

# *The Rebirth of Social Licence*

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*Canada's energy industry and the agencies that regulate it are suffering a crisis of legitimacy. Both are battered by shifting public opinion, opposition from powerful NGOs, a troubled history with many communities and Indigenous groups, and the actions of political parties that consider opposition to oil and gas projects to be central to their platforms. In such an environment, the concept of social licence to operate, or simply social licence, seems more important than ever to the energy industry. This Article argues, however, that it is not the ability or inability to obtain social licence, as the term is currently used, that will allow the fossil fuel industry to maintain some measure of public good will and to lower municipal and provincial resistance to energy projects. That is because, while social licence has some value as a normative concept, it is functionally meaningless. Not only has the term itself been hollowed out by overuse and*

*fluctuating definitions, but what it represents in popular discourse—a broad public acceptance or approval—is probably not achievable. For too long, the national debate over social licence has obscured the very real concerns over the local impacts of energy projects, and this has eroded the trust and support of communities. This Article proposes that the concept of social licence should be understood as descriptive only, and what should matter instead is what measures companies can take to earn that descriptor. This Article also argues that, in order to obtain acceptance from local and community groups and thus to obtain social licence, Canadian energy companies should follow the lead of companies in other jurisdictions and employ community agreements to demonstrate their commitment to responsible resource development and to earn local buy-in for projects.*

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*Une crise de légitimité pèse sur l'industrie canadienne de l'énergie et les organismes qui la réglementent. Tous deux sont bouleversés par l'opinion publique changeante, l'opposition d'ONG puissantes, un passé trouble avec de nombreuses communautés et des groupes autochtones, et les actions de partis politiques qui placent l'opposition aux projets pétroliers et gaziers au centre de leur plateforme. Dans ce contexte, le concept d'acceptabilité sociale (« permis social ») semble plus important que jamais pour l'industrie énergétique. Cet article soutient toutefois que ce n'est pas la capacité ou l'incapacité à obtenir l'acceptabilité sociale, tel que le concept est actuellement utilisé, qui permettra à l'industrie des combustibles fossiles de maintenir une opinion publique lui étant relativement favorable et de réduire la résistance des municipalités et des provinces aux projets énergétiques. En effet, bien que la notion d'acceptabilité sociale ait une certaine valeur normative, elle est futile sur le plan fonctionnel. Non seulement l'expression elle-même a été vidée*

*de son sens par sa surutilisation et ses définitions fluctuantes mais, en outre, ce qu'elle représente dans le discours populaire—une large acceptation ou approbation du public—n'est probablement pas réalisable. Depuis trop longtemps, le débat national sur l'acceptabilité sociale occulte les préoccupations très réelles liées aux impacts locaux des projets énergétiques, ce qui érode la confiance et le soutien des communautés. Cet article propose que le concept d'acceptabilité sociale soit compris strictement comme descriptif et que l'accent soit mis sur les mesures que les entreprises peuvent prendre pour obtenir ce descripteur. Cet article soutient également que, pour obtenir l'acceptation des groupes locaux et communautaires, les entreprises canadiennes du secteur de l'énergie devraient suivre l'exemple d'entreprises d'autres juridictions et recourir à des ententes communautaires pour démontrer leur engagement envers l'exploitation responsable des ressources et pour obtenir l'adhésion locale aux projets.*



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## 1. INTRODUCTION

“An idea is like a virus. Resilient. Highly contagious. And even the smallest seed of an idea can grow. It can grow to define or destroy you.”

- *Inception* (Warner Bros. Pictures, 2010)

During a 2016 House of Commons debate over which political party had caused more damage to Canada’s energy industry, Prime Minister Justin Trudeau defended the actions of his government by saying: “We are working very hard right across the country with municipal leaders and with provincial leaders to ensure we are creating the social licence, the oversight, the environmental responsibility, and the partnership with communities to get our resources to market in a responsible way because that is what it takes in the 21st century.”<sup>1</sup> The Prime Minister’s comments reveal how important the idea of social licence has become in Canada, although his comments do not reveal exactly what he believes social licence is. It is apparently something that can be “created,” something that belongs in the same category as oversight, environmental responsibility, and community partnership. Energy companies also often refer to social licence to operate as something they must secure in order to move forward with projects, while environmental groups and others opposed to such projects argue that social

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<sup>1</sup> Jason Fekete, “Will Battle over Energy East Pipeline Threaten National Unity?”, *Ottawa Citizen* (25 January 2016), online: <[ottawacitizen.com/news/national/will-battle-over-energy-east-pipeline-threaten-national-unity](http://ottawacitizen.com/news/national/will-battle-over-energy-east-pipeline-threaten-national-unity)>.

licence acts as a veto, and if energy companies do not have the social licence for a project, that project cannot go forward.<sup>2</sup>

This tension over whether the social licence for particular projects has been obtained from the public is a dangerous distraction from real issues that can and should be addressed. Fossil fuel projects pose a real risk to Canada's efforts to curb its carbon emissions and comply with its Paris Agreement obligations,<sup>3</sup> and more and more communities are resisting both linear projects, like pipelines, and site-specific projects—even when they are renewable, as in the case of wind turbines. At the same time, Canada remains dependent on oil and gas.<sup>4</sup> As an enormous country with a sparse and very diffuse population, Canada uses fossil fuels for transportation, industry, agriculture, heating, and, in some areas, electricity.<sup>5</sup> This is Canada's challenge: to lead the world in tackling climate change, while acknowledging its own dependence on fossil fuels. But while this larger conversation is going on, we should not lose sight of the fact that communities where energy projects are located often experience the most direct impacts of those projects, whether they are environmental, quality-of-life, or both. Indeed, it may be that the unification of aggrieved community (including Indigenous) groups with national and international environmental groups caused the idea of social licence to expand so far beyond its origins.

With so much at stake for communities, social licence as a normative concept—that is, as a proxy for public assent to energy projects—is simply no longer good enough. This is not just an argument about the vagueness of the term itself.<sup>6</sup> Indeed, this Article argues that no new

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<sup>2</sup> There has even been at least one conference on social licence where the first question posed to participants was whether social licence is even real (they agreed that it is). See Mark Lowey, "Is Social Licence a Licence to Stall?" (March 2016) at 1, online (pdf): *The School of Public Policy, University of Calgary, SPP Research Papers* <[www.policyschool.ca/wp-content/uploads/2016/03/social-licence-loweyfinal.pdf](http://www.policyschool.ca/wp-content/uploads/2016/03/social-licence-loweyfinal.pdf)>.

<sup>3</sup> Canada has set its nationally determined contributions (NDCs) to the Paris Agreement in the Pan-Canadian Framework on Clean Growth and Climate Change. These NDCs include setting a price on carbon, phasing out coal-fired power plants, revising fuel efficiency standards for vehicles, and reducing emissions from industry, including the oil and gas sector. See Canada's 2017 Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change, online: <[www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada First/Canada First NDC-Revised submission 2017-05-11.pdf](http://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf)>.

<sup>4</sup> Canada is the world's third largest consumer of oil, mainly due to transportation demand. See Natural Resources Canada, "Market Snapshot: Why Do Canadians Use So Much Oil?" (24 January 2018), online: <[www.nrb-one.gc.ca/nrg/ntgrtd/mrkt/snpst/2018/01-04whdcndnssl-eng.html?=&wbdisable=true](http://www.nrb-one.gc.ca/nrg/ntgrtd/mrkt/snpst/2018/01-04whdcndnssl-eng.html?=&wbdisable=true)>.

<sup>5</sup> *Ibid.*

<sup>6</sup> See e.g. Nigel Bankes, "The Social Licence to Operate: Mind the Gap" (24 June 2015), online (blog): *ABlawg* <[ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/](http://ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/)> [Bankes, "Mind the Gap"]. This definitional problem surrounding social licence also exists in other contexts, such as mining (where the term originated). See John R Owen & Deanna Kemp, "Social Licence and Mining: A Critical Perspective" (2012) 38:29 *Resources Policy* 30 (note that this Article is narrowly focused on the use of the term "social licence to operate" in the context of energy projects in Canada and their local impacts; it does not touch on the very rich but much more expansive literature on social licence, which includes religious expression of employees, international Indigenous sovereignty, corporate legitimacy and corporate social responsibility [including stakeholder theory], behavioural economics, and more). See e.g. Jinhua Cui, Hoje Jo & Manuel G Velasquez, "Community Religion, Employees, and the Social License to Operate" (2016) 136 *J Bus Ethics* 775; Jennifer Noel Costanza, "Mining Conflict and the Politics of Obtaining

*normative* definition is needed, because “social licence” has become functionally meaningless in a normative capacity, and no amount of reframing or reanalyzing is likely to change that. However, many of the ideas that social licence was originally understood to capture are still relevant—they have simply become subsumed by a controversial term. While energy companies and their opponents argue over whether or not social licence for a particular project has truly been obtained, real questions about community participation and the distribution of benefits and burdens may be slipping through the cracks. As a result, energy projects remain controversial, and people are right to be concerned about the impacts of these projects on communities. While it is true that energy projects can have positive local impacts, the negative impacts have yet to be addressed to the satisfaction of many communities.<sup>7</sup>

To address this gap, the industry’s focus should be returned to the issue of local impacts and obtaining the cooperation of communities: the original goal of social licence.<sup>8</sup> Regulations are generally not flexible enough to accommodate the unique concerns of communities as a whole surrounding each project, leaving some communities feeling unprotected, which may in turn lead to resistance and litigation (and arguments over whether the project has obtained social licence).<sup>9</sup> Canada has fallen behind in creative solutions to these problems, but in other jurisdictions, there has been a proliferation of different kinds of agreements between industry and communities, addressing a host of issues from environmental concerns to local hiring practices.<sup>10</sup>

There is also evidence that these agreements do in fact reduce the number of citizen questions and complaints to energy regulators.<sup>11</sup> This indicates that, unlike the normative conceptualization of social licence, community agreements actually do represent meaningful

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a Social License: Insight from Guatemala” (2016) 79 *World Development* 97; John Morrison, *The Social License: How to Keep Your Organization Legitimate* (UK: Palgrave Macmillan, 2014); Kathleen M Wilburn & Ralph Wilburn, “Achieving Social Licence to Operate Using Stakeholder Theory” (2011) 4:2 *J Intl Bus Ethics* 3.

<sup>7</sup> Burnaby, British Columbia is a notable example in its resistance to the Trans Mountain Expansion, but there are others: landowners along a pipeline from Fox Creek, Alberta to Edmonton pushed to negotiate with a pipeline company, and communities in Ontario have protested wind farms. See Sheila Pratt, “Landowners Negotiate Together on Fox Creek to Edmonton Pipeline Project”, *Edmonton Journal* (25 October 2015), online: <[edmontonjournal.com/business/energy/landowners-negotiate-together-on-fox-creek-to-edmonton-pipeline-project](http://edmontonjournal.com/business/energy/landowners-negotiate-together-on-fox-creek-to-edmonton-pipeline-project)>.

<sup>8</sup> See Jim Cooney, “Reflections on the 20th Anniversary of the Term ‘Social Licence’” (2017) 35:2 *J Energy & Resources L* 197.

<sup>9</sup> See e.g. Lesley Matthews, *How to Restore Public Trust and Credibility at the National Energy Board*, C.D. Howe Institute Commentary No. 479 (May 2017) at 7, 17–18 (examining the effectiveness of the NEB and critiquing, among other things, the public participation provisions); Natural Resources Canada, *supra* note 4.

<sup>10</sup> See e.g. Kristen van de Biezenbos, “Contracted Fracking” (2018) 92 *Tul L Rev* 587.

