

Case Comment: Forum non Conveniens and Liability for Alleged Human Rights Violations – The Nevsun Resources Ltd. Case

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In October 2016, the Supreme Court of British Columbia decided to exercise its jurisdiction to hear claims resulting from alleged human rights violations and civil torts in the case of *Araya v. Nevsun Resources Ltd.*[1] The *Nevsun* proceeding had commenced in 2014 on the issue of whether foreign plaintiffs can sue in a Canadian court for violations they allegedly suffered in Eritrea.[2] The case is significant in part because the civil lawsuit is among the first human rights cases in Canada to assert claims based directly on international law prohibitions against forced labour, slavery, torture and crimes against humanity and because of the implications for Canadian companies doing business in developing countries where the rule of law is fragile or nonexistent.

The *Nevsun* case raises several issues of transnational law (a term that reflects the convergence of customary international law and private claims regarding human rights violations).[3] This article focuses on the propriety of Canadian jurisdiction in response to a *forum non conveniens* application, an area of law that has been the target of considerable judicial interpretation pursuant to s.11 of the *Court Jurisdiction and Proceedings Transfer Act*.[4] The case also examines whether damages claims for peremptory norms of customary international law such as forced labour and torture can form the basis of Canadian domestic civil proceedings. This second aspect raises novel issues of law, including

whether such claims are justiciable before Canadian courts, along with the issue of the act of state doctrine, and will be dealt with in a subsequent article.

This case note should be read in parallel with the decision of the British Columbia Court of Appeal's 2017 decision in *Garcia v. Tahoe Resources Inc.*[5] which was decided three months later than *Nevsun* and is also discussed in this journal. These cases raise the issue of the importance of diligence by Canadian directors in situations that might give rise to human rights violations that take place on their watch or that of their international affiliates.

Background

The plaintiffs, Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekleare are Eritrean refugees who allege that they were subject to forced labour by Eritrean contractors connected to the Eritrean military and the ruling party, and by the Eritrean military itself. They claim Nevsun and/or its Eritrean subsidiary Bisha Mine Share Company (BMSC) engaged these organizations to build the Bisha Mine and that these organizations obtained work from the plaintiffs.[6] The claims also invoke responsibility in relation to the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and infliction of mental distress.[7]

Nevsun is alleged to have entered into a commercial development of the Bisha mine, a gold mine located in the Gash-Barka region of Eritrea, with the Eritrean state.[8] The plaintiffs allege that the gold mine was built using a military program of conscripted labour provided by Eritrea called the National Service Program (NSP).[9]

The plaintiffs allege that the forced labour took place in abhorrent conditions over lengthy periods of time. One plaintiff claimed exposure to extreme heat conditions of 47°C, leaving burns and scars. According to affidavit evidence, workers were punished by beatings, bound hand and foot and left in the sun, and forced to roll in the hot sand. As well, the plaintiffs claim excessively long work days (twelve hours), insufficient food, and inadequate housing.[10]

The plaintiffs allege that Nevsun and/or its affiliate BMSC in Eritrea engaged the services of construction companies that were connected with the Eritrean military and Eritrea's ruling party. The plaintiffs allege that Nevsun incurred direct liability by condoning the tortious conduct and failing to stop practices such as battery, unlawful confinement and intentional infliction of mental distress. The plaintiffs also allege Nevsun's vicarious responsibility and negligence in connection with the conduct of the construction contractors as well as the Eritrean military, and civil conspiracy with BMSC, the contractors and the military.[11]

The allegations are denied by Nevsun. It specifically denied the allegations of human rights abuses, or that it had condoned such conduct.[12]

Abrioux J. made it clear that he was relying on the evidence for the purposes of deciding the motion and was not making any findings of fact binding at trial.[13]

The Corporate Connection

Nevsun is incorporated under the *Business Corporations Act*.[14] Its head office is in Vancouver, British Columbia. Nevsun's shares are traded on the Toronto Stock Exchange and the New York Stock Exchange. It senior management was primarily resident in Vancouver, British Columbia and its directors resident in Vancouver, Ontario and Connecticut.[15]

Nevsun exercised effective control over the Eritrean subsidiary, BMSC. According to the evidence, it "controls a majority of the Board of BMSC and Cliff Davis, the CEO of Nevsun, is the Chair of BMSC."[16] The company's reports indicate that "the company is involved in all aspects of Bisha operations…".[17]

Nevsun, for its part, denied that the Bisha mine is its asset, arguing that the mine is the property of its subsidiary BMSC, which was also the party to the relevant agreements with the Eritrean government.[18] Nevsun claimed operational decisions were made by BMSC, including selecting the company engaged to make agreements with subcontractors.[19] A former BMSC general manager denied knowledge that one of the contractors alleged to be connected to the Eritrean military was at the mine and, as regards the other contractor, he denied knowledge of any physical abuse or mistreatment.[20] Nevsun's VP for Social Responsibility testified before a Parliamentary Committee that it complies with all human rights standards, as well as evolving international standards that the Government of Canada has recognized.[21]

