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JUDICIAL CENTRE	CALGARY
PLAINTFFS	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 ATTORNEY GENERAL OF CANADA IN RESPECT OF A SPECIAL CHAMBERS APPLICATION SCHEDULED FOR DECEMBER 8-11, 2020 IN MASTERS CHAMBERS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. In 2012, new federal regulations were published for the purpose of establishing a regime to reduce carbon dioxide emissions resulting from coal-fired generation of electricity based on a performance standard.

2. Approximately 1.5 years later, a sophisticated public company decided to bet heavily on the coal industry and acquired (through its subsidiaries) a significant royalty interest in certain coal that was and remains entirely dedicated to the generation of electricity in Alberta.

3. The company contends that it "expected" the regulations to remain static for the next four decades, thereby allowing it to receive a long-term royalty stream until 2055. However, the Government of Canada did not give any representations or statements to encourage this "expectation" and the public disclosure of the company reveals that it courted the risk of coal despite:

   a. knowing that its operations were subject to "extensive governmental regulations with respect to such matters as environmental protection…";

   b. recognizing 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"; and

   c. expecting that the regulations would "cause existing power plants to close down as, in the current environment, meeting the new regulations will be challenging".

4. In 2018, the regulations were amended so as to require the performance standard to be met no later than 2030.

5. In reaction to the amended regulations, not to mention a separate environmental initiative at the provincial level, the company (through its subsidiaries) commenced this Action alleging that the Governments of Canada and Alberta had "foiled" its "legitimate expectations" of a static regulatory regime, "unduly" interfered with its economic relations and "taken" (or expropriated) its property. Damages in the approximate amount of $190 million are claimed.

6. The Action is premature, improperly pled, fails to disclose recognized causes of action and warrants dismissal on account of clear admissions given by the company and its subsidiaries. For these reasons, the Attorney General of Canada respectfully seeks an Order striking out the Statement of Claim and summarily dismissing the Action, together with costs.

II. FACTS

A. The Mine and Coal:

7. The Genesee mine is a coal mine located in Central Alberta (the "Mine").[1]

8. Capital Power LP ("Capital Power") and Prairie Mines Royalty ULC ("Prairie Mines") operate the Mine through a joint venture[2] and they each hold freehold and leasehold interests in certain of the coal located within the Mine (the "Coal").[3]

B. Dedication of Coal:

9. The Coal has historically been dedicated to the Genesee Power Plant (the "Plant"), a coal-fired electricity generating station comprised of three generation units that were commissioned in 1989, 1994 and 2005 (collectively, the "Units"). The Plant is operated by Capital Power and generates electricity for the City of Edmonton and elsewhere in Alberta.[4]

10. The dedication of the Coal to the Plant is the subject of a Dedication and Unitization Agreement dated August 7, 1980, as amended. Pursuant to the terms of the Dedication and Unitization Agreement, the predecessors in interest to Capital Power and Prairie Mines dedicated their respective interests in the Coal to the Plant.[5]

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[1] Amended Statement of Claim ("ASOC"), paras. 12(a) & 13. Affidavit of Ben Lewis, sworn September 28, 2020 ("Lewis Affidavit"), para. 8.
[2] ASOC, para. 14. Plaintiffs' Response to Request for Particulars, filed February 25, 2019 ("Response"), para. 3(a). Lewis Affidavit, para. 9.
[3] Response, paras. 2(a) & 3(b)-(c).
[4] ASOC, paras. 13, 16 & 18-19.
[5] ASOC, para. 16.

C. SOR/2012-167:

11. In February 2012, the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*[6] ("SOR/2012-167") were published in the *Canada Gazette*, Part II, for the purpose of establishing a regime to reduce carbon dioxide emissions resulting from coal-fired generation of electricity.[7]

12. Subsection 3(1) of SOR/2012-167 imposes the following emissions intensity limit as of July 1, 2015:

> **Limit – 420t/GWh**
>
> 3(1) A responsible person for a new unit or an old unit must not, on average, emit with an intensity of more than 420 tonnes CO_2 emissions from the combustion of fossil fuels in the unit for each GWh of electricity produced by the unit during a calendar year.

(the "Limit").

13. The Limit in Subsection 3(1) applies only to "new units" and "old units" (as those terms are defined). Units that do not fit within either definition are exempt from the Limit until they reach the end of their "useful life", which term is defined in Section 2 of SOR/2012-167 as follows:

> **Useful life**, in respect of a unit, means the period that begins on the commissioning date and ends on
>
> **(a)** for a unit other than a unit referred to in paragraph (a) of the definition **commissioning date**,
>
> (iii) in any other case, December 31 of the calendar year that is 50 years after the commissioning date.

14. The Units comprised within the Plant are neither "old units" nor "new units". Accordingly, by operation of SOR/2012-167, the Units were not scheduled to reach the end of their "useful life" until 2039, 2044 and 2055, respectively.[8]

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[6] SOR/2012-167 as it appeared between 30 August 2012 and 29 November 2018 **[Tab 1]**.
[7] Statement of Defence of the Attorney General of Canada ("Canada SOD"), para. 5.
[8] ASOC, para. 21.

D. Arrangement Agreement:

15. On December 24, 2013, more than 1.5 years after SOR/2012-167 were published, Altius Minerals Corporation[9] ("Altius Minerals") and its wholly owned subsidiary, Altius Royalty Corporation ("Altius Royalty"), entered into an Arrangement Agreement with various counterparties, including a predecessor in interest to Prairie Mines.[10]

16. Pursuant to the Arrangement Agreement, the following transactions (among others) closed on or about April 28, 2014 (the "Effective Date"):

    a. Genesee Royalty Limited Partnership ("Genesee LP") acquired a royalty interest in the Coal belonging to Prairie Mines (the "Royalty Interest"); and

    b. Altius Royalty purchased the general partner of Genesee LP, Genesee Royalty GP Inc. ("Genesee GP"), and the limited partners of Genesee LP.[11]

17. The Arrangement Agreement did not effect a transfer of title to the Coal, which remained registered to Prairie Mines.[12]

18. Altius Royalty, Genesee GP and Genesee LP (collectively, the "Altius Entities") assert in this Action that they "expected" at the time of the Arrangement Agreement that SOR/2012-167 would "continue as enacted" for the next four decades, until 2055.[13] However, they can point to no statements or representations from Canada and instead rely on generalities and innuendo to assert an apparent "understanding" that Canada "had a settled regulatory framework for coal-fired electrical generation".[14] Moreover, as set out in greater detail below, Altius Minerals - the parent company of the Altius Entities - palpably appreciated the risk of future regulatory change and specifically expected that SOR/2012-167 would cause existing power plants to "close down".

