Federal Court  Cour fédérale

Date: 20160408

Docket: T-1157-13

Citation: 2016 FC 392

Ottawa, Ontario, April 8, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SUNRIDGE GOLD CORP.

Appellant/Garnishee

and

DELIZIA LIMITED

Respondent/Garnishor

and

STATE OF ERITREA

Respondent

JUDGMENT AND REASONS

I. Nature of Matter and Summary of Disposition

[1] This is a motion appeal of the decision by Prothonotary Morneau [Prothonotary] dated January 9, 2015, who granted a final garnishment order in favour of the Respondent judgment creditor, Delizia Limited [Delizia] against the garnishee, Sunridge Gold Corporation [Sunridge] in respect of debts allegedly owed by the Appellant Sunridge to the judgment debtor, the State of Eritrea [Eritrea].

[2] By way of background, Delizia obtained an arbitral award against Eritrea. Subsequently, Delizia moved *ex parte* to register that award in this Court for the purposes of enforcement, which registration was granted on July 17, 2013. Upon further *ex parte* motion, the Prothonotary granted Delizia a Provisional Order of Garnishment and Show Cause [technically a Garnishee Order to Show Cause, but for consistency with the decision under appeal hereinafter referred to as Sunridge POG] against Sunridge dated July 31, 2013. After a further hearing, this time having heard from Sunridge, the Prothonotary granted Delizia a Final Order of Garnishment [Sunridge FOG] against Sunridge on January 9, 2015, which is the subject of this appeal. Justice Kane stayed the Sunridge FOG pending this appeal by Order dated July 31, 2015.

[3] This appeal was heard together with an appeal brought by another garnishee named by Delizia: Nevsun Resources Ltd. [Nevsun]. Both the Sunridge matter and the Nevsun matter have proceeded in this same Court file, but have been argued separately, and are dealt with separately here and below. Accordingly, this Judgment deals only with the Sunridge matter; the Nevsun appeal is dealt with separately in this Court file.

[4] For the reasons outlined below, this appeal is allowed and the Sunridge POG and FOG are set aside. The appeal respecting various production orders is dismissed.

II. Facts

A. *Contract between Delizia and Eritrea*

[5] Delizia, a Cyprus-based company, entered a contract to sell military aircraft equipment to Eritrea in 2003. Eritrea did not pay an amount owing. Pursuant to the terms of their contract, Delizia proceeded to arbitration against Eritrea before the Arbitration Institute of the Stockholm Chamber of Commerce [AISCC]. Although Delizia filed extensive materials with the Arbitration Tribunal, Eritrea did not fully engage with these proceedings and eventually decided not to participate further.

[6] The duly convened arbitral tribunal of the AISCC thereafter awarded Delizia [Arbitral Award] $2,175,775 US on April 18, 2006, with 6% interest accumulating as of January 31, 2005, as well as arbitrator fees with interest accumulating as of April 18, 2006. This award totaled $4,062,428.70 CA as of the date of registration of foreign judgment in this Court.

[7] The validity of the Arbitral Award is not in dispute.

B. *Sunridge and the Asmara Mine in Eritrea*

[8] Sunridge was incorporated in 1983 under the laws of British Columbia; it is a Canadian publicly-traded corporation listed on the TSX Venture Exchange. Sunridge adopted its current name in 2002. Sunridge is in the business of mineral exploration and development. It is engaged

in the acquisition, exploration, discovery and development of base and precious metal deposits in East Africa.

[9] Since 2003, Sunridge has focussed on exploration and development of a particular mine in the Asmara region of the State of Eritrea, known as the Asmara Mine. In 2003, Sunridge entered into a joint venture with an Australian company regarding the Asmara Mine. Sunridge subsequently decided to buy out the Australian company's interests in their joint venture.

[10] In and around 2006, when negotiating to buy out the Australian company's interests and acquire exclusive title to the necessary Asmara Mine exploration licences, Sunridge was informed of an Eritrean Ministry of Energy and Mines requirement that Sunridge establish an office in Eritrea as a pre-condition to the Ministry approving Sunridge's acquisition of the exploration licences. Sunridge by this time also understood that Eritrea required local control of mining companies carrying out operations in Eritrean territory.

[11] After July 15, 2005, Sunridge established a "branch office" in Eritrea known as Sunridge Gold Eritrea [SGE], pursuant to these Eritrean government requirements. It was a true branch office of Sunridge in that it had no legal separate personality distinct from Sunridge itself. That is, Sunridge's branch office was simply Sunridge carrying on business under a different name [SGE] in Eritrea.

[12] In January 2006, Sunridge completed the purchase, assignment, and transfer of exploration licences relating to the Asmara Mine from the Australian company. The transaction was approved by the Eritrean Ministry of Energy and Mines in 2007.

[13] Eritrea's Proclamation 68/1995 (A Proclamation to Promote the Development of Mineral Resources), states that Eritrea may acquire a 10% interest in every mining operation such as that proposed by Sunridge, essentially on demand. This Proclamation further provides Eritrea may acquire additional equity by agreement. Also in compliance with Eritrean law for mining projects, a separate entity (such as the Asmara Mining Share Company [AMSCo]) may be incorporated, with ownership by an Eritrean shareholder.

C. *Shareholders' Agreement between Sunridge and ENAMCo*

(1) Share issuance and ownership

[14] Against this regulatory and factual background, in 2012, Sunridge through its branch office in Eritrea (i.e., Sunridge) entered into a Shareholders' Agreement with Eritrea National Mining Corporation [ENAMCo], an Eritrean state-controlled entity, to establish a joint venture mining company to be named AMSCo to develop the Asmara Mine. ENAMCo is the *alter ego* of Eritrea.

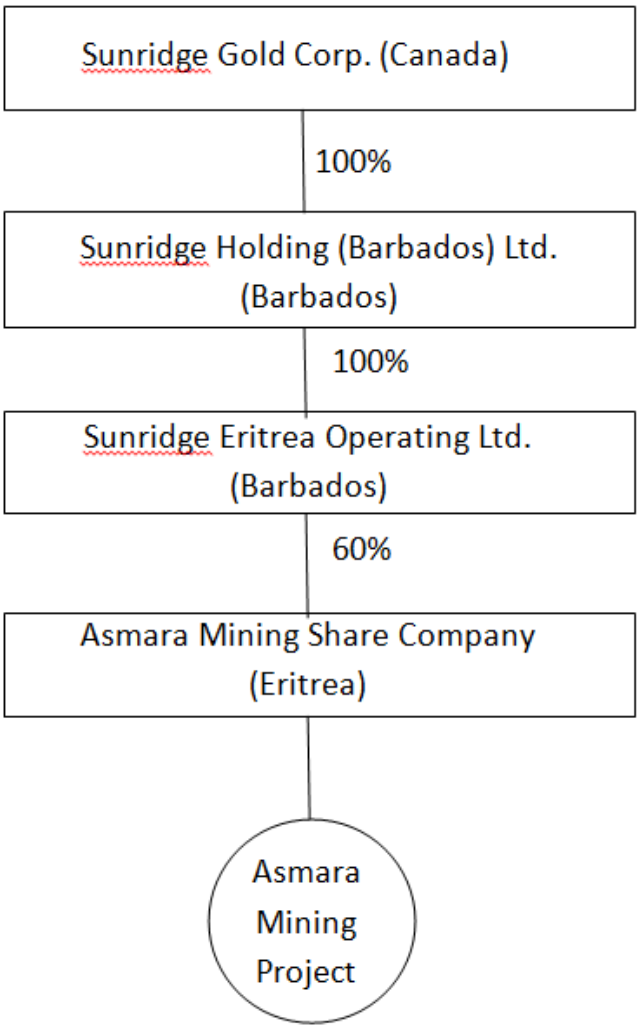
[15] The Shareholders' Agreement outlined the rights and obligations of each of the parties in the development of the Asmara Mine. Pursuant to the Shareholders' Agreement and as allowed by Eritrean law, on July 4, 2012, ENAMCo exercised its option to acquire 40% of the shares of AMSCo, a company to be incorporated in the future. ENAMCo was to obtain a 10% interest in

AMSCo free of charge as per Eritrea's Proclamation, and did so as Eritrea's *alter ego*. ENAMCo also agreed to pay Sunridge $18.3 million US for an additional 30% of AMSCo's shares, which it would acquire after the joint venture company, AMSCo was incorporated. Sunridge was to acquire 60% of the AMSCo shares also out of AMSCo's treasury and again "on establishment and incorporation" of AMSCo. Sunridge for its part among other things, was to transfer the exploration licences and other of its assets including equipment and mineral data into the joint venture company. AMSCo was to be established sometime after the Shareholders' Agreement was signed, and was to be incorporated to start production and operation of the Asmara Mine.

