

**CITATION:** Castillo v. Xela Enterprises Ltd., 2022 ONSC 3803  
**COURT FILE NO.:** CV-11-9062-00CL  
**DATE:** 20220629

**SUPERIOR COURT OF JUSTICE – ONTARIO  
(COMMERCIAL LIST)**

**RE:** Margarita Castillo, Applicant

**AND:**

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest Inc., 696096 Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, Executor of the Estate of Juan Arturo Gutierrez, Respondents

**AND:** In the Matter of the Receivership of Xela Enterprises Ltd.

**BEFORE:** Conway J.

**COUNSEL:** *Monique J. Jilesen and Derek Knoke*, for the Receiver, moving party

*Brian H. Greenspan and Michelle Biddulph* for Juan Guillermo Gutierrez, responding party

**HEARD:** May 30-31, June 2, 16, 2022

**REASONS FOR DECISION**

[1] In October 2015, Margarita Castillo obtained a judgment from this court for \$4.25 million plus interest against Xela Enterprises Ltd. (“**Xela**”), her brother Juan Guillermo Gutierrez (“**Mr. Gutierrez**”), and their now-deceased father Juan Arturo Gutierrez, among others. The defendants were ordered to pay an additional \$889,858 in costs.

[2] In January 2019, Ms. Castillo sought the appointment of a receiver over the property and assets of Xela in connection with her efforts to enforce the judgment. On July 5, 2019, Justice McEwen granted the order (the “**Appointment Order**”). He appointed KSV Restructuring Inc. as the receiver of Xela (the “**Receiver**”).<sup>1</sup>

[3] The Receiver brings this motion for a declaration that Mr. Gutierrez is in contempt of court for breaching the Appointment Order and a subsequent order of Justice McEwen dated March 24, 2020. The Receiver seeks a finding of both civil and criminal contempt.

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<sup>1</sup> In response to the receivership application, Mr. Gutierrez sought protection for Xela under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Justice McEwen granted the Appointment Order and dismissed the CCAA application.

[4] For the reasons that follow, I find Mr. Gutierrez in contempt of court for breaching the Appointment Order. The elements of civil contempt have been proven beyond a reasonable doubt. I decline to make a finding of criminal contempt.

### **Evidence on the Motion**

[5] The motion proceeded before me in person. Three witnesses gave *viva voce* evidence and were cross-examined by opposing counsel. Those witnesses were (i) Robert Kofman, President of the Receiver, (ii) Carl O'Shea, a partner of the Hatstone Group, Panamanian counsel for the Receiver,<sup>2</sup> and (iii) Mr. Gutierrez.

[6] The Receiver had previously filed affidavits of Mr. Kofman and Mr. O'Shea. Those affidavits were entered as exhibits on the consent of counsel. Further additional documents were entered as exhibits on the motion.

### **Overview of Xela and its Subsidiaries**

[7] Xela is a privately-owned Ontario family holding company that oversees the operations of several direct and indirect wholly-owned subsidiaries located mainly in Central and South America. Mr. Gutierrez is the sole common shareholder and a director of Xela. Since August 2000, he has served as its President.

[8] One of Xela's wholly-owned subsidiaries is Gabinvest S.A. ("**Gabinvest**"), a Panamanian company. Gabinvest itself is a holding company. It owns all the shares of another Panamanian company named LISA S.A. ("**LISA**").

[9] At the time the Receiver was appointed in 2019, LISA held, directly or indirectly, a one-third interest in the Avicola Group, a family-owned, vertically integrated group of poultry companies in Guatemala. Mr. Gutierrez values the Avicola Group at close to a billion dollars. The other two thirds interest in the Avicola Group is owned by Mr. Gutierrez's cousins.

[10] There has been multi-jurisdictional litigation with respect to the Avicola Group among the family for over 20 years. LISA alleges that it is owed years' worth of unpaid dividends from the Avicola Group. According to Mr. Gutierrez, LISA has secured a judgment in Panama ordering the payment of those dividends. In February 2020, LISA transferred its interest in the Avicola litigation to a subsidiary of a trust for the benefit of Mr. Gutierrez's wife, mother, and children. This transfer is being investigated by the Receiver as a reviewable transaction.

