



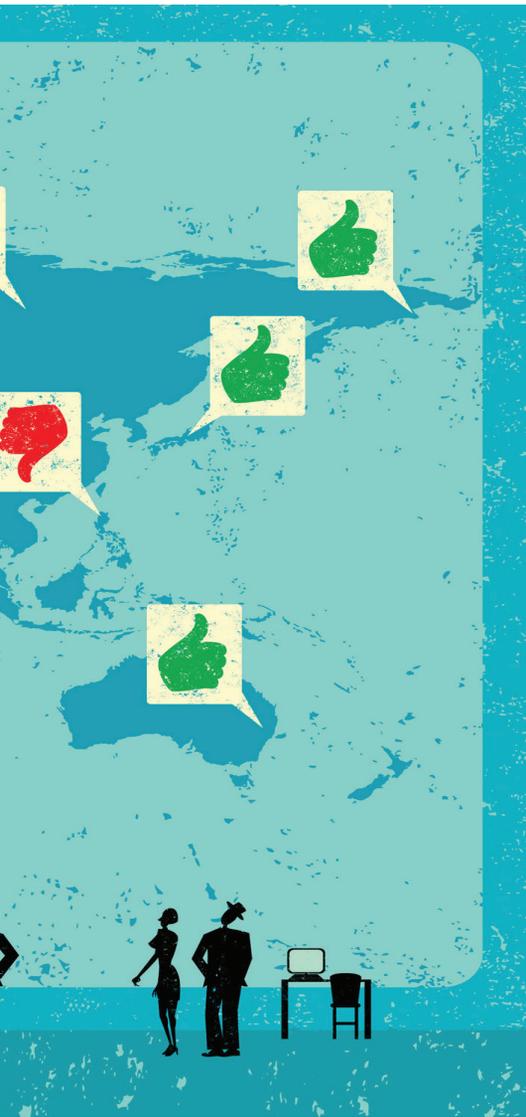
QUANTIFYING SOCIAL LICENSE

In search of society's approval for energy development projects

BY ROWLAND HARRISON

The concept of a social license to operate has been embraced on the energy regulatory scene with swiftness and pervasive impact. Today, obtaining such a license for major energy development projects is widely considered to be just as necessary—and maybe even more so—than any legal authorizations required.

In the case of Enbridge's Northern Gateway Project in Canada, the certificates to construct and operate the project were issued following a comprehensive regulatory review process, yet the project remains stalled, in part awaiting a social license. The concept has even been extended to challenge the regulatory process itself and to require that regulators earn a social license. It is often assumed that a failure to obtain such a license is a barrier to proceeding.



What is this idea that employs the language of the law while also rejecting the legitimacy of traditional legal processes and authority? The meaning of and requirements for obtaining such a license are, to say the least, obscure. The widespread adoption of social license has somehow broadened to imply a right to veto an approved project, a result that potentially undermines the rule of law.

WIDE ACCEPTANCE ACROSS THE BOARD

With resource development projects, social license has been widely adopted by project opponents, governments, politicians and even project proponents. It is not surprising that project opponents would perpetuate social license as something that must be obtained in addition to formal approvals issued through conventional regulatory

processes—thereby establishing another means of potentially preventing projects from proceeding. However, it is somewhat surprising that certain governments have also adopted it as necessary to the overall development process.

One example appears on the Alberta Energy website, where it defines the role of its recently established regulator as follows: “The single regulator is one part of the province’s commitment to improve integration of its resource system. This integration sets and achieves the environmental, economic and social outcomes Albertans expect from resource development, **while maintaining the social license to develop resources.**” The statement acknowledges and implicitly endorses the need to maintain social license as a fundamental value that is supported by, but exists independently of, the formal regulatory process.

