

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

*Jonathan Sommer*, for the Plaintiff

*Michael Pinacci*, for the Intervenors

**HEARD:** October 3-4, December 1, 4-6, 8,  
12, 2017, February 6-8, 2018

**E.M. MORGAN, J.**

[1] The Plaintiff, Kevin Hearn, has a good ear for music. Does he have a good eye for art fraud?

**I. The artist and the musician**

[2] Norval Morrisseau was a renowned Anishinaabe artist from northern Ontario. He was the founder of the Woodland school of painting, whose works give visual expression to the spiritual and cultural legacy of his people. His fame as an artist dates from the early 1960s and continued

up until his death in 2007, and, indeed, until the present day. He is perhaps the best known Indigenous Canadian artist of his time.

[3] Kevin Hearn is a well-known Canadian artist in his own right. He is a musician and songwriter who has produced solo albums, written numerous songs performed by himself and others, played an assortment of instruments with a number of different groups and artists, and toured extensively in Canada, the United States and Europe. He is perhaps best known as the keyboardist for the popular band, Barenaked Ladies.

[4] Hearn was also a close friend and musical collaborator of another famous Canadian musician, Gord Downie, and the two of them produced a number of shows that raised money for Indigenous children. Hearn testified that he seeks to help in the process of healing the relationship between the Indigenous people and the rest of Canada, and that he is dedicated to promoting truth and reconciliation with the Indigenous community.

[5] Hearn's dedication to Indigenous issues coincides with his longtime affection for the art of Norval Morrisseau. In his testimony, Hearn stated that he saw a Morrisseau painting on the cover of a 1979 Bruce Coburn album. He also testified that early on he fell in love with Morrisseau's work because it reminded him of stained glass; and, indeed, Morrisseau himself was known to say that stained glass church windows were one of his early influences.

[6] Although he is not an expert in visual arts, Hearn indicated in his evidence at trial that he formed a desire to purchase an Indigenous Canadian painting, and that the chance to do so came along in 2005 when on the internet he discovered the gallery run by the Defendant, Joseph McLeod (now deceased). As it turned out, McLeod's gallery – i.e. the Defendant, Maslak-McLeod Gallery Inc. (the "Gallery") – specialized in the works of Norval Morrisseau. When they met, McLeod apparently told Hearn that he knew the renowned artist personally from time he had spent near Thunder Bay, Ontario. Hearn was quite taken by the Gallery's Morrisseau collection.

[7] At the same time, Hearn was aware that there were rumors of many forged Morrisseau paintings circulating in the art world. That same year, Morrisseau himself had established the Norval Morrisseau Heritage Society to protect his own legacy by having experts in the field catalogue and document as many as possible of the artist's thousands of known works. Hearn testified that he asked Joseph McLeod many questions about the provenance of the paintings in the Gallery and sought assurances that the works displayed there were authentic.

[8] Despite his caution about making a large investment in a painting for the first time in his life, Hearn was effectively hooked on the Morrisseau works that he saw in the Gallery. It had for years been his ambition to own an impressive painting such as the ones McLeod showed him, and it had now become a barenaked ambition. If he had a million dollars (or at least tens of thousands), he would buy a Norval Morrisseau.

## **II. *Spirit Energy of Mother Earth***

[9] In May 2005, Hearn returned for a second visit to the Gallery, this time with his spouse as he had become more serious about buying a piece of art for his home. On this second visit he ended

up purchasing a large and colourful painting. He selected this piece over several others he saw in the Gallery, including some considerably more expensive Morrisseaus – one featuring a canoe and another featuring a bear. The work that Hearn purchased is entitled *Spirit Energy of Mother Earth*, and on the back of the canvass it is dated 1974.

[10] Hearn testified that McLeod had *Spirit Energy* in the storeroom rather than on display in the front part of the Gallery, but brought it out for him along with some others so that he could see more of the collection before making a final purchase decision. The painting is composed of acrylic on canvas, and measures 167 cm x 167 cm. It was unframed when he bought it in the Gallery, and Hearn immediately retained a framer who took two weeks to construct a suitable large, wooden frame. It is visually a striking and impressive piece.

[11] The name and date of the work appear on the verso (back side) of the painting along with Norval Morrisseau's name written in bloc letters in dry black paint. There is also a small drawing of a thunderbird – a trademark design of Morrisseau's – accompanied by a small copyright sign – © – next to the title of the work. Hearn testified that McLeod explained to him that the thunderbird design made this painting rather special, as that was a personal emblem for Morrisseau. The Gallery supplied him with a provenance statement along with his purchase that listed the prior owners of the painting.

[12] The recto (front side) of *Spirit Energy of Mother Earth* contains yet another signature, this one written in Cree syllabics that translates as Copper Thunderbird – a name used by Norval Morrisseau for much of his life. The painting itself is done in a combination of green, yellow, and pale blue and brown colours, with black outlines around and connecting fantastic, serpent-like creatures arranged in a circular pattern. Surrounding and in-between the creatures there are a number of spherical objects with lines down the middle, similar to the spheres which recur in numerous Morrisseau paintings.

[13] The overall effect of *Spirit Energy of Mother Earth* is aesthetically pleasing, certainly to a lay person. Hearn was captivated by it when Joseph McLeod showed it to him. In fact, the art expert produced by Hearn and his counsel, Dr. Carmen Robertson, although skeptical of its authenticity, conceded that the work is highly artistic. She acknowledged that *Spirit Energy* contained many familiar Morrisseau motifs, but described it as almost "too pretty to be a real Morrisseau".

[14] Dr. Robertson's interest as an academic is in the symbolic representations contained in Morrisseau's works. As will be further elaborated below, Dr. Robertson's expertise and credentials are not in doubt; and like many scholars who spend a lifetime studying the works of another, she has developed a definite view of the artist's paintings. In short, Dr. Robertson has come to see Morrisseau's work as imbued with a spiritual intensity, and she reads this intensity into many of his techniques. As a brief illustration, she describes one of his paintings, *Serpent of Life* (1969) – a painting that is quite similar to *Spirit Energy of Mother Earth*, right down to the use of an ochre yellow background surrounding a fantastic creature – and imbues this painting with an intense spirituality and cultural significance:

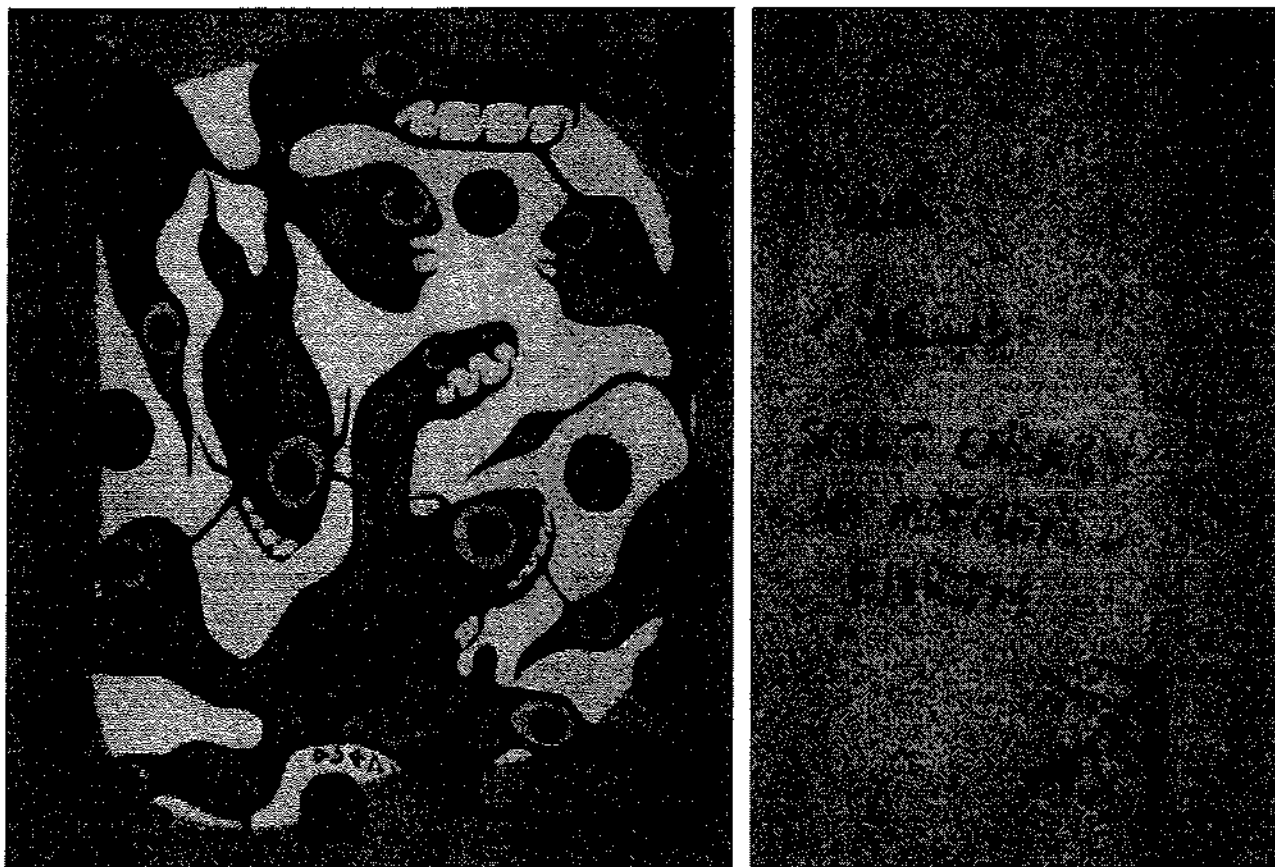
...the central figure, surrounded by life symbols, common to Morrisseau iconography, confirm his use of intense color. The enclosed center of the snake in *Serpent of Life* has a more intense hue of yellow than the more ochre-yellow that surrounds the outer portion of the field of the painting. This color difference allows Morrisseau to emphasize spiritual power.

