

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

December 16, 2022

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TO: **THE SERVICE LIST**

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FACTUM OF THE RESPONDENT, THE RECEIVER

PART I - OVERVIEW

1. This is an appeal by Juan Guillermo Gutierrez from an order that he is in civil contempt of the Order of McEwen J. dated July 5, 2019 (the “**Appointment Order**”) and an order that he be imprisoned for 30 days.

2. Mr. Gutierrez showed an astounding lack of respect for an Order of this Court.¹ He breached an Order appointing a Receiver by initiating criminal proceedings against an officer of the Court. He did not do everything in his power to withdraw those criminal proceedings even following a finding of contempt.

¹ *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594 (the “**Sentencing Decision**”), at [para. 37](#), Respondent’s Book of Authorities (“**AOR**”) Tab 1

3. These findings of contempt and the aggravating factors supporting a custodial sentence are amply supported by the evidentiary record. The Appellant's grounds of appeal either challenge findings of fact, which are entitled to deference, or are technical arguments unsupported by the law or the facts.

4. The appeal should be dismissed with costs.

PART II - SUMMARY OF FACTS

A. THE PARTIES AND RELATED ENTITIES

5. KSV Restructuring Inc. ("**KSV**") is a restructuring and advisory firm appointed by the Court, pursuant to the Appointment Order, as receiver and manager (in such capacity, the "**Receiver**") of Xela Enterprises Ltd. ("**Xela**") on July 5, 2019.²

6. Hatstone Abogados ("**Hatstone**") is the Panamanian law office of the Hatstone Group, which was retained by the Receiver to act as its counsel in Panama. Hatstone was also retained by the Receiver to appoint directors to Xela's wholly-owned subsidiaries in Panama.³

7. The Appellant, Mr. Gutierrez, is the President, sole common shareholder, and a director of Xela. Since August 2000, he has served as its President.⁴

8. In 2011, Margarita Castillo, Mr. Gutierrez' sister, commenced an application in Ontario against Xela, Mr. Gutierrez, and their now-deceased father, Juan Arturo Gutierrez. In 2015,

² May 30, 2022 Transcript of Hearing, Examination-in-Chief of Robert Kofman ("**May 30, 2022 Kofman Exam-in-Chief**"), Q. 2, Respondent's Compendium ("**RCOM**") Tab 1, p. 2

³ Affidavit of Robert Kofman sworn May 4, 2022 ("**May 4, 2022 Kofman Affidavit**"), at para. 11, RCOM, Tab 2, p. 7, Exhibit Book, Tab 2; May 31, 2022 Transcript of Hearing, Examination-in-Chief of Carl O'Shea, Q. 16, RCOM, Tab 3, p. 10

⁴ Affidavit of Juan Guillermo Gutierrez sworn June 17, 2019 ("**June 2019 Gutierrez Affidavit**"), at para. 1, RCOM, Tab 4, p. 12, Exhibit Book, Tab 2(E)

Newbould J. found that Mr. Gutierrez was the directing mind of Xela’s subsidiaries (the “**Judgment**”).⁵ Justice Newbould granted the Judgment in Ms. Castillo’s favour, awarding her \$4.25 million plus interest and costs (the “**Judgment Debt**”).⁶

9. Harald Johannessen Hals (“**Mr. Hals**”) is the applicant in a Panamanian criminal complaint against Hatstone. Mr. Hals was a director and the treasurer of Xela’s subsidiary, Gabinvest S.A. (“**Gabinvest**”), and the president and a director of Xela’s indirect subsidiary, LISA S.A. (“**LISA**”). Mr. Hals is Mr. Gutierrez’ brother-in-law. They have been friends since they were teenagers⁷ and have worked together in Mr. Gutierrez’ family business since 2013.⁸

10. Xela is an Ontario holding company for the family business, which oversaw the operations of several direct and indirect, wholly-owned subsidiaries (including Gabinvest and LISA) located in Central and South America.⁹ Shortly after Newbould J.’s Judgment, some of Xela’s indirect subsidiaries, which own and operate a valuable restaurant chain (the “**EAI Companies**”), were sold or transferred to a trust, the beneficiaries of which are Mr. Gutierrez’ wife, mother, and four children (the “**Trust**”).¹⁰

⁵ *Margarita Castillo v. Xela Enterprises Ltd.*, 2015 ONSC 6671, at [para. 16](#), AOR, Tab 2

⁶ See *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#) (the “**Liability Decision**”), AOR, Tab 3, and *Margarita Castillo v. Xela Enterprises Ltd. et al.*, [2015 ONSC 7978](#) (the “**2015 Costs Order**”), AOR, Tab 4

⁷ Transcript of Hearing, Cross-examination of Juan Guillermo Gutierrez held May 31, 2022 (“**May 31, 2022 Gutierrez Cross**”), Q. 170, RCOM, Tab 5, p. 40

⁸ May 31, 2022 Gutierrez Cross, Q. 167, RCOM, Tab 5, p. 40

⁹ First Report of the Receiver dated October 17, 2019 (“**First Receiver’s Report**”), at s. 1.0(7) RCOM, Tab 6, p. 42, Exhibit Book, Tab 2(G); June 2019 Gutierrez Affidavit, at paras. 40-59, RCOM, Tab 4. p. 21-25, Exhibit Book, Tab 2(E)

¹⁰ Fifth Report of the Receiver dated February 28, 2022 (“**Receiver’s Fifth Report**”), at s. 4.1(2), RCOM, Tab 7, p. 57; Exhibit Book, Tab 2(O); Transcript of Cross-Examination of Juan Guillermo Gutierrez held on June 26, 2019 (“**June 2019 Gutierrez Cross**”), at QQ. 294-304 and Answer to UT #13-14, RCOM, Tab 8, p. 64 and 66-67, Exhibit Book, Tab 2(G)(c) and (d); Transcript of Hearing, cross-examination of Juan Guillermo Gutierrez held on June 2, 2022 (“**June 2, 2022 Gutierrez Cross**”), QQ. 970-972, RCOM, Tab 9, p. 93

11. Gabinvest, a Panamanian company, is a direct, wholly-owned subsidiary of Xela. LISA, a Panamanian company, is a direct, wholly-owned subsidiary of Gabinvest.¹¹ When the Receiver was appointed, LISA held a one-third interest in a group of poultry companies in Central America known as the Avicola Group.¹² Mr. Gutierrez values the Avicola Group at close to \$1 billion.¹³

12. For more than 20 years, Mr. Gutierrez has been focused on multi-jurisdictional litigation on behalf of LISA against the majority owners of the Avicola Group (the “**Cousins**”) for unpaid dividends.¹⁴

B. THE RECEIVER IS APPOINTED

13. By early 2019, most of the Judgment Debt remained outstanding. Ms. Castillo commenced an application to appoint a receiver over Xela.¹⁵ Mr. Gutierrez commenced a competing application, seeking protection for Xela under the *Companies’ Creditors Arrangement Act*.¹⁶

14. On July 5, 2019, McEwen J. dismissed Mr. Gutierrez’ CCAA application and appointed the Receiver. The Appointment Order:

- (a) prohibits defined “Persons” from executing, issuing, or endorsing “documents of whatever nature” in relation of Xela’s property (paragraph 3(h));
- (b) grants the Receiver exclusive authority to exercise Xela’s shareholder rights without interference from any defined “Person” (paragraph 3(q)); and

¹¹ June 2019 Gutierrez Affidavit, at paras. 50-51, RCOM, Tab 4, p. 23, Exhibit Book, Tab 2(E)

¹² First Receiver’s Report, at s. 1.0(8), RCOM, Tab 6, p. 42, Exhibit Book, Tab 2(G); June 2019 Gutierrez Affidavit, at paras. 3-5, 9-15, RCOM, Tab 4, pp. 12-13, 14-16, Exhibit Book, Tab 2(E)

¹³ June 2019 Gutierrez Cross, Q. 643, RCOM, Tab 8, p. 65, Exhibit Book, Tab 2(G)(c)

