



# Tseil-Waututh Nation səlilwətəl



**File OF-Tolls-Group1-T260-2023-03 01**

June 23, 2023

To: Canada Energy Regulator  
210-517 Tenth Ave SW Calgary, Alberta  
T2R 0A8

**Via email and CER website**

**Attention: Ms. Ramona Sladic, Secretary of the Commission**

Dear Ms. Sladic,

**RE: Trans Mountain Pipeline ULC Application pursuant to Section 67 and the Traffic, Tolls and Tariffs provisions in Part 3 of the Canadian Energy Regulator Act for Approval of Interim Commencement Date Tolls and Other Matters related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System (Application)  
File OF-Tolls-Group1-T260-2023-03 01  
Letter of Interest from Tseil-Waututh Nation**

## Introduction

This letter of interest is from Tseil-Waututh Nation regarding Trans Mountain Corporation's (TMC) application for interim tolls (Application)<sup>1</sup>, submitted pursuant to section 67 and the tolling provisions of Part 3 of the *Canadian Energy Regulator Act*. (the Act)

Tseil-Waututh Nation has participated extensively in many National Energy Board (NEB) and Canadian Energy Regulator (CER) processes related to the Trans Mountain Expansion project (TMX or the Project) since the Project was first proposed.

The Trans Mountain Pipeline, the expansion project, and related infrastructure including the Westridge Marine Terminal and Burnaby Mountain Tank Farm are in the heart of TWN's territory. TMX directly affects TWN's rights and title, culture and identity, and traditional and contemporary economies as outlined in our evidence and in the TWN 2015 Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal ("the Assessment")<sup>2</sup> submitted to the NEB and the CER in the Project hearings.

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<sup>1</sup> Trans Mountain Corporation, [Application for Interim Commencement Date Tolls](#) – Application – A8Q5Z9, June 1, 2013. (Application)

<sup>2</sup> Tseil-Waututh Nation, [Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal](#), May 2015

In the reports recommending approval of the TMX CPCN, the NEB and CER balanced the economic benefits with the burdens of TMX, including the infringement of TWN and other First Nations' rights, the risk of oil spills on land and water, the climate impacts, and impacts on endangered species and found that the benefits justified the burdens. TWN is engaging in this tolling application because it confirms that the economic benefits and viability as previously claimed no longer exist, and Trans Mountain (and its owners, the Canadian public) are responsible for \$16.2 billion in project costs based on the application of this tolling methodology. The losses to Trans Mountain, and by extension the Canadian public, arising from the portion of Trans Mountain's expansion costs not captured in proposed tolls is much larger.

TWN is directly and significantly affected by TMX and as such, submits the following letter of interest.

TWN submits that the CER should conduct a thorough process and deny Trans Mountain's application for interim tolls because they violate the principles of ratemaking and fail to meet the standard set out in the *Canadian Energy Regulator Act* (the Act) of being just and reasonable. TWN further submits that the CER should use its powers under section 233 of the Act to disallow these tolls on the basis that they are not just and reasonable.

Specifically, the application confirms that the tolls for TMX will cover less than half (48%) of the current project cost of \$30.9 billion. This severely compromises Trans Mountain's ability to continue as a going concern, or to fund adequate maintenance to uphold the integrity and safety of the Trans Mountain pipeline system.

Tolls that cover less than half of a project's costs cannot be found to be just nor reasonable, nor in the public interest. Approving this interim toll application would set a dangerous precedent by conflicting with the CER Act, and with guidelines from the NEB and CER. More importantly, the applied for tolls violate well established principles of rate design, including cost-of-service recovery; fair return; revenue sufficiency; efficiency; and transparency.

Moreover, approving these tolls will further distort the market that the CER is meant to be protecting – as has already begun with tolling applications from Trans Mountain's competitors.

The CER's general deference to negotiated settlements being just and reasonable cannot apply to this unprecedented and unusual circumstance, where fundamental elements of the TMX project have materially changed. In particular, the original cost estimate of \$5.4 billion that the negotiated toll settlement was based upon has been exceeded by more than 5 times, and currently sits at \$30.9 billion. Indications are that further cost increases are likely, and consistent with the terms of the negotiated contracts, will not be fully passed on in final tolls.

The Application shows that at \$7.4 billion, full cost recovery on commercial terms was still possible under the negotiated settlement. However, at \$30.9 billion, only 48% of costs are recovered in tolls resulting in tolls that are approximately half those which would arise under commercial terms, and which are well below those that would result under a cost-of-service methodology. The CER has compared negotiated settlements with cost-of-service methodologies to assess and deny other tolling applications.

Furthermore, Trans Mountain's owners have changed from Kinder Morgan Inc. to the Canadian public, via Canadian Investment Development Corporation (CDEV), a Crown corporation. Despite promises from the federal government to "build and operate Trans Mountain on a commercial basis,"<sup>3</sup> the project has seen costs quadruple since Canada purchased the company from Kinder Morgan in 2018.

A commercial enterprise operating on a commercial basis would not file an application that recovers less than half of the project's cost, nor would the CER approve such an application. Instead, a commercial enterprise would be applying to the CER for full recovery of project costs, and the CER would conduct a hearing on the prudence of those costs.

While many have speculated<sup>4</sup> and projected<sup>5</sup> that the federal government is preparing to write down all or more of the \$17 billion that will have been loaned from the Canada Account to Trans Mountain, this has not been acknowledged or confirmed by the federal government. Absent such a statement, the CER should evaluate this application solely on the basis of the Application itself and its impact on the company and marketplace, and deny it for the reasons summarized above and elaborated on below.

