



Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries

*A Universal feeling, whether well or ill founded,
cannot be safely disregarded.*

– Abraham Lincoln

Introduction

The term "social licence to operate" ("SLO") arises frequently in discussions about resource development projects. One study notes that, between 2007 and 2012, almost every corporate member of the International Council of Mining and Metals, the Minerals Council of Australia, the Mining Association of Canada, and the Prospectors and Developers Association of Canada used the term in its public communications.¹

The London-based International Institute for Environment and Development examined the challenges facing the mining industry in its 2003 report, Breaking New Ground: Mining, Minerals and Sustainable Development, and noted the failure to achieve social licence to operate in many regions worldwide:

The mining and minerals industry faces some of the most difficult challenges of any industrial sector – and is currently distrusted by many of the people it deals with day to day. It has been failing to convince some of its constituents and stakeholders that it has the 'social licence to operate' in many parts of the world, based on the many expectations of its potential contributions ...

So, what are these organizations talking about? The answer is neither simple nor consistent across the spectrum of people and organizations using the term in their public communications.

¹ See Own and Kemp, 2014, in the list of references at the end of this article.

Project developers often talk about social licence as the outcome of a commitment to corporate social responsibility. Others often expect something deeper, akin to demonstrable community acceptance.

Without definition and boundaries, social licence is no more than abstract rhetoric that has little meaning or, worse still, may frustrate genuine efforts to align interests because of the differing expectations it creates.

This article examines the evolution of SLO in the approval of resource development projects and its recent rise in popular use. It then considers how the concept relates to political governance and law. Finally, it assesses the implications of how SLO is being applied – for good and for bad, but most often without a proper context.

Common Understandings of SLO

The phrase SLO has popular appeal because it evokes the idea of community acceptance, something for which all organizations strive. However, SLO tends to relate more to the negative drive of doing what is necessary to avoid the loss of community acceptance and the resulting public opposition, than to the positive drive of striving for higher standards of social and environmental performance.

A recent review of the use of the term in the mining industry summarized the academic literature as follows:

Typically, an operation's social licence is theorized as comprising ongoing acceptance

or approval from the local community (Joyce and Thomson, 2000; Nelsen and Scoble, 2006; Parker et al., 2008; Thomson and Joyce, 2008) and other stakeholders who can affect profitability (Graafland, 2002).

In this way, the social licence is contrasted with a statutory licence: it is intangible and unwritten, and cannot be granted by formal civil, political, or legal authorities (Franks and Cohen, 2012). ...

Social licence, then, can be seen as an intangible construct associated with acceptance, approval, consent, demands, expectations, and reputation. Moreover, these notions suggest an overarching concern with organizational legitimacy.²

The intangible and abstract nature of a "social licence" presents challenges to defining it on the ground. Without some effective means to measure social acceptance, it is easier to understand when SLO is lost than when it is achieved.

A basic level of social acceptance may be presumed when legal licences are granted, since those legal standards are based on a government view of acceptable performance and are enacted in law or policy through democratically established institutions. What more may be needed to meet other relevant social expectations, local or otherwise, is an exercise in judgment and, in some cases, pure speculation. One researcher noted,

While the social licence is intended as a metaphor to encapsulate values, activities and ideals which companies must espouse within society to ensure successful operation [Joyce and Thomson, 2000] — and not a literal licensing arrangement — even metaphors require clear boundaries to make them meaningful.³

If a SLO is considered a necessary condition to operate, then it becomes an ambiguous extra-

legal requirement. We have established well-defined environmental review regimes to receive public comment and inform decisions on legal permissions for resource development. How does the SLO reconcile with that process when it stands apart from it?

One author summarized the dilemma of SLO as follows:

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.⁴

Working towards higher social and environmental performance than the law may require is a laudable goal, and even a priority for many socially responsible businesses. However, the focus on SLO can confuse the public discourse. An extra-legal social permission may be based on other dimensions beyond even best environmental and social practice and can easily be distorted by public misinformation since the debate lacks structure and accountability.

No doubt, strong public sentiment can move government policy and even drive changes to the law. Indeed, the democratic process is fuelled by the healthy debate of competing ideas to shape the laws and institutions that we establish to govern ourselves. By its very nature, however, SLO is commonly regarded as lying outside of the purview of our legal institutions. A report by KPMG in Australia asserts,

[a] social licence to operate is quite distinct from the formal licences, permits and concessions granted by governments and their agencies.⁵

Do we erode our legal institutions by trying to institutionalize SLO? Applied literally, a SLO suggests that some segment of the public must

² Parsons, Lacey and Moffat, 2014, p. 84.

