Submission to Ministerial Panel for Trans Mountain Expansion Project

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Economist
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Regrettably, this brief does not congratulate the Federal government on its promised overhaul of the National Energy Board (NEB) or on the introduction of a credible review process for Trans Mountain's expansion as Prime Minister Trudeau promised Canadians.

This brief is delivered with the recognition that Canadians have been betrayed.

Mr. Trudeau knows the NEB cannot be trusted. He knows that the NEB "torqued" reviews making it easier to recommend approval.[1]

The Board did this by narrowly scoping the issues, removing cross-examination, refusing to compel answers to information requests and by not testing the evidence.[2]

The suggestion that there are omissions in the NEB Report, and that the Ministerial Panel needs to make Minister Carr aware of these gaps so they can be addressed, confirms that Minister Carr has no idea how the NEB failed in its duty to protect the public interest. He has no idea the lengths to which a biased and politically motivated Board went to in order to present a Report that recommends approval of the Project.

The NEB Report does not have gaps that can be filled by the process the Ministerial Panel has been engaged to deliver. The very foundation upon which the Report was developed was faulty and any decision based on that Report is doomed.

The only way Cabinet can deliver a "credible" decision on this Project is to redo the process as promised. Prime Minister Trudeau knows this.

Mr. Trudeau promised an NEB overhaul. He said it would apply to existing reviews. Trans Mountain's would be redone.[3]

MP Terry Beech said last October, "We are going to redo the National Energy Board process."[4]

MP Jonathan Wilkinson confirmed, "The Kinder Morgan Expansion Project must satisfy this new rigorous review…"[5]

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[1] CBC, Liberal Leader Justin Trudeau talks energy and environment, August 13, 2015.

[2] Robyn Allan, Withdrawal Letter from NEB Trans Mountain Expansion Review, May 19, 2015.

[3] Robyn Allan, Open Letter to Justin Trudeau, Fix the NEB as soon as possible, National Observer, October 25, 2015.

[4] Burnaby Now, Burnaby's newest MP says Liberals will redo the NEB Process, October 21, 2015.

[5] Open Letter to Justin Trudeau, op. cit. Mr. Wilkinson has since taken down from his website his written promise in this regard. https://jwilkinson.liberal.ca/where-i-stand-on-kinder-morgan/

Kinder Morgan is not undergoing a credible review.

Kinder Morgan is not undergoing anything.

Instead of fixing the process and starting over, Minister Carr appointed your three-member Ministerial Panel.

Your Panel travelled the pipeline route collecting impressions in public meetings.

Your Panel has no investigative powers or scientific expertise. You are not able to discern facts from fiction.

Your Panel did not record its proceedings. You are relying on memory and hand written notes.

At each stop, this process was faced with complaints. The meetings were poorly administered and poorly advertised.

By the time your Panel reached Vancouver and Victoria, and the public was aware of when and where the meetings would be held, many who wanted to speak were not given a chance.

Your Panel has been ill-equiped to perform its task and shrouded in prior conflict of interest.

Panel Chair, Kim Baird, and Kinder Morgan Canada president, Ian Anderson, signed a leadership exchange agreement in 2010.[6]

Ms. Baird publicly expressed that she and Mr. Anderson are very much alike. They were able to develop a deeper understanding of each other through their business exchange.

Ms. Baird played her hand even before public meetings concluded. She wrote an op ed for the Globe and Mail telegraphing her bias.[7] She said she was hearing four “themes” during the open sessions.

She started with the theme of the “impatience” pipeline proponents were feeling because of how long the process was taking.

She said that **many presenters** endorsed the NEB report and urged a quick and favourable decision.

I would like to remind the Panel that the delay in the Trans Mountain NEB hearing was a result of two events. Neither had to do with due process or a fair and balanced hearing. They were a result of:

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[6] Elizabeth McSheffrey, Trudeau government denies conflict after appointing former Kinder Morgan partner to review panel, National Observer, July 21, 2016. See Video regarding partnership.

[7] Kim Baird, What’s missing from review of Trans Mountain’s pipeline expansion, Globe and Mail, August 21, 2016.

1. Kinder Morgan's lack of route preparedness that led to a 7 month delay as the company assessed the viability of tunnelling through Burnaby Mountain; and
2. the appointment of Steven Kelly—Trans Mountain's consultant—to the NEB while the hearing was ongoing that led to a 5 month delay because his evidence was stricken from the record.

Instead of representing the facts as your Panel has experienced them, Ms. Baird's claims—on behalf of the Panel—are inconsistent with them.

Her op ed was published days after the Panel experienced peaceful protests outside the hall where the Panel met in Vancouver.[8] The hall was packed—standing room only. The people that were in the room, along with the people who made presentations to the Panel, overwhelmingly opposed the project.

Ms. Baird, Ms. Trimbee and Mr. Penikett—you know that citizen, after concerned citizen, all along the pipeline route, expressed how the NEB process failed Canadians.

They provided well researched reasons why the project should not proceed and how the NEB deliberately got it wrong.

And yet the Panel Chair characterized the opposite in a national newspaper.

Stand, a non-government organization, attended and documented the public meetings in BC. They report that 90 per cent of public presenters were opposed to the project.[9]

There were earlier meetings held in Calgary, Edmonton and Jasper, Alberta, where "a total of 84 Albertans made presentations." There is a summary of these meetings on Natural Resources Canada's website.[10] The summary contradicts Ms. Baird's Globe and Mail piece.

The Panel's distorted perspective, in part, may be due to the fact that before public meetings began, you took actions to actively cultivate a petro-culture bias.

Your Panel sent invitations to meet privately with selected parties. It met privately with Kinder Morgan, privately with the National Energy Board and privately with Alberta Premier, Rachel Notley.

In an exclusive interview Ms. Baird gave to Alberta Oil Magazine she called the preferential closed-door sessions "Pre-engagement meetings".[11]

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[8] Elizabeth McSheffrey, National Energy Board the greatest farce in Canada, says Kinder Morgan pipeline critic, August 17, 2016.

[9] Stand, Kinder Morgan does not have consent to build pipeline, August 26, 2016, Sven Biggs.

[10] Major Projects Management Office, Update I, Alberta, Modified August 17, 2016

[11] Alberta Oil, The Business of Energy, An Exclusive Interview with Kim Baird as the Trans Mountain decision looms, September 7, 2016.

In that same interview, she explained the Panel's job. She said, "Our job is to listen to outstanding concerns by citizens."

But before hearing citizen concerns, you held private sessions with the people most likely to tell you why any public concerns—any concerns you would hear about the NEB's flawed process, about the lack of economic benefits, about the environmental impact—are unwarranted and invalid.

This is totally unacceptable.

We have seen what happened when the NEB held private meetings on the Energy East project.

The Energy East Panel, along with NEB Chair, Peter Watson, had to step away from the process.

