CITATION: Belokon et al. v. The Kyrgyz Republic, 2016 ONSC 4506
COURT FILE NOS.: CV-15-10890-00CL
CV-15-11142-00CL
CV-11-9419-00CL
CV-14-10731-00CL
DATE: 20160711

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: VALERI BELOKON, Applicant ("**Belokon**")

AND:

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: ENTES INDUSTRIAL PLANS CONSTRUCTION & ERECTION CONTRACTING CO. INC., Applicant ("**Entes**")

AND:

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: SISTEM MÜHENDISLIK İNŞAAT SANAYI VETICARET ANONIM SIRKETI, Applicant ("**Sistem**")

AND:

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: STANS ENERGY CORP., Applicant ("**Stans**")

AND:

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

BEFORE: Conway J.

COUNSEL: *Peter Cavanagh* and *Chloe A. Snider*, for Belokon

Robert Wisner and *Stephen Brown-Okruhlik*, for Entes

Steven G. Frankel, for Sistem

John Terry and *Vitali Berditchevski,* for Stans

Aaron Rubinoff and *John Siwiec*, for The Kyrgyz Republic

Matthew Latella, Christina Doria and *Matt Saunders*, for Kyrgyzaltyn JSC

HEARD: June 28 and 29, 2016

REASONS FOR DECISION

[1] Belokon, Entes, Sistem and Stans (the "**Applicants**") have brought applications in Ontario to recognize and enforce arbitral awards in their favour against the Kyrgyz Republic (the "**Republic**" or the "**Government**").[1]

[2] While each of these applications is a separate proceeding, they all have one issue in common: each Applicant seeks a declaration that the Republic has an ownership interest in shares of Centerra Gold Inc. ("**Centerra**"), a Canadian company, that are registered in the name of the Republic's wholly owned subsidiary Kyrgyzaltyn JSC. The Applicants submit that the ownership interest of the Republic in the Centerra shares is subject to seizure by way of execution under the *Execution Act*, R.S.O. 1990, c. E.24.

[3] This hearing was held to determine the common issue in all four applications.[2] For the reasons that follow, the applications for a declaration that the Republic has an exigible ownership interest in Centerra shares are dismissed.

Overview of the Kumtor Project

[4] The Republic, formerly a territory within the USSR, gained independence as a country in 1991. Shortly thereafter, it started to attract foreign investors for the exploration and development of the Kumtor Gold Mine, the country's largest gold mine and a key strategic asset (the "**Kumtor Project**").

[5] In 1992, the Republic granted rights for the Kumtor Project to CJSC Kumtor Gold Company ("**Kumtor Gold Co.**"). Originally, Kumtor Gold Co. was owned 66.67% by Kyrgyzaltyn State Concern (a state concern with no separate existence), and 33.33% by Kumtor Mountain Corporation, a subsidiary of Cameco Corporation, a Canadian company.

[6] In the late 1990s, the Republic was moving from a state-controlled economy towards a more modern market economy. As part of that effort, the Republic restructured the Kumtor

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[1] The arbitral award in favour of Stans has been set aside. Stans is challenging the set aside decision in its Ontario recognition application.

[2] Since the issue of the Republic's interest in the Centerra shares was common to all four applications, and to avoid any inconsistency of results, this hearing proceeded for a single determination of the issue for the four applications. All counsel consented to or did not oppose proceeding on that basis. Centerra did not appear or take a position on the issue.

Project and transferred its shares in Kumtor Gold Co. from the state concern to a "joint stock company", Kyrgyzaltyn JSC ("**Kyrgyzaltyn**"). In exchange for the transfer, the Republic became the 100% shareholder of Kyrgyzaltyn.

[7] Under the Kyrgyz Civil Code (the "**Code**"), a joint stock company ("**JSC**") is a commercial company that has full ownership rights to its assets.[3] The Code provides that upon establishment of a JSC and the transfer of assets to it by its founders, the founders no longer have any property rights in the assets transferred but instead obtain shareholder rights in the company. Accordingly, once the Republic transferred the shares of Kumtor Gold Co. to Kyrgyzaltyn, the shares became the property of Kyrgyzaltyn and the Republic relinquished any rights it had in those assets.

[8] According to the Kyrgyz law governing joint stock companies ("**JSC Law**"),[4] a joint stock company's assets are to be separately accounted for on its own balance sheet; shareholders are not responsible for the liabilities of the company; and the company is not responsible for the liabilities of its shareholders.

[9] In 2003, the Kumtor Project was further restructured. The shareholders of Kumtor Gold Co. transferred their shares of Kumtor Gold Co. to Centerra, in exchange for which they received shares in Centerra. Kyrgyzaltyn received a 33% shareholding in Centerra (the "**Initial Shares**") and Cameco Corporation and its related entities (collectively, "**Cameco**") received a 67% shareholding in Centerra. At that point, Kyrgyzaltyn and Cameco were the sole shareholders of Centerra, which in turn operated the Kumtor Project through its operating subsidiaries. In 2004, Kyrgyzaltyn sold some of the Initial Shares, reducing its Centerra shareholding to approximately 17%.

