

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

and

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

Defendants

**MOVING PARTY'S FACTUM**  
**(Security for Costs, returnable November 24, 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) 865-9010  
Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

Derek Knoke (75555E)

Tel: (416) 865-3018  
Fax: (416) 865-9010  
Email: [dknoke@litigate.com](mailto: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**

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiffs

and

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

Defendants

**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>PART I - INTRODUCTION.....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>2</b>
<b>(i) Background to the appointment of the Receiver .....</b>	<b>2</b>
<b>(ii) Mr. Gutierrez relies on conspiracy allegations to avoid payment of the Judgment Debt .....</b>	<b>3</b>
<b>(iii) Enforcement proceedings.....</b>	<b>3</b>
<b>(iv) The receivership.....</b>	<b>4</b>
<b>(v) Mr. Gutierrez extends his conspiracy allegations to include the Receiver .....</b>	<b>5</b>
<b>(vi) Mr. Gutierrez’s conduct throughout the receivership has been frivolous and vexatious.....</b>	<b>6</b>
<b>PART III - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES .....</b>	<b>8</b>
<b>A. ONE OF THE FACTORS AT RULE 56.01(1) EXISTS .....</b>	<b>9</b>

(i)	Mr. Gutierrez has an unpaid costs order.....	9
(ii)	There is good reason to believe the Recusal Motion is frivolous and vexatious .....	10
(iii)	There is good reason to believe that Mr. Gutierrez has insufficient assets in Ontario to pay the Receiver's costs .....	12
B.	MR. GUTIERREZ CANNOT SHOW THAT AN ORDER FOR SECURITY FOR COSTS WOULD BE UNJUST .....	13
	PART IV - ORDER REQUESTED.....	15

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

B E T W E E N:

MARGARITA CASTILLO

Plaintiffs

and

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

Defendants

**FACTUM OF THE RECEIVER  
(Motion for Security for Costs – Returnable November 24, 2022)**

**PART I - INTRODUCTION**

1. This is a motion for an order requiring Juan Guillermo Gutierrez to pay security for costs associated with his motion to replace KSV Restructuring Inc. (“**KSV**”) as the receiver and manager (the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”).
  
2. The justice of the case demands an order for security for costs in the amount of \$150,000:
  - (a) this receivership arises from a 2015 judgment and costs award owed by Mr. Gutierrez to the Applicant;
  
  - (b) a portion of the judgment and costs award was paid prior to the appointment of the Receiver, but the majority of the debt remains outstanding;
  
  - (c) the Applicant is funding the receivership;

- (d) Mr. Gutierrez’s motion to replace KSV as the Receiver (the “**Recusal Motion**”) is frivolous and vexatious. It seeks to determine issues that have already been determined, lacks merit, and is brought for an improper purpose;
- (e) Mr. Gutierrez has insufficient assets in Ontario to pay the Receiver’s fees and costs associated with his Recusal Motion, particularly those of its legal counsel;
- (f) Mr. Gutierrez cannot meet his onus to show that he is impecunious; and
- (g) Mr. Gutierrez cannot meet his onus to show that the Recusal Motion has a good chance of success.

## **PART II - SUMMARY OF FACTS**

### *(i) Background to the appointment of the Receiver*

3. On October 28, 2015, this Court ordered Mr. Gutierrez, Xela, and others to pay the Applicant \$4.25 million.<sup>1</sup> This Court, subsequently, ordered Mr. Gutierrez and his co-defendants to pay the Applicant \$889,858.21 in costs (collectively with the \$4.25 million judgment, the “**Judgment Debt**”).<sup>2</sup>

4. On December 30, 2016, the Divisional Court dismissed Mr. Gutierrez’s appeal of the Judgment Debt.<sup>3</sup>

---

<sup>1</sup> Orders and Endorsements Brief (“**Orders Brief**”), Tab 1

<sup>2</sup> Orders Brief, Tab 2

<sup>3</sup> Orders Brief, Tab 3

**(ii) Mr. Gutierrez relies on conspiracy allegations to avoid payment of the Judgment Debt**

5. Mr. Gutierrez has been advancing conspiracy claims against his cousins (which are repeated in the Recusal Motion) since he brought a claim against them and the Applicant in 2011.<sup>4</sup>

6. Prior to the hearing, Mr. Gutierrez sought to have his conspiracy claim heard together with Applicant's oppression claim.<sup>5</sup> Justice Newbould rejected the request.

