

**CITATION:** Castillo v. Xela Enterprises Ltd., 2022 ONSC 6696  
**COURT FILE NO.:** CV-11-9062-00CL  
**DATE:** 20221129

**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:** In Writing

**REASONS FOR DECISION**  
**(COSTS)**

[1] KSV Restructuring Inc. (the “**Receiver**”) was appointed as the receiver of Xela Enterprises Inc. (“**Xela**”) pursuant to the order of McEwen J. dated July 5, 2019 (the “**Appointment Order**”).

[2] The Receiver brought a contempt motion against Juan Guillermo Gutierrez (“**Mr. Gutierrez**”) for breach of the Appointment Order. In reasons released June 29, 2022, I held Mr. Gutierrez in civil contempt for the breach: see *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006. In reasons released October 17, 2022, I sentenced Mr. Gutierrez to 30 days’ imprisonment as a penalty for civil contempt: see *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594.

[3] In my sentencing reasons, I said that if the parties were unable to agree on costs, they could make written submissions. I have now reviewed those submissions.

[4] The Receiver seeks costs of the contempt motion on a full indemnity basis in the amount of \$628,485.23. The costs claimed include the fees and disbursements of the Receiver’s legal counsel and the fees of the Receiver itself.

[5] Mr. Gutierrez submits that costs should be on a substantial, not full, indemnity basis. He submits that the costs claimed are neither reasonable nor proportionate. Mr. Gutierrez provided a

draft bill of costs for the contempt motion. His counsel's fees were \$124,110 on a substantial indemnity basis.

### **Scale of Costs**

[6] In contempt proceedings, costs are generally payable on a full or substantial indemnity basis: see *Bickram v. Bickram*, 2015 ONSC 705, at para. 71; *The Corporation of the Township of King v. 11547372 Canada Inc. et al*, 2022 ONSC 2261, at para. 27. The rationale is that the moving party should not have to bear the financial burden of the contempt: see *Andersson v. Aquino*, 2019 ONSC 2751, at para. 23; *Astley v. Verdun*, 2013 ONSC 6734, at para. 52; *Royal Bank of Canada v. Yates Holdings Inc.* (2007), 33 C.B.R. (5th) 268 (Ont. S.C.), at para. 14, aff'd, 2008 ONCA 474; *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al*, 2012 ONSC 2240, at para. 10.

[7] Full indemnity costs have been awarded in numerous civil contempt cases: see *Bickram; Township of King; Sweda Farms; Royal Bank; Sycor v. Kiaer et al*, 2016 ONSC 7384; *Lepp v. The Regional Municipality of York*, 2021 ONSC 6695, leave to appeal ref'd, 2022 ONSC 306; *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2007 CanLII 2650 (Ont. S.C.); *9646035 Canada Limited et al. v. Kristine Jill Hill et al.*, 2018 ONSC 5986.

[8] In determining costs on a contempt motion, the court may consider the seriousness of the conduct and its effect on the administration of justice: see *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 104.

[9] In this case, I found that Mr. Gutierrez' wrongdoing was extremely serious and that his conduct demonstrated an astounding lack of respect for this court. Mr. Gutierrez swore a declaration that formed the basis for a criminal complaint against the Receiver's representatives in Panama. This constituted a breach of the Appointment Order and interfered with the Receiver's fulfillment of its mandate. He exposed the Receiver's representatives to potential criminal proceedings. He ignored this court's supervisory role over its appointed officer. He acted unilaterally and engaged in self-help. His purported withdrawal of the criminal complaint was not genuine nor was his attempt to purge his contempt. His conduct was knowing and deliberate.

[10] Not only did Mr. Gutierrez breach a court order, his conduct was specifically targeted towards an officer appointed by this court. In taking the steps that he did, Mr. Gutierrez both interfered with and distracted the Receiver from doing the work that this court appointed its officer to do.

[11] Further, although this was a single breach of the Appointment Order, Mr. Gutierrez perpetuated the contemptuous conduct when he attended an interview with the Panamanian Public Prosecutor's representative in Toronto in December 2021. He continues to make allegations against the Receiver, specifically threatening its principal Mr. Kofman with criminal liability in Panama.

[12] In addition, Mr. Gutierrez knew from the Receiver's reports that Xela has no revenue or source of liquidity. The receivership is being funded by the Applicant, who is seeking to enforce the \$4.25 million judgment she obtained from this court in 2015. It would be manifestly unfair for the Applicant to have to bear the financial burden of Mr. Gutierrez' breach of the Appointment

Order that was granted to assist her in enforcing that judgment. I note that his conduct can only have the effect of delaying her eventual recovery of the \$4.25 million judgment.

