

# Court of Queen's Bench of Alberta

**Citation: West Edmonton Mall Property Inc v Proctor, 2020 ABQB 161**

**Date:** 20200302  
**Docket:** 1903 23107  
**Registry:** Edmonton

Between:

**West Edmonton Mall Property Inc and David Ghermezian**

Plaintiffs

- and -

**Dana Proctor a.k.a. Debbie Dana Marie Proctor a.k.a. Dana Cole a.k.a. Dana Cole Proctor  
a.k.a. Dana Graham a.k.a. Jane Doe**

Defendant

---

**Reasons for Judgment  
of the  
Honourable Mr. Justice Douglas R. Mah**

---

## **A. Background**

[1] The Defendant, Dana Proctor, says that she speaks truth to power and nothing more. Her medium of expression is the internet, by way of her own Youtube channel and various social media platforms.

[2] The Plaintiffs, West Edmonton Mall and its principal, David Ghermezian, say that Ms. Proctor is a dangerous internet troll who traffics in racist and defamatory screed. They have commenced a defamation action and say she must be stopped once and for all.

[3] In this application, WEM and David seek by procedural means to nullify Ms. Proctor's defence of their action and her counterclaim, and thereby put themselves in a position to obtain a permanent injunction as a final remedy. They do so by applying for this hierarchy of procedural remedies (in order of preference):

- striking of Ms. Proctor's pleadings (both statement of defence and counterclaim) under Rule 3.68;
- summary disposition with regard to both the claim and the counterclaim under Rule 7.3;
- dealing with Ms. Proctor's pleadings (both statement of defence and counterclaim) under Civil Practice Note 7 pertaining to vexatious proceedings.

[4] The matter was heard by me as a special application on the Commercial List on the afternoon of February 5, 2020. Mr. Dhir, counsel for WEM and David, began his submissions at 2:06 p.m. and concluded at 3:02 p.m. Ms. Proctor, who is self-represented, had prepared a lengthy written submission and proceeded to read it into the record. She began at 3:02 p.m. and continued until 3:50 p.m., at which time I stopped her to ask the parties to address the issue of whether the temporary injunction should be extended. During the hearing, I interrupted Ms. Proctor a few times to ask questions and seek clarity on some of her remarks. I had similarly interrupted Mr. Dhir during his submissions to ask questions.

[5] Ms. Proctor did not finish reading the entirety of her submission into the record. She got part way through page 7 of an 11- page, single-spaced document. I took a copy of the submission and had it formally entered as part of the official record of this Court.

[6] I told the parties that I needed to reserve my decision so that I could read the whole of Ms. Proctor's written submission. She also asked that I view the videos that she had made and submitted as part of her evidence, as well as the other exhibits to her affidavits. These other exhibits consist of some 1000 pages of images, some with captions. All of Ms. Proctor's material has been taken into consideration in making my decision.

[7] In hearing and deciding this case, I have had regard to the *Statement of Principles on Self-Represented Litigants and Accused Persons* adopted by the Canadian Judicial Council in September 2006 and, in particular, the presiding judge's duty to assist a self-represented litigant.

[8] In this decision, I will refer to David Ghermezian by his first name as there are several other members of the Ghermezian family who are mentioned in Ms. Proctor's material and who will be referred to in this decision by their first names.

## **B. Antecedent proceedings**

[9] Relying on David's affidavit of November 7, 2019 WEM and David obtained an interim injunction against Ms. Proctor on November 14, 2019 on a without notice basis, from Justice Woolley. Ms. Proctor was enjoined from posting online about the Ghermezians and WEM and her social media accounts were ordered to be disabled or have all content removed from them. A comeback date of December 17, 2019 specified in the Order. Ms. Proctor takes umbrage with the fact that the injunction was granted without notice to her.

[10] On December 17, 2019 the matter was returned before Justice Henderson in morning civil chambers. He granted an interim injunction that slightly expanded the prohibitions contained in Justice Woolley's Order and provided more specificity. He also directed that a Special Chambers hearing occur on February 5, 2020 to deal with the injunction issue again and any corollary relief sought by the Plaintiffs. The action was otherwise stayed.

[11] Before Justice Henderson, WEM and David also relied on David's affidavit of November 7, 2019. By that time, Ms. Proctor had filed the first 2 volumes of her evidence, including about 75 videos. Ms. Proctor was displeased that Justice Henderson had not had the opportunity to review her material in detail prior to the appearance before him.

[12] As indicated, the February 5, 2020 was heard by me.

### **C. The Ghermezians**

[13] The Ghermezians are a well-known local family involved in commercial real estate development. Through their organization, Triple Five Group (described by David as a "multi-national development and finance corporation"), they are known as the owners and operators of West Edmonton Mall (which for convenience I shall also refer to as 'WEM'), Mall of America in Bloomington, Minnesota and American Dream Meadowlands in Meadowlands, New Jersey, all of which are large retail and entertainment complexes.

[14] David deposes that his grandfather, Jacob Ghermezian, immigrated with his wife and four sons from Iran to Canada in 1964. The Ghermezians, including David, are members of the Jewish faith.

[15] David's brother, Don, was previously president of WEM before David assumed the role in 2012. Don currently is the leader of Triple Five's American Dream Meadowlands venture.

### **D. Ms. Proctor's History with WEM**

[16] Ms. Proctor is the principal of a company known as Surfco Inc. The company previously was registered under the name Chocolate Bikini Company Inc. Between 1999 and 2016, Surfco was a tenant of WEM and engaged in the retail sale of swimwear and beachwear. Over the years, Ms. Proctor says, Surfco changed locations within WEM eight times.

[17] It seems that Surfco's business was struggling in 2017. On June 1, 2017 Ms. Proctor posted a Facebook entry lamenting the state of her business and inviting then premier Rachel Notley and Prime Minister Justin Trudeau to discuss the woes of the retail economy in Canada with her. She says that as a result of the Facebook post, she was banned by WEM security for 24 hours. Upon her return, she found that the lease had been terminated, her store had been closed and its contents seized for non-payment of rent.

[18] On April 3, 2018 Master Schlosser gave a final Order validating service of all documents, declaring Surfco's notice of objection to be invalid and vesting full title and interest in the seized assets to WEM for disposal in satisfaction of the lease. While it appears from the Order that Ms. Proctor did not personally attend Court on this date, the Order recites that the application had been adjourned from an earlier date at the request of Surfco. The Order also provides that it may be served by fax on Surfco's counsel (who had either just removed or was in the process of removing himself from the record) and by email at a certain email address. I note that Ms. Proctor uses the same email address, as shown on the documents she has filed in this action, to this day. Master Schlosser's Order was not appealed.

[19] Ms. Proctor says that on a later visit to the mall, she confirmed that WEM was selling her former inventory at its Waterpark store.

[20] I have no doubt that Ms. Proctor feels deeply aggrieved by the actions taken by WEM against her store and that she is, in her mind, the victim of a grave injustice. I also have no doubt, as she confirmed to me in Court, that she harbours a bitter, profound and unabiding enmity towards the Ghermezians and their mall complexes, wherever situate. I accept that she feels victimized by what she sees as rent-gouging and predatory landlord practices and that she believes the Ghermezians benefit financially by exploiting tenants and deliberately engaging in such practices. I also accept that she believes such practices and exploitation have caused many businesses to fail, a phenomenon she describes in her material as the “retail apocalypse.”

### **E. A Campaign of Vilification**

[21] Following Surfco’s demise at WEM, sometime in 2017 Ms. Proctor began her internet campaign of criticism and disparagement against the Ghermezians and their mall complexes. Using social media platforms such as Facebook, Twitter, Instagram and LinkedIn, as well as her own website ([americandreamstore.blogspot.com](http://americandreamstore.blogspot.com)) and Youtube channel, Ms. Proctor has relentlessly attacked, insulted and heaped scorn on David and his family and WEM and its associated businesses. The extent and scope of these attacks are described in some detail in 52 paragraphs of David’s affidavit of November 7, 2019 along with examples as exhibits. Apparently wishing that nothing be overlooked, Ms. Proctor herself, as her own evidence, submitted screenshots of the material in question, which evidence is contained in three large binders and, as I said, comprises by estimate some 1000 pages.