7. Mr. Gutierrez later sought a stay of execution of the Judgment Debt, pending an adjudication of his conspiracy claims. Justice McEwen dismissed the motion:

Much of [Mr. Gutierrez's] supporting affidavit contains unconfirmed hearsay and investigations with respect to critical issues concerning the alleged conspiracy. This, of course, is inadmissible.

...

I should reiterate that the claims of wrongdoing against the Applicant were largely before Justice Newbould [when His Honour ordered the Judgment Debt].<sup>6</sup>

**(iii) Enforcement proceedings**

8. The Applicant pursued various enforcement actions against Mr. Gutierrez. In 2017, Mr. Gutierrez attended for an examination in aid of execution. He testified that the Judgment Debt will not be paid until he resolves his claims against his cousins (and, therefore, the conspiracy claim against the Applicant).<sup>7</sup>

---

<sup>4</sup> *Margarita Castillo v. Xela Enterprises Ltd. et al.*, 2015 ONSC 6671, ("*Castillo*") at paras. [17-18](#)

<sup>5</sup> *Castillo*, at paras. [44-48](#)

<sup>6</sup> Orders Brief, Tab 4 (pp. 7-9 of the 10-page, handwritten endorsement)

<sup>7</sup> July 25, 2017 Excerpt of Transcript of Examination in Aid of Execution of Mr. Gutierrez, Exhibit A to the Affidavit of Grace Tsakas, sworn November 15, 2022 (the "*Tsakas Affidavit*"), Q. 46-50, Motion Record of the Receiver ("*MR*"), Tab 2A, p. 19

9. Mr. Gutierrez testified that he has no other meaningful assets in his name to contribute to the Judgment Debt.<sup>8</sup> His personal accounts were frozen, and his homes sold.<sup>9</sup>

10. From 2017 to 2018, the Applicant recovered \$1,568,293.37.<sup>10</sup> However, the majority of the Judgment Debt was (and is) outstanding.

**(iv) The receivership**

11. In January 2019, the Applicant commenced an application to appoint a receiver and manager over Xela.

12. In June 2019, Mr. Gutierrez commenced a competing application on behalf of Xela for protection under the *Companies' Creditors Arrangement Act* ("CCAA"). In his affidavit in support of the application, Mr. Gutierrez relied on his conspiracy claims to avoid the receivership. He stated that his cousins "are responsible for this dispute" with the Applicant.<sup>11</sup>

13. On July 5, 2019, McEwen J. dismissed Mr. Gutierrez's CCAA application and granted Ms. Castillo's receivership application. KSV was appointed as the Receiver of Xela (the "Appointment Order").<sup>12</sup>

---

<sup>8</sup> August 30, 2018 Excerpt of Transcript of Continued Examination in Aid of Execution of Mr. Gutierrez, Exhibit B to the Tsakas Affidavit, Q. 671 and 674, MR, Tab 2B, p. 24

<sup>9</sup> August 30, 2018 Excerpt of Transcript of Continued Examination in Aid of Execution of Mr. Gutierrez Exhibit B to the Tsakas Affidavit, Q. 672 and 674, MR, Tab 2B, p. 24

<sup>10</sup> January 14, 2019 Excerpt of Affidavit of Margarita Castillo, Exhibit C to the Tsakas Affidavit, at para. 43, MR, Tab 2C, p. 31

<sup>11</sup> June 17, 2019 Excerpt of Affidavit of Mr. Gutierrez, Exhibit D to the Tsakas Affidavit, para. 6, MR, Tab 2D, p. 37

<sup>12</sup> Orders Brief, Tab 5



(v) *Mr. Gutierrez extends his conspiracy allegations to include the Receiver*

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

15. On February 9, 2021, the Receiver brought a motion to hold Mr. Gutierrez in contempt of Court for swearing a declaration (the “**Declaration**”) in support of a criminal complaint against the Receiver’s representatives in Panama. The Receiver obtained an urgent case conference for the following day.

