File No. 37919

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

NEVSUN RESOURCES LTD.

APPELLANT
(Appellant)

- and -

GIZE YEBEYO ARAYA
KESETE TEKLE FSHAZION
MIHRETAB YEMANE TEKLE

RESPONDENTS
(Respondents)

- and -

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MININGWATCH CANADA

INTERVENERS

FACTUM OF THE INTERVENER MININGWATCH CANADA

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

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PART I – OVERVIEW

1. The Canadian common law should develop in a way that accounts for the realities of the globalized economy. While a discussion of the benefits and adverse effects of globalization divides opinion, globalization has undeniably led to the emergence of "governance gaps". Transnational corporations often operate in states where institutions are weak, regulatory oversight is minimal, and the rule of law is tenuous. The Intervener is concerned that the acceptance of the Appellant's arguments risks promoting impunity by creating barriers for victims seeking a judicial determination of their right to civil remedies. It further believes that this appeal will have a bearing on the ability of private civil liability to deter tortious corporate conduct when such conduct has a nexus to state actors.

2. The Intervener will first argue that permitting Canadian courts to hear private transnational civil claims to redress corporate conduct with a nexus to state actors does not engage the Federal executive's foreign policy prerogative save for exceptional circumstances that are not present in this case. It will further argue that such private litigation complements Canada's policies for promoting transnational corporate accountability and providing access to remedy. Second, the Intervener will argue that the doctrine of forum of necessity should form one of the limitations to the act of state doctrine, should the latter be recognized in Canadian common law.

PART II – QUESTIONS IN ISSUE

3. The Intervener makes the following submissions on the availability and applicability of the act of state doctrine in Canada:

(a) The adjudication in Canadian courts of private transnational civil disputes that implicate foreign state conduct does not engage the executive's prerogative power over foreign affairs save for exceptional circumstances and complements Canadian policies for promoting corporate accountability.

(b) Should this Court recognize the act of state doctrine in Canada, it should interpret it in a way that accounts for the rationale and policy concerns that gave rise to the doctrine of forum of necessity.

PART III – STATEMENT OF ARGUMENT

(a) The adjudication in Canadian courts of private transnational civil disputes that implicate foreign state conduct does not engage the executive's prerogative power over foreign affairs save for exceptional circumstances and complements Canadian policies for promoting corporate accountability.

(i) A potential interference with the executive's prerogative power will only justify the application of the act of state doctrine to bar a lawsuit between private parties in exceptional circumstances.

4. In the Intervener's view, transnational corporations would gain an unduly wide shield from liability if this Court rules that the claim before it interferes with the foreign affairs prerogative.

5. This Court has recognized that the Canadian legal system must adapt to the reality of globalized commerce.[1] In this case, the only possible link with Canada's foreign relations lies in the allegation that the defendant corporation committed torts in a foreign state in concert with a foreign government. Commercial transactions between actors in different states regularly occur with some government participation. In the Intervener's experience, Canadian mining companies operating in foreign states commonly carry out activities with a link to foreign state conduct.[2]

6. For the reasons stated below, no legal justification exists for holding that remedying human rights violations that occur in such circumstances falls under the sole purview of the executive. The Intervener submits that Lord Neuberger's approach in *Belhaj v. Straw* on this issue is preferable.[3] As a matter of policy, Lord Neuberger states that the act of state doctrine should be applied with restraint given the importance that the common law and human rights law attach to the right of access to the courts.[4] In the Intervener's view, only in exceptional circumstances where compelling evidence establishes a serious impediment to Canada's foreign relations will any limitation of this right be justified.

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1 *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, 2012 SCC 17 at para. 74 **[*Van Breda SCC*]**; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077 at pp. 1095-1097.

2 Affidavit of Jamie Kneen at para. 8, **MiningWatch Canada's Memorandum, p. 9**.

3 [2017] UKSC 3 at paras. 144-148 **[*Belhaj*]**.

4 *Ibid. supra* note 3 at para 144.

7. The prerogative power is "a limited source of non-statutory administrative power accorded by the common law to the Crown".[5] It is for the courts to determine both the existence of the prerogative powers and their extent.[6]

8. The present lawsuit does not engage the powers traditionally identified by the courts as being covered by the foreign affairs prerogative, such as the making of treaties, the making of war and peace, and diplomatic relations.[7] No Canadian Court has ever held that litigation between private parties with a link to the acts of a foreign state engages this prerogative power due to a risk of diplomatic tensions with that state or any alleged impact on that state's economy.

