

CANADA / JUDGMENT

Araya v. Nevsun Resources Ltd.

2019 BCSC 260

COURT

Supreme Court of British Columbia

DECIDED

18 January 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 260 Araya v. Nevsun Resources Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Ltd.,

2019 BCSC 260

Date: 20190118

Docket: S148932

Registry: Vancouver

Between:

Gize Yebeyo Araya, Kesete Tekle Fshazion

and Mihretab Yemane Tekle

Plaintiffs

And

Nevsun Resources Ltd.

Defendant

Corrected Judgment: The text of the judgment

was corrected at paragraphs 97 to 100 on April 17, 2019

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment

Counsel for Plaintiffs:

J. Fiorante Q.C.

J. Thornback

J. Winstanley

N. Baker

Counsel for Defendant:

A. Nathanson

M. Parrish

G. Cameron

A. Mitretodis

C. Senini

Place and Date of Hearing:

Vancouver, B.C.

December 10-11 and 13-14, 2018

January 7-11, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2019

Table of Contents

I: INTRODUCTION AND PROCEDURAL BACKGROUND. 3

II: THE EXAMINATION/DEPOSITION OF TREVOR MOSS. 5

A: Introduction. 5

B: The Parties' Positions. 8

C: Analysis. 10

U.S. Law and Procedure. 10

British Columbia Rules of Court 11

Discussion. 12

D: Conclusion. 17

III: WAIVER OF PRIVILEGE RESULTING FROM THE PLAINTIFFS' REPLY PLEADINGS OF POSTPONEMENT OF THE LIMITATION DEFENCE AND COMMUNICATIONS WITH A THIRD PARTY. 17

A: Introduction. 17

B: The Legal Framework. 18

C: Discussion. 22

D. Conclusions: 26

I: INTRODUCTION AND PROCEDURAL BACKGROUND

- [1] Due to the time sensitivity of these applications, I am delivering reasons for judgment orally. I intend to issue them in writing in due course. When I do, they may be edited for publication and clarification, but the results will not change.
- [2] I am providing these reasons for judgment in the Araya action, being SCBC action #S148932. They are also intended to include the applications brought in the other actions over which I have judicial case management, being Alemayo (#S169622), Negash (#S1610863), Tsegay (#S171414), Berhe (#S174850), Hadish (#S174850), Hadish (#S174851), Fshaye (#S1710736), Hailemichael (#S1711866), and Mekonen (#S184108).
- [3] I note that on February 20, 2019, I settled the order referred to in Part II of these reasons. At para. 100 of these reasons, there is an amended version of my reasons given on January 18, 2019, which results from additional submissions made by counsel.
- [4] The Araya action has been under judicial case management since 2015. As a result of my reasons for judgment indexed at 2016 BCSC 1856 (the "2016 Reasons") and the orders made therein, the other actions to which I have referred are also under judicial case management.
- [5] The pertinent background of this case is set out in the 2016 Reasons at paras. 1-70. Reduced to its essentials, the plaintiffs, who are all refugees from the State of Eritrea in East Africa, make numerous allegations with respect to the Bisha Mine. They allege that the mine was built using forced labour, a form of slavery, obtained from the plaintiffs and others coercively and under the threat of torture by the Eritrean government, the military, and its contracting arms.
- [6] All the allegations are all denied by the defendant.
- [7] In the 2016 Reasons, I provided rulings with respect to certain preliminary applications brought by Nevsun. This included deciding that the action could not proceed as a representative proceeding pursuant to Supreme Court Civil Rules [Rules], R. 20-3, although the remaining preliminary applications brought by the defendants were dismissed.

- [8] These rulings were appealed, with the Court of Appeal rendering reasons on November 21, 2017, indexed at 2017 BCCA 401. Prior to the hearing of the appeals, the plaintiffs abandoned their appeal of the representative action ruling.
- [9] Nevsun sought and was granted leave to the Supreme Court of Canada of the dismissal of the appeals taken from the preliminary rulings. I am advised that the appeals which will be heard by the Court in late January 2019 are now limited to two of the pre-trial rulings, one of which, the act of state ruling, being potentially dispositive of the actions.
- [10] Notwithstanding the appeals, the parties are continuing in their preparation for the trial date, which has been set for a minimum six month period to commence on April 1, 2020.
- [11] In total, there are now 10 notices of civil claim which have been filed against Nevsun (the "Actions"), which originally encompassed 89 plaintiffs. As a result of the filing of notices of discontinuance, there are now 85 plaintiffs.
- [12] One of the applications before me in April 2018 related to whether test cases should be selected (the "Bellwether Application"). Issues arising from that application were ultimately resolved, largely by consent, and are contained in an order dated April 6, 2018. This has resulted, inter alia, in an order permitting Nevsun to proceed with examinations for discovery of all the plaintiffs, subject to the further order of the court, with the expectation that the Bellwether Application can proceed in 2019.
- [13] The applications in question proceeded in December 2018 and January 2019. The issues relate to:
- (a) the out-of-province examination of a non-party witness, Trevor Moss, who is a resident of California, U.S.A.;
 - (b) production of documents by both the plaintiffs and Nevsun, including the need for affidavits of verification;
 - (c) whether, as a result of replies filed by the plaintiffs in which they raise the issue of the postponement of a limitation period, they have waived solicitor-client privilege, and if so, the scope and expiry of that waiver;
 - (d) within the context of a case plan order, the number of additional examinations for discovery by Nevsun which should occur prior to the Bellwether Application and Nevsun's request for additional interrogatories from a plaintiff in the Mekonen action; and
 - (e) waiver of privilege in relation to a third party, Ms. Elsa Chyrum.
- [14] These reasons relate to the out-of-province examination of Mr. Moss, the extent to which solicitor-client privilege has been waived by the plaintiffs as a result of the replies they have filed, and the involvement of a third party. Reasons for judgment on the documentary production and outstanding case plan matters will be rendered on January 21, 2019.

