

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

FACTUM OF THE RESPONDENT/RECEIVER
(Appellant's Further Evidence Motion)

September 7, 2022

LENCZNER SLAGHT LLP

Barristers

130 Adelaide St. W., Suite 2600
Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place

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

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Respondent, the Receiver

TO: **THE SERVICE LIST**

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FACTUM OF THE RESPONDENT, THE RECEIVER

PART I - OVERVIEW

1. Juan Guillermo Gutierrez brings a motion to admit fresh evidence, being a letter by a psychotherapist which purports to address the impact of a custodial sentence on Mr. Gutierrez. It should not be admitted because:

- (a) the evidence of the impact of a custodial sentence on Mr. Gutierrez could have been adduced at the sentencing hearing with due diligence;
- (b) the letter of the psychotherapist is not supported by an affidavit – it is inadmissible hearsay;
- (c) the psychotherapist is not qualified to communicate a diagnosis. The evidence is not relevant or credible; and

- (d) an unsworn letter from a professional not qualified to communicate a diagnosis would not have affected the result of the sentencing hearing.

PART II - LAW AND ISSUES

A. THE TEST FOR ADMISSIBILITY OF FRESH EVIDENCE

2. The four-part test for admissibility of fresh evidence is well-established, whether the evidence is “fresh” or “new” evidence:¹

- (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;²
- (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.³

3. The latter three criteria are “conditions precedent” – evidence that falls short of them cannot be admitted on appeal.⁴

4. The *Palmer* test is purposive, fact-specific, and driven by a concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the

¹ *Barendregt v. Grebliunas*, 2022 SCC 22, at para. [55](#)

² *R. v. Lévesque*, 2000 SCC 47, at para. [19](#)

³ *R. v. Lévesque*, 2000 SCC 47, at para. [22](#); *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [\[1980\] 1 S.C.R. 759](#)

⁴ *R. v. Lévesque*, 2000 SCC 47, at para. [14](#); *Barendregt v. Grebliunas*, 2022 SCC 22, at para. [44](#)

matters in issue between the parties should “narrow rather than expand as [a] case proceeds up the appellate ladder”.⁵

B. THE DUE DILIGENCE TEST IS NOT MET

5. The due diligence test seeks to determine whether, with due diligence, the moving party has acted in a way that would have rendered the evidence available for trial. The due diligence inquiry should focus on the conduct of the party seeking to adduce such evidence rather than on the evidence itself. And in doing so, a court should determine why the evidence was not available at the trial.⁶

(i) *The Evidence is Not New*

6. Mr. Gutierrez testified at trial to the fact that he was kidnapped in Guatemala.⁷ The evidence is not new. Nevertheless, Mr. Gutierrez adduced no evidence at the sentencing hearing whatsoever and made no reference to this Guatemalan history, the impact of the kidnapping, or his psychological state in his sentencing hearing.⁸ Neither did he adduce any evidence suggesting he would suffer a disproportionate negative impact of a custodial sentence. All of these options were available to him, and he chose not to adduce or rely upon any such evidence.

7. The fact that the risk of being incarcerated creates anxiety for Mr. Gutierrez is not surprising. It is reasonable that it would create anxiety for any person. To the extent that such anxiety might reach a clinical level as a result of pre-existing circumstances (which is not the

⁵ *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, at para. 10 as cited in *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 32

⁶ *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 43

⁷ Examination-in-Chief of Juan Guillermo Gutierrez held on May 31, 2022, at QQ. 9-15, Amended Exhibit Book, Tab 28, at p. 3959, Exhibit A to the Affidavit of Grace Tsakas sworn September 6, 2023 (the “**Tsakas Affidavit**”), Respondent’s Motion Record (“**RMR**”), Tab 1A, at p. 6

⁸ Notice of Motion of the Moving Party dated August 31, 2023, at para. 3, Motion Record of Juan Guillermo Guitierrez dated September 1, 2023 (“**MR**”), Tab 1, at p. 5

evidence tendered before this Court), it is evidence which could have been tendered at the sentencing hearing.

