COURT OF APPEAL OF ALBERTA

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REGISTRY OFFICE:	CALGARY
PLAINTIFF/APPLICANT:	ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.
STATUS ON APPEAL:	APPELLANTS
DEFENDANT/RESPONDENT:	HIS MAJESTY THE KING IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**FACTUM**

Appeal from the Order of
The Honourable Madam Justice J.C. Price
Pronounced the 8th day of April, 2022
Filed the 8th day of June, 2022

FACTUM OF THE RESPONDENT, HIS MAJESTY THE KING IN RIGHT OF ALBERTA

Alberta Justice
Cynthia R. Hykaway / Melissa N. Burkett
1710, 639 – 5th Avenue SW
Calgary, Alberta T2P 0M9
Tel: 403-297-2001
Fax: 403-662-3824

For the Respondent, His Majesty the King in Right of Alberta

Department of Justice Canada
Shane P. Martin / Jordan C. Milne / Sydney A. McHugh
601, 606 - 4 Street SW
Calgary, AB T2P 1T1
Tel: 403-292-6813
Fax: 403-299-3507

For the Respondent, Attorney General of Canada

Code Hunter LLP
Christian J. Popowich / Dextin A. Zucchi
850, 440 - 2 Avenue SW
Calgary, AB T2P 5E9 Tel: 403-234-9800
Fax: 403-261-2054

For the Appellants

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> "…**we do not change the doctrine of constructive takings**".
>
> Majority Reasons *Annapolis,* at para. 25.[1]

PART I: Facts

1. Overview of Appeal

[1] This factum is filed by the Respondent (Defendant), His Majesty the King in right of Alberta ("**Alberta**"), in response to the appeal by the Appellants (Plaintiffs), Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc. (collectively, the "**Plaintiffs**" or "**Altius**"), from a decision of the Honourable Justice J.C. Price on April 8, 2022.

[2] In the Court below, both Alberta and the Respondent (Defendant), Attorney General of Canada ("**Canada**") successfully applied for summary dismissal of the Plaintiffs' claim for *de facto* expropriation.

[3] The Chambers Justice found that the record before her was sufficiently complete for a fair and just determination[2] and that the first branch of the *de facto* expropriation test had not been met, namely that Alberta acquired a beneficial interest in the subject property, or flowing from it.[3]

[4] The Plaintiffs seek to set aside the Chambers Justice's decision. Alberta opposes this appeal.

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[1] *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 ("***Annapolis***") at para. 25. **[Book of Authorities of the Respondent, Alberta ("Alberta's Authorities"), Tab 5]**.

[2] *Altius Royalty Corporation v Alberta*, 2022 ABQB 255 (Reasons for Decision of Chambers Justice dated April 8, 2022) (the "**Summary Judgment Decision**") at para. 77(a) **[Appeal Record, Tab 16, p. 117]**.

[3] Summary Judgment Decision at para. 77(b) **[Appeal Record, Tab 16, p. 117]**.f

[5] The Supreme Court of Canada's recent *Annapolis* decision does not blow the doors off the law of *de facto* expropriation. The majority reasons "illuminate" the *de facto* expropriation test, but do not change it.

[6] The evidence before the Chambers Justice consisted of admissions made by the Plaintiffs, as well as an affidavit of Ben Lewis (the "**Lewis Affidavit**")[4].

[7] While at first glance, the Lewis Affidavit appears to substantially respond to Alberta's summary judgment application, upon closer inspection, the Lewis Affidavit is of little to no probative value.

[8] As will be discussed in further detail below, the Plaintiffs have failed to put their best foot forward and cannot defeat Alberta's summary judgment application. The Appeal should be dismissed, with costs.

2. Statement of Facts

[9] The facts set out below are relevant for the purposes of this Appeal.

(a) Corporate Relationships

[10] Altius Minerals Corporation ("**Altius Minerals**") is a public company headquartered in Newfoundland and Labrador and trades on the Toronto Stock Exchange.[5]

[11] Altius Minerals owns 100% of the voting shares in the Plaintiff, Altius Royalty Corporation ("**Altius Royalty**"), an Alberta corporation.[6]

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[4] Affidavit of Ben Lewis, sworn September 26, 2020 (the "**Lewis Affidavit**") **[Appellant's Extracts of Key Evidence ("Altius EKE"), Tab 1]**.

[5] Amended Statement of Claim, filed December 19, 2018 (the "**Amended Claim**") at para. 10 **[Appeal Record, Tab 1, p. 4]**.

[6] Notice to Admit Facts issued by Alberta dated May 1, 2020 ("**Alberta NTAF**"), at para. 2 **[Alberta's Extracts of Key Evidence ("Alberta's EKE"), Tab 1, p. 4]**; Reply to Alberta NTAF issued by Altius dated May 21, 2020 ("**Reply to Alberta NTAF**"), at para. 2 **[Alberta's EKE, Tab 2, p. 12]**; Amended Claim, at para. 8 **[Appeal Record, Tab 1, p. 4]**.

[12] Altius Royalty owns 100% of the voting shares in the Plaintiff, Genesee Royalty GP Inc. ("**Genesee GP**"), an Alberta corporation.[7]

[13] Genesee GP is the general partner of the Plaintiff, Genesee Royalty Limited Partnership ("**Genesee LP**"), a partnership formed and existing under the laws of Ontario.[8]

(b) Genesee LP's Royalty Interest

[14] On April 28, 2014, pursuant to an Arrangement Agreement dated December 24, 2013, Genesee LP acquired a royalty interest from Prairie Mines & Royalty ULC ("**Prairie Mines**") in the coal underlying lands near and around Genesee, Alberta (the "**Coal**").[9] Genesee LP continues to hold this royalty interest in the Coal.[10]

[15] The Coal is mined at the Genesee Coal Mine, which is the subject of a joint venture between Capital Power LP ("**Capital Power**") and Prairie Mines (collectively, the "**Joint Venture**").[11]

[16] The Coal is currently mined and used to fuel the Genesee 1 ("**G1**"), Genesee 2 ("**G2**"), and Genesee 3 ("**G3**") units (collectively, the "**Genesee Power Plant**") and generate coal-fired electricity, in particular, for the City of Edmonton.[12]

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[7] Alberta NTAF, at para. 3 [**Alberta's EKE, Tab 1, p. 4]**; Reply to Alberta NTAF, at para. 3 **[Alberta's EKE, Tab 2, p. 12]**; Amended Claim, at para. 7 **[Appeal Record, Tab 1, p. 4]**.

[8] Amended Claim, at paras. 6-7 **[Appeal Record, Tab 1, p. 4]**.

[9] Amended Claim, at para. 12(a) **[Appeal Record, Tab 1, p. 5]**; Response to Request for Particulars filed February 8, 2019 at para. 1 **[Appeal Record, Tab 3, p. 15]**; Response to Request for Particulars filed February 25, 2019, at para. 2 and Schedule "A" **[Appeal Record, Tab 5, pp. 24, 25, and 27-37]**.