¹⁴ Affidavit of Juan Guillermo Gutierrez sworn March 22, 2020 (“**March 22, 2020 Gutierrez Affidavit**”), at paras. 10-11, RCOM, Tab 10, p. 100, Exhibit Book, Tab 2(J); June 2, 2022 Gutierrez Cross, QQ. 924-929, 946-951, 979-981, 1013-15, 1072-1073, RCOM, Tab 9, pp. 90, 91-92, 94, 95-96, 98

¹⁵ Notice of Motion to Appoint a Receiver dated January 15, 2019, RCOM, Tab 11, p. 105, Exhibit Book, Tab 2(D)

¹⁶ June 2019 Gutierrez Affidavit, para. 2, RCOM, Tab 4, p. 12, Exhibit Book, Tab 2(E)

- (c) prohibits the commencement of proceedings against the Receiver without leave of the Court (paragraph 9).¹⁷

15. On July 8, 2019, the Receiver sent Mr. Gutierrez a letter, advising him of the terms of the Appointment Order and noting the Receiver’s exclusive right to take possession of and exercise control over the Property of Xela “without interference from any other Person.”¹⁸

(i) *The Receiver Investigates the Reviewable Transactions*

16. After its appointment, the Receiver learned (and McEwen J. found as a fact¹⁹) that, following the 2015 Judgment, Xela’s extensive assets were transferred or sold:

- (a) in 2016, shares of the valuable EAI Companies were transferred to the Trust (the “**EAI Transaction**”), benefitting Mr. Gutierrez’ family;
- (b) in 2016, Arturo’s Technical Services Ltd. (“**ATS**”) was incorporated in Canada (with an Ontario office) as a subsidiary of the EAI Companies (and, therefore, beneficially owned by the Trust) with Mr. Gutierrez’ sons as directors and officers. Xela was essentially shut down with assets sold to ATS;²⁰ and
- (c) LISA assigned most of the proceeds from the Avicola litigation (the “**Assignment Transaction**”) to one of the EAI Companies (BDT), representing substantially all of the value of LISA’s interest in Avicola.

¹⁷ July 5, 2019 Appointment Order of McEwen J. (the “**Appointment Order**”), RCOM, Tab 12, p. 127, Exhibit Book, Tab 2(F)

¹⁸ July 8, 2019 Letter from Aird & Berlis to Juan Guillermo Gutierrez, RCOM, Tab 13, p. 144, Exhibit Book, Tab 3; May 31, 2022 Gutierrez Cross, QQ. 150-151, RCOM, Tab 5, p. 39

¹⁹ March 25, 2021 Endorsement (unofficial transcription) of McEwen J (the “**March 25, 2021 Endorsement of McEwen J.**”), at para. 38, RCOM, Tab 14, p. 166, Exhibit Book, Tab 19(X)

²⁰ See also the Receiver’s Fourth Report, at ss. 4.1 to 4.2, RCOM, Tab 15, pp. 180-184, Exhibit Book, Tab 4; March 25, 2021 Endorsement of McEwen J., RCOM, Tab 14, p. 163, Exhibit Book, Tab 19(X)

17. During the receivership, it has always been Mr. Gutierrez' view that the Avicola litigation represented the only potential source of recovery for Xela's creditors and shareholders.²¹ Nevertheless, in February 2020 (during the receivership) any residual interest that LISA may have had in Avicola was transferred under Mr. Hals' direction from LISA to one of the EAI Companies (BDT)—and therefore to the Trust for the benefit of Mr. Gutierrez' wife, mother, and children. (the "**LISA Transaction**") (collectively, the EAI Transaction, the Assignment Transaction, and the LISA Transaction are the "**Reviewable Transactions**").²²

(ii) *The Gabinvest Resolution*

18. By January 2020, the Receiver had sought but was given limited information about the first three Reviewable Transactions.²³ The Receiver decided to exercise Xela's shareholder rights in Gabinvest by changing its Board to obtain the necessary information.²⁴

19. On January 16, 2020, in accordance with the Receiver's authority under the Appointment Order, and under the direction of the Receiver, a Gabinvest shareholder's meeting was held at which a resolution was passed to remove the directors of Gabinvest and replace them with three members of Hatstone's law firm, Alvaro Almengor, Manuel Carrasquilla, and Lidia Ramos (the "**Gabinvest Resolution**"). Subsequently, resolutions were also passed to add the three Hatstone directors to LISA's existing Board.²⁵

²¹ June 2, 2022 Gutierrez Cross, Q. 1026, RCOM, Tab 9, p. 97

²² March 25, 2021 Endorsement of McEwen J., at para. 42, RCOM, Tab 14, p. 167, Exhibit Book, Tab 19(X)

²³ Receiver's Fourth Report, at s. 2.4(5), RCOM, Tab 15, p. 175, Exhibit Book, Tab 4

²⁴ Liability Decision, at [paras. 18-19](#), AOR, Tab 3

²⁵ Second Report of the Receiver dated February 18, 2020 ("**Receiver's Second Report**"), at s. 3.0(3), RCOM, Tab 16, p. 187, Exhibit Book, Tab 2(H)(2); Affidavit of Harald Johannessen Hals, sworn March 22, 2020 (the "**March 22, 2020 Hals Affidavit**"), at para. 18, RCOM, Tab 17, p. 192, Exhibit Book, Tab 16(2)

(iii) Objections to Board Changes

20. Following the Receiver’s Board changes in Panama, objections and competing Board resolutions were filed.²⁶ On February 5, 2020, Mr. Hals’ lawyer claimed that the Gabinvest Resolution was “illegal” and implied “the commission of crimes” by Mr. Almengor, Mr. Carrasquilla, and Ms. Ramos.²⁷ A meeting was held in Bogota on February 21, 2021.²⁸ Mr. Gutierrez attended with Mr. Almengor and Carl O’Shea (both of Hatstone), Mr. Hals, and others.²⁹

21. The Receiver brought a motion on March 3, 2020 to, among other things, approve and ratify the Gabinvest Resolution.³⁰ Mr. Gutierrez understood the nature of the motion³¹ and opposed it, relying upon his own affidavit and one sworn by Mr. Hals.³² In his affidavit, Mr. Gutierrez acknowledged the Receiver’s request for him to “consent to the changes” of the Boards³³ but complained that Hatstone “did not follow the required steps to make those changes [to the Boards], nor did they notify me of their plans.”³⁴

22. Mr. Hals’ affidavit, which was filed as part of Mr. Gutierrez’ responding motion record, similarly complained about the Board changes.³⁵

²⁶ Receiver’s Second Report, at s. 3.0(4) to (15), RCOM, Tab 16, pp. 187-188, Exhibit Book, Tab 2(H)(2); March 22, 2020 Gutierrez Affidavit, at para. 27, RCOM, Tab 10, p. 103-104, Exhibit Book, Tab 2(J); March 22, 2020 Hals Affidavit, at paras. 18-19, RCOM, Tab 17, p. 192, Exhibit Book, Tab 16(2)

²⁷ Letter of Objection from Joao Javier Quiroz Govea dated February 5, 2020, Appendix AA to the Second Report of the Receiver, RCOM, Tab 16, p. 190, Exhibit Book, Tab 2(H)(2)(aa)

²⁸ Receiver’s Second Report, at s. 3.0(15), RCOM, Tab 16, p. 188, Exhibit Book, Tab 2(H)(2)

²⁹ Supplement to the Receiver’s Second Report dated March 17, 2020, at s. 3.0(1), RCOM, Tab 18, p. 194, Exhibit Book, Tab 2(I)(2); June 2, 2022 Gutierrez Cross, QQ. 353, 356-357, RCOM, Tab 9, pp. 73, 74; Examination-in-chief of Mr. Gutierrez held on May 31, 2022, Q. 80, RCOM, Tab 5, p. 38

³⁰ Notice of Motion of the Receiver dated March 3, 2020, para. 1(b), RCOM, Tab 19, p. 195, Exhibit Book, Tab 2(H)(1); May 30, 2022 Kofman Exam-in-Chief, Q. 95, RCOM, Tab 1, p. 4

