

CANADA / JUDGMENT

Araya v. Nevsun Resources Ltd.

2020 BCSC 511

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 511 Araya v. Nevsun Resources Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Ltd.,

2020 BCSC 511

Date: 20200402

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 Waiver of Privilege and Production of Communications

Counsel for Plaintiffs:

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R. Mogerman, QC

K. Duke

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A. Crabtree

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Place and Date of Hearing:

Vancouver, B.C.

December 18, 2019 and

January 15-16, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 2, 2020

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Introduction

- [1] This is an application brought pursuant to R. 7-1(13) of the Supreme Court Civil Rules by the plaintiffs for the listing and production of several categories of documents following NevSun's refusal to produce the documents on the basis of relevance and privilege. The plaintiffs submit that they have previously demanded these documents pursuant to subrules 7-1(10) and 7-1(11). The plaintiffs seek:

1. An order that Nevsun list and produce the following categories of documents to the plaintiffs within 14 days:
 - a) All communications between Clifford Davis and the Eritrean National Mining Corporation ("ENAMCO") or its representatives regarding cooperation or assistance with this litigation (the "ENAMCO Communications");
 - b) All communications between Nevsun or its representatives and representatives of the Bisha Mine Share Company ("BMSC"), including communications to and from counsel or other representatives for Nevsun and BMSC, regarding document production for the purposes of this litigation (the "BMSC Communications"); and
 - c) All communications between Nevsun and BMSC regarding document production for the purposes of the securities litigation in which Nevsun obtained the BMSC back-up tapes, including communications to and from counsel or other representatives for Nevsun and BMSC. (the "Securities Communications").
2. A declaration that Nevsun has waived privilege over all communications with BMSC and ENAMCO regarding document production for the purposes of the actions under common case judicial management, including communications to and from counsel or other representatives of Nevsun, BMSC, or ENAMCO.

Background

- [2] The plaintiffs submit that the documents sought are relevant to the material facts at issue in the action and, in addition, are relevant to a documents motion that the plaintiffs intend to bring. There is some history that is necessary to put the present application in its proper context.
- [3] First, with respect to the relevant material facts at issue in the litigation, I note that 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. 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.
- [4] It appears from the pleadings that the Bisha mine is owned and operated by BMSC. Nevsun Resources (Eritrea) Ltd. ("NREL"), an indirect wholly owned subsidiary of Nevsun, is a 60% shareholder of BMSC while the remaining 40% is held by ENAMCO.

- [4] 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.
- [8] 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, which the plaintiffs assert is controlled by the military of Eritrea.
- [5] The nature of the relationship between Nevsun and BMSC is an issue on the pleadings. In the notice of civil claim, the plaintiffs allege that (Part 1: Statement of Facts at para. 26):

Nevsun's principal and most valuable asset is the Bisha mine. All important decisions relating to the development and operation of the Bisha mine, including the retainer of contractors, were made and/or approved by Nevsun's senior management and/or the Board of Directors.

- [6] The plaintiffs further allege (Part 3: Legal Basis at para. 73):

Nevsun controlled operations at the Bisha mine and exercised complete control over the actions of BMSC.

- [7] In the response to civil claim, Nevsun denies that it exercised control over the actions of BMSC as alleged or at all.
- [8] The issue of possession, power and control over documents of BMSC, SENET and Segen arose early in the litigation in relation to certain preliminary applications that were brought. In 2015, Todd Romaine of Nevsun swore an affidavit in connection with the preliminary applications, in which he stated that documents belonging to BMSC, SENET and Segen were located in Africa. Nevsun's position was that it did not have means to compel third parties to provide it with documents:
10. I am aware that each of BMSC, SENET and Segen generated a large number of documents, and kept records concerning the construction of the Bisha Mine, and the employment of individuals who were engaged in this project. Many of these documents are located in Eritrea. They are not in the hands of Nevsun in British Columbia.
11. Accordingly, witnesses and documents, including documents relating to national service requirements, employment records, and medical records, and other matters touching upon the Group Members' claims as set out in the NCC, are in Eritrea, or in the case of SENET, in South Africa.

12. Some of these documents are in the hands of third parties, such as Segen and the Eritrean Government, and Nevsun does not have means to compel these third parties to provide it with documents. As far as I am aware, Segen does not have any presence, business, or assets located in British Columbia or Canada.
- [9] Document discovery in this and the related actions is governed by a detailed protocol, referred to as the "Document Exchange Protocol". Under the Document Exchange Protocol, the parties agreed to a process to determine which time period (up to the end of 2014), custodians and search terms would apply to electronic discovery obligations. The parties ultimately agreed on search parameters and discovery of electronically stored information ("ESI") proceeded on that basis. The parties could request to amend the search parameters outlined above by agreement.
- [10] The plaintiffs made a demand for documents in May 2018 seeking production of categories of documents in the possession of BMSC, SENET and Segen. The documents sought were:
1. Identification cards issued to any of the plaintiffs by BMSC, [SENET], or Segen.
 2. Copies of any demobilization records or other documentary proof that the plaintiffs had been released from Eritrean national service.
 3. All records related to [SENET's] review of Segen payroll and BMSC's review of [SENET] payroll, as recommended by Dr. Connor (NEV 3310). This request includes the payroll records themselves, as well as any documents containing analysis of the payroll records.
- [11] These are not the categories of documents which are at issue in the present application.
- [12] Nevsun listed and produced BMSC documents that were in its possession. It maintained the position that BMSC documents not in its possession were not in its power or control. The plaintiffs' position was that notwithstanding the fact that Nevsun did not have possession of these documents, it nevertheless had power and control over these documents and ought to produce them.
- [13] In preparation for this litigation, Nevsun's counsel had obtained some documents from BMSC, SENET and Segen. Nevsun asserted a claim of privilege with respect to these documents. With some exceptions, which were not listed initially, these documents were listed as privileged. The plaintiffs disputed the validity of those privilege claims.
- [14] On December 21, 2018, the plaintiffs filed an application that sought documents from Nevsun (the "BMSC Documents Motion") The BMSC Documents Motion sought documents belonging to BMSC, SENET and Segen that were located in Africa. The documents predominantly consisted of identification cards, demobilization, employment and payroll records maintained by those companies, as well as documentary evidence of reviews or audits of such records. The basis of the application was that such documents were alleged to be in Nevsun's power or control.