<sup>11</sup> See e.g. Chad Walker & Jamie Baxter, “It’s Easy to Throw Rocks at a Corporation: Wind Energy Development and Distributive Justice in Canada” (2017) 19:6 *J Envtl Pol’y & Planning* 754 (on the much warmer reception to wind farms in Nova Scotia, where wind developers have been more engaged in including communities in planning and sharing benefits than developers in Ontario); there is also research in the context of Impact and Benefits Agreements between Indigenous communities and energy and mining companies. See Ontario Wind Resistance, online: <<http://ontario-wind-resistance.org/>>; Heather Sonoran, “The Fight against a Controversial Wind Turbine Project in Prince Edward

public assent to energy projects, albeit assent from a specific segment of the public: communities. More importantly for the purposes of this Article, this kind of assent does, in fact, constitute social licence in its descriptive sense.<sup>12</sup> However, restoring meaning to the term social licence in order to obtain the approval of broader swaths of the public is not necessary because, as will be discussed more fully herein, non-local groups have alternatives in expressing their support or lack thereof for particular projects. This Article aims to contribute to the literature on the equitable allocation of benefits and burdens between communities and project proponents, but it is also intended to be of practical use to policy makers and energy companies.

First, this Article will track the evolution of the concept of social licence, and in particular explore how a descriptive term that emerged less than forty years ago has become so central to today's debates over energy projects. The importance of obtaining community assent for energy projects, as well as the inadequacy of normative social licence to accomplish this, will also be discussed. Second, this Article will review the different kinds of community agreements, which are increasingly being used to bolster trust and apportion benefits between industry and communities. Third, and finally, I argue that at least one Canadian province, Alberta, already has a regulatory structure in place that allows for the integration of community agreements into the permitting process, which could provide an avenue to not only restoring trust between local groups and industry, but also between citizens and regulatory agencies.

## 2. THE EVOLUTION OF SOCIAL LICENCE AS A NORMATIVE CONCEPT

In order to understand the swift rise of the importance of social licence in the Canadian energy sector,<sup>13</sup> it is important to discuss the origins of the idea and its subsequent evolution. Social licence has been defined (although, as this section will explore, there is no single definition) as the “social approval of those affected by a certain business activity.”<sup>14</sup> Put another way, as Professor Bankes has observed, the term is made up of both the “social” aspect, referring to a society or community, and the “licence” aspect, which refers to “consent or permission”.<sup>15</sup> He also notes that the term itself implies that the consent from the particular societal community group is in some sense required, but because social licence is extra-legal, its requisite nature must arise from some source besides law.<sup>16</sup> This idea is explored further below.

Social licence is one of a number of concepts that address the social concerns surrounding certain regulated activities, including banking, insurance, mining, forestry, and, most relevant to this Article, energy extraction, generation, and transportation.<sup>17</sup> Those other concepts

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County Continues”, *Global News* (19 September 2017), online: <globalnews.ca/news/3757121/the-fight-against-a-controversial-wind-turbine-project-in-prince-edward-county-continues/>.

<sup>12</sup> See Cooney, *supra* note 8, and the discussion in Part 3.1, *below*.

<sup>13</sup> As discussed in more detail in this section, the term “social licence to operate” originally referred to community engagement strategies by mining companies operating abroad. This Article is more narrowly focused on the way social licence is used and understood (or not) in Canada.

<sup>14</sup> Domènec Melé & Jaume Armengou, “Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate: A Case Study” (2015) 136 *J Bus Ethics* 729 at 729.

<sup>15</sup> See Bankes, “Mind the Gap”, *supra* note 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> See e.g. Melé & Armengou, *supra* note 14 at 730. See also Sara L Seck, Book Review of *Corporate Social Responsibility: A Legal Analysis* by Michael Kerr, Richard Janda & Chip Pitts, (2010) 49 *Canadian Bus LJ*



include corporate social responsibility, private environmental governance, and stakeholder relations.<sup>18</sup> But, unlike those other concepts, social licence has become a powerful rhetorical tool in public debate over controversial projects, used by energy companies and politicians alike to suggest that certain projects and initiatives have earned popular approval.<sup>19</sup> It is then used in turn by those opposed to such projects or initiatives, who will argue that social licence has, in fact, not been obtained.<sup>20</sup> Part of the problem is that the term “social licence” has defied a single definition, leading some to describe it as a “mythical beast” that “remains elusive.”<sup>21</sup> This section turns to the history of social licence to understand how it evolved from a descriptive term to an “inviolable principle” in Canadian energy law—the normative version of social licence that this Article argues should be put to rest.<sup>22</sup>

### 2.1. IN THE BEGINNING: MINING COMPANIES & RISK MANAGEMENT IN SOUTH AMERICA

In the 1990s, international mining companies operating in South America found themselves in a quandary. On the one hand, national governments were welcoming, encouraging the development of their natural resources and the associated investments, while erecting few legal or regulatory barriers.<sup>23</sup> On the other hand, the mining companies sometimes faced significant resistance from local, often Indigenous, groups.<sup>24</sup> There was usually no law requiring the consent or participation of these groups, yet their resistance did pose economic, security, and logistical challenges for the companies.<sup>25</sup> So, in order to both maintain the legal licence to operate from the national governments and also achieve some acceptance from local groups (and their international supporters), mining companies began to create procedures for negotiating with

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335 (noting that the author of the book in question suggests that corporate social responsibility actually confers the social licence to operate to corporations).

<sup>18</sup> See Michael P Vandenberg, “Private Environmental Governance” (2013) 99 *Cornell L Rev* 129; David Spence, “Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk” (2011) 86 *Chi Kent L Rev* 59.

<sup>19</sup> See Jason MacLean, Meinhard Doelle & Chris Tollefson, “Polyjural and Polycentric Sustainability Assessment: A Once-In-A-Generation Law Reform Opportunity” (2016) 30 *J Envtl L & Prac* 35 at 57; Rob Mariani, “Social Licence is not Dead”, *iPolitics* (12 June 2018), online: <[ipolitics.ca/2018/06/12/op-ed-social-license-is-not-dead/](http://ipolitics.ca/2018/06/12/op-ed-social-license-is-not-dead/)>.

<sup>20</sup> Social licence is also frequently conflated with the duty to consult Indigenous groups. See Jeffrey Simpson, “Define ‘Consultation’ and ‘Social Licence’”, *The Globe and Mail* (22 October 2014), online: <[www.theglobeandmail.com/opinion/define-consultation-and-social-licence/article21199386/](http://www.theglobeandmail.com/opinion/define-consultation-and-social-licence/article21199386/)>.

<sup>21</sup> Lowey, *supra* note 2 at 4.

<sup>22</sup> See Cooney, *supra* note 8 at 197; Bankes, “Mind the Gap”, *supra* note 6 (Professor Bankes also notes that the term is often used both descriptively *and* normatively).

<sup>23</sup> See Cooney, *supra* note 8 at 197; Bankes, “Mind the Gap”, *supra* note 6.

<sup>24</sup> See Cooney, *supra* note 8 at 197; Bankes, “Mind the Gap”, *supra* note 6.

<sup>25</sup> See Cooney, *supra* note 8 at 197; Bankes, “Mind the Gap”, *supra* note 6. See also John Dowling & Jeffrey Pfeffer, “Organizational Legitimacy: Social Values and Organizational Behavior” (1975) 18:1 *Pacific Sociological Rev* 122 at 123 (it is possible that these companies were also driven by what some have called the legitimacy theory, which posits that corporations seek to act in congruence with the values and norms of the society in which they are situated).

local groups and communities to provide information, assurances, and benefits in order to obtain what mining executive Jim Cooney would later call the social licence to operate.<sup>26</sup>

This two-track process would allow mining projects to maintain approval at both the national level (the legal licence) and the local level (the social licence).<sup>27</sup> As Cooney explains, he used the term “social licence” instead of “community permit” because, while the concept was deliberately meant to mirror the legal licence required to commence mining projects, the word “social” was “nebulous” enough to indicate that this form of licence was not always granted by way of local legal processes.<sup>28</sup> But Cooney had no idea how the term he created to describe what he believed mining companies should do would evolve.<sup>29</sup> Indeed, two months after Cooney first used the term at an international mining conference, social licence was being used by his contemporaries in a variety of contexts, and within two decades, the term had morphed into “a prescriptive norm that mining companies should endeavour to achieve.”<sup>30</sup>

## 2.2. SOCIAL LICENCE TAKES FLIGHT: FROM METAPHOR TO MANDATE

Social licence was originally intended to describe an approach to establishing positive community relations in countries with an underdeveloped rule of law, but it began to take on a broader, more normative cloak when it moved into the context of Western democracies with highly developed natural resource sectors.<sup>31</sup> At first blush, this development seems unexpected. Why would countries with a strong rule of law need something like social licence to gain local and community approval? And yet, social licence has become so prevalent an idea in Canada that even the Prime Minister emphasizes the need for social licence in support of the government’s carbon pricing plans.<sup>32</sup> One explanation for this might be the greater power of community groups, neighbourhood associations, and non-governmental organizations (NGOs), especially environmental advocacy groups, in these countries.<sup>33</sup> Generally speaking, a strong civil society is able to exert significant pressure on unpopular energy projects, and the concept of social licence worked for both communities and project proponents because of its signalling power: when a project proponent was able to claim social licence, it served to indicate the project’s acceptance or approval by those community groups.<sup>34</sup>

Yet another possible explanation for the rise of social licence in Canada is the formation of alliances between Indigenous groups and environmental groups, both national and

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<sup>26</sup> Cooney, *supra* note 8 at 198–99. See also Kieran Moffett & Airong Zhang, “Exploring the Origins of ‘Social License to Operate’ in the Mining Sector: Perspectives from Governance and Sustainability Theories” (2012) 37:3 Resources Policy 346 at 347–54.

<sup>27</sup> Cooney, *supra* note 8.

<sup>28</sup> *Ibid* at 199.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at 200.

<sup>31</sup> See Bankes, “Mind the Gap”, *supra* note 6.

<sup>32</sup> See Fekete, *supra* note 1.

<sup>33</sup> See e.g. Neil Gunningham, Robert A Kagan & Dorothy Thornton, “Social License and Environmental Protection: Why Businesses Go Beyond Compliance” (2006) 29:2 Law & Soc Inq 307 at 308.

<sup>34</sup> See *ibid* at 309.

international.<sup>35</sup> By combining the concerns of local groups with larger organizations, the reasons for protesting energy projects became more divorced from community-based concerns. In response, energy companies began to seek a social licence that would meet, in some way, the demands of both the local and the national. Thus, social licence grew to encompass the steps taken by large natural resources companies—including oil & gas firms—to respond to the demands of these powerful new alliances, to “meet the expectations of society and avoid activities that societies (or influential elements within them) deem unacceptable.”<sup>36</sup> And, because of the power these alliances wield in Western countries like Canada, addressing their concerns to prevent retaliation (whether economic or political) has become necessary as opposed to discretionary.<sup>37</sup> There is also a sense that the law is often too slow to reflect shifting attitudes about certain projects and industries, while social licence reflects those shifts more accurately.<sup>38</sup>

In some cases, what the community wants is unrelated to economic impacts or local health or safety needs, but it is key to local acceptance. For example, paper mill owners in the United States have voluntarily undertaken measures at their facilities such as odour control, water tinting, and steam suppression to appease the nearby communities.<sup>39</sup> As one mill owner said, “we wanted to be a good neighbour; it’s the local stakeholders that give us the right to operate.”<sup>40</sup> Or, as Prime Minister Justin Trudeau has said, “[g]overnments may be able to issue permits, but only communities can grant permission.”<sup>41</sup> Many of the industry concerns that social licence is able to address are thus reputational; it offers benefits beyond what strict legal compliance can confer.<sup>42</sup> This may explain why social licence became so important to Canada’s oil and gas industry (and its opponents) so quickly. Avoiding boycotts and other

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<sup>35</sup> Sean Kheraj, “The Complicated History of Building Pipelines in Canada”, *Maclean’s* (31 May 2018), online: <[www.macleans.ca/news/canada/the-complicated-history-of-building-pipelines-in-canada/](http://www.macleans.ca/news/canada/the-complicated-history-of-building-pipelines-in-canada/)>. Note that the reasons why an Indigenous group might partner with an environmental group are diverse. Certainly, it may be because the group has environmental concerns over projects on reserve or claimed land, but it could also be more of an alliance of necessity from the Indigenous perspective: sometimes what Indigenous groups want is more control of or participation in a particular project, and partnering with national and international groups can provide a greater public platform to express these concerns. See Darren J Ranco, “The Ecological Indian and the Politics of Representation: Critiquing the Ecological Indian in the Age of Ecocide” in *Native Americans and the Environment* (Lincoln: University of Nebraska Press, 2007) at 37–38 (noting that the idea of Indigenous people as environmentalists by culture is based on Western stereotypes).