[10] Alberta NTAF, at para. 23(g) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(g) **[Alberta's EKE, Tab 2, p. 16]**.

[11] Amended Claim, at para. 13 **[Appeal Record, Tab 1, p. 5]**; Lewis Affidavit, at para. 10 and Exhibit "B" **[Altius EKE, Tab 1, pp. 4, 5, 19-41]**.

[12] Amended Claim, at paras. 2, 13, 15-17, and 44 **[Appeal Record, Tab 1, pp. 2, 5-7, and 11]**.

[17] Genesee LP, Capital Power, Prairie Mines, and the Joint Venture are parties to a Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014 (the "**Unitization and Dedication Agreement**").[13]

(c) Policy decisions to reduce emissions from coal-fired electricity

[18] In or around 2012, Canada announced a new regulatory regime aimed at reducing carbon dioxide emissions resulting from the coal-fired generation of electricity throughout the country. In particular, Canada unveiled the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167 (the "**Regulations**").[14]

[19] In November 2015, Alberta introduced the "Climate Leadership Plan" which aimed to phase out emissions from coal-fired electricity generation by 2030.[15]

(d) The Off-Coal Agreement

[20] On November 24, 2016, as part of the implementation of the Climate Leadership Plan, Alberta entered into an Off-Coal Agreement with, among others, Capital Power (the "**Off-Coal Agreement**").[16]

[21] Under the Off-Coal Agreement, Capital Power agreed to end emissions from coal-fired electricity generation by 2030 and Alberta agreed to pay certain transition payments.[17]

[22] None of the Plaintiffs is a party to the Off-Coal Agreement.

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[13] Amended Claim, at para. 15 **[Appeal Record, Tab 1, p. 5]**.

[14] Amended Claim, at para. 20 **[Appeal Record, Tab 1, p. 7]**; Lewis Affidavit, at paras. 12-14 and Exhibits "C", "D", and "E" **[Altius EKE, Tab 1, pp. 5, 42-59]**.

[15] Amended Claim, at para. 29 **[Appeal Record, Tab 1, p. 9]**; Lewis Affidavit, at para. 33 and Exhibit "T" **[Altius EKE, Tab 1, pp. 9, 258-259]**.

[16] Amended Claim, at para. 31 **[Appeal Record, Tab 1, p. 9]**; Lewis Affidavit, at paras. 38-39 and Exhibits "Y" and "Z" **[Altius EKE, Tab 1, pp. 10, 282-301]**.

[17] Amended Claim, at para. 32 **[Appeal Record, Tab 1, p. 9]**.

(e) The Genesee Power Plant and the Genesee Coal Mine

[23] The Genesee Power Plant was planned and constructed to generate coal-fired electricity until 2044 (in the case of G1), 2039 (in the case of G2), and 2055 (in the case of G3).[18]

[24] The Genesee Coal Mine is operational and has not been shut down.[19]

[25] Coal is being extracted from the Genesee Coal Mine.[20]

[26] The Genesee Power Plant is operational and has not been decommissioned.[21]

[27] The Genesee Power Plant is using the Coal extracted from the Genesee Coal Mine to generate electricity.[22]

[28] Genesee LP continues to hold ownership of the royalty interest that is asserted in the Amended Claim.[23]

[29] Genesee LP continues to receive the payment of royalties on account of the royalty interest.[24]

PART II: Issues of Appeal

[30] Alberta submits the following in response to the grounds for appeal identified by the Plaintiffs:

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[18] Amended Claim, at para. 21 **[Appeal Record, Tab 1, p. 8]**.
[19] Alberta NTAF, at para. 23(a) **[Alberta's EKE, Tab 1, p. 9]**; Reply to Alberta NTAF, at para. 23(a) **[Alberta's EKE, Tab 2, p. 15]**.
[20] Alberta NTAF, at para. 23(b) **[Alberta's EKE, Tab 1, p. 9]**; Reply to Alberta NTAF, at para. 23(b) **[Alberta's EKE, Tab 2, p. 15]**.
[21] Alberta NTAF, at para. 23(c) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(c) **[Alberta's EKE, Tab 2, p. 15]**.
[22] Alberta NTAF, at para. 23(d) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(d) **[Alberta's EKE, Tab 2, p. 15]**.
[23] Alberta NTAF, at para. 23(g) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(g) **[Alberta's EKE, Tab 2, p. 16]**.
[24] Alberta NTAF, at para. 23(h) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(h) **[Alberta's EKE, Tab 2, p. 16]**.

Issue #1: The Chambers Justice correctly stated the test for *de facto* expropriation.

Issue #2: The Chambers Justice did not err in finding that there was no merit to the Plaintiffs' claim by reason that the "beneficial interest in the property or flowing from it" requirement in *CPR* could not be made out.

PART III: Standard of Review

[31] The first ground of appeal is a question of law and Alberta agrees with the Plaintiffs that the standard of review for pure and extricable questions of law is correctness.[25] In the present case, the Chambers Justice correctly stated the test for *de facto* expropriation.

[32] While the applicable legal standard is a question of law, whether that standard has been met is a mixed question of fact and law that attracts the more deferential standard of palpable and overriding error.[26] The Chambers Justice did not commit a palpable and overriding error in applying the test to the facts.

PART IV: Argument

1. The allegation as against Alberta

[33] In light of the consented amendments and for the purposes of the hearing before the Chambers Justice, the Plaintiffs made a single allegation against Alberta: the alleged "taking" by Alberta of Genesee LP's property.[27] In other words, the Plaintiffs amended down their claim to exclude all other tort allegations.

[34] As addressed below, there is no merit to this allegation and the Chambers Justice made no error in granting summary dismissal.

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[25] *Housen v Nikolaisen*, 2022 SCC 33 (CanLII), [2002] 2 SCR 235 at para. 36 ("***Housen***")**[Alberta's Authorities, Tab 9]**.

[26] *Ibid*.

[27] Amended Claim, at paras. 43-45 **[Appeal Record, Tab 1, p. 11]**.

