

Province: British Columbia
Bankruptcy Division
Vancouver Registry
Court No. B150025
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: Contech Enterprises Inc. ("Contech" or the "Company")

To: Deloitte Restructuring Inc. (the "Trustee") in its capacity as trustee in bankruptcy of the Company

To: All creditors with a proven claim against the Company's estate

And to: The Office of the Superintendent of Bankruptcy (the "OSB")

TAKE NOTICE that an application will be made by the Company to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on January 15, 2015 at 10:00 a.m. for the order set out in Part 1 below.

Part 1: ORDER SOUGHT

1. The Company seeks an Order declaring that the Company is the owner of certain intellectual property (the "IP") in substantially the form of Order attached hereto as **Schedule "A"**. The IP is enumerated in Schedule "B" to the draft Order.

Part 2: FACTUAL BASIS

Background

1. This application is being brought concurrently with the application of the Company and the Trustee for the approval of the proposal dated December 23, 2014 (the "Proposal") made by the Company to its Affected Creditors. All capitalized terms not otherwise defined herein have the same meanings as is ascribed to them in the Proposal.

2. Contech was founded in 1987. It designs, manufactures and sells environmentally friendly products for the pet and garden industries. The Company has approximately 30 employees in Canada, and, through a subsidiary, approximately another 35 employees in the U.S.
3. In recent years Contech has expanded rapidly through its acquisitions of the shares or assets of other companies and/or persons. As a result of these acquisitions, the Company experienced operational and integration-based challenges and also took on significant additional debt which the Company has struggled to service. Additionally, the Company changed its distribution model during this period and, at times, has suffered cash-flow issue due to the highly seasonal nature of its business. As a result of the foregoing, over the last three fiscal years the Company has had aggregate losses of over \$4.5 million.
4. Throughout 2014, the Company made numerous attempts to refinance its business. One of the speciality financiers approached by Contech was Siena Lending Group LLC ("**Siena**"), which is the "Funder" under the Proposal. Although the Company and Siena had executed a term sheet that would have provided sufficient funding to enable the Company to carry on business for the foreseeable future, that refinancing did not complete due to, among other things, Vegherb, LLC ("**Vegherb**") not agreeing to subordinate its security interest in the Company's assets to that of Siena.
5. When the refinancing with Siena failed, the Company was left with no viable options other than a formal restructuring. The Company filed the Proposal with the OSB on December 23, 2014. The Meeting to vote on approving the Proposal was held on January 8, 2015, at which time the Affected Creditors voted overwhelmingly in favour of the Proposal.
6. Vegherb is a secured creditor of the Company and is an Affected Secured Creditor under the Proposal. Vegherb voted against the Proposal.

Dispute with Vegherb regarding the ownership of the IP

7. Vegherb is a company which was formerly engaged in the business of designing, manufacturing and selling raised garden beds and sandboxes (the "**Business**").
8. In or around February 2013, the Company and Vegherb completed a transaction (the "**Transaction**") whereby the Company acquired the Business by acquiring all or substantially all of Vegherb's assets (collectively, the "**Assets**"). The Assets included, among other things, all of the IP.
9. In furtherance of the Transaction, the Company and Vegherb entered into, among other agreements, the following:
 - (a) Asset Purchase Agreement, dated February 22, 2013, as modified by the Modification of Asset Purchase Agreement dated February 22, 2013 (as modified, the "**APA**");

- (b) License Agreement, dated February 22, 2013 (the "**License Agreement**");
- (c) General Security Agreement, dated February 22, 2013 (the "**GSA**");
- (d) Assignment Agreement, dated February 22, 2013 (the "**Physical Assets Assignment Agreement**");
- (e) Assignment Agreement, dated February 22, 2013 (the "**IP Assignment Agreement**"); and
- (f) Promissory Note, dated February 22, 2013 (the "**Promissory Note**")

(collectively, the "**Transaction Documents**").

