

Goodmans^{LLP} Update

Supreme Court of Canada to Hear Appeal of Mining Company Accused of Complicity in Human Rights Abuses in Eritrea

The Supreme Court of Canada recently granted leave to appeal in *Araya v. Nevsun Resources Ltd.*, a case that raises important issues about a Canadian company's liability for alleged human rights abuses committed by a foreign state in connection with a commercial venture in which the Canadian company was participating.

The case could have significant implications for Canadian companies with operations abroad and could expose those companies to liability in Canadian courts for complicity in human rights abuses committed anywhere in the world.

Background

The plaintiffs, a group of Eritrean refugees, allege they were conscripted into the Eritrean military and forced to provide labour for the construction and operation of a gold, zinc and copper mine in Eritrea. The plaintiffs claim they were forced to work in inhumane conditions, under threat of physical punishment, torture, imprisonment and other human rights abuses.

The plaintiffs seek damages from a Vancouver-based mining company Nevsun Resources Ltd., which entered into a commercial venture with the State of Eritrea to develop, construct and operate the mine. The plaintiffs base their claim on allegations that Nevsun was complicit in the alleged human rights abuses committed at the mine.

The plaintiffs are seeking damages from Nevsun for alleged breaches of several private law torts under Canadian law and for breaches of "peremptory principles of international law", which the plaintiffs argue have been incorporated into the law of Canada.

Nevsun brought a preliminary motion seeking to dismiss the claim (or part of it) on two grounds. Nevsun argued that:

- a seldom-applied common law principle known as the "act of state doctrine" precluded the Canadian courts from hearing the case, because to do so would necessarily require the courts to determine the lawfulness of the actions committed by representatives of the State of Eritrea; and
- the plaintiffs should not be permitted to advance a claim based upon principles of customary international law that prohibit forced labour, slavery and torture.

Decisions of the British Columbia Courts

Nevsun's motion was rejected by the Supreme Court of British Columbia and the British Columbia Court of Appeal, which ordered that the plaintiffs' claim could proceed to trial.

The Court of Appeal held that the "act of state" doctrine did not apply for a number of reasons, including:

- the plaintiffs' claim did not challenge the validity of Eritrea's laws, nor did the claim challenge the lawfulness of acts that were contemplated by Eritrean legislation or official policy;
- the alleged acts of slave labour and torture would be unlawful under domestic Eritrean law; and
- in any event, even if the act of state doctrine might apply, the very serious nature of the wrongs alleged provided a public policy reason for the case to proceed.

With respect to whether a plaintiff can sue for violations of human rights, the Court of Appeal acknowledged that such a claim would be novel, but held that it was not plain and obvious that the claim could not succeed.

Earlier this month, the Supreme Court of Canada granted leave to Nevsun to appeal the Court of Appeal's decision.

Implications for Canadian Companies

The decision of the Supreme Court of Canada could have significant implications for Canadian companies with operations or investments abroad, most obviously companies in the resource extraction field. It will undoubtedly affect the extent to which such companies may face liability for "complicity" (the meaning of which remains unclear) in human rights abuses committed by foreign state actors in connection with commercial ventures involving a Canadian company or its subsidiaries.

Mining and resource companies, in particular, are often subject to those types of claims, because their foreign ventures frequently require contractual arrangements with foreign state entities related to the exploration and development activities. Recent years have seen a growing number of such claims and, depending on the Supreme Court's decision, that number could further increase markedly.

The Supreme Court's decision could also have significant implications for the enforcement of principles of international human rights law through private law claims for damages, raising the prospect of Canadian companies being held liable in Canadian courts for complicity in human rights abuses committed anywhere in the world, even when those human rights abuses are committed by foreign state actors, joint venture partners or subsidiaries.

It is expected the appeal will be heard by the Supreme Court of Canada late 2018 or early 2019. Goodmans will monitor the progress of this case throughout the appeal process with an eye to its potential impact on the mining industry.

For further information concerning this case, please contact any member of our [Litigation Group](#) or [Mining and Natural Resources Group](#).

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