

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.**

**SUPPLEMENTAL FACTUM OF THE APPELLANT, JUAN GUILLERMO
GUTIERREZ**

April 3, 2023

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PART I: STATEMENT OF THE CASE

1. Pursuant to the endorsement of Justice Zarnett dated March 28, 2023, this supplemental factum addresses the appeal of the costs award made on November 29, 2022. The Appellant seeks leave to appeal the costs award and, if leave is granted, appeals against the costs award.

PART II: STATEMENT OF THE FACTS

2. The Receiver initially brought this contempt motion in February of 2021, seeking an order declaring the Appellant in contempt of several orders of Justice McEwen in relation to the Appellant's conduct in swearing a declaration in Guatemala for use in a criminal proceeding in

Panama.¹ The contempt motion was combined with a request for Justice McEwen to direct the Appellant to withdraw his sworn declaration.² The Appellant did so, and provided a sworn affidavit confirming that he had directed Mr. Hals, Mr. De Leon, and the prosecutor to withdraw and not rely upon his declaration.³ The affidavit itself was four paragraphs long, with six exhibits (five of which were virtually identical).⁴ Disclosure on the contempt motion was provided on May 4, 2022, with additional emails provided in disclosure on May 17, 2022.⁵ Evidence was heard on May 30, 31, and the morning of June 2, 2022.⁶ After a half day of submissions on June 16, the learned trial judge rendered her decision on June 29, 2022. Sentencing proceeded by way of written and oral submissions, which were heard on the morning of September 22, 2022.⁷ The learned trial judge rendered her decision on sentence on October 17, 2022.

PART III: ISSUES AND LAW

3. The test for leave to appeal a costs award is strict: leave will only be granted in obvious cases “where there are strong grounds upon which the appellate court could find that the judge erred in exercising his discretion”.⁸ Where leave is granted, a costs award will only be set aside “if the trial judge has made an error in principle or if the costs award is plainly wrong”.⁹ Leave may be granted where the quantum of the costs award is so significant that its reasonableness is questionable,¹⁰ where there is “no basis” for an award of costs on a substantial or full indemnity

¹ Notice of Application, *Appeal Book and Compendium*, Tab 10.

² *Ibid.*

³ Exhibit 2, Affidavit of Robert Kofman, Exhibit M, *Exhibit Book*, Tab 2, Caselines p. A8268.

⁴ *Ibid.*

⁵ Exhibit 2, Affidavit of Robert Kofman, *Exhibit Book*, Tab 2; Exhibit 14, Affidavit of Carl O’Shea, *Exhibit Book*, Tab 14.

⁶ Transcripts of Evidence, *Exhibit Book*, Tabs 27-29.

⁷ Transcript of Submissions on Sentence, *Exhibit Book*, Tab 30.

⁸ *Carroll v. McEwen*, [2018 ONCA 902](#) at para. 58.

⁹ *Hamilton v. Open Window Bakery Ltd.*, [2004 SCC 9](#) at para. 27.

¹⁰ As in *The British Society of Audiology v. B.C. Decker Inc.*, [2010 ONCA 543](#) at para. 25, where the quantum of the costs award exceeded the amount of damages sought.

scale,¹¹ or where there are otherwise strong grounds to believe the trial judge erred in exercising his or her discretion.

4. It is respectfully submitted that this standard is amply met, as the costs award is rooted in factual and legal errors. With respect to factual errors, the learned trial judge held that it was reasonable for the Appellant to expect the costs award of a “five-day hearing” to be significant, given that Justice Newbould had awarded \$899,858.21 in costs against the defendants for a two-day hearing in the underlying judgment being enforced by the Receiver.¹² This comparison is factually and legally inapt. On a factual basis, the underlying judgment was not the product of a simple two-day hearing. It was the culmination of close to five years of litigation, which included nineteen days of cross-examinations; six attendances to deal with refusals to produce documents; several other case conferences; a contested motion for directions; and close to 400 hours spent by counsel for the applicant to prepare the initial statement of claim.¹³ Justice Newbould found that, in light of all of all of this work over the course of close to five years, the applicant was entitled to costs of \$500,000.¹⁴ The additional costs related to disbursements, including close to \$350,000 for four years of work of a valuation expert retained by the applicant.¹⁵

5. By contrast, the Receiver here sought costs of \$628,485.23 for work relating to two days of evidence and two half days of submissions on a contempt hearing. There were no discoveries or cross-examinations prior to the hearing, no interim motions, no experts, hundreds of hours were not expended preparing a complex statement of claim – this was a simple contempt motion with *viva voce* evidence from three witnesses. The Receiver’s claimed fees in this motion exceeded the

¹¹ As in *Krieser v. Garber*, [2020 ONCA 699](#) at para. [135](#), dealing with substantial indemnity costs.

¹² Reasons for Decision on Costs, *Appeal Book and Compendium*, Tab 9, para. 15.

¹³ *Castillo v. Xela Enterprises et al.*, [2015 ONSC 7978](#) at paras. [5](#), [8](#).

¹⁴ *Ibid* at para. [17](#).