³ Bice, 2014, p. 63.

⁴ Newman, 2014, p. 14.

⁵ KPMG, 2013, p. 4.

give “permission” – tacit or otherwise – for an activity to operate or for an investment to be made. But which segment of the public makes that call?

We should not turn our attention to those who would approach SLO as a form of public veto simply because they have the loudest public campaign. Sometimes the public interests that deserve the greatest attention can only make themselves heard in a forum that allows all relevant perspectives to be received. Optimal decision-making in the public interest calls for a reasoned and structured approach, which is why we have formal environmental reviews. Those reviews incorporate procedural safeguards to ensure a fair process and well-informed decisions.

If an aggressive social campaign questions the legitimacy of a formal review process, then we have remedies, political and legal, to improve the review process. We should not discard the formal process on the belief that direct civil action by public interest groups somehow represents a more democratically sound approach. That belief would be misguided.

Origin of the Concept

Some attribute the expression SLO to public debate in the mining industry. One study points to a speech by a senior mining executive in the late 1990's:⁶

The social license to operate began as a metaphor comparing the ability of communities to stop mining projects with the ability of governments to do the same. It was coined by Jim Cooney, a former executive with Placer Dome. He used the phrase in a meeting with the World Bank in 1997 and it gained wider currency at a World Bank sponsored meeting on mining and the community later that year.

⁶ Boutilier et al, 2012, pp. 230-31.

⁷ Sanyal, 2012, p. 1.

⁸ Wilburn and Wilburn, 2011, p. 4.

In a speech in 2012, Dev Sanyal, Executive Vice President and Group Chief of Staff for BP, also referred to SLO as a "metaphorical concept" and observed that companies "... cannot operate sustainably without the support of society."⁷

Others suggest that SLO was developed as a response to the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, which requires states to obtain free, prior, and informed consent ("FPIC") from the indigenous peoples affected by development in their territory.⁸ Still others claim the concept has earlier roots, pointing to work by Shocker and Sethi in 1973 on corporate management theory and the need for a social contract.⁹

The theoretical underpinnings of SLO are notionally linked to the more fundamental concepts of "social contract" and political legitimacy – concepts explored by political philosophers of the Age of Enlightenment and even earlier by the Greek Sophists and other ancient philosophers.

The Minerals Council of Australia describes SLO in "social contract" terms in its work on a sustainable development framework for the industry:¹⁰

Foundation[al] to the industry's commitment is the concept of a 'social licence to operate'. Simply defined the 'social licence to operate' is an unwritten social contract. Unless a company earns that licence, and maintains it on the basis of good performance on the ground, and community trust, there will undoubtedly be negative implications.

At its core, the SLO suggests a bargain between a private enterprise and a broader social group – i.e., the enterprise conforms to certain social norms to gain the acceptance and trust of the

⁹ Bice, 2014, p. 62.

¹⁰ Minerals Council of Australia, 2005, p. 2.

social group to allow a resource development to operate. In a 2013 report, KPMG observed,

Developing and maintaining a social licence to operate is rapidly becoming core business for resource companies and community investments are now a vital part of viable resource project development.¹¹

Social contract theory is not new. Nor is the understanding that corporate reputation is important for success. What then is new? Why is the focus on SLO now becoming "core business"? Haven't businesses always been concerned with public reputation and goodwill? The ideas underlying SLO are not new, but the SLO label and the current social environment have novel elements.

First, one novel element lies in the application of social contract to a relationship between a private enterprise and an undefined social group, rather than the state and its institutions. The ambiguity inherent in an unwritten contract with an undefined social group is a business risk minefield, particularly if the use of SLO is intended to be more than a statement of commitment to corporate social responsibility – i.e., if it seen to involve some form of governance.

Second, the innovations in communication technology and social media have revolutionized how public debates on resource developments unfold. Public sentiment can be influenced and organized in ways that were unknown even a decade ago. Social engagement has changed and is continuing to evolve at a dramatic pace.

Third, the level and potency of social activism on environmental issues has increased. This reflects, in part, the revolution in social communication, but it also speaks to a shift in generational attitudes on public interest priorities, including the environment.

Fourth, public debates are rarely confined to purely local issues. Many non-governmental organizations ("NGO's") are well-organized and can mobilize when projects trigger their specific areas of environmental or social interest. Local community interests are often represented by *ad hoc* groups that are formed as a result of a proposed project. How the local groups align with more organized NGO's will depend on the issue and circumstance, but the opportunity to organize globally and locally is greater now.

