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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.
DEFENDANTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA
DOCUMENT	**Brief of the Applicant (Defendant), Her Majesty the Queen in Right of Alberta** **(Special Chambers Application returnable December 8-11, 2020 at 2:00 pm in Masters Chambers)**

ADDRESS FOR SERVICE AND CONTRACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. LIT-10710

Table of Contents

PART I: Facts

1. Overview of the Application

[1] The Defendant, Her Majesty the Queen in Right of Alberta ("**Alberta**") seeks an Order striking, or in the alternative, summarily dismissing the Amended Statement of Claim filed on behalf of the Plaintiffs, Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc. (collectively, the "**Plaintiffs**").

[2] The Plaintiff, Genesee Royalty Limited Partnership ("**Genesee LP**") acquired a royalty interest in certain coal which is mined at the Genesee Coal Mine and which is used to fuel the Genesee Power Plant (defined below) and generate coal-fired electricity in Alberta.

[3] Both the Federal Government and the Government of Alberta have made policy decisions to phase out emissions from coal-fired electricity generation, including emissions from the Genesee Power Plant, by 2030.

[4] The Plaintiffs filed a Statement of Claim and then an Amended Statement of Claim[1] (the "**Amended Claim**") seeking damages in the amount of $190 million from Alberta and from the Defendant, Attorney General for Canada ("**Canada**") because of those policy decisions.

[5] The Amended Claim discloses no reasonable cause of action as against Alberta. In the alternative, there is no merit to the claims brought against Alberta and there are no genuine issues requiring trial.

[6] The Amended Claim should be struck, or alternatively, summarily dismissed, as against Alberta, with costs.

2. Statement of Facts

[7] The facts set out below are relevant for the purposes of this Application.

[1] Amended Statement of Claim, filed December 19, 2018.

(a) Corporate Relationships

[8] Altius Minerals Corporation ("**Altius Minerals**") is a public company headquartered in Newfoundland and Labrador and trades on the Toronto Stock Exchange.[2]

[9] Altius Minerals owns 100% of the voting shares in the Plaintiff, Altius Royalty Corporation ("**Altius Royalty**"), an Alberta corporation.[3]

[10] Altius Royalty owns 100% of the voting shares in the Plaintiff, Genesee Royalty GP Inc. ("**Genesee GP**"), an Alberta corporation.[4]

[11] Genesee GP is the general partner of Genesee LP, a partnership formed and existing under the laws of Ontario.[5]

(b) Genesee LP's Royalty Interest

[12] On April 28, 2014, pursuant to an Arrangement Agreement dated December 24, 2013, Genesee LP acquired a royalty interest from Prairie Mines & Royalty ULC ("**Prairie Mines**") in the coal underlying lands near and around Genesee, Alberta (the "**Coal**").[6] Genesee LP continues to hold this royalty interest in the Coal.[7]

[13] The Coal is mined at the Genesee Coal Mine, which is the subject of a joint venture between Capital Power LP ("**Capital Power**") and Prairie Mines (the "**Joint Venture**").[8]

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[2] Amended Claim, at para. 10

[3] Notice to Admit Facts issued by Alberta ("**Alberta NTAF**"), at para. 2; Reply to Alberta NTAF issued by Altius Plaintiffs ("**Reply to Alberta NTAF**"), at para. 2; Amended Claim, at para. 8.

[4] Alberta NTAF, at para. 3; Reply to Alberta NTAF, at para. 3; Amended Claim, at para. 7.

[5] Amended Claim, at paras. 6-7.

[6] Amended Claim, at para. 12(a); Response to Request for Particulars filed February 8, 2019 at para. 1; Response to Request for Particulars filed February 25, 2019, at para. 2 and Schedule "A".

[7] Alberta NTAF, at para. 23(g); Reply to Alberta NTAF, at para. 23(g).

[8] Amended Claim, at para. 13; Affidavit of Ben Lewis, sworn September 26, 2020 (the "**Lewis Affidavit**"), at para. 10 and Exhibit "B".

[14] The Coal is mined and used to fuel the Genesee 1 ("**G1**"), Genesee 2 ("**G2**"), and Genesee 3 ("**G3**") units (the "**Genesee Power Plant**") and generate coal-fired electricity, in particular for the City of Edmonton.[9]

[15] Genesee LP, Capital Power, Prairie Mines, and the Joint Venture are parties to a Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014 (the "**Unitization and Dedication Agreement**").[10]

[16] The Unitization and Dedication Agreement states, in part:

> (mm) … the rights, obligations and liabilities of [Genesee LP] pursuant to the Genesee Royalty Agreement dated April 24, 2014 between New PMRL and [Genesee LP], as amended, restated, supplemented or replaced from time to time, evidencing the legal and beneficial interest of [Genesee LP] in the PMRL Coal Rights.
>
> 2.1 Dedication of Coal Rights
>
> Capital Power, PMRL and the Joint Venture hereby acknowledge the dedication to the Genesee Coal Mine of all of their respective interests in the Coal Rights as set forth in Parts I, II and III of Schedule "A" to this Agreement. [Genesee LP] hereby acknowledges the dedication to the Genesee Coal Mine of all of its interest in the PMRL Coal Rights (including the Royalty Interest).
>
> 6.1 Royalties
>
> The Joint Venture shall pay to PMRL the following royalties for its Percentage Interest (as determined in accordance with this Agreement, which for certainty, includes the Percentage Interest attributed to the Royalty Owner) in each tonne of Coal mined from the Dedicated Area, subject to Section 6.3.
> …
>
> 7.1 Term
>
> …This Second Amended and Restated Dedication and Unitization Agreement shall be effective immediately after the closing of the Arrangement Agreement Transactions and shall continue in effect until all Recoverable Coal Reserves have been mined, or the Genesee Power Plant is permanently decommissioned or as terminated pursuant to this Agreement.
>
> 8.1 Termination of Agreement

[9] Amended Claim, at paras. 2, 13, 15-17, and 44.

[10] Amended Claim, at para. 15.

