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Supreme Court of Canada Rules in *Nevsun Resources Ltd. v Araya*

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The Supreme Court of Canada has rendered its decision in *Nevsun Resources Ltd. v Araya*, stating that customary international law (CIL) norms are directly incorporated into Canadian law and that claims such as the ones advanced in this case may be considered by Canadian courts.

The case involves a mine in Eritrea that is majority-owned and -operated by a subsidiary of Nevsun, a Canadian company. At issue in the appeal was whether Eritrean nationals who allege that they were subject to forced labour in constructing the mine are entitled to assert claims in Canada against the Canadian parent company.

In dismissing Nevsun's appeals, the Supreme Court found on February 28, 2020, that it was up to the trial judge to decide whether a Canadian parent company could be sued on the basis of a civil claim that is grounded in international law. CIL norms, which served as the basis of the claim under appeal, are generally formed based on the actions of public actors, such as states, which make them ill suited to govern the relationships between private individuals.

Davies acted for the Mining Association of Canada in the appeal and presented submissions only with respect to issues related to CIL. See our earlier [overview](#) of the case and of our involvement on behalf of the Mining Association of Canada.

Background

In 2014, a group of Eritrean nationals commenced a legal proceeding in British Columbia against Nevsun. The plaintiffs alleged that by engaging the Eritrean military and state-owned construction companies to construct the Bisha Mine in Eritrea, "Nevsun facilitated, aided, abetted, contributed to and became an accomplice to the use of forced labour, crimes against humanity and other human rights abuses." The claims are based on alleged breaches of CIL, among other causes of action.

Nevsun brought a series of preliminary applications, including an application to strike the claims. Nevsun argued that the claims should be struck because

- Canadian courts are precluded from ruling on the lawfulness of the sovereign acts of a foreign state committed within that state's territory, pursuant to a legal doctrine known as "act of state"; and
- Canadian law does not and should not recognize claims based on alleged breaches of CIL.

To date, a private law claim based on the breach of a CIL norm has never been successfully advanced in Canada.

Supreme Court Ruling

Five of nine justices of the Supreme Court found that the act of state doctrine did not exist under Canadian law and that it was not plain and obvious that a claim based on breaches of CIL would fail.

On the issue of the act of state, the majority found that the act of state doctrine was completely subsumed within Canadian law, which has developed its own approach to dealing with cases where courts are called upon to rule on the lawfulness of the acts of foreign states.

Namely, Canadian judges routinely resort to conflict of law principles and judicial restraint to deal with such issues. As such, it was unnecessary for Canadian law to recognize the act of state doctrine.

On the issue of whether Canadian law recognizes a private cause of action for breaches of CIL, the majority found that under the doctrine of adoption, CIL is automatically incorporated into Canadian law without the need for legislative action. As a result, the majority found that the creation of a remedy designed to provide compensation for the breach of a CIL norm would be a necessary development of the common law. The majority further stipulated that the remedy need not necessarily be created through the development of tort law and left it ambiguous as to whether CIL could now form its own distinct area of private law.

The dissenting justices strongly disagreed with the majority's approach to the CIL-based claims and found that civil claims based on CIL are bound to fail. The dissenting justices identified the numerous issues a trial judge would face in deciding whether to find that a private cause of action for breach of CIL norms exists in Canada.

First, the dissenting justices found that it was plain and obvious that corporations are excluded from direct liability under CIL and that such a norm has not yet been recognized at international law. Second, while CIL may create prohibitions, it is up to each state to create the applicable remedies to deal with such prohibitions. Therefore, CIL itself does not create a remedy, and the creation of such a remedy should best be left to Parliament. Third, the common law test for the creation of novel torts had not been met, as new nominate torts should not be created if there are alternative and adequate remedies to deal with the harm caused. In this case, the existing torts of battery, unlawful confinement or intentional infliction of emotional distress could adequately deal with the harms alleged.

Impact of Decision

This case now moves back to the Supreme Court of British Columbia, which will hear the merits of the plaintiffs' case and therefore have an opportunity to decide whether such a cause of action exists with the benefit of a full evidentiary record and the majority and dissenting views of the Supreme Court.

The decision rendered by the majority leaves a number of questions unanswered regarding the scope and application of CIL norms to private individuals, as a number of issues have been left unaddressed by the majority. The majority provided no guidance regarding the applicable standards of liability, limitation periods or whether its decision only impacts torts under the common law or constitutes an entirely new branch of law. Lower courts will look to the additional detail and analysis given by the dissenting justices in considering whether such causes of action should be created under Canadian law.

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