

CANADA / JUDGMENT

Araya v. Nevsun Resources Inc.

2020 BCSC 294

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 294 Araya v. Nevsun Resources Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Inc.,

2020 BCSC 294

Date: 20200303

Docket: S148932

Registry: Vancouver

Between:

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle

Plaintiffs

And

Nevsun Resources Ltd.

Defendant

Before: The Honourable Madam Justice C. Ross

Reasons for Judgment

Re Mode of Trial

In Chambers

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Place and Date of Hearing:

Vancouver, B.C.

November 7-8 and 12-14, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

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Introduction

- [1] These reasons address two applications concerning the mode of trial for a number of actions that have been under common case management. The plaintiffs seek to proceed by way of a bellwether trial, which would select a group of plaintiffs from the actions, combined with a stay of the remaining actions until the completion of the bellwether trial. The defendants seek an order for a common trial of all actions.
- [2] The litigation is complex and presents a number of challenges. The applications address different visions of how best to satisfy the interests of justice, having regard to factors including fairness, convenience, access to justice, efficiency and prejudice.

Nature of the Actions

- [3] The present applications concern eleven actions commenced in this court between November 20, 2014 and February 1, 2019 (the "Actions"), summarised in the following chart:

Action

Date Commenced

Original # of Plaintiffs

Current # of Plaintiffs

S148932 - Araya

November 20, 2014

3

3

S169622 - Alemayo

October 19, 2016

1

1

S1610863 - Negash

November 23, 2016

27

20

S171414 - Tsegay

February 16, 2017

18

7(6)1

S174850 - Berhe

May 23, 2017

5

0

S174851 - Hadish

May 23, 2017

1

0

S1710736 - Fshaye

November 17, 2017

7

6

S1711866 - Hailemichael

December 22, 2017

1

1

S184108 - Mekonen

March 26, 2018

26

20(18)2

S186035 - Mohemmed-Adem

May 24, 2018

3

3

S191125 - Mengisteab

February 1, 2019

1

1

Total:

93

62

1 Includes an out of contact plaintiff (Samson Haile) whose action was stayed until December 31, 2019 pursuant to the order made September 9, 2019.

2 Includes two out of contact plaintiffs (Yemane Sebehatleab and Mekonen Berhane) whose actions were stayed until December 31, 2019 pursuant to the order made September 9, 2019.

[4] With the exception of the Mengisteab action, discussed further below, the Actions are the subject of common judicial management.

[5] The above chart was accurate as at the time the motions were argued. Since that time, the actions of the out of contact plaintiffs have been dismissed, reducing the total plaintiffs to 59. However, a new action has been commenced with three additional plaintiffs. There have been further discontinuances reducing the total remaining plaintiffs to 57.

[6] The background to the litigation, as articulated in the pleadings, is set out in the reasons for judgment of Justice Abrioux, the original case management judge, indexed at 2016 BCSC 1856 [Araya 2016]. In brief summary, the plaintiffs, who are refugees from the State of Eritrea in East Africa, make numerous allegations with respect to conditions at the Bisha mine, which is located in Eritrea. These allegations include that the mine was built using forced labour, a form of slavery, obtained from the plaintiffs and others coercively under threat of torture by the Eritrean government, the military and its contracting arms. The allegations include that plaintiffs were subjected to cruel, inhuman and degrading treatment, as well as harsh working conditions including forced confinement.

[7] It appears from the pleadings that the Bisha mine is owned and operated by the Bisha Mine Share Company ("BMSC"). Nevsun Resources (Eritrea) Ltd. ("NREL"), an indirect wholly owned subsidiary of the defendant Nevsun Resources Ltd. ("Nevsun"), is a 60% shareholder of BMSC while the remaining 40% is held by the Eritrean National Mining Corporation.

- [8] Nevsun Africa (Barbados) Ltd. ("NABL") owns 100% of the shares of NREL. Nevsun (Barbados) Holdings. Ltd ("NBHL") owns 100% of the shares of NABL. Nevsun owns 100% of the shares of NBHL.
- [9] BMSC engaged a South African company, SENET CC ("SENET"), to act as the main engineering, procurement and construction management contractor on the Bisha mine project. SENET engaged subcontractors including Segen Construction Company ("Segen"), an Eritrean civil engineering and construction company. Another entity referred to in the pleadings is Mereb Construction Company ("Mereb"), which the plaintiffs assert is controlled by the military of Eritrea.
- [10] The plaintiffs plead that Nevsun facilitated, aided, abetted, contributed to and became an accomplice to the use of forced labour, crimes against humanity and other human rights abuses. The pleadings seek damages under customary international law, as incorporated into the laws of Canada, for the use of forced labour, torture, slavery, cruel, inhuman or degrading treatment and crimes against humanity. The pleadings seek in addition, or in the alternative, damages under domestic law for the torts of conversion, assault, battery, unlawful confinement, negligence, conspiracy and negligent infliction of mental distress together with, or in the alternative, an accounting and restitution for unjust enrichment.
- [11] The notices of civil claim plead that Nevsun is directly liable for the injuries suffered by the plaintiffs. They allege that Nevsun is liable for the conduct of BMSC on the grounds that BMSC was at all times acting as the agent of Nevsun, that it is an extension of the business enterprise of Nevsun, and that the corporate ownership structure separating Nevsun from BMSC is artificial and should be disregarded in the interests of justice.
- [12] The notices of civil claim allege that Nevsun is vicariously liable for the conduct of Segen, Mereb and the Eritrean military because:
1. Nevsun engaged Segen, Mereb and the Eritrean military at the Bisha mine in furtherance of Nevsun's commercial objectives.
 2. Nevsun knew or should have known that by engaging with an oppressive, dictatorial state such as Eritrea, and its contracting arms, Segen and Mereb, human rights violations, including the use of forced labour and tortious treatment of labourers, at the Bisha mine were inevitable.
 3. The plaintiffs have no effective legal remedy against Segen, Mereb or the Eritrean state as there is no functioning system of justice in Eritrea.

[13] The pleadings raise a limitations issue which encompasses issues of choice of law and postponement. Nevsun pleads that the Eritrean Civil Procedure Code is the law governing the time limits for instituting actions. Under the provisions of that code the claims of all of the plaintiffs are statute barred. Nevsun pleads in the alternative that the plaintiffs' claims are also barred under the provisions of the British Columbia Limitation Act, S.B.C. 2012, c. 13.

[14] In response, the plaintiffs pleaded that the limitation period was postponed and in the alternative that there is no limitation period because the circumstances of forced labour under the circumstances described in the notices of civil claim and reply constitute an assault and battery within the meaning of s. 3(1)(k) of the Limitation Act which provides:

3 (1) This Act does not apply to the following:

- (k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant
 - (i) was a minor, or
 - (ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery;

[15] The plaintiffs will also argue that pursuant to the provisions of s. 4 of the Limitation Act, there is no limitation even if the substantive law of Eritrea is to be applied to the dispute. That section provides:

4 (1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.

(2) Despite subsection (1) of this section, the court must apply section 3(1) to any claim referred to in section 3(1)(i), (j) or (k) whether or not the substantive law of another jurisdiction is to be applied by the court in deciding the claim.

[16] Nevsun has indicated its intention to bring a constitutional challenge to s. 4(2) of the Limitation Act.

[17] The claim of direct parent company liability, that Nevsun had a duty to prevent the use of forced labour at the Bisha mine, is grounded in the control which the plaintiffs allege Nevsun exercised over the construction and operation of the mine, its knowledge of the risks of forced labour and human rights abuses present in Eritrea and its corporate social responsibility policies. The claim is based on developments in the United Kingdom, Australia and New Zealand. It appears to be a novel claim in this jurisdiction.

[18] The claims advanced by the plaintiffs against Nevsun for complicity in the breach of peremptory norms of customary international law are likewise novel claims in this jurisdiction.