[15] As a scholar of this work, Dr. Robertson has a keen interest in the religious significance of the paintings. Her resumé discloses that her latest journal article on Morrisseau, entitled “Thunderbirds and Concepts of Transformation in the Art of Norval Morrisseau” (2012), 33 *Journal of Canadian Art History* 59, explores the use of traditional Ojibway religious concepts in his work. This is, of course, a legitimate perspective for a scholar and is not mentioned here as a criticism. However, this focus on the spirituality of Morrisseau’s work imbues her analysis with a certain predisposition for seeking out an intensity of meaning. It has also prompted a certain reticence in acknowledging that these paintings may also appeal to what might be called bourgeois tastes. As she put it, “Morrisseau didn’t paint art to hang above your couch”, although, of course, Kevin Hearn did just that.

[16] Accordingly, if *Spirit Energy of Mother Earth* is not an authentic Norval Morrisseau work, it would be a truly excellent imitation – “a pleasing simulation of Morrisseau’s artistic vocabulary”, as Dr. Robertson put it. On the hand, if *Spirit Energy* is an authentic Norval Morrisseau work, it would be one of his best. It contains many of the spiritual symbols that Dr. Robertson describes as running throughout the Morrisseau oeuvre, and at the same time is a refined design that lacks some of the visually awkward traits that characterize many of Morrisseau’s paintings.

[17] In this respect, Dr. Robertson states that it would be similar to Morrisseau’s 1977 masterpiece, *Man Changing Into Thunderbird*, which is thought to be among his most visually engaging and meaningful paintings. That is, it combines deeply meaningful symbolic content with high aesthetic value.

[18] Since a picture tells the story better than any narration, the recto and verso of *Spirit Energy of Mother Earth* appear as follows:



[19] It should be noted that in the time that has passed since McLeod's death several months prior to the commencement of trial, the Gallery has closed. Counsel for McLeod's estate and the Gallery did not appear at the opening of trial to defend the case, although it had been defended up until that point. This, then, prompted other Morrisseau collectors and gallery owners to apply to intervene in order to carry the defense at trial. They were of the view that a judgment on the authenticity of one noteworthy painting (purportedly) by Norval Morrisseau might impact on the assessment of many others. I was open to the prospect of intervenors participating, since the issues here are contentious and the adversarial system is designed to work better with two opposing sides presenting evidence and challenging each other's case.

[20] In my endorsement on the motion to intervene, *Hearn v McLeod*, 2017 ONSC 7247, at para 5, I indicated that "the present case straddles private and public issues. On one hand it is a dispute over the authenticity 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." As indicated, the case raises the prospect of impacting on the value of numerous Morrisseau paintings. In addition, it has ramifications for the legacy of an important First Nations artist and, therefore, for the artistic heritage of Canada's indigenous peoples.

[21] I therefore allowed James White, a well-known dealer in Norval Morrisseau works, along with his corporation, to intervene. I also granted intervenor status to Nathaniel Big Canoe, a contemporary Anishinaabe painter who carries on in an artistic path similar to that of Morrisseau. These Intervenor were permitted to stand in the Defendants' shoes in presenting evidence and argument. Having a defense represented at trial has been valuable in ensuring that there are two sides adducing evidence, cross-examining each other's witnesses, making submissions about their respective cases, and responding to each other.

### III. The AGO incident

[22] Hearn apparently enjoyed his Morrisseau painting for 5 years following his purchase, never suspecting that its authenticity could be questioned. In 2009 he registered *Spirit Energy of Mother Earth* with the Norval Morrisseau Heritage Society. No member of that organization, including, Plaintiff's expert Dr. Carmen Robertson whose resumé indicates that she has been a member since 2009, ever indicated that it was anything other than an authentic Morrisseau.

[23] In April 2010, the Art Gallery of Ontario ("AGO") extended an invitation to Hearn to act as a celebrity guest co-curator for an art show featuring works from his own personal collection. The show would also feature works from other sources that were similar to those being displayed by Hearn. The exhibit was designed to generate a large audience, and Hearn was engaged to host the opening of the show and play some of his music to the AGO audience.

[24] Hearn pleads in his Statement of Claim that McLeod eventually became aware of the proposed AGO show and encouraged Hearn to display *Spirit Energy of Mother Earth*. The McLeod gallery also made arrangements to display two of its own Morrisseau paintings at the AGO show. The opening of the show took place on June 11, 2010, and by all accounts was a great success. Hearn provided the musical accompaniment, which was greatly complimented in emails from AGO staff members, that were made exhibits at trial.

[25] Less than two weeks after the opening of the AGO show, on June 22, 2010, artistic disaster struck Kevin Hearn. He received an email from an AGO staff member advising him that his painting was removed from the exhibit by Gerald McMaster, the lead curator of the show. That same afternoon, Hearn received an email from Ritchie Sinclair, a notorious individual in the law reports for his frequent involvement in Morrisseau-related litigation, stating: "I met with Jennifer Bohgal (an AGO manager) today at the AGO University Ave. venue. I had to ask her to remove your purported Morrisseau painting (which she did)."

[26] Hearn testified that he was devastated and greatly embarrassed by this turn of events. He was very surprised by McMaster's allegation, relayed to him by another AGO employee, that *Spirit Energy* was "most likely a fake". He immediately contacted McLeod, who provided him with a second provenance statement, and who assured him of *Spirit Energy's* authenticity. Among other things, McLeod explained to Hearn in a letter that the "bald or smooth headed" figures in the painting were related to Eckankar, a religious sect from the United States – sometimes referred to as a 'cult' – that combined Eastern and Western elements. Norval Morrisseau was known to have had a personal interest in this movement for a number of years.

[27] Hearn, however, was not inclined to believe McLeod at this point – a skepticism that was reinforced when the ownership as set out on the provenance statement proved impossible to verify. I cannot blame Hearn for being frustrated. One does not expect a long time, respected art dealer such as McLeod and a high-end outlet such as the Gallery to provide its customers with an unreliable provenance statement. If McLeod himself had some doubts about the painting's provenance, one would think he would have advised Hearn of those doubts in a forthright way.

[28] It also turned out that McLeod's reference to Eckankar was incorrect, as Morrisseau was not introduced to that movement until 1976, two years after the date of *Spirit Energy*. The mistake was a natural one, since Morrisseau's attraction to the fantasy-like creatures found in his paintings pre-dated his involvement with Eckankar; in fact, a review of his works up to 1976 would suggest that Morrisseau's serpents fed his interest in the religious sect, and not the other way around. Nevertheless, this mistake must now be acknowledged, although Hearn does not appear to have been aware of McLeod's mistake in this regard at the time.

[29] In any case, McLeod's responses to Hearn regarding the AGO incident inspired no confidence. Hearn had suffered a tremendous embarrassment and disappointment, and he considered the dealer from whom he bought the painting as the source of all of that. Hearn was thus inclined to disbelieve McLeod and to believe Ritchie Sinclair, who he described as a "devoted friend" of Norval Morrisseau's and an artist in his own right.

[30] In cross-examination, Hearn described himself as a "trusting person" by nature. When he bought *Spirit Energy*, he trusted McLeod. And when *Spirit Energy* was challenged, he trusted Sinclair.

[31] It is unclear in the evidence how Sinclair came to know anything about *Spirit Energy*, or how and why he went about advising the AGO of his view. It is equally unclear why the AGO so readily heeded Sinclair's unsolicited advice. After all, everyone, including Hearn's own expert, Dr. Robertson, agrees that if *Spirit Energy* is not authentic it is a very good imitation. Indeed, Dr. Robertson, a noted scholar with substantially more training than Sinclair, took 50 pages to come to the subtly stated conclusion that, "The disparate elements discussed throughout this report, when taken as a whole, result in an artistic dissonance with Morrisseau's artistic style, conventions, and art practice." And yet, Sinclair appears to have concluded in a single glance, with supreme confidence, that the painting was a forgery.

[32] I note that Sinclair was not called to testify at trial. I also note that, likewise, neither Gerald McMaster nor any staff member of the AGO was called to testify. What the record contains are some short email messages from McMaster and other AGO employees to Hearn which are rather non-committal, and which indicate a concern for Hearn's feelings and express a desire to try to resolve the situation, etc. I can imagine that the AGO staff may have been reticent to involve themselves in a litigious matter; although, frankly, they acted very quickly on the advice of a questionable source. I do not know whether the failure to call anyone from the AGO as a witness indicates that they may not now be as supportive as Plaintiff's counsel would like. Their testimony, with some pointed cross-examination, may have provided some insight into what happened behind the scenes, but the court will never have that insight.

[33] As for Ritchie Sinclair, the failure to call him – the very source of the entire controversy over the painting owned by Hearn – is more interesting. A survey of law reports in recent years shows that he has been deeply involved in litigation concerning Norval Morrisseau, often in alliance with or in support of cases brought by Kevin Hearn’s present counsel. He likewise has often played the part of the instigator of the controversies, and has equally often been held to be in the wrong. For this reason, counsel for the Intervenors here has dubbed him the “source of misinformation” about *Spirit Energy* and other Morrisseau works.

[34] In an earlier, pre-trial ruling I observed that Sinclair was proposed as a witness by Hearn’s counsel, and that, in fact, he had previously been a defendant in a defamation action brought by Joseph McLeod and his Gallery – *McLeod et al. v. Sinclair*, CV-08-00366828. In that case, like in this one, Sinclair had asserted that certain Morrisseau works sold by the Gallery were forgeries. That prompted McLeod to bring an action against him to recover the economic losses that those assertions caused. In an interlocutory motion, Sinclair was ordered to place an advisory on every page of his website signaling that his claims were unproven; in fact, the court required him to do that every time he “opines that any work attributed to Norval Morrisseau is a fraud, forgery, counterfeit, stolen or in any other way is not authentic or genuine”: *McLeod et al. v. Sinclair*, 2008 CanLII 67901, at para 41 (SCJ).

