



True North In Canadian Public Policy

Commentary

November 2014

When Demands for “Social Licence” Become an Attack on Democracy

This paper is based on remarks made at the Social Licence Panel hosted by the University of Calgary School of Public Policy in Calgary on October 8, 2014.

Brian Lee Crowley

While I would never claim to have been the first to have expressed doubts about the idea of social licence, I think it is right to say that my *Globe and Mail* column about it last year was an “ah ha moment” for a lot of people. Before that, people invoking “social licence” were treated with kid gloves, and their every pronouncement treated virtually as gospel. After my column I saw increasing skepticism, and an increasingly balanced debate.

As I tried to show in my original argument, the need for “social licence” before major development projects can proceed seems increasingly accepted as self-evident despite the fact that it is either a synonym for cool, calm, intelligent risk and reputation management by government and industry or else a polite term for mob rule. Which kind of social licence we are dealing with matters enormously, and yet much of what I have heard here at this conference assumes that we are dealing with the first kind and not the second. I believe, however, that they are now inextricably intertwined, with the illegitimate second kind getting a free ride on the soft innocuous appeal of the first.

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Wherever there is organized opposition to new pipelines, mines, railroads, manufacturing plants, container terminals, or tree cutting, to mention just a few examples, the opponents repeat the mantra that such projects must obtain social licence or else they must not be allowed.

No one, however, seems to be able to answer a few basic questions about the need for such a licence.

What, for instance, is the address to which you need to write to obtain it? What form must be used? Who are the authorities entitled to decide if your application meets the rules and to whom are they accountable? In fact, what are the rules? What are the procedures followed in determining if you satisfy them? What appeal procedures exist if a project proponent feels their project has not been fairly assessed?

If you're like most people, these questions will bring a smile to your lips, because you and I both know that there are no answers to these questions. Indeed to ask them is to invite ridicule from the social licence advocates, who will say that to ask such questions shows that you just don't get it.

And yet these are not silly questions. On the contrary they go right to the heart of how a democratic society that lives under the rule of law operates.

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?

Change always creates winners and losers. That is why we hedge economic development with many restrictions and requirements, including the need to consult and compensate people whose legitimate interests may be damaged, including, properly, Aboriginal peoples. We must minimize any unavoidable harms to the greatest extent possible. We also must meet the highest environmental standards while seeking to maintain the consent of the population. But we have to balance the harm created against the benefits that development may create in terms of jobs, business, investment, and opportunity.

When the benefits are judged to outweigh the costs, every society must have ways to allow a decision to be made to proceed, even in the face of opposition. But we don't just allow those who benefit to ride roughshod over their opponents.

In a civilized society we create numerous institutions that are domiciled at known addresses and are given specific authority to examine impartially the issues that are raised according to known rules, outfits like the National Energy Board (NEB) or various environmental assessment agencies.

And the standard we appeal to when such tribunals make their rulings is not whether we have won over the determined opponents of individual projects. Rather we appeal to the standard of winning over the *average reasonable person* or what Lord Denning, a famous British judge immortalized as the "man on the Clapham omnibus." What Lord Denning meant here is not something obscure, but the standard by which legal decisions are always measured, namely what an average reasonable person would conclude if he or she were in possession of all the relevant facts and arguments, which is what a legal proceeding is designed to elicit.

That is precisely the purpose of the regulatory and administrative proceedings we undertake through the NEB and other similar evaluation processes: to create a fair setting where all relevant information is gathered and independent and disinterested commissioners ask themselves what a reasonable person would conclude about the balance between the costs and benefits of the project before them.

Moreover, administrative tribunals such as the NEB, Canadian Nuclear Safety Commission, environmental assessment panels, and others apply laws they have not themselves made, but that are determined by

legislators. These boards and commissions are accountable to the governments that appoint them as well as to the courts, to whom aggrieved parties may appeal when they think the rules have been broken. The legislators who pass the laws creating these agencies must submit themselves periodically to the verdict of the voters.

