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

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, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

FACTUM OF THE MOVING PARTY, JUAN GUILLERMO GUTIERREZ

(Date of issue)

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PART I - IDENTITY OF MOVING PARTY, PRIOR COURT & RESULT

1. The Respondent, Juan Guillermo Gutierrez ("**Mr. Gutierrez**"), seeks leave to appeal the interlocutory order of the Honourable Justice McEwen of the Superior Court of Ontario (the "**Motion Judge**") wherein Mr. Gutierrez was ordered to pay security for costs before he could bring a motion to vary the appointment order and seek recusal of the Receiver.

2. Mr. Gutierrez submits that the Motion judge erred by:

(a) ordering security for costs against a respondent/defendant.

(b) ordering security for costs where paragraph 33 of the Appointment Order outlines the only requirements with respect to bringing a motion to vary the Appointment Order.

(c) ordering security for costs be paid in the context of a single motion within a proceeding.

(d) finding that r. 56.01(1)(c) applied, despite the fact that the Receiver did not have an outstanding cost order against Mr. Gutierrez;

(e) applying r. 56.01(1)(e) when the motion being brought to vary the Order of Justice McEwen is neither an application nor action that would trigger r. 56.01(1)(e); Alternatively, if r. 56.01(1)(e) does apply, the Receiver has failed to show that the Recusal Motion is frivolous and/or vexatious; and,

(f) failing to consider that there are numerous conflicting Superior Court decisions in Ontario. In fact, the Receiver failed to refer to any case law where security for costs was ordered against a respondent in the context of an application.

3. The policy reasons behind prohibiting security for costs against defendants/respondents is to ensure that defendants who are forced into the court by others to defend themselves, are not prevented from participating in the proceedings commenced against them. Allowing the Motion Judge's order to stand will have far reaching and unintended consequences for respondents in receivership applications and beyond.

4. In the context of a receivership, the respondent will in most cases have no assets in Ontario, therefore, the unintended consequence of the Motion Judge's decision will be to deprive respondents of the ability to defend themselves and raise legitimate questions regarding the conduct of a Receiver, thereby insulating a receiver from critical scrutiny by stakeholders.

PART II - SUMMARY OF FACTS

Background to Judgment and Collection of Judgment Debt

5. The within proceedings relate to execution of a Judgment (the "**Judgment**") against (among others) Xela Enterprises Inc. ("**Xela**") and Mr. Gutierrez in favor of Margarita Castillo ("Ms. Castillo").[1]

6. On July 5, 2019 KSV Restructuring Inc. (the "**Receiver**") was appointed the receiver over the undertakings, property and assets of Xela, in accordance with s. 101 of the Courts of Justice Act to aid in the execution of the Judgment (the "**Appointment Order**").[2]

7. Mr. Gutierrez is the president of Xela and owner of 100% of Xela's voting shares. Xela's only significant assets are: (a) Gabinvest S.A. ("Gabinvest"), a wholly owned subsidiary of Xela; and (b) Lisa S.A. ("LISA"), a wholly owned subsidiary of Gabinvest. Both are Panamanian entities. Mr. Gutierrez has never been employed by, or been an officer or director of, either.[3]

8. Prior to the appointment of the Receiver, the Judgment was partially satisfied with all of Mr. Gutierrez's personal assets, with approximately $4 million remaining unsatisfied.

9. As part of the enforcement efforts, Mr. Gutierrez':

(a) Bank accounts were frozen;

(b) home was sold;

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[1]Affidavit of Nanda Singh dated November 22, 2022 ("**Singh Affidavit**") at para 4, Motion Record of the Respondent Juan Guillermo Gutierrez dated January 23, 2023 ("**MR**") at Tab 3, pg. 39
[2]Singh Affidavit at para 4, MR at Tab 3, pg. 39
[3]Singh Affidavit at Exhibit "E", Affidavit of Juan Guillermo Gutierrez at para 1-3, MR at Tab 3, pg. 275-276

(c) cottage was sold; and

(d) cars were sold.[4]

10. On or about July 25, 2017, Juan Gutierrez was examined in aid of execution. The examination continued on August 30, 2018.[5]

11. The Applicant was unable to collect any more money and/or assets to realize on the Judgment as all of Mr. Gutierrez assets/money were used to satisfy the Judgment. After all of Mr. Gutierrez' assets were seized by the Applicant, the Applicant brought an application for the appointment of a receiver.[6]

Appointment of the Receiver

12. On July 5, 2019, a Receiver was appointed.[7]

13. On October 17, 2019, the Receiver delivered its first report.[8]

14. In or around January 2020, Mr. Gutierrez sought to bring a motion to terminate the Receivership. The Receiver did not bring a motion for security for costs at this time.[9]

15. In March 2020, the Receiver brought a contempt motion against Juan Gutierrez ("First Contempt Motion"). Thousands of dollars were billed towards preparation for the First Contempt

[4]Singh Affidavit at Exhibit "A", Examination in Aid of Execution Transcript at pg. 446-447, MR at Tab 3, pgs. 61-62
[5]Affidavit of Grace Tsakas Sworn November 15, 2022 ("Tsakas Affidavit") at paras 2 and 3, MR at Tab 5, pg. 886
[6]Tsakas Affidavit at paras 4 and 5, MR at Tab 5, pg. 887
[7]Tsakas Affidavit at para 7, MR at Tab 5, pg. 887
[8]Tsakas Affidavit at para 8, MR at Tab 5, pg. 887
[9]Singh Affidavit at para 5, MR at Tab 3, pg. 39

Motion. The First Contempt Motion was later adjourned sine die and never brought back and/or abandoned.[10]

16. On October 27, 2020, Justice McEwen made an order for disclosure of certain documents. However, a detailed protocol was established in order to ensure that Mr. Gutierrez' private and confidential documents were not disclosed.[11]

17. On January 18, 2021, the Receiver brought a motion to compel Mr. Gutierrez to, inter alia, provide passwords to devices.[12] On February 9, 2021, the Receiver brought another contempt motion against Mr Gutierrez.[13]

18. On the same day, Mr. Gutierrez delivered a notice of motion seeking to vary the Appointment Order to replace KSV with another Receiver. The Receiver by this point knew that Mr. Gutierrez was seeking to bring a recusal motion. No security for costs motion was brought.

