Federal Court  Cour fédérale

Date: 20160408

Docket: T-1157-13

Citation: 2016 FC 393

Ottawa, Ontario, April 8, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

NEVSUN RESOURCES LTD.

Appellant/Garnishee

and

DELIZIA LIMITED

Respondent/Garnishor

and

STATE OF ERITREA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter, Outline of Proceedings, and Summary of Disposition

[1] This is a motion appeal from the decision of Prothonotary Morneau [Prothonotary] dated January 9, 2015, which granted a final garnishment order in favour of the judgment creditor Delizia Limited [Delizia or the Respondent] against the garnishee, Nevsun Resources Ltd. [Nevsun or the Appellant] in respect of amounts allegedly owed by Nevsun to the judgment debtor, the State of Eritrea [Eritrea].

[2] 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 [technically a Garnishee Order to Show Cause, but for consistency with the Order under appeal, hereinafter referred to as Nevsun POG] against Nevsun dated July 31, 2013. After a hearing with notice and having heard from both Nevsun and Delizia, the Prothonotary granted Delizia a final Order of Garnishment [Nevsun FOG] against Nevsun on January 9, 2015, which is the subject of this appeal. Justice Kane stayed the Nevsun FOG pending this appeal by Order dated July 31, 2015.

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

[4] The appeal is allowed and both the Nevsun POG and the Nevsun FOG are set aside. In summary, and in my respectful opinion, there are no debts owing or accruing by Nevsun to Eritrea and or its *alter ego*, Eritrea National Mining Corporation [ENAMCo], and therefore, there is nothing to which a garnishment order may attach. The corporate veil may not be pierced in the circumstances of this case. Moreover, both the Nevsun POG and FOG are nullities because of non-compliance with the mandatory requirement to serve Eritrea imposed by the *State Immunity Act*, RSC 1985, c S-18 [*SIA*]. No final order of garnishment may be granted in this case. For these and other reasons, the appeal against the Nevsun FOG must be allowed. Therefore, it is not necessary to deal with the production orders; however if it were, I would allow the appeal against them as well.

II. Facts

A. *Contract between Delizia and Eritrea, Default and Arbitral Award*

[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 arbitration tribunal of the AISCC 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 the foreign judgment in this Court.

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

B. *Nevsun and the Bisha Mine in Eritrea*

[8] Nevsun was incorporated in 1965 under the laws of British Columbia. Nevsun is a Canadian publicly-traded company listed on both the Toronto Stock Exchange and the New York Stock Exchange.

[9] Nevsun's corporate structure was created before 2000, i.e., well before the events at hand. There are three foreign-incorporated and wholly-owned subsidiaries of Nevsun (Nevsun (Barbados) Holdings Ltd., Nevsun Africa (Barbados) Ltd. and Nevsun Resources (Eritrea) Ltd.) interposed between Nevsun itself and the operating mining company, Bisha Mining Share Company [BMSCo].

[10] Neither Nevsun nor any of the subsidiaries have ever had any dealings with Delizia; they are complete strangers to the contract between Eritrea and Delizia.