> This Agreement and all of the terms thereof including the dedication and unitization thereunder shall be terminated only in accordance with Section 7.1 of this Agreement or upon mutual agreement of Capital Power and PMRL. For certainty, the Parties acknowledge and agree that a termination of this Agreement does not constitute a termination of the Royalty Interest.[11]

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

[17] In or around 2012, Canada announced a new regulatory regime aimed at reducing carbon dioxide emissions resulting from the coal-fired generation of electricity throughout the country. In particular, Canada unveiled the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167 (the "**Regulations**").[12]

[18] In November 2015, Alberta introduced the "Climate Leadership Plan" which aimed to phase out emissions from coal-fired electricity generation by 2030.[13]

[19] In December 2015, representatives from Alberta attended the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change in Paris, France.[14]

[20] On or about March 3, 2016, Canada's First Ministers, including Alberta, issued the "Vancouver Declaration on Clean Growth and Climate Change" (the "**Vancouver Declaration**") and resolved to develop a national framework to meet or exceed the emissions reduction goal contemplated by the Paris Agreement.[15]

[21] The Working Group on Specific Mitigation Opportunities identified the potential phase out of traditional coal-fired power plants by 2030 as a potential policy option.[16]

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[11] Amended Claim, at para. 16; Reply to Alberta NTAF, at para. 16.
[12] Amended Claim, at para. 20; Lewis Affidavit, at paras. 12-14 and Exhibits "C", "D", and "E".
[13] Amended Claim, at para. 29; Lewis Affidavit, at para. 33 and Exhibit "T".
[14] Amended Claim, at para. 22; Lewis Affidavit, at para. 26 and Exhibit "N".
[15] Amended Claim, at para. 25; Lewis Affidavit, at para. 29 and Exhibit "Q".
[16] Amended Claim, at para. 27; Lewis Affidavit, at para. 31 and Exhibit "R".

[22] On or about December 9, 2016, the federal, territorial, and provincial governments, including Alberta (with the exception of Saskatchewan and Manitoba), released the "Pan-Canadian Framework on Clean Growth and Climate Change".[17]

(d) The Off-Coal Agreement

[23] On November 24, 2016, as part of the implementation of the Climate Leadership Plan, Alberta entered into an Off-Coal Agreement with, among others, Capital Power (the "**Off-Coal Agreement**").[18]

[24] Under the Off-Coal Agreement, Capital Power agreed to end emissions from coal-fired electricity generation by 2030 and Alberta agreed to pay certain transition payments.[19]

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

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

[26] The Genesee Power Plant was planned and constructed to generate coal-fired electricity until 2044 (in the case of G1), 2039 (in the case of G2), and 2055 (in the case of G3).[20]

[27] The Genesee Coal Mine is operational and has not been shut down.[21]

[28] Coal is being extracted from the Genesee Coal Mine.[22]

[29] The Genesee Power Plant is operational and has not been decommissioned.[23]

[30] The Genesee Power Plant is using the Coal extracted from the Genesee Coal Mine to generate electricity.[24]

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[17] Amended Claim, at para. 28; Lewis Affidavit, at para. 32 and Exhibit "S".
[18] Amended Claim, at para. 31; Lewis Affidavit, at paras. 38-39 and Exhibits "Y" and "Z".
[19] Amended Claim, at para. 32.
[20] Amended Claim, at para. 21.
[21] Alberta NTAF, at para. 23(a); Reply to Alberta NTAF, at para. 23(a).
[22] Alberta NTAF, at para. 23(b); Reply to Alberta NTAF, at para. 23(b).
[23] Alberta NTAF, at para. 23(c); Reply to Alberta NTAF, at para. 23(c).

[31] Genesee LP continues to hold ownership of the royalty interest that is asserted in the Amended Claim.[25]

[32] Genesee LP continues to receive the payment of royalties on account of the royalty interest.[26]

PART II: Issues

[33] The following issues arise in this Application:

Issue #1: Should the Amended Claim be struck out as against Alberta for failing to disclose a reasonable cause of action?

Issue #2: If any of the allegations as against Alberta disclose a reasonable cause of action, should any or all of the claims nonetheless be summarily dismissed?

PART III: Argument

1. The allegations as against Alberta

[34] The Plaintiffs' allegations as against Alberta fall within three categories:

1) The alleged "taking" by Alberta of Genesee LP's property;[27]

2) The alleged "foiling" of the Plaintiffs' "legitimate expectations";[28] and

3) Alberta's alleged "undue interference" with Genesee LP's economic relations.[29]

[35] As addressed below, none of the allegations are properly pleaded, nor are any of them meritorious.

[24] Alberta NTAF, at para. 23(d); Reply to Alberta NTAF, at para. 23(d).
[25] Alberta NTAF, at para. 23(g); Reply to Alberta NTAF, at para. 23(g).
[26] Alberta NTAF, at para. 23(h); Reply to Alberta NTAF, at para. 23(h).
[27] Amended Claim, at paras. 43-45.
[28] Amended Claim, at paras. 40-42.
[29] Amended Claim, at para. 46.

2. Striking a claim under Rule 3.68

[36] Rule 3.68 permits the Court to strike out all or any part of a pleading that does not disclose a reasonable claim.[30] No evidence may be considered[31].

[37] Nothing in the Amended Claim discloses a reasonable claim as against Alberta as it is **plain and obvious that the alleged claims against Alberta cannot succeed**[32] and **there is no reasonable prospect of success**.[33]

[38] While the Plaintiffs are entitled to a broad reading of the pleadings[34], the Court must apply the rule as intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck and needless litigation should be avoided.[35]

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

[39] A claim may be summarily dismissed under Rules 7.2 and 7.3.[36] The leading cases in this jurisdiction for summary judgment are:

a. The SCC's decision in *Hryniak*[37] where the SCC called for a "shift in culture", and strongly endorsed the merits of summary judgment where there is no genuine issue requiring trial.

b. The ABCA's decision in *Weir-Jones*[38] where a five-judge panel convened to establish the law of summary judgment in Alberta post-*Hryniak*. They found:

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[30] *Alberta Rules of Court*, Rule 3.68, Tab **1** of Alberta's Authorities.

[31] *Alberta Rules of Court*, Rule 3.68(3), Tab **1** of Alberta's Authorities.

[32] *Alberta Adolescent Recovery Centre v Canadian Broadcasting Corp.*, 2012 ABQB 48 ("***Alberta Adolescent Recovery Centre***"), at para. 25, Tab **2** of Alberta's Authorities; *Harun-ar-Rashid v Canada (Royal Canadian Mounted Police)*, 2019 ABQB 54 ("***Harun-ar-Rashid***"), at paras. 14 and 18, Tab **3** of Alberta's Authorities.

[33] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 ("***Imperial Tobacco***") at paras. 19-20, Tab **4** of Alberta's Authorities; *Ernst* v. *Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 ("***Ernst***") at paras. 14-15, Tab **5** of Alberta's Authorities.

[34] *Alberta Adolescent Recovery Centre*, at para. 27, Tab **2** of Alberta's Authorities.

[35] *Alberta Adolescent Recovery Centre*, at para. 27, Tab **2** of Alberta's Authorities; *Harun-ar-Rashid*, at paras. 14 and 18, Tab **3** of Alberta's Authorities.

[36] *Alberta Rules of Court*, Rules 7.2-7.3, Tab 1 of Alberta's Authorities.

[37] *Hryniak v Mauldin*, 2014 SCC 7 ("***Hryniak***"), at para. 2, Tab **6** of Alberta's Authorities.

