

2008 CarswellOnt 7842

McLeod v. Sinclair

Joseph McLeod (c.o.b. as Maslak McLeod Gallery), Jackie Bugera, Bugera Holding Ltd. (c.o.b. as Bearclaw Art Gallery), James White, White Distribution Limited, Donna Child, Artworld Inc. (c.o.b. as Artworld of Sherway), Sun Nam Kim ("Sunny Kim"), and Gallery Sunami Inc. (c.o.b. as Gallery Sunami), Plaintiffs and Ritchie Sinclair (also known as "Ritchie Ross Sinclair", "Richie Sinclair", "Stardreamer", and "Blackmagic"), Defendant

Ontario Superior Court of Justice

Lederer J.

Heard: December 8, 2008
Judgment: December 8, 2008
Docket: CV-08-00366828

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Counsel: Beth Symes, Ben Millard, for Plaintiffs / Moving Parties

Zak Muscovitch, for Defendant / Responding Party

Subject: Intellectual Property; Property; Civil Practice and Procedure

Intellectual property.

Remedies.

Lederer J.:

1 Norval Morriseau is a well-known and recognizable name in the world of Canadian art. He was a significant First Nation artist. More importantly for the purpose of this proceeding, he was prolific. By one estimate, he produced as many as eight thousand separate works of art.

2 The plaintiffs can generally be described as four galleries and one distributor, all engaged in the business of identifying, purchasing, holding and selling the work of Norval Morriseau.

3 While there is no direct evidence of this, counsel alluded to, articles were presented and it is, I believe, generally known that there is a concern that there are a number of paintings on the market which are claimed to be or identified as the work of Norval Morriseau when they are not. They are "forgeries" or "counterfeit".

4 The defendant was referred to by counsel in their submissions both as Ritchie Sinclair and Stardreamer. The defendant describes himself as the "artistic apprentice" of Norval Morriseau. Consistent with the allusion to which I have already referred, the defendant expresses a concern that: "Many of the works that are attributed to Norval Morriseau however, are in fact counterfeit, and have been produced solely for the purposes of capitalizing off of Norval Morriseau's fame and market value".

5 It seems, from the record, that the defendant has made it his personal concern to identify, uncover, make known and even publicize works said to be those of Norval Morriseau which he believes are false. In his affidavit, he says:

I have no interest in identifying counterfeit Morriseau paintings other than to perform a public service and to assist in protecting the legacy of one of Canada's foremost artists.

6 In furtherance of this goal, the defendant has created and continues to update a website (*www.Morriseau.com*) on which he purports to identify forged, counterfeit and stolen works of Norval Morriseau. The website is at the heart of this action. The plaintiffs say it defames each of them by falsely and without justification stating that works of art attributed to Norval Morriseau owned or held by them for sale are not genuine. In each case, the website is said to harm their reputation, to threaten their goodwill in the marketplace and to endanger or damage their businesses.

7 Counsel for the plaintiffs points to examples of the words and images on the website that demonstrate these concerns.

8 These sample pages contain titles such as:

(a) 'Inferior Counterfeits at Artcube'

(b) 'Inferior Morriseau #223' 'Image Copyright -- Bearclaw Gallery' accompanied by the words 'Inferior Counterfeit Morriseau #107'

(c) 'Image Copyright -- Artworld of Sherway' accompanied by the words 'Inferior Counterfeit Morriseau #330'

(d) Inferior counterfeit auctioned off by Jim White.

9 These sample pages contain "Tags" or key word references such as:

copy, forgeries, imitations, fake, inferior

10 These sample pages contain narrative such as:

Mr. Christian Morriseau posing with what appears to be inferior counterfeit Norval Morriseau paintings. There appear to be fresh paintings behind Artcube owner Sunny who sits with Christian Morriseau

...

Description: INFERIOR COUNTERFEIT NORVAL MORRISEAU ' in the opinion of Norval Morriseau protégé, Ritchie 'Stardreamer' Sinclair this is an image of an INFERIOR COUNTERFEIT NORVAL MORRISEAU painting. ' Inferior counterfeit ' means counterfeit, fake, falsified, unauthorized, un-

genuine, unreal, forged, forgery, descending into the inferior regions of the earth, poor in quality, sub-standard, less important, valuable, or worthy, bottom-rung, less, lesser, lower, nether, peon, subordinate, under, underneath, bent, bogus, copied, crock, deceptive, delusive, delusory, faked, fishy, fraudulent, imitation, misleading, mock, pseudo, sham...