2. Summary dismissal of a claim under Rules 7.2 and 7.3

[35] A claim may be summarily dismissed under Rules 7.2 and 7.3.[28] The leading cases in this jurisdiction for summary judgment are:

a. The SCC's decision in *Hryniak*[29] where the Court called for a "shift in culture", and strongly endorsed the merits of summary judgment where there is no genuine issue requiring trial.

b. This Court's decision in *Weir-Jones*[30] where a five-judge panel convened to establish the law of summary judgment in Alberta post-*Hryniak*. This Court found:

- "…there has been a paradigm shift in the approach to summary judgment"[31] as a result of *Hryniak*;
- "Summary judgment procedures should be increasingly used, and the previous presumption of referring all matters to trial should end;"[32]
- **The test for summary judgment is**: if there is "**no merit**" to the claim and "**no genuine issue requiring a trial**", it should be summarily dismissed[33]; and
- The responding party must put their "best foot forward".[34]

[36] In *P & C Lawfirm*, this Court confirmed that unsupported bare assertions could not block a summary judgment application.[35]

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[28] *Alberta Rules of Court*, Rules 7.2-7.3 **[Alberta's Authorities, Tab 2]**.
[29] *Hryniak v Mauldin*, 2014 SCC 7 ("***Hryniak***"), at para. 2 **[Alberta's Authorities, Tab 10]**.
[30] *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2019 ABCA 49 ("***Weir-Jones***") **[Alberta's Authorities, Tab 17]**.
[31] *Weir-Jones*, at para. 13 **[Alberta's Authorities, Tab 17]**.
[32] *Weir-Jones*, at para. 15 **[Alberta's Authorities, Tab 17]**.
[33] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 17]**.
[34] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 17]**.
[35] *P & C Lawfirm Management Inc v Sabourin*, 2020 ABCA 449 ("**P&C Lawfirm**"). See, in particular paras. 41-49 **[Alberta's Authorities, Tab 14]**.

(a) This case is appropriate for summary judgment

[37] The present case is suitable for summary judgment because it is possible to fairly resolve it on a summary basis:

a. The parties agree on the material facts. Alberta accepts that the Plaintiffs have a royalty interest in the Coal that is capable of being taken (but says it was not taken). Only the application of the facts to the law are in dispute.

b. A trial will not produce a more complete factual record than already exists.

[38] While it is true that the Plaintiffs are not required to prove their own case to defeat summary judgment, they must nonetheless put their best foot forward.[36] Here, the facts and evidence that the Plaintiffs purport to rely upon to resist summary judgment (namely, those from the Lewis Affidavit) are unsupported bare assertions.

3. *De facto* expropriation explained

[39] The Plaintiffs make a claim for *de facto* expropriation (sometimes called a constructive taking or a regulatory taking).

[40] Expropriation is the forcible taking of property from an unwilling owner:

> "expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers[37]

[41] Only the Crown has the power to expropriate. The Crown is granted this power under the common law or various statutes to further some public purpose. When the Crown expropriates property it always has a public purpose – there is always a policy objective that is furthered by the taking.[38]

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[36] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 17]**.

[37] *Expropriation Act*, R.S.A. 2000, c. E-13, at s. 1(g) **[Alberta's Authorities, Tab 1]**.

[38] If there is not, the decision to expropriate can be judicially reviewed, or challenged under s. 15 of the *Expropriation Act* as not being fair, sound, or reasonably necessary.

[42] Under various statutes, the Crown also has the power to regulate property and its use. Regulation is not expropriation. Regulation is not confiscation of property. When the Crown regulates property it always has a public purpose – there is always a policy objective that is furthered by the regulation.[39]

[43] The doctrine of *de facto* expropriation recognizes that, in very extreme circumstances (the stringent legal test is set out below), regulation may be tantamount to expropriation (which is why it is sometimes called a regulatory taking).

[44] *De facto* expropriation cases (and this case) are about the tipping point – when the regulation of property becomes the confiscation of property.

(a) The nature of the Plaintiffs' property rights

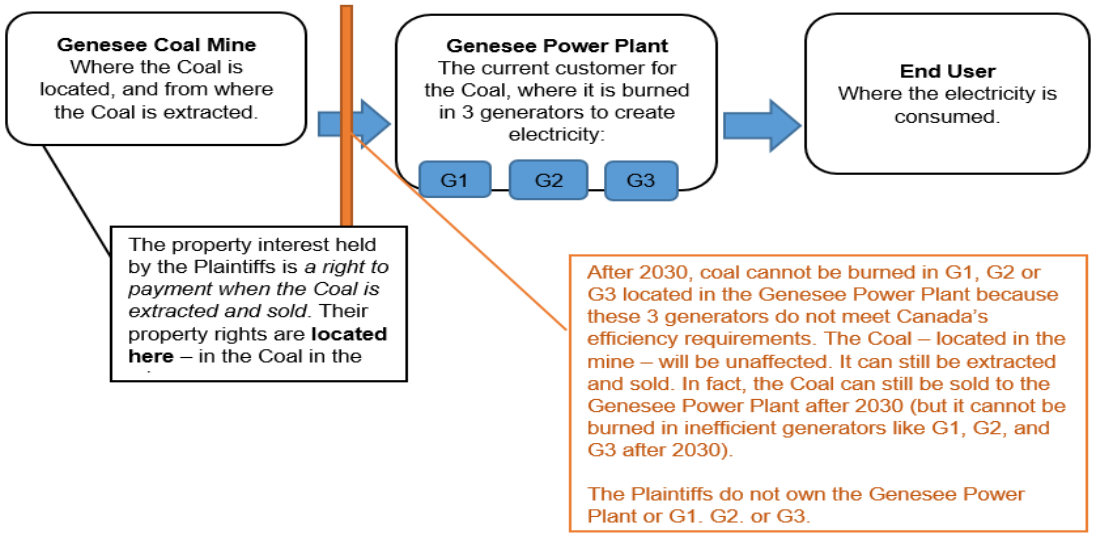
[45] It is trite to say that property is a "bundle of rights" (a collection of entitlements).

[46] To make out their claim, the Plaintiffs must show that Alberta has taken (expropriated) *their* property rights. Therefore, the analysis must begin with an examination of what property rights the Plaintiffs have (what sticks in the bundle they hold), to determine if any of those property rights have been, or will be, taken by Alberta.

[47] The property interest held by the Plaintiffs is: *a right to payment when the Coal is extracted from the mine and sold*. These are the sticks in the bundle of rights – the property rights – held by the Plaintiffs.

[48] Alberta acknowledges that the Plaintiffs have a property right that is capable of being taken through *de facto* expropriation, but says that there has not been (and there will not be, even after 2030) a taking.

[39] If there is not, the *vires* of the regulation can be challenged, or the government decision to enact it judicially reviewed. The present case is not a judicial review and there is no challenge to any legislation. This case, therefore, deals with reasonable government action taken under valid legislative authority.



[49] *Today*:

a. The Genesee Coal Mine is operational.[40]

b. Coal is being extracted from the Genesee Coal Mine.[41]

c. The Genesee Power Plant is operational and has not been decommissioned.[42]

d. The Genesee Power Plant is using coal extracted from the Genesee Coal Mine.[43]

e. Genesee LP continues to hold ownership of the royalty interest.[44]

f. Genesee LP is receiving payment of royalties on account of the royalty interest.[45]

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[40] Alberta NTAF, at para. 23(a) **[Alberta's EKE, Tab 1, p. 9]**; Reply to Alberta NTAF, at para. 23(a) **[Alberta's EKE, Tab 2, p. 15]**.

[41] Alberta NTAF, at para. 23(b) **[Alberta's EKE, Tab 1, p. 9]**; Reply to Alberta NTAF, at para. 23(b) **[Alberta's EKE, Tab 2, p. 15]**.