II: THE EXAMINATION/DEPOSITION OF TREVOR MOSS

A: Introduction

- [15] On November 19, 2018, the plaintiffs commenced proceedings in the United States District Court, Northern District of California (the "US Court") pursuant to Title 28 of the United States Code [USC] §1782 for a subpoena compelling Trevor Moss to produce documents and provide evidence under oath at a deposition (the "US Subpoena Application"). Section 1782(a) the USC authorizes a United States District Court to grant "any interested person" an order for the discovery testimony and documents or things from a person who resides or is found within its district for use in a foreign or international proceeding or tribunal ("§1782").
- [16] Mr. Moss is the former Chief Operating Officer and Executive Vice President of Nevsun. The plaintiffs filed the US Subpoena Application without notice to Nevsun and without having sought or obtained letters of request from this Court pursuant to R. 7-8.
- [17] Nevsun applies for a judicial case management order prohibiting the plaintiffs from continuing with the US Subpoena Application without leave of this Court. Specifically, Nevsun seeks:
- (a) an order that the plaintiffs are required to obtain an order and letter of request of this Court pursuant to the R. 7-8 before the plaintiffs or their agents, representatives, or any other person acting at the plaintiffs' request or behalf, take any act or step in furtherance of the US Subpoena Application; and
 - (b) an order declaring that this Court declines and is not receptive to judicial assistance from the US Court with respect to the US Subpoena Application in the absence of the plaintiffs first obtaining an order and letter of request from this Court.
- [18] According to Nevsun, the plaintiffs have, through an Ontario lawyer, made a number of statements to the US Court respecting British Columbia law and procedure, including the following:
- (a) the plaintiffs "have no other means of obtaining this discovery";
 - (b) the British Columbia courts "will not order pre-trial examination of witnesses residing outside of British Columbia";
 - (c) the "British Columbia rules of civil procedure provide for pre-trial examination of only one corporate representative";
 - (d) "Nevsun has designated its corporate representative, and it is not Mr. Moss";
 - (e) the plaintiffs "cannot obtain Mr. Moss's deposition through the standard discovery process" in British Columbia";

- (f) the British Columbia "court has no jurisdiction over Mr. Moss for pretrial discovery purposes, and there is no British Columbia civil procedure rule which will reach Mr. Moss in California";
 - (g) "this procedural posture, and Nevsun's failure to designate Mr. Moss as its representative, means that the plaintiffs have no means of obtaining Mr. Moss' documents and testimony absent relief from this Court";
 - (h) "there is no reason to believe the Supreme Court of British Columbia would be anything other than receptive to the judicial assistance the plaintiffs seek";
 - (i) "there is no basis to assert or conclude that the plaintiffs are circumventing foreign procedures by seeking aid from this Court";
 - (j) the plaintiffs "are not circumventing any Canadian discovery or evidentiary rules"; and
 - (k) British Columbia courts "cannot compel an individual who is not a party to the litigation and who is outside the court's territorial jurisdiction to participate in discovery";
- [19] Nevsun takes issue with a number of the above statements and characterizations of British Columbia law and procedure, both generally and in the circumstances of this case.
- [20] The plaintiffs dispute Nevsun's characterization of the information of which the US Court was informed.
- [21] Counsel for Nevsun first learned of the US Subpoena Application when they were provided with a "courtesy copy" of the materials from the plaintiffs. Nevsun is not a named party to the US Subpoena Application, but has been identified as an interested party by way of a "Certification of Interested Persons" pursuant to U.S. law.
- [22] On November 26, 2018, the U.S. trial judge issued an interim order directing that the plaintiffs and its agents not take any steps to have the US Court determine or hear the application on the merits until this Court heard the US Subpoena Application on December 12, 2018. This date has since been extended to January 21, 2019.

B: The Parties' Positions

- [23] In summary, Nevsun's position is that the US Subpoena Application is a clear circumvention of one of this Court's core judicial case management functions: the control and management of the discovery process. It points to the fact I expressly cited this Court's rules and processes relating to litigation and trial management, including the management of the discovery and trial processes relating to "depositions and foreign witnesses", in the 2016 Reasons as a basis for this Court to exercise its jurisdiction over this case (at paras. 290-293).

