

**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 RESPONDENT/RECEIVER**

April 18, 2023

**LENCZNER SLAGHT LLP**

Barristers

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

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

**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 Respondent, the Receiver

TO: **THE SERVICE LIST**

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**SUPPLEMENTAL FACTUM OF THE RESPONDENT, THE RECEIVER**

**PART I - OVERVIEW**

1. The Appellant’s request for leave to appeal the costs award of the Motion Judge (the “**Costs Award**”) should be denied. If leave is granted, the appeal of costs should be dismissed.
2. The Appellant identifies neither an error in principle nor any basis upon which this Court may conclude that the Motion Judge was clearly wrong.
3. The contempt proceedings involved several thousands of pages of affidavit evidence, hundreds of pages of extra disclosure provided by the Receiver at the Appellant’s request, five days of *viva voce* evidence and submissions, and two other attendances—all in the context of two vigorously contested phases (liability and penalty) of the contempt motion.
4. The Motion Judge awarded full indemnity costs but in an amount less than that sought by the Receiver. The total award of \$563,485 included the costs of the Receiver (a court-appointed officer) and its counsel. The Motion Judge exercised her discretion based on the governing

principles with the full benefit of the extensive evidentiary record and submissions. This Court should not interfere with Her Honour’s exercise of discretion.

## PART II - ISSUES AND LAW

5. Leave to appeal costs should only be granted where there are “strong grounds upon which the appellate court could find that the judge erred in exercising [their] discretion”.<sup>1</sup>

6. An appellate court should not interfere with a costs award unless the judge “has made an error in principle or if the costs award is plainly wrong.”<sup>2</sup> No such errors were made in this case.

### A. SCALE OF COSTS

7. The Appellant alleges that the Motion Judge “gave no reasons” for awarding full indemnity costs rather than substantial indemnity costs.<sup>3</sup> This ignores the Motion Judge’s reasons and the caselaw cited by the Motion Judge—both of which amply support a full indemnity costs award.

8. The Motion Judge was correct when she said that, in contempt proceedings, costs are generally payable on a full or substantial indemnity basis.<sup>4</sup> Her Honour cited seven cases from Ontario in which full indemnity costs were awarded.<sup>5</sup>

9. *Net Connect Installation Inc. v. Mobile Zone Inc.* does not, as the Appellant asserts, stand for the proposition that full indemnity costs may only be awarded in contempt proceedings in rare and exceptional cases.<sup>6</sup> That was a breach of contract case—not a contempt case.

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<sup>1</sup> *Hobbs v. Hobbs*, 2008 ONCA 598, at para. [32](#)

<sup>2</sup> *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, at para. [27](#)

<sup>3</sup> Supplemental Factum of the Appellant (“SAF”), at para. 7

<sup>4</sup> *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 6696 (“**Costs Reasons**”), at para. [6](#), citing *Bickram v. Bickram*, 2015 ONSC 705 (“**Bickram**”), at para. [71](#); *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, 2022 ONSC 2261 (“**Township of King**”), at para. [27](#); *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, 2012 ONSC 2240 (“**Sweda Farms**”), at para. [10](#)

<sup>5</sup> Cost Reasons, at paras. [6-7](#); *Bickram*, at para. [71](#); *Township of King*, at para. [27](#); *Sweda Farms*, at para. [10](#); *Royal Bank of Canada v. Yates Holdings Inc.* (2007), 2007 CanLII 23601 (ON SC), 33 C.B.R. (5th) 268 (Ont. S.C.), at para. [14](#), aff’d, [2008 ONCA 474](#); *Sycor v. Kiaer et al.*, 2016 ONSC 7384, at para. [29](#); *Lepp v. The Regional Municipality of York*, [2021 ONSC 6695](#), leave ref’d [2022 ONSC 306](#); *9646035 Canada Limited et al. v. Kristine Jill Hill et al.*, [2018 ONSC 5986](#)

<sup>6</sup> SAF, at para. 7

10. The Motion Judge correctly noted that “the moving party [in contempt proceedings] should not have to bear the financial burden of the contempt.”<sup>7</sup>