[10] The uncontradicted evidence of Kyrgyzaltyn and the Republic is that:

- the Centerra shares have been accounted for as an asset on Kyrgyzaltyn's financial statements;
- the Centerra shares have not been listed on the registry of state property maintained by the State Property Fund (the entity that manages the Republic's shareholdings in companies such as Kyrgyzaltyn). There is no evidence of any accounting or other record that identifies the Centerra shares as assets of the Republic;
- all dividends on the Centerra shares have been paid by Centerra to Kyrgyzaltyn; and
- Kyrgyzaltyn attends and votes at meetings of Centerra shareholders.

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[3] This is unlike a transfer of assets by the Republic to a "state institution" or a "state enterprise" where the Republic continues to own the assets after the transfer.

[4] *The Law of Business Partnerships and Companies No. 60*, 15 November 1996, Chapter 4 of which was later replaced by the *Law on Joint Stock Companies No. 64*, 27 March 2003.

The Agreement on New Terms

[11] Several years later, disputes arose between Centerra and the Republic about the Kumtor Project. Centerra and Kumtor Gold Co. commenced an investor-state arbitration against the Republic. In 2008, the parties agreed to suspend the arbitration to negotiate and establish new ownership terms for the operation of the Kumtor mine. This culminated in the "Agreement on New Terms for the Kumtor Project" dated April 24, 2009 (the "**ANT**").

[12] The ANT is an umbrella agreement among the Government (acting on behalf of the Republic), Kyrgyzaltyn, Cameco, Centerra and its two operating subsidiaries. The ANT refers to the settlement of all claims in the arbitration and sets out, in detail, the basis for amended agreements to govern the Kumtor Project.

[13] The second recital to the ANT (on which the Applicants rely as discussed below), describes the existing shareholders of Centerra. It reads (my emphasis in this and following clauses added in bold):

> Whereas, Cameco, directly or through its subsidiary Kumtor Mountain Corporation, which is in turn wholly owned by Cameco Gold Inc., a wholly-owned subsidiary of Cameco, and Kyrgyzaltyn, **which holds shares in Centerra on behalf of the Government (Kyrgyzaltyn, together with the Government, the "*Kyrgyz Side*")** are the largest shareholders in Centerra;

[14] Under the ANT, the Republic expanded the Kumtor mining concession and implemented a more favourable tax regime for one of Centerra's operating subsidiaries. In exchange, Kyrgyzaltyn acquired an additional 15.7% of the shares of Centerra (43,532,615 common shares) (the "**Additional Shares**"), bringing Kyrgyzaltyn's shareholding in Centerra up to 32.7%.

[15] The Additional Shares were acquired by Kyrgyzaltyn in two ways: (a) 25,300,000 through a transfer from Cameco pursuant to a custodial arrangement under which the shares were to be released to Kyrgyzaltyn on certain conditions (the "**Cameco Contributed Shares**"); and (b) 18,232,615 in treasury shares issued directly by Centerra to Kyrgyzaltyn (the "**Treasury Shares**").

[16] Section 2.1(a) is the operative section of the ANT with respect to the Cameco Contributed Shares:

> Cameco shall (out of its existing holding of Centerra common shares) deposit in escrow with the Custodian 25,300,000 common shares in Centerra (the "*Cameco Contributed Shares*") (without any off-setting, contribution, payment or issuance by Centerra in Cameco's favor) to be held **for the benefit of and on behalf of Kyrgyzaltyn and/or Cameco, as the case may be**. The Cameco Contributed Shares shall be held and transferred by the Custodian

> as provided in this Agreement on New Terms and the Custodian Agreement.

[17] Section 2.2(a) is the operative section of the ANT with respect to the Treasury Shares. The first sentence reads:

> On the Completion Date, the Treasury Shares shall be issued by Centerra to Kyrgyzaltyn so that Kyrgyzaltyn **will beneficially own and be entitled to all the benefits arising from** (including the exercise of all rights attaching to) such shares, subject only to the terms of this Agreement on New Terms and the Restated Shareholders' Agreement.

[18] The ANT provided that the existing shareholders' agreement for Centerra would be restated to reflect the new arrangements in the ANT. The parties to the restated shareholders' agreement (the "**RSA**") are Kyrgyzaltyn, Cameco Gold Inc., Kumtor Mountain Corporation and Centerra. The RSA states that Kyrgyzaltyn is the registered and beneficial owner of the Centerra shares. The Republic is not a party to the RSA.