³¹ June 2, 2022 Gutierrez Cross, QQ. 318-319, RCOM, Tab 9, p. 69

³² June 2, 2022 Gutierrez Cross, QQ. 334-348; 359-366, RCOM, Tab 9, pp. 70-72, 74-75

³³ March 22, 2020 Gutierrez Affidavit, at para. 28, RCOM, Tab 10, p. 104, Exhibit Book, Tab 2(J)

³⁴ March 22, 2020 Gutierrez Affidavit, at para. 27, RCOM, Tab 10, p. 103, Exhibit Book, Tab 2(J)

³⁵ March 22, 2022 Hals Affidavit, at paras. 18-19, RCOM, Tab 17, p. 192, Exhibit Book, Tab 16(2)

(iv) The Court Ratifies the Gabinvest Resolution

23. On March 24, 2020, McEwen J. granted the Receiver’s motion, issuing an Order and a related endorsement, which confirmed that the Gabinvest Resolution was “a proper exercise of the Receiver’s exclusive power and authority, under paragraph 3 of the Appointment Order, to exercise [Xela’s] shareholder rights.”³⁶ At the contempt hearing, Mr. Gutierrez testified that he understood that “the Canadian judge, he approved that change.”³⁷

24. On April 29, 2020, following the steps taken by Mr. Hals to interfere with the Board changes, the January 16, 2020 changes to Gabinvest’s Board were ratified by a further shareholder’s meeting, as directed by the Receiver pursuant to its exclusive authority under the Appointment Order.³⁸

C. THE DECLARATION AND THE CRIMINAL COMPLAINT

(i) The Criminal Complaint is Filed

25. Mr. Hals filed a criminal complaint against the Hatstone directors on January 20, 2021. The criminal complaint wrongfully alleges that the Receiver-appointed and Court-approved directors of Gabinvest were not authorized to hold a shareholder’s meeting and sign minutes on behalf of Gabinvest.³⁹ The criminal complaint sought \$2 million in damages.⁴⁰ The sole evidence tendered is a declaration sworn by Mr. Gutierrez on December 3, 2020 (the “**Declaration**”).⁴¹

³⁶ March 24, 2020 Endorsement and Order of McEwen J., RCOM, Tab 20, p. 206, Exhibit Book, Tab 2(K)

³⁷ June 2, 2022 Gutierrez Cross, Q. 399, RCOM, Tab 9, p. 76

³⁸ May 4, 2022 Kofman Affidavit, at para. 18, RCOM, Tab 2, p. 8, Exhibit Book, Tab 2

³⁹ Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit C to the Affidavit of Carl O’Shea, sworn May 4, 2022 (the “**May 4, 2022 O’Shea Affidavit**”), RCOM, Tab 22, p. 265, Exhibit Book, Tab 14(C)

⁴⁰ Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

⁴¹ Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

26. On February 10, 2021, McEwen J. issued an endorsement further to an urgent motion brought by the Receiver. He was “of the view that the criminal complaint and supporting [D]eclaration are, *prima facie*, a collateral attack on my previous order.”⁴² Justice McEwen ordered Mr. Gutierrez to “forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Declaration.”⁴³

(ii) The Criminal Complaint and Declaration are Affirmed

27. On August 16, 2021, Mr. Hals made a request to the Public Prosecutor’s Office to interview Mr. Gutierrez, for Mr. Gutierrez to answer whether he “affirm[s] and ratif[ies]” his Declaration, and whether he participated in the Gabinvest shareholder’s meetings held on January 16, 2020 and April 29, 2020.⁴⁴

28. On December 14, 2021, Mr. Gutierrez voluntarily attended for an interview at the Panamanian consulate in Toronto with a Panamanian public prosecutor (the “**Interview**”).⁴⁵ He did not advise the Receiver before attending the Interview, nor did he instruct his lawyers to seek the direction of the Ontario Court before going to the Interview.⁴⁶

29. Mr. Gutierrez took no steps in the meeting with the prosecutor to correct the statements in his Declaration. When cross-examined about whether he asked the prosecutor to withdraw the criminal complaint, he said, “I couldn’t ask her that.”⁴⁷ Mr. Gutierrez remained adamant and defiant during his cross-examination that there was nothing he could do to withdraw the criminal complaint. But he could have sought instructions from the Superior Court about what to do before

⁴² February 10, 2021 Endorsement of McEwen J., RCOM, Tab 23, p. 271, Exhibit Book, Tab 2(L)

⁴³ February 10, 2021 Order of McEwen J., at para. 7, RCOM, Tab 23, p. 282, Exhibit Book, Tab 2(L)

⁴⁴ August 16, 2021 Request to Interview Mr. Gutierrez, RCOM, Tab 24, p. 285, Exhibit Book, Tab 14(E)

⁴⁵ June 2, 2022 Gutierrez Cross, Q. 797, 809, 822, RCOM, Tab 9, pp. 83, 84, 85

⁴⁶ June 2, 2022, Gutierrez Cross, Q. 842-846, RCOM, Tab 9, p. 86-87

⁴⁷ June 2, 2022, Gutierrez Cross, Q. 873, RCOM, Tab 9, p. 89

attending a meeting with the prosecutor. He could have pleaded with the prosecutor to withdraw the complaint. He did none of these things. Instead, he led the prosecutor to believe that he was a “judicial hostage” of the Ontario courts.⁴⁸

30. For over a year and a half, the criminal complaint was investigated by the Panamanian prosecutor. Police attended at the home of at least one of the Hatstone directors. The individual was not present when the police attended, but his young children were.⁴⁹ As a result of the criminal complaint, the Receiver’s representatives faced potential interim limitations on their ability to travel, prison sentences of up to eight years, and financial reparations of USD\$2 million.⁵⁰

PART III - ISSUES, LAW, AND AUTHORITIES

A. STANDARD OF REVIEW

31. The issues raised by Mr. Gutierrez are fundamentally a re-argument of the case and an attack on the motion judge’s factual findings. Mr. Gutierrez identifies no error of law and no extricable legal error arising from the alleged errors of mixed fact and law.⁵¹ Mr. Gutierrez largely concedes that the motion judge considered the correct legal principles. Mr. Gutierrez complains about the application of the law to factual findings, which are entitled to deference.⁵²

B. ISSUES

32. The motion judge committed no reviewable errors when she:

⁴⁸ Liability Decision, [para. 31](#), AOR, Tab 1

⁴⁹ Third Supplement to the Receiver’s Fourth Report dated March 1, 2021, at s. 4.1(6), RCOM, Tab 25, p. 297, Exhibit Book, Tab 2(M)

⁵⁰ Receiver’s Fifth Report, RCOM, Tab 7, p. 43, Exhibit Book, Tab 2(O); May 4, 2022 O’Shea Affidavit, at para. 16, RCOM, Tab 22, p. 269, Exhibit Book, Tab 14; Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

⁵¹ *Housen v. Nikolaisen*, 2002 SCC 33, at [paras. 36-37](#), AOR, Tab 5

⁵² *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at [paras. 54-58, 64-70](#), AOR, Tab 6, applying *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650, at [para. 34](#), aff’d [2012 ONCA 337](#), AOR, Tab 7; see also *Aloe-Gunnell v. Aloe et. al*, 2015 ONSC 191, at [paras. 24-26](#), AOR, Tab 8

- (a) asserted jurisdiction over the contemptuous conduct;
- (b) concluded that Mr. Gutierrez breached the Appointment Order; and
- (c) exercised her discretion to sentence Mr. Gutierrez to 30 days' imprisonment.

(i) ***Jurisdiction Over the Contemptuous Conduct***

(A) ***The Motions Judge had Jurisdiction***

33. Mr. Gutierrez argues that it was not appropriate for a Canadian Court to assert jurisdiction over his contemptuous conduct because, he alleges, Ontario's civil contempt jurisdiction is territorially limited. In asserting this, Mr. Gutierrez relies upon cases in which the *Criminal Code* is being applied extraterritorially, suggesting that a “real and substantial link” is required. Those cases have no application here because this is an enforcement of an Ontario civil Court Order that governs an Ontario company and those associated with the company. The Courts of Ontario have a unique interest in enforcing such orders.

