Federal Court  Cour fédérale

Date: 20201020

Docket: T-1315-18

Citation: 2020 FC 986

Toronto, Ontario, October 20, 2020

PRESENT: Justice A.D. Little

BETWEEN:

CHRIS HUGHES

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TRANSPORT CANADA

Respondent

ORDER AND REASONS

[1] These reasons concern an appeal made in writing under Rule 51 of the *Federal Courts Rules*, SOR/98-106. The applicant, Mr Hughes, asks the Court to vary or set aside in part an Order of Prothonotary Ring dated November 28, 2019 (the "Order"). In that Order, the Prothonotary

dismissed a show-cause contempt motion against Transport Canada and four individual public servants including the Minister of Transportation.

[2] For the reasons below, the appeal is dismissed.

[3] Mr Hughes was not represented by legal counsel on this appeal. In summary without legal jargon, the Prothonotary did not make any errors that justify a change to her conclusions. On an appeal, this Court can change the Prothonotary's legal conclusions if she made an error in stating the correct law. The Court can also change the Prothonotary's conclusions about whether the evidence satisfies the correct legal test, but only if that error is obvious to the Court and affected the overall outcome – so much so that the outcome would have been different if the Prothonotary had not made the obvious error. I did not find either kind of error in the Prothonotary's reasons.

I. **Events Leading to the Appeal**

[4] There is a considerable procedural history to the dispute between the parties, including the events leading to this appeal. Only a summary is needed for present purposes.

[5] This proceeding is rooted in a 2014 decision of the Canadian Human Rights Tribunal (the "Tribunal") which held that Transport Canada discriminated against Mr Hughes on the basis of disability in the staffing process for a Marine Security Analyst (PM-04) position at Transport Canada: *Hughes v Transport Canada*, 2014 CHRT 19. The Federal Court initially set aside the Tribunal's decision on judicial review, but the Federal Court of Appeal restored it: *Hughes v Canada (Attorney General)*, 2016 FCA 271.

[6] On July 1, 2018, the Tribunal released its decision on remedies: *Hughes v Transport Canada*, 2018 CHRT 15. It comprises more than 400 paragraphs. It ordered Transport Canada to instate Mr Hughes as a Marine Intelligence Analyst at the PM-04 group and level classification and to pay monetary compensation. The Tribunal made an 11-paragraph Remedies Order under s. 53 of the *Canadian Human Rights Act*, RSC 1985, c H-6, in the following terms:

> 1. The Respondent shall instate the Complainant, subject to the required security clearance, on the first reasonable occasion, and without competition, to the position of Intelligence Analyst at the PM-04 group and level classification, with all attendant employment benefits. The location of the position will be Esquimalt, British Columbia, or Vancouver, British Columbia, provided the Complainant is willing to relocate.
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> 2. Immediately after the Complainant's instatement into the PM-04 Intelligence Analyst position, the Respondent shall provide training to the Complainant appropriate to the position, having regard to the passage of time since the discriminatory practice.
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> 3. The Respondent shall pay to the Complainant compensation for lost wages (excluding Overtime), which the Complainant would have earned as a Marine Security Analyst at the group and level of PM-04, during the period May 8, 2006 to May 7, 2011, including any wage rate increases in accordance with the relevant Collective Agreements, and subject to all usual deductions for an indeterminate employee.
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> 4. From the award in paragraph 3 of this Remedies Order, the Respondent shall deduct an amount equivalent to the Complainant's employment income for each year of the period.
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> 5. The award of compensation for lost wages is subject to the parties' obligations under ss. 45 and 46 of the Employment Insurance Act.
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> 6. The Respondent shall contribute all amounts which the Respondent would have contributed to all Pension plans to which the Complainant, as an indeterminate employee,

> would have subscribed to, for the period May 8, 2006 to May 7, 2011.
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> 7. The Respondent shall pay the Complainant the amount of $46,100 in compensation for lost Overtime wages during the period May 8, 2006 to May 7, 2011, subject to any standard deductions for these kinds of wages.
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> 8. The Respondent shall pay to the Complainant a gross-up amount sufficient to cover any additional income tax liability arising from the order for the Respondent to pay the Complainant in a lump-sum, regular wages, Overtime and any taxable benefits that he would have otherwise earned over the period May 8, 2006 to May 7, 2011.
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> 9. Pursuant to s. 53(2)(e) of the Act, the Respondent shall pay to the Complainant the amount of $15,000, as compensation for pain and suffering resulting from the discriminatory practice.
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> 10. Pursuant to s. 53(3) of the Act, the Respondent shall pay to the Complainant the amount of $5,000, as compensation for the Respondent's reckless engagement in the discriminatory practice.
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> 11. Pursuant to s. 53(4) of the Act, and Rule 9(12) of the Tribunal's Rules of Procedure, the Respondent shall pay the Complainant interest on the compensation ordered, accruing from May 8, 2006 to the date of payment. This interest shall be simple interest, calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series) set out by the Bank of Canada. In no case shall the accrual of interest on awards made under subsection 53(2)(e) or 53(3) result in a total award that surpasses the statutory maximums therein prescribed.

[7] Both parties applied for judicial review of the Remedies Decision. Justice LeBlanc dismissed the application of the Attorney General and allowed Mr Hughes's application in part: *Hughes v Canada (Attorney General)*, 2019 FC 1026. Justice LeBlanc set aside the Remedies Decision insofar as it related to the determination of the ultimate cut-off date of May 2011 for

compensation for lost wages and benefits. He remitted the matter to a differently constituted panel of the Tribunal for redetermination.

[8] Both parties have appealed Justice LeBlanc's decision.

[9] Promptly after the Tribunal released its Remedies Decision, and while the applications for judicial review were pending, Mr Hughes sought to have the Remedies Decision implemented. In June and July 2018, soon after the Remedies Decision was released, the applicant's counsel wrote to counsel for Transport Canada demanding immediate payment of the Tribunal's monetary award. Transport Canada, through its counsel, took the position that the amount of payment was in dispute due to its application for judicial review.

[10] On July 9, 2018, the applicant filed a true copy of the Remedies Decision with this Court. A certificate of filing of a true copy of the order was placed in the Federal Court file. The Federal Court Administrator did not and has not issued a certificate of judgment pursuant to Rule 474 of the *Federal Courts Rules* against the Crown, nor did the Administrator deliver such a certificate to the Deputy Attorney General of Canada.