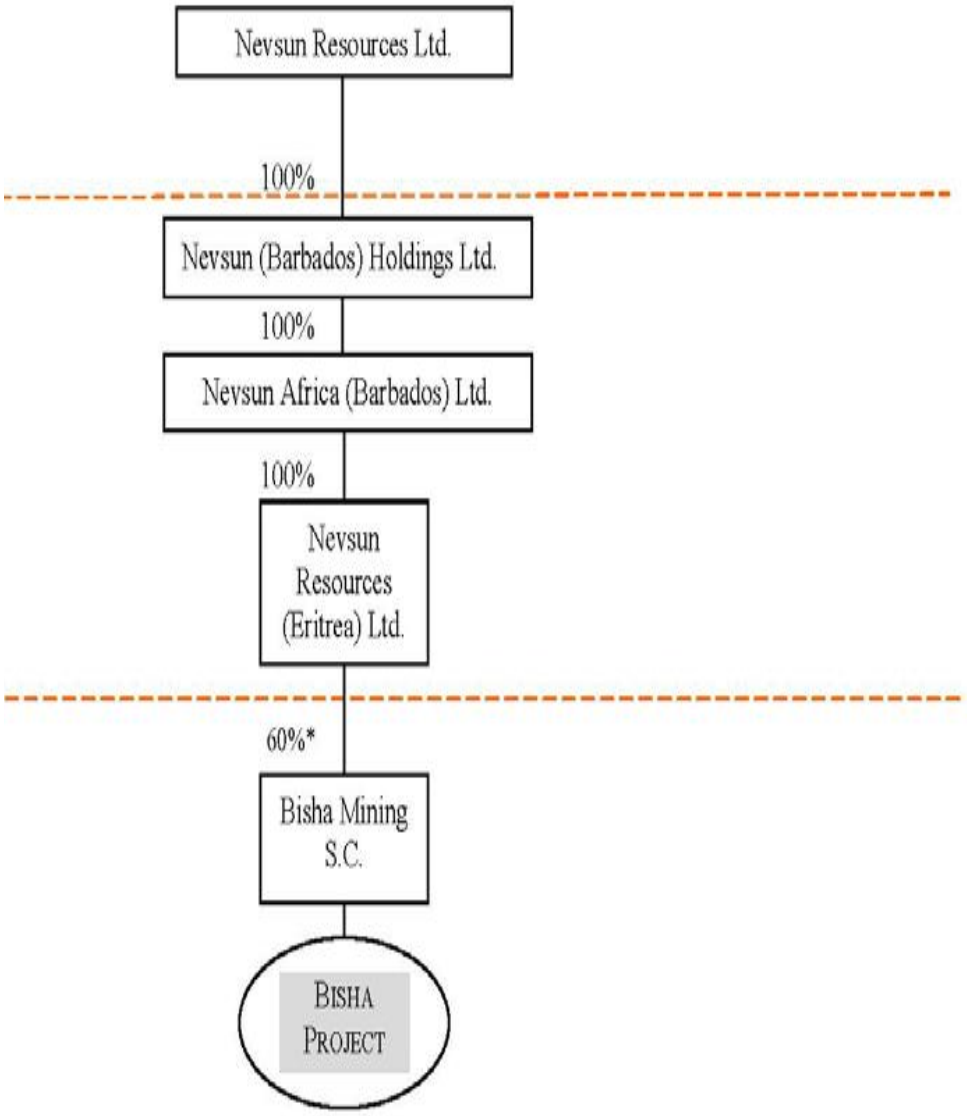
[11] BMSCo owns mining property located in Eritrea known as the Bisha Mine. BMSCo was incorporated in 2006 to formally establish a joint venture between Nevsun and the State of Eritrea through its *alter ego*, ENAMCo. BMSCo was incorporated in compliance with, and in my view, to comply with Eritrean law, in particular Eritrea's Proclamation 68/1995 (A

Proclamation to Promote the Development of Mineral Resources). This Proclamation states that Eritrea may acquire a 10% interest in mining companies such as BMSCo, essentially on demand. This Proclamation further provides that Eritrea may acquire additional equity by agreement, and in this case, Eritrea acquired an additional 30% interest. This Proclamation also obliges mining licensees such as BMSCo to pay royalties in addition to taxes and licence fees.

[12] BMSCo, as the joint venture company, is 60% owned by Nevsun Resources (Eritrea) Ltd. The other 40% of BMSCo is owned by ENAMCo, an Eritrean state-controlled entity. ENAMCo holds both the original 10% and 30% interests referred to above. ENAMCo is the *alter ego* of Eritrea.

[13] This joint venture arrangement authorizes and in my view enables the lawful exploitation of the Bisha Mine in Eritrea in accordance with Eritrean law.

[14] Nevsun's interest in the Bisha Mine and Nevsun's inter-corporate holdings are summarized as follows:



[15] It is common ground that the only income-producing asset in the Nevsun corporate structure is the Bisha Mine in Eritrea. BMSCo is the sole owner of the Bisha Mine. BMSCo holds the Bisha Mine mining licences issued by Eritrea, and BMSCo conducts all mining operations. BMSCo generates revenue from the Bisha Mine operation. This revenue is used to fund payments to Eritrea and or ENAMCo in the form of royalties, taxes and licence fees. In addition, BMSCo pays dividends to Nevsun's wholly owned subsidiary which owns 60% of the

shares of BMSCo. These payments totalled over $300 million CA in 2012, the year before these proceedings began.

[16] Nevsun's three intermediate wholly-owned subsidiaries are inactive and have no employees. All three have the same directors, including Mr. Clifford T. Davis, who is the CEO of Nevsun and Chairman of the Board of BMSCo.

C. *Debts Owing or Accruing by Nevsun to Eritrea*

[17] There are debts owing and accruing by BMSCo to Eritrea both directly, and by BMSCo to ENAMCo, Eritrea's *alter ego*.

[18] However, there are no debts owing or accruing by Nevsun to either Eritrea or to ENAMCo.

[19] Therefore, any liability of Nevsun for debts owing or accruing by BMSCo to Eritrea, may only arise through operation of law and in this case, may only arise if Delizia is able to persuade the Court to pierce the corporate veil that exists between Nevsun and BMSCo as separate legal personalities.

D. *Legal history of proceedings*

(1) Delizia's US garnishment proceedings

[20] Upon Delizia's successfully obtaining the Arbitral Award from AISCC against Eritrea (see paras 5 and 6 above), Delizia filed a Petition to Confirm Arbitration Award in a United

States District Court in 2009, which granted default judgment on February 5, 2010. However, on March 2, 2012, a United States District Court judge ruled a final garnishment order could not be granted, because Delizia had not established that 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 the property Delizia sought to garnish, was precluded from garnishment by the Vienna Convention on Diplomatic Relations.

