

December 7, 2014

Secretary to the National Energy Board  
National Energy Board  
517 10th Avenue SW  
Calgary Alberta  
T2R 0A8

Dear Ms. Young:

**Re: Hearing Order OH-001-2014, Trans Mountain Expansion Project  
Application, 16 December, 2013 – File OF-Fac-Oil-T260 Robyn Allan Response  
to Kinder Morgan Letter December 3, 2014 Motion to Stay**

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Kinder Morgan Canada Inc.'s letter of December 3, 2014, prepared by Osler, Hoskin and Harcourt LLC on behalf of Trans Mountain Pipeline ULC (Kinder Morgan), is not in accordance with the facts of the acquisition transaction filed by Kinder Morgan Inc. (KMI) with the US Securities and Exchange Commission (SEC), numerous statements made by Richard Kinder, Chair and CEO of KMI, or actions taken by KMI and its credit rating agencies.

The November 26, 2014 transaction is described by Kinder Morgan Canada Inc. in its letter to the National Energy Board (NEB) as a "minor corporate reorganization"<sup>1</sup> while Richard Kinder tells investors that the \$76 billion purchase, "marks the second largest M&A transaction of all time in the energy sector, second only to the Exxon purchase of Mobil back in the 1990's".<sup>2</sup>

The acquisition of Trans Mountain Pipeline LP and related entities, through the acquisition of Kinder Morgan Energy Partners LP (KMP), by KMI, puts at risk the Canadian public interest. The change in ownership has implications for Trans Mountain's expansion project financing, spill liability insurance and access to financial resources on its existing and proposed facilities, toll rates, depreciation of its assets and related tax avoidance strategies, and supply security and cost of refined petroleum products to British Columbians.

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<sup>1</sup> Letter to the NEB from Osler Hoskin and Harcourt on behalf of Trans Mountain Pipeline LP, December 3, 2014, page 3, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2578643/B291%2D1\\_%2D\\_Response\\_to\\_Notice\\_of\\_Motion\\_by\\_R.\\_Allan\\_dated\\_November\\_23%2C\\_2014\\_%2D\\_A4F6S2.pdf?nodeid=2578550&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2578643/B291%2D1_%2D_Response_to_Notice_of_Motion_by_R._Allan_dated_November_23%2C_2014_%2D_A4F6S2.pdf?nodeid=2578550&vernum=-2)

<sup>2</sup> Rich Kinder Transaction Update, October 22, 2104, Minute 2:30 [http://www.kindermorgan.com/investor/km\\_transaction.aspx#](http://www.kindermorgan.com/investor/km_transaction.aspx#)

Kinder Morgan's incomplete rendering of its revised corporate structure submitted as attachment 1.07 (a) with its December 3, 2014, letter is not accurate.<sup>3</sup> The NEB is not in a position to determine the reliability of the chart since Kinder Morgan has not provided any evidence to accompany the illustration, nor has it submitted evidence explaining changes in the underlying partnership, operating, shareholder, or other agreements that impact, directly or indirectly, NEB regulated entities. In a transaction as significant as KMI's purchase of KMP, underlying agreements change. The NEB has a responsibility to assess the implications of those changes on the pipelines it regulates.

The NEB does not have, nor has it requested, sufficient information regarding the transaction announced on August 10, 2014. Thus the NEB is neither in a position to make a determination on "what" has taken place, nor is it in a position to determine "if" the transaction is in the Canadian public interest.

### **Notice of Motion 6**

The purpose of this letter is to respond to the Osler, Hoskin and Harcourt and the Kinder Morgan Canada Inc. letters, both dated December 3, 2014, and provide the Board with additional legal and material facts in addition to those provided in Notice of Motion 6 to Stay the Proceedings (Motion to Stay) confirming why the Motion should be granted.

The Board has an obligation to regulate pipelines under its jurisdiction in the public interest of Canada. The absence of Kinder Morgan's application for leave under section 74 of the *NEB Act*, and requirement by the Board to have Kinder Morgan rectify this situation, is a decision for the Board to make well within its authority, particularly in a Part III public interest hearing.

Section 52(2) of the NEB Act states under "factors to consider" in making its recommendation regarding a Part III Application that the Board shall have regard, ***"to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:***

*(c) the economic feasibility of the pipeline;*

***(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and***

***(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."*** (emphasis added).<sup>4</sup>

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<sup>3</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2558704/2578643/B291%2D3\\_%2D Revised NEB IR No 1 07a Attachment1 %2D A4F6S4.pdf?nodeid=2578222&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2558704/2578643/B291%2D3_%2D Revised NEB IR No 1 07a Attachment1 %2D A4F6S4.pdf?nodeid=2578222&vernum=-2)

<sup>4</sup> <http://laws-lois.justice.gc.ca/eng/acts/N-7/page-23.html#h-35> section 52 (2)

Further endorsement of the Board's power in a Part III hearing is the Board's ability to request **any** information the Board deems important in the preparation of its report and its ability to exclude from the legislated time frame the time taken to secure the information. The Board has powers to satisfy its informational needs.

*"Section 52 (5): If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit."*

The Board concluded in Ruling No. 28 when it granted Trans Mountain's July 25, 2014 request to access City of Burnaby lands for survey and examination purposes that the Board, "has authority to extend or abridge time where considerations of public interest and fairness so require."<sup>5</sup>

The need to fully review and understand the impact of the purchase of Trans Mountain Pipeline LP, its general partner Trans Mountain Pipeline ULC, its operator Kinder Morgan Canada Inc., and its 99.99% limited partner Kinder Morgan Cochin ULC, as well as all entities leading to KMP, by KMI, is a clear situation where the consideration of public interest and fairness so require an extension of time.

The information filed with the Board on December 3, 2014, is woefully insufficient to test the reliability of Trans Mountain Pipeline ULC's claims post the November 26, 2014, transaction.

The Board can request Kinder Morgan file a section 74 application for leave, and request concomitant or additional information as a stand-alone report filed as evidence at the Hearing. The Board can order any relief it finds appropriate under the circumstances.

The Board requires information in addition to that which would be provided in a section 74 application outlining the November 26, 2014, transaction. The Board requires Kinder Morgan to rectify past failures to fulfill reporting requirements of the *Act* and Regulations as well as correct the Hearing record to reflect the terms of the November 24, 2014 transaction.

In particular, Trans Mountain Pipeline ULC and Kinder Morgan Cochin ULC have failed to fulfill the requirements of the *NEB Act* and Regulations in prior years as explained in Sections 3 and 4 below. Kinder Morgan must update and correct the public record to provide a basis upon which to test the reliability of its claims regarding its corporate structure prior to the November 26, 2014, transaction.

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<sup>5</sup> NEB Ruling No. 28, page 4 <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2498607/A73%2D1 %2D Ruling No. 28 %2D A4A2V2.pdf?nodeid=2498824&vernum=-2>

As well, Trans Mountain Pipeline ULC has filed information in its Part III Application and in responses to Information Requests that is no longer correct solely because of the November 26, 2014, transaction. The Hearing record needs to be corrected to ensure it is accurate and reliable since this is the only record the Board and Intervenors can rely on.

### **Section 74 of the NEB Act is Engaged**

The Intervenor, Robyn Allan relies on the Board's "powers under sections 12 and 13 of the NEB Act where the Board can inquire into, hear and determine any matter where it appears that a person has failed to do something required under the *NEB Act* or has done or is doing something contrary to or in contravention of this *Act*; and to issue orders requiring that person to do what is required under the Act and to forbid the doing or continuing of any act that is contrary to the Act."<sup>6</sup> (emphasis added)

"Trans Mountain is a Canadian corporation and a "company" within the meaning of section 2 of the *NEB Act*."<sup>7</sup> Section 12 and 13 of the *NEB Act* include "the word "person"; and (2) the *Interpretation Act* RSC 1985, c I-21 defines "person" as ""person", or any word or expression descriptive of a person, includes a corporation"<sup>8</sup>

Sections 12 and 13 state:

*12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter*

*(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence permit order or direction; or*

*(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.*

*(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.*

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<sup>6</sup> Notice of Motion of Trans Mountain, September 3, 2014, page 6, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2504482/B258%2D1\\_%2D Notice of Motion of Trans Mountain %2D A4A7E3.pdf?nodeid=2503706&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2504482/B258%2D1_%2D Notice of Motion of Trans Mountain %2D A4A7E3.pdf?nodeid=2503706&vernum=-2)

<sup>7</sup> Ibid., page 1.

<sup>8</sup> Trans Mountain Notice of Constitutional Question Reply Submissions, October 7, 2014, page 9.

### 13. The Board may

- (a) order and require any person to do forthwith, or within or at any specified time and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act,
- (b) forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction.<sup>9</sup>

In Ruling No. 28 the Board stated, “In order to make a recommendation under section 52 of the NEB Act, the Board requires companies to provide detailed information about engineering, environmental, geotechnical, archaeological, and **other matters**. As the Board noted previously in the Dawn Gateway Pipeline process, **it would not be logical that the Board be required to recommend approval or denial of a project without all the necessary information before it. This would not be in the public interest.**<sup>10</sup> (emphasis added).

In further support of the Board’s ability to secure the information it needs to make informed decisions, NEB Chair, Peter Watson has confirmed his willingness to support an extension to a hearing. “Y(y)ou need to know that I will not hesitate to seek an extension to a hearing beyond the 15 months if we need to get additional information to make our decision—or if we believe we need more time for intervenors to be fairly and properly heard.”<sup>11</sup>

In an effort to keep the Board from understanding why the Motion to Stay is necessary, Kinder Morgan has fundamentally contradicted itself.

In its December 3, 2014 letter in response to the Motion to Stay the company claims, “With respect to the Application the Board is currently holding a public hearing to determine whether to recommend approval of the Project. The Project has not received a Certificate of Public Convenience and Necessity. There is no “pipeline” in respect of the facilities proposed in the Application to which section 74 can apply.”<sup>12</sup>

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<sup>9</sup> NEB Act, <http://laws-lois.justice.gc.ca/eng/acts/N-7/page-5.html#h-10>

<sup>10</sup> NEB Ruling No. 28, August 19, 2014, page 4, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2498607/A73%2D1\\_%2D\\_Ruling\\_No.\\_28\\_%2D\\_A4A2V2.pdf?nodeid=2498824&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2498607/A73%2D1_%2D_Ruling_No._28_%2D_A4A2V2.pdf?nodeid=2498824&vernum=-2)

<sup>11</sup> Peter Watson, Chair, NEB, Speech to the Economic Club of Canada, November 21, 2014 <https://www.neb-one.gc.ca/bts/nws/spch/2014/nystrm/index-eng.html>

<sup>12</sup> December 3, 2014 letter op. cit., page 3.

In direct contrast, and in order to obtain NEB support to access Burnaby lands, Kinder Morgan told the Board “The Project...is an expansion of an existing interprovincial pipeline and a recognized federal undertaking.”

