NOVA SCOTIA COURT OF APPEAL
Citation: ***Godin v. Godin***, 2012 NSCA 54

Date: 20120525
Docket: CA 342242
Registry: Halifax

Between:

Cindy Mae Godin

Appellant

v.

Marc Kenneth Godin

Respondent

Judges:	Saunders, Oland and Beveridge, JJ.A.
Appeal Heard:	February 13, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Saunders, J.A.; Oland and Beveridge, JJ.A. concurring.
Counsel:	David A. Grant, for the appellant C. LouAnn Chiasson, Q.C., for the respondent

Reasons for Judgment:

[1] The principal focus of this appeal concerns a finding of contempt against the mother during a custody and access battle between the estranged parents of three children. This case obliges us to consider, once again, the law of contempt and the efficacy of the court's contempt power in the context of family law proceedings.

[2] The trial judge found the appellant to be in contempt of a previous court order in failing to abide by the terms of certain custody and access provisions. After subsequently finding that she had failed to purge her contempt, the judge ordered that she be imprisoned for 90 days, but suspended that sentence, upon terms, and placed her on probation.

[3] She appeals both the finding of contempt and the penalty. Her grounds of appeal raise a host of technical and substantive complaints as to the manner in which the proceedings were conducted, and the orders that resulted.

[4] For the reasons that follow I would allow the appeal.

[5] The trial judge's decision is reported at 2010 NSSC 365. To place the appellant's numerous grounds of appeal in context, it will be necessary for me to review the background to this prolonged litigation in some detail.

Background

[6] The parties are husband and wife. They met in 1993. She became pregnant with their oldest son. They moved in together around the time of the boy's birth in December, 1993. They were married on February 14, 1995. A second child, also a boy, was born in September, 1995. Their youngest child, a daughter, was born in March, 1999. At the time of trial the boys were 16 and 14. Their sister was 11. Both boys have been diagnosed with Autism Spectrum Disorder. They attend school in the regular curriculum and participate in extra-curricular activities.

[7] For the first seven years of their relationship they lived in Nova Scotia. The parties then relocated to Ontario for three years. The family moved back to Nova Scotia in 2007. Included in the "family" were the mother's two daughters from two previous relationships.

[8] In January, 2007, while the parties were living in Ontario, the mother falsely advised the father that she was suffering from multiple types of cancer and undergoing treatment. In actual fact the mother came to Nova Scotia in April, 2007 to have a "tummy tuck".

[9] During a trip to Nova Scotia in the summer of 2007, the mother was charged with assaulting the father. She was placed on a Recognizance requiring her not to have any contact with him except in the presence of a police officer.

[10] The parties have lived apart since July, 2007. Initially, the three children resided with their father. That changed over time. In early September, 2007, the youngest child (8 years old at the time) left her father's home and went to reside with her mother.

[11] On September 12, 2007, the mother applied under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 for custody, access, child maintenance, spousal maintenance and exclusive possession of the residence. She also applied for interim relief to all of her claims for relief.

[12] A week later the father applied for custody and access under the **Maintenance and Custody Act**. He also applied for a divorce under the **Divorce Act**, R.S. 1985, c. 3, and sought exclusive possession of the matrimonial home and a division of property under the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275. At the same time he sought interim custody and interim access in relation to the children.

[13] At an interim hearing held October 17, 2007, the father was granted primary care of all three children and the mother granted interim reasonable access. She was not ordered to pay child maintenance. The father was not ordered to pay her spousal maintenance.

[14] A Parental Capacity Assessment Report dated February 6, 2009, prepared by two psychologists with the IWK Health Centre recommended that the children remain in the primary care of their father and that they have access with their mother no more than twice per week and that there be no overnight access. The

three children had resided in their father's home since their parents had separated in the summer of 2007.

[15] In June, 2009, the eldest child Alex left the father's home and went to live with his mother. He continued to reside with her, contrary to the terms of the October 17, 2007, interim order. Contact between the father and the eldest son has been limited since June, 2009.

[16] The case came on for trial before Nova Scotia Supreme Court Justice Mona J. Lynch over the course of five days in June-September, 2010. For the purposes of this appeal, we need only concern ourselves with the judge's directions with respect to custody and access.

[17] In a very thorough and well-reasoned decision, Lynch, J. ordered that the three children be placed in the sole custody of the father, with unsupervised but limited daytime access by the mother. There was to be no overnight access until the mother had undergone a complete psychiatric assessment, which was to be provided to the father and the father then agreeing to overnight access. The father was given all decision-making power regarding their three children.

[18] Based on the evidence presented, it is clear that Justice Lynch had very serious concerns about the mother's mental health. The judge extensively reviewed the record and went to great lengths to explain the basis for her factual findings. Obviously, Justice Lynch was not impressed with the mother's credibility. To illustrate, the evidence established that the mother had encouraged their eldest boy to surreptitiously take his father's computer from the father's bedroom while the father was at work and hand it to his mother who was waiting across the street. She then hacked into the computer and read the father's e-mail, later forwarding some of his computer folders to her own e-mail account.

[19] Regarding the criminal proceedings in Ontario concerning the mother's being charged with assaulting the father, Justice Lynch observed:

> [47] The mother was charged with assaulting the father. The charge was resolved by the mother entering into a peace bond to have no contact with the father. The mother was charged with breaching the peace bond and that matter was again resolved by her entering into a further peace bond.

> [48] In the mother's affidavit she asserts that the court in Ontario appointed her second oldest daughter as intermediary between herself and the father. There is absolutely no evidence that the court appointed anyone as intermediary and certainly no evidence that any court appointed the second oldest daughter as intermediary. The second oldest daughter was not with the mother in court in Ontario. ... The mother's description of the court process in Ontario does not make sense and causes concern about her credibility.

[20] Even more troubling was the mother's false statements to the father, their children, their families and their friends that she was suffering from terminal cancer and had only a short time to live. In the words of Justice Lynch:

> [38] There is absolutely no medical evidence that the mother ever had cancer or was ever told she had cancer. ... The father found the results of a mammogram dated February 26, 2007 indicating that her results were normal. The mother had hidden the mammogram results in her underwear drawer. ...
>
> [41] The mother's oldest daughter testified how devastated she was to first learn from her mother that she had cancer with two years to live and then to learn that it was not true. ...
>
> [43] ... she told friends, family, her husband and children that she had three different forms of cancer, that she was undergoing treatment and had a limited amount of time to live. The mother's actions are in no way reasonable and raise major concerns about her mental health. The mother did not have the psychiatric assessment recommended by the assessors who performed the parental capacity assessment.
>
> [51] The mother continued to assert that she had cancer when it was to her benefit. I accept the evidence of the police officer who was called to the family residence to assist the mother retrieve her belongings in August 2007. ... The police officer ... presented clear and cogent evidence that the mother informed her that she was dying of cancer. I accept the police officer's evidence... The mother continued to lie about having cancer to obtain the sympathy of the police officer.

