Court File No. 37919

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

NEVSUN RESOURCES LTD.

Appellant
(Appellant)

- and -

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

Respondents
(Respondents)

- and -

INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, EARTHRIGHTS INTERNATIONAL, GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL COMMISSION OF JURISTS, MINING ASSOCIATION OF CANADA and MININGWATCH CANADA

Interveners

FACTUM OF THE INTERVENER, INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PARTS I & II – OVERVIEW & POSITIONS ON QUESTIONS IN ISSUE

1. A Canadian defendant should not escape scrutiny of its own tortious or wrongful conduct solely because that conduct relates to or is intertwined with the conduct of a foreign state. Granting immunity to private parties on such a basis undermines the rule of law and goes far beyond what is required by the principles of sovereign equality and comity.

2. On this appeal, the International Human Rights Program, University of Toronto Faculty of Law ("IHRP") limits its submissions to the issue of the "act of state" doctrine. The IHRP submits that the act of state doctrine has no application in a dispute between two private parties, even if the court is required to make a finding regarding the conduct of a foreign state, as long as: 1) the court does not make any findings which purport to be legally binding or otherwise have a legal effect on the foreign state; 2) consideration of the actions of the foreign state arises collaterally in the course of adjudicating the rights and obligations of parties who are properly before the court; and 3) the court considers the actions of the foreign state in accordance with the principle of comity and only insofar as necessary to resolve the dispute.

PART III – STATEMENT OF ARGUMENT

Canadian courts have not seen the need to apply the act of state doctrine

3. The doctrine of act of state has never been applied in Canada.[1] To the extent that it exists within the common law of British Columbia, it is only because the doctrine was inherited as part of the adoption of all English law as it existed in 1858 into British Columbia pursuant to the *Law and Equity Act*, RSBC 1996, c 253 and its predecessors.[2] Remarkably, in the 226

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[1] *Araya v Nevsun Resources Ltd*., 2017 BCCA 401 at para 123 [*Nevsun* BCCA].

[2] *Law and Equity Act*, RSBC 1996, c 253, s. 2. The date at which each province inherited English law varies from province to province. Ontario inherited English law as it existed in 1792; see *R v Montague*, 2007 CanLII 51171 (ON SC) at paras 12 & 18.

years since courts in Upper Canada first started applying Canadian law as distinct from English law in 1792, no court in Canada has applied the act of state doctrine.[3]

4. In these 226 years, Canadian courts have successfully safeguarded the principles of sovereignty and the equality of nations by relying on the doctrines of comity, sovereign immunity and general principles of private international law, without needing to resort to the act of state doctrine. This Court should continue that approach.

Courts in other states have failed to clearly define the act of state doctrine

5. Other common law jurisdictions that recognize the act of state doctrine have repeatedly struggled to articulate its scope and utility.[4] For example, the United Kingdom's Supreme Court's most recent attempt in *Belhaj v Straw* resulted in a 2:2:2:1 split decision where the only consensus was that act of state, however defined, did not bar the adjudication of the claim.[5] None of the judgments defined a coherent doctrine of act of state; instead, the three main judgments each described an amalgam of disparate rules that were loosely grouped under the umbrella term "act of state."[6]

6. This Court should not borrow problems from other jurisdictions. Instead, this Court should reason from first principles to determine whether act of state is doctrinally sound and necessary in the circumstances.

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[3] Only a handful of Canadian cases even mention the act of state doctrine, none of which apply it. See e.g. *United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32 at para 50; see also *Crown Resources Corporation v National Iranian Oil Company* (2006), 273 D.L.R. (4th) 65, 2006 CanLII 28334 (ON CA) at paras 31 & 42.

[4] Andrew Dickinson, "Acts of state and the frontiers of private (international) law" (2018) 14:1 J Priv Intl L 1 at 11 **[Intervener Book of Authorities, Tab 1]**; Michael Bazyler, "Abolishing the Act of State Doctrine" (Jan 1986) 134:2 U Pa L Rev 325 at 327.

[5] *Belhaj & Anor v Straw & Ors*, [2017] UKSC 3 [*Belhaj*].

[6] *Belhaj* at paras 35-40 (Lord Mance), 120-124 (Lord Neuberger), 228 & 234 (Lord Sumption). See especially *Belhaj* at para 33, citing Francis Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986).

