Federal Court of Appeal  Cour d'appel fédérale

Date: 20130916

Docket: A-554-12

Citation: 2013 FCA 214

CORAM: **TRUDEL J.A.**
STRATAS J.A.
MAINVILLE J.A.

BETWEEN:

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Appellant

and

IRENE J. BREMSAK

Respondent

Heard at Vancouver, British Columbia, on May 14, 2013.

Judgment delivered at Ottawa, Ontario, on September 16, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: STRATAS J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] The Professional Institute of the Public Service of Canada (the Institute or bargaining agent) appeals from the November 29, 2012 Order of the Federal Court in which Lemieux J. (the Judge) established a remedy against the Institute for being in contempt of an order of the Public Service Labour Relations Board (the Board) dated August 26, 2009 (2009 PSLRB 103) (2009 Decision).

The Board had ordered the reinstatement of Ms. Irene Bremsak (the respondent) as an elected and appointed official of the Institute, and the Institute failed to comply with this Order.

[2] The Federal Court had made its finding of contempt in a decision dated February 16, 2012 (2012 FC 213) (Contempt Reasons or Contempt Order). The Institute's appeal of the Contempt Order was denied (2012 FCA 147).

[3] As a remedy for the contempt, the Federal Court ordered the Institute to pay a fine of $400,000 within 30 days of its decision. However, if a settlement could be reached between the Institute and Ms. Bremsak, the fine could be reduced by the amount of the settlement (2012 FC 396) (Remedy Reasons or Remedy Order).

[4] While it now recognizes its guilt for contempt, the Institute alleges that the Judge committed several errors leading to the imposition of a demonstrably unfit sentence. More particularly, it states that the Judge erred:

A. in considering that the breach had continued for several years,

B. in considering the violation of the Board's Order as an aggravating factor,

C. in failing to consider mitigating factors,

D. in fashioning a remedy to provoke a negotiated settlement, and

E. in imposing a disproportionate penalty.

[5] By way of cross-appeal, the respondent seeks a variation of the Remedy Order as to costs since none were awarded by the Judge. Ms. Bremsak seeks costs assessed on a solicitor-client basis or, alternatively, costs at the usual scale to be assessed under the highest column in Tariff B. She estimates her costs under column V at approximately $14,000.

[6] Ms. Bremsak's cross-appeal came to this Court by way of a motion record for an order granting her an extension of time to file her notice of cross-appeal. The motion was heard at the outset of the hearing of this appeal and was taken under advisement. I shall discuss it after dealing with the appeal. I intend to proceed as follows:

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A) The Appeal

[7] "[A]bsent an error in principle, failure to consider a relevant factor or an overemphasis of the appropriate factors" our Court will not intervene to vary a remedy fashioned by a judge in a contempt of court proceeding unless the sentence is demonstrably unfit (*9038-3746 Quebec Inc. v. Microsoft Corporation*, 2010 FCA 151, leave to appeal to S.C.C. refused, 33835 (December 23, 2010) at paragraph 4 [*Microsoft*], citing to *R. v. M. (C.A.).*, [1996] 1 S.C.R. 500 at paragraph 90).

[8] I propose to allow the appeal and to vary the sentence. The Institute has persuaded me that the sentence is demonstrably unfit, as the Judge failed to address mitigating factors in his reasons, and provided a disproportionate remedy in light of the effects of the breach and prior jurisprudence.

I) Background and Procedural History

[9] The following background information is necessary to better understand the sentencing Order. The parties have an acrimonious relationship that has been further marred by their engagement in numerous legal proceedings. To date, the Board has issued 7 decisions in the dispute between Ms. Bremsak and the Institute and other individual members of the bargaining agent: 2008 PSLRB 49 (request for interim relief is denied); 2009 PSLRB 103 (the 2009 Decision ordering reinstatement); 2009 PSLRB 159 (the Board orders that the 2009 Decision be filed with the Federal Court); 2010 PSLRB 126 (Ms. Bremsak's request for reconsideration of the 2009 Decision dismissing her first complaint is denied); 2011 PSLRB 95 (Ms. Bremsak's additional complaints and request to obtain the Board's consent to prosecute members of the Institute are dismissed);

2013 PSLRB 22 (Ms. Bremsak's complaints following the harassment complaints filed against her by fellow members of the bargaining agent – which led to her 5-year suspension and her request to obtain the Board's consent to prosecute – are dismissed); 2013 PSLRB 28 (Ms. Bremsak's request for reconsideration of the previous decision is dismissed); and *Bremsak v. North Shore Investigations and Mattern*, 2011 PSLRB 56 (one decision following a complaint of unfair labour practices against the independent investigator hired by the Institute to investigate complaints of harassment mentioned above).

[10] In the Federal Court, the file (T-2049-09) was opened in December 2009. The summary of recorded entries in the Federal Court's proceedings includes well over 200 entries. The parties also paid several visits to our Court before the hearing of this appeal (2012 FCA 147 (appeal from Contempt Order is dismissed); 2012 FCA 91 (judicial review of the Board's decision in 2011 PSLRB 95 is dismissed); 2011 FCA 258 (the stay imposed by the Judge during contempt proceedings is lifted); 2009 FCA 312 (request by the Institute for a stay of the Board's orders is denied)).

[11] In these reasons, I will focus only on the decisions and orders relevant to the Remedy Order starting, of course, with the 2009 Decision ordering reinstatement.

[12] The respondent was employed by Health Canada. She was a member of the Institute, which represents approximately 55,000 Government of Canada employees holding various professional positions. She also held a number of elected and appointed positions within the Institute. Although

the membership is the Institute's ultimate decision-making authority, its activities are supervised by a Board of Directors as well as Regional Councils.

[13] In June 2007, two positions on Regional Councils were to be filled. An issue arose about regional representation and the election of a particular representative for Victoria, B.C. The respondent was unhappy with the way this representative handled herself and shared her opinion with a number of people within the bargaining agent. From then on, several events prompted the parties to withdraw to their trenches and to initiate litigation.

[14] In its 2009 Decision, the Board aptly summarizes Ms. Bremsak's first two complaints:

> 2 The complaints allege violations of paragraph 188(*c*) and subparagraph 188(*e*)(ii) of the [*Public Service Labour Relations Act*, S.C. 2003, c. 22, s.2] ("the *Act*"). Paragraph 188(*c*) prohibits an employee organization from taking disciplinary action or imposing "any form of penalty" on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner. Paragraph 188(*e*) prohibits discrimination against a person with respect to membership in an employee organization. It also prohibits intimidation or coercion of a person, or the imposition of "a financial or other penalty on a person", because the person made an application under the *Act*.
>
> 3 The first complaint [dated November 16, 2007] started with an email sent by the [respondent] involving a controversy over a local election within the bargaining agent. The [respondent] was concerned that another member, who was selected as a successful candidate based on regional representation, did not step aside because of "ethical" issues and "a lack of morals". The person who had not stepped aside made a complaint to the president of the bargaining agent alleging that the [respondent]'s comments were harassing and defaming. The bargaining agent's Executive Committee agreed with the complaint and wrote to the [respondent] on September 12, 2007, requesting that she apologize. The [respondent] declined to apologize and the bargaining agent's Board of Directors apologized on the [respondent]'s behalf. The [respondent] then filed a complaint dated November 16, 2007 with the [Board] alleging that this was a form of penalty and discipline and it was done in a discriminatory manner contrary to paragraph 188(*c*) of the *Act*.

