SUPREME COURT OF NOVA SCOTIA

Citation: *Mutual Transportation Services Inc. v. Saarloos*, 2016 NSSC 164

Date: 20160805
Docket: Hfx No. 215409
Registry: Halifax

Between:

Mutual Transportation Services Inc.

Plaintiff

v.

Rodi Saarloos, Bransam Enterprises Inc. and Bransam Logistic Services Inc.

Defendants

Judge:	The Honourable Justice Joshua Arnold
Heard:	February 8, 2016, in Halifax, Nova Scotia
Final Submissions:	April 4, 2016 and April 11, 2016
Counsel:	Richard Norman, for the Plaintiff Michael Blades, for the Defendant, Rodi Saarloos Christopher Madill, for the Defendant, Bransam Logistic Services Inc.

By the Court:

[1] This is a contempt of court motion.

Overview

[2] Mutual is a transportation logistics company. Saarloos is a former agent for Mutual who provided transportation services to Mutual's customers. Enterprises and Logistic were closely held companies incorporated by Saarloos. Saarloos and Mutual signed a confidentiality and non-competition agreement in 1999. Mutual commenced an action against all of the defendants in 2004, alleging breach of contract and breach of fiduciary duty. The interpretation of the confidentiality and non-competition agreement is an issue.

[3] Mutual sought production of documents beginning in 2008. They obtained a production order from Murphy J. dated April 28, 2008, requiring disclosure of certain documents within thirty (30) days (the "Murphy Order").

[4] Mutual was not satisfied with the defendants' response to the Murphy Order, and brought a contempt motion. The defendants were cited in contempt by Wright J. for having failed to comply with the Murphy Order. The defendants were then ordered to inquire about and produce certain documents (the "Wright Order"). Some documents were produced and some were not.

[5] Enterprises was dissolved in September 2009.

[6] Since 2009 Logistic has been owned by the Calyx Transportation Group. Mutual is no longer proceeding on this contempt motion against Logistic.

[7] Prior to September 23, 2015, all defendants, including Saarloos, Logistic and Enterprises (when it was a legal entity), were represented by Kelly Shannon of Burnside Law. Saarloos is now represented by Michael Blades of McInnes Cooper. Enterprises is now unrepresented. Logistic is now represented by Christopher Madill of Stewart McKelvey.

[8] Mutual claims that Saarloos and Enterprises have failed to comply with the Wright Order and seek a new order that:

a) Cites Saarloos and Enterprises in contempt;

b) Strikes Saarloos's and Enterprises' defences; and

c) Indemnifies Mutual for all of the costs incurred in pursuing the contempt motion and reviving the corporate defendant Enterprises.

[9] Mutual is also seeking an order requiring Saarloos to produce documents relating to Kreative Carriers Transportation & Logistics Services Inc., specifically freight invoices, customer transaction invoices, and statements of account for customers with a company proof of delivery, including any bills of lading from November 23, 2003, to November 23, 2004.

History

[10] During discoveries held in 2008, Saarloos undertook to produce a number of documents, including banking records of Logistic and Enterprises. Some of those documents were not disclosed. Mutual brought an application in 2008 for production of those documents. On April 28, 2008, Murphy J. ordered production of those documents within 30 days. The Murphy Order stated in part:

> IT IS ORDERED THAT the Defendants produce the documents listed in Schedule "1" as provided by Civil Procedure Rule 20.02 and 20.06 within thirty (30) days of the date of the hearing of this Application.
>
> …
>
> Schedule "1"
>
> 1. A copy of all banking records of Bransam Enterprises Inc. and Bransam Logistics Inc. from June 24, 2003 to November 24, 2003. In addition, a copy of all banking records for Bransam Enterprises Inc. and Bransam Logistics Inc. from November 24, 2003 – November 23, 2004 with respect to any dealings those companies had with Mutual Transportation Services Inc.'s customers.
>
> 2. The general ledger of Bransam Enterprises Inc. and Bransam Logistics Inc. from November 24, 2003 – November 24, 2004 with respect to any dealings they had with Mutual Transportation Services Inc.'s customers.
>
> 3. All records with respect to any dealings Bransam Enterprises Inc., Bransam Logistics Inc., and Rodi Saarloos had with Mutual Transportation Services Inc.'s customers between November 24, 2003 and November 24, 2004 and, without limiting the generality of the foregoing, copies of freight invoices, customer transaction invoices, billing documents, banking records, financial records, correspondence, and any other documentation.

> 4. Telephone bills of Bransam Enterprises Inc. and Bransam Logistics Inc. from November 24, 2003 to November 24, 2004 with respect to any dealings those companies had with Mutual Transportation Services Inc.'s customers.
>
> 5. A copy of the minute books for Bransam Enterprises Inc. and Bransam Logistics Inc. from the date of incorporation to November 24, 2004.
>
> 6. Advise of the percentage of total revenue the Defendants, Bransam Enterprises Inc., Bransam Logistics Inc., and Rodi Saarloos earned from Mutual Transportation Services Inc.'s customers from November 24, 2003 to November 24, 2004.
>
> 7. Copies of any premises leases the Defendants have been a party to from June, 2003 to November 24, 2004.
>
> 8. A copy of Mr. Saarloos'ss address book with respect to any of Mutual Transportation Services Inc.'s customers.

[11] The Murphy Order was not fully satisfied.

[12] In January 2010, Mutual applied for leave to bring a Civil Procedure Rule 89 contempt motion in relation to Saarloos's, Enterprises' and Logistic's failure to produce the requested documents in accordance with the Murphy Order. Justice Murphy granted leave.

[13] Justice Wright heard the first contempt motion on May 31, 2011. He cited Saarloos, Logistic and Enterprises in contempt and issued the Wright Order on June 13, 2011. The preamble to the Wright Order states:

> On May 31, 2011, the Plaintiff, Mutual Transportation Services Inc. ("Mutual"), moved for an order under Civil Procedure Rule 89 citing the Defendants, Rodi Saarloos ("Mr. Saarloos"), Bransam Enterprises Inc. ("BEI") and Bransam Logistic Services Inc. ("BLSI"), in civil contempt for failing to disclose certain documents referred to in "Schedule 1" of an order granted by the Honourable Justice John D. Murphy on April 28, 2008 that required disclosure of those documents to Mutual within 30 days (the "Original Order").
>
> After reviewing the Affidavits filed in support of and in opposition to Mutual's contempt motion and hearing from Joey D. Palov for Mutual and Kelly P. Shannon for the Defendants, the Court determined that the Defendants did not disclose the documents to which the Original Order refers within the required period and that certain of those documents remain outstanding.

[14] The Wright Order required the defendants to inquire about and produce various documents, including bank records for Enterprises, CRA records for Logistic and Enterprises and telephone records referred to in paragraph 62(b) of

Saarloos's November 22, 2010 affidavit. Mutual says that the defendants' inquiries were deficient and as a result almost five years later some of the documents described in the Wright Order have still not been produced.

[15] In relation to the bank records, Wright J. stated in the Order:

> 2 (i) BEI must make inquiries forthwith to its bank(s) for its banking records between November 2003 and November 2004 and immediately disclose any of those records produced by the bank(s);

[16] In relation to CRA records, Wright J. stated:

> 2 (iv) BLSI and BEI must forthwith inquire with Canada Revenue Agency to obtain copies or summaries of all their tax returns for the period between November 2003 and November 2004 and immediately disclose those documents when received;

[17] The relevant section of the Wright Order relating to the telephone records is:

> 2 (v) Mr. Saarloos must forthwith produce all telephone records to which he refers in paragraph 62(b) of his affidavit filed November 22, 2010.

[18] Paragraph 62(b) of Saarloos's November 22, 2010 affidavit states:

> 62 (b) Bank records: I had initially had my accountant search for the records at Bransam Enterprises Limited and they were unable to be located. They were stored at the time of move and I made certain that all of the records boxes were thoroughly searched and to no avail. I searched my own office at and made inquiries at home at my residence there and could not locate any records. I travelled to the Ontario head office and could not locate them there and flowing that simply concluded that I was unable to produce the required information. I advised my solicitor as such and was quite prepared to come to this honourable court and swear such. In preparation for this hearing, I discussed the matter again with my solicitor and my wife. She searched some storage boxes in my garage at home and located the general bank statements with regards to the CIBC and the Royal Bank as well as the phone bills for Bransam for the relevant period in a box with some of my children's belongings at my home in a place where they simply and clearly should not have been. I have no explanation as to why there were there but they were. They are attached herewith at schedule "A" to this my affidavit.