Prior Rulings

[19] The current nature of the actions was addressed at an early stage in the litigation. Because none of the plaintiffs in any of the actions reside in British Columbia, the actions could not be commenced under the provisions of the Class Proceedings Act, R.S.B.C. 1996, c. 50. When this litigation commenced, s. 2(1) that Act provided (the current language of s. 2(1) is similar):

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

[20] At an early stage in the litigation the plaintiffs sought to prosecute the proceedings as a representative action pursuant to R. 20-3 of the British Columbia Supreme Court Civil Rules which provides in part:

(1) If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[21] In *Araya* 2016, Justice Abrioux concluded that the matter was not appropriate for a representative action pursuant to this rule. In considering this issue Justice Abrioux also addressed whether the claims fell within the common law class proceeding criteria set out in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [Dutton].

[22] Justice Abrioux concluded that common law class proceedings are only available in the absence of comprehensive class proceedings legislation (at para. 515). Further, noting at paras. 516-518:

[516] I also accept Nevsun's argument that to decide otherwise would provide Rule 20-3 with extra territorial effect by authorizing a representative action where the only plaintiffs or group members are non-residents. The plaintiffs' submit that Dutton contemplated this interpretation to suggest a more active role for the court in a representative proceeding set down in Dutton.

[517] In their submissions, the plaintiffs appear to recognize that the representative action they envision requires the Court "to develop the common law" and adopt "a more active role", and that it should not be overly concerned with "too strictly adhering to forms and rules".

[518] In my view, a "more active role for the court" cannot extend to permit the plaintiffs to circumvent the residency requirement of the CPA. This would be contrary to the historical development of the Rule. Only the Legislature, not this Court, can ascribe to Rule 20-3 the purpose and effect advanced by the plaintiffs in this case.

[23] Justice Abrioux then concluded that the claims did not meet the requirement for a representative action under the Rules, stating at paras. 524-528:

[524] In my view, there is a fundamental obstacle to this action proceeding as a representative proceeding. This is not a situation where membership in the proposed class is readily ascertainable as in such cases as:

- (a) First Nation aboriginal title or rights issues;
- (b) an association seeking linguistic rights remedies;
- (c) members of unions, a housing cooperative or participants in a game show,

and the like, all of whom are seeking the same or a similar remedy and where there is a single measure of damages for the class that is subject only to quantification.

[525] Furthermore, no principal issues of fact or law are essentially the same with regard to all members. The creation of sub classes is not available under this Rule.

[526] A threshold issue of fact is whether the plaintiffs, named or unnamed, are members of the proposed class. This can only be ascertained after they have established that they were at the Bisha Mine, during what time frame, in what capacity, and what their relevant [National Service Program ("NSP")] status was.

[527] Not only has Nevsun, which is its right, taken the position that none of the acts alleged by the plaintiffs occurred, it has also garnered evidence putting squarely in issue whether any of the plaintiffs, or others who have sworn affidavits pertaining to the abuses they witnessed or were subjected to, were in fact ever present at the Bisha Mine. There is also evidence that there were individuals subject to NSP requirements who were working in the general area of the Bisha Mine, but on government or public work projects rather than the Bisha Mine, a commercial venture.

[528] It will be necessary for there to be an individual examination of the circumstances of each plaintiff and proposed class member on this issue alone. This will likely include document production, examinations for discovery, and the need for each class member to testify at the trial which would defeat the entire purpose of a representative proceeding.

[24] In their submissions with respect to the representative action issue the plaintiffs advanced a list of what they submitted were common issues in very similar terms to those articulated in the present application. At that stage, the plaintiffs were proposing that those common issues would be tried in the first stage of the trial. The plaintiffs proposed, at that time, that the second stage of the trial would address individual issues of each plaintiff. The second

stage issues included: when each proposed class member was at the Bisha mine; whether they provided labour while in active/extended NSP or while demobilized; whether they were tortured or otherwise mistreated at the Bisha mine and its surrounds; and, whether they are entitled to damages as claimed and if so, the quantum.

[25] Justice Abrioux noted that this proposal ignored what he characterized as the threshold issue of whether each plaintiff was at the mine at all. This was an issue that in his view could not be postponed to the second phase of a trial. He acknowledged that there were common issues, but doubted that their resolution in isolation would significantly advance the litigation, noting:

[547] I am also of the view that while there may be some common issues as outlined by the plaintiffs, the individual circumstances of the plaintiffs and putative class members need to be examined. As Justice Smith stated in *Thorburn v. British Columbia*, 2013 BCCA 480 at para. 42:

Accordingly, even if the answers to the "common issues" could be said to clarify the questions they pose, they would not advance the litigation in any meaningful way as they would not avoid the duplication that would be necessary for the individual fact finding and legal analysis of each class member's claim. In other words, a finding of a s. 8 Charter violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member.

Plaintiffs' Proposal

[26] The plaintiffs seek the following orders:

1. In the trial of the Actions, the claims of certain selected plaintiffs will be heard and determined before the claims of the remaining plaintiffs.
2. Subject to further order, no steps will be taken in the claims of all the remaining plaintiffs pending determination by the court of the claims of the selected plaintiffs.
3. Subject to necessary rulings at trial as to relevance and admissibility, all evidence received by the court on the hearing of the claims of the selected plaintiffs shall be evidence in the hearings of the claims of all the remaining plaintiffs.
4. Subject to further direction by the trial judge, all findings of fact made by the court on the hearing of the claims of the selected plaintiffs shall become findings of fact on the hearing of the claims of the remaining plaintiffs.

[27] The notice of application contained the plaintiffs case plan proposal which provided for the following:

Case Plan Proposal

29. The plaintiffs propose that a bellwether trial be conducted of the claims of select plaintiffs (the "Selected Plaintiffs"). Bellwether trials are a form of test case in which a small number of cases which are broadly representative of common recurring fact patterns in the plaintiff group are tried so as to obtain important rulings on issues of fact and law. Those rulings then provide a basis from which the parties can attempt to resolve the remaining claims without trial (the "Bellwether Case Plan").
30. Under the Bellwether Case Plan, the remaining claims would be diverted to mandatory mediation once the results of the bellwether trials are known.
31. The plaintiffs submit that trial of approximately six of their claims would provide useful guidance that could be used to settle the remaining claims. Based on a review of the pleadings, affidavits, document discovery, and examinations which have been delivered and conducted to date, the plaintiffs have identified the following criteria which can be used to select test cases:
 - (a) Liability - all claims advance the same theories of liability including direct duty of care, accomplice liability for breach of peremptory norms of customary international law and "domestic" torts of conversion, battery, unlawful confinement, negligence (direct duty of care), conspiracy and negligent infliction of mental suffering.
 - (b) Time Frame - the claims presently filed cover the time period 2005 to 2015. Based on the pleadings exchanged to date including particulars, and the affidavit evidence, [and an analysis of what appears to be significant events in relations to the issues of liability]

The Plaintiffs propose that claimants who were present at the Bisha Mine between the dates of early 2008 and up to 2015 be selected for the bellwether trial. This would effectively cover the key events identified above including the period before and after remedial screening measures were allegedly put in place.

- (c) Physical Injuries - all plaintiffs advance generally similar claims for bodily injury as a result of poor living and working conditions at Bisha. A subset of the plaintiffs also advance claims for physical punishment suffered at the Bisha Mine site.

The plaintiffs propose that the cases selected include at least one claim for serious physical punishment.

- (d) Assignment to Bisha - the Notices of Civil Claim identify three main ways by which conscript labour was allegedly assigned to or delivered to the Bisha Mine:
 - (i) Segen Construction;
 - (ii) Mereb Construction; and
 - (iii) Military.

The plaintiffs propose that at least one claimant from each of the Segen, Mereb and Military groups be selected.

