
CANADA / JUDGMENT

Araya v. Nevsun Resources Ltd.

2015 BCSC 1209

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1209 Araya v. Nevsun Resources Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Ltd.,

2015 BCSC 1209

Date: 20150713

Docket: S148932

Registry: Vancouver

Between:

Gize Yebeyo Araya, Kesete Tekle Fshazion

and Mihretab Yemane Tekle

Plaintiffs

And

Nevsun Resources Ltd.

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Plaintiffs:

Joe Fiorante, QC,

Michelle Segal

Counsel for Defendant:

Andrew Nathanson,

Gavin Cameron

Place and Date of Hearing:

Vancouver, B.C.

June 18, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 13, 2015

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I: INTRODUCTION

[1] On February 16, 2015, this proceeding was assigned to me for judicial management and trial.

[2] The issues on this application are the terms of a confidentiality order relating to certain material documents as particularized below (the "Documents"), which are to be produced by the defendant, Nevsun Resources Ltd. ("Nevsun"), in this proceeding.

[3] Nevsun agrees to produce the Documents and the parties have agreed to certain terms. These include production of the Documents to certain individuals including counsel and the use that can be made of them.

[4] What remains in issue is whether:

- the Documents can be disclosed by counsel for the plaintiffs to the Canadian Centre for International Justice (the "CCIJ");
- at this stage of the proceedings, counsel for the plaintiffs is permitted to have the Documents translated into the language of Eritrea, being Tigrinya; and
- counsel for the plaintiffs is permitted at their discretion to refer to or disclose generally confidential or highly confidential information to their clients or fact witnesses so long as counsel does not disclose the specific contents of any of the Documents.

[5] The substantive portions of the plaintiff's form of order (the "Order") is as follows:

THIS COURT ORDERS that:

1. Any documents or materials produced or otherwise disclosed in this action (the "Action") designated by the parties as "Confidential Documents" in their List of Documents and any Amended List(s) of Documents shall be treated as confidential. In addition to being used by the parties only for the purpose of the Action, the Confidential Documents shall be subject to the provisions of this Order.
 2. Any documents or materials designated as a Confidential Document shall be marked as "Confidential Document - Araya v. Nevsun, SCBC No. S148932".
 3. If counsel for any party believes that any particular document is not properly designated as a Confidential Document, counsel may challenge such designation by raising the matter with the Court. If the Court finds the document at issue is not properly designated, such document shall not be subject to this Order.
 4. Confidential Documents and the information contained therein shall not be disclosed by counsel for the Plaintiffs or Defendants to any persons other than lawyers and staff of that counsel EXCEPT THAT counsel may disclose copies of Confidential Documents to the following "Excepted Persons".
 - (a) other members of the Plaintiffs' counsel team namely Siskinds LLP. James Yap and Matt Eisenbrandt and all lawyers working at Camp Fiorante Matthews Mogerman;
 - (b) any expert witness for the purpose of the Action when such counsel considers disclosure to such persons to be necessary or appropriate for the preparation for, and the conduct of, the trial of the Action and any interlocutory proceedings;
 - (c) any translators located in Canada, for the purpose of the Action when such counsel considers disclosure to such persons to be necessary or appropriate for the preparation for, and the conduct of, the trial of the Action, and any interlocutory proceedings: and
 - (d) the Canadian Centre for International Justice.
- 4.5. Prior to any such disclosure to Excepted Persons, counsel shall obtain the written agreement and undertaking of such Excepted Persons persons to keep such copies of the Confidential Documents and the information contained therein confidential, to refrain from copying them or disclosing them to any other third person, and to use them only for the purposes of assisting counsel in preparation for, and the conduct of, the trial of the Action or any interlocutory proceedings. This written agreement and undertaking shall be obtained through the person's execution of the writing provided in the attached Schedule "A".
- 5.6. The parties shall not file materials containing Confidential Documents or information derived from Confidential Documents without giving counsel for the other parties five (5) business days' notice of their intention to do so, in order to provide the other parties with an opportunity to seek a sealing order.

