SUPREME COURT OF CANADA OPENS THE DOOR TO NOVEL INTERNATIONAL HUMAN RIGHTS CLAIMS: THE UNCERTAIN IMPLICATIONS FOR CANADIAN RESOURCE COMPANIES

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In its 5-4 decision in *Nevsun Resources Ltd. v. Araya*,[1] the Supreme Court of Canada has given Canadian courts the green light to develop new forms of civil liability based on alleged breaches of customary international law. In doing so, it has permitted torts that are unlike those in any other jurisdiction - with the possible exception of claims brought under the United States' *Alien Tort Statute*.[2]

The Supreme Court's decision has implications for all corporations subject to the jurisdiction of Canadian courts, but especially for Canadian-based resource companies with operations in developing countries that have poor human rights records. These companies now face vague and uncertain potential liabilities in Canada connected to the development of resource projects by their foreign subsidiaries.

The Growth of International Human Rights Litigation in Canada

The *Nevsun* decision is the latest in a series of cases brought against Canadian mining companies by non-resident plaintiffs alleging harm caused by the actions of these companies' foreign subsidiaries. To this date, none of these cases has resulted in a decision considering the merits of the serious allegations of international human rights abuses. However, Canadian courts have shown an increasing reluctance to dismiss these claims on a preliminary motion. The *Nevsun* decision will only make it harder for defendants to bring successful preliminary objections.

The earliest international human rights claims against Canadian mining companies were framed as traditional common law torts, but Canadian courts still struck them out for failure to disclose a cause of action.[3] One of the hurdles faced by plaintiffs in these cases was Canadian courts' reluctance to lift the corporate veil between parent corporations and their subsidiaries.[4] However, plaintiffs were later able to overcome this hurdle by pleading that subsidiaries acted as agents of parent companies, thereby rendering the parent liable for any tort committed by the subsidiary. Plaintiffs also alleged that parent companies owed a duty of care to those harmed by their subsidiaries, thereby rendering them directly liable in negligence.[5] Given the high standard for dismissing such claims on a preliminary basis, which assumes the truth of the allegations in the pleadings

and requires it to be "plain and obvious" that no claim can succeed, courts permitted plaintiffs the opportunity to prove these common law tort claims on the evidence.

The early success of some Canadian mining companies in staying international claims on the basis of the doctrine of *forum non conveniens* also proved to be short lived. Canadian courts have jurisdiction over parent companies resident in Canada, but have discretion to decline to exercise their jurisdiction in favour of the plaintiffs' home jurisdiction. Where the defendant seeks a stay, the plaintiffs and most witnesses reside outside of Canada, the alleged torts were committed outside of Canada and foreign law likely applies, a Canadian court would traditionally decline jurisdiction. [6] However, in *Garcia v. Tahoe Resources Inc.*,[7] the British Columbia Court of Appeal held that Canadian courts could find a "real risk" that the plaintiffs would not obtain justice in their home jurisdiction based on generalized allegations of corruption or bias against the local judiciary and thereby refuse to refer claims back to those courts. This willingness to engage in broad condemnation of a foreign judiciary contrasts with the more circumspect approach of courts in the United Kingdom or the United States.[8]

The Allegations of Nevsun's Complicity in Eritrean Human Rights Abuses

The plaintiffs in *Nevsun* were former Eritrean nationals who claimed they were conscripted through their military service into a forced labour regime to work at the Bisha mine in Eritrea, where they were subjected to violent, cruel and inhuman treatment. The mine was majority owned by a Canadian company, Nevsun Resources Ltd., through a series of subsidiaries. The alleged abuses were not committed by Nevsun itself, but by Eritrean state-controlled sub-contractors of Nevsun's local subsidiary. Nonetheless, the plaintiffs alleged Nevsun's vicarious liability through two different legal theories, namely:

a. traditional Canadian common law torts such as battery, false imprisonment, conspiracy and negligence; and
b. novel forms of civil liability based on alleged breaches of customary international prohibitions against forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity.[9]

Nevsun asked the British Columbia courts to decline to hear these claims, but they refused to do so in light of the evidence of the real risk of injustice in the Eritrean judicial system. Nevsun did not pursue those *forum non conveniens* arguments before the Supreme Court, choosing instead to focus on two other preliminary challenges:

a. an objection to all tort claims based on the "act of state" doctrine; and
b. an objection that Canadian common law did not recognize any new form of civil liability based on alleged breaches of customary international law.