[35] In yet another case with players and subject matter that overlap with this one, James White, an Intervenor here, sued Sinclair for slander of title with respect to Morrisseau paintings that White owned, contending that, once again, Sinclair had asserted that a number of Morrisseau works are, as quoted in White’s claim, “‘Counterfeit’, ‘Forged’ ‘Bogus’, ‘Fake’, ‘Fraudulent’”. I understand that in 2015, the claim went to trial and that Mr. White was the successful party: *White v. Sinclair*, SC-10-109226 (Sm Ct Ct).

[36] Finally, in *Hatfield v. Child*, 2013 ONSC 7801, a plaintiff represented by Hearn’s present counsel alleged that a Morrisseau painting she had purchased was not an authentic Morrisseau and that the black brush signature purporting to be Norval Morrisseau’s on the verso of the painting was a forgery. The court rejected the evidence of none other than Ritchie Sinclair, who was presented as a witness on behalf of the plaintiff in that case. The trial court, as upheld on appeal to the Divisional Court, accepted that the painting was an authentic Morrisseau painting. In the process of doing so, the Court found that Sinclair’s views on the Morrisseau painting in issue there were “unsupported and unreliable” [para 18], while it found that Joseph McLeod, who had done an appraisal of the painting in issue, was “a credible witness”: *Ibid.*, para 26.

[37] All of this is to say that Sinclair’s intervention with the AGO can be viewed in a number of ways. While Hearn seems to perceive Sinclair as a savior attempting to spread truth about Morrisseau art works, the courts have tended to see him as an officious intermeddler wrongfully identifying works as forgeries without a basis for doing so. I do not know why, but he appears to be on a campaign to undermine the authenticity and value of works by Norval Morrisseau, although to date the courts have responded negatively to that campaign.

[38] This history of findings that Sinclair is unreliable undoubtedly provides an answer to why he was not called by Hearn’s counsel to testify about his intervention with the AGO here. At the same time, it fosters considerable skepticism as to whether the AGO’s decision to remove the



painting from its exhibit was the right one. If history provides any clue, there is reason to believe that Sinclair was no more correct about *Spirit Energy of Mother Earth* than he was about *Wheel of Life*, the Morrisseau painting at issue in *Hatfield*. The AGO may well have acted in excessive haste and at the behest of someone who has made himself into a figure that is better for the art world to avoid than to rely on.

#### IV. The northern Ontario fraud ring

[39] Counsel for Hearn went to considerable effort in gathering evidence and calling witnesses to establish that a group of fraudsters worked for a number of years in northwest Ontario, and that as a consequence of their prolific activities a substantial number of Morrisseau forgeries exist. Some of these witnesses recounted the actual workings of a fraud ring, while one or two others were called because they knew and befriended Norval Morrisseau in northern Ontario during the 1970s and were familiar with some of his habits with respect to the production of paintings. By my count, 7 of the live witnesses and another 7 or 8 witnesses on affidavits that were submitted by Hearn's counsel addressed the issue of Morrisseau frauds without addressing *Spirit of Mother Earth* itself.

[40] I allowed this evidence as it was background information that counsel for Hearn presented as part of the trial's narrative. However, I am cognizant that one cannot allow background information to overshadow the foreground of the trial. This trial is concerned with the authenticity of one painting only. It is not, as it sometimes came to feel, a commission of inquiry into the existence of a large conspiracy to produce many fraudulent works of art.

[41] The fact that paintings other than *Spirit Energy* may or may not be authentic is of relevance only in the most general way. Specifically, there is evidence of the existence of a forgery ring in Morrisseau's home town of Thunder Bay, headed by a local criminal named Gary Lamont and focused on imitating Norval Morrisseau's style of painting. This broader tale of fraud is important insofar as there is some evidence to suggest that Joseph McCleod may have purchased some works that trace to this source.

[42] That said, the evidence does not in any conclusive way connect *Spirit Energy* to the Thunder Bay fraud ring. No witness identified this particular painting as having been produced by a member of the northern Ontario-based criminal enterprise. The most that can be said of this evidence is what Plaintiff's counsel submits in his final argument – that witnesses “testified to describe the operations of a fraud ring, which operated out of Thunder Bay, Ontario, producing large numbers of Morrisseau forgeries similar to the painting [i.e. *Spirit Energy of Mother Earth*]...” With that in mind, evidence of the fraud ring's existence is interesting but must be treated with care here.

[43] The first of the northern Ontario-related witnesses to testify was Robert Fox. He identified himself as a retired Area Supervisor of the Indian Community Branch of the Ministry of Social Services. In the 1970's he lived in Kenora and was working for the Province providing social services to Aboriginal communities off reserve. Fox related that he first met Norval Morrisseau in the 1960s when Morrisseau lived then in northwest Ontario, somewhere around Red Lake. He

testified that the two of them became friends, and that sometimes Morrisseau would camp out in the bush behind Fox' house.

[44] Fox described Morrisseau during this period as a difficult person who was highly opinionated and who drank a lot. He was in jail in Kenora for 6 months sometime between 1971-73. While in custody, Morrisseau painted on brown mill paper that Fox acquired for him. Fox indicated that he saw Morrisseau paint numerous works and make many sketches on mill paper, but he only ever saw him producing two small paintings on canvas, both of which are featured in a National Film Board documentary on Morrisseau.

[45] While Fox may have been familiar with Morrisseau the person, he is unschooled in anything to do with Morrisseau the artist. Of the hundreds, and perhaps thousands of paintings that Morrisseau produced during his lengthy career, Fox has seen only a tiny sample. Although he was more than happy to give an off-the-top opinion about the quality of *Spirit Energy* in comparison with other Morrisseau works, he has no expert credentials to do so and his opinions are not relevant.

[46] What would be relevant to hear in Fox's testimony, and presumably the reason Plaintiff's counsel produced him as a witness, is first-hand evidence as to Morrisseau's painting in the 1970s. It turns out, however, that not only did Fox see relatively little of Morrisseau's production during that period, he was in northern Ontario a bit too early. Fox testified that he left the region in 1973 and never saw Morrisseau paint anything after that. *Spirit Energy of Mother Earth*, as indicated, is dated 1974.

[47] The next witness to provide background on Morrisseau's work in the 1970s was John Vincett. From 1972 to 1975, he was a community resource officer in Red Lake working with indigenous communities to help them gain access to government assistance programs. More specifically, Vincett indicated that he was during those years involved with the Triple K Co-op project in Red Lake, which was a centre to which Norval Morrisseau supplied work. He said that he saw Morrisseau intermittently, and described the artist as being "semi-nomadic" during this phase of his life.

[48] Vincett testified that Morrisseau showed him about 100 to 120 paintings during the course of their 3 years of being acquainted. Vincett said that he saw Morrisseau working on paintings on paper and sometimes on canvass, although it was relatively rare for him to have canvass unless someone bought it for him and primed it and stretched it.

[49] Vincett also indicated that he knew Morrisseau to be an experimental person, and that he would often try different techniques and different ways of signing his work. Vincett testified that he saw Morrisseau frequently sign with syllabics, sometimes in a circle and sometimes in a sausage shape. He said that Morrisseau would also sometimes sign in English, occasionally with a little figure attached. Vincett stated that he had not seen Morrisseau sign his name on the back of a painting, but he did see him write titles and small stories of the paintings on the verso of his works.

[50] Further, Vincett testified that he saw Morrisseau draw small pictures like the thunderbird sketch on the back of *Spirit Energy*. He then went on to indicate that the block letter signature on

the back of *Spirit Energy* is in the standard format that Morrisseau used for prints in the mid-1970s, although in Vincett's experience it would more typically be on the front of the piece. He also pointed out that Morrisseau was very aware of copyright laws and would put the © symbol on his prints in much the same way as it appears on the back of *Spirit Energy*.

[51] With all of that, however, Vincett concluded his testimony by indicating that he was not familiar with *Spirit Energy of Mother Earth*. It was not one of the works that he saw Morrisseau produce during the several years that the two of them were occasional friends.

[52] The first witness called by counsel for the Plaintiff to discuss the existence of fake or forged Morrisseau paintings was Richard Baker, who was Norval Morrisseau's lawyer and business manager from 1975 to 1982. Baker, who is now retired, indicated that he remained in contact with Morrisseau until his death in 2007.

[53] Like Fox and Vincett, Baker is not an art expert and can venture no opinion as to the authenticity of any particular work. Also like those two witnesses, Baker saw Morrisseau paint on a number of occasions during the period in which they had their most intense relationship. Unlike Vincett, Baker indicated that he has never seen an English block letter signature like the one on the verso side of *Spirit Energy*.

[54] Baker said that the Norval Morrisseau Heritage Society, of which he was one of the founding board members, estimates that there are roughly 5,000 to 7,000 Morrisseau paintings in existence. Baker has personally seen somewhere in the range of 200 to 300 paintings. He did indicate that the 1970s was Morrisseau's most prolific period, and that it embodied the most "brilliant expansion of his art".

[55] Baker testified that in 2005, Morrisseau initiated the Norval Morrisseau Heritage Society to collect, preserve, and make sense of his large, career-long output. As he described it, at the opening meeting of the Society, Morrisseau brought with him a number of canvasses which he displayed to the board and told them they were forgeries. The identification of forgeries was part of the impulse in setting up this body, since by 2005 the existence of Morrisseau forgeries was a known problem in the market.

[56] After establishing the Society in 2005, art owners started to approach the board members to have their Norval Morrisseau works authenticated. The Society has refrained from doing that, however, as it did not want to involve itself in the risk of litigation. Instead, it has created a registry of artworks with their provenance.

[57] Baker testified that he had never seen *Spirit Energy of Mother Earth* before this trial. It was not one of the paintings that Morrisseau brought to the Society to demonstrate the existence of forgeries.