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[9] Altius Minerals is a public company which holds royalties in mines across Canada and in Brazil producing copper, zinc, nickel, cobalt, iron ore, potash and thermal (electrical) and metallurgical coal: ASOC, paras. 9-10.
[10] ASOC, para. 12. Response, para. 2(d).
[11] ASOC, paras. 6-9 & 12. Response, para. 2(a). Lewis Affidavit, para. 22.
[12] Response, paras. 2(a) & 3(c).
[13] ASOC, paras. 40-41. Lewis Affidavit, para. 19
[14] Response, para. 1. The Lewis Affidavit identifies a limited number of statements and representations from third parties, such as financial advisors and Sherritt, but does not describe or append anything from Canada.

E. Related Agreements:

19. In order to give effect to the Arrangement Agreement, the Altius Entities entered into a number of new or amended agreements on or about the Effective Date, including a Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014.

20. The Second Amended and Restated Dedication and Unitization Agreement confirms that Genesee LP's Royalty Interest in the Coal is dedicated for the purpose of fuelling the Plant.[15] It also contains the following term and termination clauses:

> **7.1 Term**
>
> … The Second Amended and Restated Dedication and Unitization Agreement shall be effective immediately after the closing of the [Arrangement Agreement] 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**
>
> 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.[16]

F. Knowledge of SOR/2012-167 and Recognition of Risk:

21. The Altius Entities and their parent company, Altius Minerals, were well aware of SOR/2012-167 at or about the time of the Arrangement Agreement and they anticipated the "risk" of future regulatory change affecting the company's operations.

2014 Equity Offering:

22. On April 28, 2014, the same day that the Arrangement Agreement took effect, Altius Minerals filed a preliminary short form prospectus (the "Prospectus").

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[15] ASOC, para. 14. Plaintiffs' Reply to Notice to Admit Facts ("Reply to NA"), para. 15. Lewis Affidavit, para. 24 and Ex. L.

[16] ASOC, para. 16. Reply to NA, para. 18. Lewis Affidavit, para. 24 and Ex. L.

23. The Prospectus contains the following statement at page 30:

> The Canadian federal government is not committed to legally binding targets for the reduction of greenhouse gas emissions ("GHG"), however, it has voluntarily proposed to reduce Canada's GHG by 17% below 2005 levels by 2020 as part of the Copenhagen Accord. Part of this reduction will be achieved through the implementation of regulations that would require significant reductions of GHG emissions by certain of Canada's largest industrial sectors. The regulations that the federal government has issued for the electricity sector will require, among other things, that new and certain refurbished coal-fired plants, commissioned after July 2015, achieve an annual emissions intensity performance standard of 420 tonnes of CO2 per GWh. The result of the regulations is expected to cause existing power plants to close down as, in the current environment, meeting the new regulations will be challenging.
>
> [emphasis][17]

2014 Financial Reporting:

24. On July 2, 2014, Altius Minerals issued its financial reporting for the year ended April 30, 2014, including a Management's Discussion and Analysis (the "MD&A") and an Annual Information Form (the "AIF").[18]

25. The MD&A contains the following statements at pages 22 and 25, which anticipate the investment risk associated with future changes in environmental legislation:

> **Risk Factors and Key Success Factors**
>
> An investment in securities of the Corporation involves a significant degree of risk that should be considered prior to making an investment decision. In addition to discussions of key success factors and business issues elsewhere in this MD&A, the investor should consider the following risk factors:
>
> …
>
> *Government Regulations*
>
> The Corporation's operations are subject to extensive governmental regulations with respect to such matters as environmental protection, health, safety and labour; mining law reform; restrictions on production or export, price controls and tax increases; aboriginal land claims; and expropriation of property in the jurisdictions in which it operates. Compliance with these and other laws and regulations may require the Corporation to make significant capital outlays which may slow its growth by diverting its financial resources. 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

[17] Reply to NA, para. 8.
[18] Reply to NA, para. 11.

> Corporation. The Corporation cannot give assurances that it will be able to adapt to these regulatory developments on a timely or cost-effective basis. Violations of these regulations and regulatory requirements could lead to substantial fines, penalties or other sanctions.[19]
>
> [emphasis]

26. The AIF contains the following similar statements at pages 10 and 13, again recognizing the risk associated with future changes in environmental legislation:

> **6.2 Risk Factors**
>
> The following is a summary of significant business risks as they pertain to the outlook and conditions currently known to management which could have a material impact on the financial condition and results of the operations of the Corporation and its investments and royalty interests. The risks described are not the only ones faced by the Corporation and any risks in combination or individually could have a material adverse effect on the Corporation's financial condition and results of operations.
>
> …
>
> *Government Regulations*
>
> The Corporation's operations are subject to extensive governmental regulations with respect to such matters as environmental protection, health, safety and labour; mining law reform; restrictions on production or export, price controls and tax increases; aboriginal land claims; and expropriation of property in the jurisdictions in which it operates. Compliance with these and other laws and regulations may require the Corporation to make significant capital outlays which may slow its growth by diverting its financial resources. 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. The Corporation cannot give assurances that it will be able to adapt to these regulatory developments on a timely or cost-effective basis. Violations of these regulations and regulatory requirements could lead to substantial fines, penalties or other sanctions.[20]
>
> [emphasis]

G. Alberta Off-Coal Agreement:

27. On November 24, 2016, the Government of Alberta ("Alberta") entered into an Off-Coal Agreement with Capital Power to phase out coal-fired emissions, including emissions from the

[19] Reply to NA, para. 13.
[20] Reply to NA, para. 14.

Plant, by December 31, 2030 (the "OC Agreement").[21] The OC Agreement included an obligation to make certain transition payments to Capital Power.[22]

28. In direct response to the OC Agreement, Altius Minerals recorded an impairment charge of $72,001,000.00 for the fiscal quarter ended January 31, 2017.[23]

H. Amendments to SOR/2012-167:

29. On December 17, 2016, the Government of Canada ("Canada") published a notice of intent in the *Canada Gazette*, Part I, that communicated its intention to amend SOR/2012-167 so as to require all coal-fired electricity generation units to meet the Limit no later than 2030. The Limit did not change.[24]

30. The amended *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*[25] ("SOR/2018-263") came into force on November 30, 2018[26] and modified the definition of "useful life" to provide as follows:

> **Useful life**, in respect of a unit, means the period that begins on the commissioning date and ends on
>
> **(a)** for a unit other than a unit referred to in paragraph (a) of the definition **commissioning date**,
>
> (ii) in the case of a unit whose commissioning date is after 1974, the earlier of
>
> (A) December 31 of the calendar year that is 50 years after the commissioning date, and
> (B) December 31, 2029…

31. In practical terms, SOR/2018-263 have the effect of requiring the Units comprised within the Plant to meet the Limit as of 2030. The Altius Entities speculate that this will have the effect of phasing out the Units as of 2030.[27]

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[21] Statement of Defence of Her Majesty the Queen in Right of Alberta ("Alberta SOD"), para. 4.
[22] ASOC, paras. 31-32.
[23] Reply to NA, para. 19-22. The impairment charge of $72,001,000.00 contrasts significantly with the amount of damages claimed in this Action (~$190 million).
[24] ASOC, para. 36. Canada SOD, para. 8.
[25] SOR/2018-263 **[Tab 2]**
[26] ASOC, para. 39. Canada SOD, para. 9.
[27] ASOC, para. 38.