It is interesting to note that even those that support resource development are endorsing social license as a requirement that could impede it. In addition to government agencies, there are many companies acknowledging that the absence of a social license presents a barrier to development, notwithstanding that formal regulatory approvals are obtained. According to the President and CEO of Enbridge, “It’s the need to achieve what some call social license that’s proving to be our greatest test.” The President and CEO of TransCanada seems to concur, stating that, “**If we don’t regain public confidence, we won’t be able to retain our social license to continue to operate.**”

In a random sampling of energy project proponent websites, the use of social license in their corporate policies and publications is widespread. The concept is endorsed in Suncor’s 2013 Report on Sustainability, in TransCanada’s website and in Encana’s 2013 Sustainability Report. In addition, collective acceptance of the concept is found in the two leading energy

industry associations. The Canadian Association of Petroleum Producers reported in its 2013 President’s message that it focuses on delivering results for its members under two broad themes: “Competitiveness and Social License.” The Canadian Energy Pipeline Association website contains an extensive discussion of whether pipeline companies need social license and states, “Companies have realized that **in order to build new pipeline infrastructure, they must obtain a social license** from the communities where they operate.”

There is an implicit belief that social license is necessary, and that in its absence, projects cannot legitimately proceed, even when formal regulatory approvals have been issued. A manager for Anadarko Petroleum commented on the challenge of getting community acceptance of proposed drilling programs in northern Colorado, saying, “Those minerals go undeveloped, not for lack of the legal license, but for lack of earning and maintaining that social license.”

The issue is not whether a certain level of public and community support is needed before major infrastructure projects should proceed. Rather, the concern is determining the basis for measuring an acceptable level of support. Earning a social license remains an undefined process that exists independently of established regulatory review processes and without the sanction of any duly enacted law.

ACTING ON BEHALF OF SOCIETY

What exactly is a social license? There is no accepted definition. Rather, there are vague descriptions of what it is about, such as trust in the company to do the right thing and to keep the public safe. It is generally considered to exist when the perceptions, opinions and beliefs held by a local community regarding a development

allow for the ongoing public approval of the related activity.

It must be emphasized that there is no right or wrong answer as to whether to develop a natural resource. In fact, the decision of whether or not to proceed has always been made by society at large based on the public interest, which implies an overall balancing of various competing interests.

So how can we move forward? The first task is to identify who is to make the social license determination on behalf of society, and the second is to establish a process for doing so. There are various models, but typically they include a structured regulatory review process, such as the one found in the *National Energy Board Act*. With respect to proposed pipelines, the NEB's role under that Act is to recommend to the federal government whether a certificate of public convenience and necessity should be issued in a particular case. In forming its recommendation, the Board is required to consider "any public interest that may be affected by the issuance of the certificate or the dismissal of the application."

The Act requires applicants to file information on the public consultations that the applicant has undertaken. The application must demonstrate that those potentially affected have been adequately consulted and that any concerns raised are considered and addressed as appropriate. The Board then considers this information when deciding whether a proposed project would be in the public interest. In doing so, the Board must consider and balance *all* relevant interests.

CASE IN POINT

In 2004, a decision was made on an application for an international power line that was proposed to pass through the City of Abbotsford in British Columbia. Originally filed in 1999, the application attracted the largest public response of any NEB application ever filed. More than 400 parties registered as intervenors and more than 22,000 letters of comment were received. A local Member of Parliament, who was registered as an intervenor in the proceeding, filed a motion requesting that the Board dismiss the application on the ground that "it is

the unanimous opinion of all Canadians so involved in the process, that [the application] not be approved..."

Not surprisingly, the motion was dismissed. The Board emphasized that it was committed to ensuring that stakeholders are engaged effectively in its public processes and that one aspect of that commitment was "to have effective public participation in oral hearings before the Board." However, the Board also stated that it must focus on the overall national public interest. It concluded that decisions by regulatory tribunals such as the NEB are not made by merely conducting a poll or on the basis of a demonstration of public opposition or support. Rather, such decisions are made within a legal framework enacted by the legislature and applied by the courts. This is, of course, the essence of the rule of law.

Having weighed all of the relevant factors, the Board ultimately concluded that the project was not in the public interest and dismissed the application, a decision that was upheld by the Federal Court of Appeal.

SOCIETY'S EXPANDING EXPECTATIONS

It is unlikely that any major resource development project will ever be universally accepted and supported. Unlike a mine which is localized, pipelines extend over hundreds or even thousands of miles and thus impact numerous and diverse local and community interests. Competing interests must be balanced.

