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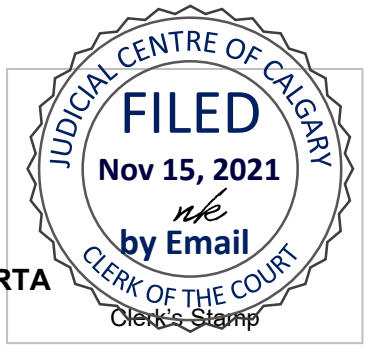

COURT FILE NUMBER	**1801 – 16746**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
PLAINTIFFS / CROSS-RESPONDENTS	**ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.**
DEFENDANTS / CROSS-APPELLANTS	**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA**

RESPONSE BRIEF OF THE PLAINTIFFS
RE: DEFENDANTS' CROSS-APPEALS
JUSTICE SPECIAL CHAMBERS APPEARANCE
SCHEDULED FOR NOVEMBER 30 - DECEMBER 1, 2021

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TABLE OF CONTENTS

PART I: INTRODUCTION

1. This brief responds to the defendants' cross-appeals of those portions of Master J.R. Farrington's decision (i) allowing the pleading amendments opposed by the defendants, and (ii) refusing to strike the plaintiffs' Amended Amended Statement of Claim pursuant to Rule 3.68.

2. The plaintiffs claim against the defendant governments for the *de facto* expropriation of a significant royalty interest in thermal coal which was dedicated for use as fuel at the Genesee Power Plant until the year 2055. Since inception, the mine and power plant have been integrated as a single operation.

3. The impugned actions of Alberta and Canada comprise part of their climate change laws and policies, and have the express objective of phasing out coal-fired electrical generation by 2030. In particular:

   (a) the Government of Alberta paid $733.8 million to the owner of the Genesee Power Plant which used the coal to cease generating coal-fired electricity by 2030; and

   (b) the Government of Canada changed the regulatory framework, upon which the plaintiffs relied, to prohibit traditional coal-fired electrical generation by 2030.

4. The effect of these actions is to shutter the Genesee Mine and lock the coal in the ground, thereby sterilizing the plaintiffs' royalty interest in the coal of all use and value.

5. The plaintiffs claim $190 million in compensation (representing the royalty income from the production of coal they would have earned after 2030, but for the defendants' actions), and a declaration that the plaintiffs' property has been, or will be, *de facto* expropriated.

6. While the plaintiffs have appealed the Master's decision granting summary dismissal of their *de facto* expropriation claim, for the reasons stated herein the Master was correct in allowing the disputed amendments and refusing to strike the claim.

7. The plaintiffs respectfully request that the defendants' cross-appeals be dismissed with costs.

PART II: FACTS

8. The plaintiffs adopt and repeat the Facts section in their appeal brief addressing summary dismissal, filed 17 September 2021.[1]

PART III: ISSUES AND STANDARD OF REVIEW

9. The issues on the defendants' cross-appeals are whether the Master erred by:

   (a) allowing the pleading amendments opposed by the defendants; and

   (b) refusing to strike the plaintiffs' Amended Amended Statement of Claim pursuant to Rule 3.68.

10. As an appeal from a Master's decision is a hearing *de novo*, the standard of review is correctness on both issues.[2]

PART IV: THE DEFENDANTS' IMPROPER SUBMISSIONS

11. As a preliminary matter, it needs be raised that the defendants breach a Consent Order by arguing that the Genesee coal can be put to a reasonable use after 2030, and misstate both the law of *de facto* expropriation and key facts.

12. As those improper submissions could prejudice (or colour) the Court's consideration of the disputed amendments and grounds for striking the taking claim raised on the defendants' cross-appeals, they are responded to here.

A. Breach of Court Order

13. The defendants breach paragraph 6 of the Consent Order of Justice Eidsvik, which provides in part that "…the defendants will not argue at the Appeal Hearing that the coal which is subject to the royalty interest of the plaintiff, Genesee Royalty Limited Partnership, can be put to a reasonable use after 2029."[3]

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1 Plaintiffs' Appeal Brief Re: Summary Dismissal filed September 17, 2021 at paras 9-67.
2 *Daytona Power Corp v Hydro Company Inc*, 2020 ABQB 723 at para 11 **[Pl Auth at Tab 1]**, citing *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166.
3 Consent Order of Justice K.M. Eidsvik filed July 22, 2021 at para 6 **[Appeal Record Vol I at Tab 28]**.

14. Alberta's breach is flagrant, submitting that the plaintiffs "cannot satisfy the Loss Branch" of the test from *CPR v Vancouver* because:

> The coal is currently being accessed, mined and sold. Even after 2030, the coal can still be accessed, mined and sold – it can even be sold to the Plaintiffs' current customer (Capital Power), but it cannot be burned in G1, G2, and G3 unless the customer (Capital Power) improves those generators.[4]

15. And elsewhere in its brief, Alberta argues that after 2030 coal can still be used to generate electricity under Canada's Amended Regulations, submitting:

> 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*.[5]

16. These arguments cannot be considered given the defendants' agreement and the Consent Order, they have no evidentiary foundation, and if evidenced they would give rise to material facts in dispute (*i.e.*, whether Alberta's Off-Coal Agreement and Canada's Amended Regulations remove all reasonable uses of the Genesee coal) which preclude summary dismissal.

17. The affidavit evidence of Ben Lewis (upon which no cross-examination was had) demonstrates how the Genesee Power Plant and Mine will close by 2030 as a result of the Off-Coal Agreement and Amended Regulations,[6] and the defendants' own public statements inescapably lead to the same conclusion (see the plaintiffs' brief addressing summary dismissal at paragraphs 144 to 148).

18. The Master correctly determined that:

    (a) the Genesee Mine "supplies all of its geothermal coal to the plant alone" and that it "does not supply geothermal coal to anyone else";[7]

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4 Alberta Appeal Brief at paras 123-127.
5 Alberta Appeal Brief at para 83(a) [emphasis in original].
6 Affidavit of Ben Lewis at paras 13, 38-39, 45-47, 52-57 **[Appeal Record Vol II at Tab 2]**.
7 Master's Reasons at para 6 **[Appeal Record Vol I at Tab 22]**.

(b) the Genesee Mine is "immediately adjacent to the plant and the mine does not have the infrastructure such as rail facilities to send the coal elsewhere";[8]

(c) although "the coal itself is not actually taken here, the ability to develop and exploit the coal is arguably taken (albeit indirectly by making it valueless)".[9]

19. As to Alberta's submission that the coal can still be "accessed" and "mined" after 2030, that obviously has no practical consequence given there is no use for the coal other than as a fuel source for the Genesee Power Plant.

20. And it is evident that Alberta recognizes the Genesee coal will be sterilized of value and open to claims, as in the Off-Coal Agreement Alberta required Capital Power to forbear from commencing any legal action against the province with respect to "the mines, coal supply agreements, mining contracts, or mining equipment related to the coal used to fuel the Plants".[10]

21. There is also no evidence that Capital Power is able to "improve" G1, G2, and G3 such that they are capable of generating coal-fired electricity in compliance with the emissions standard imposed by Canada's regulations (420 tonnes of carbon dioxide per gigawatt hour of electricity produced), let alone in compliance with the Off-Coal Agreement (no coal-fired emissions whatsoever).

22. Moreover, the fact that Alberta agreed to pay Capital Power $733.8 million for the net book value of the Genesee units "pro-rated by [their] percentage of life remaining after 2030"[11] belies any submission that the Genesee units are capable of generating coal-fired electricity after that point in time.

23. To ask as a rhetorical question, if it can be said Capital Power has the technological means to continue generating coal-fired electricity after 2030 in compliance with Canada's "efficiency requirements",[12] why did Alberta independently agree to pay the company $733.8 million?

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8 Master's Reasons at para 36 **[Appeal Record Vol I at Tab 22]**.
9 Master's Reasons at para 33 **[Appeal Record Vol I at Tab 22]**.
10 Affidavit of Ben Lewis at Exhibit "Z" section 7(a) **[Appeal Record Vol II at Tab 2]**.
11 Affidavit of Ben Lewis at para 39, Exhibit "Z" **[Appeal Record Vol II at Tab 2]**.
12 See Alberta Appeal Brief at para 84.

24. Canada's breach of the Consent Order results from its nonsensical argument that all reasonable uses of the royalty interest have not and will not be removed as the "land underlying the Mine" can be used for land leasing and cattle grazing after 2030.[13]

25. Canada does not explain what is meant by the phrase "land underlying the Mine", but considering that the plaintiffs' property interest is a royalty interest in subsurface coal, Canada is obviously re-describing the mineral as "land underlying the Mine" and then asserting there is reasonable use for it after 2030, thereby arguing indirectly what it is refrained from arguing directly.

26. In any event, the argument that the plaintiffs' royalty interest has reasonable uses after 2030 because the "land underlying the Mine" can be used for land leasing and cattle grazing is premised on a highly erroneous understanding of property law. The plaintiffs hold a royalty interest in subsurface coal, and one obviously cannot use a royalty interest in subsurface coal for "land leasing" or "cattle grazing", activities which would only benefit the holder of the surface rights (presently Capital Power).[14]

B. Misstatements of Law

27. In addition to breaching their agreement to refrain from arguing there is a reasonable use for the Genesee coal after 2030, in their briefs the defendants misconstrue two leading cases in the area of *de facto* expropriation: *Manitoba Fisheries*[15] and *Tener*.[16]

    (a) Canada argues that *Manitoba Fisheries* and *Tener* help show that Canadian courts have "faithfully and rigidly applied the two-part test" stated in *CPR v Vancouver*.[17]

    (b) Alberta argues that the two-part test from *CPR v Vancouver* is not a departure from *Manitoba Fisheries* and *Tener*, and that there has "always been a two-part test".[18]

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13 Canada Appeal Brief at paras 72, 77.
14 See Affidavit of Ben Lewis at Exhibit "L" section 15.1 **[Appeal Record Vol II at Tab 2]**.
15 [1979] 1 SCR 101 ("*Manitoba Fisheries*") **[Pl Auth at Tab 11]**.
16 [1985] 1 SCR 533 ("*Tener*") **[Pl Auth at Tab 12]**.
17 Canada Appeal Brief at paras 54, 60.
18 Alberta Appeal Brief at page 22.

28. Those statements of law are incorrect as neither *Manitoba Fisheries* nor *Tener* used the words "beneficial interest", and in neither case did the Crown acquire one. As sagely observed by the late legal scholar Peter Hogg:

> In *Canadian Pacific*, the Court restated the test for a constructive (or de facto) taking. McLachlin C.J. said that two requirements had to be met: "(1) an acquisition of a beneficial interest in the property, or flowing from it, and (2) removal of all reasonable uses of the property." The Court held that neither requirement was met. As to (1) (acquisition), since the property was designated as a public thoroughfare for the people of the City, one would have thought that there was an acquisition of something like a beneficial interest by the City. But the Court held otherwise, pointing out that the private ownership of the company would enable the company to exclude the public from the corridor as trespassers (a "futile exercise" according to the trial judge in view of the length of the corridor being used as a public pathway)… The result seems unfair, and a departure from *Manitoba Fisheries* and *Tener*, in neither of which was there an acquisition by the Crown of a beneficial interest in property. Indeed, if that requirement were taken literally, it would be the end of compensation for constructive (or de facto) takings, because the acquisition of an equitable interest in property is an actual taking (or expropriation). [Emphasis added, footnotes removed.][19]

29. That neither *Manitoba Fisheries* nor *Tener* involved the actual acquisition by the Crown of property rights (beneficial or otherwise) is evident from the reasons for each.

30. While in *Manitoba Fisheries* the Supreme Court of Canada reasoned that the Crown had taken the plaintiffs' goodwill, there was no actual acquisition of goodwill but only an effective one from having denied the plaintiff's ability to operate as a going concern, Ritchie J writing:

> It will be seen that, in my opinion, the Freshwater Fish Marketing Act and the corporation, created thereunder, had the **effect** of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless, and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid. [Emphasis added.][20]

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19 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019) at 29-11 to 29-12 **[Pl Auth at Tab 13]**.

20 *Manitoba Fisheries* at para 36 **[Pl Auth at Tab 11]**.

31. That the Crown did not actually acquire goodwill is even more evident when considering that a commercial monopoly (such as the government agency which brought about the "obliteration of the [plaintiff's] entire business") has no use for goodwill, as there is no one else with whom customers can do business.