[16] It is important to note that the acquisition of shares by both Sunridge's subsidiary and by ENAMCo would only occur after AMSCo's incorporation.

[17] AMSCo was incorporated under the laws of Eritrea on October 1, 2014. After its incorporation, AMSCo issued shares from its treasury as follows: 40% to ENAMCo and 60% to a Sunridge subsidiary.

[18] In the result, AMSCo is indirectly owned 60% by Sunridge, and 40% by ENAMCo. Sunridge's interest in the Asmara mining project and Sunridge's inter-corporate holdings are summarized in the following chart:



[19] It is standard practice in Eritrea for mining projects to be developed in this manner, i.e., by using an Eritrean company like AMSCo to hold title to all key assets, permits and licences, and for ENAMCo to be a shareholder in that company.

[20] I find it was always Sunridge's understanding and intention since it acquired the exploration licences in 2006 that the development of the Asmara mining project would be structured in this manner. Sunridge acquired exclusive title to the exploration licences in 2006. Eritrea approved the transfer in April 2007.

(2) Super majority provision in the Shareholders' Agreement

[21] The Shareholders' Agreement between Sunridge and ENAMCo contains super majority provisions requiring that many if not all major decisions be approved by 80% of AMSCo shareholders. Matters requiring 80% shareholder approval include:

i. approval of budgets and business plans;

ii. entering into partnerships or joint ventures with third parties;

iii. spending over $200,000 US;

iv. entering into material contracts; and

v. hiring or firing key executives.

[22] In my view, these super majority provisions gave Eritrea through ENAMCo a very significant and substantial degree of control over most if not all major decisions of AMSCo regarding the Asmara Mine.

(3) Other key details of the Shareholders' Agreement re: AMSCo

[23] Other key details of the relationship between ASMCo and ENAMCo are:

- AMSCo is responsible for securing the necessary licences, approvals and financial investments to develop the Asmara joint venture into a mine;
- All mineral data, equipment and property associated with the Asmara joint venture will be owned by AMSCo;
- All required exploration licences and permits in connection with the Asmara joint venture must be approved by the Minister of Mines for Eritrea and held by AMSCo; and
- Assuming all necessary permits and licences for the Asmara project are granted, any current or future obligations to Eritrea in connection with the Asmara project, including obligations in respect of income taxes, stamp duties, withholding and other taxes,

royalties, customs and duties, mining, exploration and business fees are solely the obligations of AMSCo.

(4) Asmara Mine is not yet in production, and is not yet profitable

[24] AMSCo is not profitable. AMSCo did not produce income before these proceedings began. Further, AMSCo holds the only potentially income-producing asset of the Sunridge corporate structure, namely the Asmara Mine and related mining licences issued by Eritrea, and other assets.

D. *Debts Allegedly Owing or Accruing by Sunridge to Eritrea*

[25] Delizia claims the right to garnish three types of alleged "debts" allegedly owing or accruing by Sunridge to Eritrea: (1) exploration licence fees; (2) certain taxes withheld from service providers; and (3) the shares AMSCo issued to ENAMCo. I will consider each.

(1) Exploration licence fees

[26] Prior to the incorporation of AMSCo, Sunridge through its local branch office SGE, owed the State of Eritrea certain small amounts for exploration licence fees (for 2013 and 2014, totalling $1,694.71 US and $1,857.36 US, respectively). After AMSCo's incorporation, these exploration licence fees became debts owing and accruing by AMSCo to the State of Eritrea. I have concluded that exploration licence fees are exempt from seizure because they are quintessentially obligations imposed by a sovereign state on those who carry on business within its reach. They are not properly classified as being related to "commercial activity" for the purposes of the *State Immunity Act*, RSC 1985, c S-18 [*SIA*].

(2) Withheld taxes

[27] While certain payments respecting withheld taxes from service providers were claimed by Delizia, the Prothonotary disallowed them. No appeal was taken and therefore they are not considered further.

(3) Treasury shares issued by AMSCo to ENAMCo

[28] AMSCo issued 40% of its shares from treasury to ENAMCo after AMSCo's incorporation (10% were free and 30% were paid for). A major issue in this appeal is whether these shares constituted a "debt" attachable by the Sunridge POG and FOG as claimed by Delizia. The shares were and could only have been issued after AMSCo was incorporated. In my view, Sunridge could only be liable to Delizia for this share issuance if the Court pierces the corporate veil that presumptively exists between Sunridge and AMSCo. I have concluded that the corporate veil may not be pierced in this case, and therefore the shares cannot be garnished by Delizia.

E. *State Immunity Act*, RSC 1985, c S-18 *[SIA]*

[29] Following established jurisprudence, I have concluded that both the Sunridge POG and FOG are nullities by reason of the fact that the State of Eritrea was not served with Delizia's originating documents related to its application for a recognition order that underlies both the POG and the FOG. Such service is a mandatory requirement of the *SIA*.

F. *Production Orders*

[30] The Sunridge FOG also ordered Sunridge to answer certain questions it objected to. In my view, the objections were well-founded and the questions need not now be answered.

G. *History of Legal Proceedings*

(1) Delizia's US garnishment proceedings

[31] Upon Delizia's successfully obtaining the Arbitral Award of the AISCC against Eritrea, Delizia filed a Petition to Confirm Arbitration Award in a United States District Court in 2009. This was granted February 5, 2010, by default judgment. However, on March 2, 2012, a United States District Court judge determined that a final garnishment order could not be granted, because Delizia had not established the State of Eritrea was properly served with the default judgment as required under the *Foreign Sovereign Immunities Act*, 28 USC 97. The US court also expressed concerns as to whether property Delizia sought to attach was precluded from garnishment by the Vienna Convention on Diplomatic Relations.

(2) Delizia's garnishment proceedings in the Federal Court in Canada

(a) *Delizia obtains ex parte recognition order*

[32] Delizia proceeded to institute this garnishment proceeding in the Federal Court. Delizia applied to register the Arbitral Award citing the *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16(2nd Supp). It did so by filing an *ex parte* Notice of Application to register a foreign judgment as defined by Rule 326 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], namely the Arbitral Award. The State of Eritrea was not served with this motion, nor

with the Recognition Order. Rule 326 enables parties to enforce garnishment orders against Canadian persons or organizations that have a debt owing or accruing to a judgment creditor.

[33] The materials and pleadings before the Court made no reference to mandatory service of originating court documents on foreign states as required by section 9 of the *SIA*.

[34] By Order dated July 17, 2013, the Court granted Delizia its requested *ex parte* registration order [Recognition Order]. The Recognition Order not only recognizes the Arbitration Award for the purposes of enforcement in this Court, but also says that: "[t]he petitioner Delizia Limited is relieved of the requirement pursuant to Rule 334 and is hereby authorized to execute upon the present judgment without filing any proof of service of the present judgment upon the respondent State of Eritrea." As noted, the Recognition Order was obtained *ex parte* and without reference to the mandatory service requirements of the *SIA*.

(b) *No service pursuant to the State Immunity Act*

[35] Delizia did not serve Eritrea with the Recognition Order by the modalities set out in the *SIA*. The *SIA* in section 9(2) sets out service requirements:

9 (2) For the purposes of paragraph (1)(c), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.	9 (2) La signification mentionnée à l'alinéa (1)c) peut se faire par remise personnelle ou par envoi recommandé d'une copie de l'acte introductif d'instance au sous-ministre des Affaires étrangères ou à la personne qu'il désigne; le sous-ministre ou cette personne transmet à son tour cette copie à l'État étranger.

[36] Eritrea was not served under the *SIA* before or after Delizia applied to obtain the Recognition Order. I point this out because, as discussed later, failure to serve Eritrea rendered both the Sunridge POG and FOG nullities.

(3) Delizia obtains e*x parte* provisional order of garnishment [Sunridge POG]

[37] Having obtained the Recognition Order, Delizia next applied, again *ex parte*, for a provisional order of garnishment directed against Sunridge. The Prothonotary granted the Sunridge POG on July 31, 2013. This POG did two things. First, its garnishment component ordered "that any debts owing or accruing from the garnishee [i.e., Sunridge] to respondent [i.e., Eritrea] be attached to answer the Judgment" i.e., the Recognition Order. Secondly, the show cause component of the Sunridge POG ordered Sunridge to declare all debts owing or accruing by Sunridge to Eritrea, and *ordered* Sunridge to "show cause" why Sunridge should not pay to Delizia debts owed by Sunridge to Eritrea ["to say to the Court why it should not be paid to the applicant the debt due from it to the respondent or so much thereof as may be sufficient to satisfy the Judgment" i.e., the Recognition Order].