- (e) Limitation Period - Nevsun has raised a limitations defence. All plaintiffs assert by way of reply, that the extraction of forced labour under the circumstances pleaded constitutes an assault and battery within the meaning of s.3(1)(k) of the Limitations Act and are therefore not subject to any limitation period. In the alternative, all claimants allege that any running of the limitation period was postponed due to a number of factors including time spent fleeing Eritrea in perilous circumstances and in refugee camps. If limitation issues are decided against the plaintiffs in the bellwether trials, it could lead to a significant reduction in the number of plaintiffs who have cases to advance. If limitation issues are decided in the plaintiffs' favour, it could drastically reduce the amount of time spent in examinations for discovery for the remaining plaintiffs.
 - (f) Punitive Damages - all plaintiffs advance a claim for punitive damages. Nevsun's conduct which might lead to a punitive damages award can be assessed in the bellwether cases without examination of the individual circumstances of every other plaintiff.
32. In the alternative, the plaintiffs propose that the issues of duty and standard of care should be tried before other issues in the case, including individual causation and damages (the "Liability Only Plan"). If the plaintiffs are successful, there will likely be a significant impact on settlement discussions. If the plaintiffs are unsuccessful, then all of the cases will be resolved.
33. [The plaintiffs submit that both] the Bellwether Case Plan and the alternative provide a means for a trial of a limited number of claims on the core issues. The primary advantage of the Bellwether Case plan is that it is designed to cover a broader scope of recurring fact patterns. The primary advantage of the Liability Only Plan is that it would allow the parties to try key issues in the case sooner, and without further expenditure by all parties on pre-trial procedures for all plaintiffs that may prove to be unnecessary. [In the plaintiffs' submission both] plans would lead to a more efficient use of the court's and parties' resources than proceeding to trial on all cases at the same time.

Proposed Selected Plaintiffs

50. The plaintiffs nominate the following six plaintiffs as suitable test plaintiffs:
- (a) Yoseif Gebremichael (Negash Action)
 - (b) Gebremedhin Adhanom Abrha (Negash Action)
 - (c) Mihreteab Yemane Tekle (Araya Action)
 - (d) Yemane Woldemariam (Negash Action)
 - (e) Merhawi Fshaye Gaym (Fshaye Action)

(f) Tesfagabr Okbagergsh (Mekonen Action)

51. [The plaintiffs note that these] nominations are drawn from the group plaintiffs that have already been examined for discovery. As such, they are among the most advanced towards trial
52. [The plaintiffs submit that these] nominations also offer a balanced distribution among the three major classes of conscripts that performed construction work at Bisha: there are two from each of the Mereb (Yoseif Gebremichael and Gebremedhin Abrha), Eritrean Defence Forces Division 47 (Mihreteab Yemane and Yemane Woldemariam), and Segen (Merhawi Fshaye and Tesfagabr Okbagergsh) class of plaintiffs.
53. [They submit further that], among the Mereb nominees, there is one plaintiff from each of the two principal units of Mereb that were assigned to do construction work at Bisha: Division 28 (Yoseif Gebremichael) and Division 38 (Gebremedhin Abrha). Similarly, there is one plaintiff from each of the two principal units of Eritrean Defence Forces Division 47 that were assigned to do construction work at Bisha: the First Brigade (Mihreteab Yemane) and the Second Brigade (Yemane Woldemariam).
54. [The plaintiffs state that the] nominations are also convenient geographically. Gebremedhin Abrha and Yemane Woldemariam both reside in or around Tel Aviv, Israel. Merhawi Fshaye and Tesfagabr Okbagergsh both reside in France, while Yoseif Gebremichael resides minutes from the French border in the canton of Geneva, Switzerland. Mihreteab Yemane, meanwhile, resides one province over in Calgary, Alberta.
55. [Finally, the] selection also covers all of the important time periods in the case, and includes plaintiffs who [allege that they] were subjected to severe physical punishment at Bisha, as well as those who [alleged] relatively minor or no physical punishment.
- [28] The plaintiffs submit that the objectives of access to justice and the efficient use of judicial resources are best achieved through the use of bellwether or test cases. They note that the use of bellwether trials is well established in the United States as a tool for the management of mass tort cases and has been used in Canada. The approach conserves the resources of the judiciary, the parties and their counsel.
- [29] The plaintiffs assert that a properly constructed bellwether trial will capture the benefits of common issues trials found in class proceedings while providing valuable judicial guidance on individual issues such as quantum of damages. They assert that if the plaintiffs fail to establish liability in a test case which includes the common elements of liability, no other trials will be necessary and the resources which would be devoted to conducting examinations for discovery of the remaining plaintiffs will be saved. The plaintiffs predict that success in the test case, particularly when combined with mandatory mediation, will almost certainly result in settlement of the remaining claims.

- [30] The plaintiffs submit that there are a number of common elements of liability advanced in the notices of civil claim. First, the direct parent company liability of Nevsun. This is grounded on the control that the plaintiffs allege Nevsun exercised over the construction and operation of the mine, its knowledge of the risks of forced labour and human rights violations, and its corporate social responsibility policies which place responsibility for compliance with labour and human rights standards at the highest levels of the company.
- [31] The plaintiffs submit that the question of whether Nevsun exercised sufficient control over the development of the Bisha mine to impose a duty of care is common to all of the claims. Further, the issue turns on the conduct of Nevsun, not that of the plaintiffs.
- [32] A further issue common to all of the claims in the plaintiffs' submission is the extent to which the Bisha mine was developed in accordance with international standards and in particular, the 2006 International Finance Corporation standards. Again, the determination of this issue turns on an analysis of Nevsun's conduct.
- [33] The plaintiffs assert that a third common issue relates to the claims for complicity in the breach of peremptory norms of customary international law. The elements of this novel claim will need to be established at trial. This includes establishing the legal standard for accomplice liability. The plaintiffs assert that resolution of these issues will require a detailed investigation into Nevsun's knowledge of the risks of forced labour and other abuses, its response to those risks and its relationship with the Eritrean regime. This investigation is common to all claims and once again turns on Nevsun's knowledge and conduct.
- [34] The plaintiffs assert that further common issues relate to the tort based on concerted action in furtherance of a common design. The degree of concerted action required to impose liability is a common legal and factual element of each plaintiffs' claim, with the exception of plaintiff Daniel Hailemichael who does not allege that he was a forced labourer.
- [35] The plaintiffs assert that resolution of the limitation issues have common legal elements, including whether Eritrean law applies to the claims, if so what is the limitation period under Eritrean law and if not whether the claims are barred under British Columbia law. The plaintiffs submit that if the court determines in a bellwether trial that Eritrean law applies and that the claims are barred, this would dispose of most, if not all of the claims.
- [36] While the plaintiffs acknowledge that the quantum of damages is a matter for individual assessment, they assert that there are aspects of the damage claims that are common, for example, the principles that are to govern the quantification of damages for breaches of customary international law and whether non-pecuniary damages are constrained by the upper limit.
- [37] Finally, the plaintiffs note that all plaintiffs advance a claim for punitive damages. The plaintiffs submit that this claim will turn on a detailed assessment of Nevsun's knowledge and response to the alleged use of forced labour at the Bisha mine.

- [38] The plaintiffs submit that the nominations are drawn from the group of plaintiffs that have already been examined for discovery. They are therefore in the group most advanced towards trial.
- [39] The plaintiffs submit that their proposed bellwether trials combined with mandatory mediation will achieve the objective of access to justice and efficient use of judicial resources by streamlining and prioritizing for judicial determination important novel issues of law while providing guidance of matters of quantum of damages.
- [40] In reply, the plaintiffs provided an estimate that a trial of six bellwether plaintiffs could be conducted in 90 to 120 days. This estimate was based upon an estimate of approximately 85 days for the plaintiffs' case. This estimate is therefore likely too short given the likely length of the defence case and time for final submissions.

Nevsun's Proposal

[41] Nevsun seeks the following orders:

1. Subject to further order of the court, the Actions shall be tried together and the evidence in one shall be admissible in the other, subject to the direction of the trial judge and the right of any party to dispute the admissibility, in one of the Actions, of evidence admissible in the other on the basis of relevance or otherwise;
2. The Actions will proceed to trial as if they are separate actions and nothing in this order shall be construed to merge the claims in the Actions;
3. The order shall not prejudice any application by a party pursuant to R. 9-6 or R. 9-7 of the British Columbia Supreme Court Civil Rules for judgement generally or on an issue in any of the Actions;
4. This order shall not prejudice the rights of a party to apply for an order that the trial of one or more of the Actions as bellwether or test cases shall proceed before the trials of the remaining Actions;
5. Any party may apply for an order that one or more of the Actions be tried separately in the event of a material change in circumstances that suggests a common trial will result in delay, complication or prolongation of the trial or otherwise prejudice a party; and
6. An order that *Debesay Mengisteab v. Nevsun Resources Ltd. and Clifford T. Davis*, SCBC Vancouver Registry No. S-191125, be subject to judicial management by Madam Justice Ross in conjunction with the Actions.

