Members of the Review Panel:

What is Social Licence?

The term "social licence to operate" was originally used in the late nineties by Canadian mining executive Jim Cooney to describe how to operate in international jurisdictions with weak rule of law. If an ore body was found in a third world country in an area where the writ of a weak or corrupt government did not run, and where services normally provided by governments, such as medical clinics and schools, were poor or non-existent, then a project developer would step in and provide these facilities and services, as well as jobs, to win local support and thereby gain "social licence".

Since then the term has come into use in many different contexts. In Canada, it is widely associated with consultation and accommodation of First Nations. Industry has embraced the idea in the context that, for example, negotiating an Impacts and Benefits agreement with the relevant First Nations would demonstrate social licence to operate in their traditional territories.

More recently, in a form of conceptual drift, use of the term has been more broadly adopted by environmental activists who hold that, in addition to the usual government review processes and regulatory permits, social licence is also a "requirement" for a business to operate. According to proponents of this idea, the social licence must be won from stakeholders who range from First Nations to local residents, and also include both local and international non-governmental organizations.

What is social licence? How is it obtained? How do you know when you have it? How do you know when you don't have it? Who decides, and on what basis?

Skeptics point out that the term means different things to different people. Political Economist Brian Lee Crowley notes that "The very vagueness of the term "social licence" means we cannot know what the rules are, when you're in compliance, or when you've still got work to do. And hardline project opponents like that vagueness just fine because it gives them unilateral authority to claim that the need for social licence has not been met. Who can prove them wrong since no one knows the tests that must be satisfied?"

Canada, including Labrador and Newfoundland, is a jurisdiction with strong rule of law. Environmental regulations are as tough as or tougher than almost anywhere in the world. The environmental review process is stringent and includes community consultation. We have strong

institutions, including an independent judiciary, free press and competent, professional regulatory bodies. We are not a third world country.

Nonetheless, anti-development activists will say that social licence must be obtained for any project to go ahead. Why? Because “people don’t trust the government”, or “people don’t trust regulators”.

It is one thing to say that people don’t trust the government in a third world country where the government is corrupt and institutions are weak, and quite another when it comes to a country such as Canada, where corruption is very low and the press and the judiciary have the ability to hold even the most powerful to account.

Some prominent legal theorists have raised questions about this new version of social licence in a country such as Canada.

Dwight Newman, Professor of Law at the University of Saskatchewan, wrote that “any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law and a suggestion that Canada should become a less well-ordered society.”

Rowland Harrison, QC, a former chair of the National Energy Board, said “social licence as it operates is without legislative authority, illegitimate, and not sufficiently well defined to meet the requirements of the rule of law, which is stable, clearly defined, and just…it rejects the regulatory process . . .”

A concept that started as a means to operate in jurisdictions with weak institutional capacity has drifted, in the hands of anti-development activists, into a weapon that attacks the strong institutional capacity democratically built up over many years in a rule of law jurisdiction such as Canada.

If a regulatory body comes to a decision that the activists do not like, then the regulators are in the pockets of the capitalists and the decision is illegitimate because the project lacks social licence, as evidenced by protesters waving placards on the evening news.

No project that has a physical impact on the environment will find unanimous support. Roads, railways, pipelines, port facilities, mines, logging operations and mills, sewage treatment plants, hydro dams, electric transmission lines, manufacturing plants and oil and gas operations will all have a negative impact on somebody. Those impacts have to be weighed against the common good.

Who weighs individual impacts against the common good? In a democratic society it is necessary to have institutions that can evaluate all the competing interests, from economic development to environmental, health and community impacts and more, and come to a balanced decision about whether a project should go ahead. These institutions are created by

democratically elected governments to act in the interests of citizens. They have rules and consider evidence, including input from those affected by a project, and the process is as transparent as possible.

A legitimate regulatory process addresses the need to consult and compensate people whose legitimate interests are affected. The process should maintain the highest environmental standards and minimize harms. A transparent process will improve the confidence and trust of the people affected, even if there will always remain some who stand against any given project.

In balancing the benefits and impacts of a project, the standard is not whether you have satisfied every objection by those implacably opposed to development, but whether you have reached a conclusion that any reasonable person would if he or she were in possession of all the relevant facts and arguments.

Regulatory processes already in place in Newfoundland and Labrador require stakeholder engagement. The Petroleum Regulations, Drilling Regulations, Environmental Protection Act, Environmental Assessment Regulations and Aboriginal Consultation Policy detail the province's requirements regarding consultation with relevant stakeholders, including details of how and where public consultations should take place.

The proper framework for achieving relevant stakeholder support is a public, legal, regulatory process with clear rules, overseen by dispassionate, professional regulators with a mandate to protect the public interest.

If a democratically legitimized regulatory process is rejected, then what is the alternative? If some vaguely defined social licence must be satisfied by pleasing every imaginable "stakeholder", then decisions would be made by the minority with the loudest voice. This is not just undemocratic; it is anti-democratic.

In the case of our unconventional oil project in western Newfoundland, nobody can credibly claim that the government has rushed blindly in to allow development of a hydrocarbon industry on the west coast. Instead, in response to concerns expressed by a small but very vocal group of local anti-development activists, the government declared a de facto moratorium on the engineering technique of hydraulic stimulation and initiated this Panel Review process.

The Panel's mandate is quite broad, including topics that are not specific to hydraulic fracturing, but which are common to all oil and gas development and indeed to all development. The Panel has consulted extensively with the public, in one on one meetings, in public meetings and by receiving an enormous volume of submissions.

The Panel Review consultation and evaluation process is in addition to the provincial regulatory oversight provided by the Department of Natural Resources and the Department of the

Environment and Conservation, as well as the Canada-Newfoundland and Labrador Offshore Petroleum Board and various federal regulators.

The anti-development activists have hedged their bets very well. First, they demanded that an independent review panel be established. Then, when the government acceded to that demand, the activists demanded that the Panel be disbanded because the composition of the Panel was not to their liking. Nonetheless, they have swamped the Panel with submissions. That way, if the Panel comes out with recommendations they like, all is well. If the Panel dares to come out with recommendations the activists don't like, they can claim the whole process is illegitimate and the project lacks social licence.

Most people I talk to in western Newfoundland want economic development as long as it is safe. They want economic development because, outside of St. John's, unemployment in Newfoundland and Labrador is the second highest in Canada, at more than 17%. They want private investment to drive that economic development because the province has the second highest ratio of public employment to total employment in the country: 27.2%.

The silent majority that wants development does not make a lot of noise. Should the vocal minority dictate public policy?

Nobody can credibly claim that the public has not had a chance to provide input to this Panel. You members of the Panel must now evaluate all the inputs you have received, including the vast scientific literature, come to balanced conclusions and make recommendations to the new government of Newfoundland and Labrador.

Then it will be up to the politicians. In our society, democratically elected leaders have the ultimate social licence to make decisions. In fact, it is their duty to make decisions. When politicians try to lead from behind, it never ends well. Democratically elected leaders must have the courage to lead.

Respectfully yours,

Mark Jarvis

CEO

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