

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

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

Respondents

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

**RESPONDING FACTUM OF THE RECEIVER  
(Motion for Leave to Appeal)**

April 28, 2022

**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 Receiver

**LENCZNER SLAGHT LLP**

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

Peter H. Griffin (19527Q)  
Tel: (416) 865-2921  
Email: pgriffin@litigate.com  
Monique J. Jilesen (43092W)  
Tel: (416) 865-2926  
Email: mjilesen@litigate.com  
Derek Knoke (75555E)  
Tel: (416) 865-3018  
Email: dknoke@litigate.com

Lawyers for the Receiver, KSV Restructuring Inc.

**TO: THE SERVICE LIST**

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

**RESPONDING FACTUM OF THE RECEIVER**

**PART I - INTRODUCTION**

1. The Moving Party, Juan Guillermo Gutierrez (“**Juan Guillermo**”), seeks leave to appeal an Order dated March 25, 2022. The March 25, 2022 Order requires the Moving Party to comply with an Order made on March 25, 2021. The Moving Party has not filed a factum or any further materials, despite being directed by this Court to deliver both by April 18, 2022.

2. There is no merit to the motion for leave to appeal. It is frivolous and an abuse of process.

3. KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Xela Enterprises Ltd. (“**Xela**”) files this factum in support of an order to dismiss the motion for leave to appeal (the “**Leave Motion**”) and to dismiss

the motion brought by Juan Guillermo for a stay pending leave to appeal (the “**Stay Motion**”) with costs on a full indemnity basis.

4. The Leave Motion and the Stay Motion are attempts to re-litigate issues that have previously been decided by the Superior Court and this Honourable Court. The Receiver submits that the motions are intended to further delay compliance with Court Orders. The Receiver asks that this Court dismiss the Leave Motion and the Stay Motion with full indemnity costs.

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

### **A. BACKGROUND**

#### *(i) The Parties*

5. Juan Guillermo is the President, sole common shareholder, and a director of Xela, which is a holding company for several direct and indirect, including wholly-owned subsidiaries in Central and South America.

6. Margarita Castillo (“**Margarita**”) is Juan Guillermo’s sister. Margarita commenced an application in the Ontario Superior Court of Justice against Xela, Juan Guillermo, and her now-deceased father, Juan Arturo Gutierrez (the “**Deceased**”). Judgment in Margarita’s favour was granted on October 28, 2015. The total amount due under the judgment debt was approximately \$5 million (the “**Judgment Debt**”).

7. ATS is a federally incorporated Canadian company with an office in Ontario. ATS’s directors and officers are Juan Guillermo’s two sons, who also live in Ontario. ATS was created in 2016 after Margarita obtained judgment against Juan Guillermo, Xela, and the Deceased. ATS is the custodian of Xela’s electronic records as a result of a sale of Xela’s servers to ATS in 2017.

(ii) *The Appointment Order*

8. Following an appeal of the Judgment Debt, Margarita pursued various enforcement actions. However, by early 2019, most of the Judgment Debt remained outstanding. Margarita brought a motion to appoint KSV as the Receiver of Xela which was granted in July 2019.

9. On July 5, 2019, KSV was appointed as the receiver and manager of Xela (the “**Appointment Order**”). Paragraph 6 of the Appointment Order requires all Xela’s current and former directors, officers, employees, and others (the “**Persons**”) to provide the Receiver with any:

books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the “**Records**”).<sup>1</sup>

(iii) *The August 28, 2020 Order – Imaging of Devices*

10. After significant efforts on the part of the Receiver to obtain Xela’s records from Juan Guillermo and others, on August 28, 2020, by way of Order (on consent and on notice to ATS), the Court authorized the Receiver to (among other things) forensically image Xela’s documents and devices (the “**August 2020 Order**”). The August 2020 Order prevented Juan Guillermo from asserting privilege against the Receiver in respect of the company’s documents and devices.<sup>2</sup>

11. After being unable to obtain the documents and devices from the August 2020 Order, the Receiver requested a case conference to compel ATS to allow the Receiver to image the servers

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<sup>1</sup> The Appointment Order is in the Compendium (the “**Compendium**”) to the Case Conference Memorandum of the Receiver, dated September 30, 2020 (“**Case Conference Memo**”). The Compendium is Exhibit B to the Affidavit of Grace Tsakas sworn April 4, 2022 (“**Tsakas Affidavit**”), Responding Motion Record of the Receiver dated April 6, 2022 (“**RMR**”), Tab 1B, p. 27, at para. 6

<sup>2</sup> The August 2020 Order is in the Compendium, Exhibit B to Tsakas Affidavit, RMR, Tab 1B, p. 43, at para. 14

(the “**Servers**”) and to compel Juan Guillermo to allow the Receiver to image his iPad and iPhone (the “**Devices**”).