[58] Amanda Dalby was produced by Plaintiff's counsel as one of several witnesses who have some first-hand knowledge of the northern Ontario fraud ring. She is originally from Thunder Bay and is of First Nations heritage. Her aunt, Linda Tkachyk, was the common law spouse of Gary

Lamont, a local Thunder Bay drug dealer who had a camp on Waneka Lake. Dalby described the house at the camp as having bars on the window and double locks on all the doors.

[59] When she was 10 years old, Dalby lived with Tkachych and Lamont for a time. She says that her aunt and Lamont were friends of Morrisseau's, and that sometime in the 1990s, in return for letting him stay rent free in a cabin that Lamont owned, Morrisseau gave Lamont 14 original paintings. It is difficult to know how a 10-year old would process all of that information or how she would know the precise number of original paintings and what became of them, but in any case Dalby testified that Lamont and Tkachych sold the paintings that they had been given. She stated that it was her understanding that when they ran out of the real paintings Lamont recruited people to paint imitations.

[60] Dalby identified Benjamin Morrisseau, Norval's nephew, as one of those who did the forged paintings. She also thought that Norval Morrisseau's brother, Wolf Morrisseau, was involved as well. Dalby stated that she saw Benjamin copying Norval Morrisseau paintings from a book that Lamont had in the house.

[61] According to Dalby, Benjamin Morrisseau was at the house every few days and closed himself in a small room to do his painting. She testified that he had a large number of canvases at Lamont's place and would work there for several hours at a time. She said that she saw him painting duplicates of the Norval Morrisseau paintings, and would sign the paintings in Cree syllabics after practicing the signature a number of times. At least once she saw Benjamin Morrisseau use a photo of a real Norval Morrisseau painting as a model for the syllabic signature.

[62] Dalby also testified that she saw Benjamin create signatures on the backs of the paintings, in the same format as the *Spirit Energy* black dry brush signature. She said she saw him copy this from the signature on the back of an authentic Norval Morrisseau sketch.

[63] Once the paintings were done, Dalby said that she saw Lamont and Tkachyk put them in white shipping tubes and place them in a closet. Others were stacked up in the room where Benjamin did his painting or in the basement. Dalby indicated that she and her sister Tanya were told to look after the stored paintings, and were constantly sent to the basement to count them. Dalby said that she saw more than 80 paintings in the stack and at least 20 tubes. She also stated that Tkachyk did the email communication with buyers, and was the one who cashed the cheques and deposited them. According to Dalby, Lamont is illiterate so Tkachyk had to do all of the correspondence.

[64] Dalby mentioned one buyer of the fraudulent paintings, Ugo Metulic, but she did not think that he was aware that they were forgeries. Of course, as a young girl it seems unlikely that she would have had any coherent insight of that sort. She did not mention Joseph McLeod or the Gallery, nor does she appear to have been familiar with *Spirit Energy of Mother Earth*.

[65] There was one other witness produced by Plaintiff's counsel who professed to have an insider's knowledge of the Thunder Bay-based frauds. This was Dallas Thompson, a young acquaintance of Lamont's who testified that when he was 16 years old Lamont plied him with drugs, sexually abused him, and recruited him into the art fraud world as his communicator with

buyers. Thompson testified that at a relatively young age he had been given full charge of selling for Lamont, and in 2004 alone he travelled 26 times from Thunder Bay to Calgary on sales trips. He also indicated that he was put in charge of purchasing supplies for Morrisseau, and that he used his Native status identification card in order to avoid paying tax on the supplies.

[66] Although Thompson told a story that was similar to that of Amanda Dalby, in some respects he contradicted Dalby. In the first place, Dalby thought it was Linda Tkachyk, not Thompson, who was the email communicator with Lamont's customers. Likewise, Thompson testified that he saw Benjamin Morrisseau forge Norval Morrisseau's signature on a number of paintings, and that Benjamin did this freehand, as it were, without copying the signature from anything; Dalby, on the other hand, testified that Benjamin copied Norval's signature either from an art book or from an original Morrisseau work.

[67] It was Thompson's understanding that Lamont had set up a website called woodlandart.com, and that he used this as his vehicle for selling fraudulent Norval Morrisseau paintings. Thompson said that after a while he took over the selling from Lamont. After a year or so of this, however, Thompson left Lamont's camp after having been sexually assaulted and threatened by Lamont. He indicated that Lamont appeared to be somehow connected with the Hells Angels, and had warned Thompson that he would end up like another local individual who had been found murdered and for whom Lamont was known to be the prime suspect.

[68] Sometime around 2005, Thompson returned to Lamont's house and moved back in. He explained that by then Lamont was living with his common law wife, and he therefore did not think that the sexual assaults would repeat. As it turned out, they did repeat. In 2012, Thompson and several other complainants went to the police about Lamont. Although Lamont was never charged with anything related to art fraud, he was eventually convicted of sexual assault and, according to Thompson, was sentenced to 5 years in prison.

[69] In 2006, however, Thompson was engaged full-time in selling paintings for Lamont. He stated that he travelled quite a bit on the art-selling runs. He again said that he went to Calgary 26 times – a number that is suspect as it is precisely the same as the number of Calgary trips Thompson claimed to have taken in 2004. Thompson also related going to Toronto and elsewhere to sell art. He testified that in 2006, he saw about 100 paintings sold; of these, he estimated that one or two would have been authentic, as Norval Morrisseau lived nearby and did provide Lamont with some original paintings. However, he said that the rest were doubtless forgeries produced by Benjamin as far as Thompson knew.

[70] Thompson stated that he handled the money for Lamont, and collected hundreds of thousands of dollars altogether. He said that the paintings ranged from \$3,000 to \$25,000, depending on the size, and that Lamont paid him \$600 per picture, plus food, drugs, alcohol, and hotel rooms.

[71] One can certainly sympathize with Dallas Thompson. He was exploited and abused at a young age by a person who was apparently a seasoned criminal. Indeed, in his testimony Thompson stated expressly he is testifying because he hates Gary Lamont – that Lamont raped him and, as Thompson put it, he is raping his culture for profit.

[72] Much as Thompson is a witness that is important to hear, his bitter response to this personal history makes some of his evidence suspect. To be clear, I do not think that he has fabricated anything, but his narrative is so perfectly tailored to impugn Lamont at every step that it has the feel of exaggeration.

[73] In any case, like all of the other witnesses, Thompson was unfamiliar with *Spirit Energy*. Furthermore, although he claimed to know the name Joseph McLeod, he also had no first-hand knowledge of McLeod and could not identify him or the Gallery as being a buyer of Lamont's forged Morrisseau art.

[74] One more northern Ontario witness to testify was Lorraine Cull, the owner of the Painted Turtle Art Shop in Thunder Bay. It was this shop that Dallas Thompson indicated that he used to purchase art supplies on Gary Lamont's instructions. If I had to speculate as to why she was called as a witness, it would have to be for the suggestion that the Morrisseau frauds – presumably including *Spirit Energy of Mother Earth* – were created at a much later time than the painting's stated 1974 date. If that was the point of her testimony, however, it would have to be by innuendo; she stated no such thing and knew nothing whatsoever about *Spirit Energy*.

[75] Cull testified that she remembers Benjamin Morrisseau coming into the store with Lamont in or around 2001 or 2002. She recalled that they bought supplies and paid with cash. In this, she contradicted Dallas Thompson, who testified that he did the purchasing of supplies and that Benjamin Morrisseau stayed out of sight and was careful not to be seen in public with Lamont. In any case, Cull added that she has no record of any these transactions, as her store only kept records from 2004 onward. She also indicated, as did every other witness from northern Ontario, that prior to this litigation she had never seen *Spirit Energy of Mother Earth*. She does not know who painted it.

[76] The final witness called in an effort to rope McLeod and the Gallery into the northern Ontario conspiracy theory was Norval Morrisseau's close friend and estate executor, Gabor Vadas. He testified that he met Morrisseau in 1987 and stayed by his side for 20 years until his death. As Vadas described it, Morrisseau became like a father to him, teaching him Ojibway tradition, spirituality, and art.

[77] Vadas testified that in early June 1993, he and Morrisseau were in Toronto and drove past the Gallery. He said that in the window he saw a painting on display that had Morrisseau's signature on the front in syllabics. Although the statement is, of course, hearsay, there was no objection and so I allowed him to state that Morrisseau told him at the time that it wasn't his painting. For reasons which became obvious as Vadas' testimony continued, I give this statement that Morrisseau supposedly told Vadas very little, if any weight.

[78] Vadas testified that Morrisseau was upset about seeing a piece of artwork with his signature forged on the front, and wrote to McLeod to protest the forgery. As it turned out, however, that is not really what Morrisseau did, and it does not capture Morrisseau's complaint about the painting hanging in the Gallery.

[79] On June 3, 1993, a day following Vadas' and Morrisseau's drive-by in which they saw the supposedly fraudulent Morrisseau work in the Gallery window, Morrisseau wrote a letter to Joseph McLeod. That letter has been produced and is in the evidentiary record. The letter was typed by another gallery owner, Don Robinson – a frequent ally of Norval Morrisseau's and competitor of Joseph McLeod's – and complains about the reproduction of Morrisseau works in McLeod's promotional material. The letter never mentions forged Morrisseau paintings or fraudulent art of any kind; rather, it complains of the unauthorized reproduction of real Morrisseau paintings in McLeod's brochure.

[80] This, apparently, is what initially set Morrisseau off against McLeod and led to Morrisseau's unending anger at him. Contrary to Vadas' account, the letter had nothing to do with Morrisseau forgeries. Instead, the letter written by Robinson claims royalty payments for Morrisseau in respect of works sold by McLeod and the Gallery. It therefore represents an acknowledgment that it was authentic works, and not forgeries, that were being sold.

[81] Ten years later, in March 2003, a British Columbia law firm representing Morrisseau wrote to McLeod, this time at least on the surface identifying a number of paintings supposedly displayed at the Gallery which Morrisseau had apparently identified as frauds. The letter indicated that the forged paintings had been circulating in the market for some 20 years. Vadas testified that the genesis of this correspondence was that he and Morrisseau were looking at various art gallery websites, including McLeod's website, and that he was surprised at the audacity of people in putting fraudulent paintings on the market.