34. The Appointment Order is an *in personam* order which requires the co-operation of “Persons” (including Mr. Gutierrez) on notice of the Order. Such orders regularly have the effect of binding any person who is properly before the Court to comply with such an Order on a worldwide basis.⁵³

35. Even in the *Criminal Code* context, where a probation order is made, if the probation order is breached in another jurisdiction (whether or not the order specifically contains an

⁵³ *Borrelli, in his Capacity as Trustee of the SFC Litigation Trust v. Chan*, 2017 ONSC 1815, at [para. 27-31](#), AOR, Tab 9; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at [para. 38](#), AOR, Tab 10

express provision that it is effective abroad) Canadian courts maintain the jurisdiction to enforce a validly made Court order.⁵⁴

36. As set out by this Court in *Greco*, “once it is understood that Canada is the only country that has an interest in ensuring compliance with orders made by Canadian courts, little more need be said in terms of the “real and substantial link” test.⁵⁵

37. Nevertheless, the motion judge articulated and applied the real and substantial link test and found that such a real and substantial link existed between the contemptuous conduct and Canada.⁵⁶

38. The Court recognized that, in establishing jurisdiction, Courts must focus on the underlying activities giving rise to the offence rather than aspects of the alleged offender and that where the offence at issue is contempt, emphasis may also be placed on the court that issued the initial order.⁵⁷

39. As set out by this Court in *R. v. Barra*, citing *R. v. Libman*, “facts that are relevant to the existence of a substantial link to Canada are those that ‘legitimately give this country an interest in prosecuting the offence.’” Relevant facts include those that give Canada an interest in prosecuting the offence—not just ones that “in strictness constitute part of the offence.”⁵⁸

40. Having considered the applicable law, the motion judge concluded there was a real and substantial link. She identified numerous significant connections to Ontario:

⁵⁴ See *R v. Rattray*, 2008 ONCA 74, at [paras. 34-36](#), AOR, Tab 11; *R. v. Greco* (2001), 155 O.A.C. 316 (C.A.),

⁵⁵ *R. v. Greco* (2001), 155 O.A.C. 316 (C.A.), at [para. 42](#), AOR, Tab 12

⁵⁶ Liability Decision, at [para. 35](#), AOR, Tab 3

⁵⁷ Liability Decision, at [para. 35](#), AOR, Tab 3; *Dish Network L.L.C. v. Shava IPTV Network LLC*, 2021 ONSC 1582, at [para. 45](#), AOR, Tab 13

⁵⁸ *R. v. Barra*, 2021 ONCA 568, at [para. 55](#), AOR, Tab 14

- (a) the Appointment Order was made in Ontario;
- (b) the Appointment Order applied to Xela, an Ontario corporation;
- (c) Mr. Gutierrez swore the Declaration purportedly in his capacity as the President and Director of Xela, the Ontario corporation;
- (d) the Declaration makes allegations with respect to Xela, the Ontario corporation;
- (e) the contempt is a breach of an Ontario Court Order intended to facilitate the enforcement of an Ontario judgment that was granted in Ontario-based litigation.

She concluded that, as a result, “I am satisfied that Ontario courts have a legitimate interest in prosecuting the offence.”⁵⁹

41. As this Court noted in *Ratray*, it is not the underlying conduct (here the swearing of the Declaration) which is the subject of prosecution, but rather the breach of Court Orders made and enforced in Canada. In these circumstances, the Court found that an Ontario court has jurisdiction of a person who breaches the Court order outside of the country.⁶⁰

(B) No Recognition of the Appointment Order is Necessary

42. Mr. Gutierrez distinguishes *Greco* (and by extension *Ratray*) on the basis that since the Appointment Order had a provision that authorizes the Receiver to apply for recognition of the Order in foreign courts, that this had the effect of “limiting the territorial effect of the order.”⁶¹

43. There is no provision in the Appointment Order limiting the territorial effect of the Order.

⁵⁹ Liability Decision, at [paras. 36-37](#), AOR, Tab 3

⁶⁰ *R v. Ratray*, 2008 ONCA 74, at [paras. 35-36](#), AOR, Tab 11

⁶¹ FAP, at para. 23

44. This argument was properly considered and rejected by the motion judge, holding that the “Receiver’s Powers” (para. 3) and “No Proceedings Against the Receiver” (para. 9) sections of the Appointment Order, stand on their own without being conditional on having the Appointment Order recognized in foreign jurisdictions. More importantly, the language of those sections is “clear and unequivocal — [Mr. Gutierrez] could not “interfere” with the Receiver’s exercise of its rights (s. 3), nor could he bring proceedings against the Receiver without leave or consent (s. 9). There are no limits on the restrictions set out in those sections.”⁶²

45. Notably, by exercising *in personam* jurisdiction over Mr. Gutierrez (and others who fall within the definition of “Persons”, such as Mr. Gutierrez and others with Notice of the Order⁶³), such jurisdiction applied to conduct anywhere in the world.⁶⁴

46. Mr. Gutierrez’ argument, if accepted, would create a perverse outcome. Principals of companies under receivership could sign documents or take steps to interfere with a receiver’s exclusive powers as long as they travelled to one of the innumerable countries where the court order had not been recognized or domesticated. This would undermine the rule of law in Canada.

47. The motion judge did not, as Mr. Gutierrez suggests, assert Canada’s “criminal jurisdiction” on Panama (or Guatemala).⁶⁵ The motion judge interpreted the terms of the

⁶² Liability Decision, at [para. 54](#), AOR, Tab 3

⁶³ Paragraph 5 of the Appointment Order, RCOM, Tab 12, p. 132, Exhibit Book, Tab 2(F), defines “Persons” as: (i) the Debtor [Xela], (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being “Persons” and each being a “Person”)

⁶⁴ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at [para. 38](#), AOR, Tab 10

⁶⁵ FAP, at para. 22

Appointment Order and then found Mr. Gutierrez in civil contempt of an Ontario order, pursuant to her inherent jurisdiction to do so under the common law.⁶⁶

48. Ontario Court orders directing parties not to do certain acts are not limited to the territory in which the order is made. There is no presumption that an order prohibiting conduct applies only to conduct within Canada.⁶⁷ This is true regardless of whether the order expressly mentions its territorial reach.⁶⁸

49. The Declaration and the criminal complaint interfered with the Receiver's exercise of Xela's shareholder rights, delayed the investigation into the Reviewable Transactions, and interfered with the Receiver's ability to deal with Xela's assets—all of which insulated the Reviewable Transactions for the benefit of Mr. Gutierrez' family, who reside in Ontario. Mr. Gutierrez' assertion that no benefit "was felt in Canada"⁶⁹ is incorrect and is, in any event, contrary to the motion judge's factual finding, which is entitled to deference.⁷⁰

(C) *Comity*

50. Mr. Gutierrez suggests the motion judge imposed Canadian law in Panama, infringing Panama's sovereignty.⁷¹ The motion judge did not do so. There is nothing in her decision or in the Receiver's motion which sought to interfere with Panama's sovereignty or application of its criminal law. The order, which was sought and granted, related to Mr. Gutierrez and his conduct in relation to an Ontario Court order.

⁶⁶ *R v. Gibbons*, 2012 SCC 28, at [paras. 14-15](#), AOR, Tab 15

⁶⁷ *R v. Greco*, (2001), 155 O.A.C. 316 (C.A.), at [paras. 21, 31](#), AOR, Tab 12

⁶⁸ *R v. Greco*, (2001), 155 O.A.C. 316 (C.A.), at [para. 31](#), AOR, Tab 12

⁶⁹ FAP, at para. 13

⁷⁰ Liability Decision, at [para. 10](#), AOR, Tab 3

⁷¹ FAP, at paras. 27-29

51. The motion judge correctly identified the issue:

The issue on this motion is not whether the Receiver complied with Panamanian law when it exercised its rights to replace the board of Gabinvest or whether the Panamanian authorities can investigate the Receiver's conduct in Panama. Rather, the issue is whether [the Appellant] respected and complied with the terms of an order of this court — which, again, arose in the context of lengthy Ontario court proceedings — when he signed the Declaration. This court is not treading on the jurisdiction of the Panamanian courts in making this determination. I conclude that this court has jurisdiction over the alleged contemptuous conduct. [Emphasis in original.]⁷²

52. The contempt order was sought and granted because it was incumbent upon Mr. Gutierrez to seek leave of the Court⁷³ before seeking a remedy against the Receiver or its representatives, and to give complete and truthful evidence if such leave had been granted. It is not an interference with Panama's sovereignty to require Mr. Gutierrez to seek leave of the Court prior to bringing a criminal proceeding (or any other proceeding) against the duly appointed Receiver.