[21] Justice Lynch went further, rejecting the mother's allegations that the father had physically and sexually abused their younger daughter. She said:

> [53] The mother has also made allegations of physical abuse and implied sexual abuse by the father in relation to the youngest daughter. These allegations were and are found to be without foundation.

> [54] The mother's credibility was further damaged by her repeated assertion during cross-examination that she had problems with her short-term memory. Much of the mother's evidence lacks an air of reality and where there is a contest on the evidence I do not accept the mother's evidence.

[22] In arriving at her conclusions, Justice Lynch was assisted by "a comprehensive and persuasive parental capacity report" completed by the IWK Parent and Child Assessment Team (para. 14, **supra**). Justice Lynch said:

> [65] I find the recommendations and analysis in the parental capacity report to be persuasive. The assessors interviewed many people. They raised concerns about both parents and made fair and impartial recommendations.

[23] The assessors found that the mother did not have the ability to meet the needs of their children. She was seen to be too focussed on herself and as referenced by Justice Lynch:

> [68] The mother is found by the assessors not to have the ability to provide the necessary emotional safety for the children. She was found to have minimal insight into how her actions impact her children and that significantly impacts the prospect for change. The assessors recommend that the mother have limited contact with the children and that the contact be supervised by a neutral third party. This is not a recommendation that was made lightly. The recommendation was amply supported in the report. The mother has not completed the most important recommendation of the assessors – a thorough psychiatric assessment. Because the mother has not followed through on this recommendation, the concerns raised in the assessment remain a major concern for the court.

[24] After carefully considering all of the evidence presented during the course of this five day trial, Lynch, J. determined that it "would not be in the best interests of the children to live primarily with the mother. The children's emotional health would be jeopardized." She ordered that all three be placed in the sole custody of their father and that he be given all decision-making authority regarding their care. Justice Lynch recognized the difficulty created by the fact that the eldest boy had been living with his mother since June, 2009, contrary to the provisions of the Interim Custody Order issued in October, 2007. Lynch, J. ordered that the mother would have limited parenting time with the children after school on Tuesdays and every second weekend, with additional visits scheduled for Mother's Day and

Christmas Day but that there would be no further access granted until the mother had undertaken a complete psychiatric assessment. The judge declared:

> [86] It is imperative that the mother have a complete psychiatric assessment before her parenting time can be normalized. Until that time there will be no overnight access between the children and the mother. The psychiatric assessment must be provided to the father and the father must agree to overnight access.
>
> [87] If the mother fails to comply with the parenting order it may be necessary to require her access with the children be supervised.

[25] The judge's written decision was filed October 8, 2010. The order confirming the judge's decision made pursuant to the **Maintenance and Custody Act** was issued November 1, 2010.

[26] Four days after that order was granted the father brought an *ex parte* motion pursuant to **Civil Procedure Rule** 89.04 seeking the court's permission to proceed with contempt proceedings against the mother. Although the motion was made *ex parte*, the notice and supporting documentation were personally served upon the mother and copied to her trial counsel. Coincidental with the contempt motion, the father also gave notice of a variation application seeking to change the access provisions of the November 1 order. The father's affidavit, filed in support of both motions, provided evidence of the alleged contempt as well as evidence establishing a change in circumstances. While nothing turns on it, there is an error in the father's lawyer's letter to the court dated November 5, 2010, giving notice of their intended *ex parte* motion. The letter states:

> ... make a motion for a contempt order as against the Respondent in relation to the Consent Order issued from this court on November 1, 2010.

The impugned order issued by the trial judge on November 1 was not by consent.

[27] To understand the process that ensued, I will now describe the sequence of events in some detail.

Contempt Proceedings

[28] In his affidavit filed in support of his two motions (contempt and access variation), the father described the alleged violations of the terms of Justice Lynch's November 1 order. His principal objection was that the mother had refused to return their sons Joey and Alex to his care or abide by the parenting time set out in the order, including the prohibition against overnight access. He said his efforts to comply with the order were thwarted by the actions of the mother. He said that when he asked his wife to return their sons to his care, she refused. He said he approached the R.C.M.Police for assistance but that the police refused to intervene unless the court found that there was "an immediate threat to the children". Given his wife's mental difficulties, Mr. Godin said he was "extremely concerned about the children's psychological and emotional well being while in the care" of their mother. He asked that her access be immediately suspended until the contempt application could be heard. He also sought an order directing the police to enforce the terms of the November 1 order.

[29] It should be noted that at the time of trial in June-September, the mother was represented by counsel, Mr. Colin Campbell.

[30] Ms. Godin filed a responding affidavit sworn November 24, 2010. The jurat was completed by her new lawyer, David Grant. Ms. Godin swore that her sons were well aware of the terms of the November 1 order but had refused to leave her residence and return to their father's home. As a mother she said she simply could not throw her sons out into the street.

[31] The motion for contempt came before Lynch, J. on November 25. She set the matter over to December 6. Based on the exchanges between the court and counsel as appears in the transcript it was anticipated that the hearing would deal with both the charge of contempt, and the father's application to vary access.

[32] The hearing took place as scheduled on December 6th. The only two witnesses were Mr. and Mrs. Godin. The direct examination of each party consisted of putting them on the stand and having them confirm their respective affidavits. The bulk of the transcript is taken up by their respective cross-examinations.

[33] After hearing the evidence and counsels' submissions, Lynch, J. gave a brief oral decision finding Ms. Godin in contempt. The judge found that the terms of

her order were clear and unequivocal; that Ms. Godin had had notice thereof; and that she had knowingly disobeyed the order. The judge then went on to address penalty. She said:

> So I find that Ms. Godin is in contempt of the order from November 1st. All right.
>
> So with regard to the disposition stage of the -- and the penalty stage, in family proceedings, it's clear that the recommendation that's given in family proceedings is -- what the goal is to try and remedy the situation and to have the Order followed. It's not about punishment.
>
> So the normal practice in a case such as this would be to put the matter over for the disposition stage of the contempt and allow Ms.Godin then to comply with the Order, so that the sanctions can be minor rather than major.
>
> Ms. Godin understands that one of the penalties for contempt can lead to her imprisonment and the -- if the Order is complied with and the contempt is purged, then the penalties can be minor. If the Order is not complied with then the penalties can be more serious.
>
> So we'll put the matter over for -- give Ms. Godin the opportunity to comply with the Order and then we'll come back for the sentencing hearing.

