No. S170912
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of review of a Decision to approve the Kinder Morgan Pipeline made January 10, 2017, pursuant to the *Judicial Review Procedure Act*, RSBC 1996 c. 87.

BETWEEN:

DEMOCRACY WATCH and PIPE UP NETWORK

PETITIONERS

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA
and TRANS MOUNTAIN PIPELINE ULC

RESPONDENTS

APPLICATION RESPONSE

Application Response of: the Petitioners

THIS IS A RESPONSE TO the notice of application of the Attorney General of British Columbia filed June 20, 2017

Part 1: ORDERS CONSENTED TO

The Petitions do not consent to any of the orders sought by the Attorney General

Part 2: ORDERS OPPOSED

The Petitioners oppose all of the orders sought by the Attorney General

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Petitioners take a position on all of the orders sought by the Attorney General.

Part 4: Statement of Facts

INTRODUCTION AND OVERVIEW

1. The Petition challenges the integrity of the process leading to the Provincial approval of the Kinder Morgan Pipeline (the "KMP Approval process"). This challenge is based on the administrative law principle that administrative process and decision-making must be free from bias and the reasonable apprehension of bias. On this application, the Petitioner argues that a more complete Record of the Proceedings is necessary to the determination of whether bias tainted the KMP Approval because the law regarding administrative bias consistently requires the Court to place itself into the perspective of the informed observer.

2. Here, the Petitioners say that bias and the apprehension of bias arises from the fact that, while the KMP Approval process was ongoing, payments in excess of $640,000.00 were made to the BC Liberal Party by Kinder Morgan and other corporations who stand to benefit from the KMP Approval, a salary of approximately $300,000 was paid to the Premier of British Columbia by the BC Liberal Party, and the Premier was involved in fundraising for the BC Liberal Party.

3. The Respondents wish to narrow the temporal scope of the KMP Approval process to the formal Environmental Assessment process, which appears to have commenced in early 2016 and ended on January 10, 2017. The Respondents wish to narrow the decision-makers to just the Minister of Environment and Minister of Natural Gas Development. With respect, temporal narrowing and narrowing of decision-makers is not supported by the evidence.

4. The evidence before this Court consists of public documents demonstrating that the Premier was personally involved in setting five conditions for issuing the KMP Approval (the "Five Conditions") in 2012, and that she took personal responsibility for the satisfaction of the Five Conditions, including the decision that the Fifth Condition (that British Columbia receive a "fair share" of the pipeline revenue) was met by a revenue sharing agreement between the project proponent and the Province (the "Revenue Sharing Agreement"). Satisfaction of the Five Conditions was said by the Premier to be a precondition for consideration for approval.

5. The imposition and application of the Five Conditions and the specific decision that the Fifth Condition was satisfied by the Revenue Sharing Agreement could well be an aspect of the statutory consideration of "any other matter that they consider relevant to the public interest in making their decision" under s.17(3)(b) of the *Environmental Assessment Act*. Alternatively, satisfaction of the Five Conditions could be conceived as a precondition for the exercise of the s.17 *EAA* power (ie. the Premier decided

that the Ministers would not decide whether to issue an EA Certificate until the Five Conditions were satisfied). Either way, the imposition of the Five Conditions in 2012, the decision on January 11, 2017 that the Five Conditions were satisfied, and the administrative processes in between those dates are all part of the KMP Approval process.

6. The Respondents rely on the affidavit of Nathan Braun to support their desire to narrow the duration and decision-makers. However, Nathan Braun does not depose that the Ministers and/or Premier did not consider the Revenue Sharing Agreement in making their decision under s.17(3)(b) of the *EAA*, and he certainly does not say anything about whether satisfaction of the Five Conditions was a precondition of the exercise of discretion under s.17 of the *EAA*. Mr. Braun just deposes that the Revenue Sharing Agreement was not part of the *EA* package of documents sent by the Executive Director to the Ministers. It is both implausible and premature to conclude at this time that the satisfaction of the Fifth Condition by means of the Revenue Sharing Agreement is irrelevant or unconnected to the issuance EA Certificate.

