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CASE SUMMARY: CANADIAN COMPANIES CAN FACE CLAIMS IN CANADA FOR HUMAN RIGHTS VIOLATIONS THAT OCCUR IN FOREIGN COUNTRIES

The Supreme Court of Canada dismissed a preliminary application by a Canadian mining company, Nevsun Resources Ltd. The decision allows three Eritrean workers to proceed with a claim in B.C. alleging that Nevsun violated customary international law in its mine operation in Eritrea, Africa. This decision represents a significant shift in Canadian law regarding the potential liability of Canadian corporations who operate internationally.

Administrative law – Human rights complaints – Working conditions – Remedies – Damages – Public law remedies

Nevsun Resources Ltd. v. Araya, [2020] S.C.J. No. 5, 2020 SCC 5, Supreme Court of Canada, February 28, 2020, R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, C. Gascon, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

The Respondents, three Eritrean workers, alleged they were forced into a labour regime and were subject to violent, cruel, inhuman and degrading treatment in a mine operated in Eritrea by the Appellant, Nevsun Resources Ltd. ("Nevsun"). The three workers brought a claim in BC seeking damages for breaches of customary international law and domestic tort claims of battery, unlawful confinement, conspiracy, and negligence. Nevsun applied to the BC Supreme Court to seek a dismissal of the claim on the basis that the claims were barred by the "act of state" doctrine, and also alleging the claims for breach of customary international law were bound to fail at trial. The BC Supreme Court Chamber's judge dismissed Nevsun's application to strike the claim, and the Court of Appeal agreed with this decision. Nevsun appealed to the Supreme Court of Canada.

The appeal to the SCC focused on two issues: (1) whether the act of state doctrine forms part of Canadian common law, and (2) whether a claim for damages in Canada can be grounded in a breach of customary international law prohibitions against forced labour, slavery, and crimes against humanity.

In a 5-4 decision, the majority of the Supreme Court of Canada dismissed Nevsun's appeal, thus allowing the claim to proceed on the merits in B.C.

Seven of nine justices held that the act of state doctrine does not play a role in Canadian law. The doctrine has never been applied in Canada. Instead, the principles underlying the act of state doctrine have been subsumed within the principles of conflict of laws and judicial restraint. The majority confirmed that the act of state doctrine is not part of Canadian common law and neither it, nor its underlying principles as developed in Canada, bar the Eritrean workers' claims.

In a closer 5-4 decision, the majority held it was not plain and obvious that the claim for breach of customary international law would fail at trial. Importantly, the majority concluded that customary international law is part of Canadian common law and it is permissible to bring claims alleging breaches of customary international law against a Canadian Company.

In dissent, Justices Brown and Rowe concluded that breach of customary international law discloses no cause of action and it was plain and obvious that the claims would not succeed. Justices Moldaver and Côté agreed with this approach but also held the claims were not justiciable.

In the result, Nevsun's appeal was dismissed by the majority of the Supreme Court of Canada, with costs awarded to the Respondents.

This case was digested by Scott J. Marcinkow, and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Scott Marcinkow at smarcinkow@harpergrey.com.