NORTON ROSE FULBRIGHT

Legal update

The Supreme Court's judgment on Canadian businesses in foreign states and potential liability for alleged human rights abuses

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Business ethics and anti-corruption
Environmental, social and governance (ESG)
Mining
Dispute resolution and litigation

Can alleged victims of forced labour and torture at the hands of a foreign state sue a Canadian company in Canada for alleged complicity with those harms? In *Nevsun Resources Ltd. v. Araya et al.*, released on February 28, 2020, the Supreme Court of Canada answered "yes."

The facts, in brief, are as follows:

- the plaintiffs are Eritrean refugees who claim to have been conscripted through Eritrea's National Service Program to work in the Bisha mine in Eritrea;
- the Bisha mine was constructed by companies controlled by the Eritrean military and Eritrea's ruling political party and is operated by an Eritrean corporation;
- the defendant is Nevsun Resources Ltd. ("Nevsun"), a publicly-held corporation incorporated under the laws of British Columbia ("B.C."), which holds an ownership stake in the Bisha mine through a chain of subsidiaries;
- the plaintiffs allege that they were forced to provide labour at the Bisha mine in harsh and dangerous conditions and were subject to various punishments during the period in which they and other worker conscripts were at the mine; and
- the plaintiffs allege the conditions under which they worked at the Bisha mine constitute forced labour, slavery, torture, cruel, inhuman and degrading treatment, and crimes against humanity, and that Nevsun, by virtue of its ownership stake in the Bisha mine, was complicit in the impugned acts.

The plaintiffs brought a claim against Nevsun in the British Columbia Supreme Court, alleging (1) breaches of private law torts under B.C. law and (2) breaches of customary international law ("CIL"). Nevsun has denied the factual allegations and raised, among other legal defences, the English common law doctrine of "act of state."

The "act of state" doctrine is related to state immunity. The latter prevents the courts of one state from hearing claims against a foreign state (it is called "restrictive immunity" when there are exceptions, and "absolute immunity" when there are no exceptions). The act of state doctrine allows a private party to benefit collaterally from the immunity that

shields foreign states, where judging the acts of that party will necessarily involve criticism of acts of the foreign state. Nevsun invoked the act of state doctrine in order to argue that the B.C. Supreme Court does not have jurisdiction over the plaintiffs' claims since a finding of liability against Nevsun would necessarily, so it argued, involve criticizing Eritrea's sovereign acts.

Among the various preliminary proceedings, Nevsun brought motions to strike the claims on jurisdictional grounds and on the basis that the CIL claims disclose no reasonable cause of action. Its motions to strike were denied and its appeal to the B.C. Court of Appeal was dismissed. A majority of the Supreme Court has now rejected Nevsun's arguments and allowed the claims to proceed on the merits.

Regarding the act of state doctrine, a 7-judge majority of the Court held that, unlike England, which has accepted the act of state doctrine into its common law, the act of state doctrine is not part of Canadian common law. Regarding the question of the CIL claims, a 5-judge majority held that it was not plain and obvious that the CIL claims have no reasonable likelihood of success, describing CIL as "the common law of the international legal system,"[1] constantly evolving. The majority stated that, pursuant to the doctrine of adoption, CIL norms, including those pleaded here, are fully integrated into, and form part of, Canadian domestic common law unless there is conflicting law preventing the adoption of CIL norms.

As for the more specific question of the civil liability of corporations for violations of CIL norms, the majority applied the standard for a motion to strike allegations, and concluded that it was not "plain and obvious" that the causes of action based on CIL had no reasonable likelihood of success. However, the majority did not engage in the specific analysis of whether civil liability and corporate civil liability for breaches of CIL are themselves settled CIL norms. In other words, CIL norms are part of Canadian common law, but is it part of those norms for there to be corporate civil liability in the event of a breach of the norms? This was left to be decided by the trial judge.

In two separate dissents, a minority of the Supreme Court expressed disagreement with the majority's CIL judgment and reasoning. Notably, while the minority agreed with the majority's conclusion that there exist prohibitions at international law against crimes against humanity, slavery, torture, forced labour, and cruel, inhuman and degrading treatment, and that these prohibitions have attained a status that does not permit derogation, it considered it plain and obvious that there is no cause of action available to the plaintiffs before the B.C. courts allowing them to assert that (1) CIL norms include a requirement that states provide domestic civil liability rules to remedy breaches of those norms, and (2) a corporation can be civilly liable in Canada for a breach of CIL norms.

The lesson for Canadian companies doing business abroad is simple: the acts of a foreign state within its sovereign territory which potentially engage human rights norms can lead to costly litigation and potential liability in Canada for Canadian companies that allegedly benefit from those acts of the foreign state. The majority judgment of the Supreme Court, which characterizes modern international human rights law as a "phoenix [rising] from the ashes of World War II,"[2] sends a strong signal to the Canadian business community that consideration for human rights norms in all of their activities, whether at home or abroad, must form an integral part of their legal and business planning. Canadian companies should assess their risk of involvement (direct or indirect) in activities that may implicate alleged human rights abuses, such as forced labour or torture, and take appropriate steps to address any such risks (see https://www.nortonrosefulbright.com/en-ca/news/b61c2a8d/norton-rose-fulbright-and-biicl-publish-human-rights-due-diligence-and-supply-chain-management-study).

Note on authors:

Azim Hussain has extensive experience in matters involving liability for human rights violations and the immunity of foreign states. He was one of the lawyers involved in the Supreme Court case of *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.

Alison FitzGerald has extensive experience advising clients on a range of matters in connection with foreign investments and foreign investment planning, including business ethics and anti-corruption and human rights due diligence.

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Footnotes

1 *Nevsun Resources Ltd. v. Araya et al.*, 2020 SCC 5, at para. 74.

2 Ibid., at para. 1.

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