[42] Nevsun agrees with the plaintiffs that the pleadings in the Actions disclose common claims and disputes and note that the plaintiffs in the Araya action originally sought to bring the claim as a representative action. Nevsun submits that the Actions are clearly "so interwoven as to make separate trials before different judges undesirable and fraught with problems, not to mention expense".

[43] Nevsun submits that in particular:

- (a) The trial of the Actions at the same time, before the same trier and on the same evidence, will avoid the need for duplicative evidence on common issues and avoid repetitive argument on common legal issues. It will also avoid having to call fact and expert witnesses whose evidence is relevant to more than one plaintiff multiple times. This is a material concern because the alleged wrongful conduct occurred outside British Columbia. The plaintiffs reside outside British Columbia. Many fact and expert witnesses will be required from Eritrea and elsewhere. An order for trial together will substantially reduce the trial time over what would be required if all of the Actions were tried separately, to the benefit of the parties and the court;
- (b) The order sought will also avoid the need for duplicative fact-finding and eliminate the risk of inconsistent results;
- (c) The order would not prejudice any of the plaintiffs. They are all represented by the same counsel. The Araya action plaintiffs were prepared to act as representatives of the plaintiffs in all of the Actions, and a number of those plaintiffs have already declared that they were prepared to be so represented. Many (but not all) of the plaintiffs claim common restitutionary and other relief (while also claiming individualised damages) such that they cannot complain that they would be prejudiced by having to participate in a trial in which they have only a marginal interest. There is similarly no evidence that the plaintiffs have retained counsel on a basis other than a contingent fee agreement. Nor is delay a material concern: The Actions are all substantially at the same stage and can be managed together so that they are ready for trial at the same time; and
- (d) The order sought has the greatest likelihood of relieving the burden on the administration of justice in trying these Actions.

[44] Nevsun's estimate is that a common trial of all plaintiffs will take approximately 200 days, made up of 180 days of trial plus 20 days of commission evidence.

[45] Mr. Davis adopted Nevsun's proposal and submissions. He emphasized the need for prompt resolution of these serious allegations, and echoed the concern that the plaintiffs' proposal would result in a lengthy delay in final resolution.

Applicable Rules

[46] The parties are in agreement that there are mechanisms in the Rules, the Law and Equity Act, R.S.B.C. 1996, c. 253, and the inherent jurisdiction of the court to permit both of the proposals under consideration.

[47] The plaintiffs and defendants for their parts each submit that their proposal will best achieve the object of the Rules, as set out in R. 1-3, which provides:

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [48] The plaintiffs' proposal would require the severance of the claims of all but a small sub set of selected plaintiffs and an order that those selected claims be tried first. Rule 12-5(67) permits a court to order that one or more questions of fact or law in an action be tried and determined before others.
- [49] The factors to be addressed in relation to the exercise of the discretion to sever are discussed by MacKenzie J.A. in *Johnston Estate v. Johnston*, 2017 BCCA 59 at paras. 45-46, as follows:
- [45] The court's jurisdiction under Rule 22-5, s. 8(2) of the Law and Equity Act, and its inherent jurisdiction are exceptions to the principle stated in s. 10 of the Law and Equity Act as to the general avoidance of multiplicity of legal proceedings "as far as possible".
- [46] I would endorse the judge's non-exclusive summary of the key considerations relevant to an application to sever and the general principles governing severance:
- [68] The key factors engaged in a general sense on an application to sever were canvassed in *Schaper v. Sears Canada*, 2000 BCSC 1575 [Schaper] at para. 19:
 1. ...the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
 2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this found [sic], that would strengthen the argument to sever.
 3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.

4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?

[69] Guidelines that focused attention more keenly on the efficacy of the trial process were helpfully laid out in *O'Mara v. Son, Kim et al.*, 2007 BCSC 871 [O'Mara] at para. 23:

1. whether the order sought will create a saving in pre-trial procedures;
2. whether there will be a real reduction in the number of trial days taken up by the trial being heard at the same trial;
3. whether a party may be seriously inconvenienced by being required to attend a trial in which the party may have a marginal interest;
4. whether there will be a real saving in expert's time and witness fees;
5. whether one of the actions is at a more advanced stage than the other;
6. whether the order sought will result in delay of the trial of any one of the actions and, if so, whether any prejudice which a party might suffer as a result of that delay outweighs the potential benefits which a consolidated trial might otherwise have;
7. the possibility of inconsistent findings and common issues resulting from separate trials.

[70] Severance may well be appropriate where the determination of one issue will render another one moot: *Lawrence v. ICBC*, 2001 BCSC 1530 [Lawrence].

[71] The judicial discretion to sever trials or hearings is to be exercised sparingly: *Morrison Knudsen Co. v. British Columbia Hydro & Power Authority*, 1972 Carswell B.C. 62, 24 D.L.R. (3d) 579 (S.C.); *Lawrence* at para. 43. The test for severance is not applied in a vacuum; it is to be considered against the backdrop of the nature of the particular case at hand: *Wirtz v. Constantini*, 137 D.L.R. (3d) 393, 1982 CarswellBC 588 (S.C.). Because the determination involves an individualized assessment of the unique case before the Court, there is no closed list of uniformly applied considerations that inform the exercise of the Court's discretion.

[50] Rule 22-5(6) permits the court to order separate trials where joinder would unduly complicate or delay the trial or prove otherwise inconvenient.

- [51] The defendants' proposal is for a common trial of all of the Actions currently under case management. Rule 22-5(8) permits the court to consolidate proceedings or to order that they be tried at the same time. The factors to be considered in an exercise of discretion to order the proceedings be tried at the same time pursuant to R. 22-5(8) were addressed by Griffin J., as she then was, in *Wheatland Industrial Park Joint Venture v. Soo*, 2017 BCSC 2109 at paras. 15-16, as follows:
- [15] This type of order is discretionary. The court will generally consider two questions on an application for consolidation or joinder:
- a) Do common claims, disputes and relationships exist between the parties?
 - b) Are the actions "so interwoven as to make separate trials before different judges undesirable and fraught with problems, not to mention expense"? see *Merritt v. Imasco Enterprises Inc.*, (1992) 2 C.P.C. (3d) 275 (BCSC); *Shah v. Bakken*, [1996] B.C.J. No. 2836; and *Bhinder v. 47028 B.C. Ltd.*, 2007 BCSC 805.
- [16] Where the above questions are satisfied, and there is sufficient commonality between the two actions, factors to be considered on such applications include: savings in time and expense in pretrial procedures and at trial; risk of inconsistent findings if there were to be two trials; and the prejudice to a party caused by having to participate in a trial in which they have marginal interest or in suffering delay of the trial of one action. I would add to this list of factors the consideration of the burden on the administration of justice generally: see *Shah v. Bakken* at para. 13.
- [52] The compulsory mediation that is an aspect of the plaintiffs' proposal together with a trial of issues are contemplated in R. 5-3(1), which provides in part:
- (1) At a case planning conference, the case planning conference judge or master may make one or more of the following orders in respect of the action, whether or not on the application of a party:
 - (o) requiring the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process, and giving directions for the conduct of the mediation, settlement conference or other dispute resolution process;
 - (p) authorizing or directing the parties of record to try one or more issues in the action independently of others;
 - (v) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.
- [53] A temporary stay of all proceedings except those selected to be part of the bellwether trial is an integral component of the plaintiffs' case. A court may temporarily stay proceedings pursuant to its inherent jurisdiction or under s. 8(2) of the Law and Equity Act.

