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THE ISSUE OF SOCIAL LICENCE AND ENERGY UTILITY PLANNING AND INVESTMENT

Results of a symposium on the topic at The School of Public Policy, Calgary, October 8, 2014

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EXECUTIVE SUMMARY

The vagaries of the term "social licence" and its broad application by various interest groups who tailor its meaning to their widely differing agendas, have proved frustrating for regulatory institutions as well as the energy industry. This problem was the subject of a symposium held in October 2014 in Calgary, and organized by the University of Calgary's School of Public Policy, to assess the situation and its effects on the energy industry.

The use of the term social license may be traced to a growing distrust of regulators and government; in recent years it has been used as a means to demonstrate that the viewpoints of given stakeholders, such as directly affected landowners, special-interest groups or even minority groups who may only be remotely affected by projects, are being ignored. This issue is exacerbated by the fact that various stakeholders involved in energy projects often have complicated, overlapping and sometimes inconsistent interests in its outcome; this tension is in turn further compounded by the fact there is no firm legal or regulatory definition of social licence. The consequent lack of definitional allows a term or concept such as social licence to be used without precision and authority in the approval process by interested groups, who may insist on rulings or conditions for proposed energy projects to meet a range of ill-defined and unenforceable standards.

The regulatory process has been established to solicit and use the contributions of public participation. This participation role, however, brings with it a requirement and commitment to participate under the rule structure established by the regulatory agency, which also typically specifies the qualifications of those testifying as well as establishing the veracity of submittals and oral testimony. This is a key feature separating the policy debates undertaken by legislatures and

regulatory institutions that are mandated to implement and enforce policy objectives, but are not in a position to define or re-interpret them.

The upshot is that in order to maintain objective control of the hearing and permit process, both the energy industry as well as the full range of engaged public and stakeholders must adhere to the published and governing rule structure in order to sustain and improve the overall energy infrastructure and use system. Absent such a process and rule structure, the system cannot function in a timely, efficient or egalitarian manner.

Panelists in this symposium stressed the critical need to maintain a clear, transparent and efficient regulatory process for considering future energy projects and the upgrading and maintenance of existing systems. This process was cited as a clear example of an opportunity to bring together the voices of groups that often feel disenfranchised such as landowner or First Nations people, in a forum that respects, solicits and encourages their participation as key stakeholders. However, the participants also stressed the need to have a uniform set of procedures and rules for hearing projects while stressing the fact that the regulatory process is driven by policy prescriptions and is not a substitute for hearing voices and opinions about the nature and design of energy systems serving the public.

The panellists in this symposium were clear that Canada can improve the existing system to consider future regulatory issues. Alberta was cited for positive examples of including citizen engagement in proposed energy developments. A first step in achieving better alignment between regulatory processes and maintaining an informed citizenry will be started by restoring public trust in due process and in regulatory authority.

Ultimately, it is clear is that the term “social licence” warrants a definition and standardized framework so that regulators and, potentially, the judiciary will be able to use the term consistently and fairly in the future. A well functioning energy system is critical for society. As well, confidence in the regulatory and policy process are vital for ensuring investment and appropriate, environmentally responsibility energy infrastructure facilities are available for all.

INTRODUCTION

This document provides a commentary on a conference held in Calgary in October 2014 to discuss a concept and a process proponents[1] describe as the exercise of *social licence*. The term "social licence" is a term of art at present, appearing nowhere in the legal, regulatory or economic literature dealing with energy systems. The lack of social licence, however, is mentioned or cited as a justification in public hearings throughout North America as a reason to revise, re-hear or reject previous public hearing outcomes.

The symposium on this issue was developed to help clarify the term, to more fully understand the context in which it is used,[2] and to gain some preliminary understanding of the import and impact of acceding to abide by a rule organized around the concept.[3]

The reasons and timing for this symposium were driven by a consensus at the School of Public Policy that the term is used with increased frequency, but not with increasing confidence, clarity,[4] comprehension or compatibility with existing laws and rules, either in Canada or in the United States. In recent applications from energy companies and the support industry including pipelines and transmission lines, the nature and responsibilities of key stakeholders have been highlighted in this discussion. Prominent in these discussions is the issue of land ownership, historical and even undefined rights for First Nations people, and transit over, or use of, public lands. The complicated, overlapping and even inconsistent set of interests for various stakeholders and landowners highlights the interest, and often frustration in roles and authority for intensifying land use access. Thus, the interest in exploring new methods of gaining access or influence in the process has been growing.

While there are no citations or authority given for the term "social licence", it has been asserted that the absence of a firm definition of the concept creates an opportunity to challenge opinions and approvals for energy system projects, potentially rejecting them or causing them to be reviewed again (ab initio) under different and more appropriate rules and standards. The lack of precedent or accepted definition can create confusion in

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1 To date, the argument advanced on the term is not used or accepted uniformly by all sides debating energy issues.

