IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Araya v. Nevsun Resources Ltd.,*
2016 BCSC 1856

Date: 20161006
Docket: S148932
Registry: Vancouver

Between:

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle

Plaintiffs

And

Nevsun Resources Ltd.

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Plaintiffs:	J. Fiorante, Q.C. R. Mogerman D. Lascaris J.D. Winstanley J. Yap
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Place and Date of Hearing:	Vancouver, B.C. January 4-8, 11-15 and 19-22 2016 March 7-11, 2016
Supplementary Written Submissions:	August 3, 2016

Place and Date of Judgment:	Vancouver, B.C. October 6, 2016

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ACRONYMS

AI	Amnesty International
ATS	*Alien Tort Statute* (US)
BMSC	Bisha Mining Share Company
CIL	Customary International Law
CJPTA	Court Jurisdiction and Proceedings Transfer Act
CPA	*Class Proceedings Act*
CSR	Corporate Social Responsibility Program
DIS	Danish Immigration Service
EASO	European Asylum Support Office
ENAMCO	Eritrean National Mining Corporation
EPCM	Engineering, Procurement and Construction Manager
EPLF	Eritrean People's Liberation Front
IFC	International Finance Corporation
IRB	Immigration Review Board
JVTA	*Justice for Victims of Terrorism Act*
NCEW	National Confederation of Eritrean Workers
NDP	National Documentation Package
NSP	National Service Program
PFDJ	People's Front for Democracy and Justice
TCPCE	Transitional Civil Code of Eritrea
UN COI	United Nations Commission of Inquiry

I: INTRODUCTION

[1] This representative action proceeding was commenced in November 2014 and is still in its early stages. The plaintiffs, who are refugees from the State of Eritrea which is located in East Africa, make allegations of the most serious nature against the defendant Nevsun Resources Ltd. ("Nevsun"), a British Columbia mining company. None of the plaintiffs or putative members of the class are residents of British Columbia or Canada.

[2] The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:

(a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;

(b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

[3] The parties' respective positions are succinctly summarized this way in the notice of civil claim (the "NOCC") and Nevsun's response to civil claim (the "Response to NOCC").

[4] The NOCC:

> CONCISE SUMMARY OF NATURE OF CLAIM:
>
> In October 2007, Vancouver based Nevsun Resources Ltd. entered into a commercial venture with the rogue state of Eritrea to develop the Bisha gold mine in Eritrea. The mine was built using forced labour, a form of slavery, obtained from the plaintiffs and others coercively and under threat of torture by the Eritrean government and its contracting arms.
>
> The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law, on their own behalf and as a representative action on behalf of

> all Eritrean nationals who were forced to work at the Bisha mine from September 2008 to the present.

[5] The Response to NOCC:

> [1] In answer to the Notice of Civil Claim as a whole… Nevsun denies the Plaintiffs' and Group Members' … allegations that subcontractors and the Eritrean military engaged in forced labour, slavery, torture or other abuses in connection with the Bisha Mine, or that Nevsun agreed to or in any way aided, abetted or approved of or condoned such conduct. At all material times, Nevsun was an indirect shareholder and the Bisha Mine was owned and operated by Bisha Mine Share Company ("BMSC"). BMSC prohibited the use of forced labour and abuses of workers at the Bisha Mine and took reasonable steps to ensure that such conduct did not occur.

[6] This proceeding is under judicial management. These reasons for judgment relate to certain applications brought by Nevsun and heard in January and March 2016 , with additional written submissions filed at the request of the parties in August 2016, being:

(a) an application pursuant to s.11 of the *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 (*CJPTA*) that this Court decline to exercise territorial competence on the basis that British Columbia is *forum non conveniens* (the “Forum Application”);

(b) two applications pursuant to Rule 9-5 of the *Supreme Court Civil Rules* to strike the plaintiffs’ claims on the basis they are not justiciable in that:

i. they are barred by the act of state doctrine (the “Act of State Application”) and

ii. they are based on alleged breaches of customary international law (the “CIL Application”)

(c) an application pursuant to Rule 20-3(1) of the *Supreme Court Civil Rules*, to deny process of this proceeding as a representative action (the “Representative Action Application”);

(collectively, the “preliminary applications”)

[7] Nevsun also applies for an order striking portions of the affidavits the plaintiffs have filed in response to the preliminary applications (the "Evidence Application").

[8] The preliminary applications and the Evidence Application raise a number of issues including, but not restricted to:

(a) the Evidence Application:

i. whether unattributed hearsay is admissible in the circumstances of these preliminary applications;

ii. whether reports concerning Eritrea authorized by governmental and non-governmental agencies such as the United Nations Commissions of Inquiry ("UN COI"), the United States Department of State, the European Asylum Support Office ("EASO"), Human Rights Watch, Amnesty International ("AI") and the Danish Immigration Service ("DIS") (collectively, the "secondary reports") and others are admissible, and if so, for what purpose;

iii. whether the reports by Mr. Dan Connell, tendered by the plaintiffs as an expert in Eritrean affairs, are admissible;

iv. whether other evidence including that of former Eritrean judges and lawyers is admissible as expert evidence.

(b) the Forum Application:

i. whether Eritrea is the proper forum for this proceeding;

ii. whether there is a real risk the plaintiffs will not obtain a fair trial in Eritrea.

(c) the Act of State Application:

i. whether this doctrine forms part of the common law of Canada and British Columbia;

ii. if so, whether it is engaged in the circumstances of this case such that the action be dismissed.

(d) the CIL Application:

i. whether CIL is part of the common law of Canada and British Columbia;

ii. if so to what extent can it form part of the basis for the plaintiffs' claims against Nevsun including the right to private law remedies; and

iii. whether Nevsun's corporate status results in immunity to the CIL claims in any event.

(e) the Representative Action Application

i. whether this action can proceed as a representative proceeding pursuant to Supreme Court Civil Rule 20-3 which permits representative actions;

ii. what the test is for a representative proceeding action and to what extent it differs from an action commenced pursuant to the *Class Proceedings Act* R.S.B.C. 1996, c. 50 ("*CPA*").

[9] The Forum, Representative Action and Evidence applications will require, to some extent, a consideration of the plaintiffs' allegations against Nevsun as set out in the affidavits filed on the parties' behalf.

[10] I must state at the outset of these reasons for judgment that I agree with the parties on the following: to the extent I consider and refer to the evidence to decide these preliminary applications I am not making any findings of fact with respect to the plaintiffs' allegations against Nevsun nor with respect to Nevsun's response. That can only occur following a trial of the issues raised in this proceeding.

[11] One example will illustrate why this must be so. Nevsun's extensive affidavit evidence squarely puts in issue whether any of the plaintiffs were in fact at the Bisha

Mine from 2008 onwards. No finding on that issue can be made outside the trial process.

II: SUMMARY OF DECISION

[12] For the reasons that follow:

(a) success on the Evidence Application is divided. Certain portions of the plaintiffs' affidavit evidence is inadmissible and will not be considered. However:

i. the secondary reports are admitted for a limited purpose as will be described below;

ii. Mr. Connell's reports (the "Connell reports") are admitted into evidence for a limited purpose as will be described below:

iii. the opinion portion of the evidence of the former judges and lawyers is admitted into evidence;

(b) the Forum Application is dismissed. Nevsun has not established that Eritrea is the appropriate forum. Accordingly the action will proceed in this Court;

(c) the Act of State and CIL Applications are dismissed;

(d) the Representative Action Application is granted.

[13] This ruling applies only to the preliminary applications. The parties can object to the admissibility of disputed evidence such as the secondary reports and the Connell reports at the trial of the action, the mechanics of these objections being determined during the trial management process.

III: EVIDENCE ON THE PRELIMINARY APPLICATIONS: BACKGROUND, CLAIMS AND RESPONSE

A: Introduction

[14] What follows is taken from the evidence before me on these applications. To the extent it includes evidence objected to by Nevsun, its inclusion accords with my

rulings on the Evidence Application set out in Part IV of my reasons below. For ease of reference I have, where appropriate, briefly summarized the basis for the objections taken to some of this evidence.

B: Eritrea

[15] Eritrea is a member state of the United Nations. Canada recognizes the government of Eritrea with direct diplomatic relations between the two countries.

[16] Eritrean nationals are required to obtain entry visas before entering Canada. Similarly, Canadian or other nationals must obtain entry visas to travel to Eritrea. Authorizations are also required to travel within Eritrea, including to the Bisha Mine.

[17] Eritrea was an Italian colony from 1890 to 1941. Following the Second World War, it became a British protectorate until its annexation by Ethiopia in the 1950s. In May 1991, after a 30 year war, the Eritrean People's Liberation Front ("EPLF") defeated the Ethiopian army. On April 29, 1993, after Ethiopia recognized a referendum for Eritrean independence, Eritrea became independent and was admitted as a member state of the United Nations.

[18] Isaias Afewerki has been president since 1993. His party, now known as the People's Front for Democracy and Justice ("PFDJ"), is the only political party in Eritrea. No elections have been held since independence.

[19] From 1998 to 2000, Ethiopia and Eritrea engaged in a border war. Despite the war being over, Ethiopia refused to withdraw its troops from a part of Eritrea and the Eritrean government characterizes this ongoing occupation as "hampering the exercise of normal government functions".

[20] Mr. Dan Connell is a visiting scholar at Boston University's African Studies Center and has authored several books on Eritrea. The plaintiffs have tendered his reports of October 15, 2015 and December 1, 2015 as expert reports in this proceeding.

[21] Nevsun objects to the admissibility of both Connell reports in their entirety. Its position is that Mr. Connell is not a qualified expert and is also a non-objective advocate for regime change in Eritrea.

[22] For the reasons I explain in Part IV, being the Evidence Application, I will consider the Connell reports for the limited purpose of providing social and background facts in order to provide additional context to the first-hand accounts of the plaintiffs' affiants including the former judges and lawyers.

[23] Nevsun has tendered the August 6, 2015 report of Professor Senai Wolde-Ab Andemariam as expert evidence in this proceeding. Prof. Andemariam is an assistant professor of law at the University of Asmara's Faculty of Law, and was previously a judge in Eritrean regional and district courts.

[24] The plaintiffs do not object to the admissibility of Prof. Andemariam's evidence. They state that much of his evidence is consistent with the plaintiffs' evidence that:

(a) Eritrea lacks a written constitution and functioning legislature;

(b) executive interference in the judicial process exists;

(c) the Special Courts have taken jurisdiction over civil matters including those decided by other courts and hears them *de novo*;

(d) judges lack basic personal freedoms and are unable to leave their positions; and

(e) there is no established practice of contingency fees in Eritrea.

[25] According to the Connell reports, civil unrest was a serious issue in Eritrea in the early 2000s. The government removed the Chief Justice for speaking out against executive interference in the judiciary. It also effected mass arrests of students and their families for protesting the conditions and compensation in the government's mandatory summer work campaign. During this period, the government also

arrested almost all of the top governmental officials after they had signed a letter critical of the president and calling for democratization.

C: The National Service Program

[26] The Eritrean National Service Program (the “NSP”) is a government program of military and national service administered by the Eritrean Ministry of Defence. Mr. Connell and Prof. Andemariam agree that the NSP consists of six months of military training and a 12 month "military development service program". The latter service consists either of assignment to government, parastatal or other workplaces for training and skill development, or assignment to the Eritrean military for "purely military service". The plaintiffs say that conscientious objection is not recognized.

[27] In approximately 2002, the government began a mass demobilization and reintegration program through which members of the NSP continued to participate in national development campaigns until their turn for demobilization came. Both Prof. Andemariam and Mr. Connell report that the government discontinued the demobilization program and has only allowed demobilization on a case-by-case, individual basis. As a result, the military development portion of the NSP has extended service beyond the mandated 18 months to indefinite periods until members are demobilized.

[28] The plaintiffs say this program provides labour to various companies owned by senior military officials including Segen Construction Company (“Segen”) and Mereb Construction Company (“Mereb”) who are described below. Human Rights Watch reported in the mid-2000s that national service conscripts were used as labour on public works and farms belonging to party and military officials.

[29] Nevsun relies on the affidavit of Berhane Afewerki Weldemariam, an engineer and the Contract Administration Head of Segen. He deposes that the Eritrean government has encouraged Segen to use active NSP service staff for road and dam construction and other infrastructure projects commissioned by the government or public authorities. This is done "in order to assist in the construction of public projects that are in the national interest".

[30] Mr. Weldemariam states that the use of active NSP members is not permitted for private contracts and that the character of the above mentioned projects is in the national interest, distinct from contracts with private enterprises.

[31] Human Rights Watch reported in 2006 that individuals attempting to flee national service in Eritrea are frequently tortured. Similar statements are found in a 2008 US Department of State report, a 2009 Human Rights Watch report, and the Connell reports. The Human Rights Watch report in 2007 and Mr. Connell reported that family members of children who did not report for national service were arrested. The 2009 Human Rights Watch report and the Connell reports added that those caught fleeing national service are detained without charge or trial. Conscripts deployed on civilian development projects who abscond are treated as deserters under military law since their salaries are paid to the Ministry of Defence.

[32] Nevsun objects to the admissibility of these reports, taking the position that they are not products of judicial inquiry, are not based on any fact-finding in Eritrea, and that they contain unattributed hearsay, double-hearsay and argument. Nevsun says it is not able to test the findings of these reports.

D: The Bisha Mine

[33] The Bisha Mining Share Company (“BMSC”) owns and operates the Bisha Mine. The Bisha Mine is the first operating modern mine in Eritrea. It is located on a large, high-grade sulphide deposit with high grade base metal reserves, including gold, copper and zinc, 150 km west of Asmara in the Gash-Barka region of Eritrea. Construction of the Bisha Mine began in 2008 and due to expansion projects, is not yet complete.

[34] BMSC engaged SENET, a South African company, as the Engineering, Procurement and Construction Manager (“EPCM”) for the construction of the Bisha Mine.

[35] In its role as EPCM contractor, SENET entered into sub-contracts on behalf of BMSC. One of the subcontractors it engaged was Segen, an Eritrean contractor. SENET directly supervised Segen's performance.

[36] Construction of the Bisha Mine began in 2008 and was principally completed in late October 2010. Extraction of minerals has proceeded as follows:

(a) phase 1, commercial gold production commenced in February 2011;

(b) phase 2, copper production commenced in late 2013; and

(c) phase 3, consists of a zinc expansion project and is not yet complete.

[37] The plaintiffs say Nevsun entered into a commercial relationship with the State of Eritrea to develop the Bisha Mine. Specifically, the plaintiffs claim that Nevsun engaged Segen, the Eritrean military, and Mereb to build infrastructure and mine facilities at the Bisha Mine. The plaintiffs say that Segen, Mereb, and the Eritrean military deployed forced labour obtained from the plaintiffs.

[38] Nevsun says neither it nor SENET engaged the Eritrean military, and that it was SENET, not the defendant, that engaged Segen.

E: Economy and the Mine

[39] Eritrea maintains a command economy. Estimates from 2014 place its per capita gross domestic product at $1,200 US. This ranks it 164th of 196 states in the world.

[40] Mr. Connell reports that the Bisha Mine is, at present, the single largest revenue source for Eritrea. In 2013, gold exports amounted to $143 million US, almost entirely from the Bisha Mine.

[41] Mr. Connell also reports that since independence, Eritrea has faced many economic problems including lack of resources and chronic drought. Nearly 80% of Eritrea's population remains engaged in subsistence agriculture. These problems have been exacerbated by restrictive economic policies.

F: Claims in the Action

The Plaintiffs

[42] The named plaintiffs, Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle are Eritrean nationals who are now refugees. They allege that they were conscripted into the NSP and then forced to provide labour to two for-profit construction companies being Segen and Mereb, the latter allegedly owned by members of the Eritrean military. They say that these companies were engaged by Nevsun and/or its Eritrean subsidiary, BMSC, for the construction of the Bisha Mine.

[43] The plaintiffs bring this action for damages against Nevsun under CIL as incorporated into the law of Canada for: the use of forced labour; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. They also seek damages under domestic British Columbia law against Nevsun for the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress. They relate the tortious conduct to Nevsun specifically through the following allegations:

(a) Nevsun engaged Segen, Mereb, and the Eritrean military to build the infrastructure and mine facilities at the Bisha Mine;

(b) Segen, Mereb, and the Eritrean military deployed forced labour obtained from the plaintiffs and others to carry out this work, and used deprivation, physical assault, threats, and torture to control them;

(c) the conduct of Segen, Mereb and the Eritrean military amounts to conversion, battery, unlawful confinement, and intentional infliction of mental distress;

(d) Nevsun is directly liable for condoning the above by Segen, Mereb, and the Eritrean military;

(e) Nevsun is directly liable for failing to stop these practices at its mine site and this amounts to aiding and abetting Segen’s and Mereb’s conduct;

(f) BMSC condoned the above and Nevsun is liable for the conduct of BMSC;

(g) Nevsun is vicariously liable for the conduct of Segen, Mereb and the Eritrean military at the Bisha Mine in furtherance of Nevsun's commercial objectives;

(h) Nevsun participated in a civil conspiracy with BMSC, Segen, Mereb, and the Eritrean military by entering into an unlawful agreement for the supply of forced labour to the Bisha Mine;

(i) Nevsun is negligent because it breached a duty of care it owed to the plaintiffs; and

(j) the consequences of the alleged negligence occurred in Eritrea which is where the damages were sustained.

[44] In his affidavit, the plaintiff, Kesete Tekle Fshazion, claims he was not permitted to leave the NSP after serving for six years. He states that he was deployed by Segen to the Bisha Mine and escaped the mine and Eritrea in 2012. The plaintiff, Gize Yebeyo Araya, also claims to have not been released after his 18 months of training in the NSP, and to have been deployed to the Bisha Mine by Segen to work in the tailings management facility until October 2010. The plaintiff, Mihretab Yemane Tekle, similarly claims the NSP did not release him after his 18 months of service and that he was forced to work at the Bisha Mine until October 2010.

[45] In his affidavit, Mr. Tekle claims that the temperature at the location where he and his co-workers worked laying large, black plastic sheets reached 47 degrees Celsius. They were fully exposed to the sun. Mr. Araya claims this heat left burns and scars on his face. He claims he witnessed others receiving punishment by beating, being made to roll or run in hot sand, and being bound with their hands and feet tied together behind the back and left in the hot sun, often for hours. Mr. Tekle also observed others being tied in this position as punishment.

[46] Both Mr. Araya and Mr. Tekle claim to have been forced to work six days a week, generally being woken at 4:00 am and working 12 hours a day, including a two hour lunch break. They claim they and other conscripts they observed were given very little food throughout the day, consisting of bread, lentil soup, and tea. They were housed in huts without beds or electricity. Mr. Tekle adds that he was always very hungry, weak, and often sick. He once observed a co-worker collapse as he was working in the hot sun.

[47] Mr. Fshazion deposes to being made to work outside testing soil density, seven days a week, six of which were ten hour days, and the seventh was an eight hour day.

[48] The plaintiffs make these claims on their own behalf and on behalf of all members of the putative class. They say the putative class consists of over one thousand Eritrean nationals, “all conscripts in the Eritrean National Service Program who worked at the Bisha mine from 2008 to the present”.

Nevsun

[49] Nevsun is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. Its head office is in Vancouver, British Columbia. It is a reporting issuer, as defined in the *Securities Act*, R.S.B.C. 1996, c. 418, as amended. Its shares are widely-held and are listed for trading on the Toronto Stock Exchange and the New York Stock Exchange.

[50] At the relevant times, members of Nevsun’s senior management primarily resided in Vancouver, British Columbia. Nevsun’s directors resided in Vancouver, Ontario and Connecticut.

[51] Nevsun exercises effective control over BMSC. It controls a majority of the Board of BMSC and Cliff Davis, the CEO of Nevsun, is the Chair of BMSC.

[52] Nevsun's Management Discussion and Analysis, third quarter 2013 report contains the following statement:

> Through its majority representation on the board of BMSC, the company is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation.

[53] Nevsun has adopted the 2006 International Finance Corporation ("IFC") standards on labour practices and working conditions which require it to:

(a) protect workers by addressing forced labour risks;

(b) use commercially reasonable efforts to protect workers of contractors;

(c) use commercially reasonable efforts to ensure that contractors are reputable and legitimate enterprises; and

(d) use commercially reasonable efforts to require contractors to abide by the IFC standards including the prohibition on forced labour.

[54] Nevsun denies that Bisha Mine is its asset, stating instead that BMSC and not Nevsun is party to the agreements with the State of Eritrea and the Eritrean National Mining Corporation ("ENAMCO") that entitle it to operate the mine. Nevsun claims that operational decisions at the material times, including selecting SENET, were made by BMSC's management.

[55] Nevsun also claims that BMSC required SENET to agree not to employ forced labour and ensure any subcontractors it engaged did likewise. Nevsun further asserts that SENET and all subcontractors providing services to BMSC in connection with the Bisha Mine were required to refrain from violence, crime or abuse and to comply with BMSC's corporate policies prohibiting such conduct.

[56] In his affidavit, Stan Rogers, the former general manager of BMSC, states that he was employed in that capacity from 2005 to 2011. He describes his involvement in the Project, that is the Bisha Mine, and states that he "had a good grasp of who was performing work and who was employing them to do so". He

deposes that he has never heard of Mereb and does not believe it had any role in the construction of the Bisha Mine. He also states:

> 60. Segen's employees resided in a camp which Segen constructed at the early stages of the Bisha Mine project. I never attended at this camp, which was located a couple of kilometres away from BMSC' s camp.
>
> 61. I have reviewed the Notice of Civil Claim in this matter, which contains allegations of physical abuse and other mistreatment against workers engaged in the construction of the Bisha Mine.
>
> 62. I did not hear any allegations that Segen (or any other) workers were being physically abused. My experience is that rumours travel quickly on a mine site. If people engaged in work at the Bisha Mine were being beaten, I expect I would have heard rumours of such things.
>
> 63. I heard nothing of the sort. I saw no signs that any employee of Segen (or anyone else) had been beaten or physically abused. If I heard any suggestion of this, or had any inkling or suspicion of it all, I would have immediately taken action, going to the board of BMSC, and the Government of Eritrea.
>
> 64. In comparison to other mining operations I have been involved with in Africa and around the world, the Bisha Mine was run in a first rate fashion in the way it treated its employees, and the employees of contractors.
>
> 65. People at the mine were among the highest paid workers in Eritrea, a country which is very poor. Even high ranking government ministers drive second hand cars.
>
> 66. I was regularly at the Bisha Mine, and witnessed the conditions of work and workers. I did not see dangerous conditions, nor did workers appear to be ill and malnourished.
>
> 67. Everyone on the mine site was treated in the same fashion, regardless of their employer. The same safety standards and conditions of work prevailed. That said, there were differences between those persons who had to work outdoors (where it could be very hot), and those persons who had indoor jobs, as most of the buildings at the Bisha Mine were air conditioned.
>
> 68. Further, there were differences between the camps where various individuals were housed. As noted above, I never attended the Segen camp. However, I was aware of occasions where Segen encountered supply and logistical problems, meaning it did not have enough food for its workers. Those occasions were brought to the attention of BMSC and SENET by Segen’s management, and BMSC supplied Segen with food, as we maintained large stores at the Bisha Mine.

[57] Lloyd Lipsett, who conducted a human rights assessment at the Bisha Mine for Nevsun and Todd Romaine, Nevsun’s vice president for corporate social responsibility, testified on June 5, 2014 before the House of Commons

Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (the "Subcommittee").

[58] Nevsun objects to the admissibility of the transcripts from those hearings. For the reasons I outline below in Part IV of these reasons for judgment, I agree with this objection with the exception of parts of the transcripts which contain Mr. Lipsett and Mr. Romaine's testimony. Mr. Romaine has also sworn two affidavits tendered by Nevsun on these preliminary applications.

[59] I have also considered the fact that in their testimony to the Subcommittee, Mr. Lipsett and Mr. Cliff Davis, Nevsun's president and CEO, referred to being aware of and informed by several of the secondary reports. Mr. Davis stated that Nevsun took appropriate steps to ensure that staff at the Bisha Mine did not act in a manner contrary to what had been identified in recommendations given by international human rights organizations.

[60] Mr. Lipsett's approach and methodology for the Bisha Mine assessment, and the approach taken was to do a comprehensive assessment of potential human rights impacts. The:

> full spectrum of human rights was screened and reviewed rather than concentrating on a limited number of human rights issues that had been raised in past allegations.

[61] He relied on elements from the Danish Institute for Human Rights and Democracy's tools to structure the different steps of the assessment and to develop customized questions and indicators about specific categories of human rights issues.

[62] Mr. Lipsett undertook two field missions to Eritrea in September 2013 and January 2014. He acknowledged that it had been rare for human rights observers to have direct access to Eritrea. He spent approximately 10 days between Asmara and the Bisha Mine site and undertook certain activities including:

(a) conducting interviews with Eritrean stakeholders, including workers, community leaders, managers, government officials, national-level

unions, lawyers, and labour tribunal judges. The interviews with workers included confidential individual interviews and focus groups with male and female employees;

(b) conducting site visits to various areas of the Bisha Mine, the Bisha camp, and the camp of the subcontractor, Segen;

(c) conducting formal and informal interviews with workers during those site visits;

(d) conducting a review of all the relevant policies, management systems, and internal reports and records at the Bisha Mine and in the BMSC headquarters in Asmara;

(e) given the past allegations about the Bisha Mine, he paid particular attention to reviewing and spot-checking the screening procedures in place to safeguard against the use of NSP workers. He also conducted interviews and reviewed documents in employment files at Segen's headquarters in Asmara.

[63] Mr. Lipsett stated that throughout the assessment, he experienced cooperation from senior management at Nevsun, BMSC, and ENAMCO, as well as from various Eritrean government officials and judges in the Eritrean labour tribunals. At the same time, he was of the view that he was at liberty to plan his site visits and conduct private and confidential interviews without interference.

[64] As part of his assessment he stated:

> I have extensively relied upon the UN's Guiding Principles on Business and Human Rights for framing the assessment. Obviously, these UN guiding principles are the relevant global standard for business and human rights; however, I find them particularly useful because they emphasize a procedural approach to ongoing human rights due diligence.

[65] His conclusions included:

(a) there were some differences between external reports and what he was able to observe on the ground. He expected a more militarized

and overtly repressive environment than he witnessed in Asmara and at the mine site;

(b) he acknowledged that his investigation did not delve into some of the complex civil and political rights issues that are reported about Eritrea. But his" first and second impressions of the country, and particularly the mine site, do not concord with the characterization of Eritrea as the North Korea of Africa";

(c) an overarching theme of his conversations with all Eritrean stakeholders was that the Bisha Mine is serving as an important precedent for mining in Eritrea. Even in casual conversations on the streets of Asmara, people are aware of and interested in Bisha's activities;

(d) there were clearly sensitivities on the part of the Eritrean government about framing the assessment in terms of international human rights standards that it believes had been politicized. Without detracting from the importance of those standards, it was often much more productive and constructive to have conversations about underlying principles, such as respect, equality, freedom, and fairness. Moreover, in his report he tried to link these international standards to national legislation and the policies in place at the Bisha Mine in order to provide reference points for local actors;

(e) he believed that Nevsun's approach to transparency about the assessment and its engagement with stakeholders about the report's recommendations and a follow up action plan should be commended.

