CITATION: Hearn v. Maslak-McLeod Gallery Inc., 2017 ONSC 7247
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., Allen Fleishman, and Nathaniel Big Canoe, Proposed Intervenors

BEFORE: Justice E.M. Morgan

COUNSEL: *Jonathan Sommer*, for the Plaintiff

Michael Pinacci, for the Proposed Intervenors

HEARD: December 4, 2017

MOTION FOR LEAVE TO INTERVENE

[1] On October 3, 2017, I adjourned this motion brought at the opening of trial in order to provide the Proposed Intervenors time to file a full set of materials in support of their motion to intervene. They have now done so.

[2] The Proposed Intervenors are two businesses owned by Jim White, an art collector and dealer who owns a number of Norval Morrisseau paintings, Allen Fleishman, a director and officer of Auction Network.ca, which carries on business as an online auctioneer of Norval Morrisseau art, and Nathaniel Big Canoe, a First Nations painter in the Woodlands School of art in the tradition of Norval Morrisseau and a person who is knowledgeable about the significance of Norval Morrisseau's artistic legacy to Indigenous culture in Canada.

[3] In my endorsement of October 3, 2017 I set out the reasons that it would be helpful to have intervenors participate in this trial, which will otherwise be undefended. There I explained that the authenticity of Norval Morrisseau paintings has been the subject of much litigation and that it is preferable to hear two sides of the story instead of one. I also indicated that there are interests in the question of Morrisseau art – both commercial and cultural – that go beyond the

two parties to this litigation. The relevant portions of my October 3, 2017 endorsement are as follows:

> [25] …Mr. Panacci, on behalf of the proposed intervenors 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 intervenors are not given a hearing.
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> [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.
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> [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.
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> [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 intervenors representing this interest can participate in the case.

[4] Generally speaking, Rule 13 of the *Rules of Civil Procedure* sets out three factors to consider in granting leave to intervene: a) whether the proposed intervenor has an interest in the

subject matter of the proceeding, b) whether the proposed intervenor is potentially adversely affected by a judgment in the proceeding, or c) whether the proposed intervenor shares a question of law or fact with an issue in the proceeding. These factors, in turn, prompt the court to look carefully at not only the nature of the case and the issues addressed therein, but at whether the proposed intervenor is likely to make a useful contribution: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co*. (1990), 74 OR (2d) 164 (CA).

[5] As I have indicated previously, the present case straddles private and public issues. On one hand it is a dispute over the provenance of a single, privately owned work of art; on the other hand, it is one in a series of cases that has put into issue the works of a prominent and culturally significant First Nations artist. The burden on a proposed intervenor is heavier in cases that are "closer to the 'private dispute' end of the spectrum": *Authorson v A.G. Canada*, 2001 CanLII 4382, at para 9 (Ont CA). There, a very direct interest is generally required in the subject matter of the proceeding, such as where a person applies to intervene in an action over title to a piece of land where the intervenor also claims an interest in the same piece of land: *Finlayson v GMAC Leaseco Ltd.* (2007), 84 OR (3d) 680, at para 27 (SCJ).

[6] On the other hand, the public nature of some of the issues expands the leeway for interventions beyond what would ordinarily pertain in strictly private litigation: *John Doe v. Ontario (Information & Privacy Commissioner)* (1991), 53 OAC 236, 239 (Ont CA). The question is whether the case "'rises above' a purely private dispute": *Authorson v A.G. Canada*, 2001 CanLII 4382, at para 10 (McMurtry CJO in chambers).

[7] The case law under Rule 13 indicates that the mischief that the traditionally strict application of the intervention rule seeks to address when it comes to private litigation is the introduction of a new quasi-party into the case, with its "real potential to complicate and prolong proceedings": *Loy-English v The Ottawa Hospital*, 2017 ONSC 6533, at para 12. In my view, that is not a particular concern here. The Defendant has not appeared to defend the action, and so the most the intervenors will do is to stand in the Defendant's shoes. The Plaintiff, of course, has a right not to have his action made longer, more complex, and more costly than it would otherwise be if he faced only the Defendant; here, however, where there is no Defendant, and if the Proposed Intervenors are permitted to participate the Plaintiff will simply face a defended trial rather than an undefended one.

[8] Turning to Mr. White, it seems to me that he has a strong interest in subject matter of the case and will be an appropriate party to stand in the shoes of the absent Defendant. His affidavit attests to the fact that he is a substantial collector of Norval Morrisseau art, and that he owns some 86 Morrisseau paintings ranging from a value of $1,000 to $80,000 each. He has both brought and testified in previous actions concerning the authenticity of Morrisseau paintings. Indeed, in seeking to demonstrate that Mr. White should have applied to intervene sooner than he has, the Plaintiff has submitted an affidavit detailing the numerous times that Mr. White has appeared in legal proceedings in which he has mentioned this case or the painting at issue in this case.

