CITATION: Hearn v. Maslak-McLeod Gallery Inc., 2017 ONSC 58805
COURT FILE NO.: CV-12-455650
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SUPERIOR COURT OF JUSTICE - ONTARIO

2017 ONSC 58805 (CanLII)

RE: Kevin Hearn, Plaintiff

– AND –

Estate of Joseph Bertram McLeod, Deceased and Maslak-McLeod Gallery Inc., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Jonathan Sommer*, for the Plaintiff

Michael Panacci, for the proposed interveners, Auction Network and 2439381 Ontario Inc.

John Goldi, in person as proposed intervener

HEARD: October 2-3, 2017

ENDORSEMENT

[1] This motion arises at the opening of trial, some 6 years after the Statement of Claim was issued.

[2] In this action, the Plaintiff, a renowned Canadian musician and member of the band Barenaked Ladies, claims that the Defendant, Maslak-McLeod Gallery Inc, (the "Gallery"), sold him a painting entitled "Spirit Energy of Mother Earth". The painting is purportedly by Norval Morrisseau, a renowned Anishinaabe artist and founder of the Woodland school of Canadian Indigenous art. The Plaintiff alleges that the painting is a fake and that it was not in fact painted by Norval Morrisseau.

[3] The personal Defendant, Joseph Bertram McLeod, was the principal of the Gallery. He died in August 2017. On August 14, 2017, the Plaintiff obtained from Dow J. an Order to Continue against Mr. McLeod's personal estate. I am advised by counsel for the Plaintiff that while the Gallery is not formally bankrupt, it is no longer open for business.

[4] The Defendants have filed a Statement of Defense, and until several months ago were active participants in the action. In May of this year, prior to Mr. McLeod's death, counsel for the Defendants sent another lawyer as his agent to the pre-trial and advised the court that the

Defendants no longer intended to defend the action. McEwen J. noted in his pre-trial directions that the matter was proceeding undefended. No one appeared for either of the Defendants at the opening of trial yesterday.

[5] Several parties who were previously not involved in this case did appear in court. One of them, John Goldi, seeks to intervene in the trial as a friend of the court. The others, Auction Network and 2439381 Ontario Inc. ("Number Co."), filed last minute motions for an adjournment of the trial in order to give themselves time to file more fulsome materials in support of motions for leave to intervene. The principal of Number Co. is Jim White, an art dealer who has been involved in previous litigation concerning the provenance of Norval Morisseau paintings. Mr. White has filed an affidavit in support of the adjournment request. I do not know anything about Auction Network, except that it is represented by Mr. Panacci, the same counsel who represents Number Co. and Mr. White.

[6] Mr. Sommer, as counsel for the Plaintiff, opposes the adjournment for reasons which are self-evident. He and his client have invested considerable time and effort getting to trial and they are ready to proceed. They have some 8 witnesses lined up, several of which I am advised have travelled from as far away as Alberta to attend the trial. As already indicated, the action was commenced 6 years ago. Mr. Sommer states that this has been a long, hard road involving extensive investigation and compiling of evidence, and he wonders aloud why the proposed interveners have waited until the opening of trial to come forward with their requests. He submits that the time for this kind of delay has passed, and that his client is entitled to have the matter tried as scheduled.

[7] Rule 13.01 of the *Rules of Civil Procedure* permits a party to apply for leave to intervene where they have an interest in the subject matter of the proceeding, or may be adversely affected by a judgment in the proceeding, or share a question of law or fact in common with an issue in the proceeding. Generally speaking, on a motion for leave to intervene the court is to consider: a) the nature of the case; b) the issues that arise; and c) the likelihood of the proposed intervener making a useful contribution to the case: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co*. (1990), 74 OR (2d) 164 (CA).