Links to Corporate Social Responsibility

Within the resource industry sector, increasing attention has been directed towards promoting corporate social responsibility in areas of public interest, including corporate ethics, human rights, labour practices, social engagement, community involvement, and environment. The attention to defining and implementing best practices is a positive trend that will continue.

The International Standards Organization's (ISO) Guidance on Social Responsibility, ISO 26000, offers guidance on implementing practices that conform to internationally recognized standards of social responsibility. The introduction to ISO 26000 explains,

An organization's performance in relation to the society in which it operates and to its impact on the environment has become a critical part of measuring its overall performance and its ability to continue operating effectively. ... The perception and reality of an organization's performance on social responsibility can influence, among other things:

- its competitive advantage;
- its reputation;
- its ability to attract and retain workers or members, customers, clients or users;
- the maintenance of employees' morale, commitment and productivity;

¹¹ KPMG, 2013, p. 3.

- the view of investors, owners, donors, sponsors and the financial community; and
- its relationship with companies, governments, the media, suppliers, peers, customers and the community in which it operates.¹²

In a 2003 report entitled The Social Licence to Operate, the organization Business for Social Responsibility equated SLO with simply gaining support from concerned stakeholders:

Gaining a social license to operate simply means gaining support for the project from concerned groups, or stakeholders, over and above meeting any legal requirements.¹³

The addition of SLO into the discussion of social responsibility is troubling because of its focus on permission – the licence – rather than on improving performance. The focus on permission emphasizes a governance role that is vague and unachievable. In the end, it is not helpful.

Absence of Legal Foundation and Recognition

The term SLO has received little attention in the legal jurisprudence. Canadian courts have not considered the term, nor recognized it. Legal writers have reviewed it to some extent and, in particular, its association with other legal concepts. The associations are not always apt though, because of the abstract nature of SLO.

One author draws links between SLO and the concept of FPIC embedded in the United Nations *Declaration on the Rights of Indigenous Peoples*.¹⁴ Another study also draws a link between SLO and FPIC, but notes the process for achieving SLO is not defined.¹⁵ That study cites three key issues, which may be summarized as follows:

1. How is "the community" defined? Is there a strict geographical limit?
2. If there is a lack of consensus in the community, what process validates any decision-making for the community?
3. Absent a political process, what represents an adequate level of consent?

The comparison of SLO to FPIC falls short in several key respects. The concept of FPIC relates specifically to indigenous groups who have identifiable rights within the territory being developed. The United Nations Declaration on the Rights of Indigenous Peoples defines a duty of the state, not of a private resource developer. The approach to achieve FPIC is easier to understand because of the defined elements.

By contrast, the concept of SLO is amorphous. The public interests in a resource development project can have many dimensions – environment, labour, human rights, safety, or health. They are diverse, and the public can align in different formations on each issue. Further, the interests may be local, regional, or wider. Hence, SLO has no clear boundaries. The response by a developer will depend on how the developer understands the myriad social interests that may be engaged by the project.

SLO has no legal force or recognition, but strong public opposition can affect the success of a project. This potential is one of the drivers – albeit a negative one – that moves developers to adopt practices that exceed the legal standards.

In a review of social licence and its effect on the governance of corporate behavior, one study identified several impacts social pressure may have on the legal institutions that can lead to "enforcement" of SLO:¹⁶

¹² ISO website May 2015

<https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>

¹³ BSR, 2003, p. 4.

¹⁴ Baker, 2012.

¹⁵ Wilburn and Wilburn, 2011.

¹⁶ Gunningham, Kagan and Thornton, 2004, pp. 319-20.

- Affecting corporate "reputation capital."
- Augmenting legal enforcement – i.e. pushing government agencies to enforce existing legal requirements more vigilantly.
- Causing a change to the existing legal requirements.

Thus, the authors argue that the interaction of between SLO and legal licence to operate is bilateral:

The regulatory license often extends the reach and impact of the social license, either by directly empowering social licensors, or by giving them access to information, which they can then use to pressure target enterprises. Conversely, the scope of the legal license can also be expanded as a result of its interaction with the social license—for example, as social pressures on legislators and regulators feed through in terms of enactment, monitoring and enforcement of regulation.¹⁷

SLO and Governance in Resource Development Decisions

The use of the word "licence" in SLO suggests a governance and decision-making role, which is misleading since there is no formal process for obtaining a SLO. How SLO relates to the governance of resource development decision-making is, however, an important question to examine.