Why has Minister Carr tolerated private meetings that you held with Kinder Morgan, the NEB and Premier Notley?

He tolerates them because the fix is in.

Mr. Carr said that now his Panel has allowed more "opponents" to be heard this will lend "credibility" to the Government's decision in December.[12]

Mr. Carr's Panel is window dressing. Your travels and your report are meant to placate protest and fashion credibility.

Mr. Carr has tried to suggest the Ministerial Panel is the "right process". It is not. It is not the process we were promised.

Mr. Carr's process is a joke. But Canadians are not laughing.

However, Kinder Morgan is…Kinder Morgan is laughing at the Prime Minister and the Liberal government.[13]

Kinder Morgan is laughing at Canadians.

Just days after the Federal election Kinder Morgan Inc. held its quarterly meeting in Houston, Texas.

Ian Anderson was asked by an analyst how the Liberal majority might affect Trans Mountain's application.

Mr. Anderson snickered. He said, "I'm wearing…I'm wearing my Liberal red tie."

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[12] Jeremy van Loon, Trans Mountain Process lends "credibility" to Final Decision, Bloomberg, August 29, 2016.

[13] Robyn Allan, Open Letter to Justin Trudeau, Fix the NEB asap, National Observer, October 25, 2016.

After audible laughter from those on the call, Mr. Anderson continued. He said: "We'll certainly be briefing the Liberal government in due course on the project…We'll just keep … them informed and plan to execute the project as soon as we get approval."

The Lobby register shows just how informed Mr. Anderson has kept the Federal government.

Between December and August, Ian Anderson reported 31 days when meetings took place with elected officials and senior bureaucrats.[14] And now we learn that Mr. Anderson, Scott Stoness, Norm Rinne, Michael Davies and Peter Forrester met to brief you on the Project—to lobby their needs and perspective before you heard from the Canadian public your process purports to serve.

Let's not forget who Kinder Morgan is.

Kinder Morgan Inc. is a Texas based company. It plans to siphon more than one billion dollars a year in financial returns away from our economy.[15] The NEB refused to consider this drain as an economic burden. They ruled it outside the scope of its review.

Many of Kinder Morgan's largest shareholders are former Enron employees who stack the ranks of Kinder Morgan's Board and its senior executive team.

Kinder Morgan relies on a complex corporate structure facilitating the avoidance of liability and minimizing its corporate taxes payable. Its chief tax strategist in Canada is Jordan Mintz, VP and Chief Tax Officer at Kinder Morgan Canada Company ULC registered in Nova Scotia. Mr. Mintz is also VP and Corporate Tax Officer for Trans Mountain's parent, Kinder Morgan Inc. Mr. Mintz was Managing Director, Corporate Tax, at Enron.[16]

Scott Stoness, VP Regulatory and Finance at Kinder Morgan Canada is a former Enron regulatory affairs specialist. He was Director of Utility Risk Management at Enron Energy Services in Houston for almost five years.[17] Mr. Stoness' bio on Trans Mountain's website fails to mention his job at Enron although in an affidavit filed with the NEB in 2011, he includes it.[18]

The NEB's economic case is Kinder Morgan's

The NEB parrots Kinder Morgan's false economic narrative throughout its Report. It was possible for it to do so because the NEB narrowly scoped its list of issues and refused to allow

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[14] Office of the Commissioner of Lobbying Canada, 12 Month Lobbying Summary, Kinder Morgan.

[15] Ian Anderson told investors the distributable cash flow would be $850 million a year, but that projection was based on a $5.4 billion capital cost. With a $6.8 billion capital cost the revenue drain will be closer to $1 billion per year.

[16] Robyn Allan, Trans Mountain Pipeline: Big Bucks for US Investors, Peanuts for US, Tyee, November 17, 2014 and Robyn Allan, How Trans Mountain Project will pump profits to its Texas owners, Tyee, January 12, 2015.

[17] NEB, MH-001-2011, Written Direct Evidence of Scott Stoness Firm 50 Application

[18] Trans Mountain Blog, Meet Scott Stoness VP Regulatory Affairs and Finance

actual and reasonable economic costs to be considered. When it came to the evidence that was filed on the record, the NEB refused to properly test it.

The economic benefits claims in the NEB Report cannot be trusted.

The NEB report says that economic benefits from the Project outweigh its residual environmental burdens.[19]

The NEB determined that if Benefits are greater than Residual Burdens then the project should be approved.

We can put the Board's benefits and residual burdens into an equation.

The Benefits the Board identified as "considerable" are: Markets; a Reduction in Canadian Crude Discount; Government Revenues; Jobs.

They stacked these up against "significant" Residual Burdens they identified as: Death to Orcas and First Nations way of life related to them; Greenhouse gases from Marine Traffic, and then they identified Fresh Water and Marine spill risk as "acceptable".

The Board didn't actually use the phrase "death to Orcas". It said tanker traffic "would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale." Sounds like extinction to me.

[19] National Energy Board Report, Trans Mountain Expansion Project, May 2016, page xiii and xiv.

But the Board waved this off. It decided that since the Orcas are unlikely to survive anyway, Kinder Morgan can go ahead and have at them.

The formula shows how easy it is for the NEB to rig the outcome in favour of approval if it overstates the benefits and callously dismisses the burdens.

And that's just what they did.

Let's start with Markets.

Markets. What Markets?

There are 13 shippers that have signed long-term take or pay contracts.[20] None of these shippers provided evidence to the NEB on where markets in Asia might exist.[21]

None said access to new markets would reduce Canadian crude discounts and lead to crude oil price lifts. None said they are stuck taking a discounted price from buyers in the US.

If the Panel reads the evidence that was filed by shippers on the hearing record—and it is a short read—it will learn that the only foreign markets shippers specifically identified were US markets. BP wants guaranteed access to serve its refinery in Washington State.[22] Same with Tesoro who wants to supply its Anacortes refinery, also in Washington.[23]

Suncor said it wants access to existing and new crude oil markets including Washington State, BC and the Pacific Basin as well as greater access to the BC refined product market.[24] Pacific Basin might include California—we don't know, because the shippers are not clear where markets might exist beyond Washington State and BC. Imperial says it wants to diversify markets for crude oil sales and to continue to provide petroleum products to the BC market through secured volumes.[25]

There have been suggestions made to this Panel that Trans Mountain's expansion is needed to reduce the dependency of Alberta's crude oil producers on US markets. How would any of these shippers' commitments reduce the dependency on US markets? They would not.

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[20] Toll Methodology Hearing, Application Pursuant to Part IV, Trans Mountain Pipeline ULC, Revised Direct Evidence of George R. Schink, January 10, 2013, page 16. The list is 12 companies because Suncor represents two.

[21] Exhibit C50-1, Evidence of TMX Shippers, May 27, 2015 and Exhibit C-37 Written Evidence of BP Canada Energy Group.

