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JUDICIAL CENTRE: Calgary

*In the Matter of the Companies' Creditors
Arrangement Act, RSC 1985, C C-36, as amended*

And in the Matter of the Compromise or
Arrangement of JMB Crushing Systems Inc. and
2161889 Alberta Ltd.

APPLICANT: KALINKO ENTERPRISES LTD.

RESPONDENT: JMB CRUSHING SYSTEMS INC.

DOCUMENT: **REPLY BRIEF OF THE APPLICANT
KALINKO ENTERPRISES LTD.**

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1. OVERVIEW

1. N.P.A.'s response brief includes a few minor arguments not addressed in Kalinko's briefing. They say Kalinko's PPR registration is invalid, and they assert that Kalinko never exercised its contractual option with JMB under s. 5.10(c) of the Operating Agreement as it applies to the Kalinko Lands Piles.
2. While those arguments necessitate a short reply, they are tertiary issues. Ultimately, N.P.A. has a breach of contract claim against JMB for failing to perform its end of the January 2020 Agreement. That claim is unsecured. N.P.A. now valiantly attempts to seek specific performance—possession of aggregate it says it contracted for—rather than join the long line of JMB's unsecured creditors.
3. As Kalinko explained in its opening brief, N.P.A. isn't entitled to specific performance. The property isn't unique, monetary damages are an adequate remedy since replacement aggregate is available on the market, and JMB did not own the material it purported to sell. Even if N.P.A. showed that specific performance was an appropriate remedy, and proved JMB had owned the aggregate, title never passed to N.P.A. under the terms of the agreement. And N.P.A. can't avail itself of the bona fide purchaser provisions of the PPSA and *Sale of Goods Act* in light of its admissions that this unusual transaction was out of the ordinary course of JMB's business, and N.P.A. knew about Kalinko's ownership interest and PPR registration covering all aggregate extracted from its lands, wherever situated.
4. With that in mind, we have a short rejoinder to N.P.A.'s arguments regarding the PPR and s. 5.10(c).

2. ISSUES IN REPLY

A. KALINKO HAD MULTIPLE VALID GROUNDS TO REGISTER AT PPR

5. N.P.A. argues, at paragraphs 55 and 56 of its brief, that Kalinko had no security agreement with JMB and so had no right to register its interest at the Personal Property Registry. Not so. While signing a document entitled "SECURITY AGREEMENT" is one potential basis for registration in the PPR, it is by no means the only one.
6. Here, Kalinko had two bases for registration. First, it owned the aggregate. Property owners are entitled, under s. 26(2) of the *Sale of Goods Act*, to register that interest at PPR, which "is... also the registry for registrations under... the *Sale of Goods Act*."¹ Second, given the nature of the relationship between Kalinko and JMB, the Operating Agreement created a deemed purchase-money security interest in Kalinko's favour under s. 1(1)(II)(i) and (ii) of the PPSA, because JMB was dealing with Kalinko's aggregate

¹ Ronald Cuming and Roderick Wood, *Alberta Personal Property Security Act Handbook* (Toronto: Carswell, 1998) (4th Ed.), at pg. 394. [TAB 1]

and payment was deferred until it was sold until a third party. Either of these grounds are sufficient for registration.

B. KALINKO EXERCISED ITS OPTION UNDER S. 5.10(c) OF THE OPERATING AGREEMENT

7. At paragraphs 9, 30, 42, 50, and 55, of its brief, N.P.A. asserts that Kalinko never exercised the contractual option under s. 5.10(c) of the Operating Agreement with respect to the Kalinko Land Piles. N.P.A.'s repetition of this assertion is puzzling. N.P.A. is not a party to the Operating Agreement and has no independent knowledge of what occurred between Kalinko and JMB. And in any case, N.P.A. has no quarrel with the Kalinko Land Piles. It asserts an interest only in the Precambrian Pile. So whether the option was exercised is of no concern to N.P.A., because that isn't the aggregate which comprises the Precambrian Pile.
8. And it is not clear where N.P.A. got the idea that the option was never exercised. It cites the affidavit of Tim Kalinski for that proposition, but the affidavit says no such thing. If N.P.A. wished to know whether Kalinko had expressly exercised the option, it could have asked Mr. Kalinski. It didn't. If N.P.A. had asked Mr. Kalinski, it would have discovered that Kalinko did exercise its option in writing, on April 11, 2019. Kalinko would be happy to provide the letter to N.P.A. if requested, though as we say, since s. 5.10(c) doesn't address the Precambrian Pile, the exercise of the option isn't relevant to N.P.A.'s claim.
9. N.P.A. also construes s. 5.10(c) of the Operating Agreement to imply that prior to the exercise of the option, any aggregate piles on Kalinko's lands are "owned" by JMB. This is irrelevant to the Precambrian Pile, and in any event that term of the Operating Agreement can't be interpreted in isolation from the rest of the document and the uncontradicted evidence of Tim Kalinski. As described in paragraphs 12-13 and 64-68 of Kalinko's brief, construed as a whole, the Operating Agreement was intended to ensure the aggregate was owned by Kalinko until sold by JMB.
10. In several points in its brief, including paragraphs 33, 34, and 50, N.P.A. also states that Kalinko continued to allow JMB access to its lands after termination in April 2019 and "condoned the conduct of JMB." As Mr. Kalinski explained in his affidavit at paragraph 42, and under examination, it did indeed do so a job-to-job basis, since the agreement was terminated, but Kalinko needed JMB to complete its reclamation obligations, and knew that if it stopped providing job-to-job access, JMB would stop that reclamation work. In any event, the legal import of this argument is murky. There is nothing unlawful or untoward about Kalinko working with JMB on a job-to-job basis after the Operating Agreement was terminated.