2 The challenge to participants was set out in the framework for the meeting: "Canada's regulators act in the public interest to review energy and infrastructure project applications. Regulators are guided by procedural fairness and follow a transparent application, review and hearing process with data filings and sworn testimony.
But that's changing. 'Social licence' is a relatively new term which some interests are using to create a different standard for the approval of projects – especially energy projects. According to social licence advocates, projects must meet often ill-defined requirements set up by non-governmental organizations, local residents or other interests – a new hurdle for project approval, but without the rigour and rule of law of a regulator.
Is social licence a meaningful addition to the regulatory process, or is it being used as a constantly moving goalpost designed to legislate social licence into regulatory processes, delay project implementation, frustrate energy infrastructure expansion and even enrich those advocates who promote it as a new model?"

3 The Calgary symposium was held after a separate but thematically linked event also organized by The School of Public Policy: a Regulatory Roundtable on June 25-26 in Denver, Colorado that looked at "The Role of Social Licence in the Regulatory Process." (A separate summary paper of the Denver Regulatory Roundtable is available).

4 There are many definitions for the term, but currently we must rely on a variance of the quote from Justice Potter Stewart: "You know it when you see it."

those adjudicating cases, permits or petitions, and gives rise to aphorisms, imprecise and inconsistent application, and broadly can be seen to support substituting self-defined minority or affected users for the public majority.[5]

Energy and energy systems are a backbone of modern society. Without a range of energy products, commerce, health, safety and comfort would not be possible. Access to energy, however, depends on complex, interdependent and capital-intensive investments that demand land, and access to raw and processed fuels and transportation systems, in order to deliver energy for power systems when and where it is needed. Despite calls for reductions in intensity of use, demand for energy continues to increase, outpacing the rate of population growth.

This symposium then was intended to open a timely debate regarding energy system planning, the role and location for public participation, the roles and authority of key actors in the process, the ongoing assessment of impacts, and the assignment and oversight of mitigation measures. The symposia, topics and participants were designed to illuminate the issue and the instance of its use. The potential for this term to be seen as a problem is left for future panels and papers. Four expert panels explored the issue. Beginning with an attempt to broadly define the use of the term "social licence", a panel followed that addressed the current range of use or application of the term. The third panel explored the derivation of authority (or lack of), and attempted to describe the vesting of any moral or legal authority in any given individual or group. Finally, the symposium concluded with panellists speculating on the future use and value of this term in the public debate and energy system process.

This summary document is split into sections that broadly follow the discussions and thread of each panel presentation and their remarks.

DEFINING SOCIAL LICENCE - IS IT REAL?

There was a broad consensus that the concept of social licence has emerged as a significant issue, but not that it has a real or definable role as yet in current regulatory or policy arenas. However, there was general agreement that the term is vague, not clearly defined within or across various groups, and consequently can be conveniently adopted by competing groups to stand for different values and standards over time, depending on use and purpose.

In the case of Canada, increased use of the term appears to be primarily driven by opponents of current energy projects and process; this is most likely tied to current events that influence the process, including:

- A broader decline of public trust in institutional authorities and the larger polity to make decisions in the greater public interest about proposed projects;
- Recent revisions to the federal government's regulatory practice and environmental standards;

[5] The so-called "tyranny of the majority" phrase is often heard when discussing the fairness of systems of democracy and majority rule. It can involve scenarios where decisions made by a majority appear to place collective interests above those of affected individual or minority groups.

- A perceived politicization of the regulatory process;
- A growing and significant increase in the use of un-vetted and unverified social media not driven or bound by existing public rule structures of evidence or rights to participate;
- The lack of a forum or process whereby people concerned about broader policy issues, such as climate change, can have their concerns heard and meaningfully addressed; literally, the belief that there is a failure of the policy institution to hear or address public concerns;
- A growing sense that there is an increasing fragmentation and breakdown of social authority and standards.

Underlying all of the discussions, and much of which has been reported in the popular press, is the sense that various groups are excluded or discounted when they attempt to participate in regulatory hearings. This is noticeable most often when petitioners have been denied stakeholder standing or when certain groups not directly affected by a proposed project are determined to have no standing in a hearing. Their common path is to offer a challenge to existing rules and institutions, often maintaining that they have unique information or expertise that should be included in the process. Proponents of alternative regulatory processes assert that the public interest is not represented fairly in the existing policy and regulatory process, and should be replaced by broad grassroots involvement that expands and extends the definition, timing and moment accorded to those who oppose or would significantly alter energy infrastructure projects.