7. In their Notice of Application filed April 10, 2017, at paragraphs 1 and 4, the Petitioners seek an Order requiring the Attorney General of British Columbia to file a complete Record of Proceedings within seven (7) days of this Order, and specifying that a complete Record of the Proceedings for the purpose of this order includes:

   a. the intermediate decision made by the Premier of British Columbia to impose five (5) conditions on the Kinder Morgan pipeline approval;

   b. the decision made by the Premier of British Columbia that the five (5) conditions were satisfied;

   c. all submissions (whether oral or written) made by the project proponent or their representatives in respect of the imposition of and satisfaction of the five conditions; and

   d. all internal deliberative documents generated in respect of those five (5) conditions.

8. These are intended to capture documents dealing with the process of imposing the Five Conditions and documents dealing with the application of the Fifth Condition (ie. the decision that the Revenue Sharing Agreement satisfied the Fifth Condition).

9. The Attorney General of British Columbia filed an unsatisfactory and incomplete version of the Record that elides the decision that the Fifth Condition is met by the "Revenue Sharing Agreement". The Respondents' contention that the Revenue Sharing Agreement and the Fifth Condition are a $1 billion legal nothingburger does not withstand scrutiny.

10. The Petitioners also seek an Order requiring the AGBC to file and/or deliver all documents dealing with political donations, fundraising and fundraising

events associated with the Kinder Morgan Pipeline, the KMP Shippers and Kinder Morgan, including emails send or received from email accounts controlled or accessible to the Ministers and Premier from all email accounts, including government-hosted accounts, BC Liberal Party-hosted accounts, and email accounts hosted by other private or third party (ie. gmail) accounts. The broad wording of this relief is intended to cover private email accounts that are used for government business.

11. In response to the issues raised by the Attorney General of British Columbia ("AGBC") and Trans Mountain Pipeline ULC ("TMP"), the Petitioners say:

    a. In the absence of a record dealing with the Five Conditions and the decision that the Fifth Condition is satisfied by the Revenue Sharing Agreement, it would be premature for this Court to conclude that the satisfaction of the Five Conditions and the Revenue Sharing Agreement were not an aspect of or a precondition of the exercise of powers under the *Environmental Assessment Act*.

    b. The justiciability of the decision that the Fifth Condition was satisfied by the Revenue Sharing Agreement is a collateral issue and, in any event, should await the hearing of the Petition and should be determined on the entire Record.

    c. The Attorney General of British Columbia is not being especially transparent or forthright about the identity of the decision-maker or decision-makers who concluded that the Revenue Sharing Agreement satisfied the Fifth Condition. Even though the Premier publicly claimed responsibility for satisfaction of the Fifth Condition, it may well be prudent to resolve the identity of the decision-maker once the Record is complete.

    d. In the absence of a record dealing with the decision that the Fifth Condition is satisfied by the Revenue Sharing Agreement, and in the absence of any affidavit evidence stating that the Premier was not involved, and in the face of the public record of the Premier announcing and appearing to take responsibility for the KMP Approval, it would be premature for this Court to conclude that the Premier was not herself involved in the decision-making.

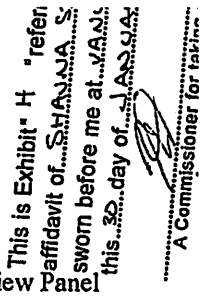
    e. The issue of the appropriate respondents can be resolved at the hearing of the Petition, on a complete Record.

STATEMENT OF FACTS

The Five Conditions

1. On July 23, 2012, the Government of British Columbia issued the Five Conditions, in the form of a press release with an attached Technical Bulletin. It is clear from the text of the Five Conditions that the Five Conditions are binding

and that they specifically bind the KMP proposal. An excerpt from the press release is as follows:



British Columbia News

British Columbia outlines requirements for heavy oil pipeline consideration

https://news.gov.bc.ca/02438

Monday, July 23, 2012 10:00 AM

VANCOUVER - As part of ongoing work to participate in and monitor the Joint Review Panel on the Northern Gateway Project, the government of British Columbia today outlined five minimum requirements that must be met for the province to consider the construction and operation of heavy oil pipelines within its borders.

"Our government is committed to economic development that is balanced with environmental protection," said Premier Christy Clark. "In light of the ongoing environmental review by the Joint Review Panel on the Enbridge pipeline project proposal, our government has identified and developed minimum requirements that must be met before we will consider support for any heavy oil pipeline projects in our province. We need to combine environmental safety with our fair share of fiscal and economic benefits."

...

Lastly, British Columbia must receive a fair share of the fiscal and economic benefits of any

environment and a significant proportion of the risk on the land should a spill event ever occur. Current heavy oil project proposals do not balance the risks and benefits for British Columbia.