<sup>36</sup> Gunningham, Kagan & Thornton, *supra* note 33 at 308.

<sup>37</sup> See Joel Gehman, Lianne M Lefsrud & Stewart Fast, “Social License to Operate: Legitimacy by Another Name?” (2017) 60:2 *Can Public Administration* 293 (varieties of social licence at 294–301).

<sup>38</sup> Gunningham, Kagan & Thornton, *supra* note 33 at 318.

<sup>39</sup> *Ibid* at 318–19.

<sup>40</sup> *Ibid* at 319.

<sup>41</sup> Jesse Snyder, “‘Not Even on the Radar Screen’: Why Big Oil Has Abandoned Canada’s Once-Promising Energy Industry”, *Financial Post* (4 June 2018), online: <[business.financialpost.com/commodities/not-even-on-the-radar-screen-why-big-oil-has-abandoned-canadas-once-promising-energy-industry](http://business.financialpost.com/commodities/not-even-on-the-radar-screen-why-big-oil-has-abandoned-canadas-once-promising-energy-industry)>.

<sup>42</sup> Alison Moodie, “The World’s Most Hated Company: Can NGOs Help Turn Shell’s Reputation Around?”, *The Guardian* (6 February 2016), online: <[www.theguardian.com/sustainable-business/2016/feb/06/most-hated-company-shell-oil-carbon-fuels-ngo-greenpeace-sigwatch-nestle-mcdonalds](http://www.theguardian.com/sustainable-business/2016/feb/06/most-hated-company-shell-oil-carbon-fuels-ngo-greenpeace-sigwatch-nestle-mcdonalds)>.

forms of negative publicity are major concerns of the energy industry, as a poor public image can discourage investment and drive up costs.<sup>43</sup>

Energy companies face significant challenges from environmental groups, “not in my backyard” or NIMBY concerned landowners, Indigenous communities and groups, as well as the Canadian public’s growing concerns over the industry’s contribution to climate change.<sup>44</sup> At the same time, these same companies continue to emphasize the oil and gas industry’s importance to the national and provincial economies.<sup>45</sup> This makes social licence a powerful and attractive tool for these companies, since the considerable efforts needed to obtain the requisite provincial and local permits may assure the relevant government that a particular project is in the best interests of the nation or province and meets the applicable standards, but obtaining those permits may do little or nothing to move the needle of public opinion.<sup>46</sup> Social licence offers a tantalizing way to win the ever-elusive war for the people’s approval.<sup>47</sup>

However, this is when the vagueness of the term bites back. Companies may take measures to respond to what they perceive national, provincial, and local concerns to be, and in doing so they (or their supporters) may claim that they have acquired the social licence to operate.<sup>48</sup> After all, social licence has no definition or objective criteria, so the company is not clearly wrong when it says that it has acquired the social licence.<sup>49</sup> However, opponents of these companies or particular projects are equally able to argue, no matter what a company may say or do, that they have not earned social licence for their projects.<sup>50</sup> Their proof of this may simply be the fact that some opposition remains, in spite of the steps a company has taken to win popular support.<sup>51</sup> Further complicating matters is the fact that some groups are fundamentally opposed to certain energy projects, which means that if one accepts their

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<sup>43</sup> Shawn McCarthy, “Alberta’s Oil Sands Take a Hit as Scientists, Academics Call for Halt to Development”, *The Globe and Mail* (10 June 2015), online: <[www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/scientists-academics-call-for-halt-to-further-oil-sands-development/article24895667/](http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/scientists-academics-call-for-halt-to-further-oil-sands-development/article24895667/)>. See also Spence, *supra* note 18.

<sup>44</sup> See Peter Forrester, Kent Howie & Alan Rosse, “Energy Superpower in Waiting: New Pipeline Development in Canada, Social Licence, and Recent Federal Energy Reforms” (2015) 53:2 *Alta L Rev* 419 at 429–30.

<sup>45</sup> See Canadian Association of Petroleum Producers, “Canadian Economic Contribution”, online: <[www.capp.ca/canadian-oil-and-natural-gas/canadian-economic-contribution](http://www.capp.ca/canadian-oil-and-natural-gas/canadian-economic-contribution)>.

<sup>46</sup> See Forrester, Howie & Rosse, *supra* note 44 at 426.

<sup>47</sup> In a 2014 survey of Western Canadians, “Only 20% of respondents trust the energy industry (and that is because of perceived economic contribution), but almost half distrust the industry because it is perceived as being motivated solely by financial gains.” See “Western Canadians Support Oil and Gas Expansion, but Demand More from Industry”, *Calgary Herald* (18 July 2014), online: <[calgaryherald.com/business/energy/western-canadians-support-oil-and-gas-expansion-but-demand-more-from-industry](http://calgaryherald.com/business/energy/western-canadians-support-oil-and-gas-expansion-but-demand-more-from-industry)>.

<sup>48</sup> See Canada Action, “Trans Mountain Has Social Licence”, (9 June 2017), online: <[www.canadaaction.ca/transmountain\\_sociallicence](http://www.canadaaction.ca/transmountain_sociallicence)>.

<sup>49</sup> See Banks, “Mind the Gap”, *supra* note 6.

<sup>50</sup> See Jen Gerson, “Rise of ‘Social Licence’: Claiming They Speak For Their Community, Protest Groups Are Undermining the Law”, *National Post* (17 October 2014), online: <[nationalpost.com/news/canada/rise-of-social-licence-believing-they-speak-for-their-community-protest-groups-are-undermining-the-law](http://nationalpost.com/news/canada/rise-of-social-licence-believing-they-speak-for-their-community-protest-groups-are-undermining-the-law)>.

<sup>51</sup> *Ibid.*

definition of social licence, certain projects may never gain the social licence to operate, and thus may never legitimately operate at all.

As a result, we end up with oil and gas companies claiming to have acquired social licence, opposing groups arguing that the companies do not have social licence, while directly impacted local groups and communities are being left out of the conversation altogether.

### 2.3. THE BEGINNING OF THE END: SOCIAL LICENCE FOR EVERYTHING

Just as climate change, environmental damage, Indigenous issues, and NGO opposition has battered the reputation of the oil and gas industry in Canada, a lack of public trust has also undermined the credibility of the National Energy Board (NEB) and, possibly, the federal government itself. This loss of trust may have begun during the Harper administration, when the federal government took steps that politicized the interprovincial pipeline approval process, overseen by the NEB.<sup>52</sup> While campaigning prior to the 2015 federal election, the Liberal party's platform included restoring public trust in the environmental impact assessment of energy infrastructure projects, including what seems to be reference to requiring the NEB to ensure that project proponents have secured social licence: "While governments grant permits for resource development, only communities can grant permission."<sup>53</sup>

However, once elected, Prime Minister Justin Trudeau's Liberal government came under fire for backing away from this promise of greater community input, and perhaps even community veto.<sup>54</sup> Instead, Trudeau's government has shifted to using a definition of social licence that emphasizes the approval of the general public over that of impacted communities—possibly in reaction to the difficulty in gaining approval from every community impacted by a linear project like a pipeline, which spans thousands of kilometers.<sup>55</sup> Using the definition of social licence assumed by the Liberals is attractive on its face, since it discards the need for community input and cooperation, but keeps the idea of social licence as a necessary accessory to the legal permits granted by the NEB and provincial agencies. But, as discussed above, social licence is not acquired via an approval poll, and it was never meant to apply to the idea of national support for projects. Furthermore, a national social licence confers no benefits, creates no partnerships, and fails to forge trust between energy project proponents and the affected communities.

An illustration of how sideways things can go for those (mostly politicians) who rely on a national conception of social licence to ease the way for energy projects is the current battle over the Trans Mountain Pipeline Expansion, or TMX. If one thinks of social licence as national public approval for a project, and if one also believes that social licence to operate plus legal permit to build equals success, then one would naturally expect the construction of

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<sup>52</sup> See e.g. Tzeporah Berman, "Harper's Sneaky NEB Act Revisions Violate Our Charter Rights", *Huffington Post* (21 October 2013), online: <[www.huffingtonpost.ca/tzeporah-berman/harpers-neb-act-charter-rights\\_b\\_3792956.html](http://www.huffingtonpost.ca/tzeporah-berman/harpers-neb-act-charter-rights_b_3792956.html)>.

<sup>53</sup> Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 42, online: <[www.liberal.ca/realchange/](http://www.liberal.ca/realchange/)>.

<sup>54</sup> Peter O'Neil, "Federal Government's 'Social Licence' for Pipelines 'Permission' Cuts Out Communities", *Vancouver Sun* (21 September 2016), online: <[vancouversun.com/news/local-news/federal-governments-social-licence-for-pipelines-permission-cuts-out-communities](http://vancouversun.com/news/local-news/federal-governments-social-licence-for-pipelines-permission-cuts-out-communities)>.

<sup>55</sup> *Ibid.*



TMX to be well underway by now. After all, the TMX project earned approval of the necessary federal permits from the NEB, and several opinion polls show that a majority of Canadians support the project, although there are stark geographic differences in opinion.<sup>56</sup>

And yet, TMX has still not been built, as powerful resistance in British Columbia and the city of Burnaby in particular has thus far effectively prevented Kinder Morgan, the project proponent, from starting construction.<sup>57</sup> In fact, the NEB's decision to grant permits for TMX has given rise to several legal challenges, and British Columbia has signalled low confidence in the federal environmental impact assessment process by insisting that it will conduct its own environmental studies of potential spills by heavy bitumen pipelines (the same type of pipeline as TMX).<sup>58</sup> Ultimately, the possibility that Kinder Morgan planned to abandon the project altogether prompted Ottawa to buy the pipeline project itself, with Alberta possibly taking an equity interest.<sup>59</sup>

Thus it would appear that obtaining “national social licence”, even if we assume that TMX did in fact obtain it, did nothing to help Kinder Morgan build or operate its pipeline. Would a community-level social licence have solved Kinder Morgan and the NEB's problem? It would have certainly addressed the problem of consultation, although even if Kinder Morgan were able to get the approval of all of the communities and First Nations along TMX's proposed route, some groups within these communities would certainly still be opposed for various reasons.<sup>60</sup> But as it stands at present, social licence's lack of clear definition means that, even if we could say which group social licence needs to be obtained from, we still do not have a way of determining whether or not social licence has been obtained from them. And, to the

<sup>56</sup> Steven Chase, “Most Canadians Back Pipeline Expansion but Oppose Public Funding: Poll”, *The Globe and Mail* (6 May 2018), online: <[www.theglobeandmail.com/politics/article-most-canadians-back-pipeline-expansion-but-oppose-public-funding-poll/](http://www.theglobeandmail.com/politics/article-most-canadians-back-pipeline-expansion-but-oppose-public-funding-poll/)>; Ipsos, “Majority of Canadians (56%) Support Kinder Morgan Trans Mountain Pipeline Expansion, Including 55% of British Columbians” (3 May 2018), online: <[www.ipsos.com/en-ca/news-polls/Kinder-Morgan-Trans-Mountain-Pipeline-Expansion-Poll-May-3-2018](http://www.ipsos.com/en-ca/news-polls/Kinder-Morgan-Trans-Mountain-Pipeline-Expansion-Poll-May-3-2018)>.