7. The parties shall be at liberty to make application at any time to seek a sealing order with respect to any Confidential Documents or information contained therein which form part of any material to be filed with the court.
8. Nothing in this order shall prevent any counsel from advising his or her client concerning this litigation and, in the course of providing such advice, from referring to or disclosing generally Confidential or Highly Confidential Information, so long as he or she does not disclose its specific contents.

6.9. Nothing in this order shall prevent any counsel from referring to or disclosing generally Confidential or Highly Confidential Information to fact witnesses, so long as he or she does not disclose its specific contents.

- [6] Nevsun objects to paragraphs 4(c), 4(d), 8, and 9 being included in the Order.
- [7] For the reasons that follow, the Order shall be in the form proposed by Nevsun. The plaintiffs have liberty to reapply with respect to the additional paragraphs and/or additional terms of disclosure once their counsel have had the opportunity to review the Documents.

II: BACKGROUND

- [8] This proceeding was commenced on November 20, 2014. The notice of civil claim alleges that Nevsun, which is based in Vancouver, entered into a commercial venture with "the rogue and essentially lawless state of Eritrea" to develop the Bisha Gold Mine (the "Mine") in Eritrea. Eritrea is located in Eastern Africa.
- [9] The plaintiffs allege they were subjected to abuses while employed by Segen Construction Company ("Segen"), a subcontractor to Bisha Mine Share Company ("BMSC"). BMSC is the Eritrean company that operates the Mine. Nevsun is an indirect shareholder of BMSC.
- [10] It is alleged that the Mine was built using forced labour, a form of slavery, obtained from the plaintiffs and others coercively and under threat of torture by the Eritrean government and the contracting arms of the ruling party and the military.
- [11] Nevsun filed a jurisdictional response on December 18, 2014 and a response to civil claim (the "Response") on February 13, 2015.
- [12] The Response, inter alia:
- alleges that Nevsun was an indirect shareholder and the Mine was owned and operated by the BMSC;
 - denies that Eritrea is a "rogue state" and that military conscripts were employed at the Mine; and
 - also denies that Nevsun was engaged in a commercial venture or enterprise with the State of Eritrea as alleged, or at all.
- [13] The Response explicitly refers to the Documents as follows:

- the Shareholders' Agreement: "[Nevsun Resources (Eritrea) Ltd. ("NREL")] and [Eritrean National Mining Corporation ("ENAMCO")] are parties to a Shareholders' Agreement made as of October 26, 2007": Response at para. 17;
 - the Project Agreements: "BMSC is a party to a series of agreements with the State of Eritrea and ENAMCO which give rise to its right, title and interest in the Bisha Mine. These agreements include the Mining Agreement made as of December 12, 2007 between BMSC and the State of Eritrea, as represented by the Minister of Energy and Mines (the "Mining Agreement") and the Stabilization Agreement made as of December 12, 2007 between BMSC and ENAMCO (the "Stabilization Agreement") (collectively, the "Project Agreements)": Response at para. 31;
 - the Mining Licenses: "BMSC's entitlement to operate the Bisha Mine is subject to the terms of Mining Licenses issued to it by the State of Eritrea in 2008 and again in 2012 (the "Mining Licenses)": Response at para. 33; and
 - the Construction, Environmental and Social Management Plan: "BMSC also adopted plans, including a Construction, Environmental and Social Management Plan ("CESMP"), consistent with various social and environmental commitments it made in connection with the Bisha Mine project": Response at para. 40.
- [14] Nevsun initially sought that an additional document referred to in the Response, being the collective agreement entered between Segen and the union representing Segen's employees, also be subject to the Order. It has now agreed to provide that document without its inclusion in the Order.
- [15] The parties have also agreed that the issue of production of the Project Agreements be adjourned generally.
- [16] Accordingly, the documents at issue on this application are the Shareholders' Agreement, the Mining Licenses, and the CESMP.
- [17] Nevsun has advised the court that it intends to bring certain preliminary applications, which include:
- an application pursuant to s.11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA") that this Court decline to exercise territorial competence on the basis that British Columbia is forum non conveniens;
 - an application to stay or dismiss the action on the basis that this Court lacks subject matter competence because of the existence of a collective agreement between the plaintiffs and the defendant;
 - an application pursuant to Rule 20-3(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, to deny process of this action as a representative action; and

· two applications pursuant to Rule 9-5 to strike the plaintiffs' claims on the basis that the claims are based on customary international law and on the basis that the plaintiffs' claims are not justiciable and are barred by the act of state doctrine and the State Immunity Act, R.S.C. 1985, c. S-18.

