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Nevsun Resources Ltd. v Araya: Canadian Supreme Court confirms that Eritreans can seek legal redress against Canadian parent company for alleged violations of customary international law

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The Supreme Court of Canada has upheld the Court of Appeal's decision in *Nevsun Resources Ltd. v Araya* 2020 SCC 5, ruling that a claim for alleged breaches of domestic torts and customary international law at an Eritrean mine can proceed against its Canadian parent company. This is an important decision, as it indicates that violations of customary international law may give risk to a private cause of action against Canadian corporations. It will be of interest to Canadian multinationals, as it indicates that they could be held directly liable for alleged complicity in a foreign subcontractor's use of forced labour abroad.

Here we discuss the most salient points from the decision and its practical implications for the human rights policies and practices of Canadian multinational companies. This case also provides important insights when viewed from an international comparative law perspective, as it forms part of a growing global trend towards litigation against businesses for the alleged involvement of subsidiaries or third parties in human rights abuses overseas, including the Vedanta and African Minerals proceedings in the UK.

Background

The claims were brought by three Eritrean miners against a Canadian company, Nevsun Resources Ltd. (**Nevsun**). Nevsun was the 60% majority owner of the Bisha Mining Share Company (the **Bisha Company**) in Eritrea, which operated the Bisha mine, with the other 40% owned by the Eritrean National Mining Company. The Bisha Company hired a contractor, who in turn entered into sub-contracts with two companies (one controlled by the Eritrean military and the other owned by Eritrea's only political party) to construct the mine. Both sub-contractors received conscripts from Eritrea's national military service programme.

The miners alleged that they had been indefinitely conscripted through Eritrea's military service programme and subjected to forced labour and violent, cruel, inhuman and degrading treatment at the Bisha mine. They sought damages for breaches of:

- domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence (the **Domestic Tort Claims**); as well as
- breaches of customary international law (**CIL**) prohibitions against forced labour, slavery, crimes against humanity and cruel, inhuman or degrading treatment (the **CIL Claims**).

Prior proceedings

Nevsun had sought to stay the proceedings on the basis that Eritrea was a more appropriate forum. This was rejected by the judge at first instance, who observed that Nevsun exercised effective and operational control over the Bisha Company through its majority representation on the board and involvement in all aspects of its operations. The Court of Appeal upheld the finding at first instance, and Nevsun did not challenge this decision.

Issues on appeal

In addition to the above, Nevsun challenged the subject-matter jurisdiction of the Canadian courts. It contended that the Act of State doctrine – which forms part of English common law and provides that domestic courts cannot adjudicate upon the lawfulness of the sovereign acts of a foreign state – also applies in Canada. Nevsun argued that both the Domestic Tort Claims and the CIL Claims were non-justiciable on the basis of the Act of State doctrine, as they would involve an inquiry into the legality of the actions of the Eritrean State.

Nevsun also sought to strike out the CIL Claims under the Supreme Court Civil Rules, which permit pleadings to be struck if it is 'plain and obvious' that they had no reasonable prospect of success. The miners claimed that they were entitled to bring the CIL Claims on the basis that CIL is part of the law of Canada and therefore a "*breach of customary international law… is actionable at common law*".[1] Nevsun argued that CIL prohibitions may not ground a claim for damages under Canadian law, as there is no statute creating such causes of action.

This motion was denied at first instance, and again by the Court of Appeal. Nevsun appealed to the Supreme Court, which considered two questions:

a) whether the Act of State doctrine forms part of Canadian common law; and

b) whether the CIL prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity may ground a claim for damages under Canadian law.

Main findings of the majority

By a majority, the Supreme Court dismissed Nevsun's appeal and held that the Canadian courts may hear the claim against Nevsun. It made two important findings, which are considered in turn below.

1. The Act of State doctrine is not part of Canadian common law

First, the Supreme Court considered whether the Act of State doctrine forms part of Canadian common law. In doing so, it highlighted an important distinction between the related concepts of state immunity and the Act of State doctrine. State immunity is a principle of customary international law which protects a State and its property from the jurisdiction of the courts of another state. By contrast, the Act of State doctrine is a creation of domestic law (notably in England) which prevents a domestic court from adjudicating on the lawfulness or validity of the sovereign acts of a foreign state.