> 4 The second complaint is dated April 11, 2008 (but was filed with the Board on July 8, 2008) and it relates to a decision by the bargaining agent to issue a [Policy Relating to Members and Complaints to Outside Bodies (Policy)]… The Board was included as an outside body under that policy. The effect of the policy is that, "...where a member … refers a matter which has been or ought to have been referred to the Institute's internal procedure to an outside process or proceeding for consideration, that member … shall automatically be temporarily suspended …" from any elected or appointed office. On April 9, 2008, the [respondent] was advised by the bargaining agent's acting president that, pursuant to that policy and because of her complaint to the Board, she was temporarily suspended from four positions to which she was either elected or appointed. She was also advised that the temporary suspension would cease once the outside procedures had been finally terminated for any reason. The [respondent] submits that the policy and its application amount to discrimination against her with respect to her membership in an employee organization, it is intimidation and coercion, and imposes a financial or "other penalty" on her because she made an application to the Board, contrary to subparagraph 188(*e*)(ii) of the *Act*.
>
> (2009 Decision, joint book of authorities, volume 1, tab 6 at pages 48-49.)

[15] In its 2009 Decision, the Board denied the first complaint but allowed the second one:

> 143 The bargaining agent is directed to rescind the application of its [Policy] to the [respondent].
>
> 144 The bargaining agent is directed to amend its [Policy] to ensure that it complies with the *Act*.
>
> 145 The bargaining agent is directed to restore the [respondent]'s status as an elected official of the bargaining unit and to advise its members and officials, in the form described in paragraph 131 of this decision, that she has been reinstated to all of her elected and appointed positions subject to the normal operation of the constitution and by-laws of the bargaining agent.
>
> (*Ibidem* at page 84.)

[16] The Order made at paragraph 145 cited above is at the core of the contempt proceedings. Despite the Order, the respondent was never reinstated to any of her elected or appointed positions. Moreover, while the respondent was attempting to enforce compliance with the 2009 Decision, the Institute's Executive Committee, on October 20, 2009, suspended her from membership for five years following an independent investigation of harassment complaints made against Ms. Bremsak by other Institute members. As a result, Ms. Bremsak was disqualified from holding office in the Institute. The respondent's terms of office then expired in September 2010.

[17] The respondent, as summarized above, filed complaints with the Board, arguing that the harassment complaints were filed against her in retaliation for her pursuing her rights under the Act. This matter was still pending at the time the Judge issued his Order. However, the Board's decision was filed with this Court (2013 PSLRB 22, joint book of authorities, volume 1, tab 16 at pages 218-392). At paragraphs 497 and 498 of its reasons, the Board wrote:

> [497] In my view, there was a rational reason for the five-year suspension from membership in the Institute that was connected to Ms. Bremsak's misconduct. She behaved in a harassing manner towards other Vancouver Executive members over a period of more than a year. Her conduct escalated over time. A cooling-off period was required. I find that Ms. Bremsak received no discriminatory treatment, or even arbitrary or otherwise unreasonable treatment, in the harassment investigations or in the application of the 2009 *Dispute Resolution Policy* to her.
>
> [498] I therefore dismiss the five-year suspension complaint and the related application for consent to prosecute.

[18] Upon reconsideration, the Board upheld its decision, declaring that the respondent's application for reconsideration was an abuse of process (2013 PSLRB 28, joint book of authorities, volume 1, tab 17, page 414 at paragraph 42).

[19] I will come back later to some of these facts when discussing mitigating factors. For now, however, I turn to the Contempt Order.

II) The Contempt Order

[20] The Contempt Order has its own history which sheds light on the Judge's objectives in fashioning the Remedy Order.

[21] The Contempt Order is dated February 16, 2012 and was issued almost three years after the respondent filed her motion record for an order for contempt (Summary of Recorded Entries, document #4, December 18, 2009).

[22] The contempt hearing was held on October 20, 2010, several weeks after it was originally set down for hearing. Hoping for an out of court settlement, the Judge had imposed an adjournment *sine die,* which explains the rescheduling. The Institute declined the Judge's offer to act as mediator. This chain of events occurred after the Judge had issued an oral direction stating that "from a review of the parties' correspondence, it appears that they are too far apart to schedule a mediation" (*ibidem*, document #80, October 1, 2010). Still, the Judge persisted in urging the parties to compromise and to settle their differences.

[23] The Judge was well aware of the parties' on-going appearances in front of the Board. As a result, on April 1, 2011, he postponed the issuance of his Contempt Order pending the Board's decision on the 5-year suspension. On appeal from that Order, our Court, on September 19, 2011,

lifted the stay and returned the matter to the Judge for a decision on the basis of the record before him (See 2011 FCA 258 cited above at paragraph [10]).

[24] On November 16, 2011, the Judge once again expressed his view that it was "in the interest of both parties to attempt to settle this matter between themselves" (Summary of Recorded Entries, document #111, November 16, 2011). No settlement ensued.

[25] On February 16, 2012 the Judge therefore found the Institute in contempt and ordered:

> … that the parties attempt to resolve the appropriate remedy to the contempt finding between themselves within six (6) weeks … such settlement to be approved by [the Federal] Court …
>
> (Contempt Order (2012 FC 213), joint book of authorities, volume 1, tab 14 at page 209.)

[26] The Institute was unsuccessful in challenging the Contempt Order on appeal (2012 FCA 147, joint book of authorities, volume 2, tab 30 at pages 667-686). The Judge once again invited the parties to settle the matter out of Court and directed that a mediation conference take place on October 30, 2012 (Summary of Recorded Entries, document #167, October 30, 2012). The mediation failed. The Judge followed up on his efforts, seeking information detailing each party's last settlement offer. The Institute was not prepared to waive its settlement privilege. Finally, on November 29, 2012, the Judge issued the impugned Order and Remedy.

[27] The Judge was obviously hoping for a settlement, despite his first comment that the parties were too far apart to resolve the matter out of Court. This is, in all likelihood, why he gave the

Institute a chance to purge its contempt by achieving a settlement for all or part of the amount of the fine. I shall come back to this part of the Order, as the Institute alleges that the Judge erred in fashioning a remedy intended to promote settlement.

III) Analysis

1) Role of an Appellate Court

[28] Before turning to the issues identified by the Institute (see above at paragraph [4]), a few general remarks are in order about the role of an appellate court in matters of sentencing, both in criminal and civil contexts.

1.1 Criminal Context

[29] The Federal Court of Appeal has stated that the usual principles of sentencing apply to cases of civil contempt (*Microsoft*; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1996] 1 F.C. 787 at page 801 (C.A.) [*Liberty Net*], affirmed on the finding of contempt, [1998] 1 S.C.R. 626). Accordingly, principles of sentencing in the criminal context are applicable to the case at bar.