[22] Written Evidence, BP Canada Energy Group ULC, May 27, 2015.

[23] Written Evidence, Tesoro Canada Supply and Distribution, Ltd., May 27, 2015.

[24] Written Evidence, Suncor Marketing Inc., and Suncor Energy Products Partnership, May 27, 2015.

[25] Written Evidence, Imperial Oil Limited, May 27, 2015.

The remaining shippers are very vague in their evidence and final argument about which potential markets they want to develop. This is because these markets do not yet exist. It will take many years to develop them, if indeed they ever materialize.

The existence of non-US markets, and a reduction in the discount because of them, are a creation of consultants Kinder Morgan hired—Steven Kelly, former VP, IHS, and Neil Earnest, VP, Muse Stancil.

Your Panel has adopted this false narrative invented by consultants. This is explained in Ms. Baird's Globe and Mail op ed when she elected to repeat it.

She wrote, "Many presenters in industry, business and labour organizations…say that without tidewater access for oil-sands bitumen, Canada is stuck taking a discounted price from our only buyers in the United States."

The Panel has been seriously misled. Canada is not "stuck" taking a discounted price.

Further, tidewater access from the West Coast has been available since 1956. This access has barely been used since the dock went into service.[26]

The tanker loadings that have taken place at Westridge are primarily for crude tankers destined for US ports. Fewer than 6 crude oil tankers **a year** have been loaded with heavy oil destined for non-US ports. The peak was reached in 2010 and has declined significantly since. This decline in non-US exports occurred during the period the so-called "discount" was said to have existed.[27]

The Panel should also be aware that Canadian heavy oil shipped to the US Gulf Coast has tidewater access to non-US markets. The Panel must ask itself why offshore exports from the Gulf have not materialized if tidewater access is so critical.

The Panel should also be aware that if the US is Canada's only market it's not only because non-US markets have failed to develop. It is also because Enbridge and Trans Canada pursued a deliberate strategy to build into the US market for much of the past decade.

Enbridge delayed progress on its application for approval of Northern Gateway by more than a year and a half because it wanted to focus on the development of US markets. It abandoned the pursuit of West Coast access while it did so.[28] Enbridge asked the NEB to put its application on hold. It informed the Board that, "Enbridge is reprioritizing its efforts towards fulfilling the more immediate requirement of US markets."

To suggest oil producers have been unwittingly trapped into delivering into a market that refuses to pay them a fair price is ludicrous—particularly since most of Alberta's heavy oil shipped to US refineries are to refineries with interlocking ownership relationships to these same oil producers.

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[26] Kinder Morgan Canada, Presentation to Shareholders, March 24, 2011, Slide 8

[27] Tanker Loadings and shipments to non-US markets are discussed in greater detail on pages 12 - 15 with graphs illustrating how rarely existing access to tidewater has been utilized.

[28] Robyn Allan, Letter to NEB regarding Northern Gateway Sunset Clause, June 27, 2016, page 4-5.

When Suncor sells into its Commerce City, Colorado refinery[29], or Cenovus supplies its facilities in Wood River, Illinois and Borger, Texas, owned in a joint venture with Phillips 66[30], or Husky supplies its refinery in Toledo, Ohio it owns in partnership with BP[31], or Imperial and its parent ExxonMobile deliver crude from their joint venture to ExxonMobile's US facilities[32], it is hardly accurate to suggest that they are "stuck" taking a "discount".[33]

It is important for the Panel to be aware that the numerous oil producers in Canada who have integrated operations in the US have an incentive to receive lower prices for their crude. They pay royalties based on the crude price, not the price they receive for petroleum products.

Without getting too caught up in the intricacies of transfer pricing, the idea that there is an *evil-one-buyer-holding-Canadian-producers-ransom* is silly. It is a concocted story designed to frighten Canadians into accepting heavy oil pipelines. It is spouted by business organizations and industry councils who don't bother to check the facts or learn the history.

The two labour organizations that actually participated at the NEB hearing as Intervenors—Unifor and Alberta Federation of Labour—provided testimony. Their evidence and final argument states the opposite to what Ms. Baird claims the Panel is hearing from labour organizations.

Unifor and AFL members do not support the Trans Mountain expansion project and do not buy the false discount story. They wish to see value added in Canada to provide meaningful and long-term employment. They represent more than 180,000 workers directly affected.

As I mentioned, the existence of non-US markets that are willing to pay a premium price for Alberta's low quality crude is a narrative created by Kinder Morgan's consultants.

But even these two consultants can't agree.

Mr. Kelly, Trans Mountain's long-time consultant was appointed to the National Energy Board while the hearing was ongoing.

After relying on Mr. Kelly's report for almost two years it was stricken from the Hearing record.

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29 Suncor on its website.

30 Cenovus on its website contradicts the industry and business organizations. "We have 50 percent ownership in two U.S. refineries – Wood River, located in Roxana, Illinois, and Borger, located in Borger, Texas – that are part of our joint venture with Phillips 66, the operator. **Ownership in these two refineries reduces the risk of price fluctuations** in the oil market, by allowing us to **capture value** from the production of oil through to the output of finished products, such as gasoline, diesel and jet fuel. **Essentially, we shift from being just a producer of heavy crude oil to being a producer of higher-value finished products.** This helps to reduce our risk and balance out the volatility in our business. (Emphasis added) Also see Cenovus Investor Day, Calgary, June 18, 2013.

31 Husky on its website.

32 Argus Media, January 2015, Joliet refinery to take Canadian crude by rail.

33 Robyn Allan, Oil Sands money left on the table and more myths, Tyee, April 11, 2013.

A few weeks later Mr. Earnest's replaced Mr. Kelly's. It told a very different market story.

With Mr. Kelly's evidence stricken the Board said it would no longer consider it.

The Board refused to reconcile serious differences about market demand from two consultants working for the same proponent at the same hearing. This was convenient for the Board. It only referenced Mr. Earnest's concocted story in its Report. Without conflicting views, Mr. Earnest's is presented as if it is reliable.

Trans Mountain aggressively promoted one view of markets with Mr. Kelly's evidence and then quickly switched when it received Mr. Earnest's. Kinder Morgan was not held accountable.

The Board's ruling to strike the evidence meant Intervenors were not allowed to point to Mr. Kelly's evidence in comparison with Mr. Earnest's to expose Trans Mountain's lack of market knowledge.

