

Corporate Conduct, Community Response: Towards Sustainability in Ethics and Business.

First let me thank the Sheldon Chumir Foundation, both for enabling me to work on the compelling issue of Ethics and Extractive Industries, and for inviting me to Calgary for this presentation. I regret that I have not been to Calgary since March 2000, when I came to brief the executive committee of Talisman Energy Inc. on the report I had just produced for the Canadian government on Sudan.

I suspect that the reason lies in the fact that Calgary is too fine a place in which to live: it must stand at the top of the UN's Human Development Index, whereas I usually spend my working time in countries and cities near the bottom.

And often they are host to extractive companies, including those based in Canada.

This evening, when I talk about corporate conduct, I will mainly deal with companies in the array of extractive industries. Which are they? The lead exemplars are mining, lumber, cocoa, and oil.

As to Ethics, I was interested to notice that in the published report of the very first public symposium of the Chumir Foundation, the first item of business was a definition drawn from the Oxford English Dictionary, so I feel I am in good company turning to it for a sense of what we generally mean by "Ethics".

The venerable 1911 edition defines ethics as the science of morals, dealing with moral principles and rules of conduct. The same edition states that "Morals" are concerned with the distinction between right and wrong, and deal with the regulation of conduct.

So, I will be talking about conduct, rather than words or profession, and about right as opposed to wrong; and I will not necessarily be talking about legal as opposed to illegal, though more must be said about that later.

And initially, I will not be talking about Canada, but about countries in or recovering from conflict. There are many of these, regrettably. If you think about mining, perhaps you recall the struggles over diamonds, as in Sierra Leone, one of my regular haunts, or the exploitation of koltan mud in the war-torn DRC. If you focus on lumber, you might think of Liberia, where French and Chinese buyers seem to have helped the ruler, Charles Taylor, avoid the impact of UN sanctions. Most of the world's cocoa comes from Cote D'Ivoire, slipping daily into a full-blown civil war. And oil: Sudan, of course, but also Nigeria and Angola, let alone Indonesia or Burma.

But while I won't be focused on Canada, we must keep in mind that it has much guidance to offer.

Take, for example, the Whitehorse Mining Initiative's "vision of a socially, economically and environmentally sustainable, and prosperous mining industry, underpinned by a political and community consensus".

My friends in many African countries would say Nice if you can get it. Or get to it! In the first public symposium organized by the foundation, Maureen Maloney re-titled her contribution to "How do you get there?" Might I add the words, From here?

There is in our culture an old and portable joke about someone from the city asking a country-dweller how to get to the city and being told that the respondent would not start from here.

When I was an advisor to the ruler of an African country, one, I have to add, who was operating within a parliamentary system, I was asked to draft his answer to a parliamentary question. This was not one of my usual activities; it was one which I know to be highly organized in Ottawa, possibly Edmonton, and certainly in London. The experience brought back to me a political anecdote from the U.K., one dating from before the Clean-Air Acts, when fog was more evident than it is today.

A Cabinet minister was being driven to a meeting in a small town outside London, and he was lost as well as late. On seeing a man walking by, the politician ordered the driver to stop. He wound down the window and called across to the pedestrian, "Where are we?"

The response was equally curt. "In a car". The pedestrian walked on. The civil servant accompanying the politician said, "Minister, that was a perfect example of how to answer a parliamentary question. He told you the truth, he told you nothing you did not already know, and he did not tell you what you wanted to know."

Starting points are often inconvenient, and sometimes only recognized belatedly. The truth, and with it reliability of information, are sometimes never recognized, and often ignored or discouraged.

I recall the fog of an English childhood, and I recall the fog of war in and about Sudan, one of the conflict zones of particular interest to students of ethics and corporate conduct, particularly, perhaps, here in Calgary.

As I have said, I was last here in March 2000, following the publication of my report on Sudan. But at the end of October 2002, Calgary came to me: a reporter from the Calgary Herald tracked me down, and asked two questions prompted by the sale by Talisman of its Sudan holding.

The first was did I think the sale represented a victory for Protest. The second, was I now able to say that Talisman was an ethical company?

