SCC decision in Nevsun a warning for Canadian companies operating overseas

March 04, 2020

In its February 28, 2020 decision *Nevsun Resources Ltd. v. Araya*, the majority of the Supreme Court of Canada (the Court) dismissed a motion to strike a proceeding started against Nevsun Resources Ltd. (Nevsun) for actions that took place in Eritrea, opening the door for litigation in Canada to hold corporations civilly liable for breaches of international human rights law. This decision has important implications for Canadian companies operating in foreign jurisdictions.

Background

Nevsun brought a motion to strike pleadings filed in British Columbia by three Eritrean workers who claim they were conscripted through their military service to work at Nevsun's Bisha mine in Eritrea, which is operated under a joint venture with an Eritrean state-owned enterprise.

The workers sought damages for breaches of customary international law prohibitions against "forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity," along with damages for recognized domestic torts including "conversion, battery, unlawful confinement, conspiracy and negligence."

Nevsun brought a motion to strike the pleadings on the basis that (i) the act of state doctrine precludes domestic courts from addressing the sovereign acts of a foreign government, and (ii) the claims based on customary international law have no reasonable prospect of success. Both the Supreme Court of British Columbia and the British Columbia Court of Appeal denied the motion to strike.

Majority decision

The majority of the Court dismissed Nevsun's appeal.

The Court found that the act of state doctrine is not part of Canadian common law. When asked to rule upon the acts of foreign states, Canadian courts have taken a distinct approach, relying on both conflict of law principles and judicial restraint. The act of state doctrine therefore has no application to the matter.

The Court also found that customary international law is incorporated automatically into Canadian law, without the need for specific legislative action. As a result, it is not “plain and obvious” that domestic law cannot recognize a remedy for a breach of customary international law by a corporation. The Court did not determine whether a remedy would be created through the development of tort law, and did not clarify whether a breach of customary international law could form a distinct source of private liability.

Dissenting decisions

The dissenting justices disagreed with the majority’s approach to customary international law claims, finding that civil claims based on customary international law are bound to fail. The dissenting justices found that it was “plain and obvious” that corporations are excluded from direct liability under customary international law, and that it is up to each state to create applicable remedies to deal with prohibitions under customary international law. Finally, the dissenting justices held that the common law test for the creation of novel torts was not met, given that alternative and adequate remedies already exist under Canadian law for the harm alleged.

Next steps and implications

The case will now return to the Supreme Court of British Columbia. The court will hear the merits of the plaintiff’s case and determine if the facts justify findings of breaches of customary international law and, if so, the appropriate remedies.

The majority’s decision leaves the scope and application of customary international law norms to private individuals, including corporations, somewhat ambiguous. The decision provides no guidance regarding standards of liability, or whether the liability would be grounded under established common law torts or a new head of liability based on customary international law.

However, the decision shows a willingness of the Court to address questions regarding the application of international human rights law against Canadian corporations carrying on business abroad. Moving forward, companies doing business in foreign jurisdictions will have to exercise extreme caution and conduct enhanced due diligence to ensure that they are not implicated in human rights abuses by their foreign operations, subsidiaries and partners.

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