

Case Comment: Potential Corporate Liability in Transnational Law

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An earlier article in this Journal[1] discussed a preliminary application made by Nevsun Resources Ltd., a British Columbia mining company, to defeat an action brought against it by Eritrean nationals alleging breaches of their rights in the operation of the Bisha mine in Eritrea from proceeding in BC. Nevsun pleaded that the mine is owned and operated by Bisha Mining Share Company ("BMSC"). For the purposes of the application, the Chambers judge, Abrioux J., found that BMSC was effectively controlled by Nevsun which had pleaded that it was an "indirect shareholder" in BMSC.[2] The central issue in the action is the liability of Nevsun for alleged torts and human rights breaches based on injuries occurring in Eritrea. The earlier article in this Journal analyzed the issue raised in this application, about whether British Columbia was *forum non conveniens*. The Chambers judge held that it was not.

This article considers two other questions raised in the application of transnational law, described by the Chambers judge as the convergence of customary international law and private claims for human rights breaches.[3] He articulated the first as whether a plaintiff could claim damages in the BCSC for alleged breaches of *jus cogens* or peremptory norms of customary international law, such as forced labour and torture. The second was whether a company could be liable for breaches of private or customary international law ("CIL") in BC, or whether it was immune either as a company not subject to CIL, or pursuant to the act of state doctrine because of the alleged involvement of the state of

Eritrea in the subject matter of the action.

This article will deal only with the act of state and CIL issues.

Act of State Doctrine

The Chambers judge dismissed Nevsun's application to dismiss, stay or strike the action alleging based on the act of state doctrine that either the BCSC lacked jurisdiction over the subject matter or that the plaintiffs' claims disclosed no reasonable cause of action.

Abrioux J. summarized the basis of the act of state issue by saying that Nevsun argued that the doctrine was a common law rule that made the BCSC incompetent to adjudicate the lawfulness of the sovereign acts of a foreign state, that applied even though Eritrea was not a party to the action. The argument was that this action would require the BCSC to adjudicate the issue of whether Eritrea's National Service Program ("NSP") administered by the Eritrean Ministry of Defence and under which the named plaintiffs alleged to have suffered is a "system of forced labour" contrary to international law and that it constitutes a crime against humanity by the Eritrean state and its officials.[4] The named plaintiffs, Araya, Tekle and Fshazion, alleged that they were conscripted by the government into the NSP and forced to provide labour for two construction companies that were engaged by Nevsun or BMSC at the Bisha mine and subjected to forced labour, torture, slavery, cruel, inhuman or degrading treatment and crimes against humanity contrary to international law, in addition to the tort claims they made.[5] Nevsun argued that these proceedings would "affect the property, rights, interests or activities" of Eritrea or its agents who were immune from the jurisdiction of the BCSC and that this provided them with a complete defence to the plaintiffs' claims because they prevented the BCSC from adjudicating on the whole subject matter of these sovereign actions of Eritrea and that this justified dismissal of the action under the act of state doctrine. To the extent that the claim against Nevsun were bound up with the subject matter of the claim against Eritrea, and required the BCSC to inquire into the legality of the conduct and motives of the foreign sovereign and the state of Eritrea's legal system[6] it would be beyond the jurisdiction of the BCSC. Nevsun also argued that the sovereign actions of Eritrea were similarly immune from the BCSC under the *State Immunity Act*[7] ("*SIA*").

Briefly put in Nevsun's argument, the act of state doctrine forbids the courts of one state to sit in judgment on the sovereign acts of another or its government. While state immunity is a matter of international law, the act of state doctrine is a matter of domestic law that creates a subject matter immunity and applies even if the other state is not a party. The roots of the doctrine lie in the concept of sovereignty, comity and territoriality. The doctrine may confer immunity to other persons incidentally involved in the subject matter of the state action.[8] However, the Chambers judge noted that the courts have acknowledged limitations to the doctrine's reach. One of these is that the doctrine will not apply to the acts of another state that are in breach of established rules of international law, contrary to public policy, or grave infringements of human rights.[9] Another is a limitation to official and not commercial acts.