[22] It would be difficult to recite the complete catalogue of Ms. Proctor’s work. Rather, for illustrative purposes, I will mention some examples and try to focus on the material that David and WEM find most troubling and defamatory

[23] The material complained of appears on, but is not limited to, the following websites:

- <https://americandreamstore.blogspot.com>
- [fuckwem.com](http://fuckwem.com) (links to <https://americandreamstore.blogspot.com>)
- [lioniss.com](http://lioniss.com) (links to the Youtube.com channel at: [https://www.youtube.com/channel/UCHJIGJzMsq2NdaliTZp7D\\_Q/](https://www.youtube.com/channel/UCHJIGJzMsq2NdaliTZp7D_Q/))
- [banmalls.com](http://banmalls.com) (links to the Youtube.com channel [lioniss.com](http://lioniss.com) featuring a video called “What is a Terrorist? 555 American Dream Mall Don Ghermezian Financial Terrorism”)
- [americandreem.com](http://americandreem.com) (links to the Youtube.com channel [lioniss.com](http://lioniss.com), featuring a video called “American Dream Mall.COM 555 plan to take over America EXPOSED using domain name registration”)
- [americandreemmall.com](http://americandreemmall.com) (links to <https://www.instagram.com/missamericandrm/>)
- <https://www.instagram.com/missamericandrm/>
- <https://www.facebook.com/SurfcoSwimwear/>
- <https://www.facebook.com/dana.graham.6>
- <https://twitter.com/vexyvixen>

- <https://twitter.com/lioniss7>
- <https://publicinsta.com/hashtag/davidghermezian>
- <https://www.linkedin.com/in/dana-graham-658081191>

[24] Some examples that David and WEM highlighted in David's affidavit include:

- Between October 16, 2017 and October 28, 2017, Ms. Proctor posted several times on <https://twitter.com/lioniss7>, that West Edmonton Mall had "stolen" her store, Surfco.
- On October 15, 2018 Ms. Proctor posted on [americandreamstore.blogspot.com](http://americandreamstore.blogspot.com) a statement accusing WEM of "STEALING over a million dollars of merchandise and store fixtures."
- On November 2, 2018, she posted on [americandreamstore.blogspot.com](http://americandreamstore.blogspot.com), referring to WEM, that "These criminals need to be arrested" and "Please arrest these criminals."
- November 10, 2018 she posted on Facebook, referring to the Ghermezians and WEM: "I like NOT being dominated by foreigners.....but in this country, we allow them to immigrate here and STEAL [...]"
- November 12, 2018, Ms. Proctor posted on Facebook a comment referring to WEM and the Ghermezians as follows: "These criminals need to just go back to their own country. Take Canada back!! So our businesses and Canadians can earn a living again #boycottwestedmontonmall #wem #westedmontonmall #MAGA #trump #donaldtrump #immigration #savecanada #savenewyork #americandream."
- On March 3, 2019, Ms. Proctor posted a comment on Facebook calling WEM a "family of criminals", above an image of Donald Trump next to an image of Don Ghermezian.
- On March 26, 2019, she posted a comment on Twitter that reads, "don't sign a lease with triple five American dream mall west edmonton mall or mall of America evil company!"
- On April 3, 2019 Ms. Proctor posted a video entitled "SNAKES West Edmonton Mall BANS Me 4 Photographing MY Swimsuits that they STOLE from me!". The video depicts an image of a snake with the phrase "A SNAKE'S A SNAKE! JUST BECAUSE YOU'RE A BILLIONAIRE SNAKE, IT DOESN'T CHANGE THAT YOU'RE A SNAKE...IT JUST MEANS YOU'RE A RICH SNAKE", then a clip of Donald Trump reading a story about a snake that bites the person caring for it, intended as a negative allegory regarding immigrants, and later showing pictures of and naming Jeff Schechter (a WEM executive), and Don, Eskandar (David's father), along Raphael, Bahman and Nadir (David's uncles). The video states:

"THESE 2 SNAKES WORK FOR SOME RICH SNAKES CALLED TRIPLE FIVE", and:

This is what I did all day 11 hours a day while trapped in this prison store with no customers... Now all of these photos I took are about to come back to haunt you West Edmonton Mall  
Criminals belong behind bars

and

These criminals need to be behind bars! Or exported out of our countries because I promise you, president Trump is a lot like me, and he will not want them invading America! Never 2 big 2 fail. Not when u have me fighting against u! Remember that West deadmonton mall! Bet you never saw my youtube channel happening out of this.

- On April 24, 2019, Ms. Proctor posted a link to a video she had placed on her YouTube channel entitled “What is a Terrorist”, in which she references WEM and Don as “terrorists” or “terroristic,” that WEM kept her “locked up” in the mall, and that we “let these people into our country”.
- On April 27, 2019 Ms. Proctor posted on Twitter: “louis Vuitton supports iranian immigrants coming into my country and STEALING small businesses! SORRY THEY NEED 2 GTFO OF MY COUNTRY!!!”
- On May 2, 2019 Proctor posted on Instagram a picture with Don’s face digitally transposed onto the body of a woman with the statement, “U stole \$5 million from me plus 20 years of my time Don’t sign a lease with this sicko!” The post included a number of hashtags including #slavery, #thief, #criminal, #westedmontonmall, #mallofamerica, #americandreammall, #banmalls, #triplefive, #bikinithief, and #ghermezian.
- Also in May 2, 2019, she posted on Instagram an image of Don’s face transposed onto the body of the bikini clad woman with the caption: “DON GHERMEZIAN STOLE THIS WILDFOX SWIMSUIT FROM ME NOW HE HAS A NEW JOB AS AN INSTAGRAM MODEL”.
- On May 8, 2019, Proctor posted this comment on Instagram:  
cockroach @donghermezian of American Dream mall blocked me!  
Because that’s what cockroaches do...they hide when the light is on them! this scum stole over a million dollars in property from me, a \$500,000 store Reno, 3.55 million in RENT and all my TIME since I was 17 years old!
- After being issued a petty trespass notice by WEM security on April 5, 2019, Ms. Proctor posted on Instagram on May 9, 2019 a copy of the notice and this comment:  
BANNED by @donghermezian @sheckter @westedmontonmall for 10 years for no legal reason. Either because I am FEMALE (sexist) WHITE/BLONDE (racism) or for producing the SNAKES video online (violation of my right to free speech)  
@donghermezian @westedmonton mall #sexist #racist [...]

- Also, on May 9, 2019 Ms. Proctor posted on Instagram a repost of comments made on her Surfco Facebook page, attaching a comment referring to “terrorism” attaching the twitter handles @donghermezian and @westedmontonmall.
- On May 10, 2019 she posted on Instagram the comment “BECAUSE I AM FEMALE BLONDE AND WHITE I HAVE BEEN ROBBED BY JEWISH IRANIAN MEN IN CANADA BECAUSE THEY ARE ABOVE THE LAW,” referring to the Ghermezian family.
- On May 12, 2019, Ms. Proctor posted on Instagram another digital image of Don’s face transposed onto the body of a woman in a swimsuit with the text “I MAKE MY BILLIONS BY STEALING SINGLE MOMS SMALL BUSINESSES I AM DON GHERMEZIAN [...]”
- On June 14, 2019 Ms. Proctor posted on Facebook an image of herself with the text “MEET ME IN THE MALL IT’S GOING DOWN”. The text comes from a video that she posted on her YouTube channel in which she discusses her use of social media and digitally altering photographs to insult and humiliate the Ghermezian family and her interactions with the police in that regard.
- On July 29, 2019, Ms. Proctor posted a video on YouTube entitled “LOOKING 4 REVENGE REMIX Fortnite Ninja TFUE Drake Retail Row Destroyed American Dream Mega Mall,” showing Ms. Proctor wearing a tank top with the word “revenge” emblazoned on it, standing in front of an image labelled “American Dream”. The video then depicts a video game being played with meteors hitting objects on the ground, followed by the words “You don’t know what you just started,” then the images of Ken Downing (another WEM executive), Don, Nader, Jeff Schechter, Paul and David, along with the mall, being blown up in the video game, followed by a screen showing the same individuals and the words “THEY GOTTA GO THEY GOTTA DIE OUT EVENTUALLY”.
- On August 8, 2019 Ms. Proctor posted the video on YouTube entitled “SNAKES 2 TIMBER Kesha American Dream Mall 555 Criminals Don Ghermezian Jeff Sheckter STEAL Bikinis,” which depicts Don and Jeff Sheckter as heads on top of women in bikinis, and later shows an image of Eskander, Jeff Sheckter, Don, Nader, Paul and David, along with the building labelled “American Dream Mega Mall” and the words “Timber” and “It’s Goin’ Down,” a reference to the lyrics from the song *Timber* by Pitbull and Kesha.
- On August 20, 2019 Ms. Proctor posted a video on YouTube entitled “if you’re 555 then I’m 666 American Dream Mall Don Ghermezian the Devil Slipknot Heretic Anthem,” in which she depicts Don with devil horns in a ring of fire, next to the words “if your 555 then I’m 666.”
- On September 11, 2019 Ms. Proctor posted on YouTube video entitled “Thunderstruck 911 Save New York City from Attack – weapon of mass