8. The evidence of the impact of incarceration on Mr. Gutierrez or Mr. Gutierrez' anxiety was not available at the sentencing hearing because Mr. Gutierrez took no steps to adduce any evidence. The contempt decision was released on June 29, 2022. The sanction hearing was held on September 14, 2022. Mr. Gutierrez had more than enough time to adduce relevant evidence.

9. The test requires litigants to take all reasonable steps to present their best case at trial, or in this case the sentencing hearing. This ensures finality and order in the judicial process.⁹ Mr. Gutierrez failed to take all reasonable (or any) steps to adduce evidence at the sentencing hearing.

(ii) Mr. Gutierrez Did not Act with Due Diligence

10. To the extent that the evidence of Mr. Gutierrez' anxiety following his brief incarceration in October 2022 might be considered new, the evidence of its impact has not been brought before this Court with due diligence:

- (a) the contempt reasons were released on June 29, 2022;
- (b) the sanction hearing took place on September 22, 2022. No evidence was adduced at the hearing;
- (c) Mr. Gutierrez was incarcerated for five hours on October 17, 2022;

⁹ *Barendregt v. Grebliunas*, 2022 SCC 22, at para. [36](#)

- (d) the indirect evidence of Mr. Went is that Mr. Gutierrez approached Mr. Went in January 2023.¹⁰ At that time, Mr. Went was not licenced to practice because he was subject to a suspension by the College of Psychotherapists;¹¹
- (e) Mr. Went was suspended from the practice of psychotherapy from January to March 2023;¹²
- (f) there is an absence of evidence to explain why Mr. Went could not see Mr. Gutierrez between March and August 2023;
- (g) Mr. Gutierrez saw Mr. Went on August 9, 2023;
- (h) Mr. Went's letter is dated August 15, 2023;
- (i) Mr. Gutierrez' Motion Record and Factum were served on September 1, 2023, six business' days before the scheduled appeal, with no prior notice to the responding party;
- (j) there is no evidence of any due diligence in seeking treatment or obtaining evidence other than that provided by Mr. Went; and
- (k) there is no evidence of Mr. Gutierrez seeking the assistance of any person qualified to make a diagnosis of Post Traumatic Stress Disorder (“PTSD”).¹³

¹⁰ Letter from John H. Went to “Whom it May Concern” dated August 15, 2023, MR, Tab 2, at pp. 10-11

¹¹ College of Registered Psychotherapists of Ontario, “John Henry Went”, Exhibit B to the Tsakas Affidavit, RMR, Tab 1B, at p. 9; *ONCRPO v. Went*, [2023 ONCRPO 1](#)

¹² College of Registered Psychotherapists of Ontario, “John Henry Went”, Exhibit B to the Tsakas Affidavit, RMR, Tab 1B, at p. 9; *ONCRPO v. Went*, [2023 ONCRPO 1](#)

¹³ College of Registered Psychotherapists of Ontario, *Practice Matters*, at “Can I write a letter for my client?”, Scope of Practice, December 2022, Exhibit D to the Tsakas Affidavit, RMR, Tab 1D, at p. 36; College of Registered

11. The evidence is entirely unclear as to when Mr. Gutierrez began to suffer the symptoms he now seeks to adduce before this Court. There is no evidence he acted with diligence in seeking care for those symptoms. All this Court is left with is the fact that the evidence has been tendered on the eve of the hearing, almost a year after the incarceration, with no explanation for the delay.