I. Litigation:

32. The Altius Entities commenced this Action on November 23, 2018 and filed an Amended Statement of Claim on December 19, 2018.

33. The Amended Statement of Claim names Alberta and Canada as Defendants, jointly and severally, and asserts three causes of action against them:

a. "Foiling" of "legitimate expectations";

b. "Undue interference with economic relations"; and

c. "Taking" (expropriation) of a property interest.

34. Alberta and Canada have both filed Statements of Defence that comprehensively deny the allegations against them.

III. ISSUE

35. This Application seeks a determination of whether the claims asserted against Canada in the Amended Statement of Claim should be struck out or summarily dismissed.

IV. ARGUMENT

A. The Principle of Proportionality

36. The Alberta *Rules of Court*[28] ("*Rules of Court*") gravitate around the principle of proportionality. Rule 1.2 states:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

37. The Supreme Court of Canada has interpreted the principle of proportionality as a bedrock concept that permeates the litigation process and informs the Court's approach to dispute resolution. In *Hryniuk* v *Mauldin*[29] [*Hryniuk*], the Court unanimously stated as follows:

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[28] Alta Reg 124/2010 **[Tab 3]**.
[29] 2014 SCC 7, 2014 CSC 7 **[Tab 4]**.

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expenses and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[30]

38. Guided by the principle of proportionality, as set out in Rule 1.2 and interpreted in *Hyrniuk*, there is a growing recognition in Alberta that unmeritorious claims do not deserve a full trial.[31]

B. Proportionality Tools

39. The *Rules of Court* provide two distinct tools for dealing with unmeritorious claims at an early stage: striking out and summary disposition.

1. Striking Out

40. Rule 3.68 of the *Rules of Court* allows the Court to strike out all or any part of a claim. It states:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out…
>
> (2) The conditions for the order are one or more of the following:
>
> …
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim …

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[30] *Hryniuk* **[Tab 4]**, paras. 27-28.

[31] For example, in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, [2019] 6 WWR 567 [*Weir-Jones*] **[Tab 5]**, the majority of the Court of Appeal of Alberta stated that there is no right to take an unmeritorious claim to trial (para. 42). Similarly, in *Riccioni* v *Law Society of Alberta*, 2017 ABQB 261, [2017] AWLD 2099 **[Tab 6]**, the Court held that "[n]ot every claim filed with the Court of Queen's bench deserves a trial" (para. 150).

41. In *R.* v *Imperial Tobacco Canada Ltd.*[32] [*Imperial Tobacco*], the Supreme Court of Canada explained the rationale for striking out pleadings. It wrote:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be – on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.[33]

42. The basic test for striking out pleadings is whether the pleadings disclose a "reasonable cause of action" or there is "reasonable prospect of success".[34]

43. In determining whether a pleading discloses a "reasonable cause of action" or has a "reasonable prospect of success", the Court may have regard to many factors. In *O'Connor Associates Environmental Inc. v MEC OP LLC*[35] [*O'Connor*], the Court of Appeal of Alberta noted as follows:

> … many factors must be examined. The clarity of the factual pleadings is important. The existence of case law discussing the same or similar causes of action is relevant. As noted in *Imperial Tobacco*, the courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success…[36]

44. The Court's analysis pursuant to Rule 3.68 will be guided by the following basic parameters:

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[32] 2011 SCC 42, [2011] 2 SCR 45 **[Tab 7]**.
[33] *Imperial Tobacco* **[Tab 7]** at paras. 19-20.
[34] *Imperial Tobacco* **[Tab 7]** at para. 17. *Al-Ghamdi* v *Alberta*, 2017 ABQB 684, [2018] AWLD 499, aff'd 2020 ABCA 81 [*Al-Ghamdi*] **[Tab 8]** at para. 104.
[35] 2014 ABCA 140, [2014] AJ No 441 **[Tab 9]**.
[36] *O'Connor* **[Tab 9]** at para. 16.

a. The facts pleaded are assumed to be true, unless they are manifestly incapable of being proven;

b. No evidence is admissible on the application;

c. The claimant must clearly plead the facts upon which it relies in making its claim, and cannot rely on the possibility that new facts may turn up as the case progresses;

d. The claimant need not prove the facts pleaded at the time of the motion. However:

> … plead them [the claimant] must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.[37]

2. Summary Disposition

45. Part 7, Division 2 of the *Rules of Court* provides for summary disposition of a claim, or part of it. Summary disposition may be granted on the basis of "admissions of fact … made in a pleading or otherwise"[38] (Rule 7.2) or when the evidence positively establishes that there is "no merit to a claim or part of it" (Rule 7.3).

46. The "substantive test" applied on applications for summary disposition under Rules 7.2 and 7.3 is the same: *Craik* v *Alberta Treasury Branches*.[39]

47. Recently, in *Weir-Jones*, the majority of the Court of Appeal of Alberta articulated a four-part test for summary disposition in the context of Rule 7.3. It wrote:

> The proper approach to summary dispositions, based on the [*Hryniuk*] test, should follow the core principles relating to summary dispositions, the standard of proof, the record and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and outcome must be just, appropriate, and reasonable. The key considerations are:

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[37] *Imperial Tobacco* **[Tab 7]** at para. 22. *Al-Ghamdi* **[Tab 8]** at para. 107.

[38] "Admissions" are "concessions or voluntary acknowledgments made by a party of the existence of certain facts. More accurately regarded, they are statements by a party, or some one identified with him in his legal interest, of the existence of a fact which is relevant to the cause of his adversary…": *Admiral Canada Inc.* v *Freekick Ltd.*, 2006 ABQB 451, [2006] AJ No 1651 **[Tab 10]** at para. 14.

[39] 2012 ABQB 373, [2012] AWLD 4726 **[Tab 11]** at para. 4.

