S.C.C. File No. 37919

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

BETWEEN:

NEVSUN RESOURCES LTD.

APPLICANT
(APPELLANT)

AND:

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

RESPONDENTS
(RESPONDENTS)

RESPONDENTS' MEMORANDUM OF ARGUMENT

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I - STATEMENT OF FACTS

A. Overview

1. This application for leave to appeal should be denied. The act of state motion raises no matter of national importance. As no Canadian court has ever had occasion to apply the doctrine, it is highly doubtful that it serves any useful purpose in Canadian law. The considerations that lie at the heart of the act of state doctrine – sovereignty and comity – have, historically, been well managed by Canadian courts through the doctrines of *forum non conveniens* and choice of law.[1]

2. In any event, this case falls well outside the scope of any known formulation of the act of state doctrine. The purpose of the doctrine is not to immunize corporate conduct from judicial scrutiny,[2] and the doctrine has no application to cases involving violations of fundamental human rights.[3]

3. The second issue raised by the applicant – the customary international law claims – has not reached a stage where there is anything substantial for this Court to decide. Thus far, the lower courts' rulings have decided only that the respondents' claims raise "arguable, difficult and important points of law"[4] that would be premature to dismiss at this point and which require proper argument and consideration at trial to resolve. Both lower courts thus chose to defer definitive judgment on this question until they have had the benefit of a full trial. If there is an appropriate juncture for this Court to intervene in this matter, it would be after a trial has run its course, not before.

B. Background

4. This case raises claims of corporate complicity in forced labour and widespread violations of fundamental human rights.

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[1] Gib van Ert, "The Reception of International Law in Canada – Three Ways We Might Go Wrong" (2018) Centre for International Governance Innovation, Canada in International Law at 150 and Beyond Publication Series Paper No. 2 – January 2018, at 10-11 online: CIGI <https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf >.

[2] *Araya v Nevsun Resources Ltd.*, 2017 BCCA 401 ("*Araya BCCA*"), at para. 173.

[3] *Araya BCCA, supra* at para. 169.

[4] *Araya et al v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (*"Araya BCSC"*) at para. 484.

5. The respondents are Eritrean refugees who escaped a lifetime of indefinite conscription in Eritrea's National Service Program. They allege that the applicant, Vancouver based mining company Nevsun Resources Ltd., entered into a commercial venture with the state of Eritrea to develop, construct and operate the Bisha gold, zinc and copper mine in Eritrea. The respondents allege that they, and hundreds of fellow conscripts in the National Service Program, were forced to work at the mine in inhuman conditions and under the constant threat of physical punishment, torture, and imprisonment.[5]

6. Eritrea is one of the most repressive, autocratic states in the world. It has no constitution, no active legislature, no elections, no political opposition, and no private media. All political and economic power is concentrated firmly in the hands of dictator Isaias Afewerki, who has held power since the country gained independence in 1993.[6]

7. Eritrea's National Service Program began as a presidential proclamation requiring all Eritreans to complete 18 months of military training and service upon reaching the age of 18. In 2002, the government announced that conscripts would no longer be demobilized from national service after 18 months.[7] According to Nevsun's own expert on Eritrean law, the President's indefinite extension of the National Service Program lacks a legal basis.[8]

8. Conditions in the National Service Program are brutal. Punishment for perceived disobedience is severe. Conscripts are assigned to the military or companies owned by the ruling party or military.[9] The United Nations, the International Labour Organisation, and various other international bodies have condemned the practice of indefinite conscription as a violation of international treaties prohibiting forced labour.[10]

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[5] *Araya BCCA*, *supra* at para. 3.
[6] *Araya BCCA*, *supra* at paras. 41, 44 and 97(3), citing the report prepared by the European Asylum Support Office on Eritrea for the purpose of assisting in the determination of claims for international refugee protection; and see *Araya BCSC*, *supra* at paras. 18 and 124.
[7] *Araya BCSC*, *supra* at para. 27.
[8] *Araya BCCA*, *supra* at paras. 161-162.
[9] *Araya BCCA*, *supra* at para. 97(4), citing the 2009 World Report prepared by Human Rights Watch.
[10] *Araya BCSC*, *supra* at para. 88(c)(iii)-(iv).

9. Nevsun is alleged to have used conscript labour supplied by Segen, a construction company owned by the ruling party; the Eritrean military; and, Mereb, a military-owned construction company[11].