"We have identified aggressive environmental requirements and principles for First Nations engagement, and we have clearly stated we expect a fair share of the fiscal and economic benefits for our province," said Premier Clark. "British Columbians are fair and reasonable. We know we need resource and economic development, but we also expect that risks are managed, environmental protection is uncompromised and that generations will benefit from the decisions we make today."

Affidavit #3 of Shauna Stewart, Exhibit H, pp.24-26

2. The press release unequivocally states that the "five requirements must be met for the province to consider the construction and operation of heavy oil pipelines within its borders". The Five Conditions appear to be an initiative of the Premier. At this point, in July of 2012, the Five Conditions appear to be a prerequisite for consideration of any authorization.

3. The following excerpts are from the Technical Bulletin issued by the Government of British Columbia, which was linked to the press release:

Government of British Columbia Statement of Minimum Requirements: Expansion of Heavy Oil Export Activity

At present, there are two proposed pipeline projects that would result in the export of Alberta oil sands-produced heavy oil through British Columbia ports. As with most economic development opportunities, while there are fiscal benefits that accrue to individuals, companies and governments, there are environmental risks to assess, manage and mitigate.

Our government has identified five minimum requirements that must be met before we would consider supporting the commencement of these projects.

Trans-Mountain Pipeline Anticipated Project

Kinder Morgan has proposed a $4.1 billion expansion of its Trans Mountain Pipeline from Alberta to Vancouver that would potentially increase the amount of heavy oil shipped to 750,000 barrels per day. It is estimated that this expansion would increase the number of oil tankers in Vancouver's Burrard Inlet to 20-25 per month from the current 4-5 per month.

As Kinder Morgan has not filed an application to the National Energy Board, British Columbia has yet to conduct a significant or comprehensive review of the proposal. However, our government would ensure the same minimum requirements be met before provincial approval of this project would be considered.

Improved Fiscal Benefits to British Columbia

Objective: B.C. enjoys commensurate fiscal benefits for its citizens in proportion to the environmental risks the province would assume if the project is approved.

According to Enbridge, the Project is anticipated to generate significant revenues to both governments and individuals. They estimate that over a 30 year period the Project will generate $270 billion in additional GDP to Canada and provide $81 billion in incremental government revenues.

However, the incremental revenues that accrue to British Columbia are a fraction of those accruing to Canada or Alberta. Of the $81 billion of incremental revenues, British Columbia is projected to receive only $6.7 billion, or approximately 8 per cent, while assuming much of the risk to our land and rivers, and all of the risk to our coastline.

Our government does not agree that we should bear the majority of risk with the minority share of benefits being returned to our citizens.

Summary

The proposed heavy oil projects represent a unique opportunity to expand the global markets for Alberta's oil, increase federal and provincial government revenues, and create jobs.

However, while they are a unique opportunity, they also represent a unique challenge to ensure that the projects, if approved, are built and operated in as environmentally safe a manner as possible with world class environmental protection.

In order for there to be any possibility of this project receiving the support of our government, each principle must be satisfactorily addressed in advance of formal support being considered by British Columbia.

Affidavit #2 of Andrea Craig, Exhibit A, pp.4 and 8

4. The Technical Requirements unequivocally state that the Five Conditions are "minimal requirements that must be met before provincial approval of this project will be considered". This wording tracks the wording of the press release - the Five Conditions are described as a precondition to provincial approval.

5. The Five Conditions were reiterated by a press release from the Office of the Premier on November 30, 2016. The press release quoted the Premier as saying "any heavy oil project must meet the five conditions". In her press conference held the same day, the Premier stated that the Fifth Condition had not been met and repeatedly took personal responsibility for ensuring that the

Five Conditions are met: "I haven't changed my position on this project one iota from the very beginning... I have said from the very beginning that the Five Conditions are the path to getting to yes... What British Columbians expect is that their Premier is going to stand up, fight to protect our Province, find the balance between economy and jobs... I've been fighting to make sure we get there for British Columbians". The Premier closed the press conference by saying, "My job is to make sure it's met the Five Conditions".