Further, Kinder Morgan stated that distinguishing the Project from its existing pipeline under Board jurisdiction would not make sense and lead to false conclusions. “Burnaby’s attempt to distinguish the Project—which is an expansion of the existing provincial pipeline—from the pipeline itself is illogical and leads to an absurd result.”<sup>13</sup>

Thus we find ourselves in the “absurd” situation where Kinder Morgan argues that under its section 73 Motion and Notice of Constitutional Question before the NEB, that the term “pipeline” includes the proposed expansion but in response to the Motion to Stay, section 74, “pipeline” does not include the proposed expansion.

Furthermore, as noted below in Section 4 dealing with the audit history of Kinder Morgan’s regulated pipelines, Kinder Morgan did file under section 74 of the *NEB Act* for a transfer of a minority interest in the Cochin Pipeline system in 2012, as required by the *Act*. Now the company is trying to tell the Board that a majority acquisition of ownership interests, as has arisen from the KMI transaction, is not subject to the *NEB Act*.

Resisting its obligation to file for leave and avoiding full disclosure of the recent transaction to this Hearing, Kinder Morgan compromises the legitimacy of the NEB generally and the legitimacy of the Part III Hearing, specifically. Kinder Morgan is the only beneficiary of its lack of transparency, accountability and disclosure. The company’s secrecy puts the Canadian public interest in harm’s way.

Kinder Morgan has placed the Board in an untenable situation. The solution is to grant the requests in the Motion to Stay while Kinder Morgan’s failure to seek leave is rectified and the Board obtains any, and all, additional information it requires to fulfill its duty not only generally as a regulator of interprovincial pipelines, but specifically in conducting a Part III public interest Hearing.

### **Impact on Board and Intervenors**

Kinder Morgan has failed to uphold the letter and the spirit of requirements under the *NEB Act* and has withheld pertinent information from the Part III Hearing.

Kinder Morgan has allowed the Board and Intervenors to operate under the grossly incorrect assumption that there were no changes in Trans Mountain’s ownership or the company’s broader corporate structure. Kinder Morgan has not informed the Board of

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<sup>13</sup> Trans Mountain Notice of Constitutional Question Reply Submissions, October 7, 2014, paragraph 23, page 5.

changes in KMP's debt structure and related credit ratings, its ability to finance the project, or its access to adequate financial resources in the event of an oil spill.

Had the Motion to Stay not been filed with the Board, when, if ever, would Kinder Morgan have thought it helpful to inform the Board about the "second largest M&A transaction of all time in the energy sector, second only to the Exxon purchase of Mobil back in the 1990's" and the transaction's implications for federally regulated pipelines?

When, if ever, would Kinder Morgan have thought it helpful to correct the evidence on the record rendered inaccurate because of this major transaction?

Even subsequent to the Motion to Stay, Kinder Morgan has not felt it important to correct its Part III Application and related evidence. Instead, Kinder Morgan has tossed the Board a flippant letter accompanied by a self-serving and selected corporate structure that does not represent the actual corporate structure relevant to this Hearing. Kinder Morgan seems to assume the Board will take no action to hold Kinder Morgan to account. Kinder Morgan behaves as if there is no need to be forthright and fulsome in its provision of the facts related to the transaction and how those facts impact the Part III Hearing.

As early as December 2013 Kinder Morgan Inc. knew internally of its planned acquisition.<sup>14</sup> It would not be expected that the Board would be informed until after the transaction was publicly announced. The point is, the company had eight months to prepare its full disclosure to the Board and submit this disclosure as a section 74 Application once the transaction was announced publicly on August 10, 2014.

It would have been appropriate to alert the Board at this Hearing as soon as the transaction was publicly announced by filing evidence and correcting numerous sections of its Application rendered incorrect because of the transaction. Had Kinder Morgan done so, it might have still been possible for Intervenors to understand the impact of the changes and prepare questions related to them in the first round of Information Requests.

Had Kinder Morgan advised the Board of the impending sale on the record it would have afforded the Board an opportunity to ask questions regarding the impact of the transaction on the Part III Application in advance of the transaction being complete.

Kinder Morgan is aware that the Board can only consider evidence filed on the record. "The Board will hold a public hearing to consider whether to recommend approval of this Project. During the hearing process, the Board will receive written evidence that will be available in an online public registry on the Board's website...The Board will use various ways to gather and test evidence and will review and consider all of the evidence on the

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<sup>14</sup> KMI Proxy, SEC filing, page 33, [http://www.kindermorgan.com/content/docs/KMI\\_Proxy\\_Statement.pdf](http://www.kindermorgan.com/content/docs/KMI_Proxy_Statement.pdf)

record before making a recommendation. **The Board will rely only on the evidence on the record.**<sup>15</sup> (emphasis added)

Kinder Morgan is aware that the Board relies on the integrity of the Proponent to anticipate informational needs and be transparent and fulsome in its disclosure. When the Proponent fails to do so, the Board must act.

The *extent* of Kinder Morgan's evidence related to the transaction now on the evidentiary record is the company's three-paragraph letter to the Board dated December 3, 2014 that accompanied the response to the Motion to Stay. The substance of the letter consists of one paragraph, "On November 26, 2014, Kinder Morgan, Inc. and its subsidiaries purchased the outstanding publicly traded units of Kinder Morgan Energy Partners, LP that it, and its subsidiaries, did not already own."<sup>16</sup> Kinder Morgan attached a selected and "updated" organization chart as its revised response to 1.07(a).

As documented below, the terse description provided by the company on December 3, 2014 is not consistent with the facts. It misrepresents the scope and substance of the transaction and deliberately mischaracterizes its impact. Kinder Morgan would have the Board and Intervenors believe there is nothing worthy of inquiry respecting KMI's \$76 billion purchase of KMP's assets—including regulated pipelines—because the company spent \$76 billion for something it already owned. Paying something for nothing, as Kinder Morgan pretends, should send shock waves through the Board and elicit immediate and substantive response to bring into action the full powers of the Board.

Even if Intervenors could prepare adequate Requests for Information by relying on an understanding of the transaction garnered outside the Hearing process, and in time to meet the January 9, 2014 deadline for the second and final round of questions, based on Kinder Morgan's behaviour during the first round of Information Requests, legitimate attempts to enlighten the Board will be frustrated. The company will respond by stating the request for information is outside the scope of the review and refuse to answer, or direct Intervenors to the paragraph in the December 3, 2014 filing as if it is correct and complete.

Had Kinder Morgan fulfilled the letter and the spirit of the *NEB Act*, the Board's ability to fulfill its obligations to the Canadian public under the Part III Hearing would not be compromised. Had Kinder Morgan informed the Board during the course of the Part III Hearing of the details surrounding the transaction and its implications for the Part III Hearing, the accuracy and reliability of its Application would not be compromised.

For the Board's information and consideration the following facts are provided to assist the Board in appreciating the full extent of the disservice Kinder Morgan has perpetrated on

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<sup>15</sup> Hearing Order OH-001-2014, page 3. [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445930/A15%2D3\\_%2D\\_Hearing\\_Order\\_OH%2D001%2D2014\\_%2D\\_A3V6I2.pdf?nodeid=2445615&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445930/A15%2D3_%2D_Hearing_Order_OH%2D001%2D2014_%2D_A3V6I2.pdf?nodeid=2445615&vernum=-2)

<sup>16</sup> Kinder Morgan Canada to the NEB, December 3, 2014





Kinder Morgan considers Trans Mountain's ultimate parent to be KMP throughout the Application and in other evidence Kinder Morgan has filed with the Board prior to the November 26, 2014 transaction. It is KMI that now holds 100% ownership rights to Trans Mountain. As well, KMP is no longer the corporate entity it was prior to the transaction.

KMP was a Master Limited Partnership listed on the New York Stock Exchange under the ticker symbol KMP. KMP had a diverse number of unit holders predominantly US based. What is known is that KMP has been delisted from the NYSE and its units are no longer publicly traded. With the acquisition of KMP units by KMI, KMP's former unit holders no longer exist.

What is not known is the relationship between KMP as a limited partnership—if it is still a limited partnership registered in Delaware—and its new 100% owner, KMI.

What Kinder Morgan failed to tell the Board in its December 3, 2014 letter is the relatively limited number of KMP units KMI actually held before the transaction. This information is available in Kinder Morgan's SEC filing.

*"KMI directly and indirectly owns...approximately 10% of the total outstanding limited partner interests of KMP. KMI also indirectly owns all of the common stock of KMGP, the general partner of KMP, which owns an effective 2% interest in KMP and its operating partnerships and the right to receive incentive distributions from KMP pursuant to KMP's partnership agreement. Together, these limited partner and general partner interests represent approximately 12% of KMP's total equity interests and an approximate 50% economic interest in KMP, as a result of the incentive distributions."*<sup>18</sup>

The \$76 billion purchase price to complete the transaction represents the magnitude of the change in ownership. In order to gain 100% ownership over KMP's assets, including those of Trans Mountain, KMI had to pay for them.

Further, Kinder Morgan has failed to inform the Board that, "A limited partnership is inherently different from a corporation. Ownership interests in a limited partnership are therefore fundamentally different from ownership interests in a corporation. KMP unitholders will own KMI common stock following the completion of the KMP merger, and their rights associated with the KMI common stock will be governed by KMI's certificate of incorporation and bylaws and Delaware corporation law, which differ in a number of respects from the KMP partnership agreement and Delaware limited partnership law."<sup>19</sup>

It is imperative that the Board understand KMI's certificate of incorporation and bylaws to determine the impact of the transaction on KMI's new 100% owned regulated subsidiaries.

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<sup>18</sup> SEC filing form S-3, page3, <http://www.sec.gov/Archives/edgar/data/1506307/000104746914007230/a2221196zs-4.htm>

<sup>19</sup> Ibid, page 10.

If KMP continues to exist as a private limited partnership then it is critical to know how the partnership agreement might have changed because of the transaction.

The Board has no understanding of the terms of the partnership agreements that exist between Trans Mountain Pipeline LP and its general partner or Kinder Morgan Operating LP “A” and “D” (if they still exist) and Kinder Morgan Energy Partners LP and its general partner.

In NEB IR No. 1 the Board asked Kinder Morgan to provide “ a summary of Trans Mountain Pipeline LP’s distribution policy that would determine how cash in the limited partnership would be distributed to the limited partners.”<sup>20</sup>

Kinder Morgan responded that:

*“Pursuant to the terms of the Amended and Restated Limited Partnership Agreement dated February 1, 2008 which governs Trans Mountain Pipeline L.P., distributions made from Trans Mountain Pipeline L.P. are subject to the consent of the General Partner, Trans Mountain Pipeline ULC. The distributions are limited to the amount by which the cash held by the Partnership exceeds the aggregate of (i) the liabilities of the Partnership (other than any liability secured by non-cash assets of the Partnership having a net realizable value greater than all liabilities thereby secured) and (ii) such amount the General Partner establishes as a reasonable reserve to be retained for use in the Business of the Partnership.”<sup>21</sup>*

There has been no evidence filed by Kinder Morgan with the NEB, or at the Hearing, as to the nature of the new KMP entity, whether it has been re-registered, how partnership or other agreements might have changed, how distributable cash flow, including that provided by NEB regulated assets might be required to flow to the new parent KMI, or what, if any changes have been made to the entities structured between KMP and KMI, as well as the entities structured between KMP and Kinder Morgan Canada Company—a ULC registered in Nova Scotia.