Consultant's Competing Claims

	Steven Kelly (IHS)	Neil Earnest (Muse)
Offshore Markets for Western Canadian Oil	200,000 bbl/d of heavy to California 350,000 bbl/d of heavy to Asia	California disappears as a market; all heavy to Asia (> 500,000 bbl/d)
Trans Mountain Volume	Heavy oil only; capacity related to the new pipeline	Light and heavy; entire capacity on two pipelines
Transportation Systems	Need for rail displaced as Trans Mountain and other pipelines are built including Energy East	Trans Mountain the only new pipeline capacity in the next 20 years

Mr. Kelly said that by 2019 about 350 thousand barrels a day of diluted bitumen would go to Asia. Most of the rest of it, he said, would go to California.[34]

[34] Direct Written Evidence, Steven Kelly, IHS Global Canada Ltd.,Trans Mountain Expansion Project, November 30, 2013, page 14. In 2018 213 thousand barrels a day to Asia growing to 354 thousand barrels a day in 2019 and staying at that level until 2037.

Mr. Earnest told the Board no heavy oil would go to California.[35]

Mr. Earnest sent 40 percent more heavy oil to Northeast Asia instead.

Mr. Earnest has a whopping 500,000 barrels a day going to Northeast Asia the minute the pipeline opens.[36]

Northeast Asian does not currently receive Alberta's heavy oil.

But, according to Mr. Earnest, demand for half a million barrels a day of diluted bitumen will materialize by 2018.

To put this in context, Alberta's heavy oil producers have aggressively pursued the US Gulf Coast market for more than a decade.

The Gulf Coast refines 9 million barrels a day of crude oil and represents 45% of the refining capacity in the US.[37]

Billions were spent on refinery upgrades to accept heavy oil.

The US government brought in special laws and subsidies to do it.[38]

Enbridge and Trans Canada built pipelines to ship it.

Still, after all this, only 300 thousand barrels a day of diluted bitumen is delivered from Canada to the US Gulf Coast.[39]

How, in less than two years, is a market for 500 thousand barrels a day going to materialize in Asia?

The fact that it will take many years for Asian markets to develop—if they ever materialize—is crucial for the Panel to understand. The Panel should be aware that Mr. Kelly testified under oath during cross examination at the NEB Part IV hearing approving the toll methodology that would be applied if the Project proceeds. He told the NEB then that development of markets in Asia is a very long and difficult process.

Mr. Kelly said that market development in Asia is "far from simple and, if we're going to take China as a good example, I think it has to be recognized that there's not a pot of gold at the end

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[35] Neil Earnest, Market Prospects and Benefits Analysis of the Trans Mountain Expansion Project, September 2015, page 10 and pages 73 - 74

[36] Ibid.

[37] EIA, Gulf of Mexico Fact Sheet, June 22, 2016.

[38] Robyn Allan, Keep the oil sands wealth at home, Vancouver Sun, May 17, 2012, Tax incentives through the Energy Policy Act—2005.

[39] EIA, Imports of heavy(sweet and sour) to PADD3 (Gulf Coast), June 2016

of this rainbow. And the client, my clients -- many of my clients who come to me for that kind of work—many of the same companies are shippers, potential shippers on the Trans Mountain Pipeline—recognize that development of markets in Asia will be a many-year process."[40]

The so-called price lift benefits Mr. Earnest presents—and the Board adopts—are based on half a million barrels a day of heavy oil exported to Northeast Asia as soon as it begins operation.

Mr. Earnest didn't have to be accountable. There was no cross examination at the hearing and most of the questions Intervenors asked about his report remain unanswered.

Mr. Earnest is Enbridge's consultant as well as Kinder Morgan's.

When Mr. Earnest prepared his report on Northern Gateway he told the NEB that Northeast Asia would take 290,000 barrels a day of diluted bitumen by 2018—not 500 thousand.[41]

But, just as the Board refused to consider the flip flop in markets from Mr. Kelly to Mr. Earnest, the Board refused to consider Mr. Earnest's serious differences in his own evidence from one pipeline hearing to another.

This isn't the first time Kinder Morgan has promised the Board new markets in Asia.

Half a decade ago Kinder Morgan told the Board the same story.[42]

Kinder Morgan promised that if the Board approved its Firm 50 Application guaranteeing dock access, markets in Asia would—with certainty—be developed.

Five shippers—PetroChina, Nexen, US Oil, Cenovus, and Astra—signed ten year take or pay contracts to ship 10 thousand barrels a day each to Westridge.

US Oil said it wanted access to its refinery in Washington state, but the other four? Their oil was off to Asia.

It was an unprecedented decision made by the Board to actively assist Trans Mountain with a future expansion.

The Board guaranteed access and it approved a surcharge on those deliveries to create a $280 million slush fund Kinder Morgan is drawing down to finance its project through regulatory approval.

The Board bought Kinder Morgan's Asian market story then and it's swallowing it now.

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[40] Hearing Transcript Part IV Toll Methodology, Volume 3, February 14, 2013. Testimony of Mr. Steven Kelly, Trans Mountain's Expert Witness, Paragraph 4439-4440.

[41] Neil Earnest, Market Prospects and Benefits Analysis Northern Gateway Pipeline, Reply Evidence, July 2012, page 62

[42] Trans Mountain, Application for Firm Service to the Westridge Marine Terminal on the Trans Mountain Pipeline System (RH-2-2011).

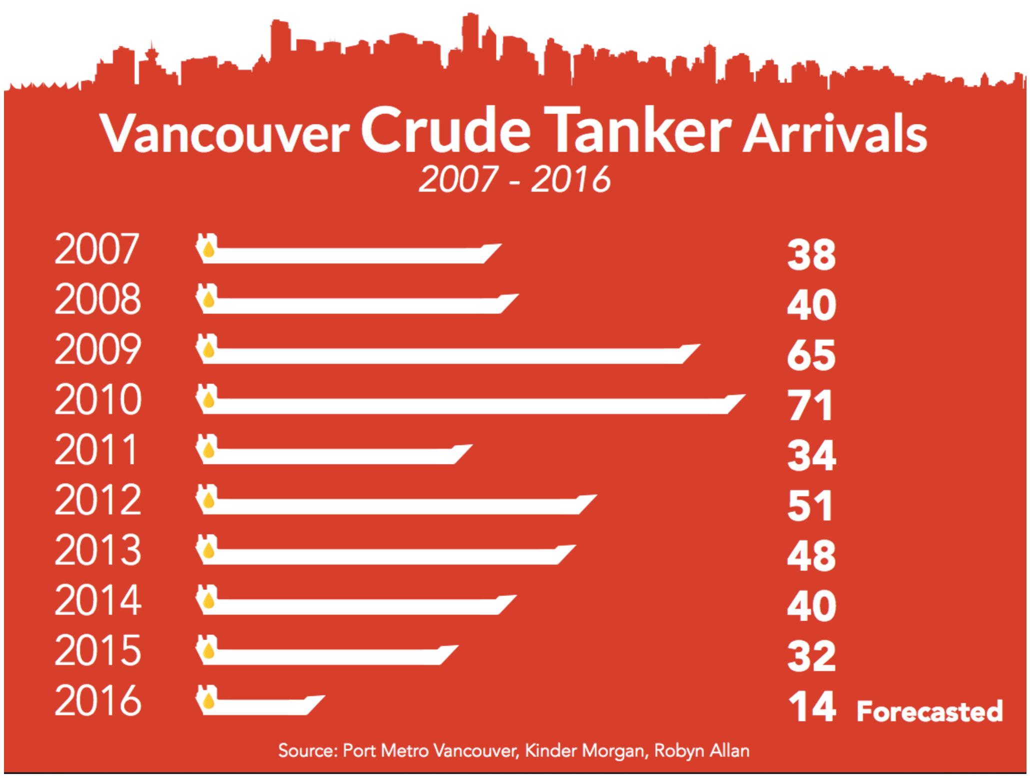
The Board concluded that, “The certainty of space and cost to the Westridge dock will likely, in the Board’s view, enhance the ability of Canadian producers to develop long-term relationships with buyers in new markets and lead to increased acceptance and utilization of Canadian crude oil in non-traditional markets.”[43]

The Board didn’t bother to check during the recent hearing whether the promises Kinder Morgan made were promises Kinder Morgan kept.

