

VANCOUVER

Court of Appeal File No. CA42532

FEB 13 2015

COURT OF APPEAL

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REGISTRY

On appeal from the Order of the Honourable Madam Justice Griffin, of the Supreme Court of British Columbia pronounced January 26, 2015

IN THE MATTER OF THE PROPOSAL OF CONTECH ENTERPRISES INC.

BETWEEN:

**CONTECH ENTERPRISES INC. AND DELOITTE
RESTRUCTURING INC.**

**RESPONDENTS
(APPLICANTS)**

AND:

VEGHERB, LLC

**APPELLANT
(RESPONDENT)**

RESPONDENTS' FACTUM

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INDEX

	PAGE
CHRONOLOGY	i
OPENING STATEMENT	iii
Part 1: STATEMENT OF FACTS	1
A. Respondents' Statement of Facts	1
Part 2: ISSUES ON APPEAL	2
Part 3: ARGUMENT	3
A. Overview of the Respondents' position	3
B. The chambers judge did not err in finding that the License Agreement is a security agreement	3
C. The chambers judge did not err in finding that neither Contech's default in payment under the Promissory Note nor Vegherb's purported termination of the License Agreement had the effect of divesting Contech or other secured creditors of their interests in the IP	6
D. The chambers judge did not err in the exercise of her discretion in approving the Proposal	10
E. The chambers judge did not err in dismissing Vegherb's application that it be entitled to amend its proof of claim.	14
F. Conclusion	17
Part 4: NATURE OF ORDER SOUGHT	18
LIST OF AUTHORITIES	19

(i)

CHRONOLOGY

DATE	EVENT
February 22, 2013	Transaction (the “Transaction”) between Contech Enterprises Inc. (“Contech” or the “Company”) and Vegherb, LLC (“Vegherb”) closes
February 28, 2013	<ul style="list-style-type: none">• Vegherb, First West Credit Union (“FWCU”) and Contech execute a Subordination and Standstill Agreement in favour of FWCU• Vegherb, HSBC Bank Canada (“HSBC”) and Contech execute a Subordination and Standstill Agreement in favour of HSBC
September 2014	Contech commences negotiations with Siena Lending Group LLC (“Siena”) to obtain refinancing
October 30, 2014	Contech fails to pay an installment payment due to Vegherb under the promissory note (the “Promissory Note”)
October 31, 2014	Counsel for Vegherb writes to Contech and purports to terminate the license agreement (the “License Agreement”), one of the documents governing the parties’ interests in the intellectual property (the “IP”) conveyed to Contech as part of the Transaction
November 6, 2014	Contech cures the default and delivers the missed payment to Vegherb
November 7, 2014	Counsel for Vegherb writes to HSBC and FWCU and advises of Contech’s default under the License Agreement
Early-mid November 2014	<ul style="list-style-type: none">• Contech and Siena agree on refinancing terms• HSBC and FWCU object to Vegherb retaining the cure payment and Vegherb repays the cure payment to Contech• Vegherb refuses to execute an assignment and postponement agreement in favour of Siena and the Siena financing does not complete
December 23, 2014	Contech files a proposal (the “Proposal”) pursuant to the

(ii)

provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) and Deloitte Restructuring Inc. (the “Trustee” and together with Contech, the “Respondents”) is appointed proposal trustee

December 23-24,
2014

The Trustee gives notice of the Proposal to all creditors of Contech who are affected by the Proposal (the “Affected Creditors”) and also gives notice of the meeting of Affected Creditors to vote on whether to approve the Proposal (the “Meeting”)

December 31, 2014

Vegherb’s counsel advises of Vegherb’s position that Vegherb owns the IP and that Contech has no further interest in the IP

January 8, 2015

The Meeting is held and the Affected Creditors vote to approve the Proposal

January 20-21, 2015

The Respondents’ applications for approval of the Proposal and a declaration regarding Contech and Vegherb’s respective interests in the IP, and Vegherb’s application for leave to amend its proof of claim, are heard by Griffin J.

January 26, 2015

Griffin J. issues oral reasons for judgment granting the Respondents’ applications and dismissing Vegherb’s application

January 30, 2015

Vegherb files a Notice of Appeal appealing each of the orders of Griffin J.

