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Nevsun puts Canada's Corporate Decision Makers in the *Human Rights Zone*

A manager's job is to make decisions. With *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (*Nevsun*), the Supreme Court of Canada has changed the way that senior business decision makers must think about the human rights impacts of their decisions on people abroad. They must now grapple more directly and systematically with issues such as forced labour in the supply chain, abhorrent and dangerous working conditions, cruel and degrading punishment, as well as concerns over due process rights and freedom of association. This is a tall order, yet a necessary one. At the same time, the Court's decision has widened the realm of uncertainty for business decision makers, since the legal risks that have been created are not yet clearly defined. The details will be worked out over many more years of litigation, unless the government sees fit to pass legislation that endorses or negates the direction given by the court. In this essay, I argue that *Nevsun* puts the multinational corporate decision maker in an uncertain yet also demanding human rights decision-making 'zone'. This 'zone' is not a physical place; rather, it is a thinking space where business leaders must make judgments among and between the distinct concerns of human dignity and economic profit.¹ Decisions made in the corporate *human rights zone* concern processes, ethical values and broad consequences for people inside and outside the corporation over the short term and long term. This is a delicate yet positive change for businesses and for the communities that they have impacts on, as we shall see below.

While the investor and business decision maker are free to choose what risks to assume from a wide menu of options, the human rights victim has no such freedom. The victim's only choice lies in how to pursue a vindication of rights after they have already been taken away. But the age-old problem that persists today is that very often few realistic options for redress are available. The "nuclear" option—very rarely used—is to bring a transnational lawsuit against the parent company. This is precisely the route that Mr. Gize Yebeyo Araya and two other Eritreans who once worked at the Bisha mine took in 2014 in the *Nevsun* case.² By this lawsuit, they seek to vindicate their human rights claims against Vancouver-based *Nevsun Resources Ltd.*, a multinational enterprise that jointly owns the Bisha gold-

¹ The author conceived and developed the concept of the corporate human rights decision making zone over several years as an SJD candidate at Harvard Law School.

² See *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401 appealing *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856.

copper-zinc mine in western Eritrea.³ In February 2020, in a 5-4 majority decision, the Supreme Court of Canada rejected the company's bid to dismiss the case and ruled that Araya's human rights claim could go forward in British Columbia courts.

The Bisha mine is a major extractive project that today employs more than 1200 people. Araya and his co-plaintiffs claim that when Nevsun started construction on the mine in 2008, the company's decision-makers must have been aware of grave concerns over the use of forced labour in Eritrea. Multiple reports had already been published by Amnesty International, Human Rights Watch, the U.S. State Department and other organizations. Working for years at the mine site, Araya and his co-plaintiffs claim that they were "subjected to cruel, inhuman and degrading treatment as well as harsh working conditions including long hours, malnutrition and forced confinement for little pay."⁴ In their plea to the court, the workers claim that Nevsun, "facilitated, aided, abetted, contributed to and became an accomplice to the use of forced labour, crimes against humanity and other abuses at the Bisha mine."⁵ Nevsun denies all the allegations.

As the Supreme Court's decision pertained only to the company's preliminary motion to dismiss the claim, the plaintiffs only had to demonstrate that it was not 'plain and obvious' that their lawsuit could not succeed at the trial court. Writing for the majority, Justice Rosalie Abella began by stating that, "[t]his appeal involves the application of modern international human rights law... [such] norms were not meant to be theoretical aspirations or legal luxuries, but *moral imperatives and legal necessities*" [emphasis added].⁶ The majority agreed that customary international law's prohibitions against slavery, forced labour, crimes against humanity and cruel, inhuman and degrading treatment are automatically adopted into Canadian law and, "potentially apply to Nevsun."⁷ Ultimately, they were convinced enough that Canadian courts could potentially "develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law."⁸ But because "some norms of customary international law are of a strictly interstate character," the litigants and the trial judge must sort out the thorny issue of "whether the common law should evolve so as to extend the scope of those norms to bind *corporations*" [emphasis added].⁹ And so, the case goes back to the Supreme Court of British Columbia, where the trial is set to take place in September 2021 at the very earliest.

³ The Bisha Mine is a joint venture of Nevsun Resources Ltd. and the government of Eritrea. At the time the lawsuit began, Nevsun held a controlling interest in the project (60%).

⁴ *Araya v. Nevsun*, Statement of Claim, 20 November 2014, at para. 6.