If it had it would know offshore markets have not developed, the guaranteed capacity has not been used and the preferential treatment the Board granted was a failure.

Throughout the hearing Trans Mountain consistently said that an average of 5 tankers per month are loaded at the Westridge dock. The NEB repeated this figure in its report.[44]

Facts show there have been nowhere near that number in recent years. After reaching a peak in 2010 before guaranteed access was granted, tanker loadings have declined.



There were fewer than 3 tankers a month in 2015—32 for the full year. There are fewer than two tankers a month for 2016.

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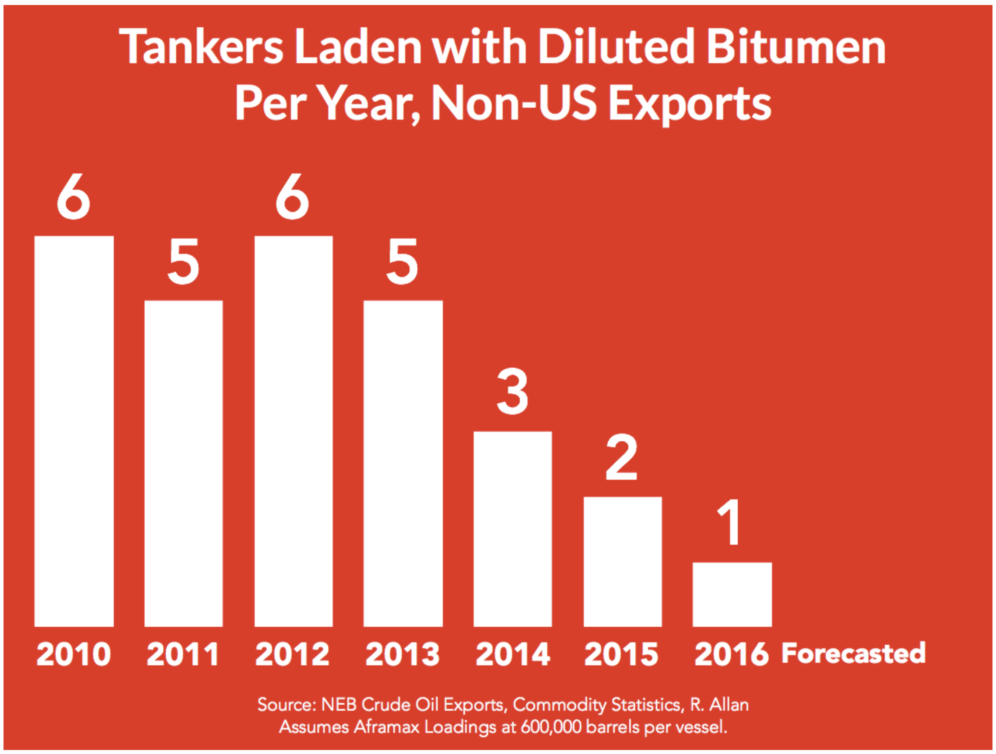
[43] NEB Reasons for Decision, Application for Firm Service to the Westridge Marine Terminal on the Trans Mountain Pipeline System, page 15.

[44] NEB Report Trans Mountain Expansion, op. cit., page 2.

In June—the most recent month that statistics are available—there were none.[45]

Tankers that have been loaded at Westridge are destined for US markets—not Asian.

Commodity Export statistics confirm this.[46]



In 2010, only six tankers in Canada were loaded with diluted bitumen destined for non-US ports for the entire year.

In 2014, Suncor shipped diluted bitumen east by rail and loaded two tankers that sailed up the St. Lawrence River destined for Italy.

This year? With the diluted bitumen exports to non-US markets recorded during the first 6 months, there might not even be the equivalent of one Aframax tanker loaded by year end.

If markets don't exist, why would crude oil producers sign 20 year take or pay contracts representing about $2 billion each of liability?

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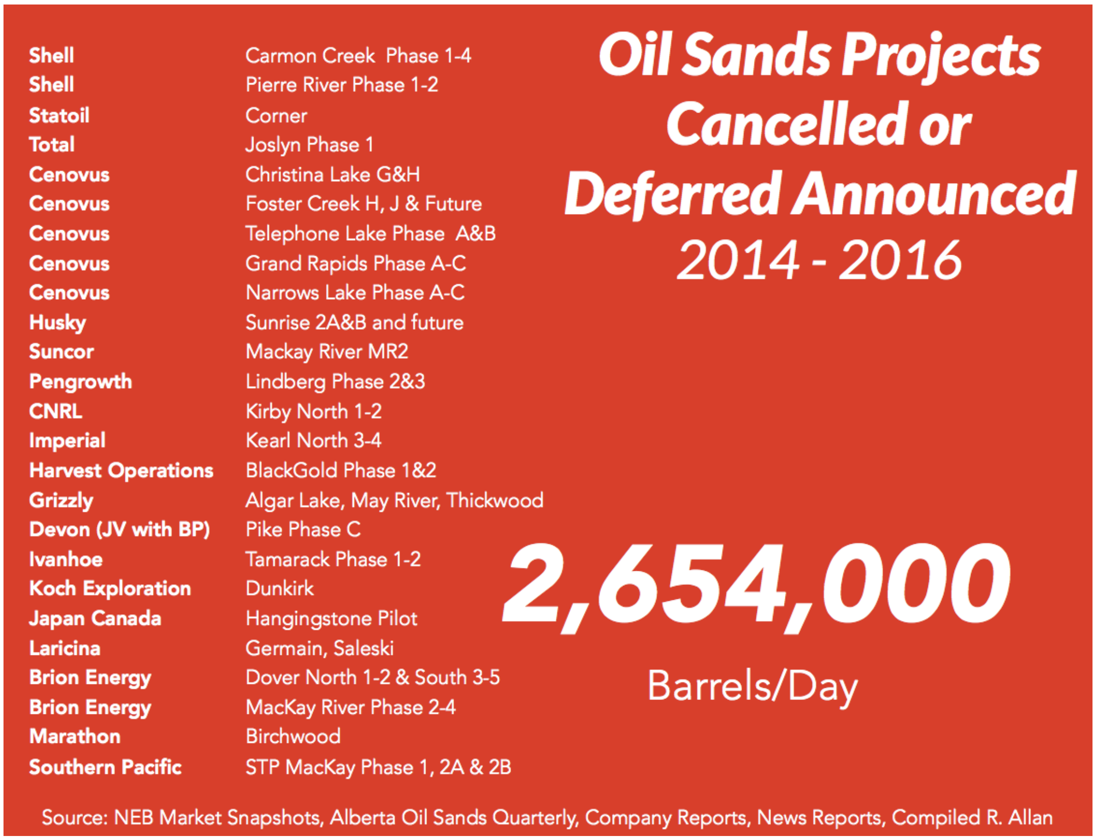
[45] Statistics provided from Port Metro Vancouver on a monthly basis at the author's request.