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> … the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.[40]

48. The majority in *Weir-Jones* concluded: summary disposition "should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be."[41]

C. Application of Proportionality Tools

49. This Action suffers from numerous deficiencies that collectively compromise its merits. The claim is premature. The Amended Statement of Claim is improperly pled and advances causes of action that do not exist, whether at all or in this particular context. Further, and in any event, the Altius Entities have given admissions that undermine some of their claims.

50. Against the background of these deficiencies, the Attorney General of Canada respectfully invites this Honourable Court to invoke the principle of proportionality and strike out the Amended Statement of Claim or summarily dismiss the Action in its entirety. Relief of this nature

[40] *Weir-Jones* **[Tab 5]**, para. 47.
[41] *Weir-Jones* **[Tab 5]**, para. 48.

would provide a fair, just and proportional resolution to this dispute and avoid unnecessary litigation in respect of a hopeless claim.

1. "Legitimate Expectations"

Amended Statement of Claim:

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.

42. However, the subsequent decision of the Defendants to phase out traditional coal-fired electrical generation by 2030 caused the legitimate expectations of Altius Royalty to be foiled.

51. The claim for "legitimate expectations" is not a recognized cause of action and should be struck out. Furthermore, the claim is defeated by admissions given by the Altius Entities and should be summarily dismissed.

a. No Cause of Action

52. Canadian law does not recognize a cause of action that is grounded in "legitimate expectations". In *Anglehart* v *Canada*[42] [*Anglehart*], Gagné J (as she then was) cited earlier Supreme Court of Canada authority and other relevant jurisprudence for the following proposition:

> [E]xpectations, however legitimate they may be, cannot generate or create substantive rights or form the basis for an action in damages (*Agraina* v. *Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 97; *Canada (Attorney General)* v. *Mavi*, 2011 SCC 30, at paragraph 68; *Canada* v. *South Yukon Forest Corporation*, 2012 FCA 165, at paragraphs 78-9).[43]

53. Two cases effectively illustrate the hopelessness of a civil claim based on "legitimate expectations".

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[42] 2016 FC 1159, 272 ACWS (3d) 176, aff'd 2018 FCA 115, leave to appeal to SCC refused: 2018 CAF 115 **[Tab 12]**.
[43] *Anglehart* **[Tab 12]** at para. 125.

54. In *Ontario Black Bear/Ontario Sportsmen & Resources Users Assn.* v *Ontario*[44] [*Black Bear*], the Government of Ontario amended a regulation in 1999 that abolished the spring bear hunt in Ontario. The amended regulation was at odds with statements given by the Minister one year earlier in apparent favour of the spring bear hunt and impacted tourist camp operators, which were licensed to provide accommodation, outfitting and guiding services to bear hunters on Crown lands.

55. The Plaintiff Ontario Black Bear/Ontario Sportsmen & Resources Users Association was a trade association representing tourist camp operators in Ontario. It commenced an action against the Crown, the Minister and others alleging, *inter alia*, that its members had detrimentally relied upon the Minister's representations and that the Government of Ontario was estopped from amending the regulations in the manner that it did.

56. Cameron J of the Ontario Superior Court of Justice struck out the claim for detrimental reliance with leave to amend with "sufficient facts to constitute a cause of action which has some prospect of success".[45] In granting this relief, Cameron J offered the following instructive comments with respect to "legitimate expectations":

> It is clear from *Gustavson Drilling, Cosyns, A & L Investments and Reclamation Systems*, cited above, as enunciated in *Gustavson Drilling* at pp. 282-283:
>
> > No one has a vested right of continuance of the law as it stood in the past. In tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The doctrine of legitimate expectations does not apply to a body exercising purely legislative functions including a purely ministerial decision based on broad grounds of public policy. A minister cannot fetter his or her own freedom, or that of Parliament or the Legislative Assembly, to change laws.
>
> A government and a legislature must be left free to change policy to reflect changing social needs; to permit otherwise in the name of legitimate expectations would paralyze parliament, the legislature and ministerial powers to respond to changing social circumstances…[46]

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[44] [2000] OJ No 263, 2000 CanLii 22815 (ONSC) **[Tab 13]**.
[45] *Black Bear* **[Tab 13]** at para. 75.
[46] *Black Bear* **[Tab 13]** at paras. 58-59.

57. In *Aviation Portneuf Ltd.* v *Canada (Attorney General)*[47] [*Aviation*], the Plaintiffs operated a floatplane business and offered sightseeing flights from Lac Saint-Augustin, where they were based, to Québec City. In 1998, the *Canadian Aviation Regulations*, SOR/96-433 were amended so as to eliminate sightseeing flights to and from Lac Saint-Augustin completely. The Plaintiffs proceeded to commence an action asserting four distinct causes of action, including a claim of breach of contract based on "promises, guarantees and commitments" allegedly made by the Government of Canada with respect to the continued viability of their sightseeing flight business.

58. Blais J found that there was no basis for a claim grounded in breach of contract and suggested that the Plaintiffs were "actually arguing … the administrative doctrine of 'legitimate or reasonable expectations'". He then proceeded to consider the doctrine of "legitimate expectations", applying focus on the decision in *Black Bear* and the following other cases:

> In *Apotex* v *Canada (Attorney General)*, [2000] FC 264 (CA), Décary, Sexton and Evans JJ.A. stated:
>
> > [para 102] Indeed, in *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, at pages 557-560, it was specifically said that the doctrine of legitimate expectations has no application to the exercise of legislative powers. In addition, in *Old St. Boniface Residents Assn. Inc.* v *Winnipeg (City)*, [1990] 3 SCR 1170, at page 1204, the Court rejected a challenge to the validity of municipal bylaws that was based on an allegation that they were passed in breach of a legitimate expectation of prior consultation.
>
> Furthermore, in *Edmonton Telephones Corp.* v *Stephenson*, [1994] A.J. No. 720 (B.R. Alta.), Ritter J said:
>
> > [para 85] … Moreover, the Rules governing procedural fairness do not apply to a body exercising purely legislative functions … Meggary, J said so in *Bates* v *Lord Hailsham of St. Marylebone*, [1972) 1 WLR 1373 and this was approved by Estey J for the Court in *Inuit Tapirisat of Canada* v *Canada (AG)* supra, at 758 [SCR]. In *Martineau* v *Matsqui Institution*, [1980] 1 SCR 602…
>
> Further at p.34 Sopinka J. states:
>
> > Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament … The business of government would be stalled while the application of the doctrine and its effect were argued out in the courts. Furthermore it is a

[47] 2001 FCT 1299, 115 ACWS (3d) 64 **[Tab 14]**.