53. There is no issue of the violation of international comity, and the motion judge did not convert the Appointment Order into an anti-suit injunction.⁷⁴ The motion judge's decision did not impact Panama's decision to investigate the Receiver's representatives.

54. The motion for fresh evidence seeks to adduce evidence which updates this Court on the steps taken by Panamanian authorities. The fresh evidence demonstrates that no steps taken by the Ontario Courts interfered with Panama's sovereignty.

⁷² Liability Decision, at [para. 40](#), AOR, Tab 3

⁷³ Paragraph 33 of the Appointment Order provides that "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" Appointment Order, RCOM, Tab 12, p. 140, Exhibit Book, Tab 2(F)

⁷⁴ FAP, at paras. 28-29

(ii) ***Mr. Gutierrez Breached the Appointment Order***

55. The motion judge appropriately found Mr. Gutierrez in breach of the Appointment Order. Her findings were grounded both in fact and in law, and her reasons are comprehensive and complete in making such findings.

56. The Appointment Order provides that the Receiver is empowered and authorized to:

3(h) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order

...
3(q) to exercise any shareholder, partnership, joint venture or other rights which they debtor may have"

...
and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all Persons (as defined below), including the Debtor, and without interference from any other Person.⁷⁵

57. Mr. Gutierrez clearly, deliberately, and blatantly breached the Appointment Order in swearing the Declaration.

- (a) When Mr. Gutierrez executed the Declaration purporting to represent Xela with respect to its shareholder rights in Gabinvest, he was in breach of paragraph 3(h) of the Order.⁷⁶
- (b) The Receiver exercised Xela's shareholder rights with respect to Gabinvest when it appointed the Hatstone Board members and removed the existing Gabinvest directors. When Mr. Gutierrez executed the Declaration in support of a criminal complaint against the Receiver, he asserted that:

⁷⁵ Appointment Order, RCOM, Tab 12, p. 127, Exhibit Book, Tab 2(F); Liability Decision, at [paras. 12-13](#), AOR, Tab 3

⁷⁶ Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C); Liability Decision, at [paras. 49, 55-57](#), and [61\(a\)](#), AOR, Tab 3

- (i) Xela was not notified of the shareholder's meeting; and
- (ii) the Directors were not known to Xela.

Such conduct was an interference with the Receiver's exercise of Xela's shareholder rights in breach of 3(q) of the Appointment Order.⁷⁷ At the time Mr. Gutierrez swore the Declaration, he knew that the Receiver had exercised Xela's shareholder rights to reconstitute the Gabinvest Board.

- (c) When Mr. Gutierrez knowingly executed the Declaration in support of the criminal complaint, he was in breach of paragraph 9 of the Appointment Order, which provides that "no proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court."⁷⁸

58. The three elements of for civil contempt are well-settled and were correctly articulated by the motion judge.⁷⁹ She stated:

As the Supreme Court of Canada noted in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at paras. 32-35, three elements must be satisfied to establish civil contempt:

- a. The order must be clear and unequivocal;
- b. The defendant must have knowledge of the order;
- c. The defendant must have intentionally breached the order.

Each of these elements must be established beyond a reasonable doubt: *Carey*, at para. 32.

In assessing contempt allegations, courts should consider the totality of the evidence: *Sweda Farms Ltd v. Ontario Egg Producers*, 2011 ONSC 3650, 96 W.C.B. (2d) 88, at para. 75, *per* Lauwers J. (as he then was). The credibility of the witnesses is an important consideration, particularly where there are discrepancies on important points: see *Tribecca Finance*

⁷⁷ Liability Decision, at [paras. 49, 55-57](#), and [61 \(b\), \(c\)](#), AOR, Tab 3

⁷⁸ Liability Decision, at [paras. 31, 33, 50, 54](#), and [61\(d\)](#), AOR, Tab 3

⁷⁹ Liability Decision, at [paras. 41-62](#), AOR, Tab 3

Corporation v. Tabrizi, 2018 ONSC 486, at para. 29; *Jackson v. Jackson*, 2016 ONSC 3466, at para. 65.⁸⁰

59. Mr. Gutierrez argues that the motion judge’s reasons are inadequate. A review of the reasons does not support this argument. Each element of the test is analyzed and considered by the Court.

(A) *The Order is Clear and Unequivocal*

60. The Court analyzed both paragraphs 3 and 9 of the of Appointment Order and held that each were clear and unequivocal. She noted that, with respect to paragraph 3, “if the Receiver exercises its rights, no one else can do anything to interfere with the exercise of those rights.” With respect to paragraph 9 “the provision prohibits proceedings being taken against the Receiver and specifically contemplates that a person wishing to do so must apply to the court for leave or obtain the Receiver’s consent.”⁸¹

(i) *The Exclusivity Provision*

61. With respect to paragraph 3 of the Appointment Order, Mr. Gutierrez argues that, first, it must be established that the Receiver exercised a power pursuant to paragraph 3 and that Mr. Gutierrez must have “exercised that same power”, thereby infringing the exclusivity provision or, alternatively, Mr. Gutierrez interfered with the Receiver’s exercise of that power.⁸²

62. Mr. Gutierrez admits that the January 2020 shareholder resolution was an exercise of the Receiver’s powers under paragraphs 3(q) and (h) of the Appointment Order.⁸³

⁸⁰ Liability Decision, at [paras. 41-43](#), AOR, Tab 3

⁸¹ Liability Decision, at [paras. 49-50](#), AOR, Tab 3

⁸² FAP, at paras. 35-36

⁸³ FAP, at paras. 37

63. Mr. Gutierrez argues that it is not clear how “the making of the [D]eclaration in one’s personal capacity, or even in the capacity of a director, would constitute the exercise of shareholder rights.”⁸⁴ This submission ignores the language of the Declaration. Mr. Gutierrez was purporting to exercise his shareholder rights when in the Declaration he (i) identified himself acting in the capacity as Director – President of Xela; (ii) declared Xela is the sole shareholder of Gabinvest; and (iii) finally declared that Xela was not notified of the shareholders meeting. When he declared that Xela was not notified of the shareholders meeting and that the appointment of the Hatstone directors had “no value whatsoever”, he was purporting to exercise Xela’s shareholder rights.⁸⁵ This is consistent with the motion judge’s finding in paragraph 61(a) that “he signed documents on behalf of Xela contrary to the restriction in s. 3(h).⁸⁶

64. Mr. Gutierrez’ supplementary submission, that the December 2020 declaration was not an affidavit and was “at most a summary”, must be summarily rejected.⁸⁷ The motion judge considered and rejected this submission. He admitted that he signed the document⁸⁸, under penalty of perjury,⁸⁹ that the document was read to him,⁹⁰ and that he did not disagree with anything.⁹¹ He ratified, “accept[ed]”, and “sign[ed]” the Declaration.⁹² He cannot escape that he attested to all the

⁸⁴ FAP, at paras. 40

⁸⁵ Liability Decision, at [para. 25](#), AOR, Tab 3; Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

⁸⁶ Liability Decision, at [para. 61\(a\)](#), AOR, Tab 3

⁸⁷ FAP, para. 39

⁸⁸ June 2, 2022 Gutierrez Cross, Q. 449, RCOM, Tab 9, p. 77

⁸⁹ June 2, 2022 Gutierrez Cross, Q. 502, RCOM, Tab 9, p. 81

⁹⁰ June 2, 2022 Gutierrez Cross, Q. 475, 483, 490, RCOM, Tab 9, p. 78, 79, 80

⁹¹ June 2, 2022 Gutierrez Cross, Q. 486, RCOM, Tab 9, p. 79-80

⁹² Criminal Complaint and Declaration, RCOM, Tab 21, p. 222, Exhibit Book, Tab 14(C)

words in the Declaration under oath.⁹³ He cannot point “the finger of blame [at the notary]... in an effort to avoid responsibility for his own actions.”⁹⁴