9. No authority supports the proposition that the *non-judicial* mechanisms created by the Canadian government demonstrate that the provision of remedies to foreign victims of Canadian corporations falls under the sole purview of the foreign affairs prerogative. As Professors Hogg and Monahan note, it is well-established that there is no prerogative power to administer justice and only the courts have the power to adjudicate disputes according to law.[8] As the power is residuary by definition[9], the Intervener submits that this Court should not entertain extending the foreign affairs prerogative to functions that are the responsibility of the judicial branch.

10. This Court's jurisprudence on the foreign affairs prerogative concerns cases where private parties sought to compel action by the federal government in the field of international relations. For instance, in *Khadr 2010*, the applicant sought a court order that the government request his repatriation from the United States.[10] In *Operation Dismantle v. The Queen,* the applicants challenged the government's decision to allow the American government to test ballistic missiles on Canadian soil.[11]

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5 *Canada (Prime Minister) v. Khadr*, [2010] 1 SCR 44, 2010 SCC 3 at para. 34 **[*Khadr 2010*]**.

6 *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA) at para. 26. The Courts may have no power to expand these powers any further than their historically recognized scope: Paul Lordon, *Crown Law,* (Toronto: Butterworths, 1991) at p. 64, **Intervener's Book of Authorities ("IBA"), Tab 5.**

7 See Peter W. Hogg, Patrick J. Monahan and Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto, Ont.: Carswell, 2011) at p. 23, **IBA, Tab 2, [*Liability of the Crown*]**; Lordon, *ibid*. at pp. 75-81, **IBA, Tab 5**; Pierre Issalys and Denis Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives*, 3e éd. (Cowansville, Que.: Yvon Blais, 2009) at para. 3.18, **IBA, Tab 3**.

8 *Liability of the Crown*, *ibid.* at p. 20, **IBA, Tab 2**.

9 *Khadr 2010, supra* note 5 at para. 34.

10 *Ibid*.

11 [1985] 1 S.C.R. 441 **[*Operation Dismantle*]**.

These authorities do not preclude transnational litigation between private parties that seeks to have a Canadian corporation answer to allegations of human rights violations.

11. Relying on American jurisprudence, the Appellant argues that the risk of interference with the conduct of international relations is one of the main justifications for the act of state doctrine.[12] This statement is at odds with the majority opinion in *Belhaj*. Lord Neuberger described this risk in his "fourth possible rule" which posits that "the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our country".[13] After explaining that this rule stemmed from the American justification for the doctrine described as "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder 'the conduct of foreign affairs'", he concluded that the existence of the rule was doubtful in English law and would require exceptional circumstances before it could be invoked.[14] Furthermore, Lord Neuberger's "third rule", which he explained was justified on the ground that domestic courts should not decide issues that are the proper purview of diplomacy, will, according to him, "almost always only […] apply to actions involving more than one state".[15] This is obviously not the case here.

12. The absence of interference with the conduct of Canada's foreign affairs is all the more obvious when the conduct of the foreign state pointed to is in clear violation of the human rights protections provided for under Canadian and international law. Given Canada's reputation as a global defender of human rights, it would be surprising, to say the least, for our government to find indirect criticism of conduct of this nature before our courts as antithetical with its foreign policy towards this same state. In *Banco Nacional de Cuba v Sabbatino*, the United States Supreme Court held that the risk of interfering with diplomatic relations decreased as the degree of consensus regarding a particular area of international law increased.[16]

13. The Appellant's allusion to the potential impact of this litigation on Eritrea's economy is unfounded. One of the main goals of providing civil remedies to victims of wrongdoing is to force economic actors to internalize the true costs of their activities. The Appellant's suggestion that "permitting claims like this one may discourage foreign investments in developing countries" in effect argues that economic development should come before respect for fundamental human rights.[17] The

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12 Appellant's Factum at para. 35.
13 *Belhaj*, *supra* note 3 at para. 124.
14 *Ibid.* at paras. 131-132.
15 *Ibid*. at para. 147.
16 376 US 398 at p. 428, 84 S. Ct. 923 (1964), **Appellant's Book of Authorities ["ABA"], Tab 1**.
17 Appellant's Factum at para. 36.

Intervener believes on the contrary that developing countries should not be forced to choose between the two. It is quite possible that a mine operated with forced labour would be more profitable than one in which workers receive decent wages and working conditions. This Court should not countenance the use of such arguments to deny access to Canadian courts for victims of human rights violations committed by Canadian corporations.

