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Challenges Facing Resource Development: Implications for Lawyers

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Abstract

Speech given at Session 3: Challenge Facing Resource Development. Our topic is the impact of globalization of resource development, with particular emphasis on trans-boundary ventures. For the purpose of my remarks, she took it as a given that we will see a continuation of the trends of the past decade or so. She focused on what these trends are likely to mean for lawyers who work in the area of resource development, whether as corporate solicitors or as private practitioners who advise resource companies.

CHALLENGES FACING RESOURCE DEVELOPMENT: IMPLICATIONS FOR LAWYERS

*Constance Hunt**

INTRODUCTION

As the title to this session indicates, our topic is the impact of globalization of resource development, with particular emphasis on trans-boundary ventures. For the purpose of my remarks, I will take it as a given that we will see a continuation of the trends of the past decade or so. That is to say, we can expect that resource industries will continue to work internationally to a significant extent. Moreover, with the freeing of trade between vast blocks of the world, there will be, if anything, an increase in the linkage of the resource infrastructures between nations, through, for example, pipelines and electricity grids.

I would like to focus on what these trends are likely to mean for lawyers who work in the area of resource development, whether as corporate solicitors or as private practitioners who advise resource companies. Given my background as an academic, and in honor of the fact that these sessions are being held at a law school, I will make passing reference to what these same trends imply for legal education.

It will be apparent from my remarks that I speak from a North American perspective, as a person whose first language is English, and who works in a legal environment rooted in English common law but that has been adapted to the needs of the country where I live. I want to concentrate on three themes. I will briefly outline these themes, then explore each in more detail.

The three broad themes, then, are as follows:

1. There are a myriad of general changes at work that implicate the legal profession. As already indicated, these include globalization and the freeing of trade. They also include technological change, shifts in where people live, increasing complexity of law, fierce competition, and commonality of disciplines. Each of these has ramifica-

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tions for how lawyers do their work and for the education that they need to have in order to be good at it.

2. The constant interaction of lawyers with people from countries other than their own requires increased sensitization to cultural differences. This includes the need to appreciate the context and details of the legal system in countries other than their own and the desirability of mastering other languages.
3. In a related vein, lawyers must appreciate that certain sensitivities within their own countries — in relation to "moral" issues such as human rights and business ethics — may have an impact on their business practices abroad. Moreover, globalization means that some issues that previously received little attention in the developing world, such as the environment or the rights of indigenous people, must increasingly be dealt with wherever you work.

I. *THE CHANGING CONTEXT OF PRACTICING LAW*

As a profession whose primary concern is to serve the members of the society that pays its bills, of course lawyers have always had to adapt to change. But the pace of that change, as we all know from our own lives, has escalated dramatically.

Stop and think for a moment about what things were like when you were a law student. I'll give you a glance at my own experience. Twenty-five years ago, international law was an optional course taken by relatively few students. Subjects such as environmental law and human rights did not exist. Most dispute resolution occurred through the courts. The computer was unknown in the legal world. It was assumed that a law degree was a ticket to earning a good income for life. The profession in North America was dominated by white males, as was, to a considerable extent, the clientele of most lawyers.

Now, think about today's world. Most law schools offer a panoply of courses in subjects relating to the international context. It would be difficult to graduate from law school without knowing something about environmental law, rights of indigenous peoples, and how to use computers for research and communication. The populations that lawyers serve are much more diverse, racially, ethnically, and from a gender perspective. So

too are the legal profession and, increasingly, even the bench. Well-established national and international law firms have to compete for clients, by performing dog and pony shows to demonstrate why they can offer more effective and economical service to a major client than can another firm down the street. Business clients, forced themselves to be ever more competitive, are eager to short-circuit the delay and cost that seems an almost inevitable byproduct of disputes that have to be resolved through litigation. The ability to speak a foreign language, or extensive experience abroad, is considered an asset in recruiting new members to the firm.

As I will discuss more fully in relation to the next theme, the necessity of working in an international context has certain implications for the skills that lawyers need to have. In concert with the information explosion that surrounds us at every turn, it also means that lawyers must master bodies of knowledge that are ever more complex and extensive.

These are trends that I, too, encounter every day in my work as a judge. We also must stretch ourselves constantly to deal with problems that are shaped by international agreements, competing jurisdictional claims, and conflicts of laws principles. We encounter expert evidence about the legal principles of other countries and have to strain to understand and then apply those principles to disputes. We have to sort out contracts entered into by parties from remarkably different cultures and backgrounds, who have equally remarkable differing approaches to words and their significance and meaning in certain contexts. We have to come to grips with the regulatory systems that exist in foreign countries. Judges, like lawyers, have to experiment with new ways of resolving disputes, whether through case management, judicial dispute resolution, or mediation. There are days when the era of the quill pen seems incredibly attractive.

