Court of Queen's Bench of Alberta

Citation: Altius Royalty Corporation v Alberta, 2021 ABQB 3

Date:
Docket: 1801 16746
Registry: Calgary

Between:

**Altius Royalty Corporation,
Genesee Royalty Limited Partnership
and Genesee Royalty GP Inc.**

Plaintiffs

- and -

**Her Majesty the Queen in Right of Alberta
and Attorney General of Canada**

Defendants

**Memorandum of Decision
of
J.R. Farrington, Master in Chambers**

The Applications

[1] These are applications by Canada and Alberta to either strike or summarily dismiss the action pursuant to either Rule 3.68 or Rules 7.3 of the ***Alberta Rules of Court***. The plaintiffs Altius Royalty Corporation, Genesee Royalty Limited Partnership and Genesee Royalty GP Inc. oppose the applications. They also made a cross application to allow amendments to their statement of claim. While that application would normally be heard first, given the nature of the amendments sought, the time available for argument, and the fact that one of the reasons for opposition to the amendments was the oft cited "hopeless" argument, I decided that it would be best to hear the submissions on the striking and dismissal applications first in order to avoid as much overlap as possible. During the course of hearing the amendment application, I concluded

without hearing final reply submissions for the plaintiff that the amendments were appropriate and I allowed all of them. I did not rule on costs of the amendment application. It withdrew two causes of action and clarified others so there is some substance to the costs debate. Costs of the amendment application may be finalized at the same time as costs of these applications.

The Facts

[2] The plaintiffs allege that actions of Canada and Alberta amounted to a constructive expropriation or "taking" of its royalty interest in a coal mining facility situated next to the Genesee Power Plant in the Edmonton region.

[3] In 2012, the federal government of the time adopted the ***Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations***, SOR/2012-167. Section 3(1) of the regulation provided:

> 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 CO2 emissions from the combustion of fossil fuels in the unit for each GWh of electricity produced by the unit during a calendar year.

[4] The Genesee Power Plant generating units were neither "new units" or "old units" within the meaning of the regulation, meaning they were not bound by the new standard.

[5] In 2014, by way of a corporate arrangement, the plaintiffs were involved in a series of transactions with other entities which also included the coal royalty which forms the basis for this dispute. The plaintiffs, and more specifically Genesee Royalty Limited Partnership, hold a 9% royalty in the coal used from the mine by the plant. The other plaintiffs hold interests in the royalty holding entity.

[6] The mine supplies all of its geothermal coal to the plant alone. It does not supply geothermal coal to anyone else. There is a dedication agreement to that effect.

[7] The briefs describe the mine as a joint venture between Capital Power LP and Prairie Mines Royalty ULC. Prairie Mines is a subsidiary of Westmoreland Mining Holdings LLC of Colorado, USA. The plaintiffs hold their royalty through Genesee Royalty Limited Partnership. The briefs are not entirely clear on the point, but during argument I was advised that the plant was owned and operated by Capital Power LP alone.

[8] The plaintiffs collectively paid $460 million for the royalty interest. No doubt there were other ways in which an investor could invest funds in the project, but the method chosen was a royalty interest in the coal. Presumably there were reasons for structuring the investment in that fashion, but they are not in evidence, and I make no further comments on that aspect and I do not speculate.

[9] The Genesee Power Plant consists of three different units. They were commissioned in 1989, 1994 and 2005. Under the 2012 regulatory regime they would be deemed to end their useful life in 2039, 2044 and 2055 respectively. An underlying premise of the action advanced on behalf of the plaintiffs is that because the 2012 regulation permitted those plants to operate from an emissions perspective for 50 years from their commissioning dates, a reduction in that ability entitles them to compensation.

[10] Concurrently with the complex corporate arrangement, the plaintiffs' effective parent Altius Minerals Corporation released financial disclosure documentation for its investors.

[11] In a prospectus that was concurrent with the transaction it said 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.

[12] In subsequent financial reporting it stated:

> 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 regulation s 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.
>
> (Emphasis added)

[13] In 2016, and with the ***Paris Agreement*** on climate change newly signed, a new federal government gave notice that it intended to pass further regulations pertaining to coal-fired emissions regulation.

[14] The new regulation came into force in 2018 (SOR/2018-263). Most significantly, the new regulatory scheme also affected existing plants such as the Genesee Power Plant and it required that they meet the new emissions standard by December 31, 2029. The regulation and its predecessor are both directed specifically at the coal-fired plants that create the emissions, rather than coal suppliers themselves. The effects upon coal suppliers are collateral.