12. On October 27, 2020, the Court made two additional Orders on consent. In the first Order, the Court authorized the Receiver’s IT agent to make a single disk image of the Servers in the possession of ATS (the “**October 2020 ATS Order**”). In the second Order, the Court authorized the Receiver’s IT agent to, within seven business days, make a single forensic image of Juan Guillermo’s Devices, after which the data thereon would be subject to a privilege protocol (the “**October 2020 Juan Guillermo Order**”).<sup>3</sup>

*(iv) Events Following the October 2020 ATS Order and the October 2020 Juan Guillermo Order*

13. Juan Guillermo did not allow the Receiver to image the Devices until January 5, 2021. When he did so, it was on the condition that the images be uploaded to a password-protected hard drive (the “**Hard Drive**”) to which Juan Guillermo has the password.<sup>4</sup>

14. On November 5, 2020, the Receiver imaged the Servers under ATS’s control, but did not access the data.<sup>5</sup>

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<sup>3</sup> The October 2020 ATS Order is in the Supplementary Brief of the Receiver re Orders and Endorsements dated April 28, 2022 (“**Supplemental Brief**”), Tab 1. The October 2020 Juan Guillermo Order is in the Supplementary Brief, Tab 2.

<sup>4</sup> See the endorsement of McEwen J. dated March 25, 2021, Supplementary Brief, Tab 3. See also the Fourth Report of the Receiver dated January 18, 2021 (the “**Fourth Report**”), Exhibit C to Tsakas Affidavit, RMR, Tab 1C, p. 123, at s. 6.1(3)(g), and the Second Supplement to the Fifth Report of the Receiver dated April 4, 2022 (the “**Second Supplement to the Fifth Report**”), Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1366, at s. 3.3(6)

<sup>5</sup> Fifth Report of the Receiver dated February 28, 2022 (the “**Fifth Report**”), Exhibit I to Tsakas Affidavit, RMR, Tab 1I, p. 1138, at s. 2(3)

(v) *The Receiver's January 2021 Motion Requiring Compliance with the October 2020 Orders*

15. On January 18, 2021, the Receiver brought a motion to, among other things, compel Juan Guillermo to give the Receiver the passwords to the Hard Drive and compel ATS to give the Receiver access to Juan Guillermo's emails on the Servers.

16. On March 25, 2021, McEwen J. granted an order (the "**March 2021 Order**"), requiring, among other things:

- (a) Juan Guillermo to immediately provide the Receiver and its IT agent ("**Epiq**") with all encryption codes, keys, passwords, or any other such information or knowledge necessary to unlock and access the data on the Hard Drive; and
- (b) ATS to, within 14 days, provide the Receiver and Epiq with an electronic copy of all emails sent or received by Juan Guillermo at any email address maintained on the Servers to the date of the Order, along with any encryption codes, keys, or passwords used to secure the emails.<sup>6</sup>

17. Juan Guillermo and ATS sought leave to appeal the March 2021 Order. One of the alleged grounds for seeking leave to appeal was a claim of privilege by Juan Guillermo over his emails on the Servers. The motion for leave to appeal was dismissed with costs by this Court on July 9, 2021.<sup>7</sup>

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<sup>6</sup> See the Order of McEwen J. dated March 25, 2021, Supplemental Brief, Tab 4. See also Fifth Report, Exhibit I to Tsakas Affidavit, RMR, Tab 1I, p. 1138, at s. 2(5)

<sup>7</sup> *Castillo v. Xela Enterprises Ltd.*, [2021 ONSC 4860](#), Book of Authorities of the Receiver ("**BOA**") at Tab 1; see also Fifth Report, Exhibit I to Tsakas Affidavit, RMR, Tab 1I, p. 1139, at s. 2(6)