[54] In *Giles et al v. Westminster Savings Credit Union et al*, 2002 BCSC 1583, a case which ultimately proceeded by way of a test case trial, Sigurdson J., as the case management judge, relied on s. 10 of Law and Equity Act and the inherent jurisdiction of the court to direct a stay of a class proceeding in favour of test cases to avoid a multiplicity of proceedings. Section 10 is the same now as it was then, it provides:

In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

Examples of the use of Test Cases

[55] As the plaintiffs note the use of test cases or bellwether trials is relatively common in the United States. Bellwether trials in the United States emerged as a response to cases, for example mass torts, in which individual trials were not a genuine possibility. The procedure has been adopted in Canada, albeit in a more limited fashion.

[56] The following Canadian cases are illustrative of the use of test cases:

a) *Indian Residential Schools, Re* (2000), 44 C.P.C (4th) 328:

This case involved more than 2,000 claimants in approximately 1,000 actions. The defendants were the federal Crown and several religious bodies. The claims included alleged abuses and wrongful confinement, and breach of Treaty obligations. There were also limitations issues. Unlike the circumstances in the present case, all parties agreed that there was benefit to proceeding with a series of test cases. McMahon J. directed the plaintiffs to identify up to 30 individual plaintiffs and the defendants up to 20 whose claims would be expedited. Each group was to represent a cross section of causes of action, schools, time periods and defendants. After the conclusion of examination for discovery a smaller group would be selected to proceed to trial. There was no stay of the other cases. Discovery rights remained ongoing. No orders were made making the findings of those trials binding on the other plaintiffs and actions.

b) *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.* (1999), 33 C.P.C. (4th) 362:

This case was comprised of six corporate plaintiffs and 152 individual plaintiffs who sued on their own behalf and on behalf of a roughly equal number of unnamed plaintiffs. There were several defendants comprised of three groups: the fund managers, the lawyer, and the auditor and accountant. All of the plaintiffs had invested in three funds. The claims raised issues of alleged breaches of fiduciary duty, duty of care, misrepresentation and negligence. The central legal and factual issues were common. The documents were also essentially common. One central issue which was not common was the question of actual reliance by each of the plaintiffs on the alleged misrepresentations. There were limitation issues spanning several jurisdictions which were also

not common.

The plaintiffs proposed a test case of the six corporate and 18 individual plaintiffs be severed and proceed to trial as a test case. The other actions would be stayed pending the results of the first trial. The defendants were opposed to this procedure. Baynton J. noted, at para. 20, while it was preferable that test cases proceed where all parties supported the procedure, lack of consent does not preclude a test case being ordered in appropriate circumstances. The court noted at para. 22:

In considering a test case model it is important to distinguish between legal and practical considerations. Seldom would practical considerations outweigh legal ones. A test case would not likely be ordered if the price of expediency was the curtailment of the legal rights of any of the litigants. But on the other hand, a test case should not be denied just because a litigant feels threatened by it.

At para. 33, Baynton J. stated that:

The only issue is whether justice is best done in this case by way of a test case or by proceeding with all the claims simultaneously.

The plaintiffs offered to provide an undertaking from each of the plaintiffs who were not part of the test case that they would not pursue their claims if none of the claims chosen for the test case succeeded.

In the result, the court directed that a test case proceed with plaintiffs having the obligation and defendants the right to designate a selection of claims to form part of the test case. The plaintiffs were to file the undertaking described above and were to provide all disclosure and discovery to the defendants prior to the selection of claims for the test case. The remaining claims were stayed pending the result of the trial of the test cases.

c) *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282:

This was an action brought by approximately 400 plaintiffs who lost money investing in Taylor Ventures Ltd., a real estate development company that went bankrupt. Taylor Ventures did most of its banking with the defendant Westminster Savings and Credit Union. Gary Thomas, another defendant, was the commercial loans manager of the defendant credit union. The claim was that Taylor Ventures held all of the properties purchased in trust for its investors and that Taylor Ventures breached its fiduciary duties. The Credit Union and Mr. Thomas were alleged to be knowing accessories to those breaches. The essential questions at issue were the contractual relationship between the investors and the developer as manifested in the contractual documents and liability of the credit union and its officer for knowing assistance and knowing receipt.

The plaintiffs selected 10 cases to proceed as test cases. Collectively, the selected cases represented all of the projects that were the subject matter of the litigation. There was no agreement of the parties that the result of the test cases would bind the other parties. The claims of the plaintiffs were dismissed at trial and on appeal. The remaining plaintiffs then sought to

proceed with a new trial. This attempt was rejected by the trial judge, whose decision on this issue was upheld on appeal. Justice Frankel, for the Court of Appeal, noted at para. 39, that whether *res judicata* would apply could not be determined until the result of the first trial was known. He noted further at para. 42, that issue estoppel was not up to the parties:

The flaw in this argument is that it is not for the parties to litigation to decide whether issue estoppel will or will not apply; it is not a matter of "opting in" or "opting out". A party cannot evade the application of the common-law doctrine of issue estoppel merely by asserting that it will not apply. In this regard, it is to be remembered that the doctrine is based, in part, on the public interest in the finality of litigation: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para. 33. I agree with the trial judge that if at the first trial it had been found that the Credit Union and Mr. Thomas knowingly assisted Taylor Ventures in breaching obligations to its investors, then the Credit Union and Mr. Taylor would have been bound by that finding with respect to the claims of the remaining plaintiffs, despite the assertions of their counsel to the contrary.

Finally, at paras. 52-53, citing *R. v. Mahalingan*, 2008 SCC 63, and *Danyluk*, Frankel J.A. noted that issue estoppel is related to the material facts which are found to exist, or not, and extends to issues of fact, law and mixed fact and law that are necessarily bound up with the determination of the issue in question.

- d) *Sutherland v. Attorney General of Canada*, 2001 BCSC 1024, rev'd 2002 BCCA 416, leave to appeal ref'd [2002] S.C.C.A. No. 385:

This case concerned the claims of nuisance advanced by property owners related to the noise from aircraft using the Vancouver International Airport's North runway, which opened on November 4, 1996. The plaintiffs initially sought to have the matter proceed as a class proceeding. That application was dismissed, but Smith J. noted that some of the legal issues could be determined fairly and efficiently in a test case (*Sutherland v. Canada (Attorney General)* (1997), 15 C.P.C. (4th) 329 at paras. 35, 39). The matter then proceeded as a claim involving approximately 300 plaintiffs. Justice Low, by an order dated July 30, 1999, ordered that the claims of five plaintiffs, related to three properties, would be tried first, with the other claims stayed pending resolution of the first claims. The order provided that the same judge who heard the first trial would hear the other claims, that all evidence received in the first trial would be evidence in any subsequent trial and that all findings of fact made in the first trial would become findings of fact in any subsequent proceeding. The Court of Appeal ultimately concluded that the claims failed on the basis that the defendants had established the defence of statutory authority.

- e) *Singh v. Trump*, 2015 ONSC 4461, rev'd 2016 ONCA 747, leave to appeal ref'd [2016] S.C.C.A. No. 548:

This matter involved 20 actions brought by 22 groups of purchasers dealing with hotel condominium units in the hotel portion of the former Trump International Hotel and Tower Toronto. The purchasers were all represented by the same counsel. A number of actions involved claims for rescission by purchasers who did not complete their agreements for purchase and sale. In addition, three actions were commenced on behalf of purchasers who did close.

The parties agreed that one action involving a purchaser who did not complete and one involving a purchaser who did complete would be selected as test cases proceeding to a motion for summary judgment.

See also *Singh v. Trump Sr.*, 2018 ONSC 4649.

f) *Sodhi v. Genesis Land Development Corp.*, 2004 ABQB 628, aff'd 2005 ABCA 69:

This was another commercial case. The plaintiffs, numbering between 60-90, were investors in a development scheme. The claim was one of misrepresentation and oppression. The plaintiffs sought to have the case proceed with five test case complainants on the oppression issue. Justice Hart noted that the test case procedure would not be appropriate to deal with the allegations of misrepresentation. Hart J. concluded that while the result would not determine the litigation, it would likely resolve many claims and reduce the number and complexity of the remaining claims. The court granted the application for a test case trial of an issue. The other issues and claims were stayed pending the outcome of the trial.

g) *Arishenkoff et al. v. British Columbia*, 2002 BCSC 951, aff'd 2004 BCCA 299, rev'd in part 2005 BCCA 481:

This case involved claims by 55 plaintiffs against the government. The plaintiffs were children who were apprehended and confined as a result of their parents being members of the Sons of Freedom sect of the Doukhobor religion. The claims included allegations of sexual and physical abuse and unlawful confinement. The parties agreed to select three test cases to determine several discreet issues of law, included an interpretation of the Limitation Act.

