Court File No. CV-11-9062-00CL

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

B E T W E E N:

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.

# COMPENDIUM OF THE RECEIVER

November 21, 2022

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Lawyers for the Receiver

TO: **THE SERVICE LIST**

**COURT FILE NO. CV-11-00009062-00CL**
**Castillo v. Xela Enterprises Ltd., et al.**

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Court File No. CV-11-9062-00CL

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiffs

and

XELA ENTERPRISE LTD., JUAN GUILLERMO GUTIERREZ, JUAN GUILLERMO GUTIERREZ, TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD. and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Defendants

# NOTICE OF MOTION
**(Security for Costs, returnable November 24, 2022)**

KSV Restructuring Inc. ("**KSV**") in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**"), without security, of all the assets, undertakings, and properties of Xela Enterprises Ltd. ("**Xela**" or the "**Company**"), will make a motion to the Honourable Justice McEwen of the Commercial List on November 24, 2022 at 10:00 a.m. EST, by judicial videoconference via Zoom or at 330 University Avenue, Toronto, Ontario.

**THE MOTION IS FOR:**

(a) An Order requiring Juan Guillermo Gutierrez ("**Mr. Gutierrez**") to pay into Court the sum of $150,000 as security for the costs of his motion to replace KSV as the receiver of Xela (the "**Recusal Motion**");

(b) Costs of this motion for security for costs; and

(c) Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION**

***Basis for Security for Costs***

(a) Mr. Gutierrez is a judgment debtor to the Applicant in respect of an October 2015 judgment in the amount of $4.25 million;

(b) In addition to the judgment, Mr. Gutierrez owes $889,858.21 in costs to the Applicant for a total Judgment Debt of over $5 million plus accumulating interest since 2015 (the "**Judgment Debt**");

(c) Only approximately $1.6 million of the Judgment Debt has been paid, following enforcement proceedings by the Applicant. The majority of the Judgment Debt remains outstanding;

(d) This receivership results from the outstanding Judgment Debt;

(e) The Applicant is funding this receivership;

(f) There is good reason to believe that Mr. Gutierrez's Recusal Motion is frivolous and vexatious;

(g) Mr. Gutierrez has insufficient assets in Ontario to pay the Receiver's costs;

***Background***

(h) On December 30, 2016, the Divisional Court dismissed Mr. Gutierrez's appeal of the Judgment Debt;

(i) Mr. Gutierrez sought a stay of execution of the Judgment Debt pending an adjudication of claims of conspiracy against Ms. Castillo and his cousins, which was dismissed in July 2017;

(j) In January 2019, Ms. Castillo commenced an application to appoint a receiver and manager over Xela;

(k) In June 2019, Mr. Gutierrez commenced a competing application on behalf of Xela for protection under the *Companies' Creditors Arrangement Act* ("**CCAA**");

(l) On July 5, 2019, McEwen J. dismissed Mr. Gutierrez's CCAA application and granted Ms. Castillo's receivership application. KSV was appointed Receiver of Xela (the "**Appointment Order**");

(m) On January 18, 2021, the Receiver brought a motion to compel Mr. Gutierrez to provide passwords to certain devices, obtain investigative powers, and other relief (the "**Investigative Powers Motion**");

(n) On February 9, 2021, the Receiver brought a motion to hold Mr. Gutierrez in contempt of Court for swearing a declaration (the "**Declaration**") in support of a criminal complaint against the Receiver's representatives in Panama (the "**Contempt Motion**");

(o) Later, on February 9, 2021, for a hearing on February 10, 2021, Mr. Gutierrez served a notice of motion (the "**February 9th Notice of Motion**") seeking to replace KSV as the Receiver of Xela. The February 9th Notice of Motion contained various allegations against the Receiver;

(p) On February 10, 2021, McEwen J. ordered Mr. Gutierrez to withdraw the Declaration and to do everything in his power to have the criminal complaint withdrawn;

(q) In opposing the Investigative Powers Motion, Mr. Gutierrez filed evidence and made submissions in which he continued to advance the allegations contained in the February 9th Notice of Motion;

(r) On March 25, 2021, McEwen J. granted the Receiver's Investigative Powers Motion and granted none of the relief sought by Mr. Gutierrez. Subsequently, McEwen J. ordered costs against Mr. Gutierrez;

(s) Mr. Gutierrez sought leave to appeal the March 25, 2021 Order. The Divisional Court dismissed his motion for leave to appeal on July 9, 2021;

(t) Nearly a year later, on March 2, 2022, McEwen J. directed Mr. Gutierrez to comply with His Honour's prior Orders. Mr. Gutierrez did not comply;

(u) On March 25, 2022, Mr. Gutierrez sought to schedule a motion for an injunction of the March 25, 2021 Order. Justice McEwen declined to schedule this motion;

(v) Justice McEwen ordered Mr. Gutierrez to provide the passwords to his devices by March 28, 2022 at 5 pm;

(w) On March 28, 2022, Mr. Gutierrez brought a motion in the Divisional Court to stay the March 25, 2022 Order. No stay was granted;

(x) On March 31, 2022, Mr. Gutierrez brought a motion in the Divisional Court for leave to appeal the March 25, 2022 Order;

(y) On April 29, 2022, Mr. Gutierrez abandoned his motion for leave to appeal;

(z) The Contempt Motion was heard in May and June 2022;

(aa) On June 29, 2022, Conway J. held Mr. Gutierrez in civil contempt of the Appointment Order for swearing the Declaration in support of a criminal complaint against the Receiver's Panamanian counsel;

(bb) Justice Conway found that Mr. Gutierrez knowingly and intentionally interfered with the Receiver;

(cc) On August 30, 2022, on the eve of the penalty hearing in the contempt proceedings, Mr. Gutierrez provided the passwords to his devices;

(dd) On September 12, 2022, Mr. Gutierrez served the notice of motion for his Recusal Motion;

(ee) On September 27, 2022, McEwen J. scheduled the Recusal Motion for January 18, 2023 and this security for costs motion;

(ff) On October 17, 2022, Conway J. sentenced Mr. Gutierrez to 30 days' imprisonment. Her Honour found that Mr. Gutierrez demonstrated an "astounding lack of respect for this court." Her Honour's costs decision is under reserve;

(gg) Mr. Gutierrez appealed Conway J.'s liability and penalty Orders. On October 17, 2022, the Receiver consented to an Order from the Court of Appeal for Ontario to stay Mr. Gutierrez's sentence, pending appeal;

***There is an unpaid outstanding costs award***

(hh) Mr. Gutierrez is a judgment debtor to the Applicant. The Applicant sought and obtained an order appointing the Receiver;

(ii) The costs of the receivership, including various motions and attendances requiring Mr. Gutierrez to comply with orders, have been significant;

(jj) Funding for these proceedings has been provided by the Applicant, pursuant to Receiver Certificates;

(kk) There is presently no source of liquidity in the Company to fund the costs of these proceedings;

(ll) It would be unfair to require the Applicant to fund the Recusal Motion with no assurance or comfort that any costs award arising out of the Recusal Motion would be paid;

***There is good reason to believe the Recusal Motion is frivolous and vexatious***

(mm) A version of the Recusal Motion was first delivered on February 9, 2021. No affidavit was ever affixed to it and its bald allegations;

(nn) The current draft of the Recusal Motion was first served on September 12, 2022;

(oo) No affidavit has yet been delivered to support the Recusal Motion;

(pp) Mr. Gutierrez's notice of motion for the Recusal Motion relies on his contemptuous conduct as grounds for the replacement of KSV as the Receiver. It also includes threats and various unsupported allegations against the Receiver;

(qq) The Recusal Motion seeks to determine issues that have already been decided:

(i) The Recusal Motion advances the conspiracy claims that McEwen J. rejected on July 6, 2017, when His Honour dismissed Mr. Gutierrez's motion for a stay of execution;

(ii) The Recusal Motion seeks to vary the Appointment Order, which was granted when McEwen J. rejected Mr. Gutierrez's CCAA application that relied, in part, on Mr. Gutierrez's ongoing conspiracy claims;

(iii) In opposing the Investigative Powers Motion, Mr. Gutierrez made allegations against the Receiver, many of which are repeated in his present notice of motion on this Recusal Motion;

(iv) In Mr. Gutierrez's costs submissions on the Investigative Powers Motion, he continued to make allegations against the Receiver, which this Court found had already been litigated and dealt with in previous endorsements; and

(v) On March 25, 2022, Mr. Gutierrez delivered a notice of motion, seeking an "injunction" on this Court's past Orders, in which he repeated many of the same allegations against the Receiver, which injunction was not granted;

(rr) The Recusal Motion has no chance of success;

***There is good reason to believe that Mr. Gutierrez has insufficient assets in Ontario to pay the Receiver's costs***

(ss) Mr. Gutierrez is a party to the Judgment Debt, which he has not paid;

(tt) Mr. Gutierrez admits that he has no assets in his name;

(uu) Mr. Gutierrez, personally, owns no real property in Ontario;

(vv) Mr. Gutierrez has no known material assets in Ontario and is a judgment debtor;

***Mr. Gutierrez cannot show that an order for security for costs would be unjust***

(ww) An order for security for costs would not create an injustice to Mr. Gutierrez in the circumstances:

(i) Mr. Gutierrez cannot meet his onus to show that he is impecunious;

(ii) For at least the past two-and-a-half years, Mr. Gutierrez has been represented by two sets of Ontario counsel in contentious and expensive litigation; and

(iii) Mr. Gutierrez' bill of costs filed in the contempt proceeding reflects a payment of approximately $150,000 between April 2022 and September 2022 to contest the Contempt Motion;

(xx) The justice of this case demands that an order for security for costs be made. Mr. Gutierrez, a judgment debtor, has caused the Receiver to incur significant costs

throughout this receivership by pursuing numerous motions and appeals, all while interfering with the Receiver and its efforts to carry out its Court-ordered mandate;

(yy) Rules 56-57 and all the Rules of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194;

(zz) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and

(aaa) Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

(a) Affidavit of Grace Tsakas sworn; and

(b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 15, 2022

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Lawyers for the Moving Party,
the Receiver

TO: **THE SERVICE LIST**

MARGARITA CASTILLO
Plaintiff

-and-

XELA ENTERPRISES LTD. et al.
Defendants

Court File No. CV-11-9062-00CL

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

PROCEEDING COMMENCED AT TORONTO

# NOTICE OF MOTION
**(Security for Costs, returnable November 24, 2022)**

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Lawyers for the Moving Party,
the Receiver

Court File No. CV-11-9062-00CL

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Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

# BILL OF COSTS OF THE RECEIVER
**(Motion for Security for Costs, returnable November 24, 2022)**

| **STATEMENT OF EXPERIENCE**<br>A claim for fees is being made with respect to the following lawyers, law clerks and law students: | | | | |
|---|---|---|---|---|
| **Name of lawyer** | **Years of experience (Year of Call)** | **Partial Indemnity Rate[1]** | **Substantial Indemnity Rate[2]** | **Actual Billable Hourly Rate** |
| Monique J. Jilesen | 22 years (2000) | $591 | $887 | $985 |
| Derek N. Knoke | 4 years (2018) | $312 | $468 | $520 |
| Grace Tsakas, Law Clerk | | $210 | $315 | $350 |
| Adam Davis, Law Student | | $174 | $261 | $290 |

[1] The partial indemnity rate has been set at 60% of actual fees. Per the Court of Appeal in *Inter-Leasing, Inc. v. Ontario (Revenue)*, 2014 ONCA 683, "the cost rates set out in the Information for the Profession set out in the preamble to Rule 57 of the *Rules of Civil Procedure* are now out of date, and that amounts calculated at 55%-60% of a reasonable actual rate might more appropriately reflect partial indemnity, particularly in the context of two sophisticated litigants well aware of the stakes"
[2] The substantial indemnity rate is 1.5 times the partial indemnity rate, per Rule 1.03.

| 01 - Tasks related to preparing Responding Record | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Monique J. Jilesen | 18.0 | $591 | 10,638.00 | $887 | 15,957.00 | $985 | 17,730.00 |
| Derek N. Knoke | 35.0 | $312 | 10,920.00 | $468 | 16,380.00 | $520 | 18,200.00 |
| Grace Tsakas, Law Clerk | 7.0 | $210 | 1,470.00 | $315 | 2,205.00 | $350 | 2,450.00 |
| Adam Davis, Law Student | 30.0 | $174 | 5,040.00 | $261 | 7,560.00 | $290 | 8,400.00 |
| Subtotal | | | **$28,068.00** | | **$42,102.00** | | **$46,780.00** |

| 02 - Tasks related to preparing for Cross-Examination | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Monique J. Jilesen | 17.0 | $591 | 10,047.00 | $887 | 15,070.50 | $985 | 16,745.00 |
| Derek N. Knoke | 17.0 | $312 | 5,304.00 | $468 | 7,956.00 | $520 | 8,840.00 |
| Grace Tsakas, Law Clerk | 3.0 | $210 | 630.00 | $315 | 945.00 | $350 | 1,050.00 |
| Adam Davis, Law Student | 12.0 | $174 | 2,016.00 | $261 | 3,024.00 | $290 | 3,360.00 |
| Subtotal | | | **$17,997.00** | | **$26,995.50** | | **$29,995.00** |

| 03 - Tasks related to attending Cross-Examination | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Monique J. Jilesen | 8.0 | $591 | 4,728.00 | $887 | 7,092.00 | $985 | 7,880.00 |
| Derek N. Knoke | 8.0 | $312 | 2,496.00 | $468 | 3,744.00 | $520 | 4,160.00 |
| Adam Davis, Law Student | 8.0 | $174 | 1,344.00 | $261 | 2,016.00 | $290 | 2,240.00 |
| Subtotal | | | **$8,568.00** | | **$12,852.00** | | **$14,280.00** |

| 04 - Tasks related to preparing for Case-Conference | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Monique J. Jilesen | 3.0 | $591 | 1,773.00 | $887 | 2,659.50 | $985 | 2,955.00 |
| Derek N. Knoke | 5.0 | $312 | 1,560.00 | $468 | 2,340.00 | $520 | 2,600.00 |
| Grace Tsakas, Law Clerk | 1.0 | $210 | 210.00 | $315 | 315.00 | $350 | 350.00 |
| Adam Davis, Law Student | 5.0 | $174 | 840.00 | $261 | 1,260.00 | $290 | 1,400.00 |
| Subtotal | | | **$4,383.00** | | **$6,574.50** | | **$7,305.00** |

| 05 - Tasks related to preparing the Factum | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Monique J. Jilesen | 15.0 | $591 | 8,865.00 | $887 | 13,297.50 | $985 | 14,775.00 |
| Derek N. Knoke | 30.0 | $312 | 9,360.00 | $468 | 14,040.00 | $520 | 15,600.00 |
| Grace Tsakas, Law Clerk | 7.0 | $210 | 1,470.00 | $315 | 2,205.00 | $350 | 2,450.00 |
| Adam Davis, Law Student | 30.0 | $174 | 5,040.00 | $261 | 7,560.00 | $290 | 8,400.00 |
| Subtotal | | | **$24,735.00** | | **$37,102.50** | | **$41,225.00** |

| 06 - Tasks related to preparing for and attending Hearing | | | | |
|---|---|---|---|---|
| | Hours | Partial Indemnity | Substantial Indemnity | Actual Billable Rate |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Monique J. Jilesen | 10.0 | $591 | 5,910.00 | $887 | 8,865.00 | $985 | 9,850.00 |
| Derek N. Knoke | 15.0 | $312 | 4,680.00 | $468 | 7,020.00 | $520 | 7,800.00 |
| Adam Davis, Law Student | 15.0 | $174 | 2,520.00 | $261 | 3,780.00 | $290 | 4,200.00 |
| Subtotal | | | **$13,110.00** | | **$19,665.00** | | **$21,850.00** |

| **07 - Tasks related to all sections noted above completed by the Receiver** | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| Robert Kofman | 40.0 | $459 | 18,360.00 | $689 | 27,560.00 | $775 | 31,000.00 |
| Noah Goldstein | 30.0 | $397 | 11,910.00 | $595 | 17,850.00 | $675 | 20,250.00 |
| Other | 4.0 | $240 | 1,848.00 | $360 | 1,440.00 | $160 | 640.00 |
| Subtotal | | | **$32,118.00** | | **$46,850.00** | | **$51,890.00** |

| **SUMMARY OF FEES** | | | | |
|---|---|---|---|---|
| | | Partial Indemnity Rate | Substantial Indemnity Rate | Actual Billable Rate |
| 1 | Work on Responding Record | $28,068.00 | $42,102.00 | $46,780.00 |
| 2 | Preparing for Cross-Examination | $17,997.00 | $26,995.50 | $29,995.00 |
| 3 | Attending Cross-Examination | $8,568.00 | $12,852.00 | $14,280.00 |
| 4 | Preparing for Case Conference | $4,383.00 | $6,574.50 | $7,305.00 |
| 5 | Working on Factum | $24,735.00 | $37,102.50 | $41,225.00 |
| 6 | Preparing for and attending Hearing | $13,110.00 | $19,665.00 | $21,850.00 |
| 7 | Receiver's Fees | $32,118.00 | $46,850.00 | $51,890.00 |
| | **TOTAL FEES** | **$128,979.00** | **$192,141.50** | **$213,325.00** |

| **SUMMARY OF DISBURSEMENTS** | |
|---|---|
| Courier Charges | |
| Online Searches Fees | |
| Court Filing Fees (Non-Taxable) | |
| Transcript Fees | |
| eDiscovery Expenses | |
| **Total ESTIMATED Disbursements** | **5,000.00** |
| *HST Except HST at 13% | 650.00 |
| **Total Disbursements and HST** | **5,650.00** |

| **TOTAL FEES AND DISBURSEMENTS CLAIMED** | | | |
|---|---|---|---|
| | Partial Indemnity Rate | Substantial Indemnity Rate | Actual Rate |
| Fees | $128,979.00 | $192,141.50 | $213,325.00 |
| HST on Fees at 13% | $16,767.27 | $24,978.40 | $27,732.25 |
| Disbursements | 5,000.00 | 5,000.00 | 5,000.00 |
| HST on Disbursements at 13% | 650.00 | 650.00 | 650.00 |
| **TOTAL** | **$151,396.27** | **$222,769.90** | **$246,707.25** |

November 15, 2022

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Lawyers for the Moving Party, the Receiver

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Respondents

Court File No. CV-11-9062-00CL

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PROCEEDING COMMENCED AT TORONTO

# BILL OF COSTS OF THE RECEIVER

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Lawyers for the Moving Party, the Receiver

**CITATION:** Margarita Castillo v. Xela Enterprises Ltd. et al, 2015 ONSC 6671
**COURT FILE NO.:** CV-11-9062-00CL
**DATE:** 20151028

**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 JUAN ARTURO GUTIERREZ**

Respondents

**BEFORE:** Newbould J.

**COUNSEL:** *Jeffery S. Leon and Jason W.J. Woycheshyn*, for the Applicant

*Joseph Groia, Kevin Richard and Martin Mendelzon*, for the Respondents

**HEARD:** June 4 and 5, 2015

[1] The applicant moves for an order requiring the respondents[1] to buy her shares in Tropic International Limited ("Tropic"). The respondents take the position that the issues raised by the

[1] The order sought is against all respondents other than the respondent 696096 Alberta Ltd., which is Margarita's company to hold her preference shares in Xela.

applicant should proceed to trial and that in any event there is no basis for the relief sought by the applicant.

[2] For the reasons that follow, I hold that the issues can and should be determined without the necessity of a trial and that the applicant is entitled to have her shares in Tropic bought out at a price of $4.25 million.

[3] In this oppression application, Margarita Castillo ("Margarita") alleges that her father Juan Arturo Gutiérrez ("Arturo") and her brother Juan Guillermo Gutiérrez ("Juan") have conducted the business and affairs of certain family companies in a manner that has been oppressive. The close family ties that once existed are no more. Margarita alleges that for several years there has been a complete breakdown in the relationship among shareholders and a state of animosity exists that precludes all reasonable hope of reconciliation. Accordingly, Margarita seeks to have the respondents buy her shares of Tropic at fair value.

[4] Arturo was one of three children of Juan Bautista Gutiérrez who emigrated from Spain to Guatemala in 1911 and created a flour milling and animal feed business. By 1965, Arturo was running the family business. Arturo and his two siblings incorporated Avicola Villalobos for the purpose of engaging in poultry production. Avicola expanded to become a fully-integrated set of companies engaged in the production of poultry. In addition to its poultry business, the Gutiérrez family also developed a highly successful chain of chicken restaurants. Ownership of the Avicola Group was divided equally among Arturo and his brother and sister.

[5] In 1974, after his brother and his sister's husband died, their roles in the family business were assumed by their respective children (the Bosch and Gutiérrez Mayorga families, also known as the "Cousins"). Arturo says that from the time one of the Bosch sons, Juan Bosch, became involved in the business, tensions grew in the family and in the operation of the business. Because of that and the societal strife and civil war, Arturo decided to leave Guatemala. After Arturo emigrated from Guatemala, the Cousins were left with two-thirds ownership of the Avicola Group and Arturo retained his one-third stake in the business. Arturo has been in

litigation in various jurisdictions for many years against the Cousins whom he alleges have defrauded him out of his interest in the Avicola Group.

[6] Arturo emigrated to Canada in 1984. His son Juan and his daughter Margarita and her husband Ricardo Castillo emigrated to Canada at about the same time.

**Xela Enterprises Ltd.**

[7] Arturo formed Xela Enterprises Ltd. as the corporation holding his business interests. It is an Ontario corporation. Initially, he gifted to each of Juan and Margarita 75 Class B non-voting shares of Xela, while he retained control. He also hired his son, Juan, and Margarita's husband Ricardo to work for Xela. In 1996 Arturo effected an estate freeze in Xela under which Margarita and Juan exchanged their common stock in Xela for preferred shares with a fixed value to each of approximately $14 million that would be redeemable at Arturo's death. The common stock was put into a Gutiérrez family trust in which Arturo retains voting control and whose beneficiaries are his grandchildren.

**Tropic International Limited**

[8] Ricardo and Charles Graham, a business colleague of Ricardo's, founded Tropic in 1989. Tropic's business was initially focused on the sale and distribution of ginger and cassava root. Ricardo and Mr. Graham were the founding shareholders of Tropic and its officers and directors. Margarita was also a founding officer and director. Arturo and Juan were not shareholders, officers or directors, and had no role in operating Tropic.

[9] As part of Tropic's initial business plan, Xela's indirect subsidiary Mayacrops S.A. grew the ginger and cassava root to be sold and distributed by Tropic. However, Mayacrops could not successfully grow cassava, and absorbed its own losses. Tropic did not seek alternate suppliers, and from approximately 1990 to 1994 the company was inactive. Ricardo acquired Mr. Graham's Tropic shares, leaving Ricardo as the sole shareholder of Tropic during this period.

millions. In the end at the urging of Arturo and Juan, Ricardo's shares of Tropic were transferred to his wife Margarita for $1.00 on April 2, 2008. On the same day Ricardo resigned from the board of Xela and was replaced by Margarita.

[14] While there are statements in the material filed on behalf of the respondents that Margarita held her shares in Tropic for the benefit of Xela, Arturo admitted on his cross-examination that the shares legally belong to Margarita and that she is entitled to whatever benefit flows from them. Juan admitted the same on his cross-examination.

[15] While Margarita was a shareholder and director of Tropic, she was given financial information from the CFO of Xela that had been prepared by the comptroller of Xela that her shares of Tropic were worth US$20,111,500. This information was required by Margarita who had been asked to sign a personal guarantee of Tropic's line of credit with its banker. Juan's shares in Tropic were valued as well at this figure of US$20,111,500.

[16] Despite Tropic's separate legal identity, the respondents have historically treated Tropic and Fresh Quest like any other Xela subsidiary. As CEO, the day-to-day management of both Tropic and Fresh Quest are controlled by Juan. Before 2012, Fresh Quest matters were only addressed at Xela board meetings. Tropic never held its own board meetings until after Margarita was removed as a director and officer. Margarita started attending Xela board meetings in 2007 and acquiesced in the practice of determining Fresh Quest matters at Xela board meetings.

**Removal of Margarita from the Xela and Tropic boards**

[17] The Xela companies have been embroiled in a bitter dispute with the Cousins regarding Arturo's one third interest in the Avicola Group. The interest in the Avicola Group is held by a Xela subsidiary named Lisa S.A. A judgment was obtained against the Cousins in Bermuda in which it was found that the Cousins had conspired to defraud Lisa through the misappropriation of corporate profits. The Cousins have responded with a series of lawsuits in Guatemala seeking to expropriate Lisa's interest in the Avicola Group.

[18] Arturo and Juan accuse Margarita of siding with the Cousins and of scuppering settlement discussions in 2009. Much of their accusations are based on speculation. Margarita denies the accusations. Be that as it may, it is clear that the accusations against Margarita led to her removal from the boards of both Xela and Tropic.

[19] The friction between Margarita, Juan and Arturo escalated in April 2010, when Juan and Arturo, through their accounting advisors, proposed that Tropic should be sold to Xela at a total valuation of $8 million. Margarita's shares were accordingly valued at $3.52 million. This valuation shocked Margarita, after being told that her Tropic shares were valued at approximately US$20 million.

[20] Margarita received no explanation for this $8 million valuation of Tropic. On April 7, 2010, Arturo phoned Margarita to try to get her to agree to the transaction. Arturo refused to give Margarita any information on the valuation of Tropic or provide her with any of Tropic's or Fresh Quest's financial statements. She says that he threatened that if she did not agree to sell her shares, her monthly draws from Xela would stop.[2] When she refused, Arturo demanded she resign as a director of Xela by April 15, 2010.

[21] On April 28, 2010, Arturo asked Margarita why she had not resigned from Xela's board. When Margarita told him that she had no desire to resign, her father demanded that she not attend the Xela board meeting scheduled for the next day, April 29, 2010. Margarita emailed the Xela Board members to explain that she would not be attending the April 29th meeting as she had not received any prior notice of the board meeting or any of the standard materials provided to board members.

[2] Margarita states that her father took a portion of his wealth and gifted it to her and her brothers Luis and Juan. They were then required to loan this money back to the corporate predecessor of Xela. For the following 25 years, until May 2010, she received monthly "draws" which were characterized as shareholder loan repayments. In April, 2010 the Xela tax advisor was told that the shareholder advances and paid-up capital of the Xela group at the individual shareholder level had been exhausted, and he recommended an alternative. Juan and Arturo say the draws were simply gifts.