(ii) *The Interference Provision*

65. Mr. Gutierrez submits that the provision in paragraph 3 of the Appointment Order, which provides that the Receiver shall be exclusively authorized to exercise powers “without interference from any other Person”, requires the Receiver to prove that Mr. Gutierrez obstructed or hindered the exercise of that power.⁹⁵

66. The Declaration is the only evidence in support of the criminal complaint. The motion judge found that Mr. Gutierrez signed the Declaration for the very purpose of supporting the criminal complaint.⁹⁶ It was filed for the purpose of challenging, undermining, and undoing the Receiver’s action in replacing the Board of Gabinvest (a shareholding of Xela).⁹⁷

67. The authority relied upon by Mr. Gutierrez does not stand for the proposition that an attempt to interfere is not sufficient or that the interference must be in respect of the exercise of the specific power.⁹⁸ The Appointment Order simply says “without interference.” “Interfere” has several definitions, which include: to take part or intervene in an activity without invitation or necessity, to intrude, or to meddle, among others.⁹⁹

⁹³ June 2, 2022 Gutierrez Cross, Q. 585, RCOM, Tab 9, p. 82

⁹⁴ *Crawford v. Standard Building Contractors Limited*, 2021 ONSC 5346, at [para. 140](#), AOR, Tab 16

⁹⁵ FAP, at para. 42

⁹⁶ Liability Reasons, at [para. 33](#), AOR, Tab 3

⁹⁷ Liability Decision, at [para. 61\(c\)](#), AOR, Tab 3

⁹⁸ *2198572 Ontario Inc. v. First Land (Overlea) Ltd.*, 2016 ONSC 5587, at [para. 22](#), AOR, Tab 17

⁹⁹ [Merriam-Webster dictionary](#); and [Cambridge dictionary](#)

68. It is beyond doubt that participating in bringing a criminal complaint against the Receiver's appointed Board members is an interference with the Receiver and an interference with the exercise of the power appointing those Board members.

69. In any event, the Declaration interfered with the Receiver's powers. As a result of the criminal complaint, the Receiver was not "able to exercise its authority as shareholder (or ultimate shareholder, in the case of LISA) of each company and obtain the information it require[d]" to fulfill its mandate.¹⁰⁰ While the Panamanian Registry did not ultimately reject the January 16, 2020 Gabinvest Resolution, the Receiver was not able to obtain information about alleged debts owed by Xela's subsidiaries to former Xela subsidiaries (which debts were relied on to execute the Reviewable Transactions that transferred Xela's value to the Trust for the benefit of Mr. Gutierrez' family)¹⁰¹ or to exercise control over the Avicola litigation (as contemplated by para. 4 of the Appointment Order).¹⁰²

(iii) Commencing a Proceeding without Leave

70. The motion judge found, as a fact, that Mr. Gutierrez:

was integrally involved in the bringing of a proceeding against the Receiver without seeking leave of this court or the Receiver's consent contrary to [para.] 9. The Declaration that he swore was the basis for the Criminal Complaint brought against the Receiver's representatives in Panama.¹⁰³

71. Mr. Gutierrez queries whether the Court was finding that he was guilty as principal or an aider of Mr. Hals.¹⁰⁴ Both Mr. Hals and Mr. Gutierrez were involved in bringing the proceeding

¹⁰⁰ Receiver's Fourth Report, s. 9.0(1), RCOM, Tab 15, p. 185, Exhibit Book, Tab 4

¹⁰¹ Receiver's Fourth Report, ss. 2.0 to 2.5, RCOM, Tab 15, p. 171-177, Exhibit Book, Tab 4

¹⁰² Appointment Order, at para. 4, RCOM, Tab 12, p. 131, Exhibit Book, Tab 2(F); May 30, 2022 Kofman Exam-in-Chief, QQ. 30-32, RCOM, Tab 1, p. 3

¹⁰³ Liability Decision, at [para. 61\(d\)](#), AOR, Tab 3

¹⁰⁴ FAP, at para. 49

against the Receiver. That Mr. Gutierrez was “integrally involved” in the bringing of the proceeding is more than sufficient to be a basis for a breach of paragraph 9 of the Appointment Order.

72. Mr. Gutierrez argues that the Declaration does not commence a proceeding in “any court or tribunal” because the proceeding was only at the investigation stage.¹⁰⁵ This argument also ignores Mr. Gutierrez’ own evidence. Both Mr. Gutierrez and Mr. O’Shea (of Hatstone) testified that the Panamanian prosecutor decided to accept the criminal complaint and open a file.¹⁰⁶ A proceeding was commenced, which was intended to start a criminal court proceeding. The criminal complaint is akin to the issuance of a statement of claim – it commences a proceeding in a Court. The evidence supports that Hatstone directors were caught up in a process, which was both stressful and serious.¹⁰⁷

73. Mr. Gutierrez also argues that the proceeding was not against the Receiver because the proceedings instead were brought against the Board members appointed by the Receiver. The Board members were agents of the Receiver, appointed pursuant to paragraph 3(d) of the Appointment Order in which the Receiver is authorized to engage agents to “assist with the exercise of the Receiver’s powers and duties, including without limitation those conferred by this Order.”¹⁰⁸ Again, this allegation is inconsistent with Mr. Gutierrez’ own position. After the contempt finding, Mr. Gutierrez relied on the evidence that Mr. Kofman gave instructions to change the Board to say that Mr. Kofman personally faced criminal liability in Panama for

¹⁰⁵ FAP, at para. 47

¹⁰⁶ May 4, 2022 O’Shea Affidavit, at paras. 9 and 12, RCOM, Tab 22, p. 267-268, Exhibit Book, Tab 14; May 31, 2022 Transcript of Hearing, Examination-in-Chief of Carl O’Shea, Q. 79-81, RCOM, Tab 3, p. 11

¹⁰⁷ Third Supplement to the Receiver’s Fourth Report, at s. 4.1(6), RCOM, Tab 25, p. 297, Exhibit Book, Tab 2(M)

¹⁰⁸ Appointment Order, at para. 3(d), RCOM, Tab 12, p. 129, Exhibit Book, Tab 2(F)

directing Hatstone to change Gabinvest’s Board.¹⁰⁹ In any event, any proceedings brought against the agents of the Receiver are proceedings against the Receiver, for which the Receiver is responsible.

74. Finally, Mr. Gutierrez further argues that “in the absence of recognition in foreign jurisdictions, the prohibition in para. 9 can only apply to the institution of proceedings against the Receiver in Canada.”¹¹⁰ For the reasons set out above on jurisdiction, this argument must be rejected. In brief, the Appointment Order does not limit the prohibition against the institution of proceedings to Canada.

75. Mr. Gutierrez has parsed each term of the Appointment Order and argues that, by way of technicalities, he has not breached it. However, civil contempt extends beyond the breach of a specific term in a court order. “It will be sufficient if the actions taken by the person alleged to be in contempt are designed to obstruct the course of justice by thwarting or attempting to thwart a court order.”¹¹¹ Based on the motion judge’s findings of fact and assessments of credibility, Mr. Gutierrez attempted to thwart the Appointment Order.

76. Mr. Gutierrez is trying to “hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and the administration of justice.”¹¹² This approach has been

¹⁰⁹ September 12, 2022 Notice of Motion of Juan Guillermo Gutierrez, at para. aa), Exhibit B to the Affidavit of Robert Kofman, sworn September 16, 2022, RCOM, Tab 26, p. 298, Exhibit Book, Tab 20

¹¹⁰ FAP, at para. 46

¹¹¹ *Horrey v. Douglas Management Corporation*, 1996 ABCA 13, [para. 14](#), AOR, Tab 18

¹¹² *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, 2011 ONSC 3650, at [para. 21](#), AOR, Tab 7, citing *Zhang v. Chau* (2003), 2003 CanLII 75292 (QC CA), at [para. 32](#), leave to appeal dismissed [2003] S.C.C.A. No. 419, AOR, Tab 19

rejected by this Court.¹¹³ Mr. Gutierrez seeks a granular parsing of the Appointment Order and the motion judge’s reasons. His request fails to accord with established case law for civil contempt.

