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**** HIGHLIGHTS ****

* The Manitoba Court of Appeal dismissed an appeal from a bankruptcy order on the grounds that leave was not obtained under s. 8(1) of the Family Farm Protection Act (Manitoba) before the application for a bankruptcy order was made. The farmer relied on a 1998 decision of the Supreme Court of Canada and his assertion that the bankruptcy order was a nullity as leave had not been obtained. The Court of Appeal held the Act did not apply as the land was not owned by the farmer, but by a corporation in which the farmer was the sole shareholder. The Court also observed that it may be necessary to consider the doctrine of paramountcy to determine whether the provincial Act applied to proceedings under the Bankruptcy and Insolvency Act (Canada). (Keystone Agri-Motive (2005) Inc. v. Desrochers, CALN/2014-037, [2014] M.J. No. 323, Manitoba Court of Appeal)

* A Judge of the Saskatchewan Court of Queen's Bench has considered the standard of review which applies to appeals from the decision of discipline committees constituted pursuant to the Agrologists Act (Saskatchewan). The Court concluded that discipline committees are entitled to significant deference, and that the Court need only consider whether the committee came to a defensible conclusion. The decision need not be necessarily correct in the Court's view. The Court upheld a decision of professional misconduct against a Saskatchewan agrologist who published conclusions concerning the efficacy of an air seeding system used by the agrologist's employer, as compared to a seeding system used by a competing air seeder manufacturer. The Committee concluded, among other things, that the agrologist failed to test his hypothesis through a proper scientific trial and that he stated his opinions without appropriate qualifications and assumptions. (Meier v. Saskatchewan Institute of Agrologists, CALN/2014-038, [2014] S.J. No. 686, Saskatchewan Court of Queen's Bench)

**** NEW CASE LAW ****

Keystone Agri-Motive (2005) Inc. v. Desrochers; CALN/2014-037, Full text: [2014] M.J. No. 323; 2014 MBCA 109, Manitoba Court of Appeal, B.M. Hamilton, H.C. Beard and M.A. Monnin JJ.A., November 28, 2014.

Family Farm Protection Act (Manitoba) -- Requirement of Land Ownership by Farmer -- Application to Bankruptcy Orders.

Marcel Desrochers ("Desrochers") appealed to the Manitoba Court of Appeal from a bankruptcy order granted on the application of Keystone Agri-Motive (2005) Inc. ("Keystone").

Desrochers asserted that the bankruptcy Judge had made three errors:

1. Failing to find that he was a farmer for the purposes of s. 48 of the Bankruptcy and Insolvency Act (Canada) (the "BIA").

2. Finding that he had committed an act of bankruptcy for the purposes of s. 43 of the BIA.

3. Concluding that leave under s. 8(1) of the Family Farm Protection Act, C.C.S.M. c. F15 (the "FFPA") was not required by Keystone with respect to its application under the BIA.

Section 43(1) of the BIA permits creditors to file an application for a bankruptcy order against a debtor if it is alleged in the application that the debtor's debts owing to the creditor amount to $1,000.00, and the debtor has committed an act of bankruptcy within 6 months preceding the filing of the application.

Section 48 of the BIA provides that an application for bankruptcy may not be made by individuals whose primary occupation is, among other things, farming. This section provides:

> 48. Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

Sections 8(1) and 8(4) of the FFPA provide:

> Actions or proceedings requiring leave
>
> 8(1) No person shall commence or continue any action or proceeding to realize upon or otherwise enforce
>
> (a) a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein;
>
> (b) a judgment or an attachment obtained on the basis of a

> mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein;
>
> whereby a farmer could be deprived of the ownership or the possession of farmland of which the farmer is the registered owner or of which the farmer is the purchaser under an agreement for sale, without first obtaining leave of the court under this Part.
>
> Non-compliance with this Part
>
> 8(4) Any action or proceeding which is commenced or continued after the coming into force of this Act without first obtaining leave of the court as required by this Part is a nullity.

Keystone had obtained default judgment against Desrochers in March of 2010 for $66,934.07 for outstanding payments due on a lease for grass cutting equipment.

Desrochers was the sole shareholder of Frenchie's Farm & Ranch Ltd. (the "Corporation"), which owned a quarter section of land in rural Manitoba.

In the course of an examination in aid of execution, Desrochers had testified that the Corporation never paid him; that he works for free; that did not expect any income in 2011 or 2012 for farming, and that he had no personal income as a farmer from 2008 to 2011.

