CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MAGALY GERMAIN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GROUPE MAJOR EXPRESS INC.

Respondent

RULING

MEMBER: Michel Doucet 2007 CHRT 57
2007/12/19

[1] At the beginning of the hearing on November 21, 2007, Jacques Jobidon, counsel for Groupe Major Express Inc. (the respondent), informed the Tribunal, for the first time, that his client had presented to its creditors a proposal under the *Bankruptcy Act*, R.S.C. 1985, c. B-3 (the *Bankruptcy Act*). The first meeting of creditors took place on October 18, 2002. The proposal was accepted by the creditors and went into effect on November 5, 2003. In turn, the trustee was discharged on March 17, 2004. When asked why he had waited until the first day of the hearing to raise this issue, Mr. Jobidon said that he had only recently been informed of this fact.

The respondent's submissions

[2] Mr. Jobidon argued that this proposal had the effect of removing the Tribunal's jurisdiction to hear this matter or, at the very least, made any order against his client unenforceable. To support his claims, he relied *inter alia* on subsection 69.1(1) of the *Bankruptcy Act*, which provides:

69.1 (1) Subject to subsections (2) to (6) and sections 69.4 and 69.5, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(*a*) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(*b*) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(*c*) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(*d*) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until

(iii) the trustee has been discharged,

(iv) six months have elapsed following court approval of the proposal, or

(v) the insolvent person becomes bankrupt.

[3] According to this provision, if the proposal is accepted by the creditors, no creditor has any remedy against the debtor, in this case the respondent, or against the debtor's property, without leave of the court. A proposal is a contract between a debtor and a debtor's creditors. When it is accepted by these creditors and approved by the court, all of the creditors are bound by it. Accordingly, in this case, the respondent's creditors who accepted the proposal could not be granted leave to commence or continue enforcement proceedings against the debtor for the balance of their claim without challenging the very essence of the proposal and its acceptance. I note that, according to the evidence filed at the hearing, the complainant was not included in the proposal between the respondent and its creditors.

[4] Section 69.4 of the *Bankruptcy Act* in turn provides:

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(*a*) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(*b*) that it is equitable on other grounds to make such a declaration.

[5] According to this provision, a creditor affected by section 69.1 must seek leave from the court to commence or continue legal proceedings. Mr. Jobidon therefore inferred from this that the complainant could not proceed before the Tribunal without first seeking leave of the Superior Court of Québec. He added that she would not be exempt from this obligation unless she fell under one of the exceptions provided under subsection 178(1) of the *Bankruptcy Act*, which states:

178. (1) An order of discharge does not release the bankrupt from

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(*a*.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(*b*) any debt or liability for alimony or alimentary pension;

(*c*) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(*d*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(*e*) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

(*f*) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(*g*) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within ten years after the date on which the bankrupt ceased to be a full- or part-time student; or

(*h*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*g*).

[6] It is obvious that the complainant does not fall under any of these exceptions. Mr. Jobidon therefore drew the conclusion that since she had not sought leave from the Superior Court of Québec to continue her proceeding before the Tribunal and since none of the exceptions provided under subsection 178(1) applied, the Tribunal did not have jurisdiction to continue the hearing of this complaint.

Decision

[7] A proposal is a contract between a debtor and his creditors. These proposals are covered by Part III of the *Bankruptcy Act*, which contains the applicable provisions. The debtor who files a proposal is an insolvent person within the meaning of section 2 of the *Bankruptcy Act*, but is not a bankrupt.

[8] According to section 2 of the *Bankruptcy Act*, the word "person" includes a corporation but the definition of "insolvent person" excludes those who are bankrupt. In this case, Mr. Jobidon, who had the burden of establishing that the Tribunal does not have jurisdiction to hear the matter, did not file any evidence establishing that the respondent was an insolvent person or a bankrupt when its proposal was filed. I thereby infer that at that time Groupe Major Express Inc. was insolvent and not bankrupt.

[9] In the context of a proposal, trustees do not take possession of the property and therefore cannot dispose of it as they would in the case of a bankrupt. Indeed, the trustee's powers in regard to the possession and disposal of a bankrupt's property should be distinguished from those of the same trustee acting during the proposal of an insolvent person. Despite the trustee's intervention, the debtor is still the owner of its business. The trustee is then considered to be an agent and not a grantee. The *Bankruptcy Act* allows insolvent persons to submit proposals to their creditors without first assigning their property to the official receiver. Debtors thereby keep their property and continue to administer it. (*Darabaner v. Imperial Bank of Canada*, [1960] S.C. 411; *Appolo Refrigeration Inc. v. Office de construction du Québec*, [1976] S.C. 1716; commented on by Bohémier, A. "Proposition préventive - refus des créanciers - cession rétroactive - détermination des créances admissibles", (1977) 37 *R. du B.* 229.)

[10] According to the *Bankruptcy Act*, if the creditors refuse a proposal, the debtor is deemed to have made an assignment of his property on the date the proposal was filed.

However, if the creditors accept the proposal, the trustee must immediately apply to the court to have the proposal approved (see section 58 of the *Bankruptcy Act*.) A proposal accepted by the creditors and approved by the court is binding on creditors with claims provable contemplated by the proposal (subsection 62(2) of the *Bankruptcy Act*). In such a case, the debtor continues to do business but must comply with the requirements of the *Bankruptcy Act* in regard to proposals and the limitations resulting from the proposal. The debtor becomes a bankrupt and is presumed to have made an assignment of his property only in cases where the debtor's creditors refuse the proposal. (*Appolo Refrigeration Inc. v. Office de construction du Québec*, *supra*)

[11] In this case, we can infer from the evidence filed at the hearing that the proposal was accepted by the respondent's creditors and approved by the court. The accepted and approved proposal was never filed. Therefore, the Tribunal does not know what it contains. Further, Mr. Jobidon did not file any evidence regarding the enforcement of this proposal.

[12] Following my analysis of the *Bankruptcy Act* regarding proposals and the state of the evidence filed by the respondent, I find that the fact that the respondent filed a proposal does not have any effect on the Tribunal's jurisdiction to hear this complaint. The respondent is still in business in a case where a proposal has been accepted and approved. None of the respondent's arguments have persuaded me that it was, on that basis, released from its obligations under the *Canadian Human Rights Act*.

[13] For these reasons, I find that the Tribunal still has jurisdiction to hear this complaint. The parties shall therefore within 10 days of this decision advise the Tribunal of their dates of availability in the next three months for a three-day hearing. Should the parties not comply with this direction, the Tribunal shall set the hearing dates. Should one of the parties not have any date available in the next three months, it shall provide the Tribunal with sufficient reasons to explain its unavailability. The Tribunal will then decide the merits of those claims.

Michel Doucet

OTTAWA, Ontario
December 19, 2007

PARTIES OF RECORD

TRIBUNAL FILE:	T1179/6106
STYLE OF CAUSE:	Magaly Germain v. Groupe Major Express Inc.
DATE AND PLACE OF HEARING:	November 21, 2007

	Québec (Quebec)
RULING OF THE TRIBUNAL DATED:	December 19, 2007
APPEARANCES:	
Jérôme Carrier	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Jacques Jobidon	For the Respondent