> Like in *Manitoba Fisheries*, the plaintiffs' business here has been **obliterated** as a result of the Crown rendering the Genesee coal (and the royalty interest in it) virtually useless. Compensation is owing.

32. The Supreme Court of Canada also found a taking had occurred in its subsequent decision of *Tener* even though the Crown had acquired neither the plaintiffs' mineral rights nor the right to exploit them.[21]

33. Estey J. for the majority concluded that the plaintiffs were "left with the minerals", and Wilson J. and Dickson C.J. (concurring) wrote that "the fee in the land including the surface rights was and continues to be in the Crown."[22] Wilson J. considered the property rights held by the plaintiffs as a profit à prendre, and as she pointed out, "the owner of the fee cannot in law hold a profit à prendre in his own land."[23]

34. Nor did the Crown want or need the mineral claims. As Estey J. observed, "the action taken by the government was to enhance the value of the public park" and the Crown sought "to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the [plaintiffs] … as a threat to the park".[24]

35. The Court's reasons in *Tener* as to an acquisition by the Crown regarded only an effective or abstract gain – as no property rights were actually transferred. Wilson J. wrote that the denial of the mineral permits "effectively" removed an encumbrance from the Crown's land, had "the effect" of defeating the plaintiffs' entire interest in the land, and "in effect" caused a derogation by the Crown of its grant of minerals.[25] Similarly, Estey J. reasoned that the denial "amounts to" a recovery by the Crown of the plaintiffs' access rights, and

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21 Hogg, *Constitutional Law of Canada*, at 29-10 to 29-11 **[Pl Auth at Tab 13]**.
22 *Tener* at paras 20, 28 **[Pl Auth at Tab 12]**.
23 *Tener* at para 68 **[Pl Auth at Tab 12]**.
24 *Tener* at para 21 **[Pl Auth at Tab 12]**.
25 *Tener* at paras 65, 68 **[Pl Auth at Tab 12]**.

that the refusal to grant the permits took "value" from the plaintiffs and "added value to the park".[26]

36. But as succinctly put by Russell Brown in his academic article, "both Estey J.'s more rigorous requirement of 'value' and Wilson J.'s lower threshold of 'effective' gain fall well short of the requirement of a beneficial proprietary interest which the Court imposed in *CPR v Vancouver.*"[27]

> Like in *Tener*, the plaintiffs' interest in land here has been **effectively defeated** as a result of the Crown sterilizing the Genesee coal of all value. Compensation is owing.

37. In summary, *Manitoba Fisheries* and *Tener* involved considerations of only an effective acquisition by the Crown. In neither case did the Crown acquire a "beneficial interest in the property or flowing from it", and imposing such a requirement collapses the distinction between a *constructive* taking and a *de jure* taking.[28]

38. And as neither *Manitoba Fisheries* nor *Tener* were overturned in *CPR v Vancouver*, they remain good law and provide binding authority which determine the present case in the plaintiffs' favour.

39. In particular, *Manitoba Fisheries* and *Tener* establish a common law right to compensation when the state prohibits or prevents all reasonable uses of the subject property even though the Crown does not actually acquire anything for itself of an equitable or otherwise *in rem* quality.

40. Even the defendants appear to agree with that:

    (a) as stated by Alberta in its brief, "In the context of natural resources, *de facto* expropriation IS a complete sterilization of the ability to exploit the resource"[29]; and

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[26] *Tener* at paras 20-21 **[Pl Auth at Tab 12]**.
[27] Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC Law Review at 315 ("Brown Article") at 331 **[Pl Auth at Tab 9]**.
[28] Brown Article at 333-34 **[Pl Auth at Tab 9]**.
[29] Alberta Appeal Brief at page 24 [emphasis removed].

(b) as stated by Canada in its brief, "*De facto* expropriation arises when the state takes for itself the full bundle of rights associated with private property ownership."[30]

41. Compensation was ordered by the courts in all seven cases where state action prohibited or prevented all reasonable uses of the subject property, reflecting that such gives rise to a complete taking of the property:

CASE & CITATION	CHARACTERIZATION OF COMPLETE TAKING
Manitoba Fisheries Ltd v R, [1979] 1 SCR 101 at para 36 **[Pl Auth at Tab 11]**	It will be seen that, in my opinion, the Freshwater Fish Marketing Act and the corporation, created thereunder, had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless… [Emphasis added.]
British Columbia v Tener, [1985] 1 SCR 533 at para 65 **[Pl Auth at Tab 12]**	While the grant or refusal of a licence or permit may constitute mere regulation in some instances, it cannot be viewed as mere regulation when it has the effect of defeating the respondents' entire interest in the land. Without access the respondents cannot enjoy the mineral claims granted to them in the only way they can be enjoyed, namely, by the exploitation of the minerals. [Emphasis added.]
Casamiro Resource Corp v British Columbia (1991), 55 BCLR (2d) (CA) at para 34 **[Pl Auth at Tab 18]**	This order in council has the same practical effect as the refusal in the *Tener* case of a park use permit. It has reduced the Crown grants to meaningless pieces of paper. Thus, the Lieutenant Governor in Council is an "expropriating authority" within the meaning of the Expropriation Act, S.B.C. 1987, c. 23 (Index c. 117.1) which has taken land without the consent of the owner. [Emphasis added.]
TFL Forest Ltd v British Columbia, 2002 BCSC 180 at para 25 **[Pl Auth at Tab 31]**	I am satisfied in the present case that the *Park Amendment Act* did result in the taking of TFL's interests or right to harvest timber in the lands which became part of the park. Prior to the *Park Amendment Act* the rights were subject to certain restrictions and limitations contained in the … *Forest Act*. However the *Park Act* clearly prevented any taking or commercial harvesting of timber in the 7,064 hectares included in the parks. [Emphasis Added.]

[30] Canada Appeal Brief at para 52.

CASE & CITATION	CHARACTERIZATION OF COMPLETE TAKING
Rock Resources Inc v British Columbia, 2003 BCCA 324 at paras 26, 57 **[Pl Auth at Tab 19]**	By excluding mining, *inter alia*, from the purposes for which the Lieutenant Governor in Council might issue a park use permit, the legislation prevented the plaintiff from exploring for or developing minerals in parts of the Amber Claims. … I am therefore of the view that the *Park Amendment Act* (1995) effected the taking of a property right or interest held by the plaintiff prior to its enactment. [Emphasis added.]
Lynch v St John's (City), 2016 NLCA 35 at paras 62-63 **[Pl at Tab 24]**	The City's Municipal Plan and Development Regulations passed under *URPA* do not provide for any permitted uses in an area zoned "watershed" and only allow three possible discretionary uses: (i) agriculture, (ii) forestry, and (iii) public utility… Despite the noted discretionary uses of agriculture, forestry and public utilities, it is clear that the City takes the position that the City Manager is entitled to refuse all applications for building on the land in order to keep the land "unused in its natural state," with its groundwater uncontaminated. Despite enquiries from the Lynches about possible farming activity, tree harvesting, saw milling and wind turbine or solar panel installations, City officials would not, or could not, identify any uses at all to which the Lynches might be entitled to put the land. Even though some agricultural, forestry or public utility uses conceivably could, with proper conditions, be compatible with maintaining a sufficiently pristine flow of groundwater, City officials take the position that the best watershed management plan is to prohibit all activity on the Lynch property. The trial judge, at paragraph 67 of his decision, found that "given the nature of the property and its historical use," the Lynches have not been deprived of all reasonable uses of the property… But the trial judge did not identify a single use which might be possible. With respect, I believe the trial judge erred in failing to ask, as discussed in *Mariner*, at paragraph 48, whether the *City Act* and the exercise of the City Manager's discretion resulted in "deprivation of the reality of proprietorship." Having the property rights flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land "unused in its natural state," results in virtually all of the aggregated incidents of ownership being taken away. All of the reasonable uses of the property were

CASE & CITATION	CHARACTERIZATION OF COMPLETE TAKING
	taken away and a compulsory taking, a *de facto* or constructive expropriation, resulted. [Emphasis added.]
Sun Construction Company Limited v Conception Bay South (Town), 2019 NLSC 102 at paras 1, 14-15 **[Pl Auth at Tab 32]**	The applicant owns vacant lands on Perrins Road in Conception Bay South. On a visit to its property in July 2015, the applicant discovered that a paved roadway and turnaround ("roadworks") had been constructed on the land by the respondent, the Town of Conception Bay South (the "Town") without its knowledge. … Constructive expropriation generally arises where land use regulation impacts upon the use of private lands. In such cases, the rights of ownership have been taken as a result of restrictions which the state has put on the uses of those lands… Applying the principles in *Lynch*, I am satisfied that the private land was converted to a public road which has removed other reasonable uses of this portion of the property. Indeed, the applicant or its invitees cannot walk upon or otherwise use the roadworks without fear of being struck by vehicular traffic. [Emphasis added.]

42. Insofar as a "beneficial interest" (in the equitable or proprietary sense) must be acquired by the state before there is a taking, it is submitted that requirement arises only where there is not a complete deprivation of use and a balancing of interests must be made.

43. That was the case in *CPR v Vancouver*, where CPR could still use its land to operate a railway even though the effect of the impugned bylaw was to "freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land",[31] and in *Mariner* where the plaintiffs could still use their oceanside property for camping and other recreational activities even though the designation of the plaintiffs' lands as a breach depressed its value and constrained some types of development.[32]

44. Foreign jurisdictions likewise engage in this sort of balancing of interests in the context of partial takings.

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31 2006 SCC 5 ("*CPR*") at paras 8, 34 **[Pl Auth at Tab 14]**.
32 1999 NSCA 98 ("*Mariner*") at paras 4-5, 7, 9, 23, 27-28, 89 **[Pl Auth at Tab 27]**.

(a) In the United States, a taking occurs when regulation "denies all economically beneficial or productive use of land" (*i.e.*, a complete taking of property), but a taking can also occur when regulation merely *impedes* the use of property based on a "complex of factors", including the economic impact of the regulation on the plaintiff, the extent to which the regulation interfered with distinct investment-backed expectations, and the character of the governmental action (*i.e.*, a partial taking of property.)[33]

(b) In the United Kingdom, the Supreme Court recently affirmed compensation was owing to a fisherman under the *European Convention on Human Rights* (which provides that "no one shall be deprived of his possessions except in the public interest…") as a result of environmental restrictions which reduced his allowable catch of salmon by 95%. The Court's analysis focused on the deprivation to the plaintiff, and whether the impact to him reflected a "fair balance".[34]

45. In the present case (and unlike in *CPR v Vancouver*), a complete taking has occurred as the original and only use of the subject coal is effectively prohibited as a result of the defendants' actions to phase out coal power. The Genesee Mine was developed for the sole purpose of fueling the Genesee Power Plant, and to this day the plant remains the only user of the coal.[35] There are no other uses to which the coal has or can be put, and both defendants admit that the coal produced from the Genesee Mine is entirely dedicated to the generation of electricity in Alberta.[36]

46. The defendants have locked the thermal coal in the ground as a result of their campaign against coal power, and in the liberal democratic tradition they are obligated to provide a "just indemnity" for it.[37]

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33 *Murr v Wisconsin*, (2017) 137 S Ct 1933 at 1943, and as discussed in Factum of Annapolis Group for SCC Appeal at paras 85-86 **[Pl Auth at Tab 16]**.

34 *Mott v Environment Agency*, [2018] UKSC 10 at paras 1, 17, 22, 27, 33, 36-37, and as discussed in Factum of Annapolis Group for SCC Appeal at paras 82-83 **[Pl Auth at Tab 16]**.

35 Ben Lewis Affidavit at paras 52, 55, Exhibit "MM" **[Appeal Record Vol II at Tab 2]**.

36 Alberta Application filed June 5, 2020 at para 12 **[Appeal Record Vol I at Tab 13]**; Canada Application filed June 3, 2020 at para 6 **[Appeal Record Vol I at Tab 12]**.

37 See *Lorraine (Ville) c 2646-8926 Quebec Inc*, 2018 SCC 35 at para 1 **[Pl Auth at Tab 28]**.

47. The defendants make other misstatements of law as well, such as at paragraph 53 of Canada's brief where it submits that in *Nilsson* the Alberta Court of Appeal "explained with reference to earlier case authority" that:

> A mere negative prohibition though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State.