- [24] Nevsun argues that the plaintiffs should have sought leave from this Court as part of the judicial management process, but they proceeded in California without authorization from this Court pursuant to R. 7-5, being the examination of a non-party witness, and/or R. 7-8, which relates to deposition evidence.
- [25] It argues that the relief it seeks on this application does not preclude the plaintiffs from obtaining the evidence of Mr. Moss or any other non-party. Rather, it ensures that before such evidence is obtained, the plaintiffs have properly satisfied the court that the evidence is necessary and appropriate in the circumstances and adequate procedural and evidentiary safeguards are in place.
- [26] In so far as appropriate safeguards are concerned, Nevsun says the following will arise if Mr. Moss is compelled to give evidence as sought by the plaintiffs:
- (a) there will be no rules or procedures respecting Nevsun's ability to attend and ask questions at the depositions;
 - (b) there will be no rules or procedures respecting the subsequent use or admissibility of any deposition evidence or documents produced in this action;
 - (c) there will be no rules or procedures respecting objections, or the manner of resolving objections, under British Columbia law;
 - (d) there will be no rules or procedures respecting claims of privilege, or the manner of resolving disputes relating to claims of privilege, under British Columbia law;
 - (e) there will be no rules or procedures respecting the use of documents produced in this action at any deposition, including whether such documents are protected by the implied undertaking or confidentiality order; and
 - (f) the question of whether this Court will have jurisdiction over any disputes relating to the deposition testimony or subpoena discovery, including disputes relating to privilege, is uncertain and raises the spectre of competing claims of jurisdiction between this Court and the US Court.
- [27] In the alternative, Nevsun submits that if the US Subpoena Application is to proceed, it should be on the terms and conditions set out in a draft form of order, which includes the result of certain discussions between the parties which occurred during the hearing of the application.
- [28] The plaintiffs say that they are entitled to bring the US Subpoena Application without leave or the approval of this Court and that this Court ought not to interfere in the US Subpoena Application, which they describe as a "foreign proceeding".

- [29] Relying on, *inter alia*, *Penty v. Law Society of British Columbia*, 1999 BCCA 630, they submit that the history and purpose of §1782 are to the effect that this procedure should not interfere with foreign courts' process. The plaintiffs are entitled to obtain and preserve evidence as long as what they propose to do is lawful in the country where they seek the order. The plaintiffs emphasize that there is no property in a witness.
- [30] They further argue that orders restraining foreign court process raise serious issues of comity and should not be granted unless this Court concludes the foreign court has assumed jurisdiction in some manner inconsistent with the principles of *forum non conveniens* resulting in a serious injustice: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 914-915.
- [31] In so far as the draft order is concerned, the plaintiffs say that they will adhere to most of its contents "as a courtesy", but that an order is not required.

C: Analysis

U.S. Law and Procedure

- [32] The parties agree regarding the law and procedure arising from United States law and procedure under §1782 of the USC. The following is largely excerpted from Nevsun's summary of argument.
- [33] The threshold requirements for a applications under §1782 are that: (1) the target resides or is found in the district; (2) the discovery is "for use" in a foreign or international proceeding, and (3) the person seeking the discovery is "a person interested" in the foreign or international proceeding (emphasis added).
- [34] When considering whether to order discovery for use in a foreign proceeding pursuant to §1782, the US Court has broad discretion to take into account, *inter alia*, the character of the proceedings abroad, the nature of the foreign tribunal, the receptivity of the court abroad to U.S. Federal Court judicial assistance, the "good faith" of the person seeking discovery, and whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.
- [35] One of the discretionary factors that a U.S. court must take into account in determining whether to grant an application under §1782 is the receptivity of the foreign court to the evidence sought. The receptivity inquiry examines whether there is authoritative proof that a foreign tribunal would reject the evidence obtained with the aid of §1782. Where the foreign court gives a clear indication that it is not receptive to the assistance of the U.S. courts, U.S. courts have refused to issue subpoenas under §1782.
- [36] There is no requirement that the discovery ordered be discoverable in the foreign jurisdiction under its rules. There is also no requirement that the resulting evidence be admissible in the foreign jurisdiction.

[37] Foreign litigants and targets of §1782 may object to the subpoena being issued or seek to quash a subpoena after it has been issued. A party seeking to quash an issued subpoena bears the onus of establishing that the subpoena ought not to have been issued in the first instance.

British Columbia Rules of Court

[38] Rule 1-3 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.

[39] When an application is made under R. 7-5(1) regarding the pre-trial examination of a witness, the application must be supported by an affidavit pursuant to R. 7-5(3) :

Affidavit in support of application

- (3) An application for an order under subrule (1) must be supported by affidavit setting out
 - (a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,
 - (b) if the proposed witness is an expert retained or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means, and
 - (c) that the proposed witness
 - (i) has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question, or
 - (ii) has given conflicting statements.

[40] Rule 7-5(10) incorporates by reference certain examination for discovery provisions set out in R. 7-2, including subrule (27) which provides:

Application to persons outside British Columbia

- (27) So far as is practicable, this rule applies to a person residing outside British Columbia, and the court, on application on notice to the person, may order the examination for discovery of the person at a place and in the manner the court considers appropriate.