14. In addition, neither *Belhaj* nor any other English case on the act of state doctrine listed the avoidance of a deleterious impact on a foreign state's economy as one of the justifications for this doctrine. To support this argument, the Appellant cites *Jesner v. Arab Bank, PLC*, where *foreign* claimants brought a claim against a *foreign* corporation under the American *Alien Tort Statute* and the Supreme Court described the litigation's connection to the United States as "relatively minor".[18] The same can be said of the *Talisman Energy* case cited by the Appellant: the Canadian government was critical of litigation against a Canadian corporation brought *in the United States.*[19] Whatever may be said of the merits of the concerns expressed in these two cases, it is clear that their precedential value for the present case is low. The adjudication of a lawsuit against a Canadian corporation in Canada involves none of the foreign relations concerns raised by *Alien Tort Statute* litigation.[20]

(ii) Transnational lawsuits like the one before the court complement Canadian policies for promoting corporate accountability and providing access to remedy.

15. In addition to the foregoing, this Court should take note of how transnational lawsuits of this nature complement the foreign policy initiatives Canada has developed to deal with alleged human rights violations by Canadian corporations. Canadian policy on business and human rights expressly states that it has not sought to remove access to Canadian courts for foreign victims. In accordance with the international law principles of subsidiarity and complementarity and Rule 27 of the *UN Guiding Principles on Business and Human Rights*[21], Canada has rather designed its policy in this area to complement and supplement private civil litigation.

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18 138 S. Ct. 1386, 200 L. Ed. 2d 612, at pp. 1390, 1406, **ABA, Tab 6**; *Alien Tort Statute*, 28 U.S.C. § 1350.

19 See generally Appellant's Factum at para. 34.

20 See François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010), at pp. 317-318, **IBA at Tab 4**.

21 United Nations, Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (New York and Geneva: United Nations: 2011). at p. 30 (Principle 27 and its commentary) [*UN Guiding Principles*]. See also p. 28 (Commentary

16. Before it moved to create the future Canadian Ombudsperson for Responsible Enterprise ("**CORE**"), the Canadian government set up the Extractive Sector Corporate Social Responsibility Counsellor and the Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises to facilitate dialogue and mediate disputes between Canadian corporations and victims of their overseas operations.[22] Prior to its recent statement to the effect that CORE does not affect the right of any party to bring a legal action[23], the Federal government had clearly posited that the two previous bodies also did not remove the right of victims to access civil remedies under private litigation brought through courts in either the foreign host state or Canada.[24]

17. In the Intervener's submission, even if it had been the *stated goal* of the Federal government to curtail the rights of victims to bring claims for civil remedies, its constitutional power to bring about such a result would be questionable, as the creation of civil remedies is a provincial power under section 92(13) of the *Constitution Act, 1867*.[25]

18. In any event, all three of these federal mechanisms lack adjudicative power: they cannot make binding orders against the parties and thus only offer a space where the parties can attempt to resolve their disputes out of court. The Intervener has extensive first-hand experience with these mechanisms.[26] In its submission, the lack of adjudicative power limits their effectiveness as Canadian corporations may not take the claims of foreign victims as seriously as they would if they had to answer to a binding legal proceeding.

19. The Appellant's arguments on this matter thus ignore Canada's desire to maintain the availability of judicial mechanisms for foreign victims of Canadian corporations and undermine the important role that courts play in achieving the objective of holding them accountable for their human rights obligations.

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to Principle 25: "State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy").

22 Global Affairs Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (November 2014 online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf) at p. 11 [GAC].

23 See Respondents' Factum at para. 92.

24 GAC, *supra* note 22 at p. 11 ("It should be noted that these Canadian mechanisms are not meant to replace local processes, nor do they preclude the use of court systems, either locally or in Canada, to seek legal restitution").

25 30 & 31 Victoria, c 3 (UK) at s. 92 (13). See also *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at pp. 672-673.

26 Affidavit of Jamie Kneen at para. 9, **MiningWatch Canada's Memorandum, pp. 9-10**.

(b) Should this Court recognize the act of state doctrine in Canada, it should interpret it in a way that accounts for the rationale and policy concerns that gave rise to the doctrine of forum of necessity.

20. If this Court confirms that the act of state doctrine forms part of Canadian common law, it will have to determine its nature and scope. In *Belhaj*, Lord Mance cited Lord Rix in *Yukos* for the proposition that "increasingly in the modern world the [act of state] doctrine is being defined, like a silhouette, by its limitations".[27] In the Intervener's submission, one of the limitations should be the availability of the doctrine of forum of necessity.