48. However, those words were <u>not</u> said by the Alberta Court of Appeal and instead come from a 1927 decision of the Court of King's Bench (England) cited by the Alberta Court of Appeal when reviewing the history of takings law.[38] From its review of the authorities, the Alberta Court of Appeal instead concluded that "in an exceptional case the extent of restrictions may be so significant that a *de facto* taking of property has occurred."[39] (Which is what has occurred here.)

49. Canada also asserts at paragraph 61 of its brief that, "The case law is clear that legislative and regulatory initiatives designed to protect human health or the environment very rarely amount to *de facto* expropriation," but that statement is wrong at law as a *de facto* expropriation was found in each of *Manitoba Fisheries* (where the commercial monopoly was established for the purpose of marketing fish "in an orderly manner"),[40] *Tener*, *Casamiro*, and *Rock Resources* (where the Crown denied mining permits to protect newly created parks),[41] and *Lynch* (where the government prohibited development of the plaintiff's lands to preserve a supply of "uncontaminated ground water" for the City of St. John's).[42]

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38 *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283 at paras 47, 50 ("*Nilsson ABCA*") **[Pl Auth at Tab 26]**.

39 *Nilsson ABCA* at para 62 **[Pl Auth at Tab 26]**.

40 *Manitoba Fisheries* at para 4 **[Pl Auth at Tab 11]**.

41 *Tener* at para 21 **[Pl Auth at Tab 12]**; *Casamiro Resources Corp v British Columbia* (1991), 55 BCLR (2d) 346 (CA) at paras 17-18, 31, 34 ("*Casamiro BCCA*") **[Pl Auth at Tab 18]**; *Rock Resources Inc v British* Columbia, 2003 BCCA 324 at paras 1, 57 ("*Rock Resources*") **[Pl Auth at Tab 19]**.

42 *Lynch v City of St John's*, 2016 NLCA 35 at para 60 ("*Lynch*") **[Pl Auth at Tab 24]**.

50. As to the decision of *Club Pro Adult Entertainment Inc v Ontario*, which Canada submits is "similar in many respects",[43] that case has no application here.

51. In *Club Pro*, the plaintiffs had built designated smoking rooms (DSRs) in their adult entertainment businesses, which at the time were permitted under Ontario tobacco control laws. When the province enacted new legislation prohibiting indoor smoking, the plaintiffs sued the Ontario government for having *de facto* expropriated the value of the DSRs.

52. On motion by the Crown, the Ontario Superior Court of Justice struck the taking claim ultimately on the basis that the new legislation did "not appropriate the plaintiffs' business for the Crown's use or benefit, or for the public's use or benefit."[44]

53. That is manifestly not the case here, where the defendants' actions to phase out coal power have effectively appropriated the Genesee coal and the royalty interest in it to obtain substantial health and environmental benefits for the public, which both defendants have announced will result in benefits worth billions of dollars. (See below in this brief at paragraphs 87 and 88.)

54. And while the Court in *Club Pro* observed that the Crown "transferred no property rights from the plaintiffs to itself by [the] legislation",[45] that consideration has no application where there is a complete taking of the subject property (as discussed). Moreover, as other provincial superior courts have stated (expressly or implicitly), an actual transfer of property rights is not required for a taking.

    (a) In *Casamiro*, MacKinnon J. for the British Columbia Supreme Court found a taking had occurred as the Order-in-Council left the plaintiff "with land which was essentially worthless" and "took away the plaintiff's entire interest" in the land.[46] Significantly, he added that "[t]he fact that the Province does not gain the mineral rights does not alter the situation in any way."[47]

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43 Canada Appeal Brief at para 65, citing *Club Pro Adult Entertainment Inc v Ontario (AG)* (2006), 27 BLR (4th) 227 (ONSC) ("*Club Pro*") **[Canada Auth at Tab 18]**.
44 *Club Pro* at para 82 **[Canada Auth at Tab 18]**.
45 *Club Pro* at para 71 **[Canada Auth at Tab 18]**.
46 (1990), 43 LCR 246 (BCSC) ("*Casamiro BCSC*") at paras 11, 13 **[Pl Auth at Tab 17]**.
47 *Casamiro BCSC* at para 12 **[Pl Auth at Tab 17]**.

(b) In *Nilsson*, Marceau J. for the Court of Queen's Bench of Alberta concluded that "the benefit [accruing to the state] does not have to be in form of the Crown making direct use of the owner's property in the same manner as the owner would have, but can be a general benefit to the public."[48]

(c) In *Kalmring*, Master Mason refused to strike a taking claim brought by privately-licensed driver examiners in response to the Alberta government's decision to transition to a system of using government employees to conduct road tests, concluding that revenues the government could generate in providing the services itself or the provision of subsidized services to constituents could "arguably be characterized as the acquisition of an intangible benefit by the Crown."[49]

(d) In *Compliance Coal*, the British Columbia Supreme Court held that the acquisition branch of the test from *CPR* was satisfied on the basis that denying the plaintiffs' mining operations "enhanced the value" of surface lots owned by the provincial Crown.[50]

55. Alberta states at paragraph 148 of its brief that "the impugned government action was pursuant to valid statutory authority", but notably does not identify the statute pursuant to which its actions to phase out coal power were taken. (Insofar as is known to the plaintiffs, there was no such statute.)

56. As to Alberta's submissions that its actions were "lawful" because "there is no claim for damages in the present case" and "reasonable" because "there is no judicial review in this case",[51] Alberta cites no legal authority for either of those *non sequiturs* and the plaintiffs say that:

(a) state action is not "lawful" simply because a claimant declines to sue for damages, but by Alberta's reasoning its actions here were <u>not</u> lawful given that the plaintiffs seek damages of $190 million;[52] and

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48 1999 ABQB 440 ("*Nilsson ABQB*") at para 55 **[Pl Auth at Tab 25]**.
49 2020 ABQB 81 at paras 74-75 ("*Kalmring*") **[Pl Auth at Tab 21]**.
50 2020 BCSC 621 at para 96 ("*Compliance Coal*") **[Pl Auth at Tab 22]**.
51 Alberta Appeal Brief at paras 146-147.
52 See Order of Master Farrington re Amendments dated December 11, 2020 at Schedule "A" para 44(b) **[Appeal Record Vol I at Tab 23]**.

(b) state action is not "reasonable" simply because judicial review was declined, and in the present case Alberta presupposes that its decision to enter into the Off-Coal Agreement (a private contract) was even a matter which could be subject to judicial review.

C. Misstatements of Fact

57. Canada and Alberta also repeatedly make factual assertions with no evidentiary basis.

i) Canada's Misstatements of Fact

58. Canada asserts at paragraph 72 of its brief that the plaintiffs "foresaw" that "coal-driven revenue could subside as of 2030" at the time they acquired the royalty interest in 2014, but that is no defence to a claim for a taking.

59. Plus, there is no evidence of that and the only evidence before the Court suggests the contrary. As demonstrated by the affidavit of Ben Lewis:

(a) as part of its due diligence efforts in 2013, Altius reviewed the impact of the *original* Regulations on the royalty interest at the Genesee Mine and its decision to acquire the royalty interest was based in significant part on the expectation that the Regulations would continue as enacted and that the Genesee Power Plant would generate electricity from coal until 2055;[53]

(b) during the asset sale process, Sherritt advised Altius that the Genesee and other royalty interests provided "stable cash flows" and were situated in a country of low "economic and political risk" which had by regulation "prescribed" the lifespans for its coal-fired power plants;[54] and

(c) Altius came to view the royalty interest at the Genesee Mine as the "crown jewel" of Sherritt's asset portfolio, due in large part to the mine's "stability" and "long life".[55]

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53 Ben Lewis Affidavit at para 19 **[Appeal Record Vol II at Tab 2]**.
54 Ben Lewis Affidavit at para 17, Exhibit "G" **[Appeal Record Vol II at Tab 2]**.
55 Ben Lewis Affidavit at para 20, Exhibit "I" **[Appeal Record Vol II at Tab 2]**.

60. The two statements from Altius' public disclosure cited by Canada at paragraph 78 of its brief do not show that the plaintiffs contemplated the royalty interest could cease generating income as of 2030.

(a) The statement that SOR/2012-167 was "expected to cause existing power plants to close down" was made in spring 2014 when the *original* Regulations were in force, pursuant to which the Genesee units were scheduled to continue generating electricity from coal until 2044 in the case of Genesee 1, 2039 in the case of Genesee 2, and 2055 in the case of Genesee 3.[56] It was not until November 2016 that Canada first announced it would amend the Regulations to accelerate the phase out coal power to 2030.

(b) The second statement, as paraphrased by Canada, is misleading. One of the "significant business risks" noted in Altius' public disclosure was that the "enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements may increase costs, which could have an adverse effect on the Corporation."[57] Therefore, the statement clearly concerns increased regulatory compliance costs and has nothing to do with what occurred here – a complete taking of the royalty interest's ability to generate income through a transformative regulatory change (Canada) and Off-Coal Agreement (Alberta) which upended the long term planning of industry participants.

61. As to Canada's submission at paragraph 78 of its brief that "royalty interests can fail to generate royalties for a variety of reasons", that is no defence to a taking claim. And even if it was a defence, the only evidence before the court is that the royalty interest was to generate income from the production of coal until 2055.

62. And insofar as Canada submits the royalty interest cannot be taken because its rate of return is "subject to risk",[58] that is tantamount to saying the mineral claimants in *Tener*,

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56 See Canada Appeal Brief at paras 25-26.
57 See Canada Appeal Brief at para 29 [emphasis removed in part].
58 Canada Appeal Brief at para 78.

Casamiro, and *Rock Resources* had nothing taken from them because a successful mining operation is never guaranteed.

63. Furthermore, the British Columbia Court of Appeal's decision in *Rock Resources* makes it clear that just because the property has an uncertain nature does not mean it is incapable of being taken by the government.

64. In *Rock Resources*, the Crown argued that legislation which had the effect of preventing the plaintiff from exploiting its mineral claims in a newly created provincial park could not constitute a taking as the plaintiff's mineral claims were "contingent", in the sense that they were already subject to statutory provisions allowing the Crown to restrict a claimholder's surface rights and require a claimholder to obtain Crown authorization before exploring or developing the claims. New legislation which said henceforth no consent would be given to exploit the mineral claims within the park boundaries, as the Crown argued, "merely made certain what had previously been uncertain".[59]

65. That argument was expressly rejected by the majority at the British Columbia Court of Appeal, Finch C.J. finding that the plaintiff had provided "substantial consideration" for the mineral claims and that the contingent nature of the claims did not mean they were without any value such that "nothing was taken".[60]

66. Here, the plaintiffs likewise paid substantial consideration to acquire the royalty interest in the Genesee coal ($251 million, to wit) and simply because the royalty interest's rate of return may be "subject to risk" does not mean it is incapable of being taken, or that compensation will not be paid for a taking.

67. Canada also asserts that the plaintiffs knowingly "courted the risk of thermal coal" by having contracted to have the Genesee Mine operated "in material compliance with applicable federal, provincial and local laws, statutes, rules, regulations, permits, ordinances, certificates, licences or other regulatory requirements related to operations and activities on or with respect to the Royalty Lands."[61]

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59 *Rock Resources* at para 44 **[Pl Auth at Tab 19]**.
60 *Rock Resources* at paras 48-50 **[Pl Auth at Tab 19]**.
61 Canada Appeal Brief at paras 4, 23.

68. A contractual provision which states the parties would operate a coal mine in accordance with the law does not in any way support an inference that the plaintiffs knew thermal coal was a risky investment, and one would expect such a clause to be found in any mining contract between good corporate citizens.

69. Canada also states at paragraph 70 of its brief that it "neither granted the interest in the coal at first instance nor will anything ever revert to Canada, actually or constructively." However, there is no evidence which confirms the coal interests at issue were granted solely by the provincial Crown (as opposed to the federal Crown).

ii) Alberta's Misstatements of Fact

70. In addition to arguing without any evidentiary basis that the Genesee coal can still be "accessed, mined and sold" after 2030, Alberta asserts at paragraph 81 of its brief that "Capital Power did not receive any compensation for any interest in coal in the Genesee Coal Mine" and that "No party received compensation for any coal interest in the Genesee Coal Mine."