Discussion

[41] Penty involved an order obtained in the State of Oklahoma by the Law Society of British Columbia to have an inmate in a state penitentiary give evidence for use in a disciplinary proceeding in British Columbia pursuant to §1782. The Court of Appeal, in concluding that there was no impediment to the Law Society taking advantage of the procedure available to it under §1782, referred to the decision of the House of Lords in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1987] 1 App. Cas. 24 [South Carolina], which had considered the "person interested" provision in §1782, noting at paras. 26-27:

[26] In rejecting the reasoning of the Court of Appeal, Lord Brandon of Oakbrook stated, at 41:

I consider, first, the ground that the re-re-insurers' conduct was an interference with the court's control of its own process. It is not clear to me why this should be so. Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. The court may give him help certainly;... Subject, however, to the help of the court in these various ways, the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used. ... I cannot see why, since the Federal law of the United States authorises an application of the kind made by the re-re-insurers in this case, the making of such application, which may or may not succeed in whole or in part, should be regarded as such an interference either. I cannot, therefore, agree with the first ground of decision relied on by the Court of Appeal.

[27] As to the second ground upon which the Court of Appeal had upheld the injunction, Lord Brandon said (at 42):

... I cannot see that the re-re-insurers, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case. It was said that the re-re-insurers could have applied to the High Court under R.S.C., Ord. 39, r. 2, for letters of request to issue to the proper judicial authorities in the United States. But 28 United States Code, section 1782, allows an application to be made either indirectly by the foreign court concerned or directly by an interested party, and I can see no good reason why the re-re-insurers should not have chosen whichever of these two alternatives they

preferred.

[42] The Court of Appeal in *Penty* concluded at para. 32:

[32] In the present case, the Law Society has taken advantage of legislation the United States has seen fit to enact to assist foreign and international tribunals and litigants to obtain testimony and documents located in the United States. The order of the Oklahoma District Court was not made as a consequence of "a letter rogatory issued, or request made, by a foreign or international tribunal". Rather, the order was made, as section 1782 also permits, "upon the application of any interested person".

[43] *Nevsun* seeks to distinguish *Penty* on the basis that it concerned the jurisdiction of the Law Society under its constating legislation. In addition, it argues *Penty* did not involve or consider the question before this Court, namely whether a party to a civil proceeding in the British Columbia Supreme Court under judicial case management must obtain the approval of the case management judge before bringing foreign evidence gathering proceedings.

[44] While this statement is accurate, *South Carolina* involved proceedings commenced in the Commercial Court of England and the principles referred to in that case apply in the case at bar.

[45] *Nevsun* refers to *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2016 BCSC 2212 to argue that leave must be obtained from this Court prior to a party availing itself of the §1782 procedure. I disagree. In *Pro-Sys Consultants Ltd.*, after the commencement of the trial, Justice Myers granted leave to the plaintiff to proceed with §1782 depositions for two witnesses and denied leave for two others. In my view, this case does not stand for the proposition that a party must obtain leave of the court in all instances prior to attempting to invoke the §1782 procedure in the United States.

[46] I do agree with *Nevsun*, however, that this Court does have the ability, pursuant to both its inherent jurisdiction and s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253 to grant what, in practical terms, is an injunction preventing a party from proceeding with a §1782 proceeding in the United States under the appropriate circumstances. An example would be where the party in question had failed to make proper disclosure to the US Court, proceeded ex parte and/or where it was evident that the U.S procedure was essentially being used improperly to interfere with this Court's case management responsibilities. An example is *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87 at paras. 56-61, albeit in circumstances of a class action proceeding, which significantly differs from those before the court on this application.

- [47] Accordingly, the plaintiffs have the right to proceed with the US Subpoena Application on the terms set out in the settled form of the order, which includes the extent of production of documents. The issue is whether under the circumstances, I should direct the plaintiffs' counsel to advise the US Court that this Court will not be assisted by the US Subpoena Application or whether I should exercise judicial management authority and prohibit the plaintiffs from continuing with the application.
- [48] First of all, what is at issue is not a "deposition" or evidence to be adduced at trial as contemplated by R. 7-8, but rather, is the pretrial examination of a witness who the parties agree has material and relevant evidence to the case at bar.
- [49] As a result of ongoing trial management issues, both parties clearly have a considerable amount of work to complete prior to the April 2020 trial date. This includes additional examinations for discovery with many of the plaintiffs residing in Ethiopia, Israel, Europe, and the United States. Much of this will be required for the parties to prepare for the Bellwether Application, which will likely occur in the summer of 2019 or at the latest, the early fall of this year.
- [50] For the reasons I will set out in my other rulings, there is also considerable time and effort to be spent on ongoing document disclosure issues.
- [51] In my view, the plaintiffs' reliance on this Court's management powers and the Rules, including the availability of letters rogatory, in support of their resistance to Nevsun's forum conveniens application is not of real significance. The context of that submission was deposition evidence for the trial as opposed to the pre-trial examination of an out-of-province witness.
- [52] It is not a solution for Nevsun to propose Mr. Moss as a second representative to be examined for discovery, as the plaintiffs should decide whom Nevsun's representative should be in addition to the recently retired CEO, Mr. Cliff Davis.
- [53] I also take into account that under the current Rules, Nevsun would have limited standing on a R. 7-5 application to address procedural issues, such as proportionality and issues of privilege: see *Brooks v. Abbey Adelaide Holdings Inc.*, 2014 BCSC 2075 at paras. 12-13.
- [54] Under the former Rules, there is a line of authority to the effect that a R. 28 examination could not be ordered when the proposed witness resided out of British Columbia: see *Rintoul v. Granger*, 2008 BCSC 1852; and *Cansulex Ltd. v. Perry* (1982), 37 B.C.L.R. 397 (S.C.).
- [55] I was not referred to any cases where this Court has ordered the pre-trial examination of a non-party witness pursuant to R. 7-5 for a witness residing outside of British Columbia, nor was I able to locate any.