21. While comity may demand respect and deference when Canadian courts deal with claims that involve the act of a foreign state, comity is not absolute and should not produce a rule that tends towards injustice.[28] As judge Black stated in *Habib v. Commonwealth of Australia*, "the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms".[29] The Intervener submits that this Court should define the act of state doctrine in a manner that accounts for the difficulties that foreign victims sometimes face in bringing civil claims and not in a manner that allows it to be used to produce an international denial of justice, where a plaintiff has no forum where it could be reasonably required to bring suit.

22. In *Van Breda SCC*, this Court left open the possible application of the forum of necessity doctrine where the courts would otherwise be bound to dismiss or stay an action.[30] While forum of necessity grants a court a residual discretion to assume jurisdiction in Canada in order to avoid the denial of justice referred to above, its availability in situations like the one on appeal ultimately turns on whether act of state is an absolute rule of non-justiciability that does not allow a court to consider issues such as access to justice.[31] In the Intervener's submission, it is not.

23. In *Belhaj*, all seven members of the court recognized that not all foreign state conduct is non-justiciable. The court established various rules and exceptions to determine when judges should abstain from hearing a matter. Lord Mance recommended a flexible approach when he included the

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27 *Belhaj, supra* note 3 at para. 33.
28 *Van Breda SCC, supra* note 1 at para. 73.
29 [2010] FCAFC 12 at para. 13.
30 *Supra* note 1 at para. 100.
31 The Intervener submits that though he did not address forum of necessity, Lord Neuberger recognized this issue in his reasons: *Belhaj*, *supra* note 3 at para. 144.

fundamental right of access to justice as a factor that the court must consider when determining the justiciability of the foreign state conduct:

> Whether an issue is non-justiciable falls to be considered on a case-by-case basis. Considerations both of separation of powers and of the sovereign nature of foreign state or interstate activities may lead to a conclusion that an issue is non-justiciable in a domestic court: […]. But in deciding whether an issue is non-justiciable, English law will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised: […].[32]

In this regard, he questioned whether the act of state doctrine should operate where litigants were deprived of any form of access to justice in the foreign state, reasoning that it was important for them to have a means of challenging an illegal act of that state's executive.[33]

24. The Intervener submits that Lord Mance's approach to non-justiciability accords with that espoused by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*: "[t]here is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible".[34]

25. A justiciability test that does not account for considerations of access to justice is inconsistent with Canadian public policy. The development of forum of necessity by common law courts and its codification by various provincial and territorial legislatures confirms that it offends Canadian public policy to deny a foreign plaintiff with a connection to a Canadian jurisdiction access to a court when no real alternative exists in the foreign state.[35] Unlike *forum non conveniens*, which is concerned with the convenience or appropriateness of the foreign forum, necessity jurisdiction evidences the objective of granting courts discretion to assume jurisdiction where no other forum exists or can be reasonably accessed. As Lebel J.A. recognized in *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, the National Assembly enacted this private international rule to address precisely the access to justice problems that the Respondents would face in Eritrea:

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32 *Ibid.* at para. 11 (iv) c) [emphasis added].
33 *Ibid.* at paras. 65, 99. See also para. 144 (Lord Neuberger).
34 2018 SCC 26 at para. 34.
35 *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 100. For the codification of the doctrine in Canada, see *Civil Code of Quebec*, CQLR c CCQ-1991 at art. 3136; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003 c 28 at s. 6; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess.) c 2 at s. 7; *Court Jurisdiction and Proceedings Transfer Act*, SY 2000 c 7 at s. 6.

> "[…] Elle veut régler certains problèmes d'accès à la justice, pour un plaideur qui se trouve dans le territoire québécois, lorsque le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles, comme une impossibilité en droit ou une impossibilité pratique, presqu'absolue. Ainsi, on peut penser à celles résultant de la rupture des relations diplomatiques ou commerciales avec un État étranger ou de la nécessité de la protection d'un réfugié politique, ou à l'existence d'un danger physique sérieux, si l'on entame un débat devant le tribunal étranger."[36]

By granting the court discretion to assume jurisdiction in such circumstances, forum of necessity furthers Canada's commitment to the rule of law by ensuring that a foreign plaintiff with a claim connected to Canada is not unreasonably denied access to a court.[37]