11 These sample pages contain graphic images which with the words included implicate at least some of the plaintiffs. A hexagon which has the appearance of a street sign and encloses the following words can be found on some of these pages. The enclosed words are:

THIS IMAGE HAS BEEN REMOVED

THERE ARE SO MANY INFERIOR COUNTERFEIT MORRISSEAU TO CHOOSE FROM

AND IT SEEMED SO IMPORTANT TO THIS GALLERY THAT THEY SWORE UNDER PENALTY OF PERJURY, THAT THEY HOLD EXCLUSIVE COPYRIGHT TO THIS IMAGE that...

it seemed wise to comply.

12 Many of the pages contain images of work ostensibly that of Norval Morriseau. There are said to be at least forty-five images associated with the Maslak McLeod Gallery which the website suggests are "stolen, forgeries, counterfeit or were otherwise inauthentic". There are said to be at least forty-five images associated with the Bearclaw Gallery which the website suggests are "stolen, forgeries, counterfeit or were otherwise inauthentic". There are said to be at least thirty-six images associated with Artworld of Sherway which the website suggests are "stolen, forgeries, counterfeit or were otherwise inauthentic". There are said to be at least twelve images associated with the Gallery Sunami which the website suggests are "stolen, forgeries, counterfeit or were otherwise inauthentic". There are at least twenty-four images associated with White Distribution which the website suggests are "stolen, forgeries, counterfeit or were otherwise inauthentic".

13 Each of the plaintiffs produced an affidavit.

14 Each of the plaintiffs asserts that the claims made attacking the pictures are in error and the paintings are genuine. Each of the plaintiffs asserts that their reputations and businesses have been or they fear will be damaged by these false accusations.

15 Accordingly, an action was commenced to "close down" the website and a motion brought for an interlocutory injunction to the same effect.

16 The defendant seeks an adjournment which the plaintiffs are prepared to agree to, but only if, in the interim, proper terms are imposed. I heard submissions both for and against what was referred to by counsel for the plaintiffs as an interim interim injunction.

17 The parties acknowledge that the test for an injunction found in the seminal case of *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 does not apply where the action is grounded in defamation. It is not enough to show, as that test demands, a "serious issue to be tried". Moreover, it is conceded that where defamation is at the foundation of the allegations being made, the test found in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 of a "strong *prima facie* case" is similarly inapplicable. Something more, something stronger is required.

18 The defendant says that, in effect, to grant the relief sought (the taking down of the website) I would have to find that the plaintiffs cannot fail at trial. This proposition, counsel says, arises from decisions of the Supreme Court of Canada and, most recently, the Divisional Court of this province (for Supreme Court of Canada, see: below, for Divisional Court of Ontario, see: *Beidas v. Pichler* 294 D.L.R. (4th) 310, 238 O.A.C. 103).

19 The concern is for the freedom of expression. This has been outlined as follows:

2 The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. *The exceptions to this rule are extremely rare.*

[Emphasis added]

(*Canada Metal Co. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261, 55 D.L.R. (3d) 42 at p. 261)

and where, as here, there is commercial impact on one of the parties:

In my view, the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above, involved the commercial context in which the criteria of 'balance and convenience' and 'irreparable harm' had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity, it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in 2(b) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest *other than the expression itself*, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

(*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1995] 157 D.L.R. (4th) 385, at para. 47)

20 While it may be rare, it is not impossible that an injunction may be granted in response to defamatory statements. As the last sentence of the first of the two quotes above suggests: "The exceptions to this rule are extremely rare". As already noted, these exceptions occur when the words are so clearly defamatory the finder of fact would inevitably determine they were so:

The guiding principle then is, that the injunction should only issue where words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.

...American Cyanamid ...has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory. [Emphasis added]

(*Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2nd) 452 (Ont. H.C.) at pp. 455-6)

as quoted in *Canada (Human Rights Commission) v. Canadian Liberty Net, supra*, at p. 415)

21 It is certainly hard, and in my mind impossible, to imagine a finding that statements made that the individuals and galleries referred to in this case are selling forged, counterfeit and stolen paintings, would not be found to be defamatory. The proposition is made all the more substantive by reference to the number of paintings to which these comments are directed.

22 According to the defendant, this is not the end of the matter. Counsel submitted that once it is proposed to defend the action on the basis that the complained of statements are true, the defendant should be free to pursue that defence without an injunction being granted. This is not precisely what the cases and at least one relevant text say. In *Canadian Metal Co. v. C.B.C., supra*, the quote referred to earlier (see: para. [19], above) is followed immediately by:

For at least one hundred years and certainly since the leading cases of *William Coulson & Sons v. James Coulson & Co.* (1887), 3 T.L.R. 846, and *Collard v. Marshall*, [1892] 1 Ch., and perhaps above all, in the leading case of *Bonnard v. Perryman*, [1891] 2 Ch. 269, it has been universally and consistently held by British and Canadian Courts that such an interim injunction will never be granted where the defendant expresses his intention to justify unless the words in question are so clearly defamatory and so obviously impossible to justify that the verdict of a jury accepting a plea of justification as a defence would of necessity have to be set aside as a perverse finding on appeal. ...