[19] Mutual says that contrary to the Wright Order, Saarloos has failed to produce:

- Enterprises' bank records between November 2003 and November 2004;

- Enterprises' complete tax returns between November 2003 and November 2004 (they claim several months remain outstanding); and

- Telephone records referred to in paragraph 62(b) of Saarloos's November 22, 2010 affidavit, which states:

> 62 (b) Bank records: … She searched some storage boxes in my garage at home and located the general bank statements with regards to the CIBC and the Royal Bank as well as the phone bills for Bransam for the relevant period in a box with some of my children's belongings at my home in a place where they simply and clearly should not have been. I have no explanation as to why there were there but they were. They are attached herewith at schedule "A" to this my affidavit.

[20] Following requests by Mutual for these documents spanning several years, on May 21, 2015, Derek Brett of Burnside Law on behalf of Saarloos wrote to Mutual's lawyers stating:

> - With regard to the income tax records of Bransam Enterprises, Inc. for the year ending September 2005, this demand is without any basis. Judge Wright's Order of June 13, 2011.
> - With regard to the bank record details, reference to Judge Wright's Order will also provide you with the necessary elaboration – the Order pertained to records from Bransam Enterprises, Inc. So, evidently, the production pertained to this company.
> - With regard to phone records, you again will be required to refer to the Court's Order. The Court's Order specifically references Kelly Shannon's Affidavit of November 22, 2010, and the paragraph regarding phone records. Specifically, Mr. Shannon provided that there were cell phone records, and that those cell phone records would be produced. Subsequently, those records were produced – twice – to your Firm. Therefore, it is incomprehensible why you would now demand records already produced, and threaten contempt proceedings.
> - In a new development, you are demanding documents associated with Kreative Carriers. No such documents have ever been previously requested; further, we cannot fathom how any documents relating to Kreative Carriers, a non-party to this action, has any bearing on any effort by your client's pursuit of admissible evidence.

[21] When Mutual raised the spectre of the current contempt motion in August 2015, Burnside Law made a motion to withdraw as solicitor for the defendants. Included in that application was the solicitor's affidavit of Kelly Shannon, which states in part:

> 12. In early 2015, almost four years later, I received a telephone call from Mr. Palov, who had returned to his previous position with Cox Palmer, and advising that he was seeking to move matters forward on the case-at-bar. By this time, my file had become dormant; I had not received any contact from Mr. Saarloos since approximately September 2011. I attempted to reach Saarloos through email and via his mobile number. The email address I had for Saarloos was no longer valid; however, the telephone number for Saarloos was still active and appeared from its message to belong to him. I left a message for Saarloos to contact me.
>
> 13. Having not heard a response, I had tried on a couple of occasions to reach Saarloos, eventually reaching him via teleconference in April 2015.
>
> …
>
> 20. Since that time, there has only been one other contact with Saarloos, in late June 2015, and repeating our message of April. Subsequently, we have received no word from Mr. Saarloos despite repeated calls, emails, and letters sent to him. We have received no instructions, nor retainer.

[22] Mr. Shannon's application to withdraw as solicitor of record was granted by Duncan J. on September 24, 2015.

[23] It eventually came to light that Enterprises had been dissolved in 2009 and was no longer a corporate entity. Saarloos would not agree to revive Enterprises. Justice Heather Robertson directed Mutual to revive Enterprises and this was accomplished in January 2016.

[24] On February 7, 2016, Mutual confirmed the withdrawal of the contempt motion against Logistic. As a result, this contempt motion is made in relation to Saarloos and Enterprises only.

[25] There was nothing in the Wright Order relating to Kreative Carriers. I will not be dealing with any issues relating to Kreative Carriers on this contempt motion. Mutual will have to bring a fresh application in relation to that matter.

The Current Contempt Motion

Telephone Records

[26] The current contempt hearing took place on February 8, 2016. Saarloos was represented at the contempt hearing by new counsel, Michael Blades. Mr. Blades explained that when Saarloos's file was transferred to his office from Burnside Law, the telephone records in question were found within the file materials. Those telephone records have since been disclosed. During argument on this matter, counsel confirmed that Mutual now has possession of the deficient telephone records referred to in Saarloos's November 22, 2010 affidavit at paragraph 62(b).

Bank and CRA Records

[27] During argument on February 8, 2016, when questioned by the Court as to why nothing had been done to obtain the CIBC and CRA records since commencing representation of Saarloos on September 23, 2015, Mr. Blades stated that he would make immediate efforts to obtain the deficient banking records from CIBC and the deficient tax records from CRA. Scheduled updates were provided to the court between February 8 and 26, 2016, detailing Saarloos's progress in this regard.

[28] On February 12, 2016, Mr. Blades sent an email stating in part that CIBC had destroyed the banking records:

> As indicated in the attached email chain, CIBC has advised that the requested documentation would have been destroyed in or before November 2011 in accordance with CIBC's 7 year Retention Policy. I say "in or before" because, for example, November 2003 records would presumably have been destroyed in November 2010, and so on. CIBC further advised that it could not determine the date upon which the Bransam Enterprises bank account was closed.

[29] On February 26, 2016, the final status update was received from Mr. Blades stating:

> **Para. 2(i) – Enterprises Banking Records spanning November 2003 to November 2004**:
>
> There have been no further developments in relation to this item since being repeatedly advised by CIBC that the documents in question no longer exist.
>
> **Para. 2(iv) – Enterprises 2005 Tax Return**:
>
> We received the attached correspondence from the CRA enclosing documentation which appears to only pertain to the tax year ending September 30, 2004. We are left to assume, consistent with Mr. Saarloos's belief and recollection, that there were no filings made on behalf of Bransam Enterprises Inc. for the 2005 taxation year. However, recognizing the fact that I had explicitly asked, in my February 9,

> 2016 letter, that the CRA confirm in writing the non-existence of any of the requested documentation, I will accordingly again write to the CRA requesting that written confirmation. By copy on this email, counsel for all other parties are receiving production of these documents recently received from the CRA.

[30] Subsequent to receiving the final status update, further correspondence was sent to CRA from Mr. Blades on March 10, 2016, and the following update was received on March 21, 2016:

> Further to my last update dated March 10, 2016, Mr. Saarloos has now received the attached letter from the CRA indicating that no tax documentation exists in relation to Bransam Enterprises Inc.'s 2005 taxation year because there were no such filings made. As such, there was never any further tax documentation to be produced beyond that which was produced on behalf of Mr. Saarloos in August 2011.

[31] On March 30, 2016, affidavits were provided to the court with the consent of all parties. Attached as Exhibit "B" to the affidavit of Michael Blades filed on March 30, 2016, is an email exchange with an assistant manager of CIBC confirming the bank's retention policy as follows:

> Good Day Mr. Blades,
>
> Here at CIBC our retention period for acc't statements as requested by your client is; current year + 7. Therefore, the statements in question would have destroyed in November 2011.
>
> I trust this is the information you are looking for. Should you have any further inquiries; feel free to contact me directly.

[32] Saarloos states in his affidavit filed with the court on March 30, 2016:

> 4. On February 8, 2016, following the contempt motion hearing in this proceeding, I telephoned the CIBC branch located at 1600 Bedford Highway, Bedford, Nova Scotia, and asked that copies of the Bransam Enterprises Inc. banking records which were, in part, the subject of the February 8, 2016 contempt motion in this proceeding, be located and provided to me immediately.
>
> 5. On February 8, 2016, following the contempt motion hearing in this proceeding, I telephoned the Canada Revenue Agency ("CRA") headquarters in St. John's, Newfoundland, and asked that copies of the Bransam Enterprises Inc. tax records pertaining to the 2005 taxation year which were, in part, the subject of the February 8, 2016 contempt motion in this proceeding, be located and provided to me immediately. During that call, I was advised by a CRA representative that 2004 was the last taxation year for which Bransam Enterprises Inc. filed a tax return.

> 6. On or about February 18, 2016, I visited the CIBC branch located at 1600 Bedford Highway, Bedford, Nova Scotia, in order to inquire as to whether there was any possibility of obtaining copies of the Bransam Enterprises Inc. banking records which were, in part, the subject of the February 8, 2016 contempt motion in this proceeding. During that visit, I was told by a CIBC representative that this was not possible.
>
> 7. On or about February 18, 2016, I again telephoned the CRA headquarters in St. John's, Newfoundland, to request a status update with respect to my inquiry referred to in the foregoing paragraph 5 of this Affidavit. During that call, I was told by a CRA representative that my inquiry was being processed.