(Collectively, the "Preliminary Applications").

[18] The Preliminary Applications are set for hearing for 10 to 15 days commencing January 4, 2016.

III: THE LEGAL FRAMEWORK PERTAINING TO CONFIDENTIALITY ORDERS

[19] Exceptional circumstances are required before the implied undertaking that exists in all litigation in British Columbia is to be replaced by an express undertaking such as the one contemplated by the Order: see *Knight v. Imperial Tobacco Canada Ltd.*, 2009 BCSC 339 at para. 5.

[20] The principles pertaining to confidentiality provisions are summarized in *Eisses v. CPL Systems Canada Inc.*, [2008] O.J. No. 239 at para. 5, 2008 CanLII 1946 (S.C.J.) and *Altec Design Group Ltd v. Motion Works Inc.*, [1993] 46 C.P.R. (3d) 61 at 71-72 (B.C.S.C.):

i. a confidentiality order is exceptional in nature: *Homelife Realty Services Inc. v. Homelife Properties Inc.*, [2002] O.J. No. 1482 at para. 3 (S.C.J.);

ii. the presumption is that parties ought to have access to the other side's productions. In general, the necessity for complete disclosure supersedes the fact that a party may lose a competitive advantage when disclosure is made: *Forestral Automation Ltd. v. R.M.S. Industrial Controls Inc.*, (1977), 4 B.C.L.R. 219 (S.C.);

iii. the burden of demonstrating that the court ought to deviate from this presumption rests on the party who would deny the access to or use of the documents. The denying party must show that the risk of harm is real and substantial. Speculation is not sufficient. An adequate factual basis must be provided: *Dodd v. Cossar*, [1998] O.J. No. 335 at paras. 2-4 (Gen. Div.); *Allerex Laboratory Ltd. v. Dey Laboratories L.P.*, [2002] O.J. No. 3168 at para. 15 (S.C.J.); *Homelife* at para. 22; *Deprenyl Research Ltd. v. Canguard Health Technologies Inc.* (1992), 41 C.P.R. (3d) 228 (Fed. T.D.);

iv. however, the court has inherent discretion to grant an order restricting the production of documents in circumstances where unlimited production will prejudice a party: *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1999] O.J. No. 515 at para. 15 (S.C.J.); *Supreme Court Civil Rules*, Rule 7-1(1);

v. an order may be made where the access or use of the information would risk serious financial harm if the information was available to a competitor or would allow a competitor to improve its competitive position: *BASF* at para. 16; *Zellers Inc. v. Venta Investments Ltd.*, [1998] O.J. No. 2118 (Gen. Div.);

- vi. if the court is satisfied that (a) the information is confidential, (b) it is commercially sensitive, and (c) a competitor could obtain an unfair advantage through its release, the party seeking the order is *prima facie* entitled to a protective order unless the responding party would be unduly prejudiced by such an order: BASF at para. 17;
- vii. in instances where the probative value of the documents is not sufficiently great to outweigh the real and considerable adverse effect of disclosing a trade secret, disclosure ought not to be ordered: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 70 B.C.L.R. (2d) 180 (S.C.);
- viii. the making of such an order is designed to strike a balance between the disclosure necessary for the conduct of an action and a party's bona fide right to the protection of confidential and sensitive information: BASF at para. 16. In maintaining a balance between disclosure and confidentiality, the governing principle is to lean in favour of openness and disclosure: *Devron-Hercules Inc. v. Gill* (1988), 27 B.C.L.R. (2d) 394 (C.A.);
- ix. the party whose documents are being disclosed to be examined by an expert is entitled to have a representative present during the examination: GEAC;
- x. in matters not requiring technical expertise, the parties may be required to produce the documents to a third party for examination and report to the court: *Webster v. Mastercraft Development Corp.* (1991), 55 B.C.L.R. (2d) 121;
- xi. an order preventing counsel from showing relevant documents to his or her client should only be granted in exceptional circumstances: *Deprenyl Research*;
- xii. where the information that is at issue is such that it would allow a competitor to improve its competitive position, the deemed undertaking rule offers insufficient protection. This is because the deemed undertaking rule would not prevent the use of the information by a competitor so long as it does not use the information to commence a new lawsuit: *Zellers* at para. 16. It also does not apply to evidence filed in court or referred to in a hearing and it applies only to parties, their counsel, and experts, not to third parties: BASF at para. 20; *Juman v. Doucette*, 2008 SCC 8 at para. 4; and
- xiii. the party viewing the confidential materials shall give an undertaking to the court and the opposite party, the terms of which may vary from case to case: *GEAC Canada Ltd. v. Prologic Computer Corp.* (1989), 24 C.P.R. (3d) 566 (B.C.S.C.).

