

**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.

**COSTS SUBMISSIONS OF THE RECEIVER  
(Contempt Proceedings)**

October 26, 2022

**LENCZNER SLAGHT LLP**  
Barristers  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

Monique J. Jilesen (43092W)  
Tel: (416) 865-2926  
Email: mjilesen@litigate.com  
Derek Knoke (75555E)  
Tel: (416) 865-3018  
Email: dknoke@litigate.com

**AIRD & BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Kyle Plunkett  
Email: [kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)  
Sam Babe  
Email: [sbabe@airdberlis.com](mailto:sbabe@airdberlis.com)

Tel: (416) 863-1500  
Fax: (416) 863-1515

Lawyers for the Moving Party,  
the Receiver

TO: **THE SERVICE LIST**

1. The Receiver makes these submissions on costs in respect of the contempt hearing. The Receiver seeks full indemnity costs in the amount of \$628,485.23, representing the Receiver’s fees and its legal counsel’s fees.

### **SCALE: FULL INDEMNITY COSTS ARE APPROPRIATE**

2. In contempt proceedings, costs are generally payable on a full or substantial indemnity basis.<sup>1</sup> This Court has awarded full indemnity costs, particularly where the contempt is knowing and deliberate.<sup>2</sup> Full indemnity costs reinforce a primary purpose of costs rules—to discourage and sanction inappropriate behaviour by litigants.<sup>3</sup> This is consistent with the purposes of deterrence and denunciation in contempt proceedings generally<sup>4</sup> and with the additional discretion to order such costs as are just in the circumstances.<sup>5</sup> An award of full indemnity costs is therefore consistent with the objectives of civil contempt proceedings and costs awards more broadly.

3. In determining a just costs award in a civil contempt proceeding, courts consider the seriousness of the conduct and its effect on the administration of justice.<sup>6</sup> In this case, the Court found that “the wrongdoing was extremely serious.”<sup>7</sup> Mr. Gutierrez’s conduct demonstrated “an astounding lack of respect for this court.”<sup>8</sup> The Court found that Mr. Gutierrez interfered with a Court-appointed receiver and that he did so with full knowledge of the implications of his actions.<sup>9</sup>

---

<sup>1</sup> *Bickram v. Bickram*, 2015 ONSC 705 (“**Bickram**”), at para. [71](#); *Astley v. Verdun*, 2013 ONSC 6734 (“**Astley**”), at para. [52](#); *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663 (“**Cavalon**”), at para. [104](#); *Niagara (Municipality) (Police Services Board) v. Curran*, [2002] O.J. No. 179, 2002 CanLII 49405 (ON SC), at para. [49](#)

<sup>2</sup> *The Corporation of the Township of King v. 11547372 Canada Inc. et al*, 2022 ONSC 2261 (“**Township of King**”), at para. [27](#)

<sup>3</sup> *Township of King*, at para. [45](#)

<sup>4</sup> *Cavalon*, at para. [90](#); *Canadian National Railway Company v. Plain*, 2013 ONSC 4806 (“**CNR v. Plain**”), at para. [27](#)

<sup>5</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. [60.11\(5\)\(e\)](#); *Astley*, at para. [49](#)

<sup>6</sup> *Cavalon*, at para. [104](#)

<sup>7</sup> *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594 (“**Sentencing Decision**”), at para. [24](#)

<sup>8</sup> *Sentencing Decision*, at para. [37](#)

<sup>9</sup> *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006, at para. [33](#); *Sentencing Decision*, at para. [49](#)

The seriousness of Mr. Gutierrez’s conduct and its effect on the administration of justice is a major factor warranting full indemnity costs.

4. A long-standing and deliberate course of conduct is worthy of full indemnity costs— notwithstanding that it is a finding of contempt with respect to a single order.<sup>10</sup> Mr. Gutierrez’s long-standing, deliberate refusal to do everything in his power to have the criminal complaint withdrawn is relevant to this Court’s exercise of discretion and warrants full indemnity costs.<sup>11</sup>

5. The moving party in a contempt proceeding should not bear the financial burden of the contempt.<sup>12</sup> The relevance of this factor is exacerbated by the factual context of this receivership. The Receiver was appointed because of a failure to pay a judgment debt. Since its appointment, the Receiver has repeatedly faced funding issues. Mr. Gutierrez’s contempt and these proceedings have further exerted financial pressure on the Receiver and the receivership. Meanwhile, Mr. Gutierrez’s contempt (as found by this Court) worked “to his financial benefit.”<sup>13</sup> Contemptuous conduct aimed at procuring for oneself a financial benefit is another factor that courts have held warrants full indemnity costs.<sup>14</sup>

6. Finally, in any event, this Court has been clear that much less flagrant acts of contempt warrant, at the very least, substantial indemnity costs awards.<sup>15</sup> In all the circumstances, nothing less than an award of substantial indemnity costs is warranted.

---

<sup>10</sup> *Township of King*, at paras. [2](#) and [27](#)

<sup>11</sup> Sentencing Decision, at para. [39](#); *Rules of Civil Procedure*, at r. [57.01](#)

<sup>12</sup> *Township of King* at paras. [26-27](#); *Hobbs v. Hobbs*, 2008 CanLII 1947 (ON SC) (“*Hobbs*”), at para. [4](#); See *Bickram*, at paras. [71-72](#)

<sup>13</sup> Sentencing Decision, at para. [40](#)

<sup>14</sup> *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2007 CanLII 54953, at paras. [17-22](#)

<sup>15</sup> See [CNR v. Plain](#)

**QUANTUM: THE AMOUNT REQUESTED IS FAIR AND REASONABLE**

7. The quantum sought (\$628,485.23) is fair and reasonable. Although the amount is significant, it reflects months of work to conduct a fair hearing.