[15] The following categories of documents were specified in the BMSC Documents Motion (Part 1: Orders Sought at para. 1):

- (a) Records of identification cards issued to any of the plaintiffs in this action or the related actions that are subject to common judicial management with this action (the "Actions") by BMSC, [SENET], or Segen.
- (b) Copies of any demobilization records or other documentary evidence that the plaintiffs in the Actions had been released from Eritrean national service before working at Bisha.
- (c) All records related to BMSC audits of demobilization and national service release records.
- (d) All records related to [SENET] audits of demobilization and national service release records.
- (e) All records related to BMSC's reviews of [SENET] and Segen payroll, including copies of the payroll records and documents containing analysis of these records.
- (f) All records related to [SENET's] review of Segen payroll, including copies of the payroll records and documents containing analysis of the payroll records.
- (g) All other documents in Nevsun's possession, power, or control, including documents in the possession of BMSC, [SENET], and Segen, that could prove or disprove:
 - (i) the presence of any of the plaintiffs at Bisha;
 - (ii) the national service status of any of the plaintiffs; or
 - (iii) that employees or directors of BMSC knew that labour was provided at Bisha by national service conscripts.

[16] Nevsun agreed that these categories of documents were material and important. Nevsun's position was that the documents were not in its power or control, asserting that it lacked an enforceable right to obtain the documents from those companies.

[17] The application also sought an order that Nevsun deliver an affidavit setting out, inter alia, efforts it had made to obtain documents from BMSC, SENET and Segen for use in the litigation.

[18] In support of that application the plaintiffs attached as an exhibit to the Affidavit #8 of Kimberly Hill an email dated November 28, 2014 from Clifford Davis, a former director and CEO of Nevsun (now retired), to Todd Romaine and Frazer Bouchier reporting on discussions Mr. Davis had had with ENAMCO. He reports, in part, that ENAMCO has "offered to assist in any way on the law suit."

[19] In response to the plaintiffs' reference to Mr. Davis's email, Mr. Davis deposed to the following in Davis Affidavit #1, :

The discussion referred to in my e-mail occurred shortly after the Plaintiffs commenced their action. After that email was sent, ENAMCO and its representatives' willingness to cooperate diminished over time. I have been repeatedly told by representatives of ENAMCO, in strong terms, that the Plaintiff's action is an affront to Eritrea's sovereignty and that the action is Nevsun's problem to deal with.

- [20] Ryan MacWilliam, who was the CFO of Nevsun and one of Nevsun's appointees as a director of BMSC provided an affidavit (MacWilliam Affidavit #1) in which he stated that he retained Lawson Lundell LLP to provide advice to BMSC. He attached a letter dated November 2, 2018 from Nevsun's counsel to BMSC's counsel requesting its position on production of documents. He deposed further that the BMSC board decided not to respond to the request.
- [21] On December 20, 2018, Nevsun's counsel wrote to plaintiffs' counsel and explained that counsel for Nevsun had been engaged in efforts to obtain documents from BMSC, SENET and Segen for the purpose of preparing Nevsun's defence and to provide advice. Counsel stated Nevsun's position that those entities had no obligation to cooperate with Nevsun, and have not, in practice, provided unfettered cooperation or access to their documents. Counsel had, however, been able to select and assemble a brief of documents obtained from these entities which was the subject of litigation privilege.
- [22] The letter stated that Nevsun agreed to waive litigation privilege over the documents that fell within the scope of paragraphs 1(a) through (f) of the BMSC Documents Motion (see above, para. 15). Nevsun also agreed to do the same for documents obtained from SENET. Counsel for Nevsun further agreed that, to the extent that counsel obtained further documents from one or more of BMSC, SENET or Segen in the future which fall within the scope of paragraphs 1(a) through (f) of the BMSC Documents Motion, Nevsun would not claim privilege over same, and would list and produce them.
- [23] Nevsun produced documents falling within the relief sought in paragraphs 1(a) through (f) of the BMSC Documents Motion. These documents were delivered to the plaintiffs on December 21, 2018, as part of Nevsun's sixth amended list of documents. Nevsun subsequently listed the documents that were previously subject to litigation privilege which it had obtained from SENET.
- [24] The BMSC Documents Motion was argued January 7 to 9, 2019. During the hearing, Justice Abrioux directed counsel for Nevsun to write to BMSC's counsel to again attempt to determine BMSC's position regarding the production of documents. On January 11, 2019, counsel for Nevsun delivered such correspondence to BMSC's counsel.
- [25] Justice Abrioux reserved judgment following argument in order to give BMSC's counsel time to respond to Nevsun's letter with leave to the parties to make further submissions, if needed. No response was received from BMSC's counsel.