**Events post-application**

[38] By letter dated April 1, 2011, the respondents' lawyer Kevin Sherkin advised Margarita that the Fresh Quest line of credit had been terminated by the International Finance Bank, alleging that the termination was the result of Margarita telling the bank of her litigation. Margarita denies telling the bank that. The letter stated that Margarita was now required within seven business days to personally advance 44% of the $7 million, being the amount of the line of credit before it was said to have been terminated by the bank.

[39] The letter from Mr. Sherkin also stated that because of the position of Margarita, there would be a restatement to the financial statements of Tropic:

> In the event that the funds are not confirmed to be committed and delivered within seven business days, you will leave us with no alternative but to consider a new strategy for the company.
>
> Also be advised that given the nature of how the Tropic Group of Companies was treated by Xela, and given your client's position, the accounting for the group is presently being restated to reflect all of the proper expenses on Tropic's accounts and books in order to give the true picture of it's [sic] profitability. This is going to result in a sizeable deficit for the group.

[40] On April 12, 2011, the same day the statement of claim was issued, a Xela wholly-owned subsidiary, Xela International Inc. posted two journal entries effective May 31, 2010 that caused the shareholders' equity of Tropic to be decreased from approximately $580,000 to approximately a negative $3.5 million.

[41] On April 8, 2011, Margarita's lawyers requested that she be provided with information about the "new strategy for the company" referred to in the April 1 letter.

[42] A reply dated April 15, 2011 from the respondents' lawyer ignored the request. It stated that Margarita had destroyed a longstanding relationship with the bank. It enclosed a statement of claim issued on April 12, 2011 by Xela, Arturo, Juan and other corporations against

Margarita, her husband Ricardo and 10 other defendants associated with the Cousins claiming damages of $400 million. It also claimed a further $4,350,000 against Margarita and Ricardo for breach of their fiduciary duties as directors of Xela which had caused damage to Xela. No allegations were pleaded that Margarita or Ricardo breached any duties owing to Tropic or Fresh Quest and those companies were not parties to the action.

[43] The credit facility for Fresh Quest with the International Finance Bank was still in place when Mr. Korol, the CFO of Xela, was cross-examined on July 12, 2012. There is no evidence that it has since been terminated by the bank.

**Issues**

1. **Should Tropic and Xela issues be tried together?**

[44] In my decision of July 3, 2014 I did not accede to a request of the respondents that the application of Margarita regarding Tropic should go to trial to be dealt together with her application regarding Xela. Rather, because it was not clear at that stage whether the Tropic and Xela issues in the application could or could not be severed, I permitted the applicant to proceed with her application relating to Tropic and permitted the respondents to contend on the hearing of the application that the Tropic and Xela issues could not be severed and should proceed together to trial.

[45] Having heard the evidence, I am satisfied that the applicant's claim that she is entitled to an order requiring her Tropic shares to be purchased can be dealt with separately from her claim for relief relating to her interest in Xela. There are a number of reasons for this.

[46] The allegations made by the respondents against Margarita regarding her alleged damage caused to Xela include no allegations that her alleged activity caused any damage to Tropic or to Fresh Quest. The statement of claim against her and the Cousins for in excess of $400,000 million includes no such allegations and Tropic and Fresh Quest are not referred to. The

evidence of the alleged conduct referred to on behalf of the respondents on the hearing of this application, apart from being nearly entirely speculation and innuendo based on no cogent evidence, all relate to the claims that Margarita has been assisting the Cousins who have deprived Arturo of his one-third interest in the Avicola Group, which is entirely separate from Tropic and Fresh Quest

[47] On his cross-examination, Arturo stated that what Margarita did with the Cousins was not relevant to her claim with respect to her shares in Tropic as the two things were separate matters. On his cross-examination, Juan stated that information regarding Tropic was irrelevant to what the Cousins were interested in, being Xela information. I accept that the two issues are separate. What Margarita is alleged to have done with the Cousins to harm Arturo's interest in the Avicola Group cannot affect her rights as a shareholder of Tropic.

[48] I further find that it is possible on the evidence to determine if there has been conduct on the part of the respondents towards Margarita that gives rise to a right of relief and if so what that relief should be.

**2. Has there been oppressive conduct towards Margarita regarding her position in Tropic?**

[49] The proper approach in dealing with a claim for oppression is first to look to the concept of reasonable expectations and, if a breach of a reasonable expectation is established, to then consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 248 of the OBCA. See *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 at paras. 56 and 68.

[50] Relationships in closely held family businesses and the practices carried out can be of importance in considering the reasonable expectations of a family member who is a complainant and cause a court to look at more than simply legal rights. In *BCE*, the Court stated:

# FILE/DIRECTION/ORDER

BEFORE JUDGE McEwen ACTION # CV-11-9062-00CL

Castillo
Plaintiff(s)

-v-

Xela Enterprises Ltd. et al
Defendant(s)

CASE MANAGEMENT: YES [ ] NO [✓]

COUNSEL: Leon/Woyeleshyn - Applicant PHONE NO. _____

Richard/Mendelzon - Respondents PHONE NO. _____

PHONE NO. _____

[✓] ORDER [ ] DIRECTION FOR REGISTRAR

[ ] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT _____
[ ] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT _____

The moving respondents (Xela, Juan Guillermo and Artino) bring this motion seeking an order to stay the execution of the Divisional Court Order dated Dec 30/16 which affirmed the decision of Justice Newbould dated Oct 28/15.

6 July 17
DATE

McEwen
JUDGE'S SIGNATURE

Tab 04 - Endorsement of McEwen J. re Stay of Execution Denied, July 6, 2017 (Orders Brief Tab 4)

Court File Number: _____

**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

In his decision, Justice Newbould held that the Applicant had been oppressed[1] and ordered that the moving respondents purchase her 100 Common Shares in Tropic for the amount of $4,250,000.00

The moving respondents and others have commenced another action against the Applicant and others (CV-11-9177-00CL) claiming $400 million from all the defendants and specific relief against the Applicant. That action is currently bogged down in jurisdictional disputes.

It also bears noting that Newbould J. severed the Tropic claim from the Applicants claim against Xela and decided the issue (which was upheld).

The moving respondents now submit that the execution of the

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1. within the meaning of s. 248 of the OBCA.

Court File Number: _____

**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

Divisional Court order be stayed until there has been a determination of the Applicant's liability in the aforementioned action ("the Action").

I disagree and for the reasons below dismiss the motion.

Insofar as the governing law is concerned, the parties agree that the test for exercising discretion to award a stay under s. 106 of the CTA is set out by the Div. Ct in 1247902 Ont Inc v. Carlisle 2003 Carswell Ont 6433. In Carlisle, the court generally held that the bar for a stay is a high one and ought to be used only in very rare circumstances. It added that it should only be granted where the court seeks to avoid an oppressive or vexatious result, but also



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**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

in Circumstances where it would not cause an injustice to the plaintiff.

The moving respondents submit that more recent caselaw of this court have applied a "broader test" that simply looks at the equities. Having reviewed the caselaw I disagree and even if I am wrong, in my view, the equities favour the Applicant. In any event, as I have noted, Carlisle is the binding authority.

The main thrusts of the moving respondents' submissions are that the Applicant is one of the key defs in the Action; this proceeding and the Action are intricately linked; and that the Applicant was involved in a conspiracy against the moving respondents that involved her, amongst other things, stealing corporate



Judges Initials TM

Court File Number: _____

**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

documents and now facing criminal charges. Accordingly, they submit that it would be inconsistent with the interests of justice to allow the Applicant to collect the money awarded by Justice Newbould at this time.

While the moving ~~&~~ respondents have made serious allegations against the Applicant I do not believe that I should exercise my discretion in their favour and stay the execution of the Div. Ct order for the following reasons:

- Justice Newbould and, later, the Div. Ct allowed the Applicants claim regarding Tropic to proceed separately for the reasons set out. Chief amongst those reasons is the fact that the Action does not include the Tropic

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**Superior Court of Justice**
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# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

issues.

- While these reasons are not binding upon me, they are highly persuasive. The reasons set out a number of reasons as to why the Tropic issue had little to do with the Xela issue and the Action. In this regard Justice Newbould characterized the moving respondents' accusations of a conspiracy ~~was~~ "was speculative at best". Little has changed since then.
- The moving respondents could have brought a motion to join the two proceedings. They did threaten such a motion, but it was later abandoned.
- Justice Newbould's decision set out numerous examples of aggressive and inappropriate conduct by the moving respondents against the Applicant.
- A stay of the execution could result in real prejudice to the

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Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

Applicant as the moving respondents could take further steps to diminish her shareholding in Tropic. As set out by Justice Newbould the moving respondents past actions made it clear that the Applicant cannot expect to be properly treated.

- It also cannot be said that the Applicant may have received money that someday may be shown to be inappropriate. As a result of Justice Newbould's order the moving respondents will pay the money in exchange for the Applicants Tropic shares.
- It also bears noting that much of Travis's supporting affidavit contains unconfirmed hearsay and investigations with respect to critical issues concerning the alleged conspiracy



Judges Initials DM

Court File Number: _____

**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

This of course is inadmissable.
With respect to the allegation of stolen documents, one must question how this can be said to be an accurate assertion against a Director and shareholder. But in any event, the moving respondents have done little to show what it is that the Applicant should not have disclosed in those documents.

In all of the above circumstances I find that the moving respondents have failed to satisfy the test in Carlisle or even establish that the equities favour a stay. Indeed the moving respondents have continued to take steps prejudicial to the Applicant when Proper sold Fresh Quest in Oct/15 in/around the time Justice Newbould released his



Judges Initials TM

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Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

decision.

Overall, given Justice Newbould's clear findings of oppression on the specific Trapp claim I cannot conclude that it would be oppressive or vexatious, or an abuse of process to enforce the settlement now or as voted, that the equities favour the moving respondents. In fact, based on the above, given the actions of the moving respondents and the glacial pace of the Action any further delay would likely cause an injustice to the Applicant.

Last, I should reiterate that the claims of wrongdoing against the Applicant were tried before Justice Newbould. The later criminal complaint, initiated by Don Juan, is also essentially based on information that



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**Judges Endorsment Continued**

was before Justice Newbould as well.

The motion is dismissed. The Applicant shall have her costs on a partial indemnity basis in the amount of $15,000.00 for fees plus HST and disbursements of $391.29.

At the hearing the Applicant sought an order to compel the respondents to attend at an examination in aid of execution. Since no motion was brought by the Applicant, I decline this relief sought.

McEwen



Judges Initials _____

Court File No.

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF XELA ENTERPRISES LTD.**

# AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ

(Sworn June 17, 2019)

I, Juan Guillermo Gutierrez, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the president of Xela Enterprises Ltd. ("**Xela**" or the "**Company**"), a role which I have held since August 10, 2000. This role has made me familiar with Xela's business affairs, books and records, relationships with its subsidiaries, ongoing litigation, and its current financial situation. I therefore have personal knowledge of the matters contained in this affidavit, except for those matters about which I have information and belief. In all such cases, I have stated the source of my information and do verily believe it to be true.

## I. Overview

2. I swear this affidavit in support of Xela's application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), including the granting of a stay of proceedings and approval of debtor-in-possession ("**DIP**") financing by this Court to facilitate the implementation of a plan of compromise or arrangement ("**CCAA Plan**") for the benefit of Xela's stakeholders. Xela also seeks this Court's appointment of RSM Canada Limited ("**RSM**") as Monitor.

3. Xela is indirectly involved in various litigation in Florida (with related proceedings in Panama) and Guatemala. This litigation stems primarily from the maltreatment of Xela's subsidiary, Lisa S.A. ("**Lisa**"), by my cousins ("**The Cousins**"), who are majority shareholders

of a group of vertically-integrated Guatemalan poultry companies in which Lisa holds a 33.33% interest. This group of companies is referred to collectively as "**Avicola**." Lisa's interest in Avicola is potentially worth hundreds of millions of dollars.

4. The Cousins have spent years attempting to undermine Lisa's shareholder rights and exclude Lisa as an Avicola shareholder. Moreover, since 1998, The Cousins have withheld dividends from Lisa, the total value of which I estimate to be in excess of US $360 million. This has harmed Xela's indirect investment in Avicola. The ongoing litigation is aimed at restoring Lisa's shareholder rights and recouping the withheld dividends.

5. Meanwhile, Xela faces a liquidity crisis. It is indebted to numerous creditors and has no ability to generate revenue at this time. Most of its subsidiaries are inactive and its previous access to liquidity in the form of unsecured loans is no longer available. To make matters worse, Xela is facing specific action from a particular creditor: Margarita Castillo, my sister. Xela is a judgment debtor to Ms. Castillo, who is owed approximately $3.5 million in respect of her judgment. She has taken various steps to enforce this judgment against Xela, including applying for an equitable receiver. Xela is concerned that, through any such receivership, Ms. Castillo will seek to have Xela's valuable indirect interest in Avicola sold to satisfy her judgment in a fire sale.

6. But, Ms. Castillo is not Xela's only creditor, and she is not Xela's most significant creditor. While Ms. Castillo is owed approximately $3.5 million, Xela owes in excess of $70 million to other creditors. The Avicola shares and related litigation represent the only potential source of recovery for Xela's other creditors. The sale of these shares as a result of Ms. Castillo's receivership would be catastrophic. I believe the shares would be sold at less than their true value, because there are likely to be few buyers for what amounts to a minority stake in a Guatemalan chicken business that has been undermined and embroiled in litigation for years. The only realistic buyers are The Cousins, who are responsible for this dispute. Such a sale would force ongoing litigation to an end, severely limit recoveries for other creditors, and remove all future value from Xela.

7. By contrast, if Xela is able to continue its involvement in pursuing the restoration of Lisa's shareholder rights and payment of the approximately US $360 million in dividends that

***(e) The Monitor***

113. RSM has consented to act as the Court-appointed Monitor of Xela, subject to Court approval. RSM is a trustee within the meaning of Section 2 of the *Bankruptcy and Insolvency Act*, as amended, and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.

114. RSM has been working with Xela and its advisors in the lead-up to these proceedings and has familiarity with the Company's business. RSM is experienced with this type of proceeding and is well-suited to the role of Court-appointed Monitor in these proceedings.

115. RSM, as proposed Monitor, has advised me that it is supportive of the relief being sought in favour of Xela, as well as the existence and amounts of the DIP Lender's Charge, the Administration Charge, and the Directors' and Officers' Charge.

**XII. Foreign Representative**

116. Given that Xela has an interest in litigation in the United States, Panama, and Guatemala, the draft Initial Order contemplates that Xela be given authority to apply as a foreign representative for recognition of any orders of this Court, as well as for any ancillary relief flowing out of the recognition of this Court's orders.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 17 day of June, 2019.

Commissioner for Taking Affidavits

Stefan M. Case

JUAN GUILLERMO GUTIERREZ

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF XELA ENTERPRISES LTD.

Court File No.

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
(Commercial List)

Proceeding commenced at Toronto

**AFFIDAVIT OF JUAN GUILLERMO GUTIERREZ**
**(Sworn June 17, 2019)**

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Lawyers for Xela Enterprises Ltd.

Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

# NOTICE OF CROSS-MOTION

The Respondent Juan Guillermo Gutierrez ("**Mr. Gutierrez**"), will make a Motion to the Honourable Justice McEwen presiding over the Commercial List on _____ at 10:00 a.m., or as soon after that time as the Motion can be heard.

**PROPOSED METHOD OF HEARING**: The Motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[ X ] By video conference.

at the following location:

330 University Avenue, Toronto, Ontario

**THE MOTION IS FOR:**

a) An Order varying the Order dated July 3, 2019 **(the "Appointment Order")** substituting KSV Restructuring Inc. ("**KSV**") as receiver, with a Receiver to be determined;

b) an Order directing KSV in its capacity as court-appointed receiver (the "**Receiver**") of the assets, undertakings and properties of Xela Enterprises Inc. (the "**Company**") to return, or direct its agents to return, to Arturo's Technical Services **("ATS")** the hard-drive images (*i.e.*, copies) of the Xela servers previous provided to KSV's agents, and ordering that no person other than ATS may access the data thereon, until further Order after the conclusion of BDT's Motion for Full or Partial Discharge of the Receiver **(the "BDT Motion")**;

c) an Order that no person, including without limitation, the Receiver and/or its agents, shall access the data contained on hard-drive images of Mr. Gutierrez's personal electronic devices until further Order after the conclusion of the BDT Motion;

d) an Order directing Duff & Phelps **("D&P")** to provide Mr. Gutierrez with copies of the hard-drive images of his personal electronic devices;

e) an Order suspending the deadlines set out in the Court's Order dated October 27, 2020, until further Order after the conclusion of the BDT Motion;

f) an Order compelling the Receiver to substitute D&P with a new IT consultant, to be named on or before the return of this Motion;

g) an Order compelling KSV to disclose to Mr. Gutierrez: (a) particulars in respect of the funds received for the conduct of this receivership, including sources, dates and amounts; (b) copies of all communications between the KSV and/or its counsel, on the one hand, and the "Cousins" and/or their counsel, on the other hand; and

h) such further and other Relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

i) KSV's conduct in the receivership has been such that it has become, as a practical matter, impossible under KSV's authority to achieve the objective of the receivership, which is to satisfy the judgment of Margarita Castillo **(the "Castillo Judgment")**;

j) KSV's conduct throughout the course of the receivership has been antagonistic and hostile toward Mr. Gutierrez;

k) Contrary to what KSV has both asserted and implied – Mr. Gutierrez has fully cooperated with the Receiver;

l) The only reasonable source of monies to satisfy the Castillo Judgment is litigation in Panama **(the "Panama Litigation")** to collect tens of millions of U.S. dollars in unpaid dividends owed to LISA, S.A., a Panama corporation and an indirect subsidiary of Xela **("LISA")**, by Villamorey, S.A., a Panama corporation **("Villamorey"),** in which LISA holds a 1/3 stake;

m) The Panama Litigation is being prosecuted by BDT Investments Inc., a Barbados corporation **("BDT"),** which owns the rights to collect LISA's unpaid dividends by virtue of a settlement agreement that resolves substantial unpaid debt previously owed by LISA to BDT, dating to 2005;

n) The Panama Litigation includes an order requiring Villamorey to pay all of LISA's unpaid dividends, regardless of where in the world they may be held, and that said order is full and final, and in its collection phase;

o) The Panama Litigation includes a separate action by LISA for damages against Villamorey, including damages stemming from non-payment of dividends, and a default judgment has been entered in LISA's favor in those proceedings;

p) Villamorey's corporate agent in Panama has admitted to Panamanian prosecutors that Villamorey maintains its official books and records in Guatemala, not in Panama as required by Panama law;

q) Villamorey and its majority shareholders are under criminal investigation in Panama in connection with Villamorey's non-payment of dividends owed to LISA and their failure to maintain accurate financial records with its corporate agent in Panama;

r) In the 18 months since its appointment, the Receiver has taken no meaningful steps to pursue the Panama Litigation, or to secure a commitment from BDT regarding the proceeds of the Panama Litigation;

s) LISA secured a loan commitment in December 2019 sufficient to satisfy the Castillo Judgement in its entirety, along with all receivership expenses;

t) LISA informed the Receiver in December 2019 about the loan commitment, and requested a payout amount from the Receiver;

u) Upon learning of the LISA loan commitment that would have resulted in a discharge of the receivership, the Receiver improperly inserted itself into the loan transaction by attempting to reconstitute LISA's board of directors in Panama without taking any steps to cause the Order dated July 3, 2019 **(the "Appointment Order")** to be recognized in Panama;

v) the Receiver retained counsel in Panama, without seeking any recognition orders, and instructed it to file documents with the Panama Public Registry to the effect that LISA's board of directors had been properly reconstituted in accordance with Panama law, which was false and misleading;

w) the Receiver instructed its counsel in Panama to file documents with the Panama Public Registry without first giving its agents a proper power of attorney signed by a person duly authorized and recognized by the Panama courts;

x) Conduct by the Receiver's agents in Panama has been reported to the criminal authorities in Panama by LISA;

y) the Receiver has demanded that LISA's president withdraw LISA's criminal complaint against KSV's agents in Panama, which itself calls for LISA to commit a criminal act in Panama in that LISA is under a legal duty to report criminal activity that bears on the administration of governmental matters in Panama;

z) The conduct of the Receiver's agents in Panama resulted in a refusal by the Panama Public Registry to certify that LISA's board of directors had been reconstituted;

aa) When the Receiver learned that its agents in Panama had not succeeded in taking control of LISA's board of directors, the Receiver attempted to secure the same outcome by conditioning meetings with Mr. Gutierrez – which Mr. Gutierrez had been requesting – upon LISA's voluntary accession to the Receiver's demands, despite the fact that Mr. Gutierrez was divested of authority to act on Xela's behalf by virtue of the receivership;

bb) After failing to reconstitute LISA's board, the Receiver brought a motion for contempt against Mr. Gutierrez for ostensible failure to cooperate with the Receiver, erroneously implying that the Receiver's conduct had been proper and/or that Mr. Gutierrez had improperly instructed LISA not to accede to the Receiver's demands regarding the LISA board;

cc) The so-called "reviewable transactions" under investigation by the Receiver for the past 18 months have yielding nothing of value and have little promise of leading to collection of any funds that could satisfy the Castillo Judgment, yet those investigations have generated legal and other professional fees of approximately $1 million, which presumably will be charged to Xela;

dd) None of the Receiver's reports to this Court contain any mention of the [status of?] Panama Litigation;

ee) the Receiver's reports to this Court contain numerous inaccuracies and are incomplete, and the Receiver has failed to correct its reports after being informed of their flaws via sworn affidavits;

ff) the Receiver's investigative strategy in the receivership is consistent with the strategy of the majority shareholders of Villamorey **(the "Cousins")** to deplete LISA's resources in order to avoid ever paying the dividends rightfully owed to LISA;

gg) the Receiver has taken no interest in the loan transaction given to Ms. Castillo by a Guatemala Bank friendly to the Cousins **(the "GT Loan")**, which appears to have been secured by LISA unpaid dividends and repaid by foreclosure of the collateral rather than repayment by Ms. Castillo, such that, if true, the Castillo Judgment has long since been satisfied;

hh) the Receiver has never requested a copy of the GT Loan documents from Ms. Castillo, despite repeated requests by Mr. Gutierrez, nor has it mentioned the GT Loan in its reports to this Court;

ii) The Receiver has taken no steps to collect against a promissory note signed by Ms. Castillo's husband, Roberto Castillo, [who is an Ontario resident,?] in favor of Xela, nor has it mentioned said promissory note in its reports to this Court;

jj) The Receiver has taken no steps to pursue the pending litigation by Xela in Toronto, alleging damages caused by Ms. Castillo, who is an Ontario resident, in an amount that would more than offset the Castillo Judgment, nor has it mentioned said pending litigation in its reports to this Court;

kk) the Receiver's investigation into the so-called "reviewable transactions" includes recent discovery requests targeting computer servers previously owned by Xela, currently maintained by Arturos Technical Services **("ATS")**, which contain emails and other sensitive data that would be useful to the Cousins in their improper efforts to avoid payment of dividends owed to LISA, both in Panama and in Guatemala;

ll) the Receiver's investigation into the so-called "reviewable transactions" also includes recent discovery requests to review Mr. Gutierrez's personal electronic devices for potential

documents belonging to Xela – to which Mr. Gutierrez consented in an effort to cooperate with the Receiver – but which necessarily implicates potential exposure of personal, privileged and/or non-Xela documents to which the Receiver is not entitled, and which are sensitive and potentially useful to the Cousins;

mm) the Receiver engaged Duff & Phelps ("D&P") to copy (*i.e.*, "image") and to supervise the review of Mr. Gutierrez's personal devices, as well as the Xela servers now owned by ATS, without disclosing that the work would actually be performed by Kroll, a subsidiary of D&P;

nn) A conflict of interest exists in that Kroll has a long history of working for the Cousins, including conducting investigative surveillance of Mr. Gutierrez and his family, including his children;

oo) the Receiver failed to disclose the relationship between D&P and Kroll;

pp) All data on Xela's computer servers was previously stolen by a former Xela employee and provided to the Cousins, who improperly used some of the stolen documents to attempt to exclude LISA from Villamorey and from the related poultry group in Guatemala in which LISA also holds a 1/3 stake **(the "Avicolas")**;

qq) Prior to the discovery of D&P's relationship with Kroll, ATS provided Xela's servers to Kroll for imaging without any security measures that would prevent Kroll from reviewing or copying the data, despite the fact that neither Kroll nor D&P nor any other person is entitled to access the data at this stage;

rr) Mr. Gutierrez provided images of his personal electronic devices to Kroll on a locked hard drive to which Kroll does not have the passcode;

ss) Mr. Gutierrez has requested duplicates of the images of his personal devices from the Receiver in order to conduct his preliminary review pursuant to the Order dated October 27, 2020 without exposing the data to Kroll, which is not entitled to review the data at this stage;

tt) The Receiver has refused Mr. Gutierrez's request for duplicates of the images of his own personal devices;

uu) Aside from an emergency trip to Guatemala beginning on October 26, 2020 – forced by unexpected cancer surgery and resulting complications with his mother-in-law, who subsequently passed away as a consequence, Mr. Gutierrez has complied with the requirements of the Court's Order dated October 27, 2020;

vv) The data contained on Mr. Gutierrez's personal devices and on the Xela servers maintained by ATS is extensive and requires substantial review and translation prior to any analysis by the Court concerning its discoverability by the Receiver;

ww) The BDT Motion would moot the need for any further investigation by the Receiver into the so-called "reviewable transactions" or any other transaction, including without limitation any pending discovery sought by the Receiver; and

xx) Mr. Gutierrez's counsel has requested on multiple occasions copies of all communications between the Receiver and/or its counsel, on the one hand, and the Cousins and/or their counsel, on the other hand;

yy) the Receiver's counsel has not denied that the Receiver has been communicating with the Cousins, but instead flatly refused to acknowledge any duty to disclose communications or provide copies.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

(a) Affidavit of Juan Guillermo Gutierrez to be sworn

(b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 18, 2021

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MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF CROSS-MOTION**

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Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

# FACTUM OF RESPONDENT, JUAN GUILLERMO GUTIERREZ

## I. OVERVIEW

1. More than 20 months have passed since the Receiver's appointment over Respondent Xela Enterprises Inc. **("Xela")**. In that time, the Receiver has incurred over one million dollars in receivership expenses but made no significant progress toward collecting the judgment debt **(the "Castillo Judgment").** The Receiver has shown significant bias against Respondent Juan Guillermo Gutierrez **("Mr. Gutierrez")** and a pattern of conduct that is unlikely ever to accomplish the main purpose of the receivership.