[82] McLeod responded to the B.C. law firm by letter in April 2003 saying that the paintings in question were from different periods and did not fit the description of forgeries "made some 20 years ago". He also said that he had the paintings on consignment from a dealer in Winnipeg, and that the signatures had undergone forensic analysis and were verified as Morrisseau's. Specifically, McLeod explained: "Placing all of these paintings in a single category would require a situation where dozens of knowledgeable collectors of Morrisseau's work, who did not know one another, who lived all over Canada, were all duped over some forty years by a single forger."

[83] On June 4, 2003, lawyers on behalf of Morrisseau again wrote to McLeod and said that they were instructed to start a Federal Court action over copyright infringement. However, the Federal Court action was never commenced. Vadas testified that by that time Morrisseau was suffering from Parkinson's disease, and as his health care needs were expensive he and Morrisseau together concluded that they should not engage in litigation. They decided instead to commence a public education campaign.

[84] On October 24, 2003, Morrisseau commenced this campaign in earnest by issuing a Notice in which he stated that some canvasses being offered for sale bearing his own thumb print were, in fact, frauds. The Notice stated that someone had pushed his thumb print onto the paintings in question. Vadas testified that it was Gary Lamont who had done this. The Notice demanded that any questionable painting be authenticated either by his friend Don Robinson or by Vadas himself.

[85] These various allegations were accompanied by two sworn declarations that Morrisseau produced dated March 14, 2003 and April 24, 2003, both of which identified what he at the time

called fake paintings being sold by the Gallery. The first declaration identifies 4 paintings that Morrisseau apparently saw displayed in the Gallery, while the second declaration identified some 51 paintings contained in a catalogue being distributed by the Gallery. None of the paintings identified in these declarations are *Spirit Energy of Mother Earth*.

[86] It is difficult to know what to make of Morrisseau's accusations and legal maneuverings in the mid-2000s. On one hand, Vadas asserts that Morrisseau was very sure of himself in making these allegations in publicly issued declarations and lawyers' letters. On the other hand, Morrisseau was suffering from Parkinson's, which eventually took both a severe mental and physical toll on him. Vadas has produced a note from a physician who examined Morrisseau in Nanaimo, B.C. on October 4, 2004, attesting to Morrisseau's sound mind at the time despite suffering from a debilitating disease. However, the very fact that someone thought it necessary to obtain such a medical letter indicates that the symptoms of the disease had started to manifest.

[87] In another letter from yet another law firm, this one dated September 15, 2004, a lawyer at Fraser Milner Casgrain wrote on Morrisseau's behalf to the Art Dealers Association of Canada about the existence of Morrisseau forgeries. This effectively put all of the association's member galleries on notice, and advised that only Morrisseau works sold by Don Robinson's gallery could be trusted as being authentic. This, of course, had the effect of chilling the market for all other sellers.

[88] That same week in September 2004, Morrisseau also had a legal letter sent to a number of individual art dealers making the same allegation. One such letter, dated September 14, 2004 and addressed to Artworld of Sherway located in Sherway Gardens mall in Toronto, specifically warned of fraudulent works sold by McLeod and the Gallery. Apparently, Artworld of Sherway had continued to carry Morrisseau paintings even after the Notice went out to the market at large stating that only the Robinson gallery was trustworthy.

[89] It is worth noting that Artworld of Sherway was the place where the plaintiff in *Hatfield v Child*, *supra*, bought the painting that was the subject of that case. As described earlier, in *Hatfield* the court rejected the evidence of Ritchie Sinclair – the same person who instigated the controversy over *Spirit Energy* by contacting the AGO during its exhibit that included the painting – and accepted the evidence of none other than Joseph McLeod. In other words, in a situation remarkably similar to the one here, the *Hatfield* judgment upheld a finding that an ailing Morrisseau was wrong and that the allegations of forgery made by Sinclair were not credible; at the same time, it concluded that McLeod's assessment of the authenticity of the Morrisseau painting at issue was an assessment on which it could rely.

[90] In addition to the *viva voce* evidence about the existence of Morrisseau forgeries, several other witnesses recruited by counsel for the Plaintiff submitted testimony by affidavit. They were either lawyers, friends, and even a notary public who witnessed some signatures by Norval Morrisseau. Each produced testimony that was entirely credible and entirely beside the point.

[91] The various affiants had no first-hand knowledge of any fraudulent art being produced and no knowledge whatsoever about *Spirit Energy of Mother Earth*. They each deposed, with their own particular variation, that they had been told by a friend, or that Morrisseau said something to



them, or they knew from a friend of a family member of Morrisseau's, that there are numerous fraudulent paintings circulating in the market. This is the kind of 'evidence' that the law rightly frowns upon; it is a form of hearsay that has the effect of distracting from the issue at hand more than it helps probe the issue at hand.

[92] In my view, the numerous witnesses whose testimony speaks to a northern Ontario-based fraud ring must be taken into account minimally, if at all. The danger is that excessive focus on the alleged Thunder Bay frauds can spill over from being informative as background to being highly prejudicial. It is reminiscent of the tendency in U.S. criminal courts to shift focus from the specific conduct at issue to the fact that it took place in a "high crime area": see *Illinois v Wardlow*, 528 U.S. 119, 124. This form of analysis has been criticized as inflammatory, socially biased, and non-probative: Andrew Ferguson and Damien Bernache, "The 'High-Crime Area' Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis." 57 American University Law Review 1587, 1591-92 (2008).

[93] I do not doubt the existence of a Thunder Bay-area fraud ring and the circulation of fraudulent paintings produced there. However, I cannot impugn the authenticity of *Spirit Energy of Mother Earth* simply because it was produced in a 'high crime area', as it were. The information conveyed by the witnesses who relate the existence of a fraud ring is only truly probative of the issues in this action to the extent that it relates to paintings possibly acquired and re-sold by McLeod and the Gallery. And the little evidence that exists in that respect is, as described above, highly suspect. Indeed, since no one can identify *Spirit Energy of Mother Earth* at all, let alone as having been produced by the fraudsters, the relevance of this evidence turns out to be tangential at best.

## **V. The expert evidence**

[94] Two expert witnesses testified at trial. The Plaintiff produced a respected Morrisseau scholar, Dr. Carmen Robertson, who provided opinion evidence about *Spirit Energy of Mother Earth* based on her analysis of how this painting does or does not fit into the rest of Norval Morrisseau's oeuvre. The Intervenors produced an experienced handwriting analyst, Kenneth Davies, who provided opinion evidence about the signature on the verso of *Spirit Energy of Mother Earth* based on his analysis of how this signature does or does not match other known Morrisseau signatures.

### **a. The opinion of Carmen Robertson**

[95] Dr. Carmen Robertson is a full professor of Indigenous Art History at University of Regina, where she has been a member of the Department of Visual Arts since 2006. She teaches indigenous contemporary art, and the work of Norval Morrisseau and his pivotal period are one of her main research concerns. She is also a scholar of indigenous culture more generally, and is an art curator as well as a teacher. She has produced several books on the art of Norval Morrisseau, and has received substantial funding for this research from the Social Sciences and Humanities Research Council of Canada. She is also a member of the Norval Morrisseau Heritage Society.

[96] At trial, I accepted Dr. Robertson as qualified to give evidence as an expert witness in art history, contemporary indigenous art, and the artistic methods of Norval Morrisseau.

[97] Dr. Robertson's methodology combined a number of different approaches. First, she indicated that she has engaged in what is called Morellian analysis. I understand that this approach, named for 19<sup>th</sup> century physician and art collector Giovanni Morelli, is an attempt at scientifically analyzing idiosyncratic details such as the way eyes, ears, hair, etc. are depicted over the course of an artist's career in much the way that a detective might examine physical clues or a doctor examine symptoms: see Carlo Ginzburg, "Morelli, Freud, and Sherlock Holmes: Clues and Scientific Method", in: Umberto Eco and Thomas Sebeok, eds., *The Sign of Three: Dupin, Holmes, Peirce* (Bloomington: Indiana, Indiana University Press, 1984), pp. 81–118. In this way, a researcher hopes to achieve a level of 'connoisseurship' – i.e. "[t]he ability to tell almost instinctively who painted a picture" – based on a study of an artist's style and technique over many years: Bendor Grosvenor, "On Connoisseurship", *Arthistorynews.com*, August 12, 2010.

[98] To this end, Dr. Robertson has studied the iconography of Morrisseau's paintings from the earliest stages of his career to the time of his last works. To further focus her task, she has compiled a database of Morrisseau works from 1973 to 1975 displayed in public institutions (as opposed to private collections and galleries), and has used this database together with the pieces reproduced in a well-known book on Morrisseau published in 1979 to compare the known pieces during the period in which *Spirit Energy* is purportedly dated. In all of this, she has compiled some 532 Morrisseau works, 33 of which fit into a 3-year time span around 1974.

[99] Dr. Robertson testified that her ambition in doing all of this has been to become familiar enough with details in Morrisseau's paintings that she might perceive signs of Morrisseau's style not otherwise noted by a less experienced eye. It is this comparative examination of detail in order to discern hidden markers of authenticity that form the essence of Morellian analysis: see Patrick Lawrence, "The Morelli Method and the Conjectural Paradigm as Narrative Semiotic", (2008) 2 *Watermark* 103-116.

[100] To her credit, Dr. Robertson was candid about the skepticism of contemporary art scholars regarding the scientific approach to connoisseurship. She indicated that in academic circles critical theory has come to dominate the field and to surpass Morellian analysis. In approving her as an expert witness, I indicated that I would keep this methodological qualification in mind. In legal academic terms, Dr. Robertson's description of contemporary methodological debate in her field is reminiscent of the dominance of critical theories of interpretation over earlier methods of 'scientific interpretation' of statutes based on canons of construction and other approaches.

