Court File No. CV-16-00011351-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GOLD CANDLE LTD.

Applicant

-and-

GSR MINING CORPORATION and AJ PERRON GOLD CORP.

Respondents

RESPONDING FACTUM OF GSR MINING CORPORATION
(Opposing Application to Appoint a Receiver returnable July 6, 2016)

Dated: June 30, 2016

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PART I - OVERVIEW[1]

1. This factum is delivered in response to the factum of Gold Candle Ltd. (the "**Applicant**") and in opposition of the application by the Applicant for an Order, among other things, appointing A. Farber & Partners Inc. as receiver (the "**Proposed Receiver**") over the property of the Respondents and approving a public sale by the Proposed Receiver of the Limited Surface Rights.

2. Since December 2014, GSR Mining Corporation ("**GSR**") has been in ongoing discussions with Michael Berns, the President of the Applicant, with respect to various matters including the Applicant's potential acquisition of the Limited Surface Rights that relate to certain Mining Rights that the Applicant had previously acquired from Kerr Jex (a related company to

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[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Michael Berns, sworn April 4, 2016 in support of the Application (the "**Berns Affidavit**").

GSR). During this time, the Applicant and GSR have been in related discussions with respect to a royalty that Kerr Jex holds in the Mining Rights.[2]

3. At no time during these discussions did the Applicant inform GSR that it was purporting to acquire alleged indebtedness and/or security obligations of GSR to various third parties to initiate a plan to appoint a receiver over the Limited Surface Rights with the intent of selling those rights to itself as part of a "pre-packaged" sale in these receivership proceedings (in response to GSR's opposition to the relief sought by the Applicant, the Applicant delivered a [Second] Supplementary Application Record on June 21, 2016 wherein it retreats from the "pre-packaged" sale of the Limited Surface Rights in favour of a more traditional marketing process).[3]

4. GSR submits that the Applicant is now attempting to acquire the Limited Surface Rights through a receivership proceeding as a result of its inability to negotiate the acquisition of the Limited Surface Rights.[4]

5. GSR opposes the Application on the basis of, *inter alia*,

(a) the expiry of the limitation period in respect of GSR's purported indebtedness to the United Steel Workers of America, Local 9283 (the "**Union**") in the amount of $1.222 million (referred to in the Berns Affidavit as the "**GSR Indebtedness**"), which is purportedly secured by the GSR Debenture;[5]

(b) the appropriateness of granting leave, *nunc pro tunc*, to file writs that relate to Judgments in the aggregate amount of $76,289.89 (without interest) that were

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2 Affidavit of John E. Perron sworn June 23, 2016 (the "**Perron Affidavit**"), para 38-39; Responding Record, Tab 1.

3 Perron Affidavit, para 39; Responding Record, Tab 1.

4 Perron Affidavit, para 40; Responding Record, Tab 1.

5 Perron Affidavit, para 6; Responding Record, Tab 1.

entered approximately nineteen years ago and with respect to which no enforcement steps were taken until their recent assignment to the Applicant;[6] and

(c) the Applicant's refusal to execute the Second Royalty Agreement or the proposed amendment to the Royalty Agreement in bad faith and in breach of its obligations under the Purchase Agreement by which it acquired the Mining Rights (which it now seeks to unite with the related Limited Surface Rights).[7]

6. In these circumstances, GSR submits that it is not fair, just or equitable for the Court to appoint the Proposed Receiver in reliance on the GSR Debenture and the GSR Indebtedness or based upon nineteen year old Judgments in the original amount of $76,289.89.[8]

PART II - THE FACTS

7. The facts with respect to GSR's response to the Application are more fully set out in the Responding Affidavit of John E. Perron sworn June 23, 2016 in opposition of the Application (the "**Perron Affidavit**"). The facts relevant to specific issues herein are reviewed in the submissions relating to such issues.

PART III - ISSUES

8. The issues to be determined on this Application are as follows:

(a) has the applicable limitation period expired in respect of the GSR Indebtedness?

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6 Perron Affidavit, para 6; Responding Record, Tab 1.

7 Perron Affidavit, paras 50-51; Responding Record, Tab 1.

8 Perron Affidavit, para 37; Responding Record, Tab 1.

(b) should the Court grant leave, *nunc pro tunc*, to allow the Applicant to file the Writs? and

(c) should the Court appoint the Proposed Receiver as an equitable receiver?

