

THE ALBERTA ENERGY REGULATOR

IN THE MATTER OF Application No. 432
to the Alberta Energy Regulator

AER PROCEEDING

VOLUME 5

Calgary, Alberta

March 13, 2024

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1 Proceedings taken at Govier Hall, Calgary, Alberta

2

3 March 13, 2024

Morning Session

4

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The Chair

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Hearing Commissioner

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26

1	D. Naffin	For Pembina Pipeline Corporation,
2		Plains Midstream Canada ULC,
3		and SECURE Energy Services
4	T. Myers	For Pembina Pipeline Corporation,
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6		and SECURE Energy Services
7	T. Machell	For Pembina Pipeline Corporation,
8		Plains Midstream Canada ULC,
9		and SECURE Energy Services
10		
11	S. Duncanson	For Keyera Corp.
12	J. Baker	For Keyera Corp.
13		
14	D. Lopez, CSR(A), RPR	Official Court Reporter
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1 (PROCEEDINGS COMMENCED AT 9:01 AM)

2 THE CHAIR: Good morning. Please be
3 seated.

4 Good morning, everyone, and welcome back to
5 Govier Hall. So as every day of the hearing, there's
6 a little bit of a reminder that video cast is going to
7 be streamed -- live-streamed on a link on AER
8 website -- from a link on the AER website. We don't
9 record the video cast, and the video cast is not the
10 transcript.

11 So the court reporters will prepare the only
12 transcript that we -- that's official transcript of
13 this hearing, and any viewers who are observing, please
14 refrain from recording or rebroadcasting the live
15 stream. For the benefit of the court reporters, please
16 speak slowly and one at a time. And if you have
17 difficulty hearing us, just point to us.

18 Any preliminaries today? None.

19 Okay. So going with the schedule we had, we have
20 Qualico's final argument.

21 Whenever you are ready.

22 Final Submissions by G. Fitch

23 G. FITCH: Good morning, Madam Chair,
24 Hearing Commissioners, AER staff.

25 On behalf of our clients, Qualico Developments
26 West Limited and the members of the Developers Group,

1 we would like to begin by thanking the AER for a fair
2 and efficient hearing. It's been our honour and
3 pleasure to spend the last number of days in the
4 hearing room with you and look forward to presenting
5 Qualico's final argument this morning.

6 So I want to begin, believe it or not, in 1958,
7 which was 10 years before the Pembina pipeline was
8 built and 13 years before the Plains pipeline was built
9 because that was the year that the Alberta Legislature
10 passed what was then Bill 14, a new version of the
11 Pipeline Act. And that bill contained Section 34,
12 which basically stated, in subsection (1): (as read)

13 The minister may, upon such terms and
14 conditions as he deems proper, direct a
15 licensee to alter or relocate any part of his
16 pipeline if, in the minister's opinion, the
17 alteration or relocation would be in the
18 public interest.

19 And Subsection 2 of Section 34 stated that: (as read)

20 Where the minister directs the alteration or
21 relocation of any part of a pipeline, he may
22 order the payment of such compensation as he
23 may determine and by whom and to whom the
24 compensation is payable.

25 So today that provision is Section 33 of the Pipeline
26 Act. The reference to the "minister" has changed to

1 the "Regulator", but substantively the section is the
2 same. And, of course, Qualico's application is brought
3 pursuant to Section 33. And I raise this at the outset
4 because my friends for -- representing Plains and
5 Pembina would have the Hearing Commissioners believe
6 that what Qualico is requesting in this application is
7 somehow extraordinary or unusual, and it is not at all.

8 It has been possible for a party to bring an
9 application to relocate or alter a pipeline and to see
10 cost sharing for 65 years or so in this province.
11 Applications have been made under Section 34 and
12 Section 33 before, and cost sharing has been ordered by
13 the ERCB and the AER before.

14 Qualico is simply exercising a right which the
15 legislature has given to persons in this province in
16 1958. So Qualico's application, obviously, is brought
17 on the basis that alteration of the Plains and Pembina
18 pipelines is in the public interest, and we seek an
19 order that the cost of the alterations be shared as
20 between the two pipeline companies and Qualico.

21 In our amended application, we have suggested a
22 50-50 cost sharing. This is on the basis that the
23 continued safe operation of the pipelines, on the one
24 hand, and the construction of arterial roads required
25 to accommodate new growth mandated by the
26 City of Edmonton's statutory plans, on the other hand,

1 are both in the public interest, and there is no reason
2 to favour one over the other. And I'm going to be
3 expanding on this point later in my argument.

4 But before commencing the substantive portion of
5 my argument, I just want to briefly summarize the
6 evidence that Qualico relies on in support of its
7 application. So there's, obviously, the written
8 evidence that was filed prior to the hearing, and then
9 the oral evidence that you have heard over the past
10 week and a half.

11 So with regard to the written evidence, Qualico
12 expressly relies on Exhibit 5.01, which is our amended
13 application, and I'll just be referring to it as our
14 application. We rely on Qualico's response to the
15 Regulator's Supplemental Information Request Number 2,
16 and that's Exhibit 4.01 at PDF 51, and that includes
17 Mr. Morrison's first report, which is in the same
18 exhibit at PDF 58. We will be relying on Qualico's
19 written submissions in response to the notice of
20 reconsideration, and those are in Exhibit 6.01 at
21 PDF 280. We will be relying on Qualico's reply to the
22 submissions of Pembina and Plains, again, in response
23 to the notice of reconsideration, also contained in
24 Exhibit 6.01, PDF page 416. We will be relying on
25 Qualico's written submissions for the public hearing,
26 which are Exhibit 64.01 and which include

1 Mr. Morrison's second report at PDF page 20. We will
2 be relying on the Developers Group written submissions
3 for the public hearing, and that's Exhibit 66.01. And,
4 finally, Qualico's reply to the joint submissions of
5 Plains, Pembina, and SECURE, which is Exhibit 79.02
6 and which includes Mr. Morrison's final report at
7 PDF page 24.

8 So just for the record, those are the main
9 portions of the documentary record that Qualico will be
10 relying on.

11 With respect to the oral evidence adduced at this
12 hearing, obviously we will be relying on the evidence
13 given by the members of the witness panels for both
14 Qualico and the Developers Group. In our submission,
15 all of the witnesses called for both Qualico and the
16 Developers Group were entirely credible and
17 well-informed. They had firsthand knowledge of the
18 crossings in question and the discussions and the
19 negotiations that they were involved in.

20 By contrast, Pembina, Plains, and also Keyera
21 chose to seat senior officers and employees, none of
22 whom had firsthand and personal knowledge of these
23 matters, the result being that they were frequently
24 unable to answer very basic questions about the events
25 which gave rise to Qualico's application.

26 You heard from Mr. Gerein and Mr. Dal Bello of

1 WSP. These are folks that were there. They had the
2 conversations with the folks at Pembina and Plains.
3 They sent the emails, received the emails. They
4 participated in all of these discussions.

5 By contrast, Mr. Trim and Mr. Torr for Plains and
6 Mr. Sprott and Mr. Balfour for Pembina were not there.
7 They had no firsthand knowledge; they had no personal
8 knowledge. Therefore, our submission is that where the
9 evidence of Plains and Pembina and the evidence of
10 Qualico conflicts on a factual question, i.e., what
11 actually happened, the Hearing Commissioners should
12 prefer the evidence of the Qualico witnesses.

13 So why are we here? What is this hearing about?
14 So the most basic procedural facts are that Qualico
15 filed its application originally on -- in
16 November 2020. It filed its amended application in
17 January 2022. The amended application was dismissed
18 by the AER in April 2022, and then the Regulator issued
19 a notice of reconsideration in November 2022.

20 One argument you have heard or read from my
21 friends at Plains and Pembina is that there is no
22 legitimate -- no legitimate dispute with respect to the
23 need for the alterations, and, therefore, so they
24 argue, there's no need for an order under Section 33(1)
25 of the Pipeline Act.

26 And you will recall my friend Mr. Myers spent the

1 first half hour of his cross-examination taking the
2 Qualico witness panel through the black line version of
3 our application in an attempt to show that in our
4 original application Qualico acknowledged there was no
5 disagreement regarding the need for the alterations and
6 that the only dispute is about cost.

7 And then you also heard the witnesses for Plains
8 and Pembina self-servingly repeating again and again
9 that they are willing and able to undertake the work,
10 ergo, no dispute.

11 In our submission, in Qualico's submission, this
12 argument and that whole line of cross-examination and
13 evidence was incorrect and improper. It is incorrect
14 and improper because it was dismissed by the AER in the
15 reconsideration decision issued November 14, 2022, and
16 that's Exhibit 6.01 at PDF page 3. Quote -- and
17 they're talking about the original decision in
18 April 2022: (as read)

19 In the decision, the AER declined to decide
20 the application made to it under
21 Subsection 33(1) of the Pipeline Act on the
22 basis that there was no dispute that the work
23 should be done; however, the legislative test
24 set out in Subsection 33(1) requires in
25 respect of Subsection 33(1), paragraph (a)
26 that direction to a licensee to alter its

1 pipeline must be in the public interest.

2 It does not require dispute regarding the
3 alteration. Failing to apply the legislative
4 test set out in Subsection 33(1) constitutes
5 a prima facie error.

6 So this was a prima facie error that constituted
7 exceptional and compelling grounds, justifying the
8 exercise of the AER's reconsideration power.

9 Now, Pembina and Plains both filed requests that
10 the AER reconsider the reconsideration decision. Those
11 requests were denied. So the reconsideration decision
12 was issued in November 2022; the denial of the request
13 to reconsider the reconsideration decision was in
14 December of 2022, so all of this was about a year and a
15 half ago.

16 Regardless, since then, Pembina and Plains have
17 continued to argue in their written evidence and
18 submissions that there must be a dispute that the work
19 be done in order for the AER to issue an order under
20 Section 33, and Qualico submits to you that this Panel,
21 in fact, does not have the authority to deny Qualico's
22 application on the basis that there is no dispute that
23 the work needs to be done because that issue has been
24 decided. It was decided by the AER in its
25 reconsideration decision. If you were to do that now
26 at the end of this hearing, you would be repeating the

1 prima facie error made by the AER in its April 2022
2 decision which led to this reconsideration and this
3 hearing.

4 So that's what the hearing is not about. It's not
5 about whether there is a dispute as to the need for the
6 work. What the hearing is about are the two issues
7 identified by the Regulator in the notice of
8 reconsideration: one, the nature of the requested
9 pipeline alterations, whether the pipeline alterations
10 are in the public interest and why; and, two, should
11 the AER direct the work, the cost of the work, and by
12 whom and to whom it should be paid and why. So that's
13 what this hearing is about.

14 Having just submitted to you that the hearing is
15 not about whether there is a dispute, I do want to just
16 briefly address the evidence, 'cause there actually was
17 a fair bit of it, about the nature of the dispute.

18 In our submission, the record is clear that there
19 has never been any agreement between Qualico and
20 Pembina and Plains with respect to the crossings other
21 than everyone understood something has to be done. But
22 what that something is, what that work is, which
23 methodology, how extensive, that has never been agreed
24 to.

25 You will recall that I began my cross-examination
26 by referring the Pembina and Plains witnesses to

1 Section 28(2) of the Pipeline Rules, which states:
2 (as read)

3 Prior to the initiation of any construction
4 related to the building, improving or
5 widening of a road or highway over an
6 existing pipeline or extending a road or
7 highway right-of-way over an existing
8 pipeline, the pipeline at such locations must
9 either be upgraded or otherwise meet the
10 requirements of CSA Z662 respecting crossings
11 of existing pipelines.

12 So that's the source of this requirement to ensure that
13 when roadwork is being done overtop a pipeline, the
14 pipeline is going to continue to comply with CSA Z662,
15 either because it's being upgraded or because it just
16 doesn't need to be, but you have to have figured that
17 out.

18 So after doing that, I then had this question and
19 answer with Mr. Torr from Plains, and this was at
20 transcript page 344: (as read)

21 Q All right. Is it fair to say that until
22 the integrity assessment is done, nobody
23 knows what work may or may not be
24 required? Is that fair?

25 A MR. TORR: Yes, that is fair.

26 So the reality is that it remains the case today that

1 nobody, neither Plains and certainly not Qualico, knows
2 what work actually is going to be required at -- at the
3 Plains crossing.

4 And staying with the Plains crossing,
5 Exhibit 86.01, you will recall, is the cost recovery
6 agreement for the 167th Avenue/Meridian Street
7 crossing, and I cross-examined on that document, and
8 you will recall that the scope of work included things
9 such as excavation, inspection of the pipeline, and
10 construction of the concrete slab.

11 And -- and in cross-examination, the witnesses for
12 Plains agreed that as of the date of that agreement,
13 which was March 11, 2019, the pipeline had not yet been
14 inspected, and, in fact, they also agreed that as of
15 today, Plains has not done any excavation work at the
16 167th Avenue intersection.

17 That led, then, to this exchange with Mr. Torr at
18 transcript page 351: (as read)

19 Q Okay. So would you agree with me,
20 Mr. Torr, that as of today, there has
21 been no final determination made as to
22 what alteration work will, in fact, have
23 to be carried out at that crossing
24 location?

25 A Yes, that's correct. Because there has
26 been no agreement between us and, in

1 this case, Horse Hills or Qualico.

2 So there has been no final determination made what work
3 has to be carried out.

4 So that's Plains. With regard to Pembina and the
5 crossing at 167th Avenue, we talked during the hearing
6 about Exhibit 88.01, which is the interim support
7 agreement or backstopping agreement dated April 11,
8 2019. This is the one where Qualico agreed to pay
9 Pembina \$60,000. And we talked about the scope of work
10 under that agreement, which basically was a
11 fit-for-service engineering assessment by a third-party
12 engineering company and an integrity review by Pembina.

13 So during cross-examination, I asked whether this
14 scope of work was to, in effect, conduct the integrity
15 assessment required by CSA Z662. In response -- and
16 this is at transcript page 357 -- Mr. Balfour said that
17 the scope of work was to come up with a "detailed scope
18 of work". So Qualico paid \$60,000 to Pembina to let
19 them prepare a detailed scope of work.

20 So I -- I asked again after that, Was the intent
21 of the work covered by the interim support agreement to
22 carry out the integrity assessment required to meet the
23 requirements of CSA Z662? Mr. Balfour's answer, "No".
24 That was at transcript page 358.

25 He also confirmed that Pembina has never done any
26 excavation at 167th Avenue and there has been no

1 physical or external inspection of the pipeline at that
2 crossing location. That was at transcript page 359.

3 So then after Mr. Balfour and I talked about the
4 interim support agreement, he confirmed that Pembina
5 provided Qualico with a final support agreement. And
6 that's the one that's referred to in our amended
7 application where Pembina basically told Qualico it's
8 going to cost \$559,000 to do the work at that crossing
9 location.

10 And I asked Mr. Sprott at transcript page 366:
11 (as read)

12 So it's fair, is it not, to conclude that as
13 of today, there has not been a determination
14 made of what alteration work will, in fact,
15 have to be carried out at that crossing
16 location, has there?

17 And Mr. Sprott -- Mr. Sprott answered: (as read)

18 No. We would definitely need to go out and
19 re-evaluate the situation.

20 So Qualico submits, in short, that the evidence is
21 clear. The work required at the 167th intersection
22 both for Plains and Pembina has, to this date, never
23 been determined. That being the case, there has also
24 never been any agreement on the work that needs to be
25 done, and there is a dispute, and there is a need for
26 an order under Subsection (1) of Section 33.

1 So I'd now like to return to Section 33, the --
2 the wording of Section 33 and its purpose and the fact
3 that a version of Section 33 has existed since 1958.
4 And my first submission on this point is what that
5 means is that since 1958, all pipeline operators in
6 Alberta must be taken to be aware whenever they build a
7 pipeline that the AER may, in the future, issue an
8 order to relocate that pipeline and may require the
9 operator to pay some or all of the costs of doing so.

10 An operator's right to quiet enjoyment under its
11 right-of-way agreements that they need to construct and
12 operate their pipeline, that right does not and cannot
13 shield them from the application of Section 33 and the
14 possibility that the AE -- that the AER may make an
15 order under Section 33 and that it may -- and that --
16 and that that order may include cost sharing.

17 But that is the logic and clear implication of
18 Plains and Pembina's first-in-time, first-in-right
19 theory. They say, We have the right to quiet enjoyment
20 under our right-of-way agreements, and that right
21 cannot be interfered with, not even by the AER under
22 Section 33. They don't say that part out loud, but
23 that's the clear implication. And, in response,
24 Qualico submits that that position, if accepted by this
25 Hearing Panel, would make Section 33 a meaningless
26 remedy.

1 So, again, what is the meaning of Section 33?
2 What is its purpose? So, unfortunately, there is no
3 Hansard from -- excuse me -- the enactment of the 1958
4 version of the Pipeline Act that sheds light on what
5 the Legislature's intention was when it enacted
6 Section 34, but as we state in Exhibit 79.02, which is
7 Qualico's reply submission from February 14th of this
8 year, there are other statutes, such as the Canadian
9 Energy Regulator Act and the Hydro and Electric Energy
10 Act, which have provisions very similar, practically
11 identical, to Section 33.

12 So, for example, Section 17 of the Hydro and
13 Electric Energy Act states: (as read)

14 The Commission [being the Alberta Utilities
15 Commission] may, on any terms and conditions
16 it considers proper, direct a permittee or
17 licencee to alter or relocate any part of the
18 permittee or licencee's transmission line if,
19 in the Commission's opinion, the alteration
20 or relocation would be in the public
21 interest.

22 So very similar to Section 33(1) of the Pipeline Act.

23 And then Subsection (2) states: (as read)

24 The Commission may, in an order under
25 Subsection (1), provide for the payment of
26 compensation and prescribe the persons by

1 whom and to whom the compensation is payable.

2 Again, very similar to the wording of Subsection 2 of
3 Section 33 of the Pipeline Act.

4 As stated in Qualico's reply submission, again,
5 Exhibit 79.02, the Alberta Utilities Commission
6 considered the purpose and the meaning of Section 17 of
7 the Hydro and Electric Energy Act in an application to
8 alter the Heartland Transmission Line, which,
9 interestingly, is also on the urban periphery of the
10 city of Edmonton in the transportation and utility
11 corridor parallel to Anthony Henday drive.

12 So this decision is Decision 2012-333. We refer
13 to it in our written submissions. In paragraph 24 of
14 that decision, the Commission stated: (as read)

15 Section 17 empowers the Commission to do two
16 things: (a), direct a transmission facility
17 owner to alter or relocate an approved
18 transmission line when it is in the public
19 interest to do so, and, (b), decide who
20 should be responsible for paying the costs of
21 the alteration or relocation if the party
22 requesting the alteration and the
23 transmission facility owner cannot reach a
24 cost-sharing agreement for the alteration.

25 Then in paragraph 27, the Commission stated: (as read)

26 When the Commission receives an application

1 to alter or relocate a previously approved
2 transmission line under Section 17, that
3 application relates to a transmission line
4 that the Commission has already determined to
5 be in the public interest. Accordingly, for
6 the alteration or relocation proposed and the
7 Section 17 application to be in the public
8 interest, the proposed alteration or
9 relocation must necessarily be premised upon
10 changed circumstances, which could include
11 the existence of new material information
12 since the transmission line was approved.

13 In the next paragraph of the decision, the Commission
14 refers to Hansard related to the enactment of
15 Section 17 on -- and the purpose of Section 17, and one
16 of those purposes, according to the Hansard, is to
17 allow for a transmission line and relocations as a
18 result of: (as read)

19 Rapid growth and more severe land use
20 conflicts.

21 So after having gone through that analysis, in
22 paragraph 29 of Decision 2012-333, the AUC concluded:
23 (as read)

24 The Hansard quotation above suggests that one
25 type of changed circumstances contemplated by
26 Section 17 is a land use conflict that arises

1 after the approval of a transmission line.
2 Such a conflict could result from urban
3 growth or the need for other infrastructure
4 in the area.

5 So this is exactly what we're dealing with in this
6 case. These pipelines need to be altered to
7 accommodate the conversion of Meridian Street [sic]
8 from a two-lane roadway to a four-lane arterial road as
9 a result of urban growth.

10 So the AUC, in Decision 2012-333, talking about
11 Section 17, which is so similar to Section 33 of the
12 Pipeline Act, in our view, correctly identified this
13 very type of situation as being -- this type of
14 situation, Section 17, and we argue, by analogy,
15 Section 33 of the Pipeline Act is expressly aimed to
16 deal with.

17 Now, this leads me to the next thing I'd like to
18 talk about, which is you will, of course, recall
19 hearing the Pembina and Plains witnesses say over and
20 over again that Qualico is the "cause" of the work that
21 needs to be done; therefore, Qualico should pay. And I
22 am here to submit to you that that is not correct. The
23 cause is not Qualico; the cause is the accommodation of
24 urban growth in -- in -- in northeast Edmonton.
25 Qualico is not the cause of the work.

26 The evidence on this point, Qualico's evidence,

1 which is largely set out in our application but was
2 also spoken to by our witness panel, is uncontested.
3 As stated in the Edmonton metropolitan regional growth
4 plan, the population of Edmonton is projected to
5 increase from 1.2 million to 2.2 million by 2044, so in
6 just the next 20 years.

7 Horse Hills is expressly identified as a priority
8 growth area in the City of Edmonton's planning
9 documents. Horse Hills is projected to increase in
10 population from 3,000 in 2020 to 65 to 70,000 in 2044,
11 so only 16 years from now.

12 There is an approved area structure plan and
13 neighbourhood structure plan -- area structure plan for
14 Horse Hills and neighbourhood structure plan for
15 Marquis. As per the neighbourhood structure plan,
16 Marquis is anticipated to be complete in approximately
17 2035, and this one neighbourhood alone -- and this is
18 the neighbourhood Qualico has already started
19 developing -- will, at full buildout, have 13,000
20 dwellings and approximately 29,500 residents. And that
21 was testified to by Mr. Gerein.

22 The area structure plan for Horse Hills is an
23 indication of the City of Edmonton's belief that
24 development in Horse Hills and Marquis is needed and is
25 in the public interest. Even Mr. Romanesky agreed with
26 the proviso that if by "public interest" you mean that

1 the development planned in the ASP will achieve the
2 City's vision of sustainable development, then, yes,
3 it's in the public interest.

4 So there's really no disagreement that this growth
5 in Horse Hills and in Marquis is in the public
6 interest. The City of Edmonton wants it. And Qualico
7 is one of several developers that is going to be
8 carrying out the work required to achieve that vision.
9 So it is the growth in population in the City of
10 Edmonton that is the cause of the upgrading to
11 Meridian Street from basically an old two-lane country
12 road to a four-lane city standard arterial road, an
13 arterial road that will be a public road owned by the
14 City on public land owned by the City.

15 Qualico is the applicant here because of the
16 operation of the City's ARA bylaw, the arterial roadway
17 assessment bylaw. And, basically, Qualico is the
18 applicant because it is the first developer in, so to
19 speak, and, therefore, it has to build the road.

20 But if Qualico wasn't the first developer in, it
21 would be someone else. So, indeed, this is what
22 happened with the Meridian Street and 172nd Avenue
23 crossing. It turned out Qualico was not the first
24 developer in. Rather, the MLC Group through its joint
25 venture Marquis JV Limited went first. And so it ended
26 up being Marquis JV who had to do the work, not

1 Qualico.

2 And I -- I -- I point -- point this out to -- to
3 address this argument that it's somehow the individual
4 developer, be it Qualico or Marquis JV, that is, (a),
5 the cause of this, and, (b), therefore should pay the
6 costs. But whether it's Qualico, Marquis JV, Melcor,
7 Cantiro Group, whomever, it's all to the same end. The
8 goal is to construct a public road on public land that
9 is required to accommodate growth called for in the
10 City of Edmonton's various statutory and other plans.

11 So, again, Qualico is not the cause of the work
12 required to be done to these pipelines. I think a
13 better way to think of it is that Qualico is the agent
14 by which the work which, first and foremost, is for the
15 benefit of the City of Edmonton -- so Qualico is the
16 agent by which this work will be carried out.

17 So I've talked about the fact that during the
18 hearing the Plains and Pembina witnesses repeatedly
19 referred to Qualico as being the cause of the work.
20 They also repeatedly referred to Qualico as the
21 "second-in-time party". And this, of course, was all
22 part of reiterating their key message that the
23 second-in-time party is responsible for costs.

24 So we have already submitted -- Qualico has
25 already submitted that the first-in-time,
26 first-in-right principle does not trump Section 33 of

1 the Pipeline Act; in fact, it's the other way around.
2 The intention of the legislature as expressed through
3 Section 33 trumps the first-in-time, first-in-right
4 principle.

5 In Canada, property rights are not inviolable.
6 They are subject to all manner of regulation. And, in
7 fact, the Supreme Court of Canada recently confirmed in
8 Annapolis Group Inc. v Halifax Regional Municipality
9 2022 SCC three six six that: (as read)

10 Government may validly regulate the use of
11 property even if it devalues the property so
12 long as the regulation does not result in the
13 effective confiscation of the property, in
14 which case, it would constitute a
15 constructive taking or a de facto
16 expropriation.

17 So Annapolis -- the Annapolis Group case was a case
18 about de facto expropriation or what the Supreme Court
19 of Canada now calls "constructive taking".

20 But the point for our purposes today is that there
21 is nothing sacrosanct about property rights in Canada,
22 and there's nothing sacrosanct, in particular, about
23 the rights of Plains and Pembina under their
24 right-of-way agreements, as they would have you
25 believe.

26 But there is a further flaw in Pembina and Plains'

1 argument, and that is that they are not, in fact,
2 first-in-time at the crossing locations. Sturgeon
3 County, now the City of Edmonton, is first-in-time, and
4 that's because the crossings are not on land owned by
5 Qualico but on land owned by the City. 1968, 1970,
6 this was a public road allowance; Meridian Street, I
7 believe, existed. So there's no question about this.

8 And you will recall I cross-examined Mr. Telford
9 on this point. And I'm just going to quote from some
10 of that cross-examination starting at transcript
11 page 459. So at lines 5 to 8, I'd asked: (as read)

12 Q Where a pipeline right-of-way crosses a
13 public road, you can't register the
14 right-of-way because there's no title to
15 the road, is there?

16 A That is correct.

17 And then at line 11, same page: (as read)

18 Q And would you agree with me that no
19 pipeline can be constructed across a
20 public road without the approval of the
21 local authority?

22 A I don't know if there's any appeal, but
23 in all instances I've dealt with, we've
24 always got an approval.

25 Q Okay. So if you imagine a pipeline
26 right-of-way that runs through private

1 land and then crosses a public road
2 allowance and then carries on running
3 through another parcel of private land,
4 you have this situation where the
5 pipeline operator has a right-of-way
6 agreement where the pipeline crosses the
7 private land on either side of -- of the
8 road, but its rights to cross the road
9 are by virtue of a crossing agreement
10 with the local authority; isn't that
11 right?

12 A I am not sure if that's a hundred
13 percent the case, but I would say it's
14 common that you have a crossing
15 agreement, whether it's Crown land,
16 whether it's municipal land, or
17 provincial.

18 So now this is on page 460, line 4: (as read)

19 Q And, sir, would you agree with me that,
20 in this case, Meridian Street was
21 already existing when these two
22 pipelines were constructed?

23 A I think we're starting to get into
24 legal, but I believe there is a road
25 allowance surveyed there.

26 So skipping ahead a little bit. Transcript page 461,

1 line 3: (as read)

2 Q So, sir, doesn't that mean the County's,
3 now the City's, interest in the public
4 road right-of-way is first-in-time to
5 Plains' and Pembina's interest under the
6 crossing agreement it had to enter into
7 with the County?

8 A I'm not sure if I understand that
9 question. Is it to do with rights,
10 like, the County was there first?

11 Q The County was there first.

12 A I'll agree with that.

13 So Pembina and Plains' argument, this first-in-time,
14 first-in-right argument, is predicated on the premise
15 that they have rights in their right-of-way agreements
16 that are first-in-time to Qualico's rights, but they
17 do not have a right-of-way agreement across the
18 Meridian Street road allowance. As a matter of law,
19 it is impossible because public roads are not titled
20 parcels of land, so there is no title against which you
21 can register a right-of-way agreement.

22 And I'm going to refer as authority for that
23 proposition to Section 17 of the Municipal Government
24 Act, which is titled "Disposal of Estate or Interest in
25 Roads": (as read)

26 Subject to any other act or agreement, the

1 council of a city has the power and is deemed
2 always to have had the power to dispose of an
3 interest in a road in the city so long as the
4 disposition does not amount to a sale or
5 lease or require a road closure under
6 Section 22.

7 So granting a consent or entering into a crossing
8 agreement with a pipeline owner to allow that pipeline
9 to cross a road, that is a disposal by the City of an
10 interest in its road, and that's permissible because
11 it's something less than granting a lease or selling
12 fee-simple title.

13 Subsection (2) of Section 17 of the Municipal
14 Government Act states: (as read)

15 No interest disposed of under Subsection (1)
16 may be registered in a land titles office.

17 And, again, that's just confirmation that you can't do
18 it because there's no title to the road.

19 And then, finally, Section 39(1) of the Pipeline
20 Act states -- well, it's titled "Pipeline Crossing
21 Road", and it states: (as read)

22 No pipeline should be constructed on, across,
23 over, or under a road without the approval of
24 the local authority concerned.

25 So although Mr. Telford did not want to offer a legal
26 opinion, and fair enough, it is clear that the right of

1 the -- of Plains and Pembina to have their pipelines
2 cross Meridian Street does not arise under any
3 right-of-way agreement. It arises under some form of
4 consent or agreement that it has to the City, and
5 there's -- you can't go to Land Titles and check to see
6 this.

7 And that leads me to paragraph 21 of the Keyera
8 written submission which Commissioner Robinson,
9 actually, picked up on and asked some questions about
10 the other day.

11 So this is -- this is where Keyera is articulating
12 the first-in-time, first-in-right principle. And
13 Keyera states: (as read)

14 Qualico's position on cost sharing is also
15 inconsistent with the buyer beware principle
16 of Alberta's land titles laws. A purchaser
17 of property has the opportunity and the onus
18 to review existing encumbrances on title,
19 including pipeline rights-of-way, which have
20 priority over subsequently registered
21 interests before purchasing the property so
22 the purchaser can properly determine whether
23 such encumbrances could limit how it intends
24 to use the property. Any decision -- [that
25 is decision by the AER] any decision that
26 would allow a purchaser to adversely effect

1 the quiet enjoyment of a person with a prior
2 interest in land by demanding alterations to
3 such interest and forcing unexpected costs on
4 the prior interest holder would be
5 inconsistent with the buyer beware principle
6 and would create a precedent with serious
7 implications for AER-regulated pipelines.

8 With respect, this argument is misguided because the
9 buyer beware principle has no application to pipeline
10 crossings of public roadways. It just simply does not.
11 Again, the pipeline right-of-way agreement is not
12 registered as an encumbrance against the title to the
13 public roadway because there is no title to the public
14 roadway.

15 Fundamentally -- and I think maybe this is a
16 critical point that we haven't really thought much
17 about -- this is not really a contest between Plains'
18 and Pembina's rights at the crossing and Qualico's
19 rights at the -- at the crossing, and the reason is
20 that Qualico has no rights at the crossing. What
21 Qualico has is an obligation to build the arterial
22 road, an obligation imposed by the City. It's the City
23 that has rights at the crossing at Meridian Street, not
24 Qualico.

25 And, as we know, the City of Edmonton, through the
26 ARA steering committee, expressly directed Qualico to

1 file the application, and the City supports the
2 application. And this is evidenced by the letter of
3 support issued by the City, which is attached to
4 Qualico's application at PDF page 35 of Exhibit 5.01.
5 It is a short letter, but I think it's important
6 because there's been a lot of talk in this hearing
7 about the City and the position of the City.

8 But, of course, unfortunately, the City elected
9 not to appear at the hearing, but they did send this
10 letter, and it's short, so I'm going to read it:
11 (as read)

12 As per the subdivision approval dated
13 April 25, 2019, Qualico is required to
14 undertake a number of different activities,
15 including the construction of portions of
16 certain arterial roadways. The
17 City of Edmonton confirms that the
18 ARA steering committee directed Qualico to
19 approach the Alberta Energy Regulator to seek
20 direction with respect to the sharing of the
21 costs associated with constructing pipeline
22 crossings along Meridian Street Northeast.
23 The City agrees that some type of cost
24 sharing with respect to the Meridian Street
25 Northeast pipeline crossings is in the public
26 interest. This letter confirms that the City

1 is supportive of Qualico's application to the
2 AER in this case.

3 End of quote. The City is -- sorry. The letter is
4 signed by Neal Upshall, the general supervisor
5 subdivision and development coordination for the
6 City of Edmonton.