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<sup>2</sup> The Hatstone Group is a multi-jurisdictional legal and corporate services group. Hatstone Abogados is the Panamanian office of the Hatstone Group retained to act as the Receiver's counsel in Panama.

## **The Appointment Order**

[11] On July 5, 2019, the Receiver was appointed over “all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the “**Property**”)”.

[12] Section 3 of the Appointment Order contains broad powers in favour of the Receiver “to act at once in respect of the Property” and, without limiting the generality of the foregoing, lists 18 actions or steps that the Receiver is empowered and authorized to take, including:

- (a) To execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver’s name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order (s. 3(h)).
- (b) To exercise any shareholder, partnership, joint venture or other rights which the Debtor may have (s. 3(q)).

[13] The language at the end of s. 3 states:

[I]n each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

[14] Section 9 of the Appointment Order provides that “no proceeding or enforcement process in any court or tribunal [...] shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.”

[15] Section 17 provides that the Receiver “shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.”

[16] Sections 30 and 31 request the assistance of foreign courts in giving effect to the order and assisting the Receiver in carrying out its terms. They state:

30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama Guatemala, Barbados, Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in

respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

[17] On July 8, 2019, the Receiver's counsel sent Mr. Gutierrez a letter advising him of the Appointment Order and its various terms, including the exclusive right of the Receiver to exercise control over Xela's property without interference from any other person.

### **Steps Taken by the Receiver with respect to the Boards of Gabinvest and LISA**

[18] Mr. Kofman testified that in the fall of 2019, the Receiver was experiencing challenges receiving information with respect to Xela and its historical transactions. The Receiver became frustrated and thought that it might be necessary to get that information directly from Xela's subsidiaries.

[19] Mr. Kofman testified that on January 16, 2020, the Receiver exercised Xela's rights under the Appointment Order as the sole shareholder of Gabinvest. It held a Gabinvest shareholders meeting at which a resolution was passed (the "**Gabinvest Resolution**") to remove the three existing directors of Gabinvest and replace them with the Receiver's representatives: Alvaro Almengor, Manuel Carrasquilla, and Lidia Ramos. Those three individuals were lawyers with the Hatstone firm. Subsequently, resolutions were also passed to add those individuals to LISA's existing board.

[20] Prior to his removal, Harald Johannessen Hals ("**Mr. Hals**") was one of the directors of both Gabinvest and LISA. Mr. Hals also served as the Treasurer of Gabinvest and the President of LISA. Mr. Hals is Mr. Gutierrez's brother-in-law.

[21] The replaced directors were notified of the change in late January 2020. They immediately protested the change on the basis that Hatstone had no legal authority in Panama to change the board of Gabinvest. On February 5, 2020, Mr. Hals' lawyer claimed that the Gabinvest Resolution was illegal and that the three new directors from Hatstone may have committed a crime. A meeting was subsequently held in Bogota on February 21, 2020 to try to resolve the situation. Mr. Gutierrez attended with Messrs. Almengor and O'Shea, Mr. Hals, and others. A further meeting was scheduled but was cancelled by the Receiver. Nothing was resolved.

[22] The Receiver brought a motion in this court on March 3, 2020 to approve and ratify the Gabinvest Resolution. Mr. Gutierrez opposed the motion. Both he and Mr. Hals swore affidavits in response to the motion, both dated March 22, 2020. On March 24, 2020, Justice McEwen issued an order (the "**March 24th Order**") approving and ratifying the Gabinvest Resolution. He held that the Gabinvest Resolution was a proper exercise of the Receiver's exclusive power and authority to exercise Xela's shareholder rights under s. 3 of the Appointment Order.

[23] On April 27, 2020, the January 16, 2020 changes to the Gabinvest board were ratified by a further shareholders meeting directed by the Receiver.

### **The Criminal Complaint**

[24] Mr. Hals filed a criminal complaint against the Hatstone directors on January 20, 2021 (the "**Criminal Complaint**"). The Criminal Complaint related to the Receiver's January 16, 2020

shareholders meeting. It said that the meeting was not properly held and that it constituted a crime. The Criminal Complaint estimates \$2 million in provisional damages against the three replacement directors. The sole evidence tendered in support of the Criminal Complaint is a declaration sworn by Mr. Gutierrez on December 3, 2020 (the “**Declaration**”).

