



S-170912

No.
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:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(PREMIER OF BRITISH COLUMBIA, MINISTER OF ENVIRONMENT and MINISTER
OF NATURAL GAS DEVELOPMENT)

RESPONDENT

PETITION

ON NOTICE TO:

Attorney General of British Columbia
PO. Box 9289 Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by Democracy Watch (petitioner).

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC
(2)	The ADDRESS FOR SERVICE of the petitioners is: Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6B 1L8 Email address for service of the petitioners: jason@gratlandcompany.com
(3)	The names and office addresses of the petitioners' lawyers are: Jason Gratl Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6C 1L8 Phone: (604) 694-1919

Claim of the Petitioners

OVERVIEW

This is a judicial review by Democracy Watch and PIPE UP Network of a decision dated January 10, 2017 to approve the Kinder Morgan Pipeline made jointly by the Premier of British Columbia, the Minister of Environment and the Minister of Natural Gas Development (the "KMP Approval"). The KMP Approval consisted of the issuance of Environmental Assessment Certificate E17-01 pursuant to the *Environmental Assessment Act*, S.B.C. 2002, c. 43, and related Reasons for Decision, as well as interim decisions setting criteria for issuing the KMP Approval.

The Petitioners seek to quash and set aside the KMP Approval on the basis that it is tainted by reasonable apprehension of bias arising from the accretive effect of approximately \$560,000.00 in payments made to the Liberal Party of British Columbia by Kinder Morgan and oil shippers that intend to use the pipeline ("KMP Shippers"), together with payment to the Premier of British Columbia of an annual salary of approximately \$50,000.00 by the Liberal Party of British Columbia. The Premier was paid more than \$300,000.00 by the Liberal Party during the six-year period that Kinder Morgan and the KMX Shippers paid more than \$560,000 to the Liberal Party.

A reasonable objective and informed observer would conclude that the Premier, the Minister of Environment and Minister of Natural Gas Development were or could likely have been influenced by the \$560,000.00 in payments to the Liberal Party of British Columbia, and, further, that the Premier's salary paid by the Liberal Party amounted to an indirect private benefit received over and above the Premier's salary paid by the public treasury, contrary to ss.2 and 7 of the *Members Conflict of Interest Act*, and which precluded her involvement in the KMP Approval pursuant to s.3 of the *Members Conflict of Interest Act*.

Part 1: ORDERS SOUGHT

The Petitioners seek the following orders:

- (a) An order in the nature of *certiorari* quashing and setting aside the Decision to approve the Kinder Morgan pipeline made January 10, 2017;
- (b) Should the Petitioners be successful, an order for costs, including special costs, and an order protecting the Petitioner from adverse costs liability in the event that this petition is dismissed; and
- (c) Such other and further relief as this Court deems appropriate and just.

Part 2: FACTUAL BASIS

The Parties

1. Democracy Watch is a national non-profit, non-partisan society and Canada's leading citizen group advocating democratic reform, government accountability and corporate responsibility.
2. PIPE UP Network ("PIPEUP") is a British Columbia non-profit society representing the interests of British Columbia residents directly affected by the Kinder Morgan Pipeline ("KMP"). PIPEUP members have local expertise and academic credentials in air quality, agriculture, water quality, fish and fish habitat, endangered species, and health and safety requirements. PIPEUP members and their families live, work and attend schools near water, land and air that is put at risk by the KMP. PIPEUP was granted intervener status by the National Energy Board ("NEB") in respect of the application hearings for the KMP.

The Proposed Pipeline

3. The KMP is proposed by Kinder Morgan Inc., a Texas-based oil company, through a subsidiary, Trans Mountain ULC ("Kinder Morgan"). The KMP is an interprovincial pipeline approximately 987 kilometres long between Edmonton, Alberta and a marine terminal on the Pacific coast in Burnaby, British Columbia. KMP has a capacity of 590,000 barrels of diluted tar sands bitumen per day. Some of Kinder Morgan's corporate subsidiaries are in Canada but the vast majority of capital flows from Kinder Morgan's Canadian pipeline operations and moves untaxed to Texas by means of unlimited liability partnerships and other such devices.
4. In 2013, Kinder Morgan filed an application to the NEB to build the KMP. Long before applying to the NEB for approval to build the KMP, Kinder Morgan applied to the NEB to set the shipping rates for KMP in case the construction of the KMP was approved by the NEB (the "KMP Tolling Application").