IV: THE PARTIES' POSITIONS

- [21] The plaintiffs' position is that, while it recognizes that Nevsun has certain legitimate concerns as to disclosure of the Documents, its form of the Order is reasonable and provides a fair balance between the parties' respective interests.

- [22] Plaintiffs' counsel submit it is reasonable to have the Documents translated into Tigrinya at this stage since translated copies may be required in order to be able to refer to or describe in a general sense confidential or highly confidential information to their clients or fact witnesses in order to properly prepare for the Preliminary Applications.
- [23] Plaintiffs' counsel also says that Mr. Matt Eisenbrandt who is the CCIJ's in-house counsel is expressly subject to the confidentiality provisions. Mr. Eisenbrandt is a qualified lawyer in the United States and he would be subject to the same undertaking as to confidentiality as would be an expert witness. Accordingly, the CCIJ is in the confidentiality "tent" as to Mr. Eisenbrandt and there is no reason for the CCJI not to be included in the Order.
- [24] Nevsun's position is that its concerns regarding disclosure of the Documents or their general contents are not fanciful. It says that, not only do they have concerns regarding the "usual risk of commercial harm", but these also relate to disclosure to third parties who are not subject to the control of the court. They say that there is no evidence that the plaintiffs or fact witnesses need to be advised of the contents of the Documents, even in a general sense, in order to properly prepare for the Preliminary Applications, which may be dispositive of the proceeding in its entirety.
- [25] Nevsun points to the fact that it is not a party to any of the Documents, which are the property of BMSC or NREL. Nevsun possesses the Documents as a result of its affiliation with these two entities and is impressed with an express duty of confidentiality with respect to certain of the Documents.
- [26] Nevsun says it also has concerns relating to the potential dissemination of confidential information to third parties such as non-governmental organizations ("NGOs"). In that regard, the Chief Financial Officer of Nevsun, Thomas Whelan, deposes at paragraphs 24 to 28 of his affidavit #1 dated June 16, 2015 that:
24. I believe that the Confidential Documents contain proprietary commercial information the disclosure of which could be harmful to one or more of BMSC, NREL, ENAMCO and the State of Eritrea. Other mining companies do business in Eritrea, and BMSC, NREL and ENAMCO would naturally wish to keep confidential the terms of their bargains as against competitors to prevent them from obtaining a competitive advantage and to give ENAMCO and the Eritrean government the ability to negotiate distinct commercial terms in agreements with third parties that are most favourable to the Eritrean state.
25. I am not conversant with Eritrean law. I do not know whether there are other applicable Eritrean laws that restrict or prevent the disclosure of the Confidential Documents. Nevsun would not want to cause BMSC to breach its existing contractual obligations or breach other Eritrean laws by disclosing the Confidential Documents without authorization of BMSC, NREL, ENAMCO or the State of Eritrea, at least without significant express confidentiality protections.

26. Nevsun has a further concern that absent express confidentiality order in this action, the Confidential Documents that Nevsun is prepared to disclose on terms may be disclosed by the Plaintiffs to third parties. This concern arises from a combination of the fact that the Plaintiffs are not within the court's jurisdiction, they appear not to speak or read English, and they appear to be receiving assistance with their claim from one or more third party non-governmental organisations ("NGOs").
27. Now produced and shown to me and marked as Exhibit "C" is a true copy of a printout from the website of the Canadian Centre for International Justice (the "CCIJ").
28. This action is taking place against a backdrop of a concerted campaign by NGOs and human rights groups who have been very critical of the Eritrean government's policies. Nevsun is concerned that it would be without effective recourse if the Plaintiffs chose to disclose Confidential Documents, or the information they contain, to third parties.