10. The respondents filed their claim against the applicant as a representative action in British Columbia in November 2014. They pleaded a variety of established common law torts, including battery, false imprisonment, and negligence. They also pleaded novel common law torts drawing on standards supplied by the customary international law prohibitions against forced labour, slavery, torture, crimes against humanity, and cruel, inhuman, or degrading treatment. These prohibitive norms of customary international law are incorporated into the common law through the doctrine of adoption, as affirmed by this Court's ruling in *R. v. Hape*, 2007 SCC 26.

11. In response, the applicant filed and litigated four motions, two of which are addressed in this application: the motion to dismiss the action by reason of the act of state doctrine, and the motion to strike the respondents' customary international law claims. Two other motions – one to stay the claim by reason of the doctrine of *forum non conveniens* and another contesting the representative action form of procedure – were also heard in the lower court.

C. Decision of Abrioux J. in the British Columbia Supreme Court

12. Nevsun asserted that the respondents' claims were barred by the act of state doctrine. It asserted that the doctrine deprived the courts of British Columbia of subject matter jurisdiction, or in the alternative, that the respondents' claims should be struck as disclosing no cause of action which could be adjudicated in the face of the doctrine.

13. Abrioux J. dismissed the application. He ruled that it was not appropriate at such an early stage of the case to dismiss the claim on the basis of a doctrine which he considered "essentially a 'novel' defence",[12] which, if successful, would provide a "draconian remedy".[13] He noted that

[11] Amended Notice of Civil Claim filed on May 31, 2017 ("NOCC") at para. 27, Response Book ("RB") at Tab B1.
[12] *Araya BCSC, supra* at para. 394.
[13] *Araya BCSC, supra* at para. 393.

it had never been applied in Canada[14] and questioned its continued relevance in the modern context of growing universal recognition of fundamental human rights norms, adding that "After all, this is British Columbia, Canada; and it is 2016."[15]

14. Abrioux J. also rejected the applicant's argument that the customary international law torts pleaded by the respondents have no reasonable prospect of success. He considered the respondents' claims raised a "real issue"[16] not suitable for determination at such an early stage. Rather, he believed that the claims "should proceed to trial so that they can be considered in their proper factual and legal context."[17] This, he said, was "necessary such that the common law and the law of tort may evolve in an appropriate manner."[18]

15. Abrioux J. also dismissed the *forum non conveniens* motion, ruling that the evidence before him established that there was a "real risk" the respondents would not receive a fair trial in Eritrea.[19] On the *forum non conveniens* motion, the respondents introduced firsthand testimony from former Eritrean judges who had fled the country, as well as reports from the United Nations and other international bodies, indicating that the Eritrean justice system was entirely subject to the control of and intimidation by the dictator, and the respondents would not receive a fair trial in Eritrea. The appeal of the *forum non conveniens* application was dismissed, and is not addressed in the applicant's application for leave to appeal.

16. Abrioux J. granted the applicant an order denying the proceeding the status of a representative action. The respondents did not appeal this ruling.

D. The UK Supreme Court Decision in *Belhaj v. Straw*

17. After Abrioux J. released his decision, the UKSC released its landmark act of state decision in *Belhaj v. Straw*.[20] The UKSC's reasons are comprehensively summarized in the reasons of Newbury J.A. in the BC Court of Appeal.[21]

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[14] *Araya BCSC, supra* at para. 419.
[15] *Araya BCSC, supra* at para. 421.
[16] *Araya BCSC, supra* at para. 484.
[17] *Araya BCSC, supra* at para. 484.
[18] *Araya BCSC, supra* at para. 484.
[19] *Araya BCSC, supra* at para. 296.
[20] *Belhaj & Anor v. Straw & Ors*, [2017] UKSC 3 ("*Belhaj UKSC*").