Common justifications for the act of state doctrine

7. The following rationales have been advanced to justify the act of state doctrine:

   (a) certain types of international questions are not justiciable by a court simply because the nature of the question is outside the capacity of the court;[7]

   (b) the separation of powers preclude interference by the judiciary with the power of the executive to engage in foreign affairs;[8] and

   (c) the international law principles of sovereignty and the equality of nations preclude the judicial consideration of actions taken by a foreign state in its own territory.[9]

8. None of the above justify recognizing the act of state doctrine to prevent the consideration of a private dispute between two parties in circumstances like those currently before this Court.

Concerns about justiciability are not engaged

9. Regarding justiciability, it may well be that there are certain kinds of international questions that are beyond the capacity of domestic courts to consider, such as making war and peace, treaty making, and determining a border dispute between foreign states.[10] These questions, however, do not arise in the case currently before the Court, and articulation of any act of state doctrine based on these justiciability concerns should be left to another day.

Concerns about the role of the courts in foreign affairs do not apply in Canada

10. Concerns regarding the separation of powers between the executive and the judiciary with respect to foreign affairs feature most heavily in American act of state jurisprudence.[11] In Canada, in contrast, there is no strict separation between the executive and the judiciary regarding foreign affairs, and Canadian courts will not refuse to resolve a dispute only for the reason that hearing the dispute may indirectly impact foreign relations. As stated by this

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[7] *Belhaj* at para 239, Lord Sumption.

[8] *W.S. Kirkpatrick & Co. v Environmental Tectonics Corp., Intl.*, 493 US 400 (1990) at 405.

[9] *Belhaj* at para 85, Lord Mance.

[10] This principle was called "international law act of state" by Lord Sumption: *Belhaj* at para 237.

[11] *Belhaj* at para 212.

Court, there is "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."[12] Canadian courts will even specifically review and overturn the executive's foreign policy decisions if they violate the *Charter*.[13]

11. Similarly, Canadian courts will not refrain from making findings regarding the laws and conduct of foreign states that may cause discomfort or embarrassment to that state, even though such findings may indirectly impact the executive's conduct of foreign relations. In recognition and enforcement cases, for example, the defences of natural justice and public policy require courts to analyze a foreign legal proceeding to determine whether it is "contrary to Canadian notions of fundamental justice" and whether the foreign law is contrary to Canadian concepts of justice or fundamental morality.[14] This can include an inquiry by a Canadian court into whether the foreign court is biased or corrupt.[15] Similarly, courts routinely make findings regarding a foreign state's protection of human rights (or lack thereof) when considering both extradition requests and judicial reviews of refugee determination and deportation decisions.[16] Finally, when conducting a *forum non conveniens* analysis to determine which of two forums is the more appropriate forum for resolution of the dispute, Canadian judges may consider evidence of corruption and injustice in the judicial system of a foreign state to determine whether there is a real risk that the foreign court will not provide justice.[17] In each of these cases, a Canadian court's consideration of the actions

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[12] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 38 [*Operation Dismantle*]. Justice Wilson also observed that "in the area of foreign affairs the [American] courts are especially deferential to the executive branch of government," at para 55.

[13] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 37-39.

[14] *Beals v Saldanha*, 2003 SCC 72 at paras 59-64 & 71-72 [*Beals*].

[15] *Beals* at para 72.

[16] *India v Badesha*, 2017 SCC 44 paras 44 & 45; *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at paras 53-54, 125 & 130.

[17] *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 at paras 113, 124 & 126. It is notable that in this case, a judge has already engaged in a detailed analysis of, and made findings regarding, the real risk that the Eritrean legal system will not provide a fair trial: *Araya v Nevsun Resources Ltd.*, 2016 BCSC 1856 at paras 242, 251, 284 & 296; *Nevsun* BCCA at paras 117-120.

of a foreign state may potentially impact the executive's conduct of foreign relations, but this is not sufficient reason for a court to refuse to consider an issue properly before it.

Act of state is not needed to protect sovereignty and equality of nations

12. This leaves only the third concern regarding sovereignty and equality of nations. The IHRP submits that courts can resolve disputes between private parties that involve the consideration of actions taken by foreign states without violating the principle of sovereignty so long as the Court does not purport to make findings that are binding on the foreign state, and so long as the analysis is conducted in accordance with the principle of comity.