destruction American Dream Mall,” in which she uses images of members of the Ghermezian family in association with words like “criminal” and David with the name “Greedymezian.” David deposes that this video has had over 80,000 views.

- On September 16, 2019 Ms. Proctor posted on Instagram a link to one of her YouTube videos with the comment “Save New York from these criminals!” Followed by #donghermezian and @donghermezian. The screenshots from the video that are included in the post feature the words “911” and “BOMB.”
- Starting May 2019, Ms. Proctor created a website in David’s name (<https://publicinsta.com/hashtag/davidghermezian>) where she has been publishing much the same content.

[25] I reiterate that the above examples constitute a mere smattering from Ms. Proctor’s overall *oeuvre*. Moreover, all of the sites used by Ms. Proctor are connected to one another by links and all, one way or another, refer to Ms. Proctor as the originator. She admits to using several aliases and pseudonyms such as Dana Cole, Dana Graham, MissAmericanDrm, Vexy Vixen and lioniss. Her posts often incorporate hashtags or handles such as #donaldtrump, #trump, #MAGA, #justintrudeau, #drake, #britney, #superbowl and @louisvuitton. She explained during the hearing that her intention in doing so is to increase awareness of her issues in the wider online community.

[26] David claims that Ms. Proctor is using racist tropes to foment hatred against himself and the Ghermezians. In particular, by reinforcing that the family is Iranian (Iran being a country in the Middle East), using trigger terms such as “9/11”, “terrorist”, “New York” and “attack”, and releasing her video “Thunderstruck 911 save New York from attack - weapon of mass destruction American dream Mall” on September 11, 2019, she means to provoke an angry backlash in North America against the Ghermezians as dangerous Middle Eastern terrorists. He suggests that by channeling Donald Trump, Ms. Proctor attempts to harness and direct anti-immigrant sentiment against his family. David characterizes Ms. Proctor’s online activity as racist, anti-immigrant and anti-Semitic and suggests that it poses a risk of physical danger to members of the Ghermezian family, particularly Don and his wife Marina.

[27] David also alleges that describing the family and its businesses as “criminal” and “terrorist” is defamatory.

#### **F. The nature of Ms. Proctor’s evidence**

[28] During the hearing, Ms. Proctor stressed to me that it was important for me to review the allegedly defamatory comments in the context of her entire body of work. By doing so, I would appreciate the merit of her position and in particular the truth or justification for her negative statements against WEM and the Ghermezians.

[29] Ms. Proctor appears to be a person with varied interests and influences, which she has woven together in her online work. Aside from extreme disdain and antipathy for the Ghermezians and their projects, Ms. Proctor is an admirer of the Canadian rapper and singer Drake (also known as Aubrey Drake Graham) and the American singer Britney Spears. References to and depictions of both Drake and Ms. Spears (including video clips) are sprinkled throughout Ms. Proctor’s work. In addition, she is an acolyte of Donald Trump, President of the

United States, in whom she finds a soulmate in terms of their views on immigration. Much of her work, she says, is in emulation of Trump.

[30] Ms. Proctor's online offerings do not admit of easy description. The material is quite diffuse. I will not attempt to recount everything that I saw in the three binders but rather extract the thematic strands which are relevant to this action. Basically, the content of the three binders is a pictorial accompaniment to her main affidavit of December 13, 2019. That affidavit is, essentially, Ms. Proctor's life story and the three binders provide a graphic or visual depiction of not just the journey of her life but also the emotions and heartbreak of that journey, as well as the thought or belief systems that have emerged as a result.

[31] The affidavit and the pictorial accompaniment in the binders recount her experience as a retail tenant at WEM, her frustrations with complying with WEM's requirements and attempting to keep the store afloat, and the terrible affront she experienced when she spoke her mind on June 1, 2017. She was evicted and her store contents seized the next day, effectively ending her association with WEM. As stated, she feels this is a great injustice. She now devotes her life to exposing what she feels are the wrongdoings of the Ghermezian family which she contends have resulted in the failure of many businesses in Triple Five malls across North America. She does so using much pejorative and vituperative language and images intended to demean their subjects and provoke others to action.

[32] Ms. Proctor has cast herself as an investigative journalist investigating and reporting on the retail mall economy which she believes is being destroyed by the Ghermezians. The first two generations of Ghermezians are foreign-born and the family itself is part a visible minority. Like President Trump, she sees herself justified in railing against the domination of the Western way of life by interests of foreign origin.

[33] There are 76 distinct videos submitted by Ms. Proctor as part of her evidence. Some of the videos are mere seconds or minutes in length, while another entitled "Thunderstruck 9/11" clocks in at nearly 40 minutes. For the most part, the videos embody the themes already discussed.

[34] Ms. Proctor is quite enamoured of her own work. I refrain from commenting on the artistic merit of her videos and other online material.

#### **G. Affidavit of February 5, 2020 and 'Congratulations' video**

[35] On the day of the hearing, Ms. Proctor filed yet another affidavit. This one, however, is not lengthy but includes a new video entitled 'Congratulations' as an exhibit. The content of the affidavit and the video is unfortunate.

[36] Ms. Proctor, as demonstrated throughout her evidence, has a penchant for creating and propagating digital images of persons she dislikes for the purpose of insulting and humiliating them. One of her favourite techniques is to take a picture of her male subject's head and digitally transpose it onto the body of a female person, usually dressed in a bikini or bathing suit. In the video, she has done this with counsel for WEM and David. The face of counsel has been transposed onto the body of the cover model for the Sports Illustrated swimsuit edition. The caption reads "Snake Law."

[37] The video, which is mere seconds in length, functions as a sort of "enemies list" for Ms. Proctor. Aside from featuring current counsel for WEM and David, the video also depicts

previous counsel for WEM, Edmonton mayor Don Iveson, Prime Minister Justin Trudeau, former Premier Rachel Notley, members of the EPS, a couple of Global and CTV news personalities, former mayor of Newark Cory Booker, former New Jersey Governor Chris Christie, New York Mayor Bill de Blasio, and two generations of the Ghermezian family, all with their heads transposed on to the bodies of snakes. The inference one is asked to draw is obvious – that these persons are likened to slimy reptiles and, so depicted, are dishonest, treacherous and cannot be trusted. Apparently, these are individuals whom Ms. Proctor feels have somehow crossed her. The video appears to welcome current counsel for WEM to the group.

[38] To ensure that counsel saw the image of himself, Ms. Proctor apparently added as a special insert to counsel’s copy of the affidavit a separate copy of that image. The image was brought to the Court’s attention by way of an affidavit dated January 30, 2020 filed by counsel’s office. However, it turns out the image is prominently featured in the video, which was supplied directly to the Court.

[39] During the hearing, when the image in question was held up by counsel so that I could see it, Ms. Proctor lapsed into a fit of uncontrollable and almost maniacal laughter. It took her a few moments for her to compose herself and I had to ask her if she needed a break.