[42] Alberta NTAF, at para. 23(c) **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(c) **[Alberta's EKE, Tab 2, p. 15]**.

[43] Alberta NTAF, at para. 23(d), **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(d), **[Alberta's EKE, Tab 2, p. 15]**.

[44] Alberta NTAF, at para. 23(g), **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(g), **[Alberta's EKE, Tab 2, p. 16]**.

[45] Alberta NTAF, at para. 23(h), **[Alberta's EKE, Tab 1, p. 10]**; Reply to Alberta NTAF, at para. 23(h), **[Alberta's EKE, Tab 2, p. 16]**.

[50] In other words, today, *the Plaintiffs use and enjoy their property rights*. Their property rights have not been taken.

[51] Even after 2030, the Coal can still be mined and sold, but it cannot be burned in G1, G2, and G3 (unless the owner of these generators – Capital Power – improves the generators to make them more efficient). Even after 2030, the Coal, and the Plaintiffs' interest in the Coal, will be unaffected. Even after 2030: the Coal can still be mined; the Coal can still be sold; the Plaintiffs can still receive payment from the sale of the Coal.

[52] As of today, the Plaintiffs have lost none of the sticks in the bundle of rights they hold. They currently receive royalties. Even after 2030, they will lose none of the sticks in the bundle of rights they hold.

(b) The nature of Alberta's impugned actions

[53] The Plaintiffs allege that either the Climate Leadership Plan, or Alberta's entry into the Off-Coal Agreement with Capital Power constitute a *de facto* expropriation. For the reasons described below, neither does.

[54] In November of 2015, Alberta introduced the Climate Leadership Plan. It is a policy decision that includes, among other things, a commitment to phase out emissions from coal-fired electricity generation by 2030.

[55] As part of the implementation of the Climate Leadership Plan, Alberta entered into the Off-Coal Agreement with the owners of the Genesee Power Plant, Capital Power[46].

[56] Under the Off-Coal Agreement, Alberta agreed to make certain voluntary payments to Capital Power based on a formula. The formula is based on the capital investment made by Capital Power for three generators (G1, G2, and G3 in the graphic above), pro-rated by their percentage of the generators' remaining life after 2030. The Off-Coal Agreement is payment for *capital investment in the generators*. Capital Power

[46] Lewis Affidavit at Exhibit "Z" **[Altius EKE, Tab 1, pp. 286-301]**. Specifically, Alberta entered into the Off-Coal Agreement with Capital Power Corporation, Capital Power L.P., Capital Power (G3) Limited Partnership and Capital Power (K3) Limited Partnership.

received a voluntary payment under the Off-Coal Agreement *because it owns G1, G2, and G3*.

[57] Capital Power did not receive any compensation for any interest in coal in the Genesee Coal Mine. No party received compensation for any coal interest in the Genesee Coal Mine.

[58] Neither the Climate Leadership Plan, nor the Off-Coal Agreement takes any property rights away from the Plaintiffs.

[59] The Plaintiffs were not impacted by the impugned conduct of either Canada or Alberta. Instead, it was the Plaintiffs' customer for the Coal (Capital Power) that was impacted:

a. Under Canada's impugned Regulations, plant owners like Capital Power cannot burn coal in inefficient generators like G1, G2, and G3 after 2030. *They can continue to burn coal after 2030, but not in inefficient generators like G1, G2, and G3*.

b. Under Alberta's impugned Off-Coal Agreement, Capital Power received a voluntary payment from Alberta for their capital investment in G1, G2, and G3.

[60] *Capital Power was faced with a business decision*: Would they improve G1, G2, and G3 to meet Canada's efficiency requirements? Would they use the money they received from Alberta to make those improvements?

[61] Any potential loss that the Plaintiffs may suffer flows from the business decision of their customer – Capital Power – and not from the impugned conduct of the Defendants.

(c) The Claim is Premature

[62] The Climate Leadership Plan was announced in November 2015. The Off-Coal Agreement with Capital Power was executed in November 2016.

[63] The Plaintiffs continued to receive their royalties after November 2015/2016 (and continue to receive their royalties today). As such, their property has clearly not been taken by Alberta's impugned conduct.

[64] The claim is, therefore, premature and on this basis alone (without considering anything else) it was appropriately summarily dismissed.

(d) The Two-Part *De facto Expropriation* Test

[65] Before *Annapolis*, the leading case on *de facto* expropriation in Canada was the SCC's 2006 decision in *Canadian Pacific Railway Co. v City of Vancouver* ("***CPR***")[47]. In *CPR*:

a. CPR owned the fee simple interest in the Arbutus Corridor, a 10 km, 50-60 ft wide stretch of land running through the City of Vancouver. Real estate in Vancouver is extremely valuable. There was an enormous development potential for these lands.

b. The City passed the Arbutus Corridor Official Development Plan (the "**Plan**"), restricting the use of the lands as a public thoroughfare for transportation and greenways – like public heritage walks, public nature trails and public cyclist paths.

c. The Plan severely reduced the value of the lands. The development potential of the lands was destroyed. CPR was prevented from putting the land to any economic use.

d. McLachlin, C.J., writing for a unanimous Court, confirmed that two requirements must be met for a *de facto* taking requiring compensation[48]:

   <u>The *de facto* Expropriation Test</u>

[47] *Canadian Pacific Railway Co. v City of Vancouver*, 2006 SCC 5, [2006] 1 SCR 227 ("***CPR***") **[Alberta's Authorities, Tab 6]**.
[48] *CPR* at para. 30 **[Alberta's Authorities, Tab 6]**.

(1) an acquisition of a beneficial interest in the property or flowing from it, and (the "**Acquisition Branch**" of the test)

(2) removal of all reasonable uses of the property (the "**Loss Branch**" of the test)

e. The SCC unanimously held that the Plan was not a *de facto* expropriation. CPR was confined to uneconomic use of its lands.

(e) *CPR* is still Good Law

[66] *Annapolis* was a 5-4 split. Both the majority and the minority upheld *CPR*.

[67] The majority in *Annapolis* applied the two-part *de facto* expropriation test as it was articulated in *CPR*. The majority upheld the two-part *CPR* test, but said they wished to clarify it: "**We aim to illuminate *CPR*, not overrule it**."[49] In fact, the majority was careful to make clear: "**we do not change the doctrine of constructive takings**".[50]

[68] The minority in *Annapolis* did not think *CPR* needed illuminating.

[69] The *bottom* line is: *CPR* is still good law.

(f) *Annapolis* Clarified the Acquisition Branch

[70] The majority in *Annapolis* articulated the two-part test as follows:

> *CPR* signifies that a constructive taking occurs where:
> (1) a beneficial interest — **understood as an advantage** — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and
> (2) the impugned regulatory measure removes all reasonable uses of the private property at issue [emphasis added].[51]

[71] Later in the decision, the majority in *Annapolis* framed the two-part test this way:

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[49] *Annapolis*, at para. 41 **[Alberta's Authorities, Tab 5]**.
[50] *Annapolis*, at para. 25 **[Alberta's Authorities, Tab 5]**.
[51] *Annapolis*, at para. 4 **[Alberta's Authorities, Tab 5]**.

