

SOCIAL LICENCE AND CANADIAN ABORIGINAL LAW

TONY KNOX

(Delivered at the Insight 6th Annual Western Canada Aboriginal Law Forum held in the Four Seasons Hotel on May 11 and 12, 2010)

A. Introduction

This paper is about certainty in Canadian resource development both for industry and its aboriginal neighbours. It approaches certainty from the view point of the relatively new concept of “social licence”. A quick review of literature on “social licence” demonstrates that it is much defined and usually differently and usually with a partisan bias depending upon who are the usual clients of the commentator.

What follows ought not be taken as more than seeking to inspire further thought about analysis of the social licence fact of life. To that end, I am proposing an analytical framework based on a number of concepts which I suggest apply to any jurisdiction and any interface between resource developer and its neighbours, whether the latter are indigenous peoples or not. The elements of my proposed framework are defined in the next section.

Thereafter, there is discussion of how social licence differs from legal licence, social licence as described in social science from the perspective of industry, social licence as entitling neighbours of development to a veto of development, the international environmental law background of social licence, the international indigenous peoples law background of social licence and finally, social licence and Canadian aboriginal law.

That discussion will look at application of the elements of my proposed analytical framework to the situation of Canada and, in particular, social licence earned in respect of First Nations.

It will conclude with a discussion of what might be done in order to assist in making Canadian law no longer need the social licence concept and the uncertainty inherent in it.

B. Proposed Analytical Framework

Definitions

Understanding the thrust of this paper requires the use of a small number of defined terms. As in a long contract, these appear in this section as the following series of definitions:

- a. “Legal Licence” means a licence granted according to domestic law processes by the appropriate governmental authority of a jurisdiction to an industrial developer

- in order to give such developer the legal right to develop a project within the territory of such jurisdiction;
- b. “Social Licence Gap” means the gap in domestic law that probably exists in all jurisdictions between (X) the rights granted by Legal Licence and (Y) the additional justifiable expectations of neighbours that their interests will be fairly dealt with in any development resulting from such Legal Licence;
 - c. “Social Risk” means the risk that an industrial developer may not be able to proceed with a project that it has a legal right to develop under a Legal Licence; and
 - d. “Social Licence” means the aggregate of what must be done by an industrial developer in order to bridge the applicable Social Licence Gap, deal with applicable Social Risk so as to be able to proceed with development of its project with the support or acquiescence of the project’s neighbours.

Dynamics of the Analytical Framework

As will be seen below, Legal Licence has long been obsolete as “turnkey” access to industrial development. Worldwide, industry faces all manner of licensing regimes that can be arranged along a spectrum from those with a tiny Social Licence Gap, for example Canada, to those with a vast Social Licence Gap, for example the Democratic Republic of Congo.

The width of a Social Licence Gap does not dictate the degree of Social Risk in any jurisdiction. In fact, liberal jurisdictions such as Canada have virtually eliminated the Social Risk Gap with respect to aboriginal neighbours but in its fundamental aim of reconciliation with its aboriginal peoples is willing to do what is necessary to require industry to obtain a Social Licence that is reconciliatory in effect. This is inherently productive of substantial Social Risk. However, an industrial developer oblivious of its international reputation may face a wide Social Licence Gap but almost no Social Risk in a jurisdiction that will use force to enforce Legal Licences granted without any reference to neighbours’ interests.

Later in this paper, I will seek to answer the question, “How does this analytical framework apply to the relationship between developers of Canadian resources and neighbours who are First Nations?”

C. Legal Licence and Social Licence

Before looking going further it is useful to consider the two complementary concepts of “licence” which relate to industrial development.

Note that, at this stage, the discussion is not of the particular impacts of industry upon Canadian First Nations but all industrial impacts of all industries on all industry's neighbours. It is too easy at a conference like this to miss the fact that broad legal concepts cannot be understood only in terms of their application to one legally distinct minority population.

Legal Licence

*Black's Law Dictionary*¹ defines "license", Legal Licence, as, *inter alia*, "The permission by competent authority to do an act which, without such permission, would be illegal, a trespass, a tort or otherwise not allowable". It is a fundamental legal concept recognized by any competent lawyer in those basic terms.

"Licence" is a concept which finds almost endless variety of official existence with more or less clarity in numberless enactments and regulations as well as in the common law. The legal implications of any legal licence, if sufficiently unclear to be the subject of adversarial controversy, may be considered and defined by the courts. Legal Licence, therefore, is an indispensable part of the paraphernalia for achieving certainty in relations between state and citizen as well as between citizen and citizen. It is, along with the mass of legally mandated processes that provide for licences to be denied or granted, a cornerstone of industrial development everywhere.

Until as recently as the 1970s, in most jurisdictions, Legal Licence was all that was needed to do permit development of an industrial project. For centuries, neighbours put up with the varied inconveniences of having industry move into the neighbourhood because the law required that they do so. In jurisdictions at the "tiny gap" end of the spectrum of Social Licence Gaps, legal rules governing the granting of licences have increasingly sought to balance the good and ill effects of development among the interests of industry, its neighbours and Canadian society as a whole. At the "wide--gap" end of that spectrum, the will of governments to balance such effects is less obvious or can be absent with neighbourly objection being greeted with force, even lethal force.

Social Licence

"Social licence" is not a concept found in Canadian law. It is a concept generated not by legislatures or the courts but by businessmen and elaborated by their supporting experts in the law as well as the social and natural sciences. It is based on observation of consensus in the world community that developer/neighbour relations cannot go on as they were and the pragmatic observation that world-wide interactions between industry and its neighbours have entered into an obviously new era. Quite suddenly it became much less easy for industry to exercise its duly granted legal licence to develop without fear of effective local and increasing world-wide opposition to development. Social Licence has become the normal means of dealing with Social Risk.

¹ J.R. Nolan et. al., *Black's Law Dictionary*, 6th edition, West Publishing, 1990 p. 920. Note that in Anglo-Canadian English, "licence" is the noun and "license" the verb.

Sources of the Social Licence Gap

Neighbours have been given the bargaining power in dealing with developers in their neighbourhoods that is the source of Social Licence Gaps and Social Risk by a host of inter-related developments. These include the world-wide environmental movement², the internet, the growth in the number and power of non-governmental organizations³ (“NGOs”), the development of international industry standards relating to the environment and dealing with neighbours⁴, the international movement for the protection of indigenous peoples including the acceptance of the existence of aboriginal rights in most jurisdictions and in international law⁵, advances in international environmental and indigenous peoples law⁶ and the development of domestic legal regimes that adopt the enlightened vision of such improved industrial standards and changed international law⁷ are only some of the fundamental changes in the world development background in the last approximately forty years.

Such bargaining power exerted by neighbours has resulted in numerous successful resistance campaigns by neighbours in which it was demonstrated that a mere legal licence to develop an industry was not sufficient to permit such development⁸.