[57] As can be seen from this list, the test case approach has been adopted in a variety of circumstances. Relevant factors can be seen to include:

- a) The number of claimants, whether there are so many claimants that individual trials are impracticable;
- b) The presence of common issues and whether such common issues can be determined without considering each individual claim;
- c) The likelihood that the results of the test case will either resolve or simplify the resolution of the remaining claims; and
- d) Consent of the parties, this is preferable but not essential.

[58] I agree with Baynton J. that ultimately the question of whether the test case approach is appropriate in the circumstances involves a consideration of how justice will best be done having regard to the practical and legal considerations relevant to the particular circumstances of the litigation (First Choice Capital at paras. 22-27, 33).

Should these claims be heard at the same time?

[59] The first question to be considered is whether the claims in these separate actions should proceed to separate trials or be tried together, either in a common trial or seriatim as the plaintiffs propose.

[60] In the present case, it appears to be common ground that there are common claims, disputes and relationships among the parties and that the actions are interwoven such that separate trials before different judges would be undesirable and fraught with problems and unnecessary expense. No one suggests that it would be appropriate to hold eleven different trials of the Actions. Indeed the plaintiffs' proposal is premised on the assumption that there are sufficient commonalities that the findings in the first trial would be binding in any subsequent trials.

[61] However, in reply plaintiffs' counsel seemed to argue to the contrary, stating that a common trial would deny Mr. Mengisteab a fair, speedy and efficient resolution of his claim. He noted that Mr. Mengisteab has produced his documents and been examined for discovery and that unlike other plaintiffs, does not seek postponement of the limitations due to access to counsel but on other grounds. Counsel submits that it is unjust to force Mr. Mengisteab to wait to advance his case to trial for the completion of the remaining examinations for discovery. He notes that Mr. Mengisteab is not part of a pre-defined group like a union, where it could be argued that the legal action is brought on behalf of the entire group and therefore they must proceed together.

[62] There are two difficulties with this submission. The first is that in the course of submissions the plaintiffs agreed that Mr. Mengisteab's claim should be brought under common case management with the remaining claims. The second is that his is not one of the cases that the plaintiffs have identified to be tried first. It follows that resolution of his case will be postponed under either alternative. In the case of a common trial, the delay would be the result of an inevitable later start date for the trial. In relation to a bellwether trial, the delay would follow from not being selected as one of the bellwether plaintiffs.

[63] In the present circumstances, I am satisfied that these actions have common claims, disputes and relationships. These are such that separate trials of the individual actions before different judges is undesirable and fraught with problems including unnecessary duplication, extra expense and the risk of inconsistent results. I am satisfied that there is sufficient commonality among the actions that separate trials of the individual actions would be inappropriate.

Consideration of the Two Proposals

Stay of the Actions

- [64] A central component of the plaintiffs' proposal is an order for an immediate stay of the claims of all the plaintiffs who are not part of the bellwether trial pending determination of the claims of the test case plaintiffs. This clearly includes a stay of the defendants' ability to conduct any further examinations for discovery in respect of the non bellwether claims. In fact, the stay on further discovery was the main focus of the submissions.
- [65] Discovery is a particularly time consuming and expensive exercise in this case. All of the plaintiffs reside out of this jurisdiction. They are scattered in a variety of locations across North America, in various countries in Europe, in Israel, and in Ethiopia. The plaintiffs for the most part do not speak English and require translators. The expense and complexity of discovery in this case formed a central component of the plaintiffs' submissions with respect to a stay.
- [66] The plaintiffs submit that it will take two years to complete discovery of all remaining plaintiffs at a rate that is sustainable for plaintiffs' counsel. Counsel characterizes this exercise as unnecessary, and a "massive waste of resources" that would, of necessity, push back the start date for a common trial of all plaintiffs.
- [67] The plaintiffs submit that a stay would not prejudice Nevsun for the following reasons. First, the plaintiffs assert that Nevsun had years to make a proper assessment of the issues related to forced labour and the working conditions in the mine but failed to do so. In counsel's submission, it follows that Nevsun cannot now assert that the discovery of the plaintiffs is necessary in order to respond to allegations with respect to these issues.
- [68] In any event, the plaintiffs submit that "will say" statements, interrogatories and "other disclosure tools" are an appropriate substitute for discovery in the circumstances. I note that this submission appears to run counter to the plaintiffs' request for an order that "no steps will be taken" in the claims of all the other plaintiffs. Presumably, the stay sought would encompass these alternative measures.
- [69] Nevsun does not dispute that completion of discovery of all of the remaining plaintiffs would result in some delay. Counsel does take issue with the plaintiffs' characterization of the magnitude of such delay. In any event, notwithstanding the issue of additional delay, Nevsun submits that a stay of the actions would prejudice Nevsun and compromise the fairness of the proceedings.
- [70] Nevsun submits that the discovery process has been an important factor in weeding out unmeritorious claims thereby promoting judicial economy while enhancing the search for truth. In addition, in Nevsun's submission, it is clear that the discovery evidence of the plaintiffs is relevant to the assessment of the credibility and reliability of the claims of other plaintiffs.

- [71] Nevsun notes that the plaintiffs' submission with respect to discovery run counter to the conclusions that Justice Abrioux reached in Araya 2016. In those reasons, at para. 568, Justice Abrioux concluded that one of the "significant advantages" of requiring the plaintiffs to commence individual actions is that Nevsun would be entitled to discovery as a right. He also concluded that it will be necessary for there to be an individual examination of the circumstances of each plaintiff.
- [72] Counsel submits that the request for a stay is counter productive since the prospects for settlement will be compromised by denying Nevsun important information about the claims. In Nevsun's submission, denying discovery compromises the chances for a global resolution of the claims.
- [73] Nevsun notes that the claims are already significantly dated. A stay of discovery will result in further deterioration of the evidence. This affects the fairness of subsequent trials. It is a matter of particular concern given the few documents that the plaintiffs claim to possess.
- [74] I agree with Nevsun's submissions with respect to the issue of a stay. In my view the plaintiffs' position with respect to discovery runs counter to the central role it occupies in the administration of justice. As Justice Abrioux noted in Marsh Canada Limited v. BFL Canada Insurance Services Inc., 2014 BCSC 1171 at para. 67:
- Full and complete disclosure between or among litigants prior to trial is essential to the truth-seeking function of the litigation process and the proper administration of justice: Nikolic v Olsen, 2011 BCSC 125 at para. 93.
- [75] Given the central role that discovery plays in the litigation process, in my view it is not for the plaintiffs to suggest that discovery is unnecessary for Nevsun to respond to the plaintiffs' allegations or that other disclosure methods should suffice. Moreover, under the plaintiffs' proposal the plaintiffs would be afforded full rights of discovery of the defendants, further magnifying unfairness.
- [76] The plaintiffs' position in my view rests upon the unstated premise that the discovery of each plaintiff is relevant only to the circumstances of that plaintiff and irrelevant to the issue of the liability of the defendants. However, I am satisfied both from the pleadings and the extracts from discovery referred to in the course of submissions that in fact there is considerable interrelationship. Non bellwether plaintiffs are likely to have evidence which is material to issues that would be tried in the bellwether cases both with respect to the claims of the other plaintiffs and with respect to the issue of the liability of the defendants.
- [77] The pleadings allege that the harsh treatment at the mine included public physical punishments. For instance, the Araya action and Alemayo action plaintiffs assert, at para. 49 and para. 41 of the respective notices of civil claim:

These and other forms of severe punishment served to create an atmosphere of fear and intimidation at the Bisha mine that helped to ensure the continued obedience of conscripts and other workers and caused the plaintiffs and other forced labourers to live in fear for their lives.