13. State sovereignty and the equality of nations are the cornerstones of international law, and are principles long recognized and adopted by Canadian courts.[18] As noted by this Court, sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference.[19] Equality of nations is the recognition that no one state is above another in the international order.[20] In public international law, "an equal has no authority over an equal."[21]

14. The doctrine of state immunity provides that a foreign state is immune from the jurisdiction of domestic courts.[22] This "fundamental principle of public international law" protects sovereignty and the equality of nations by ensuring that Canadian courts are never in a position to use their powers of compulsion over a foreign state, and can never issue a judgment that purports to legally bind a foreign state.[23] State immunity has long been

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[18] *R v Hape*, 2007 SCC 26 at paras 41-46 [*Hape*].

[19] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para 35 [*Kazemi*].

[20] *Kazemi* at para 35.

[21] *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at para 13.

[22] *Kazemi* at para 34.

[23] *Kazemi* at para 35; *Kuwait Airways Corp. v Iraq*, 2010 SCC 40 at para 13. Even this principle is not absolute: see *State Immunity Act*, RSC 1985, c S-18, ss. 5, 6, 6.1.

recognized and applied in Canadian common law, and now is codified in the *State Immunity Act*, RSC 1985, c S-18.[24]

15. Unlike state immunity, the doctrine of act of state is not a principle of customary international law and has no equivalent at international law.[25] International law does not require the courts of one state to refrain from considering the actions of another state in order to maintain the equality of nations in the international order. In *Belhaj*, Lord Sumption wrote:[26]

> [Act of state doctrine] is wholly the creation of the common law. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law. It is not based upon it.

16. While the act of state doctrine and the doctrine of state immunity are ostensibly motivated by the same concerns regarding the protection of sovereignty, they operate very differently in practice. State immunity says that Canadian courts have no jurisdiction over a foreign state; the Respondent's version of act of state would say that Canadian courts cannot even collaterally consider the acts of a foreign state when adjudicating a claim brought against a Canadian defendant.

17. The IHRP submits that act of state goes far beyond what is required by the principles of sovereignty and equality of nations. In the IHRP's submission, this Court should focus on the *legal effect* of the adjudication, rather than on the subject matter of adjudication. Sovereignty and the equality of nations are impacted only when the judgment at issue purports to have a legal effect on the foreign state. Simply considering the actions of a foreign state, without making findings that are legally binding on that state, cannot and does not interfere with sovereignty.

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[24] *State Immunity Act*, RSC 1985, c S-18.

[25] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No.3)*, [2000] 1 A.C. 147 (UKHL) at 269.

[26] *Belhaj* at para 200.

18. In particular, it has never been a concept in international or Canadian law that a judicial finding that may cause embarrassment in a foreign state constitutes a violation of that state's sovereignty. As noted above, there are many instances in which Canadian courts are required to consider and make findings regarding the laws and conduct of foreign nations that are critical of and may cause embarrassment to a foreign state, and Canadian courts regularly do so without infringing on the sovereignty of those states.

Comity as a guide for analysis of the actions of a foreign state

19. While a Canadian court can consider the actions of a foreign state when determining the rights and obligations of private parties without infringing the sovereignty of that state, this analysis must nonetheless be conducted cautiously and respectfully in accordance with the overarching principle of comity.

20. Comity is not a rule of law, but a "principle of interpretation" predicated on inter-state courtesy that calls on courts to act cautiously and treat foreign states with due respect.[27] Comity is a "flexible concept" which "cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states."[28] "Comity refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and goodwill, rather than strict legal obligation."[29] In other words, comity is a guide for analysis, not a prohibition on considering certain subjects.

21. Comity's operation as a guide for analysis can be seen in a wide variety of circumstances where judicial consideration of a dispute could have an impact on the sovereignty of a foreign state, including extradition cases and cases involving private international law issues such as jurisdiction *simpliciter*, *forum non conveniens*, choice of law, recognition and enforcement of foreign judgments, and anti-suit injunctions.[30] In each of these instances, comity does not act to prevent the court from conducting an analysis of difficult questions that touch on a

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[27] *Hape* at paras 47 & 50.

[28] *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 at para 74 [*Van Breda*].

[29] *Hape* at para 47; see also *Beals* at paras 167-168.

[30] *Hape* at paras 48-49; *Spar Aerospace Ltd. v American Mobile Satellite Corp*., 2002 SCC 78 at paras 15 & 21; see also *Van Breda* at para 74.

foreign state, but rather guides the manner in which the court this analysis is conducted. Comity should play the same role when a court is asked to consider the actions of a foreign state in circumstances similar to this case.