10. In addition to the foregoing, as part of the Transaction, Vegherb also entered into a Subordination and Standstill Agreement dated February 28, 2013 with First West Credit Union ("**FWCU**") and the Company (the "**Subordination Agreement**") and a Subordination and Standstill Agreement dated February 28, 2013 with HSBC Bank Canada ("**HSBC**") and the Company (the "**HSBC Subordination Agreement**") whereby Vegherb subordinated its interests in the personal property of the Company to those of HSBC and FWCU.
11. The effect of the Transaction Documents was as follows:
 - (a) Under the APA, the purchase price (the "**Purchase Price**") for the "Purchased Assets" (as defined in the APA) was \$4,438,750, of which: (i) \$857,100 was paid to Vegherb or others at its direction on closing; (ii) \$2,301,650 (the "**Deferred Cash Payment**") was to be paid in cash over time; and (iii) the balance was to be paid by way of the issuance of common shares of the Company to Vegherb or other third parties on behalf of Vegherb (see APA, sections 3.1 and 3.2).
 - (b) Contech executed the Promissory Note in favour of Vegherb as the Deferred Cash Payment was to be made over a five year period commencing in June 2013 and ending in October 2018 (see Promissory Note, page 1).
 - (c) Under the APA, the "Purchased Assets" (as defined therein) included all of the Assets except the IP. The Purchased Assets were conveyed to Contech pursuant to the Physical Assets Assignment Agreement (see APA, section 1.1(iii)).
 - (d) The IP was dealt with under the License Agreement and the IP Assignment Agreement. Pursuant to the License Agreement (see License Agreement, sections 2.1 and 3):
 - (i) for the consideration of \$1.00, Vegherb granted Contech the exclusive right to use the IP worldwide;
 - (ii) if Contech made all payments to Vegherb as required under the Promissory Note, upon the conclusion of those payments, the IP would be

automatically transferred to Contech pursuant to the IP Assignment Agreement; and

- (iii) if Contech defaulted in making payment under the Promissory Note, the License Agreement automatically terminated.
 - (e) Pursuant to the IP Assignment Agreement, upon payment of \$1.00, plus the full Deferred Cash Payment, Vegherb's rights, title and interest in and to the IP is transferred to Contech (see IP Assignment Agreement, section 1).
 - (f) In addition to the License Agreement and the IP Assignment Agreement, as security for payment of the Deferred Cash Payment in accordance with the Promissory Note, the Company granted Vegherb a security interest in all of the Company's present and after acquired personal property (see GSA, section 1).
12. From Contech's perspective, the Transaction was structured in an unusual way. This was at Vegherb's behest. Specifically, Vegherb required that the IP be transferred to the Company separately from the other Assets pursuant to the License Agreement and the IP Assignment Agreement. Title to the IP would not transfer to Contech until the Company paid the Deferred Cash Payment. Nevertheless, as is evident from the Transition Document, it was always the parties' intention that Contech would acquire all of the Assets used in the Business, including the IP.
 13. The IP includes, among other things, patents needed for the production of certain products developed and sold as part of the Business, as well as certain trademarks and domain names which are used in the Business and which Contech required in order to be able to manufacture and sell to its customers the products designed by Vegherb. Accordingly, from a business standpoint, the IP is the most important component of the Assets and acquiring the Assets without the IP would not have been practical or commercially reasonable.
 14. Vegherb has taken the position that the License Agreement was terminated by virtue of Contech failing to make one of the Deferred Cash Payments under the Promissory Note. Contech is of the position that the License Agreement is, in substance and fact, a security agreement within the meaning of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "PPSA") and is, accordingly, subject to the provisions of that Act and the interests of Contech and its other secured creditors, including those that rank in priority to Vegherb.

Part 3: LEGAL BASIS

1. Contech relies on the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), the provisions of the PPSA, the legal authorities cited herein, the inherent jurisdiction of this Honourable Court and such further and other legal authority as the Company may advise.