[46] NEB Commodity Statistics, Crude Oil and Refined Products, 2010 - 2016 Q2.

Shippers have only said they want the opportunity to develop markets, not that they exist.

When they signed up to ship on Trans Mountain's expansion in 2012 it was thought Asian demand was growing, crude oil prices were more than double what they are today, and supply prospects were strong.

Markets conditions have seriously deteriorated.



Since January 2014 oil sands producers have cancelled or put on hold almost 2.7 million barrels a day of previously announced future production.

Market conditions have constrained future supply.

Why then are producers continuing to support the project if their market prospects have tanked?

The short answer is they are contractually obligated to support the project through the regulatory process.[47]

[47] Revised Trans Mountain Pipeline ULC Application Pursuant to Part IV of the NEB Act, RH-001-2012, FSA Final Form, March 27, 2012. The contracts were filed as part of the Toll Methodology Hearing (Part IV), but the Panel at the Public Interest Hearing (Part III) ruled it would not consider evidence filed on the record at the Toll Methodology hearing. It would need to be on the Part III record, but the Board did not ask Trans Mountain to file it.

They must say they want the project to proceed, even if they don't.

Its in Clause 2.2. of their contract.

> **Facility Support Agreement**
> **Between Trans Mountain Shippers**
> **March 27, 2012**
>
> **2.2 Support in Proceedings**
>
> The shipper agrees to provide support to and cooperate with the Carrier in obtaining Regulatory Approvals contemplated in Sections 4.1(b)(i) and 4.1(b)(ii), and to not oppose the efforts of the Carrier, to obtain such Regulatory Approvals.

If the Board had read the contracts it would know this, but the Board never asked Trans Mountain or the shippers to file them.

Contracts? What Contracts?

The Board maintains that if evidence is not filed on the hearing record by the party that can speak to it, the Panel will not consider it.

The Board relied on hearsay rather than understanding what the contracts say and what they mean.

During the more than two years the review was ongoing the Board asked the shippers one question. It was on supply and markets.[48]

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[48] Response of Canadian Oil Sands, Cenovus, Devon, Husky Oil, Imperial Oil, Statoil, Suncor and Total to NEB Information Request No. 1, July 27, 2015 and Response of BP Canada Energy Group ULC to NEB Information Request No.1, July 27, 2016.

In April 2015 they were asked to provide their crude oil supply forecast and discuss whether the lower price environment affected their financial commitment to the Project.

Supply? What Supply?

But instead of providing updated supply projections as asked, shippers refused.

They cited commercial confidentiality even though they have, and do, reveal supply intentions to their shareholders, and they have, and do, announce changes in their intended supply projections to media.

Every year these same oil producers willingly submit their future supply intentions to the Canadian Association of Petroleum Producers (CAPP) so CAPP can produce its annual outlook.

But when requested by the national pipeline regulator to provide updated supply intentions that reflect changed market conditions, they refused.

The shippers simply told the Board, "The current lower-price environment has no impact on the long-term financial commitment that these shippers have made to this Project."[49]

Of course it doesn't. There is nothing in their contract that would allow shippers to walk from the project based on market conditions.

But those market conditions are severely impacting future supply intentions among Alberta's producers and have been severely impacting them for more than two years. The oil producers refused to provide the Board with updated information—and the Board failed to compel them to do so.

During Trans Mountain's expansion hearing the Board deliberately avoided a consideration of a future where oil sands production stays in the ground because of changed market conditions and the introduction of climate change policies.

The NEB report is based on a future outlook of supply that makes little sense—a future designed under the Harper government. Canadians rejected that view of our future last October.

The NEB relied on supply projections that are stale-dated. It relied on Mr. Earnest's forecast which uses CAPP's June 2015 outlook to 2030 and then Mr. Earnest created his own projections of supply from 2031 to 2038.[50]

CAPP does not forecast crude oil prices. It provides producers with a survey asking them to use their own internal view of future oil prices for the outlook they submit.[51]

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[49] Ibid. BP added that market conditions do not affect their intent to ship to their own refinery in Washington.

[50] CAPP, <u>Crude Oil Forecast, Markets and Transportation</u>, June 2015.

[51] Ibid., page 1.

CAPP's 2015 outlook does not reflect the decline in producer intentions because of the lower crude price environment experienced during the past year and a half nor does it take into account any climate change policies that have been announced by the Federal government or the government of Alberta. The survey reflects a market outlook and political climate that existed in late 2014 and early 2015.

The Board tried to pretend that the supply outlook Kinder Morgan provided, through its consultant Mr. Earnest, is credible. It is not.

In its Report, the Board presents Mr. Earnest's comparison of CAPP's forecast to its own NEB Energy Future 2013 forecast released in November 2013 and the Alberta Energy Regulator (AER) forecast release in early 2015.[52]

In its May 2016 Report the Board tried to pawn off to the Federal government an outlook for supply that is not credible by relying on outlooks prepared in mid-2013 (Energy Future 2013) and late 2014 - early 2015 (CAPP and AER).

AER has since released a forecast that reflects lower production intentions as at February 2016.

Even without incorporating the impact of climate change polices, AER concluded that no new pipeline capacity is required before 2025.

AER 2016 states that crude oil exports will "begin to reach pipeline capacity limits by 2021… assuming that the four proposed pipeline projects do not advance and there are no other incremental additions to pipeline capacity. However, current rail capacity is enough to provide the additional volumes needed within the forecast period (to 2025).[53]

The NEB Energy Future 2016 was released January 27, 2016 although it was prepared in mid-2015.[54] The report was slated for release in November 2015, but was held for release until January 2016, after the Trans Mountain review was complete.

Figure 10.7 of the Energy Future 2016 report, notwithstanding the fact it was based on a stale-dated market view without accommodation for climate change policy impacts, also confirms that current pipeline and rail infrastructure is sufficient to accommodate crude oil available for export until at least 2025.