- [26] On February 13, 2019, while judgment was still reserved on the BMSC Documents Motion, counsel for Nevsun advised that additional ESI on a back-up tape, which originated with BMSC, was in Nevsun's possession in Vancouver (the "Back Up Documents"). Counsel for Nevsun advised that the Back Up Documents had not been previously disclosed due to a mistake by counsel.
- [27] Nevsun accepted that since these documents, which consisted of ESI, were in Nevsun's actual possession, they were of a different type than the documents at issue in the BMSC Documents Motion which related to documents not in Nevsun's possession. Counsel for Nevsun advised that "[p]reliminary analysis suggests there are over 78,000 documents (including families) which are responsive to the previously utilized search terms" and that it appeared that the contents of the Back Up Documents cover the period 2010-2012, but some documents dated back to 2006.
- [28] Counsel for Nevsun invited counsel for the plaintiffs to meet on February 21 or 22, 2019 to discuss "search terms, time periods, custodians, and the responsibility of costs arising from the review and production of electronic data". On February 15 and 18, 2019, the parties exchanged further correspondence about this issue.
- [29] On February 20, 2019, a judicial management conference was held to address certain issues arising from the existence of the Back Up Documents. The plaintiffs sought to rely on this development as new evidence, to expand the relief sought in the BMSC Documents Motion and to make additional submissions, including a written submission.
- [30] The court made certain orders, including that Nevsun deliver a list of the relevant Back Up Documents and any additional affidavit and responding submissions by March 30, 2019. Justice Abrioux directed Nevsun to provide an explanation for why these new BMSC documents had not been listed and disclosed previously. This direction was not embodied in a formal judicial direction.
- [31] Nevsun provided the following explanation with respect to how it acquired the Back Up Documents. In 2012, securities class actions were commenced in Canada and the US against Nevsun (the "Securities Actions"). One action was filed in the Southern District of New York on March 13, 2012. The second action was filed in Ontario on May 18, 2012.
- [32] The class actions resulted from the decrease in Nevsun's stock price following Nevsun's February 7, 2012 disclosure that:
- (i) it had materially overstated gold reserves at the Bisha mine by 30-35%;
 - (ii) the amount of gold to be produced in 2012 would be about half of what Nevsun previously represented to investors; and
 - (iii) it would restate its proven reserves. The class, in the US action, consisted of purchasers of Nevsun's securities between March 31, 2011 and February 6, 2012, the day before the announcement.

- [33] It appears to be common ground that the Securities Actions are not closely related to the actions before this Court.
- [34] With respect to the action commenced in Ontario, the Ontario court approved a settlement and ordered dismissal of the action with prejudice on October 6, 2014. With respect to the action commenced in New York, the district court approved a settlement and dismissed the case with prejudice on February 13, 2015.
- [35] Nevsun retained Gibson, Dunn and Crutcher LLP ("Gibson Dunn") to defend it in the US securities class action. In a letter dated December 4, 2019, Gabrielle Levin, counsel at Gibson Dunn, provides a summary of the requests US counsel made to Nevsun to facilitate document collection from BMSC in connection with that lawsuit:

In connection with the Action [which she defined as *In re Nevsun Resources Ltd.*, filed in the Southern District of New York], and at our request, Nevsun collected certain documents and electronic communications from [BMSC] to assist our firm in providing legal advice to Nevsun and defending Nevsun in the Action.

We are not aware of any waiver of the attorney-client privilege, the work product protection, or any other privilege or protection by Nevsun related to our representation of Nevsun in the Action, and nothing in this letter should be constituted as a waiver of any such privilege or protections.

- [36] A summary of the efforts undertaken by Nevsun to collect and obtain the Back Up Documents in Nevsun's possession is set out in the affidavit of Roxanne Dhanpaul #19. This evidence is as follows:
10. I am informed by Randy Park ("Park") of the following information, and verily believe it to be true.
 11. Mr. Park was employed by Nevsun from 2009 - 2017. For his first two years at Nevsun, he was the Manager of Corporate Financial Reporting. He then served as Internal Audit Manager for the remainder of his employment with Nevsun.
 12. Mr. Park recalls obtaining back-up tapes and other electronic information from BMSC for the purpose of assembling information to address the class actions. He was asked to do this by Nevsun's CFO, Peter Hardie ("Hardie"). Mr. Park travelled to the Bisha Mine at some point in 2013 or 2014 to obtain certain employee email accounts, financial information, and other records. Nevsun did not otherwise have these emails. Mr. Park made a request for these documents to BMSC's IT Manager, Jamie Breadmore ("Breadmore").
 13. Mr. Park does not have a specific recollection of raising this with BMSC's General Manager, but he is quite certain the General Manager would be aware of this, and that Mr. Breadmore would not have provided him with the requested documents unless BMSC's General Manager was aware and had approved the matter.