[8] The court's discretion to allow interveners to participate is typically exercised more narrowly in traditional, private, two-party litigation, *Authorson (Litigation Guardian) v. Canada (Attorney General)* (2001), 147 OAC 355 (CA), while the court has greater latitude to allow interventions where the case raises the public interest: *John Doe v. Ontario (Information & Privacy Commissioner)* (1991), 53 OAC 236, 239 (CA). The present case straddles these two categories; although it takes the form a two-party dispute over a piece of personal property, it has broader public implications as discussed below.

[9] I will address the requests by the proposed interveners sequentially, starting with Mr. Goldi. Rule 13.02 provides that any person may, with leave of the court, intervene as a friend of the court without becoming a party to the proceeding. Although he did not put it this way, Mr. Goldi essentially submits something close to what this court held in *Pinet v. Administrator, Mental Health Centre, Penetanguishene* (2006) 80 OR (3d) 139, at para 41, that his intervention

2017 ONSC 58805 (CanLII)

is necessary because it will assist my "informed adjudication of the issues to protect a constituency within the Canadian community that will not be otherwise represented during this application." He indicates in his written and oral submissions that he is a noted Canadian historian, documentary filmmaker, journalist, and blogger, who has dealt extensively with the issues at stake in this case.

2017 ONSC 58805 (CanLII)

[10] Although Mr. Goldi did not have a C.V. to tender with his materials yesterday, he came ready with one this morning. Having looked at it and at the websites he publishes, I do not question his credentials and his extensive experience with matters involving the contentious authenticity of Norval Morrisseau paintings. He has a website which displays a large quantity of Canadian art works, historical artifacts and memorabilia. This website presents itself as a "museum" of Canadiana, as Mr. Goldi described it; at the same time, it clearly indicates that the items are for sale and invites purchasers to submit bids. That said, Mr. Goldi assured me at the hearing that his interest here is as art expert, not as art seller, and that he has never sold a Morrisseau painting and has none for sale now.

[11] Mr. Goldi also authors an internet blog entitled "The Morrisseau Hoax Exposed". As its name suggests, this blog is singularly focused on the very issue in this litigation. It is Mr. Goldi's pervasive contention in his ongoing blog that those who allege that Norval Morrisseau paintings are fakes are undermining his legacy. Mr. Goldi asserts that people such as the Plaintiff and his counsel are themselves the perpetrators of a hoax on the arts community and on the public at large.

[12] I make no comment here as to whether this is right or wrong, or how this contention about allegations of Morrisseau 'fakes' might apply to "Spirit Energy of Mother Earth" – that is to be determined after trial on the merits. However, it is worth noting that Mr. Goldi's attention to this issue is both continuous – he appears to follow each and every allegation and controversy about Norval Morrisseau artworks – and personal – he takes aim at any purchasers of Morrisseau paintings and their legal counsel who challenge the authenticity of the works. Plaintiff's counsel, Mr. Sommer, has been the subject of some rather vituperative commentary on Mr. Goldi's blog.

[13] Likewise, Plaintiff's proposed expert witness, Carmen Robertson, a Professor of Visual Arts at the University of Regina, has strayed into Mr. Goldi's line of sight and come in for personal attack. Having apparently read her expert report which was served on counsel for the Defendants in anticipation of trial, Mr. Goldi wrote to the President of the University of Regina. In his letter he demanded "to know the official University of Regina position on this report", and was "seeking to clarify the university's position…[on] the willingness of its own employee, Carmen Robertson, to aid and abet and cooperate with the enablers of the greatest art fraud in Canadian history."

[14] It is Mr. Sommer's submission that this correspondence to a potential witnesses' employer constitutes a form of intimidation. He does not go so far as to say that Mr. Goldi has committed the offense of intimidating a justice system participant as set out in s. 423.1 of the *Criminal Code*, but he did indicate that Professor Robertson is understandably upset about this correspondence. In his reply, Mr. Goldi indicated that he did not intend to intimidate anyone, and

that he sincerely wanted to know whether the President of Professor Robertson's university stands behind a report in which the author goes out of her way to indicate her university affiliation.