PPSA Provisions

2. 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]

3. 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....

4. In summary, the PPSA applies to all transactions which, in substance, create an interest in personal property (including intangibles such as the IP) that secures payment or performance of an obligation. Regardless of its title or form, if an agreement creates a security interest, then that agreement is, for the purposes of the PPSA, a security agreement and is subject to the provisions of that Act.

The License Agreement is a Security Agreement

5. The License Agreement is a security agreement as, in substance, it creates a security interest in the IP in favour of Vegherb. By its terms, it secures performance of an obligation, namely the payment of the Deferred Cash Payment in accordance with the Promissory Note.

6. In *Anderson's Engineering Ltd. (Re) (Trustee of)*, the Court cited with approval the following passage from Cuming and Wood's *British Columbia Personal Property Security Act Handbook* (Carswell, 1990):

The substance test of Section 2 [of the PPSA] ignores both title and form as factors in characterizing transactions. If a transaction is one under which a party gives or recognizes that someone else has an interest in his or her property in order to secure payment or performance of an obligation, it is a security agreement.

Anderson's Engineering Ltd. (Re) (Trustee of), 2001 BCSC 1476 at para. 85

7. Accordingly, in determining whether the PPSA applies to the License Agreement, it is irrelevant that the agreement is called a "license agreement" and it is irrelevant that title to the IP does not immediately transfer to Contech. Rather, the Court must consider whether the License Agreement, in substance, creates a security interest in the IP in favour of Vegherb as security for the payment of the Deferred Cash Payment.
8. When determining whether an agreement creates a security interest (and is therefore a security agreement), 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".

Skybridge Holidays Inc. (Trustee of) v. British Columbia (Registrar of Travel Services),
1999 BCCA 185 at para. 26.
9. In applying these factors to the facts at hand it is clear that the License Agreement is a security agreement:
 - (a) The purpose of the Transaction was the acquisition by Contech of Vegherb's Business, which necessitated the acquisition of the Assets, including the IP which was needed to carry on the Business.
 - (b) The relationship between the parties is one of vendor and purchaser and, due to the deferred payment of part of the Deferred Cash Payment, one of creditor and debtor. More specifically, Vegherb is a secured creditor of Contech: pursuant to the GSA, it took a security interest in all of Contech's assets, and pursuant to the License Agreement it retained title to the IP pending payment of the Deferred Cash Payment.
 - (c) The intention of the parties in carrying out the Transaction was simply for Vegherb to sell the whole of its Business to Contech, including the IP which Contech was to acquire when the full amount of the Purchase Price was paid.
10. From the foregoing, it is apparent that the License Agreement creates a security interest as defined in the PPSA. More specifically, the License Agreement is, for all practical purposes, a conditional sale agreement, which is one of the agreements identified in subsection 2(1)(b) of the PPSA as being a security agreement for the purposes of that Act.
11. In *Anderson's Engineering* the Court held that if something is specifically covered by the PPSA, an arrangement with the same effect should also be covered:

[84] If a conditional sale (an agreement by which a seller retains title to goods until the buyer pays the full price for the goods) is specifically included in the scope of the *Personal Property Security Act*, a mechanism that is alleged to accomplish exactly the same thing by the retention of title documents, in substance, also creates a security interest and is included in the scope of the *Personal Property Security Act*.

Anderson's Engineering, at para. 84.