(2) Delizia's garnishment proceedings in Canada

(a) *Recognition Order*

[21] 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. Rule 326 enables parties to enforce garnishment orders against Canadian persons or organizations that have a debt owing or accruing to a judgment creditor.

[22] The materials and pleadings before the Court (on this *ex parte* motion) made no reference to mandatory service of originating court documents on foreign states as required by section 9 of the *SIA*.

[23] By Order dated July 17, 2013, this Court granted Delizia its requested *ex parte* registration Order [Recognition Order]. The Recognition Order recognizes the Arbitral Award

thereby rendering it amenable to enforcement proceedings such as garnishment in this Court. The Recognition Order also provides 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."

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

[24] Delizia did not serve Eritrea with the Recognition Order by the modalities set out in the *SIA*. The *SIA* subsection 9(2) sets out mandatory 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.

[25] 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 renders both the Nevsun POG and FOG nullities.

(3) Delizia obtains ex parte Nevsun provisional order of garnishment [Nevsun POG]

[26] Having obtained the Recognition Order, Delizia applied, again *ex parte*, for a Provisional Order of Garnishment directed against Nevsun. The Prothonotary issued the Nevsun POG on July 31, 2013. This Order did two things. First, its garnishment component ordered "that any

debts owing or accruing from the garnishee [i.e., Nevsun] to the respondent [i.e., Eritrea] be attached to answer the [Recognition Order]." Secondly, its show cause component ordered Nevsun to declare all sums owing or accruing by Nevsun to Eritrea and to show cause why Nevsun should not pay to Delizia the debts owed by Nevsun 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 [Recognition Order]").

[27] On the same day, the Prothonotary made a similar Provisional Order of Garnishment at Delizia's request against Sunridge. This Judgment deals only with Nevsun. The Sunridge matter is dealt with separately in the same Court file.

(4) Nevsun final order of garnishment [Nevsun FOG]

[28] Delizia served Nevsun with the Nevsun POG sometime before August 19, 2013, and applied to the Prothonotary for a Final Order of Garnishment under Rule 449 and following to garnish debts owing or accruing by Nevsun to Eritrea and or ENAMCo, Eritrea's *alter ego*. Nevsun had notice of this proceeding and contested, asking that the motion for a Final Order of Garnishment be dismissed. Affidavits and exhibits were exchanged and cross-examinations conducted. Nevsun's position was that only BMSCo and not Nevsun, had debts owing or accruing to Eritrea in respect of the BMSCo's Eritrean mining operations.

[29] The Prothonotary found in favour of Delizia on January 9, 2015. He pierced the corporate veil and thereby found BMSCo's liabilities to Eritrea and ENAMCo could be garnished by Delizia. He found it appropriate to pierce the corporate veil because BMSCo was "only the mere

agent or puppet of Nevsun and that to conclude to the contrary, would yield a result for Delizia, which seeks to enforce the Judgment, that is too flagrantly opposed to justice".

[30] The Prothonotary noted many courts do not follow the "too flagrantly opposed to justice" test for piercing the corporate veil, preferring instead a test relying on the extent of "control", without more, the garnishee has over the company whose debts are to be attached. In this connection, the Prothonotary found Nevsun's controlling interest in BMSCo enabled it in effect to have "complete control over BMSCo", adding that nothing in the evidence rebutted that perception.

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

[32] The Nevsun FOG does not discuss which debts owing or accruing by BMSCo to Eritrea or ENAMCo should be garnished and which are exempt as related to "commercial activity" under section 5 and paragraph 12(1)(b) of the *SIA*; the Nevsun FOG orders the attachment of "all debts". However, the Prothonotary noted that Nevsun's material refers to the following debts: "income taxes, stamp duties, withholding and other taxes, royalties, customs and duties, mining, exploration and business license fees". It appears all were considered garnishable.

[33] The Nevsun FOG also ordered Nevsun to answer certain questions which are discussed in detail towards the end of these Reasons.

[34] Costs were awarded against Nevsun in favour of Delizia.

III. Issues

[35] This matter 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 Nevsun to answer certain questions objected to in cross-examination?

IV. Analysis

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

[36] First, the Court must determine the nature of this 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*.

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).

[37] Justice Beaudry in *Corporation Steckmar, Re,* 2004 FC 1568 [*Steckmar*] had earlier explained in a garnishment case, albeit 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]

[38] In my view, the Prothonotary's discretionary order in this appeal of the Nevsun FOG is 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 on its own and determine if

there are debts owing or accruing by Nevsun to Eritrea and or ENAMCo, that is, the Court must decide if a final order of garnishment should issue. I will also consider findings made by the Prothonotary.