<sup>57</sup> See National Energy Board, Application on the Trans Mountain Expansion Project, A 97-1, Order No. 40 (23 October 2014); Rob Gillies, “Kinder Morgan Announces Suspension of Trans Mountain Expansion”, *The Star* (8 April 2018), online: <[www.thestar.com/news/canada/2018/04/08/kinder-morgan-announces-suspension-of-trans-mountain-expansion.html](http://www.thestar.com/news/canada/2018/04/08/kinder-morgan-announces-suspension-of-trans-mountain-expansion.html)>.

<sup>58</sup> See “B.C. Creates More Uncertainty for Trans Mountain with Bitumen Restriction”, *CBC News* (30 January 2018), online: <[www.cbc.ca/news/canada/british-columbia/b-c-creates-uncertainty-for-transmountain-with-bitumen-restriction-1.4510839](http://www.cbc.ca/news/canada/british-columbia/b-c-creates-uncertainty-for-transmountain-with-bitumen-restriction-1.4510839)>.

<sup>59</sup> See “Alberta Likely to Take Equity Stake in Trans Mountain Pipeline, Notley Says”, *The Canadian Press* (9 July 2018), online: <[www.cbc.ca/news/canada/calgary/trans-mountain-equity-stake-notley-pipeline-stampede-1.4739320](http://www.cbc.ca/news/canada/calgary/trans-mountain-equity-stake-notley-pipeline-stampede-1.4739320)>.

<sup>60</sup> See Fred E Fiedler, Judith Fiedler & Steven Campf, “Who Speaks for the Community?” (1971) 1:4 *J Applied Psychology* 324 (even saying “all of the communities and First Nations” along a particular route is a fudge, since it is not clear how much community buy-in is needed to stand in for the entire group). Similarly, among First Nations, there are often accusations that leaders have said yes to projects even when there are many members in opposition. See Gemma Karstens-Smith, “Trudeau Meets with B.C. Indigenous Body that Helps Pipeline Project ‘Move Forward’”, *The Canadian Press* (5 June 2018), online: <[www.cbc.ca/news/politics/trudeau-pipeline-indigenous-meeting-1.4691843](http://www.cbc.ca/news/politics/trudeau-pipeline-indigenous-meeting-1.4691843)>. Note that the Federal Court of Appeal overturned the NEB's granting of the licence for Trans Mountain because, among other things, it found that Kinder Morgan had not sufficiently consulted with the impacted Indigenous groups along the pipeline's projected route.

extent that normative social licence has become a stand-in for moral legitimacy, it may in fact be impossible to obtain from all stakeholders of a project. Meanwhile, as industry, government, and NGOs fight over whether social licence has been granted or not, communities are still struggling to be heard and have their concerns over local energy projects addressed.<sup>61</sup> This is a strange state of affairs, since this Article argues that it is only communities that can give a project social licence.

### 3. THE REBIRTH OF SOCIAL LICENCE AS MEANINGFUL COMMUNITY ENGAGEMENT

A major reason normative social licence is a dead end for both energy companies and the public is that it attempts to allay the concerns of too many diverse stakeholders, many of whom have vastly different concerns. While there is general opposition to energy projects among women, urban residents, and people who identify as politically liberal, the concerns of communities have more to do with the possible disruption of “place-based identities” due to water and soil contamination and influxes of new workers.<sup>62</sup> The steps that a company might take to address these disparate sets of issues would be very different, and too often in the current context of social licence, the companies end up not succeeding in making anyone happy.<sup>63</sup> It might well be beyond the ability of companies to win social licence from those women, urban residents, and other members of the general Canadian population who oppose their projects for primarily environmental reasons. Then again, these groups may not need the protections of social licence, because they have an even stronger tool: the democratic process.<sup>64</sup> If a politician sides with a controversial energy project, any voter who disagrees with that decision is free to express their displeasure at the ballot box. By contrast, the impact that energy projects can have on communities is far more immediate and potentially disruptive, implicating both social and environmental issues—hence why social licence originally applied only at the local level.<sup>65</sup> Adding to the problem is the fact that communities have very little regulatory power in this area—provinces have primacy over natural resources, yielding to the federal government for interprovincial projects.<sup>66</sup>

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<sup>61</sup> Note that many energy projects, and hydraulic fracturing in particular, are subject to community fears about local impacts that are much greater than the statistical likelihood of such impacts actually occurring, at least in the short term. See David Spence, “The Political Economy of Local Vetoes” (2014) 93 *Tex L Rev* 351.

<sup>62</sup> See Austin Shaffer, Skylar Zilliox & Jessica Smith, “Memoranda of Understanding and the Social Licence to Operate in Colorado’s Unconventional Energy Industry: A Study of Citizen Complaints” (2017) 35 *J Energy & Nat Resources L* 73 at 73.

<sup>63</sup> See *ibid.*

<sup>64</sup> Additionally, people outside the ambit of a particular project’s negative impacts are not likely to be informed on those impacts, and thus will not advocate effectively for their mitigation—indeed, most voters are not particularly well-informed even about issues that impact them directly. See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957) at 259.

<sup>65</sup> See e.g. Cooney, *supra* note 8 at 197.

<sup>66</sup> See generally Martin Z Olszynski, “Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines” *Rev Const Stud (SSRN)* [forthcoming in 2019] (for a good primer on the relationship between provincial and federal regulation of resource and environmental issues).

But normative social licence is one of the weakest tools available to address local and community concerns over energy projects, especially since the term no longer applies only to community assent. This is a particularly bad time for social licence to do as little as it does, since the problem of lack of trust in regulators and project proponents among communities is real, urgent, and deserves a substantive response. The usefulness of a concept like social licence to different parties with different agendas stems, at least in part, from its flexibility. But this is also its Achilles heel, since it cannot be proven, measured, tracked, or enforced.<sup>67</sup> It is even more concerning that social licence, which has become essentially a symbol of public approval, is also treated by many as a *de facto* veto on projects.<sup>68</sup> In this way, social licence may actually endanger the rule of law, since the failure to obtain social licence (and, again, depending on one's definition of social licence, it may in fact be impossible to obtain) has been used as grounds to stop or block projects that have received a legal licence to build and operate.

This is the danger of today's social licence as a normative concept: If it really is society's veto on energy projects, it could be used to halt any project, even if it has otherwise cleared the requisite regulatory hurdles.<sup>69</sup> But social licence should not be seen as a veto on projects, as this would not be consistent with the need to establish a credible regulatory regime that can determine whether a particular project is within our society's best interest or not, a complicated inquiry that considers economic, environmental, and other factors.<sup>70</sup> Social licence as it currently functions does not reflect all of these concerns; it reflects only popular sentiment. We must therefore look beyond social licence to find ways of engaging with communities in meaningful ways. This engagement, along with a re-thinking of how to overhaul energy regulations in order to restore citizen confidence, is key to the future development of Canada's natural resources in a sustainable manner.

### 3.1. NORMATIVE SOCIAL LICENCE IS INSUFFICIENT TO ADDRESS VALID CITIZEN CONCERNS

As originally envisioned, social licence did speak to an important goal, which is that project proponents should seek community input and, if possible, cooperation on projects that directly impact community members.<sup>71</sup> One of the reasons normative social licence should be buried is because it has been asked to do what no single concept can: encompass the social acceptance of every level of society: local to national. Different groups of stakeholders should have avenues for voicing their concerns over projects, but not all concerns are created equal. Some participation mechanisms can be found in the project approval processes themselves, although there are standing issues that should be addressed, or may be addressed in the proposed new environmental impact assessment legislation.<sup>72</sup> But, for directly impacted communities, a

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<sup>67</sup> See Gunningham, Kagan & Thornton, *supra* note 33 at 319–20 (the problem of enforcement of social licence may stem from its voluntary, extra-legal nature).

<sup>68</sup> See Banks, "Mind the Gap", *supra* note 6.

<sup>69</sup> See *ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> See Cooney, *supra* note 8 at 197.

<sup>72</sup> See Kristen van de Biezenbos, "Your Concerns Have Been Noted: Citizen Participation in Pipeline Regulatory Processes Under the Proposed Impact Assessment Act" (28 February 2018), online (blog):



different and perhaps more in-depth conversation with energy project proponents is needed.<sup>73</sup> That is partly because community resistance forms a particularly acute risk for project proponents, as communities can be instrumental in obtaining needed municipal permits, licences, and zoning variances, while their opposition can make doing business difficult and costly.<sup>74</sup>

Concentrating on communities also promotes sustainable development and cuts project delays.<sup>75</sup> Sustainability is a complex issue, and it requires national, provincial, and local responses. Engaging with local and community groups can help to ensure that energy project proponents are working with communities to create long-term, sustainable development plans, while also recognizing that the greatest negative environmental and quality-of-life impacts of these projects are often local: “local communities are often a key arbiter in the process by virtue of their proximity to projects, sensitivity to effects, and ability to affect project outcomes.”<sup>76</sup> These unique local impacts, and the ability of communities to delay projects, are among the reasons why the concept of social licence was developed in the first place.<sup>77</sup> But, while community assent is important, and should be obtained whenever possible, such assent is not a replacement or even an additional requirement to a legal permitting system.

The rest of this Part will look at ways in which local groups and communities can be included in energy project planning and development, and thus how the original ideal of social licence can be restored in the Canadian energy sector. These community agreements have flourished in other jurisdictions like the United States, where social licence has collapsed in certain areas and led to a wave of local bans on certain types of energy projects, especially fracking.<sup>78</sup> The comparative lack of shale development and lower population densities in Canada may partially explain why these agreements have largely not caught on here as of yet, but they offer a way to both ensure that meaningful community engagement has occurred and that a particular project has earned social licence.<sup>79</sup>

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*ABlawg* <[ablawg.ca/2018/02/28/your-concerns-have-been-noted-citizen-participation-in-pipeline-regulatory-processes-under-the-proposed-impact-assessment-act/](http://ablawg.ca/2018/02/28/your-concerns-have-been-noted-citizen-participation-in-pipeline-regulatory-processes-under-the-proposed-impact-assessment-act/)>.

<sup>73</sup> See Shelley Welton, “Grasping for Energy Democracy” (2018) 116 *Mich L Rev* 581 (different ways of increasing community engagement in energy projects are often referred to under the blanket term “energy democracy”).

<sup>74</sup> See Gunningham, Kagan & Thornton, *supra* note 33 at 318–19.

<sup>75</sup> See Jason Prno & D Scott Slocombe, “Exploring the Origins of Social Licence to Operate in the Mining Sector: Perspectives from Governance and Sustainability Theories” (2012) 37:3 *Resources Policy* 346 at 354.

<sup>76</sup> *Ibid* at 347.

<sup>77</sup> See Cooney, *supra* note 8 at 198. See also Prno & Slocombe, *supra* note 75 at 347.

<sup>78</sup> See e.g. van de Biezenbos, “Contracted Fracking”, *supra* note 10 at 588–90.

<sup>79</sup> One reason why fracking is so controversial is that it sometimes takes place in urban, densely populated communities, such as the Barnett Shale, located underneath the Dallas-Fort Worth metroplex, home to over 11 million people. See Jack Money, “Urban Drilling Stirs Fort Worth Debate”, *Newsok.com* (24 August 2008), online: <[newsok.com/article/3287702/urban-drilling-stirs-fort-worth-debate](http://newsok.com/article/3287702/urban-drilling-stirs-fort-worth-debate)>.