## Description of TWN's interest in the Application

Tsleil-Waututh are the "People of the Inlet" whose territory includes Burrard Inlet and the waters draining into it and beyond ("**Territory**"). The Tsleil-Waututh people have occupied, governed, and acted as the stewards of their Territory since time out of mind, which has provided them with sustenance, spirituality, economy, and transportation.

Tsleil-Waututh's ancestors maintained villages in Burrard Inlet, exclusively occupied and defended the area, and intensively used all the natural resources there, especially marine and intertidal resources. TWN members are "aboriginal peoples of Canada" within the meaning of s. 35 of the *Constitution Act, 1982*. TWN possesses inherent and Aboriginal title, rights, and interests throughout its Territory, including title to the land, waters, air, and marine foreshore in Burrard Inlet. TWN also has extensive governance, cultural, and harvesting rights there.

TWN's Territory is at the epicenter of the Project. The 987 km of new pipeline from Edmonton to Burnaby ends at a petroleum storage facility and marine terminal in the core of TWN's Territory. The project includes an expansion of the petroleum storage facility, a new and expanded dock, and two new pipelines between the storage facility and the marine terminal. The Project could also result in a roughly seven-fold increase in marine shipping activities, meaning up to 34 Aframax-class tankers being loaded at the marine terminal every month.

TWN has conducted a world-class, independent assessment of the Project pursuant to its Stewardship Policy pursuant to Tsleil-Waututh law.<sup>6</sup> The serious, permanent, and far-reaching impacts of the Project identified in the assessment report led TWN to conclude that the Project:

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<sup>3</sup> Department of Finance Canada News Release, "[Canada Welcomes Interest in Indigenous Economic Opportunities in Proposed Trans Mountain Expansion Project](#)", March 25, 2019.

<sup>4</sup> Saldanha, Ruth, "[Who'll Pay the \\$15 Billion Loss on the Trans Mountain Pipeline? We Will.](#)" *Morningstar*, 30 March 2023.

<sup>5</sup> Allan, Robyn, "[Trans Mountain: Compromised viability to cost taxpayers more than \\$17 billion](#)", October 2022

<sup>6</sup> *Supra*, n.2

- a) will deprive past, current, and future generations of Tsleil-Waututh people of the control and benefit of the water, land, air, and resources in its Territory; and
- b) does not represent the best use of TWN's Territory and its land, waters, air, and resources to satisfy the needs of TWN's ancestors, or present and future generations of Tsleil-Waututh people.

TWN has participated in good faith in many NEB, CER and federal consultation processes related to TMX, as well as legal challenges at the Federal Court of Appeal. This includes the CPCN application (2013-2016); the judicial review of the cabinet decision following the initial CPCN (2016-2018); the subsequent NEB reconsideration (2018-2019); further consultation; and a second legal challenge at the FCA (2019-2020).

In each of these fora, TWN raised the issue of the eroding and eventually collapsed business case for TMX. In particular, TWN questioned the NEB's reliance on the existence of long-term committed contracts, negotiated and approved before the project was reviewed, to establish need for the project. However, the NEB, CER and federal government declined to meaningfully address these issues, in TWN's view.

In the NEB and CER reports, and ultimately the federal cabinet decisions, the economic benefits of TMX were supposed to justify the burdens, including the infringement of Aboriginal rights, oil spill risks, climate impacts, and the acceleration of the extinction of endangered species, among many others. While TWN does not agree with the CER or Cabinet's conclusion when balancing of these factors, the fact that the economic benefits of TMX have collapsed means that these burdens cannot be justified.

TWN's continued participation in these regulatory processes arises from our sacred duty to steward and protect the Territory. This includes ensuring that the CER fulfills its function of upholding the public interest and ensuring that pipeline operators are capable of meeting pipeline safety, integrity, maintenance and abandonment costs through their rate structure.

TWN intends to participate as an intervenor in this process to file Information Requests (IR) and argument. TWN may file intervenor evidence, if deemed necessary.

The fact that the applicant is a Crown corporation means that it is more susceptible to political factors, as evidenced by the significant political capital already expended on TMX by federal cabinet ministers. This means that the CER cannot rely on the applicant's actions to be equivalent to those of a commercial enterprise. Despite promises of being built and operated on a commercial basis, it is evident that TMC has a higher tolerance for risk, as demonstrated by the massive price tag associated with the project and that TMC is seemingly content with a toll structure that portends ongoing and significant losses, compromising its ability to continue as a going concern.

## Substantive comments about the Application

TWN submits that following a thorough hearing process, the CER should deny this Application on the basis that the tolls are not just and reasonable, pursuant to section 230 and 232 of the Act. Indeed, TWN submits that the CER should disallow this tariff pursuant to section 233 of the Act.

### When 48% of project costs are covered by tolls, they cannot be just or reasonable

The toll methodology approved in 2013 by the NEB was based on a project cost of \$5.4 billion with that cost completely passed through to committed shippers on commercially determined terms. Trans Mountain was then owned by a private, publicly traded company, Kinder Morgan. Notwithstanding that the toll methodology contemplated the possibility of a less than full cost increase passthrough should project costs increase after the CPCN Cost Estimate, Trans Mountain was very clear that its owner would not proceed with a project that did not meet its required rate of return over the life of the long-term contracts.

In this application, that toll methodology is applied to a materially different project cost; a cost 472% higher than the original estimate and now owned by the federal government, who is not subject to commercial discipline as is a private company.

Trans Mountain currently projects that project costs will be \$30.9 billion; an increase from the \$7.4 billion CPCN Cost Estimate of \$23.5 billion. However, only \$7.3 billion of this \$23.5 billion project cost increase is reflected in the fixed tolls.<sup>7</sup> That is, Trans Mountain's shipper tolls reflect \$14.7 billion of the project cost – or 48% – with 52% of project costs, or \$16.2 billion to be borne by Trans Mountain.