[39] Different principles apply to the appeal concerning production orders to be dealt with later in these Reasons.

2. *Should a Final Order of Garnishment issue in this case?*

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

[40] Delizia may only succeed if it establishes that there is a debt owing or accruing by Nevsun - as the proposed garnishee - either to Eritrea as judgment debtor or to ENAMCo as its *alter ego*: see Rule 449 of the *Rules*. 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	(ii) les créances échues ou à échoir dont est redevable un

to a judgment debtor, where the debt is one for which the person might be sued in Canada by the judgment debtor,

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.

Marginal note: Service of show cause order

(2) An order to show cause made under subsection (1) shall be served, at least seven days before the time appointed for showing cause,

(a) on the garnishee personally; and

(b) unless the Court directs otherwise, on the judgment debtor.

Marginal note: Debts bound as of time of service

(3) Subject to rule 452, an order under subsection (1) binds the debts attached as of the time of service of the order.

[emphasis added]

tiers ne se trouvant pas au Canada et à l'égard desquelles le débiteur judiciaire pourrait intenter une poursuite au Canada;

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.

Note marginale: Signification

(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) au tiers saisi, par signification à personne;

b) au débiteur judiciaire, sauf directives contraires de la Cour.

Note marginale: Prise d'effet de l'ordonnance

(3) Sous réserve de la règle 452, l'ordonnance rendue en vertu du paragraphe (1) grève les créances saisies-arrêtées à compter du moment de sa signification.

[soulignement ajouté]

[41] In other words, the *Rules* require some basis on which to ground a finding that a debt was owing or accruing by Nevsun as garnishee to the judgment debtor Eritrea and or ENAMCo: *Champlain Company Limited v The Queen*, [1976] 2 FC 481 (FCA).

[42] In this case, there is no evidence of a debt owing or accruing by Nevsun to Eritrea, nor is there any evidence of any debt owing or accruing by Nevsun to ENAMCo. While BMSCo has paid and is continuing to pay money, indeed quite substantial amounts of money, to both ENAMCo and Eritrea in the form of dividends, royalties, licence fees and taxes, Delizia is not entitled to garnish such payments from Nevsun, unless this Court pierces the corporate veil that presumptively exists between Nevsun and BMSCo as separate legal entities. Certain payments may also be exempt from garnishment under the *SIA*, which I will consider later.

[43] However, and with respect, the corporate veil may not be pierced in this case for the following reasons.

(2) There is no improper conduct or conduct akin to fraud as required to pierce the corporate veil

[44] 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 statutory 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 at para. 51).
>
> [emphasis added]

[45] I am bound by this decision of the Federal Court of Appeal. I wish to add that many other cases in many other jurisdictions apply the same approach and require 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]

[46] 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*].

[47] 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. This test would

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 rule 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]

[48] I note the Prothonotary relied on the first part of paragraph 12 of *Kosmopoulos* to pierce the corporate veil so as to fix Nevsun with BMSCo's obligations to ENAMCo and Eritrea, and to base his finding that: "BMSCo is only the mere agent or puppet of Nevsun and that to conclude to the contrary would yield a result for Delizia, which seeks to enforce the Judgment, that is too flagrantly opposed to justice" [emphasis added].

[49] 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 [*Emtwo*] at paras 127-128, 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.

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

v Cape Industries plc [1990] Ch 433 (Slade, Mustill and Ralph Gibson L JJ). 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 free-wheeling "just and equitable" approach as smacking 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.

[51] In any event, I am not persuaded Nevsun's actions by any means constituted "conduct too flagrantly opposed to justice". It is important to note that Nevsun set up BMSCo in Eritrea in 2006 – well before and completely unconnected with the dispute at hand. Moreover, in my view, ENAMCo was given and obtained a 40% interest in BMSCo to accommodate legal requirements imposed by the State of Eritrea concerning local ownership and control of mining interests within its territory. The Prothonotary also found BMSCo was not put in place to avoid garnishment.

[52] These longstanding arrangements constituted legitimate business purposes. There is no evidence in this case of fraud, conduct akin to fraud or improper conduct on the part of Nevsun or its subsidiaries. Whatever payments were made by BMSCo to ENAMCo or Eritrea were made under longstanding arrangements that well predate these proceedings altogether. Nor is this the case of a company incorporated as an afterthought to cover sham transactions. BMSCo was separately incorporated to allow for the ownership of assets in Eritrea to be held jointly between ENAMCo and Nevsun and to meet the requirements of Eritrean law.

[53] These legitimate business purposes both introduce and support my finding that BMSCo's incorporation was valid as a separate legal entity from Nevsun. The Prothonotary's finding that the corporate structure was "[certainly]… not put in place to avoid this garnishment" was correct. However, it is inconsistent with his subsequent suggestion that by keeping the structure in place, Nevsun sought to protect itself in the event of such a proceeding. Potential garnishees are under no obligation to re-arrange long-standing and legitimate corporate arrangements to accommodate potential garnishors, and they should not be faulted for not doing so.