[25] Mr. Gutierrez testified that he was in Guatemala with his wife’s family, including Mr. Hals, following his mother-in-law’s death. He testified that six days after her death, Mr. Hals asked him to answer some questions and that he agreed to do so. He testified that he met with a notary, answered questions, had the Declaration read to him, and then signed it. The Declaration states:

**FIRST:** Mr. Juan Guillermo Gutierrez Strauss, aware of the penalties related to the crime of perjury, under solemn oath in accordance with the law, DECLARES as follows: **a)** that he acts in his capacity as Director – President of the company XELA ENTERPRISES LTD.....**b)** that his client is the sole shareholder of the company Gabinvest S.A.....**c)** Therefore, I DECLARE that my client, the company XELA ENTERPRISES LTD., was not notified or summoned in any way to the participate in the Shareholders’ Meeting of the company GABINVEST, S.A., held on January sixteenth, two thousand and twenty, in which the appointments of the recognized Board of Directors of the company GABINVEST, S.A. were rendered null and void, providing in such sense, the appointment of a new board of directors, presided by Mr. Alvaro Almengor as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. These persons are not known to my client, nor do they have the authority to represent the company GABINVEST, S.A., since they are not members of the Board of Directors proposed and elected by the Shareholder of the aforementioned company. **d)** I also DECLARE that my client, as sole shareholder of the Company GABINVEST, S.A. has never held a Shareholders’ Meeting or been informed of any meeting of this nature BY TELEPHONE held on April twenty-night, two thousand twenty, with Mr. Alvaro Almengor in his alleged capacity as President of GABINVEST, S.A; nor has he ordered the modification of the Articles of Incorporation of the Company GABINVEST, S.A. IN ANY WAY. Therefore, any decision, appointment or order given by Mr. Alvaro Almengor as alleged President, Mr. Manuel Carrasquilla as alleged Secretary and Ms. LIDIA RAMOS as alleged Treasurer of the Company GABINVEST S.A. HAVE NO VALUE WHATSOEVER, and are the result of falsehood in form and substance and any other crime that corresponds to the acts committed.<sup>3</sup>

[26] Mr. Gutierrez testified that he and Mr. Hals did not discuss the Declaration. He testified that all Mr. Hals did was to ask him if he would sign a document as to whether he was at the meeting where the directors were replaced, and that he agreed to do so. Mr. Gutierrez testified that

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<sup>3</sup> This is a translation of the original Declaration. Mr. Gutierrez’s counsel submitted that the use of the term “client” is inappropriate and that it should read that he was the “representative” of Xela.

he did not know the Declaration was going to be used to support a criminal complaint and that he only learned about the Criminal Complaint several months later.

[27] After the Criminal Complaint was filed, the Receiver brought an urgent motion. On February 10, 2021, Justice McEwen ordered Mr. Gutierrez to “forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Declaration.” On February 11, 2021, Mr. Gutierrez sent a letter to the Public Prosecutor’s general office in Panama enclosing an affirmation withdrawing the Declaration. He also asked Mr. Hals to withdraw the Criminal Complaint. Mr. Hals responded that Justice McEwen had overstepped his powers and that he would not withdraw the Criminal Complaint.

[28] On August 16, 2021, Mr. Hals made a request to the Public Prosecutor’s Office to interview Mr. Gutierrez and to answer whether he affirmed and ratified the Declaration, and whether he participated in the Gabinvest shareholders meetings held on January 16, 2020 and April 29, 2020. On December 14, 2021, Mr. Gutierrez attended the interview at the Panamanian consulate in Toronto (the “**Interview**”). He told the Public Prosecutor’s representative that the case involves a company that he manages in Canada, that he was not present at the Gabinvest shareholders meeting, and that he was a “judicial hostage” because Justice McEwen’s orders prevented him from participating in this case. He did not state that he had withdrawn the Declaration. The Public Prosecutor is still investigating the Criminal Complaint.