[15] I am willing to take Mr. Goldi at his word on this. I assume that he did not intend to intimidate a witness when he wrote what was nevertheless an angry and, in my view, inappropriate letter to her employer. I also have no doubt that Mr. Sommer is relaying the truth when he says that the effect of Mr. Goldi's letter is that Professor Robertson is nervous about further participation in these proceedings. No one would want a missive like Mr. Goldi's letter sent to the president of their employer.

[16] It is almost beside the point to say that the accusations contained in this letter are meaningless. University faculty who publish scholarly research or who act as experts in judicial proceedings always identify their university affiliation; it would be surprising for them not to do so. Although Mr. Goldi might be, as he put it, "astonished that there does not seem to be a protocol in place, at the University of Regina, which binds employees, before publishing anything, into vetting it with their employer", most people in a university environment would be astonished if such a protocol were to exist. I am certain that the principle of academic freedom would prohibit any such vetting, not to mention that it would be logistically impossible for a university president's office to review every publication by its faculty in every field of study.

[17] As indicated, I do not doubt Mr. Goldi's credentials, his keen interest in the subject matter, or his sincerity in pursuing it. However, his approach is not conducive to an intervention under Rule 13.02. As McMurtry CJO explained in *Childs v. Desormeaux* (2003), 67 OR (3d) 385, at para 16 (CA), a friend of the court must "'make a useful contribution' to the argument of the issues before the court…[and] not cause injustice to the [opposing party]". In my view, Mr. Goldi does not meet that test.

[18] Turning to Mr. Panacci's clients, there may be more of a case for intervention although the record is not sufficient at this stage to make a determination. I do note that the affiant, Mr. White, has been down a similar road before. In *James White v. Ritchie Sinclair*, SC-10-109226 (Small Cl Ct), Mr. White brought a claim against Ritchie Sinclair, who was apparently a protégé of Noval Morrissea's and who also writes a blog entirely dedicated Morrissea-related legal and other matters. Mr. White's claim alleged slander of title with respect to Morrisseau paintings that he owned, contending that Mr. Sinclair's blog had asserted that a number of his paintings are "'Counterfeit', 'Forged' 'Bogus', 'Fake', 'Fraudulent'". I understand that in 2015, the claim went to trial and that Mr. White was the successful party, although I have not been able to find published reasons for that decision.

[19] I note that Mr. Sinclair turns up again in the proceedings before me, as he is one of the witnesses proposed by Mr. Sommer in the Plaintiff's affidavit of documents (although Mr. Somer advises he does not now intend to call him as a witness at trial). He has apparently been involved in multiple claims and other proceedings pertaining to Morrisseau paintings. In particular, he was a defendant in a defamation action brought by, *inter alia*, the late Joseph McLeod and the Gallery (i.e. the Defendants in this case) – *McLeod et al. v. Sinclair*, CV-08-

2017 ONSC 58805 (CanLII)

00366828 – in which Mr. McLeod alleged that Mr. Sinclair's assertions of forgery, etc. on his Morrisseau blog caused him economic loss.

[20] In an interlocutory motion brought by Mr. McLeod, Mr. Sinclair was ordered to place a prominent warning notice on each and every page of his website. The notice advises that the claims are unproven every time the blog "suggests that any distributor, gallery or individual owner who possesses, has owned, or possessed in the past or has sold or is now selling a painting or other work of art attributed to Norval Morriseau, or any page that opines that any work attributed to Norval Morriseau is a fraud, forgery, counterfeit, stolen or in any other way is not authentic or genuine": *McLeod et al. v. Sinclair*, 2008 CanLII 67901, at para 41 (SCJ).

