CITATION: Hearn v. Maslak-McLeod Gallery Inc., 2018 ONSC 945
COURT FILE NO.: CV-12-455650
DATE: 20180207

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

HEARD: February 7, 2018

MID-TRIAL MOTION TO QUALIFY EXPERT WITNESS

[1] The Intervenors, who are standing in the shoes of the Defendant in this trial, have proposed calling Mr. Paul Bremner as an expert witness in art appraisal and, more specifically, in the art work of Norval Morrisseau. At issue in the trial is the challenged authenticity of Morrisseau's 1974 painting (or his purported painting) *Spirit Energy of Mother Earth*. The Plaintiff's expert witness, Dr. Carmen Robertson of the University of Regina, has already been qualified as an expert in the works of Norval Morrisseau and has completed her testimony.

[2] Mr. Bremner is not well practiced in being an expert witness. He is not a professional witness, and does not have the usual academic credentials of a professional witness. His expertise is based on experience in the field, not academic credentials. He does have the accreditation necessary to practice as a professional personal property appraiser – he has completed the requisite course work and belongs to both the Canadian and the American professional associations – but most importantly he is a long time appraiser of artwork, including the work of Norval Morrisseau. As Mr. Bremner put it, the courses he took are one thing – they are a threshold – but the real credential is his 43 years of experience in the art world and in art

appraisals. He has viewed and studied several thousand Morrisseau paintings, among thousands of others, during the course of his career.

[3] The bar for qualifying as an expert and for admitting expert opinion evidence is not overly high. As the Supreme Court of Canada said in *R v Mohan*, [1994] 2 SCR 9, "What is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury'" [citations omitted]. Given that most people, including myself, have only limited experience and a very general knowledge of the art world, all types of expertise – including industry experience – could potentially meet this test. Certainly, this case is not akin to a medical case where lengthy schooling in the field is indispensable in achieving the required expertise.

[4] In questioning Mr. Sommer when he raised the objection to Mr. Bremner's credentials, I compared Mr. Bremner's industry experience to that of a jeweler appraising a diamond, and in the process determining whether the specimen is really a diamond or is a piece of cut glass. The jeweler with 43 years of experience may be as valuable as a scholar with a doctorate in mineralogy. I am willing to agree with Mr. Pinacci that Mr. Bremner has the kind of experience that could potentially be qualified to give helpful opinion evidence here. His long experience in art appraisals, and especially in Morrisseau appraisals, necessarily includes substantial experience in distinguishing authentic pieces from forged pieces. That takes a practiced and discerning artistic eye, and, as Mr. Pinacci suggests, it does not necessarily require a PhD in fine art.

[5] I will turn briefly to Mr. Sommer's submission that Mr. Bremner has had business dealings in the past with one of the intervenors, James White, and that this makes him an inappropriate choice of expert witness. Mr. Bremner sold Mr. White some Morrisseau paintings some 20 years ago when he was an art dealer himself. Sometime after that, Mr. White was apparently part of a group that purchased Mr. Bremner's own art business when his spouse took ill and he left the business. In recent years, Mr. Bremner advises that he sold a few Morrisseau reproductions to other galleries that he had purchased from Mr. White. The art world of dealers specializing in Morrisseau paintings is not that large, and so it does not take me by surprise that people in the art gallery business have had past dealings with each other.

[6] There is no evidence that Mr. Bremner has any financial interest or ongoing dealings with Mr. White today, or that he will financially benefit from the result of this case. Mr. Bremner has indicated that he does not own any Morrisseau black dry brush signed paintings of the type at issue here; indeed, he indicated that he does not currently own any Morrisseau paintings at all. Moreover, even Mr. White is only an intervenor and not a party to the case, and although he has some indirect economic concerns about the general value of Morrisseau paintings he has no direct financial interest in this case himself. I do not see Mr. Bremner's past business dealings with Mr. White to be such as to undermine his impartiality, independence and absence of bias: see *WBLI v Abbott and Haliburton*, [2015] 2 SCR 182, at para 32.

[7] Mr. Sommer submits that since Mr. Bremner has appraised, and thereby authenticated, Morrisseau paintings in the past, he has an ongoing interest in authenticating the Morrisseau

painting here. In my view, that puts the matter too high. Just because Mr. Bremner has said that other Morrisseau paintings are authentic and therefore valuable does not mean that he is compelled to find every supposed Morrisseau painting authentic and valuable. He certainly has no interest in *Spirit Energy of Mother Earth*, and it would not matter to Mr. Bremner's appraisal business if the painting at issue here were found not to be authentic. To exclude Mr. Bremner on the theory presented by Mr. Sommer would be to exclude as an expert every person in the art appraisal, or the Norval Morrisseau art appraisal, business. Anyone in that business will have a record of appraisals behind him or her, but that is simply the price of having long experience in the industry – the very thing which lends strength to Mr. Bremner's expertise. I do not find here any reason to doubt Mr. Bremner's honesty or objectivity in giving the opinion asked of him in testimony.

[8] There is, however, one aspect of the challenge to Mr. Bremner's being called as an expert witness that gives me pause. Mr. Sommer accurately notes that Mr. Bremner's expert report, such as it is, does not conform to the requirements of Rule 53.03 of the *Rules of Civil Procedure*. The report is essentially an authenticity and appraisal certificate. As such, it does not set out the methodology engaged in my Mr. Bremner or the reasoning that he pursued in coming to his conclusion. It simply states that the painting "is most definitely a work composed by the artist Norval Morrisseau", and provides a monetary value for the work.

[9] The Court of Appeal in *Marchand v Public General Hospital of Chatham* (2000), 51 OR (3d) 97, at para 38, has admonished against this kind of expert report. Specifically, the Court indicated that, "an expert report cannot merely state a conclusion." I would add that it will be difficult for Mr. Bremner to improve or elaborate on the information he conveys in his oral testimony. The Court of Appeal in *Marchand* warned that, "while testifying, an expert may explain and amplify what is in his or her report but only on matters that are 'latent in' or 'touched on' by the report." The entire methodology employed by the expert in producing a bare, conclusory report is obviously not what the Court of Appeal had in mind when it spoke of explaining or amplifying what is already in the report.

[10] The problem here is accentuated by the fact that Mr. Bremner's brief report was served very late – Mr. Sommer received it literally the day before Mr. Bremner was called to testify. Mr. Sommer therefore had no time to request a further and better report or to figure out how to prepare for his cross-examination of Mr. Bremner on a report that itself gives little hint as to what the testimony will contain. In this respect, the Court of Appeal has put the duty on me as gatekeeper of procedural fairness. In *Marchand*, at para 38, the court specifically said that, "The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report."

[11] It is evident from a review of Mr. Bremner's 1-page expert report that virtually anything he says in oral testimony about the painting in issue will not have been anticipated from a reading of his report and will therefore take counsel by surprise. His report may work well in the appraisal business as a certificate issued to an art owner, but as an expert analysis it is bereft of

methodology or reasoning. It is simply not a true expert report as contemplated by the *Rules of Civil Procedure*.

[12] For that reason I am not prepared to qualify Mr. Bremner as an expert witness. It would simply be unfair to the Plaintiff and his counsel to do so.

Morgan J.

Date: February 7, 2018