### **Mr. Gutierrez’s Evidence**

[29] Mr. Gutierrez testified on this motion. Where an alleged contemnor testifies in civil or criminal contempt proceedings, the rule in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 must be applied in assessing whether guilt has been proven beyond a reasonable doubt. That rule is as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused: *W.(D.)*, at p. 758.

[30] I find that Mr. Gutierrez was not a credible witness. His evidence was not believable on its face and contradicted the text and tone of the written documents. I do not believe much of his testimony, nor does it leave me with a reasonable doubt about the circumstances in which he signed the Declaration.

[31] Specifically, I do not believe his testimony that he did not know the Declaration was being used to support a criminal complaint. Mr. Gutierrez himself alleges in the Declaration that crimes were committed — the Declaration refers to a “falsehood” and “any other crime that corresponds to the acts committed”. Further, the Criminal Complaint was filed by Mr. Hals, Mr. Gutierrez’s brother-in-law and someone with whom he had a business relationship with for many years. It is simply not credible that Mr. Gutierrez, an experienced businessman, had no idea why Mr. Hals

was asking him to go to a notary public in Guatemala to sign the Declaration. This is particularly so given that the Declaration related to the replacement of the board of Gabinvest, a wholly-owned subsidiary of Xela and a corporation in which Mr. Gutierrez and his family had a significant economic interest.

[32] I also do not believe Mr. Gutierrez’s testimony that all he did was answer a few questions posed by the notary and that the text in the Declaration was simply the notary’s words, not his. Nor do I believe his testimony that he probably paid no attention to what was in the Declaration. The document is signed by the notary who stated that “having read this document in its entirety to the applicant, being well informed of its content, value and legal effects, he [*i.e.*, Mr. Gutierrez] ratified, accepts and signs it. I ATTEST.” Mr. Gutierrez admitted on cross-examination that he signed the Declaration under penalty of perjury, that the document was read to him, and that he did not disagree with anything in it.

[33] I find that Mr. Gutierrez knew exactly what he was doing when he signed the Declaration. He was aware of the contents of the document and swore that they were true. I find that he knew that the purpose of signing the Declaration was to file a criminal complaint in Panama to challenge the Receiver’s removal and replacement of the Gabinvest board.

### **Jurisdiction Issues**

[34] Mr. Gutierrez submits that this court has no jurisdiction over the alleged contempt because the acts complained of occurred in Guatemala and Panama.

[35] I reject that submission. Canadian courts will exercise jurisdiction over criminal charges generally — and civil and criminal contempt proceedings specifically — where there is a “real and substantial link” between the misconduct grounding the offence and Canada: *Libman v. The Queen*, [1985] 2 S.C.R. 178, at p. 213; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 52. In other words, so long as there is a “significant link between Canada and the formulation, initiation, or commission of the offence”, Canadian courts properly take jurisdiction: *R. v. B.(O.)* (1997), 99 O.A.C. 313 (C.A.), at para. 12, *per* Abella J.A. (as she then was). In determining whether this standard is met, courts focus on the underlying activities giving rise to the offence rather than aspects of the alleged offender: *B.(O.)*, at para. 12. Where the offence at issue is contempt, emphasis may also be placed on the court that issued the initial order: *Dish Network L.L.C. v. Shava IPTV Network LLC*, 2021 ONSC 1582, at para. 45.

[36] In this case, there is no question that there was a real and substantial link between Mr. Gutierrez’s conduct and the province of Ontario. The Appointment Order was made in Ontario. It applies to Xela, an Ontario corporation. Mr. Gutierrez is the sole common shareholder and President of Xela, the company placed in receivership. When he signed the Declaration in Guatemala, he stated that he was doing so in his capacity as the President and director of the Ontario corporation. The Declaration makes allegations with respect to Xela, an Ontario corporation, and its wholly-owned subsidiary Gabinvest.