The majority acknowledged that Canadian common law has grown from the same roots as English law, including the foundational English cases concerning the Act of State doctrine. However, it highlighted the sharp differences in the way the doctrine evolved in the two countries. It observed that the Act of State doctrine was "*continually reaffirmed*" in English jurisprudence. By contrast, it concluded, Canadian law "*developed its own approach to addressing the twin principles underlying the doctrine:* … [i.e.] *conflict of laws and judicial restraint*… [which] *have developed separately in Canadian jurisprudence… and have been completely subsumed*".[2] It concluded that to import the Act of State doctrine into Canadian common law now would be at odds with Canadian jurisprudence on conflict of laws and judicial restraint.

The majority therefore concluded that the Act of State doctrine is not part of Canadian common law. It emphasised that Canadian courts are not barred from enquiring as to the lawfulness or validity of foreign laws, especially where this is necessary or incidental to the resolution of domestic legal controversies before the Canadian courts.

As the Act of State doctrine did not apply in Canada, the majority concluded that the doctrine could not bar the CIL Claims and Domestic Tort Claims. As the doctrine was the only ground on which Nevsun sought to strike the Domestic Tort Claims, they could now proceed to trial. By contrast, Nevsun put forward a second reason why it believed that the CIL Claims should be struck out – this is discussed below.

1 Para. 60.
2 Para. 44.

2. CIL forms part of Canadian common law and may ground a claim for private damages under Canadian law

The second question considered by the Supreme Court was whether CIL prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity may ground a claim for damages under Canadian law. Specifically, the court contemplated:

a) whether claims for damages arising out of the alleged breach of CIL may form the basis of a civil proceeding in Canada; and

b) the potential corporate liability for alleged breaches of CIL, including the question of corporate immunity.

As a preliminary point, it is important to note that Canada is a 'monist' state, meaning that CIL is automatically adopted into Canadian domestic law, making it part of the common law in the absence of conflicting legislation. The majority noted that CIL contains a subset of peremptory norms, from which no derogation is permitted – which includes but is not limited to the prohibition of crimes against humanity. It found no Canadian legislation that conflicted with these norms, and emphasised that they must be treated with the same respect as any other Canadian law.

As regards (a) above, the majority held that it was not 'plain and obvious' that common law would not recognise a direct remedy for the miners' claims, as they were based on norms that were already part of Canadian common law. It concluded that "*recognising the possibility of a remedy for the breach of norms already forming part of the common law is… a necessary development*" of the common law. It noted that there were several legal mechanisms by which this could be achieved, e.g. by the recognition of new nominate torts inspired by CIL or by a private cause of action for breach of CIL as part of Canadian common law. The majority, however, left this determination to the trial judge. Nevertheless, it warned that existing torts might be inadequate to redress breaches of CIL norms, which were of a different character and might require different and stronger responses.

Turning to (b) above, the majority noted that certain CIL norms are of an interstate character whereas others prohibit conduct regardless of whether the perpetrator is a state. It held that it was for the trial judge to determine whether the specific norms relied on by the claimants are of an interstate character and, if so, "*whether the common law should evolve so as to extend the scope of those norms to bind corporations*".

The majority rejected the notion that corporations are immune from the application of CIL. Nor was it convinced that corporations enjoy a blanket exclusion from direct liability for violations of obligatory, definable and universal norms of international law, or indirect liability for their involvement in "*complicity offences*".

Consequently, the majority concluded that it was not 'plain and obvious' that the CIL Claims had no reasonable chance of success. It therefore declined to strike out the CIL Claims at a preliminary stage. The case can now proceed to a full trial on the merits.

Main findings of the dissenting minority

The decision of the majority was subject to a strong dissent on both of the findings described above. The dissent concluded that the Domestic Tort Claims and CIL Claims had no reasonable prospect of success, and warned that the majority's decision would require Canadian law to change, overstepping the institutional competence of the courts. In particular:

a) The dissent observed that Canadian jurisprudence indicates that some claims are not justiciable because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations. It found that "*justiciability turns on whether the outcome of the claims is dependent on the allegation that the foreign state acted unlawfully*": if "*this issue is central to the litigation, the claims are not justiciable*" but if it arises incidentally, then a court may consider the legality of the acts of a foreign state under international law.[3] In this case, the minority found that the legality of

[3] Para. 276.

foreign acts was central to the litigation: in order to obtain relief, the miners would have to establish that Eritrea had violated international law. Consequently, it concluded that the Domestic Tort Claims and CIL Claims were not justiciable.

b) The dissent agreed that CIL forms part of Canadian law, but did not accept that it could be used to create corporate liability. It rejected the notion of a private cause of action for breach of CIL as part of common law, on the basis that corporate liability for human rights violations has not yet been recognised under CIL. It cautioned that it was for Parliament, not the courts, to provide a redress mechanism for a breach of CIL. Moreover, there is a common law rule in Canada against courts recognising a new tort where adequate alternative remedies already exist. The dissent considered that Canadian law already furnished an appropriate cause of action for the miners' claims, through the torts of battery, unlawful confinement and intentional infliction of emotional distress, with the possibility of increased punitive damages under existing tort law. Accordingly, the minority concluded that the Canadian courts should not recognise new nominate torts inspired by CIL, relating to forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity.