71. However, Alberta does not cite any evidence to support either of those statements, and (as noted above) in the Off-Coal Agreement Alberta required Capital Power to forbear from commencing any legal action against the province with respect to "the mines, coal supply agreements, mining contracts, or mining equipment related to the coal used to fuel the Plants".[62]

PART V: SUBMISSIONS RE AMENDMENT APPLICATION

A. The Test to Amend Pleadings

72. Rule 3.65 gives the court broad discretion to permit a party to amend its pleadings,[63] and the test applied on a such an application has been described by the Alberta Court of Appeal as follows:

> Assuming some modest amount of evidence is provided in support, any pleading may be amended, no matter how careless or late the party seeking the amendment, subject to four major exceptions:

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62 Affidavit of Ben Lewis at Exhibit "Z" section 7(a) **[Appeal Record Vol II at Tab 2]**.
63 *Rules of Court* at r 3.65 **[Pl Auth at Tab 2]**.

> (a) The amendment would cause serious prejudice to the opposing party, not compensable in costs;
>
> (b) The amendment requested is hopeless;
>
> (c) Unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; or
>
> (d) There is an element of bad faith associated with the failure to plead the amendment in the first instance.[64]

73. The Alberta Court of Appeal recently affirmed that even after the close of pleadings amendments are "still relatively easy to get", and the court's discretion is to be exercised "generously" and allow the amendment unless it would cause irreparable prejudice to the other side.[65]

74. An application to amend pleadings is a low bar, as this Court in *Lischuk v K-Jay Electric Ltd* recently explained:

> An application to amend pleadings is a procedural step and not an adjudication on the merits of the amendments sought. An application to amend pleadings is procedural and is a relatively easy bar to meet. The proposed amendments are viewed in isolation and the question asked is whether the proposed additional claim has arguable merit. There is a presumption in favour of a liberal application to amend pleadings. As long as there is some foundation and unless there is significant prejudice or injustice, the order to allow amendments should be freely given. [Emphasis added, citation removed.][66]

75. The amount of evidence required to justify an amendment is "low", and the amending party needs not show that the amendment can ultimately be proven at trial or on summary judgment.[67]

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64 *Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited*, 2014 ABCA 74 at para 25, as cited in *Terrigno v Butzner*, 2021 ABCA 18 at para 11 **[Pl Auth Tab 33]**.

65 *Delta Hotels No 2 Holdings Ltd v Tyco International of Canada Ltd*, 2020 ABCA 24 at paras 22-23 ("*Delta Hotels*") **[Pl Auth at Tab 34]**.

66 *Lischuk v K-Jay Electric Ltd*, 2021 ABQB 280 at para 36 ("*Lischuk*") **[Pl Auth at Tab 35]**.

67 *Delta Hotels* at para 22 **[Pl Auth at Tab 34]**.

B. The Amendments Opposed

76. In oral argument before the Master, the defendants provided their consent to all of the plaintiffs' proposed amendments save for:

    (a) an allegation that the defendants would obtain "financial benefits" as a result of their actions to phase out coal power by 2030; and

    (b) a remedy seeking "a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation".[68]

77. The defendants opposed (and continue to oppose) these amendments on the stated basis that they fall under the above-noted exception for hopeless pleadings, which applies "only if it is clear and obvious that there is no triable issue" such that the allegation would have been struck if originally pled.[69]

78. The Master rejected the defendants' arguments that the disputed amendments were hopeless and allowed them from the Bench (without even hearing reply submissions from the plaintiffs), stating:

> In my view, all of them have some reasonable basis for success. That is not to say that they will be successful in terms of the merits, but a reasonable argument could be made on all of them. There is at least some evidence to support every one of the amendments, in particular the Supreme Court of Canada cases are a bit malleable in terms of what is seen as a taking in the circumstances of a particular case. Pleadings aren't the place to draw hard lines, and in my view, the application for the amendments is not particularly close. I'm allowing all of the amendments.[70]

79. For the reasons which follow, the plaintiffs submit that the Master was correct in allowing the disputed amendments.

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68 Amendment Application at Schedule "A" paras 40, 44(a) **[Appeal Record Vol I at Tab 17]**; Transcript of proceedings before the Master (December 11, 2020) at page 2, lines 30-40; page 3, lines 1-4; page 15, lines 14-31 **[Appeal Record Vol I at Tab 21]**.

69 *Swaleh v Lloyd*, 2020 ABCA 18 at para 13 **[Pl Auth at Tab 36]**.

70 Transcript of Proceedings before the Master on December 11, 2020 at page 24, lines 30-36 **[Appeal Record Vol I at Tab 21]**.

C. Canada Cannot Appeal Consent Amendments

80. Canada cannot now challenge the entirety of paragraph 40 of the Amended Amended Statement of Claim, as it previously consented to the portion of the amendment which added "health and environmental benefits to the Alberta and Canadian public".

81. To explain, in their amendment application the plaintiffs sought to add the following underlined text to paragraph 40 of the Statement of Claim:

Taking

40. The Defendants' actions as aforesaid have resulted in a grave loss of value of Genesee LP's interests, financial benefits to the Defendants, and health and environmental benefits to the Alberta and Canadian public.

Extract of Amended Amended Statement of Claim
Source: Appeal Record Vol I at Tab 23

82. In oral submissions before the Master, Canada represented that its objection was limited to insertion of the words "financial benefits", its counsel stating:

> That then takes us to paragraph 40 of the proposed amended amended statement of claim, which seeks to add in the words "financial benefits" to the defendants. Canada objects to the insertion of the words "financial benefits" on the basis that it is hopeless. There is no evidence for this particular allegation, and it is strikeable. In other words, it is hopeless.[71]

83. Even though Canada's objection did not extend to the words "health and environmental benefits to the Alberta and Canadian public", it now opposes the addition of that text in its appeal brief at paragraph 114.

84. Canada cannot consent to a pleading amendment and then appeal the Master's decision allowing the amendment on the basis that it is hopeless.

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[71] Transcript of Proceedings before the Master on December 11, 2020 at page 5, lines 15-18 **[Appeal Record Vol I at Tab 21]**.

D. The "Financial Benefits" Amendment Has Merit

85. The allegation that the defendants will obtain "financial benefits" as a result of their actions to phase out coal power by 2030 has both an evidentiary basis and legal relevance, and the Master was correct in allowing it to be pled.

86. The evidentiary basis is found in public statements made by both defendants which state or suggest that the phase out of coal power will result in avoided health care costs and climate change mitigation expenses.

87. In a bulletin entitled "Phasing out coal pollution", Alberta announced that:

> Pollution from coal-fired electricity generation will be phased out by 2030 under the Climate Leadership Plan.
>
> …
>
> Moving to more renewable energy and natural gas will protect the health of Albertans - especially vulnerable groups like children and seniors - and save money in health-care costs and lost productivity.
>
> …
>
> The Canadian Association of Physicians for the Environment (CAPE) found that an accelerated Alberta coal phase out will prevent 600 premature deaths, 500 emergency room visits, and will avoid nearly $3 billion in negative health outcomes. [Emphasis added.][72]

88. And in its Regulatory Impact Analysis Statement which set out the rationale for the accelerated phase out, Canada announced that:

> The cumulative benefit in Canada of the emission reductions from the Amendments is valued at about $4.7 billion (2019-2055).
>
> Benefits of the Amendments are from avoided global climate change damage and improved air quality due to reduced air pollutant emissions. Benefits from reduced air pollutants (calculated at the provincial level) include health benefits and environmental benefits. The Amendments will reduce GHG emissions from electricity generation by 94 Mt CO_2e 27 between 2019 and 2055 versus the baseline scenario. The avoided climate change damage from these reductions is valued at $3.4 billion... The Amendments will also result in the reduction of emissions of many criteria air pollutants. The most significant reduction in emissions will be 555

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[72] Ben Lewis Affidavit at Exhibit "U" **[Appeal Record Vol II at Tab 2]**.

> kilotons (kt) of sulphur oxides (SOx) and 206 kt of nitrogen oxides (NOx) between 2019 and 2055. These criteria air pollutants have been shown to adversely affect the health of Canadians, through direct exposure and through the creation of smog (including particulate matter and ground-level ozone). The health benefits from reduced air pollutant emissions and avoided human exposure to mercury are valued at $1.3 billion. Environmental benefits, such as increased crop yields, reduced surface soiling, and improvement in visibility, is valued at $40 million. [Emphasis added.][73]

89. These public statements are more than sufficient for the Court to conclude that the defendant governments are likely to obtain financial benefits from the phase out of coal power, and further evidence of that is not presently available as the information is within the defendants' sole possession and there has been no document production or questioning on the new allegation.

90. And even though Rule 6.14(3) permitted the defendants to enter additional evidence in support of their cross-appeals,[74] neither one filed an affidavit deposing that the defendants are not expected to obtain financial benefits from the phase out of coal power by 2030.

91. The plaintiffs therefore request that the Court draw an adverse inference against the defendants for their failure to lead material evidence on this key point.[75] As explained by the court in *Dowell v Millington*:

> As a general rule, an adverse inference may be drawn against a party for failing to call a material witness or lead material evidence. The inference is that the evidence the witness would have given would have been favourable to the other party's case. The inference is one of logic and experience. It us usually [sic] be drawn where the evidence is material, is not before the Court otherwise, and no plausible reason is given for failing to call the evidence. The inference usually requires that the power to lead the evidence or call the witness is uniquely within the power of the party against whom the inference is to be drawn.[76]

92. Not only do the alleged financial benefits have an evidentiary basis, they are legally relevant to whether a taking has occurred.

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73 Ben Lewis Affidavit at Exhibit "HH" at pgs 18-19 **[Appeal Record Vol II at Tab 2]**.
74 See Rule 6.14(3) **[Pl Auth at Tab 2]**.
75 *Williams v Rosenstock*, 2020 ABQB 303 at para 24 **[Pl Auth at Tab 37]**.
76 *Dowell v Millington*, 2016 ONSC 6671 at para 33 **[Pl Auth at Tab 38]**.

93. As noted above, in the recent decision of *Kalmring* the Court of Queen's Bench of Alberta concluded that a financial benefit to the state could be sufficient to satisfy the first branch of the test for a taking as stated by the Supreme Court of Canada in *CPR v Vancouver*, Master Mason writing:

> The Crown submits that it did not acquire anything when it enacted the March 2019 Regulation, as road testing is a revenue neutral public service. It argues that unlike the fishing industry at issue in *Manitoba Fisheries*, road testing is not a business enterprise undertaken with a view to profit.
>
> That is a matter of evidence, which is not before the Court on this striking application. The government may generate revenue in providing the services itself, or perhaps it provides a subsidized service to its constituents. In view of the case law, either could arguably be characterized as the acquisition of an intangible benefit by the Crown. [Emphasis added.][77]

94. In the result, Master Mason held that the plaintiffs' taking claim was arguable and declined to Order it struck.

95. And as further demonstrated above at paragraphs 30, 35, and 54, *Manitoba Fisheries*, *Tener*, *Nilsson*, and *Compliance Coal* all state or imply that a general or intangible benefit accruing to the state or public is relevant to determining whether a taking has occurred.

96. The Master here was thus correct in allowing the allegation of "financial benefits" and the defendants have (yet again) failed to discharge their onus to show that the amendment is hopeless.

E. The Requested Declaratory Relief Has Merit

97. As noted above, the defendants also oppose the remedy of "a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation."[78]

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[77] *Kalmring* at paras 74-75 **[Pl Auth at Tab 21]**.

[78] Order of Master Farrington re Amendments dated December 11, 2020 at Schedule "A" para 44(a) **[Appeal Record Vol I at Tab 23]**.

98. Bearing in mind that an application to amend pleadings is a procedural step and not an adjudication on the merits of the amendments sought,[79] the plaintiffs need not demonstrate that they are ultimately entitled to the requested declaration at this time.

99. The question before the Court is instead only whether the requested declaration has "arguable merit" such that it can be pled, which this Court has described as a "relatively easy bar to meet."[80]

100. But on both the amendment application and the ultimate merits of the case, the plaintiffs are entitled to the requested declaration.