February 4, 2015

Madam Justice Stromberg-Stein orders that Vegherb post 200,000 shares in Contech as security for costs and that the appeal be heard on an expedited basis

February 6, 2015

Vegherb posts security as ordered

(iii)

OPENING STATEMENT

Contech seeks to restructure under the proposal provisions of the BIA in order to continue its business for the benefit of all stakeholders. Vegherb is a secured creditor of Contech that is dissatisfied with its treatment under the Proposal.

The central issue on this appeal, and on the application below, is whether the License Agreement is a security agreement within the meaning of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the “PPSA”). All other relief sought by the Respondents on the application below, and all challenges raised by Vegherb to the relief granted by the chambers judge, flow from this determination.

The salient terms of the License Agreement are not in dispute. Under the License Agreement Vegherb retains title to the IP until Contech pays the balance of the purchase price owing from the Transaction, at which point title to the IP transfers to Contech. On the relevant authorities, this is the exact definition of a conditional sale agreement, which is a security agreement under the PPSA. This correct finding by the chambers judge necessarily means that Vegherb is a secured creditor of Contech and is appropriately included in the Proposal in the Affected Secured Creditor Class.

As found by the chambers judge, the Proposal is fair and reasonable, made in good faith and calculated to benefit the general body of creditors. The Proposal was approved by the Affected Creditors. Under the Proposal, these creditors will obtain material recovery, whereas in a bankruptcy scenario they will recover nothing.

Vegherb is unable to point to any misapprehension of the facts or of the law by the chambers judge, and is effectively seeking to re-argue the application. As will be apparent, the chambers judge’s consideration of the issues, as evidenced by the Oral Reasons, was thorough and well-reasoned, and her decisions were manifestly correct. Accordingly, Vegherb’s appeal should be dismissed with costs to the Respondents.

PART 1: STATEMENT OF FACTS

A. Respondents' Statement of Facts

1. The Respondents accept the chambers judge's findings of fact as set forth at paragraphs 1 to 53 of the Oral Reasons. All of these findings are supported by the evidence that was before the chambers judge.

Oral Reasons, paras. 1-53, Application Record ("AR") Tab 18

2. In Part 3 of Vegherb's Factum, certain statements are made which mischaracterize the facts and the findings of the chambers judge. These will be addressed by the Respondents in Part 3 of this Factum.

3. All capitalized terms used in this factum and not otherwise defined herein have the same meanings as are ascribed to them in the Respondents' Notices of Application from which this appeal proceeding is taken.

PART 2: ISSUES ON APPEAL

4. The Respondents' responses to the errors asserted in Vegherb's Factum are as follows:

- A. The chambers judge did not err in finding that the License Agreement is a security agreement.
- B. The chambers judge did not err in finding that neither Contech's default in payment under the Promissory Note nor Vegherb's purported termination of the License Agreement had the effect of divesting Contech or other secured creditors of their interests in the IP.
- C. The chambers judge did not err in the exercise of her discretion in approving the Proposal.
- D. The chambers judge did not err in dismissing Vegherb's application for an order permitting it to amend its proof of claim

PART 3: ARGUMENT

A. Overview of the Respondents' position

5. In the Respondents' submission, several of the errors asserted by Vegherb involve questions of mixed fact and law, or questions of fact, and are entitled to deference. In particular, contractual interpretation is inherently fact specific and appellate intervention is limited. Other alleged errors concern the exercise of the chambers judge's discretion. This Court may interfere with discretionary decisions only if the chambers judge failed to take into account relevant factors, failed to exclude irrelevant factors, or her decision will result in an injustice.

Northstone Power Corp. v. R.J.K. Power Systems Ltd., 2002 ABCA 201 at para. 4

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 at paras. 50-55

B. The chambers judge did not err in finding that the License Agreement is a security agreement

6. Vegherb has failed to demonstrate that the chambers judge misapprehended the law or that she erred in her application of the law to the relevant facts in determining that the License Agreement is, in fact, a security agreement and is subject to the provisions of the PPSA.

7. Specifically, the chambers judge was manifestly correct in holding that the License Agreement, in substance, created a security interest and was, therefore, a security agreement within the meaning of the PPSA.

8. As conceded by Vegherb, the chambers judge correctly identified and summarized the relevant provisions of the PPSA and identified the relevant principles from the case law to be considered in interpreting those provisions. Having done so, the chambers judge turned to consider the nature of License Agreement in light of the relevant PPSA provisions and authorities.