[37] Significantly, the Appointment Order was obtained in connection with the enforcement of a judgment obtained by Ms. Castillo, in lengthy Ontario-based proceedings, against Xela, Mr. Gutierrez, and others. The Receiver alleges that Mr. Gutierrez has breached the terms of an order

issued by an Ontario court to facilitate the enforcement of an Ontario judgment that was granted in Ontario-based litigation. I am satisfied that Ontario courts have a legitimate interest in prosecuting the offence: see *Libman*, at p. 211.

[38] Mr. Gutierrez further submits that asserting jurisdiction over his conduct in Panama would go beyond the bounds of international comity because it would interfere with the investigation by the Panamanian authorities of criminal conduct in Panama. He submits that he cannot be held in contempt in Canada for signing a declaration that was used to support a complaint under Panamanian criminal law.

[39] In support of this argument, Mr. Gutierrez points to his testimony that the Receiver had no authority in Panama to change the board of Gabinvest because it did not have the Appointment Order recognized (or domesticated) in Panama. On this issue, Mr. Kofman's testimony was that the Receiver did not think that it was necessary to have the order recognized in Panama. No expert evidence on Panamanian law or whether the Appointment Order had to be recognized in that jurisdiction was provided by either party.

[40] In my view, there is no issue of international comity in this case. The issue on this motion is not whether the Receiver complied with Panamanian law when it exercised its rights to replace the board of Gabinvest or whether the Panamanian authorities can investigate the Receiver's conduct in Panama. Rather, the issue is whether Mr. Gutierrez respected and complied with the terms of an order of this court — which, again, arose in the context of lengthy Ontario court proceedings — when he signed the Declaration. This court is not treading on the jurisdiction of the Panamanian courts in making this determination. I conclude that this court has jurisdiction over the alleged contemptuous conduct.

### **Civil Contempt**

[41] As the Supreme Court of Canada noted in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at paras. 32-35, three elements must be satisfied to establish civil contempt:

- a. The order must be clear and unequivocal;
- b. The defendant must have knowledge of the order;
- c. The defendant must have intentionally breached the order.

[42] Each of these elements must be established beyond a reasonable doubt: *Carey*, at para. 32.

[43] In assessing contempt allegations, courts should consider the totality of the evidence: *Sweda Farms Ltd v. Ontario Egg Producers*, 2011 ONSC 3650, 96 W.C.B. (2d) 88, at para. 75, *per* Lauwers J. (as he then was). The credibility of the witnesses is an important consideration, particularly where there are discrepancies on important points: see *Tribecca Finance Corporation v. Tabrizi*, 2018 ONSC 486, at para. 29; *Jackson v. Jackson*, 2016 ONSC 3466, at para. 65.

[44] While contempt is an exceptional order, it is necessary to maintain the rule of law and the public's faith in the justice system: *L. Morreale Consulting Professional Corp. v. Manieri*, 2016 ONSC 7048, at para. 18.



Is the Order Clear and Unequivocal?

[45] As mentioned, the breached order must clearly and unequivocally state what should or should not be done: *Carey*, at para. 33. This requirement does not exist to provide an alleged contemnor with a technical means to disregard the order. It exists to avoid punishing people who do not know what must be done to comply with the order: *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 24, cited with approval in *Carey*, at para. 33. An alleged contemnor “must obey the order in letter and spirit with every diligence”: *Sweda Farms*, para. 21.

[46] Courts will therefore consider both the specific provisions that have allegedly been breached, as well as the order as a whole: *Sweda Farms*, at para. 41. The provisions must be read in light of the purpose and design of the order: *Sweda Farms*, at para. 74.

[47] The Receiver submits that Mr. Gutierrez breached ss. 3, 9, and 17 of the Appointment Order and s. 3 of the March 24th Order when he signed the Declaration and participated in the Interview.

[48] Mr. Gutierrez submits that the provisions of the Appointment Order were neither clear nor unequivocal. He relies on case law in which courts have held that, in order to be sufficiently clear and unequivocal so as to support a contempt finding, a provision of an order “must be directive and not simply permissive”: *Sweda Farms*, at para. 21. Phrased differently, it must not be worded using “overly broad language” — rather, it must be specific and directive as to what should and should not be done: *Jackson*, at para. 51.