- "there has been a paradigm shift in the approach to summary judgment"[39] as a result of *Hryniak*;

- "Summary judgment procedures should be increasingly used, and the previous presumption of referring all matters to trial should end;"[40]

- **The test for summary judgment is**: if there is "**no merit**" to the claim and "**no genuine issue requiring a trial**", it should be summarily dismissed[41]; and

- The responding party must put their "best foot forward".

[40] Recently, in *Hannam*[42] the ABCA took:

> … the opportunity to assess the practical significance of *Weir-Jones*, evaluate its place in historical evolution of summary judgment, and suggest other possible protocols that may allow courts to *increase the likelihood* that more disputes will be resolved as soon as possible at the least expense without sacrificing the quality of the adjudication and the fairness of the proceeding[43]
>
> [emphasis added]

[41] Regarding the requirement that there be "**no merit**" to the claim, the ABCA in *Hannam* confirmed and clarified:[44]

a. A summary judgment court can "make contested findings of material facts". Summary judgment is not limited to cases where the facts are not in dispute.

b. "[S]ummary judgment courts should not be reluctant to make material fact findings".

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[38] *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2019 ABCA 49 ("***Weir-Jones***"), Tab **7** of Alberta's Authorities.

[39] *Weir-Jones*, at para. 13, Tab **7** of Alberta's Authorities.

[40] *Weir-Jones*, at para. 15, Tab **7** of Alberta's Authorities.

[41] *Weir-Jones*, at para. 47, Tab **7** of Alberta's Authorities.

[42] *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 ("***Hannam***"), Tab **8** of Alberta's Authorities.

[43] *Hannam*, at para. 6, Tab **8** of Alberta's Authorities.

[44] *Hannam*, at paras 147-148, Tab **8** of Alberta's Authorities.

[42] Regarding the requirement that there be "**no genuine issue requiring a trial**", the ABCA in *Hannam* confirmed and clarified:[45]

a. The disposition does *not* have to be "obvious", "beyond doubt" or "highly unlikely". That would set the bar too high.

b. "The 'no genuine issue' concept no longer measures the merits of the parties' position. It now concentrates on procedural fairness." An application for summary judgment will be procedurally fair where the process:

- Allows the judge to make the necessary findings of fact.
- Allows the judge to apply the law to the facts.
- Is a proportionate, more expeditious and less expensive means to achieve a just result.

[43] Generally, in the *Hannam* decision, the Court is calling for a more robust use of summary judgment.

(a) This case is appropriate for summary judgment

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

a. The parties agree on the material facts. Alberta accepts that the Plaintiffs have a royalty interest in the Coal. Only the application of the facts to the law are in dispute.

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

4. *De facto* expropriation explained

[45] The Plaintiffs allege *de facto* expropriation (sometimes called a constructive taking or a regulatory taking).

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

[45] *Hannam*, at paras 157-161, Tab **8** of Alberta's Authorities.

> "expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers[46]

[47] Only the Crown has the power to expropriate. The Crown is granted this power under the common law or various statutes to further some public purpose.

[48] Under various statutes, the Crown also has the power to regulate property and its use. Regulation is not expropriation. Regulation is not confiscation of property.

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

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

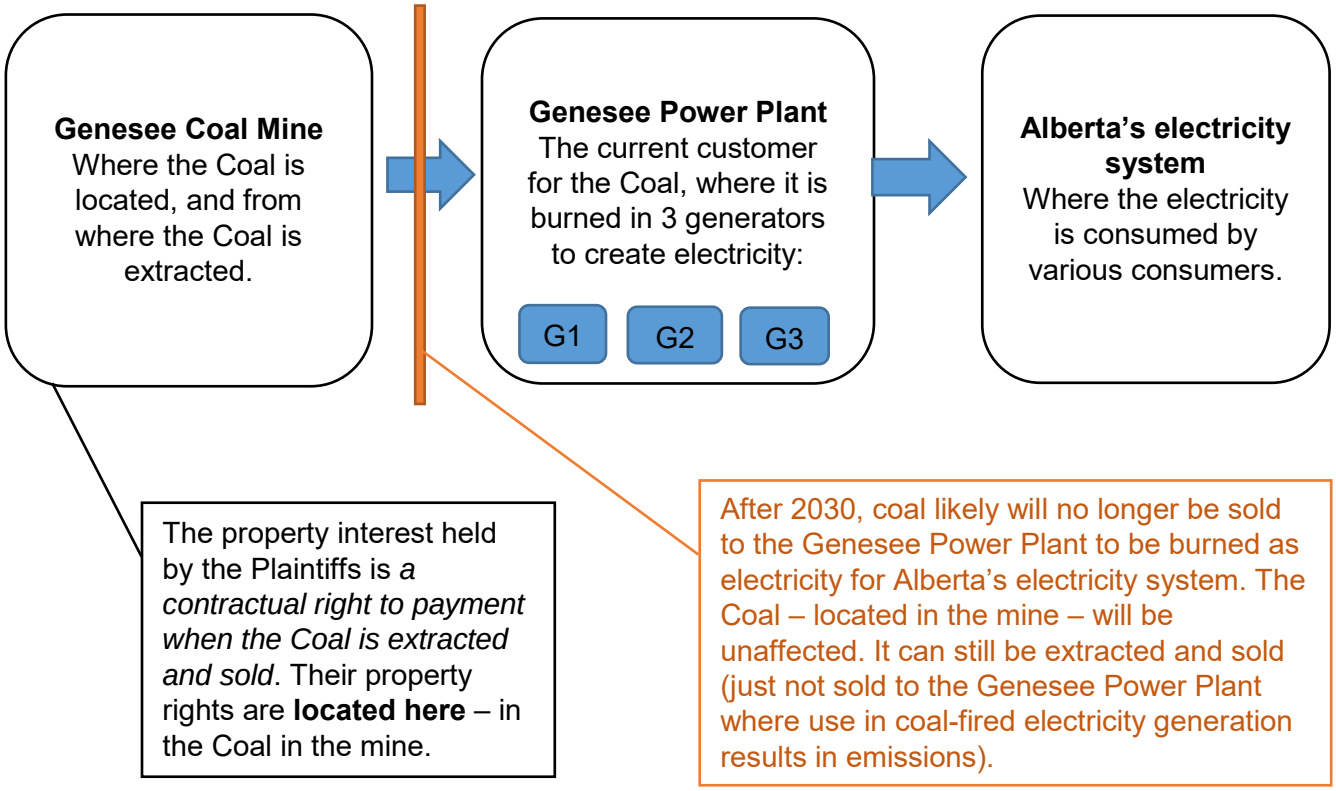
(a) The nature of the Plaintiffs' property rights

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

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

[53] The property interest held by the Plaintiffs (and more particularly, Genesee LP) is *a contractual right to payment when the Coal is extracted from mine and sold*. These are the sticks in the bundle of rights held by the Plaintiffs.

[46] *Expropriation Act*, R.S.A. 2000, c. E-13, at s. 1(g),1(g), Tab **9** of Alberta's Authorities.



