MEMORANDUM OF ARGUMENT

PART I – OVERVIEW & FACTS

A. Overview of National Public Importance

[1] Different Canadian provinces have taken different approaches as to whether the truth can be used as a defence to a criminal contempt charge resulting from the use of words. Resolving that ambiguity in the Common Law (and determining whether someone can be imprisoned for criminal contempt because he spoke the truth) is an issue of national importance.

[2] This case furthermore provides this Court with its first serious opportunity to address the interpretational framework applicable to public orders, particularly whether they should be interpreted broadly or restrictively. This is also an issue of national importance.

[3] The Applicant, Mr. Satinder Dhillon, was convicted of criminal contempt of court for allegedly breaching the order of Chief Justice Brenner of the Supreme Court of British Columbia, which prohibited him and others from publishing disparaging or defamatory statements about persons connected to the involuntary bankruptcy proceeding of Erwin Singh Braich. Mr. Dhillon alleges that the statements he made were true. As such, they could be neither defamatory nor disparaging per the terms of the order. Canadian courts have increasingly come to recognize that the defence of truth should be available against many allegations of contempt committed by words and have modified the Common Law as such.

[4] Furthermore, even if truth is not a defence to a charge of contempt committed by words, the order of Brenner C.J. was unclear and ambiguous in its failure to indicate whether the prohibition against defamatory statements included a prohibition against true statements. Mr. Dhillon, a lay litigant, could not be expected to understand the nuances of the law of defamation. It was reasonable on his part to assume that the truth of his statements could be held up as a full defence to charges of criminal contempt.

[5] Should leave to appeal be granted in the present case, it would proceed on a small, simple, and uncontested record. The only issues on appeal would relate to the interpretation of and

defences available to the breach of public orders of the court, i.e., "questions of law" with no deference owed on review.[1]

B. The orders of former Chief Justice Brenner

[6] The applicant, Satinder Dhillon, is a creditor in the involuntary bankruptcy proceeding of Erwin Singh Braich, where he is owed several million dollars.[2]

[7] On 23 February 2009, former Chief Justice Brenner of the Supreme Court of British Columbia made an order prohibiting Mr. Dhillon and others from publishing disparaging or defamatory statements about persons connected to the involuntary bankruptcy proceeding:

> 6. until further order of the Court, each of … (ii) Satinder Dhillon, …shall not, either directly or indirectly, make or continue any publication of any kind including in a pleading which expresses any disparaging or defamatory statements about the Trustee, counsel for the Trustee, or any other person or entity connected to the administration of this bankruptcy;[3]

[8] Former Chief Justice Brenner made two other similar orders on 11 March and 15 July 2009.[4]

[9] On 23 March and 7 April 2010, Mr. Dhillon published two blog posts commenting on the involuntary bankruptcy proceeding, including its trustees, legal counsel, and justices of the Supreme Court of British Columbia. Specifically, these blogs state:

> • "The lightning speed at which KPMG, their counsel and the Court proceeded is allegedly only one of the many violations of statutes, court guidelines, policies, and ultimately the Charter of Rights and Freedoms which has been committed by these parties."
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> • "It is alleged by Mr. Braich and his creditors that David Wood and Vancouver lawyer, Brian McLean, assisted in orchestrating the unlawful raid of Mr. Braich's motel room…"

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[1] *Royal Bank of Canada v Robertson*, 2016 NSSC 176 at para 11, Moir J **[Part VI]**.

[2] Reasons for Sentence, dated 9 July 2019 [Reasons for Sentence], para 18 **[Tab 2C]**.

[3] Decision of the British Columbia Court of Appeal, dated 30 October 2019 [Appeal Decision], para 4 **[Tab 2E]**.

[4] Appeal Decision, para 5-6 **[Tab 2E]**.

- "When contacted by Quantum Media, David Wood refused to speak about the matter and Stephen Boale lied…"
- "Court records indicate that KPMG's current lawyers, Howard Mickelson and Jonathan Tweedale, were and are not approved by the majority of lawful creditors. These records also reflect that Mr. Mickelson was present in 1999, at an improperly convened first meeting of creditors. … Despite having no lawful creditor as a client, Mr. Howard Mickelson took an active role during the improperly convened meeting."
- "In 2002, KPMG's first choice of counsel Mr. Brian McLean actually thwarted an effort that was made by the involuntary bankrupt to repay all of his creditors in full including all accrued interest. In another unethical maneuver by Mr. McLean; convinced a Supreme Court of British Columbia judge to improperly usurp funds that were on deposit to purchase real estate in Vancouver, B.C."
- "Oracle Media and many other observers believe that never has the Bankruptcy and Insolvency Act been so recklessly disregarded by a Trustee, Officers of the Court and other parties who have fiduciary obligations to the creditors in a bankruptcy proceeding."[5]

C. Trial decision

[10] By notice of application dated 4 March 2011, the Attorney General of British Columbia asked the Supreme Court of British Columbia to find Mr. Dhillon guilty of criminal contempt of court.[6] The Attorney General alleged that Mr. Dhillon's statements in the two blog posts violated the orders of Brenner C.J.[7]

[11] Mr. Dhillon was self-represented at trial.