⁵ *Araya v. Nevsun*, Statement of Claim, 20 November 2014, at para. 4.

⁶ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 1.

⁷ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 116.

⁸ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 122.

⁹ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 113.

The dissenting Supreme Court Justices criticized the majority for relying almost entirely on the opinion of a small handful of academics. They complained that the majority did not cite a single case “where a corporation has been held civilly liable for breaches of customary international law anywhere in the world,” adding that, “we do not know of any.”¹⁰ Going forward, these points of difference will be worked out at great cost in terms of time and money for both sides, rich and poor. At this juncture, the *Nevsun* case could go in almost any direction. Indeed, much legal uncertainty lies ahead for Canadian multinational corporations that operate where human rights abuses might occur. And yet, it bears reminding that Araya and other victims of human rights abuses around the world face tremendous uncertainty themselves, legal and otherwise.

Appearance v. Reality in the Human Rights Zone

Like all adult Eritreans, Araya and his co-plaintiffs were conscripted into that country’s compulsory national service program. They allege that the program is utterly corrupt and that they were forced to work for many long years after their 18-month term had expired. For his part, Araya claims that he was forced to work for a contractor owned by Eritrea’s ruling party (a company called Segen); another plaintiff alleges that he was conscripted to work for a company owned by Eritrea’s military (a company called Mereb). Araya worked six and a half days a week in the tailings management facility at the Bisha mine where he claims to have faced dangerous working conditions. At least one other worker, he says, died from heat exhaustion and dehydration while he was working at the site. Araya eventually escaped from service and fled Eritrea in 2011.

In their plea to the British Columbia court, Araya and the other plaintiffs claim that, “all important decisions relating to the development and operation of the Bisha mine... were made and/or approved by Nevsun’s senior management and/or the Board of Directors.”¹¹ These officials, they say, made a choice to contract directly with the Eritrean companies that were abusing workers and holding them in servitude. At the time the lawsuit was brought, Nevsun’s senior managers traveled occasionally to Eritrea for short visits of a few days to two weeks at a time.¹² These decision-makers, Araya says, “knew or consciously disregarded information which indicated” that the State-controlled contractors used forced labour and acquiesced to it.¹³ And so, they claim, the company was complicit with the Eritrean government’s human rights abuses and should be held accountable in Canadian courts.

Starting around 2012, controversy began to rear in Canada over conditions at the Bisha mine and Nevsun saw fit to commission a review of the project. One of their investigators was Lloyd

¹⁰ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 188.

¹¹ *Araya v. Nevsun*, Statement of Claim, 20 November 2014, at para. 26.

¹² Cliff Davis, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, 1 November 2012, at 1320.

¹³ *Araya v. Nevsun*, Statement of Claim, 20 November 2014, at para. 76.

Lipsett, a world-recognized authority on human rights impact assessment. In evidence given in 2014 to Canada's long-running Parliamentary subcommittee on international human rights, Lipsett stated that, "[m]y 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... I did not observe traits of people who were fearful."¹⁴ In his overall conclusions, he remarked that, "...there are some differences between external reports and what I was able to observe on the ground... [f]rankly, I expected a more militarized and overtly repressive environment than I witnessed in Asmara and at the mine site."¹⁵ At the same time, he acknowledged that, "I was only there twice... I wasn't doing investigations of prison conditions or places where some of the allegations that are quite serious are made, so I have to admit that my view of Eritrea is partial."¹⁶ Nonetheless, he emphasized that he had "unfettered access to people, places, and documentation."¹⁷ The Eritrean government, he said, did not interfere in his investigation.

What is so striking about Lipsett's observations is how widely at odds they are with the claims of abuses, including torture, made by Araya and the other victims.¹⁸ Does this mean that one is true and the other false? No. In all likelihood, there are good things and bad things going on at the Bisha mine today, and in Eritrea more generally. And in all likelihood, the same was true long before civil society shone a spotlight on Nevsun. This kind of background ambiguity is typical of company-community conflicts including those involving the extractive industry. Information about just what is happening on the ground is incomplete. Situations change rapidly. Critical information is lost or hidden. It is quite possible that the plaintiff's allegations about abuses suffered many years ago are entirely true, while today, similar abuses are unlikely to occur. After all, when risks become apparent, most companies will at least try to avoid them in the future.