[11] By late July 2018, the applicant took the position in correspondence that Transport Canada's failure to pay the monetary portion of the award amounted to a contempt of court. According to Transport Canada, s. 30(1) of the *Crown Liability and Proceedings Act,* RSC 1985, c C-50 (the "CLPA"), in conjunction with Rule 474 of the *Federal Courts Rules*, operated to stay

any payment of the damages award until the final disposition of its outstanding judicial review application.

[12] On August 8, 2018, the applicant filed a Notice of Motion for contempt of the Tribunal's Order, seeking an order that Transport Canada appear for a show-cause hearing pursuant to Rule 467.

[13] On October 12, 2018, after various procedural issues were resolved, Prothonotary Ring was assigned as Case Management Judge. The parties also reached an Agreed Statement of Facts filed with the Court on October 10, 2019 (the "ASF").

[14] On November 13, 2018, the Applicant filed an amended motion for contempt under Rules 359, 466 and 467 for an order compelling Transport Canada and four individuals to appear before the Court to "show-cause why they should not be found guilty of contempt of Court for disobeying" the Tribunal's Remedies Decision. In addition to Transport Canada (which was the respondent before the Tribunal against which the Remedies Order was made) the motion named four new individuals as being in alleged contempt: Minister of Transport Marc Garneau; an Executive Director at Transport Canada, Trevor Heryet; and two Department of Justice legal counsel, Malcolm Palmer and Kevin Staska.

[15] Mr Hughes's allegation was that Transport Canada and the named individuals breached the Remedies Order "by failing to begin the process to appoint Mr Hughes to the position of Marine

Security Analyst (non-monetary award) and by failing to begin the process of calculating lost wages, pension etc. (the monetary awards)".

[16] After Mr Hughes filed his contempt motion, it was adjourned *sine die* and a variety of events intervened, including other motions, applications and settlement discussions. Amongst those was a motion for relief under subs. 24(1) of the *Canadian Charter of Rights of Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: *Hughes v Canada (Human Rights Commission)*, 2019 FC 53 (Heneghan, J). In that decision, Justice Heneghan rejected Transport Canada's position that s. 30 of the *CLPA* effects a stay of execution of the Remedies Decision pending resolution of Canada's judicial review application: at paras 40 and 46.

[17] Following Justice Heneghan's decision, Transport Canada issued a cheque in the amount of $352,970.07 to Mr Hughes in respect of certain monetary amounts ordered in the Remedies Decision.

[18] Eventually, on November 8, 2019, the parties attended a show-cause hearing for the motion for contempt before Prothonotary Ring.

[19] On November 28, 2019, Prothonotary Ring made the Order dismissing the motion. That decision is the subject of this appeal.

[20] A number of additional factual points are material. First, as noted, paragraph 1 of the Tribunal's Remedies Decision dated June 1, 2018 provided that Transport Canada "shall instate the Complainant, subject to the required security clearance, on the first reasonable occasion, and without competition, to the position of Intelligence Analyst at the PM-04 group and level classification, with all attendant employment benefits" [underlining added]. In that regard:

- A PM-04 opening has been available at Transport Canada since June 1, 2018: ASF at para 72.
- On December 10, 2018, Transport Canada sent Mr Hughes the requisite security and personnel forms for him to complete: ASF at para 51.
- There was no evidence that from June 1, 2018 to December 10, 2018 Mr Hughes asked Transport Canada to send him any security forms to complete.
- On January 17, 2019, counsel for Transport Canada wrote to counsel for the applicant providing further information related to the delivery of the security clearance forms and confirming that Transport Canada would cover the cost of any fees associated with obtaining the fingerprints necessary for the security clearance: ASF at para 67.
- As of the date of the ASF (October 10, 2019), Transport Canada had not received any completed security forms from Mr Hughes: ADF, at para 76.

II. **The Order under Appeal**

[21] Prothonotary Ring identified two issues for determination: first, a "threshold" issue of whether contempt was even available against the five alleged contemnors; and second, if contempt were available, whether Mr Hughes had established a *prima facie* case that contempt has been committed by the alleged contemnors.

[22] On the first, threshold issue, the Prothonotary concluded that Transport Canada could not be the subject of a contempt proceeding because contempt of court is not available against the Crown, in part due to *Tahmourpour v Canada (Human Rights Commission)*, 2013 FC 1131 ("*Tahmourpour FC")*, aff'd 2014 FCA 204 (without concluding on this point). However, based on comments in *Tahmourpour FC*, the Prothonotary held that a finding of contempt may be available against a Crown official, even if not named as a party in a court order, if the Crown official subject to the contempt proceedings had knowledge of that order and either statutory or delegated responsibility to comply with that order, and disobeyed or otherwise failed to comply with it. With respect to the four individuals named in the contempt proceeding, the Prothonotary held that only Minister Garneau could, in law, be the subject of a contempt proceeding, only for the instatement portion of the award, and only if Mr Hughes could demonstrate a *prima facie* case that contempt had been committed by Minister Garneau by failing to implement the instatement provision of the Tribunal's Remedies Decision. Minister Garneau could not be found in contempt with respect to non-payment of the monetary order because under s. 30 of the *CLPA*, the Minister of Finance has exclusive responsibility to pay such awards: at para 43.

[23] On the second issue, the Prothonotary concluded that Mr Hughes had not discharged his onus to establish a *prima facie* case that Minister Garneau, or any of the individuals, had failed to comply with the Remedies Decision as Mr Hughes alleged. The Prothonotary set out the following legal test for civil contempt at paragraphs 48-49 of her reasons:

> [48] It is well established that civil contempt has three elements which must be proved by the moving party:
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> > 1. the order alleged to have been breached "must state clearly and unequivocally what should and should not be done";

> 2. the party alleged to have breached the order must have had actual knowledge of it; and
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> 3. 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: *Carey v Laiken*, 2015 SCC 17 (CanLII), [2015] 2 SCR 79 at paras 32 to 35 [*Carey*]; *ASICS Corporation v 9153-2267 Québec inc.*, 2017 FC 5 at para 32 [*ASICS*].
>
> [49] With respect to the third element, all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has had notice. There is no additional requirement to establish an intention to disobey, in the sense of desiring or knowingly choosing to disobey the order or judgment in question (i.e. "contumacious" intent): *Carey* at para 38; *ASICS* at para 33.