Neither has Kinder Morgan filed a copy of the February 1, 2008 Partnership Agreement referenced in IR Response 1.07 (e) with the Board which governs Trans Mountain Pipeline LP’s cash distributions from the operation of the Trans Mountain’s regulated assets. The most recent NEB audit of Trans Mountain was for the years 2005 and 2006 to November 30, therefore NEB auditors have not examined any documents related to Trans Mountain beyond November 30, 2006. The Board does not know what partnership agreement terms and conditions exist and how those might be affected by the recent transaction.

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<sup>20</sup> Trans Mountain Response to NEB No. 1 page [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2\\_%2D Trans Mountain Response to NEB IR No. 1 1 of 2 %2D A3W9H8.pdf?nodeid=2456419&vernum=-218](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2_%2D Trans Mountain Response to NEB IR No. 1 1 of 2 %2D A3W9H8.pdf?nodeid=2456419&vernum=-218)

<sup>21</sup> Ibid, page 23.

Prior to the transaction Kinder Morgan Operating LP “A” existed as an intermediary entity between Kinder Morgan Canada Company—a ULC registered in Nova Scotia and 100% shareholder in Trans Mountain’s general partner—and KMP.

Prior to the transaction Kinder Morgan Operating LP “A” and “D”, as well as Kinder Morgan Canada Company, Trans Mountain (Jet Fuel) and KM Canada Terminals ULC existed as intermediary entities between Kinder Morgan Cochin ULC—Trans Mountain Pipeline LP’s 99.99% unit holder—and KMP.

Kinder Morgan in its letter of December 3, 2014, and accompanying corporate structure diagram, did not identify Kinder Morgan Operating LP “A” or “D”, Trans Mountain (Jet Fuel) or KM Canada Terminals ULC. The Board needs to know if these entities continue to exist and if so be apprised of the terms and conditions of their agreements.

Kinder Morgan’s corporate structure filed December 3, 2014 also has indirect ownership of Kinder Morgan Energy Partners LP between it and KMI. The Board needs to know which entities exist between KMI and KMP and the terms of any and all agreements between them as they relate to federally regulated pipelines.

Kinder Morgan has not informed the Board that not only does KMI consider the transaction to represent a purchase of assets, this is how the transaction is treated by accounting and tax rules in the US. KMI, a C-Corp, has bought KMP, a partnership.

*“Why a C-corp?...(because of) significant income tax savings. And so, we will get depreciation shield from this transaction that amounts to about \$20 billion in tax savings over the next 14 years. And people say why, how, does that happen? So, we are buying assets, right, because we are buying partnerships, so we are deemed to be buying the assets, just like going out and buying an office building...the only difference here is we are buying pipelines and terminals.”<sup>22</sup>*

## **1.2 Debt**

Prior to KMI’s purchase of KMP, KMP issued its own long and short-term debt and obtained credit ratings by independent credit agencies—in particular Moody’s, Standards and Poor’s and Fitch’s. The purchase of KMP has resulted in KMI as the sole surviving entity with the ability to issue debt. All future short-term and long-term debt for Kinder Morgan will be issued at KMI. All the existing debt at the operating subsidiaries will be refinanced as it matures.

On September 19, 2014, KMI entered into a five year \$4 billion revolving credit facility, which expires in September 2019. Under certain circumstances the facility can be increased to \$5 billion.

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<sup>22</sup> Kim Dang, CFO KMI, Jefferies 2014 Global Energy Conference, November 11, 2014, minute 5:40, Kinder Morgan website presentations audio recording.

On September 19, 2014, KMI entered into a new, one year, \$5 billion revolving credit agreement.<sup>23</sup>

On November 24, 2014, KMI issued \$6 billion in bonds with maturities ranging between 2017 and 2045 and interest rates ranging from 2% to 5.55%. The interest rate for the 30 year bonds was 255 basis points above treasuries of similar maturity.

The purpose of the debt issue and lines of credit were to assist in financing the \$76 billion acquisition transaction. The issuance of debt has increased the energy giant's debt load from \$36 billion to \$40 billion (including subsidiaries acquired on November 26, 2014, and their \$26.4 billion in debt assumed by KMI, and not including the revolving lines of credit).<sup>24</sup>

On November 26, 2014, existing credit agreements were terminated and cross guarantee agreements were entered into between KMI and substantially all of its wholly owned subsidiaries whereby each party to the agreement unconditionally and absolutely guaranteed the indebtedness of each of the other parties to the agreement.

*"After the consummation of the KMP, KMR and EPB mergers, KMI, KMP and EPB and substantially all of their wholly owned subsidiaries with debt will enter into cross guarantees with respect to the existing debt of KMI, KMP, EPB and such subsidiaries, so that KMI and those subsidiaries will be liable for the debt of KMI, KMP, EPB and such subsidiaries. Further, following the consummation of the Transactions, EPB is expected to be acquired by KMP."*<sup>25</sup>

KMI amended its bylaws and shareholder's agreement after the transaction. KMI and its original investors are the only parties to the shareholder agreement. The agreement affects the governance of the company.

Outlining the transaction to investors on November 19, 2014, Kinder Morgan explained that KMI would have "full control over operated assets" because of the acquisition and KMP would become "100% owned with fully cross-guaranteed debt."<sup>26</sup>

The change in the treatment of the debt held by Trans Mountain's former parent, KMP, and its subsidiaries, and KMI's corporate debt now that it has become 100% owner of KMP, is

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<sup>23</sup> Sec filing, 8-K, September 19, 2014, [http://www.sec.gov/Archives/edgar/data/1506307/000110465914068325/a14-21387\\_18k.htm](http://www.sec.gov/Archives/edgar/data/1506307/000110465914068325/a14-21387_18k.htm)

<sup>24</sup> SEC filing, November 24, 2014, <http://phx.corporate-ir.net/phoenix.zhtml?c=93621&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTk5MjMOMDYmRFNFUT0wJINFUT0wJINRREVTQz1TRUNUSU9OX0VOVEISRSZzdWJzaWQ9NTc%3d>

<sup>25</sup> KMI Proxy Statement, page 33, [http://www.kindermorgan.com/content/docs/KMI\\_Proxy\\_Statement.pdf](http://www.kindermorgan.com/content/docs/KMI_Proxy_Statement.pdf)

<sup>26</sup> KMI to acquire KMP, KMR, EPB, November 19, 2014, Kinder Morgan Presentation, page 25.

significant and yet there is no mention of this in Kinder Morgan Canada Inc.'s December 3, 2014 letter to the Board.

Absolute and unconditional cross guarantees among KMI and its subsidiaries, including joint ventures, have been executed. Prior to the acquisition KMP—and its subsidiaries—were subject to structural subordination of debt.

Structural subordination means that a lender to a company will not have access to the assets of the company's subsidiary—like Trans Mountain Pipeline LP—until after all of the subsidiaries creditors—such as oil spill claimants—have been paid.

Absolute and unconditional cross guarantees do not provide such protection but put the assets of subsidiaries at risk for the debt of their parents. KMI has created “a single creditor class and virtually eliminates structural subordination. The cross guarantees are expected to be absolute and unconditional between the entities, and any refinancing of maturing notes is expected to be done primarily at the KMI level over time (excepting some pipeline debt which would remain at the pipelines for rate-making purposes but stay cross guaranteed).”<sup>27</sup> The Board is unaware of how this affects pipelines it regulates or the pipeline Part III Application before it.

KMI explained to investors that cross guarantees were relied on “instead of merging KMP or refinancing existing debt because of tax and rate making considerations.”<sup>28</sup>

Even the substantive increase in security afforded creditors through cross-guarantees was insufficient to raise KMI's credit rating to the level that existed for KMP prior to the transaction. KMI is now rated at the lowest level of investment grade and the existing KMP debt has been downgraded to bring it in line with KMI's rating.

Thus, the structure of the purchase of KMP by KMI was designed to facilitate tax minimization and maximize toll rates, while elevating the credit risk of Trans Mountain's parent.

On November 26, 2014, Standard and Poor's assigned KMI a short-term credit rating of A-3 and a corporate credit rating of BBB- and withdrew the short-term credit and commercial credit rating for KMP at the issuer's request.

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<sup>27</sup> Business Wire, Fitch Ratings, <http://www.businesswire.com/news/home/20141120006534/en/Fitch-Upgrades-Kinder-Morgan-BBB--Downgrades-Affiliates#.VH-f3r6xGfQ>

<sup>28</sup> [http://www.kindermorgan.com/investor/presentations/KMI\\_Purch\\_MLPs\\_Investor\\_Presentation\\_vR.pdf](http://www.kindermorgan.com/investor/presentations/KMI_Purch_MLPs_Investor_Presentation_vR.pdf) page 18.

Standard and Poor's explained that notwithstanding the cross-guarantees KMI is "highly leveraged" and has "aggressive financial policies, namely high financial leverage and the reliance on the capital markets to fund large discretionary cash flow deficits."<sup>29</sup>

Similarly, Moody's Investor Service has explained that KMP's merger with KMI negatively impacts KMP's credit profile primarily because KMP becomes a direct obligor of the debt that has been issued by KMI. KMP's assets (including Trans Mountain) were leveraged about 4.1 times as of June 30, 2014. After the purchase, its assets were leveraged roughly 6 times.<sup>30</sup>

Kinder Morgan's Part III Application states that:

*"The expected capital cost for the Project is approximately \$5.4 billion. Financing will be arranged by Trans Mountain's parent company KMP. Kinder Morgan Energy Partners, L.P. is one of the largest midstream energy companies in North America with an enterprise value of more than US\$48 billion. Table 3.2.1 provides unaudited KMP consolidated balance sheets. KMP typically finances growth projects using a mix of 50 per cent debt and 50 per cent equity. Funding sources may include a combination of the issuance of long-term debt securities, bank financing, and the issuance of public equity at KMP. Kinder Morgan Energy Partners, L.P.'s long-term corporate debt credit rating is BBB (stable) at Standard & Poor's Ratings Services, Baa2 (stable) at Moody's Investors Service, Inc. and BBB (stable) at Fitch, Inc."*<sup>31</sup>

The acquisition of KMP by KMI renders the financing section of the Proponent's application obsolete. The Board does not know how financing for the project will be arranged or the credit worthiness of the ultimate borrower. This brings into question the validity of Kinder Morgan's Part IV Application for approval of the toll methodology and toll rates that would be applicable if the Part III Application is approved.

As a result of the recent acquisition of KMP by KMI, KMP's credit rating has been downgraded by all three rating agencies. KMI's credit rating was upgraded from where it was before the purchase, but the rating is below that of KMP's when Kinder Morgan Canada Inc. filed the Part III, and Part IV Applications on Trans Mountain Pipeline ULC's behalf.