2. The only realistic source of funds to satisfy the Castillo Judgment is dividends owed to Xela's indirect subsidiary Lisa S.A., a Panama company **("LISA").** The Receiver has shown no interest in helping LISA collect, but has focused instead on: (a) preventing LISA from closing a loan that would have satisfied the Castillo Judgment **(the "LISA Loan")**; and (b) investigating legitimate past transactions unlikely to yield actual money.

3. The Receiver's objection to the LISA Loan was that it did not know "how the economics . . . affect the interests of other stakeholders of Xela or its subsidiaries."[1] The LISA Loan, however, would have satisfied the Castillo Judgment and all receivership expense; those concerns could have been raised in response to a motion for discharge.

4. The Receiver prevented the LISA Loan from funding by publicly exercising Xela's shareholder rights in Panama without any recognition in that country. The Receiver caused shareholder minutes to be filed in Panama's Public Registry to take control of the board of Gabinvest S.A., a Panama company and LISA's sole shareholder **("Gabinvest")**. The filing claimed that Gabinvest's shareholder (*i.e.*, Xela) was present at the Panama meeting either in person or by proxy, while omitting any reference to: (a) the Receiver; (b) Xela's name; (c) the name of the person authorizing the alleged proxy; (d) the name of the person receiving the alleged proxy; or (e) any power of attorney from the Receiver. The Public Registry rejected the filing, and Gabinvest's board of directors remained unchanged, but the lender withdrew the LISA Loan as a result.

5. The Receiver's investigation of the "Reviewable Transactions" has been inappropriate and costly. The transactions are unrelated to assets in Ontario, and involve only foreign entities. At best, they are contingent unliquidated claims and/or remote/uncertain entitlements, which are not a proper basis for equitable receivership.

6. Further, the Receiver has repeatedly cast Mr. Gutierrez as non-cooperative when he has asserted his rights. The allegations have never been supported by actual evidence, yet they follow a troubling propensity to characterize the facts unfavorably to

[1] Exhibit 12 to Affidavit of Juan Guillermo Gutierrez dated February 22, 2021; Responding Record dated March 9, 2021 at Tab A page 247 **(the "Gutierrez Affidavit)**.

Mr. Gutierrez. The Receiver's Fourth Report contains numerous such mischaracterizations, and it lacks evidentiary support. Annex A hereto contains details.

7. Questions are also raised with respect to the Receiver's ongoing but unreported communication with the majority shareholders who have wrongfully withheld the dividends since 1998 **(the "Nephews").** Billing records reflect communications over a period of at least 13 months between the Receiver's lawyers and counsel for the Nephews, including time descriptions suggestive of strategic discussions. The Receiver denies coordination but does not explain the contacts and refuses to disclose the content.

8. The Receiver's Motion relates to discovery sought from Mr. Gutierrez, most or all of which is outside the scope of the Receiver's authority. In an effort to cooperate, Mr. Gutierrez consented to an Order dated October 27, 2020 **(the "Consent Order")**, relating to review of his personal electronic devices, not property of Xela. The Receiver's interpretation of the Consent Order is incorrect and prejudicial; it would require Mr. Gutierrez to unlock and upload the entire contents of his personal devices to a database maintained by the Receiver's agent before Mr. Gutierrez and/or his lawyers have reviewed the contents. Also, the Receiver's agent has already conducted forensic analysis of the devices and agreed that file deletions are consistent with normal operations, yet the Receiver wishes to conduct further forensic analysis without a basis.

9. The Receiver also seeks access to the entire universe of Mr. Gutierrez's emails, without any limitation to Xela's business operations or explanation how they might assist.

10. The new investigative authority requested by the Receiver is virtually unlimited, without any valid articulated relationship to the receivership. It would perpetuate (and probably exacerbate) the Receiver's current pattern of conduct, and it promises massive

additional costs. Further, the Court's Order dated July 5, 2019 **(the "Appointment Order")** already authorizes the Receiver to seek recognition overseas.

11. It is in the interest of Justice that the Receiver's motion is dismissed with costs.

## II. SUMMARY OF FACTS

### A. Background

12. Mr. Gutierrez is the president and owner of 100% of the voting shares of Xela, subject to the limitations imposed by the receivership.[2]

13. Mr. Gutierrez's father was one of the original founders of a 28-company agricultural conglomerate in Guatemala **(collectively the "Avicolas")**. LISA owns a 1/4 stake in each of the individual Avicola companies, along with a 1/3 stake in Villamorey S.A. **("Villamorey")**, a Panama company that separately holds 25% of the Avicolas shares.[3] Until his passing in 2016, LISA was wholly owned by Mr. Gutierrez's father, Arturo Gutierrez **("Arturo")**. The other 2/3 stake in the Avicolas and Villamorey are held by the Nephews, members of the two branches of the Gutierrez family that remain in Guatemala.

14. In 1984, Arturo relocated with his family to Toronto, ceding operational control of the Avicolas and Villamorey to the Nephews. Thereafter, the Nephews implemented a tax fraud scheme in Guatemala that understated the actual revenues of the Avicolas (along with the corresponding sum of dividends disbursed to LISA) and concealed the fraud with false accounting records.[4] In 1998, Arturo discovered the discrepancies by accident, and within a year after he confronted the Nephews, they ceased all dividend

[2]Gutierrez Affidavit at para 1; Responding Record dated March 9, 2021 at Tab A page 1.
[3]Gutierrez Affidavit at para 18; Responding Record dated March 9, 2021 at Tab A page 9
[4]Gutierrez Affidavit at paras 23-26; Responding Record dated March 9, 2021 at Tab A page 12.

payments to LISA and embarked on a crusade to ruin Arturo and his family financially.[5]

### B. The Leamington Judgment

15. In or about 1998, LISA sued companies controlled by the Nephews in Bermuda. Judgment was entered for LISA on September 5, 2008 **(the "Leamington Judgment")**, which was not appealed. The Leamington Judgment establishes, among other things, that: (a) Lisa was a victim of a conspiracy to defraud by the Nephews; (b) the Avicolas used false accounting records to conceal income; (c) a substantial portion of the concealed income was used to fund distributions to the Nephews but not to LISA; (d) phony re-insurance contracts were used to launder the funds; (e) the Nephews intended to deprive LISA of its rightful share of the profits; (f) the Nephews used cash-only operations to conceal earnings from the Guatemalan tax authorities; (g) the Nephews intended to injure LISA; (h) LISA was excluded from distributions made to the Nephews; and; (i) the members, officers and directors of the Avicolas had actual knowledge.[6]

### C. Funding for the Oppression Action

16. After the Leamington Judgment, the parties entered settlement discussions. It was at this time that Applicant Margarita Castillo **("Margarita")** – while a director of Xela – secretly joined forces with the Nephews to plan a counterattack, which led to a breakdown of discussions.[7] The counterattack began with the civil action in Toronto that ultimately led to the Castillo Judgment **(the "Oppression Action")**. The Nephews helped fund the Oppression Action by arranging for a friendly bank in Guatemala, G&T Continental Bank

[5]Gutierrez Affidavit at para 24; Responding Record dated March 9, 2021 at Tab A pages 12-13.
[6]Gutierrez Affidavit at paras 28-30; Responding Record dated March 9, 2021 at Tab A pages 14-15.
[7]Gutierrez Affidavit at para 31; Responding Record dated March 9, 2021 at Tab A page 16.

**("G&T Bank")**, to give Margarita a loan of US$ 4.35 million **(the "Castillo Loan")**. Evidence suggests that the loan was collateralized with a portion of LISA's dividends, and repaid by foreclosure.[8] If so, the Castillo Judgment as already in effect been paid.

### D. Theft and Misuse of Xela's Computer Records

17. The Nephews' counterattack also involved attempts to exclude LISA from the Avicolas using stolen Xela documents made public by Margarita through the Oppression Action. Margarita's husband Ricardo coerced a former Xela employee to download the entirety of Xela's computer servers, including privileged and confidential documents. Margarita then attached the documents in bulk as a single exhibit to the complaint in the Oppression Action, although the documents did not relate to the action itself. Once in the public record, the Nephews used the documents in corporate resolutions and in legal proceedings in Guatemala to try to exclude LISA's interest in the Avicolas. Those proceedings were baseless and ultimately failed, but at significant cost to LISA.[9]

18. Thereafter, Xela filed a complaint for civil conspiracy in the Superior Court in Toronto against Margarita, Ricardo, the Nephews and others **("the Conspiracy Action")**. The Conspiracy Action, which is still pending, was delayed by procedural arguments and appeals, but the Oppression Action proceeded, yielding the Castillo Judgment.[10]

### E. The "Reviewable Transactions"

19. In 2005, LISA was forced to begin borrowing from BDT Investments Inc. **("BDT")**, which at the time was a subsidiary of Xela, to cover the cost of pursuing the unpaid

[8] Affidavit of Juan Guillermo Gutierrez dated March 22, 2020 at paras 31-38, Responding Record dated March 9, 2021 at Tab A page 14.
[9] Gutierrez Affidavit at paras 39-46; Responding Record dated March 9, 2021 at Tab A page 19-21.
[10] Gutierrez Affidavit at para 47 Responding Record dated March 9, 2021 at Tab A pages 21-22.

dividends. In 2012, BDT secured a judgment in Panama of approximately US$19 million against LISA, with additional debt accumulating over time to approximately US$50 million. In 2020, all of LISA's indebtedness to BDT was satisfied in a settlement under which LISA assigned all of its dividend rights to BDT. LISA's borrowing from BDT is the basis for three of the four Reviewable Transactions.[11]

20. The Reviewable Transactions are described in the Receiver's Notice of Motion, in summary as follows: (a) "**EAI Transaction"** – the transfer in early 2016 by EAI of BDT and Arven shares to Arturo, then from Arturo to the ARTCARM Trust **(the "Trust")**; (b) "**Assignment Transaction"** – the assignment in January 2018 by LISA of the majority of proceeds from the Avicola litigation to BDT; (c) "**Lisa Transfer"** – the transfer from LISA in February 2020 to BDT of Lisa's interest in the Avicolas; and (d) **"Litigation Assignment"** – the assignment of the right to control Lisa's litigation against the Avicolas.[12]

21. Based on information reported by the Receiver: (a) EAI is a Barbados corporation; (b) BDT and Arven are Barbados corporations; (c) The Trust is a trust established in Barbados; (d) The Avicola litigation involves litigation between Mr. Gutierrez and the Nephews that has lasted decades, relating primarily to the Avicolas, which operates a number of businesses in Central America; (e) Lisa is a Panamanian corporation; (f) Gabinvest is a Panamanian corporation; and (g) Villamorey is a Panamanian corporation.[13] Thus, the Reviewable Transactions all relate exclusively to entities, assets and transactions that are outside of Ontario, and specifically in Barbados, Panama and

[11] Gutierrez Affidavit at para 27; Responding Record dated March 9, 2021 at Tab A pages 13-14.
[12]Motion Record of the Receiver dated January 18, 2021 at Tab 1, Page 2
[13]Motion Record of the Receiver dated January 18, 2021 at Tab 2

Guatemala.

22. While the Receiver has indicated that it has not uncovered any commercially reasonable basis for the Reviewable Transactions[14], that conclusion ignores the several explanations provided to the Receiver regarding the Reviewable Transactions, including the shareholder loans payable by EAI to Arturo, the valuation received at the time of the EAI Transaction of the shares, the inability of Lisa to continue to fund its participation in the Avicola Litigation and BDT's loans to Lisa in respect of this litigation, BDT's ability to recover amounts owing to it by Xela and Lisa being connected to the Avicola Litigation, and more. Although the Receiver may not accept these reasons, it is not accurate to say that it has not uncovered any commercially reasonable basis.[15]

**F. Receiver's Conduct of the Receivership**

23. The Receiver has exhibited a pattern of conduct throughout the course of these proceedings that has frustrated the primary purpose of the receivership, such that it has become difficult or impossible for this receiver to achieve satisfaction of the Castillo Judgment. The details are set out in the Gutierrez Affidavit, while the highlights are summarized here.[16]

24. ***LISA's Dividends*** – The Receiver has not prioritized LISA's dividends.[17]

25. ***Communication with the Nephews*** – The Receiver has not explained its ongoing, undisclosed communications over at least 13 months with the Nephews, despite

[14]Motion Record of the Receiver dated January 18, 2021 at Tab 2, Page 31, Para 2.4(1)
[15] Gutierrez Affidavit at paras 55-57, 69; Responding Record dated March 9, 2021 at Tab A pages 25-26, 30-31.
[16]Gutierrez Affidavit at para 48-108; Responding Record dated March 9, 2021 at Tab A page 22-48
[17] Gutierrez Affidavit at para 48; Responding Record dated March 9, 2021 at Tab A page 22.

acknowledging that LISA's dividends are the only realistic source of funds.[18]

26. ***The LISA Loan*** – Had the Receiver not taken unrecognized action in Panama, the Castillo Judgment and receivership expenses could have been paid in their entirety.[19]

27. ***Conduct in Panama*** – The Receiver tried to replace the Gabinvest and LISA boards without any notice to those entities, Mr. Gutierrez, or any of their counsel. The document it filed in the Panama Public Registry was false or at least misleading, and was rejected as a result, leaving the boards unchanged.[20] The Receiver has never sought recognition in Panama, although Paragraph 31 of the Appointment Order expressly authorizes it.[21]

28. **Contempt Motions** – The Receiver has twice sought to incarcerate Mr. Gutierrez. First the Receiver moved for contempt when LISA and Gabinvest declined voluntarily to adopt the Receiver's directors, even though Mr. Gutierrez has no authority over Xela's foreign subsidiaries[22] Now the Receiver seeks contempt because of the sworn statement submitted by Mr. Gutierrez in the criminal proceedings in Panama against the Receiver's agent, even though Mr. Gutierrez was merely confirming that he was not the anonymous person who purported to give Xela's proxy at the Gabinvest shareholder meeting, and despite his compliance with the Court's Order dated February 10, 2021.[23] When LISA's

[18] Gutierrez Affidavit at paras 49-53; Responding Record dated March 9, 2021 at Tab A pages 22-24.
[19] Gutierrez Affidavit at paras 70-86; Responding Record dated March 9, 2021 at Tab A pages 31-39.
[20]Gutierrez Affidavit at paras 87-99; A copy of the Gabinvest Minutes, with a certified English translation, is attached as Exhibit 1 to the Supplemental Affidavit of Juan Guillermo Gutierrez dated March 5, 2021, in response to the Receiver's Motion for Investigative Authority & Recognition (returnable March 22, 2021).
[21] Gutierrez Affidavit at paras 109; Responding Record dated March 9, 2021 at Tab A pages 48-49.
[22] Gutierrez Affidavit at para 97-100; Responding Record dated March 9, 2021 at Tab A page 43-44.
[23] Gutierrez Affidavit at paras 12, 93-94, 100; Responding Record dated March 9, 2021 at Tab A pages 6-7, 42 and 44-45.

president refused to withdraw the complaint, the Receiver sought contempt.[24]

29. **Discovery into Mr. Gutierrez's Personal Information** – The Receiver has launched discovery seeking access to Mr. Gutierrez's personal electronic devices as well as his emails. The discovery is intrusive and includes information beyond the scope of the Receiver's authority. The cost is almost incalculable. Further, the information sought does not seem reasonably calculated to advance the receivership, as the information would not assist in the collection of LISA's unpaid dividends.[25]

30. **Rejection of BDT Settlement Proposal** – BDT owns the rights to LISA's dividends, and it is pursuing the litigation against Villamorey in conjunction with LISA. On December 17, 2020, BDT offered to commit proceeds from its recovery against Villamorey to the receivership, thereby satisfying the purpose of the receivership while suspending the costs and expenses incurred by the Receiver. The Receiver summarily rejected the offer, and has made no attempt to discuss any of its alleged concerns with BDT to try to find an agreeable solution that would suspend the costs and expenses being incurred by the Receiver.[26]

31. **The Receiver's Lack of Interest in the Castillo Loan** – There is evidence to suggest that the Castillo Loan was secured by and paid with Lisa's 2010 Villamorey dividends. If true, the Castillo Judgment has already effectively been satisfied by an indirect subsidiary of Xela. Mr. Gutierrez brought this transaction to the Receiver's

[24] Gutierrez Affidavit at paras 8-14; Responding Record dated March 9, 2021 at Tab A pages 4-7.
[25] Gutierrez Affidavit at paras 18, 105-106; Responding Record dated March 9, 2021 at Tab A pages 9 and 46-47.
[26] Gutierrez Affidavit at paras 21, 108; Responding Record dated March 9, 2021 at Tab A pages 10-11 and 49.

attention on numerous occasions, but the Receiver seemed disinterested.[27] It does not appear that the Receiver has even asked Margarita for a copy of the loan documents.[28]

32. **The Receiver's Lack of Interest in the Conspiracy Action** – Neither the Nephews nor Margarita have been held accountable for the theft of Xela documents or for the resulting exclusion actions that almost misappropriated LISA's stake in the Avicolas.[29] The conspiracy action has been stayed in the Ontario Superior Court of Justice and could offset the Castillo Judgment.[30] The Receiver has expressed no interest in that action, and has made no mention of it in its reports.

33. **The Receiver's Lack of Interest in the Gadais Limited Promissory Note** – In 2007, Margarita's husband Ricardo signed a promissory note for $400,000 on behalf of a Gadais Limited, a company he owned, in exchange for Xela's 86.6% stake in a real estate management company.[31] The shares were duly transferred, but the note has never been repaid, nor is there any indication a demand has been made. Mr. Gutierrez informed the Receiver, but the Receiver's reports make no mention of the matter.[32]

34. **The Receiver's Failure to Seek Recognition in Panama or Barbados** – Paragraphs 30 and 31 of the Appointment Order give the Receiver all the authority it needs to seek recognition in, among other places, Panama and Barbados. The Appointment Order was obtained on July 5, 2019 and the Receiver is only now moving to seek recognition of the Appointment Order, which is unnecessary. The Receiver's failure

[27]Gutierrez Affidavit at paras 58-62; Responding Record dated March 9, 2021 at Tab A pages 26-28.
[28] Gutierrez Affidavit at para 62; Responding Record dated March 9, 2021 at Tab A pages 27-28.
[29] Gutierrez Affidavit at para 68; Responding Record dated March 9, 2021 at Tab A page 30.
[30] Gutierrez Affidavit at para 69; Responding Record dated March 9, 2021 at Tab A pages 30-31.
[31] Gutierrez Affidavit at para 63; Responding Record dated March 9, 2021 at Tab A page 28.
[32]Gutierrez Affidavit at paras 64-65; Responding Record dated March 9, 2021 at Tab A page 28.

to take this step for more than 20 months created serious problems in Panama.[33]

35. **Inaccuracies and Misstatements in the Receiver's Reports** – The Receiver's fourth report is troubling in its inaccuracy. Virtually every statement approaches the facts from a contentious perspective, making conclusory statements without appropriate knowledge or evidence, all of which cut against Mr. Gutierrez and his family. Many of the misstatements are corrected throughout the Gutierrez Affidavit.[34] A table listing some of the inaccuracies is submitted as Annex A.

## III.STATEMENT OF ISSUES, LAW & AUTHORITIES

### A. Whether the Consent Order Allows Mr. Gutierrez to Review the Data on His Personal Devices Before They Are Uploaded to a Relativity Database Maintained by the Receiver's Agent

36. The Receiver contends that Mr. Gutierrez has violated the Court's October 27, 2020 Order by refusing to permit the Receiver to upload the contents of his personal devices to a Relativity database maintained by the Receiver's agent, without having the opportunity to review the data first and object to its discoverability. That contention is misguided.

37. The Receiver's request to examine Mr. Gutierrez's personal devices is based on the belief that they may contain documents produced in the course of Xela's business operations. As a preliminary matter, the receivership relates to Xela property, not Mr. Gutierrez's personal property. As a consequence, any data on his personal devices that was not generated in the course of Xela's business operations is not discoverable by

[33]Gutierrez Affidavit at paras 1, 22 and 129; Responding Record dated March 9, 2021 at Tab A pages 1, 11-12 and 55-56.
[34] Gutierrez Affidavit at para 127-128; Responding Record dated March 9, 2021 at Tab A page 55.

**COURT FILE NO.: CV-11-9062-00CL**
**DATE: March 25, 2021**

# ONTARIO
# SUPERIOR COURT OF JUSTICE
# 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, as Executor of the Estate of Juan Arturo Gutierrez, Respondents

**BEFORE:** **The Honourable Justice Thomas J. McEwen**

**COUNSEL:** *Jeff Leon and Jason Woycheshyn* for Margarita Castillo
*Monique Jilesen and Derek Knoke* for the Receiver
*Philip Cho and Michael Ly* for ATS
*Chris MacLeod and Joan Kasozi* for Juan Guillermo Gutierrez
*Aaron Kreaden* for Avicola Group, Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga and Juan Jose Gutierrez Moyorga

**HEARD BY ZOOM HEARING: March 22, 2021**

## ENDORSEMENT

[1] This motion, brought by the Receiver KSV Restructuring Inc. (the "Receiver"), seeks a number of orders. I will deal with each below.

**Electronic Devices**

[2] The first deals with the Receiver's attempts to have Juan Guillermo Gutierrez ("Juan Guillermo") deliver his electronic devices for analysis. I previously granted an order, to which Juan Guillermo consented, on August 28, 2020 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

[3] Thereafter, I granted another order on October 27, 2020, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo's devices.

[4] Juan Guillermo, contrary to the terms of the above orders, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image, and then advise what he is prepared to produce – subject to claims of privilege and relevancy.

[5] I am not prepared to alter the terms of my previous orders where a protocol has been agreed to by the Receiver and Juan Guillermo.

[6] The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my orders will delay matters possibly undermine the Receiver's legitimate investigations.

[7] I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated, consent orders stand and shall be adhered to. Thus, Juan Guillermo is to provide the password so that Epiq Global (who I agree will succeed Duff & Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo's objections, can proceed, as per the Order.

**Computer Servers**

[8] The second issue concerns access to certain computer servers.

[9] By way of background, Arturo's Technical Services Inc. ("ATS") purchased certain assets from Xela in June 2017, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo's sons – Thomas and Andres – are directors and officers of ATS.

[10] The Receiver has asked ATS to deliver, amongst other things, digital records.

[11] The August 28, 2020 order (which was made on notice to ATS, but ATS did not appear) provided, *inter alia*, that the Receiver be entitled to conduct forensic examinations of Xela devices, and that no privilege claims could be asserted in respect of any Xela documents or devices.

[12] It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the "blue network" by ATS and certain data related to Xela's business. This includes the Xela.com server, financial records end information concerning former clients of Xela.

[13] The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28, 2020 order and the 2nd October 27, 2020 order (the October order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS).

[14] An impasse has arisen between the Receiver and ATS.

[15] ATS has suggested a protocol, taking the position that the blue servers also contain information of third parties and thus is not captured by the Appointment Order.

[16] I do not agree with ATS.

[17] First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xela's subsidiaries, customers (including Greenpack – a related company) officers and employees who uploaded personal information onto the blue servers.

[18] In my view, this is captured by paragraph 6 of the Appointment Order which refers to the unfettered access to records of any kind related to the business or affairs of Xela.

[19] It is not surprising that client records are on those servers as they were related to Xela's business.

[20] The Receiver's position is supported by the decision of D. Brown J., as he then was, in *GE Real Estate v. Liberty Assisted Living* 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company. He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question. I do not accept ATS' position that *GE Real Estate* is distinguishable as it speaks to broad principles.

[21] Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's sons. They have been the beneficiaries of, what the Receiver has identified as being, Reviewable Transactions. In these circumstances, the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.

[22] I should note that, at the motion, a debate broke out about the process [that] should be carried out and whether ATS and/or the Receiver was acting reasonably. ATS referred to what I considered to be a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.

[23] Third, I also do not accept the argument of ATS/Juan Guillermo that the nature of the Receivership should fetter access. The Receivership was granted pursuant to s. 101 of the CJA, which allows for broad powers if appropriate – it is appropriate here to grant unfettered access to the blue servers.

[24] Last, with respect to both issues 1 and 2, I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access to devices, since it has received a settlement offer from BDT.

[25] I disagree.

[26] BTS [BDT], a Barbadian company, is a former subsidiary of Xela. It has refused to attorn to the jurisdiction of this Court. Andres, Juan Guillermo's son, is a director.

[27] The offer does not involve a payment, but rather a promissory note, conditional on the future receipt of proceeds of an apparent Panamanian judgment involving the oft-noted "Avicola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.

[28] I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, is likely unenforceable and involves a related company in which Andres is a director.

**Powers of the Receiver**

[29] The third issue involves the Receiver seeking to expand it powers.

[30] This requires some discussion about the above noted acrimonious relationship between the Receive and Juan Guillermo/Xela.

[31] Juan Guillermo and ATS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

[32] These include:

- Prioritizing the pursuit of LISA dividends
- Communicating with "the Nephews" who Juan Guillermo accuses of wrongfully withholding divides owed to LISA, which is Xela's subsidiary.
- Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
- Rejecting the aforementioned BDT proposal
- Focusing on the Reviewable Transactions which may not result in realizations
- Generally, inappropriately pursuing Juan and his family, including the scheduled contempt motion.

[33] In addition to the above Juan Guillermo and (and ATS) make a number of other allegations which I have reviewed.

[34] The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xela or ATS.

[35] The Receiver points to a number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices/servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving LISA/Xela/BDT/Arven
- Juan Guillermo's brother-in-law ("Hals") who is the President of Xela's subsidiary LISA filed a criminal complaint against the Receiver's agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as being, *prima facie*, a collateral attack on my order.

[36] Additionally, the history of the litigation cannot be ignored.

[37] Justice Newbould in his October 2015 decision made substantial findings of oppression in granting judgment to [Ms.] Castillo.

[38] Subsequently, shares of the Xela subsidiaries BDT & Arven were transferred to a trust (the "EAI Transaction") benefitting Juan Guillermo's family. ATS was incorporated as a subsidiary

to BDT with the sons as directors and officers. Xela was essentially shut down with certain assets sold to ATS. LISA assigned most of the proceeds from the Avicola action (the "Assignment Transaction") to BDT.

[39] Subsequently, the Receiver [was] appointed.

[40] In light of all of the above, it is reasonable to expand the investigative powers of the Receiver.