[34] The case was then adjourned to February 22, 2011, to deal with the penalty phase of the contempt, as well as the variation of access application brought by the father.

[35] On February 21 (not 22 as stipulated, which leads me to assume that the date was changed by agreement, but for reasons not apparent on the record) counsel appeared. Mr. Grant expressed surprise that his client was not in attendance. Ms. Chiasson, counsel to Mr. Godin, objected to any attempt to introduce third party communications without the substance of such assertions being put in an affidavit so that the declarants could be subject to cross-examination. The court had to press Mr. Grant to find out exactly what he was asking. Finally, he agreed that he was seeking an adjournment. After further discussions, Lynch, J. agreed to the request for an adjournment. Ms. Chiasson put on the record her client's "significant concern" that the matter was being delayed, yet again. She said the matter had already been put over several weeks to encourage Ms. Godin to purge her contempt and that had not happened.

[36] Counsel appeared next before Lynch, J. on March 21. On that date, Mr. Grant apologized that he hadn't issued subpoenas for witnesses on time and he requested another adjournment. Ms. Chiasson objected and referred to the previous lengthy delays. After hearing further submissions, Lynch, J. said that because incarceration was a potential penalty, she could not go ahead without hearing from witnesses who might be able to mitigate that penalty. The judge reluctantly adjourned the hearing to April 1, 2011.

[37] At the hearing on April 1, five witnesses testified: Mr. Godin; Ms. Godin; Dr. Jeffrey A. Champion, M.D.; Ms. Shawna L. Stuart, M.S.W.; and Ms. Cheryl A. Blynn, a guidance counsellor in the boys' high school.

[38] After hearing the evidence and counsels' submissions, Justice Lynch gave a brief oral decision. She began by reiterating her earlier decision made December 6, 2010, where she found Ms. Godin to be in contempt of the November 1 order. She found that Ms. Godin had had ample opportunity to purge her contempt between November and April but that she had done little or nothing to remedy her default. Accordingly, Lynch, J. declared:

> I have to preserve the integrity of the administration of justice ... I need to impress upon Ms. Godin the importance of complying with Court Orders. ... So I am going to order her imprisonment for 90 days but I am going to suspend the penalty and provided she complies with the Court Order and that is that she is not to have the children in her presence except under the conditions of the Order from October; and that is Tuesday evening in the specific hours in that Order, or/and on Saturday and Sunday in every second week, in the specific hours in the Order, then the sentence will be suspended.
>
> But she understands that the sentence will go forward if she does not comply.

[39] The Contempt Order signed by Justice Lynch is dated May 25, 2011. It states the penalty of 90 days imprisonment is suspended for "a period of one year commencing April 1, 2011" and obliges Ms. Godin during that one year to keep the peace and be of good behaviour, and not to have access with any of their three children "except as provided in" the November 1, 2010, order.

[40] The Amended Notice of Appeal dated June 21, 2011 purports to appeal both the December 6, 2010, decision finding her in contempt, as well as the order issued May 25, 2011, sentencing her for that contempt.

Grounds of Appeal

[41] The Amended Notice of Appeal states the following grounds:

(1) The proceeding failed to follow the procedure set out in the rules of court in so far as no notice of motion was issued or served upon the appellant after permission of a judge was obtained to issue such a notice of motion with the consequential result that there was no specific allegation as to how the appellant was in contempt of the order issued the 1st day of November 2010. No notice in form 89.05 was ever issued nor was any order issued respecting the granting of permission or the finding of contempt.

(2) The Honourable Justice failed to consider or take into account the wishes of two male children aged 17 and 15 with respect to where they were going to live and how they were going to live and placed a duty on the appellant to compel the children to comply with the order when the basis for the contempt should have been her failure to comply with the order not theirs.

(3) The Honourable Justice failed to consider or take into account the wishes of two male children aged 17 and 15 with respect to where they were going to live in determining whether or not the order was one which was capable of enforcement and wrongly found that the order was capable of enforcement.

(4) The Honourable Justice found the Appellant in contempt despite the Appellant's best diligent and best efforts to comply with the Order that she had failed by not seeking others to counsel the children to comply with the Order.

(5) The Honourable Justice failed to address the question of how the respondent should comply with the order or purge herself of the contempt either at the stage when the contempt was found or subsequently so that the respondent has no means of complying with the contempt.

> (6) The Honourable Justice erred in law in sentencing the respondent to a penalty when the respondent had complied with the order at the time of sentencing.
>
> (7) The Honourable Justice erred in law by failing to allow the respondent to give evidence of her efforts to comply with the order at the sentencing hearing.
>
> (Underlining in original)

Issues

[42] I would recast the appellant's long list of complaints in the form of three discrete questions:

i. whether the appellant was denied a fair hearing by not being given proper notice of the alleged contempt such that she was unaware of the specific allegations, or the case she had to meet;

ii. whether the trial judge erred in finding the appellant in contempt of the court's order dated November 1, 2010; and

iii. whether the trial judge erred in sentencing the appellant for contempt.

Standard of Review

[43] Having regard to the unique circumstances of this case, I see the three questions as I have framed them to raise matters of law, with certain subtle, factual overtones, to which I will apply a standard of correctness, unless otherwise stated. **Housen v. Nikolaisen**, 2002 SCC 33; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80.

Analysis

i. whether the appellant was denied a fair hearing by not being given proper notice of the alleged contempt such that she was unaware of the specific allegations, or the case she had to meet

[44] I see no merit to the appellant's submissions that she was denied a fair hearing in the manner suggested. On the contrary, the record clearly establishes that Ms. Godin had proper notice through personal service as well as communications to her counsel; fully knew the case she had to meet; and suffered no prejudice. Justice Lynch gave appropriate directions with respect to the conduct of the hearing including setting a reasonable schedule for the filing of affidavits and the appearance of witnesses. She insisted that the contempt hearing be kept separate from the application brought by Mr. Godin to vary access, recognizing that each carried different burdens of proof. She satisfied herself that the actions of Ms. Godin alleged to have been contemptuous were sufficiently particularized and understood.