9. At paragraph 51 of the Oral Reasons, the chambers judge considered section 3 of the License Agreement, which provides that, subject to Contech making all payments due to Vegherb under the promissory note (the “Promissory Note”), the License Agreement will terminate and ownership of the IP will transfer to Contech.

Oral Reasons, para. 51, AR Tab 18

10. The chambers judge also noted that the License Agreement references other documents underlying the Transaction between Vegherb and Contech (collectively, the “Transaction Documents”) and the chambers judge turned to consider those documents, finding as follows:

- A. The Promissory Note evidences the payments remaining due to Vegherb from the sale of its assets to Contech pursuant to the asset purchase agreement between the parties (the “APA”). (Oral Reasons, para. 39, AR Tab 18)
- B. The IP is carved out of the APA to be dealt with under the License Agreement and an assignment agreement (the “IP Assignment Agreement”). Those documents provide that once all payments due under the Promissory Note are paid to Vegherb, the License Agreement terminates and, pursuant to operation of the IP Assignment Agreement, title to the IP automatically transfers to Contech. (Oral Reasons, paras. 46, 51- 53, AR Tab 18)

11. The foregoing findings of fact are not in dispute and are supported by the evidence.

Affidavit #1 of Mark Grambart made January 12, 2015, Exhs. B-G,
AR Tab 6 [Grambart Affidavit]

12. In its Factum, Vegherb alleges that the chambers judge erred both by considering the “form” - i.e. the contractual terms - of the License Agreement, and also erred in not considering it. In that regard, Vegherb’s submissions are difficult to reconcile. Moreover, paragraphs 10-19 of Vegherb’s Factum mischaracterize the

context of the findings of the chambers judge with respect to the “form” of the License Agreement. In the court below, Vegherb argued that the License Agreement was a “true License agreement” and referenced certain aspects of the License Agreement in support of this assertion. These provisions were considered by the chambers judge and she determined they did not support a finding that the License Agreement was a true license agreement. This was based on the plain wording of the terms relied on by Vegherb, and the fact that these provisions were similar to those in the agreement before the court in *Haibeck v. No. 40 Taurus Ventures Ltd.*, [1991] B.J.C. No. 2759. In that case, the court found the agreement in question was a conditional sale agreement (and therefore a security agreement).

Oral Reasons, paras. 74-82, AR Tab 18

Haibeck v. No. 40 Taurus Ventures Ltd., [1991] B.J.C. No. 2759 at ps. 4 and 5

13. In the Respondents’ submission, the chambers judge properly considered the terms of the License Agreement as part of her analysis regarding the substance of that agreement. She properly identified the relevant factors set forth in *Manning Jamieson Ltd. v. Registrar of Travel Services*, 1999 BCCA 185, at para. 26, which inform this analysis and applied these factors to the evidence before her. Based on this analysis, the chambers judge found that the purpose of the Transaction and the relationship between Vegherb and Contech, in a commercial context, were “readily apparent” on the terms of the License Agreement and the other Transaction Documents and that these documents clearly showed that the intention of the parties was for Vegherb to sell the IP to Contech as part of the sale of its assets. Based on these findings, Her Ladyship held: “The structure of the entire transaction was that the purchase price of all of the assets of Vegherb, including the IP, was secured by Vegherb seeking to retain title of the IP until the entire payments due under the Promissory Note were paid.”

Oral Reasons, paras. 60, 67-72, AR Tab 18

14. In *Anderson’s Engineering*, the Court described a conditional sale as, “an agreement by which a seller retains title to goods until the buyer pays the full price for the goods.”

Anderson's Engineering Ltd. (Re) (Trustee of), 2001 BCSC 1476 at para. 84

15. The finding by the chambers judge as to the substance of the transaction between Vegherb and Contech exactly meets the definition of “conditional sale” as set forth in *Anderson's Engineering*. The chambers judge did not err in determining that the License Agreement is in substance a conditional sale agreement and therefore a security agreement to which the PPSA applies.

16. The chambers judge did not err in her interpretation of the PPSA, and made no palpable and overriding error in her interpretation of the License Agreement in the context of the overall Transaction and the objective intentions of the parties.

