IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***M. R. Desrochers***
MNP LTD.	)	*on his own behalf*
	)	
(Applicant) Respondent	)	***D. R. M. Jackson***
	)	*for the Respondent (Trustee in*
- and -	)	*Bankruptcy)*
	)	
MARCEL R. DESROCHERS	)	*Appeal heard:*
	)	***April 25, 2018***
(Respondent) Appellant	)	
	)	*Judgment delivered:*
	)	***October 1, 2018***

MONNIN JA

[1] The appellant, Marcel Desrochers (the bankrupt), appeals from a bankruptcy judge's decision dismissing his application to declare his bankruptcy proceedings a nullity because of the procedural requirements in the *Farm Debt Mediation Act*, SC 1997, c 21 (the *FDMA*).

[2] This is not the first time the bankrupt is before this Court on matters involving his bankruptcy. In our earlier decision, *Keystone Agri-Motive (2005) Inc v Desrochers*, 2014 MBCA 109, we dealt with the bankrupt's appeal of the order placing him into bankruptcy. A succinct and helpful outline of the facts and proceedings which led to that initial appeal can be found in my colleague, Hamilton JA's decision (at paras 6-13):

Keystone obtained default judgment against the appellant in March 2010 for outstanding payments due under a lease for grass-cutting equipment. In November 2012, Dewar J. determined that Keystone was entitled to $66,934.07 plus execution costs on a solicitor-client basis under the judgment.

Keystone's efforts to realize on the judgment, which included examining the appellant in aid of execution, have been unsuccessful. More than $100,000 is now owed under the judgment.

Keystone is one of several judgment creditors.

The appellant is the sole shareholder of Frenchie's Farm & Ranch Ltd. (the corporation), which owns a quarter section of land in rural Manitoba (the land).

During the course of the examination in aid of execution in 2011 and 2012, the appellant testified that the corporation has never paid him and he works for it for free; that he did not expect any income whatsoever in 2011 and 2012 from farming; and that he had no income personally as a farmer from 2008 to 2011. There is no evidence to suggest that this changed at any later date. He also testified that he owned an unincorporated grass-mowing business that did work in Manitoba for the Province of Manitoba and that he was employed in Alberta doing the same work. Dewar J. subsequently found him in contempt of court on September 6, 2013, for refusing to produce court-ordered particulars about his mowing business and employment.

On July 26, 2013, Keystone applied under s. 43(1) of the *BIA* [*Bankruptcy and Insolvency Act*, RSC 1985, c B-3] for an order of bankruptcy against the appellant, stating that he had committed an act of bankruptcy by ceasing to meet his liabilities generally as they became due within the six months preceding the date of filing its application. See s. 42(1)(*j*) of the *BIA*.

In support of its application, Keystone filed, among other documents, transcripts from the proceedings before both Master Lee and Dewar J.

The appellant opposed the application, arguing that he was not insolvent; that the order could not be granted because he was a farmer for the purposes of s. 48 of the *BIA*; and that leave was required under s. 8(1) of the *FFPA* [*The Family Farm Protection Act*, CCSM c F15.

[3] By that decision, this Court upheld the bankruptcy judge's decision that

the bankrupt was not a farmer for the purposes of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the *BIA*), and that he had committed an act of bankruptcy for the purposes of making an order against him under that *Act*.

[4] Before the bankruptcy judge, when challenging the granting of the original order, the bankrupt raised the provisions of *The Family Farm Protection Act*, CCSM c F15 (the *FFPA*) and, more particularly, under section 8 of that *Act*, that leave was required from the Court of Queen's Bench to commence or continue a proceeding. In raising that argument, he relied upon the Supreme Court of Canada decision of *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961, where the bankrupt was successful in obtaining a stay of proceedings for an action brought against him by his creditor on the ground that it had failed to obtain leave to commence its proceedings under the then *Farm Debt Review Act*, RSC 1985, c 25 (2nd Supp), section 23.

[5] Of note, before the bankruptcy judge and before this Court, in the proceedings challenging the validity of the bankruptcy order, the bankrupt (represented by counsel at both levels) raised only the provisions of the *FFPA*, the provincial statute. He did not invoke the *FDMA*. In our decision on the appeal of that order, we agreed with the bankruptcy judge that the *FFPA* was inapplicable given the definitions of farmer and farmland in the *FFPA*, namely, that the bankrupt was not a farmer as defined, nor was the farmland registered in his name, which could lead to a deprivation of farmland from a farmer which was required to engage the protections of that statute.

[6] We therefore dismissed the appeal.

Further Proceedings

[7] The bankruptcy did not proceed smoothly. Part of the bankrupt's assets

consisted of his claim as a beneficiary of his father's estate which was the subject of a contentious dispute between him and the joint executors of that estate. The bankrupt was also not a willing participant with the trustee in a number of the attempts to resolve matters arising from the bankruptcy. This was, in part, the result of the bankrupt being involved in criminal proceedings and in custody for a significant portion of the time it took the trustee to resolve the issue.

[8] Without going into further detail, the trustee eventually applied to the Bankruptcy Court for advice and direction with respect to surplus funds and assets of the estate and dealing with the discharge of the bankrupt. That matter was eventually brought on before the bankruptcy judge on August 29, 2017. At that time, the bankrupt requested a ruling that the entire bankruptcy was a nullity. While no formal motion was filed, the bankruptcy judge generously gave an interpretation to a portion of an affidavit filed by the bankrupt seeking his discharge to find that the issue was before him.