¹⁵ *Ibid* at paras. [18-20](#).

amount claimed by Ms. Castillo’s counsel following five years of hotly contested litigation. The learned trial judge accordingly erred by using the costs award in the underlying motion as an anchor to assess the reasonableness of the Appellant’s belief as to the quantum of the costs award.

6. Further, the learned trial judge erred in fact in holding that “both sides delivered several affidavits with voluminous exhibits” as a reason to justify the elevated costs award against the Appellant.¹⁶ This is incorrect. The Appellant did not deliver or file any affidavit evidence at all, let alone any affidavit evidence with voluminous exhibits. It was only the Receiver that filed that evidence; much of which was entirely irrelevant to the question of whether the Appellant’s December 3, 2020 declaration was in breach of the Appointment Order.¹⁷

7. With respect to legal principles, the learned trial judge gave no reasons as to why the presumption of substantial indemnity costs in contempt proceedings ought to be displaced.¹⁸ As Justice Goldstein stated in *Astley v. Verdun*, “there is a rebuttable presumption that substantial indemnity costs are appropriate in a contempt of court case”.¹⁹ However, rebutting the presumption results in an award of *partial* indemnity costs, not full indemnity costs.²⁰ The presumption of substantial indemnity costs already presumes that the accused has intentionally breached a court order in a wilful or flagrant manner,²¹ as the presumption may be rebutted where the contemptuous conduct is at the “lower end of the ‘flagrant and wilful’ scale”.²² Full indemnity costs may only be awarded in contempt cases in “rare and exceptional cases”,²³ such as where the accused’s conduct

¹⁶ Reasons for Decision on Costs, *Appeal Book and Compendium*, Tab 9, para. 16.

¹⁷ For example, despite the fact that the allegedly contemptuous conduct occurred in December of 2020, the Receiver filed close to 1000 pages of documents relating to events in the receivership prior to December of 2020: see Exhibit 2, Affidavit of Robert Kofman, Exhibits A-K, *Exhibit Book*, Tab 2.

¹⁸ *Astley v. Verdun*, [2013 ONSC 6734](#) at para. [52](#).

¹⁹ *Ibid* at para. [57](#).

²⁰ *Ibid*.

²¹ See, e.g., *Canadian National Railway Company v. Plain*, [2013 ONSC 4806](#) at para. [28](#).

²² *Astley*, *supra* at para. [57](#).

²³ *Net Connect Installation Inc. v. Mobile Zone Inc.*, [2017 ONCA 766](#) at para. [9](#).

intentionally delays the contempt proceeding,²⁴ or where the accused deliberately fabricates evidence.²⁵ The learned trial judge provided no reasons as to why the Appellant’s conduct was such a “rare and exceptional case”, especially given the evidence that he had immediately complied with Justice McEwen’s direction to withdraw his affidavit.

8. Finally, the learned trial judge held that the elevated costs award was justified in light of the Appellant’s vigorous defence of the contempt charge at trial, and in light of the Receiver’s elevated standard of proof on a quasi-criminal charge.²⁶ It is respectfully submitted that these considerations are legally misguided. The Appellant is constitutionally entitled to make full answer and defence to a criminal charge; this constitutional right should not be utilized to penalize him with an elevated costs award. Further, the Receiver’s standard of proof should not result in an increased costs award: the proof of a fact beyond a reasonable doubt should not cost significantly more than the proof of that same fact on a balance of probabilities.

PART IV: ORDER REQUESTED

9. It is respectfully requested that leave to appeal be granted and that the costs award be reduced to an appropriate amount on a substantial indemnity scale.

DATED at Toronto, this 3rd day of April, 2023.



Brian H. Greenspan/Michelle M. Biddulph
Counsel for the Appellant

²⁴ As in *The Corporation of the Township of King v. 11547372 Canada Inc. et al*, [2022 ONSC 2261](#), where the accused repeatedly requested adjournments, forcing the applicant to file close to 60 CaseLines documents in order to continually update its contempt materials. The accused also breached the order in question three times *after* the finding of contempt.

²⁵ As in *Net Connect, supra*.

²⁶ Reasons for Decision on Costs, *Appeal Book and Compendium*, Tab 9, paras. 18-19.

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CERTIFICATE

The Appellant estimates that 90 minutes will be required in total for his oral argument. An order under subrule 69.09(2) is not required.

DATED at the City of Toronto, this 3rd day of April, 2023.



Brian H. Greenspan/Michelle M. Biddulph
Counsel to the Appellant

SCHEDULE A**AUTHORITIES CITED**

Carroll v. McEwen, 2018 ONCA 902

Hamilton v. Open Window Bakery Ltd., 2004 SCC 9

The British Society of Audiology v. B.C. Decker Inc., 2010 ONCA 543

Krieser v. Garber, 2020 ONCA 699

Castillo v. Xela Enterprises et al., 2015 ONSC 7978

Astley v. Verdun, 2013 ONSC 6734

Canadian National Railway Company v. Plain, 2013 ONSC 4806

Net Connect Installation Inc. v. Mobile Zone Inc., 2017 ONCA 766

The Corporation of the Township of King v. 11547372 Canada Inc. et al, 2022 ONSC 2261

SCHEDULE B

n/a