

2018 INSIGHT SERIES

02. The Nevsun Effect: A New Era of Corporate Responsibility

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Aman said he finally escaped from the mine in 2014 and fled to Europe.

"I'm not surprised by the Eritrean government, as they already use conscripts as slave labour. It is accepted as normal," he said.

"But the Canadian company should know better."

— *(The Guardian, 14 October 2016)*¹

Prudent corporates, legal advisors, financiers and investors should pay close attention to the ground-breaking case of *Araya v Nevsun Resources*² currently before the Canadian courts. It is the first international trial against a corporation on grounds of modern slavery within its supply chains.

The questions raised by the case - ***should, and can corporations be held responsible for crimes of modern slavery carried out by suppliers? Should, and can victims of modern slavery sue the parent company in international courts?*** - could have important ramifications for global companies operating in emerging markets.

THE EXCEPTIONAL FACTS

The facts and the legal issues raised in this case were described as 'exceptional' by legal counsel instructed.³ In 2014, three Eritrean workers filed a lawsuit against a mining company in the Supreme Court of Canada. The plaintiffs are currently refugees living in Ethiopia. Simply put, the plaintiffs allege that Nevsun Resources, a Canadian resources company, was complicit in and profited from crimes of modern slavery by using forced labour to build the Bisha Mine in Eritrea. Six further claims have been filed against Nevsun on behalf of 59 additional plaintiffs on the same basis.

Eritrea is a small and secretive state⁴. It became an independent nation in 1993 after a long war with Ethiopia. Instability, chronic drought, violence and civil unrest continue despite two decades of independence. Eritrea is strategically placed in the Horn of Africa and is a resource-rich country with copper, gold, silver and zinc reserves.⁵

With a government actively looking for foreign investment, it is on the cusp of economic development.

The Eritrean Government has a 'National Service Program', which on paper requires 6 months of military training, and 12 months of service to the Government. Reports by the International Labour Organization have found that conscripts have been forced to construct infrastructure and other projects for economic development to further the interests of the State, far beyond this stated period.⁶ With an estimated 4 million victims of state imposed forced labour globally,⁷ Eritrea has one of the poorest track records for state imposed forced labour. The Global Slavery Index 2016 ranked Eritrea within the 3 worst performing countries in the world for its government response to modern slavery.⁸ This is the backdrop against which Nevsun began its investment in Eritrea.

NEVSUN INVESTMENT

Nevsun was the first foreign company to develop a mine in Eritrea. It holds a 60% shareholder interest in the project, with the remaining shareholding in the venture held by the Eritrean Government. In 2008, Nevsun contracted the Eritrean Government to build the Bisha mine and infrastructure, which involved the recruitment of local Eritrean workers. Nevsun currently has a market cap close to CA\$900 million.⁹

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THE CLAIM

The plaintiffs allege that they were conscripted by the Eritrean Government under the 'National Service Programme' and forced to build the Bisha Mine in inhumane conditions, including forced labour, slavery, imprisonment, torture, cruel, inhuman or degrading treatment and crimes against humanity.

"The mine was like an open prison,"

said one former security guard, speaking on condition of anonymity to protect family still in Eritrea.

"They can take you and do what they want with you. I was owned by them. We were like objects for the government and for foreign companies to do with us what they wanted."

(The Guardian, 14 October 2016)¹⁰

The legal claim against Nevsun is under international customary law. The claim is not that Nevsun directly engaged in alleged breaches of human rights, but it was a complicit accessory – in other words, Nevsun aided, approved of, acquiesced in, condoned, or failed to prevent these crimes.

Nevsun has denied that forced labour was used to build the mine, alleging screening procedures were used to ensure no conscripts worked at the mine. And, even if forced labour was used, as a parent company Nevsun was not responsible for employing those workers. Finally, on a legal technicality – the starting defence for Nevsun was that the plaintiffs had no legal standing to file a case in Canada; if there was to be a dispute, it should be tried and heard before the Eritrean Courts.

THE LEGAL TECHNICALITY - WHICH COURT?