No Role for the Act of State Doctrine

The act of state doctrine holds that a national court is not competent to adjudicate upon the lawfulness of a sovereign act of a foreign state. Unlike the doctrine of state immunity, which is a rule of customary international law that exempts foreign states and their officials from the personal jurisdiction of national courts, the act of state doctrine is a rule of domestic law that addresses subject matter jurisdiction. The act of state doctrine forms part of the laws of England and other common law jurisdictions. The British Columbia courts found that it also formed part of Canadian law, but declined to apply it on the grounds that the Eritrean plaintiffs were not directly challenging the laws or executive acts of the Eritrean state. Alternatively, they held that public policy exceptions to the doctrine applied.

By a 7-2 majority, the Supreme Court went further and held that the act of state doctrine was simply not part of Canadian law. Instead, it held that ordinary principles of private international law relating to the enforcement of foreign judgments and the application of foreign law were sufficient tools to address the concerns regarding judicial deference that lie at the heart of the act of state doctrine. This aspect of the *Nevsun* decision is likely to be of mostly academic interest. Canadian litigation relating to the act of state doctrine has been rare and it remains open to Canadian companies to plead that foreign law applies to an alleged tort occurring outside of Canada, such that actions that are legal in the foreign jurisdiction cannot be grounds for liability in Canada.

A New Civil Right of Action for Breaches of Customary International Law

The more significant impact of *Nevsun* is the decision's holding, by a 5-4 majority, that a plaintiff may bring a private right of action for damages flowing from an alleged breach of customary international law by a corporate defendant. Customary international law is one of the main sources of public international law, along with treaties made between states.[10]

As its name implies, customary international law is unwritten. Instead, the content of customary international law arises from two requirements. The first is a general but not necessarily universal practice of states. The second is evidence of *opinio juris*, i.e. the belief that such state practice is followed out of a sense of legal obligation.[11] The decisions of national and international courts or arbitral tribunals can be evidence of norms of customary international law as are the writings of "highly qualified publicists", i.e. distinguished academics.

Unlike international treaties, which require implementing legislation to form part of the Canadian legal order, customary international law is adopted into domestic law by judicial incorporation, absent conflicting legislation.[12] Thus, customary international law prohibitions on crimes against humanity, slavery or cruel and inhuman treatment form part of Canadian law even in the absence of any constitutional or legislative prohibition.

The majority's decision in *Nevsun* begins by a lengthy recital of these largely uncontroversial statements regarding customary international law. However, the traditional understanding of these rules of customary international is that they are binding on states rather than on private parties. Citing only a handful of academics, the majority decision then accepts the possibility that these prohibitions on state conduct can be transformed into rules of corporate liability.[13] As the dissenting opinion observed, the majority "cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any".[14]

Many of the academic articles cited by the majority begin by observing that international human rights treaties grant individuals with direct rights against states. These individual rights against states then become a springboard for an argument for the imposition of new liabilities on private persons. Yet, outside of the very narrow area of international criminal law (mostly limited to genocide, crimes against humanity and war crimes), none of these authors point to widespread state practice and *opinio juris* imposing any international legal obligations directly on private parties. Nonetheless, the majority decision calls on trial judges to examine these novel questions and consider the imposition of a new form of civil liability (distinct from traditional common law torts) on private parties.[15]

Nevsun's Unanswered Questions

Given the exceptional nature of the facts alleged in the *Nevsun* case, the decision may appear to have limited application. However, customary international law extends well beyond norms against forced labour and slavery. It arguably extends to certain ill-defined standards of environmental protection and labour rights. Moreover, customary international law can also apply to activities that are entirely within Canada. While Canadian parents of companies operating in developing countries with poor human rights records may be the main targets for claims of breach of customary international law, there is nothing to prevent enterprising plaintiff lawyers from adding such pleas to claims based on purely domestic fact patterns.

