

CITATION: Hearn v. Maslak-McLeod Gallery Inc., 2017 ONSC 7246
COURT FILE NO.: CV-12-455650
DATE: 20171204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kevin Hearn, Plaintiff

– AND –

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

– AND –

White Distribution Limited, 2439381 Ontario Inc., and Nathaniel Big Canoe,
Intervenors

BEFORE: Justice E.M. Morgan

COUNSEL: *Jonathan Sommer*, for the Plaintiff

Michael Pinacci, for the Intervenors

Jamie Kastner, in person

HEARD: December 4, 2017

MOTION TO VIDEOTAPE THE TRIAL

[1] At the outset of trial, the Plaintiff has brought a motion to permit filmmaker Jamie Kastner to videotape the trial. Mr. Kastner is a documentary filmmaker and is in the process of producing an educational film about the controversies surrounding the art works of the renowned First Nations painter, Norval Morrisseau. This trial concerns the authenticity of one of Mr. Morrisseau's paintings.

[2] Mr. Kastner advises that his film has been commissioned by TV Ontario, and that it will present issues in an even-handed, non-inflammatory or adversarial way. He has a demonstrated background in documentary movies and is a credible educational filmmaker. Counsel for the Plaintiff and counsel for the Intervenors both consent to the proceedings being filmed, on the understanding that any given witness will have the choice to opt out of having their testimony filmed.

[3] Despite the consent of both sides and the qualifications of the filmmaker, this motion causes me substantial concern.

[4] In the first place, there is no authority for it. Mr. Sommer, on behalf of the Plaintiff, points to section 136(3)(c) of the *Courts of Justice Act* as providing a statutory basis for the motion. Section 136 does not exactly authorize the filming of a trial. Indeed, quite the opposite; it prohibits the filming of a court proceeding. Subsection 3(c), of section 136 provides a small caveat whereby a judge can order an exception to the usual rule banning filming of a court proceeding if done for educational purposes. However, counsel can point to no case or instance where this has actually been done.

[5] The procedure described in s. 136(3)(c), in other words, is rarified at best. I can understand that it provides a narrow exception to allow the filming of legal argument in an appeal case such as one sees late at night on cable television, as appellate argument by its nature engages the public and does not involve witness testimony. I can also understand that in enacting this section of the *Courts of Justice Act* the legislature might have provided a small opening to film discrete procedures to be used in educating law students. There is nothing like viewing an effective cross-examination to train young lawyers in the methods underlying an effective cross-examination. But it is more difficult for me to view s. 136(3)(c) as authorizing the inclusion of video from the trial itself in a documentary film on the substantive subject matter of the trial. I simply do not know how that would impact on the dynamics of the trial, or whether it would rebound to the detriment of any one party. Absent some precedent, I am loathe to go down that road.

[6] There is another concern which relates more particularly to this trial. I have already had several motions, including one contempt of court motion brought by the Plaintiff against various parties (not the Defendant or the Intervenors here) that are engaged in advocacy about Morrisseau art, in which far reaching allegations were made about misconduct by those parties. Counsel for the Plaintiff has pointed me to a blog dealing with allegations and counter-allegations regarding the authenticity of Morrisseau paintings in which seemingly defamatory statements are made about all who engage in this advocacy – including Plaintiff’s counsel himself as well as the expert witness that the Plaintiff proposes to call.

[7] Indeed, Plaintiff’s counsel has even complained about surreptitious photographing of him in the courthouse, and the intimidating effect of such photography. While the proposed videotaping of the trial would be out in the open rather than hidden, and any given witness could opt not to be filmed, the filming of witnesses under this atmosphere could well have an adverse effect on the proceedings and the testimony. I could imagine witnesses feeling that they were somehow obliged to cooperate in the filming of their testimony in order not to undermine the educational value of the film, but then tempering their testimony lest viewers of the film post it on the internet and blog about them in unflattering ways.

[8] Although as indicated there is little precedent in this regard, I am certain that I am not alone in thinking this way about witnesses and the impact of filming. In *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 883, the Supreme Court of Canada took note of the

anxiety that people naturally feel when called to testify in court. In considering the issue of publication bans on witness testimony or identity, the court noted that removal of publicity will “maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity.” Furthermore, in *Canadian Broadcasting Corporation v A.G. Canada*, [2011] 1 SCR 19, at para 83, the Supreme Court of Canada considered the prospect of audio broadcasts of trial proceedings, and pointed out that, “To broadcast the audio recordings of a hearing would be to alter the forum in which the testimony is given.” The Court went on to state emphatically that, “A person, whether a party or a witness, who is summoned to testify in court must address his or her testimony to the court, in the courtroom, not to the media’s audience outside the room.”

[9] In view of the Supreme Court’s skepticism about other forms of media presence in the courtroom, and in view of the narrowness of the exception contained in section 136(3)(c) of the *Courts of Justice Act*, I am not prepared to authorize the videotaping of the trial of this matter. The impact on witnesses and on the fairness of the trial is too unpredictable.

[10] The Plaintiff’s motion to authorize the videotaping of the trial is dismissed. As the Intervenors, who are the Plaintiff’s only adversaries in this otherwise undefended trial, consented to the Plaintiff’s motion, there will be no costs of this motion for or against any party.

Morgan J.

Date: December 4, 2017