Court of Appeal File No.: CA42532
Supreme Court File No.: B150025
Supreme Court Registry: Vancouver

ON APPEAL FROM: THE SUPREME COURT OF BRITISH COLUMBIA FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE S. GRIFFIN PRONOUNCED THE 26TH DAY OF JANUARY 2015

COURT OF APPEAL

IN THE MATTER OF THE PROPOSAL OF CONTECH ENTERPRISES INC.

Between

Contech Enterprises Inc. and Deloitte LLP

Respondents (Applicants)

And

Vegherb, LLC

Appellant (Respondent)

Appellant Factum

Appellant

Vegherb, LLC

Solicitor for the Appellant

Gregory N. Harney
Shields Harney
602 – 732 Broughton Street
Victoria BC V8W 1E1
Telephone: (250) 405-7616
Facsimile: (250) 405-7619

Respondents

Contech Enterprises Inc.
Deloitte LLP

Solicitor for the Respondents

Kibben Jackson
Fasken Martineau
2900-550Burrard Street
Vancouver BC V6C 0A3
Telephone: (604) 631-4786
Facsimile: (604) 632-4786

Court of Appeal File No.: CA42532
Supreme Court File No.: B150025
Supreme Court Registry: Vancouver

ON APPEAL FROM: THE SUPREME COURT OF BRITISH COLUMBIA FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE S. GRIFFIN PRONOUNCED THE 26TH DAY OF JANUARY 2015

COURT OF APPEAL

IN THE MATTER OF THE PROPOSAL OF CONTECH ENTERPRISES INC.

Between

Contech Enterprises Inc. and Deloitte LLP

Respondents (Applicants)

And

Vegherb, LLC

Appellant (Respondent)

Appellant Factum

Appellant

Vegherb, LLC

Solicitor for the Appellant

Gregory N. Harney
Shields Harney
602 – 732 Broughton Street
Victoria BC V8W 1E1
Telephone: (250) 405-7616
Facsimile: (250) 405-7619

Respondents

Contech Enterprises Inc.
Deloitte LLP

Solicitor for the Respondents

Kibben Jackson
Fasken Martineau
2900-550Burrard Street
Vancouver BC V6C 0A3
Telephone: (604) 631-4786
Facsimile: (604) 632-4786

INDEX

CHRONOLOGY

February 23, 2013	Contech Enterprises LLP. ("Contech") enters into an asset purchase agreement with Vegherb, LLC ("Vegherb"). The purchase price was payable partly in shares, partly in cash installments secured by a promissory note and general security agreement.
February 28, 2013	Vegherb entered into subordination agreements under which it subordinated its security in Contech's property to the priority interests of HSBC Bank Canada and First West Credit Union ("FWCU").
October 30, 2014	Contech fails to pay Vegherb its periodic payment under the promissory note, due October 30, 2014
October 31, 2014	Vegherb issues notice of default under asset purchase and license agreement, demands full payment.
November 6, 2014	Due date for Contech to cure default; Contech fails to do so.
December 23, 2014	Contech files a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] (the "Proposal") with the Office of the Superintendent of Bankruptcy.
January 8, 2015	Meeting of creditors. Creditors approve proposal.
January 20-21, 2015	British Columbia Supreme Court hearing before Madam Justice S. Griffin (the "Chambers Judge").
January 26, 2015	Reasons for judgment, 2015 BCSC 129 (the "Reasons") approving proposal, declaring intellectual property forms part of Contech's assets, dismissing Vegherb's application to amend proof of claim.

OPENING STATEMENT

The appeal arises out of the Proposal in bankruptcy of Contech (the "Proposal"), and the British Columbia Supreme Court's approval of that Proposal.

Contech had previously made asset purchase agreements with many parties, including the appellant Vegherb. Under the Agreement between Contech and Vegherb, Vegherb agreed to transfer its assets and grant Contech a license (the "License Agreement") to use its IP in exchange for ongoing payments to promissory notes.

Contech defaulted on payment and subsequently made a Proposal under the *BIA*, which Proposal required that the IP become part of Contech's property by virtue of the *Personal Property Security Act,* RSBC 1996, c 359 [*PPSA*].

Contech sought a declaration that the IP License Agreement was actually a security agreement, and that it owns the IP. Contech also applied for approval of the Proposal.

Vegherb applied to amend its proof of claim.

In the Reasons, the Court granted Contech's applications and dismissed Vegherb's application.

Vegherb appeals all three orders.