In leaving it to trial judges to develop civil liability for breaches of customary international law, the Supreme Court has left corporations and their legal advisors to struggle with a number of novel issues, including:

a. *how are prohibitions against state conduct to be applied to the conduct of private corporations?* As the dissenting opinion observed, there is no private law cause of action for simple breach of statutory Canadian public law.[16] Thus, there is no domestic law analogy for how a breach of an international public duty is to be converted into a private action;
b. *how is corporate complicity for state breaches of international law to be determined?* It is unclear whether the standards for such complicity will be based on traditional common law principles regarding joint tortfeasors or those based on the jurisprudence of international criminal tribunals. In some cases,

corporations have been accused of complicity in international human rights breaches simply by paying taxes to the state or paying for public services in circumstances where it was known that such revenues would finance unlawful state action;

c. *what is the applicable limitation period?* Given that civil claims for breaches of customary international law were not previously known in any jurisdiction, it is unclear whether they can be barred under provincial limitation statutes or applicable foreign equivalents. If not, defendants may need to invoke equitable doctrines of international law such as the principle of "extinctive prescription"; and
d. *what are the implications for corporations based in Québec?* While the incremental creation of new forms of tort liability is permitted under Canadian common law, it is unclear whether the decision creates a new form of implied delict beyond those expressly created by the Civil Code of Québec.

The only jurisdiction that has arguably grappled with some of these questions is the United States where the *Alien Tort Statute* has been interpreted as requiring American courts to treat international law as creating civil liabilities.[17] Ironically, the Supreme Court of Canada's invitation to lower courts to develop similar jurisprudence comes after the United States Supreme Court has taken steps to put strict limits on the development of alien tort claims.[18]

The Need for Heightened Due Diligence and Stricter CSR Programs

Until lower courts define the scope of potential civil liability for breaches of customary international law, Canadian companies will be faced with additional legal uncertainty, particularly if they are involved in natural resources projects in developing countries. Purchasers of corporations with assets in such jurisdictions will need to engage in heightened due diligence relating to human rights, social and environmental issues so as to ensure that they do not acquire corporations with hidden potential civil liabilities. Meanwhile, companies operating in such jurisdictions should review their Corporate Social Responsibility programs and consider steps to audit compliance. While a successful CSR program does not always prevent liability, it can help to improve community relations and minimize the risk of litigation by disaffected community members. The adoption of CSR policies, where combined with steps to ensure compliance, may also assist companies in defending claims of complicity in international human rights violations or simple failure to meet a standard of care under traditional negligence claims.

by Robert Wisner

[1] 2020 SCC 5 ["*Nevsun*"]
[2] 28 USC s.1350 (2018)
[3] *Piedra v. Copper Mesa Mining Corporation*, 2010 ONSC 2421 aff'd 2011 ONCA 191
[4] For a recent affirmation of the importance of separate corporate personality, see *Yaiguaje v. Chevron*

Corporation, 2018 ONCA 472
[5] *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414
[6] *Recherches internationales Québec v. Cambior inc*, 1998 CanLII 9780 (QC SC)
[7] 2017 BCCA 39
[8] For the UK, see *Spiliada Maritime Corp. v. Cansulex Ltd*. (1986), [1987] A.C. 460 (U.K. H.L.) at 478; *Standard Chartered Bank (Hong Kong) Ltd & Anor v. Independent Power Tanzania Ltd*., [2015] EWHC 1640 (Comm), 2015 WL 3479997 ["generalised reports of corruption of this kind, which are no doubt produced in relation to many countries and which in any event seem to be directed at the lower echelons of the judiciary are not cogent evidence of a real risk of [the plaintiff] being unable to obtain a fair trial"]. For the US, see *Palacios. v. The Coca-Cola Company*, 757 F. Supp.2d 347 (S.D.N.Y. 2010) at 358-360.
[9] *Nevsun* at para.4
[10] *Statute of the International Court of Justice, art.*38(1), Can. T.S. 1945 No.7. The Statute also refers to "general principles of law recognized by civilized nations" and "judicial decisions and the teachings of the most highly qualified publicists" as sources of international law, but these are generally supplementary means for the determination of rules of international law (and expressly subsidiary means in the latter case).
[11] *Nevsun* at para.77
[12] *Nevsun* at paras.86-90
[13] *Nevsun* at paras.107-116
[14] *Nevsun* at para.188
[15] *Nevsun* at para.127
[16] *Nevsun* at para.211
[17] *Nevsun* at para. 212 [citing *Khulumani v. Barclay National Bank Ltd*., 504 F.3d 254 (2nd Cir. 2007)]
[18] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.