PART IV - THE LAW

A. THE LIMITATION PERIOD FOR THE GSR INDEBTEDNESS HAS EXPIRED

9. The Applicant purports to have acquired the Union's right, title and interest in and to the GSR Debenture pursuant to the Assignment Agreement. The Applicant appears to rely in part on its purported assignment of the GSR Debenture to, among other things, appoint the Proposed Receiver and approve a sale of the Limited Surface Rights through the receivership.[9]

10. The GSR Debenture purportedly secures the GSR Indebtedness. The GSR Indebtedness relates to certain agreements between GSR and the Union that are over twenty years old, including:

(a) the 1989 MOA executed at the time GSR acquired its interest in the Kerr-Addison Mine by which a related company to GSR agreed that it would be the employer at the Kerr-Addison Mine and would enter into a collective agreement with the Union to establish a deferred profit sharing plan to provide for, among other things, certain "cash-out" payments to Kerr-Addison Mine employees on retirement or termination;[10]

(b) the 1994 MOA executed by GSR and the Union whereby GSR agreed that it would pay to the Union the sum of $20,000 on March 15, 1995 in partial

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[9] Perron Affidavit, paras 21-22; Responding Record, Tab 1.

[10] Perron Affidavit, para 15; Responding Record, Tab 1.

satisfaction of its obligations under the 1989 MOA, and the sum of $20,000 on the 15th day of each month thereafter until the obligations under the 1989 MOA were fully satisfied;[11] and

(c) the Second 1994 MOA executed by GSR and the Union whereby the parties confirmed their agreement that an amount was currently due and payable to the former employees of GSR and Golden Shield respecting severance pay as described in the 1989 MOA, which the Union estimated to be in the amount of $1.222 million.[12]

11. GSR failed to make the March 15, 1995 payment and therefore was in default of its obligations under its agreements with the Union. No action has been commenced to enforce payment of the GSR Indebtedness which the GSR Debenture purports to secure over the last twenty years. Pursuant to the following default provisions in the GSR Debenture and in the 1994 MOA, it is clear that GSR has been in default of its obligations thereunder since at least May, 1995:[13]

(a) the GSR Debenture provides, among other things, that (i) GSR shall be in default under the agreement upon the occurrence of GSR's failure to satisfy or perform any of the Obligations when due; (ii) upon the occurrence of an event of default, the Obligations shall become immediately due and payable if the default has not been cured or remedied within twenty-one days of the event of default; and (iii) the remedies upon default include possession of the collateral by any method

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[11] Perron Affidavit, para 17; Responding Record, Tab 1.

[12] Perron Affidavit, para 18; Responding Record, Tab 1.

[13] Perron Affidavit, paras 24-25; Responding Record, Tab 1.

permitted by law and the sale or lease of the collateral (which includes the Limited Surface Rights);[14] and

(b) the 1994 MOA provides, among other things, that (i) in the event of default under the 1994 MOA all amounts secured by the 1989 MOA shall become immediately due and payable and shall constitute an event of default under the GSR Debenture; and (ii) the GSR Debenture shall also secure the obligations under the 1994 MOA and a breach of the 1994 MOA shall constitute an event of default under the GSR Debenture and all amounts secured by the GSR Debenture shall become immediately due and payable.[15]

12. Despite being in default of its obligations under these agreements since at least May 1995 (more than twenty years ago), the Applicant's Application is the first time any party has attempted to enforce its rights under these agreements, or at all in respect of the GSR Indebtedness. Prior to receiving the Application Record, GSR had never received any demand for payment, notice of a lawsuit or of any other enforcement steps in respect of the GSR Indebtedness from the Union or any other person.[16]

13. The GSR Debenture and the 1989 MOA were executed on November 29, 1989 when the former *Limitations Act*, RSO 1980, c 240 (the "**1980 Limitations Act**") was in force. The 1994 MOA and the Second 1994 MOA were executed on March 23 and March 24, 1994, respectively, when the former *Limitations Act*, RSO 1990, c L.15 (the "**1990 Limitations Act**") was in force. The 1980 Limitations Act and the 1990 Limitations Act are substantially similar

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[14] Perron Affidavit, para 25; Responding Record, Tab 1.