The Birth of Social Licence

Rebuffed by neighbours that are increasingly supported by NGOs, international law and public opinion, industry has taken a pragmatic approach to the fact that Legal Licence has been proven not to be universally effective. As early as 1998 the social licence concept was raised in industry conferences and by 2003 industry leaders were accepting the fact that Legal Licence needed to be supplemented with Social Licence in order for there to be real access to resources in the face of neighbourly opposition⁹. In the pragmatic relationship of developer with its neighbours, basic principles of achieving a working relationship arose organically from the common experience of dealing with the similar issues raised by diverse neighbour groups in jurisdictions around the world.

² *Vide passim* http://Wikipedia.org/wiki/Environment_movement#Environmental_reactivism

³ ISSA, *The Rise and Rise of NGOs*, <http://www.svt/mtnu/no/ISS/ISSA/0101/010109.shtml>

⁴ For example, the Whitehorse Mining Initiative, the Global Mining Initiative, the Mines, Minerals and Sustainable Development Program, the International Council on Mining and Metals, the World Bank Group’s Extractive Industries Review.

⁵ *Vide infra*, p.11.

⁶ *Vide infra*, pp.11ff.

⁷ Susan Joyce and Ian Thomson, *Earning A Social Licence to Operate: Social Acceptability and Resource Development in Latin America*, *The Canadian Mining and Metallurgical Bulletin*, Vol.93, No. 1037, Feb. 2000.

⁸ Jamie Kneen, Mining Watch Canada, *The Social Licence to Mine: Passing the Test*, Presentation to the Roundtables on Corporate Social Responsibility, 2006, p. 4.

⁹ J. Nelson and M Scoble, *Social License to Operate Mines: Issues of Substance, Analysis and Process*, 2006, <https://www.mining.ubc.ca/files/SocialLicense/Final%20MPES%20Paper.pdf>.

In so acting, the major developers were accepting that the laws of jurisdictions in which they were seeking to develop resources did not create certainty with respect to the Social Risk encountered in such jurisdiction's Social Licence Gap.

D. Social Licence as an Attainable and Quantifiable Goal in Social Science

Not surprisingly, as a concept generated by industry, the boards of industrial corporations have sought professional advice on exactly how Social Licence is to be earned.

Industry Lawyers' Advice

Lawyers retained by industry are asked for such advice.

They tend to advise their clients about (i) the limitations of Legal Licences, in effect, the width of the Social Licence Gap (ii) due diligence required about the state of affairs among the neighbours to the development and NGOs that are interested in the development, in effect, the extent of Social Risk (iii) seeking an early diplomatic interface with the neighbours in order to have the best chance of bridging the Social Licence Gap, and (iv) actually bridging it in contractual arrangements with neighbours; for example, in Canada and many other jurisdictions, through impact and benefit agreements, variously named and usually with contents kept confidential to the contracting parties¹⁰.

Legal commentary accepts that something called "social licence" had arisen that was separate from but necessarily walked in tandem with "legal licence" if a developer client which had a legal licence to develop a resource were to obtain actual access to such resource¹¹. It also accepts that Social Licence is not obtained in a legal process. In addition, it accepts that a Social Licence is not a true "licence" in the legal sense as neighbours do not exert a *de jure* veto on development although it is clear that there is material Social Risk of a *de facto* veto. Business, being pragmatic, is less bothered by there being no *de jure* solution giving access to development than if there were no *de facto* solution. For business, legal licence and social licence are simply parts of whatever is needed in order to get on with development

Additional pragmatic, if not strictly legal lawyers' advice to industry includes recognition that obtaining Social Licence depends upon the development of the social skills of industry including the long-term and world-wide elevation of the reputation of individual enterprises and whole industries and making such accommodations to neighbours as balance the bad effects of development with the good effects of development. Such pragmatic advice may include advice that sharing some of the benefits of development

¹⁰ Steven A. Kennett, *A guide to impact and benefits agreements*, University of Calgary, 1999.

¹¹ The week after the conference at which this paper is presented, the influential Rocky Mountain Mineral Law Foundation Mining Law Short Course will include a paper on "Ethics Cultural Differences and Social License, The Realities of Practising International Mining Law."

including, in some cases, the profits thereof, with neighbours must be considered in order to get on with the project and obtaining the profits projected to arise from it.

Industry and its lawyers, faced with the tangible existence of Social Risk, without naming it, recognized the Social Licence Gap, without naming it, and the need to bridge it with Social Licence. Predictably, in adversarial processes between industry and neighbours, lawyers as well as natural and social scientists have adopted positions on either side of such adversarial divide.

On the neighbours' side, "social licence" has been defined, *inter alia*, as "acquiring free, prior and informed consent from indigenous peoples and local communities through mutual agreements." In effect, industry responding to an ultimate neighbours' veto of development.

On the industry side, it has been defined, *inter alia*, as "a comprehensive and thoroughly documented process to have local stakeholders and other vested interests identify their values and beliefs as they participate in scoping the environmental impact assessment of the proposed project and in identifying alternative plans of operations for the project." In effect, it is something else to be obtained on the way to development without actually accepting an ultimate neighbours' right to veto development.

Both sides of the industry/neighbours equation deal outside the law in respect of Social Licence. The veto of the neighbours is a *de facto* veto; the veto of the roadblock, the occupation, the demonstration and the *ad hoc* referendum. The process of relationship building of industry is a *de facto* construction of trust based on positive diplomatic relations between representatives of developer and neighbours as well as recourse to *ad hoc* binding contracts regulating amelioration of the impacts and sharing of the benefits of development.

Depending on the unwillingness of governments to enforce Legal Licence by force, *de facto* neighbour resistance may be effective but still lack the *de jure* certainty of a legal licence based on fair processes that could appropriately and justly eliminate the Social Licence Gap and Social Risk. To the extent that the insufficiency of *de jure* processes leave industry and its neighbours requiring recourse to *de facto* and *ad hoc* means of balancing the good and ill effects of development, there remains Social Risk and resulting wasteful uncertainty for both sides of the development equation.

Industry's Natural Scientists' Advice

Given the subjectivity of any diplomatic interface between industry and its neighbours, corporate boards have also turned to other experts in order to develop guidelines for rendering their diplomatic efforts in earning Social Licence as productive of certainty for both industry and its neighbours as possible

The natural sciences play a fundamental role in establishing what the environmental impacts of development might be. Scientific experts retained by a developer are usually

well-financed and motivated to produce a development plan, developed in light of analysis of neighbours' interests, that can be offered to neighbours as a reasonable plan for obtaining a Legal Licence and from which to work out what, if any, accommodations are required in order to earn Social Licence.

There are, however, almost always at least two ways of analyzing scientific data as well as fundamentally opposing assumptions about what degree of environmental risk can be present while still allowing industry to develop. For industry scientists, the fact that every possible negative effect cannot be known does not mean that reasonable caution would determine that a development should not proceed if quantifiable risks are such as to justify a decision to proceed. Similarly, industry scientists analyze what can be predicted by scientific knowledge at the time they are retained to create a development plan. It is not their business to guess if a resource would be better left fallow for the indeterminate future while science develops further rather than being developed by their employer according to the timetable in their development plan.