C. The chambers judge did not err in finding that neither Contech's default in payment under the Promissory Note nor Vegherb's purported termination of the License Agreement had the effect of divesting Contech or other secured creditors of their interests in the IP

17. The chambers judge held that the purported termination of the License Agreement by Vegherb could not operate to divest Contech or other secured creditors of their rights to and interests in the IP. This is consistent with the law governing security agreements and Vegherb has shown no demonstrable error in the chambers judge's apprehension or application of the law.

Oral Reasons, para. 104, AR Tab 18

18. It is not disputed that Contech failed to pay \$300,000 to Vegherb on October 30, 2014 in accordance with the payment terms of the Promissory Note. Contech submits this default was cured pursuant to the terms of the Promissory Note and the APA when Contech delivered payment to Vegherb on November 6, 2014; Vegherb demurs and notes that, in any event, the cure payment was subsequently returned.

19. In any event, irrespective of whether Contech defaulted under the Promissory Note, the result is the same. As found by the chambers judge, Vegherb, being a secured creditor of Contech, could not simply choose to ignore the provisions of the PPSA upon the occurrence of an event of default.

20. The PPSA is a unified statutory scheme which applies to all security interests on personal property in British Columbia. The overriding goal of the legislation is to provide commercial certainty and predictability to personal property financing, and it achieves this through clear rules regarding, among other things, debtors' and creditors' rights and competing interests of secured creditors.

674921 B.C. Ltd. v. New Solutions Financial Corp., 2006 BCCA 49 at para. 1

KBA Canada, Inc. v. Supreme Graphics Limited, 2014 BCCA 117 at para. 20

21. The Oral Reasons clearly evidence that the chambers judge appreciated both the purpose of the PPSA and its application to the License Agreement. At paragraphs 91, 104 and 118 of the Oral Reasons, the chambers judge made the following statements regarding the competing interests of the various interested parties in the IP:

[91] The License Agreement provided an extra form of security to Vegherb (which also had a general security agreement). However, because it fits within the definition of security agreement under the *PPSA*, once there is a contest amongst secured creditors, Vegherb's rights under the License Agreement as between it and other secured creditors are treated just like other security interests under the *PPSA*.

.....

[104] I cannot accept Vegherb's argument that because of either the default in payment or Vegherb's unilateral notice of termination, all of Contech's rights to the IP would then be taken out from under the umbrella of the *PPSA* and *BIA*. That argument suggests that Vegherb could unilaterally "opt-out" of the legislation governing security interests, the *PPSA*, which is to provide certainty amongst competing creditors as to how their interest in personal property will be rank.

.....

[118]I find that by the License Agreement, Contech acquired the proprietary right to immediate use of the IP and the right to receive legal title upon payment of the remaining debt, the full purchase price. This is part of Contech's personal property to which claims of secured creditors of Contech attached (that is, those creditors who registered security interests against all of Contech's

personal property). Mere default by Contech does simply result in that property becoming the sole property of Vegherb.

Oral Reasons, paras. 91, 104 and 118, AR Tab 18

22. As recognized by the chambers judge, the PPSA, not the terms of the License Agreement, governs the rights and interests of Vegherb, Contech and other secured creditors in and to the IP. Were Vegherb permitted to circumvent those rights by simply purporting to “terminate” Contech’s interest in the IP, the commercial purpose of the PPSA would be undermined. Every thoughtful drafter would henceforth include such an escape clause in their conditional sales agreements (or like security agreements).

23. It was not contested in the court below that Contech has a number of secured creditors with perfected security interests in Contech’s assets, including the IP. Nor was it contested that many of these secured creditors rank in priority to Vegherb, either by virtue of the timing of the registration of their security interest in the BC Personal Property Registry, or because Vegherb agreed to specifically subordinate its security interest to the interests of these other secured creditors.

Grambart Affidavit, Exhs. H, I and J, AR Tab 6

24. Paragraph 32 of Vegherb’s Factum states that if Vegherb “held the IP as security, then Vegherb would nonetheless prevail in priority”. This is incorrect and is not supported by the facts. The chambers judge correctly found, as she was entitled to do on the evidence, that several secured creditors have security registrations which rank in priority to Vegherb.

