174) The first was signed in January of 2005, after the SEB had a chance to review the documents that were to govern the relationship between UM and Central and UM and the homeowners. This fatwa confirmed that the relationship between CUCO and UM was a Mudarabah and UM intended to use the fatwa as a marketing tool, as it signalled to the community the legitimacy of the product.[[175]](#footnote-175)
6. UM and CUCO agreed to share the profits at a 97/3 profit ratio, whereby UM received 3% for managing the CUCO funds.[[176]](#footnote-176) There is also an explicit reference in the fatwa that “UMF will share any loss, if they are negligent or dishonest”.[[177]](#footnote-177) This statement is in accordance with the traditional rules of a Mudarabah and as a consequence, according to the fatwa, should loss occur in the absence of negligence or dishonesty, it is CUCO who should suffer that loss.[[178]](#footnote-178)
7. Based on the language used in this fatwa and on his understanding of the rules of Islamic finance, Mr. Kalair believed that:

“We would never be in a situation where we would go negative. So this is where when people say a, a mudarib, which was UM Financial went into bankruptcy, it's not conceivable from a Sharia aspect because a, a mudarib can never go into bankruptcy because it's simply acting as an agent and, and it doesn't expose itself to any sort of creditor's risk”[[179]](#footnote-179)

1. In keeping in line with the rules of Islamic Finance, the SEB also wanted to ensure that UM could not penalize a homeowner for missing a payment. As such, if UM did not receive a monthly payment from a homeowner, they would still be required to remit the monthly payment to CUCO. [[180]](#footnote-180) The payment would come directly out of UM’s pocket. UM did not miss a monthly payment in seven years. They made their payments right up to the date of the receivership.[[181]](#footnote-181) This was not disputed by Sacco, Thompson nor Paul Coort, the Crown’s forensic accountant.

#### *SEB Fines*

1. According to section 17 of the Musharakah agreements, if the homeowner was unhappy about a decision made by UM, they were entitled to mediate or arbitrate that decision through the SEB. In total, there were approximately seven incidents where the SEB directed UM to pay the homeowner between $3,000.00 and $7,000.00, depending on the grievance.[[182]](#footnote-182) It was UM’s auditors that referred to these payments as “fines”.[[183]](#footnote-183) Mr. Kalair explained this “fine” process to the receiver when they attended the UM offices on October 7, 2011. Kalair belived the receiver misunderstood this to mean that the only role of the SEB was to impose fines and therefore, that the $2.1 million payment would be to pay them for same. However, Mr. Kalair was explaining only one role of the SEB[[184]](#footnote-184):

So in that discussions, there's three members there so sometimes the other members from Grant Thornton would ask the questions and we got a lot into this detail. I think from that they misunderstood that the 2.1 million was to pay fines. It wasn't to pay fines, it was for their fees for their seven years of work. And I told them this, is that the Sharia Board worked for seven years and they weren't paid and this was a payment towards that.[[185]](#footnote-185)

1. Mr. Kalair is adamant that at all times he indicated to the receiver that the 2.1 million owed to the SEB was for unpaid fees.[[186]](#footnote-186)

#### The Contracts

1. Mr. Kalair explained his understanding of the provisions of the contracts. His understanding would have been informed by his discussions with the SEB and his discussions with CUCO and specifically, Mr. Lohmueller. When asked about the provision of the MMASA relating to expenses, Mr. Kalair replied:

Yeah, so this was a point that came up with our Sharia Board that, yes, we're agreeing on the profits but obviously the profits are only calculated after expenses are deducted. So the wanted to see an explicit mention where expenses UM could deduct before it gave funds back to the credit union. So this was a clause that we showed… So from that the Sharia Board concluded, yes, we're agreeing to the profits and obviously the expenses the credit union is agreeing in this letter or in this document that it would be deducted before giving it to them. [[187]](#footnote-187)