Industry scientific data and analysis is often determinative in obtaining Legal Licence but may be less effective in convincing neighbours that a development is innocuous in the face of contrary scientific opinion, traditional knowledge and a lack of neighbours' capacity and resources allowing for fair judgement of the positive and negative effects of development for purposes of constructing Social Licence.

Industry's Social Scientists' Advice

Social scientists advising industry have developed advice on how Social Licence is to be obtained and measured. They recognize that there is no one social authority that "grants" Social Licence and that Social Licence need not be unanimously granted by all interested neighbours. While accepting that the industry/neighbour interface requires diplomacy combining art, good manners and innate personal diplomatic gifts, industry's non-legal advisors on dealing with Social Risk have sought to bring more measurable rigour to such interface with analysis of quantifiable human relationships and risks.

Such analysis uses typical social science methodologies. One such is so-called "Situational Analysis" which is based on applying all available information about local conditions, different classes of neighbours, often called "stakeholders" as well as interested NGOs and their respective interests on maps that can assist in guiding the diplomatic interface between industry and interested parties.. Another is so-called "PEST" Analysis, the detailed analysis and comparison of political, economic, social and technological factors in the external macro-environment of a particular project. Yet another is so-called "SWOT Analysis", the detailed analysis and comparison of strengths, weaknesses, opportunities and threats both internal and external to the industrial developer in respect of a particular project¹².

One local mining engineer adopting a social science approach to obtaining Social Licence has developed a body of analytical modules to assist and guide the user through the

¹² Richard B. Shepard, "Gaining a Social License to Mine", *Mining .com*, April 2008, pp. 20-21.

process of obtaining social licence, namely, Situational Analysis, Research Sites, Development of Exploration Team and Strategy, NGO Selection, Community Resiliency, Consultation, Contact with Community and Negative Community Indicators¹³.

However, such analytical tools are necessarily more or less subjective and will be flawed to the extent that (i) the person applying them is bound up in a substantially different system of values and culture from those of the affected neighbours and (ii) the effected neighbours lack the capacity or resources to communicate their interests meaningfully to the developer. Such flaws may lead to false assumptions and misunderstandings of the interests of both parties to the industry/neighbour interface.

Other social scientists have eschewed stock analytical models to study the history of actual businesses dealing with actual neighbours. This has led to the discovery that a history of good industry/neighbour relations, including exceeding legal requirements in respect of such things as social and environmental impacts can lead to the accumulation by a business of what has been termed “reputation capital” that can be drawn on to assist in purchasing social licence¹⁴. Such “reputation capital” can be grown both at the level of an individual corporation and at that of a global industry as industry groups and international organizations establish initiatives, codes, compacts and guidelines designed to provide industry with a reputation for appropriate dealing with neighbours that can be drawn on in obtaining the social licence to develop. Such study of case histories also identify that incompetent articulation of interests often delegitimize the positions taken by neighbours as appearing extremist and irrational. They can also render the subjective mechanisms of PEST and SWOT analysis more in tune with objective reality.

Also in answer to such criticism of analytical models such as PEST and SWOT, other social scientists have come forward with what amounts to analysis of what makes up successful diplomacy in the face of Social Risk. So-called “Participatory Scoping” requires seeking input from the widest possible spectrum of stakeholders and public interests as early as possible in the process of creating any industrial development¹⁵. Thereafter, this approach requires (i) the identification of alternatives (ii) the separation of environmental issues into their constituent categories, including, economic, natural and social and (iii) quantification of values and beliefs in order to identify their relative importance.

For those familiar with writings of Roger D. Fisher on the analysis of successful negotiation, none of this will come as a surprise¹⁶. For those familiar with administrative law processes of consultation, from “mere consultation” to “full or complex consultation” none of this will sound unfamiliar¹⁷. Fisher’s balancing of best alternatives and Canadian

¹³ *Ibid.* n. 9, *supra*.

¹⁴ N. Gunnigham, R.A. Kagan, D. Thornton, “Social Licence and Environmental Protection: why businesses go beyond compliance. <http://escholarship.org/uc/item/35/962b3>

¹⁵ *Ibid.* n.12, *supra*.

¹⁶ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreements Without Giving In*, Penguin, 2004.

¹⁷ Thomas Isaac and Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41 *Alta. L. Rev.* p. 49.

laws constitutionally mandated consultation and accommodation to minimize negative impacts on aboriginal rights in Canadian aboriginal law are logically related to “participatory scoping”. The advice to do it early and based on maximum data is both common sense and empirically provable.

Reflections on Social Licence as an Industry Tool

Industry needs all the help it can get in developing good relationships with its neighbours. The industry-side advisors provide an impressive body of scientific data and analysis, self regulatory precepts and other guidance relating to how Social Licence may be earned. It leaves a comforting impression that while Social Risk is real, the Social Risk Gap can normally be bridged by Social Licence.

However, “industry” is not monolithic. It is as diverse as the minds of entrepreneurs can make it. Great international initiatives have been undertaken in favour of transparency, sustainable development, the environment and the rights of affected parties are being undertaken by leading multinationals and overseen by industry-wide, national and international institutions including NGOs.

It would be naïve to assume that the highest standards of reputation capital building are maintained by all industrial developers. Equally, the cultural solitudes inhabited by industry and its neighbours and the presence in both of some or all of arrogance, greed, bad faith, manipulated science, fear of change, lack of capacity, poverty and ignorance cause friction in industry/neighbour relations.

E. Neighbours’ Tools for Resisting or Shaping Social Licence

Needless to say, there is an antithesis to the comforting industry thesis that, with due diplomatic process and some contractual give and take, the Social Risk Gap can be bridged and Social Risk controlled by Social Licence. The neighbours’ antithesis uses Social Licence in a number of ways.

The Emperor Has No Clothes!

Some neighbours’ advocates treat Social Licence with suspicion as a tool by which industry seeks to build trust with what is a fundamentally untrustworthy industrial sector.

Jamie Kneen of Mining Watch Canada, an NGO with the purpose of publicly overseeing the mining industry said in 2006, “The vaunted “social licence to mine” has become a meaningful point of engagement in some cases, though with varying results.” Of mining companies in general he said, “Most mining companies – from the largest global players to the smallest exploration juniors – are willing to do whatever they can get away with to reward their shareholders with juicy returns”. He supports such statements with some examples of failure in Canada and abroad in the industry/neighbour interface. Reputation capital is clearly subject to deeply sceptical audit¹⁸.

¹⁸ *Ibid.* n. 8 *supra*.

The Highest and Best Use is to Leave It as It Is

Neighbours' advocates also assert that Social Licence means what it says. That, in effect, there are circumstances in which the Social Risk Gap cannot be bridged so that there does exist the *de facto* social veto to development that industry accepts by implication.

Mr. Kneen noted that there needs to be, "...recognition that the highest and best use of some areas is not mining...".¹⁹ This is a very unappealing precept for resource developers faced with a natural resource that can be profitably exploited but only with possible material cost to the environment and adverse impact upon neighbours. However, such precept is the logical concomitant of accepting that Social Licence is way to control Social Risk. "Licence" is about permission and accepting that Social Licence must be earned suggests that if it is not earned logically it may be denied.