COMMENT

With the Nevsun decision, the Canadian Supreme Court has set a ground-breaking precedent. It has become the first Supreme Court anywhere to conclude that violations of CIL by corporations may be civilly actionable. The majority of the Court acknowledged the novelty of its finding, noting that it was unable to cite any other case "*where a corporation has been held civilly liable for breaches of* [CIL] *anywhere in the world*".

The Supreme Court's decision is likely to have a significant impact on how Canadian companies operate overseas. Canadian companies that operate in countries where the risk of being involved in human rights impacts is high and potential plaintiffs are less likely to be able to access remedies are now exposed to potential liability at home. They are now subject to certain – yet to be precisely identified – aspects of CIL, the constituent elements of which they will have to ascertain and translate to a business context. Faced with considerable uncertainty over their position, Canadian companies will need to do due diligence on their own operations and for each component of their supply or value chains, in order to identify any situations where they might be held to be complicit for a breach of international human rights standards.

The Nevsun decision leaves a number of significant questions unanswered. For example, it will now be for the trial judge to determine whether Canadian common law imposes liability for non-compliance with CIL norms, and if so, whether it does so directly, or whether new nominate torts must first be identified. Also, while the majority indicated that civil remedies may be insufficient, it did not specify what remedies may be eventually granted for a breach of such a novel cause of action. While international human rights tribunals, such as the Inter-American and European courts of human rights, have produced extensive jurisprudence on remedies for international human rights violations, this has only been with respect to State perpetrators.

The Nevsun decision is part of a burgeoning global trend. Businesses in numerous jurisdictions are facing litigation in respect of alleged involvement in human rights abuses, including with respect to their subsidiaries, suppliers or other third parties overseas. Indeed, Nevsun follows a year on from the landmark UK Supreme Court decision in Vedanta and a month after an English Court of Appeal decision in African Minerals. In the wake of Nevsun, more claimants in other jurisdictions may seek to rely on CIL as a foundation for their claims against companies.

Canadian corporations have now been warned that alleged victims of forced labour and torture at the hands of a foreign state may sue them in Canada for alleged complicity with those harms. These companies will not be shielded from liability by the act of state doctrine, which in England and elsewhere allows a private party to benefit collaterally from the immunity that shields foreign states. Even if judging the acts of Canadian companies will necessarily involve criticism of acts of a foreign state, such companies can be held liable. As a consequence, Canadian companies will undoubtedly be motivated to do heightened due diligence on the human rights performance of the States in which they operate and,

where this performance is lacking, to put into place strong safeguards to ensure that they do not become involved in abuses.

It remains to be seen whether courts in other jurisdictions take as radical an approach to the issue as the Canadian Supreme Court. However, given the Supreme Court's acknowledgement that Canadian jurisprudence has diverged from the English position on the Act of State doctrine, this decision is unlikely to impact on future English decisions in that regard. The same may be true of other common law courts which have recognised the continued applicability of the Act of State doctrine, such as, for example, in Australia.

In any event, we would advise all companies, and particularly those that operate in high risk industries and environments, to prepare for the possibility that the approach of the Canadian Supreme Court may be followed in other jurisdictions. While the law remains less than clear regarding the human rights duties of corporations, there are other blueprints for the way forward, including the United Nations Guiding Principles on Business and Human Rights. Those principles suggest that companies should be alert to the risks their businesses pose, directly or indirectly, to the enjoyment by others of internationally recognised human rights and put in place strong safeguards to mitigate those risks. They also note that companies' risk mitigation strategies should involve engaging in meaningful consultations with potentially affected groups and other stakeholders, and establishing robust mechanisms to enforce compliance by business partners with internationally recognised human rights standards. Companies that take such precautions will be better prepared to meet the increasing expectations, not only of courts, but also of investors and regulators who see respect for human rights as a mission critical issue for multinational businesses.

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