1. With respect to any pre-payment received from a homeowner, Mr. Kalair’s understanding was again, based on the rules of a Mudarabah. According to him, and corroborated by the expert in Islamic Finance, the prepayment funds belong to the silent partner (Central), who has given UM the authority to use those funds for expenses related to their business.[[188]](#footnote-188) These prepayments reside with UM until a mortgage is paid off completely.[[189]](#footnote-189)

#### The Road to Receivership

1. UM grew to the point where they had as many as 20 employees and 8 offices at one given time.[[190]](#footnote-190) Both UM and Central 1 were profitable. Millions of dollars were advanced by CUCO and hundreds of Muslim Canadians had Sharia compliant mortgages. Then the credit crisis hit. CUCO blamed the credit crisis when they reneged on the $49 million dollar commitment letter that was issued by Mr. Lohmueller in 2007 before he left CUCO. Without that additional funding from CUCO, UM was unable to finance any additional homeowners and their profit was limited to existing clientele.[[191]](#footnote-191)
2. With the departure of Mr. Lohmueller, UM no longer had a senior point person at Central 1. Ms. Sacco became the point of contact. The profit model changed when Ms. Sacco came on board, and although Mr. Kalair was assured that UM would be receiving 20 basis points per mortgage, it wasn’t until his bank account was empty and he hired an auditor that he realized that CUCO was taking 100% of the profits on most of their mortgage files.[[192]](#footnote-192) UM was only being paid on two tranches of eleven.[[193]](#footnote-193)
3. Over the years, UM would find itself in a position where it was forced to take a loss (a power of sale for example), and because a Mudarabah does not permit the Mudarib to take a loss, UM would look to CUCO to find a solution[[194]](#footnote-194). Mr. Kalair even offered to put up his home to keep the contracts sharia compliant[[195]](#footnote-195). This extraordinary proposal greatly undermines the allegation that Kalair was behaving in a deceitful or dishonest manner, putting the homeowners at risk of deprivation. On the contrary, it was Kalair himself who was assuming great personal risk in order to protect the sharia integrity of a homeowner in arrears. C1, as a regulated financial body, was unable to accept Kalair’s proposal but instead settled on a reduction in UM’s profit margins for a one-year period.[[196]](#footnote-196)
4. It was on occasions similar to this one that Mr. Kalair had to discuss the unique facets of the Mudarabah with senior CUCO staff. He reasonably believed that these discussions reinforced the understanding that all parties were operating under a Mudarabah, subject to principles of Islamic Finance.
5. When Central finally terminated the relationship with UM in 2010, Mr. Kalair’s main priority, which he communicated endlessly to Central, was to keep the mortgages Sharia compliant.[[197]](#footnote-197) UM could now not take on any more clients and also could not renew the contracts of their existing clients. They were in a stalemate and things were becoming increasingly chaotic. Nothing is more demonstrative of the state of disarray than Mr. Kalair’s admission that once his COO resigned, there was no one left to replace him than the intern, Mr. Anwar Pathan.[[198]](#footnote-198)
6. Mr. Kalair was spending every waking hour attempting to find an alternative funder to replace Central.[[199]](#footnote-199) During this time, the homeowner’s contracts were up for renewal and homeowners were eager to renew in an era of declining interest rates yet no refinancing was available. The homeowners continued to make their monthly payments and UM continued to forward those payments to Central.[[200]](#footnote-200) Although some exit deals were being contemplated and shared with Central, UM received the final “dagger” in its heart when it received the formal Notice of Receivership.[[201]](#footnote-201) After UM received the notice[[202]](#footnote-202), they retained counsel to formally respond to Central and essentially begged for Central’s reconsideration.[[203]](#footnote-203) Shortly after, UM filed their 50 million dollar lawsuit[[204]](#footnote-204):

Yeah, yeah, we – after we had our notices given, then we said is that we've been quiet in terms of taking legal action against Central, so now that, you know, they brought out their dagger, you know, we, we did what we were legally entitled to, is that to quantify our grievances and file it in court.