[15] Based upon the previous regulation, the plaintiffs had counted upon their royalty stream being available to 2039, 2044 and 2055 in relation to three Genesee Power Plant units (or at least they hoped that would be the case).

[16] The plaintiffs allege that the new regulation amounts to a constructive expropriation or "taking" of its royalty interest after 2030 by Canada. They also allege that Alberta engaged in conduct, such as entering into an "off coal agreement" with compensation to Capital Power LP effectively ending the coal fired operation of the Genesee Power Plant after 2030.

[17] For the purposes of these applications, the parties agreed that Canada and Alberta would not argue that there are other uses for the coal after 2030. While that was the agreement made, the defendants' arguments drifted into suggesting that there were other uses for the coal after 2030. That created issues during the course of argument. My decision on the applications in the end, however, does not turn on that aspect.

Summary Judgment Law

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

[19] The applications do not turn on any issues between the parties with respect to the law pertaining to summary judgement. I will not discuss the law in detail here other than to emphasize that the ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,*** 2019 ABCA 49 test originating from the culture shift in ***Hryniak v. Mauldin***, 2014 SCC 7 is the applicable test and approach. Summary dispositions are encouraged if appropriate, but only if the record is sufficient to make a fair and just disposition.

[20] I would also refer to ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 which is a more recent decision of our Court of Appeal encouraging the use of summary procedures where appropriate.

Is the action premature?

[21] One of the points over which there was much argument was whether this action ought to be dismissed on the basis that it is premature. Canada and Alberta argue that no one knows what the state of affairs will be in 2030, or if the law will change once again before then, or what emissions technology will then exist, and therefore they assert that the action is premature. Ironically, Alberta also pleaded in its statement of defence that the action is statute barred by the ***Limitations Act,*** RSA 2000, c L-12 so the combination of being both premature, and time-barred, seems unusual, but presumably I can take the pleadings as alternative ones.

[22] One of the amendments sought by the plaintiff (and granted by me) included a provision that:

> 44. The Plaintiffs claim against the Defendants, jointly and severally:
>
> a) a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation;

[23] There was much argument about whether that provision was truly declaratory or not. In my view, and based upon the authorities, it is declaratory and not premature and it is capable of a present adjudication on existing facts.

[24] For example, one of the cases relied upon by Canada and Alberta to argue that the matter was not properly declaratory was the decision of Hall, J. in ***British Columbia (Attorney General) v Alberta (Attorney General)***, 2019 ABQB 550. That was a case considering legislation which had not yet been proclaimed in force. Not surprisingly, that type of question was found to be hypothetical and not declaratory. Here, the Court is being asked to consider regulations that are in force based upon facts that have occurred.

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

Taking and Constructive Expropriation

[26] Canada and Alberta say that the law is clear with respect to what does or does not constitute a "taking", and that the facts here do not rise to that level.

[27] In ***Canadian Pacific Railway Co. v. Vancouver (City),*** 2006 SCC 5, which was the most recent Supreme Court of Canada case on the "taking" issue, the Court unanimously held at paragraphs 30-32:

> For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see ***Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*** (1999), 1999 NSCA 98 (CanLII), 177 D.L.R. (4th) 696 (N.S.C.A.), at p. 716; ***Manitoba Fisheries Ltd. v. The Queen***, 1978 CanLII 22 (SCC), [1979] 1 S.C.R. 101; and ***The Queen in Right of British Columbia v. Tener***, 1985 CanLII 76 (SCC), [1985] 1 S.C.R. 533.
>
> In my view, neither requirement of this test is made out here.
>
> First, CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. Thus, in ***Manitoba Fisheries***, the government was required to compensate a landowner for loss of good will. See also ***Tener***.

[28] The case was one where CPR owned land in Vancouver and the municipality passed a zoning bylaw which prohibited CPR from exploiting the lands to their full commercial potential and limited development. No taking was found. Of additional note is that the underlying ***Vancouver Charter*** also gave the municipality the right to act, as it had so there were really two bases for the decision.