25. Should Vegherb have wished to enforce its rights vis-à-vis the IP upon default by Contech, it had to do so in accordance with the enforcement provisions set forth in Part 5 of the PPSA, which it did not do.

26. Vegherb did not argue in the court below that it had, in effect, enforced its security by terminating the License Agreement. Accordingly, the chambers judge had no cause to consider Part 5 of the PPSA. Those provisions generally provide that upon default by a debtor, a secured creditor may:

- A. Seize or repossess the secured collateral (section 58 of the PPSA);
- B. Dispose of the secured collateral, having given proper notice of its intention to do so to the debtor, subordinate secured creditors and other interested parties (section 59 of the PPSA); and
- C. Take the secured collateral in satisfaction of the secured obligation and foreclose all other interested parties (including the debtor) off title to that asset (i.e. voluntary foreclosure; section 61 of the PPSA).

27. The PPSA further provides that following a default, unless otherwise waived by the debtor post-default, the debtor may, at any time prior to (i) the disposition of the secured collateral by the secured creditor under section 59 of the PPSA, or (ii) the secured creditor being deemed to have irrevocably elected to take the secured collateral pursuant to section 61 of the PPSA, redeem the collateral by tendering the full amount secured by the collateral.

PPSA, section 62(1)

28. Accordingly, under the PPSA, mere default by a debtor under a security agreement does not extinguish the debtor's rights to and interests in the secured collateral. Nor does it extinguish the rights of other secured creditors whose security interests have attached to that property. These rights can only be extinguished (or terminated) upon the secured creditor taking all the requisite steps to dispose of the debtor and other secured creditors' interests in strict accordance with the PPSA.

29. Vegherb took no steps to enforce its rights as a secured creditor in accordance with the PPSA, and accordingly neither Contech's alleged default in payment under the Promissory Note or Vegherb's purported termination of the License Agreement could have had the effect of divesting Contech or other secured creditors of their interests in the IP.

30. In its Factum at paragraph 33, Vegherb says: "...unlike traditional security over real or personal property, when title generally remains with the debtor, there was no step of seizure or sale required in this case beyond Vegherb's termination of the

License Agreement....” This is not correct at law. The License Agreement is a security agreement and the IP is an “intangible” form of personal property to which the PPSA applies. While enforcement of a security interest in intangible property is in some ways different from enforcement of a security interest in physical property, any such distinctions do not operate so as to excuse a secured creditor from complying with its obligations under the enforcement provisions of the PPSA.

PPSA, section 1

31. At paragraphs 27-29 of its Factum, Vegherb purports to show that the actions of Contech following Vegherb’s alleged termination of the License Agreement indicate that Contech agreed the License Agreement was terminated. These paragraphs ignore the fact that the termination or dissolution of Contech’s rights to the IP can only occur in accordance with the provisions of the PPSA. These provisions cannot be contracted out of and can only be waived in specific circumstances. There is no evidence that Contech waived any of its rights under the PPSA in favour of Vegherb or at all.

PPSA, section 56(3)

32. In short, the chambers judge was correct in holding that Vegherb’s rights were subject to the provisions of the PPSA, and that Vegherb could not unilaterally choose to opt out of those provisions. Any purported termination of Contech’s rights to and interests in the IP was, as the chambers judge found, of no effect.

D. The chambers judge did not err in the exercise of her discretion in approving the Proposal

33. Vegherb has failed to demonstrate the chambers judge erred in fact or in law in exercising her discretion to approve the Proposal.

34. Section 59(2) of the BIA requires that the court refuse to approve a proposal where its terms are not reasonable or not calculated to benefit the general body of creditors. Courts have developed a three-pronged test that must be satisfied in order to meet the requirements of this section. Specifically, the court must be satisfied that (a)

the proposal is reasonable; (b) the proposal is calculated to benefit the general body of creditors; and (c) the proposal is made in good faith.