Trans Mountain does not make explicit in its application the fact that it will be responsible for covering 52% of expected project cost. It is necessary to work through the figures included in Trans Mountain's Application to see this.

In 2017 Trans Mountain delivered a CPCN Cost Estimate for the project of \$7.4 billion as well as a list of Revised Tolls reflecting the full cost of the CPCN estimate to its committed oil product shippers.<sup>8</sup> The base fixed toll arising from the total cost of the 2017 CPCN Cost Estimate was \$5.76 per barrel.<sup>9</sup> At \$7.4 billion, the tolls covered the entire cost of construction, as set out in table 3-4 of the Application.<sup>10</sup>

The base fixed toll arising from the \$30.9 billion cost estimate is \$10.88 per barrel<sup>11</sup>, representing an increase in the toll of \$5.12 per barrel.

The increase in the base fixed toll from \$5.76 per barrel to \$10.88 per barrel was determined by charging 7 cents per \$100 million on uncapped cost increases from the CPCN estimate. Uncapped costs are the portion of cost increases beyond the \$7.4 billion budget that Trans Mountain can pass through to its shippers as detailed in the Firm Service Agreements (FSAs) signed in 2012.

The uncapped cost increase from the CPCN Cost Estimate was \$7,320 million as detailed in Table 3-10 of Trans Mountain's Application. Applying the uncapped cost pass through formula to \$7.3 billion results in a base fixed toll increase of \$5.12 per barrel.<sup>12</sup> Adding \$7.4 billion to \$7.32 billion results in tolls reflecting project costs of \$14.7 billion.

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<sup>7</sup> Application for Interim Commencement Date Tolls, Trans Mountain, [Attachment 3](#), p11

<sup>8</sup> Ibid, p.4 -5.

<sup>9</sup> Ibid, [Table 3-5](#), p. 5.

<sup>10</sup> Ibid, Table 3-4, p.4

<sup>11</sup> Supra note 7, Attachment 3, [Table 3-1](#), p. 1.

<sup>12</sup>  $0.07 \times 7,320/100 = \$5.12$

It is through this calculation that it becomes clear that only \$14.7 billion – or 48% – of Trans Mountain’s expected project cost of \$30.9 billion has been passed through to shippers in the applied for tolls. This leaves the remaining 52%, or \$16.2 billion in project costs to be absorbed by the company.

Trans Mountain’s inability to recover even half of the project cost means that their capacity to adequately fund maintenance, safety, integrity, and spill response is compromised. While the fixed component of the toll has an annual escalator of 2.5% per year, any operating cost increases above that amount would not be covered in Trans Mountains’ tolls.

As NEB lawyer Mr. Kiril Dumanovski confirmed with Trans Mountain’s (former) VP Scott Stoness during the Part IV Application in 2012:

MR: DUMANOVSKI: [P]ractically speaking, every dollar spent on integrity or safety is a dollar that Trans Mountain cannot recover as return on capital; is that correct?

MR. STONESS: If it falls in that category, that’s correct.<sup>13</sup>

The ability of Trans Mountain to conduct maintenance and uphold minimum safety and integrity standards is a key concern for Tsleil-Waututh Nation, whose Territory and rights would be significantly impacted by an oil spill of any kind.

### Will the Minister of Finance write down billions of dollars of Trans Mountain’s debt?

The fundamental issue with the applied for tolls is that they do not come close to covering the cost of the project – even under a cost-of-service approach – and the impact this will have on Trans Mountain, Canada’s oil industry, and the public at large.

A report by economist and public finance expert Robyn Allan<sup>14</sup> found that Trans Mountain is hiding its full financial picture from the Canadian public through corporate shells and accounting wizardry. The report also projects that because of the insufficient tolls, the Minister of Finance is likely to write off \$17 billion in debt borrowed from the Canada Account using their powers under section 23(6) of the *Export Development Act*. A \$17 billion write-off would be one of the largest fossil fuel subsidies in Canadian history.

In March 2023, Morningstar analyst Stephen Ellis also forecast that the negotiated tolls for the pipeline would generate insufficient revenues such that Trans Mountain, if sold, would be at a loss of about \$20 billion. That is, he predicts Trans Mountain might be able to be sold for \$15 billion and likely less, leaving the balance as a loss for the Canadian government.<sup>15</sup>

The present Application adds Trans Mountain’s own numbers in support of the above analysis and confirms that the tolls are insufficient to cover project costs, and that they will leave \$16.2 billion to be

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<sup>13</sup> NEB Hearing Order RH-001-2012, Trans Mountain Pipeline ULC Part IV Application, [Hearing Transcript](#), Volume 3, at para 4530 ([PDF](#))

<sup>14</sup> *Supra*, note 2 Ms. Allan’s analysis relied on a project cost of \$21.4 billion and as such the expected write-downs under a \$30.9 billion budget with further costs to be borne by Trans Mountain would result in a burden to Canadians of greater than \$17 billion.

<sup>15</sup> *Supra*, note 4.

absorbed by Trans Mountain. There are two ways out of this difficult situation: debt forgiveness or toll increases.

Trans Mountain is silent on how it intends to service its growing debt load or repay the principal with insufficient tolls and the federal government has not confirmed their intention to forgive Trans Mountain's debt. Without confirmation of coming debt forgiveness, the CER must assess this Application on the information before it and consider the impacts of these tolls on Trans Mountain's ability to continue as a going concern. These issues should be canvassed thoroughly in the Commission's hearing process.