E. Decision of Newbury J.A. in the British Columbia Court of Appeal

18. Newbury J.A. found that the doctrine did not apply to the circumstances of this case as there was no official law or executive act of the Eritrean state authorizing the use of conscript labour at the Bisha Mine. Even if there were, she concluded that the claim would fall squarely within the established public policy exception.[22]

19. She emphasized that torture, forced labour, and slavery are "contrary to both peremptory norms of international law and a fundamental value of domestic law."[23] As such, the applicant "cannot rely on the doctrine of act of state to claim immunity from the consequences of violating same."[24]

20. Like Abrioux J., Newbury J.A. deferred judgment on the respondents' customary international law claims until the issues raised have been fully explored at trial. She observed that many of these issues raised by the claims are "historical or philosophical rather than legal – a fact that makes it all the more difficult [at this stage] to arrive at a clear conclusion as to the likelihood of the respondents' position succeeding in Canada."[25]

21. Newbury J.A. also found no error in Abrioux J.'s analysis of the *forum non conveniens* question.

PART II - STATEMENT OF ISSUES

22. The question to be determined is whether this application raises matters of such public importance that this Court should grant leave to appeal.

PART III - ARGUMENT

A. Act of State Doctrine

23. The act of state doctrine has rarely been discussed, let alone applied, in Canadian courts. Further, the doctrine is simply not engaged in the circumstances of this case. As such, the

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[21] *Araya BCCA*, *supra* at paras. 123, and 142-153.
[22] *Araya BCCA*, *supra* at para. 169.
[23] *Araya BCCA*, *supra* at para. 169.
[24] *Araya BCCA*, *supra* at para. 169.
[25] *Araya BCCA*, *supra* at para. 195.

applicant's motion on this issue raises no issue of national importance. Moreover, it is doubtful whether the act of state doctrine serves any useful purpose which cannot be adequately addressed through existing doctrines of *forum non convienens* and choice of law. As the name implies, the act of state doctrine is intended to address acts of a foreign state, not to provide immunity to corporations.[26]

24. As Newbury J.A. observed, the doctrine under any known formulation does not apply and even if it did, the public policy exception would apply to allow a Canadian court to adjudicate this case.[27] While Newbury J.A.'s reasoning focused on the British version of the doctrine, the same result would be obtained under the American[28] and Australian[29] versions.

25. Further, concerns over sovereignty of the foreign state, deference to the laws of a foreign state and comity of nations can be and are fully canvassed through *forum non conveniens* and choice of law. For example, in this case, the applicant advanced *forum non conveniens* arguments that Eritrea is the more appropriate forum because the claim engages sovereign acts of the state. In written submissions at first instance, the applicant devoted an entire section to summarizing its submissions on the act of state doctrine in order to incorporate them into its argument on *forum non conveniens,*[30] arguing that "[I]f the Court finds that the act of state doctrine does not bar the claim, then it is still open to it to take the underlying concerns about

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[26] *Araya BCCA, supra* at para. 173.

[27] *Araya BCCA, supra* at paras. 165-169.

[28] In the United States, the phrase "act of state" is a term of art that applies not to any act by a government or military official, but only the "officially approved policy of a state." Further, violations of *jus cogens* norms do not qualify as official acts of state. See EarthRights International's, Intervenor, BCCA Factum, at paras. 10-21, RB Tab B3.

[29] In Australia, courts are "free to consider and pronounce an opinion upon the exercise of sovereign power by a foreign Government if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question … which in itself is subject to the competency of the Court of law. The fact that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue." See *Moti v. The Queen*, [2011] HCA 50 at para. 52.

[30] British Columbia Supreme Court Forum Challenge Chambers Brief of Nevsun Resources Ltd. ("Nevsun's BCSC Brief"), at paras. 293-299, RB Tab B2.

sitting in judgment on the State of Eritrea into account in determining whether it should exercise territorial competence."[31]

26. Recasting those same arguments as a bar to subject matter jurisdiction serves no useful purpose in Canadian law.

27. In *Belhaj*, Lords Mance and Neuberger both expressed the opinion that the act of state doctrine was in part equivalent to, or at least based on, private international law principles of choice of law.[32] In the landmark Australian case of *Habib v. Commonwealth of Australia*, Perram J. speculated that it was nothing more than a "super choice of law rule."[33]

28. With no history of the act of state doctrine being applied in Canada, and the doctrine not being implicated by the facts of this case, the applicant's motion raises no issue of national importance.