Lipsett told Canada's parliamentarians that, "[t]here are two stories and there's a middle narrative." After his first investigation in Eritrea, he asked himself: "Had the wool been pulled over my eyes? Had I been asking the wrong questions? Had I been talking to the wrong people?"¹⁹ In a follow-up audit that he conducted a year later, he checked in with several of the workers that he had spoken to on his first visit. He concluded his testimony with humility: "I know that these are contested issues, that there are different perspectives on it. I don't want to

¹⁴ See Lloyd Lipsett, Subcommittee on International Human Rights, 5 June 2014, at 1305. See also LKL International Consulting Inc., Human Rights Impact Assessment of the Bisha Mine (2014); LKL International Consulting Inc., Human Rights Impact Assessment of the Bisha Mine: 2015 Audit (2015).

¹⁵ Lipsett, Evidence, at 1305.

¹⁶ Lipsett, Evidence, at 3120.

¹⁷ See Lloyd Lipsett and Mark Wielga, "Kick-starting Human Rights Due Diligence: The Role of Human Rights Impact Assessments," in Conference Proceedings from the Rocky Mountain Mineral Law Foundation, Special Institute on Human Rights and the Extractive Industries, Mineral Law Series, Volume 2016, Number 2, at 14.

¹⁸ See Elizabeth Chyrum (Director, Human Rights Concern Eritrea) and Aaron Berhane (Eritrean Human Rights Group Canada), Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, 14 February 2012.

¹⁹ Lipsett, Evidence, at 1320.

wave [my human rights] report and say I have some magic bullet.”²⁰ At the same hearing in Ottawa, one Member of Parliament noted that, “there’s a disparity here in the kinds of testimony we hear about life on the ground in [Eritrea]... we’re still hearing some pretty horrendous things...”²¹ This disparity reflects the fact that the lived experience of specific people affected on the ground is often very different from the general story that filters up to the decision makers at corporate headquarters.²²

Falling into the Corporate Human Rights Zone

The controversy over Nevsun’s project in Eritrea is hardly unique. When allegations of human rights abuses are levelled against a company, the decision makers at the highest levels are thrust into the uncertain realm of the corporate *human rights zone*. There is no ready-made map that clearly marks how to exit this space. The only way to chart a way out of the quagmire is to get down on the ground and view the scenario from as many perspectives as possible. This task is easier said than done, as Lipsett’s measured observations demonstrate. The curious dilemma for corporate decision makers in the human rights zone is that having greater knowledge cuts both ways. When a person (legal or natural) is named in a lawsuit, the very fact of knowing something and not acting on that knowledge in certain ways can create its own style of legal risk. Often, the worst human rights abuses take place completely below the company’s radar. Such abuses are the most pernicious of all the unknown unknowns that affect victims, business and government alike. With *Nevsun*, the extractive industry’s senior decision makers are challenged to do a better job of *knowing more*.

When Nevsun’s CEO, Mr. Cliff Davis, was asked in 2012 if he had heard of reports of human rights violations in Eritrea, his answer was no.²³ Two years later, Lipsett seemed to indicate that abuses might well have occurred at earlier stages in the development of the Bisha project—though he was unable to confirm or negate those allegations.²⁴ Since the initial allegations arose, the company had put in place screening procedures to make sure that Eritrea’s national service workers were not working at the mine. This is not the first time that the leader of one of Canada’s major extractive firms has been put in a position to walk back denials.

²⁰ Lipsett, Evidence, at 1330.

²¹ Wayne Marston, Meeting #32, Subcommittee on International Human Rights, 5 June 2014, at 1325.

²² For example, in *Copper Mesa Mining Corporation v. Republic of Ecuador* P.C.A. 2012-2 at para. 6.100, senior managers based in Canada and the U.S. claimed that they had no knowledge of the violent and illegal attacks on villagers that were organized and carried out by the Ecuadorian subsidiary.

²³ Recent reports allege that the CEO knew more than he let on at the time. See Scott Anderson, “What did Canadian mining executives know about possible human rights violations in Eritrea,” *CBC News*, January 22, 2019.

²⁴ Lipsett stated, “...there is always the challenge of adequately assessing allegations from the past. To put it bluntly, I don't have a time machine, nor do I have the powers of a judicial inquiry to compel witnesses and evidence. The inability to make a definitive finding about some of the past allegations about the Bisha mine emphasized for me the importance of ongoing work by Nevsun and its business partners to strengthen credible and effective grievance mechanisms.” Lipsett, Evidence, at 1310.