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

[54] 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. There is no evidence of agency in this case. Nevsun only indirectly holds a 60% interest in BMSCo through a series of wholly-owned subsidiaries, while ENAMCo holds 40%. In my view, Nevsun's partial indirect ownership in this case is insufficient to ground a finding of agency. The evidence does not support complete control of ENAMCo by Nevsun, nor does it support a finding that BMSCo acted as a mere puppet or agent of Nevsun: to say that would be to ignore the influence on BMSCo exercised by ENAMCo.

[55] In any event, the case law is clear that control alone cannot, without more, constitute either express or implied agency sufficient to lift the corporate veil. If it were otherwise, the corporate veil would be lifted for 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*. While the Prothonotary appears to have found agency in order to lift the corporate veil, I am unable to agree.

[56] 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 in my respectful view insufficient to justify lifting the corporate veil in the absence of 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 the Federal Court of Appeal's decision in *Meredith*.

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

[57] *Angelica Choc* identifies a third category of relationships in which a corporate veil may be lifted, namely where statutes require that to be done. Examples include 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. This exception does not apply in this case.

[58] With respect, my finding that the corporate veil may not be pierced disposes of this appeal and requires that the Nevsun FOG be set aside.

(3) Failure to appeal, *res judicata* and rule against collateral attacks

[59] In the alternative, Delizia argues that Nevsun is precluded from attacking the Nevsun FOG because of *res judicata*, Nevsun's failure to appeal or otherwise attack the FOG, and the rule against collateral attacks. In my view, none of these arguments have merit.

[60] Generally, I am unable to accept that a finding made on an *ex parte* application for a Recognition Order or an *ex parte* application for a provisional order of garnishment bind the Court hearing a final order of garnishment. In my view, such findings in this case are rebuttable. The provisional order of garnishment expressly required the garnishee Nevsun to "show cause why it should not pay" the debts sought to be garnished. Nevsun, when it got the chance to address this Court, did just that. In my view, Nevsun was at liberty to challenge findings made without notice to it in both the Recognition Order and the Nevsun POG. To hold otherwise would defeat the purpose of the mandatory "show cause" component of Rule 449(1)(b) which requires the proposed garnishee be given an opportunity to "show cause why the person should not pay" the debts alleged to the judgment creditor.

(a) *Failure to appeal*

[61] In my respectful view, the suggestion Nevsun should have appealed or challenged the POG (or the Recognition Order) is unconvincing for several reasons. I see no reason why Nevsun should have employed Rule 399 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 separate and 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 certainly should not be 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 Nevsun POG should be converted to a final order of garnishment.

(b) *Res judicata*

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

[63] In bringing its "causes" to the attention of the Court for adjudication on the Court-ordered "show cause" hearing, Nevsun is doing as allowed and contemplated by Rule 449(1)(b): Nevsun was entitled to and in this respect was showing cause why the POG should not be made final.

(c) *Collateral attack*

[64] I do not agree that Nevsun is 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 the "show cause" provision in the *Rules* which not only authorized but compelled Nevsun to "show cause" why a final order of garnishment should not be made: Rule 449(1)(b). Therefore in my view, the collateral attack rule does not apply. What transpired was not a collateral attack but simply the showing of cause why the POG should not be made into a FOG.

(4) Service on Eritrea waived in Recognition Order and in POG

[65] There is no doubt that both the Recognition Order and the Nevsun POG purport to waive service on Eritrea. However, in my respectful view, the Court acting under its *Rules* is unable to waive compliance with service requirements of the *SIA*. That was the express finding of Justice Martineau in *TMR Energy Ltd v State Property Fund of Ukraine*, 2004 Carswell Nat 6249 [*TMR*] who explained why in the following terms:

> 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]

[66] Canada's international obligations to other nations as embodied 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* must be given precedence over subordinate legislation such as the *Rules*, for the reasons articulated by this Court in *United States of America v Zakhary*, 2015 FC 335 at paras 20-23 [*Zakhary*].

(5) Additional grounds of appeal raised before this Court but not before the Prothonotary

[67] Nevsun raised two new issues of law it appears not to have raised before the Prothonotary:

1. whether the Recognition Order, POG and FOG are nullities because Eritrea was not served in accordance with the *State Immunity Act* [*SIA*] prior to the issuance of the POG and FOG; and
2. whether "income taxes, stamp duties, withholding and other taxes, royalties, customs and duties, mining, exploration and business license fees" or any of them relate to commercial activity and are therefore immune from garnishment by virtue of section 5 the *SIA*.