The Latin doctrine of Forum non conveniens (forum of convenience) has historically been used as a procedural block to prevent human rights violations being brought against corporations. The doctrine allows Courts to dismiss a case on the basis that it should be heard in another 'more appropriate forum'.¹¹ Usually judges refer cases to be heard in the same jurisdiction where the crimes have allegedly occurred rather than in another jurisdiction, for example; where the corporation is headquartered.

The plaintiffs argued that any case heard in Eritrea could never be a fair trial, as the local courts have no independence from the State whose very conduct was being deliberated. Nevsun's response was that the plaintiffs had no connection with Canada and were unfairly 'forum shopping'¹² and creating inconvenience and undue expense of litigating in Canada (thousands of miles away from local witnesses and documents).

Yet in both the first instance trial and appeal decisions, the courts held that Canada was the most appropriate jurisdiction to hear the case, particularly given the allegations were of grave humanitarian concern relating to jus cogens (fundamental principles of international law). The judges commented it was in the public interest to let this case go to trial irrespective of the complexities and legal technicalities.

THE NEXT APPEAL - SOVEREIGNTY

The final appeal, before the court can proceed to hear the merits of the claim, is with the Canadian Supreme Court, the highest court in Canada. Nevsun lodged its appeal application on 19 January 2018. This appeal is premised on two questions submitted to the Supreme Court.

The first question is whether a Canadian court can make a judgment over the legality of the sovereign acts of a foreign state. Nevsun stressed the practical and political challenges of bringing such a claim against Eritrea and asserts that such fundamental principles of international law properly belong to international courts, not Canadian domestic courts.

The second question is whether Canadian common law can recognise for the first time, a cause of action for damages based on customary international law norms. Nevsun contends this is out of step with international consensus, with unprecedented policy implications that are already opening the floodgates of new litigation.¹³

This latest appeal means there may be a long wait ahead before the case can proceed to hear merits of the claim – whether in fact the plaintiffs were victims of modern slavery and, whether the defendant company was complicit.

DEVELOPING TRENDS

Whilst the merits of the claim have not yet been heard, these decisions remain crucially important. It highlights an increasing appetite from the Canadian judiciary and, arguably, is indicative of a global trend for foreign courts to exercise jurisdiction and hear cases of grave humanitarian concern in emerging markets where legal systems are still developing, fragile, or non-existent. No longer can directors and shareholders hide behind the 'corporate veil'.

Similar US cases brought against Costco and Nestle under Californian supply chain transparency laws have also been brought by activist NGOs.¹⁴ Each have ultimately failed not only due to lack of evidence, but also because this is largely untested and developing law for corporates to be sued for complicity with slavery in supply chains. The legal bar is set very high, requiring evidence of blatant and deliberate criminal actions taken by corporate or business directors directly.

As the judges commented in the Nevsun Case, it is critical to allow cases that bring up difficult or important points of law to proceed. This will ensure that common law continues to evolve to meet the legal challenges of modern day society and to grapple with crimes, namely, modern day slavery.¹⁵

Outside of the courts, the trend continues towards greater accountability of corporates for human rights abuses. In a major development in January 2018, the Canadian Government announced the newly created independent watchdog, the Canadian Ombudsperson for Responsible Enterprise, to investigate the conduct of Canadian companies operating overseas. This watchdog is the first of its kind in the world. The Ombudsman will investigate complaints and make recommendations for remedies, focusing on sectors including mining, oil and gas, and the garment sector.¹⁶ Canada is home to nearly 75% of the world's mining companies.

EARLY WARNING SIGNS

The Nevsun case is already having knock-on effects for global corporates not only in mining, but across construction, engineering, technology and energy firms operating in newly emerging markets. Increasingly, stakeholders are already asking corporates to answer questions about the consequences of their commercial operations, both through their own activities and their supply relationships.¹⁷ Time will tell how the Nevsun case will be determined, and if other international courts will follow in its footsteps. What is clear, is that these developments in Canada are early warning signals.