16. Mr. Gutierrez also served a notice of motion on February 9, 2021, seeking to replace KSV as the Receiver of Xela (the “**February 9<sup>th</sup> Notice of Motion**”).<sup>13</sup> The February 9<sup>th</sup> Notice of Motion contained various allegations against the Receiver and relied on his contemptuous conduct.<sup>14</sup> It was unsupported by an affidavit.

17. On February 10, 2021, McEwen J. ordered Mr. Gutierrez to withdraw his Declaration and to do everything in his power to have the criminal complaint withdrawn.<sup>15</sup> Justice McEwen did not schedule Mr. Gutierrez’ motion set out in the February 9<sup>th</sup> Notice of Motion.

18. Later, in opposing the Investigative Powers Motion, Mr. Gutierrez filed evidence and made submissions in which he continued to advance the allegations contained in the February 9<sup>th</sup> Notice of Motion:

---

<sup>13</sup> February 9, 2021 Notice of Motion of Mr. Gutierrez, Exhibit F to the Tsakas Affidavit, MR, 2F, p. 75

<sup>14</sup> February 9, 2021 Notice of Motion of Mr. Gutierrez, Exhibit F to the Tsakas Affidavit, at paras. v-z, ee-pp, MR, Tab 2F, p.79, 80

<sup>15</sup> Orders Brief, Tab 6 and 7

- (a) Mr. Gutierrez’s February 22, 2021 affidavit complained of the alleged conspiracy by his cousins and the Applicant. Mr. Gutierrez also alleged that the Receiver was colluding with the cousins;<sup>16</sup> and
- (b) Mr. Gutierrez’s March 17, 2021 factum complained about the Receiver’s conduct and alleged that the Receiver was coordinating with the cousins.<sup>17</sup>

19. On March 25, 2021, McEwen J. granted the Receiver’s Investigative Powers Motion and granted none of the relief sought by Mr. Gutierrez. His Honour found that the Receiver had acted in a “neutral” manner.<sup>18</sup> In making a costs order on the Investigative Powers Motion, his Honour stated that Mr. Gutierrez raised certain issues, which had “already been litigated and dealt with in my previous endorsements.”<sup>19</sup>

**(vi) *Mr. Gutierrez’s conduct throughout the receivership has been frivolous and vexatious***

20. Mr. Gutierrez has a history of seeking numerous, unsuccessful appeals in this receivership—including using appeals to re-litigate issues significantly impacting the costs of this proceeding and delaying the advancement of the receivership:

- (a) Mr. Gutierrez sought leave to appeal the March 25, 2021 Order arising from the Receiver’s Investigative Powers Motion. The Divisional Court dismissed his motion for leave to appeal on July 9, 2021;<sup>20</sup>

---

<sup>16</sup> February 22, 2022 Excerpt of Affidavit of Mr. Gutierrez, Exhibit G to the Tsakas Affidavit, at paras. 23-108, MR, Tab 2G, p. 90

<sup>17</sup> March 18, 2021 Responding Factum of Mr. Gutierrez, Exhibit H to the Tsakas Affidavit, at paras. 7, 31, MR, Tab 2H, p. 136, 143

<sup>18</sup> Orders Brief, Tabs 8 and 10

<sup>19</sup> Orders Brief, Tabs 8, 9 and 10

<sup>20</sup> Orders Brief, Tab 11

- (b) nearly a year later, on March 2, 2022, McEwen J. directed Mr. Gutierrez to comply with His Honour's prior Orders. Mr. Gutierrez did not immediately comply;<sup>21</sup>
- (c) instead, on March 25, 2022, Mr. Gutierrez sought to schedule a motion for an injunction preventing the enforcement of the March 25, 2021 Order.<sup>22</sup> The draft notice of motion advanced the conspiracy claim against the Receiver and alleged (without evidence) that "the Receiver is coordinating with the" cousins.<sup>23</sup> Justice McEwen declined to schedule this motion;
- (d) on March 25, 2022, McEwen J. ordered Mr. Gutierrez to comply with the Order made a year earlier by providing the passwords to his devices by no later than March 28, 2022 at 5 pm;<sup>24</sup>
- (e) on March 28, 2022, Mr. Gutierrez brought a motion in the Divisional Court to stay the March 25, 2022 Order.<sup>25</sup> No stay was granted;
- (f) on March 31, 2022, Mr. Gutierrez brought a motion in the Divisional Court for leave to appeal the March 25, 2022 Order;<sup>26</sup> and