5. Before the KMP Tolling Application was initiated, and beginning in early 2011, Kinder Morgan began discussing the idea of an "open season" process with potential shippers in an effort to garner corporate interest and financial support for the expansion of the pipeline. The "open season" formally began on October 20, 2011 and resulted in 15 and 20 year contractual commitments from various oil and gas companies that intended to ship diluted bitumen using the KMP (the "KMP Shippers"). Materials filed with the NEB refer to the contractual commitments by KMP Shippers as "Transportation Service Agreements" ("TSAs").

Affidavit #2 of Shauna Stewart, Exhibit D

Affidavit #1 of Shauna Stewart, Exhibit H

6. The following KMP Shippers are referred to in the material filed with the NEB and have a TSA with the expansion project:

1. Canadian Natural Resources Ltd.;
2. Canadian Oil Sands Partnership #1;
3. Cenovus Energy Inc.;
4. Devon Canada Corporation;
5. Husky Oil Operations Limited;
6. Imperial Oil Limited;
7. Statoil Canada Ltd.;
8. Suncor Energy Marketing Inc. and Suncor Energy Products Partnership;
9. Tesoro Canada Supply & Distribution Ltd.;
10. Total E&P Canada Ltd.;
11. BP Canada Energy Group ULC; and
12. Nexen Marketing Inc.

Affidavit # 2 of Shauna Stewart, Exhibit B

7. The open season process resulted in the pre-sale of approximately 80 percent of KMP's bitumen capacity to the KMP Shippers. Each TSA consists of a contract for services between Kinder Morgan and the KMP Shippers upon completion of KMP. In 2011, the NEB held hearings in which Kinder Morgan and the KMP Shippers participated and set shipping rates and various options that allocated the financial risks of KMP between Kinder Morgan and KMP Shippers. In 2012, the

NEB approved shipping rates and allocated various financial risks as between Kinder Morgan and KMP Shippers.

Affidavit #2 of Shauna Stewart, Exhibit D

8. On July 23, 2012, the Premier of British Columbia, Christy Clark, publicly stated that she was against recommending the expansion project unless she could be satisfied that five conditions for approving KMP were met (the "KMP Conditions"). The KMP Conditions are:
 1. Successful completion of an environmental review process.
 2. World-leading marine oil spill response, prevention and recovery systems for B.C.'s coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments.
 3. World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines.
 4. Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project.
 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.
9. Premier Clark and other representatives of the British Columbia government repeatedly reaffirmed the KMP Conditions while awaiting the decision of the NEB.
10. On January 13, 2016, the Honourable Madam Justice Koenigsberg determined that a decision under both the *National Energy Board Act* and British Columbia's *Environmental Assessment Act* were necessary to ratify inter-provincial pipeline projects. The *Coastal First Nations* decision involved a judicial review of British Columbia's approval of Enbridge's Northern Gateway Pipeline, but the decision implied a legal requirement for a Provincial Environmental Assessment process for Provincial approval of KMP.

Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34 at paras. 41-76
11. On November 29, 2016 the Government of Canada approved KMP subject to 157 conditions. On November 30, 2016, Premier Clark publicly reaffirmed that the province's KMP Conditions applied to Provincial approval of the KMP.

Affidavit #3 of Shauna Stewart, Exhibit I

12. On January 10, 2017, the Government of British Columbia announced its pending approval of KMP. On January 11, 2017, Premier Clark personally announced the KMP Approval to the public through the media. The KMP Approval entailed the issuance of Environmental Assessment Certificate E17-01 (the "EA Certificate") pursuant to the *Environmental Assessment Act*, S.B.C. 2002, c. 43 and reasons for issuing the EA Certificate, which were signed by the Minister of Environment and Minister of Natural Gas Development. The KMP Approval was based in part on the NEB decision and hearings.

Affidavit #1 of Shauna Stewart, Exhibits C and F

13. The KMP Approval includes 37 conditions meant to supplement the 157 conditions imposed by the NEB, and makes repeated reference to the five KMP Conditions.