7 So as is clearly indicated in this letter, this is
8 not a case of Qualico attempting to assert so-called
9 second-in-time rights over Pembina and Plains'
10 first-in-time rights. Qualico has a subdivision
11 approval, and pursuant to that approval, it is
12 required, it is obligated to construct arterial
13 roadways. So there's no issue of Qualico's rights
14 trumping Pembina and Plains' rights. Qualico doesn't
15 even have any rights in this crossing. It's the City.

16 So this brings me to discuss an issue raised by
17 Mr. Telford and Mr. Romanesky in their reports. And
18 they basically say the developer, as a second-in-time
19 party, "is responsible for costs". And I
20 cross-examined each of these gentlemen on those
21 assertions in their reports, and as was disclosed
22 during the cross-examination, neither Mr. Telford nor
23 Mr. Romanesky could point to anything in writing
24 anywhere, whether in legislation, regulations,
25 policies, or directives, stating that the initiating
26 party must pay. It doesn't exist.

1 What is written down in legislation is Section 33
2 of the Pipeline Act, which expressly empowers this
3 regulator to allocate costs when it makes an order that
4 alteration or relocation of a pipeline is in the public
5 interest.

6 Okay. I'm now going to switch gears and talk
7 about this issue of transparency or, as Qualico and the
8 Developers Group sees it, the complete lack of
9 transparency with respect to both, Number 1, what work
10 will have to be done, and, Number 2, how much it will
11 cost.

12 So both Pembina and Plains' witnesses claimed at
13 various times during their evidence that, in fact, they
14 are very transparent. We disagree vehemently. You
15 heard Mr. Gerein testify, We paid for integrity
16 assessments, and they won't share them with us. And in
17 cross-examination, I explored this with the witnesses
18 for Pembina and Plains, and, in particular, I explored
19 the distinction between maintenance and repair work on
20 the pipelines that the companies would have to carry
21 out regardless of the crossing request versus work that
22 is actually required as a result of the crossing
23 request.

24 And at page thirty -- 381 -- sorry -- of the
25 transcripts, I asked: (as read)

26 Q Would you agree that it would be

1 reasonable for the developer who has
2 approached you as part of its due
3 diligence to inquire about your
4 integrity and maintenance plans for the
5 location in question?

6 A MR. TRIM: No.

7 [To which I followed up and said]

8 Q Okay. The developer doesn't want to end
9 up paying for work you have to do
10 anyways, but you don't think it would be
11 reasonable for the development to
12 inquire into that?

13 A That's correct.

14 So, basically, You, developer, have to pay, but you
15 can't even see what you paid for. It's none of your
16 business.

17 Similarly, when I was cross-examining the Pembina
18 witnesses about whether they provided one of the
19 integrity reviews to Qualico, I asked at transcript
20 page 360 -- I asked that question at transcript
21 page 360, and the answer was: (as read)

22 A We did not provide that to Qualico. And
23 we typically don't provide that
24 information to crossing parties. The
25 results of the engineering assessment
26 contained proprietary information

1 related to our operational philosophy,
2 our risk management. It can contain
3 customer information that is
4 confidential. But we do want to work
5 with parties, and we provide what the
6 scope of work is, what the estimated
7 costs are, what the schedule would be.
8 It is our practice.

9 [To which I responded]

10 Q And the developer just has to take it on
11 faith?

12 A MR. SPROTT: I would say that the
13 developer doesn't have to take it on
14 faith. I'm here as a professional
15 engineer. I work at a public company
16 that is required by significant
17 regulation to be a pipeline operator.

18 Well, in our submission, that is the very definition
19 of, You have to take it on faith. Oh, don't worry.
20 I'm a professional engineer. Oh, don't worry. I work
21 at a public company. You can trust me, so I don't have
22 to provide you the information you sought. I just
23 basically tell you, Here's how much it's going to cost,
24 and you have to pay.

25 It is interesting that in the case of Keyera, they
26 did provide Brookfield with one integrity assessment

1 though Mr. Beztilny was careful to say, Oh, but that's
2 not our regular practice. But he was not able to offer
3 any explanation for why Keyera departed from that
4 practice in providing Brookfield with -- with the one
5 report. So clearly there is a serious lack of
6 transparency here. There's -- and that's with regard
7 to what work has to be done, but there's also a lack of
8 transparency, and I think maybe a better way to
9 describe it would be a lack of reliability with regard
10 to information provided about cost.

11 So you recall I -- I took the Pembina and Plains
12 witnesses through the various cost-recovery agreements
13 or backstopping agreements. So to begin with, the
14 Plains crossing at 167th Avenue, the March 11, 2019,
15 cost-recovery agreement, which is Exhibit 86.01. That
16 agreement estimated the cost of the crossing to be
17 \$858,000. So that's the Plains crossing at
18 167th Avenue.

19 With regard to the Pembina crossing at
20 167th Avenue -- I think it's important to remember when
21 you look at the maps and the materials, the Pembina and
22 Plains pipelines are parallel to one another as they
23 cross the -- as they diagonally cross the intersection
24 of Meridian Street and 167th Avenue, so they are right
25 next to each other.

26 So Plains says, Oh, it's going to cost \$858,000.

1 So what did Pembina say? Well, originally in 2014 when
2 they were first approached by CIMA+ on behalf of
3 Walton, they said it would be \$1,135,000, so a roughly
4 \$300,000 difference between what Pembina said it would
5 cost and what Plains later said it would cost.

6 Then in 2019, Qualico was provided with a new cost
7 estimate for the same crossing of \$559,000, half the
8 original estimate. And, remember, between 2014 and
9 when the first estimate of 1.1 million was given and
10 2019 when the second estimate of, we'll just call it,
11 \$560,000 was given, it's not like there had been any
12 work done in the interim to inspect the pipe, so it's
13 not like Pembina really had any better information in
14 2019 than it had in 2014, and yet their estimate is
15 half of what it was.

16 So you have the Plains pipeline which is, you
17 know, right here, \$858,000; you have the Pembina
18 pipeline directly next to it, first it's 1.1 million,
19 now it's \$560,000.

20 With regard to the Pembina crossing at Marquis
21 Boulevard, so this is the one that Qualico basically
22 held its nose and paid for so it could start its
23 development, Exhibit 85.01, there was a backstopping
24 agreement for \$974,000. Mr. -- I think it was --
25 Balfour confirmed that the actual cost was \$482,000.

26 So clearly these cost estimates are all over the

1 map, and, frankly, it is simply not possible for
2 developers to reasonably rely on them. It would be
3 foolish, in fact, to take it on faith that these are
4 reliable cost estimates.

5 So next I want to talk about a related issue. So
6 we've talked about lack of transparency. Now I want to
7 talk about lack of timeliness.

8 So certainly, I think, the Hearing Commissioners
9 heard loud and clear from the witnesses for Qualico and
10 the Developers Group about the lack of timeliness of
11 pipeline companies responding to inquiries for
12 crossings. Ms. Rowe of Cantiro testified that the
13 typical due diligence period when a developer is
14 acquiring land for a proposed development is 90 days,
15 so that's three months or 12 weeks. She also testified
16 that it is very uncommon for developers to get useful
17 information from pipeline companies within 90 days,
18 within the due diligence period.

19 And this was, I think, unintentionally confirmed
20 by the evidence of Mr. Beztilny for Keyera the other
21 day when he testified -- and this is at transcript
22 page 573 -- he testified that for a simple process,
23 which he defined as those where no mitigation is
24 required, "We aim for a processing time of four to six
25 weeks". So six weeks, that's half of a due diligence
26 period -- typical due diligence period, and that's for

1 a simple crossing with no mitigation. It takes half
2 the time. And that's what they -- what Keyera says
3 they aim to achieve. He also said that for complex
4 crossings, which he defined as those where mitigation
5 is required, "There really is no standard timeline".

6 Well, the evidence is clear that whatever the
7 standard timeline is, if there is one, it is a lot
8 longer than six weeks. And I think it's fair to -- for
9 us all to understand that the crossings at issue in
10 this proceeding and the crossings in the Orchards
11 development that Brookfield dealt with and the Mattson
12 development are all complex in the sense that they need
13 mitigation. So we're dealing with, here, complex
14 crossings. There's no standard timeline.

15 Mr. Beztilny's evidence was, as I say, I think
16 unintentionally consistent with the evidence of the
17 witnesses for the Developers Group. So, for example,
18 Ms. Rowe testified that it has taken -- it took them
19 16 months to get a proximity agreement. That's at
20 transcript page 237. Mr. Nicholas for the MLC Group
21 testified with respect to their Desrochers development
22 that they waited for a response to a crossing request
23 for 18 months. That's at transcript page 233.

24 Well, they're still waiting, and, in fact, the
25 result of not being able to get a crossing agreement in
26 the Desrochers development is that they haven't been

1 able to complete the construction of a collector road
2 that -- that gives access to a K to 9 school and a
3 brand-new high school. There is a 20-metre gap where
4 the road is unfinished because they can't get the
5 crossing agreement.

6 So there is clearly a problem and a lack of
7 transparency with respect to both work that has to be
8 done and timing. And this brings me to another of the
9 principal arguments made by Mr. Telford and
10 Mr. Romanesky which is that the developers: (as read)
11 Would have known about the crossings and
12 would have factored those costs into their
13 acquisition.

14 So there's basically no loss.

15 The evidence of Qualico and the Developers Group
16 was very clear that that is not how it works.
17 Mr. Armstrong was very clear about this in his
18 testimony. He was asked at transcript page 37:
19 (as read)

20 Q Can you please explain how the existence
21 of the Plains and Pembina pipelines
22 factored into Qualico's due diligence?

23 A Certainly. Obviously, we knew the
24 pipelines were there. We -- we
25 understood that there could be costs
26 associated with respect to crossing the

1 pipelines. We've got a lot of
2 experience around the region doing
3 community development. So we do have
4 experience in crossing them. So we did
5 view it as a potential risk in terms of
6 the cost, just as we do with other
7 potential constraints that we see.

8 Q And how would you characterize the level
9 of detail or clarity that Qualico had
10 when it was doing due diligence with
11 respect to crossing costs?

12 A I'd -- I would characterize it as very
13 high level. I mean, we rely on
14 external consultants to help us
15 understand what those risks are, and
16 we've also got experience crossing
17 pipelines in the past, and historically
18 [we've seen those costs as being] quite
19 negligible.

20 Q So, sir, in this case, did Qualico
21 specifically reduce or lower the price
22 it paid for the Walton lands because of
23 expected pipeline crossing costs?

24 A No.

25 Now, Mr. Armstrong's evidence was supported by the
26 evidence of other members of the Qualico witness panel

1 and the Developers Group witness panel to the effect
2 that during the due diligence period developers
3 obtained little, if any, useful or actionable
4 information regarding the cost of pipeline crossings.
5 Ms. Rowe of Cantiro stated, at transcript page 237:
6 (as read)

7 Pipeline rights-of-way are especially
8 challenging, as we can't usually find much
9 information within a 90-day period. We look
10 at what rights-of-way exist, where they're
11 located, how close to them we are, and what
12 regulations we understand to exist at that
13 time.

14 Further to Ms. Anderson's commentary, it
15 is not possible for an individual land
16 developer to know all possible future
17 outcomes that would impact where specific
18 crossings may or may not be required. This
19 is particularly the case in areas where land
20 is acquired for development prior to any
21 high-level or detailed planning taking place.

22 We do not know the expense of a
23 potential pipeline crossing even if we know
24 that a pipeline crossing will be required.
25 We're not provided timely or consistent
26 information regarding the age of the

1 pipeline's depth, classification, condition,
2 et cetera by operators within a due diligence
3 period or sometimes ever at all.

4 She went on: (as read)

5 Inquiries can be made and almost always are;
6 however, based on past experiences, Cantiro
7 is unlikely to receive a response by the
8 operator within the due diligence period,
9 which, again, is usually 90 days. No urgency
10 is shown by the operators in these
11 situations, which makes it impossible for
12 Cantiro to fully understand the scope and
13 cost of any crossing agreements at an early
14 stage.

15 And as Ms. Anderson of UDI Edmonton testified, if a
16 developer becomes concerned during the due diligence
17 period about the impact of pipelines on their proposed
18 development, it simply is not like they can pick up and
19 go somewhere else. So she stated at transcript
20 page 223: (as read)

21 It's not possible to simply avoid traversing
22 or crossing a pipeline as a proactive
23 business decision of some type, either
24 practically speaking or
25 economically ... [because] developers must
26 grow contiguously, they have to meet the

1 density targets that are set out by the
2 different plans. They are also not able to
3 develop wherever they might see fit to be the
4 most advantageous for them at the time.
5 Their decisions are highly constrained. We
6 need to grow the region in a logical and
7 connected way.

8 So, as I said, the evidence clearly supports that for
9 "complex crossing", in other words, where something has
10 to be done to the pipeline to protect its integrity,
11 developers are waiting years, not just months.

12 So returning to, again, Section 33 of the Pipeline
13 Act and its predecessor, Section 34, one point which my
14 friends Pembina and Plains make in their written
15 materials is there are -- is that Qualico has been
16 unable to point to a single example of where cost
17 sharing has been ordered, and I just want to make sure
18 that we're all clear here that there have been a number
19 of ERCB decisions on applications made under Section 34
20 now Section 33 of the Pipeline Act, and we have
21 referred to these in our written materials, but just
22 briefly.

23 The first one is decision 80-10, so this was an
24 ERCB decision from 1980 on an application by the Town
25 of Sundre for a relocation of a pipeline. And
26 basically in that case, there was a pipeline that ran

1 diagonally through a couple of quarter sections. The
2 position of the Town, as stated by the Board in
3 Section 3.1 of that decision, was that: (as read)

4 The Town contended that the present pipeline
5 location would adversely affect orderly
6 development under its annexation plans and
7 would result in restrictions to planned
8 residential and industrial development. It
9 believes such restrictions would cause
10 land use classification problems and thus
11 preclude optimum use of property within the
12 proposed town limits.

13 So similar sort of arguments.

14 Now, the position of the pipeline owner in that
15 case was stated by the Board in Section 4.1 of the
16 decision to be -- so this is Alberta Gas Trunk Line or
17 AGTL. So: (as read)

18 AGTL stated that it could see no demonstrated
19 need for moving its pipeline and that the
20 future subdivision plans of the Town could
21 accommodate the pipeline right-of-way with no
22 detrimental effects on the overall plan. It
23 said that, in general, pipelines have been
24 successfully incorporated in the subdivisions
25 in the past and it saw no difference in the
26 pending plans of the Town.

1 So, again, similar arguments that were made by
2 Mr. Romanesky and Mr. Telford, Oh, it doesn't matter
3 because you can incorporate pipelines into your
4 development.

5 So the Board in its decision in Section 7 stated:
6 (as read)

7 The Board notes from the evidence presented
8 that the timing and pace of the Town's
9 proposed development is still quite
10 uncertain, and, therefore, the need for
11 upgrading the existing AGTL line is
12 indeterminate. In the opinion of the Board,
13 upgrading of the existing AGTL pipeline does
14 not appear to be warranted at this time, but
15 if or when it is, the Board notes from AGTL's
16 testimony that the company is prepared to pay
17 the upgrading costs and to cooperate with
18 developers. This would effectively relieve
19 the Town of any major expenditures in this
20 regard.

21 So there are, in our submission, two important points
22 that arise from this case. Firstly, the application
23 was denied, but it was denied because the Board
24 considered it premature because the development for
25 which the relocation was sought was too uncertain.
26 Well, that is clearly not the case here. Not only is

1 the development not uncertain, the development is
2 underway.

3 And the second important point is that AGTL was
4 prepared to pay the upgrading costs when necessary to
5 accommodate development. That's important because if
6 Pembina and Plains' position is correct -- and that
7 position is, It is always the developer who pays -- why
8 would AGTL have agreed to pay to upgrade its pipeline
9 to accommodate future development? Why would they have
10 done that? Why didn't -- why wouldn't they just simply
11 rely on their first-in-time rights?

12 So, I mean, this is a clear signal, in our
13 submission, that it's not always the way that Pembina
14 and Plains tell you it is.

15 So the second decision we'd like to refer you to
16 is Decision 85-22, another ERCB decision, from 1985,
17 and it was an application made by the Municipal
18 District of Foothills pursuant to Section 34, as it
19 then was, of the Pipeline Act.

20 So in that case, the MD decided it wanted to
21 upgrade a secondary road, and that entailed widening
22 the road right-of-way from 30 to 40 metres. So as
23 stated by the Board's decision in Section 1.3:
24 (as read)

25 Due to this upgrading, the vault is -- [this
26 is a vault in which there was equipment for

1 the pipeline] the vault is now located well
2 within the road right-of-way, and the
3 proposed road profile would result in the
4 pipeline being partially exposed in the
5 ditch. Although the parties agreed that the
6 pipeline needed to be lowered and the vault
7 removed, no agreement on the matter of costs
8 could be negotiated. This impasse on cost
9 sharing could not be resolved by the parties
10 and resulted in the MD submitting an
11 application to the Board requesting a Board
12 direction under Section 34 of the Pipeline Act.

13 So I pause here to note that this completely undermines
14 the position of Plains and Pembina that there must be a
15 dispute on the need for the work and that a
16 disagreement on costs only does not engage the
17 Regulator's jurisdiction.

18 Clearly that's not true. In Decision 85-22, there
19 was no dispute on the need for the work and basically
20 what that work entailed, which was lowering the
21 pipeline. The only dispute was on costs, yet the ERCB
22 heard the application and rendered a decision.

23 So moving, though, on in the decision. In
24 Section 3.2, the Board summarized the position of the
25 pipeline operator, which was Canadian Western Natural
26 Gas, or CWNG, as follows: (as read)

1 CWNG stated that lowering was necessary only
2 to accommodate the levels of the proposed
3 road ditch. It pointed out that it was
4 CWNG's policy ("policy") to require municipal
5 districts to pay for pipeline alterations
6 made necessary by road improvements; however,
7 in this case, because the pipeline will be
8 lowered to conform to current standards, CWNG
9 indicated that it was willing to pay half the
10 costs of lowering the line even though it
11 believed there was no legal obligation to do
12 so.

13 And in Section 4, the Board stated its conclusion:
14 (as read)

15 The Board agrees that CWNG should bear the
16 cost of lowering the pipeline across the
17 original 20-metre road right-of-way but that
18 the MD should assume the cost of alterations
19 imposed on the pipeline outside the original
20 road right-of-way. The Board accepts that
21 the cost of lowering below the original road
22 right-of-way is about equal to the cost
23 involved in the work beyond the original
24 20-metre road right-of-way. Accordingly,
25 each party should bear half the cost.

26 So, again, in our submission, two very important points

1 arise from this decision. Firstly, it's a second
2 example of where the pipeline owner agreed to cost
3 share contrary to Plains and Pembina's position that it
4 has always and forever been the practice that the party
5 requesting the alteration pay. Secondly, and most
6 importantly, the Board did, in fact, order cost
7 sharing.

8 So Pembina and Plains and -- and, I would say, in
9 particular, Keyera submit in their written materials
10 that granting Qualico's application will set some kind
11 of earth-shattering precedent. And, in response, we
12 say, no, it will not. It has been done before, and you
13 can do it again.

14 The third case I will very briefly refer to is the
15 City of Calgary case, which is Decision 2011 ABERCB 29,
16 and that one involved the relocation of a pipeline to
17 accommodate a road widening, and that was at
18 52nd Street South East here in Calgary.

19 Now, while parties ultimately reached agreement
20 and the ERCB did not have to deal with cost sharing,
21 the Board did find that relocating the pipeline to
22 accommodate the road widening was in the public
23 interest. And I -- so I think you can see a parallel
24 that you have to widen the road, there's a -- there's a
25 dispute about whether a pipeline needs to be altered or
26 relocated. In this decision, the ERCB had no problem

1 finding that it was in the public interest to relocate
2 the pipeline to accommodate road widening within a
3 city.

4 Finally -- and I can deal with this one quickly
5 too -- there is the case of Douglas and Dorothy
6 Hollands' Section 33 application for pipeline removal,
7 and that's Decision 2014 ABAER 3. This one was only
8 concerned with relocation, not cost sharing. The
9 applicants were private landowners near Leduc. They
10 argued that an existing pipeline had sterilized
11 20 acres of land on the east side of their property and
12 submitted that this impeded development which was
13 projected for industrial and urban growth.

14 Somewhat like the Town of Sundre case, the
15 application was denied on the basis that the Hollands
16 had provided insufficient evidence to support the need
17 for relocation because the AER was not satisfied that
18 there were any clear development plans. It noted that
19 the ASP, area structure plan, for the area had not yet
20 been approved, and the -- the AER stated: (as read)

21 In the absence of any clear plans, the Panel
22 is unable to determine whether the pipeline
23 is incompatible with area development. The
24 Panel believes that to relocate the pipeline
25 at this time would be premature.

26 So, again, like the Town of Sundre, it was simply that

1 the development plans which were the basis for the
2 request to relocate were premature, and, again, that
3 can be completely factually distinguished from our case
4 where the development plans are actually happening.

5 So Qualico submits it's very clear from this
6 review of these four precedents from the 'A' -- ERCB
7 and the AER that there is nothing extraordinary or even
8 unusual about Qualico making an application under
9 Section 33 of the Pipeline Act and seeking cost
10 sharing, nor, as Pembina and Plains seem to think, is
11 Qualico asking for some new "rule" to be established.

12 So, as we understand the submissions of our
13 friends, they seem to believe that Qualico is asking
14 that the AER issue a ruling that henceforth and in all
15 cases there must be cost sharing. We are not asking
16 for that.

17 As noted by Ms. Anderson of UDI in her testimony
18 at transcript page 218: (as read)

19 The Edmonton Metro Region contains the
20 highest density of pipelines of any major
21 metro area in North America.

22 We're not asking for some new blanket rule that would
23 apply everywhere in the province; rather, what we are
24 asking is that the Regulator find that where, as here,
25 pipeline alteration work is required to accommodate
26 pressing and substantial growth in urban periphery

1 areas such as Horse Hills in Northeast Edmonton and
2 Orchards and Mattson in Southwest Edmonton, that in
3 that -- in these specific circumstances, cost sharing
4 is appropriate.

5 It's appropriate because there is a public
6 interest in facilitating growth that is expressly
7 called for by the City's land use planning documents,
8 just as there is a public interest in the
9 continued safe transportation of oil and gas.

10 So, again, I want to be clear. Qualico and the
11 Developers Group are not asking for some new general
12 rule that would apply across the province. We -- we
13 do expect that your decision in this case, should you
14 order cost sharing, will set a precedent for these
15 types of situations, high growth urban periphery. But,
16 in our submission, such an order will not affect in any
17 way the majority of pipeline crossings in Alberta on
18 agricultural land and in the more remote parts of the
19 province.

20 So that brings me, then, to the question of public
21 interest, and as the Commission knows --

22 THE CHAIR: Mr. Fitch, sorry to interrupt
23 you. I just want to do a time check since we indicated
24 a 10:15 break.

25 G. FITCH: Sure. I'm --

26 THE CHAIR: If you wish to continue,

1 that's okay, but if you have an hour, as contemplated
2 previously, we may want -- is this a natural break for
3 you?

4 G. FITCH: Well, it -- it -- it could be,
5 but I -- I -- my preference, if it's all the same for
6 the Panel, is just to finish in one go. I -- I'm not
7 going to be another hour. Probably another half hour
8 to 40 minutes would be my guess. But I'm in your
9 hands.

10 THE CHAIR: Let me check with our court
11 reporter.

12 How are you doing? Do you need a break?

13 THE COURT REPORTER: I'm all right.

14 THE CHAIR: You're okay.

15 Okay. Carry on.

16 G. FITCH: All right. Thank you.

17 So, as I said, I'm going -- I'm going to finish
18 our substantive submissions directly addressing the
19 issue of public interest. As the record is clear,
20 Qualico retained Mr. Morrison of Stantec, who provided
21 some expert reports on this issue, and Pembina, Plains,
22 and SECURE retained Dr. Makholm of NERA to provide
23 reports, also on the public interest.

24 So I'm going to just briefly talk about
25 Mr. Morrison and his evidence. Plains and Pembina have
26 in their written materials prior to the hearing and

1 then, of course, in their cross-examination, obviously,
2 tried to discredit Mr. Morrison. But, in our
3 submission, the key points in Mr. Morrison's evidence
4 remain unimpeached.

5 So what are those key points? Firstly, when
6 considering the public interest, the AER should
7 consider equity as between the parties, Qualico on the
8 one hand, Pembina and Plains on the other. When the
9 AER is thinking about equity, it should remember that
10 the developer -- actually, Qualico's predecessor,
11 Walton -- has already accommodated the pipelines in the
12 design of the neighbourhood.

13 For example, you heard Mr. Dal Bello testify that
14 Meridian Street was actually raised to ensure the
15 design in the design was raised to ensure that there's
16 correct depth of cover over the pipeline. And that was
17 to remove the need for relocation. So that was
18 Mr. Dal Bello's evidence.

19 And then Mr. Gerein testified that: (as read)

20 There are areas of the NSP that are
21 constrained by the existence of pipelines
22 that will ultimately have a net -- negative
23 impact on the developability or of the
24 salability of certain parcels of land ...

25 That was transcript page 48.

26 So the point is -- is that when you're thinking

1 about the relative positions of Qualico on the one hand
2 and Plains and Pembina on the other hand, Qualico has
3 already paid, in one respect, for the constraints
4 imposed -- the constraints on development imposed by
5 these pipelines.

6 Another factor, we submit, the Hearing
7 Commissioners should -- should think about is ability
8 to pay, like the impact of a cost-sharing order. It is
9 clear from Exhibit 95.01, which is the Pembina 2023
10 annual report excerpt, and Exhibit 96.01, which is the
11 Plains investor presentation, that -- that these are
12 billion-dollar corporations and they can afford to
13 contribute to pipeline crossing costs, and these
14 protests that you've heard that cost sharing will
15 materially impact these companies and cause chaos are
16 not credible and not believable.

17 So another critical point Mr. Morrison makes that
18 we urge upon the Commission -- or -- sorry -- the
19 Regulator is that the public interest is not just or
20 even primarily about who was there first, as
21 Dr. Makholm seems to think. And the principal reason
22 why this is the case is that the context has changed so
23 dramatically since the pipelines were first constructed
24 in the late 1960s and early 1970s.

25 And I -- I want to be clear on one point because I
26 think, admittedly, it was unclear in earlier written

1 evidence. Neither Qualico nor Mr. Morrison take
2 issue with the amount of compensation awarded to the
3 landowner 50 years ago. Whether the landowner received
4 fair compensation 50 years ago, as I say, we don't
5 dispute that, but that's not the point. This is the
6 point. Having regard to the dramatic change in
7 circumstances -- so it was just this undeveloped
8 farmland in 1970 on the periphery of the
9 city of Edmonton, not far from the TUC, but that's what
10 it was then. Having regard to what it is now and the
11 incredible change in circumstances, what Mr. Morrison
12 was saying, is saying, that what was paid then has
13 turned out to be a fraction of the impact that the
14 pipelines are having today, as measured, for example,
15 by crossing costs of between half a million to a
16 million dollars.

17 Mr. Morrison correctly, in our submission,
18 characterizes Plains' and Pembina's position based on
19 first-in-time, first-in-right as basically being: We
20 paid fair market value for our right-of-way 50 years
21 ago, and that absolves us forever from having to pay
22 for future costs associated with the pipeline. And we
23 and Mr. Morrison disagree.

24 Now, Plains and Pembina criticized Mr. Morrison
25 for suggesting that anyone could have foreseen 50 years
26 ago the development that is occurring today, but, as

1 Mr. Gerein testified, the Horse Hills area was annexed
2 into the city of Edmonton in 1982, and future
3 development and urban growth in this very area has been
4 anticipated for a long time, likely 50 to 60 years.
5 And that was transcript page 45.

6 What Mr. Morrison is saying and what Qualico
7 submits is correct is that Plains and Pembina
8 effectively want a get-out-of-jail card in perpetuity.
9 We never will have to ever pay for any crossing costs
10 or costs associated with the impact to our pipelines in
11 perpetuity as long as we have our right-of-way
12 agreement. And we submit that is both incorrect in law
13 and cannot possibly be in the public interest. In the
14 particular circumstances of this case where the
15 surrounding land use has changed so dramatically, that
16 can't be right and is not right.

17 Now, Dr. Makholm, by contrast, gave testimony that
18 I am going to characterize as hard to comprehend at
19 times and -- and sometimes even somewhat bizarre. For
20 example, he suggested that cost sharing might lead to
21 these pipelines becoming rate-regulated. I'm not sure
22 where he came up with that opinion, but that was at
23 transcript page 476 and 477.

24 He acknowledged or -- yeah, he acknowledged under
25 cross-examination that in his report he criticized
26 Mr. Morrison for saying that the AER has not

1 established a definition of what "public interest" is,
2 but then he said the same thing himself. He
3 acknowledged that he "overstated" his criticism that
4 Mr. Morrison said, according to Dr. Makholm, that the
5 AER must inherently become involved in a matter between
6 private parties. He acknowledged that, in fact,
7 Mr. Morrison never said any such thing.

8 He claimed that NERA was not here to give
9 direction to the Regulator on their public interest
10 mandate when that is precisely why he was retained and
11 what he has been doing. He claimed that if cost
12 sharing were ordered, pipeline companies will not be
13 able to raise capital in financial markets. Again, I'm
14 not sure where that comes from, but that was at
15 transcript page 488 to 489. I mean, talk about an
16 overstatement.

17 Dr. Makholm's position on public interest, as far
18 as I was able to figure out, seemed to be based on what
19 he described as "cost causation". That is public
20 interest favours Qualico paying the crossing costs
21 because they are caused by Qualico. I've already
22 addressed this, and the answer is, no, they are not
23 caused by Qualico. They are caused by urban growth and
24 the pressure to develop affordable housing in the
25 city of Edmonton.

26 When Dr. Makholm wrote his report, he stated that

1 Qualico was asking Plains and Pembina to share in the
2 cost of reinforcing pipelines which cross Qualico's
3 land. When I pointed out to him on cross-examination
4 that the crossing is on City land, not Qualico land,
5 his response was: (as read)

6 Public land, public road. You were right to
7 bring that up with Mr. Telford and
8 Mr. Romanesky. I don't know.

9 That was at transcript page 486 - 87.

10 In his report, he stated that the requirement to
11 reinforce pipeline crossings is a local authority
12 requirement. When I pointed out that, no, it's
13 actually a requirement of the Pipeline Act and rules,
14 his response was, "I don't really care". And that was
15 at transcript page 487.

16 I then pressed him on whether he understood that
17 it is the City of Edmonton that requires that arterial
18 roads be constructed and that the roads will be public
19 roads. I asked him this: (as read)

20 Q What I'm asking you, sir, is: If the
21 City were the proponent of this road
22 and, therefore, it was the City that had
23 to obtain the crossing and get the
24 crossing done by Plains and Pembina,
25 would that affect your public interest
26 analysis?

1 A No.

2 That's at transcript page 496.

3 In our submission, it can't be any clearer than
4 that. Dr. Makholm has an incredibly narrow and
5 exclusively economic conception of public interest
6 which, not coincidentally, entirely favours his
7 clients, and it should be rejected by the AER. This
8 is not a rate hearing. That's where Dr. Makholm has
9 experience and expertise.

10 Not only did Dr. Makholm refuse to acknowledge the
11 obvious public interest elements to this dispute, he
12 had no answer to the evidence of Qualico and the
13 Developers Group that crossing costs will end up
14 getting passed on to homeowners.

15 So, again, during cross-examination, and this was
16 at paragraph -- or -- sorry -- pages 493 of the
17 transcript, I asked: (as read)

18 Q You've heard the evidence of Qualico and
19 the Developers Group; correct?

20 A Yes, we have.

21 Q And so you know that every single
22 developer has said these costs will get
23 passed on to the homeowners. Do you
24 just not believe this evidence? Do you
25 think it's false?

26 A That's not why I'm here.

1 [And then a little further.]

2 Q Are you saying that -- notwithstanding
3 what the developers have all said, are
4 you saying these costs will not get
5 passed on to homeowners, and, if so,
6 what is the basis for that statement?

7 And then after a brief objection from my friend, he
8 provided this answer: (as read)

9 A It's not my conclusion that any of those
10 individual developers have market power
11 in this province.

12 Wow. I -- I -- I don't really know what that answer
13 means. All I know is that it didn't answer the
14 question.

15 The fundamental fact is that Dr. Makholm fails to
16 address one of the most important public interest
17 considerations in this case, which is the impact of
18 pipeline crossing costs on housing affordability.