BIA, section 59(2)

Kitchener Frame Ltd. (Re), 2012 ONSC 234 at para. 19

Magnus One Energy Corp. (Re), 2009 ABQB 200 at para. 10

35. The chambers judge correctly set out this test at paragraph 126 of her reasons. The chambers judge then properly considered and weighed each of the factors and made findings of fact that met each criterion. In particular, the chambers judge found:

- A. Affected Creditors will be better off under the Proposal than if Contech filed for bankruptcy. (Oral Reasons, para. 154, AR Tab 18)
- B. The Affected Creditors voted to approve the Proposal by a large majority, which is a sign that they consider the Proposal to be fair reasonable and a fact entitled to considerable weight. (Oral Reasons, para. 155, AR Tab 18)
- C. Principals of Contech are required to provide personal guarantees to secure the proposed refinancing from Siena. This is an indication of the good faith that lies behind the Proposal. (Oral Reasons, para. 159, AR Tab 18)
- D. There is no suggestion Contech failed to provide full disclosure of its assets and liabilities, no evidence that Contech has not acted in good faith and no evidence that its conduct is subject to censure. (Oral Reasons, paras. 160 and 161, Tab 18)

36. Having properly considered the relevant factors, the chambers judge found that the Proposal is fair and reasonable in respect of the whole body of Contech's creditors.

Oral Reasons, para. 163, AR Tab 18

37. Vegherb contests the chambers judge's conclusion on two apparent bases: (i) Vegherb's claim is distinct from those of the other Affected Secured Creditors and, accordingly, Vegherb should not have been included in the Affected Secured Creditor Class; and (ii) the Proposal is not fair to Vegherb.

38. Regarding classification, it is not contested that the chambers judge correctly identified section 50(1.4) of the BIA as setting out the relevant factors to consider when determining classes of secured creditors for the purposes of a proposal under the BIA. Nor is it contested that *Canadian Airlines Corp., Re* (2000) 19 C.B.R. (4th) 12 (Alta. QB) which the chambers judge considered and applied, is one of the leading authorities on the classification of creditors under a BIA proposal or a plan or arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

Oral Reasons, para. 132 and 133, AR Tab 18

39. At paragraph 19 of the *Canadian Airlines* decision, the court held:

[19] The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario.

Canadian Airlines at para. 19

40. In the Oral Reasons, the chambers judge enumerated the relevant factors, and properly applied those factors to the facts of the case. The chambers judge found that: "the class of Affected Secured Creditors are those persons whose security ranks behind FWCU. They have a commonality of interest because they are unlikely to recover anything if Contech goes bankrupt. They all have general security agreements. Thus the rights of the members of this class vis-à-vis Contech are similar." These findings are supported by the evidence that was before the chambers judge as set forth in the Trustee's Report to the Creditors dated December 23, 2014 and in the Grambart Affidavit at Exhibit J.

Oral Reasons, para. 134, AR Tab 18

Trustee's Report to the Creditors dated December 23, 2014, p. 12,
AR Tab 4

Grambart Affidavit, Exh. J., AR Tab 6

41. Accordingly, the chambers judge was correct in her determination that Vegherb is properly classified as an Affected Secured Creditor under the Proposal, as there is a commonality of interest among Vegherb and all of the creditors in the Affected Secured Class - all are secured creditors of Contech, having a security interest in all of Contech's assets and all would likely recover nothing in a bankruptcy or liquidation scenario.

42. Vegherb seeks to distinguish its claim from those of the other Affected Secured Creditors. With respect, Vegherb's argument is premised on a misapprehension or misstatement of the facts. Like the other Affected Secured Creditors, Vegherb has a security interest in all of Contech's assets. By virtue of timing of perfection (and, in the case of HSBC and FWCU, by virtue of subordination agreements), Vegherb's security interest ranks subordinate to a number of secured creditors, including HSBC, FWCU and, significantly, a number of the secured debenture holders.

43. At paragraph 38 of its Factum, Vegherb refers to the other Affected Secured Creditors as having only "convertible debentures". This is a deliberate mischaracterization of the nature of those creditors' claims. Those creditors are convertible debenture holders, but at the time the Proposal was filed, those debentures were in default and no conversion had occurred. Moreover, the debentures are secured, and, pursuant to general security agreements, each debenture holder, like Vegherb, has a security interest in all of Contech's assets.

44. Vegherb also argues that it should be treated differently from the other Affected Secured Creditors because its claim is for the unpaid part of its purchase price arising from the sale of its assets to Contech, whereas the other Affected Secured Creditors acquired convertible secured debentures. With respect, that is not a relevant distinction for the purpose of classification. How a creditor's debt and security arose is not of concern, rather the question is whether that secured creditor's debt and security are of the same nature as that of the other creditors in its class as at the filing date. In the present case, and as properly found by the chambers judge, there is no difference at all between Vegherb's secured claim and those of the other Affected Secured Creditors: all

have liquidated claims secured by charges over all of Contech's assets and all would recover nothing in a liquidation.