[24] With respect to the instatement aspect of the Remedies Decision, the Prothonotary held at paragraph 53 that the it was "apparent on the face of the Tribunal's Remedies Decision" that the order that Transport Canada instate Mr Hughes to the position of Intelligence Analyst was "expressly made subject to Mr Hughes fulfilling all of the required conditions of employment for the position, including the security clearance". She referred to paragraph 1 of Tribunal's Order ("subject to the required security clearance") and to the following paragraph in the Tribunal's reasons:

> [272] I therefore conclude that subject to s. 54(a) of the Act, <u>and subject to Mr Hughes meeting all the required conditions of employment for the position—including the security clearance</u>, the Respondent must instate him on the first reasonable occasion as a PM-04 Intelligence Analyst.
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> [Underlining added by Prothonotary Ring]

[25] The Prothonotary held that there was "no dispute on the evidence before me that Mr Hughes has not fulfilled the requirement for a security clearance". She noted that in in the ASF, the parties agreed that counsel for Transport Canada sent copies of the required security clearance and screening personnel forms to counsel for Mr Hughes on December 10, 2018 even though the Tribunal did not specifically order this step. Further information was provided on January 17, 2019. She noted that in paragraph 72 of the ASF, a position has been available at Transport Canada since June 1, 2018. The Prothonotary then referred to paragraph 76 of the ASF:

> 76. As of the date of these Agreed Statement of Facts, Transport Canada has not received completed security forms from Mr Hughes, a requisite initial step for appointment to the Marine Intelligence Analyst position.

[26] The Prothonotary found at paragraph 58 of her reasons that "[i]n accordance with the terms of the Remedies Decision, [the applicant] is required to submit the required security forms as a precondition to being instated in the Intelligence Analyst position."

[27] The Prothonotary noted Mr Hughes's argument at the hearing that before he submitted an application for a security clearance, he "wanted Transport Canada to make an offer of employment to him which indicates what will happen if he fails the security clearance". The Prothonotary observed that this "may be how Mr Hughes would like the process to unfold, but it is completely contrary to what is required by the Remedies Decision. The Tribunal expressly provided that Mr Hughes is required to obtain a security clearance *before* Transport Canada must reinstate [*sic*] him" [original italics].

[28] At paragraph 63, she concluded:

> [63] Since the provision in the Remedies Decision requiring the instatement of Mr Hughes in an Intelligence Analyst Position is contingent on Mr Hughes first obtaining a security clearance, and he has taken no steps to satisfy that requirement, I find that Mr Hughes has failed to establish a *prima facie* case that Minister Garneau, or any of the other alleged contemnors, have breached the instatement provision in the Remedies Order.

[29] With respect to the financial payments aspect of the Remedies Decision, the Prothonotary was not persuaded that Mr Hughes had established a *prima facie* case that any of the alleged contemnors intended to evade the obligation on Transport Canada to pay the monetary award to Mr Hughes. As discussed, she concluded that Minister Garneau could not be liable for contempt by failing to pay the monetary compensation awarded under the Remedies Decision because he did not have the statutory or delegated authority to authorize such a payment from the Consolidated Revenue Fund.

[30] For the sake of completeness, and in the event that she erred in her analysis of the threshold issue, the Prothonotary continued her analysis on the evidence, finding that Mr Hughes had not established a *prima facie* case that any of the alleged contemnors were in breach of the Remedies Decision by failing to pay the monetary award.

[31] The Prothonotary referred to s. 29 of the *CLPA*, which provides that no execution shall issue on a judgment against the Crown. Instead, she noted, awards against the Crown are to be paid by the Minister of Finance from the Consolidated Revenue Fund, pursuant to s. 30 of that *CLPA*, upon receipt of a certificate of judgment against the Crown.

[32] Rule 474 of the *Federal Courts Rules* provides for the issuance of a certificate of judgment where an order against the Crown for the payment of money is executory and is either not under appeal or has been affirmed or varied on appeal. After setting out Rule 474, the Prothonotary noted that the parties had agreed, in the ASF, that "[a]t no point, pursuant to Rule 474 … did the Federal Court Administrator issue a certificate of judgment against the Crown nor did the Administrator deliver such a certificate to the Deputy Attorney General of Canada". She further noted that Justice Heneghan concluded that a party in the position of Mr Hughes was required to make a request under the Rules for a certificate of judgment, and that he had not complied with Rule 474: *Hughes v Canada (Human Rights Commission)*, 2019 FC 53 at paras 48-50 and 63. In the absence of such a certificate of judgment, Mr Hughes had not demonstrated a *prima facie* case for contempt.

[33] Finally, the Prothonotary was not satisfied that Mr Hughes has established a *prima facie* case that "any of the alleged contemnors" had *intentionally* failed to pay the monetary award made by the Tribunal.

[34] Prothonotary Ring therefore dismissed Mr Hughes's motion, and exercised her discretion not to award costs to the respondent.

III. **Preliminary Issues**

A. *New Evidence on Appeal (1)*

[35] There are two issues as to new evidence on appeal. The first arose in an unusual way.

[36] The respondent's written submissions stated that in the applicant's motion record, Mr Hughes had attempted to admit excerpts of fresh evidence before this Court that were not before the Prothonotary. The respondent objected, because Mr Hughes did not bring a formal motion and did not establish that the relevant test for new evidence on an appeal has been met.

[37] At first blush, this was a curious submission, for the applicant's motion record index did not refer to anything new for the appeal. His filed motion record contained no documents other than his initial written submissions for the appeal. Its index listed his Notice of Motion for this appeal and other Court Orders but no new or proposed evidence. His written submissions also did not mention or make any apparent reference to new or fresh evidence, or anything by way of new material.

[38] In his reply submissions, under the heading "Arguments raised by Respondent", the applicant advised that he "anticipated raising these issues in Reply and therefore gave a 'heads up' to the respondent". He stated that the "issues being raised are not evidence but are rather statutory provisions and Treasury Board policies" that Transport Canada is required to follow. A couple of paragraphs later, some of the fog lifted when the applicant's Reply submissions referred to a statutory provision, a "Treasury Board Standard on Security", two Public Service Commission documents and a "Public Works Security Policy".

[39] The applicant did not file a Notice of Motion to seek the admission of these documents into evidence on this appeal or provide evidence as to why the documents were not before the Prothonotary or not located earlier. In addition, none of the documents was actually filed in a

motion record. The applicant's submission in reply was that the documents were not "evidence" and were "publically posted" and therefore, the applicant maintained, Prothonotary Ring should have availed herself of them. He provided a link to a website that apparently houses the documents, and asserted that the documents are "authorities" or "secondary sources" that are listed in his Reply and that they govern the federal Public Service. He did not refer to any specific argument of the respondent to which the new argument and documents responded.