[15] *Ibid.*

[16] Perron Affidavit, para 26; Responding Record, Tab 1.

and are collectively referred to herein as the "**Former Limitations Acts**". The Former Limitations Acts are each subject to the "Transition" provisions of the *Limitations Act, 2002*, SO 2002, c 24 Sch B (the "**2002 Limitations Act**").

14. GSR submits that the GSR Indebtedness under the 1989 MOA, the GSR Debenture, the 1994 MOA and the Second 1994 MOA are each "simple contracts or debts grounded upon any lending or contract without specialty" and are subject to a limitation period of six years to bring an action upon such indebtedness after the cause of action arose (section 45(1)(g) of the Former Limitations Acts).

Section 45(1)(g), *Limitations Act,* RSO 1980, c 240 and section 45(1)(g), *Limitations Act*, RSO 1990 c L.15 [together, "*Former Limitations Acts*"]; Factum of the Respondent, Schedule B.

15. GSR has been in default of its obligations under these agreements since at least May 1995 and the applicable limitation period would have expired on or about May 2001.

16. The "Transition" provisions of the 2002 Limitations Act provide as follows:

> *"If the former limitation period [defined as the limitation period that applied in respect of the claim before January 1, 2004] expired before January 1, 2004, no proceeding shall be commenced in respect of the claim"*
>
> **Sections 24(1) and 24(3), *Limitations Act, 2002*, SO 2002, c 24, Sch B [*2002 Limitations Act*]; Factum of the Respondent, Schedule B.**

17. If the Court holds that the GSR Indenture is a "specialty" (i.e. a contract under seal) it is subject to a limitation period of twenty years to bring an action upon a specialty after the cause of action arose (section 45(1)(b) of the Former Limitations Acts).

***Former Limitations Acts, supra* at section 45(1(b)); Factum of the Respondent, Schedule B.**

18. Again, GSR has been in default of its obligations under the GSR Indenture since at least May 1995 and the applicable limitation period would have expired on or about May 2015.

19. The "Transition" provisions of the 2002 Limitations Act further provide as follows:

> *"If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:*
>
> *1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.*
>
> *2. If the claim was discovered before January 1, 2004, the former limitation period applies."*

***2002 Limitations Act, supra* at section 24(5); Factum of the Respondent, Schedule B.**

20. A claim in respect of the GSR Debenture would be subject to the basic two year limitation period under the 2002 Limitations Act. The analysis with respect to whether the claim was discovered before or after January 1, 2004 is immaterial as in either case the applicable limitation period would have expired.

21. It is evident from the above analysis that on any interpretation of the GSR Indenture, the 1989 MOA, the 1994 MOA or the Second 1994 MOA, and on any reading of the Former Limitation Acts or the 2002 Limitation Act, the Applicant's attempt to enforce the GSR Indebtedness is outside of the applicable limitation period.

22. GSR submits that, given the expiry of the applicable limitation period, it is not fair, just or equitable for the Court to appoint the Proposed Receiver in reliance on the GSR Debenture or the GSR Indebtedness.[17]

B. THE COURT SHOULD NOT GRANT LEAVE TO FILE THE WRITS

23. The Applicant also purports to have acquired the Union's right title and interest in the Judgments pursuant to the Assignment Agreement. The Applicant appears to rely in part on its purported assignment of the Judgments to, among other things, appoint the Proposed Receiver and approve a sale of the Limited Surface Rights through the receivership.[18]

24. The Judgments relate to amounts that GSR was ordered to pay to the Union pursuant to two related arbitral awards dated November 9, 1995 and February 21, 1997. On April 4, 1997, the Union obtained two orders of the Ontario Court (General Division) to enforce the arbitral awards (referred to in the Berns Affidavit as the "**Judgments**").[19]

25. The Union has not taken any steps to enforce the Judgments in the nineteen years since they were issued and entered and has never filed writs of seizure and sale in respect of the Judgments.[20]

26. The Applicant, after obtaining an assignment of the Judgments from the Union on January 29, 2015 (approximately seventeen and a half years since the Judgments were entered), issued writs of seizure and sale in respect of the Judgments on March 17, 2016 (approximately

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17 Perron Affidavit, para 27; Responding Record, Tab 1.