The rules generally require public consultations of some kind and compensation for damaged interests. The NEB recently granted a permit to the Northern Gateway pipeline, subject to 209 conditions designed to respond to rising expectations around the stringency of approvals for such major developments.

Smart developers want local support for their plans. Politicians want development that wins public support rather than alienates voters. These institutions I am describing help to achieve this.

It is under this painstakingly built up institutional edifice that many of the great nation-building decisions of Canada have occurred in the teeth of opposition: the building of canals, the railways, the first pan-Canadian pipelines, highways, and more.

Sometimes mistakes are made and there are consequences, such as the way the great Pipeline Debate sowed the seeds of the defeat of the St. Laurent government in the 1950s. We are always revising the rules as we learn more about public expectations, innovative technologies, risks, and opportunities. In other words these are the procedures by which our society has decided such painful but necessary decisions shall be made, both because they make progress possible and because they treat all the parties fairly. If this, plus sensible risk-management by proponents and governments, is what is meant by “social licence”, who can object? Ordinary reasonable people want to be reassured that the properly constituted authorities – including companies – are applying reasonable standards in making such momentous decisions.

The proponents of full-blooded “social licence”, however, sneeringly dismiss this as mere legalism. According to them, some abstract and ill-defined entity called “society,” independent of legislatures, regulators, and courts, must be satisfied or else it is illegitimate to build the mine or the pipeline or the plant.

But as I hope I have made clear, these claims don’t just constitute an attack on the rule of law thanks to their lack of due process and natural justice. They also constitute an attack on democracy, because they don’t just attempt to intimidate legitimate political and regulatory institutions, operating within the democratic rules of our society, who are called upon to make such difficult decisions. They refuse to recognize the fundamental legitimacy of those institutions. Unless those institutions come to the same conclusion that they do about individual projects, their work is to be discarded and indeed denigrated as obviously the work of the hand puppets of rapacious capitalism.

There is nothing undemocratic about saying that you think the processes used to make such decisions ought to be changed, and submitting your ideas to political parties and the voters. It is entirely legitimate to go to court to question whether the law is being correctly, fairly, and properly applied. It is equally democratic to voice your displeasure about proposed projects, to demonstrate against them, or to threaten politicians with a loss of support if they go ahead. That is all fair game and that is part of the process by which politicians get feedback about how the rules should be framed and what is publicly acceptable.

It is wholly undemocratic, however, to say that you simply disregard the decisions of duly constituted constitutional and democratic authority as without merit or foundation, as if your views are the only ones that deserve to be heard or taken account of.

The recent BC election was a good example of how the process should work, although as you will see shortly I have reservations too about the position of the government that was elected regarding the pipeline approval process.

The Liberal government campaigned on the notion that there were conditions under which pipeline projects should go ahead. The NDP started out with a nuanced position and then the leader of the party, Adrian Dix, decided to go full bore after the anti-development vote by opposing not only Northern Gateway but also the expansion of the Kinder Morgan pipeline to Burnaby. Most observers see that as the campaign's turning point. The Liberals went on to win re-election with, I think it is fair to say, a reasoned pro-development policy.

But undaunted, the anti-project people in BC still rally under the banner of social licence because, after all, what's the mere rule of law and democracy compared to your sense of your own righteousness? And so you get, to take just one example, the municipal government of Burnaby refusing to cooperate with the efforts to proceed with the legally-constituted Kinder Morgan approval process despite having no jurisdiction in the matter.

What the proponents of social licence outside the institutional framework I've described really mean to say is that change must be approved by its opponents, who decide whether "social licence" has been achieved, while its absence is allegedly demonstrated by angry media releases or hand-lettered signs waved on the evening news. This is why at the outset of my talk I equated some forms of social licence with mob rule.

Increasingly, therefore, "social licence" ought properly to be called "opponents' permission". And a moment's thought reveals why such open-ended, undefined, biased, undemocratic, and unaccountable tests can never be the basis on which civilized societies make such decisions.