> fundamental of our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy.[48]

59. Blais J struck out the claim relating to contractual liability, holding (in part) that the "doctrine of legitimate expectations does not apply to the legislative function."[49]

60. *Black Bear* and *Aviation* are demonstrative of the result that should follow in the instant case. The claim for "legitimate expectations" is not premised on a recognized cause of action and has no reasonable prospect of success. The claim should be struck out.

b. Admissions

61. The Altius Entities have given admissions that undermine their generalized "expectation" that SOR/2012-167 would remain static, and would not be amended, for the next forty years, until 2055.

62. The following admissions have been given:

a. The Altius Entities were aware of SOR/2012-167 when they placed their royalty investment in 2014. Far from believing that SOR/2012-167 would allow them a long-term royalty stream until 2055, the Altius Entities actually expected the regulations would "cause existing power plants to close down as, in the current environment, meeting the new regulations will be challenging".[50] While it turned out that SOR/2012-167 allowed a longer time horizon than the Altius Entities expected, that is not how the regulations were perceived at the relevant time;

b. The Altius Entities recognized that the regulatory regime applicable to their operations was not fixed in nature and was at risk of future change. Indeed, Altius Minerals represented to its own shareholders that it faced the following material risks:

i. the enactment of new adverse regulations or regulatory requirements; or

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[48] *Aviation* **[Tab 14]** at paras. 25-26.
[49] *Aviation* **[Tab 14]** at para. 27.
[50] Reply to NA, para. 8.

ii. more stringent enforcement of current regulations or regulatory requirements;[51]

c. Canada did not give any clear "statements and representations" regarding "the reliability and consistency of their environmental policies", as alleged. When asked to provide particulars of the said "statements and representations", the Altius Entities could not offer a single example and instead suggested in generic terms that "[Canada] maintained and held out its jurisdiction as having consistent environmental policies with changes in the governing parties".[52] Not only is this claim unsupported, it is patently absurd to suggest that the governing party in 2012 would or even could fetter its own legislative discretion for the next four decades, not to mention the legislative discretion of future governing parties.

63. In summary, instead of believing that SOR/2012-167 would remain static in ensuing decades, the Altius Entities actually perceived the regulatory regime as harmful to their royalty investment and foresaw the potential for future adverse regulatory change.

64. The admissions given by the Altius Entities combine to compromise the claim for "legitimate expectations" and provide the basis for summary dismissal pursuant to Rule 7.2. There is simply no merit to the claim and the Court can confidently grant summary dismissal on the state of the existing record, which is clear and certain.

2. Undue Interference with Economic Relations

Amended Statement of Claim:

46. The actions of the Defendants constitute undue interference with the economic relations of Genesee LP. More specifically:

(a) the Government of Alberta has in real and practical terms paid Capital Power, the only user of the coal in which Genesee LP has its royalty interest, to cease generating coal-fired electricity by 2030; and

(b) the Government of Canada has in real and practical terms changed the regulatory framework in a way that renders the Plaintiffs' property valueless.

[51] Reply to NA, paras. 13 & 14.
[52] Response, para. 1(a).

65. The cause of action asserted by the Altius Entities - *undue* interference with economic relations - is not recognized under Canadian law.[53] Paragraph 46 of the Amended Statement of Claim should therefore be struck out.

66. If the Altius Entities intended to claim for *intentional* interference with economic relations, which is a recognized cause of action in Canada, that claim should also be struck out or summarily dismissed for two reasons. First, the Amended Statement of Claim fails to plead the required elements of the tort. Second, there was no "unlawful act".

a. Failure to Plead Required Elements of Tort

67. In *A.I. Enterprises Ltd.* v *Bram Enterprises Ltd.*[54] [*Bram*], the Supreme Court of Canada explained the tort of intentional interference with economic relations in the following manner:

> The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party).[55]

68. Alberta case authority confirms that the elements of the tort must be "specifically pled"[56] in order to sustain a claim for intentional interference with economic relations, failing which the claim will be struck out or summarily dismissed.

69. For example, in *MK Engineering Inc.* v *Plecash*[57] [*MK*], the Statement of Claim alleged a two-party situation where the Defendant intentionally committed an unlawful act against the Plaintiff. Manderscheid J summarily dismissed the claim on the basis that it did not conform with the pleading requirements for intentional interference with economic relations. He wrote:

> In this case, there is no suggestion, in the statement of claim, the reply to request for particulars, the evidence before me or MK's arguments, that the applicants, or either

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[53] The Attorney General of Canada has been unable to locate any case authority in support of a cause of action based in *undue* interference with economic relations.
[54] 2014 SCC 12, [2014] 1 SCR 177 **[Tab 15]**.
[55] *Bram* **[Tab 15]** at para. 23.
[56] *Seto* v *Wendy's Restaurants of Canada Inc.*, 2016 ABQB 493, [2016] AWLD 3967 **[Tab 16]** at para. 52.
[57] 2014 ABQB 483, [2014] AWLD 4732, aff'd 2015 ABCA 311 **[Tab 17]**.

> of them, targeted MK "through the instrumentality of unlawful acts against a third party"… The alleged tortious conduct is against MK, not a third party. As the unlawful means tort is only "available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff", it is unavailable in these circumstances".[58]

70. Strekaf J (as she then was) reached a similar conclusion in *JEC Enterprises Inc. v Calgary (City)*[59] [*JEC*]. In that case, the Plaintiff alleged that the City of Calgary intentionally interfered with its economic interests by "showing inattention and by illegal or unlawful means in its dealing with the bylaws and the special development agreements and through various reports and meetings."[60] Citing *Bram*, Strekaf J struck out the claim for failing to plead the required elements of the tort:

> There is no reasonable prospect of success as to this aspect of JEC's claim as there is no third party against whom JEC is alleging that the City committed an unlawful act in order to harm JEC. This aspect of the claim, and in particular paragraphs 82-83 are struck out pursuant to Rule 3.68 as disclosing no reasonable claim.[61]

71. Much like the defective pleadings that were summarily dismissed and struck out in *MK* and *JEC*, the Amended Statement of Claim in this Action fails to plead all the elements of the tort claimed. Three deficiencies are particularly glaring in this regard:

a. The claim is premised on a two-party relationship between the Altius Entities and Canada, not a three-party relationship;

b. There is no suggestion in the Amended Statement of Claim that Canada committed any "unlawful act", much less against any third party; and

c. There is no allegation that Canada acted "intentionally" in an effort to harm the economic interests of the Altius Entities.

72. In light of the foregoing deficiencies in the pleadings, the Amended Statement of Claim fails to disclose a cause of action, has no reasonable prospect of success and should be struck out pursuant to Rule 3.68.

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[58] *MK* **[Tab 17]** at para. 66.
[59] 2015 ABQB 555, [2015] AWLD 3746 **[Tab 18]**.
[60] *JEC* **[Tab 18]** at para. 63.
[61] *JEC* **[Tab 18]** at para. 67.