[30] A test known as the "demonstrably unfit" test was developed in the context of criminal contempt sentencing. It refers to the circumstances in which it is appropriate for an appeal court to intervene and vary a sentence imposed by a trial judge. Leading cases on this test in the criminal

sentencing context are *R. v. Shropshire*, [1995] 4 S.C.R. 227 [*Shropshire*] and *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 [*M.(C.A)*]. In the latter case, the Supreme Court of Canada admonished the British Columbia Court of Appeal for inappropriately reducing the accused's sentence. The Court stated:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit
>
> (at paragraph 90).

[31] Due to the highly contextual nature of sentencing, an appellate court owes considerable deference to the trier of fact when reviewing the fitness of a sentence. Thus, "an appellate court may not vary a sentence simply because it would have ordered a different one" (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paragraph 14). Rather, a "variation in the sentence should only be made if a court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable" (*Shropshire* at paragraph 46).

[32] A trial judge does not commit an error in principle simply because, in the opinion of the appellate court, the trial judge gave too much weight to one factor or not enough weight to another. The Supreme Court has stated:

> The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

> (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at paragraph 46 [*Nasogaluak*], citing *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 at paragraph 35 (Ont. C.A.))

[33] The principle of proportionality is central in criminal sentencing. In *Nasogaluak* at paragraph 43, the Supreme Court provided the following guidance as to what constitutes a "fit" sentence:

> The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the [*Criminal Code*] and in the case law.

[34] Thus, the jurisprudence establishes that appellate court interference with a trial judge's sentence in criminal cases should happen only when it is "not fit", based on the circumstances of the case.

1.2 Civil Context

[35] As already mentioned, the test for appellate court interference with regard to criminal sentencing also applies in relation to civil matters. Moreover, as with the criminal cases cited above, there is no single correct approach to weighing aggravating and mitigating factors when

determining a sentence for civil contempt. Federal Courts case law has developed a number of guiding principles for judges to consider. For example:

- The trial judge should consider "the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice" (*Baxter Travenol Laboratories of Canada, Ltd. v. Cutter Canada, Ltd.*, [1987] 2 F.C. 557 at page 562 (C.A.) [*Baxter Travenol*]; *Lyons Partnership, L.P. v. MacGregor* (2000), 186 F.T.R. 241 at paragraph 21 (T.D.));

- Aggravating factors include the objective gravity of the contemptuous conduct, the subjective gravity of the conduct (*i.e.* whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness), and whether the offender has repeatedly breached orders of the Court (*Canada (Minister of National Revenue) v. Marshall*, 2006 FC 788 at paragraph 16 [*Marshall*]);

- In the case of corporate offenders, the trial judge should also consider the size, scale and nature of the offender's operations and the premeditation and deliberation involved in committing the offence (*Apotex Inc. v. Merck & Co. Inc.*, 2003 FCA 234 at paragraph 83 [*Apotex v. Merck*]);

- The fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine (*Wanderingspirit v. Salt River First Nation 195*, 2006 FC 1420 at paragraph 4 [*Wanderingspirit*]; *Desnoes & Geddes Ltd. v. Hart Breweries Ltd.*, 2002 FCT 632 at paragraph 7);

- Mitigating factors might include good faith attempts to comply (even after the breach), whether there was an apology or acceptance of responsibility, or whether the breach is a first offence (*Marshall* at paragraph 16);

- The judge can consider whether an order subsequently issued has somewhat changed the situation of the contemnor or an order violated by him has been found by the Court to be invalid (*R. v. Bernier*, 2011 QCCA 228; *R. v. Emmelkamp*, 2013 ABCA 71; *Liberty Net* at paragraph 27.

[36] There is nothing in the case law to suggest that the factors listed above are exhaustive. Again, a trial judge has wide discretion when determining the appropriate sanction for civil contempt, based on the circumstances.

2) Whether the Sentence Imposed is Demonstrably Unfit

2.1 The Breach Persisted for Several Years

[37] In his Remedy Order, the Judge justified the amount of the fine based on his finding that the Institute's breach of the Board's Order had continued for several years. The Institute had argued that the breach only lasted six weeks running from the date of the 2009 Decision to the date of the five-year suspension. During the course of the proceedings, the Institute also argued that the breach could not have lasted more than one year running from the 2009 Decision to September 2010 when all of Ms. Bremsak's terms of office had expired.

[38] At best, the length and timing of the breach is a mixed question of fact and law subject to deference. The Judge had been required to decide whether the breach of the Order to reinstate the respondent continued to exist despite the fact that the remedy initially ordered could no longer be implemented because the respondent's terms of office had expired (as of September 2010) and because her membership had been suspended for five years (in October 2009).

[39] As a matter of law, court orders continue to exist and must be obeyed until they are set aside by legal process or an equally effective order is secured to the effect that it need not be obeyed (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at pages 87-88; *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 52 O.A.C. 151, 85 D.L.R. (4th) 694 at paragraph 13 (C.A.); *MacMillan Bloedel Ltd. v. Simpson* (1994), 90 B.C.L.R. (2d) 24, 43 B.C.A.C. 1, 113 D.L.R. (4th) 368 at paragraph 49 (C.A.), affirmed on other grounds, *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 14 B.C.L.R. (3d) 122).

[40] Moreover, a court order cannot be impeached by a party affected by it on the basis of his own opinion as to the order's validity (*Newfoundland (Treasury Board) v. N.A.P.E.*, (1986), 59 Nfld. & P.E.I.R. 93, 39 A.C.W.S. (2d) 149 (NFCA)). Our Court also applied this principle sitting on the appeal of the Contempt Order (2012 FCA 147), as the Institute had raised a similar argument. Writing for a unanimous panel, our colleague Sharlow J.A. stated, at paragraph 8:

> The Institute has also asserted that it would be unreasonable to hold it in contempt of the Reinstatement Order before October 28, 2009, the date on which its two stay applications were determined by this Court. It is convenient to deal with that submission at the outset because it is so obviously devoid of merit. As a matter of law, merely taking proceedings to stay an order cannot excuse non-compliance with the order, although in certain circumstances non-compliance with an order while a

> stay application is pending may be a mitigating factor in determining the consequences of non-compliance.

[41] The record shows that the Institute effectively decided the matter for itself. It never applied to the Board or to the Federal Court for an order finding that it was no longer in breach and need not obey the Reinstatement Order made by the Board and subsequently affirmed by our Court. Consequently, the Institute remained in contempt of the Board's Order, despite Ms Bremsak's five-year suspension and the expiration of her terms of office.

2.2 The Breach of the Board's Order is an Aggravating Factor

[42] The Judge wrote: "[t]he contempt by the Institute is particularly severe because it disobeyed an order of the Board" (Remedy Order at paragraph 1). The Institute opines that there is "absolutely no basis in law or in logic for finding that a breach of an order of one administrative tribunal is any more serious than a breach of an order from another tribunal or the Court" (Institute's memorandum of fact and law at paragraph 32). I disagree with the Institute's interpretation of the Judge's Order on this point.

[43] The Board, as found by the Judge in the Remedy Reasons, is the supervisory body of the Institute. Its mandate is to ensure compliance with the federal statute governing labour relations between the bargaining agent and its members (Remedy Reasons at paragraph 12). The Judge's words must be read in that context.