101. The court may issue a declaration where:

(a) the court has jurisdiction to hear the issue;

(b) the dispute before the court is real and not theoretical;

(c) the party raising the issue has a genuine interest in its resolution; and

(d) the respondent has an interest in opposing the declaration sought. [81]

102. A fifth requirement is sometimes added, which is that the requested declaration will have practical utility.[82]

103. The defendants appear to contest only the second and fifth criteria, both arguing that the requested declaration is hopeless as it concerns future events and lacks practical utility.[83] However, these arguments do not withstand scrutiny.

104. As the prematurity section of this brief discusses in greater detail (see below at paragraphs 151 to 184), no further action by the defendants is required for the taking of the royalty interest to unfold, and the plaintiffs have a present loss of approximately $190 million which is fully quantifiable at this time.

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79 *Lischuk* at para 36 **[Pl Auth at Tab 35]**.
80 *Lischuk* at para 36 **[Pl Auth at Tab 35]**.
81 *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 at para 17 ("*British Columbia v Alberta*") **[Canada Auth at Tab 34]**.
82 *British Columbia v Alberta* at para 18 **[Canada Auth at Tab 34]**.
83 Canada Appeal Brief at paras 117-121; Alberta Appeal Brief at paras 177-181.

105. Furthermore, the case law establishes that declaratory relief is appropriate where future rights are at stake.

(a) In *Edmonton Telephones Corp v Stephenson*, the Alberta Court of Appeal unanimously held it is "trite law that one of the legitimate purposes for a declaration is to settle rights respecting something which has not yet happened, but is likely to happen."'[84]

(b) In *Edmonton Telephones Corp v Stephenson*, the Court of Queen's Bench of Alberta ruled that declaratory relief may be granted in respect of future events where there is a "significant or a likelihood near certainty" of the events occurring.[85]

(c) In *Re Principal Investment Ltd and Gibson*, the Ontario Court of Appeal's granted declaratory relief in respect of a lease provision which would not take effect for another 7 years.[86]

106. These authorities were presented to the Master, who agreed that the dispute was real and that the requested declaration would have practical utility, writing in his Memorandum of Decision:

> One of the amendments sought by the plaintiff (and granted by me) included a provision that:
>
> > 44. The Plaintiffs claim against the Defendants, jointly and severally:
> >
> > a) a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation;
>
> There was much argument about whether that provision was truly declaratory or not. <u>In my view, and based upon the authorities, it is declaratory and not premature and it is capable of a present adjudication on existing facts</u>.
>
> For example, one of the cases relied upon by Canada and Alberta to argue that the matter was not properly declaratory was the decision of Hall, J. in

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84 *Edmonton Telephones Corp v Stephenson* (1994), 26 Alta LR (3d) 33 (CA) at para 10 ("*Edmonton Telephones ABCA*") **[Pl Auth at Tab 51]**, leave to appeal to SCC ref'd [1995] SCCA No 39.

85 *Edmonton Telephones Corp v Stephenson* (1994), 24 Alta LR (3d) 96 (QB) at para 51 ("*Edmonton Telephones ABQB*") **[Pl Auth at Tab 50]**, aff'd *Edmonton Telephones ABCA* **[Pl Auth at Tab 51]**.

86 1963 CanLII 22 (ONCA) at pages 5-6 ("*Gibson*") **[Pl Auth at Tab 52]**, aff'd 1964 CanLII 9 (SCC).

> ***British Columbia (Attorney General) v Alberta (Attorney General)***, 2019 ABQB 550. That was a case considering legislation which had not yet been proclaimed in force. Not surprisingly, that type of question was found to be hypothetical and not declaratory. Here, the Court is being asked to consider regulations that are in force based upon facts that have occurred.
>
> In my view, parties who are affected by the regulation who feel aggrieved are entitled to an answer now as to whether the regulation amounts to a "taking" or not. I am satisfied that the action is not premature. It serves no useful purpose for anyone to wait until 2030 to commence litigation, as was suggested by Canada and Alberta in their argument. Present rights are affected. At the very least, the present value of the plaintiffs' future royalty stream is clearly affected in ways that can be adjudicated upon (with the possible assistance of expert evidence).[87] [Emphasis added.]

107. And if the requested declaration truly had no practical utility, why then are the defendants so strenuously resisting the plaintiffs from even *pleading* the relief? Put differently, the defendants' resolute opposition to the requested declaration belies their submission that it lacks practical utility.

108. Both defendants cite *Anderson v Canada* in support of their position that courts will not pronounce on the legal status of hypothetical future events,[88] but that case is easily distinguishable.

109. In *Anderson*, a business owner sought to challenge the constitutionality of a federal attestation required in the 2018 Canada Summer Jobs application form. However, by the time the matter proceeded to hearing the 2018 program had ended and it was unknown whether the program would return in 2019, let alone with the impugned provision. In the result, the Court declined to rule on the requested declaration on the basis of mootness.[89]

110. But unlike in *Anderson* where it was unknown whether the impugned provision would return in the future, in the present case the impugned government actions (*i.e.*, Alberta's Off-Coal Agreement and Canada's Amended Regulations) remain in place.

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87 Master's Reasons at paras 22-25 **[Appeal Record Vol I at Tab 22]**.
88 Canada Appeal Brief at paras 117, 121; Alberta Appeal Brief at paras 179-180.
89 *Anderson v Canada*, 2018 ABQB 839 at paras 1-2, 4, 18-26 **[Canada Auth at Tab 33 / Alberta Auth at Tab 28]**.

111. The appropriateness of declaratory relief where ongoing government action will affect future rights was even recognized by the Court in *Anderson*, Tillleman J. writing:

> In Canadian jurisprudence, there are exceptions to both the requirement that there be a "real and not theoretical" issue for a court to grant a declaration, and a court declining to hear a moot case.
>
> Admittedly, a declaration could still have utility in resolving the dispute between the parties, even if it might affect future rights and not cure past ills (*Solosky* at 832-833).
>
> …
>
> The facts at bar are easily distinguishable from *Solosky*. In *Solosky*, the impugned order was still in place, and would continue to cause a dispute between *Solosky* and the institution's Director each time *Solosky* communicated with his solicitor, as opposed to the situation in this case, where the impugned provision is no longer applicable because the 2018 Program has ended.[90]

112. Applying the Court's reasoning in *Anderson* to the facts here, the requested declaration would have practical utility as (like in *Solosky*) the impugned government action remains in place.

113. Canada also argues that the requested declaration is hopeless on the basis that "*de facto* expropriation is a cause of action remunerable in damages; it is not a matter for declaratory relief".[91] However, that is yet another incorrect statement of law.

114. Not only is declaratory relief appropriate for taking claims, but declaratory relief is the only form of remedy which courts have issued in every single case where a *de facto* expropriation was found, generally remitting the matter of compensation to an expropriation tribunal.

115. In particular, the remedy fashioned by courts in successful taking cases is a bifurcated one which first **declares** that a taking has occurred and secondly **declares** that the plaintiff is entitled to initiate a separate claim for compensation pursuant to applicable expropriation legislation.

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90 *Anderson* at paras 14-15, 19 **[Canada Auth at Tab 33 / Alberta Auth at Tab 28]**.
91 Canada Appeal Brief at para 116.

116. As shown by the cases in the following table, this precedent has been consistently followed by courts of different jurisdictions for over 40 years:

CASE & CITATION	DECLARATORY RELIEF GRANTED
Manitoba Fisheries Ltd v R, [1979] 1 SCR 101 at para 37 **[Pl Auth at Tab 11]**	For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and direct that judgment be entered providing for a declaration that the appellant is entitled to compensation in an amount equal to the fair market value of its business as a going concern … together with a declaration that the said fair market value is to be agreed to by the parties and, failing agreement within a reasonable time, that either party may apply to a judge of the Federal Court to have that value determined. [Emphasis added.]
British Columbia v Tener, [1985] 1 SCR 533 at para 24 **[Pl Auth at Tab 12]**	The plaintiffs are entitled to compensation under the Ministry of Highways and Public Works Act, R.S.B.C. 1960, c. 109, for the expropriation under the Park Act, S.B.C. 1965, c. 31, of the right to the use of the minerals conveyed by the Crown grant of 8th July 1937. The particulars of such compensation must be assessed under the above Act on the basis of the evidence placed before the arbitrator… [Emphasis added.]
Casamiro Resource Corp v British Columbia (1991), 55 BCLR (2d) (CA) at paras 1, 41 **[Pl Auth at Tab 18]**	In this action, the Attorney General appeals from a judgment pronounced by Mr. Justice D.B. MacKinnon … on 10th April, 1990: THIS COURT ORDERS AND DECLARES that the nineteen (19) Crown-granted mineral claims located in Strathcona Park and registered in the name of Sherwood Mines Ltd. (NPL) have been expropriated by reason of passage of Order-in-Council 2142 dated November 25, 1988. THIS COURT FURTHER ORDERS AND DECLARES that compensation is to be determined pursuant to the Expropriation Act, R.S.B.C. 1979, c. 23. … The answer to the final question is “No”. Thus, the appeal fails and must be dismissed with costs. [Emphasis added.]

CASE & CITATION	DECLARATORY RELIEF GRANTED
TFL Forest Ltd v British Columbia, 2002 BCSC 180 at paras 66-67 **[Pl Auth at Tab 31]**	I order and declare that the plaintiff's right to harvest timber pursuant to Tree Farm Licence 46 in the areas of Walbran Valley and Hitchie Creek, Vancouver Island, have been constructively expropriated by the enactment of the *Park Amendment Act*, 1995, S.B.C. 1995, c. 54. I order and declare that compensation for this taking is to be determined pursuant to the terms and in accordance with the provisions of s. 60 (formerly s. 53) of the *Forest Act*, R.S.B.C. 1996, c. 157. [Emphasis added.]
Rock Resources Inc v British Columbia, 2003 BCCA 324 at para 157 **[Pl Auth at Tab 19]**	I would therefore grant a declaration in the following terms: 1. The plaintiff's rights in parts of Mineral Claims Amber 1 and Amber 2 have been taken by the enactment of the *Park Amendment Act*; 2. The plaintiff is entitled to compensation for the taking of those rights; 3. The compensation payable by the Province is the value of the rights lost to the plaintiff by the taking; and 4. The amount of compensation is to be determined by the Expropriation Compensation Board. [Emphasis added.]
Lynch v St John's (City), 2016 NLCA 35 at para 71 **[Pl at Tab 24]**	I would allow the appeal with costs in accordance with column 5 in both the Trial Division and the Court of Appeal. A declaration shall issue: (i) That the real property owned by the Lynches in the Broad Cove River catchment area within the City of St. John's has been constructively expropriated by the City of St. John's pursuant to sections 101 and 105 of the *City Act*: and (ii) That the Lynches have a right pursuant to sections 18 and 19 of the *Expropriation Act* to file a claim for compensation with the City as though a notice of expropriation has been served under the *Act* as of February 1, 2013, and, failing agreement within three months of the filing of the formal order, concerning the amount of compensation that is to be paid by the City to the Lynches, they have a right to proceed to a determination of the compensation claim by the Board of Commissioners of Public Utilities. [Emphasis added.]

CASE & CITATION	DECLARATORY RELIEF GRANTED
Sun Construction Company Limited v Conception Bay South (Town), 2019 NLSC 102 at paras 23-24 **[Pl Auth at Tab 32]**	That portion of 47-53 Perrins Road taken by the Town and paved as a roadway and turnaround constitutes constructive expropriation. The procedure for compensation relating to expropriation and injurious affection is set out under Part IX of the *Act*. The applicant has a right pursuant to section 62 of the *Act* to initiate a claim for compensation with respect to the expropriation and any injurious affection which may result from the expropriation as though a notice of expropriation has been served under the *Act* to be determined by agreement or a board of assessors. [Emphasis added.]

117. In light of this clear precedent, the plaintiffs' request for declaratory relief is necessary given the real possibility that this Court – on finding a taking of the royalty interest – declines to affix damages and instead remits the matter of compensation to:

    (a) the Land and Property Rights Tribunal, to determine compensation in accordance with the provisions of the Alberta *Expropriation Act*;[92] or

    (b) the Federal Court, to determine compensation in accordance with the provisions of the Canada *Expropriation Act*.[93]

118. And while the Nova Scotia Supreme Court in the *United Pentecostal Church* case cited by Canada concluded that *de facto* expropriation is not a subject of declaratory relief, the Court there (i) did not address the fact that declaratory relief has been the only form of relief given in successful taking cases, and (ii) held that declaratory relief was inappropriate for the sole reason that *de facto* expropriation had been referred to as a "claim" in some cases.[94]

119. The plaintiffs respectfully submit that reasoning is erroneous, and that *United Pentecostal Church* is inconsistent with the dominant trend in the jurisprudence (including from three

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92 See RSA 2000 c E-13 ss 1(m.1), 29(1), 41-58 **[Pl Auth at Tab 39]**.
93 See RSC 1985 c E-21 ss 2(1), 25-26, 31(a) **[Pl Auth at Tab 40]**.
94 *United Pentecostal Church of Nova Scotia v Nova Scotia Power Incorporated*, 2020 NSSC 286 at paras 11-14 **[Canada Auth at Tab 32]**.

different appellate courts) to grant declaratory relief in the context of successful taking cases.