[40] The short affidavit which accompanied the video explains that Ms. Proctor’s latest project is to conduct a campaign against the “evil law practices I’ve been subjected to in Canada that are a violation of so many of my basic rights.” After deposing that she has been unfairly treated by counsel and that she is a journalist rather than a vexatious litigant, she states “These lawyers need to be reviewed and punished for this.”

#### **H. Application to strike**

[41] The application to strike Ms. Proctor’s statement of defence and counterclaim is based on Rule 3.68, the relevant part of which reads:

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;
- (b) that a commencement document or pleading be amended or set aside;
- (c) that judgment or an order be entered;
- (d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

- (a) the Court has no jurisdiction;
- (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
- (c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

### **Statement of Defence**

[42] First, WEM and David contend that Ms. Proctor's statement of defence contains a fatal irregularity which engages subparagraph (e) of Rule 3.68 (2). Ms. Proctor has herself added Chocolate Bikini Company Inc as a defendant. In the statement of claim, the Plaintiffs did not name Chocolate Bikini Company Inc as a defendant. This defendant has been inserted in the style of cause by Ms. Proctor in her statement of defence. As stated earlier, Ms. Proctor asserts that Chocolate Bikini Company Inc is another name for Surfco Inc. Much of the statement of defence refers to Surfco's travails at WEM.

[43] There is no rule within the Alberta Rules of Court permitting a defendant to add another defendant in the statement of defence. In the very least, Chocolate Bikini Company Inc must be struck as a defendant.

[44] Having said that, there is no need on my part to specifically rule on Mr. Dhir's argument that the statement of defence should be struck because Ms. Proctor as a non-lawyer cannot act on behalf of another party. However, I do agree with the statement that a non-lawyer is not permitted under current Alberta law to act on behalf of another litigant in this Court, even where the non-lawyer is a director of the corporation that is the other party: *908077 Alberta Ltd v 1313608 Alberta Ltd*, 2015 ABQB 108 at para 56.

[45] Second, WEM and David say that Ms. Proctor's statement of defence discloses no legal defence. I have read it carefully. It contains much in the way of argument, evidence and much irrelevancy, such as a lengthy digression speculating as to the identity of a mysterious online personality that Ms. Proctor calls Ronaldus Shamask. In another section, the statement of defence attempts to rehash the termination of Surfco's tenancy and the sale of its inventory under legal process.

[46] Nowhere in the statement of defence is an actual legal defence identified or raised. If I sift through all of the allegations and rhetoric contained in the statement of defence, and give the most generous reading possible to a few of the words contained therein, there may be the germ of a possible defence in two respects:

- the defence of truth or justification; and
- the defence of responsible communication.

[47] I do not say these will be successful defences. I only say that it is possible to dimly sense a scintilla of these two defences from the confusing collection of comments that comprise the statement of defence. In doing so, I pay heed to the admonition that judges should not rely on technical rules to hinder the legal interests of self-represented persons. Consequently, I do not strike out the statement of defence but rather will deal with the two defences, among others, on the merits when I consider the motion for summary judgment.

### The counterclaim

[48] The counterclaim is another matter. First, there is the issue of the naming of parties. Once again, Ms. Proctor has added Chocolate Bikini Company Inc as a plaintiff-by-counterclaim. Although counsel for WEM and David was prepared to concede that it is permissible to do so, I prefer the interpretation of Rule 3.56 (the rule governing the right to counterclaim) advanced by Master Robertson in *Lil Dude Ranch Ltd. v. 1229122 Alberta Inc*, 2014 ABQB 39 at para 29 where he found that a counterclaim made by a non-party is a nullity. Master Robertson's position was adopted by Justice Michalyshyn in *Decore v Decore*, 2016 ABQB 246 at para 69 and by Justice Renke in *623455 Alberta Ltd v The Partnership of Jackie Handerek & Forester and Shawn D. Hagen*, 2018 ABQB 86 at para 244.

[49] It is not a technical application of the Rules to not permit something that is prohibited by the Rules. Only one set of Rules govern, even where one of the parties is self-represented: *Gjergji v Hyatt Mitsubishi*, 2017 ABQB 500 at para 32. Accordingly, the counterclaim is a nullity and, in reliance on subparagraph (e) of Rule 3.68(2), is struck to the extent that it purports to advance a claim on behalf of Surfco Inc or Chocolate Bikini Company Inc.

[50] Moreover, I reiterate the same *obiter* regarding the inability of Ms. Proctor to act on behalf of a corporate litigant even where she is a director of that corporation.

[51] Further, quite apart from what I said above, there is another good reason for striking out the counterclaim. It does nothing more than complain about WEM's closing of the Surfco store and disposal of its contents. As stated, all of this occurred under legal process and was validated by Court Order. Ms. Proctor and Surfco could have, and did at the time, contest the seizure by filing a notice of objection. However, the Court ultimately saw it differently. Attempting to relitigate something for which a final Court Order has issued amounts to an abuse of process under subparagraph (d) of Rule 3.68(2): *Reece v. Edmonton (City)*, 2011 ABCA 238 at para 20; *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 144 at paras 11-13; *Chutskoff v Bonora*, 2014 ABQB 389 at para 92 and *Toronto (City) v CUPE*, 2003 SCC 63 at para 37.

[52] The Court of Appeal notes in *Reece* at para 16:

Abuse of process is a compendious principle that the Courts use to control misuses of the judicial system. Abuses of process can arise in many different contexts, and there is no universal test or statement of law that encompasses all of the examples.

[53] Another such context is where the pleading seeks impossible remedies or the action is hopeless: *McMeekin* at para 12 and *Chutskoff* at para 92. Here, the plaintiffs-by-counterclaim seek, among other remedies, cross-border investigations into all of Triple Five's malls, the release of all animals "held captive against their will" in Triple Five malls, closure of all of Triple Five malls in North America and the banning of Triple Five and its directors from owning any malls in North America. Clearly, all such putative remedies are beyond the jurisdiction of this and perhaps any other Court.

[54] The counterclaim also claims that WEM has committed fraud and criminal personation by assuming the fake online identity of a person named Ronaldus Shamask. This is merely an accusation unsupported by any fact other than a belief on Ms. Proctor's part.

[55] Finally, no cause of action underlies the claim for monetary damages of \$35M sought by Ms. Proctor. The damages claim is not explained in the counterclaim but Ms. Proctor elaborates upon it in the last paragraph of her written submission:

The total cost to produce a music video can range from \$20,000 to \$500,000 and up. You can google that. There are a handful of music videos each year in the seven – figure budget range, but those are exceptions in the overall market

I have 80 of them. And so many more ideas. And the plaintiff's brother Don Ghermezian is bad at math. He can't even count 22 rides. So I will help him out here.....

\$1,600,000 at the low end to \$40,000,000 at the high end But my content can also be considered a movie as they collectively tell a story called my autobiography

Film budgets come in ranging from \$100-\$150 million. I currently have 3

So that's \$300,000,000 - \$450,000,000 respectively And I have so much more content to report on

In fact, I can take this bikini show on tour and sell tickets because I can sing and I can write. Maybe things really do come round full circle eventually, because that's how it all started...doing bikini shows.

[56] What Ms. Proctor seems to suggest is that WEM and David, as damages, should finance her career as an online impresario, both to date and going forward. It is completely unknown, at least to me, how WEM and David are legally responsible for this financing or on what legal theory such a claim founded. Again, requiring a legal basis for a claim is not invoking a mere technicality. Furthermore, the quantum of the claim has no factual foundation other than Ms. Proctor's imagination.

[57] For the reasons above, the counterclaim is struck under Rule 3.68.

## I. Summary Judgment

[58] In considering summary judgment under Rule 7.3 in Alberta, the Court is required to apply the test for summary judgment from *Hryniak v Mauldin*, 2014 SCC 7 and the standard of proof for summary judgment per *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49.