Eritrea

Although Eritrea has civil and criminal laws, it lacks a written constitution that is in force, a properly functioning legislature, and an independent judiciary. It has few lawyers. While expert evidence and secondary reports were not entirely consistent, Eritrean judges apparently lack basic personal freedoms and the justice system is arbitrary. Civil unrest and political instability are widespread. Importantly, the plaintiffs adduced evidence from a report showing a lack of judicial procedures for claims of human rights violations that are alleged to be perpetrated by the government.[22] Abrioux J. noted that Nevsun's expert did not indicate that he was aware of any examples of cases involving allegations of serious governmental misconduct or how the government would react if the plaintiffs' claims proceeded in Eritrea.[23] The plaintiffs allege that the NSP is or was administered by the Ministry of Defence, which provides labour from conscripted personnel to companies owned by Eritrean military officials. Human rights reports indicate that Eritrea uses conscripts in public works and on private property belonging to party and military officials.[24] Human Rights Watch has also reported that those attempting to flee have been tortured and that relatives of conscripts who did not report for service have been arrested.[25]

Secondary human rights reports characterize the NSP's use of involuntary conscription and forced labour as a violation of international human rights law. Widespread allegations of corruption and arbitrary judicial proceedings were raised by both the plaintiff's experts and by secondary human rights reports, which were denied or rejected by the defendant as dated, inaccurate, or hearsay.

Forum non conveniens

As noted earlier, Nevsun is a British Columbia company and as such Abrioux J. had presumptive jurisdiction over the proceedings. However, Abrioux J. held that for Nevsun to succeed on its application for a stay based on *forum non* conveniens, Nevsun had to meet its burden of showing that the comparative convenience and expense for the parties would favour Eritrea, whereas the plaintiffs had to demonstrate a real risk that the plaintiffs would not receive a fair trial in that forum.[26]

Are the statutory factors exhaustive?

Nevsun argued that the jurisdiction with the closest connection to the claim is Eritrea and moved for a stay of proceedings under s. 11(2) of the *Court Jurisdiction and Proceedings Transfer Act* having regard to:

a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

b) the law to be applied to issues in the proceedings,

c) the desirability of avoiding multiplicity of legal proceedings,

d) the desirability of avoiding conflicting decisions in different courts,

e) the enforcement of an eventual judgment, and

f) the fair and efficient working of the Canadian legal system as a whole.

Factors connected to these criteria, and especially (a), include the residence of the parties and witnesses, the location of the evidence and key events connected to the cause of action, and more broadly, the interests of justice and those of the parties.[27] Abrioux J. decided that the statutory factors of the *CJPTA* are intended to be mandatory and that they codify the *forum non conveniens* test. The risk of an unfair trial should be considered under the s. 11(2)(a) analysis rather than being considered as a separate threshold issue.[28]

1. *The General Test*

The defendant must show that “an alternate forum is clearly more appropriate and should be preferred” based on an objective that aims “to ensure fairness to the parties and a more efficient resolution of their dispute.”[29]

The logistics of trying a case involving a large number of potential witnesses in foreign countries who do not speak English raise practical considerations in favour of Eritrea. The applicable criteria require sensitivity to overall considerations of order and fairness having regard to the doctrine of international comity, which is designed to ensure order in resolving international and transnational conflicts and to facilitate exchanges and communications between different people in different legal systems.[30]

However, the *Nevsun* case raised unusual circumstances in that Eritrean courts were alleged to be inappropriate or unavailable to plaintiffs because of fear of persecution and/or lack of judicial independence. These factors do not easily fit in the traditional analysis of the appropriate forum.

The relevant test was sent out by Abrioux J. as follows:

[255] The Canadian approach to the issue is focussed not on whether Canada's legal system is fairer and more efficient than the foreign forum, but **whether the foreign legal system is capable of providing justice to the parties in the proceeding**: *Garcia* at para 64…

[256] In my view, the correct approach is that while Nevsun must satisfy the court that the comparative convenience and expense for the parties favours Eritrea, the plaintiffs must provide sufficient evidence such that the court can conclude that there is a real risk that they will not receive a fair trial in that forum. (Emphasis added.)

2. *Would the Plaintiffs Receive a Fair Trial?*

The plaintiffs were NSP deserters and claimed that they likely would be considered as traitors by Eritrea if they returned to the country. They therefore claimed that there is no real likelihood that the plaintiffs would be able to commence proceedings in Eritrea if the Nevsun's application regarding the appropriate forum were granted.[31]

The evidence regarding the likelihood that the plaintiffs would not receive a fair trial in Eritrea was considerable and taken seriously by Abrioux J.: evidence from former Eritrean judges who also fled the country supported the plaintiffs' claims that their ability to seek justice would be either limited or nonexistent. The unlikelihood of a fair trial was exacerbated by the apparent incapacity of the Eritrean justice system to manage a complex civil proceeding, difficulties associated with the role of the military in Eritrea, as well as the lack of a proper body of the law of evidence, all of which militated against Eritrea as an appropriate forum.[32] Abrioux J. concluded that there was a real risk to the plaintiffs of an unfair trial in Eritrea.[33]

The testimony of an expert witness provided by Nevsun was given less weight, since he was providing "constant" advice to the Government of Eritrea.