120. Even Alberta disagrees with Canada's submission that *de facto* expropriation is a cause of action remunerable in damages, Alberta having written in its brief that "a claim for *de facto* expropriation (like this claim) is *not a claim for damages*."[95]

121. Alberta takes a different tack in opposing the requested declaration, arguing that it is not a "true declaration" but instead a plea for "remedial relief, i.e., compensation".[96] However, that position is likewise without merit.

122. The leading textbook in the area of declaratory judgments has described the remedy as follows:

> The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights. While consequential relief may be joined or appended, the court has the power to issue a pure declaration without coercive direction for its enforcement.[97]

123. Keeping with that description and the declaratory relief granted in successful taking cases noted above, the relief sought at paragraph 44(a) of the Amended Amended Statement of Claim seeks to confirm the legal status of the royalty interest and provide justification for the consequential relief at paragraph 44(c) that the plaintiffs are permitted to file a claim for compensation under applicable expropriation legislation. There is no judicial coercion.

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95 Alberta Appeal Brief at para 96.
96 Alberta Appeal Brief at paras 172-176.
97 Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed (Toronto: Thomson Carswell, 2007) at pg 1 **[Pl Auth at Tab 41]**.

Remedy Sought:

44. The Plaintiffs claim against the Defendants, jointly and severally:

(a) a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation;

(b) judgment for compensation or damages in the approximate amount of $190,000,000, or the amount proven at trial;

(c) in the alternative, a declaration that the Plaintiffs are permitted to file a claim for compensation under applicable expropriation legislation;

(d) costs of this action; and

(e) such further and other relief as this Honourable Court deems just.

Extract of Amended Amended Statement of Claim
Source: Appeal Record Vol I at Tab 23

124. While the plaintiffs also seek damages (as the Court may decide to depart from tradition and determine compensation itself), such a claim does not bar a plea for declaratory relief. This is confirmed by section 11 of the *Judicature Act*, which expressly permits the Court to make "binding declarations of right whether or not any consequential relief is or could be claimed."[98]

125. Both defendants cite *Yellowbird v Samson Cree Nation No 444* in support of their position that the requested declaration is hopeless,[99] and in particular the following test endorsed by Slatter J. (as he then was) to determine whether relief is "truly declaratory":

> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?[100]

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98 RSA 2000 c J-2 s 11 **[Pl Auth at Tab 42]**.

99 Canada Appeal Brief at para 120, citing *Yellowbird v Samson Cree Nation No 444*, 2008 ABCA 270 at paras 45-47 ("*Yellowbird ABCA*") **[Canada Auth at Tab 35]**; Alberta Appeal Brief at paras 172-174, citing *Yellowbird ABCA* at paras 45-47 **[Alberta Auth at Tab 24]**.

100 *Yellowbird ABCA* at para 45 **[Canada Auth Tab 35 / Alberta Auth Tab 24]**.

126. But *Yellowbird* has no application here, and in any event the requested relief is "truly declaratory" under this test and would have practical utility.

127. *Yellowbird* was decided in the context of a plaintiff framing substantive relief as a declaration ostensibly to avoid a limitations defence (which apply only to claims for a "remedial order", but not declarations), and continues to be applied in those circumstances. As this Court recently stated in *Ginn v Feng*:

> The leading authority on determining whether relief is declaratory or remedial for the purpose of section 1(i) of the *Limitations Act* is *Yellowbird v Samson Cree Nation No 444*, 2006 ABQB 434, aff'd 2008 ABCA 270. [Emphasis added.][101]

128. That is because the test from *Yellowbird* is concerned with the mischief of plaintiffs advancing time-barred claims under the guise of declaratory relief (thereby rendering the *Limitations Act* nugatory), a point repeatedly made by Slatter J. when explaining the need for a "satisfactory test on this issue."[102]

129. No case cites *Yellowbird* (as the governments do here) for the entirely different purpose of finding that a plaintiff ultimately seeking monetary compensation for a taking cannot obtain declaratory relief (let alone at the pleadings stage), and such a ruling would be contrary to over 40 years of jurisprudence in the area of *de facto* expropriation.

130. But even if *Yellowbird* has application here, the requested relief is "truly declaratory" under the test and would have practical utility.

(a) If this Court declares that a taking of the royalty interest has occurred, one would expect the defendant governments to honour this Court's pronouncement and provide compensation to the plaintiffs voluntarily.

(b) Even if the defendants ignore the declaration and do not provide compensation voluntarily, the plaintiffs could still leave this Court in peace and enjoy the benefits of the pronouncement, as their likely recourse is to initiate a separate claim for

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101 2021 ABQB 292 at para 20 **[Pl Auth at Tab 43]**.
102 *Yellowbird v Samson Cree Nation No 444*, 2006 ABQB 434 at paras 35, 37-39 **[Pl Auth at Tab 44]**.

compensation through either the Alberta Land and Property Rights Tribunal or the Federal Court pursuant to expropriation legislation.

131. Lastly, Alberta asserts the portion of the requested declaration which alleges the defendants "have caused" a *de facto* expropriation is hopeless given that Genesee LP still retains its royalty interest and is currently receiving royalty income.[103]

132. However, this argument is entirely defeated by the fact that Alberta (and Canada for that matter) **consented** to the plaintiffs' amendments that "the Defendants have acquired a beneficial interest in the coal related to the royalty interest held by Genesee LP" and "all reasonable uses of the royalty interest have been removed"[104] – the two factual requirements for a taking as argued by both defendants.[105]

133. In other words, a declaration that Alberta "has caused" a taking cannot be hopeless as the defendants consented to what they assert are the factual allegations establishing liability for a taking (which factual allegations also happened to be framed in the past tense).

134. And as the prematurity section of this brief will discuss in greater detail (see below at paragraphs 151 to 184), there is merit to the plea that the defendants "have caused" a *de facto* expropriation given that (i) no further action by the defendants is required for the taking of the royalty interest to unfold, and (ii) the plaintiffs' have a present loss of approximately $190 million which is fully quantifiable at this time.

135. In summary, the Master was correct in allowing the requested declaration to be pled and the defendants have (yet again) failed to discharge their onus of showing that the amendment is hopeless.

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[103] Alberta Appeal Brief at paras 183-186.

[104] See Order of Master Farrington re Amendments dated December 11, 2020 at Schedule "A" paras 41-42 **[Appeal Record Vol I at Tab 23]**; Transcript of Proceedings before the Master on December 11, 2020 at page 2, lines 34-35; page 15, line 18 **[Appeal Record Vol I at Tab 21]**.

[105] See Alberta Appeal Brief at paras 87, 123; Canada Appeal Brief at paras 52, 54.

PART VI: SUBMISSIONS RE STRIKE APPLICATION

A. The Test to Strike Pleadings

136. Pursuant to Rule 3.68(2)(b), the Court may Order that all or any part of a claim be struck if the pleading "discloses no reasonable claim".[106]

137. An Order to strike is discretionary, and the moving party has a high burden as it must demonstrate there is "no reasonable prospect the claim will succeed."[107]

138. No evidence may be submitted on an application to strike brought under Rule 3.68(2)(b), and instead the Court must assume the allegations of fact as true.[108]

139. Being a form of evidence, responses to a Notice to Admit likewise cannot be considered on a strike motion brought under Rule 3.68(2)(b).[109]

140. A liberal reading of the impugned pleading is to be taken,[110] and the Court is to err on the side of generosity in applying the test by permitting novel claims to proceed so long as they are arguable.[111] As stated by the Supreme Court of Canada in *R v Imperial Tobacco*:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed… The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [Emphasis removed.][112]

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106 *Rules of Court* r 3.68(2)(b) **[Pl Auth at Tab 2]**.

107 *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 5 ("*Grenon*") **[Pl Auth at Tab 45]**, leave to appeal to SCC ref'd 2017 CanLII 61800.

108 *Rules of Court* r 3.68(3) **[Pl Auth at Tab 2]**; *Grenon* at para 6 **[Pl Auth Tab 45]**.

109 *Melcor Reit Limited Partnership (Melcor Reit GP Inc) v TDL Group Corp (Tim Hortons)*, 2021 ABQB 379 at paras 10-11 ("*Melcor*") **[Pl Auth at Tab 46]**.

110 *Harun-ar-Rashid v Royal Canadian Mounted Police*, 2019 ABQB 54 at para 18 ("*Harun*") **[Pl Auth at Tab 47]**.

111 *Grenon* at para 6 **[Pl Auth at Tab 45]**.

112 *R v Imperial Tobacco Canada Limited*, 2011 SCC 42, as cited in *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at para 26 **[Pl Auth at Tab 48]**, leave to appeal to SCC ref'd 2018 CanLII 61050.

141. Therefore, and contrary to Alberta's submission at paragraph 191 of its brief, the alleged facts need not be "examined in light of the existing law", a proposition from a 2000 decision by the Alberta Court of Appeal[113] which is inconsistent with subsequent authorities such as *R v Imperial Tobacco*, decided 11 years later by the Supreme Court of Canada.

B. The Master's Refusal to Strike and the Defendants' Cross-Appeals

142. In the present case, the Master dismissed the defendants' strike application for the following reasons:

> I start by saying that I do not think that it would be appropriate to deal with these applications in a Rule 3.68 striking context. They are very fact driven and hundreds of pages of evidence were introduced and relied upon by all of the parties. The amendment application was found not to be hopeless. If the applications are to succeed, they will need to do so on a summary judgment basis.[114]

143. On their cross-appeals, both defendants argue that the Master ought to have struck the claim on the grounds that:

(a) the taking claim has no reasonable prospect of success; and

(b) even if there is a cause of action, it is premature.

144. However, both of these grounds of appeal are without merit, and the Master was correct in refusing to strike the taking claim.

C. The Taking Claim has a Reasonable Prospect of Success

145. Both defendants argue that the Master should have granted their strike applications on the basis that the claim lacked a reasonable prospect of success.

146. Alberta does this explicitly, stating "Nothing in the either the Amended or the Twice Amended Claim discloses a reasonable claim as against Alberta as it is plain and obvious that the alleged claims against Alberta cannot succeed and there is no reasonable prospect of success."[115]

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113 See *Tottrup v Lund*, 2000 ABCA 121 at para 9, as cited in *Harun* at para 18 **[Pl Auth at Tab 47]**.
114 Master's Reasons at para 18 **[Appeal Record Vol I at Tab 22]**.
115 Alberta Appeal Brief at para 190.

147. Canada implicitly makes the same point, submitting that "both elements" of the test from *CPR v Vancouver* are "presently missing in this case" and that "Canada has not acquired anything and the royalty interest … continues to hold value."[116]

148. As a matter of procedure, the defendants' cross-appeals of the Master's refusal to strike the claim pursuant to Rule 3.68(2)(b) fail automatically.

(a) Both defendants argue that "the" test for a *de facto* expropriation is as articulated by the Supreme Court of Canada in *CPR v Vancouver*; namely:

i. the acquisition of a beneficial interest in property or flowing from it; and

ii. the removal of all reasonable uses of the property.[117]

(b) When the plaintiffs applied to further amend their Statement of Claim, both defendants **consented** to the following amendments with green underlining:[118]

> 41. Further, the Defendants have acquired a beneficial interest in the coal related to the royalty interest held by Genesee LP.
>
> 42. Genesee LP has been deprived of rights of use and enjoyment of its property. A taking of the property interests of Genesee LP has occurred. The coal which is mined and used to fuel the Genesee Power Plant has been sterilized and rendered of no value, and all reasonable uses of the royalty interest have been removed.