[41] It is not up to Xela/Juan Guillermo to dictate how the Receiver, a court officer, should direct its investigation. If, in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

[42] The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assessment of LISA's interest in the Avicola Group to BDT.

**Disposition**

[43] Accordingly, I am authorizing the relief sought in paragraph 1(a)(i)-(ii) of the Notice of Motion.

[44] I am not, at this time, authorizing examinations under oath of any person as requested in subpara (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpara (ii) provides for the ability to conduct interviews.

[45] I am also authorizing that the information sought in subpara 1(f) be granted. It is consistent with my previous orders and Gabinvest, a Xela subsidiary, wholly-owns LISA.

[46] For similar reasons, I am granting the relief sought in subpara 1(g). AFRA was LISA's/Gabinvest's registered agent in Panama until February 2020. It maintained those companies' share registers and other information. They have advised that they require a Court order to release the information.

[47] In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained. The expansion, therefore, is consistent with the CA jurisprudence in *Weig v. Weig,* 2012 ONSC 7262 and *Akagi v. Synergy Group* (2000), 2015 ONCA 368.

[48] Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation, particularly where there is evidence in the record of ongoing participation by Juan Guillermo and his family in those companies.

**Foreign Recognition Order**

[49] I am also satisfied that a foreign recognition order is fair and reasonable particularly in light of what transpired in Panama with respect to the Receiver's agents.

[50] Neither Juan Guillermo nor ATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in his Receivership, which now warrant such an Order.

**The Fees of the Receiver and Counsel**

[51] The Fees of the Receiver and its counsel. In my view, they should be approved.

[52] I have considered the relevant factors: *CIBC v. Urbancorp*, 2017 ONSC 4205 at para 57; *Re Nortel*, 2017 ONSC 673 at paras 14-15.

[53] The Receiver's undertaking is a significant one given the complicated structure of the Xela-related corporations, the after judgment transactions and LISA's Avicola interest.

[54] I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela subsidiaries and Hals.

[55] While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard, I rely on my comments above, particularly concerning the alleged LISA loan and BTS [BDT] settlement offer.

[56] I also reject Juan Guillermo's submissions that the costs issue should be directed to a reference. This would only add more costs and delay to an already complicated situation.

**Orders Sought**

[57] I agree that Duff & Phelps be replaced with Epiq Global. This relief is unopposed and settles a debate over whether Duff & Phelps had a conflict of interest, which was denied.

[58] There were a number of orders included in the Receiver's materials. The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement. I am prepared to sign it unless parties wish to make submissions as to form and content.

[59] The order beginning at p. A176 deals with a number of issues [and] also appears to accord with this endorsement. Again, I am prepared to sign it subject to submissions as to form and content.

[60] Last, the order beginning at p. A1626 deals with the replacement of Duff & Phelps. It should go as it is unopposed, subject to submissions as to form and content.

[61] I stress, however, that the review of the orders is not an invitation to relitigate issues that have been before me, and decided upon, on at least one occasion.

[62] If the parties cannot agree on costs I can be spoken to.

**Justice Thomas J. McEwen**

**Date:** March 25, 2021

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Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

# NOTICE OF MOTION
[Injunctive Relief]

The Respondent Juan Guillermo Gutierrez, will make a Motion to a Judge presiding over the Commercial List on Wednesday, March 30, 2022 at 10:00 a.m., or as soon after that time as the Motion can be heard.

**PROPOSED METHOD OF HEARING**: The Motion is to be heard

[X] By video conference.

at the following location

**THE MOTION IS FOR**

1. An interim Order staying the enforcement of all Orders for disclosure of Juan Guillermo Gutierrez's emails and information on the Personal Devices (defined below)

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and the ATS Server Emails (defined below), including without limitation the Orders of Justice McEwen dated October 27, 2020 and March 25, 2021, and any endorsements made in respect thereof (collectively the **"Discovery Orders"**), for a period of 60 days, subject to further extension for good cause shown;

2. the Costs of this motion, if opposed; and

3. such further and other Relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

a) The Discovery Orders require Mr. Gutierrez to permit all of the data on a personal iPad and a personal iPhone (the **"Personal Devices"**) to be uploaded to a Relativity database maintained by Epiq, an IT consultant unilaterally identified and retained by the Receiver. The Personal Devices have been imaged, and all of the data currently resides on a hard drive in Epiq's possession, locked with a passcode known only to Mr. Gutierrez.

b) The Discovery Orders also require Arturos Technical Services (**"ATS"**) – the third-party data storage provider that maintains all emails to or from Mr. Gutierrez with an @xela.com or an @arturos.com domain (the **"ATS Server Emails"**) – to be uploaded to Epiq's Relativity database. The ATS Server Emails include *all* emails involving Mr. Gutierrez between [date] and [date], representing more than 70 gigabytes of data.

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c) The Discovery Orders contemplate that Mr. Gutierrez conduct advance review of the Personal Devices and the ATS Server Emails by examining the data on Epiq's Relativity platform for issues of privilege and other potential objections to disclosure, whereupon any disputes would be resolved by the Court and, if applicable, the resulting discoverable data would be supplied to the Receiver.

d) Mr. Gutierrez's family – through LISA, S.A. (**"LISA")**, an indirect Panamanian subsidiary of Xela – are the ultimate beneficiaries of a 1/3 stake in a lucrative poultry conglomerate in Guatemala (the **"Avicola Group"**). The majority shareholders (the **"Nephews"**) have improperly withheld hundreds of millions of U.S. dollars in corporate dividends from Mr. Gutierrez's family since 1998 (the **"Unpaid Dividends"**), while continuing to pay dividends to themselves. Mr. Gutierrez and his family have been involved in bitterly contentious, multi-jurisdictional litigation with the Nephews for more than two decades in an effort to recover the Unpaid Dividends.

e) The Nephews have historically engaged in and/or benefited from corporate espionage to the prejudice of Mr. Gutierrez and his family. Specifically, in 2011, they used stolen confidential/privileged documents from Xela's computer servers – with the complicity of the Applicant, who sponsored the theft and placed the documents in the public record by appending them to an unrelated lawsuit – as bases for frivolous legal actions and improper corporate resolutions in Guatemala and Panama, all designed to

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misappropriate LISA's shares in the Avicola Group. Those actions have all been resolved in LISA's favor, at great cost and expense, over a period of some ten years.

f) Facts have emerged over the past two days, relating to criminal proceedings against the Nephews in Panama (outlined further below), to suggest a very high risk that the Nephews will engage in new malfeasance and corporate espionage to try to obtain copies of the Personal Devices and the ATS Server Emails. Should those data fall into the Nephew's hands, – Mr. Gutierrez's family would suffer overwhelming, irreparable injury.

g) There is a historical mistrust of the Receiver in the conduct of this receivership grounded in, among other things:

1. the appearance that the Receiver is being funded by the Nephews;

2. the appearance that the Receiver is coordinating with the Nephews – based upon, *inter alia*, billing records submitted by the Receiver that suggest ongoing strategic discussions between the Receiver's counsel and the Nephews' lawyers – to use this receivership as a vehicle to prejudice the recovery of Unpaid Dividends rather than to pursue monies that might satisfy the judgment herein (the **"Castillo Judgment"**);

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3. the propensity of the Receiver to dismiss legitimate concerns about the confidentiality, privilege, privacy and security of the ATS Server Emails and the data on the Personal Devices;

4. the propensity of the Receiver to publish on its website, without any apparent reason or any articulated justification, massive amounts of Xela data and other information that Mr. Gutierrez would consider confidential and inappropriate for public disclosure;

5. the appearance that the Receiver is actively seeking to prevent a discharge of this receivership by interfering with third-party funding that would satisfy the Castillo Judgment and approved receivership expenses.

h) Mr. Gutierrez has secured a third-party loan sufficient to satisfy the Castillo Judgment in its entirety, along with the approved receivership costs (the **"Loan"**). The lender has transferred the full amount of the Loan proceeds to the client trust account of Mr. Gutierrez's counsel for deposit with the Court pending consideration of a motion to discharge the receivership. The Loan proceeds reached Canada in February 2022 but were returned to the lender bank because the funds were inadvertently transferred to counsel's Canadian-dollar-denominated trust account rather than its U.S.-dollar-denominated account. The Loan proceeds were transferred a second time to Mr. Gutierrez's counsel, in February 2022; however – after the Receiver inexplicably published on its website the SWIFT banking confirmation for the

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second transfer, which Mr. Gutierrez had provided to the Court as a courtesy – the intermediary bank in the U.S. undertook to conduct additional due diligence, which is presently in process.

i) The Nephews (and others) have been under criminal investigation and prosecution in Panama on charges of, among other things, embezzling and laundering Unpaid Dividends. Social media reports indicate that within the past two days, those criminal proceedings have entered a new phase. Specifically, it has been reported that the Nephews were required to make personal appearances in Panama in connection with the criminal charges, and that the Panamanian Court thereafter arrested their return to Guatemala and is barring them from departing Panama. Those recent developments exponentially increase the risk of malfeasance and corporate espionage in retaliation against Mr. Gutierrez.

j) The progress of the criminal proceedings in Panama raises the question whether the Nephews may already have misused the SWIFT transfer confirmations published by the Receiver on its website.

k) The Receiver has refused to cooperate with good-faith attempts by both Mr. Gutierrez and ATS to discuss a reasonable and satisfactory method to upload the ATS Server Emails and the data on the Personal Devices to Epiq's Relativity platform while preserving appropriate security. In that regard, the Receiver has shown a complete lack of consideration for the safety of Mr.

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Gutierrez's data, which concerns are magnified in light of the recent developments in the criminal proceedings against the Nephews in Panama.

l) Moreover, the Receiver has consistently mischaracterized Mr. Gutierrez's level of cooperation, as well as ATS's cooperation, in the receivership, placing Mr. Gutierrez in a false light. Most recently, on 23 March 2022, the Receiver falsely represented that Mr. Gutierrez and ATS were in non-compliance with the Discovery Orders, when in fact counsel for ATS were in the midst of discussions with the Receiver's counsel and the experts retained by Mr. Gutierrez were in the midst of discussions with the with Epiq in an effort to address Mr. Gutierrez's legitimate concerns over the safety and security of the data on the Personal Devices and the ATS Server Emails. Indeed, it was the Receiver that failed reasonably to cooperate in the process to protect Mr. Gutierrez's legitimate privacy concerns. The Receiver's failure to provide objective reporting to this Court concerning Mr. Gutierrez's cooperation as it relates to the data in question signals a further red flag.

m) Indeed, the tendency of the Receiver to misreport the facts has been manifest from the outset of the receivership. Every official report submitted by the Receiver has been replete with inaccuracies and omissions of material fact, all with an unreasonably biased tone against Mr. Gutierrez designed to cast him as uncooperative. Moreover, the Receiver has refused to acknowledge the inaccuracies when the facts are clarified by Mr. Gutierrez, or to correct the record. Further, the Receiver has twice sought contempt against

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Mr. Gutierrez, but on both previous occasions adjourned the contempt motions *sine die* when faced with the prospect of cross-examination.

n) The Receiver has incurred more than a million dollars in fees in the receivership without recovering one single dollar toward satisfaction of the Castillo Judgment. Neither has the Receiver ever identified any rational relationship between the data in question and any potential recovery of funds toward satisfaction of the Judgment. Equally as important, the cost implications of proceeding under the Orders is staggering; the ATS Server Emails alone represent some 70 gigabytes of data, largely in Spanish, without any articulated urgency.

o) There will be no prejudice to the Receiver or any other person if a stay of the Discovery Orders is ordered for a period of 60 days, subject to extension for good cause shown.

p) The circumstances constitute grounds for an interim Order suspending the Discovery Orders for a reasonable period of time, to permit the Loan proceeds to clear the international baking system and be deposited with the Court for satisfaction of the Castillo Judgment and approved receivership expenses.

q) Sections 101 and 106 of the *Courts of Justice Act,* RSO 1900, c C43, as amended;

r) Rule 40 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended;

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s) Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

(a) The Affidavit of Juan Gutierrez;

(b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 25, 2022

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n)

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF MOTION**

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Lawyers for the Respondent
Juan Guillermo Gutierrez





a)

Court File No. CV-11-9062-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

# NOTICE OF MOTION

The Respondent Juan Guillermo Gutierrez ("**Mr. Gutierrez"**), will make a Motion to the Honourable Justice McEwen presiding over the Commercial List on _____ at 10:00 a.m., or as soon after that time as the Motion can be heard.

**PROPOSED METHOD OF HEARING**: The Motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[ X ] By video conference.

at the following location:330 University Avenue, Toronto, Ontario

**THE MOTION IS FOR:**

a) An Order varying the appointment Order dated July 5, 2019 (the **"Appointment Order"**) to substitute Albert Gelman Inc. in place of KSV Restructuring Inc. (**"KSV"**) as receiver;

b) An Order for costs in favor of Mr. Gutierrez, payable on a priority basis over the Applicant from funds collected by the receivership; and

c) such further and other relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

d) Pursuant to the Appointment Order, KSV was appointed receiver and manager over Xela Enterprises Ltd. ("**Xela**") pursuant to the *Courts of Justice Act* to enforce a judgment dated October 28, 2015 (the **"Castillo Judgment"**), and a series of outstanding costs orders, in favour of the Applicant, Margarita Castillo (**"Ms. Castillo"**);

e) Mr. Gutierrez is also a judgment debtor pursuant to the Castillo Judgment and the sole shareholder of Xela;

f) At the time of the Appointment Order, approximately $1.568 million had been paid against the Castillo Judgment – all from the liquidation of Mr. Gutierrez's personal assets – and approximately $4 million remained outstanding in respect of the Castillo Judgment;

g) In its First Report to the Court dated October 17, 2019, KSV reported that Xela's most

significant asset was its indirect one-third interest in certain businesses in Central America, referred to as the "Avicola Group," and which was the subject of multi-year, multi-jurisdictional litigation relating to shareholder disputes (the **"Avicola Litigation"**);

h) KSV further reported that it was investigating certain transactions that it alleged had the effect of transferring the potential value of the Avicola Litigation to third parties (referred to as the **"EAI Transaction"** and the **"Assignment Transaction"**);

i) The EAI Transaction occurred in April 2016 and relates to the transfer by a Barbados corporation (EAI) of shares in two other Barbados corporations – BDT Investments Inc. (**"BDT"**) and Corporacion ARVEN Limited – to Mr. Gutierrez' father, Juan Arturo Gutierrez (now deceased) (**"Arturo"**), and then subsequently to a Barbados trust, the ARTCARM Trust, as part of Arturo's estate planning.

j) The Assignment Transaction occurred in January 2018 and describes a transaction between a Panamanian corporation, LISA S.A. (**"LISA"**), assigning its interest in the Avicola Litigation to BDT in consideration for BDT's past and continued funding of the Avicola Litigation;

k) Xela was not a party to the EAI Transaction nor the Assignment Transaction, both of which involved foreign corporations;

l) A mutual lack of trust has developed between Mr. Gutierrez and KSV that has infected the proceedings. As a practical matter, it has become impossible under KSV's authority to achieve the objective of the receivership, which is to satisfy the Castillo Judgment.

m) Mr. Gutierrez asserts that KSV has failed to act objectively and in good faith to seek satisfaction of the Castillo Judgment but has engaged in a fishing expedition in coordination

with Mr. Gutierrez's cousins (the **"Cousins"**) – with whom Mr. Gutierrez and his family have been embroiled in highly contentious multi-jurisdictional Avicola Litigation for more than twenty years – that has no nexus to the potential receipt of funds and instead appears designed solely to inflict financial injury on Mr. Gutierrez.

n) During meetings with Mr. Gutierrez in the early days of the receivership, KSV's Bobby Kofman explicitly refused to discuss the only monies realistically available to satisfy the Castillo Judgment, which are the claims for an estimated US$400 million in dividends improperly withheld by the Cousins from LISA, an indirect Panamanian subsidiary of Xela. After more than three years as receiver, KSV has yet to articulate a plan to address collection of the unpaid dividends but has rejected multiple requests by Mr. Gutierrez to discuss a coordinated, cooperative approach.

o) KSV has engaged in numerous regular discussions with the Cousins throughout the course of the receivership without disclosing the nature of those communications. Mr. Gutierrez became aware of the coordination between KSV's lawyers and the Cousins' lawyers solely as a result of billing records submitted by KSV to this Court for approval. Despite inquiries from Mr. Gutierrez, KSV refuses to disclose the content of or reasoning behind those discussions.

p) Rather than pursue the dividends withheld by the Cousins from LISA, KSV has focused exclusively on certain "reviewable transactions" that, even if reversed, would have no bearing on the potential collection of funds. Although KSV has already incurred more than a million dollars in professional fees investigating those transactions, it has not collected a single dollar in the receivership.

q) Conversely, KSV has taken no steps to collect an unpaid $400,000 promissory note in favor

of Xela from a company owned by Ms. Castillo's husband. Neither has KSV investigated the evidence supplied by Mr. Gutierrez suggesting that Ms. Castillo received the full benefit of a US$4.35 million loan in 2010 that was repaid with LISA dividends wrongfully pledged as collateral by the Cousins, effectively satisfying the Castillo Judgment.

r) KSV's official reports are riddled with inaccurate and/or incomplete statements and omissions, unfairly casting Mr. Gutierrez as uncooperative and giving little if any consideration to Mr. Gutierrez's legal rights. Although Mr. Gutierrez has corrected the record repeatedly with both sworn testimony and documentary evidence, KSV has not amended its reports accordingly. Further, KSV has made of practice of making sensitive documents public, seemingly without reason. For example, KSV recently posted on its website a copy of a SWIFT electronic funds transfer confirmation that contained personal information belonging to a Russian third-party lender who was transferring funds to Mr. Gutierrez's counsel to satisfy the Castillo Judgment. Those funds were subsequently held up by the U.S.-based intermediary bank identified in the SWIFT, further preventing satisfaction of the Castillo Judgment.

s) KSV has abused its broad discovery powers in search of documents potentially useful to the Cousins. Most notably, under the premise that it required additional information to review the transactions, KSV continued to insist on access to all of Mr. Gutierrez's emails and his personal electronic devices in a manner not available to ordinary civil litigants. Yet without advising the Court or the stakeholders, KSV had already commenced a civil claim in Ontario against Mr. Gutierrez and his family relating to the same "reviewable transactions" under investigation by KSV in the receivership. Consequently, KSV has now exposed highly confidential and personal information belonging to Mr. Gutierrez – not to Xela – to the risk of security breach, knowing that Xela's entire electronic database had been stolen and delivered

to the Cousins at least once before.

t) KSV has articulated no potential nexus between information in Mr. Gutierrez's emails/personal devices and the collection of funds. KSV's efforts to obtain the information over the last three years has been grossly disproportionate to any potential relevance of the evidence expected to be contained therein. The data uploaded to an electronic database maintained by KSV's agent constitute more than 60 gigabytes and hundreds of thousands of separate emails spanning more than 20 years. Proper review calls for a massive outlay of time and resources in the days ahead – all of which will undoubtedly be charged to Mr. Gutierrez, who has already lost all his personal assets to Ms. Castillo, including his family home and his ability to support his aging mother in Toronto, who receives no financial assistance from her daughter Ms. Castillo.

u) KSV took possession of all of Xela's physical documents without cataloguing them, creating unnecessary chain-of-custody concerns. KSV subsequently refused to address tax issues of certain Xela subsidiaries whose documents were seized by KSV.

v) In 2019, LISA secured a third-party loan commitment that would have satisfied the Castillo Judgement and all receivership expenses (the **"LISA Loan"**). KSV objected to the Lisa Loan on the ground that it could not evaluate the impact of the loan on the remaining Xela creditors (*i.e.*, other than Ms. Castillo). KSV has never explained the logic of that reasoning considering Paragraph 25 of the Appointment Order, which places the onus on Ms. Castillo to argue that the Receiver should not be discharged even if the Castillo Judgment were satisfied.

w) More importantly, in response to LISA's disclosure of the LISA Loan and its request for a payoff amount, the Receiver intentionally interfered with the loan and prevented its funding.

Even while KSV's lawyers were in discussions with LISA's lawyers concerning the LISA Loan, KSV quietly hired the Hatstone law firm in Panama (**"Hatstone"**) and instructed it to take over LISA without first going through the process of seeking recognition in Panama consistent with Paragraph 30 of the Appointment Order. In order to achieve that objective, Hatstone filed an official public writing with the Panamanian corporate registry falsely representing that Gabinvest, S.A. (**"Gabinvest"**), LISA's parent company, had properly notified and conducted a shareholder meeting in Panama during which the Gabinvest board of directors was ostensibly reconstituted to give Hatstone representatives control. The public writing filed by Hatstone made no reference: (1) to Xela; (2) to KSV; (3) to the fact that – at least in Ontario, Canada – KSV had replaced Mr. Gutierrez as the acting shareholder of Xela; or (4) to the fact that the Appointment Order had not been recognized in Panama, and that KSV's authority to act as Xela's sole shareholder therefore did not extend to Panama.

x) Thereafter, Hatstone sought to cause Gabinvest to reconstitute the LISA board of directors to give Hatstone control of LISA. The scheme was uncovered by LISA's and Gabinvest's Panamanian lawyers before the changes could take effect. Still, the public controversy over LISA's board caused the third-party funder to withdraw its loan commitment. Consequently, Mr. Gutierrez was prevented from satisfying the Castillo Judgment and bringing a motion to discharge the receivership, and KSV's onerous investigation into the "reviewable transactions" took on new life and continues to the present.

y) As the Court knows, Hatstone is now facing criminal charges in Panama stemming from the misconduct. In the process, Mr. Gutierrez – still the only Xela shareholder recognized in Panama – truthfully affirmed that he had not participated in the Gabinvest shareholder meeting alleged by Hatstone. In response, this Court ordered Mr. Gutierrez to withdraw his affirmation

and to direct LISA to withdraw the criminal complaint in Panama, which he did. However, LISA declined on the ground that it was under a legal obligation in Panama to report criminal activity, and the prosecution against Hatstone continues.

z) KSV has never acknowledged its own misconduct in Panama. Instead, in apparent retaliation for the outcome in that country, KSV sought a finding of criminal contempt and incarceration against Mr. Gutierrez, which was heard before Justice Conway on May 30/31 and June 2, 2022. Although Justice Conway (erroneously) concluded that Mr. Gutierrez was liable in civil contempt, she found that he had not engaged in criminal conduct. However, sentencing is pending, and the potential injury to Mr. Gutierrez is still unknown.

aa) Although KSV failed to give Hatstone a power of attorney as required under Panama law, creating the appearance that Hatstone was acting alone, Mr. Kofman has admitted under oath that KSV instructed Hatstone. Consequently, KSV and/or Mr. Kofman may themselves be exposed to potential criminal prosecution in Panama, exacerbating the conflict between KSV and Mr. Gutierrez. KSV should not continue to act as an Officer of the Court in a receivership where KSV and/or its principal may be charged criminally in connection with the conduct of the same receivership.

bb) The foregoing developments have created serious tensions and a mutual lack of trust between KSV and Mr. Gutierrez. There is a conflict of interest – or, at the very least, an appearance of conflict – with respect to KSV's mandate as receiver given the undisclosed relationship with the Cousins, the potential for criminal sanctions in Panama, and the singular focus on Mr. Gutierrez's personal emails and data. Under these circumstances, Mr. Gutierrez has found it challenging to fulfill his responsibilities under the Appointment Order while

safeguarding his own legal rights. All parties would seemingly benefit from a new receiver.

cc) Albert Gelman Inc. is a licensed insolvency trustee with extensive experience under similar mandates and has agreed to act, subject to satisfactory payment terms.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

dd) Affidavit of Juan Guillermo Gutierrez to be sworn; and

ee) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

September 12, 2022

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MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

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Lawyers for the Respondent
Juan Guillermo Gutierrez

**CITATION:** Castillo v. Xela Enterprises Ltd., 2022 ONSC 5594
**COURT FILE NO.:** CV-11-9062-00CL
**DATE:** 20221017

**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:** September 22, 2022

## REASONS FOR DECISION (SENTENCING)

[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 contempt for the breach: see *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006. I found that the elements of civil contempt were proven beyond a reasonable doubt. I declined to make a finding of criminal contempt.

[3] This is the penalty phase of the civil contempt motion.

[4] The Receiver seeks an order for 90 days' imprisonment of Mr. Gutierrez, a $25,000 fine and full indemnity costs of the contempt motion. Mr. Gutierrez submits that an appropriate penalty is a $25,000 fine or alternatively, that a fine followed by 12 months of probation with restrictive terms is sufficient.

**Factual Background and Contempt Finding**

[5] The background facts are described in greater detail in my June 29, 2022 reasons. Briefly, the Receiver was appointed in connection with the efforts of Mr. Gutierrez's sister, Margarita Castillo, to enforce a $4.25 million judgment against Xela, Mr. Gutierrez and their father.

[6] The Receiver, in seeking to obtain information about Xela and its historical transactions, exercised Xela's rights as the sole shareholder of its Panamanian subsidiary, Gabinvest S.A. ("**Gabinvest**") on January 16, 2020. It removed Gabinvest's three existing directors and replaced them with the Receiver's representatives from the Hatstone Group (Panamanian counsel to the Receiver). On March 24, 2020, McEwen J. held that the replacement of the Gabinvest board was a proper exercise of the Receiver's exclusive power under the Appointment Order.

[7] Harald Johannessen Hals ("**Mr. Hals**") was one of the directors of Gabinvest. On January 20, 2021, Mr. Hals filed a criminal complaint against the new Gabinvest directors (the "**Criminal Complaint**") stating that the Receiver's January 16, 2020 shareholder meeting was not properly held and that it constituted a crime. The Criminal Complaint estimated $2 million in provisional damages against the three directors. The sole evidence tendered in support of the Criminal Complaint was a declaration sworn by Mr. Gutierrez on December 3, 2020 (the "**Declaration**").

[8] The Declaration is reproduced in full in my June 29, 2022 reasons. Mr. Gutierrez declared, among other things, that Xela was his client and was not notified of the Gabinvest shareholder meeting; that the three replacement directors had no authority to represent Gabinvest since they were not elected by the shareholder of the company; and that any decisions by those directors were of no value and "are the result of falsehood in form and substance and any other crime that corresponds to the acts committed". He did not say that Xela was in receivership or that the Receiver had the exclusive authority to take actions on behalf of Xela.

[9] On February 10, 2021, McEwen J. 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 adamantly that McEwen J. had overstepped his powers and that he would not withdraw the Criminal Complaint.

