

## THE ROLE OF CORPORATE LEGAL COUNSEL IN OBTAINING, MAINTAINING, AND RECOVERING THE SOCIAL LICENSE TO OPERATE

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## § 27.01 Introduction\*

In-house lawyers working within infrastructure, energy, and resources companies are familiar with the need to obtain legal and regulatory licenses. Because being corporate counsel involves wearing many hats, most have come across issues relating to a company's relationship with local communities and the broader society. Over time, a variety of approaches to these issues have emerged, along with debate about whether a corporation has any duty to the communities in which it operates or to society at large—and, if so, the scope of that responsibility. Within this realm have arisen concepts such as "corporate social responsibility" (CSR) and "social license to operate."

In practice, the social license is at least as important as the legal license. Given the increasing incorporation of social performance expectations and practices into legal regimes, lawyers have a critical role in helping their companies and social performance teams navigate this evolving landscape. The purpose of this chapter is to gather recent scholarship from the legal academy, the business academy, and the social performance academy to identify selected areas where legal involvement in social performance issues is prudent.

The business management academy regularly address these issues from an internal management perspective, and the social theory academy has conducted empirical research and analysis on the scope of business responsibility to the communities in which companies operate and how these responsibilities have been and should be managed. Parallel to these disciplines, the human rights discussion this century has evolved from international efforts to establish treaties, international law,

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and other means to force states to protect the human rights of their citizens, to establishing non-legal frameworks to urge businesses to respect human rights.<sup>1</sup>

Within these concurrent developments, the concept of a social license to operate emerged. A company's social license to operate is informal and based on trust (and trustworthiness), legitimacy, and the perceptions—public, governmental, and community—of the company's social, environmental, and ethical conduct. Because of the extensive physical footprint of projects relating to infrastructure, energy, and mining, companies in these sectors often face heightened scrutiny from local communities and have challenges in obtaining and maintaining social license. A fundamental truth is that resource extraction can only take place where the resources are located; therefore, opportunities to locate or relocate extraction activities in response to stakeholder concerns or resource conflicts are limited.<sup>2</sup>

But what, exactly, is the social license to operate? How do you get one? How do you comply with or maintain it? What is its relationship with CSR, sustainability, environmental, social, and governance (ESG) practices, and social performance? What role should in-house counsel play in assisting senior leadership and the social performance<sup>3</sup> team with the various components relating to social license?

This chapter addresses the various definitions of social license, the reasons a company might seek one, the aspects of social license where legal counsel may be useful or necessary, and potentially useful<sup>4</sup> practices that can help a company and its lawyers fully benefit from the expertise of the company's social performance team.

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<sup>1</sup>See generally *Human Rights Law and the Extractive Industries* (Rocky Mt. Min. L. Fdn. 2016). This special institute was the first conference of its kind to address human rights and social risks specifically within the extractive industries, and extensively discussed the United Nations' Guiding Principles on Business and Human Rights (2011) (UNGPs).

<sup>2</sup>For more discussion of the fundamental sources of social risk, see Susan Joyce & Ian Thomson, "Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America," 93(1037) *Can. Mining & Metallurgical Bull.* 49 (Feb. 2000).

<sup>3</sup>Terminology for this discipline changes over time. Social performance is generally an umbrella term that can include or overlap with terms such as CSR, sustainability, and stakeholder engagement. In some organizations, it is housed within an external affairs department encompassing all these functions; in others, it is separate from government affairs. For convenience, this chapter uses the term "social performance" unless another term is specifically intended.

<sup>4</sup>The term "useful" is used here deliberately instead of "best." Any engagement with Indigenous communities and governments, local communities, and regulators must follow local law and custom, address the unique needs of the company, and respond to the local social context.

## § 27.02 What Is Social License?

While some have equated “social license to operate” or “social license” to “free, prior, and informed consent” (FPIC), a social contract, or reputation capital—and have linked it to public participation and consultation in regulatory decision making—like most terms in the social performance arena, there is no universally accepted definition.<sup>5</sup> Most sources trace the term to Canadian mining executive Jim Cooper, who is reported to have used it in the 1990s.<sup>6</sup> Cooper, then Director of International and Public Affairs at Placer Dome, is said to have used the term to “refer to the idea of companies needing something more than the legal licence granted by the state.”<sup>7</sup> There is consensus that “[a] social license to operate is hard to define, difficult to get, easy to lose and if lost near impossible to get back.”<sup>8</sup>

Social license does not require unanimity of community acceptance, but rather “a threshold, a level which, although it may vary within a spectrum, approaches the notion of consensus without being unanimous.”<sup>9</sup> It has been observed that “social license does not mean social unanimity. It would be utopic to seek this objective when a project involves varied environmental impacts based on different sectors of the same territory.”<sup>10</sup> Joyce and Thomson assert that the

Social Licence to Operate exists when a mineral exploration or mining project is seen as having the approval, the broad acceptance of society to conduct its activities. It is a license which can not be provided by civil authorities, by political structures or even by the legal system. . . . [I]t cannot be claimed as a product of an internal corporate process such as an audit of company practices. It can only come from the acceptance granted by your neighbors.<sup>11</sup>

This definition begs the question of how such “approval” is “seen,” and by whom. The inherently subjective and ephemeral nature of social license can cause a company—and its legal counsel—to discredit or discount its

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<sup>5</sup>See Emilie Bundock’s useful illustrations in “The Role and Process of Stakeholder Engagement – Impact Assessments as a Framework to Structure Stakeholder Engagement to Secure SLO,” *Human Rights, Natural Resources and Energy Law* 6-1, 6-3 to 6-4 (Found. for Nat. Resources & Energy L. 2024).

<sup>6</sup>Chilene Nwapi, “Can the Concept of Social License to Operate Find Its Way into the Formal Legal System?,” 18 *Flinders L.J.* 349, 350, 353 (2016).

<sup>7</sup>*Id.* at 353. *But see* Robert G. Boutilier & Ian Thomson, *The Social License: The Story of the San Cristobal Mine* 42 (2019) (noting that the term was coined independently by both Cooper and W.H. Moore).

<sup>8</sup>Jane Baseby & Justin Webb, PATRIZIA Infrastructure, “Research Brief: Matter of Trust – Why Social License to Operate Is Critical for Infrastructure,” at 3 (Oct. 2022).

<sup>9</sup>Ressources Strateco Inc. v. Procureure Générale du Québec, 2017 QCCS 2679, at para. 348.

<sup>10</sup>Arbour v. Procureure Générale du Québec, 2017 QCCS 1812, at para. 197.

<sup>11</sup>Joyce & Thomson, *supra* note 2.

value. Social license often does not fit neatly within traditional project development considerations, such as the financial and technical drivers of exploration, development, and operations, with which company leaders are much more familiar and comfortable. Many aspects of social license are also well outside of a company's direct control.

[Social license] is often rooted in the beliefs, perceptions and opinions held by the local population and other stakeholders about the project. It is therefore granted by the community in a rather intangible and informal manner and not always permanently because beliefs, opinions and perceptions are subject to change during the long life of a mining project. As a result, from a corporate and business viewpoint, there is a sense that [social license] is a rather vague, uncertain and slightly beyond the organization's control since [social license] has not only to be earned, through a time-consuming and uncharted road, but also needs to be maintained given the duration of a mining project.<sup>12</sup>

Yet in many cases, acquiring social license can be more important than securing a project's legal license. Social license interacts with and informs formal legal requirements, through community or impact benefit agreements and processes, mitigation agreements, communications protocols, anti-corruption policies to comply with sometimes multiple national legal requirements, legally required consultation, and many other intersections too numerous to list.

### § 27.03 Where Does Social License Fit Within Company External Relations?

There are many other terms of art that, like social license, have no precise definition and are used by companies to describe their efforts to be responsible world citizens—terms such as CSR,<sup>13</sup> business and human rights,<sup>14</sup>

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<sup>12</sup>Laurent Develle, "The Social License to Operate: Beyond Compliance and Risk Management," in *Social License and Dispute Resolution in the Extractive Industries* 188 (Cory H. Kent et al. eds., 2021).