11. The Motion Judge considered the seriousness of the conduct and its effect on the administration of justice, which is entirely appropriate when determining the scale of costs in contempt proceedings.<sup>8</sup> In this case, the Motion Judge found, as a fact, that the Appellant knowingly and deliberately interfered with a court officer, exposing their representatives to potential criminal proceedings.<sup>9</sup> The Appellant’s “conduct was egregious and highly disrespectful of this court and its appointed officer.”<sup>10</sup>

12. Finally, the Motion Judge found that the Appellant perpetuated his contemptuous conduct when he attended an interview with the Panamanian Public Prosecutor in December 2021 and that the Appellant was continuing to threaten the Receiver.<sup>11</sup> Such a deliberate course of conduct is worthy of full indemnity costs—notwithstanding that the proceedings concern a finding of contempt with respect to a single order.<sup>12</sup>

## **B. QUANTUM OF COSTS**

13. The Appellant argues that the quantum of the Costs Award is unreasonable.<sup>13</sup> The sole case upon which the Appellant relies is not analogous. That case involved a claim for damages arising from a contract dispute brought under the simplified procedure.<sup>14</sup> The quantum of that costs award

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<sup>7</sup> Costs Reasons, at para. [6](#); see *Andersson v. Aquino*, 2019 ONSC 2751, at para. [23](#); *Township of King*, at para. [45](#)

<sup>8</sup> Costs Reasons, at para. [8](#); *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. [104](#)

<sup>9</sup> See the Motion Judge’s finding at the liability hearing that the Appellant “knew exactly what he was doing when he signed the Declaration”: *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006, at para. [33](#). Also, see the Motion Judge’s finding at the penalty hearing that the Appellant’s “wrongdoing was extremely serious”: *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594, at para. [24](#)

<sup>10</sup> Costs Reasons, at para. [13](#)

<sup>11</sup> Costs Reasons, at para. [11](#). The Appellant’s Ontario counsel threatened to have Mr. Kofman himself held criminally liable in Panama with respect to the Appellant’s contemptuous conduct. See the Notice of Motion of the Appellant, dated September 12, 2022, at para. (aa), RCOM, Tab 26, Exhibit B, at p. 310

<sup>12</sup> *Township of King*, at paras. [2](#) and [27](#)

<sup>13</sup> SAF, at para. 3

<sup>14</sup> *The British Society of Audiology v. B.C. Decker Inc.*, [2010 ONCA 543](#)

was unreasonable because it exceeded the damages awarded. It has no application to the scale or quantum of costs in contempt proceedings.

14. The Appellant alleges that the Motion Judge committed a factual error by comparing the contempt proceedings at issue in this appeal to the 2015 costs award of Newbould J.<sup>15</sup> The Motion Judge's reference to the 2015 costs award was a proper consideration of the relative complexity and importance of the issues, pursuant to r. 57.01.

15. The proceeding was essentially a short trial which proceeded through the pleadings, discovery, and trial stage over the course of months. The record "was large".<sup>16</sup> The Receiver delivered two affidavits making full disclosure of the allegations against the Appellant. The Appellant demanded further disclosure. In response, the Receiver reviewed nearly three years of emails and documents to conduct a privilege review. The Receiver provided hundreds of pages of disclosure, which is in addition to the evidence contained in the Appellant's 4,207-page Amended Exhibit Book.

16. The Appellant insisted that the Receiver provide *viva voce* evidence. The Receiver appropriately prepared its two witnesses for examinations in chief and cross-examinations. The Appellant unexpectedly testified, which extended the hearing and required significant preparation.

17. In total, there were five days of evidence and submissions. The Receiver prepared two more affidavits for the penalty hearing. The parties attended two other times before Conway J. (a case conference and Her Honour's reading of the penalty decision).

