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# Contempt on the Commercial List

Court orders must be obeyed. If they are not, the consequences can be severe. In *Castillo v Xela Enterprises Ltd*, the Ontario Court of Appeal imposed a 30-day prison sentence following a finding of civil contempt in a Commercial List matter. The Court emphasized the need for the “full co-operation” of the parties for the Commercial List to operate efficiently and effectively.

## Background

The Court of Appeal’s decision is the culmination of one issue in a long-running Commercial List matter. In 2019, a Commercial List judge appointed KSV Restructuring Inc. as the receiver of Xela Enterprises Ltd., a privately-owned Ontario holding company.

The Appointment Order gave the Receiver the exclusive authority to exercise Xela’s shareholder rights. The Receiver exercised Xela’s rights as the sole shareholder of Gabinvest S.A., a Panamanian company, by replacing its existing directors with the Receiver’s representatives. One of the removed directors was the brother-in-law of the appellant, Juan Guillermo Gutierrez.

Mr. Gutierrez’ brother-in-law filed a criminal complaint against the Receiver’s Panamanian representatives. The sole evidence filed in the criminal complaint was a declaration sworn by Mr. Gutierrez while he was in Guatemala.

Mr. Gutierrez later attended the Panamanian consulate in Toronto for an interview with the Panamanian public prosecutor’s representative, where he claimed he was a “judicial hostage”.

## The Superior Court Decisions

The Receiver brought a contempt motion against Mr. Gutierrez for swearing the declaration in support of the criminal complaint.

On June 29, 2022, Justice Conway of the Commercial List found Mr. Gutierrez to be in civil contempt of the Appointment Order. Her Honour concluded that Mr. Gutierrez “knew exactly what he was doing when he signed the Declaration”, including that it would be used to initiate a criminal complaint against the Receiver’s appointed directors.

On October 17, 2022, Justice Conway sentenced Mr. Gutierrez to 30 days in prison. The contemptuous conduct was “blatant, deliberate, wilful and unrepentant.” Mr. Gutierrez demonstrated

an astounding lack of respect for the Court and its process.

On November 29, 2022, Justice Conway granted the Receiver's costs on a full indemnity basis in the amount of \$563,485. This costs order included the professional fees of the Receiver itself – not just its counsel.

### **The Appeal**

Mr. Gutierrez appealed Justice Conway's order to the Court of Appeal for Ontario.

Writing for a unanimous panel, Justice Feldman dismissed the appeal in its entirety.

Justice Feldman held that there was a real and substantial link between the impugned conduct and Ontario. The Appointment Order bound Mr. Gutierrez' conduct with respect to the company, no matter where he was.

In upholding the 30-day prison sentence, Justice Feldman affirmed that punishment may be one of the purposes of sentencing for civil contempt. In this case, "it is difficult to think of conduct by a litigant that is more flagrant and disrespectful to the court and the rule of law."

The fact that the order was a Commercial List order was a relevant factor in the analysis. Justice Feldman stated:

This Appointment Order was made by a judge of the Commercial List of the Superior Court. That division of the court deals exclusively with commercial matters and is structured to supervise those cases closely and in a timely manner as commercial remedies often involve remedial transactions that occur very quickly during the process. That does not mean that Commercial List orders are more important or due more respect than other court orders. The added significance is that the court, made up of a small number of Superior Court judges, is more intimately involved in supervising the process, for example, of a receivership and can be immediately aware of a breach of its order and its effects on the ongoing process. I would add that the Commercial List operates efficiently and effectively based on the full co-operation and respect of the commercial bar and the litigants.

The Court of Appeal declined to grant leave to appeal costs. While the Court of Appeal did not specifically comment on Justice Conway's award with respect to the Receiver's professional fees, the panel saw "no basis to review the costs order of the motion judge."

### **Key Takeaways**

This case affirms that the Commercial List is unique because of the level of judicial involvement in its proceedings. If the parties do not meet its expectations and respect its orders, the

efficiency and effectiveness of the Commercial List will suffer, which will undermine the fast-paced nature of its practice.

This case also offers guidance on where contempt might be committed. While each case will turn on its facts, the case confirms that in personam Ontario orders respecting Ontario companies are likely to have a real and substantial connection to Ontario. Breaches of such orders are likely to result in a finding of contempt even when the contemptuous conduct was perpetrated outside of Ontario.

The case also firmly enshrines punishment as a secondary purpose for civil contempt. Imprisonment may be warranted, particularly when the contempt demonstrates a flagrant disregard for the court or the rule of law.

Finally, the Court of Appeal's decision to uphold the costs award, which included the Receiver's own professional fees, may mean that more court-appointed receivers will seek their own costs.

*Lenczner Slaght litigators, Monique Jilesen and Derek Knoke, acted for the Receiver in these proceedings.*