19 The evidence of Mr. Fjeldheim, which was somewhat
20 confirmed by Mr. Romanesky, is that if developers are
21 required to pay 100 percent of all arterial road
22 crossing costs in the Horse Hills basin, this could
23 lead to an increase in per-unit prices of a thousand
24 dollars. Mr. Romanesky's math was \$670, but there, you
25 know, you have a range. And that's for arterial roads.

26 Mr. Fjeldheim further testified that there are

1 likely over 100 local road crossings in Horse Hills.
2 And local roads, like arterial roads, will be
3 City of Edmonton roads. Their right-of-ways will be
4 public. And Mr. Fjeldheim testified that if you factor
5 those crossings in, the cost per housing unit could
6 increase by as much as \$3,000 per property. In our
7 submission, this is a critical public interest
8 consideration that must be taken into account by the
9 AER and which was completely ignored and dismissed by
10 Dr. Makholm.

11 So maybe it's obvious, but I want to talk about it
12 anyways. What is Qualico and what are the Developers
13 Group asking for here in this application? As I said
14 at the outset, the application asks for a cost sharing
15 on a 50-50 basis. And we acknowledge there's no
16 quantitative analysis supporting that, and there's no
17 quantitative analysis because the cost sharing -- or --
18 sorry -- the cost information from the pipeline
19 operators is so unreliable that we -- it's impossible,
20 really, to give a quantitative analysis.

21 As I said at the outset, really, our -- our
22 position on -- in the application that it should be
23 shared 50-50 is based on the fact that both
24 activities -- so continued safe transportation of oil
25 and gas on one hand and development of new affordable
26 housing on the other, both of these are in the public

1 interest.

2 So where does this leave us? Well, at the
3 conclusion of Qualico's evidence on the first day of
4 the hearing, the Chair asked the Qualico witness panel
5 about potential terms and conditions in an order. And
6 after caucusing for a moment, the response provided was
7 basically, We agree that protection of the pipeline is
8 of utmost importance, but we also believe that the --
9 that this -- sorry -- that that is the area of
10 responsibility that lays directly with the pipeline
11 company.

12 So our thoughts on this matter are that if we were
13 to be granted pipeline crossings to facilitate
14 community growth and neighbourhood development, that
15 any upgrades to the road surfaces and the engineering
16 that's required to spread out the load to protect the
17 pipeline, that would be taken on by the development
18 industry. Any upgrades and replacements to existing
19 pipelines that would -- and that would include bringing
20 it up to CSA requirements and all the rest of that,
21 that should remain with the pipeline companies.

22 So it is the position of Qualico and the
23 Developers Group that this represents a principled and
24 conceptually logical approach to analyzing the sharing
25 of costs between pipeline companies and the development
26 industry in areas of significant new urban growth.

1 Before wrapping up, I just want to briefly address
2 the status of the Plains pipeline crossing at
3 172nd Avenue. So this is the one that -- excuse me --
4 ended up getting constructed by Marquis JV Limited,
5 which, of course, was the joint venture established by
6 MLC Group.

7 Our position is it's part of this application. If
8 you order cost sharing with respect to the 167th Avenue
9 crossings, you should also order cost sharing with
10 respect to the 172nd Avenue crossing.

11 So Mr. Nicholas -- thank you. Mr. Nicholas of the
12 MLC Group testified to this point, and this was at
13 transcript page 232: (as read)

14 Q Can you describe for the Hearing
15 Commissioners the circumstances
16 surrounding the alteration work that was
17 completed at that intersection?

18 A Our joint venture called Marquis JV
19 Limited, we entered into an agreement
20 with Plains who completed the work in
21 order to proceed with development.
22 Marquis paid for the crossing under
23 protest, understanding it would be
24 encompassed by Qualico's application.
25 Again, it was out of necessity because
26 the crossing is right across the

1 entrance to our neighbourhood.

2 So, in other words, what happened is Plains took the
3 same position with Marquis JV Limited as it has with
4 Qualico and all the other developers, which is that in
5 order to do the work, Marquis JV would have to pay
6 100 percent of the costs. Because it needed to get on
7 with its development, it had no choice, and it agreed.
8 But that agreement in no way changes the position of
9 Qualico, the position of the members of the Developers
10 Group, including Marquis JV and the MLC group, that the
11 cost of the alteration work should be shared.

12 And -- and MLC Group and MG -- MJ -- sorry --
13 Marquis Joint Ventures did not need to bring their own
14 Section 73 application because the 172nd Avenue
15 crossing was -- was, at the time they did the work,
16 already in front of the Regulator as part of Qualico's
17 application. So it is -- the question of cost sharing
18 at 172nd Avenue is not moot, as my friends will
19 undoubtedly suggest, and if cost sharing is ordered
20 with respect to the crossings at 167th Avenue, it
21 should also be ordered with respect to the 172nd Avenue
22 crossing.

23 So, in conclusion, I would like to bring us all
24 back to the first day of the hearing. It is a matter
25 of record. It's not disputed that Qualico was directed
26 to bring this application to the Regulator pursuant to

1 Section 33 of the Pipeline Act by the ARA steering
2 committee.

3 So Qualico had a witness from the ARA steering
4 committee on its panel, Mr. Fjeldheim. So I asked
5 Mr. Fjeldheim at transcript page 21: (as read)

6 Why did the ARA steering committee give that
7 direction?

8 And his answer was: (as read)

9 The ARA steering committee at the time was
10 getting multiple requests for pipeline
11 crossings to be included as a cost in the
12 arterial road levy, and while the committee
13 has accepted these costs in the past, the
14 costs of the more recent requests were
15 substantially higher. The committee is used
16 to seeing costs in the area of 15 to \$20,000
17 per crossing, but the new requests were in
18 the hundreds of thousands and even millions
19 of dollars.

20 And this particular case with Qualico,
21 it is in what's known as the Horse Hills area
22 structure plan in Northeast Edmonton. In
23 that plan, there are 45 arterial road
24 crossings. If each crossing is now expected
25 to average \$800,000, that would add
26 \$35 million to the levy, which would increase

1 the levy by about 10 percent or about \$1,000
2 per housing unit.

3 Also in the Horse Hills area structure
4 plan, there are likely over 100 local road
5 crossings. They have not been planned yet,
6 but just given the neighbourhood layouts,
7 that's probably a conservative estimate. So
8 if all of those crossings are also included,
9 we're talking about \$3,000 per housing unit.

10 And so given my experience with
11 Section 33 applications and the fact that
12 affordable housing is very much in the public
13 interest, the committee requested that
14 Qualico pursue an application to the AER.
15 The appeal was meant to set a precedent for
16 all developers in the area and the Edmonton
17 region.

18 So, in a nutshell, that's why we're here, because of
19 this concern among developers in the working --
20 actively working in the greater Edmonton area that
21 these costs -- when you consider all the neighbourhoods
22 that are either under development now or will shortly
23 become under development, that these crossing costs are
24 going to become significant, they are going to add to
25 the costs of the -- the per-unit cost of homes, and it
26 is going to affect affordability. There is no reason,

1 in our submission, to disbelieve the evidence of
2 Qualico and the Developers Group that pipeline crossing
3 costs are ultimately passed on to homebuyers.

4 As stated by Mr. Fash of BILD Alberta,
5 developer -- developers recover increased costs through
6 the sale price of the lot, and the builder recovers
7 costs through the sale of the home. The ultimate
8 consumers of housing, often first-time homebuyers, in
9 the context of suburban communities like Horse Hill,
10 they bear the ultimate price.

11 Similarly, there is no reason to disbelieve
12 Mr. Fash's evidence that the lack of responsiveness on
13 the part of pipeline operators in processing crossing
14 applications leads to delays. It leads to lost
15 construction seasons which are already short in our
16 northern climate. There's no reason to disbelieve his
17 evidence that lost construction time results in a
18 reduction of the supply of housing units and that if
19 supply does not meet demand, housing prices go up.

20 There's no reason to disbelieve Mr. Fash's
21 evidence that delays also lead to additional financing
22 costs incurred by developers and that where those
23 financing costs become significant, developers may
24 cancel a project altogether, and that, again, will
25 affect market supply and, thus, overall housing prices.

26 And, finally, there's no reason to believe

1 Mr. Fjeldheim's evidence that his company,
2 TAG Developments, had been required, had been asked, by
3 Pembina to pay \$3.2 million to cross a pipeline in
4 order to develop 32 lots and that this would have
5 cancelled the project. And that's at transcript page
6 PDF 18.

7 Qualico submits, having regard to all of this
8 evidence adduced in this proceeding, we have
9 demonstrated that alteration of the Plains and Pembina
10 pipelines is in the public interest and that an order
11 directing that Plains and Pembina contribute to the
12 cost of the alteration work is, in all the
13 circumstances, fair and equitable and in the public
14 interest.

15 And that concludes the closing argument of
16 Qualico. Thank you very much. I'm more than happy to
17 take any questions the Commissioners may have.

18 THE CHAIR: Thank you, Mr. Fitch. Just a
19 clarification for the record. So that was Qualico and
20 Developers Group?

21 G. FITCH: Correct.

22 THE CHAIR: Thank you.

23 Thank you very much, Mr. Fitch. So we --
24 depending on -- we have one hour. At this point we
25 will take a break because I'm sure others in the room
26 would like a break. We may, may not, have questions

1 for you at this point.

2 I'll say 20 minutes' break because it's too early
3 for lunch, and then we will go to -- after questions
4 from you, if we have any, we'll go to Brookfield and
5 then have lunch after if that works for everyone.

6 Yeah. Okay. So it seems like somebody has fixed
7 our clocks here, so 10 past. Is that reasonable,
8 20 minutes?

9 G. FITCH: Yes. Thank you.

10 THE CHAIR: Thank you.

11 (ADJOURNMENT)

12 THE CHAIR: Thank you very much. Please
13 be seated.

14 Mr. Fitch, we have one question for you, this
15 Panel, and the question is -- there has been concerns,
16 and you mentioned it in your argument, about
17 transparency and predictability. Now, if this Panel
18 were to make -- direct the work or issue an order, how
19 would this Panel might, in your view, address those
20 questions?

21 G. FITCH: Thank you.

22 So if the Regulator issues an order for cost
23 sharing of the -- at the specific crossings that are
24 the subject of this application -- well, firstly, we
25 know that the 172nd Avenue crossing is built, so that's
26 not a concern.

1 With regard to the 167th Avenue crossing -- and
2 I'll give my answer, and I'll just make sure my client
3 is in agreement, but my expectation is if there's an
4 order from the Regulator that the pipelines be altered
5 and an order on cost sharing, our expectation is that
6 Plains and Pembina would, of course, comply with the
7 order. So I don't think there would be any timeliness
8 issue in relation to the compliance with the order.

9 With respect to costs -- so I think, probably, the
10 fair way to characterize the evidence is that both
11 Pembina and Plains would need to have a fresh look at
12 what the costs would be for each crossing, and,
13 certainly, Qualico would appreciate it if the Regulator
14 were to provide some direction to Plains and Pembina
15 about the sharing of enough information to Qualico such
16 that Qualico as a commercially reasonable entity could
17 satisfy itself that the costs are appropriate. Because
18 even if -- I mean, if there's cost sharing, Qualico is
19 going to pay some amount, so it's either, you know,
20 some percentage of a million dollars, or maybe it's
21 some percentage of \$500,000. Qualico would still like
22 to get some direction from the Panel, who -- who have
23 heard all the evidence, about the level of cost
24 information which it would be appropriate for the
25 operators, the pipeline operators, to share with the
26 developers so the developers can satisfy themselves

1 that, yes, these costs seem reasonable. We will pay
2 our share.

3 Does that answer your question?

4 THE CHAIR: It does.

5 But if you wish to check -- just -- I'm mindful
6 that you also have the reply opportunity. If you want
7 to check and address it then, or you can -- after the
8 other parties have ...

9 G. FITCH: No. I think Mr. Gerein has
10 confirmed that -- that my response is satisfactory from
11 Qualico's perspective.

12 THE CHAIR: Wonderful. Thank you.

13 G. FITCH: Thank you.

14 THE CHAIR: And that's our question for
15 you and Qualico. Now, next on the agenda -- thank you
16 very much.

17 Next on the agenda we have Brookfield.

18 Final Submissions by E. Dixon

19 E. DIXON: Good morning, Madam Chair,
20 Panel Members, and Panel staff. I am pleased to be
21 here today to present the final argument of Brookfield
22 Residential Alberta LP, which I will refer to as
23 "Brookfield" throughout this final argument in respect
24 of this matter.

25 At the outset, I just wish to advise the Panel
26 that representatives of Brookfield, Mr. Tingle and

1 Ms. Martin, are in attendance, and I am advised that
2 they have a hard stop at noon, so I have advised them
3 that they can leave, and I just want to let the Panel
4 know so that they don't think that there's anything I'm
5 saying that they disagree with or that they are
6 concerned with the direction things are going.

7 So if -- in the event my friends get up and leave,
8 that's simply because they have another commitment, and
9 it is not indicative that they're not interested in
10 this proceeding or that they disagree with what I am
11 saying.

12 So given that my friend Mr. Fitch has accurately
13 set out the procedural history that has led us to this
14 proceeding, I will not repeat it here in my final
15 argument. Suffice it to say, we agree with Mr. Fitch's
16 recitation of the facts that have led us here and the
17 fundamental issues that are at play.

18 However, at the outset, I do think it's important
19 to note that pursuant to Subsection 34(2) of the
20 Alberta Energy Regulator Rules of Practice where the
21 Regulator sets a reconsideration down for a hearing,
22 all the rules concerning hearings on applications, as
23 set out in Part 2 of the Rules of Practice, apply to a
24 reconsideration hearing. In other words, a
25 reconsideration hearing is to be conducted no
26 differently than had the Regulator originally set

1 Qualico's application down for a hearing.

2 So why is Brookfield here? Brookfield elected to
3 participate in this -- in this proceeding because the
4 issues that are being dealt with in this proceeding are
5 of fundamental importance to Brookfield individually
6 and as a member of the broader development industry.

7 This proceeding is of obvious importance to the
8 pipeline industry as well as the municipalities who are
9 seeking to grow and expand to accommodate population
10 growth in furtherance of their municipal growth plans.

11 As stated succinctly by Mr. Westren of Brookfield
12 in his direct evidence, Brookfield has a vested
13 interest in the outcome of this proceeding, has been a
14 party to similar negotiations with pipeline companies
15 regarding proposed relocations and crossings, and fully
16 supports Qualico's application.

17 Brookfield believes the developers and pipeline
18 operators need to exist and coexist. Indeed, the
19 development of new housing and commercial properties
20 together with the safe and orderly operation of vital
21 infrastructure, like pipelines and other utilities, are
22 the collective backbone of what it means to build a
23 community.

24 Through its evidence, Brookfield has been clear
25 that it is not seeking to avoid all costs associated
26 with pipeline relocations; rather, Brookfield advocates

1 for an equitable division of costs based on the
2 significant public interest served by both industries.
3 In Brookfield's submission, this objective can only be
4 accomplished by a positive decision from the AER in
5 this proceeding, confirming the availability of a
6 regulatory remedy when pipelines must be relocated or
7 altered to allow land development.

8 Brookfield is seeking a decision which recognizes
9 the inherent public interest of the activities of land
10 development, particularly when land developers are
11 acting in furtherance of municipal planning and
12 development requirements, which is frequently the case
13 when dealing with the construction or upgrading of
14 municipal road infrastructure.

15 Brookfield submits the evidence before the Panel
16 supports the following conclusions: The decision under
17 reconsideration was both detrimental and wrong at law,
18 and the AER should vary the decision and grant the
19 orders requested by Qualico. Granting the orders
20 requested by Qualico would be in the public interest of
21 all Albertans.

22 That it is imperative for the AER to establish a
23 workable precedent that recognizes the public interest
24 provided by land developers and pipeline operators in
25 order to level the playing field in negotiations of
26 future roadway crossings between land developers and

1 pipeline companies. This will assist parties like
2 Brookfield and Qualico and the other land developers
3 involved in this proceeding as well as the pipeline
4 companies in moving development projects ahead in a
5 predictable and timely manner.

6 Brookfield believes there are a number of systemic
7 issues which underlie the interactions between pipeline
8 companies and land developers when negotiating pipeline
9 crossings that can only be remedied through regulatory
10 guidance issued by the AER. My argument will canvass a
11 number of these factors that Brookfield believes
12 supports the conclusion that the AER should grant
13 Qualico's application.

14 Through this proceeding, Brookfield submits that
15 the evidence has demonstrated that the current system
16 is broken. Although Brookfield and the other
17 developers are competitors in business, their evidence
18 in this proceeding has been remarkably consistent in
19 their description of the respective interactions with
20 the pipeline companies and how these interactions have
21 impacted their respective projects.

22 The evidence provided by Brookfield and the
23 Developers Group provides important factual context for
24 the AER to consider in making its determination of what
25 is in the public interest. The evidence in this
26 proceeding has established the significant difficulties

1 that have more recently characterized the interactions
2 between the pipeline companies and land developers in
3 the context of new development in the Edmonton area and
4 the work that is being undertaken in furtherance of
5 municipal planning objectives and pursuant to
6 directions from the City of Edmonton.

7 Brookfield and other land developers are
8 frequently faced with one-sided negotiations and an
9 unfair cost split for pipeline work related to the need
10 to build the roads and infrastructure that are both
11 integral to the safe development of communities and
12 mandated by municipal authorities.

13 Given that developers and pipeline operators both
14 have a vested interest in safely building or rebuilding
15 these pieces of vital infrastructure that move both
16 people and the petroleum products people rely on to
17 fuel their daily life, in an ideal world, the pipeline
18 companies and the developers would be able to work
19 together collaboratively to serve the broader public
20 interest inherent in both undertakings.

21 Unfortunately, the current position of the
22 pipeline companies completely ignores the important
23 public interest served by land development, including
24 that much of the work is municipally directed and
25 sanctioned. This opposition is based on the pipeline
26 companies' narrow of -- interpretation of the

1 first-in-right principle and the rights that they
2 purport to hold under their respective right-of-way
3 agreements.

4 The inequality of bargaining power and dysfunction
5 that has characterized the relationship between the
6 pipeline companies and the developers has essentially
7 come down to a take-it-or-leave-it proposition, which
8 is reflected in the pipeline companies' unified
9 position that they will not undertake any work to
10 accommodate what they have described as a
11 "second-in-time counterparty" without an agreement that
12 said party pay 100 percent of the cost of the work and
13 without any ability for the counterparty -- in this
14 case, the developers -- to assess the reasonableness of
15 the work or the associated costs.

16 The increasingly acrimonious relationship between
17 the pipeline companies and developers such as
18 Brookfield was borne out in the testimony of
19 Brookfield's witness Mr. Tsoukalas, who spoke to
20 Brookfield's experience of having the pipeline
21 companies use proximity agreements and other routine
22 agreements as leverage in negotiations regarding
23 pipeline crossings, including having cancelled an
24 agreement after Brookfield indicated it would seek
25 recourse to the Regulator regarding at -- its project
26 at The Orchards. That can be found at transcript

1 page 276.

2 Mr. Dal Bello also indicated both Qualico and MLC
3 encountered similar issues relating to the cancellation
4 of routine proximity and other related agreements as
5 those described by Brookfield. And that can be found
6 at transcript page 31.

7 I'd like to turn to the AER's public interest
8 mandate at the outset because I think it's important to
9 frame things as we move forward. As the Regulator of
10 energy development in Alberta, the AER is mandated to
11 provide for the efficient, safe, orderly, and
12 environmentally responsible development of the energy
13 resources in Alberta.

14 The AER's public interest mandate with respect to
15 pipelines, including the assessments required by this
16 application, are expressly provided for in
17 Sections 4(a) of the Pipeline Act as well as the
18 express language of Section 33 of the Pipeline Act.

19 Additionally, the AER has broad authority to do
20 all things that are necessary for or incidental to
21 carry out any of its functions or duty.

22 In addition, the AER has extremely broad
23 rulemaking authority under Section 3 of the
24 Pipeline Act. In this case, the Regulator is tasked
25 with making a determination of the public interest
26 based on the evidence presented during this proceeding.

1 It is clear that the activities of the pipeline and
2 land development industries contribute to the public
3 interest.

4 Brookfield acknowledges that there is a compelling
5 public interest associated with the safe transportation
6 of hydrocarbons via pipeline but that there is an
7 equally important public interest associated with the
8 development of new housing and new development
9 activities that are required more broadly in order to
10 provide much-needed housing for Alberta's growing
11 cities and towns.

12 As set out by Mr. Westren, Brookfield strongly
13 believes there is an intersection between the public
14 good provided by pipelines and the public good provided
15 by land development. And in this proceeding, the AER
16 is tasked with assessing all of the public interest
17 factors and making a decision that aligns with the
18 overall public interest of all Albertans. There is no
19 question the Regulator has the requisite authority to
20 grant the relief requested by Qualico.

21 As was discussed by Mr. Fitch and in a number of
22 the submissions that have been filed during this
23 proceeding, there are relatively few decisions of the
24 AER and its predecessors that have considered a reply
25 to Section 33 of the Pipeline Act. Brookfield submits
26 that the current proceeding is fundamentally

1 distinguishable from many of the previous decisions of
2 the Regulator wherein the Regulator has denied
3 Section 33 applications either on the basis that the
4 application was premature, such as in the Hollands case
5 and the other cases referred to by my friend Mr. Fitch,
6 or in the earlier decision of the -- of the ERCB, in
7 Examiner's Report Application 800416, which considered
8 an application by a landowner of the name Martyshuk,
9 who sought to relocate a gas pipeline on the basis --
10 basis that it would render his ability to construct a
11 homesite on his farmland more difficult, if not
12 impossible.

13 The current application is fundamentally different
14 from more recent decisions wherein the AER concluded
15 there was insufficient evidence to support an
16 application under Section 33, such as in the Voltarix
17 decision which was referred to in the submissions of
18 Qualico.

19 As set out by Mr. Fitch in this case, the
20 development is currently underway. This hearing has
21 provided the AER with a significant and fulsome
22 evidentiary record pertaining to the public interest
23 considerations that are engaged by the application and
24 which arise from the conflict between developments in
25 the periphery of Alberta's urban areas and the
26 extensive network of energy pipeline infrastructure

1 that has been put in place over the years.

2 Throughout this hearing, evidence was provided by
3 the developers in the Edmonton area that the issue of
4 pipeline crossings has become a major issue and,
5 frankly, one that is not going to resolve without
6 regulatory guidance from the AER.

7 While Qualico is requesting that the AER exercise
8 its discretion and make a decision as pertains to this
9 particular application, the rest of the developers,
10 including Brookfield, are here to support Qualico in
11 hopes that a positive decision on Qualico's application
12 will provide much-needed clarity and certainty in the
13 process for facilitating pipeline crossings agreements
14 that includes an equitable cost-sharing formula and
15 accurate and timely disclosure of pertinent information
16 between the parties that recognizes the public interest
17 goals of both parties.

18 For example, Ms. Anderson, who is the CEO of the
19 Urban Development Institute of Edmonton, a nonprofit
20 organization, stated in her direct evidence that the
21 issue of pipeline crossings has been a frequent topic
22 of discussion among UDI's members working in the
23 Edmonton Metro Region, which, as Mr. Fitch alluded to,
24 the Edmonton area contains the highest density of
25 pipelines of any major metro area in North America.
26 In fact, I have seen the Edmonton area be referred to

1 as the "Edmonton transportation and diluent hub" in
2 certain filings or certain publicly available documents
3 relating to the pipeline companies.

4 I think common themes expressed in the testimony
5 provided by the individuals representing the developers
6 include a lack of predictability when it comes to
7 timelines, pipeline alteration costs and sharing costs,
8 as well as a lack of transparency and the asymmetry in
9 access to information with respect to both the cost of
10 investigation, design, and work required, as well as
11 with respect to the age, status, and life cycle of the
12 pipelines in questions.

13 The reason a clear direction is needed from the
14 AER was highlighted by the evidence of Brookfield and
15 the other land developers with respect to the
16 interactions with the pipeline companies in negotiating
17 the pipeline crossings needed to facilitate new
18 development and how the complete lack of transparency
19 in these interactions, coupled with the fact that there
20 is significant active pipeline infrastructure where
21 development is occurring in all of the major growth
22 corridors in Alberta, has made it difficult, if not
23 impossible, for developers like Brookfield to assess
24 the reasonableness of the cost they are being asked to
25 bear.

26 The asymmetry in access to information with

1 respect to the pipelines makes it next to impossible
2 for land developers to conduct the type of due
3 diligence prior to acquiring lands that would be
4 required to account for the potential cost being forced
5 on land developers by pipeline relocations.

6 As Mr. Fitch discussed in argument, with
7 reference, there was, obviously, significant timelines
8 associated with getting -- hearing back from the
9 pipeline operators in many cases, which makes
10 exercising due diligence extremely difficult at the
11 outset.

12 And while there certainly is some information on
13 pipelines available by reviewing a land title and even
14 more substantive information that may be available,
15 this type of information is generally limited to the
16 line size, wall thickness, the material of
17 construction, and substance class.

18 As Mr. Beztilny testified, that information is --
19 is -- is readily available in AbaData or other similar
20 programs. That's about the extent of the information
21 that's readily available from a public perspective.

22 As discussed by Mr. Fitch, the engineering
23 assessments the developers are required to pay for are
24 not typically shared by the pipeline companies, and the
25 age, suitability, and status of the pipelines are not
26 discussed in any detail with the developers or are

1 shared only anecdotally. And even if reports are
2 shared, they may not be shared, even with respect to
3 the same pipeline, as was the case regarding Brookfield
4 and Keyera at its 66th Street crossing, which was
5 discussed at page 581 of the transcripts.

6 All of this places land developers at a -- at a
7 significant disadvantage and, as stated by Mr. Westren
8 in his opening statement, has led to an inequality of
9 bargaining power that exacerbates the relationship
10 between the parties and can lead to bad-faith
11 negotiations.

12 The quantity of current and potential pipeline
13 crossings in the Edmonton region is highlighted by the
14 fact that Qualico and Brookfield are essentially facing
15 identical issues in their interactions with pipelines
16 as part of their developments at both ends of Edmonton,
17 Qualico being active in North Edmonton and Brookfield
18 being active in South Edmonton.

19 Pipelines in Edmonton are ubiquitous. The
20 prevalence of pipelines in the areas being developed
21 means it is simply not possible for land developers to
22 avoid crossing a pipeline as some type of business
23 decision, and this is not a problem that is just going
24 to go away.

25 The cloak of secrecy pipeline companies operate
26 under when negotiating pipeline crossings was on full

1 display during the cross-examination of the
2 Plains/Pembina/SECURE panel, wherein Mr. Sprott, in
3 responding to a question from Mr. Fitch regarding the
4 sharing of information and whether developers in
5 essence had to take it in -- on faith that the cost
6 estimates and scope of work typically provided by the
7 pipeline companies are reasonable and necessary in all
8 cases -- and Mr. Fitch went through this with you
9 before, so I don't intend to repeat it, but the answer
10 provided by Mr. Sprott was, in essence, Trust us.
11 We're engineers.

12 Unfortunately, this exchange is entirely
13 indicative of the attitude that has characterized the
14 unproductive and one-sided discussions between the
15 parties, including that the pipeline companies are
16 typically unwilling to enter into NDAs with the
17 developers in order to share information that is
18 confidential and proprietary, as Mr. Balfour testified,
19 despite such agreements being extremely common in the
20 oil and gas business more generally.

21 And Mr. Fitch referred you to the same passage,
22 and I believe it's the same passage I'm referring to,
23 and that's at pages 360 through 362 of the transcripts,
24 and I won't repeat it here, but I -- I put it to you,
25 Panel, that it would be well worth a read in the
26 process of making your deliberations.

1 Brookfield believes, as set out in its evidence,
2 that certain alterations or upgrades to pipelines that
3 are paid for by developers may benefit the pipeline
4 companies by upgrading aging infrastructure that would
5 otherwise have to be upgraded by the pipeline companies
6 at their own expense. Even if the infrastructure being
7 replaced or upgraded is potentially years away from
8 requiring work, one cannot deny that value is being
9 added to the pipeline at historically zero cost to the
10 pipeline operator. This is the textbook definition of
11 a windfall, regardless of who initiates the crossing
12 discussion.

13 Unfortunately, nothing that has been put on the
14 record in this proceeding has allayed Brookfield's
15 concerns. As pertains to its experience at The
16 Orchards, the evidence in this proceeding confirms that
17 integrity digs were completed by Keyera shortly before
18 the line was upgraded to accommodate the roads needed
19 to advance The Orchards' development.

20 And although Mr. Beztilny attempted to -- to
21 distinguish between protection of the pipeline, as
22 discussed in his direct evidence and under
23 cross-examination, with Keyera's use of the word
24 "upgrade" in its evidence, his explanation did little,
25 if anything, to assuage Brookfield's concerns.

26 Taken together and coupled with the reluctance of

1 the pipeline companies to share relevant information
2 with the developers, despite the fact that developers
3 are required to pay for upgrades, supports Brookfield's
4 concerns.

5 In the case of line replacement, we're dealing
6 with aging infrastructure. Pipeline companies are
7 receiving a betterment, and they should be making
8 contributions accordingly. This practice is accepted
9 in the electrical transmission industry in Alberta,
10 such as in cases of a third-party funded relocation,
11 wherein certain transmission providers credit some
12 value back to the third party, recognizing the
13 betterment to the electrical company's infrastructure.

14 I'd like to turn to the right to quiet enjoyment
15 and the first-in-time principle that has been a great
16 topic of debate in this proceeding. Throughout this
17 hearing, we have heard the pipeline companies'
18 suggestion that the first-in-time principle is, for all
19 intents and purposes, determinative of this
20 application, including the intentional and deliberate
21 use of the term second-in-right party on countless
22 occasions throughout this proceeding.

23 With respect, this is not true. As discussed by
24 my friend Mr. Fitch, in the case of municipal roadways,
25 the roads are owned by the municipalities, pursuant to
26 Section 16 of the Municipal Government Act, and the

1 pipelines in those cases are there for second in right.
2 As such, the principle may be of limited utility.

3 To be clear, the first-in-time, first-in-right
4 principle cited by the pipeline companies is, no doubt,
5 a principle of the Torrens system of land titles in
6 Alberta. Indeed, this principle is codified in
7 Sections 15 and 56 of Alberta's Land Titles Act.

8 However, the mere fact that the pipeline
9 companies' registration was duly noted on title or the
10 fact that the developers may have purchased the land
11 with knowledge of the registration does not mean that
12 the developers cannot seek to rely on specific
13 statutory authority, such as Section 33 of the Pipeline
14 Act.

15 The first-in-time, first-in-right principle, as it
16 pertains to registrations under the Torrens systems,
17 including the registration of pipeline companies'
18 easements, is to provide notice. It is not intended,
19 as suggested by Mr. Beztilny, to provide a chronology
20 or set the stage for anything that's proposed to come
21 next on that land.

22 Similarly, the position advanced by the pipeline
23 companies that the property rights they hold pursuant
24 to their right-of-way are somewhat -- somehow absolute
25 and the right to quiet enjoyment under their
26 right-of-way agreement trumps all does not accord with

1 Canadian property law. And Mr. Fitch discussed this
2 with you this morning, but I do have some additional
3 authority and context I'd like to provide.

4 In Canada, property rights, including the right to
5 the quiet enjoyment of property, are subject to all
6 kinds of limitations and restrictions, a fact that it
7 even acknowledged by Keyera in paragraph 20(c) of its
8 submission, which is Exhibit 72.01.

9 There is no guarantee of property rights in the
10 Charter, and while the 1960 Bill of Rights does affirm
11 the right of individuals to the enjoyment of property,
12 that right is subject to the right not to be deprived
13 thereof, except by due process of law.

14 In *Harrison v Carswell*, a decision of the
15 Supreme Court from 1975, the Supreme Court of Canada
16 stated at paragraph 83 of the decision: (as read)

17 Anglo-Canadian jurisprudence has
18 traditionally recognized, as a fundamental
19 freedom, the right of the -- of the
20 individual to the enjoyment of property and
21 the right not to be deprived thereof of any
22 interest therein, saved by due process of
23 law.

24 Brookfield submits that an examination of the
25 legislative and regulatory scheme governing the oil and
26 gas business, including how pipeline companies can

1 acquire the rights-of-way needed for a pipeline, is a
2 powerful illusion of statutory limitations on property
3 rights or an interference with the enjoyment of
4 property by due process of law using the language from
5 the Supreme Court case I just referred to.

6 In Alberta, the Land and Property Rights Tribunal
7 and its predecessors routinely grant right-of-entry
8 orders to allow resource extraction activities, such as
9 the drilling of a well, the construction of a pipeline,
10 or to facilitate the construction of electrical
11 transmission infrastructure.