---

<sup>21</sup> Order Brief, Tab 15

<sup>22</sup> March 25, 2022 Notice of Motion of Mr. Gutierrez, Exhibit I to the Tsakas Affidavit, MR, Tab 2I, p.170

<sup>23</sup> March 25, 2022 Notice of Motion of Mr. Gutierrez, Exhibit I to the Tsakas Affidavit, para. g, MR, Tab 2I, p.173

<sup>24</sup> Orders Brief, Tabs 16, 17 and 18

<sup>25</sup> March 28, 2022 Notice of Motion of Mr. Gutierrez, Exhibit J to the Tsakas Affidavit, MR, Tab 2J, p.185

<sup>26</sup> March 30, 2022 Notice of Motion of Mr. Gutierrez, Exhibit K to the Tsakas Affidavit, MR, Tab 2K, p. 201

- (g) on April 29, 2022, Mr. Gutierrez abandoned his motion for leave to appeal. Mr. Gutierrez recognized that there was no basis in law to appeal the Order that required him to comply with a previous Order made a year prior.<sup>27</sup>

21. As reflected in the finding of contempt,<sup>28</sup> Mr. Gutierrez has a history of knowingly and intentionally interfering with the Receiver and showing an “astounding lack of respect for this court”<sup>29</sup> again increasing costs and delaying the advancement of the receivership.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

22. There are two issues on this motion:

- (a) the initial onus is on the Receiver to satisfy the Court that the matter comes within one of the circumstances enumerated at r. 56.01(1);<sup>30</sup> and
- (b) if the Receiver satisfies this initial burden, the onus shifts to Mr. Gutierrez to establish that an order for security would be unjust.<sup>31</sup>

23. Security for costs can be granted on the basis that:

- (a) Mr. Gutierrez has an unpaid costs order (r. 56.01(1)(c)), and it would be just to make such an order pursuant to s. 101 of the *Courts of Justice Act*; or

---

<sup>27</sup> Email from Cambridge LLP to Lenczner Slaght LLP dated April 13, 2022, Exhibit L to the Tsakas Affidavit, MR, Tab 2L, p. 217

<sup>28</sup> *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)

<sup>29</sup> *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594, at [para. 37](#)

<sup>30</sup> *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119, 1989 CanLII 4354 (ON SC) (“*Hallum*”), at [para. 10](#); *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435 (QL), 2007 CanLII 37475 (“*Shuter*”), at [para. 60](#)

<sup>31</sup> *Hallum*, at [para. 10](#); *Shuter*, at [para. 60](#)

- (b) there is good reason to believe that the Recusal Motion is frivolous and vexatious and Mr. Gutierrez has insufficient assets in Ontario to pay the Receiver's costs (r. 56.01(1)(e)).

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

**A. ONE OF THE FACTORS AT RULE 56.01(1) EXISTS**

**(i) *Mr. Gutierrez has an unpaid costs order***

25. Rule 56.01(1)(c) states that an order for security for costs may be made where 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.

26. Mr. Gutierrez has an outstanding costs order of \$889,858.21, which is owed to the Applicant. Although the costs order arising out of the Newbould J. judgment is not owed to the Receiver, s. 101 of the *Courts of Justice Act* provides this Court jurisdiction to grant any order that appears just in the context of this receivership.<sup>32</sup>

27. The overall effect of Mr. Gutierrez's Recusal Motion is to increase the costs of the receivership and further delay the Receiver's mandate. Security for these costs is, therefore, required as a measure of "protection" against further expense.<sup>33</sup>

28. It is consistent with the purpose and spirit of r. 56.01(c) to require Mr. Gutierrez to pay security for costs. Mr. Gutierrez is a judgment debtor (including costs) to the Applicant, who is

---

<sup>32</sup> *Courts of Justice Act*, RSO 1990, c C.43, at s. 101(1)

<sup>33</sup> *Rebello v. Paragon Security et al.*, 2020 ONSC 2303, at [para. 9](#)

funding this receivership.<sup>34</sup> He ought not be permitted to continue to increase the costs of this proceeding without having to first pay security for costs.