C. THE EVIDENCE IS NOT ADMISSIBLE, RELEVANT, OR CREDIBLE

(i) Mr. Went's Letter is Inadmissible Hearsay

12. Mr. Gutierrez' affidavit attaches a report by Mr. Went, a registered psychotherapist. No affidavit of Mr. Went is tendered. The letter is submitted for the truth of the contents. It is relied upon as such in Mr. Gutierrez' affidavit in which he relies upon Mr. Went's conclusion about PTSD.¹⁴ The letter is hearsay and should not be admitted on that basis alone.¹⁵

(ii) Mr. Went is not Qualified to Make a Diagnosis

13. Mr. Gutierrez appears to rely upon the letter of Mr. Went for a diagnosis of PTSD. As a psychotherapist, Mr. Went is permitted to assess cognitive, emotional, and behavioural disturbances in the course of his work. However, it is not within a psychotherapist's scope of practice to communicate a diagnosis.¹⁶

14. Because psychotherapists are not qualified to make a diagnosis, including a diagnosis of PTSD, Mr. Went is unable to reach any conclusions useful to this Court. Mr. Went "suspects" that

Psychotherapists of Ontario, *Standard 1.4 Controlled Acts*, Exhibit E to the Tsakas Affidavit, RMR, Tab 1E, at p. 43; College of Registered Psychotherapists of Ontario, *Professional Practice and Jurisprudence for Registered Psychotherapists*, at "Standard 1.4 Controlled Acts", Assessment vs. Diagnosis, Exhibit F to the Tsakas Affidavit, RMR, Tab 1F, at pp. 54-55

¹⁴ Affidavit of Juan Guillermo Gutierrez sworn August 30, 2023, at para. 4, MR, Tab 1, at p. 8

¹⁵ *McLaughlin v. McLaughlin*, 2020 ONSC 5666, at paras. [54-55](#)

¹⁶ *Regulated Health Professions Act, 1991*, [S.O. 1991, c. 18](#), at s. 27(1) and 27(2); *Psychotherapy Act, 2007*, [S.O. 2007, c. 10, Sched. R](#), at s. 4; *Professional Misconduct, O. Reg. 317/12*, at s. 10; *College of Physicians and Surgeons of Ontario v. Aboujamra*, 2022 ONPSDT 14, at para. [6](#) and [13](#)

Mr. Gutierrez “repressed the strong negative emotions.”¹⁷ He concludes that the stress and trauma endured “may” lead to PTSD, a diagnosis that Mr. Went is not qualified to make.¹⁸ Absent a diagnosis, the best Mr. Went can communicate to this Court is what Mr. Gutierrez communicated to him, which is inadmissible hearsay. It should be rejected as inadmissible, lacking credibility, and irrelevant. Similarly, Mr. Gutierrez’ reliance in his own affidavit on Mr. Went’s purported diagnosis of PTSD should be rejected.

(iii) Credibility – Mr Went’s Letter Lacks Transparency

15. In addition to failing to include an affidavit of Mr. Went, both Mr. Gutierrez and Mr. Went failed to indicate that the reason that Mr. Went could not see Mr. Gutierrez between January 2023 and March 2023 is that Mr. Went had been suspended by the College of Psychotherapists. Instead, all he says is that, after Mr. Gutierrez “reconnected” with him in January 2023, he was “unable to see him until August 9 of this year.”¹⁹

16. In a disciplinary proceeding, the College found that Mr. Went signed or issued, in his professional capacity, a document that he knew or ought to have known contained false or misleading statements. It was also found that Mr. Went engaged in duplicitous and misleading practices with his patients, which amounted to undue influence or abuse.²⁰ As a result of this conduct, Mr. Went was suspended for five months, with the ability to remit three months under certain conditions, including that the first two months of the suspension be served consecutively.²¹

¹⁷ Letter from John H. Went to “Whom it May Concern” dated August 15, 2023, MR, Tab 2, at p. 11

¹⁸ Letter from John H. Went to “Whom it May Concern” dated August 15, 2023, MR, Tab 2, at p. 11

¹⁹ Letter from John H. Went to “Whom it May Concern” dated August 15, 2023, MR, Tab 2, at p. 10

²⁰ College of Registered Psychotherapists of Ontario, “John Henry Went”, Exhibit B to the Tsakas Affidavit, RMR, Tab 1B, at p. 8; *ONCRPO v. Went*, [2023 ONCRPO 1](#)

²¹ *ONCRPO v. Went*, [2023 ONCRPO 1](#), at “The Joint Submission on Penalty and Costs”, at para. 2

Mr. Went's registration history shows Mr. Went to be suspended consecutively for two months from January 17 to March 17, 2023.²²

17. The fact of Mr. Went's suspension at a material time to the evidence being tendered was withheld from this Court by both Mr. Gutierrez and Mr. Went. This lack of transparency puts the credibility of both Mr. Gutierrez and Mr. Went into serious question. The non-disclosure should be fatal to the motion.