[38] On the same day, the Prothonotary made a provisional order of garnishment in favour of Delizia against Nevsun; these Reasons only deal with Sunridge. The Nevsun matter is dealt with in separate Reasons in the same Court file.

(4) Delizia obtains final order of garnishment [Sunridge FOG]

[39] Delizia served Sunridge with the POG sometime before September 2013. Thereafter Delizia, giving notice to Sunridge for the first time, applied to the Prothonotary for a FOG under Rule 449 to garnish debts owing or accruing by Sunridge to Eritrea and or ENAMCo, Eritrea's

alter ego. Sunridge contested this application. Sunridge asked that both the Recognition Order and the Sunridge POG be set aside for non-compliance with the *SIA*. Sunridge also asked in its show cause filing that the motion for a FOG be dismissed. Affidavits and exhibits were exchanged and cross-examinations conducted. Sunridge's position was that it did not owe any garnishable debts to Eritrea, and that the AMSCo-issued shares to ENAMCo were neither the property of Sunridge nor a debt subject to garnishment.

[40] The Prothonotary found in favour of Delizia on January 9, 2015. The Prothonotary also found that the exploration licence fees paid by Sunridge and AMSCo to Eritrea were garnishable. However, the Prothonotary agreed with Sunridge that taxes withheld from various service providers were not debts "owing" or "accruing" within the meaning of subparagraph 449(1)(a)(i) of the *Rules*.

[41] Most significantly, the Prothonotary found the shares issued out of AMSCo's treasury to ENAMCo after AMSCo's incorporation could be garnished by Delizia, because the issuance of treasury shares constituted a sale of assets from Sunridge to ENAMCo as Eritrea's *alter ego*.

[42] The resulting Sunridge FOG ordered the attachment of all debts owing and accruing by Sunridge to Eritrea, including those from AMSCo to ENAMCo. It ordered Sunridge to answer the Recognition Order. It declared that Sunridge wrongfully failed to hold and to declare the debts owed to Eritrea as of July 17, 2013; and it ordered Sunridge to pay $4,371,618.47 US (to be perfected) for the benefit of Delizia.

[43] The Sunridge FOG also ordered Sunridge to answer certain questions relating to: the name of the bank in Eritrea to process exploration licence renewal cheques, and the method of accounting and classifying for withholding tax payments to Eritrea within the Sunridge financial statements.

[44] Costs were awarded against Sunridge in favour of Delizia.

III. Issues

[45] This appeal raises the following issues:

1. What is the standard of review of the Prothonotary's decision?
2. Should a final order of garnishment issue in this case?
3. Did the Prothonotary err in ordering Sunridge to answer certain questions objected to in cross-examination?

IV. Analysis

1. *What is the standard of review of the Prothonotary's decision?*

[46] To decide this appeal, the Court first must determine the nature of the appeal and the appropriate standard of review. I agree with Justice Beaudry who, citing well-established jurisprudence, held that where a prothonotary's decision is determinative of the outcome, that is, if the order is vital to the final issue of the case, or is clearly wrong, the Court must review the decision *de novo*:

> 31. The principles that apply when deciding an appeal from a prothonotary's order were laid down in *Canada v Aqua-Gem Investments Ltd* [1993] 2 FC 425 [*Aqua-Gem*], and restated in *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 [*Merck & Co*]. The

> criteria are set out at paragraph 19 of *Merck & Co*, where Justice Décary, writing on behalf of the Federal Court of Appeal, states as follows: . . . Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts. …
>
> 36. … The Court must therefore conduct an analysis *de novo*.
>
> [emphasis added]

London Life, Compagnie d'assurance-vie (Re), 2013 CF 93 [*London Life*] at paras 31 and 36 (upheld at the FCA in *London Life Insurance Company v Canada*, 2014 FCA 106).

[47] Justice Beaudry in *Corporation Steckmar, Re*, 2004 FC 1568 [*Steckmar*] subsequently explained, also in a final order of garnishment case (under the *Income Tax Act*):

> 16 In *Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1925 (F.C.A.), at paragraph 19, the Court explained the standard of review applicable to discretionary orders by prothonotaries. This standard had previously been developed in *R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (Fed. C.A.).
>
> 17 It has been held that a judge hearing an appeal from a prothonotary's discretionary order should not intervene except in the following two cases:
>
> > (a) the order deals with a question vital to the final issue of the principal matter;
> >
> > (b) the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or a misapprehension of the facts.
>
> 18 The effect of the prothonotary's order was that the garnishee was directed to pay the sum of $126,666.39. That surely is a question which is vital to the final issue of the principal matter. The Court must redo the analysis *de novo* in order to exercise its discretion.

[emphasis added]

[48] The appeal at hand deals with a matter vital to the final issue of the principal matter in the case. Indeed the FOG is the only issue in this matter. I therefore conclude this Court must redo the analysis and determine on its own if there are debts owing or accruing by Sunridge to Eritrea and or ENAMCo and decide if a final order of garnishment should issue. I will also consider findings made by the Prothonotary.

[49] Different principles apply to the appeal concerning the production orders which I will deal with later.

2. *Did the Prothonotary err in granting the final order of garnishment in this case?*

(1) There is no debt owing by Sunridge to either Eritrea or ENAMCo; unless the corporate veil is pierced, there is nothing to attach

[50] First, it is clear that Delizia may only succeed if it establishes there is a debt owing or accruing by Sunridge as the proposed garnishee, to Eritrea as judgment debtor and or to ENAMCo as Eritrea's *alter ego*: see Rule 449. For completeness, I set out the garnishment rule in its entirety, but see in particular subparagraph 449(1)(a)(i) and (ii):

Garnishment	**Saisie-arrêt**
449 (1) Subject to rules 452 and 456, on the ex parte motion of a judgment creditor, the Court may order	449 (1) Sous réserve des règles 452 et 456, la Cour peut, sur requête ex parte du créancier judiciaire, ordonner :
(a) that	a) que toutes les créances suivantes du débiteur judiciaire dont un tiers lui est redevable soient saisies-arrêtées pour le paiement de la dette constatée

	par le jugement :
(i) a debt owing or accruing from a person in Canada to a judgment debtor, or	(i) les créances échues ou à échoir dont est redevable un tiers se trouvant au Canada,
(ii) a debt owing or accruing from a person outside Canada to a judgment debtor, where the debt is one for which the person might be sued in Canada by the judgment debtor,	(ii) les créances échues ou à échoir dont est redevable un tiers ne se trouvant pas au Canada et à l'égard desquelles le débiteur judiciaire pourrait intenter une poursuite au Canada;
be attached to answer the judgment debt; and	
(b) that the person attend, at a specified time and place, to show cause why the person should not pay to the judgment creditor the debt or any lesser amount sufficient to satisfy the judgment.	b) que le tiers se présente, aux date, heure et lieu précisés, pour faire valoir les raisons pour lesquelles il ne devrait pas payer au créancier judiciaire la dette dont il est redevable au débiteur judiciaire ou la partie de celle-ci requise pour l'exécution du jugement.
Marginal note: Service of show cause order	**Note marginale: Signification**
(2) An order to show cause made under subsection (1) shall be served, at least seven days before the time appointed for showing cause,	(2) L'ordonnance rendue en vertu du paragraphe (1) est signifiée, au moins sept jours avant la date fixée pour la comparution du tiers saisi :
(a) on the garnishee personally; and	a) au tiers saisi, par signification à personne;
(b) unless the Court directs otherwise, on the judgment debtor.	b) au débiteur judiciaire, sauf directives contraires de la Cour.
Marginal note: Debts bound as of time of service	**Note marginale: Prise d'effet de l'ordonnance**
(3) Subject to rule 452, an	(3) Sous réserve de la règle

order under subsection (1) binds the debts attached as of the time of service of the order.	452, l'ordonnance rendue en vertu du paragraphe (1) grève les créances saisies-arrêtées à compter du moment de sa signification.
[emphasis added]	[soulignement ajouté]

[51] The *Rules* require some basis on which to ground a finding that a debt is owing or accruing by Sunridge as garnishee to the judgment debtor Eritrea or to ENAMCo: *Champlain Company Limited v The Queen*, [1976] 2 FC 481 (FCA).There are no debts owing or accruing by Sunridge to ENAMCo. Except for the exploration licence fees arising before the incorporation of AMSCo, there is no evidence of any debt owing or accruing by Sunridge to Eritrea.