[45] The trial judge was also very explicit in her instructions to counsel. For example, she cautioned the appellant and her counsel as to the type of evidence they would have to provide so as not to run afoul of the rules against hearsay, especially in light of the trial judge's previous adverse findings with respect to the appellant's own credibility. This included a direction that the appellant's witnesses would have to be subpoenaed in order to permit proper cross-examination. Lynch, J. also reminded the appellant's counsel, on more than one occasion, of the two specific matters for which Ms. Godin was alleged to be in contempt. First, it was alleged that because the two boys were still living with her, she had failed to comply with the terms of the November 1, order by not returning the boys to the care and custody of their father. Second, that she had breached the provisions of the order which prohibited her from having overnight access with any of the children until she had completed a full psychiatric assessment, which would then be given to the father and subject to his agreeing to extending overnight access to the mother.

[46] The transcript confirms repeated interventions by the judge to ensure that these details were understood by the appellant's counsel. As well, and as noted earlier, Ms. Godin was personally served, and her counsel was copied with all of the relevant documentation. The judge went out of her way to ensure that the parties understood the nature of the proceedings, and had every opportunity to be

heard. On this record, it cannot be seriously suggested that the appellant did not receive proper notice, or was prejudiced, or did not know the case she had to meet.

ii. whether the trial judge erred in finding the appellant was in contempt with the court's order dated November 1, 2010

[47] Notwithstanding the trial judge's diligent and repeated efforts to ensure that the appellant had proper notice of the allegations and a full opportunity to fairly present her position, I have, respectfully, come to the conclusion that in the circumstances of this case the judge erred in finding the appellant guilty of contempt. I believe many of the unique and troubling features of this case have led to a result that requires our intervention. Before exploring some of those details, I think it important to emphasize certain fundamental principles. Many of these were explored by Justice Farrar in **Soper v. Gaudet**, 2011 NSCA 11. From that and the jurisprudence cited therein, we know (and I am here extracting those principles which are especially important in this case) that:

1. finding a party in contempt falls within a trial judge's discretion;

2. on appeal, the standard of review applied to the exercise of that discretion is one of reasonableness.

3. we are not to substitute our own view for the judge's discretion unless we conclude that the judge erred in law; misapprehended material evidence; or produced a result which is obviously unjust;

4. notwithstanding its civil nature, contempt of court is quasi-criminal;

5. the standard of proof in contempt proceedings is proof beyond a reasonable doubt;

6. the party alleging contempt has the burden of proof;

7. in a case of civil contempt the following elements must be established beyond a reasonable doubt:

(i) the terms of the order must be clear and unambiguous;

(ii) proper notice must be given to the contemnor of the terms of the order;

(iii) there must be clear proof that the contemnor intentionally committed an act which is in fact prohibited by the terms of the order, and

(iv) *mens rea* must be proven which, in the context of civil contempt proceedings, means that while it is not necessary to prove a specific intent to bring the court into disrepute, flout a court order, or interfere with the due course of justice, it is essential to prove an intention to knowingly and wilfully do some act which is contrary to a court order.

[48] In many of the reported cases, the judge is forced to deal with a situation where access is denied to the accessing parent by the custodial parent. By contrast, one of the inherent difficulties in this case (but hardly uncommon in the family law context), is that it involved two teenage children who, for one reason or another, refused to return to live with their father whom the court chose as the custodial parent.

[49] Where – as here – the custodial parent believes that the accessing parent has failed to comply with the custody and access provisions of the order, an application may be brought to decide whether the defaulting parent is in contempt of the court's order. Such a process invites a very careful consideration of the evidence, and a proper application of the law surrounding such fundamental concepts as burden of proof, onus of proof, and any available defences to the allegation.

[50] One can certainly sympathize with the quandary in which Mr. and Ms. Godin found themselves. Seen through the eyes of both parents, each had their own obstacles to fulfilling the court's order. To illustrate the point I will refer to portions of the evidence from the contempt hearing on December 6th, 2010.

[51] Mr. Godin described his frustration in his various attempts to enforce the terms of Justice Lynch's order. Their younger son Joey had told him that he

preferred living with Ms. Godin because he (Mr. Godin) didn't tell him the "truth". This prompted Mr. Godin to tell Joey:

> You're 14 years old now. ... You're telling me that you want the truth and you're getting the truth from your mother, not from me, but that's because I haven't told you anything. ... I want you to sit down. ... I want you to read this. ... This is something that's between you and I because you're asking me about it, you're challenging me on it, and I think you should know what the truth is.

Accordingly, Mr. Godin gave Joey a copy of Justice Lynch's decision and left him on his own to read it. He also wanted Joey to understand the false stories his mother had told about her cancer. Mr. Godin testified:

> Throughout the conversation Joey told me that mom never said she had cancer, or mom never said she had to take medicines. So that's part of why I showed it to him.

[52] He told Joey that he was supposed to stay with him. When Joey said "I'm going to Mom's", Mr. Godin replied:

> I'm not going to lock the doors or chain you to the house or anything like that. ... I'm not going to force you to be here. ... but I am not going to drive you back to your mother's when you're not supposed to be there.

[53] Instead, Joey left, and walked the 1.6 kilometres to a friend's house.

[54] Mr. Godin called his wife repeatedly and asked "When can I expect the boys to be returned home?" and reminded her "You're in contempt of the Order". He offered to drive over and fetch the boys. Each time his wife said "I'm not forcing them to leave". He would sit outside her home and Joey would text or call him saying "I'm not coming out". And when he called his wife she would say "I'm not forcing my boys to leave".

[55] He encountered similar difficulties with their elder son Alex, then 16 years of age. Mr. Godin sent his son many e-mails asking him to come home but the boy "gets upset and emotional and he just shakes, and then ignores me or doesn't acknowledge me" and "doesn't speak to me anymore". This then was the standoff in which Mr. Godin found himself and which he described in his testimony.

[56] For her part, Ms. Godin described the same wrenching predicament. I will refer to her evidence in more detail later. At this point, it is enough to say she testified to their son Alex having sought legal advice; that she had encouraged both boys to return to live with their father, but that they had refused; and that as their mother she didn't feel she could physically throw them out on to the street and destroy what "little amount of relationship ... we have left".