[10] On December 14, 2021, Mr. Gutierrez attended an 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 shareholder meeting, and that he was a "judicial hostage" because McEwen J.'s orders prevented him from participating in this case.

[11] The contempt motion proceeded before me in May and June 2022. I found that the Receiver established the elements of civil contempt and that, in signing the Declaration, Mr. Gutierrez breached 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.

[12] I found that Mr. Gutierrez was not a credible witness. I did not accept his evidence, nor did it leave me with a reasonable doubt. I found 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.

[13] Following the release of my reasons, Mr. Gutierrez's counsel wrote a letter to Mr. Hals on July 6, 2022. He renewed Mr. Gutierrez's "clear and unequivocal request" to Mr. Hals to withdraw the Criminal Complaint and to ensure that Mr. Hals not rely on the Declaration or the Interview as the evidentiary foundation for any proceeding against the Receiver or its agents in Panama.

**Law on Sentencing for Civil Contempt**

[14] Rule 60.11(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that in disposing of motion for a contempt order, the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary.

[15] The applicable principles in sentencing for civil contempt are well-established. The purpose of sentencing for civil contempt is different than for criminal contempt. The purpose of a sentence for criminal contempt is primarily about punishment whereas the purpose of a sentence for civil contempt is primarily about coercion and is designed to protect and enforce the rights of

a private party: see *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 77.

[16] However, the courts have recognized that while gaining compliance with the court's orders is the primary aim of sentencing in civil contempt proceedings, acts of civil contempt, like criminal contempt, undermine the authority of the courts and diminish respect for the law: see *Cavalon*, at para. 78. As stated in *Cavalon*, at para. 81, "[b]ecause civil contempt engages issues of public law and the need to condemn acts which undermine the authority and dignity of the court, punishment has been recognized as a secondary purpose for sentencing in such cases." In *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at para. 79, the court observed that one of the purposes of a penalty for civil contempt is to "to ensure societal respect for the courts" and "to enforce the efficacy of the process of the court itself."

[17] In *363523 Ontario Inc. v. Nowack*, 2016 ONSC 2518, at paras. 71-72[1], Dunphy J. stated:

> Punishment serves to denounce conduct that requires denouncing and thereby deter the contemnor specifically and others more generally who might contemplate breaches of court orders...
>
> If a party has disagreements or issues with an order that has been made, it must nevertheless be complied with unless validly stayed or reversed on appeal in accordance with the rules. There is no self-help after an order has been issued. [Emphasis added.]

[18] While imprisonment is a common sentence for criminal contempt, it is rare for civil contempt. Ordinarily, a finding of contempt, together with a fine or some other appropriate order, is sufficient to gain compliance and restore the authority of the court. Imprisonment is a sentence of last resort: See *Chiang (Re)*, 2009 ONCA 3, at para. 90. See also *Cavalon*, at paras. 82, 89.

[19] However, "[a] wilful flagrant breach of a single court order that shows a callous disregard for the court's authority, or that causes significant prejudice to the other party may attract a jail sentence": *Cavalon*, at para. 87 (emphasis added). "[S]erious violations of court orders – even if only one order or one instance – can warrant a jail sentence. In determining whether a jail sentence is needed to adequately vindicate the due administration of justice, the context in which the contempt occurs is an important consideration": *Cavalon*, at para. 89 (citations omitted).

[20] Where a contemnor has purged their contempt, there usually is no longer any need or justification for imprisonment: see *Andersson v. Aquino*, 2019 ONSC 886, at para. 31. A contemnor bears the onus of establishing on a balance of probabilities that they purged their contempt: see *Chiang (Re)*, at paras. 50-52.

---

[1] aff'd 2016 ONCA 951, leave to appeal refused, [2017] S.C.C.A No. 37376.

[21] In fashioning an appropriate sentence, the court is to consider the following factors:

- the proportionality of the sentence to the wrongdoing;
- the presence of mitigating factors;
- the presence of aggravating factors;
- deterrence and denunciation;
- the similarity of sentences in like circumstances; and
- the reasonableness of a fine or incarceration.

See *Boily*, at paras. 90-113; *Cavalon*, at para. 90.

**What is a Fit Sentence in this Case?**

[22] I have considered the factors set out above.

Proportionality

[23] Proportionality requires that the punishment fit the wrongdoing: see *Boily*, at para. 91. The circumstances that will warrant a jail sentence depend on the facts of any given case. The more wilful, flagrant, ongoing, and damaging the contempt, the more likely it is that a jail sentence will be imposed: see *Astley v. Verdun*, 2013 ONSC 6734, at para. 36.

[24] In this case, the wrongdoing was extremely serious. The Receiver was appointed as an officer of this court and, through the Appointment Order, was given the exclusive authority to deal with the shareholdings of Xela. In the face of the exclusive authority given to the Receiver, Mr. Gutierrez (i) purported to act on behalf of Xela when he signed the Declaration; (ii) interfered with the exercise of the Receiver's powers under the Appointment Order; and (iii) participated in the Criminal Complaint brought against the Receiver's representatives in Panama.

[25] The sentence must reflect the severity of Mr. Gutierrez's conduct.

Mitigating and Aggravating Factors

[26] A sentence should be increased or reduced to account for aggravating or mitigating factors: see *Astley*, at para. 16.

[27] There is only one mitigating factor: this is Mr. Gutierrez's first offence. Purging one's contempt, pleading guilty, or apologizing can also act as mitigating factors in sentencing: see *Chiang (Re)*, at para. 87; *Cavalon*, at paras. 25, 86. Mr. Gutierrez has not offered any apology or expressed remorse for his conduct. However, he submits that he purged his contempt when his counsel wrote to Mr. Hals on July 6, 2022 reiterating the request that Mr. Hals discontinue the Criminal Complaint and not rely on the Declaration or the Interview. At the sentencing hearing, Mr. Gutierrez's counsel asked, "What else could Mr. Gutierrez have done to purge his contempt?"

[28] I am not persuaded, on a balance of probabilities, that Mr. Gutierrez purged or attempted to purge his contempt, for several reasons. First, Mr. Gutierrez had already sent a letter to Mr. Hals

in February 2021, advising him that he had withdrawn the Declaration and requesting that Mr. Hals discontinue the Criminal Complaint. Mr. Hals wrote back in no uncertain terms that he had no intention of discontinuing the proceedings. The translation of Mr. Hals' letter says that McEwen J.'s order was illegal, that he overstepped his powers and that he invaded a foreign jurisdiction in a "boorish and gross way". He said he would appeal to protect "our rights as citizens, including complaining to the Panamanian Chancellery's Office." Indeed, in August 2021, despite Mr. Gutierrez's request that he withdraw the Criminal Complaint, Mr. Hals requested the Public Prosecutor interview Mr. Gutierrez in connection with the Criminal Complaint, which led to the Interview taking place.

[29] Given such conduct, Mr. Gutierrez knew that Mr. Hals would not back down. The July 6th letter asking him to do so was, in my view, not a genuine attempt to purge his contempt.

[30] Second, after he was found in contempt, Mr. Gutierrez did not attempt to contact the Public Prosecutor to advise (once again) and reinforce that he had withdrawn the Declaration, that they should not rely on the Interview and that he wished to discontinue the Criminal Complaint. Mr. Gutierrez knew the contact information for the Public Prosecutor's representative in Toronto since he had attended the Interview with that individual in December 2021.

[31] Third, after Mr. Gutierrez withdrew the Declaration in February 2021, he proceeded to go to the Interview months later without alerting the Receiver or this court. He also failed to tell the Public Prosecutor's representative that he had withdrawn the Declaration or to ask that the Public Prosecutor not use it to support the Criminal Complaint. Instead, he told the Public Prosecutor's representative that he was a "judicial hostage" of this court. Mr. Gutierrez's actions call into question the sincerity of his withdrawal of the Declaration, both before and after the finding of contempt.

[32] Fourth, to the extent that Mr. Gutierrez had no power to cause Mr. Hals to discontinue the Criminal Complaint (which was based on the Declaration) or to stop the Public Prosecutor from continuing its investigation, that is a situation of Mr. Gutierrez's own making. In signing the Declaration, he assisted in putting the wheels in motion for the initiation of a criminal investigation against the Receiver's representatives. "It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the court order where such impossibility is the result of the contemnor's own conduct": *Sussex Group Ltd. v. Fangeat*, [2003] O.T.C. 781 (S.C.), at para. 56. See also *Manis v. Manis* (2001), 55 O.R. (3d) 758 (C.A.), at paras. 29-30; *Andersson*, at para. 21.

[33] There are several aggravating factors. It is an aggravating factor when the contemptuous conduct is "blatant, deliberate, wilful and ... unrepentant" as opposed to misguided or accidental and not intended to defy the rule of law: *Chiang (Trustee of) v. Chiang* (2007), 85 O.R. (3d) 425 (S.C.), at para. 38, aff'd *Chiang (Re)*. See also *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic* (2009), 308 D.L.R. (4th) 562 (Ont. S.C.), at para. 32.

[34] I found, as an element of civil contempt, that Mr. Gutierrez intentionally signed the Declaration. I also found that he knew that the purpose of the Declaration was to support the

Criminal Complaint against the Receiver's representatives in Panama and that he did so unilaterally, without any regard for this court's supervisory role over its appointed officer. As I held in my reasons:

> [I]f 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.

[35] Instead, he took matters into his own hands and engaged in self-help.

[36] I have considered Mr. Gutierrez's conduct in the context of how events unfolded over a period of almost two years. In so doing, 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.

[37] Mr. Gutierrez's conduct demonstrates an astounding lack of respect for this court. The Receiver replaced the Gabinvest board in January 2020. Two months later, McEwen J. held that this was a proper exercise of the Receiver's authority. Nine months after McEwen J.'s order, Mr. Gutierrez swore the Declaration, purporting to act on behalf of Xela and directly challenging the Receiver's replacement of the board. He did not seek direction from this court before signing the Declaration.

[38] In February 2021, after the Receiver returned to this court, McEwen J. ordered Mr. Gutierrez to withdraw the Declaration and forthwith take all steps within his control to withdraw the Criminal Complaint. Ten months later, Mr. Gutierrez voluntarily participated in the Interview. He did not seek direction from this court before attending the Interview.

[39] As noted above, at the Interview, he failed to tell the Public Prosecutor's representative that he had withdrawn the Declaration or that he did not wish to pursue the Criminal Complaint. To the contrary, he stood by his position. According to the summary of the Interview, he told the Public Prosecutor that this case involves a "company that I manage in Canada" and described Xela as "a company I represent" (contrary to the exclusive authority given to the Receiver under the Appointment Order). He described himself as "a victim and plaintiff". He said that "a commercial judge in the province of Ontario issued an order limiting me from participating or carrying out further proceedings in this case, which makes me feel like a judicial hostage". He did not forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Declaration as ordered by McEwen J. on February 10, 2021.

[40] Finally, in making the Declaration, Mr. Gutierrez interfered with the Receiver's mandate to assist in enforcing Ms. Castillo's $4.25 million judgment against Mr. Gutierrez and Xela, his family's holding company. That works to his financial benefit. Contemptuous conduct that is

intended to lead to personal financial gain is also an aggravating factor: see *Cavalon*, at para. 94; *Astley*, at para. 37; *Andersson*, at para. 33.

Deterrence and Denunciation

[41] In *Boily*, at para. 105, Epstein J.A. recognized that deterrence is the most important principle in civil contempt sentencing, citing *Niagara (Regional Municipality) Police Services Board v. Curran* (2002), 57 O.R. (3d) 631 (S.C.), at para. 35:

> The primary purpose of sentencing in contempt proceedings is deterrence: both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is wounded when court orders are ignored. The sentence must be one that will repair the wound and denounce the conduct.

[42] In *Cavalon*, at para. 81, the court repeated that specific and general deterrence are the most important sentencing objectives in civil contempt cases.

[43] The need for denunciation and deterrence is evident in this case. Mr. Gutierrez must know that he cannot breach an order of this court. He cannot take unilateral action to challenge the conduct of this court's officers. He cannot participate in a criminal complaint against a court officer without seeking any direction from this court.

[44] The penalty in this case must also serve as a general deterrent to others. Litigants must know that they cannot breach a court order, interfere with the mandate of a court officer, and ignore the supervisory role of the court over its appointed officer.

Similar Sentences

[45] As noted above, imprisonment is to be imposed as a sentence of last resort. However, in numerous cases, imprisonment was imposed as a sanction for civil contempt. The court in *Cavalon* listed some cases in which imprisonment was ordered, at para. 88:

> While each case is fact specific, incarceration has been imposed in numerous cases for failure to produce documents or corporate records: see *Sussex Group Ltd. v. Sylvester* (2002), 62 O.R. (3d) 123 (S.C.), at para. 85 (6 months); *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, at para. 35 (3 months and a fine of $7500); *Cellupica v. Di Giulio*, 2011 ONSC 1715, 105 O.R. (3d) 687, at para. 49 (90 days); *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.T.C. 683 (S.C.), at para. 15 (2 months); *Nowack*, at para. 114 (1 month).

[46] The imposition of a jail sentence has reflected, among other things, the severity of the contemptuous conduct, the degree of remorse shown by the contemnor, and the number of court orders breached. However, as noted above, imprisonment may be imposed for breaching a single court order.

[47] There are two cases in which a custodial sentence was imposed for interfering with a receiver. In *Fangeat*, the contemnor was imprisoned for six months. The court found that the contemnor's interference was knowing and deliberate, harmed Sussex Group and its investors, and was to the contemnor's own personal benefit. Cumming J. stated, at para. 57, that "it is a contempt to interfere with a receiver acting under a court order, even if the terms of the order clearly are wrong or impracticable. The creditor must attack the receiving order itself through the courts."

[48] In *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 889, the contemnor stole 32 gold bars that he purchased with the debtor's money and was required by court order to provide to the receiver. The effect of the accused's conduct was to deprive the receiver of access to the only asset capable of satisfying the debtor's judgment. The court held that a fine was not appropriate as there was no reasonable basis to believe that the accused would pay the fine. The sentence imposed was six months' imprisonment if the contemnor did not purge his contempt within a week.

[49] While those cases are distinguishable on their facts, it is clear that interfering with a court-appointed officer in the exercise of its mandate is treated as a significant factor in determining an appropriate sentence for civil contempt.

Reasonableness of a Fine or Incarceration

[50] In this case, a fine would not serve the principles of sentencing. It would not reflect the seriousness of Mr. Gutierrez's conduct. It would not accomplish the objectives of general and specific deterrence. Indeed, the appointment of the Receiver was required to assist in enforcing a $4.25 million judgment against Mr. Gutierrez and Xela. A fine of $25,000 in these circumstances would not sufficiently deter Mr. Gutierrez, if at all.

[51] Mr. Gutierrez submits, in the alternative, that a fine and 12 months of probation with restrictive terms is sufficient. He provided no evidentiary support to justify a probationary sentence. In any event, probation would not adequately address the principles of sentencing for the reasons set out above.

[52] Only imprisonment is appropriate to meet the applicable principles. Having regard to those principles and the range established by the case law, I have determined that a sentence of 30 days' imprisonment is a fit and appropriate sentence. I consider 30 days to be a sufficient, but not excessive, period of imprisonment to address the objectives of sentencing. Since the custodial sentence appropriately addresses the need for denunciation and deterrence, I see no need to impose an additional monetary penalty.

**Decision**

[53] I order that Mr. Gutierrez be imprisoned for a period of 30 days. A warrant for committal shall issue forthwith.

[54] If the parties are unable to agree on costs, I will receive written submissions (no longer than four pages double spaced, exclusive of bill of costs). The Receiver's costs submissions shall

be delivered within ten days and Mr. Gutierrez's costs submissions within ten days thereafter. The Receiver may deliver reply submissions of no more than two pages within three days thereafter.

Conway J.

**Date:** October 17, 2022

**COURT FILE NO.:** 02-CV-235918CM2
**DATE:** 20090501

**SUPERIOR COURT OF JUSTICE - ONTARIO**



**RE:** Coastline Corporation Ltd. et al. v. Canaccord Capital Corporation et al.

**BEFORE:** Master Glustein

**COUNSEL:** John Kingman Phillips for the plaintiffs

Joel D. Farber for the defendants Canaccord Capital Corporation, Douglas A. Doiron, Jim Miller, Ward McMahon, Peter M. Brown, Michael G. Greenwood, Dennis Neil Burdett, and Robert M. Larose

Matthew Gottlieb for the defendants Sprott Securities Limited, Sprott Securities Inc., Eric S. Sprott, Gordon Ludolph, Lloyd Lamont Gordon, Anne L. Spork, Scott Lamacraft, Colleen Wright and Jeff Kennedy

**HEARD:** April 22, 2009

## REASONS FOR DECISION

### Nature of the motions and overview of issues

[1] There are two motions before me. In the first motion (the "Canaccord Motion"), the defendants Canaccord Capital Corporation ("Canaccord"), Douglas A. Doiron, Jim Miller, Ward McMahon, Peter M. Brown, Michael G. Greenwood, Dennis Neil Burdett, and Robert M. Larose (collectively, the "Canaccord Defendants") seek security for costs under Rules 56.01(1)(a) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules of Civil Procedure*"), against the plaintiffs Coastline Corporation Ltd. ("Coastline") and Forum Management Inc. ("Forum"). The basis of the motion is that (i) Coastline and Forum are non-residents of Ontario and (ii) Coastline and Forum are corporations and there is good reason to believe that they have insufficient assets in Ontario to pay the costs of the defendants if Coastline or Forum is unsuccessful in their action.

[2] In the second motion (the "Sprott Motion"), the defendants Sprott Securities Limited ("Sprott") , Sprott Securities Inc., Eric S. Sprott, Gordon Ludolph, Lloyd Lamont Gordon, Anne L. Spork, Scott Lamacraft, Colleen Wright and Jeff Kennedy (collectively, the "Sprott Defendants") seek security for costs under Rule 56.01(1)(a) and (d) against Coastline and Forum. The Sprott defendants rely on the same basis as in the Canaccord Motion. The Sprott Defendants also seek security for costs under Rule 56.01(e) on the basis that there is good reason to believe that (i) the action is frivolous and vexatious and (ii) Coastline and Forum have insufficient assets in Ontario to pay the costs of the defendants if Coastline or Forum is unsuccessful in their action.

**Applicable law**

[7] I apply the following legal principles:

(i) The initial onus is on the defendant to satisfy the court that it "appears" there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56.01 (*Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.J.) at 123);

(ii) Once the first part of the test is satisfied, "the onus is on the plaintiff to establish that an order for security would be unjust" (*Uribe v. Sanchez* (2006), 33 C.P.C. (6th) 94 (Ont. S.C.J. – Mast) ("*Uribe*") at para. 4);

(iii) The second stage of the test "is clearly permissive and requires the exercise of discretion which can take into account a multitude of factors". The court exercises a broad discretion in making an order that is just (*Chachula v. Baillie* (2004), 69 O.R. (3d) 175 (S.C.J.) at para. 12; *Uribe*, at para. 4);

(iv) The plaintiff can rebut the onus by either demonstrating that:

(a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation,

(b) the plaintiff is impecunious and that justice demands that the plaintiff be permitted to continue with the action, *i.e.* an impecunious plaintiff will generally avoid paying security for costs if the plaintiff can establish that the claim is not "plainly devoid of merit", or

(c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must meet a high threshold to satisfy the court of its chances of success[2]

(See *Willets v. Colalillo*, [2007] O.J. No. 4623 (S.C.J. – Mast.) at paras. 46, 47, and 55; *Uribe*, at para. 5; *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.) at para. 50; *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2007] O.J. No. 4096 (S.C.J. – Mast.) ("*Bruno*") at para. 35);

(v) Merits have a role in any application under Rule 56.01, but in a continuum with Rule 56.01(1)(a) at the low end (*Padnos v. Luminart Inc.*, [1996] O.J. No. 4549 (Gen. Div.) ("*Padnos*"), at para. 4; *Bruno*, at para. 36);

[2] Courts use different language to explain the threshold to be met as to the strength of the case that the plaintiff must demonstrate to avoid security for costs when a plaintiff does not have sufficient assets to pay a costs award but is not impecunious, such as the claim has a "good chance of success", a "real possibility of success", or an "overwhelming" case. However, the principle governing all of the cases is that there is a high threshold to meet for the plaintiff to satisfy the court of its chances of success.

(vi) The court on a security for costs motion is not required to embark on an analysis such as in a motion for summary judgment. The analysis is primarily on the pleadings with recourse to evidence filed on the motion, and in appropriate cases, to selective references to excerpts of the examination for discovery where it is available (*Padnos*, at para. 7; *Bruno*, at para. 37);

(vii) "If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious" (*Wall v. Horn Abbott Ltd.*, [1999] N.S.J. No. 124 (C.A.) at para. 83);

(viii) The evidentiary threshold for impecuniosity is high, and "bald statements unsupported by detail" are not sufficient. The threshold can only be reached by "tendering complete and accurate disclosure of the plaintiff's income, assets, expenses, liabilities and borrowing ability, with full supporting documentation for each category where available or an explanation where not available" (*Uribe*, at para. 12; *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435 (S.C.J. – Mast.) ("*Shuter*") at para. 76);

(ix) To meet the onus to establish impecuniosity, "at the very least, this would require an individual plaintiff to submit his most recent tax return, complete banking records and records attesting to income and expenses" (*Shuter*, at para. 76);

(x) A corporate plaintiff who claims impecuniosity must demonstrate that it cannot raise security for costs from its shareholders and associates, *i.e.* it must demonstrate that its principals do not have sufficient assets (*Smith Bus Lines Ltd. v. Bank of Montreal* (1987), 61 O.R. (2d) 688 (H.C.J.) at 705). Evidence as to the "personal means" of the principals of the corporation is required to meet this onus (*Treasure Traders International Co. v. Canadian Diamond Traders Inc.*, [2006] O.J. No. 1866 (S.C.J.) ("*Treasure Traders*"), at paras. 8-11). A corporate plaintiff must provide "substantial evidence about the ability of its shareholders or others with an interest in the litigation to post security". "A bare assertion that no funds are available" will not suffice. (*1493677 Ontario Ltd. v. Crain*, [2008] O.J. No. 3236 (S.C.J. – Mast.) at para. 19);

(xi) Consequently, full financial disclosure requires the plaintiff to establish the amount and source of all income, a description of all assets including values, a list of all liabilities and other significant expenses, an indication of the extent of the ability of the plaintiffs to borrow funds, and details of any assets disposed of or encumbered since the cause of action arose (*Morton v. Canada* (2005), 75 O.R. (3d) 63 (S.C.J.) at para. 32);[3]

[3] The plaintiffs were granted leave to appeal the decision in *Morton* to the Divisional Court on the basis that despite the finding of no impecuniosity, leave was appropriate because (i) the motion judge (Quinn J.) failed to consider whether an adjournment was appropriate for better evidence and (ii) Quinn J. held that the plaintiffs had a "real

(xii) Because the plaintiff has the onus to establish impecuniosity, a defendant "can choose not to cross-examine if the plaintiff fails to lead sufficient evidence". The decision not to cross-examine does not convert insufficient evidence into sufficient evidence (*Bruno*, at pars. 27-28; *Shuter*, at paras. 59 and 71); and

(xiii) When an action is in its early stages, an installment (also known as "pay-as-you-go") order for security for costs is usually the most appropriate (*Bruno*, at para. 65; *Hawaiian Airlines, Inc. v. Chartermasters Inc., et al.* (1985), 50 O.R. (2d) 575 (S.C.O. – Mast.)).



**Analysis**

[8] I consider each of the issues set out in paragraph 4 above, in light of the above case law and the evidence (or lack thereof) on this motion.

**Issue 1: Impecuniosity**

**(a) Lack of evidence as to impecuniosity**

[9] Given that Coastline and Forum acknowledge that (i) they are non-residents and (ii) they are corporations with insufficient assets in Ontario to pay the costs of the defendants if Coastline or Forum is unsuccessful in their action, Coastline and Forum have to meet the high threshold required to establish impecuniosity.

[10] The only evidence Coastline and Forum provided as to their impecuniosity was a bald hearsay statement by their business advisor, George Georgiou ("Georgiou") that he was "informed by Ron Wyles", the sole director of both Coastline and Forum, that:

(i) "as a direct result of the wrongdoing of the Plaintiffs herein, Forum currently has no assets",

(ii) "as a direct result of the wrongdoing of the Plaintiffs herein, Coastline currently has no assets",

(iii) both Coastline and Forum are "wholly owned by a Turks & Caicos trust called Cypco Capital Trust", and

(iv) "Cypco Capital Trust does not have sufficient assets of its own to post the security sought by the Moving Parties, nor does it have any shareholders from whom such security may be sought".

[11] The above evidence falls far short of the requirement for "complete" and "accurate" disclosure of Coastline and Forum's "income, assets, expenses, liabilities and borrowing ability". Neither Coastline nor Forum filed any documentation to support the assertion of impecuniosity.

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possibility of success" but dismissed the motion for lack of financial disclosure ([2005] O.J. No. 4965). However, Quinn J.'s conclusion that a plaintiff must provide detailed financial disclosure is now settled law.

**CITATION:** McArthur v. Neumann, 2020 ONSC 66
**COURT FILE NO.:** 56646/16 (St. Catharines)
**DATE:** 20200109

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **BETWEEN:** | |
| SAMUEL MCARTHUR also known as SAM MCARTHUR<br>Plaintiff | *Luigi De Lisio*, for the Plaintiff (Responding Party) |
| **– and –** | |
| GARY NEUMANN and NIAGARA REGIONAL MORTGAGE SERVICES INC.<br>Defendants | *Frederick Caplan*, for the Defendants (Moving Parties) |
| | **HEARD:** December 16, 2019 |

**R. A. LOCOCO, J.**

**REASONS FOR DECISION**

## I. Introduction

[1] The Defendants bring a motion to require the Plaintiff to provide security for costs. For the reasons below, I am dismissing the motion.

[2] The Plaintiff Samuel McArthur has brought an action against the Defendants Gary Neumann and Niagara Regional Mortgage Services Inc., alleging financial loss arising from breach of fiduciary duty and breach of trust. According to the Plaintiff, the following is the factual basis for his claim.