[49] I am satisfied beyond a reasonable doubt that the provisions of s. 3 of the Appointment Order are clear and unequivocal. If the Receiver exercises any of its rights under s. 3, it is entitled to do so “exclusively” and “without interference from any other Person”. That language is specific and directive — if the Receiver exercises its rights, no one else can do anything to interfere with the exercise of those rights.

[50] Section 9 is also clear, unequivocal, and directive: “No proceeding or enforcement process in any court or tribunal [...] shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.” The provision prohibits proceedings being taken against the Receiver and specifically contemplates that a person wishing to do so must apply to the court for leave or obtain the Receiver’s consent.

[51] Section 17 is not directive. It provides that the Receiver will not incur any liability or obligation as a result of its appointment or the carrying out of the provisions of the Appointment Order. It does not require anyone to do or not do anything. It therefore cannot form the basis of a contempt finding.

[52] Section 3 of the March 24th Order is also not directive. It says is that the Gabinvest Resolution “was a proper exercise of the Receiver’s exclusive power and authority under paragraph 3 of the Appointment Order, to exercise the Debtor’s shareholder rights.” It does not require anyone to do or not do anything. It also cannot form the basis of a contempt finding.

[53] Mr. Gutierrez submits that ss. 30 and 31, which request the assistance of foreign courts in enforcing the Appointment Order, render the other sections of the order unclear. He argues that if

the Receiver did not have the Appointment Order recognized or “domesticated” in Panama, it created a lack of clarity as to what the Appointment Order permitted or restricted him from doing.

[54] I reject that submission for several reasons. First, while the Appointment Order must be read as a whole, ss. 3 and 9 stand on their own. They are not conditional upon the Receiver taking any steps pursuant to ss. 30 or 31. Second, the language of ss. 3 and 9 is clear and unequivocal — Mr. Gutierrez could not “interfere” with the Receiver’s exercise of its rights (s. 3), nor could he bring proceedings against the Receiver without leave or consent (s. 9). There are no limits on the restrictions set out in those sections.

[55] Most significantly, however, if Mr. Gutierrez thought that the Receiver’s conduct was illegal or did not conform with Panamanian law, he had other options open to him. He could have returned to this court for direction. He could have asked to have the Appointment Order set aside. He could have asked for the restrictions in the order to be suspended. He could have sought leave to challenge the Receiver’s actions in Panama. Mr. Gutierrez was an active participant in proceedings before this court throughout the receivership process and was represented by counsel. He knew how to seek relief or direction from this court.

[56] Mr. Gutierrez did none of those things. He acted unilaterally and took matters into his own hands. The case law makes it clear that this is impermissible. A person subject to a court order must continue to abide by its terms, even if they think that such terms may result in an injustice or that another legal obligation necessitates their breach: *Dankiewicz v. Sullivan*, 2019 ONSC 6382, at para. 11. Again, in such circumstances, the appropriate course of conduct is to return to court for direction: *Carey*, at para. 59.

[57] In summary, the Appointment Order, read as a whole, is clear and unequivocal. The Receiver has the exclusive authority to take action on behalf of Xela and its Property. No one is to interfere with the exercise of the Receiver’s rights. In light of these clear and unequivocal provisions, if Mr. Gutierrez thought that the Receiver was acting contrary to Panamanian law, the appropriate course of conduct was to return to this court for direction. He also could have sought leave to bring proceedings against the Receiver in Panama. Instead, he made the unilateral decision to swear a Declaration in support of a criminal complaint.

#### Knowledge of the Order

[58] There is no issue that Mr. Gutierrez knew about the Appointment Order. He admits that he did. He further testified that he understood that the Receiver could exercise Xela’s shareholder rights, that he was not permitted to interfere with the Receiver’s exercise of its authority, and that he could not bring proceedings against it.

#### Intentional Breach of the Appointment Order

[59] Intent does not require that an individual breach an order with “the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order”: *Carey*, at para. 39, citing *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, at para. 17, *per* Cromwell J.A. (as he then was). All that is required is the intentional commission (or omission) of an act that is in fact prohibited (or required) by the order. As Cromwell J.A. explained in *TG Industries*, “[t]he required intention relates to the act itself, not to the disobedience”: at para. 17.