PART 1 - STATEMENT OF FACTS

1. For brevity and convenience, Vegherb adopts the facts stated in the Reasons, paragraphs 1 to 51 inclusive.

PART 2 – ERRORS IN JUDGMENT

I. The Chambers Judge erred in fact and law in finding the License Agreement to be a security agreement.

II. The Chambers Judge erred in fact and law in finding the License Agreement did not validly terminate.

III. In the alternative, the Chambers Judge erred in fact and law in finding that on default of payment, the IP remained the property of Contech.

IV. The Chambers Judge erred in fact and law in approving the Proposal.

V. The Chambers Judge erred in fact and law in dismissing Vegherb's application to amend its proof of claim.

PART 3 – ARGUMENT

I. The Chambers Judge erred in fact and law when she found the License Agreement to be a Security Agreement.

1. Vegherb generally agrees with the Chambers Judge's statement of law as set out in paragraphs 55, 56, 59, and 60 of the Reasons regarding when s. 2 of the *PPSA* will deem a security agreement to exist.

> [55] Subsection 2(1) of the *PPSA* provides:
>
> 2(1) Subject to section 4, this Act applies
>
> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation.
>
> [Emphasis added.]
>
> [56] Section 1 of the *PPSA* includes the following definitions:
>
> "security agreement" means an agreement that creates or provides for a security interest and, if the context permits, includes
>
> (a) an agreement that provides for a prior security interest, and
>
> (b) writing that evidences a security agreement;
>
> "security interest" means
>
> (a) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and....
>
> ...

> [59] Both the title and form of a transaction are unimportant in determining whether a transaction is a security agreement; what is important is the substance of the transaction: s. 2(1), *PPSA*; *Anderson's Engineering Ltd. (Re) (Trustee of)*, 2001 BCSC 1476 (CanLII) at para. 85 [*Anderson's Engineering*].
>
> [60] In looking at the substance of the transaction, the court will consider "the purpose of the transactions; the role and relationship of the parties; the practicality and commercial reality; and the intention of the parties with respect to the transactions", as held in *Manning Jamison Ltd. v. Registrar of Travel Services*, 1999 BCCA 185 (CanLII) at para. 26.

2. On the basis of this test, the Chambers Judge concluded that the substance of the agreement was a security agreement.[1]

3. The appellant respectfully submits that the Chambers Judge erred in so finding.

4. First, the appellant submits that the Chambers Judge erred in disregarding the form of the License Agreement, notwithstanding s. 2 of the *PPSA* stating that the existence of a security interest is determined, "without regard to its form".

5. The Court of Appeal confirmed in *Manning Jamison Ltd. v. Registrar of Travel Services*,[2] that the substance of an agreement is determined by, *inter alia*, "the intention of the parties with respect to the transactions".[3]

6. The words of a contract reflect the mutual and objective intentions of the parties, which they elect to reduce to writing. The surrounding circumstances may assist in interpreting an agreement, but cannot override the plain and ordinary wording an agreement to make the agreement say something it never intended to say: see e.g. *Sattva Capital Corp. v. Creston Moly Corp.*[4]

---

[1] Reasons at paras. 67-85.
[2] 1999 BCCA 185.
[3] *Ibid* at para. 26.
[4] 2014 SCC 53 at para. 57.

7. Although the mere form of the agreement does not determine whether a security agreement exists, form is nonetheless an objective manifestation of the parties' intentions, which the Court considers in relation to the substance of the agreement.

8. That is particularly important in instances where other evidence surrounding the parties' intention is of limited assistance, such as in the present case where the chambers judge found the parties' affidavit evidence to be "self-serving".[5] Accordingly, the form of the agreement does have some importance as evidencing the parties' intention.

9. Accordingly, to the extent the Chambers Judge disregarded form, the appellant submits the Court erred to that limited extent.

10. Second, the Chambers Judge decided that the "License Agreement... is not a true license agreement"[6] on the basis of its particular form. The Chambers Judge lists a variety of elements absent from the agreement, suggesting these elements determine whether a license agreement is a "true" license agreement:

> [70] The License Agreement was not a means for Vegherb to keep ownership of the IP beyond the date of payment of the purchase price, nor was it a means for Vegherb to receive ongoing benefits in relation to that ownership. Payment by Contech to Vegherb under the License Agreement was not based on royalties for revenues earned by use of the IP; it was not based on any performance milestones to be met by Contech in using the IP; and there were no restrictions on Contech's use of the IP geographically or temporally.
>
> [emphasis added]

11. The Chambers Judge obviously considered these indicia to reflect whether a "true license agreement" existed.

12. In other words, after commencing analysis acknowledging that the form of the license agreement is immaterial to whether a security agreement exists, the Chambers Judge analyzes the form of the license agreement to determine whether or not it is a "true license agreement".