19. In or around December 2021, the Receiver commenced a civil proceeding against Mr. Gutierrez and his family. The Receiver did not disclose that it had commenced this proceeding until approximately 6 months after the claim was issued.[14]

Review of Mr. Gutierrez' Documents and Personal Devices

20. On or about August 25, 2022, Dave Burton, an expert retained by Mr. Gutierrez, Laura Clewley of Epiq and a representative of the Received held a meeting to discuss the process for

[10]Singh Affidavit at para 7, MR at Tab 3, pg. 39
[11]Singh Affidavit at para 8 and Exhibit D, MR at Tab 3, pg. 39
[12]Tsakas Affidavit at para 9, MR at Tab 5, pg. 887
[13]Singh Affidavit at para 12, MR at Tab 3, pg. 40
[14]Singh Affidavit at para 14 and 16, MR at Tab 3, pg. 40

providing the password for the drive. During that meeting Laura Clewley from Epiq noted that the process could take days to complete. At the meeting, Burton inquired about whether the data would be copied from the locked drive and then ingested into Relativity, or whether there was a conversion process conducted as it was ingested into Relativity. Epiq advised that there was in fact a conversion process that takes place from the UFDR format used by Cellebrite (which was used to create the images of the devices), to the format used by Relativity. She explained that this is why the process could take so long. At no time was there any mention of the use of FTK Imager to image the entire locked drive.[15]

21. Epiq advised Burton that they would copy the data off the drive to allow for processing of the data for review in Relativity. Epiq did not mention the use of Cellebrite Physical Analyzer to parse the images of Mr. Gutierrez devices to ensure the integrity.[16]

22. It was agreed upon by all parties that should the copying process being conducted by Epiq be completed before Thursday September 1, 2022, that they would notify Burton and he would immediately attend their offices to re-lock the drive with a new password. It was Burton's understanding, based on discussions with Epiq, that the data was being converted and ingested into Relativity.[17]

23. On August 30, 2022, Mr. Gutierrez provided the passwords to his devices. Brian Greenspan, Laura of Epiq and Dave Burton were present for the meeting. During this meeting Mr. Greenspan again reviewed what the anticipated process would be once the drive password was

[15]Affidavit of Dave Burton dated November 22, 2022 ("**Burton Affidavit**") at para 5, MR at Tab 4, pg. 858
[16]Burton Affidavit at para 6 and 9, MR at Tab 4, pg. 858 and 859-860
[17]Burton Affidavit at para 5, MR at Tab 4, pg. 857

provided. Epiq informed Burton and Mr. Greenspan that the data would be copied from the drive to Epiq's servers for review in Relativity. If the process were to be concluded before Thursday the 1st of September, Epiq would notify Mr. Greenspan. There was no mention of the process that was actually going to occur with FTK or Cellebrite Physical Analyzer.[18]

24. However, at some time unknown to Mr. Gutierrez, KSV instructed Epiq not to upload the data on relativity.[19] Thus, the data is presumably now on Epiq servers where it might be accessed without any of the Relativity safeguards that would have identified any such malfeasance.

25. KSV has noted that it cannot upload the data on relativity due to funding issues. However, this scenario has created the very circumstances that Mr. Gutierrez decried from the outset, which is that his personal, confidential information must not be exposed to risk, owing to the historical theft of Xela electronic documents by the Applicant's husband and delivery of same to Mr. Gutierrez's cousins in Guatemala.[20]

26. KSV did not alert the Court on a case conference that took place on September 13, 2022 that, as a consequence of KSV's instructions to Epiq, no progress whatsoever would be made towards compliance with the document review process.

27. On September 12, 2022, Mr. Gutierrez delivered his notice of motion to replace the Receiver (the "Recusal Motion"). On September 27, 2022 Justice McEwen (the "Motion Judge") scheduled the Recusal Motion, despite opposition from the Receiver.[21]

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[18]Burton Affidavit at paras 8 and 12, MR at Tab 4, pgs. 859 and 860
[19]Burton Affidavit at Exhibit C, MR at Tab 4, pg. 879
[20] Singh Affidavit at Exhibit E, Gutierrez Affidavit at paras 40-47, MR at Tab 3, pgs. 292-295
[21]Singh Affidavit at paras 17 and 18, MR at Tab 3, pg. 41

28. In November 2022, the Receiver brought a motion for security for costs.

29. On December 1, 2022, the Motion Judge rendered his decision. The Motion Judge ordered Mr. Gutierrez to pay $100,000 for security for costs prior to the motion to vary the Appointment Order. The Motion Judge also ordered Mr. Gutierrez to pay for the costs of the motion and recused himself from hearing the motion to vary the appointment order.[22]

PART III - LIST OF ISSUES

30. The issues to be determined by this Honourable Court are:

(a) Whether the Motion Judge erred in ordering the Respondent, Juan Guillermo Gutierrez, to pay security for costs.

(i) Whether the Motion Judge lacked the Jurisdiction to Order Security for Costs Against a Respondent in the proceeding.

(ii) Whether the Motion Judge erred in Ordering Security for Costs despite paragraph 33 of the Appointment Order that sets out *the only* requirements for an Order to vary the appointment Order.

(b) Whether the Motion Judge erred in relying upon *Di Paola,* re 2006 and *Kramer Henderson Sidlofsky LLP v. Monteiro* in granting security for costs against a respondent;

[22]Endorsement of Justice McEwen dated December 1, 2022, MR at pg. 18

(c) Whether the Motion Judge erred in ordering security for costs pursuant to r. 56.01)(1)(c) where the Receiver did not have an outstanding order against Mr. Gutierrez.

(d) Whether the Motion Judge erred in finding that r. 56.01(1)(e) applies in the context of a motion within a proceeding and if so, whether the Motion to Vary is frivolous and/or vexatious.

PART IV - LAW & AUTHORITIES RELATING TO ISSUES

(a) Whether the Motion Judge erred in ordering the Respondent, Juan Guillermo Gutierrez, to pay security for Costs

(i) *The Motion Judge lacked the Jurisdiction to Order Security for Costs Against a Respondent Defending themselves within a Proceeding*

31. The Motion Judge erred when he ordered security for costs payable by the Respondent without a claim and relied upon rules that are extrinsic to r. 56.01(1) to support his order.