<sup>13</sup>"[T]he status of CSR as a well-defined and widely agreed upon concept in the management literature remains elusive." *The Oxford Handbook of Corporate Social Responsibility* 6 (Andrew Crane et al. eds., 2008). This concept has been around since at least the 1950s (H.R. Bowen, *Social Responsibilities of the Businessman* 6 (1953)), but the modern conception of it began emerging in the 1970s, with one of the first systematic explorations of the concept by Archie Carroll in 1979. Archie B. Carroll, "A Three-Dimensional Conceptual Model of Corporate Performance," 4(4) *Acad. Mgmt. Rev.* 497 (1979). For a history of the development of CSR, see Archie B. Carroll, "Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks," 44 *Organizational Dynamics* 87 (2015).

<sup>14</sup>Traditionally, human rights have been framed as the duty of the state to protect certain inalienable, individual rights of its people. *See, e.g.*, International Covenant on Civil and Political Rights art. 2(1) (entered into force Mar. 23, 1976). The duties of the state are based on territorial and legal jurisdiction. Businesses, having neither territorial jurisdiction nor legal jurisdiction do not have the same human rights duty. A robust international discussion over what business responsibility should be in regard to human rights culminated in the UN's Guiding Principles on Business and Human Rights in 2011. *See supra* note 1.

corporate social performance,<sup>15</sup> ESG,<sup>16</sup> and sustainability.<sup>17</sup> How are these concepts related or different, and why does that distinction matter?

These terms are closely related. For example, respect for human rights is a baseline requirement for any company on the road to social license. CSR policies may identify social license as a goal, with their implementation potentially containing elements that foster the community perceptions needed to achieve it. Social performance could be a more encompassing approach leading to social license, while ESG could be an accountability mechanism to collect data and shape the communications that go into reporting on elements of social license. Sustainability, depending on how it is defined within a company, could either be a subset of concerns addressed on the social license journey or an even larger umbrella than social license, depending on how a company envisions these connections and chooses to organize its approach.

So, if no one can clearly define it, no one can fully achieve it; it takes extraordinary effort to maintain, and it can be lost so easily, why would any company make the effort?

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<sup>15</sup>In some uses, social performance refers to the action-oriented component of CSR. It is what companies “do” to implement the policies they have adopted to meet what the company has identified as its social responsibility. See, e.g., Steven L. Wartick & Philip L. Cochran, “The Evolution of the Corporate Social Performance Model,” 10 *Acad. Mgmt. Rev.* 758 (1985). It may also be used as an umbrella term to incorporate CSR, human rights, community engagement, sustainability, etc. This chapter uses the term “social performance” in the umbrella sense, for the sole purpose of distinguishing the legal and social performance functions within a company.

<sup>16</sup>ESG is externally focused on reporting out a company’s performance in these three areas. In some jurisdictions reporting is voluntary, but some are now requiring such disclosures. See, e.g., Jonathan Drimmer, Lina Lorenzoni Escobar & Sharon G. Kaur Singh, “When Stock Exchanges Met ESG Disclosure: A Story of Opportunities and Challenges Ahead,” *Human Rights, Natural Resources and Energy Law* 5-1 (Found. for Nat. Resources & Energy L. 2024).

<sup>17</sup>The United Nations defined “sustainability” in 1987 as “meet[ing] the needs of the present without compromising the ability of future generation to meet their own needs.” U.N. World Comm’n on Env’t & Dev., “Our Common Future, From One Earth to One World,” U.N. Doc. A/42/427 (1987). The U.S. Department of Energy (DOE) defines it as “[t]o create and maintain conditions under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic and other requirements of present and future generations,” echoing the National Environmental Policy Act’s policy declaration in 42 U.S.C. § 4331(a). DOE, “Terms and Definitions—Sustainability,” [https://www.directives.doe.gov/terms\\_definitions/sustainability](https://www.directives.doe.gov/terms_definitions/sustainability). The Harvard Business School defines it, in relation to business, as “doing business without negatively impacting the environment, community, or society as a whole.” Alexandra Spiliakos, “What Does ‘Sustainability’ Mean in Business?,” *Harv. Bus. Sch. Online, Bus. Insights Blog* (Oct. 10, 2018).

## § 27.04 Why Does Social License Matter?

One recent example of the uncertainty and disruption caused by the loss of social license is the 2023 forced closure of—and subsequent renewed support for—the Cobre Panamá mine. In 2023, the Panamanian government renegotiated its contract with First Quantum for the Cobre Panamá mine, mainly to address tax issues. While some elements of civil society had previously raised environmental and water concerns, the new contract triggered protests by environmental, labor, and Indigenous groups, culminating in a blockade of the mine’s export port. In November 2023, the Panamanian supreme court found that the contract violated Panama’s constitution. The legislature subsequently banned all new metal mining.<sup>18</sup> Cobre Panamá then sought \$30 billion in compensation through arbitration. After mine closure, unemployed former workers and local businesses reliant on mine contracts voiced strong objections. In 2025, a new administration in Panama reopened talks with the company about restarting operations.<sup>19</sup>

This example highlights the multiple layers of stakeholders with competing demands, the mercurial nature of social license, and the reality that maintaining—or losing—social license can sometimes be largely outside the control or influence of a project proponent.<sup>20</sup> The Cobre Panamá example is not an isolated incident; in fact, examples abound and appear in the news regularly. The Khudoni hydroelectric power plant in Georgia was halted after community protests.<sup>21</sup> From the Dakota Access Pipeline to Cape Wind to the Northern Gateway Pipeline, “[w]ithout community acceptance of a project, operators may struggle to get it built or implemented and may create damage to a company’s reputation.”<sup>22</sup>

The raw economic consequences of losing social license should be enough for company leadership to pay attention. Yousuf Aftab noted in 2016 that “[a] major mining project, for instance, will lose approximately

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<sup>18</sup>Kathia Martínez & Juan Zamorano, “Panama’s High Court Declared a Mining Contract Unconstitutional. Here’s What’s Happening Next,” *Assoc. Press* (Nov. 30, 2023).

<sup>19</sup>Cecilia Jamasmie, “JV Floated as Path to Reopen First Quantum Cobre Panama Mine,” *Mining.com* (Apr. 15, 2025).

<sup>20</sup>See Joyce & Thomson, *supra* note 2.

<sup>21</sup>David Jijelava & Frank Vanclay, “How a Large Project Was Halted by the Lack of a Social License to Operate: Testing the Applicability of the Thomson and Boutilier Model,” *73 Env’t Impact Assessment Rev.* 31 (2018).

<sup>22</sup>Eric Newell, Transcript of Luncheon Keynote Talk at Oct. 8, 2014, Univ. of Calgary Sch. of Pub. Pol'y Symposium “Is Social Licence a Licence to Stall?,” *9(9) SPP Research Papers* 12 (Mar. 2016); *see also* Claudia Sícoli Pósoleman & Jose M. Sallan, “Social License to Operate in the Mining Industry: The Case of Peru,” *37(6) Impact Assessment & Project Appraisal* 480 (2019).

\$20 million per week of delayed production in the event of a shutdown; costs can accrue even at the exploration stage.<sup>23</sup> These costs would be significantly higher, now nearly a decade later. “There is a growing list of companies whose experience with . . . conflict indicate that it is more expensive to recover from conflict than to prevent it.”<sup>24</sup> Even without the extreme event of a shutdown, other expenditures (labor, infrastructure, etc.) relating to stakeholder conflict have been measured to cost from up to \$10,000 to \$50,000 per day.<sup>25</sup> Up to 72% of the discount that markets place on the net present value of the gold in the ground controlled by gold mining companies can be attributed to conflicts with stakeholders.<sup>26</sup>

Failure to obtain, or maintain, social license can lead to protests and blockades, delays or denials in receiving legal license, boycotts, expanded government oversight and investigations, and significant financial and legal costs, especially in the wake of environmental disasters.<sup>27</sup> Despite the challenges, today’s extractive industries are embracing the effort. Legal counsel and social performance professionals both assess and manage risk on a daily basis, and each brings needed perspectives to the social license discussion.