Affidavit #3 of Shauna Stewart, Ex.F, p.20

Affidavit #7 of Shauna Stewart, Ex.A

6. The press release and Technical Bulletin do not reference any legislation or specific statutory provision as a basis for imposing the Five Conditions. However, the Five Conditions are consistent with the imposition by the Premier of a precondition for the exercise of discretion under s.17 of the *EEA* or a decision that the Five Conditions represent aspects of the public interest that "must" be considered under s.17(3)(b) of the *EEA*, even though s.17(3) of the *EEA* provides only that the Minster "may" consider other matters in the public interest.

7. The Petitioner notes that the Five Conditions may also be a "policy direction" under s.21 of the *EAA*, which provides for procedural or substantive Ministerial direction in the exercise of discretion under the *EAA*. Merely describing the Five Conditions as "policy", as the Respondents want, does not end the inquiry into the relationship between the Five Conditions and the *EAA*. The current record is inadequate to conclude whether s.21 of the *EEA* was exercised.

The Revenue Sharing Agreement

8. On January 11, 2017, the Province issued two press releases announcing the KMP Approval on its gov.bc.ca website. The first press release, issued at 1:30 p.m., announced the Environmental Assessment Certificate. The second press release, issued at 3:00 p.m., announced that the Fifth Condition had been met by means of the Province entering into the Revenue Sharing Agreement with Trans Mountain Pipeline ULC. Satisfaction of the Fifth Condition with the Revenue Sharing Agreement was explicitly referenced in the 3:00 p.m. press release:

British Columbia's fifth condition related to a fair share of fiscal and economic benefits has resulted in an agreement that:

- has British Columbians first in line for jobs of the more than 75 ,000 person-years of employment;
- will boost B.C.'s GDP by $19.1 billion during construction and operations over 20 years; and
- generates over $2.2 billion in tax revenue for provincial and local governments.

In addition, B.C. has achieved an unprecedented agreement with Kinder Morgan to receive a significant investment worth up to $1 billion. The company will pay the Province between $25 million and $50 million annually for 20 years. This is the first time in B.C. that a company will share revenue from a large industrial project directly with the Province.

Condition 5: British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the Province, the environment and taxpayers.

- The economic benefits B.C. is receiving as a result of government's consistent and principled position includes (updated economic numbers from the 2012 submission to the National Energy board):
  - 75,110 person-years of employment for B.C. throughout construction and operation.
  - $3.8 billion in GDP to B.C. in construction and $15.3 billion (over 20 years) during operation for a total of $19.1 billion.
  - Approximately $2.2 billion in provincial tax revenue, including construction and operation benefits.
  - Estimated $512 million in property taxes to municipalities in B.C. over 20 years of operation.
- In addition B.C. will receive significant fiscal benefits direct from Kinder Morgan worth up to $1 billion.

...

In an unprecedented agreement between the Province of British Columbia and a private company, B.C. will receive significant fiscal benefits direct from Kinder Morgan worth up to $1 billion. The company will pay the Province between $25 million and $50 million annually for 20 years. The actual amount paid to the Province each year will depend whether the expanded pipeline is operating at full capacity on its spot market contracts.

Affidavit #3 of Shauna Stewart, Ex.B and Ex.C

9. The Revenue Sharing Agreement itself, which is dated for reference April 4, 2017, expressly states that it is intended to satisfy the Fifth Condition. An excerpt from the recitals of the Revenue Sharing Agreement is as follows:

D. In July, 2012 the Province issued *Technical Analysis – Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*, which outlined five minimum requirements (the "Five Conditions") that must be met for the Province to consider support for heavy oil pipelines such as the Project.

E. The fifth of the Five Conditions ("Condition 5") stipulated as follows:

"British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers."

F. Trans Mountain has been, and is, desirous of satisfying Condition 5 and accordingly in addition to other fiscal and economic benefits to the Province arising from the Project, Trans Mountain agreed that it would share with the Province certain revenues arising from the Project with a view to allocating such shared revenues as provided for in Section 4.6 of this Agreement should the Province acknowledge that such sharing and allocation of revenues, having regard to the other fiscal and economic benefits, would constitute satisfaction of Condition 5.

G. The Province has reached agreement with Trans Mountain with respect to the proposed sharing of revenues and has confirmed by public announcement delivered on January 11, 2017 the satisfaction of Condition 5 and accordingly the Parties wish to enter into this Agreement to memorialize their respective rights and obligations relating to these matters.