[52] I reach this conclusion for two reasons. First, although the exploitation of the Asmara mining project may yield dividends or profits in the future which may then flow from AMSCo to ENAMCo or Eritrea, Delizia is not in law entitled to attach such payments unless this Court pierces the corporate veil that presumptively exists between Sunridge and AMSCo. I am unable to do so here. Secondly, and in any event, the Recognition Order and subsequent Sunridge POG and FOG are nullities because the mandatory service requirements of the *SIA* were not complied with in this case. These conclusions require me to allow this appeal and set aside the Sunridge POG and FOG.

[53] However, before considering the issue of piercing the corporate veil and the service requirements of the *SIA*, I wish to deal with the special case of the exploration licence fees and withholding taxes.

(2) The special case of the licence fees (and taxes): not garnishable

[54] It is important to distinguish between debts owed by *Sunridge* and debts owed by *AMSCo* to the State of Eritrea. Debts owed by Sunridge to the State of Eritrea only arose or accrued before the incorporation of AMSCo in 2014. The only such debts identified are the exploration licence fees and certain withholding taxes, which in both cases were obligations of Sunridge to the State of Eritrea through its branch office i.e., obligations of Sunridge directly to Eritrea. These are a special case, because there is no issue of piercing the corporate veil when dealing with debts owing or accruing by Sunridge's branch office to Eritera.

[55] Insofar as the exploration licence fees are concerned, the *SIA* governs. The issue is whether these payments are related to "commercial activity". If they are, they may be attached; if not they are immune from execution. In this connection, the starting point is the legislation. Generally, a foreign state is immune from the jurisdiction of any court in Canada; see section 2 which defines commercial activity, and subsection 3(1), which provides the general rule of state immunity of the *SIA*:

2 In this Act,	2 Les définitions qui suivent s'appliquent à la présente loi.
…	
commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character	activité commerciale Toute poursuite normale d'une activité ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature. (commercial activity)
…	…
State immunity	**Immunité de juridiction**
3 (1) Except as provided by	3 (1) Sauf exceptions prévues

this Act, a foreign state is immune from the jurisdiction of any court in Canada.	dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.
[emphasis added]	[soulignement ajouté]

[56] However, the *SIA* in section 5 removes immunity in any proceedings that relate to any commercial activity of the foreign state:

Commercial activity	**Activité commerciale**
5 A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.	5 L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions qui portent sur ses activités commerciales.
[emphasis added]	[soulignement ajouté]

[57] Subsection 12(1)(b) reinforces the above and exempts property of a foreign state located in Canada from attachment or execution where the property is used or is intended to be used for a commercial activity:

Execution	**Exécution des jugements**
12 (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture except where	12 (1) Sous réserve des paragraphes (2) et (3), les biens de l'État étranger situés au Canada sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre ou confiscation, sauf dans les cas suivants :
…	…
(b) the property is used or is intended to be used for a commercial activity or, if the	b) les biens sont utilisés ou destinés à être utilisés soit dans le cadre d'une activité

foreign state is set out on the list referred to in subsection 6.1(2), is used or is intended to be used by it to support terrorism or engage in terrorist activity [.].	commerciale, soit par l'État pour soutenir le terrorisme ou pour se livrer à une activité terroriste si celui-ci est inscrit sur la liste visée au paragraphe 6.1(2) [.].

[58] The *SIA* establishes a presumptive immunity for foreign states from the jurisdiction of Canadian courts, including immunity from execution. This principle is summarized by the Supreme Court of Canada in *Kuwait Airways Corp v Iraq*, 2010 SCC 40 [*Kuwait Airways*] at para 19:

> To the extent that a foreign state is found to be entitled to immunity under this Act, the Canadian court simply does not have jurisdiction to consider an application against that state, including an application for recognition and enforcement of a foreign decision. It is only in the case of an exception to the general principle of immunity that the court may rule on the merits of an application against a foreign state.

[59] To determine whether the "commercial activity" exception under the *SIA* is available, a court must look at the nature of the particular act and the underlying context. In assessing the nature of the activity, courts in the US and the UK have analysed whether the state is acting "in the manner of a private player" within the market. Canadian courts have referenced this approach in their analysis but will also consider the entire context of the circumstances at issue: *Kuwait Airways* at paras 29-31; *Re Canada Labour Code*, [1992] 2 SCR 50.

[60] I also accept that the *SIA* is a codification of the law on state immunity. Again, to quote the Supreme Court of Canada, this time from *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 42:

> In Canada, state immunity from civil suits is codified in the SIA. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. The "cornerstone" of the Act is found in s. 3 which confirms that foreign states are immune from the jurisdiction of our domestic courts "except as provided by th[e] Act."

[61] In this connection it is useful to review what the Supreme Court of Canada said in *Kuwait Airways*:

> [28] Both in the United Kingdom and in the United States, state immunity seems to be limited in the modern case law to true sovereign acts, with the exceptions being used to confirm an interpretation that corresponds to the restrictive theory of state immunity that has been developed in public international law.
>
> [29] In the United Kingdom, the courts ask whether the act in question could be performed by a private individual. Lord Goff of Chieveley recommended the use of this test in one of the decisions related to the litigation between KAC and IAC on which the instant case is based. Relying on an earlier opinion of Lord Wilberforce in *I Congreso del Partido*, [1983] A.C. 244, at pp. 262, 267 and 269, he found that the proper test would be not what the state's objective is in performing the act, but whether the act could be performed by a private citizen (*Kuwait Airways Corp. v. Iraqi Airways Co.*, [1995] 3 All E.R. 694, at pp. 704-5). In the United States, the Supreme Court described the sovereign acts protected by state immunity as those performed in the exercise of the powers peculiar to sovereigns:
>
> > Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*). . . . We explained in *Weltover, supra*, at 614 (quoting *Dunhill*, supra, at 704), that a state engages in commercial activity under the restrictive theory where it exercises '"only those powers that can also be exercised by private citizens,'" as distinct from those '"powers peculiar to sovereigns.'" Put differently, a foreign state engages in

> commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market. (*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), at pp. 359‑60).

[30] Thus, in both U.S. and English law, the characterization of acts for purposes of the application of state immunity is based on an analysis that focusses on their nature. It is therefore not sufficient to ask whether the act in question was the result of a state decision and whether it was performed to protect a state interest or attain a public policy objective. If that were the case, all acts of a state or even of a state-controlled organization would be considered sovereign acts. This would be inconsistent with the restrictive theory of state immunity in contemporary public international law and would have the effect of eviscerating the exceptions applicable to acts of private management, such as the commercial activity exception.

[31] In Canadian law, La Forest J. recommended in *Re Canada Labour Code* that this analytical approach be adopted to resolve the issues related to the application of the SIA. But he also made it clear that the Canadian commercial activity exception requires a court to consider the entire context, which includes not only the nature of the act, but also its purpose:

> It seems to me that a contextual approach is the only reasonable basis of applying the doctrine of restrictive immunity. The alternative is to attempt the impossible — an antiseptic distillation of a "once-and-for-all" characterization of the activity in question, entirely divorced from its purpose. It is true that purpose should not predominate, as this approach would convert virtually every act by commercial agents of the state into an act *jure imperii*. However, the converse is also true. Rigid adherence to the "nature" of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*. [p. 73]

[62] Applying these principles, I conclude that exploration licence fees are not properly categorized as payments related to "commercial activity". Instead, their nature and purposes are quintessentially the imposition of regulatory obligations imposed by a sovereign state on those

who carry on business within the reach of that sovereign state, here Eritrea. In imposing such obligations, the State of Eritrea was not acting "in the manner of a private player" within the market. It is acting as only a sovereign may act in regulating activities on the territory it controls and doing so through the issuance of permits entailing both government control of private conduct. Primarily and in particular, Eritrea imposes a licence requirement for the purpose of asserting national control over businesses in general and over mining activities in particular where they are carried out within its territory. The licence fees are but a part of the manner in which that state control is asserted but are in my view inextricably bound up with the licences themselves. While small in quantum, such fees also raise taxes for use by the national government.

[63] These licence fees therefore serve the legitimate important and commonplace purpose of allowing in this case, the State of Eritrea to exert sovereign control over mining assets and mining activity within its territory. These payments lack the nature and purpose and legal quality required of "commercial activity" such as to be the subject of a final order of garnishment. They are therefore exempt from seizure by virtue of subsection 12(1) of the *SIA*, and are not covered by the exclusions for "commercial activity".

[64] I need not discuss the withholding taxes because no appeal was taken from the Prothonotary's refusal to allow them to be garnished.