[9] The bankrupt's argument was that the *M & D Farm Ltd* decision referred to previously was applicable and, as a result, by reason of the failure to obtain leave, the entire bankruptcy proceeding was a nullity.

[10] The bankruptcy judge, following the comments of this Court dismissing the argument on the basis of the *FFPA*, found that the matter had been dealt with and refused the request.

[11] On appeal to this Court, the bankrupt argues that *M & D Farm Ltd* deals with the need for leave to be obtained under the *FDMA*, an issue not dealt with by this Court previously or by the bankruptcy judge on his discharge application.

Issues

[12] The bankrupt had counsel file a factum on his behalf. However, at the hearing of the appeal, he chose to act on his own behalf.

[13] The issue raised in the factum by the bankrupt is whether the operation of the provisions of sections 21 and 22(1) of the *FDMA*, the successor to the *Farm Debt Review Act* referred to in *M & D Farm Ltd*, renders the bankruptcy proceedings null and void. The bankrupt argues that it does. The trustee argues that the *FDMA* is inapplicable given that the bankrupt does not satisfy the definition of farmer under the *FDMA*, nor do Keystone Agri-Motive (2005) Inc. or the trustee qualify as secured creditors.

[14] The preliminary issue is whether, by virtue of the principles of *res judicata* and/or abuse of process, the issue can be raised at this time.

[15] The bankrupt has brought a motion for fresh evidence proposing to file two affidavits: one from him and one from his counsel's legal assistant containing information with respect to his being a farmer under the *FDMA* and whether the proceedings were initiated by a secured creditor according to the provisions of the *FDMA*. At the hearing of the appeal, as is our practice, we reserved our decision on the motion to our decision on the appeal as a whole.

Analysis

Res Judicata/Abuse of Process

[16] This appeal can be decided on the question of whether the bankrupt can raise the issue of the applicability of the *FDMA* at this stage in the proceedings. In my view, he cannot.

[17] Before the bankruptcy judge on the motion for discharge, the bankrupt was not represented by counsel. He did not articulate the contention, which he now advances before our Court, that the *FDMA* was applicable and not complied with. He simply referred the bankruptcy judge to the *M & D Farm Ltd* decision without arguing that the federal statute had to be complied with, as opposed to the provincial statute upon which the initial argument before the bankruptcy judge on the challenge to the bankruptcy order had been based.

[18] It is no surprise, therefore, that the bankruptcy judge proceeded to dismiss the request on the basis of *res judicata*, namely, that the issue had previously been determined. It is only before this Court that the bankrupt, through his counsel's factum, argues that it is the federal statute that has not been complied with and that issue has not yet been determined.

[19] The Latin phrase, *res judicata*, is a fundamental doctrine of our justice system in Canada. The words, taken literally, mean "the matter has been decided". The reasons for the doctrine are: firstly, to put an end to litigation; and, secondly, so that no individual should be subjected to a re-litigation of the same cause (see Donald J Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham: LexisNexis, 2015).

[20] Not only is it the same issue that should not be the subject of re-litigation, it is also what should have been raised by a party at the initial proceeding. As set out in Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) (at para 19.93):

> The second principle [of *res judicata*] makes it mandatory that a plaintiff asserting a cause of action must claim all possible relief in respect thereto, and prevents any second attempt to invoke the aid of

> the courts in the same cause. . . . This principle prevents the fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.

[21] Lange refers to it as an "extended form of issue estoppel" (at p 59). In his text, he states (*ibid*):

> Any point which could have been raised in the first proceeding as part of the question to be determined in the first proceeding is precluded from determination in the second proceeding. This means that the same question cannot be relitigated in the second proceeding on the basis that some point materially affecting the question which could have been considered, but was not, in the first proceeding should now be considered.

[22] For our purposes, the issue of the applicability of the federal statute, the *FDMA*, was not raised in the first proceeding before the bankruptcy judge challenging the validity of the bankruptcy order, nor before us on the appeal of that order. If the bankrupt wished that point to be considered, he should have raised it then. As noted, he had legal counsel who raised the provisions of the provincial statute for him, as well as on the appeal of that decision to this Court. In my view, the doctrine of issue estoppel clearly prevents the matter from being raised at this time. There may have been tactical reasons not to raise the federal statute given the differing definitions of farmer and creditor from the provincial statute. However, that is not before us.

[23] Another aspect of the doctrine of *res judicata* is preventing a collateral attack of a previously valid decision. Were the bankrupt able to challenge the validity of the entire bankruptcy proceedings at this late stage, it would amount to a collateral attack on the validity of the initial bankruptcy order which was properly made and upheld upon appeal. The decision he seeks would collaterally

attack both the initial bankruptcy order and the subsequent appeal decision well after the time for appeals had passed. This would be contrary to the concept of finality ensconced in the doctrines of *res judicata* and abuse of process.

[24] The appeal must be dismissed and the corollary issues with respect to the applicability of the *FDMA* need not be decided. This obviates the need to rule on the motion for fresh evidence as that evidence is not relevant to the *res judicata* issue but only to the applicability of the *FDMA*.

Conclusion

[25] I would therefore dismiss the appeal from the bankruptcy judge's order and uphold the discharge upon the terms set out in the bankruptcy judge's order. Costs are in favour of the trustee on a solicitor and client basis payable from the estate.

Monnin JA

I agree: Mainella JA

I agree: Pfuetzner JA