### 3.2. RESTORING LEGITIMACY TO SOCIAL LICENCE THROUGH THE COMMUNITY AGREEMENT

Social licence was intended to be descriptive of ways in which companies earn community trust by exceeding legal requirements and providing direct local benefits, but there are better ways to go about accomplishing the same goal in countries with a strong rule of law, like Canada. The most powerful of these is the community agreement or contract, which is used as part of a comprehensive industry approach to “assure that problems that might not be addressed, or in the community’s view, might not be adequately addressed, in the government approval process, are dealt with.”<sup>80</sup> This is precisely the same set of concerns that led mining companies to undertake measures that came to be referred to as “social licence”. In many cases, these contracts were the result of clashes between disenfranchised, low-income, or rural communities and developers of large-scale or otherwise disruptive projects.<sup>81</sup>

While we might normally expect zoning or other local ordinances to help protect communities from the negative externalities of such projects, the perceived economic upside may overrule the objections of certain communities.<sup>82</sup> Agreements that typically arise in such circumstances include Community Benefits Agreements (CBAs) and Good Neighbor Agreements (GNAs). In other cases, entire municipalities and Indigenous groups have been resistant to certain types of natural resource development, often leading to Memoranda of Understanding (MOUs) and Impact and Benefits Agreements (IBAs). While CBAs, GNAs, and MOUs are proliferating in other jurisdictions, especially the United States, the only form of agreement currently in wide use in Canada is the IBA.

Why do these parties—communities and companies—choose contracts when regulation already exists? The companies in these situations have a legal licence to operate, and thus do not need to take on additional legal obligations to the communities in which they will be working. This means that community agreements are voluntary, but once entered into, create legally enforceable obligations. But it may be that the voluntary nature of the agreements is a key part of their appeal. The effect of legal licence and compliance with local ordinances is to remove the decision of whether and where a project takes place from the community. The ability to make a choice, in the form of whether or not to enter into a community agreement, allows for community decision-making to be added to the process. This, in turn, restores a democratic element to what is otherwise a strictly regulatory matter, and recognizes that a project may be in the public interest but still cause local harms.<sup>83</sup>

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<sup>80</sup> See LeRoy C Paddock, “Community Benefit Agreements for Wind Farm Siting” in *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impacts on Communities* (Oxford: Oxford University Press, 2016) 161.

<sup>81</sup> See e.g. La Risa Lynch, “Five Community Benefits Agreements that Worked”, *The Chicago Reporter* (24 May 2016), online: <[www.chicagoreporter.com/how-neighborhoods-have-held-developers-accountable-to-their-needs/](http://www.chicagoreporter.com/how-neighborhoods-have-held-developers-accountable-to-their-needs/)> (“[c]ommunity benefits agreements, or CBAs, are being used around the country, especially in low-income and communities of color in major cities”).

<sup>82</sup> Indeed, zoning laws have historically been used in some places to push industrial activities to low-income neighbourhoods. See Patricia E Salkin & Amy Lavine, “Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations” (2008) 26 *UCLA J Envtl L & Pol’y* 291 at 292.

<sup>83</sup> This is especially true given that the question of whether or not a project is in the public interest centers on the question of “[w]ould Canada be better or worse off if a particular project were to go ahead?”, an inquiry

Further, evidence from the First Nations context suggests that entering into agreements surrounding natural resource development can have positive economic impacts for both parties.<sup>84</sup> Granted, much of this evidence is in the context of modern treaties surrounding natural resource development—and these are community agreements.<sup>85</sup> There are important lessons to be gleaned from these agreements: first, modern treaties reduce transaction costs for the natural resources industry, because they clarify property rights and make it clear who companies should be talking to; second, this clarification allows the companies to hire locally, which in turn increases demand for local goods and services.<sup>86</sup> Community agreements in the non-Indigenous context may have a similar effect, since they also clarify the parties' respective rights and duties, and may also include promises to train and hire locally where possible (among other economic commitments).

Another strength of community agreements is that they allow the parties to directly negotiate the allocation of benefits and burdens surrounding particular projects. This is consistent with notions of distributive justice: Community agreements may be the closest that a burdened party (in these cases, the communities) can get to achieving a just result once a project has been approved, as they can choose whether to accept consideration in return for bearing the risk of environmental and quality-of-life impacts.<sup>87</sup> From an economic perspective, the community agreement can also be seen as a way to force companies to internalize, at least to some extent, the negative externalities of their activities.<sup>88</sup> This is not to say that every community agreement achieves an efficient outcome, but the fact that community agreements exist and have been shown to reduce citizen complaints over projects does suggest that an efficient outcome is possible.<sup>89</sup>

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that does not leave much room for local concerns (despite local and traditional knowledge ostensibly being part of this inquiry). See “Issue: Regulating in the Public Interest” (last modified 4 December 2017), online: *National Energy Board* <[www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/22rgltrsnpsht-eng.html?=&wbdisable=true](http://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/22rgltrsnpsht-eng.html?=&wbdisable=true)>.

<sup>84</sup> See Fernando M Aragón, “The Effect of First Nations Modern Treaties on Local Income” (2015) C.D. Howe Information E-Brief at 5–6.

<sup>85</sup> See *ibid* at 3.

<sup>86</sup> See *ibid* at 5.

<sup>87</sup> See Emmanuel Voyiakis, “Contract Law and Reasons of Social Justice” (2012) 25 Can JL & Juris 393 at 398–99. Although *contra* John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 19–30. As Voyiakis points out, Rawls did not believe that justice could be achieved through contract, since it is difficult to ensure that the parties are truly in an equal bargaining position to begin with. Voyiakis, *supra* note 87 at 401. However, scholars have pointed out that one way to address this problem and retain the distributive justice efficacy of contract is to enforce contracts through regulation, which is addressed in Part 4 of this Article, *below*. See Anthony Kronman, “Contract Law and Distributive Justice” (1980) 89 Yale LJ 472 at 498–501.

<sup>88</sup> Negative externalities are costs generated by a firm's activity that are imposed on society. Pollution is a classic example, but energy projects can generate unique externalities. For example, wind turbines have been shown to cause a drop in property value for homes located nearby. Martijn I Dröes & Hans RA Koster, “Renewable Energy and Negative Externalities: The Effect of Wind Turbines on House Prices” (2016) 96 J Urban Econ 121.

<sup>89</sup> See Lynch, *supra* note 81. See also William J Baumol, *Welfare Economics and the Theory of the State*, 2nd ed (Cambridge: Harvard University Press, 1965) at 164–70 (economic theory is not always a predictor of real-world success, and economic theory in the legal context has been criticized as incapable of recognizing that equivalent amounts of compensation do not always represent equivalent amounts of welfare).

Finally, contract law places particular importance on the element of trust between the parties; indeed, some have described the “core concern of contract law” to be the protection of the parties’ trust in each other.<sup>90</sup> The strict liability regime of contract law supports this, since even if a party’s failure to uphold their contractual obligations is not a result of their fault or wrongdoing, they will still be liable for that failure.<sup>91</sup> The establishment and maintenance of trust between communities and energy companies, whether those companies are proposing to frack wells or install wind turbines, is important to both sustainability issues on a local level and the success of future energy projects. It is also missing from the current discourse surrounding social licence.

### 3.2.1. COMMUNITY AGREEMENTS THAT ADDRESS LOCAL IMPACTS OF ENERGY AND NATURAL RESOURCES PROJECTS

All community agreements, save for MOUs, have similar structures. In Canada, oil and gas companies already enter IBAs with Indigenous communities that establish the rights of the parties and govern how those companies will undertake extractive activities in certain areas.<sup>92</sup> These contracts are a way for project proponents to comply with the requirement to consult with First Nations, Metis, and Inuit groups when they intend to explore for, develop, and/or produce hydrocarbons on Indigenous land.<sup>93</sup> The content of IBAs varies from agreement to agreement, and can include royalties, equity stakes, environmental remediation plans, and local hiring requirements, among other provisions.<sup>94</sup>

By law, First Nations must be consulted before drilling or other resource development can take place upon their ancestral lands.<sup>95</sup> IBAs are used to satisfy this requirement, to ensure economic benefits for the First Nation, and to address the community concern over negative impacts on “environmental, social, cultural, and economic effects.”<sup>96</sup> Because IBAs are formal contracts, they also provide a framework for negotiation between oil and gas companies and

<sup>90</sup> See Seana Valentine Shiffrin, “Enhancing Moral Relationships through Strict Liability” (2016) 66 UTLJ 353 at 365–68; John J Chung, “Promissory Estoppel and the Protection of Interpersonal Trust” (2008) 56 Clev St L Rev 37 at 49–50.

<sup>91</sup> See Shiffrin, *supra* note 90 at 357–58.

<sup>92</sup> See Brad Gilmour & Bruce Mellett, “The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations” (2013) 51:2 Alta L Rev 385. In British Columbia, the provincial government has started using Community Benefits Agreements with municipalities for infrastructure projects. See Province of British Columbia, “Transportation and Infrastructure: Community Benefits Agreements”, online: <<https://news.gov.bc.ca/factsheets/community-benefits-agreement>>.

<sup>93</sup> See Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Abingdon: Routledge, 2015) at 195–97; Tara Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law” (2011) 10 NW Intl LJ 54 at 54–55, 71.

<sup>94</sup> See Laura Wright & Jerry P White, “Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements” (2012) 3:2 Intl Indigenous Pol J 1 at 10.

<sup>95</sup> See *ibid* at 1–2.

<sup>96</sup> See *ibid* at 10 (also explaining that IBAs do not nullify the requirement that the Canadian government also consult with the First Nation on any proposed hydrocarbon development).

the impacted First Nations.<sup>97</sup> These negotiations allow the First Nation to decide whether the benefits offered by the energy company—which may include royalties, rental and delay payments, as well as promises to employ community members, to invest in local businesses, and to make certain assurances with respect to environmental protection—are sufficient to allay their concerns.<sup>98</sup> In return, the oil and gas company can satisfy its duty of consultation, obtain community assistance with obtaining needed permits, and face reduced local opposition, in addition to generating positive public relations.<sup>99</sup> IBAs are not only used for site-specific projects like wells and mining operations, but also for linear projects like pipelines.<sup>100</sup>

In the United States, similar agreements have been used in the energy and environmental contexts. CBAs were created by low-income and minority community groups threatened by large-scale real estate projects that had otherwise obtained municipal approvals.<sup>101</sup> Although we might expect that local governments would protect residents from encroachment by these sprawling commercial uses through zoning and other land use regulations, in practice, these regulations often work against low-income residents and other groups.<sup>102</sup> CBAs were developed as a way for affected communities within the footprint of large development deals to have a seat at the negotiating table.<sup>103</sup> In turn, developers have been willing to enter into these agreements in order to “avert or mitigate the negative effects development will have on a community, reduce conflict, promote civic engagement, and create community buy-in and goodwill toward a new project.”<sup>104</sup> CBAs are also beginning to appear in the context of energy projects—the state of Maine has passed legislation requiring wind farm owners to enter CBAs with surrounding communities.<sup>105</sup> The emergence of the CBA in the wind energy sphere may reflect the limited powers of municipalities over natural resource development, which generally falls outside of their jurisdiction to regulate.<sup>106</sup>

Finally, there is the GNA. Like CBAs and IBAs, the GNA is an agreement between communities and companies, although they generally occur in the context of health and

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<sup>97</sup> *Ibid* at 10.

<sup>98</sup> *Ibid*. Note that issues can arise when an IBA does not include all affected First Nations as parties. See Deninu Kue, “First Nation Takes Fight for Benefits to New Indigenous Affairs Minister”, *CBC News* (19 January 2016), online: <[www.cbc.ca/news/canada/north/deninu-kue-diamond-mine-ibas-1.3409567](http://www.cbc.ca/news/canada/north/deninu-kue-diamond-mine-ibas-1.3409567)>.

<sup>99</sup> See Wright & White, *supra* note 94 at 10 (though note that the existence of an IBA does not automatically satisfy the Crown’s duty to consult—while it does fulfill the procedural duty, the Crown must still ensure that the substantive duty to engage in meaningful consultation has been met).

<sup>100</sup> See Alistair R Lucas, “Participatory Rights and Strategic Litigation: Benefits Forcing and Endowment Protection in Canadian Natural Resource Development” in Lilia Barrera-Hernandez et al, eds, *Sharing the Costs and Benefits of Energy and Resource Activity* (Oxford: Oxford University Press, 2016) 339 at 343.