As to the first of these, I had to wonder: what victory and at whose expense, rather than at whose hands. It seems unlikely to me that the lives of the southern Sudanese, especially those around the oil zone, have been much improved by the sale, or its announcement. And that announcement came at a time of Talisman's own choosing, when oil revenues had risen to represent over 40% of Sudan government revenues, and it came after the US Congress had effectively abandoned the idea of using capital sanctions against Talisman or other companies doing oil business in Sudan.

But the durability and resonance of protest must be understood as being a major element in Talisman's decision-making. Without protest, would there really have been what transparency there has been on oil and Sudan?

Presumably, in deciding to sell, Talisman has had an eye to the impact of its Sudan operation not just on a bottom-line but on its corporate reputation, more and more seen as a priceless asset by leading CEOs.

Which brings us to the second question, is Talisman now an Ethical company. I recall that when Jim Buckee first met Lloyd Axworthy, in November 1999, he told the minister that Talisman had always been an ethical company.

I could say that "the jury is still out" on this question, given that a class action law suit is underway in New York, with plaintiffs alleging that Talisman and the Government of Sudan have violated their rights, particularly by displacing them from their homes and livelihoods, hardly ethical conduct. This, by the way, is certainly not the only such law suit against an extractive company now underway in New York, as I will elaborate later.

To return to the question, I must also return to my original February 2000 report. In it I made three major points. One was that Oil was not the cause of war in Sudan, but was exacerbating it. I have to remark here that I was very impressed when a Calgary analyst with Research Capital produced, within a day of the report's unveiling, a really sound commentary on the report's findings and recommendations—with one caveat: instead of exacerbating, he said I had concluded that Oil was exasperating the war. Quite true!

The second point is major displacements of Nilotic people from the oil region did take place, and may be still.

Thirdly, I concluded that Talisman had to more clearly comply with international human rights and humanitarian law.

What went into this conclusion? The report is quite lengthy and I do not plan to make detailed reference to it. You can buy it from Dalhousie University, or peruse it on the web site of the Department of Foreign Affairs and International Trade. So I won't say much more about its content; rather I will share with you three matters which were either touched on in the report or not mentioned but were significant to the overall conclusions. And, as I hope you will agree, have a relevance for the overall study of ethics and extractive industry.

The first item was mentioned in the report, where I aired the serious allegation that as many as eight Nuer tribesmen who went to the oil base camp at Heglig to seek employment were murdered there.

Talisman did take this matter seriously and conveyed to me the information that there had been an incident around the time of the alleged killings, when a group of Nuer had been killed whilst taking part in an attempted robbery. This is plausible, though it appears that at no time prior to my report did the company mention this serious incident, a failed robbery with gunshots and deaths, to anyone in the Canadian government. This would make some people view the later explanation as one of convenience rather than conviction, and underscores the vital importance of transparency as an operating principle for extractive companies operating in difficult places.

The second item concerns where my assessment mission felt it had to go. And before we went anywhere, concerns were being raised, alarm bells rung. Journalists in Ottawa asked if Talisman would determine where we went, or if it was possible to find anything out if the Government of Sudan could say where we went or could not go. In addition, in November 1999, the UN special reporter on Sudan described a major military assault on people living in the oil region, particularly in “Ruweng County”. This is basically the area east of the Heglig camp, east also of a township, Paryiang, where Talisman was active on the social development front. When the UN report came out, Jim Buckee said it was hearsay—the UN official had gone nowhere near either Paryiang or the Ruweng district. Even Lloyd Axworthy said the account of assault and displacement was unverified. Which meant that I had to go there, and attempt to verify or dismiss the UN claims.

I did do so, and not from Khartoum, but from northern Kenya, avoiding any barrier to my trip from the Government of Sudan. I had earlier visited Paryiang, with the help of Talisman. And I want to stress how helpful the company was. It did not stand in my way. And the government basically did not do so either—its flight bans, imposed on the UN, made it necessary for me to juggle some landing sites and abandon one visit to a village in the south, but this was not really germane to the purpose of the mission or its success. A failure to visit Ruweng County would have been, and I can reveal here that a major effort was made to prevent me going there. But the effort was not made by either Talisman or the government in Khartoum. The liberation movement, SPLM/A did stand in the way, but our determination prevailed. Complexities abound in the lives of extractive companies in conflict zones.