### **1.3 Insurance Program**

Kinder Morgan advised the Board in its Response to NEB IR No 1 that the amount of insurance available to an insurance program is, "subject to the market conditions at the

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<sup>29</sup> Standard and Poor's Research Update, <http://www.standardandpoors.com/prot/ratings/articles/en/au?articleType=HTML&assetID=1245377570487>

<sup>30</sup> Moody's Investors Service, Kinder Morgan Energy Partners and Kinder Morgan Inc., November 24, 2014

<sup>31</sup> Volume 2 page 2-40

time the insurance is placed. Market conditions such as... merger activity within the marketplace can all have an impact on the amount of insurance coverage available.”<sup>32</sup>

The purchase of KMP by KMI, and thus Trans Mountain, has resulted in an appreciation of the energy conglomerate’s asset base of \$55-\$60 billion.<sup>33</sup> The insurance program that KMI had in place prior to the transaction has been fundamentally impacted by the appreciation of KMI’s asset base arising from the acquisition. This means that the \$750 million general liability insurance program that was in place—if it indeed is still in place—is now spread over a much larger potential loss.

Insurance is established based on risk which is a function of likelihood times consequence (Risk = Likelihood x Consequence). KMI’s purchase of KMP increases the financial consequence for any given loss.

It is to be expected that KMI’s insurance providers would make adjustments to the terms and conditions of the insurance program because of their increased loss exposure. It is even likely that the relevant policies have clauses that anticipate a major acquisition, such as the one KMI has undertaken, triggering certain terms and conditions.

It is imperative that the Board be apprised of the changes to KMI’s insurance program which may have occurred as a result of the recent transaction, and how this transaction impacts future insurance scope and limits of coverage.

The potential changes in KMI’s existing insurance program and its ability to renew its coverage on an annual basis puts the availability of financial resources for a spill on Trans Mountain’s existing system into question. The Board has a responsibility to ensure that the requirements under the Act and regulations related to financial loss from a spill adequately protect the public from bearing the cost of a Trans Mountain spill under the company’s new owner.

As well, the Board has an obligation to ensure that insurance and other financial assurances will be adequate and can be secured—that Trans Mountain will be able to pierce the corporate veil—when, and as, required.

The restructuring of KMI and its subsidiaries may have resulted in enhanced liability protection of KMI, its affiliates, executive and the Board and as such documentation related to the new structure needs to be examined. The impact of cross-guarantees on access to financial resources and KMI’s insurance program, not only today, but into the future, must be addressed.

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<sup>32</sup> IR Response to NEB, 1.8 (f), page 27 [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2\\_%2D\\_Trans\\_Mountain\\_Response\\_to\\_NEB\\_IR\\_No.\\_1\\_1\\_of\\_2\\_%2D\\_A3W9H8.pdf?nodeid=2456419&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2_%2D_Trans_Mountain_Response_to_NEB_IR_No._1_1_of_2_%2D_A3W9H8.pdf?nodeid=2456419&vernum=-2)

<sup>33</sup> Kim Dang, CFO KMI, op cit., minute 6:40



Trans Mountain shares the cost of insurance protection provided through KMI on a proportional basis. With an increase in KMI's asset base it would be expected that the same level of protection for all KMI assets will result in an increased premium—if not immediately, when the program is renewed.

The impact of increased insurance costs to Trans Mountain, and the way those increased costs feed into toll rates and are shifted onto Trans Mountain's current, and proposed shippers, needs to be explored.

Thus, with respect to KMI's insurance program and the impact of the acquisition, the Board needs to determine:

- i) the affect of the transaction on the existing insurance program and financial resources available to meet potential clean-up, damage, remediation and other claims related to a spill event on the existing Trans Mountain pipeline system;
- ii) the affect of the transaction on the KMI insurance program when it is up for annual renewal;
- iii) projections as to the likely impact the transaction might have related to the insurability and access to resources related to the expansion;
- iv) the allocation of costs to Trans Mountain, its shippers and the Canadian economy related to the insurance program solely because of the transaction both for the existing pipeline and the proposed expansion;
- v) any and all limits to liability afforded by the new corporate structure and related revised agreements between KMI affiliates, creditors and/or insurers;
- vi) limits to liability related to the introduction of cross-guarantees which may be triggered in the event of a spill; and
- vii) any exposure for financial liability Trans Mountain may have because of cross-guarantees if any of KMI's subsidiaries experience a loss that exceeds insurance resources.

#### **1.4 Accounting and Tax**

Kinder Morgan's complex corporate structure, and the frequency of changes to that corporate structure, not only related to its regulated Canadian based activities but also its non-regulated Canadian based activities, raises red flags.

Kinder Morgan began as a publicly traded Enron tax shelter in 1992 called Enron Liquids Pipeline LP. Publicly traded US limited partnerships are called Master Limited Partnerships (MLPs). Ownership shares are units. MLPs are treated as a partnership for tax purposes

and therefore none of the income is subject to federal corporate income tax. MLPs combine the tax advantages of a partnership with the liquidity benefits of publicly traded stocks.

Enron Liquids Pipeline LP—the MLP—held Enron Corporation’s liquid pipeline assets as well as some gas processing and coal transfer and storage facilities. The general partner, Enron Liquids Pipeline Company was the operator. Richard Kinder, KMI’s current Chair and CEO, was instrumental in setting up the arrangement. When Enron Liquids Pipeline Company was established he was a member of the Enron Board, its president and Chief Operating Officer (COO) and became the general partner’s first Chair. Mr. Kinder was the person responsible for establishing the company’s accounting and tax planning years before he left Enron.

Beginning in 1992 Enron Corporation—the parent—embarked on deliberate accounting and tax manipulations approved by Enron’s Board and often in concert with its bankers and outside accountants. The purpose of these transactions was to overstate earnings and cash flow by cleverly disguising debt. The strategy is known as “prepays”. They are legal if they are undertaken for legitimate purposes, but as the US Joint Staff Committee reporting to Congress points out, in Enron’s case, they were not. From 1992 - 1996, while Kinder was a Board member and key executive at Enron Corporation, Enron engaged in two or three of these transactions a year. These practices, albeit on a more aggressive scale, continued until Enron’s demise in 2001.<sup>34</sup>

Beginning in 1995 Enron began to engage in a series of transactions that, according to the US Joint Staff Committee on Taxation, were designed to “satisfy the literal requirements of the corporate tax laws, yet produce results that that were not contemplated by Congress and not warranted from a tax policy perspective. Several of the projects were structured to duplicate and accelerate tax deductions.”<sup>35</sup>

The first of these transactions was called Project Tanya. It was based on duplicating deductions between Enron companies—effectively claiming the same loss twice. Project Tanya resulted in federal tax savings of \$66 million. The US Joint Committee on Taxation report explained that as Director, president and COO, Richard Kinder was instrumental in delivering this strategy for Enron Board approval.<sup>36</sup>

In early 1997 while still employed by Enron, Richard Kinder and his partner William Morgan, a former Enron employee and member of the Board of Enron Liquid Pipelines Company—the general partner of the MLP—acquired the general partner. They changed the name of the limited partner to Kinder Morgan Energy Partners LP (KMP).

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<sup>34</sup> <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/the-role-of-the-financial-institutions-in-enrons-collapse>

<sup>35</sup> <http://www.jct.gov/s-3-03-vol1.pdf>, page 109.

<sup>36</sup> *ibid*, page 119.

Kinder and Morgan created their own board of directors and executive team for the general partner. The roster was heavily weighted with Enron insiders. Out of the nine original directors and officers, six were Enron employees and a seventh member of the team, Michael Morgan, was William Morgan's son. The Treasurer and Secretary of Kinder Morgan's company was an independent tax and accounting consultant underscoring the entity's continued emphasis on tax planning. Enron Liquids Pipeline Company's 141 employees came with the deal at their existing salaries.

Even today, many of Kinder Morgan's senior executive are Enron alumni. Steven Kean, Director and Chief Operating Officer of Kinder Morgan is a former Enron employee who served as the Executive Vice President and Chief of Staff until Enron's demise and served as Senior Vice-President Government Relations from 1997-1999.<sup>37</sup> Mr. Kean's bio on Kinder Morgan's website is noticeably silent about his years spent at Enron.<sup>38</sup>

Jordan Mintz is Kinder Morgan's Vice-President and Chief Tax Officer and member of the Board of various Canadian subsidiaries, including Kinder Morgan Canada Company and Kinder Morgan Cochin ULC.<sup>39</sup> "From January 1996 until October 2000, Mintz was a Vice-President of the Tax Division of Enron Corp. ("Enron"). In October 2000, Mintz became the General Counsel of Enron Global Finance, a position he held during the charged conduct and maintained until February 2002. Mintz is currently a Vice President and the Chief Tax Officer in the Tax Department of the Finance Division at Kinder Morgan."<sup>40</sup>

David P. Michels, Vice President Finance and Investor Relations and Dax Sanders, Senior Vice President of Corporate Development, were in the analyst and associate programs at Enron.<sup>41</sup>

Within months of acquiring the corporate entities from Enron in 1997, KMP filed a prospectus with the US SEC issuing three million units of the MLP to the public. Kinder Morgan's 1997 prospectus—similar to the initial public offering in 1992—promoted the tax related properties available to maximize unit holder returns over what they would be if the limited partnership were treated as a corporation for tax purposes.

The special tax treatment—the government subsidy—the US affords energy companies that are structured as MLPs is what has enabled Kinder Morgan to grow into the third largest energy company in North America. The corporate history illustrates that avoiding tax is

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<sup>37</sup> <http://investing.businessweek.com/research/stocks/people/person.asp?personId=22260484&ticker=KMI>

<sup>38</sup> [http://www.kindermorgan.com/about\\_us/about\\_us\\_steven\\_kean.aspx](http://www.kindermorgan.com/about_us/about_us_steven_kean.aspx)

<sup>39</sup> [http://www.kindermorgan.com/about\\_us/about\\_us\\_jordan\\_mintz.aspx](http://www.kindermorgan.com/about_us/about_us_jordan_mintz.aspx)

<sup>40</sup> In the Matter of Jordan H. Mintz, January 26, 2009, Order Instituting Public Administrative proceedings pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings and Imposing Remedial Sanctions, SEC, <https://www.sec.gov/litigation/admin/2009/34-59296.pdf>

<sup>41</sup> [http://www.kindermorgan.com/about\\_us/about\\_us\\_kmi\\_management.aspx](http://www.kindermorgan.com/about_us/about_us_kmi_management.aspx)

fundamental to Kinder Morgan's corporate culture and a driving force behind the Houston based executive team's decision making.

Richard Kinder announced in August that KMI would purchase three entities KMP, KMR and EPB. He explained the restructuring to investor analysts shortly after the transaction was announced and characterized the deal as a "tax shelter" because the purchase price sets a higher value for the assets than keeping them on the books at their historical depreciated cost. He said, "From the purchase price alone, including the step-up, we will realize over 20 billion dollars in cash tax savings over the next 14 years."<sup>42</sup>

Effectively KMI gets to work the intricacies of the accounting system. It will buy assets from its subsidiaries at a premium price and then depreciate these assets as if they were brand new. The deal creates a hefty \$1.4 billion in tax savings each year.