Mentioning Burnaby and BC in the context of the "social licence" discussion brings me to a different aspect of the issue I can only touch on lightly, and that is the argument that people far away shouldn't have an important say on decisions that have a differential impact on locals, and therefore that social licence is something that must be conferred by those who have the most at stake. Moreover if the economic benefits are to be enjoyed more by the "far away" than by the locals, that licence's extortion of the far-away interests or "social licence" will not be forthcoming.

If the argument is that those who benefit must pay all the costs of their projects, including of the highest standards of environmental protection and of any clean-up required by a failure of those protections, and compensation for legitimate interests damaged, I think I scarcely need to say that such things are the hallmarks of a civilized society and can and must be done. But again these things must be determined by an independent and evidence-based process, not on the basis of orchestrated and exaggerated fear and emotion. And indeed in the case of Northern Gateway, that is precisely what many of the 209 conditions I mentioned are designed to ensure: that the project has confronted all these issues and has offered reasoned and reasonable answers to the foreseeable risks and dangers the project gives rise to.

Once these legitimate claims are recognized and honoured, however, vital national projects cannot be held hostage to every grasping local interest. The Saint Lawrence Seaway benefits some communities hugely, others not at all, for yet others it is a nuisance, and some communities were even submerged to make way for it. Railways pass through hundreds of communities in Canada where they never stop, and yet those communities run the risk of noise pollution, collisions, and catastrophic spills of chemicals and other toxic substances. People who live next to airports are surely inconvenienced by the noise and traffic.

But we don't allow provinces or communities or disaffected groups to throw up customs booths at their borders and collect taxes to allow them to get what they judge to be their "fair share" of other people's goods as they pass through or to prevent them from carrying on their lawful activities.

That's what countries too often do to each other and the result is the collective impoverishment of the world and we are busily engaged in a massive effort to try and tear down those barriers so that other countries cannot object to the importation of our goods and services on the grounds that such transactions benefit

Canadians more than the citizens of those other places. We rightly regard it as a great victory for Canada that we have just negotiated a free trade agreement with the EU, for example, that will prevent local European industries and politicians from obstructing access to their markets for Canadian products, claiming that Canadians have not been granted “social licence” to threaten local livelihoods.

Domestically this is exactly what Canada was supposed to prevent. In 1867 we created a national government and parliament to represent all Canadians and to make decisions in the national interest, over and above the interests of individual provinces or groups.

We empowered that government to create, for example, infrastructure of national significance, in defiance of petty local interests trying to extort booty from other regions. Manitoba, for instance, didn’t have the power to stop the CPR from crossing its territory until it got its “fair share” of the wealth that would be created. Ottawa could do it without provincial consent and had that power for a very good reason: the railway doesn’t cross Manitoba or BC or Quebec. It crosses Canada. Ditto with pipelines, air travel, and a host of other things.

There are certainly those who think that every transaction, including building the infrastructure to open up the oil sands, should somehow be subject to a local cost-benefit calculation carried out by local communities or even the provincial government. In this view, a pipeline comes from Alberta and passes through BC or Ontario.

Legally, constitutionally, and economically, however, as soon as it crosses a provincial boundary, it ceases to be a provincial matter; it goes from one part of Canada to another. Ottawa makes the rules, in this case mostly through the National Energy Board, and generally very sound rules they are, too. The residents of every province are well represented in the parliament that is constitutionally, legally, and democratically entitled to make these decisions.

Some may want to make the case that specific communities or provinces get shortchanged in the benefits generated by individual projects. That is a legitimate political position. But holding up projects that benefit the whole country simply because you think you haven’t got your “fair share”, whatever that is, is the precise logic of protectionists and NIMBYists everywhere: that unless each transaction can demonstrably be shown to benefit us more than other parties to the transaction we will block it – not because blocking it will help us, but because we would rather all be poor together than to see anyone else get ahead.

BC already benefits from the national approach that disgorges the wealth of western Canada at the Port of Vancouver, creating prosperity and thousands of jobs. It will benefit from that same national approach when the time comes to ship its Peace River natural gas to Alberta to fuel the oil sands extraction process. Saskatchewan and Manitoba benefit disproportionately from the physical and institutional infrastructure on which a great agricultural economy is based. Ontario benefits disproportionately from various national standards and projects around manufacturing, banking, a third crossing to Detroit, subsidies to electric transmission across Northern Ontario, and many more instances I could adduce.