The third matter I will share with you also relates to going where needs must.

On the eve of my last day in southern Sudan, word came that Lloyd Axworthy hoped I would manage to fit in a visit to a guerrilla commander in the bush and persuade him to not shoot at Canadians working for Talisman. I did as requested, and was promptly told I was a hostage and would remain so until Talisman withdrew from Sudan.

A novel experience for me. One which, as you can see, ended well, without my having to remain there until October 30 2002.

Afterwards, a leading “protestor” contacted me. He had heard about the incident, and wanted to know more about the guerrilla commander. Would I agree, he asked, that the commander is a principled opponent of Oil and a stalwart of the liberation movement.

I have to confess that I did not respond. I could have told him that a few months after the incident, I met a key go-between, a trusted confidante of the commander, who made it clear that his man was more than willing to have a meeting with Talisman, and not with a view to taking hostages. He was more interested in “arrangements”. And I wonder, today, what the protestor thinks, now that the guerrilla commander has quit the liberation movement and thrown his lot, once again, in with the government in Khartoum?

Anything seems possible in Sudan except, so far, the “political and community consensus” highlighted in the Whitehorse Mining Initiative. And I have to wonder, does this consensus give rise to ethical conduct or is it advanced by it? Certainly it is not exasperated by it, to misuse my friends at Research Capital.

So what can be said about Talisman and ethics? A few things, it seems to me.

The company did upgrade its work on Corporate Social Responsibility, and called on PricewaterhouseCoopers for “verification”. In the post-Enron climate, it is reasonable to ask if this is good enough. Independence in verification is key.

Also, the company did sign the Canadian code of conduct, even if reluctantly, and seems to have promoted CSR within GNPOC.

And, very quietly, it seems to have tried, through working with official and other channels in Washington to promote the pursuit of a sustainable peace process.

But as to conditions on the ground in Sudan, especially in the oil region, I am not up-to-date, thought members of my 1999 team recently, writing in the Montreal Gazette, seemed to say that Talisman is “still complicit in violations of human rights” in Sudan.

Finally, some people in Canada seem to assume that the Indian oil company buying the Talisman holding will be less interested in compliance with international human rights and humanitarian law than Talisman, and that things will now worsen for the Sudanese as a result. Perhaps the visit of India’s energy minister to Calgary in June 2002 contributed to this perception.

My approach is rather different.

I pose the question, will Talisman act like an ethical company, actions not words, remember, and try to encourage their Indian friends to be ethical in their new Sudan operations?

There are, in fact, credible partners willing to help move forward any such development, and this could, and should, be seen as one test of whether or not Talisman is an ethical company.

Of course, there are other tests, and one is in the process of being applied in the US District Court for the Southern District of New York. The Class Action suit.

Now, it is by no means certain that the case will actually go to trial. The lawyers for the plaintiffs have asked for trial by jury. The lawyers for the defendants, Talisman and the Government of Sudan, have asked for the case to be dismissed on the grounds that the issues should be tried other than in the United States, they have asked that the judge seek an opinion from the State Department in the hopes that this would persuade the judge to stop the proceedings lest they hurt US foreign policy interests, and there is now a problem over access to documents, given that Talisman operated in Sudan as a member of a consortium.

And a trial does not always mean that justice is done. We all know of cases where the innocent have been found guilty and who among us can doubt that there are times when the guilty get off. But a trial would shed light on what has gone on in Sudan, it would encourage Transparency, which I see to be essential.

It has also to be remembered that the Class Action suit relates to Law rather than Ethics, but in reality, more and more the acid test of ethical behaviour is coming to be compliance with international human rights and humanitarian law. This is a development which stands in need of close examination. For example, will litigation and the fear of getting caught be the motivators for ethical conduct and if so, where is the place of values and their influence on conduct?

The Talisman case is by no means the only class action underway today.

The same lawyers have filed suit against Shell concerning the repression of opponents of oil development in Nigeria's Ogoniland. Exxon Mobil faces a class action for its relationship with the Indonesian army in Aceh Province, Indonesia. In this case, the judge did seek an opinion from the State Department, and stopped the case. Recent legal developments might result in it being resumed, but recent political developments, a possible end to insurgency in Aceh, might also have an impact. Unocal is involved in a class action for its operations in Myanmar/Burma, and an appeal court in California has recently ruled that the company cannot hide behind the activities of the security forces of the government concerned but rather must bear responsibility for them.