32. In *Blenkarn, Roche v Beckstead*[23] the court confirmed that there is no inherent power to order security for costs nor can such a power be supported by analogy to the Rules. If the Court's order for security for costs is not properly within Rule 56.01, then the order was made without jurisdiction.[24]

> There is no jurisdiction under Rule 56.01 to award security for costs against a defendant. see *Toronto Dominion Bank v. Szilagyi Farms Ltd.* supra. It is appropriate in some cases to award security for costs against a plaintiff by counterclaim, but only when the counterclaim is in substance a claim wholly independent of the defence to the main action. This principle was stated clearly by Morden, J.A. in *Toronto Dominion Bank v. Szilagyi Farms Ltd.* He stated at p.442:

[23] *Blenkarn, Roche v Beckstead* [1995] O.J. No. 2777
[24] *Blenkarn, Roche v Beckstead* [1995] O.J. No. 2777 at para 13

> Where a counterclaim arose out of the same circumstances as the claim and in substance was a defence to the claim security for costs was not ordered.[25]

33. The Court of Appeal has also found that there is no inherent jurisdiction to order security for costs. The authority for the issuance of an order for security for costs must be found within the rules.[26]

34. In the instant case, Mr. Gutierrez is a respondent without a counterclaim. He sought to bring a motion to vary the receivership order, a step that he was entitled to take. Mr. Gutierrez was involuntarily added to the litigation by the Applicant, therefore, should not be precluded from defending himself.

35. In *Willets v Colalitto*, a case cited by the Receiver, the Court found as follows:

> 61 Rowland: As is the case with respect to Willets, an order for security for costs is not available against Rowland as he is neither a corporation nor a nominal plaintiff. **In fact, he is not a plaintiff at all, as he advances no claim or counterclaim on his own behalf**. **It is trite law that no one can be required to post security for costs to defend themselves**..[27]

36. The case law is clear that an order for security for costs is not available against a respondent who has no cross-claim or counterclaim and is only defending himself.[28]

37. Ordering security for costs in this case would allow plaintiffs and other parties to a proceeding to stop a respondent from defending themselves against coercive conduct. This is

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[25] *Blenkarn, Roche v Beckstead* [1995] O.J. No. 2777 at para 22
[26] *Societe Sepic S.A. v. AGA Stone* Ltd 21 o.r. (3d) 542 at para 3; *Tricontinental Investments Co. v Guarantee Co. of North Americ*a [1989] O.J. No. 1663;
[27] *Willets v Colalillo* [2007] O.J. No. 4623 2007 Canlii 51174 (ON SC) at para 61
[28] *ICC International Computer Consulting & Leasing Ltd v. ICC Internationale Computer & Consulting GmbH* [1989] O.J. No. 70 at para 7; *Willets v Colalillo* [2007] O.J. No. 4623 2007 Canlii 51174 (ON SC) at para 61

especially troubling in the context of a receivership, where the Receiver knows that the respondent, Juan Gutierrez has no assets and/or property because all of his assets were taken by the Applicant in order to satisfy the Judgment.

38. There are a number of decisions that conflict with the Motion Judge's decision to order security for costs in this case. In fact, the preponderance of cases illustrate that security for costs should not have been awarded. In *Ogunlesi v Talon International Inc*.[29] a case in which a motion for security for costs was brought, the Judge expressly found that security for costs could not be sought against a defendant. The Judge went on to find that it is well established that where a counter-claim arises out of the same transaction or circumstances as the claim and the counterclaim is in substance a defence to the claim, security for costs will not be ordered.[30]

39. Again, in *Donaldson International*[31] the Court of Appeal found that a respondent on appeal cannot rely upon rule 61.06(1)(b) to obtain an order for security for costs of an appeal as against a defendant/appellant. It was conceded in that case that the moving party could not resort to subsection (1)(b) and rule 56.01 to seek security for costs against a defendant/appellant. The Court of Appeal went on to note that the policy reasons behind jurisprudence that prohibit security for costs against defendants, is not to impose security for costs upon foreign or impecunious defendants who are forced into the court by others to defend themselves.[32]

> ... it has for a long time been the accepted position that no party should have to give security for costs as a condition of simply defending itself (see Re Percy and Kelly Cobalt & Chrome Iron Mining Co. (1876), 2 Ch. D. 531, 24 W.R. 1057) and, in

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[29]*Ogunlesi v Talon International Inc.* 2019 ONSC 1798
[30]*Ogunlesi v Talon International Inc.* 2019 ONSC 1798 at paras 16-18
[31]*Donaldson International Livestock Ltd v Znamensky Selekcionno-Gibridny Center LLC* 2010 ONCA 137
[32]*Donaldson International Livestock Ltd v Znamensky Selekcionno-Gibridny Center LLC* 2010 ONCA 137 at para 13

> this regard, it can be said that an appeal is simply a step in the proceeding in which the defendant appealing is continuing to defend itself.[33]

40. In addition to the foregoing, there is clear authority from the Court of Appeal that if a *Rule of Civil Procedure* can be said to "occupy the field" to which it relates, it will supersede any inherent jurisdiction to the contrary. When a rule of civil procedure enacted by the legislature or the Rules Committee is comprehensive, then the inherent jurisdiction of the Superior Court is ousted.[34] In result, the Motion Judge ought not to have resorted to other rules or statutes to base his order for security for costs against Mr. Gutierrez, who is clearly a respondent in the proceeding.

41. Again, in *K.V.C. Electric Ltd v louis Donolo Inc*., Morden J.A. considered whether the Court of Appeal had inherent jurisdiction to order security for costs and found that it did not. This was an appeal from an order requiring security to be paid. Fraser J, after thoroughly reviewing the case law, allowed the appeal. He held that the Court had no inherent jurisdiction to order security for costs in the circumstances and that 'subject to any specific statutory provisions, security for costs may be ordered only in the categories enumerated in R. 373 [the immediate predecessor to r. 56.01] and that the instant case did not fall within any of those categories.[35]

42. The decision in *K.V.C Electric* was cited favourably by the Court of Appeal in *Toronto Dominion Bank v Szilagyi Farms Ltd*.[36] In the latter case, the Court of Appeal Judge found that he

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[33]*Donaldson International Livestock Ltd v Znamensky Selekcionno-Gibridny Center LLC* 2010 ONCA 137 at para 13 citing *Toronto Dominion*

[34]*Toronto Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433, 28 C.P.C. (2d) 231 (Ont. C.A. [In Chambers]) ("**Toronto Dominion**"); *Waxman v. Waxman*, 2011 ONSC 4707 at para 28; (See also *EnerWorks Inc. v. Glenbarra Energy Solutions Inc*., 2012 ONSC 414 at para 103

[35]*K.V.C Electric Ltd. v. Louis Donolo Inc*. [1964] 1 O.R. 565-573

[36]*Toronto Dominion*

did not have jurisdiction to make an order for security for costs against the defendant, even though they were appellants on appeal.[37]

43. After conducting an extensive analysis of the case law the Court of Appeal noted as follows:

> I think there is much to be said for analogizing the position of the defendant on appeal to a plaintiff at the trial stage for the purpose of requiring security for costs to be given in an appropriate case. Cf. Bailey Cobalt at p. 324. On the other had, **it has for a long time been the accepted position that no party should have to give security for costs as a condition of simply defending itself (see Re Percy and Kelly Cobalt & Chrome Iron Mining Co. (1876), 2 Ch. D. 531, 24 W.R. 1057) and, in this regard, it can be said that an appeal is simply a step in the proceeding in which the defendant appealing is continuing to defend itself.** In Centaur Cycle Co. v Hill (1902), 4. O.L.R. 92 at 95 (Ont. C.A.) Osler J.A. said, in the context of considering a stay pending an appeal by the Defendant:
>
> > A proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment the appeal being a step in the cause.[38]

44. The Motion Judge erred by treating the motion to vary as a separate proceeding. The motion to vary is a step in a proceeding in which Mr. Gutierrez is a respondent.