[19] While the ANT provides that the Additional Shares are to be transferred or issued to Kyrgyzaltyn, the Applicants rely on the fact that there are references in the ANT to "the Kyrgyz Side" in relation to the Centerra shareholdings, including:

- **The Kyrgyz Side** shall have no restrictions on the transfer or encumbrance of any Centerra common shares it holds ... (Section 2.4(c));
- Any Centerra shares held by **the Kyrgyz Side** shall be subject to the provisions of Section 3.8 of the 2004 Shareholders Agreement ... (Section 2.4(d));
- Nominees [to be elected to the Centerra board of directors] shall include two individuals selected by the Government ... , provided, however, that (i) if **the Kyrgyz Side's** ownership in Centerra is less than 10% but is greater than 5%, Centerra shall only be required to include one nominee selected by the Government ...; and (ii) **if the Kyrgyz Side's** ownership in Centerra is equal to or less than 5%, without limiting any rights the Kyrgyz Side may have as a shareholder under applicable law, Centerra shall not be required to include any nominees selected by the Government ... (Section 3.3(a));
- The Restated Shareholders' Agreement shall not include any restrictions of the transfer or encumbrance of any shares in Centerra held by **the Kyrgyz Side** other than as provided in this Agreement on New Terms. (Section 5.8(c)).

[20] According to s. 6.5 of the ANT, the term "Kyrgyz Side" has the meaning given to it in the second recital – (Kyrgyzaltyn, together with the Government, the "*Kyrgyz Side*").[5]

[21] Section 6.6 provides that the ANT is to be governed by and construed in accordance with the laws of the State of New York.

Ratification of the ANT

[22] On April 24, 2009, the Prime Minister of the Republic signed the ANT for the Government and the President of Kyrgyzaltyn signed the ANT for that company. On the same day and in accordance with the conditions of the ANT, the Prime Minister signed a government resolution ("**Resolution 254**") requesting approval of the ANT from the Kyrgyz Parliament, the Jogorku Kenesh. Paragraph 5 of Resolution 254 reads:

> To authorize the open joint stock company "Kyrgyzaltyn", **on behalf of the Government of the Kyrgyz Republic**, to receive and hold shares in the company "Centerra Gold Inc." **which are owned by the Government of the Kyrgyz Republic in accordance with the Agreement mentioned under 1 of this Resolution [the ANT]**, and to exercise other rights with regard to said shares.

[23] The Jogorku Kenesh approved the ANT on April 30, 2009. Pursuant to the "**Law on Ratification**", the ANT acquired the status of law.[6] That same day, the Jogorku Kenesh also passed Decree No. 1141-IV, which instructed the Government to submit information to the Jogorku Kenesh regarding the ANT, including information concerning:

> ordinary shares received under the project "Kumtor" **to the benefit of the Kyrgyz Republic** from the company "Cameco Corporation" amounting to 25300000 and the additionally issued ordinary shares amounting to 18232615 shares, in the period before 1 July 2009.

Positions of the Parties

[24] The Applicants' position is that the Government is the owner of the Centerra shares and, as such, its ownership interest in the shares is subject to seizure and sale by the sheriff pursuant to section 18 of the *Execution Act*. Section 18 provides that the sheriff may seize and sell "any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property" of a debtor.

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[5] Technically, the definition only consists of the words in the parentheses in the second recital. The preceding words "Kyrgyzaltyn, which holds shares in Centerra on behalf of the Government" are not included in the definition.

[6] The Applicants did not argue or suggest that the Law on Ratification ranks ahead of or supersedes the property rights established by the Code.

[25] The Applicants rely on the ANT as the primary basis for their argument that the Government has an ownership interest in the Centerra shares. They argue that in the ANT, the Government and Kyrgyzaltyn agreed that the Government is the owner of the Centerra shares and that Kyrgyzaltyn is simply holding those shares on the Government's behalf.[7] The Applicants do not assert that the Republic has any other type of interest in the shares besides an ownership interest.

[26] The Applicants submit that the Republic's ownership interest can be seen from the wording of the second recital of the ANT (which states that Kyrgyzaltyn "holds shares in Centerra on behalf of the Government") and by the various references to the term "Kyrgyz Side" in the ANT set out above. They submit that when properly construed in accordance with New York law, the ANT is unambiguous in establishing the parties' intention with respect to the Government's ownership interest. They submit that if the court finds any ambiguity in the ANT, the language of Resolution 254 and Decree 1141-IV is evidence that supports their interpretation of the ANT that the Government owns the Centerra shares.

[27] The Applicants submit that they are not attempting to assert that the Republic has an interest in any assets that are the property of Kyrgyzaltyn. Their position is that, as a contractual matter, the parties agreed in the ANT that the Republic, not Kyrgyzaltyn, owns the shares that are registered in Kyrgyzaltyn's name. In other words, the Applicants assert that the Centerra shares are the property of the Republic, not of Kyrgyzaltyn.

[28] The position of the Republic and Kyrgyzaltyn is that the Centerra shares are owned by Kyrgyzaltyn and are the sole property of that corporation, as provided by the Code and JSC Law. They submit that the Government has no ownership interest in the Centerra shares, which are the property of Kyrgyzaltyn, and that the Government's interest is limited to its share ownership in Kyrgyzaltyn.