Oral Reasons, para. 134, AR Tab 18

45. With respect to the unfairness alleged by Vegherb and the alleged confiscation of its rights, the chambers judge noted that, properly considered, Vegherb is divested of its interest in the IP not by operation of the Proposal, but instead as a consequence of the fact that the License Agreement is, in substance, a security agreement.

Oral Reasons, para. 156, AR Tab 18

46. The chambers judge did not err in exercising her discretion to approve the Proposal. She properly considered the relevant legal test, found as fact that the test had been met, and properly considered and weighed the relevant legal factors.

E. The chambers judge did not err in dismissing Vegherb's application that it be entitled to amend its proof of claim.

47. Vegherb has failed to demonstrate that the chambers judge erred in determining that Vegherb is not entitled to amend its proof of claim and claim as an unsecured creditor under the Proposal.

48. It is not disputed that Vegherb was a secured creditor of Contech on the date that Contech filed the Proposal and the stay of proceedings under the BIA became effective.

BIA, section 69.1

49. Vegherb relied on sections 50.1(2) and 132(1) of the BIA in applying to amend its proof of claim. The chambers judge specifically considered these sections in her reasons.

Oral Reasons, paras. 167-171, AR Tab 18

50. The chambers judge found as fact that the Proposal did not include a proposed assessed value of Vegherb's secured claim. Accordingly, the chambers judge correctly determined that Vegherb's application could not succeed as it was based on a mischaracterization that the Proposal did include such an assessed value.

Oral Reasons, para. 170, AR Tab 18

51. There is no basis on which to challenge the chambers judge's findings; the Proposal clearly does not provide an assessment as to the value of Vegherb's secured claim. The only reference to the "value" of Vegherb's security is in the Form 78, which the Trustee is mandated to file and provide to all creditors upon the filing of a proposal under the BIA. This does not affect or comprise part of a debtor's proposal. Practically, were Vegherb's argument accepted, for the purposes of voting on a proposal, in every case, the vote of a secured creditor whose security was "underwater" would have a value of zero.

BIA, section 2

52. The chambers judge relied on the decision of the Ontario Court of Appeal in *Workgroup Designs Inc. (Re)* in dismissing Vegherb's application. In that case, the Court of Appeal held:

[14].....Section 50.1(1) [of the BIA] sets out the general rule. It provides that, subject to subsections (2) to (4), the secured creditor has the right to vote the claim as a secured creditor for the entire amount once it has filed proof of security. Section 50.1(2) [of the BIA] provides that, where the proposal ascribes an assessed value to the claim, the secured creditor is only allowed to vote for the lesser of the amount of the claim or the proposed assessed value.

.....

[16] In this case, the proposal did not include a proposed assessed value for RBC's claim as provided in s. 50.1(2). Had it done so, then the procedure set out in that section would have been mandatory and, if RBC disagreed with the proposed assessed value, RBC would have had the right to challenge it pursuant to s. 50.1(4).

[17] Because the proposal did not include a proposed assessed value for RBC's claim, s. 50.1(1) applies.

Workgroup Designs Inc. (Re), 2008 ONCA 214 at paras 14, 16 and 17

53. The chambers judge did not err in her factual findings and relied on the correct analysis as set out in *Workgroup Designs*. The Proposal does not provide any valuation

of Vegherb's claim and accordingly Vegherb cannot rely on sections 50.1(2) and 132(1) of the BIA in support of its application to amend its proof of claim to claim as an unsecured creditor.

54. Although not specifically considered by the chambers judge in her Oral Reasons, the Respondents did rely on section 50.3 of the BIA in their submissions in the court below. That section provides as follows:

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

55. It is generally accepted in the construction of statutes that the drafters of the legislation have included what they intended to include, and have excluded or omitted what they intended to leave out. Accordingly, by including a provision in the BIA which expressly provides when sections 112 and 127 to 134 of the BIA apply with respect to the proofs of claim filed by secured creditors, it follows that, absent a bankruptcy by the insolvent person these sections are not applicable and may not be relied on.