14. It was not in the ordinary course for Nevsun to obtain BMSC e-mail accounts or server data. Obtaining these documents required a trip to the Mine, and the assistance of BMSC.
15. It is possible that Nevsun had previously obtained a back-up of financial, accounting, and mining/geology related information (not e-mails), but Mr. Park cannot recall and believes that Pamela Kinsman ("Kinsman") or Siu Wong ("Wong") may know.
16. I am informed by Ms. Kinsman, who was employed by Nevsun from October 2009 to March 2016, in roles including as Nevsun's office manager of the following information and verily believe it to be true.
17. BMSC and Nevsun's I.T. systems were very separate. BMSC would have had a separate I.T. policy, if such policy existed. BMSC had a separate I.T. manager, who for a part of the period was Mr. Breadmore. BMSC and Nevsun maintained separate servers. BMSC made back-ups of its electronic documents pursuant to its I.T. policies or practices and Ms. Kinsman understood that BMSC's back-ups were not compatible with Nevsun's system.
18. Certain Nevsun employees had the ability to have VPN access to the BMSC server. VPN access is a secure connection between two ports. It was encrypted. Specific Nevsun employees had such access where it was necessary for the performance of their functions, for example, certain accounting and finance employees, by reason of applicable Canadian and U.S. securities laws and accounting standards. Ms. Kinsman's understanding from watching people login to the BMSC server via VPN, was that access was set based on roles, in other words, Nevsun's accounting personnel would only have access to certain accounting or general folders on the BMSC server, and not wholesale access to the entire contents of the server. Only BMSC IT admin would be able to access the Exchange server which would have contained BMSC employees' e-mail accounts.
19. Ms. Kinsman's understanding is that VPN access was and could only have been enabled by BMSC in Eritrea.
20. Nevsun employees could obtain documents from BMSC in two ways. First, through VPN access as described above. Second, by emailing and requesting a copy from them.
21. BMSC did not send its back-ups to Nevsun in the ordinary course.
22. Nevsun did gather documents from BMSC for the defence of the U.S. class action. One on occasion Mr. Park did this while onsite in Eritrea. This was arranged between Mr. Breadmore of BMSC and Mr. Hardie. Mr. Breadmore had to give Mr. Park access. It is Ms. Kinsman's understanding that Mr. Park could not have obtained these documents otherwise. Other backups gathered were sent directly by Mr. Breadmore at BMSC.
23. Nevsun's I.T. policy did not require BMSC to give Nevsun any documents.24. The information set out below is true for the period that Ms. Kinsman was employed by Nevsun, from October 2009 to March 2016. Following the disclosure of the existence of the Back Up Documents, Nevsun sought to schedule a meeting with counsel for the plaintiffs. They did

not attend. Instead, on February 21, 2019, counsel for the plaintiffs wrote, "We agree that a meeting is necessary, but we need further information and time before we will be able to propose search terms." Plaintiffs' counsel posed detailed questions about the characteristics of the backup tapes possessed by Nevsun. In addition to searches of the newly-identified documents, plaintiffs' counsel also advised that they intended to propose new searches outside of the original date range.

- [37] On February 22, 2019, counsel for Nevsun responded to counsel for the plaintiffs. Counsel for Nevsun explained that based on preliminary information, the Back Up Documents were gathered in connection with Nevsun's defence of the Securities Actions. The data was intended to be responsive to that litigation, which concerned Nevsun's public disclosure of gold reserves and production estimates. It was not intended to capture human resources documents or other information which the plaintiffs assert would be "critically relevant" to this litigation.
- [38] In the same letter, counsel for Nevsun explained that, again on a preliminary basis, there appeared to be substantial duplication between the Back Up Documents and other devices, across the devices and with some of the documents Nevsun had already listed. In order to respond to the situation, counsel described the steps that were being taken by Nevsun to produce the documents as soon as practicable. The letter set out in detail the search terms and custodians that Nevsun was employing and requested comments from plaintiffs' counsel with respect to the search terms or custodians that Nevsun was employing with respect to the Back Up Documents.
- [39] On February 25, 2019, counsel for the plaintiffs responded. They took the position that they had been "kept in the dark as to what data Nevsun has obtained from BMSC." They asserted that they "require[d] time and information before we can settle on appropriate search terms. We take issue with your attempt to deprive us of both time and information". Plaintiffs' counsel did not agree with Nevsun's search terms or custodians, posed more questions and confirmed their intention to go back to prior data and propose further search terms.
- [40] On February 28, 2019, counsel for Nevsun wrote to counsel for the plaintiffs, providing an explanation for the delay in disclosing the Back Up Documents.
- [41] On March 18, 2019, Mr. Justice Abrioux issued a memorandum to counsel which provided in part:

In so far as [the BMSC Documents Motion] is concerned, once Nevsun has listed the approximately 78,000 documents which were discovered on a backup tape, and which, by consent, Nevsun has agreed to list by the end of March 2019, then the parties have leave to set down a hearing before me, limited to one day, to complete submissions regarding that application. If counsel is unable to agree on the timing for the exchange of additional submissions, then that issue can be set down before me at 9:00 a.m. on a date agreeable to the parties and in conjunction with my rota. If the completion of the document application does not take place on or before Friday, May 17, 2019, then it will have to be reargued before the new JMC/

trial judge;

[42] On March 20, 2019, counsel for Nevsun wrote to counsel for the plaintiffs, suggesting a date for the hearing of the completion of the BMSC Documents Motion, a schedule for the exchange of materials and agreement to restrict the scope of any further submissions to new evidence, namely the Back Up Documents. Counsel for the plaintiffs responded, taking the position that they did not believe the parties could complete the BMSC Documents Motion until issues concerning the scope Nevsun's search of the Back Up Documents (including new proposed search terms, still not provided) were resolved and unless Nevsun "agrees that it has waived privilege and provides us with all of the relevant documents".

[43] On March 25, 2019, in anticipation of the delivery of Nevsun's amended list of documents containing the Back Up Documents, counsel for Nevsun wrote summarising the process Nevsun had undertaken to satisfy its document discovery obligations. In the letter, Mr. Cameron explained that Nevsun's list would include the entirety of the relevant documents counsel had reviewed in the course of processing and reviewing the "Data Sources" identified as containing the Back Up Documents. Mr. Cameron addressed the criticisms the plaintiffs had made of Nevsun's approach to these documents. He pointed out that counsel had employed 366 search terms against documents held by 21 custodians, following which they reviewed 118,511 documents from the Data Sources. This resulted in a list of 4,120 "Net New" relevant documents, other than photographs. This was accomplished in a very short time frame of approximately one month, and before the plaintiffs had delivered the bulk of their outstanding documents.

