

COURT OF APPEAL FOR ONTARIO

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.

MOVING PARTY'S FACTUM
(Introduce Further Evidence)

December 16, 2022

LENCZNER SLAGHT LLP

Barristers

Suite 2600

130 Adelaide Street West

Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: dknoke@litigate.com

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 Respondent/Moving Party, the
Receiver

TO: **THE SERVICE LIST**

COURT OF APPEAL FOR ONTARIO

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.

TABLE OF CONTENTS

	Page No.
MOVING PARTY'S FACTUM	1
TABLE OF CONTENTS	1
MOVING PARTY'S FACTUM	1
PART I - OVERVIEW	1
PART II - SUMMARY OF FACTS	2
PART III - ISSUES, LAW & AUTHORITIES.....	4
A. THE FURTHER EVIDENCE IS CREDIBLE.....	5
B. THE FURTHER EVIDENCE COULD NOT HAVE BEEN OBTAINED, BY THE EXERCISE OF REASONABLE DILIGENCE, PRIOR TO THE CONTEMPT PROCEEDINGS	6
C. THE FURTHER EVIDENCE IS NECESSARY TO DEAL FAIRLY WITH AN ISSUE ON APPEAL	7
PART IV - RELIEF REQUESTED	8
SCHEDULE "A" – LIST OF AUTHORITIES.....	1
SCHEDULE "B" – TEXT OF STATUTES, REGULATIONS & BY-LAWS.....	1

COURT OF APPEAL FOR ONTARIO

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.

MOVING PARTY'S FACTUM

PART I - OVERVIEW

1. This is a motion by the Respondent, KSV Restructuring Inc. (“**KSV**”), in its capacity as Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”), to introduce further evidence with respect to the appeal by Juan Guillermo Gutierrez (the “**Appellant**”) from an order that he is in civil contempt of the Order of McEwen J. dated July 5, 2019 (the “**Appointment Order**”) and an order that the Appellant be imprisoned for 30 days.
2. The further evidence is credible, could not have been obtained by the exercise of reasonable diligence prior to the contempt proceedings, and is necessary to deal fairly with the jurisdictional issues raised by the Appellant.
3. A primary basis for the Appellant’s appeal is that the motion judge erred in concluding that there was a real and substantial connection between the offence and Canada. The Appellant

submits that the motion judge's conclusion with respect to this issue violated the rules of international comity and violated Panama's sovereignty by imposing Canadian law on a Panamanian proceeding with respect to alleged crimes committed by the Receiver's lawyers.¹

4. The Appellant relies upon the fact that the criminal complaint arising from changes to the Board of Xela's wholly-owned subsidiary, Gabinvest S.A.,("**Gabinvest**"), which is the subject of the contempt finding, "continues to be investigated by Panamanian authorities."²

5. The fresh evidence shows that the criminal complaint is no longer being investigated by the Panamanian authorities. Together with the remaining facts in the record, the evidence demonstrates that the finding of civil contempt against the Appellant did not and will not invoke the rules of international comity or Panama's sovereignty.

6. Counsel for the Appellant has consented to the admission of the fresh evidence on appeal, subject to arguments about the weight of the evidence.³

PART II - SUMMARY OF FACTS

7. KSV was appointed the Receiver of Xela on July 5, 2019.⁴

8. On January 16, 2020, the Receiver instructed its lawyers in Panama ("**Hatstone**") to convene a Board meeting of Gabinvest, a Panamanian company which is a wholly-owned

¹ Factum of the Appellant ("**FAP**"), para. 13-29

² FAP, para. 27

³ Email from Appellant's counsel to Lenczner Slaght dated November 28, 2022, Affidavit of Grace Tsakas, sworn December 16, 2022 (the "**Tsakas Affidavit**"), Exhibit C, Respondent's Motion Record ("**MRR**"), Tab 2C, p. 32

⁴ July 5, 2019 Appointment Order of McEwen J., RCOM, Tab 12, p. 127, Exhibit Book, Tab 2(F)

subsidiary of Xela, to replace the then Board of Directors of Gabinvest with three members of the Hatstone firm (the “**Gabinvest Resolution**”).⁵

9. On January 20, 2021, a criminal complaint was filed in Panama against the new Hatstone directors arising out of the Gabinvest Resolution.⁶ The criminal complaint was supported by a declaration sworn by Mr. Gutierrez (the “**Declaration**”).⁷

10. On June 29, 2022, further to a motion brought by the Receiver, the motion judge held Mr. Gutierrez in civil contempt of the Appointment Order because of the Declaration.⁸

11. Following the contempt finding, on August 22, 2022, the Panamanian prosecutor dismissed the criminal complaint. Thereafter, an application to appeal the prosecutor’s decision was made to a Panamanian court.⁹

12. On October 13, 2022, following the penalty hearing in the contempt proceeding, the appeal of the Panamanian prosecutor’s dismissal of the criminal complaint was heard.¹⁰