Extract of Amended Amended Statement of Claim
Source: Appeal Record Vol I at Tab 23

(c) These allegations are not subject to the defendants' cross-appeals of the amendment application (nor could they be, having gone in by consent), and form part of the Amended Amended Statement of Claim allowed by the Master before he decided the strike application.

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116 Canada Appeal Brief at para 133.
117 See Alberta Appeal Brief at para 87; Canada Appeal Brief at paras 54-55.
118 See Transcript of Proceedings before the Master on December 11, 2020 at page 2, lines 34-35; page 15, line 18 **[Appeal Record Vol I at Tab 21]**.

(d) As the Amended Amended Statement of Claim pleads what the defendants consider as the necessary elements to establish liability for a *de facto* expropriation (and those allegations are to be assumed as true), the commencement document has a reasonable prospect of success.

149. The Amended Amended Statement of Claim also has a reasonable prospect of success given the Supreme Court of Canada's binding authorities of *Manitoba Fisheries* and *Tener*, where there was a total deprivation of the subject property but no acquisition of a beneficial interest by the Crown.

(a) Paragraphs 5, 12, and 43 of the Claim plead the property at issue, being the "royalty interest in the coal … underlying lands near and around Genesee, Alberta" and the "royalty from the coal that was to be used for electricity generation after 2030".

(b) The total deprivation of property is captured by paragraphs 5 and 42 of the Claim, which allege that the royalty interest has been rendered of "no value", that "all reasonable uses of the royalty interest have been removed", that "Genesee LP has been deprived of rights of use and enjoyment of its property", and that coal which is mined and used to fuel the Genesee Power Plant "has been sterilized and rendered of no value".

150. Bearing in mind that a liberal reading of the subject pleading must be taken and that novel claims should be permitted to proceed so long as they are "arguable",[119] as the taking claim has a reasonable prospect of success it should be permitted to proceed.

D. The Taking Claim is not Premature

151. In addition to arguing that the taking claim lacks merit, both defendants argue that the Master erred by not striking the taking claim for prematurity.[120]

152. Alberta states the claim is premature as the plaintiffs "continue to own and receive payment for their interest in the Coal" and that a claim for *de facto* expropriation may not

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[119] *Harun* at para 18 **[Pl Auth at Tab 47]**; *Grenon* at para 6 **[Pl Auth at Tab 45]**.
[120] Alberta Appeal Brief at paras 192-198; Canada Appeal Brief at paras 2, 134-135, 137.

crystalize until 2030, if at all.[121] No legal authority is cited in Alberta's section on prematurity.

153. Canada essentially makes the same point, submitting that the claim for *de facto* expropriation is "premised on a set of facts that have not yet occurred" given that the Genesee mine is still operational and royalties are still accruing to the plaintiffs.[122]

154. These arguments were rejected by the Master, writing:

> In my view, parties who are affected by the regulation who feel aggrieved are entitled to an answer now as to whether the regulation amounts to a "taking" or not. I am satisfied that the action is not premature. It serves no useful purpose for anyone to wait until 2030 to commence litigation, as was suggested by Canada and Alberta in their argument. Present rights are affected. At the very least, the present value of the plaintiffs' future royalty stream is clearly affected in ways that can be adjudicated upon (with the possible assistance of expert evidence).[123]

155. The plaintiffs submit that the Master was correct in finding that the matter is capable of present adjudication, and that the defendants' arguments on prematurity are without merit.

156. As a matter of procedure, the defendants' cross-appeals of the Master's refusal to strike the claim on the basis of prematurity also fail automatically given that the Amended Amended Statement of Claim (allowed by the Master before he decided the strike applications) pleads that a taking has occurred:

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121 Alberta Appeal Brief at para 192.
122 Canada Appeal Brief at paras 132-33.
123 Master's Reasons at para 25 **[Appeal Record Vol I at Tab 22]**.

Taking

40. The Defendants' actions as aforesaid have resulted in a grave loss of value of Genesee LP's interests, financial benefits to the Defendants, and health and environmental benefits to the Alberta and Canadian public.

41. Further, the Defendants have acquired a beneficial interest in the coal related to the royalty interest held by Genesee LP.

42. Genesee LP has been deprived of rights of use and enjoyment of its property. A taking of the property interests of Genesee LP has occurred. The coal which is mined and used to fuel the Genesee Power Plant has been sterilized and rendered of no value, and all reasonable uses of the royalty interest have been removed.

43. In the result, Genesee LP has lost the value of its property, the royalty from the coal that was to be used for electricity generation after 2030 – in the approximate amount of $190,000,000.

Extract of Amended Amended Statement of Claim
Source: Appeal Record Vol I at Tab 23

157. As noted above, these allegations are to be assumed as true for the purposes of the strike applications and no evidence (including the plaintiffs' responses to the Notices to Admit) is to be considered.[124]

158. Even if the allegations are not assumed as true and the balance of the appeal record is considered (noting both defendants improperly rely on evidence to show why the claim ought to have been struck and Alberta raises prematurity as a basis for upholding summary dismissal),[125] the record shows that the impact of the defendants' actions on the royalty interest is certain even if not fully manifested at present:

(a) Alberta has executed a contract with Capital Power pursuant to which the utility is required to cease all coal-fired emissions from the Genesee Power Plant by 31 December 2030;[126]

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124 *Rules of Court* r 3.68(3) **[Pl Auth at Tab 2]**; *Melcor* at paras 10-11 **[Pl Auth at Tab 46]**.
125 Alberta Appeal Brief at paras 143-44, 192, 194; Canada Appeal Brief at para 133.
126 Ben Lewis Affidavit at Exhibit "Z" **[Appeal Record Vol II at Tab 2]**.

(b) Alberta admitted in its brief for the Master that in 2030 the Genesee Power Plant "will" be eliminated as a customer for the subject coal[127] and in its notice of application states the Genesee Mine has not "yet" been shut down;[128] and

(c) the Amended Regulations are in force, which Canada has confirmed in its own public statements will result in a phasing out of the Genesee coal plant and mine. See paragraphs 147 to 148 of the plaintiffs' brief addressing summary dismissal.

159. Moreover, given the significant financial resources the defendants have currently made available to coal power workers and communities reliant on the coal power industry,[129] it is reasonable to suggest that the defendants recognize the economic impacts associated with the phase out of coal power by 2030 will come to pass.

160. As to the defendants' arguments that the taking claim is premature because the Genesee Power Plant and Mine are still operational and the royalty interest is still generating income, the taking claim is actionable now even though it is premised on sterilization of the royalty interest as of 2030.

161. As noted, no further action by the defendants is required for the taking to unfold. While the lost royalty income does not begin to accumulate until 2030, the Court routinely awards damages for losses accruing in the future, such as future loss of income and future cost of care awards in personal injury cases.[130]

162. There is no principled reason why this case should be any different, and the plaintiffs' loss is fully quantifiable at this time. As discussed in the Facts section of the plaintiffs' brief addressing summary dismissal:

(a) a commodity asset, such as coal or a royalty interest in it, is valued by a discounted cash flow model, which on one approach calculates the present value of future income discounted by the weighted average cost of capital;[131]

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127 Alberta Brief for the Master filed October 30, 2020 at para 70 **[Appeal Record Vol I at Tab 14]**.
128 Application filed by Alberta on June 5, 2020 at para 11 **[Appeal Record Vol I at Tab 13]**.
129 Ben Lewis Affidavit at paras 40, 48-49, Exhibits "AA", "BB", "II", "JJ" **[Appeal Record Vol II at Tab 2]**.
130 See e.g., *Warner v Calgary Regional Health Authority*, 2020 ABQB 172 at paras 66-67, 76-79, 80, 89 **[Pl Auth at Tab 49]**.
131 Ben Lewis Affidavit at page 12, footnote 2 **[Appeal Record Vol II at Tab 2]**.

(b) upon learning of the Off-Coal Agreement with Capital Power in 2016, the plaintiffs used the discounted cash flow technique with a 5% discount rate to calculate $137 million as the present value of the royalty income that will no longer be earned between 2030 and 2055, which calculation was verified by an independent auditor;[132] and

(c) the Statement of Claim seeks damages of $190 million, which is the present loss of income from the royalty calculated using a 3% discount rate – the same discount rate Alberta agreed to use for calculating the compensation payable to Capital Power for the post-2030 life of the Genesee units under the Off-Coal Agreement.[133]

163. And in *Tener*, the Supreme Court of Canada made it clear that the chance of a reversal in government policy which would avoid these losses is treated as a contingency which informs the quantum of the compensation payable, not liability.[134]

164. Further, matters which depend on future events need not wait for those events to transpire when declaratory relief is sought, noting the Alberta Court of Appeal has stated it is "trite law that one of the legitimate purposes for a declaration is to settle rights respecting something which has not yet happened, but is likely to happen."[135]

165. In light of that principle and the evidence discussed above, the plaintiffs' claim may proceed now as the sterilization of the royalty interest is "likely to happen" and the Amended Amended Statement of Claim seeks a declaration that the defendants "have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation" and also a declaration that the plaintiffs are "permitted to file a claim for compensation under applicable expropriation legislation."[136]

166. Even though the plaintiffs' request for declaratory relief alone is enough for this case to proceed now, the Court also retains a discretion to hear cases which depend on future events if the circumstances warrant.[137] For example, in *Re Principal Investment Ltd and*

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132 Ben Lewis Affidavit at para 59, Exhibit NN" at pages 1, 12-13 **[Appeal Record Vol II at Tab 2]**.
133 Ben Lewis Affidavit at page 12 (footnote 2), Exhibits "Z", "PP" **[Appeal Record Vol II at Tab 2]**.
134 See *Tener* at para 20 **[Pl Auth at Tab 12]**.
135 *Edmonton Telephones ABCA* at para 10 **[Pl Auth at Tab 51]**.
136 Order of Master Farrington re Amendments dated December 11, 2020 at Schedule "A" paras 44(a), (c) **[Appeal Record Vol I at Tab 23]**.
137 *Edmonton Telephones Corp ABQB* at paras 38-39, 41 **[Pl Auth at Tab 50]**.

Gibson[138] a party intending to sell its interest in a commercial lease applied for a declaration that the renewal provision was valid 7 years before the provision could take effect. The landlord made a preliminary objection that the motion was premature, but the Ontario Court of Appeal exercised its discretion to let the application proceed being satisfied the matter was of practical importance.[139]

167. In *Edmonton Telephones Corp v Stephenson*,[140] the Court of Queen's Bench of Alberta confirmed that the discretion to hear a matter which may await future events is informed by the same considerations relating to mootness (*i.e.,* where the controversy no longer exists). Those considerations are:

(a) whether an adversarial relationship exists between the parties, and will continue to exist;

(b) weighing the conservation of judicial resources against the societal cost of continued uncertainty in the law and the practical effect that a decision on the merits would have on the rights of the parties; and

(c) the need for the Court to not depart from its traditional role, such as non-interference in the political arena.[141]

168. The Court is also to consider the likelihood of the matter becoming ripe for consideration, and if there is a "significant or a likelihood near certainty" of the events occurring then the Court is more likely to exercise its discretion in favour of proceeding.[142]

169. Having regard to those principles, the plaintiffs submit this case is appropriate to proceed now even though the taking claim is premised on sterilization of the royalty interest as of 2030.

(a) By the within action, there is an adversarial relationship between the plaintiffs and the defendants, and that relationship will continue to exist.

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138 *Gibson* **[Pl Auth at Tab 52]**.
139 *Gibson* at pages 5-6 **[Pl Auth at Tab 52]**.
140 *Edmonton Telephones ABQB* at para 38 **[Pl Auth at Tab 50]**.
141 *Edmonton Telephones ABQB* at paras 46, 48-49 **[Pl Auth at Tab 50]**.
142 *Edmonton Telephones ABQB* at para 51 **[Pl Auth at Tab 50]**.

(b) There is a public importance in clarifying both the scope and necessity of the "beneficial interest" requirement imposed by the Supreme Court of Canada in *CPR v Vancouver*, and permitting the action to proceed now will have a significant practical effect on the plaintiffs as they have already been required by applicable accounting standards to write down the present value of their royalty interest by $137 million. Having regard to the maxim "justice delayed is justice denied",[143] the plaintiffs should not have to wait nearly 10 years to begin anew their claim for compensation to which they are lawfully entitled.

(c) Permitting the action to proceed keeps the Court in its traditional role and does not result in an interference with the political arena.