8. The contempt motion was first brought on February 9, 2021 with an attendance before McEwen J. on February 10, 2021. Mr. Gutierrez responded with a lengthy affidavit.

9. The Receiver delivered two affidavits making full disclosure of the allegations against Mr. Gutierrez. Mr. Gutierrez demanded further disclosure. He said that the Receiver owed the duties of a Crown prosecutor. In response, the Receiver reviewed nearly three years of emails and documents to conduct a privilege review. The Receiver provided hundreds of pages of disclosure.

10. Mr. Gutierrez insisted that the Receiver provide *viva voce* evidence. In addition to the affidavits of the witnesses, the Receiver appropriately prepared its two witnesses for examinations in chief and live cross-examinations.

11. Mr. Gutierrez chose to testify at the liability hearing, for which the Receiver also prepared. In total, there were five days of evidence and submissions (May 30-31, June 2, June 16, September 22, 2022). This was a significant motion that was vigorously opposed. The Receiver prepared two more affidavits for the penalty hearing (for a total of four motion records). The parties attended two other times—a case conference before Conway J. on August 26, 2022 and an appearance to receive the penalty decision on October 17, 2022.

12. The costs sought are the aggregate of the costs of the Receiver and its counsel. Justice McEwen previously awarded the Receiver its costs and specifically referred to the criminal complaint as a basis for doing so.<sup>16</sup>

---

<sup>16</sup> Exhibit DD to Robert Kofman's September 8, 2022 Affidavit, Further Supplementary Motion Record of the Receiver dated September 8, 2022, Tab 1(EE), at p. [A2636 to A2653](#)

13. The issues were complex. The hearing was complicated by jurisdictional and procedural issues raised by Mr. Gutierrez. The Receiver was wholly successful.

14. This Court has made clear that courts should not ordinarily second-guess experienced counsel in deciding how to staff and spend time on a case unless it is “manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been ‘over lawyered.’”<sup>17</sup> The Receiver pursued these contempt proceedings as efficiently as possible in the face of Mr. Gutierrez’s difficult behaviour.

15. The consequences of Mr. Gutierrez’s conduct continue to pose legal and financial risks to the Receiver and its representatives in Panama.<sup>18</sup> Mr. Gutierrez set these events in motion.<sup>19</sup> The Receiver should not bear the financial burden of Mr. Gutierrez’s intentional interference with a court officer.<sup>20</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of October, 2022.




---

Monique J. Jilesen

**LENCZNER SLAGHT LLP**

Barristers  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926  
Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

Derek Knoke (75555E)

Tel: (416) 865-3018  
Email: [dknoke@litigate.com](mailto:dknoke@litigate.com)

---

<sup>17</sup> *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, 2012 ONSC 2240, at para. [37](#)

<sup>18</sup> Sentencing Decision, at para. [32](#)

<sup>19</sup> Sentencing Decision, at para. [32](#)

<sup>20</sup> *Bickram*, at paras. [71](#), [74](#); *Hobbs*, at para. [4](#)

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Kyle Plunkett**

Email: [kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)

**Sam Babe**

Email: [sbabe@airdberlis.com](mailto:sbabe@airdberlis.com)

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Moving Party, the Receiver

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Astley v. Verdun*, [2013 ONSC 6734](#)
2. *Bickram v. Bickram*, [2015 ONSC 705](#)
3. *Business Development Bank of Canada v. Cavalon Inc.*, [2017 ONCA 663](#)
4. *Canadian National Railway Company v. Plain*, [2013 ONSC 4806](#)
5. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)
6. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#)
7. *College of Optometrists of Ontario v. SHS Optical Ltd.*, [2007 CanLII 54953](#) (ON SC)
8. *Hobbs v. Hobbs*, [2008 CanLII 1947](#) (ON SC)
9. *Niagara (Municipality) (Police Services Board) v. Curran*, [2002] O.J. No. 179, [2002 CanLII 49405](#) (ON SC)
10. *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, [2012 ONSC 2240](#)
11. *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, [2022 ONSC 2261](#)



## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194

##### General Principles

##### Factors in Discretion

**57.01 (1)** In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
  - (a) the amount claimed and the amount recovered in the proceeding;
  - (b) the apportionment of liability;
  - (c) the complexity of the proceeding;
  - (d) the importance of the issues;
  - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
  - (f) whether any step in the proceeding was,
    - (i) improper, vexatious or unnecessary, or
    - (ii) taken through negligence, mistake or excessive caution;
  - (g) a party’s denial of or refusal to admit anything that should have been admitted;
  - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
    - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
    - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

...

## **Contempt Order**

### **Motion for Contempt Order**

**60.11** (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 (1).

[...]

### **Content of Order**

(5) In disposing of a motion under subrule (1), 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,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property. R.R.O. 1990, Reg. 194, r. 60.11 (5).

MARGARITA CASTILLO et al.  
Plaintiffs

-and- XELA ENTERPRISE LTD. et al.  
Defendants

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

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

PROCEEDING COMMENCED AT  
TORONTO

**COSTS SUBMISSIONS OF THE RECEIVER  
(Contempt Proceedings)**

**LENCZNER SLAGHT LLP**

Barristers  
130 Adelaide Street West,  
Suite 2600  
Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

mjilesen@litigate.com  
Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com  
Tel: (416) 865-3018

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Moving Party,  
the Receiver