[68] The threshold issue is whether the Court should address these new arguments. Both were fully argued before this Court both in extensive written filings and over the two- day hearing. I am not aware of any prejudice occasioned to Delizia by having these issues considered. I was not advised, for example, that new evidence would have been submitted or that further examinations or exchanges of material were necessitated, nor was I asked for any such relief. Both issues concern legal arguments arising out of the facts.

[69] I have decided to consider these additional arguments. In doing so, I adopt the Supreme Court of Canada's view on new arguments: "[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without prejudice to the opposing party and where the refusal to do so would risk an injustice": *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club,*

Ltd, [2002] 1 SCR 678 at para 33 per Binnie J.; and see *Renova Holdings Ltd v Canadian Wheat Board,* 2006 FC 71 (Blanchard J.) at para 33; *Hall v Canada (Attorney General),* 2013 FC 933 (Crampton, CJ). I also wish to avoid a risk of injustice.

New Issue 1: Non-compliance with the State Immunity Act [SIA]

[70] There is no need to look at this issue because I have found there are no debts to garnish, that is, no debts are owing or accruing by Nevsun to Eritrea and or ENAMCo because the corporate veil may not be pierced on this record.

[71] However, for completeness and in the event I am wrong, I am of the view that both the Nevsun POG and FOG must be set aside. In this connection, the key statutory provision is section 9:

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	(2) La signification

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.	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.
…	…

[72] To succeed in this case on this issue, Delizia must establish that Delizia served Eritrea with the originating document leading to the Recognition Order. However, Eritrea was not served. As a consequence of non-compliance with the *SIA* service requirements, the Nevsun POG and FOG are nullities. This consequence was set out by this Court in *Zakhary*.

[73] *Zakhary* was decided two-plus 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 USA sought and obtained judicial review; the enforcement Certificate was set aside.

[74] Justice Rennie (as he then was) in *Zakhary* summarized the mandatory requirement of service under 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]

[75] This Court came to the same conclusion, namely that service under subsection 9(2) of the *SIA* is mandatory in *TMR*. In *TMR*, a dispute arose between the State Property Fund of Ukraine [SPF] (an organ 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 in Sweden. Justice Martineau refused to grant an order registering, recognizing and enforcing a final arbitration award. Justice Martineau found, as here, that the state concerned was not served per subsection 9(2) of 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]

[76] A unanimous Federal Court of Appeal upheld Justice Martineau's decision without 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.

[77] There is no dispute that Eritrea was not served in accordance with the *SIA*. Therefore, both the Nevsun POG and FOG are nullities.

> *New Issue 2: Whether "income taxes, stamp duties, withholding and other taxes, royalties, customs and duties, mining, exploration and business license fees" or any of them relate to commercial activity and are therefore immune from garnishment by virtue of section 5 because they are commercial activities under the SIA*

[78] Because I have found the corporate veil may not be pierced, and because I have also found the POG and FOG to be nullities due to non-compliance with the *SIA*, it is not necessary to deal with whether "income taxes, stamp duties, withholding and other taxes, royalties, customs and duties, mining, exploration and business license fees" are immune from seizure under the *SIA* or liable to seizure because these are "proceedings that relate to any commercial activity of

the foreign state" [commercial activity exemption] as set out in section 5 and paragraph 12(1)(b) of the *SIA*. I will nonetheless deal with these issues for completeness.

(i) "Commercial Activity" exemption to state immunity under section 5 of the *SIA*

[79] The starting point is the legislation. Subsection 3(1) of the *SIA* is the general provision which says that a foreign state is immune from the jurisdiction of any court in Canada:

State immunity	**Immunité de juridiction**
3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	3 (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.

[80] Section 5 carves out "commercial activity" from the above in the following terms:

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]

[81] Paragraph 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	12 (1) Sous réserve des

(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	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 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 [.]	b) les biens sont utilisés ou destinés à être utilisés soit dans le cadre d'une activité 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) [.]

[82] The *SIA* establishes a presumptive immunity for foreign states from the jurisdiction of Canadian courts, including 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.

[83] I accept that the *SIA* is a codification of the law on state immunity. Foreign states are immune from domestic courts except in limited circumstances, as set out in that statute. 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."

[84] In order to determine whether the "commercial activity" exception under the *SIA* is available, the 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.

[85] In this connection, 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]

[86] I turn to the proper classification of the debts owing and accruing in this case as identified by the Prothonotary and Nevsun.

(6) Status of income taxes, stamp duties, withholding and other taxes, customs and duties, mining, exploration and business licence fees

(a) *Income taxes, stamp duties, and other taxes, customs and duties*

[87] In my respectful view, income taxes, in addition to stamp duties, other taxes, customs and duties are not properly categorized as payments related to commercial activity. Instead, the nature and purposes of these payments, which are of course imposed by the state, are quintessentially obligations imposed by a sovereign state on those who carry on business within the reach of such sovereign state. In imposing such obligations, the State of Eritrea was not acting "in the manner of a private player" within the market. It was acting as a sovereign entity, and indeed acting as only a sovereign power may act. These are simply payments imposed for the purpose of raising funds for the State of Eritrea; no evidence suggests they have either the nature or purpose of payments related to "commercial activity".