---

[5] Reasons at para. 68.
[6] Reasons at para. 156.

13. Further, although the Chambers Judge references a variety of criteria of a "true" license agreement, she introduces, and relies on, no statutes, case law, textbook authority, or evidence to explain or substantiate the reasoning. The parties introduced none, and the Chambers Judge referred to none.

14. The appellant respectfully submits the Chambers Judge's reasoning on this point is without legal foundation.

15. There is no particular legal or commercial reason that an IP license must contain a geographical or temporal restriction, "performance milestones", or royalties in relation to revenues to be considered a "true" license agreement.

16. Moreover, Vegherb actually did explain how each of these elements arose:

    a. although payments were not individually separated into "royalties", ongoing license payments were obviously reflected in the payment under the promissory note;

    b. the License Agreement transferred an extremely broad, but not unfettered, right of use, reflected in the substantial portion of amounts payable by Contech attributable to "intangibles";

    c. Vegherb retained residual rights in the IP which Contech was not permitted to transfer or sublicense without Vegherb's authorization; and

    d. the amounts payable by Contech to Vegherb did, in fact, vary according to performance, under the payment terms of the asset purchase agreement.

17. Further, after citing apparent indicia of a "true" license agreement with no source, the Chambers Judge considered at least some of these elements identified by Vegherb, only to conclude that these elements did not actually evidence a true license agreement after all.[7] For example:

---

[7] Reasons at paras. 71, 74-82.

> [80] The other aspect of the License Agreement that Vegherb argues is significant in supporting its position that the true nature of the agreement is a license agreement, is the restriction in articles 2.1 and 6.5 of the Agreement which limited Contech's right to sublicense or assign the license to only a "wholly-owned subsidiary" without Vegherb's consent.
>
> [81] However, I do not find these provisions any more indicative of a license agreement than a conditional sales agreement. These restrictions on assignment or sublicensing were simply consistent with Vegherb's goal under the agreement to retain title to the IP until the purchase price was paid, after which these restrictions would terminate and Contech would have the ability to do whatever it wanted with the IP.
>
> [82] These were not true restrictions on the ability to use the IP within Contech's business, which was unlimited.
>
> [emphasis added]

18. In other words, after citing elements to determine whether the license agreement was a "true" license agreement, the Chambers Judge promptly decides that these elements do not actually apply, and are at best equivocal.

19. Further, the Chambers Judge had a variety of evidence regarding the commercial reality, parties' intentions, and relationship of the parties which supports the inference of a "true license agreement".

20. Vegherb was already secured via a general security agreement. The Chambers Judge acknowledges this later,[8] and describes it as "extra" security. However, the License Agreement being an "extra" security agreement would be commercially redundant.

21. The Chambers Judge considers that there was "no evidence" that Contech "agreed ... that the License Agreement was terminated due to default",[9] even though it would be exceptional for a party in default to indicate its agreement.

---

[8] Reasons at para. 91.
[9] Reasons at para. 102.

22. At the same time, the Chambers Judge fails to consider that Contech did not assert any rights in the IP on termination; on the contrary, it proposed refinancing terms and says it attempted to cure its default when no cure would otherwise have been required.

23. Put another way, the Chambers Judge overlooked unequivocal evidence of the parties' intentions regarding this security agreement to focus instead on the absence of equivocal evidence unlikely to exist in the first place.

II. The Chambers Judge erred in fact and law in finding the License Agreement did not validly terminate.

24. Vegherb terminated the License Agreement on default by Contech.

25. The Chambers Judge addressed this issue on the following basis:

    a. the License Agreement was a security agreement;
    b. there was "no evidence" that Contech agreed with the termination;[10] and
    c. termination would effectively lead Vegherb to "opt out" of the legislation and take "priority" over the IP.[11]

26. This analysis is problematic for several reasons.

27. First, it is entirely irrelevant whether or not Contech "agreed" with the termination on default, or ceased to use the IP. Commercial parties in default of their obligations seldom explicitly acknowledge default; the fact Contech did not do so here is of no more importance than in, for example, a commercial case in which a debtor does not respond to correspondence demanding payment.

