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Supreme Court of Canada opens door to liability for alleged human rights abuses abroad

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In this Update

- On February 28, 2020, a five-justice majority of the Supreme Court of Canada ruled that Canadian corporations can be sued in Canada for breaches of customary international law committed abroad.
- The plaintiffs claimed damages from Nevsun Resources Ltd. (Nevsun), a Canadian corporation, for alleged human rights abuses in a mine in Eritrea operated by a majority-owned Eritrean indirect subsidiary.
- The issue before the Supreme Court was whether the plaintiffs' pleading should be struck because (1) under the "act of state" doctrine, Canadian courts are precluded from ruling on the lawfulness of the sovereign acts of a foreign state committed within that state's territory, and (2) Canadian law does not recognize civil claims based on breach of customary international law.
- The majority held that (1) the "act of state" doctrine does not form part of Canadian law, and (2) customary international law automatically forms part of Canadian common law absent conflicting legislation, and may result in liability for private parties. As such, the Supreme Court refused to strike the claims.
- This decision opens Canadian corporations to potential civil claims for human rights violations committed overseas. However, the case now moves back to the B.C. Supreme Court, which will hear the merits of the plaintiffs' case and assess the scope and potential for liability arising from such claims.
- This decision should further heighten the assessment of jurisdiction risks in corporate transactions within a current market environment that already has a significant focus on environmental, social and governance issues, especially in the resource sector.

Overview

In *Nevsun Resources Ltd v Araya*,[1] a majority of the Supreme Court held that (1) absent conflicting legislation, "customary international law" — the common law of the international legal system — automatically forms part of Canadian law and, therefore, a civil action seeking to hold Canadian companies liable for violations of customary international law

committed outside of Canada is not doomed to fail, and (2) the "act of state doctrine," which prevents one country from ruling on the actions of another, does not form part of Canadian law. As a result, the Supreme Court dismissed Nevsun's motion to strike the plaintiffs' claims against Nevsun for violations of customary international law arising from alleged human rights abuses in a mine in Eritrea operated by an indirect Nevsun subsidiary.

The case now moves back to the B.C. Supreme Court, which will hear the merits of the workers' claims and have an opportunity to decide whether they can be sustained with the benefit of a full evidentiary record.

Conclusion and implications

This is an important case for Canadian companies operating abroad, particularly in jurisdictions with poor human rights records.

Since this was a motion to strike, the Supreme Court did not determine whether Nevsun was in fact liable for the alleged abuses or consider Nevsun's potential defences; the Supreme Court only determined that the plaintiffs' claims should be allowed to proceed to trial. In so doing, however, the Supreme Court has opened the door to domestic litigation arising from human rights violations or violations of (as-yet undefined) norms of customary international law committed abroad by non-Canadians, including acts committed or sanctioned by foreign state actors. In theory, claims for breach of customary international law norms may also be available in relation to purely domestic fact scenarios, although the facts of the Nevsun case involve acts in foreign territory.

The decision leaves a number of unanswered questions. The reasons of the majority of the Supreme Court provide little guidance about how to demonstrate the existence of a particular customary international law norm, let alone the basis on which such liability could be imposed, or the remedies that may flow from a finding of liability. As the dissenting justices noted, it is not clear from the majority's decision how a trial court should assess whether Nevsun is liable: (1) whether liability will simply arise automatically if the plaintiffs successfully prove the facts underlying their claims, or (2) if the trial court must also determine whether those facts constitute a new tort or torts, or identify some other recognizable basis for imposing liability at common law. The majority relegates these decisions to the trial court, leaving the law in a state of some uncertainty.

Moreover, the extent to which principles of separate corporate personality will affect this analysis is unresolved. In this case, Nevsun's foreign operations were conducted by a majority-owned indirect subsidiary and a contractor to that subsidiary, not Nevsun itself. These issues were not before the Supreme Court on the appeal and remain to be fleshed out at trial. The reasons of the majority of the Supreme Court identify a certain degree of board oversight or involvement by Nevsun or "complicity." However, the majority's recitation of the facts is not determinative, given that, on a motion to strike, the Supreme Court is required to accept the facts pleaded by the plaintiffs as true.

Still, Canadian corporations should be cognizant of their international operations and the potential liability implications in Canada. Investors will likely be increasingly interested in such issues when assessing operations and transactions and, at least until the merits of the Nevsun case are resolved, may require heightened levels of diligence in respect of the risks potentially arising out of foreign operations. To mitigate future risk, Canadian corporations would be advised to review governance procedures relating to foreign operations to ensure proper oversight and controls are in place, especially for joint ventures where the Canadian parent corporation does not directly operate such foreign operations.