The Precautionary Principle

Neighbours' advocates use different assumptions about what an acceptable level of environmental or social risk may be. This includes the so-called "precautionary principle" which is that when there is no scientific certainty of harm but no scientific certainty that there is no harm, it is best not to proceed. This is known also known as the "paralyzing principle" for obvious reasons²⁰.

Future Science

A somewhat related assumption of neighbour's advocates is that the current limits of scientific knowledge may expand in future in such a way as to allow development to be done safely in the future which now can only be done with some perceived risk²¹ or, under the precautionary principle, no scientific proof that there is no risk.

Future Generations and Sustainable Development

Another concept is that a development ought not to occur that damages the lives of future generations more than any benefit gained from current development. This concept is, of course, fundamental to the generally accepted principle on both sides of the industry/neighbour equation that development should, except in extraordinary circumstances, be sustainable. Of course, what "sustainable" means is subject to a diversity of interpretation.

Traditional Knowledge

At the level of resisting a legal licence to develop, neighbours' advocates can and do employ natural scientists to argue against the conclusions of industry's natural scientists.

¹⁹ *Ibid.* n. 8, *supra*.

²⁰ Cass R. Sunstein, "The Paralyzing Principle", *Regulation*, Winter 2002-2003, pp. 32 ff.

²¹ Kemess North Copper-Gold Mine Project, Joint Review Panel Report Summary, Sept. 17, 2007,

However, neighbours are typically underfinanced and often lack the education to understand how or what further critical scientific analysis might refute industry's scientific positive development conclusions leading to a legal licence viewed as improper by those potentially affected by the licensed development.

A common substitute for contradictory scientific data and analysis is “traditional knowledge”, knowledge of all sorts relating to the environment surrounding a development that can only be accumulated over many generations of living in such environment. Traditional knowledge is considered in some legal licensing processes although it may not be scientifically verifiable²². Even if not thus verifiable or rejected in the legal licensing process, however, traditional knowledge is not easily ignored in a situation in which a reconciliatory respect of neighbours' culture is part of earning Social Licence.

Reconciliation

Indigenous neighbours have extra bargaining tools. As it becomes clearer that the primary principle in the relationship between indigenous peoples and governments is that of reconciliation, there is an increasing tendency on the part of liberally minded governments to eschew immediate legal certainty in the context of fair but slow processes in favour of doing what seems to be right in reacting to infringements as they arise mixing social reconciliation with legal reconciliation. This tendency is necessarily to the advantage of indigenous neighbours, especially in jurisdictions with a narrow Social Licence Gap but high Social Risk.

F. Figuring Out How is the Social Licence Gap Narrowed

The examples set out under headings D and E, above, are of tools developed by both industry and neighbours relating to Social Licence. It is necessary to analyse such key elements of the industry/neighbours interface in order to get some sense of what is required so as to extend applicable domestic law in order to narrow the Social Licence Gap.

Also necessary for understanding what might be done to narrow the Social Licence Gap is a very brief look at the international law support of the Social Licence Gap. As noted above, international law has assisted in establishment of Social Licence Gaps related to domestic legal regimes around the world. It thereby, has assisted materially in developing the Social Licence concept. It also provided principles which find their way into domestic law, render processes for granting of Legal Licence more acceptable to neighbours and, thereby, effect a narrowing of the Social Licence Gap.

G. International Law Background

²² H. Evans and M. Goodjohn, “Traditional Knowledge – a resource for mining companies, *Mining Journal*, October 2008.

What follows under this heading is intended cast brief light on the consensus of many but not all countries expressed in international reports, conventions and declarations in respect of issues that relate to understanding Social Licence.

As will be seen even from such a short review, there is broad international support for the existence and definition of the issues that create Social Licence Gaps, Social Risk and Social Licence as well as the need to amend domestic and international law to adapt law to those emerging issues so as to narrow Social Licence Gaps.

International Environmental Law

Official international concern for the environment has grown in clarity and complexity since the early 1970s. In 1972, the United Nations held its Conference on the Human Environment and by eleven years later the United Nations' World Commission of Environment and Development (the "WCED") met in Stockholm in response to Resolution 38/161 of the General Assembly which set out the purposes of such commission²³. Some of these purposes have become important themes in development of the Social Licence concept. They included:

- a. Proposing long-term strategies for achieving sustainable development;
- b. Considering how the international community can deal more effectively with environmental concerns; and
- c. Defining shared perceptions of long-term environmental issues in order to enhance and protect the environment.

The 1987 report of the WCED entitled, *Our Common Future*, dealt with "sustainable development" as a core concept in achieving the purposes of the WCED. United Nations General Assembly Resolution 42/187²⁴. The *Our Common Future* definition of 'sustainable development' has been and continues to be very influential not only in defining environmental standards generally but also in providing some fundamental concepts to those seeking to assert the need to go beyond legal licence to social licence in determining what industrial development may be allowed. That definition states:

"Sustainable development is development that meets the essential needs of the present without compromising the ability of future generations to meet their own needs. It contains two key concepts:

- (i) The concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and
- (ii) The idea of limitations imposed by the state of technology and social organizations on the environment's ability to meet present and future needs²⁵."

²³ http://wikipedia.org/wiki/Environmental_law

²⁴ United Nations Environment Programme, Report of the Governing Council on the work of the First Special Session, General Assembly official record: Forty-third Session, Supplement No. 25 (A/43/25), United Nations, New York, 1988.

²⁵ *Ibid.* n. 24, *supra*.

In 1992, the United Nations held yet another Conference on Environment and Development in Rio de Janeiro. The lengthy list of principles in the resulting *Rio de Janeiro Declaration* include some of the same and some other concepts employed in justifying a neighbours' veto as the eventual foundation of Social Licence. These include:

- a. Principle 1, "Human beings are ... entitled to a healthy and productive life in harmony with nature."
- b. Principle 2, "States have...the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies..."
- c. Principle 3, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations;
- d. Principle 4, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."
- e. Principle 10, "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. ... each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to take place in the decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy, shall be provided."
- f. Principle 15, "In order to protect the environment, the precautionary approach shall be widely applied by States ... Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measure to prevent environmental degradation."
- g. Principle 17, "Environmental impact assessment... shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent authority."
- h. Principle 22, "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."²⁶

In 1998, the UNECE *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, known as the "Arrhus Convention" was signed²⁷. It entered into force in 2001 and now has about 40 countries and the European Community that have ratified it. It grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the environment. In effect, it is a powerful endorsement of transparency in industrial development combined with a

²⁶ <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

²⁷ <http://www.unece.org/env/pp/documents/cep43e.pdf>

compliance review mechanism that gives standing to members of the public to communicate concerns to a panel of international legal experts for review.

Finally, it is interesting to touch briefly on the 2002 *Johannesburg Declaration on Sustainable Development* in which the focus strays from mechanisms to protect the environment to dealing with a long list of historic evils from hunger and armed conflict to illicit drugs and organized crime to corruption and natural disasters, terrorism, intolerance and disease. The interest in this list is that there is not, at first, an obvious connection with environmental degradation resulting from development although clearly connections can be drawn on further examination²⁸. It might be observed that in seeking to deal with all the problems of earth and humankind, none will be effectively dealt with.