[44] Mr. Cameron also pointed to the significant amount that Nevsun had spent on document discovery, now approaching \$2 million, and invoked proportionality considerations:

If the Plaintiffs seek to have the 5 excluded search terms run, or demand any further document production efforts on the part of Nevsun after what is now approaching \$2 Million in expense has been incurred in circumstances where it appears Nevsun's ability to recover costs is illusory, Nevsun requires agreement as to the sharing of (or security for) prospective expenses before more effort is undertaken, and any such efforts will have to be viewed in light of the overarching principle of proportionality.

[45] The plaintiffs did not agree to any cost-sharing arrangements further to Mr. Cameron's letter.

[46] On April 2, 2019, the plaintiffs applied to withdraw the BMSC Documents Motion. In reasons indexed as 2019 BCSC 651, Justice Abrioux granted the plaintiffs' application to withdraw with leave to refile the application as it was then or in an amended form. He left the issue of costs of the application to be spoken to once the BMSC Documents Motion, in whatever form it would take once refiled, had been reheard, if the plaintiffs proceed with it or if it is not reheard, to be raised with the judicial management judge.

- [47] The plaintiffs made a formal document request by letter dated July 9, 2019, with respect to the documents sought in the present application. Nevsun took the position that the documents sought were privileged, that there had been no waiver and declined to produce them.
- [48] The plaintiffs have stated that they intend to bring a new application with respect to the relief sought in the BMSC Documents Motion (the "Replacement Motion"); however, as at the date of the hearing of this application, none has been filed. Their position is that the documents sought in the present application are required "so that a full record can be before the court" when deciding the Replacement Motion.

Issues

- [49] The plaintiffs submit that the issues in the present application fall to be determined according to the following decision tree:
1. Are the documents relevant to the litigation or to the motion (that being the Replacement Motion) such that they should be listed and produced?
 2. If so, are they privileged?
 3. Whose law applies to the issue of privilege and waiver?
 4. If the documents are privileged, has there been a waiver of privilege?
- [50] The plaintiffs' position is that the documents are relevant and producible pursuant to the Rules, specifically R. 7-1(1) and R. 22-1(4). The plaintiffs acknowledge that some, if not all, of the documents at issue were once privileged, but submit that the privilege has been lost through expiration and/or waiver.
- [51] Nevsun's position is that the application is procedurally flawed. Rule 22-1(4) has no application, and the documents are not producible under R. 7-1. Nevsun submits that the documents are privileged and that there has been no waiver. Finally, and in any event, Nevsun submits that the Court should exercise its discretion against the relief sought.
- [52] For the reasons that follow, I have concluded:
- a) that it is not appropriate to grant a declaration with respect to waiver as sought by the plaintiffs;
 - b) that R. 22-1(4) is not applicable in the present application; and
 - c) that the plaintiffs have not established that the documents sought are relevant within the scope of R. 7-1.
- [53] A finding of relevance is the necessary first step in the decision tree. Given the conclusions I have reached, it is not necessary to address the issues of privilege, choice of law, waiver or the exercise of discretion in the present application and I do not intend to do so.

Procedural Objections

- [54] Nevsun submits that applications for the production of documents should normally proceed through the procedures designed to protect privilege. As noted in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at para. 34, applications for waiver are normally brought as (a) challenges to part 4 of a party's list of documents or (b) applications to compel a response to a question asked on examination for discovery. A third procedural option is an application brought under R. 22-1(4) for production of documents or cross examination on an affidavit filed in chambers. Declarations pursuant to the court's inherent jurisdiction should be the exceptional case (at para. 36).
- [55] In *H.M.B. Holdings*, Justice Hunter, speaking for the court, stated the following with respect to this procedural issue:
- [33] Before addressing the proper test for waiver of privilege, I wish to make some comments on the procedural approach implicitly endorsed by the chambers judge. The appellants have characterized this as a jurisdictional issue, but I would prefer to address it in procedural terms. There is no doubt that a judge of the Supreme Court of British Columbia has the jurisdiction to determine that solicitor-client privilege has been waived, but the procedure adopted by the respondents enhances the danger that a waiver order will be made in circumstances that do not adequately protect the privilege.
- [34] In the ordinary course of litigation, the question of waiver will arise in one of two ways. A litigant will challenge a list of documents that asserts privilege over documents, and bring an application in relation to particular documents listed but not disclosed. Or a litigant may refuse to answer a question based on the assertion of privilege, permitting a narrow order to be sought tailored to the question asked and the scope of the waiver claimed.
- [35] In this case, the respondents chose not to defend the Conspiracy Claim based on abuse of process. By defending the claim, discovery of documents would have been required that could have raised the waiver issue, and examinations for discovery would have been held at which the waiver issue could have been explored.
- [36] Instead, the respondents filed a pleadings application under Rule 9-5, a procedure that does not engage either of these discovery mechanisms, and brought an interlocutory application for a "declaration". I do not regard it as decisive that such an application is not authorized by the rules. A judge of the Supreme Court of British Columbia has broad inherent jurisdiction, and in a proper (though rare) case it might well be appropriate to follow such a course. In this case, it has led the chambers judge to make a very wide disclosure order for the benefit of the respondents in a proceeding chosen by the respondents that would not normally require disclosure of documents at all.
- [37] In the view I take of the merits of this appeal, it is not necessary to explore further the procedural problems created by this approach.

- [56] The plaintiffs did not rely upon inherent jurisdiction of the court in the notice of application. They did not address particular submissions to the appropriateness of the declaration sought.
- [57] I agree with Nevsun with respect to the issue of the appropriateness of granting a declaration in the circumstances. In my view the very wide declaration sought on the present application raises the danger described by Justice Hunter that a waiver order will be made in circumstances that do not adequately protect the privilege.