The Premier and the Ministers

14. The Premier of British Columbia is the President of the Executive Council pursuant to s.9 of British Columbia's *Constitution Act*. The Executive Council is a body of government appointed by the Premier to exercise various statutory powers that are not enjoyed by members of the legislative branch and to direct the implementation of statutes by the civil service. The Premier has the power to appoint Ministers and to designate what powers are to be exercised by each Minister.
15. Mary Polak was appointed Minister of Environment on June 10, 2013. Rich Coleman was appointed Minister of Natural Gas Development on June 7, 2013. Both were appointed by the Honourable Christina Clark, the current Premier of the Province of British Columbia, and both of them serve at her pleasure.
16. The Premier made and announced the interim decision to impose the KMP Conditions as pre-requisites for the KMP Approval. The Premier made and announced the KMP Approval, but Minister Polak and Minister Coleman endorsed the Reasons for Decision and their signatures are on the EA Certificate.
17. Satisfaction of the KMP Conditions is said by the Premier to involve certain payments to the Province of British Columbia, but the statutory authority for requiring such payments as a precondition to the KMP Approval is not stated.

Donations to the BC Liberal Party

18. Payments (called "donations") to the Liberal Party of BC are disclosed by Elections BC: <http://contributions.electionsbc.gov.bc.ca/pcs/Options.aspx>
19. 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. As of January 30, 2017, the Elections BC website has no publicly accessible information dealing with political donations made to British Columbia political parties after February of 2016.

20. Corporate contributions to the Liberal Party of British Columbia are commonplace. Relevant to this matter are corporate contributions from two groups of corporations: (a) Kinder Morgan and KMP Shippers with a TSA; and (b) other Oil and Gas companies that, upon application, became intervenors in the NEB approval process.

(a) Kinder Morgan and TMX Shippers with a TSA

21. Of the 12 KMP Shippers, six have made significant contributions to the Liberal Party of BC since 2005. The six KMP Shippers with a TSA that have made contributions to the Liberal Party are:

1. Canadian Natural Resources Ltd.;
2. Cenovus Energy Inc.;
3. Devon Canada Corp.;
4. Imperial Oil Ltd.;
5. Suncor; and
6. Nexen Marketing Inc.

22. In their KMP Tolling Application submissions to the NEB, Kinder Morgan submitted that they started contacting shippers about an "open season" in "early 2011". From the first day of Kinder Morgan's "open season", October 20, 2011, to December 31, 2015, these six KMP Shippers have contributed \$330,470.00 to the BC Liberal Party. Under their respective TSA's, the KMP Shippers' commitment to the pipeline includes sharing liability and a non-refundable upfront commitment. KMP Shippers are heavily invested in whether KMP is approved and built.

23. From October 20, 2011 to December 31, 2015 Kinder Morgan and Trans Mountain have contributed \$16, 800 to the BC Liberal Party.

(b) Other Intervenors in the NEB decision

24. 18 intervenors participated in the KMP Tolling Application hearings to approve the toll methodology for KMP. The six KMP Shippers with a TSA are included in the 18 intervenors at the NEB Tolling hearing.

Affidavit #2 of Shauna Stewart, Exhibit A

25. Two additional intervenors without a TSA made large donations to the Liberal Party. Those two are (1) the Canadian Association of Petroleum Producers ("CAPP") and (2) Chevron Canada Ltd. ("Chevron").
26. CAPP and Chevron do not have as direct an interest in the outcome of the application as the KMP Shippers with a TSA. However, they were intervenors in the NEB process, they have expressed public support for the project and they stand to potentially benefit from the approval.
27. From October 20, 2011 to December 31, 2015, CAPP has contributed \$74,100.00 and Chevron has contributed \$140,563.44 to the Liberal Party of BC. Payments by KMP intervenors without a TSA to the BC Liberal Party total \$214,663.44.

Aggregate Donations

28. Kinder Morgan, the KMP Shippers with a TSA and the other intervening parties contributed an aggregate of \$561,933.44 from October 20, 2011 to December 31, 2015. Amounts contributed after December 31, 2015 are relevant but unknown to the Petitioners at this time.

The Premier's Private Liberal Party of BC Salary

29. Christina Joan Clark was appointed the Premier of British Columbia on March 14, 2011. From the date of her appointment to January 13, 2017, Premier Clark received an annual salary of approximately \$50,000 from the Liberal Party of BC in consideration for the performance of duties as the leader of the Liberal Party.
30. An aspect of the Premier's duties as leader of the Liberal Party, for which she is paid her salary, is to engage in fundraising. It can be inferred by a reasonable observer that if Liberal Party fundraising were insufficient, the Liberal Party would cease to pay a salary to the Premier.
31. 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 Liberal Party of BC. Even if they do not, they remain influenced by the Premier by means of her power of appointing and dismissing Ministers and assignment of powers to Ministers.

Private Functions

32. 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.