[21] In addition to submitting an affidavit of Mr. Sinclair, a persistent litigant on Morrisseau-related matters and an unsuccessful adversary of Mr. White's and Mr. McLeod's, Mr. Sommer was counsel on another case very similar to the present one. In *Hatfield v. Child*, 2013 ONSC 7801, a plaintiff represented by Mr. Sommer alleged that a Morrisseau painting she had purchased was a fake and that a black brush signature purporting to be Norval Morrisseau's on the back of the painting was a forgery. The court rejected the evidence of Mr. Sinclair, who was presented as a witness by Mr. Sommer on behalf of the plaintiff, and accepted that the painting was an authentic Morrisseau painting.

[22] This court, on appeal in *Hatfield v Child*, upheld the trial judge's finding that the signature was that of Norval Morrisseau [para 16]. A similar type of black brush signature is in issue in the present case. Also of interest in *Hatfield v. Child* is that the court found that Mr. Sinclair's evidence was "unsupported and unreliable" [para 18], while it found that Mr. McLeod, who had done an appraisal of the painting in issue, was "a credible witness" [para 26].

[23] In yet another case raising a question of provenance of a Morrisseau painting, *John McDermott v. Joseph McLeod and Maslak McLeod Gallery Inc.*, CV-13- 490894, a purchaser represented by Mr. Sommer sued the same defendants as in the present case. That claim has apparently been abandoned by its plaintiff. Interestingly, in a 2014 newspaper interview, Mr. Sommer indicated that the two cases are remarkably similar. As he put it, "Those facts as they were presented in the McDermott claim, those are exactly the facts we'll be proving or attempting to prove in the Hearn case": James Adams, "Famed tenor drops suit alleging art dealer sold him fake Morrisseau paintings", *The Globe and Mail*, October 31, 2014, accessed Oct. 2, 2017: https://beta.theglobeandmail.com/arts/art-and-architecture/famed-tenor-drops-suit-alleging-art-dealer-sold-him-a-fake-morrisseau/article21411707/?ref=http://www.theglobeandmail.com&.

[24] I say all of this not to pre-judge any issue or witness here, including Mr. Sinclair, or to reflect negatively on Mr. Sommer's case on behalf of the current Plaintiff. I will hear that evidence when it is presented in the context of this case, and will assess it accordingly. Each case rises and falls on its merits and on its own evidence adduced at trial.

[25] However, the fact that a position which, by Plaintiff's counsel's own description, is very similar to that taken by the Plaintiff here, has not been successful in several past cases, gives me

2017 ONSC 58805 (CanLII)

pause. Mr. Panacci, on behalf of the proposed interveners Auction Network and Number Co., submits that it is unfair and dangerous for this court to now adjudicate the provenance of a Morrisseau painting without anyone appearing for the opposing side. He argues that Mr. Sommer has already lost the same argument with previous clients, and that the all-important difference here is that there will be no one arguing against him if the interveners are not given a hearing.

2017 ONSC 58805 (CanLII)

[26] It is hard to disagree with this logic. Although it is a trial judge's duty in an undefended case to ensure that the Plaintiff satisfies his burden of proof, it is not unduly cynical to observe that trials are easier to win when there is no opponent. Given the history of the various proceedings surrounding Norval Morrisseau paintings, I cannot help but think that the cause of justice will be advanced if there are two sides facing off in this trial. If I am to assess the Plaintiff's witnesses, it would be helpful for them to be tested in cross-examination; if I am to evaluate the Plaintiff's expert's opinion, it would be helpful to have another expert provide me with an opposing opinion. If this case has to proceed undefended it will do so, but it behooves me to at least try to level the playing field.

[27] Further, Mr. Panacci submits that any judgment in this case will have an impact beyond the named parties. Mr. Sommer responds that this claim is *in personam* and that the judgment at trial will therefore bind only the named parties. While Mr. Sommer's point is correct as a matter of legal formality, Mr. Panacci is also correct that the judgment – whichever way it goes – will undoubtedly impact on other Morrisseau collectors and dealers such as Mr. White. For example, if this case and the McDermott case were supposed to be on all fours with each other, other cases may fit the same pattern. I do not know how many Morrisseau (or purportedly Morrisseau) paintings exist with a similar black brush signature as the one at issue here, but at least in that respect "Spirit Energy of Mother Earth" does not appear to be unique.