- [78] Thus, the atmosphere of fear and intimidation that allegedly arose in part from knowledge of and witnessing the treatment afforded to other workers forms an integral part of the plaintiffs' claim. In addition, many of the plaintiffs were at the mine at the same time as others. The descriptions of the conditions at the mine that each plaintiff provides constitutes evidence that is potentially relevant to the assessment of the reliability and credibility of the accounts of others who were there at the same time.
- [79] I agree with Nevsun that the imposition of a stay would be prejudicial to the defendants' rights to a fair trial. A stay would compromise the defendants' ability to respond to the allegations of the plaintiffs. Moreover, in the event that there was an order for a test case trial, a stay would create a real risk of findings of fact in that trial, which would be binding in subsequent trials, that were inconsistent with the evidence at a subsequent trial.
- [80] I also agree that the imposition of a stay would be counterproductive to prospects for an overall settlement. In my view, the prospects of settlement are enhanced and not inhibited by full discovery prior to trial. Indeed this is one of the reasons that discovery holds such a central role in our system of justice, see *Juman v. Doucette*, 2008 SCC 8 at para. 24.
- [81] I agree that there are features adding to the expense and complexity of the discovery process in the present cases. However, in my view, this is not a case in which the numbers of plaintiffs and the complexity make it impracticable to discover all of the plaintiffs.
- [82] The plaintiffs' proposal for a stay also rests on the assumption that completion of the discoveries will be unnecessary following the test case trial because either the plaintiffs will lose or there will be a global settlement. However, if the plaintiffs succeed and there is no immediate global settlement the discoveries will have to be completed in any event, only then with further significant delay and the corresponding deterioration of memory. In addition, this is not a case in which it necessarily follows that if the test case plaintiffs fail, the claims of all other plaintiffs are likewise doomed to failure. That result is perhaps likely but by no means certain.
- [83] In summary, this is not a case in which it is impracticable to complete the discovery process for all parties. The plaintiffs' proposal results in savings and efficiencies in only a limited set of circumstances but comes at a cost of significant prejudice to the defendants' ability to conduct their defence and to the fairness of the trial and a potential for significant additional delay in the eventual resolution of the litigation. I agree with Nevsun's submission that a stay of the Actions would prejudice Nevsun and compromise the fairness of the proceedings.

Practicalities of the Proposals

- [84] I turn next to the parties' proposals for the mode of trial. The first consideration is the practicalities of the two proposals. I agree with the plaintiffs that their proposal would see the case ready for the test case trial sooner than the common trial proposed by the defendants. I also agree that a trial of six plaintiffs would be significantly shorter than a trial of all of the claims. However, I also agree with the submission of the defendants that if a bellwether trial is undertaken and all the claims do not resolve following the first test case trial, the final resolution will be delayed for years longer than in a common trial scenario. The resulting expense would be the same if not greater with considerable delay and prejudice.
- [85] The promise of the savings of time and expense inherent in the plaintiffs' test case proposal is really premised on a faith in one of two outcomes. The first alternative is that the plaintiffs do not succeed in establishing liability in the first test case trial. It is clear that if the plaintiffs fail and the remainder of the claims do not proceed to trial, much time and expense will have been saved. However, this could be argued in any case in which liability and damages are split, yet this is rarely appropriate. The second alternative is that if the plaintiffs succeed in the bellwether trial all the claims would be settled without proceeding to try the remainder of the claims.
- [86] An integral component of the plaintiffs' proposal is mandatory mediation following the conclusion of the test case trial. As noted above, the Rules do provide for an order that the parties attend mandatory mediation. None of the parties provided any guidance with respect to the principles that should guide the court in its exercise of discretion in considering such an order. I do not intend to address this aspect of the relief further in these reasons except to note, as stated earlier, that in my view the prospects of settlement are enhanced and not inhibited by the completion of discoveries by all parties to the litigation.
- [87] The plaintiffs argue that it is unjust to burden the plaintiffs in a common trial with the longer, more complex trial that would be required with hundreds of days of testimony, potentially unrelated to their time at the Bisha mine and their injuries. However, on the assumption that the claims do not settle after the test case, the result will be the same, only significantly delayed.
- [88] The plaintiffs argue that a common trial would simply be impracticable. This contention is based upon a premise that a common trial would involve 60 plaintiffs with damage claims requiring 3-5 days each to present.
- [89] With respect to the question of the number of claims that would be tried in a common trial, the defendants note that while at one point there were approximately 90 plaintiffs, that number has been steadily declining as discovery has progressed to the present number of which is less than 60. The defendants predict that if discoveries are permitted to continue, by the time of trial the number would have settled to approximately 40. Of course, we can't know the future. However, given the recent history, it does seem more likely than not that

some additional plaintiffs will fall away by the time of trial.

- [90] A consideration of how long it would take to try the plaintiffs' case requires some consideration of the claims being advanced. It appears that all or virtually all of the plaintiffs seek recovery for forced labour. In addition, all or virtually all will advance a claim based upon the harsh working conditions that they allege they were forced to endure. A more limited group of plaintiffs allege that they suffered a physical or emotional injury caused by the treatment at the mine and within this group a smaller subset alleges injury that resulted in loss of past and/or future income.
- [91] The plaintiffs who advance claims based upon forced labour and harsh working conditions, but who do not advance claims for physical or emotional injury or loss of income, have been defined in the litigation as "restricted damages plaintiffs". The parties reached an agreement at an earlier stage in the litigation with respect to document production for this group of plaintiffs. For the purpose of these applications, the relevance of the restricted damages plaintiffs is that clearly the adjudication of the claims of these plaintiffs would require less court time than those alleging injury and income loss. In my view, it is unlikely that the evidence with respect to the claims of the restricted damages plaintiffs would require 3-5 days of court time each. At this stage of the proceedings, there are four plaintiffs who have been characterized by plaintiffs' counsel as restricted damages plaintiffs.
- [92] Thus, at this point it is not known how many plaintiffs would be involved in a common trial. Nor do we know the composition of that group, and how many will be restricted damage plaintiffs. On the basis of what we do know and reasonable predictions about what is likely to occur between now and the start of trial, I think that the plaintiffs' prediction of the likely length of a common trial is overly pessimistic as it does not account for further reductions in the number of plaintiffs, the restricted damages plaintiffs and possible efficiencies in the trial process that could be adopted.
- [93] In my view, it cannot be said at this time that it would be impossible or impracticable to try all of the claims in a common trial. This is not a case involving hundreds or thousands of claims where a trial of all claims is simply not possible or practicable.

Selection of Test Case Plaintiffs

- [94] As noted above, the plaintiffs contend that the group they have nominated as suitable test plaintiffs offer a balanced distribution of the three major classes of conscripts, cover all of the important time period and are convenient geographically. In oral submissions, counsel stated that the plaintiffs were open to other suggestions with respect to the composition of the group.

- [95] Nevsun submitted that the plaintiffs' claim that the proposed test case plaintiffs are representative rests upon the pleadings and not on the evidence. In fact, Nevsun asserts that the proposed plaintiffs represent the most advantageous selection by the plaintiffs, drawn from those who have been examined and who are convenient geographically.
- [96] Nevsun submits that the plaintiffs' criteria for selection ignore considerations about the representativeness of the individuals' experiences or the strength of their cases. For example, Nevsun submits that these plaintiffs are not representative of those who describe witnessing no torture and receiving no threats.
- [97] In my view, if a test case approach is to be adopted, the selection of the test case plaintiffs is a matter of critical importance. The importance of this element is magnified in the current proposal because the plaintiffs' plan would have the findings of fact from the bellwether trial be binding on subsequent proceedings.
- [98] On the basis of the record and submissions before me I am not able to conclude that the proposed test case plaintiffs are a group that are fairly representative and appropriate for purposes of a test case trial.