> In sum, we affirm that the test to show a constructive taking is that stated by *CPR*, properly understood. The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property **or flowing from it** (**i.e. an advantage**); and (2) whether the state action has removed all reasonable uses of the property [bold emphasis added; underline emphasis in original]. [52]

[72] The majority in *Annapolis* clarified the Acquisition Branch of the test saying: "the Court in *CPR* did not use 'beneficial interest' in the technical sense that it carries in the domain of equity".[53] The Acquisition Branch can be satisfied if the government acquired an "advantage".

[73] **When deciding what type of "advantage" will satisfy the Acquisition Branch, Alberta submits this Court should be guided by 3 established principles**:

1. **The advantage has to flow from the property constructively taken**.
    - As discussed below, this principle comes from the SCC decisions in *Manitoba Fisheries* (1979) and *Tener* (1985). It was then reinforced by the SCC in both *CPR* (2006) and *Annapolis* (2022).
2. **A general advantage to the public, and a furtherance of policy objectives, is insufficient for a *de facto* expropriation**.
    - As discussed below, this principle comes from *CPR*.
3. **The majority in *Annapolis* chose to maintain a two-part test**.
    - The majority did not eliminate the Acquisition Branch (as they were invited to do by the appellants in that case). As such, the Acquisition Branch of the test must play a meaningful role in the *de facto* expropriation analysis.

(g) The "advantage" has to flow from the property constructively taken

[74] The SCC has considered the law of *de facto* expropriation four times: *Manitoba Fisheries* (1979), *Tener* (1985), *CPR* (2006), and *Annapolis* (2022).

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[52] *Annapolis*, a para. 44 **[Alberta's Authorities, Tab 5]**.
[53] *Annapolis*, at para. 25 **[Alberta's Authorities, Tab 5]**.

[75] In *Manitoba Fisheries*[54]:

a. Manitoba Fisheries was in the business of exporting fish. Parliament passed legislation that created a Crown corporation to carry out the business of fish exportation. The legislation also said that no private business could export fish without a license. The evidence was that *no* licenses were ever granted.

b. Importantly, the statute was not a mere prohibition of carrying on business. Instead, the government got into the very same business that they prohibited Manitoba Fisheries from carrying on.

c. As for the **Acquisition Branch** of the test, the SCC held that the government constructively acquired the plaintiffs business by *expropriating the goodwill of Manitoba Fisheries*. As for the **Loss Branch** of the test. Manitoba Fisheries lost the goodwill of its business.

d. In *Manitoba Fisheries* the same goodwill that was lost by the claimant, was acquired by the government. This was a taking of property – the same property was lost as was gained.

e. To reach this conclusion, the SCC had to consider whether goodwill was a type of property that was capable of being expropriated. The SCC concluded that it was, even though goodwill is intangible property.

> Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a **loss of property** and that the **same goodwill** was by statutory compulsion **acquired** by the federal authority, it seems to me to follow that **the appellant was deprived of property which was acquired by the Crown** [emphasis added].[55]

[54] *Manitoba Fisheries Limited v The Queen*, 1978 CanLII 22, [1979] 1 SCR 101 ("***Manitoba Fisheries***") **[Alberta's Authorities, Tab 12]**.

[55] *Manitoba Fisheries*, at p. 110 **[Alberta's Authorities, Tab 12]**.

[76] When discussing *Manitoba Fisheries*, the majority in *Annapolis* said: "the monopoly created by the Act conferred an economic advantage upon the state, but not an *actual acquisition* of property" [emphasis in original].[56]

[77] **The "economic advantage" acquired by the government in *Manitoba Fisheries* flowed directly from the property taken: the goodwill lost by the claimant and acquired by government**.

[78] In *Tener*[57]:

a. The claimants owned Crown-granted mineral rights in an area that was later designated a provincial park. The property rights held by the claimant (their sticks in the bundle) were the right to explore and work the minerals. Under the British Columbia *Park Act*, a park use permit had to be obtained before a natural resource in a provincial park could be exploited.

b. When the claimants applied for a permit to conduct mining work in the park, their request was refused. The claimants were then advised by letter that *no new exploration or development work would be permitted under current park policy*. The SCC held that a *de facto* expropriation had occurred.

c. The claimants were denied access to the surface owned by the government. As such, it was *impossible* for the claimants to explore or work their mineral interest. Their proprietary interests were completely sterilized. All of their sticks in the bundle had been taken away. The **Loss Branch** of the test was satisfied because the claimant had no ability whatsoever to exercise its rights to explore and exploit the resource.

d. As for the **Acquisition Branch** in *Tener*:

[56] *Annapolis* at para. 29 **[Alberta's Authorities, Tab 5]**.
[57] *R v Tener*, [1985] 1 SCR 533, 1985 CanLII 76 (SCC) ("***Tener***") **[Alberta's Authorities, Tab 15]**.

(1) In *Manitoba Fisheries*, the very same property (goodwill) was acquired by government, as was lost by the claimant.

(2) In *Tener*, the government argued that there was no expropriation because it had not acquired the right to explore and exploit the claimants' subsurface interests. In other words, the government did not acquire the same property that was lost by the claimants.

(3) The SCC considered: does the same property that was lost have to be acquired for there to be a *de facto* expropriation? The SCC said "no", it does not have to be the same property. What, then, did the government acquire in *Tener*?

(4) Estey J, writing for the majority, held that the denial of access to the surface lands was *a recovery by the government of a part of the mineral right granted*:

> Here the government wished, for obvious reasons, to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the respondents under their 1937 grant as a threat to the park. **The notice of 1978 took value from the respondents and added value to the park**. The taker, the government of the province, clearly did so in exercise of its valid authority to govern. It clearly enhanced the value of its asset, the park. The respondents are left with only the hope of some future reversal of park policy and the burden of paying taxes on their minerals. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process [emphasis added].[58]

(5) Wilson J. wrote concurring reasons and noted:

> By depriving the holder of the profit of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee has **effectively removed the encumbrance from its land** [emphasis added].[59]

[79] In *Tener* the same property was not acquired by government as was lost by the claimant (unlike *Manitoba Fisheries*), but the government acquired an advantage that flowed from the property lost. The claimants in *Tener* lost the ability to explore and

[58] *Tener* at para. 60 **[Alberta's Authorities, Tab 15]**.
[59] *Tener* at para. 37 **[Alberta's Authorities, Tab 15]**.

exploit the subsurface, and the government acquired a corresponding advantage: an increase in value of the surface lands, and the effective removal of an encumbrance from government owned land. **The advantage acquired by the government in *Tener* flowed directly from the property taken**.