ENDNOTES

- ¹ As Above
- ² *Araya v Nevsun Resources Ltd.*, 2017 BCCA 401. Available from: <http://www.courts.gov.bc.ca/jdb-txt/ca/17/04/2017BCCA0401.htm>. [27 March 2018].
- ³ Paragraph 2, *Reasons for Judgment of the Honourable Madam Justice Newbury*, Available from: <http://www.courts.gov.bc.ca/jdb-txt/ca/17/04/2017BCCA0401.htm>. [27 March 2018].
- ⁴ BBC News 2017, BBC News Eritrea Country Profile, *BBC News*, 30 October. Available from: <http://www.bbc.com/news/world-africa-13349078>. [23 January 2018].
- ⁵ UN Side Event 2018, 'Demystifying Eritrea: the Ground Reality, Mining and Human Rights', *Madote*, 8 March. Available from: <http://www.madote.com/2018/03/un-side-event-demystifying-eritrea.html>. [26 March 2018].
- ⁶ International Labour Organization 2016, *Observation (CEACR) - adopted 2015, published 105th ILC session (2016)*. Available from: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3256806.103282,Eritrea,2015. [28 April 2017].
- ⁷ International Labour Organization 2017, *Forced Labour, Modern Slavery and Human Trafficking*. Available from: <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>. [15 March 2018].
- ⁸ Global Slavery Index 2016, *Eritrea Country Report*. Available From: <https://www.globallslaveryindex.org/country/eritrea/>. [15 March 2018].
- ⁹ Company Information 2017, *Nevsun Resources Ltd*, Simply Wall Street. Available from: <https://simplywall.st/stocks/ca/materials/tsx-nvu/nevsun-resources-shares#info>. [26 March 2018].
- ¹⁰ McVeigh, K 2016, 'Canadian firm faces new forced labour claims over Eritrean mine', *The Guardian Online*, 14 October. Available from: <https://www.theguardian.com/global-development/2016/oct/14/canadian-firm-nevsun-resources-new-forced-labour-claims-eritrea-bisha-mine>. [23 January 2018].
- ¹¹ "Forum non Conveniens", Legal Information Institute, Cornell Law School, available from: https://www.law.cornell.edu/wex/forum_non_conveniens [27 March 2018].
- ¹² *Araya v Nevsun Resources Ltd.*, 2017 BCCA 401. Available from: <http://www.courts.gov.bc.ca/jdb-txt/ca/17/04/2017BCCA0401.htm>. [27 March 2018].
- ¹³ E.g., *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (alleged human rights abuses in Guatemala); *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, leave to appeal to dismissed June 8, 2017, SCC File No. 37492 (alleged criminal conduct in Guatemala); *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2012 QCCA 117 (alleged abuses committed by military in Congo); *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191 (alleged human rights abuses in Ecuador); *Das v. George Weston Limited*, 2017 ONSC 4129 (alleged liability for damage suffered in Bangladesh); *Yassin c. Green Park International Inc.*, 2010 QCCA1455 (claim for aiding and abetting alleged war crimes in Israel).
- ¹⁴ Business and Human Rights Resource Centre, 'Nestle faces new lawsuit in Californian court alleging use of fish sourced from Thai company using slave labour', *Business and Human Rights Resource Centre*. Available from: <https://business-humanrights.org/en/nestle%20faces-new-lawsuit-in-california-court-alleging-use-of-fish-sourced-from-thai-company-using-slave-labour>. [23 January 2018]. Lawrence, F 2015, 'Costco and CP Foods face lawsuit over alleged slavery in supply chain', *The Guardian Online*, 20 August. Available from: <https://www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain>. [23 January 2018].
- ¹⁵ Paragraph 83, *Reasons for Judgment of the Honourable Madam Justice Newbury*, Available from: <http://www.courts.gov.bc.ca/jdb-txt/ca/17/04/2017BCCA0401.htm> [27 March 2018].
- ¹⁶ Sevunts, L 2018, 'New ombudsperson to investigate behaviour of Canadian companies abroad', *Radio Canada International*, 17 January. Available from: <http://www.rcinet.ca/en/2018/01/17/new-ombudsperson-to-investigate-behaviour-of-canadian-companies-abroad/>. [23 January 2018].
- ¹⁷ News 2018, 'Australian Mining Company defends Eritrea at the UN', *Human Rights Law Centre*, 14 March. Available from: <https://www.hrlc.org.au/news/2018/3/13/australian-mining-company-defends-eritrea-at-the-un-2>. [26 March 2018].