

ONTARIO

SUPERIOR COURT OF JUSTICE

TORONTO SMALL CLAIMS COURT

BETWEEN

James White

Plaintiff

v

Ritchie Sinclair

Defendant

**CLOSING SUBMISSIONS
OF RITCHIE SINCLAIR**

- 1) The Defendant is an artist who was an artistic protégé of the late Norval Morrisseau (“Morrisseau”) and is considered an expert on Morrisseau’s art by Morrisseau’s principal art dealers, Norval Morrisseau Heritage Society members, and others who knew Morrisseau personally and his art intimately. (Exhibit 3, Tab 1)

- 2) In 1979 the Defendant began an apprenticeship with Morrisseau and they became great friends. The Defendant spent an enormous amount of time painting with him over the course of decades and the two remained close friends until he passed away in 2007. This fact amongst others with regard to the Defendant’s character and credibility are noted in the *Otavnik v Sinclair SC-09-00082782* Decision rendered by Justice Godfrey on January 11 2011.

- 3) The last seven years of Morrisseau's life were spent doing all he could to stop a massive fraud that was destroying his life's work and reputation. He began his quest to end the fraud in 2001 by pointing out that the 23 paintings the Plaintiff sent in to him for authentication were fakes. (Exhibit 3, Tab 2-4). He went to the media with the result that a newspaper article was published entitled, "Morrisseau Fakes Alleged," that discredited the Plaintiff's paintings and the Plaintiff's painting source. The Plaintiff admitted to these facts and further testified that he chose to dismiss Morrisseau's assessments of his paintings, and the related media attention, and went on to buy hundreds more from the same discredited source. Furthermore the Plaintiff testified to advising both his source and his retailers to ignore Morrisseau's 2004-2005 sworn declarations that were sent to them about their sale of fakes and to continue selling the White Distribution Ltd ("WDL") purported Morrisseau paintings anyway.
- 4) After Morrisseau passed away in December 2007 sales of Morrisseau art increased and soon there were thousands of fake Morrisseau paintings up for sale on the internet. In October 2008 when the Defendant began displaying images of inferior counterfeit Morrisseau art on his website the Defendant did so only because he knew that he could no longer in good conscience shrink from his moral duty to defend his mentor's artistic legacy in the public interest. The Defendant does not benefit financially from defending Morrisseau's art, and in fact has suffered tremendously because of speaking up about the issue.
- 5) Since 2007 the Defendant has more intensively studied Morrisseau's work and developed a well rounded expertise in the face of legal challenges and overwhelming numbers of fakes,

produced by various forgers of different skill levels. It is the Defendant's view that even if he was mistaken that the painting identified in the allegedly Defamatory Statement was sold by Jim White the Defendant stands firmly behind the belief that the painting is a fake.

- 6) The Plaintiff admitted to owning hundreds; not dozens (as stated at paragraph 6 of the Plaintiff's Closing Submissions), of purported Morrisseau paintings that were displayed as inferior counterfeits on the Defendant's website, when one includes White Distribution Ltd's distribution of paintings through the company's gallery retailers. This fact is confirmed (Exhibit 1, Tab R) in para. 6 (and para.11) of the Nov 22 2008 Affidavit of James White where he states:

“On or around October 11 2008 I visited the website and confirmed that it contained hundreds of images of paintings which White Distribution owns, has sold, or is attempting to sell.”

In spite of this fact, neither White Distribution Ltd. nor the Plaintiff has pursued any claim against the Defendant in relation to injurious falsehood or any other cause of action in relation to the Defendant having called those paintings fakes. The Defendant asks the court to draw a negative inference from that fact; an inference that the Plaintiff has brought this lawsuit to pick on the one small error the Defendant may have made in pointing out his connection to fake paintings, when in fact the plaintiff has been selling numerous fake paintings, and associating with numerous sellers of fake paintings, where many of such paintings and sellers have already been identified by Morrisseau himself as frauds. It is the Defendant's position that the reason the Plaintiff has brought this lawsuit is clearly as an indirect attack on the Defendant's credibility so that the Plaintiff can continue to sell fake

paintings. Furthermore I also ask the court to give no weight to the statements of the Plaintiff's associates (Exhibit 2) solicited by the Plaintiff for the aforementioned purpose. None of his associates chose to appear as witnesses to be questioned about their statements. These are clearly biased statements made by persons with a vested interest in continuing to retail fakes for the plaintiff and in limiting their own liability exposure for fakes they have sold in the past.

- 7) The Claim appears to have dropped the slander of goods cause of action and is now only a defamation action. I ask the court to note in the final decision to this action that there is no longer a claim for injurious falsehood and that this cause of action has not been pursued by the plaintiff.