[29] The Republic and Kyrgyzaltyn argue that the ANT did nothing to alter the property rights of Kyrgyzaltyn in the Centerra shares. They submit that the ANT, properly construed, is unambiguous in establishing that Kyrgyzaltyn, not the Government, is the owner of the Centerra shares.

Applicable Legal Principles

[30] The *Execution Act* is remedial in nature and is to be construed liberally.[8] The Applicants submit that section 18 of the *Execution Act* should therefore be interpreted in a manner that facilitates the process of enforcing judgments, not in a manner that would deny creditors a

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[7] The Applicants submit that the court does not need to decide whether the Republic acquired this ownership interest before or on the date of the ANT, since the ANT contained provisions that gave legal effect to the agreement of the parties with respect to the Centerra shares. As stated in the Belokon factum, the "ANT either confirmed or superseded the prior legal relationship between [Kyrgyzaltyn] and the Government in respect of the Centerra shares." I note that, apart from the ANT, the Applicants do not rely on any document or agreement that purports to legally transfer any ownership rights in the Centerra shares from Kyrgyzaltyn to the Government.

[8] *Legislation Act, 2006*, S.O. 2006, C. 21, Sched. F, s. 64(1).

remedy. The Applicants acknowledge that they have the burden of proof in establishing that the Republic has an exigible interest in the Centerra shares.

[31] The *Execution Act* is a procedural statute. It does not create new rights – it only provides a process for the enforcement of otherwise existing rights.[9]

[32] The issue to be determined is whether the Republic has any "equitable or other right, property, interest or equity of redemption in or in respect of" the Centerra shares that are registered in Kyrgyzaltyn's name. If the Republic does, the court has the authority to order the sheriff to seize and sell the Republic's interest in those shares to satisfy a debt owed by the Republic to the Applicants. If the Republic does not, the procedural mechanisms of the *Execution Act* are not engaged.

Interpretation of the ANT

[33] As noted above, the ANT is to be interpreted in accordance with New York law. Both sides presented expert evidence on New York law. The experts agree on the following principles of contract interpretation:

- The fundamental principle is that agreements are construed in accordance with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing.

- A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.

- Recitals in a contract do not control the operative clauses of the contract unless the latter are ambiguous. Where a recital clause and operative clause are inconsistent and the recital clause is clear, but the operative clause is ambiguous, the recital clause should prevail. Where a recital clause and an operative clause are inconsistent, the operative clause, if unambiguous, should prevail.[10]

[34] Sections 2.1, 2.2 and 2.3 are the key operative provisions of the ANT with respect to the Additional Shares to be issued or transferred to Kyrgyzaltyn. Those sections clearly state that those shares are to be acquired by Kyrgyzaltyn. Section 2.1 states that the Cameco Contributed Shares are to be held by the custodian "for the benefit of" Kyrgyzaltyn (or Cameco, as the case may be). Section 2.3 provides that the Cameco Contributed Shares are to be released by the

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[9] As noted by Cumming J. in *DSLangdale Two LLC v. Daisytek (Canada) Inc.*, [2004] O.J. No. 5281 (Ont. S.C.), at para. 19, the regime for enforcing judgments is a procedural, not substantive, matter.

[10] Each of the experts also provided his own interpretation of the ANT applying these principles. I have not relied on those interpretations but rather have conducted my own analysis using the applicable New York legal principles.

custodian to Kyrgyzaltyn. There is no reference to the Government having any ownership interest in the Cameco Contributed Shares.

[35] Likewise, Section 2.2 states that the Treasury Shares are to be issued to Kyrgyzaltyn and that Kyrgyzaltyn "will beneficially own and be entitled to all the benefits arising from (including the exercise of all rights attaching to) such shares". There is no reference to the Government having any ownership interest in the Treasury Shares.

[36] There are additional references in the ANT to Kyrgyzaltyn's rights and status as a Centerra shareholder – for example, the right to vote shares (s. 2.2(b)); the right to receive dividends (s. 2.2(d)); a right of first refusal on a rights issue (s. 2.4(a)); and its status as an accredited investor under Canadian securities regulations (s. 2.5(c)). None of these sections refers to the Government as having any ownership interest in the Centerra shares.

[37] Further, the RSA (expressly contemplated by the ANT) explicitly refers to Kyrgyzaltyn as the registered and beneficial owner of the Centerra shares. There is nothing in that agreement that states or suggests that the Government is the owner of the Centerra shares.

[38] The Applicants submit that the Government owns the Centerra shares based on (i) the wording of the second recital that reads "Kyrgyzaltyn, which holds the shares of Centerra on behalf of the Government"; and (ii) the use of the term "the Kyrgyz Side" in various sections of the ANT.

[39] I reject the Applicants' submission, for several reasons.

[40] First, the Applicants rely on the words in the second recital and the defined term "the Kyrgyz Side" as constituting or evidencing an agreement that the Government owns all of the Centerra shares registered in Kyrgyzaltyn's name.[11] They argue that this applies to both the Initial Shares (that were Kyrgyzaltyn's property pursuant to the Code and JSC Law) and the Additional Shares (that Kyrgyzaltyn acquired under the ANT).