Trans Mountain has not changed its physical asset base or the physical aspects of the proposed expansion. What has happened is that KMI has paid a premium for assets owned and operated by KMP.

The increased cost base has financial implications. It can be expected to increase the financial burden on Canadian shippers through tolls on the existing system, and given the cost pass-through imbedded into the toll methodology that would be applied if the expansion is approved, has financial implications for shippers committed to the expansion project. This impact will likely filter down in some measure to Canadian consumers and businesses when higher costs are passed on in the form of higher petroleum product prices.

Kinder Morgan has made representations to the Board that the company will contribute significant corporate tax revenues to provincial and federal treasuries if the expansion is approved. The company relies heavily on the notion that it pays its fair share of tax in its application and when it responds to Intervenor concerns regarding economic, environmental and social costs of its project.

For example, Trans Mountain told the City of Vancouver in IR No.1.08.01 (g), (h) and (i) that:

*"Trans Mountain pays taxes to municipal/regional, provincial and federal governments. Despite not being along the pipeline corridor or near the marine terminal, the City of Vancouver would benefit from government tax revenue from the Project. Additional pipeline capacity will result in more tax revenue to governments which could be used to fund additional community capacity in areas such as emergency response training and resources."<sup>43</sup>*

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<sup>42</sup> Richard Kinder, KMI to purchase KMP, KMR and EPB, August 11, 2014, <http://www.kindermorgan.com/pages/investor/presentations/presentations.aspx>

<sup>43</sup> City of Vancouver Response to Notice of Motion by Robyn Allan dated November 23, 2014, page 2.

KMC president Ian Anderson informed analysts in Houston, Texas last January that the Trans Mountain system received a cash tax refund of \$4.2 million in 2013. This, even though Trans Mountain generated \$167 million in distributable cash flow available to its US parent. Mr. Anderson's figures also tell us Trans Mountain has contributed combined federal and provincial corporate taxes that average a meagre \$1.5 million over the past five years. Trans Mountain received a tax refund in two of them.<sup>44</sup>

Trans Mountain files accounting information with the NEB on its regulated assets, which represents the majority of its Trans Mountain activity in Canada. The information reveals that although Trans Mountain told the NEB in 2013 it would pay \$7 million in taxes, the company received a tax refund of more than half a million dollars.<sup>45</sup>

Kinder Morgan was asked to explain the discrepancy between its filing with the NEB, what it tells the Canadian public about Trans Mountain's contribution to fiscal revenues and what it tells US investors and analysts. These questions were filed in Information Request No. 1 as part of my right as a qualified intervenor. Kinder Morgan refused to answer.

Kinder Morgan's stellar success at avoiding the payment of cash taxes is a serious issue. Representing itself as a strong contributor to fiscal revenues is a violation of the public trust. By Trans Mountain's own admission, in communication with investors in Houston, the company pays barely any tax at all.

The purchase of KMP by KMI promises an even more aggressive tax planning strategy than Kinder Morgan has been able to undertake in the past. The tax avoidance corporate culture that drives Kinder Morgan must be examined and understood, particularly in light of the recent transaction which Richard Kinder, himself, relies on as a tax-shelter.

## **2. Amendments Required in the Part III Application**

Kinder Morgan Canada Inc. on behalf of Trans Mountain Pipeline ULC, has made numerous representations in its Part III Application and responses to Information Requests to the Board and Intervenors. These representations are rendered inaccurate because of the recent transaction.

It is Kinder Morgan's responsibility to address each of the representations made and correct the public record allowing sufficient time for Intervenors to review and understand the changes. Intervenors need adequate opportunity to develop questions related to the impact of the transaction on the evidence filed by the Proponent prior to the second and final round of Information Requests.

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<sup>44</sup> Kinder Morgan Investor Analyst Conferences, January 29, 2014 and January 30, 2013, <http://www.kindermorgan.com/pages/investor/presentations/presentations.aspx>

<sup>45</sup> Incentive Toll Settlement ITS-21

The current deadline for the Information Request is January 9, 2015. This is an insufficient amount of time to receive and consider Trans Mountain's revised information. If the deadline for the final IR is not changed there will be no opportunity for Intervenors to test the corrected evidence. The absence of appropriate opportunity to test the evidence compromises the validity of the review process.

A compendium of some, but not all, of the representations made in the Application and IR responses are provided below as a way to alert the Board to the significance of the impact of the recent KMI transaction to this Hearing.

## **2.1 General References no Longer Reliable**

**2.1.1 Volume 1 Application Action Sought, Page 1-1:** *"Trans Mountain is a wholly-owned subsidiary of Kinder Morgan Energy Partners, L.P. (Kinder Morgan)."*

**2.1.2 Volume 1 Application, Project Overview, Page 1-11:** *"Trans Mountain Pipeline is a Canadian corporation with its head office located in Calgary, Alberta. Trans Mountain is a general partner of Trans Mountain Pipeline L.P., which is operated by Kinder Morgan Canada Inc. (KMC), and is fully owned by Kinder Morgan Energy Partners, L.P. Trans Mountain is the holder of the National Energy Board (NEB) certificates for the Trans Mountain pipeline system (TMPL system)."*

**2.1.3 Volume 1 Application, Project Cost Estimate, Page 1-25:** *"The \$5.5 billion capital cost estimate (exclusive of the firm service fee credit) for the TMEP was included in NEB Decision RH-01-2012. The cost estimate has been re-sorted in Table 2.1.2 to be generally consistent with the breakdown indicated in the NEB Filing Manual. The cost estimate will be updated for the purpose of toll calculations at the conclusion of the regulatory proceedings and prior to the start of construction. The expected capital cost for the Project is approximately \$5.5 billion. Financing will be arranged by Trans Mountain's parent company KMP."*

**2.1.4 Volume 1, Application, Page 1-83:** *"KMP's current Emergency Management Program and ERPs are in the process of being updated to reflect the increased emergency response requirements arising from the Project. Some of the needed revisions to ERPs will come from ongoing consultations with emergency responders and anticipated specific public input during the NEB hearing process."*

**2.1.5 Volume 2, Project Overview, Page 2-1:** *"Trans Mountain Pipeline ULC (Trans Mountain) is a Canadian corporation with its head office located in Calgary, Alberta (AB). Trans Mountain is a general partner of Trans Mountain Pipeline L.P., which is operated by Kinder Morgan Canada Inc. (KMC), and is fully owned by Kinder Morgan Energy Partners, L.P. Trans Mountain is the holder of the National Energy Board (NEB) certificates for the Trans Mountain pipeline system (TMPL system)."*

**2.1.6 Volume 2, Project Overview, Page 2-2:** *"Kinder Morgan is the largest midstream and the fourth largest energy company (based on combined enterprise value)*

*in North America. Kinder Morgan owns an interest in or operates approximately 130,000 km of pipelines transporting natural gas, refined petroleum products, crude oil, and carbon dioxide (CO2). The Kinder Morgan family of companies has four publicly traded entities: Kinder Morgan, Inc., Kinder Morgan Energy Partners, L.P. (KMP), Kinder Morgan Management, LLC and El Paso Pipeline Partners. Combined, the Kinder Morgan companies have an enterprise value of approximately \$105 billion.”*

**2.1.7 Response to NEB IR No.1, Page 23:** *“Pursuant to the terms of the Amended and Restated Limited Partnership Agreement dated February 1, 2008 which governs Trans Mountain Pipeline L.P., distributions made from Trans Mountain Pipeline L.P. are subject to the consent of the General Partner, Trans Mountain Pipeline ULC. The distributions are limited to the amount by which the cash held by the Partnership exceeds the aggregate of (i) the liabilities of the Partnership (other than any liability secured by non-cash assets of the Partnership having a net realizable value greater than all liabilities thereby secured) and (ii) such amount the General Partner establishes as a reasonable reserve to be retained for use in the Business of the Partnership.”* It is important to determine whether the partnership agreement has been amended or restated, in addition to having the most current agreement filed.

## **2.2 Financial Capability of the Applicant**

There are two extensive representations made regarding the financial capability of the Applicant which need to be addressed.

**2.2.1 Volume 2 page 2-38 to 40:** *“The expected capital cost for the Project is approximately \$5.4 billion. Financing will be arranged by Trans Mountain’s parent company KMP. Kinder Morgan Energy Partners, L.P. is one of the largest midstream energy companies in North America with an enterprise value of more than US\$48 billion. Table 3.2.1 provides unaudited KMP consolidated balance sheets. KMP typically finances growth projects using a mix of 50 per cent debt and 50 per cent equity. Funding sources may include a combination of the issuance of long-term debt securities, bank financing, and the issuance of public equity at KMP. Kinder Morgan Energy Partners, L.P.’s long-term corporate debt credit rating is BBB (stable) at Standard & Poor’s Ratings Services, Baa2 (stable) at Moody’s Investors Service, Inc. and BBB (stable) at Fitch, Inc.”*

Table 3.2.1 “Kinder Morgan Energy Partners LP and Subsidiaries Consolidated Balance Sheet” is no longer the relevant Balance Sheet under consideration and needs to be adjusted accordingly.

The acquisition of KMP by KMI renders the financing section of the Proponent’s application obsolete and impacts the recent Part IV Application and Reasons for Decision. The Board does not know how financing for the project will be arranged or the credit worthiness of the ultimate borrower. KMP’s existing debt, which will be refinanced by KMI as it comes due, is now subject to a reduced rating by all three rating agencies.

As a result of the recent acquisition of KMP by KMI, KMP's credit rating was downgraded by all three rating agencies. KMI's credit rating was upgraded from where it was before the purchase, but the rating is below that of KMP's when the Application was filed and the Part IV Hearing conducted.

The Board and Intervenors need to be apprised of the financial capability of the Applicant since the ultimate parent of the Applicant is no longer KMP and the source of financing is no longer to be provided by KMP—KMP does not have the capacity to issue debt.

**2.2.2 Volume 2, Appendix C, Trans Mountain's expert witness John Reed represents the financial capability of the company's "parent" (no longer the parent) as follows:** *"coupled with the strong credit rating of the Company's parent, Kinder Morgan Energy Partners LP, and the fact that the Project is designed to respond to the needs of shippers in the evolving market for oil pipeline services, should make financing readily attainable."*<sup>46</sup>

### 2.3 Parental Guarantee

The Board was informed in Response to NEB IR No. 1 that, *"Kinder Morgan Energy Partners L.P. is a Delaware limited partnership governed by the Delaware Revised Uniform Limited Partnership Act (Delaware) and is registered in Delaware. The common limited partnership units of Kinder Morgan Energy Partners L.P. trade on the New York Stock Exchange under the symbol "KMP".*<sup>47</sup>

The Board was also informed that Kinder Morgan Energy Partners LP, Trans Mountain's ultimate parent would provide a parental guarantee if one was required as part of the conditions attached to the Board's decision.