[12] At trial, Mr. Dhillon argued that the contents of the blogs were true and, therefore, that the statements could not be "disparaging or defamatory".[8]

[13] In a mid-application ruling, the application judge reviewed the case law on defamation. She noted that "[v]arious authorities and learned works do, indeed, include comments which on

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[5] Appeal Decision, para 35 **[Tab 2E]**.

[6] Notice of Application **[Tab 4A]**.

[7] Reasons for Judgment of the Honourable Justice Holmes, dated 25 February 2015 [Trial Decision], para 1 **[Tab 2B]**.

[8] Appeal Decision, para 10 **[Tab 2E]**.

their face appear to support the proposition Mr. Dhillon advances." However, after diving deeper into the case law, the application judge concluded that "those comments generally express in abbreviated form the two-stage analysis applicable to the tort of defamation, by which the defamatory character of the impugned words is considered at the first stage, and justification or truth only at the second."[9] The application judge then cited Raymond E. Brown to refute the "numerous judicial remarks [observing] that defamatory statements are by their nature untrue":

> This is not technically correct. Whether words are or are not defamatory has nothing to do with whether they are justified. As Williams J. observed in *Coughtrey v. Evening Star Co.* (1902), 21 N.Z.L.R. 116 at 121 (S.C.): "The question whether the statement is defamatory is distinct from the question as to whether it is true. A statement is nonetheless defamatory because it may be true; only, if it is true, no action will lie." This issue was also canvassed by Steele J. in *Elliott v. Freisen* (1982), 1982 CanLII 2179 (ON SC), 37 O.R. (2d) 409 at 413 (H.C.), affirmed (1984), 1984 CanLII 1922 (ON CA), 45 O.R. (2d) 285 (C.A.), where he said: "[T]he law presumes in favour of the plaintiff that the defamatory words are false. Once the statements are made or published that lower the reputation of the plaintiff, a defamation exists whether or not the statements are true. The elements of falsity is only a legal presumption which arises after the defamation already exists".[10]

[14] In her ruling on relevance, the application judge concluded that "the truth or falsity of the statements in issue is not relevant in the determination of whether publication of those statements violated Brenner C.J.'s orders".[11] The application judge did not permit Mr. Dhillon to make arguments or present evidence of the truth of his statements as a defence to his charge.

[15] On 25 February 2015, the application judge convicted Mr. Dhillon of criminal contempt of court.[12] The judge found that Mr. Dhillon's blog statements were defamatory and disparaging toward KPMG, its lawyers, other professionals associated with the administration of the bankruptcy, and several judges:

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[9] Ruling re Relevance of the Honourable Justice Holmes, dated 23 October 2014 [Ruling re Relevance], para 18 **[Tab 2A]**.

[10] Ruling re Relevance, para 18, citing Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* 2nd ed., loose-leaf (updated 2013), (Toronto: Carswell, 1994), vol 3, ch 10 at 10-7 **[Tab 2A]**.

[11] Ruling re Relevance, para 5 **[Tab 2A]**.

[12] Trial Decision, para 91 **[Tab 2B]**.

> The statements in issue (in exhibits 16 and 17) are without a doubt disparaging and defamatory. On the part of KPMG itself, as well as lawyers and other professionals associated with the administration of the bankruptcy, the statements allege or strongly imply criminal or civil wrongs that include dishonesty, corruption, incompetence, and unethical conduct. On the part of several judges who had a role in the administration of the bankruptcy, the statements allege or strongly imply an improper alignment with KPMG's interests, and concerted, ill-motivated steps to protect those interests in the judicial process.[13]

[16] The judge sentenced Mr. Dhillon to 30 days' imprisonment and ordered him to take down the blog posts.[14] At the time of his conviction, Mr. Dhillon was 37 years of age. He had no previous criminal record.[15] Early in life, he overcame "major challenges": his father died while he was still in his teens and a close friend and her family were murdered. He nevertheless achieved "significant success" and "accumulated very significant assets at an early age" moving into entrepreneurial work and becoming involved in "at least two businesses, one of which provides financial and strategic advice through a group of companies". He also succeeded in becoming a leader within his family and community, as well as "strongly principled, loyal, and generous with both [his] time and… money".[16] The sentencing judge noted it may have been because Mr. Dhillon's early achievements and financial success from his own creative effort and hard work that he reacted as strongly as he did to the Braich bankruptcy proceedings.

D. Appeal decision

[17] Mr. Dhillon appealed to the British Columbia Court of Appeal.