⁵ Second Report of the Receiver dated February 18, 2020 (“**Receiver’s Second Report**”), at s. 3, RCOM, Tab 16, p. 186, Exhibit Book, Tab 2(H02); Affidavit of Harald Johannessen Hals, sworn March 22, 2020 (the “**March 22, 2020 Hals Affidavit**”), at para. 18, RCOM, Tab 17, p. 191, Exhibit Book, Tab 16(2)

⁶ Criminal Complaint and Declaration, Exhibit C to the Affidavit of Carl O’Shea, sworn May 4, 2022 (the “**May 4, 2022 O’Shea Affidavit**”), RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C); Receiver’s Fifth Report, at s. 3.1(2)(i), RCOM, Tab 7, p. 53, Exhibit Book, Tab 2(O)

⁷ The Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

⁸ *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#), at para. 4

⁹ Tsakas Affidavit, at para. 3, MRR, Tab 2, p. 8

¹⁰ September 8, 2022 Affidavit of Robert Kofman, Exhibit Book, Tab 19; September 16, 2022 Affidavit of Robert Kofman, RCOM, Tab 26, p. 298, Exhibit Book, Tab 20; Tsakas Affidavit, at paras. 3-4, MRR, Tab 2, p. 8; *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#) (the “**Sentencing Decision**”), Respondents/Moving Parties’ Book of Authorities (“**MPBOA**”), Tab 1

13. On November 18, 2022, the Receiver received a screenshot of a summary of the Panamanian court's October 13, 2022 decision (the "**Panamanian Appeal**"). It notes that the Panamanian court dismissed the appeal and ordered that the criminal complaint remain closed.¹¹

14. On November 21, 2022, the Receiver obtained an official translation of the August 2022 Panamanian prosecutor's dismissal (the "**Prosecutor's Decision**").¹²

15. On December 16, 2022, the Receiver obtained an official translation of a letter from the First Judicial Office of Panama addressed to "attorney Tejada" (the Panamanian criminal lawyer for the Receiver's agents) confirming the decision in the Panamanian Appeal (the "**Panamanian Appeal Letter**")¹³ (together the Panamanian Appeal, the Prosecutor's Decision, the Panamanian Appeal Letter appended to the affidavit of Grace Tsakas are the "**Further Evidence**").

PART III - ISSUES, LAW & AUTHORITIES

16. This Court may exercise its discretion and receive further evidence to assist the Court in fairly determining an issue in the appeal.¹⁴

17. A primary issue that this Court considers when exercising its discretion is whether the further evidence is necessary to deal "fairly with the issues on appeal".¹⁵

¹¹ Tsakas Affidavit, at para. 3, MRR, Tab 2, p. 8

¹² Tsakas Affidavit, Exhibit B, MRR, Tab 2B, p. 30

¹³ Tsakas Affidavit, Exhibit D, MRR, Tab 2D, p. 35

¹⁴ *Courts of Justice Act*, RSO 1990, c C. 43, at s. [134\(4\)\(b\)](#)

¹⁵ *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), [1994 CanLII 8711](#) (ON CA) ("*Sengmueller*"), at para. [10](#), MPBOA, Tab 2

18. In civil cases, this Court has used two slightly different tests to determine the admissibility of further evidence.¹⁶

19. According to the test in *Sengmueller v. Sengmueller*, this Court will exercise its discretion and admit further evidence when:

- (a) the evidence tendered is credible;
- (b) the evidence could not have been obtained, by the exercise of reasonable diligence, prior to trial; and
- (c) the evidence, if admitted, will likely be conclusive of an issue in the appeal.¹⁷

20. The two tests are not materially different. The test in *Sengmueller* “may be perhaps more demanding.”¹⁸ This comes from the final branch of the *Sengmueller* test, which asks whether the fresh evidence would be “conclusive” of an issue in the appeal.¹⁹ This contrasts with the final branch in *R. v. Palmer*, which asks whether the fresh evidence, taken together with other previous evidence adduced at trial, would have affected the result.²⁰

A. THE FURTHER EVIDENCE IS CREDIBLE

21. The Further Evidence is a sworn affidavit from the Respondent’s counsel’s firm appending:

¹⁶ The two tests are *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979 CanLII 8](#) (SCC) (“*Palmer*”), MPBOA, Tab 3, and *Sengmueller*, MPBOA, Tab 2. See *Aurora (Town) v. Lepp*, 2020 ONCA 528, at para. [28](#), MPBOA, Tab 4

¹⁷ *Sengmueller*, at para. [9](#), MPBOA, Tab 2

¹⁸ *Ojeikere v. Ojeikere*, 2018 ONCA 372 (“*Ojeikere*”), at para. [47](#), MPBOA, Tab 5

