



True North In Canadian Public Policy

Commentary

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Be Careful What You Wish For

WHY SOME VERSIONS OF “SOCIAL LICENCE” ARE UNLICENSED AND MAY BE ANTI-SOCIAL

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The concept of social licence to operate – sometimes abbreviated SLO – is increasingly on the minds of policy-makers, business actors, and social activists of various stripes.¹ The concept is also increasingly in the media, discussed as if it were some new requirement that had been legislated onto business in recent years. But, despite its name, a social licence is not a licence. And, on careful analysis, some versions of the concept of social licence have very different social consequences than may first appear that are partly “anti-social” and that may actually end up undermining various legal rights, including Indigenous rights.

The term “social licence to operate” is usually attributed to Canadian mining executive Jim Cooney, who was Director of International and Public Affairs for Placer Dome when he first spoke about it in 1997. He referred to the idea of needing something beyond the applicable legal licences in terms of attaining sufficient public support for a project so that it would remain viable. Others had used different terms for a very similar concept earlier, and some seem even to have used the same term.² But Cooney’s use of the term got attention. Suddenly, a major mining executive had seemingly acknowledged a need for social licence. Things took off from there. The concept now features at every mining conference, at other natural resource conferences, and in broader public discourse – and often, mistakenly, as if it is some kind of new legal requirement on resource development or even on business more generally.³

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The point of the term was actually to acknowledge a practical reality. A resource company that hopes to develop certain resources over the long term needs its legal licences and permits but, as part of the business realities it faces, it also needs some degree of local public support for its projects so that the projects do not face new obstacles down the road. Cooney was thinking, particularly, of development in contexts without legal order, where the contents of the law are not set up for stability of business operations and where people can take political steps to alter the law based on shorter-term preferences or can take steps outside the law against a project. Thinking of those kinds of risks, social licence to operate matters a great deal to resource companies.

The presence or absence of support for a project is, in practical terms, a real factor that matters. As put by one mining executive, “Today, I can show you two mines identical on [other] variables that differ in their valuation by an order of magnitude . . . Why? Because one has support and the other doesn’t” (Lee 28 April 2014). Ernst & Young recently suggested that social licence to operate is the fourth-biggest risk factor affecting mining companies (Lee 28 April 2014).

In accord with these ideas, various analysts have offered specific definitions of social licence to operate, but they all come back to this idea of measuring public support because it impacts whether a particular business activity will be practically feasible on a longer-term basis.⁴ Their studies typically consider social licence to be granted at a broader societal level but to be particularly affected by support or opposition from locally proximate communities (Prno and Slocombe 2012, 347–349).

Obstacles arising from lack of local public support can vary but will often involve either a change in the law and/or application of extra-legal means against a company. So, for example, companies operating over the longer term in some jurisdictions have seen lack of local public support for their activities translate into major changes in royalty structures that later altered the business realities of their operations. In terms of more extra-legal means, Canadian resource companies operating abroad, for instance, have seen instances where their assets have simply been expropriated outright. For example, Vancouver-based South American Silver Corp. saw increasing conflict near its Bolivian silver mine with local artisanal miners from 2007, with lingering local issues suddenly escalating and influencing the national government to expropriate the mine in 2012. Other Canadian mining projects around the world have also faced extra-legal pressures when they have been delayed by non-violent protests or even affected by violent attacks.

Those employing the concept of social licence to operate developed a concept that could be used to assess the impacts of social support for or opposition to a particular project. Different consultants or accounting firms have now developed different tools for assessing the social licence to operate and changes in it over time, along with analysing means of investing so as to enhance the value of the social licence to operate.⁵ For example, KPMG Australia published a report in 2013, “The Community Investment Dividend: Measuring the Value of Community Investment to Support Your Social Licence to Operate”, in which it detailed a number of methodologies for analysing social licence to operate and ways of effectively retaining the trust that is a key focus of the SLO. Similarly, a group including the International Finance Corporation (IFC), Rio Tinto, and Deloitte has more recently developed the Financial Value Tool for Sustainability Investments (FV Tool).⁶ The FV Tool allows for the analysis of investment in communities in terms of its time-value-adjusted effects on value creation and value protection. The latter is particularly focused on SLO considerations in terms of the amount of mitigation of operational risks like production disruptions.

The FV Tool has been subjected to testing by Newmont in some of its operations, and it has helped it identify new ways of investing that have helped reduce things like security costs on operations. The concept of social licence to operate, then, was put forward in a business context as a way of understanding various kinds of operational challenges that could emerge from changes in the law or extra-legal disruptions where a company did not have adequate local social support. So far as it goes, it can help business to engage in stronger relationships with communities that have often offered win-win solutions.