At Barrick Gold's annual general meeting in Toronto in 2008, Ipili indigenous leader Jethro Tulin rose to address then venerable Chairman, Peter Munk. Speaking about Barrick's massive Porgera valley mine in Papua New Guinea, Tulin stated, "I have travelled half way across the world... to speak out against the grave conditions my people face because of your Porgera mine... your security guards have been shooting and killing our people and raping, even gang-raping our women with impunity for years now."²⁵ The company pushed back vigorously, denying Tulin's claims and verbally assailing the organization that he represented. Days later, Barrick Gold responded in a letter to Tulin from the mine manager stating that, "...we found your public allegations of our employees 'gang raping' Porgera Land Owners' women to be most distasteful, to say the least, as you know these allegations to be untrue."²⁶ And yet, a report released a year later by Amnesty International backed up Tulin's claims. And soon after, investigators from the Harvard Law School International Human Rights Clinic identified ten more incidents of alleged rape. The company continued to deflect. When yet another report was released, this time by Human Rights Watch, Barrick Gold began to change its tune.²⁷ The company conducted an internal investigation and found, after years of denial, that many of the allegations of sexual violence committed by company employees were well-founded.

In the *human rights zone*, corporate decision-makers must grapple with the fact that things may not be as they appear on the surface; indeed, the truth may be very much at odds with what they are initially inclined to believe. In this precarious decision-making space, acting on superficial understandings often turns out to have very negative rebound effects for the company. Here, corporate decision makers must resist the kneejerk urge to aggressively defend and deflect against any and all allegations. Rather, decision makers should regard such allegations as the kind of 'red flag' that they would want to know about. Being on the receiving end of such allegations could mean that they are missing part of the picture, or that they have miscalculated some aspect of their business strategy and operations. Unfortunately, in the highly adversarial civil liability system of law that exists today, corporate defendants in a lawsuit systematically and vigorously deny each and every allegation that is made against them. This is done as a matter of course and is felt to be a matter of legal necessity. Indeed, it is one of the first things that young aspiring lawyers are trained to do: deny each and every allegation now and defend later.

²⁵ Jethro Tulin, Annual General Meeting of Barrick Gold, May 6, 2008, http://protestbarrick.net/downloads/Statement_Porgera.pdf (last visited March 9, 2020).

²⁶ See Porgera SML Landowners Association, Akali Tange Association and Mining Watch Canada, *Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises, Specific Instance Regarding: The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea*, (March 1, 2011), at 13. From: *OECD Watch, Mining Watch Canada et al. vs. Barrick Gold Corporation*, Human rights violations at Barrick's Porgera JV Mine in PNG (March 1, 2011), http://oecdwatch.org/cases/Case_210, (last visited March 9, 2020).

²⁷ See Albin-Lackey, C. and Ganesan, A., *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*. Human Rights Watch, 2011.

From the outset, the human rights victims and their advocates must plan to be involved in litigation for a decade or longer.

The Human Rights Zone is Management's Terra Incognita

While retaining some ambiguity and leaving much to be worked out in years ahead, the Supreme Court of Canada's *Nevsun* decision crosses a legal threshold that makes it much more difficult for corporate decision makers to play down a company's responsibility to respect human rights.²⁸ Beyond the legal necessities, the "moral imperatives" (as Justice Abella called them) that are contained within international human rights have influence-over and constrain the boundaries of fiduciary loyalty that a decision maker owes to the corporation and its shareholders. When there is potential for this constraining effect to occur in thinking about what choices to make, corporate decision makers find themselves in the *human rights zone*.

The notion of a corporate decision-making 'zone' will be familiar to most practitioners and scholars of Anglo-American corporate law. In particular, they may recall learning about the so-called '*Revlon zone*' in their very early corporate law training.²⁹ The *Revlon zone* is named after a landmark 1986 Delaware case involving the well-known cosmetics company and controversy over decisions that were made by its Board of Directors.³⁰ In what became known as the *Revlon zone*, directors who become involved in a sale or a change of control of the company are called on to make judgments about the appropriate course of action in light of their fiduciary duty to get the best deal for the shareholders. As no two business deals are ever exactly alike, there can be some ambiguity about whether a decision maker is actually in the *Revlon zone* or not, which is why its contours are expressed somewhat vaguely. The notion of a corporate *human rights zone* draws on this familiar notion of a high-stakes, normatively constrained decision-making space for corporate fiduciaries. The *Revlon zone* is "not intended to lead to a structured, mechanistic, mathematical exercise" for decision-making, nor is the *human rights zone*.³¹ Both require reflective judgments to be made with regards to distinct normative and economic concerns. In

²⁸ On the corporate responsibility to respect human rights, see United Nations. (2011). *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*. Human Rights Council U.N. doc. A/HRC/17/31 (21 March 2011).