(vi) *Juan Guillermo Promises Imminent Funding to Discharge the Receiver*

18. On July 21, 2021, the Receiver wrote to ATS's counsel to request Juan Guillermo's emails on their Servers. On the same day, the Receiver wrote to Juan Guillermo's counsel and asked for the passwords to the Hard Drive.<sup>8</sup>

19. On September 16, 2021, the day prior to a case conference to address compliance with the March 2021 Order, Juan Guillermo and ATS advised that he had secured funding sufficient to satisfy the Judgment Debt and costs of the receivership.<sup>9</sup>

20. While this was not the first time that Juan Guillermo had made a promise of imminent funding (he also made these promises in January 2020 and again in March 2021), for six months, compliance with the March 2021 Order was placed on the "backseat" pending the receipt of the funding which was said to be imminent.<sup>10</sup> However, after five court attendances, the funding had not arrived.<sup>11</sup>

(vii) *The Receiver's Further Efforts to Obtain Xela's Records*

21. On March 2, 2022, McEwen J. directed Juan Guillermo and ATS to comply "immediately" with the March 2021 Order.<sup>12</sup> In the days that followed, Juan Guillermo did not provide the passwords, and ATS did not provide the emails. The Receiver requested another case conference.<sup>13</sup>

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<sup>8</sup> Fifth Report, Exhibit I to Tsakas Affidavit, RMR, Tab 1I, p. 1139, at s. 2(7)

<sup>9</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1362, at s. 2(4)

<sup>10</sup> March 25, 2022 endorsement, Exhibit M to Tsakas Affidavit, RMR, Tab 1M, p. 1481

<sup>11</sup> The Receiver attended case conferences on September 17, 2021; December 2, 2021; January 21, 2022; February 7 and 17, 2022. See the Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1362, at s. 2(5)

<sup>12</sup> March 2, 2022 endorsement, Exhibit M to Tsakas Affidavit, RMR, Tab 1M, pp. 1408-1409

<sup>13</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1363, at s. 3.1(1)

22. On March 9, 2022, Juan Guillermo again asserted privilege over his emails on the Servers at a case conference.<sup>14</sup> Justice McEwen directed Juan Guillermo and ATS to begin the “smooth flow of documents” to the Receiver.<sup>15</sup> Despite several exchanges among counsel, no passwords to the Hard Drive were provided, and no emails on the Servers were produced. A further case conference was arranged.<sup>16</sup>

23. On March 17, 2022, the parties and the Receiver attended for their eighth case conference in six months.<sup>17</sup> In an effort to move the matter forward, the Receiver consented to the application of the privilege protocol in the October 2020 Juan Guillermo Order (which already applied to the images on the Hard Drive) to Juan Guillermo’s emails on the Servers.<sup>18</sup> Later that day, McEwen J. issued an endorsement, which said, among other things:

Forthwith, [Juan Guillermo] will provide the passwords to his devices to Epiq so the images can be fully accessed...;

ATS emails, contained on their servers, will also be provided to Epiq forthwith; [and]

Subsequently, the protocol contained in my [October 2020 Juan Guillermo] Order will be followed ....<sup>19</sup>

24. Despite several exchanges among counsel, there was disagreement about the process. In any event, no passwords and no emails were produced.<sup>20</sup> The Receiver emailed McEwen J. on

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<sup>14</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1363, at s. 3.2(1)

<sup>15</sup> March 9, 2022 endorsement, Exhibit M to Tsakas Affidavit, RMR, Tab 1M, pp. 1410-1412

<sup>16</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, pp. 1363-1365, at s. 3.2(2) to (12)

<sup>17</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1365, at s. 3.3(1)

<sup>18</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1365, at s. 3.3(1)

<sup>19</sup> March 17, 2022 endorsement, Exhibit M to Tsakas Affidavit, RMR, Tab 1M, pp. 1441-1443

<sup>20</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, pp. 1365-1367, at s. 3.3(2) to (10)

March 23, 2022 to update His Honour, as he had requested. Among other things, the Receiver recommended that:

- (a) Juan Guillermo attend via a videoconference call with Epiq (but with the Receiver absent) to provide the passwords to Epiq. In an effort to assuage Juan Guillermo's concerns, the Receiver agreed to have Epiq re-lock the Hard Drive after the data was uploaded; and
- (b) ATS provide Juan Guillermo's emails to Epiq using the secure file transfer protocol ("FTP").<sup>21</sup>