[40] In fact, from my own review, the new documents are directly related to a new argument made by the applicant in his reply submissions. That position was that Transport Canada was required from the outset to send him a "letter of offer that would include any and all *'subject to'* clauses" [original emphasis]. The applicant's reply argument also noted that he has been requesting a letter of offer from December 2018 onwards. Mr Hughes raised a similar point before the Prothonotary and, as noted already, she dismissed the argument (at para 59, as set out above at para 27). However, I have been unable to find arguments about a requirement for a letter of offer in the applicant's initial submissions on this appeal, nor any responsive mention of that issue in the respondent's submissions.

[41] Very recently, in a separate motion to this Court under Rule 431, Mr Hughes requested an Order requiring the government appoint him through a conditional letter of offer to the position at Transport Canada. Justice McVeigh dismissed that motion on August 20, 2020: *Hughes v. Transport Canada*, 2020 FC 843. The arguments Mr Hughes made in his reply submissions on this appeal substantially overlap with the position he took before Justice McVeigh.

[42] In my view, on this appeal it is not appropriate for the Court to consider the new documents listed by the applicant, or the arguments in relation to them, for the following reasons:

> (i) they were not before Prothonotary Ring on the original contempt motion;
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> (ii) they are not before the Court on this motion either, as they were not included in a motion record. The Court cannot try to track them down as public documents, for example by looking on the Internet: *Canada (Attorney General) v Kattenburg*, 2020 FCA 164 (Stratas, JA), at para 32. Apart from being improper to do so, there would be no affidavit before the Court to identify the documents as the ones the applicant wants to rely on, or to explain what they are and how they might apply to the present case;
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> (iii) the applicant's initial submissions on the appeal made no mention of the documents and made no argument about them. They were first raised in his reply submissions, as was the general position taken by the applicant that Transport Canada should have sent him an offer letter. Even if the issue of an offer letter was generally known to the respondent outside this motion and a similar issue was raised before the Prothonotary, it is not fair to the respondent to raise these new documents and arguments first in reply on this appeal. Despite the applicant's courteous "heads-up" to the respondent's counsel, it leaves the respondent without an opportunity to answer the applicant's written reply submissions about the meaning and importance of the documents in its own written submissions, or about the broader issue the applicant now raises;
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> (iv) the applicant did not file a Notice of Motion or otherwise make a request for admission of the documents as fresh evidence on appeal, nor did he provide any evidence to meet the test for fresh evidence on an appeal to this Court: see *David Suzuki Foundation v. Canada (Health)*, 2018 FC 379 (Kane, J), at paras 16-19, 36-39, 41; *Carten v Canada*, 2010 FC 857 (Gauthier, J), at para 23; and
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> (v) a number of issues related to an offer letter have been raised by Mr Hughes and determined by this Court, including in relation to whether he is entitled to an offer letter under paragraph 1 of the Tribunal's decision. The argument on this appeal would essentially constitute a collateral challenge to Justice McVeigh's Order and Reasons: see 2020 FC 843, esp. at page 2 at #1 and #4 and at paras 4, 6, 10, 14-18 and 23. The proper way to attempt to reverse that Order is to appeal. I recognize that the parties filed their written submissions on this motion before Justice McVeigh's decision, but

> that does not detract from the point that the Court has already determined issues between these parties raised by Mr Hughes related to an alleged requirement for an offer letter.

[43] To some, these concerns may seem like technical or procedural points. In fact, however, they go directly to the fairness of this appeal in writing under Rule 51. All parties, including parties not represented by legal counsel, must play by some basic ground rules. Several come up here.

[44] First, there are three stages in written arguments on a motion in writing. They are set out in Rule 369 of the *Federal Courts Rules*. An applicant submits written representations. Then the responding party answers them and may raise its own points. Then the applicant may reply. The exchange of written representations ends there.

[45] At the second stage, a responding party is entitled to know and respond to all the substantive arguments the applying party is relying on. At stage three, the reply affords the applicant a chance to answer the responding party's arguments. On the subject of reply, Justice Mactavish explained in *Deegan v Canada (Attorney General)*, 2019 FC 960, at para 121:

> It is a well-established principle that new arguments are not the proper subject of Reply. The purpose of a Reply is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance. Proper Reply is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated.

[46] A new argument made first in reply that does not respond to an argument by the respondent and should have been raised in the applicant's first submission is not permitted because a responding party has no opportunity to answer it in written submissions. It is a matter not only of

fairness but also of sensible process. Without limits on the scope of reply and a firm end to legal arguments at the reply stage, some litigating parties would continue to exchange written representations like ping-pong. That would cause delays, waste time, drive up legal costs and generally serve no one well.

[47] A second ground rule is that documentary evidence has to come before the Court in a motion record. This ensures that everyone has the same things to look at during the motion. Motion records are governed by Rules 364 and 365.

[48] Third, in order to be included in a motion record, a document must be admissible as evidence. The Court can only act on facts that are proven by evidence, matters of judicial notice or statutory deeming provisions: see *Kattenburg*, at para 32 and the cases cited there. Where a party seeks to enter a document as evidence, it is very often attached to an affidavit that explains it to the Court. I note that the Court may consider legal arguments about a statute without formal proof of it, as Mr Hughes correctly submitted.

[49] Fourth, on an appeal under Rule 51, the Court considers the evidence as it stood before the Prothonotary and does not consider new factual evidence unless the evidence passes a legal test allowing its admission as fresh evidence on appeal. That legal test allows, on an exceptional basis, for the admission of new evidence on appeal where it could not have been made available earlier; will serve the interests of justice; will assist the Court; and will not seriously prejudice the other side: *David Suzuki Foundation*, at para 37; *Carten*, at para 23. In addition, it must affect the outcome or impact the merits of the appeal: *David Suzuki Foundation*, esp. at paras 38, 41 and 56.

[50] Lastly, there are legal limitations on bringing the same issues to Court more than once. The legal principles of issue estoppel and *res judicata* prevent re-litigation of an issue or cause of action that has been decided on its merits: see *British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52, [2011] 3 SCR 422, at paras 24-25, 27, 34; *Penner v Niagara (Regional Police Services Board),* 2013 SCC 19, [2013] 2 SCR 125, at paras 28-31, and paras 88-91 and 98-100; *Tuccaro v Canada,* 2014 FCA 184, at paras 12-17; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248.

[51] For the reasons above, I will not consider the applicant's new documents, or his arguments in relation to them, on this appeal.