While accepting that both the *SIA* and the act of state doctrine might both apply in a case, the Chambers judge noted that Eritrea was not a named party and that the issue before him was not state immunity but the act of state doctrine. Further, he noted Nevsun was not a foreign state but a BC company accused of human rights abuses and torts in furthering its commercial interests in Eritrea.[10]

While much of the discussion proceeded on the basis that the act of state doctrine had not been applied in Canada, the Chambers judge held that the doctrine had been a live issue before the BCCA, and not *obiter dicta*, and so was part of Canadian common law.[11]

Having made that finding, the Chambers judge noted that it might have resulted in the striking of the application. However, he then considered the limitations to the act of state doctrine that have been fashioned by the courts. He added that the propriety of the rules governing preliminary proceedings provided some flexibility to allow courts to enable plaintiffs to proceed to a trial with an arguable case without being shut down before they can prove it.

The Chambers judge then considered the *SIA* cases offered by Nevsun to shore up gaps in the Canadian act of state doctrine that would give it the certainty required to defeat the plaintiffs' claim. He held that the cases did not convince him that they went so far. First, the cases did not address the act of state doctrine in Canada to render the plaintiffs' case unarguable at this stage of the proceedings. Second, he noted that some of the *SIA* cases suggested that the need to uphold such international law norms as invoked by the plaintiffs might trump the principles of comity and territoriality underlying the act of state doctrine.[12] Abrioux J. made it clear that though there might be an overlap between the *SIA* and act of state doctrine in some cases, they are different principles. The *SIA* codified Canadian law on state immunity, a matter of international law.[13] The Chambers judge distinguished the *SIA* cases from the act of state doctrine for this reason.[14] The Canadian act of state doctrine might raise other triable issues.[1516] These would include the application of limitations to the doctrine based on international norms. Thus, the Chambers judge refused to dismiss the action based on the act of state doctrine because the state of the law was too uncertain in Canada to find that it rendered the plaintiffs' claim not justiciable

In the alternative, the Chambers judge held that the modern law of act of state made the issues of public policy arguable, here, the supremacy of international norms and the exemption for the doctrine of a state's commercial activity.[17] Canada is party to treaties prohibiting torture and other inhuman or degrading treatment.[18] Further, he reasoned that if the foreign act of state cases found actions for complicity by home state government officials in torture to fall within the public policy limitation, then it might also cover the actions of a private company where such acts were alleged to have occurred in their commercial activities.[19]

The Chambers judge rejected the argument that the lawfulness of the conduct of the foreign state involved had to be first adjudicated by courts in that state's own jurisdiction.[20] He held that his finding that Eritrea was not an appropriate forum suggested that the modern concern with the importance of international norms outweighed the possibility that the allegation would never be tried.[21]

The Chambers then concluded the issue by stating that he did not agree with Nevsun that the plaintiffs were asking the BCSC to enquire into Eritrean government action or its judicial system to test their legal validity. If he was wrong, he invited the plaintiffs to amend their pleadings. Presumably, he was defining the issue to be the plaintiffs' seeking to investigate these issues to establish their claim against Nevsun without assessing the legal effect of the actions on Eritrea itself.

The Chambers judge wrote that he would not have not stayed or dismissed the action if it were based on the commercial limitation to the act of state doctrine alone. Nevsun appeared to agree that these actions had to be assessed in its context.[22]

Finally, the Chambers judge noted that the action alleged separate claims originating in the office of the company in BC.[23]All in all, there was uncertainty in the act of state doctrine, though it was still an arguable issue.

Customary International Law

The Chambers judge dismissed Nevsun's application to strike out the claim based on alleged breaches of CIL for failing to disclose a reasonable cause of action or because they had no reasonable prospect of success: it was not plain and obvious that the claims would fail. This part of the application had a similar result to the one on the act of state issue. The law was unsettled, but the plaintiffs raised an arguable case on the assumption that the facts as alleged could be proved.