*"If, as a condition of approval, a parental guarantee is required it would likely be provided by Kinder Morgan Energy Partners, L.P., Trans Mountain's ultimate parent, as the top layer of a financial assurance package and would cover spill and pollution costs which could not otherwise be provided for by Trans Mountain's accessible cash or through Trans Mountain's access to insurance. Trans Mountain does not expect that funds dedicated for this purpose would be isolated from day-to-day operating and capital accounts. Kinder Morgan Energy Partners, L.P., has access to significant sources of liquidity such that the requirement for a*

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<sup>46</sup> Direct Evidence, John Reed, Volume 2 Appendix C, page 134, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2385938/B1%2D5\\_%2D\\_V2\\_4of4\\_PROJ\\_OVERVIEW\\_%2D\\_A3S0R1.pdf?nodeid=2392869&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2385938/B1%2D5_%2D_V2_4of4_PROJ_OVERVIEW_%2D_A3S0R1.pdf?nodeid=2392869&vernum=-2)

<sup>47</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2\\_%2D\\_Trans\\_Mountain\\_Response\\_to\\_NEB\\_IR\\_No.\\_1\\_1\\_of\\_2\\_%2D\\_A3W9H8.pdf?nodeid=2456419&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2_%2D_Trans_Mountain_Response_to_NEB_IR_No._1_1_of_2_%2D_A3W9H8.pdf?nodeid=2456419&vernum=-2) page 20



*segregation of funds to support the guarantee would not be necessary or economically efficient.*<sup>48</sup>

Kinder Morgan provided a sample guarantee as attachment 1, NEB IR No.2.003d, which, it should be noted only guarantees the expanded project and does not satisfy claims that may be related to the 60 year old legacy pipeline. In any event, the entire sample guarantee document is no longer relevant, nor are the representations made regarding parental guarantee.<sup>49</sup>

### **3. History of Kinder Morgan's Corporate Structure**

Kinder Morgan provided a revised corporate structure chart in response to NEB IR No. 1.07(a). The chart provides a selected mapping of inter-company relationships among Canadian and US entities.<sup>50</sup> Based on the NEB public record, this is the first time a number of these entities and their holdings have been identified to the Board. Transactions which gave rise to the structure took place between 2007 and 2014.

A transaction history is provided below to assist the Board in identifying instances whereby Kinder Morgan did not inform the Board of entity name changes or seek leave as required under section 74. The paper trail is complex and although best efforts have been made to provide a full and accurate recording of transactions, it is Kinder Morgan that will need to provide the Board with a complete accounting of the myriad of transactions.

The Board must be able to confirm that the partial organization chart as presented in IR Response No. 1.07(a) is accurate and reliable, and determine if the new partial organization chart that has been submitted as revised No. 1.07(a) is also accurate and reliable.<sup>51</sup>

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<sup>48</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2487413/B239%2D13%2D%20Trans Mountain Response to NEB IR No. 2 %2D A3Z4T9.pdf?nodeid=2487205&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2487413/B239%2D13%2D%20Trans%20Mountain%20Response%20to%20NEB%20IR%20No.%202%20A3Z4T9.pdf?nodeid=2487205&vernum=-2)

<sup>49</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2487413/B239%2D16%2D%20Trans Mountain Response to NEB IR No%2E2.003d%2DAttachment 1 %2D A3Z4U2.pdf?nodeid=2487584&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2487413/B239%2D16%2D%20Trans%20Mountain%20Response%20to%20NEB%20IR%20No%2E2.003d%2DAttachment%201%20A3Z4U2.pdf?nodeid=2487584&vernum=-2)

<sup>50</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D4%2D%20Trans Mountain Response to NEB IR No%2E 1.07a%2DAttachment 1 %2D A3W9I0.pdf?nodeid=2454402&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D4%2D%20Trans%20Mountain%20Response%20to%20NEB%20IR%20No%2E1.07a%2DAttachment%201%20A3W9I0.pdf?nodeid=2454402&vernum=-2)

<sup>51</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2578643/B291%2D3%2D%20Revised NEB IR No 1 07a Attachment1 %2D A4F6S4.pdf?nodeid=2578222&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2578643/B291%2D3%2D%20Revised%20NEB%20IR%20No%201%2007a%2DAttachment1%20A4F6S4.pdf?nodeid=2578222&vernum=-2)

### 3.1 Section 74 Application—February 2007

On February 21, 2007, Trans Mountain Pipeline Inc., a 100% indirectly owned subsidiary of KMI and general partner of Trans Mountain Pipeline LP, along with Terasen Inc. 4371348, a 100% subsidiary of KMI, submitted an application to the NEB regarding a proposed change of ownership status for the Trans Mountain pipeline system. The transaction was a sale of the Trans Mountain system indirectly 100% owned by Kinder KMI and a purchase by KMP rendering KMP the indirect 100% owner of Trans Mountain, through a number of corporate entities.<sup>52</sup>

The corporate structure and transactions contemplated in the 2007 Application for leave are provide below in unitalicized, bold, text. The *italics provide background information not included in the 2007 Application*:

**1. Terasen Inc. was continued under the federal Canada Business Corporations Act (CBCA) as of February 15, 2007. The next day, Terasen amalgamated with Terasen Pipelines (Trans Mountain) Inc. and retained the name Terasen Inc.**<sup>53</sup>

*i) Terasen Inc. 4371321 was a company continued in from British Columbia to the federal level of incorporation February 15, 2007. The next day Terasen Inc. 4371321, another numbered company 4371330 Canada Inc., and Terasen Pipelines (Trans Mountain) Inc. 4279701 amalgamated to form Terasen Inc. 4371348. Same name as 4371321, but new registration number.*

*ii) Terasen Inc. 4371348—the new Terasen Inc.—was discontinued federally on May 1, 2007 and exported to British Columbia.*

*iii) Terasen Pipelines (Trans Mountain) Inc. 142751 was originally Trans Mountain Pipe Line Company Ltd. (April 12, 1974 to December 31, 2002).*

*iv) On December 31, 2004 Teresen Pipeline (Trans Mountain) Inc. 142751 amalgamated with Alpac Construction and Surveys Limited and Trans Mountain Housing to become Terasen Pipelines (Trans Mountain) Inc. 4279701. It was Terasen Pipelines (Trans Mountain) Inc. 4279701 that amalgamated to become Terasen Inc. referred to in 1 above.*

**2. Trans Mountain Pipeline Inc. is a CBCA corporation (registration number 441001-7 February 21, 2007)<sup>54</sup> and general partner of Trans Mountain Pipeline LP, an Alberta limited partnership yet to be registered. Trans**

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<sup>52</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=454628&objAction=browse&viewType=1>

<sup>53</sup> Certificate of Amalgamation, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X8Z8\\_%2DAttachment\\_2\\_Cert\\_Continuance%2DAmalgamation.pdf?nodeid=454112&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X8Z8_%2DAttachment_2_Cert_Continuance%2DAmalgamation.pdf?nodeid=454112&vernum=-2)

<sup>54</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X8Z9\\_%2DAttachment\\_3\\_Cert\\_of\\_Incorp\\_Trans\\_Mountain\\_Pipeline\\_Inc.pdf?nodeid=454115&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X8Z9_%2DAttachment_3_Cert_of_Incorp_Trans_Mountain_Pipeline_Inc.pdf?nodeid=454115&vernum=-2)



- i) This is **not** the Trans Mountain Pipeline ULC 2013813148 that is the current general partner of Trans Mountain Pipeline LP, holding 0.01% of the units in Trans Mountain Pipeline LP and sponsor of the current Application before the Board.
- ii) Trans Mountain Pipeline ULC 2013020017 (the Trans Mountain Pipeline ULC in the 2007 application for leave) amalgamated to form KMEP Canada ULC and no longer exists. The Board was informed that subsequent to Board approval the shares in Trans Mountain Pipeline Inc. and Trans Mountain Pipeline ULC would be transferred from Terasen Inc. to KMEP Canada ULC. The Board was not informed about transactions which took place subsequently.
- iii) It should also be noted that two KMEP Canada ULC's were formed to complete the transactions that saw Trans Mountain Pipeline ULC 2013020017 amalgamated into KMEP Canada ULC before it was amalgamated into Kinder Morgan Canada Company. KMEP Canada ULC 2013020322 was registered in Alberta on February 20, 2007 and listed its home jurisdiction as Nova Scotia. This company and Trans Mountain Pipeline ULC 2013020017 were amalgamated to form KMEP Canada ULC 2013190901 on May 1, 2007.

**4. Trans Mountain Pipeline ULC is a 100% wholly owned subsidiary of Terasen Inc. and Trans Mountain Pipeline Inc. is a 100% wholly owned subsidiary of Trans Mountain Pipeline ULC (2013020017), and indirectly Terasen Inc. and through Terasen Inc. to Kinder Morgan Inc.**

**5. Subsequent to Board approval the shares in Trans Mountain Pipeline Inc. and Trans Mountain Pipeline ULC 2013020017 are to be transferred from Terasen Inc. to KMEP Canada ULC which is an indirect, wholly owned, subsidiary of Kinder Morgan Energy Partners LP (KMP).**

- i) The Board was not informed that KMEP Canada ULC 2013020322 and Trans Mountain Pipeline ULC 2013020017 would be amalgamated to form a new KMEP Canada ULC 2013190901. Neither was the Board informed of the amalgamation with Kinder Morgan Canada Company 3049933, to form a new Kinder Morgan Canada Company 3268897—a ULC registered in Nova Scotia. Subject to confirmation, it appears that the Kinder Morgan Canada Company 3268897 is the company identified on the corporate chart provided to the Board in IR No. 1.07(a).

**6. The operator of the facilities is Kinder Morgan Canada Inc., (KMC), an indirect, wholly owned subsidiary of KMI.**

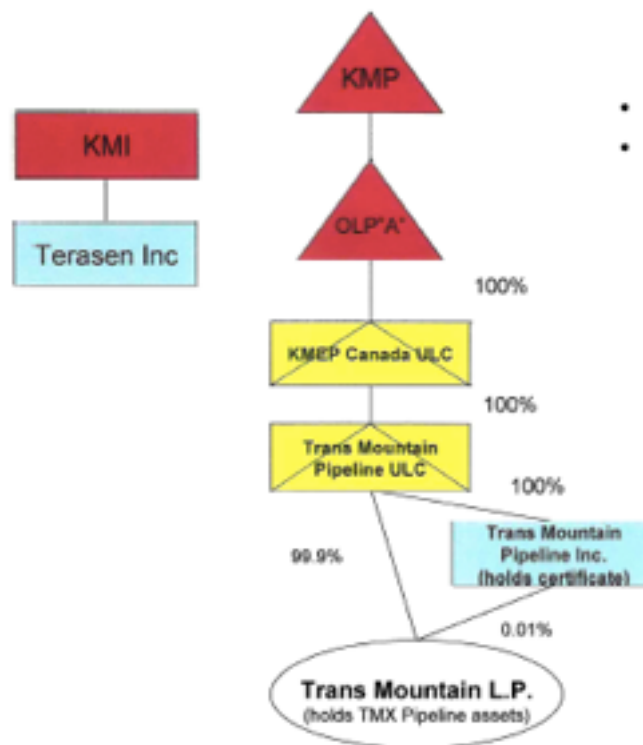
- i) The Board was not informed when or how KMC—the operator of Trans Mountain—became a 100% wholly-owned subsidiary of KMP.