What this means is that those of us who are in the problem-solving business, whether as lawyers or as judges, must be, above all, flexible and adaptable. We can never rest on our laurels. We must constantly learn. We have to be open to new ideas and new ways of doing things. We have to be alive to what is happening, not only within our own communities, but within the global village. We have to be prepared to work with, and borrow from, professionals in other disciplines.

In this environment, some of the skills earlier prized by lawyers have faded in importance. For example, the ability to manipulate detailed, specific rules is probably less of an asset than the ability to think creatively. Knowledge of a narrow body of law is less useful than a capacity to organize and conceptualize approaches to problems. The skill of looking at situations through the eyes of someone who is different from you is more important than knowing where the precedents are kept. Aptitude at communication will make you a more effective lawyer than will a willingness to work long hours. A mastery of the rules of court, enabling you to tie up your client's adversaries in the courts for years, or even decades, will be less appreciated by those clients than will facility with new forms of dispute resolution. The skill of cutting through complexity and simplifying issues to be resolved, of being able to separate the wheat from the chaff, will endear you more to your clients than will dazzling them by the breadth and depth of your knowledge of arcane legal principles.

This is a daunting task for all of us, whether we are at the sunrise or the sunset of our careers. But it is made even more daunting by the reality that we live and work in a global context, and this brings me to my next theme.

II. *THE CHALLENGES OF INTER-CULTURAL LAWYERING*

It may seem trite to say that, as we work with people from other cultures and languages, we must be aware of the fact that they often approach the world from a perspective that is very different from our own. Even if this is trite, it is nevertheless apt for members of the legal profession whose work, by its very nature, is already full of sensitivities the effective handling of which will often require a delicate or diplomatic touch. Moreover, it is important to realize that those differing perspectives are a potential breeding ground for misunderstandings that can ultimately sour a business deal or lead to legal disputes. On the other hand, those varying perspectives can also be exciting and enriching and strengthen the bonds between both individuals and business associates.

Let me talk briefly about some of the research that illustrates the basis of these vastly different cultural perspectives and how such differences can impact upon the work that lawyers do. I want to touch especially upon the work of Geert Hofstede, a

Dutch social scientist who conducted a huge study of IBM employees around the world — in fifty countries and twenty languages.[1] Among other factors, his work focused upon something he called the Individualism-Collectivism dimension.[2]

Countries that rated high in the Individualism dimension included the common-law based countries of the United States, Great Britain, Canada, Australia, New Zealand, as well as the Netherlands. In such countries, a sharp distinction is made between the self and the society. Families tend to be considered as consisting only of the parents and their children, in contrast to the notion of the extended family that is extant elsewhere. Independence of the individual is stressed, and speaking one's mind is considered to be a virtue. In the business world, the employer/employee relationship is treated as trans-active, in that the task is more important than the personal relationship. Thus, one does business with a company and not with an individual.

Contracts prepared in such countries reflect these characteristics. They tend to be long and detailed. They provide for extensive remedies in the event of a breach. The role of lawyers in such arrangements is partly to emphasize the importance of the agreement and the negative ramifications if contractual promises are not kept. Central to the concept of such contracts is the idea of a "closing" to conclude them. This implies the expectation that, once pen has been put to paper, the negotiating process is over.

Our individualist values are well-illustrated by a few proverbs with which all English speakers are familiar. Consider, for example, the following:

— The squeaky wheel gets the grease (the value of aggressiveness).

— If at first you don't succeed, try, try again (the value of persistence).

— All that glitters is not gold (the importance of wariness).

— A man's home is his castle (the importance of privacy, private property, and the immediate family).

On the other hand, think about the approach in countries

1. *See* Rob Goffee, *Mastering Management: Cultural Diversity*, FIN. TIMES, Jan. 26, 1996 (discussing Hofstede IBM study).

2. *See id.* (discussing Individualism-Collectivism dimension).

that score high on the Collectivist dimension. They include China, Colombia, Pakistan, Thailand, and parts of East and West Africa. There, a much less stark line is drawn between the self and the society. Interdependence is valued and is fostered through the socialization of children. Direct confrontation is considered rude and undesirable. The word "no" is seldom heard; instead, "I'll think it over" is considered a polite way of turning down a request.

These approaches spill over into the business world, where relationships between employers and employees tend to resemble family relationships. Preference in hiring is often given to people you know, including family members. Personal relationships prevail over the task. You do business more with the individual and less with the formal, corporate organization.