45. The Divisional Court has routinely dismissed attempts to rely on general rules of procedure in order to override an express rule, yet this is precisely what the Motion Judge did in this case.

46. In *Bondy-Rafael v Potrebic*[39] the Respondent argued that there is provision in the Rules for a judge to dispense with compliance with the Rules where necessary in the interest of justice. However, the Court dismissed these arguments stating as follows:

> [36] It is simply not the case that the presence of this provision means that a Rule cannot take away the inherent jurisdiction of a judge, for the reasons I have already discussed and the case law referred to above. If everything is to be decided by an individual judge's view

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[37] *Toronto Dominion*
[38] *Toronto Dominion*
[39] *Bondy-Rafael v Potrebic* 2015 ONSC 3655 at para 36

> of what is "necessary in the interests of justice," there would be no need for Rules at all. In my view, similar to the findings of Morden J.A. **in Toronto Dominion Bank v. Szilagyi Farms Ltd. dealing with jurisdiction by analogy under Rule 1.04(2), these saving provisions in the Rules are meant to cure irregularities or address non-compliance with issues of minor importance, and cannot provide jurisdiction to resolve an issue "involving considerations of policy and serious consequences to the progress of a proceeding" in the face of a Rule that provides to the contrary**.[40]

47. In the instant case, the Motion Judge applied Rule 1.04(1) and s. 101 of the *Courts of Justice Act* to base his jurisdiction. This is contrary to the findings of this Court and the Court of Appeal.

48. Again, in *Georgian (St. Lawrence) Lofts Inc.*[41] the Court examined whether Rule 1.04 could be used to fill in a purported 'gap' in the rules. The Judge, citing *Toronto Dominion*, found that "the rules committee cold not have been unaware of its exclusion of motions from the security for costs provisions contained in the rules" and therefore it would not be appropriate to expand the scope of Rule 61.06 by resort to Rule 1.04(2). The Court went on to find that the authorities are clear that resort should not be made to Rule 1.04(2) to imply a jurisdiction to grant security for costs of an appeal from an Arbitration award.[42]

49. The Jurisprudence is clear that courts should not resort to more general rules like Rule 1.04(2) (and s. 101 of the Courts of Justice Act) to imply jurisdiction to grant security for costs.

Whether Mr. Gutierrez is a claimant

50. The Motion Judge further erred by finding that Mr. Gutierrez was a claimant within Rule 56.01(2). It was not open to the Motion Judge to resort to 56.01(2) where the circumstances of the

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[40] *Bondy-Rafael v Potrebic* 2015 ONSC 3655 at para 36
[41] *Georgian (St Lawrence) Lfts Inc. v. Market Lofts Inc.* [2006] O.J. No. 4797 at para 6
[42] *Georgian (St. Lawrence) Lofts Inc. v Market Lofts Inc*. [2006] O.J. No. 4797 at paras 7 and 8

case fell squarely within the ambits of R 56.01(1). The proceeding is an application and Mr. Gutierrez is a Respondent. Labelling Mr. Gutierrez a claimant would imply that every Respondent who brings a motion within a proceeding would become a claimant and Judges can ignore the clear wording of r. 56.01(1) and apply r. 56.01(2) whenever they see fit. That was not the intended purpose of r. 56.01(2). That Rule was intended to apply where the proceeding in question is not an application or action. Here, the proceeding is an application and Mr. Gutierrez is a respondent. Resort to r. 56.01(2) was improper in the circumstances.

51. However, should this Court find that the Motion Judge was correct in concluding that Mr. Gutierrez's motion to vary the appointment order, made him a claimant within the meaning of r. 56.01(2), it is respectfully submitted that the motion to vary the order is intrinsically related to the application. By analogy, the motion to vary is likened to a counterclaim that is intrinsically linked to the main application, and as such, as discussed above, the courts have found it inappropriate to award security for costs where the counterclaim is intrinsically connected to the application.[43]

(ii) Whether the Motion Judge erred in Ordering Security for Costs despite paragraph 33 of the Appointment Order that sets out *the only* requirements for an Order for Security for Costs

52. The Receiver sought and obtained an order for Mr. Gutierrez to pay security for costs before bringing a specific motion within a proceeding. Mr. Gutierrez's motion was to vary the Appointment Order, seek the recusal of the Receiver and substitution with another receiver.

[43] *Blenkarn, Roche v Beckstead* [1995] O.J. No. 2777 at para 27

53. Mr. Gutierrez was seeking to vary the Appointment Order and the substitution of KSV as Receiver. Paragraph 33 of the Appointment order sets out the requirements for varying the appointment order and provides as follows:

> THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

54. To impose a requirement that security for costs be paid before a motion is brought to vary the appointment order, adds an additional obstacle, that was not contemplated in the very order in which the Receiver derives all of its power.

55. There is no requirement in the appointment order that a party post security for costs before a motion to vary the appointment order is brought. In fact, in *GMAC Commercial Credit Corp,* where the receiver sought to add a provision requiring security for costs to be posted before a motion was brought, the motion Judge refused to add such a provision in the appointment order finding that it was unduly onerous.[44] The court could have included security for costs as a requirement for bringing a motion to vary, but did not do so. Jurisprudence has shown that such a provision is often seen as overly onerous and would likely have been excluded from the order.

56. In this case, the Motion Judge did not have jurisdiction to order security for costs, either under the Rules or the appointment order. Imposing security for costs before a motion to recuse a receiver essentially insulates that Receiver from scrutiny in the context of a Receivership. The Receiver was appointed since the applicant was unable to collect from the respondents, therefore, in most instances in the context of a receivership, the respondent will be impecunious. Therefore,

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[44] *GMAC Commercial Credit Corp. Canada v TCT Logistics Inc.* 2006 SCC 35 at para 26

ordering security for costs in this context would have far reaching consequences that would not only insulate a Receiver from scrutiny, but also diminish a respondent's ability to defend themselves in the context of a receivership.