- [56] Accordingly, any potential R. 7-5 application regarding Mr. Moss would likely involve submissions on novel points of law which may well result in delaying the examination. This should be considered within the context that an established procedure exists in the United States to facilitate the pre-trial examination of this witness where Nevsun would have standing pursuant to U.S. law as a "person interested in the foreign or international proceeding".
- [57] When I consider the object of the Rules, proportionality, and the efficient use of counsel's and the court's resources over the following months as the parties prepare for the Bellwether Application and the trial (which is only approximately 14 months away), I see no useful purpose in there being a further application in this Court relating to Mr. Moss' examination and the issuance of letters rogatory if the plaintiffs are able to satisfy all the R. 7-5 requirements. Rule 7-5(3)(a) is clearly established, but there is no evidence regarding R. 7-5(3)(c) that is Mr. Moss is not prepared to provide a responsive written or oral statement or that he has provided conflicting statements.
- [58] The fact remains that Mr. Moss is an essential, or at the very least an important, witness who resides in California. There is little efficiency in having the plaintiffs reduce what will no doubt be a substantial number of questions to writing and wait to see what the responses will be before proceeding to an application in this Court. If there were to be an application in British Columbia for letters rogatory regarding Mr. Moss, there would still need to be an application in California to have them enforced. Viewed within this context, while I recognize that some of the statements referred to above by the Ontario counsel were inaccurate, others were not. For example, it is not inaccurate that any order of this Court cannot be provided with extra territorial effect without the assistance of the foreign court.
- [59] I would add that Mr. Moss is aware of this application in British Columbia and chose not to attend.
- [60] Rather, in my view, the fairest course of action for all the parties is for the US Court to be advised that this Court will be assisted by the US Subpoena Application, but on the conditions set out in the settled order, which are supplementary to those of the US Court.
- [61] I understand that the parties have agreed to the extent of further documentary disclosure by Mr. Moss that is supplementary to what has been disclosed by Nevsun to date, and pertains to Mr. Moss' involvement in this matter.

D: Conclusion

- [62] The relief sought by Nevsun as outlined in paras. 17 (a)-(b) above is dismissed. The US Court may be advised that this Court will be assisted by the US Subpoena Application on the basis that it be conducted in part in accordance with the settled order of February 20, 2019.

III: WAIVER OF PRIVILEGE RESULTING FROM THE PLAINTIFFS' REPLY PLEADINGS OF POSTPONEMENT OF THE LIMITATION DEFENCE AND COMMUNICATIONS WITH A THIRD PARTY

A: Introduction

- [63] On this application, Nevsun applies for orders resulting from what it asserts is consequent on the plaintiffs' waiver of privilege and requiring certain plaintiffs to answer questions objected on examination for discovery on the basis of privilege.
- [64] Nevsun has raised the timeliness of the actions and asserted a defence on the basis of an expiration of a limitation period. The plaintiffs assert that there is no limitation period applicable or, alternatively, that the limitation period was postponed and/or tolled. Their replies have, as Nevsun notes, "evolved somewhat through the course of the litigation, but are substantially similar".
- [65] There is a significant difference between the postponement as it is pled in the first action filed in November 2014, Araya, and the other nine actions filed following the 2016 Reasons.
- [66] The Araya reply, which was filed January 31, 2017, states in part:
8. In the alternative, any limitation period applicable to this action was postponed until at least November 20, 2014.
 11. Prior to November 20, 2014, the plaintiffs lack the means to discover that they may have had a claim against the defendant Nevsun and that a court action in the courts of British Columbia was the appropriate means of seeking a remedy against Nevsun.
 - 12.
 - (c) In order to ascertain and assess their rights against the defendant Nevsun, the plaintiffs required the benefit of legal advice from Canadian lawyers;
- [Emphasis added.]
- [67] The filing dates of the replies in the other actions range from February 9, 2018 to September 7, 2018. I agree with Nevsun that the reply in the Mekonen action provides a good illustration of the common pleas advanced in the various replies:
1. In reply to paragraphs 6 and 7 of Part 3 of the defendant's Response to Civil Claim, this action is not subject to any limitation period. In the alternative, any limitation period applicable to each of the plaintiffs' claims was:
 - (a) postponed until at least the time when they accessed the legal advice of Canadian counsel necessary to ascertain and assess their legal rights in Canada as against the defendant; and
 - (b) tolled during the period November 20, 2014 to October 6, 2016.