## **B. THE MARCH 25, 2022 ENDORSEMENT**

25. On the morning of March 25, 2022, Cambridge circulated a case conference brief and a notice of motion for injunctive relief for a case conference the same day, seeking in essence a stay of enforcement of the March 2021 Order.<sup>22</sup>

26. After hearing submissions from the parties, McEwen J. issued the March 25, 2022 endorsement which provided:<sup>23</sup>

- (a) The case conference was convened by His Honour;

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<sup>21</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1367, at s. 3.3(11)

<sup>22</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1368, at s. 4.1(1). Juan Guillermo also sought a stay of enforcement of the Judgment Debt in July 2017, which McEwen J. refused on July 6, 2017. See the Fifth Report, Exhibit I to Tsakas Affidavit, RMR, Tab 1I, p. 1150, at s. 4.2(3)(g)(ii)

<sup>23</sup> March 25, 2022 endorsement, Exhibit M to Tsakas Affidavit, RMR, Tab 1M, pp. 1474-1486

- (b) He considered Juan Guillermo’s notice of motion for injunctive relief. His Honour noted that it “generally speaking, repeats historical complaints” that Juan Guillermo has “raised against the Receiver”;
- (c) Justice McEwen was “not prepared to defer the access/productions any further”. He ordered Juan Guillermo and ATS to follow the recommended method of production as set out in the Receiver’s March 23, 2022 email to the Court;
- (d) In issuing this endorsement, McEwen J. noted, among other things, that:
  - (i) Epiq is accountable to the Court and its proposal is a “sensible and secure manner to secure the passwords and ATS’s documents”;
  - (ii) There is “no reasonable basis to suggest that” other parties “can somehow engage in ‘corporate espionage’ to secure the data that Epiq will secure. [Juan Guillermo], in some fashion or another, for some time has made these allegations without proof”;
  - (iii) The protocol contained in the October 2020 Juan Guillermo Order allows Juan Guillermo alone to review the documents and assert any objections to disclosure;
  - (iv) His Honour had allowed compliance with His Orders to take a “backseat” to see if funding might materialize. However, several months had passed. Further promises of funding were no basis to grant a stay of Orders made over a year ago. Moreover, a similar argument (of a proposed settlement offer) was made by Juan Guillermo at the March 2021 motion as a basis to

avoid production, which His Honour rejected because the offer “was no offer at all”; and

(v) His Honour had “made no findings of any misconduct against the Receiver” but expressed concerns about Juan Guillermo’s ongoing involvement in a criminal complaint filed in January 2021 against the Receiver’s Panamanian counsel (which is the subject of a contempt hearing in the Ontario Superior Court on May 30-31, 2022); and

(e) Justice McEwen directed Juan Guillermo and/or his counsel to attend a videoconference with Epiq by March 28, 2022 at 5 pm to provide Epiq with the passwords to the Hard Drive. ATS was directed to provide Epiq with Juan Guillermo’s emails using Epiq’s secure FTP by March 28, 2022 at 5 pm.

### **C. THE MOTION**

27. On March 28, 2022, Cambridge served the Stay Motion, which repeats a number of Juan Guillermo’s allegations in his March 25, 2022 case conference brief and notice of motion for injunctive relief.<sup>24</sup> On March 31, 2022 delivered the Leave Motion, seeking leave to appeal the March 25, 2022 endorsement.<sup>25</sup>

28. On April 8, 2022, after being advised by the Court that the Leave Motion would be expedited, counsel for Juan Guillermo advised the Divisional Court that they would serve their factum and complete motion materials by April 18, 2022.

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<sup>24</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1371, at s. 4.2(1)

<sup>25</sup> Second Supplement to the Fifth Report, Exhibit L to Tsakas Affidavit, RMR, Tab 1L, p. 1372, at s. 4.2(5)

29. As of April 28, 2022:

- (a) The Receiver has received no factum and no further materials from Juan Guillermo. Indeed, Juan Guillermo has not taken any steps to take out an order; and
- (b) Neither Juan Guillermo nor ATS have taken any steps to comply with the March 25, 2022 endorsement, notwithstanding there is no stay of the endorsement.