International Indigenous Peoples Law

Some years ago, I was the Chairman of the International Bar Association's Committee on Indigenous Peoples and Development. At one of our annual sessions there was a presentation in respect of developments in Canadian aboriginal law based on Canadian constitutional recognition of "existing aboriginal and treaty rights". One of the lawyers present who came from a Central American country expressed astonishment at what even then seemed to be Canadian principles in aboriginal law of considerable complexity which demonstrated a sophisticated desire to deal honourably with First Nations. In his country, he said, such issues were dealt with by the use of extreme force including napalm on neighbouring indigenous peoples who objected to resource development. I have never verified his claim but his plea was heartfelt and there are certainly verifiable incidents of complete disregard of the interests of defenceless indigenous peoples unfortunate enough to have valuable resources on or under their traditional territories²⁹. In terms of this paper, such circumstances are those of a vast Social Licence Gap but relatively little Social Risk and hence no need for Social Licence. It is the liberalizing power of international concern that has materially assisted in creating Social Risk in places where none was present before.

A few years before the incident described in the last paragraph, in 1982, the United Nations Economic and Social Council set up a working group on Indigenous Populations to study the problem of discrimination faced by indigenous peoples. That working group produced a draft Declaration on the Rights of Indigenous Peoples in 1993. That draft worked itself through various layers of United Nations process until 2007 when the final form of the Declaration on the Rights of Indigenous Peoples (the "Declaration") was adopted by a resolution of the General Assembly. 143 countries voted for it, four against and 11 abstained. Of the countries voting against, only Canada and the United States of America have maintained their opposing votes³⁰.

²⁸ http://www.google.ca/search?sourceid=navclient&aq=0&oq=johannesburg+de&ie=UTF-8&rlz=1T4ADRA_enCA362CA368&q=johannesburg+declaration+on+sustainable+development

²⁹ *Ibid.* n.8, *supra*.

³⁰ http://en.wikipedia.org/wiki/Declaration_on_the_Rights_of_Indigenous_Peoples

The Declaration covers many topics relating to indigenous peoples. For our purposes, we can pick a few of its Articles have a direct relationship to our study of social licence and Canadian law. These are:

- a. Article 19 which provides that indigenous peoples have the right to participate in decisions that affect them.
- b. Article 20 which provides that indigenous peoples have the right to participate in law and policy-making that affects them including the right to withhold their consent.
- c. Article 24 which provides that indigenous people have a right to their traditional medicines, the sources of which shall be protected;
- d. Article 25 which provides that indigenous peoples have the right to their distinctive spiritual relationship with their land and waters.
- e. Article 26 which provides that indigenous peoples have the right to own and control the use of their land, waters and other resources.
- f. Article 30 which provides that indigenous peoples have the right to determine strategies for the development of their own land and resources and *governments must obtain the consent of indigenous peoples before giving approval to activities affecting their land and resources* particularly the development of mineral, water and other resources and just compensation must be paid for such activities (emphasis added)³¹.

Without more, the acceptance of those Articles by the vast majority of countries in the world would establish a legal basis in those countries for the Social Licence Gap in respect of indigenous peoples in each such country.

Interestingly, for the discussion of Social Licence in Canadian aboriginal law that follows, the Secretary-General of the United Nations, Ban Ki-moon described General Assembly approval of the Declaration as a, "...historic moment when UN Member States and indigenous peoples have *reconciled* with their painful histories and are resolved to move forward together on the path of human rights, justice a development for all (emphasis added)."³²

Reconciliation is, of course, a profound and complicated process. There is also a well-known tendency in many regimes to treat what is written as agreed as having been effected.

Canada is now one of only two countries that has not approved the Declaration although as recently as March 3, 2010, in the federal Speech from the Throne, the Government of Canada stated that "Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada's constitution and laws."³³ Given that the Declaration is substantially at odds with detailed provisions if not the spirit of the Canadian constitution and other Canadian domestic law, it is to be assumed that

³¹ <http://www.iwgia.org/sw1592.asp>

³² *Ibid.* n.30, *supra*.

³³ *Ibid.* n. 30, *supra*.

Canada's "endorsement" will fall short of approval but will be couched in terms of supporting the "aspirations" of the Declaration and seeking to reconcile the Declaration with Canadian law. Such reconciliation almost inevitably will seek to recognize the rights set out in the Declaration in the light of Canadian history and the principles of Canadian law that constitutionally mandate reconciliation of aboriginal rights and Canadian law as well as the reconciliation of aboriginal and non-aboriginal Canadian society. Note that both Australia and New Zealand which first voted against the Declaration have now approved it³⁴.

H. Social Licence, First Nations and Canadian Law

Application of the Analytical Framework to Canada

All the foregoing discussion was intended to set up an analytical framework for the examination of the Social Licence concept in relation to how the domestic law of any jurisdiction deals with the interface between industry and its neighbours generally as well as to give some sense of the dynamics of the thinking on both sides of the industry/neighbour interface.

The following seeks to answer the question asked at the start of this paper, "How does this analytical framework apply to the relationship between developers of Canadian resources and neighbours who are Canadian First Nations?"

The Social Licence Gap and Social Risk in Canada

Canada is a country with a long, sometimes unhappy but currently reconciliatory relationship with its indigenous peoples. Since before the United Nations first focused on the issues surrounding indigenous peoples around the world, Canada has been taking reconciliatory steps which initially widened the Canadian Social Licence Gap and in the past twenty-eight years have inexorably narrowed it.

Granting of the right to vote in Canadian elections to "status" Indians on reserves in 1960 recognized the majority of First Nations people in Canada as participating citizens of Canada³⁵. Allowing the existence of aboriginal rights to be tested in the Supreme Court of Canada in 1973 in *Calder v. Attorney General of British Columbia*³⁶ opened the status of First Nations peoples and their rights to full legal scrutiny. At the same time, federal and provincial environmental impact review legislation, including any place in it for First Nations peoples was largely undeveloped. As of the early 1970s, there was no effective Social Licence Gap in Canada.

³⁴ *Ibid.* n. 30, *supra*.

³⁵ <http://www.danielnpaul.com/CanadianVotingRights-1960.html>

³⁶ [1973] S.C.R. 313.

In 1982, Canada took a unique step in the shaping of relationships between nation states and their indigenous peoples world-wide. In section 35 of the *Constitution Act 1982*³⁷ (“Section 35”), it recognized and affirmed, “existing aboriginal and treaty rights of the aboriginal peoples of Canada” as part of the Canadian constitution. It also did so without setting out in the constitution a comprehensive explanation of what such recognition meant.

In terms of the width of the Canadian Social Licence Gap, 1982 probably represented its historic maximum. Prognostications of doom for Canadian resource industries appeared and “uncertainty” became a favoured concept in the discussion of the legal relations between Canadian governments, businesses and First Nations. Nowhere did the shadow of “uncertainty” fall longer than in British Columbia. Most of the British Columbia land mass was not subject to treaties with British Columbia’s First Nations. Indeed, in 1982, the Province of British Columbia still espoused the theory that there were no *existing* colonial era legislation³⁸.