18. To the extent the Motion Judge considered any of the evidence irrelevant, she discounted the Receiver's costs.<sup>17</sup>

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<sup>15</sup> SAF, at paras. 4-5

<sup>16</sup> Costs Reasons, at para. [16](#)

<sup>17</sup> Costs Reasons, at para. [21](#)

19. The costs sought were the aggregate of the costs of the Receiver and its counsel. This Court has refused to interfere with costs awarded to a court officer (Deloitte) who attended trial, even though the court officer was represented by counsel.<sup>18</sup>

20. The Appellant suggests that the Motion Judge penalized the Appellant for his vigorous defence and the Receiver's elevated standard of proof.<sup>19</sup> That is not what the Motion Judge did. She relied on the elevated standard of proof as a basis for why the Appellant could have reasonably expected "that the Receiver's fees would significantly exceed those of his own counsel."<sup>20</sup>

21. While costs were high, there is no legal principle that "allows [a judge] to be offended by a raw number."<sup>21</sup> There is no basis to condemn the market-based hourly rates (which hourly rates have been approved by the Court) of the Receiver and its counsel, who appropriately staffed and worked the file.

### **PART III - ORDER REQUESTED**

22. The Receiver requests that this Court dismiss the Appellant's request for leave to appeal the Costs Award or, if leave is granted, the appeal of the Costs Award be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 18th day of April, 2023.



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Monique J. Jilesen

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<sup>18</sup> *First National Financial GP Corporation v. Golden*, 2022 ONCA 621, at paras. [5](#), [74-76](#)

<sup>19</sup> SAF, at para. 8

<sup>20</sup> Costs Reasons, at para. [18](#)

<sup>21</sup> *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, at para. [145](#)



**LENCZNER SLAGHT LLP**

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

**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

**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 Respondent, the Receiver

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *9646035 Canada Limited et al. v. Kristine Jill Hill et al.*, [2018 ONSC 5986](#)
2. *Andersson v. Aquino*, [2019 ONSC 2751](#)
3. *Bickram v. Bickram*, [2015 ONSC 705](#)
4. *Business Development Bank of Canada v. Cavalon Inc.*, [2017 ONCA 663](#)
5. *Canadian Thermo Windows Inc. v. Seangio*, [2021 ONSC 6555](#)
6. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 4006](#)
7. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 5594](#)
8. *Castillo v. Xela Enterprises Ltd.*, [2022 ONSC 6696](#)
9. *First National Financial GP Corporation v. Golden*, [2022 ONCA 621](#)
10. *Hamilton v. Open Window Bakery Ltd.*, [2004 SCC 9](#)
11. *Hobbs v. Hobbs*, [2008 ONCA 598](#)
12. *Lepp v. The Regional Municipality of York*, [2021 ONSC 6695](#), leave ref'd [2022 ONSC 306](#)
13. *Royal Bank of Canada v. Yates Holdings Inc.* (2007), [2007 CanLII 23601](#) (ON SC), 33 C.B.R. (5th) 268 (Ont. S.C.) aff'd, [2008 ONCA 474](#)
14. *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, [2012 ONSC 2240](#)
15. *Sycor v. Kiaer et al.*, [2016 ONSC 7384](#)
16. *The British Society of Audiology v. B.C. Decker Inc.*, [2010 ONCA 543](#)
17. *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, [2022 ONSC 2261](#)

## SCHEDULE "B"

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

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

##### General Principles

##### Factors in Discretion

**57.01 (1)** In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

...

## **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).

[...]

### **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).

MARGARITA CASTILLO  
Applicant

-and-

XELA ENTERPRISES LTD. et al.  
Respondents

Court File No. COA-22-CV-0206

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PROCEEDING COMMENCED AT TORONTO

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Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

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Fax: (416) 865-2876

Email: [dknoke@litigate.com](mailto:dknoke@litigate.com)

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Kyle Plunkett

Email: [kplunkett@airdberlis.com](mailto:kplunkett@airdberlis.com)

Sam Babe

Email: [sbabe@airdberlis.com](mailto:sbabe@airdberlis.com)

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Fax: (416) 863-1515

Lawyers for the Respondent, the Receiver

Email for parties served: TO THE SERVICE LIST