

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

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.

**REPLY COSTS SUBMISSIONS OF THE RECEIVER
(Contempt Proceedings)**

November 10, 2022

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TO: **THE SERVICE LIST**

1. Mr. Gutierrez claims the Receiver misled the Court. The Receiver addresses these claims.
2. Mr. Gutierrez filed a 116-page affidavit on February 12, 2021 purporting to withdraw his Declaration.¹ Mr. Gutierrez relied on this affidavit as evidence that he had purged his contempt.² The Receiver has not claimed fees in relation to Mr. Gutierrez’s February 22, 2021 affidavit. The amounts claimed under Task 1 are limited to the time between when the Receiver learned of the Criminal Complaint (on January 25, 2021) and when the Receiver received Mr. Gutierrez’s February 12, 2021 affidavit. This time includes the motion record for contempt.
3. Disclosure was demanded by Mr. Gutierrez. The disclosure brief contained 34 tabs, each with several emails and attachments—not 34 emails. It totalled more than 500 pages. The delay was not entirely the Receiver’s fault. The motion was initially scheduled for June 2021. It was adjourned by the Court to October 2021, by which time the Receiver lacked funding. The time required to prepare the brief was not materially affected by the seven-month delay.
4. The Receiver was wholly successful on the motion. Mr. Gutierrez received 30 days’ imprisonment, which is a substantial penalty. The Court granted the relief sought in the Receiver’s notice of motion—being a finding of “contempt” and “imprisonment for such period” as is “just”.³
5. The Receiver has accurately articulated the principles for costs awards in contempt proceedings. The Receiver cited four cases⁴ where this Court awarded full indemnity costs. In all

¹ Mr. Gutierrez’s February 12, 2021 affidavit is at Appendix A to the Third Supplement to the Receiver’s Fourth Report dated March 1, 2021, Exhibit M to Robert Kofman’s May 4, 2022 affidavit (“**Kofman’s Affidavit**”), Supplementary Motion Record of the Receiver (“**SMR**”), Tab 1M, at p. A602

² Written Submissions of Mr. Gutierrez (liability), June 13, 2022, at paras. 12, 42, 95, at p. B-1-8, 18, and 39; Written Submissions of Mr. Gutierrez (sentencing), September 13, 2022, at paras. 35 and 42, at p. B-1-20, B-1-22

³ Notice of Motion of the Receiver (for contempt), dated February 9, 2021, at paras. 1(d) to 1(f), A11

⁴ *The Corporation of the Township of King v. 11547372 Canada Inc. et al*, [2022 ONSC 2261](#); *Bickram v. Bickram*, 2015 ONSC 705, at [paras. 71-74](#), 96; *Hobbs v. Hobbs*, 2008 CanLII 1947 (ON SC), at [para. 4](#); *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2007 CanLII 54953, at [paras. 17-28](#)

four, the Court ordered full indemnity costs for the breach of a single order in the face of flagrant contempt. Full indemnity costs have been awarded in numerous other contempt proceedings.⁵

6. Mr. Gutierrez complains that the number of hours claimed are unreasonable. The Receiver is not asking for a blank cheque. It is fair and reasonable that the Receiver spent comparatively more time preparing the evidence given it had the onus of proving contempt. In any event, Newbould J. awarded costs of \$889,858.21 against Mr. Gutierrez and Xela, following a two-day hearing in June 2015.⁶ Mr. Gutierrez knew or ought to have known that a five-day hearing could be as much or more than that seven-year-old costs award.

7. Mr. Gutierrez complains that the Receiver's affidavits contain little, if any, new evidence. This position is contrary to his position during the contempt proceedings, where Mr. Gutierrez repeatedly objected to evidence from the receivership. In any event, the Receiver required time to exercise significant care with the evidence, given the constant allegations against the Receiver—including, most recently, a threat made by Mr. Gutierrez's Ontario counsel to have Mr. Kofman himself held criminally liable in Panama with respect to Mr. Gutierrez's contemptuous conduct.⁷

8. The Receiver is not obtaining "double recovery" by a costs award. Xela currently has no revenue. The Receiver has advised that it is being funded by loans from the Applicant, pursuant to Receiver Certificates.⁸ Xela presently has no source of liquidity.

⁵ See for example *Sycor v. Kiaer et al.*, 2016 ONSC 7384, at [para. 29](#); *Royal Bank of Canada v. Yates Holdings Inc.*, 2007 CanLII 23601, at [paras. 15-16](#), aff'd [2008 ONCA 474](#); *9646035 Canada Limited et al., v. Kristine Jill Hill et al.*, 2018 ONSC 5986, at [paras. 2-4, 13](#); *Sweda Farms Ltd. v. Ontario Egg Producers*, 2012 ONSC 2240, at [para. 42](#); *Lepp v. The Regional Municipality of York*, [2021 ONSC 6695](#), leave ref'd [2022 ONSC 306](#)

⁶ December 21, 2015 Costs Order of Newbould J., Exhibit C to Kofman's Affidavit, SMR, Tab 1C, at p. A33

⁷ See the Notice of Motion of Mr. Gutierrez, dated September 12, 2022, at para. (aa), Third Supplementary Motion Record of the Receiver (Contempt), dated September 16, 2022, at p. A3226

⁸ Receiver's First Report (October 17, 2019), s. 6.0(4), Exhibit G to Kofman's Affidavit, SMR, Tab 1G, at p. A105

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of November, 2022.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *9646035 Canada Limited et al., v. Kristine Jill Hill et al.*, [2018 ONSC 5986](#)
2. *Bickram v. Bickram*, [2015 ONSC 705](#)
3. *College of Optometrists of Ontario v. SHS Optical Ltd.*, [2007 CanLII 54953](#)
4. *Hobbs v. Hobbs*, [2008 CanLII 1947](#) (ON SC)
5. *Lepp v. The Regional Municipality of York*, [2021 ONSC 6695](#), leave ref'd [2022 ONSC 306](#)
6. *Royal Bank of Canada v. Yates Holdings Inc.*, [2007 CanLII 23601](#), aff'd [2008 ONCA 474](#)
7. *Sweda Farms Ltd. v. Ontario Egg Producers*, [2012 ONSC 2240](#)
8. *Sycor v. Kiaer et al.*, [2016 ONSC 7384](#)
9. *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, [2022 ONSC 2261](#)

MARGARITA CASTILLO et al.
Plaintiffs

-and- XELA ENTERPRISE LTD. et al.
Defendants

Court File No. CV-11-9062-00CL

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PROCEEDING COMMENCED AT
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