Without any coherent legal theory of how necessary infringements of the newly recognized rights would be dealt with, the Social Licence Gap became very material. With a Canadian constitution protective of human rights generally, the level of Social Risk also became extreme. There were historic, in some cases violent, conflicts that arose at various touch points in the industry/aboriginal neighbour interface³⁹.

What is Left of the Canadian Social Licence Gap and Social Risk?

By 2010, a twenty-eight-year legal history has gradually developed in jurisprudence and government policy a massive shrinking of the Canadian Social Licence Gap and with it, a concomitant decline in the level of Social Risk to development in Canada.

The Supreme Court of Canada has bridged much of the yawning chasm of the 1982 Social Licence Gap with an extension of Canadian law based on the principle that the meaning of Section 35 is that the Canadian constitution mandates the *reconciliation* of Canada with its indigenous peoples⁴⁰. Such reconciliation has been described by the court in terms of the reconciliation of aboriginal rights with Canadian law. I have called this elsewhere, “legal reconciliation”. It has also been described by the court in terms of the reconciliation of aboriginal and non-aboriginal societies in Canada. I have called this elsewhere, “social reconciliation”⁴¹.

Legal reconciliation was authoritatively described by the court in *Haida Nation v. British Columbia (Ministry of Forests)* (“*Haida*”)⁴² as consisting of:

³⁷ Schedule B of the *Canada Act, 1982*(U.K.), 1982, c. 11 as am. by the *Constitution Amendment Proclamation 1983*, R.S.C. 1985, App. II, No. 46.

³⁸ *Delgamuukq v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

³⁹ For example see, http://en.wikipedia.org/wiki/Oka_Crisis

⁴⁰ *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 2 S.C.R. 511.

⁴¹ Tony Knox, “Peeling the Reconciliation Onion” *The Advocate*, Vol. 68 Part 2 March 2010, p. 207.

⁴² *Ibid.* n. 40, *supra*.

- a. The negotiation of treaties;
- b. Consultation and if required accommodation;
- c. Establishment of specialized regulatory schemes for determining the adequacy of consultation to which the courts can defer; and
- d. Government guidelines for dealing with Aboriginal claims that fall short of a regulatory scheme.⁴³

Social reconciliation has not been described in detail by the court but has been approached by both federal and provincial governments in terms of the creation of “new relationships” with First Nations reflected in a wide range of social reconciliatory practices aimed at allowing aboriginal and non-aboriginal Canadian societies to understand the truth about each other and their relationships apologise, forgive and move on.

Because the process of reconciliation is an organically human process anciently antedating its inclusion in Canadian law, it cannot be finally achieved other than in the hearts and minds of parties to the Canadian reconciliation process. Thus legal and social reconciliation, while achieved through different mechanisms cannot individually effect actual reconciliation in the absence of the other.

It is noted that Secretary-General Ban Ki-moon saw the Declaration as a foundation for reconciliation in all countries applying its principles. Given the atavistic human quality of reconciliation, it is difficult to envision that reconciliation can be achieved under the Declaration principles, the Canadian constitution or any other proposed reconciliation formula unless it contains sufficient effective reconciliatory power to achieve the “hearts and minds” result that true reconciliation is. Just as the great philosophies and religions espouse many of the same fundamental moral tenets but approach achieving them through different processes, so too, reconciliation mechanisms can vary in detail while aimed at the same human result.

How the Canadian Approach to Reconciliation has Narrowed the Social Licence Gap

Developers are constantly proposing developments that infringe on the asserted aboriginal rights of First Nations. They do so in one of two general contexts; namely in circumstances of an existing treaty and in circumstances of no existing treaty.

Treaties effect a wholesale reconciliation of a First Nation’s aboriginal rights into treaty rights forming part of Canadian law. However, treaty rights can also be infringed by developers. As a result, there was developed by the court a process for dealing with *ad hoc* infringements of aboriginal rights and treaty rights. This process, drawn from general administrative law, is that of consultation and accommodation. Much ink has been spilt on the subject of consultation and accommodation. For our purposes, studying narrowing of the Social Licence Gap, the following should be observed:

- a. Consultation can only be effected by the Crown;

⁴³ *Ibid.* n. 40 *supra.* *Haida*, at paras. 25, 38, 45 and 51.

- b. The Crown can deputize third parties to assist in fulfilling its consultation duties;
- c. Appropriate consultation must be appropriate to the importance of the proposed infringement;
- d. Some rare infringements are of a nature that cannot and will not be licensed by legal licence;
- e. Appropriate consultation must adequately identify the interests of affected First Nation in such a way as to make it clear if any appropriate accommodations must be made to minimize negative impacts of the proposed infringement
- f. Appropriate consultation can be effected in the context of a duly completed statutory environmental assessment;
- g. Consultation often is not considered complete unless the development proponent enters into an impact and benefits agreement with the affected First Nation(s) ; and
- h. The court has advised that expert tribunals should be established in order to judge the appropriateness of consultation processes to which the courts could defer but no such tribunal has been created⁴⁴.

As can be seen even from this brief summary, the doctrine of consultation and accommodation contemplates:

- a. Authority in the Crown to grant a Legal Licence to the developer to develop a resource and thereby potentially infringe one or more aboriginal rights if appropriate accommodation is made; and
- b. Filling the Social Licence gap with an impact and benefit agreement developer and neighbours.

Canadian regulators have developed a largely unofficial linking between their carrying out their duties in assessing scientific and social information relating to a proposed development while sending the developer off to make its peace with the effected First Nation. The system, working as designed, closes the Social Licence Gap and the Legal Licence truly does become a turnkey authorization to develop. Earning Social Licence in Canada in the context of First Nations, therefore, has effectively, if not mandatorily, been obviated under optimal conditions. Nothing guarantees, however, that conditions will be optimal . In Canada, the impact and benefit agreement is usually the official settlement of the kind of careful due diligence assessment and diplomacy advised by social scientists to their corporate employers after a lengthy dialogue with First Nations’ representatives. The relationship-building and the often difficult interface between industry and neighbour described in world-wide terms above appropriately should start as soon as the developer is aware of a potential infringement resulting from a matured business plan for a project.

The overall reconciliatory approach engendered by Section 35 has fundamentally narrowed the Social Licence Gap in Canada to the point that settlement of a Social Licence is often, although not necessarily, contemplated as a condition precedent to being

⁴⁴ Thomas Isaac and Anthony Knox, “Canadian Aboriginal Law” *Journal of Energy & Natural Resources Law*, Vol. 23 No. 4, 2005 pp. 435 ff.

granted legal licence. However, the essential liberalism of Canadian institutions means that there is still Social Risk associated with our enviably small Social Licence Gap.

Will Social Licence Survive in Canada?

While the court has made it clear that in rare cases an infringement of an aboriginal right may allow for aboriginal veto of a development within Canadian law, the thrust of Canadian law in this area is achieving reconciliation while balancing the rights and needs of all Canadians⁴⁵.