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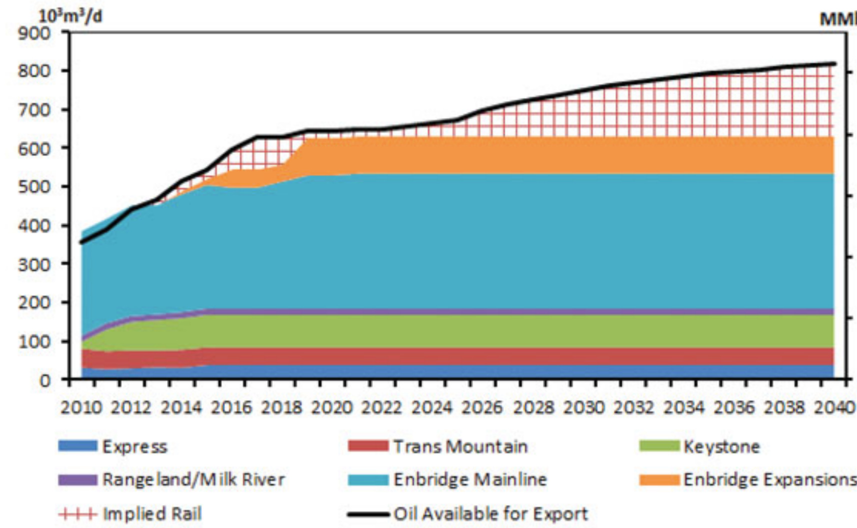
[52] NEB Report, op. cit., page 296-297

[53] Alberta Energy Regulator, ST98, May 2016, Pipelines.

[54] NEB, Canada's Energy Future 2016, January 27, 2016.

Figure 10.7 - Canadian Oil Export Pipeline Capacity and Oil Exports



Source: Canada's Energy Future 2016

Certainly it is incumbent on the Panel to alert Minister Carr that the forecast of oil supply and need for new pipelines relied upon by the NEB in its Report is grossly out of date.

There are other instances where the Board deliberately avoided the consideration of facts because these facts would have suggested a different narrative than the one Kinder Morgan wanted the Board to parrot.

The NEB report refers to a $5.5 billion project.[55]

Everyone, except the NEB, knows that Kinder Morgan raised the capital cost of its project to $6.8 billion. This happened in October 2015.

The Board did not ask Kinder Morgan to provide an updated capital cost during the hearing.

Why? Because it avoids obvious questions… and the Board didn't want the answers.
Higher capital costs mean increased toll rates and increased toll rates give the shippers an out from their contracts.

If capital costs exceed $6.8 billion and trigger a revised toll that exceeds the Open Season Toll Limit, shippers have a right to terminate, but only after the project has been approved and NEB certificates are in hand.

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[55] NEB Report Trans Mountain Expansion, op. cit., page 262.

Facility Support Agreement Between Trans Mountain Shippers March 27, 2012

Clause 3.2 (b)

If the Revised Toll exceeds the Open Season Toll Limit, the Shipper shall have the right to terminate this Agreement

The Board didn't want to consider the possibility that shippers might be free to walk because the Board used the firmness of the contracts as their central reason for justifying project need.

The Board states in its Report, "…utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall. It is in this context that the Board placed **significant weight on the existence of long-term firm transportation service agreements (TSA) with shippers in determining whether the facilities are needed and likely to be well utilized over their economic life.** The Project has strong support from 13 shippers with firm commitments of approximately 112 300 m3/d (707,500 b/d) in long-term contracts of 15 or 20 years. The Board finds that these contracts are a clear demonstration that the Project can be expected to be utilized at a high load factor for many years."[56] (emphasis added).

The Board never read the contracts so how would it know if they were firm or not?[57]

Increased toll rates also reduce the price shippers receive for their crude oil.

The Board's refusal to recognize a revised capital cost allowed it to accept overstated price lift benefits and allowed it to pretend that the project will lead to a reduction in Canadian crude discounts.

A reduction in crude discounts was the second major benefit the Board cited from the project.

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[56] Ibid., page 309.

[57] The obvious question the Ministerial Panel needs to ask itself is why—when two Board members on the Part IV Hearing (Mr. Hamilton and Ms. Scott) with access to and familiarity with the contracts because they were widely discussed during cross examination during that hearing—why these same two parties on the Part III Hearing would not deem it important to have the contracts filed as part of the Hearing Record at that hearing.

They even put the price on it that Kinder Morgan gave them.

"Muse estimated that in its Project Scenario vs. its Base Scenario higher prices for Western Canadian crude oil production would provide total producer benefits of $73.5 billion on an undiscounted basis, and a present value of approximately $38 billion attributable to the market access provided by the Project (CAD$2012) for the forecast period 2017–2037."[58]

With accurate toll rates, Mr Earnest's $73.5 billion price lifts fall by almost 80%.[59] The remaining 20 percent disappear because facts show price discounts for Canadian crude are within the normal range.

They have nowhere to be further reduced.

Price Lifts? What Price Lifts?

What the Board doesn't say in its report is that diluted bitumen always sells at a discount. It is a lower quality crude and costs more to refine. It also costs more to transport by pipeline because it is so dense.

The crude discount is there because the discount takes quality considerations and transportation costs into account.[60]

According to an NEB research report, the normal discount the Board expects is about $20US a barrel.[61]

A discount of less than $20US per barrel would be considered a premium price for Alberta's heavy oil by the Board.[62]

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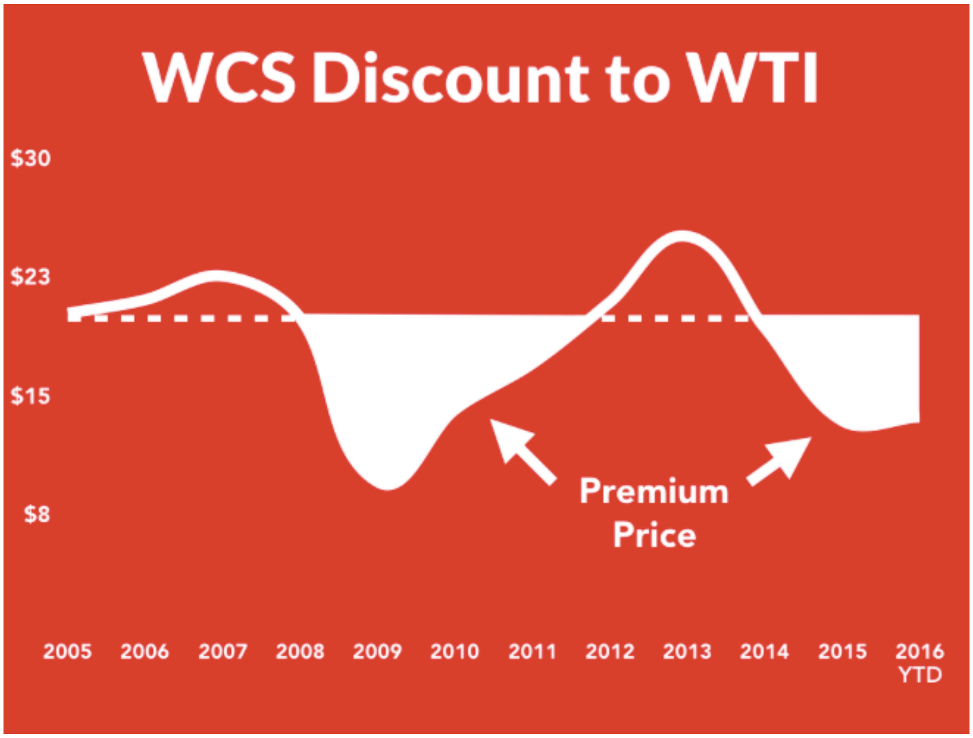
[58] NEB Report, op. cit., page 307. The Board got the dates wrong. They are 2018 - 2038 as per Mr. Earnest's report.