As an aside, TWN's rough calculation of the base rate fixed toll required to cover the current construction cost plus Trans Mountain's commercially determined unlevered rate of return would be \$22.21 per barrel.

### Trans Mountain No Longer Meets its Definition of a Fair Return

In its 2012 Toll Methodology Application, Trans Mountain relied on the Fair Return Standard to support its position that the tolls determined by the contracts would be just and reasonable. "According to Trans Mountain, the proposed amount of the toll must allow the regulated company a reasonable opportunity to recover its costs and to earn a fair return."<sup>16</sup> Trans Mountain indicated – and the NEB accepted – that a fair return is "a targeted unlevered internal rate of return in the typical range of 12 percent (12%) to 15 percent (15%)."<sup>17</sup>

The Fair Return Standard establishes the requirements that must be met by the return allowed to a utility. The Fair Return Standard requires that a return:

- be comparable to the return available from the application of the invested capital to other enterprises of like risk (comparable investment requirement);
- enables the financial integrity of the regulated enterprise to be maintained (financial integrity requirement); and
- permits incremental capital to be attracted to the enterprise on reasonable terms and conditions (capital attraction requirement).<sup>18</sup>

Trans Mountain no longer meets the standard of cost recovery and return it relied on to gain approval for Trans Mountain's expansion.

### The applied for tolls are an affront to the Principles of Ratemaking

In addition to the Application failing to meet the just and reasonable or fair return standards, these tolls are an affront to the principles of ratemaking, and in particular the principles of cost-of-service pricing, revenue sufficiency, fairness, and efficiency.

Bonbright's principles of utility regulation provide the fundamental framework for evaluating the fairness and reasonableness of utility rates.

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<sup>16</sup> National Energy Board, Part IV [Reasons for Decision](#), RH-001-2012, May 2013 at p.24

<sup>17</sup> Ibid, p.23

<sup>18</sup> Ibid, Fair Return Standard Definition, p vi.

The Principle of Cost-of-Service Pricing is central to Bonbright's principles, and states that rates should be set to cover the costs incurred by the company in providing the service. The Principle of Cost-of-Service Pricing ensures that companies are not unfairly profiting from their natural monopoly status by charging excessive rates, but it also ensures that they are able to recover their reasonable costs.

In the case of a toll that covers only 48% of costs, it is evident that the Trans Mountain is not fully recovering them. This raises concerns about the financial sustainability of Trans Mountain, as it is operating at a significant deficit with a growing debt load. Toll revenue that falls short of covering Trans Mountain's costs, could result in a number of adverse consequences.

Firstly, Trans Mountain may struggle to maintain and improve the infrastructure necessary to provide the service effectively. This can lead to a decline in service quality, increased maintenance issues, and compromise safety standards. Ultimately, the shippers will bear the brunt of these deficiencies in the form of poorer service, while TWN and the public will bear the increased risk of an oil spill.

Secondly, the financial viability of the Trans Mountain may be jeopardized. If the toll revenue consistently falls short of covering costs, Trans Mountain may face financial instability, which can impact its ability to invest in necessary upgrades, innovations, and maintenance. This can hinder Trans Mountain's ability to adapt to changing circumstances, respond to emergencies, or make long-term investments that benefit the consumers and the broader public. It will also compromise Trans Mountain's ability to service its significant and growing debt load.

Moreover, allowing a toll to cover only 48% of costs may lead to an unfair distribution of costs between Trans Mountain and its customers. If Trans Mountain is unable to recover its expenses, it may result in higher rates for customers in the future, or the burden may shift to taxpayers or other funding sources, which would not be equitable or efficient. This contradicts the principle of cost-of-service pricing, non-discrimination and intergenerational equity which aim to ensure that the costs are appropriately allocated between the applicant and the consumers.

The Principle of Revenue Sufficiency holds that rates should be set at a level that allows the Applicant to generate sufficient revenue to cover its costs, provide a reasonable return on investment, and ensure financial sustainability. It is evident that a toll that covers 48% of costs violates the principle of revenue sufficiency and will result in an inability to maintain the pipelines' integrity.

When a toll fails to collect a significant portion of costs, as is the case here, it undermines the principles of fairness, efficiency, and conservation. The inefficient allocation of resources does not incentivize users to consider the full cost of their usage, thereby distorting the market.

The financial integrity principle is satisfied if the combined effect of the allowed return and the equity thickness of a company's capital structure results in a debt coverage ratio sufficient to support stable investment grade ratings. Trans Mountain's equity thickness is accounting fiction: it is funded 100% by debt, but TMP finance assigned an equity thickness of 45% when it passed through to Trans Mountain Corporation the money it borrowed from the Canada Account not as debt, but as equity.

In summary, the applied-for tolls that only cover 48% of projected project costs are a gross violation of the fundamental principles of rate design and must be considered unjust and unreasonable.



## The current TMX project is fundamentally different to the one the NEB approved tolling methodology for in 2013

The CER must depart from its general presumption that negotiated settlements between commercial parties are just and reasonable<sup>19</sup> in this unique and unprecedented situation, which is fundamentally different from the situation in which the NEB approved the tolling methodology in 2013.

The last time the NEB considered project need and utilization it did so on a project cost of \$5.5 billion – \$5.4 billion inclusive of the firm service fee credit and allowance for funds used during construction (AFUDC) -- with fixed tolls to recover 100% of project cost<sup>20</sup>, along with an unlevered rate of return to Trans Mountain's owners of 12 - 15%.<sup>21</sup>

Trans Mountain has now applied to the CER for approval of Interim Commencement Date Tolls based on a project cost of \$30.9 billion including AFUDC.<sup>22</sup>

The applied for fixed tolls are expected to recover only 48% of project cost, with the remaining 52% of project cost to be borne by Trans Mountain. There is no indication in the Application of the significantly negative impact these tolls, if approved, will have on Trans Mountain's financial performance, ongoing viability or anticipated return on capital invested. The CER cannot make an informed decision on the Application without this information being made available for consideration.