B. Customary International Law Claims

29. At this preliminary stage of the case, it is premature for this Court to review the claims for damages based on alleged violations of peremptory norms of customary international law. On a "bound to fail" standard, both lower courts conducted only a "superficial"[34] analysis of the matter and acknowledged the conceptual complexity of the arguments. Both courts agreed on the need to assess the claims in the context of a complete record of the type afforded by a trial. Abrioux J. explained that the claims "raise arguable, difficult and important points of law and should proceed to trial so that they can be considered in their proper factual and legal context."[35] He stressed that a "contextual analysis" was required to properly decide these questions.[36]

30. It is premature to settle the issue at this stage. Once the issues have been fully explored by lower courts through the process of a trial, that may be a more appropriate stage for this Court

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[31] Nevsun's BCSC Brief, *supra* at para. 299, RB Tab B2.
[32] *Belhaj UKSC*, *supra* at paras. 34-35, 38, 150, and 159.
[33] *Habib v. Commonwealth of Australia*, [2010] FCAFC 12.
[34] *Araya BCCA*, *supra* at para. 177.
[35] *Araya BCSC*, *supra* at para. 484.
[36] *Araya BCSC*, *supra* at para. 477.

to weigh in on the discussion. At present, however, the debate is not sufficiently developed to afford this Court a good opportunity to do so.

31. The applicant recognizes that courts prefer to decide novel questions of law with the benefit of a full factual record. It thus argues that because the Court of Appeal has found that the act of state doctrine does not apply in this case "the record in relation to that issue will not improve if deferred until after trial."[37] This is not correct. Elsewhere the applicant acknowledges that the respondents' claims under "existing torts" will proceed to trial.[38] In litigating the respondents' claims the parties will develop a rich and comprehensive record relevant to all claims, both those based on "existing torts" and those based on customary international law. Moreover, as Newbury J.A. noted, certain of the evidence adduced to date was for the purpose of the interlocutory motions before the court and "not as evidence on the substantive issues to be determined at trial".[39] It is therefore wrong to suggest that the record is complete and frozen at this point in time.

32. The applicant also says the issues should be resolved now because the trial will take months and cost significant sums of money and the applicant has little prospect of recovering costs from the respondents.[40] With respect, the applicant's pecuniary interest is not a relevant criterion for this Court in deciding whether to grant leave. As noted, the trial will proceed and the record relevant to all issues will be assembled for that purpose.

C. The Legal Questions Raised are too Narrow to Have a Significant Impact in Lawsuits Against Canadian Multinational Companies for Complicity in Human Rights Violations Abroad

33. The applicant also raises the spectre of opening the "floodgates" and claims this case will have a profound impact on "hundreds"[41] of Canadian companies. The applicant asserts that if the lower courts' rulings stand, claims for complicity in human rights abuses against Canadian multinational businesses active in foreign countries will proliferate greatly. No evidence is tendered in support of this assertion.

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[37] Leave Argument at para. 41.
[38] Leave Argument at para. 48.
[39] *Araya BCCA, supra* at para. 100.
[40] Leave Argument at para. 52.
[41] Leave Argument at para. 1.

34. In reality, the facts of this case are unusual, and the legal questions raised here – act of state and customary international law - reflect that. As the applicant observed in written submissions in the Court of Appeal:

> "The chambers judge was right to this extent: this is not an "ordinary" case. It is unlike anything that has been seen in our courts."[42]

35. Newbury J.A. agreed that the questions raised are "exceptional."[43] Unless the applicant now suggests that many other Canadian companies are also alleged to be engaged in commercial partnerships with dictatorial states and complicit in forced labour, slavery, torture, and crimes against humanity, it is unlikely that the jurisprudential impact of these questions will approach the scale asserted by the applicant.

PART IV - SUBMISSIONS REGARDING COSTS

36. The respondents ask for their costs of this application.

PART V - ORDER SOUGHT

37. The respondents seek an order that the application for leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Joe Fiorante, Q.C.
Counsel for the respondents

February 23, 2018

[42] Nevsun Resources Ltd.'s BCCA Factum, at para. 157, RB Tab B4.
[43] *Araya BCCA*, *supra* at para. 2.

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
CASES	
Araya et al v. Nevsun Resources Ltd., 2016 BCSC 1856	3, 6, 7, 8, 13, 14, 15, and 29
Araya v. Nevsun Resources Ltd., 2017 BCCA 401	2, 5, 6, 7, 8, 17, 18, 19, 20, 23, 24, 29, 31 and 35
Belhaj & Anor v. Straw & Ors, [2017] UKSC 3	17 and 27
Habib v. Commonwealth of Australia, [2010] FCAFC 12.	27
Moti v. The Queen, [2011] HCA 50	24
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PART VII - LEGISLATION AT ISSUE

N/A