[9] As I mentioned in my October 3, 2017 endorsement, I am particularly concerned that there be someone standing at least partially in the shoes of the Defendant. The painting in issue here apparently has a "black brush" signature on the reverse side of the canvass that is purportedly that of Norval Morrisseau. In previous litigation against the Defendant (before his untimely passing several months ago), counsel for the Plaintiff then acting for another purchaser of a Morrisseau painting was unsuccessful in challenging the authenticity of this type of signature: *Hatfield v. Child*, 2013 ONSC 7801. Since the Defendant's estate is not interested in defending this matter, there is a serious danger that an uncontested trial will, in effect, undermine the provenance of all black brush-signed Morrisseau paintings. A collector in the position of Mr. White has more than in interest in the outcome of this case or in setting a legal precedent to his liking: *Miller v Jansen*, 2012 ONSC 4059, at para 16. He has an interest in the very subject matter of the case: *Finlayson*, at para 27.

[10] That said, I will exercise my authority as trial judge to ensure that any evidence provided by Mr. White or any witness called on his behalf is relevant to the issues in this trial and admissible as evidence. In correspondence from counsel for Mr. White to counsel for the Plaintiff, it was indicated that Mr. White will testify as to the value of his Morrisseau paintings and the potential impact of a ruling in this case on that value. Mr. Sommer points out, correctly, that this kind of information may be relevant to Mr. White's position on this motion as it goes to establishing his interest; but information about the impact of a ruling about the authenticity of the Morrisseau painting at issue here on other Morriesseau paintings likely does not assist in ascertaining the authenticity of the painting in issue here. As Mr. Sommer says, it seems to ask the court to be flexible in determining the truth as a finding against the Plaintiff may hurt others. That is not proper evidence to be brought in this case.

[11] As for the application to intervene by Mr. Big Canoe, he speaks more to the public interest of this case. While he is not a formal spokesperson for the Assembly of First Nations or other Indigenous community organization, he deposes that he is a member of the Chippewas of Georgina Island First Nation in the area of Lake Simcoe, which is a band related to that of Norval Morrisseau's own community. While he does not represent the Morrisseau family or estate in any legal sense – the Morrisseau estate has an executor and it has retained solicitors that represent it in that sense – he explains that he reflects Morrisseau's artistic heritage. As he puts it in his affidavit, he has "a genuine interest in promoting and protecting the art of Norval, the legacy of Norval…and the art and culture of the Aboriginal Community and Canada."

[12] It is admittedly difficult for me to assess Mr. Big Canoe's potential contribution as an intervenor. I appreciate and agree with his statement that this case will benefit from an Indigenous voice and a party that conveys the meaning of Norval Morrisseau art to First Nations culture. But I do not really know whether Mr. Big Canoe will be effective in fulfilling that role. His affidavit provides me with little in terms of his own artistic endeavors except to say that he is an artist and that he is a Frist Nations person who knew Noval Morrisseau and who is from an area close to Morrisseau's own territory.

[13] Counsel for the Proposed Intervenors points out that no one else from the First Nations community has come forward to speak to the matters that Mr. Big Canoe addresses, and that Mr.

Big Canoe is being presented in order to fill that gap. Counsel for the Plaintiff responds that Plaintiff will be calling several witnesses who are First Nations persons, including his proposed expert witness Dr. Carmen Robertson, and that these witnesses will address the issues that Mr. Big Canoe identifies as important.

[14] With respect, it is not an answer for counsel for the Plaintiff to say that the Defendant – or someone proposing to stand in the shoes of the Defendant – need not be concerned that there is no one to address the issues around Indigenous arts and culture, because the Plaintiff will have someone doing just that. This speaks to the need to have intervenors take on the defense role in the first place. Counsel for the Proposed Intervenors advises me that if granted leave to intervene his clients will be calling a number of witnesses, including an expert witness of their own as well as Mr. Big Canoe and others to speak to the matters at hand. While no one will be able to testify in the same way as the late Mr. McLeod would have testified, this is as close as we can now come to ensuring that all issues are properly aired.

[15] I see no need to deal with the motion for leave to intervene brought by Mr. Fleishman. Counsel for the Plaintiff complains that Mr. Fleishman did not meet the timetable that I set out for this motion, which under the circumstances was designed as a strict one. He has a point. Mr. Fleishman should have expedited this motion like the other two Proposed Intervenors did. In any case, counsel for the Proposed Intervenors advises me that Mr. Fleishman would not be available to testify at trial due to medical reasons, which makes the issue moot. To the extent that he has an interest that could be satisfied through counsel's cross-examination of the Plaintiff's witnesses and final submissions, these tasks will be done by counsel on behalf of the other Intervenors and I doubt much will be lost if a third Intervenor does not have his name included on the style of cause.

[16] Leave to intervene in this trial is granted to White Distribution Limited and 2439381 Ontario Inc. Leave to intervene is also granted to Nathaniel Big Canoe.

[17] The Intervenors are at liberty to participate as parties in this case, and may call witnesses, have their counsel cross-examine adverse witnesses, and make final submissions – subject, of course, to my rulings as trial judge. They will also be responsible for or entitled to costs in the usual way of a party in a trial. In this regard, I note that Mr. White indicated in his supporting affidavit filed on behalf of White Distribution Limited and 2439381 Ontario Inc. that his personal interest and the interest of these two companies in Norval Morrisseau paintings are the same. A condition of their intervention is that Mr. Jim White will be personally liable for any costs ordered against White Distribution Limited and 2439381 Ontario Inc.

[18] Costs of this motion will be in the cause.

Morgan J.

Date: December 4, 2017