[54] Today:

a. The Genesee Coal Mine is operational.[47]

b. Coal is being extracted from the Genesee Coal Mine.[48]

c. The Genesee Power Plant is operational and has not been decommissioned.[49]

d. The Genesee Power Plant is using coal extracted from the Genesee Coal Mine.[50]

e. Genesee LP continues to hold ownership of the royalty interest.[51]

[47] Alberta NTAF, at para. 23(a); Reply to Alberta NTAF, at para. 23(a).
[48] Alberta NTAF, at para. 23(b); Reply to Alberta NTAF, at para. 23(b).
[49] Alberta NTAF, at para. 23(c); Reply to Alberta NTAF, at para. 23(c).
[50] Alberta NTAF, at para. 23(d); Reply to Alberta NTAF, at para. 23(d).
[51] Alberta NTAF, at para. 23(g); Reply to Alberta NTAF, at para. 23(g).

f. Genesee LP is receiving payment of royalties on account of the royalty interest.[52]

[55] *After 2030*, the Genesee Power Plant will likely no longer burn Coal to produce electricity. The current customer for the Coal will likely be eliminated. The Coal, and the Plaintiffs' interest in the Coal, will be unaffected.

Importantly, even after 2030: → The Coal can still be mined. → The Coal can still be sold. → The Plaintiffs can still receive payment from the sale of the Coal.

[56] As of today, the Plaintiffs have lost none of the sticks in the bundle of rights they hold. Even after 2030, they will lose none of the sticks in the bundle of rights they hold.

(b) The nature of Alberta's impugned actions

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

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

[59] As part of the implementation of the Climate Leadership Plan, Alberta entered into the Off-Coal Agreement with the owners of the Genesee Power Plant (the "**Plant Owners**")[53]. Under the Off-Coal Agreement, Alberta agreed to make certain payments to the Plant Owners based on a formula. The formula is based on the net book value (i.e. the capital investment made by the Plant Owners) of three generators (G1, G2, and G3 in the graphic above), pro-rated by their percentage of remaining life after 2030. The

[52] Alberta NTAF, at para. 23(h); Reply to Alberta NTAF, at para. 23(h).

[53] Lewis Affidavit at Exhibit "Z". Specifically, Alberta entered into the Off-Coal Agreement with Capital Power Corporation, Capital Power L.P., Capital Power (G3) Limited Partnership and Capital Power (K3) Limited Partnership.

Off-Coal Agreement is payment for *capital investment* – the generators. The Plant Owners have not been paid for any interest they may have had in the Coal.

[60] Neither the Climate Leadership Plan, nor the Off-Coal Agreement takes any property rights away from the Plaintiffs. Alberta does not acquire any property rights through either the Climate Leadership Plan, or the Off-Coal Agreement.

(c) The Plaintiffs cannot meet the stringent test for *de facto* expropriation

[61] First, we will describe the two-part test for *de facto* expropriation. Next, we will explain the relevant principles established by the case law. Last, we will apply the two-part *de facto* expropriation test to the facts of this case.

[62] The leading case on *de facto* expropriation in Canada is the SCC's decision in *Canadian Pacific Railway Co. v City of Vancouver* (after this "***CPR***")[54]:

a. CPR owned the fee simple interest in the Arbutus Corridor, a 10 km, 50-60 ft. wide stretch of land running through the City of Vancouver.

b. Real estate in Vancouver is extremely valuable. There was an enormous development potential for these lands.

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

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

e. The SCC took the opportunity to comment on, and clarify, the law of *de facto* expropriation for the first time since its 1985 decision in *R v Tener* (that will be discussed later in this brief).

[54] *Canadian Pacific Railway Co. v City of Vancouver*, [2006] 1 SCR 227 ("***CPR***"), Tab **10** of Alberta's Authorities.

f. McLachlin, C.J., writing for the Court, confirmed that 2 requirements must be met for a *de facto* taking requiring compensation[55]:

> **The *de facto* expropriation test**
>
> (1) an acquisition of a beneficial interest in the property or flowing from it, and
>
> (2) removal of all reasonable uses of the property

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

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

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

[64] Several cases deal with the *de facto* expropriation of natural resources. The case law is clear: the ability to work and recover the resource must be completely sterilized for there to be a *de facto* expropriation.

[65] In *R v Tener*[56]:

a. The claimants owned mineral rights in an area that was later designated a provincial park. The property rights held by the claimant (their sticks in the bundle) were the right to explore and work the minerals.

b. Under the British Columbia *Park Act*, a park use permit had to be obtained before a natural resource in a provincial park could be exploited.

c. When the claimants applied for a permit to conduct mining work in the park, their request was refused.

d. The claimants were then advised by letter than *no new exploration or development work would be permitted under current park policy*.

[55] *CPR*, at para. 30, Tab **10** of Alberta's Authorities.
[56] *R v Tener*, 1985 CanLII 76 (SCC) ("***Tener***"), Tab **11** of Alberta's Authorities.

e. The SCC held that a *de facto* expropriation had occurred. The claimants were denied access to the land. It was *impossible* for the claimants to explore or work their mineral interest. Their proprietary interests were completely sterilized. All of their sticks in the bundle had been taken away.[57]

[66] The SCC's decision in *R v Tener* confirms that a *de facto* expropriation requires a total barrier to the exercise of a proprietary interest in a natural resource.

[67] In *Casamiro Resource Co. v British Columbia*[58]:

a. The claimants had mineral interests in Strathcona Park.

b. British Columbia passed an Order in Council prohibiting the issuance of resource use permits for the portion of the park where the mineral claims were located.

c. The BCCA held that a *de facto* expropriation had occurred because the mineral interests had been reduced to "meaningless pieces of paper". It was *impossible* for the claimants to enjoy their property rights. They were completely barred from exploring, working and recovering the resource. All their sticks in the bundle of rights had been taken away.

[68] In *Rock Resources Inc. v British Columbia*[59]:

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

b. The *Park Act* was amended to create a new provincial park partially encompassing the claimant's mineral claims.

c. The amendment prevented the claimant from exploring or developing the minerals falling within the park boundaries.

d. Again, the BCCA held that a *de facto* expropriation had occurred because it was *impossible* for the claimants to enjoy their property rights. They

[57] *Tener*, Tab **11** of Alberta's Authorities, at p. 550.

[58] *Casamiro Resource Co. v British Columbia (Attorney General)*, 1991 CanLII 211 (BCCA) ("***Casamiro***"), Tab **12** of Alberta's Authorities.

[59] *Rock Resources Inc. v British Columbia*, 2003 BCCA 324 ("***Rock Resources***"), Tab **13** of Alberta's Authorities.

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

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

[70] Even in 2030, the Coal will not be sterilized. The Coal can still be explored, worked, recovered, and sold. A customer for the Coal – the Genesee Power Plant – will be eliminated, not the ability to extract and sell the Coal.