[41] In my view, if the parties had intended that the Government be the owner of all of these Centerra shares, they would not have done so on the strength of a few words and a definition contained in a recital. I note that there is nothing in the operative sections of the ANT that addresses the ownership of the Initial Shares or states that they are owned by the Government. The operative sections only address the Additional Shares, which are to be issued and transferred to Kyrgyzaltyn as the legal and beneficial owner. Further, nothing in the ANT conveys any rights in the Initial Shares or the Additional Shares from Kyrgyzaltyn to the Government; appoints Kyrgyzaltyn to hold any of the Centerra shares for the Government as the owner thereof; or refers to any other agreement or document that would have that legal effect.

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[11] The Applicants argue that the court should draw an adverse inference against the Republic for failing to put forth evidence of any witness with knowledge of the negotiations of the ANT. However, any such witness would only provide evidence of subjective intent, which is not to be considered in interpreting the ANT. There is no basis for me to draw an adverse inference.

[42] Second, as noted above, the wording in the key operative clauses of the agreement (Sections 2.1, 2.2 and 2.3) are clear that Kyrgyzaltyn is to be the registered and beneficial owner of the Additional Shares issued and transferred to it under the ANT. There is no need to refer to the recitals to interpret those sections.

[43] Third, even if I consider the language in the second recital, I do not find it inconsistent with those key operative clauses. In my view, the words "Kyrgyzaltyn, which holds the shares on behalf of the Government" simply reflect the fact that the Government is Kyrgyzaltyn's sole shareholder and ultimately derives the benefit of the Centerra shares that are owned by (and are the property of) its subsidiary. In any event, if there is any inconsistency between the key operative clauses and the recital, the key operative clauses are unambiguous and therefore prevail.

[44] Fourth, I read the use of the term "the Kyrgyz Side" in the sections set out above as general references to the shareholdings on the Kyrgyz Side, as opposed to the shareholdings on the other "side", namely Cameco. I do not regard the use of "the Kyrgyz Side" as conferring an ownership interest in the Centerra shares on the Government or reflecting the Government as the owner of the shares. The use of this language is entirely consistent with the fact that the Government and Kyrgyzaltyn are on the same "side" – Kyrgyzaltyn is the shareholder of Centerra and the Government is the sole shareholder of Kyrgyzaltyn. I also note that the term "the Kyrgyz Side" is used in other clauses of the ANT that have nothing to do with the Centerra shareholdings.[12]

[45] In summary, when reading the ANT as a whole, I find that the agreement unambiguously provides that Kyrgyzaltyn, the existing shareholder of Centerra and owner of the Initial Shares under Kyrgyz law, acquired the Additional Shares as part of an overall resolution of the dispute between Centerra and the Government, the sole shareholder of Kyrgyzaltyn. The Additional Shares were expressly issued and transferred to Kyrgyzaltyn as the registered and beneficial owner. The Applicants have failed to establish that the parties agreed in the ANT that the Government is the owner of the Centerra shares or that the ANT gives the Government any ownership interest in those shares.[13]

Additional Evidence

[46] In light of my conclusion that the ANT is unambiguous, it is not necessary to look at any other evidence to interpret that agreement. However, if I am incorrect in my conclusion, I have considered the evidence relied on by the Applicants – in particular, the language of Resolution 254 and Decree 1141-IV.

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[12] For example, Section 5.7 refers to "the Kyrgyz Side" having a pre-emptive right to purchase Products from the Project Companies. Section 6.1 refers to Parliamentary approval being obtained to vest "the Kyrgyz Side" with all necessary powers to perform the ANT and the Restated Project Agreements.

[13] The Applicants rely on the ability of an owner under Article 222(3) of the Code to transfer rights in its property to another person while still remaining the owner of the property. That section does not assist the Applicants. The fact that an owner has the ability to transfer rights does not establish that the Republic does in fact own the Centerra shares.

[47] Resolution 254 was a request by the Government for the Jogorku Kenesh to approve the ANT and to authorize Kyrgyzaltyn, "on behalf of the Government of the Kyrgyz Republic", to receive and hold shares in Centerra "which are owned by the Government of the Kyrgyz Republic in accordance with [the ANT]".[14] The Applicants submit that this wording is evidence that supports their interpretation of the ANT.

[48] I disagree. The wording of Resolution 254 is equally consistent with an interpretation of the ANT in which Kyrgyzaltyn, the existing shareholder of Centerra, acquired the Additional Shares as part of a resolution of the dispute between Centerra and the Government. The wording of Resolution 254 is also consistent with the fact that, under the ANT, the Government was increasing its stake in Centerra through its 100% shareholding in Kyrgyzaltyn.

[49] Similarly, the language of Decree 1141-IV states that the Additional Shares are "to the benefit of the Kyrgyz Republic". In my view, this language is likewise consistent with the fact that the Republic, as the sole shareholder of Kyrgyzaltyn, derived the benefit of an increased shareholding in Centerra.