[3] In 2003, the Plaintiff received a lump sum pay-out of his pension from his former employer in the amount of $723,000. The Plaintiff invested those funds in mortgages arranged through the Defendants, who carried on business as mortgage brokers. The funds were invested in a total of 18 mortgages secured by 12 properties. The mortgages were generally second or third mortgages. The funds were invested in the period from 2003 to 2006. The Plaintiff says that in making those investments, he relied on the Defendants' representations with respect to the value of the mortgaged properties and the amounts to be loaned under the mortgages. The Plaintiff's return from the mortgages

[12] At para. 26, the court sets out several of the "unique factual circumstances" that led to its conclusion that the interests of justice require that no order for security of costs be made in that case. Among other things, those circumstances included the following: (i) the plaintiffs were seeking to enforce a judgment in which they had no direct economic interest arising from pubic interest litigation; (ii) any costs award against the plaintiffs would constitute a miniscule fraction of the annual revenues of the defendants who are part of a global conglomerate; and (iii) the defendants' course of conduct in the litigation over a 25 year period made it clear they would use all available means to resist enforcement of the Ecuadorian judgment, leading to the conclusion that the security for costs motion was a litigation tactic intended to bring the litigation to an end.

[13] In *Novak*, at para. 7, the Court of Appeal upheld a security for costs order by the same motion judge, clarifying that *Chevron* should not be read as "altering the established test for ordering security for costs. The established test requires a judge, after analysing the specific factors spelled out in the rules, to consider the overall justness of the order sought." In *Novak*, at para. 8, the court finds that the motion judge did not err in determining a security for costs to be just in that case, noting (among other things) the absence of the unique circumstances that were present in *Chevron*.

[14] To support their request for a security for costs order in the present case, the Defendants rely on r. 56.01(1)(e), which applies where it appears that there is good reason to believe that (i) the Plaintiff's action is frivolous and vexatious, and (ii) the Plaintiff has insufficient assets in Ontario to pay the Defendants' costs. If the Defendants establish that both these factors are satisfied, the court may in its discretion make a security for costs order after considering the overall justness of doing so in all the circumstances.

[15] It is common ground between the parties that the second of the two first-stage considerations has been established in this case, that is, it appears that there is good reason to believe that the Plaintiff has insufficient assets in Ontario to pay the Defendants' costs. Therefore, the issues to be determined on this motion are as follows:

a. Frivolous and vexatious: Does it appear that there is good reason to believe that the Plaintiff's action is frivolous and vexatious?

b. Justness of ordering security for costs: If the answer to the first question is yes, should the court exercise its discretion to make a security for costs order, after considering the overall justness of doing so in all the circumstances?

## III. Frivolous and vexatious

[16] Does it appear that there is good reason to believe that the Plaintiff's action is frivolous and vexatious?

[17] As previously noted, the onus is on the Defendants to establish that it appears there is good reason to believe the Plaintiff's action is frivolous and vexatious. Notably, the Defendants are *not* required to establish the Plaintiff's action is *in fact* frivolous and

vexatious. Rather, for r. 56.01(1)(e) to apply, the first stage requirement is that *it appears that there is good reason to believe* that the Plaintiff's action is frivolous and vexatious.

[18] In *Pickard*, Watt, J.A., sitting as a single Court of Appeal justice on a security for costs motion under r. 61.06(1), considers the interpretation of r. 61.06(1)(a), the wording of which corresponds to r. 56.01(1)(e). As the court notes in *Pickard*, at para. 18, the standard imposed by the rules "does not demand that the motion judge reach a definitive conclusion, make an affirmative finding or actually determine that the appeal is frivolous and vexatious". Instead, it "suggests a tentative conclusion of absence of merit". At para. 19, the court went on explore the meaning of "frivolous and vexatious", as follows:

> A frivolous appeal is one readily recognizable as devoid of merit, as one having little prospect of success. The reasons may vary. A vexatious appeal is one taken to annoy or embarrass the opposite party, sometimes fuelled by the hope of financial recovery to relieve the respondent's aggravation.

[19] In *Pickard*, the court ordered security for costs, finding at the first stage of the analysis that it appeared that there was good reason to believe that the appeal was frivolous and vexatious. Among the factors the court cites are findings in the decision under appeal (amply supported by the evidence) that the claim was statute barred and disclosed no reasonable cause of action. At para. 23, the court describes one aspect of the plaintiff's claim as being "incapable of definition, let alone proof." At paras. 25-26, the court goes on to conclude that it was just in the circumstances of that case to require security for costs, even if the result was that the appellant would not pursue his appeal. At para. 25, the court states as follows: "To deny meritless claims is not to curtail access to justice, rather to facilitate access to justice by making room for legitimate claims."

[20] The analysis in *Pickard* is cited with approval by Epstein, J.A. in *York University v. Markicevic*, 2017 ONCA 651 (In Chambers), sitting as a single justice on a security for costs motion under r. 61.06(1). In *York University*, at para. 32, the court adopts the definitions in *Pickard* for "frivolous" and "vexatious", and at para. 33, goes on to state as follows:

> Rule 61.06(1)(a) requires that [it appear there is good reason to believe] the appeal is both frivolous and vexatious. Given the way the rule is worded, the mere fact that an appeal appears to be devoid of merit, i.e. appears to be frivolous, is insufficient. *Pickard* suggested distinct requirements for "frivolous" and "vexatious". Likewise, Sharpe J.A. in *Perron v. Perron*, 2011 ONCA 776, 286 O.A.C. 178 (In Chambers), found that the appeal had "a very low prospect of success", and that it was "very unlikely" the panel hearing the appeal would intervene. However, he declined to label the appeal as appearing "frivolous and vexatious", finding that the appellant sincerely believed in the importance and merits of the appeal.

[21] In *York University*, at para. 34, the court rejects the argument that it would be open to the court to find that that an appeal was so devoid of merit to be both frivolous and vexatious. In those circumstances, the proceedings may well be frivolous, but without something more, they would not be frivolous *and* vexatious. At para. 35, the court states as follows:

> An appeal that appears to rise even to the level of "low prospect of success" or "unlikely to succeed" is not "frivolous and vexatious". To find that an appeal is "frivolous and vexatious" there must be something that supports the conclusion that the appeal is "vexatious" in order for security for costs to be available under r. 61.06(1)(a).

[22] In *York University*, at paras. 36-37, the court goes on to find that the record did not support a finding that there appeared to be good reason to believe the appeal was vexatious, with the result that the test under r. 61.06(1)(a) was not met. Among other things, the court notes that there was no evidence that the plaintiff was "pursuing his appeal for reasons other then he believes it has merit." Nevertheless, the court goes on to make a security for costs order, relying on r. 61.06(1)(c). Under that provision (which has no counterpart in r. 56.01(1)), the Court of Appeal may make such security for costs order as is just where it appears that "for other good reason, security for costs should be ordered." In *York University*, the court determines it is just to so do in all the circumstances, including the trial judge's findings relating to the plaintiff's fraudulent conduct that the plaintiff did not challenge on appeal (at para. 68).

[23] In the matter before me, the Plaintiff argues that the Defendants' motion for security for costs fails at the first stage of the analysis. According to the Plaintiff, the Defendants have not established there appears to be good reason to believe the Plaintiff's action is frivolous and vexatious, as provided for in that r. 56.01(1)(e).

[24] Based on the Defendants' submissions, it is clear they are relying on r. 56.01(1)(e) as the basis for their security for costs motion. It is common ground that the circumstances set out in the other clauses of r. 56.01(1) are not present. Unlike in *York University*, there is no "basket" clause equivalent to r. 61.06(1)(c) upon which the Defendants may rely.

[25] To support their position that it appears there is good reason to believe the Plaintiff's action is frivolous and vexatious, the Defendants rely, among other things, on the fact that in the Statement of Claim, the Plaintiff alleges a fiduciary relationship between the Defendants and the Plaintiff without pleading the factors necessary to create that relationship. The Defendants say that the Plaintiff is effectively asking that the Defendants be treated as guarantors for any loss the Plaintiff suffered without providing a legal basis for doing so. In support of their position, Defendants' counsel (in his factum and oral submissions) quotes at length from the transcript of the Plaintiff's cross-examination on his affidavit, in which the Plaintiff states repeatedly that he relied on the Defendants' representations as to value of the mortgaged properties and the amounts to be loaned under the mortgage. In his evidence, the Plaintiff acknowledges that appraisals had been provided for most of the mortgaged properties, but he continues to insist that he relied on the Defendants' advice rather than the opinion of the appraisers or advice from

# Yaiguaje et al. v. Chevron Corporation et al.
# [Indexed as: Yaiguaje v. Chevron Corp.]

Ontario Reports

Court of Appeal for Ontario,

Hoy A.C.J.O., Cronk and Hourigan JJ.A.

October 31, 2017

**138 O.R. (3d) 1** | 2017 ONCA 827



## Case Summary

**Civil procedure — Costs — Security for costs — Plaintiffs obtaining judgment in Ecuador against Chevron on behalf of 30,000 indigenous Ecuadorian villagers arising from environmental pollution — Plaintiffs bringing action in Ontario to enforce judgment against Chevron and its seventh-level indirect subsidiary Chevron Canada — Defendants moving successfully for summary judgment dismissing claim against Chevron Canada on basis of Chevron Canada's separate corporate identity — Plaintiffs appealing — Motion judge erring in ordering plaintiffs to post security for costs — Motion judge failing to consider justness of that order in circumstances of this case.**

In a claim in Ecuador for damages for environmental pollution, the plaintiffs obtained judgment against Chevron in the amount of US$9.5 billion on behalf of approximately 30,000 indigenous Ecuadorian villagers. They brought an action in Ontario to enforce the judgment against Chevron and its seventh-level, indirect subsidiary Chevron Canada. The defendants obtained summary judgment dismissing the claim against Chevron Canada on the grounds that Chevron Canada's shares and assets were not exigible pursuant to the *Execution Act*, R.S.O. 1990, c. E.24 and there was no basis to pierce the corporate veil between Chevron Canada and Chevron so that Chevron Canada's shares and assets became available to satisfy the judgment against Chevron. The plaintiffs appealed. The defendants moved successfully for security for costs in the amount of $972,951. The plaintiffs brought a motion to vary that order.

**Held**, the motion should be granted and the order for security for costs should be vacated.

In deciding motions for security for costs on appeal, judges are obliged to first consider the specific provisions of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 governing those motions and then to step back and consider the justness of the order sought in all the circumstances of the case. The motion judge failed to undertake the second part of that analysis. This was public interest litigation, and the funds collected on the judgment would be used for environmental rehabilitation or health care purposes. The environmental devastation to the plaintiffs' lands had severely hampered their ability to earn a livelihood. In contrast, Chevron and Chevron Canada had annual gross revenues in the billions of dollars. It was difficult to believe that either of those corporations required protection for costs awards. It could not be said at this stage that the appeal was [page2 w]holly devoid of merit. The history of this litigation

made it clear that Chevron had employed all available means to resist enforcement of the Ecuadorian judgment, which made it difficult to accept that the motion for security for costs was anything more than a measure intended to bring an end to the litigation. In all of the circumstances, the interests of justice required that no order for security for costs be made.

**Cases referred to**

*Brown v. Hudson's Bay Co*., [2014] O.J. No. 795, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.); *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, [2015] S.C.J. No. 42, 2015 SCC 42, 335 O.A.C. 201, 22 C.C.L.T. (4th) 1, 73 C.P.C. (7th) 1, 38 B.L.R. (5th) 171, 388 D.L.R. (4th) 253, 474 N.R. 1, 2015EXP-2554, J.E. 2015-1413, EYB 2015-256214, 256 A.C.W.S. (3d) 583; *Cigar500.com Inc. v. Ashton Distributors Inc*. (2009), 99 O.R. (3d) 55, [2009] O.J. No. 3680, 77 C.P.C. (6th) 80, 180 A.C.W.S. (3d) 401 (S.C.J.); *DeMarco v. Nicoletti*, [2017] O.J. No. 2622, 2017 ONCA 417; *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119, [1989] O.J. No. 1399, 17 A.C.W.S. (3d) 21 (H.C.J.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63, [2005] O.J. No. 948, [2005] O.T.C. 171, 137 A.C.W.S. (3d) 908 (S.C.J.); *Pickard v. London (City) Police Services Board*, [2010] O.J. No. 4169, 2010 ONCA 643, 268 O.A.C. 153, 193 A.C.W.S. (3d) 396; *Ravenda Homes Ltd. v. 1372708 Ontario Inc*., [2017] O.J. No. 3414, 2017 ONCA 556; *Wang v. Li*, [2011] O.J. No. 3383, 2011 ONSC 4477, 205 A.C.W.S. (3d) 646 (S.C.J.); *Yaiguaje v. Chevron Corp*. (2013), 118 O.R. (3d) 1, [2013] O.J. No. 5719, 2013 ONCA 758, 313 O.A.C. 285, 370 D.L.R. (4th) 132, 15 B.L.R. (5th) 285, 52 C.P.C. (7th) 229, 235 A.C.W.S. (3d) 373; *Yaiguaje v. Chevron Corp*. (2017), 136 O.R. (3d) 261, [2017] O.J. No. 311, 2017 ONSC 135, 410 D.L.R. (4th) 409, 275 A.C.W.S. (3d) 67 (S.C.J.)

**Statutes referred to**

*Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 7(5), 106

*Execution Act*, R.S.O. 1990, c. E.24

**Rules and regulations referred to**

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 56, 56.01, (1)(a), 61, 61.06, (1)(b)

MOTION to vary the security for costs order of the motion judge (2017), 137 O.R. (3d) 729, [2017] O.J. No. 4903, 2017 ONCA 741.

*Alan Lenczner*, *Brendan Morrison*, *Kirk Baert* and *Celeste Poltak*, for appellants (see Schedule I).

*Peter Grant*, for appellants (see Schedule II).[1]

*Benjamin Zarnett*, for respondent Chevron Canada.

*Larry Lowenstein*, for respondent Chevron Corporation. [page3 ]

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BY THE COURT: --

*Introduction*

[1] The appellants bring a motion to vary the order of the motion judge requiring them to post $942,951 as security for costs of the proceeding and the appeals in *Yaiguaje v. Chevron Corporation* (C63309 and C63310), both now pending in this court, prior to the hearing of the appeals.

[2] For the reasons that follow, we grant the motion and vacate the order of the motion judge.

*Facts*

[3] The dispute among the parties has a long and complex history. For present purposes, the following brief factual summary provides sufficient context.

[4] The appellants are residents of Ecuador who hold a judgment of US$9.5 billion against Chevron Corporation obtained in 2011. The judgment was the result of a claim for environmental damage that the appellants allege was caused by Texaco Inc., a company that later merged with Chevron Corporation. The appellants are representative plaintiffs for approximately 30,000 indigenous Ecuadorian villagers who have been affected by the environmental pollution.

[5] The appellants first commenced proceedings against Texaco Inc. in 1993 in New York. That proceeding was eventually dismissed on *forum non conveniens* and international comity grounds. The decision was upheld on appeal, in part, because Texaco Inc. had agreed to submit to the jurisdiction of the Ecuadorian courts.

[6] The appellants commenced proceedings against Chevron Corporation in Ecuador in 2003. By then, Texaco Inc. had merged with Chevron Corporation. It was in that proceeding that the appellants obtained their judgment. Chevron Corporation has resisted enforcement of the judgment in courts around the world on the basis of the assertion, among others, that the judgment was obtained by fraud.

[7] In 2012, the appellants commenced an action in the Ontario Superior Court of Justice for the recognition and enforcement of the Ecuadorian judgment against Chevron Corporation and Chevron Canada, a seventh-level, indirect subsidiary of Chevron Corporation.

[8] In the Ontario proceeding, Chevron Corporation and Chevron Canada challenged the jurisdiction of the Superior Court of Justice to recognize and enforce the Ecuadorian judgment. Justice David Brown (as he then was) dismissed that motion and [page4 c]oncluded that the Ontario court had jurisdiction to recognize and enforce the judgment against these defendants. However, Brown J. also concluded that this was an appropriate case in which to exercise the court's power to stay the proceedings pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[9] This court overruled the imposition of the stay and upheld the decision on the jurisdictional issue: *Yaiguaje v. Chevron Corp.* (2013), 118 O.R. (3d) 1, [2013] O.J. No. 5719, 2013 ONCA 758. The Supreme Court of Canada affirmed this court's decision with respect to the Ontario court's jurisdiction: *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, [2015] S.C.J. No. 42, 2015 SCC 42.

[10] Following the Supreme Court's decision, Chevron Corporation and Chevron Canada filed defences in the action. The defences raised by Chevron Corporation include that the Ecuadorian judgment cannot be recognized or enforced in Ontario because, as the United States District Court for the Southern District of New York found in 2014, it was obtained by fraudulent means.[2]

[11] Chevron Corporation and Chevron Canada then moved for summary judgment, submitting that the shares and assets of Chevron Canada are not exigible pursuant to the *Execution Act*, R.S.O. 1990, c. E.24 and that there is no basis to pierce the corporate veils between Chevron Canada and its indirect parent Chevron Corporation so that Chevron Canada's shares and assets become available to satisfy the Ecuadorian judgment against Chevron Corporation. Justice Glenn Hainey accepted these submissions, granted summary judgment in favour of Chevron Corporation and Chevron Canada, and dismissed the plaintiffs' claim against Chevron Canada: *Yaiguaje v. Chevron Corp.* (2017), 136 O.R. (3d) 261, [2017] O.J. No. 311, 2017 ONSC 135 (S.C.J.).

[12] The appellants have appealed the order of Hainey J. to this court, and Chevron Corporation and Chevron Canada brought a motion for security for costs of the proceeding and the appeals.

[13] Whether the Ecuadorian judgment can or should be recognized or enforced in Ontario remains to be determined. [page5 ]

*Decision of the Motion Judge*

[14] The motion judge granted the motion and ordered security for costs be posted before the appeals could be heard.

[15] In so ruling, the motion judge found that the appellants had not established that they were impecunious or that third party litigation funding was unavailable. Because she found that impecuniosity had not been established, the motion judge ruled that the appellants had to demonstrate that their claim has a good chance of success. On a review of the merits of the claim, she found that the appellants had not met that onus.

[16] The motion judge went on to reject the appellants' other submissions, including that the order should not be made on the basis that this is an action for the enforcement of a foreign judgment or because it is essentially a class proceeding.

*Analysis*

(i) *Standard of review*

[17] Chevron Corporation and Chevron Canada relied on rules 61.06(1)(b) and 56.01(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 in support of their motion for security for costs. In an appeal, rule 61.06(1)(b) authorizes this court to make such an order for security for

costs of the proceeding and the appeal "as is just" where an order for costs could be made under rule 56.01.

[18] Rule 61.06 is permissive, not mandatory. In an appeal, there is no entitlement as of right to an order for security for costs. Even where the requirements of the rule have been met, a motion judge has discretion to refuse to make the order: *Pickard v. London (City) Police Services Board*, [2010] O.J. No. 4169, 2010 ONCA 643, 268 O.A.C. 153, at para. 17.

[19] In determining whether an order should be made for security for costs, the "overarching principle to be applied to all the circumstances is the justness of the order sought": *Pickard*, at para. 17; and *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, [2017] O.J. No. 3414, 2017 ONCA 556, at para. 4.

[20] The appellants move pursuant to s. 7(5) of *Courts of Justice Act* to review and vary the motion judge's order. In fact, although the motion uses the term "vary", they ask the court to set aside the order. No evidence of change in circumstances was tendered. The appellants acknowledge that the impugned order was discretionary. Therefore, the motion judge's decision is afforded deference: *DeMarco v. Nicoletti*, [2017] O.J. No. 2622, 2017 ONCA 417, at para. 3. [page6 ]

[21] The appellants raise numerous grounds in support of their motion. For present purposes, it is only necessary to consider one: whether the motion judge erred in principle in determining the justness of the order sought. An error in principle is one of the bases on which this court may interfere with a discretionary order: *DeMarco*, at para. 3.

[22] In deciding motions for security for costs, judges are obliged to first consider the specific provisions of the Rules governing those motions and then effectively to take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront. While the motion judge concluded that an order for security for costs would be just, with respect, she failed to undertake the second part of that analysis. The failure to consider all the circumstances of the case and conduct a holistic analysis of the critical overarching principle on the motion before her constitutes an error in principle. It therefore falls to this panel to conduct the necessary analysis of the justness of the order sought.

(ii) *Justness of the order*

[23] The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rules 56 or 61 have been met.

[24] Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns and the public importance of the litigation. See *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119, [1989] O.J. No. 1399 (H.C.J.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63, [2005] O.J. No. 948 (S.C.J.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d)

55, [2009] O.J. No. 3680 (S.C.J.); *Wang v. Li*, [2011] O.J. No. 3383, 2011 ONSC 4477 (S.C.J.); and *Brown v. Hudson's Bay Co.*, [2014] O.J. No. 795, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).

[25] While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already [page7 p]rovided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.

[26] Having undertaken that analysis, we conclude that the unique factual circumstances of this case compel the conclusion that the interests of justice require that no order for security for costs be made. To conclude otherwise, in our view, would result in an unjust order for security for costs. The pertinent circumstances include the following:

(a) The appellants are seeking to enforce a judgment in which they have no direct economic interest. Funds collected on the judgment will be paid into a trust and net funds are to be used for environmental rehabilitation or health care purposes. This is public interest litigation.

(b) Although there was no direct evidence of impecuniosity before the motion judge, it would be highly impractical to obtain this evidence from the representative plaintiffs, let alone the 30,000 people who would indirectly benefit from the enforcement of the judgment. There can be no doubt that the environmental devastation to the appellants' lands has severely hampered their ability to earn a livelihood. If we accept the findings that underlie the Ecuadorian judgment -- findings that have not yet been undermined in our courts -- Texaco Inc. contributed to the appellants' misfortune.

(c) In contrast to the position of the appellants, Chevron Corporation and Chevron Canada have annual gross revenues in the billions of dollars. It is difficult to believe that either of these two corporations, which form part of a global conglomerate with approximately 1,500 subsidiaries, require protection for cost awards that amount or could amount to a miniscule fraction of their annual revenues.

(d) While the question whether the Ecuadorian plaintiffs have third party litigation funding available to them was left unanswered, there should be no bright line rule that a litigant must establish that such funding is unavailable to successfully resist a motion in an appeal for security for costs. This is especially so in this case, where counsel for the appellants has advised the court he is operating under a contingency arrangement and where there is evidence that Chevron Corporation has sued some of the appellants' former third party funders, and the funders withdrew their financial support. [page8 ]

(e) It cannot be said, at this stage, that this is a case that is wholly devoid of merit. The motion judge herself acknowledged, at para. 51 of her reasons, that it might be possible to establish that Chevron Canada's shares are exigible under the *Execution Act*.

(f) There is no doubt that the legal arguments asserted by the appellants are innovative and untested, especially with regard to piercing the corporate veil. But this does not foreclose the possibility that one or more of them may eventually prevail. That is how the common law evolves. Innovative or novel arguments are made and the law develops, either gradually or in leaps and bounds. For obvious reasons, substantive changes in the law usually take place in our intermediate appeal courts and at the Supreme Court. Lower courts are often bound by precedent that restrains them from changing the common law. It is hardly just that potential advancements in or restatements of the law be thwarted for procedural or tactical reasons.

(g) The history of this litigation, which has been ongoing for almost 25 years, makes clear that Chevron Corporation has and, it may be anticipated, will employ all available means to resist enforcement of the Ecuadorian judgment. This, of course, is within its rights. However, this reality makes it difficult to accept that the motion for security for costs was anything more than a measure intended to bring an end to the litigation.



*Disposition*

[27] For all these reasons, the motion is granted and the order of the motion judge requiring the appellants to post security for costs and pay costs of the motion for security for costs is set aside.

[28] The appellants are entitled to their costs of the motion for security for costs and this motion in the agreed all-inclusive sums of $4,000 and $7,500, respectively, payable by Chevron Corporation and Chevron Canada.

*Motion granted.*



SCHEDULE I

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP/ KOSKIE MINSKY LLP

37 plaintiffs

Daniel Carlos Lusitande Yaiguaje

Benancio Fredy Chimbo Grefa

Miguel Mario Payaguaje Payaguaje

Teodoro Gonzalo Piaguaje Payaguaje

Simon Lusitande Yaiguaje

Armando Wilmer Piaguaje Payaguaje

Angel Justino Piaguaje Lucitante

Javier Piaguaje Payaguaje

Fermin Piaguaje

Luis Agustin Payaguaje Piaguaje

Emilio Martin Lusitande Yaiguaje

Reinaldo Lusitande Yaiguaje

Maria Victoria Aguinda Salazar

Carlos Grefa Huatatoca

Catalina Antonia Aguinda Salazar

Lidia Alexandria Aguinda Aguinda

Clide Ramiro Aguinda Aguinda

Luis Armando Chimbo Yumbo

Beatriz Mercedes Grefa Tanguila

Lucio Enrique Grefa Tanguila

Patricio Wilson Aguinda Aguinda

Patricio Alberto Chimbo Yumbo

Francisco matias Alvarado Yumbo

Olga Gloria Grefa Cerda

Narcisa Aida Tanguila Narvaez

Bertha Antonia Yumbo Tanguila

Gloria Lucrecia Tanguila Grefa

Celia Irene Viveros Cusangua

Lorenzo Jose Alvarado Yumbo

Francisco Alvarado Yumbo

Luisa Delia Tanguila Narvaez

Elias Roberto Piyahuaje Payahuaje

Lourdes Beatriz Chimbo Tanguila

Octavio Ismael Cordova Huanca

Guillermo Vincente Payaguaje Lusitande

Alfredo Donaldo Payaguaje Payaguaje

Delfin Leonidas Payaguaje Payaguaje [page10 ]

SCHEDULE II

GRANT HUBERMAN BARRISTERS & SOLICITORS
10 plaintiffs (as per notice of change of October 4, 2017)

Segundo Angel Amanta Milan

Heleodoro Pataron Guaraca

Hugo Gerardo Camacho Naranjo

Maria Clelia Reascos Revelo

Maria Magdalena Rodriguez Barcenes

Francisco Victor Tanguila Grefa

Rosa Teressa Chimbo Tanguila

Maria Hortencia Viveros Cusangua

Jose Gabriel Revelo Llore

Jose Miguel Ipiales Chicaiza

## Notes

1 Mr. Grant filed a notice of change of lawyers on October 5, 2017. He purported to represent ten of the 47 representative plaintiffs and sought to make brief oral submissions to supplement those of Mr. Lenczner. As an indulgence, the court permitted him to do so, without determining that a sub-group of representative plaintiffs, all of who advance the same claim, can be represented by different counsel.

2 As the motion judge noted, the decision of the United States District Court for the Southern District of New York was upheld by the United States Court of Appeal for the Second Circuit, and the Supreme Court declined to grant *certiorari* for a further appeal.