The panel offered several positive examples of initiatives, groups or processes that succeeded by managing to achieve consensus either during or prior to the commencement of hearings. All touched on the need to clarify the definition of public interest, and finding ways to communicate this concept to the broader public, beyond special interest groups, and build a consensus over the term as well as value in its use. At stake is public confidence in the regulators and their role in assuring an adequate, safe and affordable public energy infrastructure in the future.

The panel's conclusions underpinned the discussion for the remainder of the symposium with four succinct observations:

- Part of the dilemma faced by regulators is that those who argue for change believe that notwithstanding the absence of a reference to social licence in existing statutes or regulations, the concept is real, and regulators who hear this argument should be aware of a need to address it in a coherent and consistent manner and adopt their contribution as a matter of course;
- The variation in the use of the term "social licence" is large, and is sufficiently ad hoc as to render routine application in hearings meaningless;
- A clear definition of roles and responsibilities between policy, regulatory and participatory groups is needed in order to keep the overall system manageable and functional;
- The rule of law is challenged by the current use of this term and should be clarified ultimately in the policy arena, although there may be interim interpretations that emerge from judicial challenges.

SOCIAL LICENCE: INCONSISTENT USE OF THE TERM

The use of the term "social licence" invokes a variety of responses, interpretation and opinion, approximating the reaction in the broader public arena. The panel moderator suggested that the term itself was nebulous, a view functionally underlined by panellists offering various examples of its use by industry, policymakers, politicians, environmental non-government organizations and the media.

Use of the term seems to follow roles in the hearing process. Opponents of projects or assigned roles of participation cite a lack of social licence in the proceedings, often claiming exclusion and limited attention paid to their opinions. Project proponents who employ the term often present defensive testimony, citing actions or processes that were designed to achieve or perfect the social licence of the community. The term is largely ignored by regulators who issue opinions and decisions on individual projects. A common feature in each group is a consistent lack of definition of either the authority for, the definition of the community affected by, or the source of, social licence.

The revealed consensus was that use of the term itself was arbitrary and ad hoc, and offered a wide range of opinion as to how such a term or concept should be managed or applied. For instance, one panellist suggested the notion of social licence either should be recognized as being granted already through society's legislated regulatory system and other institutions, or the concept should be rejected altogether because it is beginning to undermine democracy and capitalism. Alternatively, another panellist asserted that social licence reflects the democratic process at work and that the courts and government must ultimately decide the context and significance of its use. One panellist offered that the right to approve or not approve social licence is embedded in each opportunity to vote in the electoral process. As for the role of regulatory bodies regarding social licence and the actual or perceived lack of public confidence in regulators, one panellist suggested that if a regulatory agency, or regulators themselves, are perceived as unfair, then the regulatory process itself means nothing.

SOCIAL LICENCE: AUTHORITY AND OWNERSHIP

The regulatory process functions with authority and direction from the legislative branch of government. Most regulatory institutions are appointed, and regulators enjoy a range of authority that can be interpreted in a similar range of independence versus direction from the executive branch of government. These circumstances can vary by country as well as province or state, and have historically been subject to change or reinterpretation over time, which illustrates the inconsistency of the process.

Panellists addressed the challenge of defining this authority, and broad claims or assertions of abuse or non-compliance with implied grants of social licence or regulatory permission. There was a wide variety of opinion on this topic, reflected in a commentary suggesting that it was possible to see social licence not as a metaphor or document, but rather a process or management tool, representing the quality of the relationship a project proponent has with the community. This view was reinforced by another panellist, who offered that acquiring

social licence was really a process of gaining "social acceptability"; that this was any project proponent's responsibility. In this view, timing is critical and a proponent shouldn't enter the regulatory process until social licence/acceptability has been attained.

These interpretations were not universal. One panellist rejected the concept of social licence altogether, saying the term was so vague no one could know or comply with appropriate rules. The result confers the ultimate authority on energy infrastructure to opponents of development. In this case, social licence should actually be called "opponents' permission." Clearly, this view of the process implies a threat to any projects that are deemed in the national or even regional interest.

This is a critical point, given the role energy plays in commerce as well as in basic living standards. Taken to an extreme, future projects facing an inconsistent standard of social licence approval, are burdened with uncertainty that translates into project delays, increased borrowing costs and potential future reviews in the judiciary or at regulatory hearings. This, in turn, imposes higher future costs on consumers, and ultimately could contribute to lower predictable operation of energy systems, capacity and even consistent application of environmental standards.

However, defining those projects that are important to Canadians' prosperity and contrasting them with special or threatened interest groups, regional or provincial and state interests is difficult in the absence of a national strategy or plan for energy infrastructure, markets and regulatory authority. The panel suggested that it was important for Canadians to identify goals and build a national political consensus around those future projects deemed to be in the national interest and which therefore should proceed.