Affidavit #6 of Shauna Stewart, affirmed June 5, 2017, Ex.A, p.2

10. At a press conference held on January 11, 2017, the Premier was asked how a deal could be reached in the space of an hour-and-a-half if negotiations on the agreement did not form part of the environmental assessment process (presumably between the 1:30 p.m. and 3:00 p.m. press releases). In response, the Premier stated, "Well, we have been working over the past four-and-a-half-years, talking to Kinder Morgan about how this could potentially be structured. The money part of it is the least hard, I guess. The ocean spills protection side of it was the hardest to nail down. All of these things though have been under discussion at some level between governments and the proponents for some years now".

Affidavit #7 of Shauna Stewart, Affirmed June 22, 2017, Ex.A, 6:45

The KMP Approval Process was Not Limited to the formal EA process

11. The KMP Approval process was not limited to the EA process attached to the affidavit of Nathan Braun. The imposition and satisfaction of the Five Conditions was integral to the KMP Approval process. This is true whether the Five Conditions are conceived of as a precondition to the exercise of the Minister's discretion under s.17 or as an aspect of the public interest considered under s.17(3)(b) of the *EAA*.

12. The formal EA process commenced in early 2016 after the decision was released in the *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34.

In contrast, the Premier described the process leading to the satisfaction of the Five Conditions as taking four-and-a-half years, commencing July 23, 2012.

13. The AGBC takes the factual position that the Five Conditions to do not relate to the exercise of any statutory power under the *EAA*. With respect, the AGBC has tendered no evidence in support of that assertion, and it grates against the record currently before this Court. Furthermore, it would be premature to decide the relationship between satisfaction of the Five Conditions and the exercise of *EAA* powers at this early juncture.

14. The AGBC takes the position that the Five Conditions do not and did not affect legal rights. It is difficult to square this position with the statement in the Technical Requirement that "our government would ensure that the same minimum requirements be met [by Kinder Morgan] before provincial approval of this project would be considered". The Five Conditions appear to be a precondition for statutory consideration, and are thus a precondition for project approval.

15. It is clear from the recitals to the Revenue Sharing Agreement that the Five Conditions had a significant effect on legal rights. The Revenue Sharing Agreement expressly states that the binding legal obligations therein are to satisfy the Fifth Condition. If the Fifth Condition were of no force or effect, it is difficult to see why Trans Mountain Pipeline ULC would agree to pay $1 billion to satisfy that condition.

The Premier was Responsible for the Five Conditions Aspect of the KMP Approval

16. The Premier, by her own public admission, was responsible for the satisfaction of the Five Conditions. The Five Conditions were a precondition of the KMP Approval, and the Revenue Sharing Agreement was a precondition of satisfying the Fifth Condition. It is difficult to argue that the Premier was not involved in the KMP Approval.

The Process leading to the Satisfaction of the Fifth Condition with the Revenue Sharing Agreement is Relevant to this Judicial Review

17. Satisfaction of the Fifth Condition with the Revenue Sharing Agreement is relevant to this Judicial Review. The Premier has claimed personal responsibility for ensuring that the Five Conditions were met before the KMP Approval was issued. At the same time as the Premier took responsibility for the four-and-a-half years of negotiation with Kinder Morgan to satisfy the Five Conditions, she was being paid by the BC Liberal Party to raise funds for the BC Liberal Party from Kinder Morgan and other companies that stood to benefit from the KMP Approval.

18. The Petitioners seek to set aside the KMP Approval on the basis that the KMP Approval is tainted by a reasonable apprehension of bias arising from payments of more than $560,000.00 made to the Liberal Party of British Columbia from companies with an interest in the outcome of the KMP Approval process, coupled with payment of a salary to the Premier by the Liberal Party of British Columbia totaling more than $300,000.00 over the period of the KMP Approval process.

19. The precise relationship between the satisfaction of the Five Conditions and the Ministers' issuance of the Environmental Assessment Certificate need not be determined at this stage, and it would be premature to attempt to resolve that question on an incomplete record that does not include the record dealing with the imposition and satisfaction of the Five Conditions.

Donations to the Liberal Party of British Columbia

20. The Petitioners say that payments to the BC Liberal Party during the KMP Approval process irreparably taint the KMP Approval process, requiring the KMP Approval to be set aside.

21. Payments (called "donations") to the Liberal Party of BC are disclosed by Elections BC. Elections BC receives updates on political party contributions from political parties registered in British Columbia once a year, usually towards the end of March. Elections BC then updates their website data with the previous year's donations.