12 The activities for which a right-of-entry may be
13 made are delineated at Section 12 of the Surface Rights
14 Act, and the Alberta Courts have made it clear that
15 once a licencing authority, such as the AER or the AUC,
16 as the case may be, has issued a permit or licence to
17 the operator, and, provided that the operator meets the
18 technical requirements of the Surface Rights Act and
19 regulations, that the tribunal has very limited
20 discretion to refuse to grant a right-of-entry order.

21 Indeed, the role of the Surface Rights Board, as
22 it pertains to right-of-entry orders, has been
23 judicially described as, in essence, a "rubber stamp".
24 And I quote that from paragraph 34 of the
25 Mueller v Montana Alberta Tie Line case, citation being
26 2011 ABQB 738.

1 The ability to expropriate land for certain
2 statutory purposes is indicative that the right of
3 land -- the rights of landowners, including the right
4 to quiet enjoyment of property, are not absolute and
5 are always subject to limitations, restrictions, or
6 even expropriation in accordance with the due process
7 of law.

8 Indeed, and as pointed out by my friend,
9 Section 33 of the Pipeline Act is simply another type
10 of statutory limitation or government-sanctioned
11 intrusion on property rights.

12 When read in the context of the entirety of the
13 statutory scheme applicable to pipelines in Alberta,
14 Section 33 of the Pipeline Act and its predecessors,
15 which have existed in some form since 1958, reflect a
16 counterbalance to the power to expropriate land that
17 has been granted to the pipeline companies Alberta --
18 in Alberta pursuant to the Pipeline Act and the Surface
19 Rights Act.

20 Respectfully, the rules of statutory construction
21 strongly suggest that part of the bargain of having
22 been granted the power of expropriation is that a
23 pipeline company can be directed to move or alter a
24 pipeline if the relocation is found to be in the public
25 interest.

26 This concept that I have just referred to and

1 interpretation is evidenced in the similar provisions
2 that exist in the other statutes where a regulatory
3 taking is contemplated, such as the statutes
4 administered by the AUC and the CER. Mr. Fitch ably
5 went over with you the provisions of Section 17 of the
6 HEEA and the case law that supports that. I don't
7 intend to canvass it on that basis, other than to note
8 that the wording of Section 17 is virtually identical
9 to the Pipeline Act.

10 Similarly and as discussed by Mr. Fitch, the
11 Canadian Energy Regulator also has jurisdiction to a
12 order a relocation of a pipeline and to allocate the
13 costs to do so pursuant to Section 212 of the Canadian
14 Energy Regulator Act.

15 Accepting the construction of the legislation
16 urged by the pipeline companies would, in essence, make
17 the pipeline companies the decision-maker of
18 whether relocation and cost sharing is in the public
19 interest. This would be tantamount to giving pipeline
20 companies a veto. Respectfully, this interpretation
21 would severely circumscribe the AER's proper role and
22 the mandate that has been granted under the statutory
23 scheme.

24 Pursuant to Section 33 of the Pipeline Act, it is
25 the AER, not the pipeline companies, who have been
26 tasked to determine whether relocation or alteration of

1 a pipeline is in the public interest, and the power to
2 determine who should bear the costs of the relocation
3 or alteration work.

4 I will now address an issue that was raised
5 earlier in the hearing regarding Section 28 of the
6 Pipeline Rules. Again, relying on the rules of
7 statutory interpretation, read in their proper context
8 and in accordance with the -- with the ordinary
9 principles of statutory interpretation, Section 28 of
10 the Pipeline Rules clearly places the onus on the
11 pipeline companies to upgrade their pipelines to
12 accommodate the required roadwork and is a strong
13 indicia that the pipeline companies ought to bear the
14 financial responsibility of complying with that
15 requirement. And, obviously, when I'm referring to the
16 entire context, I'm referring to the fact that the --
17 the Pipeline Act is -- is -- must be read in
18 conjunction with the Pipeline Rules, and pipe -- the
19 Pipeline Act under Section 39, which Mr. Fitch went
20 through -- you -- this morning, requires the pipeline
21 company to obtain consent of the municipality to go
22 through the road. And so in my submission, Section 28
23 places the onus on the pipeline company to be paying
24 for the road if you interpret the statute correctly and
25 the rules correctly.

26 Throughout this proceeding, we have heard that the

1 Pipeline Act and the Pipeline Rules are intended to
2 apply to pipeline companies. This is borne out in the
3 testimony of the pipeline companies. Properly
4 interpreted, the legislation applies to pipeline
5 companies primarily, not those that are forced to
6 engage with pipeline companies. It is the pipeline
7 companies that are obligated to be good licencees and
8 abide by the rules and regulations.

9 The testimony of each of the pipeline companies
10 has been clear that the accountability for the safe
11 operation of the pipelines properly rest with them.
12 The Act and the Rules place positive obligation on the
13 pipeline companies to make sure the pipelines are in a
14 safe operating condition.

15 Section 28 of the Pipeline Rules, which Mr. Fitch
16 read to you, and so -- which I won't read to you again,
17 is triggered in a situation where someone wants to
18 initiate construction of a road, either a new road or a
19 widening of an existing road over an existing pipeline.
20 In such cases, the pipeline at that location must
21 either be upgraded or otherwise meet the requirements
22 of CSA Z662 respecting crossings of an existing
23 pipeline.

24 The pipeline operator is under an obligation under
25 the Pipeline Rules to determine whether it needs to
26 upgrade the pipeline or whether it will otherwise meet

1 the requirements of CSA Z662. In cross-examination,
2 the Plains/Pembina/SECURE panel agreed that this
3 section places an obligation on them as pipeline
4 operators to comply with the requirements of CSA Z662,
5 and if work is proposed over an existing pipeline, the
6 pipeline operator must carry out work to determine
7 whether the pipeline at that location needs to be
8 upgraded or whether it will otherwise meet the
9 requirements of the CSA provision.

10 But they just -- but they indicated that the
11 Section 28 does not say who should pay for such work.
12 Respectfully, this position makes no sense and ought to
13 be rejected by the Regulator. To the extent the
14 Pipeline Act and the Pipeline Rules govern the
15 activities of the pipeline companies, the only
16 reasonable construction of Section 28 of the Pipeline
17 Rules is that it both places an onus on the pipeline
18 companies to comply with the direction, which of
19 necessity means that they must be able to pay for such
20 upgrades in the absence of an agreement with the
21 counterparty to share the costs.

22 As discussed by Mr. Fitch in his argument, the
23 absence of any precedent where a pipeline operator has,
24 over their own objections, been ordered to share in the
25 cost of a pipeline alteration or relocation does not
26 support the position of the pipeline company, so this

1 is consistent with a longstanding, well-established
2 industry practice in Alberta.

3 The fact that there are no reported decisions does
4 not somehow nullify the purpose of Section 33; rather,
5 we have heard in this proceeding about how the context
6 has changed so much in terms of where developments are
7 happening and that perhaps the reason there are
8 currently no other decisions are because these issues
9 are only now becoming more commonplace.

10 Here we have almost every land developer in
11 Edmonton represented and supporting Qualico's
12 applications all saying they are dealing with the same
13 issues and that these issues have become increasingly
14 more difficult to navigate.

15 Further and as I discussed with you earlier, there
16 were a number of decisions wherein the -- the AER and
17 its predecessors concluded that the applications were
18 premature. As Mr. Fitch discussed, that's clearly not
19 the case here. There is ample information before the
20 Board. The reality is the position taken by the
21 pipeline companies would render Section 33 virtually
22 useless and meaningless. Finding Section 33 of no
23 force and effect would be tantamount to violating the
24 presumption against absurdity and other rules of
25 statutory interpretation. As pointed out by Mr. Fitch,
26 some version of Section 33 has been in the Pipeline Act

1 since 1958.

2 If the Legislature had intended it only be limited
3 to circumstances put forth by the pipeline companies,
4 it is reasonable it would have been removed from the
5 Act in one of the many amendments the Act has undergone
6 since it was first enacted. The Act says what it says.

7 Brookfield submits that the arguments that the AER
8 granting the orders requested by Qualico would result
9 in a dangerous precedent with far-reaching impacts on
10 pipeline companies frankly has no merit. Pipeline
11 companies could absorb costs via contracts with
12 shippers or choose to bear the costs themselves.

13 Further, as acknowledged in cross-examination of
14 the Plains/Pembina/SECURE panel and based on the annual
15 reports of the pipeline companies for 2023, there would
16 be little to no actual financial impact on these
17 companies should the AER grant the order requested by
18 Qualico.

19 Respectfully, there is simply no air of reality to
20 the argument that directing the sharing of cost of
21 pipeline relocation would harm the financial interests
22 of the pipeline companies or the future prosperity of
23 the oil and gas business in Alberta.

24 The strenuous objections lodged by the pipeline
25 companies regarding questions related to their economic
26 health is clear evidence that the concerns they have

1 expressed in this proceeding regarding the impacts of a
2 cost-sharing order are grossly overstated. If the
3 risks were as great as suggested, such risks ought to
4 have been included in their annual reports and investor
5 presentations, some of which have -- have been put on
6 the record of this proceeding.

7 Respectfully, the pipeline companies are telling
8 the AER one story in this proceeding and expressing to
9 the public, including their investors, an entirely
10 different story. Respectfully, the AER ought not to
11 countenance such behaviour.

12 In terms of requested relief, Brookfield is not
13 asking for cost certainty and is not seeking to
14 transfer all the costs to the pipeline companies.
15 Rather, Brookfield is seeking a workable precedent that
16 recognizes an equitable cost-sharing formula for the
17 pipeline crossings at issue is in the public interest.

18 To be clear, Brookfield does not seek to avoid all
19 costs; it seeks an equitable division based on the
20 public interest served by both industries. A workable
21 precedent from this Panel would facilitate the
22 advancement of development projects in a predictable
23 and timely manner. Densification of the urban
24 periphery of Alberta cities is reaching the point where
25 conflicts with existing pipeline infrastructure is
26 becoming a critical issue. Without clear regulatory

1 guidance from the AER, this conflict will likely
2 continue to escalate.

3 Brookfield submits it is up to the AER to
4 determine a fair and equitable cost-sharing formula
5 that recognizes the inherent public interest of the
6 activities of all parties. The AER ought to establish
7 a workable precedent along with suggested timelines and
8 information requirements that must be shared between
9 the parties and confirm that Section 33 of the Pipeline
10 Act can be relied upon by land developers when a
11 dispute arises over the allocation of the costs of a
12 pipeline relocation.

13 As I noted before, the AER has broad rulemaking
14 authority under the Pipeline Act, and if nothing else,
15 I think this proceeding establishes that all parties
16 would be well-served by additional guidance,
17 potentially in the form of additional AER rules
18 pertaining to crossings or ground disturbance, given
19 the testimony we've heard here about the systemic
20 asymmetry and access to information and the way that
21 these negotiations have proceeded as has been discussed
22 at length in this proceeding.

23 To summarize, Brookfield is, at a high level,
24 seeking access to information. As I've discussed,
25 Brookfield believes there is a systemic asymmetry in
26 access to information with respect to the pipelines.

1 The reviews of engineering the developers are required
2 to pay for are done internally, and the age,
3 suitability, and status of the pipelines are either not
4 shared with the developers or are only shared
5 anecdotally.

6 Brookfield seeks clarity of process,
7 predictability of timelines, timely access to the
8 Regulator when Pipeline Rules are not being followed,
9 and, most of all, Brookfield is advocating for a
10 decision from the Regulator that establishes a workable
11 precedent that recognizes the public interest of both
12 parties.

13 I'd like to thank the Panel for its
14 professionalism throughout and for conducting its
15 hearing in a respectful manner.

16 And subject to any questions from the Panel, those
17 are my submissions on behalf of Brookfield.

18 THE CHAIR: Thank you, Mr. Dixon. Just
19 give us a second.

20 Commissioner Robinson has a question for you -- I
21 apologize. Commissioner Robinson is going to ask you a
22 question.

23 H. ROBINSON: Thank you very much,
24 Madam Chair.

25 And thank you for your presentation and closing
26 arguments.

1 To the extent that this is an exercise in
2 statutory interpretation and application,
3 understanding, I think, the purpose of Section 33 is
4 critical to our work on the go forward.

5 Mr. Fitch, I believe, spoke to the purpose of
6 Section 33 from Qualico and Developers' point of view
7 this morning, walked us through a Driedger-like sort of
8 review in terms of statutory interpretation.

9 Maybe I missed it. But I was wondering whether
10 you might articulate for us now Brookfield's
11 understanding of the purpose of Section 33.

12 E. DIXON: If I might have a moment to --
13 as I indicated to you before, it appears my clients
14 have left due to their other commitment. So I will
15 go -- I will try to answer to the -- to the best of
16 my -- my understanding.

17 But I -- I think that Brookfield understands that
18 Section 33 is a remedy available under the Pipeline Act
19 wherein a party can seek recourse to the AER in the
20 event that a pipeline needs to be relocated and an
21 agreement cannot be reached, and it also provides a
22 mechanism to obtain a cost order from the AER dividing
23 the cost of the work that is required to be completed.

24 H. ROBINSON: Thank you very much,
25 Mr. Dixon.

26 THE CHAIR: Thank you very much. And

1 thanks everyone.

2 So we are at lunch hour now. I'm going to ask
3 counsel to Pembina, Plains and -- and thank you. You
4 may be seated.

5 Counsel to Pembina/Plains/SECURE, we have
6 allocated an hour for lunch, but if you require more
7 time, please let us know, or you can let us know
8 through Ms. Arruda later if so you wish.

9 T. MYERS: One hour is just fine with us.

10 THE CHAIR: Perfect.

11 Okay, then. Based on this newly fixed clock,
12 let's try to reconvene at 1:15. Thank you very much.

13 _____

14 PROCEEDINGS ADJOURNED UNTIL 1:15 PM

15 _____

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1 Proceedings taken at Govier Hall, Calgary, Alberta

2

3 March 13, 2024

Afternoon Session

4

5 P. Meysami

The Chair

6 H. Robinson

Hearing Commissioner

7 E. McNaughtan

Hearing Commissioner

8

9 D. Brezina

AER Counsel

10 E. Arruda

AER Staff

11 T. Wheaton

AER Staff

12 F. Hamdan

AER Staff

13

14 G. Fitch

For Qualico Developments West Ltd.

15

16 E. Appelt

For the Developers Group

17

18 E. Dixon

For Brookfield Residential

19

Alberta Limited

20 M. Cherkawsky

For Brookfield Residential

21

Alberta Limited

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23

24

25

26

1 D. Naffin For Pembina Pipeline Corporation,
2 Plains Midstream Canada ULC,
3 and SECURE Energy Services
4 T. Myers For Pembina Pipeline Corporation,
5 Plains Midstream Canada ULC,
6 and SECURE Energy Services
7 T. Machell For Pembina Pipeline Corporation,
8 Plains Midstream Canada ULC,
9 and SECURE Energy Services
10
11 S. Duncanson For Keyera Corp.
12 J. Baker For Keyera Corp.
13
14 A. Porco, CSR(A) Official Court Reporter
15

16 (PROCEEDINGS COMMENCED AT 1:16 PM)

17 THE CHAIR: Thank you very much. Please
18 be seated.

19 So next we have Plains -- Pembina, Plains, and
20 SECURE to deliver their argument. Thank you. Final
21 submissions by Mr. Myers.

22 Final Submissions by T. Myers

23 T. MYERS: Good afternoon. And thank
24 you, Madam Chair, Panel Members.

25 I'd like to start by thanking yourselves, AER
26 counsel, AER staff, and the court reporters for

1 facilitating an organized and efficient hearing process
2 for the past several days.

3 Just for clarity at the outset, while SECURE
4 adopts and supports the positions advanced by Pembina
5 and Plains throughout this proceeding, SECURE was not
6 granted a right to present final argument in this
7 proceeding, so for the purposes of this afternoon, our
8 submissions are being advanced on behalf of Pembina and
9 Plains only, and I'll refer to those two companies from
10 time to time as "the pipeline companies".

11 This afternoon, Mr. Naffin and I have organized
12 our closing remarks as follows: I'm going to start by
13 discussing a few key points, but I'd ask you to keep in
14 mind as you consider the evidence before you and the
15 submissions that you've heard this morning from our
16 friends, and you'll hear it from us this afternoon.

17 Second, I'll provide a brief overview of the key
18 facts and issues within the scope of this
19 reconsideration proceeding. I'll also outline what the
20 pipeline companies submit are the clear motivations
21 behind Qualico's cost-sharing application.

22 Third, I'll briefly discuss the concept of the
23 public interest as it relates to the AER's
24 decision-making process and, in particular, the
25 decision-making process under Section 33 of the
26 Pipeline Act.

1 Fourth, I'll provide a summary of the applicable
2 legislative and regulatory regime in Alberta as it
3 relates to pipeline crossings and pipeline alteration
4 work.

5 After that, you'll have probably heard enough from
6 me. I'll turn it over to Mr. Naffin, who will discuss
7 the evidence submitted by the pipeline companies in
8 this proceeding as well as SECURE and Keyera, which in
9 totality demonstrates why the orders sought by Qualico
10 are not in the public interest and should not be
11 granted. Mr. Naffin will then address the various
12 flaws and deficiencies in Qualico's approach to and
13 evidence in this proceeding.

14 And, finally, he'll briefly discuss the positions
15 taken by Brookfield and the Developers Group in this
16 proceeding. The two of us will also have some
17 additional comments in response to what we heard from
18 our friends Mr. Fitch and Mr. Dixon in their closing
19 remarks before the lunch break.

20 Of course, we'll be happy to respond to any
21 questions that the Panel may have. And you'll be happy
22 to hear that it's not our intention to repeat the
23 contents of our various submissions and other filings
24 on the record of this proceeding; however, to be clear,
25 the pipeline companies continue to rely on those
26 materials and the positions that are advanced therein.

1 So to begin, the key points that I'd ask the Panel
2 to keep in mind as you weigh the evidence in this
3 proceeding and come to your determination: The first
4 is that at no point has there been a legitimate dispute
5 between Qualico and Pembina or Plains regarding the
6 need for the alteration work that's necessary to
7 facilitate Qualico's road crossings despite Qualico's
8 transparent attempt to manufacture such a dispute in
9 its amended cost-sharing application.

10 That's made abundantly clear in our submission by
11 the black line of Qualico's amended cost-sharing
12 application where it specifically confirms that when it
13 filed its original cost-sharing application, the only
14 dispute between the parties was -- was with respect to
15 cost.

16 It's also made clear by the testimony you heard
17 from the Pembina and Plains witnesses, all of whom
18 confirmed that both companies are ready, willing, and
19 able to complete the work necessary to allow Qualico's
20 crossings to proceed, provided Qualico agrees to pay
21 for the cost of that work that it alone is causing.

22 The second point is that in their testimony last
23 Tuesday, Qualico's witnesses effectively confirmed that
24 there is no longer any dispute related to the costs of
25 the alteration work, having regard to the scope of that
26 work as set out in the cost recovery agreement related

1 to Plains' pipeline at 167th Avenue and Meridian
2 Street -- that cost recovery agreement is at
3 Exhibit 86.01 -- and the description of that work
4 provided by Mr. Balfour on behalf of Pembina during his
5 testimony with respect to the pipeline at the same
6 intersection. That's in Transcript Volume 3 at PDF
7 pages 199 and 200.

8 It didn't appear to -- to me, Madam Chair, this
9 morning that my friend recognized the import of his
10 witnesses' testimony in this regard. Mr. Armstrong was
11 clear on behalf of Qualico that: (as read)

12 Any upgrades to the road's surfaces and the
13 engineering that's required to protect the
14 pipeline and the load forces, that would be
15 taken on by the development industry.

16 That's at Transcript Volume 1, PDF 189.

17 While that newly articulated position represents a
18 departure from the 50-50 cost-sharing orders that
19 Qualico was seeking in the original cost-sharing
20 application and in the amended cost-sharing
21 application, you heard it directly from Qualico's lead
22 witness, Mr. Armstrong, who described himself as the
23 Qualico panel chair and policy witness when he
24 introduced himself on the first day of the hearing.

25 Mr. Armstrong's testimony in this regard aligns
26 with the position Pembina and Plains have taken from

1 the very outset of this proceeding and, indeed, the
2 same position they have taken since 2014 when they
3 first engaged with CIMA+ to discuss the crossings in
4 this development.

5 Mr. Armstrong's evidence also aligns with the
6 well-established industry practice that a
7 second-in-time user pays when linear facilities or
8 features cross one another. You heard the witnesses
9 from Pembina, Plains, and SECURE describe that
10 practice, you heard Mr. Telford describe that practice,
11 and you heard the witness from Keyera describe that
12 practice yesterday -- or on Monday.

13 Contrary to the unsubstantiated assertions made by
14 some of the developers, that practice has not changed
15 in decades, it isn't variable, and it is not
16 unpredictable. It's grounded in relevant and
17 long-standing legal and regulatory principles, and it
18 is applied consistently across the pipeline industry
19 and other industries.

20 Mr. Armstrong's evidence aligns with the cost
21 causation principle you heard Dr. Makholm discuss and
22 which you've seen discussed by the pipeline companies
23 in their written submissions. Mr. Armstrong's evidence
24 aligns with the findings of the AER itself in the April
25 2022 decision where it dismissed Qualico's cost-sharing
26 application. Mr. Armstrong's evidence is supported by

1 various of the other developers who participated in
2 this proceeding based on the testimony that they
3 provided.

4 And, finally, Mr. Armstrong's evidence is even
5 supported by Mr. Fjeldheim, the lone representative
6 from the ARA steering committee who testified that:
7 (as read)

8 Anything to do with the road structure, so if
9 there needs to be concrete slabs or a thicker
10 road structure in order to dissipate the
11 loads that are transferred down to the
12 pipeline would be the development industry's
13 cost 'cause that's what we do. We build
14 roads.

15 That's at Transcript Volume 1, PDF page 190.

16 As I mentioned a moment ago, based on the evidence
17 on the record of this proceeding, this is the exact
18 type of work that needs to be performed on Plains' and
19 Pembina's pipelines at the 167th Avenue crossing, and
20 both Qualico and the ARA steering committee have
21 acknowledged on the record that developers should pay
22 for it.

23 I emphasize these points because they go to the
24 heart of this matter, and they confirm exactly what
25 Pembina, Plains, and the other pipeline companies have
26 been saying all along, that it is the second-in-time

1 party who always pays for pipeline alteration costs in
2 these circumstances because it is that party who's
3 causing those costs.

4 I would respectfully suggest to you that your
5 assessment of Qualico's cost-sharing application can
6 end right here. There is absolutely no need for the
7 AER to direct Pembina or Plains to perform work they
8 are willing to undertake voluntarily, and there is
9 absolutely no need for the AER to allocate the costs of
10 that work here or where, based on its own evidence,
11 Qualico is prepared to take responsibility for the very
12 costs the City of Edmonton and the ARA steering
13 committee directed it to dispute through the
14 cost-sharing application.

15 To be clear, while our position is that's all you
16 need to consider as part of this proceeding, I want to
17 be very clear that, that said, upholding the practice
18 of the second-in-time pays should equally apply where
19 alteration work caused by the crossing relates to the
20 pipeline itself. In both of those circumstances, it is
21 the crossing party that is causing those costs.

22 The third key point that I'd ask you to keep in
23 mind is that the AER does not need to endeavour to fix
24 the well-established and long-standing process for
25 pipeline crossings in Alberta through its decision in
26 this matter. That process is not broken, in our

1 submission, it does not lack transparency, and it is
2 not unfair or inequitable to any party involved.

3 As we heard from every single one of the pipeline
4 company witnesses, including SECURE and Keyera, as well
5 as Dr. Makholm, a decision that upsets that process
6 would result in significant uncertainty and inequity
7 for the pipeline industry in Alberta. That type of
8 decision would not be in the public interest, in our
9 submission.

10 The fourth point is that Qualico purchased the
11 subject lands and development with full knowledge of
12 the presence of the pipelines and with full knowledge
13 that it would be responsible for constructing roads
14 across those pipelines as a condition to the
15 development approvals it was purchasing. In other
16 words, it purchased the development eyes wide open.
17 Qualico had access to detailed documentation in the
18 form of the Horse Hill area structure plan, the
19 neighbourhood structure plan, the CIMA+ concept plan
20 during the due diligence process, and it confirmed that
21 it reviewed those materials and accounted for the
22 pipelines in its purchase of the lands and the
23 development.

24 That information included cost estimates of the
25 crossings themselves that are actually higher than the
26 more recent estimates included in Qualico's

1 cost-sharing application. It still went ahead and
2 purchased the development in the face of those
3 potential pipeline alteration costs.

4 There is nothing inequitable or unfair about a
5 private for-profit enterprise bearing known costs that
6 it willingly accepted. What would be -- but what would
7 be inequitable, unfair, and prejudicial, in our
8 submission, is shifting any portion of those costs to
9 Pembina and Plains in these circumstances.

10 The fifth point is that this cost-sharing
11 application isn't being driven by Qualico; it's being
12 driven by the City of Edmonton and the ARA steering
13 committee with a view to achieving broader policy and
14 political objectives which extend far beyond the scope
15 of this proceeding and which are not appropriately
16 raised in this forum, in our submission.

17 What you've got is the City of Edmonton and the
18 ARA steering committee, which is comprised exclusively
19 of representatives from the City and the development
20 industry, requiring Qualico to pay for the costs of
21 roads within its development pursuant to the ARA bylaw.
22 At the same time, you've got the City of Edmonton and
23 the ARA steering committee directing Qualico to try and
24 do an end run around those requirements by having the
25 AER allocate a portion of those costs to Pembina and
26 Plains under Section 33 of the Pipeline Act.

1 In our respectful submission, this constitutes an
2 attempt to usurp the jurisdiction of the AER over
3 pipelines in the province based on Sections 619 and 620
4 of the Municipal Government Act. In this regard,
5 Section 619 of the Municipal Government Act provides
6 that an AER licence prevails over any planning and
7 development instrument enacted by a municipality and
8 that any bylaw must not conflict with an AER licence or
9 must be amended to conform with an AER licence. That
10 includes the ARA bylaw.

11 Section 620 similarly says that a condition of a
12 licence issued by a provincial agency like the AER
13 prevails over any condition of a development permit
14 that conflicts with it. In our submission, these
15 provisions of the MGA preclude the City of Edmonton or
16 the ARA steering committee from requiring Pembina and
17 Plains to pay for any portion of road costs which are
18 properly borne by developers based on the City's very
19 own bylaws.

20 It's not appropriate for the City to attempt to
21 use Qualico to try and circumvent these clear statutory
22 provisions in an effort to have the AER burden Pembina
23 and Plains with these costs, particularly where the
24 City chose not to participate in this proceeding apart
25 from providing a one-page letter of support for the
26 original cost-sharing application.

1 It's no surprise to us that Qualico's cost-sharing
2 application is supported by the Developers Group and
3 Brookfield. They're all either developers themselves,
4 members of the ARA steering committee, or development
5 industry advocacy groups who clearly see this
6 proceeding as an opportunity to shift costs they are
7 otherwise required to bear onto the pipeline industry.

8 We heard from Ms. Anderson on behalf of the UDI of
9 which Qualico is a member that, for 2023, the UDI:
10 (as read)

11 ... identified the issue of pipeline
12 crossings as one of our top ten advocacy
13 priorities.

14 That's at Transcript Volume 2, PDF 7.

15 We also heard from Mr. Fash with BILD Alberta that
16 his organization is actively trying to pursue
17 legislative change with respect to certain of the
18 issues raised in Qualico's cost-sharing application.
19 This is not the appropriate forum for any of these
20 parties to be pursuing these political objectives or
21 the type of legislative change we heard the UDI and
22 BILD Alberta witnesses speak about during their
23 testimony.

24 Dr. Makholm summarized the motivation behind these
25 developers and development industry advocacy groups
26 well when he said the following: (as read)

1 The fact that they are all in here as a group
2 looking for an advantage as an interest group
3 is also not surprising. We live in a land
4 where interest groups come before agencies
5 like the AER or the AUC or the CER and make
6 their case. The idea that there would be a
7 smaller charge for them for land crossings
8 and that they would all support it is not an
9 unsurprising thing. I think that doing so
10 would violate a number of principles like
11 cost-based user pay and also breach the
12 difference between public interest and
13 private interest even if requested by a
14 collective group of private actors. But I
15 don't think the fact that they were all there
16 breaches our definition of public interest
17 and how that's distinct from what
18 Mr. Morrison has concluded.

19 That's at Transcript Volume 3, PDF 194.

20 The sixth and final key point that I'd ask you to
21 bear in mind is that you do not have a single example
22 of another regulator in Alberta or anywhere else in
23 Canada having issued the type of cost-sharing order
24 that Qualico is seeking in circumstances that are
25 similar to this case.

26 Based on the information before you in this

1 proceeding, what Qualico is asking for in its
2 cost-sharing application is unprecedented. The reason
3 for that is because it doesn't make any sense. It
4 doesn't make sense to direct a party to take action
5 they're willing to take voluntarily, and it doesn't
6 make sense to impose costs on a party where they have
7 not caused any aspect of those costs and do not benefit
8 in any way from those costs. Put very simply, there is
9 no justification for the relief that's being sought in
10 Qualico's cost-sharing application.

11 I'm now going to move to an overview of the key
12 facts and issues in this proceeding. At this stage the
13 only two crossings that are properly in-scope are
14 Pembina and Plains' pipelines at the intersection of
15 Meridian Street and 167th Avenue.

16 As we heard this morning, Qualico continues to
17 seek a cost-sharing order for Plains' pipeline at
18 172nd Avenue and Meridian Street despite the fact that
19 this work has already been completed and has been paid
20 for by Marquis JV pursuant to a cost recovery
21 agreement. We've got a copy of that agreement at
22 Exhibit 6.01, starting at PDF 399.

23 You don't need to direct Plains to do this work
24 because it's already been done, and you don't need to
25 make a decision with respect to who should pay for that
26 work because Marquis JV has already paid for it

1 pursuant to a valid and binding contract.

2 The next key fact is the two pipelines at issue
3 have been in place for more than 50 years. They're
4 each covered by valid and subsisting surface
5 dispositions: Pembina is by a right-of-entry order,
6 and Plains by an easement agreement. Those
7 dispositions grant the pipeline companies rights like
8 the right to quiet enjoyment which the requested orders
9 from Qualico would violate.

10 As the party requesting the crossings, Qualico is
11 the second-in-time party and is responsible for the
12 costs associated with crossing existing linear
13 infrastructure. This is reflective of the widely
14 accepted legal principle of first-in-time,
15 first-in-right, and the foundational principle of cost
16 causation which is frequently applied in the regulatory
17 context. And I'm going to come back to -- to those
18 principles and the purpose for which the pipeline
19 companies are relying on them in this proceeding in a
20 moment.

21 With respect to Mr. Fitch's suggestion during
22 cross-examination that the road or the road allowance
23 was there first such that Pembina and Plains'
24 right-of-entry order and easement are second-in-time to
25 that road, we would submit to you as follows: There is
26 no record -- or no evidence on the record that the

1 existing road or road allowance was actually there
2 first. Even if the existing road or road allowance was
3 there first, there's no evidence with respect to the
4 terms of any consent the County might have provided for
5 the pipelines to cross the road or the road allowance
6 at that time, and none of this changes the fact that
7 Qualico's upgraded arterial road is second-in-time to
8 Pembina and Plains' pipelines and that the upgraded
9 arterial road is solely responsible for causing the
10 pipeline alteration costs.

11 The next fact. The Horse Hill area structure plan
12 was approved on May 22nd, 2013. The ASP clearly
13 explains that there are ten pipelines within the plan
14 area and that the existing pipeline shall be
15 accommodated and incorporated into the development
16 concept. That's at Exhibit 5.01, PDF pages 663 and 709.

17 The ASP also provides detailed pipeline
18 information, including licence number, status, sour gas
19 content, pressure, product, and diameter broken down
20 for each quarter section within the plan area. That's
21 Exhibit 5.01, pages 7 -- 728 to 732.

22 The Marquis neighbourhood structure plan was
23 approved on April 28th, 2015, and includes further
24 information regarding the existence of pipelines within
25 the subject area, including mapping, and sets out an
26 objective to: (as read)

1 Ensure the development respects the ongoing
2 operation and integrity of existing pipeline
3 infrastructure.

4 Detailed pipeline information is also provided at
5 Table 1 of the NSP. Again, those are in Exhibit 5.01
6 at pages 734, 746, 754, and 814.

7 The CIMA+ concept plan report for Meridian Street
8 was issued in January of 2015. Section 3.3.4 of that
9 concept plan specifically discusses the interaction
10 between Qualico's development plans and Pembina and
11 Plains' existing pipelines. The concept plan explains
12 that Plains' existing pipeline can be left in the
13 current location based upon the proposed conceptual
14 design; however, it is likely that recoating and
15 installation of bridging blocks will be required to
16 protect the existing infrastructure. That's at
17 Exhibit 5.01, page 995.