[50] The Applicants also rely on other conduct of the Republic (described below), both before and after the ANT, to support their argument that the Republic is the owner of the Centerra shares. They argue that this conduct is consistent with, and further evidence of, the agreement of the Republic and Kyrgyzaltyn in the ANT that the Republic is the owner of the shares.

[51] The Applicants do not argue that this conduct had the legal effect of transferring the Centerra shares from Kyrgyzaltyn to the Republic (nor do they point to any document, other than the ANT, that purports to have that legal effect). They also do not argue that the Republic exerted such control over Kyrgyzaltyn that the separate legal personalities of Kyrgyzaltyn and the Republic should be ignored and the assets of Kyrgyzaltyn regarded as those of the Republic. As they state in their reply factum, "[t]his case does not turn on piercing the corporate veil." Rather, they rely on this conduct as evidence that supports their interpretation of the parties' agreement in the ANT that the Republic is the owner of the Centerra shares registered in Kyrgyzaltyn's name.

[52] The Republic submits that the Applicants are in some cases mischaracterizing the Government's conduct and that, in any event, all of the alleged conduct is consistent with the Government acting as the sole shareholder of Kyrgyzaltyn.[15]

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[14] The Applicants do not submit that this resolution had the legal effect of transferring ownership of the Centerra shares to the Government. The Republic's uncontradicted evidence is that Resolution 254 is subordinate to the Code and the JSC Law and therefore would not have had the effect of transferring any property rights of Kyrgyzaltyn to the Government.

[15] The Republic and Kyrgyzaltyn also point out that, under the hierarchy of normative legal acts under Kyrgyz law, any such acts taken by the Government are subordinate to the legal rights established by the Code and the JSC and would not have had the legal effect of transferring property rights from Kyrgyzaltyn to the Government. Normative legal acts are defined in Article 4(1) of the law *On Normative Legal Acts of the Kyrgyz Republic* and include, in ranking order, (i) the Constitution; (ii) codes (such as the Code); (iii) laws (such as the JSC Law); and (iv) certain

[53] The conduct relied on by the Applicants, and the Republic's response, are summarized as follows:

- Disposition 610-p (2004). The Applicants rely on this Disposition, pursuant to which the Government ordered that all proceeds from the sale of 7.5 million Centerra shares be assigned to the state budget. The Republic responds that the actual text of Disposition 610-p simply directs the State Property Fund to "bring to the consideration of the general meeting of shareholders" of Kyrgyzaltyn the issue of allocating the proceeds to the state budget, and that this was done in accordance with the JSC Law and the Charter of Kyrgyzaltyn.

- Government Resolutions 239 and 247 (2006). Resolution 239 established a working group to address issues relating to the sale of the Centerra shares. Resolution 247 directed the State Property Fund to prohibit the sale of the Centerra shares without an appropriate Government resolution and to use the sale proceeds in the manner determined by the Government. The Republic argues that these acts are consistent with Kyrgyz law and the Republic's rights as the sole shareholder of Kyrgyzaltyn.

- Establishment of Working Group (2007). In May 2007, the Prime Minister of the Republic created an expert group that considered options for transferring Centerra shares held by Cameco. On August 30, 2007, the Government passed Resolution 382, which approved a draft agreement on new terms. The parties to the draft agreement were the Government and Centerra, but not Kyrgyzaltyn. A recital to the agreement states "Cameco and the Government are the largest shareholders in Centerra". The resolution was ultimately declared null and void when the ANT was signed. The draft agreement was never signed.

- Disposition No. 495-r (2011). Disposition 495-r established an interagency commission to advise Kyrgyzaltyn's shareholder on issues relating to the Centerra shares. The Republic argues that obtaining advice on a major asset of its subsidiary is consistent with the Republic's role as the sole shareholder and that any proposals raised by the commission would have had to go through the usual decision-making procedures for Kyrgyzaltyn.

- Disposition 180-p (2011). The Applicants rely on Disposition 180-p, pursuant to which dividends declared by Centerra and received by

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resolutions of Parliament and the Government. There is no dispute among the parties' experts that, according to this hierarchy, a normative legal act shall not contradict a higher-ranking normative legal act.

Kyrgyzaltyn were transferred to the Government on account of "future dividends" on three occasions. The Applicants submit that this transfer was contrary to the JSC Law. The Republic argues that the Disposition only instructed the State Property Fund to put the issue of the transfer of dividends on the agenda for an extraordinary shareholders meeting of Kyrgyzaltyn, that there was nothing illegal about the arrangement, and that the dividends were treated as income of Kyrgyzaltyn, which paid tax on that income. The Republic also notes that the minutes of the 2012 shareholders meeting of Kyrgyzaltyn state "the shares of Centerra Gold Inc. belong to Kyrgyzaltyn JSC with the right of ownership; dividends received by Kyrgyzaltyn JSC on these shares belong to Kyrgyzaltyn JSC with the right of ownership".