[Emphasis added.]

[68] An issue also arises with respect to communications between some of the plaintiffs and Ms. Elizabeth (Elsa) Chyrum, the founder and director of Human Rights Concern Eritrea ("HCRE"), which I will detail later in these reasons.

B: The Legal Framework

[69] The parties essentially agree on the legal framework.

[70] The plaintiffs admit that, as a result of the plea of postponement, their state of mind is in issue and privilege has been waived. What remains is the scope of the waiver, as well as the facts and documents which must be disclosed as a result.

[71] I will not set out in these reasons the well established principles relating to solicitor-client and litigation privilege. The law has clearly recognized the importance and value of both forms of privilege, and the virtually sacrosanct status of the former.

[72] In so far as the issues of postponement, tolling, and waiver of privilege, what follows is largely excerpted from Nevsun's written submissions.

[73] A party waives privilege where he puts his state of mind at issue with respect to legal knowledge in the litigation. In *Camosun College v. Levelton Engineering Ltd.*, 2014 BCSC 1190 at para. 13, Justice Affleck stated:

a party's state of mind is automatically put into issue when it relies on the postponement provisions of the Limitation Act because to successfully invoke postponement provisions it must be established that the party lacked the factual and legal knowledge necessary to start the action prior to the date in which it was actually commenced

[74] In assessing a plea of postponement, the court will necessarily be required to determine when the action should have been commenced. This invokes questions such as "when did [the plaintiffs] get appropriate advice and acquire sufficient knowledge" which would have allowed them to commence proceedings, as well as "what is the period of postponement": *Homalco Indian Band v. British Columbia*, 2001 BCSC 1566 at para. 15. This necessarily requires an inquiry into the party's subjective understanding of their own circumstances and interests: *Harry v. British Columbia*, 2002 BCCA 557 [Harry] at para. 17.

[75] Discoverability has both subjective and objective elements. It engages questions of fact, regarding when the particular plaintiff actually discovered the facts underlying his or her claim, but also considers the time when the hypothetical person, exercising reasonable diligence, would have discovered these same facts. Discoverability puts into issue the "wider circumstances surrounding both when and how the plaintiff acquired, or could have acquired, particular knowledge and what the sources of this actual or potential knowledge were": Jonathan de Vries, "Privilege and Limitations: The Impact of Raising the Discoverability of Claims on Solicitor-Client Privilege", (2014) 43 *Advocates Quarterly* 219-256 [de Vries] at 230.

- [76] This state of mind includes not only the plaintiff's own subjective and objective knowledge, but where counsel has been retained prior to the date on which the cause of action was said to have been discoverable, the knowledge and investigations of counsel are also put in issue, even where the plaintiff is unaware. The knowledge of counsel is deemed to be the knowledge of the client: *Jack v. Canada (Attorney General)*, [2004] O.J. No. 3294 (S.C.J.) [Jack] at para. 120.
- [77] In respect of the scope of materials which must be produced, the two relevant dimensions concern the subject matter and the temporal period of the waiver. The former concerns the materials and information to which the waiver extends, and the latter the period of time captured by the waiver.
- [78] Where privilege has been waived, the scope of what must be produced is clear. Privilege is lost over any communication that has a relevant and material connection to the issue being brought forward. Once privilege over a subject matter or topic is lost, it is lost with respect to all communications on that topic, not just the ones that [the party] selects for disclosure. *Transportation Lease Systems Inc. v. Viridi et al*, 2007 BCSC 132 at para. 26, citing *H.H. v. R.L.* (1997), 51 Alta. L.R. (3d) 177 (A.B. Q.B.) at 230.
- [79] The scope of the subject matter encompasses knowledge of the facts underlying the claim, instructions and advice regarding the claim passing between counsel and client, evidence regarding how the client acted on this advice, comments from the client on strategy, and instructions regarding commencement of a claim. It can also extend to the realm of counsel, file management practices, and due diligence in investigating claims: see Jack at paras. 123 and 128.
- [80] The period of the waiver will be impacted by the circumstances of the particular case, and may extend into the time period when the limitation period is supposedly running, and until the filing date which commenced the litigation: Harry at para. 15. This is from the accrual of the claim to the putative discovery date, at which time the plaintiff experienced the "paradigm shift" so as to be imbued with the requisite mix of factual and legal knowledge necessary to commence the claim. At 252, de Vries states:

The proper approach to setting the temporal dimension of an implied waiver is to ensure that the information needed to properly adjudicate the discoverability issue is available. As a starting point, this would include the information relevant to the actual act of discovery. Discovery of a claim does not just occur out of thin air or at the plaintiff's whim. A plaintiff must prove that, at a particular point in time, his or her knowledge either reached a critical mass or underwent a paradigm shift which resulted in a transition from a state of ignorance to one of knowledge of a claim. This is a bridge that must be definitively crossed and can be crossed only once. Once a claim is discovered it cannot be "re-discovered" so as to re-start the limitation period.

