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A New Cause of Action: The Supreme Court Expands the Scope of Corporate Liability for International Human Rights Violations

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By Megan Mah

On February 28, 2020, the Supreme Court of Canada released its decision in *Nevsun Resources Ltd.* v *Araya*,[1] in which it held that a Canadian corporation could potentially be held liable for a breach of customary international law.

Notably, the Court held that "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'."[2] The Court also held that remedying violations of norms of customary international law requires "different and stronger responses than typical tort claims".[3] However, the Court did not set out what such "different and stronger" responses might entail.

This decision will likely have significant implications for Canadian companies with operations in foreign jurisdictions. Specifically, the decision may give rise to new claims commenced by individuals impacted by the actions of Canadian corporations abroad.

Background

Three Eritrean refugees claimed that they were conscripted through Eritrea's national military service program into a forced labour regime where they were required to work at the Bisha mine, a gold, copper and zinc mine in Eritrea. The plaintiffs alleged that they were subjected to violent, cruel, inhuman and degrading treatment at the mine. The Bisha mine was owned and operated by an Eritrean corporation, which was 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun Resources Ltd. ("Nevsun"), a Canadian company incorporated in British Columbia.

The proceeding was commenced as a class action in British Columbia on behalf of more than 1,000 individuals, who sought damages for breaches of domestic torts, including conversion, battery, false imprisonment, conspiracy and negligence, as well as damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

Nevsun brought a series of motions after the action was commenced, including motions for an order to deny the proceeding the status of a representative action, a stay of the proceedings on the basis that Eritrea was a more appropriate forum, and an order striking portions of the evidence.

This decision dealt with Nevsun's motion to strike the pleadings on the basis of the "act of state" doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also alleged that the claims based on customary international law had no reasonable prospect of success.

The Chambers Judge and the Court of Appeal dismissed Nevsun's motion to strike the pleadings.

The Supreme Court recognizes a new cause of action based on a breach of customary international law

In the Court's 5-4 decision, the majority held that the act of state doctrine was not a bar to the Eritrean workers' claims, as the doctrine is not part of Canadian common law. Although English jurisprudence has reaffirmed the act of state doctrine, Canadian law has developed its own approach to conflict of laws and judicial restraint, the two principles underlying the act of state doctrine.

The majority also held that Nevsun had not satisfied the test for striking the pleadings dealing with customary international law. Specifically, it had not established that the customary international law claims had no reasonable likelihood of success.

The majority reviewed the concept of *jus cogens*, peremptory norms that have been accepted and recognized by the international community from which no derogation is permitted. This includes the prohibition against slavery. The majority held that international human rights norms today are "routinely applied to private actors."[4] Therefore, it is "not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in […] 'complicity offences'."[5] The majority also held that "customary international law is automatically adopted into domestic law without any need for legislative action"[6] and that it "must be treated with the same respect as any other law."[7]

The majority left the door open for the potential recognition of new nominate torts, stating that a "compelling argument" could be made for "a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law."[8] The majority also recognized that a good argument could be made that appropriately remedying such violations "requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches."[9]

The majority held that Nevsun had not demonstrated that the Eritrean workers' claim based on breaches of customary international law should be struck at a preliminary stage. The claim was therefore allowed to proceed.

Brown and Rowe JJ., dissenting in part, stated that the claims for damages based on a breach of customary international law disclosed no reasonable cause of action because a rule of customary international law would need to be adopted by the legislature in order to form the basis of a cause of action. Brown and Rowe JJ. agreed that both individuals and states must obey some customary international law prohibitions, such as prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment. However, they disagreed that a corporation may be civilly liable in Canada for a breach of customary international law norms, as corporate liability for human rights violations has not been recognized under customary international law.

Moldaver and Côté JJ. dissenting, stated that the Eritrean workers' claims were not justiciable within Canada, as adjudicating them would "impermissibly interfere" with the executive's conduct of international relations, since the private law claim impugns the lawfulness of a foreign state's conduct under international law. Moldaver and Côté JJ. stated that while a court may consider the legality of acts of a foreign state if the issue arises incidentally, a claim will not be justiciable if the allegation that the foreign state acted unlawfully is central to the litigation. They stated that in this case, the claims required a determination that Eritrea committed an internationally wrongful act, as the workers alleged that Nevsun was liable because it was complicit in the Eritrean authorities' actions.

Key takeaways for Canadian companies

The Supreme Court has now clarified that a Canadian corporation's breach of customary international law may give rise to a private

cause of action. However, the scope of a corporation's specific obligations remains uncertain.

The Court's decision recognized that remedying a violation of customary international law "requires different and stronger responses than typical tort claims". However, the Court left it to the trial judge to determine whether the facts in this case justify making findings of breaches of customary international law, and what remedies would be appropriate in the circumstances.

Until companies receive further judicial guidance with respect to their obligations under customary international law and the scope and nature of any remedies for the potential breach of these obligations, companies should mitigate their risk by:

- Implementing robust human rights and corporate social responsibility policies;
- Ensuring that these policies are uniformly followed by all subsidiaries and partners;
- Implementing training programs for employees, partners and contractors at all levels of the organization;
- Conducting comprehensive due diligence before commencing a project in a foreign jurisdiction; and
- Conducting regular reviews and audits of projects to ensure that the company is in compliance with local regulations and customary international law, and that the company is not complicit in human rights abuses by their international partners.

[1] *Nevsun Resources Ltd.* v *Araya*, 2020 SCC 5.

[2] *Ibid* at para 113.

[3] *Ibid* at para 129.

[4] *Ibid* at para 111.

[5] *Ibid* at para 113.

[6] *Ibid* at para 86.

[7] *Ibid* at para 95.

[8] *Ibid* at para 127.

[9] *Ibid* at para 129.

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