When less than half of the project's costs are to be covered by fixed tolls, the financial viability of Trans Mountain is fundamentally compromised.

The NEB reviewed and recommended a project owned by a commercial enterprise driven by market realities. Trans Mountain is now a Crown corporation not subject to market discipline.

The CER's Guidelines for Negotiated Settlements state, *inter alia*, that:

[A] settlement must not fetter the Board's ability and discretion to take into account **any public interest considerations** which may extend beyond the immediate concerns of the negotiating parties. [And]

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<sup>19</sup> CER/NEB Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs ([Guidelines](#)), 2002.

<sup>20</sup> National Energy Board, [Trans Mountain Expansion Project](#), May 2016, p. 305. "Trans Mountain said that the expected capital cost for the Project is approximately \$5.5 billion." When the Firm Service Fee is considered as a project cost reduction, the project cost becomes \$5.4 billion and forms the basis for establishing the tolls. Notwithstanding project costs having increased beyond \$7.4 billion when the CER undertook a reconsideration of its recommendation to approve Trans Mountain's expansion, the CER continued to rely on a project estimate of \$5.4 billion as included in the CER's Reconsideration Report released in February 2019. National Energy Board, [Reconsideration Report](#), p.343.

<sup>21</sup> Supra note 16, p. 23 "Trans Mountain stated that it made an investment decision based on a return on investment that was acceptable, taking into account the cash flow generated by the negotiated tolls that were agreed to by Trans Mountain and Firm Service Shippers. The investment decision criteria included a targeted unlevered internal rate of return in the typical range of 12 percent (12%) to 15 percent (15%)."

<sup>22</sup>Supra, note 7, [Attachment 3](#), p12.

Only in **unusual circumstances**, such as in cases where the Board was concerned that there was a **broader public interest consideration**, would the Board require further evidence and seek to evaluate a proposed settlement in more detail.<sup>23</sup> (emphasis added)

When the NEB approved Trans Mountain's toll methodology, it did so with the understanding that Kinder Morgan would be the source of financing and that this would bring market discipline. The NEB was assured that if stringent financial requirements could not be met, the project would not proceed.

As Trans Mountain president Ian Anderson explained to the Board under oath:

The process we undertook...would have been to having (*sic*) established what the investment requirements would be for a project of this sort and having full knowledge of what the hurdle rate is that we have to accomplish, is then go through some really internal proprietary consideration of pro formas and scenarios that give some comfort that a projected IRR -- unlevered IRR of 12 percent, you know, could be achieved...And the investment decision was made based upon that and the decision was made to support the project on the basis that we had a probability of achieving that unlevered IRR hurdle through the period of the 20 years of the investment.<sup>24</sup>

Kinder Morgan was clear that the company "would not proceed with a project that did not meet its targeted IRR for pipeline infrastructure"<sup>25</sup> and expected the project could pay for itself before the contracts expired.

Since Trans Mountain's representations were made to the NEB, much has changed. The NEB is now the CER. Trans Mountain is no longer owned by a private company, but a Crown corporation. Project financing has not been secured in the market by a company who makes decisions based on competing market opportunities. Project financing for Trans Mountain consists of 100% debt, secured from the Canada Account to TMP Finance, and third-party financial institutions supported by a 100% guarantee provided by the Canada Account.

Canada Account financing and guarantees are relied upon when a project is outside the risk tolerance of Export Development Canada<sup>26</sup>; a public sector entity that relies on commercially determined evaluation criteria. The repayment risk associated with Trans Mountain's expansion has fundamentally changed.

A process that allows the CER to understand Trans Mountain's financial responsibilities given these changed circumstances is critical to ensuring the CER can continue to effectively undertake its regulatory obligations. The Application as it stands does not provide sufficient information for the CER to make an informed decision.

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<sup>23</sup> *Ibid*

<sup>24</sup> Trans Mountain Expansion Toll Methodology Hearing, February 13, 2013, [Volume II Transcripts](#), Paras 1894 - 1895.

<sup>25</sup> Trans Mountain Expansion Toll Methodology Hearing, [Information Request Response to CAPP IR 3\(c\)](#), p.4

<sup>26</sup> Export Development Canada, [Disclosure: Canada Account](#).

The tolls, financing structure, and obligations that Trans Mountain faces would not exist if Trans Mountain were subject to market realities. This situation brings with it important considerations for the CER since it regulates other utilities that are subject to market realities.

The tolls that Trans Mountain is requesting be approved must be considered in the context of their impact on utilities that face market realities. Trans Mountain's ownership through its Crown corporation structure is fundamentally distorting the market signals the CER is supposed to protect. The CER has not had an opportunity to assess this issue, and therefore a toll review process whereby it can be addressed is critical.

Trans Mountain's status as a Crown corporation requires the CER to play a more involved role in regulating Trans Mountain's tolls because Trans Mountain is not subject to commercial discipline, in spite of Government statements that they are. The Crown corporation is willingly taking a loss while their customers – long term committed shippers – are content to pay a deeply discounted toll rate. The CER cannot rely on the existence of a negotiated toll settlement to presume just and reasonable tolls.

As tolls must be just and reasonable at all times, the Commission "acknowledges that circumstances may evolve to the point where an approved tolling methodology may produce tolls that are not just and reasonable."<sup>27</sup>

TWN submits that circumstances have evolved significantly to the point that the previously approved tolling methodology has clearly produced tolls that are not just and reasonable.

