

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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.

COSTS OUTLINE

KSV Restructuring Inc., 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**”), provides the following outline in support of the costs of the motion brought by Juan Guillermo Gutierrez for leave to appeal the December 1, 2022 Order of McEwen J., which ordered Mr. Gutierrez to post security for costs in the amount of \$100,000 (the “**Security for Costs Order**”):

	Partial Indemnity	Substantial Indemnity	Actual Rate
Fees and HST (as detailed below)	29,612.89	44,420.47	49,475.36
Disbursements and HST (see Schedule “A” attached)	31.08	31.08	31.08
Estimated Attendance Fee (N/A – in writing)	0.00	0.00	0.00
TOTAL	29,309.38	44,451.54	49,506.43

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- The amount claimed and the amount recovered in the proceeding

N/A – the Receiver was appointed in respect of a judgment debt in the amount of \$5,083,866.04 (the “ Judgment Debt ”). There are other stakeholders with claims against Xela. No amounts have been recovered to-date in the receivership proceedings.

- The complexity of the proceeding

The Receiver has repeatedly faced funding issues. Mr. Gutierrez acknowledges the Receiver's funding issues in his factum to this Court for leave to appeal the Security for Costs Order (the "**Leave Motion**").¹

Those funding issues are, in part, the result of Mr. Gutierrez' vigorous opposition to producing Xela's documents and records, which are on his devices and in the possession of a company operated by his sons.

For approximately three years, the Receiver tried to gain access to Xela's documents and records. Only after Mr. Gutierrez was found in contempt by Conway J. for breaching the July 5, 2019 Order (which appointed the Receiver) did Mr. Gutierrez provide access. Immediately thereafter, he brought a motion to replace the Receiver (the "**Recusal Motion**"), for which the Receiver sought security for costs.

The Recusal Motion makes bald allegations of misconduct against the Receiver, a Court officer, and its counsel. The allegations are uncivil, unprofessional, and unfounded. They are the very sort of "baseless allegations of impropriety" that can undermine the justice system as a whole by "diminishing the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism."²

The Recusal Motion is another attempt to delay and/or interfere with the Receiver's efforts to access Xela's documents and records on Mr. Gutierrez' devices, when (or, if) the Receiver is ultimately able to resolve its funding issues. The Recusal Motion will continue to adversely affect the Receiver's funding issues, particularly if costs are ordered but not paid in a timely manner.

Previously, Mr. Gutierrez has not paid costs orders in a timely manner. At times, his payments have been made months after they were due. On one occasion, a significant costs order was only paid after he allegedly secured funding from a third party.

Mr. Gutierrez' financial obligations are accumulating. Following the finding of contempt by Conway J., her Honour ordered Mr. Gutierrez to pay costs to the Receiver in the amount of \$563,485 (on a full indemnity basis). While that costs order is stayed pending Mr. Gutierrez' appeal to the Court of Appeal for Ontario, there is no guarantee that the Receiver will recover those amounts even if Mr. Gutierrez' appeal is dismissed.

In all the circumstances, the complexity of this receivership (which has largely been generated by Mr. Gutierrez' conduct throughout) warrants full indemnity costs of this Leave Motion.

- The importance of the issues

It is essential to protect Court officers from unfair attacks by principals of the company under receivership. When unfair and unfounded attacks are made, this Court should exercise its discretion with respect to costs to discourage such baseless allegations by awarding full indemnity costs.

¹ Factum of the Moving Party, Mr. Gutierrez, at para. 25

² *Groia v. Law Society of Upper Canada*, 2018 SCC 27, at [para. 67](#)

The issues in this proceeding also concern the Court's ability to manage a receivership. Permitting a security for costs motion in response to another motion brought within the larger proceeding is undoubtedly a fact-specific discretionary decision that ought to be shown considerable deference. Absent this discretion, a Court's ability to supervise a receivership may be compromised. Awarding full indemnity costs on this Leave Motion is part and parcel to discouraging baseless appeals of discretionary, interlocutory orders.

- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

After three years, five production Orders (dated July 5, 2019; August 28, 2020; October 27, 2020; March 25, 2021, and March 25, 2022), and numerous endorsements, the Receiver finally obtained access to Xela's documents and records. Mr. Gutierrez has stringently resisted the Receiver at every turn. The Recusal Motion is another attempt to interfere with the Receiver's attempts to review Xela's records and documents (when, or if, the Receiver ultimately resolves its funding issues).

Mr. Gutierrez' conduct has unnecessarily lengthened this proceeding and warrants full indemnity costs of the Leave Motion.

- Whether any step in the proceeding was improper, vexatious, or unnecessary or taken through negligence, mistake or excessive caution

Mr. Gutierrez was found to have an "astounding lack of respect for this court" when he was found in contempt of Court by Conway J.³

He, through his counsel, is making improper and vexatious allegations against the Receiver, a Court officer, and its counsel. These allegations continued after Mr. Gutierrez was found in contempt. Most troubling, the Recusal Motion continues to rely on Mr. Gutierrez' contemptuous conduct as a ground for removing the Receiver.

Mr. Gutierrez' has shown a well-established pattern of vexatious behaviour. This appeal continues that pattern and warrants full indemnity costs of the Leave Motion.

- A party's denial of or refusal to admit anything that should have been admitted

Mr. Gutierrez has still not delivered an affidavit in support of the Recusal Motion. He has provided no credible evidence of the Receiver's alleged conspiracy with his cousins. Despite this, he continues to advance these improper allegations.

Mr. Gutierrez' refusal to admit that there is no credible evidence to support his allegations warrants full indemnity costs of the Leave Motion.

- The experience of the party's lawyer

Monique J. Jilesen, Called to the Ontario Bar in 2000
Derek N. Knoke, Called to the Ontario Bar in 2018
Adam Davis, Law Student
Grace Tsakas, Law Clerk

³ *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594, at [para. 37](#)

- The hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEM	PERSONS	HOURS	PARTIAL INDEMNITY RATE		SUBSTANTIAL INDEMNITY RATE		FULL RATE	
			/hr	Total	/hr	Total	/hr	Total
Tasks related to preparing responding motion materials	Monique J. Jilesen (2022 rate)	0.3	\$591	177.30	\$887	265.95	\$985	295.50
	Monique J. Jilesen (2023 rate)	5.5	\$621	3,415.50	\$932	5,123.25	\$1,035	5,692.50
	Derek N. Knoke (2022 rate)	5.6	\$312	1,747.20	\$468	2,620.80	\$520	2,912.00
	Derek N. Knoke (2023 rate)	30.9	\$357	11,031.30	\$536	16,546.95	\$595	18,385.50
	Adam Davis, Law Student	32.4	\$186	6,026.40	\$279	9,039.60	\$310	10,044.00
	Grace Tsakas, Law Clerk	11.4	\$216	2,462.40	\$324	3,693.60	\$360	4,104.00
Tasks related to the above, by Receiver	Robert Kofman	2.5	\$459	1,147.50	\$689	1,722.50	\$800	2,000.00
	Noah Goldstein	0.5	\$397	198.50	\$595	297.50	\$700	350.00
Subtotal				26,206.10		39,310.15		43,783.50
HST (13%)				3,406.79		5,110.32		5,691.86
				29,612.89		44,420.47		49,475.36

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

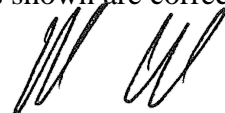
- any other matter relevant to the question of costs

See Schedule "A" to the Costs Outline regarding disbursements.

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: February 13, 2023



Derek N. Knoke

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Lawyers for the Respondent, the Receiver

TO: THE SERVICE LIST

SCHEDULE "A"
DISBURSEMENTS

ITEM	CHARGE
Online Searches Fees	27.50
TOTAL DISBURSEMENTS	27.50
HST at 13%	3.58
TOTAL	31.08

MARGARTIA CASTILLO et al.
Applicants

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Divisional Court File No.: 703/22
Superior Court File No. CV-11-9062-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT TORONTO

**COSTS OUTLINE OF THE RESPONDENT,
THE RECEIVER**

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