[66] Mr. Romaine's testimony included:

(a) the decisions affecting the Bisha Mine are that of "collaborative consensus", of which Nevsun has had influence to pursue numerous CSR ("corporate social responsibility") objectives that adhere to

Eritrea's national laws "as well as meet evolving international standards that the Government of Canada recognizes and endorses";

(b) as part of Nevsun's CSR program, Nevsun decided it was important to undertake an extensive external assessment on how the Bisha Mine compared both in a national and international context with respect to human rights in its workforce;

(c) meetings included NGOs, including MiningWatch, AI, UNICEF, as well as a planned meeting with Human Rights Watch in July;

(d) Nevsun was committed to ongoing transparency with respect to the implementation of certain selected measures and that "CSR is a key corporate strategy that is critical in maintaining [its] social licence to operate in Eritrea".

[67] Yacob Keleta, former SENET and BMSC safety officer at the Bisha Mine since 2009, deposed that in 2010 the number of Segen workers involved in the construction of the tailings management facility was limited. This is where and when the plaintiffs, Mr. Araya and Mr. Tekle, claimed they worked. Mr. Keleta says he did not know them despite being in a position to have done so due to the limited numbers of people working at that facility. Nevsun's affiant, Kahsay Gebremichael, deposes that he had never heard of Mr. Araya or Mr. Tekle. Mr. Gebremichael has been the foreman employed at the Bisha Mine for Segen for the last seven years and worked on the tailings management facility.

[68] Mr. Keleta also deposes that BMSC required Eritrean employees to present proof that they had been demobilized or exempt from NSP, and that this policy applied to all Segen employees. He further states that he monitored compliance with protective equipment requirements for Segen workers at the tailings management facility construction, including gloves, safety glasses, boots, and safety vests. He says he visited the Segen camps and ate meals with the workers, which were better than meals of those who live in the villages around the mine. He states that no one

complained to him there was not enough to eat. Mr. Gebremichael says the Segen employees' camp had meat three days a week.

[69] Both Mr. Keleta and Mr. Gebremichael say they never observed any of the Segen employees being physically abused or mistreated.

[70] Mr. Gebremichael also deposes he never saw a NSP person working at the Bisha Mine.

G: Administration of Justice in Eritrea

Laws

[71] While Eritrea has no official language, in practice, most domestic official communications, laws and statements are issued in Tigrinya and Arabic, frequently accompanied by English translations.

[72] According to Prof. Andemariam, Eritrea does not presently have a constitution as the country's supreme law. A constitution was drafted in 1997 but has not been implemented.

[73] One of the plaintiffs' affiants, Biniam Ghebremichael, who graduated from the law faculty at the University of Asmara, served as a judge in Eritrea while a conscript in the NSP. He deposes that laws in Eritrea are passed, amended, and repealed by government decree only. The legislature has not convened since 2002.

[74] Mr. Ghebremichael is tendered by the plaintiffs in part as an expert witness. His affidavit contains the certification that he is aware of his duty to assist the Court and not to be an advocate for any of the parties.

[75] Prof. Andemariam's evidence is that Eritrean law consists of legislation in the form of six Transitional Codes adopted from Ethiopia prior to the dissolution of the legislature and based on the Continental European System, and an additional 180 proclamations, regulations and other delegated legislation.

[76] The proclamations include Proclamation No. 82/1995, *the National Service Proclamation* and Proclamation No. 118/2001, the *Labour Proclamation of Eritrea* (the "Labour Proclamation"), Eritrea's labour legislation.

[77] The codes include Proclamation No. 2 of 1991, *Transitional Civil Code of Eritrea* (“TCPCE”). The TCPCE, Nevsun says, is the equivalent of the *Supreme Court Civil Rules*. The TCPCE ensures that proceedings take place in languages that the court, the parties and witnesses understand. English translation is available. TCPCE also provides for the taking of evidence on commission and the issuance of letters requesting the assistance of courts of other states to obtain relevant evidence for trial. The TCPCE authorises representative actions. The personal attendance of the plaintiffs is not required unless the court orders it. The plaintiffs can instead appear by counsel or by agent.

[78] Prof. Andemariam further says the TCPCE would apply if the plaintiffs' claims were tried in Eritrea. The proceedings would most likely take place in the Tigrinya language.

[79] Under the TCPCE, the parties are entitled to call, examine and cross-examine witnesses. Experts may be called. Evidence taken on commission is admissible. While Eritrea lacks a comprehensive evidence law, the various codes contain numerous evidence-law related provisions. However, the courts are apparently divided on whether hearsay evidence is admissible at all, or whether its second hand nature goes to weight.

[80] In Prof. Andemariam’s opinion, the evidence related provisions in the codes are not sufficient to conclude that the Eritrean legal system has a comprehensive body of the law of evidence.

[81] Prof. Andemariam states that Eritrea does not have conflict of laws legislation. If foreign law is applicable to a case brought before the Eritrean courts, the courts will dismiss the case.

[82] He further says the substantive laws of Eritrea recognise private law causes of action for, among other things, conversion, battery, unlawful confinement, negligence, conspiracy and intentional or negligent infliction of emotional distress. Eritrean law also recognises claims for unjust enrichment. While Eritrean law does not incorporate CIL, it does recognise equivalent private law causes of action for forced labour, torture, slavery, cruel, inhuman and degrading treatment, and crimes against humanity. These are all crimes in Eritrea. Any violation of any Eritrean law, including the criminal or penal law that causes harm is actionable.

[83] Mr. Ghebremichael deposes that:

(a) the government closed the country's only law school in 2002. He states that the Ministry of Justice had not issued a license for the private practice of law since approximately 1995 and that only a few of his school classmates (one of the last classes to graduate from the law school before it was closed) remain in Eritrea with many judges and lawyers having fled the country;

(b) he did not have a say in his appointment to the court and did not apply to become a judge. While a judge, he was without right to leave his position, seek another position, or negotiate salary even after demobilization. He was paid wages insufficient to live on until he was demobilized, when it increased approximately to three times the amount;

(c) many judges had to borrow money to supplement their wages;

(d) when he tried to escape NSP conscription and the country in 2007, he was detained without due process, not provided with access to a lawyer, was not formally charged, nor was there a trial or hearing. While imprisoned, he witnessed severe beatings of prisoners;

(e) during his time as a judge, there was a constant rotation of people transferred from the judiciary to the prosecutor's office and vice versa;

(f) the Minister of Justice had the power to hire, re-assign, and summarily fire any judge or judicial personnel;

(g) presidents or coordinators of regional courts are usually ex-fighters or party members;

(h) loyalists, who often handle files without knowledge of the judges, request changes of venue and interfere with the administration of justice through threat of demotion;

(i) in 2001, the Chief Justice of Eritrea was removed for making a statement criticizing the government's interference with the judiciary;

(j) after issuing a summons to a regional governor, he was told he could not do so and was re-assigned to a remote court;

(k) when judges advocated that police who use torture should be prosecuted, the Minister of Justice instructed the prosecutor's office that the police should be given immunity from prosecution;

(l) the new codes drafted for Eritrea by Dutch legal scholars in 2002 were never put into effect, despite a government declaration in 2015 this had occurred. The codes are not available to the public;

(m) no constitutional limits are placed on the authority of the executive since no constitution has been enacted;

(n) the laws are made by way of Presidential decree, statement, or letter;

(o) the Labour Court ruled against an attempted unionization of public transport employees, without issuing any legal reasons. The case was appealed to Mr. Ghebremichael's court where he issued reasons allowing unionization pursuant to a statute. He was reprimanded by the Chief Justice for this ruling after the Minister of Labour complained to the Chief Justice;

(p) only a few of the Labour Court judges have any legal training;

(q) many of the Labour Relations Board members are not lawyers;

(r) the Special Court was created by a proclamation that stipulated defendants were not permitted any legal representation, trials were to be held in private, no appeal is permitted, the court can use any method to pursue a case, and the court is not bound by the principles of *res judicata*;

(s) the Special Court has reversed decisions of ordinary courts, including in civil cases;

(t) the Special Court judges are members of the Ministry of Defense, including ranking military officials; and

(u) in his opinion, there is no likelihood the plaintiffs could receive a fair trial in Eritrea, and it is "highly dubious" whether any witnesses in the country would be willing to come forward and testify.

[84] According to Mr. Ghebremicheal, in 2011 a new law program was opened at the Adi-Keih College of Arts. He states that his understanding is that the law program is a department within the College and that all graduates are NSP conscripts who are assigned to the Ministry of Justice to work as clerks, prosecutors or judges. Prof. Andemariam has not specifically refuted this evidence.

[85] Nevsun takes issue with this evidence, however, claiming it is out of date, unreliable, and not readily ascertainable as coming from someone qualified to give that evidence.

H: The Eritrean Courts

[86] The parties appear to agree that three branches of adjudicative tribunals in Eritrea are relevant to this proceeding, being the High Court, the Special Court, and the Labour Court.

The High Court

[87] Prof. Andemariam states that despite being a trial court, the High Court sits in divisions of three judges. Judgments are read in open court. The court may award

costs. The court hearing the case has jurisdiction over execution of its judgments. The pre-trial process includes the exchange of pleadings, notice of the evidence each side intends to rely on, and an appearance before the court to determine any preliminary objections and frame and to record the issues for trial. Some discovery is available, and the court can order the production of any document it considers necessary for trial. Appeals from decisions of the High Court on interlocutory and final orders are heard by the Court of Last Appeal.

[88] The plaintiffs refer to a number of secondary reports that canvass social conditions and the administration of justice in Eritrea:

(a) US Department of State Report 2007 concludes that:

i. the constitution remains unimplemented;

ii. the judicial process is influenced by the patronage of former fighters;

iii. the Office of the President acts as arbitrators or facilitators in civil matters and bypasses courts;

iv. no judicial procedures exist for claims of human rights violations by the government;

v. few remedies for enforcing domestic court orders exists for persons not affiliated with the executive branch or who have wealth;

vi. no licences to lawyers for private practice have been issued for eight years prior to the report;

vii. the Special Court issues directives to other courts regarding administrative matters;

viii. no lawyers practice in the Special Court and the judge serves as prosecutor;

ix. trials are closed to the public;

x. the attorney general has allowed the Special Court to re-try High Court cases; and

xi. persons detained for being critical of government were detained without due process and that no civil judicial procedures were available to those claiming human rights violations by the government.

(b) a report prepared in 2015 by a UN COI established to investigate the human rights situation in Eritrea (the "2015 UN COI report"). Its conclusions included that:

i. judges are appointed and dismissed at will by the President, and directed in their decisions by the ruling party and army;

ii. some judges are conscripts whose careers depend on the Ministry of Defense and are paid less than 2 USD per day because of their conscript status;

iii. in no documented cases was a public official prosecuted for involvement in a human rights violation;

iv. the government espouses a lack of cooperation with the UN Special Rapporteur investigating human rights in the country;

v. since 2002, laws are passed exclusively by government decree; and

vi. Special Court judges are senior military officials without legal training, directly accountable to the President. One judge acts as prosecutor. The parties have no right to legal representation or to present a defence. No public record of proceedings exists. The Special Court can reopen cases already tried. No right of appeal lies from Special Court decisions. There appears to be no basis in law for the decisions.

(c) a second UN COI report published in May 2016 (the "2016 UN COI report") includes the following:

i. the constitution has still not been implemented;

ii. the government taxes two percent of the individual's income, including those living abroad and refusal to pay the tax has resulted in denial of title to land or business licences for family members still in Eritrea, and denial of passport recognition. This is so until the exiled person signs a confession admitting to treason and failing to fulfill one's national duty;

iii. Eritrea's system of national service violates international treaties against the use of forced labour;

iv. Eritrea's system of indefinite conscription constitutes enslavement in violation of international law;

v. there has been no progress towards the implementation of a constitution and the practice of issuance of legislation by decree continues; and

vi. in the absence of a constitution, an independent judiciary or democratic institutions in Eritrea, the commission has found no improvement in the rule of law. The commission has heard of no plans to hold national elections. While the commission was informed about the establishment of a committee to consider drafting a new constitution, it has received no further details.

(d) US Department of State Report - Eritrea 2014 concludes:

i. the judiciary is not independent from executive control, specifically the Office of the President's adjudicative function.

(e) EASO, Country of Origin Information Report: Eritrea Country Focus, May 2015 concludes:

i. there have been no elections since independence;

ii. the constitution has never been implemented;

iii. Parliament has not been convened for more than 10 years;

iv. laws reformed in 1997 were not entered into force;

v. new legislation is issued by decree or administrative directives, and personal interventions by the President, and without parliamentary consent;

vi. the Special Court is operated by the President's Office, the secret service, the army and police;

vii. all courts' officials report to the Ministry of Justice; and

viii. the government taxes two percent of the individual's income, including those living abroad. Exiled Eritreans can re-enter the country only after paying this tax, signing a repentance, and promising to abstain from anti-government activities while abroad. They may also be sent to a six-week training course whose purported purpose is to re-instill patriotism.

[89] Nevsun's position is that if the Court does consider the secondary reports, it should also consider the 2014 DIS Report, which concluded:

(a) rules and procedures are not applied in a uniform manner and some laws are unclear or unpublished;

(b) the judicial system seems to operate in arbitrary ways and is not well functioning;

(c) no international human rights observers have had access to the country for many years;

(d) it is easier to be released from NSP (military service) today than previously, in that although open-ended NSP tends to be limited to between two and five years, as opposed to previously, when it lasted over ten years;

(e) there has also been a relaxation in NSP recruitment procedures in that people are not being collected by soldiers if they did not appear when called; and

(f) the capacity of the state to enforce rules relating to the NSP and control citizens' movements seems to be diminishing: exiled Eritreans can re-enter the country after paying the 2% income tax and signing an apology letter.

[90] Relying on the UN COI reports, the plaintiffs say conscripts can be appointed to the judiciary while still being under the authority of the Ministry of Defence, they are unable to choose or leave their position, negotiate a salary, or travel or leave the country. Further, the former President of the High Court was removed in 2001 from his position after he criticized undue interference by the executive in the judicial process. Prof. Andemariam says that most judges are subject to similar restrictions to those that apply to all government employees, such as travel restrictions and inability to leave their position.

[91] Mr. Ghebremichael deposes that presidents or coordinators of regional courts are often former military personnel who fought in the war against Ethiopia, or are ruling party loyalists who administer files without the knowledge of judges, request changes of venue through express or implicit intimidation and threat of demotion.

[92] The former judges and lawyers who have sworn affidavits on the plaintiffs' behalf depose to being transferred to courts in remote areas as a form of punishment after refusing to vary from court procedure in order to comply with the demands of government officials. Prof. Andemariam states that judges have procedural immunity if they commit offences or breach ethical discipline, and that they are not automatically prosecuted, but rather appear before a disciplinary committee.

[93] Isaias Tesfalidet is a lawyer who swore an affidavit on the plaintiffs' behalf. He was formerly assigned to the Office of the Legal Advisor to the Office of the President of the State of Eritrea. He states that:

(a) the Office of the President allows parties to by-pass a court by applying to have the Office of the President issue a decision on a dispute that falls within court jurisdiction;

(b) the Office of the President may then refer the cases to the Special Court, or decide upon the dispute;

(c) there are no procedures for appealing decisions of the Office of the President;

(d) while he was a conscript, he was assigned to be a regional judge, without choice nor freedom of movement; and

(e) the deputy of a high-ranking local government official interrupted his courtroom after he had issued an order against the local administration. He asked the official to leave and was then transferred to a remote court where his accommodations had no bathroom and no bed.

[94] A former judge, Abdalla Osman Khiyar's evidence is that:

(a) he experienced government and military interference in the judicial process in the Gash-Barka region where he says the plaintiffs' claim would be brought as the Bisha Mine is in this region;

(b) the Special Court is run by military judges with no legal training, with the authority to re-try cases already decided including civil matters. Parties have no right to counsel nor appeal;

(c) he estimates only 50 lawyers are licensed for private practice and only 10-12 would be licensed to represent clients in the High Court. Almost all of the latter are based in Asmara;

(d) no Asmara based lawyer would agree to pay the expense of travel to the Gash-Barka region, nor agree to represent the plaintiffs on a contingency fee basis due to the complexity of the case;

(e) the only equivalent to a representative action would require all plaintiffs outside the country to execute powers of attorney through the embassy; and

(f) for someone outside the country to hire a lawyer inside the country, the Eritrean embassy charges a tax equivalent to 2% of the applicant's income to obtain a power of attorney.

[95] A former judge, Yonas Gebreselassie's evidence is that:

(a) he was transferred to a district court in Mendefara as a reprimand for having a conflict with the executive;

(b) the President of the Southern Region Court did not have a law degree and lacked knowledge of many areas of law and procedure, but tried to instruct him on how to decide cases; and

(c) the Ministry of Justice is involved with the logistical administration and human resources of the courts including the appointment and removal of judges.

[96] A former prosecutor and judge, Kifleyohanes Teweldebrhan Yeibio's evidence is that:

(a) while working as a prosecutor, he ordered a politically detained labour tribunal complainant to be released from detention but was defied by a military colonel;

(b) the Attorney General terminated his training program for public prosecutors and police investigators on the procedural rights of criminally accused. The training packs he distributed were confiscated;

(c) while prosecutor, he witnessed the current Minister of Justice remove from prosecution a case against a Ministry advisor;

(d) he was removed as Chief Prosecutor in 2001, and when his replacement started conducting random prison inspections, he was also removed;

(e) his fellow judge was ordered by a military major general to stop hearing a civil case and when he issued written reasons denying this request, his right to work or travel was revoked indefinitely; and

(f) as a judge, he did not order the perpetrators of torture arrested and investigated for fear for his own life.

[97] Nevsun objects to the former judges' and lawyers' evidence of interference in the judicial system, saying that it is severely dated, contains substantial hearsay and argument, and does not disclose sufficient detail regarding their qualifications to give the opinions expressed.

[98] Prof. Andemariam states he is not aware of any improper influence, inducement, pressure or threats against judges. He says Eritrean courts at all levels have decided "tens of thousands" of civil, commercial and criminal cases with no discernable executive or political interference. Insofar as the High Court is concerned, he deposes he has not known the court to be a corrupt institution, and knows of only one case of corruption which occurred nine to 12 years ago. He is of the opinion that most judges in the High Court are well-educated, experienced, and competent to hear the plaintiffs' case.

[99] Mr. Yohanne Sium, an attorney who practices in Washington State, U.S.A., has sworn an affidavit on Nevsun's behalf. He describes travelling in Eritrea in 2008 and again from May 2011 to January 2012. He states he met with law students, professors and judges, and attended classes where students asked "pointed questions" and where "there was serious debate about Eritrean legal issues". There was a "robust legal community" in Eritrea and excitement with the economic prospects created by the opening of the Bisha Mine.

[100] The Human Rights Watch 2015 Report at page 218 states:

> Eritrea's dismal human rights situation, exacerbated by indefinite military conscription, is causing thousands of Eritreans to flee their country every month. In early 2014, President Isaias Afewerki confirmed his lack of interest in an open society, stating: "[I]f there is anyone who thinks there will be democracy or [a] multiparty system in this country. . . then that person can think of such things in another world."

The Special Court

[101] In 1996, the government created the Special Court with the purported intent of tackling corruption. The Special Court has exclusive jurisdiction on criminal matters relating to corruption, theft, breach of trust and fraud. The Proclamation that created the Special Court stipulated that: defendants were not permitted any legal representation; trials would be held in private; no appeal is permitted; the court is empowered to use any method it sees fit to pursue a case; and is not bound by the principles of *res judicata*. There is no public record of the proceedings. Decisions are reportedly not taken on the basis of domestic law or established jurisprudence.

[102] The Special Court has reversed decisions of the ordinary courts, including decisions in civil cases. The Special Court established its own Executive Office to enforce its decisions. It has also been given wider power to auction off property and dissolve companies.

[103] As noted above, the 2015 UN COI report states that judges in the Special Court are members of the Ministry of Defense and some are ranking military officials. Judges are directly accountable to the President.

[104] While Prof. Andemariam acknowledges the practices of the Special Court constitute executive interference in judicial proceedings, he states he has not heard of instances of these problems in the past two to three years.

The Labour Court

[105] The Labour Proclamation assigns jurisdiction to labour tribunals, and governs the rights of employees under individual contracts of employment or collective agreements.

[106] The Labour Court has exclusive jurisdiction over individual labour cases and it is presided over by one judge. The decisions of this court are appealable to a regional court. Mr. Ghebremichael deposes that judges are usually former soldiers, not lawyers, and are appointed by the Minister of Labour. Again, the defendant objects to the admissibility of this evidence. Prof. Andemariam claims he is unaware

of corruption in specialized labour tribunals like the Labour Court or Labour Relations Board.

[107] Prof. Andemariam states the Labour Relations Board has exclusive jurisdiction over collective labour disputes and the interpretation of the Labour Proclamation. It has five members, including representatives of management and labour. The Board members have knowledge and experience in labour matters. The Board is not bound by the laws of evidence and procedure used in the civil courts. As provided for in the Labour Proclamation, in deciding cases, it "shall take into account the substantial merits of the case [without following] strictly the principles of substantive law as followed by the courts": Article 135(5) of the Labour Proclamation. Article 127 of the Labour Proclamation provides that "[a]ll findings of fact made by the Labour Relations Board ... shall be conclusive and final". There is a limited right of appeal from the Labour Relations Board to the High Court "solely on questions of law which materially affect the Board's decision": Article 127. Wage-related claims, claims based on hours of work, and leave-related claims are labour claims.

[108] Mr. Ghebremichael deposes that the judges on the Labour Court appointed by the Minister of Labour are usually former fighters and only a few have legal training. Some members of the Labour Relations Board are lawyers.

[109] Prof. Andemariam states that persons who are active in the NSP are not "employees" for the purposes of the Labour Proclamation. Persons who are exempt, released or demobilized are "employees" and the legislation applies to them. For such persons, the Labour Proclamation assigns exclusive subject matter competence over labour claims to labour tribunals.

[110] Prof. Andemariam appears to accept that neither the putative class members who have not been demobilized, nor Nevsun itself, fall under the jurisdiction of the labour tribunal. Only one named plaintiff, Mr. Kesete, would be subject to the Labour Proclamation and the labour tribunal. Nevsun, as a party related to the plaintiffs'

employer at the Bisha Mine, is also exempt since the plaintiffs are not considered employees of Nevsun.

I: Jurisdiction

[111] Prof. Andemariam's evidence is that the Eritrean High Court has subject matter jurisdiction over the plaintiffs' tort claims.

[112] As to the contractual relationships, Prof. Andemariam states the SENET-Segen contracts were governed by Eritrean law, while the BMSC contract terms were governed by English and Welsh laws.

[113] Mr. Weldemariam deposes that at all relevant times, Segen's employees were unionized. All of Segen's workers are registered members of the National Confederation of Eritrean Workers ("NCEW"). The terms and conditions of their employment were governed by a collective agreement (the "Segen Collective Agreement") between Segen and the Association of Segen Construction Company Employees (the "Base Union") first made as of April 2000.

[114] Article 28 of the Segen Collective Agreement provides that any dispute arising out of the interpretation of the collective agreement shall be decided by the Office of the Ministry of Labour and Human Welfare. Appeal to the High Court is reserved for both parties.

[115] According to Prof. Andemariam, the agreements in question in this proceeding contained arbitration provisions that provided that arbitral proceedings would be conducted in Asmara, Eritrea. They provide that if the arbitration award was not enforceable, either party could bring an action "in a competent Court of Law", in which case the law of South Africa would apply.

[116] Prof. Andemariam is of the opinion that the combined effect of the provisions of the Segen Collective Agreement and the Labour Proclamation is that labour disputes falling within the scope of the collective agreement would proceed through the conciliation services of the Eritrean Ministry of Labour and Human Welfare, and

failing agreement, to arbitration or the Eritrean Labour Relations Board, depending on the parties' agreement.

J: Additional Background Relevant to Forum

[117] Tigrinya is the primary language of most of BMSC's employees. Local languages are also spoken. Near the Bisha Mine, the local language is Tigre.

[118] The three named plaintiffs all required translation of their affidavits from Tigrinya to English. All of the putative class members who swore affidavits and all of the Segen employees who responded, a further 15 witnesses in all, also required translation from Tigrinya.

[119] Communications between Eritrea and Canada or other western countries can be very difficult. Telephone and internet communications with Eritrea are unreliable. Calls, even on landlines, are often disconnected and where connections are achieved, the quality of the connection is often poor such that it is difficult to hear or be heard. Internet connections and videoconferencing or communicating via Skype or other internet video communications is subject to similar difficulties.

[120] Eritrea is also physically difficult to reach from Vancouver. The only airline connections to Eritrea's capital, Asmara, are through Cairo, Istanbul, or Doha, Qatar. Depending on the schedule of connecting flights, the total travel time from Vancouver can range from 24 to 36 hours. The cost of economy airfare from Vancouver is generally between $3,000-$4,000.

[121] According to Nevsun’s affiant, Pieter Theron, who is the Director of the Bisha Mine for SENET, in 2009 BMSC advised SENET that it had received allegations that Segen was employing military conscripts. BMSC and SENET introduced a screening process requiring Segen employees to attend new safety inductions and provide documentary proof they were free of national service requirements. Two months after this process was initiated, 99% of Segen employees had been re-inducted and had submitted military clearances. A different program, requiring photo ID cards, was instituted in 2011.

[122] The documents from these safety inductions and NSP documentation checks, including the names of all who participated, appear to be in Eritrea or with SENET in South Africa. The same is true of records of Segen employees who attended daily safety briefings.

[123] Other documents, including national service, employment and medical records relevant to the plaintiffs' and putative class members' personal damages, are also located in Eritrea. Some are in the hands of third parties including Segen and the Eritrean government and military. Some documents are in English, others are in Tigrinya.

[124] There is no private or independent media in Eritrea. According to the 2015 UN COI report, the Eritrean government refused to permit the Special Rapporteur of the commission unrestricted access to visit the country and refused to provide the commission with the information necessary to fulfill their mandate. Eritrea has not been open to international human rights observers for many years.

[125] And yet, it would appear from his testimony before the Subcommittee that Mr. Lipsett was provided with extensive access to locations he wished to visit.

[126] The 2015 UN COI report also found an extensive surveillance and spying system in which the Eritrean government systematically recruits individuals to spy on individuals and entities inside and outside the country. Targets of surveillance include conscripts, those trying to escape conscription or flee the country, relatives or critics of the government, members of non-governmental organizations and religious groups, detainees, and individuals suspected of being spies for foreign entities and governments. The information collected is used in arbitrary arrests, unjustified detentions, torture, enforced disappearances, extrajudicial killings, among other things.

IV: THE EVIDENCE APPLICATION

A: Introduction

[127] This application affects certain of the preliminary applications including the Forum, the CIL and the Representative Action applications, and as such, I will consider it first.

[128] Nevsun applies for an order striking portions of the affidavit evidence filed and relied on by the plaintiffs in opposition to the preliminary applications.