- Statements of the Government in various resolutions, reports and news articles that refer to its interest in the Centerra shares.[16] The Republic argues that these statements were made in a highly politicized context and that, in any event, none of these statements can have the legal effect of altering the property rights of Kyrgyzaltyn in the Centerra shares.[17]

- The conviction in 2016 of the former Chairman of Kyrgyzaltyn on criminal charges relating to a dividend paid to Centerra by its subsidiary. The Applicants point to statements made to the court in that proceeding that refer to the Government's ownership of Centerra. The Republic argues that the case involved a charge of abuse of official duties and the court did not consider or determine the issue of the ownership of the Centerra shares.

[54] For their part, the Republic and Kyrgyzaltyn rely on evidence that the Government knew it had no proprietary interest in the Centerra shares. In 2006, a special working group meeting took place among senior representatives of the Government and Kyrgyzaltyn regarding loan negotiations between the Republic and the International Monetary Fund (IMF). They discussed transferring the shares "of the Kyrgyz side" in Centerra to state ownership so that the Republic could pledge those shares to the IMF. The working group concluded that the Centerra shares

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[16] For example, the Applicants rely on, among other reports and statements, a 2007 report of the Government that refers to "[r]evenues from the sale of shares and the privatisation of state property including Centerra Gold shares"; a 2009 report from the Prime Minister that states "[w]ith account of the increase in the paid shares of Centerra, 33% of the shares in that company are now in ownership of the Kyrgyz Republic"; a statement of the Prime Minister in 2011 that "..we have 33% stake in Centerra and should have influence in operational, financial and other management to that degree"; a statement of the Prime Minister in 2014 that "Kyrgyzstan received dividends of $12 million only. After payment of 5% taxes, we obtained only $11.4 million"; a statement by the Prime Minister in 2016 with respect to a potential dilution of "Kyrgyzstan's stake in Centerra Gold Inc...We are shareholder number 1 having more than 32% of stocks."

[17] The Applicants also rely on reports by Centerra that conflate the interests of the Government and Kyrgyzaltyn. The Republic argues, relying on the evidence of Mr. Herbert, General Counsel of Centerra, that any reference to ownership interest of the Republic was to ensure proper disclosure under Ontario securities law, which deems a parent corporation to own shares that are legally owned by its affiliates.

"are the ownership of Kyrgyzaltyn JSC" and that any transfer of the shares to the Republic would have to be done through a repurchase on the Toronto Stock Exchange.

[55] The Republic and Kyrgyzaltyn also rely on the evidence that Kyrgyzaltyn is a fully operating corporate entity. Their evidence is that Kyrgyzaltyn is a major corporation in the Republic and produces over 97% of the country's gold. Kyrgyzaltyn employs 2,354 people and pays wages of over USD 6.8 million. Its operations include management of a number of services and businesses, including a transportation company, retail stores, a health resort, a medical centre, a hotel, and jewellery shops. It pays tax on all of its income, including on income from the Centerra shares.

[56] I have considered the totality of this evidence as well as the arguments of the parties. I am not persuaded, on a balance of probabilities, that this evidence supports the Applicants' interpretation of the ANT that the parties intended and agreed that Republic owns the Centerra shares. In my view, all of this evidence is equally consistent with the interpretation that Kyrgyzaltyn is the owner of the Centerra shares and the actions of the Republic are those of the sole shareholder of Kyrgyzaltyn.

Centerra Shares not held in Trust for the Republic

[57] In the alternative to their argument based on the parties' agreement in the ANT, the Applicants submit that Kyrgyzaltyn holds all of the Centerra shares in trust for the Republic.[18] As set out in Sistem's factum, "even if [Kyrgyzaltyn] at one point owned the shares, the Republic became the beneficial owner by the time that the ANT was entered into. The ANT either created, or reflected the creation of, an express trust whereby [Kyrgyzaltyn] held the shares as trustee for the Republic."

[58] The only documents the Applicants rely on in establishing a trust are the ANT and Resolution 254. Again, the Applicants rely on the language in the second recital "Kyrgyzaltyn, which holds the shares on behalf of the Government", together with the language of Resolution 254, as establishing or reflecting a trust arrangement.

[59] I reject this submission. The language in the second recital and Resolution 254, as I have noted, is equally consistent with the parent-subsidiary relationship between the Republic and Kyrgyzaltyn. I do not accept that it reflects an intention on the part of Kyrgyzaltyn to grant the beneficial interest in the Centerra shares to the Republic and I consider this language insufficient to establish the certainty of intention required for an express trust.[19] This is particularly so in

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[18] The parties disagreed on whether Kyrgyz or Canadian trust law applies. The Republic and Kyrgyzaltyn argue that Kyrgyz law applies and that it does not distinguish between legal and beneficial ownership rights. The Applicants argue that Canadian trust law applies and that it establishes that the Republic is the beneficial owner of the shares. In light of my conclusion that there is nothing in the ANT or Resolution 254 that gives rise to an express or resulting trust, even under Canadian law, I do not need to decide which law applies.