To be fair, in the vast majority of infringement cases, the system works to achieve Legal Licence without recourse to Social Licence although outstanding exceptions stand out. T

Taku

In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (“*Taku*”),⁴⁶ the court made it clear that a licence issued to carry on a project which had been subject to an appropriate consultation and the making of all necessary accommodations would proceed despite continued objections from the affected First Nation. In that case, the First Nation affected by the building of an access road was found by the court to have been treated appropriately in respect of the consultation with it relating to such development in the course of the environmental assessment conducted in respect of the proposed project.

There was before the courts ample evidence of the promoter of the project and the Crown dealing appropriately with the First Nation. *Taku* thus stands as strong and uncontroverted authority at the highest level of the Canadian courts that, in the end, appropriate consultation can result in fully effective Legal Licence in the absence of Social Licence. In effect, that legal reconciliation must come at the cost of the balancing of all interests in Canadian society without giving a free veto to First Nations, if, in the view of the court, they have been fairly dealt with in terms of that balancing act. That said, the duty to effect social reconciliation does exercise a further check and balance both upon the courts and Canadian governments.

Tsilqot'in

However, history does not yet always run smoothly over the legal road constructed across the Canadian Social Licence Gap by the wise justices of the Supreme Court of Canada.

In 2008, Mr. Justice Vickers of the Supreme Court of British Columbia rendered his decision in the case *Tsilqot'in Nation v. British Columbia*⁴⁷ (“*Tsilqotin*”) in a *-page judgement that was almost all *obiter dicta*, the non-binding observations of the judge on

⁴⁵ *Ibid.* n. 40, *supra*, *Haida* at para. 45.

⁴⁶ [2004] 3 S.C.R. 550.

⁴⁷ 2007 B.C.S.C. 1700.

an application denied for technical errors in the framing of the application. *Tsilquot'in* deals at length with Vickers J's views on many issues raised in the application including stating that reconciliation could only start in Canada if Canadian law were to, "acknowledge the historical rights of Indigenous peoples to their ancestral lands...as the essential starting point for any modern settlement."

On the face of it, this is an attractive doctrine and apparently one supported by Article 26 of the Declaration. It is not, however, the law of Canada and it is not because Canada and its provinces are not honestly interested in achieving its constitutional goal of reconciliation. It is because reconciliation is a two-way street in a country inhabited by many different societal groups with governments seeking to balance the best interests of all of them.

As we speak, I understand that the Government of British Columbia is in negotiation with the Tsilqot'in First Nation and, in the spirit of British Columbia's "New Relationship" *Tsilquot'in* has not been appealed. In effect, Government and First Nation are taking part in an *ad hoc* reconciliatory process outside the courts. Is there anything wrong with this approach to a set of issues which have dogged British Columbia in dealing with the Tsilqot'in First Nation since colonial times⁴⁸?

The answer is not clear. In terms of dealing with this one set of issues, it is clearly an approach which may be another brick in the growing, constitutionally mandated edifice of reconciliation, legal reconciliation to the extent that Tsilqot'in aboriginal rights are reconciled to Canadian law in any settlement and social reconciliation to the extent that historic grievances are assuaged. In terms of the Social Licence Gap it is relatively neutral. The law of Canada is not changed by it.

Tsilqot'in probably increased the perception of Social Risk in British Columbia in the short term. The Government of British Columbia being willing to become involved in lengthy negotiations rather than seeking clear legal authority upon appeal that the opinions on the law stated in *Tsilquot'in* are incorrect might be seen as weakening the Government's position in such negotiations. If the negotiations come to a mutually acceptable compromise, any such negative perception may be reversed.

As someone who has long criticized the great non-reconciliatory cycle of victory and defeat played out in the courts between the Crown, industry and First Nations I can understand the decision to negotiate settlement rather than re-entering the great non-reconciliatory cycle.

Platinex Inc.

In order to obtain certainty as the result of low Social Risk that can be offered by Canadian law under *Taku*, it is necessary for all parties to the industry/neighbour interface to play their appropriate roles. The wise advice of industry's social scientists

⁴⁸ http://www.google.ca/search?sourceid=navclient&aq=0&oq=chilcotin+war&ie=UTF-8&rlz=1T4ADRA_enCA362CA368&q=chilcotin+war+1864

about earning Social Licence in the face of Social Risk, if ignored, can lead to substantial anomalies which would seem, at first glance, to indicate not only a heightening of Social Risk but a widening of the Social Licence Gap.

Such might be seen as the result of what happened in the circumstances of Platinex Inc. (“Platinex”), a junior Canadian mining company staking mineral claims and starting exploration for platinum on land in the traditional territory of the Kitchenuhmaykoosib Inninuwig First Nation (“KIFN”). What Platinex was doing on such land seems to have been completely legal under existing Ontario law⁴⁹. No environmental assessment or consultation with the KIFN was mandated for exploration activity. However, Platinex does not seem to have done sufficient due diligence about the views of the indigenous neighbours of their claims.

The result was a mining company running headlong into a determined First Nation in an area of the Canadian Social Licence Gap in which there was no obvious legal trigger for Crown/First Nation consultation and, thereby, legal and social reconciliation of Platinex and KIFN. The Government of Ontario substantially stood aside as relations between Platinex and KIFN completely broke down and Platinex tried to enforce its Legal Licence to explore under the *Mining Act* (Ontario) with injunctions against KIFN’s interference with their exploration activities and eventually imprisonment and fines levied on KIFN leadership for contempt of such injunction. There were, as well, a law suit started by Platinex against KIFN for \$10-billion in damages by KIFN⁵⁰.

All this led to one of those flashes of the historic spot-light that illuminated very clearly the Canadian Social Licence Gap as not a single measurable gap but as a channel between two jagged shores. Exploration does, in fact, produce little or no impact on aboriginal rights and usually leads to no development. Thus it also results in no infringements and is normally at or below the lowest end of the consultation spectrum endorsed by the court. However, the court has also endorsed reconciliation as Canada’s constitutional goal and reconciliation, Janus-like, has two faces, one legal and one social. Somehow, these two faces must work together to achieve a fair and genuinely reconciliatory result.

News of KIFN elders being jailed for defending what appeared to be their heartfelt duty to what they believed to be the rights of their people produced sudden, substantial and influential pressure on the Government of Ontario. Premier McGuinty of Ontario, who had already embarked his Province upon a “New Relationship”⁵¹ with its indigenous peoples, was quick to blame the shortcomings of the *Mining Act* (Ontario) and to distance his government from the courts’ enforcing Platinex’s legal licence to explore by incarcerating KIFN elders⁵². In the end, the Province of Ontario settled the whole matter by buying out Platinex’s interests in the subject mineral claims for \$5-million and a 2.5%

⁴⁹ *Platinex v. KIFN*, 2008 Can LII 11049.

⁵⁰ http://www.platinex.ca/news/in_the_news/cmj.htm,

⁵¹ http://www.aboriginalaffairs.gov.on.ca/english/policy/ontarios_approach.asp

⁵² Letter from Premier Dalton McGuinty to Ms. Margaret Atwood and Colleagues, April 29, 2008
<http://www.ccamu.ca/uranium-news/news-may6-08.htm>

net smelter return on any eventual mineral products of those claims should they ever be exploited⁵³.