## § 27.05 The Necessity to Cooperate When Managing Social Risk

Legal risk and social risk are inextricably intertwined, and it is important to realize that though the social performance team and legal team may be inherently skeptical of each other, their work is overlapping. Managing legal risk can inform the management of social risk and vice versa. Though

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<sup>23</sup>Yousuf Aftab, “Anticipating and Managing Human Rights Risks: Due Diligence Tailored to Business Risk,” *Human Rights Law and the Extractive Industries* 6-1, 6-2 (Rocky Mt. Min. L. Fdn. 2016).

<sup>24</sup>Rebecca Darling et al., “Water, Mining and Communities: Finding Shared Solutions with Project-Affected Stakeholders,” *2nd Int’l Conference on Social Responsibility in Mining* 404 (2013).

<sup>25</sup>Daniel M. Franks et al., “Conflict Translates Environmental and Social Risk into Business Costs,” 111(21) *Proc. Nat’l Acad. Scis.* 7576, 7578 (2014).

<sup>26</sup>Witold J. Henisz et al., “Spinning Gold: The Financial Returns to Stakeholder Engagement,” 35(1) *Strategic Mgmt. J.* 1727 (2013).

<sup>27</sup>For example, it is reported that as of 2018, BP, p.l.c., had paid at least \$65 billion in costs related to the 2010 *Deepwater Horizon* oil spill. Ron Bousso, “BP Deepwater Horizon Costs Balloon to \$65 Billion,” *Reuters* (Jan. 16, 2018). Rio Tinto’s destruction of ancient rockshelters in the Juukan Gorge in Australia led to a 16-month parliamentary inquiry. Deanna Kemp et al., “Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change,” 41(4) *J. Energy & Nat. Res. L.* 379, 380 (2023). The exact amount of Rio Tinto’s multi-million dollar annual payments to the Indigenous owners of Juukan Gorge remains confidential. Peter Ker, “Multimillion-Dollar Juukan Gorge Remedy Payments to Remain Secret,” *Fin. Rev.* (Mar. 31, 2025).

the social performance team may see lawyers as transactional and risk averse, the reality is that the social capital needed to execute a successful transaction is similar to the principles underlying social license.

A sustainability executive recently observed that often the lawyer just wants to get the best deal for the company, and fast, lamenting that the long-term relationship with the community did not seem to be valued.<sup>28</sup> This sentiment is not isolated. Yet, transactions themselves are based on relationships—they are an exchange of promises that, if certain conditions are met, create binding obligations. For example, research and analysis of private law arrangements within certain trading groups reveal that the social contract, based on trust and reputation, is at least as valuable in such trade communities as any written term in a contract, and in some trading communities may be more so.<sup>29</sup> Lisa Bernstein quotes counsel to one company: “you don’t want to get a reputation for suing your suppliers, it will make all of them jittery, we will then be viewed with distrust, others will negotiate for more protections, our world . . . is very small, word gets around.”<sup>30</sup> Social and reputation capital occur within these industries because most transactions are repeat contracts with a small group of players, and these repeated transactions over many years have created social communities.<sup>31</sup> This phenomenon is not dissimilar to non-commercial communities, where behaviors and social norms are regulated by non-legal means—through trust, reputation, and social sanctions.<sup>32</sup>

Beyond the transactional orientation, Alexandra Guaqueta has asserted that “corporate lawyers frequently ended up being the most conservative force when it came to corporate culture change in line with today’s ideals of global justice. . . .”<sup>33</sup> Further, in discussions on whether to create or implement business and human rights codes, she asserts that legal counsel

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<sup>28</sup>Personal communication with the author.

<sup>29</sup>E.g., Lisa B. Bernstein, “Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts,” 7 *J. Legal Analysis* 561 (2015); Lisa Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions,” 99 *Mich. L. Rev.* 1724 (2001).

<sup>30</sup>Bernstein, “Beyond Relational Contracts,” *supra* note 29, at 570.

<sup>31</sup>Bernstein notes that in the cotton industry, social networks are just as important as the business networks and transactions. Bernstein, “Private Commercial Law,” *supra* note 29, at 1749–50.

<sup>32</sup>See, e.g., Michihiro Kandori, “Social Norms and Community Enforcement,” 59 *Rev. Econ. Studies* 63 (1992).

<sup>33</sup>Alexandra Guáqueta, “The New Social License to Operate and the Role of Legal Advisors,” 105th Annual Meeting, *Am. Soc'y Int'l L.* 303, 305 (2011).

was concerned with other risks: (1) admitting knowledge of potential impacts to communities and workers could be held against a company in court when the impact materialized; (2) in the process of building trust with NGOs and communities, companies would share information that was not necessarily sensitive at that time, but could be misconstrued or abused by others in moments of conflict; and (3) companies would be increasing their legal risks by signing up to ambitious commitments that were hard to measure objectively, such as improving human rights conditions in a given locality, or that were ultimately unattainable.<sup>34</sup>

Other objections to legal counsel's involvement include the intimidation factor of bringing a lawyer to a community meeting. That, of course, depends on the context and the lawyer. Two of the most effective leaders at community engagement in my experience have each been in the role of general counsel of a global mining company. But each had extraordinary skill in listening and learning, and each had significant influence in the C-suite. Whether or not legal counsel should have a public-facing role is situation-dependent.

Resistance can go in both directions. Some legal counsel have legitimate frustrations with social performance teams that do not understand the legal frameworks within which they must operate. For example, an increasing phenomenon in the United States is for social performance teams familiar with Canada and Australia to import those countries' models of engagement with Indigenous groups. The legal and cultural nature of Native Nations<sup>35</sup> in the United States is *sui generis*. Engagement with Native Nations is part of stakeholder engagement, but Native Nations are not mere stakeholders or communities, they are governments, and must be approached as such. Another example is the permitting process, where stakeholder engagement may be a required part, or at a minimum must be coordinated with the formal regulatory mechanisms to obtain the legal license to operate. Any separate community engagement needs to be coordinated with any legally required process to ensure (1) all legal requirements are met, (2) the community is not confused by parallel engagement, and (3) the company consciously weighs legal risk of information disclosure versus the social risk of being perceived as non-transparent or dishonest.

These tensions are not irreconcilable; in fact, the two perspectives complement each other. As Aftab has noted, “social risk” is not the only aspect of risk related to corporate social performance—standardization of social performance expectations through laws, legal agreements, and the

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<sup>34</sup>*Id.*

<sup>35</sup>Domestic law continues to use the geographically incorrect term “Indian.” Out of respect, the term “Native Nation” will be used to refer to the U.S. governmental bodies known as federally-recognized Indian tribes.

proliferation of voluntary commitments also creates significant legal risk.<sup>36</sup> With this evolution, the art of community and stakeholder engagement has evolved over the last three decades from a practice grounded more in CSR, public relations, and perception management to one that ensures that “legal risk is addressed in tandem with reputational risk.”<sup>37</sup> One could reasonably conclude, then, that there is no practical difference between social and legal risk, and that the most effective way to address them is together.

Lawyers can also assist companies in ensuring that respect for human rights is integrated into the management of all company operations - and that it is not seen as solely the responsibility of one or two departments or of [CSR] “programs.” . . . People may feel that the management of human rights impacts is the responsibility of a small number of people within their company when in fact everyone at the company has the capacity to effect the nature of those impacts.<sup>38</sup>

With the “why” established and the need to integrate the legal and social performance teams—the “who”—understood, the next step is to consider the “what” and the “how.”

## § 27.06 Social License Paradigm—Legitimacy, Credibility, and Trust

Much guidance on “stakeholder engagement” encourages establishing community “trust.” But for many historical and sociological reasons, resource companies often arrive in a community with an inherited trust deficit and will need to be particularly cognizant of community issues and values. This deficit can arise because of the community’s experience with other projects in the area or country, the lack of trust in the government to consider the community’s interests, and the influence of issue-driven opposition groups. Given the “globalization and democratization of the means of communication and the enhanced access to worldwide media through the internet,”<sup>39</sup> this experience does not even need to be specific to the project locale.

