Canadian Supreme Court Opens Door to Corporate Liability for Human Rights Abuses Abroad

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The Supreme Court of Canada has issued a landmark ruling recognizing that corporations, as private actors, may be liable for violations of customary international law.[1] In its February 28, 2020 decision in *Nevsun Resources Ltd. v. Araya*, the Court, by a 5-4 majority, concluded that a common law claim on the basis that a Canadian mining company had violated various customary international law obligations was sufficiently plausible to survive a motion to strike. The decision opens the door to claims against corporations subject to Canadian jurisdiction and, at a minimum, creates significant litigation uncertainty for Canadian corporations operating abroad. It will be of particular relevance to natural resource companies, manufacturing companies, and other actors whose operations may implicate human rights, the environment and other business integrity issues.

Customary International Law

The *Nevsun* decision breaks new ground by concluding that CIL obligations may apply to corporations, and that a common law cause of action to enforce CIL obligations against corporations may exist in Canadian law without any statutory authorization.[2] Customary international law ("CIL") is the set of international law rules that presumptively apply to all sovereign states because enough states, through their conduct, have indicated that they believe they are legally required to follow these international rules of the road. A CIL obligation is formed through (*i*) consistent state practice and (*ii*) evidence that states comply with the obligation out of a belief that they are legally required to do so (*opinio juris*).[3] CIL covers a range of international legal

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1 *Compare Jesner v. Arab Bank*, 584 U.S. _____, p. 15 (2018) (plurality opinion stating that current international practice "counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law").

2 *Contrast 28 U.S.C. § 1350* (the "Alien Tort Statute") (creating a cause of action for a tort committed "in violation of the law of nations.").

3 United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124.

issues, from fundamental human rights, such as the prohibition against torture,[4] to environmental obligations,[5] and has traditionally applied to sovereign states—not private actors. Many jurisdictions consider CIL obligations to be directly incorporated into their domestic law because CIL obligations are the "custom" of all sovereign states.[6] The *Nevsun* decision is novel because it recognizes that CIL obligations may also extend to corporations and may be directly enforceable through a common law action.

Background

Nevsun Resources Ltd ("Nevsun"), a publicly held Canadian mining company, is the 60% owner of the Bisha gold, copper and zinc mine in Eritrea.[7] The Eritrean National Mining Corporation owns the remaining 40%.[8] Plaintiffs, three refugees and former Eritrean nationals, alleged that they were conscripted by the Eritrean Government and forced to work in harsh and dangerous conditions at Nevsun's mine, where they were subjected to violent, cruel, inhuman and degrading treatment.[9]

Plaintiffs brought a class action suit against Nevsun on behalf of thousands of similarly situated Eritreans seeking—in addition to damages for domestic torts—damages for breaches of CIL prohibitions against forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[10] Plaintiffs' case hinged on the theory that Nevsun was complicit in abuses by the Eritrean Government because Nevsun's subsidiary subcontracted with State-owned entities that used forced labor.[11]

Nevsun argued that Plaintiffs' claims should be struck out because they would require adjudicating the lawfulness of Eritrea's conduct—thus triggering the act of state doctrine[12]—and because no common law claim for damages against a corporation for violation of CIL exists under Canadian law.[13]

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4 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.

5 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment I.C.J. Reports 2010, p. 14, at p. 83 (obligation to complete Environmental Impact Assessment).

6 Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514, at p. 528 (finding "widespread acceptance" of the concept of incorporation in a study covering 101 countries).

7 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 7.

8 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 7.

9 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 3.

10 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶¶ 4, 8.

11 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 8.

12 The Court observed that there "*is no single definition that captures the unwieldy collection of principles, limitations and exceptions that have been given the name "act of state" in English law.*" *Nevsun Resources Ltd. v. Araya*, 2020

The *Nevsun* Decision

The Supreme Court dismissed Nevsun's appeal, holding that the act of state doctrine was not available as a defense and that Nevsun failed to establish that it was "plain and obvious" that Plaintiffs' common law claims for CIL violations had no reasonable chance of success.[14]

First, the Court held that the act of state doctrine is not part of Canadian common law and therefore was not a bar to Plaintiffs' claims.[15] The Court expressly refused to import the English act of state doctrine and jurisprudence into Canadian law.[16] Instead, the Court held that the principles underlying the act of state doctrine have been completely absorbed within Canadian conflict of laws and judicial restraint jurisprudence.[17]

