

October 24, 2015

Prime Minister Trudeau
House of Commons
Ottawa Ontario
K1A 0A6

Dear Mr. Prime Minister,

Re: National Energy Board and Kinder Morgan's Trans Mountain Expansion

As you know from your extensive election campaign, the National Energy Board (NEB) has lost the public's trust. This is regrettable. Canadians need the NEB to operate as an effective and efficient institution that fosters responsible economic growth and development in the long term interests of Canadians and the environment.

As a professional economist with a long career in both the private and public sector, I was an expert intervenor on behalf of the public interest in the Kinder Morgan Trans Mountain expansion project review. I was also an expert witness at the Enbridge Northern Gateway hearing.

Although the Northern Gateway hearing had its flaws—as numerous court challenges to the Board's review by First Nations and environmental groups attest—the unfortunate erosion of the NEB as an agent of sound decision making has intensified during the Kinder Morgan review. The Board's violations of the basic principles of natural justice and procedural fairness, along with its inability, or unwillingness, to duly consider the Canadian public interest, has turned the review process into a farce and exposed the Board as the industry-captured regulator it has become.

After more than eighteen months of intensive participation in the Trans Mountain review I withdrew. Direct experience with the Board process led me to conclude that the outcome of its deliberations would not be fair or balanced. I have attached, for your information, my letter to the Board detailing my concerns and reasons for withdrawal.¹ In particular, it explains how the NEB has designed the scope of its review so narrowly, restricted participation so profoundly, and removed essential features of quasi-judicial inquiry—such as cross examination—so completely, that it pre-determines an outcome that favours Kinder Morgan and puts the rest of us at risk.

Certainly the appointment of Trans Mountain's consultant to the Board immediately prior to the election campaign is indicative of the former government's complete disregard for due process and contempt for the Canadian public interest. In order to return it to the important role it was intended to play, the NEB needs the clear and decisive direction you promised during your campaign, particularly as outlined in the Liberal policy statement on making Environmental

¹ Robyn Allan, Letter of Withdrawal, NEB, May 19, 2015, <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451015/2776410/C9%2D31%2D1%2D%2D%20Withdrawal%20Letter%20A4L3S6.pdf?nodeid=2776227&vernum=-2>

Assessments credible again.² As you accurately characterize the issue, “governments might grant permits, but only communities can grant permission.”

Under the current NEB process Trans Mountain will never be granted a social license to expand. Numerous local mayors have been quite direct and vocal in expressing their concern.³ In an open letter last March they called on senior government to step in and fix the broken process. The call, to date, has gone unheeded. The only avenue for reasoned intervention capable of setting the NEB process back on a considered and trusted path lies with your government.

That is why I am writing to you today. I wish to bring to your attention the fact that both the NEB and Kinder Morgan continue to operate as if they are unaware, or doubt the intent, of commitments you, and your candidates, made during the campaign.

Liberal election campaign commitments were clear

In Esquimalt, BC on August 20, 2015 you were very clear when asked if the overhaul of the NEB applied to Kinder Morgan’s application. You answered, “Yes, yes. It applies to existing projects, existing pipelines as well...because we’re going to change the government and that process has to be redone.”⁴

At campaign events and in interviews you explained how the Harper government tried to accelerate resource projects by minimizing environmental oversight and marginalizing voices that have legitimate concerns, but that this, ironically, resulted in a lack of progress on pipeline projects. The gutting of environmental legislation and politicization of the NEB by the former government undermined the Board’s legitimacy. People don’t believe or trust the NEB the way they used to. If elected you confirmed your government would understand the need for both environmental oversight and economic development, and the first step toward this end would be to restore the public’s trust by making the NEB process credible.⁵

Numerous Liberal candidates underscored your commitments during the campaign and recently reconfirmed the need to redo the Trans Mountain review. North Vancouver newly elect MP, Jonathan Wilkinson, explained on his website that, “The current National Energy Board regulatory approval process has lost the trust of Canadians. A new, independent, evidence-

² Liberal Platform, Environmental Assessment, <http://www.liberal.ca/realchange/environmental-assessments/>

³ Mayors’ Declaration on Kinder Morgan National Energy Board Process, March 31, 2015, <https://www.burnaby.ca/Assets/TMEP/Mayors+Stand+Together+Against+Kinder+Morgan+Pipeline+Proposal.pdf>

⁴ <https://www.youtube.com/watch?v=gldTbJ0nGIQ> Justin Trudeau on Kinder Morgan, August 20, 2015, Dogwood Initiative

⁵ Liberal Leader Justin Trudeau talks energy and environment: wants NEB returned to pre-conservative state, CBC, Saskatoon radio, August 13, 2015. <http://www.cbc.ca/news/canada/saskatoon/liberal-leader-justin-trudeau-talks-energy-and-environment-1.3189726>

based process must be established. The Kinder Morgan expansion project must satisfy this new rigorous review that its environmental and social impacts can be effectively addressed.”⁶

In an interview with the Burnaby Now on October 21, 2015, newly elected MP for Burnaby North —Seymour, Terry Beech confirmed that, “We are going to redo the National Energy Board process. We’re going to broaden the scope. We’re going to make sure it’s objective, fair and based on science. We’re going to make sure proponents of any major energy projects, including Kinder Morgan, have to work towards getting community support and support from partner First Nations,” he said, reiterating pre-election promises. “We’ve already said there will be no decision on Kinder Morgan in January (sic). Kinder Morgan will have to go through a new, revised process.”⁷

Kinder Morgan believes its business as usual

In stark contrast, Kinder Morgan is dismissive of Liberal promises to fix the system. The company maintains that under a Liberal government it will be business as usual—effectively the same as when the Conservatives behaved as cheerleaders for pipeline projects, rather than referees.