3. *Law to Be Applied in the Proceedings: Lex loci delicti*

Nevsun argued that Eritrean law should apply because the common law shows a strong preference to have the dispute determined in the forum whose substantive law applies.[34] However, the plaintiffs argued that *Tolofson* provides a limitation to the normal rule where breaches of some overriding norms are alleged.They relied on the British case *Oppenheimer v. Catermole,* involving a Nazi law that had stripped Jews of their citizenship. That law was a fundamental infringement of human rights such that the House of Lords refused to recognize it as a law at all.[35] Moreover, the plaintiffs asserted that there was little clarity as to how substantive Eritrean law was to be applied.

Abrioux J. concluded that the choice of law was an equivocal factor in the forum analysis.

4. *Multiple or conflicting judgments and enforceability*

Abrioux J. noted the problems inherent in enforcing judgments from countries whose legal systems are vulnerable to accusations of judicial interference or the absence of rule of law.[36] Enforceability would obviously be much easier in British Columbia given the presence of assets of the defendant corporation within that province.

Given the serious concerns about the capacity of the Eritrean justice system, the fact that Nevsun's main asset was a mine in Eritrea and that there would likely be proceedings regarding enforcement of any judgment, regardless of where the proceeding might be heard, Abrioux J. considered that these factors are equivocal in the *forum non conveniens* analysis and therefore did not support Nevsun's application.[37]

5. *Fair and efficient working of the Canadian legal system*

A consideration in the choice of forum is whether the principles of order and fairness militate against assuming jurisdiction. Nevsun focused on the expense of the case given the fact that the plaintiffs have no link to the jurisdiction and raised concerns about forum shopping. However, Abrioux J. noted that this was not a situation where the plaintiffs had a wide range of choice in terms of other possible forums, but rather, that British Columbia was the province where the defendant company was located and where they allege certain corporate decisions were taken that directly affected them.[38]

Conclusion

The Court concluded that based on section 11 (2) of the *Court Jurisdiction and Proceedings Transfer Act*, Nevsun had not successfully demonstrated that Eritrea was the more appropriate forum. The same result obtained in the 2017 *Tahoe* case before the British Columbia Court of Appeal three months later, in the context of the Guatemalan justice system. Leave to appeal to the Supreme Court of Canada was sought in that case. These cases should clarify the potential of a Canadian lawsuit to litigate liability for transnational human rights issues.

Nevsun has appealed the decision.

These issues are of considerable interest in Canada, but they are also coming to a head at a time when a comparable statutory framework in the United States, the *Alien Tort Statute*, is once again going to the US Supreme Court.[39]

Finally, the Court's decision with regard to the application of customary international law and issues related to the act of state doctrine will be discussed in a subsequent article.

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References

1. 2016 BCSC 1856. All references in the notes shall be to *Nevsun* unless otherwise indicated.
2. The plaintiffs claimed on their own behalf as well as members of a class that consists of over 1000 Eritrean nationals who were conscripts in the Eritrean National Service Program “who worked at the Bisha mine between 2008 to the present.” (para 48). The Court refused the representative action, and so the case is proceeding on the basis of the individual claims.
3. Para. 2.
4. S.B.C. 2003, c. 28.
5. 2017 BCCA 39.
6. Paras. 4, 37, 42, 43.
7. Para. 43.
8. Para. 4.
9. Para. 28.
10. Paras. 44-46.
11. Paras. 42-43.
12. Para. 5.
13. Para. 10.
14. S.B.C. 2002, c. 57.
15. Paras 49-50.
16. Para 51.
17. Para. 52.
18. Para 54.
19. Paras. 34, 35, 54.

20. Para. 56.
21. Para 66.
22. Para 88(a)(iv), the judge held the reports admissible at least to show the connections between other asserted facts, at para. 171.
23. Para 279(e).
24. Para 28.
25. Para 31.
26. Para 256.
27. *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 (but note the decision on appeal that later reversed the Supreme Court of British Columbia on the issue of *forum non conveniens* in *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39). See also *Tech Cominco Metals Ltd. v Lloyd's Underwriters*, 2009 SCC 11, at para 38.
28. Paras. 241-244.
29. Para. 230, citing Garcia at paras. 34-35.
30. Para. 232, citing *Club Resorts Limited. v Van Breda*, 2012 SCC 17, para 74.
31. Para. 271.
32. Paras. 258, 287-288.
33. Paras. 258, 296.
34. Para. 297 relying on *Tolofson v. Jensen*. [1994] 3 SCR 1022 at 1060.
35. Para. 299 citing *Oppenheimer v. Catermole*, [1976] A.C. 249 (H.L.)
36. Notably, the experience following the case of *Chevron Corporation v Yaiguaje*, 2015 SCC 42.
37. Para. 311.
38. Para 320.
39. The United States *Alien Tort Statute*, 28 U.S.C. 1350 is being considered anew by the US Supreme Court in *Jesner et al. v. Arab Bank, PLC*. Certiorari was granted on April 3, 2017.