1. Meanwhile, the main concern of the SEB was with the absence of sharia compliancy for the contracts they had worked so diligently to develop in a post-receivership environment.[[205]](#footnote-205)

#### Romspen

1. Although the Romspen commitment letters are on their face traditional financial contracts with traditional financial terminology, Mr. Thomas explained that with the right supplemental documents, a traditional contract becomes Sharia compliant.
2. When Mr. Kalair was shopping around for an alternative funder, he found that prospective purchasers took issue with the current UM finance model. It was at that time that Mr. Kalair attempted to re-design the model based on examples that were successful in other countries. He put together a legal opinion (Gowlings), an international SEB and who signed fatwas as to the legitimacy of the new product and a new Musharakah agreement.[[206]](#footnote-206) Mr. Kalair indicated that these documents would have been part of the package sent to Romspen in addition to any commitment letters.[[207]](#footnote-207) This kept the sharia component of the relationship outside the scope of the financial regulators but satisfied the religious requirements of Muslim consumers. As explained by Mr. Kalair:

So when OSFI (ph) or any regulator looks at it, you’ll just see a regular mortgage with an interest rate, but the financial institution would have signed these additional documents to meet the Sharia compliant side of it.[[208]](#footnote-208)

1. Mr. Kalair does not dispute that at one time, he was prepared to pledge 17kg of gold to Rompsen in order to secure a deal, even though that gold was promised to the SEB. The goal of both Mr. Kalair and the SEB was to find a Sharia compliant alternative.[[209]](#footnote-209)
2. Romspen seemed interested in stepping in to the mortgage portfolio and maintaining a sharia compliant structure but was demanding one million dollars in security to move forward. Although Mr. Kalair suggested he mortgage his own home as a means of security, Rompsen was not amenable.[[210]](#footnote-210) This was the second time Kalair attempted to put ***his own*** primary asset at risk for the sake of salvaging a sharia compliant solution for the homeowners. The only person at risk of deprivation in Kalair’s increasingly desperate schemes, we himself. In these dire circumstances, the SEB was content to pledge a portion of the gold payable to them and defer payment (yet again) of their professional fees if it meant that the portfolio would remain sharia compliant.[[211]](#footnote-211) Ultimately, the issue of payment of the gold to Romspen over the scholars became moot, as the receivership was ordered before the details of a deal could be finalized.[[212]](#footnote-212)

#### Payment of Precious Metals

1. According to Mr. Kalair, both UM and the SEB agreed that the scholars would be paid industry standard rates once UM had more than one million dollars in their bank account.[[213]](#footnote-213) UM started to see an accumulation of funds in their bank account in 2011. Kalair explained that this was a result of mortgages for whom UM did not have 100% of the funds they were owed. As such, they were not in a position to forward the full payment to C1.[[214]](#footnote-214) Under the mudarabah contract, those funds rightly belonged to UM until the mudarabah expenses were satisfied and the profits, if any, distributed.[[215]](#footnote-215)
2. The SEB requested that their fees be set aside in gold and silver.[[216]](#footnote-216) This request did not cause Mr. Kalair concerns. He had made a promise to the scholars and he had to fulfill that promise. He understood the significance of gold and silver in Islamic culture as both metals were staples of cultural and religious importance.[[217]](#footnote-217)
3. This discussion of the SEB fees arose numerous times, but the frequency of the requests increased once the court ordered the receivership.[[218]](#footnote-218)
4. When Mr. Kalair first purchased gold on August 30, 2011, it was Mr. Durst who assisted him. According to Mr. Kalair, in the course of their usual discussions about business, he explained to Mr. Durst the interplay of first and second mortgages to assist homeowners in meeting their down payment obligations. These second mortgages were often funded by investors through a $5 million dollar fund held by UM’s sister company, UM Real Estate (UMRE) which shared office space with UM.[[219]](#footnote-219) Mr. Kalair explained his exchange with Mr. Durst as follows:[[220]](#footnote-220)

Q. So we see that it says this is submitted August 31st, around lunchtime at 11:38 a.m. And there’s a discussion there saying that he, Mr. Durst has met with you. “We’ve now met with Mr. Omar Kalair. He claims that one of the investors in the business has requested that some of his five million investment be converted to gold …” etc., etc. What do you think you were talking about with Mr. Durst at that time?