18. Mr. Went's letter also appears to include a misrepresentation. Mr. Went claims that he has been "a Clinical Member of the Ontario Society of Registered Psychotherapists from 1986 to present."²³ However, the website of the Ontario Society of Registered Psychotherapists (a trade association) states that it was founded in 1991. Mr. Went is not listed as a founding member.²⁴ Even if he was, he could not have been a member in 1986.

19. Mr. Went's qualifications and his transparency cannot be tested by cross-examination because Mr. Gutierrez failed to deliver an affidavit of Mr. Went. Mr. Went's letter and Mr. Gutierrez' reference to Mr. Went should all be disregarded as inadmissible and lacking credibility.

D. THE EVIDENCE WOULD NOT HAVE AFFECTED THE RESULT

20. The final criterion requires the Court to consider whether the evidence would have affected the result. A court must approach this criterion purposively. The inquiry is not so narrow as to permit a court to conclude that evidence of facts arising after the trial could not have affected the

²² College of Registered Psychotherapists of Ontario, "John Henry Went", Exhibit B to the Tsakas Affidavit, RMR, Tab 1B, at p. 8

²³ Exhibit A to the Affidavit of Juan Guillermo Gutierrez sworn August 30, 2023, MR, Tab 2, at p. 10

²⁴ Exhibit 1C to the Affidavit of Grace Tsakas sworn September 6, 2023, RMR, Tab 1C, at p. 14

result of the trial. The question is not the evidence's timing but whether the evidence is sufficiently probative of the trial issues, had it been available.²⁵

21. Mr. Gutierrez' alleged PTSD does not rise to the level of "extreme and unique collateral circumstances" warranting a conditional sentence.²⁶ In *R. v. El-Azrak*, relied upon by Mr. Gutierrez, the convicted had a severe condition that caused recurrent, multiple, and unpredictable tumours. She had lost sight in one eye and had a tumour developing in the other eye. She was also the sole caregiver for her children. Despite those rare and exceptional circumstances, the convicted was still sentenced to a lengthy custodial sentence. In any event, the admissible and credible medical evidence proffered in *R. v. El-Azrak* and *R. v. Shahnawaz* is missing in this case.²⁷

22. Mr. Went's letter as adduced on this motion for fresh evidence is not admissible (because it is hearsay), not credible (failure to disclose suspension), and not useful (no diagnosis). If this evidence had been adduced at the sentencing hearing, it would have been burdened with each of the same problems and would not have had any impact on the sentencing decision.

PART III - ORDER SOUGHT

23. The Receiver requests an order dismissing the motion to adduce fresh evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2023.



Monique J. Jilesen/Derek Knoke

²⁵ *Barendregt v. Grebliunas*, 2022 SCC 22, at para. [63](#)

²⁶ *R. v. El-Azrak*, 2023 ONCA 440, at para. [105](#)

²⁷ *R. v. El-Azrak*, [2023 ONCA 440](#); and *R. v. Shahnawaz*, [51 O.R. \(3d\) 29](#) (C.A.)

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Barristers
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Email: mjilesen@litigate.com

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Sam Babe

Email: sbabe@airdberlis.com

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Fax: (416) 863-1515

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CERTIFICATE

I estimate that 10 minutes will be needed for my oral argument of this motion. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 7th day of September, 2023.



Monique J. Jilesen/Derek Knoke

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Barendregt v. Grebliunas*, [2022 SCC 22](#)
2. *R. v. Lévesque*, [2000 SCC 47](#)
3. *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [\[1980\] 1 S.C.R. 759](#)
4. *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000 SCC 2](#)
5. *ONCRPO v. Went*, [2023 ONCRPO 1](#)
6. *McLaughlin v. McLaughlin*, [2020 ONSC 5666](#)
7. *College of Physicians and Surgeons of Ontario v. Aboujamra*, [2022 ONPSDT 14](#)
8. *R. v. El-Azrak*, [2023 ONCA 440](#)
9. *R. v. Shahnawaz*, [51 O.R. \(3d\) 29](#) (C.A.)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Powers on appeal

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

Interim orders

...

Determination of fact

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

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

Evidence by Affidavit

Expert Witness Evidence

- 39.01** (7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

Expert Witnesses

Experts' Reports

- 53.03** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

- (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

3. *Regulated Health Professions Act, 1991, S.O. 1991, c. 18*

PROHIBITIONS

Controlled acts restricted

27 (1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,

- (a) the person is a member authorized by a health profession Act to perform the controlled act; or
- (b) the performance of the controlled act has been delegated to the person by a member described in clause (a). 1991, c. 18, s. 27 (1); 1998, c. 18, Sched. G, s. 6.

Controlled acts

(2) A "controlled act" is any one of the following done with respect to an individual:

1. Communicating to the individual or his or her personal representative a diagnosis identifying a disease or disorder as the cause of symptoms of the individual in circumstances in which it is reasonably foreseeable that the individual or his or her personal representative will rely on the diagnosis.
2. Performing a procedure on tissue below the dermis, below the surface of a mucous membrane, in or below the surface of the cornea, or in or below the surfaces of the teeth, including the scaling of teeth.

3. Setting or casting a fracture of a bone or a dislocation of a joint.
4. Moving the joints of the spine beyond the individual's usual physiological range of motion using a fast, low amplitude thrust.
5. Administering a substance by injection or inhalation.
6. Putting an instrument, hand or finger,
 - i. beyond the external ear canal,
 - ii. beyond the point in the nasal passages where they normally narrow,
 - iii. beyond the larynx,
 - iv. beyond the opening of the urethra,
 - v. beyond the labia majora,
 - vi. beyond the anal verge, or
 - vii. into an artificial opening into the body.
7. Applying or ordering the application of a form of energy prescribed by the regulations under this Act.
8. Prescribing, dispensing, selling or compounding a drug as defined in the *Drug and Pharmacies Regulation Act*, or supervising the part of a pharmacy where such drugs are kept.
9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers.
10. Prescribing a hearing aid for a hearing impaired person.
11. Fitting or dispensing a dental prosthesis, orthodontic or periodontal appliance or a device used inside the mouth to protect teeth from abnormal functioning.
12. Managing labour or conducting the delivery of a baby.
13. Allergy challenge testing of a kind in which a positive result of the test is a significant allergic response.
14. Treating, by means of psychotherapy technique, delivered through a therapeutic relationship, an individual's serious disorder of thought, cognition, mood, emotional regulation, perception or memory that may seriously impair the individual's judgement, insight, behaviour, communication or social functioning. 1991, c. 18, s. 27 (2); 2007, c. 10, Sched. L, s. 32; 2007, c. 10, Sched. R, s. 19 (1).

4. *Psychotherapy Act, 2007, S.O. 2007, c. 10, Sched. R*

Authorized Act

4 In the course of engaging in the practice of psychotherapy, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to treat, by means of psychotherapy technique delivered through a therapeutic relationship, an individual's serious disorder of thought, cognition, mood, emotional regulation, perception or memory that may seriously impair the individual's judgement, insight, behaviour, communication or social functioning.

5. *Professional Misconduct, O. Reg. 317/12*

Acts of misconduct

1. The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:

...

10. Performing a controlled act that the member is not authorized to perform.

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Applicant

-and-

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Respondents

Court File No. COA-22-CV-0206

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PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RESPONDENT/RECEIVER
(Appellant's Further Evidence Motion)

LENCZNER SLAGHT LLP

Barristers

130 Adelaide St. W., Suite 2600
Toronto ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Fax: (416) 865-2851

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Fax: (416) 865-2876

Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place

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

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Respondent, the Receiver

Email for parties served: TO THE SERVICE LIST