(b) Whether the Motion Judge erred in replying upon Di Paola, [2006] O.J. No. 4381 and Kramer Henderson Sidlofsky LLP v. Monteiro in granting security for costs against a respondent;

57. The Motion Judge erred in law when he relied upon *Di Paola*[45], re 2006 in granting security for costs in this case.

58. *Di Paola* is a case where a motion for security for costs was brought outside of an application or action. The case involved a bankruptcy proceeding wherein there was no Plaintiff and/or defendant. In that case, the Judge drew an analogy since there was no defendant/respondent or Applicant/plaintiff in the bankruptcy proceeding.[46] Accordingly, in that instance, the Judge could look to R. 56.01(2) and draw an analogy in order to determine who the proper plaintiff or claimant was. Perhaps crucially, in that case, the Judge found that "A party who is a defendant or a respondent in a proceeding does not lose that status because a motion is brought in the proceeding." Similarly, the plaintiff or applicant in the proceeding remains a plaintiff or applicant even when a motion is brought.

59. The Judge in *Di Paola* went on to find that post-discharge claims to recover debts on the basis that the debts were not released by the bankrupts discharge should be brought by way of

[45] *Di Paolo* [2006] O.J. No. 4381 ("***Di Paolo***")
[46] Di Paolo at para 14

action in civil courts.[47] Therefore, the motion in Di Paolo, in the context of a bankruptcy, ought to have been brought by way of civil action, again, making the analogy appropriate in that case.[48]

60. It was clear that the reason that an order for security for costs was granted in this case was that it involved a bankruptcy proceeding, where Di Paola, who was seeking the order for security for costs was seeking security for costs from Participative, who was the true Plaintiff. Participative was seeking judgment against Di Paola, therefore it was open to the Judge to find that Participative was a plaintiff within the context of a motion that should have been brought by way of an action.

61. In light of the fact that a bankruptcy case was not a "proceeding" as defined in the *Rules of Civil Procedure*, the Judge had to draw an analogy.

62. In the instant case, bringing a motion to vary did not make Mr. Gutierrez a plaintiff. To make such a finding would mean that every defendant/respondent who brings a motion within a proceeding, is a claimant/plaintiff. That was not the intention of the legislature.

63. With respect to *Sidlofsky LLP v Monteiro*[49], again the Motion Judge was forced to draw an analogy since within the context of an assessment hearing, there is no 'plaintiff/applicant' or defendant/respondent.

64. In the instant case, where the proceeding is an application and the Rules specifically provide for when security for costs can be applied in an application, the Motion Judge ought not to have drawn an analogy and, in fact, did not have the jurisdiction to do so.[50]

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[47] *Di Paolo* at para 5
[48] Di Paolo at para 19
[49] *Sidlofsky LLP v Monteiro* 98 O.R. (3d) 286
[50] *Toronto Dominion*; Bondy-Rafael v Potrebic 2015 ONSC 3655 at para 36

(c) The Receiver does not have an outstanding cost order against Mr. Gutierrez, therefore Rule 56.01(1)(c) has no application

65. If this Court should find that the Rules permit a security for costs motion to be brought against a respondent in a receivership application, the Receiver still failed to meet the requirements under Rule. 56.01(1)(c).

66. Rule 56.01(c) states:

> 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;

67. The Motion Judge erred in finding that Rule 56.01(1)(c) applies. The purported outstanding costs order of $880,858.21 that the Receiver relied upon is owed to the Applicant not the Receiver.

68. Ontario Courts have routinely found that Rule 56.01(1)(c) only applies where the moving party has an outstanding order against the party from whom they are seeking security for costs. In *Massih v AMA*, the Court found that Rule 56.01(1)(c) could not be relied upon by defendants that did not have an outstanding cost order against the Plaintiff.[51]

69. With respect to the applicability of Rule 56.01(1)(c) in the context of this case, the Motion Judge noted as follows:

> Gutierrez submits that since his unpaid costs relate to Justice Newbould's order concerning the Applicant ($889,858.21) and not the Receiver, the provisions of Rule 56.01(1)(c) does not apply. Again I disagree. A purposeful reading of the above OCA jurisprudence and s.101 of the CJA lead to a conclusion that the Receiver ought to be able to rely on subrule(1)(c). Gutierrez is a judgment debtor

[51] *Massih v AMA International Development* Corp 2015 ONSC 539 at para 15-18

> to the Applicant who is funding this receivership. He ought not be able to bring the motion, in these circumstances, without paying security for costs.[52]

70. If a receiver is entitled to rely upon an outstanding cost order or judgment in another proceeding as a basis for obtaining security for costs, a receiver would, in most cases, be entitled to an order for security for costs against a respondent in a receivership. This could not have ben contemplated by the Rules Committee. A receivership application, by its very nature involves impecunious respondents who are unable to pay a judgment.

71. The Receiver is a neutral party and should not be synonymous with the Applicant. In fact, if the Receiver is perceived to be acting in the interest of the Applicant, instead of as an officer of the court, this may give rise to an apprehension of bias.

72. Rule 56 was carefully drafted by the Rules Committee. As the case law above has shown, within the context of security for costs, a judge does not have the jurisdiction to look beyond the security for costs rule.[53]

> This Court has no inherent power to order security for costs. It may do so only where the relevant rules so provide.[54]

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[52]Endorsement of Justice McEwen dated December 1, 2022 at pg. 6-7/14; MR at pg. 23-24; Transcribed Endorsement at para 16-17, MR at pg 35

[53] Societe Sepic S.A. v. AGA Stone Ltd 21 o.r. (3d) 542 at para 3; *Tricontinental Investments Co. v Guarantee Co. of North America* [1989] O.J. No. 1663

[54]*Tricontinental Investments Co. v Guarantee Co. of North* America [1989] O.J. No. 1663 at para 12

73. Here, Rule 56.01(1)(c) requires that the outstanding cost order be owed *to the person bringing the motion for security for costs*. 56.01(1)(c) only applies where the Receiver can show that it has an outstanding order against Juan Gutierrez.[55]

74. As illustrated in paragraphs 50-54 above, the Motion Judge erred by relying upon Rule 1.04 and section 101 of the *Courts of Justice Act* as a basis of deviating from the specific requirements under r. 56.01(1)(c).