B. *New Evidence on Appeal (2)*

[52] By letter dated August 25, 2020, Mr Hughes wrote to the Court stating that the applicant "discovered yesterday a material non-disclosure", which he stated "is significant and goes to the heart of the Contempt issue". He attached two pages of a poster for a job opening that he stated "is the exact job the Tribunal ordered the Respondent instate the Applicant into on June 1, 2018". The poster is alleged to show that Transport Canada would staff the position at various security levels. The applicant's letter claims that the document undermines the respondent's position that the applicant could only be hired as a Marine Intelligence Officer with the "highest security clearance" (Top Secret), and that the security clearance must be obtained prior to sending him a letter of offer. The poster on its face stated that the competition for the job closed in January 2018.

[53] The applicant requested that the Court allow the parties to make brief submissions on this new evidence. However, before that, I must determine whether this evidence should be considered on this appeal.

[54] By letter dated August 28, 2020, the respondent submitted that the evidence is irrelevant to the appeal before the Court, that the applicant was out of time to tender this evidence because it predates the June 1, 2018 order of the Tribunal, and that the new evidence does not meet the test for adducing new evidence on appeal. The respondent also submitted that the request for this new evidence was an abuse of process as an attempt to circumvent findings made in an Order by Justice McVeigh that Mr Hughes is not entitled to a letter of offer for employment prior to his security clearance: *Hughes v Transport Canada,* 2020 FC 843. The respondent did not identify the specific findings it relied upon.

[55] In my view, the job posting should not be admitted as fresh evidence on appeal.

[56] First, the applicant provided no explanation as to why this evidence of a job posting that closed in January 2018 could not be found before late August, 2020 and specifically, why it was not before the Prothonotary on the contempt motion in November 2019. The new evidence therefore does not pass the test for new evidence on appeal from *David Suzuki Foundation* and *Carten*, which requires, among other things, that for new evidence to be admissible on appeal, it must not have been made available any earlier.

[57] Second, the job posting evidence has marginal relevance to this appeal. The Prothonotary referred in passing to different levels of security at paragraph 60 of her reasons: she mentioned that an affidavit sworn in response to another motion brought by Mr Hughes stated that "[o]n December 10, 2018, the forms necessary for Mr Hughes to seek top secret clearance and to allow him to potentially fill the Assignment Coverage Position on a determinate basis were forwarded to his counsel" [emphasis added]. She made no other reference to different levels of security clearance elsewhere in her reasons.

[58] On this appeal, Mr Hughes's initial submissions also made little reference to different levels of security. Where he did touch on it, he argued that it was not relevant to the present contempt allegations (at para 63 of his submissions, below):

> 62. The respondent admitted a position existed on June 1, 2018. The security forms needed to be mailed out to the Applicant **within days**. Instead the Respondent rewrote the Award order saying they did not have to comply. And they did so without seeking a Stay by consent or seeking a Court approved Stay. The security forms were not emailed until December 10, 2018. The Contempt charge is for failing to take any action between June 1, 2018 and November 13, 2018 to begin implementing the **order not for failing to appoint the Applicant**.
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> 63. All these other issues over the security forms not being returned due to credit worthiness concerns, Top Secret vs Secret are outside the scope of the contempt charges. In fact, they would be subject to a completely separate charge of contempt.
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> [Original emphasis in para 62; underlining added to para 63.]

[59] In his Reply submissions, there is no reference to different security levels as an issue in this case, although I note that in certain of the cases relied upon by the applicant (e.g. *Tahmourpour*), different levels of security were part of the facts.

[60] On the applicant's own position, therefore, the proposed new evidence has no, or very marginal, relevance to the outcome of this Rule 51 appeal from the Prothonotary's Order. The respondent made no submissions on this appeal about different security levels. I find therefore that the proposed new evidence has little or no relevance to this appeal.

[61] Because the proposed new evidence of the job posting does not pass the test for fresh evidence on appeal and has marginal or no relevance to the merits of the appeal, it should not be admitted as evidence or considered on this appeal. It is not necessary to conclude in relation to the respondent's argument about the effect of Justice McVeigh's decision.

IV. **The Appeal**

A. *Standard of Review on a Rule 51 Appeal*

[62] On an appeal from a discretionary order of a Prothonotary under Rule 51 of the *Federal Courts Rules*, the Court applies the standards of review established in the Federal Court of Appeal's decision in *Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331. Justice Nadon, speaking for a five-person panel of the Court, held that the Federal Court may only interfere with a discretionary decision of a Prothonotary if the Prothonotary made an error on a question of law, or if the Prothonotary made a palpable and overriding error on a question of fact or mixed fact and law: *Hospira* at paras 68-69 and 79. The Court in *Hospira* adopted the same standard for Rule 51 appeals as set out by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, for appellate review of decisions by trial judges: *Housen*, at paras 19-37.

[63] The correctness standard may also apply to a question of law or a legal principle that is extricable from a question of mixed fact and law: *Hospira*, at paras 66, 71-72; *Creston Moly Corp. v Sattva Capital Corp*., 2014 SCC 53, [2014] 2 SCR 633, at paras 53-55, 63-64; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344 (Stratas, JA), at paras 57 and 74; *Canadian National Railway v Emerson Milling*, 2017 FCA 79, [2018] 2 FCR 573 (Stratas, JA), at paras 21-28; *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, [2017] 1 SCR 688, at para 44; *Clayworth v Octaform Systems Inc.*, 2020 BCCA 117 (Hunter, JA), at para 47. However, if the impugned findings are factually suffused or a legal principle is not readily extricable, the standard will be palpable and overriding error: *Mahjoub* at paras 60, 156 and 318; *Housen*, at para 36; *Teal Cedar Products*, at paras 45-46.

[64] The correctness standard is a non-deferential standard of review in which the Court can substitute its own opinion, discretion or decision for that of the Prothonotary: *Hospira*, at para 68; *Mahjoub*, at para 58. By contrast, the palpable and overriding standard is a highly deferential standard of review: *Benhaim v St. Germain*, 2016 SCC 48, [2016] 2 SCR 352, at para 38. In *Mahjoub*, Justice Stratas described the palpable and overriding error standard in the following words:

> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See Canada *v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.
>
> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in

> accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
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> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

See also *Laliberte v Day*, 2020 FCA 119 (Laskin, JA), at para 32.

[65] The *Hospira* standards have been applied very recently in appeals under Rule 51 concerning contempt matters: *Wachsberg v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 675 (Mosely, J), at para 26; *Lill v Canada (Attorney General)*, 2020 FC 551 (Gascon, J), at para 23.

