

Civil contempt finding against litigant for breaching receivership order

Contempt of Court | Litigation | Litigation & Dispute Resolution

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Ontario courts maintain the inherent right to control their own processes and to sanction litigants who fail to abide by court orders. While a finding of contempt is an exceptional order, courts will utilize this power to maintain the rule of law and the public's faith in the justice system.

The decision in *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006 (CanLII), demonstrates how a court will assess a litigant's misconduct for breaching a court order to determine whether contempt has occurred.

The case arose from a dispute involving Xela Enterprises Inc. (Xela), a privately-owned Ontario family holding company overseeing the operations of several subsidiaries in Central and South America.

One of Xela's wholly-owned subsidiaries was a Panamanian company that held an interest in a family-owned group of poultry companies.

The defendant, JG, was the President, a director, and sole common shareholder of Xela. The plaintiff was his sister. Multi-jurisdictional litigation had been ongoing with respect to the poultry companies among the family for over 20 years.

In October 2015, the plaintiff obtained judgment in the Ontario Superior Court of Justice for \$4.25 million plus interest against JG, their now-deceased father, and Xela. The defendants were ordered to pay an additional \$889,858 in costs.

In 2019, the plaintiff obtained a court order appointing a receiver in connection with her efforts to enforce the judgment. The receiver was appointed over "all of the assets, undertakings and properties" of Xela's business. The receivership order empowered the receiver to exercise any shareholder, partnership, joint venture or other rights which Xela may have. The order stated that any steps taken by the receiver were to be "without interference" from any person.

In the fall of 2019, the receiver was experiencing challenges receiving information with respect to Xela and its historical transactions. The receiver sought to get that information directly from Xela's subsidiaries.

The receiver exercised its rights under the court order and called a shareholders meeting of one of Xela's subsidiaries. At the shareholders meeting, a resolution was passed to remove and replace the subsidiary's current directors with three lawyers from the receiver's Panamanian counsel, the Hatstone Group.

In March 2020, the receiver brought a motion in the Ontario Superior Court of Justice to approve the appointment of the Hatstone Group directors, which was opposed by JG. The court approved and ratified the resolution and held that it was a proper exercise of the receiver's exclusive power and authority to exercise Xela's shareholder rights.

In January 2021, JG's brother-in-law, who was one of the replaced directors of the subsidiary, filed a criminal complaint in Panama against the Hatstone Group directors. The sole evidence tendered in support of the criminal complaint was a declaration sworn by JG. The criminal complaint claimed that the shareholders' meeting was not properly held and that it constituted a crime. The criminal complaint estimated \$2 million in provisional damages against the three Hatstone Group directors.

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At an urgent motion brought by the receiver in Ontario regarding the criminal complaint, the court ordered JG to effect the withdrawal of the criminal complaint and his declaration.

JG subsequently sent a letter to the Public Prosecutor's general office in Panama enclosing an affirmation withdrawing his declaration and asked his brother-in-law to withdraw the criminal complaint. However, his brother-in-law responded that the Ontario court had overstepped its powers and that he would not withdraw the criminal complaint.

In December 2021, JG attended an interview at the Panamanian consulate in Toronto. He told the Public Prosecutor's representative that the case involved a company that he manages in Canada, that he was not present at the shareholders' meeting, and that he was a "judicial hostage" because the Ontario court orders prevented him from participating in the case. He did not state that he had withdrawn the declaration. The Public Prosecutor continued to investigate the criminal complaint.

In 2022, the receiver brought a motion in the Ontario Superior Court of Justice for a declaration that JG was in contempt of court for breaching the appointment order. The receiver sought a finding of both civil and criminal contempt.

In the *Reasons for Decision*, the motion judge referred to the Supreme Court of Canada's decision in *Carey v. Laiken*, 2015 SCC 17, at paras. 32-35, which requires that three elements be satisfied beyond a reasonable doubt to establish civil contempt:

- a. The order must be clear and unequivocal;
- b. The defendant must have knowledge of the order;
- c. The defendant must have intentionally breached the order.

While contempt is an exceptional order, it is necessary to maintain the rule of law and the public's faith in the justice system:*L. Morreale Consulting Professional Corp. v. Manieri*, 2016 ONSC 7048, at para. 18.

At the contempt hearing, the motion judge was satisfied beyond a reasonable doubt that the provisions of the order appointing the receiver were clear and unequivocal and that the receiver was empowered to exercise its rights exclusively and "without interference" from any other person.

The motion judge found that the JG intentionally breached the receivership order when he signed the declaration in support of a criminal complaint and participated in the interview at the consulate. In that regard, (a) JG signed documents on behalf of Xela; (b) he purported to exercise authority on behalf of Xela contrary to the exclusivity granted to the receiver; and (c) he interfered with the receiver's exercise of its right to deal with the shareholdings of Xela. The declaration supported the criminal complaint that was filed for the purpose of challenging, undermining, and undoing the receiver's action in replacing the board of one of Xela's shareholdings.

JG testified that he and the director did not discuss the declaration at the time that he signed it. He testified that all the director did was to ask him if he would sign a document as to whether he was at the meeting where the directors were replaced, and that he agreed to do so. JG testified that he did not know the declaration was going to be used to support a criminal complaint and that he only learned about the criminal complaint several months later.

The court found that JG was not a credible witness. The court found that his evidence was not believable on its face and contradicted the text and tone of the written documents. It was simply not credible that JG, an experienced businessman, had no idea why his brother-in-law was asking him to go to a notary public to sign the declaration.

The court also did not believe JG's testimony that all he did was answer a few questions posed by the notary and that the text in the declaration was simply the notary's words, not his. Rather, the court found that JG knew exactly what he was doing when he signed the declaration and that he was aware of the contents of the document and swore that they were true. Further, he knew that the purpose of signing the declaration was to file a criminal complaint in Panama to challenge the receiver's removal and replacement of the board.

As to the final two elements in the *Carey* test, there was no issue that JG knew about the appointment order and the terms therein, and the court found that his breach was intentional. Intent does not require that an individual breach an order with "the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order": *Carey*, at para. 39, citing *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, at para. 17, per Cromwell J.A. (as he then was). All that is required is the intentional commission (or omission) of an act that is in fact prohibited (or required) by the order.



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The court reasoned that if JG had truly believed that the receiver's conduct was illegal or did not conform with Panamanian law, he had other options open to him. He could have returned to court for direction or sought to have the appointment order set aside. He did none of those things and instead acted unilaterally and took matters into his own hands.

The court was not prepared to make a declaration of criminal contempt as the notice of motion did not sufficiently put JG on notice of the conduct alleged to rise to the level of criminal contempt.

In the result, the court granted an order declaring JG in civil contempt of the order appointing the receiver. The consequences of the finding of contempt will be addressed at a later date during the sentencing phase of the proceeding.

****30 days imprisonment imposed as a penalty**** In October 2022, the court released reasons for the penalty phase of the contempt hearing, ordering that JG be imprisoned for a period of 30 days: *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 5594 (CanLII). The court reasoned that a fine would not serve the principles of sentencing as it would not sufficiently deter JG, if at all. A PDF version is available to download [here](#).

Appeal Dismissed February 2024

The Court of Appeal subsequently dismissed an appeal, concluding that the motion judge's reasons and her finding of contempt were "unassailable": *Castillo v. Xela Enterprises Ltd.*, 2024 ONCA 141 (CanLII).

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