[65] From the foregoing I conclude that the sums owed by Sunridge's branch office to Eritrea before AMSCo was incorporated are not subject to garnishment.

[66] I also conclude that exploration licence fees owed by AMSCo to Eritrea arising after AMSCo was incorporated are not garnishable, and do so for two reasons. First, the licence fees are not related to "commercial activity" as just discussed. In addition, even if they were, they could not be garnished because the corporate veil may not be pierced between AMSCo and Eritrea as discussed below.

(3) Are the shares issued by AMSCo to ENAMCo garnishable?

[67] This is a central issue in this appeal. The starting point of this analysis is the fact that the shares were issued after AMSCo's incorporation. Before AMSCo's incorporation, no shares could be issued because no company was in existence to issue shares. It is trite that only a company may issue company shares.

[68] There were no debts owing by Sunridge to either Eritrea or ENAMCo after AMSCo was incorporated. Therefore, the only manner by which Delizia may succeed in attaching the issuance of shares of AMSCo to ENAMCo is for this Court to pierce the corporate veil that presumptively exists between Sunridge and AMSCo. However, the Court may not pierce the corporate veil in this case for several reasons.

(4) Corporate veil between Sunridge and AMSCo may not be pierced

(a) *Sunridge's legitimate business purpose in setting up AMSCo*

[69] Respectfully, in my view, the Court must first consider the original and legitimate business purpose of establishing a joint venture through a share company taking on the mining operation responsibility, which resulted in ENAMCo exercising its option rights to acquire 40%

of AMSCo shares in 2012. In this connection, Eritrean law requires the participation of the State of Eritrea in mining operations conducted within its territory pursuant to Proclamation No. 68/1995: A Proclamation To Promote the Development of Mineral Resources, which in article 41 states:

> Without prejudice to the provision of Article 7 of the Mining Law Proclamation No. 68/1995, the Government may acquire, without cost to itself, a participation interest of up to 10 percent of any mining investment. The Government is also entitled to equity participation not exceeding a total of 30 percent, including the 10 percent mentioned hereinabove, the percentage, timing, financing, resulting rights and obligations and other details of which shall be specified by agreement.

[70] In my view, for Sunridge to enter the production phase for the Asmara Mine and to start generating revenue, Sunridge essentially had no choice but to enter into an agreement with ENAMCo and comply both with its own undertakings and with Eritrean law. Eritrean law gave Eritrea (i.e., ENAMCo as its *alter ego*) a 10% participation interest to Eritrea without cost. Eritrean law also allowed Eritrea to benefit from additional participation upon agreement with the operating company. In my respectful view, therefore, incorporating AMSCo and issuing shares to ENAMCo had legitimate business purposes.

[71] These legitimate business purposes both introduce and support my finding that AMSCo's incorporation was valid as a legitimate separate legal entity from Sunridge. Also, I note that Sunridge's plan to enter such a joint venture with ENAMCo, and the establishment of the rights and obligations attaching to each party, pre-date the garnishment proceedings.

(b) *No fraud or conduct akin to fraud as required to pierce the corporate veil*

[72] There is no doubt that lifting the corporate veil is contrary to well-established principles of corporate law, both in Canada and elsewhere. In order to pierce a corporate veil in the absence of agency or other requirement, there must be a sham or the existence of a vehicle for wrongdoing, or some conduct akin to fraud. This test was affirmed by the Federal Court of Appeal (per Malone, Décary and Rothstein JJ A) in *Meredith v R*, 2002 FCA 258 [*Meredith*] where that Court stated:

> [12] Lifting the corporate veil is contrary to long-established principles of corporate law. Absent an allegation that the corporation constitutes a "sham" or a vehicle for wrongdoing on the part of putative shareholders, or statutory authorisation to do so, a court must respect the legal relationships created by a taxpayer (see *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2). A court cannot re-characterize the *bona fide* relationships on the basis of what it deems to be the economic realities underlying those relationships (see *Continental Bank Leasing Corp. v. The Queen*, [1998] 2 S.C.R. 298; *Shell Canada Ltd. v. The Queen*, [1999] 3 S.C.R. 622; *Ludco Enterprises Limited v. the Queen*, 2001 SCC 62 at para. 51).
>
> [emphasis added]

[73] I am bound by the Federal Court of Appeal. I wish to add that many other cases in many other jurisdictions take the same approach in requiring wrongdoing or conduct akin to fraud before piercing the corporate veil. Recently, for example, the Ontario Court of Appeal stated in *Shoppers Drug Mart v 6470360 Canada Inc.*, 2014 ONCA 85 at para 43 [*Shoppers Drug Mart*]:

> 43 […] *Fleischer* is the appropriate test to apply to piercing the corporate veil in Ontario. In *Fleischer*, Laskin J.A. stated that only exceptional cases that result in flagrant injustice warrant going behind the corporate veil. It can be pierced if those in control expressly direct a wrongful act to be done. At para. 68, he stated:
>
> > Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a

> wrongful thing to be done": *Clarkson Co. v. Zhelka* at p. 578. Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."
>
> [emphasis added]

[74] Another recent decision to the same effect sets out three circumstances in which a company's separate legal personality may be disregarded and the corporate veil pierced:

> [44] Since *Salomon v. Salomon & Co.*, *supra*, Anglo-Canadian law has recognized that a corporation is a legal entity distinct from its shareholders. A parent corporation is also a legal entity distinct from a wholly-owned subsidiary. In *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.) at para. 24, the Court of Appeal stated with respect to the separate legal personality of a parent and subsidiary:
>
> > Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.
>
> [45] Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: (a) where the corporation is "completely dominated and controlled and being used as a shield for fraudulent or improper conduct" (*642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 68); (b) where the corporation has acted as the authorized agent of its controllers, corporate or human (*Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, [2009] O.J. No. 1195 at para. 51); and (c) where a statute or contract requires it (*Parkland Plumbing*, *supra*, at para. 51).

[emphasis added]

Angelica Choc v Hudbay Minerals Inc, 2013 ONSC 1414 [*Angelica Choc*].

[75] In terms of wrongdoing or conduct akin to fraud, I appreciate it may appear that the Supreme Court of Canada advanced a wider test for piercing the corporate veil which does not require a finding of wrongdoing or fraud: all that might be needed is a finding that not piercing the veil would "be too flagrantly opposed to justice, convenience or the interests of the Revenue": *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 [*Kosmopoulos*], per Justice Wilson:

> 12. As a general a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L. C. B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, *supra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
>
> 13. There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, *supra*, at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.

> 14. I am mindful too of this Court's decision in the *Aqua-Land Exploration Ltd.* case, *supra*, in which the Court did not "lift the veil" in order to find that one of three shareholders in a corporation had an insurable interest in its asset. So also in the *Wandlyn Motels Ltd.* case, *supra*, the Court refused to regard a motel owned by a man who held all but two of the shares of the insured, Wandlyn Motels Ltd., as the property of that corporation. If the corporate veil were to be lifted in this case, then a very arbitrary and, in my view, indefensible distinction might emerge between companies with more than one shareholder and companies with only one shareholder: for a recent comment on the arbitrary and technical distinctions that would be created by lifting the corporate veil in this case, see Jacob S. Ziegel, "Shareholder's Insurable Interest--Another Attempt to Scuttle the *Macaura* v. *Northern Assurance Co.* Doctrine: *Kosmopoulos* v. *Constitution Insurance Co.*" (1984), 62 *Can. Bar Rev.* 95, at pp. 102-03. In addition, it is my view that if the application of a rule leads to harsh justice, the proper course to follow is to examine the rule itself rather than affirm it and attempt to ameliorate its ill effects on a case-by-case basis.
>
> [emphasis added]

[76] However, Canadian courts including the Federal Court of Appeal in *Meredith* have repeatedly held that mere injustice to one party is not sufficient, without more, to pierce the corporate veil. For example, see *Shoppers Drug Mart* at para 43 ("only exceptional cases that result in flagrant injustice warrant going behind the corporate veil. It can be pierced if those in control expressly direct a wrongful act to be done"); *Emtwo Properties Inc v Cineplex (Western Canada) Inc*, 2011 BCSC 1072 at paras 127-128 [*Emtwo*], 132; *Actton Petroleum Sales Ltd v British Columbia (Minister of Highways)* (1998), 50 BCLR (3d) 187 at paras 15, 19; and *BG Preeco (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 37 BCLR (2d) 258 (CA) at paras 37-40.