[18] On appeal, Mr. Dhillon was self-represented once again. He argued that the application judge erred when:

1. she found that the orders were sufficiently clear, unambiguous, and not overly broad to support a finding of criminal contempt;

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[13] Trial Decision, para 75 **[Tab 2B]**.

[14] Appeal Decision, para 13 **[Tab 2E]**.

[15] Reasons for Sentence, para 15 **[Tab 2C]**.

[16] Reasons for Sentence, para 16-17 **[Tab 2C]**.

2. she failed to interpret the orders in the way that was most favourable to Mr. Dhillon, given that more than one interpretation was possible; and

3. she concluded that truth was not available as a defence for criminal contempt.[17]

[19] The court of appeal dismissed the appeal.

[20] The court acknowledged the basic principle that "[t]he terms of an injunction order on which a prosecution for criminal contempt rests must be free from ambiguity, vagueness, or uncertainty so that those governed by the injunction will know with precision what actions are forbidden… Where a finding of contempt is founded on the breach of a court order, that order must state clearly and unequivocally what is required or prohibited to ensure that an individual will not be convicted of contempt if the court order is vague."[18]

[21] Applying this principle, the court of appeal reversed in part the reasoning of the Supreme Court of British Columbia, finding that the application judge "erred in her interpretation" that the orders enjoined Mr. Dhillon from making disparaging and defamatory statements against judges. The orders were "ambiguous" to that effect since "[j]udges making orders in bankruptcy proceedings are not, in general terms, considered to be connected to the administration of a bankruptcy":[19]

> [I]n my opinion, the orders are unclear as to whether judges are properly considered persons connected to the administration of the bankruptcy. As such, the trial judge's conclusion that the order enjoined Mr. Dhillon from publishing disparaging or defamatory statements about "several judges who had a role in the administration of the bankruptcy" was in error (at para. 75). Unlike the trustee, legal counsel, and other professionals connected to the administration of the bankruptcy, the orders were silent as to whether they were meant to cover statements about the judiciary. In my view, there was more than one reasonable interpretation of the order in this respect.[20]

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[17] Appeal Decision, para 14 **[Tab 2E]**.

[18] Appeal Decision, para 21 **[Tab 2E]**.

[19] Appeal Decision, para 27, 30 **[Tab 2E]**.

[20] Appeal Decision, para 25 **[Tab 2E]**.

[22] Beyond this conclusion, however, the court of appeal accepted that the terms of the orders were otherwise "clear and unambiguous".[21] They "clearly" prohibited Mr. Dhillon from publishing "disparaging or defamatory statements" about the trustee, individual professionals administering the bankruptcy, and legal counsel.[22]

[23] The court of appeal rejected Mr. Dhillon's argument that the truth of the statements was available as a defence to criminal contempt.[23] According to the court, it is the "character" of a statement that makes a statement defamatory, "not its falsity".[24]

[24] Mr. Dhillon's belief that the statements could not be defamatory because they were true resulted from a misunderstanding of legal principles about defamation. While the defence of truth is available in tort actions "after defamation is *prima facie* established", this defence was not available to defend against a charge of criminal contempt since the orders did not prohibit "the tort of defamation", but rather the "publication of any kind … which expresses any disparaging or defamatory statements."[25] As such, the court concluded that "[w]hether or not the statements can be justified as true or otherwise is irrelevant to whether they were defamatory in the first place."[26]

[25] Furthermore, and despite the existence of "numerous judicial remarks that defamatory statements are by their nature untrue", Mr. Dhillon's legal misunderstanding on this point did not make the orders vague or ambiguous.[27] The court of appeal effectively condemned Mr. Dhillon for his failure to understand the finer legal distinctions pertaining to defamation.

[26] Ultimately, according to the court of appeal, there existed "no question" that Mr. Dhillon's publication of statements in the two blog posts were disparaging and/or defamatory and

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[21] Appeal Decision, para 45 **[Tab 2E]**.

[22] Appeal Decision, para 36 **[Tab 2E]**.

[23] Appeal Decision, para 39 **[Tab 2E]**.

[24] Appeal Decision, para 44 **[Tab 2E]**.

[25] Appeal Decision, para 44 **[Tab 2E]**.

[26] Appeal Decision, para 45 **[Tab 2E]**.

[27] Ruling re Relevance, para 18 **[Tab 2A]**; Appeal Decision, para 44 **[Tab 2E]**.

violated the terms of the order.[28] The court thus upheld the application judge's finding of criminal contempt.

PART II – QUESTIONS IN ISSUE

[27] This case raises the following two issues of national public importance, which this Court should address in the interest of justice:

I. Can truth be used as a defence to a criminal contempt charge resulting from the alleged breach of a court order prohibiting the publication of disparaging or defamatory statements?

II. A public order from the court must be expressed in clear, certain and unambiguous language. The person affected should know with complete precision what it is that he is required to abstain from doing and should not be required to cross-refer to other materials in order to ascertain his precise obligation. Given these requirements, is an order that requires a lay litigant to understand the legal nuances of defamation ambiguous?