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

29. Rule 56.01(1)(e) provides that an order for security for costs may also 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.

30. The Receiver need only demonstrate that “it appears” that the proceeding is frivolous and vexatious.<sup>35</sup> The standard will be satisfied if the proceeding “suggests a tentative conclusion of absence of merit.”<sup>36</sup> Courts have defined frivolous as “lacking a legal basis or legal merit; not serious; not reasonably purposeful.”<sup>37</sup>

31. Proceedings may be vexatious when they:

- (a) seek to determine an issue already determined;
- (b) have no merit;
- (c) are brought for an improper purpose; or
- (d) there are numerous unsuccessful appeals.<sup>38</sup>

---

<sup>34</sup> Receiver’s First Report dated October 17, 2019, Exhibit E to the Tsakas Affidavit, at s. 6.0(4), MR, Tab 2E, p.41

<sup>35</sup> *McArthur v. Neumann*, 2020 ONSC 66 (“*McArthur*”), at [para. 17](#)

<sup>36</sup> *McArthur*, at [para. 18](#), citing *Pickard v. London Police Services Board*, 2010 ONCA 643, at [para. 18](#)

<sup>37</sup> *Currie v. Halton Regional Police Services Board*, [2003] O.J. No. 4516 (QL), 2003 CanLII 7815 (ON CA), at [para. 14](#)

<sup>38</sup> *Black v. McDonald*, 2018 ONSC 2825 (“*Black*”), at [para. 15](#)

32. Each of the above applies in this case. The Recusal Motion seeks to determine issues that have already been decided:

- (a) it relies on conspiracy claims that were before Newbould J. on October 28, 2015 when this Court issued a decision and granted the Judgment Debt;
- (b) it relies on claims that were rejected on July 6, 2017, when this Court dismissed Mr. Gutierrez's motion for a stay of execution;<sup>39</sup>
- (c) it asserts several unsupported conspiracy claims against the Receiver, which are in many respects similar to the conspiracy claims that were not accepted by this Court (on October 28, 2015 and July 6, 2017) as a basis to avoid the Judgment Debt;
- (d) it seeks to vary the Appointment Order, which was granted when McEwen J. rejected Mr. Gutierrez's CCAA application that relied, in part, on Mr. Gutierrez's conspiracy claims;<sup>40</sup>
- (e) it seeks to allow the judgement debtor, Mr. Gutierrez, to replace the Receiver with a receiver that he seeks to have appointed;
- (f) it repeats the accusations made against the Receiver in materials filed on the contested Investigative Powers Motion. The Court granted the Investigative Powers Motion, dismissing Mr. Gutierrez' complaints and finding that Mr. Gutierrez raised issues that had already been litigated;<sup>41</sup> and

---

<sup>39</sup> Orders Brief, Tab 4 (pp. 7-9 of the 10-page, handwritten endorsement)

<sup>40</sup> June 17, 2019 Excerpt of Affidavit of Mr. Gutierrez, Exhibit D, at para. 6, Tsakas Affidavit, MR, Tab 2D, p. 37

<sup>41</sup> Orders Brief, Tabs 8, 9 and 12

(g) it is a repeat of allegations made against the Receiver in the March 25, 2022 notice of motion, seeking an “injunction” on this Court’s past Orders.<sup>42</sup> In McEwen J.’s endorsement of the same date, His Honour noted that Mr. Gutierrez’s allegations against the Receiver repeated “historical complaints Mr. Gutierrez has raised against the Receiver”.<sup>43</sup>

33. The Recusal Motion has no merit. Mr. Gutierrez has not provided any evidence of his allegations against the Receiver. Instead, for many months, he has made unsupported allegations, including implicit threats of professional misconduct against the Receiver’s Ontario counsel and explicit threats of criminal liability against the Receiver.<sup>44</sup>

34. Importantly, Mr. Gutierrez’s notice of motion for the Recusal Motion relies on his contemptuous conduct as grounds for the replacement of KSV as the Receiver.<sup>45</sup>

35. The Recusal Motion has no chance of success.

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

36. In circumstances where the proceeding appears to be frivolous or vexatious, the moving party must only demonstrate that there is good reason to believe the respondent has insufficient