[59] Taking into account both the pipeline toll rates and the marine tanker costs which Mr. Earnest also underestimated, along with the negative impact of higher toll rates on the existing Trans Mountain system which rise to assist in paying for the expansion. Mr. Earnest ignored the impact on the Canadian economy of increased toll rates on the existing system because the Board ruled this outside the scope of its review.

[60] Robyn Allan, Bitumen's Deep Discount Deception and Canada's Pipeline Mania, April 2, 2013.

[61] NEB, Canadian Pipeline Transportation System, July 2009, page 7. Taking the percentage differential the Board identified and putting it into dollar terms results in $20US per barrel.

[62] I am aware that the Federal Department of Finance in a recent document released under Freedom of Information references a narrower discount. There are errors in this estimate that when rectified would point to a wider natural discount. However, what is relevant to this Panel is the NEB estimate of discount since it is the NEB that prepared the Report and claimed that the discount would be reduced.



Source: Baytex Energy, Historical WCS Pricing

Discounts below the dotted line on the graph represent a premium price.

The average discount for the past year and a half was less than $14 US.

Had the Board checked crude oil prices it would know there is no reduction in discounts for the project to capture.

Government Revenues? What Revenues?

So what about Government Revenues. The Board claims $28.2 billion over 20 years.

Burnaby[63] and other municipalities told the Board that property tax revenues will not be enough to pay for municipal services required by the project or to compensate for lost future planning and development options.

The Board ignored them.

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[63] City of Burnaby, Final Written Argument, January 12, 2016.

The Board pretends property tax revenue is a significant benefit.

Government Fiscal Revenues

Total Fiscal Impact	$28.2	100%
Project Capital Spend	$1.2	4%
Project Operations	$3.3	12%
Price Lifts (Reduction in Discounts)	$23.7	84%

Source: The Conference Board Report

Eighty Four percent of fiscal revenues come from Mr. Earnest's non-existent price lifts.

Price lifts are not there so neither is $23.7 billion in tax and royalty revenue related to it.

Look at Project Operations. Three point three billion dollars over twenty years. Sixty percent come from corporate income tax. One hundred million dollars a year because it is claimed Trans Mountain pays corporate taxes on operating profits.

But, Trans Mountain does not.

Trans Mountain hardly pays any corporate tax at all.[64]

As an intervenor I asked Trans Mountain questions about its structure and sophisticated tax avoidance planning. I wanted to test the evidence and show that the corporate taxes provided by the Conference Board were not there.[65]

[64] Robyn Allan, Trans Mountain Pipeline: Big Bucks for US Investors, Peanuts for Us., op. cit.

[65] Trans Mountain Response to R. Allan, Information Request No. 1, June 4, 2014 page 30-44.

Instead of compelling Kinder Morgan to answer my questions so it could rely on facts rather than inflated Conference Board estimates, the Board ruled my questions outside the scope of its review.[66]

For the five years from 2009-2013 Trans Mountain paid an average of $1.5 million a year in tax and received a tax refund in two of them.

This is the sophisticated tax planning model Kinder Morgan will rely on for its expansion. When it does, it will hardly pay any corporate tax in Canada at all.

So, municipalities are concerned that the project represents a net cost, fiscal revenues from price lifts do not exist, and corporate taxes from Project operations are artfully avoided.

The Board also refused to look at fiscal revenue losses when other sectors—like tourism, commercial fishing and the refinery sector—are negatively impacted by the Project—it ruled impacts on other sectors outside the scope of its review.[67]

Finally, we are left with the Board's jobs claim.

The Board finds a considerable benefit in the form of jobs created across Canada.

Pipeline Construction
400 - 600 Workers per spread

Tank Construction
between 60 and 370 workers

West ridge Marine Terminal Construction
95 workers

Over the first 20 years of operation
443 jobs/year (313 in B.C., with remainder in AB

There will be short-term construction employment related to the pipeline.

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66 NEB decisions and reasons on motions to compel full and adequate responses to the first round of Intervenor IRs, September 24, 2014, starting on page 105.

67 Alberta Federation of Labour, Final Written Argument, January 12, 2016.

Unifor[68] represents 12,000 energy sector workers and 5,000 west coast commercial fishing workers and the Alberta Federation of Labour [69] represents 170,000 unionized workers.

These workers do not support the project.

Unifor and AFL said there will be a greater number of job losses in construction and losses in permanent employment because the Project robs our economy of value added opportunity and crowds out existing activity particularly in commercial fishing.

The Board ruled workers concerns outside the scope of its review.

Kinder Morgan told the Board there will be 90 permanent jobs from project operations with 50 of them in BC. But the Board didn't rely on these figures. It relied on grossly exaggerated figures from a faulty input-output analysis done by the Conference Board to assert 443 permanent jobs instead.

Jobs? What Jobs?

Under a proper scope of review, where an energy strategy for Canada and job losses across industries are considered, the jobs figures become negative.

[68] Unifor Intervenor, Hearing Record, Exhibit C362.

[69] Alberta Federation of Labour, Hearing Record, Exhibit C5

Facts show there are no existing Asian markets for Alberta's crude oil.

The demand is not there and future supply is quickly disappearing.

Crude oil producers can't be trusted to provide an accurate picture of the lay of the land because they are contractually obligated to only speak good of the project.

There is no reduction in crude discounts to be captured.

There is a likely net reduction in government revenues and net job losses.

These are not greater than residual environmental burdens.

Facts show the project should be rejected, but the Board refused to consider the facts.

The Federal government is betraying Canadians by not living up to its promise to redo the Trans Mountain review.

Canadians have not been given due process.

Without due process, permission for Trans Mountain's expansion will never be given.