[71] Alberta has agreed not to argue that there will be other reasonable uses of the Coal after 2030. Alberta does not argue this – there is no evidence before the Court about any other potential customers for the Coal after 2030. The point we make here is different. A regulatory taking is about the taking of property rights. The Plaintiffs need to point to some property right(s) that cannot be exercised because of the impugned government action. They cannot.

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

De Facto Expropriation IS a confiscation of property rights.

[73] In *Genesis Land Development Corporation v Alberta,*[60] the Alberta Court of Appeal confirmed that property rights have to be taken for there to be a *de facto* expropriation:

a. This case involves a successful summary judgment application brought by Alberta.

b. The plaintiff wanted to develop a recreational and tourist facility at the Spray Lakes Reservoir in Kananaskis. The plan included a resort, a Helicat Ski operation, and a tour boat operation.

c. The Minister decided that the proposed development was not in the public interest.

[60] *Genesis Land Development Corporation v Alberta*, 2009 ABQB 221 ("***Genesis ABQB***"), Tab **14** of Alberta's Authorities; aff'd 2010 ABCA 148 ("***Genesis ABCA***"), Tab **15** of Alberta's Authorities.

d. The Court of Queen's Bench confirmed that:

> *De facto* expropriations are very rare in Canada and they require proof of *virtual extinction of an identifiable interest in land*.[61]
>
> [emphasis added].

e. The Queen's Bench Justice concluded that the plaintiffs could not meet this test because they had no identifiable interest in land (Kananaskis is Crown land).

f. The Alberta Court of Appeal agreed and stated that:

> *The appellants had no interest in land that was taken from them*. At best they had an opportunity that they might develop on land they might lease from the respondent Alberta.[62]
>
> [emphasis added]

[74] In the present case, no property rights have been taken from the Plaintiffs. They continue to enjoy payment when the Coal is extracted and sold. Even after 2030, the Coal can be explored, worked, retrieved, and sold. None of the sticks in the bundle the Plaintiffs hold have been (or will be) taken away.

[75] Instead, their sticks have probably lost value – but this is not a taking of property rights.

De facto expropriation <u>IS NOT</u> a devaluation of property rights.

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

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

[61] *Genesis ABQB*, Tab **14** of Alberta's Authorities, at para. 133.
[62] *Genesis ABCA*, Tab **15** of Alberta's Authorities, at para. 8.

[78] In *CPR,* the City's Plan had an enormous negative impact on the value of the fee simple lands owned by CPR:

> The effect of the by-law was to freeze the redevelopment potential of the corridor and to *confine CPR to uneconomic uses of the land*.[63]
>
> [emphasis added]

[79] This significant devaluation of the lands was insufficient for a finding of *de facto* expropriation. CPR could still use and enjoy the lands, even if that use was uneconomic.

[80] Another illustration of this point is *Mariner Real Estate Ltd. v Nova Scotia*[64]:

a. The claimants owned oceanfront private land on Kingsburg Beach.

b. The Province passed legislation and regulation to protect the beach, after determining that it was environmentally fragile and ecologically significant.

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

d. The Court accepted that the regulation took virtually all of the lands' economic value.

e. The NSCA held that:

   - The *de facto* expropriation test is "exacting" and the claimants must prove:

     > "[b]oth the extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriating authority"[65].

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

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[63] *CPR*, Tab **10** of Alberta's Authorities, at para. 7.

[64] *Mariner Real Estate Ltd. v Nova Scotia*, 1999 NSCA 98 ("***Mariner Real Estate***"), Tab **16** of Alberta's Authorities.

[65] *Mariner Real Estate*, Tab **16** of Alberta's Authorities, at para. 50.

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

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

> The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the Expropriation Act. In my view, this distinct treatment supports the conclusion that *decline in value of land, even when drastic, is not the loss of an interest in land*.[66]
>
> [emphasis added]

- There was no *de facto* expropriation.

[81] The Alberta Court of Appeal came to a similar finding in *Alberta v Nilsson*[67]:

a. The claimant owned land within the North Edmonton Restricted Development Area (RDA). Within the RDA, land owners required permission of the Minister of Environment to develop land.

b. The land owner applied for a permit to build a trailer park. The application was denied.

c. The ABCA held that:

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

> Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.[68]

- Even though "the land's value was reduced"[69], this is not sufficient for a *de facto* expropriation.

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[66] *Mariner Real Estate*, Tab **16** of Alberta's Authorities, at para. 72.
[67] *Alberta v Nilsson*, 2002 ABCA 283 ("***Nilsson***"), Tab **17** of Alberta's Authorities.
[68] *Nilsson*, Tab **17** of Alberta's Authorities, at para. 64.

[82] In the present case, the Plaintiffs argue that their interest in the Coal has been devalued, and that after 2030, virtually all of its economic value will be gone. This is not a *de facto* expropriation. Loss of economic value is not the same thing as loss of property.

De facto expropriation <u>IS NOT</u> a business risk that did not work out.

[83] In 2014, the Plaintiffs made a business decision to invest in coal. In doing so, they assumed a business risk.

[84] *De facto* expropriation is not a business risk that did not work out the way you hoped. This point is illustrated in *64933 Manitoba Ltd. v Manitoba*[70]:

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

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

c. The MBCA held that:

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

  > … if the effect of the government's action is to *essentially extinguish the claimant's interest in land or property*[71]
  >
  > [emphasis added]

- If there were a *de facto* expropriation in these circumstances, this would mean every "disappointed developer"[72] would be entitled to compensation.

[69] *Nilsson*, Tab **17** of Alberta's Authorities, at para. 65.
[70] *64933 Manitoba Ltd. v Manitoba*, 2002 MBCA 96 ("***64933 Manitoba***"), Tab **18** of Alberta's Authorities.
[71] *64933 Manitoba*, Tab **18** of Alberta's Authorities, at para. 13.
[72] *64933 Manitoba*, Tab **18** of Alberta's Authorities, at para. 15.

- The land owner has not been denied an interest in land or any property rights. Though, certainly, their property rights had decreased in value.

- Instead, the land owner "took a commercial risk and lost"[73].

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

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

[86] As stated, in *CPR* the SCC confirmed a two-part test:

(1) an acquisition of a beneficial interest in the property or flowing from it, and

(2) removal of all reasonable uses of the property

[87] With respect to the first element of the test, no beneficial interest in the property held by the Plaintiffs has been acquired by Alberta through either the Climate Leadership Plan, or the Off-Coal Agreement. As stated several times, the Plaintiffs have not lost (and will not lose) any of their property rights. Alberta has not (and will not) acquire any property rights.