**7. On March 15, 2007 the Board approved the transfer as defined by Kinder Morgan.<sup>58</sup>**

Kinder Morgan provided the Board with a three stage corporate structure diagram representing the before, during and after steps in the transaction. The chart below indicates the corporate structure that was to exist after the transfers identified in the 2007 application were completed.

**Kinder Morgan Structure Related to Trans Mountain  
Post Transaction<sup>59</sup>**

**Chart 1**



Other than the stale-dated notification of the name change of Trans Mountain Pipeline Inc. to Trans Mountain Pipeline ULC, Kinder Morgan has not informed the Board of other changes to its corporate structure related to Trans Mountain that resulted in the corporate structure it filed in NEB IR No. 1.07(a).

<sup>58</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/456756/A0Y2L2\\_%2D Board letter and Order MO%2D04%2D2007 re sale of facilities\\_%2D Trans Mountain Pipeline System.pdf?nodeid=456757&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/456756/A0Y2L2_%2D Board letter and Order MO%2D04%2D2007 re sale of facilities_%2D Trans Mountain Pipeline System.pdf?nodeid=456757&vernum=-2)

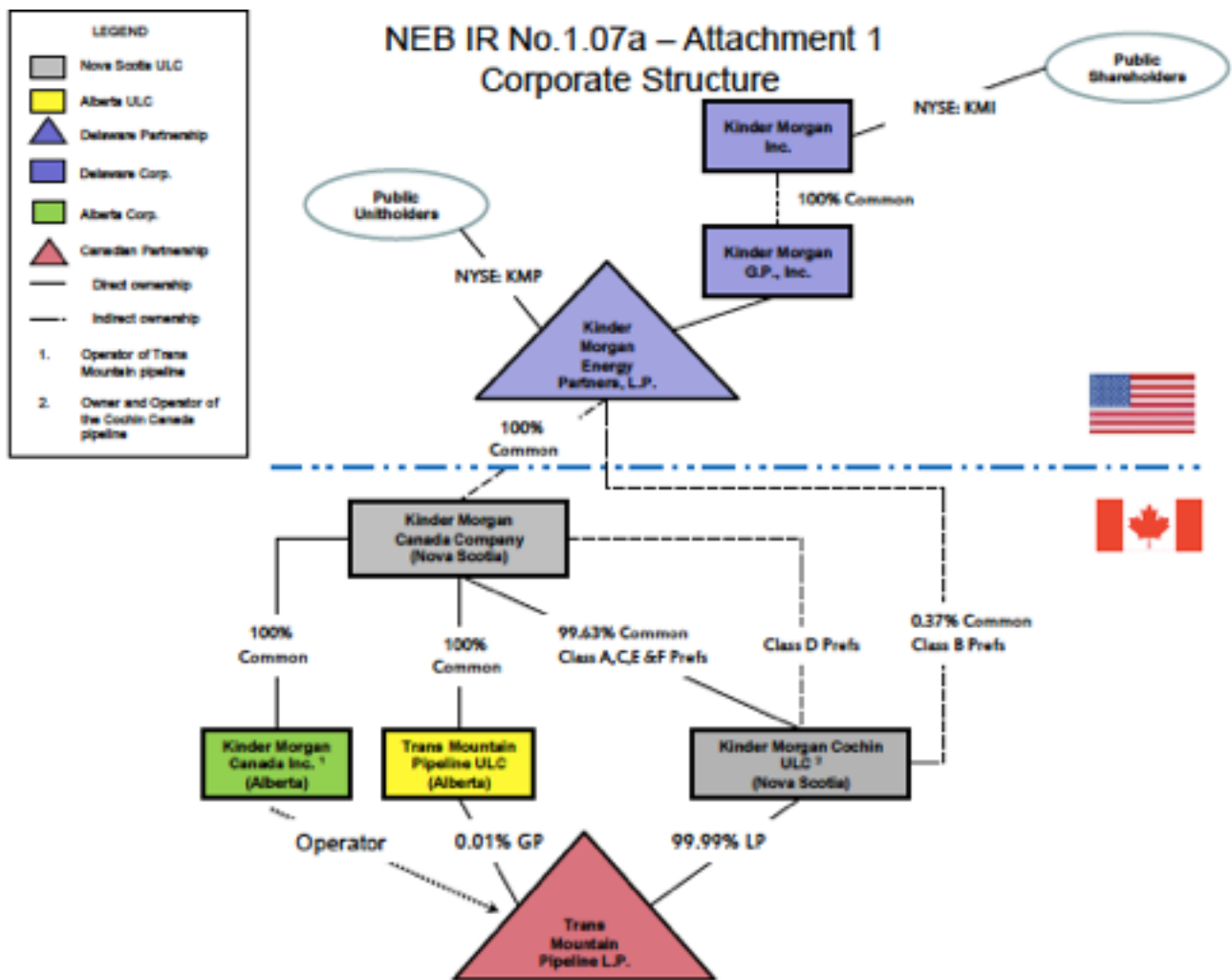
<sup>59</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X9A2\\_%2D Attachment 6 Corporate Structure Diagrams.pdf?nodeid=454124&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X9A2_%2D Attachment 6 Corporate Structure Diagrams.pdf?nodeid=454124&vernum=-2)

### 3.2 Corporate Structure Pre-November 26, 2014

In evidence filed at this Hearing, Kinder Morgan has identified Kinder Morgan Cochlin ULC as the entity that holds a 99.99% interest in the Trans Mountain Pipeline LP units, but has not informed the Board as to how, or when, that holding came about. Kinder Morgan also identifies KMC as 100% owned by KMP.

The Board needs Kinder Morgan to file a record of how Kinder Morgan managed to go from the corporate structure in Chart 1 to the corporate structure in Chart 2 including all corporate entities—not a selection of corporate entities as provided in Chart 2 below. With the section 74 Application for leave, and a complete post November 26, 2014 corporate structure including all entities, the Board will be in a better position to appropriately assess the public interest implications of the recent transaction.

Chart 2



#### 4. NEB Audit History of Kinder Morgan's Regulated Pipelines

The NEB undertakes financial audits of Group 1 regulated pipeline companies including the Trans Mountain Pipeline LP, its general partner, Trans Mountain Pipeline ULC, and Trans Mountain's current 99.99% unit holder, Kinder Morgan Cochin ULC.

##### 4.1 Trans Mountain Audit

The most recent audit of Trans Mountain's regulated activities was conducted on the company's books for the years 2005 and 2006 and filed on February 8, 2008.<sup>60</sup> No evaluation of the year 2007 was undertaken. This means that the NEB does not know if over the past seven years:

- i) Trans Mountain's system of accounts have been maintained in accordance with the Board's Oil Pipeline Uniform Accounting Regulations (OPUAR);
- ii) the company has complied with the *NEB Act* and the Board's decisions, tariff orders and other accounting and reporting directives since December 31, 2006;
- iii) the financial information contained in various company applications or submissions to the Board agrees with the company's records; or
- iv) cross-subsidies and abuse of transfer pricing between corporate entities may have occurred.

The NEB does not have, nor has it maintained, "up-to-date knowledge of Trans Mountain, including its regard for economy and efficiency".<sup>61</sup> The Board does not know whether the preparation of tax returns over the past seven years is accurate and well managed, whether the tolls are being calculated in accordance with the methodology approved by the Board or if depreciation is being calculated in accordance with OPUAR.

The 2008 Audit stated that the risk management and insurance program for Trans Mountain is administered by KMI in Houston and that the reason for the limited insurance program for the Canadian operations is due to "issues arising out of the federal and provincial tax regimes." Thus, it would appear, Kinder Morgan maintains its Canadian insurance program not as a prudent risk management approach, but as part of its tax planning initiatives.

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<sup>60</sup> Trans Mountain Regulatory Audit, February 8, 2008, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/267614/571482/571281/A1L4Q7 %2D Trans Mountain Pipeline L%2EP%2E %2C Trans Mountain Pipeline Inc.%2C and predecessors %28TMPL%29 %2D National Energy Board Financial Regulatory Audit of Years 2005 and 2006.pdf? nodeid=571320&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/267614/571482/571281/A1L4Q7%2D%20Trans%20Mountain%20Pipeline%20LP%2E%2E%2C%20Trans%20Mountain%20Pipeline%20Inc.%2C%20and%20predecessors%28TMPL%29%2D%20National%20Energy%20Board%20Financial%20Regulatory%20Audit%20of%20Years%202005%20and%202006.pdf?nodeid=571320&vernum=-2)

<sup>61</sup> Ibid., page 2.

The audit report also confirms that Trans Mountain’s internal audit function has “moved to Houston”. It confirms that the accounting system is Houston based. This information is consistent with the KMC organization chart provided in response to Robyn Allan IR Request No. 1.04(l).<sup>62</sup>

Kinder Morgan Canada Inc. is an operating arm of Kinder Morgan based in Houston Texas. KMC President, Ian Anderson has two direct reports (other than an executive assistant): engineering/operations and regulatory/finance. All remaining corporate functions are sourced through the head office in Houston including insurance, project financing, human resources, legal, information technology, audit, tax planning, procurement, public relations.

The NEB audit report identified “Kinder Morgan Energy Partners Canada ULC” as the 99.99% owner of Trans Mountain Pipeline LP.<sup>63</sup> Kinder Morgan Energy Partners Canada ULC has never existed. There have been two KMEP Canada ULCs, the company identified in the section 74 Application for leave and then a new KMEP Canada ULC which amalgamated KMEP Canada ULC with Trans Mountain Pipeline ULC as explained in 3.1.3 (iii) above.

Presumably the initials KMEP stand for Kinder Morgan Energy Partners, but corporate registry searches in Nova Scotia, Alberta and BC—the only provinces that allow ULCs—have failed to identify an entity called Kinder Morgan Energy Partners Canada ULC.

The NEB audit report also states that, “In the section 74 application of February 2007 for the sale of the Trans Mountain Pipeline system from Terasen to Kinder Morgan, the ownership structure was for Trans Mountain Pipeline ULC as a 99.99% owner. After the transaction was closed, Trans Mountain Pipeline ULC was amalgamated with Kinder Morgan Energy Partner Canada ULC.”<sup>64</sup> Again, there is no Kinder Morgan Energy Partner Canada ULC—the 2007 Application informed the Board that Trans Mountain Pipeline ULC would be amalgamated to form KMEP Canada ULC.

It would appear that the Board has no information on the record to map the corporate structure provided by Kinder Morgan in its 2007 section 74 Application for leave to its corporate structure provided as evidence at the Part III Hearing. The information provided in the most recent NEB audit, notwithstanding how easy it is to become confused with the scope and magnitude of Kinder Morgan’s complex corporate structure and numerous changes, is not only dated, even then is not consistent with corporate registration records.

