

thing 002296 (*Mount Whymper*)

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In late November, 1986, John Hawley, who was incarcerated in Frontenac Institution, a minimum security establishment in Kingston, Ontario Canada, approached the prison authorities with a proposal to make a mural in the Visitors' & Correspondence room. At that time Hawley was sitting a 10-year sentence for a series of armed robberies in 1980. He provided the authorities with a small portfolio of photographs so that they could decide what particular theme would be appropriate. In December, 1986, a painting based on a photograph of Mount Whymper in Kootenay National Park was approved. On January 23, 1987, Hawley received a written permission by the work board to undertake his suggested assignment. He was transferred to the community services department, which was run by Bernard Aucoin. Rather than doing a mural they agreed upon a large painting. Art supplies were ordered together with a 3 m2 masonite board. Hawley was given access to the hobby room during working hours to paint. Over the course of four months Hawley made the painting *Mount Whymper*. For this large acrylic painting he used the air-brush technique. On April 10, 1987, the painting

was framed and installed on one of the dining-room walls.

In October of 1987 the artist was eventually released on parole. Since then he has been running a successful commercial art and design studio in Toronto. The painting *Mount Whympet* remained in the possession of Frontenac Institution.

Hawley stated that he has been deprived of his work of art made in prison. Hawley claimed in a legal action against warden George Downing and Correctional Services of Canada that the painting belonged to him and that Frontenac Institution had no right to keep it. Frontenac Institution alleged that it is the legal owner of the painting, that the work was done as a commission by the prison authorities, that it was created during Hawley's working periods and that the Crown is entitled to keep possession of it. On April 24, 1990, the court case *Hawley v. Canada* was heard at the Federal Court. Justice Louis-Marcel held that:

*[Hawley] says that the painting was done on his own time. It was not part of his assigned duties. He calculates having spent some 500 hours to finish it. It is true he*

*had access to his studio every day but his working hours were spent doing any number of painting or design chores for the institution. Such chores included refinishing the edges of an existing mural in the common room, in doing paint touch-ups here and there, in designing and painting a large banner for a community organization, in designing a crest for the institution and in performing artistic functions as in painting signs, painting carnival wheels and boards for the Kinsmen Club and other duties of a similar nature. [...] [Hawley]'s working hours were from 08:00 hrs. to 16:00 hrs. with a one and a half-hour break at 11:30 hrs. His leisure hours were from roughly 18:00 hrs. to 23:00 hrs. Furthermore, as all inmates could leave their rooms at 06:00 hrs. he could put in a couple of extra hours of leisure time in his studio before the work day started at 08:00 hrs. According to [Hawley], these hours were devoted to completing his work of art. He calculated that on a total of some 500 hours on his venture, perhaps 100*



*hours would have been expended during his working hours. [...] [Hawley] stresses that upon his transfer to Frontenac Institution, he had brought with him a large inventory of art supplies and equipment. Out of his past and more current earnings as an inmate, he had rented compressor equipment and compressed gas cylinders to work on and develop his air-brush techniques to apply to the large painting which he dreamed of creating.*

*According to the warden, [Hawley] was to be given a special assignment to do a painting for the institution. The original idea of a mural was deemed impractical. The warden gave approval for a room to be used as a studio. Formal announcement came through the work board's meeting on January 8, 1987. [Hawley] was to be assigned to the maintenance supervisor, Mr. Potter, but when the latter complained, [he] was assigned to Mr. Aucoin, the community services supervisor. From then on, states*

*Warden Downing, his view of the matter was that [Hawley] was supposed to be busily engaged in creating his painting. Several weeks went by. The warden looked into the studio regularly. The painting was progressing but he observed on later visits many erasures from previous visits. He spoke to [Hawley] and both agreed that the the Visitors' & Correspondence Room might not be the proper place to hang the painting. The dining-room would be a better place. [...] The warden says that there was no doubt in anyone's mind that upon completion, the painting would belong to the institution. That assignment was part of [Hawley]'s obligation to fulfill his working days in completing the work. He was being paid for it. It was part of [Hawley]'s rehabilitation program. [Hawley] would hone his skills in his medium and at the same time provide a satisfying piece of art decoration for the institution.*

*The deputy-warden acknowledges that there was no specific contract in writing "com-*

*missioning" [Hawley] to do the work as that term might be employed in the making of works of art for others. She had no worries about this: after all, the programme had always been of [Hawley]'s own choosing.*

*Mr. Potter was quite happy to have [Hawley] come under Mr. Aucoin's supervision and he only reluctantly agreed that the costs of supplies, including the masonite board, paints and pigments and the like would come out of his budget.*

*Mr. Aucoin, speaks at length on [Hawley]'s program from January to April, 1987. [Hawley], he says, had been assigned a paint room in the hobbycraft area of the building. [Hawley] was expected to spend his working hours there and complete his assignment. Mr. Aucoin would attend at that work place about four times a day. He observed [Hawley]'s preparations for the project, the ordering of materials, the white matt finish that [Hawley] applied to the masonite board, the several mixes of paints and*