[88] Further, Alberta has received no benefit flowing from the property held by the Plaintiffs. In *CPR*, CPR argued that the City of Vancouver had acquired a "*de facto* park" by restricting its lands to a public thorough fare for transportation and greenways (for things like public heritage walks, nature trails and cyclist paths). The SCC rejected this argument and held that the City had not acquired any benefit. Instead, the SCC held that:

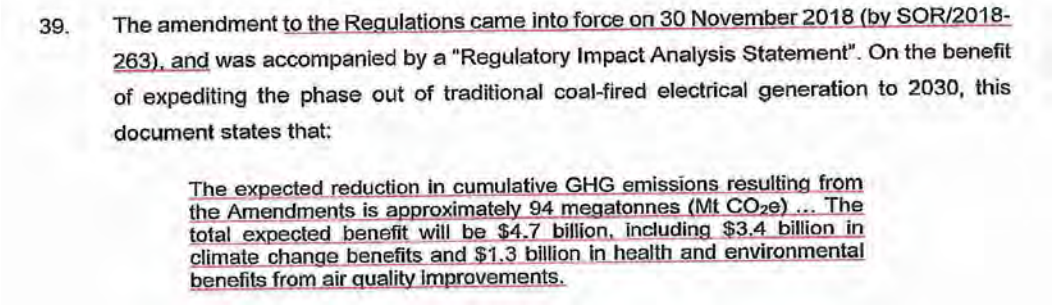
> The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]".[74]

[73] *64933 Manitoba*, Tab **18** of Alberta's Authorities, at para. 20.
[74] *CPR*, Tab **10** of Alberta's Authorities, at para 33.

[89] In the present case, the Plaintiffs do not particularize any beneficial interest or benefit they allege Alberta to have acquired. They merely allege that the:

> … benefits that Alberta will obtain are *of the sort* set out in the 'Regulatory Impact Analysis Statement' referenced at paragraph 39 of the Amended Statement of Claim.[75]

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



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

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

[91] The allegation appears to be that Alberta will receive a general benefit by the furtherance of its policy objective to reduce pollution from coal-fired electricity. In *CPR,* the SCC held that this type of general benefit – the general furtherance of government policy – is not enough.

[92] This makes sense. *All* government regulation furthers some policy decision. If a general furtherance of a policy decision was sufficient to satisfy this branch of the *de facto* expropriation test, then this branch of the test would be meaningless – any legislative or policy goal would suffice.

[93] The second branch of the *de facto* expropriation test drives at whether all of the claimant's property interest (all of their sticks in the bundle) have been taken, leaving the claimant with bare legal title.

[75] Response to Request for Particulars, filed February 8, 2019, at para. 4.

[94] As stated repeatedly, the Plaintiffs have not (and will not) lose any of their property interests. They can explore, work, recover, and receive payment from the sale of the Coal. The Plaintiffs have this bundle of rights today, and will continue to have them after 2030.

[95] The Plaintiffs confuse the loss of economic value of property, with the loss of property. They admit:

> "… the royalty interest has presently sustained a significant loss of value with the balance to be lost by 2030 – *thereby depriving Genesee LP of all use and enjoyment of its property*"[76]
> [emphasis added]

[96] This is incorrect in law. Property that has lost value, even virtually all of its value, can still be used and enjoyed (even if the owner is restricted to uneconomic uses as CPR was). As described above, loss of economic value is not sufficient for *de facto* expropriation.

(e) At best, the Plaintiffs' claim is premature

[97] At best, the Plaintiffs' claim for *de facto* expropriation is premature and may not crystalize until 2030, if at all. The Plaintiffs continue to own and receive payment for their interest in the Coal.

[98] Although we say that the Plaintiffs will not lose any property rights even after 2030, if it is arguable that property rights will be lost, then they will not be lost until 2030.

(f) The *de facto* expropriation claim should be struck or summarily dismissed

[99] The claim for *de facto* expropriation should be struck. The claim is not pleaded properly and has no reasonable prospect of success. In the alternative, the claim for *de facto* expropriation should be summarily dismissed – there is no merit to the claim and no genuine issue for trial.

[76] Alberta NTAF, at para. 23(g); Reply to Alberta NTAF, at para. 23(g).

[100] Specifically:

a. The Plaintiffs have not pleaded and have no evidence of any beneficial interest or other benefit that Alberta will acquire from either the Climate Leadership Plan, or the Off-Coal Agreement. There is no evidence that Alberta will gain any property rights.

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

5. "Foiling" of "legitimate expectations" is not a recognized cause of action

[101] The Plaintiffs allege that:

- they relied on statements made by Alberta regarding the reliability and consistency of its environmental policies and its safe investment climate;[77]

- the expectations that the Regulations would continue as enacted and that the Genesee Power Plant would generate electricity from Coal until 2055 directly contributed to and encouraged [Altius Minerals] to purchase the royalty interest;[78] and

- Alberta's decision to phase out traditional coal-fired electrical generation by 2030 caused the legitimate expectations of Altius Royalty to be foiled and seek damages in the amount of $190 million.[79]

(a) "Legitimate expectations" is not a question of substantive rights

[102] The SCC, in the *Retired Judges Case*, noted that the "doctrine of legitimate expectations is 'an extension of the rules of natural justice and procedural fairness'" and that it "looks to the conduct of a Minister or other public authority in the exercise of a

[77] Amended Claim, at para. 40.
[78] Amended Claim, at para. 41.
[79] Amended Claim, at para. 42.

discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants […] a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken."[80]

[103] It is well settled in law that expectations, however legitimate they may be, cannot generate or create substantive rights or form the basis for an action in damages.[81] Legitimate expectations only give rise to procedural rights. They do not create substantive rights.[82]

[104] The Plaintiffs have not alleged any loss of procedural rights, only damages.

[105] It is plain and obvious that this allegation against Alberta cannot succeed and should be struck. In the alternative, the claim for foiling of legitimate expectations should be summarily dismissed. There is no merit to the claim and no genuine issue for trial.

[106] Specifically:

- Legitimate expectations do not entitle the Plaintiffs to substantive rights;
- The Plaintiffs have not particularized or provided any evidence of established practices, conduct or representations on the part of Alberta that can be characterized as clear, unambiguous and unqualified, that have induced in the Plaintiffs a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken; and
- An award of damages is not an available remedy.

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[80] *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 ("***Retired Judges Case***"), Tab **19** of Alberta's Authorities, at para. 131.

[81] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 ("***Agraira***"), Tab **20** of Alberta's Authorities, at para. 97; *Canada (Attorney General) v Mavi*, 2011 SCC 30 ("***Mavi***"), Tab **21** of Alberta's Authorities, at para. 68; *Canada v South Yukon Forest Corporation*, 2012 FCA 165 ("***South Yukon Forest***"), Tab **22** of Alberta's Authorities, at paras. 78-79.

[82] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("***Baker***"), Tab **23** of Alberta's Authorities, at para. 26.