Rule 22-1(4)

- [58] As noted above, the application was brought under R. 7-1. However, in their written submissions, the plaintiffs rely on R. 22-1(4)(c) as an alternative basis for an order for production. The plaintiffs submit that Nevsun relied upon selected portions of the documents sought in the BMSC Documents Motion. Accordingly, the plaintiffs submit that the documents sought are material to the Replacement Motion so that the court will have access to a full range of documents on the subject. The plaintiffs submit that the documents sought go to the key issue that will govern the Replacement Motion, whether Nevsun has power or control over BMSC documents.
- [59] In support of this position the plaintiffs rely upon the discretionary nature of R. 22-1(4)(c): *Ip v. Wilson*, 2019 BCCA 189 at para. 3; *United States (Securities And Exchange Commission) v. Cosby*, 1999 CanLII 5885 at para. 28 (B.C.S.C.) [Cosby]. These two cases were decided pursuant to this rule. In addition, the plaintiffs rely on *Weir-Jones v. Taylor*, 2013 BCSC 1633. With respect to *Weir-Jones*, the plaintiffs note that while Justice Fitzpatrick did not cite R. 22-1(4)(c) in making a document production order, the order can be understood to flow from this rule.
- [60] Nevsun's position is that R. 22-1(4)(c) has no application in the circumstances of the present application. Nevsun submits first that the application does not rely on R. 22-1 as a legal basis for the orders sought. This in the Nevsun's submission, is not purely a matter of form. The plaintiffs should not be permitted to reframe the applications at this juncture.
- [61] In any event, Nevsun submits that R. 22-1(4)(c) has no application to the present circumstances because the application for which the production is sought is hypothetical. The plaintiffs are seeking document production in relation to the Replacement Motion; however, there is no such motion.
- [62] Rule 22-1(4) provides:
- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
- (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

- (b) order the examination of a party or witness, either before the court or before another person as the court directs,
- (c) give directions required for the discovery, inspection or production of a document or copy of that document,
- (d) order an inquiry, assessment or accounting under Rule 18-1, and
- (e) receive other forms of evidence.

[63] In my view, none of the cases cited by the plaintiffs are of particular assistance with respect to the application of R. 22-1(4) to these particular circumstances. Weir-Jones dealt with an order for production of a portion of the solicitor's files in relation to an application for relief regarding a failure to file a jury notice. The solicitor had provided affidavit evidence, as had the plaintiff client, setting out the client's instructions and putting his intentions at issue. Ip concerned an order for production of documents on a judicial review commenced by petition. Cosby related to production of documents material to the injunction application.

[64] In Cosby at para. 28, however, Justice Sinclair Prowse cited Wilkie Garment Company Ltd. v. Interlock Holdings Ltd., 1993 CanLII 2163 (B.C.S.C.), a decision of Master Grist, as he then was. In Wilkie there was an application for document production in the context of ongoing proceedings related to a Mareva injunction, in which there had been a previous order for cross examination. Master Grist distinguished between document production in the action and document production pursuant to R. 52, the predecessor to R. 22-1(4). He noted, at 3-4:

The injunction application is corollary to the action itself and the issues which arise are different from the issues in the action. Discovery of documents relevant to the action can be had pursuant to Rule 26. The procedure laid out within that Rule calls for a demand for a list of relevant documents and the right to subsequent production of same, unless covered by privilege.

In the context of this application, production of documentation not relevant to the action itself falls within the procedure laid out under Rule 52, sub 8. This Rule provides:

Evidence on an application

- (8) On an application, evidence shall be given by affidavit, but the court may
- (c) give such directions as may be required for the discovery, inspection or production of a document or copy thereof,

Rule 52(8)(c) has particular relevance to this application. The Rule is discretionary and should be applied weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice.

[65] As Wilkie makes clear, the purpose of R. 22-1(4) is not to serve as an alternate method of securing production of documents in the action. It is directed to the application.

[66] This conclusion is consistent with the commentary on this rule found in Frederick M. Irvine, McLachlin & Taylor British Columbia Practice, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2006) vol. 2. The authors note that R. 22-1(4) deals with evidence to be used in chambers (at 22-9). The authors note further (at 22-14.1):

Rule 22-1(4)(c) confers a discretion that should be exercised by weighing the degree of relevance of the documents sought to the issues arising on the application and factors of comparative prejudice.

[67] In the present case, the documents are not sought as evidence on the present application. The plaintiffs have been clear that the documents are sought as discovery in the action and as possible evidence in relation to the Replacement Motion.

[68] No authority has been provided to support the proposition that R. 22-1(4) can serve as method for obtaining discovery for the purpose of an application, presently unfiled, contemplated to be brought in the future. In my view, such a purpose is outside the scope of this rule.

[69] The plaintiffs have submitted that an objection to the applicability of R. 22-1(4) in the present circumstances based on the absence of the Replacement Motion is an overly narrow and technical view. I do not agree. The degree of relevance to the application can only be addressed when there is an application before the court. There is no reason to assume that the Replacement Motion will be the same as the BMSC Documents Motion, particularly given the reasons that the plaintiffs sought to withdraw that motion.

[70] In my view, R. 22-1(4)(c) is not applicable in relation to the present notice of application. Neither of the purposes identified by the plaintiffs, those being to obtain discovery of documents in the action and to obtain discovery of documents in relation to the Replacement Motion fall within the scope of this rule. I agree with Nevsun that R. 22-1(4) cannot be invoked in relation to a hypothetical motion.

[71] It follows that relevance for the purposes of this application falls to be determined pursuant to R. 7-1.