A. Yeah, so when I seen this is that the only time we mentioned five million was in reference to UM Real Estate Investment Inc. and money moving from UM Financial Inc. to UM Real Estate Investment Inc

Q. So did the gold purchase, in your mind, have anything to deal with UM Real Estate Investment Inc.?

A. No.

Q. Did it have anything to do with making an investment on behalf of one of your UMRE investors?

A. No.

Q. So is this an accurate statement of what the conversation you had with Mr. Durst to your recollection?

A. It’s not accurate.

Q. Okay, so did Mr. Durst ask you at all about the purpose for the gold transaction? What exchange did you have with Mr. Durst while you were doing whatever you needed to do to purchase that gold?

A. Yeah, we did talk about -- I did say I want to buy gold and we got into the gold discussion, how gold’s been rising and there’s a lot of unrest in the world, etc., and it’s projected to grow, so we did have that discussion with him.

Q. But was that what you gave as a reason or did he even ask as a reason?

A. I don’t recall him asking me why I’m buying it. I don’t recall him asking me that question.

Q. So would you have mentioned anything about the Sharia Board to Mr. Durst, do you recall?

A. No. We didn’t mention at all the Sharia Board.

1. At this point in time, Mr. Kalair had a sense that the SEB was to be paid $30,000.00 a month dating back to 2004. Overall, they were owed somewhere around 2.8 million dollars.[[221]](#footnote-221) When Mr. Kalair came back a second time and told Mr. Durst that he was looking to purchase more gold, it was Mr. Durst who directed him to Bendix.[[222]](#footnote-222) Mr. Kalair provided Bendix with whatever documentation they requested, including multiple pieces of ID. He did not feel as though he had anything to hide.[[223]](#footnote-223)
2. The 2.79 million dollar invoice was drafted on September 26, 2011 by Mr. Kalair on the instructions of Mr. Panchbhaya, who was representing the collective MCC[[224]](#footnote-224). Mr. Kalair did not know how the money would be divvied up amongst the scholars.[[225]](#footnote-225) With respect to whether or not the money would be paid to international scholars, Mr. Kalair said the following[[226]](#footnote-226):

Q. So did you make any inquiries about whether some of these funds were going to be going, as I said overseas to international scholars?

A. Well in my discussions with them I was, I understood from what they shared to me that yes there were a group of scholars overseas that had issued a Fatwa and they were directly involved or reporting to this Sharia Board.

Q. Did you ever get to see that Fatwa that you thought was issued by someone internationally?

A. No, I have not.

1. After Mr. Joseph Adam was appointed as Manager of Finance for MCC,[[227]](#footnote-227) Mr. Kalair was to pass the precious metals off to him.[[228]](#footnote-228) Mr. Kalair had known Mr. Adam for 20 years. He was an active member of the Muslim community. Mr. Kalair had complete trust in him.[[229]](#footnote-229) Once he passed off the precious metals, it was his view that he had satisfied his obligations. He had much more pressing concerns to attend to as his business was rapidly disintegrating.

#### Assignment of Claim

1. As has been discussed throughout the evidence, UM filed a 50 million dollar statement of claim against Central 1. Mr. Kalair was concerned that Central 1 would purchase the lawsuit and abandon it – a concern that proved to be well-founded. In October of 2011, that claim was assigned to MCC knowing that MCC shared the ultimate goal of keeping the mortgage portfolio Sharia compliant.[[230]](#footnote-230) Had the claim succeeded, funds from that claim could have offset any debt owed to Central 1 and the SEB and might have left Mr. Kalair in a position to restart the business of UM in whatever form he could.
2. While the Crown claims that the assignment reeks of an unsuccessful effort to grant an unlawful preference, the defence points to the unsavoury odor emanating from Central 1’s decision to hire Grant Thornton prior to any receivership, paying GTL millions of dollars during receivership while GTL is purporting to be a neutral court-appointed third party and then having GTL return the favour by arranging the purchase and abandonment of the claim. The purchase of the claim ensured that Central 1 did not have to answer the claim in civil court.
3. Although originally assigned for $1000.00, evidence suggested this was a typographical error. The correct amount, as corroborated by Mr. Siddiqui in his testimony and in a letter written by counsel for UM, Mr. Ullman, would have been somewhere around 2 million dollars. This was close to the amount owed to MCC in professional fees. [[231]](#footnote-231)
4. With resect to the intentions behind that Statement of Claim, Mr. Kalair stated[[232]](#footnote-232):