[66] Decisions of a Prothonotary dismissing motions for contempt have been considered to be discretionary in nature: *Johnson v Canada (Attorney General)*, 2008 FCA 290 (Sharlow, JA), at para 7, dismissing an appeal from 2008 FC 119 (Hughes, J), at para 5; *Osmose-Pentox Inc v Société Laurentide Inc.*, 2010 FC 676 (Martineau, J), at para 25.

[67] In addition, I bear in mind on this Rule 51 appeal that a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding: *Hospira*, at paras 102-103; *Da'naxda'xw First Nation v Peters*, 2020 FC 208 (Favel, J), at para 39. In this instance, the Prothonotary had been the case management judge for this proceeding for over a year before

the show-cause hearing. Further, a case management judge's decisions are afforded deference, especially on factually-suffused questions: *Hospira*, at para 102; see also *Sawridge Band v R*, 2001 FCA 338, [2002] 2 FC 346, at para 11; *Merck & Co v Apotex Inc.*, 2003 FCA 438, at para 12; *744185 Ontario Inc. v Canada (Transport)*, 2018 FC 1024 (Ahmed, J), at para 20.

B. *Grounds of Appeal*

[68] Mr Hughes raised a large number of issues on this appeal. He began by characterizing Prothonotary Ring's ruling as "clearly wrong" and "based on a wrong principle or upon a misapprehension of the facts". Broadly speaking, his principal arguments were:

> ● The Prothonotary erred by using events in December 2018 (security forms mailed out) and February 2019 (monetary award paid) that fell outside the relevant time window of the contempt charge outlined in his motion (which was June 1, 2018 to November 13, 2018). The Prothonotary "used subsequent and irrelevant events to undermine the contempt charges essentially allowing a collateral attack";
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> ● The Prothonotary asked the applicant to show that the respondent was "still in contempt of court at the date of the [contempt] hearing and not on the relevant dates. This misperception led to the hearing being sidetracked into irrelevant timeframes and this confusion permeates the decision under appeal"; and
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> ● The Prothonotary "confused the failure of the respondents to obey the order (contempt) with the statutory inability of the applicant to force the respondent to pay (enforcement proceedings)".

[69] Mr Hughes's essential position on this appeal is that the respondent did not immediately begin to implement the Tribunal's Remedies Decision. Mr Hughes argues that a "mistake of law" does not excuse their failure to begin implementing – specifically, that Transport Canada cannot

be excused due to its incorrect legal argument that its application for judicial review operated as a stay of the Remedies Decision under s. 30 of the *CLPA*: see *Hughes v Canada (Human Rights Commission)*, 2019 FC 53 (Heneghan, J), at paras 38-47.

[70] Mr Hughes also submits that the Prothonotary erred in finding that Transport Canada cannot be liable for civil contempt. He made a wide variety of other legal and factual arguments designed to demonstrate that the Prothonotary incorrectly decided his contempt motion on its merits.

C. *Analysis*

[71] In my view, the outcome of this appeal may be decided without addressing many of the arguments raised by the parties.

[72] To recap the Prothonotary's decision, she concluded, as a threshold matter, that Transport Canada could not, in law, be held liable for contempt. On the individual contemnors, the Prothonotary concluded that Minister Garneau could be liable for contempt in respect of the instatement order made in the Tribunal's Remedies Decision based on his statutory authority, but the remaining individuals could not based on their respective delegated authority. On the money aspects of the Remedies Decision, Prothonotary Ring concluded that none of the individuals could be liable for contempt as none had the statutory or delegated authority to pay the amounts ordered.

[73] The Prothonotary then considered whether Mr Hughes had established a *prima facie* case of contempt. She concluded, applying *Carey*, that Mr Hughes had not discharged the onus on him to establish a *prima facie* case that Minister Garneau or any of the alleged contemnors had failed to comply with the Remedies Decision as alleged: at para 50. She considered contempt with respect to both the instatement order (at paras 51-63) and the monetary order: at paras 64-79.

[74] In the circumstances, if the Prothonotary was correct in her conclusions applying *Carey* to the evidence, it is not necessary to deal with any of the "threshold" issues. That is because even if the Prothonotary erred in law on any of the threshold issues, she concluded in any event on the evidence that a *prima face* case of contempt had not been made out against <u>any</u> of the alleged

contemnors. Only if the Court concludes that the Prothonotary made a reviewable error on the issues of a *prima facie* case of contempt, will it be necessary to consider the threshold issues.

[75] This Court must apply a correctness standard of review to the Prothonotary's conclusions of law, including the legal standard to be applied to the evidence. By contrast, the Prothonotary's conclusions as to whether the facts satisfy the legal test raise questions of mixed law and fact that attract the palpable and overriding error standard of review: *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at paras 35 and 45; *Housen*, at paras 36-37; *Mahjoub*, at paras 72-74.

(1) Legal Test for Civil Contempt

[76] In my view, the Prothonotary correctly stated the legal test for civil contempt, as set out in the Supreme Court's decision in *Carey*. In addition to the three elements described above, as noted, the Prothonotary recognized that the burden of proof for civil contempt is proof beyond a reasonable doubt: at para 49 of her reasons.

[77] To the Prothonotary's summary, I will add the following points from Justice Cromwell's reasons in *Carey* (with case references removed):

> ● On the first element (that the "order alleged to have been breached must state clearly and unequivocally what should and should not be done"), Justice Cromwell noted that "[t]his requirement of clarity ensures that a party will not be found in contempt where an order is unclear". In addition, he noted that 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: *Carey*, at para 33;
>
> ● The contempt power "is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders": *Carey*, at para 36; and
>
> ● "[…] 'contempt of court cannot be reduced to a mere means of enforcing judgments'… Rather, it should be used 'cautiously and with great restraint' … It is an enforcement power of last rather than first resort": *Carey*, at para 36.

(2) **Application of Civil Contempt Law to the Evidence**

[78] Applying the legal elements for contempt in *Carey*, the Prothonotary reached express conclusions on the evidence that Mr Hughes had not made out a *prima facie* case of contempt in respect of the instatement order (at para 63) and had not made out a *prima facie* case of contempt in respect of the money order (at para 66, 72, 76 and 79), in both cases against any of the alleged contemnors.

[79] The Prothonotary's conclusions on these issues are not subject to a correctness standard of review; it is not the Court's role to re-consider or re-weigh the evidence or to substitute the Court's own opinion on the evidence concerning whether a *prima facie* case of contempt exists. The issue is whether the Prothonotary made a palpable and overriding error – one that was obvious and affects the outcome of her decision, causing her whole reasoning to fall.