(b) *Mining, exploration and business licence fees*

[88] I conclude that mining, exploration and business licence fees are not properly categorized as payments related to "commercial activity". Instead, their nature and purposes are also quintessentially the imposition of regulatory obligations imposed by a sovereign state on those who carry on business within the reach of that state, in this case, 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 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 and 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.

[89] These fees therefore serve the legitimate and commonplace government purpose of allowing a state, 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".

(c) *Withholding taxes*

[90] As to withholding taxes, the Prothonotary ruled they did not constitute "commercial activity" in the parallel case of *Sunridge* (see: 2015 FC 34); I agree and no appeal was taken. There is no reason to attach withholding taxes in this file where they are not attachable in the Sunridge appeal. Indeed, it is not clear if the Prothonotary intended to attach withholding taxes in this case, but for clarity I find that they are not garnishable.

(d) *Royalties and dividends*

[91] The remaining debt owing and accruing are royalties and dividends. In my view, dividends are properly be characterized both in terms of their context and nature, as payments related to "commercial activity". I say this because dividends are the fruits of and directly relate to "commercial activity" namely the BMSCo's commercial mining activity.

[92] Royalties on the other hand, are paid not by agreement but by force of law: Eritrea's Proclamation 68/1995 referred to earlier (see para 11) imposes a legal duty on Nevsun to pay royalties. Royalties give a state its "due"; in this case, a share in the upside of commercial mining activity. I agree that royalties flow from "commercial activity" and are calculated on the basis of "commercial activity". That said, in my view, royalties are simply another form of taxes. They are simply payments a state compels an entity within its control to make. The nature and context of royalty payments are quintessentially obligations imposed by a sovereign state and fall into the same category as taxes for the reasons discussed above.

[93] If the POG and FOG were not nullities as a result of failure to comply with the *SIA*, and had it been legally permissible to pierce the corporate veil, I would have agreed with the Prothonotary and held that royalties and dividends are subject to garnishment under the Nevsun FOG. But that point is academic given my findings.

3. *May Nevsun challenge the Recognition Order re: "commercial activity"?*

[94] Delizia also argues that Nevsun should not be allowed to raise the issue of what is or what is not "commercial activity" because that entails a challenge to the Recognition Order,

which found debts allegedly owing and accruing by Nevsun to Eritrea and or ENAMCo were "commercial activity" under the *SIA*; 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." I have already considered and rejected a variant of this argument in my finding that on the Court-ordered "show cause" a prospective garnishee is entitled to rebut findings such as this made in a recognition award and a provisional order of garnishment sought and obtained without notice to the garnishee.

4. *Did the Prothonotary err in ordering Nevsun to answer certain questions objected to in cross-examinations?*

[95] Turning to the productions sought, the standard of review for a reviewing judge of production orders made by a prothonotary is found in *R v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 at paras 67-68 [*Aqua-Gem*]. The reviewing court is only to 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.

[96] 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.

[97] The threshold issue in this case was whether Delizia could persuade the Court to pierce the corporate veil that presumptively exists in law between Nevsun and BMSCo. Nevsun resisted disclosing some information requested by Delizia in advance of the hearing of the FOG motion on the ground it was irrelevant to a determination of whether the corporate veil could be pierced. I agree with Nevsun's position and find that ordering Nevsun to answer Delizia's questions was therefore based on a wrong principle. Each class of questions is discussed below.

[98] The productions sought are:

1. Produce, for the period starting on the day Mr. Davis was served with the garnishment order, the interim quarterly or monthly statements for each of Bisha Mining Share Company, Nevsun Resources Eritrea, Nevsun Africa, and Nevsun Barbados.
2. Produce a copy of the Shareholders' Agreement in existence as of July 2013, as amended as the case may be.
3. Determine what sum, from all the cash controlled directly or indirectly by Nevsun Resources Limited as of July 1, 2013, if any, is owed directly or indirectly to the State of Eritrea, is held in trust in favour of the State of Eritrea, or is payable now or in the future to the State of Eritrea.
4. Identify the country where the bank account in the name of Bisha Mining Share Company is located.
5. Advise as to whether payments of royalties come from funds held by Bisha Mining Share Company inside Eritrea or outside of Eritrea.

6. Verify and inform whether any of Nevsun Barbados Holdings, Nevsun Africa, or Nevsun Eritrea have made any form of payments to BMSCo on or after July 1, 2013.