However, several factors have led to the concept getting misinterpreted. First, those involved in business contexts, now reaching across various sectors, have made various prominent speeches in which they have referred to the need to have a social licence to operate in ways that, taken on their own, make it sound like something they acknowledge as a new requirement. To take just one example, Dev Sanyal, Executive Vice President for BP, gave a late 2012 speech in which he said that the “social licence to operate . . . indicates that companies cannot operate sustainably without the support of society.”

Second, there are various sectors interested in transforming the descriptive statement that companies “cannot” operate without an SLO into a prescriptive “cannot” and in using social licence as part of a broader political agenda. For example in her new book, *This Changes Everything: Capitalism vs. The Climate*, Naomi Klein (2014) writes “The main power of divestment is not that it financially harms Shell and Chevron in the short term but that it erodes the social license of fossil fuel companies and builds pressure on politicians”. Activists discussing social licence envision using the idea as a means of undermining the influence of resource development companies. If they can peddle successfully the idea that companies need a social licence in order to operate legally and legitimately, then they succeed in transforming the concept into a new source of power for activists like environmental extremists.

Third, a sort of breakdown in real societal dialogue is currently weighing on resource development – something that Brian Lee Crowley (2014) highlighted in an important recent *Commentary* in which he discussed the need to redevelop a more visible societal consensus in favour of responsible resource development. Experts and members of the general public who support responsible resource development will tend not to come out with radical statements because they see resource development proceeding within a carefully regulated framework and being subject to careful qualifications as needed. But those who would quash all development in general or, commonly, at least in their own back yards (the traditional NIMBYism) are quite ready to proclaim this loudly and to use the concept of social licence to operate as a means of saying that they hold a veto exercised through scowling faces on social media and, if necessary, peaceful and/or violent protest. All of the dynamics were present, then, for an internal concept concerned with business reputation and trust to morph into a term that would get reinterpreted into a new constraint to which business had allegedly agreed.

Thinking of social licence to operate as a new quasi-legal requirement on companies, though, carries with it some extremely dangerous underlying assumptions. These become apparent as soon as one thinks again of what it measures: the risks of legal changes adverse to a business’s operations and of extra-legal disruptions of business activities. To say that businesses operating in Canada should be subjected to a shifting social licence to operate is to say that businesses should face risks of legal changes that damage their business interests and of extra-legal disruption of their business activities by those opposed to them. To put it bluntly, any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law and a suggestion that Canada should become a less well-ordered society.

Consultants who have studied means of assessing social licence to operate and who advise companies on ways of measuring their social licence to operate at a particular point in time would identify a particularly low level of social licence at a moment in time when a project faces violent disruption.⁷ That is pertinent (if not surprising) information for a company, and the company needs to reflect on what it can do to avoid such situations. However, if someone transforms the descriptive statement that the company *cannot* operate with this low-level social licence into a prescriptive claim that the company *cannot* legitimately operate, that morphing of the statement logically depends on a presumption as to the legitimacy of the underlying violence. Unfortunately, over-enthusiastic embraces of social licence that actually misinterpret it through a sort of mistake about categories thereby undermine legally determined rights and even legitimize physical violence. Those who have rushed to embrace some interpretations of social licence because they are socially

mindful and support better flourishing of people in society should really think about whether they want to embrace a form of the concept through which they may legitimize physical violence.

Further implications follow too. At the extremes, surrender the rule of law, and you surrender the rights that law protects. Legitimize physical violence, and you surrender to the rule of the mighty and powerful. Those embracing the misinterpreted version of social licence actually embrace the exact opposite form of society from that which they presumably hope to support.

This point perhaps becomes clearest in the context of Indigenous rights. Many of those who advocate for better opportunities for Indigenous communities – myself amongst them – may have initially felt tempted by the idea of social licence as something that could help protect Indigenous communities and support them in their negotiations with resource companies where they have real opportunities at economic empowerment. However, Indigenous communities also need to think about whether their interests are always going to be aligned with the interests of certain environmental extremists, Twitterverse activists, and individuals ready to resort to disruption of business.