[77] UK cases also indicate that evidence of wrongdoing or conduct akin to fraud is required to pierce the corporate veil: *Prest v Petrodel Resources and others*, [2013] UKSC 34; *Adams v*

Cape Industries plc [1990] Ch 433 (Slade, Mustill and Ralph Gibson LJJ). Also in support of a conduct akin to fraud requirement is the following passage from Gower, *Modern Company Law*, 4th ed (1979) at page 138 which in my view convincingly rejects the just and equitable approach because it smacks of "palm-tree justice" rather than the application of legal rules:

> The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules.

[78] Finally on this point, even if the law of piercing the corporate veil is as some suggest as a result of *Kosmopoulos*, I am not persuaded Sunridge's actions constituted "conduct too flagrantly opposed to justice". In this case, Sunridge followed Eritrean ground rules that required the incorporation of a local joint venture company (eventually AMSCo) and a joint venture with an Eritrean state company (eventually ENAMCo) as early as 2006 and 2007. Sunridge had already established a branch in 2005 with a view of exploring and eventually exploiting the Asmara mining project. In 2012, well before these proceedings were started, ENAMCo exercised its option to purchase an additional 30% interest in the Asmara Project. Sunridge and ENAMCo were, well before the Sunridge POG was served (i.e., before September, 2013), already negotiating the precise terms of the ENAMCo acquisition of 30% interest. Moreover, in my view ENAMCo was given and obtained a 40% interest in AMSCo to accommodate legal requirements imposed by the State of Eritrea concerning local ownership and control of mining interests within its territory. In this case there is no evidence of fraud, conduct akin to fraud or improper conduct on the part of Sunridge or its branch office in Eritrea. I certainly agree with the Prothonotary who made no finding of fraud, conduct akin to fraud or improper conduct. On this record no such finding was available. The shares issued by AMSCo to ENAMCo were issued

under long-standing arrangements that predate these proceedings. Without those arrangements, exploitation of the Asmara mining project could not be possible. This is not the case of a company incorporated to cover sham transactions.

[79] There is no basis on which the Court may pierce the corporate veil on these facts and as further outlined below.

(c) *No agency or complete control or puppet relationships*

[80] Another ground on which the corporate veil may be pierced, as noted in *Angelica Choc* is the presence of agency, i.e., a situation where the subsidiary is completely controlled by the parent and acts as a mere puppet or agent. Sunridge, through its branch in Eritrea, only holds a 60% interest in AMSCo, while ENAMCo holds 40%. Moreover, the Shareholders' Agreement has the super majority provisions requiring 80% shareholder approval for most if not all significant business dealing, namely:

i. approval of budgets and business plans;

ii. entering into partnerships or joint ventures with third parties;

iii. spending over $200,000 US;

iv. entering into material contracts; and

v. hiring or firing key executives.

[81] In my view, Sunridge's partial ownership coupled with ENAMCo's veto power through the super majority 80% requirement, effectively negates a finding of agency between Sunridge

and AMSCo in this case. I note the Prothonotary made no finding of agency; again, such a finding is not possible on this record.

[82] In any event, the case law is clear that control alone cannot, without more, constitute either express or implied agency sufficient to lift a corporate veil. If it were otherwise, the corporate veil would be lifted in the case of all subsidiaries, which is not the law: *Meredith*; *Trans-Pacific Shipping Co v Atlantic & Orient Trust Co Ltd*, 2005 FC 311 (motion to strike out denied); *Emtwo* at paras 127-128; *Kosmopoulos*.

[83] For the same reasons, even being a puppet in the sense of being completely controlled, as is the case with virtually all wholly-owned subsidiaries, is not enough to justify lifting the corporate veil without improper conduct or conduct akin to fraud: see generally *Salomon v Salomon & Co, Ltd*, [1897] AC 22 (HL); *Edgington v Mulek Estate*, 2008 BCCA 505; and *Meredith*.

[84] There is no basis for piercing the corporate veil on the basis of agency.

(d) *No statutory requirement to pierce the corporate veil*

[85] Finally, *Angelica Choc* correctly, in my respectful view, identifies a third category of relationships where the corporate veil may be pierced, namely where statutes require that to be done. Examples might be anti-avoidance provisions of taxation or family law regimes where the legislatures have chosen to remove the common law protection to promote public policy goals. No statutory exception applies such as to enable this Court to pierce the corporate veil.

(e) *The Prothonotary's findings*

[86] Having conducted a *de novo* analysis, I will address concerns raised by the Prothonotary, and do so with great respect. First, he found there was a sale of shares between Sunridge and Eritrea, ENAMCo being Eritrea's *alter ego*. I respectfully disagree. There could not have been a sale of shares by Sunridge to ENAMCo because at that point, i.e., before AMSCo was incorporated, Sunridge had no AMSCo shares to sell; the shares were not yet in existence.

[87] The only element of the transactions that might even be considered garnishable was AMSCo's issuance of treasury shares to ENAMCo. But this was not a sale. The shares could only be attached as debts owing or accruing by Sunridge *after* AMSCo was incorporated. Before that they did not exist. However, once incorporated, AMSCo shares could only be attached by Delizia if the corporate veil could be pierced, i.e., if there was fraud or conduct akin to fraud as discussed above. Since there was no fraud or conduct akin to fraud, the issuance of shares by AMSCo could not be subject to garnishment.

[88] The Prothonotary also found the "sale of shares should not have occurred given the existence of the POG". I disagree and again do so with respect. In my view, there was no "sale of shares" between Sunridge and ENAMCo. The transaction that took place was the implementation of a joint venture agreement pursuant to the Shareholders' Agreement dated June 27, 2014. The shares were not sold to ENAMCo by Sunridge; they were issued from AMSCo's Treasury to ENAMCo by a separate company – AMSCo. Sunridge never sold AMSCo shares to ENAMCo. This is the legal reality created by the joint venture required to implement the development of the mine in accordance with Eritrean law.

[89] There is no evidence of subterfuge or disobedience of an order of this Court. To recall, the Shareholders' Agreement called for the creation of the joint venture company, which was subsequently created, named AMSCo. Further, it required that "on establishment and incorporation" of what became AMSCo, share capital "shall be issued" by the joint venture company (AMSCo) in the agreed amounts: 60% to Sunridge and 40% to ENAMCo.

[90] Of importance, the Shareholders' Agreement had two other requirements. The first required Sunridge to transfer its exploration licences and other Sunridge assets into the joint venture company (AMSCo) "immediately after the incorporation of the Company". Secondly, it set out timelines by which ENAMCo would pay Sunridge $18.33million US for 40% of AMSCo's shares, which compensated Sunridge for the exploration licences and other assets Sunridge was obliged to transfer to AMSCo.

[91] While there is no doubt ENAMCo was required to pay Sunridge for the shares that ENAMCo received, and while I agree ENAMCo was the *alter ego* for Eritrea, those payments cannot be garnished by Delizia because payments by ENAMCo to Sunridge are not garnishable. They are not debts owing or accruing by Sunridge to ENAMCo; it is the other way around. Only debts owing or accruing from Sunridge to ENAMCo could be garnished by Delizia, and then, as already discussed, only if the corporate veil could be pierced.

[92] In addition, while Sunridge did put its assets including exploration licences and other assets into AMSCo as part of the overall structuring of AMSCo as the joint venture company, and did so on or after October 1, 2014, I am unable to see how an obligation to transfer Sunridge

assets to AMSCo constituted a debt owing or accruing by Sunridge to either Eritrea or ENAMCo. Sunridge assets went into AMSCo, not to ENAMCo, nor to Eritrea its *alter ego*. With respect, such was not precluded by the terms of the Sunridge POG, directed as it was to attach debts owing or accruing by Sunridge to Eritrea. This being the case, I am unable to agree that implementation of the joint venture after notice of the POG was improper. I reiterate that such implementation was in pursuance of established practices in Eritrea and had been planned since the mid to late 2000's and well before the commencement of litigation in this Court.

3. *Non-compliance with the State Immunity Act*

[93] There is no need to review this *SIA* issue because I have found there are no debts to garnish, that is, there were no debts owing or accruing by Sunridge to Eritrea and or ENAMCo, because the corporate veil may not be pierced (which dispenses with issues related to AMSCo), and because amounts owing by Sunridge before the incorporation of AMSCo were exempt from garnishment under the *SIA* (in the case of exploration licence fees). I have also found there was no share sale from Sunridge to ENAMCo.

[94] However, in my view, both the Sunridge POG and the FOG must also be set aside due to non-compliance with the *SIA*.