[129] It submits its application is not premised upon technicalities but rather engages matters of substance. Limiting the record to those materials that may properly be received in evidence is critical to the proper disposition of the applications and should an appeal be taken by either side.

[130] According to Nevsun, fair process requires the Court to decide the issues solely upon properly admissible evidence. The extremely serious nature of the plaintiffs' allegations and the potential consequences of any judicial determination make this principle all the more important.

[131] It submits that although this is a civil case and the applications are interlocutory, the rules of evidence apply. These proceedings seek to draw the Court into sensitive political issues. Among other things, the plaintiffs seek to establish that:

(a) Eritrea is a "rogue state";

(b) its judicial system is corrupt and completely unreliable; and

(c) a number of individuals, and indeed, the Eritrean government itself, are engaged in or complicit in war crimes and other crimes against humanity.

[132] According to Nevsun, the evidence tendered in support of these allegations:

(a) fails to comply with basic rules of evidence;

(b) even where the evidence is technically admissible, “it is rife with hearsay, is dated, fragmentary, vague and often internally inconsistent”;

(c) it is not material such that it can safely be relied upon, and much of it cannot be used at all.

[133] The plaintiffs take an entirely different approach. Their position is that Nevsun is essentially using a “set of hyper-technical evidentiary arguments to obscure the court’s truth finding function and create an obviously false reality”. They submit that in addition to being legally and factually flawed, Nevsun’s arguments are antithetical to the nature of the issues before the Court and the modern approach to evidence in Canadian law.

[134] They submit that the recent trend in the law of evidence has been to remove barriers to the truth-seeking process. Accordingly, the rules of evidence are not inflexible.

[135] They point to what they say is a most unusual set of circumstances presenting significant impediments to obtaining first hand evidence in Eritrea. This, they say, is due to the political regime.

[136] This application raises issues that include:

(a) the use, if any, that can be made of unattributed hearsay alleged in certain of the affidavits filed on behalf of the plaintiffs;

(b) the use, if any, that can be made of reports, including those of the 2015 and 2016 UN COI, and various reports prepared by the United States Department of State, the EASO, Human Rights Watch, AI, the DIS, the Government of Canada, and the United Kingdom reports pertaining to Eritrea (collectively, the “secondary reports”);

(c) whether transcripts from the House of Commons Subcommittee on International Human Rights of the Standing Committee on Foreign

Affairs (the "Subcommittee transcripts") are admissible and if so for what purpose;

(d) the admissibility of the opinion evidence of the plaintiffs' purported expert on Eritrea, Dan Connell, and certain former judges and lawyers in Eritrea;

(e) whether decisions of the Immigration Review Board ("IRB") are admissible on these applications, and if so, for what purpose;

(f) the effect of allegations of bias regarding the translation of affidavits and certain exhibits in a foreign language.

[137] Chief Justice McLachlin commented on the basic principles of the law of evidence in Canada in *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 30:

> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

[138] In applying this foundational principle I have concluded:

(a) what is clearly unattributed hearsay in certain of the affidavits is inadmissible;

(b) the secondary reports are admitted into evidence for the limited purpose of providing a social, historical and contextual framework to the first hand allegations or properly attributed hearsay in certain of the affidavits filed on behalf of the plaintiffs, and the opinion evidence of the former judges and lawyers and Mr. Ghebremichael relating to

whether there is a real risk the plaintiffs will not receive a fair trial in Eritrea;

(c) the Connell reports, that are in part based on statements contained in certain of the secondary reports, are admitted into evidence for the limited purpose of providing social and historical facts in which to place the first hand evidence of the plaintiffs' affidavits in context;

(d) the opinion evidence contained in the affidavits of the former judges and lawyers is admitted into evidence;

(e) the IRB and Subcommittee transcripts are not admitted into evidence with the exception that the testimony before the Subcommittee of Mr. Lipsett, Mr. Romaine and Mr. Davis to which I have referred is admitted;

(f) the allegations of bias against the translator are dismissed; and

(g) the Court will not consider exhibits in a foreign language that have not been translated into English.

B: Unattributed Hearsay

[139] The issue of hearsay evidence is also raised by Nevsun in the context of other objections I shall refer to below. In this section of my reasons, I shall consider Nevsun's submission regarding unattributed hearsay in certain of the affidavits filed by the plaintiffs.

[140] The rules of evidence clearly apply on interlocutory applications subject to the applicable Rules of Court. In *Warner v. Edmonton Hospital,* [2008] O.J.No. 3252 at para. 5 (Ont. Sup. Ct.), Master Beaudoin addressed the issue of *jurisdiction simpliciter* and *forum non conveniens* in the context of interlocutory applications:

> 5 As Master MacLeod noted in *Mapletoft*, motions are generally argued on the basis of affidavits, but all too frequently, counsel forget that the normal rules of evidence must be applied. Interlocutory motions can be of vital importance to the ultimate disposition of a case and moving parties have a responsibility to put forward the best possible evidence. Findings of fact can be critical and the motions court is frequently called upon to weigh the

> available evidence. In this case, I note that most of the relevant background facts are not seriously in dispute but the serious evidentiary issues all arise in the context of the factors that must be weighed by me on this motion.

[141] Rule 22-2(13) of the *Supreme Court Civil Rules* permits the use of hearsay evidence in an affidavit on an interlocutory application if the source of the information and belief is given, and the affidavit is made in respect of an application that does not seek a final order.

[142] While Nevsun is seeking final orders in the Forum and Act of State applications, the issue arises as to whether the plaintiffs are entitled to rely on hearsay evidence if it is presented in accordance with the requirements of Rule 22-2(13).

[143] As Justice Saunders stated in *Lieberman v. Business Development Bank of Canada*, 2006 BCCA 363 at para 11:

> … any order on a matter of jurisdiction is interlocutory because, in the event the court refuses to decline jurisdiction, the matter in litigation is not finally determined …

[144] Since Nevsun is seeking final orders on two of the preliminary applications, I agree with the plaintiffs that hearsay evidence is permissible in affidavits filed in response to these applications pursuant to Rule 22-2(13)(b)(i) of the *Supreme Court Civil Rules,* and not permissible in affidavits filed in support of these applications.

[145] This is consistent with the approach in Alberta, where the applicant who seeks to dismiss an action on the ground of lack of jurisdiction seeks a final disposition of the action, and, like other applicants for summary judgment, cannot rely on hearsay. The respondent, not seeking to dispose of the action but rather that it proceed to trial, may rely on hearsay: *Court v. Debaie*, 2012 ABQB 640 paras. 33-34.

[146] The issue then becomes whether portions of the affidavits relied on by the plaintiffs offend Rule 22-2(13).

[147] In *Albert v. Politano*, 2013 BCCA 194 at paras. 20-22, Justice Saunders stated:

> [20] In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.) Mr. Justice O'Halloran stated at 188:
>
> > ... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.
>
> [21] In *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 at 137-8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America,* Local 1598, [1982] 6 W.W.R. 744, wherein Madam Justice McLachlin (now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".
>
> [22] The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information. This affidavit, in this paragraph critical to the application, fails to satisfy Rule 22-2(13), is inadmissible, and fails to meet the third *Palmer* criteria.

[148] In *XY, LLC v. Canadian Topsires Selection Inc*., 2015 BCSC 988 at paras. 33 and 36, having reviewed the criteria regarding hearsay in affidavits, Justice Kelleher held that failure to identify the source of the information in an affidavit “is not simply a matter of form. It is substantive”.

[149] Nevsun’s position is that the affidavits filed by the plaintiffs are replete with unattributed hearsay and double hearsay and those portions should be struck.

[150] The plaintiffs’ position is that much of what Nevsun objects to as being unattributed hearsay is not intended to prove a material fact at issue and/or is not submitted as evidence for the truth of the statement.

[151] I will place the parties' positions in context by providing a few examples raised by Nevsun in the 20-page written schedule of objections attached to its written argument.

(a) Abadi Gebremeskel Alemayo: the affiant states that unidentified conscripts told him they had been imprisoned as punishment at the mine; that a SENET station doctor reported his co-worker had heatstroke; a nameless government security agent warned him to flee; a family member told him that security agents came to his house to inquire if he had been there and searched for him;

(b) Gize Yebeyo Araya: the affiant states that people at the Bisha Mine said they were from Divisions 46, 48, and 49; local people employed by SENET said they were making roughly 7,000-8,000 naqfa per month; Merahi Masre told him that a co-worker who had been accused of speaking to foreigners was imprisoned and tortured;

(c) Kesete Tekle Fshazion: the affiant states that a lab technician told him that as a lab technician, that individual was free to leave the mine; he was not;

(d) Yoseif Gebremichael: the affiant states that other men in his unit were never able to satisfy their hunger; that other conscripts who worked for Mereb told him they received 450 naqfa per month; that his pay was reduced for attempting to evade national service; many conscripts lost hope for better conditions at the Bisha Mine; foreign workers told him they were earning 21,000 and 19,000 naqfa; the Mereb officials told him not to disclose he was a conscript to anyone;

(e) Filimon Ghrmay: the affiant states that he had heard many stories of parents or other family members being punished for students who had evaded NSP; he had heard that families would be denied food ration coupons if their children did not attend NSP when required;

(f) Biniam Simon Solomon: the affiant states that he has been told by listeners that Radio Erena is closely followed both inside Eritrea as well as in remote, inaccessible locations outside Eritrea;

(g) Mihretab Yemane Tekle: the affiant states that his colleagues told him they felt weak and that conscripts said their punishment was the "helicopter" form of torture.

[152] I have reviewed all the specific objections raised by Nevsun on this issue and have reached the following conclusions:

(a) to the extent the statements are adduced for their truth, some of Nevsun's objectives are well founded. This should be evident from the above extracts, an example being Mr. Tekle deposing that conscripts had told him they were subjected to the helicopter form of torture or Mr. Gebremichael's statement that conscripts disclosed their wages;

(b) some of the statements are not hearsay because they are not being adduced for their truth but rather to explain why a certain action was taken. For instance, Mr. Ghrmay's statements explain his reason for boarding the bus to Sawa in order to commence his national service. He is stating what he heard in order to explain what he did;

(c) some of the objections relate to observations, not statements. Mr. Gebremichael stating that men in his unit were never able to satisfy their hunger is an example. This evidence is admissible;

(d) Mr. Solomon's evidence regarding Radio Erena while based on unattributed reports from listeners is nonetheless admissible to explain his personal knowledge and understanding as to the breadth of the radio station's accessibility.

[153] Reviewing every objection made in relation to this issue is beyond the scope of these reasons for judgment. Suffice it to say that in my consideration of the applications themselves and in reaching my conclusions in Part IV of these reasons for judgment, I have not considered any unattributed hearsay if, in my view, it was in

fact hearsay evidence adduced as proof as to the truth of its contents as opposed to forming part of the deponent's narrative.

[154] In reviewing the evidence and Nevsun's objections, I am mindful that an affidavit neglecting to set forth grounds of information and belief is not worthless if the court can otherwise ascertain the source of that unstated information and belief: *Re Bowell Estate v. Gill*, 2008 BCSC 1270 at para. 41.

[155] Furthermore, evidence that comes from a variety of sources is not automatically inadmissible. If the evidence as to the source of the knowledge or information is sufficiently detailed for the court to assess the strength of the evidence, the fact of multiple sources will be a factor in determining the ultimate reliability or weight of the evidence: *Ahousaht v. Canada (Attorney General),* 2008 BCSC 769 at paras. 5, 20-21.

C: The Secondary Reports

[156] Nevsun's position is that reports prepared by quasi-governmental and non-governmental ("NGO") agencies are not admissible in evidence. It argues that most if not all of the secondary reports are political documents containing hearsay, double hearsay and argument.

[157] Relying on, inter alia, *Robb v. St. Joseph's Health Care Centre* (1998), 31 C.P.C. (4th) 99 (Ont. Ct. J. (Gen. Div.)), aff'd (2001), 9 C.C.L.T. (3d) 151 (Ont. C.A.); *Rumley v. HMTQ*, 2003 BCSC 234; *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540; and *Radke v. M.S. (Litigation guardian of)*, 2005 BCSC 1355, aff'd 2007 BCCA 216, Nevsun also submits that the secondary reports are akin to inadmissible investigative reports or reports of commissions.

[158] Nevsun also argues that much of the content of the secondary reports is contradictory or inconsistent.

[159] I should note that on August 3, 2016, the parties agreed that the plaintiffs could apply to adduce fresh evidence on these applications. That evidence was the 2016 UN COI report.

[160] At that time, the parties also made additional written submissions relating to the admissibility of this report which largely followed their arguments in the Evidence Application heard earlier this year. I conclude that the 2016 UN COI report meets the criteria for consideration as fresh evidence. The 2016 UN COI report is now included in what I have described as “secondary reports” in these reasons for judgment.

[161] The plaintiffs have relied on the secondary reports both for the truth of their contents, and for the fact that human rights violations in Eritrea have been extensively investigated and documented. They say that the reports also provide direct evidence of the positions of these governmental and non-government bodies on the situation in Eritrea.

[162] They argue that the secondary reports are admissible, at least, for proof of the fact that the relevant organization (the United Nations Human Rights Council, the United States Department of State, and others) investigated human rights abuses in Eritrea and reached the conclusions set out in the various reports. They assert that such evidence is directly relevant to a number of issues arising on these applications: for example, comity between nations and the reasonable expectations of the international community as to whether Eritrea is a functioning state with the requisite requirements of the rule of law and judicial independence which are addressed in this proceeding.

[163] The plaintiffs also submit that the secondary reports are admissible for the truth of their contents since hearsay evidence is admissible on these applications. In addition, they say the reports meet established exceptions to the hearsay rule, and the principled exception since they satisfy the requirements of necessity and reliability.

[164] In the numerous authorities to which I was referred on this issue, courts in Canada have referred to reports from governmental, NGO and other organizations in a variety of contexts. What follows is a table identifying some examples of various reports and how they were considered.

Report	**Authority**	**Treatment**
Human Rights Watch	*Thavachchelvam v. Canada (Citizenship and Immigration),* 2014 FC 601 at para. 9	The applicant's application for risk assessment and exemption to removal from the country, on the basis of humanitarian and compassionate grounds was rejected by a Pre-Removal Risk Assessment Officer. He sought a judicial review. The officer had summarily dismissed all relevant information provided by Human Rights Watch, among other organizations, for the reason that it was "anonymous". The court stated this outright dismissal on this basis was problematic since these organizations were very credible and internationally recognized, and protecting the sources of their information was central to their mandate of exposing human rights violations. The court allowed the application, set aside the officer's decision and ordered returned the matter for reassessment and redetermination
Commissions of Inquiry	*Robb v. St. Joseph's Health Care Centre* (1998), 87 O.T.C. 241, 31 C.P.C. (4th) 99 (Gen. Div.), cited with approval in *Rumley v. HMTQ,* 2003 BCSC 234 at paras. 49-51; *Radke v. M.S. (Litigation guardian of),* 2005 BCSC 1355 at paras. 56-59.	The court found the Royal Commission of Inquiry into the Blood System report inadmissible since the report was based on a record not before the court, the standards of proof of evidence were not applied by the report maker in coming to conclusions and opinions, and it did not determine a *lis inter partes*, thus it was not judicial or even quasi-judicial, and not of binding force. The defendants would not have the opportunity to test the evidentiary findings in the report, thus prejudicing them. Similar conclusions were reached in British Columbia in *Rumley* and *Radke*.
United	*Vancouver (City)*	The City of Vancouver sought to remove

Nations International Human Rights Organization	*v. Zhang,* 2009 BCSC 84 at para. 2	structures erected by Falun Gong practitioners outside the Chinese Consulate. The trial judge referred to statistics in certain reports of the UN and international human rights organizations, as well as an international court's documentation, as supporting the proposition that Falun Gong practitioners are persecuted in China. The type of reports and the purpose of the reports is not specified.
United Nations Human Rights Committee	*Canadian Foundation for Children, Youth and the Law v. Canada,* 2004 SCC 4, paras. 33, 38	The issue in the case was the constitutionality of the exception to the criminal offence of assault, for parents and teachers using corrective force on children. The Supreme Court of Canada accepted the proposition from the Human Rights Committee of the United Nations that corporal punishment of children in schools engages Canada's obligations under international treaties prohibiting degrading treatment or punishment. The type of report and purpose is not specified.
United Nations Statistics	*Bedford v. Canada,* 2010 ONSC 4264 at para. 187, upheld by 2013 SCC 72	The issue in the case was the constitutionality of certain *Criminal Code* provisions against sex-work related activities such as soliciting and living off the avails. The court accepted statistics from United Nations reports as to the number of women involved in the sex trade in the Netherlands and their countries of origin. The type of reports and purposes are not specified in the decision.
United Nations Report	*R. v. Russell & Grenfal,* 2000 BCSC 27	In reasons for judgment on sentencing, the court accepted UN reports on the proliferation of certain drugs and the effects of their use. The type of reports and purposes are not specified in the decision.
Amnesty International reports	*Isakhani v. Al-Saggaf,* 2007 ONCA 539 at para. 38	The issue in this case was child custody. The motions judge concluded the husband had assaulted and abused his wife in the child's presence and there was a reasonable likelihood the violence would continue if the wife and child returned to Dubai, where the husband lived. He relied on and admitted into evidence an AI report concerning violence against women in the region and the inadequate protective legal

		measures. The Court of Appeal found the report was not a study of Dubai, but of a broad region, and mentioned Dubai on two occasions. The report also did not address any failed attempts to address violence against women in Dubai. The Court of Appeal concluded its probative value was slight when weighed against its potential prejudicial effect and should not have been admitted. The Court of Appeal commented on hearsay, and stated reliability and trustworthiness take on added importance when the report is being tendered for the truth of its contents in respect of contested facts. In other words, "the closer the Amnesty International Report came to the dispositive issue, … the closer scrutiny it deserved".
Amnesty International	*Mahjoub v. Canada,* 2006 FC 1503 at para. 72	This was a judicial review of the Minister of Citizenship and Immigration's delegate's decision to remove Mr. Mahjoub on the basis that he was a danger to the security of Canada and that removal to Egypt would probably not subject him to detention or other human rights abuses. The delegate found no substantial risk Mr. Mahjoub would face the death penalty upon return, and in doing so, gave little weight to a 2005 Amnesty International (AI) report concluding that torture is used systematically throughout Egypt stating that the documentation from AI and Human Rights Watch was unreliable and not credible. She relied on US Department of State reports. The court said that while the delegate's conclusion was not patently unreasonable, the delegate's rejection of information from AI and Human Rights Watch was puzzling in the face of the Supreme Court of Canada's reliance on reports compiled by AI [when AI was a party as an intervenor] in *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779 at 829-830, 839.
United States Department of State	*Amnesty International Canada v. Canadian Forces,* 2008 FC 162 at	AI sought an interlocutory injunction to prevent Canada from transferring detainees to Afghan authorities, citing concerns about the measures Canada took to ensure the detainees would not be mistreated by the Afghan authorities. The Federal Court considered the US Department of

	paras. 102ff	State recognition of serious systemic detainee torture and abuse in Afghan prisons. The specifics of the reports and their purposes were not specified.
	BTO v. AA, 2013 ONCJ 708 at para. 103	The issue was whether the mother of the children should be permitted to relocate the children to Nigeria while the father stayed in Canada. The court admitted reports from US State Department on travel concerns in Nigeria, finding they met the principled hearsay exception of necessity and reliability. The court ruled it would treat the evidence cautiously since the reports' authors could not be cross-examined.
	Hamid v. Mahmood, 2012 ONCJ 474 at para. 19	The court admitted a US Department of State report, among others, on the current political and social climate in Pakistan, stating it considered it trustworthy and reliable. The central issue in the case was the mother's application to take the three children to visit their grandmother in Pakistan.
Office of the Correctional Investigator report	*Ewert v. Canada (Attorney General),* 2016 BCSC 962	This was a class action certification hearing. While not admitted for the truth of its contents, Blok J. held the report "was helpful" to place otherwise asserted facts in context.
Secondary Reports concerning India's human rights record including Asian Centre for Human Rights and Human Rights Watch	*India v. Badesha,* 2016 BCCA 88 at para. 30, leave granted SCC	The applicants sought judicial review of a decision of the Minister of Justice which ordered their surrender to the Republic of India on charges of conspiracy to commit murder. The application was granted with the Court stating: "In summary, the body of material presented by the applicants paints a disturbing picture of India's human rights record to custodial confinement".

[165] All that can be drawn from this compilation is that there is no clear answer to this issue. Not surprisingly, the context of the proceeding, including the type of

hearing and the circumstances of the individual case, govern the analysis and conclusions reached.

[166] I do not accept Nevsun's argument that the reasoning relied on in *Robb*, *Rumley*, *Ernewein* and *Radke* is essentially dispositive of this issue. Those cases are distinguishable on the basis that they address applications made at trial or class action certification proceedings to rely on the relevant report as proof of its contents and to prove facts at the centre of the controversy between the parties.

[167] That is not the case with the secondary reports the plaintiffs rely on here. They are not adduced as proof of the plaintiffs' claims. As their counsel note in their written argument, the fundamental issue to which much of this evidence is directed is whether Eritrea is a proper forum for this dispute. The reports do not address, affect, or determine the substantive rights between the parties.

[168] Nor are the reports here analogous to what was considered by Moldaver J.A., as he then was in, *Isakhani v. Al-Saggaf*. The Ontario Court of Appeal concluded that the AI report, which concerned discrimination and violence against women in Gulf Cooperation Countries, was so general that its probative value was at best slight. The report was not even specific to the United Arab Emirates, which was only referred to on a handful of occasions and Dubai was mentioned only in passing.

[169] But *Isakhani v. Al-Saggaf* is of assistance in this respect. At para. 38, the Court referred to the decisions of the Supreme Court of Canada in *R. v. Spence*, 2005 SCC 71, a case on judicial notice. There, Justice Binnie drew a distinction at para. 58 between "social facts" and "adjudicative facts." The latter category encompasses "the where, when and why of what the accused is alleged to have done". Social facts, on the other hand, are those facts that are "used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case". He noted at paras. 56-57 that:

> [Social facts are] difficult to prove, and they do not strictly relate to the adjudication of guilt or innocence, but rather to the framework within which that adjudication is to take place… "social facts" are general. They are not

> specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence.

[170] In *Mahjoub v. Canada* at paras. 72-75, Tremblay-Lamer J. referred to two decisions of the Supreme Court of Canada which dealt with social facts in granting judicial review of a decision of the Minister of Citizenship and Immigration's delegate. The delegate found that the applicant posed a danger to the security of Canada and, in finding that there were sufficient grounds for believing the applicant would not be at substantial risk of torture or other ill-treatment in Egypt, that he should be returned there. Tremblay- Lamer J. stated:

> 72 The delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility (France Houle, "Le fonctionnement du régime de preuve libre dans un système non-expert : le traitement symptomatique des preuves par la Section de la protection des réfugiés" (2004) 38 R.J.T. 263 at para. 71 and at n. 136).
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> 73 This reputation for credibility has been affirmed by Canadian courts at all levels. The Supreme Court of Canada relied on information compiled by AI, as well as one of its reports, in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (S.C.C.)(at 829, 830, 839). That Court also cited AI in *Suresh*, above, at paragraph 11 in noting the use of torture in the context of that case.
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> 74 Similarly, the Federal Court has recognized the reliability of both Amnesty International and Human Rights Watch. For instance, my colleague Justice Michael Kelen referred to a HRW report as "credible" (*Buri v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1358, [2001] F.C.J. No. 1867 (Fed T.D.) at para. 22); another colleague, Justice François Lemieux, stated that an immigration officer erred in failing to consider a current AI report relating to country conditions, where the report was not among the documents she had considered and where the officer's views were contrary to its findings (*Kazi v. Canada (Minister of Citizenship and Immigration),* 2002 FCT 178, [2002] F.C.J. No. 223 (Fed. T.D.) at paras. 28, 30).
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> 75 In *Thang v. Canada (Solicitor General)*, 2004 FC 457, [2004] F.C.J. No. 559 (Fed. T.D.) at para.8, Justice James O'Reilly seemingly recognized that the credibility of AI did not necessarily mandate that a decision-maker agree with the conclusions of its reports, but it did require her to state why she found the report unpersuasive. It remains open to this reviewing Court to assess whether the delegate's treatment of evidence from such credible sources was done arbitrarily or by ignoring crucial evidence.

See also *A.B. v. Bragg Communications Inc*., 2012 SCC 46 at paras. 20-24; *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 at para. 86, where this Court relied on an Expert Advisory Committee report for both specific, mathematical and general conclusions.

[171] In my view, the secondary reports are admissible at a minimum to "connect the dots" of otherwise asserted facts. This was the conclusion reached by Associate Chief Justice Rooke of the Alberta Court of Queen's Bench in *Harrison v. XL Foods Inc.*, 2014 ABQB 720, although the scope of admissibility was very narrow. At issue in *Harrison* was a report of an independent panel appointed by the federal government to investigate a beef recall. Associate Chief Justice Rooke held that three pages of the report could be admitted, despite the hearsay nature of the evidence.

[172] A similar conclusion was recently reached in *Ewert v. Canada (Attorney General)* where Blok J. on a class action certification proceeding stated at para. 39:

> [39] For these reasons I conclude that the OCI Report is not admissible for proof of the facts stated in it, although it is helpful, in the sense described in *Harrison*, in placing otherwise asserted facts in context. It is helpful as well in understanding why a class action may be necessary to encourage a modification in CSC behaviour.

D: Mr. Connell's Reports

[173] The plaintiffs' written argument summarizes Mr. Connell's qualifications. He has spent 39 years researching, reporting, studying and lecturing on the history and politics of Eritrea. He is a Visiting Scholar at Boston University's African Studies Center and the author of seven books and numerous articles on Eritrea. He has lectured and presented papers on Eritrea and has consulted to the US Department of Homeland Security, the Immigration Board of Canada, the EASO, the Norwegian Ministry of Foreign Affairs and Justice and the Swedish Foreign Ministry.

[174] Mr. Connell is tendered as an expert who is qualified to provide an opinion on Eritrean history, historical trends and events, and how those trends and events have shaped current Eritrea.

[175] Nevsun's position is that Mr. Connell is not qualified to provide expert evidence to the Court and submits that his background makes it clear he has a bias and "agenda", being regime change in Eritrea. Nevsun describes him as a journalist who has not been to Eritrea in well over a decade.

[176] Relying on, *inter alia*, *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*, 2014 QCCS 3590 at para. 345, Nevsun also submits that Mr. Connell's reports repeatedly and egregiously violate the rules governing expert opinion evidence. Nevsun claims Mr. Connell does not have expertise, having significant deficiencies in respect of his independence, objectivity, reliability, and transparency, all of which lead inescapably to a conclusion that he is not an "expert witness" in any sense of the word.

[177] In *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 [*White Burgess*], the Supreme Court of Canada summarized the law governing the admissibility of expert opinion evidence. For the Court, Cromwell J. noted at para. 1 that:

> Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted.

