SCC File Number: 38998

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

SATINDER PAUL SINGH DHILLON

APPLICANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

REPLY OF SATINDER DHILLON

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REPLY OF THE APPLICANT, SATINDER DHILLON

A. Issues of national and public importance

1. Contrary to the Respondent's assertion, this case does raise two issues of national and public importance. Over the past decades, courts and legal commentators have begun accepting that an accused can use truth as a defence against allegations of contempt committed by words in several circumstances. This interpretation is consistent with the public policy rationale encouraging truthful free speech and legitimate criticism of the legal system. It has not been determined, however, whether an accused should be able to use truth as a defence against allegations of criminal contempt committed by words in all circumstances. Therefore, this Court has the opportunity to resolve the following issues of national and public importance in the present case:

- 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?

- Should speech prohibitions in public orders be restrictively interpreted, particularly where these prohibitions require laypersons to understand the legal nuances of defamation? A restrictive interpretation of these prohibitions would promote the policy rationales of truthful free speech and the legitimate criticism of the legal system. They will also more easily be understood by laypersons and limit the need for litigation.

B. Test case on the development of the Common Law of criminal contempt

2. The Respondent concedes that courts have modified the Common Law offence of contempt by scandalizing so as to recognize truth as a defence (at para 34). It also agrees that "[i]t makes eminent sense to recognize a defence of truth in such circumstances, because permitting individuals to speak truthfully about judges and courts usually enhances the administration of justice" (at para 36). It disagrees, however, that this Court should modify additional Common Law offences of contempt by words.

3. Deciding this novel issue is the first reason why this Court should grant leave in the current test case. Prior to *Kopyto*,[1] the Common Law did not provide for truth as a defence to the offence of contempt by scandalizing. Yet, in that case, the Court of Appeal for Ontario modified the Common Law by, on policy grounds very similar to those at play in the present case: namely that, where an accused faces criminal contempt charges because of criticisms directed to the legal system, the administration of legal proceedings would only be advanced by allowing him to prove the truth of what was said.

4. Since the seminal decision in *Kopyto*, at least one other court has further pushed the debate, accepting that truth can be used as a defence to contempt charges stemming from the breach of an order prohibiting "disparaging" statements.[2] Academic commentators have agreed, including the Canadian Judicial Council, which tentatively concluded that "[w]henever contempt is alleged to be committed by words[,] the defence of truth may be available to an accused".[3]

5. By granting leave on this test case, the Supreme Court of Canada will have the opportunity to determine whether to endorse a continued evolution for the Common Law of criminal contempt, in a context where Mr. Dhillon otherwise faces imprisonment due to statements that are allegedly true. If Mr. Dhillon were criminally convicted for contempt because he made true statements of the legal system, it would be much more damaging to the reputation of the legal system and the administration of justice than if Mr. Dhillon were allowed to proffer his truthful criticisms.

C. This is not a case about the collateral attack doctrine

6. The Respondent spends much of its argument mischaracterizing this case as amounting to a collateral attack. At paragraphs 14, 28-29, 32-33, and 42-43 of its Memorandum of Argument, the Respondent attempts to frame this case as one where Mr. Dhillon is collaterally challenging the constitutionality or the validity of the order. The Respondent cites paragraph 28-34 of the trial

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[1] *R v Kopyto*, 1987 CanLII 176 (ONCA).

[2] *New Roots Herbal Inc. v W-7 Clay Inc.*, 1999 CanLII 12529 (SK QB); aff'd 1999 CanLII 12307 (SK CA).

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

judge's Ruling on Relevance for the proposition that to permit Mr. Dhillon to advance a defence of truth "would run counter to the rule prohibiting a collateral attack on a court order."

7. This submission is wrong. In its Ruling on Relevance, the trial judge found that the public interest defence was not available to Mr. Dhillon because it amounted to a collateral attack.[4] The trial judge did not, however, suggest that Mr. Dhillon's submissions on the defence of truth amounted to a collateral attack. Mr. Dhillon's argument is not that he does not need to comply with the order for public interest reasons, that the order is invalid, or even that the order is unconstitutional – these arguments would amount to collateral attacks. Rather, Mr. Dhillon's argument is that, by making true statements, he is in fact complying with the terms of the order. He could only find itself in contempt of the order if his statements were false, just as he could only find himself in contempt for scandalizing the court if his statements were false.

D. The need for public orders to be simple and accessible to laypersons is an issue of national importance

8. At paragraph 11 of its factum, the Respondent emphasizes that the use of the word "defamatory" in the orders merely reflects the meaning of that word at law, namely that a "defamatory" statement is one that would lower the reputation of the referenced person or entity among reasonable members of society, regardless of whether the statement is true or false.

9. This submission encapsulates the second need for this Court to grant leave in the present case. In order to avoid a criminal conviction, the order expects a layperson such as Mr. Dhillon to develop a nuanced understanding of defamation law so as to be in the position to respect its terms. This is an unreasonable expectation with respect to public orders, particularly since various legal authorities include comments that, on their face, support the proposition that a true statement cannot be defamatory.[5]

10. For policy reasons, public orders must be simple, accessible, and devoid of ambiguities and uncertainties. A superficial reading of the order should be sufficient to know with precision

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[4] Ruling re Relevance of the Honourable Justice Holmes, dated 23 October 2014, para 28-37 **[Tab 2A of the Applicant's Application for Leave to Appeal]**.

[5] *MacDonald v Tamitik Status of Women Assn.*, [1998] BCJ No 2709 at para 85; *Elkow v Sana*, 2015 ABQB 803 at para 25.

what actions are forbidden, without risking a conviction for criminal contempt. 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. Failure to do so will leave it open to other judges to craft complex orders, which will adversely affect the interests of all laypersons covered by these orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT TORONTO this 13th day of February 2020.

for **Nicolas M. Rouleau**
Counsel for the Applicant, Satinder Dhillon

TABLE OF AUTHORITIES