*pigments [Hawley] worked on, and specifically, the numerous instances when parts of the work would be painted and erased, repainted and erased again. [...] Mr. Aucoin went on to state that [Hawley] had worked on the design of a crest but as far as he was concerned no other assignment was given to him apart from his painting project.*

*Counsel for [Hawley] urges the court to look at the whole evidence on the basis that the creator of a work is deemed to own the product of his labour. Such a presumption strongly favours [Hawley] especially in the light of his own evidence that the work he completed was substantially done during his leisure hours.*

*Counsel for the Crown in turn reminds the court that it was at [Hawley]'s own request that a specific work assignment was given to him. [Hawley], in fact, was paid for it and on completion of the work, title vests in the Crown.*

*The original assignment for [Hawley] was to create a mural for the Visitors & Correspondence room. Somehow the mural became a large painting to be exposed in the dining-room. [...] [O]n balance, the evidence, specially the documentary evidence, is more consistent with an employment relationship having been established with respect to the Mount Whympers painting and, in accordance with section 13(3) of the Copyright Act, ownership of it vests in the Crown. [...] I should first of all find that all inmates at Frontenac Institution had to be gainfully employed. The gain might only be in the neighbourhood of \$6 per diem but it was employment nevertheless. The particular assignment given to [Hawley], it will be recalled, was at [Hawley]'s own urgings. It was [Hawley] who suggested that he paint a mural on the wall of the Visitors & Correspondence room. It was [Hawley] who provided evidence of his artistic talents and who was able to have his project approved. As early as January 23, 1987,*

*as noted in exhibit P-4, it was recognized that he was now the institutional artist employed to paint a large mural for Visitors & Correspondence room. The fact that the large mural became a large painting hanging in the dining-room is of no consequence. [...] I also find that the purchase of various artistic supplies for the completion of the work as well as the later purchases for the framing of it and described by [Hawley] himself as being for purposes of the institution, are consistent with the carrying out of the assignment to do the work on behalf of the institution. In my mind, it would have been inconsistent with the institution's policies, with its programme of work-board assignments, with its necessary and continuing supervision over the carrying out of these assignments in proper and orderly fashion, to conclude that [Hawley] would be given free scope to engage in any artistic endeavour over a three-month period and that, upon the eventual completion of the work which he was specifically asked to do, the ownership*

*of it would remain with him. [...] It could also very well be that [Hawley] spent many of his leisure hours on the project. Whether spurred on by his desire to perfect his skills in air-brushing techniques, or by his creative urges to make of the painting a work of quality, and a greater reflection of his own developing talents, all of this is in the realm of possibility or probability. I need not, however, make specific findings in that regard because, in my respectful view, nothing having to do with the ownership of the painting flows from it. A great deal of documentary evidence was submitted showing continuing purchases of art supplies by [Hawley] and which would lead to the inference that the large painting was done with his own supplies and, as he indicates himself, was done on his own time. Again, however, such an inference is inconsistent with the fact that specific art supplies for the painting was on the institution's account, including of course the purchase of framing material for it. Unfortunately for [Hawley], I have no evidence*

*before me that the terms and conditions of his assignment were amended or modified in the three-month period between January and April, 1987. I have no evidence from anyone that, notwithstanding the terms of the original undertaking, [Hawley] was assigned so many other duties as to enable one to conclude that such undertaking was effectively abandoned by mutual consent and that thereafter [Hawley] could proceed with its completion on his own account and for his own benefit. In my view, exhibit D-5, the quarterly progress report issued in April, 1987, and subscribed by [Hawley] and stating that he was "employed doing a large mural to be mounted in a prominent place in this institution" effectively closes the door to that line of argument advanced by his counsel. [...] In essence, [Hawley] was assigned to do a large mural for the Visitors & Correspondence room. I find that by agreement, it became a large painting for the dining-room. The scene for the painting, namely, Mount Whymp, was also chosen*



*by common agreement. What [Hawley] created was exactly what he was called upon to do. As a consequence, whatever honest perceptions [Hawley] might have gained as the work progressed, are submerged to a large extent by the more objective evidence to which I have referred and which brings the issue clearly within the terms of ordinary contract law or within the terms of the Copyright Act. In effect, I am finding that in dealing with a literary work or a work of art made or created by an inmate in a penal environment, there is no reason to apply different criteria or to depart from normal rules.*

*Frontenac Institution policies, as found in similar institutions, provide only circumscribed conditions under which an inmate can profit or gain from his own labours exerted during leisure hours. The product of such an inmate's labour during working hours is something else. Any accommodation which the correctional services would*

*otherwise have been able to provide in dealing with the claim would, in my view, have seriously undermined, both from an institutional and moral point of view, the scheme of the whole work programme in force at the institution.*

The court dismissed Hawley's action and found that it was a "work for hire" and that the copyrights of the painting were owned by the employer: the Crown.