The Chambers judge briefly summarized a rule of CIL as a norm established by the conformance of the community of sovereign states to it as a legal obligation.[24] The rule binds all states, subject to a few exceptions. *Jus cogens* are fundamental norms of CIL and permit no exceptions by treaty and included prohibitions on slavery, forced labour, torture and crimes against humanity.[25]

The Chambers judge accepted that CIL is incorporated automatically into the common law of Canada, absent express legislative exception.[26] He noted that there had been no successful claims advanced for breach of the prohibitions of CIL in Canada so far. However, the central issue before him was whether the CIL claims were arguable.

The Chambers judge started with Nevsun's argument that the Supreme Court of Canada's ruling in *Kazemi*[27] that the *SIA*did not make an exception in Canada for a remedy against the state of Iran and certain of its officials for the torture suffered by a Canadian journalist in Iran. He quoted at length from the reasons of LeBel J. who wrote that a CIL exception to state immunity for torture was excluded by the clear words of the *SIA*. LeBel J. went on to say that the mere existence of a rule in CIL did not necessarily automatically incorporate it into the common law, but suggested that a CIL exception to state immunity in civil proceedings for torture might be "permissive – and not mandatory", which would require legislation to incorporate it into Canadian law.[28] In *Hape*, he held that it appeared that "prohibitive rules" were automatically incorporated. In *Kazemi*, LeBel J. found that there was no exception to state immunity for torture at CIL in any event.

The Chambers judge distinguished *Kazemi* as a *SIA* case, which was a complete code of the state immunity doctrine in Canada. He also suggested that if he was wrong about automatic incorporation, this did not mean that CIL could never be incorporated. Presumably, according to the quotations from *Hape* and *Kazemi*, prohibitive rules of CIL against torture would be incorporated into domestic common law, but an option to create a domestic exception to state immunity for acts of torture would be permissive and require legislative change. The Chambers judge held that it was arguable that the CIL prohibition against torture was part of the domestic common law, given there was no statute conflicting with it as there was with the *SIA*.[29]

The Chambers judge rejected Nevsun's argument that international norms were crimes, not torts, and so did not give rise to a civil cause of action, on the ground of authority that held that the common law should develop according to the ideals of CIL, not classification.[30]

To Nevsun's argument that Parliament has chosen to create some causes of action, but had not created one for CIL norms, the Chambers judge replied that this says nothing about Parliamentary intent to exclude such an action as in *Kazemi*. He turned the point around to observe that no Canadian legislation was contrary to the claims made. He noted that in *Hape*, the Supreme Court of Canada had said that the courts were to look to CIL for interpretation and development of the common law.[31]

The Chambers judge rejected the plaintiffs' argument that the plaintiffs' claims were arguable because the CIL claims satisfy the requirements for establishing four new nominate torts. He held that it was too early in the proceedings for him to conclude this point. All he had to decide was that he could not conclude that they would fail. He characterized that claims as arising from social or technological change posing novel harms that he could not conclude were bound to fail. He quoted former Binnie J. to the effect that as transnational companies now rival the power of states, though without their legal responsibilities, the international community will have to develop remedies for harms arising from the involvement of such companies in human rights abuses.[32] It was an issue for trial.

Nevsun's last major argument was that CIL did not apply to companies, but only to states. Nevsun argued cases and actions by international bodies refusing to endorse company liability for claims such as those at issue. The plaintiffs in turn argued cases holding persons to be liable at international law. The Chambers judge recognized these arguments as belonging to a "complex and layered narrative" spanning many countries and disciplines.[33] He resolved the dispute by holding that the law will have to evolve with the context of the plaintiffs' claims to determine whether liability might arise from CIL claims generally, whether corporate or not, or whether such claims can arise from domestic law.[34] This should be done at trial in the proper factual and legal context.

The Chambers judge was not persuaded that the plaintiffs' claims should be dismissed because they involved more than an incremental development of the common law, a matter that the Supreme Court of Canada has said is a matter for the legislature. Rather, he replied that he was only dealing with the issue of whether CIL claims are bound to fail. The substantive issues were for the trial judge.[35]

Conclusion

The central point of these preliminary arguments is that while the common law did not provide a solid answer to the applications to end the action brought by Nevsun, the Chambers judge was had a sufficient legal basis to say that the common law was ripe for development in the relatively recent context of expansive company activity that is carried on beyond Canada's boundaries.