[27] The CCIJ printout referred to in paragraph 27 of Mr. Whelan's affidavit contains the following statements:

Dimitri Lascaris, a partner with Siskinds, said, "There is, regrettably, a long and ignominious record in the Canadian resource sector of companies doing business with repressive regimes." He added, "We intend to shine a bright light on these relationships, and we hope to raise the ethical bar for Canadian resources companies that are profiting from their interactions with such regimes."

The lawsuit also advances ground-breaking claims based on the international law prohibitions on forced labour, slavery, torture and crimes against humanity. It is one of the first human rights lawsuits in Canada to assert claims based directly on international law.

[28] Two reports authored by the United Nations Human Rights Office of the High Commissioner for Human Rights formed part of the Application Record. They refer to "systematic, widespread and gross human rights violations being committed in Eritrea under the authority of the Government. Some of these violations may constitute crimes against humanity".

[29] Nevsun submits that, once the Documents have been produced, the plaintiffs should be at liberty to apply to have the right to have the Documents translated and generally disclose confidential information as set out in paragraphs 8 and 9 of the proposed Order. This way the plaintiffs can advise the court and Nevsun as to the need to make general disclosure in order to prepare for the Preliminary Applications.

[30] In reply, the plaintiffs' counsel submits that "counsel only" provisions are exceptional and they should not be obliged to reapply prior to discussing the Documents in a general way with their clients or fact witnesses.

- [31] Furthermore, if one or more of the Documents, such as the Shareholders' Agreement, identify substantial obstacles to the merits of their clients' case then counsel should be allowed to discuss that with the plaintiffs.

V: DISCUSSION

- [32] It is agreed between the parties that the Documents contain confidential or highly confidential information. I note that paragraphs 8 and 9 of the Order appear to contemplate "Confidential or Highly Confidential Information" to be a defined term but that phrase is not, in fact, defined. In any event for the purposes of this application, I assume that the phrase refers generically to information contained in the Documents as described in paragraphs 1 and 2 of the Order.
- [33] When I apply the principles to which I have referred to the circumstances of this case at this stage of the proceedings, I conclude that the disclosure of confidential or highly confidential information contained in the Documents should be considered in stages.
- [34] The fact that the Preliminary Applications themselves will require 10 to 15 days to be argued is indicative of their novelty and complexity.
- [35] I am mindful that more is required than "bald" statements to justify the need for a "counsel only" protective order, particularly one intended to restrict the dissemination of information to a party to the proceeding and is tantamount to interference with the solicitor-client relationship: see *Merck & Co. v. Apotex Inc.*, 2004 FC 567 at paras. 8, 14.
- [36] I am satisfied that Mr. Whelan's assertions to which I referred at paragraphs 26 and 27 above warrant, for the time being, the exclusion from the Order of the paragraphs to which Nevsun takes objection.
- [37] In attempting to strike the balance "between the disclosure necessary for the conduct of an action and a party's bona fide right to protection of confidential and sensitive information" that balance presently tips in favour of Nevsun.
- [38] It may be that the balance will tip in favour of the plaintiffs after their counsel has had the opportunity to review the Documents and to consider them within the context of responding to the Preliminary Applications and the conduct of the proceeding generally.
- [39] At that point, the need to have them translated and/or disclosed in general terms to their clients and third parties may become apparent. Meanwhile, the CCIJ's in-house counsel will also have access to the Documents in accordance with the terms of the Order.
- [40] There remains the better part of six months before the hearing of the Preliminary Applications.
- [41] Accordingly, I conclude that the Order should not contain paragraphs 4(c), 4(d), 8, and 9.

- [42] I order that the Documents be produced to counsel for the plaintiffs within 15 days in accordance with the revised form of the Order.
- [43] Upon receipt of the Documents, the plaintiffs, upon filing additional material, have the right to reapply to have the excluded paragraphs of the Order included in a subsequent order and/or seek further relief they consider appropriate.
- [44] In that there may be a further application relating to disclosure of the Documents, I make no order as to costs at the present time.

"Abrioux J."

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