Several models describe the path toward social license and community trust, but those developed by Thomson and Joyce (2008) and refined by

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<sup>36</sup>Aftab, *supra* note 23, at 6-3. For a description of recent developments in enshrining CSR values in legislation, court, and tribunal decisions, and investor and funding institution expectations, see generally Douglass Cassel & Erika George, “Enshrining and Expanding the Corporate Responsibility to Respect Human Rights,” *Human Rights, Natural Resources and Energy Law* 1-1 (Found. for Nat. Resources & Energy L. 2024).

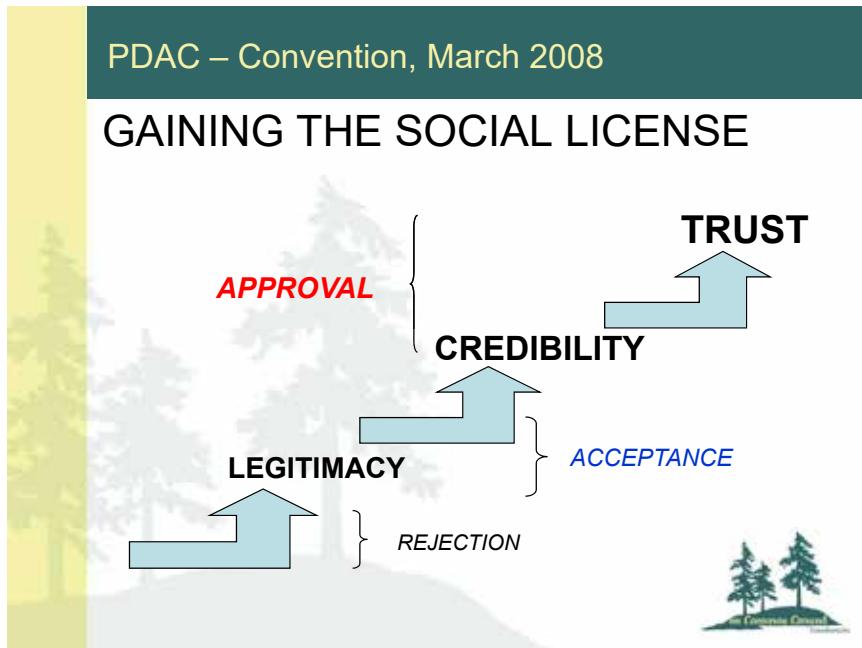
<sup>37</sup>Aftab, *supra* note 23, at 6-5.

<sup>38</sup>Sarah A. Altschuller, “Advising Corporate Clients on Human Rights and the Challenges of Integrating Human Rights into Corporate Management Systems,” *105th Annual Meeting, Am. Soc’y Int’l L.* 305 (2011).

<sup>39</sup>Bundock, *supra* note 5, at 6-1.

Thomson and Boutilier (2011) are the most useful and authoritative for the purposes of this chapter. In an influential 2008 presentation to the Prospectors and Developers Association of Canada's (PDAC) annual convention, Thomson and Joyce framed the path toward acceptance and social license as beginning with legitimacy, then establishing credibility, and ultimately achieving trust, as shown in Figure 1.<sup>40</sup>

**Figure 1. Path Toward Acceptance and Social License**



Thomson and Boutilier later refined this framework, as shown in Figure 2.<sup>41</sup>

<sup>40</sup>PowerPoint Presentation, Ian Thomson & Susan Joyce, On Common Ground Consultants Inc., "The Social Licence to Operate: What It Is and Why Does It Seem So Difficult to Obtain?," at Slide 11 (PDAC Convention Mar. 2008). This PowerPoint presentation is cited in dozens of scholarly articles.

<sup>41</sup>Adapted from Ian Thomson & Robert G. Boutilier, "Social License to Operate," in *SME Mining Engineering Handbook* 1784 fig. 17.2-2 (2011).

**Figure 2. Refined Path Toward Social License to Operate**



The difference between acceptance and approval is that “the lower level is sufficient to allow a project to proceed and a mine to enjoy a quiet relationship with its neighbors, the higher level is more beneficial for all concerned, including the industry as a whole.”<sup>42</sup> The ultimate level, co-ownership, does not necessarily involve sharing of management or financial equity, but refers to the identification of the project as being part of the community, such that the community defends the project in the face of criticism or outside opposition.<sup>43</sup>

The three components of legitimacy, credibility, and trust measure the perception of the community, rather than any accomplishment or specific actions taken by a company seeking social license. The above two figures posit that community perception of a lack of legitimacy is likely to lead to rejection, but as perceptions move toward credibility, and then trust, first acceptance, and then approval, is possible. Components of this progression intersect with the legal process and could benefit from legal counsel’s perspective in ensuring that legal risk is adequately identified and managed along with social risk.

### [1] Legitimacy

Thomson and Joyce define “legitimacy” as “[c]onforming to established norms – norms may be legal, social, cultural and both formal and informal.”<sup>44</sup> Because legitimacy is defined by community perceptions, a company may start at a deficit of legitimacy if it is viewed as a foreign entity, aligned with a distrusted government, or otherwise associated with unfavorable outside interests.<sup>45</sup> Legitimacy has also been described as the

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<sup>42</sup>*Id.* at 1779.

<sup>43</sup>*Id.*

<sup>44</sup>Thomson & Joyce, *supra* note 40, at Slide 8.

<sup>45</sup>Thomson & Joyce, *supra* note 2, at 6.

acceptance of the fairness of the process to approve the project and a fair distribution of benefits from the project.<sup>46</sup>

## [2] Credibility

“Credibility is the extent to which a project or company is considered to be believable . . .”<sup>47</sup> To have credibility, a company must have a high degree of technical competence, a high level of social skills, and commitment to social performance.<sup>48</sup> “Legitimacy can be earned by just listening; credibility requires doing something about what has been heard.”<sup>49</sup> Other elements include providing reliable information, acting responsibly, honoring commitments, and avoiding surprises.<sup>50</sup>

Credibility can be helped by quick response to requests and needs. There can be a mismatch of time horizons between companies and communities. For example, resource extraction only provides cash flow once production begins, and finances raised during exploration, construction, and development periods are funneled toward identifying the resources, impact assessment, and design leading to production. Therefore, a company’s time horizon is often years into the future when it prefers to provide community benefits. Host communities, however, see impacts through land disturbance, increased use of roads and community infrastructure, and the social impact of outsiders moving into the community. Because company lawyers are usually embedded in efforts to raise capital and other funds, they are well placed to convey the need to provide shorter-term benefits to communities and include funding such community investment and impact mitigation in raising finances for the project.

Other company activities to demonstrate credibility include transparency, providing accurate and timely information, identifying and managing all social, environmental, and economic impacts of a project throughout its lifecycle, meaningful community engagement, and others. The openness expected by communities can run headlong into legal counsel’s instinct toward confidentiality and privilege. This can be addressed with careful planning of the timing and content of information sharing, community engagement strategies, assessing impact and crafting mitigation,

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<sup>46</sup>David Jijelava & Frank Vanclay, “Legitimacy, Credibility and Trust as the Key Components of a Social License to Operate: An Analysis of BP’s Projects in Georgia,” 140 *J. Cleaner Prod.* 1078 (2017).

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*; Thomson & Joyce, *supra* note 40.

<sup>49</sup>Thomson & Boutilier, *supra* note 41, at 1785.

<sup>50</sup>Thomson & Joyce, *supra* note 40.

addressing cultural, historical, health, and other community priorities, and attending to governance.