18 And with respect to Pembina's pipeline, the
19 concept plan also indicates that protection of the
20 existing pipeline crossing is the preferred option.
21 This will need to be confirmed during detailed design
22 through an inspection of the existing facility by
23 Pembina. The estimated cost for the installation of a
24 pipeline protection slab is approximately \$1,135,200.
25 That's at Exhibit 5.01. 996 is the page number.

26 Qualico purchased the subject lands and these

1 plans in 2018 after each one of these detailed planning
2 documents was approved or prepared and after completing
3 robust due diligence on those plans and on the lands.
4 Consistent with the well-established industry practice
5 and the typical crossing process, we heard each of
6 Mr. Balfour, Mr. Sprott, Mr. Trim, and Mr. Torr,
7 described on April 1st of 2019, Qualico, through its
8 subsidiary, Horse Hill Land Company, entered into two
9 cost recovery agreements with Plains which established
10 Qualico's responsibility for approximately \$1.1 million
11 in pipeline alteration costs for the crossings at 167th
12 Avenue and 172nd Avenue. Copies of those agreements
13 are at Exhibit 86.01 and 87.01.

14 Then on May 7th of 2021, Qualico entered into a
15 final support agreement with Pembina which outlined
16 Qualico's responsibility for an additional \$974,000 in
17 pipeline alteration work for another Pembina Pipeline
18 at Marquis Boulevard crossing, which is Exhibit 85.01
19 for a copy of the agreement.

20 All of these agreements were based on the premise
21 that Qualico, as the party causing the need for the
22 pipeline alteration work, would pay for the cost of
23 that work. Again, this is entirely consistent with the
24 cost causation principle that I referenced a few
25 moments ago.

26 It wasn't until the City of Edmonton and the ARA

1 steering committee got involved that Qualico
2 subsequently terminated these agreements in order to
3 pursue the cost-sharing orders that are or were being
4 requested in the application. There was no lack of
5 transparency in the process that led to Qualico
6 executing those agreements. They all clearly set out
7 the scope of work to be performed and provided a
8 breakdown of the costs for which Qualico agreed it
9 would be responsible.

10 The record also shows that it's not just Qualico
11 that has followed this well-established practice.
12 Marquis JV did the exact same thing with respect to the
13 crossing of Plains' pipeline at 172nd Avenue and
14 Meridian Street.

15 The best evidence on the record of this proceeding
16 is that, contrary to the political direction of the
17 City of Edmonton and the ARA steering committee,
18 sophisticated developers like Qualico understand the
19 industry practice applicable to crossings and continue
20 to follow that practice by voluntarily agreeing to
21 cover the cost they cause as a result of their
22 crossings.

23 We also know, based on those agreements and based
24 on the testimony from the pipeline companies'
25 witnesses, that they have specific details regarding
26 the scope of work and the costs that are applicable to

1 those crossings in the agreements that they enter into,
2 and they also have a clear understanding of what
3 they're paying for when they're invoiced for the
4 amounts that are actually spent to perform that work.

5 I'm now going to move to the legislative and
6 regulatory framework governing pipeline crossings in
7 Alberta under Section 33. These are set out in detail
8 at section II(b) of the pipeline companies' joint
9 written submission in Exhibit 71.01. I'll try to be
10 brief and -- and not repeat the entirety of those
11 submissions.

12 The first thing I'd like to note is that Qualico
13 bears the onus in this proceeding. Qualico
14 acknowledges as much in its letter to the Panel
15 regarding the -- regarding its participation in this
16 proceeding at Exhibit 24.01. The pipeline companies
17 submit that it is clear that Qualico has failed to meet
18 its onus in this proceeding.

19 As I mentioned at the outset, given that Qualico
20 appears to have abandoned its request for a 50-50
21 cost-sharing order in the amended cost-sharing
22 application, it's difficult to envision any
23 circumstance in which the Panel could arrive at the
24 conclusion that Qualico did satisfy its onus.

25 Even if Qualico had stood by its request for a
26 50-50 cost-sharing order, the evidence that came out of

1 the hearing was that Qualico would likely only be
2 responsible for approximately 5 percent of the crossing
3 costs after it was reimbursed through the ARA levy
4 that's paid by other developers in the basin or the
5 catchment area. 5 percent.

6 The Panel's basic task in this reconsideration
7 proceeding is to confirm, vary, suspend, or revoke the
8 AER's decision in accordance with Section 42 of the
9 REDA. This question turns on whether the relief sought
10 by Qualico satisfies the requirements under Section 33
11 of the Pipeline Act.

12 Section 33, as the Panel I'm sure is well aware,
13 has three components. In their proper and logical
14 order, they can be summarized as follows:

15 Subsection (1). The AER may, on any terms and
16 conditions that it considers appropriate, direct a
17 licensee to alter its pipeline when the AER is of the
18 opinion that it would be in the public interest to do
19 so.

20 Subsection (2). If the AER decides that it's in
21 the public interest to direct alteration work and
22 directs a licensee to undertake this work, the AER may
23 also order by whom and to whom payment for the cost of
24 this alteration work should be made.

25 And subsection (3) says that if a dispute arises
26 regarding the amount to be paid pursuant to the AER's

1 order, this dispute must be referred to the AER, and
2 the AER's decision is final.

3 So the first component of Section 33 requires a
4 public interest determination by the AER with respect
5 to the alteration of a pipeline, not with respect to
6 the -- the associated cost. Accordingly, the success
7 of Qualico's cost-sharing application first depends on
8 whether it is in the public interest for the AER to
9 order Pembina and Plains to alter their pipelines.
10 Cost allocation is not a consideration at this stage of
11 the analysis.

12 As I've mentioned and as is evident based on the
13 record of this proceeding, there is no dispute or
14 disagreement as to whether Pembina and Plains need to
15 alter their pipelines to accommodate Qualico's
16 development. This was confirmed by the pipeline
17 companies numerous times in writing and at the hearing.

18 It follows, in our submission, that the Panel must
19 first decide whether it is in the public interest to
20 issue an order directing the alteration work where both
21 Pembina and Plains have made it clear that they are
22 ready, willing, and able to complete the required work.
23 That's at Transcript Volume 3, PDF page 2 hundred --
24 216, PDF page 27, and PDF page 28.

25 In the pipeline companies' respectful submission,
26 it is not in the public interest for a regulator like

1 the AER to intervene in a private matter where there is
2 no need for it to do so, and the Regulator should
3 exercise caution in engaging in the private commercial
4 realm as was reflected in the AER's April '22 -- 2022
5 decision.

6 While the pipeline companies are of the view that
7 the AER's April 2022 decision was rightly decided, the
8 interpretation of Section 33 that I've just outlined is
9 also consistent with the comments made by the AER in
10 its November 14th, 2022, letter initiating this
11 proceeding, which focused on the public interest
12 considerations as they relate to the alteration work
13 itself and not the associated costs. That letter's at
14 Exhibit 6.01 on page 3.

15 Qualico fails to grasp this important point
16 throughout its submissions and its witnesses' testimony
17 and the submissions that we heard this morning.
18 Instead, Qualico's singular focus throughout this
19 proceeding has been on whether or not cost sharing
20 would be in the public interest, which is a question
21 that is based on an incorrect interpretation of
22 Section 33.

23 Moreover, Qualico's and its experts' formulation
24 of what constitutes the public interest is plain wrong.
25 The notion of ESG does not equate to the public
26 interest as Mr. Morrison suggested during his

1 testimony. The public interest is not determined with
2 reference to the fact that the road is a public road.
3 It's not determined with reference to the fact that a
4 piece of public infrastructure or a development
5 approved by a public authority doesn't automatically
6 make those things in the public interest simply because
7 that infrastructure is used by some members of the
8 public or that development is being pursued by a public
9 entity.

10 Dr. Makholm was unequivocal in confirming that
11 these factors would have absolutely no impact on his
12 and Dr. Olive's public interest analysis. That's at
13 Transcript Volume 3, page 196.

14 The public interest is not determined with
15 reference to the fact that members of the public may
16 ultimately purchase the homes in Qualico's development.
17 These prospective purchasers of Qualico's homes do not
18 represent the public interest as that term applies to
19 regulators like the AER. These prospective homebuyers
20 are simply private parties who may choose to engage in
21 a private transaction to buy a home in Qualico's
22 development.

23 The relief requested by Qualico in its amended
24 cost sharing application is not in the public interest
25 simply because Edmonton City Council approved the
26 Horse Hill area structure plan as Mr. Fitch tried to

1 suggest during his cross-examination and as he
2 suggested this morning. As confirmed by Mr. Romanesky,
3 all that approval of the ASP indicates is that it
4 accords with the City's vision of sustainable
5 development.

6 In this case the public interest assessment is
7 properly formed by whether Pembina and Plains should be
8 directed to undertake alteration work on their
9 pipelines where they're already willing to do that
10 work. The public interest is a much broader concept
11 than Qualico would have the AER believe. There is a
12 significant difference between a residential
13 development and pipeline being in the public interest
14 and the alterations of pipelines being in the public
15 interest in these circumstances.

16 As Dr. Makholm stated during cross-examination:
17 (as read)

18 The private interest of the earnings of
19 Qualico cannot be confused reasonably by this
20 agency or any other that does this kind of
21 agency's work with the public interest.

22 That's what Mr. Morrison conflates. That's one of the
23 reasons we're here, to try and make it plain that the
24 public interest is a larger matter, not just Qualico's
25 earnings. That's at Transcript Volume 3, page 192.

26 The second component of Section 33 or

1 Subsection 33(2) is only engaged after the AER has made
2 a positive public interest determination regarding the
3 alteration work. Again, if this Panel determines that
4 it is not in the public interest to order the
5 alteration work for -- for Pembina and Plains'
6 pipelines, that is a full answer to the ultimate
7 question in this proceeding. Subsection 33(1) would
8 not be satisfied, and the analysis comes to an end.

9 Put differently, the Panel's public interest
10 analysis in this proceeding should not conflate the
11 physical alteration work on Pembina and Plains'
12 pipelines with the cost of this work or who is
13 responsible for the cost of this work. From a public
14 interest perspective, the question that the Panel must
15 answer is whether it is in the public interest to
16 direct Pembina and Plains to alter their respective
17 pipelines.

18 While the pipeline companies submit that the
19 foregoing interpretation of Section 33 is correct and
20 that it is not in the public interest to direct
21 alteration work in this case, it is similarly not
22 appropriate having regard to the public interest or
23 otherwise to issue corresponding cost-sharing orders as
24 requested by Qualico for the reasons Mr. Naffin --
25 Mr. Naffin and I will present today.

26 In approaching Section 33 of the Pipeline Act, the

1 Panel can be guided by the findings of the Supreme
2 Court of Canada in Vavilov. The cite for that case is
3 2019 SCC 65. At paragraphs 119 to 121 -- and I'll read
4 a brief passage of the Court's findings from
5 paragraph 121 where the Supreme Court held as follows:
6 (as read)

7 The administrative decision-maker's task is
8 to interpret the contested provision in a
9 manner consistent with the text, context, and
10 purpose, applying its particular insight into
11 the statutory scheme at issue. It cannot
12 adopt an interpretation it knows to be
13 inferior, albeit plausible, merely because
14 the interpretation in question appears to be
15 available and is expedient. The
16 decision-maker's responsibility is to discern
17 meaning and legislative intent, not to
18 reverse-engineer a desired outcome.

19 In the pipeline companies' submission, the
20 interpretation of Section 33 that I've just outlined is
21 consistent with the text, context, and purpose of the
22 provision, and it is superior to an interpretation
23 which suggests that the public interest should be
24 assessed with respect to the cost-sharing orders
25 requested by Qualico.

26 The interpretation of Section 33 that I've just

1 outlined is also supported by Ruth Sullivan's The
2 Construction of Statutes which describes the
3 presumption of orderly and economic arrangement. In
4 that regard, Sullivan states: (as read)

5 It is presumed that, in preparing the
6 material that is meant to be enacted into
7 law, the legislature seeks an orderly and
8 economical arrangement. Each provision
9 expresses a distinct idea. Related concepts
10 and provisions are grouped together in a
11 meaningful way. The sequencing of words,
12 phrases, clause, and larger units reflect a
13 rational plan.

14 I'd submit to you that Section 33(1) represents the
15 distinct idea that it must be in the public interest
16 for the AER to order the alteration or relocation of a
17 pipeline.

18 Further, based on the implied exclusion rule to
19 statutory interpretation, in other words, to express
20 one thing is to exclude another, if the legislature had
21 intended for the AER to engage in a public interest
22 assessment with respect to whether or not a cost order
23 should be issued under subsection 33(2), it would have
24 done so, given that the public interest is expressly
25 referenced under subsection 33(1). It did not, which
26 represents grounds for inferring that assessment of the

1 public interest was deliberately excluded from the
2 ambit of subsection 33(2).

3 In addition to Section 33 of the Pipeline Act, I'd
4 like to address a few other legislative provisions on
5 which Qualico relies in its submissions and which
6 Mr. Fitch discussed this morning.

7 First, Qualico suggests that it's a landowner for
8 the purposes of Section 15 of the REDA, which provides
9 that the AER must, in addition to any other factor that
10 it -- that it may or must consider in the
11 circumstances, consider the interests of landowners
12 when conducting a reconsideration.

13 In our submission, Qualico is much different from
14 a typical landowner that would participate in an AER
15 proceeding, and the interest that Qualico has in this
16 proceeding are also much different.

17 Qualico's interests in the context of this
18 proceeding are readily apparent as a result of the
19 relief that it is seeking. It is only Qualico's profit
20 margins that are affected by this proceeding.

21 In addition, Pembina and Plains have rights and
22 interests in the subject lands that must be considered
23 and respected. Qualico's business is not the only
24 interest at play.

25 Qualico also points to Section 3 of the REDA
26 General Regulation which states that, for the purposes

1 of Section 15 of the REDA, the AER must consider the
2 impacts on a landowner as a result of the use of the
3 land on which the energy resource activity is or will
4 be located.

5 Again, this provision does not indicate that the
6 impacts on the landowner, which in this case are the
7 potential impacts to Qualico's bottom line, are the
8 driving consideration.

9 Moreover, based on the cross-examination conducted
10 by Qualico's counsel and based on his submissions this
11 morning, Qualico has emphasized the point that it isn't
12 the owner of the roads where the alteration work will
13 be carried out. So if you accept their position in
14 that regard, they're not a landowner at all.

15 The pipeline companies further submit that these
16 statutory provisions relied upon by Qualico must not be
17 viewed in isolation. The AER's general mandate under
18 paragraph 2(1)(a) of the REDA is to provide for the
19 efficient, safe, orderly, and environmentally
20 responsible development of energy resources and mineral
21 resources in Alberta.

22 Section 4 of the Pipeline Act also authorizes the
23 AER to: (as read)

24 ... on its own motion inquire into or examine
25 any matter relating to the economic, orderly,
26 and efficient development in the public

1 interest of pipeline facilities in Alberta.

2 In our submission, it's not economic, it's not orderly,
3 and it's not efficient for pipeline companies to have
4 to pay for alterations to existing pipelines solely for
5 the purpose of subsidizing the business endeavours of a
6 sophisticated for-profit developer like Qualico,
7 especially where they derive no benefit from doing so
8 and where such an order from the AER would have broader
9 impacts on the economics of the pipeline industry and
10 capital investment in Alberta, more broadly.

11 Outside the legislative context of this
12 proceeding, Qualico and Brookfield also point to
13 certain provisions of the Canadian Energy Regulator Act
14 and the Hydro and Electric Energy Act. In this regard,
15 all Qualico has done is identify other statutory
16 provisions under those statutes which allow the CER or
17 the AUC to order the alteration or relocation of an
18 existing facility. Section 33 gives the AER the same
19 authority. It doesn't mean that that authority should
20 be exercised in these circumstances.

21 What Qualico has not done is provide any
22 indication, in a reported decision or otherwise, that
23 any of these statutory provisions have been used to
24 order a facility owner to alter its existing
25 infrastructure and to shoulder the cost of altering or
26 relocating its existing facility where that facility

1 owner is willing to do the work voluntarily over its
2 own objections.

3 Section 33 of the Pipeline Act, Section 212 of the
4 CER Act and Section 17 of the HEEA all say what they
5 say. None of these provisions have been applied in the
6 manner that Qualico has asked for in its amended
7 application.

8 The final statutory provision that I'll point you
9 to, and it relates to the issue of -- of responsiveness
10 and transparency through this process, is Section 43 of
11 the Pipeline Rules. It specifically sets out a
12 timeline by which pipeline companies are required to
13 respond to crossing requests or ground disturbance
14 requests when they're received. It provides specific
15 recourse to parties requesting those crossings to come
16 to the AER if they're not getting a response.

17 So contrary to the submissions that we heard this
18 morning, and as I've already mentioned, there is a
19 clear process in this province under the Pipeline Act.
20 You don't need to embark upon the exercise of creating
21 new rules or a new framework that would overhaul or
22 upset the existing process.

23 I've got a few comments before I turn it over to
24 Mr. Naffin in response to some of the specific
25 submissions that we heard from Qualico and Brookfield
26 this morning.

1 Qualico started by saying that its request in this
2 proceeding is not unusual in any way. As you heard
3 from us, Qualico hasn't provided a single example or
4 precedent of the relief it's requesting in this
5 proceeding in analogous circumstances.

6 Mr. Fitch was critical of Pembina and Plains for
7 not seating witnesses with firsthand knowledge of
8 discussions that occurred between those companies and
9 Qualico. First, I'd suggest that it's not necessary,
10 or it wasn't necessary because there are no relevant
11 facts that are in dispute. The various backstopping
12 agreements that Qualico entered into are also very
13 clear in terms of the work the parties agreed needed to
14 be done, and the amount Qualico would be required to
15 pay for that work.

16 Second, as you'll have noticed last Thursday when
17 the pipeline companies' panel was -- was seated,
18 Pembina and Plains, as well as SECURE, put forward
19 senior representatives of their organization. I'd
20 suggest you should take that as an indication of how
21 seriously all of these companies take this proceeding
22 and the importance of the outcome of this proceeding to
23 both them and the pipeline industry more broadly.

24 Third, Mr. Balfour, Mr. Trim, and Mr. Torr all
25 confirmed that they were responsible for the teams that
26 were dealing directly with Qualico. It's not

1 unreasonable that a senior executive would not attend
2 every single meeting involving a pipeline crossing,
3 particularly considering that they deal with thousands
4 of those crossing requests every year.

5 Mr. Fitch brought up my cross-examination of the
6 Qualico panel regarding the clear statements that had
7 been made in the original cost-sharing application and
8 the pipeline companies' willingness to carry out the
9 necessary alteration work. I believe he suggested that
10 that line of questioning was improper and inaccurate.
11 I certainly didn't hear any objection to any of those
12 questions while that cross-examination was being
13 conducted. And I don't believe any of the witnesses
14 disagreed with any of the questions that had been put
15 to them, so I'm not sure how that adds up to being
16 improper or inaccurate cross-examination.

17 He suggested that the issue of whether or not
18 there's a dispute regarding the alteration work is not
19 relevant and has been fully and finally determined by
20 the AER in its notice of reconsideration. This is an
21 important point. Qualico and Brookfield, the
22 Developers Group, they fundamentally misapprehend the
23 point. The critical point is that the issue of whether
24 or not there is a dispute with respect to the work goes
25 directly to your assessment of whether or not it is in
26 the public interest to direct that work. You've

1 already heard my submissions on why it's not in the
2 public interest to direct the work in these
3 circumstances.

4 With respect to Mr. Fitch's suggestion that the
5 AER does not have authority to make a decision on this
6 issue because it was decided in the notice of
7 reconsideration, that's not right, and it overlooks the
8 fact that you're specifically authorized to confirm the
9 April 2022 decision under Section 42 of the Responsible
10 Energy Development Act.

11 Finally, if there ever -- if there has never been
12 agreement on the work that needs to be performed, as my
13 friend suggested this morning, why did Qualico go to
14 the length of amending its application where, for the
15 first time, suggested that there is a dispute with
16 respect to that work? Why in its original application
17 would Qualico specifically say that the only dispute
18 was with respect to costs?

19 Qualico suggested this morning that Pembina and
20 Plains' right to quiet enjoyment under their easement
21 agreement or right-of-entry order does not override
22 Section 33 of the Pipeline Act. Again, that's not what
23 we're suggesting. The point is that these rights
24 shouldn't be interfered with in these circumstances,
25 but, consistent with the comments that I just made,
26 these rights need to be considered in your assessment

1 of whether or not it is in the public interest to
2 direct the alteration work.

3 We're not here to argue the fine legal points
4 around the first-in-time, first-in-right principle, the
5 buyer-beware principle, the technical requirements
6 around land titles in Alberta, or that any of these
7 principles override the AER's authority under
8 Section 33 of the Pipeline Act. Our simple point is
9 that these principles and legal requirements are
10 directly relevant to your public interest assessment
11 under subsection 33(1).

12 Mr. Fitch asked this morning, What's the purpose
13 of Section 33? I'd suggest that's very clear. It's --
14 it's to resolve disputes between a second-in-time
15 party, like a developer, and a pipeline company where
16 they can't agree on the need for the alteration work or
17 the relocation work. You don't need to resolve that
18 sort of dispute here because there is no dispute.

19 My friend suggested this morning that Qualico
20 isn't actually the cause of the work. He says the
21 cause is the accommodation of growth in northeast
22 Edmonton. I think it's very clear that Qualico is the
23 cause of the work. It's the one asking to cross
24 Pembina and Plains' pipelines because it's the one
25 that's required to construct the road to cross those
26 pipelines.

1 The growth that Mr. Fitch referenced, it's growth
2 that Qualico stands to profit from, it's growth that
3 Qualico is voluntary -- voluntarily pursuing, and, one
4 final point, contrary to what my friend suggested this
5 morning, Mr. Romanesky never agreed that this growth
6 was in the public interest. The excerpt of the
7 testimony was mischaracterized. Mr. Romanesky never
8 agreed to that, and you heard my comments on that
9 earlier.

10 Again, this notion that Sturgeon County's road or
11 road allowance was first-in-time to Pembina and Plains'
12 pipelines, as I'd mentioned, there's no evidence on the
13 record of this proceeding to demonstrate that. You
14 can't find that anywhere on the record that's before
15 you.

16 So in that respect, I'd suggest you can completely
17 disregard that argument by my friend. And, again,
18 these submissions represent a continued misapprehension
19 of the primary point that's being advanced by the
20 pipeline companies. Again, it's that the Pembina and
21 Plains pipelines are first-in-time to Qualico's
22 crossings, and, on that basis, it should be Qualico as
23 the second-in-time party and the party who is driving
24 the costs of those crossings who should pay for those
25 costs.

26 My friend discussed what he characterized as a

1 lack of transparency and a lack of reliability with
2 information about crossing cost estimates provided by
3 pipeline companies. This was all addressed by the
4 Pembina and Plains witnesses in their testimony who
5 explained the iterative process that is required to
6 arrive at scopes of work and cost estimates for more
7 complex crossings. They explain that cost estimates
8 are dependent upon, to a degree, the information that's
9 provided to them by the developer regarding the
10 crossing. They explain why two pipelines in close
11 proximity to one another might require different
12 protective measures and why the costs of that work
13 might differ. Every crossing is unique, especially
14 when it's two different companies operating those
15 pipelines.

16 In terms of the precedence that my friend
17 referenced this morning, there wasn't anything we
18 haven't already seen in their prior written
19 submissions. They're all distinguishable, and none
20 grant cost-sharing orders in circumstances similar to
21 the present case. Qualico itself acknowledged that all
22 of these authorities are distinguishable in its written
23 submission. You can find that at Exhibit 64.01,
24 paragraph 31.

25 The one case that I don't think we had seen until
26 this morning was AUC Decision 2012-333. What my friend

1 did is simply pull obiter* out of that decision to
2 suggest that it provides guidance to the AER in this
3 case. It doesn't, and what he failed to mention is
4 that there was no cost-sharing request made in that
5 proceeding, and he also failed to mention that the
6 application was ultimately denied by the AUC, so I'd
7 suggest that it's of no value to your determination
8 here.

9 On the issue of the pipeline companies' financial
10 wherewithal or their ability to pay for these crossings
11 because they're profitable corporations, this is not
12 a -- even a remotely relevant consideration in your
13 assessment in this case. It doesn't go to the public
14 interest, and it represents a very flawed view of how
15 disputes are appropriately resolved by decision-makers
16 like the AER, like the Courts. It also ignores the
17 fact that, clearly, Qualico and other developers in the
18 catchment can afford to pay for these crossings. We've
19 got numerous examples on the record of this proceeding
20 of those developers entering into contracts, agreeing
21 to pay for the costs of these very crossings.

22 It was suggested that Pembina and Plains want a
23 get-out-of-jail-free card in terms of never wanting to
24 pay for crossings of their pipelines. That's not at
25 all what we heard from the pipeline companies'
26 witnesses. They want to maintain the well-established,

1 logical, and fair industry practice in this province.
2 As we heard from the pipeline companies' witnesses,
3 that practice is a two-way street. When they are the
4 second-in-time party crossing someone else's linear
5 infrastructure, they reasonably expect to and they do
6 pay for the costs of those crossings. That's how this
7 practice works.

8 The one final comment I'll -- I'll leave you with
9 before I -- well, I'm going to first propose a break,
10 if -- if anyone wants one, but before I turn it over to
11 Mr. Naffin -- relates to the suggestion at the end of
12 my friend's remarks that Qualico isn't looking for a
13 blanket precedent through this proceeding.

14 Qualico and the other developers have gone back
15 and forth on this point throughout the course of the
16 proceeding. The UDI and BILD Alberta appear to want
17 the AER to somehow direct legislative change. Qualico
18 says it doesn't want a blanket precedent this morning
19 that applies to all areas of the province, but what I
20 did hear is that it wants a blanket precedent that
21 applies to the parts of Alberta that it's active in.
22 And I'd suggest to you that that perfectly sums up the
23 self-interested nature of Qualico's entire application.

24 That concludes my closing remarks this afternoon,
25 Madam Chair and Panel Members. I recognize that I've
26 been going for a while. I'm ready to turn it over to

1 Mr. Naffin, but if anyone would like a break, then
2 we're -- we're certainly happy to break here before he
3 proceeds. Thank you very much.

4 THE CHAIR: Thank you, Mr. Myers.

5 Let's take a 15-minute break, and we will be back
6 at 2:25. Thank you.

7 (ADJOURNMENT)

8 THE CHAIR: Thank you very much. Please
9 be seated.

10 Go ahead, Mr. Naffin.

11 Final Submissions by D. Naffin

12 D. NAFFIN: Good afternoon, Madam Chair,
13 Panel Members. Thanks for the opportunity to provide
14 closing remarks on behalf of Plains and Pembina this
15 afternoon.

16 Thanks to Mr. Myers for leading the charge and
17 being gracious enough to let me get up next.

18 Madam Chair, Panel Members, I'm first going to
19 speak to the pipeline companies' position and evidence
20 in this proceeding. It's not my intention to go
21 through the pipeline companies' evidence in great
22 detail, as I believe it speaks for itself, but I will
23 highlight the key conclusions arising out of this
24 evidence as they relate to the issues before the Panel
25 in this proceeding.

26 So, first, Madam Chair, Panel Members, I'd like to

1 speak about the pipeline companies' general approach to
2 pipeline crossing work. In my respectful submission,
3 it's abundantly clear that the pipeline companies, as
4 well as Keyera and SECURE, adhere to the first-in-time,
5 first-in-right or cost-based user pay principle with
6 respect to crossing work, and as Mr. Myers clarified in
7 his remarks, we're not talking about esoteric land
8 titles priorities and so on and so forth when we refer
9 to the first-in-time as first-in-right principle.

10 What we're getting at is that Plains and Pembina
11 were on the subject lands first, they have rights and
12 privileges that should be considered by you in
13 evaluating the public interest, and that Qualico, as
14 the second-in-time user who is driving the need for the
15 pipeline alteration costs to take place, should pay for
16 those alteration costs.

17 So we can dispense with discussions of the Alberta
18 Bill of Rights, the Canadian Charter of Rights and
19 Freedoms, expropriation law concepts, and so on because
20 that's exhibiting a fundamental misunderstanding of
21 what's a fairly simple position on the part of the
22 pipeline companies, as I've just explained.

23 So with respect to that principle, Mr. Balfour for
24 Pembina, Mr. Torr for Plains explained in detail the
25 pipeline companies' respective processes that are
26 followed in each case when a request is received for

1 crossing an existing pipeline, and that's at transcript
2 Volume 3, PDF page 206 and PDF page 210. These
3 processes are consistent, transparent, and effective.

4 You also heard from Mr. Balfour that these
5 processes are dependent on the amount of information
6 received from the party requesting the crossing, and
7 that's at transcript Volume 3, PDF page 39.

8 Mr. Trim also confirmed that Plains' processes
9 upwards of 3,500 crossing requests every year. It's at
10 Volume 3 of the transcript, PDF page 113. This further
11 establishes that the pipeline companies' processes are
12 well-tested and work effectively in the vast majority
13 of cases.

14 You also heard from the pipeline companies'
15 witnesses that this is an iterative process that
16 requires coordination and cooperation between a
17 pipeline company and the second-in-time party looking
18 to cross the pipeline to develop an appropriate scope
19 of work to estimate the costs and to execute the work.

20 And, Madam Chair, Panel Members, in my respectful
21 submission, it's not responsible to expect this all to
22 occur overnight or in a number of days. It's a process
23 that does take some time to get it right. That
24 discussion from the pipeline companies' witnesses is at
25 transcript Volume -- pardon me -- Volume 3 of the
26 transcript, PDF pages 205 to 210.

1 Mr. Sprott also explained that Pembina follows
2 this rule as well, that being the second-in-time or
3 person driving the cost pays rule. If Pembina were to
4 undertake a new development across another company's
5 pipeline, Pembina would fully expect to pay those costs
6 as the second-in-time party. And that's at transcript
7 Volume 3, PDF page 22.

8 As further explained by Mr. Sprott, and as
9 Mr. Myers referenced this morning: (as read)

10 It's a two-way street. We very commonly are
11 crossing other people's assets. We, being
12 pipeline operators, are crossing other
13 people's assets, and we do that solely
14 100 percent at our costs.

15 That's at Volume 3 of the transcript, PDF page 123.

16 In addition to the fact that the pipeline
17 companies consistently follow established practices for
18 pipeline crossings, Subsection 28(2) of the Pipeline
19 Rules, as we discussed a bit earlier, obligates
20 pipeline owners to upgrade a pipeline crossed by a road
21 to meet the standards set out under CSA Z662. Hence,
22 the pipeline companies are subject to a statutory
23 obligation to do the work necessary to satisfy these
24 requirements. In the pipeline companies' submission,
25 complaints regarding those costs or processes required
26 to meet the requirements of CSA Z662 are not reasonable

1 where there's a legislative obligation for those
2 particular requirements to be met.

3 Further, nothing in Subsection 28 (2) of the
4 Pipeline Rules or elsewhere in the Pipeline Act states
5 that the licensee should be responsible for the cost of
6 complying with CSA Z662 when a third party, such as
7 Qualico, is the driver of those costs.

8 Now, I found it curious this morning, Madam Chair,
9 Panel Members, when Mr. Dixon suggested on his read of
10 Rule 28(2) that companies were obligated or required to
11 pay the costs by virtue of the fact that they're
12 directed to comply with CSA Z662. As I just said, that
13 is not at all reflected in the actual text of
14 Subsection 28(2) of the Pipeline Rules, but, moreover,
15 that would do exactly what Mr. Fitch and Mr. Dixon were
16 being critical of the pipeline companies for doing,
17 what -- that was embracing an interpretation that
18 ignored Section 33 of the Pipeline Act -- or -- pardon
19 me -- of the Pipeline Act, yes, and rendered it
20 useless, in their words. I disagree with their
21 characterization of the -- the topic they were levying
22 that accusation at us over, but this would have the
23 same effect. If Rule 28(2) was as plain as Mr. Dixon
24 suggests, there would be no need to be here today. And
25 also, curiously, if it were that clear and there was an
26 obligation that the pipeline operator pays the costs,

1 why has the second-in-time party consistently paid for
2 alteration costs when it needs to cross someone else's
3 linear infrastructure for decades in this province? So
4 with all due respect to Mr. Dixon and his
5 interpretation, I'd suggest that doesn't make any
6 sense.