[44] As well, contempt does not only arise through breach of an order of an administrative tribunal or court, but may arise through a range of actions which obstruct justice. By way of example, Rule 466 of the *Federal Courts Rules* (SOR/98-106) [Rules] states that a person may be found guilty of contempt where, *inter alia*, he or she fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding at a hearing; disobeys a process or order of the Court or acts in other ways which interfere with the orderly administration of justice or impair the authority or dignity of the Court. In other circumstances, failure to produce documents or to submit to examinations for discovery may similarly constitute contempt. Within this framework, an action which amounts to defiance of a court or tribunal order may well be considered more serious and an aggravating factor.

2.3 Failure to Consider Mitigating Factors

[45] The Institute complains that the Judge failed to consider even a single mitigating factor. In its view, three mitigating factors should have been considered: the Institute partially complied with the Contempt Order; the Institute honestly but mistakenly relied on legal advice; and the Institute was trying to balance the interests and legal rights of its members.

[46] The respondent counters that these factors were not put to the Judge in the written submissions and should not be brought forward at this point. I found no clear evidence in the record substantiating Ms. Bremsak's position. The transcript reveals that the Institute raised these factors at the contempt hearing in order to convince the Judge that he should not, on proof beyond a reasonable doubt, make a finding of contempt against it (book of transcripts at page 13 and ff).

[47] I do note, however, that the words "mitigating factor" are absent from the Judge's Remedy Reasons and Order. As a result, I cannot detect whether or not the Judge considered these factors or others when he imposed his sentence. Indeed, the Judge did appreciate the sentencing objectives of specific deterrence, denunciation and protection of the public, and, in addition to these objectives, compliance with the Board's Order (Remedy Reasons at paragraph 10). The Judge clearly identified the factors that he considered to be aggravating under the circumstances. However, nowhere in his reasons did he identify and discuss mitigating factors which might result in a lesser sentence. The Judge seems to have relied heavily on the nature of the contempt itself, *i.e.* the Institute's defiance of the Board's Order.

[48] I am therefore of the view that the exercise of his discretion remained incomplete. It lacked a discernable and proper balancing exercise, which was required to achieve a fit sentence.

[49] This is regrettable since both the parties and the Court are unable to assess the legal process underlying the Remedy Order. It is possible that the Judge had these factors in mind when he fashioned the remedy. As a general rule, an appellate court tends to proceed on the basis that the first judge knows the law and applied the correct legal test even if he did not express it clearly in his reasons.

[50] However, this is a sentencing order which carries heavy consequences for the contemnor. The Judge's failure to discuss potential mitigating factors in his Remedy Reasons and Order, combined with the amount of the fine ordered, lead me to believe that he overlooked this part of the test. I conclude that the sentence is therefore unreasonable.

[51] As a result, I have examined anew the Institute's arguments on this issue and I conclude that they militate in favour of a lesser sentence. Moreover, I give some weight to the Board's recent decision wherein it found that the 5-year suspension was justified.

2.3.1 The Institute's Partial Compliance and Good Faith

[52] The Institute states that it partially complied with the Contempt Order by modifying its Policy and by posting an announcement regarding Ms. Bremsak's reinstatement. The Institute argues that these actions demonstrate good faith attempts to comply with the Contempt Order and are in line with the principles enunciated in *Marshall*, cited above.

i) Modification of the Policy

[53] Indeed, the Policy was amended to the satisfaction of the Board (see 2009 PSLRB 159, December 4, 2009, joint book of authorities, volume 1, tab 7, page 96 at paragraph 27) although not only as a result of the 2009 Decision but also because of extrinsic reasons. While the parties were completing their written submissions to the Board in anticipation of the 2009 Decision, the Board ruled, in an unrelated file involving the bargaining agent, that the Policy violated the Act and the principles of natural justice (*Veillette v. Professional Institute of the Public Service of Canada and Rogers*, 2009 PSLRB 64, May 29, 2009). There were, as a result, reasons other than the dispute with Ms. Bremsak and the Board's 2009 Decision for the bargaining agent's action. I am also mindful that the original Policy imposed a form of penalty on a member because it removed that person from her elected position if she exercised her legal right to make an application to the Board

or another body, such as a Canadian court, outside of the bargaining agent. I conclude that this is not a factor calling for a lesser sentence.

ii) Posting an Announcement

[54] With regard to the appellant's efforts to post an announcement informing its membership of the respondent's reinstatement, the Judge was clearly sceptical as to whether this could be determined to be an effort to comply with the August 2009 Order. He pointed to the fact that Ms. Bremsak was never reinstated and no attempt was made to achieve that result (see Contempt Reasons at paragraph 87). The Court repeatedly questioned the appellant's counsel on the wording of the announcement and whether it was in fact accurate (book of transcripts at pages 119-120). Further, in his show cause motion decision (2010 FC 661, joint book of authorities, volume 1, tab 9 at page 120), Prothonotary Lafrenière drew the following conclusion at paragraph 30:

> [30] The Institute clearly did not comply with the Board's Order to publish the announcement in a prominent place "in the next edition of one of its regular and significant publications to the membership". The requirement to comply with the Board's Order crystallized on December 8, 2009, when the Board decision became a Court Order. Although an announcement was published by the Institute on December 22, 2009, there was a two week delay in doing so. The announcement was placed at the bottom of the Institute website over the winter holiday period, when few members would be accessing the site. It also included a disclaimer. On the evidence before me, I conclude that the placement of the announcement and disclaimer, combined with the unexplained delay in posting it on-line, did not comply with the terms and intent of the Court Order.

This factor does not help to mitigate the Institute's sentence. To the contrary, it demonstrates the Institute's reluctance to comply swiftly and fully with the Board's Order.

2.3.2 Reliance on Legal Advice

[55] The Institute states that it "consistently attempted to comply with what it perceived to be its legal obligations" (Institute's memorandum of fact and law at paragraph 46). It relied on legal advice on several fronts: (1) when it chose not to comply with the Board's Order awaiting the Judge's decision on the stay, because it believed that otherwise it could not argue that it would suffer irreparable harm from the Board's Order; (2) when it set the start of the "contempt clock" at the date of filing of the Board's Order with the Federal Court (certificate of filing issued on December 8, 2009); and (3) when it relied on Ms. Bremsak's 5-year suspension imposed on October 20, 2009 for its decision not to reinstate her.

[56] In his Contempt Reasons, the Judge considered these arguments. First, regarding the Institute's decision not to comply, he wrote:

> [79] … That is why [the Institute] sought to stay the operation of the Board's order at a time when its harassment investigation was well advanced; indeed draft reports were in circulation.
>
> [80] In this context, it is unreasonable for the Institute to interpret the Board order as permitting a subsequent event such as a suspension of membership which would nullify the reinstatement. The terms of this order were clear. Reinstate now! If disciplinary issues arose later to warrant action, the Institute could do so at that time.