**End of Document**

**CITATION:** Trez Capital Limited Partnership v. Dr. Bernstein, 2018 ONSC 6771
**COURT FILE NO.:** CV-15-11147-00CL
**DATE:** 20181127

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** TREZ CAPITAL LIMITED PARTNERSHIP, TREZ CAPITAL (2011) CORPORATION, and COMPUTERSHARE TRUST COMPANY OF CANADA, Plaintiffs

**AND:**

DR. STANLEY BERNSTEIN, NORMA WALTON, RONAULD WALTON, DBDC WEST MALL HOLDINGS INC., 2272551 ONTARIO LIMITED, DBDC GLOBAL MILLS LTD., GLOBAL MILLS INC., DEVRY SMITH FRANK LLP, and JOHN TODD HOLMES, Defendants

**BEFORE:** McEwen J.

**COUNSEL:** *Dominique Michaud*, for the Plaintiffs, Trez Capital

*Danielle Glatt* and *Graham Henry*, for the Defendants, Dr. Bernstein, DBDC West Mall Holdings Inc., 2272551 Ontario Limited, and DBDC Global Mills Ltd.,

*Michael Kohl*, for the Defendant, Ronauld Walton

*Howard Cohen* and *Jessica Parise*, for the Defendant, Norma Walton

**HEARD:** October 18, 2018

## ENDORSEMENT

[1] This motion is brought by the defendants, Dr. Stanley Bernstein, DBDC West Mall Holdings Inc., 2272551 Ontario Limited, and DBDC Global Mills Ltd. (the "Bernstein Defendants") for an order dismissing the crossclaim of Norma Walton and Ronauld Walton (the "Waltons") on the basis that the Waltons have failed to pay a $32,000 costs award. Alternatively, the Bernstein Defendants are seeking to stay the crossclaim until the costs are paid and the Waltons post security for costs in respect to their crossclaim against the Bernstein Defendants in the amount of $200,000.

[2] It bears noting at the outset that Ronauld Walton submits, and Norma Walton concedes, that it is reasonable to allow them 60 days to pay the $32,000 costs award failing which their crossclaim for damages can be dismissed.

[3] They submit, however, that they should not be subject to an order to post security for costs.

[4] In my view, for the reasons below, it is reasonable to order as follows:

i) the Waltons shall pay the outstanding costs award of $32,000 plus $12,000 inclusive with respect to this motion within 60 days otherwise their crossclaim for damages set out in paragraphs 44(a), (b), and (e) of their crossclaim shall be dismissed,

ii) if the aforementioned costs are paid the Waltons shall thereafter, within 60 days, post security for costs with respect to their crossclaim for damages, referred to above, in the amount of $200,000, failing which that crossclaim is dismissed, and

iii) the within order only relates to the Waltons' claim for damages. Notwithstanding whether the costs awards are paid or security for costs posted, they ought to be able to carry on with their claims for contribution and indemnity contained in paragraphs 44(c) and (d) of their crossclaim.

[5] First, with respect to the payment of the costs award, Rule 57.03(2) provides the court with the authority to dismiss or stay a proceeding, or make any just order when a party fails to pay costs.

[6] Justice Pattillo was very critical of the Waltons' abandoned motion when he awarded the $32,000 in costs against them. He observed, amongst other criticisms, that the motion included "serious and unsubstantiated allegations".

[7] As noted, the Waltons do not dispute that the $32,000 costs awards should be paid within 60 days. Employing the same logic, the costs award for this motion ought to be paid as well within 60 days.

[8] For the first time, at the hearing of this motion, counsel for the Waltons conceded that costs should reasonably be paid or the crossclaim with respect to the damages ought to be dismissed.

[9] In my view, it is reasonable to allow the Waltons 60 days as a last chance to pay, given their solicitors' above concession. The matter is not close to trial and I see no real prejudice to the Bernstein Defendants in allowing 60 days to pay.

[10] Second, with respect to security for costs, Rule 56.01(1)(c) and (e) provide:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> …

> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> …
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent…

[11] In determining whether security for costs ought to be posted a two-step inquiry is required as follows:

> (a) the burden is initially on the moving party to satisfy the Court that it appears there is good reason to believe that one of the factors listed in the subrules to 56.01(1) exists; and
>
> (b) if the moving party satisfied this initial burden, the onus shifts to the resisting party to establish that an Order for security would be unjust.[1]

[12] The Bernstein Defendants have satisfied the first step of the inquiry for the following reasons:

i) The Waltons currently owe the Bernstein Defendants approximately $1.1 million dollars in costs, plus approximately $66 million dollars in unpaid judgments.

ii) The Waltons have insufficient assets in Ontario to pay the outstanding costs and damages awards.

iii) There is good reason to believe the Waltons' crossclaim for damages is frivolous and vexatious.

[13] With respect to reason (iii), I accept the Bernstein Defendants' submission that the crossclaim is, in essence, a collateral attack on the court-approved sales process in the DBDC Application.

[14] The crossclaim is an attempt to relitigate not only a number of previous court orders that the Walton Defendants did not oppose, but also claims raised in their former counterapplication which was struck by Justice Newbould without leave to amend on the basis that it was frivolous,

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[1] *Sirron Systems Inc. v. Scott, Pichelli & Easter Limited*, 2018 ONSC 1930 at paras. 8-9.

vexatious, and an abuse of process. Justice Newbould largely based his decision on the fact that the claims in this counterapplication were nearly identical to claims made by the Waltons that were rejected by Justice D. Brown (as he then was) in an earlier application.



[15] To illustrate this point, the Bernstein Defendants, in their factum, have provided the court with a Schedule C which is a comparison of the Walton Defendants crossclaim with the previous counterapplication and the findings of the court. A review of Schedule C discloses that the damages claimed in the crossclaim are similar to, or exactly the same, as the allegations previously made and dismissed.

[16] Ms. Walton, in her affidavit, claims that she now relies on "new evidence". A review of the record, however, indicates that the evidence that she now purports to rely upon was, generally, in her possession before Justices D. Brown and Newbould in the DBDC Application. There does not appear to be new evidence of any significance whatsoever. The remaining evidence concerning Dr. Bernstein's financial affairs does not seem to be of any particular relevance to the issues raised in the Waltons' crossclaim.

[17] Having determined that the Waltons have outstanding, significant monetary orders against them and there is good reason to believe that the crossclaim for damages is frivolous and vexatious, the onus shifts to the Waltons to establish that an order for security would be unjust.

[18] In addition to the claim of "new evidence", which I have rejected, the Waltons also raised two additional arguments in an attempt to establish that an order for security for costs would be unjust.

[19] First, the Waltons rely upon a comment made by Justice Newbould in his May 18, 2017, Amended Endorsement wherein he indicated, at paragraph 44, that he would not have made a specific finding had a February 25, 2013, email from Ms. Walton to Dr. Bernstein been included in evidence at trial. Paragraph 44 of the Amended Endorsement reads as follows:

> Unfortunately, the evidence at that time did not include the February 25, 2013 email from Ms. Walton to Dr. Bernstein, nor did Dr. Bernstein admit that he was aware that Ms. Walton was telling the lenders that the Waltons were the only shareholders and that he was participating in the deception by temporarily resigning as a director to permit the lending to take place and then reinserting himself as a director. Based on the evidence before me now, I would not make the finding I made on November 5, 2013 when appointing a manager of the properties.[1]
>
> [1]The February 25, 2013 email from Ms. Walton to Dr. Bernstein that disclosed the deception being made to Trez was only produced after I refused to hear this motion until documentary production

> requested by Trez was answered and a computer search for documents was made by Dr. Bernstein's lawyers. It had not earlier been produced by Dr. Bernstein in any of the litigation, including the motions for the appointment of the inspector and later for the appointment of the manager. In saying this, I do not suggest that the lawyers for Dr. Bernstein acted in any way improperly

[20] The Waltons interpret this paragraph to mean that Justice Newbould would not have appointed a manager had he been aware of the email.

[21] I do not read paragraph 44 in this fashion. In my view, Justice Newbould's comments are made with only respect to a specific credibility finding. In any event, it is likely that Justice Newbould made an error since the finding that he is referring to does not appear to have been made by him but rather by Justice D. Brown who also dealt with the previously-noted earlier application between the parties.

[22] Accordingly, I do not believe that Justice Newbould's comments are of any assistance to the Waltons on this motion.

[23] Second, the Waltons claim that it would be unjust to order security for costs since they are impecunious.

[24] Mr. Walton, however, has not put forward any evidence to establish that he is impecunious. Ms. Walton's affidavit falls well-short of the necessary requirement to demonstrate impecuniosity. Her affidavit contains bald statements without supporting documentation. Two days before the motion she filed CRA Notices of Assessment unattached to any affidavit. Even if I was to consider this evidence, it is insufficient and is not even up to the standard of that filed by the plaintiff in the case of *Goldman v. Powers*, 2017 ONSC 1634, wherein Master Brott, after reviewing a number of financial records filed by the plaintiff, determined that they were insufficient to satisfy the high threshold required to establish impecuniosity.

[25] Further, when one considers the facts of this case, and considers the issue of security for costs in a just and holistic fashion, even if the Waltons are impecunious I am of the view that, since there is good reason to believe that the claim for damages is frivolous and vexatious and given the fact that the Waltons currently owe the Bernstein Defendants in excess of $67 million dollars, they have failed to meet the burden to prove that security for costs would be unjust in this circumstances.

[26] The Bernstein Defendants seek partial indemnity security for costs for the amount of $200,000. Given the complexity of this matter and the resources that will have to be put into discovery before trial, I am of the view that the amount sought is reasonable.

**Disposition**

[27] An order shall go as per paragraph 4 above. As noted, I am awarding $12,000 inclusive for costs of this motion against the Walton Defendants payable to the Bernstein Defendants. In my view, the Bernstein Defendants enjoyed greater success on the motion and are entitled to approximately 60% of the costs they sought. As noted, these costs are to be paid within 60 days or the crossclaim for damages is to be dismissed.

[28] As also noted in paragraph 4, I am not dismissing the Walton Defendants claim for contribution and indemnity. This is separate and distinct from any claim of damages, and would not much, if at all, prolong any trial. It would only expose Dr. Bernstein to limited examinations for discovery. Furthermore, I see no basis to dismiss a claim for contribution and indemnity because that is a statutory right completely unrelated to the previous litigation between the Bernstein Defendants and the Waltons.



**McEwen J.**

**Date:** November 27, 2018

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

MARGARITA CASTILLO

Plaintiff,

- and -

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Defendants.

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This is the Examination In Aid of Execution of JUAN GUILLERMO GUTIERREZ, a Defendant herein, taken at the offices of Network Court Reporting, 1 First Canadian Place, 100 King St. West, Suite 3600, Toronto, Ontario, on July 25, 2017.

---

A P P E A R A N C E S :

| | |
|---|---|
| Jason W.J. Woycheshyn<br>Adam Zur, Summer Student | for the Plaintiff |
| Martin Mendelzon | for the Defendants, Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., Juan Guillermo Gutierrez and Carmen S. Gutierrez |

ALSO APPEARING:
Margarita Castillo

31. Q. And your fax number?
A. No fax number.
32. Q. Your date of birth is March 1st, 1956?
A. Yes.
33. Q. And your Social Insurance Number is 487 192 445?
A. I believe so. I don't know it by memory but if it's in my tax return, it must be it.
34. Q. Do you know your Driver's Licence number?
A. No, I don't know it but I have it with me, so I can give it to you.
35. Q. If I can get a copy of it, please. Mr. Mendelzon, it's fine if we take a copy of that?
MR. MENDELZON: Yes.
THE DEPONENT: Just don't forget to give it to me before we leave because I have to drive home.
BY MR. WOYCHESHYN:
36. Q. This is an examination in aid of execution arising from a judgment of Justice Newbould dated October 28, 2015. Do you remember



that?
A. Yeah, I do remember.
37. Q. Okay. You recall that that judgment jointly required you to pay Margarita $4.25 million plus 2 percent interest. Does that sound about right?
A. Probably, yeah.
MR. MENDELZON: And, counsel, just to be clear, it required him to purchase Margarita's shares for 4.25 million.
BY MR. WOYCHESHYN:
38. Q. Thank you. And jointly with yourself, your father and Xela Enterprises, right? You understood that?
A. I understand that for about the same price as we offered her in 2010 and she rejected then.
39. Q. And then you recall in about December of 2015, Justice Newbould released his cost endorsement for around $890,000?
A. I remember hearing about that, yeah.
40. Q. And then there was an appeal to the Divisional Court of Ontario and the Divisional Court made an additional order of costs of $76,096.47; do you remember that?



A. I don't remember the exact numbers, but yes.
41. Q. Okay. And then in March of this year, the Court of Appeal dismissed a motion for leave to appeal and awarded Margarita an additional cost of $1,500. Does that sound about right?
A. Probably.
42. Q. And then most recently, there was a motion for a stay of execution in front of Justice McEwen and that motion was dismissed and Justice McEwen ordered that Margarita receive an additional approximately $15,000; is that -- you are aware of that, sir?
A. I don't remember hearing the number but I guess it's right.
43. Q. You have not appealed the decision of Justice McEwen?
MR. MENDELZON: As of now there's been no appeal.
MR. WOYCHESHYN: Okay. And if that changes, you'll let me know?
U/T MR. MENDELZON: We sure will.
BY MR. WOYCHESHYN:
44. Q. So the total court orders, and I



recognize that the orders against you, sir, are joint as against you, your father's estate and Xela, total about $5.2 million. We are now at the end of July 2017 and am I right that you haven't paid Margarita any money towards that judgment or those orders?
A. Can you ask the question again?
45. Q. Yes. You haven't paid any money --
A. No, we have not paid anything.
46. Q. Okay. And what is the reason for non-payment?
A. Well, part is because we don't have the funds to do that. As a matter of fact, we intend to pay when we can but right now it's impossible. It's impossible because of all the actions of Margarita has taken in the last eight years has made it impossible.
MR. MENDELZON: And, counsel, Juan, when you are saying "we" in your answers --
THE DEPONENT: When I say "we", I refer myself and my father and the company too, the three of us, we would like to pay. Now, obviously you are going to cross-examine my mother as an executor of my dad's estate and somebody else for Xela, so they will speak for

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the companies, but I tend to say "we" all the time as my way of speaking.

BY MR. WOYCHESHYN:

47. Q. And I understand it's a family company and you, for a long time, have been the head of the company so I understand why you would use "we", but in terms of your personal finances, your evidence is that you personally do not have the resources or assets to pay any portion of Margarita's judgment or order?

A. At this particular time, I don't.

48. Q. Is there something on the horizon that you see a time when you will be able to pay those amounts?

A. Yes. We have a major lawsuit against several defendants including Margarita for $400 million, very well substantiated, has not gone to hearings yet. So we expect to get a solution on that and when that happens, we are going to have, you know, money to pay for this. I say "we" again, it's myself or any of the other two parties.

49. Q. And just so I'm clear, that -- the action -- the lawsuit that you are just referring to is the lawsuit that you and Xela and others

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commenced against Margarita, Ricardo, Roberto and I'll call them the boys in Guatemala, but that action was commenced in 2011 in Ontario; is that the action you are referring to?

A. That is the action and it's been held for six years arguing the service of process which has been affirmed. So go figure, six years to discuss service, that's where we are but when that lawsuit is resolved, we'll have more than plenty resources to pay for this judgment. Before that, I can't.

50. Q. Okay. So just so I understand, that's the only potential source of income that you can get that will satisfy the -- that will allow you to pay Margarita.

A. Me personally, yes. That's the only -- the only option I have.

51. Q. And if -- I know you anticipate that you will be successful in that action but if that action does not result in a payment to you, am I right that you will not be able to pay Margarita?

A. As things are today, I can't.

52. Q. And other than the outcome of the action, you don't have any source of income that you see on the horizon that would allow you to

Page 20

pay Margarita; am I right?

A. At this point in the immediate time, I can't. I have no source of income coming, and I may add, it's a direct consequence of many of the actions taken by Margarita and the other people that are working with her. So they have cornered me. So at this point, I don't have anything else. I gave you my financial statement there.

53. Q. Right. So you have nothing right now and you have nothing foreseeable other than the potential recovery on the action.

MR. MENDELZON: Counsel, I think you've asked him this about --

BY MR. WOYCHESHYN:

54. Q. No, but he hasn't --

A. I answer again, as far as I know, I'm not the -- let me put it this way: I don't have a crystal ball that tell me what's going to happen in the future. At this particular time, I don't have any other thing that I can tell you is going to barely make me survive at this point. I cannot tell you what's going to happen in a year or in two years or five years.

55. Q. Okay. I note you have a lawyer

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present with you today.

A. Yes.

56. Q. Who is paying for your lawyer?

A. Well --

R/F MR. MENDELZON: Don't answer that.

THE DEPONENT: Okay.

MR. WOYCHESHYN: On the grounds of?

MR. MENDELZON: It's privileged.

MR. WOYCHESHYN: As to who is paying?

MR. MENDELZON: Correct.

BY MR. WOYCHESHYN:

57. Q. Are you paying your lawyer?

R/F MR. MENDELZON: Don't answer that.

BY MR. WOYCHESHYN:

58. Q. I'm going to be examining you in your personal capacity and I just -- I'm going to ask you some questions about Xela but I'm not expecting you to answer questions on behalf of Xela; do you understand the difference?

A. Yes.

59. Q. You are the president and CEO of Xela?

A. Yes.

60. Q. And just for clarity of the record, when I refer to Xela, I'm referring to Xela

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- and -

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Defendants

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This is the Continued Examination in Aid of Execution of JUAN GUILLERMO GUTIERREZ, personally and on behalf of the corporate Defendants herein, taken at the offices of Network Reporting & Mediation, 100 King Street West, Suite 3600, Toronto, Ontario, on the 30th day of August, 2018.

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A P P E A R A N C E S:

WILLIAM BORTOLIN Solicitor for the Plaintiff

679. Q. But my question was until they take over. Until they take over the house.

A. Well until then we're spending time -- I'm still in the house until November 30th. At that time I don't know at this point where I'm going to live because I have no other place to go and I don't have the money to buy another place, so I don't know what I'm going to do.

680. Q. Can you not reside at 174 Amber Bay Road?

A. That's my wife's property. I presumably can stay there.

681. Q. You don't have a plan one way or another where you're going to stay after November?

A. No, I don't know.

682. Q. I mention 174 Amber Bay Road and we talked about 2 Gordon Road. Just to confirm, there's no other residences that you own or lease?

A. I already told you last year I don't and I know you've done all your research; you didn't find anything because there's no other assets. I never had a house anywhere else, I never had any other properties other than those two properties and you took them away from me already, so I have no properties, period.

You can ask as many times as you want, but there's none.

683. Q. So where did you stay last winter?

A. Last winter? At 2 Gordon Road.

684. Q. And that's true for the past few years; you've stayed in Toronto over the winters?

A. I work, I wasn't retired so I was working and my place of work is here. I travel a lot, but I stay here. So I live there for over 20 years.

685. Q. So no vacation homes?

A. No vacation homes.

686. Q. No timeshares or anything like that?

A. No.

687. Q. How did you get here today?

A. I drove.

688. Q. What did you drive?

A. My wife's car. I don't have a car because you took my cars away.

689. Q. And I think you've answered it, but I just want to confirm so your evidence is that you do not own or lease any motor vehicles?

A. You took my cars away and I don't have any leases. I had before but you took my things away, so what else you want me to tell you?

690. Q. Just say yes or no would suffice.

Court File No.: CV-11-9062-00CL

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

B E T W E E N:

**MARGARITA CASTILLO**

Moving Party

- and -

**XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez**

Responding Party

# AFFIDAVIT OF MARGARITA CASTILLO

**(Sworn January 14, 2019)**

I, MARGARITA CASTILLO, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

**Introduction**

1. I am the applicant and judgment creditor in this proceeding, as a former shareholder and director of Tropic International Limited (**"Tropic"**), a shareholder of 696096 Alberta Ltd. (**"Alberta Co."**) and a former director of Xela Enterprises Ltd. (**"Xela"**). I know of the matters contained in this affidavit either from my personal knowledge, or where indicated, from information provided to me by others, which in all cases I believe to be true.

would cause Carmen. My lawyers confirmed that I intended to proceed with the examination. Mr. McLean advised, on the afternoon of November 22, 2018, that Carmen would not attend the examination. Carmen failed to attend on November 23, 2018. Attached as **Exhibit "DD"** is a copy of this correspondence with Mr. McLean. Attached as **Exhibit "EE"** is a certificate of non-attendance prepared by a commissioner of oaths at Network Reporting & Mediation.

41. Regarding Xela, the Judgment Debtors' lawyers offered Calvin Shields to be examined again as Xela's representative. As reflected in the correspondence attached above as Exhibit "Z", Xela's lawyers declined proposals suggesting that either Juan (Xela's President) or Juan Jose Rodriguez (a lawyer identified on Xela's corporate profile report as an officer) be examined instead. Attached as **Exhibit "FF"** is a transcript of Mr. Shield's examination.

42. Based on the lengthy process of obtaining answers to undertakings and refusals from the initial examinations of Juan, Xela and Carmen, held in July 2017, I believe it would be futile to continue to pursue answers from the Judgment Debtors.

**Most of the Judgment Debt Remains Unpaid**

43. Attached as **Exhibit "GG"** is a chart, prepared my lawyers, summarizing the amounts I have recovered from the Judgment Debtors. The collected amounts total $1,568,293.37, and arise from:

(a) Garnishments from Judgment Debtor bank accounts held at TD Canada Trust, in amounts totaling $155,485.74;

(b) The seizure and sale, by the Enforcement Office for the Regional Municipality of Halton, of four motor vehicles owned by Juan or Arturo, from which I received $213,685.37;

(c) The seizure and sale, by the Enforcement Office for the Town of Parry Sound, of Juan's joint ownership interest in the Cottage, from which I received $774,122.26. On July 18, 2018, shortly before the second auction was held, I received a cheque for $16.58 from the Ministry of the Attorney General, possibly for the deposit paid regarding the failed first auction attempt; and

(d) The sale, with my consent, of the Toronto House, from which I received $425,000.

44. Based on the answers received from Juan's and the Estate's examinations in aid of execution, I do not anticipate obtaining significant further amounts from them.

45. Juan has indicated that he relies on financial support from his wife, Wencke, and mother, Carmen, to finance his living expenses. However, Juan had also indicated, during his first examination in aid of execution, that Wencke did not have her own source of income and was financially reliant on Juan. Juan similarly stated in his first examination he had been providing financial assistance to Carmen. It is unclear how Wencke and Carmen now have assets available to support Juan. Before 2010, I had a close relationship with Carmen (my mother) and Wencke (my sister-in-law). In the decades that I knew them, I never knew them to have independent sources of income or wealth. Rather, each was financially dependent on Arturo and Juan.

**My Preference Shares of Xela**

62. Xela, besides being a judgment debtor also owes money to me under preference shares, held by me indirectly through a holding company, 696096 Alberta Ltd. The Xela preference shares were the subject of an estate-freeze that prevented them from being redeemed before Arturo's death. On January 11, 2017 (after Arturo's death on June 24, 2016), I gave formal notice to redeem the preference shares. Attached as **Exhibit "KK"** is a copy of my redemption notice addressed to Xela.

63. Attached as **Exhibit "LL"** is a copy of the response I received from Xela, dated January 31, 2017. Xela refused to pay me, or any other preferred shareholder, for their preference shares, relying on section 32(2) of the Ontario *Business Corporations Act*. Juan owned an identical amount of preference shares and, I believe, he has similarly has not received payment for them.

**SWORN BEFORE ME** at the City of Toronto, Ontario January 14, 2019

K Crocker

Katrina Crocker

A Commissioner for Taking Affidavits in and for the Courts in Ontario

Katrina Elizabeth Crocker, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 22, 2020.

Margarita Castillo

**MARGARITA CASTILLO**

**MARGARITA CASTILLO**
Applicant

-and-

**XELA ENTERPRISES LTD. et al.**
Respondents
Court File No. CV-11-9177-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(Commercial List)**

Proceeding commenced at Toronto

**AFFIDAVIT OF MARGARITA CASTILLO**
**(Sworn January 14, 2019)**

**BENNETT JONES LLP**
3400 One First Canadian Place
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Lawyers for the applicant, Margarita Castillo

Court File No. CV-11-9062-00CL

*ONTARIO*

**SUPERIOR COURT OF JUSTICE**

**(COMMERCIAL LIST)**

B E T W E E N:

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.

**BILL OF COSTS OF JUAN GUILLERMO GUTIERREZ**

**STATEMENT OF EXPERIENCE**

A claim for fees is being made with respect to the following lawyers, law clerks and law students:

| **Name of Lawyer** | **Years of Experience (Year of Call)** | **Partial Indemnity Rate[1]** | **Substantial Indemnity Rate[2]** | **Actual Billable Hourly Rate** |
|---|---|---|---|---|
| Brian H. Greenspan | 48 years (1974) | $600 | $900 | $1,000 |
| Michelle M. Biddulph | 7 years (2015) | $180 | $270 | $300 |

[1] The Respondent agrees with the Receiver that the partial indemnity rate is 60% of actual fees.
[2] The Respondent agrees with the Receiver that the substantial indemnity rate is 1.5x the partial indemnity rate.

| 01 - Tasks Related to Contempt Motion Prep and Hearing (April – June, 2022) | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| **Brian H. Greenspan** | 68.9 | $600 | $41,340 | $900 | $62,010 | $1,000 | $68,900 |
| **Michelle M. Biddulph** | 87.1 | $180 | $15,678 | $270 | $23,517 | $300 | $26,130 |
| | 156 | **Total: $57,018** | | **Total: $85,527** | | **Total: $95,030** | |

| 02 – Tasks Related to Contempt Sentencing Hearing (July – September, 2022) | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Hours | Partial Indemnity | | Substantial Indemnity | | Actual Billable Rate | |
| **Brian H. Greenspan** | 32.1 | $600 | $19,260 | $900 | $28,890 | $1,000 | $32,100 |
| **Michelle M. Biddulph** | 35.9 | $180 | $6,462 | $270 | $9,693 | $300 | $10,770 |
| | 68 | **Total: $25,722** | | **Total: $38,583** | | **Total: $42,870** | |

**03-CV-257164CM1**

**Willets et al. v. Colalillo**

Cote, P.A.J. for the moving party, the defendants and plaintiffs by counterclaim, Colalillo et al.
Book, I. for the responding parties, the plaintiffs and defendants by counterclaim

## Reasons

**Master Haberman:** The Colalillos move to add a defendant by counterclaim. They also seek security for costs. The first part of the motion is not opposed. The order for security for costs is vigorously resisted.