No Unlawful Act

73. The commission of an "unlawful act" against a third party is a central requirement of the tort of intentional interference with economic relations.

74. In *Bram*, the Supreme Court of Canada narrowly construed the "unlawful act" requirement. It wrote:

> … the trend of authority is towards a narrow definition of "unlawful means" … [62]
>
> I conclude that in order for conduct to constitute "unlawful means" for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.[63]

75. Two cases have decided that legislative enactments or amendments do not satisfy the requirement for an "unlawful act".

76. In *Filson* v *Canada (AG)*[64] [*Filson*], the Appellant commenced a class action arising out of the passage of Bill C-18, An Act to Reorganize the Canadian Wheat Board. The action did not challenge the *vires* of Bill C-18, which had already been upheld in a different proceeding, but instead asserted various causes of action against the Crown, including intentional interference with economic relations, and claimed damages.

77. The Court in *Filson* struck out the claim for intentional interference with economic relations on the basis that the passage of legislation was not, by itself, an "unlawful act" within the meaning of *Bram*. Ryan-Froslie JA wrote:

> … as a matter of law … Mr. Filson could not prove an unlawful action by the Respondents which resulted in economic loss to the plaintiffs. The passage of Bill C-18 was not unlawful … and, thus, an essential element of the tort could not be established.[65]

78. *Black Bear* is also instructive. In that case, the Court struck out claims of intentional interference with economic relations against the Crown for several reasons, including the fact that there was no underlying cause of action for change of law. Cameron J wrote (in part):

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[62] *Bram* **[Tab 15]** at para. 74.
[63] *Bram* **[Tab 15]** at para. 76.
[64] 2015 SKCA 80, 116 LCR 1 **[Tab 19]**.
[65] *Filson* **[Tab 19]** at para. 55.

> The law is clear that no one has a vested right in the continuance of a law or a cause of action against the government or the Crown based upon the passing of a valid statute or regulation which deprives the plaintiff of a benefit he or she had before the change in the law and which does not constitute an expropriation by government …[66]
>
> It is fundamental to a liberal democracy that the government must be free to change its policy and change legislation to meet changing societal needs…[67]

79. Based on the authority of *Filson* and *Black Bear*, SOR/2018-263 are not an "unlawful act" and do not satisfy the test for intentional interference with economic relations. It follows that the Amended Statement of Claim does not disclose a cause of action for intentional interference with economic relations and should be struck out.

3. *De Facto* Expropriation

Amended Statement of Claim:

43. The Defendants' actions as aforesaid have resulted in a grave loss of value of Genesee LP's interests and benefits to themselves.

44. 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.

45. 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.

80. *De facto* expropriation is an "exacting"[68] cause of action that arises when the state takes for itself the full bundle of rights associated with private property ownership. Expropriation of this nature is very rare[69] and does not occur under most exercises of regulatory authority, which merely regulate and do not take.[70]

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[66] *Black Bear* **[Tab 13]** at para. 38.
[67] *Black Bear* **[Tab 13]** at para. 39.
[68] *Mariner Real Estate Ltd.* v *Nova Scotia (Attorney General)*, 1999 NSCA 98, [1999] NSJ No 283 [*Mariner*] **[Tab 20]** at paras. 47 & 50.
[69] *Mariner* **[Tab 20]** at paras. 37-38.
[70] In *Quality Plus Tickets inc.* c *Québec (Procureur general*), 2013 QCCS 3780, 245 ACWS (3d) 324 [*Quality Plus*] **[Tab 21]**, Payette J explained:

> The Supreme Court distinguishes [the situation of a recovery by the Crown for itself] from those in which a government appropriates property or the use of a property through a regulatory prohibition… (para. 64)

81. In *Canadian Pacific Railway Co.* v *Vancouver (City)*[71] [*CPR*], the Supreme Court of Canada identified two strict requirements for *de facto* expropriation:

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

b. Removal of all reasonable uses of the property.[72]

82. The claim for *de facto* expropriation advanced by the Altius Entities is premature as no expropriating event has occurred. Further, and in any event, the claim does not satisfy either of the requirements identified in *CPR* and instead seeks compensation in respect of regulations that do not take anything for the state. For these reasons, the claim is devoid of merit and should be struck out or, in the alternative, summarily dismissed.

a. Claim is Premature

83. The claim for *de facto* expropriation is premised on a set of facts that have not yet occurred, but could occur in the future. The claim is therefore premature and cannot proceed at this time; it should be struck out.

84. The essential elements of *de facto* expropriation require that an act of expropriation must have already occurred. In *Mariner*, the Court of Appeal of Nova Scotia confirmed that in determining whether *de facto* expropriation has resulted from a regulatory regime, 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" [emphasis in original].[73] Expropriation cannot be hypothetical or speculative, and a claimant cannot rely on "what evidence in the future might or might not show."[74]

85. Similar logic applies in the instant case. The Amended Statement of Claim alleges that the Altius Entities have suffered a taking of their property as a result of the enactment of SOR/2018-263. Even if one were to accept that the effect of SOR/2018-263 was to deprive the Altius Entities of

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[71] 2006 SCC 5, [2006] 1 SCR 227 **[Tab 22]**.
[72] *CPR* **[Tab 22]** at para. 30.
[73] *Mariner* **[Tab 20]** at paras. 51-52**.**
[74] *Rawcliffe v British Columbia (Ministry of Environment, Lands & Parks)*, [2003] BCWLD 153 (British Columbia Expropriation Compensation Board) **[Tab 23]** at paras. 90-94, 102-104.

all reasonable uses of their property, which is denied, that taking would not occur until 2030. At this time, the claim is speculative and is concerned with a hypothetical scenario that has not come to fruition. The Amended Statement of Claim fails to plead sufficient facts to support that an expropriating event has already occurred and the claim for *de facto* expropriation should be struck out as it has no reasonable prospect of success as pled.

b. Claim Lacks Merit

86. In addition to prematurity, the claim for *de facto* expropriation should also be struck out or summarily dismissed for want of merit on the basis that it fails to meet either branch of the applicable legal test.

i. Acquisition of a Beneficial Interest

87. The first branch of the test for *de facto* expropriation requires the state to "acquire the property taken from the plaintiff either for its own use or for the purpose of destruction".[75]

88. Two leading decisions of the Supreme Court of Canada illustrate the types of situations in which the Crown can be said to have acquired a beneficial interest in property:

a. In *Manitoba Fisheries Ltd.* v *The Queen*[76] [*Manitoba Fisheries*], federal legislation gave a Crown corporation a commercial monopoly over the export of fish and overtook the Appellant's longstanding fish export business. Ritchie J, writing for the unanimous Supreme Court of Canada, found that the legislation had the direct effect of taking the Appellant's goodwill (suppliers and customers cultivated over the years) and transferring it to the Crown corporation. As a result, the legislation was not merely prohibitory in nature, but actually effected a "taking" of goodwill benefitting the Crown.

b. In *R v Tener*[77], the Province of British Columbia declined to grant a permit for exploration work on the Respondent's mineral claims located within a provincial park.