22. Of the 12 KMP Shippers, Elections BC reveals that six have made significant contributions to the Liberal Party of British Columbia during the KMP Approval process. Those six companies are:

    a. Canadian Natural Resources Ltd.,
    b. Cenovus Energy Inc.,
    c. Devon Canada Corp.,
    d. Imperial Oil Ltd.,
    e. Suncor, and
    f. Nexen Marketing Inc.

23. Since October 21, 2011 to December 31, 2015 these six KMP Shippers made payments totaling $330,470.00 to the BC Liberal Party.

24. Additionally, from October 21, 2011 to December 31, 2015, Kinder Morgan made payments totaling $16,800.00 to the BC Liberal Party.

25. There have also been sizable donations to the Liberal Party of British Columbia from two corporations that were intervenors in the KMP Tolling Application: (1) the Canadian Association of Petroleum Producers ("CAPP") and (2) Chevron

Canada Ltd. ("Chevron"). From October 20, 2011 to December 31, 2015, CAPP paid a total of $74,100.00 and Chevron paid a total of $140,563.44 to the Liberal Party of BC.

26. Combined, from October 20, 2011 to January 10, 2017, Kinder Morgan, the KMP Shippers and two of the KMP Tolling Application intervenors paid a total of $644,438.44 to the Liberal Party of British Columbia.

The Premier's Private BC Liberal Party Salary

27. From October 20, 2011 until she and the Ministers granted the KMP Approval on January 11, 2017, Premier Clark received an annual salary of approximately $50,000.00 from the Liberal Party of BC in consideration for the performance of duties as the leader of the Liberal Party.

28. One aspect of the Premier's duties as leader of the Liberal Party, for which she is paid her salary, is to engage in fundraising. The Petitioners do not know if the Minister of Environment or Minister of Natural Gas Development also receive a salary or other payments or benefits from the BC Liberal Party and/or personally engaged in fundraising from corporations that stood to benefit from the KMP Approval, but that issue is certainly relevant to this judicial review.

Private Functions Involving the Premier and KMP-related Companies

29. Premier Clark has admitted to attending private "pay-for-access" events where tickets providing exclusive access to the Premier and other cabinet Ministers are sold by the Liberal Party for $20,000.00 or more. Ms. Clark, in her role as Premier of British Columbia, hosts these small, invitation only, "pay-for-access" events.

30. The donations by Kinder Morgan, the KMP Shippers and the other KMP intervenors were often paid in closely grouped clusters, in which high value donations, often for the same amounts, were given on the same date or within a few days of one another. The Petitioners infer that the clusters of donations are the product of ticket sales for "pay-for-access" events and/or Liberal Party fundraising campaigns targeted at parties with a pecuniary interest in the outcome of the KMP Approval process.

Bias and Reasonable Apprehension of Bias

31. The Petitioners say fundraising and personal contact with the project proponents at targeted events are sufficient to establish bias. Moreover, there is a reasonable apprehension of bias throughout the KMP Approval process: a rational and informed observer would conclude that due to the payment of approximately $645,000.00 by the interested companies, including Kinder Morgan, to the BC Liberal Party, especially when coupled with payment of approximately $300,000.00 by the Liberal Party to the Premier, it is more likely

than not that the Premier and the Ministers were consciously or unconsciously affected by these enormous payments. The KMP Approval was tainted by the payments.

Part 3: LEGAL BASIS

32. As a general rule, the court's review of a decision of the executive must be based on the Tribunal's record of proceedings as that term is defined in s.1 of the *Judicial Review Procedural Act*:

> "record of the proceeding" includes the following:
>
> (a) a document by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceeding;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript, if any, of the oral evidence given at a hearing; and
>
> (f) the decision of the tribunal and any reasons given by it.

33. Documents dealing with the imposition and application of the Five Conditions for consideration of KMP Approval fall squarely into the definition of the "record of the proceedings". They are in the nature of intermediate orders, documents in evidence before the decision-makers, oral evidence given (whether in or outside the course of lobbying at pay-for-access events), or the decision and reasons for deciding that the Revenue Sharing Agreement was rich enough to satisfy the Fifth Condition.

