

Business and Human Rights Litigation in Canadian Courts

Araya v. Nevsun Resources Ltd.

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Eritrea - Background

- Ruled by President Isaias Afewerki since independence from Ethiopia in 1991
- Complete ban on elections, political opposition, private press, and NGOs; no active legislature or constitution
- **National service program – considered by ILO as forced labour**
- 10th highest refugee producing country in the world according to UNHCR data (of a population of 6 million)



The Bisha Mine

- Operated by Nevsun Resources Ltd – Canadian mining company headquartered in British Columbia
- Construction begin in 2008, in production since 2011
- Has extracted more than US\$2.4 billion worth of gold
- Nevsun engaged a state-owned enterprise, the Segen Construction Company, to build the mine's facilities
- Segen, like other state-owned companies, draws heavily from forced labour supplied by the “national service” program for its workforce

The Bisha Mine

- In June 2015, a UN Commission of Inquiry released a report on human rights in Eritrea
- Among its findings, the report concluded that forced labour and torture occurred at the Bisha Mine
- *“A former Segen employee recalled: “There were many accidents in Bisha, more than I want to remember. It is one of the hottest parts of the world, 50 degrees Celsius. People were sick of pressure. Some died, they were not able to breathe. Others had no uniforms and suffered from chemical burns on the face, hands and body; they did not receive any medical care. A friend was working while oxygen was limited and he died because of it. Furthermore, there was an old man who should not even have been there given his age. He did not have appropriate shoes, and the electric tubes were not wired well. There was liquid on the floor He slipped and was electrocuted”.”*
- In June 2016, the Commission of Inquiry released a report concluding that Eritrea’s “national service” program of forced labour constituted a crime against humanity

Gold: What is it Good for?

- “I will say this about gold. If you took all the gold in the world, it would roughly make a cube 67 feet on a side... Now for that same cube of gold, it would be worth at today’s market prices about \$7 trillion dollars – that’s probably about a third of the value of all the stocks in the United States... For \$7 trillion dollars... you could have all the farmland in the United States, you could have about 7 Exxon Mobils, and you could have a trillion dollars of walking-around money... And if you offered me the choice of looking at some 67 foot cube of gold and looking at it all day, and you know me touching it and fondling it occasionally... Call me crazy, but I’ll take the farmland and the Exxon Mobils.”

- Warren Buffett, 2011

***Nevsun* Lawsuit**

- Lawsuit filed in November 2014 in British Columbia
- Originally three plaintiffs
- All plaintiffs were refugees living outside Eritrea

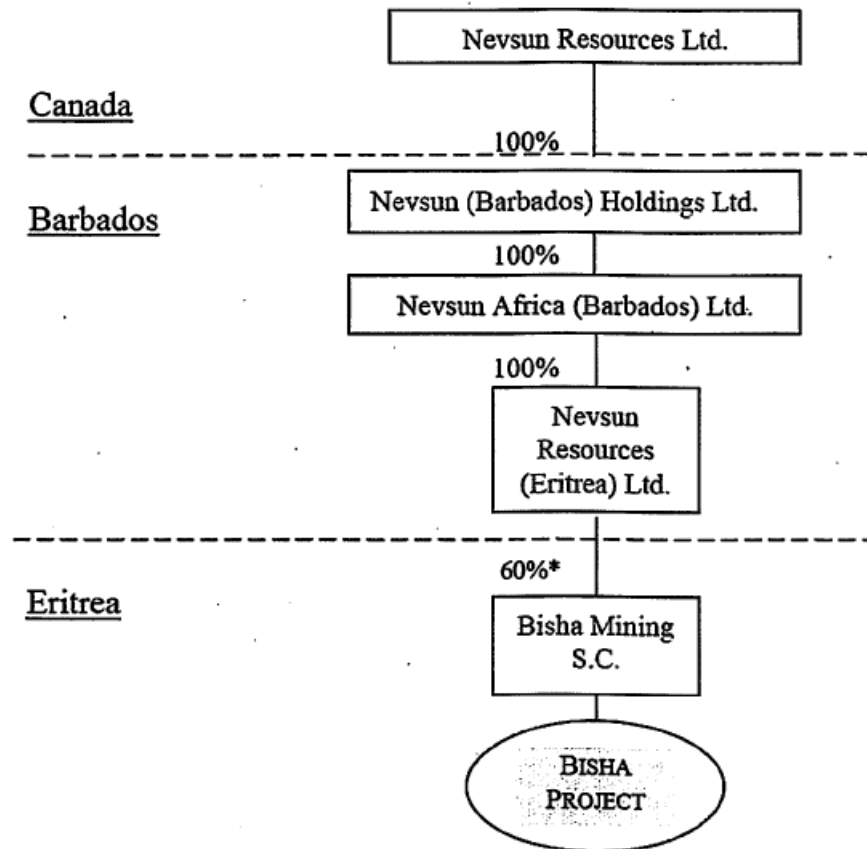
Customary International Law

- In the common law, a plaintiff in tort/delict must invoke one or more of a series of established torts/delicts that have set requirements
- In addition, a plaintiff may argue to a judge that a new tort should be recognized
- The Supreme Court of Canada has recognized that customary international law is part of the law of Canada
- The *Nevsun* plaintiffs argue that Canadian law should recognize novel torts for violations of the customary international law rules against slavery, forced labour, torture, and crimes against humanity

Obstacle – Jurisdiction

- Principle of *forum non conveniens*
- Considerations such as fairness, convenience, availability of justice in foreign court system
- Most difficult legal obstacle for these lawsuits in Canada so far
- Actual quote from Nevsun’s appeal submissions:
“The chambers judge failed to weigh the risk that the plaintiffs might not receive a fair trial in Eritrea against the certainty that Nevsun cannot defend itself in British Columbia.”

Obstacle – The Corporate Veil



Obstacle – Limitation Period

- Roughly analogous to civil law concept of prescription
- Typical limitation period in Canada is 2 years

Procedural History

- Motion to dismiss – *forum non conveniens*
- Motion to dismiss – act of state
- Motion to strike customary international law claims
- BC Motions Judge dismissed Nevsun’s motions in Oct 2016 – “After all, this is British Columbia, Canada; and it is 2016.”
- Decision appealed to BC Court of Appeal; appeal dismissed in Nov 2017
- Rulings on act of state and customary international law appealed to Supreme Court

Nevsun Resources Ltd. v. Araya, 2020 SCC 5

- Released in February 2020
- 9-0 unanimous ruling that act of state doctrine does not exist in Canada (but 2 would have dismissed on related principles)
- 5-4 majority rules that customary international claims can continue
- Corporations can be subject to international law responsibility

THANK YOU

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