Relevance in the Action

[72] Pursuant to R. 7-1(1)(a)(i) parties to litigation are required to list and produce:

- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact,

[73] The initial production obligation under R. 7-1(1)(a)(i) is limited to what could be used by any party to prove or disprove a material fact. Material fact refers to an issue that is in dispute, the resolution of which will have legal consequences between the parties to the dispute. It is a fact put in issue by the pleadings. In *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2017 BCSC 19 at para. 90, Justice Adair stated:

What qualifies as a "material fact" was discussed by K. Smith J.A. in *Jones v. Donaghey*, 2011 BCCA 6, at paras. 9-10 and 18. An "issue" is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute. Such facts are referred to as "material" facts. Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. On the other hand, facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.

[74] The Rules create what has been characterized as a two tier system for document production. Pursuant to R. 7-1(10) a party who believes that documents have been omitted from the disclosure can demand further production. In addition, pursuant to R. 7-1(11) a party can seek broader disclosure of documents that "relate to any or all matters in question in the action".

[75] A party who is not satisfied with the response to a demand made pursuant to subrules (10) or (11) can apply to the court pursuant to R. 7-1(13). The discretion of the court in relation to such an application is addressed in R. 7-1(14), which states, in part:

(14) On an application under subrule (13) or otherwise, the court may

- (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or
- (b) order a party to
- (i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,

[76] The jurisprudence with respect to the interplay between the subrules of R. 7-1 was summarized in *Edwards v. Ganzer*, 2012 BCSC 138 at para. 41, in which Master Bouck stated :

I understand the principles outlined in these various decisions, together with the applicable Rules, to be as follows:

- a. The initial production obligation under Rule 7-1(1)(a)(i) is limited to what is required to prove or disprove a material fact: *Biehl v. Strang* at para. 14;
- b. Rule 7-1(10) allows the opposing party to issue a written demand requiring the listing party to amend the original list and produce documents that should have been disclosed under Rule 7-1(1)(a)(i);
- c. In addition, Rule 7-1(11) allows the opposing party to issue a written demand requiring the listing party to amend the list and produce documents which ought to be disclosed under a test "close to" that set out in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63, (the "Guano test"): *Global Pacific* at para. 9;

- d. The distinction between the two types of disclosure provided for under Rule 7-1 is stated in Global Pacific as follows:

The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences. Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).

[Emphasis in original.]

- [77] The materiality requirement under R. 7-1(1) was discussed in *Biehl v. Strang*, 2010 BCSC 1391. In that case, the court considered the meaning of "used by a party of record at trial to prove or disprove a material fact" in subrule (1)(a)(i), and at para. 16, Justice Punnett noted:

In *Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 2.50, relevance is distinguished from materiality:

§2.50 A distinction has also been drawn between relevance and materiality. ... The concept of materiality, however, requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case.

In other words, the requirement that the disclosure relate to a material fact limits the breadth of what is relevant.

[Emphasis in original.]

- [78] The scope of disclosure pursuant to R. 7-1(14) was described by Justice Dillon in *Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 at paras. 8-9. Justice Dillon cited *Biehl* and stated that R. 7-1(14) "provides a wider disclosure" than subrule (1), permitting a court, on application, to order the production of documents related "to any or all matters in question in the action". The court proceeded to align this wider disclosure with the Peruvian Guano test of relevancy (at para. 9; set out in *Edwards* at para. 41; see above, para. 77).

- [79] The purpose of R. 7-1 is to provide for discovery of documents in the action. No authority has been provided that would suggest that discovery of documents in relation to a motion falls within the ambit of R. 7-1. I conclude that discovery in relation to a motion does not fall within R. 7-1. In any event, as noted above, discovery was not sought in relation to the present application but in relation to the Replacement Motion. I have concluded that is not an appropriate basis for a production order.

[80] Accordingly, relevance for the purpose of this present application falls to be determined on the basis of relevance in the actions. As Justice Dillon noted in *Global Pacific Concepts* at para. 2, applications of this type must be determined in the context of the pleadings.

(a) ENAMCO Communications

[81] In their submissions the plaintiffs grouped this category of documents with the category (b) communications of the BMSC Communications. They submitted that both categories of documents are relevant in the litigation because they bear on the degree of control exercised by Nevsun over BMSC and at least may contain information that may enable the plaintiffs to advance their case or damage the case of Nevsun.

[82] However nowhere in the pleadings is there an allegation that Nevsun exercised control over ENAMCO. With respect to the first stage of production, in the course of this application, no material fact has been identified that these documents could be used to prove or disprove. Mr. Davis's evidence relates to ENAMCO's willingness to cooperate. Cooperation is not control and is not evidence of control. ENAMCO is not BMSC. These documents do not in my view fall within the scope of R. 7-1(1) disclosure. Further the plaintiff has not demonstrated that the documents fall within the scope of wider disclosure pursuant to R. 7-1(11).

[83] I conclude that the plaintiffs have not demonstrated the relevance in the action of these documents within the scope either subrules 7-1(1) or (11) disclosure.

(b) BMSC Communications

[84] The plaintiffs submit that these documents are relevant to the issue of the degree of control exercised by Nevsun over BMSC, or that they at least may contain information that may enable the plaintiffs to advance their own case or to damage that of Nevsun or lead to a train of inquiry. For example, counsel submits that the documents might provide evidence of the degree to which Nevsun controls BMSC from 2014 to the present. Counsel notes that there is some overlap with the time period when some plaintiffs allege that they were at the mine. Plaintiffs Bekit Alem, from the Tsegay Action, and Tesfagabr Okbagergsh, from the Mekonen Action, plead that they were at the mine until sometime in 2015.