(5) *SIA* requires service on foreign state: absence of service renders recognition and subsequent garnishment orders nullities

[95] In my view, the Sunridge POG and FOG are nullities because service of originating documents as required by the *SIA* was not made on the State of Eritrea. The key statutory provision is subsection 9(2):

Service on a foreign state	**Signification à l'État étranger**
9 (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made	9 (1) La signification d'un acte de procédure introductif d'instance à l'État étranger, à l'exclusion de ses organismes, se fait :
(a) in any manner agreed on by the state;	a) selon le mode agréé par l'État;
(b) in accordance with any international Convention to which the state is a party; or	b) selon le mode prévu à une convention internationale à laquelle l'État est partie;
(c) in the manner provided in subsection (2).	c) selon le mode prévu au paragraphe (2).
Marginal note: Idem	**Idem**
(2) For the purposes of paragraph (1)(c), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.	(2) La signification mentionnée à l'alinéa (1)c) peut se faire par remise personnelle ou par envoi recommandé d'une copie de l'acte introductif d'instance au sous-ministre des Affaires étrangères ou à la personne qu'il désigne; le sous-ministre ou cette personne transmet à son tour cette copie à l'État étranger.

[96] To succeed on this issue, Delizia must establish that Delizia served the State of Eritrea with the originating document leading to the Recognition Order. However it did not. The consequences were set out by this Court in *United States of America v Zakhary*, 2015 FC 335 [*Zakhary*].

[97] *Zakhary* was decided two months after the Prothonotary's decision. *Zakhary* involved an unjust dismissal complaint by a former employee of the United States Consulate in Toronto. The complainant obtained an arbitral award which she successfully filed for enforcement with this Court. However, the foreign state had not been served with the original complaint in accordance with subsection 9(2) of the *SIA*. Instead, pleadings were sent by registered mail to the consular offices in Toronto, receipt of which was acknowledged by the Embassy of the United States of America in Ottawa. The foreign state sought and obtained judicial review: the enforcement Certificate was set aside.

[98] In *Zakhary*, Justice Rennie (as he then was) summarized the mandatory requirement of service under section 9 of the *SIA*:

> [20] The case law in this Court, and others, is both unequivocal and longstanding; service on foreign states must be made pursuant to section 9(2) of *SIA*: *Tritt v United States of America*, (1989), 68 OR (2d) 284 (QL) (HCJ); *Softrade v Tanzania*, [2004] OJ No 2325 (SCJ). Leaving documents at the feet of a representative of the US Consulate is not proper service. Apart from agreement by a foreign state as to the manner of service, a state can only be served through the medium of the Deputy Minister of Foreign Affairs: Janet Walker, Castel & Walker: *Canadian Conflict of Laws*, 6th ed., loose-leaf (Markham, ON: LexisNexis, 2005), at 10-21; H.L Molot and M.L. Jewett, *"The State Immunity Act of Canada"*, (1983) Can Bar Rev 843.
>
> [21] The provenance of state immunity in international law, its codification in the Vienna Convention on Diplomatic Relations and its incorporation into domestic law is traced in detail in the recent decision of the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, where Justice LeBel, writing for the majority, observed at paras 42 and 43:
>
> > In Canada, state immunity from civil suits is codified in the *SIA*. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. The "cornerstone" of the Act is found in s. 3 which

> confirms that foreign states are immune from the jurisdiction of our domestic courts "except as provided by th[e] Act" (*Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at para. 42; SIA, s. 3). Significantly, the *SIA* does not apply to criminal proceedings, suggesting that Parliament was satisfied that the common law with respect to state immunity should continue governing that area of the law (SIA, s. 18).
>
> When enacting the *SIA*, Parliament recognized a number of exceptions to the broad scope of state immunity. Besides the commercial activity exception, canvassed above, Canada has chosen to include exceptions to immunity in situations where a foreign state waives such right, as well as for cases involving: death, bodily injury, or damage to property occurring in Canada; maritime matters; and foreign state property in Canada (SIA, ss. 4, 6, 7 and 8; Currie, at pp. 395-400; Emanuelli, at pp. 346-49; J.-M. Arbour and G. Parent, *Droit international public* (6th ed. 2012), at pp. 500-8.3).

[22] The policy objectives furthered by section 9 of the *SIA* are articulated in a Government of Canada Circular of March 28, 2014 titled "Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States." The Circular emphasizes that "under Canada's *State Immunity Act*, all other States receive in Canada the protections...with respect to service by diplomatic means to their Ministries of Foreign affairs in their respective capitals of Canadian originating documents with at least 60 days' notice before the next step in the proceedings." The Circular also notes that "[s]ervice on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the Vienna Convention on Diplomatic Relations..."

[23] The service of the Complaint on the Consulate by registered mail did not conform with section 9 of *SIA*. As service pursuant to section 9 of *SIA* is a mandatory, jurisdictional pre-condition to the commencement of proceedings against a foreign state, the Adjudicator could have no jurisdiction over the United States.

…

> [25] (…) The service provisions of the *SIA* are mandatory, regardless of which individual or agency is responsible for service under any particular recourse mechanism.
>
> [emphasis added]

[99] This Court came to the same conclusion, namely that service under subsection 9(2) of the *SIA* is mandatory, in *TMR Energy Ltd v State Property Fund of Ukraine*, 2004 CarswellNat 6249 [*TMR*]. In *TMR*, a dispute arose between the State Property Fund of Ukraine (SPF) (an entity of the State of Ukraine) and TMR Energy Ltd. (TMR), when SPF was in breach of its agreement with TMR, and an arbitration award was granted in favour of TMR. Justice Martineau refused to grant an order registering, recognizing and enforcing the final arbitration award finding, as is the case here, that the state concerned was not served per the *SIA*. Justice Martineau stated the following with respect to section 9 of the *SIA* and the *Rules*:

> 10 *AND UPON* the Court considering that whether SPF is an "agency of a foreign state" within the meaning of the *State Immunity Act*, R.S.C. 1985, c. S-18, as amended, or is in fact the alter ego or a subdivision of the "foreign state" itself, here the State of Ukraine, it remains that before a judgment or an order can be obtained or made, service of the originating document must be made in accordance with section 9 of the *State Immunity Act*;
>
> 11 *AND UPON* the Court considering that the conditions and requirements found in the *State Immunity Act* have precedence over the *Rules of the Federal Court, 1998*, SOR/98-106, as amended (the "Rules"); …
>
> [emphasis added]

[100] A unanimous Federal Court of Appeal upheld Justice Martineau's decision without any comment on the mandatory nature of service under section 9 of the *SIA*: *TMR Energy Ltd v State Property Fund of Ukraine*, 2005 FCA 28. The Supreme Court of Canada granted leave to appeal, but the appeal was abandoned.

[101] Based on the above, I find that service was not made on the State of Eritrea as required by subsection 9(2) of the *SIA*. Therefore the Recognition Order together with both the Sunridge POG and FOG are nullities.

4. *Further Issues Relating to the Recognition Order and POG*

[102] Delizia raised several other grounds on which it argued that the Sunridge POG and FOG should nonetheless be upheld. The Prothonotary found that Sunridge's failure to "appeal or validly challenge the POG in a timely fashion, under Rule 399 and the POG therefore became final." In terms of the Recognition Order and the POG, the Prothonotary found: "like the POG, the Judgment has also become res judicata because those two orders were not appealed." He also relied on the fact that both the POG and the Recognition Order "expressly stated that they do not need to be served on the State." These arguments were advanced on appeal, but I am unable to accept them.

(6) Failure to appeal

[103] In my respectful view, the suggestion Sunridge should have appealed or challenged the POG (and or the Recognition Order) is unconvincing for several reasons. First, Sunridge in fact did move to set aside the Recognition Order and the Sunridge POG in the course of its show cause filing, as it was entitled to do under Rule 499(1)(b). I see no reason why Sunridge should have employed Rule 399 instead of or in addition to filing its responding "show cause" material under Rule 449. Rule 453 specifically calls for *summary* determinations of garnishment proceedings. I see nothing summary about requiring a garnishee to bring additional proceedings in addition to showing cause why a provisional order of garnishment should not be made final.

This is especially the case where both the Recognition Order and the POG were made *ex parte*. A multiplicity of proceedings is to be avoided and not encouraged. There is considerable efficiency in having issues such as this determined at the show cause hearing; indeed the very purpose of the show cause hearing is to summarily determine whether the Sunridge POG should be converted to a final order of garnishment.

(7) *Res judicata*

[104] I do not agree Sunridge is bound by either the Recognition Order and or the Sunridge POG on the grounds they are *res judicata* and were not appealed. In my respectful view, the argument based on the *res judicata* argument must fail because *res judicata* at a minimum requires an identity of parties which was not the case with the Recognition Order: Sunridge was not a party to the Recognition Order and therefore *res judicata* cannot apply. Allowing Sunridge to address the validity of the POG as part of the show cause hearing also accords with the underlying purpose of the doctrine of *res judicata*, which is to ensure the efficiency of the justice system.