<sup>101</sup> See Patricia E Salkin & Amy Lavine, “Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations” (2008) 26 *UCLA J Envtl L & Pol’y* 291 at 299.

<sup>102</sup> See Alejandro E Camacho, “Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use” (2003) 78:2 *Brook L Rev* 355 at 358.

<sup>103</sup> *Ibid* at 361–63.

<sup>104</sup> *Ibid* at 356. *Contra* Vicki Been, “Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?” (2010) 77:5 *U Chicago L Rev* 5 at 21–24.

<sup>105</sup> See Paddock, *supra* note 80 at 165.

<sup>106</sup> Been, *supra* note 104 at 16–17.



environmental concerns surrounding polluting industries.<sup>107</sup> Although environmental regulations do generally provide for some recourse for communities, there are problems both with enforcement and with the remediation of specific harms to the community.<sup>108</sup> Because of the existence of environmental regulations, it can be particularly difficult to bring companies to the bargaining table for GNAs, unless the community can exert pressure through citizen lawsuits, control over permitting processes, or creating bad press for the companies through protests, rallies, and the like.<sup>109</sup> The terms of GNAs often “include significant financial investment by the facility in pollution control technology and equipment,” and the elimination or controlled disposal of certain chemicals.<sup>110</sup> They may also include a timeframe in which the company is supposed to adopt and implement these measures.<sup>111</sup>

Additionally, there is usually some type of financial remuneration to the community, often in the “form of community investment[s]” in health or safety services and the hiring of local employees.<sup>112</sup> Although every GNA is different, the aim of redressing environmental harm—specifically pollution—in both practical and economic terms, is a common thread. Also, allowing “communities to bargain for terms not available through traditional citizen suit remedies,” such as “pollution reductions that go beyond standards required by law,” can have a positive empowering aspect.<sup>113</sup>

### 3.2.2. CRITICISMS OF COMMUNITY AGREEMENTS

All of the agreements discussed in this Part have similar weaknesses. For one, although they take place at different stages of industry activity, they are essentially remedial. In each case, these contracts are an attempt to mitigate the negative impacts of industry activity (oil and gas activity, real estate development, pollution) that will take place or that has already occurred, whether or not an agreement is reached with the community. This puts the community groups at a bargaining disadvantage that may encourage them to agree to terms that are not beneficial to them, such as confidentiality and penalties for noncompliance with industry

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<sup>107</sup> See Gregg P Macey & Lawrence Susskind, *Using Dispute Resolution Techniques To Address Environmental Justice Concerns: Case Studies*, Jennifer Thomas-Larmer, ed (Pubnumber 300R03004) (Washington, DC: The Office of Environmental Justice, Environmental Protection Agency, 2003) at 40. See also Janet V Siegel, “Negotiating for Environmental Justice: Turning Polluters into ‘Good Neighbors’ Through Collaborative Bargaining” (2002) 10 NYU Envtl LJ 147 at 173 (mentioning Chevron’s GNA with West County Toxics Coalition).

<sup>108</sup> Siegel, *supra* note 107 at 173–74. See also Thalia González & Giovanni Saarman, “Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?” (2014) 41 Ecology LQ 37 at 74 (“[w]ithout significant leverage, codified in the regulatory scheme, communities may be forced to bargain away their rights in order to achieve incremental positive change”).

<sup>109</sup> Siegel, *supra* note 107 at 173–75. Professor Siegel points out that the threat of tort suits, including nuisance claims, does not seem to be sufficient, possibly due to the difficulties in prevailing on those claims.

<sup>110</sup> *Ibid* at 175–76.

<sup>111</sup> *Ibid* at 176.

<sup>112</sup> *Ibid* at 177–78.

<sup>113</sup> *Ibid* at 180.

activity.<sup>114</sup> Moreover, it is not clear how much consultation is needed before an agreement should be entered. In the case of IBAs, the United Nations and other international human rights organizations agree that the best practice is to obtain Free, Prior, and Informed Consent (“FPIC”) from Indigenous groups before proceeding with activities that could impact the groups’ way of life, but there is no internationally agreed upon definition of FPIC, nor is there clear guidance on how it should be implemented.<sup>115</sup>

IBAs are also often unregulated and the terms are largely confidential, leading to concerns that oil and gas companies are using them to *de facto* define the rights of Indigenous groups.<sup>116</sup> The confidentiality also means that there is no way for First Nations groups to learn from the prior experiences of other Indigenous communities who have entered into these agreements.<sup>117</sup> This makes it difficult for a First Nations party to know whether they are getting a fair deal compared to what the oil and gas company has been willing to promise to other groups.<sup>118</sup> It also means that First Nations cannot bring in a third party to help them monitor and enforce compliance with contractual obligations by the oil and gas company without potentially violating confidentiality—although many IBAs do allow for limited disclosure to governmental organizations and investors.<sup>119</sup> Also, many IBAs contain noncompliance provisions that legally require First Nations not to take any action that would obstruct the oil and gas company’s exploration, development, and production activities.<sup>120</sup> Any CBA or GNA with similar confidentiality and/or noncompliance provisions would pose similar difficulties for community parties.

Additionally, IBAs, CBAs, and GNAs all pose collective action problems, including the issues of deciding who speaks for a community and who must agree before the entire community may be considered bound by an agreement.<sup>121</sup> Also, communities may suffer

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<sup>114</sup> Ken J Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 *Organization & Environment* 76 at 85–86.

<sup>115</sup> See Ward, *supra* note 93 at 54, 58.

<sup>116</sup> See Caine & Krogman, *supra* note 114 at 79, 85–86; Courtney Fidler & Michael Hitch, “Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice” (2007) 35 *Environments* 49 at 50–52, 58.

<sup>117</sup> Caine & Krogman, *supra* note 114 at 79; Fidler & Hitch, *supra* note 116 at 64.

<sup>118</sup> Caine & Krogman, *supra* note 114 at 85; Fidler & Hitch, *supra* note 116 at 58.

<sup>119</sup> Caine & Krogman, *supra* note 114 at 84–86.

<sup>120</sup> *Ibid* at 86 (opining that noncompliance requirements in IBAs turn First Nations into “indentured servants” of oil and gas companies).

<sup>121</sup> All community agreements raise practical questions about representation of community groups, including identifying who the client is, determining who the lawyer is (or lawyers are), and ensuring that the community’s diverse concerns are all fully represented in negotiations. Some of these issues are addressed in Luke W Cole, “Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law” (1992) 19 *Ecology LQ* 619 at 664–67 (discussing group representation). See generally Michael B Gerrard & Sheila R Foster, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, 2nd ed (Chicago: American Bar Association, 2008) (provides legal practitioners with research on legal theories, procedures, and objectives regarding environmental justice laws). See also Camacho, *supra* note 102 at 369–71. Camacho notes that the lack of formal procedures for negotiating CBAs and the lack of transparency surrounding them can make it difficult for communities to build on past mistakes. It can also make it possible for developers to play different groups against one another and favour certain demands over others. See also Chadé Severin, “We Built This City: The Legality of

from a lack of complete understanding about certain issues, which may cause them to bargain for the wrong things.<sup>122</sup> Further, many of the concessions made by oil and gas companies with respect to the environment may be too difficult for communities and First Nations to monitor and enforce.<sup>123</sup> It is also true that communities that enter community agreements will likely have to surrender present or future legal rights in order to obtain the benefits of the agreement. This commonly includes the right to sue—the avoidance of litigation stemming from the commercial activity is one of the main incentives prompting industry parties to enter contractual arrangements.<sup>124</sup> But while it is certainly possible that giving up the right to a legal remedy in the future may seem like a fair trade for present benefits, the community could end up being wrong about that. This is particularly true because of another issue common in these agreements, especially IBAs and GNAs: problems with monitoring and enforcement.<sup>125</sup> When promises obtained from industry include the use of specific technology, chemicals, methods, and/or processes that are intended to mitigate environmental harms, there is a significant information and expertise gap.<sup>126</sup>

Despite these drawbacks, IBAs and CBAs are still widely used (the remedial nature of GNAs makes them comparatively less common).<sup>127</sup> This may be, in part, because these agreements offer local and Indigenous groups a way to directly participate in the commercial aspect of these activities.<sup>128</sup> This, in turn, is a more powerful tool for including the community than relying on the consultation process or the participation provisions of individual regulators.<sup>129</sup> Also, in many cases, these agreements have come about because the people whose lives have been or will be negatively impacted by industry activity found that they could not get a governmental body to speak for them, and so they used contracts to speak for themselves.<sup>130</sup> In addition to IBAs, CBAs, and GNAs, there is one more type of agreement that is being used in the United States to address the local impacts of resource development: the Memoranda of Understanding.

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Community Benefit Agreements for Big Box Construction Under Title VII and the Equal Protection Clause” (2013) 3 Colum J Race & L 215 at 232–49 (discussing various legal pitfalls surrounding CBAs, including possible violations of Title VII of the Civil Rights Act when community groups do not include impacted minorities); *cf* Been, *supra* note 104 at 18–20 (discussing the idea that CBAs may reduce the likelihood of lawsuits).

<sup>122</sup> Caine & Krogman, *supra* note 114 at 85–86.

<sup>123</sup> See *ibid* at 84.

<sup>124</sup> Siegel, *supra* note 107 at 172–73.

<sup>125</sup> Caine & Krogman, *supra* note 114 at 84; González & Saarman, *supra* note 108 at 76–77; Siegel, *supra* note 107 at 182.

<sup>126</sup> González & Saarman, *supra* note 108 at 76–77.

<sup>127</sup> See e.g. Caine & Krogman, *supra* note 114 at 84 (referring to the increasing prevalence of IBAs and some of the benefits of IBAs for Aboriginal populations, although noting a lack of monitoring and enforcement of IBAs).

<sup>128</sup> Fidler & Hitch, *supra* note 116 at 61 (charting examples of the commercial activities with which First Nations can participate in negotiations with developers). This is a definite improvement over the prior legal landscape for First Nations, which put them on weak negotiating ground because of the unsettled legality of their land claims. See Caine & Krogman, *supra* note 114 at 83–84.

<sup>129</sup> Fidler & Hitch, *supra* note 116 at 58–59; Wright & White, *supra* note 94 at 14–15.

<sup>130</sup> Although sometimes GNA negotiations began when a government agency called for them as a precondition to permit approval or renewal. See Siegel, *supra* note 107 at 171, 174.



### 3.2.3. CONTRACTS IN THE FRACKING CONTEXT: MEMORANDA OF UNDERSTANDING

The US state of Colorado offers an instructive case study that might be particularly helpful for Canada. The oil and gas industry has long been a major contributor to Colorado's economy, but over the last decade, the rise of hydraulic fracturing ("fracking") has polarized the state, with some cities and towns pushing hard to ban the technique altogether.<sup>131</sup> Changing demographics and a booming population in the state also mean that many new residents are competing for land with energy companies, especially in places like Denver, where there are plentiful jobs and plentiful shale oil resources that can be drilled or accessed using hydraulic fracturing.<sup>132</sup> Local pushback against energy projects, including bans and moratoria on fracking by counties, cities, and towns, proliferated until a decision by the Supreme Court of Colorado struck them all down, on the grounds that only the state could decide whether such projects could go forward or not.<sup>133</sup>

But energy companies have not simply used that court decision to steamroll communities that are resistant to projects. Instead, companies have begun to bargain with communities. Increasingly, companies that plan to frack oil and gas wells in unconventional formations in Colorado are entering into Memoranda of Understanding ("MOUs") with nearby communities.<sup>134</sup> These MOUs generally require that the energy company attach "best management practices," as negotiated with the community, as conditions to its government permits, making the MOUs essentially terms of operation.<sup>135</sup> In a study of whether MOUs actually had any positive impact on the relationship between energy companies and communities, it appeared that residents in towns with MOUs were only filing agency complaints about issues not addressed in the MOU.<sup>136</sup> In the community without the MOU, complaints ran the gamut.<sup>137</sup>

Another consequence of MOUs was that residents of communities that had negotiated a set of best practices made greater use of public agency databases to register and track complaints related to fracking.<sup>138</sup> The use of these databases by community members suggests that the integration of MOUs into the relevant agency's permitting process can restore some measure of local trust in the government agency and its resources.<sup>139</sup> As a result, the use of MOUs shows that community agreements may not only win community trust for energy companies, but also for government agencies, resulting in the restoration of legitimacy for previously disputed

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<sup>131</sup> See Keith Coffman, "Colorado an Energy Battlefield as Towns Ban Fracking", *Reuters* (6 November 2013), online: <[www.reuters.com/article/us-usa-fracking-colorado-idUSBRE9A50QT20131106](http://www.reuters.com/article/us-usa-fracking-colorado-idUSBRE9A50QT20131106)>.