[85] Counsel submits further that the responses could reveal documents that BMSC did not create or maintain such as audits of Segen's payroll records. This information could be evidence of the extent that BMSC did not take certain steps to comply with the governing social responsibility and human rights standards.

[86] Nevsun submits that the plaintiffs have not met the test for relevance, citing *Imperial Oil v. Jacques*, 2014 SCC 66, for the following definition of relevance

[30] To be relevant, the requested document must relate to the issues between the parties, be useful and be likely to contribute to resolving the issues (Glegg, at para. 23; Arkwright, at p. 2741; Chubb, at p. 762; Westfalia Surge Canada Co.; Autorité des marchés financiers; Fédération des infirmières et infirmiers du Québec).

- [31] This relevance requirement ensures that the parties do not conduct "fishing expeditions". It also ensures that the conduct of the proceedings is not delayed, complicated or even jeopardized by the introduction of evidence that does not assist in establishing the rights being claimed (see Royer and Lavallée, at p. 487; Marseille, at pp. 1 and 21). In this sense, the relevance rule is a procedural balancing rule that ensures the efficiency of the judicial process while facilitating the search for truth.
- [87] Counsel submits that it is clear by their nature that the documents do not fall within the scope of R. 7-1(1) disclosure. Counsel submits that the core material fact at issue in relation to this issue is paragraph 26 of the notice of civil claim. Communications between Nevsun or its representatives and BMSC regarding document production in this litigation do not fall within the scope of what is required to prove or disprove that material fact.
- [88] Counsel notes that until this motion it has not been suggested that such process documents are relevant to the substantive issues. The plaintiffs have not listed documents akin to the process documents relating to their efforts to obtain documents after the litigation commenced and have refused to list such documents.
- [89] I agree with Nevsun that the BMSC Communications are not relevant within the scope of R. 7-1(1).
- [90] With respect to the wider disclosure under R. 7-1(11) Nevsun submits that there must be an evidence based connection between the document sought and the pleadings beyond a mere possibility that the documents might be relevant or the application will be dismissed as a fishing expedition, citing *Holmberg v. McMullen*, 2019 BCSC 1434 at para. 31, where Justice Johnson concluded:

I conclude that in order to succeed on an application for further document discovery under Rule 7-1(11), an applicant must provide some evidence to support a connection between the documents sought and the matters in issue between the parties. Pleadings alone are not sufficient.

- [91] Nevsun submits that there is no such evidence in the present application. This absence in counsel's submission is striking given the volume of Nevsun's document production, including BMSC documents, and the fact that the plaintiffs have conducted examinations for discovery of Mr. Davis and an extensive interview with Mr. Moss.
- [92] Examination for discovery has been considered to be the most likely source of such evidence. Justice N. Smith in *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166, noted:
- [7] Under the former rules, the duty to disclose documents and the duty to answer questions on oral examination were therefore controlled by the same test for relevance. Under the new Rules, different tests apply, with the duty to answer questions on discovery being apparently broader than the duty to disclose documents.

- [8] Although that may appear to be an anomaly, there are at least two good reasons for the difference. One reason is that if the court is to be persuaded that the broader document discovery made possible by rule 7-1(14) is appropriate in a particular case, some evidence of the existence and potential relevance of those additional documents will be required. The examination for discovery is the most likely source of such evidence.

See also *Hadani v. Hadani*, 2012 BCSC 1142 at para. 38, citing *Kaladjian v. Jose*, 2012 BCSC 357 at paras. 50, 62-64, 67-69.

- [93] I agree with Nevsun that an evidentiary basis for the potential relevance of the documents sought is required and agree further that based on the absence of such a record in the present application record and the nature of the documents, the plaintiffs have not established that the BMSC Communications are relevant in the actions such that their production should be required under R. 7-1(11).

(c) Securities Communications

- [94] The plaintiffs submit that that documents concerning Nevsun's past efforts and ability to collect documents from BMSC are relevant to the litigation going to the issue of the degree to which Nevsun controlled BMSC. The Securities Communications fall within the material timeframe which the parties identified as 2003-2014 based on the Document Exchange Protocol. The plaintiffs submit further that the documents could be used to prove or disprove material facts and are therefore relevant under R. 7-1(1)(a)(i).
- [95] Alternatively the plaintiffs submit that these documents are producible under the second step of production as they may reveal Nevsun's degree of control over BMSC and the ease with which it is able to obtain documents from BMSC. This may enable the plaintiffs to advance their cases or damage Nevsun's.
- [96] Nevsun submits that the documents by their nature do not fall within the scope of R. 7-1(1). They note that the BMSC documents that were producible pursuant to the Document Exchange Protocol, and that were obtained because of the Securities Actions, have been produced. Nevsun repeats the submission with respect to the absence of an evidentiary foundation required for production pursuant to subrule (11).
- [97] I agree with both of these submissions. I do not agree that the Securities Communications could help prove or disprove the material fact of the control or lack thereof of BMSC by Nevsun. The plaintiffs have not provided an evidentiary foundation providing "some evidence to support a connection between the documents sought and the matters in issue between the parties": Holmberg at para. 31. I note that the plaintiffs provide nothing more than the possibility of what might be contained in the documents. In my view, this is the essence of a fishing expedition of the kind the Rules are meant to forestall.

[98] In my view, the plaintiffs have failed to establish that any of the categories of the ENAMCO, BMSC or Securities Communications are relevant so as to be producible within the ambit of Rules, either subrule 7-1(1) or (11). A finding of relevance is necessary before production will be ordered.

[99] In the result, the application is dismissed.

"Ross J."

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