[80] This is why in *CPR*, the Court articulated the Acquisition Branch as the "acquisition of a beneficial interest in the property **or flowing from it**" [emphasis added].[60] The advantage must flow from the property taken. The majority in *Annapolis* explains:

> … the Court in *CPR* did not use "beneficial interest" in the technical sense that it carries in the domain of equity. Rather, a "beneficial interest" is to be more broadly understood as an "advantage" — **hence the Court's coupling of "beneficial interest" with the phrase "or flowing from [the property]"**. **Clearly, if the interest acquired by the state can be one which *flows from* the property**, what must be shown by the property owner can fall short of an *actual* acquisition by the state [italic emphasis in original; bold emphasis added].[61]

[81] The majority in *Annapolis* explains further:

> This interpretation is supported by the explicit wording under the first part of the CPR test: "… a beneficial interest in the property or flowing from it …" (para. 30 (emphasis added)). **An interest flowing from the property** affirms that a "beneficial interest" can be more broadly understood as an advantage, and need not be an actual acquisition [underline emphasis in original; bold emphasis added].[62]

[82] Only an advantage that flows from the property constructively taken will satisfy the Acquisition Branch of the *de facto* expropriation test.

(h) A general advantage to the public, and the furtherance of policy objectives, is insufficient for a *de facto* expropriation

[83] The facts of *CPR* are set out above. In *CPR*:

a. In relation to the **Loss Branch**, CPR's lands had lost virtually all of their economic value. Loss of value was insufficient to satisfy the Loss Branch of the test.

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[60] *CPR* at para. 30 **[Alberta's Authorities, Tab 6]**.
[61] *Annapolis*, at para. 25 **[Alberta's Authorities, Tab 5]**.
[62] *Annapolis* at para. 40 **[Alberta's Authorities, Tab 5]**.

b. As for the **Acquisition Branch** in *CPR*, the City restricted use of the lands to *public* uses – for things like *public* heritage walks, *public* nature trails and *public* cyclist paths. CPR argued that the City had acquired a *de facto* park, and that there was a general benefit to the public who used its lands as a park.

c. The unanimous SCC in *CPR* rejected this argument. A general public benefit, and a furtherance of the City's policy objective (that the lands remain undeveloped), was insufficient to satisfy the Acquisition Branch of the test. The Court in *CPR* explained:

> The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]" [emphasis added].[63]

[84] *CPR* stands for the principle that a general benefit to the public, and a furtherance of policy objectives, is insufficient to satisfy the Acquisition Branch of the *de facto* expropriation test. The majority in *Annapolis* was careful to say that they did not overrule *CPR*. *CPR*, and this principle, is still good law.

(i) The majority in *Annapolis* chose to maintain a two-part test

[85] The majority in *Annapolis* could have eliminated the Acquisition Branch of the test (as they were invited to do by the appellants in that case). Instead, they maintained the long-established two-part test. This means the Acquisition Branch must play a meaningful role in the *de facto* expropriation analysis.

[86] *De facto* expropriation is a taking by regulation or other government action. All statutes, regulations, Ministerial Orders, development permits (or their denial), government decisions, etc. further the policy objectives of the government that made them. In other words, all government action that might constructively take property furthers some policy objective.

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[63] *CPR* at para 33 **[Alberta's Authorities, Tab 6]**.

[87] As a result, the furtherance of government policy objectives cannot be a sufficient "advantage" that satisfies the Acquisition Branch. If it were, the Acquisition Branch would completely collapse. It would be satisfied in every case. Alberta submits this is not what the majority in *Annapolis* intended.

[88] Only an advantage that flows directly from the property constructively taken will satisfy the test.

(j) *De facto* expropriation principles established in the case law

[89] The case law establishes what *de facto* expropriation IS, and what it IS NOT.

In the context of natural resources, de facto expropriation <u>IS</u> a complete sterilization of the ability to exploit the resource.

[90] There are several cases that deal with the *de facto* expropriation of natural resources. This case law is clear: the ability to work and recover the resource must be completely sterilized for there to be a *de facto* expropriation.

[91] The SCC's decision in *Tener* confirms that a *de facto* expropriation requires a total barrier to the exercise of a proprietary interest in a natural resource. The claimants in *Tener* had no ability to access the surface and, as such, it was *impossible* for them to exercise their rights to explore and exploit the subsurface.

[92] In *Casamiro Resource Co. v British Columbia*[64]:

a. The claimants had mineral interests in Strathcona Park. British Columbia passed an Order in Council prohibiting the issuance of resource use permits for the portion of the park where the mineral claims were located.

b. The BCCA held that a *de facto* expropriation had occurred because the mineral interests had been reduced to "meaningless pieces of paper". It was *impossible* for the claimants to enjoy their property rights. They were completely barred

[64] *Casamiro Resource Co. v British Columbia (Attorney General)*, 1991 CanLII 211 (BCCA) ("***Casamiro***") **[Alberta's Authorities, Tab 7]**.

from exploring, working and recovering the resource. All their sticks in the bundle of rights had been taken away.

[93] In *Rock Resources Inc. v British Columbia*[65]:

a. The claimant owned mineral claims located on Crown land.

b. The *Park Act* was amended to create a new provincial park partially encompassing the claimant's mineral claims. The amendment prevented the claimant from exploring or developing the minerals falling within the park boundaries.

c. Again, the BCCA held that a *de facto* expropriation had occurred because it was *impossible* for the claimants to enjoy their property rights. They were completely barred from exploring, working and recovering the resource. All their sticks in the bundle of rights had been taken away.

[94] In the present case, the Plaintiffs' ability to recover the Coal has not been affected. The Coal is still being recovered and the Plaintiffs are receiving payment for their interest.

[95] Even in 2030, the Coal will not be sterilized. The Coal can still be explored, worked, recovered, and sold. The current customer for the Coal, Capital Power, will be unable to burn the coal in G1, G2, and G3 unless Capital Power improves them.

[96] Only sterilization of natural resource interests – the complete inability to explore, work and recover the resource – will be tantamount to confiscation.

De facto expropriation IS NOT a devaluation of property rights

[97] The Plaintiffs confuse the devaluation of property with the ability to use and enjoy property. These are not the same thing.

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[65] *Rock Resources Inc. v British Columbia*, 2003 BCCA 324 ("***Rock Resources***") **[Alberta's Authorities, Tab 16]**.

[98] The case law establishes that a reduction in value, even a drastic reduction, does not constitute a *de facto* expropriation.