The open access system of mineral exploration under the *Mining Act* (Ontario) is now under review and legislation is being considered by the Government of Ontario in respect of resource development in Northern Ontario which would require land use planning in which First Nations would be involved. All this will be viewed with some dismay by mining companies with better Social Licence skills than Platinex. However, it does demonstrate that any perceived widening in the Social Licence Gap in Canada will be quickly dealt with.

The same flash of the historical spot-light also might suggest that, in appropriate circumstances, Social Risk is still substantial in Canada. However, this is a bit misleading as a mining company that deals with its neighbours as Platinex dealt with KIFN might fairly be said to be subject to the ancient maxim, “*volenti non fit injuria*”. The lesson is, perhaps, that Social Risk depends not only on the attitude of neighbours but on the attitude of industry.

Hupacasath #2

If the Platinex/KIFN dispute somewhat understandably flew under the Crown’s reconciliation radar, the next and last case I will discuss is one in which such radar malfunctioned.

In *Ke-Kin-Is-Uqs v. British Columbia (Ministry of Forests)#2* (“*Hupacasath #2*”) ⁵⁴, Mme. Justice Smith heard a case relating to the adequacy of consultation in respect of an alleged infringement of aboriginal rights relating to privately owned forest lands. The Government of British Columbia confused the subject First Nation by dealing with it through a number of uncoordinated provincial ministries and refused to call upon a facilitator in order clear up conflicting government messages.

Smith J. held:

“Since it is the Province that (by necessity) divides its mandate among Ministries and agencies, it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown’s duty is to carry on a process that is as transparent as possible.”⁵⁵

Is this evidence of a substantial Social Licence Gap? Clearly it is not. Smith J. endorsed the Canadian mechanism for granting Legal Licences involving infringements of

⁵³ <http://news.ontario.ca/mndmf/en/2009/12/correction-ontario-resolves-litigation-dispute-over-big-trout-lake-property.html>

⁵⁴ 2008 B.C.S.C. 1505

⁵⁵..*Ibid.* n.. 54, *supra* at para. 147.

aboriginal rights but held the Crown to proper execution of its duty to consult. The only difference between the result in *Taku* and the result in *Hupacasath #2* is that, in the former case, the Crown followed the legal recipe for appropriate consultation and, in the latter, it did not. If, as was advised in *Haida*, there were a tribunal charged with judging the adequacy of consultation, *Hupacasath #2* would probably never have made it to court.

Will Canada Always have a Social Licence Gap?

If the four cases just discussed tell us anything, it is that Canada and its provinces are dedicated to fulfill the letter and spirit of the reconciliatory mandate of Section 35.

Taku represents a text book case of what needs to happen in order to obtain Legal Licence that will be upheld in the highest court. The Platinex fiasco demonstrates that some existing law needs recalibrating in order to meet the high standards required by the Section 35 duty to reconcile. *Tsilqot'in* is a case with a relatively bizarre judgement that could probably be overturned on appeal but at the expense of continuing the thoroughly non-reconciliatory cycle of victory and defeat that has generated an impressive body of reconciliatory law but is increasingly becoming more a source of lawyers' income than deepening legal enlightenment. Finally *Hupacascath #2* reinforces the message of *Taku*; appropriate consultation and accommodation justifies infringement of aboriginal rights, even without final First Nation approval but if the Crown gets consultation wrong, it will need to be continued until legally appropriate.

All this suggests that Canada has an enviably tiny Social Licence Gap but that individual circumstances that can be dealt with by legislative reform and extra-judicial negotiation will should allow appropriately reconciliatory dealing with what is left of it. It also teaches that Canada has a relatively low level of Social Risk as long as the rules of Canadian law relating to reconciliation are followed scrupulously.

Possible Policy Approaches to Further Reduction of Social Risk In Canada

When Jamie Kneen of Mining Watch suggested legislative changes which would assist in controlling mining companies in their relations with their neighbours all of his advice was in terms of amendment to existing securities and corporate law that would generate greater transparency about corporate activity for shareholders and the general public. Such an approach seems to contemplate controlling Canadian mining companies abroad rather than in Canada where licensing processes tend to be public and transparent⁵⁶.

This would suggest that in Canada, the law is not doing a bad job of narrowing the Social Licence Gap and, with it, Social Risk. However, some substantial improvements can yet be made.

⁵⁶ *Ibid.* n.8, *supra*.

As consultation is necessarily the cutting edge of Canadian law in respect of *ad hoc* infringements of aboriginal rights, it seems appropriate to concentrate upon making the consultation process more economical, efficient and certain.

The first great step towards making such progress has already been advised by the court. In *Haida*, the court made clear that the courts ought not to be dealing with every challenge to the adequacy of any particular consultation process. Rather, the court favours establishment of “specialized regulatory schemes (“tribunals”) that would make the adequacy of consultation their special mandate. Experience and expertise about this narrow area of the law would lead to the courts being able to defer to such tribunals so that only very few difficult cases of judging the adequacy of a consultation would ever get to the courts.

It is the nature of specialized institutions mandated to deal with a substantial volume of cases to develop thinking and policies well beyond what is generated by judges who deal with any particular issue, including consultation, only occasionally. If they existed, consultation tribunals could be expected to generate useful guidelines of the sort also contemplated by the court as valuable means to achieve legal reconciliation.

It would not be strange if such specialized tribunals quite quickly identified one of the most fundamental reasons for friction in the industry/neighbour interface, that of the unfair imbalance of resources and capacity between industry and First Nations. Simple, honest people fearing what a development project might do to their otherwise timeless environment can easily determine, especially when encouraged by friendly NGOs that the only acceptable approach to development is allowing no development. They often do not know the right questions to ask or who might provide professional advice that would allow them to negotiate a balancing of good and ill effects of development in such a way as to generate a valuable legacy for the First Nation. Most crucially, they often do not have the resources to deal with the technical data and analysis supplied by the development proponent.

Tribunals such as the court has advised should exist could consider how to deal with the capacity, financial resources and due diligence gap that can elevate Social Risk; even in a legal system in which the Social Licence Gap is minimal.

The courts have long asked to be relieved of judging the sufficiency of consultations. Specialized tribunals dealing with such questions would (i) take most of such issues out of the non-reconciliatory context of litigation, (ii) lead to a development of specialized case law based on expert review of consultation cases, (iii) lead to the development of specialized consultation tribunal members to whom the courts could comfortably defer, and (iii) allow the Crown to seek rulings on what is contemplated to be appropriate consultation so as to multiply “*Takus*” and get rid of “*Hupacasath #2s*”.

I have very little doubt that a few years after formation of such tribunals, the thought of doing without them would be as abhorrent as doing without securities commissions in the securities industry or the energy sector doing without the National Energy Board.

Mankind being made of uneven timber and the circumstances encountered by it being without limit, there will probably always be some Social Licence Gap in Canada but it seems possible, with proper attention to improvement of the consultation tool, that it could become very small indeed.