Consider the very practical scenario of the Chevron Pacific Trail Pipeline. This pipeline, which received its full environmental approvals a number of years ago, will transport gas on a 480-kilometre route from northeastern British Columbia to an LNG terminal at Kitimat. Chevron has signed agreements with 15 of the 16 First Nations along the route, who will economically participate in the project. Chevron also has support from significant parts of the leadership and membership within the last First Nation, the Wet'suwet'en Nation. However, some specific clans within that Nation, such as the Unist'ot'en clan, have withheld their support and have even erected protest camps along the route. Chevron continues to try to negotiate. But, at some point, the question is raised of whether the practical challenge of protest camps – which some will trumpet as showing a lack of social licence to operate – gets to override the legally negotiated agreements of 15 other First Nations. Those Indigenous communities who want to participate in responsible resource development – of whom there are many – should think very carefully before deciding that their interests are aligned with those who try to use the idea of social licence in extreme ways.

This is, as much as anything, because effective protections for Indigenous rights themselves depend upon the rule of law. In the context of a rule of law that is working toward very nuanced balances between resource development and Indigenous rights, legitimization of a concept that breaks down the rule of law is not helpful to industry, and it is not helpful to Indigenous communities. The duty to consult provides a very important legal instrument and policy tool for Indigenous communities in Canada, many of whom have been able to leverage the duty to consult into win-win agreements with industry project proponents.⁸ The adoption of vague ideas about social licence to operate, with much less clarity about how it is obtained and with whom, would arguably undermine rather than consolidate meaningful gains by Indigenous communities.

Nothing here, of course, weighs against business making use of tools that help them to analyse social licence to operate and its implications in terms of ongoing support for resource projects. At a real level, social licence to operate has practical effects. At the same time, there are important reasons to resist any drift in the concept. So long as it remains a descriptive concept for business to be able to analyse factors that include what are ultimately illegitimate impacts against business, it is a valuable tool for those bold enough to try to create prosperity in a sometimes unwelcoming world. But any steps that turn it into a prescriptive concept – a new requirement on business that you obtain social licence to operate, however we define it today, or else – have very negative effects in terms of what they legitimize.

The risk that social licence to operate is subject to a sort of conceptual drift – from practical, useful business concept to imposition of new requirements through extra-legal means – gives rise to several recommendations of ways that different sectors and different actors can help to avoid this problematic transformation and work toward well-ordered, responsible resource development that is appropriately responsive to environmental issues and Indigenous rights.

BUSINESS

- (1) Business actors who are speaking about the social licence to operate should be extremely careful about the different categories of the concept.

In speaking about the practical business concept, they should be careful that their words do not support misinterpretations of the concept as legitimizing new extra-legal requirements on business. Indeed, they should actually contemplate the possibility of discussing the same concept with different terminology so as not to continue to support the development of a problematic discourse.

- (2) Business actors may wish to think about different and more neutral terminology, such as terminology related to building public trust or building community relationships.

The presence of the term “licence” in the name gives it a more legal-sounding legitimacy than it has and may help perpetuate confusion.

That said, it may be worth realizing here that different business actors may initially seem to have rather different interests on the point – something that is one of the complications in this context. Some larger businesses with certain kinds of economies of scale may be well-placed to mount public relations campaigns around each new project. Indeed, they may see themselves as having a competitive advantage over smaller businesses – such as junior exploration companies – and may see the development of additional layers of regulatory complexity by government and society as something that supports a more oligopolistic industry structure that is to their advantage. However, this thinking is short-term. Major resource companies are dependent, over the longer term, on junior exploration companies being able to make finds. Larger companies are dependent on a culture of entrepreneurship continuing to be supported.

- (3) Even business actors who think themselves well-positioned to meet the challenges of a misinterpreted SLO discourse should still be wary of it.

INDIGENOUS COMMUNITIES

- (4) Indigenous communities should be more cautious about the social licence to operate than they have sometimes been.

We can all sympathize with Indigenous communities who are looking for every advocacy tool they can find to advance the position of their economically disadvantaged members. But something like the social licence to operate contains real risks in it and may, quite frankly, come back to bite those who currently think they can use it. Indigenous communities should make careful choices that best reflect their interests and best support the protection of Indigenous rights. Surrendering power to a vague concept like social licence carries longer-term risks to Indigenous communities.

POLICY-MAKERS

- (5) Policy-makers should continue to develop well-designed, well-ordered, stable policy frameworks that facilitate investment and that offer appropriate, well-defined protections for the environment, for Indigenous communities, and for others affected by resource development. They should work to ensure broad-based understanding of the design of these frameworks and the protections that they offer and work to continue to build public input.

Strong public understandings of the nature of these frameworks should build an ongoing base of support for well-ordered regulation and limit the appeal of extra-legal means of impacting decisions or projects.

- (6) Policy-makers should also contemplate the possibility of providing additional protections against sudden shifts in policy frameworks, such as strong administrative law protections for those playing by the rules, or possibly even property rights protections.

Although such protections raise a variety of questions going beyond the scope of this article, the presence of a growing discourse that calls for businesses to be subjected to shifting legal requirements raises the stakes for ensuring that our policy frameworks provide adequate certainty so that entrepreneurs can continue developing Canadian prosperity. Stable policy frameworks and predictable legal requirements are important to entrepreneurship. Those playing by the rules need the assurance that decisions made under those rules will receive protection. And those playing by the rules may need assurances that their work is not subject to sudden seizure through actual or effective expropriation through shifts in the legal regime. Appropriate property rights protections might also offer some additional protection against extra-legal efforts against business, though that latter issue largely depends on adequate enforcement of the rule of law.

- (7) Policy-makers should, quite simply, continue to recognize that business actors may have reasons to analyse legal and extra-legal risks to their businesses without taking those analyses as in any manner a way to increase legal and extra-legal risk. Policy-makers do not generally have reason to be referring to the social licence to operate.

ACADEMICS, PUBLIC INTELLECTUALS, AND THE GENERAL PUBLIC

- (8) The current discourse on the social licence to operate is, at the end of the day, an interesting example of conceptual drift. For the sake of a good society, we need to resist the kind of sloppy thought present in that sort of conceptual drift. We all bear a mutual responsibility to work toward clearer understandings, to combat misunderstanding, and to remember that ideas matter.



About the Author

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Endnotes

- 1 For a business-directed discussion of social licence that will be a prominent contribution, see John Morrison, 2014, *The Social License: How to Keep Your Organization Legitimate*.
- 2 Some longer history of the concept is present in Jacqueline Williams and Paul Martin eds., 2011, *Defending the Social Licence of Farming: Issues, Challenges, and New Directions for Agriculture*. Apart from earlier references to “social licence”, there were many writing on the concept of “social acceptability” in the years leading up to Cooney’s concept entrepreneurship.
- 3 A particularly significant recent discussion in Canada on social licence to operate took place at a conference at the University of Calgary School of Public Policy in October 2014; Brian Lee Crowley’s presentation will be featured in an MLI commentary accompanying this one. On the latter point concerning the extension of the concept to business contexts generally, a *Slate* contributor in 2010 asked whether Goldman Sachs had lost the “social licence to operate”, considering it mainly in terms of reputation and whether various public entities would do business with it (Gross 30 April).
- 4 For example, see Jason Prno and D. Scott Slocombe, 2012, “Exploring the Origins of ‘Social License to Operate’ in the Mining Sector: Perspectives from Governance and Sustainability Theories”, p. 347; John R. Owen and Deanna Kemp, 2013, “Social License and Mining: A Critical Perspective,” p. 30; Kieran Moffat and Airong Zhang, 2014, “The Paths to Social License to Operate: An Integrative Model Explaining Community Acceptance of Mining,” p. 61; Kathleen M. Wilburn and Robert Wilburn, 2011, “Achieving Social License to Operate Using Stakeholder Theory,” p. 3.
- 5 Early efforts owe a lot to Robert Boutilier and Ian Thomson, 2011, “Measuring and Modelling the Social License to Operate: Fruits of a Dialogue Between Theory and Practice.” Boutilier and Thomson have been cited extensively, and they have also presented follow-up papers at various mining conferences in which they continue to articulate their approach to measuring social licence to operate.
- 6 Many details on the FV Tool are available on the website <https://www.fvtool.com/index.php>.
- 7 This would be true of the models offered by Boutilier and Thomson (whose presentation at the World Mining Congress, 2013, in Montreal set out various means of measuring social licence to operate grounded in their earlier work) but also of any plausible measurement models concerning the social licence to operate.
- 8 For a fuller discussion, see Dwight Newman, 2014, *Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and Canada’s Natural Resource Sector*.



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As the author Brian Lee Crowley has set out, there is a strong argument that the 21st Century could well be the Canadian Century.

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I saw your paper on Senate reform [Beyond Scandal and Patronage] and liked it very much. It was a remarkable and coherent insight – so lacking in this partisan and anger-driven, data-free, a historical debate – and very welcome.

SENATOR HUGH SEGAL, NOVEMBER 25, 2013

Very much enjoyed your presentation this morning. It was first-rate and an excellent way of presenting the options which Canada faces during this period of "choice"... Best regards and keep up the good work.

PRESTON MANNING, PRESIDENT AND CEO, MANNING CENTRE FOR BUILDING DEMOCRACY