### [3] Trust

“Trust is a strong form of credibility in which members of the community have confidence that the company will make decisions at least in their mutual best interest.”<sup>51</sup> Trust represents moving beyond acceptance and obtaining approval, perhaps even community “ownership” of a project. Trust may arise from establishing a common/shared experience, working together with a community, building collaborative and transformational opportunities, and having contractual, competence, and goodwill elements.<sup>52</sup> Trust must be earned; it cannot simply be demanded. Trust is earned through behavior and outcomes that demonstrate trustworthiness.<sup>53</sup>

The shift in focus from trust to trustworthiness is an important one, as it moves the focus away from the public to those seeking to attain a [social license to operate] and the processes they use . . . . Good or bad experiences with an institution or organisation can have a lasting effect, up to 10 years or more in some cases. This means that trust and [social license] must be constantly earned, and never taken for granted. Institutions or organisations play a central role in the construction of social licence because they are both the party seeking it and the party with direct influence over how engagement and communication with community can proceed. . . .<sup>54</sup>

## § 27.07 The Lawyer’s Role

Because social license is as important as, and may be more important than, legal license, stakeholder engagement processes (whether or not required under local law) have significant legal implications for a company. As such, the roles of general and in-house counsel have expanded to include working with the social performance team, senior leadership, and boards to help assess risk and ensure compliance with both legal and social norms. As Michael Peregrine has noted,<sup>55</sup> this is consistent with the lawyer’s role as advisor under Rule 2.1 of the Model Rules of Professional Conduct:

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<sup>51</sup>Jijelava & Vanclay, *supra* note 46, at 1078.

<sup>52</sup>Thomson & Joyce, *supra* note 40.

<sup>53</sup>Dean C. Stronge et al., “Building Social License to Operate: A Framework for Gaining and Maintaining Meaningful, Trustworthy Relationships,” 89 *Resources Pol'y* 104586 (2024).

<sup>54</sup>*Id.* (internal citations omitted).

<sup>55</sup>Michael W. Peregrine, “The General Counsel as Key Corporate Social Responsibility Advisor,” *Harv. L. Sch. F. on Corp. Governance Blog* (June 24, 2018).

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral, economic, social and political factors*, that may be relevant to the client's situation.<sup>56</sup>

Adopting a framework from longtime General Counsel for GE, Ben W. Heineman, Jr.,<sup>57</sup> Peregrine writes:

[T]he initial question the general counsel considers when providing advice may be "Is it legal?", but it is followed up by the question, "Is it right (for the client)?" In that respect, she will place the question in context, and identify both the legal and non-legal issues that impact on the decision. . . .

[The general counsel's role implicates responsibilities] (i) to the corporation itself, and its employees; (ii) to organizations and individuals outside the core entity who are served, or otherwise affected by, the corporation and its actions (ranging, e.g., from stockholders to customers to creditors); (iii) to the legal system and the rule of law, which are a fundamental component of a sound economy and a democracy; and (iv) the need "to secure other broad public goods and embrace sound private ordering" in support of justice and other similar sound societal goals.<sup>58</sup>

Good cooperation among the legal team and the social performance team can contribute significantly to managing legal and social risk and enhancing a company's reputation capital and trustworthiness. One way of managing such risk is to establish robust policies to engage with communities, and some companies include within their policies commitments to comply with voluntary standards set by various industry consortiums and third parties.<sup>59</sup>

Aftab has argued that voluntary standards, such as the United Nations' Guiding Principles on Business and Human Rights (UNGPs), while not being law, are nonetheless

singularly legal in both content and consequence. They are also comprehensive with respect to industry and business operations. The [UNGPs'] widespread endorsement transforms CSR strategy from public relations art to legal science by creating a new CSR paradigm driven by systematic precision based on legal concepts – one that is justiciable in a way that traditional CSR never could be.<sup>60</sup>

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<sup>56</sup>Model Rules of Pro. Conduct r. 2.1 (2025) (emphasis added).

<sup>57</sup>See generally Ben W. Heineman, Jr., *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension* ch. 2 (2016).

<sup>58</sup>Peregrine, *supra* note 55.

<sup>59</sup>For the mining industry, see, e.g., "Consolidated Mining Standard Initiative," <https://miningstandardinitiative.org/>; and ICMM, "Global Industry Standard on Tailings Management" (Aug. 2020). For the oil and gas industry, see, e.g., Ipieca Ltd., "Ipieca Principles," <https://www.ipieca.org/membership/ipieca-principles>.

<sup>60</sup>Aftab, *supra* note 23, at 6-4.

Sarah Altschuler observes that corporate commitments to international human rights standards can be perceived as increasing the risk of litigation, and that the documentation resulting from human rights due diligence creates disclosure risks in discovery.<sup>61</sup>

It is important for lawyers advising clients on these issues to acknowledge the basis for these concerns, but also to discuss ways in which human rights policies and due diligence efforts may actually reduce risk. Many companies are operating in complex environments with well-documented human rights concerns. Companies may be held accountable for adverse human rights impacts, including gross human rights abuses, that are seen by stakeholders as directly linked to their own activities or to the activities of their business partners.<sup>62</sup>

Such due diligence can help a company to decide whether to undertake an acquisition or development of a project in the first place, and to distinguish and document the actions of the company and other third parties. In its role of “advisor,” legal counsel can then assist the business to assess not only what is legal but what is right, and in ensuring that these business decisions are incorporated into policies and procedures so that the path toward social license meets minimum legal standards and achieves the company’s economic and social goals.

## **§ 27.08 Examples of Where Social and Legal Risks Converge—Areas for Cooperation**

This section outlines selected areas where it is most appropriate and helpful for legal counsel to assist leadership and the social performance team, as these intersect with legal issues and processes.

### **[1] Assessing the Business Case for Social Performance—“You Have to Make the Business Case”<sup>63</sup>**

Some of the disconnect between the legal team and the social performance team arises from a failure of the company to understand the business case for social performance. It is often assumed that the subjective nature of social license makes this difficult. But the social performance team and the legal team are addressing the same issue—risk—from different perspectives: legal and social. As previously noted, the distinction is diminishing. To make the business case for social performance, risk must

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<sup>61</sup>Altschuller, *supra* note 38.

<sup>62</sup>*Id.*

<sup>63</sup>Rebecca Darling & David Clarry, Workshop, “The Sustainability Backlash: What Holds True as the Pendulum Swings?,” *Mining Social License Summit: Unearthing Best Practices for Social License Success* (Univ. of Ariz. Apr. 23, 2025).

be assessed and, to the extent feasible, quantified. Much of the risk can be identified through due diligence, as discussed below. But prior to due diligence, stakeholder analysis, mapping, or any of those basic tasks—much less establishing or implementing an engagement strategy—an internal process to socialize the need for social license should occur.<sup>64</sup>

This process gauges the commitment of the company to social performance and a community relationship and assesses the strengths and weaknesses of all the relevant internal players. The issues useful for an internal assessment for the business case need to be tailored to the company, the community, and the project. What is the nature of the project? What are the environmental and social impacts? What is the related legal context, such as formal laws and company commitments to voluntary standards and frameworks? In addition to the “hard” requirements of laws and regulations, what are the expectations of regulators, and could failing to engage stakeholders and communities distract such regulators from addressing required permits and approvals? Are there investment constraints, such as domestic laws relating to capital markets or requirements of international financing agencies?<sup>65</sup> Is the project location stable politically? These questions, and the internal perspectives and assumptions surfaced by them, can lead to a better understanding of company commitment to social license. If the commitment of leaders in the company is tenuous, limited to lip service, or focused solely on a “one and done” community support for the project, it may not make sense to make much of an investment in social performance. A half-hearted effort is little better than no effort and ultimately will lead to failure, including accusations of greenwashing.<sup>66</sup> A half-hearted approach, in other words, is unlikely to get a company past the legitimacy stage and certainly would not pass a credibility test.

If undertaken with seriousness, however, the socializing process can create common understandings of risk over time, and a company commitment to strategies beyond lip service to engage and mitigate such risks. Legal counsel is essential in the socializing process because of counsel’s influence with management, familiarity with legal requirements and constraints, and

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<sup>64</sup>A model proposed last year by Dean C. Stronge, Robyn L. Kannemeyer & Peter Edwards may be helpful for ideas; their full recommendations are likely beyond the capacity of many companies. *See* Stronge et al., *supra* note 53.

<sup>65</sup>See generally Drimmer, Lorenzoni Escobar & Kaur Singh, *supra* note 16.