[57] The judge's decision was given orally as soon as counsel had completed their submissions. The judge began her reasons by reviewing the elements of the offence and expressing her view that the terms of the order were clear and unambiguous. She said:

DECISION (Orally)

> **THE COURT:** The elements of contempt are that the Order is clear and unequivocal, unambiguous, and I do find that the Order is very clear that Mr. Godin is to have sole custody of the children. The – and it sets out when Ms. Godin will have access.
>
> The Order is clear that until there is a complete psychiatric assessment there is to be no overnight access between the children and the Respondent. So those provisions are clear.
>
> I am also satisfied that Ms. Godin had proper notice; she acknowledges that in her Affidavit. The other thing is that Ms. Godin knowingly disobeyed the Order. It's not necessary to prove that the – Ms. Godin intended to put herself in contempt, that she – it's enough that she did something that's deliberate or wilful, or knowingly did an act that was in breach of the Order. ...

[58] The judge then went on to paraphrase the appellant's evidence saying:

> On the stand she indicated that she actively encouraged them to talk to him, she told them where they - - they were both aware that the Order said that they were supposed to be living there, and that she was concerned, she was not going to physically remove them, did not want to damage the relationship that they had. That she tried to comply but she was worried about damaging the relationship that she has with the boys. ...

[59] She then referred to the decision of Quinn, J. in **Hatcher v. Hatcher**, [2009] O.J. No. 1343 (Q.L.) (Ont. Sup. Ct.), saying the central issue in that case was "the

extent to which a parent's duty is to require a 15 year old son to return to the home of the other parent following a period of access" and quoting from the case:

> [27] A parent "has some positive obligation to ensure a child who allegedly resists contact with the access parent complies with the access order". ...
>
> [28] A parent governed by an access order is not entitled, in law, to leave access up to the child. ...
>
> [29] ...
>
> > Undoubtedly, there are many tasks that a child, when asked, may find unpleasant to perform. But ask we must and perform they must. A child who refuses to go on an access visit should be treated by the custodial parent the same as a child who refuses to go to school or otherwise misbehaves. The job of a parent is to parent.

[60] Lynch, J. then adopted the same approach in assessing the conduct of Ms. Godin here. She said:

> In this case, as I've indicated, Ms. Godin says that she told the children about the Order; that she indicates that Alex is receiving legal advice. She said they're both aware of it, they know what they're supposed to be doing; that she encouraged both of them to talk to their father. She told them that they were supposed to be living with their father.
>
> <u>But I'm not satisfied that that is making reasonable efforts to ensure that the Order is complied with</u>. ... I have no indication what steps that she took, when she took them, how many times? Did she tell the children once, you're supposed to be living with their father. That's - - I don't have evidence from her in relation to that in the Affidavit with regard to Joey. She indicates that Alex was living with her since 2009.
>
> > "I advised him of the outcome, he sought counsel, he refused to leave my apartment despite my instructions."
>
> Again, I don't know when that was done and if it was done more than once. With respect to Joey:

> "He was given a copy of the decision by his father. He comes to - - but he comes to my home after school from time to time, and since November 1st he has resided there. He advised me that his father has deprived him of things."
>
> But there's nothing in there - - although she did indicate that she told Joey where he was supposed to live. But I'm not satisfied that she took reasonable steps to comply with the Order and have the children comply with the Order.
>
> I am satisfied beyond a reasonable doubt that she is in contempt of the Order. She has not taken reasonable steps, and she's certainly not done everything in her power to ensure that the Order has been complied with by seeking advice of other people, having the children talk to somebody.
>
> So I find that Ms. Godin is in contempt of the order from November 1st. All right.
> (Underlining mine)

[61] In my respectful opinion, what caused this case to go sideways was that the judge and counsel focussed their attention almost exclusively on the appellant's "efforts", losing sight of the quasi-criminal nature of the proceedings and the heavy, unshifting burden upon the applicant to prove his case.

[62] Notwithstanding the judge's use of the words "satisfied beyond a reasonable doubt", she failed to critically examine the evidence offered by the applicant father with the requisite "restraint" and "caution" required when presiding over contempt proceedings in family law matters (see for example, **White v. White** (1999), 179 N.S.R. (2d) 397 (S.C.) and became sidetracked with an examination of the "reasonable steps" taken by the appellant "to ensure that the order is complied with". Rather than ask herself whether Ms. Godin had done "everything humanly possible" or "everything in her power" to comply with the order, the question the judge should have asked was whether the respondent had produced clear evidence to prove beyond a reasonable doubt that his wife's actions, with the requisite intent, violated the court's order and constituted civil contempt.

[63] While I fully appreciate that whether to hold a party in contempt falls within a trial judge's discretion, and great deference is paid to the exercise of that discretion, I do find that by restricting her analysis to the "reasonableness" of the efforts made by Ms. Godin to ensure compliance with the order, the judge failed to

cautiously and critically assess the proof offered by Mr. Godin, effectively reversing the burden such that the appellant was expected to prove she was *not* in contempt.

[64] After carefully reviewing the entire record, it appears to me that Ms. Godin's evidence describing the efforts she made and the obstacles she encountered, both in her testimony and submitted by way of affidavit, were either misunderstood, or were misapplied in the requisite legal analysis, such that Ms. Godin was, effectively, put in the position of having to negate guilt. For example, when the judge says:

> I have no indication what steps that she took, when she took them, how many times?" Did she tell the children once, you're supposed to be living with their father ... I don't know when that was done and if that was done more than once,

it seems to ignore or miss the appellant's important testimony on this very point. After being asked

> ... did you have discussions with your sons as to where they should live? (My emphasis)

the appellant testified that both of the boys were aware

> ... that the Court has ordered them to live with their father... I've told them that that's what they're supposed to be doing. ... I've actively encouraged them to go out and even talk to their - - to him.

When asked when she had had such discussions she described at least two occasions, the first on Remembrance Day, and then on a subsequent occasion when Mr. Godin had attended at her apartment to pick up Joey. From this we know that the appellant "actively encouraged" her sons to respect the court's order and take up residence with their father. Short of physically throwing her sons out of her apartment and on to the street, it is difficult to imagine what more the appellant could have done with two teenage boys who refused to move in with their father.

[65] She went on to explain her predicament. Under direct questioning by her counsel we see this exchange:

BY MR. GRANT:

Q. Now, would you tell the Court what your view is to comply - - as to your complying with the Order?

A. I have in no way stopped them; I have encouraged them to go back to their dad's. They refuse to go.

Q. And what's your view about them staying with you?

A. Alex has sought legal advice on the matter.

I'm sorry, I've lost track of the question. Can you repeat it?

Q. Well, what's your view of them staying with you at this time?

A. I don't want to put them out on the street; I don't want to physically remove them. I don't want to damage what little amount of relationship that we have left.