---

<sup>42</sup> March 25, 2022 Notice of Motion of Mr. Gutierrez, Exhibit I to the Tsakas Affidavit, MR, Tab 2I, p. 170

<sup>43</sup> Orders Brief, Tabs 16, 17 and 18

<sup>44</sup> April 13, 2022 Email from Cambridge LLP to Lenczner Slaght LLP, Exhibit L to the Tsakas Affidavit, MR, Tab 2L, p. 217; September 12, 2022 Notice of Motion of Mr. Gutierrez, Exhibit M to the Tsakas Affidavit, at paras. z and aa, MR, Tab 2M, p. 226

<sup>45</sup> September 12, 2022 Notice of Motion of Mr. Gutierrez, Exhibit M to the Tsakas Affidavit, at para. aa, MR, Tab 2M, p. 226



assets in Ontario to pay a costs award following his Recusal Motion.<sup>46</sup> Mr. Gutierrez has no known material assets in Ontario and is a judgment debtor:

- (a) in 2017, he testified that the Judgment Debt will not be paid until he resolves his claims against his cousins (and, therefore, the Applicant);<sup>47</sup>
- (b) Mr. Gutierrez admitted that he has no assets in his name;<sup>48</sup>
- (c) Mr. Gutierrez's personal accounts were frozen, and his homes sold;<sup>49</sup> and
- (d) recent property searches show that Mr. Gutierrez, personally, owns no real property in Ontario.<sup>50</sup>

**B. MR. GUTIERREZ CANNOT SHOW THAT AN ORDER FOR SECURITY FOR COSTS WOULD BE UNJUST**

37. On a security for costs motion, the Court will look to the surrounding circumstances, having regard to factors such as the merits of the underlying proceeding, the financial circumstances of the respondent, and the effect an order could have on preventing a *bona fide* claim from proceeding.<sup>51</sup> The *Rules* effectively ask the Court to “take a step back and consider the justness of the order sought in all the circumstances of the case.”<sup>52</sup>

---

<sup>46</sup> Rule 56.01(e); *Black*, at [para. 24](#)

<sup>47</sup> July 25, 2017 Excerpt of Transcript of Examination in Aid of Execution of Mr. Gutierrez, Exhibit A to the Tsakas Affidavit, Q. 46-50, MR, Tab 2A, p.19

<sup>48</sup> August 30, 2018 Excerpt of Transcript of Continued Examination in Aid of Execution of Mr. Gutierrez, Exhibit B to the Tsakas Affidavit, Q. 671-674, MR, Tab 2B, p.24

<sup>49</sup> August 30, 2018 Excerpt of Transcript of Continued Examination in Aid of Execution of Mr. Gutierrez, Exhibit B to the Tsakas Affidavit, Q. 671-674, MR, Tab 2B, p.24

<sup>50</sup> Exhibits N and O to the Tsakas Affidavit, MR, Tab 2N and 2O, pp. 232, 235

<sup>51</sup> *"Norius Company" v. Filipenko*, 2019 ONSC 2573, at [para. 6](#)

<sup>52</sup> *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, at [para. 22](#)

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

- (a) Mr. Gutierrez cannot meet his onus to show that he is impecunious. There is a high burden of proof on a party who asserts impecuniosity to prove it by disclosing their financial state with particularity.<sup>53</sup> Bald statements unsupported by any detail will not be sufficient. This includes tendering complete and accurate disclosure of income, expenses, and liabilities;<sup>54</sup>
- (b) according to the bill of costs filed in the contempt proceeding (dated November 7, 2022), Mr. Gutierrez paid Mr. Greenspan approximately \$150,000 between April 2022 and September 2022 to contest the Contempt Motion;<sup>55</sup>
- (c) since the commencement of these proceedings, Mr. Gutierrez has been represented by three sets of Ontario counsel; and
- (d) there is no access to justice issue here. Mr. Gutierrez's conduct throughout this receivership shows that legal costs have not and will not deter him from accessing the courts.