[99] In *CPR,* the City's Plan had an enormous negative impact on the value of the fee simple lands owned by CPR. Any development potential for the lands was eliminated. This significant devaluation of the lands was insufficient for a finding of *de facto* expropriation. CPR could still use and enjoy the lands, even if that use was uneconomic:

> The effect of the by-law was to freeze the redevelopment potential of the corridor and to **confine CPR to uneconomic uses of the land** [emphasis added].[66]

[100] Another illustration of this point is *Mariner Real Estate Ltd. v Nova Scotia*[67]:

a. The claimants owned oceanfront private land on Kingsburg Beach. The Province passed legislation and regulation to protect the beach, after determining that it was environmentally fragile and ecologically significant.

b. Significantly, the Minister refused to allow single-family dwellings. This was a blow to the private owners who wanted to build valuable oceanfront residences.

c. The Court accepted that the regulation took virtually all of the lands' economic value. The NSCA held that:

   - Canada is a highly regulated society, and land use controls drastically and routinely affect the value of land.

   - The Court specifically addressed the question: Does the loss of economic value of land constitute the loss of land within the meaning of the *Expropriation Act*?

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[66] *CPR*, at para. 8 **[Alberta's Authorities, Tab 6]**.

[67] *Mariner Real Estate Ltd. v Nova Scotia*, 1999 NSCA 98 ("***Mariner Real Estate***") **[Alberta's Authorities, Tab 13]**.

- After a thorough analysis of the law in Canada (and other countries), the Court concluded that loss of economic value is not the same thing as loss of land:

> The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the Expropriation Act. In my view, this distinct treatment supports the conclusion that **decline in value of land, even when drastic, is not the loss of an interest in land** [emphasis added].[68]

- There was no *de facto* expropriation.

- The majority in *Annapolis* specifically commented on *Mariner* and the finding that loss of economic value is not the loss of property (implying it was correctly decided) saying:

> To be clear, *Mariner* does not stray from focussing [sic] on both the *effect* of the taking and the *advantage* acquired by the government, as required by this Court's jurisprudence and affirmed in the test set out in *CPR*. Rather, and consistent with both *Manitoba Fisheries* and *Tener*, *Mariner* asked whether the *effect* of the regulation was to remove an interest in land (*Mariner*, at p. 722, referring to *Tener*) [emphasis in original].[69]

[101] This Court came to a similar conclusion in *Alberta v Nilsson*[70]:

a. The claimant owned land within the North Edmonton Restricted Development Area (RDA). Within the RDA, land owners required permission of the Minister of Environment to develop land. The land owner applied for a permit to build a trailer park. The application was denied. This Court held that:

- Zoning changes or development freezes do not amount to a *de facto* expropriation:

> Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.[71]

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[68] *Mariner Real Estate*, at para. 72 **[Alberta's Authorities, Tab 13]**.
[69] *Annapolis* at para. 43 **[Alberta's Authorities, Tab 5]**.
[70] *Alberta v Nilsson*, 2002 ABCA 283 ("***Nilsson***") **[Alberta's Authorities, Tab 4]**.
[71] *Nilsson*, at para. 61 **[Alberta's Authorities, Tab 4]**.

- Even though "the land's value was reduced"[72], this is not sufficient for a *de facto* expropriation.

De facto expropriation IS NOT a business risk that did not work out

[102] In 2014, the Plaintiffs made a business decision to invest in the Coal. In doing so, they assumed a business risk. *De facto* expropriation is not a business risk that did not work out the way you hoped. This point is illustrated in *64933 Manitoba Ltd. v Manitoba*[73]:

a. On Hecla Island (a provincial park in Manitoba) there was some privately owned land that was subject to the *Provincial Park Lands Act*.

b. The owner wanted to build a vacation resort. Permission from the Minister was required for the development. The application was denied. The MBCA held that:

- There was no *de facto* expropriation because the test can only be made out:

> … if the effect of the government's action is to **essentially extinguish the claimant's interest in land or property** [emphasis added][74]

- If there were a *de facto* expropriation in these circumstances, this would mean every "disappointed developer"[75] would be entitled to compensation.

- The land owner had not been denied an interest in land or any property rights. Though, certainly, their property rights had decreased in value. Instead, the land owner "took a commercial risk and lost"[76].

[103] Investors who take business risks are not entitled to compensation. A business risk that is realized, is not a confiscation of property.

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[72] *Nilsson*, at para. 62 **[Alberta's Authorities, Tab 4]**.
[73] *64933 Manitoba Ltd. v Manitoba*, 2002 MBCA 96 ("***64933 Manitoba***") **[Alberta's Authorities, Tab 3]**.
[74] *64933 Manitoba*, at para. 13 **[Alberta's Authorities, Tab 3]**.
[75] *64933 Manitoba*, at para. 15 **[Alberta's Authorities, Tab 3]**.
[76] *64933 Manitoba*, at para. 20 **[Alberta's Authorities, Tab 3]**.

(k) The *de facto* expropriation test applied to this case

[104] The majority in *Annapolis* confirmed the long-established two-part test. The Plaintiffs cannot satisfy either branch. They will be discussed in reverse order.

The *Loss Branch is not satisfied in this case*

[105] The Plaintiffs cannot satisfy the Loss Branch. They confuse the loss of economic value of property, with the loss of property. They admit:

> … the royalty interest has presently sustained a significant **loss of value** with the balance to be lost by 2030 – **thereby depriving Genesee LP of all use and enjoyment of its property** [emphasis added][77]

[106] This is incorrect in law. Property that has lost value, even virtually all of its value, can still be used and enjoyed (even if the owner is restricted to uneconomic uses as CPR was).

[107] In *Tener*, *Casamiro Resources* and *Rock Resources* (the successful subsurface interest cases) by contrast, the claimants lost all ability to access, mine and sell the minerals. Unlike the present case, their property rights were completely sterilized.

The *Acquisition Branch is not satisfied in this case*

[108] Alberta has not acquired any advantage that flows from the Plaintiffs' royalty.

[109] In their claim, the Plaintiffs do not particularize any advantage they allege Alberta to have acquired that flows from the royalty. They merely allege that the:

> … benefits that Alberta will obtain are *of the sort* set out in the 'Regulatory Impact Analysis Statement' referenced at paragraph 39 of the Amended Statement of Claim.[78]

[110] Paragraph 39 of the Amended Statement of Claim deals with allegations involving "Federal Actions" and states:

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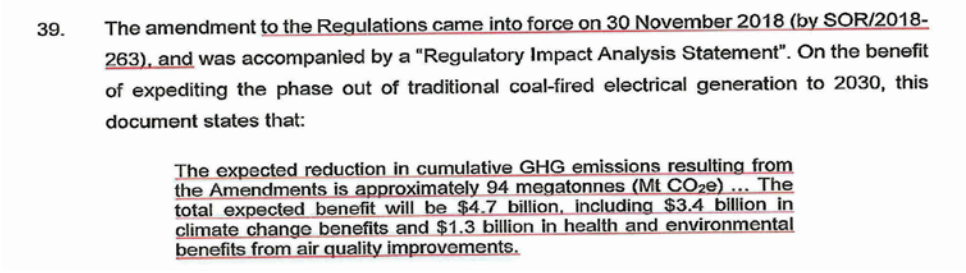
[77] Reply to Alberta NTAF, at para. 23(g) **[Alberta's AEKE, Tab 2, p. 16]**.