Q. What's your view of complying with the Order of the Court?

A. I've tried to comply with the Order short of - - and I even expressed this directly to Mr. Godin; I asked him what he wanted me to do, and he said he wanted me to physically take them out of the building and lock the door and not permit them in. And not only do I think that's psychologically damaging, but I think it's extremely damaging to, like I said, the relationship that we have.

[66] On cross-examination by Mr. Godin's counsel, the appellant described the difficulties she had encountered in obtaining the "complete psychiatric assessment" described in the order. We see this exchange:

BY MS. CHIASSON:

Q. I understand that you spoke with a psychologist by the name of Glen Goss. Do I have the name right?

A. He's a psychiatrist, yes.

Q. Psychiatrist. And Mr. Goss indicated that there would be two reasons to have the psychiatric assessment, and one of them was if the Court orders it, correct?

A. Yes.

Q. And you agree with me, do you not, that the Court ordered it?

A. The Court has not ordered it. The Court has left the directive for me to seek it on my own. Had the Court ordered it, it would be far easier to get.

...

Q. And I put it to you, Ms. Godin, that this shows that you had no intention to comply with the terms of the Order, even the day after it was issued, correct?

A. No.

Q. Ms. Godin, there's no evidence before the Court that you've done anything else in terms of attempting to comply with the terms of the Order, such as contacting the school, correct?

A. I'm sorry, repeat the question.

Q. You didn't contact the school, the guidance counsellor, the teachers, anyone in terms of assisting you in having the children returned to Mr .Godin?

A. I did not involve the school.

Q. So the only thing that you indicate to us that you have done is that you've told the children to go back, and that's your evidence?

A. Yes.

Q. And one of the concerns with respect to not having the children go back is, I understand your evidence to Mr. Grant, that you're concerned about your relationship with the boys, correct?

A. That is a reason, correct.

> **MS. CHIASSON:** If I may just have one moment, please, My Lady.
>
> **BY MS. CHIASSON:**
>
> **Q.** Have you sought the assistance of any therapist or any psychologist or any psychiatrist with respect to having the children returned to Mr. Godin's care so that you are not in contravention of the Order?
>
> **A.** If you're asking me if I've spoken to my psychologist about it, yes. And if you're asking if I had asked that psychologist if that office can deal with talking to the boys at all, yes.
>
> **Q.** And you haven't arranged for any of that, have you?
>
> **A.** No. She said that would have to be done through the IWK and initiated by Mr. Godin because he has the decision-making authority.
> (Underlining mine)

[67] A modest review of the case reports reveals the difficulty judges often have in trying to characterize the degree of "effort" made in complying with the court's order, especially in situations where the children's wishes may be an obstacle to compliance. For example, in **Soper, supra**, Farrar, J.A. set aside the trial judge's finding of contempt, saying:

> ... it is unclear from the record and decision what act is alleged to have been committed by the Sopers in breach of the Consent Order. There was no evidence that the Sopers prevented the children from leaving or, indeed, prevented anyone from coming and taking the children. There was no finding that the Sopers did not take reasonable efforts to have the children comply with the Consent Order.
> (Underlining mine)

[68] In **Hatcher, supra**, Quinn, J., found the father guilty of contempt for failing to take "reasonable steps" to have their son comply with the principal residence and access terms of the divorce order, saying:

> [36] ... he did not make an effort to encourage Jimmy to comply with the divorce order. Indeed, I go further and find that the father induced Jimmy to disobey the divorce order. He did so ... intending ... for Jimmy to disobey the divorce order ...

[69] While these case references are helpful in understanding the impugned conduct in those cases, the language used does not change the law of contempt. The test for proof of contempt is not whether the contemnor used best efforts to comply with the court's order. It is whether the applicant has proven the elements of the offence beyond a reasonable doubt. In this case, Mr. Godin bore the burden of presenting clear proof sufficient to establish beyond a reasonable doubt that his estranged wife had, with the requisite intent, violated the terms of the November 1, 2010, order. The decision of this Court in **MacKenzie v. MacKenzie** (1984), 65 N.S.R. (2d) 52 (N.S.S.C., A.D.) is instructive. There Macdonald, J.A. said:

> [10] ... she certainly made it difficult for him, but as I view it her conduct did not reach the point where it could be said that she was in contempt of the access order. In other words, the material before this court does not establish, in my opinion, beyond reasonable doubt a wilful refusal by Mrs. MacKenzie to give up access to the two children to the appellant.
> (Underlining mine)

[70] I fully appreciate the significance of the contempt power in a trial judge's arsenal as a ready means to maintain respect for the rule of law and to dispense even-handed justice to all parties. Nonetheless, it is a blunt instrument only to be wielded sparingly, in circumstances where no other sanction will do. Its penal consequences require a strict application of proper procedures. This critical balance is aptly described by Melissa N. MacKovski in **Administering Justice: The Law of Civil Contempt**, [2009] Annual Review of Civil Litigation 80:

> ... civil contempt may attract severe consequences. Court orders are meant to be followed and breaches in a civil context may result in criminal penalties. The contempt power remains an important tool in ensuring compliance with court orders which is fundamental to the rule of law and the fair and proper administration of justice. Without the ability to sanction for contempt, the dignity of the court and the integrity of the justice system are threatened. ... the use of the contempt power should be tempered and reserved for those cases where the breach is both serious and beyond a reasonable doubt. Otherwise the power itself risks being diluted. ....

[71] While the content of **Civil Procedure Rule** 89 is new and leaves trial judges with a wide discretion concerning the way in which the hearing is to be conducted, it must be remembered that contempt is a quasi-criminal proceeding. Once the offence is proven, penalties cover a wide spectrum ranging from fine or other costs

consequences, all the way up to imprisonment. A strict adherence to procedure, standards and burdens of proof, and the rules of evidence is required.

[72] Respectfully, the critical error in this case arose when the judge became preoccupied with an inquiry into the reasonableness of the efforts made by Ms. Godin to ensure compliance with the order, and then conflated dissatisfaction with those efforts as constituting proof, to a criminal standard, of all of the elements of the offence.

[73] For all of these reasons I would allow the appeal and set aside the finding of contempt as well as the Contempt Order and Probation Order that were issued as a consequence of that finding. Having done so, there is no need for me to go to address the third question, that being, whether the judge erred in sentencing the appellant. However, to provide assistance in future cases, I think it wise to offer the following comments with respect to the process and documentation that emerged during the penalty phase.