[178] At paras. 18-20 of *White Burgess*, Justice Cromwell summarized the framework this way:

> 18 The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.,* at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at

> p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.
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> 19 To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect -- a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.,* at para. 28.
>
> 20 *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[179] The Court outlined a two-step process. In the first step, the proponent of the evidence must establish the four *Mohan* criteria. Expert evidence that does not meet the threshold requirements must be excluded. In the second stage, the trial judge as gatekeeper must balance the potential probative benefits of the evidence against the prejudicial effects to determine whether the potential benefits justify the risks. Once the admissibility criteria are met, the expert's function is to provide the trier of fact with a ready-made inference for the facts to be proven at trial: paras. 23-24.

[180] Justice Cromwell also held that:

(a) the expert's duty is to the court to provide independent assistance by way of objective unbiased opinion. Within that duty are three related

concepts, namely: impartiality, independence and absence of bias: paras. 30, 32;

(b) the "acid test is whether the expert's opinion would not change regardless of which party retained him or her": para. 32;

(c) once the expert attests or testifies that his duty was to the court, the burden is on the party opposing the admission of evidence to show that there was a realistic concern the expert is unable or unwilling to comply with that duty: para. 48; and

(d) this threshold requirement is not particularly onerous and it would only be in rare circumstances that a proposed expert's evidence would be ruled inadmissible for failing to meet it: para. 49.

[181] While the formal requirements of Part 11 of the *Supreme Court Civil Rules* may only apply to expert evidence at trial, not on interlocutory applications (see *L.S. v. G.S.*, 2015 BCSC 377 at para. 17), it remains a fundamental rule of the common law that no expert opinion evidence can be received in evidence without:

> … the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research …
>
> [*Healey v. Chung*, 2015 BCCA 38 at para. 20]

[182] *R. v. Lavallee*, [1990] 1 S.C.R. 852 at 893 [*Lavallee*] is authority for the following common law requirements:

(a) An expert opinion is admissible if relevant, even if based on second-hand evidence;

(b) This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based;

(c) Where expert evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion; and

(d) Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[183] The Court of Appeal addressed the issue this way in *Jones v Zimmer GMBH*, 2013 BCCA 21 at para. 50:

> Experts must as a matter of practical necessity rely on second-hand source material for their opinions. Proponents of expert opinions cannot be expected to prove independently the truth of what the experts were taught by others during their education, training, and experience or the truth of second-hand information of a type customarily and reasonably relied upon by experts in the field. Accordingly, the degree to which an expert opinion is based on hearsay evidence is a matter to be considered in assessing the weight to be given the opinion.

[184] When I apply these principles to Mr. Connell's reports, I conclude that they contain certain deficiencies, including:

(a) his dismissal of the DIS report which is based, at best, on a superficial analysis of its conclusions;

(b) purporting to make findings of fact, an example being the statement that "interviews with refugees confirmed that these practices continued unabated";

(c) commenting on the credibility of anonymous refugees when he states "there was little possibility that answers had been coached or prepared"; and

(d) it is problematic at times to differentiate between his "concerns" regarding the human rights situation in Eritrea and his opinions although one is likely largely synonymous with the other.

There are others.

[185] Notwithstanding these deficiencies, I have concluded that the Connell reports should be admitted into evidence for a limited purpose being to describe "social" or "historical" facts which are of assistance to the Court in giving context to the first-hand evidence of the plaintiffs' affiants and opinions arising therefrom. My reasons include:

(a) I accept that Mr. Connell has the necessary qualifications to provide opinion evidence. He has also provided an attestation recognizing and accepting that his primary duty is to the court;

(b) I do not accept Nevsun's argument that this is one of those "rare circumstances" that the opinion evidence is inadmissible at the first stage of the White *Burgess* analytical framework. Mr. Connell explains in his second report the context of a speech he made in May 2013 that included comments regarding the exertion of pressure on foreign mining interests to cause regime change in Eritrea;

(c) Nevsun must establish that there is a "realistic concern" that Mr. Connell's evidence should not be received because he is unable and/or unwilling to comply with his duty to the court. It has not done so. Anything less than clear unwillingness or inability to provide the court with fair, objective and non-partisan evidence should not lead to exclusion, but be taken into account in the overall weighing of the costs and benefits of receiving the evidence at the second stage of the *White Burgess* framework;

(d) I accept that the opinions are the result of independent judgment and that they do not unfairly favour the plaintiffs' position in the litigation over that of Nevsun. I am satisfied that Mr. Connell's opinions would not change regardless of which party had retained him;

(e) unlike in *Churchill Falls,* Mr. Connell is not providing a historical narrative or acting as an "intermediary", synthesizing source materials into a historical narrative. He has provided his own assessment based

substantially on his own work that includes researching the history and politics of Eritrea;

(f) the secondary reports to which Mr. Connell refers are the type of research found to be acceptable in an expert's methodology in formulating his/her opinion. Experts are expected to identify the research they conducted or relied on in formulating their opinion. The fact that the research itself may consist of studies or reports potentially containing hearsay or unattributed hearsay does not render the expert's opinion inadmissible. That is an issue to be explored on cross examination, the results of which may or may not affect the weight the court gives to the opinion; and

(g) for these preliminary applications, Nevsun chose not to cross examine Mr. Connell on his reports. Had it done so, it may have been better placed to impugn his research and/or methodology.

E: The Evidence of the Former Judges and Lawyers

[186] The plaintiffs rely on affidavits from former Eritrean judges and lawyers who give evidence about interference in the Eritrean justice system: Yonas Gebreselassie, Biniam Ghebremichael, Abdalla Khiyar, Tsegazghi Tesfaldet, Isaias Tesfalidet, and Kifleyonhanes Teweldebrhan Yeibio. I have referred to portions of their evidence above.

[187] Nevsun's position with respect to the admissibility of this evidence includes the assertion that this evidence:

(a) is non-compliant with the requirements for the admissibility of expert evidence, specifically, the former judges and lawyers are neither qualified nor objective and they do not disclose counsel's instructions nor provide answers to those instructions;

(b) contains impermissible hearsay and argument;

(c) is generalized and anecdotal; and

(d) is of limited relevance.

[188] The plaintiffs' position with respect to the admissibility of this evidence includes the following assertions:

(a) technical non-compliance with Part 11 of the Rules, to the extent they apply on interlocutory applications, should not defeat the interests of justice; in any event Messrs. Ghebremichael, Gebresslassie and Tesfalidet have provided attestations accepting their duty to the court;

(b) the evidence meets the common law requirements for the admissibility of expert evidence;

(c) Nevsun has not provided any basis on which to conclude that the affidavits are in fact biased; and

(d) the evidence is hybrid in nature in that it contains both first hand facts and opinion.

[189] The plaintiffs are correct as to the dual nature of this evidence. To the extent that it is based on the personal observations and experiences of the affiant, it is properly admissible. In that regard, I do not consider the term "anecdotal" in the sense it was used in *R. v. Sekhon*, 2014 SCC 15, that is of the "never" or "always" kind to be accurate here.

[190] I also conclude that to the extent the affidavits of the former judges and lawyers contain opinions, the affidavits can be admitted into evidence even if certain of them do not contain the attestation required by Rule 11-2.

[191] I accept the plaintiffs' submission that the evidence provided by the former Eritrean judges and lawyers meets the common law requirements for the admissibility of expert evidence set out in *Mohan*:

(a) the evidence is relevant to an issue in dispute, namely, whether Eritrea is a clearly more appropriate forum for the resolution of the plaintiffs' claims;

(b) the opinions are necessary in assisting the Court to appreciate the facts and form a correct judgment on the evidence, including:

i. whether executive interference with the judiciary is sufficiently widespread that there is a real risk of the plaintiffs not obtaining a fair trial in Eritrea. Nevsun's expert, Prof. Andemariam, refers to executive interference in his evidence and this, together with the direct evidence of the former judges and lawyers, provides a factual matrix from which it could be concluded that executive interference with the judiciary is not geographically constrained nor constrained to a particular court; and

ii. executive interference in judicial function has taken different forms, ranging from suggestions of desired outcomes in cases all the way to violence and imprisonment of judges;

(c) the evidence is not excluded under another rule of evidence; and

(d) the evidence is given by properly qualified experts, that is individuals who by their experience have acquired a special or peculiar knowledge of the subject upon which they are giving evidence. This special knowledge was acquired through personal experience with interference and intimidation in the performance of their respective professions. They have knowledge or experience outside that of this Court.

[192] As was the case with the evidence of Mr. Connell, I do not need to consider the entirety of the evidence of the former judges and lawyers to have the proper evidentiary foundation for analysing the issues. The evidence I have considered is contained in Part III above.

F: The IRB Decisions and the Subcommittee Transcripts

[193] The plaintiffs rely on IRB decisions appended as exhibits to the affidavit of Mr. Jared Will, an immigration lawyer who practices in Toronto.

[194] These are 14 redacted decisions on applications for refugee status made by Eritrean nationals. None involved the plaintiffs or putative class members.

[195] The plaintiffs submit that they rely on these decisions primarily for purposes other than the truth of their contents. Accordingly, they are not hearsay. They argue that at a minimum, the decisions are admissible for the fact the IRB reached the conclusions in them.

[196] They also submit that the IRB maintains a central repository of relevant documents for each country of origin referred to as the National Documentation Package (the “NDP”). The NDP is updated at regular intervals, and each document is screened by a panel of experts for reliability. Many of the reports relied on by the plaintiffs are, or have been, included in the IRB’s NDP for Eritrea. They say that the IRB has a highly specialized expertise in making the kinds of factual determinations at issue on these applications. Accordingly, they invite the Court to find the IRB decisions reliable and to accept as reliable the documents that are or have been contained in the IRB’s NDP.

[197] I accept Nevsun’s argument that the IRB decisions should not be admitted into evidence.

[198] The selected decisions do not appear to be a random or statistically valid sample of the "well over one hundred" cases involving Eritrean refugee claimants that Mr. Will’s firm has worked on over the past two years, not all of which have been successful.

[199] Furthermore, the standard applied by the IRB in reaching its decisions is that "[t]he affirmed testimony of refugee claimants is presumed to be true unless it is internally inconsistent, inherently implausible or contradicted by documentary evidence on country conditions". That is not the standard of proof in this Court.

[200] In any event, as stated in *Dhillon v. Dhillon*, 2006 BCCA 524 at paras. 56-61 by Thackray J.A. (Finch C.J.B.C. concurring), the reasons for judgment in one case are not admissible in evidence and have no probative value in other litigation.

[201] Nevsun also objects to the admissibility of the transcripts from the House of Commons Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, from November 1, 2012, June 5, 2014, and March 12, 2015, all of which relate to hearings on human rights issues in Eritrea.

[202] The plaintiffs' position is that the Subcommittee transcripts are admissible as direct evidence of the views of the Canadian government. They are also admissible for the truth of their contents as an exception to the hearsay rule on the basis that they are both necessary and reliable.

[203] I disagree. If the plaintiffs wished to lead the evidence of the Canadian Government on this issue, there are other ways this could have been accomplished including obtaining evidence directly from an authorized representative. I need not consider whether that evidence would have been admissible in any event.

[204] I will consider the testimony of Mr. Lipsett, Mr. Romaine and Mr. Davis on the limited basis set out above. Although Nevsun objected to the admissibility of the transcripts, I am assisted by their testimony in the sense that it gives a broader context to the evidence of Nevsun's affidavits and Nevsun's objections to the secondary reports.

G: Miscellaneous Objections

[205] Nevsun objects to the admissibility of the report of Dr. Donald Payne, a Toronto psychiatrist, who in his affidavit, states that he has "been retained by the plaintiffs…to provide an opinion on the psychological and other barriers, if any, that members of the Claimant group may face in returning to Eritrea to seek access to justice in Eritrea".

[206] In preparing his report, Dr. Payne considered various secondary materials, including a Human Rights Watch report. He also acknowledges he has:

> not had the opportunity to examine the individuals in question, but based on the allegations in the NOCC and the facts provided regarding the claimants

> identified as B and F, including the severe and prolonged nature of their abuse, it would be expected that they would have PTSD symptoms.

[207] Dr. Payne opines that the matters he has considered would "act as a strong barrier preventing [B & F] from returning to Eritrea to seek access to justice there".

[208] In their submissions, the parties focussed on whether the fact Dr. Payne had not examined the claimants rendered the report inadmissible or went to the weight of the opinions expressed.

[209] There are different views on this issue in this Court which I need not consider.

[210] One of the prerequisites to expert evidence being admissible is that it will assist the trier of fact.

[211] I will not be assisted by this report and it is not admitted into evidence. Common sense would suggest that certain psychological consequences would result if:

(a) what the plaintiffs say is true as to what occurred at the Bisha Mine and the circumstances under which they fled Eritrea; and

(b) they face the consequences to which I refer in my decision on the Forum Application, in the event they be required to return to Eritrea to proceed with their claims against Nevsun.

[212] Nevsun objects to the admissibility of five affidavits translated by Elisabeth Chyrum, an advocate for Eritrean human rights. It also objects to certain exhibits appended to two affidavits which are not in English and are without translation.

[213] Nevsun argues that Ms Chyrum’s precise involvement with the plaintiffs and their counsel team is unclear. It appears she may have been involved in bringing one or more of the plaintiffs to legal counsel.

[214] Nevsun relies on *Luu v. Wang,* 2011 BCSC 1201 at paras. 13-16 for the proposition that where there are legitimate reasons to doubt the objectivity and impartiality of an interpreter, an interpreted affidavit will be inadmissible.

[215] But at paragraphs 15 and 16 of *Luu*, Burnyeat J. stated:

> [15] Where, like here, a reasonable doubt has been raised about the interpretation, the Court is in a position to conduct an inquiry into the qualifications of the interpreter or to set into motion a new interpretation which complies with the qualifications that should be expected of all interpreters.
>
> [16] Here, there are legitimate reasons to doubt the objectivity of the interpreter. In the circumstances, I am satisfied that the Plaintiff has raised sufficient doubt regarding the competency and neutrality of the interpreter that it is appropriate to require a new affidavit from Songbai Zou
>
> [Emphasis added.]

[216] There is nothing before the Court which raises a reasonable doubt regarding the translations of the affidavits in question. That Ms. Chyrum's advocacy for regime change in Eritrea may have affected the objectivity and partiality of her translations is purely speculation.

[217] Accordingly, the affidavits are admitted into evidence in accordance with my other rulings on the Evidence Application.

[218] I agree with Nevsun that the untranslated exhibits cannot be received into evidence: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* 2013 SCC 42 at paras. 1-2.

[219] Nevsun also submits that four affidavits delivered in late November and early December 2015 should not be admitted into evidence since they were not served in accordance with what it describes as "the parties' ambitious schedule for these motions". One of those affidavits contained Mr. Connell's second report.

[220] I disagree. While the parties are to be complimented on the manner in which they worked collaboratively to have these preliminary applications heard, the substantive issues are such that it would be prejudicial in the extreme to the plaintiffs if these affidavits were not received into evidence on this basis.

[221] This proceeding had been under judicial case management for some time as at late November 2015 with the applications set to be heard commencing January 5, 2016 for four weeks.

[222] One of the benefits of case management is that the Court may be in a better position to attempt to accommodate the parties if situations such as what happened here, occurs.

[223] In fact, at the request of the parties, the hearing of the last of the preliminary applications was adjourned for several weeks when the plaintiffs delivered a revised litigation plan.

[224] I have little if any doubt that a similar accommodation could have been arranged had Nevsun sought an adjournment of the preliminary applications on the basis that it had been prejudiced by the timing of the delivery of these affidavits.

H: Conclusions

[225] In arriving at my decisions on the many issues raised on the Evidence Application, I have been guided primarily by two principles:

(a) the flexible adaptation of the rules of evidence to the particular circumstances of this case in accordance with *Mitchell v. CPR* above; and

(b) the importance of the cost/benefit analysis and the Court's role as gatekeeper as articulated in *White Burgess*.

V: THE FORUM APPLICATION

A: Introduction

[226] This Court has presumptive jurisdiction over this proceeding since Nevsun is a British Columbia company.

[227] Nevsun applies pursuant to R. 21-8(2) and s.11 of the *CJPTA* for a stay of proceedings on the basis that the courts of the State of Eritrea are a more

appropriate forum for the proceeding. The object of the s. 11 inquiry is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties". Nevsun asserts that jurisdiction is Eritrea.

[228] The plaintiffs oppose the application. They say that Nevsun is seeking to avoid all judicial scrutiny of its conduct by having this case transferred to the very country which they assert violated their human rights and caused them significant damages.

B: The Legal Framework

[229] Section 11 of the *CJPTA* outlines how the court may exercise its discretion with respect to territorial competence and provides:

> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[230] In *Garcia v. Tahoe Resources Inc.,* 2015 BCSC 2045 [*Garcia*], Justice Gerow summarized certain applicable principles:

> [32] The factors set out in s. 11(2) of the *CJPTA* are not exhaustive: *Laxton v. Anstalt*, 2011 BCCA 212, at para. 44. In *Huang v. Silvercorp Metal Inc.*, 2015 BCSC 549 at para. 33, discussed the additional factors set out in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, which include:
>
> (a) the residence of the parties, witnesses, and experts;

(b) the location of material evidence;

(c) the place where the contract was negotiated and executed;

(d) the existence of proceedings pending between the parties in another jurisdiction;

(e) the location of the defendant's assets;

(f) the applicable law;

(g) advantages conferred on the plaintiff by its choice of forum, if any;

(h) the interests of justice; and

(i) the interests of the parties.

[33] The weight to be attributed to the various factors is a matter of discretion. The analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate: *Breeden v. Black,* 2012 SCC 19 at para. 37.

[34] The defendant must establish an alternate forum is clearly more appropriate and should be preferred. As stated in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103:

> 103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[35] The objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and a more efficient resolution of their dispute. In *Van Breda*, the Court stated at paras.108-110:

> 108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".

> 109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.
>
> 110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

[Emphasis added.]

[231] These “factors are simply a more detailed articulation of the criteria set out in s.11(2)” and “[t]he only inquiry mandated by the *Act* is a consideration of the enumerated factors in s.11(2)”: *JTG Management Service Ltd v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 23 [*JTG Management*].

[232] As Nevsun outlines in its written submissions:

(a) in exercising its s. 11 discretion, if the court has regard to considerations of juridical advantage, it must do so within appropriate limits. The Supreme Court of Canada has cautioned that “an emphasis on juridical advantage may be inconsistent with the principles of comity” and may erroneously lead courts to view difference or disadvantage “as a sign of inferiority”. Juridical advantage also

balances out, since a juridical advantage to one party to proceeding in a forum is a corresponding juridical disadvantage to the other. Indeed, "simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach" to conflicts rules, or indeed, to order, fairness and the actual language of s. 11. "[I]t is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win". It follows that juridical advantage should "not weigh too heavily" in the forum analysis: *Breeden v. Black,* 2012 SCC 19 at paras. 26-27 [Breeden];

(b) the defendant seeking a stay under s. 11 bears the burden of demonstrating that an alternative forum is a "more appropriate forum in which to hear the proceeding". The central consideration is whether the alternative forum is "in a better position to dispose fairly and efficiently of the litigation". At the same time, the discretion to decline to exercise territorial competence serves as an "important" counterweight to the liberal standard for assuming territorial competence:

> But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.
>
> [*Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 at para. 109 [*Van Breda*]]

(c) it has been held that "a court will generally be reluctant to stay proceedings without some evidence that the proposed alternate forum will have territorial competence". This concern can also be addressed by the agreement of the party seeking the stay to attorn to the alternate forum, as a term of the order: *Douez* v. *Facebook, Inc.,* 2015 BCCA 279 at para. 38, leave to appeal to the SCC granted 2016 CanLII 12162, citing *Lubbe v. Cape Plc,* [2000] UKHL 41 at para. 50;

(d) in a forum challenge under s. 11, the court makes a global assessment of relevant considerations: *Breeden* at para. 37. The relevance and

weight given to individual factors will vary depending on the context and "the actual circumstances of the parties": *Van Breda* at para. 104. The "doctrine [of *forum non conveniens*] focuses on the contexts of individual cases": *Van Breda* at para. 105. The exercise of the court's discretion must be guided by "the mandates of order and fairness, not a mechanical counting of contacts or connections": *Young v. Tyco International of Canada Ltd.,* 2008 ONCA 709 at para. 30, citing *Hunt v. T&N plc,* [1993] 4 S.C.R. 289. Ultimately, what is sought is a case-specific determination, the purpose of which is "to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient": *Van Breda* at para. 105;

(e) the objective of the s. 11 analysis is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties": *Teck Cominco Metals Ltd. v. Lloyd's Underwriters,* 2009 SCC 11 at para. 38; and

(f) order and fairness are the "twin objectives" of the "doctrine of international comity": *Spar Aerospace Ltd. v. American Mobile Satellite Corp.,* 2002 SCC 78 at para. 20. International comity, in turn, is one of the "key principles underpinning the various private international law rules": *Spar Aerospace* at para. 15. Comity is "an attitude of respect for and deference to other states": *Van Breda* at para. 74. Comity serves to "ensure order in the conflicts system", prevent "parochialism", and to make our courts "more tolerant of foreign law than they might otherwise have been": *Spar Aerospace* at para. 18. In this way, it serves the larger goals of the modern conflicts system, "to facilitate exchanges and communications between people in different jurisdictions that have different legal systems": *Van Breda* at para. 74.

[233] Furthermore, as Gerow J. noted in *Garcia*:

> [105] In my view, the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens. To hold otherwise is to ignore the principle of

> comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard.

C: Parties' Positions

[234] Nevsun's position is that both the *CJPTA* and additional factors militate in favour of an order staying the proceedings. Its reasons include:

(a) the comparative convenience and expense for the parties and their witnesses overwhelmingly favours proceeding in Eritrea. The representative plaintiffs and putative class members are all Eritrean nationals who were in Eritrea at the relevant times. The vast majority of the witnesses - hundreds, if not thousands - are in Eritrea. These witnesses will not be able to give evidence in person in British Columbia and this Court will be denied the ability to see them firsthand and assess their evidence. The grave nature of the allegations and the sharp contradictions in the evidence that already exist make this essential. The majority of the documentary evidence necessary to adjudicate the plaintiffs' claims, including the critical question of whether the three named plaintiffs were ever at the Bisha Mine, as they claim, is in Eritrea and in the Tigrinya language. Neither practical nor substantial justice can be done if this action proceeds in British Columbia;

(b) that Eritrean law applies results from a straightforward application of the *lex loci delicti* rule. There is a strong preference to have a dispute that is governed by the law of a particular jurisdiction resolved there;

(c) staying this proceeding ensures that the plaintiffs are not able to circumvent Eritrean law's allocation of subject matter competence over labour claims to specialised labour tribunals;

(d) proceeding in Eritrea avoids the jurisdictional problems posed by the class being composed entirely of persons outside British Columbia;

(e) proceeding in Eritrea also avoids the jurisdictional limitation imposed by the act of state doctrine. This doctrine applies because this Court is not an international court, yet is being asked to sit in judgment on the acts of a foreign sovereign, the State of Eritrea, in its own territory. The rule has no application in Eritrea. In fact, its very purpose is to ensure that claims such as this are brought in Eritrea and not elsewhere;

(f) the overall mandates of order and fairness point to the courts and tribunals of Eritrea as the most appropriate fora for determining the issues between the parties; and

(g) it is also for the plaintiffs to establish that there is a real risk that justice will not be obtained in Eritrea and to adduce positive and cogent evidence in that regard and they have not done so.

[235] The plaintiffs' position is that Nevsun has failed to establish that Eritrea is clearly a more appropriate forum. Specifically, it has failed to demonstrate that in light of the political and judicial culture in Eritrea, it would be fairer and more efficient to have the proceeding heard there; and that the plaintiffs should be denied the benefits of their decision to select a forum under the conflicts rules, in this case the jurisdiction where Nevsun is incorporated and where it governs its affairs.

[236] The plaintiffs focus their submissions on whether there is a real risk that justice will not be obtained for them in Eritrea. They say they have adduced positive and cogent evidence that this is indeed the case which includes:

(a) the plaintiffs face severe barriers to justice in Eritrea given their status as traitors who cannot return to Eritrea;

(b) the Eritrean judiciary is not independent and is subject to extensive interference by the executive, the military and the Special Courts;

(c) Eritrea does not have a constitution or functioning legislature. The basis by which presidential decrees and statements become "law" is therefore obscure;

(d) Eritrea does not recognize CIL;

(e) the Eritrean legal system is not fully developed and has significant gaps in the areas of evidence, jurisdiction and choice of law;

(f) there are perhaps fewer than 10 lawyers remaining in the country who are licenced to practice in the High Court of Eritrea;

(g) the practice of representation by contingency fees arrangements is unknown for a case of any complexity; and

(h) the state operates an extensive surveillance and spy network within Eritrea.

D: Discussion

The CJPTA Factors

[237] I will now consider both the *CJPTA* and additional factors referred to in the authorities bearing in mind that:

(a) the analysis is highly individualized and contextualized to the circumstances of this case;

(b) the list is non-exhaustive, that all factors need not point to a single forum;

(c) that the process is not to be a "tallying up" of the various factors, as per *Garcia*. It is for Nevsun to establish that Eritrea is clearly the more appropriate forum.

[238] First, the Court must determine when the analysis should occur of whether a fair and impartial trial is possible in Eritrea.

[239] The plaintiffs point out that the enumerated factors in s. 11(2) of the *CJPTA* do not specifically address the rare circumstances where the foreign court is not available to plaintiffs because of a fear of persecution or lack of judicial independence. Such factors are not easily captured under the notion of comparative convenience which tends to focus on such traditional factors as the location of the parties and the witnesses.

[240] Accordingly, they submit that this should be considered as a threshold issue which they say was the case in the *889457 Alberta Inc. v. Katanga Mining Ltd*., [2008] EWHC 2679 at paras. 33-34.

[241] I disagree. That is because, s. 11(2) contains mandatory language, that "the court must consider". In *Teck Cominco*, Chief Justice McLachlin for a unanimous court noted that consideration of the s.11 factors is mandatory in every case:

> The first argument is that s. 11 of the *CJPTA* does not apply where a foreign court has asserted jurisdiction. I cannot agree. The *CJPTA* creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. This includes the desirability of avoiding multiplicity of legal proceedings. But the prior assertion of jurisdiction by a foreign court does not oust the s. 11 inquiry.
>
> [22] Section 11 of the *CJPTA* was intended to codify the f*orum non conveniens* test, not to supplement it.
>
> …Section 11 of the *CJPTA* thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum

[242] In *Garcia*, what I shall term the "real risk of an unfair trial" issue was dealt with in the s. 11(2)(a) analysis and I will do likewise in this case. The alternative was to consider the issue separately after examining the statutory factors. In my view, considerations such as the availability of witnesses and documents, for example, may overlap with the broader issue of the real risk of an unfair trial in that the issue of whether witnesses will in fact come forward if the trial occurs in Eritrea could relate to both.

[243] I intend to take a broad interpretation of the term "convenience" since a real risk of an unfair trial is likely not convenient for the plaintiffs.

[244] There is no doubt this will be a complicated proceeding whether it takes place in British Columbia or Eritrea.