PART III – STATEMENT OF ARGUMENT

ISSUE 1: Can truth be used as a defence to a criminal contempt charge resulting from the alleged breach of a court order prohibiting the publication of disparaging or defamatory statements?

[28] The freedom to speak the truth about the administration of justice and legal proceedings is a critical value in our free and democratic society. Subject to a few limited exceptions, to be determined on a case-by-case basis, the defence of truth should be available against any allegation of contempt committed by words. This includes the present circumstance, where Mr. Dhillon allegedly breached a court order prohibiting defamatory statements by publishing blog posts containing statements that he claims are true. In fact, courts of appeal in other provinces have begun modifying the Common Law step-by-step to recognize the possibility of using truth as a defence to charges of different forms of contempt committed by words.

1. The freedom to speak the truth about the legal system is a critical value

[28] Appeal Decision, para 45 **[Tab 2E]**.

[29] The protection of freedom of expression is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression.[29]

[30] In a democratic society, citizens must have the right to express their opinions publicly on the operation of the State, including the administration of justice and legal proceedings. The right to criticize, within the limits imposed by law and social convention, is the sign of a healthy society.[30] While the Common Law against defamation provides one such limit to freedom of expression, the Common Law also accepts that true statements do not fall afoul of the law.

[31] Legitimate criticism of the legal system is in fact constructive. It points out defects and errors. It opens the way for reform, and thus makes it possible to improve the system generally.[31]

[32] The administration of justice, including the administration of involuntary bankruptcy proceedings or other legal proceedings, should not be set apart or be an exception. It is normal and important for all citizens to feel involved in their system of justice. It is healthy for them to be able to identify its imperfections and defects freely, without fear of reprisals, and to propose means of remedying them. Justice must be accessible to the people. It would be contrary to the very democratic process to deny them the right to criticize.

2. Courts of appeal in other provinces have already recognized the possibility of using truth as a defence to some charges of contempt committed by words

[33] The defence of truth should be available against any allegation of contempt committed by words. In a publication titled "Some Guidelines on the Use of Contempt Powers", the Canadian Judicial Council agrees, concluding that "[w]henever contempt is alleged to be committed by words[,] the defence of truth may be available to an accused".[32] The Canadian Judicial Council

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[29] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 **[Part VI]**; *Ford v Quebec*, [1988] 2 SCR 712 at 765-766 **[Part VI]**.

[30] Law Reform Commission of Canada, "Report 17: Report on Contempt of Court" (Ottawa: Minister of Supply and Services Canada, 1982) at 9 **[Part VII]**.

[31] Law Reform Commission of Canada, "Report 17: Report on Contempt of Court" (Ottawa: Minister of Supply and Services Canada, 1982) at 9 **[Part VII]**.

[32] Canadian Judicial Council, "Some Guidelines on the Use of Contempt Powers" (Ottawa: May, 2001) at 26 **[Part VI]**. The CJC notes that this defence may not apply if the impugned conduct is

adds that "[i]f words spoken in or out of court do not disturb proceedings then truth is a defence."[33]

[34] Courts of appeal in Ontario and Saskatchewan have recognized that, in several contexts, truth can now be used as a defence to charges of contempt resulting from the use of words.

[35] In *R v Kopyto*, the Court of Appeal for Ontario addressed whether truth could be used as a defence to a charge of contempt of court by scandalizing the court. As Cory, J.A. noted, truth had not been historically permitted as a defence: "It would seem that historically the defence of truth has not been available to a charge of scandalizing the court. There have been extensive criticisms of this position. Nevertheless there has been and continues to be a vigorous debate on the issue."[34]

[36] Ultimately, the court modified the Common Law, concluding that truth could be used as a defence to a charge of contempt of court by scandalizing the court.[35] Cory J.A. reasoned as follows: "let us assume that the statement giving rise to the charge of scandalizing the court was that a judge had taken a bribe. In such a situation it would seem to me to be repugnant to a sense of justice and fairness to refuse to permit the defence of truth to be put forward."[36]

[37] In separate reasons, Dubin, J.A. (*dissenting* in part, but on other grounds) emphasized the public policy benefits of allowing an accused person to prove his or her remarks, which could in some cases advance the administration of justice:

> In my opinion, truth is a defence to a charge of contempt of court by scandalizing the court. I think the issue is accurately summarized in the Australian Law Reform Commission, Discussion Paper No. 26, "Contempt

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a verbal or partly verbal outburst in court which interferes with proceedings because, in such a case, the disturbance may be the offence.

[33] Canadian Judicial Council, "Some Guidelines on the Use of Contempt Powers" (Ottawa: May, 2001) at 26 **[Part VI]**.

[34] *R v Kopyto*, 1987 CanLII 176 (ONCA) at 45, Cory JA **[Part VI]**.