28. In any event, far from there being "no evidence" that Contech "agreed" to the License Agreement being terminated, Contech in fact sought to cure its default, and sought further financing on condition that Vegherb's security be further subordinated. Contech did not assert that the IP was subject to priority interest of other creditors.

29. This conduct cannot reasonably be interpreted as the actions of a debtor who believed it already owned the IP, subject to a security agreement.

---

[10] Reasons at para. 102.
[11] Reasons at para. 104.

30. Second, the Chambers Judge erroneously suggests that, if Vegherb cancelled the License Agreement, it would "unilaterally 'opt-out' of the legislation ... and thereby take priority over an asset".[12] Respectfully, this is incorrect. Assuming the Chambers Judge's analysis on this point is otherwise correct, this would only lead Vegherb taking notional possession of the IP; doing so would have no impact on actual legal priority, the effect of the *PPSA* or *BIA* on the parties, or the priority ranking following those laws. This would only perhaps lead to a priority dispute between secured parties.

31. Interestingly, no other secured party, when notified of Contech's default, alleged a secured or priority interest in the IP.

III. In the alternative, the Chambers Judge erred in fact and law in finding that on default of payment, the IP remained the property of Contech.

32. Even if conceding that Vegherb held the IP as security, then Vegherb would nonetheless prevail in priority.

33. Logically, if Vegherb held the IP as security, then termination of the License Agreement and recovery of the IP is tantamount to enforcement of security. However, 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, if indeed that agreement was a security agreement.

34. Under the *PPSA* and *BIA*, secured parties are, of course, entitled to enforce their security. The fact other creditors have priority does not impact that ability.

IV. The Chambers Judge erred in fact and law in approving the Proposal.

35. Respectfully, the Chambers Judge erred in approving the Proposal.

---

[12] Reasons at para. 104.

36. The central defect in the Chambers Judge so doing is classifying Vegherb as an affected secured creditor, along with every other secured creditor. The Proposal would not have succeeded had secured creditors been distinguished according to the considerations in the *BIA*.

37. Fundamentally Vegherb's security was both a general security agreement and, to the extent this Court accepts the Chambers Judge's or respondents' reasoning, the IP.

38. The other affected secured creditors had no such security, but instead held convertible debentures, which by one point or another in the near future would convert indebtedness for shares in Contech.

39. The Chambers Judge did correctly state the test for classifying secured creditors:

> [131] One of Vegherb's strong objections to the form of the Proposal is the fact that it groups it into a class of Affected Secured Creditors. Vegherb asserts it should be in its own class as a secured creditor because the other creditors in its class are all debenture holders who always expected to ultimately receive equity in Contech. In contrast, Vegherb says that it is the seller of assets to Contech waiting to get paid for those assets.
>
> [132] Section 50(1.4) and (1.5) of the *BIA* state:
>
> > (1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account
> >
> > > (*a*) the nature of the debts giving rise to the claims;
> > >
> > > (*b*) the nature and rank of the security in respect of the claims;
> > >
> > > (*c*) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;
> > >
> > > (*d*) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and
> > >
> > > (*e*) such further criteria, consistent with those set out in paragraphs (*a*) to (*d*), as are prescribed.
> >
> > (1.5) The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of

secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

[133] In *Re Canadian Airlines Corp., Re* (2000), 2000 CanLII 28185 (AB QB), 19 C.B.R. (4th) 12 [*Canadian Airlines*] the Alberta Court of Queen's Bench considered classification issues. While that case dealt with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the approach is similar under the *BIA*. The Court held at paras. 14-19:

> **14** The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims see for example, Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988),1988 CanLII 3570 (AB QB), 72 C.B.R. (N.S.) 20 (Alta Q.B.)
>
> **15** Beyond identifying secured and unsecured classes the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.
>
> **16** A frequently cited description of the method of classification of creditors for the purposes or voting on a plan, under the C.C.A.A., is Sovereign Life Assurance Co. v. Dodd (1891) [1892] 2 Q.B. 573, (Eng. C.A.).
>
> **17** At page 583 (Q.B.), Bowen L.J. stated:
>
> > The word class is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling, the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section, being so worked as to result in confiscation and injustice, and that it must be confined to those persons, whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.
> >
> > This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply to classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.
>
> **18** Generally, the cases hold that classification is a fact-driven determination unique, to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible, and remedial jurisdiction involved: see, for example, Re Fairview Industries Ltd. (1991) 1991 CanLII 4266 (NS SC), 11 C.B.R. (3d) 71 (N.S.T.D.)
>
> **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 a 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. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