I have to wonder about the impact of cases such as these on a range of other initiatives in the field of ethics in business and corporate social responsibility.

Will the drive towards voluntary codes be blunted by this legal push, for example? Should it be blunted?

This is no idle question. These days, codes, particularly those endorsed or developed by large, global, companies, frequently bring on board specific standards of international law, but are they effectively monitored? They frequently lack serious “internal” monitoring, much less regimes of monitoring which entrust the role to external actors.

A colleague of mine, Ian Smillie, is noted for his work on “Conflict Diamonds”. He and others pressed hard, with success, to have diamond producing countries establish a process, named after the South African city of Kimberly, for stopping the trade in conflict diamonds. But in today’s Globe and Mail, he rightly bemoans the fact that there is no monitoring machinery in place to ensure that the Kimberly states behave as they are meant to.

Added to the question of monitoring is the possible impact of the availability now of so many codes. One executive from a major extractive company said his company thinks this is a good thing. “Let a thousand flowers bloom” is how he expressed it.

Well, my cultural heritage is more Methodist than Maoist, and I cannot help think of leaves covering up, hiding more than they reveal. I repeat that transparency is key to ethical business.

One other initiative which might be impacted by the Class Action drive relates very much to transparency. This is “Publish What you Pay”, an initiative of the NGO, Global Witness, and George Soros the noted financier. It has called on the G8 governments to require that oil and other extractive companies publish what they pay to host governments, in regular payments and the additional, usually hidden, special payments.

Soros has said that regulation is needed because the companies will not voluntarily disclose what they pay, but it could be noted that BP did disclose what it paid, as special payments, to the Angolan authorities.

In 2001, it is thought that Angola received more than US\$2 billion in oil revenues, though the income was not recorded in the official books of the country. In that same year, the UN had to raise US\$200 million to care for Angolans internally displaced by the civil war. BP’s action in revealing its payments to Angola was not appreciated in Luanda!

Shell has said it is against Publish What You Pay, and would prefer to operate on a level playing field, with disclosure required by and monitored by a body such as the US Securities Exchange Commission.

Shell, along with other oil giants such as Exxon Mobil, took a lead role in another initiative which may be affected by the Class Actions. This was the formulation of UK/US guidelines on security and extraction.

Work on them began in February 2000, after a dispute in parliament between the government and Labour backbenchers over official assistance to British firms operating in Sudan.

The guidelines are just that—they are not binding. But at least they have involved bodies like Amnesty International, well used to monitoring conduct, particularly unethical conduct. Monitoring is key, but perhaps it is not enough.

One extractive sector has gone further. The major chocolate companies, users of cocoa which is mainly harvested in, extracted from, West Africa, have created a jointly-run organization along with major civil society organizations, including unions and anti-slavery bodies: reports have shown that the cocoa farms often depend on exploiting child labour in a form of contemporary slavery. The new initiative seeks to foster actual projects which will change employment and social practices, freeing the children and freeing the companies from complicity in unethical conduct.

Will it work? We must hope so. Will it be impeded by the Class Action phenomenon?

This is all new social action, but the basis for the Class Actions now appearing in the U.S. is a venerable piece of legislation, the federal Alien Torts Claims Act, one of the first enacted by the United States. It is, one might say, as American as apple pie or baseball.

And returning to the question of whether the cocoa and other initiatives will work in the Class Action environment, we might recall that Yogi Berra once said that “Prophecy is difficult, especially about the future”.

I cannot predict where the drive for ethics is going, but I can assert that it is here to stay, and there are many signs of this.

One such sign is the durability of pressure and protest. Some cause groups have been around for a while, weathering all storms, keeping the flame of their protest burning. Other groups have been created, responding, perhaps, to emerging issues.

Welcoming this, as I do, I have to also express a concern. I am uneasy when I hear it said that we need a “new normative framework”, and worried when we rush to fashion new codes and consortia.

My concern stems from an appreciation of the value, an under-respected value, of the “old” normative frameworks and regulatory systems built on their foundation.

