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Courts likely to be next battleground for Canadian companies with foreign ops

By Jax Jacobsen

It's not news that Canadian miner [Nevsun Resources Ltd.](#) may or may not have engaged in using forced labor — or, in less politically correct terms, slaves — in the construction of its [Bisha](#) copper mine in the repressive northern African state of Eritrea.

What's news this month is that the United Nations High Commissioner for Human Rights is now looking into it, issuing a June 5 report quoting Eritreans saying that they had been forced to work at the mine by Segen Construction Co., a subcontractor to Nevsun with ties to the Eritrean government.

The UN catalogues a number of abuses in the report, including this quote from a former Segen employee:

"There were many accidents in Bisha, more than I want to remember. It is one of the hottest parts of the world, 50 degrees Celsius. People were sick of pressure. Some died, they were not able to breathe. Others had no uniforms and suffered from chemical burns on the face, hands and body; they did not receive any medical care. A friend was working while oxygen was limited and he died because of it. Furthermore, there was an old man who should not even have been there given his age. He did not have appropriate shoes, and the electric tubes were not wired well. There was liquid on the floor. He slipped and was electrocuted."

Nevsun issued a statement following the release of the UN report, complaining that the authors did not visit the country or the mine, and had ignored the company's independent human rights impact assessment.

The company continues to insist that it is ultimately not responsible for actions taken by its contractors.

The UN body told SNL Metals & Mining on June 22 via email that it had received a report from Nevsun on Jan. 26, and acknowledged receipt of the report the same day.

"The [human rights impact assessment] provided by Nevsun was duly acknowledged and fully taken into account during the preparation of the Commission's report," the group said.

"However, the submission did not contain any pertinent information on the possible use of conscripts during the construction phase (2008-2011) of the infrastructure for the mine, nor that it called into question the information about the use of conscripts as forced laborers that had been collected in the course of the investigation."

Nevsun's report focused entirely on the period from July 2013 to January 2014, after the period in question ended.

This is not the first time conscription allegations have been levied at Nevsun. In January 2013, international non-governmental organization Human Rights Watch published a report titled "Hear No Evil: Forced Labor and Corporate Responsibility in Eritrea's Mining Sector."

HRW's Eritrea researcher Felix Horne flatly rejected Nevsun's stance that it was not responsible for the actions of its contracting partners.

"Nevsun cannot simply pass on the responsibility for human rights problems at its mine site to the contractor it is paying to work there," Horne told Canada's House of Commons on Feb. 14, 2013.

"Any human rights abuses by Segen would implicate Nevsun, and Nevsun has the responsibility to investigate them and ensure that they stop."

In November 2014, three Eritrean citizens filed a lawsuit in British Columbia's Supreme Court against Nevsun, alleging the company was complicit in the use of forced labor by the construction subcontractor.

James Yap, who is serving as one of the lawyers for the Eritrean citizens, told SNL June 22 via email that Nevsun's defense of being unaware of the actions of its contractor is implausible.

"I can't speak to the specific evidence we have in this case at the present," he said. "But one would think that someone responsible for managing a multibillion-dollar operation would have a good idea of where several hundred of the people working for them were from. So I'll just say that we're confident we can prove our allegations in court."

Nevsun is not the only instance of a Canadian company coming under legal pressure due to its actions abroad. [Tahoe Resources Inc.](#), which is being sued by seven Guatemalan workers who were injured when they were shot during a protest, is arguing that Guatemalan and not Canadian courts should hear the case because the incident happened in Guatemala. Arguments lasted three days in April, and the court has yet to return a decision on jurisdiction.

[HudBay Minerals Inc.](#) has also had trouble in Guatemala, with three lawsuits brought against the company due to the shooting of an aboriginal leader at a protest and gang rapes of local women. A Canadian court found in 2013 that the case will be heard in an Ontario court, despite HudBay's insistence that the case move forward in Guatemala, where the case would be much less likely to be heard.