[33] Attached as Exhibit "B" to Saarloos's affidavit of March 30, 2016, is a letter dated March 10, 2016, with the response from CRA to Saarloos's inquiries:

> Dear Sir or Madam:
>
> Re: Corporation Income Tax Records for 2005
>
> We are unable to provide photopies of the Corporate income tax return or related documents as our records indicate that there has been nothing filed for that tax year end. (2005)

Contempt

[34] Civil Procedure Rule 89 sets out the procedural framework for a contempt motion:

> **Scope of Rule 89**
>
> 89.01 (1) This Rule provides procedures for starting and conducting a contempt citation, motion, or application.
>
> (2) Rules outside this Rule apply to contempt processes, including the contempt hearing, with both of the following exceptions:
>
> (a) a judge's direction for the conduct of the process prevails over another Rule;
>
> (b) a Rule that cannot be adapted to the requirements of the Canadian Charter of Rights and Freedoms for a criminal or penal proceeding has no application to the contempt process.
>
> …
>
> **Motion or application by person other than judge**
>
> 89.04 (1) A party, the prothonotary, a person appointed by the court to perform an act on behalf of the court, the Attorney General of Nova Scotia, or another interested person may do either of the following:

(a) make a motion for a contempt order in a proceeding to which the conduct alleged to be contemptuous relates;

(b) start an application for a contempt order, if the conduct alleged to be contemptuous does not relate to a proceeding.

(2) A judge may require parties to a contempt proceeding to attend at a prehearing conference.

(3) A judge who presides at a prehearing conference in a contempt proceeding may give directions for the conduct of the proceeding and the contempt hearing.

(4) A judge who is satisfied that a contempt proceeding started by notice of motion or application is not in the interests of any party, or is not in the public interest, may stay the proceeding.

…

Compelling attendance for motion or application

89.08 (1) A judge may order a person against whom a contempt order is sought, or an officer, director, or manager of a corporation against whom the order is sought, to attend at the time, date, and place appointed for the contempt hearing.

…

Penalties for contempt

89.13 (3) A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

[35] In *Carey v. Laiken*, 2015 SCC 17, Cromwell J. reviewed the law of civil contempt and stated for the court:

> 30 Contempt of court "rest[s] on the power of the court to uphold its dignity and process ... . The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *United Nurses of Alberta v. Alberta (Attorney General)*,[1992] 1 S.C.R. 901, at p. 931. It is well-established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20.
>
> 31 The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to

> this appeal accept, rests on the element of public defiance accompanying criminal contempt: see, e.g., *United Nurses*, at p. 931; *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, at p. 522. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at para 6.100. However, one purpose of sentencing for civil contempt is punishment for breaching a court order: *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655, at para. 117. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: Sharpe, at para 6.100.
>
> …
>
> 33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.
>
> 34 The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226;*College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).
>
> 35 Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.). at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

Reasonable Doubt

[36] To prove civil contempt, the moving party must prove each of the three essential elements on the criminal standard, not the civil standard. Therefore, the three essential elements as detailed in *Carey v. Laiken* must be proven by the moving party beyond a reasonable doubt. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, Cory J., speaking for the majority of the Supreme Court of Canada, detailed the importance of reasonable doubt:

> 27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titanic and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[37] While discussing reasonable doubt in the context of jury instructions, Cory J.'s comments are equally applicable to a judge sitting alone on a civil contempt motion. Cory J. summarized the majority position on the reasonable doubt standard at para. 36 of *Lifchus*:

> 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> · rather, it is based upon reason and common sense;
>
> · it is logically connected to the evidence or absence of evidence;
>
> · it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
>
> · more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[38] It is therefore not for a trier of fact to simply choose which version of the events that it believes. The trier of fact must consider all of the evidence. In discussing how to define the reasonable doubt standard, Iacobucci J., writing for the Supreme Court of Canada in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, stated:

> 242. In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much more closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to

explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said at p. 177:

> If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed …

[39] In *Lifchus*, Cory J. provided instructions regarding the standard of proof:

> 39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
> >
> > What does the expression "beyond a reasonable doubt" mean?
> >
> > The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
> >
> > On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

Assessing Credibility

[40] Some aspects of this motion require an assessment of Saarloos's credibility. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the British Columbia Court of Appeal discussed how to assess a witness's credibility at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of the probabilities which are practical and informed person would readily recognize as reasonable in that place and in those conditions.

[41] Saarloos provided evidence by way of affidavit and *viva voce* testimony. He was cross-examined on significant issues. In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26, Cory J. provided clear instructions for a trier of fact in assessing credibility when an accused person testifies:

> 27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> 28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of

> the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[42] In *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.), Wood J.A., speaking for the court, commented on the *R. v. W.(D.)*, *supra*, instructions and stated, at para. 24:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely:
>
> > If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[43] The majority of the Supreme Court of Canada in *Lifchus* articulated some of the issues facing a trier of fact when assessing a witness's credibility. I keep in mind the words of the Supreme Court of Canada when considering all of the evidence Saarloos has provided:

> 29 Nonetheless there is still another problem with this definition. It is that certain doubts, although reasonable, are simply incapable of articulation. For instance, there may be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility.

[44] The Supreme Court of Canada again examined the issue of assessing credibility in the context of reasonable doubt in *R. v. Dinardo*, 2008 SCC 24, 2008 1 S.C.R. 788, where Charron J. spoke for the unanimous Court:

> 23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can

> better be dealt with under the rubric of the sufficiency of his reasons for judgment.

[45] I have considered all of the evidence presented in this case, including the testimony of Saarloos, when making my determination.

Carey v. Laiken Analysis

1. Is the Order clear and unequivocal?

[46] The relevant aspects of the Wright Order are paragraphs 2 (i), (iv) and (v) which state:

> 2 (i) BEI must make inquiries forthwith to its bank(s) for its banking records between November 2003 and November 2004 and immediately disclose any of those records produced by the bank(s);
>
> …
>
> (iv) BLSI and BEI must forthwith inquire with Canada Revenue Agency to obtain copies or summaries of all their tax returns for the period between November 2003 and November 2004 and immediately disclose those documents when received;
>
> (v) Mr. Saarloos must forthwith produce all telephone records to which he refers in paragraph 62(b) of his affidavit filed November 22, 2010.

[47] The Wright Order details the specific documents the defendants were to inquire about and disclose. The defendants have not suggested that there was anything unclear or equivocal about the Wright Order. I am convinced beyond a reasonable doubt that Mutual has proven the Wright Order is clear and unequivocal.

2. Did the defendants have actual knowledge of the Order?

[48] Saarloos was aware of the Murphy Order. In his November 22, 2010 affidavit he said:

> 21. Immediately following the hearing I was advised by Mr. Shannon via telephone of the Order from Justice Murphy and arranged to meet with Mr. Shannon when the order was finalized in an effort to obtain all of the documentation required.
>
> 22. I met with Mr. Shannon at my office and reviewed the order and was provided with a copy of the order which I had given to my company accountant, Mr. Jeff Currie, bookkeeper with instructions to provide the information sought.

> …
>
> 46. I have discussed with Mr. Shannon on numerous occasions regarding the disclosure items sought by the plaintiff and ordered by this honourable court.
>
> 47. I was at all times prepared to comply with order of the court and have at no time destroyed any documentation or records of either company.
>
> …
>
> 49. Mr. Shannon advised has advised me [*sic*] on numerous occasions about the necessity of having the documents produced. I did not feel we had anything other [*sic*]
>
> …
>
> 55. I am quite aware and have been since March of 2008 that I am required to produce documentation in accordance with the order.
>
> …
>
> 59. After initially receiving the order, I had every intention of simply complying with the order and it took considerable time and a thorough search involving several days and several offices to determine that the information in its entirety was not available to be produced.

[49] Saarloos and his counsel were both present during the first contempt motion held before Wright J. on May 31, 2011. In his August 11, 2011 affidavit Saarloos swore that he was present at the contempt hearing in May 2011 in his personal capacity as well as on behalf of Logistic and Enterprises (although Enterprises had been dissolved in 2009 and was only revived for the current motion in January 2016):

> 2. On May 31, 2011 I attended a hearing before the Supreme Court of Nova Scotia.
>
> 3. I attended this hearing in my capacity as a representative of the corporate defendants, BEI, BLSI and as a defendant myself.

[50] During the contempt motion of May 31, 2011, Wright J. stated directly to Saarloos:

> Quite frankly Mr. Saarloos I say this to you directly the efforts that you have made since April of '08 have simply not been sufficient. It's not sufficient just to delegate it to a bookkeeper and not follow up and this isn't just a minor transgression of two or three months from the date of Justice Murphy's order. This is something that has been going on now, that went on for about two and a half years with sporadic production of documents. Now does that constitute contempt? Well certainly it technically does because under the principles of civil

contempt set down by Justice Cromwell in *TG Industries and Williams*, all that is necessary to establish civil contempt is that there be a clear order that directs a person to do something or refrain from doing it, that the person on the receiving end of the order be aware of it, and that the person fail to comply with it. And intention to deliberately disobey the order is not a requirement for civil contempt. Justice Cromwell's decision makes that very clear and so I mean Mr. Shannon acknowledges because he's playing the hand he was dealt, that there hasn't been timely compliance with the order and as I say, this is not just a minor non-compliance that sufficient efforts to comply with Justice Murphy's order were not made. It was not complied with and no effort was made to come back to the court to gain a variation of that order. So you know I say to you, Mr. Shannon, instead of telling Mr. Palov that he should be doing this, that or the other thing, if your client couldn't reasonably comply with that order of April '08, I suggest there was a higher onus on your client to have brought an order – sorry, brought a motion to this court for a variation of an order and of course that wasn't done. So the inescapable legal conclusion on this is that Mr. Saarloos is in contempt of the Murphy order. There's no getting around that. The criteria laid down in the TG Industries case is clearly met.