[13] Mr. Gutierrez' conduct was egregious and highly disrespectful to this court and its appointed officer. It is entirely appropriate to award costs on a full indemnity basis in this case.

### **Quantum of Costs**

[14] The Receiver's costs are significant. However, with one exception, the quantum of costs sought by the Receiver is justified.

[15] The contempt and sentencing hearings took five days in total. The application that gave rise to the \$4.25 million judgment took two days. Newbould J. ordered Mr. Gutierrez and Xela to pay costs of \$899,858.21 for that hearing. Mr. Gutierrez could reasonably have expected that significant costs would be incurred for a five-day hearing on this matter.

[16] The record for the contempt and sentencing hearings was large. Both sides delivered several affidavits with voluminous exhibits. The Receiver had disclosure requests from Mr. Gutierrez for which it had to conduct a privilege review of three years of emails and documents. Witnesses from both sides gave *viva voce* evidence. Counsel had to prepare for examination in chief and cross-examinations of those witnesses. The Receiver's counsel had to scrutinize the record it put forth given the nature of the motion and Mr. Gutierrez' ongoing allegations against the Receiver and its representatives.

[17] Detailed submissions on liability and sentencing were made both in writing and orally in court.

[18] The Receiver had the onus of establishing contempt and of establishing the elements of contempt beyond a reasonable doubt. Given the heavy onus on the Receiver, Mr. Gutierrez could reasonably have expected that the Receiver's fees would significantly exceed those of his own counsel.

[19] Both the liability and sentencing phases were vigorously opposed by Mr. Gutierrez. He raised numerous legal and factual issues. Mr. Gutierrez contested the jurisdiction of this court to adjudicate the contempt motion. He argued that the Appointment Order was not clear and unequivocal. He disputed that he intentionally breached the Appointment Order. On the sentencing hearing, he maintained that he had purged his contempt and argued that a monetary fine should be imposed instead of incarceration.

[20] I rejected his submissions. In my view, the Receiver was entirely successful on the motion and the penalty phase. While I made no finding of criminal contempt, I accepted the Receiver's core submission that Mr. Gutierrez had breached an order of this court in an extremely serious way. While the period of incarceration was less than what the Receiver requested, I accepted the Receiver's core submission that incarceration was an appropriate penalty.

[21] I am prepared, however, to discount the costs in one respect. The Receiver devoted considerable time in its affidavit and written submissions on sentencing to Mr. Gutierrez' alleged breach of other court orders. As Mr. Gutierrez points out, I did not consider that to be a relevant


factor on sentencing – I stated, at para. 36 of my sentencing reasons, that in considering how events unfolded over a period of two years, “I have not considered the Receiver’s evidence about Mr. Gutierrez’s alleged failure to comply with the production orders of McEwen J. as those were not the subject of the contempt hearing before me.” The amount of costs claimed by the Receiver for the penalty phase is \$126,486.50. I am reducing that amount by \$65,000 to reflect the portion of the materials spent on facts that I considered to be irrelevant.

[22] Finally, the Receiver includes in its cost submissions the time spent by the Receiver on the contempt motion, a total of \$104,153 for all phases of the motion. Mr. Gutierrez submits that including this time in the costs would amount to double recovery as that time has been separately claimed in the receivership process.

[23] I reject that submission for three reasons. First, as noted above, Xela is illiquid and has no source of revenue other than funding provided by the Applicant. Second, to the extent that any amounts are claimed in the receivership that have already been the subject of this cost award, the court can address that overlap to ensure that there is no duplication. Third, McEwen J. awarded the Receiver its costs in a previous (unreported) decision in July 2021, noting that these costs were incidental to a step in the proceeding pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. He stated that depriving the Receiver of those costs “would be unfair to stakeholders and saddle them with costs that ought not to have been incurred”. The same reasoning applies with even greater force to this contempt motion. The Receiver had to incur unnecessary time and expense to enforce compliance with the very order under which it was appointed by this court.

### **Costs Decision**

[24] Taking into account the factors set out in r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, I consider that a fair and reasonable costs award for this motion is **\$563,485** on a full indemnity basis, inclusive of disbursements and taxes, and I exercise my discretion under s. 131 of the *Courts of Justice Act* accordingly.

  
Conway J.

**Date:** November 29, 2022