### The CER uses cost of service to evaluate negotiated settlements

Even though the CER guidelines presume that negotiated settlements between commercial entities are just and reasonable, the Commission regularly benchmarks these rates against a cost-of-service methodology when assessing those settlements.

In the recent Enbridge Mainline tolling decision<sup>28</sup>, the Commission compared the application to a cost-of-service toll methodology and found Enbridge's returns would be too high under the negotiated firm service approach.

Comparing negotiated tolls to cost-of-service tolls begins with a rate base reflecting asset value. Based on this approach, Trans Mountain's applied for tolls represent tolls that are far lower than what would exist through a cost-of-service methodology, and therefore the tolls are not just and reasonable. As the CER held in the *Enbridge Mainline* decision:

The Commission is of the view that a comparison of Enbridge's proposed tolls to illustrative cost of service tolls under the same 90 per cent contracted service structure, as well as projected returns on equity (ROEs) under the proposed methodology, are key to assessing whether Enbridge's proposed tolling methodology would yield just and reasonable tolls. To a significant extent, the combination of the proposed international joint tariff methodology, the uncertainty and disparity involving Lakehead local tolls and costs, and the long-term 20-year fixed toll

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<sup>27</sup>CER, *Re TransCanada Keystone Pipeline GP Ltd*, [Reasons for Decision](#) 2022 CarswellNat 5352, December 14, 2022, RH-005-2020 at para 38, p.15.

<sup>28</sup> CER [Reasons for Decision](#), Enbridge Pipelines Inc. Application for Canadian Mainline Contracting, November 2021. RH-001-2020

approach obscured whether the proposed methodology would, considering costs, produce just and reasonable Canadian Mainline tolls.<sup>29</sup>

In other words, costs matter and must be incorporated into the tolls the shippers pay. The CER reaffirms the principles of "cost-based user-pay economic efficiency" and that "users of a pipeline system should bear the financial responsibility for the costs caused by the transportation of their product through the pipeline without unjustified cross subsidization by other toll payers."<sup>30</sup>

Other issues to be considered when assessing whether tolls from a settlement are just and reasonable, include : "a comparison of the proposed tolls to cost of service tolls, and projections of ROEs under the proposed methodology" and "the potential for abuse of market power."<sup>31</sup>

The Commission continues in the *Enbridge Mainline* decision:

In previous decisions,<sup>32</sup> the NEB and CER articulated tolling principles that assist in the interpretation and application of statutory provisions in respect of traffic, tolls and tariff matters. These fundamental tolling principles include cost-based/user-pay, economic efficiency, and no acquired rights:

- The cost-based/user-pay principle means that tolls should be, to the greatest extent possible, cost based and that users of a pipeline system should bear the financial responsibility for the costs caused by the transportation of their product through the pipeline without unjustified cross subsidization by other toll payers.
- In the context of regulated tolls, economic efficiency generally means that tolls should promote proper price signals, in order to maximize the utilization of the pipeline system and thus lower costs. However, the NEB has stated that there would have to be strong reasons for departing from the principle of cost-based/user-pay tolls in order to set tolls which would encourage economic efficiency.
- The no acquired rights principle means that payment of tolls in the past confers no benefit on toll payers beyond the provision of service at that time.<sup>33</sup>

In TWN's submission, the Commission should do the same analysis in the current application which can only lead to the conclusion that the tolls are not just and reasonable.

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<sup>29</sup> Ibid. p.3

<sup>30</sup> Ibid. p. 74

<sup>31</sup> Ibid.

<sup>32</sup> A summary is found in the NEB, Reasons for Decision – TransCanada Pipelines Limited Gros Cacouna Receipt Point, RH-1-2007 (July 2007) at 21-23 (pdf 33-35) [RH-1-2007]; CER, Letter Decision - NOVA Gas Transmission Ltd Transportation Temporary Service Protocol Extension, Filing ID C12183-1 (30 March 2021) at 8.

<sup>33</sup> Ibid.p.74-75

## Perversion of the market

Trans Mountain's subsidized tolls have already impacted the market, as evidenced by Enbridge's 2021 tolling application<sup>34</sup> and the application for approval of a new toll agreement for the Enbridge Mainline<sup>35</sup> that reflects the impacts of competing with Trans Mountain.<sup>36</sup> If Enbridge needs to reduce tolls in order to compete with Trans Mountain's subsidized tolls, then there is a market problem.

The purpose of the Commission is to protect "the public and the environment while supporting efficient markets."<sup>37</sup> By approving Trans Mountain's Application, the CER risks significantly distorting the market beyond recognition.

If the CER is interested in how this toll Application impacts the efficiency of the competitive market, then they should invite Trans Mountain's competitors, such as Enbridge Inc. and TC Energy to participate in the hearing, if they do not file a letter of interest. The positions of Trans Mountain's long-term take or pay customers are relevant, but the weight given to their arguments should factor in the self-interest inherent in an applied for toll that is heavily subsidized.

## Trans Mountain Cannot Cover the Cost of invested Capital Presenting a Problem for the CER Once Contracts Expire

As part of the Part IV Tolling Methodology approval in May 2013, the CER granted Trans Mountain's request for the expanded pipeline system to be exempt from a number of Oil Pipeline Uniform Accounting Rules (OPUAR) that require CER approval for depreciation, including approval of the method and rate and the requirement to advise the CER if depreciation rates change.<sup>38</sup>

This creates a high degree of risk for the CER since it may find itself presented with a utility whose un-depreciated assets represent a rate-base toll burden that undermines the pipeline's economic viability.