[57] On the clock-ticking argument, he found that in appropriate circumstances, a contempt finding could be based on events prior to a Board's decision being filed with the Federal Court. He concluded, at paragraph 85, that "the facts giving rise to a contempt finding can be based on the terms of the very Board order which is sought to be enforced – immediate reinstatement".

[58] Regarding the 5-year suspension, the Judge questioned its validity. He raised several concerns, ranging from procedural equity and the authority of the Executive Committee to suspend the respondent, to the proportionality of the sanction. In his Contempt Reasons, he wrote:

> [83] By raising these questions, I must not be taken as having decided the merits of the Institute's decision. The Institute had the right to investigate and to discipline Ms. Bremsak. The allegations against her and her husband were serious. The question is whether they amounted to harassment, and whether the penalty and its timing were reasonable and proportioned.
>
> [84] In the circumstances on the evidence before me, I am not satisfied the Institute met its evidentiary burden of establishing lawful excuse.

[59] The fact that all these findings by the Judge supported his decision to issue the Contempt Order does not mean, however, that one or all of these factors could not have militated in favour of a lesser sentence in the remedy portion of the proceedings. But once again, mitigating factors are absent from the Remedy Reasons and Order.

[60] Nonetheless, I do not find that the Institute's reliance on legal advice constitutes a mitigating factor in the circumstances. The record is thin on this point and makes it difficult to assess the nature of the legal advice, the extent to which the Institute relied upon it, the objective reasonableness of the Institute's reliance and the subjective evidence relating to the appellant's decision to rely on legal advice. (See *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5; *Dockside Brewing Co. v. Strata Plan LMS 3837*, 2007 BCCA 183, leave to appeal to SCC refused, 32060 (September 27, 2007).

[61] It is also useful to note that this Court has determined that where a party relies on legal advice to nourish an action or to support a defence, the party opposite should have disclosure of that advice. Otherwise, a party could try to rely on legal advice to justify its conduct without having to disclose the substance of this advice. "This could be unfair to the other side and, if so, a finding that the privilege has been impliedly waived by the party's conduct may be justified" (*Mid-West Quilting Co. v. Canada*, 2007 FC 735 at paragraph 8, citing *Apotex Inc. v. Canada (Minister of Health)*, 2003 FC 1480, [2004] 2 F.C.R. 137, affirmed 2004 FCA 280) [*Apotex v. Canada*]. On appeal, Evans J.A. upheld the Federal Court's conclusion in *Apotex v. Canada* that "relying on the fact of taking legal advice … puts in issue the communications between the Minister's officials and her legal advisors in such a way that it would be unfair to shield those communications from disclosure" (*Apotex v. Canada*, 2004 FCA 280, 34 C.P.R. (4th) 289 at paragraph 2). As a result, I conclude that reliance on legal advice under the present circumstances is not a mitigating factor.

2.3.3 Balancing the Interests and Legal Rights of Members

[62] I do not accept the Institute's argument that its actions "must be taken as a genuine, though eventually mistaken, attempt to act in the interests of its members within the confines of the law" (Institute's memorandum of fact and law at paragraph 57). Ms. Bremsak was also a member of the bargaining agent, albeit a more demanding and uncompromising member, in view of the context. Nonetheless, it seems to me that the Institute made choices without showing that it had considered Ms. Bremsak's rights following the 2009 Decision. Although she won in front of the Board, she has nothing to show for it, not even a letter of apology. As stated by the Judge at the Contempt Hearing "… when somebody has got an order of reinstatement and is never reinstated, you have to

dig…You have to dig hard to see what went wrong, and whether it's justified" (book of transcripts at page 190, line 15 and ff). Consequently, I conclude that this does not constitute a mitigating factor.

2.3.4 The Board's Decision to Uphold the 5-year Suspension

[63] We now know that the Board upheld the Executive Committee's decision to suspend the respondent for 5 years and found that she (and her husband who represented her) had been harassing other Vancouver Executive members for more than a year. Ms. Bremsak is challenging the Board's decision by way of an application for judicial review filed with our Court on April 11, 2013 (file A-131-13). She alleges no less than 51 legal and factual errors on the part of the Board.

[64] It is my view that this recent decision by the Board gives weight to the Institute's explanation as to why it did not reinstate the respondent following the 2009 Decision. I therefore afford some importance to this sequence of events as a mitigating factor.

2.4 Fashioning a Contempt Remedy to Promote Settlement

[65] The Institute's position is expressed at paragraphs 33 to 37 of its memorandum of fact and law:

> 33. Before his reasons on remedy were issued, Lemieux J. was very concerned with provoking a settlement between the parties. … [O]n November 26, 2012, three days before his reasons were released, [the Judge] sent a direction to the parties which read:

> What I want to know is the last offer of settlement made by each party and what was the basis of the offer. I am available any time for a phone conference, or the parties can write to me.
>
> I am about to issue my judgment. I need this information by the end of the day on Wednesday, November 28, 2012 at the latest. (Direction of Lemieux J., 26 November 2012, appeal book, tab 13 at page 30.)

34. The Institute's representative wrote to [the Judge] on November 27, indicating that it was "not prepared to waive settlement privilege", and requesting "that no adverse inference be made based on the fact that the Respondent has exercised its right to maintain the privilege surrounding settlement communications" (*ibidem*, tab 14 at page 31). On November 28, Ms. Bremsak's husband, John Lee, wrote on her behalf to the Court, indicating that she "did not make a final last offer of settlement on the basis that she felt under the circumstances, no doable settlement offer was possible or achievable" (*ibidem*, tab 15 at page 32).

35. In his reasons on remedy, released the next day, [the Judge] commented:

> This case should have been settled a long time ago. The Court attempted to do so before the contempt hearing began. In its order finding the Institute in contempt this Court ordered that the parties attempt to resolve the matter between themselves. <u>It made numerous efforts to encourage the parties to settle and this as recently as a few weeks ago. Intransigence between the parties is the order of the day</u>. [Emphasis added in the original.]

[the Judge] found that Ms. Bremsak was entitled to be compensated, but found that this required evidence "which this Court does not have" and saw a "negotiated settlement [assisted by a Prothonotary] as most appropriate in the circumstances". [Footnote omitted.]

36. Based on his Direction of November 26 and his reasons, the Institute can only presume that a central motivation underlying the severe fine that [the Judge] imposed was to provoke a settlement. His remedy acknowledged that Ms. Bremsak should be compensated, but awarded her no compensation. In contrast, the Institute was levied a very substantial fine, presumably in order to motivate it to reach a settlement with Ms. Bremsak. In effect, as a response to the failure of the parties to agree on a mutual settlement, [the Judge] punished the Institute. Indeed, by the terms of the order itself, the Institute had no incentive to reach a settlement, as it was still liable to pay the remainder of the $400,000 fine over the amount of any settlement.

37. With respect, [the Judge]'s approach on the question of remedy - to apparently provoke a negotiated settlement – was inappropriate. The Ontario Court of Appeal has noted that contempt is "an offense against the authority of the court and the administration of justice," which does not have "the function of a civil action

> in tort or for breach of contract", (*SNC – Lavalin Profac Inc. v. Sankar*, 2009 ONCA 97 at paragraph 14).