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<sup>62</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2490908/B247%2D3\\_%2D\\_Trans\\_Mountain\\_Follow%2DUp\\_Response\\_to\\_Allan\\_R\\_F%2DIR\\_No%2E\\_1.04!%2DAttachment\\_1\\_%2D\\_A3Z7Y9.pdf?nodeid=2490910&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2490908/B247%2D3_%2D_Trans_Mountain_Follow%2DUp_Response_to_Allan_R_F%2DIR_No%2E_1.04!%2DAttachment_1_%2D_A3Z7Y9.pdf?nodeid=2490910&vernum=-2)

<sup>63</sup> Ibid., page 8.

<sup>64</sup> Ibid.



#### 4.2 Kinder Morgan Cochin Audit

The most recent audit of Kinder Morgan Cochin ULC's regulated activities was conducted on the company's books for the year 2007 and the eleven months to November 30, 2008.<sup>65</sup> Kinder Morgan Cochin ULC is a Nova Scotia registered company and thus subject to the Nova Scotia *Companies Act*. The audit was conducted in Kinder Morgan's offices in Houston and Calgary.

No audit on performance since December 2008 has been undertaken. This means that the NEB does not know if over the past six years:

- i) Kinder Morgan Cochin's system of accounts have been maintained in accordance with the Board's Oil Pipeline Uniform Accounting Regulations (OPUAR);
- ii) the company has complied with the *NEB Act* and the Board's decisions, tariff orders and other accounting and reporting directives since December 1, 2007;
- iii) the financial information contained in various company applications or submissions to the Board agrees with the company's records; or
- iv) cross-subsidies and abuse of transfer pricing between corporate entities may have occurred.

Kinder Morgan has advised the Board that Kinder Morgan Cochin ULC (Cochin) is the 99.99% owner of Trans Mountain Pipeline LP. The ownership affords the distribution of cash flow to Cochin resulting in a co-mingling of revenues and opportunities for favourable accounting and tax treatment of Trans Mountain's distributable cash flow. Kinder Morgan has not informed the Board as to when or how this transfer occurred. This makes evaluation of the most recent audit findings more difficult. However, the following discussion assumes that Kinder Morgan Cochin ULC was not the owner of 99.99% of Trans Mountain Pipeline LP when the NEB audit took place.

Kinder Morgan acquired control of Cochin in 2007. On March 20, 2007, as Cochin Pipe Lines Ltd., the company filed a joint application with Dome NGL Pipeline Limited under section 74 of the *NEB Act*. The company informed the Board that it had transferred Cochin Pipe Lines Ltd. from federal to Nova Scotia jurisdiction on March 5, 2007, changed the entity to an unlimited liability corporation and changed the name to Kinder Morgan Cochin ULC on March 9, 2007. BP Canada Energy Resources had been the sole shareholder of Kinder Cochin and a member of the BP plc group of companies prior to the transfer of shares to Kinder Morgan Cochin ULC.

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<sup>65</sup> Kinder Morgan Cochin ULC Regulatory Audit, May 28, 2009, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/472901/558655/571063/A1L4L8 %2D Kinder Morgan Cochin ULC %28Cochin%29 %2D National Energy Board Financial Regulatory Audit of 2007 Year and 2008 to 30 November. pdf?nodeid=571064&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/472901/558655/571063/A1L4L8%2DKinderMorganCochinULC%28Cochin%29%2DNationalEnergyBoardFinancialRegulatoryAuditof2007Yearand2008to30November.pdf?nodeid=571064&vernum=-2)

Kinder Morgan Cochin ULC filed another application under section 74 on December 13, 2012 for the transfer of Kinder Morgan Canada Company's minority interest in the Cochin Pipeline System to Kinder Morgan Cochin ULC. The transaction became effective on December 31, 2012.<sup>66</sup>

The Board was informed in the Application that, "The Kinder Morgan group of companies is one of the largest pipeline transportation and energy storage companies in North America. KMCC and Cochin ULC are indirect subsidiaries of Kinder Morgan Energy Partners, LP... Cochin ULC is currently the operator of the Canadian portion of the Cochin Pipeline System, and will remain the operator following the proposed transaction." There was no mention of KMI in the Application.

Kinder Morgan filed, as required under section 74 for a transfer of minority interest in the Cochin Pipeline system in 2012, without any change in the designated operator of the system. The company is now trying to tell the Board that a majority transfer of ownership interests, as has arisen out of the KMI transaction, is not subject to the *NEB Act*.

*"Cochin ULC owns a 50.23795% interest in the Cochin Pipeline System. KMCC owns the remaining 49.76205% interest in the Cochin Pipeline System. Pursuant to the proposed transaction, KMCC will transfer its 49.76205% legal interest in the Cochin Pipeline System to Cochin ULC, which will result in a Cochin ULC owning 100% of the System."*

Kinder Morgan did inform the Board that, "Following the closing of the transfer of KMCC's legal interest in the System to Cochin ULC to be effective December 31, 2012, KMCC intends to amalgamate with an affiliate to simplify the existing corporate structure for the Kinder Morgan group of companies."

Corporate records in Nova Scotia and Alberta confirm that Kinder Morgan Canada Company 3049933 and KMEP Canada ULC 2013190901 were amalgamated on January 1, 2013 to form Kinder Morgan Canada Company 3268897—a ULC registered in Nova Scotia and in Alberta (access number 2117458253) on May 1, 2013. There is no filing with the NEB that informs the Board that KMEP Canada ULC was amalgamated—twice, before it was amalgamated into Kinder Morgan Canada Company. The most recent information the Board seems to have is that KMEP Canada 2013020322 was to be the entity that held the 99.99% ownership interest in Trans Mountain Pipeline LP.

Kinder Morgan Canada Company 3268897 appears to be the entity identified in Response to NEB IR NO. 1.07(a). The corporate registry information on this company confirms that Kinder Morgan Canada Company holds shares in:

Kinder Morgan Cochin ULC  
Kinder Morgan Bison ULC

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<sup>66</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/457425/895407/894835/A3E2G2-%2DRequest%20for%20Transfer%20KMCC%20and%20Cochin%20ULC.pdf?nodeid=894836&vernum=-2>

Kinder Morgan Canada Inc. (Trans Mountain's operator, although no filing transferring the ownership from KMI to KMP seems to have been submitted)  
Kinder Morgan Heartland ULC  
Kinder Morgan Canada CO2 ULC  
KM Express Limited

Kinder Morgan Canada Company is the ultimate Canadian corporation before the corporate hierarchy leads to US based entities. Although it is a Canadian ULC, the directors and executive are predominantly Houston based decision makers employed directly by Trans Mountain and Cochin's new 100% owner—KMI. Only two persons on the list have Canadian addresses.

### **Kinder Morgan Canada Company—Nova Scotia ULC Directors and Executive**

David DeVeau—Director who fulfills the function of Vice-President and General Counsel, KMI, Houston  
Ian Anderson—Director who fulfills the function of President KMC, Calgary, reporting to KMI, Houston  
Leigh Peters—Assistant General Counsel, Calgary, reporting to KMI, Houston  
Jordan Mintz—Vice President and Chief Tax Officer, KMI, Houston  
Kimberly A Dang—CFO KMI, Houston  
Meli Armstrong—Vice President and Assistant Controller KMI, Houston  
Ronald McClain—President Products Pipelines KMI, Houston  
Adam Forman—VP Secretary and Deputy General Counsel KMI, Houston  
Gary Bohnsack—Vice President and Controller KMI, Houston

The corporate organization chart provided to the Board in IR No. 1.07(a) identifies Kinder Morgan Canada Company as the 99.63% Common Class share holder and holder of Class A, C, E, & F preferred shares. It is not clear when or how the Class D preferred shares were allocated to a non-identified identity(ies) or the 0.37% Common and Class B preferred shares were allocated to non-identified entity(ies).

Based on corporate search records it is believed that the Class D preferred shares are held by Trans Mountain (Jet Fuel) and the minority Common and Class B preferred shares are held by KM Canada Terminals ULC, 100% owned (before the recent KMI purchase transaction) by Kinder Morgan Operating LP "D" and in turn, 100% owned by KMP.

Kinder Morgan Cochin ULC's audit report released in 2009 based on the corporate books for 2007 and first eleven months of 2008, revealed significant weaknesses in the company's procedures and practices including, but not limited to:

- i) surveillance reports filed during the audit period did not correctly calculate the semi-depreciated rate base and did not correctly calculate the income taxes payable;
- ii) audited financial statements had not been prepared and filed with the Board in accordance with Board direction; and

iii) Cochin did not reconcile its books kept for tax purposes to its books kept for financial regulatory purposes.

The Board was informed through the audit report that the Canadian portion of the Cochin pipeline was held in two corporate entities for tax purposes: one entity for the pieces adding up to 49.8% which were acquired prior to 2007 and a second entity for the 50.2% acquired in 2007.

Kinder Morgan Cochin was required to file the results of the OPUAR conformity review by September 30, 2009 but did not file the required document until October 26, 2009.

Kinder Morgan Cochin ULC is the operator of the Cochin Pipeline system in Canada. The Board and executive are predominantly Houston based. This is significant since the partnership agreement related to Trans Mountain determines the cash distribution to unit holders, with Kinder Morgan Cochin ULC holding 99.99% of Trans Mountain's units.

The complement of Directors and executive of Kinder Morgan Cochin ULC are effectively the same as those for Kinder Morgan Canada Company but for Ian Anderson, replaced by Scott Stoness, and two KMI VPs added to the list of executives.

#### **Kinder Morgan Cochin ULC—Nova Scotia Directors and Executive**

David DeVeau—Director who fulfills the function of Vice-President and General Counsel, KMI, Houston

Scott Stoness—Director, Calgary, who fulfills the function of Vice-President, Finance and Regulatory, KMC

Leigh Peters—Assistant General Counsel, Calgary, reporting to KMI, Houston

Jordan Mintz—Vice President and Chief Tax Officer, KMI, Houston

Kimberly A Dang—CFO KMI, Houston

Meli Armstrong—Vice President and Assistant Controller KMI, Houston

Ronald McClain—President Products Pipelines KMI, Houston

Adam Forman—VP Secretary and Deputy General Counsel KMI, Houston

Gary Bohnsack—Vice President and Controller KMI, Houston

Charles Lindley—VP Business Development, KMI, Houston

David Halphen—VP, KMI, Houston

Kinder Morgan Cochin applied for approval to reverse Cochin pipeline in August 2012 and now imports condensate for bitumen diluent purposes. Trans Mountain Pipeline requires diluent, such as that imported on Cochin, to meet pipeline specifications for heavy oil transport to Burnaby. The opportunities for accounting and tax manipulation when Kinder Morgan Cochin ULC owns 99.99% of the units of Trans Mountain Pipeline ULC are staggering.

Kinder Morgan was required under section 74 of the *NEB Act* to file for leave to transfer majority ownership of Trans Mountain Pipeline LP from KMEP Canada ULC (through

whatever stream of complex transactions that ultimately led) to Kinder Morgan Cochin ULC, but failed to do so.

All which is respectfully submitted the 7th day of December 2014.

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