---

<sup>53</sup> *Willets v. Colalillo*, [2007] O.J. No. 4623, 2007 CanLII 51174 (ON SC), at [para. 48](#)

<sup>54</sup> *Marvello Construction v. Santos et al.*, 2017 ONSC 3913, at [para. 10](#), citing *Coastline Corp. v. Canaccord Capital Corp.*, [2009] O.J. No. 1790, 2009 CanLII 21758 (ON SC) at [para. 7\(viii\)](#)

<sup>55</sup> November 7, 2022 Bill of Costs of Mr. Gutierrez, Exhibit P to the Tsakas Affidavit, MR, Tab 2P, p. 244

39. Mr. Gutierrez cannot meet his onus to show that his Recusal Motion has a good chance of success on the merits for the reasons above. At this stage of the legal analysis, this is a high threshold, which is clearly not met in this case.<sup>56</sup>

40. In *Trez Capital Limited Partnership*, the Court held that, even if it had found the plaintiff to be impecunious, it would have held it just to order security for costs, given that the plaintiff owed the defendants a significant judgment debt.<sup>57</sup>

41. The justice of this case demands that an order for security for costs be made. Mr. Gutierrez, a judgment debtor, has caused the Receiver to incur significant costs throughout this receivership by pursuing numerous motions and appeals, all while interfering with the Receiver and its efforts to carry out its Court-ordered mandate.

#### **PART IV - ORDER REQUESTED**

42. The Receiver requests an order that Mr. Gutierrez post security in the amount of \$150,000 and seeks costs of this motion in the amount of \$25,000.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of November, 2022.



---

Monique J. Jilesen

---

<sup>56</sup> *Horizon Entertainment Cargo Ltd. v. Marshall*, 2019 ONSC 2081, at [para.3\(iv\)\(c\)](#)

<sup>57</sup> *Trez Capital Limited Partnership v. Dr. Bernstein*, 2018 ONSC 6771, at [para. 25](#)

**LENCZNER SLAGHT LLP**

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

**Monique J. Jilesen (43092W)**

Tel: (416) 865-2926  
Fax: (416) 865-9010  
Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

**Derek Knoke (75555E)**

Tel: (416) 865-3018  
Fax: (416) 865-9010  
Email: [dknoke@litigate.com](mailto: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

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Black v. McDonald*, [2018 ONSC 2825](#)
2. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)
3. *Coastline Corp. v. Canaccord Capital Corp.*, [2009] O.J. No. 1790, [2009 CanLII 21758](#) (ON SC)
4. *Currie v. Halton Regional Police Services Board*, [2003] O.J. No. 4516 (QL), [2003 CanLII 7815](#) (ON CA)
5. *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119, [1989 CanLII 4354](#) (ON SC)
6. *Horizon Entertainment Cargo Ltd. v. Marshall*, [2019 ONSC 2081](#)
7. *Margarita Castillo v Xela Enterprises Ltd. et al.*, [2015 ONSC 6671](#)
8. *Marvello Construction v. Santos et al.*, [2017 ONSC 3913](#)
9. *McArthur v. Neumann*, [2020 ONSC 66](#)
10. *"Norius Company" v. Filipenko*, [2019 ONSC 2573](#)
11. *Pickard v. London Police Services Board*, [2010 ONCA 643](#)
12. *Rebello v. Paragon Security et al.*, [2020 ONSC 2303](#)
13. *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435 (QL), [2007 CanLII 37475](#)
14. *Trez Capital Limited Partnership v. Dr. Bernstein*, [2018 ONSC 6771](#)
15. *Willets v. Colalillo*, [2007] O.J. No. 4623, [2007 CanLII 51174](#) (ON SC)
16. *Yaiguaje v. Chevron Corporation*, [2017 ONCA 827](#)

## **SCHEDULE “B”**

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

#### **1. *Courts of Justice Act*, R.S.O. 1990, CHAPTER C.43**

##### **Interlocutory Orders**

##### **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).

#### **2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

##### **RULE 56 SECURITY FOR COSTS**

##### **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).

MARGARITA CASTILLO  
Plaintiff

-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

**MOVING PARTY'S FACTUM  
(Security for Costs, returnable November 24, 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  
Sam Babe  
Email: sbabe@airdberlis.com  
Tel: (416) 863-1500  
Fax: (416) 863-1515

Lawyers for the Defendant,  
Xela Enterprise Ltd.

Email for parties served: the service list