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[75] *A&L Investments Ltd.* v *Ontario*, [1997] OJ No 4199, 152 DLR (4th) 692 (ONCA), leave to appeal to SCC refused: [1997] SCCA No 657 [*A&L*] **[Tab 25]** at para. 27.
[76] [1979] 1 SCR 101 (SCC), [1978] SCJ No 78 **[Tab 26]**.
[77] [1985] 1 SCR 533,[1985] SCJ No 25 **[Tab 24].**

The effect of the declination was to preclude any exploration and neutralize the mineral claims. The majority decision, written by Estey J, found that the Crown had effectively "recovered" the minerals and "enhanced" the value of the park in the process.[78] The minority, concurring in the result, agreed that the Crown had taken back the minerals. Wilson J wrote:

> … the [Crown] has effectively removed the encumbrance from its land … Indeed, this case seems stronger than *Manitoba Fisheries* inasmuch as the doctrine of merger would appear to operate so as to make the [R]espondents' loss the [A]ppellant's gain. [79]

89. The Supreme Court of Canada was driven to conclude as it did in *Manitoba Fisheries* and *Tener* by the fact that the Crown had acquired for itself the very asset that had been surrendered.[80] While Estey J made passing reference in *Tener* to the fact that the Crown's actions had "enhanced" the value of the provincial park, Canadian Courts have subsequently made clear that this was not the basis for the Supreme Court of Canada's finding that there had been a taking by the state. The acquisition of a remote benefit that is only marginally connected to the Plaintiff's property, such as the enhancement of park value, does not by itself establish a taking by and for the Crown.[81]

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[78] *Tener* **[Tab 24]**at paras. 20-21.
[79]*Tener* **[Tab 24]** at para. 68.
[80] In *Manitoba Fisheries* **[Tab 26]**, the Crown corporation gained the goodwill that was taken from the Appellant. In *Tener* **[Tab 24]**, the Crown re-acquired, in fact, the Respondent's mineral claims.
[81] In *Mariner* **[Tab 20]**, Cromwell JA (as he then was) held as follows at para. 95:

> The respondents place great weight on comments of Estey J in *Tener* to the effect that the action taken by the government was to enhance the value of the park. These comments, while on their face supportive of the respondents' position, must be read in the context of Estey J's statements in the case that an expropriation necessarily involves the acquisition of land and that the extinguishment of the Teners' mineral rights constituted, in effect, the re-acquisition of such rights by the Crown. I do not think, with respect, that his statements to the effect that the re-acquisition enhanced the value of the park takes away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition…

Similarly, in *BJ Games Inc.* v *Ontario*, 155 ACWS (3d) 57, 2007 CanLii 3483 (Ont SCJ) [*BJ Games*] **[Tab 27]**, Frank J interpreted *Tener* in the following light:

> I do not see *Tener* as lending support for the plaintiffs' position that what is required to establish a taking for the purposes of a finding of expropriation can be so marginally connected to the taking of the plaintiff's property as is the case here. While it was acknowledged in *Tener* that the Crown's

90. Since *Manitoba Fisheries* and *Tener*, Canadian Courts have applied a rigid test for determining whether the Crown has acquired a beneficial interest in property and few cases have passed this test. The following five decisions are illustrative of this trend:

a. In *A&L*, the Province of Ontario introduced rent control legislation that rolled back prior rent increases. The Court of Appeal of Ontario dismissed a claim of *de facto* expropriation by affected landlords, holding that there had been no acquisition by the state. Although the legislation had a "significant" financial impact on landlords, this did not turn the legislation "into an act of expropriation".[82]

b. In *BJ Games*, the Province of Ontario ended the licensing of a three-day gambling event and replaced the event with Charity and Gaming Clubs. The organizers of the event alleged that they had suffered a *de facto* expropriation of the goodwill associated with the event, but the claim was dismissed. The Crown did not acquire the goodwill for itself. Furthermore, while the Crown did achieve some benefits (i.e., enhanced and more profitable charity casinos), those benefits were too "marginally connected" to the loss to constitute a taking.[83]

c. In *CPR*, the Appellant owned a railway right-of-way that was designated under a municipal bylaw as a public thoroughfare. The effect of the bylaw was to prevent commercial redevelopment of the right-of-way and confine the Appellant to historical and current uses of the land. The Supreme Court of Canada found that the municipality had not acquired a beneficial interest related to the land. It "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".[84]

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taking of the mineral interests had the result of adding value to the Crown park, that was not the basis for the finding that there was an acquisition by the Crown. (para. 34)

[82] *A&L* **[Tab 25]** at para. 30.
[83] *BJ Games* **[Tab 27]** at para. 34.
[84] *CPR* **[Tab 22]** at para. 33.

d. In *Club Pro Adult Entertainment Inc.* v *Ontario (Attorney General)*[85] [*Club Pro*], the Province of Ontario enacted the *Smoke-Free Ontario Act* which prohibited designated smoking rooms (DSRs), including the DSR in the Plaintiffs' establishment. Spies J declined to find that the Crown had acquired the requisite beneficial interest:

> While the use of the DSRs for smoking has been "taken" from the plaintiffs, in no sense has this right been acquired by the Crown. The Crown transferred no property rights from the plaintiffs to itself by this legislation.[86]
>
> …
>
> The [Act] does not appropriate the plaintiff's business for the Crown's own use or benefit, or for the public's use or benefit. … It is too far fetched to suggest that the public gets a benefit from the elimination of the DSRs such that there has been a "taking" by the province.[87]

e. In *Quality Plus Tickets inc c Québec (Procureur general)* [*Quality Plus*], the Québec government passed legislation that precluded ticket brokers from selling event tickets at a markup. Payette J acknowledged that the legislation "had an impact on the value of the goodwill of the brokers", but found that the Crown "had not appropriated the goodwill that was lost or created a monopoly to market the said goodwill for its own benefit".[88] The claim for *de facto* expropriation was dismissed.

91. As matters currently stand, the Royalty Interest remains vested in the Altius Entities and continues to generate royalties for the Altius Entities,[89] at least for the foreseeable future. Consequently, Canada has not acquired a beneficial interest in the Royalty Interest at this time.