[35] *R v Kopyto*, 1987 CanLII 176 (ONCA) at 92, Dubin, JA, dissenting in part but on other grounds **[Part VI]**.

[36] *R v Kopyto*, 1987 CanLII 176 (ONCA) at 45 Cory, JA **[Part VI]**.

and the Media", referred to in the judgment of my brother Cory, which concludes as follows:

> Finally, there is authority in the cases to the effect that in the course of trying a scandalising case, a court will exonerate the accused unless it finds the allegedly scandalising remarks to be "unjustified", "unwarrantable" or "baseless" ... [T]his element in scandalising law operates to protect the accused against being convicted where it is plain that his or her allegations have a clear and genuine basis in fact.
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> (Emphasis added.)

It is further to be observed that in Re Duncan, supra, in considering the allegation of contempt of court made against Mr. Duncan, the court entertained his defence of truth and, in convicting him, stated at p. 619 D.L.R., p. 45 S.C.R.:

> The members of the Court now available, omitting Mr. Justice Locke, have no doubt that what was said by Mr. Duncan on November 18, 1957, was deliberate and that there is no basis in fact or law for his statements.

Thus, where the words spoken are capable of proof of the truth, it must be open to an accused person to have the opportunity of proving the truth. It would be contrary to public policy to deprive an accused person of the opportunity to prove the truth of what he said which, if true, could, in some cases, advance the administration of justice rather than bringing it into disrepute. Furthermore, to deny truth as a defence would be contrary to the principles of fundamental justice.[37]

[38] In the present case, the British Columbia Court of Appeal claimed *Kopyto* had "no application to this appeal" because it dealt with contempt of court by scandalizing the court rather than the violation of a court order. Yet in both cases, the issue concerned whether truth could be used as a defence to a contempt charge resulting from the use of words. The same policy reasoning adopted in *Kopyto* applies in the present case: where an accused faces criminal contempt charges, it ought to be open to him or her to prove the truth of what was said; the administration of legal proceedings would only be advanced by the advancement of the truth about these proceedings.

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[37] *R v Kopyto*, 1987 CanLII 176 (ONCA) at 92-93, Dubin, JA, dissenting in part but on other grounds **[Part VI]**.

[39] Furthermore, as noted by Jeffrey Miller, the approach of the Court of Appeal for Ontario in *Kopyto* "makes sense if one sees scandalizing law as parallel to that of defamation: for policy reasons, and out of respect for natural justice and our constitutional law, we should encourage legitimate criticism of the justice system."[38] In the present context, Mr. Dhillon allegedly breached court orders prohibiting defamatory statements. The policy reasons supporting the use of truth as a defence in a case of contempt for scandalizing the court apply almost identically to the use of truth as a defence in a case of contempt for the breach of an order prohibiting defamation, given that the law on defamation is geared precisely toward fostering the pursuit of truth.

[40] Ultimately, the decision in *Kopyto* represented a narrow evolution in the Common Law, to allow for truth to be put forward as a defence to a charge of contempt through one particular use of words. This evolution has generally also occurred in other common law countries.[39] Should this Court grant leave to appeal in the present case, it will have the opportunity to determine whether truth can be put forward as a defence to a charge of contempt through a different but similar use of words, namely the breach of an order prohibiting the use of defamatory or disparaging statements.

[41] In any event, at least one court in another province has already accepted that truth can be used as a defence to contempt charges stemming from the breach of an order prohibiting "disparaging" statements. As such, there exists a difference of opinion between courts in different provinces.

[42] In *New Roots Herbal Inc. v W-7 Clay Inc.*, a judge had granted an order restraining the respondent "from making further disparaging remarks against the applicants which would tend to

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[38] Jeffrey Miller, *The Law of Contempt in Canada*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2016, 2nd ed) at 226 **[Part VII]**.

[39] See Australia: *Nationwide News Pty. Ltd. v Willis*, (1992) 177 CLR 1, 38 (Australia) **[Part VI]**; Ireland: The Law Reform Commission of Ireland, "Consultation Paper on Contempt of Court" (Dublin: The Law Reform Commission, 1991) at 64, citing *The State (DPP) v Walsh*, [1981] IR 412 **[Part VI]**.

discredit or injure their business."[40] Following further statements by the respondent, the Saskatchewan Court of Queen's Bench was asked to find the respondent in contempt of court. The court refused to find the accused in contempt on the grounds that the word "disparaging" applied only to untruthful statements. There was evidence in the case that the statements were true.[41]

[43] The Saskatchewan Court of Appeal affirmed the decision below, though it added that the interpretation of the term "disparaging" was done in the particular context of that case: "We are not to be taken as approving this definition in any other or wider context."[42]