- 8) The Plaintiff states (at page 2-4 of Claim) that the Defendant is a "broadcaster" within the meaning of that term in the Libel and Slander Act (the "Act"). The Defendant submits that he is, indeed, a broadcaster. The Defendant attempted to give evidence with respect to this key issue at trial but the court refused to allow him to do so. In any case, by this admission of both parties, and by the evidence that was allowed to be heard, he is a broadcaster and, therefore, the strict limitation periods set out in Sections 5 and 6 of the Act apply. In this case, the Plaintiff admitted that he became aware of the Defamatory Words (as defined in the plaintiff's Closing Submission at paragraph 10) and that he served the Defendant on or about Nov 22 2008 with a libel notice in the form of an injunction motion affidavit which was within the limitation period requirements of section 5 of the Act. However, he did not then commence this action until October 25, 2010, which is approximately 2 years later, and

which therefore violates the 3 month limitation in section 6 of the Act. The Defendant pleaded this defence in paragraph 6 of his Amended Statement of Defence. The plaintiff did have an opportunity to pursue his claim against the defendant in a separate Superior Court action (“*White et al v Sinclair CV-08-00366828*”), which was commenced in time, but he abandoned that action and it was dismissed, with costs ordered against the Plaintiff that remain unpaid. He never brought a motion to have that other action transferred to Small Claims, as it would have been his right to do pursuant to Section 23(2) of the Courts of Justice Act, by motion to a judge of the Superior Court (see *Shoppers Trust Co. v. Mann Taxi Management Ltd.* (1993), 16 O.R. (3d) 192 (Gen. Div.)). In conclusion, this action is out of time and should be dismissed.

9) The alleged Defamatory Statement is merely defamatory on its face, but not defamatory in the full sense.

a) The evidence shows that the plaintiff already has a severely-tarnished reputation, after Morrisseau identified his art collection as fake and his retailers as selling fakes distributed by White Distribution Ltd. (Exhibit 3, Tab 6, pg2-4)

b) The Plaintiff testified that he kept a low profile quietly wholesaling to galleries and collectors. He had no art gallery on the internet or otherwise, by choice, except with those he freely supplied paintings to in return for 50% of their sales. He has always been the man behind the curtain.

c) The Plaintiff, for some reason, testified that he never auctioned anything, ever, and denied operating an Ebay auction platform, yet when pressed hours later in cross-examination he admitted to operating an Ebay account that was formerly under the username, “Prancing Elk”. Furthermore the plaintiff admitted to owning S & J auction house in Richmond Hill with a man named Sunny Kim. The plaintiff’s evidence actually shows an inferior counterfeit Morrisseau painting being auctioned off by S & J auctions. (Exhibit 1, Tab D)

d) The Plaintiff testified that he doesn’t know Morrisseau art. When an image of Morrisseau’s most famous painting, *Man Changing into Thunderbird* that hangs in the Art Gallery of Ontario was shown to him he denied ever seeing it. When shown a forgery pictured below the famous painting (Exhibit 3 Tab 6, pg 5) the plaintiff testified that he bought the painting from his associate Sunny Kim for \$90K, plus taxes. He testified that Morrisseau’s son, David, had owned this painting since 1977 and sold it to Sunny Kim around 2002 who then sold it to the plaintiff in 2008. He then had it appraised at \$190K. (Exhibit 3 Tab 6, pg 6) In spite of this, he testified, and was quoted in a newspaper stating that Morrisseau left his estranged children with “nothing, nothing, nothing” (Exhibit 3, Tab 8). The plaintiff also admitted to representing Morrisseau’s sons, David and Christian Morrisseau, at the time that forgery and 48 others appeared at an exhibition from the private collection of Jim White (Exhibit 3, Tab 7). When questioned about this new, fresh, colourful collection of 49 paintings that appeared in 2008 the plaintiff testified that these paintings were not sourced to Randy Potter auctions, but sourced to the Morrisseau family. It is the Defendants view and position that Morrisseau’s sons are

forgers of their father's art and that the plaintiff admits to working with them to facilitate their art sales.

10) Even if the alleged Defamatory Statement were deemed to be defamatory, it caused no damage to the plaintiff:

- a) The plaintiff did not produce any proof of financial damage to himself. He did provide sales figures for a company, White Distribution Ltd., but never provided any evidence of what that company's actual profits/losses, expenses, inventory issues, market conditions, marketing efforts etc. were in the relevant years, thus making it impossible for this honourable court to draw any conclusions from that evidence. He also never provided any evidence showing what the monetary link is between White Distribution Ltd. and his own personal finances. White Distribution Ltd. is not a plaintiff in this action and therefore has no right to claim damages.

- b) The plaintiff's reference to White Distribution Ltd's sales figure drop during certain periods, even if true, does not prove anything about the reputational damage allegedly sustained by the plaintiff.