[60] It is no defence that the contemnor did not intend to interfere with the administration of justice. Nor is it a defence if a person's own actions, contrary to the terms of an order, make future compliance (or the ability to purge contempt) impossible: *Carey*, at paras. 27-29, 40-41. It is also no defence for a person with a "sophisticated understanding of business" to breach the court's orders and claim that they were misled or to point "the finger of blame [...] in an effort to avoid responsibility for [their] own actions": *Crawford v. Standard Building Contractors Limited*, 2021 ONSC 5346, at para. 140. Finally, it is not a defence to claim that an order never should have been granted or "that the order is wrong or ineffective in law": *Boily v. Carleton Condominium Corporation 145*, 2013 ONSC 1467, at para. 39, aff'd 2014 ONCA 574, 121 O.R. (3d) 670.

[61] I am satisfied beyond a reasonable doubt Mr. Gutierrez intentionally breached the Appointment Order when he swore the Declaration. His signing the Declaration was a breach of the Appointment Order in numerous respects:

- (a) He signed documents on behalf of Xela contrary to the restriction in s. 3(h).
- (b) He purported to exercise authority on behalf of Xela contrary to the exclusivity granted to the Receiver in s. 3.
- (c) He interfered with the Receiver's exercise of its right to deal with the shareholdings of Xela contrary to the restriction in s. 3(q). The Declaration supported the Criminal Complaint that was filed with the Public Prosecutor in Panama. It was filed for the purpose of challenging, undermining, and undoing the Receiver's action in replacing the board of Gabinvest (a shareholding of Xela).
- (d) He was integrally involved in the bringing of a proceeding against the Receiver without seeking leave of this court or the Receiver's consent contrary to s. 9. The Declaration that he swore was the basis for the Criminal Complaint brought against the Receiver's representatives in Panama.

[62] Finally, Mr. Gutierrez intentionally signed the Declaration: he went to the notary's office and signed the document after it was read to him. As a result, all of the elements of civil contempt have been established beyond a reasonable doubt.<sup>4</sup>

### **Criminal Contempt**

[63] The Receiver further seeks to hold Mr. Gutierrez in criminal contempt. There are two elements to criminal contempt, both of which must be proven beyond a reasonable doubt. The first element, the *actus reus*, is established by proof "that the accused defied or disobeyed a court order

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<sup>4</sup> The Receiver submits that the contents of the Declaration are false. For purposes of determining whether Mr. Gutierrez is in contempt, it is not necessary for me to determine whether the contents are true or false. It is the swearing of the Declaration itself that constitutes contempt. Further, as I have found Mr. Gutierrez in contempt by swearing the Declaration, I do not propose to consider whether the Interview breached the Appointment Order. I note that in both its written and oral submissions, the Receiver focused primarily on the Declaration as the basis for a contempt finding and submitted that the Interview was an affirmation of the statements made in the Declaration.

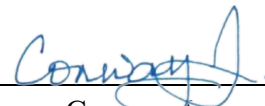
in a public way”: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 933. The second element, the *mens rea*, requires the accused’s public defiance or disobedience of the court order to be done “with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court”: *United Nurses*, at p. 933. Satisfaction of the *mens rea* requirement may be inferred from the circumstances: *United Nurses*, at p. 933.

[64] I am not prepared to make a declaration of criminal contempt. The Receiver’s notice of motion, dated February 9, 2021, only seeks an order “declaring Juan Guillermo in contempt of Court”. There are no particulars pled as to why the conduct of Mr. Gutierrez constitutes criminal contempt. As a result, the notice of motion did not sufficiently put Mr. Gutierrez on notice of the conduct alleged to rise to the level of criminal contempt: see *Feigin v. L’vova*, 2018 ONSC 5091, at para. 30. I therefore decline to grant the order declaring Mr. Gutierrez in criminal contempt.

### **Decision and Next Steps**

[65] I grant an order declaring Mr. Gutierrez in civil contempt of the Appointment Order.

[66] I direct counsel to arrange a scheduling appointment before me, through the Commercial List office, to schedule the sentencing phase of this proceeding.

  
Conway J.

**Date:** June 29, 2022