The only revenue guaranteeing accommodation of Trans Mountain's capital contributions arises from its long-term take-or-pay contracts. Once the contracts expire, Trans Mountain is at risk for any unrecovered capital and this amount will be significant since the applied for tolls will be insufficient to cover most of the repayment of debt principal within the 20-year period. Trans Mountain will be motivated to release financial statements that present a more favourable performance picture than is prudent, and can, in part, do so by adopting certain depreciation practices.

Trans Mountain appears to have begun to adopt such practices. During the 2012 Toll Methodology Hearing, Trans Mountain stated it would use a 35-year depreciation of assets<sup>39</sup> whereas Trans Mountain's Five-Year Corporate Plan Summary 2023 – 2027 appears to rely on a 40 year asset depreciation schedule.

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<sup>34</sup> Supra n.28

<sup>35</sup> Enbridge Pipelines Inc., [Application for Toll Order](#), May 31, 2023

<sup>36</sup> Nickel, Rod and Bose, Sourasis, [Canada's Enbridge reaches Mainline toll agreement with oil shippers](#), Reuters, May 4, 2023

<sup>37</sup> CER, [2021-22 Departmental Plan](#), 2021.

<sup>38</sup> Supra n. 16 [Reasons for Decision](#), p. 41

<sup>39</sup> Trans Mountain Expansion Toll Methodology Hearing, February 12, 2013, [Volume I Transcripts](#), para 687

This issue is relevant to the CER from the perspective that Trans Mountain may revert to a cost-of-service methodology when the contracts expire because shippers are no longer interested in capacity utilization under negotiated long term agreements. Reverting to cost of service requires a rate base determined by the value of assets that have not been depreciated. The greater this value, the higher the future tolls. Tolls that are too high render them non-competitive and presents a potential for corporate failure as they lead to underutilization of capacity.

Certainly, the flip side of this risk exists. If Trans Mountain's application is approved, and the pipeline's insufficient revenue stream results in government funded write-downs, Trans Mountain's asset base will be decreased. In this case, once contracts expire, under a cost-of-service methodology, Trans Mountain's subsidized rate base would become significantly low which in turn would result in artificially low toll rates. The integrity of the competitive market would be undermined as a result.

Either way, the tolls violate the principles of intergenerational equity, non-discrimination and fairness by effectively creating cross-subsidization by future customers or the Canadian public.

### **Trans Mountain's Ability to Maintain Pipeline Integrity and Safety is Compromised**

In its Reasons for Decision approving Trans Mountain's toll methodology in 2013, the NEB's direction was clear: pipeline integrity and safety must be maintained. "The Board notes Trans Mountain's commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved. Trans Mountain is expected to provide sufficient planning and resources to deliver on its pipeline safety commitments now and during the operation of the Expanded System."<sup>40</sup>

The Board further states:

Trans Mountain acknowledged that pipeline integrity spending can reduce return on capital pursuant to the applied-for toll methodology. Pipeline safety is of paramount importance to the Board and it will take all available actions to protect Canadians and the environment. The NEB requires pipeline companies to anticipate, prevent, manage and mitigate potentially dangerous conditions associated with their pipeline. The Board expects regulated companies to invest the resources required for safe operations, environmental protection and full regulatory compliance at all times. The Board notes Trans Mountain's commitment to continue to maintain the integrity of the pipeline and its safe operation if the proposed toll methodology was approved. Trans Mountain is expected to provide sufficient planning and resources to deliver on its pipeline safety commitments now and during the operation of any Expanded System.<sup>41</sup>

Trans Mountain's requirement to continue to maintain the integrity of the pipeline is significantly compromised because the resulting tolls are insufficient to ensure that Trans Mountain is profitable and financially viable. Tsleil-Waututh Nation's interests are severely impacted if Trans Mountain's lack of revenue limits Trans Mountain's ability to allocate sufficient resources to maintain safety and pipeline integrity. There is insufficient information provided in Trans Mountain's Application to address this concern. As a result, TWN requires intervenor status to participate in a process whereby its concerns regarding Trans Mountain's capacity to maintain pipeline safety and integrity can be addressed.

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<sup>40</sup> Supra n.16, [Reasons for Decision](#), p. 1.

<sup>41</sup> Supra n.16, [Reasons for Decision](#), p. 28.

Although Trans Mountain acknowledged that pipeline integrity spending can reduce return on capital, the situation that now exists — evidence of highly compromised return on capital — means that Trans Mountain's choices are limited. The CER assured Canadians when approving the tolling methodology that it will take "all available actions to protect Canadians and the environment." The CER establishing additional process steps prior to deciding on Trans Mountain's application, and accepting TWN as an intervenor, are at minimum required to respect this commitment.

Tsleil-Waututh Nation has stewarded our territory for millennia, and this sacred obligation extends seven generations into the future. In the context of TMX, that includes ensuring that abandonment and restoration costs are adequately funded. The tolls applied for significantly compromise Trans Mountain's viability to the point that it is unclear to TWN if Trans Mountain will be able to cover costs of abandonment and restoration, let alone maintenance and oil spill cleanup.

### Tolls are Insufficient to Address Climate Change Impacts

In the CDEV 2022 Annual Report<sup>42</sup> Trans Mountain discusses a physical risk assessment of the impacts of climate change on its pipeline system, including the pipeline, pumping stations, storage terminals and Westridge Marine Terminal. It found that storms, droughts, and flooding are the most pronounced acute risks, while heat stress, water stress and rising sea levels are chronic risks.