[80] *The Instatement Order*: The basis of the Prothonotary's conclusions on the instatement aspect of the alleged contempt rested on her interpretation of the express terms of the Tribunal's order to instate Mr Hughes in the Remedies Decision and the undisputed evidence that Mr Hughes

had not fulfilled the requirement for security clearance by returning the security forms sent to him in December, 2018. She concluded based on the terms of the Remedies Decision and the agreed facts that completing and returning the security forms was a precondition to Mr Hughes's instatement to the position (para 58); that the Tribunal expressly provided that he was required to obtain a security clearance "*before*" Transport Canada must instate him (para 59); he had not sought or obtained a security clearance as required by the Remedies Decision (para 61); and his instatement was contingent on first obtaining the security clearance (para 63).

[81] Mr Hughes submitted that the Prothonotary erred because the alleged contemnors failed to *begin the process* to instate him to the position. In effect, he argued that the Tribunal's order speaks from the date it was issued (June 1, 2018) and that Transport Canada should have immediately begun to implement it by mailing him the necessary security forms "within days". He noted that his counsel wrote to Transport Canada many times in June and July 2018 seeking implementation of the Tribunal's order. The first response from Transport Canada's counsel did not come until near the end of July, almost two months after the Tribunal's Remedies Decision was released. The security forms were eventually mailed to him but not until months later in December, 2018. Mr Hughes also submitted, with reference to the Supreme Court's observation in *Carey* at paragraphs 58-59, that Transport Canada could have sought Directions from the Court to excuse its non-performance but failed to do so.

[82] The respondent submitted that Mr Hughes is responsible for his failure to be instated because the Remedies Decision (at paragraph 272) and the Tribunal's Order (at paragraph 1) specifically required him to take steps to complete a security clearance prior to being instated. At

the time of the show-cause hearing in November 2019, which included the time period from June to November 2018, Mr Hughes had taken no steps towards initiating the security clearance requirement, a condition precedent to instatement. Mr Hughes made no request for the security forms, nor did the Remedial Order require Transport Canada to take any steps (though it eventually did so on December 10, 2018 and followed up on January 17, 2019). As well, the Remedies Decision contained no timeline for instatement.

[83] The respondent also noted that the applicant could have returned to the Tribunal to sort out implementation issues because the Tribunal retained jurisdiction over the Order for one year in the event that any implementation issues arose: ASF, at para 9(a); Tribunal Order, at para 408 ("the Tribunal hereby retains jurisdiction to decide any dispute that may arise with respect to the quantification or implementation of any of the remedies ordered").

[84] With respect to the timing to implement Orders, I note that in *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 1268, at para 43, this Court observed that courts have consistently held that an order of contempt will not issue where time for compliance has not been specified, citing *International Brotherhood of Electrical Workers, Local 529 v Central Broadcasting*, [1977] 2 FC 78, at para 79 (FCTD); and *Tardif v Verrault Navigation Inc.*, [1978] 1 FC 815, at para 7 (FCTD). See recently, *M.P.R. v J.B.R.*, 2020 BCSC 1046 (Armstrong, J), at para 117, and the cases cited there. There are other cases, however, suggesting that if an order does not specify an explicit time for performance, it should be implemented within a reasonable time after it is made: *Canadian Broadcasting Corp. v Assoc. des Realisateurs*, [1993] FCJ No. 1356 (FCTD) (Noel, J), at paras 15-16; *Sound Contracting Ltd. v Regional District of Comox-*

Strathcona, 2005 BCCA 167 (Smith, JA), at para 11**;** *Ring Contracting Ltd. v Aecon Construction Group Inc.*, 2006 BCCA 304 (Kirkpatrick, JA), at paras 10-13 and 17. It seems to me that in considering the contempt issues relating to the timing of the performance or implementation of an Order, courts tend to react sensitively to the particular circumstances of the case – particularly the specific terms of the Order involved and the conduct giving rise to the alleged contempt.

[85] On this appeal, many of the parties' arguments, particularly the applicant's, were aimed at the correctness of Prothonotary Ring's Order on the evidence – in effect, a re-argument of the contempt motion. The issue, however, is whether her Order discloses a palpable and overriding error. In my view, she made no such error.

[86] First, the Prothonotary made no error in interpreting the express "subject to" language in paragraph 1 of the Tribunal's Order in the Remedies Decision to require security clearance before the instatement could occur: at paras 51-63. The Tribunal's order on instatement did not state with particularity "what should … be done" (*Carey*, at para 33) to begin the security clearance process and which party had an obligation to do it. There is no obvious error in the Prothonotary's factual conclusions relating to the failure to obtain the security clearance, given the facts agreed in the ASF and the evidence before her. Considering the language contained in that Order and what was not in it (including express requirements as to a deadline by which instatement had to occur and who was to do what to implement the instatement), as well as the Prothonotary's factual conclusion that Mr Hughes had taken no steps to satisfy the security clearance requirement, it was open to her to conclude that he had not proven a *prima facie* case of contempt for the respondent's failure to begin the instatement process.

[87] Mr Hughes referred to several decided cases involving contempt and reinstatement of an individual, which he submitted should have been followed by the Prothonotary. The respondent sought to distinguish those cases on their facts, with particular reference to the "subject to" language in the present instatement order. I will address two of those cases specifically.

[88] Mr Hughes contended that this Court's decision in *Bremsak v Professional Institute of the Public Service of Canada*, 2012 FC 213, aff'd 2012 FCA 147, "matches" the present case. In my view, *Bremsak* is distinguishable. The Public Service Labour Relations Board order in that case was to reinstate Ms Bremsak immediately to her elected and appointed positions with the bargaining unit. There were no preconditions or "subject to" language that interfered with or required additional actions prior to her reinstatement. The order was "subject to" the union's constitution and by-laws which, in that case, provided for the expiry of the applicant's term. The board ordered reinstatement immediately to avoid the expiry of her term in office. See 2012 FC 213, at paras 12 and 73 (excerpts from the underlying order) and 75-76, 78, 80 and 85; and 2012 FCA 147, at para 29. There is concern here is not the same. In this case, as the Prothonotary concluded, there was a precondition to instatement.