[59] Under *Hryniak*, summary judgment is indicated where the record allows the Court to make the necessary findings of fact, apply the law to the facts and where summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result. Applying *Weir-Jones*, the question is whether the matter can be fairly resolved on a summary basis or whether the facts, the record or the law reveal a genuine issue requiring a trial. The moving party must meet the burden of showing there is either “no merit” or “no defence” based on facts proven on a balance of probabilities and therefore no genuine issue requiring trial. If the moving party meets this burden, then the resisting party must put its best foot forward to demonstrate from the record that there is a genuine issue requiring trial. Overall, the Court must have confidence that the state of the record is such that judicial discretion should be exercised to summarily resolve the dispute.

[60] Overall, I am satisfied that this case is appropriate for summary judgment. The record is complete. WEM and David, through David's affidavit, have established the particulars of the alleged defamation. In terms of the evidence, Ms. Proctor has put her best foot forward. If the 1000 or so pages of screenshots with captions and 76 videos are not a complete reproduction of her work pertaining to the Ghermezians and their malls, they are a full and valid representation. She has made sure, as she told me in Court, that her work is not misrepresented by providing to the Court the full context in which the impugned comments were made.

[61] Further, she has submitted an 11-page, single-spaced written submission, which I have studied assiduously. While, as I said earlier, her statement of defence contains mere ghostly hints of a defence, I will consider all of the defences raised in her written submission on the merits as part of my duty to deal fairly with the self-represented litigant.

### **Are the comments defamatory?**

[62] In this case, in order for WEM and David to succeed in establishing their cause of action, I must be satisfied on a balance of probabilities (from the record) that the comments complained of are defamatory, that the comments refer to them and that they were communicated to third parties: *Grant v Torstar*, 2009 SCC 61 at para 28.

[63] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; that is, it tends to lower that person in the estimation of right-thinking members of society: *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 67; *Vander Zalm v Times Publishers*, [1980] 4 WWR 259, 1980 CanLII 389 (BCCA) at para 4; and *Kent v Martin*, 2016 ABQB 314 at paras 95 & 96.

[64] Although Ms. Proctor has said many negative things about the Ghermezians and their malls, and by visual depiction demeans and humiliates David and his family members, I will focus on two categories of comments in particular to establish whether Ms. Proctor has defamed the Plaintiffs or not:

- that WEM and the Ghermezians are criminals and specifically that they stole Ms. Proctor's inventory; and
- that the Ghermezians are terrorists and practice terrorism through their malls.

[65] It is plain from the record that Ms. Proctor has uttered these words on numerous occasions. Many examples were cited above in para 24.

[66] There is no evidence in the record that WEM nor any of the Ghermezians have ever been charged, much less convicted, of a criminal offence. A false imputation of criminality is defamatory: *Knorr v Ibrahim* (1998), 169 NSR (2d) 34 (NSSC) (*theft from employer*); *Misiner v L J Trabert Ltd* (1982), 51 NSR (2d) 633 (NSTD) (*shoplifting*); *Risk v Zeller's Ltd* (1977) 27 NSR (2d) 532 (*shoplifting*); *Siepierski v F W Woolworth Co* (1979) 34 NSR (2d) 551 (NSTD) (*shoplifting*); *Knowles v Goldt*, [1950] 2 WWR 1242 (SKCA) (*theft*).

[67] Moreover, the seizure and disposal of Surfco's inventory was conducted under legal process and validated by a final Court Order that was never appealed. Such a taking of possession of property can in no way, by any understanding of the word "theft", be construed as a theft or stealing.

[68] Ms. Proctor's imputation that WEM and the Ghermezians are criminals or thieves who stole from her is *prima facie* defamatory.

[69] A “terrorist” is generally understood as a person or organization that uses unlawful violence and intimidation, especially against civilians, in pursuit of political or ideological aims. The most notorious terrorist act of the 21<sup>st</sup> century is the September 11, 2001 attacks against the United States perpetrated by the Islamic terrorist group al-Qaeda.

[70] Terrorism is an offence in Canada, punishable by life imprisonment: see Part II.1 of the *Criminal Code*. I am not stepping out on a limb by saying (by way of judicial notice) that terrorists are reviled by civilized and decent people all over the world.

[71] Ms. Proctor argues that she does not intend to say that the Ghermezians use violence against innocent civilians for political or ideological purposes. Rather, she asserts that the Ghermezians engage in “financial terrorism” by intimidating the commercial tenants in their malls. Their purpose, she says, is either to dominate or destroy (it is not clear which) the retail mall industry in North America.

[72] In saying that her words and images are not defamatory, Ms. Proctor relies on context. She says the inoffensive whole should not be dissected into incriminating fragments. The problem with this argument is that the whole is not inoffensive. The totality of her work, as shown in the record, is intended to attack and injure the Ghermezians and their malls. The Plaintiffs have not plucked or parsed singular offensive morsels from a large innocuous body of material. The whole of the material is devoted to attacking its subjects. It is one long and concerted exercise in character assassination.

[73] Furthermore, it is somewhat disingenuous for Ms. Proctor to say that she means “financial terrorism” only, which would only be a metaphor, as opposed to actual terrorism. In this regard, as she says, context is important. She continually refers to the Ghermezians as being of Iranian or Middle Eastern origin. She released her “Thunderstruck 9/11” video on September 11, 2019 and referred to the malls as “a weapon of mass destruction.” She makes reference to an attack on New York and uses the word “BOMB.” By associating the Ghermezians and their malls with ideological Middle Eastern terrorism, she either implies that they are ideological Middle Eastern terrorists or that they act in a way which is so similar that they should be treated the same.

[74] Ms. Proctor also argues that conventional news outlets have referred to the Ghermezians as Iranian immigrants, that the statement is true and she is thereby offering no offence. However, the conventional news media do not refer to them as “terrorists” and do not depict the faces of family members on the bodies of snakes.

[75] By referring to the Ghermezians and WEM as “terrorists”, Ms. Proctor has *prima facie* defamed them.

#### **Do the comments refer to David and WEM?**

[76] There are specific references to David throughout Ms. Proctor’s material and a great number of specific references to WEM, both as targets of disparagement. Ms. Proctor is correct that much of the focus of her attacks has been on Don and American Dreamland Meadowlands. In many other instances, she refers to the Ghermezians and their malls generically.

[77] It is clear that she has grouped the Ghermezians together as members of the same family and participants in the same family enterprise. In fact, she refers to the Ghermezians collectively as a “crime family.” It is also clear that she has grouped the Triple Five malls together and characterizes them all as evil, without distinction. Her intent is not to differentiate between

family members or mall properties. She tars them all with the same brush. All family members involved in the mall business have their heads depicted on the bodies of snakes. She says that all Triple Five malls cause or contribute to the collapse of the retail economy in North America. Ms. Proctor takes pains to have her audiences understand that the Ghermezians are all members of a single family who own and control the malls in question. Because of the way in which Ms. Proctor portrays the family members and malls as parts of one evil whole, the vilification of one Ghermezian family member or one Ghermezian property is the vilification of all.

[78] It is well known in the public that David is the president of WEM and that WEM is the best-known Triple Five or Ghermezian property in Alberta. I have no difficulty in concluding that Ms. Proctor's vituperation directed at one Ghermezian family member or the Ghermezians generally, or one Triple Five mall or the malls generally, also refers to and is meant to refer to David and WEM.

**Were the defamatory comments communicated to third parties?**

[79] Ms. Proctor's activity against the Ghermezians and the malls took place on the internet. Accordingly, there was publication of the defamatory comments to the entire world: *Fort McKay Métis Community Association v Morin*, 2019 ABQB 185 at paras 1, 55-56.

**Does the record disclose a triable defence?**

[80] Ms. Proctor must establish a triable defence from the material in the record. The simple assertion that there is a defence is insufficient. The Court must evaluate whether there is a triable defence and can only do so if there are facts put forward, which if proven at trial, might well establish the defence: *GFK Capital Base Corporation v Fernando*, (November 5, 1993) 1993 CanLII 14748 (MB CA), 88 Man R 2<sup>nd</sup> 5, [1994] 1 WWR 735 (MBCA), at paras 13 and 14; *Canadian Union College v Bonamy*, 1995 Carswell Alta 767, [1995] AJ Number 1058, at para 58; and *Goulet v Da Silva*, 2002 ABQB 369, at para 74.