3. CONCLUSION

11. With those minor issues addressed, Kalinko is otherwise content to rely on its opening brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF AUGUST, 2020.

FIELD LLP

Handwritten signature in cursive script, appearing to read "Scott Matheson" followed by a flourish that likely represents "Adam L. Ollenberger".

Scott A. Matheson/Adam L. Ollenberger
Counsel for the Applicant, Kalinko Enterprises
Ltd.

4. AUTHORITIES CITED

TAB	AUTHORITY
1.	Ronald Cuming and Roderick Wood, <i>Alberta Personal Property Security Act Handbook</i> (Toronto: Carswell, 1998) (4 th Ed.),

New Brunswick	PPSA	s. 42
Northwest Territories	PPSA	s. 42
Nova Scotia	PPSA	s. 43
Ontario	PPSA	ss. 41-42
Prince Edward Island	PPSA	s. 42
Saskatchewan	PPSA	s. 42
Yukon	PPSA	ss. 40-41
USA	UCC	no equivalent

Commentary

¶42 The Personal Property Registry continued under section 42 is the mechanism for providing public disclosure by registration of the existence or potential existence of security interests and deemed security interest falling within the scope of the PPSA. In this respect, it displaces the registries established under the *Chattel Security Registry Act*¹ and the *Business Corporations Act*.² It also is the registry for registrations under the *Factors Act*³ (see section 8(2)), the *Garagemen's Lien Act*,⁴ the *Matrimonial Property Act*⁵ (see sections 23 and 26), the *Sale of Goods Act*⁶ (see section 27(1.1)), the *Railways Act*⁷ (see section 63) and the *Workers' Compensation Act*⁸ (see section 127.1). The Personal Property Registry is also used as the registry for writs of enforcement under the *Civil Enforcement Act*⁹. In addition, civil enforcement agencies are required to register reports giving details of any seizure, sale or distribution of funds in the registry.¹⁰ The Personal Property Registry is also used as the registry for charges on land under section 59.2 of the *Law of Property Act*¹¹ and for statutory charges.¹² The Regulations made under the PPSA provide for

1 S.A. 1983, c. C-7.1 [repealed 1988, c. P-4.05, s. 101].

2 S.A. 1981, c. B-15, ss. 88.1-88.9 [all repealed 1988, c. P-4.05, s. 77].

3 R.S.A. 1980, c. F-1 [am. 1988, c. P-4.05, s. 81].

4 R.S.A. 1980, c. G-1 [am. 1988, c. P-4.05, s. 83; 1990, c. 31, s. 63].

5 R.S.A. 1980, c. M-9 [am. 1988, c. P-4.05, s. 89; 1990, c. 31, s. 66].

6 R.S.A. 1980, c. S-2 [am. 1988, c. P-4.05, s. 95; 1990, c. 31, s. 68].

7 R.S.A. 1980, c. R-4 [am. 1988, c. P-4.05, s. 93.1; 1990, c. 31, s. 67].

8 S.A. 1981, c. W-16 [en. 1990, c. 39, s. 21].

9 S.A. 1994, c. C-10.5.

10 *Civil Enforcement Regulation*, Alta. Reg. 276/95, s. 13.

11 R.S.A. 1980, c. L-8 [en. 1992, c. 21, s. 22]. For a discussion of the registration system see R.J. Wood, "The Floating Charge on Land in the Western Provinces" (1992), 20 C.B.L.J. 132.

12 The registration of Crown charges is needed to prevent subordination to the trustee in bankruptcy as a result of the 1992 federal bankruptcy amendments. For

registration of financing statements relating to interests falling within the enumerated Acts as permitted by section 42(1.1).

The integration of registration facilities for the Acts noted above is not paralleled by an integration of priority structures. While aspects of Part 4 of the PPSA apply to the registration of a financing statement in accordance with these statutes, the priority regime of the Act is not incorporated. The registry serves only as a mechanism for providing public disclosure; the priority rules relative to interests arising under or regulated by each of these Acts are to be found in the Acts themselves.

a discussion of these provisions see R.J. Wood and M.I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 Alta. L. Rev. 1055 at 1095-98.