[44] In the present case, the British Columbia Court of Appeal found that "*New Roots Herbal* has no application to this appeal… [T]he interpretation of "disparaging" in the chambers judgment was limited to the context of that commercial dispute in a passing off action that considered the *Trademark Act*… It does not stand for the proposition that a statement must be false to be disparaging."[43]

[45] Yet in reviewing the application judge's reasoning in *New Roots Herbal*, it becomes clear that the "context" in question related to the *Trade-mark Act*, which "does not prohibit the making of truthful statements". In other words, for the judge, there was no reason to take the draconian approach of reading the order as limiting true statements, given that the context did not compel him to do so. Quoting a decision on the *Trade-mark Act*, the application judge noted:

> …[T]o make a statement that is neither false nor misleading is not prohibited even though it may tent to discredit the business, wares or service of a competitor…. [I]t never has been regarded, at least so far as I am aware, as dishonest or wrong for a business man to seek by any honest means to attract the customers of his competitors and thus to reduce the custom which they have theretofore enjoyed.[44]

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[40] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12529 (SK QB) at para 3 **[Part VI]**.

[41] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12529 (SK QB) at para 7, 13 **[Part VI]**.

[42] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12307 (SK CA), para 2 **[Part VI]**.

[43] Appeal Decision, para 38 **[Tab 2E]**.

[44] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12529 (SK QB) at para 14, citing *Clairol International Corporation and Clairol Inc. of Canada v Thomas Supply & Equipment Co. Ltd. et al.*, 38 Fox Par.C. 176 (Ex.) at 187-188 **[Part VI]**.

[46] This context is remarkably similar to the present context, where there was no indication from Brenner C.J. that, in making his order preventing defamatory and disparaging statements, he intended to prohibit true statements.

[47] Ultimately, in the present case, the courts below refused to even consider the truth of the statements as a defence to Mr. Dhillon's contempt charges. A better and simpler approach would be for this Court to confirm that, with limited exceptions to be decided on a case-by-case basis (e.g., a verbal or partly verbal outburst in court which interferes with proceedings)[45], truth can be used as a defence to contempt charges resulting from the use of words.[46]

ISSUE 2: **A public order from the court must be expressed in clear, certain and unambiguous language. The person affected should know with complete precision what it is that he is required to abstain from doing and should not be required to cross-refer to other materials in order to ascertain his precise obligation. Given these requirements, is an order that requires a lay litigant to understand the legal nuances of defamation ambiguous?**

[48] Even if this Court does not accept that truth can be used as a defence to contempt charges resulting from the use of words (specifically in the context of the breach of an order prohibiting defamatory and disparaging statements), this Court's guidance is needed on the concept of

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[45] As noted above, in such a case, the offence would be the disturbance: Canadian Judicial Council, "Some Guidelines on the Use of Contempt Powers" (Ottawa: May, 2001) at 26 **[Part VI]**. Another example would be material published in violation of a publication ban that affects the fair trial of an accused: "[I]f the act complained of as affecting the fair trial of an accused is a speech or an article or a newspaper report the truth of what was said or written is not a defence. …In these instances the person accused can do no more than explain why he acted as he did and hope that his explanation will mitigate or avert the punishment that the trial Judge may impose": *Hébert v Quebec (Attorney General)*, [1967] 2 CCC 111 (QCA) at 41 **[Part VI]**; also see *R v Carocchia* (1973), 15 CCC (2d) 175 (QCA) at 181-182 **[Part VI]**.

[46] Another common law jurisdiction, India, has gone even further. It has passed legislation allowing the courts to permit justification by truth as a valid defense in any proceeding for criminal contempt if it is satisfied that it is in the public interest and the request was made in *bona fide*: *Contempt of Courts Act*, 1971, s. 13(b) **[Part VI]**.

"ambiguity" within public orders of the court. More specifically, the SCC has provided clear guidelines about the principles to be used in legislative interpretation. But it has never indicated whether the same principles apply to the interpretation of public orders. Most courts agree that for a public order to be obeyed, its terms must be clear, free from ambiguity, and capable of being interpreted without reference to outside material. Yet in the present case, the courts below took a narrow view of what constitutes an "ambiguity". Specifically, while the courts conceded that many judges and legal scholars have referred to "defamation" as excluding true statements, they refused to find Brenner C.J.'s use of the term ambiguous. They also convicted a lay litigant, Mr. Dhillon, of criminal contempt because he did not have a sufficiently nuanced understanding of the law of defamation.

1. Orders must be clear and unambiguous

[49] The principles of legislative interpretation have been clearly enunciated by this Court in a number of cases.[47]

[50] This Court has not provided such guidelines for the interpretation of public orders by the court.