The implied waiver should also cover the time period from the accrual of the claim up to and including the putative discovery date so that the triggering event(s) of the alleged discovery can be tested.

- [81] In certain circumstances, a limitation period applicable to a particular individual will be suspended or tolled. This may arise in the context of class proceedings, where a limitation period will be suspended to protect class members from the operation of limitation periods until it has been determined whether they may seek recourse through membership in a class proceeding.
- [82] I will deal further with this issue below since, in this case, the Class Proceedings Act, R.S.B.C. 1996, c. 50 does not apply to representative proceedings brought under R. 20-3 which is the manner in which the Araya plaintiffs chose to proceed and which I disallowed in the 2016 Reasons.
- [83] In so far as the involvement of third parties is concerned, that is Ms. Chyrum, in *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 15, Justice Boyd provides a helpful summary of the applicable principles, which I will not repeat in these reasons.
- [84] Reduced to its essentials, communications made between a client or a counsel and an agent may be protected by solicitor-client privilege. A determination of whether privilege exists requires an analysis of the third party's activities and their relationship with the client and/or solicitor. This determination process which adopts a functional approach, calls upon the court to address the true nature and function of the relationship by asking whether the function performed by the third party is essential or integral to the operation of the solicitor-client relationship.

C: Discussion

- [85] The principal point in dispute between the parties pertaining to the non-Araya plaintiffs is whether the reply pleadings amount to a waiver of privilege until the date of the first meeting with Canadian counsel or if it includes what transpired at that meeting.
- [86] Nevsun argues the plaintiffs' conclusion that they had a reasonable prospect of success against Nevsun in a Canadian court could only have been the result of the advice obtained at the first meeting with counsel.
- [87] The plaintiffs point to the language in their respective replies which refers to the point in time "they accessed the legal advice of Canadian counsel". They submit the waiver of privilege ends at the time the "access" commenced, which is when the meeting commenced.

- [88] The plaintiffs distinguish certain of the authorities relied on by Nevsun, including Harry and Jack on the basis that, in those cases, the waiver was extended past the initial meeting with counsel since further investigation as to the facts and the law then occurred with the decision made a later date that there was a reasonable likelihood of success. They also point to the fact that in Harry, the decision to extend the waiver to the date of the issuance of the writ of summons was also based on a plea of laches.
- [89] In reply, Nevsun points to para. 8 in the Mekonen action which pleads that any limitation period was postponed "until at least the time when they accessed the legal advice of Canadian counsel necessary to ascertain and assess their legal rights in Canada as against Nevsun" (emphasis added).
- [90] I agree with Nevsun on this issue. The waiver should include the first meeting with counsel since it could only be as a result of the meeting that the plaintiffs' state of mind would have transitioned from one of without knowledge or certainty to that of was a reasonable likelihood of success against Nevsun in a Canadian court. In other words, it would only be as a result of this first meeting that the "paradigm shift" referred to at para. 80 above would have occurred.
- [91] The date of the waiver regarding the Araya defendants is more problematic because the plaintiffs' counsel advised the court during his submissions that the plea in the reply filed January 31, 2017 that:
11. Prior to November 20, 2014, the plaintiffs lack the means to discover that they may have had a claim against the defendant Nevsun and that a court action in the courts of British Columbia was the appropriate means of seeking a remedy against Nevsun.
- "does not make sense because November 20, 2014 was the date of the filing of the Araya notice of civil claim, which would be the date those plaintiffs acquired the requisite knowledge". I would add that certain plaintiffs had sworn affidavits several months before this action was commenced that formed part of the record at the hearing of the preliminary applications.
- [92] During his submissions, plaintiffs' counsel advised he would be bringing an application to amend the reply and withdraw any admissions which could arise from this pleading relating to November 20, 2014.
- [93] Notwithstanding the understandable objection from Nevsun's counsel relating to the timing of notice that an application would be brought, I nonetheless exercised my discretion and ordered that this application be brought on an expedited schedule.
- [94] Nevsun's counsel properly raised the point that if this application is brought, it may raise issues regarding the production of counsel's file to November 20, 2014, in any event.
- [95] In the result, the application regarding waiver of privilege by the Araya defendants is adjourned to be reset if and when an application is brought to amend the reply.

