
Brian Kolenda
416-865-2897
bkolenda@litigate.com


Sean Lewis
416-865-2973
slewis@litigate.com

March 19, 2020

# Supreme Court of Canada Opens the Door to Claims Against Corporations for Breaches of International Law

In its February 28, 2020 decision, *Nevsun Resources Ltd v Araya*, the Supreme Court of Canada allowed a claim by three Eritrean citizens against a British Columbia corporation operating in Eritrea to proceed. Canadian (and international) corporations with international operations in high risk jurisdictions should take note.

## The Decision

Three Eritrean workers at a mine ultimately owned by a Canadian mining company, Nevsun Resources Ltd, succeeded in resisting a motion to strike their claim on a number of grounds, including that it failed to disclose a cause of action. The workers' claims included breaches of customary international law, breaches of international legal provisions against forced labour, slavery, cruel/inhuman or degrading treatment and crimes against humanity.

In a split 5-4 decision, the majority concluded that the claims for breaches of customary international law should not be struck at this stage. While the bar on a pleadings motion such as this is usually low, the majority went out of its way to emphasize that Canadian courts should not close the door on even novel claims relating to breaches of international law, particularly ones that have the status of peremptory norms, from which international law does not permit any State to derogate.

## Discussion

The majority's analysis is focused on the doctrine of adoption, which provides that customary international law is incorporated indirectly and automatically into Canadian Law absent legislation to the contrary; however, as the dissenting opinions in this case emphasized, the majority's analysis does not spend any significant time considering the extent to which the admittedly obvious preemptory norms against the heinous conduct alleged actually give rise in customary international law to what is called "horizontal application" – i.e. whether international law recognizes causes of action against private persons (in particular, corporations) by other individuals.

As the dissenting opinions noted, there seems to be comparatively less evidence that customary international law in this area actually recognizes such claims by individuals.

While the decision does not finally determine that such claims are actionable in Canadian Law, it does reflect a clear attitude of at least a majority of the Supreme Court that concern for international human rights norms are a compelling reason to allow this area of law to develop.

Although the defendant in this case was a Canadian corporation (thus, mitigating concerns about Canadian courts' exercise of extraterritorial jurisdiction), this perspective of the Supreme Court (confirming the decisions of the British Columbia courts in this case) reflects a potentially very different attitude towards such international human rights claims than the courts of other countries. As the dissenting opinions note, the Supreme Court has opened the door to private law, human rights claims based on breaches of customary international law. This is without precedent in Canada.

The relevant American law that authorizes private causes of action for breaches of customary international law, the Alien Tort Statute, is unique to that country. There is no similar legislation in Canada but the continued progress of this and similar claims may give an impetus for Parliament to clarify this area of law.

**Conclusion**

This decision opens the door for private actions based on breaches of international law to proceed in Canada; however, until a decision on the merits of one of these actions, it is unclear whether Canadian law will recognize such causes of action.

Nevertheless, Canadian corporations with foreign operations, and foreign corporations who also do business in Canada, should watch the result in *Nevsun* and several on-going related cases closely. It seems that Canadian courts are now a

friendlier jurisdiction for such claims, which could result in a boon for such claims being brought in Canada, as opposed to other jurisdictions.