…if there were any proceeds to come out of that, that would also be for the betterment of our community and have the Sharia Board intervene and got a settlement from that 50 million dollar Statement of Claim, that would be for the home owners who’d been caused a lot of these issues that are quantified in our 50 million Statement of Claim. It wasn’t any personal motive that I was after.

1. Kalair’s actions again follow a now predictable theme. Kalair’s motivation was always to protect the interests of the Muslim community and his first priority was always to ensure that the financing remained sharia compliant. The assignment of the civil claim was a further example of this commitment.
2. Once the precious metals were transferred and this claim was assigned, Mr. Kalair was of the view that UM had paid their debt and was no longer involved in the affairs of MCC.[[233]](#footnote-233)

#### The Receivership

1. After UM was placed into receivership, Mr. Kalair and UM were in a state of chaos. Not only were there angry investors, but very angry homeowners as well. A group of six homeowners went so far as to retain their own legal counsel.[[234]](#footnote-234) These homeowners felt as though they were being forced to accept non-Sharia compliant financing. Mr. Kalair theorized that it was this dissident group of homeowners who sent the mystery emails from “info@creditunionandumfinancial.com”.[[235]](#footnote-235) Regardless of who sent these emails, there is absolutely no evidence before the court that suggests that they were sent by Mr. Kalair.
2. On November 1, 2011, Mr. Adam transferred the silver back to Mr. Kalair and Mr. Kalair in turn transferred it to Mr. Panchbhaya. It was Mr. Kalair’s understanding that the silver was to be kept for payment to the local scholars and the gold was to be paid to the international scholars.[[236]](#footnote-236)
3. It was not until Mr. Siddiqui informed Mr. Kalair that the precious metals needed to be returned that he suspected that there may have been something wrong with the transaction.[[237]](#footnote-237) Mr. Siddiqui began to look and act increasingly nervous and Mr. Kalair believed he was attempting to remove himself from the file completely.[[238]](#footnote-238)
4. According to Mr. Kalair, Mr. Siddiqui never questioned him about the whereabouts of the gold.[[239]](#footnote-239)
5. By the time the court ordered the return of the precious metals, Mr. Kalair’s understanding was that[[240]](#footnote-240):

A. Joseph Adam had already left and he was already in Egypt and he had already disbursed the funds. So in my discussion with Mufti Yusuf is that when he tried, or the information that he had, I don’t know where he gained it from was that everything was already distributed before any court Order was in place.

Q. Were you in a position to make any efforts to recover the gold?

A. No, so again, Joseph Adam was appointed by MCC. He was a Finance Manager, so MCC would have the onus to inquire or push for that.

1. In December of 2011, UM received a cheque in the amount of approximately $100,000.00[[241]](#footnote-241). It was received in error, as it should have been sent to the receiver. Rather than to do anything improper with this cheque, Mr. Kalair, in good faith, instructed his staff to send it back to Central.[[242]](#footnote-242) If Mr. Kalair truly had a personal vendetta against Central as the Crown alleges, certainly this particular transaction would have gone differently.[[243]](#footnote-243) Along with the repeated proposals by Kalair to pledge his own home as collateral in support of UM, Kalair’s return of this cheque belies any claims of persistently deceitful and dishonest conduct.