(8) Collateral attack

[105] I do not agree that Sunridge was making a form of impermissible collateral attack on the Recognition Order by raising these defences as causes why the POG should not be made final. I recognize the rule against collateral attacks. However in my view, raising these issues is expressly allowed by and is the purpose of the "show cause" provision in the *Rules* which not only authorized but compelled Sunridge to "show cause" why a final order of garnishment should not be made: Rule 449(1)(b). Therefore, the collateral attack rule does not apply. What

transpired was not a collateral attack; it was showing cause why the POG should not be made a FOG.

(9) Service on Eritrea waived in recognition order and in POG

[106] Both the Recognition Order and the Sunridge POG purport to waive service on Eritrea. In my respectful view, this Court acting under its *Rules* is unable to waive compliance with the service requirements of the *SIA*. That was the express finding of Justice Martineau in *TMR* who put it in the following terms:

> 3 *AND UPON* the Court having, in an order issued concurrently with the present order, decided that the order made on January 17, 2003, by Prothonotary Morneau was rendered in absence of jurisdiction and should be set aside;
>
> 4 *AND UPON* the Court now being asked by TMR to make, *ex parte*, an order *nunc pro tunc* (or *de bene esse*) registering, recognizing, and enforcing the Award on the basis of the record as it then was at the time TMR made its original application to the Court, that is on January 15, 2003; …
>
> 10 *AND UPON* the Court considering that whether SPF is an "agency of a foreign state" within the meaning of the *State Immunity Act*, R.S.C. 1985, c. S-18, as amended, or is in fact the alter ego or a subdivision of the "foreign state" itself, here the State of Ukraine, it remains that before a judgment or an order can be obtained or made, service of the originating document must be made in accordance with section 9 of the *State Immunity Act*;
>
> 11 *AND UPON* the Court considering that the conditions and requirements found in the *State Immunity Act* have precedence over the *Rules of the Federal Court, 1998*, SOR/98-106, as amended (the "Rules");
>
> …
>
> 21 *AND UPON* the Court finding that, as a result of the setting aside of order made by Prothonotary Morneau on January 17, 2003, and of the Court's concurrent refusal to make, *ex parte*, an order *nunc pro tunc* (or *de bene esse*) registering, recognizing and enforcing the Award on the basis of the record as it then was at the

> time TMR made its original application, the seizure of the Aircraft cannot be maintained or held valid under Rule 399(3), or any other rule;
>
> [emphasis added]

[107] Canada's international obligations to other nations as enacted in the *SIA* may not be waived under the *Rules* of this Court. There is no power to do so in the *SIA* itself. To waive these obligations under the *Rules* would, in my respectful view, require very clear language from Parliament which is not present. I also agree that the *SIA* takes precedence over subordinate legislation such as the *Rules* for the reasons set out in *Zakhary*.

5. *Commercial Activity Exemption*

[108] Delizia also argued Sunridge may not raise the issue of what is or what is not "commercial activity" because to do so impermissibly challenges the Recognition Order's finding. The Recognition Order held that debts allegedly owing and accruing by Sunridge to Eritrea and ENAMCo were "commercial activity"; the Recognition Order states in paragraph 5: "[t]he respondent is not immune from the jurisdiction of this Court in accordance with section 5 of the State Immunity Act, R.S.C. 1985, c. S-18."

[109] But a Court issuing a Recognition Order hears only one side of the case. I do not criticize Delizia for moving *ex parte*, but having done so it must accept the consequence of obtaining an *ex parte* order. In this case Sunridge, once it received notice of what took place, was permitted to object to the *ex parte* Recognition Order's finding of "commercial activity". Such finding was rebuttable and has been rebutted.

[110] In my view, there would be little point in our *Rules* requiring provisional orders of garnishment to demand garnishees "show cause why the person should not pay" (Rule 449(1)(*b*)) if the garnishee is precluded from doing just that. The Sunridge POG ordered Sunridge to "show cause why it should not pay". Sunridge now says it should not pay because of non-compliance with the *SIA*. Both the language of Rule 449(1)(b) and principles of fundamental fairness, separately and in combination, give Sunridge the right to raise the non-compliance with *SIA* issue.

6. *If the Court did not err in granting a final order of garnishment, did the Court nonetheless err in ordering Sunridge to answer the questions objected to in cross-examinations?*

[111] Turning to the productions sought, the standard of review for a reviewing judge of production orders made by a Prothonotary is set out in *R v Aqua-Gem Investments Ltd*, [1993] 2 F.C. 425 at paras 67-68 [*Aqua-Gem*]. The reviewing court should only interfere where the Court was clearly wrong in that its exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts.

[112] The scope of questioning on cross-examination such as this is limited and narrower than the scope of discovery and is otherwise limited to relevant matters arising out of the affidavit itself: *Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402 at paras 12-13. As such, discovery is bound on all sides by the notion of relevance: *Royal Bank of Scotland plc v Golden Trinity (The)*, [2000] 4 FCR 211 at paras 15-17. In addition, cross-examination may not be used as a fishing expedition: *Imperial Chemical Industries PLC v Apotex Inc* (1988), 23 CPR (3d) 362 (FC) at para 9.

[113] It is not necessary to address this issue because of my finding that the POG is a nullity for non-compliance with the *SIA*, and my finding there were no debts to garnish. Moreover, there is no practical utility to ordering a proposed garnishee to answer questions posed in order to obtain a final order of garnishment once a final order of garnishment has issued, i.e., after the garnishor has obtained the very remedy it sought. For completeness however, I will do so.

[114] The issue in this proceeding was to determine if and to what extent there are debts owing or accruing between Sunridge and Eritrea and or ENAMCo. On this basis, Sunridge resisted disclosing some of the information requested by Delizia in advance of the hearing of the FOG motion on the ground it was irrelevant to this issue.

[115] I agree with Sunridge and find that ordering Sunridge to answer Delizia's questions was based on a wrong principle.

[116] The Sunridge FOG ordered Sunridge to answer the following questions, to which Sunridge had objected on cross-examination:

1. Provide name of bank in Eritrea where cheque was processed and cleared regarding payment for renewal of the exploration licences.
2. Inform as to how the withholding tax payments to the state of Eritrea are accounted for and classified within the financial statements of Sunridge Gold Corp., including all payments made by Sunridge Gold Eritrea or Sunridge Gold Corp. to the state of Eritrea.

[117] Question 1 on its face is an attempt to obtain information usually obtained on an examination in aid of execution after a party has obtained judgment. Then, it may be a legitimate question because it seeks to identify an entity to which further enforcement orders might be directed. This question is therefore *prima facie* improper as premature on motion for a final order of garnishment. Even if it was not premature, this inquiry is not relevant to the issue of whether there are debts owing from Sunridge to Eritrea as Delizia needed to establish to obtain a FOG.

[118] The second question requests information pertaining to the method of accounting for withholding tax payments to the State of Eritrea in the corporate financial statements. This request is moot and therefore irrelevant because the Prothonotary found the withholding tax payments not garnishable.

V. Conclusion

[119] In the result, the appeal must be allowed and both the Sunridge POG and Sunridge FOG are set aside.

VI. Costs

[120] In my view, costs should follow the normal rules and therefore will follow the cause. Therefore costs are awarded in favour of Sunridge here, on the FOG and on the stay. Sunridge presented a detailed bill of costs in respect of the FOG, the stay of proceedings, and this appeal which are reasonable except that those costs claimed by Sunridge under Column V should be recalculated at the midpoint of Column IV. If the parties are unable to agree on the recalculated cost amount, they may seek further guidance in writing within 15 days of this Judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed.

2. The provisional order of garnishment dated July 31, 2013, and the final order of garnishment dated January 9, 2015, are set aside.

3. Costs are payable by Delizia to Sunridge for this appeal, the stay and the hearing of the final order of garnishment, in the amount claimed in the Bill of Costs submitted by Sunridge except that those costs claimed by Sunridge under Column V should be recalculated at the midpoint of Column IV. If the parties are unable to agree on the recalculated cost amount, they may seek further guidance in writing within 15 days of this Judgment.

4. The style of cause is amended to that shown on the first page hereof, effective immediately.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1157-13
STYLE OF CAUSE:	SUNRIDGE GOLD CORP. v DELIZIA LIMITED v STATE OF ERITREA
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APPEARANCES:

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