(b) In the alternative, misrepresentation is insufficiently particularized

[107] If the Plaintiffs intended to allege misrepresentation against Alberta, even with the most generous reading of the pleadings, the allegation must be struck.

[108] Rule 13.7 requires that a pleading give particulars of misrepresentation.[83]

[109] Where one of the claims listed in Rule 13.7 is alleged in a pleading, this Court has struck those portions of the pleading relating to the claim were it is not supported by sufficient particulars.[84]

[110] To establish a claim of negligent misrepresentation, the Plaintiffs must provide the following particulars:

- The alleged misrepresentation itself;
- When, where, how, by whom and to whom it was made;
- Its falsity;
- The inducement;
- The intention that the plaintiff should rely upon it;
- The alteration by the plaintiff of his or her position relying upon the misrepresentation;
- The resulting loss or damage to the plaintiff.[85]

[111] The Plaintiffs have not provided those particulars. Rather, they allege as follows in the Amended Claim:

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[83] *Alberta Rules of Court*, Rule 13.7, Tab **1** of Alberta's Authorities.

[84] *McMorran v Hockett*, 2016 ABQB 279 ("***McMorran***"), Tab **24** of Alberta's Authorities, at para. 65.

[85] *Andriuk v Merrill Lynch Canada Inc.*, 2013 ABQB 422 ("***Andriuk***"), Tab **25** of Alberta's Authorities, at para. 89; *Alberta v Altria Group Inc.*, 2015 ABQB 390 ("***Altria Group***"), Tab **26** of Alberta's Authorities, at para. 68.

40. When Altius Royalty purchased the royalty interest in 2014 through Genesee LP, it relied upon statements and representations made by the Defendants regarding the reliability and consistency of their environmental policies, including the former Regulations, and their safe investment climate.

41. In particular, the expectations that the Regulations would continue as enacted and that the Genesee Power Plant would generate electricity from coal until 2055 directly contributed to and encouraged Altius Royalty to purchase the royalty interest.

[112] Alberta issued a Request for Particulars requesting that, with respect to those paragraphs of the Amended Claim, the Plaintiffs specify:

- The content of each alleged statement or representation;
- When each alleged statement or representation was made;
- Who made each alleged statement or representation;
- To whom each alleged statement or representation was made, and
- If in person, where each alleged statement or representation was made.

[113] In response, the Plaintiffs particularized their claim as follows:

- "The particular representation relied on by Altius Royalty Corporation in acquiring the royalty interest **is found at paragraph 41** of its Amended Statement of Claim."
- "Additionally, Altius Royalty Corporation **understood** that Alberta…"

[114] The Plaintiffs' *understanding* and *expectations* are insufficient to ground a claim of misrepresentation in the absence of any particulars regarding the basis of that understanding or those expectations, i.e., what Alberta is alleged to have actually done to give rise to that understanding or those expectations.

[115] It is plain and obvious that an allegation of misrepresentation cannot succeed against Alberta and should be struck.

[116] Specifically, the allegations in paragraphs 40 and 41 of the Amended Claim and the particulars (or lack thereof) in the Reply to Request for Particulars, taken as a whole, fall short of the requirement of a pleading of misrepresentation under Rule 13.7.

(c) In any event, there is no merit to a claim of misrepresentation

[117] In the alternative, an allegation of misrepresentation has no merit and there is no genuine issue for trial.

[118] The Plaintiffs' complaint is with Alberta's policy decisions and, in particular, its change of environmental policies.

[119] In *Imperial Tobacco*, the SCC confirmed that government policy decisions are not justiciable and cannot give rise to tort liability:

> […] "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. [86]

[120]. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. This is the policy vs operational distinction.[87]

[121] In order to establish liability in misrepresentation, the Plaintiffs must establish that a special relationship existed between them and Alberta and that they were induced.

[122] In *Hercules Managements*, the SCC held that a special relationship would be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in

[86] *Imperial Tobacco*, Tab **4** of Alberta's Authorities, at para. 90.
[87] *Imperial Tobacco*, Tab **4** of Alberta's Authorities, at para. 90.

the circumstances of the case.[88] Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff because of a negligent misstatement.

[123] The SCC, in *Imperial Tobacco*, noted that a "complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the clamant and the government, and is not negated by the statute."[89]

[124] The Amended Claim does not allege a duty of care that arose explicitly or implicitly from the statutory scheme. Nor does the Amended Claim allege that a duty of care arose from interactions between the Plaintiffs and Alberta. It does not allege a duty of care at all.

[125] There is no evidence of anyone on behalf of Alberta specifically or intentionally making statements to the Plaintiffs. Any allegation of misrepresentation appears to be solely based on Alberta's prior policy decisions.

[126] This Court, in *Neufeld v Mountain View (County)*, dismissed a claim in negligent misrepresentation where the plaintiff allegedly relied on existing county policies and positive encouragements and representations of the County Planning Department in deciding to proceed with an investment in the county.[90]

[127] The Court held that the representations were not representations of an existing fact, but the County's vision for the future. Those plans and policies are subject to change or amendment from time to time.[91]

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[88] *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165 ("***Hercules Managements***"), Tab **27** of Alberta's Authorities, at para. 24.

[89] *Imperial Tobacco*, Tab **4** of Alberta's Authorities, at para. 43.

[90] *Neufeld v Mountain View (County)*, 2016 ABQB 676 ("***Neufeld***"), Tab **28** of Alberta's Authorities.

[91] *Neufeld*, Tab **28** of Alberta's Authorities, at paras. 142 and 149.

[128] It is also plainly evident from the Plaintiffs' admissions that there was no special relationship and that there was no inducement.

[129] Paragraphs 16 to 25 of the Lewis Affidavit describe Genesee LP acquiring the royalty interest. The Lewis Affidavit, however, provides no evidence of any statements or representations made by anyone on behalf of Alberta to any of the Plaintiffs.

[130] Rather, the Lewis Affidavit describes the following:

- Altius Minerals reviewed an information memorandum prepared by Sherritt International Corporation's ("Sherritt") financial advisor[92];
- Sherritt made representations to Altius Minerals through a May 2013 presentation regarding:[93]
    - The royalty interests being "situated in a country of low 'economic and political risk' which had by regulation 'prescribed' the lifespans for its coal-fired power plants"; and
    - The royalty payments being "based on tonnages of coal produced from the mine to fuel the Genesee Power Plant until the facility's decommissioning in 2055 by operation of the Regulations";
- Altius Minerals and Altius Royalty reviewed the impact of the Regulations on the royalty interest as part of its due diligence efforts;[94]
- Altius Minerals and Altius Royalty based their decision to acquire the royalty interest "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";[95] and

[92] Lewis Affidavit, at para. 16 and Exhibit "F".
[93] Lewis Affidavit, at paras. 17 and 18 and Exhibit "G".
[94] Lewis Affidavit at para. 19.
[95] Lewis Affidavit, at para. 19 and Exhibit "H.