Desrochers also testified that he owned an unincorporated grass mowing business.

The bankruptcy Judge found that Desrochers' principal means of livelihood at the relevant time was his grass cutting business and not farming, and therefore concluded that s. 48 of the BIA did not apply.

The bankruptcy Judge also found that Desrochers had committed an act of bankruptcy within 6 months because he had failed to meet his liabilities as they became due.

Decision: Hamilton, J.A (Beard and Monnin, J.J.A. concurring) dismissed the appeal [at para. 26].

Hamilton, J.A. concluded that the bankruptcy Judge's findings concerning whether Desrochers' principal occupation and means of livelihood was farming under s. 48 of the BIA, and the bankruptcy Judge's findings with respect to whether or not an act of bankruptcy had been committed, were either decisions of fact, or a mixed fact in law, and that Desrochers had not demonstrated that either finding was as a result of palapable or overriding error. The bankruptcy Judge had reviewed and applied the correct law [at para. 16].

With respect to the application of s. 8(1) of the FFPA, Desrochers argued that because he was a farmer and because the application could deprive him of ownership or farmland, leave was required under s. 8(1) of the Act. Desrochers relied on the decision of the Supreme Court of Canada in M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., 1998 CanLII 779 (SCC), [1998] 1 S.C.R. 1074 for his assertion that the bankruptcy order was a nullity pursuant to s. 8(4) of the FFPA because leave was not obtained.

Hamilton, J.A. held that because the Corporation and not Desrochers was the registered owner of the land, s. 8(1) could not apply to the application under the BIA against Desrochers.

Hamilton, J.A. referred to the following definitions of "farmer" and "farmland" in s. 1(1) of the FFPA which make this clear:

> "farmer" means a person engaged in farming in Manitoba, and includes all individuals holding an interest in farmland in joint tenancy with an individual engaged in farming in Manitoba;
>
> "farmland" means land in Manitoba that is used, or that has been primarily used during the immediately preceding two years, by a farmer for farming, and that is owned by the farmer or that is being purchased by the farmer under an agreement for sale, and includes all erections, buildings and improvements thereon, any commercial crops which are growing thereon, and any mines and minerals.

Hamilton, J.A. also pointed out that the application of the FFPA (a provincial statute) for proceedings under the BIA (a federal statute) may trigger the need to consider the constitutional doctrine of federal paramouncy, referring to Lemare Lake Logging Ltd. v. 3L Cattle Co., 2014 SKCA 35, 433 Sask.R. 266, leave to appeal to S.C.C. granted, [2014] S.C.C.A. No. 248.

Meier v. Saskatchewan Institute of Agrologists; CALN/2014-038, Full text: [2014] S.J. No. 686; 2014 SKQB 389, Saskatchewan Court of Queen's Bench, D.H. Layh J., November 26, 2014.

Agrologists -- Discipline -- Standard of Review -- Using Proper Scientific Methods to Support Opinions.

A Saskatchewan agrologist, Garry Meier ("Meier") appealed to the Saskatchewan Court of Appeal from a decision of the Discipline Committee (the "Committee") of the Saskatchewan Institute of Agrologists (the "Institute"). The charge against Meier was based on a complaint from the designer and manufacturer of the "Seed Hawk" air seeder which used a seed and fertilizer placement system known as "side-row banding".

Meier is an employee of Bourgault Industries Ltd. of St. Brieux, Saskatchewan which manufactures a seeding system referred to as a "mid-row banding".

The charges against Meier alleged that he published photographs and a text stating that the difference in crop development at a Saskatchewan farm was due to the crop's response to fertilizer placement by the two different methods of fertilizer and seed placement (side-row band v. mid-row band) even though Meier knew that the difference in rate of crop development was not due to fertilizer placement.

The Committee concluded that Meier failed to adhere to the agrologist's need to draw and publish conclusions only after appropriate scientific investigation.

The Committee concluded that although Meier had developed a hypothesis that side-row banding posed a greater risk of fertilizer damage to seed, the study was not a "proper scientific trial".

The Committee found that:

> "...There were absolutely no controls established over any variables that may impact seed development including soil conditions, nature of the seed used, nature of the fertilizer used, the rate of application of the fertilizer, the settings on the respective equipment and the actual seeding depth..."

and that this alone should have made Meier cautious about the use of the information he obtained from Redland Farms before his hypothesis.