[245] Expanding upon what is set out in paragraph 234 above, the factors raised by Nevsun that militate in favour of Eritrea include:

(a) there may well be hundreds of witnesses and many thousands of documents depending on how the case proceeds. The witnesses include employees of BMSC, Segen and SENET, including those employed by BMSC and SENET, who supervised and worked alongside the Segen employees, the vast majority of whom were Eritreans. They also include Segen management and Segen supervisors at the Bisha Mine. Some of these are identified in the affidavits delivered by the plaintiffs and their witnesses. Others are mentioned in the minutes of weekly progress meetings. Segen witnesses also include:

i. those employees who were housed at the Bisha Mine camp but who were exempt, released or demobilized from NSP;

ii. those NSP members who lived in the same camp but worked on the public road project described by Messrs. Weldemarian and Rogers;

(b) witnesses may also include union officials (both from the Segen Base Union and the NCEW); officers and members of the Eritrean military; Mereb management, supervisors and employees; members of local communities like Mogoraib, where the Segen employees socialised during their time off; and Eritrean government officials. Those who entered into the unlawful conspiracy alleged by the plaintiffs may well be important witnesses, as will the Segen managers who made the alleged agreement in mid-2009 to bring in workers from Mereb and the mechanized branch of the armed forces designated as “74”, as described by Mr. Alemayo;

(c) as Nevsun notes, the documentary evidence gives some indication of the order of magnitude of the number of witnesses: there were over 1,700 persons on site at the Bisha Mine in the month of August 2010 alone. BMSC had 934 employees in 2011 and 1,085 in 2012;

(d) the named plaintiffs suggest that if the class succeeds at trial, they expect the class members to be given "the opportunity to participate because their involvement may be necessary at that stage to prove their damages". This raises the prospect of individual inquiries to prove damages. This would in turn require witnesses, including family members, employers, health care professionals, and economists or other experts, in respect of each putative class member's claim for damages. Many of those witnesses, too, would be found in Eritrea, where the class members resided at the relevant times;

(e) most of the Eritrean witnesses will speak Tigrinya. The BMSC, SENET and Segen employees from the communities surrounding the Bisha Mine speak Tigre. The named plaintiffs themselves do not speak or read English. Obtaining and translating evidence will pose considerable challenges and will lengthen the trial;

(f) most of the relevant documents, with the exception of Nevsun's own documents, are held in Eritrea or South Africa. These include documents held by the Eritrean government and military;

(g) communications between the two countries, including telephone and internet is unreliable. Videoconferencing or communicating via Skype or other internet video communications is subject to similar difficulties. Travel time from Vancouver can range from 24 to 36 hours with the cost of economy airfare from Vancouver generally between $3,000-$4,000;

(h) attempting to take evidence on commission in Eritrea from so many witnesses would be extremely difficult and would also deprive the Court of hearing this important evidence firsthand; and

(i) Eritrean nationals are required to obtain entry visas before entering Canada. Similarly, Canadian or other nationals must obtain entry visas to travel to Eritrea. Further authorizations are required to travel within Eritrea, including to the Bisha Mine.

[246] Nevsun cites other factors as militating in favour of Eritrea.

[247] The factors raised by the plaintiffs that militate against Eritrea include:

(a) the plaintiffs may be considered to be traitors in Eritrea, and practically precluded from returning to that country. In any event they will not do so. There is a real risk that witnesses will not come forward to testify out of fear and that judges would be fearful to rule in the case. The former judges have given clear accounts of witnesses being intimidated, arrested and in some cases beaten as a result of their testimony in court;

(b) the evidence of Prof. Andemariam is that the military refuses to cooperate in the judicial process and will not make its personnel available to testify;

(c) witnesses and counsel in Eritrea may be subject to internal travel restrictions;

(d) it is for Nevsun to satisfy the court that there is a system in place in Eritrea whereby proper documentary disclosure could occur and also to demonstrate how the evidence would be made available in a court proceeding in that country. It has failed to do so;

(e) Nevsun's own expert, Prof. Andemariam, has recently commented on "the problems and inconsistencies in the admission, analysis and weighing of evidence" in Eritrean courts in the absence of comprehensive evidence legislation. In particular, he notes that the law of evidence serves to secure fairness in trials. The Eritrean legal system exists in a legislative vacuum regarding comprehensive evidence law. This has resulted in Eritrean courts being unable to

confidently answer questions of evidence and, consequently, discrepancies in rulings and judgments in similar cases;

(f) there are additional difficulties raised by Prof. Andemariam including the fact there is no legal framework for the admission of foreign documents or testimony into evidence. It appears the practice is to require authentication of evidence by Eritrean embassies or consular offices.

[248] The events forming the basis of the plaintiffs' claims occurred in Eritrea. While allegations of primary and secondary liability are advanced against Nevsun regarding decisions in its Canadian corporate offices, those decisions are all related to events the plaintiffs say occurred in Eritrea, allegedly in concert with Eritrean entities and SENET.

[249] I commence my analysis by noting that to the extent an ordinary or typical case exists, the numbers of witnesses and documents and their location in Eritrea would be granted significant weight.

[250] But this is far from being a typical case. It will be challenging to manage and conduct a trial fair to all the parties no matter the jurisdiction.

[251] For the following reasons, I have concluded:

(a) Nevsun has not established that comparative convenience and expense favours Eritrea as the appropriate forum; and

(b) there is a real risk of an unfair trial occurring in Eritrea.

[252] It is for Nevsun to establish that it would be fairer and more efficient for this action to be stayed and heard in Eritrea: *Van Breda* at para. 109.

[253] Nevsun relies on a line of English authorities and submits it is for the plaintiffs to establish that "there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption" and this must be supported by "positive and cogent" evidence, anecdotal evidence being

insufficient: *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors (Isle of Man)(Rev 2)*, [2011] UKPC 7 at paras. 92, 95 [*AK Investment*]; *Mengiste v. Endowment Fund for the Rehabilitation of Tigray*, [2013] EWHC 599 (Ch.) at para. 144 [Mengiste]; *Standard Bank Pic & Anor v. Just Group LLC & Ors,* [2014], EWHC 2687 (Comm.) at para. 215; *Ferrexpo AG v. Gilson Investments Ltd.*, [2012] EWHC 721 (Comm) at paras. 44-57 [*Ferrexpo*].

[254] The plaintiffs do not approach this issue from the perspective of whether they have the burden of proof on this issue. Rather, they submit that in assessing whether Nevsun has discharged its burden the Court should proceed on the basis of the plaintiffs' allegations, provided there is some basis in the record to support them. As stated by the Ontario Court of Appeal in *Young* at para. 34:

> [34] However, the important point is that at this preliminary stage of the action, the motion judge's assessment and weighing of the *forum non conveniens* factors should be based on the plaintiff's claim if it has a reasonable basis in the record, not on the defendant's defence to that claim. This approach makes sense to me because the ultimate question is whether an Ontario court should take jurisdiction over the plaintiff's claim.

[255] The Canadian approach to the issue is focussed not on whether Canada's legal system is fairer and more efficient than the foreign forum, but whether the foreign legal system is capable of providing justice to the parties in the proceeding: *Garcia* at para. 64.

[256] In my view, the correct approach is that while Nevsun must satisfy the court that the comparative convenience and expense for the parties favours Eritrea, the plaintiffs must provide sufficient evidence such that the court can conclude that there is a real risk that they will not receive a fair trial in that forum.

[257] In any event, as Justice Satanove [Kloegman] stated in *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw,* [1999] BCJ No. 150 at para. 68:

> [d]eciding who carries the burden of proving something only becomes crucial if there is insufficient evidence on a point or an even balancing of evidence for and against a particular contention.

[258] In my view, this is not one of those situations. There is sufficient cogent evidence from which I can conclude that there is a real risk that the plaintiffs could not be provided with justice in Eritrea.

[259] This evidence is set out in Part III to these reasons for judgment and includes:

(a) the first hand and opinion evidence of the former judges and lawyers and Mr. Biniam Ghebremichael;

(b) portions of the opinion evidence of Mr. Connell and Prof. Andemariam;

(c) portions of the secondary reports to which I have referred and have determined are admissible, and which place in context many of the asserted facts of the various affiants.

[260] The circumstances in this case are much different from those in *Garcia* and the additional authorities relied on by Nevsun.

[261] In *Garcia*, the plaintiffs were Guatemalan residents, not refugees who had fled the country having made allegations of persecution and repression. At the time of the hearing of the *forum non conveniens* motion, they were also civil claimants in Guatemala in the criminal proceedings brought against the head of the defendant mine's security forces. No similar proceedings are ongoing in this case in Eritrea and the plaintiffs have expressed their reasons for not returning to that country. In *Garcia,* the plaintiffs also had the benefit of *pro bono* legal representation in Guatemala.

[262] Nevsun submits that *Bil'in (Village Council) v. Green Park International Inc.,* 2009 QCCS 4151, aff'd 2010 QCCA 1455, is closely analogous to this case. But there are several material distinguishing features which include:

(a) *Bil'in* did not involve a group of refugee plaintiffs who had fled what they alleged to be persecution in their country of origin;

(b) the plaintiffs were resident in the Israeli-occupied West Bank. There was no suggestion that Israeli courts lacked independence or that the

rule of law was weak in Israel. In fact, the plaintiffs had engaged the Israeli courts on a number of actions relating generally to the same dispute as was brought to the Quebec courts;

(c) there was also no suggestion that the Israeli state was engaged in widespread human rights violations against its citizenry;

(d) the defendant corporation was registered in Quebec but had no active presence there which is not the case with Nevsun and British Columbia.

[263] In *Ferrexpo,* the suggested alternative forum was the Ukraine. That case is also readily distinguishable in that:

(a) there was no suggestion of widespread human rights violations by the state;

(b) the undisputed expert evidence was to the effect that "judicial decisions in civil and commercial cases are public, reasoned statements of the law" (at para. 46);

(c) one of the court's principal concerns was that the plaintiffs' expert had not provided direct evidence of instances of corruption or political interference in the Ukrainian court process. In this case, the plaintiffs have presented first-hand accounts from former judges and lawyers of interference in the judicial process; and

(d) the court was also concerned about the reliance by the expert on reports taken from the internet from two organizations, being Transparency International and the Heritage Foundation, without providing any information about those organizations. In this case, there is evidence regarding the methods and procedures utilized by Human Rights Watch. There is also Mr. Connell's evidence which includes references to certain of the secondary reports in particular the 2015 UN COI report and the report of the EASO and his reliance on them. At this preliminary stage, it is not for the plaintiffs to prove the

> assumptions in the Connell reports. In any event, as I have decided in the Evidentiary Application, I have considered excerpts from those reports for a limited purpose.

[264] *Mengiste* can also be distinguished on certain material points from the circumstances of this case. It involved an application in the United Kingdom by defendants in lengthy litigation in Ethiopia challenging the continuation of proceedings in England on the basis that it was not a *forum conveniens*.

[265] In granting the application, Justice P. Smith of the High Court of Justice Chancery Division referred to the seven years of litigation in which the parties had been involved in Ethiopia and noted that "[i]n that litigation the Claimants substantially lost but they did not lose on every issue": at para. 124.

[266] The court reviewed several reports some of which were similar to the secondary reports in this case concluding that they were not supportive of the claimants' contention that there was a risk of an unfair trial in Ethiopia. Reference was made to, amongst others, a report from the Canadian International Development Agency which indicated substantial progress in the independence of the judiciary. This was supported by an article in the Ethiopian Bar Review and a report submitted by the applicants that judicial reform was:

> a "top priority of the Government and as a result there has been a significant improvement in terms of access to justice, case flow management, judicial autonomy and accountability as well as on the right to speedy trial particularly on civil and commercial matters [at para 244].

[267] In this case, Mr. Biniam Ghebremichael deposes as to his involvement in the Eritrean justice system over the years and, based on that experience, his belief that the plaintiffs would not receive a fair trial.

[268] Prof. Andemariam has a different view. While identifying significant ongoing difficulties in the Eritrean justice system, he concludes that the plaintiffs would receive a fair trial. As one of the "tens of thousands" of civil and commercial trials to

be heard, it would likely take place in a time frame of approximately 18 months to two years.

[269] I referred above at para. 99 to the evidence of Washington State attorney, Mr. Sium as to his observations during his two visits to Eritrea in 2008 and 2011/2012.

[270] Prof. Andemariam's conclusion that the plaintiffs will receive a fair trial if the case is brought before the High Court is made notwithstanding his evidence that it is not necessary for them to be personally present when the trial occurs since they can appear by agent.

[271] The evidence is contradictory as to whether the plaintiffs, as deserters, are considered as traitors in Eritrea and if they can even return to that country. The plaintiffs assert that they will be treated as such which is why they have not attempted to return. They say there is no likelihood they will commence proceedings in Eritrea if Nevsun's forum application is granted.

[272] According to the EASO Report, the plaintiffs will be able to return to Eritrea but upon doing so will have to pay a fine or tax and undergo a six week training session "to reinforce their patriotic duties".

[273] Nevsun submits that the plaintiffs' evidence regarding the administration of justice in Eritrea is anecdotal, outdated and that the former judges have long since departed that country.

[274] I disagree. Mr. Biniam Ghebremichael was a judge in Eritrea until he was expelled from the judiciary in 2007. This occurred after he was imprisoned for refusing to accept relocation to a remote area of the country for what he considered to be retribution for objecting to military interference in a case he was seized of. He describes in detail his experiences while in prison.

[275] He remained in Eritrea as a legal officer at Eritrean Airways until he fled in late 2014. He is now considered a traitor since he has been absent for more than six

months. While his accounts as a judge are limited to the time frame up to 2007, his evidence regarding the justice system, the role of the courts which have special jurisdiction, including the Special Court with its arbitrary powers, and the creation of the "Special of the Special" Court is apparently based on his knowledge until the time of his departure.

[276] I considered Nevsun's objections to Mr. Connell's report including his alleged bias in my decision regarding the Evidence Application.

[277] I would add at this stage that Prof. Andemariam's curriculum vitae is to the effect that since 2007 he has been:

> a member of the team of advisors to the Minister of Justice of Eritrea. The team constantly meets with the Minister to advise her on legal matters pertaining to the functions of the Ministry, legal advices to the government as well as law making and other matters related to her mandate.

[278] From the former judge Kifleyonhanes Teweldebrhan Yeibio's affidavit, this is the same Minister of Justice who was in office during the time frame identified in the plaintiffs' and the former judges' and lawyers' evidence.

[279] There are some additional weaknesses in Prof. Andemariam's reports which include that:

(a) he appears to be in a position to provide concrete examples to this Court as to the manner in which the administration of justice and the independence of the judiciary has improved over the years, but has not done so;

(b) he could also have provided examples of situations where complex civil trials, involving dozens of witnesses and hundreds if not thousands of documents, have taken place in Eritrea, but has not done so;

(c) he refers in his report to the availability of representative proceedings but provides no examples of any such cases in fact having occurred and how the Eritrean justice system handled them;

(d) he says that there is no prohibition against contingency fees, but provides no examples of a practice of this occurring, particularly in a case such as this;

(e) while he acknowledges proceedings have taken place against the government and its ruling party, nothing suggests he is aware of any proceedings in which claims have proceeded involving allegations of serious governmental misconduct or how the government would react if the plaintiffs' claims proceeded in Eritrea; and

(f) Mr. Biniam Ghebremichael's evidence is that the Special Court, whose proceedings are held in private and where no representation is permitted, "has created chaos in the judicial system by reversing decisions of the ordinary courts…" While Prof. Andemariam is of the opinion that the parties would receive a fair trial in the High Court, he does not comment on a fair trial within the context of the Special Court or the "Special of Special" court.

[280] In addition, although this is a preliminary application, I have significant difficulty in placing much weight on Prof. Andemariam's evidence regarding a fair trial for the plaintiffs in Eritrea. He is apparently providing "constant" advice to the government. Although the State of Eritrea is not a party in this proceeding, it is clear from the evidence that the State's role, which includes the military, will be a most important factor in the plaintiffs' ability to prove their case and/or Nevsun to establish its defence.

[281] There is also the fact that the plaintiffs will not be present in person if the case were to proceed in Eritrea, although they can, according to Prof. Andemariam, appear by agent.

[282] Nevsun submits that the plaintiffs have made no effort to have the case tried in Eritrea and that this is a factor which militates against the proceeding taking place in British Columbia.

[283] I do not agree. First of all, whether the plaintiffs have attempted to return to Eritrea is not part of the legal test to be applied on this application. In any event, the plaintiffs have detailed in their affidavits their reasoning for not returning to Eritrea and, as I have noted, there is a dispute in the evidence as to whether they would be treated as traitors.

[284] But there is evidence on the record, which I find to be cogent, that corroborates the plaintiffs' expressed fears that they cannot return to Eritrea and obtain a fair trial against Nevsun in that forum. This evidence also corroborates Mr. Biniam Ghebremichael's assertions that the plaintiffs would not receive a fair trial in Eritrea and that any judge hearing the case and who ruled in their favour would place his or her career and personal safety in jeopardy.

[285] The secondary reports dealing with this issue appear to be unanimous that the plaintiffs would face real consequences if they attempted to return. These vary from a minimum of paying a tax or fine and making a written apology to also being required to attend a six week training course " to enforce their patriotic feelings": EASO, *Court of Origin Report: Eritrea Country Focus,* (2015).

[286] With respect, it would defy common sense for this Court to accept that the plaintiffs, as a pre-condition to returning to Eritrea, would have to:

(a) pay a tax or fine as punishment for having left the country illegally;

(b) render a written apology for their conduct; and

(c) possibly attend a six week course designed to enforce their patriotic feelings

and not find that there is a real risk that the plaintiffs would not receive a fair trial in Eritrea. This is particularly the case if they then chose to commence legal proceedings in which they make the most unpatriotic allegations against the State and its military, and call into question the actions of a commercial enterprise which is the primary economic generator in one of the poorest countries in the world.

[287] There is also no evidence or only the most general statements from either Prof. Andemariam or Mr. Sium, who was not tendered as an expert witness, on such issues as:

(a) the capabilities of the Eritrean justice system to manage what will be an extremely complex civil proceeding. In fact there is no evidence at all as to how complex commercial cases are managed. A case such as this does not appear to be contemplated in Prof. Andemariam's report; and

(b) the plaintiffs' ability to access legal counsel and whether there are counsel who would take on a case such as this involving, as it does, the most serious allegations of egregious conduct by the State and its military.

[288] There is also Prof. Andemariam's evidence relating to the role of the military and the difficulties posed by the lack of a proper body of the law of evidence. These are important factors for consideration that militate against Eritrea being the appropriate forum.

[289] I would reach the same conclusion should the plaintiffs not return to Eritrea. That is because this would result in proceedings commenced in Eritrea being made in abstentia through an agent.

[290] Conversely, in British Columbia:

(a) there are well established Rules of Court that include broad provisions for comprehensive case management which is routinely used in complex civil cases. Some of these are set out in Rule 12-2(9) with the court having a very broad discretion to make any orders that may make the trial more efficient and will further the objects of the Rules;

(b) there is a history of lengthy and complicated civil trials in such diverse fields as commercial litigation, and aboriginal and language rights claims to name a few. The court's experience in "mega" criminal trials

is also indicative of its ability to effectively manage and provide justice to all the parties in this case; and

(c) there is a robust and well-established body of evidentiary law.

[291] Nevsun refers to the hundreds of witnesses who may have to give evidence in this case, the vast majority of whom are in Eritrea and the obstacles which arise due to the sheer volume and location of documents.

[292] I am of the view that with proper case management and the cooperation of the parties, the number of witnesses will be considerably less than what Nevsun submits may be the case. I note that the parties and their counsels' conduct and their cooperation in the manner in which this proceeding has proceeded to date has been exemplary.

[293] All this points to the likelihood that in the exercise of the trial management powers at my disposal as judicial management judge, the proceeding can be tailored to best serve the parties and the interests of justice. This may include:

(a) directing that certain issues be tried before others. This could involve determining certain threshold liability issues:

i. whether the plaintiffs were at the Bisha Mine and when;

ii. what occurred at the Bisha Mine and when; and

iii. substantive issues such as the applicable law and limitation defences;

(b) directing that summaries of evidence of certain witnesses be provided and/or the use of depositions and affidavits as evidence for certain witnesses;

(c) providing that certain witnesses give their evidence outside of British Columbia or Canada; and

(d) making orders regarding documentary production which would presumably be coordinated with any directions made regarding the order in which certain issues will be tried.

[294] I am sure there are many more.

[295] Taking all these factors into account, I have concluded that Nevsun has not established that the comparative convenience and expense favours Eritrea as the appropriate forum.

[296] In reaching this decision, I have also concluded that there is a real risk to the plaintiffs of an unfair trial occurring in Eritrea.

(b) the law to be applied to issues in the proceeding

[297] Nevsun's position includes the assertion that the proper law to be applied to the plaintiffs' claims is that of Eritrea and the common law shows a strong preference to have the dispute determined in the forum whose substantive law applies. This is particularly the case since the alleged torts occurred in Eritrea. The *lex loci delicti* should apply: *Kvaerner U.S. Inc. v. AMEC E&C Services Limited*, 2004 BCSC 635 at para. 26; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1060. Accordingly, it submits that this factor weighs heavily in favour of Eritrea as the appropriate forum.

[298] The plaintiffs do not accept that the choice of law is as simple as asserted by Nevsun. They argue that *Tolofson* at 1047, provides a limitation to the normal rule where breaches of some overriding norms are alleged, such as here.

[299] In that regard they rely on *Oppenheimer v. Catermole*, [1976] A.C.249 (H.L.), where the House of Lords declined to give effect to a Nazi law purporting to strip Jews of their German citizenship, holding at 278:

> To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

[300] They also point to the fact that the record does not clearly establish how Eritrean law is to be applied. Both the President's office and the Special Court have the opportunity to intervene and, according to Prof. Andemariam, the lack of a substantive body of law of evidence means that there is a lack of consistency in judicial decisions.

[301] If this were a case where, at this stage of the proceeding, the foreign law were readily ascertainable from the various codes, promulgations, interpretations and applications, then I would be more inclined to accept Nevsun's submission on this issue.

[302] But there are a number of issues that cannot be determined at this stage. They include:

(a) whether the procedural code set out in the legislation is the law that will be applied to the issues in the proceeding;

(b) whether the legislation passed prior to the dissolution of the legislature will have any force in relation to the issues, since laws may be issued, amended and repealed by government decree;

(c) without a substantive body of the law of evidence, to what extent rulings on this issue will be at the discretion of individual judges; and

(d) if the proceeding did originate in the High Court, whether the ultimate decision would be made by that court. The Special Court, or simply the Office of the President, could make the final decision with no discernable law applying in either of those fora.

[303] Accordingly I conclude that, at best when viewed from Nevsun's perspective, the choice of law is an equivocal factor in the *forum conveniens* analysis.

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts and

(e) the enforcement of an eventual judgment

[304] I will consider these factors together as the submissions of the parties overlap on these issues.

[305] Nevsun submits that the desirability of avoiding a multiplicity of proceedings is an equivocal factor because at present there is no litigation in Eritrea.

[306] Nevsun also says that it has agreed to attorn to the jurisdiction of the Eritrean courts. Although Eritrea is not a reciprocating state under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, the plaintiffs could apply to enforce a final judgment obtained against Nevsun in Eritrea pursuant to the common law principles governing the enforcement of foreign judgments.

[307] The plaintiffs' position is that there will likely be contentious, costly, and time-consuming proceedings in British Columbia over any judgment obtained in Eritrea. Given the state of Eritrea's judicial system, any losing party could easily mount a credible challenge to the integrity of any resulting judgment.

[308] They cite the example of *Chevron Corporation v. Yaiguaje,* 2015 SCC 42, which they say illustrates the difficulties that can arise when enforcing a judgment from a forum that is vulnerable to accusations about the absence of judicial independence and rule of law. After many years of litigation both in the United States and Ecuador, a judgment from an Ecuadorian court in the amount of $9.5 billion remains unpaid. This has generated litigation in many jurisdictions.

[309] The plaintiffs submit that it is easy to envision this saga repeating itself in this case. This factor favours this Court retaining jurisdiction "where the integrity of the courts is unassailable".

[310] They submit that for similar reasons, the factor pertaining to the enforceability of a judgment also weighs in favour of British Columbia as the more appropriate forum. An enforcement action in British Columbia could become a whole proceeding in and of itself.

[311] I have concluded that whether the substantive proceeding occurs in British Columbia or Eritrea:

(a) there are serious allegations made as to the integrity of the Eritrean judicial system;

(b) Nevsun's principal asset is the Bisha Mine located in Eritrea; and

(c) there will undoubtedly be various proceedings in any event with enforcement of any judgment likely problematic irrespective of where this proceeding is heard.

As a result, these three factors are equivocal in the forum analysis.

(f) the fair and efficient working of the Canadian legal system as a whole

[312] In its written submissions, Nevsun refers to a recent decision of the Ontario Superior Court of Justice, *Airia Brands v. Air Canada*, 2015 ONSC 5332 [*Airia*] both with respect to the forum issues generally and specifically in relation to this factor.

[313] It submits, based on *Airia*, that this Court should decline jurisdiction on the basis that the principles of order and fairness militate against it assuming jurisdiction over the claims of absent foreign plaintiffs.

[314] Nevsun also submits that this Court should consider whether it is appropriate for our legal system to incur the expense of trying a case where the plaintiffs have no links with Canada or British Columbia and the alleged wrongs occurred in another country. Exercising appropriate restraint by declining jurisdiction over claims that properly belong elsewhere promotes the fair and efficient working of the Canadian legal system.

[315] The plaintiffs argue that denying the plaintiffs access to the courts in British Columbia on the basis of the "expense" of trying their claims would not promote the fair and efficient working of the Canadian legal system.

[316] In *Airia*, the plaintiffs alleged that the defendants conspired in Canada and throughout the world to fix the prices of airfreight shipping services. The court certified a global class action.

[317] Justice Leitch at para. 175, recognized the many difficulties posed by a proceeding sought to be advanced on behalf of foreign plaintiffs and agreed that "the question of jurisdiction over absent foreign claimants must be answered separately from the question of jurisdiction over the Defendants themselves". Justice Leitch noted that the defendants did not dispute that the court had jurisdiction over them.

[318] She concluded at para. 146 that the Ontario court did not have *jurisdiction simpliciter* over absent foreign plaintiffs whose "only link" to Canada was that they had "purchased Airfreight Shipping Services from somewhere out of Canada into Canada". Justice Leitch agreed with the defendants that permitting a global class action on behalf of absent foreign claimants did not satisfy the principles of order and fairness, and the related concept of comity, which underlie the territorial limits in s. 92 of *the Constitution Act,1867*. She concluded that it would offend the principles of order and fairness to take jurisdiction over absent foreign claimants who would not expect their rights to be adjudicated in Ontario and where an Ontario judgment would not be enforceable abroad.