²⁹ In their U.S. corporate law casebook, Allen et al. write that "[f]or want of better terminology, lawyers and judges came to talk of '*Revlon duties*,' '*Revlon land*,' and '*Revlon mode*' for those times when similar duties arose. Yet no one was certain when a board had entered *Revlon land* or exactly what the new *Revlon duties* required." See Allen, Kraakman, Subramanian, *Commentaries and Cases on the Law of Business Organizations*, 2012, at 513.

³⁰ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del., 1986). The court held that, "the [fiduciary] duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." [at 182]

³¹ See *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1374 (Del. 1995). In leading up to the quoted passages, the court referred to the "test" established previously in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

the corporate *human rights zone* the relevant concerns include those contained within international human rights law as well as human rights conceived as ethical precepts.³²

In the *human rights zone*, moral imperatives of the kind Justice Abella refers to in *Nevsun* have constraining effects on the range of decisions that a manager will choose to take. Few directors and managers will relish the thought of entering such uncertain terrain, but with the global reach of complex value chains today, and now with the Supreme Court's *Nevsun* decision, the likelihood of falling into it only increases. As in the *Revlon* zone, there is no bright line that demarcates the boundary of the corporate *human rights zone* in every case. Decision makers may be within its depths long before they become aware of the problem—in the most difficult cases, they might find themselves slipping into Hollywood quicksand. Getting into a human rights controversy can happen extremely quickly; climbing out of it takes time and a willingness to see the problem using a different lens.

And so, we come back to the manager's job: making decisions. Nobel economist Eugene Fama, describes the manager's decision-making role as "coordinating the activities of inputs and carrying out the contracts agreed among inputs."³³ In the *human rights zone*, the technical role that Fama defined expands to include wrestling over potentially tragic decision dilemmas, as well as facing public policy quandaries in which no option appears facially acceptable.³⁴ At the end of the day, we can say that each decision maker is responsible to him or herself for their chosen course of action. There is something to be gained in homing in on the role of reflective decision makers in bringing the abstract corporate entity to life. In the corporate *human rights zone*, the normative priors that lie in Justice Abella's *moral imperatives* of international human rights apply not for instrumental reasons that serve the corporate bottom line, but for the value of humanity as an end in itself. It makes little sense that business decision-makers have complete immunity from responsibility for such normative constraints, though one must also recognize the practical constraints that they face as managers, as well as the internally oriented demands of their fiduciary duty to the corporation and its shareholders. The tension that lies between all of these constraints and responsibilities is most palpable in the corporate *human rights zone*.

As U.S. corporate law Professor Robert Clark averred years ago, the corporate fiduciary duty may be triggered in "factual situations that no one has foreseen and categorized."³⁵ This style of indeterminacy is also characteristic of the corporate *human rights zone*. Canadian corporate

³² On human rights as ethical precepts ('parents' of law), see Sen, A., 2011. *The idea of justice*. Harvard University Press; see also Sen, A., 2004. Elements of a theory of human rights. *Philosophy & Public Affairs*, 32(4), pp.315-356.

³³ Fama, Eugene F., "Agency problems and the theory of the firm," *Journal of political economy*, 88(2), 1980, at 289. Fama is best known for the efficient market hypothesis.

³⁴ On "tragic dilemmas," see Nussbaum, Martha C., 2000. "The costs of tragedy: Some moral limits of cost-benefit analysis," *The Journal of Legal Studies*, 29(S2), 2000, at 1005 and 1014-17.

³⁵ See Robert C. Clark, *Corporate Law* (Little, Brown & Company, 1986), at 24.

decision makers might feel today the way that British corporate decision makers felt when the U.K.'s *Modern Slavery Act* became law in 2015.³⁶ Under the *Transparency in Supply Chains Provisions* of the *Act*,³⁷ firms of a certain size must make public statements regarding the steps they are taking to prevent human trafficking and slavery in their business or in their supply chain. But, there is no magic formula prescribed for how to do this. As best practices evolve, even good faith preventive efforts to avoid *causing* or *contributing* to human rights abuses will sometimes fail or may even backfire.³⁸ The *human rights zone* is a sticky place. But, the situation will improve for corporate insiders and outsiders who take human rights seriously.