Risk of Prejudice/Trial Fairness

- [99] The plaintiffs' proposal would make findings of fact from the bellwether trial binding on any subsequent action. This creates a potential for significant challenges and potential unfairness.
- [100] This is not an occasion for fact finding; however, certain examples referenced in Nevsun's submissions from evidence given on discovery illustrate the concern. Bellwether plaintiffs have testified on discovery about having suffered instances of physical abuse, including being tied up and displayed in public. They described experiencing this, seeing others treated in this way and hearing or knowing of many other instances. However, other non bellwether plaintiffs from the limited group who have been discovered to date testified that they experienced no abuse or threats, and did not witness any torture, threats or abuse to others.
- [101] There is in my view a real potential for inconsistency between the results of bellwether and non bellwether trials, particularly in circumstances in which the defendants have been deprived of the opportunity to complete discovery. As noted earlier, the atmosphere of oppression, which was influenced not only by what the plaintiffs experienced themselves but by what they saw or knew was happening to others, is an integral part of their claim. The plaintiffs' proposal to have the findings of fact from the bellwether trial binding on any subsequent trial carries with it in these circumstances a real risk of an unjust result.
- [102] Nevsun notes that the form of order proposed by the plaintiffs does not refer to issue estoppel, does not prevent the re-litigation of issues or preclude parties from adducing additional or contrary evidence that could alter or embarrass the court's earlier findings.

Nevsun notes further that the order proposed by the plaintiffs in the present case, unlike the order in *First Choice Capital*, does not contain an undertaking from all non bellwether plaintiffs "to the effect that they will not pursue their claims against the Defendants if none of the individual Plaintiffs in the test case are ultimately successful" (at para. 37(6)(b)). Nevsun submits that given these concerns the order proposed creates the potential for confusion, additional complexity and disputes.

- [103] I agree that the form of order proposed by the plaintiffs creates the potential for these problems. The possibility of inconsistent findings of fact is of particular concern in the circumstances of the present litigation which, as noted earlier, raises questions of law which are novel in this jurisdiction.

Claim for Punitive Damages

- [104] All of the plaintiffs advance a claim for punitive damages. The plaintiffs submit that this claim will turn on a detailed assessment of Nevsun's knowledge and response to the alleged use of forced labour at the Bisha mine.
- [105] The plaintiffs submit that common issues arising from claims for punitive damages in class proceedings are routinely certified. The approach taken by British Columbia courts in recent cases is described as a bifurcated approach. The issue of whether the acts and omissions of the defendant warrant an award of punitive damages is addressed at the common issues trial. While the ultimate decision as to whether punitive damages should be awarded, and in what amount, is heard and decided later, following determination of the issues including the quantum of compensatory damages payable to class members. See for example *Sherry v. CIBC Mortgages Inc.*, 2015 BCSC 490 at paras. 6-7, 12-28.
- [106] This approach has been held to be appropriate where the assessment of the defendant's conduct will be focused on systemic wrongdoing against the group, rather than wrongdoing against individual class members. In the plaintiffs' submission, the inquiry into Nevsun's knowledge of and response to the alleged use of forced labour at the Bisha mine is an inquiry into conduct that constitutes a systemic wrongdoing against the group of plaintiffs.
- [107] Counsel submits that a bellwether trial on punitive damages would provide invaluable guidance for the resolution of this issue in the remaining claims.
- [108] The defendants note that the proposed bellwether trials are not trials of certified common issues belonging to a class of plaintiffs. They are complete trials of the actions of certain selected plaintiffs. There is therefore no room to defer the ultimate decision with respect to whether punitive damages should be awarded and if so, in what amount. Thus in the defendants' submission, the plaintiffs' position is contrary to established principles governing punitive damages.

[109] In my view, the class proceedings decisions concerning this issue are not a helpful analogy. As discussed in *Sherry*, in cases in which the analysis of the wrongfulness of the defendant's conduct does not require an examination of the individual class member's circumstances or of any interaction with individual members, the determination of whether the defendant's conduct is sufficiently reprehensible to warrant punishment is capable of being determined as a common issue. See for example *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31.

[110] However, it is also clear that where adopted this is a bifurcated approach with punitive damages determined only after consideration of the individual circumstances of the class members and the compensatory damages addressed. As Justice Watchuk stated in *Sherry* at para. 38:

As indicated above, punitive damages will only be awarded in exceptional cases for egregious misconduct if and only if all other penalties are inadequate to accomplish the objectives of retribution, deterrence, and denunciation: *Whiten* at paras. 36 and 94. Punitive damages cannot be determined "at large" and can only be decided once all other sanctions have been visited upon the defendant (at paras. 76, 94, and 98).

[111] As Justice Perell discussed in *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87 at paras. 170-171 (Ont. S.C.J.):

[170] It follows from Justice Binnie's remarks [in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18,] that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives of retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.

[171] In order to rationally determine whether punitive damages should be awarded and to determine the quantum of them, the court needs to know the quantum of compensation that will be awarded. Earlier in his judgment, at para. 74, Justice Binnie stated: "[T]he governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)." Later in his judgment, at para. 100, he stated: "The rationality test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of quantum."

[112] In the case at bar those factors would be known at the conclusion of the common trial under the defendants' proposal. However under the plaintiffs' proposal, those matters would not be known at the conclusion of the bellwether trial. Accordingly, in my view the plaintiffs' claim for punitive damages is a factor that is compatible with the common trial proposal but, incompatible with the bellwether proposal advanced by the plaintiffs.

Alternate Relief - Liability Only

[113] The plaintiffs' notice of application seeks in the alternative an order that the issues of duty and standard of care be tried before other issues including causation and damages. This alternative was not developed in submissions, neither was it abandoned. In my view the proposal, as presented, is contrary to authority, see *Prevost v. Vetter*, 2002 BCCA 202; *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138; *Hobbs v. Robertson*, 2002 BCCA 381. I do not regard this option, as presented, to be appropriate.

Conclusion

[114] I have concluded that it is not impracticable to have a common trial. I am not persuaded that the test case proposal provides an overall practical advantage. I acknowledge that there are certain circumstances that would result in savings of time and expense. However, the plaintiffs' proposal also carries the risk of significant delay in the ultimate resolution of the litigation.

[115] I have also concluded that there are legal considerations that do not favor the plaintiffs' proposal. A stay on examination for discovery would in my opinion prejudice the defendants and impair the fairness of the trial. There is a potential for mischief if binding findings of fact from the test case trial prove to be inconsistent with evidence accepted in a subsequent trial of the remaining claims. The plaintiffs' claims for punitive damages cannot be addressed in a bellwether trial, yet such a trial is meant to be a complete trial of the claims of any selected plaintiffs.

[116] This litigation is undeniably complex. If a settlement is not reached, on either proposal, the litigation will be protracted and expensive. Considering all of the circumstances, I am satisfied at this time that justice is best done in these cases by proceeding with a common trial. Accordingly, the plaintiffs' application is dismissed. The relief sought in *Nevsun's* application is granted. I expect that in the coming months, consistent with the object of the Rules, the parties will direct their attention to exploring ways to conduct this litigation in a fashion that is efficient and fair to all parties.

[117] Accordingly,

- a) Subject to further order of the court, the Actions shall be tried together and the evidence in one shall be admissible in the other, subject to the direction of the trial judge and the right of any party to dispute the admissibility, in one of the Actions, of evidence admissible in the other on the basis of relevance or otherwise;
- b) The Actions will proceed to trial as if they are separate actions and nothing in this order shall be construed to merge the claims in the Actions;
- c) The order shall not prejudice any application by a party pursuant to R. 9-6 or R. 9-7 of the British Columbia Supreme Court Civil Rules for judgement generally or on an issue in any of the Actions;
- d) This order shall not prejudice the rights of a party to apply for an order that the trial of one or more of the Actions as bellwether or test cases shall proceed before the trials of any remaining actions;
- e) Any party may apply for an order that one or more of the Actions be tried separately in the event of a material change in circumstances that suggests a common trial will result in delay, complication or prolongation of the trial or otherwise prejudice a party; and
- f) *Debesay Mengisteab v. Nevsun Resources Ltd. and Clifford T. Davis*, SCBC Vancouver Registry No. S-191125, be subject to judicial management by Madam Justice Ross in conjunction with the Actions.

"Ross J."

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