And so then it becomes a question of what should the remedy be. Well Mr. Palov is over-reaching on that today. Number 1, I've already indicated in the course of my exchange with him that I would not consider this a case that should be dealt with on the footing of a fine. It should be dealt with on the footing of costs and just wait 'til I get that before me. A second aspect where Mr. Palov is over-reaching today is asking for me to grant an order today striking the defence. Well that wasn't on the table for today. What Mr. Palov was seeking, and I think rightly so, was an order for outstanding production to be completed within 30 days of this contempt hearing and then failing compliance, and then failing that, failing compliance with that, then the defence might be struck although I think he's suggesting there it be struck automatically. So am certainly not prepared to simply take the drastic step of striking the defence summarily right now on this hearing because Number 1, it wasn't sought in the first instance and Number 2, I don't think the Defendant should be denied one last opportunity here. So I am going to be granting an order which is going to have two prongs to it. Actually it's going to have three prongs to it. And we're not going to be able to sort the form of this order out today so what I'm going to do it broad-brush it for counsel. Mr. Palov will be making up the order and then we're going to have to come back. We're going to have to come back on another occasion later this month – or sorry, next month, I hope, to talk about finalizing the form of the order and to speak to costs because I don't have enough information before me to deal with the costs the way that I want to. But I will say to counsel that there will be a three-pronged order that's going to be granted. One will cite the Defendant in civil contempt. The second will deal with specific areas of documentation which I'll come to in a moment which are to be completed within 30 days, failing which the Plaintiff will be at liberty to make further motion to strike the defence. It will not

> be automatic. Rarely do I ever do that. And the third branch of the order, the third category of the order will deal with costs. …

[51] At paragraphs 6 and 7 of his August 11, 2011 affidavit, Saarloos confirmed that he received a copy of the Wright Order:

> 6. I understood that an order was to be prepared and under that order BEI, BLSI and I would have specific things to do as well as to pay a sum of money for costs.
>
> 7. Ultimately the first time I received the written order was on July 6, 2011 when it was emailed to me on behalf of BEI from my corporate solicitor who had received it from Mr. Shannon's office. Within 24 hours of receiving that Order, all necessary requests for production from had been delivered.

[52] Saarloos also says in his affidavit of August 11, 2011:

> 38. I understand the obligation that each of the companies, and I, have that should I have to continue to look for the required documents and should I , or anyone working for the companies, come across such documentation to produce the documents and things immediately.
>
> …
>
> 40. When documents requested by BLSI and BEI from third parties are made available to me I shall immediately deliver same to my Solicitor with instructions to immediately produce same to the Plaintiff's Solicitor.
>
> …
>
> 43. I make this affidavit in response to the motion before this Honourable court to produce such documentation.

[53] During the contempt hearing on February 8, 2016, Saarloos testified:

> Norman: Is it true that you and the other defendants were cited in contempt in 2011?
>
> Saarloos: Yes.
>
> Norman: And were you present in the courtroom when Justice Wright made that oral order?
>
> Saarloos: Yes.
>
> Norman: And you heard what he said at that time, is that correct?
>
> Saarloos: I did, yes.
>
> Norman: Do you take orders of this court seriously?
>
> Saarloos: Extremely, yes.

Norman: And when they are addressed to you and require you or your companies to do something do you sit down and look at those orders carefully?

Saarloos: Uh, with my counsel.

Norman: But you yourself read them yourself, correct?

Saarloos: Yes.

Norman: And whose responsibility is it to meet the terms of the order, the Justice Wright order?

Saarloos: Well it would be my responsibility. I would have to add though that I might not be too familiar with the terminology so I rely a lot on my counsel.

Norman: Ok, well I'm going to start then, Mr. Saarloos, with uh by taking you to the actual order, the Justice Wright order. It's attached as Exhibit A to an affidavit I swore on August 13, 2015.

…

Norman: If you take a moment to have a look through, through that order. I'm going to look at paragraph 2 in relation to the outstanding documents. You see that paragraph there?

Saarloos: Yes.

Norman: BEI, that's Enterprises, must make inquiries forthwith to its banks for its banking records between November 2003 and November 2004 and immediately disclose any of those records produced by the bank. Is there anything technical in that, in the terms of that paragraph that you need legal advice on?

Saarloos: No.

Norman: Ok. If we look at item number 4 on the second page. Enterprises must forthwith inquire with Canada Revenue Agency to obtain copies of summaries of all their tax returns for the period between November 2003 and November 2004 and immediately disclose those documents when received. Anything technical about that that you need advice on?

Saarloos: No.

Norman: Number 5. Mr. Saarloos must forthwith produce all telephone records to which he refers in paragraph 62(b) of his affidavit filed November 22, 2010. Anything technical about that requirement?

Saarloos: No.

…

Norman: Moving on to the banking records. We looked at the Wright order a moment ago, and we looked at the paragraph that required Enterprises to produce the banking records. You knew that the Wright order required Enterprises to produce its banking records, correct?

Saarloos: Yeah.

…

Norman: So these are, this is a transcript of the contempt motion before Justice Wright and this is Tab C of this affidavit filed on July 19, 2011, by Joseph Herschorn. The contempt motion was heard May 31, 2011, that's what the title page says. And at page 109 of this excerpt, starting at line 8, Justice Wright says, "Alright, so the first one had to do with the banking records of Bransam Enterprises during that period", he's talking about the document requests, "the relevant period of months between 2003 and 2004. This is where some of these banking records were produced last November, but I think that my notes tell me, Mr. Palov, is that they were only produced for the period from July to October of 2003 instead of the full period of November 2003 to November 2004." So, Mr. Saarloos, you were in court that day when Justice Wright talked about those bank records, correct?

Saarloos: Yes.

Norman: Were those records, were those Bransam Enterprises Inc. banking records ever produced?

Saarloos: Bransam Enterprises, I don't know. I made the request. Everything that was obtained was submitted.

…

Norman: … This is the affidavit of Joseph Herschorn, July 19, 2011, Tab C, the transcript of the contempt motion in 2011… page 111. So this is, these are Justice Wright's comments on the tax return and he says starting a line 7, "As for tax returns, of course those should be produced for the relevant time and if it wasn't covered by Justice Murphy's order, it is certainly covered by mine in 2009 so there's partial production here in the sense that there's been one tax return for each company, but it doesn't cover the full period and so the only person – if Mr. Saarloos can't locate those, he can at least obtain summaries of them from Revenue Canada and only he can do it as the taxpayer so he will be directed to make inquiries to CRA, the Canada Revenue Agency to obtain copies or summaries of his tax returns for those two companies that cover the full period

in question back in '03 and '04." So, Mr. Saarloos, where you there in court that day when Justice Wright said that?

Saarloos: Yes.

Norman: And did you, is there anything ambiguous in your mind about what he's asking for in that comment?

Saarloos: I don't believe so.

[54] In *RCBS Holdings Inc. v. East River Holdings Ltd*., 2013 NSSC 410, 2013 CarswellNS 1022, Murray J. commented on contempt of court as it pertains to corporate directing minds:

> 42 I have been provided with caselaw authority as it relates to corporate directing minds. It's been held that a directing mind of a Company may be found to be in contempt for the Company's actions. I refer to the *United Food and Commercial Workers International Union Locals 175 and 633*, [2005] O.J. No. 4140, case at paragraph 45.
>
> 43 *Nova Scotia Civil Procedure Rule 89* permits a Contempt Order against "a person". This would allow leeway for a finding that an individual was responsible for contempt committed by the corporation of which they were a principal. *Rule 89.08(1)* makes specific allowance and requires the attendance of corporate directors and officers. It also makes specific reference to penalties available at *Rule 89* including the specific power to sequester corporate assets at *Rule 89.13(3)*.

[55] In *United Food and Commercial Workers International Union Locals 175 and 633,* [2005] O.T.C. 855, [2005] O.J. No. 4140 (Ont. Sup. Ct. J.), the court made the following comments in finding a "directing mind" of a company in contempt:

> 41 Directors of corporations cannot avoid compliance with court orders if they are aware of their existence. A party in an order can be found guilty of contempt for aiding and abetting a breach of that order. This principle was firmly established in *Seaward v. Paterson* [[1897] 1 CH. 545] when that Court stated that the jurisdiction of the Court to make a contempt order against a third party is based on the premise that
>
> > He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this -- not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that the has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice.