Taking Business & Human Rights Seriously

Uncertainty is a natural condition of life. This is no less true for business decision-makers who act as fiduciaries to the corporation and its shareholders. In his 1921 treatise on “Risk, Uncertainty and Profit,” University of Chicago economist Frank Knight observed that, “making decisions in practical life is a rather inscrutable or ‘intuitive’ formation of ‘estimates,’ subject to a wide margin of error or uncertainty.”³⁹ Knight’s critical insight was that uncertainty cuts both ways: it creates both advantages and disadvantages. A business decision maker who succeeds in locating the advantage in uncertain circumstances is rewarded with greater profits. This potentially positive dimension of uncertainty for business is often neglected in general discussion as business advocates tend to emphasize its adverse aspects. But Knight’s insight reminds us that this is a one-sided way of thinking. While the court’s holding leaves many issues still to be wrangled with, this is not necessarily a bad thing. Opportunity and advantage may lie in this change for those who choose to take up the challenge.

All told, cases like *Nevsun* are extremely rare. It’s unlikely that *Nevsun* will unleash a tidal wave of lawsuits, but only time will tell. In all of these kinds of cases, the ‘sense of injustice’ of the victims is very deeply felt.⁴⁰ The victims may be angry or traumatized; their family members may have suffered grave injuries; they may have lost loved ones, friends, acquaintances. The victim seeks a public vindication of rights in the fullest way possible. These are highly acrimonious cases that generate a polarized following on both sides. The middle ground is

³⁶ U.K. *Modern Slavery Act* 2015 (2015 c. 30). The long title is: “An Act to make provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims; to make provision for an Independent Anti-slavery Commissioner; and for connected purposes.”

³⁷ *The Modern Slavery Act* 2015 (Transparency in Supply Chains) Regulations 2015 No. 1833.

³⁸ Here, I use the language of *causing and contributing* to adverse human rights impacts that is used in Principle 13 of the UNGPs. See United Nations. (2011). *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. Human Rights Council U.N. doc. A/HRC/17/31 (21 March 2011).

³⁹ Frank H. Knight, *Risk, Uncertainty and Profit* (Chicago: The University of Chicago Press, 1985) 314.

⁴⁰ On the “sense of injustice,” see Shklar, Judith N., *The faces of injustice* (Yale University Press, 1990), at 5.

almost invisible; though more business decision makers, scholars and activists should test what it feels to walk upon it.

For corporate decision makers, the fiduciary demands of loyalty are circumscribed by the exigencies and pressures of moral and economic life; in the *human rights zone*, those pressures are especially forceful and evident to see. When the moral pressures on decision makers are great enough, a metamorphosis of values can occur: the value of humanity constrains the range of corporate loyalty and allegiance. With *Nevsun*, Canadian corporate decision makers who may have been reluctant yesterday to turn their minds to human rights impacts abroad have a very compelling reason to do so now. The fact that these are complex issues to grapple with is not a reason to avoid them. Avoiding them will only worsen the problems that lie ahead. The first move that senior business decision makers should make is to take the U.N. Guiding Principles on Business and Human Rights seriously.⁴¹ A second step is to embed those principles into the firm's global business policies. A third step is to live by the policies. And yet, steering clear of human rights *risks to business* and *risks to people* will not happen by following a predefined road map or by ticking boxes—the mechanical engineers' precision tools are impotent here.⁴² For most managers, the *human rights zone* is *terra incognita* in the classic sense—the map has not been drawn; the exit route must be discovered, not traced. The journey begins now.

⁴¹ See United Nations. (2011). *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*. Human Rights Council U.N. doc. A/HRC/17/31 (21 March 2011).

⁴² In 1996, Cor Herkstroter (then Group Chair of Royal Dutch/Shell) reflected on how "technological arrogance" within the company's organizational culture contributed to making "mistakes" in the Ogoni crisis in Nigeria.

See Herkstroter, Cor. Dealing with contradictory expectations: Dilemmas facing multinationals. *Vital Speeches of the Day*; Chicago Vol. 63, Iss. 4, (Dec 1, 1996): 100-105, at 103.