**a. Truth or Justification**

[81] Under Canadian common law, no one can complain about the truth. Truth or justification provides an absolute defence to a defamation action: see Raymond E. Brown, *The Law of Defamation in Canada*, Chapter 10, p 2; *550433 Alberta Ltd. v. Stealth Alarms Systems Inc.*, 1998 ABQB 1081 at para 12 and *Guccione v. Bell*, 1998 ABQB 613 at para 17.

[82] As noted above, Ms. Proctor has put forward no facts tending to prove that David and WEM are criminals. When referring to someone as a "criminal", it is necessary to show that the person has been convicted of criminal offence, not that, in one's opinion, the person has committed criminal acts. As Erb J observes in *Hall v Kyburz*, 2006 ABQB at paras 37-41:

[37] With respect to justification based on truth, it is clear that none of the Applicants have been convicted or charged with a criminal offence. The Respondent simply presents and interprets facts which he states occurred. Some of it is through third parties.

[38] The defence of justification based on truth requires "substantial truth" be proved. The onus is on the Respondent to prove it on a balance of probabilities with the degree of probability commensurate with the gravity of the charge. The more serious the allegation the more "cogent must be the evidence".

[39] In my interpretation of this defence, the Respondent is not at liberty to assert that he can prove that the Applicants are, for example, “criminals” based on his interpretation of the law or on alleged events respecting which no charges or convictions were ever commenced or indeed contemplated.

[40] The Respondent may have been unhappy with the manner in which police treated him on a certain occasion, he may dislike them for all manner of reasons but that does not entitle him to discredit them with loose language and imputations and accusations of criminality, dishonesty and other unsavoury characteristics.

[41] In my opinion, the Applicants have discharged the onus of establishing there is no genuine issue for trial. It is “plain and obvious” that the action in this case cannot succeed. The Applicants have been defamed, that is, their reputation has been lowered in the esteem of reasonable members of the community by the unfounded allegations of the Respondent which are not defensible.

[83] Further, Ms. Proctor has put forward no facts tending to prove that David and WEM are “terrorists” in the sense that they use violence and intimidation against innocent civilians for political or ideological ends. A reasonable person would construe the word “terrorist” as used by Ms. Proctor in its ordinary sense, particularly where she has deliberately associated her subjects with Middle Eastern terrorism and the terrorist attack on New York on 9/11. The word “terrorist” in the context provided by Ms. Proctor does not have a harmless or benign meaning. She has put forward no facts to support the notion that David and WEM are terrorists in the ordinary sense. In coming to this conclusion, I have had regard to the totality of the context.

[84] In the absence of such facts, Ms. Proctor’s belief in the statements, no matter how sincere, does not establish their truth: see *Hall* at para 20 and *Fort McKay Metis Community Association* at paras 40-44.

[85] There is no triable defence on this record based on truth or justification.

#### **b. S 107 of the Copyright Act**

[86] Ms. Proctor here, of course, is referring to section 107 of Title 17, *The Copyright Law of the United States of America*. There is a Canadian equivalent (Sections 29, 29.1 and 29.2 of the *Copyright Act of Canada*) which creates the fair dealing exception to copyright for the purposes of research, private study, education, parody or satire. These provisions protect the user of copyrighted material in an action for copyright infringement. The fair dealing provisions do not confer a license on a user to engage in defamation.

[87] No triable defence arises under this heading.

#### **c. Ms. Proctor is not a racist**

[88] In her written submission and throughout her oral submissions, Ms. Proctor insisted that she is not a racist. By way of illustration, she noted:

- she is a great admirer of Drake, who is both black and Jewish;
- she has adopted as one of her pseudonyms, the last name “Graham” as in Dana Graham, which is also the last name of Drake (a black person);

- she is also a huge fan and supporter of Britney Spears, whose current partner is of Iranian extraction;
- she has posed for and posted numerous photos of herself standing next to black people such as Drake; and
- it is rather WEM and David who are the racists, because they closed down her store for the sole reason that she is female, white and blond;

[89] The evidence before me is that the Surfco store was shut down by WEM for non-payment of rent.

[90] Whether Ms. Proctor is a racist or not is beside the point. Many of the comments directed at the Ghermezian family are racially provoking, such as when she says that the Ghermezians as Iranian immigrants should “GTFO of my country”.

[91] Even if I accept that she is not a racist, and I make no finding in that regard, not being a racist does not give rise to a triable defence in law to this action.

#### **d. The role of malice**

[92] I pause here to discuss the role of malice in the law of defamation as it pertains to this case. A finding of malice defeats the defences of privilege and fair comment and displaces the defence of responsible communication, all of which have been raised by Ms. Proctor in her written brief. Malice refers to the mental state of a person who has deliberately published untruthful or defamatory statements about another. That mental state may involve a collateral purpose or motive.

[93] In *Allan v Bushnell TV Co*, [1969] 2 OR 6, 4 DLR (3d) 212, 1969 CanLII 503 (ONCA), the Court of Appeal for Ontario described malice in this way:

...It is not without significance that the reference in s. 9 is to "actual malice", a term which relates to the actual state or condition of the mind of the person who did the act. It implies some personal hatred or ill will or wanton intention to injure and denotes a condition which is directly imputable to the publisher concerned...

[94] More recently, in *Milne v Workers' Compensation Board*, 2012 ABQB 302, Kent J described malice in this way:

Malice means “[t]he intent, without justification or cause, to commit a wrongful act, [r]eckless disregard of the law or a person’s legal rights ...” (Black’s Law Dictionary, 9<sup>th</sup> Ed), “... an improper motive in the sense of a motive to injure the plaintiff or to benefit the defendant or some party other than the plaintiff ...” (*Williams v. Webb*, 1961 CanLII 180 (ON CA), [1961] O. R. 353 at 364).

[95] In considering whether Ms. Proctor was actuated with malice in her extensive online postings about the Ghermezians and their malls, I take note of the following:

- Her intent throughout has been to demean and humiliate her subjects through digitally manipulated images. She has taken the faces of male subjects and transplanted them onto female bodies wearing bikinis or swimsuits. She has also taken the faces of persons she dislikes and transposed them onto the bodies of snakes, indicating that these persons should be likened to slimy reptiles.

- Ms. Proctor advised me during the hearing that she “hates” the Ghermezians and their malls. (She was quick to make the point that she hates the Ghermezians as individuals, not as members of a demographic group.) Ms. Proctor wrote in her brief that hating is her legal and biblical right (at page 2):

What year was the hate speech law written in Canada? 2013? The U.S. Supreme Court has repeatedly ruled that hate speech is legally protected free speech under the First Amendment. Is there a Canadian hierarchy of chartered rights showing that one is more protected than the other? What year was the bible written? 1300BC Why does Facebook protect the right of 58 genders (that is also against the bible) Deuteronomy 22:5 but not my right to BASIC fundamental rights such as religion thought and free press? In my opinion the entire HATE SPEECH LAW in Canada needs to be tossed out for this very reason. The bible SPECIFICALLY states that I will hate evil and cannot serve 2 masters. You cannot serve both GOD and money Luke 16:13 I will hate one. I think GOD trumps a Canadian HATE speech 2013 Law and to me the fact that this country even has one shows that Godless people are the one's writing the laws.