The facts

The plaintiffs, Eritrean refugees, seek damages against Nevsun, a Canadian mining company. They claimed they were conscripted by private contractors and government agents into forced labour at the Bisha Mine in Eritrea, where they were subjected to cruel, violent and degrading work conditions. The mine is owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40% owned by the Eritrean National Mining Corporation and, through subsidiaries, 60% owned by Nevsun.

The workers sought damages for certain domestic torts as well as damages for breaches of customary international law prohibitions against forced labour slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[2]

Nevsun applied to the B.C. Supreme Court to strike the claims, arguing that (1) the "act of state doctrine" precludes domestic courts from assessing the sovereign acts of a foreign government, including the use of conscripted labour, and (2) civil claims based on violations of customary international law have no reasonable prospect of success and should be struck.[3] The B.C. Supreme Court and the Court of Appeal both dismissed Nevsun's application; Nevsun appealed to the Supreme Court of Canada.

The majority decision

In a decision written by Abella J,[4] a majority of the Supreme Court held that Nevsun's appeal should be dismissed.

The majority held, first, that the act of state doctrine, which prevents one country from ruling on the actions of another, does not form part of Canadian common law as a stand-alone doctrine that would bar the plaintiffs' action. The majority held that, in Canada, the principles underlying the act of state doctrine were "absorbed" by jurisprudence regarding conflict of laws and judicial restraint, with "no attempt to have them united as a single doctrine."[5] Adopting the act of state doctrine would improperly overlook the development of these underlying principles in Canadian jurisprudence.

Next, the majority held that it was not "plain and obvious" that the workers' claim for breach of customary international law had no reasonable prospect of success. The majority found that Canadian courts have a role in implementing and advancing customary international law, contributing to the "choir" of domestic court judgments that shape the "substance of international law".[6]

Customary international law, in the majority's view, is based on internationally accepted norms. A norm arises when (1) it is a general (but not necessarily universal) state practice, and (2) there is an accompanying belief that such practice gives rise to a legal right or obligation (*opinio juris*). Some norms, called *jus cogens* or peremptory norms, are so fundamental that no derogation from them is permitted. Prohibitions against slavery, forced labour, and cruel, inhuman and degrading treatment have attained *jus cogens* status.[7]

The majority held that, absent conflicting domestic legislation, Canada automatically incorporates customary international law into its domestic law through the doctrine of adoption. As a result, prohibitive rules of customary international law, such as those alleged by the workers, are part of domestic law. Without explicitly addressing the issue, the majority appeared to conclude that these prohibitive rules necessarily give rise to civil liability. The

majority further concluded that international human rights norms apply to both states and private actors, including corporations, and could therefore apply to Nevsun. As a result, it was not "plain and obvious" that the plaintiffs' claims would fail and Nevsun's motion to strike should be dismissed.[8]

The majority rejected Nevsun's argument that the alleged breaches of customary international law could be addressed by existing torts because it is at least arguable that the workers' allegations may include conduct not captured by these torts, and existing domestic torts may not do justice to the principles of human rights norms.[9] In so finding, the majority noted that the workers' claims may be based on the recognition of new nominate torts, but that the creation of new torts may not be necessary. Given the preliminary stage of the proceedings, it was not plain and obvious that domestic common law could not recognize a remedy for the alleged breaches.

The dissenting opinions

The Supreme Court issued two strongly worded dissenting opinions. Justices Brown and Rowe dissented in part, agreeing with the majority that the act of state doctrine does not apply, but concluding that (1) the workers' claims in customary international law fail to disclose a reasonable cause of action and are bound to fail, and (2) the majority's approach oversteps the limits that Canadian law places on international law. Justices Brown and Rowe noted that there was no international precedent for imposing domestic civil penalties for violating customary international law without a domestic statute authorizing such action, and that the implementation of international law and creation of criminal offences for breach of international laws must be left to Parliament. Moreover, Canadian courts have expressly rejected a private law cause of action for a simple breach of a statute; establishing one for breach of customary international law is therefore surprising.[10]

Justices Moldaver and Côté wrote a separate dissent, finding it plain and obvious that the workers' claims under customary international law were bound to fail since international human rights norms do not apply as between individuals and corporations. They also would have held that the act of state doctrine did apply to bar the plaintiffs' claims. Justices Moldaver and Côté observed that adjudicating such claims could carry negative implications, such as exposing Canadian corporations to litigation abroad, endangering Canadian nationals, and undermining Canada's reputation as an attractive place for international trade and investment.[11]

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[1] 2020 SCC 5.

[2] At para 4.

[3] Nevsun also argued that Canada was not the appropriate forum for these claims but did not pursue this argument before the Supreme Court of Canada.

[4] Wagner CJ, Karakatsanis, Gascon and Martin JJ concurring.

[5] At para 57.

[6] At para 72.

[7] At paras 100-103.

[8] At para 111.

[9] At para 126.

[10] At para 211.

[11] At para 300.