TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

NEVSUN RESOURCES LTD. v ARAYA, 2020 SCC 5

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Facts

In 1995, the Eritrean government established a national conscription program, which required all Eritreans to complete military service or to assist with public projects, for 18 months. In 2002, Eritrea announced that the period of conscription would no longer be 18 months. Instead, all conscripts were to provide service for an indefinite amount of time. In this case, the plaintiffs were three conscripts sent to work at a mine. The mine is owned by a Canadian company, Nevsun Resources Ltd ("Nevsun"), the defendant.

All three workers claim that they were forced to provide labour in dangerous conditions. They say they were subjected to violent and inhumane treatment. As such, they started proceedings in British Columbia against Nevsun, seeking damages for breaches of domestic torts, including the tort of battery, negligence and unlawful confinement. They also claim damages for breaches of customary international law (CIL) which prohibits forced labour, slavery, inhuman treatment and crimes against humanity. CIL is a body of unwritten rules that arise from general and consistent international practices.

Note that this is not the trial for the case. Rather, Nevsun brought a motion to dismiss the workers' claims. Motions are brought to the court, at the request of a party, to obtain assistance with a legal issue. The court does not actually hear the case during a motion, but it can determine whether a trial can proceed. Nevsun brought a motion to ask the court to dismiss the lawsuit, arguing that the claims did not have a legally sound basis. They provided two arguments to support their claim. First, they argue that the act of state doctrine applies, which precludes domestic courts from assessing acts of a foreign government. Accordingly, Nevsun argued that the doctrine bars Canadian courts from examining Eritrean government's conscription program and its impact on the mine workers.

Second, Nevsun contended that claims based on CIL should be struck because they do not disclose a reasonable cause of action. They argued that domestic courts do not have the jurisdiction to remedy breaches of CIL.

Procedural History

Nevsun initiated the motion at the British Columbia Supreme Court (BCSC), where they asked the Court to strike the workers' claims. The judge denied the motion, finding that the act state of doctrine does not apply and that claims based on breaches of CIL can succeed in Canadian courts. Nevsun then appealed to the British Columbia Court of Appeal, which unanimously upheld the BCSC decision and dismissed the appeal.

Nevsun then appealed to the Supreme Court of Canada ("SCC").

Issues

The appeal focuses on two issues:

1. Whether the act of state doctrine forms part of Canadian common law; and
2. Whether the customary international law prohibitions against forced labour; slavery; cruel, inhuman treatment; and crimes against humanity can ground a claim for damages under Canadian law.

Decision

The majority dismissed the appeal. The Court held that the act of state doctrine does not form part of the Canadian common law and concluded that Nevsun failed to establish that it is "plain and obvious" that CIL claims have no reasonable likelihood of success.

Ratio

The SCC reaffirmed that the act of state doctrine is not part of Canadian law. Rather, Canadian courts apply private international law principles to determine whether they should enforce foreign laws. Further, the decision established that CIL is automatically incorporated into Canadian common law, without any need for legislative action. Therefore, courts are to treat CIL as any other law and ensure that all entities, whether it be a private corporation or state actor, obey CIL. This case has widened the role of domestic courts within the realm of international human rights law.

Reasons

The Act of State Doctrine is not Canadian law

On the issue of whether the act of state doctrine applies, the SCC held that the doctrine is not part of Canadian common law. Whereas English jurisprudence has routinely applied and reaffirmed the act of

state doctrine, Canada has developed its own approach when dealing with foreign legislation. When determining whether to enforce foreign laws, Canadian courts apply ordinary private international law principles. These principles generally call for deference and for the enforcement of foreign laws, unless such laws contravene public policy. Thus, the act of state doctrine does not stop Canadian courts from hearing the workers' claims.

Customary international law is part of Canadian law

According to the British Columbia's *Supreme Court Civil Rules*, a pleading can only be struck if it is "plain and obvious" that the claim has no reasonable prospect of succeeding at trial.

The SCC started its analysis by evaluating whether the prohibitions on forced labour, slavery, inhuman or degrading treatment and crimes against humanity, which form the foundation of the workers' claims, are part of CIL. In order to be recognized as a norm of CIL, the practice has to meet the following requirements:

1. The practice must be sufficiently general and widespread throughout the international community.
2. There must be a strong belief that the practice in question amounts to a legal obligation, not a mere habit. This is known as *opinio juris*.

However, within CIL, there is also a subset of norms known as *jus cogens*, or peremptory norms, which are norms profoundly and fundamentally accepted by the international community, from which opting out is not possible. For example, prohibitions against slavery, forced labour, and inhuman treatment have all attained the status of *jus cogens* because they are necessary to the international legal order.

The workers claim breaches not only of norms of CIL, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*.

According to the majority, CIL norms are automatically incorporated into Canadian law without any need for legislative action. This is done via the doctrine of adoption. Since CIL is part of Canadian common law, the SCC explains that it must be treated with the same respect as any other law. Moreover, the SCC highlights that CIL does not only apply to state actors. Private corporations, like Nevsun, must abide by international norms and can be held liable under CIL.

Therefore, the workers' claims are based on norms that are already recognized under Canadian law. As such, it is not "plain and obvious" that the plaintiffs' claims will fail.

The dissent reasoned that it is "plain and obvious" that the workers' claims are bound to fail. They reasoned that the majority overstepped its role as a court and that

only legislatures can determine whether international laws are adopted into the domestic legal system. They found the majority made the faulty presumption that the intent of the legislature is to comply with the international law norms. However, Parliament has the ability to pass legislation that violate norms of CIL, and such laws are not subject to review by the courts. Further, they held that corporate liability for human rights violations has not been recognized under CIL and Nevsun is not liable for violation of international law. They concluded that Canadian tort law is the appropriate remedy for the harms claimed and CIL cannot form the basis of claims in Canadian courts.

DISCUSSION

1. What is a motion? Why did the defendant bring a motion in this case?

2. In your own words, explain what customary international law is.

3. What is the Act of State doctrine? Why is it important?

4. What are some pros and cons of holding corporations liable under customary international law?

5. Who should be responsible for determining whether to make external laws part of Canadian law – courts or politicians? Why?