40. Having cited this authority, the Chambers Judge then says:

> [134] Here 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.
>
> [135] The fact that Contech also has the License Agreement, as a form of a security agreement, in my view does not justify putting it in a different class. There is no evidence suggesting that the interest secured by that agreement ranks ahead of any of the interests secured by the general security agreements.
>
> [136] I do not find it relevant that as debenture holders some of the persons in this class may have become debtors for different reasons than Vegherb became a debtor. As for the Proposal to provide shares, this does not favour debenture holders or disadvantage Vegherb. The fact is that Vegherb also was willing to become a shareholder of Contech as part of the payment of the purchase price for Vegherb's assets.

41. Vegherb respectfully submits the Chambers Judge committed a number of errors in this reasoning.

42. First, the mere fact that the secured creditors rank subsequent in priority to FWCU and other unaffected creditors is, with respect, a distinction without a difference. Under this Proposal, the affected secured creditors are those subsequent in priority to FWCU; in essence, the Chambers Judge's reasoning is that the parties have a commonality of interest merely by being affected secured creditors.

43. Second, it is incorrect. The Chambers Judge reasons that there was "no evidence" that "the interest secured by [the IP License Agreement] ranks ahead of any of the interests secured by the general security agreements". [13]

---

[13] Reasons at para. 135.

44. Certainly, there was no evidence of any difference in priorities on account of the interest secured by the License Agreement, because the parties did not intend this to be a security agreement.

45. However, the Chambers Judge omits that Vegherb also held security via a general security agreement, which was subsequently qualified by a subordination agreement between Vegherb and FWCU.

46. Unlike the case with other creditors, FWCU did not have an absolute priority over Vegherb; rather, FWCU had a priority to the extent of the first $1.45 million of indebtedness, after which Vegherb would rank ahead of subsequent FWCU indebtedness.

47. That is a significant error. With respect, the learned Chambers Judge considered only the newly found security agreement – the IP License Agreement – and not the security agreement into which the parties had actually entered. There was ample evidence that Vegherb's security gave it "a greater right vis-à-vis the debtor" than the convertible debentures held by other affected secured creditors.

48. Second, the Chambers Judge erred significantly in paragraph 136. After reasoning that it is "not relevant" that debtors became debtors for different reasons, she then acknowledges that Vegherb also took part payment for its assets in the form of shares, presumably to explain why it is not unfair for affected secured creditors to receive shares.

49. With respect, the Chambers Judge misunderstood the significance of these distinctions, and their applicability to the criteria under the *BIA* in that they go to two enunciated criteria under s. 50 (1.4): the nature of the debts giving rise to the claim, the extent to which claims are paid under the proposal, and the remedies available to the creditors.

50. Unlike the other affected secured creditors, the debts to Vegherb arose in the context of an asset purchase; Vegherb had not elected to take any further shares, and by virtue of the proposal was deprived of the exact thing for which it had contracted.

51. By contrast, the other secured creditors faced substantially the same remedy under the Proposal as they would have faced otherwise, including the substantially same remedy for which they originally contracted: shares in Contech in proportion to the money they loaned to Contech. To that extent, the Proposal allows the other affected secured creditors to recover potentially far more than the amounts for which they originally bargained.

52. To that end, the Chambers Judge fell into the exact trap against which Bowen L.J. cautioned in *Sovereign Life Assurance Co. v. Dodd*,[14] cited in the Chambers Judge's authority *Re Canadian Airlines Corp.*:[15]

> The word class is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling, the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section, being so worked as to result in confiscation and injustice, and that it must be confined to those persons, whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.
>
> [emphasis added]

53. The Chambers Judge's reasons do not recognize, let alone address, the "confiscation and injustice" effected by the Proposal. The Chambers Judge considered the "confiscation" merely the consequence of her finding that the

---

[14] (1981) [1892] 2 Q.B. 573, (Eng. C.A.).
[15] 19 C.B.R. (4th) 12; Reasons at para. 133.

License Agreement is a security agreement, not the practical effect of the proposal described above.[16]

54. Finally, the Chambers Judge fundamentally disregards the holistic and unique prejudice to Vegherb as creditor. Vegherb is unique in the Proposal in the extent to which it receives so much less than it bargained for, compared to other secured creditors. At the same time, Vegherb's security, conceded by the trustee, is notionally worthless. Nonetheless, under the Proposal, Vegherb receives less as a "secured" creditor than the unsecured creditors.