(iii) *The Sentence Was not Unfit*

77. Mr. Gutierrez alleges that the motion judge erred in her application of the principles of sentencing and failed to consider a conditional or intermittent sentence.

78. Mr. Gutierrez filed no evidence whatsoever on the sentencing hearing.

79. The motion judge considered the evidence before her, the factors that she was required to consider, and exercised her discretion, imposing a just sentence. Her application of sentencing principles is an exercise of judicial discretion and is entitled to deference.¹¹⁴

80. Mr. Gutierrez bore the onus of establishing mitigating factors on a balance of probabilities.¹¹⁵ The motion judge considered the evidence and concluded that Mr. Gutierrez had not purged or attempted to purge his contempt.¹¹⁶

81. She noted that Mr. Gutierrez had written two letters to Mr. Hals asking him to discontinue the criminal complaint.¹¹⁷ However, she found, as a fact, that this was “not a genuine attempt to purge his contempt.”¹¹⁸ She was free to make this finding, based on her assessment of Mr. Gutierrez’ credibility and the totality of the evidence. This finding is reviewable on a standard of palpable and overriding error.¹¹⁹

¹¹³ *Chirico v. Szalas*, 2016 ONCA 586, at [para. 54](#), AOR, Tab 20

¹¹⁴ *Caledon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 807, at [para. 14](#), AOR, Tab 21; *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3 (“*Chiang (Re)*”), at [para. 85](#), AOR, Tab 22

¹¹⁵ *Chiang (Re)*, at [paras. 50-52](#), AOR, Tab 22

¹¹⁶ Sentencing Decision, at [para. 28](#), AOR, Tab 1

¹¹⁷ Sentencing Decision, at [para. 27-29](#), AOR, Tab 1

¹¹⁸ Sentencing Decision, at [para. 29](#), AOR, Tab 1

¹¹⁹ *Caledon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 807, at [para. 14](#), AOR, Tab 21

82. The motion judge also questioned the sincerity of the withdrawal of the Declaration as reflected by the surrounding circumstances:

- (a) it is uncontested that, after withdrawing the Declaration in February 2021, he proceeded to go to the Interview with the prosecutor, without alerting the Receiver or this Court;¹²⁰
- (b) at the Interview, he failed to tell the prosecutor’s representatives that he had withdrawn the Declaration or to ask that the prosecutor not to use it to support the criminal complaint.¹²¹ Mr. Gutierrez admitted during cross-examination that he did not advise the prosecutor that he wanted the criminal complaint withdrawn during the Interview;¹²²
- (c) he told the prosecutor’s office that he was a “judicial hostage” of the Ontario Court;¹²³ and
- (d) following the contempt finding, Mr. Gutierrez did not attempt to contact the public prosecutor to advise and reinforce that he had withdrawn the Declaration, that they should not rely on the Interview, and that he wished for the criminal complaint to be withdrawn.¹²⁴

83. In addition to finding that there was no genuine effort to purge his contempt, the motion judge considered the law that “blatant, deliberate, wilful and unrepentant” conduct is an

¹²⁰ Sentencing Decision, at para. [para. 31](#), AOR, Tab 1

¹²¹ Sentencing Decision, at para. [para. 31](#), AOR, Tab 1

¹²² June 2, 2022 Gutierrez Cross, Q. 871, 873, RCOM, Tab 9, p. 88-89; Liability Decision, at [para. 28](#), AOR, Tab 3

¹²³ Sentencing Decision, at [para. 31](#), AOR, Tab 1

¹²⁴ Sentencing Decision, at [para. 30](#), AOR, Tab 1

aggravating factor.¹²⁵ The motion judge found that Mr. Gutierrez acted intentionally, knowingly, unilaterally, and without any regard for the Court’s supervisory role over its appointed officer.¹²⁶

84. The gravity of Mr. Gutierrez’ conduct is one of the gravest offences that could be perpetrated against this Court. There are no cases in Ontario in which the contemnor has participated in a scheme to imprison a court officer for carrying out Ontario Court’s orders. The Receiver, an officer of the court, is “a person who is charged with upholding the law and administering the judicial system.”¹²⁷ By advancing criminal proceedings against an officer of this Court, Mr. Gutierrez’ conduct transcends the limits of a dispute between litigants and constitutes an affront to the administration of justice as a whole.¹²⁸

85. The motion judge also appropriately found that financial gain was an aggravating factor. Mr. Gutierrez interfered with the Receiver’s mandate to enforce the \$4.25 million Judgment against him and Xela.¹²⁹

86. After having heard and considered all of the evidence, including the evidence of Mr. Gutierrez, the Court made a finding of fact that Mr. Gutierrez’ conduct “demonstrates an astounding lack of respect for this Court.”¹³⁰ The motion judge considered the conduct over two years when making this finding:

¹²⁵ Sentencing Decision, at [para. 33](#), AOR, Tab 1; *Chiang (Trustee of) v. Chiang* (2007), 85 O.R. (3d) 425 (S.C.), at [para. 38](#), aff’d in relevant part *Chiang (Re)*, AOR, Tab 22; See also *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic* (2009), 308 D.L.R. (4th) 562 (Ont. S.C.), at [para. 32](#), AOR, Tab 23

¹²⁶ Sentencing Decision, at [para. 34](#), AOR, Tab 1

¹²⁷ *Re D’Angelo Estate*, 2010 ONSC 7244, [para. 30](#), AOR, Tab 24

¹²⁸ *B.C.G.E.U. v. British Columbia (Attorney General)* (“*B.C.G.E.U.*”), [1988] 2 S.C.R. 214, at [para. 41](#), AOR, Tab 25; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, AOR, Tab 26

¹²⁹ Sentencing Decision, at [para. 40](#), AOR, Tab 1, citing *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at [para. 94](#), AOR, Tab 27; *Astley v. Verdun*, 2013 ONSC 6734, at [para. 37](#), AOR, Tab 28; *Andersson v. Aquino*, 2019 ONSC 886, at [para. 33](#), AOR, Tab 29; Receiver’s Fourth Report, at ss. 2.1 to 3.2, RCOM, Tab 15, p. 173-178, Exhibit Book, Tab 4

¹³⁰ Sentencing Decision, at [para. 37](#), AOR, Tab 1

- (a) the Receiver replaced the Gabinvest Board in January, 2020
- (b) in March 2020, McEwen J. held that this was a proper exercise of the Receiver's authority;
- (c) nine months later, not having sought direction from the Court, Mr. Gutierrez swore the Declaration, purporting to act on behalf of Xela and directly challenging the Receiver's replacement of the Board;
- (d) in February 2021, McEwen J. ordered Mr. Gutierrez to withdraw the Declaration and take all steps within his control to have the criminal complaint withdrawn;
- (e) ten months later, Mr. Gutierrez voluntarily participated in the Interview before the Panamanian public prosecutor; and
- (f) Mr. Gutierrez failed to tell the prosecutor that he had withdrawn the Declaration or that he did not wish to pursue the criminal complaint. Instead, he stood by his position.

87. Mr. Gutierrez submits that the motion judge should have given him mitigating credit because the criminal process was no longer solely within his control.¹³¹ However, when it is impossible for the contemnor to purge their contempt because of their own misconduct, this can constitute an aggravating factor on sentencing.¹³² In *Manis v. Manis*, this Court upheld a six-month sentence for the breach of a single Court order. The contemnor was unable to remove and discharge a mortgage he had registered against his matrimonial home, as the Court had ordered him to do.