> 42 The Supreme Court of Canada adopted the above principle in *Poje v. British Columbia (Attorney General),* [1953] 2 D.L.R. 785.
>
> 43 I do not accept the Respondent's argument that he should escape liability simply because he has no contract with the Union or because he personally committed no positive act contrary to the terms of the arbitration awards and court orders.
>
> 44 I adopt the reasons of O'Leary J. in *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp. (No. 2)* [(1975), 4 O.R. (2d) 585] where he stated:
>
> > I am not saying that before an officer or director can be committed for a contempt committed by the corporation that it must be shown that the officer aided or abetted the contempt. It may well be that the director or officer could be held in contempt, even though his role in the matter was purely passive: see *Biba Ltd. v. Stratford Investments Ltd.,* [1972] 3 All E.R. 1041, and *Glazer v. Union Contractors Ltd. and Thornton* (1961), 129 C.C.C. 150, 26 D.L.R. (2d) 349. Further, the violation of the injunction may give rise in some cases to a presumption that the director or officer did or failed to do something that caused the breach, and may put that officer or director on his defence.
>
> 45 There is a duty imposed upon all directors of corporations to do everything that is reasonable to ensure compliance with a court order. In the case at bar, it is manifestly obvious that Ladislav Syrovy has deliberately treated the arbitration awards and/or court orders as "unworthy of notice." As the directing mind of 777604 Ontario Limited which operates the Hotel, he and he alone was and is responsible for ensuring compliance and it was he who failed to ensure that the corporation and/or Hotel complied with the terms of the agreement, arbitration awards or court orders.
>
> 46 In his affidavit, Mr. Syrovy impliedly acknowledged that the company (his company) has the financial responsibility under the terms of the collective agreement. Despite his participation in all the arbitration hearings, his knowledge of the terms of the awards and his execution of the collective agreement, he brazenly continues to be non-compliant.
>
> 47 There is no doubt that the actions of Mr. Syrovy constitute an interference with the orderly administration of justice. For him to escape responsibility by shielding himself behind a corporate veil or by pleading that he committed no act of commission, only acts of omission, would make a mockery and an abuse of the process of this court. Enforcing collective agreements is in the public interest; otherwise, the entire foundation of labour relations will crumble.

[56] While it is true that the Ontario Rules under which *United Food and Commercial Workers* was decided included a specific provision permitting the court to make an order against an officer or director of a corporation that was in contempt, the cases do not indicate that such authority is a prerequisite to the

court's jurisdiction to make such an order. As Jeffrey Miller writes in *The Law of Contempt in Canada*, 2d edn (Toronto: Carswell, 2016), "[w]here a person is the active, dominant and controlling mind of a company, that person is liable for the company's contempts" unless it is established that that person did all they could to avoid the contempt (59-60).

[57] In *Sussex Group Ltd. v. 3933938 Canada Inc. (c.o.b. Global Export Consulting)*, [2003] O.T.C. 664, [2003] O.J. No. 2906 (Ont. Sup. Ct. J.), the court stated:

> 56 Any person having knowledge of the substance or nature of the order can be found guilty of contempt for acting in contravention of the order. If a directing mind of a corporation prevents the corporation from complying with the order, the person(s) comprising the directing mind is also guilty of contempt. …

[58] In *Ontario (Attorney General) v. Clark* (1966), 57 D.L.R. (2d) 596, 1966 CarswellOnt 20 (Ont S.C. (C.A.)), at paragraphs 61-65, the court determined that an individual can been found liable for contempt, even if they are not a party to the order being contravened, if they have knowledge that they are acting in contravention of an order. This proposition was also espoused in *Kroma Printing Inks Corp. of Canada v. Hobbs*, [1999] O.J. No. 1569, 1999 CarswellOnt 1326 (Ont. Sup. Ct. J.) at paragraph 21. Therefore, even if Enterprises was not a legal entity at the time of the Wright Order, Saarloos still may be liable for contempt if he had knowledge of the Wright Order and acted in contravention of that order.

[59] Enterprises and Logistic were closely held by Saarloos when the proceeding was commenced and when the original production orders were made. Saarloos has acknowledged that he appeared at the contempt hearing as a representative of Enterprises as well as on his own behalf.

[60] Enterprises was dissolved at the time Wright J. issued his order in 2011. Enterprises was not a legal entity when the Wright Order was issued and therefore the contempt order was null as against it.

[61] Although Enterprises was not a legal entity at the time of the Wright Order's issuance, Saarloos advised the court he was there on behalf of Enterprises, Logistics and himself. Enterprises was a closely held company directed by Saarloos. Saarloos cannot avoid responsibility when he had full knowledge of Enterprises' obligations. Saarloos attended at the 2011 contempt hearing in several capacities. I am convinced beyond a reasonable doubt that Saarloos had actual

knowledge of the Wright Order. Additionally, if he had knowledge for himself, in these unique circumstances, and considering the comments in the authorities noted above, I am prepared to find that Saarloos had knowledge on behalf of Enterprises as well.

3. Did the Defendant intentionally do the act that the Order intends to prohibit or intentionally fail to do the act that the Order compels?

CIBC Banking Records

[62] The Wright Order provided:

> 2 (i) BEI must make inquiries forthwith to its bank(s) for its banking records between November 2003 and November 2004 and immediately disclose any of those records produced by the bank(s);

[63] In his August 11, 2011 affidavit, at paragraph 23, Saarloos says he wrote to CIBC on July 6, 2011, requesting Enterprises' bank records for the period of November 2003 to November 2004. In that affidavit, he says that prior to August 8, 2011, he again contacted CIBC regarding delivery time of the documents. There is no indication of a reply from CIBC.

[64] In his January 22, 2016 affidavit, Saarloos says that he believes his lawyer provided CIBC records to Mutual on August 17, 2011, but says the records must have related to Logistic because Enterprises "virtually ceased operations" once Logistic was incorporated in late 2003:

> 5. Attached hereto and marked Exhibit "B" are true copies of bank records which, I am advised by my lawyer whom I do verily believe, appear to be the bank records which were produced to the Plaintiff in this proceeding on or about August 17, 2011, by my former lawyer Mr. Kelly Shannon ("Mr. Shannon"). I am advised by my lawyer, whom I do verily believe, that the Plaintiff is requesting clarification as to which of the "Bransam" companies these bank records pertain to. To the best of my knowledge, these bank records pertain to Bransam Logistic Services Inc. I conclude this based on the fact that Bransam Enterprises Inc. virtually ceased operations once Bransam Logistic Services Inc. was incorporated in late 2003.

[65] In his January 22, 2016 affidavit, Saarloos says that his previous lawyer never requested clarification from him as to which company the CIBC records

related. Saarloos says that he believed that aspect of the Wright Order had been satisfied in 2011:

> 6. To the best of my knowledge and recollection, at no time did my former lawyer Mr. Shannon ever ask me to clarify which of the "Bransam" companies those bank records pertained to. Since the production of the banking records on or about August 17, 2011, my understanding and honest belief was that this portion of the Order of The Honourable Justice Wright dated June 13, 2011 (the "Wright Order") had been satisfied.

[66] During his testimony on February 8, 2016, Saarloos said:

Saarloos:	I made the request. Everything that was, that was obtained was submitted.
Norman:	And did you ever obtain those banking records.
Saarloos:	I can't be 100% sure, but everything that I had received. I'm not exactly sure if there was any banking records for Enterprises in that period.
Norman:	You can't, you don't know and can you tell me about what efforts you've made to…
Saarloos:	I wrote sent a letter to CIBC requesting.
Norman:	Did you hear back?
Saarloos:	I did not.
Norman:	Did you follow up and try again?
Saarloos:	I can't remember.
Norman:	Ok. Have you, to the best of your knowledge you've never, have you ever seen any Bransam Enterprises banking records?
Saarloos:	I've seen some records, but I don't know what period they would've, anything that I would've had would have been submitted.
Norman:	And in your affidavit filed a couple weeks ago, you talked about banking records from that period had been sent to Mutual and you said that those, you had determined those were actually records from Logistic, correct?
Saarloos:	I assumed because I don't think there was any records that applied in that period for Enterprises.
Norman:	So that was just an assumption you made?
Saarloos:	To the best of my knowledge, yeah.

Norman: Did you take any other steps in the last few months to try to firm up that assumption?

Saarloos: For which?

Norman: To determine…

Saarloos: Yeah, like, I've been up night and day going through this stuff. I honestly, everything I had was given, I have not withheld anything, everything was given.

Norman: But no further effort was made to obtain any of Enterprises' banking records from the bank?

Saarloos: No, it was, the company was out of business, there was not business. There was no…

Norman: No effort was made to obtain those Bransam Enterprises banking records?

Saarloos: Well, the effort was made at the beginning when I sent the letter to the CIBC.