18 Perron Affidavit, paras 28-29; Responding Record, Tab 1.

19 Perron Affidavit, para 30; Responding Record, Tab 1.

20 Perron Affidavit, para 32; Responding Record, Tab 1.

nineteen years after the Judgments were entered and one and a half years after purportedly obtaining an assignment of the Judgments).[21]

27. Rule 60.07(2) of the *Rules of Civil Procedure* (the "**Rules**") provides that leave of the court *must* be obtained if a writ is sought more than six years after judgment:

> *"If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of seizure and sale shall not be issued unless leave of the court is first obtained.* [Emphasis Added.]"
>
> **Rule 60.07(2), *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended; Factum of the Applicant, Schedule B.**

28. The Applicant failed to obtain leave of the court prior to issuing the Writs, as required by the Rules. The Applicant now seeks a discretionary order from the Court granting it leave *nunc pro tunc* authorizing it to file the Writs.

29. The Applicant cites two decisions of Master Dash in *Royal Bank of Canada v. Correia* and *Adelaide Capital Corporation v. 412259 Ontario Limited et al.* in support of the Applicant's (erroneous) interpretation of the test to grant leave to issue a writ outside of the six year period prescribed by the Rules. The Applicant argues that "leave should be granted where the court may conclude that: (i) the plaintiff has not waived its right under the judgment or otherwise acquiesced in non-payment of the judgment, and (ii) the judgment debtor has not relied to its detriment or changed its financial position in reliance on reasonably perceived acquiescence resulting from the delay."[22] With respect, GSR submits that the Applicant has failed to properly state the test as set out in those cases.

30. Master Dash's decision in *Royal Bank of Canada v. Correia* was in respect of the test for granting leave for issuing a notice of garnishment more than six years after the date of the

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[21] Perron Affidavit, para 33; Responding Record, Tab 1.

[22] Factum of the Applicant, para 52.

order under Rule 60.08(2). In that decision Master Dash notes the similarity between Rule 60.07(2) and Rule 60.08(2) and states as follows with respect to the test for leave:

> "*Therefore, when a plaintiff seeks leave under rule 60.08(2) to issue a notice of garnishment more than six years after the date of judgment, he must adduce evidence explaining the delay such the court may conclude that the plaintiff has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The defendant may raise other grounds to convince the court that it would be inequitable to enforce the claim. For example the defendant could demonstrate that he has relied to his detriment or changed his financial position in reliance on reasonably perceived acquiescence resulting from the delay. Of course the onus would be on the defendant to adduce evidence of such reliance and detriment* [Emphasis Added.]"
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> ***Royal Bank of Canada v Correia,* [2006] OJ No 3206, 150 ACWS (3d) 621 (Ont Sup Ct J) at para 6; Book of Authorities of the Respondent, Tab 1.**

31. In *Adelaide Capital Corporation v. 412259 Ontario Limited et al.* Master Dash refused to issue an *alias* writ (i.e. a replacement writ) in respect of a writ that had expired (in respect of a judgment that was still enforceable under the Former Limitations Act) because the moving party had failed to adduce adequate evidence of the reasons for a thirteen year delay in enforcement. The Court reviewed the "meager" evidence put forth by the applicant in that case and stated as follows:

> *"The volume of files and reduction of staff presenting to Adelaide following the bankruptcy of Central Guaranty in or about December 1992 and the diarising of files "to be proceeded upon at a later date" is the only "explanation" proffered for its failure to enforce the judgment for over thirteen years other than a few demand letters in 1993 and early 1994. This does not amount to an explanation at all of the delay or whether Adelaide had acquiesced in non-payment or otherwise waived its rights under the judgment. At best it is an explanation as to why it cannot provide an explanation. [...] The bald assertion by Ms. McMullen that from conversations with John Richards, an officer of Adelaide, she was able to conclude that the plaintiff "did not ever intend to abandon this matter" is insufficient. She does explain Richards' involvement, if any, with this file, what conversations she had with Richards and what evidence Richards has to support his contention. Richards has not provided his own affidavit. Further, Ms. McMullen does not attest to her belief in Richards' assertions contrary to rule 39.01(4). I am not able to conclude on the meagre evidence before me that*

> *Adelaide has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment.* [Emphasis Added.]"
>
> ***Adelaide Capital Corporation v 412259 Ontario Ltd,* [2006] OJ No 4175, 155 ACWS (3d) 439 (Ont Sup Ct J) at para 14; Book of Authorities of the Respondent, Tab 2.**