[101] Before starting her Morellian analysis, Dr. Robertson testified about the provenance letter for *Spirit Energy* supplied by the Gallery at the time of its purchase by Hearn. She indicated that in her view, the written provenance is suspect, as the several previous owners listed there could not be found or would not confirm that they had owned the painting. None of these previous owners were called to testify at trial and so, of course, their statements are hearsay. Since Dr. Robertson is a credible source of the hearsay I have admitted them, but the limitations on this evidence are self-evident.

[102] Specifically, one of the previous owners named in the provenance letter has passed away, one cannot be located, and another sent Plaintiff's counsel a letter denying that he ever owned the piece. The first, a Thunder Bay collector named Rolf Schnieders, provided a written Statement of Fact dated February 8, 2013. It was obviously done in anticipation of this or some other Morrisseau-related litigation. In it, Schnieders states that he kept careful records of his art collection for Canada Revenue Agency purposes since he bought and sold a large amount of art – including a substantial number of Norval Morrisseau paintings. He indicates that after a search he has not found *Spirit Energy of Mother Earth* to be among the paintings that he owned.

[103] No one has an explanation of how Schnieders' name came to be on the provenance statement that McLeod gave Hearn, although it is obvious that Schnieders was likely a frequent supplier of Morrisseau paintings. Apparently, however, this did not include *Spirit Energy*.

[104] The last owner mentioned was Dr. Irving Jacobs. As indicated, he sent a letter – more accurately, he had a lawyer send a letter on his behalf – to counsel for the Plaintiff denying that he ever owned *Spirit Energy*. Dr. Jacobs is not a professional art dealer or collector, but rather is a Toronto physician who is listed as having personally owned the painting at some point in the past. It is impossible to assess the reliability of his denial letter and, if he never owned the painting, how or why his name appears on the provenance list. Dr. Jacobs was obviously aware from the inquiry made to him that parties were embroiled in litigation over the painting, and, in fact, he refused to actually speak with anyone involved in this case. Instead, he sent a lawyer's letter whose not very subliminal message was that he simply does not want to be involved in someone else's fight.

[105] In all, there is little I can make of the provenance provided by the Gallery. Morrisseau paintings from Thunder Bay in the 1970s – or, for that matter, from most periods of Morrisseau's career – are as chaotic as his life itself. Witnesses such as Baker and Vincett who knew him in the 1970s describe Morrisseau as a creative genius who painted with an intensity that produced large numbers of works in short bursts; simultaneously, they point out that he was in and out of jail, in and out of sobriety, and in and out of bad company: see also *Hatfield, supra*, at paras 23-24.

[106] In fairness, Morrisseau himself rejected the image that the press and others had created of him as living a troubled existence. As he put it, he was throughout his career having a “marvelous time”: Gary M. Dault, “Ojibway Artist May Soon Find He's Turned into a Living Legend,” *Toronto Star*, August 28, 1975. It is nevertheless the case that late in his life he established the Norval Morrisseau Heritage Society for the very reason that he could not keep track of what became of all of his work. The fact that a Morrisseau painting is sold with an inaccurate provenance letter, or with a provenance letter that lists untraceable prior owners or prior owners who do not wish to involve themselves in a current legal controversy, should surprise no one.

[107] Turning to Morellian methodology, Dr. Robertson identified a number of features of *Spirit Energy* which she said helped her compare it with other Morrisseau pieces in her database. As an initial observation, Dr. Robertson's descriptions of the features on which she focuses her attention tend to follow a pattern. She finds overall similarity in the way that *Spirit Energy* compares with other paintings, and then notices enough of a small difference that could point to one of two explanations: either there are inevitable variances among Morrisseau paintings, or this work might not be an authentic Morrisseau painting.

[108] One simple example of this is in Dr. Robertson's assessment of the title, *Spirit Energy of Mother Earth*. She concedes that it is a Morrisseau-style title. She then goes on to say that a large number of his paintings are spiritual in design; to this extent, it is not surprising to find the word "Spirit" in one of Morrisseau's titles. Dr. Robertson also says that there are a number of other paintings in her database whose titles contain the phrase "Mother Earth". She observes, however, that she has seen no other painting with the exact phrase "Spirit Energy". All one can do with this information is to wonder whether Morrisseau himself was playing with his own naming conventions, or someone else was trying hard to imitate them.

[109] The first physical feature of *Spirit Energy* on which Dr. Robertson commented in her testimony is the overall composition of the piece. She notes that, compositionally, there is a framing formed by a swirl of images, and comments that although there are a number of earlier pieces that share structure, Morrisseau painted more that way after 1990. She points out that Morrisseau's *Mother Earth* (1975) is not framed but rather is centre-focused without use of a visual frame. Likewise, she says that *The Serpent of Life* (1969), which, like *Spirit Energy*, uses snake-like creatures to convey a message of spirituality, utilizes a single snake as a central composition rather than the more numerous small serpent figures within an outer frame.

[110] In addition, Dr. Robertson testified that while *Spirit Energy* contains images that are floating around the canvass, Morrisseau's 1970s pieces tend to have a compositional structure that is weighted at the bottom. In *Spirit Energy* the eye is drawn to the centre, with only a slight weighting to the bottom. She did add, however, that Morrisseau was not averse to varying his compositional structures. Thus, for example, in *Unity* (1974), he decentered the object and more closely mimicked the conventions of modern abstraction in what was considered a radical bit of experimentation.

[111] Dr. Robertson opined that the small sketch of the thunderbird on the verso of *Spirit Energy* is unusual. Hearn put into evidence a letter from McLeod which stated that this feature makes the painting "in sync with the time", and that the small thunderbird – reflecting Morrisseau's name Copper Thunderbird – lends added significance to the piece. It is Dr. Robertson's view that this distinguishes *Spirit Energy* from other Morrisseau works, although, as indicated earlier, John Vincett testified that he saw Morrisseau place a thunderbird sketch on the reverse side of a number of his paintings.

[112] Dr. Robertson seemed to also take something from the fact that Morrisseau's six-panel work, *Man Changing into Thunderbird* (1977), which was known to be one of Morrisseau's own favorites – he referred to it in an interview as his culminating masterpiece – does not have a thunderbird sketch on the verso. However, like *Spirit Energy*, it is an aesthetically pleasing piece. One wonders whether the artist might have considered it superfluous to sketch a thunderbird on the verso when the entire painting is of a magnificent thunderbird on the recto.

[113] The colour scheme is also a feature of which Dr. Robertson takes note but can draw no definitive conclusion. She observes, for example, that Morrisseau's *Mother Earth* is distinctly female, containing mostly reds (representing fertility for a Mother figure) rather than greens. *Spirit Energy*, by contrast, is muted green punctuated by black lines. She concedes that the black

lines around the figures are emblematic of many Morrisseau works, but states that the lack of saturation of the colours is not typical of 1970s Morrisseau.

[114] Dr. Robertson observes that unlike *Man Changing to Thunderbird*, which tells its story through the use of colour and which utilizes hot colours to convey an intense spirituality, *Spirit Energy* is done in cool, muted greens and blues. She states that the colours impede a focal point to the painting, although the overall effect is a very pleasing one. As with composition, Dr. Robertson does acknowledge that Morrisseau was an experimenter with colour. In fact, Morrisseau's colour choices changed with the nature of the individual painting. Dr. Robertson explained that separate from the intense, fiery colouring of the spiritual paintings, Morrisseau did produce another line of paintings with muted earth tones like *Spirit Energy*, and that those paintings are more in homage to his Anishinaabe roots.

[115] In yet another technique that Dr. Robertson deems worthy of note, Morrisseau's rendering of eyes in *Spirit Energy* is partly standard and partly unique. His *Water Spirit* (1972) contains concentric circles on a black background, with an intense red in the middle. This is how he typically painted the eyes of spirit beings and animals. *Spirit Energy* utilizes a similar convention, but without contrasting colours. This rendering does not draw the viewer's eye away from the rest of the body of the serpent creatures and into the eye, although as a form of what may be compensation in *Spirit Energy* the eyes are oversized and thereby attract attention in a slightly different way. Dr. Robertson also concludes that in *Spirit Energy*, the serpents' eyes do not convey the figures being in a state of transformation, although it is difficult to know whether this is in accordance with the painting's intended theme or contrary to it.

[116] A similar ambiguity exists with respect to the black connecting lines between the figures. In *Spirit Energy*, these lines exist but sometimes go off the canvass rather than being interconnected in what Dr. Robertson calls a spiritual message. She concedes that she has seen other examples where Morrisseau has lines that seem to leave the painting, but states that in those cases the lines somehow still have a connective message. To Dr. Robertson, at least, in *Spirit Energy* the lines going off the page appear more random, or, to put a finer point on it, more a matter of secular aesthetics than spiritual message. In short, the black lines between the figures on *Spirit Energy* look good but are insufficiently connected to convey the message with the fervor that Dr. Robertson sees elsewhere.

[117] While I genuinely respect the scholarly effort that Dr. Robertson has put into this analysis, I frankly am skeptical of its usefulness. It often has the feel of subjectivity hiding within a veneer of objectivity. Lines drawn in thick paint are deemed to have a "dimension of emotion" missing in similar lines drawn with a thin layer of paint, as if expressions of rage or passion can be discerned not in what is thought out and rendered on canvass but in how it is mechanically rendered on canvass.

[118] This tendency to read undiscernible qualities into physical detail represents the central effort, and central fallacy, of Morellian analysis. What is elicited from the work is invariably mixed with what is projected onto the work. As critical theorists are wont to point out with respect to the relationship between objectivity and subjectivity, "the one always lies hidden within the other as

the sun lies hidden within a shadow, or truth within error”: Paul De Man, *Blindness and Insight* (University of Minnesota Press, 1970), p. 103.