<sup>132</sup> See Julie Turkewitz, "In Colorado, a Fracking Boom and a Population Explosion Collide", *New York Times* (31 May 2018), online: <[www.nytimes.com/2018/05/31/us/colorado-fracking-debates.html](http://www.nytimes.com/2018/05/31/us/colorado-fracking-debates.html)>.

<sup>133</sup> See van de Biezenbos, "Contracted Fracking", *supra* note 10 at 588–90; *City of Fort Collins v Colorado Oil and Gas Association*, 369 P (3d) 586 (Colo Sup Ct 2016).

<sup>134</sup> See Shaffer, Zilliox & Smith, *supra* note 62 at 70.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid* at 81.

<sup>137</sup> *Ibid* at 84.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

projects. The integration of MOUs into legal licence is instructive here, because it backs up the promises made by companies with real legal teeth.

Each of the agreements discussed above offers a more powerful path towards restoring community protection and democracy than does social licence. Moreover, it may be possible to alleviate some of the concerns surrounding these agreements through the regulatory process, which is the subject of the next Part.

#### 4. INCORPORATING COMMUNITY AGREEMENTS INTO THE REGULATORY PROCESS

Although each of the community agreements discussed above would be a better way to address community concerns than social licence, each has been subject to criticism, including problems with unequal bargaining, poor information, and the difficulty that communities have in enforcing their terms—especially technical and environmental obligations.<sup>140</sup> Even dispute resolution clauses may not remedy these problems, since local and community groups may find it difficult to compel project proponents to submit to mediation or arbitration, and they may also find paying for either process challenging.<sup>141</sup> But in Canada, energy regulators may be a solution to this problem. By including such agencies in the process of obtaining, publishing, and enforcing community agreements, at least some of the criticisms over these agreements could be addressed and possibly mitigated.

Accomplishing this implicates two additional questions: first, when would energy regulators examine whether a community agreement exists; and second, how would the regulator give the community agreement, if it does exist, the backing of the agency. First, it is important that companies engage with communities at a point when their input is meaningful—at a minimum that would be before the project has been finalized. From a practical standpoint, if the aim is to somehow attach the community agreement to the legal licence, the agreement must exist before the licence has been granted.

In terms of how to integrate community agreements, where they exist, into the regulatory process, the picture looks somewhat different depending on the agency. The local and national impacts of proposed pipelines are considered during the review process, and there may be a way to review any community agreements during this phase.<sup>142</sup> For intraprovincial projects, the Alberta Energy Regulator (AER) provides a persuasive example, because it already has procedures in place that could be modified to allow the regulator to act as a third party to assist in resolving disputes over community contracts and, in an indirect way, provide enforcement mechanisms.<sup>143</sup> This Part will discuss how existing Canadian Energy Regulator (CER) and AER

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<sup>140</sup> See Part 3.2.2, *above* (discussing the criticisms of community agreements, which include the difficulties in enforcement by communities).

<sup>141</sup> See *ibid.*

<sup>142</sup> See Martin Olszynski, “In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69” (15 February 2018), online (blog): *ABlawg* <[ablawg.ca/wp-content/uploads/2018/02/Blog\\_MO\\_Bill68\\_Bill69.pdf](http://ablawg.ca/wp-content/uploads/2018/02/Blog_MO_Bill68_Bill69.pdf)>; Nigel Banks, “Some Things Have Changed but Much Remains the Same: The New Canadian Energy Regulator” (15 February 2018), online (blog): *ABlawg* <[ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/](http://ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/)> [Banks, “Much Remains the Same”].

<sup>143</sup> See Part 4.2, *below*.

guidelines and procedures concerning citizen participation may be used to not only ensure that both communities and project proponents are on a more level playing field, but to tie the issuance of legal licences by the agency to the performance of obligations in the community contract. In particular, involving the regulator at key moments can address the safeguarding of communities from conflicts of interest and other problems in the negotiating process, as well as enforcement of industry obligations.

#### 4.1. INTEGRATING COMMUNITY CONTRACTS INTO THE NEW CANADIAN ENERGY REGULATOR'S REGULATORY PROCEDURES

Timing is critical regarding when companies and communities should begin the process of communicating with each other about the impacts and potential benefits of proposed projects. Both parties benefit from starting the process as early as possible and before a legal licence is obtained, though for different reasons. For energy companies, obtaining an agreement with a community could have a positive impact on the regulatory review of its project. For communities, negotiations should not begin at a point where it is too late in the planning stages for energy companies to make reasonable concessions. The federal government has jurisdiction over interprovincial pipeline projects and it grants permits following an environmental impact assessment and review of several factors.<sup>144</sup> Under the newly enacted Impact Assessment Act (IAA), reviews of pipeline projects will be undertaken either by the new Impact Assessment Agency or (most likely for pipeline projects) by independent review panels (IRPs) comprised of at least three people, one of whom will be a commissioner of the new Canadian Energy Regulator (CER), the agency that will replace the National Energy Board (NEB).<sup>145</sup>

First, it should be noted that the IAA review process does not offer much in the way of community participation. During the planning phase, IRPs are tasked with ensuring public participation, including inviting public input “within the period that it specifies.”<sup>146</sup> During the hearing phase, review panels—which would be reviewing most pipeline proposals—are to ensure public participation and to consider factors including “comments made by the public” with no limitation on who might be included in “the public”.<sup>147</sup> “Interested party” was defined in previous legislation as a person who is “directly affected by the project” or “has relevant information or expertise.”<sup>148</sup> The term “interested persons” has been removed (it also does not

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<sup>144</sup> See National Energy Board, “Regulation of Pipelines and Power Lines”, online: <[www.neb-one.gc.ca/bts/whwr/rspnsblt/pplnpwrln-eng.html](http://www.neb-one.gc.ca/bts/whwr/rspnsblt/pplnpwrln-eng.html)>.

<sup>145</sup> See Bill C-69, *Impact Assessment Act*, 1st Sess, 44th Parl, 2018, cls 47(3) 50(c), (third reading 20 June 2018) (Bill C-69 authorizes the creation of independent panels to review “designated projects”, which would likely include interprovincial pipelines over 40km in length). See also Bankes, “Much Remains the Same”, *supra* note 142.

<sup>146</sup> Bill C-69, *supra* note 145 at cl 11.

<sup>147</sup> *Ibid* at cl 22(1)(n).

<sup>148</sup> See Canadian Environmental Assessment Act of 2012 (CEAA 2012), SC 2012, c 19, s 2(2) (this definition caused controversy, as it was held to exclude those people who were concerned about environmental and climate change impacts but who did not live near the proposed projects); *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 at para 76 (“Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board’s task of regulating the construction and operation of oil and gas pipelines”).

appear in the proposed *Canadian Energy Regulator Act*, which replaces the *National Energy Board Act*). But, by removing the standing requirement, the new legislation seems even less oriented towards consideration of local and individual concerns over projects than CEAA. Moreover, even though IAA seems to be opening the doors to any members of the public, given the flexibility and discretion that review panels have under the IAA, it is also possible that they will restore some standing requirement.

Thus, while the citizen participation provisions probably are not a good fit for considering community agreements, there are still other avenues. Under both the old and new pipeline review procedures, there are numerous considerations that panels are to consider in their review, including:

the safety and security of persons and the protection of property and the environment ... the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors ... any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act*, and; any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.<sup>149</sup>

One of the “relevant assessment[s]” mentioned here are regional assessments under the IAA.<sup>150</sup>

The existence of a community agreement might factor into any of these considerations, since provisions within those agreements might touch upon economic, social, safety, and property concerns. And, in particular, community agreements might fit well within a regional assessment. When IBAs have been part of pipeline project proposals in the past, the existence of these contracts did play a role in the reviewing panel’s consideration of the project’s local and regional impacts. For example, Al Lucas recounts how Enbridge entered into IBAs with about 60% of the First Nations located along the route of its proposed Northern Gateway Pipeline before bringing its proposal to the joint review panel.<sup>151</sup> These IBAs were the product of early consultation on site with Indigenous communities, and included “training and employment programmes, as well as equity participation” provisions.<sup>152</sup> During the review of Northern Gateway, the joint review panel found that there were “significant potential benefits to local, regional, and national economies associated with the project.”<sup>153</sup>

Note, however, that despite the language above, the regional assessments mentioned in IAA (which also existed in the IAA’s predecessor statute, the Canadian Environmental Assessment Act of 2012, or CEAA) have never actually been carried out.<sup>154</sup> So although regulatory consideration of community agreements does not require the use of a regional assessment of a project, it might not be a bad idea to revisit the regional assessment process and actually implement it (whether there are community agreements to be considered or not). In particular,

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<sup>149</sup> Bill C-69, *Canadian Energy Regulator Act*, 1st Sess, 44th Parl, 2018, cl 183(2)(a)–(l) (third reading 20 June 2018).

<sup>150</sup> *Ibid* at cl 92.

<sup>151</sup> See Lucas, *supra* note 100 at 343 (citing *Considerations, Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 2 (Calgary: National Energy Board, 2013)).

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> See Olszynski, *supra* note 142.

a sustainability assessment at the local and regional level would be an excellent place to include the review of any agreements, which may include obligations relating to the long-term viability of a project and any environmental mitigation plans—factors that would likely be important to a regional assessment.<sup>155</sup>

It is not clear how community agreements could be enforced by the CER under its regulations, but Colorado's use of MOUs may be instructive. By attaching community agreements to an issued legal licence, it may be possible to treat the agreements as conditions (see more on this below) for maintaining the legal licence to operate. Again, community agreements are not legally necessary, and their voluntary nature is part of the reason they may address issues of fairness, justice, and democratic spirit in the relationship between energy companies and the people who live near their projects. However, if a community agreement is entered into, some of the enforcement burden on the community (including legal fees) would be at least partially lifted if companies faced the threat of losing their legal licence if they do not uphold their end of any bargains they have entered.

Because interprovincial pipelines tend to be so long that they impact dozens—or even hundreds—of communities, it is perhaps not surprising that federal regulations of these pipelines do not include more community-targeted provisions, but that does not mean that the regulations should not be read in a way to honour community protections where they exist. By contrast, provincial energy project reviews do largely consider local and regional impacts, and there are accordingly more opportunities to integrate community agreements.

#### 4.2. COMMUNITY CONTRACTS AND THE AER'S EXISTING REGULATORY PROCEDURES

Examining the integration of community agreements into AER procedures is a fruitful exercise because the AER already has taken steps to restore the input of and protect promises made to stakeholders. For other energy regulatory agencies, including the CER, the path forward for restoring social licence from communities is less clear, but only because their existing procedures are not quite as developed. The AER has considerable experience with oil and gas development, including fracking, which may be one reason the agency's procedures and processes have such an emphasis on stakeholder engagement.<sup>156</sup> By contrast, the newly enacted IAA has comparatively little in terms of specific processes in place to ensure community involvement, perhaps showing the strain of trying to implement the divergent views on what is meant by social licence in regulations.