Second, the Court held that Plaintiffs' claims against Nevsun for violating CIL obligations were sufficiently plausible to survive a motion to strike the pleadings.[18] In essence, the Court reasoned that: (*i*) CIL norms are fully integrated into, and form part of, Canadian common law, absent conflicting law;[19] (*ii*) as a matter of international law, corporations "may well" be directly or indirectly liable for breaches of CIL obligations;[20] and (*iii*) as a matter of domestic law, Canadian courts may develop new remedies for violations of CIL obligations by corporations.[21] Indeed, the Court expressly stated that "there is no reason for Canadian courts to be shy about implementing and advancing international law."[22]

However, the Court did not define the contours or content of a domestic remedy for CIL breaches, including whether damages are available.[23] Instead, the Court held that it

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SCC 5, ¶ 29. However, the Court found Lord Millett's description to be a useful starting point: "*the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.*" *Id.* (citing to *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147 (H.L.) at p. 269).

13 *Nevsun Resources Ltd.* v. Araya, 2020 SCC 5, ¶¶ 27, 63.

14 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 6.

15 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 59.

16 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 58. The English doctrine was assessed by the U.K. Supreme Court in *Belhaj v. Straw* [2017] UKSC 3 ("*Belhaj*"). Our client update on *Belhaj* is available here.

17 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 57.

18 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 69.

19 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 94.

20 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 114.

21 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶¶ 122, 127.

22 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 71.

23 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 62.

was ultimately for the trial judge to determine, assuming breaches of CIL are established, what remedies were appropriate.[24]

Areas to Watch

The *Nevsun* decision leaves many open questions for the lower Canadian courts to develop in the first instance. These include:

- Do CIL obligations *actually* apply to corporations? The Court concluded that direct and indirect corporate liability under CIL was sufficiently plausible to survive a motion to strike the pleadings, but left it up to lower courts to determine whether specific CIL obligations apply to corporations or are instead limited to sovereign states.[25] Defendants in lower court actions may rely upon the two dissenting opinions in *Nevsun*, concluding that CIL obligations do not apply to corporations.[26]

- If so, *which* CIL obligations apply to corporations? The Court's reasoning relied on the fact that the CIL obligations raised in *Nevsun* were so well established that they were peremptory norms of international law (*jus cogens*). Plaintiffs may try to articulate more novel and creative CIL obligations.

- What is the *scope* of indirect liability under CIL? *Nevsun* involved allegations that the Defendant mining company was complicit in CIL violations committed by Eritrea, but the Court did not offer any guidance on the applicable test for indirect forms of liability, such as aiding and abetting.

- What *evidence* is required to prove that a CIL obligation exists and applies to corporations?

- What *remedies* are available? The ultimate impact of *Nevsun* may turn on whether lower courts determine that damages are available and the scope of damages.

- Will legislative developments *limit liability*? The Court acknowledged that the common law cause of action could be displaced or modified by a statute passed by the Canadian legislature.[27]

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[24] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 131.

[25] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 113.

[26] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, Brown and Rowe JJ. (dissenting in part); Moldaver and Côté JJ. (dissenting).

[27] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶ 116.

Practical Implications for Businesses

Natural resource companies and manufacturing companies in high-risk environments, especially those subject to Canadian jurisdiction, should exercise even greater caution to mitigate business integrity risks at home and abroad. Tools like the Debevoise Business Integrity Screen can help companies implement a systematic approach to business integrity risks to manage the rapidly evolving reputational, financial, political and legal consequences of such risks.

Regardless of how the lower courts ultimately resolve the issues *Nevsun* leaves open, the decision's more immediate practical impact will almost certainly be greater litigation risk for corporations subject to Canadian jurisdiction. The Supreme Court's recognition that Canadian courts can and should have a role in adjudicating potential violations of CIL will no doubt prompt litigation in Canada for perceived human rights violations and other abuses abroad.

The *Nevsun* decision comes in the context of a growing global trend of regulation and guidelines that have strengthened business integrity obligations. For example, the Modern Slavery Act in the United Kingdom and the *Loi de Vigilance* in France have led to new types of sanctions and new disclosure obligations related to corporate supply chains. In addition, corporations are increasingly expected to implement best practices to comply with guidelines such as the United Nations Guiding Principles on Business and Human Rights, the United Nations Global Compact, the Voluntary Principles on Security and Human Rights, and the OECD Guidelines for Multinational Enterprises.

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Debevoise's cross-practice Business Integrity Group is closely monitoring post-*Nevsun* developments in Canada and abroad. Please do not hesitate to contact us with any questions on how this decision may impact your business.

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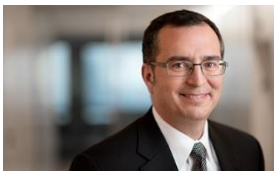

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