<sup>66</sup>See generally Cansu Perdeli Demirkhan & Jeff Parshley, “In Search of Workable Standard for ESG Management for Mining Projects,” 69 *Nat. Resources & Energy L. Inst.* 20-1, 20-14 to 20-15 (2023); Manuel José Barros & Josefina Iglesias, “The Role of Counsel in Latin American Companies Dealing with ESG Regulation with Extraterritorial Effects,” *Human Rights, Natural Resources & Energy Law* 11-1, 11-4 (Found. for Nat. Resources & Energy L. 2024).

ability to articulate the concrete risks associated with failure to achieve and maintain social license.

## [2] Identifying Social Needs and Assessing Company Capacity and Appropriateness to Address Them

The next step is to look outward to the community. Social performance professionals are skilled in stakeholder analysis and mapping, but legal counsel can also be helpful to identify the legal framework, understand past conflicts that resulted in adverse legal and financial outcomes, and ensure the inclusion of regulatory stakeholders. If Indigenous communities and Native Nations are present, it is important to understand the relevant legal framework that governs engagement.

After stakeholder analysis, what is the optimal process toward social license? Internal company capacity and competency should be assessed. Does the company have the right people in the right roles to develop and implement a strategy, plans, and resourcing needs? Are consultants needed to assist the company in these activities? This internal assessment can help to establish both legitimacy and credibility.

As part of a commitment to earning and maintaining social license, the company must understand the development priorities of the host community. From there, through ongoing and meaningful engagement, the company and community can identify how they will partner to achieve those priorities. In this process, the company will also understand the community's vulnerabilities and can also agree on partnerships to improve resilience. This requires commitment and consistency and does not always align with company project timelines. While the company should disclose its plans and information about its planned project, it should approach the conversation with more listening than talking. This is because “[u]ltimately, the reality of the community must be the reality for the company.”<sup>67</sup> This dialogue can reveal vast differences between company and community perspectives, leading to a better understanding that will affect the company's approach to community priorities and, in turn, create additional trustworthiness.

Darling, Jones, Lukic, and Read used the following figure<sup>68</sup> to illustrate this point:

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<sup>67</sup> Darling et al., *supra* note 24, at 404–05.

<sup>68</sup> *Id.* at 405. Figure re-created with permission.

**Figure 3. Two Realities: Reality of Community Must Be Reality for Company**

Company View	Phase	Community View
<ul style="list-style-type: none"> <li>Small footprint.</li> <li>Don't want to raise expectations.</li> <li>Likelihood of project low.</li> <li>Negative legacy from previous exploration.</li> </ul>	Exploration	<ul style="list-style-type: none"> <li>Don't understand mining process.</li> <li>Anxiety due to lack of info.</li> <li>Hope mine will bring jobs/services.</li> <li>Defensive due to previous bad experience w/ other company.</li> </ul>
<ul style="list-style-type: none"> <li>Locals should be grateful for infra.</li> <li>Sometimes construction &amp; social on different schedules.</li> </ul>	Development/ Construction	<ul style="list-style-type: none"> <li>Fear traditional ways will be lost because mine will deplete water.</li> <li>Weak rule of law deteriorates trust in company's investment agreement.</li> </ul>
<ul style="list-style-type: none"> <li>Providing treated water to locals.</li> <li>Undertaking consistent, robust environmental monitoring.</li> <li>Going beyond govt. compliance.</li> <li>Politically opportunistic actors create distrust regardless of facts.</li> </ul>	Operations	<ul style="list-style-type: none"> <li>Fear that all water is polluted.</li> <li>Lack of access to date or technical capacity to analyze and understand.</li> <li>Distrust in company's findings.</li> <li>No way to be heard by company or govt. except by blocking roads.</li> </ul>
<ul style="list-style-type: none"> <li>Blamed for potential pollution.</li> <li>May have to pay for others' damage.</li> <li>Compliant with local laws but people still angry.</li> </ul>	Closure & Post-closure	<ul style="list-style-type: none"> <li>Loss of access to clean water company provided during operations.</li> <li>Concern re who to hold accountable for post-closure water quality or quantity problems.</li> </ul>

Not every request or demand expressed by a community or stakeholder should be addressed by the company. A thorough approach to social performance will lend itself to an understanding of the community, its people, culture, history, development priorities, and capabilities. From this, companies can be strategic in their engagement, social investment, and impact management to support resilience and a thriving host community. As noted above, this is a dynamic environment that will change over the life of a project. Companies must remain engaged to understand evolving priorities, leadership and influencer changes, and the overall state of the community. Needs that are understood by the company could be categorized based on company capacity, legal constraints, appropriateness, and immediacy. Different communities or factions within communities may have different or competing priorities. For example, for stakeholders that are governments or have governmental players, attention must be given to anti-corruption concerns.

An “ask” for funds or other contributions for a project that only benefits a portion of the community should also be scrutinized:

- Is that portion of the community essential and influential, making a good relationship key?
- If so, is that portion of the community relatively more privileged than others, and would this be seen as favoritism that perpetuates existing power imbalances or inequities?

While these questions appear to be social performance issues, they may have legal implications or relate to voluntary commitments regarding equitable treatment—and such commitments can have evolving legal implications.<sup>69</sup> Legal counsel should be part of these conversations.

### **[3] Legal Compliance**

The baseline for legitimacy is compliance with minimum legal standards. But legal compliance alone is unlikely to influence community perceptions of legitimacy, credibility, and trust, especially given how common it is for communities to lack trust in government to represent and protect their interests. But despite a company’s best intentions, departmental silos can lead to misunderstandings about permit conditions and other commitments made by the company to obtain its legal license. Legal counsel can play an important role in educating all relevant company departments on these commitments, and the constraints under which the environmental and social performance teams must also work. Legal counsel is a key

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<sup>69</sup>Ironically, the success of the social performance community (broadly including practitioners, NGOs, and investors) in making these informal social norms into binding obligations means the social performance community must now make more room for lawyers.

internal stakeholder in developing and maintaining systems to ensure cross-departmental competence to maintain legal compliance and should have an active and influential role in these systems.

#### **[4] Engagement Strategies**

##### **[a] Interacting with Indigenous/First Nations/Tribal Governments**

Lawyers often are involved with discussions with government regulators and elected officials, at both the national and local levels, often in concert with a government or external affairs function. Company government affairs policies and compliance systems generally are structured to address anti-corruption legal compliance and internal company values. But often Native Nations, First Nations, and other Indigenous groups are addressed in the context of stakeholder and community engagement. When the external affairs function encompasses government and community relations, the nature of tribal governments is usually recognized. When these functions are separated, problems can arise if the unique government nature of Native Nations is not acknowledged.

In the United States and some other countries, Native Nations are both communities *and* governments. These governments may have formal or informal rules and cultural norms regarding communications with outsiders. Ascertaining the norms and expectations for engagement with Native Nations can benefit from the expertise of both the social performance and legal teams. When developing an engagement strategy, legal counsel can assist with:

- Identifying relevant (whether applicable or not) tribal laws, regulations, treaties, and policies.
- Determining whether to engage external consultants and framing the scope of the consulting services. Considerations can include internal resources and expertise, the availability of appropriate outside consultants and their expertise, and the identity and complexity of the Native Nations and communities that have been identified as having interests in the project or area. Drawbacks, such as the perception of “contracting out” the company/community/Native Nation relationship, should also be considered. The social performance team should ascertain whether the consultant has a good relationship with the Native Nations or community.<sup>70</sup> Consultants could be appropriate to assist with the following:

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<sup>70</sup>For example, it may not be useful to have a consultant that is a member of a different Native Nation, and especially not a consultant or liaison that does not have a good

- Research to identify interested parties and their history, known values and concerns, and norms surrounding communications and relationships with outside parties, such as the company.
- Recent internal political issues, elections, and leadership conflict.
- Coordinating the engagement. Note that actual engagement should include a level of parity between the company representatives and the seniority of leadership of a Native Nation.
- Reviewing consulting agreements (and whether to contract through legal counsel to preserve confidentiality and privilege).