[319] Justice Leitch would also have stayed the action in relation to absent foreign plaintiffs on the basis of *forum non conveniens*, stating at paras. 223-225 of *Airia*:

> [223] I agree with the Defendants submission that the reasoning of Sharpe J. A. in *Kaynes* indicates, as is set out in para. 195 of their factum, that "in a multi-jurisdictional class action the court should pay particular attention to whether its assumption of jurisdiction would be consistent with comity, prevailing international legal norms and the reasonable expectations of the parties".
>
> [224] The Defendants submit that the observations of Sharpe J.A. in *Kaynes* that the claims of purchasers on foreign exchanges should be stayed

> because they had no reasonable expectation their rights would be adjudicated in Ontario are applicable here. This position is succinctly summarized at para. 201 of their factum:
>
> > These observations apply with even greater force here. Not only did the absent foreign claimants purchase Airfreight Shipping Services through transactions abroad, they purchased them almost exclusively from foreign resident companies carrying on business abroad, while the absent foreign claimants themselves were resident abroad. The most reasonable expectation they could have is that their claims would be adjudicated in these foreign countries.
>
> [225] I agree with the Defendants' submission that the circumstances of this action are even stronger than those before the court in *Kaynes*. To include absent foreign claimants within the class would require this court to apply the laws of at least 30 different countries in relation to matters that involve non-Canadians who have entered into transactions outside of Canada. In addition, as I have found, the overwhelming evidence is that a judgment of this court will not be recognized in other jurisdictions and this court cannot resolve the potential for double recovery if the absent foreign claimants pursue an action in their own jurisdictions.

[320] The circumstances in *Airia* are different in many material respects from those in this case. Here, *jurisdiction simpliciter* is not an issue. In addition, the plaintiffs have not chosen this jurisdiction having the choice of several other *fori* in which to advance their claims, nor are the claims being advanced on a world-wide basis. The plaintiffs have two choices: British Columbia or Eritrea. They have selected British Columbia since that is where Nevsun is located and where they allege certain corporate decisions were made that adversely affected them.

[321] Furthermore, in *Airia,* the class included foreign class members who were suing foreign defendants in respect of foreign transactions. Four of six defendants were foreign companies resident and domiciled outside Canada. In the present case, there is only one defendant, a BC corporation.

[322] Justice Leitch also found at paras. 114-115, that an Ontario judgment would not be enforceable outside Canada, concluding that foreign claimants who "will be able to bring further litigation against the Defendants in their 'home' countries" would potentially expose the defendants to double recovery.

[323] I will address Nevsun's arguments regarding this court's jurisdiction over foreign group members in my decision relating to the Representative Action Application.

[324] For the purposes of this application, it is sufficient for me to state that based on the significantly different circumstances of this case from those in *Airia*, I am of the view that if this Court were to assume jurisdiction over this proceeding, it would promote the fair and efficient working of the Canadian legal system.

[325] Accordingly I conclude that this factor favours the plaintiffs.

Additional Factors

[326] Nevsun submits that this Court exercising territorial competence would usurp the exclusive subject matter competence over the plaintiffs' claims that Eritrean law assigns to Eritrean labour tribunals.

[327] I do not accept this argument in that:

(a) Prof. Andemariam acknowledges that the labour tribunals could not hear any claims against Nevsun and two of the three Plaintiffs cannot bring a claim before the labour tribunals at all;

(b) certain of the plaintiffs' allegations including forced labour and torture could not be disputes arising under a collective bargaining agreement; and

(c) as I have outlined, evidence on the record points to the risk of interference in judicial proceedings by both the Special Court and the Office of the President.

[328] Nevsun submits that this Court has no subject matter competence over the plaintiffs' claims by reason of the act of state doctrine.

[329] In its written argument, Nevsun argues that if this Court concludes that the act of state doctrine applies and limits the Court's subject matter competence, then no resort to s. 11 of the *CJPTA* is required. If the Court finds that the act of state

doctrine does not bar the claim, then this Court can still take the underlying concerns about sitting in judgment on the State of Eritrea into account in determining whether it should exercise territorial competence. Considerations of comity and sovereign equality suggest that this Court should not proceed to exercise territorial competence. So too do practical considerations, including the State of Eritrea's entitlement to immunity from this Court's process, a troublesome prospect given the central place it occupies in the plaintiffs' claim.

[330] As part of these reasons for judgment, I have dismissed the Act of State Application.

[331] If I am wrong in that conclusion, then as was noted by the Privy Council in *AK Investment* at para. 101, the act of state doctrine does not preclude a court from undertaking an assessment of the deficiencies of a foreign court system.

[332] In any event, Nevsun's argument appears to accept that if I dismiss the Act of State Application, I can nonetheless take into account underlying concerns regarding sitting in judgment on actions by the State of Eritrea.

[333] The foundational principles, both on this application and in the proceeding generally, are the interests of justice and the requirement that all parties receive a fair trial.

[334] As I noted in the introduction to these reasons for judgment, Nevsun disputes in their entirety the plaintiffs' allegations against it.

[335] There can be no doubt that at the conclusion of the trial I will be asked to make findings regarding certain allegations concerning the actions of the State of Eritrea. But when I do, it will be within the context of deciding whether the plaintiffs have proven their case against Nevsun and not "sitting in judgment" on the actions of the State of Eritrea itself.

[336] Accordingly, I conclude that this factor is equivocal in the forum analysis.

Conclusion

[337] I have considered all the factors set out in s. 11(2) of the *CJPTA*, the record of evidence, the written submissions of the parties and the relevant authorities.

[338] I have concluded that Nevsun has not established that the factors in the *CJPTA* or the case law clearly establish that Eritrea is the more appropriate forum.

[339] The Forum Application is dismissed.

VI: THE ACT OF STATE APPLICATION

A: Introduction

[340] Nevsun brings this application pursuant to Rule 21-8(1)(a) and (b) or alternatively, Rule 9-5, to dismiss, stay or strike out the plaintiffs' claim on the basis that this Court lacks subject matter competence in respect of it, or that it discloses no reasonable cause of action.

[341] The notice of application argues that the plaintiffs' claim is contrary to the act of state doctrine, a common law rule that limits the court’s subject matter competence. According to Nevsun, the doctrine holds national courts, like this one, are "incompetent to adjudicate on the lawfulness of the sovereign acts of a foreign state" committed within that state's own territory. This rule of non-intervention is based on principles including sovereign equality, reciprocity and comity, and applies despite the fact that the plaintiffs have not directly impleaded the State of Eritrea. The action depends on this Court adjudicating that Eritrea's NSP is a "system of forced labour", contrary to international law, and that it constitutes a crime against humanity by the Eritrean state and its officials. If such claims are to be pursued, it must be in Eritrean courts or in international fori; the act of state doctrine precludes this Court from entertaining such claims and the same result is reached through the application of the *State Immunity Act*, R.S.C.1985, c. S-18 (*SIA*).

[342] Nevsun argues that this proceeding, "in effect, seeks to affect the property, rights, interests, or activities" of the state of Eritrea. Further, Nevsun argues that by reason of the act of state doctrine, Eritrea and its agents are immune from this

Court's jurisdiction. It claims that this is a complete defence to the plaintiffs' claims and the action should be dismissed.

[343] This application raises several issues including:

(a) whether the act of state doctrine forms part of the common law of Canada;

(b) if it does, what are its limitations;

(c) whether the act of state doctrine is engaged in this case;

(d) if it is, whether one or more of the limitations to the doctrine apply; and

(e) whether these issues should be determined on a preliminary application.

[344] For the reasons that follow, I have concluded that whether the issues on this application are approached from the perspective of either Rule 21-8 or Rule 9-5, the application should be dismissed.

B: Applicable Principles

Rules 21-8 and 9-5

[345] R. 21-8(1)(a) allows a party to apply to strike out the notice of civil claim "or to dismiss or stay the proceeding" on the ground that the pleading "does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding".

[346] R. 21-8(1)(b) provides that a party may "apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding".

[347] The principles regarding Rule 9-5 are set out in paras. 430-432. Reduced to their essentials, the result is that Nevsun must establish that the plaintiffs' claims have no reasonable likelihood of success and are bound to fail.

Act of State

[348] Because the act of state doctrine has not yet been applied in Canada, I will refer to authorities from other jurisdictions which summarize the legal principles.

[349] The accepted classic formulation of the doctrine is by Fuller C.J. of the United States Supreme Court in *Underhill v. Hernandez Underhill v. Hernandez*, 168 U.S. 250 (1897) at 252:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

[350] In a more modern context, the act of state doctrine has been considered on several occasions by English courts. In *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 at 269 (H.L.) [Pinochet No. 3] the doctrine was described in these terms:

> Immunity ratione materiae…. is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. ... It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts.... The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states… [The cases] hold that the courts of one state cannot sit in judgment on the sovereign acts of another…

[351] In *Kuwait Airways Corpn. V. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] 2 A.C. 883 at 1108 as per Lord Hope Craighead (concurring) (H.L.):

> There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny.

[352] The English Court of Appeal in *Yukos Capital v. OJSC Rosneft Oil Company*, [2012] EWCA Civ 855 [“*Yukos*”] at para. 110 stated that the act of state doctrine is a

"prohibition on adjudication. At para. 109 the court held that "the purpose of the doctrine is to prevent such challenge at the outset, as a matter of immunity *rationae materiae*."

[353] The act of state doctrine has acknowledged limitations. These were recently summarized by the English Court of Appeal in *Belhaj v. Straw,* [2014] EWCA Civ 1394 at para. 54 [*Belhaj*], leave to appeal granted by the UK Supreme Court:

1. the act must occur in the territory of the foreign state;
2. the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, or grave infringements of human rights;
3. judicial acts are not captured;
4. the act has a commercial rather than a sovereign character; and
5. the doctrine applies in cases in which the only issue is whether the act occurred, rather than the act's legal effectiveness.

[354] The court in *Belhaj* continued at paras. 54, 55:

> In Yukos the court, emphasizing that the principle is one of restraint rather than abstinence, concluded:
>
> > "We think that on the whole we prefer to speak of "limitations" rather than "exceptions". The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed" (at para. [115]).
>
> 55. We gratefully adopt the court's analysis and conclusions.

[355] In so far as the fifth or "Kirkpatrick" limitation is concerned, the court in *Yukos* stated at para. 110:

> What *Kirkpatrick* is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to enquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand,

> something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory. As to the last possibilities, there can be a still further distinction to be made between the act of state which *cannot* be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore *can* be challenged.
>
> [Emphasis added.]

[356] The court also commented on the doctrine's place in the modern world noting at para. 115 that the doctrine predated modern international human rights law, in an era where curtailing the rights of a state by human rights obligations would have "seemed somewhat strange".

[357] In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12 [*Habib*], Justice Jagot of the Federal Court of Australia noted at para. 51 that the act of state doctrine was of uncertain application. At para. 38, Justice Perram stated:

> …Beyond the certainty that the doctrine exists there is little clarity as to what constitutes it.

[358] The act of state doctrine contains features of the principles relating to state immunity codified in Canada by the *SIA*. In *Pinochet No. 3* [2000] 1 A.C. 147 at 269, Lord Millett summarized the differences between the two:

> As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the Act of State doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.

C: Parties' Positions

[359] Nevsun's position is that even though a court has territorial competence over a proceeding it may still lack subject matter competence, being the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence.

[360] It argues that the act of state doctrine applies in this case, that this Court does not have subject matter competence. Accordingly, the action in its entirety should be stayed, dismissed or struck out.

[361] It submits that the act of state doctrine applies in that the foreign sovereign, Eritrea, is not a party, and the action is between private parties and "'sounds in tort". The essential feature that engages the doctrine is that the action requires the court to inquire into the legality of the conduct and motives of the foreign sovereign.

[362] It points to the allegations in the NOCC and says that the plaintiffs are asking this Court to adjudicate on the validity of the Labour Code Proclamation and the NSP. It also points to the plaintiffs' legal submissions on this application that the laws of Eritrea are incoherent, illegitimate and meaningless. This is said to flow from the Eritrean government's failure to implement the constitution and from the President's ability to issue executive decrees. Accordingly, the act of state doctrine is engaged.

[363] The plaintiffs' position is that the act of state doctrine does not form part of the common law of Canada or that it is unclear as to whether it does. It points to the fact that no Canadian court has applied the doctrine.

[364] In the event this Court were to conclude the act of state doctrine forms part of the common law of Canada, then the plaintiffs submit that several of the accepted limitations apply, specifically the public policy, commercial activity and *Kirkpatrick* limitations set out as limitations 2, 4 and 5 in para. 353 above.

[365] They point to the description of the doctrine in modern times and its non-engagement in cases involving allegations of serious human rights violations.

D: Discussion

(a) Does the act of state doctrine form part of the Common Law of Canada?

[366] In *United Mexican States v. British Columbia (Labour Relations Board)*, 2015 BCCA 32 [*United Mexican States*], Justice Harris specifically referred to the doctrine

while ultimately concluding that it was not engaged in the circumstances before the court. As he noted at para. 5:

> [5] I emphasize that the issue is the extent of state immunity because, in my opinion, Mexico seeks to expand the scope of state immunity by reference to the related, but different, doctrine of act of state. As I will explain, the doctrine of act of state may confer a subject matter immunity that will lead a court to decline to adjudicate matters involving the sovereign acts of foreign states even in circumstances where there is no state immunity under the *SIA.* In this case, however, Mexico has not argued at any stage in the proceedings that the Board should decline to consider its conduct on the independent ground that its acts are also protected by the doctrine of act of state. Accordingly, the only question on this appeal is whether the Board, in considering the conduct of Mexico, exercised jurisdiction over it contrary to the protection provided by s. 3(1) of the *SIA.*

[367] While the analysis in *United Mexican States* focussed on state immunity and the *SIA*, the court did have occasion to consider the act of state doctrine. Justice Harris referring to *Belhaj* stated at paras. 45-48:

> [45] The Court of Appeal in *Belhaj* noted that cases arise in which no state is directly or indirectly impleaded, so that no issue of state immunity arises, but nevertheless courts decline to adjudicate on claims that turn on the validity of public acts of a foreign state. This is the application of the act of state doctrine. After referring to cases from other jurisdictions, including the decision of the chambers judge in this case, the Court of Appeal observed at para. 39 that "[p]roceedings will not be barred on grounds of state immunity simply because they will require the court to rule on the legality of the conduct of a foreign state."
>
> [46] The Court went on to analyze the scope of the concept of indirect impleading for the purpose of the application of state immunity. In brief, it recognized that a state may be indirectly impleaded in circumstances where, although not named as a party, the proceeding, in effect, seeks to affect the property, rights, interests, or activities of that state, citing Article 6(2)(b) of the *UN Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004 (not yet in force). The Court considered academic writing, among other sources, approving of the view that the legal effects engaged should be specifically legal effects, such as the imposition of a lien or declaration of title, rather than social, economic, or political effects. Similarly, the relevant state interests should be confined to legal interests, as opposed to "interests in some more general sense": *Belhaj* at para. 45.
>
> [47] The Court summarized its view of the relationship between state immunity and act of state in the following passage:
>
> > [48] The principles of state immunity and act of state as applied in this jurisdiction are clearly linked and share common rationales. They may both be engaged in a single factual situation. Nevertheless, they operate in different ways, state immunity by reference to

> considerations of direct or indirect impleader and act of state by reference to the subject matter of the proceedings. Act of state reaches beyond cases in which states are directly or indirectly impleaded, in the sense described above, and operates by reference to the subject matter of the claim rather than the identity of the parties. This is inevitably reflected in the different detailed rules which have developed in relation to the scope and operation of the two principles. In this jurisdiction exceptions to immunity are laid down in the 1978 Act. Limitations on the act of state doctrine, which are not identical, have now become established at common law. (See, in particular, *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No.2)* [2014] QB 458.) The extension of state immunity for which the respondents contend obscures these differences. Such an extension is also unnecessary. Any wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.
>
> [48] I respectfully agree with this analysis. In my view, the argument advanced by Mexico is not a state immunity argument. Rather, to the extent it has merit, the argument invokes the related but separate principles of the act of state doctrine. Mexico did not argue act of state as an independent ground supporting a conclusion that the Board could not inquire into the sovereign acts of Mexico conducted within its own territory. It has not argued that proposition on appeal. Rather, its submission is, in substance, that the principle of indirect impleading should be expanded to incorporate principles drawn from the act of state doctrine. It submits that that is the proper meaning to be given to the exercise of jurisdiction by the Board in this case.
>
> [Emphasis added.]

[368] The circumstances in *United Mexican States* were materially different from those in this case. There, the sovereign state was a party and the court referred to the passage in *Belhaj*, noting that both the *SIA* and the act of state doctrine may be engaged in a single factual situation. Here, the State of Eritrea is not a party and the issue is not whether one or both of the *SIA* and the act of state doctrine are engaged, only whether the act of state doctrine is engaged in circumstances quite different from those in *United Mexican States*. Furthermore, Nevsun is neither a foreign sovereign state nor an official of that state or the home state. Rather, it is a British Columbia company which is alleged to have committed various human rights abuses and common law torts in furthering its commercial interests, being the development, construction and operation of the Bisha Mine.

[369] The plaintiffs also make a submission in this Court that was not advanced in *United Mexican States*. Relying on *Canada (Attorney General) v. TeleZone Inc.,* 2010 SCC 62 at para. 42 [*TeleZone*] and in particular *Equustek Solutions Inc. v. Google Inc*., 2015 BCCA 265 at para. 58 [*Equustek*]. They submit that Rule 21-8(1) and (2) cannot serve as a basis for dismissing their claims since this Court's inherent jurisdiction, which includes subject matter competence, can only be limited by clear and express statutory language.

[370] *TeleZone* in my view does not assist the plaintiffs on this point. That is because this is not a situation where there is a derogation of this Court's inherent jurisdiction in favour of a statutory court.

[371] Nor does *Equustek* advance the plaintiffs' position on this issue. At paras. 57-58, Justice Groberman stated:

> [57] Google contends that apart from territorial competence, as defined under the *CJPTA*, and the common law "real and substantial connection" test, there are other limitations on the granting of injunctions. Again, it points to the commentary of the Uniform Law Conference of Canada that accompanied the uniform model statute:
>
> > 2.3. The Act defines a court's territorial competence "in a proceeding" (section 3). It does not define the territorial aspects of any particular remedy. Thus, the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court's own province or territory.
> >
> > 2.4 The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court's jurisdiction by reference to the amount of the claim, the subject matter of a claim, or any other factor besides territorial connections.
>
> [58] In my view, commentary 2.4 is of limited interest in this case. The subject matter at issue here – misappropriation of confidential information and violations of intellectual property rights – are clearly within the jurisdiction of a provincial superior court. Indeed, because provincial superior courts are courts of inherent jurisdiction, concerns of subject matter competence will arise in respect of them only when valid legislation serves to limit the inherent jurisdiction that would otherwise exist.
>
> [Emphasis added.]

[372] If the act of state doctrine forms part of the common law of Canada then, arguably, the subject matter at issue, is not "clearly within the jurisdiction of [this] superior court".

[373] Accordingly, I conclude that notwithstanding the significant differences between *United Mexican States* and this case, I am bound by the Court of Appeal's decision as to the existence of the doctrine in the common law of Canada.

[374] I do not view Justice Harris' comments to be *obiter dictum* on the issue as to whether the act of state doctrine is part of Canada's common law. The fact that the court was not required to apply the doctrine in the circumstances of that case was a separate issue.

[375] Accordingly, although it has yet to form the basis of a decision by any court in Canada, I am of the view that the act of state doctrine, notwithstanding its "uncertain application" and "lack of clarity" does form part of the common law of this country.

[376] Even if I concluded that *United Mexican States* was not binding on me, I would have concluded that the act of state doctrine forms part of the common law of Canada. There is no reasoned basis for its well established existence in such jurisdictions as England and Australia not to be recognized in Canada. That is particularly the case in light of the persuasive comments of the Court of Appeal in *United Mexican States*.

[377] The authors of Castel and Walker, *Canadian Conflict of Laws*, 6th ed. (Markham, Ont. Lexis Nexus Canada, 2005 at 10-2 and 10-4, also are of the view that the act of state doctrine forms part of Canadian law.

(b) Is the act of state doctrine engaged in the circumstances of this case such that the plaintiffs' action should be dismissed pursuant to either Rule 21-8 or 9-5?

[378] My conclusion that the act of state doctrine forms part of the common law only incrementally advances Nevsun's position in the analysis. In my view, the real issue is whether the act of state doctrine is conclusively engaged in the

circumstances of this case such that the action should be dismissed. This involves considering the limitations to the doctrine and the propriety on a preliminary application of dismissing an action without providing the plaintiffs the opportunity to prove their case.

[379] Relying on *Yukos* at paras. 109-110, Nevsun submits that the act of state doctrine is a "prohibition on adjudication", the purpose of the doctrine being "to prevent such challenge at the outset, as a matter of *immunity rationae materiae*".

[380] Furthermore, Nevsun argues that in the context of state immunity principles courts have held that the immunity of the exercise of military authority is the "paradigm example" of the rule: *Pinochet No. 3* at 269.

[381] In light of the dearth of authority in Canada dealing specifically with the act of state doctrine, Nevsun refers to four Supreme Court of Canada decisions, decided in the *SIA* context, as "adverting" to the act of state doctrine:

(a) *R. v. Hape,* 2007 SCC 26 [*Hape*];

(b) *Canada (Justice) v. Khadr,* 2008 SCC 28 [*Khadr*];

(c) *Kazemi Estate v. Iran,* 2014 SCC 62 [*Kazemi*]; and

(d) *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [*Tolofson*].

[382] I am not persuaded that these decisions provide the necessary basis for concluding that the act of state doctrine should apply in this case to defeat the plaintiffs' claims at this preliminary stage of the proceedings. That is because none of these decisions specifically addressed the act of state doctrine, let alone concluded that its application would prevent a Canadian court from assuming subject matter jurisdiction based on its application.

[383] In fact, bearing in mind the uncertain scope and application of the doctrine, arguably, one or more of these authorities militate against concluding that it applies here.

[384] In *Hape,* the Court at para. 51 states that:

> the need to uphold international law may trump the principle of comity (see for example the English Court of Appeal's decision in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598, in respect of a British national captured by U.S. forces in Afghanistan who was transferred to Guantanamo Bay and detained for several months without access to a lawyer or a court).

[385] In *Tolofson* at 1052, furthermore, the Court held that:

> On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits.
>
> [Emphasis added.]

[386] In *Tolofson*, the Supreme Court of Canada was considering a choice of law rule, and not one of subject-matter jurisdiction. Even in this context, the Court made it clear that a breach of overriding norms of international law justifies a departure from notions of comity and territoriality.

[387] Here the plaintiffs allege breaches of overriding norms.

[388] While there may be some overlap between the *SIA* and the act of state doctrine in that they share some common rationales, they are nonetheless two different concepts. This is shown, for example, in *Habib*, *Belhaj* and *United Mexican States*.

[389] Sovereign immunity is a principle of international law that has been recognized in Canada and codified in the *SIA*, and reflects Parliament's choices as to the scope of sovereign immunity in Canada. In *Kazemi*, Justice Lebel held at para. 54 that:

> the *SIA* is a complete codification of Canadian law as it relates to state immunity from civil proceedings. In particular, s. 3(1) of the Act exhaustively establishes the parameters for state immunity and its exceptions.

[390] This is not the case with the act of state doctrine as presently described and applied in other jurisdictions.

[391] I would add that the Prince Edward Island Court of Appeal has recently decided that whether the *SIA* also governs such other issues as the applicability of the act of state doctrine raised a serious issue to be tried: *Dash 224 LLC v. Vector Aerospace Services Engine Services,* 2015 PECA 12 at para. 10.

[392] In any event, Nevsun must satisfy this Court that the legal principles which relate to the act of state doctrine are sufficiently developed in Canada generally, or British Columbia in particular, such that the plaintiffs' claims should be dismissed on this preliminary application pursuant to Rule 21-8(1) and (2).

[393] Considering the draconian remedy Nevsun seeks, I am not prepared to grant this application on the basis of the uncertain state of the law regarding this doctrine at the time of the hearing of this application.

[394] The act of state doctrine is essentially a "novel" defence raised by Nevsun. That being the case, the dismissal of the application does not preclude it from advancing this defence at the trial by which time both the legal principles and the evidentiary record may be more settled.

[395] If I am wrong in reaching this conclusion, I would nonetheless dismiss the application on the basis that if the act of state doctrine has been engaged on the pleadings before the Court, then the established public policy, *Kirkpatrick*, and commercial activity limitations of the doctrine either apply or may do so.

[396] In my analysis, I am guided by both *Habib* and *Belhaj* regarding these limitations. These cases appear to represent the modern judicial view of the act of state doctrine. I note that the decision of the Supreme Court of Canada in *Khadr* was distinguished by the English Court of Appeal in *Belhaj* at para. 95.

[397] The essential facts and elements of *Habib* are summarized in *Belhaj* at paras. 95-102.

[398] In *Habib,* the plaintiff, an Australian citizen, alleged officers of the Commonwealth had, *inter alia*, aided, abetted and counselled his torture and other

inhumane treatment by foreign officials. That the agents of the foreign states committed the principle offences was a necessary element of the case. The Commonwealth claimed that the act of state doctrine precluded these claims because the court would have to determine the unlawfulness of acts of foreign states' agents, committed within the territories of foreign states. But the court found the act of state doctrine did not apply. It noted that the Australian constitution and legislation founded the extra-territorial jurisdiction of the court, and that a common law doctrine could not exclude such jurisdiction. In addition, torture was clearly prohibited at international law and the doctrine did not preclude judicial determination of the claim.

[399] In *Belhaj,* the claimant alleged violations of international law and human rights, namely torture in Libya for which British government officials were allegedly responsible. The facts were not established and if the matter proceeded to trial, the facts would have to be investigated and determined by the court. The central issue was whether the court should apply the public policy limitation in a case where, if it exercised jurisdiction, it would be required to conduct a legal and factual investigation into the validity of the conduct of a foreign state. Referring to *Habib*, the court found that there were compelling reasons for concluding that the public policy limitation should be applied:

> 102 In this way a senior court in another common law jurisdiction has concluded, on facts which bear a striking resemblance to those in the present case, that this limitation to the act of state doctrine may be applied notwithstanding the need to investigate the conduct and to rule on the legality of the conduct of foreign states. We should add that we find the judgment of Jagot J. compelling.

[400] As in this case, both *Habib* and *Belhaj* dealt with preliminary applications.

[401] While Canada does not have a statute similar to Australia's *Crimes (Torture) Act*, it is a signatory to the same international treaties and conventions: the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1465 U.N.T.S. 85 (*CAT*), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.

[402] In *Belhaj*, the English Court of Appeal decided that the case fell within the public policy limitation. This conclusion was reached notwithstanding the fact that the respondents were either current or former officers or state officials in the United Kingdom.

[403] If such a decision could be reached in relation to the home state's officers or officials of state, the same result, in my view, should arise where the defendant is a private corporation of the home state whose conduct is motivated by purely commercial as opposed to state purposes.

[404] In that regard, the decision of the Supreme Court of Canada in *Kazemi* can be distinguished in that certain of the defendants in that case were the Islamic Republic of Iran and two of its state officials. Accordingly, the case was decided pursuant to the provisions of the *SIA*.

[405] I agree with the plaintiffs that it would not be contrary to *Kazemi* to conclude that the act of state doctrine, as yet never applied in a Canadian court, is of limited scope in cases of allegations of grave infringements of human rights.