# VI. Conclusion

1. The Crown seeks to prosecute in criminal court, a matter that rightly belongs in civil court or bankruptcy court. C1 entered into a business relationship with UM that was predicated on Islamic Finance and Sharia Law with the goal of profiting off of a large and growing Muslin population in Canada. With the departure of Mr. Lohmueller, C1 resorted to traditonal contract interpretation and processes. It was a unilateral change that fundamentally altered the nature of the relationship – a change that was never communicated to C1’s partner, UM.
2. Rather than respond to the $50 million dollar Statement of Claim (and count-claim if they felt aggrieved), C1 resorted to insolvency court where they could more quickly and efficiently rid themselves of a claim that might have proven costly and embarrassing in civil court. C1 directed GTL’s actions at every turn. Neither C1, GTL, nor a single homeowner testified to filing a criminal complaint. That action was taken solely by the Ontario Superintendent in Bankruptcy years after the receivership and after C1 had sold, closed or renegotiated the mortgages at issue.
3. At all times the relationship between Central 1 and UM was predicated on the Islamic Finance concept of Mudarabah. C1 was intended to be a partner with ‘skin in the game’ and not a leech syphoning interest dollars and administrative fees from UM and its homeowners. It was C1 who changed the rules in the mid-game leaving UM holding the bag of expenditures, including those associated with the costs of their unique sharia-compliant structure. Whereas the Crown claims[[244]](#footnote-244) that Mr. Kalair avoided all efforts to cooperate with the receiver, the extensive documents, emails exchanges, and viva voce evidence demonstrate that Mr. Kalair spent dozens, if not hundreds of hours communicating by email, telephone and meeting with GTL and the Superintendent in Bankruptcy to respond to their requests.
4. The Crown asserts at paragraph 326 that the reliance upon sharia law was “recently conjured up”, yet the vast preponderance of the evidence suggests otherwise. Far from being a late-day invention to camouflage deceitful behaviour, sharia compliance was the heart of everything Mr. Kalair did from the very birth of UM and it was the at the very foundation of the early business relationship with C1, as demonstrated by the history of the early contract drafts. The centrality of sharia law continued uninterrupted through years of effort, tens of thousands of emails and hundreds of thousands of hours by Mr. Kalair.
5. At all times Kalair honestly believed he was acting in accordance with his obligations under the contracts, his obligations under sharia law, and in the best interests of his client homeowners. The Crown has failed to dislodge Kalair’s honest belief and colour of right and thus failed to meet its burden to prove the criminal charges beyond a reasonable doubt. Similarly the evidence demonstrates that Kalair acted with due diligence and made all reasonable efforts to comply with his obligations under the BIA and is not guilty of those charges.

**DATED AT TORONTO THIS 15th DAY OF FEBRUARY, 2019**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:**

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# SCHEDULE A – LIST OF AUTHORITIES (Does not include Crown authorities re-cited herein)