7 With respect to Qualico and other developers'
8 suggestions that they be provided with an opportunity
9 to opine on the alteration work necessary to facilitate
10 their crossings, Mr. Sprott was clear in his opening
11 statement that the scope of pipeline alteration work
12 and compliance with applicable regulations, codes, and
13 technical standards, more broadly, are not items that
14 pipeline companies like Pembina and Plains negotiate or
15 seek input on.

16 Those obligations rest with the pipeline licensee
17 who bears ultimate responsibility for ensuring
18 regulatory compliance and the continued safe operation
19 of their pipelines. And that's at Volume 3 of the
20 transcript, PDF page 21.

21 In response to the suggestion that it is unfair
22 for Qualico to have to pay for engineering assessments
23 and then not get to review or challenge those
24 engineering assessments, Mr. Balfour, among others,
25 confirmed that they: (as read)

26 ... typically do not provide that information

1 to crossing parties. The results of the
2 engineering assessment contain proprietary
3 information related to our operational
4 philosophy, our risk management. It can
5 contain customer information that's
6 confidential. But we do want to work with
7 parties, and we provide what the scope of
8 work is, what the estimated costs are, what
9 the schedule would be. That's our practice.

10 And that's at Volume 3 of the transcript, PDF page 62.

11 Mr. Balfour also noted at the time Qualico entered
12 into the backstopping agreements with Pembina, it
13 agreed pursuant to the terms of those agreements that
14 it wouldn't receive or have any interest in the
15 information that was generated as a result of it.
16 That's at Volume 3 of the transcript, PDF page 63.

17 To summarize, the record shows that the pipeline
18 companies follow a long-standing and well-established
19 practice to address the need for pipeline crossing
20 work. Qualico's amended application seeks to upset
21 that practice, and Qualico has not provided any cogent
22 evidence or rationale in our submission as to why doing
23 so would be appropriate.

24 Moving on, Madam Chair and Panel Members, to land
25 acquisition and value considerations for rights-of-way.
26 While the pipeline companies submit that matters of

1 land acquisition and related compensation with respect
2 to the subject pipelines were determined long ago and
3 ought not factor into the Panel's analysis in this
4 proceeding, the evidence on the record is clear that
5 Pembina and Plains' surface dispositions, a
6 right-of-way agreement -- or easement in the case of
7 Plains -- and a public utilities board order in the
8 context of Pembina were required through a legitimate
9 process where compensation in the form of the full fee
10 simple fair market value of the acreage acquired was
11 paid to the landowner at the time of acquisition. And
12 that's notwithstanding the fact that the company
13 acquired lesser than -- or -- pardon me -- less than
14 fee simple rights. The compensation paid is still the
15 full fee simple value of the land as if they'd
16 purchased the property outright.

17 The NERA report of Dr. Makholm and Dr. Olive
18 confirms that there is no indication that the rights
19 now held by Pembina and Plains were acquired for
20 anything less than fair market value and that the
21 amounts paid for these rights are: (as read)

22 ... reasonably reflective of competitive
23 markets in land, surface dispositions, or
24 construction costs at the time they were
25 acquired.

26 That's Exhibit 71.03, PDF page 14.

1 In his testimony, Mr. Telford also explained that
2 pipeline operators pay a price that represents the full
3 fee simple fair market value for the area that is taken
4 by way of the agreement or order. That's Volume 3 of
5 the transcript, PDF page 31.

6 Qualico has not produced any credible evidence in
7 support of its suggestion that the easements and orders
8 held by Pembina and Plains were not acquired for fair
9 consideration beyond Mr. Morrison's unsupported musings
10 on the topic.

11 And it appears from my friend Mr. Fitch's closing
12 remarks that, in any event, Qualico seems to have moved
13 away the position outlined in Mr. Morrison's report as
14 I believe Mr. Fitch indicated this morning that Qualico
15 is not taking the position that the original landowner
16 was paid an amount that was inferior or insufficient,
17 so I'm prepared to move on from this point.

18 Moving on to planning and routing considerations,
19 Madam Chair and Panel Members, with respect to the
20 topics of municipal planning and pipeline routing, the
21 pipeline companies respectfully submit that the area
22 structure plan, neighbourhood structure plan, and CIMA+
23 concept plan provide detailed examples of how urban
24 development can occur in an area that is occupied by
25 existing pipelines and other energy infrastructure.

26 Indeed, the planning of the Horse Hill area was

1 executed in a manner that gave Qualico and other
2 developers the confidence to purchase lands in the area
3 and to develop those lands with a view to making a
4 profit. Mr. Romanesky's initial report confirms that:
5 (as read)

6 The integration of pipelines into urban
7 development and communities has been and
8 continues to be a common occurrence.

9 The report also explains that: (as read)

10 The presence of a pipeline informs the
11 developer of a potential limitation of the
12 land and must be incorporated into the
13 planning process.

14 That's at Exhibit 6.01, PDF page 319.

15 This is exactly what was done in the context of
16 the area structure plan, neighbourhood structure plan,
17 and CIMA+ concept plan. Regarding the suggestion that
18 the existence of Pembina and Plains' pipelines has
19 negatively impacted the developability of the subject
20 lands, Mr. Romanesky explained that the existence of
21 pipelines does not necessarily have a negative impact
22 on development and that pipelines can sometimes even
23 result in a gain, as he put it, to a developer if they
24 lead to the removal of a road. And that's at Volume 3
25 of the transcript, PDF page 156.

26 And Mr. Romanesky provided a response to the

1 suggestion of one of the Qualico witnesses --
2 Mr. Gerein, I think it may have been -- that planning
3 in triangles was problematic, and Mr. Romanesky
4 confirmed that triangular parcels don't make things
5 automatically less efficient by any means and can be
6 incorporated and accommodated through the planning
7 process.

8 So, Madam Chair and Panel Members, in my
9 respectful submission, there is simply no credible
10 evidence on the record in this proceeding that
11 pipelines make development problematic or less
12 efficient, and that's been confirmed by Mr. Romanesky
13 and Mr. Telford.

14 The subject pipelines certainly haven't resulted
15 in any negative impact to Qualico's development of the
16 land as Mr. Myers discussed. Qualico purchased the
17 development from Walton after the pipelines had already
18 been incorporated into the various development plans,
19 and it, along with other developers, has advanced their
20 development and construction of homes in the subject
21 area.

22 Mr. Romanesky also indicated in his second report
23 at Exhibit 75.01 and his testimony at Volume 3, PDF --
24 or of the transcript -- pardon me -- PDF pages 157 and
25 158 that the presence of pipelines does not impact the
26 efficiency of a development and that through the use of

1 proper planning techniques, including the distribution
2 of density throughout a development, the overall goals
3 of a development can be achieved.

4 Indeed, the evidence on the record in this
5 proceeding is that the development is proceeding in the
6 Horse Hill catchment area, clearly evidencing that the
7 cost of adjusting development to account for the
8 presence of pipelines or the cost of crossing pipelines
9 is in no way prohibitive.

10 Madam Chair, Panel Members, moving to alleged
11 impacts on housing prices. While the pipeline
12 companies dispute the alleged impact of the Panel's
13 decision on the price of homes in the Horse Hill area,
14 if, indeed, cost sharing was not ordered, the evidence
15 of Mr. Romanesky is clear that these costs aren't
16 actually passed on to homebuyers. Rather, the ARA levy
17 is paid at the subdivision approval stage or the
18 development permit stage by the developer. It is not a
19 tax that is added on or directly invoiced to the
20 ultimate homebuyer. That's at transcript Volume 3, PDF
21 page 32.

22 Moreover, even if these costs were passed on to
23 homebuyers, the impacts are not anywhere near the
24 magnitude alleged by Qualico. If Qualico is made to
25 bear the entire cost of the alteration work associated
26 with these two pipelines, Mr. Romanesky determined in

1 his initial report that this would represent an
2 additional cost of only \$35 per residential dwelling
3 unit in the Horse Hills area. That's at Exhibit 6.01,
4 PDF page 320.

5 And, indeed, some different numbers have been
6 thrown about in this proceeding, being \$670 or a
7 thousand dollars and so on, but, in any event, those
8 amounts are not passed on to homebuyers. And I'll come
9 back to that in a moment in terms of what sets the
10 price of a house and what doesn't set the price of a
11 house.

12 So, in reality, Madam Chair and Panel Members,
13 given the structure of the ARA levy and the involvement
14 of other developers in the Horse Hill area, even if the
15 Panel denies Qualico's applied-for cost-sharing orders,
16 Qualico would ultimately absorb only 5 percent of the
17 costs associated with the subject pipeline alterations,
18 given that other developers in the subject catchment
19 area would contribute to the cost of the subject
20 crossings. And that's at Volume 1 of the transcript,
21 PDF page 183 and PDF page 184.

22 Yet, Qualico's amended cost-sharing application
23 asked the AER to order that the pipeline companies
24 cover 50 percent of these costs with no ability to
25 enjoy reimbursement of same. While Qualico asked the
26 pipeline companies whether they could recover costs via

1 their own customers, Mr. Sprott, Mr. Balfour, and
2 Mr. Trim all confirmed that, given the nature of the
3 contracts in place with shippers and customers, there
4 is no ability to recover costs as they unexpectedly
5 arose. That is at Volume 3 of the transcript, PDF
6 pages 126 to 128.

7 And I -- I took interest in Mr. Dixon's comments
8 this morning in reference to the annual reports of
9 Plains and Pembina and the fact that they enjoy
10 significant profits and, therefore, they should pay for
11 the costs.

12 I think Mr. Dixon argued that that impact was --
13 or the impact on the pipeline companies of cost sharing
14 was ordered was overstated, which I found interesting
15 when we think about the impact to Qualico. As I've
16 just mentioned, \$35 per house, even up to a thousand
17 dollars a house, and you're only paying 5 percent of
18 that because you're getting reimbursement from other
19 developers in the catchment area.

20 I'm always hesitant, Madam Chair, Panel Members,
21 to embark on the lawyer math exercise. One of the
22 reasons I became a lawyer was because I'm rather
23 terrible at math, but we'll try it on for size. If we
24 take the \$35-a-house number or even the
25 thousand-dollar-a-house number, I think 5 percent of
26 those numbers is \$1.75 in the case of the \$35-a-house

1 figure and \$50 in the case of the
2 thousand-dollar-a-house figure, which would be
3 Qualico's 5 percent share if, indeed, their requested
4 cost-sharing order was denied.

5 Madam Chair and Panel Members, I would also
6 suggest it's also illogical to suggest that home prices
7 will consistently vary as Qualico's expenses and input
8 costs vary. That doesn't accord with reality. All is
9 confirmed by Mr. Telford, the only appraisal expert put
10 forward in this proceeding. As he said, the market
11 sets the sale price of homes. Qualico describes the
12 presence of pipelines as a risk that is present when
13 purchasing a parcel of land for development. That's at
14 Volume 1 of the transcript, PDF page 32. And the
15 Developers Group has mentioned other risks such as
16 potential issues obtaining development approvals from a
17 municipality. That's at Volume 2 of the transcript,
18 PDF page 25.

19 From this perspective, in my respectful
20 submission, the Panel should consider the following in
21 relation to these other risks that developers face:

22 If Qualico's municipal development approvals are
23 delayed and the project budget is negatively impacted,
24 will the price of Qualico's homes in that neighbourhood
25 go up?

26 If Qualico endures a particularly challenging and

1 inefficient -- inefficient construction season, will
2 the price of its homes go up as a result?

3 If Qualico experiences significant delays in the
4 provision of building materials from a supplier which
5 increases project costs, will the houses constructed
6 through this project be more expensive?

7 The pump -- pump line -- pipeline companies
8 respectfully submit that the answer to all of these
9 questions is clearly no.

10 These situations, like the present case, are
11 examples of business risks, which developers knowingly
12 assume and are an inherent part of their business. The
13 notion that the cost of the required pipeline
14 alteration work will be passed on directly to the
15 purchasers of Qualico's homes should be disregarded by
16 the Panel because it's simply not correct.

17 More generally, if costs are simply flowed through
18 to the ultimate purchaser of a home, why have multiple
19 developers expended such a great deal of time and
20 effort to participate in this proceeding? The pipeline
21 companies, as well as SECURE and Keyera, take their
22 positions in this proceeding on the basis that the
23 requested cost-sharing orders, if granted, will result
24 in direct costs to them and their businesses that will
25 cause significant business disruptions in terms of the
26 instability and uncertainty associated with such an

1 order.

2 Yet, Qualico and the other developers involved in
3 this proceeding want the Panel to believe that their
4 participation is based on purely altruistic motives and
5 relates only to the interests of their customers rather
6 than the profits enjoyed by these entities which the
7 pipeline companies respectfully submit is not credible.

8 Moving on to notions of risk allocation and
9 considerations of fairness. As highlighted in the
10 pipeline companies' opening statements, the pipeline
11 companies stand to bear all the risk if Qualico's
12 applied-for cost-sharing orders are granted.

13 The pipeline companies have no way of knowing if,
14 when, where, or how development might proceed in
15 proximity to their pipelines, and if it does, what type
16 of pipeline crossing will be required. Accordingly,
17 they have no way to plan for these costs. Mr. Sprott
18 also explained that if the requested cost-sharing
19 orders were granted: (as read)

20 The impact to Pembina and Plains and others
21 in the province -- [or pardon me] in the
22 pipeline industry is going to be a
23 significant amount of uncertainty and a
24 significant amount of chaos.

25 And that's at Volume 3 of the transcript, PDF page 123.

26 And that same view was expressed by Mr. Trim on behalf

1 of Plains and Mr. Beztilny on behalf of Keyera.

2 In contrast, the developers will incur these costs
3 only if they take voluntary and deliberate steps to
4 purchase a piece of land and develop it with a view to
5 making a profit, a decision which is completely within
6 their control, while Qualico's reply submission
7 suggests that the pipeline companies: (as read)

8 ... must live with the consequences of their
9 pipelines impeding orderly surface
10 development.

11 And that's Exhibit 79.02, PDF page 15.

12 The pipeline companies instead submit that Qualico
13 has to live with the consequences of its decision to
14 proceed with the acquisition and development of the
15 lands with full knowledge of the presence of the
16 pipelines and potential associated pipeline crossing
17 costs.

18 To summarize, fairness considerations weigh
19 heavily in favour of denying Qualico's requested
20 relief, given the significant advantages the developers
21 possess with respect to their knowledge of and control
22 over their development plans.

23 Now I'll provide -- I'll move on to providing some
24 comments on the various flaws in Qualico's approach to
25 this proceeding and, with all due respect, deficiencies
26 in its evidence, dealing first with Qualico's

1 acquisition of the lands.

2 Throughout this hearing, Qualico has tried to
3 minimize the fact that it purchased the subject lands
4 with full knowledge of Pembina and Plains' existing
5 pipelines as I just indicated. In the pipeline
6 companies' submission, this is a key consideration that
7 the Panel ought not disregard as Qualico suggests.

8 In his direct evidence, Mr. Armstrong explained
9 that Qualico has "a lot of experience" in this area and
10 that existing restrictions on developments such as
11 pipelines are things that are factored into Qualico's
12 decision and plans to purchase and develop a parcel of
13 land. That's at Volume 1 of the transcript, PDF
14 page 32.

15 In response to questions from the Panel,
16 Mr. Armstrong provided further comments on Qualico's
17 due diligence process and explained that: (as read)

18 There is a loss of developable acres as a
19 whole as a result of previous pipeline
20 alignments and those sorts of things. It
21 makes our land less efficient. But these are
22 all things that we factor into the pricing of
23 our land and how we acquire it, and we're
24 living with that.

25 And that's at Volume 1 of the transcript, PDF page 188.

26 Ms. Anderson on behalf of the Urban Development

1 Institute further described the typical due diligence
2 process and explained that developers look at:
3 (as read)

4 ... any relevant features or amenities and
5 rights-of-ways that exist, especially
6 pipeline rights-of-way.

7 That's at Volume 2 of the transcript, PDF page 24.

8 Yet, after describing the detailed due diligence
9 that Qualico ordinarily conducts before purchasing a
10 parcel of land and did conduct in this case,
11 Mr. Armstrong stated that he was surprised by the cost
12 of the necessary pipeline alterations. That's at
13 Volume 1 of the transcript, PDF page 35.

14 In my respectful submission, there are really no
15 surprises in these circumstances. As Mr. Myers already
16 explained and is clear on the record, Qualico purchased
17 these lands after admittedly having conducted detailed
18 due diligence, including in relation to the existing
19 pipelines and associated rights-of-way on the land.

20 As we said previously, the area structure plan,
21 neighbourhood structure plan, CIMA+ concept plan were
22 all fully developed and available to Qualico at the
23 time it purchased the subject lands in 2018. Those
24 plans contained information regarding the existence of
25 Pembina and Plains' pipelines, importantly including a
26 cost estimate for the work required in connection with

1 Pembina's pipeline, among other information acquired by
2 CIMA+ throughout its discussions with Plains and
3 Pembina. That's at Exhibit 5.01, PDF page 996.

4 As of March 2019 and April 2021, Qualico had been
5 furnished with enough information regarding the
6 required alteration work for Qualico to execute
7 agreements setting out Qualico's responsibility for
8 more than an estimated \$2 million in alteration work.
9 And those are Exhibits 85.01, 86.01, and 87.01.

10 Under cross-examination, Mr. Gerein acknowledged
11 that at the time they signed these agreements, it was
12 Qualico's understanding that it would be responsible
13 for all of the costs associated with the required
14 pipeline alteration work and that taking responsibility
15 for these costs was necessary in order to advance its
16 development. That's at Volume 1 of the transcript, PDF
17 page 106.

18 Hence, in the pipeline companies' respectful
19 submission, it is simply not credible for Qualico to
20 suggest that it was surprised by the existence of the
21 subject pipeline crossings and their associated
22 alteration costs except for having voluntarily chosen
23 to purchase the subject lands and undertake development
24 with full knowledge of those details and after having
25 entered into valid contracts pursuant to which it took
26 full responsibility for those costs.

1 Mr. Armstrong also went on to -- to explain that:
2 (as read)

3 In short, you know, we felt that we did our
4 due diligence. We could only rely on the
5 information that was provided to us at the
6 time.

7 And that's Volume 1 of the transcript at PDF page 35.

8 In my respectful submission, this perfectly
9 captures the concept of risk that Qualico and other
10 developers have mentioned during this hearing. These
11 are sophisticated developers who take on a wide variety
12 of risks in the ordinary course of doing business, yet
13 in this case they want Pembina and Plains to provide a
14 50 percent subsidy to mitigate that risk.

15 In aggregate, it is clear that Qualico identified
16 and understood the nature and scope of the potential
17 costs associated with Pembina and Plains' pipelines
18 before purchasing the subject lands. The fact that
19 Qualico and other developers are dissatisfied with the
20 status quo as to how pipeline crossing work is
21 addressed in Alberta is also in no way a public
22 interest consideration warranting AER intervention.

23 Moving on to Qualico's and the Developers Group
24 references to other crossing costs. Qualico and other
25 developers alluded to other low-cost or no-cost
26 crossing agreements that have been executed in other

1 circumstances; however, Qualico has provided no
2 verifiable evidence regarding the existence of these
3 agreements or that the cost of alteration work in other
4 circumstances has been orders of magnitude less, as
5 suggested by Mr. Armstrong during his testimony.

6 When asked specifically about these low-cost
7 crossing -- crossings -- pardon me -- by the Panel,
8 Mr. Gerein provided no detail whatsoever, other than
9 stating that Qualico: (as read)

10 Had examples where there hasn't been any
11 applicable cost other than essentially moving
12 forward with the surface construction.

13 That's at Volume 1 of the transcript, PDF page 173.

14 There's also no specific evidence on the record
15 regarding the nature of these other crossings
16 circumstances alluded to by Qualico, which could very
17 well involve sewer, water, or low-pressure
18 gas-distribution lines, all of which would be subject
19 to entirely different crossing work requirements than
20 the subject pipelines. And that was discussed in
21 Volume 3 of the transcript, PDF page 219.

22 Consistent with the pipeline companies' evidence,
23 such crossings could also be "simple crossings" or
24 proximity requests requiring no alteration work as
25 opposed to the "complex crossings" at issue in this
26 proceeding, as was explained by Mr. Balfour and

1 Mr. Trim. That's at Volume 3 of the transcript, PDF
2 page 110.

3 Mr. Torr also clearly explained that the process
4 is dependent on whether the crossing at issue is simple
5 or complex in nature. And that's at Volume 3 of the
6 transcript as well, PDF page 210.

7 In my respectful submission, the Panel should not
8 rely on these unsupported and anecdotal cost figures or
9 alleged experiences as an indication of the
10 reasonableness of the cost to alter the Pembina and
11 Plains pipelines at issue in this proceeding. In each
12 case, the pipeline alteration work is dictated by
13 CSA Z662 and not by the whim or subjective views of the
14 pipeline companies.

15 The Panel also noted during its questioning of the
16 Developers Group witness panel that the range of costs
17 associated with other pipeline crossings referenced
18 during the hearing ranges from zero dollars all the way
19 up to \$1 million. In the pipeline companies'
20 submission, this range accurately reflects the fact
21 that the Alberta pipeline industry contains a
22 significant number of private pipeline operators who
23 own a multitude of different pipelines which vary in
24 purpose, depth, size, capacity, and other
25 specifications.

26 In this regard, in my respectful submission, the

1 Panel can dispense with any notion that crossing costs
2 are arbitrary or seem to be increasing for no reason.
3 The variation in crossing costs is a natural
4 consequence of the multitude of factors that I just
5 mentioned.

6 Mr. Balfour explained that "Every crossing is
7 unique", and there's clearly not a one-size-fits-all
8 approach, and to take such an approach in this
9 proceeding would be inappropriate, in my respectful
10 submission. And Mr. Balfour's comment is at transcript
11 Volume 3, PDF page 116.

12 Losing my voice apparently, so I'll try to rectify
13 that.

14 Moving on to Qualico's dealings with Plains and
15 Pembina. Qualico has alluded to a lack of transparency
16 on the part of Pembina and Plains and has suggested
17 that the pipeline companies did not furnish Qualico
18 with sufficient information regarding the nature,
19 scope, and cost of the required alteration work.
20 Mr. Balfour clearly explained that the accuracy and
21 detail of the cost estimates and other information
22 generated and provided by the pipeline companies is
23 entirely dependent upon the stage of the development
24 process.

25 When asked about Pembina's process for responding
26 to due diligence requests, Mr. Balfour explained:

1 (as read)

2 Typically, at that stage of the process,
3 we're provided with very little information
4 from the developer in terms of the scope of
5 the proposed crossing, given that they
6 haven't even purchased the land yet, so
7 there's not often very detailed drawings;
8 there's not often detailed scope of work on
9 their end, so it makes it very difficult for
10 Pembina to undertake a detailed assessment of
11 what work needs to be required given their
12 proposed crossing, and without being able to
13 do the detailed work, it's very tough to give
14 a detailed estimate.

15 And I think that makes sense. That's at Volume 3 of
16 the transcript, PDF page 39.

17 And we've had some discussion from my friend
18 Mr. Fitch and maybe others in terms of what was alleged
19 to be Mr. Sprott's comment that I'm a professional
20 engineer, there are other professional engineers who do
21 the engineering assessment work and so on, so I think,
22 as Mr. Fitch characterized it, Don't worry, trust us,
23 or words to that effect. Clearly what Mr. Sprott was
24 getting at is that the parties conducting the
25 engineering assessment under CSA Z662 are qualified
26 engineers, presumably, members of APEGA, and who put

1 their stamp on that work and have their professional
2 reputations to guide them and make sure they're doing
3 work that's appropriate. They're also regulated by
4 their various professional bodies and so on. And that
5 was the point that Mr. Sprott was making, is that these
6 are qualified, regulated individuals who are
7 undertaking a complicated assessment under CSA Z662,
8 such that there is oversight over their activities and
9 their conclusions on behalf of their respective
10 professional organizations. So that was the point that
11 was made, and so I think that both Mr. Fitch and
12 Mr. Dixon were a little bit unfair to Mr. Sprott in
13 their comments this morning.

14 In essence, Madam Chair, Panel Members, Qualico
15 and the other developers appear to want information
16 that is simply not available at the time their
17 development plans and road crossings are not fully
18 understood or at a time when they haven't even
19 purchased the relevant lands. In my respectful
20 submission, it's not reasonable for Qualico or any
21 other developer to expect a pipeline operator to be
22 able to provide detailed information as to how an
23 unknown, undefined crossing will impact its pipeline,
24 often prior to the developer having even purchased the
25 lands.

26 This uncertainty is also the exact reason why the

1 pipeline companies require up-front payment under their
2 backstopping or cost-recovery agreements. Mr. Trim
3 explained that: (as read)

4 To minimize the risk and the burden on
5 Plains, we request up-front payment when we
6 enter into cost recovery agreements. It also
7 gives us assurance that the party wishing to
8 cross our pipelines is actually committed to
9 the work and the undertaking required to do
10 that.

11 And that's at Volume 3 of the transcript, PDF page 36.

12 Mr. Trim also explained that Plains' practice in
13 this regard is largely due to: (as read)

14 Experience with Marquis on the 172nd Avenue
15 crossing where Plains entered into a cost
16 recovery agreement to execute the pipeline
17 crossing work and, subsequently, Marquis had
18 refused to reimburse Plains when they were
19 back-invoiced.

20 That's at Volume 3 of the transcript, PDF page 36.

21 So -- so if there's a purported change in the
22 structuring of having people pay up-front, you have a
23 good rationale for why that's done, and you also have
24 the fact that one of the parties involved in this
25 proceeding was the driver for that process, given a
26 refusal to pay as acknowledged by Mr. Trim.

1 In the pipeline companies' respectful submission,
2 no reasonable pipeline operator would dig up its own
3 pipeline and undertake detailed engineering and
4 inspection activities at its own expense for any reason
5 other than the fact that the third party had proposed
6 work in proximity to its pipeline.

7 Further, without this work occurring, the
8 pipeline operator cannot possibly have a complete
9 understanding of the nature and scope of the alteration
10 work required. The record also shows that Qualico did
11 have specific information regarding the work required
12 and the associated costs after Qualico purchased the
13 lands. For example, this is apparent in the agreements
14 located at Exhibits 86.01 and 87.01 of the proceeding
15 record.

16 In addition, Qualico and other developers have
17 suggested that there's been a shift in the way that the
18 pipeline companies approach crossing -- crossing work
19 arrangements. There are no specific examples of this
20 on the record, nor is there any evidence beyond the
21 vague anecdotal claims by the developers that the
22 pipeline companies' practice in this regard have
23 changed at all. So I'd ask you to think about what's
24 actually on the record as opposed to anecdotal or vague
25 comments about purported circumstances or situations
26 that exist.

1 Briefly dealing with the late information requests
2 that were provided by Qualico to Plains and Pembina,
3 the refusal by Pembina and Plains to respond to the
4 majority of information requests in those letters at
5 the very late stage of this proceeding at which they
6 were provided is not at all indicative, in my
7 respectful submission, of a lack of transparency in the
8 pipeline crossing process described by the Pembina and
9 Plains witnesses.

10 Those information requests are an entirely
11 distinct circumstance from a developer or other third
12 party asking a pipeline company for information related
13 to a pipeline crossing at first instance or when you're
14 actually doing the crossing.

15 Despite the fact that Plains' and Pembina's
16 correspondence in the response to the Qualico IRs
17 invited further discussion, there was no follow-up and
18 certainly no follow-up referenced on the record.
19 Similarly, this is also confirmed by the record. No
20 motion was filed by Qualico seeking further and better
21 responses in accordance with Section 14(2) of the AER
22 Rules of Practice. The majority of the questions put
23 to the pipeline companies in those IRs were also
24 irrelevant to this proceeding and were refused on that
25 basis. So, again, asking those questions as part of --
26 they're irrelevant, I would suggest, to the crossings

1 at issue; they're even more irrelevant given the time
2 frame that they were asked as part of this proceeding,
3 even detracting further from the relevance given what
4 we're here to talk about.

5 In terms of Qualico's interpretation of the public
6 interest, throughout this proceeding, Qualico has
7 advocated that its requested cost-sharing orders are in
8 the public interest. We already heard from Mr. Myers,
9 however, as to why that's based on a flawed and
10 incorrect interpretation of Section 33 of the
11 Pipeline Act and an incorrect formulation of what
12 constitutes the public interest in the context of this
13 proceeding, so I won't repeat those submissions here,
14 and what Mr. Myers had to say is sufficient.

15 Lastly, I'd like to briefly address the evidence
16 of Mr. Morrison, which was purportedly tendered to
17 address public interest considerations. In short, and
18 with all due respect, the pipeline companies submit
19 that the Panel should assign no weight to
20 Mr. Morrison's evidence in this proceeding.

21 Mr. Morrison generally appears to view this
22 proceeding as an opportunity to revisit and overturn
23 the fundamental principles upon which the Alberta
24 pipeline industry has successfully operated for decades
25 as well as fundamental legal principles in Alberta.

26 In this regard, the pipeline companies submit that

1 this proceeding was not convened to conduct a broader
2 inquiry into the merits of cost-sharing arrangements
3 across the pipeline industry or to debate matters of
4 fairness arising in the private dealings between
5 pipeline operators and developers.

6 The NERA report, which incidentally was authored
7 by both Dr. Makholm and Dr. Olive -- she seems to get
8 passed over on occasion -- I would suggest to you is
9 authored by two credible experts in the fields of both
10 economics and public interest assessment. And, of
11 course, they commented on Mr. Morrison's evidence.

12 But before I get to -- to what they had to say, I
13 just want to address some of Mr. Fitch's criticisms of
14 Dr. Makholm and Dr. Olive's evidence this morning.
15 Mr. Myers touched on this already, but Mr. Fitch seemed
16 critical of Dr. Makholm for not being willing to accept
17 that because it's a public road or allegedly a public
18 road and that the development is being sanctioned by a
19 public body and it'll be -- the road will be used by
20 members of the public, it's automatically in the public
21 interest to make the cost-sharing order sought.

22 Dr. Makholm, to my recollection, properly
23 explained that the public interest is something broader
24 than that, and having a public entity undertaking an
25 infrastructure project or so on and so forth clearly
26 doesn't make that project necessarily in the public

1 interest just by virtue of the party who's pursuing it.

2 So I don't think that Mr. Fitch's criticism was
3 fair in that regard at all. And I think what
4 Dr. Makholm had to say was quite salient on the issue
5 of public interest.

6 Mr. Fitch expressed confusion as to what
7 Dr. Makholm meant by the fact that Qualico had no
8 market power. I can help with that. What Dr. Makholm
9 was referring to is the fact that -- or the
10 circumstance that I was referring to or issue that I
11 was referring to that the price of homes is set by the
12 market, as indicated by Mr. Telford, and that Qualico
13 doesn't have the market power to dictate what housing
14 prices are going to be in the city of Edmonton or in
15 portions of the city of Edmonton. That's why the
16 market dictates what houses are worth, not Qualico,
17 because Qualico lacks the market power to do that. So
18 hopefully that provides the Panel with some explanation
19 as to what Dr. Makholm was referring to, if there was
20 confusion, that appeared to be held by Mr. Fitch.

21 In terms of Dr. Makholm 's comment as to rate
22 regulation, Mr. Fitch also expressed confusion or -- or
23 he didn't understand what Dr. Makholm was referring to.
24 What Dr. Makholm was clearly referring to was the fact
25 that if the AER engages in an otherwise private matter
26 between two private parties under the guise of a public

1 interest determination, that would be akin to rate
2 regulation or regulating the affairs of those private
3 entities.

4 So that's clearly what Mr. -- Dr. Makholm --
5 pardon me -- was referring to when he made those
6 comments. And Mr. Fitch took issue with the fact that
7 Dr. Makholm indicated he was not telling the Panel what
8 to do in terms of the public interest because, in
9 Mr. Fitch's view, he clearly was.

10 I would suggest to you that the contrary is
11 absolutely the case. He clearly, I believe, looked at
12 the Panel when making those remarks and said, I'm not
13 here to tell the Panel what to do. I'm here to help.
14 Or words to that effect. So I don't think Mr. Fitch's
15 criticism of Dr. Makholm in that regard is fair either.

16 So moving back to Dr. -- pardon me --
17 Mr. Morrison's evidence and NERA's report regarding
18 Mr. Morrison's evidence. The NERA report responds in
19 detail to each of the incorrect assertions made by
20 Mr. Morrison in his reports. And, critically, the NERA
21 report explains that Morrison's evidence first relies
22 on erroneous -- an erroneous definition of the public
23 interest, which is circular, and conflates the private
24 interests of Qualico with those of the public.

25 Second, that Mr. Morrison's report entirely
26 ignores the opportunity cost of capital when comparing

1 the amounts paid for Pembina and Plains' existing
2 surface dispositions to the current value of the
3 subject lands, although we appear to have dispensed
4 with that issue this morning.