32. Master Dash's decisions in *Adelaide and Royal Bank* were each cited with approval by the Ontario Superior Court of Justice, Divisional Court, in *Adelaide Capital Corporation v. Minott*. The Appellant in that case argued that it was entitled as of right to have a writ of execution issued despite a fourteen year delay in enforcement, regardless of the leave requirements under the Rule, so long as the motion for leave to issue the writ is made within the 20 year limitation period for actions on a judgment (under the Former Limitations Act). The Divisional Court denied the appeal and held as follows:

> *"We are of the opinion that a consideration of unexplained delay is a proper exercise of the judicial officer's discretion contained in the rule. The rule is procedural and is designed to permit the court to control its own process. It does not take away from the legal and substantive right of action to sue on a judgment within the limitation period to which we have referred. Requiring the appellant to sue on its judgment may not speak well for the efficient use of judicial resources, but the appellant has invited this result by refusing to put before Paisley J. some explanation to account for the 14-year delay so as to trigger the exercise of the discretion. The threshold imposed is not a high one.* [Emphasis Added]"
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> ***Adelaide Capital Corporation v Minott,* 87 OR (3d) 469, 160 ACWS (3d) 588 (Ont Div Ct) at para 9; Book of Authorities of the Respondent, Tab 3.**

33. At paragraph 53 of its factum the Applicant misapprehends the test for leave and states that "[t]here is no evidence that the Union or the Applicant (as the Union's assignee) waived any rights under the Judgments or otherwise acquiesced in non-payment of same."[23] This is not the test for leave. Under the test for leave *evidence must be adduced with respect to the Union's explanation for the delay to allow the court to conclude that the Union had not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment.*

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[23] Factum of the Applicant, para 53.

34. In any event, neither the Applicant, the Proposed Receiver or the Union has adduced *any evidence* to explain the Union's delay in enforcing the Judgment in any of (i) the Application Record dated April 18, 2016, (ii) the Supplementary Application Record dated April 27, 2016 or (iii) the [Second] Supplementary Application Record dated June 21, 2016. The only explanation offered by the Applicant is found in the second sentence of paragraph 53 of its factum (without any underlying evidence) where it states: "[r]ather, any delay in enforcing such rights *appears* to have been the result of the Mine's shutdown prior to the issuance of the Judgments."[24] GSR submits that there is no evidentiary foundation for this statement, that it is mere speculation on the part of the Applicant, and that the Applicant has failed to put before the Court any evidence to explain the delay to establish that the Union had not waived its rights under the Judgments or otherwise acquiesced in non-payment of the Judgments.

35. In the absence of any explanation for the Union's delay, there is no need for GSR to adduce "evidence that either of the Respondents relied to their detriment or changed their financial position in reliance on any reasonably perceived acquiescence to non-payment" as suggested by the Applicant.

36. In addition, in the present matter the following aggravating circumstances militate against granting leave to the Applicant *nunc pro tunc* to file the Writs:

(a) the Union's unexplained failure to enforce the Judgments for nineteen years is significantly longer than the delays in each of the *Adelaide* decisions cited above where the court refused to allow leave (thirteen and fourteen year unexplained delays);

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[24] Factum of the Applicant, para 53.

(b) the Union's failure to enforce the Judgments for approximately nineteen years and its subsequent assignment of the Judgments to the Applicant for little or no consideration indicates that the Union never intended to enforce the Judgments;[25]

(c) the Applicant is not the original judgment debtor and the Applicant's acquisition of the Judgments and attempt to enforce the Judgments nineteen years after they were issued is simply an attempt to usurp the Limited Surface Rights as opposed to negotiating for the purchase of those rights on commercial terms;[26] and

(d) the total amount of the Judgments, without interest, is merely $76,289.89 (as of April 1, 2016, the aggregate amount payable under the Judgments is $188,232.85 as a result of accrued interest).[27]

37. In these circumstances, and given the complete lack of evidence to explain the Union's delay in enforcing the Judgments, GSR submits that it is not fair, just or equitable to allow the Applicant to appoint the Proposed Receiver based upon nineteen year old Judgments in the original amount of $76,289.89.[28]

C. THE COURT SHOULD NOT APPOINT AN EQUITABLE RECEIVER

38. As described in detail in the Perron Affidavit, GSR had been in ongoing discussions with Michael Berns with respect to the Applicant's potential acquisition of the Limited Surface Rights that relate to Mining Rights that the Applicant had previously acquired from Kerr Jex (a company related to GSR) from December 2014 until GSR was served with the

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[25] Perron Affidavit, para 35; Responding Record, Tab 1.

