Cassels

Supreme Court of Canada Allows Domestic Civil Proceedings Relating to Foreign Breaches of International Law

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In a landmark decision rendered on February 28, 2020, the Supreme Court of Canada (SCC) has permitted a group of former Eritrean mine workers to pursue a claim for injuries they allege they sustained in Eritrea as a result of actions for which a Canadian mining company should be held responsible.

Background

Three refugees, who are former Eritrean nationals, brought a proceeding in British Columbia against Nevsun Resources Ltd. (Nevsun) claiming that, between 2008 and 2012, they were indefinitely conscripted through their military service into a forced labour regime at the Bisha mine where they were subjected to violent and inhuman treatment. The claimants seek damages from Nevsun, which holds a 60% interest in the Bisha Mining Share Company which owns the mine, for breaches of domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence, as well as breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

Prior Proceedings

Nevsun brought a series of applications to have the proceeding dismissed based on three main grounds:

1. Eritrea is a more appropriate forum (*forum non conveniens*);
2. The act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government; and
3. The claims based on customary international law have no reasonable prospect of success, as Canadian law does not recognize such claims.

At first instance and on appeal the British Columbia courts denied the *forum non conveniens* application, finding that Nevsun failed to establish Eritrea as the appropriate forum. They also held that the act of state doctrine does not apply in this case. As for the claims based on customary international law, it was not

"plain and obvious" that the pleading disclosed no reasonable cause of action and was therefore bound to fail.

SCC Decision

Nevsun's appeal to the SCC focused on two issues:

1. whether the act of state doctrine forms part of Canadian common law; and
2. whether the customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are grounds for a claim for damages under Canadian law.

The Act of State Doctrine

Seven of the nine judges agreed that the act of state doctrine does not apply in the circumstances. They noted that the law, which was developed in England, has been subject to the proliferation of limitations and exceptions, and thus no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of the acts of foreign states. And although the English common law, including some of the case law which forms the basis for the act of state doctrine, was generally received into Canadian law, it has been completely absorbed by the conflict of laws and judicial restraint jurisprudence. Consequently, the doctrine is not part of Canadian common law and does not bar the Eritrean workers' claims.

The judges also stated that Canadian courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court, and that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts.

Customary International Law

In a more closely contested decision, five of the nine judges agreed with the courts below, and held that since the current state of the law in this area remains unsettled, Nevsun had not established that the customary international law claims have no reasonable likelihood of success. The prohibitions on forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity are part of customary international law as they meet both requirements of being (i) a general, but not necessarily universal, practice; and (ii) the belief that such practice amounts to a legal obligation (*opinion juris*).

It was further noted that the workers also claimed breach of a subset of the norms within customary international law, being norms which are accepted to be of such fundamental importance (e.g., crimes against humanity) that they cannot be set aside (*jus cogens*). The Court relied on the principle that

customary international law is automatically adopted into domestic law without any need for legislative action, absent conflicting law, and found that there are no Canadian laws which conflict with the adoption of the *jus cogens* as part of our common law in this case.

The judges rejected Nevsun's position that it is immune from liability under international law because it is a corporation and found that international law has significantly evolved from being state-centric, so that it applies to all categories of actors, including corporations. Therefore, it was not "plain and obvious" that corporations cannot be directly liable for violations of "obligatory, definable, and universal norms of international law," or indirect liability for "complicity offenses."

As a result, the SCC dismissed Nevsun's appeal. The judgment relates only to the procedural aspects of the workers' claims. The case now moves back to the British Columbia courts for a decision on the merits.

Key Takeaways

This decision means that Canadian corporations can be held liable in Canada for breaches of customary international law which takes place in a foreign jurisdiction. It highlights the changing nature of international law, and creates risk for Canadian firms with operations abroad, especially those with subsidiaries and partners in areas with little or no protections for employees. But it leaves a number of unanswered questions, such as the content and scope of customary international law and its application with reference to, for example, standards of liability, damages and limitation periods.