Some researchers argue that governance around resource development decisions has shifted and "no longer rest[s] on the authority and sanctions of the government alone:"¹⁸

These shifts have been both vertical (e.g., political power has moved up to transnational levels of government and down to local communities) and horizontal (e.g., political power has moved from government actors

towards non-government actors) (Eckerberg and Joas, 2004). ... As a result of these shifts, the boundaries between the public, private and voluntary sectors have now changed and distinctions between civil society and the state have blurred (Rhodes, 1997). These shifts are especially relevant to the emergence of SLO, as they have helped enable the voices of mining affected communities to become much more influential in mineral development decision making and political processes.¹⁹

Prno et al. further argue that this shift in environmental governance affects fundamental aspects of resource development:

As governance has evolved, three fundamental aspects of a positive climate for mineral development have now been altered: access to land, ease and speed of permitting, and the right to mine deposits after discovery. Mining companies have had to come to terms with these new governance requirements in order to survive.²⁰

One legal writer adds,

... social licence created an additional form of *civil regulation* by drawing on those market forces and norms that encourage certain types of (usually virtuous) behavior.²¹

Social pressure to conform to societal norms differs from licensing, however. Businesses have long understood that their corporate reputation is important in the market and can influence community support for project approval. SLO suggests a critical level of social acceptance that equates with permission when, in most cases, the social support will be tacit and the critical level is never really defined. Moreover, the diversity in views within communities means that support will be mixed, at best. A legal licence has a clear outcome; SLO does not. Some would argue that strong public opposition to a project indicates a withdrawal of SLO, but that

¹⁷ *Ibid*, p. 329.

¹⁸ Prno and Scott Slocombe, 2012, p. 349.

¹⁹*Ibid*, p. 349.

²⁰ *Ibid*, p. 350. Also see MacDonald and Gibson, 2006.

²¹ Wood and Williamson, 2007, p. 325.

measure of SLO is distorted since it focuses on opposition rather than acceptance. In most cases, public acceptance of a project is relatively quiet since those who accept or even support a project usually do not get involved in the public debate. Even in the face of high profile protests, general public acceptance may still be high.

Crowley critiques the current use of "social licence" and argues that "[i]ncreasingly, therefore, 'social licence' ought properly to be called 'opponents' permission'."²²

Owen and Kemp caution against the "inflated status" of SLO and "what its usage infers."

Even when used by NGOs as a call to public attention about poor industry practice, all that social licence offers is a crude form of 'negative governance'. That is, it is easier to point to an absence of particular factors that could be considered necessary for a social licence rather than to know when all relevant factors are actively in place.²³

They further argue,

Nothing short of a move away from social licence at the project level is required to pave the way for a more proactive stance towards sustainable development.²⁴

Prno et al. observe that hybrid or co-management governance models have been developed to include different levels of government and community participation in decision-making.²⁵ However, these hybrid forms of governance become formal legal institutions and leave the abstract realm of SLO.

Boutilier et al. suggest SLO may have three levels of community acceptance:²⁶

- Acceptance. At this basic level, the company passes the threshold for legitimacy to operate. Without legitimacy, the SLO is withheld. "Acceptance is a tentative willingness to let the project proceed."
- Approval. "If the company establishes 'credibility' its social license rises to the level of 'approval' and the environment becomes more stable. The approval level is characterised by stakeholder support for the project and a resistance to the ideas disseminated by critics of the project."
- Identification. "If a company with legitimacy and credibility manages to earn the full trust of stakeholders, the project's social license can rise to the level of psychological identification. At this level the community sees its future as tied to the future of the project. There is a willingness to fight for the interest of the project because the stakeholders share those interests."

While this model may assist in some project contexts, often the public debate is broader than local concerns. Boutilier et al. acknowledge that some of the problems seen in recent conflicts suggest a challenge to social licence at the industry level, rather than the project level.²⁷

Further,

... the question arises of how to win a social license from the minority who are looking for a global social contract. Examples are those civil sector organizations working on issues like anthropogenic climate change and human rights.²⁸

²² Crowley, 2014, p. 21.

²³ Owen and Kemp, 2013, pp. 30 and 32.

²⁴ Ibid, p. 34.

²⁵ Prno and Scott Slocombe, 2012, p. 354.

²⁶ Boutilier et al, 2012, p. 231.

²⁷ Ibid, p. 235.

²⁸ Ibid, p. 235.

They also note that there "may be a limit to how high individual mines and companies can drive their social licenses, even with the best strategies."²⁹

Given these limitations on the concept of SLO, it is best to avoid the use of term when talking about how social interests should be identified and accommodated in resource decision-making and public communications strategies.