SOCIAL LICENCE: WHERE TO FROM HERE

In the final panel, the goal was to synthesize the observations from a full day of presentations. In this, there was consensus among all the panellists that the notion of social licence – taken to mean that public consultation and stakeholder engagement in some form are required for proposed projects, such as those that have concluded days and weeks of hearings and testimony on a range of projects from pipelines to wind turbines – is a global phenomenon and must be addressed.

The form of acceptance brings yet another example of an unclear term in the context of regulatory standards and authority. The term implies an agreement or consensus of roles and authority, which remains in fact an ambiguous and imprecise value, dependent on future clarification of authority and objective. The comments reflected the dynamic nature of the term, and the manner in which it is deployed in public settings. One panellist suggested that the essence of social licence is about the nature and trust of communications and respect among groups, institutions and individuals, such as affected landowners or nearby residents. Panellists observed that this view was being challenged on scale arguments, with various groups suggesting that the group of stakeholders for energy projects was in fact global, and that pan-national agreements should be sought. Gaining this trust involves the concept of social acceptance, rather than social licence, and that the heart of the issue is about public confidence, including confidence in the regulator and policy-makers. In order to succeed

in this context, communicating procedures and commitment to public health and safety, in addition to maintaining investor confidence and sustaining financial viability, are the basis for new standards for project proponents.

In the case of the Canadian regulatory process and social licence, it was clear to all that underneath all the discussions about future regulatory institutions, a new system of involving key stakeholders such as First Nations or large landowner groups was essential. In this, the issue of gaining, and maintaining trust and co-operation was very important. The panellists offered positive examples in Alberta of long-term citizen engagement in proposed energy developments, and said citizens need to take advantage of all the information available – not just information that reinforces their selected points of view. All the panel members reiterated that resolving the issue, and coming to a common understanding of the system that must offer reliance on Canada's regulatory processes, will involve rebuilding greater levels of public trust in due process and regulatory authority.

Regarding the question of whether the absence of social licence constitutes a threat to the law, some panellists suggested that for a small minority, the use of the term is a challenge to the rule of law (lawful authority), but that the majority of society is not represented by this view. Another panellist suggested that while the issue currently does not constitute a threat to the rule of law, failure to deal with it will result in delays, confusion and lack of progress in maintaining a robust and competitive energy system.

SOCIAL LICENCE: CONCLUSIONS

The discussion synthesized above points out the highly controversial, dynamic and often contentious nature of the process of considering energy systems, investments and infrastructure proposals, not only in Canada, but throughout North America. No single thread emerged, other than the fact that the issue is current, pendant and important. All the panellists involved concurred that dealing with the issue was worthy of both legislative (at the federal and provincial level), regulatory and local government level attention if the complicated array of energy systems are going to be maintained and attract appropriate financing in the future. All were concerned that the term is sufficiently ambiguous to warrant a definition and standardized framework that will allow regulators and ultimately the judiciary to view assertions about this term to be dealt with consistently.

This is best summarized by the keynote luncheon speaker who observed that:

- The concept of social licence may be interpreted differently, but in general has been around for a long time, and will continue to be an issue in the future;
- Ambiguity in the use of the term "social licence" creates risks for industry and the finance community. Once project approvals are finally granted, the obligation to gain and maintain social licence rests with project developers and operators;
- Maintaining social licence requires leadership, trust and collaboration.

SOCIAL LICENCE: NEXT STEPS

The energy industry is a key element of modern society; it plays an outsized, important and integral role in the Canadian economy. Since the energy industry is dynamic, constantly acquiring and re-acquiring fuels, improving and upgrading and expanding infrastructure, then maintaining a clear, reliable regulatory and decision process, including enforcement and price oversight, is critical. Unfortunately, public involvement is not consistent in this arena, with the majority of opinion or testimony at regulatory hearings offered by special interests, affected stakeholders or project developer representatives. Several steps to improve this situation have emerged from this extended discussion of the topic, and are worthy of future research and policy development.

All involve improving the broad literacy of energy issues among every group in society, from policy-makers to the public, who should share common understanding and goals regarding the country's energy future. Information flows, access and reliability need to be improved along with an understanding of the roles and standards for various venues of energy debate.[6]

Much of the issue of accepting the concept of social licence is bound up in an apparent distrust of government, government-sponsored policies and their representative agents. There is an apparent frustration at hearing standards, status and standing, and a belief that public health and safety are being compromised in the process. All of this suggests that the system itself is sufficiently opaque and inconsistent enough to warrant a thorough review and revision to rebuild public confidence, involve important stakeholder groups, and build a resilient and effective energy industry for the future.

[6] Rules of evidence and expert opinion in regulatory hearings differ fundamentally from those in policy or legislative hearings.

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