V. The Chambers Judge erred in fact and law in dismissing Vegherb's application to amend its proof of claim.

55. The Chambers Judge's conclusion on this point is premised on two points.

56. The first is premised on a fundamental error of fact, that the Proposal did not value the security.[17]

57. In fact, the Proposal and its supporting documents repeatedly designated the supporting value of the security as worthless.

58. Item 297 of the Statement of Affairs of Contech listed Vegherb's claim as "unsecured".

59. The Trustee's Report on the Proposal explicitly said that if there were a bankruptcy and liquidation of Contech's assets, "it is anticipated that there would be no recovery for the Affected Creditors".[18]

60. Subsection 50.1(2) of the *BIA* permits a proposal to contain a "proposed assessed value", but it does not specify the requirements as to whom (e.g. the

[16] Reasons at paras. 150-153.
[17] Reasons at para. 170.
[18] Trustee's Report on the Proposal at p. 12.

debtor, the trustee, the creditor) proposes the value. It does not prescribe any particular form for the "proposed assessed value".

61. Accordingly, the Chambers Judge dismissed the application to amend security on a fundamental, overriding, and verifiable error of fact.

62. To that end, the reliance on *Re Workgroup Design* was of limited assistance, as in that case there was no dispute that the proposal did not value security.[19]

63. Second and in any event, the Chambers Judge erred in finding that s. 132(1) of the *BIA* does not apply.

64. It is difficult to discern the Chambers Judge's reasons for so ordering, except that reliance on the analysis in *Re Workgroup Design*.[20]

65. However, that too is problematic. *Workgroup Design* considered s. 135 of the *BIA*, and the trustee's power to allow or disallow a claim under that section.

66. In that case, the trustee had relied on s. 135 of the *BIA* to disallow a secured claim – indisputably without a proposed value of security – on the basis that the CRA held priority.

67. The error in reasoning at issue before the Court of Appeal in *Workgroup Design* is apparent: the existence of a priority by another secured creditor only affects the value of a subsequent secured creditor's security; it does not, on its own, affect whether the subsequent secured creditor is a secured creditor at all.

68. That is not the case here, and *Workgroup Design* did not consider section 132.

---

[19] (2008), 40 C.B. R. (5th) 1 (Ont. C.A.); Reasons at para 171.
[20] *Ibid* at para. 16.

69. By contrast, Vegherb applied to amend its proof of claim under s. 132; that section allows a creditor to apply to amend the value of security "at any time", when the trustee has not elected to acquire the security.

70. That wording is also a complete answer to the reasoning that Part III, Division I of the *BIA* is a complete code in respect of proposals; obviously it is less than a "complete code", otherwise sections extrinsic to that part – including, for example, the definitions section – would not apply.

71. The legislative section headings are instructive in interpretation. Section 132 of the *BIA* falls under a section generally governing proofs of claim; section 135 (at issue in *Workgroup Design*) governs "Admission and Disallowance of Proofs of Claim and Proofs of Security". There is no reason or legislative provision that these general sections would not apply to proposals.

72. Further, the plain and ordinary wording of s. 132 is that the creditor may amend its proof of claim "at any time"; there was no suggestion or evidence before the trustee that any of the other conditions required for an amendment had not been satisfied.

73. It would not be consistent to interpret the words "at any time" with any of the qualifications urged by the respondents when the *BIA* contains no such qualification.

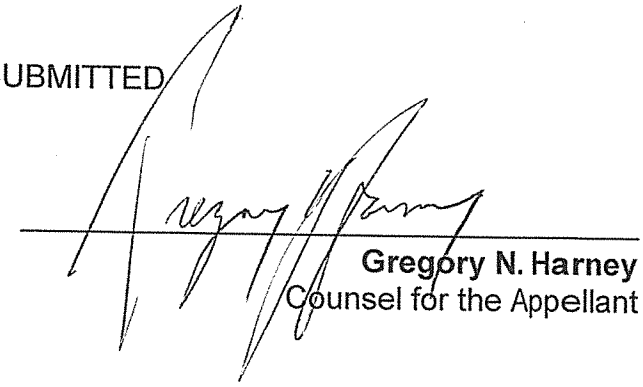
PART 4 - NATURE OF ORDER SOUGHT

The Respondent seeks:

(a) An Order allowing the appeal as sought.

(b) Costs to the appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Gregory N. Harney
Counsel for the Appellant

LIST OF AUTHORITIES