¹⁹ *Chiang (Re)*, 2009 ONCA 3 (“*Chiang*”), at para. [77](#), MPBOA, Tab 6

²⁰ *Palmer*, at para. [22](#), MPBOA, Tab 3

- (a) an official translation of the Prosecutor’s Decision, which bears the seal of the Republic of Panama, Attorney General’s Office;
- (b) a screenshot of a summary of the Panamanian judge’s decision to dismiss the appeal of the Prosecutor’s Decision. The Receiver understands that no official reasons were or will be released by the Panamanian Court;²¹ and
- (c) an official translation of a letter from the First Judicial Office confirming the Panamanian judge’s decision to dismiss the appeal of the Prosecutor’s Decision, which bears the seal of the First Judicial Office of Panama.²²

22. The credibility of the first two pieces of Further Evidence is not contested by the Appellant, whose counsel agreed that they “would be admissible as fresh evidence on appeal.”²³ The third piece of Further Evidence bears the seal of the First Judicial Office of Panama and confirms the evidence that the Appellant’s counsel already agreed was admissible.

B. THE FURTHER EVIDENCE COULD NOT HAVE BEEN OBTAINED, BY THE EXERCISE OF REASONABLE DILIGENCE, PRIOR TO THE CONTEMPT PROCEEDINGS

23. The Further Evidence did not exist prior to the liability phase of the contempt proceedings, and an appeal of the Prosecutor’s Decision was outstanding at the time of the sentencing phase of the contempt proceedings.

²¹ Tsakas Affidavit, at para. 4, MRR, Tab 2, p. 8

²² Tsakas Affidavit, Exhibit D, MRR, Tab 2D, p. 35

²³ Tsakas Affidavit, Exhibit C, MRR, Tab 2C, p. 32

24. The Further Evidence could not have been obtained, by the exercise of reasonable diligence, prior to the contempt proceedings.

C. THE FURTHER EVIDENCE IS NECESSARY TO DEAL FAIRLY WITH AN ISSUE ON APPEAL

25. In *Sengmueller*, this Court held that the Court should admit further evidence “where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result”.²⁴ The Further Evidence is required to deal fairly with an issue on appeal.

26. The Appellant submits that the motion judge erred in law when she concluded that the “real and substantial link” test in *R. v. Libman* had been satisfied. He argued before the motion judge (and now argues again on appeal) that the principles of international comity support the conclusion that Canada does not have jurisdiction.²⁵

27. As evidence of the motion judge’s alleged error, the Appellant claims that the criminal complaint “continues to be investigated by the Panamanian authorities” (emphasis added).²⁶ The Appellant frames the issue as one in which the motion judge’s decision imposes Ontario law onto issues being investigated by other states.²⁷

28. The Further Evidence is conclusive of this issue because it shows that:

- (a) Panama did not consider the Ontario contempt proceedings when assessing Hatstone’s conduct in the criminal complaint. There was no suggestion by the

²⁴ *Sengmueller*, at para. 10, MPBOA, Tab 2

²⁵ FAP, at para. 27

²⁶ FAP, at para. 27

²⁷ FAP, at paras. 27-28

Panamanian prosecutor (or the Panamanian court) that the contempt proceedings overlapped with issues in the criminal complaint. Instead, the criminal complaint was decided based entirely on Panamanian law; and

- (b) Panama did not consider the Appellant's interference with the Receiver's exercise of Xela's shareholder rights or the Appellant's other contemptuous conduct.

29. The Further Evidence makes clear that the issues in Panama and in this Court are different issues. Alternatively, even if there was overlap of the fundamental issues, Panama has no interest in the matter. There is nothing to which Ontario's courts should defer.

30. If the Further Evidence were not admitted, it could lead to a substantial injustice because the Further Evidence shows that the motion judge did not interfere with the jurisdiction of a foreign state as alleged by the Appellant.

PART IV - RELIEF REQUESTED

31. The Receiver requests that:

- (a) the Further Evidence be admitted by the Panel hearing the appeal;
- (b) the Appellant's appeal be dismissed; and
- (c) the Receiver's costs of the appeal and this motion be awarded on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2022.



Monique J. Jilesen/Derek Knoke

December 16, 2022

LENCZNER SLAGHT LLP

Barristers

Suite 2600

130 Adelaide Street West

Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: dknoke@litigate.com

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 Respondent/Moving Party,
the Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#)
2. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)
3. *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), [1994 CanLII 8711](#) (ON CA)
4. *R v. Palmer*, [1980] 1 S.C.R. 759, [1979 CanLII 8](#) (SCC)
5. *Aurora (Town) v. Lepp*, [2020 ONCA 528](#)
6. *Ojeikere v. Ojeikere*, [2018 ONCA 372](#)
7. *Chiang (Re)*, [2009 ONCA 3](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43

[...]

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

- (a)** make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b)** order a new trial;
- (c)** make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a)** draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
- (b)** receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
- (c)** direct a reference or the trial of an issue,
to enable the court to determine the appeal.

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al
Respondents

COA-22-CV-0206

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

MOVING PARTY'S FACTUM
(Introduce Further Evidence)

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

Sam Babe

Email: sbabe@airdberlis.com
Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Respondent/Moving Party, the Receiver