Goodmans LLP Update

Supreme Court Opens Door To Claims for Breaches of Customary International Law

In its long-awaited decision in *Nevsun Resources Ltd. v. Araya*, the Supreme Court of Canada has opened the door to claims for breaches of "customary international law", a source of international law based on customary practice among nations, which, by its nature, is somewhat nebulous and mutable. This decision represents a fundamental change in Canadian law, materially increasing the risk of civil liability, especially for Canadian companies that operate outside of Canada, and injecting significant uncertainty into the scope of corporate legal obligations.

Background

The plaintiffs, who were Eritrean nationals at the relevant times, allege that they were conscripted into the Eritrean military and forced to provide labour for the construction and operation of a mine in Eritrea, under inhumane conditions involving physical punishment, torture, imprisonment and other human rights abuses.

The plaintiffs seek damages from a Vancouver-based mining company, Nevsun Resources Ltd. (since acquired by a Chinese corporation). Nevsun, through subsidiaries, held a 60 percent interest in an Eritrean corporation that owned and operated the mine, with the other 40 percent owned by the Eritrean government. The plaintiffs allege that Nevsun was complicit in the alleged human rights abuses committed at the mine and, among other claims, seek damages based upon breaches of customary international law.

Nevsun brought a preliminary motion to dismiss the claim, arguing in part that Canadian law did not recognize a claim based upon a breach of customary international law.[1]

Both levels of courts in British Columbia dismissed Nevsun's motion. Now, in a split decision, a strikingly divided Supreme Court of Canada has affirmed the lower courts' rulings, and has sent the plaintiffs' claim on to trial.

Supreme Court's Decision

In sweeping reasons, Justice Abella, writing for the majority of five, held that customary international law – including prohibitions on human rights violations such as slavery and forced labour – is "automatically adopted into domestic law" unless there is conflicting domestic legislation. She further held that a breach of such customary international law principles by private actors may be actionable in a claim for damages. Justice Abella also rejected Nevsun's argument that its corporate status rendered it immune from the application of customary international human rights law.

A sharply-worded dissenting opinion was authored by Justices Brown and Rowe. While they agreed that customary international law forms part of the law of Canada, they strongly disagreed with Justice Abella's holding that a breach of those legal norms could give rise to a claim for damages. They note that, outside of

[1] Nevsun also advanced an argument based upon an obscure principle known as the "act of state doctrine", which it said 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. This argument was soundly rejected by both levels of court in British Columbia and by seven of the nine judges on the Supreme Court.

Authors

Ryan Cookson
rcookson@goodmans.ca
416.849.6012

Peter Kolla
pkolla@goodmans.ca
416.597.6279

Julie Rosenthal
jrosenthal@goodmans.ca
416.597.4259

the criminal context, where individuals face potential liability, customary international law imposes obligations only on states, not on private actors. And in a rather pointed rebuke, they highlight that the majority "cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any".

Accordingly, Justices Brown and Rowe would have held that the claims against Nevsun for breaches of customary international law could not succeed, and should be struck.

A second dissenting opinion was authored by Justice Côté. She agreed with Justices Brown and Rowe that the claims for breaches of customary international law should be struck, and emphasized that "the extension of customary international law to corporations represents a significant departure in this area of the law".[2]

Implications

The decision is notable for the degree of uncertainty that it creates, particularly (although not exclusively) for Canadian corporations that operate outside of Canada. It opens the door to claims based on alleged breaches of customary international law, but it provides virtually no guidance as to which principles of customary international law may be privately actionable. The only limit articulated is that breaches of norms that are of a "strictly interstate character" will not give rise to a cause of action. Beyond that, the reach of the Court's ruling remains unclear.

For example, while *Nevsun* deals with human rights abuses such as torture and slavery, it does not address whether a claim for damages might arise from any alleged breaches of customary international law related to environmental protection or the rights of indigenous persons. This raises the prospect of such international law obligations – the precise content and scope of which are typically highly uncertain – being layered on top of any domestic law governing the activities in question. And it suggests that Canadian courts could find themselves in the unaccustomed position of pronouncing upon the content of customary international law in the context of a civil lawsuit.

As a result of this decision, Canada stands alone among the major jurisdictions in allowing such claims to be brought. This may well make Canada a particularly attractive jurisdiction for plaintiffs seeking redress for perceived violations of environmental, social or indigenous rights, with the risk being highest for corporations with operations outside of Canada.

And since the Supreme Court's decision effectively means that such claims cannot be struck at a preliminary stage on a pleadings motion, defendants face the prospect of having to mount a defence on the merits, an expensive and time-consuming proposition.

For more information on this Update, please contact any member of our Litigation Group.

All Updates are available at www.goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice.
© Goodmans LLP, 2020

[2] Côté J. also would have struck the claims on the basis of the act of state doctrine.