(*Canada Metal Co. v. Canadian Broadcasting Corp., supra*, at p. 261)

23 In the important text, "Injunctions and Specific Performance", a similar observation is made:

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded....

The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [ie. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.

(*Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf), Robert Sharpe at paras. 5.40-5.70 (pp. 5.2-5.4))

24 Rather than provide a complete escape from the threat of injunctive relief where defamation is clearly present, the defence of truth simply lifts the bar and makes it more difficult to demonstrate that a finding of defamation remains a certainty. If it does, the possibility of injunctive relief, however rare, is still possible.

25 The defendant in this case says he will defend the action by claiming the defamatory statements are true. No demonstration of the basis for this defence has been produced to this point.

26 In the circumstances, based on the evidence before me, if it is still appears clear that the finder of fact will determine that the statements are defamatory (the truth will not be proven), injunctive relief may be considered.

27 Before going further, I should point out that the test of how clear the demonstration of defamation must be has been considered in the case of *Mallard v. Killoran*, [2005] 139 A.C.W.W. (3d) 454. In that case, the following paragraph appears:

In the decision of *Pilot Insurance Co. v. Jessome* (1993), Carswell Ont. 3977 (Ont. Crt. of Just.) the Court granted an order restraining picketing which was allegedly defamatory. Mr. Justice Ferguson stated the guiding principle set out in *Rapp v. McClelland & Stewart Ltd.*, (supra), as quoted above, and then went on to make these observations in para. 22.

22 Since it is conceded here that the words are defamatory this additional requirement, read literally, would not seem applicable unless it also applies to the merits of the defence of fair comment so the plaintiffs are required to satisfy me that the defence of fair comment would inevitably fail. Some of the cases cited to me do state that the same test should apply in weighing the defence (eg. see *Bonnard v. Perryman*, [1891] 2 Ch. 269 cited in Canadian Tire) but I do not think the same burden should be applicable to this issue because it would mean that where the words are clearly defamatory the plaintiff could not restrain the publication until trial even though there was a substantial issue to be tried as to whether the words constituted fair comment and even though the plaintiff could establish that he would suffer damage in the meantime that could not be compensated adequately by damages. In my view the rights of the parties would be more fairly balanced if the plaintiff were entitled to an injunction in cases where the words are manifestly defamatory and the court, exercising its discretion cautiously with due regard for the high value we place on freedom of expression, is convinced, not that there is no reasonable possibility that there is a defence, but that it has been established that there is at least a substantial issue to be tried as to whether there is a defence of fair comment and that the other factors relevant to interlocutory injunctions such as the inadequacy of damages and the balance of convenience warrant an interlocutory injunction. To proceed otherwise would mean that plaintiffs who had strong but not inevitably successful cases would receive no adequate remedy where they proved at trial that they had been unjustifiably defamed.

(*Mallard v. Killoran*, [2005] S.J. No. 278 (Crt. Q.B.), at para. 47)

28 This suggests that the test is or should be more open to the concerns of the plaintiff where the presence of justification is a substantive issue and the prospective damage is real and could not be compensated for purely by money. In this case, the plaintiffs all say that their reputations in the market are being or could be harmed if the activity of the defendant is left unchecked.

29 The problem is in finding a solution that offers protection to the plaintiffs, but does not unduly restrict the defendant's freedom to express his views. In the context of this case, the balance is to be struck in what amounts to an adjournment on terms that will allow the defendant to file responding material and for any necessary cross-examinations to take place in preparation for a full hearing of the motion by which the plaintiffs seek an interlocutory injunction.

30 In searching for the balance, the first question is the strength of the material before me pointing to the efficacy of a defence of justification, truth or fair comment.