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James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. Pearl Eliadis, "Forum non Conveniens and Liability for Alleged Human Rights Violations: The Nevsun Resources Ltd. Case" (2017) 1 PKI Global Just J. The author noted that there would be a follow-up article discussing the issues of transnational law.
2. *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at paras. 1, 5, 51-52. All references are to the *Nevsun* decision.
3. Para. 2.
4. Para. 341.
5. Paras. 42-48.
6. Paras. 361-362.
7. RSC 1985, c. S-18.
8. Para. 350 referring to *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 at 269 (HL) [Pinochet No. 3].
9. Para. 353 referring to *Belhaj v. Straw,* [2014] EWCA Civ 1394, aff'd [2017] UKSC 3, involving the rendition of the plaintiff and his wife to torture in another state with the alleged complicity of UK officials. The UKSC raised some doubt about whether the act of state doctrine even applies to acts against the person, and if it did, the public policy limitations would apply, including *jus cogens*, per Lord Neuberger at paras. 162,168-169.

10. Para. 368.

11. Paras. 373-376 referring to *United Mexican States v. British Columbia (Labour Relations Board)*, 2015 BCCA 32. He also refers to courts recognizing the doctrine in England and Australia as good authority for its existence.

12. Paras. 383-387, 396 referring to *R v. Hape*, 2007 SCC 26 at para. 51 and *Tolofson v. Jensen*, 1994 CanLII 44, [1994] 3 SCR 1022 at 1052 and *Canada (Justice) v. Khadr*, [2008] 2 SCR 125, 2008 SCC 28 at paras. 2, 18, 19, 21.

13. Para. 389 referring to *Kazemi Estate v. Iran,* 2014 SCC 62 at para. 54.

14. Para. 382, 389-390, 405, 411.

15. Para. 391 referring to *Dash 224 LLC v. Vector Aerospace Services Engine Services,* 2015 PECA 12 at para. 10.

16. Para. 405 noting that *Kazemi*, an *SIA* case, would not prohibit trying the grave infringement of human rights under the uncertain Canadian act of state doctrine.

17. Paras. 395-402.

18. Para. 401 referring to *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1465 U.N.T.S. 85 (*CAT*), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.

19. Paras. 403, 415.

20. Paras. 406-407. This had been the case for example in the *Khadr SIA* case referred to above. The USSC had held the detention of detainees at Guantanamo Bay were violations of international law.

21. Para. 406-408.

22. Paras. 415-417.

23. Para. 418.

24. Para. 434.

25. Para. 437-439.

26. Para. 440-442 referring to *R v. Hape*, 2007 SCC 26 at para. 39 (LeBel J. so held, at least for prohibitive rules) and *Bouzari v. Islamic Republic of Iran*, 2004 CanLII 871 (ONCA) at paras 63-66.

27. Paras. 449-454 referring to *Kazemi Estate v. Iran,* 2014 SCC 62. Interestingly, while accepting that torture was an official act immune from civil remedy in Canada under the *SIA*, LeBel J. for the majority, seemed willing to accept that Canada might be liable for a breach of s. 7 of the Charter if the severe psychological damage suffered by Ms. Kazemi's son had not been in accordance with a principle of fundamental justice at paras. 133-134. Presumably this would have been an act of state claim.

28. Para. 452 referring to *Kazemi* at para. 61 and see L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law"(2002), 16 *S.C.L.R.* (2d) 23, at 34-35.

29. Paras. 453-454.
30. Paras. 456-457 referring to *Habib v. Commonwealth of Australia*, [2010] FCAFC 12 at para. 13.
31. Paras. 459-463 referring to *Hape* at para. 39 and *R. v. Appulonappa,* 2015 SCC 59 at para. 40
32. Para. 467 referring to Justice Ian Binnie, “Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report” (2009) 38:4 *The Brief* 44 at 45.
33. Para. 473.
34. Para. 477.
35. Para. 481.