75. Section 101 of the *Courts of Justice Act* allows a judge to appoint a receiver by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so and on such terms as are just. As noted above, the appointment order set out the powers of the Receiver in this case. This section of the *Courts of Justice Act* relates to the initial appointment of the Receiver. As illustrated above, the Order provides that a motion to vary the terms of the appointment order can be brought on seven days notice. Imposition of security for costs as a precondition for bringing such a motion was not contemplated and was excluded from the order.

76. It is respectfully submitted that r. 56.01(1)(c) does not apply and the Receiver has failed to meet its burden of proving that r. 56.01(1)(c) applies to this case.

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[55] *Massih v AMA International Development* Corp 2015 ONSC 539 at para 15-18 (The court found that 56.01(1)c) could not be relied upon by the defendants that did not have an outstanding cost order against the plaintiffs.

(d) The Motion Judge erred in finding that r. 56.01(e) applies in the context of a motion within a proceeding.

77. Rule 56.01(1)(e) provides that an order for security for costs may be made where 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.

78. The Motion Judge erred in finding that Rule 56.01(1)(e) applied. The plain reading of the rule requires an analysis of whether the action and/or application is frivolous or vexatious. The rule makes no mention of assessing whether a motion within a proceeding is frivolous or vexatious. Again, the Receiver's motion should be dismissed on the basis that a motion for security for costs was never contemplated in a case where a respondent seeks to bring a motion within a proceeding.

79. In *Mutual Life Ins. Co v Buffer Investments Inc*.[56] Salhany J considered the availability of security for costs order on a motion to reopen a final order of mortgage foreclosure. He found that such a motion was one that was made within a proceeding and not an application that commenced a proceeding. Consequently, he held that r. 56.01 could not be invoked and that he therefore did not have jurisdiction to order that security be posted.[57]

80. The purpose of the motion for security is to avoid an accumulation of unpaid cost orders by a plaintiff in a proceeding. It should not apply to individual motions within a proceeding, where the Respondent is seeking to defend their rights.[58] In Ontario, costs are expected to be assessed following the disposition of the motion (not "in the cause") so the concern regarding costs of the

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[56]*Mutual Life Ins. Co. of Canada v. Buffer Investment Inc. (*1986) 56 O.R. (2D) 480 at para 6
[57] *Mutual Life Ins. Co. of Canada v. Buffer Investment Inc.* (1986) 56 O.R. (2D) 480
[58]*ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer & Consulting & Leasing Ltd. v. ICC Internationale Computer & Consulting GmbH* [1989] O.J. No. 70

action accumulating are not relevant. The Receiver has no outstanding costs orders against Mr. Gutierrez.

The Motion to Recuse the Receiver has Merit and is not Frivolous and/or Vexatious

81. The Motion Judge further erred in finding that Mr. Gutierrez' motion to recuse the Receiver is frivolous and vexatious.

82. Firstly, the Motion Judge erred when he found that the Receiver's conduct with respect to Epiq was not pleaded in the Notice of Motion to Recuse the Receiver, therefore, he failed to consider the Receiver's conduct in that regard. However, not all specifics must be pleaded in the Notice of Motion. The Notice of Motion, specifically questions the Receiver's conduct with respect to reviewing Mr. Gutierrez' personal documents and devices, the details of what have transpired are the subject of Affidavit evidence, which was presented through an affidavit of the IT specialist, Dave Burton.

83. Secondly, the Motion Judge erred when he failed to consider the complete loss of trust and confidence between Mr. Gutierrez, individuals managing Xela's subsidiaries in Panama and the Receiver, when considering the merits of the Motion to Recuse the Receiver.

84. The Receiver has taken no steps to collect monies to satisfy the Judgment. Various avenues for collection have been presented to the Receiver but have been ignored.[59]

[59]Singh Affidavit at Exhibit E, Gutierrez affidavit at paras 21-22, 48, MR at pg. 283-284

85. The Receiver has spent millions of dollars purporting to investigate "reviewable transactions" that took place many years ago outside of Ontario and pursuing decades of Mr. Gutierrez' emails, many of which are personal and not relevant to the Receiver's mandate.

86. Indeed, the Receiver's IT consultant informed Mr. Gutierrez's IT consultant that the data on Mr. Gutierrez's personal devices would be extracted from a locked hard drive for review on a Relativity platform, leading both Mr. Gutierrez' IT consultant and his counsel to believe that the data would be uploaded directly to Relativity, where audit features would ensure no tampering or improper access. On that basis, the passcodes were provided to the Receiver's consultant. However, once the hard drive was unlocked, the Receiver's consultant did not upload the data to Relativity but instead made two new images of the data and uploaded a full extraction of the data to its servers, apparently without any of the auditing features of chain of custody protections available in Relativity. The Receiver's IT consultant also appears to have left Mr. Gutierrez's hard drive unlocked for a period of days, exposing it to untraceable duplication or other tampering.

87. These security issues are precisely the types of concerns raised repeatedly by Mr. Gutierrez during the course of the dispute over his personal data, which were allowed to proceed largely on the basis that the Receiver is an officer of the Court. Officers of the Court, however, should reflect the highest possible standard of trustworthiness and confidence so as not to reflect poorly on the judicial system and this Court. Here, the Receiver has fallen short of that standard, or has acted in a cavalier manner that unfairly and unreasonably disregards Mr. Gutierrez' legitimate concerns.

88. Mr. Gutierrez's concerns over security have always been well founded. In 2011, Ms. Castillo's husband coerced the former assistant to Xela's IT director to misappropriate all of Xela's electronic data and to transfer it to Mr. Castillo, whereafter Ms. Castillo's counsel made the entire

database available to the public by attaching it in a single unrelated exhibit to the complaint underlying the judgment on which this receivership is based. Mr. Gutierrez's cousins subsequently used some of that data to assert baseless claims in Guatemala, requiring years of legal effort and expense to undo.[60] The Receiver's own records also show that the Receiver has been in ongoing communication with Mr. Gutierrez's cousins throughout these proceedings, which the Receiver has never suitably explained.[61]

89. The Receiver expended disproportionate resources on reviewable transactions, that did not show any prospect of allowing for recovery of the judgment debt. Now, the Receiver is not even in a position to permit Mr. Gutierrez to begin his review of the data on his personal devices, purportedly because the Receiver is no longer in funds, having expended its resources pursuing a contempt citation and incarceration against Mr. Gutierrez. The distrust between Mr. Gutierrez and the Receiver has made it impossible to achieve anything other than significant costs and wasting of personal and judicial resources.