[406] In attempting to distinguish *Belhaj*, Nevsun submits that in Canada there is a caveat to the public policy exception. It requires that the lawfulness of the foreign sovereign's conduct must have been previously and clearly established, whether by the courts of the sovereign state itself, as in *Khadr*, or by an international forum with jurisdiction, as in *Kuwait Airways (Nos. 4 and 5)*.

[407] This submission presupposes that the public policy exception in the *SIA* is synonymous to the public policy limitation in the act of state doctrine. I disagree. The *SIA* is a complete code whereas the act of state doctrine is a much more fluid and unclear doctrine. In *Belhaj*, the Court of Appeal found that investigating the validity of the conduct of a foreign state could entail a number of considerations including:

> (a) as a result of fundamental changes in international law, including the move toward regulation of human rights, courts are more willing than in

the past to investigate the conduct of foreign states and issues of public international law, when appropriate;

(b) the strength of international consensus on prohibiting the conduct alleged;

(c) whether an alternative international forum with jurisdiction exists, and if the action were taken in the national courts of another state, whether the defendants could plead immunity. As this was the case in *Belhaj,* the court found that as a result, "unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation"; and

(d) in the particular circumstances of the case, "the risk of displeasing our allies or offending other states" could not outweigh the "need for our courts to exercise jurisdiction" over a properly justiciable claim.

[408] Since I have found that Eritrea is not an appropriate forum, all these factors apply to some degree in this case.

[409] Nevsun also argues that until the United Kingdom Supreme Court renders its decision in *Belhaj*, there is uncertainty in the English common law and points to *Khadr* as governing this issue in Canada. For the act of state doctrine to give way, *Khadr* requires a "clear violation of fundamental human rights protected by international law" that has been previously and conclusively established by a court or tribunal with jurisdiction over the foreign sovereign. That is in accord with the position taken by the House of Lords in *Kuwait Airways (Nos. 4 and 5)*. Nevsun submits that this requirement cannot be satisfied by mere allegations, no matter how serious.

[410] By contrast, *Belhaj* and *Habib* are decisions of intermediate appellate courts of England and Australia. Nevsun claims that *Belhaj* can represent nothing higher than persuasive authority. The judgment is under appeal, rendering its ultimate value uncertain. Nevsun argues it is also difficult to reconcile *Belhaj* with *R.* (*Khan) v. Secretary of State for Foreign and Commonwealth Affairs,* 2014 EWCA Civ 24

[*Khan*], a decision of a differently constituted division of the same court rendered the same year.

[411] As I have noted, *Khadr* can be distinguished on the basis that it was decided under the *SIA*. Insofar as *Belhaj* and *Khan* are concerned, the fact that even on Nevsun's submission, there is uncertainty in the common law in England as to the breadth of the act of state doctrine, reinforces my conclusion that it is simply not possible to decide this issue on this preliminary application in Nevsun's favour thereby staying or dismissing those claims in their entirety.

[412] I wish to make the following comment with respect to the public policy and *Kirkpatrick* limitations.

[413] I do not agree with Nevsun that what the plaintiffs seek to do is to have the court enquire into Eritrea's conduct for the purpose of adjudicating upon the legal validity of such matters as the Labour Code Proclamation, the NSP or the alleged frailties in that state's system of justice. Should I be wrong in that conclusion, then I would provide the plaintiffs with the opportunity to amend the NOCC such that it was clear that this was not the case.

[414] This would be in accord with the accepted practice in this province that a plaintiff should have the opportunity to amend the NOCC prior to the draconian remedy of dismissal of a claim.

[415] I shall briefly comment on the commercial activity limitation. Nevsun appears to concede in its written submission that a factual analysis is required. It refers to the common law commercial activity exception to state immunity as codified in the *SIA*. Nevsun submits that in assessing this exception, the nature of the acts in issue, including their purpose, must be considered in their full context. Commercial activity is defined as "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character": *SIA,* s. 2.

[416] The NOCC pleads that the activities underlying the plaintiffs' claims were commercial in nature. Specifically, the plaintiffs allege that Nevsun engaged Segen,

Mereb, and the Eritrean military to build the infrastructure and facilities at the Bisha Mine, which is Nevsun's principal and most valuable asset.

[417] Were this the only limitation in issue, which is not the case, I would not have stayed or dismissed the action at this stage of the proceeding. The pleadings and evidentiary record are insufficient on this application to determine whether this limitation should prevent the doctrine from being engaged.

[418] In any event, the plaintiffs advance separate claims said to originate in Nevsun's corporate offices in British Columbia. These relate to alleged breaches of IFC standards on labour practices and working conditions to which Nevsun agrees it should follow.

E: Conclusion

[419] On this preliminary application, I am not prepared to accept that a doctrine which:

(a) has yet to form the basis of a decision at any level of court in Canada;

(b) has been described by a senior appellate court in Australia as being of "uncertain application" and "beyond the certainty that [it] exists there is little clarity as to what constitutes it"; and

(c) on Nevsun's own submission, has been described differently by two different divisions of the English Court of Appeal,

and if applied in the manner submitted by Nevsun, should result in the plaintiffs' claims being stayed or dismissed pursuant to either Rule 21-8 or Rule 9-5.

[420] As Chief Justice Black stated in *Habib* at para. 13:

> It is not to the point that Mr. Habib's proceeding is a civil claim for damages and not a criminal proceeding under the Crimes (Torture) Act, the Geneva Conventions Act or the Criminal Code. The point is that, if a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms.

[421] In my view, the same considerations apply here. After all, this is British Columbia, Canada; and it is 2016.

[422] The Act of State Application is dismissed.

VII: THE CUSTOMARY INTERNATIONAL LAW APPLICATION

A: Introduction

[423] Nevsun brings this application pursuant to Rule 9-5, to strike out certain portions of the NOCC on the basis that the plaintiffs' pleadings disclose no reasonable claim, or are unnecessary.

[424] The notice of application refers to the fact the plaintiffs base their action, in part, on the allegation that Nevsun's conduct, along with the conduct of others including the State of Eritrea, was "a breach of customary international law" and it is actionable at common law. Nevsun's position is that the CIL claims are unknown to law. It argues that the prohibitions recognised under CIL do not give rise to a private law cause of action for damages, either on their own or by reason of their adoption into Canadian law.

[425] An integral component to Nevsun's argument is that the CIL prohibitions do not impose obligations on corporations. It asserts that the plaintiffs' claims are not simply novel claims. They are contrary to fundamental principles of international law, as well as settled Canadian criminal and tort law that is said to be subject to binding decisions of the Supreme Court of Canada including *Kazemi*.

[426] According to the notice of application, while the other preliminary applications may be dispositive of the action as a whole, this one is not. If the Court strikes the claims based on breaches of CIL, the plaintiffs still have their claims based on recognised torts and other private law causes of action. The CIL claims, according to Nevsun however, are:

> … plainly bad in law and there is no reasonable prospect they could succeed at trial. They should be struck out in the interests of judicial efficiency and fairness, to allow the court and the parties to focus on the-real issues in the action.

[427] The notice of application and the plaintiffs' application response raise many issues including:

(a) whether CIL is part of the common law of Canada;

(b) if so, the extent to which it can form part of the basis for the plaintiffs' claims against Nevsun. This will include a consideration of the doctrine of "adoption" in relation to the nature and scope of the applicable customary norms;

(c) whether corporations are immune from CIL claims and in particular allegations of breaches of *jus cogens* or peremptory norms;

(d) in that the plaintiffs' claims may be subject to existing tort principles, whether the plaintiffs' CIL claims are necessary;

(e) whether this Court should recognize up to four new nominate torts to correspond to the breaches of the CIL pre-emptive norms alleged by the plaintiffs, being torture, slavery, forced labour and crimes against humanity.

[428] I am of the view that providing substantive and definitive answers to each of these issues is not required on a preliminary application such as this.

[429] For the reasons that follow, I have concluded that the application should be dismissed. The current state of the law in this area remains unsettled and, assuming that the facts set out in the NOCC are true, Nevsun has not established that the CIL claims have no reasonable likelihood of success.

B: Applicable Principles

Rule 9-5

[430] Nevsun's written submissions accurately summarize the principles relating to an application pursuant to Rule 9-5. A claim will be struck only if it is plain and obvious that the pleading discloses no reasonable cause of action or the claim has

no reasonable prospect of success. This rule promotes efficient litigation and correct results.

[431] Nevsun submits correctly that it is not determinative that the law has not yet recognized the particular claim. The court must ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. Just as the novelty of the claim will not militate against the plaintiff, the fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the motion either way.

[432] I would add that in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, Justice Iacobucci referred to the following "excellent statement of the test for striking out a claim" of Wilson J. in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980:

> . . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out …

C: Customary International law and the Doctrine of Adoption

[433] What follows is largely extracted from the plaintiffs' written submissions. Its purpose is to assist in concisely describing the origins of CIL, its relationship to the plaintiffs' claims and the doctrine of adoption. It is certainly not intended to be an exhaustive summary of this most complicated and developing area of the law as it moves to adapt to the ever changing social and economic conditions of our modern world.

[434] CIL is a branch of international law that is not derived from any written instrument but is instead drawn from the settled practice of sovereign states. To establish a rule of CIL, states must show a pattern of behaviour among them in

conformity with that rule (referred to as “state practice”), and that the pattern of behaviour arises out of a sense of legal obligation (“*opinio juris*”). A rule becomes recognized as a norm of CIL once it is clear that the community of sovereign states recognizes and observes it as a binding legal obligation. Once a rule is recognized as one of CIL it becomes, with very few and narrow exceptions, universally binding across all states. CIL is sometimes referred to in the literature as international custom or international usage.

[435] Article 38(1) of the United Nations, *Statute of the International Court of Justice*, 18 April 1946, enshrines custom as one of the sources of international law:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> …
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> ...

[436] Treaty law is the other major source of international law. A rule does not automatically attain the status of CIL because it is enshrined in an international treaty. However, multilateral international conventions can be used as evidence of CIL.

[437] There is also a set of higher-order international law principles known as *jus cogens*. These are peremptory norms of international law from which no derogation is permitted. Article 53 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 for example, states that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

[438] A *jus cogens* norm enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules, having acquired a status as one of the most fundamental standards of the international community.

Courts seeking to determine whether a norm of CIL has attained the status of *jus cogens* look to the same sources, but must also determine whether the international community recognizes the norm as one from which no derogation is permitted: *Prosecutor v. Furundzija,* IT-95-17/1-T, Final Judgment (10 December 1998) at paras.153-54; *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 at 714-15 (9th Cir. 1992).

[439] The prohibitions on slavery, forced labour, torture and crimes against humanity are part of CIL, and all have the status of *jus cogens*.

[440] In *Hape*, Justice Lebel confirmed at para. 39 that norms of CIL are adopted into and form part of the common law of Canada, and should be used to develop the common law:

> 39 Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.
>
> [Emphasis added.]

[441] Justice Goudge of the Ontario Court of Appeal summarized the principles this way in *Bouzari v. Islamic Republic of Iran*, [2004] O.J. No. 2800 at paras 63- 66 [*Bouzari*]:

> [63] Canada's international law obligations can arise as a matter of conventional international law or customary international law.
>
> [64] Where Canada has undertaken treaty obligations, it is bound by them as a matter of conventional international law. Parliament is then presumed to legislate consistently with those obligations. See Schreiber, supra, at para. 50. Thus, so far as possible, courts should interpret domestic legislation consistently with these treaty obligations.

> [65] The same is true where Canada's obligations arise as a matter of customary international law. As acknowledged by the Attorney General in this case, customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so where the obligation is a peremptory norm of customary international law, or *jus cogens*. …
>
> [66] … whether Canada's obligations arise pursuant to treaty or to customary international law, it is open to Canada to legislate contrary to them. Such legislation would determine Canada's domestic law although it would put Canada in breach of its international obligations.

[442] Common law courts have historically applied international custom to create private law obligations and, indeed, entire fields of private law. In the 1760s, William Blackstone in *Commentaries on the Laws of England,* (4th ed. 1770), Book IV at 67 described the various kinds of civil disputes between private individuals that were, at the time, governed by international custom, including:

(a) in mercantile questions, such as bills of exchange and the like;

(b) affairs of commerce, known as the law merchant;

(c) in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; and

(d) all disputes relating to prizes, shipwrecks, hostages, and ransom bills.

D: Parties' Positions

[443] Nevsun's position is that the plaintiffs' CIL claims have no reasonable likelihood of success in that:

(a) CIL does not apply to corporations:

i. states and international organisations, not corporations, are the subjects of international law and of international legal obligations;

ii. Nevsun is not a subject of international law;

iii. no international treaty imposes obligations directly on corporations created by domestic law;

iv. CIL does not impose obligations directly on corporations created by domestic law;

v. international human rights law does not impose direct obligations on corporations created by domestic law;

(b) the international obligations are not actionable against Nevsun under Canadian law:

i. adoption of CIL aids in the development of the common law, but does not automatically create new common law rules;

ii. domestic law does not automatically supply a private law remedy to complement norms of CIL;

(c) the *United States Alien Tort Statute*, 28 U.S.C. ("ATS") case law does not support the conclusion that the plaintiffs have a private law cause of action for breach of CIL;

(d) Canadian tort law does not recognise a private law right of action for breach of the CIL norms relied on by the plaintiffs;

i. claims for breach of criminal law disclose no cause of action;

ii. the plaintiffs' claims are necessarily excluded by legislation;

(e) the conditions for recognition of new nominate torts are not satisfied;

(f) the plaintiffs' claims based on breaches of CIL are unknown to the law. There is no reasonable prospect at trial that this Court would recognize them. This is also the case with new torts based on the adoption of the customary norms advanced by the plaintiffs.

[444] The plaintiffs' position can be summarized as follows:

(a) the doctrine of adoption applies in this case;

(b) corporations do not enjoy blanket immunity from CIL;

(c) there has been judicial recognition that corporations may be subject to rights and obligations under international law;

(d) Nevsun must establish an affirmative norm of corporate immunity and has not done so;

(e) the conditions for recognizing new nominate international torts are met in this case;

(f) in any event it cannot be said that the claims advanced have no reasonable chance of success and are bound to fail. The legal principles underpinning them have been accepted by Canadian courts to the extent they have been considered. Further, the soundness of these CIL claims is supported by significant precedent from American, British, and international tribunals that remain the law, given that the subject matter of the claim is CIL, reference to this international precedent is sufficient to establish that the plaintiffs' claims have a reasonable chance of success.

E: Discussion

[445] No civil claims alleging breach of CIL norms, peremptory or otherwise have been advanced successfully in Canada.

[446] But the plaintiffs' claims must be considered in light of the case law, which requires that on an application such as this "the approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at para. 21 [*Imperial Tobacco*].

[447] So the issue then becomes whether the CIL claims are "arguable", having a reasonable chance of success such that the plaintiffs on a preliminary application, such as the case here, should not be driven from the judgment seat.

[448] While the parties raise a plethora of arguments both for and against the propriety of the CIL claims, I am of the view that this application should be determined within the following context.

[449] The starting point is *Hape* and Justice Lebel's statement at para. 39 that:

> … following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.

[450] Nevsun relies on the Supreme Court of Canada decision in *Kazemi*, arguing that a civil claim based on a breach of a peremptory CIL norm has no reasonable chance of success.

[451] I referred briefly to *Kazemi* at para. 389 above. *Kazemi* involved an action for damages, including punitive damages brought by the estate of a Canadian journalist and the executrix in her personal capacity against the Islamic Republic of Iran and certain of its officials pertaining to acts of torture committed against Ms. Kazemi, resulting in her death while she was imprisoned in Iran. The Iranian defendants brought a motion in the Superior Court of Quebec to dismiss the action on the basis of state immunity. The Supreme Court of Canada dismissed an appeal from the Quebec Court of Appeal which had decided that both actions should be dismissed.

[452] The principal issue in *Kazemi* was whether the *SIA* offered a complete defence to the claims. Justice Lebel stated at paras. 59-61:

> 59 A number of interveners argue that s. 3(1) of the Act is ambiguous and should therefore be interpreted in accordance with the common law, the *Charter* and international law. The intervener the Canadian Civil Liberties Association submits that the *SIA* is ambiguous because it does not clearly extend to cases involving alleged breaches of *jus cogens* norms (factum, at paras. 8-10). The British Columbia Civil Liberties Association ("BCCLA") similarly asserts that s. 3 of the Act is ambiguous (factum, at para. 8). The intervener Amnistie internationale, Section Canada francophone argues that s. 3 of the Act only shields foreign states with respect to their [translation] "public acts", acts which do not include torture (factum, at para. 1).
>
> 60 The current state of international law regarding redress for victims of torture does not alter the *SIA*, or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, "'*Texture ouverte', droit international et interpretation de la Charte canadienne*", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), at pp. 231-35). Indeed, the presumption that legislation will conform to international law remains just that -- merely a presumption. This Court has cautioned that the

> presumption can be rebutted by the clear words of the statute under consideration (Hape, at paras. 53-54). In the present case, the *SIA* lists the exceptions to state immunity exhaustively. Canada's domestic legal order, as Parliament has framed it, prevails.
>
> 61 Even if an exception to state immunity in civil proceedings for acts of torture had reached the status of a customary rule of international law, which, as I conclude below, it has not, such an exception could not be adopted as a common law exception to s. 3(1) of the *SIA* as it would be in clear conflict with the *SIA* (*Hape*, at para. 36). Moreover, the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order (L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 S.C.L.R. (2d) 23, at p. 35). Should an exception to state immunity for acts of torture have become customary international law, such a rule could likely be permissive -- and not mandatory -- thereby, requiring legislative action to become Canadian law (Hape, at para. 36; dissenting reasons of La Forest J. in R. v. Finta, [1994] 1 S.C.R. 701, at pp. 734-35; LeBel and Chao, at p. 36; G. van Ert, Using International Law in Canadian Courts (2nd ed. 2008), at pp. 218-23).

[453] I do not accept that the decision in *Kazemi* means that the plaintiffs' CIL claims have no reasonable chance of success. The ratio of *Kazemi* is restricted to the *SIA* and claims brought against a foreign state and its officials. In my view Justice Lebel's statement that "the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal context" should be considered in that context. If I am wrong in this interpretation then I am of the view that the fact a customary rule is not automatically incorporated into the domestic legal context does not mean that it can never be so incorporated.

[454] While it is arguable that a similar result to *Kazemi* should occur in this case, it is also arguable that it should not, given that there is no statute, let alone a complete code that applies to the circumstances alleged to have occurred here.

[455] Nevsun also argues that the CIL norms are crimes at international law, not torts. Accordingly, the doctrine of adoption does not change the fundamental nature of the rules themselves, converting them from crime to tort. Furthermore, crime and tort are not the same. Accordingly, it says that breach of a criminal prohibition is not a tort and does not give rise to a civil or private law cause of action. On this basis it is plain and obvious that the CIL claims are bound to fail.

[456] I do not accept that this issue is as clear cut as Nevsun suggests. While crime and tort are not the same, commission of a crime can often result in subsequent civil liability.

[457] The potential effect of the existence of private law remedies for alleged breaches of CIL norms was addressed by Chief Justice Black of the Australian Federal Court in the passage from *Habib* to which I referred earlier and which I will repeat here for the sake of convenience:

> [13] It is not to the point that Mr. Habib's proceeding is a civil claim for damages and not a criminal proceeding under the Crimes (Torture) Act, the Geneva Conventions Act or the Criminal Code. The point is that, if a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms.

[458] I conclude that Nevsun's argument on this point does not establish that the CIL claims are bound to fail.

[459] Nevsun then submits that Parliament has demonstrated an intention against creating a private law cause of action for breaches of the CIL norms, both through legislation it has rejected, and legislation it has enacted.

[460] In its written argument, it points to the fact that Parliament enacted:

(a) the *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. 24 ("*CAHWCA*") making crimes against humanity committed anywhere crimes (and not torts) under Canadian law, and creating a compensation fund for victims of such crimes (but no private law cause of action); and

(b) *Justice for Victims of Terrorism Act,* S.C. 2012, c. 1 ("*JVTA*"), creating a private law cause of action for terrorism but not for the CIL norms on which the plaintiffs rely.

[461] Nevsun also notes that Parliament has chosen not to enact legislation designed to replicate the *ATS* in Canada and not to enact other legislation designed

to “ensure the extractive activities of Canadian corporations in developing countries respect Canada’s commitments under international law …”.

[462] While there is merit to this submission, I do not consider it to be conclusive such that the application should be granted. The fact Parliament has enacted the *JVTA* and has considered but has not yet enacted more comprehensive legislation in this field is not synonymous with there being an express derogation by Parliament as was found in relation to the *SIA* in *Kazemi*. In other words, there is no Canadian legislation which conflicts with the theory of the plaintiffs’ CIL claims. Relying on *Hape* at para. 39, this means that:

> the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

[463] Furthermore, in *R. v. Appulonappa,* 2015 SCC 59 at para. 40, the Supreme Court of Canada described *Hape* as requiring courts to “interpret legislation in a way that reflects the values and principles of customary and conventional international law”.

[464] An additional argument advanced by Nevsun is that the CIL claims are not necessary. The alleged acts, if established, are actionable under existing torts and the NOCC already seeks punitive damages. While this may indeed be the case, I do not consider this to be a material factor in determining whether the CIL claims should be struck as having no reasonable chance of success. The plaintiffs are entitled to base their claims on additional or alternative bases of relief, as long as they otherwise satisfy the requirements for proper pleadings.

[465] The plaintiffs, relying on *Jones v. Tsige*, 2012 ONCA 32, submit that the CIL claims satisfy the requirements for the creation or recognition of four new nominate torts. They argue that for the court to dismiss these claims at a preliminary stage would be an example of what the Supreme Court of Canada contemplated in *Imperial Tobacco*, stating at para. 21 that:

> The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed.

[466] It is not necessary for me to decide on this application whether one or more new nominate torts should be recognized. The plaintiffs may face significant obstacles at the trial in establishing the need for these new torts but at this stage of the proceeding, I cannot conclude that they are bound to fail.

[467] That is because these claims are said to arise as the result of social or technological change posing a novel harm for which there is no existing remedy. The Hon. Ian Binnie, C.C., Q.C., has written about these issues and potential solutions:

> When the reach of business operations was more or less coextensive with the nation states in which they resided, there was no doubt which state was in charge, although in practice the control may have been imperfectly exercised. Today, however, transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the international community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses ...: Justice Ian Binnie (as he then was), "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (2009) 38:4 The Brief 44 at 45.

[468] A key element of Nevsun's submission is that CIL does not recognize that corporations, being creatures of domestic law, can be responsible for breaches of CIL norms. In particular it submits that corporate liability is incompatible with:

(a) the basic structure of international law, including that corporations are created and regulated not on the international, but domestic plane;

(b) international conventions such as the *CAT* from which the CIL norms relied on emerged;

(c) international efforts to legislate corporate liability, that would be unnecessary if corporate responsibility for CIL norms was itself a rule of CIL; and

(d) the basic structure of CIL, that requires virtually uniform state practice accompanied by *opinio juris*.

[469] The plaintiffs respond by submitting that corporations do not enjoy blanket immunity from CIL. They point to the jurisprudence from the United States and

international tribunals in support of their position that although the CIL claims are novel they are not bound to fail.

[470] Considerable effort was expended by the parties on this issue. In relation to this application alone, I was provided with briefs of authorities which totaled upwards of 225 cases, decisions from international tribunals and extracts from the works of learned authors, a sizeable number of which related to corporate liability and/or immunity.

[471] Potentially persuasive arguments were advanced by both sides. From Nevsun's perspective these included:

(a) the limited utility, if any, of the American jurisprudence in that the United States have the *ATS*; and

(b) the lack of international recognition of corporate liability and the alleged absence of a virtually uniform state practice accompanied by *opinio juris*; specifically that states have either uniformly and consistently opposed the application of international obligations to domestic law or at least acknowledged that they do not apply.

[472] From the plaintiffs' perspective these consisted of:

(a) the history of corporate liability in the United States arising out of the *ATS*;

(b) references to decisions of international tribunals to support their position that no international law tribunal has ever recognized a doctrine of corporate immunity, and that corporations and not their shareholders have international rights;

(c) that a crime against humanity, such as apartheid can be committed by both natural and legal persons;

(d) The Nuremberg Trials which took place in two separate phases after the Second World War included those involving the heads of major German business entities seen as key contributors to the Nazi war

> effort: IGFarben, Krupp, and Flick. In their decisions in these trials, the tribunals made reference not only to the liability of the original defendants, but that of the corporations themselves which in the case of Krupp related to the private expropriation of assets based on anti-Jewish laws.

[473] While I agree with Nevsun that the American jurisprudence may be of limited assistance to the plaintiffs and that there is merit to many of its submissions, I also agree with the plaintiffs that the history of corporate liability under international law "is a complex and layered narrative that spans centuries and draws from many different fields of law, countries, and types of materials".

[474] Whether corporations are subjects of CIL is something Nevsun says is answered by *Kiobel v. Royal Dutch Pet. Co.,* 621 F.3d 111 (2d Cir. 2010) and by state practice negating such a proposition. Nevsun cites the example of when all the OECD countries voted against a proposition raised at the UN Commission on Human Rights in 2014 by Ecuador and South Africa to impose international obligations on corporations through a treaty-process. Another example it points to is the rejection by the UN Commission and the submissions of the states affirming the rejection of the draft instrument on the responsibility of transnational corporations in 2003.

[475] In contrast, the plaintiffs submit that individuals are also subjects of international law. For this proposition, they cite *Belhaj* at para. 115, and *Filartiga v. Pena-Irala,* 630 F. 2d. 876 at para. 42. The plaintiffs' specifically note *Doe v. Nestle USA Inc.,* 766 F. 3d 1013 at 1022 (9th Cir. 2014) for the proposition that corporations are not immune from claims of slavery and forced labour. The court in *Doe* stated, *inter alia,* that "there are no rules exempting acts of enslavement carried out on behalf of a corporation".

[476] Based on the extensive materials and submissions made on this issue, I find the statement of Justice Wilson in *Hunt v. Carey Canada Inc.* at 990-991, to be germane:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society
>
> [Emphasis added.]

[477] This is especially so here since, in my view, a contextual analysis will be required before the Court can provide a decision as to whether the common law, and in particular the law of tort, should evolve in the manner sought by the plaintiffs. That manner is not just with respect to the CIL claims generally, but also potential corporate liability in particular. There is also the issue as to whether corporate liability can arise out of an application of domestic law nothwithstanding the fact it does not form part of the *opinio juris* component of CIL.

[478] Nevsun also argues that the CIL claims invite the Court to embark into an area that it should treat with the utmost caution. It submits that advancement of the law in the manner the plaintiffs' seeks is for the legislature, not the courts in that:

(a) the legislature has the major responsibility for law reform;

(b) the Supreme Court of Canada has cautioned that the judiciary should "confine itself" to incremental changes necessary to keep the common law in step with the dynamic and evolving fabric of society;

(c) major changes, with complex ramifications, "however necessary or desirable", should be left to the legislature;

(d) this division of labour is consistent with constitutional responsibilities.

[479] I am mindful of the comments of the Supreme Court of Canada in relation to the court's role as distinguished from that of the legislature as stated, for example, by Justice McLachlin as she then was in *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 760-761 and Justice Iacobucci in *R. v. Salituro,* [1991] 3 S.C.R. 654 at 670.