170. Further, there is a "significant or a likelihood near certainty" of the events upon which the taking claim is premised coming to fruition. The defendants themselves recognize this (as shown above at paragraph 158), and their various programs which provide financial assistance to coal power workers and communities reliant on the coal power industry (as laudable as those programs may be) belie any argument that it is speculative that the royalty interest will cease to generate any income from thermal coal production after 2030.

171. And while Alberta cites no legal authority to show how the taking claim is premature, it does plead that the taking claim is time-barred by operation of the *Limitations Act*.[144]

172. Master Farrington noticed the paradox of alleging that a claim is both premature and time-barred, and on the subject of whether there could be a limitations issue if the plaintiffs had to wait until 2030 to sue, Alberta expressly refused to waive limitations, its counsel stated in oral submissions, "I can't say whether or not there will be a limitations defence, and I can't bind counsel of the future or a client of the future."[145]

173. Accordingly, if the plaintiffs were required to sue in 2030 about events which transpired in 2016 (namely, the date of the Off Coal Agreement) there is a real risk that Alberta may

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143 See *AF v Alberta*, 2020 ABQB 268 at para 86 **[Pl Auth at Tab 53]**.
144 Alberta Statement of Defence filed March 1, 2019 at para 18 **[Appeal Record Vol I at Tab 6]**.
145 Transcript of Proceedings before the Master on December 11, 2020 at page 39, lines 19-20 **[Appeal Record Vol I at Tab 21]**.

allege the claim is time-barred by operation of not only the two-year limitation period but the ultimate ten-year limitation period.

174. Canada writes in its brief that, "A claim for *de facto* expropriation does not arise until both elements of the cause of action have occurred",[146] but no legal authority is cited for the proposition that it must "have occurred".

175. Canada also attempts to use *Tener* to illustrate the distinction between a premature and present claim for *de facto* expropriation, arguing it was not the prohibition of unauthorized mining in the park which gave rise to the taking, but instead the denial of the mining permits which Estey J. described as what made the prohibition "operative".[147]

176. But that passage from *Tener* supports the plaintiffs' position that they have a present claim for *de facto* expropriation, as the defendant governments have already decided to deny coal-fired electrical generation post 2030 and (as already discussed) no further action on their part is required to make that prohibition operative.

177. Canada also cites *Mariner* for the proposition that, in the context of a *de facto* expropriation, the Court must consider the "*actual application* in the specific case… not the potential, but as yet unexploited, range of possible regulation which is authorized".[148]

178. That principle was articulated by Cromwell J.A. in support of his conclusion that the designation of the plaintiffs' land as a beach could not by itself constitute a taking, and that the crucial question was whether the designation together with its practical effects (*i.e.,* the government's refusal to permit construction of the dwellings) constitutes a taking.[149]

179. But the taking claim against Canada is consistent with that principle, as it is premised on the actual application or practical effects of the Amended Regulations; namely, the shuttering of the three Genesee units and the Genesee Mine which, in turn, render the royalty interest valueless. That eventuality is alleged in the Amended Amended Statement

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146 Canada Appeal Brief at para 129.
147 Canada Appeal Brief at para 130.
148 Canada Appeal Brief at para 131.
149 See *Mariner* at paras 51, 53-54 **[Pl Auth at Tab 27]**.

of Claim[150] and substantiated by Canada's own public statements (see paragraphs 147 to 148 of the plaintiffs' brief addressing summary dismissal).

180. The case of *Gevaert v Arbuckle* cited by Canada has no application here, as the issue in that case was whether a defendant tortfeasor needs wait until his action with the injured plaintiff has resolved before initiating proceedings against another party for contribution or indemnity pursuant to the Ontario *Negligence Act*.[151]

181. That context is abundantly clear when we juxtapose the excerpted text from *Gevaert* Canada quotes in its brief with the full text from the decision:

Excerpted para 18 from *Gevaert*, as found at para 127 of Canada's Brief	**Full text of para 18 from *Gevaert***
A valid Statement of Claim must disclose a presently existing, legally recognized claim against the Defendant. It must say: ' I, Plaintiff, *have* a claim against you, Defendant.' What the Stateent of Claim [sic] says in this proceeding, however, is this: 'I, Plaintiff, *may have* a claim against you, Defendant…" This discloses no cause of action, but only the possibility of a cause of action accruing in the future.	A valid Statement of Claim must disclose a presently existing, legally recognized claim against the Defendant. It must say: 'I, Plaintiff, *have* a claim against you, Defendant.' What the Statement of Claim says in this proceeding, however, is this: 'I, Plaintiff, *may have* a claim against you, Defendant, *if* I am subsequently found to be liable to X.' This discloses no cause of action, but only the possibility of a cause of action accruing in the future. [Red emphasis added.]

182. In an event, as shown above at page 42 the Amended Amended Statement of Claim here does not plead that the plaintiffs "may have" a claim against the defendant governments but instead discloses a presently existing cause of action (which on a strike application are to be assumed as true).

183. The decision of the British Columbia Expropriation Compensation Board cited by Canada for the proposition that a proceeding is a nullity "when there is no cause of action or

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[150] Order of Master Farrington re Amendments dated December 11, 2020 at Schedule "A" paras 4-5, 38, 40-43 **[Appeal Record Vol I at Tab 23]**.

[151] *Gevaert v Arbuckle* (1998), 163 DLR (4th) 762 (Ont SCJ) at paras 1-9, 16-21 **[Canada Auth at Tab 41]**, as cited in Canada Appeal Brief at para 127.

enforceable right in existence at the time of filing"[152] is likewise not determinative of anything for the reasons already noted.

184. The taking claim is not premature; the Master was correct in refusing to strike the claim on that basis as well.

PART VII: SUMMARY & REMEDY SOUGHT

185. In summary, the Master was correct in (i) allowing the pleading amendments opposed by the defendants, and (ii) refusing to strike the plaintiffs' Amended Amended Statement of Claim pursuant to Rule 3.68.

186. The defendants have again failed to discharge their onus of showing that the disputed amendments are hopeless.

(a) The allegation that the defendants will obtain "financial benefits" from their actions to phase out coal power by 2030 has an evidentiary foundation based on the defendants' own public announcements, no contrary evidence was filed by either defendant, and the plea of a general or intangible benefit is legally relevant to determining whether a taking has occurred in light of the courts' rulings in *Kalmring*, *Manitoba Fisheries*, *Tener*, *Nilsson*, and *Compliance Coal*.

(b) The remedy seeking "a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation" is not theoretical and would have practical utility, noting in particular that no further action by the defendants is required for the taking of the royalty interest to unfold and the plaintiffs have a present loss of approximately $190 million which is fully quantifiable at this time. The case law establishes that declaratory relief is appropriate where future rights are at stake, and that declaratory relief has been the form of remedy granted by courts in successful taking cases for more than 40 years (generally remitting the matter of compensation to expropriation tribunals).

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[152] *Toole v British Columbia (Minister of Transportation & Highways)* (1996), 59 LCR 43 (BC Expropriation Board) **[Canada Auth at Tab 42]**, cited in Canada Appeal Brief at para 128.

187. The defendants have again failed to discharge their onus of showing that the Amended Amended Statement of Claim should be struck pursuant to Rule 3.68(2)(b).

(a) The cross-appeals fail automatically given that the defendants consented to amendments which plead what they consider as the necessary elements to establish liability for a *de facto* expropriation, and those allegations are to be assumed as true. In any event, the claim has a reasonable prospect of success under the Supreme Court of Canada's binding authorities of *Manitoba Fisheries* and *Tener*, where a taking was found even though the Crown did not acquire a beneficial interest in the subject property.

(b) The cross-appeals fail automatically given that the defendants consented to amendments which plead *in the past tense* what they consider as the necessary elements to establish liability for a *de facto* expropriation, and those allegations are to be assumed as true. In any event, the claim is not premature given that no further action by the defendants is required for the taking of the royalty interest to unfold, the plaintiffs have a present loss of approximately $190 million which is fully quantifiable at this time, declaratory relief is sought, the court has a residual discretion to hear matters which depend on future events, and Alberta refuses to waive a limitations defence.

188. The plaintiffs therefore request that this Honourable Court dismiss the defendants' cross-appeals with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of November, 2021.

CODE HUNTER LLP

Per:

Christian J. Popowich Counsel for the Plaintiffs Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc.	Dextin Zucchi Counsel for the Plaintiffs Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc.

APPENDIX A: TABLE OF AUTHORITIES

TAB	AUTHORITY
1	*Daytona Power Corp v Hydro Company Inc*, 2020 ABQB 723
2	Alberta *Rules of Court*, AR 124/2010
3	*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49
4	John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008)
5	*Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7
6	*Third Eye Capital Corporation v Ressources Dianor Inc*, 2018 ONCA 253
7	*Tucows.Com Co v Lojas Renner SA*, 2011 ONCA 548
8	Blackstone, *Commentaries on the Laws of England*, vol 1, ch 16
9	Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC Law Review
10	*Attorney General v De Keyser's Royal Hotel Limited*, [1920] AC 508
11	*Manitoba Fisheries Ltd v Canada*, [1979] 1 SCR 101
12	*British Columbia v Tener*, [1985] 1 SCR 533
13	Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019)
14	*Canadian Pacific Railway v Vancouver*, 2006 SCC 5
15	*Annapolis Group Inc v Halifax Regional Municipality*, 2021 CanLII 54464 (SCC)
16	Factum of Annapolis Group Inc. for SCC Appeal
17	*Casamiro Resource Corp v British Columbia* (1990), 43 LCR 246 (BCSC)
18	*Casamiro Resource Corp v British Columbia* (1991), 55 BCLR (2d) 346 (BCCA)
19	*Rock Resources Inc v British Columbia*, 2003 BCCA 324
20	*Gronnerud (Litigation Guardians of) v Gronnerud Estate*, 2002 SCC 38
21	*Kalmring v Alberta*, 2020 ABQB 81
22	*Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621

TAB	AUTHORITY
23	*Kalantzis v East Kootenay (Regional District)*, 2019 BCSC 1001
24	*Lynch v St John's (City)*, 2016 NLCA 35
25	*Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440
26	*Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283
27	*Mariner Real Estate Ltd v Nova Scotia*, 1999 NSCA 98
28	*Lorraine (Ville) c 2646-8926 Quebec Inc*, 2018 SCC 35
29	*Annapolis Group Inc v Halifax Regional Municipality*, 2019 NSSC 341
30	*Halifax Regional Municipality v Annapolis*, 2021 NSCA 3
31	*TFL Forest Ltd v British Columbia*, 2002 BCSC 180
32	*Sun Construction Company Limited v Conception Bay South (Town)*, 2019 NLSC 102
33	*Terrigno v Butzner*, 2021 ABCA 18
34	*Delta Hotels No 2 Holdings Ltd v Tyco International of Canada Ltd*, 2020 ABCA 24
35	*Lischuk v K-Jay Electric Ltd*, 2021 ABQB 280
36	*Swaleh v Lloyd*, 2020 ABCA 18
37	*Williams v Rosenstock*, 2020 ABQB 303
38	*Dowell v Millington*, 2016 ONSC 6671
39	*Expropriation Act*, RSA 2000 c E-13
40	*Expropriation Act*, RSC 1985 c E-21
41	Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed (Toronto: Thomson Carswell, 2007)
42	*Judicature Act*, RSA 2000 c J-2
43	*Ginn v Feng*, 2021 ABQB 292
44	*Yellowbird v Samson Cree Nation No 444*, 2006 ABQB 434
45	*Grenon v Canada Revenue Agency*, 2017 ABCA 96

TAB	AUTHORITY
46	*Melcor Reit Limited Partnership (Melcor Reit GP Inc) v TDL Group Corp (Tim Hortons)*, 2021 ABQB 379
47	*Harun-ar-Rashid v Royal Canadian Mounted Police*, 2019 ABQB 54
48	*Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365
49	*Warner v Calgary Regional Health Authority*, 2020 ABQB 172
50	*Edmonton Telephones Corp v Stephenson* (1994), 24 Alta LR (3d) 96 (QB)
51	*Edmonton Telephones Corp v Stephenson* (1994), 26 Alta LR (3d) 33 (CA)
52	*J.E. Gibson Holdings Ltd v Principal Investments Ltd*, 1963 CanLII 22 (ONCA)
53	*AF v Alberta*, 2020 ABQB 268