- Ms. Proctor describes her subjects in hateful terms: they are members of a group (certain immigrants) who should be thrown out of the country; they are sub-human vermin (cockroaches); they are delegitimized by being labelled criminals and evil; they prey on a vulnerable group (mall tenants, or white, blond females); they are engaged in a plot to dominate or destroy an aspect of Western life (in this case, the retail mall industry in North America); they deserve to be eliminated (by being blown up). See the discussion of the “hallmarks of hatred” in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 44 & 45. I do not say that Ms. Proctor is guilty of a hate crime or a human rights violation; rather, that her use of hate language directed towards individuals is indicative of malice. Ms. Proctor has used racially charged language and anti-immigrant sentiment to provoke feelings of resentment and anger in her audience against the Ghermezians.
- She is quite unabashed about wishing to injure the Ghermezians and their malls economically. This is reflected in her wish that the malls be shut down and the Ghermezians prohibited from being commercial landlords, and in her call-out to her audience to avoid leasing from a Triple Five property.
- Ms. Proctor is clear that her whole intent behind her campaign of vilification is revenge against those she believes is responsible for shutting down the Surfco store. This motivation is exemplified in her July 29, 2019 YouTube video entitled “LOOKING 4 REVENGE REMIX...” in which Ms. Proctor herself is shown wearing a “revenge” T-shirt. In the video, Ms. Proctor warns Triple Five executives that payback is coming.
- In the same July 29, 2019 video, Ms. Proctor shows the Triple Five executives, including David, and a mall being blown up in a video game,

followed by a screen showing the same individuals and the words “THEY GOTTA GO THEY GOTTA DIE OUT EVENTUALLY.” This sequence can only be reasonably construed as a thinly veiled threat of violence or call to arms against the subjects.

[96] At risk of sounding like a moralist, I make the observation that revenge is among the least admired of human motivations. Encouraging violence, even in veiled form, can have dangerous consequences when weak-minded persons decide to take up the cause.

[97] Based on the law and the whole of the record, I conclude that Ms. Proctor’s online activity against the Ghermezians and their malls is actuated by malice in that it embodies hatred, ill-will and intention to injure. It makes no difference whether that hatred is harboured against certain individuals and not a demographic group, although an argument can certainly be made that a demographic group (Iranian immigrants) is involved. The record showing that Ms. Proctor has acted with malice in her online postings is beyond doubt.

#### **e. Responsible Communication**

[98] The Supreme Court of Canada with the concurrent release of *Grant v Torstar*, 2009 SCC 61 and *Cusson v Quan*, 2009 SCC 62 established the new defence of responsible communication in matters of public interest, sometimes known as the defence of responsible journalism. Essentially, the defence provides that otherwise defamatory statements are protected if the writer exercises diligence in attempting to verify the defamatory allegations and the matter is of public interest. In *Grant*, Chief Justice McLachlin left open the possibility that the defence might extend to internet activity, even where the writer is not a conventional journalist but rather a “participatory journalist”: *Grant* at paras 96 & 97.

[99] I might concede, as would counsel for WEM and David, that the state of the retail economy is a matter of public interest. However, for the defence to succeed, the writer must exercise due diligence by taking steps to verify the allegations of fact and seeking the other side of the story: *Grant* at paras 114-117. Here, Ms. Proctor’s conclusions that the Ghermezians are criminals and terrorists are based totally on her own perceptions. No other sources are cited, nor was any attempt made on her part to canvass the Ghermezians for a response to the allegations. Consequently, with these elements missing, there is no triable issue as to the defence of responsible communication in matters of public interest.

[100] Further, the defence of responsible communication in matters of public interest is displaced by malice. As the Court noted in *Daboll v DeMarco*, 2011 ONSC 1, CCLT (3d) 145 at para 36:

... The defence does not require a separate inquiry into malice, since a defendant who has acted with malice in publishing defamatory statements has by definition not acted responsibly.

#### **f. Qualified Privilege**

[101] The common law defence of qualified privilege arises where the maker of a defamatory statement has a legal, public or social duty to communicate the information in question and the recipient has a corresponding valid duty or interest in receiving it. The reciprocity is essential and the privilege attaches to the occasion of the communication, not the actual words: *Banks v Globe and Mail Ltd*, 1961 CanLII 6 (SCC) [1961] SCR 474, at pp 482-83, and *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 SCC [1995] 2 SCR 1130 at 1188 – 89.

[102] In *Kent v Martin*, 2016 ABQB 314, Strekaf J (now JA) provides this useful summary at para 117:

Defamatory statements are protected by qualified privilege where they are “fairly made on a privileged occasion by a person discharging some public or private duty, or... to pursue or protect some private interest, provided it is made to a person with a corresponding interest in receiving it”: *Brown on Defamation*, 2<sup>nd</sup> ed, (Toronto: Carswell, 2014) at para 13.1 [*Brown on Defamation*]. The duty can be legal, social or moral. The test is whether people of ordinary intelligence and moral principle, or right minded people, would consider it a duty to communicate the information: *ibid*, see also *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 143 [*Hill*]. However, the Supreme Court noted in *Grant* that the threshold to establish qualified privilege is high and that the defence has been of little assistance to media organizations because “qualified privilege has traditionally been grounded in special relationship characterized by a ‘duty’ to communicate the information and a reciprocal ‘interest’ in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large”: *Grant* at paras 34-37.

[103] I find that there is no triable defence of qualified privilege in that there is no special relationship between Ms. Proctor and the whole world characterized by a ‘duty’ to communicate insulting information about the Ghermezians and their malls and a reciprocal ‘interest’ by the whole world in receiving that information. Furthermore, any defence of qualified privilege is defeated by Ms. Proctor’s demonstrated malice.

#### **g. Fair Comment**

[104] The right of everyone in Canadian society to freely express opinions on matters of public interest is manifest in the defence of fair comment. Opinion includes any “deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof”: *Grant* at para 31. It is the expression of what one thinks, believes or argues as a matter of opinion as opposed to a matter of fact. Fact is amenable to proof while an opinion is not. One can agree or disagree with opinion. Generally, there is little or no room for disagreement with facts, particularly when established by demonstrable proof.

[105] Whether someone is or is not a criminal is a matter of fact, amenable to proof. The existence or not of a criminal record is the proof. Whether or not someone is a terrorist is also a matter of fact, subject to proof. Evidence that a person is a member of a terrorist organization or engages in violence or intimidation for the purposes of advancing an ideological or political agenda would be proof that the person is a terrorist.

[106] In calling the Ghermezians and their organization criminals and terrorists, Ms. Proctor is stating matters of fact, not opinion. Hence, the defence of fair comment does not arise.

[107] Even if I accept, as I said before, that the downfall of the retail industry is a matter of public interest, the comments made by Ms. Proctor are still actuated, beyond doubt, by malice and accordingly, no defence of fair comment can be established as triable on this record.

#### **h. Satire**

[108] Ms. Proctor asserts that her work is in the nature of satire and therefore insulated from the law of defamation. By this she means that calling the Ghermezians and their organizations criminals and terrorists, placing male heads on bikinied female bodies, and transposing faces of various professional persons onto the bodies of snakes is merely poking fun at the foibles of those persons.

[109] Satire, by itself, is not a legal defence. It is a literary or artistic genre. In defamation cases, satire may be a specie of the defence of fair comment: see *Vander Zalm* (provincial cabinet minister shown gleefully plucking the wings off fruit flies) and *Ross v Beutel*, 2001 NBCA 62 (schoolteacher depicted in cartoons in a Nazi uniform). However, the requisites of fair comment must be present, including the absence of malice.

[110] The record does not disclose a triable defence under this heading.

#### **i. Free Speech**

[111] Ms. Proctor argues that any limitations imposed upon her by the law of defamation or by an injunction based on that law infringe her right of free speech, which is guaranteed under the *Charter*. While it is true that section 2(b) of the *Charter* enshrines freedom of expression as a constitutional right, *Charter* rights can be used as neither a sword nor shield in litigation between private parties: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 95.

[112] I attempted to explain to Ms. Proctor during the hearing that *Charter* rights do not give rise to *Charter* remedies in private disputes but *Charter* values may inform the common law in its application to such disputes. For example, in *Hill* at paras 84 to 121, the Court describes how the law of defamation must balance the competing interests of free speech and the individual's inherent right to dignity and personal reputation.

[113] As the Supreme Court of Canada noted in para 137 of *Hill*, the law of defamation is not unduly restrictive or inhibiting. Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of individuals to protect their reputation. The Court reiterated in *Grant* at para 2 that:

... freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault.

[114] In consequence, merely invoking one's right to freedom of expression in Canada does not erect a defence to or grant immunity from an action in defamation. Ms. Proctor saying that she has a right of free speech, which she surely does, raises no triable defence on this record. What she fails to accept is that her right of free speech is circumscribed by the law of defamation.