12. Pursuant to the License Agreement, upon payment of the Deferred Cash Payment, Contech would acquire the IP from Vegherb pursuant to the terms of the IP Assignment Agreement. Pursuant to the IP Assignment Agreement, conditional only on payment of the Deferred Cash Payment in accordance with the Promissory Note, the IP would be transferred to Contech.
13. The combined effect of the License Agreement and the IP Assignment Agreement is to create a conditional sale agreement: Vegherb granted Contech all rights of ownership with respect to the IP for \$1.00, but retained title pending payment of the balance of the Purchase Price for the Business. This is indistinguishable from the facts considered by the Court in *Anderson Engineering*.
14. In the circumstances, considering the purpose of the Transaction, and on a plain reading of the License Agreement in the context of the Transaction, there can be no other conclusion than that the License Agreement creates a security interest in the IP in favour of Vegherb, and is a security agreement within the meaning of the PPSA.

The Effect of the Determination that the License Agreement is a Security Agreement

15. As the License Agreement is, in fact, a security agreement, Vegherb's interest in the IP is subject to the interests of, among others, Contech's other secured creditors. Most significantly, Vegherb's security interest is subordinate to the security interests of secured creditors who perfected their security interest in the IP before Vegherb did or who have an agreement with Vegherb granting them priority over Vegherb. These creditors include Business Development Bank of Canada ("BDC"), HSBC, FWCU and several secured debenture holders.
16. In recognition of the fact that, in a liquidation scenario, the realizations from all of Contech's assets, including the IP, would be less than the amounts owed to BDC, HSBC and FWCU, the Proposal groups all secured creditors ranking behind FWCU, including Vegherb, into one class (i.e. the Affected Secured Creditor Class).
17. Upon implementation of the Proposal, which, for the Affected Secured Creditors, means the issuance of common shares of Contech, the claims of those creditors, including Vegherb, will have been extinguished and the obligations secured by their security interests will have been satisfied. Contech will be entitled to the discharge of their security and, in the case of Vegherb, entitled to the transfer of the IP pursuant to the IP Assignment Agreement.

Part 4: MATERIAL TO BE RELIED ON

1. Trustee's Report on the Proposal, dated December 23, 2014.
2. Trustee's Report on the Proposal, dated January 13, 2015.
3. Affidavit #1 of Mark Grambart, sworn January 12, 2015.
4. Such other materials as the Applicant may advise.

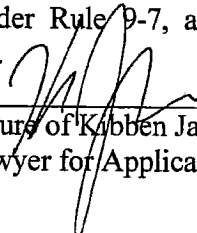
The Applicant estimate that the application will take one day.

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) service 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).

Dated: 14-Jan-2015



Signature of Kibben Jackson
 Lawyer for Applicant

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

The Solicitors for Contech Enterprises Inc. are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2900 - 550 Burrard Street, Vancouver, BC V6C 0A3 Telephone: +1 604 631 3131 (Reference: Kibben Jackson/249389.00008)

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- 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

SCHEDULE "A" - DRAFT ORDER FOR DECLARATION REGARDING IP

Province: British Columbia
Bankruptcy Division
Vancouver Registry
Court No. B150025
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**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

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

ORDER MADE AFTER APPLICATION

BEFORE))
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ON THE APPLICATION OF Contech Enterprises Inc. (the "**Company**") coming on for hearing at Vancouver, British Columbia on this date and on hearing Kibben Jackson and Danielle Toigo, counsel for the Company and those counsel listed in **Schedule "A"** attached hereto;

THIS COURT ORDERS AND DECLARES that:

1. The time for service of the Notice of Application herein and all materials relied on in support of the Notice of Application (collectively, the "**Application Materials**") is hereby abridged for the purposes of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and the *British Columbia Supreme Court Civil Rules*. Service of the Application Materials is deemed to have been duly effected, the Notice of Application is properly returnable today and the need for further service of the Application Materials is hereby dispensed with.
2. The Company is hereby declared to be the owner of all of the intellectual property (collectively, the "**IP**") enumerated in **Schedule "B"** hereto.

3. The Company is hereby authorized to take all steps necessary to cause the registration of the patents and trademarks comprising the IP in the name of the Company, including making all necessary filings in the name of "Vegherb, LLC", or in the name of any other party holding title to the IP, with the applicable Canadian and/or international registries or entities all in order to effect the transfer of title to the IP to the Company.
4. Approval of the form of this Order by counsel other than counsel for the Company is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Kibben Jackson,
 Party Lawyer for Contech Enterprises Inc.