The Committee described Meier's shortcomings as lack of recording or documenting seed depths; stating opinions without identifying qualifying circumstances, facts and assumptions; the failure to set up a proper trial or record his observations; continued public presentations of his opinions; and the failure to alter his presentations when he knew that the different in emergence may have been due to seeding depth, not fertilizer placement.

At the penalty hearing following the Committee's decision, Meier alleged that the Chair of the Committee was biased by virtue of an opinion he had provided on an unrelated matter to a third party in which (Meier argued) the Chairman had demonstrated disfavour toward Bourgault Industries Ltd.

The Committee dismissed Meier's request for a new hearing on the grounds of bias, reprimanded him, required him to complete the Institute's professionalism and ethics course, and to pay costs in the amount of $15,000.00.

Decision: Layh, J. dismissed Meier's appeal [at para. 51].

Layh, J. reviewed the statutory framework under the Agrologists Act, SS. 1994, c. A-16.1 at para. 12 to 18, and considered the standard of review for discipline committees at para. 19 to 29, stating:

> [25] ...The appropriate standard of review is the Dunsmuir standard: "correctness" for matters of jurisdiction or questions of law of general application which are of central importance to the legal system as a whole

and outside the tribunal's specialized area of expertise, and "reasonableness" for questions which relate to the interpretation and application of the Act within the tribunal's expertise which do not raise issues of general legal importance. (See also, Workers' Compensation Board of Saskatchewan v Mellor, 2012 SKCA 10 (CanLII, 385 Sask R 210)).

[26] Which standard applies: correctness or reasonableness? I must first ascertain whether jurisprudence has already determined which standard is appropriate in the instance of professional discipline. Several Queen's Bench and Court of Appeal decisions in Saskatchewan have held that in relation to decisions of professional discipline and penalty, the appropriate standard of review is reasonableness: Marchant v Law Society of Saskatchewan, 2009 SKCA 33 (CanLII), 324 Sask R 108; McLean v Law Society of Saskatchewan, 2012 SKCA 7 (CanLII), 385 Sask R 1982; Peet v The Law Society of Saskatchewan, 2014 SKCA 109 (CanLII); DeMaria v. Law Society of Saskatchewan, 2013 SKQB 178 (CanLII), 420 Sask R 230; Ali v College of Physicians and Surgeons of Saskatchewan, 2013 SKQB 37 (CanLII), 418 Sask R 51; and Sydiaha.

[27] Although these cases emphatically confirm the appropriateness of the "reasonableness" test, I am also mindful that s. 28 of the Act expressly states, "Professional misconduct is a question of fact..." This provision, alone, may leave the court with little option but to adopt the reasonable test in matters of professional discipline. My research shows that no ther Canadian jurisdiction uses ths phrase in its professional discipline statutes, although it is commonplace in many of Saskatchewan's professional discipline statutes. Findings of fact are the purview of the discipline committee and command a high degree of deference when subjected to judicial review - thence the appropriateness of the "reasonableness" standard.

[28] Implementing the reasonableness standard implies significant deference to the tribunal, as described by Justices Bastarache and LeBel in Dunsmuir at para. 47:...

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[29] A practical restatement of the test of reasonableness is well put by Justice Currie in Sydiaha, at para. 30:

> In any event, the reasonableness standard of review does not require the decision under review to be correct. Indeed, the lack of that requirement is the fundamental characteristic that distinguishes the reasonableness standard of review from the correctness standard of review. So it is that, if the council's decision meets the test of

reasonableness, even if the decision is not correct it may stand.

Layh, J. concluded, at para. 30:

> [30] So, the application of the Dunsmuir test requires me to consider whether the Discipline Committee came to defensible conclusions, not necessarily correct in my view, but that can be justified, are transparent and intelligible.

After reviewing the Committee's findings at para. 31 to 37, Layh, J. concluded [at para. 37] that the Committee had met the test of reasonableness.

Layh, J. also concluded that Meier had failed to establish a reasonable apprehension of bias and the Committee made no error in reaching its decision on this ground [at pra. 38 to 48].

Layh, J. commented [at para. 43 to 44] that the hearing did not involve a competition between two competing air seeding systems - rather the Committee's decision arose from Meier's lack of professionalism related to his poor science, and was not based on or concerned about which method of fertilizer and seed placement was preferred.

Layh, J. also upheld the Committee's decision to order costs of $15,000.00 for a 3 day hearing [at para. 49 and 50].

** CREDITS **

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