Future considerations

[74] I start with one feature which may have compounded the difficulties in this case. The operative parts of the order issued November 1, 2010 t(that are relevant to this appeal) state:

> **IT IS HEREBY ORDERED PURSUANT TO THE MAINTENANCE AND CUSTODY ACT THAT:**
>
> **CUSTODY & ACCESS**
>
> 1. The Applicant shall have sole custody of the children of the marriage, namely Alexander Kenneth Wolfe Godin, born December 13, 1993, Joseph Michael Roo Godin, born September 7, 1995 and Olivia Raven Zelphia Godin, born March 29, 1999.
>
> 2. The Applicant will have all decision making authority regarding the children.
>
> 3. The Respondent is to have a complete psychiatric assessment before her parenting time can be normalized. Until that time there will be no overnight access between the children and the Respondent. The

psychiatric assessment must be provided to the Applicant and the Applicant must agree to overnight access.

4. The Respondent shall have specified access as follows:

   (a) Tuesday evenings from after school until after supper;

   (b) Every second weekend on Saturday and Sunday from 9:00 a.m. until 7:00 p.m.;

   (c) Mother's day for the day;

   (d) Christmas day from 2:00 p.m. until 7:00 p.m.;

5. Neither parent shall discuss with the children any adult matters, any disputes with the other parent, any matters involving the court proceedings or any further parenting arrangements.

[75] These provisions are problematic. Simply to illustrate, Clause 5 prohibits both parents from discussing with their children "any matters involving the court proceedings or any further parenting arrangements", yet each has admitted under oath to having provided a copy of the decision to their two sons, presumably to inform the boys as to what had transpired and give them some basis for understanding the judge's decision. Such would appear to be a laudable objective, yet place both parents in jeopardy of having violated the order.

[76] Clauses 1 and 2 say Mr. Godin is to have sole custody of their three children and all decision-making authority over them, yet it does not order Ms. Godin to turn over custody of the two sons who were living with her, to their father. The way the order is worded, there was no positive obligation upon Ms. Godin to do anything. She was not directed to physically remove the children from her residence and surrender them to their father against their will. Neither was the father ordered or authorized to physically seize the children and return them to his care. Undergoing a "complete psychiatric assessment" was left up to the appellant if she were interested in having greater access "normalized". It is difficult to see what term or proviso Ms. Godin violated, or what "act" she perpetrated that would warrant imprisonment for contempt.

[77] Clause 3 appears to place the onus upon Ms. Godin to obtain "a complete psychiatric assessment" before any access to the children beyond what is specified in Clause 4 is authorized by the court. Yet, as Ms. Godin testified, she was stymied in her efforts to initiate the assessment because it had not been ordered by the court and the health professionals with whom she had consulted told her she did not "fit the criteria to get one". When asked by her counsel what she had done to arrange a psychiatric assessment, we see this exchange:

> **BY MR. GRANT:**
>
> **Q.** What have you done since the receipt of the Order with - -
>
> **A.** The only other option that was available to me, I had previously spoken to Dr. Glen Goss, a private psychiatrist. He said, "You don't walk in and ask for one, your doctor refers you or the Court orders it."
>
> And I also went to the mental health unit at Cole Harbour Place for the Halifax Regional Municipality where I saw, and am seeing, Dr. Shawna Stewart. And she is preparing a letter for the Court as well to say that I do not fit the criteria for a psychiatric evaluation, and there is no other avenue that I know of that I can exhaust.
>
> **Q.** So you haven't got an assessment?
>
> **A.** I don't fit the criteria to get one, so unless the Court orders it - - -

[78] The Catch-22 in which Ms. Godin found herself was corroborated by her physician, Dr. Jeffrey A. Champion who testified at her sentencing hearing. We see this exchange when Dr. Champion was questioned by the appellant's counsel:

> **BY MR. GRANT:**
>
> **Q.** Dr. Champion, were you asked about obtaining a mental health assessment for Cindy Godin at some point in time?
>
> **A.** Yes, Cindy had told me that she had been ordered by the Court to have a mental assessment done.
>
> **Q.** Okay. And were you able to award her such an assessment?

> **A.** No, I was not. I had no instruction from the Court to do so, or any information as to why the assessment was necessary.
>
> **Q.** And as a result of that, did - - what did you indicate to Cindy about the mental health assessment?
>
> **A.** I told Cindy that I was not responsible for ordering assessments on behalf of the Provincial Court.
>
> **THE COURT:** It's not the Provincial Court, sir; it's the Supreme Court.
>
> **THE WITNESS:** Supreme Court; or any court.

[79] Faced with these realities, one wonders how the appellant could be expected to "normalize" her parenting time as contemplated by the terms of the order, or how she could be required to successfully purge her contempt once found to have violated those very same terms.

[80] Before leaving this subject, I wish to comment briefly on the contents of the Contempt Order itself dated May 25, 2011. Parts of the recitals and the operative provisions are problematic and I will refer to some to make my point:

> This proceeding is before the court for determination following an application to find the Respondent in contempt of the Order of the Supreme Court of Nova Scotia (Family Division) dated November 1, 2010.
>
> ....
>
> On December 6,2010, this Court found the Respondent, Cindy Godin in contempt of the November 1, 2010 Order;
>
> Cindy Godin was given until February 21, 2011 to purge her contempt;
>
> Cindy Godin did not purge her contempt;
>
> A Probation Order was issued from this Court on April 1, 2011;
>
> On application of C. LouAnn Chiasson, counsel for the Applicant, the following is ordered pursuant to s. 41 of the *Maintenance and Custody Act*, 1989 R.S.N.S. 160;

1. Cindy Godin is found to be in contempt of the Order of the Supreme Court of Nova Scotia (Family Division) dated November 1, 2010.

2. Cindy Godin is to be imprisoned for the term of ninety (90) days which is suspended on the following conditions:

   For a period of one year commencing April 1, 2011, Cindy Godin is to:

   a. Keep the peace and be of good behaviour;

   b. Not have any access with the children, Alexander Kenneth Wolfe Godin, born December 13, 1993; Joseph Michael Roo Godin, born September 7, 1995; and Olivia Raven Zelphia Godin, born March 28, 1999 except as provided in the Order of the Supreme Court of Nova Scotia (Family Division) dated November 1, 2010.

3. All constables and peace officers are to do all such acts as may be necessary to enforce the terms of this order and they have full power and authority to enter upon any lands and premises to enforce this order.