[26] Perron Affidavit, para 36; Responding Record, Tab 1.

[27] Perron Affidavit, para 31; Responding Record, Tab 1.

[28] Perron Affidavit, para 37; Responding Record, Tab 1.

Application Record. During this time, the Applicant and GSR had also been in related discussions with respect to a royalty that Kerr Jex holds in the Mining Rights.[29]

39. Unbeknownst to GSR during these negotiations, the Applicant was acquiring alleged indebtedness and/or security obligations of GSR to various third parties to initiate a plan to appoint a receiver over the Limited Surface Rights with the intent of selling those rights to itself as part of a "pre-packaged" sale in these receivership proceedings (the Applicant subsequently retreated from the "pre-packaged" sale of the Limited Surface Rights in favour of a more traditional marketing process in response to opposition from GSR). The Applicant is now attempting to acquire the Limited Surface Rights through a receivership proceeding as a result of its inability to negotiate the acquisition of the Limited Surface Rights.[30]

40. The Applicant is also seeking to appoint a receiver while refusing to recognize the royalty in favour of Kerr Jex in the Mining Rights (which relate to the Limited Surface Rights) in violation of its obligations under the Purchase Agreement by which it acquired the Mining Rights (which it now seeks to unite with the related Limited Surface Rights).[31]

41. Epstein J. summarized the test to appoint a receiver under section 101 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended, in *Royal Bank v. Chongsim Investments Ltd.*:

> *"The jurisdiction to order a receiver is found in section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should*

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29 Perron Affidavit, paras 39-40; Responding Record, Tab 1.

30 Perron Affidavit, para 38-40; Responding Record, Tab 1.

31 Perron Affidavit, para 40; Responding Record, Tab 1.

> *consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.* [Emphasis Added]"
>
> ***Royal Bank v Chongsim Investments Ltd,* [1997] OJ No 1391, 46 CBR (3d) 267 (Ont CJ Gen Div) at para 18 [*Chongsim*]; Book of Authorities of the Respondent, Tab 4.**

42. In the *Chongsim* case, the Court reviewed the conduct of the parties and refused to appoint a receiver on the basis of, among other things, the applicant bank's conduct in "being less than straightforward" in its dealings with the respondent and the fact that the applicant orchestrated the default upon which it attempted to rely in requesting that a receiver be appointed. In refusing to appoint the receiver, the Court held as follows:

> *"The conclusion is inescapable that the bank was determined to force Dr. Chong to agree to restructure his credit facilities with the bank to the bank's advantage. Given the agreement that the bank would not call the loan unless Dr. Chong was in default, the bank only had one option — to do whatever was necessary to create a default. The bank was successful — technically, but against this background it would neither be just nor equitable to grant the interlocutory relief requested by the bank and put in a receiver."*
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> ***Chongsim, supra* at paras 24 and 27; Book of Authorities of the Respondent, Tab 4.**

43. GSR submits that the Applicant's secret acquisition of purported debt and security obligations of GSR in an attempt to appoint a receiver for the purpose of acquiring the Limited Surface Rights through the receivership can be analogized to the bank's "less than straightforward conduct" in *Chongsim*. The Applicant effectively orchestrated the defaults it attempts to rely on to appoint the receiver by acquiring twenty year old indebtedness and security obligations of GSR. Just like the bank in *Chongsim*, GSR submits that the Applicant has an ulterior motive for the receivership: it is attempting to acquire the Limited Surface Rights through the receivership as a result of its inability to negotiate the acquisition of the Limited Surface Rights. Against this background, GSR submits that it would neither be just nor equitable to grant the Applicant's application to appoint a receiver.

44. The Applicant is seeking to appoint an equitable receiver over the property of GSR, including the Limited Surface Rights, but is in breach of its obligations under the Purchase Agreement by which it acquired the Mining Rights (that relate to the Limited Surface Rights) by refusing to execute the Second Royalty Agreement in favour of Kerr Jex. The Applicant seeks an equitable remedy but does not come to Court with clean hands.