These kinds of outlooks are reflected in proverbs commonly used in some of those countries:

— from China: Friendship first, business second.

— from Russia: A person without friends is like a tree without roots.

— from Africa: Good reputation is better than wealth. Also: Individuals don't live to be a hundred years old, the tribe does.

Such views are also reflected in the approach that is taken to contracts in countries that are more Collectivist in nature. There, contracts tend to be seen as a guide or rough approximation. The end of negotiations toward a contract marks merely the beginning of an ongoing relationship that will be adjusted, over time, to changing circumstances. In contrast to contracts drafted in Individualistic countries, these are deliberately vague, in part because of the expectation that, since business relationships are based upon trust and loyalty, promises will be kept, whether or not the contract contains such items as penalty clauses. If there is an insistence upon such detailed contractual mechanisms in the negotiating process, it may be seen as an affront to friendship and trust.

Even this crude sketching of these differing approaches speaks volumes about their implications for doing business. When I first read about this research, I was intrigued by it because Bre-X, a Calgary company that had supposedly discovered one of the largest gold fields in the world in Indonesia, was in

the middle of trying to get permission from the Indonesian Government to proceed with its gold mine.[3]

At that stage, the Bre-X managers were locked into messy and well-publicized negotiations with the leaders of Indonesia, arrangements that were only finalized once various relatives and friends of political leaders were brought on board to assist in the ultimate choice of partners and owners. Commentators at that time suggested that Bre-X's management had not been sufficiently sophisticated to appreciate the reality of doing business in Indonesia. Yet it seems to me that many of the problems Bre-X had then, and that other companies encounter every day, can be traced directly to some of the differing cultural perspectives I have just described. And, if Bre-X was naive in its appreciation about how to conduct business in Indonesia, could its legal advisers be faulted for failing to explain some of those realities to their client?

Another example concerns an observation made by a Japanese translator and author named Muramatsu Masumi, who has written, among other things, a book entitled *Humour in Leadership: Reflections of a Simultaneous Translator.*[4] In it, he points out that many people deliberately set out to be humorous, taking great care and study to succeed at being amusing to listeners. He says that, in contrast, in Japan humor is considered to be more for private, personal, and intimate conversation. So, he points out, many Japanese audiences can scarcely believe their ears when a North American tries to warm them up by cracking a joke at the beginning of a speech. You can imagine what implications these different views may have for the environment in which contractual negotiations are carried out.

I would also add that our cultural perspectives are often embedded in the language we speak, its structure, its idioms, its forms of address, and, as I have already mentioned, its proverbs. An English speaker (like myself), who studies a language like French in detail, comes to appreciate (sometimes as a result of embarrassing gaffs) that French is, comparatively speaking, full of politeness and formality. It takes a lifetime of study to get

3. *See Bre-X Minerals' Plan for Indonesian Mine is Stalled by Dispute*, WALL ST. J., Oct. 7, 1996 (discussing Bre-X's gold discovery and subsequent dealings in Indonesia).

4. MURAMATSU MASUMI, HUMOUR IN LEADERSHIP: REFLECTIONS OF A SIMULTANEOUS TRANSLATOR.

over the habit of speaking the foreign language, such as French, in the same abrupt manner that does very nicely in a language such as English.

What does all this mean for lawyers in the future who work in the resources industries? Several points come to mind.

One implication is that lawyers who want to be effective in a transnational context have to put aside any tendency to think that their way of getting the job done is the only way to get there. They must set out to learn something about the country where they are working, and its people. There are lots of ways to do this, from self-education to the kinds of cross-cultural sensitization courses that are routinely offered to employees by many large resource companies. Such programs can have a number of benefits, including learning how to work effectively with interpreters (not something that, as a far as I know, is taught in law schools).

A more tangible benefit is that such sensitization can also improve relations in the home office where, at least in my country, immigration is literally changing the face of society and employment equity programs demand that the work force more accurately reflect all sectors of that society. Many law schools are also confronting such issues through curriculum changes that are designed to underscore the varying perspectives that different racial, ethnic, cultural, and gender groups often bring to their interactions with the legal system.

Another implication is that it is increasingly beneficial to have a capacity in a second or, better still, third language. For reasons that I find hard to fathom, this is an idea whose time has still not come in North America or many other English-speaking countries. Yet in so many other parts of the world it is common to come across people who are fluent in not two or even three, but as many as five or six languages. If nothing else, the process of learning a foreign language helps you to develop a sense of humility, to realize how crippling it is to try to express sophisticated ideas in a language in which you have a vocabulary equivalent to that of a four or five-year-old. The process of learning another language, moreover, helps to attune you to the subtle different ways of thinking that are part of every culture. And a facility in another language can be absolutely instrumental in developing helpful relationships, even if that language is not the language of the country where you are trying to work.