[66] With respect, the Institute's argument fails to acknowledge the range of objectives that the Court may properly pursue in fashioning a remedy for contempt as set out in the case law, as well as the range of remedies available to the Court pursuant to Rule 472 of the Rules. Canadian jurisprudence holds that civil contempt has both private and public aspects and emphasizes that the objectives to be considered when imposing a penalty for contempt include *inter alia*:

- Repairing "the depreciation of the authority of the court" (*International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at paragraph 20),
- Enforcing court orders (*Marshall* at paragraph 16; *Majormaki Holdings LLP v. Wong*, 2009 BCCA 349 at paragraph 27 [*Majormaki*]),
- Specific or general deterrence (*Marshall* at paragraph 16; *Apotex v. Merck* at paragraphs 83-89),
- Denunciation or punishment (*Majormaki* at paragraphs 27-28), and
- Compensation (S*askatchewan Health-Care Assn. v. Saskatchewan Union of Nurses*, [1999] 12 W.W.R. 240, 182 Sask. R. 248 at paragraphs 39-42 (Sask. Q.B.) [*Saskatchewan Health-Care Assn*]).

[67] When the Institute alleges that the Judge erred in law by imposing such a severe fine in an attempt to promote settlement, it presumes that the quantum of the fine would have been less had settlement not been a primary objective of the Trial Judge. In my view, an appeal court should be wary of overturning a discretionary decision of a trial judge on the basis of such a presumption. Paragraph 1 of the Remedy Order, in which the Judge states his justifications for the quantum, makes no mention of settlement.

[68] The case law does not deal directly with the issue of whether it is open to a trial judge to fashion a contempt remedy to promote settlement. However, in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 at paragraph 35, Madam Justice Deschamps, writing for the majority, held as follows:

> In Canadian law, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification.

[69] Similarly, in *Wanderingspirit*, (see above at paragraph 35) the applicants wanted the fine imposed to equate to the amount of money that was allegedly siphoned from the Salt River First Nation (SRFN) accounts by cheques issued in contravention of Court orders. Snider J. (at paragraph 8) rejected this approach on the ground that penalties for civil contempt were not a way for the applicants to recover funds that they believed were effectively stolen from the SRFN. The penalty should be designed to restore the reputation of the Court and to deter the contemnors from any further breaches of orders.

[70] However, the Institute has acknowledged that in cases where it is impossible for the contemnors to comply with the original order, there is precedent to support a trial judge allowing the contemnor an opportunity to purge its contempt through other means. For example, in *British Columbia Public School Employers Assoc. v. British Columbia Teachers Federation*, 2005 BCSC 1490 [*British Columbia Teachers Federation*] at paragraph 24, Brown J. endorsed the general principle that in ordering payment of a fine in civil contempt, "the court may permit, by imposition of appropriate conditions, the contemnor to satisfy the fine in alternative ways, such as

payment to a charity or the provision of free services to the persons harmed by the continuance of the contemptuous behaviour."

[71] In *Saskatchewan Health-Care Assn*, this approach was followed. The Union was found in contempt for striking illegally and failing to adhere to back to work legislation. The Court imposed a $120,000 fine. However, the fine was suspended for a period of 30 days in order to allow the Union to purge its contempt by paying donations in the amount of $120,000 to various hospital foundations throughout the province.

[72] This case is particularly interesting because the amount of the fine and the amount of donations were equal. This means that there was no particular incentive for the Union to pay the donations, as opposed to paying the fine, beyond the general desire of the Union to "demonstrate to the people of Saskatchewan that they do and will continue to respect their lawful obligations" (*Saskatchewan Health Care Assn* at paragraph 38).

[73] Similarly, in the case at bar, there was no particular financial incentive for the Institute to settle with Ms. Bremsak because the total amount paid would have been the same. However, it is possible that the Judge was attempting to give the Institute an opportunity to demonstrate its respect for its lawful obligations as well. In fact, before this Court, the Institute acknowledged that "it may be appropriate for this Court to direct that all or a portion of any fine imposed against the Institute be paid to Ms. Bremsak or a charity of her choosing" (Institute's memorandum of fact and law at paragraph 38).

[74] The Institute cited no authority for the proposition that the Judge erred in law by fashioning his remedy in such a way that promoted settlement. In *Nasogaluak* at paragraph 43, the Supreme Court stated that "no one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case." This proposition may be less true in cases of civil contempt because Courts have repeatedly stated that the enforcement of court orders should be the primary objective of sanctions. However, here the Judge had observed that (1) Ms. Bremsak was entitled to be compensated but it took evidence which the Court did not have (Remedy reasons, paragraph 13), and (2) compliance with the initial order was impossible. Under those circumstances, it was open to the Trial Judge to offer the contemnor the opportunity to purge its contempt through settlement. I do not believe this amounted to an error of law.

2.5 Whether the Penalty is Disproportionate

[75] The Institute's position is well explained at paragraph 58 of its memorandum of fact and law:

> 58. … the Institute submits that the $400,000 fine imposed by [the Judge] as a penalty for the contempt was grossly disproportionate. The Institute's contempt in this case stemmed from its failure to reinstate Ms. Bremsak to voluntary positions on some of the Institute's constituent bodies. As the [Board] noted with respect to her suspension for harassment, it "does not affect Ms. Bremsak's right to work, to be represented by the Institute in grievances with the employer or to participate in all the benefits that a bargaining agent secures for its members". Rather, the failure to reinstate Ms. Bremsak has affected only her ability to participate in the Institute's internal activities. The Institute does not seek to diminish the significance of its contempt on Ms. Bremsak personally. But the penalty imposed must be proportionate…

> 59. It is notable that [the Judge] did not make reference to comparable decisions in his reasons. The Institute would submit that had he done so, it would have revealed the inappropriateness of the sanction he imposed.

[76] In his Remedy Reasons, the Judge comments on the parties' suggestions as to the appropriate fine. He finds their positions "totally unreasonable" (at paragraph 9). Ms. Bremsak was suggesting a fine ranging from $500,000 to $2,000,000 with the funds going to legal aid, while the Institute proposed a fine of $5,000.

[77] The parties cited case law in support of their respective positions. These cases and others appear in a chart, annexed to these reasons.

[78] The *quantum* of the penalty is ultimately a discretionary decision based on the circumstances of each case. The Institute argues that in the case of *Baxter Travenol*, this Court stated that the penalty must be "appropriate to indicate the severity of the law and yet sufficiently moderate to show the temperance of justice" (*Baxter Travenol* at paragraph 11). In that case, the Court also noted that to significantly reduce the penalty or to levy only a "token" fine would be "inconsistent with the gravity of the issue" and "might serve to encourage others" to flout the law if it is to their advantage to do so (at paragraph 17).

[79] In cases involving unions, courts have considered the size of these organizations, and their significant resources, in setting penalties for contempt. For example, in *British Columbia Teachers Federation* at paragraphs 30-31, the Court found as follows:

> This Court must impose a sanction that recognizes the gravity of the contempt, deters this party from continuing contempt and deters others from similar conduct. The BCTF has approximately 38,000 members. It has net assets of more than $30 million. Its collective bargaining defence fund was $14,644,000 as of June 30, 2005. […] The number of members and the extent of the assets of the BCTF are such that a fine akin to that levied against the HEU would be trivial, the equivalent of approximately $4.00 per union member".