The point is that society has chosen—through its duly elected representatives—to have decisions about resource development made on its behalf. In making such decisions, is not the overall regulatory process granting social license? As one commentator asked, "Isn't social license something granted by elected officials in a democracy?"



Despite an injunction granted by the B.C. Supreme Court, protesters banded together at Burnaby Mountain in Vancouver for a long drawn out battle.

The concept rejects the legitimacy of the formal regulatory review process by adding a requirement that must be obtained independently through an unidentified process that exists outside the established legal system. However, given that the phrase is widely applied by both project opponents and proponents alike, it would be unrealistic to suggest that it be rejected outright.

Social license encompasses the increasing expectations by society at large—enabled by the internet and social media—to participate directly in decision-making processes. It serves as a reminder that the integrity of project review processes will depend in large measure on the extent to which those processes include a consideration of all affected interests, including local and community interests.

As noted earlier, there is no clear understanding of exactly what social license is. Who determines whether it has been earned? What are the criteria? Recognizing that it is nearly impossible to obtain unanimous support for any major project, what level of support should suffice? A structured regulatory framework would explicitly address who is to decide on behalf of society and specify the criteria and process to be applied.

THE ROLE OF THE COURTS

When used as justification for rejecting formal regulatory approvals, social license to operate is fundamentally antithetical to the rule of law. And even though it is not governed by formal law, it is often invoked by proponents as if it were.

Empirical evidence shows a growing willingness by project opponents to reject regulatory processes and their outcomes and even refuse to comply with court orders. In Canada, we witnessed an effort to physically remove protesters against Trans Mountain's TMX project from Burnaby Mountain.

The protesters were defying an injunction granted by the B.C. Supreme Court, which would enable the company to undertake survey work to support its application for the TMX project, as directed by the NEB. In another incident, a group identified as "Burnaby Mountain Caretakers" locked themselves to the Supreme Court entrance in Vancouver to draw attention to the role of the courts in ongoing colonial occupation of indigenous territory on Burnaby Mountain and across the country.

between Toronto and Montreal, bringing freight and passenger traffic to a halt. Justice D. M. Brown minced no words in addressing the matter by saying, "We seem to be drifting into dangerous waters in the life of the public affairs of this province when courts cannot predict, with any practical degree of certainty, whether police agencies will assist in enforcing court injunctions against demonstrators who will not voluntarily cease unlawful activities, such as those carried on by the protesters in this case."

“...the concern is determining the basis for measuring an acceptable level of support.”

It is interesting to note that the B.C. Court, in granting the injunction in favor of Trans Mountain, was sensitive to the potential effects on the right to freedom of expression. The courts must be careful not to act in ways that dissuade concerned and engaged citizens from expressing their opposition to activities that they view as destructive to the social or political good. However, the Court concluded, that "as much as the right of public dissent must be carefully protected, what is at issue in the present case goes beyond that and engages a strong *prima facie* case of liability for tortious behavior."

The Superior Court of Ontario addressed the threat to the rule of law by issuing an injunction ordering the removal of a blockade of the Canadian National Railways line

In 2012, Justice Brown had issued an injunction requiring the First Nation protesters blocking a CN Spur Line in Sarnia to remove their obstructions. To his astonishment, the local police failed to assist in enforcing that order for almost two weeks, and then only under pressure from another judge. Justice Brown responded saying, "As a judge, I make an order expecting it will be obeyed or enforced. If it will not be enforced, why should I make the order? An order which will not be enforced is simply a piece of paper with meaningless words typed on it, and making a meaningless order only undermines the authority and concomitant legitimacy of the courts." The threat to the rule of law is troublingly obvious.

SHIFT IN INDUSTRY THINKING

Looking forward, what can be said about the social license to operate? Since the concept has become widely accepted as something that can function independently of the legal system to thwart formal regulatory approvals, I have two observations.

