



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:

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

**NOTICE OF APPLICATION**

Names of applicants: The Petitioners, Democracy Watch and Pipe UP Network.

To: The Liberal Party of British Columbia

And To: Sharon White, QC  
President of the Liberal Party of British Columbia

And To: Christina Joan Clark  
Leader of the Liberal Party of British Columbia

And To: The Respondent, 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).

TAKE NOTICE that an application will be made by the applicants to a Judge or Master presiding in Chambers at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on the 12th day of April, 2017 at 9:45 a.m. for the order(s) set out in Part 1 below.

## **Part 1: ORDER(S) SOUGHT**

The Applicants seek the following orders:

1. An Order that the Liberal Party of British Columbia, the President of the Liberal Party of British Columbia and the Leader of the Liberal Party of British Columbia shall, within ten (10) days of issuance of this Order, prepare and deliver to the solicitor for the Petitioners copies of the following documents:
  - a. Copies of all documents dealing with the receipt, solicitation of or event organizing in respect of, funds paid by each of the following, and any of their parent companies, subsidiaries, employees or lobbyists, to the Liberal Party of British Columbia:
    - i. Kinder Morgan Canada Inc.;
    - ii. Trans Mountain Pipeline Inc.;
    - iii. Trans Mountain Pipeline ULC;
    - iv. Canadian Natural Resources Ltd.;
    - v. Cenovus Energy Inc.;
    - vi. Devon Canada Corp.;
    - vii. Imperial Oil Ltd.;
    - viii. Suncor;
    - ix. Nexen Marketing Inc.;
    - x. Chevron Canada Ltd.; and
    - xi. Canadian Association of Petroleum Producers; and
  - b. Copies of all documents dealing with payments made by the Liberal Party of British Columbia to the Premier of British Columbia, the Minister of Environment and Minister of Natural Gas Development from October 11, 2011 to present;
2. The Petitioner shall promptly enter this Order and deliver a copy to the Petition Respondent and the Liberal Party of British Columbia, the President of the Liberal Party of British Columbia and the Leader of the Liberal Party of British Columbia.

## 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.
3. Christina Joan Clark was appointed the Premier of British Columbia on March 14, 2011. She is the current Premier of British Columbia. She is also the leader of the Liberal Party of British Columbia. Section 9 of British Columbia's *Constitution Act* provides that the Premier is also the President of the Executive Council. The Executive Council is a body of government appointed by the Premier to exercise various statutory powers and to direct the implementation of statutes by the civil services. The Premier has the power to appoint Ministers and to designate what powers are to be exercised by each Minister.
4. Mary Polak was appointed the Minister of Environment on June 10, 2013. Rich Coleman was appointed the Minister of Natural Gas Development on June 7, 2013. Both were appointed by the Honourable Christina Joan Clark, as members of her Executive Council, and both serve at her pleasure.
5. The Application Respondent, the Liberal Party of British Columbia, is a registered political party in the Province of British Columbia.
6. The Application Respondent, Sharon White, Q.C., is the President of the Liberal Party of British Columbia.

### Crux of the Claim

7. On January 31, 2017, the Petitioners initiated a judicial review of a decision (including interim decisions) made jointly by the Premier, the Minister of Environment and the Minister of Natural Gas Development to approve the Kinder Morgan Pipeline (the "KMP Approval").
8. 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.

### The Pipeline

9. The Kinder Morgan Pipeline ("KMP") is an interprovincial pipeline approximately 987 kilometres long between Edmonton, Alberta, and a marine terminal on the Pacific coast in Burnaby, British Columbia.
10. In 2013, Kinder Morgan filed an application with the federal National Energy Board ("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 the event that construction of the KMP was approved by the NEB (the "KMP Tolling Application").
11. 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 pipeline project. The "open season" formally began on October 20, 2011 and resulted in 15 and 20 year contractual commitments from oil and gas companies that intended to ship diluted bitumen using the KMP (the "KMP Shippers").
12. The KMP Shippers that agreed, as a result of the open season, to a Transportation Service Agreement ("TSA") for the use of the KMP are outlined at paragraph six of the Petition. The open season process resulted in the pre-sale of approximately 80 percent of the KMP's bitumen capacity to the KMP Shippers.
13. In 2012 the KMP Tolling Application resulted in the NEB approving shipping rates for the proposed pipeline and the allocation of various financial risks as between Kinder Morgan and the KMP Shippers.

### The Provincial Approval Process

14. On July 23, 2012, Premier Clark publicly stated that she was against recommending the expansion project unless she could be satisfied that five conditions for approving the KMP were met (the "KMP Conditions"). These conditions are outlined at paragraph 8 of the Petition. The legal basis for imposing the KMP Conditions has never been publicly articulated by the Premier, to the knowledge of the Petitioners.
15. On January 13, 2016, the Honourable Madam Justice Koenigsberg determined that a decision under both the NEB and the Provincial *Environmental Assessment Act* would be necessary to ratify an inter-provincial pipeline project. Prior to this decision, and particularly at the time that the Premier imposed the KMP Conditions, it was believed that Provincial *Environmental Assessment Act*

approval was not required as that approval had been delegated to the NEB and Government of Canada.