For example, it is re-assuring for me when new codes and structures make specific reference to the international standards, the Conventions, of the oldest UN specialized agency, the International Labour Organization.

Yes, often these are ratified but not implemented, a practice I have to say, here in Alberta, that I am critical of, but they exist and are closely monitored, with due process available to all parties.

I wish, by the way, that the same could be said of the anti-slavery conventions, which totally lack any back-up system for monitoring, rather like the Kimberly process which Ian Smillie would see improved.

We do not need new frameworks and codes if pursuit of them means or results in ignoring what we have at hand already, unless the new is more effective than the old, about which I remain sceptical.

Another sign is the greater willingness of protestors and companies to work together. The new cocoa initiative is a case in point, and so might be the co-operation between companies like Shell or Exxon Mobil and Amnesty International with respect to the UK/US guidelines. I do think it a pity that this was not the case with respect to Talisman and the Canadian NGOs when they sought to elaborate a framework for human rights monitoring in Sudan.

The third sign is the behaviour of companies themselves. And here I will remind you that ethics is about the “regulation of conduct”, deeds, not words. According to Shell, which has produced training manuals on human rights dilemmas for its managers, if a development in ethics and business is not solidly grounded in understood management processes, it will never serve any useful function and have no relevance in Shell.

More and more companies are looking for ways in which they can act ethically. And this action is being better seen to require closer involvement by all levels of the company, including directors and investors. There is some distance to go here, and the role and responsibilities of non-executive directors needs more study and discussion, but, in this post-Enron climate, the tide is running, and less will be left to the CEOs.

But this does not imply that CEOs are unethical. We actually hear far too little of the “positives” of CEO behaviour, and the best of them are showing ethical leadership, transforming the operating culture of their companies.

Leadership is so important in moving towards sustainability in ethics and business..

And today, Human Rights Day, the Nobel Peace Prize was awarded to one outstanding leader, Jimmy Carter, and I want to take a moment to honour him for it.

His Carter Center is very active on the issue of “ethics in politics”, and I had the privilege of advising him on this during the recent Jamaican elections, but it is also playing a role in assisting US companies committed to promoting ethical business practices.

Indeed, the Carter Center has organized, with these companies, a Council for Ethical business.

One member of the council, United Parcel Services, UPS, has developed its own internal code of ethics. Many companies are doing the same now.

The UPS code carries the title Leading with Integrity. For UPS, this involves the company and all of its individuals being in compliance with the law and being ethical in their conduct.

That is, treating everyone, including each other, with respect, knowing that what is done will impact on others.

If this spirit can more readily infuse corporate cultures, I am convinced we will see more ethical behaviour from business.

And we will see that it leads to greater participation, in business and community decision-making, and to a greater sense of “shared responsibility”.

I believe that communities do have responsibilities as well as rights. Corporate social responsibility and ethics must, in the end, be about partnering for sustainable development. Which is about more than check-lists or class-actions.

It is worth recalling the Whitehorse Mining Initiative and its vision of

“a socially, economically and environmentally sustainable and prosperous mining industry underpinned by political and community consensus”.

And it is vital to understand that achieving this is never easy.

Communities often lack information or power, or both. Companies frequently have to work with two legal frameworks, the host country laws and the body of international law. It would be a mistake to assume there was harmony between them.

Too often, governments do not see sovereignty as responsibility—their responsibility to promote human security for the people under their jurisdiction. This is changing, but change is slow, and meanwhile, extraction goes on, sometimes with profit for a governing elite and dire consequences for a local community.

But it is beginning to seem unlikely that exploitative extraction will continue out of sight and thus out of mind.

The durability of protest, of concern, of awareness, is constantly building the light, and ethical companies must themselves seek to promote transparency, otherwise, they could be made complicit, even by their partners, in unethical, even illegal, conduct.

There are costs involved here, and to avoid them companies will internalize ethics, which some of them clearly want to do anyway because it is the right thing to do.

The right thing to do is not necessarily going to be the easy thing to do, and I would encourage companies and communities to work hard at effective partnering.

They should approach this with development in mind, not deception, and the driver must be dialogue, not demonization.

Corporate conduct and community response can move us towards sustainability in ethics and business, to the benefit of all, but ethical leadership must be shown on all sides, at all times.

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