5 And, finally, they point out that Mr. Morrison
6 disregards the difficulty of anticipating the location
7 of future corridors and inappropriately suggests that a
8 market-based price signal shall be applied to pipelines
9 which are already in the ground. And that's, of
10 course, at Exhibit 71.03, PDF pages 8 and 16.

11 In the pipeline companies' respectful submission,
12 Mr. Morrison also exhibited a complete lack of
13 independence and knowledge on AER matters and on
14 right-of-way acquisition matters referenced in his own
15 reports during his testimony. Several examples of this
16 are -- Mr. Morrison repeatedly referred to his
17 purportedly independent evidence as being his
18 "arguments". That's at Transcript Volume 1, PDF
19 page 56, PDF page 57, and PDF page 119.

20 Mr. Morrison exhibited a lack of familiarity with
21 his own evidence and was unable to answer questions
22 that relate specifically to information set out in his
23 own reports. Mr. Morrison confirmed that much of his
24 evidence regarding Pembina and Plains' predecessors'
25 land acquisition and pipeline routing in the 1960s was
26 based on speculation because, in his words "he was a

1 babe" at the time. And that's at Volume 1 of the
2 transcript, PDF page 129.

3 Based on Mr. Morrison's testimony, he views this
4 proceeding as an opportunity to overturn fundamental
5 principles of contract and property law as he stated
6 that: (as read)

7 The essence of the deal has to continue to
8 satisfy both partners.

9 Which, according to Mr. Morrison, means that pipeline
10 operators, oil companies, electrical utilities, and
11 other parties who have similar right-of-way interests
12 across the province can no longer rely on the validity
13 of their existing surface dispositions, compensation
14 paid under those instruments, or the legitimacy of the
15 process through which they acquired them. And that
16 discussion is at Volume 1 of the transcript, PDF
17 page 61.

18 And, with respect, I would suggest to you that the
19 comments about deals having to be constantly
20 re-evaluated over the length of time is -- is, frankly,
21 absurd, in my respectful submission.

22 Mr. Morrison had to caucus with Qualico to respond
23 to questions about his purportedly independent expert
24 report and described his answers as being those of both
25 him and Qualico. That's at Volume 1 of the transcript,
26 PDF page 157.

1 Mr. Morrison's reports rely on irrelevant pipeline
2 routing and corridor discussions, despite Mr. Morrison
3 confirming at the hearing that he is in no way
4 suggesting that Pembina and Plains' pipelines be
5 relocated into a corridor. That's at Volume 1 of the
6 transcript, PDF page 139. And that no such pipeline
7 corridors existed in the area when Pembina and Plains'
8 right-of-ways were acquired.

9 With respect to corridors, Mr. Telford's reply
10 report also notes that there were no corridors in the
11 subject area at the time Pembina and Plains' pipelines
12 were planned and constructed. That's Exhibit 71.04 at
13 PDF page 4.

14 Despite Mr. Morrison's enthusiasm for central
15 planning and pipeline corridors, Mr. Morrison confirmed
16 that he would not support the placement of a pipeline
17 corridor on the subject lands. And that's at Volume 1
18 of the transcript, PDF page 140.

19 The pipeline companies submit that this detracts
20 from Mr. Morrison's credibility and independence where
21 his opinion is clearly aligned with Qualico's
22 self-interest.

23 Mr. Morrison also included a completely uninformed
24 discussion regarding the comparison of amounts paid to
25 the original landowner in the late 1960s as
26 compensation for the Plains and Pembina rights-of-way

1 and the costs incurred by Qualico for the subject
2 crossings. With respect, this discussion, in my
3 respectful submission, is obviously illogical and
4 irrelevant, given that the two amounts are in no way
5 connected, relate to two separate private parties
6 50 years apart, and given that there was an intervening
7 land owner, Walton, among potentially others, who own
8 the subject lands.

9 Mr. Morrison also suggested that the AER should
10 send economic price signals with its decision in this
11 proceeding, which ignores the fact that the routing of
12 future pipelines and broader economic price signalling
13 is entirely outside the scope of the current proceeding
14 and, in the case of the latter, outside of the AER's
15 jurisdiction and mandate. And that's Volume 1 of the
16 transcript, PDF page 62.

17 G. FITCH: By our reckoning, my friends
18 are 15 minutes over time already. I haven't wanted to
19 rise, assuming we were almost at the end, but I
20 appreciate that we get to the end.

21 D. NAFFIN: Appreciate that guidance from
22 Mr. Fitch. The good news, Madam Chair, is I think I
23 have five minutes or maybe less than that to go. And I
24 don't know that we're beyond the hour and a half. Are
25 we?

26 In any event, I'll be done in five minutes max,

1 Madam Chair, if that meets with your approval.

2 THE CHAIR: Yes.

3 D. NAFFIN: Thank you.

4 THE CHAIR: Five minutes is fine.

5 D. NAFFIN: Finally, Mr. Morrison's
6 testimony focused a great deal on ESG and irrelevant
7 matters in other jurisdictions, and he unequivocally
8 stated that ESG is the same thing as public interest,
9 which, of course, it's not. Volume 1 of the
10 transcript, PDF page 151.

11 For all these reasons, the pipeline companies
12 submit that the Panel ought not rely on any of
13 Mr. Morrison's evidence in making its decision in this
14 proceeding. In addition, Qualico's newly articulated
15 position that it should bear responsibility for
16 pipeline alteration costs completely undermines
17 Mr. Morrison's evidence and his suggestion that this
18 Panel should somehow overturn or depart from the
19 first-in-time, first-in-right principle or, put
20 differently, the established practice that the
21 secondary user that requires pipeline modification work
22 should pay for that work.

23 Briefly commenting on the Brookfield and
24 Developers Group evidence. As Mr. Myers mentioned
25 earlier, the participation of Brookfield and the
26 members of the Developers Group in this proceeding is

1 underlain by an obvious motivation for these developers
2 to have pipeline operators subsidize their private
3 for-profit business activities in the respectful
4 submission of the pipeline companies.

5 The balance of the evidence put forward by
6 Brookfield and the Developers Group is completely
7 irrelevant to the subject matter in this proceeding and
8 is more consistent with an attempt to malign the
9 pipeline industry in general in my respectful
10 submission.

11 In conclusion, Madam Chair, as promised -- I think
12 I'm hopefully at about the three-minute mark -- based
13 on the evidence presented at this hearing and
14 throughout this proceeding, the Panel's decision, in my
15 respectful submission, should be very straightforward.

16 The Panel has a solid roadmap for the proper
17 interpretation of Section 33 of the Pipeline Act in
18 its -- in the AER's April 2022 decision. Moreover, the
19 evidence it heard over the course of the last week
20 clearly indicates that there is no dispute that it
21 needs to resolve with respect to the alteration work
22 itself or with respect to the cost of that work.

23 While a directional order is unnecessary for these
24 reasons and the fact that ordering pipeline alteration
25 in this instance in no way accords with the public
26 interest, if the AER determines that it's appropriate

1 to issue a direction for the pipeline companies to
2 carry out the alteration work and then determines that
3 it's appropriate to issue an order in respect of the
4 cost of that work, it should direct Qualico to bear
5 100 percent of those costs given that those costs arise
6 solely as a result of its development activities, and
7 Qualico is the sole party benefitting from them, and
8 this would be consistent with the well-established
9 industry practice in Alberta.

10 In closing, Madam Chair, Panel Members, the
11 pipeline companies submit that the Panel should
12 confirm, without conditions or variations, the AER's
13 decision to deny Qualico's amended cost-sharing
14 application.

15 Pembina and Plains reiterate that their evidence
16 in this proceeding, in their view, including that of
17 SECURE and their independent expert witnesses, is the
18 most credible, reliable evidence before the Panel and
19 ought to form the basis of the Panel's decision.

20 Thank you for listening this afternoon, and
21 apologies if I am a little bit over time.

22 THE CHAIR: Thank you very much.

23 So I would suggest maybe ten minutes' break before
24 we come back to Keyera, being mindful that I gave an
25 unscheduled break earlier today. So just a short break
26 if anybody needs to.

1 D. NAFFIN: You bet. Thank you,
2 Madam Chair.

3 THE CHAIR: Thank you.

4 (ADJOURNMENT)

5 THE CHAIR: Thank you very much. Please
6 be seated.

7 So next on our agenda, we have Keyera.

8 If you're ready, we are ready.

9 Final Submissions by S. Duncanson

10 S. DUNCANSON: Thank you, Madam Chair and
11 Hearing Commissioners. Again, my name is
12 Sander Duncanson, and I'm pleased to present final
13 argument on behalf of Keyera.

14 I'm not going to repeat all of the able
15 submissions from my friends Mr. Myers and Mr. Naffin.
16 Instead, I plan to just cover a few key points from
17 Keyera's perspective.

18 First, I plan to discuss Section 33 of the
19 Pipeline Act; second, I will discuss the AER's mandate
20 in the meaning of the public interest; third, I will
21 discuss the concept of equitable sharing; fourth, I
22 will cover some basic property law principles that are
23 engaged by Qualico's application; and, finally, I will
24 provide submissions on why the AER should not mandate
25 universal crossing requirements in this proceeding or
26 otherwise.

1 And before I get going, I'd like to start by
2 providing just a few points of context. First, in this
3 proceeding, we are discussing existing pipelines that
4 were built decades ago. The pipeline companies paid
5 full market value for the easements for their pipelines
6 based on the circumstances at the time. The pipelines
7 have been operating in accordance with the terms of
8 their easements ever since. None of that is in
9 dispute.

10 This proceeding is about what happens when a
11 developer is seeking to build a residential community
12 in the vicinity of an existing pipeline. Among other
13 things, new residential developers typically require
14 upgrading existing minor roads to larger, higher-volume
15 roads, or, in some cases, constructing new roads where
16 there aren't any roads at present.

17 This is an issue for buried pipelines running
18 below the road because with more weight at surface,
19 that places stress on the pipeline underground and
20 risks damaging the pipe and its integrity. That's, of
21 course, problematic for not only the pipeline company
22 and its customers who face direct risks if the pipeline
23 were to have a spill or release, but it also risks
24 human health and safety, neighbouring property owners,
25 and the environment.

26 Recognizing those risks, there are well-defined

1 technical requirements under CSA Z662 to ensure that in
2 circumstances like this, the pipeline company
3 implements mitigation measures or alterations as
4 necessary to protect the integrity of the pipeline.
5 The pipeline company is accountable for complying with
6 those CSA requirements.

7 And from a context perspective, it's also
8 important to understand that, under the terms of the
9 pipeline easements, third parties, including the fee
10 simple owner of the land, cannot cross the pipeline or
11 otherwise conduct certain work in the easement area
12 without the pipeline licensee's consent.

13 In most instances when developers are seeking to
14 cross pipelines, the third parties are seeking to
15 conduct work within the pipeline easement that requires
16 the pipeline company's consent, and they in the
17 pipeline company have been unable to reach an agreement
18 on what that consent will look like. That's the
19 private dispute that gives rise to the crossing
20 discussions that we've been talking about in this
21 proceeding.

22 So that's a segue to the first topic in my final
23 argument, which is Section 33 of the Pipeline Act.
24 Section 33 of the Pipeline Act permits the AER to
25 direct a pipeline licensee to alter, modify, or protect
26 its pipeline if such an order is in the public

1 interest.

2 Practically, this section of the Pipeline Act
3 ensures that pipeline licencees cannot simply veto
4 crossing or proximity work. If a third party seeks to
5 cross the pipeline and the pipeline company and the
6 third party can't agree on what work is required to
7 protect the pipeline, the third party can bring that
8 dispute before the AER for adjudication. That's what
9 Section 33 of the Pipeline Act is all about, but that's
10 not the circumstance of Qualico's application before
11 you as my friends Mr. Myers and Mr. Naffin have
12 outlined.

13 Based on a plain reading of Section 33, the AER
14 can make orders under subsection 1 if a pipeline
15 licencee and a third party cannot agree on the need for
16 or scope of pipeline alterations or relocations.
17 Again, this means that if a pipeline licencee acts
18 unreasonably when a third party seeks to cross its
19 pipeline and easement, there can be recourse to the
20 AER, and the AER will decide what physical works, if
21 any, are in the public interest.

22 Subsection (2) of Section 33 allows the AER to
23 order by whom and to whom payment of the cost of the
24 work directed under subsection 1 should be made. This
25 means that orders can only be made by the AER under
26 subsection (2) if the required physical work was

1 directed by the AER through an order under
2 subsection (1). Unless physical work is directed by
3 the AER under 33(1), 33(2) is never engaged.

4 Similarly, subsection (3) of Section 33 says that
5 if a dispute arises as to the amount to be paid
6 pursuant to an order under subsection (2), that dispute
7 can be referred to the AER. Again, this means that
8 unless physical work is directed by the AER under
9 subsection (1), subsection (3) is never engaged.

10 In the present case, there is no existing order
11 under subsection (1) or subsection (2), so the AER, in
12 my submission, cannot make any order under
13 subsection (3).

14 We've heard submissions from the developers today
15 about how the AER should interpret Section 33 of the
16 Pipeline Act. Those arguments misconstrue the way that
17 Section 33 is designed. Now, we set out the proper
18 interpretation of Section 33 in Keyera's written
19 submission. That's Exhibit 72.01.

20 In its reply submission, Qualico stated that it
21 was not going to respond to those arguments because it
22 viewed them as legal arguments, and it would deal with
23 them in its final argument. But we didn't hear any
24 submissions from my friend Mr. Fitch this morning about
25 those arguments in Keyera's written submissions. I
26 presume Mr. Fitch is not waiting for his reply later

1 this afternoon to address those points because that
2 would be procedurally inappropriate.

3 As Keyera set out in its written submissions, if
4 the AER directs physical work to be done under
5 subsection (1), the pipeline company would have no
6 reason to come back to the AER to challenge the cost of
7 the work because the pipeline company will fully
8 understand the basis for the cost.

9 So subsection (3) is not intended to address
10 disputes from the pipeline company around the cost of
11 physical work. It is only if either the third party
12 causing the physical work disputes the amount of costs
13 claimed by the pipeline for the physical works directed
14 by the AER or if there are multiple third parties
15 involved, and they have a dispute around how to
16 allocate those costs between themselves that
17 Section 33(3) would be engaged.

18 In a few minutes, I will go through some of the
19 legal reasons why Section 33 of the Pipeline Act should
20 not be used to impose cost sharing between pipeline
21 companies and developers in circumstances like
22 Qualico's application, but it's also important to note
23 that, as Mr. Fitch noted this morning, Section 33 of
24 the Pipeline Act has existed in substantially the same
25 form for more than 65 years.

26 The record before you demonstrates that Section 33

1 has never been used as Qualico and the other developers
2 are now seeking to use it, which is to have the AER
3 direct pipelines to cover a portion of the costs of
4 pipeline crossings, particularly when there is no
5 dispute around the physical works required to be
6 conducted.

7 While Qualico cited a few ERCB decisions from the
8 1980s in its written submission, only one of those
9 decisions involved the issuance of a cost order, and in
10 that case, the pipeline had already agreed to pay the
11 costs it was ordered to pay. Never before has the AER
12 or any of its predecessors made the type of order that
13 you are now being asked to make.

14 Mr. Fitch this morning also referred to an AUC
15 decision. Mr. Myers correctly pointed out that the
16 passage that Mr. Fitch cited was obiter from that
17 decision. But also, to be clear, the AUC's regulatory
18 function is materially different than the AER's. The
19 AUC's role is regulating utilities, including the
20 relationship between the utility and its ratepayers.
21 Guidance from the AUC about cost sharing involving
22 AUC-regulated utilities has zero relevance to how the
23 AER should apply Section 33 of the Pipeline Act.

24 We heard clear and compelling evidence from
25 Keyera's witness, Mr. Beztilny, on Monday and the other
26 pipeline company witnesses last week that the practice

1 has always been that the parties seeking to cross an
2 existing pipeline is responsible for the costs of that
3 crossing, including any alteration or relocation to the
4 pipeline that the crossing requires. That standard
5 practice applies to anyone seeking to cross or -- or
6 perform work in proximity to a pipeline easement the
7 same way that it does to developers like Qualico.

8 Keyera's interpretation of Section 33 of the
9 Pipeline Act respects the way that this section has
10 been used and has not been used for the last 65 years,
11 and it also respects the AER's mandate and property law
12 principles, which I will discuss in a few minutes. As
13 such, I submit that Keyera's interpretation of
14 Section 33 should be favoured over other
15 interpretations that would require you to depart from
16 established property law principles and which would
17 disrupt the energy industry, contrary to your
18 legislated mandate.

19 To be clear, however, Panel, we are not saying
20 that you should decline to grant Qualico's application
21 because you lack jurisdiction to rule on who should pay
22 for the cost of work required for safe pipeline
23 crossings. Section 33 gives you that jurisdiction.

24 What we are saying is that for all of the reasons
25 I will discuss in my remarks, you should deny Qualico's
26 application because imposing cost sharing between

1 pipeline companies and developers in circumstances like
2 those in Qualico's application would violate basic
3 legal principles and is not in the public interest. It
4 is a matter of what decision you should make based on
5 the evidence and the law before you, not whether you
6 have jurisdiction over this issue.

7 That takes me to the next topic in my argument,
8 which is the AER's mandate and the term "public
9 interest" as that term appears in Section 33(1) of the
10 Pipeline Act. As my friends Mr. Naffin and Mr. Myers
11 have pointed out, we heard a lot of different
12 characterizations during this hearing about what the
13 public interest means in a hearing like this. We heard
14 from Mr. Morrison that the public interest means the
15 same thing as ESG and that it is in the public interest
16 to lower the cost of housing in Alberta. That's at
17 transcript pages 62 and 158.

18 We similarly heard from Mr. Armstrong from Qualico
19 that the Developers' objective is to try to keep their
20 development costs as low as possible, and that is in
21 the public interest. That's at transcript page 193.

22 But, Panel, when the AER was established by the
23 Alberta Legislature to make decisions in the public
24 interest, the Legislature did not task the AER with
25 sorting out the types of public policy questions that
26 Mr. Morrison and the developers are asking you to

1 decide in this proceeding. Instead, the AER's mandate
2 under Section 2(1) of REDA is: (as read)

3 To provide for the efficient, safe, orderly,
4 and environmentally responsible development
5 of energy resources and mineral resources in
6 Alberta through the Regulator's regulatory
7 activities.

8 And as Mr. Dixon and Mr. Myers both noted, that same
9 wording is found in Section 4 of the Pipeline Act.

10 That's the lens through which you need to look at
11 Qualico's application. How would approval of this
12 application affect the efficient, safe, orderly, and
13 environmentally responsible development of energy
14 resources in Alberta?

15 For the reasons set out in Keyera's written
16 submissions as well as Mr. Beztilny's testimony on
17 Monday, approval of Qualico's application would harm
18 the efficient and orderly development of energy
19 resources in Alberta because it would introduce
20 additional costs and risks to the energy value chain
21 after decisions have already been made to invest in new
22 pipeline infrastructure and the associated upstream and
23 downstream developments.

24 Mr. Beztilny explained that the energy product
25 value chain is sensitive to changes in costs and risks
26 and certain developments are being shut-in as we speak

1 as a result of changes in the costs and revenues across
2 the value chain. You can find that at transcript
3 pages 545, 546, 576, and 577.

4 If the AER establishes the precedent that Qualico
5 and the other developers are seeking, Mr. Beztilny
6 explained that the energy value chain will be exposed
7 to indeterminate risks indefinitely. Not only will
8 this harm the economic viability of the basin overall,
9 but Keyera's evidence is that this precedent could
10 cause some facilities to be stranded prematurely. That
11 means environmental impacts have occurred that could
12 have been avoided.

13 All of that would be contrary to the efficient,
14 safe, orderly, and environmentally responsible
15 development of energy resources in Alberta and would,
16 therefore, be contrary to the public interest that the
17 AER has been tasked with advancing.

18 I should note that none of Keyera's evidence about
19 the harm that would be caused by approval of Qualico's
20 application was challenged by Qualico or any of the
21 other developers in their evidence or during
22 cross-examination.

23 The only questions that the developers asked about
24 this topic during cross-examination were whether this
25 proceeding was discussed in Keyera's financial
26 reporting. My friend Mr. Dixon argued this morning

1 that if this proceeding was not discussed in Keyera's
2 financial reporting, that somehow means the risks that
3 Mr. Beztilny testified to under oath are not real
4 risks.

5 Now, there is no evidence in this proceeding about
6 how Keyera's financial reports are prepared and what
7 types of risks are and are not discussed in them. But,
8 regardless, our position is that granting Qualico's
9 application would be precedent-setting and is not
10 supported by the law or the evidence before you.

11 So that likely explains why this proceeding was
12 not discussed in Keyera's financial disclosure. It in
13 no way detracts from Mr. Beztilny's clear evidence
14 under oath that establishing this new precedent would
15 affect the entire energy value chain and could be
16 reasonably expected to have a significant impact on the
17 overall basin.

18 Before leaving this topic of the AER's mandate and
19 the meaning of the public interest, I should also note
20 that two aspects of Mr. Morrison's testimony are
21 directly outside the AER's jurisdiction: First,
22 contrary to Mr. Morrison's suggestions, Section 33 of
23 the Pipeline Act is not intended to provide a mechanism
24 to address landowner compensation issues. Landowner
25 compensation for land rights needed for pipelines is
26 within the jurisdiction of the Land and Property Rights

1 Tribunal, not the AER. So if Mr. Morrison believes
2 that the pipeline company did not adequately compensate
3 the landowner for the easement rights acquired to
4 construct and operate the pipeline, the AER has no
5 jurisdiction to remedy that.

6 Second, Mr. Morrison was clear in his responses to
7 my questions during cross-examination that his
8 recommended approach would make the AER responsible for
9 land use planning decisions. You can find that in the
10 transcript at page 177.

11 However, the AER has clearly said that land use
12 planning is not within its jurisdiction. And authority
13 for that can be found at paragraph 23, Footnote 8 of
14 Keyera's written submission, which is Exhibit 72.01.
15 So, again, Panel, the AER cannot be used as the forum
16 that Mr. Morrison and his clients envision.

17 That takes me to the next topic in my argument.
18 We've heard arguments throughout the hearing and over
19 the course of the day today that what Qualico and the
20 other developers are seeking is an equitable sharing of
21 development costs.

22 Now, first of all, for the reasons I just
23 discussed, that's not the AER's role, to adjudicate any
24 commercial dispute involving an AER-regulated asset and
25 find an equitable compromise between the parties. The
26 AER's role is to adjudicate energy resource

1 applications based on its legislated mandate.

2 But, regardless, we take strong exception to the
3 suggestion that the developers' proposed relief in this
4 proceeding would be equitable. The pipeline companies
5 own their easement rights. They paid full market value
6 for those rights at the time they were acquired. The
7 record demonstrates that the pipeline companies have
8 been willing to work with the developers to accommodate
9 their -- their development plans, notwithstanding that
10 the pipeline companies gain no benefit from doing that.
11 And now the developers suggest that the pipeline
12 companies should also pay for a portion of the
13 developers' development costs.

14 We do not see that as equitable sharing. We see
15 that as an attempt to have pipeline companies subsidize
16 the costs of new residential developments in Alberta.
17 It's obvious why the developers find this appealing,
18 but it's a premise that goes beyond the AER's
19 jurisdiction and mandate for the reasons I've just
20 discussed.

21 Let me turn now to some basic principles of
22 property law in Alberta. And some of this has been
23 canvassed by my friends already, so I'll try not to
24 overlap what we've already heard.

25 The first basic principle is that when a person
26 acquires an interest in land, they pay compensation for

1 that interest based on the circumstances at the time.
2 There is no look back if property values change over
3 time.

4 I'm sure we've all experienced a situation where
5 we've bought or sold property and the value of that
6 property changed for better or for worse. A real
7 estate transaction may turn out well or it may turn out
8 poorly for a party, but there's nothing unfair about
9 that. That's the way that real estate transactions
10 work, not just in Alberta, but in most of the world.

11 Mr. Morrison seems to accept that principle for
12 fee simple ownership, but he thinks that pipeline
13 easements should be treated differently, even if the
14 pipeline easement was acquired for the same value as
15 fee simple ownership. Mr. Morrison argues that, in
16 addition to the cost of acquiring the easement rights,
17 pipeline companies should be required to ensure that
18 the landowner remains satisfied with the deal over
19 time, and that means they should pay for any additional
20 injurious affection that occurs over the entire life of
21 the pipeline over and above the full market value for
22 the cost of the easement that was paid at the time the
23 easement was acquired. That's found at transcript
24 page 66.

25 What this means, Panel, is that adopting
26 Mr. Morrison's logic would result in pipeline easements

1 costing more than fee simple ownership despite being a
2 lower form of land rights. And I respectfully submit
3 to you that is an absurd proposition.

4 It's important to take a step back and think about
5 the nature of pipeline easements and the implications
6 of what Mr. Morrison is suggesting to you. For an
7 easement, despite paying what fee simple ownership
8 would cost for the strip of land where the pipeline is
9 located, the pipeline company agrees to only take the
10 land rights as an easement, which allows the landowner
11 to continue to use the surface of the land with certain
12 restrictions over the life of the pipeline. That is a
13 benefit to the landowner. They get paid as though they
14 have saled -- sold the land outright, but they still
15 get to legally own the land and use it. That's a good
16 deal for the landowner.

17 It defies logic to suggest that the pipeline
18 companies should pay more than fee simple fair market
19 value because they have agreed to let the landowner
20 continue using the surface of the land for certain
21 purposes after paying full value to use the land for
22 the purposes of the pipeline. Again, if the value of
23 the land goes up over time and there are negative
24 impacts on the land value because the landowner
25 previously sold easement rights to the pipeline
26 company, there is no unfairness about that. The

1 pipeline company paid in full for the rights to be on
2 that land.

3 There are two other key tenets of property law
4 that arise in this case, and we've heard them
5 referenced a few times today. The first is the
6 buyer-beware principle, also known as caveat emptor,
7 and the second is the first-in-time, first-in-right
8 principle. These are both very fundamental principles
9 that apply broadly to all real estate transactions in
10 Alberta, not just pipelines.

11 The buyer-beware principle, in essence, means that
12 the onus is on the buyer of real estate to be aware of
13 what they are buying, and then once they have bought
14 that real estate, they own it. That's why when you buy
15 a house, your lawyer will confirm title to the property
16 and will recommend that you get a survey done to
17 confirm that the property complies with city bylaws and
18 you are aware of any easements or restrictive covenants
19 on the land. That's also why many homebuyers do a home
20 inspection as a condition of their purchase offer to
21 make sure that they do due diligence on the home to
22 ensure that they know what they are buying before the
23 sale closes.

24 Obviously, the process looks a little bit
25 different when you're dealing with sophisticated
26 development companies and they're buying large tracts

1 of land for the purposes of building a large
2 development project, but the principle is the same.

3 You heard from the developer witnesses that they
4 do, in fact, conduct due diligence prior to closing on
5 land sales. When developers like Qualico buy land with
6 pipeline easements running through them, they do that
7 with full knowledge that the easements are there and
8 that they will need to work with the pipeline company
9 to secure crossing agreements if they want to develop
10 across those easements.

11 Mr. Westren from Brookfield was clear on this
12 point. At transcript page 282, he said: (as read)

13 You will also hear the pipeline companies
14 arguing that since the pipeline predated the
15 purchase of or the development of the land
16 that runs beneath, the developer knew or
17 ought to have known that there would be cost
18 to protecting, relocating, or altering the
19 pipeline in some way. To this, we say, Of
20 course we do.

21 The developers may not know with certainty what the
22 crossing costs will ultimately be, but any large
23 developer will have a pretty good idea of what that
24 will cost.

25 Contrary to the claims from some of the developer
26 witnesses that we heard at page 237 of the transcript

1 that they have no information at the due diligence
2 stage about things like a pipeline's depth, its age,
3 its classification, et cetera, Mr. Beztilny explained
4 that those types of information are readily available
5 through sources like AbaData. He clarified that at
6 pages 542 and 543 of the transcript.

7 So the claim that developers are totally in the
8 dark about the nature of the pipelines in the area and
9 can't reasonably discover any information about them
10 during due diligence is not credible.

11 And, Commissioners, none of this is unique to the
12 pipeline industry. There are many types of third-party
13 easements that can run across lands, things like power
14 lines, fibreoptic cables, waterlines, sewer lines.
15 Whenever a buyer decides to purchase land with those
16 type of encumbrances on it, they do so with eyes wide
17 open that if they want to modify those facilities or do
18 work on those easements, there will be further process
19 and risk associated with that. There's nothing unfair
20 about it. That's the nature of the buyer-beware
21 principle.

22 Now, my last point on the buyer-beware principle
23 is Mr. Fitch claimed this morning that the principle
24 has no application to public road allowances because
25 there's no title to public roadways. Now, that
26 submission completely misses the point.

1 Even if we're talking about a pipeline crossing of
2 a public roadway, the point is that the developers know
3 that the pipelines are there before they make the
4 decision to purchase the land. They know that they
5 will need crossing agreements in order to develop
6 across those pipelines. The developer witnesses
7 admitted so much under cross-examination, and there is
8 no basis for Mr. Fitch to now suggest otherwise.

9 The related principle which we've heard about
10 today is the first-in-time, first-in-right principle.
11 And in the development context and how we're using the
12 term in this hearing, this principle means that when
13 new infrastructure is constructed, it must address all
14 man-made features that the infrastructure crosses.

15 If new infrastructure crosses third-party rights
16 like easements, the new infrastructure must obtain the
17 necessary consents from the third party to cross them.
18 But once that new infrastructure is built, it becomes
19 part of the landscape, and if someone else comes along
20 after the infrastructure is built, the infrastructure
21 is one of the third-party features that the new project
22 must address.

23 This approach applies regardless of what is being
24 developed or who is developing it. When new pipelines
25 are built, they too must get crossing agreements from
26 other pipeline companies and other third parties. But

1 once the pipeline is built, it becomes
2 indistinguishable from all other existing
3 infrastructure on the landscape, and it must be
4 accommodated by future pipelines or any other type of
5 development that seeks to cross it.

6 That's one of the main purposes of the land titles
7 registry, to make sure that buyers of property can see
8 what they are buying and if there are any prior
9 encumbrances on the property that may restrict what the
10 buyer does with it before the buyer closes on their
11 sale.

12 Mr. Morrison acknowledged at page 173 of the
13 transcript that what Qualico is essentially asking the
14 AER to do in this case is throw away the first-in-time,
15 first-in-right principle. We heard from Qualico in its
16 written submission and, again, this morning that
17 respecting the first-in-time, first-in-right principle
18 is inconsistent with the intent of Section 33 of the
19 Pipeline Act.

20 But Qualico and the other developers have not
21 given you any legal authority that would allow you to
22 interpret Section 33 of the Pipeline Act in a way that
23 disregards this principle by requiring existing
24 pipelines to pay to accommodate future developments in
25 proximity to them.

26 And, factually, as I've discussed, the record

1 demonstrates that departing from the first-in-time,
2 first-in-right principle would have serious negative
3 impacts on the efficient and orderly development of
4 energy resources in Alberta, contrary to the AER's
5 legislated mandate.

6 So this means that you lack both a legal and a
7 factual basis to throw away the first-in-time,
8 first-in-right principle in this proceeding as Qualico
9 and the other developers are asking you to.

10 Now, to be clear, to respond to my friend's
11 submissions this morning, we are not saying that
12 pipelines have an absolute, unfettered right to quiet
13 enjoyment and that they can veto crossings. We agree
14 that Section 33 of the Pipeline Act makes it clear that
15 is not the case.

16 But, Panel, that does not mean that existing
17 pipelines should pay to accommodate developments
18 proposed after the pipeline has been built. There is
19 no authority before you that that was ever the intent
20 of Section 33 of the Pipeline Act. The record
21 demonstrates Section 33 has never been used that way in
22 the last 65-plus years, and, again, doing so would
23 disregard established property law principles without
24 legal or factual justification.

25 My last topic of argument is the issue of
26 universal crossing requirements. This was not

1 something that Qualico included as a relief in its
2 application, but this is something that Brookfield and
3 the Developers Group asked for in their hearing
4 submissions, and we've heard other references to this
5 throughout the hearing.

6 Now, first of all, Panel, because this relief was
7 not part of Qualico's application, it would be
8 procedurally unfair, in our submission, for the AER to
9 make any form of direction in this proceeding about
10 universal crossing requirements because there may be
11 other parties in the province who would be affected by
12 those requirements, and they chose not to participate
13 in this hearing because they had understood that this
14 proceeding would be limited to the relief sought by
15 Qualico. It would be procedurally unfair to them for
16 you to make a decision that could affect their rights
17 and interests without giving them proper notice and an
18 opportunity to participate.