¹³¹ FAP, at paras. 55-57

¹³² *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, at [para. 88](#), AOR, Tab 22; *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (ONSC), at para. 56, AOR, Tab 30

This was not a mitigating factor because the inability to discharge the mortgage resulted from his own contemptuous conduct.¹³³

88. The motion judge's findings about the aggravating factors are entitled to deference.

89. The motion judge considered the other relevant sentencing principles, including proportionality, denunciation and deterrence, similar sentences, and the reasonableness of incarceration. The sentence of 30-days' imprisonment is less than other sentences imposed for less egregious conduct.¹³⁴

90. Mr. Gutierrez led no evidence about why a conditional or intermittent sentence was warranted or appropriate.¹³⁵ The burden was on him to prove mitigating circumstances on a balance of probabilities.¹³⁶

91. In any event, this Court has been clear that the mandatory sentencing provisions in the *Criminal Code* do not apply to a sentence for civil contempt. Rule 60.11 of the *Rules* provides the governing framework for a penalty for civil contempt.¹³⁷ The *Criminal Code* merely provides a set of guiding principles from which a sentencing court may, but need not, draw.¹³⁸

¹³³ *Manis v. Manis*, [2001] O.J. No. 3672 (C.A.), at [paras. 30-31](#), AOR, Tab 31

¹³⁴ 12 months' imprisonment for refusal to produce materials and attend for examinations: *Milligan v. Lech*, [2006] O.J. No. 4700 (C.A.), at [para. 3](#), AOR, Tab 32; 6 months' imprisonment for failure to produce relevant records: *Sussex Group Ltd v. Sylvester*, [2002 CanLII 27188](#) (ONSC), AOR, Tab 33; 6 months' imprisonment for interference with a court-appointed officer's mandate: *Sussex Group Ltd. v. Fangeat*, [\[2003\] O.J. No. 3348](#) (S.C.), AOR, Tab 30; 90 days' imprisonment for breach of an order to attend at an examination in aid of execution: *Cellupica v. Di Giulio*, [2011 ONSC 1715](#), AOR, Tab 34

¹³⁵ See *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic* (2009), 308 D.L.R. (4th) 562 (Ont. S.C.), at [para. 42](#), AOR, Tab 23

¹³⁶ *Chiang (Re)*, at [paras. 50-52](#), AOR, Tab 22

¹³⁷ *Astley v. Verdun*, 2015 ONCA 543, at [para. 3](#), AOR, Tab 38

¹³⁸ See *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156, at [para. 55](#), AOR, Tab 35; *Sussex Group Ltd. v. 3933938 Canada Inc.*, 2003 CanLII 49334 (ON SC), at [para. 17](#), AOR, Tab 36; *Mendlowitz & Associates Inc. v. Chiang*, 2007 CanLII 12203 (ON SC), at [para. 38](#), AOR, Tab 37; *Chiang (Re)*, 2009 ONCA 3, at [para. 51](#), AOR, Tab 22

92. Sentencing for civil contempt retains its civil character.¹³⁹ The discretion of the judge in civil contempt is governed by r. 60.11 and the common law.¹⁴⁰ The *Criminal Code* does not circumscribe the judge's discretion when fashioning an appropriate penalty.¹⁴¹

PART IV - ORDER REQUESTED

93. The Receiver requests an order dismissing this appeal in its entirety with costs on a full indemnity basis.

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



Monique J. Jilesen/Derek Knoke

¹³⁹ *Astley v. Verdun*, 2015 ONCA 543, at [para. 3](#), AOR, Tab 38; *Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v. Obregon*, 2022 ONCA 724, at [para. 9](#), AOR, Tab 39

¹⁴⁰ *R v. Gibbons*, 2012 SCC 28, at [paras. 14-15](#), AOR, Tab 15

¹⁴¹ *Astley v. Verdun*, 2015 ONCA 543, at [para. 3](#), AOR, Tab 38

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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

CERTIFICATE

I estimate that 1 hour will be needed for my oral argument of the appeal. An order under
subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 16th day of December, 2022.



Monique J. Jilesen/Derek Knoke

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)
2. *Margarita Castillo v. Xela Enterprises Ltd.*, [2015 ONSC 6671](#), aff'd [2016 ONSC 6088](#) (Div. Ct.)
3. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#)
4. *Margarita Castillo v. Xela Enterprises Ltd. et al.*, [2015 ONSC 7978](#)
5. *Housen v. Nikolaisen*, [2002 SCC 33](#)
6. *Boily v. Carleton Condominium Corporation 145*, [2014 ONCA 574](#)
7. *Sweda Farms Ltd. v. Ontario Egg Producers*, [2011 ONSC 3650](#), aff'd [2012 ONCA 337](#)
8. *Aloe-Gunnell v. Aloe et. al.*, [2015 ONSC 191](#)
9. *Borrelli, in his Capacity as Trustee of the SFC Litigation Trust v. Chan*, [2017 ONSC 1815](#)
10. *Google Inc. v. Equustek Solutions Inc.*, [2017 SCC 34](#)
11. *R v. Rattray*, [2008 ONCA 74](#)
12. *R. v. Greco* (2001), [155 O.A.C. 316](#) (C.A.)
13. *Dish Network L.L.C. v. Shava IPTV Network LLC*, [2021 ONSC 1582](#)
14. *R. v. Barra*, [2021 ONCA 568](#)
15. *R v. Gibbons*, [2012 SCC 28](#)
16. *Crawford v. Standard Building Contractors Limited*, [2021 ONSC 5346](#)
17. *2198572 Ontario Inc. v. First Land (Overlea) Ltd.*, [2016 ONSC 5587](#)
18. *Horrey v. Douglas Management Corporation*, [1996 ABCA 13](#)
19. *Zhang v. Chau* (2003), [2003 CanLII 75292](#) (QC CA), leave to appeal dismissed [2003] S.C.C.A. No. 419
20. *Chirico v. Szalas*, [2016 ONCA 586](#)
21. *Caledon (Town) v. Darzi Holdings Ltd.*, [2022 ONCA 807](#)
22. *Chiang (Trustee of) v. Chiang* (2007), [85 O.R. \(3d\) 425](#) (S.C.), aff'd in relevant part *Korea Data Systems Co. v. Chiang*, [2009 ONCA 3](#)
23. *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic* (2009), [308 D.L.R. \(4th\) 562](#) (Ont. S.C.)

24. *D'Angelo Estate*, [2010 ONSC 7244](#)
25. *B.C.G.E.U. v. British Columbia (Attorney General)*, [\[1988\] 2 S.C.R. 214](#)
26. *United Nurses of Alberta v. Alberta (Attorney General)*, [\[1992\] 1 S.C.R. 901](#)
27. *Business Development Bank of Canada v. Cavalon Inc.*, [2017 ONCA 663](#)
28. *Astley v. Verdun*, [2013 ONSC 6734](#), aff'd [2015 ONCA 543](#)
29. *Andersson v. Aquino*, [2019 ONSC 886](#)
30. *Sussex Group Ltd. v. Fangeat*, [\[2003\] O.J. No. 3348](#) (ONSC)
31. *Manis v. Manis*, [\[2001\] O.J. No. 3672](#) (C.A.)
32. *Milligan v. Lech*, [\[2006\] O.J. No. 4700](#) (C.A.)
33. *Sussex Group Ltd v. Sylvester*, [2002 CanLII 27188](#) (ONSC)
34. *Cellupica v. Di Giulio*, [2011 ONSC 1715](#)
35. *Trans Mountain Pipeline ULC v. Mivasair*, [2019 BCCA 156](#)
36. *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003 CanLII 49334](#) (ON SC)
37. *Mendlowitz & Associates Inc. v. Chiang*, [2007 CanLII 12203](#) (ON SC)
38. *Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v. Obregon*, [2022 ONCA 724](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Contempt Order

Motion for Contempt Order

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

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.11 (2).

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.11 (3).

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily. R.R.O. 1990, Reg. 194, r. 60.11 (4).

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned if the person fails to comply with a term of the order;
- (c) pay a fine;
- (d) do or refrain from doing an act;
- (e) pay such costs as are just; and
- (f) comply with any other order that the judge considers necessary,

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

...

Warrant of Committal

(7) An order under subrule (5) for imprisonment may be enforced by the issue of a warrant of committal (Form 60L). R.R.O. 1990, Reg. 194, r. 60.11 (7).

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Court File No. COA-22-CV-0206

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

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