[480] But, it is significant, in my view, that the Court is not being asked on this application to decide any of the many substantive issues raised by the parties including the effect of the doctrine of adoption and whether corporate immunity exists.

[481] Rather, the inquiry is limited to whether Nevsun has established that the CIL claims have no reasonable chance of success and are bound to fail. If the application is not granted, which I have concluded should be the case, then all these substantive issues, including whether the creation of one or more new nominate torts is necessary, will be determined at the trial.

[482] Whether the plaintiffs are successful in proving these claims at trial is an entirely different question.

F. Conclusion

[483] In many ways this application suffers from the same frailties as the Act of State Application. The CIL claims raise issues which have yet to be considered in Canada outside the *SIA* context. The question of corporate liability has also not been considered or decided.

[484] Since there is merit to the submissions of both Nevsun and the plaintiffs, I have concluded:

(a) Nevsun has not established that the inclusion of the CIL claims in the NOCC constitutes a radical defect, has no reasonable chance of success and is bound to fail;

(b) rather, a real issue exists, one which has a reasonable chance of success. The issue is whether such claims are permitted based on the common law as it currently stands or constitute a “reasonable development” of the common law; and

(c) the CIL claims raise arguable, difficult and important points of law and should proceed to trial so that they can be considered in their proper

> factual and legal context. This is necessary such that the common law and the law of tort may evolve in an appropriate manner.

[485] Accordingly the CIL Application is dismissed.

VIII: THE REPRESENTATIVE ACTION APPLICATION

A: Introduction

[486] Nevsun applies pursuant to Rule 20-3(1) for an order that the plaintiffs may not continue this proceeding on a representative basis.

[487] The plaintiffs rely on R. 20-3 and not the *CPA* because neither they nor any of the members of the class they seek to represent are resident in British Columbia as required by section 2(1) of that Act.

[488] Nevsun argues that the plaintiffs are attempting to achieve through the Rules of Court what the Legislature has determined it would not permit: to bring a common law class action proceeding consisting entirely of non-resident class members.

[489] The plaintiffs' position is that a representative proceeding is the only way to achieve the goals of judicial economy, access to justice, and behaviour modification with respect to the grave wrongs they allege against Nevsun. They say that if the claims do not proceed on a representative basis, Nevsun will acquire effective impunity for its conduct with respect to the putative class members, a great many of whom will have no other practicable recourse.

B: Common Law Class Actions in British Columbia and Rule 20-3

[490] Central to the plaintiffs' position that Rule 20-3 applies in this proceeding is that they satisfy the criteria for a form of "common law class action" set out by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*].

[491] At paras. 38-41 of *Dutton*, Chief Justice McLachlin on behalf of the Court set out the four requirements for such a proceeding:

> (a) the class is capable of clear definition;
>
> (b) there are issues of fact and law in common to all class members;
>
> (c) success for one class member means success for all and:
>
> (d) the proposed representative adequately represents the interests of the class.

[492] If these conditions are met, the court must also be satisfied that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed: *Dutton* at para. 42.

[493] *Dutton* concerned an application under the Alberta equivalent to Rule 20-3 but in circumstances where that province did not have comprehensive class action legislation.

[494] British Columbia has both a representative action rule and the *CPA*. Accordingly, the first issue to be decided is whether the *Dutton* criteria apply to a representative action in this province. The plaintiffs say they do and those criteria are satisfied in this case. Nevsun argues that they do not and that the criteria for a representative proceeding are far more limited than under the *CPA*. In the alternative, Nevsun submits that the *Dutton* criteria are not satisfied in this case.

[495] Rule 20-3 of the *Supreme Court Civil Rules* provides in part:

> Rule 20-3 — Representative Proceedings
>
> Representative proceeding
>
> (1)If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.
>
> Court may appoint representative
>
> (2)At any stage of a proceeding referred to in subrule (1), the court, on the application of a party, may appoint one or more of the defendants or respondents or another person to represent one or more of the persons having the same interest in the proceeding, and if the court appoints a person not named as a defendant or a respondent, the court must make

> an order under Rule 6-2 adding that person as a defendant or respondent.
>
> Enforcement of order made in representative proceeding
>
> (3)An order made in a proceeding referred to in subrule (1) of this rule is binding on all the persons represented in the proceeding as parties, but must not be enforced against a person not a party to the proceeding except with leave of the court.

[496] Sections 2 and 4 of the *CPA* provide in part:

> Plaintiff's class proceeding
>
> 2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.
>
> (2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.
>
> …
>
> (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.
>
> …
>
> Class certification
>
> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

[497] In essence the plaintiffs' submission is that by virtue of the Rule 20-3 representative action proceeding, there continues to exist in this province a regime of common law class action claims based on the *Dutton* criteria which operates independently from those subject to the CPA.

[498] I disagree. In *Dutton,* the Chief Justice, having referred to the enactment of "comprehensive statutory schemes to govern class action practice" in British Columbia, Ontario and Quebec, stated at paras. 31:

> 31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:
>
> > 42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.
>
> [Emphasis added]

[499] Furthermore, in this province, the representative proceeding rule has been limited to a narrow class of cases such as claims made by those:

(a) alleging a common statutory or collective right, for example aboriginal or language rights: *Campbell v. British Columbia (Forest and Range*),

2011 BCSC 448; *Quinn v. Bell Pole*, 2013 BCSC 892 at paras. 17, 19 [*Quinn*]; *L'Association des parents de l'ecole Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 1495 aff'd 2015 SCC 21 [*Conseil scolaire*];

(b) who seek a common statutory declaration or remedy such as game show participants, remedies under a collective agreement , owners in a housing development and the like: *James v. British Columbia,* 2007 BCCA 547 [*James*]; *Parker Cove Owners' Association v. Parker Cove Properties,* 2010 BCCA 100 [*Parker Cove*]; *Hayes v. British Columbia Television Broadcasting Systems Ltd.* (1990), 46 B.C.L.R. (2d) 339 (C.A.) [*Hayes*].

[500] In *Hayes*, McDonald J.A. described the test as follows:

> In deciding whether a case is appropriate for a representative action, tests were laid down by Chief Justice McEachern of this Court, then Chief Justice of the Supreme Court, in *Kripps et al v. Touche Ross & Co*. (1986), 7 B.C.L.R. (2d) 105. The tests are stated in the form of three questions to be answered:
>
> (1) Is the purported class capable of clear and finite definition?
>
> (2) Are the principal issue of fact and law essentially the same with regard to all members?
>
> (3) Assuming liability, is there a single measure of damages applicable to all members?

[501] He then cited the following passage from *Shaw et al v. The Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250 at 253 (B.C.C.A.) [*Shaw*]:

> It appears to me that the many passages uttered by Judges of high authority over the years really boils down to a simple proposition that a class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also [become] likewise entitled to that relief, having regard, always, for different quantitative participation.

[502] *Hayes* was decided in 1990 approximately 10 years before *Dutton* and the plaintiffs argue that it has been "overtaken by *Dutton*". The *CPA* was enacted in 1995.

[503] In support of their position, the plaintiffs rely on certain cases decided in this province after *Dutton* where those criteria were applied. These include *Quinn* and *Richards v. Darwin Properties (Seymour) Inc*., 2015 BCSC 2023.

[504] I do not take these authorities to stand for the proposition argued by the plaintiffs, which is that the representative action rule broadens the traditional limited class of plaintiffs to include those who do not meet the residency requirement under the *CPA* and to provide them with essentially the same benefits as if they did qualify under that statute.

[505] In *James*, Justice Huddart commented on the fact British Columbia had both a representative action rule and comprehensive class action legislation. After referring to *Dutton* she stated at para. 33 that British Columbia added Rule 5(12) and Rule. 5(13) in 1977 to permit representative actions such that now, both class proceedings under the *CPA* and representative actions under the Rules are permitted. She stated at para. 33: "A court's obligation is to make both work, so that litigants can select the procedure that works best for their purposes."

[506] She continued at para. 34 to endorse the approach in *Dutton* that courts must strive for a balance between efficiency and fairness. Two examples of this include notice and addressing problems of procedure. Class members must be given notice of the suit so as to have a chance to exclude themselves prior to any decision that purports to affect their interests. Further, due to the complexity of such proceedings, procedural issues must be addressed on a case-by-case basis, in the absence of comprehensive class-action legislation.

[507] Justice Huddart, at para. 35, warned against merely relying on the *CPA* for guidelines and instead advanced a purposive approach, such that courts should:

> look to the history of r. 5(13), its purpose as explained in the authorities, and most importantly, to the ordinary meaning of its language in the context of the British Columbia Supreme Court Rules as a whole, bearing in mind the need to make the representative action and the class proceeding work as complementary vehicles for the efficient and fair prosecution and defence of causes of action with common issues.

[508] At para. 50, Justice Huddart noted that:

> a representative proceeding may be preferred where the class is limited and clearly ascertainable, as in this case and in all the authorities provided to us where a representative proceeding was permitted to continue when challenged . . .

[509] In my view, the expression "may be preferred" should be considered in the context of what was said at para. 33 of *James*, being "a court's obligation is to make both work, so that litigants can select the procedure that works best for their purposes."

[510] In this case the plaintiffs are not able to select the procedure that works best for them. They are precluded from seeking relief under the *CPA* due to the residency requirement. I note that it may have been open for them to apply under s. 2(4) of the *CPA* to have a non-member of the class certified as a representative plaintiff, but they have not done so.

[511] While the *Dutton* criteria may be of assistance in considering the propriety of a representative action in this province, there are several significant differences between the two proceedings. They include:

(a) Rule 20-3(1) refers to the plaintiffs having "the same interest in a proceeding" whereas s. 4(1)(c) of the *CPA* uses the words "the claims of the class members raise common issues…". Although "same interest" under the Rule has been held to mean "common interest" that is within the context of the assertion of a "common right" or "common grievance" normally arising from a "common origin" (see *Parker Cove*

at paras.7, 9, 39). The “same interest” in my view is not necessarily equivalent to raising “common issues”. While Justice Wilcock in *Conseil scolaire* did refer to the *Dutton* criteria regarding “common issues”, this appears to have been in the context that the plaintiffs had the same or common interest which arose from the educational language questions which were the basis for that proceeding. He also referred to *Shaw* which was relied on by the Court of Appeal in *Hayes*, albeit in relation to a pleadings issue;

(b) s. 4(e)(ii) of the *CPA* requires the filing of a litigation plan. There is no such requirement in Rule 20-3. In my view this supports the proposition that the representative proceeding as it has developed historically in this province applies to situations as described above involving a limited and clearly ascertainable class of persons as opposed to a broader class as contemplated by the *CPA*;

(c) in a class action:

> “the opt in procedure would allow for the creation of separate classes with entitlement potentially to different remedies. That is not possible in a representative action”: *Parker Cove* at para. 42.

[512] Although not required to do so, the plaintiffs did file a litigation plan. It originally provided for an opting out mechanism but the plan was amended during the hearing of these applications to provide for an opting in provision.

[513] I am not assisted by the many authorities from other jurisdictions upon which the plaintiffs rely in their attempt to broaden the scope of Rule 20-3.

[514] One example is *Saunders v. Houghton*, [2010] 3 NZLR 331. This involved a representative proceeding on behalf of shareholders who bought into an initial public offering and in the secondary market. The court at 336 noted that in interpreting the applicable rule in other jurisdictions, "[t]here are different lines of authority, some … adopting a generous approach to representation applications and others that do

not." New Zealand does not have a class proceedings statue; that was also the case in many of the authorities I was referred to.

[515] Considering the “history and purpose” of the representative proceeding rule and the circumstances in which it applied both prior and subsequent to *Dutton* and the enactment of the *CPA*, I conclude that common law class actions under *Dutton* are only available in the absence of comprehensive class action legislation. Non *CPA* proceedings are governed by Rule 20-3 and the way that rule and its predecessors have been interpreted by the courts of this province. This includes the test set out in *Hayes*, although the *Dutton* criteria may well be of assistance in some circumstances.

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

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

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

C: Have the Rule 20-3 Requirements Been Satisfied?

[519] Nevsun’s position is that it is for the plaintiffs to satisfy the court that they and the “unnamed represented parties” have the “same interest” and they have not done so.

[520] It points to the affidavits the plaintiffs filed, the different experiences they claim to have had, and how they worked under different conditions.

[521] Nevsun also argues that the plaintiffs' assertions of a same or common interest only pertain to its alleged liability and says that, assuming liability is established, the damages will require individual assessments.

[522] The plaintiffs point to what they say is a clear proposed class definition being :

> all conscripts in the Eritrean National Service Program who worked at the Bisha mine from 2008 to the present. Membership in the class is therefore determinable based on two objective criteria: the individual's status as a conscript in the National Service Program, and work at the Bisha mine between 2008 and the present.

[523] They also submit that the other criteria referred to in *Dutton* have been satisfied. I shall return to that issue below.

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

(a) First Nation aboriginal title or rights issues;

(b) an association seeking linguistic rights remedies;

(c) members of unions, a housing cooperative or participants in a game show,

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

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

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

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

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

[529] Accordingly, I conclude that Nevsun's application should be granted on this basis alone.

D: Application of the *Dutton* Criteria to this Case

[530] If I am wrong in my conclusions regarding the scope of Rule 20-3 and whether its requirements have been met in this case, I will review the *Dutton* criteria in order to determine whether their application would lead to a different result.

(a) is the class capable of clear definition?

[531] The plaintiffs' position is that the proposed class satisfies this requirement; objective criteria for membership are set out.

[532] The difficulty with this submission is that the plaintiffs' own evidence demonstrates inconsistencies, if not outright contradictions, about the status and working conditions of the named plaintiffs and putative class members. The word "conscripts" itself is problematic since it embraces various disparate groups as described in the plaintiffs' own evidence. Mr. Alemayo's affidavit, for example, describes "Segen conscripts", "Mereb conscripts", and "74 conscripts". Further, this

definition does not distinguish those who are conscripts, were conscripts, or may have been demobilized during their time at the Bisha Mine.

[533] In addition, the pleaded facts and the evidence do not suggest that the entire class was subject to all of the alleged abuse. Indeed, the named plaintiffs' circumstances make clear that this was not the case. It is apparent that not all potential class members were subject to, or complained of, the types of mistreatment the plaintiffs assert, much of which allegedly occurred at the Segen compound, not at the Bisha Mine, and at the hands of representatives of Segen or the Eritrean military.

[534] The following table of allegations illustrates the difficulties:

Kesete Tekle Fshazion	**Gize Yebeyo Araya**	**Mihretab Yemane Tekle**	**Bemnet Negash**	**Filimon Ghrmay**	**Yoseif Gebre-michael**
demobilized Nov 2008	not demobilized	not demobilized	not demobilized	not demobilized	not demobilized
Segen employee	Segen employee	Segen employee	Segen employee	Segen employee	Mereb employee
Dec 2008 - Oct 2012	Feb 2010 - Oct 2010	Feb 2010 - Oct 2010	Feb 2010 - July 2010	Feb 2010 - July 2010	"early" 2009 - May 2010
lab technician	manual labour	manual labour			
indoors/ outdoors	outdoors	outdoors			
	inadequate food	inadequate food			
	witnessed torture	witnessed torture	was tortured	was tortured	was tortured

[535] The different classes, the individual facts alleged in relation to each of the plaintiffs coupled with the evidence regarding the varying nature of the employment, roles, responsibilities and treatment of prospective class members, as well as the

different points in time they were said to be at the Bisha Mine, demonstrates there is no coherent class definition.

[536] As I have noted, sub classes are not permitted in a representative proceeding.

[537] Accordingly, I conclude that the first *Dutton* requirement has not been met.

(b) there must be issues of fact or law common to all class members;

[538] The underlying question on the commonality inquiry is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. In *Dutton* at para. 39, the Chief Justice explained that "class members' claims must share a substantial common ingredient to justify a class action". In deciding whether common issues justify a class action, the court should "examine the significance of the common issues in relation to individual issues".

[539] Nevsun's position is that no substantial issue of fact or law is common to all potential class members. There is no common, systemic wrong that is independently actionable by all. In fact, the plaintiffs' claims depend on idiosyncratic facts and circumstances.

[540] Nevsun argues that the potential class is splintered by numerous considerations reflecting the individual inquiries, including:

(a) whether they had been demobilized, in the ANSP or RNSP (i.e. active or reserve);

(b) if they had not been demobilized, whether they nevertheless advised SENET or BMSC that they had been demobilized; Nevsun's evidence is that employees were required to show that they had been demobilized;

(c) whether they were employed by Segen, or Mereb, or were in some fashion under the control of the Eritrean military;

(d) whether they were housed at Segen or Mereb (or other) camps, or lived in surrounding communities, and if they were housed at the camps, whether they were prevented from leaving;

(e) whether they were granted leaves of absence when requested;

(f) for whom and in what capacity they worked at the Bisha Mine;

(g) when and for how long they worked at the Bisha Mine;

(h) how conditions, including rates of pay at the Bisha Mine differed from other workplaces in Eritrea at the material times;

(i) whether they were subject to forced labour or any other of the varying kinds of alleged abuses;

(j) where and when alleged abuses occurred;

(k) whether the alleged abuses were committed by members of the Eritrean military, Segen, or others;

(l) whether the circumstances of the alleged abuse are such that Nevsun is liable;

(m) the damages, if any, individuals suffered as a result of alleged abuses;

(n) the other factors which might contribute to past or continuing claims for loss or damage, such as imprisonment, kidnapping, torture or other events subsequent to work at the Bisha Mine.

[541] The plaintiffs submit that the fact finding process and legal analysis is at the core of the plaintiffs' claims and is the same for all of them and the putative class members.

[542] They argue that the proceeding is likely to involve an inquiry into, amongst other things, the part Nevsun played in the control and oversight of the Bisha Mine and its development; what its directors, officers and employees knew or ought to have known; the actions taken and not taken; whether Nevsun owed a duty of care to class members and whether, if so, that duty was breached.

[543] In particular, they assert that common issues key to the first part of the case are outlined in its litigation plan and will further substantially each class member's legal claim against Nevsun, including whether:

(a) labour by active NSP conscripts was used at the Bisha Mine;

(b) labour by demobilized NSP conscripts was used at the Bisha Mine;

(c) with respect to the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha Mine, Nevsun

i. aided and abetted it;

ii. ordered, solicited, or induced it;

iii. expressly or implicitly approved of it;

iv. acquiesced in it;

v. failed to prevent or stop it;

(d) Nevsun knowingly and intentionally contributed to the commission of these acts by a group of persons acting with a common purpose in the development of the Bisha Mine;

(e) Nevsun had effective authority and control over Segen and other subordinates at the Bisha Mine and failed to properly exercise control over its subordinates at the Bisha Mine;

(f) Nevsun either knew or consciously disregarded information indicating that its subordinates at the Bisha Mine were committing or about to commit acts in violation of the foregoing principles of CIL and *jus cogens*;

(g) these acts were within the effective responsibility and control of Nevsun and Nevsun failed to take all necessary and reasonable measures within its power to prevent or repress their commission;

(h) Nevsun is liable for the conduct of BMSC, Segen, Mereb and/or Eritrea;

(i) Nevsun owed a duty of care to the plaintiffs;

(j) Nevsun breached the standard of care;

(k) Nevsun unlawfully conspired with BMSC, Segen, Mereb and the Eritrean military to injure the plaintiffs;

(l) the Plaintiffs are entitled to restitution, a constructive trust, or other equitable relief; and

(m) Nevsun's conduct warrants punitive damages.

[544] The plaintiffs then say that the second part of the proceeding will engage individual issues and require substantially more involvement from the putative class members. The issues to be determined in the second part include: when each proposed class member was at the Bisha Mine; whether they provided labour while in active/extended NSP or while demobilized; whether they were tortured or otherwise mistreated at the Bisha Mine and its surrounds; and whether they are entitled to damages as claimed and if so, the quantum.

[545] It is noteworthy that the plaintiffs' position with respect to the second part of the proceeding is predicated on the assumption that the plaintiffs and putative class members were at the Bisha Mine.

[546] In my view, this is putting the cart before the horse. Nevsun denies that any of the plaintiffs or putative class members were at the Bisha Mine from 2008 to the present. Nevsun's potential liability is dependent on a consideration of this issue and I do not accept that it can form part of the second stage of the proceeding. It is a threshold issue which must be addressed at the outset.

[547] I am also of the view that while there may be some common issues as outlined by the plaintiffs, the individual circumstances of the plaintiffs and putative

class members need to be examined. As Justice Smith stated in *Thorburn v. British Columbia,* 2013 BCCA 480 at para. 42:

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

See also *Dutton* at paras. 39, 47.

[548] Accordingly, I conclude that the second *Dutton* requirement is not present in this case.

(c) success for one class member means success for all

[549] Success on the common issues need not lead to liability for each common issue. Success for one class member must mean success for all, or at least not result in failure for the others. All of the members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent: *Dutton* at para. 40.

[550] The plaintiffs' position is that they satisfy this requirement. They say that they and the other putative class members allege that they were forced to provide labour at Nevsun's Bisha Mine. Accordingly, if the plaintiffs are successful in establishing that Nevsun is liable for some or all of the conduct alleged in the plaintiffs' claims, that success will be equally applicable to the claims of the class members.

[551] In response to the limitation defences raised by Nevsun, including that Eritrean law applies, the plaintiffs agree that limitations issues are individual and submit that they are properly resolved in the second part of this case, after the common issues trial.

[552] I disagree with the plaintiffs that success for one will mean success or, at a minimum, not lead to failure for all.

[553] One example suffices to make this point. One or more plaintiffs may establish they were at the Bisha Mine, but not others. Those who fail to do so will have their claim dismissed.

[554] Furthermore, some of the members of the putative class may have committed certain of the alleged abuses advanced by other members such as the administration of beatings and torture. The potential for inter-class conflict militates against class action proceedings: *Monaco v. Coquitlam (City),* 2015 BCSC 2421 at para. 167.

[555] I conclude that the third *Dutton* requirement has not been satisfied.

(d) proposed representative adequately represents the interests of the class

[556] Nevsun raises several objections regarding whether the plaintiffs adequately represent the class. These include:

(a) the plaintiffs are no longer in Eritrea. At the time they swore their affidavits, predating the filing of the action, they were living as refugees in Ethiopia and there is no updated evidence about their current circumstances;

(b) there is no evidence that they continue to be willing to act as representative plaintiffs;

(c) there are language and translation difficulties;

(d) there is little evidence that the experiences or treatment of the named plaintiffs, whether at the Bisha Mine or at the camp, is representative of the class they seek to represent. There is not a single homogenous class; and

(e) some of the potential class members are still in Eritrea.

[557] The plaintiffs say that they are willing to represent the class. They filed a detailed litigation plan and an amended plan prior to the hearing of the applications.

[558] In light of my conclusions regarding the other *Dutton* criteria, I do not propose to analyse this requirement in any detail.

[559] Suffice it to say that, had the other requirements been satisfied, I would have provided the plaintiffs with the opportunity to update the evidence and further refine their litigation plan to address these concerns raised by Nevsun.

(e) countervailing considerations

[560] Both Nevsun and the plaintiffs raise countervailing considerations which they assert advance their respective positions.

[561] For Nevsun, this includes the important differences between the class members' factual and legal positions and different defences that may be available to it with respect to the claims of different groups of plaintiffs. It also points to the lack of evidence regarding the potential class size.

[562] Nevsun also refers to the submissions of plaintiffs' counsel claiming that, as a matter of "fairness" and "efficiency", the court should allow the claim to proceed as a representative action for the time being and to reassess the situation in a year. It says that conferring significant benefits to the plaintiffs at this stage, at its expense and that of judicial economy, is inconsistent with these objectives.

[563] The plaintiffs point to the efforts made to date to identify the class size and to the evidence from Biniam Solomon regarding contacting Eritreans both in Eritrea and internationally.

[564] The plaintiffs say that their inquiries to determine the class size continue. This includes utilizing the services of Radio Erena that, according to Mr. Biniam Solomon, has the capacity to broadcast to a global audience including Eritrea.

[565] According to Abadi Alemayo's affidavit sworn in June 2014, he was an environment and safety officer at the Bisha Mine from August 2008 to October 2010. He describes what he termed "a large number of conscripts at Bisha" composed of three different groups being "Segen" "Mereb" and "74".

[566] During the hearing of these applications, counsel for the plaintiffs advised the Court that contact had been made with approximately 50 people who identified themselves as NSP conscripts. This did not necessarily mean that they would opt in, to the representative action. Counsel advised that between 50 and 200 individuals may opt in but also acknowledged that the number could be lower.

[567] In light of my conclusions regarding the principal *Dutton* criteria, I would add that there are countervailing factors favouring the arguments of both the plaintiffs and Nevsun. Had I found that all the other criteria had been met, I would not have granted the application due to uncertain evidence regarding class size and communication with Eritreans both inside and outside that country. Those are issues that could have been addressed through case management.

[568] There are, however, significant advantages to having putative plaintiffs commence their own action as opposed to "opting in" to this representative action:

(a) the plaintiffs will all be parties of record, such that Nevsun is entitled to discovery as of right. They could also be liable for costs;

(b) this proceeding, or any of the individual claims, can be settled at any time since Nevsun will know who the plaintiffs are and can deal with their individual claims directly. This is in comparison to an opt-in representative proceeding where the parties could not settle until the opt-in period has lapsed;

(c) the parties will know if and when the limitation periods have lapsed based on the date the plaintiffs' claims arose and that claim being filed, subject to determination of the applicable choice of law. This issue can be dealt with separately through case management;

(d) the parties will know who is bound by the action;

(e) the Court does not need to supervise notice and any opt-in or subsequent opt-out process, as it would be required to do in a representative proceeding.

[569] In my view these factors militate against a representative proceeding.

E: Conclusion

[570] The Representative Action Application is granted.

F: Going Forward

[571] While I recognize that the issues raised in this proceeding are complex and will require extensive trial management, rather than "opting in" to this representative proceeding, the putative class members will have to commence separate actions. In the usual course, that would lead to joinder with this action.

[572] Certain factors favour this process and I have identified them above.

[573] The court's broad powers to provide fairness to all the parties have previously been used to manage actions involving many plaintiffs or multiple actions in a coordinated way.

[574] Not surprisingly, I have been advised by counsel that due to the issues arising on these preliminary applications, appellate review will likely occur. Should that be the case, this will provide further time for the plaintiffs to continue in their efforts to identify additional plaintiffs.

VIX: CONCLUSIONS

[575] The preliminary applications are disposed of as follows:

(a) the Evidence Application is granted in part;

(b) the Forum, Act of State and Customary International Law Applications are dismissed;

(c) the Representative Action Application is granted;

[576] In light of the divided success on these applications, costs may be spoken to.

[577] I direct that a further judicial case management conference occur within 60 days.

[578] I have referred in these reasons for judgment to the cooperation between the parties and counsel as to the manner in which these most complicated issues have been presented and argued before the Court.

[579] I wish to add that I am grateful to all counsel for the most thorough written and oral submissions made by them on these applications. The parties filed extensive written submissions for each application together with voluminous briefs of authorities. I have not addressed every point argued or referred to every case, but I have reviewed all of the authorities on which each party has principally relied.

“Abrioux J.”