The first is with respect to the use of the word “license,” which implies authority to do something that would otherwise be unlawful or impermissible. Using the term “social license” feeds the view that, in the absence of such a license, a project is not authorized to proceed. More appropriate terms might be “acceptance” or “support.” Both encompass the legitimate expectation that all affected interests be considered, while not implying any substantive consequence in the absence of such acceptance or support. I also suggest that the determination of the public interest be done using a structured regulatory process that considers the degree and nature of acceptance or support for a project. Most regulatory review processes do so.

Another observation is that its acceptance by industry and governments has tended to validate the view that the absence of such a license can serve as a barrier to proceeding with a development that has otherwise been lawfully approved. While acknowledging the legitimate expectations of a wide range of interests to be considered in the decision-making process, both should push back against the concept of social license as an independent threshold for proceeding with resource developments. Opponents are unlikely to abandon the concept, but industry and governments could hope to change the dynamics of the development debate by shifting the focus away from “license” onto the concepts of “acceptance” and “support,” neither of which carries the same connotation of permission or license.

Perhaps a shift in industry thinking is beginning. As noted, TransCanada’s report on Corporate Social Responsibility speaks of “earning our social license to...operate...” Comments

made by the company’s CEO suggest some reservation. “What is the bar by which we get approval? And they keep using terms like social license, but we can’t enter into a process by which we don’t have a defined way of determining what that social license looks like,” he said.

Governments in particular should recognize the ominous implications of the popular concept of social license to operate and show leadership in supporting the legitimacy and enforceability of the outcomes of structured regulatory processes. Governments should resist using social license as a justification for rejecting lawful authorizations. There are some signs that this might be beginning to happen. The Minister of Finance, Joe Oliver, was quoted as saying that social license “is too often used by a small minority of activists to block projects that have been approved by regulatory agencies, endorsed by elected governments and supported by a majority of Canadians.” However, B. C. Premier Christy Clark followed by saying “project proponents do need social license.”

GRANTING THE LICENSE TO OPERATE

No doubt it will be argued that the regulatory process for major development projects has failed to adequately consider society’s concerns, and it is this failure that has become a driver behind the widespread use of social license. The argument has merit. Regulatory processes have not kept pace with public expectations in a world where the decisions to be made are seen by many as fundamental to the future of society. I would argue that the answer must be found in addressing the source of the problem by broadening the regulatory process to address society’s legitimate concerns. That, no doubt, is a tall order.

In considering the concept of social license to operate, I have no objection to recognizing and considering the role of community and public support for—or opposition to—a project. Rather, my

objection is using it as justification for holding projects hostage, by outright rejecting the outcomes of formal regulatory processes and thereby undermining the rule of law.

I believe this ominous result has been fostered by the “license” terminology and the failure by government and industry to insist that the regulatory arena be used to determine the public interest and deliver outcomes that are understood as granting the social license to operate. ☘

References

- C.D. Howe Institute Roundtable Event, Calgary, June 4, 2014.
- CEPA, “Do pipeline companies need social license?”
- Encana Sustainability Report 2013, CAPP 2013 Year in Review
- Energy Magazine, November 5, 2014
- Financial Post, April 22, 2014
- <http://worldjusticeproject.org/what-rule-law>
- NEB Filing Manual, Chapter 3
- Pembina Institute, “The costs of losing social license,” June 6, 2014
- R.S.C., 1985, c. N-7.
- Sumas Energy 2, Inc. v. Canada (National Energy Board), [2006] 1 F.C.R. 456.
- Suncor Report on Sustainability 2013
- The Globe and Mail, October 22, 2014 and November 21, 2014
- TransCanada report on “Responsible Stakeholder Relations
- Trans Mountain Pipeline ULC v. Gold et al, November 14, 2014
- Wyoming Public Radio, December 8, 2014
- www.calgaryherald.com/business/pipeline
- www.energy.alberta.ca/initiatives/3591.asp
- www.vancouverobserver.com



Rowland Harrison is a lawyer and senior government official with more than 40 years experience in Canadian energy regulatory matters. He served on the National Energy Board in Calgary from 1997 to 2011 and is the co-Managing Editor of Energy Regulation Quarterly.