16. Notwithstanding the belief that Provincial *EAA* approval was not necessary, the KMP Conditions were repeatedly reaffirmed by Premier Clark and other representatives of the British Columbia government while awaiting the NEB decision on KMP.
17. On May 19, 2016, the NEB recommended approved of the KMP subject to 157 conditions. On November 29, 2016, the Government of Canada gave federal approval for the KMP project. On November 30, 2016, the Premier publicly reaffirmed that the KMP Conditions applied to Provincial approval of KMP.
18. On January 11, 2017, Premier Clark personally announced the KMP Approval, which included her determination that the KMP Conditions had been met, to the public through the media. The KMP Approval included an Environmental Assessment Certificate (numbered E17-01) and reasons for its issuance, signed by the Minister of Environment and the Minister of Natural Gas Development. The reasons include 37 conditions meant to supplement the 157 NEB conditions and makes repeated reference to the five KMP Conditions.

#### Donations to the Liberal Party of British Columbia

19. Payments (called "donations") to the Liberal Party of BC are disclosed by Elections BC.
20. 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. At the time of filing this application, donations are not available past early February 2016. For this reason the Petitioners set out in their judicial review payments made from the start of the open season, October 21, 2011 up until December 31, 2015. Amounts contributed after December 31, 2015 are relevant but largely unknown to the Petitioners at this time.
21. Of the 12 KMP Shippers, Elections BC reveals that six have made significant contributions to the Liberal Party of British Columbia. 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.

22. Since October 21, 2011 to December 31, 2015 these six KMP Shippers made payments totaling \$330,470.00 to the Liberal Party of British Columbia.
23. Additionally, from October 21, 2011 to December 31, 2015, Kinder Morgan made payments totaling \$16,800.00 to the Liberal Party of British Columbia.
24. 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").
25. 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 December 31, 2015, Kinder Morgan, the KMP Shippers and two of the KMP Tolling Application intervenors paid a total of \$561,933.44 to the Liberal Party of British Columbia.

#### The Premier's Private Liberal Party of BC Salary

27. From October 20, 2011 until she and the Ministers granted the KMP Approval, 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. 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.
29. 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, but that issue is certainly relevant to this judicial review.

#### Private Functions

30. 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.
31. 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.

### Reasonable Apprehension of Bias

32. The Petitioners say that a rational and informed observer would conclude that due to the payment of approximately \$560,000.00 by the interested companies, including Kinder Morgan, to the Liberal Party of British Columbia, 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**

1. 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.
2. However, 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

3. The Petitioners say that the documents sought from the Liberal Party of British Columbia 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.
4. The extraordinary circumstances are not speculative or unfounded. The Petitioners have laid a solid evidentiary foundation showing the receipt of funds from Kinder Morgan and the KMP Shippers by the Liberal Party and payment of \$300,000.00 by the Liberal Party to the Premier. The Petitioners have tailored their request for documents from the Liberal Party to the commencement of the KMP application process before the NEB.
5. The Respondent has not yet, but is expected to, file a complete record of the proceeding, including all documents dealing with the internal government process leading to the Premier setting the KMP Conditions. These documents should include documents showing direct contact between Kinder Morgan and its subsidiaries and the Premier and the Ministers as the KMP Conditions were determined and during the process for determining whether the KMP Conditions were met to the satisfaction of the Premier and the Ministers.
6. However, it can be anticipated that the Province will not have possession or control of any of the documents dealing with fundraising and payments to the Liberal Party of British Columbia by Kinder Morgan and its subsidiaries, the KMP Shippers and NEB Interveners ("Fundraising Documents").



7. The Fundraising Documents provide relevant context for assessing whether the Premier or the Ministers were consciously or unconsciously affected by the payments by Kinder Morgan, the KMP Shippers and NEB Interveners.
8. The Fundraising Documents will reveal whether the Premier or Ministers were informed of the payments by the Kinder Morgan and the KMP Shippers to the Liberal Party of British Columbia. If the Premier or Ministers were informed of the payments to the Liberal Party, that fact would be relevant to whether a reasonable person would consider that they were likely to be consciously or unconsciously affected by the payments.
9. The Fundraising Documents will also reveal whether the Premier or the Ministers personally attended intimate fundraising events at which Kinder Morgan and the KMP Shippers paid for access to the Premier and the Ministers. The clusters of payments of the same amount at about the same time by multiple KMP Shippers strongly suggests that such fundraising events occurred, or else the Liberal Party may have specifically targeted companies on the basis of their interest in specific projects.
10. The Fundraising Documents 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. A person who did not ascertain whether the Premier or Ministers knew of the payments by Kinder Morgan and the KMP Shippers to the Liberal Party could not be considered informed. Similarly, a person who did not ascertain whether Kinder Morgan or the KMP Shippers paid the Liberal Party to attend pay-for-access events with the Premier or the Ministers 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.

11. Documents dealing with the salary paid to the Premier of British Columbia, the Minister of Environment and Minister of Natural Gas Development from October 11, 2011 to present ("Salary and Benefits Documents") are relevant and necessary to determine whether the KMP Approval is tainted by bias. In particular, documents dealing with whether the Premier's salary is paid to compensate her for fundraising for the Liberal Party are important for the informed observer. Salary and Benefits Documents dealing with whether the Premier's salary is determined by or contingent on fundraising success are important for the informed observer.
12. The Donations Documents and Salary and Benefits Documents can only be in the possession and control of the Liberal Party of British Columbia, the Leader of the Liberal Party of British Columbia and the Executive Director of the Liberal Party of British Columbia.

**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 applicant(s) estimate(s) that the application will take 90 minutes.

This matter is 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 16th day of March, 2017



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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