The AER is Alberta's comprehensive energy regulator, overseeing everything from siting, to environmental impact assessments, to water conservation efforts, to compliance with licensing

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<sup>155</sup> See also Canada's EcoFiscal Commission, "Responsible Risk: How Putting a Price on Environmental Risk Makes Disasters Less Likely", online (pdf): *Ecofiscal* <[ecofiscal.ca/wp-content/uploads/2018/06/Ecofiscal-Commission-Risk-Pricing-Report-Responsible-Risk-July-11-2018.pdf](http://ecofiscal.ca/wp-content/uploads/2018/06/Ecofiscal-Commission-Risk-Pricing-Report-Responsible-Risk-July-11-2018.pdf)> (community agreements could also be used to require the establishment of environmental disaster funds in case of a pipeline rupture or other disaster, a measure recently backed by empirical data).

<sup>156</sup> This is not to say that other energy projects, including nuclear, hydropower, wind, and solar facilities, do not generate resistance—for different reasons, all of these projects are all subject to community resistance. Community agreements can and do work in some of those contexts as well. See Paddock, *supra* note 80 at 164 (in the context of wind energy).



conditions.<sup>157</sup> The agency was created in 2013 through the *Responsible Energy Development Act*, in order to streamline energy project licensing.<sup>158</sup> The importance of participant engagement is woven into the AER's licensing application scheme. Under Directive 056, which sets out the schedule for energy development applications, the AER instructs potential applicants for any type of energy project permit to create "Participation Involvement Programs" ("PIPs") directed primarily at the relationship between the directly impacted landowners, the industry or project proponent, and the AER itself.<sup>159</sup>

However, the range of potentially impacted parties is frequently wider than the parties to PIPs, and so the applicant's PIP must "include[] parties whose rights may be directly and adversely affected by the nature and extent of a proposed application."<sup>160</sup> The overall goal of the PIP requirement is to increase the regulatory standard for communications between industry and the public with respect to participant involvement.<sup>161</sup> Further, the failure of an applicant to create a PIP—or at least consult with or notify potentially impacted parties—can be fatal to obtaining a licence.<sup>162</sup> Based on the AER Table of Noncompliant Events and Associated Risk Rating of AER Requirements, a failure to attempt personal consultation and notification prior to filing an application and failure to disclose any outstanding public or industry objections/concerns is considered a high-risk noncompliant event.<sup>163</sup>

The PIP requirement seems to incorporate some notion of social licence into the AER permitting process, as it compels energy companies to show that they have engaged in some way with stakeholders. But the PIPs alone do not actually guarantee meaningful engagement with anyone, let alone communities or local groups. A more community-directed approach would be more effective in achieving these goals in a less piece-meal, more streamlined manner. Although the Program requirement does not require a community agreement (such a requirement would be unlikely since, as discussed above, IBAs are the only type of community agreement currently commonly used in Canada) the process is not incompatible with such agreements, and indeed the two may be mutually reinforcing.

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<sup>157</sup> Alberta Energy Regulator, "How Does the AER Regulate Energy Development in Alberta: Project Lifecycle", online: <[www.aer.ca/protecting-what-matters/holding-industry-accountable/how-does-the-aer-regulate-energy-development-in-alberta/project-life-cycle](http://www.aer.ca/protecting-what-matters/holding-industry-accountable/how-does-the-aer-regulate-energy-development-in-alberta/project-life-cycle)>.

<sup>158</sup> Alberta Energy Regulator, "Who We Are: Our History", online: <[www.aer.ca/providing-information/about-the-aer/who-we-are](http://www.aer.ca/providing-information/about-the-aer/who-we-are)>; Alan L Ross & Michael Massicotte, "A Divided Alberta Energy Regulator", *Financial Post* (3 July 2015), online: <[business.financialpost.com/opinion/a-divided-alberta-energy-regulator](http://business.financialpost.com/opinion/a-divided-alberta-energy-regulator)> ("[The AER] assumed the regulatory functions, from project application to reclamation, previously administered by the Energy Resources Conservation Board, and Alberta Environment and Sustainable Resource Development").

<sup>159</sup> Alberta, *Directive 056: Energy Development Applications and Schedules*, Alberta Energy Regulator (18 October 2018) at 7, online: <[www.aer.ca/regulating-development/rules-and-directives/directives/directive-056](http://www.aer.ca/regulating-development/rules-and-directives/directives/directive-056)> [*Directive 056*].

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* at s 2.

<sup>162</sup> See *Directive 056*, *supra* note 159 at 3.3.1, 3.3.2 (which makes distinctions between consultation and notification, and who is entitled to each category of communication).

<sup>163</sup> Alberta Energy Regulator, "Table of Noncompliant Events and Associated Risk Rating of AER Requirements" (last updated 11 March 2016), online (pdf): <[www.aer.ca/documents/enforcement/RiskAssessedNoncompliances.pdf](http://www.aer.ca/documents/enforcement/RiskAssessedNoncompliances.pdf)>.

Support for this idea can also be found in the AER's Alternative Dispute Resolution Program, which offers all stakeholders in a project a range of dispute resolution processes available to develop innovative and satisfactory solutions to disputes between affected parties.<sup>164</sup> According to the AER, this program was implemented after "the public and industry" asked for the agency to play a greater role in resolving disputes.<sup>165</sup> These dispute resolution guidelines could be incorporated into community agreements by reference, allowing the AER to oversee contractual disputes between the parties and act as a kind of third-party arbiter through the AER's staff facilitation provisions.<sup>166</sup> The AER also has a registry for private surface use agreements between companies and landowners, and registered agreements are available to the public.<sup>167</sup> If community agreements, including IBAs, were made public in this way, it would provide more information for communities and counter existing problems with lack of information in the bargaining processes, as well as minimize distrust between communities over who got the better deal.<sup>168</sup>

There are also interesting possibilities for enforcing community agreements through AER procedures. In addition to using the AER's own provisions on community engagement to strengthen community agreements, it should be possible to couple community agreements with the conditions required for regulatory approval. When the AER approves a licence, it may do so subject to certain conditions.<sup>169</sup> If, at any time during a project's construction or operation, these conditions are not met, the AER may levy fees, penalties, or even revoke the relevant licence unless or until the licence holder corrects the problem, especially if the licence holder's project is found to pose "an unreasonable risk."<sup>170</sup> There is also an element of public shaming in the failure to comply with conditions, as the AER publishes a list of offenders on its website, which is available to the public.<sup>171</sup>

If compliance with a community agreement were considered a condition of project approval, the AER would not only have the authority to enforce the condition, as an extension of the powers granted by government acts and regulations, but it would also be able to suspend or revoke licences for failure to comply with the obligations in the agreement. This would

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<sup>164</sup> *Directive 056*, *supra* note 159 at 3.3.4.

<sup>165</sup> Alberta Energy Regulator, "EnerFAQs: The AER and You" (last updated September 2015), online: <[www.aer.ca/providing-information/news-and-resources/enerfaqs-and-fact-sheets/enerfaqs-aer-and-you](http://www.aer.ca/providing-information/news-and-resources/enerfaqs-and-fact-sheets/enerfaqs-aer-and-you)>.

<sup>166</sup> *Ibid.*

<sup>167</sup> See Alberta Energy Regulator, "EnerFAQs: How to Register a Private Surface Use Agreement" (last updated September 2015), online: <[www.aer.ca/providing-information/news-and-resources/enerfaqs-and-fact-sheets/enerfaqs-private-surface-agreement#whotoregisterwith](http://www.aer.ca/providing-information/news-and-resources/enerfaqs-and-fact-sheets/enerfaqs-private-surface-agreement#whotoregisterwith)>.

<sup>168</sup> But see Norah Kielland, "Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements" (5 May 2015), online: *Library of Parliament Research Publications* <[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/201529E#ftn24](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201529E#ftn24)> (in some cases, it is the Indigenous groups who wish for the agreements to remain confidential).

<sup>169</sup> Alberta, *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals*, Alberta Energy Regulator (6 December 2017), online: <[www.aer.ca/documents/directives/Directive067.pdf](http://www.aer.ca/documents/directives/Directive067.pdf)>; Alberta Energy Regulator, "Compliance and Enforcement Tools", online: <<https://aer.ca/regulating-development/compliance/compliance-and-enforcement-tools>>.

<sup>170</sup> *Ibid* at 3.

<sup>171</sup> See Alberta Energy Regulator, "Compliance Dashboard", online: <[www1.aer.ca/compliancedashboard/enforcement.html](http://www1.aer.ca/compliancedashboard/enforcement.html)>.

go towards remedying one of the most glaring problems with the community agreements discussed in the previous Part, namely the difficulties in enforcement. There is also some indication outside of its procedures that the AER is also concerned with the problem of local impacts and resulting community resistance to certain projects. In particular, this might be one consideration driving the fact that in Shaun Fluker and Eric Dalke's analysis of costs awarded by the AER, the largest share of awards were given to coalitions of landowners.<sup>172</sup> The explanation given by Fluker and Dalke for this is that the AER encourages these groups of landowners to participate in project licence hearings. This, in turn, could mean that the AER is already experiencing pushback on some energy projects from groups of citizens, including communities, possibly due to fears over a project's effects.<sup>173</sup> Community agreements might be one way to address these problems before they lead to clashes between local groups and energy companies.

## 5. CONCLUSION

Debates over whether a particular energy project has acquired social licence are a distraction from real concerns over the environmental and quality-of-life impacts that such projects can have on nearby communities. Those debates can also impede the ability of governments and regulators to come up with innovative and impactful ways to tackle national problems, including climate change and meeting carbon emission reduction targets under the Paris Agreement. While the current conception of social licence is a popular rhetorical tool, Canada needs real solutions instead of more ways to win or lose an argument.

First, the term "social licence" should be used only descriptively; focus must be returned to the concerns originally encompassed by social licence, which are the environmental and quality-of-life impacts that energy projects can have on local residents. Regulations are frequently not responsive to many of these concerns, so energy companies and communities may be better served by looking to other tools, including different types of community agreements that may be strengthened by the participation of energy regulators.

Second, we must acknowledge that social licence is fundamentally concerned with community-level impacts, and has never been a good fit for national concerns over the continuing development of fossil fuel projects. By extension, we must not let noise over normative social licence allow national or provincial governments to shirk the responsibility they have to create and enforce effective legislation to meet these concerns. The idea behind the original concept of social licence, and behind community agreements as a way to earn that licence, is that every project is different, both in its particulars and external impacts, and in terms of what impacted communities ask for, as well as the steps ultimately taken by energy companies.

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<sup>172</sup> Shaun Fluker & Eric Dalke, "An Analysis of Costs Awarded by the Alberta Energy Regulator" (2018) 55:3 *Alta L Rev* 805 at 825.

<sup>173</sup> This is undoubtedly true, for reasons ranging from fracking-related earthquakes to concerns about noise pollution. See e.g. Robert Tuttle, "Canadian Shale Boom Triggers Quakes in Alberta Town as Frackers Rush to Drill New Wells", *Financial Post* (9 February 2018), online: <[business.financialpost.com/commodities/energy/alberta-forest-town-shakes-as-frackers-drill-for-light-oil-2](http://business.financialpost.com/commodities/energy/alberta-forest-town-shakes-as-frackers-drill-for-light-oil-2)>. See also Heather Senoran, "The Fight Against a Controversial Wind Turbine Project in Prince Edward County Continues", *Global News* (19 September 2017), online: <[globalnews.ca/news/3757121/the-fight-against-a-controversial-wind-turbine-project-in-prince-edward-county-continues/](http://globalnews.ca/news/3757121/the-fight-against-a-controversial-wind-turbine-project-in-prince-edward-county-continues/)>.



At this moment, social licence has crossed the line from describing real efforts to win community assent into an impossible-to-achieve normative sledgehammer, which can change definition depending on who is wielding it. It is past time to declare this conception of social licence dead and to revive the importance of community buy-in, so that we may look for new and better ways to address the real problems that we face as a nation, including environmental concerns, climate change, and the decarbonization of both our fuel and energy mixes. These problems are simply too important to reduce to catchphrases like “social licence”.