92. Once the Limit takes effect in 2030, the Altius Entities speculate that the existing royalty stream subside and the Royalty Interest will be worthless.[90] However, even if this particular outcome were to transpire, which is unknown at this time and not admitted, Canada would still not hold a beneficial interest in the Royalty Interest. As such, the first branch of the test for *de facto* expropriation cannot be met in the future either.

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[85] [2006] OJ No 5027, 2006 CanLii 42254, reversed in part on other grounds: 2008 ONCA 158, leave to appeal to SCC refused: 255 OAC 399 **[Tab 28]**.
[86] *Club Pro* **[Tab 28]** at para. 71.
[87] *Club Pro* **[Tab 28]** at para. 82.
[88] *Quality Plus* **[Tab 21]** at para. 65.
[89] Reply to N/A, para. 23(f).
[90] Lewis Affidavit, para. 57.

93. This is not a case like *Manitoba Fisheries* where the Crown took for itself the goodwill that originally belonged to a corporate party. In this situation, Canada has not acquired, and will not hereafter acquire, any property or goodwill from the Altius Entities.

94. This case is also very distinct from *Tener*. The interest holder in *Tener* was physically barred from accessing its mining claim in perpetuity and was deemed, in fact, to have surrendered that claim to the Crown. The Altius Entities are not similarly positioned for three reasons:

a. Unlike the Plaintiffs in *Tener*, the Altius Entities do not hold title to the Coal, but instead only hold a financial interest that is linked to the Coal for valuation purposes. The Altius Entities are therefore a step removed from the Plaintiffs in *Tener*;

b. The Coal is currently accessible and minable, and these activities are generating ongoing royalties for the Altius Entities. It follows that *Tener* has no present application; and

c. It is impossible to predict what will happen as of 2030. However, even if the Coal were to were to have no reasonable use moving forward, which is not admitted, Capital Power and Prairie Mines would still retain title to the Coal and would not be fettered in their ability to access or exploit the Coal should technologies improve or circumstances change in the future. This is distinct from *Tener,* where the minerals became physically inaccessible forever. More on point, the Altius Entities will continue to hold the Royalty Interest as of 2030 and that interest will survive even if the Dedication and Unitization Agreement is terminated.

95. *A&L*, *BJ Games, CPR*, *Club Pro* and *Quality Plus* are much more apt comparators. Similar to those cases, Canada has not confiscated any property or goodwill, but has merely passed a prohibiting regulation that might (at most) incidentally affect the investment that the Altius Entities made in 2014 on a financial level.

96. The Altius Entities appear to recognize that Canada has not acquired a beneficial interest in their Royalty Interest and attempt to overcome this glaring problem by arguing that SOR/2018-263 have created a "benefit" for Canada in the form of reduced GHG emissions in the future.[91] Even if that were the case, however, reported decisions such as *Mariner*, *BJ Games* and *Club Pro*

[91] Amended SOC, para. 39. Response, para. 8(b).

have all held that societal benefits of this nature are too remote and unconnected to the property in question to satisfy the exacting test for the acquisition of a beneficial interest.

ii. Removal of All Reasonable Uses of the Property

97. The second requirement for a *de facto* expropriation considers whether "all reasonable uses" of the property have been removed.

98. The test at this second stage of analysis is rigorous. The Plaintiff must prove that there has been a "confiscation of "…all reasonable private uses of the lands in question."[92] [emphasis]. In other words, "virtually all of the rights associated with the property holder's interest" must have been taken.[93]

99. The question of whether all "reasonable uses" of property have been removed is to be assessed "not only in relation to the land's highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put".[94] It is not enough for a property owner to say, without more, that the economic value of the property has declined.[95]

100. As stated earlier, the Mine is still operational[96], the Coal extracted from the Mine is still feeding the Plant[97] and royalties are still accruing to the Altius Entities.[98] Accordingly, it is not the case that SOR/2018-263 have removed all reasonable uses of the Royalty Interest at this time.

101. Canada and Alberta have agreed to refrain from arguing in this application that the Coal has a reasonable use after 2030. However, the Altius Entities do not hold title to the Coal, but instead hold a Royalty Interest that is linked to the Coal for valuation purposes. Accordingly, the relevant question is not whether the Coal has any reasonable use after 2030, but rather whether the Royalty Interest itself has any reasonable use after 2030.

102. In order to determine whether all reasonable uses of the Royalty Interest will be removed as of 2030, it is helpful to consider the range of possible outcomes associated with royalty interests

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[92] *Mariner* **[Tab 20]** at para. 48.
[93] *Mariner* **[Tab 20]** at para. 48.
[94] *CPR* **[Tab 22]** at para. 34.
[95] *Mariner* **[Tab 20]** at paras. 65, 71 & 81.
[96] Reply to N/A, para. 23(a).
[97] Reply to N/A, para. 23(d).
[98] Reply to N/A, para. 23(g).

generally. Income in the form of royalties is unquestionably the goal of the interest holder. However, like any form of investment, income is not a foregone conclusion; royalty interests can fail to generate royalties as well for a variety of reasons.

103. Based on the foregoing, the Royalty Interest comprises a wide spectrum of possible uses, ranging from royalties to no royalties at all. The latter situation - no royalties – is obviously less desirable for the Altius Entities, but it was always within their contemplation. Indeed, as emphasized above, the public disclosure of the Altius Entities contains the following statements (among others):

a. SOR/2012-167 were expected to cause power plants to close down; and

b. the enactment of new adverse regulations or regulatory requirements could adversely impact the financial condition of Altius Minerals or any of its royalty interests.

104. The Altius Entities contend that the Royalty Interest will not generate any royalties after 2030. This is presently a matter of speculation. However, even if this outcome were to transpire, this would not mean that all reasonable uses of the Royalty Interest have been lost. On the contrary, as demonstrated above, this outcome would constitute a reasonable use of the Royalty Interest and would therefore fail to meet the second branch of the test for *de facto* expropriation.

105. In any event, even if all reasonable uses of the Royalty Interest are removed as of 2030, the remedies of striking out and summary dismissal are still open at this time on the bases that the claim is premature and the first branch of the test – acquisition of a beneficial interest – cannot be met, whether now or after 2030.

V. RELIEF SOUGHT

106. The claims advanced against Canada in this Action are premature, improperly pled, fail to disclose a reasonable cause of action and are defeated by admissions given by the Altius Entities. The claims are therefore meritless and do not warrant a full trial.

107. The Attorney General of Canada therefore respectfully invites this Honourable Court to invoke the principle of proportionality and strike out or summarily dismiss this Action as it relates to Canada, with costs. Relief of this nature would be fair, just, timely and cost-effective.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF OCTOBER, 2020.

ATTORNEY GENERAL OF CANADA

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