90. In *First Pacific Credit Union v Grimwood Sport Inc.*[62] the Court found:

> [49] …On the other hand, the evidence here leaves little doubt that it is not now in a position to give an appearance of impartiality. Because of what has taken place and the positions stated in its affidavits, it will be seen by the plaintiff and perhaps other creditors as a partisan of the company. Should it follow a course different from that which it has recommended, it will be seen by the company as a turncoat. **The object of having an impartial receiver-manager can, in these circumstances, be achieved only by appointing someone whose appearance of impartiality has not been wounded by the crossfire between the parties.**[63]

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[60]Singh Affidavit, Exhibit E, Gutierrez Affidavit at paras 40-47, MR at pg. 292-295
[61]Singh Affidavit, Exhibit E, Gutierrez Affidavit at paras 49-53, MR at pgs. 295-297
[62]*First Pacific Credit Union v. Grimwood Sports Inc.*, 1984 CanLII 379 (BC CA), <https://canlii.ca/t/2166r>, retrieved on 2022-11-17
[63]*First Pacific Credit Union v. Grimwood Sports Inc.*, 1984 CanLII 379 (BC CA), <https://canlii.ca/t/2166r> at paras 46 and 49

91. That case highlights the importance of the appearance of impartiality on the part of the Receiver.

92. The Receiver first initiated a contempt motion against Mr. Gutierrez in 2020.[64] This motion was baseless, and eventually, the Receiver adjourned the motion *sine die*. The Receiver almost immediately resorted to bringing a contempt motion against Mr. Gutierrez.

93. Thereafter, the Receiver continued to request documents from Mr. Gutierrez and other companies. Mr. Gutierrez expressed concerns about disclosure of confidential documents and information, especially to the cousins who, as noted, have used misappropriated Xela documents in various proceedings in Guatemala against Xela's subsidiaries.

94. When Mr. Gutierrez released passwords to documents in his possession, his consultant and his counsel were led to believe that the data would immediately be uploaded to Relativity for review. He was never advised that an image of the drive would be stored by Epiq on new hard drives, or uploaded to Epiq's servers, or analyzed electronically. The protocol that was established and communicated to Mr. Gutierrez' expert was not followed. It is still unclear whether Mr. Gutierrez' documents have been safely stored.

95. KSV has never acknowledged its own role in the events that occurred in Panama. Instead, in apparent retaliation for the outcome in that country, KSV sought a finding of criminal contempt and incarceration against Mr. Gutierrez.[65]

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[64]Singh Affidavit at para 6, MR at Tab 3, pg. 39

[65] The Receiver's contempt motion was heard before Justice Conway on May 30/31 and June 2, 2022. Although Justice Conway concluded that Mr. Gutierrez was liable in civil contempt, she

96. In *Re Federal Trust Co. and Frisina*[66] when speaking about bias the court noted that:

> I think it follows that **not only must the receiver-manager appointed by the Court be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, but he ought to appear to have those qualities.**[67]

97. A mutual lack of trust and confidence 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.

98. 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 – 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.

99. 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 Mr. Gutierrez's cousins in Guatemala (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.

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found that he had not engaged in criminal conduct. Moreover, Justice Conway's decision was erroneous for various reasons, and has been appealed.

[66] *Re Federal Trust Co. and Frisina et al.*, 1976 CanLII 627 (ON SC), <https://canlii.ca/t/g1g48>

[67] *Re Federal Trust Co. and Frisina et al.*, 1976 CanLII 627 (ON SC), <https://canlii.ca/t/g1g48

100. KSV has engaged in numerous regular discussions with the Cousins, who are alleged to be withholding dividends throughout the course of the receivership without disclosing the nature of those communications.[68] 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.

101. This failure to disclose information about KSV's communications with the Cousins has resulted in increased distrust between Mr. Gutierrez and the Receiver. Any and all communications the Receiver has with Mr. Gutierrez are routinely disclosed in reports that are shared with the service list and/or displayed publicly on KSV's website.

102. 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 and appears to not have taken any concrete steps in the jurisdictions where the transactions occurred.

103. Particularly troubling is the fact that under the premise that KSV 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

[68]Singh Affidavit at Exhibit E, Gutierrez Affidavit at paras 49-53, MR at Tab 3, pg. 295-297

investigation by KSV in the receivership (meaning that KSV was already in possession of sufficient particulars to plead). 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. In light of the foregoing, the recusal motion is not devoid of merit.

104. The Motion Judge erred, when he stated that Mr. Gutierrez seeks to have the Receiver replaced with someone of his choosing. In arriving at this conclusion, the Motion Judge failed to consider that new Receiver that would replace the current receiver would be an officer of the court and would be appointed after receiving approval from the Court.

Mr. Gutierrez is impecunious

105. The Motion Judge erred when he found that there was no evidence of Mr. Gutierrez' impecuniosity. Firstly, this application is within the context of a receivership. If Mr. Gutierrez was not impecunious, the Receiver would have seized whatever assets Mr. Gutierrez has. In fact, prior to this receivership, evidence was adduced that the Receiver collected approximately $1.568 million from Mr. Gutierrez. Gutierrez testified under oath that all his assets and/or property were taken by the Applicant to satisfy the Judgment. In addition, the Motion Judge erred in finding that Mr. Gutierrez had paid legal fees to his lawyers when there was no evidence to support that finding. Counsel providing a bill of costs, does not mean that those costs were paid to his counsel. In this case, an Order for security for costs will effectively preclude Mr. Gutierrez from bringing the motion to vary.

106. Ontario Courts have found that in resisting an order for security for costs, a plaintiff with a meritorious case is not required to sell or encumber assets necessary to live. Those assets should not be considered as supporting an order for security for costs.[69]

Even if the Motion Judge finds that the Plaintiff is not impecunious, this court can still decline to order security for costs where to do so would cause hardship.[70]

107. In *Cigar 500.com Inc v. Ashton Distributions Inc.*[71] the Judge found that the Plaintiff was not impecunious but still declined to award security for costs. The judge took into account the fact that it was not litigation where wealthy shareholders decided to carry on business and litigation through a shell corporation.[72]

108. In *Yaiguaje v Chevron Corporation*, the Court of Appeal set aside the motion judge's decision to order security for costs where impecuniosity had not been established. The Court of Appeal found that the overarching principle to be applied is the justness of the order sought.[73]

> 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 rr. 56 or 61 have been met.[74]

109. In light of the foregoing, leave to appeal the Order of Justice McEwen should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2023.