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

30. The March 25, 2022 endorsement is an interlocutory order. The test for leave to appeal an interlocutory order under Rule 62.02(4) is difficult to meet. The test is “onerous”.<sup>26</sup> It must be “applied strictly”.<sup>27</sup> “Leave should not be easily granted”.<sup>28</sup> The rule is a “rigorous screening mechanism that is designed to narrow the number of interlocutory decisions that qualify for appellate review”.<sup>29</sup>

31. Juan Guillermo must show that: (i) there is good reason to doubt the correctness of the decision; and (ii) the proposed appeal raises issues of significant public importance.

32. There is no good reason to doubt the correctness of the March 25, 2022 endorsement. Directing a party to comply with prior court orders (that have already been the subject of appeal) is not a reviewable error.

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<sup>26</sup> *Bell Expressv Limited Partnership v. Morgan* (2008), 67 C.P.C. (6th) 263, [2008 CanLII 63136](#) (Ont. Sup. Ct. J. (Div. Ct.)) at para. 1, BOA at Tab 2

<sup>27</sup> *Blake v. Blake*, 2019 ONSC 5724, at [para. 33](#), BOA at Tab 3

<sup>28</sup> *Belokon v. The Kyrgyz Republic*, 2016 ONSC 995, at [para. 9](#), BOA at Tab 4

<sup>29</sup> *Silver v. Imax Corp.*, 2013 ONSC 6751, at [para. 34](#) (internal quotation marks deleted), BOA at Tab 5; referring to *Lloyd v. Economical Mutual Insurance Co.* (2008), 168 A.C.W.S (3d) 1070, [2008 CanLII 38364](#) at para. 29 (Ont. Sup. Ct. J.), BOA at Tab 6

33. The proposed appeal does not raise issues of general public importance. To the contrary, the proposed appeal is an abuse of process. Juan Guillermo (and ATS) have failed to comply with Court orders for over a year. Their conduct and these Motions bring the administration of justice into disrepute and the rule of law into question.

34. Given the above, Juan Guillermo cannot meet the high bar for a stay pending appeal, which is set out in *RJR-MacDonald Inc v. Canada (Attorney General)*.<sup>30</sup>

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

35. The Receiver respectfully requests that this Court dismiss the Leave Motion and the Stay Motion with full indemnity costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 28<sup>th</sup> day of April, 2022.

per



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Monique J. Jilesen

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<sup>30</sup> *Closner v. Closner*, 2019 ONSC 703, at [paras. 2–3](#), BOA at Tab 7; citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [\[1994\] 1 S.C.R. 311](#) at 334 (para. 43), BOA, Tab 8

**LENCZNER SLAGHT LLP**

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

**Peter H. Griffin (19527Q)**

Tel: (416) 865-2921  
Fax: (416) 865-3558  
Email: pgriffin@litigate.com

**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

Lawyers for the Receiver, KSV Restructuring Inc.

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay St., 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 Receiver



## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Castillo v. Xela Enterprises Ltd.*, 2021 ONSC 4860
2. *Bell Expressvu Limited Partnership v. Morgan* (2008), 67 C.P.C. (6th) 263, 2008 CanLII 63136 (Ont. Sup. Ct. J. (Div. Ct.))
3. *Blake v. Blake*, 2019 ONSC 5724
4. *Belokon v. The Kyrgyz Republic*, 2016 ONSC 995
5. *Silver v. Imax Corp.*, 2013 ONSC 6751
6. *Lloyd v. Economical Mutual Insurance Co.* (2008), 168 A.C.W.S (3d) 1070, 2008 CanLII 38364 (Ont. Sup. Ct. J.)
7. *Closner v. Closner*, 2019 ONSC 703
8. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

## **SCHEDULE “B”**

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

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

#### **Grounds on Which Leave May Be Granted**

62.02(4) Leave to appeal from an interlocutory order shall not be granted unless,

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel’s opinion, leave to appeal should be granted.

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Applicant

-and- XELA ENTERPRISE LTD. et al.  
Respondents

Divisional Court File No.: 189/22  
Superior Court File No. CV-11-9062-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT  
TORONTO

**RESPONDING FACTUM OF THE RECEIVER  
(Motion for Leave to Appeal)**

**LENCZNER SLAGHT LLP**

Barristers

130 Adelaide Street West, Suite 2600

Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

**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 Receiver, KSV Restructuring Inc.