26. The Intervener submits that *Bouzari v. Bahremani* is a good example of the need to maintain the availability of a forum for private transnational claims that raise a foreign act of state. In this decision, Bouzari won a default judgment against Bahremani, a son of the President in Iran who was found to have instigated or participated in Bouzari's torture by Iranian officials after attempting to extort him on multiple occasions.[38] This decision followed the Ontario Court of Appeal's ruling in *Bouzari 2004* that the *State Immunity Act* prevented the Ontario Court from assuming jurisdiction over a separate civil claim that Bouzari brought against Iran based on exactly the same factual scenario.[39] In its decision, the Court of Appeal alluded to forum of necessity when it posited that Ontario's lack of jurisdiction under the real and substantial connection test was troubling due to Iran being unavailable as a forum and Bouzari having no place to sue other than Ontario.[40] While *Bouzari 2011* did not include a state actor as a defendant and thus did not warrant the application of state immunity to bar proceedings, it involved the kidnapping and torture of Bouzari by Iranian officials and could have given rise to an act of state argument. The Ontario Superior Court of Justice nonetheless assumed jurisdiction of necessity after it determined that Bouzari could not be reasonably required to pursue

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36 *Lamborghini (Canada) inc. c. Automobili Lamborghini S.P.A.*, 1996 CanLII 6047 (QC CA) at p. 20 [emphasis added]. In the present appeal, the chambers judge found that the Respondents were refugees who faced serious physical dangers if they return to Eritrea and faced a real risk of an unfair trial in that forum: *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, **Appellant's Record ("AR") Vol. I, Tab 1** at paras. 247, 251, 258, 284, 286 (affirmed on appeal: *Araya v Nevsun Resources*, 2017 BCCA 401, **AR Vol. II, Tab 3** at paras. 117, 119-120).

37 See *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at para. 24; *UN Guiding Principles*, *supra* note 21 at pp. 28-29 (Rule 26 and its commentary).

38 [2011] O.J. No. 5009 at para. 3 **[*Bouzari 2011*]**. See also *Bouzari v. Islamic Republic of Iran*, 2004 CanLII 871 (ON CA) at paras. 10-12 **[*Bouzari 2004*]**.

39 *Bouzari 2004*, *ibid*. at paras. 57-59; RSC 1985, c S-18 at s. 3;

40 *Bouzari 2004, ibid.* at paras. 36-38.

the defendant in Iran, where the torture had taken place.[41] In *West Van Inc. v. Daisley*, the Ontario Court of Appeal reviewed the law on forum of necessity and posited that this form of jurisdiction was designed for cases like *Bouzari 2011*.[42]

27. Adopting an act of state test that does not account for access to justice would produce an absurd result if the foreign state's courts were not in a position to scrutinize a law of that state that for instance excluded certain classes of plaintiffs from bringing suit, criminalized anyone who brought litigation against an individual company, or removed the right to sue an individual company.[43] While a Canadian Court with jurisdiction would determine whether such a law offended domestic public policy, act of state would leave the plaintiff with no forum to challenge the law at issue.

28. Recognizing that the right to access a court is not absolute and that comity may still demand judicial abstention, the Intervener submits that its interpretation would promote order, fairness and comity in that act of state would still apply in cases where the foreign state offered plaintiffs a forum where the Canadian defendant would have to answer to their allegations in a fair and binding adjudicative process. The fundamental barriers to justice that gave rise to forum of necessity considerations would not exist in such circumstances because the foreign jurisdiction would have a shared commitment to the rule of law. The Canadian defendant could thus not use the act of state doctrine as a shield to avoid any judicial scrutiny of its conduct as the Appellant does here.

29. For these reasons, the Intervener asks that if this Court decides to recognize the act of state doctrine, it should do so in a manner that accounts for the rationale and policy concerns that gave rise to the doctrine of forum of necessity.

PART IV – SUBMISSIONS CONCERNING COSTS

30. The Intervener does not seek any costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

31. The Intervener does not seek an order in this appeal.

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41 *Bouzari 2011*, *supra* note 38 at para. 5.
42 2014 ONCA 232 at paras. 22, 26, 40.
43 See for example *UN Guiding Principles*, *supra* note 21 at p. 29 (Rule 26: discussing legal barriers to justice, the commentary recognize that "certain groups, such as indigenous peoples and migrants, [may be] excluded from the same level of legal protection of their human rights that applies to the wider population").

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montréal, this 4th day of January, 2019

Me Bruce W. Johnston
Me Jean-Marc Lacourcière
Trudel Johnston & Lespérance

Montréal, this 4th day of January, 2019

Me Andrew Cleland

Counsel for the Intervener MiningWatch Canada

PART VI –TABLE OF AUTHORITIES

Jurisprudence **Paragraph(s)**

Legislative Enactments

Secondary Materials

Secondary Materials ***(cont'd)***