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153. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 10-13. [↑](#footnote-ref-153)
154. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 14. [↑](#footnote-ref-154)
155. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 15. [↑](#footnote-ref-155)
156. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 18-19. [↑](#footnote-ref-156)
157. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 19, 31. [↑](#footnote-ref-157)
158. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 38 and see Exhibit 51. [↑](#footnote-ref-158)
159. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 40. [↑](#footnote-ref-159)
160. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 75. [↑](#footnote-ref-160)
161. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 42. [↑](#footnote-ref-161)
162. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 26. [↑](#footnote-ref-162)
163. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 19. [↑](#footnote-ref-163)
164. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 43-44. [↑](#footnote-ref-164)
165. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 44. [↑](#footnote-ref-165)
166. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 45. [↑](#footnote-ref-166)
167. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 28. [↑](#footnote-ref-167)
168. See Exhibits 52, 53, 54 [↑](#footnote-ref-168)
169. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26, page 49, 55. [↑](#footnote-ref-169)
170. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 2-3. [↑](#footnote-ref-170)
171. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 90-91. [↑](#footnote-ref-171)
172. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 91. [↑](#footnote-ref-172)
173. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 26 page 54. [↑](#footnote-ref-173)
174. See Crown Trial Brief Volume 7, Tab 6. [↑](#footnote-ref-174)
175. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 2-3. [↑](#footnote-ref-175)
176. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 7. [↑](#footnote-ref-176)
177. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 8. [↑](#footnote-ref-177)
178. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 8. [↑](#footnote-ref-178)
179. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 8-9. [↑](#footnote-ref-179)
180. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 16-17. [↑](#footnote-ref-180)
181. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 14-15. [↑](#footnote-ref-181)
182. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 46-47. [↑](#footnote-ref-182)
183. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 48. [↑](#footnote-ref-183)
184. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 48-51. [↑](#footnote-ref-184)
185. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 52. [↑](#footnote-ref-185)
186. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 57. [↑](#footnote-ref-186)
187. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 35. [↑](#footnote-ref-187)
188. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 121. [↑](#footnote-ref-188)
189. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 131. [↑](#footnote-ref-189)
190. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 37-38. [↑](#footnote-ref-190)
191. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 63-64. [↑](#footnote-ref-191)
192. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 64-65. [↑](#footnote-ref-192)
193. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 67. [↑](#footnote-ref-193)
194. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 100. [↑](#footnote-ref-194)
195. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 98. [↑](#footnote-ref-195)
196. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 99 and see Exhibit 40 [↑](#footnote-ref-196)
197. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 109. [↑](#footnote-ref-197)
198. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 114-115. [↑](#footnote-ref-198)
199. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 116. [↑](#footnote-ref-199)
200. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 118-119. [↑](#footnote-ref-200)
201. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 142. [↑](#footnote-ref-201)
202. Crown Trial Brief Volume 3, Tab 7. [↑](#footnote-ref-202)
203. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 149 and see Exhibit 59. [↑](#footnote-ref-203)
204. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 150. [↑](#footnote-ref-204)
205. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 27, page 144. [↑](#footnote-ref-205)
206. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 5-8 and see Exhibit 61. [↑](#footnote-ref-206)
207. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 18. [↑](#footnote-ref-207)
208. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 13. [↑](#footnote-ref-208)
209. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 21. [↑](#footnote-ref-209)
210. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 20. [↑](#footnote-ref-210)
211. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 21-22. [↑](#footnote-ref-211)
212. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 24. [↑](#footnote-ref-212)
213. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 28. [↑](#footnote-ref-213)
214. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 31. [↑](#footnote-ref-214)
215. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 32. [↑](#footnote-ref-215)
216. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 32. [↑](#footnote-ref-216)
217. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 38 and November 29, page 5. [↑](#footnote-ref-217)
218. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 93. [↑](#footnote-ref-218)
219. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 40. [↑](#footnote-ref-219)
220. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 42-43. [↑](#footnote-ref-220)
221. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 46. [↑](#footnote-ref-221)
222. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 28, page 46-47. [↑](#footnote-ref-222)
223. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 6. [↑](#footnote-ref-223)
224. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 12 and see Crown Trial Brief Volume 7, Tab 2. [↑](#footnote-ref-224)
225. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 15. [↑](#footnote-ref-225)
226. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 16. [↑](#footnote-ref-226)
227. See Crown Trial Brief Volume 12, Tab 1. [↑](#footnote-ref-227)
228. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 21. [↑](#footnote-ref-228)
229. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 22. [↑](#footnote-ref-229)
230. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 23-24. [↑](#footnote-ref-230)
231. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 25 and Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on October 30, page 168-169, 179-180 and 229. [↑](#footnote-ref-231)
232. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 29. [↑](#footnote-ref-232)
233. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 38-39. [↑](#footnote-ref-233)
234. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 36-37. [↑](#footnote-ref-234)
235. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 36. [↑](#footnote-ref-235)
236. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 44. [↑](#footnote-ref-236)
237. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 46. [↑](#footnote-ref-237)
238. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 47-48. [↑](#footnote-ref-238)
239. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 49. [↑](#footnote-ref-239)
240. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 55. [↑](#footnote-ref-240)
241. See Exhibit 62. [↑](#footnote-ref-241)
242. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 60-64. [↑](#footnote-ref-242)
243. Transcript, Proceedings at Trial before the Honourable Justice J. Ferguson on November 29, page 55. [↑](#footnote-ref-243)
244. Para 320 and 326 of the Crown’s written submissions. [↑](#footnote-ref-244)