- Altius Minerals came to view "the royalty interest at the Genesee Mine as the 'crown jewel' of the portfolio, due in large part to the mine's 'stability' and 'long life'.[96]

[131] The Plaintiffs have not established that Alberta ought reasonably to foresee that they would rely on its representations because it has not particularized, nor provided any evidence of, any alleged representations. The Lewis Affidavit provides no assistance in this regard, as it simply attaches bulletins, news releases, and webpages published by the previous government and disseminated to the public. This is a far cry from evidence necessary to establish a special relationship.

[132] Furthermore, Altius Minerals' public disclosure reveals that it:

- Knew its operations were subject to "extensive governmental regulations with respect to such matters as environmental protection…";[97]

- Recognized that "the enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements… could have an adverse effect on the Corporation";[98] and

- Acknowledged that the regulatory regime was "expected to cause existing power plants to close down as, in the current environment, meeting the new regulations will be challenging".[99]

[133] Any claim of misrepresentation should be summarily dismissed. There is no merit to the claim and no genuine issue for trial.

[96] Lewis Affidavit, at para. 20 and Exhibit "I".
[97] Alberta NTAF, at paras. 13 and 14; Reply to Alberta NTAF, at paras. 13 and 14.
[98] Alberta NTAF, at paras. 13 and 14; Reply to Alberta NTAF, at paras. 13 and 14.
[99] Alberta NTAF, at para. 8; Reply to Alberta NTAF, at para. 8.

6. "Undue Interference with Economic Relations" is not a recognized cause of action

[134] The Plaintiffs allege that Alberta's actions constitute "undue interference" with the economic relations of Genesee LP. Specifically, they allege that Alberta has paid Capital Power, the only user of the Coal, to cease generating coal-fired electricity by 2030.

[135] "Undue interference with economic relations" is not a recognized cause of action and the portions of the Amended Claim related to this allegation should be struck.

(a) Intentional Interference with economic relations is not properly pleaded

[136] If the Plaintiffs intended to allege "intentional interference with economic relations", it is still not properly pleaded and the allegation must be struck.

[137] To prove intentional interference with economic relations (or the tort of unlawful means), the Plaintiffs must establish:

- Interference with Genesee LP's economic interests by the use of "unlawful means" against a third party that is actionable by that third party, or would be actionable if the third party had suffered loss as a result;
- An intention by Alberta to cause economic harm to Genesee LP; and
- Resulting economic loss caused to Genesee LP.[100]

[138] A defendant's action is "unlawful" if it is something that would support a claim for civil action for damages by the third party (or would do so except for the fact that the third party did not suffer a loss).[101]

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[100] *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12 ("***A.I. Enterprises***"), Tab **29** of Alberta's Authorities, at paras. 23 and 76.

[101] *A.I. Enterprises*, Tab **29** of Alberta's Authorities, at para. 76.

[139] The Amended Claim does not particularize what alleged "unlawful" action by Alberta would support a claim for civil action for damages by Capital Power. Further, the Amended Claim does not particularize that Alberta specifically intended to harm Genesee LP.

[140] There is no reasonable prospect for success and the allegation should be struck out.

(b) There is no merit to a claim of intentional interference with economic relations

[141] In any event, there is no merit to an allegation of intentional interference with economic relations.

[142] The Lewis Affidavit describes Alberta's alleged actions to end coal power by 2030 at paragraphs 33 to 44.

[143] There is, however, no evidence of:

- Any unlawful and independently actionable wrong committed by Alberta against Capital Power;
- An intention on the part of Alberta to harm the Plaintiffs, either as an end in itself, or as a means to an end;
- Alberta's knowledge that Genesee LP had royalty interests that may be impacted by the coal phase-out either at the time the Climate Leadership Plan was announced or at the time of executing the Off-Coal Agreement; or
- Any loss suffered by Genesee LP that is anything more than merely incidental and an accepted consequence of legitimate market competition.

[144] The only evidence that is before the Court is that Alberta entered into the Off-Coal Agreement with Capital Power – a valid contract.[102] Entering into the Off-Coal

[102] Lewis Affidavit, Exhibit "Z".

Agreement with Capital Power is not unlawful conduct. It does not support a claim for civil action for damages by Capital Power.

[145] In *Neufeld*, this Court also dismissed the plaintiff's claim for damages for alleged intentional interference with economic relations because its claim was "based on alleged unlawful acts done by the Defendants directly to the Plaintiffs, and not acts committed against a third party."[103] Furthermore, there was no evidence of the defendants' intention to injure the plaintiffs.[104]

[146] This Court has similarly dismissed claims for intentional interference with economic relations where there was no evidence that the plaintiff was targeted "through the instrumentality of unlawful acts against a third party"[105] in:

- *MK Engineering Inc v Plecash*[106];
- *Seto v Wendy's Restaurants of Canada Inc.*[107]; and
- *Luan v ADP Canada Co.*[108].

[147] There is no merit to this claim and no genuine issue requiring trial.

PART IV: Conclusion and Relief Sought

[148] All of the Amended Claim should be struck, or alternatively, summarily dismissed as against Alberta.

[103] *Neufeld*, Tab **28** of Alberta's Authorities, at para. 167.
[104] *Neufeld*, Tab **28** of Alberta's Authorities, at para. 167.
[105] *A.I. Enterprises*, Tab **29** of Alberta's Authorities, at para. 78.
[106] *MK Engineering Inc v Plecash*, 2014 ABQB 483 ("***MK Engineering***"), Tab **30** of Alberta's Authorities, at paras. 63-67.
[107] *Seto v Wendy's Restaurants of Canada Inc.*, 2016 ABQB 493 ("**Seto**"), Tab **31** of Alberta's Authorities, at paras. 51-53.
[108] *Luan v ADP Canada Co.*, 2020 ABQB 387 ("***Luan***"), Tab **32** of Alberta's Authorities, at paras. 191-208.

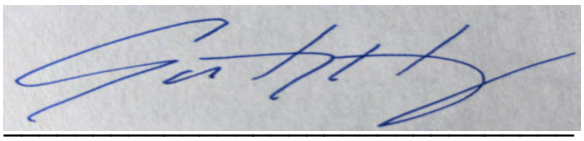
[149] Even with the most generous of reading, the allegations against Alberta are insufficiently pleaded. Furthermore, there is no merit to any of the allegations against Alberta and no genuine issue requiring trial.

[150] This is an appropriate case to determine on a summary basis.

[151] Alberta requests that this Honourable Court grant its application, with costs.

All of which is respectfully submitted this 30th day of October, 2020.

Alberta Justice and Solicitor General



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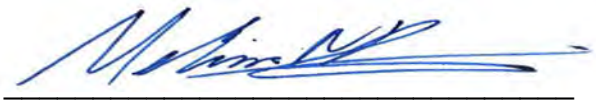

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