It is important to note that the risk assessment used the International Energy Agency's (IEA) 'Announced Pledges Scenario' (APS) in this assessment. The APS has a 50% chance of resulting in an average global temperature increase of 2.1°C above pre-industrial levels.<sup>43</sup> In other words, Trans Mountain modelled for a scenario that climate scientists have called the tipping point, warning that it will result in feedback loops and runaway climate chaos.

In any case, inadequate revenues create an incentive to compromise on investing and spending required not only to keep the pipeline safe but to meet the needs dictated by climate change. The revenues generated by the variable tolls are insufficient to respond to the climate change impacts Trans Mountain has experienced in recent years and that the pipeline will face in the future. There needs to be an opportunity to address what Trans Mountain now knows to be likely and ongoing costs related to climate change and for the CER to assess whether the tolls Trans Mountain is requesting will meet these anticipated costs. Toll that do not meet the anticipated cost of climate change can be neither just nor reasonable.

There is a 2.5% per year escalator built into the fixed toll which is intended to address increased operating costs related to future events, however, "this revenue will likely not be enough to cover the operating cost increases that are Trans Mountain's responsibility. Staffing requirements, climate-change related maintenance, and insurance costs are much higher than Kinder Morgan anticipated they ever would be when its toll methodology was designed more than a decade ago."<sup>44</sup>

Trans Mountain is aware that climate-change costs are significant, but they have not been addressed in toll determination. "TMC has started to evaluate climate-related physical and transition risks (i.e., risks

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<sup>42</sup> [CDEV 2022 Annual Report](#), May 9, 2023

<sup>43</sup> International Energy Agency, [World Energy Outlook 2021: Technical note on the emissions and temperature implications of COP26 pledges](#), 2021.

<sup>44</sup> [Supra n.5](#) p. 16.

related to the transition to a low carbon economy) ...Two important transition-related risks for TMC are carbon tax and oil demand reduction...changes in oil demand can potentially have more direct impacts.”<sup>45</sup>

Trans Mountain has also engaged in identifying risks and costs as part of its borrowing process with third-party lenders. Trans Mountain entered into an Equator Principles (EP4) Syndicated Facility with Canadian banks as mentioned in its 2023 -2027 Five Year Corporate Plan Summary.

"TMC replaced the Syndicated Facility with an Equator Principles compliant syndicated facility ("EP Syndicated Facility"). The facility has a two-year term and a borrowing limit initially of \$11.0 billion. TMC plans to increase this credit facility's limit from \$11 billion to \$13.0 billion by May 10, 2023.”<sup>46</sup> The loan was indeed increased to \$13 billion after the federal government provided an additional \$3 billion loan guarantee.

The minimum disclosure requirement on this loan is that "[f]urther to the Equator Principles requirements, the expectation is that the client will ensure that, at a minimum, a summary of the ESIA is accessible and available online and that it includes a summary of the project's **climate-related risks and the potential impacts of the identified risks.**"<sup>47</sup>

Trans Mountain has not provided a summary of the ESIA along with the summary of the project's climate-related risks and the potential impacts of those identified risks online. The process steps identified below to review Trans Mountain's Application would allow for this document to be made available and assist the CER in evaluating the cost implications of climate-change impacts and Trans Mountain's ability to meet those under its proposed toll rates.

## Comments on process

Tsleil-Waututh Nation submits that a thorough hearing, with the opportunity to test evidence and file evidence, as necessary, is appropriate, given the unprecedented and unique nature of this interim tolling application. It is not just a matter of applying a previously approved toll methodology to an updated budget. The public interest considerations, when \$16.2 billion of project costs are not recovered in toll rates, cannot be overstated. Moreover, the implications of these tolls on the broader Canadian energy market, on other pipeline companies, and on the CER's fundamental function are too significant to warrant anything other than a fulsome process.

Tsleil-Waututh Nation submits that at least two rounds of information requests and the ability for intervenors to file evidence is appropriate. TWN may file evidence, but what should also be of interest to the Commission are the views of Trans Mountain's non-subsidized competitors, Enbridge and TC Energy, among others. As stated above, they should be requested to participate should they not file a letter of interest.

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<sup>45</sup> [CDEV 2020 Annual Report](#), p.7

<sup>46</sup> CDEV [Five Year Corporate Plan Summary 2023 -2027](#). p. 13.

<sup>47</sup> Equator Principles, Guidance Note on Climate Change Risk Assessment, September 2020, [https://equator-principles.com/app/uploads/CCRA\\_Guidance\\_Note\\_Sept2020.pdf](https://equator-principles.com/app/uploads/CCRA_Guidance_Note_Sept2020.pdf) p. 13. (Emphasis in original)



## Suggestions for the list of issues

TWN has set out a number of issues in the substantive comments above. These include:

1. Is the toll just and reasonable?
2. Do the tolls require a write-down of debt for Trans Mountain?
3. Is the forgiveness of debt in the public interest?
4. Are the tolls consistent with the principles of ratemaking?
5. Do the tolls distort the market?
6. Do the tolls and resulting losses for TMC and TMP Finance still justify the burdens, including infringements of constitutionally protected title and rights, evaluated in the Commission's recommendation reports?
7. How would a cost-of-service toll structure compare to Trans Mountain's applied for Interim Tolls. Can the tolls adequately cover maintenance, safety and integrity costs?
8. Can the tolls adequately cover climate related physical risks as identified by Trans Mountain since the toll methodology was approved?

## Conclusion

Tsleil-Waututh Nation submits that the interim toll application should be rejected following a thorough hearing on the basis that tolls that collect 48% of costs are *prima facie* unjust and unreasonable.

All of which is respectfully submitted,



Gabriel George

Director, Treaty Lands and Resources, Tsleil-Waututh Nation