[51] Most appellate courts have agreed that the terms of an order on which a prosecution for criminal contempt rests must be free from ambiguity, vagueness, or uncertainty so that those governed by the injunction will know with precision what actions are forbidden.[48] Where a finding of contempt is founded on the breach of a court order, that order must state clearly and unequivocally on its face what is required or prohibited to ensure that an individual will not be convicted of contempt if the court order is vague.[49]

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[47] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 **[Part VI]**; *Bell ExpressVu v Rex*, [2002] 2 SCR 559; *Pharmascience Inc. v Binet*, [2006] 2 SCR 513 **[Part VI]**; *McLean v British Columbia (Securities Commission),* [2013] 3 SCR 895 **[Part VI]**.

[48] Appeal decision, para 21-23 **[Tab 2E]**; see also, *Oak Bay Marina Ltd. v Haida Nation* (1995), 1995 CanLII 1464 (BC CA) at para 12 **[Part VI]**; *Hama v Werbes*, 2000 BCCA 367 (CanLII) at para 8 **[Part VI]**; *Gurtins v Goyert*, 2008 BCCA 196 at para 14 **[Part VI]**; *Bell ExpressVu Ltd. Partnership v Torroni*, 2009 ONCA 85 at para 22 **[Part VI]**.

[49] *Carey v Laiken*, 2015 SCC 17 (CanLII) at para 33 **[Part VI]**.

[52] In *Gurtins v Goyert*, the British Columbia Court of Appeal approvingly quoted a summary of the principles applicable to the interpretation of an order in contempt proceedings:

> (i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.
>
> (ii) It is impossible to read implied terms into an injunction.
>
> (iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.
>
> (iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390,
>
> > a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.[50]

2. Any ambiguity must be resolved in favour of the accused

[53] To the extent that an order is capable of more than one interpretation, the case law in courts below is clear that any doubt must clearly be resolved in favour of the accused.[51] As explained in concrete terms by the Federal Court in *Bell Canada v Red Rhino Entertainment Inc.*: "before I can find [an accused] guilty of contempt for breaching the interlocutory injunction, I must be satisfied, beyond a reasonable doubt, that that order states "clearly and unequivocally what should and should not be done"."[52]

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[50] *Gurtins v Goyert*, 2008 BCCA 196 [Emphasis removed], citing *R. (Mark Dean Harris) v The Official Solicitor to the Supreme Court*, [2001] EWHC Admin 798 (Q.B.D.), para 68 **[Part VI]**.

[51] *Prescott-Russell Services for Children & Adults v G. (N.)*, 2006 CanLII 81792 (ON CA) at para 27 **[Part VI]**; *Lassonde c Québec (Commission des valeurs mobilières)*, 1994 CanLII 6358 (QC CA) **[Part VI]**; Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Thomson Reuters Canada Limited, 2016, 2nd ed) at 163-164 **[Part VII]**.

[52] *Bell Canada v Red Rhino Entertainment Inc.*, 2019 FC 1460 at para 34 **[Part VI]**.

3. The courts below accepted that an unclear order could serve as the basis for a criminal conviction

[54] Although appellate courts have traditionally required public orders to be clear and unequivocal to serve as the basis for criminal convictions, the courts below in the present case took the opposite approach. Specifically, while they conceded that many judges and legal scholars have referred to "defamation" as excluding true statements, they refused to find Brenner C.J.'s use of the term ambiguous.

[55] Mr. Dhillon, a lay litigant, read the order prohibiting him from making defamatory statements. He interpreted the prohibition restrictively, specifically concluding that it did not prevent him from making true statements. His understanding was reasonable in two respects.

[56] First, the word "defamation" is often understood to exclude true statements. In her reasons, the application judge in the present case conceded this point, observing that "[v]arious authorities and learned works do, indeed, include comments which on their face appear to support the proposition" that a true statement cannot be defamatory (Ruling on Relevance, para 18).

[57] For example, in *MacDonald v Tamitik Status of Women Assn.*, the Supreme Court of British Columbia held that "[a] true statement … cannot, by definition, be defamatory".[53] In *Elkow v Sana*, the court cited the *Law of Defamation* for the proposition that "[w]hat is true cannot be defamatory. No one can be heard to complain if only the truth is published about him. A plaintiff has no right to have his or her character or reputation free of an imputation that is not false."[54]

[58] Yet on a more nuanced reading of the law, the application judge dismissed the above reading as not "technically correct".[55] She found that a true statement can also be "technically" defamatory, and that the order should have been clear to Mr. Dhillon on this point.

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[53] *MacDonald v Tamitik Status of Women Assn.*, [1998] BCJ No 2709 at para 85 **[Part VI]**.

[54] *Elkow v Sana*, 2015 ABQB 803 at para 25 **[Part VI]**.

[55] Ruling re Relevance, para 18, citing Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* 2nd ed., loose-leaf (updated 2013) (Toronto: Carswell, 1994), vol 3, ch 10 at 10-7 **[Tab 2A]**.

[59] The courts below were wrong. A public order should not require a litigant (particularly a lay litigant) to distinguish between nuanced readings of the law that are "technically" correct or incorrect. A superficial reading of a public order should be sufficient for those governed by the injunction to know with precision what actions are forbidden, without the need to understand legal nuances.