Kinder Morgan Inc., (KMI) is the US parent of Trans Mountain Pipeline ULC. During its third quarter earnings conference call in Houston, Texas on October 21, 2015, an analyst asked KMI executives how the new Liberal majority might impact Trans Mountain’s application. Ian Anderson, president of Kinder Morgan Canada Inc., and V-P of KMI, fielded the question.

“I’m wearing...I’m wearing my Liberal red tie.” After audible laughter, Mr. Anderson continued. “Um...it’s too early to speculate on what a Liberal government is going to mean for us. You know we’re going to continue to focus on the NEB process that we’re involved in and all the requirements of that while we continue our project planning and preparation. We’ll certainly be briefing the Liberal government in due course on the project and kind of the progress we’ve made but I don’t yet have any comment on what a Liberal government may do to us with respect to the project. We’ll just keep working very hard and keep them informed and plan to execute the project as soon as we get approval.”⁸

It is important to understand what Kinder Morgan means when it says it will “brief” your government. Mr. Anderson and his staff are intensely engaged in, and skilled at, lobbying government. During the Conservative reign they held numerous meetings with the former

⁶ Jonathan Wilkinson, Where I stand on Kinder Morgan, <https://jonathanwilkinson.liberal.ca/where-i-stand-on-kinder-morgan/>

⁷ Burnaby’s newest MP says Liberals will redo NEB process, Burnaby Now, Jennifer Moreau, October 21, 2015, <http://www.burnabynow.com/news/burnaby-s-newest-mp-says-liberals-will-redo-neb-process-1.2092298> “January” was the expected release date for the NEB’s report and recommendation. The relevant date is now May 20, 2015. The schedule was revised due to the appointment of Steven Kelly to the NEB. Mr. Kelly’s evidence was struck. Trans Mountain filed new evidence on September 25, 2015 to replace it.

⁸ Kinder Morgan 3rd Quarter 2015 Earnings Results, October 21, 2015, <http://ir.kindermorgan.com/presentations-webcasts>, time 1:26:15. KMI removes audio casts within 90 days of posting.

Minister of Natural Resources responsible for the NEB—Joe Oliver—and his senior staff. Included in some of those meeting were staff from the Prime Minister’s Office.

Under Freedom of Information I petitioned the substance of the discussion in 20 meetings held during 2013 and 2014.⁹ While Kinder Morgan was actively pursuing the expansion of its Trans Mountain system at what was supposed to be an independent NEB hearing it was meeting with the government to lobby its cause. I was shocked to learn that there were no records, no agenda, no minutes or briefing notes from those meetings—just the required indication on the lobby registry that a meeting to discuss their pipeline interests had taken place.

Not only is the absence of a paper trail irresponsible administration and puts the government at risk, it is also a betrayal of the public trust. All Canadians know is that the meetings were held. What was said, and what promises were made, are effectively secret back-room agreements between a Texas based multinational and the former Harper government known for championing the cause of pipeline projects before they are assessed.

NEB dismissive of campaign promises

With respect to the NEB, you may be unaware as to how your Trans Mountain review commitments are being treated. As reported by the Burnaby Now, when asked how the Liberal majority changes the NEB process, NEB “spokesperson Craig Loewen said the Liberal majority doesn’t change anything for the pipeline at the moment because the process the board follows falls under a legislated mandate. “That doesn’t change unless the legislation changes or we’re ordered to do things differently,” he explained. “The reality is **there were a lot of things said in the campaign.**”¹⁰ (emphasis added).

The NEB cynically regards your promises as campaign rhetoric. What Canadians heard as important statements confirming that a Liberal government would restore the credibility of a broken process, the NEB summarily throws into a basket along with “a lot of things said in the campaign.”

The NEB requires clear direction. You have promised an overhaul of the process, you have considered policy direction for the future, and, you will require legislative amendments and regulatory changes to enforce your vision. It is understood that these substantive issues take time to consider and implement. However, unless clear direction is communicated, vested corporate and bureaucratic interests will endeavour to get out in front of promised Liberal policy changes making real change—meaningful change—difficult.

If the NEB review of Trans Mountain is allowed to continue it will undermine the credibility of your election promises while sending a message to the NEB and Kinder Morgan that it’s business as usual. More significantly, First Nations, communities, organizations and individuals engaged in the review will further incur a significant waste of time and money.

⁹ Meetings between Kinder Morgan and feds leave no paper trail, National Observer, Jenny Uechi, February 23, 2015, <http://www.nationalobserver.com/2015/02/23/news/meetings-between-kinder-morgan-and-feds-leave-no-paper-trail>

¹⁰ Burnaby’s newest MP says Liberals will redo NEB process, op. cit.

