

Province: British Columbia
Bankruptcy Division
Vancouver Registry
Court No. B144740
Estate No. 11-1946231

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF
CONTECH ENTERPRISES INC.**

NOTICE OF APPLICATION

Name of applicant: Vegherb, LLC (“Vegherb”)

To: Contech Enterprises Inc. (“Contech”)

To: Deloitte Restructuring Inc. (the “Trustee”) in its capacity as trustee in bankruptcy of Contech.

To: All Creditors with a claim against Contech’s estate.

And to: The Office of the Superintendent of Bankruptcy.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on January 20, 2015 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order amending Vegherb’s proof of claim of \$1,712,358.34 (the “Claim Amount”) from a secured claim to an unsecured claim.
2. An order amending Vegherb’s vote against the proposal to reflect that the dollar amount represented by its vote was an unsecured amount.
3. Costs if opposed.

Part 2: FACTUAL BASIS

1. Vegherb originally filed its proof of claim as a secured creditor for the Claim Amount, and filed its proofs of claim accordingly.
2. Since doing so, Vegherb has had the opportunity to more closely examine the Trustee's report and Contech financial documents, and received and read the notice of application and supporting affidavit #1 of Mark Grambart.
3. Vegherb's secured claim is premised on a 2013 general security agreement (the "GSA") to secure payments owed to it by Contech under a promissory note, both executed as part of the Asset Purchase Agreement.
4. However, Vegherb expressly subordinated its security under the Asset Purchase Agreement to the first \$1,450,000.00, plus associated interest and costs, in secured debts owed by Contech to First West Credit Union ("FWC"): Subordination Agreement, Art. 3.1.
5. FWC's security is in turn subordinate to HSBC, the Business Development Bank of Canada, and Roynat Inc., all of which are secured creditors: Trustee Report filed December 30, 2014 (the "Report"), pages 8 and 10.
6. The Trustee values Contech's assets at \$2,369,000.00, with an approximate liquidation value of \$1.5 million. The Trustee does not expect the security to be sufficient to satisfy any liabilities subordinate to FWC, and anticipates a loss even to unaffected secured creditors in the event of a bankruptcy: Report, pages 6 and 13, and Appendix "D".
7. Contech, in its statement of affairs sworn by board member Frank Holler, swears that the estimated value of Vegherb's security is \$0.00: Form 78 sworn December 23, 2014, page 18.
8. The Trustee has not elected to acquire Vegherb's security as provided in the Bankruptcy and Insolvency Act.

Part 3: LEGAL BASIS

1. Section 132.1 of the Bankruptcy and Insolvency Act states in part:

Secured creditor may amend

132. (1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made in good faith on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.
Amendment at cost of creditor

(2) An amendment pursuant to subsection (1) shall be made at the cost of the creditor and on such terms as the court orders, unless the trustee allows the amendment without application to the court.

2. In *Cadillac Explorations Ltd. v. Kilborn Enrg. Ltd.*, 1983 CanLII 184 (BC CA), the Court of Appeal commented on the effect of the substantially similar predecessor to this section in respect of the opposite scenario, i.e. an unsecured creditor attempting to amend its claim to become a secured creditor (emphasis added):

[5] The filing of a proof of claim as an unsecured creditor does not meet the above requirements. While there may be other reasons for holding that such a proof of claim does not constitute a “surrender” for the purposes of s. 90, it seems clear to me that the fact that a proof of claim may be amended so as to enable a creditor to claim as a secured creditor demonstrates that the filing of a proof of claim as an unsecured creditor is not an irrevocable or unconditional act: see s. 103 of the Bankruptcy Act, reading as follows:

103.(1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made bona fide on a mistaken estimate or that the security has diminished or increased in value since its previous valuation ...

[6] See also the judgment of Saunders J. in *Re Mount Jamie Mines (Que.) Ltd.* (1980), 1980 CanLII 1797 (ON SC), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227 at 233, 110 D.L.R. (3d) 80 (H.C.), as follows:

Section 103 provides that an amendment to the proof may be made “at any time”. The authorities indicate that there should be some time limitation on the right to amend, which limitation may be ascertained from the context of the legislation. For example, a secured creditor should not be permitted to amend after the trustee has redeemed the security pursuant to s. 98(2) or perhaps after the trustee has been put to his election pursuant to s. 101. Mount Jamie submits that an amendment should not be permitted after the expiration of the 15-day period provided for in s. 123(6). I do not think that s. 123(6) has that effect.

3. The effect of sections 127 to 134 of the Act is to deem that “the secured creditor will be an unsecured creditor for the balance due after deducting the assessed value of the security”: *S-Marque Inc. v. Homburg Industries Ltd.*, 1998 CanLII 4006 (NS SC).
4. The simple fact is that on reconsideration of the evidence, it is manifestly clear from Contech and Trustee evidence that the Vegherb security is little more than a fiction.
5. There is no realistic prospect of Vegherb realizing any amount on its security.
6. In substance, Vegherb’s entire claim is unsecured. The value of Vegherb’s security being zero, there is no difference between the total amount of its claim and the amount of its claim minus \$0.00 in security.

7. In respect of the voting powers of secured creditors, subsections (2) and (3) of section 50.1 of the *BIA* state (emphasis added)

(2) Where a proposal made to a secured creditor in respect of a claim includes a proposed assessed value of the security in respect of the claim, the secured creditor may file with the trustee a proof of secured claim in the prescribed form, and may vote as a secured creditor on all questions relating to the proposal in respect of an amount equal to the lesser of

- (a) the amount of the claim, and
- (b) the proposed assessed value of the security.

Idem

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

8. Again, the difference between the amount of Vegherb's claim and the "proposed assessed value" of its security is zero, so there is no difference between the two; Vegherb's votes ought more properly to be considered unsecured votes.

Part 4: MATERIAL TO BE RELIED ON

1. The Trustee Report filed December 30, 2014.
2. Affidavit #4 of Anthony Topping sworn January 19, 2015

The applicant estimates that the application will take 60 minutes.

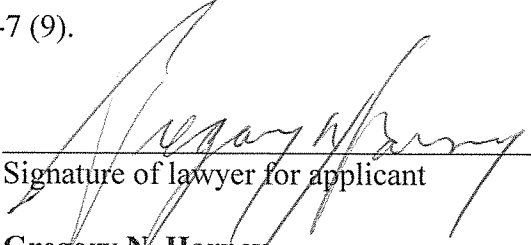
- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

- (i) a copy of the filed application response;
- (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 19/Jan/2014



Signature of lawyer for applicant
Gregory N. Harney

Name

To be completed by the court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this notice of application
- with the following variations and additional terms:

Date:

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation

- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts