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The Social Licence to Operate: Mind the Gap

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This post is based on an invited [presentation](#) that I gave at the Canadian Energy Law Forum on May 14, 2015 in Lake Louise. I began my remarks by looking at the three elements of the social licence to operate and then offered a summary of a lecture given by Rowland Harrison at the University of Alberta on March 10, 2015 from his position as the TransCanada Chair in Administrative and Regulatory Law, entitled “Social Licence to Operate: The Good, the Bad and the Ominous.” Mr. Harrison is a former member of the National Energy Board. I concluded my remarks by reflecting on four issues: (1) the normative context for thinking about the social licence to operate, (2) why it is that industry itself uses the term “social licence to operate”, (3) the need to narrow the gap between the legal licence and the idea of the social licence, and (4) the implications of allowing the social licence to operate as a veto.

Elements of a Definition: Social Licence to Operate (SLO)

Let’s start with the word “social”, the adjective that qualifies the noun, which tells us that the *source* of the licence that we are referring to is not government or a regulator but society, or some subset of society, or some community or subset of that community (begging of course questions like which society, what community, but, typically in the literature, some local or affected community).

And as for the noun, the word “licence” to us as lawyers means consent or permission; the permission to do that which without the licence would be a trespass; carrying the connotation that the permission originates from some entity whose authorization is in some sense *required*. The holder or applicant for the licence is typically industry - a resource company, a pipeline company or perhaps equally a party seeking to develop a new aquaculture operation, a wind farm, or even a school board wanting to open a special needs school in suburban Calgary. And the licence that we are taking about is additive; it is in addition to any legal licences or permits that may be required from a formal governmental authority.

And as for the verb “to operate”, this signifies that the concept is concerned not just with the commencement of the project, but implies that the project should continue to have the support of the community throughout its life.

The concept then is a highly *normative* concept; you *ought* not to proceed or continue with this operation without the permission of the affected community. But it is an extra-legal norm.

Rowland Harrison on the Social Licence to Operate

Let me turn now to Rowland's excellent paper. Rowland started with some general observations before using the headings of his title and I will follow that same order; I am paraphrasing and parsing throughout, so don't lumber Rowland with my choice of words and terminology.

First, the **preliminary observations**.

The concept of SLO is generally attributed to Jim Cooney of Placer Dome who used the term in the late 1990s in the context of social and political risk assessment by mining companies operating in developing countries which lacked a commitment to the rule of law. It is now commonly used in a broader range of social and political contexts, including linear projects (pipelines and transmission lines) in western liberal democracies strongly committed to the rule of law and with sophisticated and well-resourced regulatory schemes.

While one would expect the concept to be enthusiastically endorsed by elements of civil society it is perhaps more surprising to see industry broadly endorsing the concept, including pipeline companies, industry associations (e.g. the Canadian Association of Petroleum Producers (CAPP) and Canadian Energy Pipeline Association (CEPA)) and even some regulators.

Rowland suggests that to the extent that we are thinking about social licence and resource development projects it is useful to place this in the context of the more formal decision making procedures which, crucially in Rowland's thinking, involve a public interest determination by a regulatory body, or even by cabinet, following a process that involves significant citizen engagement, typically through industry led consultation programs and perhaps supplemented by full public hearings. Such a public interest determination will always be contingent and contested but this is the mechanism, or some form of it, which western liberal democracies have chosen to make decisions about these types of projects.

Rowland deliberately distinguishes between the concept of social licence and the rights and obligations associated with the Crown's duty to consult and accommodate aboriginal peoples — principally on the grounds that the duty to consult and accommodate is a legal and indeed a constitutional doctrine; the social licence to operate (SLO) is, by definition, extra-legal. I also note, parenthetically, that other commentators have also distinguished between social licence to operate and the concept of free, prior informed consent (FPIC). Prno and Slocombe for example note the following: (1) FPIC is a duty of the state whereas a proponent may acquire SLO without state involvement; (2) FPIC focuses on obtaining consent before a project proceeds, SLO emphasizes maintaining community support; (3) FPIC focuses on the rights of indigenous communities, SLO applies more broadly. See "Exploring the origins of 'social licence to operate' in the mining sector: Perspectives from governance and sustainability theories" (2012), 37 Resources Policy 346 at 349.

We can now turn to the three headings of Rowland's title.

The Good

The "good" for Rowland is that the concept of SLO serves as a reminder to us all and, perhaps especially to regulators, that any legitimate project approval process needs to consider affected interests, and especially local and community interests.

The Bad

The bad for Rowland largely turns on all of the uncertainties associated with the concept of SLO. Who must the licence be obtained from? How can we tell when the licence has been earned or obtained? When is it lost? If one thinks, for example, of the events on Burnaby Mountain in the fall of 2014 where protestors disrupted the efforts of TransMountain Pipelines to carry out surveying activities associated with the proposed expansion of the Kinder Morgan pipeline, who was the potential social licensor? Was it the City of Burnaby? Was it the protestors? (For a judicial account of those activities see *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133, 2014 BCSC 2403, 2015 BCSC 242).

The Ominous

Following on from the bad, Rowland's argument on the ominous (and one sees similar arguments in the writings of [Dwight Newman](#) and [Brian Crowley](#)) is that the very uncertainties associated with the content of the concept of social licence make it inconsistent with the ideals of the rule of law. Rowland recognizes that that is in some sense an unfair criticism precisely because SLO exists outside the law and the formal legal system. His response is that to the extent that the SLO concept makes normative claims then it should play by the normative rules of the formal legal system, including the rule of law.

Equally ominous for Rowland are the signs that SLO is being used by some to justify the non-application of the formal rules of the legal system by actors within the legal system. Thus, it is one thing for protesters to exercise what in the 1960s we might have termed civil disobedience, but it is altogether different if the police, for example, fail to enforce the terms of a properly obtained court order because the protesters have clothed themselves in the rhetoric of social licence to operate. This again undermines the rule of law. Here Rowland refers to Justice Brown's experiences in getting an injunction enforced in *Canadian National Railway Company v John Doe*, [2013 ONSC 115](#).

What Then Does the Future Hold?

Rowland concludes with three observations. First, we can retain the **good** underlying the SLO concept and reduce the **bad** and the **ominous** if we ditch the language of licence which is too redolent of the formal normative order. Other possible terms that are less freighted include acceptance or support. Second, industry and government need to be more careful in their choice of words and what they endorse. And third, perhaps one response to the social licence debate is, in my words, to build a bigger tent. Thus, if we recognize that there is some legitimacy to the concerns that underlie the development of the SLO, that is to say, if we recognize that in some ways and in some respects there is a gap between the formal licence of the law and acceptance of a project by an affected community or communities, then we might try to develop techniques within the formal legal system to help reduce or eliminate that gap or deficit. Sometimes that gap will be unbridgeable but in other cases perhaps we need to try to bridge it.

That concludes my summary of Rowland's paper and I now turn to my own remarks.

SLO in its Normative Context

I said earlier that SLO is a highly normative concept. What do I mean by that? A norm for me is simply an expectation about behavior. It is a claim that in X circumstances Y ought to act in a

particular way. We are all (as lawyers, family and community members, and citizens in society) familiar with different types of norms and normative orders. We frequently recognize a hierarchy of norms but we also recognize norms of different qualities and specificity.

A lawyer's hierarchy will start with the constitution and move down through senior levels of government to the local level. We saw some of the interplay between these rules operating in the TransMountain Burnaby Mountain standoff and we have sophisticated techniques for resolving normative conflict within the legal system including the doctrines of applicability or interjurisdictional immunity (IJI) and paramountcy, all as nicely illustrated by the NEB's very well-reasoned [Ruling No. 40](#) in the TransMountain proceedings.

As for the quality of our norms, consider for example the distinction between constitutional law and constitutional conventions, or in international law the distinction between soft norms and hard norms. A norm may be hard if it is (a) law, (b) expressed with precision, and (c) enforceable. A norm may be soft if: (a) its status as law is contested, (b) it is drafted in hortatory or excessively general terms, or (c) there is no enforcement mechanism. A prescriptive treaty might establish a set of hard norms whereas the [Rio Declaration on Environment and Development](#) is generally considered to establish a softer set of norms; and some instruments such as United Nations Declaration on the Rights of Indigenous Peoples ([UNDRIP](#)) may encode both hard and soft norms. See generally Alan Boyle, "Some reflections on the relationship of treaties and soft law" (1990), 48 ICLQ 901.

And as for the specificity of our norms, consider the distinction between rules and principles. Ronald Dworkin famously said that law is more than a system of rules but includes principles as well as rules. Both are norms but they operate in different ways. Norms like the neighbor principle, the precautionary principle, the polluter pays principle, or even something like the "regulatory compact" have weight, they push us in particular directions without requiring a particular outcome. They do not apply in an all-or-nothing way and the status of such principles may be highly contested. For example, there is a famous and ongoing debate in international law as to whether the precautionary principle is actually just "an approach" or whether it represents customary international law or is a general principle of law. Examples from Canadian case law of the application of normative principles include the [Baker](#) case ('best interests of the child') and the [Spraytech](#) Case (precaution). Rules on the other hand apply in an all-or-nothing way and demand a particular outcome.

My point thus far is that we live in a normatively complex world where there is constant interaction between different normative claims and different normative orders. Part of that complexity is attributable to the globalized world in which we live. If we reflect on that picture we as lawyers are actually very familiar with normative complexity; sorting through that complexity is part of what we do both as academics and practitioners. But how does this relate to the topic of SLO? I think it prompts two contradictory observations. The first is that this discussion suggests that there is nothing particularly unusual about SLO; it is simply part of, or another example of, this normative complexity and that we should not be too worried about it. A second observation is that this extended reflection on the different types of norms suggests that there is something really quite unusual about SLO which is that while it is a soft norm in the sense that it is clearly not law (it is a *social* licence and not a *legal* licence) the fact that it is presented in the form of a rule rather than that of a principle causes it to appear harder and more demanding than it actually is. Indeed on its face it is more demanding than the constitutional concept of the duty to consult and accommodate which, as the Supreme Court reminds us, does not amount to a veto. These reflections also suggest that the concept might be more useful to us,

and indeed less threatening, if we could (re)frame it as a principle. As an aspirational goal or principle it is far more attractive than as a rule.

Why Might Industry Embrace the Social Licence to Operate?

Rowland suggests that the alacrity with which industry has latched on to the concept of social licence is perhaps surprising. I think that this enthusiasm can perhaps best be explained by recognizing the different ways in which we use the term, and appreciate that it is in fact used descriptively as well as normatively. To this point I have been emphasizing the normative usage i.e. you cannot operate unless you have a social licence. A more descriptive use is simply the claim “I have a social licence to operate”. (And we might observe as well that one usage is *ex ante*, while this second is *ex post*). Of course, as soon as I make the *ex post* claim that I have a SLO the attractiveness of the term to industry is obvious. It may help industry fast track the legal approval process (as where an oil sands proponent reaches an impact and benefit agreement with an affected First Nation community with the result that a scheduled hearing is cancelled because there is no party left with standing who can insist on a hearing); it may enhance the reputation of that industry player and meet its corporate social responsibility policies; and it may help that party improve or maintain market access for its products. All of these qualities make the endorsement of a social licence very valuable in managing project risks and timelines.

Narrowing the Gap

If we accept that in some cases there may be a gap between the legal licence and community expectations what measures can we take to help us narrow that gap? The first step of course is that government, and in particular responsible ministers, should be cautious not to widen the gap by undermining the credibility of the regulatory system. In my view (see my post [here](#)), Minister Oliver’s open letter to Canadians attacking “environmental activities” on the eve of the opening of the Northern Gateway hearings was one such misstep. Other more positive measures to be taken might include: broader adoption of strategic environmental assessments; landscape level planning approaches (e.g. Alberta’s planning process under the [Alberta Land Stewardship Act](#) (although clearly there has to be full implementation of plans as well, and here, for example [we have yet to see](#) the development and implementation of the biodiversity framework called for by the Lower Athabasca Regional Plan); and broader adoption of public interest standing rules (while also exercising some control over process) rather than [limiting standing](#) to recognized private interests. I also think that the public needs a forum in which to address broad public policy issues such as climate change and greenhouse gas emissions. Thus while it might be reasonable to conclude that a pipeline application before the National Energy Board is not the best place to assess upstream and downstream greenhouse gas emissions (see *Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board*, [2014 FCA 245](#) and discussion [here](#)) these are legitimate concerns, as is the absence of a coherent federal climate change policy, and it is important to provide some forum within which these issues can be discussed. And finally, we should not underestimate the importance of reasons as a means of supporting the legitimacy of the legal licensing process. In this respect, I think that the NEB has been doing a good job in providing reasons for its decisions (see the reference above to its Ruling No. 40) whereas with the single exception of its decision in *Forest Ethics* (above), the Federal Court of Appeal’s habit of not providing reasons to support denial of applications for leave when serious legal issues are at stake does nothing to enhance the legitimacy of the regulatory scheme.

The Implications of Social Licence as a Veto

One of the concerns that I have with the concept of social licence is that it has the potential to undermine what we mean by living in a society or community. We live in societies because we are more than just individuals and we crave the benefits that living in a society offers including cultural benefits as well as material benefits such as schools, airports, hospitals, roads and energy services and infrastructure. While the market may help us make decisions about some of these projects, holdout problems and settlement and transaction costs cause us to acknowledge that contract and consent alone will not get those projects built. We need a regulatory system that allows us to assess that societally we are better off with these projects than without, we need to ensure that environmental values are properly protected at both the landscape level and the project level, we need to ensure full protection of indigenous rights (including in some cases the right to withhold consent), and we need a compensation mechanism to ensure that those who are inordinately affected are appropriately compensated. But if we also grant all of those who are detrimentally affected by such projects the power to act as a social licensor (or the power to withhold such licence), then we can pretty much guarantee that these projects will not be built, to the ultimate impoverishment of what we mean by living in a society.

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