45. GSR further submits that it would be inequitable to appoint a receiver over the property of GSR on the basis of the Applicant having obtained, by way of assignment, an interest in nineteen year old Judgments against GSR (in the amount of only $76,289.89, without interest). The Applicant, as a judgment debtor, is an unsecured creditor of GSR and the circumstances do not justify elevating the Applicant to the position of a secured creditor.

46. The appointment of a receiver is an extraordinary remedy that should only be granted sparingly. In the present matter, GSR submits that the Court should decline to exercise its equitable jurisdiction to appoint a receiver based upon the twenty year old GSR Indebtedness and GSR Debenture (which are outside of the limitation period) and the nineteen year old Judgments (for which the Writs were obtained in violation of the Rules).

D. FAILURE TO PROVIDE SECTION 244 NOTICE UNDER THE BIA

47. To the extent that the Applicant is relying on its purported security under the GSR Debenture as a foundation to appoint a receiver, the Applicant has failed to provide the ten days' notice required by section 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**").[32] Section 244 of the BIA provides as follows:

> *"**244(1) Advance notice** - A secured creditor who intends to enforce a security on all or substantially all of*

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[32] Perron Affidavit, para 24; Responding Record, Tab 1.

(a) the inventory,
(b) the accounts receivable, or
(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

***(2) Period of notice** - Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.*

[...]."

Section 244, *Bankruptcy and Insolvency Act*, RSC, 1985, c B.3, as amended; Factum of the Applicant, Schedule B.

48. The Applicant has failed to deliver the notice required by section 244 of the BIA and therefore is not entitled to appoint a receiver over the property of GSR.

PART V - RELIEF REQUESTED

49. The Company therefore requests that the Application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2016

Aubrey E. Kauffman

Dylan Chochla

Lawyers for the Respondent, GSR Mining Corporation

SCHEDULE "A"

SCHEDULE "A"

1. *Royal Bank of Canada v. Correia*, [2006] OJ No 3206, 150 ACWS (3d) 621 (Ont Sup Ct J)

2. *Adelaide Capital Corporation v 412259 Ontario Ltd*, [2006] OJ No 4175, 155 ACWS (3d) 439 (Ont Sup Ct J)

3. *Adelaide Capital Corporation v. Minott*, 87 OR (3d) 469, 160 ACWS (3d) 588 (Ont Div Ct)

4. *Royal Bank v Chongsim Investments Ltd*, 2011 ONSC 1007, 74 CBR (5th) 300 (Ont CJ Gen Div)

SCHEDULE "B"

SCHEDULE "B"

Bankruptcy and Insolvency Act, RSC, 1985, c B.3, as amended

244(1) Advance notice

A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

(2) Period of notice

Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

(2.1) No advance consent

For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

(3) Exception

This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

(4) Idem

This section does not apply where there is a receiver in respect of the insolvent person.

Limitations Act, RSO 1980, c 240

45(1) Limitation of time for commencing particular actions

The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

[...]

(b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;

[...]

within twenty years after the cause of action arose,

[...]

(g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,

within six years after the cause of action arose,

[...]

Limitations Act, RSO 1990, c L.15

45(1) Limitation of time for commencing particular actions

The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

[...]

(b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;

[...]

within twenty years after the cause of action arose,

[...]

(g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,

within six years after the cause of action arose,

[...]

Limitations Act, 2002, SO 2002, c 24 Sch B

24 Transition

(1) Definition

In this section,

"former limitation period" means the limitation period that applied in respect of the claim before January 1, 2004.

[...]

(3) Former limitation period expired

If the former limitation period expired before January 1, 2004, no proceeding shall be commenced in respect of the claim.

[...]

(5) Former limitation period unexpired

If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.

2. If the claim was discovered before January 1, 2004, the former limitation period applies.

[...]

Rules of Civil Procedure, RRO 1990, Reg 194

60.07 WRIT OF SEIZURE AND SALE

[...]

(2) Where Leave is Required

If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of seizure and sale shall not be issued unless leave of the court is first obtained.

[...]

Court File No.: CV-16-00011351-00CL

GOLD CANDLE LTD.	- and -	**GSR MINING CORPORATION and AJ PERRON GOLD CORP.**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

RESPONDING FACTUM OF GSR
(Opposing Application to Appoint a Receiver)
(returnable July 6, 2016)

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