When working with any government, anti-corruption laws must be considered. Native Nations are no exception. For example, in the United States, tribal officials are expressly included in federal criminal prohibitions on bribery and extortion.<sup>71</sup> Interactions with any government, including Native Nations, need to be undertaken under corporate policies that recognize the unique nature of these governments, whether or not they have an explicit regulatory role or jurisdiction over the project or the company. These should include policies regarding gifts, meetings, formality of communications, and complete recordkeeping of all these activities to guard against corruption and the appearance of impropriety. Do not omit understanding whether any Native Nation laws and policies exist that cover such interactions. While a Native Nation's laws do not apply off-reservation, they do apply to the tribal officials a company seeks to communicate with.

Further, some Native Nations are quite small in population. In such situations it is quite possible—even probable—that corporate funding for a specific tribal program (such as an elder assistance program or tribal school) would directly benefit a relative of one or more elected tribal officials. This is also true of many rural communities where extractive industries operate. In-house legal counsel should understand this risk, help the social performance team mitigate it, and document compliance efforts.

Finally, in the United States, Native Nations enjoy sovereign immunity from suit. This means that any agreement with a Native Nation is unenforceable by the company absent an express waiver of its immunity. Further, most Native Nations are not subject to state court jurisdiction, and federal courts only have subject matter jurisdiction when it comes to Native Nations. Therefore, consulting legal counsel with expertise in federal Indian law is essential when transacting with U.S. Native Nations; otherwise, legal

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relationship with the Native Nations in a company's area of influence—such as a former chairperson that was removed via recall. Some diligence to select this role is essential.

<sup>71</sup>See 18 U.S.C. §§ 201, 1951.

and business risks can be missed. This is also why impact benefit and other agreement models from other nations cannot translate wholesale into the U.S. legal landscape. Conversely, U.S. forms and norms will not work internationally with First Nations and Indigenous communities.<sup>72</sup>

## [b] Community and Stakeholder Engagement

Most companies do not bring lawyers to community meetings, unless the community has raised legal questions in the past. There are exceptions, such as when it may be beneficial for senior legal leaders to have a presence to demonstrate commitment.<sup>73</sup> Another consideration for legal counsel participating in meetings is compliance with the rules of professional responsibility. If one or more community groups are represented by legal counsel, both that counsel and in-house counsel need to be mindful of Model Rule 4.2:

Communication with Person Represented by Counsel: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>74</sup>

This is a simple issue to manage: if a community is represented by counsel and that counsel is not attending a meeting, then company lawyers (and their outside counsel) should not attend either. But this may not be reciprocal. Even if a community's legal counsel is attending a community meeting with company representatives, it could still chill the dialogue for the company's legal counsel to attend. Because nongovernmental organization (NGO) and nonprofit lawyers also often forget this important rule, if a decision is made for company legal counsel to forgo the meeting, it is courteous to call the community's legal counsel to inform them of this decision and to affirm consent to their presence under the local equivalent of Model Rule 4.2. This has many benefits; for example, the company gets credit for leasing its lawyers, and the company lawyer's message helps set the stage for future interactions with opposing legal counsel.

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<sup>72</sup>See *Indigenous Rights in South America—FPIC and Other Key Issues for Natural Resource Development* (Juan Sonada ed., Rocky Mt. Min. L. Fdn. 2016); *Natural Resource and Energy Development in Indian Country* (Found. for Nat. Resources & Energy L. 2023); *Indian Law and Natural Resources: The Basics and Beyond* (Rocky Mt. Min. L. Fdn. 2017); *Energy and Mineral Development in Indian Country* (Rocky Mt. Min. L. Fdn. 2014); *Natural Resources Development on Indian Lands* (Rocky Mt. Min. L. Fdn. 2011).

<sup>73</sup>I recently attended a meeting with a client and a Tribal chairperson and their counsel. The Tribal chairperson shook my hand and said: "If you are here they are finally taking me seriously." In another situation at the request of a client (and against my better judgment), I attended a Zoom call with tribal representatives where my presence itself became a contentious issue. It is important to "read the room" before you enter it.

<sup>74</sup>Model Rules of Pro. Conduct r. 4.2 (2025).

## [5] Permitting Process

Legal and social norms should also be identified and managed jointly by the social performance team and the legal team during the formal permitting process. The structure and extent of coordination should comport with both the relevant legal requirements and community expectations.

### [a] Public Involvement

In some jurisdictions, consultation and engagement processes are undertaken solely by the project proponent; in others, “consultation” has a formal legal meaning and is carried out solely by the government or government agency. For example, in the United States, “tribal consultation” is required under federal (and some state) laws and policies and is the sole province of the government. The same is true in Canada, where the Crown is the entity that consults with the First Nations, Métis, and Inuit. And yet, community (and especially Native Nation) engagement is still advisable concurrently with the government duty to consult. In the United States, these processes are generally parallel but do not substantially overlap. Legal counsel needs to understand the differences among these requirements and educate the social performance team and company leadership.

This is especially essential if the company is multinational and members of the legal and social performance teams are more familiar with a different regime and practice. Similarly, company policy and public commitments to engagement should not be so specific that they cannot be adjusted to comply with all jurisdictions in which the company operates. Commitments to broadly consult on a range of topics and issues could conflict with local law that reserves such responsibility and privilege to the government.

Likewise, commitments to transparency during Native Nation and community engagement efforts need to account for privacy and confidentiality laws of the various jurisdictions, and the desire to maintain the confidentiality of certain information provided by communities and Native Nations—especially about culturally significant areas and sacred sites. If such issues exist, a communications protocol or agreement with one or more such entities can help to identify and confirm expectations regarding the sharing of information. The flipside of holding some information confidential is that under some regimes, information cannot be used to justify regulatory decisions if it is not public.<sup>75</sup>

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<sup>75</sup>See generally Jim B. Butler & Constance L. Rogers, “Balancing Transparency, Confidentiality, Deliberation, and Sound Science in Public Land Decision Making,” 60 *Rocky Mt. Min. L. Inst.* 21-1 (2014).

## [b] Impacts and Mitigation

In situations where the public processes of permitting are managed exclusively by a regulatory agency, and a company pursues direct engagement in parallel, issues arising from both of these processes must be addressed appropriately. The legal, permitting, and engagement teams must coordinate between meetings. Where a community does not trust its government to protect its interests, it may raise concerns directly with the company but not through the government-mandated process. If the permitting team is unaware of what the social performance team is doing, the company could miss an opportunity to address concerns through mitigation in the permitting process (which is enforceable by the government).

Conversely, concerns may be raised during the public process, but the regulatory agency may lack the legal authority to mandate mitigation as a permit condition. Again, the company could miss an opportunity to address these concerns if the social performance team is unaware of them. A company lawyer can provide the connection between these silos and has the expertise to help craft a strategy to directly address concerns outside the permitting process in a manner that does not interfere with it. This could help build credibility.

## [6] Due Diligence

Due diligence relevant to social license is generally performed in at least three situations. First is the traditional due diligence a company undertakes when acquiring—and often when divesting—a company or an asset. Second is in the exploration or early development stage, when a company is first considering an area for resource development. Third is ongoing diligence.

In each case, it is important to understand perceptions, expectations, and norms (legal and social) in existence, how they have historically arisen and changed over time, and to remain aware of how each may change over time. Social license, if granted, is not something that is achieved once, but rather a level of community acceptance that ebbs and flows over time, as these perceptions, project impacts, and company trustworthiness evolve.<sup>76</sup> Keeping a finger on the pulse allows a company to weather the disruptions from external political and social change, along with internal management changes and reorganizations.