For example, I will always recall my pleasure, during a conference I attended a few years ago in Russia, at making friends with a man who did not speak English (and I did not speak Russian), but with whom I was able to communicate in French. Not only did he provide me with a totally different perspective on the proceedings and some of its colorful participants, but our brief friendship came in very handy when we non-Russian speakers arrived at an airport in a relatively remote part of Russia without interpreters and needed help figuring out how to find the plane to St. Petersburg.

Now let me turn to my third and final theme, the relationship of values at home and values abroad.

III. *VALUES AT HOME, VALUES ABROAD*

Closely related to the cultural differences that can be encountered in doing legal work in a global context are the vast differences in values and approach that are likely to exist. Often, these raise issues that can be both unexpected and challenging. Simply put, on the one hand it is difficult not to be able to accept "things the way they are" in order to succeed in the country where you are working. On the other hand, from the point of view of your home base, some of those same things may lead to unfavorable publicity, while others may be simply illegal.

If one were to look at the program for this conference, one might see a series of topics that seem unrelated. In fact, however, that is not the case. In reality, many of the challenges facing lawyers who are involved in resource development are inextricably bound up with other topics at this conference.

I have already touched upon, for instance, the impact that technology — discussed in yesterday's session — is having on the art of effective lawyering. But reflect for a moment on the topic for this afternoon, human rights. You need only think about the public relations difficulties that Shell Oil has faced throughout North America concerning its activities in Nigeria. Concerns about human rights in that country came into global prominence last year with the execution of an internationally-acclaimed writer who was an activist for the rights of his people in a part of Nigeria where Shell carries out its work.[5] This led, at

5. *See* Thomas Kamm, *Nigeria Executions Raise Sanction Threat*, WALL ST. J., Nov. 13,

least briefly, to a movement in North America to boycott Shell products.

In my own country, there has been considerable pressure on the national Government to raise human rights as an issue in all trade discussions held with China, notwithstanding the growing importance of China as a target market for many Canadian companies.

My point is that, with the communications methods of our times (including the Internet), very little can be withheld from public scrutiny, even if it is occurring thousands of miles away, on the other side of the world. And those same communications networks mean that popular movements can spring up overnight, wield considerable influence, and mold public opinion with the speed of lightening. Sometimes even the most unlikely messenger can have the greatest impact. For instance, a teenage boy from eastern Canada has gained international prominence in his efforts to expose child labor practices abroad and has been extraordinarily successful in focusing public attention on this issue.[6]

Other problems arising from globalization can prove even more difficult to deal with. Consider the fact that, in some countries, it is customary to cement business deals with large payments, directly or indirectly, to certain beneficiaries. This was another of the myriad of problems encountered by Bre-X.

What does all of this have to do with lawyers? One thing it means is that, as I have already implied, there is no longer room for the narrow-minded technician. Effective lawyers working in a global context must be alert and well-informed about the politics of not only the host country, but also of their home country. They have to be able to foresee trouble spots so that they can develop a strategy in advance to deal with them. They have to be apprised of world developments in the human rights arena. They have to be aware of steps being taken both internationally and domestically to combat corruption (such as the American initiatives for the adoption by O.E.C.D.[7] partners of stringent

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1995, at A10 (discussing execution of civil rights activist Ken Saro-Wiwa and eight other activists by Nigeria's military junta).

6. *See* Charles Truehart, *Canadian, 13, Wages War on Child Labor*, WASH. POST, Feb. 23, 1996, at A22 (discussing 13 year old Craig Kielburger's efforts to educate world on child labor practices).

7. *See* David Apatoff, *Because Reform of Worldwide Business Ethics Will Likely be Delayed,*

bribery rules). And they have to be prepared to help their clients develop and implement internal policies a step or two ahead of more formal actions being taken through statements of principle, laws, and treaties.

In a related vein, think for a moment about the revolution that has taken place in the developing world as a result of concerns about the environment. Not only have a myriad of new laws and regulatory mechanisms altered the face of resource development. Increasingly, these initiatives have moved to the international stage. With that shift, consciousness about the importance of environmental values has begun to take root in many countries where, until recently, economic development was the driving force and development could occur with few, if any, of the safeguards that have become standard fare elsewhere.