Norman: And no follow up?

Saarloos: I guess not. I mean I went through all the records, I went through everything.

Norman: Just to be clear that was an effort you made in 2011 to obtain those records?

Saarloos: Yes.

[67] According to Saarloos's March 30, 2016 affidavit, CIBC has a seven-year retention policy, following which records are routinely destroyed. If there were 2003 and 2004 banking records for Enterprises, according to the CIBC retention policy they would have been destroyed in 2010 and 2011.

[68] The Murphy Order of April 28, 2008, required production of the documents. The Wright Order of June 13, 2011, required inquiries of the bank and production of documents. There is no longer any ability to determine whether there ever were such documents to produce.

[69] In August 2011, Saarloos sent Mutual a package of banking records. The package did not indicate to which entity the records related, Logistic or Enterprises. Over time, Saarloos has argued variously that paragraph 2(i) of the Wright Order was complied with because: 1) the records were delivered and such clarification is just "an extension" to that obligation, which was an obligation of Enterprises; 2) that his previous lawyer did not advise him that clarification of this

issue was necessary; and 3) that CIBC has confirmed that if any such records had been in existence, they would have been destroyed in or before November 2011 in accordance with CIBC's seven-year retention policy.

[70] Paragraph 2(i) of the Wright Order pertained to Enterprises. Saarloos had been the operating mind of Enterprises. Since the hearing in February 2016, with nominal effort, Saarloos and his new lawyer have actually made inquiries of CIBC and received a reply. They determined that if the records did exist, they have now been destroyed. Had Saarloos made a real effort to comply with the Wright Order in 2011 there would be no mystery as to the existence of the records.

[71] As Murphy J. stated in *Blackman v. CIBC Wood Gundy Financial Services Inc.*, 2009 NSSC 416:

> 46 It is also significant, and noted in the authorities, including *T.G. Industries*, that an order must be obeyed according to its spirit as well as its letter; given the circumstances in this case I have determined that the spirit of the order was not obeyed.

[72] In his affidavit of January 22, 2016, at paragraph 5, Saarloos clarified that the banking records belong to Logistic, not Enterprises. So production in accordance with the Wright Order was not complied with, even partially. In relation to his obligation under the Wright Order to make inquiries, Saarloos's efforts in 2011 to obtain the banking records from CIBC were anemic. Making a request or two, not receiving a satisfactory response and then making no effort to follow up or determine whether the requests were actually sent to the appropriate person or received by anyone, does not satisfy the spirit of the Wright Order.

CRA Records

[73] Enterprises' tax year ends on September 30. Therefore, transactions that took place between September 30, 2004, and November 30, 2004, would only be reflected in Enterprises' 2005 tax returns. According to Saarloos's August 11, 2011 affidavit, immediately following the May 31, 2011 court hearing, he telephoned CRA and was told to file his request in writing for Enterprises' 2005 tax filings. Approximately one month later, on July, 4, 2011, Saarloos says he wrote to CRA requesting tax records for Logistic and Enterprises for 2003 and 2004. He says he requested those years based on his knowledge that this matter was focused on those time periods. Saarloos says that he instructed one of his employees to fax the letter to CRA. On July 5, 2011, the fax was sent, but the fax

number was incorrect. Saarloos says that the fax was re-sent the same day to the correct fax number.

[74] Only the 2003 and 2004 tax records for Enterprises were received in relation to this request. Saarloos says he delivered Enterprises' tax records to Burnside Law in person on July 22, 2011.

[75] In his January 22, 2016 affidavit, Saarloos says that he does not believe he ever received a 2005 tax return for Enterprises. He says his previous lawyer never advised him that further tax documentation for Enterprises was required, nor that Mutual was continuing to dispute the fulfilment of that aspect of the Wright Order.

[76] During his *viva voce* testimony of February 8, 2016, Saarloos said:

> Norman: Moving on to the tax returns, you say you made an effort, you made an inquiry of CRA, Canada Revenue Agency, for the 2005 Enterprises' tax returns, correct:
>
> Saarloos: Which one are we looking at here now? Sorry?
>
> Norman: We're talking about the tax return, the Bransam Enterprises tax return.
>
> …
>
> Saarloos: Yes, I made an effort to obtain those. Yes.
>
> Norman: And, again, you didn't hear anything back, correct?
>
> Saarloos: I did not.
>
> Norman: And, again, you didn't follow up or make any further efforts to obtain that?
>
> Saarloos: Well, actually, Revenue Canada's a little different because you only have a fax number. I tried to get a phone number but they kept referring me, my request to email so, so I made that, that's how I came to that email that I sent and I have not heard anything on it.
>
> Norman: And you just gave up after that?
>
> Saarloos: Well, I wouldn't say gave up, I did all I thought I could do.
>
> Norman: Well, you only made one, you only made one inquiry, correct?
>
> Saarloos: Well, I guess that's all I can remember doing, but I don't know what, I didn't know what else to do.
>
> Norman: You didn't think that maybe you should try again?

Saarloos: Well, I thought that when I gave this to my lawyer it was all looked after, so I wasn't, I'm new to this, I'm not in a court every day, I don't know what the procedures are, I just did what I was asked to do and I did it. I was asked to do that and I did it.

Norman: Although you did say earlier that you clearly understood what the order said and that it was not technical and you didn't require any advice in order to…

Saarloos: Correct, and it asked me to make inquiries and I did it.

Norman: And, again, that was an inquiry that you made in 2011 and am I correct that you haven't any inquiries since then including anything any requests or inquiries in recent months?

Saarloos: I have not. I mean, I thought that Enterprises was done, closed.

Norman: So even knowing that this was an outstanding item that you were going to be here today and that Mutual had made a motion for contempt and had spent years trying to obtain this document, you still made no further effort or inquiry to CRA to obtain the tax return?

Saarloos: I didn't know that it was still being, that they were still looking for it. I had no idea.

Norman: You didn't know in recent months?

Saarloos: I knew, I knew when Kelly contacted me and said that we needed to talk about this, that's when I was made aware of it since 2011. And since then I've made, I've hired new counsel, I've, I've done what I thought I needed to do to get this thing moving forward because I thought I did everything I needed to or was supposed to do and then I find out I didn't.

Norman: And so you found out you didn't, when did you find out that you didn't?

Saarloos: Well, when I was served by…

Norman: Right and from that point forward you still made no efforts to obtain records, right?

Saarloos: Well, I guess not.

Norman: And do you think that effort to make an inquiry as the order, the written order says, do you think that follows, do you think that's in keeping with the spirit of the Wright Order to make an inquiry and not follow up?

Blades: My Lord, I'm objecting to that question.

Court: Mr. Norman, I think you're asking for a legal opinion as opposed to a factual answer.

Norman: Ok, fair enough My Lord. Mr. Saarloos can you look at page, that affidavit with the transcript please, can we look at page 111, and this is the affidavit of Joseph Herschorn, July 19, 2011, Tab C, the transcript of the contempt motion 2011. Are you there Mr. Saarloos?

Saarloos: I am, yes.

Norman: Page 111. So this is, these are Justice Wright's comments on the tax return and he says starting at line 7, "As for tax returns, of course those should be produced for the relevant time and if it wasn't covered by Justice Murphy's order it is certainly covered by mine in 2009, so there's partial production here in the sense that there's been one tax return for each company but it doesn't cover the full period and so the only person, Mr. Saarloos, can't locate those he can at least obtain summaries of them from Revenue Canada and only he can do it as the tax payer so he will be directed to make inquiries to CRA to Canada Revenue Agency to obtain copies or summaries of the tax returns for those two companies that cover the full period in question back in 03 and 04". So, Mr. Saarloos, were you there in court that day when Justice Wright said that?

Saarloos: Yes.

Norman: And did you, is there anything ambiguous in your mind about what he's asking for in that comment?

Saarloos: I don't believe so.

Norman: And yet you made no additional efforts since 2011 to obtain those tax returns?

Saarloos: Well, I believe…

Blades: My Lord, this question's been asked and answered, not once but perhaps 2 maybe 3 times. So I'm going to object to the re-asking of the same question.

Norman: I'm prepared to move along….

[77] In his affidavit of March 30, 2016, at paragraph 5, Saarloos says that no tax records were filed by Enterprises in 2005:

> 5. On February 8, 2016, following the contempt motion hearing in this proceeding, I telephoned the Canada Revenue Agency ("CRA") headquarters in St. John's, Newfoundland, and asked that copies of the Bransam Enterprises Inc.

> tax records pertaining to the 2005 taxation year which were, in part, the subject of the February 8, 2016 contempt motion in this proceeding, be located and provided to me immediately. During that call, I was advised by a CRA representative that 2004 was the last taxation year for which Bransam Enterprises Inc. filed a tax return.