The Court set a penalty of $500,000 for contempt, in response to the union's defiance of an order against a strike, which lasted 10 days.

[80] However, jurisprudence demonstrates that while a fine ought to reflect the contemnor's means and needs to be more than a "cost of doing business" in order to ensure future deterrence, the fine also ought to reflect the severity of the breach, its implications for the public and ought to be consistent with fines previously issued in cases of civil contempt. For example, in *Apotex Fermentation Inc. v. Novopharm Ltd.* (1998), 162 D.L.R. (4th) 111, [1998] 10 W.W.R. 455 at paragraph 320, a fine for contempt issued by the trial judge was reduced from $1.25 million to $100,000 on the grounds that it went "farther than is necessary to reflect the public interest" and went far beyond civil contempt fines provided in prior jurisprudence.

[81] Moreover, as already discussed, fines ought to have been crafted with both mitigating and aggravating factors in mind in order to be considered proportionate and just.

[82] The range of fines imposed in cases of civil contempt is broad. However, a fine of $400,000 is on the high end of the range.

[83] As the Institute has pointed out, its failure to reinstate Ms. Bremsak has affected her participation in elected and appointed positions within the bargaining unit, but it has not affected her right to work or to enjoy the other protections and benefits of membership.

[84] Comparable remedies or smaller fines have been issued in cases which had greater implications with regard to the public interest than the case at hand. For example, in *British Columbia (Health Employers Assn.) v. Facilities Subsector Bargaining Assn.,* 2004 BCSC 762, 31 B.C.L.R. (4th) 124, the British Columbia Supreme Court issued a fine of $150,000 (current value of $175,547.10) for hospital employees refusing to obey a labour board's order to return to work. As already mentioned, in *British Columbia Teachers Federation* a fine of $500,000 (current value of $574,304.02) was ordered for teachers similarly disobeying a labour board's order to return to work. In *Saskatchewan Health-Care Assn*, the Saskatchewan Court of Queen's Bench imposed a fine of $120,000 (current value of $158,800.52) for failing to end a strike following an injunction. Moreover, in *Syndicat canadien des communications, de l'énergie et du papier v. Métro Média Inc.*, [1996] F.C.J. No 1605, 67 A.C.W.S. (3d) 899 [*Métro Média*], the Federal Court ordered the defendant to pay a penalty of $5,000 (current value of $6,910.11) for failing to obey an order to reinstate the plaintiff to the employment position she held prior to her unjust dismissal.

[85] It seems that in light of this case law, a fine of $400,000 goes far beyond what is needed to reflect the public interest and the gravity of the contempt; however, a fine comparable to that issued in *Métro Média* ($5,000) would also be inadequate in light of other factors on the record.

[86] Here, the record lacks information as to the Institute's assets; it only states that the bargaining agent represents approximately 55,000 members. However, given the Institute's size, the fine needs to be more than a token amount for its members.

[87] In addition, the fine ought to reflect the aforementioned aggravating factors, such as the length of time of the breach, as well as mitigating factors, such as the Board's decision to uphold Ms Bremsak's 5-year suspension.

IV) Conclusion on the Appeal

[88] Having considered all the facts of this case and weighed the relevant factors identified in these reasons, I am of the view that the fine imposed on the Institute should be reduced to the amount of $250,000 payable within sixty-five days from the date of the judgment to issue. Pursuant to Rule 149 of the Rules, I note that the Institute has already tendered payment in this Court in the amount of $400,000.

[89] At this point in time, I see no reason to maintain paragraphs 2 and 3 of the Remedy Order where the Judge was giving the Institute the opportunity to purge its contempt by reaching a settlement with Ms. Bremsak. I accept that mediation is a valid option for parties to attempt to resolve their differences, but there comes a point where judicial optimism must give way to reality. The parties have been fighting each other in court since 2007. The Board, the Federal Court and our Court have all come to the same conclusion: intransigence on one side has been met by defiance

from the other (2012 FCA 91 at paragraph 4). Intransigence between the parties is the order of the day (Remedy Reasons at paragraph 6).

B) The Cross-Appeal

[90] I now turn to the cross-appeal. Although launched outside the delay provided for in the Rules, the cross-appeal was fully argued at the hearing and Ms. Bremsak's continuing intention to pursue this matter is supported by the record. I see no valid reason why it should not be entertained now. The issue is straightforward and the parties' submissions are before us. There is no prejudice to the Institute and it is in the interest of the parties that this contempt matter comes to an end without further proceedings or delay. Therefore, I propose to allow the motion to extend the delay to file this cross-appeal, to accept for filing the notice of the cross-appeal as it appears in Ms. Bremsak's motion record (Appendix A at page 4) and to dispose of the cross-appeal.

[91] In his Contempt Order, the Judge reserved the question of costs for later determination. Two months later, while his Contempt Order was under appeal, he directed the parties to file their written submissions as to the appropriate remedy. However, he also stated that costs would not be adjudicated upon at that moment, being dependent upon the decision to issue from our Court (respondent's motion record for the cross-appeal, page 23, at paragraph 3). He then issued his Remedy Order which is silent on the issue of costs.

[92] Following the Remedy Order, Ms. Bremsak contacted the Federal Court in relation to this alleged omission. By then, the Judge had retired and Martineau J. issued a direction dated February 11, 2013 in file T-2049-09. In its relevant portion, it reads:

> It appears that the matter of remedy was finally disposed by Justice Lemieux in his Judgment of November 29, 2012. Despite the fact that the Judgment of February 16, 2012 mentions that "[C]osts [are] reserved for later determination", it is apparent that the issue of costs should have been raised by the applicant to Justice Lemieux prior to the making of his final Judgment. Considering that Justice Lemieux's final Judgment in the contempt proceeding does not award costs and denies "all remedies" sought other than those specifically noted, this Court is now *functus officio* and does not have the power to order special costs in favour of the applicant.
>
> Accordingly, the Court declines to make any order with respect to costs.

[93] Of course, no appeal lies from a direction and Ms. Bremsak is now left with her notice of motion in this Court to extend the delay to cross-appeal on the costs issue. Ms. Bremsak seeks special costs to cover the costs of the contempt trial, the show cause hearing, and Ms. Isabelle Roy's cross-examination (to include $727.13 for transcript and reporting services). Ms. Bremsak was already awarded a lump sum of $7,000 for the appeal on the Contempt Order. The Institute argues that Ms. Bremsak is entitled to her disbursements incurred during the hearing before the Protonothary and the Judge, but not to additional costs. The Institute adds that there is no evidence of any remunerative activity foregone by Ms. Bremsak due to her involvement in these proceedings.