Private international law already addresses concerns regarding comity and sovereignty

22. Claims against Canadian defendants for wrongful actions that are related to the actions of foreign states will often involve events that happen outside Canada, and accordingly will necessarily involve judicial consideration of the private international law doctrines of jurisdiction *simpliciter*, *forum non conveniens*, and choice of law.[31] Each doctrine is animated by respect for sovereignty and/or comity and may, in appropriate circumstances, enable a court to decline to determine the dispute. There is no need to duplicate these efforts by adding a stand-alone act of state doctrine.

There is real harm in a court refusing to hear a claim that is properly before it

23. Finally, any potential impact on foreign relations and sovereignty resulting from judicial consideration of a foreign state's acts must be weighed against the real harm created by refusing to adjudicate a dispute between two private parties that is otherwise properly before the court. Courts have the power and obligation to decide cases that are properly before them, and that obligation should not be discarded lightly.[32]

24. Using act of state to refuse to hear claims like the one before this Court effectively provides immunity to a Canadian defendant for its own wrongful conduct, simply because that conduct is tied up with that of a foreign state. The act of state doctrine should never be used to permit a Canadian defendant to escape scrutiny for its alleged involvement in human rights violations, including forced labour. As a general matter, Canadian tort law does not protect a

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[31] See e.g. *Van Breda* at paras 100-112; *Haaretz.com v Goldhar*, 2018 SCC 28 at paras 84-85.

[32] See *Operation Dismantle* at para 62: "the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state."

tortfeasor from liability on the basis that a joint tortfeasor might not be subject to liability, and no such principle should be established here.

25. Introducing act of state doctrine in this context would selectively insulate from liability those corporations who partner with state-owned enterprise engaged in human rights violations. Such impunity is incompatible with modern international human rights law. Modern international human rights law protects the right to a remedy for victims of human rights violations by corporations. Increasingly, home states such as Canada are under the international human rights duty to provide access to justice to individuals whose human rights have been violated by the actions of a Canadian corporation abroad.[33] Both the UN Guiding Principles and the UN Framework for Business and Human Rights note the importance of access to justice and access to an effective remedy, urging states such as Canada to "strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territories," to "address obstacles to access to justice, including for foreign plaintiffs,"[34] and to "ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts."[35]

Conclusion

26. The present case is one example of a dispute between two private parties where it is alleged that the Canadian corporate defendant's wrongful conduct was intertwined with the conduct of a foreign state. A Canadian court ought to consider and resolve such matters as between a plaintiff and a Canadian defendant as long as 1) the Canadian court is not required to, and

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[33] *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada*, UNHRCOR, 38th Sess, UN Doc A/HRC/38/48/Add.1 (2018) at para 69; Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights", UNHRCOR, 8th Sess, UN Doc A/HRC/8/5 (2008) [UN Framework].

[34] UN Framework at para 91. See also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res, UNGAOR, 60th Sess, UN Doc A/RES/60/147 (2006) at art 17.

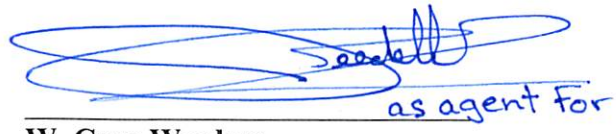
[35] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Guiding Principles on Business and Human Rights", UNHRCOR, 17th Sess, UN Doc A/HRC/17/31 (2011) at 23.

does not, make any findings which purport to be legally binding or otherwise have a legal effect on the foreign state; 2) the consideration of the actions of the foreign state arises in the course of adjudicating the rights and obligations of private parties who are properly before the court; and 3) the actions of the foreign state are considered in accordance with the principle of comity and only insofar as necessary to resolve the dispute. In such circumstances, act of state has no application, and should not be recognized as a principle of Canadian law.

PARTS IV & V – COSTS & ORDER SOUGHT

27. The IHRP does not seek costs and asks that none be awarded against it. The IHRP takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of January, 2019.



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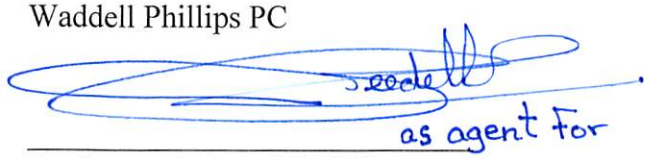

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PART VI – TABLE OF AUTHORITIES

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