[78] Plaintiffs' Response to Request for Particulars, filed February 8, 2019, at para. 4 **[Appeal Record, Tab 3, p. 16]**.



39. The amendment to the Regulations came into force on 30 November 2018 (by SOR/2018-263), and was accompanied by a "Regulatory Impact Analysis Statement". On the benefit of expediting the phase out of traditional coal-fired electrical generation to 2030, this document states that:

> The expected reduction in cumulative GHG emissions resulting from the Amendments is approximately 94 megatonnes (Mt CO_2e) ... The total expected benefit will be $4.7 billion, including $3.4 billion in climate change benefits and $1.3 billion in health and environmental benefits from air quality improvements.

[111] In their Factum, the Plaintiffs allege that Alberta has acquired "policy and economic advantages".[79]

[112] For the reasons set out in this Factum, a furtherance of government policy objectives cannot satisfy the Acquisition Branch of the *de facto* expropriation test. Such a finding would be inconsistent with *Manitoba Fisheries*, *Tener*, *CPR*, and *Annapolis*. It would also render the Acquisition Branch meaningless, causing that branch of the test to completely collapse.

[113] As for the alleged economic advantages, should there be any such advantages (which is not conceded), they do not flow from the Plaintiffs' royalty. As stated, only advantages that flow directly from the property constructively taken will satisfy the Acquisition Branch. For example, in *Manitoba Fisheries* government acquired an economic advantage by expropriating the goodwill of the claimant. The economic advantage flowed directly from the property taken (goodwill).

[114] The Plaintiffs also cite *Kalmring* and *Compliance Coal* to support their argument that they can satisfy the Acquisition Branch.[80] Alberta submits that neither case assists them.

[115] In *Kalmring*[81]:

a. The Applications Judge was considering a striking application. The issue was whether the Statement of Claim disclosed a cause of action. The case is similar factually to *Manitoba Fisheries* (where government expropriated

[79] See paragraphs 113, 126, and 142(a) of the Appellants' Factum.
[80] See paragraph 118 of the Appellants' Factum.
[81] *Kalmring v Alberta*, 2020 ABQB 81 ("***Kalmring***") **[Alberta's Authorities, Tab 11]**.

goodwill): Alberta changed the method of drivers' license road tests. Privately employed driver examiners would no longer administer road tests. Instead, they would be administered by government employees. The claim was commenced by private driver examiners.

b. Alberta sought to distinguish *Manitoba Fisheries* and argued that road testing is a revenue neutral public service, and not a business enterprise with a view to profit. The Applications Judge held that this is a matter of evidence, and the matter should not be struck.

c. The Applications Judge held that revenues acquired by government could arguably be an advantage that might satisfy the Acquisition Branch. **Note that if such revenues were an advantage, they would presumably flow directly from the property taken (the lost private driver examiners business – i.e. their goodwill)**. This case does not assist the Plaintiffs. It is consistent with *Manitoba Fisheries*.

[116] In *Compliance Coal*[82]:

a. This was another striking application. The issue was whether the claim disclosed a cause of action. The government argued that the plaintiffs did not plead a benefit that would be acquired by the government. The Court stated:

> [95] The plaintiffs plead that BC and Canada **benefitted "in that they no longer had to face criticism from constituents** and other individuals who were opposed to the development of coal mines on Vancouver Island" (NOCC at para. 19). In my view, **this supposed benefit is not equivalent to "the acquisition of a beneficial interest in the property or flowing from it**". Unlike the goodwill in *Manitoba Fisheries*, it is not a part of any property gained by BC or Canada [emphasis added].[83]

b. ***Compliance Coal* stands for the opposite proposition than the Plaintiffs cite this case for.** In *Compliance Coal*, a general public benefit was *insufficient* to satisfy the Acquisition Branch. Instead, the acquisition of a benefit that flows

[82] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 ("***Compliance Coal***") **[Alberta's Authorities, Tab 8]**.
[83] *Compliance Coal*, at para. 95 **[Alberta's Authorities, Tab 8]**.

directly from the property taken is required. This case does not assist the Plaintiffs.

4. The Chambers Justice correctly stated the test for *de facto* expropriation

[117] The Chambers Justice stated the test correctly as: "1) an acquisition of a beneficial interest in the property **or flowing from it**; and 2) removal of all reasonable uses of the property" [emphasis added].[84]

[118] This is correct, and is the test affirmed by the SCC in *Annapolis*. The Chambers Justice committed no error.

5. The Chambers Justice did not err in finding that there was no merit to the Plaintiffs' claim

[119] The Chambers Justice held:

> The Defendants have proven on a balance of probabilities that there is no merit to the Plaintiffs' claim. The first requirement of the test for *de facto* expropriation has not been and cannot be made out as there has not been an acquisition of a beneficial interest in property **or flowing from it** [emphasis added].[85]

[120] The Chambers Justice clearly considered the meaning of the phrase (from *CPR*): "beneficial interest in the property or flowing from it". Since her decision, the majority in *Annapolis* has illuminated how "or flowing from it" should be interpreted – it means an advantage that flows from the property constructively taken.

[121] There is no evidence of any advantage acquired by Alberta that flows from the Plaintiffs' royalty.

[122] The types of advantages argued by the Plaintiffs – policy and economic advantages – do not satisfy the Acquisition Branch. This would stretch the majority decision in *Annapolis* too far and mean a drastic change to the law of *de facto*

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[84] Summary Judgment Decision at para. 60 **[Appeal Record, Tab 16, p. 114]**.
[85] Summary Judgment Decision at para. 77 **[Appeal Record, Tab 16, p. 117]**.

expropriation – something the majority in *Annapolis* was careful to say they have not done.

[123] As a result, the Chambers Justice committed no palpable and overriding error in determining that the Plaintiffs cannot meet the Acquisition Branch of the test.

6. *The de facto* expropriation claim was properly summarily dismissed

[124] The decision of the Chambers Justice should be upheld, and the claim for *de facto* expropriation should be summarily dismissed – there is no merit to the claim and no genuine issue for trial.

[125] Specifically:

a. The Plaintiffs have not pleaded, and have no evidence of, any advantage flowing from the Plaintiffs' royalty that Alberta will acquire.

b. The Plaintiffs have not pleaded, and have no evidence of, any property rights that have been or will be taken by either the Climate Leadership Plan, or the Off-Coal Agreement.

PART V: Conclusion and Relief Sought

[126] The Chambers Justice made no error in summarily dismissing the claim against Alberta and the Plaintiffs' appeal should be dismissed, with costs.

All of which is respectfully submitted this 21st day of February, 2023.

Time Estimate: 45 Minutes

ALBERTA JUSTICE

Cynthia R. Hykaway

Counsel for the Respondent, His Majesty the King in Right of Alberta

Melissa N. Burkett

Counsel for the Respondent, His Majesty the King in Right of Alberta

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