31 Counsel for the plaintiffs suggests that there is much which makes it doubtful the defendant will be able to successfully rely on any of these defences. In his affidavit, the defendant lists "the factors" he says "must be considered with determining whether a particular painting which has been attributed to Norval Morriseau is au-

thentic or not. He lists these factors as:

- (a) Whether a photograph was ever taken of Norval painting a painting similar in style and subject matter to the one in question;
- (b) Whether any book, catalogue, or other record of any kind exists from the period that the painting in question is attributed to, exists;
- (c) Whether any public collection has a painting similar in style and subject matter to painting in question from that time period;
- (d) Whether Norval Morisseau himself has recognized the particular painting or painting style/subject matter, as genuine;
- (e) Whether one of Norval Morisseau's principal art dealers or a recognized curator has accepted the particular painting as genuine;
- (f) Whether the particular painting has ever been sold by a dealer directly affiliated with Norval Morisseau;
- (g) Whether any person, such as a Morisseau apprentice, affiliated art dealer, manager, or agent witnessed the painting in question being painted, or alternatively witnessed paintings of a similar style and subject matter being painted during the period when the painting in question was allegedly produced;
- (h) Whether the painting in question has a dry brush acrylic signature in black paint, with two digit date on the back of the canvas, as Norval Morisseau was known to write in pencil and sometimes ballpoint, or even more regularly, not sign his paintings on the back at all;
- (i) Whether the painting in question as [*sic*] any credible provenance other than some connection to certain persons which are suspected and/or known to have counterfeited Norval Morisseau paintings;
- (j) Whether the painting in question appears to a person trained, knowledgeable, experienced, and disinterested eye, to be so different in style and subject matter from other paintings by Norval Morisseau which are known to be authentic;
- (k) Whether a "Jack Pollack" label from the Jack Pollock Gallery, originally on Scollard Street in Yorkville, Toronto (which was Norval's original exclusive art dealer during the 1970's) appears on the painting in question. Out of the hundreds if not thousands of the counterfeit paintings allegedly produced during the 1970's bears such a label; and
- (l) Whether the painting in question resembles in style and subject matter, any painting that was included in the National Gallery of Canada's massive retrospective exhibition in 2006.

32 The website suggests that a large number of the pictures to which it refers are "stolen, forgeries, counterfeit or otherwise inauthentic". It is difficult to believe that the defendant has had an opportunity to examine all the images referred to on the website against the list of factors to which he refers. Moreover, the website does not demonstrate or discuss any specific evidence demonstrating the failure of any image to satisfy all of these factors. There is nothing but the bald statement that they are frauds or counterfeits.

33 Counsel for the plaintiffs goes on to suggest there are circumstances which point to the defendant's inability to rely on these defences.

34 She notes that, in many cases, the defendant has not seen the actual paintings. He has come to his opinions using images reproduced on the internet. She points out that there is one example where the defendant pronounced one painting as clearly authentic and then came to the opposite view a year later. There are two Norval Morriseaus in the National Gallery. Despite the fact that they are accepted as genuine by those responsible, the defendant has concluded they are frauds. Counsel for the plaintiffs goes on to point out that there is no independent confirmation of the defendant's expertise in examining and authenticating the works of Norval Morriseau. This is in contra-distinction to some of the individuals associated with the plaintiffs who have been recognized by the courts as experts.

35 All of this has to be considered, but it also must be acknowledged that the defendant has not yet had an opportunity to fully explain his case.

36 In the circumstances, on their face, the comments and observations of the defendant are defamatory. However, he has not had an opportunity to fully respond and his right to freedom of expression must be borne in mind.

37 In the circumstances, at this early stage, both sides have a claim to protection.

38 There is, it seems to me, a way in which a balance can be achieved which recognizes the two principle concerns.

39 The accusations, opinions and allegations of the defendant are on the website. They are in the public domain. They can be accessed by anyone.

40 Similarly, the proceedings in this Court are public. However, the court records are not as easily available. If the two perspectives were readily available in the same place, the rights of both sides would obtain a measure of recognition while this matter moves to a more comprehensive and complete proceeding.

41 Accordingly, I order: The website can remain up pending further order of this Court, but only on the following terms:

Each and every page which 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 shall have placed on it a label 4 inches by 3 inches in dimension. The label will have a white background, be easily-read with clear wording using a Times New Roman font stating:

The opinions expressed on this website and on this page are those of Ritchie 'Stardreamer' Sinclair and of no other person. These opinions are alleged to be defamatory and are the subject of an action in the Superior Court of Ontario.

In the upper right-hand corner of each label shall be the Ontario Superior Court File Number for this action.

The defendant must post the Notices referred to herein no later than midnight on December 8, 2008, failing which the defendant must remove the website, morriseau.com, from public display until such time as all of the Notices referred to herein are posted.

The motion for interlocutory relief is adjourned to February 18, 2009 for a full-day hearing. I am seized of the hearing of the motion.

Costs of this motion will be dealt with at the hearing of the motion on February 18, 2009.

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