[119] The reason that critical theory has taken over from Morellian and other versions of ‘scientific’ interpretations of art, literary texts, statutes, etc. is that scholars have concluded that ‘truth’ is not readily decipherable in a canvass or text. In fact, in a post-Morellian world of art criticism, “the matter becomes less one of discovering the truth, and rather one of establishing it”: Lawrence, *supra*, p. 104.

[120] Scholars of the Morellian method have come to call this form of analysis the “conjectural paradigm” – i.e. one in which the researcher’s connoisseurship, or her instinct or subjective conjecture about the authenticity of the work, is projected onto the work rather than found objectively within it: Ginzburg, *supra*, pp 28-29. As Derrida puts it, to seek ideal meanings divorced from individual intentions is to seek a mirage: Jacques Derrida, ‘*Speech and Phenomena*’ and other essays on Husserl’s *Theory of Signs*, trans. David B. Allison (Evanston: Northwestern University Press, 1973). The artist is thus a protagonist in a detective story where the Morellian expert is the author; whereas “the plot and exposition of a crime narrative rely on the illusion that the criminal is pre-existent and that he leaves behind the clues of his identity, in the material reality of the text, the criminal emerges as the product of his clues”: Lawrence, *supra*, p. 107.

[121] Once this difficulty in discerning the subjective buried within the objective is understood, the pitfalls of attribution by studying supposedly unconscious details and artistic devices are self-evident. As one scholar notes,

...earlobes and tearducts are arguably not always unconscious; and wishful thinking so often does come into the matter the wish to assign a name, to make the work be by a superior rather than by an inferior master, as well as the almost equally strong desire to downgrade the work, to take it off its pedestal, even to declare it a fake. This latter seems so often to be an easier move to make than a more positive one.

David Freedberg, “Why Connoisseurship Matters”, 2006, Columbia University Academic Commons, <https://doi.org/10.7916/D82B9746>, p. 32.

[122] In perhaps a perfect illustration of the danger, Dr. Robertson testified as to two distinctions which she identified as being similar to, but in significant ways different than, more typical Morrisseau conventions: the spherical objects that adorn *Spirit Energy* and the internal, transparent quality of the serpents’ bodies.

[123] Dr. Robertson first set out that Morrisseau scattered around his paintings what look like divided circles or spherical objects with a line down the middle. According to her, these designs signify dualities, and are often connected by solid black lines denoting communication between them. In *Spirit Energy*, the divided circles are readily apparent but they are unconnected by the black lines which outline various objects. In Dr. Robertson’s opinion, the divided circles therefore appear to the viewer to be isolated and the effect is decorative, not spiritual.

[124] Likewise, Morrisseau was in the habit of showing the inner structure of his fantasy animals – most often the backbone, and sometimes the heart or brain. Dr. Robertson explained in her testimony that Morrisseau’s exposing of an internal structure for the animals in his paintings had great spiritual importance. She then pointed out that in *Spirit Energy*, the serpent figures have interior segmentation and bone structure that appears geometrically regular. Again, she indicated, in her opinion the effect on the viewer of this skeletal configuration for the serpents is more decorative than spiritual.

[125] Perhaps even more than beauty, spirituality is in the eye of the beholder. Much as Dr. Robertson in her report characterizes her Morellian analysis as a “precise and *scientific* method” [emphasis in the original], it has occasionally been criticized as a form of pseudo-science – “nothing more than a rhetorical strategy designed to invest his attributions with authority”: Luke Uglow, “Giovanni Morelli and his friend Giorgione: connoisseurship, science and irony”, (2014) 11 *Journal of Art Historiography* 1, 3. These observations about spirituality of design go some way to indicating why this critique has purchase. One can be schooled in the narratives and symbols of a belief system or culture. But, with due respect, there is no invisible hand, or Morellian X-ray, that can be wielded to divine the presence or absence of inner spiritual essence.

[126] More importantly, when it comes to indigenous belief systems and their representation, spirituality is in the collective eye of the people. “The receiver of messages and meanings is not a passive screen on which the original meaning is accurately and transparently projected. The ‘taking of meaning’ is as much a signifying practice as the ‘putting into meaning’”: Stuart Hall, “Introduction”, in: Stuart Hall, ed., *Representation: Cultural Representations and Signifying Practices* (London: Sage Publications, 1997), p. 11. While an expert is of necessity impartial and objective, see *White Burgess Langille Inman v Abbott and Haliburton Co.*, [2015] 2 SCR 182, spirituality is constructed by those engaged in the culture.

[127] As a graphic illustration, Woodland-style artist Nathaniel Big Canoe testified that in *Spirit Energy of Mother Earth*, the design and structure speak to far more than just the superficial aesthetics that Dr. Robertson perceives. He indicated that for him the painting, with its swirl of serpents, evokes the essential connectedness of all beings. He stated that he understands this design to convey the very spiritual energy which the title of the piece invokes. Big Canoe went on to indicate that this is meaningful to the Indigenous community because it depicts the culture pre-contact with Europeans; and, in particular, it forms part of Morrisseau’s legacy in pioneering the portrayal of a more spiritual understanding of the interaction between animals and the earth.

[128] While the court can appreciate the aesthetics and cultural significance of Norval Morrisseau’s art, it is not this court’s role to pass judgment on Anishinaabe spiritual meaning or other indigenous ways of knowing. Determining the authenticity of *Spirit Energy of Mother Earth* cannot turn on whether or not an expert has convinced the court that it actually has spirit energy. All the Morellian details in the world cannot objectify that assessment, or remove it from the community to which Morrisseau and his art belong.

[129] There is one more important issue on which Dr. Robertson opined, and that is the likely authenticity of the so-called dry brush signature on the verso of the painting. She testified that this signature and the small thunderbird image that accompanies it are not representative of works in

public museums and noted works in private galleries. In fact, she said that she knows of no authentic Morrisseau paintings with a black dry brush signature or emblem of this kind on the back of the work.

[130] This unqualified statement is contradicted by at least two witnesses – John Vincett testified that he personally saw Morrisseau write titles and place small sketches such as the thunderbird on the back of paintings, and Amanda Dalby testified that she saw Benjamin Morrisseau copy signatures from an original Norval Morrisseau sketch signed on the back. It is also noteworthy that the black dry brush signatures on the reverse side of paintings are not rare items in the overall body of Morrisseau work. The Intervenor, James White, testified that he owns 40 to 50 Morrisseau paintings with such a signature.

[131] I also understand from the reasons for judgment on appeal in *Hatfield* that the painting in issue there had a similar black dry brush signature on the reverse side, although that signature had no thunderbird sketch accompanying it. As already indicated, the Divisional Court in *Hatfield*, *supra*, at para 16, observed that the trial judge there, “in reaching his conclusion on Morrisseau’s signature...also relied on the evidence of fact witnesses Wilfred Morrisseau and Marlowe Goring, who said they had personally witnessed Morrisseau signing the backs of his works in black paint.”

[132] Accordingly, Dr. Robertson’s evidence is ambiguous at best. She is a credible scholar, and so when she concludes that *Spirit Energy* is a good forgery – as she put it, “a pastiche” of Morrisseau elements, resulting in “a pleasing simulation of Morrisseau’s artistic vocabulary” – it is tempting to nod in agreement. However, her Morellian analysis of the various parts of the painting do not add up to a conclusive whole.

[133] Dr. Robertson’s expert opinion states that the design structure, colour scheme, black outlines, supernatural serpent imagery, skeletal internal patterns, black dry brush signature with thunderbird sketch and title on the verso, are all either different from standard Morrisseau approaches or are “cause for concern”. Simultaneously, her evidence is challenged by other evidence, some of which comes from individuals who have seen him use these techniques elsewhere.

[134] That said, the largest challenge to Dr. Robertson’s viewpoint comes from Morrisseau himself. He is known to have experimented with his own techniques, and this experimentation produced variances on his own themes that would encompass the variances that Dr. Robertson observes. The Morellian analysis simply does not produce the kind of scientific, objective conclusions that its promoters claim for it. It stresses the artist’s conventions, but, as leading critical theorists caution, “conventions are by essence violable and precarious, in themselves and by the fictionality that constitutes them, even before there has been any overt transgression”: Jacques Derrida, *Limited Inc.* (Northwestern University Press, 1988), p. 105.

[135] As Dr. Robertson acknowledged in cross-examination by counsel for the Intervenors, “[b]ecause of critical theory, I understand that everything is interpretation.”



**b. The opinion of Kenneth Davies**

[136] The Intervenors produced an expert witness in this trial, Kenneth Davies, a handwriting analyst who has in the past worked as a document examiner for the Ontario Ministry of Revenue and provided document authentication services for the Insurers' Advisory Organization. He has a Certification from the International Graphoanalysis Society, and has testified as an expert witness in numerous courts across western Canada. He produced a report dated September 25, 2017 entitled, "Examination of Dry Brush Signature and Titling on reverse side of Norval Morrisseau paintings," whose title alone suggests its relevance to the issues before me.

[137] I accepted Davies as qualified to provide expert opinion evidence in graphoanalysis and forensic analysis of handwriting and signatures.

[138] In explaining graphoanalysis technique, Davies indicated that he examines letter formation, slant and slope of writing, pressure variance, compression and expansion of letters, spaces between letters and words, and sequence of strokes. These are referred to collectively as writing habit, and a proper handwriting analysis seeks to compare as many of these traits as possible. He also indicated that one typically uses a microscope for document signatures, but Morrisseau canvasses are rather large and a microscope was not needed. Davies was unable to attend at the trial in Toronto, and testified via video link from Alberta. He stated that in preparing for his testimony he had examined *Spirit Energy of Mother Earth* by means of remote video link as well.

[139] Davies has examined some 80 Morrisseau paintings, including works on canvas, birch bark, and at least one on a pizza box. He stated that the paintings he examined date from 1962 to 1988, and that 90% of them were signed on the back with black dry brush signatures. Of the 80 paintings he has examined in the past, he has found 3 to be definite forgeries and 2 to be inconclusive.