[19] A.H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), pp. 192-194.

light of the explicit language in Sections 2.1 and 2.2 of the ANT (and in the RSA) that Kyrgyzaltyn is the beneficial owner of the Additional Shares.

[60] As a further alternative, the Applicants submit that since the Republic provided the consideration for the Additional Shares acquired under the ANT, Kyrgyzaltyn is presumed to hold those shares for the Republic on a purchase money resulting trust. None of the cases relied on by the Applicants stand for the proposition that where a corporation acquires an asset that is paid for by its shareholder, the corporation is presumed to hold the asset in trust for the shareholder.[20] In any event, even if a presumption did arise, it is rebutted by the language of Sections 2.1 and 2.2, which states that Kyrgyzaltyn is the beneficial owner of the Additional Shares, as well as the provisions of the RSA to the same effect.

Cases Relied on by the Applicants are Distinguishable

[61] The Applicants rely on two cases to support their argument that the Republic has an exigible interest in the Centerra shares. Both cases are distinguishable from the case at bar.

[62] In *Tracy (Litigation guardian of) v. Iranian Ministry of Information and Security*, 2014 ONSC 1696, a judgment creditor was permitted to enforce a judgment against real property found to be beneficially owned by the Islamic Republic of Iran, even though title to the property was in the name of a third party. That case was decided under the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, and each of the four assets that the court found were the property of Iran were identified as "Iran's Non-Diplomatic Assets in Canada", a fact that was not disputed by Iran. In addition, the assets were either in the name of Iran or Iran was named as the applicant in various building and construction permit applications.

[63] In *1454495 Ontario Inc. v. J=Systems Inc.*, 2002 CarswellOnt 458 (Ont. S.C.), a judgment creditor was permitted to enforce a judgment against shares that had been assigned by the debtor as collateral to a third party lender. The court found that there were "residual rights" remaining in the pledger/debtor that were subject to seizure and sale under the *Execution Act*.

[64] Those cases are distinguishable as the court was satisfied, on the evidence before it, that the judgment debtor had some ownership interest in the assets in question that could be subject to seizure and sale. Here, the Applicants have not established, on a balance of probabilities, that the Republic has any ownership interest in the Centerra shares that would engage the provisions of the *Execution Act*.

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[20] The Applicants rely on *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33, [2013] 2 S.C.R. 438, in which the Supreme Court of Canada explains, at para. 21, that a presumptive purchase money resulting trust arises where the consideration is provided by an *unrelated* party. In the present case, the consideration was provided by the sole shareholder of Kyrgyzaltyn. The Applicants also rely on the trust principles articulated in *Pecore v. Pecore*, 2007 SCC 17 – that case deals with issues arising on transfers between personal family members. In the case of *AMK Investment Ltd. (Trustee of) v. Kraus*, 1996 CarswellOnt 3434 (Gen. Div.) a bankrupt corporation was found to have a beneficial interest in a license that it paid for and put into the name of an officer – that did involve a parent-subsidiary relationship as in the present case.

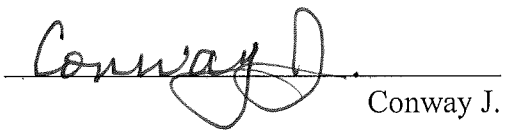
Decision

[65] Kyrgyzaltyn and the Republic are separate legal entities. Under Kyrgyz law, Kyrgyzaltyn is a joint stock company that has full ownership rights to its property. The Republic is the sole shareholder of Kyrgyzaltyn but does not own the assets of Kyrgyzaltyn.

[66] The Applicants seek to establish that the Republic has an ownership interest in the Centerra shares based on an agreement between the Republic and Kyrgyzaltyn in the ANT or, alternatively, based on trust principles. The Applicants have not met their burden of establishing any basis on which I can conclude, on a balance of probabilities, that the Republic has any such ownership interest in the Centerra shares.

[67] The Republic therefore does not have any "equitable or other right, property, interest or equity of redemption" in the Centerra shares that is subject to seizure and sale pursuant to Section 18 of the *Execution Act*.[21] The applications for such a declaration are therefore dismissed.

[68] If the parties are unable to agree on costs, I will receive costs submissions from the Republic and Kyrgyzaltyn within 30 days and from the Applicants within 21 days thereafter. Cost submissions are to be no longer than three pages per party, double-spaced, exclusive of bill of costs. I direct that the parties coordinate their cost submissions to the greatest extent possible.



Conway J.

Date: July 11, 2016

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[21] The Applicants argue that while the interpretation of the ANT and the determination of the property rights of Kyrgyzaltyn and the Republic are matters of New York and Kyrgyz law, respectively, the existence of an "interest" in the Centerra shares for purposes of the *Execution Act* is a matter of Ontario law. Given my analysis of the unambiguous language of the ANT and the failure of the Applicants, on the evidence before me, to establish any ownership rights on the part of the Republic on a balance of probabilities, I have concluded that there is no such exigible "interest" under Ontario law.