Sullivan on the Construction of Statutes, 6th ed. Sullivan, LexisNexis Canada Inc., 2014 at §8.92

56. Moreover, having regard to policy and practice considerations, it would be inappropriate to allow Vegherb to amend its proof of claim and file as an unsecured creditor at this time. The purpose of the stay of proceedings under the BIA is to suspend or freeze the rights of all creditors as they exist on the filing date of the proposal. This is intended to allow the insolvent debtor an opportunity to reorganize itself without any creditor taking steps which would gain it an advantage over the company or other creditors. In particular, "manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented."

Woodward's Ltd. (Re), [1993] B.C.J. No. 79 at page 6

57. The Proposal was designed with the claims and relative rights of all of Contech's creditors in mind. Its construction reflects the relative priorities of Contech's creditors, and was expected to be (and in fact was) acceptable to the majority of Contech's creditors, all of whom are significantly better off if the Proposal succeeds. Those goals ought not to be frustrated by the efforts of a creditor to alter the status quo solely to its benefit.

58. If Vegherb is entitled to amend its proof of claim and file as an unsecured creditor, Vegherb would be entitled to receive \$0.30 for every dollar of its Proven Claim, or approximately \$440,000, payable within 180 days of the Proposal being made effective. This would undoubtedly impair the financial position of the Company and would make it difficult (if not impossible) for Contech to meet its obligations under the Proposal and continue in business. The result of this would be that Vegherb and all of Contech's other creditors (who voted overwhelmingly in favour of the Proposal) would recover nothing.

F. Conclusion

59. Vegherb has shown no reviewable error on the part of the chambers judge and the appeal should be dismissed with costs.

PART 4: NATURE OF ORDER SOUGHT

60. That the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: Friday, February 13, 2015

DANIEL TOIGO
FOR _____
Kibben Jackson
Counsel for the Respondents
Contech Enterprises Inc. and
Deloitte Restructuring Inc.

LIST OF AUTHORITIES

<u>CASES</u>	<u>PARA(s)</u>
<i>674921 B.C. Ltd. v. New Solutions Financial Corp.</i> , 2006 BCCA 49	20
<i>Anderson's Engineering Ltd. (Re) (Trustee of)</i> , 2001 BCSC 1476	14, 15
<i>Canadian Airlines Corp., Re</i> (2000) 19 C.B.R. (4th) 12	38,39
<i>Giffen (Re)</i> , [1998] S.C.J. No. 11 (SCC)	--
<i>Haibeck v. No. 40 Taurus Ventures Ltd.</i> , [1991] B.J.C. No. 2759	12
<i>KBA Canada, Inc. v. Supreme Graphics Limited</i> , 2014 BCCA 117	20
<i>Kitchener Frame Ltd. (Re)</i> , 2012 ONSC 234	34
<i>Magnus One Energy Corp. (Re)</i> , 2009 ABQB 200	34
<i>Manning Jamieson Ltd. v. Registrar of Travel Services</i> , 1999 BCCA 185	13
<i>Northstone Power Corp. v. R.J.K. Power Systems Ltd.</i> , 2002 ABCA 201	5
<i>Sattva Capital Corp. v. Creston Moly Corp.</i> , 2014 SCC 53	5
<i>Woodward's Ltd. (Re)</i> , [1993] B.C.J. No. 79	56
<i>Workgroup Designs Inc. (Re)</i> , 2008 ONCA 214	52, 53

SECONDARY SOURCES

Sullivan on the Construction of Statutes, 6th ed. Sullivan, LexisNexis Canada Inc., 2014 55

LEGISLATION

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, sections: 2 (with respect to certain definitions only), 50(1), 50.1, 50.3, 59, 69.1, 132 34 [s. 59(2)]; 38 [s. 50(1.4)]; 48 [s. 69.1]; 49 [ss. 50.1(2), 132(1)]; 51 [s. 2]; 52 [s. 50.1]; 54 [s. 50.3]

Personal Property Security Act, R.S.B.C. 1996, c. 359, sections: 1(1) (with respect to certain definitions only), 2 and Part 5 6-8; 15; 16; 19-22; 25, 26 [ss. 58, 59, 61]; 27 [s. 62(1)]; 28; 29; 30 [s. 1]; 31; 32