34. Notably, satisfaction of the Fifth Condition requires (a) an appraisal of the risks associated with KMP and (b) balancing those risks against the economic benefits to the Province of British Columbia. The Petitioners infer that there was a deliberative process and some iterative submission process whereby the project proponent submitted versions of the Revenue Sharing Agreement to the Premier and/or other decision-makers. Then, there were reasons for the decision that the Revenue Sharing Agreement satisfied the Fifth Condition for which the Premier took personal responsibility.

35. In respect of the fundraising documents sought by the Petitioners, there is ample authority for the proposition that documents extraneous to the record of the proceeding can be compelled in certain cases. The test for admission of such evidence is as follows:

> [17] The court's power to admit evidence beyond the record of proceeding must be exercised sparingly, and only in an exceptional case. Such evidence may be admissible for the limited purpose of showing a lack of jurisdiction or a denial of natural justice. In *Ross,* Silverman J. said the following at paras. 26-27 after reviewing the relevant case law:
>
> > [26] The general rule with respect to the admissibility of extrinsic material is that it is, except in very special circumstances, inadmissible. This is because a judicial review is a review of a decision on the tribunal's record of proceedings. It is that very record which is the subject of the judicial review. Affidavit material describing evidence not before the tribunal or attaching documents that were not before the decision-maker is not part of that record and is generally inadmissible on judicial review. ...
> >
> > [27] There are, however, exceptions to the general rule where extrinsic evidence may sometimes be admissible. For example, it may be admissible for the limited purpose of showing a lack of a jurisdiction or a denial of natural justice. In circumstances where the grounds for judicial review are a breach of natural justice or procedural fairness, the petitioner may be entitled to adduce new evidence. However, the new evidence must be both relevant and necessary before it will be admissible[.]
>
> *Kinexus Bioinformatices Corp v. Asad*, 2010 BCSC 33 at para 17

36. This Petition challenges the procedure, not the substance of the KMP Approval. The allegation is bias and reasonable apprehension of bias, which is a denial of natural justice.

37. The Petitioners say that the documents sought in respect of fundraising and in respect of the Five Conditions and Revenue Sharing Agreement are both relevant and necessary to the determination of whether there is a reasonable apprehension of bias with respect to the KMP Approval, including the imposition and satisfaction of the KMP Conditions stated by the Premier.

38. The record of the Five Conditions and Revenue Sharing Agreement are necessary to the determination of whether bias tainted the KMP Approval because the law regarding administrative bias consistently requires the Court to put itself into the perspective of the informed observer. It is not enough for the

Court to proceed on the basis of the public record - the true record of decision-making in respect of the sufficiency of the Revenue Sharing Agreement is necessary to adjudicate the issues. A person who did not know why the Revenue Sharing Agreement was determined to be sufficient to balance the environmental risks against Provincial fiscal benefits could not be considered informed.

> *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p.394.

39. The extraordinary circumstances justifying production of documents is not speculative or unfounded. The Revenue Sharing Agreement is described by the Premier as "unprecedented". The Petitioners have laid a solid evidentiary foundation showing the receipt of $645,000 from Kinder Morgan and the KMP Shippers by the Liberal Party during the KMP Approval process and payment of $300,000.00 by the Liberal Party to the Premier.

40. On the question of whether Aboriginal groups should be served with the Petition, the Petitioners say that the nature and strength of their interests has not been proven by the Attorney General of British Columbia. Furthermore, the Attorney General has the addresses of the Aboriginal groups, and is at liberty to serve them with the Petition if he feels an injustice may result if they are not served. If the Petitioners are ordered to serve the Aboriginal groups, the Attorney General should be ordered to provide the addresses of the groups to the Petitioners.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavits #1-7 of Shauna Stewart, affirmed January 30, 2017;
2. Affidavit #2 of Andrea Craig, affirmed April 24, 2017; and
3. Such other material as counsel may identify.

The applicant(s) estimate(s) that the application will take one day.

This matter is not within the jurisdiction of the Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that
   (i) you intend to refer to at the hearing of this application, and
   (ii) has not already been filed in the proceeding, and

(c)) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated this 22nd day of June, 2017

PARALEGAL
for: Jason Gratl

Gratl & Company
Barristers & Solicitors
601-510 West Hastings Street
Vancouver, B.C.
V6C 1L8

To be completed by the court only:

Order made

□ in the terms requested in paragraphs _____ of Part 1 of this notice of application

□ with the following variations and additional terms:

Date: _____

_____
Signature of Judge Master □ Judge □ Master