[60] Second, Mr. Dhillon's restrictive interpretation of the order was reasonable because it was consistent with the public policy rationale encouraging truthful free speech. As explained by the Supreme Court of British Columbia in *Kerr v Conlogue*, the law surrounding defamation only seeks to discourage false statements:

> The fundamental premise on which the law of libel is founded is that "The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit." (Scott v. Sampson (supra)). Consequently, the law will allow one person to defame another if the defamatory statements of fact are true or alternatively, if the defamatory comments are honestly made and are based on true facts - those facts having been set out in the article thus enabling the reader to evaluate the comment made.[56]

[61] To the extent that Mr. Dhillon's statements were true, there is no public policy rationale prohibiting them. As explained above, this is particularly true to the extent that the statements criticized the administration of legal proceedings.

[62] A number of jurisdictions, including British Columbia, have recently passed anti-SLAPP legislation, meant to safeguard people from strategic lawsuits against public participation.[57] The increased push to encourage genuine public debate and limit strategic lawsuits aimed at stifling such debate is a contextual consideration that favours Mr. Dhillon's restrictive interpretation of the order of Brenner C.J.

[63] More generally, there is strong reason to restrictively interpret speech prohibitions in public orders. As noted above the freedom to search for truth is an essential feature of our democratic society. In regards to legislative interpretation, this Court in *R v Nova Scotia Pharmaceutical Society* established that "if there are two possible interpretations of a statutory

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[56] *Kerr v Conlogue*, 1992 CanLII 924 (BC SC) at 22 **[Part VI]**.

[57] *Protection of Public Participation Act*, SBC 2019, c 3.

provision, one of which embodies the *Charter* values and the other does not, that which embodies the *Charter* values should be adopted."[58] A similar approach is warranted for the interpretation of court orders.

[64] In the present case, an overly broad interpretation of Brenner C.J.'s order would unjustifiably infringe Mr. Dhillon's freedom of expression and thus violate his *Charter* rights. It was reasonable for Mr. Dhillon to interpret the order restrictively. To the extent it did not expressly prohibit him from speaking the truth, he was justified in speaking the truth.

[65] Ultimately, this Court should confirm that the terms of an order on which a prosecution for criminal contempt rests must be free from ambiguity, vagueness, or uncertainty so that those governed by the injunction to know with precision what actions are forbidden. An order that fails to expressly prohibit a person from making true statements cannot subsequently be used to prohibit the making of true statements. Mr. Dhillon believed there would be no legal repercussions if he only made true statements about the involuntary bankruptcy proceeding of Erwin Singh Braich. His belief was reasonable.

[66] The order was also ambiguous in its use of the term "disparaging". The British Columbia Court of Appeal in the present case stated that "[a] reasonable person would know what it means in plain language with sufficient certainty." It cited the *Oxford English Dictionary* definition of "disparage" ("To disparage is to speak or treat slightingly; to bring reproach upon; to discredit"). It also summarily dismissed the finding of the court in *New Roots Herbal Inc. v W-7 Clay Inc.* that "disparaging" is too unclear and ambiguous a term to form a proper basis for a contempt order,[59] on the grounds that the context was different.[60]

[67] Yet, read as a whole, the order of Brenner C.J. was ambiguous with regards to the use of the word "disparaging". If Mr. Dhillon was justified in believing that he was only prohibited from making untrue defamatory remarks, it was also reasonable for him to interpret the term

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[58] *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 660, Gonthier J **[Part VI]**.

[59] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12529 (SK QB) at para 16 **[Part VI]**. This finding was left undisturbed by the court of appeal: 1999 CanLII 12307 (SK CA) **[Part VI]**.

[60] Appeal Decision at para 37-38 **[Tab 2E]**.

"disparaging" similarly. A review of *New Roots Herbal Inc. v W-7 Clay Inc.* (which agreed not only that the term disparaging was ambiguous, but also indicated a true statement could not be disparaging) only further reinforced his understanding.

[68] For orders to be effective, they must be simple and accessible, and devoid of ambiguities and uncertainties. Brenner C.J.'s order was neither simple, nor was it certain. It does not provide a sound basis for a criminal contempt conviction. Any doubt ought to have clearly been resolved in favour of Mr. Dhillon.

PART IV – SUBMISSIONS REGARDING COSTS

[69] Mr. Dhillon does not request costs; he requests that no costs award be made against him.

PART V – ORDER SOUGHT

[70] Mr. Dhillon requests that leave to appeal the judgment of the British Columbia Court of Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF DECEMBER, 2019.

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Nicolas M. Rouleau
Counsel for the Applicant, Satinder Dhillon

PART VI – TABLE OF AUTHORITIES

Canadian Case Law	Paragraph Cited
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PART VII – NON-HYPERLINKED AUTHORITIES