- c) The evidence showed that the Defamatory Statement was on the defendant's website for approximately 2 years. However, the evidence also showed that for all but the first 16 days of that time (from the Nov 22nd 2008 affidavit date to Dec 8th 2008) the Defamatory Statement was accompanied by the statement mandated by the Superior Court that made it clear that the Defamatory Statement was: (i) merely the defendant's opinion; (ii) the

subject of a lawsuit in Superior Court. (iii) permitted by the Superior Court to stay active (Exhibit 1, Tab C). Because of this, the defendant seeks to avail himself of the defence of fair comment for all of the days that the Defamatory Statement was posted on his website other than the initial 16. The Defendant's testimony clearly established that when he made the Defamatory Statement he did so honestly believing that it was true, and the evidence of the vast numbers of fake paintings with which the Plaintiff is connected establishes that, objectively speaking, the Defendant's belief was objectively reasonable and honest under the circumstances.

11) With respect to the 16 day period referred to above, the defendant notes that the evidence presented by the plaintiff indicated that there were approximately 1.3 viewers of the defendant's website page per day over the 2 year period. Accordingly, it is reasonable to assume that during the aforementioned 16 day period the Defamatory Statement was viewed by approximately 21 people. As there were nine plaintiffs in the Superior Court lawsuit, and they were all represented by lawyers, and the defendant had legal counsel as well, it is therefore logical that all or most of those 21 who viewed the Defamatory Statement during that period were those litigants themselves, and their lawyers. Accordingly, the defendant takes the position that the Defamatory Statement was not viewed by anyone except for the litigants and their lawyers or others involved indirectly in that lawsuit. and, therefore, was never actually communicated to any third party, as would be legally required in order to prove defamation occurred. In the alternative, if this Honourable Court finds that there was communication of the Defamatory Statement to any third parties, the number of such parties

was extremely low, and the reputational impact of the Defamatory Statement on the plaintiff was negligible.

12) The Plaintiff makes reference (at paragraph 23, Closing Submission) to the notion that the Defendant cannot prove to the court that Mr. White owned this painting. The evidence does however show that Mr. White's auction business partner, Sunny Kim with S & J auctions (Exhibit 1, Tab S) was the former owner of the painting in question (Exhibit 1, Tab C). Mr. White also testified to buying art from Sunny Kim and operating internet auction accounts that he later changed to other names.

13) On the same day in October 2010 that the plaintiff filed this lawsuit against the defendant, another duplicate action was filed against the defendant in Sunny Kim's name at Toronto Small Claims Court. The Plaintiff has admitted that Mr. Otavnik wrote and compiled Exhibit 1 (the claim and materials) in its entirety. Mr. Otavnik clearly did the same for Sunny Kim, but the action was dismissed when Mr. Kim failed to appear.

The evidence showed that this is the same Mr. Otavnik who used small claims court to:

- i) Sue Morrisseau himself in 2007 for identifying Otavnik owned paintings as fakes.
- ii) Sue the Defendant in 2009 and lost before Justice Godfrey.
- iii) Sue the Defendant's roommate in 2009, dismissed before Justice Thompson.
- iv) Sue the defendant's witness in 2009, dismissed before Justice Godfrey.
- v) Sue the Defendant's lawyer and his lawyer's wife in 2009, settled for \$2
- vi) Sue Morrisseau's principal art dealer (twice) 2009 and 2010, settled twice after the dealers agreed to stop promoting the Defendant.
- vii) Sue CTV in 2014 for doing a news program about the Defendant's views

14) Under oath Mr. White confirmed that he sent out a letter to nine parties with regard to the Superior Court action on December 11 2008 (Exhibit 3, Tab 6, page 1) where he states,

“I have just seen the work undertaken by Joe Otavnik and it is nearing completion. It contains much of the documentation we need for this case and while Joe is not on the roster of plaintiffs for this case his time effort and financial cost will probably exceed each of our shares.”

The letter is addressed to painting source, Randy Potter of Randy Potter Auctions, and to White Distribution retailers, Artworld of Sherway, Qualicum Frameworks, Bearclaw Gallery, Maslak McLeod Gallery and Sunny Kim. Christian Morrissette, Wolf Morrissette and Joe Otavnik are also included. This letter is essentially a call to arms by a group engaged in an ongoing effort to discredit the Defendant’s name to perpetuate a fraud. Seven years later, Mr. White and his lawyer are here to persuade this court to do just that, so that a ruling on one page from 2008 can be turned into a ruling on many paintings in 2015.

- 15) The Defendant has no personal issue with Mr. White. However, Mr. Otavnik’s actions in facilitating this Claim for the Plaintiff provide further evidence of an organized syndicate who at the very least conspire to sell this purported Morrissette art, so discredited by Morrissette and others of note. Unfortunately Mr. White, in the guise of White Distribution Ltd., appears to be most heavily invested in these paintings that Norval Morrissette, and many others, told him were fakes many years ago.

- 16) Although liability and damages are denied as aforesaid, in the alternative, if the court decides to award damages then it is respectfully submitted that they should be nominal due to the absence of actual damage, the existence of the disclaimer, evidence of a tiny number of viewers, and the fact that alleged losses are attributed to a company which is not the Plaintiff. Given the foregoing it is respectfully submitted that an amount of \$1 would be appropriate if liability is found, which is denied.