[78] There are no 2005 tax records to produce. However, Saarloos's efforts to inquire with CRA about the 2005 tax records after the Wright Order was issued were even weaker than his efforts to inquire for bank records with CIBC. With nominal effort, this issue could have been clarified by Saarloos in 2011. Saarloos cannot be said to have obeyed the spirit of the Wright Order regarding his obligation to inquire with CRA.

Telephone Records

[79] The telephone records referred to in paragraph 62(b) of Saarloos's November 22, 2010 affidavit were not attached to that affidavit and were not produced until attached as Exhibit "C" to Saarloos's affidavit of January 22, 2016.

[80] Saarloos says that he delivered the telephone records to his previous lawyer in 2010 and cannot explain why his previous lawyer failed to deliver them. According to Mr. Blades, when Saarloos's new counsel received the file from his previous counsel in December 2015, he found the telephone records among the file materials. Those telephone records were then attached as Exhibit "C" to Saarloos's affidavit of January 22, 2016.

[81] It is certainly possible that Saarloos provided the telephone records to his previous counsel in 2010 and swore the November 22, 2010 affidavit with the understanding that they would be attached as exhibits. What is less clear is why, after receiving the Wright Order on June 13, 2011, Saarloos did not follow up with his previous lawyer to locate and deliver those records.

Intent

[82] The issue of intent in a civil contempt motion requires careful consideration. In *Carey v. Laiken*, Cromwell J. stated:

> [26] At the initial contempt hearing, Roberts J. stated, in my view correctly, that "civil contempt consists of the intentional doing of an act which is in fact prohibited by the order" Crowmwell J. confirmed:

[83] Justice Cromwell went on to outline the issues facing the court in that case:

> [29] However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not accept Mr. Carey's position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

[84] In order for a finding of civil contempt to be made, there must be proof beyond a reasonable doubt of an intentional act or omission that is, in fact, in breach of a clear order of which the alleged contemnor has notice:

> [38] It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: … The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: ...

[85] In *TG Ind. Ltd. v. Williams*, 2001 NSCA 105, Cromwell J.A. (as he was then) discussed the difference between an intentional act and knowledge that the act is prohibited:

> [17] It may be helpful to remember that, in criminal law, generally speaking, the required intent relates to the accused's desire to commit an act, not to the accused's knowledge that the act is prohibited by law. For example, a person who intentionally kills another is (absent excuse or justification) guilty of murder even if unaware that intentional killing is unlawful. In other words, a person acts with criminal intent if he or she desires to commit the act and does so. (It is not necessary for this case to decide how far beyond desired acts intention may extend. The act, of course, may be an omission to do an act required by law.) Similarly, in civil contempt, it is important to distinguish between an intentional act and knowledge that the act is prohibited. The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order, is not an essential element of civil contempt.

[86] Intention to disobey is not an element of civil contempt. Therefore, I do not have to be convinced beyond a reasonable doubt that Saarloos intended to disobey the Wright Order. I must instead be convinced beyond a reasonable doubt that Saarloos intended to commit or omit to do the mandatory act. The offence consists of the intentional doing of an act or omitting to do an act which is, in fact, prohibited or mandated by the order. The requirement for intention excludes only "casual or accidental" acts. Did Saarloos intentionally fail to make the necessary inquiries of CIBC or CRA or intentionally fail to provide the documents as required by the Wright Order? Did Saarloos consciously omit to inquire about or provide those documents?

Reliance on Legal Advice

[87] Saarloos says his former lawyer, Kelly Shannon, is responsible for any problems in complying with the Wright Order. Saarloos says he never had actual knowledge of a failure to comply and therefore is not guilty of contempt. The Wright Order created obligations for Saarloos as the directing mind. Saarloos acknowledges that he was required to make efforts to produce the documents in question. Yet, in his affidavit of January 22, 2016, Saarloos says that his former lawyer advised him that his efforts to comply were satisfactory so as a result his former lawyer is responsible for any malfeasance, if there was any malfeasance:

> 6. To the best of my knowledge and recollection, at no time did my former lawyer Mr. Shannon ever ask me to clarify which of the "Bransam" companies those bank records pertained to. Since the production of the banking records on or about August 17, 2011, my understanding and honest belief was that this portion of the Order of The Honourable Justice Wright dated June 13, 2011 (the "Wright Order") had been satisfied.
>
> …
>
> 8. To the best of my knowledge and recollection, at no time since the execution of my August 11, 2011, Affidavit sworn in this proceeding, did my former lawyer Mr. Shannon ever advise me that any further document production efforts were required with respect to tax documentation of Bransam Enterprises Inc.
>
> 9. To the best of my knowledge and recollection, at no time since executing my Affidavit sworn in this proceeding on August 11, 2011, did my former lawyer Mr. Shannon ever advise me that the Plaintiff continued to dispute the fulfillment of paragraph 2(iv) of the Wright Order. My understanding and honest belief since that time was that this portion of the Wright Order had been satisfied.
>
> 10. Attached hereto and marked Exhibit "C" are true copies of phone bills which, I am advised by my lawyer whom I do verily believe, were found within the original file materials which my lawyer received in December 2015 from my former lawyer Mr. Shannon. To the best of my knowledge and recollection, I delivered these phone bills to Mr. Shannon at the same time as I delivered to Mr. Shannon the banking records which were attached as Exhibit "A" to my November 22, 2010 Affidavit. As such, my belief is that these phone bills have been in MR. Shannon's possession for more than five years. I have no explanation as to why Mr. Shannon did not produce these phone bills to the Plaintiff in 2010.
>
> …
>
> 13. I am advised by my lawyer, whom I do verily believe, and I have read in the email exchange attached as Exhibit "D" hereto, that my former lawyer produced certain phone records to the Plaintiff in August 2011 which were duplicative of

> phone records which my former lawyer had already previously produced in 2010. To the best of my knowledge and recollection, at no time since August 2011 did my former lawyer Mr. Shannon ever advise me that the Plaintiff continued to dispute the fulfillment of paragraph 2(v) of the Wright Order. My understanding and honest belief since that time was that this portion of the Wright Order had been satisfied.
>
> 14. To the best of my knowledge and recollection, at no time since August 2011 did my former lawyer ever advise me that any requirement of the Wright Order remained outstanding.
>
> 15. Since August 2011, and until being personally served in 2015 with notice of this Contempt Motion, it had been my understanding and honest belief that all requirements of the Wright Order had been satisfied.

[88] Mistake of law is not a defence to civil contempt. As Cromwell J. noted in *Carey v. Laiken*, reliance on legal advice does not shield a party from a finding of contempt:

> [42] The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.
>
> [43] Further, adopting the appellant's proposal would in effect make the required mental element dependent on the nature of the order alleged to have been breached. Those who breach a prohibitory order would benefit from this heightened mental element disproportionately, due to subsequent impossibility of compliance, as compared to those who breach a mandatory order, with which the alleged contemnor will be able to subsequently comply absent a conflicting legal duty. I see no principled basis for creating this distinction.
>
> [44] The appellant also submits that lawyers should benefit from a heightened fault requirement, but I do not agree. As the Court of Appeal recognized, reliance on legal advice does not shield a party from a finding of contempt: .... Still less should the law permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice.

[89] At the trial level, in *Canada Metal Co. v. C.B.C. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.J.), at p. 661, aff'd (1975), 65 D.L.R. (3d) 231 (Ont. C.A.), the

court also found that reliance on legal advice does not shield a party from contempt:

> 35. Neither is it a defence to contempt proceedings that the things done were done reasonably and despite all due care and attention, in the belief based on legal advice that they were not breaches: *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849 at p. 862.

[90] In *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849 (R.P.C.) the court commented on the inability of legal advice to form a defence to contempt and said at p. 862-863:

> We conclude, therefore, that the breaches of undertaking here were contempts of court, even though it were to be shown that they were things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches.
>
> …
>
> Questions as to the *bona fides* of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court may be highly relevant in mitigation of the contempt. *Bona fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant, and sometimes very important, as mitigation. The extent of such mitigation must, however, depend on the circumstances of the particular case, and the evidence adduced.
>
> …
>
> While this statement does not, of course, mean that *bona fide* legal advice can never be a mitigating circumstance, it lends force to the view which we hold that reliance on legal advice certainly cannot be relied on, as a matter of course, as complete mitigation.
>
> Supposing, then, that the respondents had acted throughout the period of the rate notification agreement in the reasonable, though mistaken, belief, because of the legal advice which they had received and the absence of changed advice, that no breach of their undertakings was involved, that fact would not amount to full mitigation of their contempt. It might be a mitigating factor, but no more than that.