[89] The Alberta Court of Queen's Bench decision in *Amalgamated Transit Union, Local No 569 v Edmonton (City)*, 2015 ABQB 620, on which the applicant also relied, is distinguishable on a similar basis. In that case, Justice Renke found that the labour relations arbitrator had ordered the City of Edmonton to reinstate Mr Stuart as a Transit Operator. There were no conditions attached to that reinstatement: at paras 19-20. The Court also found no evidence of concerns around the clarity of the arbitrator's award or any implementation issues in the order: at paras 49 and 54;

see also para 22. The city had not commenced the reinstatement process, but there were no conditions or issues to be resolved between the parties in order to reinstate Mr Stuart to the position he previously occupied. By contrast in this case, there were conditions, or issues to be resolved, especially on instatement.

[90] Third, I agree with the respondent's position that it was not a palpable and overriding error for the Prothonotary to consider evidence of the parties' conduct in relation to the request for, provision, completion and return of the security forms up to the date of the show-cause hearing. While the contempt alleged by Mr Hughes concerned the failure to begin the instatement process, his charges as drafted (which the Prothonotary set out at paragraph 7 of her reasons) had no specified end date. In that light, and in the context of the text of the Tribunal's Order as analyzed above, the Prothonotary did not commit a palpable and overriding error by considering conduct and events after November 13, 2018 (the end date relied upon by Mr Hughes on this appeal) and up to the date of the hearing. The Prothonotary held that the applicant had not "sought or obtained" the security clearance by December 10, 2018 (para 61) and, more generally, had taken "no steps" to satisfy the requirement of obtaining a security clearance (para 63). It was also not unreasonable to conclude that the applicant bore some responsibility to obtain the security clearance and in particular, to complete the forms after they were sent to him, so that the precondition to instatement could be fulfilled. Considering Justice Cromwell's guidance in *Carey*, including the three points set out above at paragraph 77, I see no palpable and overriding error in the Prothonotary's conclusions.

[91] On the terms of the Tribunal's order and the evidence before her in the ASF, and given the discretionary nature of the contempt power and the legal and evidentiary onus on the applicant in a contempt matter, I would not interfere with the Prothonotary's conclusion that no *prima facie* contempt had been proven against any of the contemnors as to instatement. In my view, her reasons do not contain a reviewable error.

[92] *The Monetary Orders*: In addition to her general conclusion in relation to all the alleged contemnors at paragraph 66, the Prothonotary made several findings that applied the *Carey* elements to the evidence, in order to reach her conclusion that no *prima facie* case of contempt had been made out:

> ● At paragraph 72, because no certificate of judgment had been issued against the Crown or delivered to the Deputy Attorney General of Canada; and
>
> ● At paragraphs 73, 76 and 79, for failure on the third element (intention) in *Carey*, because she was satisfied that none of the contemnors intentionally failed to comply with the monetary order by evading the obligation to pay.

[93] There was no factual dispute before the Prothonotary about whether a certificate of judgment had been issued against the Crown or delivered to the Deputy Attorney General; the parties agreed that it had not: ASF, at para 22. The Prothonotary noted that in another decision in this proceeding, Justice Heneghan concluded that a person in the position of Mr Hughes is required to make a request for a certificate of judgment and had therefore not complied with Rule 474 of the *Federal Courts Rules*.

[94] In my view, there was no palpable and overriding error in the Prothonotary's conclusion with respect to the monetary portion of the award. It was not such an error to follow Justice Heneghan's reasoning in a decision in the very same proceeding that a certificate of judgment obtained under Rule 474 was necessary to trigger a payment under s. 30 of the *CLPA*: see *Hughes v Canada*, 2019 FC 53, at paras 37-39, 48, 50 and 63. Mr Hughes did not appeal that decision.

[95] With respect to the Prothonotary's findings on the evidence concerning the third element of the test from *Carey*, intent, again I find no palpable and overriding error. The Tribunal's order on monetary payments did not specify an overall certain sum to be paid, although (as Mr Hughes submitted) some amounts were expressly quantified. Others had to be determined. There was no date or time frame set by the Tribunal for payment in the terms of its order relating to money payments. The Prothonotary's conclusions that the alleged contemnors lacked the intention to evade accounted for Justice Heneghan's decision and the effect of the contemnors' perceived but erroneous reliance on the *CLPA*, s. 30. In my view, there is no basis for this Court to interfere with those conclusions.

[96] The applicant submitted that the Prothonotary erred by failing to understand that the *Financial Administration Act*, RSC 1985, c F-11 provided Minister Garneau with a statutory obligation or authority to pay out the monetary award from the Consolidated Revenue Fund. It is unclear whether the applicant raised this point before the Prothonotary. In any event, in my view it is answered for contempt purposes by the Prothonotary's conclusions on the absence of a certificate of judgment and the contemnors' lack of intent at paragraphs 72-79 of her reasons.

[97] As a final, overall point, I note that in *Carey*, the Supreme Court held that contempt of court cannot be reduced to a mere means of enforcing judgments, should be used "cautiously and with great restraint" and is an enforcement power of last rather than first resort: *Carey*, at para 36. The Prothonotary's conclusions are consistent with those directions. In that context, it is also noteworthy that neither the applicant nor the respondent returned to the Tribunal, in the months following the release of its Remedies Decision, to seek its assistance with quantification issues or otherwise in the implementation of its Order. The Tribunal stated that it retained jurisdiction to assist in those issues, in paragraph 408 of its reasons.

V. **Disposition**

[98] For all these reasons, the applicant's appeal under Rule 51 from the Prothonotary's Order dated November 28, 2019 is dismissed.

[99] As the respondent has succeeded on the appeal, it is entitled to costs. Considering the applicant's recent statements about his impecuniosity as noted by Justice McVeigh in her reasons, I fix those costs at $250 all-inclusive.

ORDER in T-1315-18

THE COURT ORDERS AS FOLLOWS:

1) The applicant's appeal under Rule 51 of the *Federal Courts Rules* from the Prothonotary's Order dated November 28, 2019, is dismissed.

2) The applicant shall pay costs of the appeal to the respondent in an aggregate, all-inclusive amount of $250.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1315-18
STYLE OF CAUSE:	CHRIS HUGHES v CANADIAN HUMAN RIGHTS COMMISSION and TRANSPORT CANADA
PLACE OF HEARING:	TORONTO, ONTARIO

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	OCTOBER 20, 2020

APPEARANCES:

Chris Hughes	FOR THE APPLICANT SELF-REPRESENTED
Craig Cameron	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chris Hughes	FOR THE APPLICANT SELF-REPRESENTED
Daniel Poulin	FOR THE COMMISSION
Craig Cameron Attorney General of Canada	FOR THE RESPONDENT