- [96] I will now turn to the question of tolling which Nevsun submits is a question of law.
- [97] In the Alemayo, Tsegay, Negash, Mekonen, and Mohemmed-Adem Actions the plaintiffs have plead that the limitation period tolled during the period of November 20, 2014 to October 6, 2016 (with the exception of Mr. Alemayo, who pleads only to October 19, 2015). The basis of this plea is the contention that the limitation period tolled after the representative action had been commenced in the Araya Action.
- [98] Nevsun submits that in asserting a claim of tolling, and seeking the corresponding benefit, the plaintiffs have similarly put their states of mind, and the reasonableness of their conduct in issue. Nevsun argues that in order to assess this plea, the court will be tasked with assessing the plaintiffs' position that it was reasonable to defer filing an individual action. Nevsun submits that such an assessment necessarily requires inquiry into the plaintiffs' understanding of the implications of participating in the representative action, and what they understood about the purported suspension of the limitation period.
- [99] The plaintiffs submit that the question of whether the limitation period was tolled during the pendency of the representative action is a legal issue that is not before the court, and in any event, the pleading that the limitation period was tolled would not give rise to any waiver.
- [100] Without deciding whether any of the plaintiffs have established tolling on the facts and the law in this case, as this is an issue to be decided at the trial, I find the plea of tolling by a particular plaintiff does not by itself amount to a waiver of privilege.
- [101] The next question concerns Ms. Chyrum.
- [102] Ms. Chyrum has worn essentially two "hats" in her involvement with many of the plaintiffs. On the one hand, she is a recognized human rights activist, and frequently critiques the governing Eritrean authorities and its President Isaias Afwerki, which is consistent with furthering the goal of regime change. Publications on the HRCE's website outline and profile Ms. Chyrum's international advocacy and lobbying efforts to further HRCE's objectives.
- [103] Concurrently, Ms. Chyrum has been involved in the litigation since its inception. In a press release on or about November 20, 2014, the plaintiffs' co-counsel Siskinds LLP indicated that counsel "collaborated closely with London-based Human Rights NGO Human Rights Concern Eritrea" on the lawsuit.
- [104] Furthermore, as the litigation has proceeded, Ms. Chyrum has also provided translation or interpretation services. I referred to her involvement in the 2016 Reasons at paras. 212-217 when Nevsun objected to the admissibility of certain affidavits in which she had been involved as an interpreter.

- [105] On this application, the plaintiffs argue that Ms. Chyrum is their agent, who has been retained since May 1, 2013 to "communicate with witnesses, potential clients and clients" in the actions against Nevsun. This fact was not disclosed at the hearing of the preliminary applications.
- [106] The plaintiffs accept that any communications Ms. Chyrum may have had with one or more of them where she was wearing her "activist" hat are not subject to any claim of privilege and questions about those activities on discovery are proper; an example would be assisting them in obtaining refugee status.
- [107] The real issue is when Ms. Chyrum was acting as an assistant or agent to legal counsel, since those communications would raise the issue of third party privilege.
- [108] Many of the objections taken at examinations for discovery to date regarding communications with Ms. Chyrum will likely be resolved by my decision regarding the waiver of privilege arising from the plea of postponement which will include the first meeting with counsel.
- [109] In that Ms. Chyrum has exercised a dual role, I agree with Nevsun that the particulars of her retainer agreement with Canadian counsel should be disclosed. It may well assist in delineating Ms. Chyrum's precise role while acting as a third party agent for counsel and/or be material to any potential allegations of bias arising from her translator and interpreter functions.
- [110] During submissions, I was referred to a chart of objections from the examinations for discovery. As I indicated to counsel during the hearing, I will not provide rulings at this time with respect to the validity of each objection.
- [111] I am confident that counsel, with the benefit of these reasons, particularly my conclusion that the waiver of privilege for the non-Araya defendants includes their first meeting with counsel, will be able to agree as to which questions should now be answered. To the extent they are unable to do so, they have leave to make further submissions.

D. Conclusions:

- [112] I make the following orders:
- (a) the plaintiffs in each of the Actions have waived privilege over all communications and documents, in any way relating to the pursuit of the Actions or the claims advanced therein, by reason of the plea of postponement asserted in the reply;
 - (b) for the plaintiffs in the non-Araya actions, to the date upon which each plaintiff first met Canadian counsel (each a "First Meeting") in the remaining actions, and includes:
 - (i) all communications among any of the plaintiffs and any third party, including but not limited to legal counsel, relating to the action, the subject matter thereof, or the allegations made therein;

- (ii) all notes, agreements, reports, memoranda, correspondence, or other documents related to the plaintiffs meeting with and engagement of Canadian counsel, and associated documents giving rise to a solicitor-client relationship; and
- (iii) all documents prepared in contemplation of, to record or refer to the proceedings arising from the First Meeting;
- (c) the plea of tolling by a particular plaintiff(s) does not of and by itself amount to a waiver of privilege;
- (d) the relief sought against the Araya action plaintiffs is adjourned pending their application to amend the reply in that action; and
- (e) the particulars of Ms. Chyrum's retainer agreement is to be disclosed.
- [113] I have specifically not included plaintiffs' counsel's retainer or engagement letters. That relief which Nevsun seeks is neither granted nor dismissed at this stage. In my view, it is preferable for counsel to consider this issue further upon review of these reasons with leave to apply to make further submissions if necessary.

[114] Costs may be spoken to on January 21, 2019.

"Abrioux J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/02/2019BCSC0260cor2.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/araya-v-nevsun-resources-ltd-2019-bcsc-260>

Prepared on 28 October 2026 · Esheria