Courts likely to be more important due to lack of government regulation, critics say

The Conservative government of Stephen Harper, in power since 2006, has been hesitant to impose any sort of legal regulation on the Canadian mining sector, preferring instead to urge companies to adopt corporate social responsibility regimes and self-govern in foreign locales.

The post of Extractive Sector Corporate Social Responsibility Counselor was created in 2009, with the aim of investigating Canadian mining firms that were accused of abusing human rights or damaging the environment. However, the office remained vacant from November 2013 until May 2015, when Jeffrey Davidson took the post.

The counselor's office denied a request for an interview, while the Canadian government's department for Foreign Affairs, Trade and Development issued the following statement to SNL on June 23: "The government expects all Canadian companies operating abroad to respect human rights and all applicable laws, and to operate in a manner consistent with widely-recognized international standards for responsible business conduct."

In 2009, John McKay, a member of parliament with the official opposition Liberal party, introduced a bill aiming to bring greater transparency to the mining sector, which would require the foreign affairs and trade ministers to submit annual reports to the Commons and the Senate. The bill was defeated by six votes in 2010.

"If you had a government that was actually interested in regulating the extractive industry, something could be done in a heartbeat," McKay told SNL June 22. "It is a cheerleader rather than a regulator for anything in the extractive industry."

Penny Collenette, who formally served in the Prime Minister's Office under Liberal Jean Chretien and is now an adjunct professor of law at the University of Toronto, finds the CSR Counselor's office inadequate to address these issues.

"The fact that the present government has put up a shell office yet again — to me that's not far enough," Collenette told SNL June 23.

"The Canadian parliament has never passed any legislation to say that Canadian operations overseas are to be held accountable by any misdeeds," she said. "If the government isn't going to legislate or put in place mandatory guidelines, then is it going to be up to the courts to look at these problems and force some accountability?"

Cory Wanless, who successfully argued the case against HudBay in 2013, feels that the reliance on voluntary guidelines to police Canadian mining activities abroad is coming to an end.

"No one else in our society has laws that apply to them that are only voluntary. If we hurt someone else, we can be sued. It sticks in my craw that the mining industry seems to want a free pass, saying that we'll do our best but if we hurt people, we'll try harder next time," he told SNL June 23.

Though the HudBay decision didn't set a precedent for abuses by Canadian mining companies' alleged abuses abroad to be heard in Canadian courts, Wanless believes it represents an important shift.

"Before HudBay, there was a general assumption that it wasn't possible to sue Canadian companies for events that happened abroad," he said. "I think what the HudBay case is doing is showing that that assumption is incorrect."

Wanless anticipates more and more cases of this kind to crop up in Canadian courts, given the "explosion" of the Canadian mining industry abroad.

"There is a real growth in the number of foreign projects, in part because of the nature of resource extraction and that most of the 'easy to get' stuff is gone, so companies are forced to go to places where it's more difficult to operate," he said.

Osgoode Hall law professor at York University Shin Imai also sees the pendulum swinging in this direction for Canadian mining companies.

"I can see where we're going to get different decisions at the lower courts, but once it gets to the Court of Appeal and the Supreme Court of Canada, they're going to realize that it's just not tenable to allow a company like Nevsun to take profits [in Canada] and say it's the Eritrean law that applies," he told SNL June 23. "I just don't think that's tenable."

Ultimately, Imai said, Canada must contend with the issue responsibly.

"We are the biggest mining player in the world," he said, pointing out that 62% of all mining financing was raised on the Toronto Stock Exchange in 2014.

"This is a big problem throughout the world, but it's a bigger problem for us because we're such big players."

Article amended at 9:01 a.m. ET on July 1 to reflect that Shin Imai is a law professor at York University's Osgoode Hall, not at the University of Toronto.

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SNL Financial LC, One SNL Plaza, PO Box 2124, Charlottesville, Virginia 22902 USA, (434) 977-1600