Affidavit #3 of Shauna Stewart, Exhibit A, para. 8

33. As an example, the Premier attended a "pay-for-access" event hosted by the

Simon Fraser University Chancellor, Anne Giardini, where 9 individuals attended and the cost of entrance was \$10,000.00 for seven attendees and \$5,000.00 for the other two. The Liberal Party of BC does not publicly disclose the identity of invitees or attendees of these events, but they are required to disclose donor identities, quantum of donation and date of donation to Elections BC.

34. Donations by Kinder Morgan, the KMP Shippers and other KMP intervenors to the Liberal Party were often paid in closely grouped clusters, in which high value donations, often for the exact same amount, 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 KMP Shippers or pipeline shippers.

Affidavit #2 of Shauna Stewart, Exhibit O

PART 3: LEGAL BASIS

35. The KMP Approval should be set aside or quashed on the basis that it is tainted by a reasonable apprehension of bias. A decision may be set aside if the process leading to the issuance of the decision is marred by a reasonable apprehension of bias.

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623, 1992 CanLII 84 (SCC)

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

36. The test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p 394:

what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

37. That test has been affirmed by the Supreme Court of Canada and British Columbia courts in numerous subsequent decisions.

Wewaykum Indian Band v. Canada, 2003 SCC 45

R v. S (RD), 1997 CanLII 324 (SCC), [1997] 3 SCR 484

Gordon v. Pielak, 2012 BCPC 3867 (CanLII)

38. The process and context of the KMP Approval is marred by a reasonable apprehension of bias. The decision ought to be set aside.

39. The reasonable apprehension of bias stems from the reasonable perception that there is a significant link between the more than \$560,000.00 in donations by Kinder Morgan and the KMP Shippers to the Liberal Party of BC and the ensuing KMP Approval. These companies are known to have a direct financial interest in the outcome of the expansion application.
40. The process is further tainted by the Premier's receipt of an annual salary paid by the Liberal Party, in part for fundraising at the private "pay-for-access" functions attended by the Premier. The Premier does not disclose who attends or what is discussed.
41. The Premier's Liberal Party salary represents a conflict of interest that is contrary to s.2 of the *Members Conflict of Interest Act*. The Premier's Liberal Party salary constitutes a private benefit received by the Premier that is indirectly connected with the performance of the Premier's duties of office and is hence contrary to s.7 of the *Members Conflict of Interest Act*. Furthermore, the Premier's involvement in announcing and issuing the interim KMP Conditions and the KMP Approval is contrary to s.3 of the *Members Conflict of Interest Act* as it involves the performance of an official duty and function while in a conflict of interest or apparent conflict of interest.
42. The clustering of donations suggests that Kinder Morgan and KMP Shippers may well have been buying access to the Premier of British Columbia and may have been targeted by the Liberal Party of BC for solicitations given their known interest in the outcome of a pending decision by the Premier and Ministers.
43. However, the Petitioners say that a reasonable apprehension of bias exists in respect of the KMP Approval whether or not the Premier's Liberal Party salary or the donation "clusters" are taken into account.
44. The bottom line is that a reasonable, informed and thoughtful person, after thinking about it for a while, would think that the Premier and the Ministers would have at least been unconsciously affected by more than \$560,000.00 in payments to the Liberal Party of British Columbia. The KMP Approval is tainted by money.

Costs

45. This judicial review raises two issues that are of public importance: pipeline approvals and undue political influence. Even if the Petitioners are unsuccessful on this application for judicial review, the public interest will have been served, and the Petitioners ask that they receive their costs, including special costs, if successful, and that they be spared costs liability if unsuccessful.

Enactments and Other Grounds Replied Upon

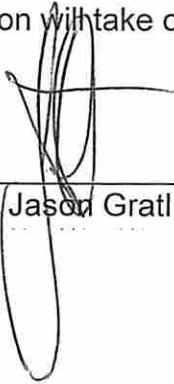
- 1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.
- 2. *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
- 3. Such other enactments and grounds as counsel may identify.

Part 4: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Shauna Stewart, affirmed January 30, 2017.
- 2. Affidavit #2 of Shauna Stewart, affirmed January 30, 2017.
- 3. Affidavit #3 of Shauna Stewart, affirmed January 30, 2017.
- 4. Such other materials as counsel may identify.

The petitioners estimate that the hearing of the petition will take one day.

Dated this 30th day of January, 2017.



Jason Gratl

To be completed by the court only:

Order made

[] in the terms requested in paragraphs of Part 1 of this petition
[] with the following variations and additional terms:

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Date: _____

Signature of [] Judge [] Master