[28] Finally, Mr. Panacci submits that a decision at trial will have impact on issues of Indigenous cultural heritage. As Lederer J. pointed out in *McLeod v. Sinclair*, *supra*, at para 1, Norval Morrisseau "was a significant First Nations artist." Mr. Panacci's motion materials state that he is in communication with First Nations representatives, and that he may soon be in a position to represent that interest as well. While these representatives are not presently before me to rule on, it seems to me that they may be important voices to be heard. I would like to maximize the chances that interveners representing this interest can participate in the case.

[29] Having said all of that, an adjournment at this late date is more than just a scheduling inconvenience to the Plaintiff. Mr. Panacci submits that an adjournment presents no prejudice to the Plaintiff that cannot be compensated for in costs. He may be right about that, but the costs may be substantial.

[30] As already indicated, Mr. Sommer has had to fly witnesses in from out of province and, presumably, put them up in hotels in Toronto. While his own time spent in trial preparation will not go to waste when the trial resumes, he has had to spend roughly a day and a half arguing about the late arriving interveners. The timing of the motions before me has to do with Mr. McLeod's untimely death rather than with the proposed interveners' tardiness, nevertheless that is not a cost the Plaintiff should have to bear.

[31] The adjournment sought by Auction Network and Number Co. to prepare proper motion materials for leave to intervene is granted. I remain seized of the matter. Mr. Panacci and Mr. Sommer will canvass new dates with me, but the adjournment will not be a lengthy one – weeks rather than months – and the next appearance will be peremptory on Mr. Panacci's clients. At that time I expect to hear argument on the motion for leave to intervene, make a ruling, and immediately return to the trial. Accordingly, both counsel should be prepared to launch into the trial, even though they will not know until I decide on Mr. Panacci's motion who, if anyone, will be opposing the Plaintiff.

[32] Mr. Goldi's motion for leave to intervene as a friend of the court is dismissed, without costs. During the oral argument Mr. Goldi indicated that he had an expert report prepared with respect to the painting at issue. I have not seen this report as he is not a party and did not submit it into evidence. However, I would encourage him to share it with Mr. Panacci and for Mr. Panacci to review it to see if this expert can be of use to him. Of course, this is only a suggestion to expedite matters, and Mr. Panacci and Mr. Goldi can do as they see best in this regard.

[33] The out-of-pocket disbursements incurred by the Plaintiff in transporting and housing witnesses for trial this week, plus Mr. Sommer's own travel and accommodation expenses and his fees for the hours actually spent in court yesterday and today, are to be paid by Auction Network and Number Co. To be clear with respect to the fees, I am not referring to Mr. Sommer's preparation time, only to the hours he was actually in court. Costs of the time spent preparing for trial will be in the cause.

[34] Within one week of today, Mr. Sommer shall provide Mr. Panacci with a Bill of Costs itemizing the disbursements described above and tallying up his fees for the court time on an hourly basis. Auction Network and Number Co. shall pay this Bill prior to the next court date, failing which they and any other entity affiliated with Mr. White will be barred from intervening in this trial.

[35] In the event that Auction Network and Number Co. dispute the Bill of Costs provided to them by Mr. Sommer, Mr. Panacci is to send their objections in writing to me at 361 University Ave., Toronto, within one week of receiving Mr. Sommer's Bill. These written objections should be no longer than 2 pages. If at that point Auction Network and Number Co. have not yet paid the Bill sent by Mr. Sommer, Mr. Panacci must indicate this in the written objections so that I can make a further order regarding payment if I deem it necessary.

Morgan J.

Date: October 3, 2017

2017 ONSC 58805 (CanLII)