By way of illustration, I recently read an article entitled "Green Chile: New Environmentalists Extend Their Reach."[8] It told of a new television series, in which, after twenty years abroad, a man comes home to find his family's logging firm about to cut down the area's last stand of virgin forest. He confronts his brother, arguing passionately that an eco-tourism resort, although less profitable, would be far better for the family as well as for the nearby town. The article explained that, throughout Latin America, environmental groups are cropping up to challenge what they consider to be inadequate laws, scant enforcement, and free-market government policies that favor economic development at any cost.[9] It added that Chile's environmentalists had recently scored a major victory when its Supreme Court invalidated the Government's approval of a controversial logging project in Tierra del Fuego.[10] The Court held that the country's environmental agency, in approving a US$350 million plan by U.S.-based Trillium Corporation, had failed to protect the right of Chileans to live in a contamination-free environment. This decision has cast into doubt a whole series of other proposed projects, including a pulp mill, an aluminum smelter, and a hydro-electric dam.

The U.S. Government May Help Companies Avert Corruption in Foreign Procurements, NAT'L L.J., Sept. 1, 1997, at B6 (discussing United States efforts to make foreign bribery criminal offense for all O.E.C.D. members).

8. Jonathan Friedland, WALL ST. J., Mar. 26, 1997, at A1.

9. *Id.*

10. *Id.*

Savvy resource development companies, of course, have already anticipated such events. The same article noted that a company based in my home city, Nova, had faced local opposition, including roadblocks and demonstrations, in the construction of a natural gas pipeline from Argentina to Santiago. It held discussions with affected communities and modified its plans to ease their fears. I'm sure there are many other examples of the same sensitivity in doing business abroad. Some companies, for instance, have a policy of ensuring that their international projects meet the same environmental guidelines abroad that they would have to meet at home, regardless of the fact that the local regime requires much less.

My point is that companies, and their lawyers, can put to good use abroad the experience they have garnered over the past couple of decades in adjusting their business plans to environmental concerns. They can do this whether or not the laws of the host country require them to. They can be leaders rather than followers, and be more successful as a result.

A similar point can be made, briefly, about the experience that many resource companies have had in North America in forging partnerships with indigenous groups who will be impacted by their exploitation activities. For example, forestry companies on the west coast of Canada have had years of demonstrations by, and litigation against, aboriginal groups who opposed their harvesting practices. Recently, it was announced that one of the forestry giants, MacMillan Bloedel Ltd., was entering into a partnership with First Nations groups, in regard to logging operations on the northern part of Vancouver Island (an area seen as such an important international battleground in the past that it has even attracted visits from such well-known activists as Robert Kennedy, Jr.). In contrast, Oxy Petroleum is currently embroiled in litigation in Columbia with the indigenous Oola people, who claim that their lifestyle and culture is threatened by proposed drilling activities.

The international networks that have now been established among indigenous peoples mean that they are able to learn from one another about their power in participating in and influencing the shape of resource development. Lawyers can play a key role in anticipating these kinds of issues and in recommending imaginative ways of dealing with them before they reach a crisis stage.

CONCLUSION

Let me close by reiterating my main points. The global context of today's world is requiring changes to legal practice never before encountered. Lawyers have to be on top of technological change, be competitive, and experiment with new ways of resolving disputes. They not only need to have expertise about the laws of the countries where they work, they also have to have an appreciation for how the laws of their own countries treat what may be considered inadequate legal requirements abroad. They must be apprised of international requirements that exist in formal treaties and that are developing through less formal policies and statements of principle. They must know how to work effectively with interpreters and be alive to the cultural perspectives in host countries. They have to be able to anticipate lightening shifts in public opinion at home that may impact upon the acceptability of their clients' products.

What, then, will be the characteristics of the successful resource lawyer in the twenty-first century? Will she have to be a multilingual computer nerd who reads the *New York Times* every day, in between sifting through the law reviews of several countries? Will he have to be a sensitive, New Age guy adept at dealing with Westerners while at the same time alert to the subtle nuances of negotiating with others who approach the world from a radically different perspective? Will the concept of "due diligence" in advising clients include clairvoyance, such as the ability to predict the overthrow of the government with which a deal has been concluded?

While some of these characteristics will obviously be very helpful to successful lawyering over the next few decades, there are, thankfully, some things that have not changed. Many of the elements of the legal profession in which we all take pride will continue to be indispensable. These include honesty, integrity, a high degree of organization, and careful preparation. These are all skills of good lawyering that I used to try to teach my students about and that, as a judge, I have come to appreciate even more profoundly in my daily work.

It is a tall order. But, I am confident that our profession will prove itself up to the task.