BY THE COURT

REGISTRAR

SCHEDULE "A"
LIST OF COUNSEL

Name		Party

SCHEDULE "B"

LIST OF INTELLECTUAL PROPERTY

Trade-mark**Application/Registration No.**

1. Veggie Wall

3903615

URLs

Domain Name	Description	Is Transfer Locked?	Status	Expiration Date
frameitall.com	frameitall.com	locked	ACTIVE	6/2/2015
	Private Domain		ACTIVE	3/2/2015
garden-wars.com	garden-wars.com	locked	ACTIVE	7/28/2013
	Private Domain		ACTIVE	7/28/2013
	Domain Expiration Protection		ACTIVE	7/28/2013
	Basic Web Site Forwarding		ACTIVE	7/28/2013
gardentimbers.com	gardentimbers.com	locked	ACTIVE	3/1/2014
	Basic Web Site Forwarding		ACTIVE	3/1/2014
	Private Domain		ACTIVE	1/31/2014
gardenwarz.com	gardenwarz.com	locked	ACTIVE	7/28/2013
	Basic Web Site Forwarding		ACTIVE	7/28/2013
	Private Domain		ACTIVE	7/28/2014
	Domain Expiration Protection		ACTIVE	7/28/2013
raisedbed.com	raisedbed.com	locked	ACTIVE	3/1/2014
	Basic Web Site Forwarding		ACTIVE	3/1/2014
	Private Domain		ACTIVE	3/1/2014
raisedbedgarden.com	raisedbedgarden.com	unlocked	ACTIVE	3/1/2014
	Basic Web Site Forwarding		ACTIVE	3/1/2014
	Private Domain		ACTIVE	3/1/2014
scenery-solutions.com	scenery-solutions.com	locked	ACTIVE	12/30/2015
	Private Domain		ACTIVE	3/2/2015

Patents

LE Ref.	OC Attorney	Title	Status	Serial No.	Filing Date	Inventor Names	Patent No.	Issue Date
00049/001629-US0	David Leason	TRELLIS BRACKET	Granted	29/103,738	4/22/1999	JEFFREY R. MARINO	D428,798	8/1/2000
00049/001631-US0	David Leason	RAISED BED BRACKET	Granted	29/103,740	4/22/1999		D422,885	4/18/2000
00049/001633-US0	David Leason	TEE PEE LEG CONNECTOR	Granted	29/105,966	6/3/1999	JEFFREY R. MARINO	D423,626	4/25/2000
00049/001635-CA0	David Leason	RAISED BORDER SYSTEM	Granted	2288583	11/5/1999		2,288,583	1/29/2002
00049/001635-GB0	David Leason	RAISED BORDER SYSTEM	Granted	99308248.6	10/19/1999		1020109	7/19/2000
00049/001635-US0	David Leason	RAISED BORDER SYSTEM	Granted	09/231,099	1/14/1999	Hans Naegerl, Dietmar Kubein-Meese, Caspar Graf Stauffen	6,202,367	3/20/2001
00049/001637-US0	David Leason	GARDEN TRELLIS WALL SYSTEM	Granted	09/229,417	1/12/1999		6,311,428	11/6/2001
00049/002729-US0	Edward Ellis	LIGHTING SYSTEM FOR USE IN RAISED BED GARDENING OR LANDSCAPING	Pending	61/597,005	2/9/2012	Anthony Topping		
00049/003113-US0	David Leason	GROMMET	Pending	29/435,496	10/24/2012	Eric Lam, Anthony Topping		
00049/003114-US0	David Leason	RAISED BORDER BRACKET ARRANGEMENT	Pending	13/673,501	11/9/2012	Anthony Topping		