Ongoing monitoring for changing expectations and social norms should not be limited to the local community, but should include a wider geographic area where impacts could arise from various potential future

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<sup>76</sup>Boutilier & Thomson, *supra* note 7, at 50–97.

events, including transportation routes, inward migration toward project jobs, and national and regional demographic, legal, political, and social changes. Further, international developments should be monitored in the areas of business and human rights, revisions to voluntary standards, investor expectations, and changes to standard-setting bodies that may impact a company or project.<sup>77</sup>

Defining the nature, scope, and documentation of social due diligence, however, should be undertaken with the guidance of legal counsel. Because international standards for due diligence change over time, and litigation over human rights issues often hinges on legal issues such as knowledge and duty of care, in-house counsel should consider integrating external counsel into the due diligence and monitoring strategies.<sup>78</sup> In this way, companies can use the legal privilege of external counsel to shield sensitive internal discussions from discovery and help create “a safe space in which to explore adverse impacts and design effective remedies without fearing that the due diligence itself will expose them to additional risk.”<sup>79</sup>

## **[7] Transparency and Information Exchange/ Disclosure Risk**

Just as there are disclosure risks in due diligence and permitting, there are risks associated with simple information exchanges that respond to calls for increased transparency. While communities want timely information—and establishing legitimacy and credibility should lead a company to avoid surprises—there are justifiable reasons why a company might be legally or prudentially constrained from unconsidered disclosure. In the legal realm, various securities or financial laws prevent early disclosure of certain information for public companies to deter insider trading. Thus, a company may be constrained from sharing certain developments, such

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<sup>77</sup>See generally Cassel & George, *supra* note 36, at 1-5 to 1-13 (describing how the UNGPs have been adopted into various standard-setting bodies and national laws).

<sup>78</sup>The UNGP’s third pillar—access to remedy—is not even touched on in this chapter, but is very important, especially in jurisdictions where redress is not available under the local government. In such cases, a private grievance mechanism should be considered and also may be useful in other situations. In addition to a remedial function, the remedy/grievance mechanism can also serve as a continuing due diligence mechanism, making that function more efficient and effective as it “giv[es] the company a way to track the pulse of the community.” Yousuf Aftab, personal communication with the author, June 6, 2025; *see also* Arvind Ganesan, Sarah McGrath & Cindy Woods, “Approaching and Enabling Access to Remedy in the Extractive Sector,” *Human Rights Law and the Extractive Industries* 17-1 (Rocky Mt. Min. L. Fdn. 2016); Michael Torrance, Eric Cheng & Gilliam Moore, “Remedying Human Rights: From the International, Regional, and Domestic Status Quo to Future Innovation—a Canadian Perspective,” *Human Rights Law and the Extractive Industries* 18-1 (Rocky Mt. Min. L. Fdn. 2016).

<sup>79</sup>Aftab, *supra* note 23, at 6-27.

as a new resource discovery, development plan, or feasibility study, with a community prior to public disclosure. In such situations, a community may feel blindsided and sidelined, leading to loss of social license. Legal counsel must be involved in conveying such constraints internally and may assist the social performance team in conveying them to the communities in advance. Some companies have included an explanation of this type of information constraint in community communication agreements or protocols.

Other types of information are similarly protected. For example, say the social performance lead meets with a Native Nation that requests access to information regarding archaeological, historical, and cultural sites in a project baseline report. In the interest of transparency, the lead agrees to provide those reports. However, the reports are confidential under applicable law and are only in the company's possession through a confidentiality agreement with a regulatory agency. Providing such reports to the Native Nation breaches that agreement and potentially results in the company losing access to such reports (which it needs to avoid impacting cultural resources). The company does not have the legal authority to release them to the Native Nation. Arming the social performance team with an understanding of the company's legal obligations concerning such reports could avoid placing the company in the position of choosing between breaking a promise to the Native Nation or complying with its legal obligations.

Information concerning environmental incidents or releases is particularly fraught. Most jurisdictions have reporting requirements for various types of environmental or safety incidents, and many have community "right to know" reporting requirements. Legal counsel must be involved in all such communications to ensure both compliance with reporting laws and to consider the scope of information released in relation to legitimate liability concerns.

Finally, there are many practical reasons why a company might delay sharing information with a community about development or production plans. Exploration geologists and engineers typically have robust internal discussions about exploration and development plans, mine or well construction, and related topics. Most of these discussions do not merit disclosure. Further, resource professionals are a highly mobile group, and even crystallized plans can change dramatically upon a change in personnel with different ideas. Public airing of this normal back-and-forth does not serve the company and may confuse the community and erode technical credibility. Having said that, meaningful engagement includes providing sufficient and accurate information, seeking community input into project plans, and allowing that input to influence business decisions. Failure

to provide information in a digestible format with enough time for the community to understand it and provide input will erode trust, undermine legitimacy and credibility, and can become an ongoing point of contention.

### § 27.09 Restoring Social License

Minor breaches of norms and promises may be forgiven if the relationship is strong, the company takes responsibility, and it mitigates or compensates for any harm in a timely fashion.<sup>80</sup>

Regaining social license after a loss of legitimacy, credibility, and trust is difficult, as the trust deficit is often extreme. Loss of social license can be caused by failing to honor commitments, not sharing relevant information in a timely fashion or through culturally appropriate and agreed-upon methods, perceived lack of fairness in value creation and social investment, or perceived lack of respect for cultural heritage and customs. Social license is also tied to the project's or company's care for its workforce (e.g., fatalities or high injury rates can significantly impact community trust).

The lawyer's protective instinct when things go wrong is to defend and deflect, for fear that response and outreach could lead to the disclosure of information detrimental to the company and the legal defenses it may have. Such a response, while necessary in many situations, will exacerbate the social license issue. Simply put, the way to regain social license is to follow the process used to gain it—only it usually takes longer and costs more. The longer a company defends, casts blame, or remains out of communication with the affected communities, and the longer it takes to restart communications and offer redress, the more opportunity there is for outside actors to leverage the disruption into outright opposition to the company and project. Once that occurs, regaining social license takes even longer and costs even more. Some projects never recover.

At the point of loss of social license, all internal company leadership—perhaps with the aid of crisis management experts—must weigh the legal risks and the social risks and make business decisions together about how to remedy any harm, restart communications, and take other measures to restore the license and move forward.

### § 27.10 Conclusion

As demonstrated, the social license is at least as important as the legal license, and the modern in-house counsel should be aware of the increasing transformation of social performance norms into legal requirements

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<sup>80</sup>See Boutilier & Thomson, *supra* note 7, at 50–97, especially at 50 fig. 5.4. The ebb and flow of one community relationship is documented in the book *The Social License: The Story of the San Cristobal Mine*.

and become an integral part of supporting company leadership and the social performance team in navigating this evolving world. The purpose of this chapter was to gather recent scholarship from the legal academy, the business academy, and the social performance academy to identify selected areas where it is prudent to have legal involvement with social performance issues. The legal aspects of social license discussed here are not exhaustive, and Foundation publications and other resources can help with such issues.<sup>81</sup>

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<sup>81</sup>For anti-corruption issues, see Kathryn Cameron Atkinson & Andrew T. Wise, “Effective Anti-Corruption Compliance Programs,” 67 *Rocky Mt. Min. L. Inst.* 19-1 (2021); Steven T. Robertson, “Anti-Corruption in Canada: An Update,” 63 *Rocky Mt. Min. L. Inst.* 18B-1 (2017); Gwendolyn Wilber Jaramillo & Anthony D. Mirenda, “International and National Anti-Corruption Laws: An Overview,” *Human Rights Law and the Extractive Industries* 15-1 (Rocky Mt. Min. L. Fdn. 2016); Milos Barutcsiski & Luiz Fernando Visconti, “Managing Corruption Risk in the Resource Sector,” 60 *Rocky Mt. Min. L. Inst.* 20-1 (2014); Mark Morrison, Rachel Wollenberg, Pedro Serrano Espelta & John F. Walsh, “Proactive Approaches to Bribery and Corruption Risks in the Natural Resources Sectors of Higher-Risk Jurisdictions,” 68 *Nat. Resources & Energy L. Inst.* 12-1 (2022). For supply chain issues and risk, see Simon M. Jowitt, “US and Canadian Critical Metals and Minerals Policymaking: Implications for Supply Chain Strengthening Through Joint Action Plans,” *Mining Law* 2-1 (Rocky Mt. Min. L. Fdn. 2021); Sean Cumberlege & Dimitri Seletzky, “Implementing Integrity: The Business Case for Forging an Ethical Company and Supply Chain and a Toolkit for Tempering the Links,” 62 *Rocky Mt. Min. L. Inst.* 8-1 (2016); Andrew C. Lillie & Elizabeth A. Och, “The Techy Future of Ethical Mining Supply Chains in a Post-Pandemic World,” 66 *Rocky Mt. Min. L. Inst.* 8-1 (2020).