In fact this whole discussion puts me in mind of a story. Some of you may recall that during the first Quebec referendum campaign in 1980, some genius in the nationalist campaign did a quick calculation and discovered that railway spending per capita in Saskatchewan was vastly higher than railway spending per capita in Quebec and this was advanced as evidence that Canada and federalism were not in Quebec’s interests and an independent Quebec would eliminate this gross discrimination in favour of the rest of Canada at Quebec’s expense.

The counter to this, which made the absurdity of the whole argument become immediately apparent, was to reverse the calculation. The federalist side pointed out that landlocked Saskatchewan got essentially zero per capita spending on ports, whereas Quebec – a maritime province with the second largest port in Canada in

Montreal, and smaller ports all up and down the Saint Lawrence, plus the benefit of the outflow of the Saint Lawrence Seaway that opened Great Lakes maritime traffic to the Atlantic – benefited hugely and disproportionately from such spending.

The “discrimination”, first against Quebec, then against Saskatchewan, was in fact nothing of the sort in either case. It is not discrimination to treat people or communities differently on the basis of their fundamental characteristics. At the time, Saskatchewan’s grain economy depended on a vast array of small branch lines serving various grain elevators. Their need was for railways. Quebec, the commercial empire of the Saint Lawrence, needed port and navigation facilities. Both got what they needed. But of course if you asked Quebecers whether high rail spending in Saskatchewan was “in their interests”, they might well have said no; certainly the PQ hoped to turn it into a potent referendum argument.

In all these cases benefits that flow to identifiable regions vastly outweigh those to some or all the other regions in the country. To which the only possible response is: So what? That is what we created Canada to make possible. It is not a drawback of Confederation. It is its purpose.



About the Author

BRIAN LEE CROWLEY

Brian Lee Crowley has headed up the Macdonald-Laurier Institute (MLI) in Ottawa since its inception in March of 2010, coming to the role after a long and distinguished record in the think tank world. He was the founder of the Atlantic Institute for Market Studies (AIMS) in Halifax, one of the country's leading regional think tanks. He is a former Salvatori Fellow at the Heritage Foundation in Washington, DC and is a Senior Fellow at the Galen Institute in Washington. In addition, he advises several think tanks in Canada, France, and Nigeria.

Crowley has published numerous books, most recently *Northern Light: Lessons for America from Canada's Fiscal Fix*, which he co-authored with Robert P. Murphy and Niels Veldhuis and two bestsellers: *Fearful Symmetry: the fall and rise of Canada's founding values* (2009) and MLI's first book, *The Canadian Century; Moving Out of America's Shadow*, which he co-authored with Jason Clemens and Niels Veldhuis.

Crowley twice won the Sir Antony Fisher Award for excellence in think tank publications for his health care work and in 2011 accepted the award for a third time for MLI's book, *The Canadian Century*.

From 2006–08 Crowley was the Clifford Clark Visiting Economist with the federal Department of Finance. He has also headed the Atlantic Provinces Economic Council (APEC), and has taught politics, economics, and philosophy at various universities in Canada and Europe.

Crowley is a frequent commentator on political and economic issues across all media. He holds degrees from McGill and the London School of Economics, including a doctorate in political economy from the latter.



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As the author Brian Lee Crowley has set out, there is a strong argument that the 21st Century could well be the Canadian Century.

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PETER NICHOLSON, FORMER SENIOR POLICY
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I saw your paper on Senate reform [Beyond Scandal and Patronage] and liked it very much. It was a remarkable and coherent insight – so lacking in this partisan and anger-driven, data-free, a historical debate – and very welcome.

SENATOR HUGH SEGAL, NOVEMBER 25, 2013

Very much enjoyed your presentation this morning. It was first-rate and an excellent way of presenting the options which Canada faces during this period of "choice"... Best regards and keep up the good work.

PRESTON MANNING, PRESIDENT AND CEO,
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