19 In any event, the record before you does not
20 support any finding or recommendation for universal
21 crossing requirements. Mr. Beztilny explained on
22 Monday that pipeline companies are responsible for
23 ensuring the integrity of their pipelines, and each
24 crossing can put different stresses on the pipeline,
25 depending on the design and materials of the crossing,
26 the depth of the pipeline, pipe material and wall

1 thickness, soil conditions, and other factors. That's
2 at transcript page 539.

3 Mr. Beztilny explained that some crossings are
4 simple and some are more complex and require full
5 engineering assessments. So there is no
6 one-size-fits-all approach to conducting these types of
7 integrity assessments, and this Panel and the AER needs
8 to be very cautious, in our submission, about making
9 any order or direction that could prevent the pipeline
10 company from doing the engineering work that is
11 required in the circumstances to ensure the pipe is
12 being adequately protected.

13 Further, despite some arguments that we've heard
14 from the developers, I would argue you don't have any
15 evidence before you that pipeline companies are failing
16 to reasonably respond to crossing requests. Of the
17 many thousands of crossing requests that the pipeline
18 companies in this proceeding receive annually, this is
19 the first time in over a decade that a dispute has been
20 brought before the AER or its predecessor under
21 Section 33 of the Pipeline Act.

22 If you look at the specific facts of the various
23 crossing disputes that have been discussed in this
24 proceeding, the development companies themselves are
25 often responsible, at least partially, for how long it
26 takes the pipeline company to process their request by

1 providing inadequate information, by making
2 unreasonable requests, and/or delaying authorizing the
3 pipeline to proceed with the necessary work.

4 There is, similarly, no evidence before you that
5 the pipeline companies are giving the developers
6 unreasonable cost estimates or are improperly seeking
7 to include pipeline maintenance work within the scope
8 of crossing costs. This is pure speculation on the
9 developers' part.

10 On that last point, I have two further points I'd
11 like to make. First is any pipeline company that
12 deferred necessary maintenance work until a developer
13 happened to come along with a crossing request would
14 likely be failing to meet its regulatory obligations to
15 safely operate the pipeline by knowingly deferring
16 maintenance work that it has determined to be
17 necessary.

18 Second, if developers are truly concerned about a
19 pipeline company proposing physical works as part of a
20 crossing agreement that are not required to accommodate
21 the developers' plans, they have recourse to challenge
22 the scope of work under Section 33(1) of the
23 Pipeline Act.

24 I respectfully submit that this existing recourse
25 is the appropriate forum for addressing any specific
26 dispute about physical crossing work, and that specific

1 dispute would be adjudicated based on actual facts, not
2 speculation. There is no evidence before you in this
3 proceeding to demonstrate that the existing recourse is
4 inadequate and some further recourse for the developers
5 is needed.

6 So, in conclusion, Madam Chair and Hearing
7 Commissioners, I respectfully submit that Qualico and
8 the developers have failed to provide the necessary
9 legal or evidentiary support that would justify their
10 requested relief. The relief that Qualico and the
11 developers are seeking would establish a significant
12 precedent that would run counter to the AER's mandate
13 and well-established property law principles. For
14 those reasons, Keyera requests that you deny Qualico's
15 application and the other relief requested by the
16 Developers Group.

17 Thank you, Panel. That concludes my argument this
18 afternoon, subject to any questions you may have.

19 THE CHAIR: Thank you, Mr. Duncanson.

20 I misspelled your name. Yeah. Thanks,
21 Mr. Duncanson.

22 Just give us a second.

23 No questions for you. Thank you very much.

24 S. DUNCANSON: Thank you.

25 THE CHAIR: Mr. Fitch, if you wish, we can
26 take a break before you have your final reply. That's

1 up to you. 'Cause while -- we are slightly over time,
2 but we are not grossly over time, so if you wish to
3 take a break, we can accommodate that.

4 G. FITCH: Madam Chair, I actually think
5 I'm ready to go. So I had the benefit of an earlier
6 break or two, so I've had a chance to talk with my
7 client. And, at this point, I am not sure much is
8 going to be gained from another 15 minutes, so I'm --
9 I'm just going to proceed if that's acceptable.

10 THE CHAIR: That's acceptable. Please
11 proceed.

12 Final Submissions by G. Fitch (Reply)

13 G. FITCH: All right. So what I'm going
14 to do -- I -- I have half an hour, so I don't have a
15 lot of time. I'm just going to briefly -- I'm going to
16 start by just briefly addressing Mr. Duncanson's
17 submissions on behalf of Keyera. That won't take me
18 very long at all. And then I'll -- I'll get to Pembina
19 and Plains. And I'm just doing that 'cause it's fresh
20 in my mind.

21 So the first thing I want to reply to from
22 Mr. Duncanson's submissions is he said that Keyera
23 accepts that Section 33 of the Pipeline Act isn't
24 meaningless, and he suggested that practically what it
25 means is the pipeline operator has no veto, and if the
26 pipeline operator is acting unreasonably, then

1 Section 33 provides a remedy.

2 We don't disagree with that, and I want to be
3 clear that the position of Qualico is that, in this
4 case, the pipeline operators have acted unreasonably.
5 So -- so I -- I agree with my friend.

6 My friend also talked about subsection (3) of
7 Section 33. And we have never argued that subsection,
8 which seems to me to relate to where an order has
9 already been issued under subsection (2), but then
10 there's a dispute about the payment. The parties can
11 go back to the AER. In our view, it's not relevant.
12 We're not relying on it.

13 Mr. Duncanson, as well as my friends -- my friend
14 Mr. Myers, urged on you that you should ignore,
15 essentially, Alberta Utilities Commission
16 Decision 2012-233 which I walked you through, and my
17 submission to you is do not ignore that decision. It
18 is highly relevant. And, in particular, paragraphs 24
19 to 29 that I -- I read some of them to you verbatim.

20 If you read that decision, fairly put in its
21 context, you will see that it is highly relevant. And
22 why it is highly relevant, because it is exactly on
23 point. It deals with a statutory provision that is
24 virtually identical to Section 33, and it provides a
25 principal discussion of what the purpose of the
26 provision is, which is to deal with conflicts exactly

1 like that in this case.

2 Mr. Duncanson referred to the evidence -- the
3 testimony of Mr. Beztilny, which he made a point of
4 saying was under oath, and that evidence was as to the
5 indeterminate risk indefinitely, should a cost-sharing
6 order be made, and he noted that none of this evidence
7 was challenged in cross-examination, and I'm going to
8 tell you, Madam Chair, that certainly, on behalf of
9 Qualico, the reason why it wasn't challenged is because
10 it is clearly hyperbole. It is Chicken Little
11 the-sky-will-fall type of evidence.

12 And this -- this kind of goes to a -- a difficult
13 point about evidence in proceedings before the
14 Regulator and the Alberta Utilities Commission. The
15 truth is the line between opinion and fact is often not
16 very clear in these proceedings, and I'm going to urge
17 on you that when Mr. Beztilny said, Oh, if you order
18 cost sharing, there will be indeterminate risk
19 indefinitely, he was expressing an opinion. That's not
20 fact in any way. So there was no point, in our view,
21 in challenging what was clearly a hyperbolic
22 over-the-top opinion.

23 Mr. Duncanson tried to respond to my argument that
24 the buyer-beware principle does not apply when the
25 crossing is on public land on a public road
26 right-of-way. He said that I missed the point, the

1 point being that Qualico would know that there's a
2 pipeline and would know that it would have to obtain a
3 crossing agreement.

4 But that's not the point. The point is that the
5 approach by Qualico to Plains and to Pembina was
6 required -- is required by the City. Qualico's not
7 doing it because it wants to. It's doing it because
8 it's been required to do it under its subdivision
9 approval and under the rules that the City has enacted,
10 and the City was there first. That's the point.

11 And, lastly, in response to Mr. Duncanson's
12 submissions, he suggested that part of the reason for
13 the lack of timeliness that you heard the Qualico and
14 Developers Group testify about was because they were
15 making "unreasonable requests". And I just simply want
16 to say very strongly on the record Qualico and the
17 developer -- the members of the Developer Group deny
18 strongly that any of their requests for basic
19 information on what work needs to be done and how much
20 will -- will it cost, those requests were not
21 unreasonable. And to try to turn around and pin the
22 blame for the lack of timeliness on the developers is
23 not appropriate.

24 All right. So turning to Pembina and Plains. I
25 would say that the submissions of my friends Mr. Myers
26 and Mr. Naffin had a -- a theme -- they had several

1 themes, but one of the themes was that this was just
2 Qualico pursuing a private interest.

3 Now, I have already made submissions on why --
4 what public interest considerations we think are at
5 play here, and we have focused on the fact that these
6 crossings are not on Qualico privately owned land, but
7 rather in a public road allowance. I'm not going to
8 repeat all of that. All I'm going to say is arguing
9 that Qualico is pursuing its private interests is truly
10 the pot calling the kettle black. Clearly Pembina and
11 Plains are also pursuing their private interests.

12 And I think, to be fair to Dr. Makholm, one of the
13 points he was making is, Well, you have these private
14 parties, Qualico on the one hand, Plains and Pembina in
15 the other, they're pursuing private interests. We
16 don't deny that Qualico is a for-profit corporation
17 pursuing private interests, but to suggest that -- or
18 to imply that there's something wrong with it and to --
19 and to ignore the fact that Pembina and Plains are
20 similarly pursuing their own private interests, it's --
21 it's -- just doesn't sit right.

22 Next, I would like to address Mr. Myers' curious
23 submission, if I can put it that way, that the response
24 provided by the Qualico witness panel to -- to the
25 Chair's question about terms and conditions -- and this
26 is the response where they said, We'll pay for the

1 things that we do, which is roadwork, and -- but
2 anything having to do with the pipe, the pipeline
3 operators should pay. He seemed to think that that
4 means we have somehow thrown in the towel and
5 acknowledged that the position that his clients have
6 put forward is correct.

7 And I'm here to tell you that is completely not
8 the case, and it has completely misconstrued what
9 Mr. Armstrong and Mr. Fjeldheim said, which was simply
10 that, We accept responsibility when we have to cross
11 with -- we're building a new road, and we have to cross
12 a pipeline. We -- we accept responsibility basically
13 for the surface costs because that's what we do, we
14 build roads. But all of the subsurface costs to
15 protect your pipeline, whatever work you need to do to
16 protect your pipeline, those are your costs. That is
17 in no way any kind of admission against our interests.

18 Mr. Myers raised Section 619 -- and this is the
19 wonders of modern telephones. I'm just going to pull
20 it up on my phone here -- of the Municipal Government
21 Act, and I'm just simply going to submit that
22 Section 619 of the Municipal Government Act is entirely
23 irrelevant in this proceeding. Section 619 basically
24 deals with where there is a conflict between a licenced
25 permit or approval granted by, in this case, the AER,
26 and a statutory plan, a land use bylaw, a subdivision

1 development -- decision or development decision, well,
2 there is no such conflict here.

3 And -- and to suggest that you can draw a line
4 between a dispute on pipeline crossing costs and a
5 conflict between the pipeline licence and, in this
6 case, I guess it would be the ASP approval, is a huge
7 stretch. The fact is Section 619 is completely
8 irrelevant.

9 Pembina and Plains also responded to the argument
10 advanced by me this morning, again, that the pipeline
11 crossings are in a road allowance. My -- my friend
12 Mr. Naffin even referred to it as an "alleged road". I
13 don't think that's really the case. It's a real road.
14 And Mr. Myers said, There's no evidence that the road
15 existed before the pipelines. Well, there is evidence
16 that the road existed before the pipelines on the
17 record of this proceeding.

18 Firstly, their own expert Mr. Telford agreed.
19 But, secondly, if you look at Exhibit 4.01, there --
20 there was a response from Qualico to the first
21 supplemental information request issued by the AER, and
22 one of the requests was for a map. And if you -- you
23 look at that map, and it's -- I think it's on -- I'm
24 not sure what PDF page it is. But it's in
25 Section 4.01. You'll see that the land that we were
26 talking about was the southeast quarter of Section 5.

1 It's east of Meridian Street, north of 167th Avenue.
2 So that's -- that's the land that the Public Utilities
3 Board issued that decision in relation to back in 1971.

4 So then if you look at the Public Utilities Board
5 decision, and that's Exhibit 64.05 at PDF page 3,
6 firstly, you'll see that it relates to the southeast of
7 5, and, secondly, you'll see the statement that the
8 lands in question are bounded on the east by an
9 all-weather, high-grade gravel road. So there -- it is
10 simply false to suggest there is no evidence on the
11 record that the road, which is now Meridian Street,
12 existed before the pipelines. It did, and that was
13 acknowledged by Mr. Telford.

14 Mr. Myers also submitted or suggested that Qualico
15 has -- I think he used the word "abandoned" our request
16 for 50-50 cost sharing. I want to be clear. If I left
17 that impression, that's not correct. We haven't
18 abandoned our request for 50-50 cost sharing.

19 All I was intending to say was, obviously, 50-50
20 was an arbitrary percentage. We -- I explained that
21 the reason we came up with it is because there's two
22 different public interests at play here. One is the
23 safe operation of the pipeline, and the other is the --
24 the development of new affordable housing in Edmonton.
25 There's no reason to favour one over the other.
26 They're both in the public interest. So 50-50 is the

1 split.

2 All I'm saying is that when we -- when the answer
3 was given to you, Madam Chair, about terms and
4 conditions, and the answer was, We'll do the civil
5 roadwork on the surface, and the pipeline operator
6 should do the underground work to protect the pipeline,
7 that could lead to a different percentage. I don't
8 know what that percentage is. That's all we were
9 saying -- or were trying to say.

10 Mr. Myers, in discussing the meaning and the
11 purpose of Section 33(1) and -- or Section 33 said that
12 we, that is, Qualico, was ignoring the fact that the
13 public interest analysis relates to subsection (1),
14 that is, is the alteration or relocation work required,
15 and that what we were doing is we were -- I think he
16 used the word "conflating" -- conflating it with the
17 should-the-costs-be-shared analysis in subsection (2).
18 So I just want to respond to that.

19 And -- and I think, with respect, Mr. Myers was
20 unfairly characterizing what our position is, which is
21 simply this: We are submitting that alteration of the
22 pipeline is in the public interest. So that's
23 subsection (1). We are also saying if the AER finds,
24 as a result of this hearing, that alteration of the
25 pipeline is in the public interest and then it goes on
26 to consider the allocation of costs and it allocates

1 costs -- we'll just say 50-50 -- the AER must have
2 determined that that allocation is also in the public
3 interest.

4 So we're not -- we're not trying to lift the
5 public interest analysis out of subsection (1) and put
6 it over in subsection (2). We know that we bear the
7 onus to persuade you that the alteration work is -- is
8 in the public interest, but the Regulator's job here,
9 if it gets over that, will -- surely involves -- when
10 you're allocating costs, you're not going to do it
11 unless you think that the allocation you arrive at is
12 in the public interest. All we're saying is we believe
13 a 50-50 allocation or whatever allocation the Regulator
14 comes up with, that's also in the public interest.
15 Also. Not -- not ignoring subsection (1). So I just
16 wanted to be clear about that.

17 I'll just see here. Mr. Myers criticized me for
18 arguing that it was improper and inaccurate -- my
19 words -- to -- for Pembina and Plains to continue
20 arguing, as they continue to do, that there's no
21 legitimate dispute as to the need for the work. So
22 this is when I was saying, Look, the AER, when it
23 issued its notice of reconsideration, found that that
24 was the wrong analysis. Just -- right.

25 So I referred to this paragraph in the
26 reconsideration decision: (as read)

1 The AER declined to decide the application
2 made to it under subsection 33(1) of the
3 Pipeline Act on the basis that there was no
4 dispute that the work should be done;
5 however, the legislative test set out in
6 subsection 33(1) requires, in respect of
7 subsection 33(1), paragraph (a), that
8 direction to a licence to alter its pipeline
9 must be in the public interest. It does not
10 require a dispute regarding the alteration.

11 So my submission to you and just to, hopefully, clarify
12 it for my friends at Plains and Pembina, is we're
13 saying you would be making the same error of law if you
14 dismissed Qualico's application on the basis that there
15 is no dispute regarding the -- regarding the
16 alteration. You can dismiss our application if you
17 don't think it's in the public interest. We get that.
18 But you can't do it on the basis that there's no
19 dispute regarding the alteration because that horse has
20 left the barn. So maybe the better way to put it is
21 all of that is irrelevant, not improper or inaccurate.

22 And in relation to why did Qualico amend its
23 application and the differences between the original
24 application and the amended application, I mean,
25 firstly, that the Regulator did issue a letter not that
26 long before the hearing commenced saying, The original

1 application is not before us; we're making our decision
2 on the amended application. So, arguably, all of that
3 is irrelevant for another reason.

4 But the -- the fact is we knew what Plains and
5 Pembina's position was because they told us. So we
6 knew that they were saying, Oh, there's no dispute
7 regarding the alteration. So we amended the
8 application to try to make it clearer that we don't
9 agree. We think there is a dispute about alteration.
10 That's all that happened in the amendment. There's
11 nothing nefarious about it, and that's why, you know,
12 my friend taking the witnesses through the black-lined
13 version was, with all due respect, a waste of time.

14 The other side, both Keyera and Plains and Pembina
15 keep arguing that the Regulator and before the
16 Regulator, the ERCB, has never done what we're asking
17 you to do now, and I merely ask you to review the case
18 law, review the precedence, review the Town of Sundre
19 decision, review the MD Foothills Canadian Natural Gas
20 decision, and review, as I said, decision 2012-333 from
21 the AUC. They're not as completely distinguishable as
22 my friends would have you believe. In fact, I would
23 argue that the CWNG decision, MD Foothills, is actually
24 quite on point.

25 There was a cost-sharing order issued. There was
26 an order that the pipeline be altered by lowering it.

1 There was no dispute about that, and yet the Board
2 heard it and issued a decision. So a lot of these sort
3 of technical points that my friends raise in saying
4 that there's -- this has never been done before, it's
5 not true.

6 Mr. Myers also addressed the issue of, Well, now
7 Qualico is saying it doesn't want a blanket rule, but,
8 really, they just want a decision that applies to where
9 they're doing their work, suggesting, again, this is
10 all just about Qualico's private interest.

11 In response, I think I was very clear this morning
12 that the direction Qualico and the Developers Group are
13 seeking from the Regulator relates to urban periphery
14 areas because that's where the conflicts are, not
15 because it's where Qualico does work. There's a lot of
16 developers that do work in these areas, but you heard
17 the testimony of the Developers Group witnesses.
18 There's -- there's this conflict between this huge
19 existing infrastructure of pipelines underground and
20 rapidly expanding urban growth. That's the issue, and
21 that's why we're seeking an order that would apply to
22 these areas, and all I was saying is we're not asking
23 for an order that applies to other areas that don't
24 have this same land use conflict. It's all about the
25 land use conflict.

26 Finally, Mr. Myers said -- you know, he referred

1 to the various agreements that Qualico signed and
2 basically said, Well, they signed the agreements, and
3 they shouldn't be coming before you now and taking
4 the -- and take the positions that they are taking.
5 And I just want to say that I think it's obvious from
6 the evidence of Mr. Gerein and Mr. Armstrong that the
7 only reason Qualico signed these agreements is because
8 they felt they had to. They had to in order to advance
9 the development. They did it holding their nose,
10 however you want to put it. This is not a case where a
11 party is seeking later to resile from a legal
12 agreement. I mean, most -- all the agreements for
13 167th Avenue never, of course, proceeded, so it's not
14 like anyone's alleging breach of contract.

15 The fact is Qualico signed the agreements because
16 they thought they had no choice, and you heard the same
17 thing from Mr. Nicholson [sic] with regard to Marquis
18 Joint Venture. They -- they signed the agreement
19 because they needed to get the work done. So they had
20 no choice.

21 With regard to Mr. Naffin's submissions -- and
22 this is going to go back to the -- where are these
23 crossings issue -- he started off by referring to the
24 subject lands and, you know, the application of the
25 first-in-time, first-in-right principle to the subject
26 lands. Well, again, I submit to you the subject lands

1 are not Qualico lands. They're City of Edmonton lands.
2 And so the first-in-time, first-in-right principle
3 doesn't have the result my friends submit that it
4 should.

5 I want to address the question of the impact on
6 affordability. Mr. Naffin, relying primarily on the
7 evidence of Mr. Telford and Mr. Romanesky, basically
8 said it's not true that pipeline crossing costs will
9 impact the prices of homes in these new developing
10 areas, and I just want to say that when you're
11 considering this issue, you have -- I think there were
12 11 witnesses on the Developers Group panel and the
13 Qualico panel combined. If we take Mr. Morrison out,
14 10 witnesses. These are developers. The developers
15 are telling you, the Hearing Commissioners, yes, it
16 will, these pipeline cross -- costs, if applied
17 basin-wide, so we'll say 45 for Horse Hills, these
18 costs will get passed on to homeowners, and they will
19 increase the cost of homes. And that evidence, I would
20 suggest, has not been impeached in any meaningful way,
21 and you should, without a doubt, prefer the evidence of
22 the developers, who are the people on the ground doing
23 the work, over the opinion evidence of Mr. Romanesky
24 and Mr. Telford, who, with all due respect, don't
25 really know.

26 Mr. Naffin got into what he called "lawyer math"

1 and came up with some percentages and whatnot, and
2 the -- the whole point of the argument seemed to be
3 that Qualico would actually only absorb 5 percent of
4 the costs if it has to pay a hundred percent because
5 the rest would get distributed through the ARA levy,
6 and to which I say, yes, that's -- that's one of the
7 main points here, is that it's not just about Qualico.
8 So it's not that -- so it's not that Qualico is trying
9 to insulate itself from its legitimate development
10 costs; it's that these costs will get spread through
11 the basin and through the ARA levy, and, as I've just
12 said, will get passed on to homeowners -- homebuyers.

13 So Mr. Naffin has -- makes my point, which is that
14 it's not just about Qualico, it's not just about
15 Qualico pursuing its private interests, it's about
16 development in general of these new emerging areas that
17 the City of Edmonton needs for affordable housing.

18 I am running out of time -- I know -- so I'm just
19 going to --

20 THE CHAIR: Mr. Fitch, take your time.

21 G. FITCH: Okay.

22 THE CHAIR: Don't rush.

23 G. FITCH: Okay.

24 THE CHAIR: If you want a glass of water
25 or ...

26 G. FITCH: Well, that much, for sure, I

1 need. But I'll carry on.

2 Maybe I'll address Mr. Naffin's submissions about
3 the evidence of Mr. Morrison. So I think what I heard
4 him say is that Mr. Morrison seemed to view this
5 hearing as an opportunity to revisit fundamental
6 principles of law and well-established practices,
7 something like that.

8 I'm not sure what he means by "revisit". I -- no
9 one's saying that first-in-time, first-in-right isn't a
10 principle of property law. No one's saying that the
11 buyer-beware principle is a principle of property law.
12 And Mr. Morrison did not, contrary to what my friend
13 has alleged, urge that those be revisited.

14 What he said -- and this, I think, responds, in
15 part, to what -- one of the things that Mr. Duncanson
16 said -- is that the -- and -- and you may recall
17 Mr. Duncanson, when he was cross-examining the Qualico
18 panel, referred to -- I think it was his
19 father-in-law's property in Windsor Park and how his
20 father-in-law always said, Oh, I wish I hadn't sold
21 that property back in the 1960s when it was worth not
22 very much because now it's worth so much, and then
23 he -- Mr. Duncanson sort of elaborated on that point in
24 his submissions.

25 No one is denying that -- that properties transact
26 in the market. Generally, over the arc of time,

1 they -- they tend to go up in price, but sometimes they
2 go down, and a subsequent purchaser may take a loss
3 or -- or -- or may -- may make money when they sell the
4 property. None of that is being taken issue with.

5 The difference between Mr. Duncanson's father's --
6 father-in-law's property in Windsor Park and what we're
7 dealing with here is -- unless I -- I'm missing it --
8 the property in Windsor Park isn't encumbered by a
9 right-of-way -- pipeline right-of-way.

10 So when you have a property, you sell it, you
11 take -- you -- you make money, you take a loss,
12 whatever happens, happens. What Mr. Morrison is saying
13 is: You have a piece of property, you own the
14 fee-simple title. Someone comes along -- the pipeline
15 company comes along, and it takes an easement across
16 your property. That easement is there for the life of
17 the pipeline, and we know that, in this case, that's
18 50 years, and there doesn't appear to be any end in
19 sight. And all Mr. Morrison is saying is that over
20 that 50-year period -- like, if this was a piece of
21 farmland in East Central Alberta, the adverse effect of
22 that pipeline right-of-way today might be little
23 different from the adverse effect of the pipeline in
24 1970. But what we're dealing with here is -- is
25 development land that's now being developed. It's not
26 future development land. It's -- it's present

1 development land. And so the adverse effect of the
2 pipeline today is markedly different in an adverse way
3 to what it was in 1970 and all Mr. Morrison is saying.
4 You need to consider that in your review of what's in
5 the public interest, and that's the context for the
6 get-out-of-jail-free argument.

7 And having used the word "argument", I'll now
8 address the criticisms my friends made about
9 Mr. Morrison not being an independent expert. I -- I
10 think they are being very unfair here. When
11 Mr. Morrison used the word "argument", so "my argument
12 is this", he was using that as a synonym for "opinion".
13 "My opinion is this". We talk about that -- that kind
14 of thing all the time. You're -- you're expressing an
15 opinion, usually -- you might be in an argument, and
16 the reality is we are in an argument. That's why we're
17 here. We have -- we have one side taking one position,
18 we're taking the other, and all Mr. Morrison was
19 basically say saying is, My opinion in this argument is
20 this. So to suggest that his use of the word
21 "argument" somehow makes him not independent, not
22 impartial, is just not correct.

23 I want to make a brief submission on Section 28 of
24 the Pipeline Rules, so Mr. -- you heard Mr. Dixon's
25 submissions on that -- on that point, and Mr. -- I'm
26 not sure who responded to it, but one of my friends

1 responded to it. And so this -- so I think the issue
2 is Mr. Dixon was saying that, in Brookfield's view, the
3 proper interpretation of Section 28 is that it's the
4 pipeline licensee who has to pay for these integrity
5 assessments. The response that I heard was, No, it's
6 never been that way, and -- and -- so that can't be the
7 right interpretation of Section 28 because it's been
8 around forever.

9 And I just simply want to point out -- and I'm
10 sure your legal counsel would do this anyways, but the
11 Pipeline Rules were revised and -- well, replaced in
12 November 2023, so the previous version of the Pipeline
13 Rules were rescinded, and a new version of the Pipeline
14 Rules were issued -- I think it was November 15, 2023,
15 and that was actually the same date that the AER
16 rescinded the old version of Directive 77 and brought
17 into force the new current version of Directive 77.

18 So -- so the first point is that Section 28 of the
19 Pipeline Rules has actually only been around since
20 November 15, 2023. If you look -- and, again, I'll --
21 I'll leave this to -- to your counsel to advise you on,
22 obviously, but when you look at the Pipeline Rules, the
23 current version, you'll see that there was a -- a
24 different section in the old rules as compared to the
25 new rules.

26 So, basically, the current version that Mr. Dixon

1 read to you, Section 28, and that I -- I referred to in
2 cross-examination is titled "Pipeline Crossing Highway
3 or Road". It states: (as read)

4 When constructing a pipeline across a road,
5 highway, right-of-way, or road allowance, the
6 licensee must apply the CSA Z662 pipeline
7 design requirements [et cetera].

8 In the old pipeline rule, the pre-November 15, 2023,
9 version, the section was titled "Modifications Due to
10 Highway, Road, or Railway", and it read as follows:
11 (as read)

12 If the construction of a new highway, road,
13 or railway, or the modification of a existing
14 highway, road, or railway requires the
15 upgrading of an existing pipeline, the
16 required casing, thicker wall pipe, or other
17 load-bearing structures allowed by CSA Z662
18 must extend for the full width of the
19 right-of-way of the highway, road, or
20 railway.

21 So the -- the point I would like to make here is that
22 the old Section 19 did not use the words "the
23 licensee". It just said it was -- I'm not sure
24 grammatically how to describe it, but it was -- it was
25 neutral in the sense that it just said the -- the pipe
26 has to do this or look at -- or -- or -- or look like

1 this. Whereas what the new section says is the
2 licencee must apply the CSA Z662 requirements.

3 So the response to my friend's submission is
4 simply that if you compare the new, current version of
5 the rule to the old version of the rule, there has been
6 a change in the wording, and the change, in our view --
7 and we support Brookfield on this -- strongly suggests
8 that now there's direction that it be the licensee that
9 does this, and, by extension, they should be
10 responsible for the costs.

11 All right. At this point, Madam Chair, I'm just
12 going to maybe take a few moments now to have a final
13 consultation with my client to see if there's anything
14 else we want to cover if that's acceptable.

15 THE CHAIR: That is acceptable.

16 G. FITCH: Thank you.

17 THE CHAIR: Please go ahead.

18 G. FITCH: Thank you, Madam Chair. Just
19 a -- a couple of small points I intended to address and
20 skipped over.

21 Mr. Naffin referred to the evidence of
22 Mr. Romanesky, who testified that pipelines don't
23 necessarily lower the value of development. I would
24 suggest that Mr. Romanesky was offering a hypothetical
25 opinion, "It doesn't necessarily lower the value", and
26 that you should prefer the evidence of Mr. Gerein who

1 testified, Yes, it does. His testimony was that, in
2 this type of a development, Marquis, urban periphery
3 pipelines do lower the value of land. And I'm just
4 going to urge on you that you prefer the evidence of
5 Mr. Gerein, who is the developer, over the evidence of
6 Mr. Romanesky on that point.

7 Mr. Naffin also referred to evidence from one of
8 the pipeline company witnesses who -- and the way I
9 thought I heard Mr. Naffin put it -- said that they
10 would not be able to recover additional costs from
11 shippers. I urge you to have a look at the
12 transcripts. The way I remember that exchange, what
13 the pipeline witnesses said is they may not be able to
14 recover that it would be a negotiation they would have
15 to have with their shippers. They expected their
16 shippers would -- would object. I have no reason to
17 disbelieve that. I -- but I don't think it was as
18 categorical as my friend Mr. Naffin told you in
19 argument, which is that they would not be able to
20 recover from shippers. I think there's just -- the
21 evidence on that is they may be able to, they may not.
22 The shippers wouldn't want that, and that's -- and
23 that's what the evidence is, in my submission.

24 I'm going to resist the temptation to go on. I --
25 I have to say this case is somewhat unique procedurally
26 in the sense that there has already been a lot of

1 written submissions made. In fact, it's -- it's --
2 it's unusual because so much of the "evidence", as I'm
3 sure you're aware, are letters and submissions written
4 by lawyers. So I think -- I feel confident that the
5 issues in this hearing have been capably argued on both
6 sides, so I don't think you need to hear anything more
7 from me.

8 So, on that, again, I would just like to thank the
9 Regulator, the Commissioners, court reporters, my
10 friends on the other side of the aisle for -- for a
11 very interesting hearing, and we look forward with
12 great interest to the Regulator's decision, which I'm
13 assuming will be reserved.

14 Thank you.

15 THE CHAIR: Thank you very much.

16 Just give us a quick minute.

17 Give us two more minutes.

18 (ADJOURNMENT)

19 THE CHAIR: Thank you very much, everyone.

20 So we have no further questions. If there is no
21 other matters that you need to bring to our attention,
22 I wish to thank everybody for their patience and
23 participation in the past two weeks, and this hear --
24 in this hearing, and the Panel will review all the
25 evidence and arguments submitted by the counsel, and we
26 will make our decision on the amended application.

1 We'll issue the decision when the decision is
2 ready, and all parties who are participants in this
3 hearing will receive a copy. And that brings this
4 hearing to a close. Thank you.

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6 PROCEEDINGS CONCLUDED

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1 CERTIFICATE OF TRANSCRIPT:

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3 We, Derek Lopez and Angela Porco, certify that the
4 foregoing pages are a complete and accurate transcript
5 of the proceedings taken down by us in shorthand and
6 transcribed from our shorthand notes to the best of our
7 skill and ability.

8 Dated at the City of Calgary, Province of Alberta,
9 this 13th day of March 2024.


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A handwritten signature in blue ink, appearing to read "Derek Lopez", is written over a horizontal line.

15 Derek Lopez, CSR(A), RPR

16 Official Court Reporter

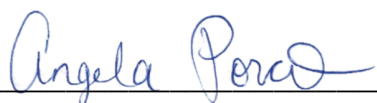
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A handwritten signature in blue ink, appearing to read "Angela Porco", is written over a horizontal line.

22 Angela Porco, CSR(A)

23 Official Court Reporter

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