Christopher Willets (Willets) and his father, Rowland Willets (Rowland), are each 50% shareholders in the plaintiff, Chiltern Retail Developments Ltd. Chiltern operates a retail business and, up until September 2006, occupied space on Queen Street East pursuant to a 6-year lease with the Colalillo defendants. At that time, they vacated the premises.

A dispute arose between this landlord and tenant, resulting in this civil action as well as an application by Chiltern for relief from forfeiture. In this action, the plaintiffs claim damages for, among other things, conspiracy and infliction of mental distress. They allege that the Colalillo defendants and other defendant tenants acted in concert to force them out of the premises before the expiry of the lease term so that Colalillo could take advantage of a development opportunity. The plaintiffs cite a litany of events that they categorize as being part of a "campaign of harassment and intimidation" designed to trigger their surrender of the lease. The Colalillos have counterclaimed. They deny the plaintiffs' assertions, stating that Willets and his father intimidated them and their other tenants. They seek damages for harassment, intimidation and intentional infliction of mental distress.

In essence, each side is accusing the other of having been the catalyst of what has become an intolerable situation. Clearly, credibility will be a significant issue at trial.

## BACKGROUND

The parties went to mediation in January 2004. That event culminated in a memorandum of settlement that reflected what the parties had agreed to. Among the terms of the agreement were payment of $25,000 by John Colalillo (Colalillo) to Willets, an extension of the lease term and a further option to lease on its expiry. The day after the mediated settlement was reached, Colalillo advised his counsel that his consent to this agreement had been procured by threats of criminal charges made by Willets when the two men met on their own during the mediation process. As a result, Colalillo was not prepared to honour what he had agreed to.

Willets was intent on enforcing the settlement and moved for judgment. This motion was initially returnable in March 2004 but adjourned as a result of a myriad of preliminary

issues raised by each of the parties in turn. The most significant involved a motion by the Willets to exclude evidence, which was not successful. These matters delayed the hearing of the motion for judgment by approximately two years. In the end, that motion was dismissed in July 2006.

In their submissions in response to Colalillo's request for the costs of the preliminary motions and main motion for judgment, Willets asserted that the plaintiffs were impecunious. Nordheimer J. ultimately ordered that the defendants were entitled to costs, fixed at $21,178.69, but payable in any event of the cause. The cost order was released in late August 2006.

These events also resulted in a series of criminal charges against Willets, as it appears the threats he made included a threat of criminal prosecution in the event that Colalillo did not agree to the settlement terms he was proposing. Willets ultimately pleaded guilty to what he refers to as "reckless harassment", likely criminal harassment.

In the interim, Chiltern commenced its application in 2004. As that matter was dormant for some period of time, Colalillo moved to dismiss the application for delay in 2006. The motion was initially resisted by Willets, who brought a cross-motion to consolidate the application with this action. In late November 2006, Willets capitulated and consented to a dismissal of the application. Low J. ordered the costs of the application to be assessed on a substantial indemnity basis and paid by the Willets group to Colalillo. The assessment has not yet occurred.

Plaintiffs' counsel confirmed that the Willets et al. did not seek any indulgence with respect to the costs of the motion and cross-motion on the basis of impecuniosity, though it was dealt with only a few months after the costs of the motion to enforce the settlement.

**ADDITION of 170**

The Colalillos seek to add 1705736 Ontario Ltd. as a defendant by counterclaim. They claim that Chiltern has transferred its assets to that company to escape the cost ramifications of this action and the possibility of having to pay damages on the counterclaim. In essence, they assert that the creation of 170 and surrounding events constitutes a fraudulent attempt to shelter assets and ensure they are protected in the event that the Colalillos' position in this action prevails.

The facts in support of this are as follows: The action was started by Willets and Chiltern, operating as "Girlplay" and "Storyville". Although Rowland is a 50% shareholder in Chiltern and the partner who generally deals with the business end things, he was not named as a co-plaintiff in this action. Rowland owns a home. His son, Willets, apparently does not.

Corporate searches reveal that "Girlplay", in fact, is a business name registered by Willets, not by Chiltern, although Willets maintained when cross-examined that this must have been done in error. "Storyville" was simply the name of the store that Chiltern

operated at the Queen Street East location. In September 2005, Chiltern registered a business called "The T-Shirt Guys".

On July 20, 2006, Rowland incorporated 1705736 Ontario Ltd. (170). Willets is neither an officer nor a director of 170 and appears to own no shares in this new entity. The day after it was incorporated, 170 registered the business name, "T-Shirt Guys", a name almost identical to the business being operated by Chiltern. According to the corporate filings, the business purpose of "The T-Shirt Guys" is "silk-screening T-shirts for retail", whereas "T-Shirt Guys" was set up for "silk screening T-shirts".

The timing of these events is curious. Nordheimer J. dismissed the plaintiffs' motion for judgment on July 5, 2006, only two weeks before this corporate activity. At that time, he invited the parties to make written submissions to him in the event they were unable to agree on costs. In view of the result on that motion and of the preliminary motions, the costs of which had been deferred to the judge, it would have been apparent to the plaintiffs that they would likely be saddled with a large cost order. Rowland was not a named plaintiff so he had no need to be concerned on a personal level. Chiltern and Willets, however, were in a different position. On that basis, the Colalillos assert that 170 was formed as a vehicle into which Chiltern could dump its assets, effectively making it both judgment and cost-proof. They assert that this constitutes fraud and that the only way around it at this juncture is to add 170 as a defendant by counterclaim.

The Willets parties opposed this aspect of the motion, so that both sides devoted time and financial resources to shoring up their positions regarding the issue. Although it appeared at one point that this part of the motion would proceed without opposition, Willets again took up arms to oppose it in his factum. It was only on the return of the motion and after questions from the Bench that the objections were finally withdrawn.

The statement of defence and counterclaim is therefore amended to include 170 as a party, as per attachment "A" hereto.

**SECURITY FOR COSTS**

The defendants move under subrules 56.01(c) and (d). With respect to (c), they claim there are cost orders in their favour that are outstanding. With respect to (d), they rely on the plaintiffs' representations before Nordheimer J. regarding their alleged impecuniosity as a basis for concluding that there is good reason to believe that the plaintiffs have insufficient assets in Ontario to pay a cost order in its favour. The motion seeks security for costs from Chiltern, 170 as well as from Rowland and Willets.

The response to the motion is that Chiltern is impecunious and that if either of the two Willets men is required pay anything, it will derail the litigation, as they are unable to do so. The only submission regarding 170 is that as it was not yet a party, no order for security can be made against it. This is easily remedied by staggering the orders and making 170 a party before ordering it to pay security for costs.

The plaintiffs also raise delay in their factum, but no oral submissions were made to that effect. I will therefore deal with it only briefly.

**Preliminary issue regarding the plaintiffs' evidence**

The parties filed copious materials for this motion, including three motion records from the Colalillos and six from the Willets. Willets' three affidavits are dated March 4, March 25 and September 24, 2007. Willets' last affidavit was filed after he was cross-examined (in April 2007), as were the affidavit from his father (September 25, 2007) and three from Adrienne Cruickshanks, Mr. Book's assistant (May 15, September 27 and October 18, 2007). The last Cruickshanks affidavit was delivered after the motion was scheduled to be heard but adjourned due to my illness.

This piecemeal approach to putting evidence before the court made for an unwieldy record. It also extended the hearing time, as locating particular documents from among so many volumes was not an easy feat. Neither party thought to provide a complete index, which would have facilitated locating materials. To make matters worse, clumps of documents were included as one exhibit and the pages within these mega-exhibits were not numbered, so much time was spent counting forward and back to isolate particular documents. The practice of filing record upon record is one that should be discouraged, particularly after the party filing has already been cross-examined. Although defence counsel initially sought to adjourn the hearing to cross-examine on these more recent affidavits, he abandoned that request when the hearing date arrived.

As counsel were advised at the outset of the motion, I have serious difficulties with the form of evidence tendered by the plaintiffs in response to this motion, as most of it constitutes hearsay. In his second affidavit, Willets makes it clear that his expertise does not extend to the financial dealings of the corporation. He states that his father, Rowland "looks after the business and book keeping aspects of the company" while he "attends to the creative and production matters." He takes up his theme several times during cross-examination, by indicating that he did not know the answer to some fundamental questions about the business and by regularly beginning his responses by indicating that this is what he was told by his father or by simply directing counsel to ask Rowland. In response to question 598, he makes this point as follows:

> *I told you all I ever get when it comes to the financial statements is the occasional synopsis from Ron (Rowland) when we talk about it. I do not want to be the type of person who understands what that is. That's not what I do, so I can't answer your question in regards to that.*

This response was offered when Willets was asked about the activity going through the accounts of Chiltern, of which he is a 50% shareholder. He seemed to know little if anything about the operations of that entity and to the extent that he was able to respond, he cited his father as the source of his knowledge.

Notwithstanding Willets' lack of interest in or acumen for the financial end of things, it is his evidence on which the responding position for this motion largely rests. All of the

financial documents and business records that were produced were introduced through his affidavits. Willets' affidavits are peppered with assertions as to what Rowland did and the state of both Rowland's and Chiltern's financial status, as well as his own. When he was cross-examined, however, it was clear Willets didn't understand much of what he had said in these affidavits or about the documents appended to them as exhibits. Several times, he indicated that counsel would have to ask his father as he was unable to respond to a particular question. He denied knowing what Chiltern was earning, despite being a 50 % shareholder and in one instances, he made it known that he had not even read material before including it in his affidavit (see questions 410-413). There is no explanation in Willet's affidavits as to why he, rather than his father, has tendered this evidence.

Willets' evidence is also troubling as it is inconsistent within itself and with other evidence filed by the plaintiffs. By way of example, the plaintiffs filed the expert report of a C.G.A., Renee Karn, to be discussed in more detail below. She states that Chiltern is "in essence" insolvent. It seems Willets was not content with that aspect of her opinion as he strived to qualify it when cross-examined. In response to questions 281 - 291, he states that Chiltern is impecunious but not insolvent. He adds that if Chiltern were insolvent, it would not be able to "afford Mr. Book's representation." When taken to the Karn report and her opinion in that regard, he states that the report states Chiltern is "effectively insolvent" (which is not what she stated), repeating that Chiltern is not insolvent at question 285. He adds later that being effectively insolvent is "a lot different than being insolvent", stating that they are effectively insolvent because all they can afford to do is fund the litigation. In response to question 507, Willets repeats that Chiltern is "effectively insolvent" as though this were part of a script he has learned but really did not understand.

Another area of Willets' evidence that is troubling concerns 170. Although opposition to the motion to add that entity was ultimately abandoned, it remained an issue for some time and featured both in Willets' affidavits and in his cross-examination, as he felt, his counsel advises, that he had to explain away this assertion of fraud. Willets' evidence regarding 170 begins in his first affidavit. He states is paragraph 19 that, "with the failure of Chiltern, my father….incorporated 170, on July 20, 2006, to operate a new silk screening business," and that this business "is not related to the previous business". Despite this alleged lack of relationship, it seems the new business assumed the lease of the silk screening equipment and negotiated a lease of the premises used by Chiltern.

Willets speaks of this again in his second affidavit, sworn only three weeks after the first. This time, he seeks to correct the evidence he gave in first instance, stating that at the time of the first affidavit, he was "under the impression" that 170 was operating a new business, "T-Shirt Guys." He does not indicate that his impressions were not accurate but it appears that he now seeks to add to what he had said earlier. He says that his father was "not present" when he made his first affidavit because of his fall on March 3, which resulted in a separated shoulder and a fractured collar bone. No medical evidence is appended to support that assertion and the term "not present" is not explained.

According to Willets his father reviewed what he said in his first affidavit and told him that in December 2006, after having incorporated the new company, he obtained a retail sales tax number and a vendor's permit in 170's name. After having gone to all of this trouble, Willets says that his father decided to shelve the new company as he wanted to take advantage of the losses that Chiltern had incurred for tax purposes.

Despite Rowland's intentions, it appears from the records that 170 continues as the tenant on its lease or premises and pays the rent with cheques drawn on its own bank account. Those monies come both from sales and from loans from Rowland, Willets tells us. Willets than goes on to say that 170 has no assets other than this bank account which it uses to meet its obligations and from which Chiltern benefits. Again, there is no explanation as to why Rowland is not the one tendering this evidence, as it appears that he is now very much "present" - he provided this information to Willets.

Neither of these affidavits addresses the timing of these events. How is it that the new company happened to be formed so soon after the plaintiffs' unsuccessful motion for judgment, and their exposure to a cost order? Why then and not earlier? This is the basis for the concern expressed by Colalillo, yet no information about the timing is provided. The additional evidence only serves to suggest that Rowland wanted to "have his cake and eat it, too" – it seems he may have been intent on sheltering Chiltern's assets and income while looking for a way to take advantage of its past business losses for tax purposes.

Willets was cross-examined about this in some depth on April 3, 2007. Although he discusses this issue in his affidavit and provides a rational for it, when cross-examined about it, Willets first claimed that he couldn't recall the rational. When confronted with the fact that he had touched on it in his evidence, he responded that his father's rational for incorporating 170 was to "fund the litigation (see questions 97 and 271). At question 107, Willets responds to a question about whether 170 has revenue by stating that the new company was "suspended" and "all rolled back into Chiltern". This is not consistent with what he says in his second affidavit, sworn only a week and a day earlier. His counsel tried to explain this by referring to a letter from the Ministry of Finance, dated April 2. 170's bank statements, however, suggest the company continued to be active, as it reflects funds moving in and out of the 170's bank account thereafter.

Rowland finally filed his own affidavit in late September 2007. This was his opportunity to explain why he failed to do so earlier, and to state that he has reviewed, agrees with and adopts everything or even some of the things that his son stated in his affidavits or on cross-examination. In fact, he does none of these things. Instead, he says that the documents filed by Willets have to be explained. He then goes on to discuss other issues, which I will return to.

All in all, it is difficult to accept much of what Willets says, as he, himself, makes it abundantly clear that he is not qualified to give this evidence and that he has not informed himself to better prepare himself to do so. Rowland was clearly the person in the best position to provide this evidence yet, having failed to do so, he has not adopted what his

son has said or explained why he has not dealt with these issues, himself. As a result, to the extent that there is other evidence that is not consistent with what Willets has said, I prefer it over his.

The second area of concern is the Karn report, mentioned above. Willets purports to submit evidence as to the factual context of these events and their impact by reference to an expert report. At paragraph 24 of his first affidavit, he speaks of the report of Renee Karn, C.G.A., suggesting that, after her review of Chiltern's "financial records", she concluded that Chiltern's business had dropped off from May 2003 to present. He refers to a chart, which he presumably prepared using her numbers, to demonstrate this.

The Karn report is problematic in many respects. Karn fails to list the precise documents she reviewed before reaching her conclusions. She also states that the circumstances of the dispute between the plaintiffs and the landlord were explained to her by Willets and Rowland, so to the extent that they quote her, they are doing no more than referring to what they told her. She then says that many of these problems have been documented in the notes to the Chiltern's financial statements. She neglects to add, however, that Rowland was the author of those notes so that this is not a source independent of the plaintiffs. It seems that most if not all of Ms. Karn's information was derived from the Willets in one form or another.

Karn also comments on the impact of SARS on Toronto businesses, presumably to explain the dip in Chiltern's business that preceded these events, though she gives no indication as to her qualifications to offer this evidence.

In the end, Karn concludes that Chiltern's problems are "a consequence of the problems with the landlord", problems she appears to be aware of solely as a result of her conversations with the two Willets men and her review of the notes prepared by Rowland. She ends the report by saying that, in her opinion, the demise of the store was "a direct result of the action of the landlord", which is the precise question the trial judge will have to grapple with to determine whether there is liability here.

Karn also states that Chiltern is "in essence" insolvent and being kept afloat by advances from the shareholders - she uses the plural, suggesting reference to Willets and his father. Willets, however, maintains that his father, alone, loaned funds to Chiltern and in fact, he himself lives off loans from his father. Again, Karn fails to indicate whether there are any documents to support her statement about loans and none have been tendered in evidence on this motion. She also provides no figures when speaking of these loans and no documents at all are appended to Karn's report as support for anything she says. In view of all the foregoing, I am unable to give the report much, if any, weight.

I turn now to the three affidavits sworn by Mr. Book's assistant, a further area of concern. In several places, Ms. Cruickshanks provides evidence based solely on what she was told by Mr. Book, counsel who argued the motion before me. It is trite law that counsel cannot be both a witness and an advocate. Having one's assistant swear an affidavit in which she recites what she was told by counsel does not remove counsel from the

evidentiary fray. Again, to the extent that any of what Ms. Cruiskshanks relates she was told by Mr. Book touches on areas that are contentious, I am unable to rely on her evidence.

In her second affidavit, Ms. Cruickshanks provides evidence in a form that constitutes double hearsay, when she recites what Mr. Book told her he was advised by his clients regarding their having done "their every best" to get their records together. It is unfortunate that the plaintiffs failed to use their best efforts in putting their evidence before the court. Ms. Cruickshanks' evidence is of no value whatsoever on this point.

The final area of concern involves the "exhibit book" tendered by Mr. Book. The book contains documents without the benefit of an affidavit to explain what they are or why they are being put forward. Defence counsel objected and when asked what the book contained and what its purpose was, the reply was not helpful. I therefore ruled that it would be excluded. Mr. Book took no issue with that.

**The Law**

There is no dispute between the parties as to the basic operation of Rule 56.01. Both agree that the analysis involves two parts. The moving party must first establish that the circumstances referred to in any of the subrules under the Rule appear to exist. If they can do that, the first stage of the inquiry is complete and the onus then shifts to the responding party (see *Hallum v. Canadian Chiropractic College* (1989) 70 O.R. (2d) 45). The motion will not proceed to the second stage unless the moving party satisfies its preliminary onus.

The second stage requires the court to inquire into all relevant circumstances in order to arrive at an order that is just. At this point, all factors that might have a bearing on the justice of the case, including the merits of the action, must be examined. It is open to the court, after having completed this part of the inquiry, to exercise its discretion against making the order sought although the moving party met its initial onus (see *Horvat et al. v. Feldman et al.*, 15 C.P.C. (2d) 220).

The purpose of the Rule must be borne in mind at the second stage of the inquiry. While the mechanism of security for costs was intended to prevent parties from initiating proceedings that are ultimately unsuccessful with impunity from exposure to costs, the Rule was not meant to prevent those with very limited financial resources from having their cases heard and resolved on the merits. There is a balance of interests that must be performed to ensure that the result on a motion of this kind is a fair and just one.

There are effectively three routes open to a party called upon to respond to a motion for security for costs. Where they are able, they can adduce evidence to demonstrate that security is not necessary as they have assets within the jurisdiction or in a reciprocating jurisdiction that can address cost concerns. In such cases, the court must consider the value and marketability of those assets in order to determine if they can be relied on as security down the road. That is not a path chosen here.

Where the facts do not permit that approach, there are still two other paths open to the responding party. First, he can try to show that he is impecunious and that justice demands that he be permitted to continue with his action without having to post security (see *Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. et al.* [1986] O.J. No. 2364).

There is a high burden of proof on a party who asserts impecuniosity to prove it by referring to his financial situation with particularity. This involves a positive obligation to tender detailed evidence demonstrating that he is "impoverished or needy" (see *RCVM Enterprises Ltd. v. International Harvester Canada Ltd.* (1985), 50 O.R. (2d) 508; *Ferguson v. Arctic Transportation Ltd.* (1996) 111 F.T.R. 154). Proof of financial hardship will not suffice, nor will demonstrating that a party lives below the poverty line (see *Mark Doe v. Canada* [2005] F.C.J. No. 705).

As the onus of demonstrating impecuniosity rests on the responding party, failure to adduce the necessary level of evidence to establish it is fatal. The moving party is not required to cross-examine in depth where the evidence itself falls short and should not be penalized for failing to do so (see *Tallarico-Robertson v. Commmunique Group Inc.* [2004] O.J. 1648, upheld: [2004] O.J. No. 4175).

Gaps in the responding party's financial disclosure will also impede successful reliance on an impecuniosity plea. In *Pritchard v. Avante Solutions Inc.* [2005] O.J. 2718, Master Dash comments on the responding party's failure to state what is in his bank account or to provide the documents to show the state of his financial affairs. He notes that the responding party also failed to state whether he had assets, aside from what he had referred to as "financial assets". Finally, the master was concerned about the failure to provide a summary of assets or financial resources or make reference to attempts and ability to borrow. In view of the missing evidence, a finding of impecuniosity was not possible.

Where the responding party is a corporation, the court cannot be asked to refrain from making an order for security for costs based only on the financial circumstances of the corporation. The court must also examine the ability of the corporation's principals to assist and inquire into the entity's credit facility. In *Treasure Traders International Co. v. Canadian Diamond Traders Inc.* 2006 O.J. No. 1866, the court held that the responding party had to show that both the shareholders and the management of the corporation were not able to satisfy the order for security for cots and that they were unable to raise the money to satisfy such an order. The rational behind this approach is that the action is initiated for the benefit of the shareholders so they should share in the cost burden.

After reviewing these and other authorities in this area, I concluded the following in *Shuter v. Toronto Dominion Bank et al.*, in action no. 02-CV-224145CM4, released September 6, 2007:

> *It appears from these passages that there is a high evidentiary threshold that must be met before a court can find that a plaintiff is impecunious, and that this threshold can only be reached by tendering complete and accurate disclosure of the plaintiff's income, assets, expenses, liabilities and borrowing ability, with full supporting documentation for each category where available or an explanation where not available. At the very least, this would require an individual plaintiff to submit his most recent tax return, complete banking records and records attesting to income and expenses, and a corporation to submit its last financial statement and current financial projections.*

In other words, a responding party cannot simply assert that they are impecunious and provide the records and information they believe will demonstrate that. The onus is on them to make full and complete disclosure, failing which the plea of impecuniosity will not be factored into the court's deliberations.

Establishing impecuniosity does not automatically result in a dismissal of the motion. The court must still assess the surrounding circumstances to determine the appropriate order that fairness dictates – fairness, of course, as it applies to both sides. This is usually accomplished by examining the merits of the case where that is possible. This is not always an easy feat, particularly where the case, in large part, rests on the credibility of the parties.

There is third path available to a responding party who can neither establish that he has sufficient assets to meet a cost order, nor meet the threshold for showing impecuniousity. The focus, in such instance, tends to rest heavily on the merits, as the responding party must show that, in the circumstances of the case, justice demands that he not be required to post security. Although some flexibility is required when considering the equities between the parties in such instance, it seems, from the case law, that justice will only make such a demand where responding party can show that his claim has a real possibility of success (see *Morton v. HMQ Canada*, 75 O.R. (3d) 63).

**Analysis and conclusions**

Rule 56.01(c): outstanding cost orders:

As noted, Nordheimer J's cost order was made payable in any event of the cause. Those costs are therefore not due and exigible until after the action has come to a conclusion by judgment or settlement.

Further, Low J's order required that costs be assessed, an event yet to occur.

As a result, neither cost order "remains unpaid" as the Rule requires, as one is not due and the other has not yet been quantified. The motion under this subrule is therefore premature and dismissed without prejudice.

Rule 56.01(d): good reason to believe there are insufficient assets:

**CITATION:** Marvello Construction v. Santos et al, 2017 ONSC 3913
**COURT FILE NO.:** CV-11-438456
**MOTION HEARD:** 20170620

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Marvello Construction Ltd., Plaintiff, Respondent

**AND:**

Antonio Santos and 1239018 Ontario Ltd. o/a Lucky Carpentry, Defendants, Moving Parties

**BEFORE:** Master Jolley

**COUNSEL:** Jordan Potasky, Counsel for the Moving Party Defendants

Domenic Saverino, Counsel for the Respondent Plaintiff

**HEARD:** 20 June 2017



## REASONS FOR DECISION

### Overview

[1] The plaintiff is in the business of framing houses. It has sued the defendants, a framing company and its director, for $1,400,000 it says it is owed for work it did on several building sites in 2005 and 2006.

[2] The defendants bring this motion for security for costs under 56.01(1)(d) and (e).

### The Test

[3] An order for security for costs is a discretionary remedy.

[4] Rule 56.01(1) provides that the court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

[5] The initial onus is on the defendant to satisfy the court that it appears there is good reason to believe the matter falls into one of the categories under Rule 56.01(1). The onus is not a heavy one.

[6] If that first part of the test is met, the responding party may avoid the order for security for costs by showing that security is unnecessary because it has sufficient exigible assets in Ontario or that it should be permitted to proceed to trial despite its inability to pay costs. (*Montrose Hammond v. CIBC World Markets* 2012 ONSC 4869 at para 33).

[7] Here the plaintiff takes the position that it is impecunious, that its claim is not plainly devoid of merit and that, as a result, it should not be required to post security for costs. The plaintiff did not advance the alternative defence available to it on this motion, namely that, if it was not found to be impecunious, the court should still not order security for costs as it has demonstrated that its case has a good chance of success.

**Analysis**

**Issue 1: Have the defendants demonstrated that the case falls within Rule 56.01(1)?**

[8] The defendants have shown, and the plaintiff has admitted, that there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendants.

[9] The defendants have met the onus to demonstrate the matter falls within Rule 56.01(1). Accordingly the inquiry is triggered as to whether security for costs ought to be granted.

**Issue 2: Should security for costs be awarded?**

**(a) Has the plaintiff established that it is impecunious?**

[10] The cases consistently hold that the evidentiary threshold to establish impecuniosity is high. Bald statements unsupported by detail are not sufficient. The threshold can only be reached by "tendering complete and accurate disclosure of the plaintiff's income, assets, expenses, liabilities and borrowing ability, with full supporting documentation for each category where available or an explanation where not available." (*Coastline Corp. v. Canaccord Capital Corp.* 2009 O.J. No. 1790 at paragraph 7(viii)).

[11] In this case, the plaintiff deposes that it has not actively performed any work for the last decade. It has not filed tax returns or had financial statements prepared and does not have a bank account or assets.

[12] As noted in *Crudo Creative Inc. v. Marin* 2007 CanLII 60834 (Ont. Div. Ct.) at paragraph 31, where a respondent corporation demonstrates that it is inactive and without assets, it is impecunious only in the narrow and limited sense. Its evidence of financial difficulties does not necessarily equate with inability to be able to post security for costs.

MARGARTIA CASTILLO et al.
Applicants

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

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

PROCEEDING COMMENCED AT TORONTO

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