#### **j. License from Donald Trump**

[115] Ms. Proctor asserts that in her online activity directed against the Ghermezians and their malls, she does no more or no different than Donald Trump, President of the United States, does in his daily tweets and pronouncements. She says that she and the American president share a common view on the influence of foreigners who are gaining a pernicious foothold in North America. Ms. Proctor seems to be arguing that there is a legal paradox at work here. Since the President of the United States can do no wrong (she seems to argue), by emulating Donald Trump, Ms. Proctor is doing no wrong.

[116] The tweets and pronouncements of Donald Trump do not confer upon Ms. Proctor a license to defame anyone, even in her emulation of him. There is no legal paradox operating here. I assess Ms. Proctor's conduct toward the Ghermezians and their organizations according to Alberta law. I do not purport to assess the conduct of President Trump under any standard.

[117] In Alberta, there is no "Donald Trump defence" to a defamation action. No triable defence is raised here on the record.

### **Conclusion re Summary Judgment**

[118] In this case:

- The facts, the record and the law do not reveal a genuine issue requiring a trial. Defamation of the Plaintiffs has been established and no viable defence requiring trial is available.
- The record allows the court to make the necessary findings of fact and apply the law to the facts. Thus, summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result.

[119] In the result, I grant summary judgment in favour of WEM and David against Ms. Proctor.

### **J. Vexatious Litigant**

[120] Strictly speaking, because I have granted summary judgment on the main claim and have struck out the counterclaim, there is no need to consider the third branch of the Plaintiffs' application which is to have Ms. Proctor declared a vexatious litigant under Civil Practice Note 7. Such a declaration, if made, permits the Court to strike out the vexatious litigant's pleadings under Rule 3.68 and to restrict that litigant's access to the civil Court system. To an extent, this relief has merged with the Plaintiffs' first branch of application, as I have already struck out Ms. Proctor's counterclaim under Rule 3.68.

[121] I agree with Mr. Dhir that many features of Ms. Proctor's filings reflect the *indicia* for a vexatious litigant set out in *Unrau v National Dental Examining Board*, 2019 ABQB 283, including:

- Seeking impossible remedies;
- Seeking unfounded and disproportionate monetary damages;
- Seeking *Charter* protection as a defence in a private law action;
- Filing wholly defective pleadings;
- Engaging in a collateral attack of a matter already decided;
- Conducting herself in an inappropriate manner (putting a demeaning image of counsel before the Court).

[122] I have commented on all of the matters enumerated above earlier in these reasons. However, since this litigation is more or less at an end apart from the question of a permanent injunction and the issue of costs, and Ms. Proctor's pleadings have already been dealt with as a

result of rulings above, I decline to consider making the vexatious litigant declaration at this time.

[123] Needless to say, any persistence in exhibiting the conduct described above may result in the Plaintiffs or the Court on its own initiative renewing consideration of just such an application. If Ms. Proctor is found to be a vexatious litigant, then the *Statement of Principles on Self-Represented Litigants and Accused Persons* may cease to have application: see commentary, page 5, point #4.

#### **K. Protection of the Court's Process**

[124] Ms. Proctor has now had three different Court Orders made against her, at the instance of the Plaintiffs, by three different judges (Justice Woolley, Justice Henderson and myself). I am concerned that the integrity of the Court's process and the public's confidence and respect in the Court's administration of justice in this province will be compromised by Ms. Proctor through further online postings. I say this because:

- She placed an image of Plaintiffs' counsel before the court that was intended to and did demean that counsel. During the hearing, I explained to Ms. Proctor that counsel is an officer of the Court, a participant in the justice system and a professional who deserves the same respect that she would expect for herself. Given her reaction when the image was shown to the Court, I am not confident that my message sunk in nor that she will discontinue such conduct.
- The introduction of the "Congratulations" video into evidence shows me that Ms. Proctor keeps a list of those she believes have done her wrong and, through her videos and postings, seeks to settle scores.
- Ms. Proctor readily admitted during the hearing that she had not complied with the two previous Court Orders requiring her to take down her Youtube videos regarding WEM and the Ghermezians and had no intention of doing so. I advised her that she was technically in contempt and made a specific direction that she remove the videos from the internet.
- Her online postings concerning WEM and the Ghermezians do not constitute reportage or fair comment. Rather, they are merely a collection of insults and digitally manipulated images intended to debase and assassinate the reputations of the subjects.

[125] In view of the above, I have concluded that it is necessary for the Court to take steps to protect the integrity of its process and to prevent Ms. Proctor from bringing the administration of justice into disrepute. As Justice Eamon noted in *Feuerhelm v Alberta (Justice and Attorney General)*, 2017 ABQB 709 at paras 79 & 80:

This Court has inherent jurisdiction to prevent misuse of its procedure in a way that would be manifestly unfair to a litigant or would bring the administration of justice into disrepute. In *Toronto (City) v CUPE*, 2003 SCC 63, [2003] 3 SCR 77 the Court stated:

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was

described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

...

The doctrine of abuse of process concentrates on the integrity and fairness of the adjudicative process (*CUPE* at para 51; *Behn v Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227, at para 41). The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons (*Blencoe* at para 115). The latter type of case arises where there is where unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process (*Canada (Minister of Citizenship and Immigration) v Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 SCR 391 at para 89).

[126] To me, there is a clear danger that Ms. Proctor, if unfettered, will engage in online activity that will contravene fundamental notions of justice and undermine the integrity of the judicial process. At the hearing before me, I extended (until further Court Order) the temporary injunction issued by Justice Henderson. To that temporary order, I add a provision that Ms. Proctor is prohibited from:

- publishing or posting any material or commentary concerning these proceedings, as well as any material (including images) or commentary concerning any participant in these proceedings, including but not restricted to any counsel, Court staff or members of the judiciary, but excluding herself provided that any publication or posting about herself is not connected in any way to these proceedings or is not otherwise subject to any ongoing injunction.

#### **L. Application for Permanent Injunction**

[127] The Plaintiffs are at liberty to apply to this Court for a permanent injunction at any time following service of the Order which emanates from this decision. I will seize myself with this matter for the purposes of that application.

[128] To be clear, the subject matter of that application is not whether there should be a permanent injunction but rather the extent of it. I well recognize that the threshold for granting any injunction in a defamation case is high. First, the comments in question must be defamatory, and second, it must be beyond doubt that there are no defences: *Kent v Martin*, 2012 ABQB 507 at para 30.

[129] Here, I have granted summary judgment in favour of the Plaintiffs, and in doing so, have considered every conceivable defence available to Ms. Proctor, and found that none can be established in law or fact. Accordingly, an injunction, this time permanent, is available.

[130] As far as I am concerned, what is at stake for Ms. Proctor in any permanent injunction application is the extent to which she should be allowed to access and use the internet, given her history of misuse. Her chances for continuing to be allowed to use the internet will, in large part, depend on whether between now and the date of the upcoming application, she has complied with Court Orders and has demonstrated that she can use the internet responsibly.

### **M. Result**

[131] In the result:

- the Plaintiffs, WEM and David, are granted summary judgment against the Defendant, Dana Proctor;
- the counterclaim of Dana Proctor is struck out;
- the temporary injunction currently in place is amended to include the additional prohibition outlined in paragraph 126 above;
- WEM and David are at liberty to apply for a permanent injunction at any time following service of the Order arising from this decision, at which time the only decision for the Court is the extent or scope of the permanent injunction;
- WEM and David may apply for costs throughout at the time of applying for the permanent injunction; and
- the Order from this decision shall be prepared by Mr. Dhir and sent to me for approval and signature, and the approval of Ms. Proctor is dispensed with under Rule 9.2(4)(c).

Heard on the 5<sup>th</sup> day of February, 2020.

**Dated** at the City of Edmonton, Alberta this 2<sup>nd</sup> day of March, 2020.

---

**Douglas R. Mah**  
**J.C.Q.B.A.**

**Appearances:**

Sandeep K. Dhir, QC  
Shourie Bhatia LLP  
for the Plaintiffs

Jeffrey B. Champion, QC  
Bishop & Mckenzie LLP  
for the Facebook Parties

Dana Proctor  
Self-Represented Litigant  
for the Defendant