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Supreme Court to Rule on Novel Claims Against Canadian Multinationals Operating Abroad

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The Supreme Court of Canada will hear an appeal in *Araya v Nevsun Resources Ltd* on January 23, 2019. The case involves a mine in Eritrea that is majority-owned and operated by a subsidiary of a Canadian company. At issue in the appeal is whether Eritrean nationals who allege that they were subjected to forced labour in constructing the mine are entitled to assert claims in Canada against the Canadian parent company.

Of particular note, the Supreme Court will be called upon to decide whether private actors can sue other private actors for alleged breaches of the norms of customary international law (CIL). CIL is formed through the actions of, and relationships between, sovereign states. Canadian courts have traditionally addressed and applied CIL in the public law context, not the private law context.

The recognition of a new, private right of action based on alleged breaches of CIL could raise concerns for Canadian businesses with operations in foreign jurisdictions. CIL is, by its nature, somewhat uncertain and in flux. If the Supreme Court decides that the CIL-based claims may proceed, multinationals with significant business in Canada will face the prospect of legal liability based on standards that may be difficult to discern and assess. This, in turn, could lead companies to leave Canada or, alternatively, to maintain their presence here but exit higher-risk jurisdictions where political or other circumstances could give rise to claims of this nature.

Background

In 2014, a group of Eritrean nationals commenced a legal proceeding in British Columbia against Nevsun Resources. The plaintiffs allege 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 for the following reasons:

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

Judicial History

The Supreme Court of British Columbia refused to strike the claims. The Court held that while the Act of State doctrine forms part of the common law of Canada, it was not appropriate to give effect to it on a preliminary application. The Court reached this conclusion for a number of reasons, including that the state of the law concerning the doctrine is unsettled and that a "public policy limitation" might apply in cases of allegations of serious human rights violations. The Court was also of the view that the law is unsettled as to whether private actors can assert civil claims based on alleged breaches of CIL. In these circumstances, the Court was not prepared to find that the CIL-based claims have no reasonable likelihood of success at trial.

The British Columbia Court of Appeal affirmed the decision of the lower court. The Court of Appeal concluded that the Act of State doctrine did not apply in this case. The claims would not require a Canadian court to rule on the validity or lawfulness of sovereign acts or laws of Eritrea, because the conduct complained of (if proven) would by its nature be unlawful under both domestic and international law. In any event, the public policy limitation was squarely applicable. With respect to the CIL issue, the Court of Appeal noted that the plaintiffs' claims face "significant legal obstacles" but are not "bound to fail" at trial.

Appeal to the Supreme Court of Canada

Nevsun sought and was granted leave to appeal to the Supreme Court of Canada on both the Act of State and CIL issues. A number of third-party groups have been granted leave to intervene in the appeal. The interveners include the Mining Association of Canada, whose submissions focus on the CIL issue.

Davies is acting for the Mining Association of Canada in this appeal.

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