Risk Management and the Public Communication of Risk

Many of the challenges associated with SLO relate to how the public perceives risk and how communications around risks are managed. Communicating about risk, especially to health, safety and environment, is difficult because the level of public trust is generally low.

Public trust is a foundation for social acceptance. Effective communication on risk is critical to building trust. Even to achieve "reluctant tolerance," public engagement on issues of risk is a key element. Most people know what their concerns are, but often they do not have the information or expertise to assess the true nature of the risks or to determine the strategies to manage the risks. Environmental assessments are designed to gather those concerns and apply expertise to assess the concerns in structured way. In the public and social media, there is no structure.

The tendency in the face of uncertainty is to avoid the associated risks. A systematic aversion to risk is, however, not in the public interest, because it will over-estimate risk and distort the true impact of a given resource development decision. An unduly cautious approach will also stifle change and innovation because the risks of new approaches are not as well-known as existing ones.

Understanding the social psychology related to risk perception is important to developing risk communication strategy and building trust. In review of the research in this area, Covello and Sandman note,

[a] major conclusion of this research was that typically there is only a low correlation between the level of physical risk in a situation and the amount of worry that it arouses. Much more important in determining people's responses, it was found, is the presence of what are now called "outrage factors."³⁰

Outrage factors include such factors as: voluntariness, controllability, familiarity, fairness, benefits, catastrophic potential, understanding, uncertainty, delayed effects, effects on children, effects on future generations, victim identity, dread, trust, media attention, accident history, reversibility, personal stake, ethical/moral nature, and human vs. natural origin.³¹

Covello and Sandman suggest,

... an individual's perception or assessment of risk is based on a combination of hazard (e.g., mortality and morbidity statistics) and outrage factors. When present, outrage often takes on strong emotional overtones. It predisposes an individual to react emotionally (e.g., with fear or anger), which can in turn significantly amplify levels of worry.

Further, simply relying on facts and science will not suffice:

[p]eople are averse to uncertainty, and find a variety of coping mechanisms to reduce the anxiety it causes. This aversion often translates into a marked preference for statements of fact over statements of probability – the language of risk assessment. Despite protests by scientists that precise information is seldom available, people want absolute answers; they demand to know

²⁹ *Ibid.*, p. 236.

³⁰ Covello and Sandman, 2001, p. 171.

³¹ *Ibid.*

exactly what will happen, not what might happen.

...

Strong beliefs about risks, once formed within a particular social and cultural context, change very slowly, and they can be extraordinarily persistent in the face of contrary evidence.³²

The debate in the media outside the environmental assessment process lacks the structure to test information that circulates in public on issues of concern. Without the opportunity to test the value of the information and to hold people to account for it, the opportunity for misinformation is great. The debates about SLO occur in this uncertain atmosphere, so resource developers must meet that challenge head on.

Both government decision-makers and project developers must understand public concerns and communicate how risks are assessed and managed. Positive economic benefits will rarely offset deeply held worries about environmental, health or social risks. Effective leadership in this situation calls for a principled approach to risk and strong communications skills to speak to the social and cultural values that underlie public concerns.

A Few Concluding Thoughts

When we talk about SLO, we are really talking about social acceptance and public trust. As Boutilier and Thomson have observed, "[s]peaking of a social license is a shorthand for a more complex situation."³³ That shorthand or metaphor, as others have called it, can confuse the public discussion because the complexity is lost in the discussion. SLO becomes an expression that misaligns expectations and focuses the debate on a vague concept of governance that defies definition and form, rather than focusing on improving performance where it matters.

Community interests, corporate reputation, commitment to responsible social and environmental norms, and positive community engagement all matter. Without question, the level of social acceptance matters to developers and decision-makers. But, we should use terminology that is more apt to describe social acceptance. Overt support or permission from all relevant public "communities" is exceedingly rare, if not impossible, for resource development (or indeed other kinds of) projects. The term licence suggests a specific permission when, in fact, many positive developments may only achieve a reluctant tolerance, even with a dedicated effort to gain social acceptance.

Ultimately, resource development decisions must be grounded on a reasonable and transparent assessment of the risks and benefits – social, environmental and economic. The decisions must also reconcile the distribution of benefits and impacts in a fair and expeditious way if we are to progress on the sustainable development path and build social equity.

The term SLO will likely continue to have currency given its widespread use, but we should understand its abstract metaphorical nature and its limitations. We should prefer to speak in language that directs attention to best practices and social responsibility. Social acceptance and public trust will be earned by performance, not abstract metaphors.

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³² *Ibid.*, p. 166.

³³ Boutilier and Thomson, 2011, p. 2.

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