

**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.

**SUPPLEMENTARY CASE CONFERENCE MEMORANDUM
(Case Conference returnable September 27, 2022)**

September 27, 2022

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TO: **THE SERVICE LIST**

1. In his case conference memorandum, Mr. Gutierrez, through his counsel, continues to make unsupported allegations against the Receiver which should be withdrawn.

2. For two years Mr. Gutierrez has been under a Court ordered obligation to produce images of his personal Devices to the Receiver.

3. The October 27, 2020 Order provides that once the Receiver's IT consultant has the data:

8. THIS COURT ORDERS that, at the request of the Receiver [Epiq] will be **authorized** to load the data onto the Relativity document review platform (the "Platform") (emphasis added).

4. Mr. Gutierrez did not comply with the October 27, 2020 (and other orders) to provide images of his personal Devices until August 30, 2022.

5. Neither the Receiver nor Epiq was mandated by any Order or direction to load the data onto the Relativity document review platform. No undertaking was given at any time that the data would be uploaded to Relativity as soon as it was received. Nor did Epiq give Mr. Gutierrez' representatives any assurance as to the timing of the upload onto Relativity.

6. Mr. Gutierrez complains that the fact that the data was not uploaded to Relativity should have been raised at the September 13, 2022 case conference. Yet Mr. Gutierrez acknowledges that within an hour of the case conference, counsel for Gutierrez made an inquiry of the Receiver's counsel about when document review could take place and the Receiver's counsel immediately advised Mr. Gutierrez' counsel that:

Until this morning, we had not yet heard that all of the ATS data has yet been uploaded. We need to confirm that information with Epiq.

In any event, paragraph 8 of the October 27, 2020 Order provides that “at the request of the Receiver, [Epiq] will be authorized to load the data onto the Relativity document review platform.”

In light of the funding issue, the Receiver has not requested that Epiq load the data onto Relativity. As a result, the timetable starting in paragraph 10 of the October 27, 2020 Order has not yet begun to run. We will provide with notice if and when the data is loaded onto relativity in accordance with the Order.¹

7. This fact was transparently repeated in the Receiver’s case conference memorandum.
8. Notwithstanding that counsel for Mr. Gutierrez had this information on September 13, 2022 at 8:52 a.m., it was not raised with the Receiver or its counsel until 2:45 p.m., September 26, 2022, the day before this case conference.
9. Nevertheless, Mr. Gutierrez, through his counsel, suggests, without any computer forensic evidence or otherwise, that preserving, rather than uploading the data risks “malfeasance” by the Receiver.²
10. Mr. Gutierrez makes unsupported allegations of misconduct on the part of the Receiver and its counsel including that:
 - (a) counsel for the Receiver “declined to inform the Court” of the facts relating to whether the data had been uploaded;³
 - (b) KSV has stalled the review process completely;⁴

¹ September 13, 2022 email from Ms. Jilesen to Mr. McLeod, Tab 1 Gutierrez case conference brief

² Gutierrez case conference brief, para. 1

³ Gutierrez case conference brief, para. 3

⁴ Gutierrez case conference brief, para. 2

- (c) the Receiver's conduct has exposed Mr. Gutierrez' confidential information to risk;⁵
- (d) the Receiver lacks concern for Mr. Gutierrez rights;⁶
- (e) the Receiver engaged in misconduct in Panama;⁷
- (f) the Receiver intentionally misled Mr. Greenspan on August 30 (when the data was loaded) so that Epiq could duplicate the data without adequate safeguards;⁸
- (g) if it was not intentional, it was at least reckless on the part of the Receiver;⁹

11. Mr. Gutierrez, through counsel, makes allegations of misconduct against the Receiver and its counsel as a matter of rote.

12. The Supreme Court of Canada has said that challenges to opposing counsel's professional integrity must be made in good faith and have a reasonable basis. This must apply equally to allegations against the Receiver - an officer of this Court. The Supreme Court has emphasized the importance of a lawyer's reputation for integrity. The same is true for Receivers:

[85]...Allegations that impugn opposing counsel's integrity must not be made lightly. A reputation for integrity is a lawyer's most important professional asset. It generally takes a long time to build up and it can be lost overnight. Courts and legal commentators have emphasized the importance of a lawyer's reputation. In *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 118, Cory J. put it this way:

⁵ Gutierrez case conference brief, para. 2

⁶ Gutierrez case conference brief, para. 4

⁷ Gutierrez case conference brief, para. 9

⁸ Gutierrez case conference brief, para. 10

⁹ Gutierrez case conference brief, para. 10

The reputation of a lawyer is of paramount importance to clients, to other members of the profession, and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.

[86] Maintaining a reputation for practicing with integrity is a lifelong challenge. **Once sullied, a lawyer's reputation may never be fully restored. As such, allegations of prosecutorial misconduct must have a reasonable foundation. I agree with the Appeal Panel that anything less "gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions": para. 235. The consequences for the opposing lawyer's reputation are simply too severe to require anything less than a reasonable basis for allegations impugning his or her integrity.** (emphasis added).¹⁰

13. These last minute, unsupported and baseless allegations are uncivil. They should be withdrawn. They should not be countenanced by this Court. They are the very sort of "baseless allegations of impropriety" that can undermine the justice system as a whole by "diminishing the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism."¹¹

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September 2022.



Monique J. Jilesen

¹⁰ *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [\[2018\] 1 SCR 772, at paras 85-86](#)

¹¹ *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [\[2018\] 1 SCR 772, at para 67](#)

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

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PROCEEDING COMMENCED AT TORONTO

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