7. Provide for the names of the non-Eritrean members of BMSCo's Board of Directors.

[99] Nevsun was asked these questions to enable Delizia to obtain a final order of garnishment. I see no practical utility in ordering such questions answered once their purpose has been served. If I am correct in finding that the POG and FOG are both nullities and that the corporate veil may not be pierced, I see no point in compelling Nevsun to answer.

[100] With these general findings in mind, I would answer the production issues as follows.

[101] With respect to the first class of questions at issue, Delizia sought production of financial statements of BMSCo and the intervening Nevsun subsidiaries to determine if they made any payments to Eritrea. However, Nevsun's indirect majority control of BMSCo and BMSCo's payments to Eritrea and or ENAMCo for royalties, taxes, and the like are not in dispute; they are admitted facts. Whether the other subsidiaries make payments to Eritrea and or ENAMCo is irrelevant to the issue of whether the corporate veil should be pierced. Even if other Nevsun subsidiaries made payments to Eritrea, this would not establish that BMSCo was a mere agent or puppet of Nevsun, nor would it indicate there was conduct akin to fraud.

[102] Delizia also sought production of financial statements from BMSCo and the intervening Nevsun subsidiaries to ascertain whether they had continued to make payments to Eritrea in defiance of the POG's prohibition on Nevsun disposing "of the said sums until the Court has ruled on this matter". Assuming the POG was valid, the FOG proceedings turn on whether the Court should pierce the corporate veil. Delizia is not allowed to carry out a fishing expedition. This question is not relevant to piercing the corporate veil. While it goes to Nevsun's duty to comply with the POG, I would not allow it, because it is not relevant to the threshold issue of piercing the corporate veil.

[103] As for the second class of questions, Delizia sought production of the BMSCo Shareholders' Agreement between Nevsun's subsidiary and ENAMCo. I note that Nevsun's indirect majority control of BMSCo is not in dispute. Where there is no finding of conduct akin to fraud, and where the BMSCo shareholding structure is based on Eritrean requirements to give more control to Eritrea over the exploitation of its natural resources, the information contained in the Shareholders' Agreement is of questionable relevance to the issue on the FOG hearing for the determinative issue, namely whether this Court should pierce the corporate veil. If the FOG is granted, Nevsun must pay and Delizia has its remedies in examination in aid of execution, enforcement and otherwise. If the FOG is not granted, there is no point ordering this production. That said, on balance, I would not interfere with the Prothonotary's discretion because the answer might be relevant to piercing the corporate veil.

[104] With respect to the third class of questions, Delizia sought to know the amount of cash owed directly or indirectly by Nevsun to Eritrea. Nevsun denied that it has any direct obligations.

The inquiry as to "indirect" obligations must concern whether any of its subsidiaries owe any money to Eritrea. Nevsun does not dispute that BMSCo has obligations to ENAMCo and or Eritrea. Whether other subsidiaries made payments to Eritrea is irrelevant to the issue of whether the corporate veil should be pierced.

[105] As for the fourth class of questions, Delizia seeks the location of BMSCo's bank accounts. In my view, the request is intended to facilitate execution against BMSCo's assets outside of Eritrea. It is premature in addition to being irrelevant to the issue of whether the corporate veil should be pierced.

[106] Similarly, Delizia's fifth class of questions seeks to determine the source location of funds which BMSCo uses to pay royalties to Eritrea. This request is likewise premature in addition to being irrelevant to the issue of whether the corporate veil should be pierced.

[107] With respect to the sixth class of questions, Delizia seeks to determine whether any of Nevsun's wholly owned subsidiaries have made any payments to BMSCo. In my view, this also is irrelevant to the issue of whether the corporate veil should be pierced.

[108] The seventh question asks for the names of non-Eritrean members of BMSCo's Board of Directors. I would not interfere with the Prothonotary's discretion as it may be relevant to piercing the corporate veil.

[109] In sum, had I not found the POG and FOG nullities for non-compliance with the *SIA*, and that the corporate veil could not be pierced, I would not have ordered the requested productions except re: questions 2 and 7.

V. Costs

[110] In my view, costs should follow the normal rules and therefore should follow the cause in this case. Therefore costs are awarded in favour of Nevsun here and below. Nevsun filed a detailed bill of costs covering the Final Order of Garnishment proceeding, the stay and this appeal, which are reasonable except that those costs claimed by Nevsun under Column V should be recalculated at the midpoint of Column IV. If further direction is required, the parties may file written representations within 15 days of the date of this decision.

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 as nullities;

3. Costs are payable by Delizia to Nevsun 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 Nevsun, except that those costs claimed under Column V should be recalculated at the midpoint of Column IV. If further direction is required, the parties may file written representations within 15 days of the date of this decision.

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

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STYLE OF CAUSE:	NEVSUN RESOURCES LTD.v DELIZIA LIMITED v STATE OF ERITREA
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No One Appearing	FOR THE RESPONDENT

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