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Case Study: *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5

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Introduction

Slavery, forced labour, cruel and degrading treatment and crimes against humanity have long been recognized as prohibited conduct under the norms of customary international law. The question that confronted the Supreme Court of Canada is whether alleged breaches of customary international norms of prohibitions against slavery, forced labour, cruel and degrading treatment and crimes against humanity can form the basis of tort claims in damages in a Canadian civil court.

The Nevsun Case

In *Nevsun Resources Ltd.* v. *Araya*, the Supreme Court of Canada decided (five to four) that it was not "plain and obvious" that claims in damages arising from allegations of breach of customary international norms "have no reasonable likelihood of success". In short, the tort claims based on a breach of customary international norms of slavery, forced labour, cruel and degrading treatment, and crimes against humanity must proceed to discovery and trial.

This is a radical change in law. Let me explain. The decision of the Supreme Court of Canada was a preliminary, technical pleadings motion seeking to strike out the plaintiffs' claims for damages based on causes of action in tort for breaches of customary international norms against a Canadian corporation, Nevsun Resources Ltd. ("Nevsun").

The Facts

The Bisha Mine in Eritrea, produces gold, copper and zinc. It represents one of the largest sources of revenue for the Eritrean economy. It is owned by the Bisha Mining Share Company ("Bisha"). Bisha is 40% owned by the Eritrean National Mining Corporation and, through subsidiaries, 60% owned by Nevsun.

Three workers being Eritrean employees working in the mine claim that their country's military "conscripted them" into a forced labour regime, compelling them to work in the mine. The workers claim that their treatment was in breach of customary international law containing prohibitions against forced labour,

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slavery, cruel and degrading treatment and crimes against humanity (the "four customary international norms").

Nevsun is a publicly held corporation incorporated under the laws of British Columbia. The workers commenced their claim in the British Columbia Supreme Court against Nevsun.

The Procedural Context: Preliminary Motion

Nevsun brought a preliminary motion to strike out and dismiss the claims based on a breach of the four customary international norms because the claims did not show recognized causes of action in Canadian common law. The motions court, the British Columbia Court of Appeal and the Supreme Court of Canada all dismissed the preliminary motion to strike the pleading. As a result, the action will proceed to discovery and trial in the ordinary course based upon allegations of breach of the four customary international norms.

The Act of State Doctrine

Nevsun based its motion on the "act of state doctrine" which, while recognized elsewhere in the common law, is not recognized in Canada. The act of state doctrine would preclude domestic courts in Canada from assessing the sovereign acts of a foreign government. Canada does have a legal doctrine that could permit the application of the four customary international norms in a civil lawsuit in Canada, namely the "doctrine of adoption".

The Doctrine of Adoption

The doctrine of adoption specifically sets out two requirements whereby a norm of customary international law can be recognized by Canadian courts in a civil damage claim (as opposed to a criminal prosecution, for which the analysis is different). The two requirements are: (1) show that the claim is a "general" practice in customary international law (it is not necessary to show it to be a universal practice); and (2) it can be shown that the norm is "*opinio juris*", meaning the belief that such a general practice amounts to a legal right or obligation. It is important to note that within the norms of customary international law there is a subset called "*jus cogens*". A norm which fits into this subset is a peremptory norm from which no derogation is permitted. The majority in the Supreme Court of Canada found that the claims of slavery, forced labour and cruel and degrading treatment had attained the status of *jus cogens.*

The doctrine of adoption considered by the majority in the Supreme Court of Canada was found to be applicable, permitting the court to convert customary international norms into domestic law without the requirement for legislative action in the federal parliament or provincial legislatures. The majority held that a Canadian corporation facing allegations of breach of *jus cogens* and customary international norms requires a stronger legal response than is currently recognized in the civil liability torts of assault and battery.

The Decisions of the Dissenting Minority

The four judges who disagreed in the result did so in two separate dissenting judgments. The judges variously found that the doctrine of adoption does not permit a Canadian court to convert a general prohibition lying against sovereign states or found in the realm of criminal prohibitions into a civil liability regime permitting individuals to claim damages for a breach of the four customary international norms. The norms can only be given effect through the criminal law, and the criminal law does not provide private law causes of action. The dissenting judges noted that the existing torts of assault, battery and intentional infliction of emotional distress are sufficient to provide relief for the plaintiffs.

The dissenting judges found that any conversion of the four customary international norms into civil causes of action in Canada required legislation by the Parliament of Canada or the provincial legislatures. The dissenting judges said that nominate torts cannot be created by Canadian courts where: (1) there are alternative remedies; (2) it is not a wrong committed by one person against another person; and (3) the change brought in the legal system would be indeterminate and substantial. The four customary international norms did not meet the three-part test.

Finally, the minority variously noted that new domestic tort claims cannot be based upon a foreign state's conduct under international law. The minority found that claims as pleaded require proof that Eritrea's acts in that sovereign country were unlawful as a matter of public international law. On that basis alone, new tort claims based on the four customary international norms require proof that Eritrea's conduct breached those norms and therefore cannot be justiciable in a Canadian domestic court.

The minority would have found that the claims must fail and therefore could not form the basis of a cause of action in the British Columbia courts. The minority would have struck out the claims based on the four customary international norms because it was plain and obvious they would have no reasonable chance of success.

Conclusion

Unless this matter is settled, the trial of the action will be lengthy and fraught with complex expert testimony, and equally lengthy cross examinations of the complainants, state officials and corporate representatives. The mere fact that the Supreme Court of Canada has discussed the application of the four customary international norms and approved their possible application in a civil case in Canada is ground breaking.

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