[81] The recital states that "on December 6, 2010, this Court found ... Cindy Godin in contempt of the November 1, 2010 order" but particulars of that contempt are not stated at all, let alone with the necessary clarity and caution that is expected in a quasi-criminal proceeding. I can think of many reasons why such detail is important. First, this is the original and only order which judicially confirms the court's finding that the contemnor's conduct was contemptuous. The contemnor and the public ought to be able to read the order and understand the specific conduct which was found to have violated the court's directions. Second, the contemnor requires such particulars if she ever hopes to satisfy the court's directions and thereby purge her contempt. Further, such detail facilitates enforcement of the court's order and permits meaningful appellate review. It also has precedential value in future cases.

[82] Next, the order states that the appellant was given until February 21, 2011 to purge her contempt but there are no particulars provided to explain, in plain language, what exactly would be required to do so. The order says the appellant "did not purge her contempt" but fails to give any details describing her default.

[83] The order makes reference to a Probation Order having been issued by the court on April 1, 2011. The Probation Order was purportedly issued pursuant to the provisions of the **Criminal Code** therein, whereas the Contempt Order was issued as a result of an application brought pursuant to s. 41 of the **Maintenance and Custody Act**. It strikes me as odd that the Probation Order was issued almost two months before the Contempt Order. Further, the Probation Order contains many more terms than does the Contempt Order such that if there were a violation of any of the terms of the Probation Order, it would, conceivably, raise a host of procedural and jurisdictional issues, much removed from the subject-matter of the original alleged contempt.

[84] Finally, and more substantively, the operative provisions of the Contempt Order are ambiguous and confusing. For example, the order provides conditions which appear to suspend the 90 day sentence of imprisonment, for one year. While the Contempt Order was issued May 25, 2011, the "period of one year" is said to commence April 1, 2011 (which is the date the Probation Order was issued). Further, the order is unclear as to whether the sentence is to take effect at the end of the year, or whether if Ms. Godin complies with the conditions, the sentence would then be void at the end of one year.

[85] It is a nice question whether the chosen sanction of probation apparently issued in this case pursuant to the provisions of the **Criminal Code**, is available as a penalty for civil contempt said to arise in proceedings initiated under provincial law, the **Maintenance and Custody Act**. The answer to that question will, of course, be informed by the Supreme Court, Family Division's inherent jurisdiction to punish disobedience or compel compliance, a power which resides in the common law: the authority of the Superior Court to control its own process.

[86] In **SNC-Lavalin Profac Inc. v. Sankar**, 2009 ONCA 97, the Ontario Court of Appeal held that a fine imposed for civil contempt ought to be paid to the Provincial Treasurer, and not to the successful plaintiff, on the basis that consistency required that the recipient of a fine for civil contempt ought to be the same as the recipient of a fine for the commission of a criminal offence.

[87] In **Puddester v. Newfoundland (Attorney General)**, 2001 NFCA 25, the appellants appealed an order for probation and an order for victim impact surcharges arising from criminal contempt provisions on the basis that since

criminal contempt was not a **Criminal Code** offence, the sentencing provisions should not apply. The appeal was dismissed with respect to the probation orders and allowed with respect to the victim impact surcharges.

[88] I recognize that the question I posed in this case is not precisely that which was considered in **SNC**, or **Puddester**. **SNC** dealt with the sanction of a fine, and **Puddester** addressed penalties that arose in sentencing for criminal contempt.

[89] I am aware of three trial court decisions where sentence was suspended, upon terms, following a finding of civil contempt. See **Dental Assn. (Alberta) v. Unrau**, 2001 ABQB 315; **Health Care Corp of St. John's v. NAPE**, [2000] N.J. No. 358 (Q.L.)(S.C.T.D.); and **Fiorito v. Wiggins**, 2011 ONSC 1868.

[90] It seems to me as well that the analysis of the issue would, in this province, have to include a careful consideration of the statutory evolution of the **Family Maintenance Act**, R.S.N.S. 1989, c. 160; the **Maintenance Enforcement Act**, S.N.S. 1994-95, c. 6; and the present iteration of the **Maintenance and Custody Act**.

[91] I prefer not to dispose of the issue definitively in these reasons as the point was not argued on appeal. It is better left to another day. Suffice it to say that trial judges should be satisfied the penalty they impose is clearly explained, and finds factual and jurisprudential support in the record.

[92] Assuming jurisdiction lies to issue a probation order, the order in this case does not identify the contempt for which Ms. Godin was sentenced. As explained earlier, the probation order contains a number of different conditions which are not included in the court's order of May 25, 2011. Incidentally, a probation order under the **Criminal Code** is not mentioned in **Civil Procedure Rule** 89, although the suspending of the passing of sentence is referred to as a "suspended penalty" under **Civil Procedure Rule** 89.13.

[93] I mention these obvious difficulties, not to decide the question, but rather to alert those who may be involved in future cases to matters which are of considerable concern.

[94] Before concluding these reasons, I wish to add a final comment about process and proof. To assist trial judges in this vexing area of civil contempt – all the more difficult in the context of family law disputes involving parents in turmoil over custody and access for their children – it may be helpful to keep the following framework of analysis in mind:

- First, before invoking the court's contempt power, is there a less coercive measure such as a sharp rebuke or stern warning that will ensure compliance and curb errant behaviour?

- Second, has the applicant established beyond a reasonable doubt <u>each</u> of the following elements of the offence of contempt?

  (i) the terms of the order are clear and unambiguous;

  (ii) the contemnor has had proper notice of the terms of the order;

  (iii) there is clear proof that the contemnor intentionally committed an act which is in fact prohibited by the terms of the order, and that

  (iv) the requisite *mens rea* is proven. In the context of civil contempt proceedings, this means that while it is not necessary to prove a specific intention to bring the court into disrepute, flout a court order, or interfere with the due course of justice, it is essential to prove wilful and deliberate conduct that has the effect of contravening the order.

- Third, in deciding whether the actions of the alleged contemnor were wilful, deliberate, and contemptuous, or whether a reasonable doubt arises on the evidence with respect thereto, the judge will likely wish to consider such things as the alleged contemnor's explanations for his or her conduct; the efforts made to ensure compliance; and whether there were obstacles not of the alleged contemnor's making, or other reasons which might provide an adequate excuse to the charge.

CONCLUSION

[95] I would allow the appeal on the basis that the trial judge erred in her application of the law and in her assessment of the evidence as it related to the alleged contempt.

[96] I would set aside the judge's decision dated December 6, 2010, finding the appellant in contempt, as well as the Probation Order and Contempt Order issued April 1, 2011, and May 25, 2011, respectively, as a consequence.

[97] Under the circumstances, where the appellant did not seek costs, I would decline to award any costs on appeal.

Saunders, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.