[94] There is no doubt that Ms. Bremsak spent time and energy to defend the 2009 Decision ordering her reinstatement. Self-litigants may be entitled to some form of compensation "particularly when that party is required to be present at a hearing and foregoes income because of that" (*Air Canada v. Thibodeau*, 2007 FCA 115 at paragraph 24, citing *Sherman v. Canada*

(Minister of National Revenue), [2003 FCA 202, [2003] 4 F.C. 865]). Here, can the costs awarded amount to $14,000 as proposed by Ms. Bremsak? No. Considering, *inter alia*, the nature of the proceedings in the Federal Court; the one-day hearing on the contempt; the request by the Judge for supplementary submissions and subsequent communications with the Federal Court regarding costs and the lateness of the filing of this cross-appeal, I propose to allow the cross-appeal without costs in this Court and to set the costs payable to Ms. Bremsak for the Federal Court contempt proceedings at $4,000 inclusive of disbursements and tax.

C) Conclusions

[95] In summary, I propose

a) to allow the appeal, to set aside the Remedy Order, to order the Institute to pay a fine of $250,000 within sixty-five (65) days of the date of the judgment to issue;

b) to award costs to the Institute in this appeal in the amount of $4,000 inclusive of disbursements and tax;

c) to accept the filing of the motion to extend the delay to file a cross-appeal; and

d) to allow the cross-appeal with no costs in this Court but with costs in favour of Ms. Bremsak for the Federal Court contempt proceedings in the amount of $4,000 inclusive of disbursements and tax.

"Johanne Trudel"

J.A.

"I agree
David Stratas J.A."

"I agree
Robert M. Mainville J.A."

ANNEX

Case	Act of contempt	Length of act of contempt	Sentence
CIT Financial Ltd. v. Western Waste Recyclers Inc., [2008] O.J. No. 2386.	Failing to return leased equipment.	Almost ten months.	$6,000 (10% of contemnor's gross earnings). **Current value:** $6,395
9038-3746 Quebec Inc. v. Microsoft Corporation, 2010 FCA 151.	Distributing 88 copies of software, possessing 545 copies for the purpose of selling.	Roughly six months.	$50,000 for each offence (totalling $100,000) **Current value:** $105,852
College of Optometrists of Ontario v. SHS Optical Ltd., 2009 ONCA 19.	Dispensing prescription eyewear to customers without prescriptions, after already having been found in contempt.	Roughly eleven months.	$50,000 for every day not in compliance, totalling $16,000,000. **Current value:** $17,098,175
Doobay v. Diamond, 2012 ONCA 580.	Refused to answer questions after a Master ordered him to.	Almost three years between the time of his first examination, and the final deadline to provide written responses to questions.	$40,000 and 42 days in jail. **Current value:** $40,461
British Columbia (Health Employers Assn.) v. Facilities Subsector Bargaining Assn. 2004 BCSC 762, 31 B.C.L.R. (4th) 124.	Hospital employees refusing to obey labour board order to return to work.	Four days.	$150,000 **Current value**: $175,547
British Columbia Public School Employers Assn. v. British Columbia Teachers Federation, 2005 BCSC 1490.	Teachers refusing labour board order to return to work.	Ten days.	$500,000 **Current value:** $575,304

Syndicat canadien des communications, de l'énergie et du papier v. Métro-Média Inc. [1996] F.C.J. No 1605, 67 A.C.W.S. (3d) 899.	Employer frustrated reinstatement order of arbitrator.	Four months and two weeks.	$5,000 penalty. **Current value:** $6,910
Manitoba Teachers' Society, local 65 v. Fort Alexander Indian Band, [1984] 1 F.C. 1109 (TD).	Indian band refused to comply with a labour board's order to reinstate four teachers.	Three months.	Penalties: $15,000 (Band), $5,000 (Chief), $1,000 (each Council member) Current value: $30,446 (Band) $10,149 (Chief) $2,030 (Council members).
United Food and Commercial Workers, Local 1252 v. Western Star, a Division of Thomson Newspaper Co., (1995) 130 D.L.R. (4th) 538 (Nfld. S.C.-T.D.).	Essentially refused to comply with an arbitrator's order to reinstate an employee by not giving the employee the same duties.	N/A	*Not relevant because party given opportunity to purge contempt.*
L'Union des employés de commerce, local 503 v. Baribeau et al., [1978] R.P. 338.	Following reinstatement, employer imposed punitive duties on employee.	*Full case information not available.*	$2,000 fine. **Current value:** $6,721
Canada (Minister of National Revenue) v. Marshall, 2006 FC 788.	Failing to provide information and documents to CRA in compliance with court order.	Three months.	$3,000 **Current value:** $3,370
Baxter Travenol Laboratories of Canada, Ltd. v. Cutter Canada Ltd., [1987] 2 F.C. 557.	Disposing of patented product rather than delivering it up to patentee, as ordered.	N/A.	$50,000 **Current value:** $89,781
Other examples:			

Case	Act of contempt	Length of act of contempt	Sentence
Apotex Fermentation Inc. v. Novopharm Ltd., (1998), 162 D.L.R. (4th) 111, [1998] 10 W.W.R. 455, (MBCA).	Researching drug in the face of an injunction	Nineteen months.	$100,000 (corporate) $10,000 each (4 individuals) **Current value:** $134,573 $13,457
Apotex Inc. v.Merck & Co. Inc., 2003 FCA 234.	Selling patented drugs and aiding and abetting others to sell drugs despite injunction.	Sold drugs directly for 10 days, aided and abetted for almost four months.	$125,000 against the company, $4,500 against the company's CEO. **Current value:** $150,000 (company) $5,400 (CEO)
Lyons Partnership, L.P. v. MacGregor (2000), 186 F.T.R. 241, (F.C.).	One performance of a children's character in breach of a court order not to infringe a trademark and copyright.	N/A.	$3,000 **Current value:** $3,864
Telewizja Polsat S.A. v. Radiopol Inc., 2006 FC 137.	Breach of court orders to enjoin from infringing copyright. Clear intention to breach and no apology.	Five months.	$25,000 (Corporate defendant) $10,000 + six months imprisonment (individual defendant) **Current value:** $28,082 $11,233
Saskatchewan Health-Care Assn. v. Saskatchewan Union of Nurses, [1999] 12 W.W.R. 240, 182 Sask. R. 248.	Failing to declare an end to a strike following an injunction.	Seven days.	$120,000 **Current value:** $158,881
Great Canadian Railtour Co. v. Teamsters Local Union No. 31, 2012 BCSC 632.	Picketing despite an injunction.	Eleven days.	$25,000 **Current value:** $25,288

Dursol-Fabrik Otto Durst GmbH & Co. KG v. Dursol North America Inc. 2006 FC 1115.	Failing to follow court orders to cease marketing and selling trademark infringing goods.	Minimum seven months	$20,000 and 14 days imprisonment if fine not paid within 60 days **Current value:** $22,466
Builders Energy Services Ltd. v. Paddock, 2009 ABCA 153, 457 A.R. 266.	Breaching a consent judgment	N/A	$500,000 or 15 months' imprisonment for defaulting on payment of the fine **Current value:** $534,318
Note: Current values are calculated using the Bank of Canada Inflation Calculator at http://www.bankofcanada.ca/rates/related/inflation-calculator/. This tool uses the monthly consumer price index information from 1914 to the present.			

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	STRATAS J.A. MAINVILLE J.A.
DATED:	SEPTEMBER 16, 2013

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