[140] For present purposes, Davies used 4 paintings in particular as formal 'comparators' – *Medicine Bear Changes* (1979), *Soaring Thunderbird* (1979), *Shaman Envelopes Soma* (1976), and *Wheel of Life* (1979). He testified that he found the verso of *Spirit Energy* to be typical. He pointed to the name written toward the top of the canvas, the copyright symbol and date, and the title *Spirit Energy of Mother Earth* with what he called the "trademark dashes" on either side. Davies stated that in his experience of Morrisseau paintings the thunderbird figure accompanying the signature is rare, but he has seen it as a symbol denoting Morrisseau on occasion.

[141] As with so many other fields of forensics, Davies acknowledged that any handwriting analysis will yield degrees of certainty rather than a definitive positive or negative conclusion. He conceded that his conclusion with respect to the black dry brush signatures attributed to Norval Morrisseau is one of "reasonable certainty" (i.e. a "highly confident result", or 80% - 90% certainty), but not a "high degree of certainty" (i.e. "beyond reasonable doubt, or over 90% certainty). The range goes from high degree of certainty at the top end of the scale to inconclusive at the bottom end.

[142] Davies also confirmed that the conclusion about any one piece of handwriting is a comparative one. That is, it is only as good as the comparator. If the comparator sample is

authentic, one can say that the studied sample is within a percentage of being authentic. Here, for example, he can only compare one black dry brush signature to another. He also acknowledged that he only examined the signature on the reverse side of the paintings, and that he cannot say that the signature was done by the same person that did the painting on the front.

[143] With those parameters in mind, Davies laid out his conclusion that the black dry brush signature on the painting at issue was done by the same hand as did the others he has studied. As he put it, the elements of formation, rhythm, pressure, compression and expansion characteristics, slant and stroke sequence, and the placement of the various features indicate that the signature on the verso of *Spirit Energy* is “consistent and without contradiction with known works of dry brush signed paintings” attributed to Morrisseau during the relevant period.

[144] In cross-examination by counsel for the Plaintiff, Davies agreed that there is nothing in his study that establishes that any black dry brush signatures, including his specific comparators, are authentic in the first place. He reiterated that his analysis compares one black dry brush signature to another. That said, one of the comparitors, *Wheel of Life* (1979), is the painting that was found to be authentic in the *Hatfield* case. Considering all of the purported Morrisseau signatures he has examined, he stated that he can be “highly confident” that either all of them are authentic or they are all forgeries by the same person. He then explained that there are no known forgers that can produce this quantity of consistent forgeries. That is, a person intentionally imitating another’s signature will eventually vary enough from the original to make the forgery easily detected.

[145] In this, Davies’ explanation is reminiscent of what Joseph McLeod wrote in April 2003 to the British Columbia law firm that had advised him of Morrisseau’s accusation regarding fraudulent paintings: “Placing all of these paintings in a single category would require a situation where dozens of knowledgeable collectors of Morrisseau’s work, who did not know one another, who lived all over Canada, were all duped over some forty years by a single forger.” What seemed intuitively implausible to McLeod in 2003 is confirmed by Davies in his testimony at trial to be virtually impossible.

## **VI. Burden of proof**

[146] The final written submissions by counsel for the Plaintiff contain a list of nearly a dozen questions posed for the court. All but one of them are superfluous. This case reduces to the question prompted by the first sentence of Plaintiff’s counsel’s submissions: “The plaintiff submits that the defendants sold him a forged Norval Morrisseau painting.” The issue is whether this contention has been proven to be true.

[147] I pause here to return to the observation made at the outset of these reasons, to the effect that Hearn is sincere in his pursuit of this case out of dedication to the truth. That is borne out by, if nothing else, the fact that in a financial sense this case can only hurt him. He purchased what he thought was a valuable painting, and has invested substantial time and resources into proving that what he purchased is worth almost nothing. James White testified that he owns Morrisseau paintings that range in value up to \$80,000, but that the art market holds Morrisseau imitations to be essentially valueless. I have no reason to doubt that; indeed, it is possibly the one thing on which Hearn and White agree.

[148] I say this in order to emphasize that while Hearn, like many litigants, has come to court seeking to establish the ‘truth’, that is not always attainable in the lay person’s sense. Truth in law is a relative concept, not a certain one. As Baroness Hale has explained, “In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place... Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did”: *Re B (A Child)* [2008] UKHL 35, at para 32. In other words, what the court seeks as truth is a measure of probabilities. The Plaintiff has the burden of satisfying the court that, on the balance, the painting is a fraud. Otherwise, legally speaking, it is not.

[149] As discussed above, Dr. Carmen Robertson distinguished the design and structure of *Spirit Energy of Mother Earth* from other Morrisseau works of the same era. She indicated, for example, that *Mother Earth* (1975), as well as works such as *Androgyny* (1983), have a central image and are arranged in a symmetrical manner with a dominant figure or groupings balanced in the centre and surrounded in a way that frames them. She explained that this symmetry represents a structural design that Morrisseau constantly repeated. By contrast, *Spirit Energy* lacks a stable centre. Its design is de-centred in a way which, according to Dr. Robertson, evokes a more sophisticated and pleasing aesthetic, but which lacks Morrisseau’s intensity of meaning and is a sign of inauthenticity.

[150] And yet Dr. Robertson also teaches that one can overstate this focus on symmetry. In fact, she has stated that the centrally anchored figure was not always the focal point for Morrisseau: “While he returned to this symmetrical structure many times, Morrisseau was an innovator and was not complacent with regard to style or technique. He often experimented... [with an] abstract, painterly background [that] dramatically illustrates Morrisseau’s awareness of European modern styles...” In doing so, he consistently displayed “willingness to explore more ways to render his thunderbird imagery”: Carmen Robertson, *Norval Morrisseau: Life and Work* (Art Canada Institute, 2016), pp. 46-47.

[151] This seeming contradiction illustrates the most fundamental problem in attempting to authenticate a purported Norval Morrisseau painting: there is more than one Morrisseau, or more than one Morrisseau style, that can emerge or submerge at any time. If centrally weighted symmetry and a de-centred, abstract background can both be emblematic of Morrisseau works, an expert’s opinion is unlikely to ever be more than half right.

[152] What fills the void left by an inscrutable record of paintings is the viewer’s own background, experiences, and understandings. Viewers, including expert viewers, bring multiple meanings to Morrisseau’s works, and Dr. Robertson is no exception to this phenomenon. She therefore states: “[m]y reading of the texts and images in this study is a product of my positioning as an Indigenous female, as an academic, and as someone who grew up in rural Saskatchewan in the 1960s and 1970s constituted, constrained, and enabled in a criss-crossing of discourses”: Carmen Robertson, *Mythologizing Norval Morrisseau: Art and the Colonia Narrative in the Canadian Media* (Winnipeg: U. of Man. Press, 2016), p. 5.

[153] I cannot find fault with Dr. Robertson’s description of her own perspective. It is inevitably correct. But, of course, it carries with it a connotation of subjectivity. Another person – another

examiner of Morriseau's work – will also be a product of multiple discourses, although they will be divergent discourses leading to that person being differently constrained and enabled.

[154] What is non-spiritual, detached and merely decorative for Carmen Robertson may be highly spiritual, intense and fully participatory for Nathaniel Big Canoe. Where meaning and authenticity are difficult to objectively pin down, the most that one can say is that “meaning is always in process and as a result is unstable because readers bring multiple meanings to texts”: *Ibid.*, p. 5.

[155] All of which leads to the conclusion that while *Spirit Energy of Mother Earth* may indeed be a fraudulent Morriseau, there is an equal chance that it is a real Morriseau. “‘You can argue either way,’ lawyers and law students often respond when asked the answer to a legal problem”: Gerald Frug, “Argument as Character”, 40 *Stanford Law Review* 869 (1988). When this happens at the end of a trial – where there is no tilting of the balance – there can be no shifting of responsibility. The chips are left to lie where they initially fell.

[156] The Supreme Court of Canada has emphasized that “there is only one civil standard of proof at common law and that is proof on a balance of probabilities”: *FH v McDougall*, [2008] 3 SCR 41, at para 40. The Plaintiff and his expert may be right or they may be wrong. What they have not done, however, is to have proved that they are right on the balance of probabilities.

[157] *Spirit Energy of Mother Earth* is one more painting – an interesting and beautiful one, if I may say so – that is possibly an authentic Norval Morriseau and possibly not. As a matter of law, what is important is that a tie goes to the Defendants (or, here, to the Intervenor). Where a court is left in doubt because the relevant burden of proof has not been satisfied, the ‘fact’ sought to be proved is in law not true: *Re B*, *supra*, at para 2 (per Lord Hoffmann).

[158] *Spirit Energy of Mother Earth* has not been proved to be a forged or fake Morriseau. From the law's point of view, it is therefore a real Norval Morriseau painting.

## VII. Disposition


[159] The action is dismissed.

[160] The Intervenor and their counsel contributed greatly to this trial. Without them, it would have been difficult to test the Plaintiff's evidence and to maintain a level playing field between two sides that have literally played to a draw. That means that the Intervenor has been successful, and in the ordinary case might deserve some costs.

[161] That said, I allowed the Intervenor into the case at the commencement of trial, well after the Plaintiff had been put to the expense of pursuing a difficult case against the Defendants throughout the pre-trial stage. The Plaintiff certainly did not require the Intervenor to participate once the Defendants dropped out.

[162] Since the Intervenor has voluntarily defended their interests, and the Plaintiff had to carry the weight of the proceedings up until trial, I am inclined to exercise my discretion under section 131 of the *Courts of Justice Act* to forego any costs award.

[163] There will be no costs payable to or by any party, including the Intervenor.



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Morgan, J.

**Released:** May 24, 2018

**CITATION:** Hearn v. Maslak-McLeod Gallery Inc., 2018 ONSC 2918  
**COURT FILE NO.:** CV-12-455650  
**DATE:** 20180524

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

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**REASONS FOR JUDGMENT**

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E.M. Morgan, J.

**Released:** May 24, 2018