Christopher MacLeod

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[69] *Das et al v Coles et al* [1989] O.J. No. 2061
[70] *Stojanovic v Bulut* 2011 ONSC 874 at para 8
[71] *Cigar500.com Inc. v. Ashton Distributors Inc.* [2009] O.J. No. 3680
[72] *Cigar500.com Inc. v. Ashton Distributors Inc.* [2009] O.J. No. 3680 at para 74 (ii)
[73] *Yaiguaje v Chevron Corporation* 2017 ONCA 827 at para 19
[74] *Yaiguaje v Chevron Corporation* 2017 ONCA 827 at para 23

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Toronto Dominion Bank v. Szilagyi Farms Ltd.* [1988] O.J. No. 1223

2. *Massih v AMA International Development* Corp 2015 ONSC 539

3. *Bondy-Rafael v Potrebic* 2015 ONSC 3655

4. *K.V.C Electric Ltd. v. Louis Donolo Inc.* [1964] 1 O.R. 565-573

5. *Blenkarn, Roche v Beckstead* [1995] O.J. No. 2777

6. *GMAC Commercial Credit Corp. Canada v TCT Logistics Inc.* 2006 SCC 35

7. *Georgian (St. Lawrence) Lofts Inc. v Market Lofts Inc.* [2006] O.J. No. 4797

8. *Mutual Life Ins. Co. of Canada v. Buffer Investment Inc.* (1986) 56 O.R. (2D) 480

9. *Donaldson International Livestock Ltd v Znamensky Selekcionno-Gibridny Center LLC* 2010 ONCA 137

10. *Waxman v. Waxman,* 2011 ONSC 4707

11. *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 (Ont. S.C.J.))

12. *ICC International Computer Consulting & Leasing Ltd v. ICC Internationale Computer & Consulting GmbH* [1989] O.J. No. 70

13. *Willets v Colalillo* [2007] O.J. No. 4623 2007 Canlii 51174

14. *Societe Sepic S.A. v. AGA Stone Ltd* 21 o.r. (3d) 542

15. *Tricontinental Investments Co. v Guarantee Co. of North America* [1989] O.J. No. 1663;

16. *Ogunlesi v Talon International Inc.* 2019 ONSC 1798

17. *Yaiguaje v Chevron Corporation* 2017 ONCA 827

18. *Das et al v Coles et al* [1989] O.J. No. 2061

19. *Cigar500.com Inc. v. Ashton Distributors Inc.* [2009] O.J. No. 3680

20. *Re Federal Trust Co. and Frisina et al*., 1976 CanLII 627 (ON SC), <https://canlii.ca/t/g1g48

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

110. Rule 1.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Definitions

1.03 (1) In these rules, unless the context requires otherwise,

"action" means a proceeding that is not an application and includes a proceeding commenced by,

(a) statement of claim,

(b) notice of action,

(c) counterclaim,

(d) crossclaim, or

(e) third or subsequent party claim; ("action")

"appellant" means a person who brings an appeal; ("appelant")

"appellate court" means the Court of Appeal or the Divisional Court, as the circumstances require; ("tribunal d'appel")

"applicant" means a person who makes an application; ("requérant")

"application" means a proceeding commenced by notice of application; ("requête")

"certificate of appointment of estate trustee" means letters probate, letters of administration or letters of administration with the will annexed, and includes a small estate certificate or amended small estate certificate (74C, 74.1C or 74.1F); ("certificat de nomination à titre de fiduciaire de la succession")

"county" includes a district, a regional or district municipality, and the City of Toronto; ("comté")

"court" means the court in which a proceeding is pending and, in the case of a proceeding in the Superior Court of Justice, includes an associate judge; ("tribunal")

"defendant" means a person against whom an action is commenced; ("défendeur")

"deliver" means serve and file with proof of service, and "delivery" has a corresponding meaning; ("remettre", "remise")

"disability", where used in respect of a person, means that the person is,

(a) a minor,

(b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not, or

(c) an absentee within the meaning of the *Absentees Act*; ("incapable", "incapacité")

"discovery" means discovery of documents, examination for discovery, inspection of property and medical examination of a party as provided under Rules 30 to 33; ("enquête préalable")

"document" includes data and information in electronic form; ("document")

"electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and "electronically" has a corresponding meaning; ("électronique", "par voie électronique")

"hearing" means the hearing of an application, motion, reference, appeal or assessment of costs, or a trial; ("audience")

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Day,

(b.1) Family Day,

(c) Good Friday,

(d) Easter Monday,

(e) Victoria Day,

(f) Canada Day,

(g) Civic Holiday,

(h) Labour Day,

(i) Thanksgiving Day,

(j) Remembrance Day,

(k) Christmas Day,

(l) Boxing Day, and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor,

and where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday; ("jour férié")

"judge" means a judge of the court but does not include an associate judge; ("juge")

"judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party; ("jugement")

"lawyer" means a person authorized under the *Law Society Act* to practise law in Ontario; ("avocat")

"lawyer's office" means the office of the lawyer of record as set out in the last document filed by him or her; ("bureau de l'avocat")

"limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client; ("mandat à portée limitée")

"motion" means a motion in a proceeding or an intended proceeding; ("motion")

"moving party" means a person who makes a motion; ("auteur de la motion")

"order" includes a judgment; ("ordonnance")

"originating process" means a document that commences a proceeding under these rules, and includes,

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

(d) an application for a certificate of appointment of estate trustee, a small estate certificate or an amended small estate certificate,

(e) a counterclaim against a person who is not already a party to the main action, and

(f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; ("acte introductif d'instance")

"partial indemnity costs" mean costs awarded in accordance with Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation partielle")

"person" includes a party to a proceeding; ("personne")

"plaintiff" means a person who commences an action; ("demandeur")

"proceeding" means an action or application; ("instance")

"referee" means the person to whom a reference in a proceeding is directed; ("arbitre")

"registrar" means the Registrar of the Divisional Court or Court of Appeal, or a local registrar of the Superior Court of Justice, as the circumstances require; ("greffier")

"respondent" means a person against whom an application is made or an appeal is brought, as the circumstances require; ("intimé")

"responding party" means a person against whom a motion is made; ("partie intimée")

"statute" includes a statute passed by the Parliament of Canada; ("loi")

"substantial indemnity costs" mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A, and "on a substantial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation substantielle")

"timetable" means a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by order of the court or by written agreement of the parties that is not contrary to an order; ("calendrier")

"will" includes any testamentary instrument of which probate or administration may be granted. ("testament")

111. Rule 56 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Where Available

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,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(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;

(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; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

112. Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2)

113.

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

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