[91] However, in *Magri v. Cellupica*, 2014 ONSC 2316, 2014 CarswellOnt 5048, the court found that poor legal advice could excuse a contemnor's actions:

> 13 I am satisfied that the order of Justice Gilmore finding Ms. Magri in contempt, ought to be set aside and the matter referred back to her on a full hearing of the evidentiary issues from both the Applicant and the Respondent. A

> finding of contempt is made on a beyond reasonable doubt standard, not on a balance of probabilities. Contempt findings are quasi-criminal in nature and can have a significant effect on the course of litigation, especially in family matters. A finding of contempt on an earlier matter can often haunt the person so found with respect to every step of the proceedings thereafter. I am satisfied that Ms. Magri has provided a satisfactory reason why she did not appear, her lawyer told her it was not necessary. Her lawyer was on the record, was an officer of the court, and was obligated to be truthful to her and to attend before Justice Gilmore on the hearing date unless other consent arrangements were made with counsel for Mr. Cellupica. He did not do so. Ms. Magri may have further remedies against her former lawyer, but that will not solve the finding of contempt, which was clearly based on Justice Gilmore's inability to hear Ms. Magri's side of the story. The negligence of a lawyer in not advising his client should not fall to the feet of the client when contempt is in issue. Ms. Magri is entitled to have her day in court before being found in contempt in these circumstances.
>
> 14 I am satisfied that she moved on a timely basis to retain new counsel who prepared materials, contacted counsel opposite, and arranged a motion date before the court. I am also satisfied that based on her affidavit submissions, she has a *prima facie* case. Her material contains a copy of a letter from her former lawyer to Mr. Cellupica's former lawyer, outlining her position with respect to travel consent. Mr. Cellupica's position is that his former lawyer did not receive that letter. Those are factual and evidentiary issues, which can be determined at a full hearing of the motion.

[92] While the Ontario court's decision in *Magri* might be somewhat inconsistent with *Carey*, I am bound by the decision of the Supreme Court of Canada. Nonetheless, because Saarloos blames his previous counsel for the failure to comply with the Wright Order, Saarloos's own actions following the making of the Wright Order should be carefully examined. What sort of care did Saarloos actually take to comply with the Wright Order?

[93] Saarloos claims that he was not aware of a compliance problem in relation to the CIBC records until 2015. Saarloos knew that he had only made one or two inquiries of CIBC that had not achieved anything, but claims that his previous lawyer then told him he was in compliance with the Wright Order.

[94] Saarloos also claims that he was not aware of a compliance problem in relation to the CRA records until 2015. Saarloos also knew that he had only made one or two inquires of CRA that had not achieved anything, but again claims that his previous lawyer told him he was in compliance with the Wright Order.

[95] Saarloos made little effort to comply with the Wright Order regarding inquiries with CIBC and CRA. His alleged reliance on legal advice is not sufficient to raise a reasonable doubt on these items.

[96] The facts relating to production of the telephone records distinguish Saarloos's culpability from that relating to the CIBC and CRA records. Saarloos knew that he had given the telephone records to previous counsel and expected they would be attached to his 2010 affidavit. By the time the Wright Order was made in 2011, Saarloos knew that the telephone records had not actually been attached to the 2010 affidavit. He says he searched for the telephone records, but could not find them.

[97] Considering the reasonable doubt standard, it is certainly possible that Saarloos gave the telephone records to his previous counsel, that he expected those records would be attached to his affidavit and that his previous counsel had possession of the records in the file until the file was sent to new counsel in 2015. As soon as new counsel sorted through the file and located the telephone records, they were produced. Based on the forgoing, Saarloos cannot be said to have intentionally failed to comply with the Wright Order in relation to the telephone records.

Inability to Purge the Contempt

[98] According to the updates provided by Saarloos since arguing the motion in February 2016, if any banking documents existed relating to Enterprises in 2005, they have been destroyed by CIBC due to the passage of time between the making of the Wright Order and Saarloos making further efforts to comply. CRA says that there were no income tax forms filed for Enterprises for 2005. Therefore, there is no way to purge the contempt. Justice Cromwell addressed the inability to purge contempt in *Carey*:

> [41] I cannot accept this position. There is no principled reason to depart from the established elements of civil contempt in situations in which compliance has become impossible for either of the reasons referred to by the appellant. Where, as here, the person's own actions contrary to the terms of a court order make future compliance impossible, I fail to see the logic or justice of requiring proof of some higher degree of fault in order to establish contempt. The appellant's submission also overlooks the point that one of the purposes of the contempt power is to deter violations of court orders, thereby encouraging respect for the administration of justice. It undermines that purpose to treat with special charity people whose acts in violation of an order make subsequent compliance

> impossible. It seems to me that the existing discretion not to enter a contempt finding and the defence of impossibility of compliance provide better answers than a heightened degree of fault where a party is unable to purge his or her contempt for the reasons the appellant outlines: ...

[99] In *Sussex*, the court also discussed the purging of contempt:

> 52 However, the intentional violation of a court order will be an aggravating factor when determining the appropriate sanction. As well, even if the contemptuous acts have ceased, or the contemnor has purged his contempt, the Court still retains jurisdiction to consider and punish for contempt. The cessation or purging of contempt is merely a mitigating factor relevant in a consideration of the appropriate sanction. ...

[100] In *Blackman*, Murphy J. made the following remarks about the purging of contempt:

> 49 The Defendants have argued that the disclosure issue has become moot as a result of the subsequent production of the PSA as directed by the Production Order. I don't agree that the issue is moot. Being forced by a subsequent court order to produce a document after resisting through two levels of court does not constitute a purging of contempt, or a substantial compliance that would vitiate contempt. The Plaintiff has still incurred cost and delay and suffered harm as a result of contempt.

[101] In *RCBS Holdings Inc.*, Murray J. found that the defendants had made no serious effort to comply with the original order until the contempt motion was made. Murray J. stated:

> 49 The burden of proof which I have mentioned remains squarely on the Applicant. I repeat Justice Cromwell's statement in *TG Industries* that there is a long history of cases which state an intention to disobey is not an element of civil contempt. This Order, as any Order of this Court, is made in the interest of justice. In my view, the actions of the Company, East River, Mr. Phillip Young and Mr. Robert Young show that they did not demonstrate a serious effort to comply with the Order unless and until motions for contempt were made. Even then, their efforts fell far short of any meaningful compliance, as far as the audited statements are concerned.

[102] To the extent Saarloos may have partly addressed some of the contempt issues since the hearing of February 8, 2016, such purging was only undertaken in the face of these contempt proceedings. Saarloos's failure to diligently inquire with either CIBC or CRA in 2011 is not erased by the recent efforts made in 2016. The fact that the CIBC records may have been destroyed in 2010 or 2011 due to

the passage of time does not excuse the failure of Saarloos to properly inquire with CIBC in 2011. The fact that no tax records were filed by Enterprises in 2005 does not excuse Saarloos's failure to properly inquire with CRA as required by the Wright Order. The Wright Order was made June 13, 2011. Saarloos has been fully aware for years that he was required to inquire with CRA and CIBC.

[103] The guilt of Saarloos must be proven beyond a reasonable doubt, which lies somewhere between probability and absolute certainty, but closer to absolute certainty. Probability of guilt on a reasonable doubt standard is not enough.

[104] Having considered all of the evidence, including the various affidavits and the testimony of Saarloos, as well as all submissions by counsel, along with the criteria for intent outlined in *Carey v. Laiken,* I am satisfied beyond a reasonable doubt that Saarloos intentionally failed to comply with the Wright Order in relation to making inquiries with CIBC and CRA.

Discretion

[105] A judge's ability to exercise some discretion in a contempt hearing does exist even in the face of an obvious failure to comply with a court order if the alleged contemnor acted in good faith to take reasonable steps to comply with the order. This proposition was confirmed by Cromwell J. in *Carey v. Laiken:*

> [36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: ... If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée v. Jean Bleu inc.*,2012 QCCA 1663 (CanLII), at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments":*Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, 1992 CanLII 29 (SCC), [1992] 2 S.C.R. 1065, at p. 1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, 1991 CanLII 3806 (QC CA), [1991] R.D.J. 249 (Que. C.A.). Rather, it should be used "cautiously and with great restraint": *TG Industries,* at para. 32. It is an enforcement power of last rather than first resort: ...
>
> [37] For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: ... While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

[106] I do not believe that this is a proper case for such discretion to be exercised. Saarloos did not act in good faith in relation to the CIBC and CRA requirements within the Wright Order. No injustice will be done because of a finding of contempt in the circumstances of this case. Although we now know that CRA records from 2005 for Enterprises never existed, Saarloos failed to make the proper inquiries with CRA. Saarloos failed to make proper inquiries of CIBC for Enterprises' banking records and as a result several months of the banking records encompassed by the Wright Order may have been destroyed.

Conclusion

[107] Saarloos is guilty of contempt for failing to make proper inquiries about the CIBC and CRA records.

[108] Counsel are invited to provide further submissions regarding the appropriate penalty.

Arnold, J.