[29] In finding a taking in ***Manitoba Fisheries Ltd. v. The Queen***, [1979] 1 SCR 101, the Court held at page 110:

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

[30] The Supreme Court of Canada case that is arguably closest to the facts here is ***R. v. Tener***, [1985] 1 SCR 533. In that case of British Columbia, a mineral claim holder in Wells Gray Park was adversely affected by a change of government policy which refused to grant permits for surface rights so that mineral rights could not be exploited. There were two concurring opinions which arrived at similar results in finding a taking or effective expropriation in different ways. Ultimately, both opinions agreed there was an "expropriation" even if what was taken was the access right as opposed to the mineral rights *per se*.

[31] In the majority opinion Estey, J. held at paragraph 59:

> In my view of the law, in these factual circumstances, only the former regulations are to be taken into account in the valuation process and only the latter regulations in the taking process. There has been no regulation *qua* minerals which reduced the value of these minerals or the opportunity of the respondents to remove them. The denial of access to these lands occurred under the ***Park Act*** and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow. Such a conclusion is consistent with this Court's judgment in ***Manitoba Fisheries Ltd. v. The Queen***, 1978 CanLII 22 (SCC), [1979] 1 S.C.R. 101. In that case the province had established a Crown corporation with a commercial monopoly in the export of fish from Manitoba and other participating provinces. The establishment of the Crown corporation had the effect of putting Manitoba Fisheries out of business. This Court held that the province's actions deprived Manitoba Fisheries of its goodwill as a going concern and that the goodwill so taken by the Crown entitled the company to compensation despite the fact that they retained their physical assets, as those assets had been rendered virtually useless. Similarly in this case, the respondents are left with the minerals. The value of the minerals in such a state depends upon one's assessment of the chances of a reversal of executive policy in the issuance of a removal permit under the ***Park Act***. This is relevant to the valuation process and particularly if and when the Crown takes the last step and expropriates the minerals themselves. See ***Kramer v. Wascana Centre Authority***, supra, per Spence J., at pp. 247-48. It has, however, an importance now because the value of the loss of access, the interest which in my view has now been taken from the respondents, must represent the total value of the minerals less whatever value may be attributed to the future possibility of the issuance of a removal permit. All this is for the tribunal charged with determination of compensation, to decide.

[32] While ***Tener*** is often cited for being a "taking" case without actual surrender of the mineral rights, as can also be seen from the passage above, there are also non-derogation from the original mineral grant concepts that affected the result.

[33] While the coal itself is not actually "taken" here, the ability to develop and exploit the coal is arguably taken (albeit indirectly by making it valueless). Of additional note in ***Tener*** is

that it distinguishes a taking from the ordinary injurious affection effects that result from land use regulation and zoning. That turns out to be an important distinction in some of the cases.

[34] The leading cases illustrate that many of the constructive expropriation or "taking" cases are very fact specific. For example, when the Crown effectively acquires an owner's business to its own benefit, there is a taking (such as in ***Manitoba Fisheries***). When a municipality does not take title to land, but instead limits its available uses, there is no taking (as in ***CPR***). When the Crown does not revoke mineral rights, but effectively prevents their development, there is a taking (as in ***Tener***).

[35] It is now helpful to reflect upon the facts here a bit more deeply. The royalty interest is in the coal. The underlying royalty agreement does not specifically say that the royalty holder may take its interest in kind, but there is wording in the agreement to the effect that an interest in land was intended, and the defendants do not seem to dispute strenuously that the royalty interest constitutes an interest in land.

[36] The parties differ, however, on the target and effect of the regulation. Canada and Alberta say that the target is the emission producing coal-fired power plant, and not the coal supplier, and that while the coal supplier may well suffer some losses, it is not the target of the regulation and suffering damage does not in itself create a cause of action. They say that the royalty remains intact after any closing of the plant, which is specifically provided for in the royalty agreement. The plaintiffs say that the affected coal interests have been taken, and they refer to the agreement between the parties for the purposes of this application that there are no uses for the coal after 2030. They say the coal interest has been sterilized and thus taken. As an aside, one of the reasons that the sterilization argument is made is that the mine is immediately adjacent to the plant and the mine does not have the infrastructure such as rail facilities to send the coal elsewhere. Whether it is possible to acquire that infrastructure was beyond the scope of the applications as argued.

[37] I find the facts of this case to be distinguishable from cases such as ***Tener*** and ***Manitoba Fisheries***. The plaintiffs largely assert that they were entitled to assume that government regulation would not change for fifty years after the government of the day's initial regulation efforts in 2012 and if it did change they are entitled to compensation.

[38] The plaintiffs acquired a royalty in 2014 that was subject to being affected by emissions regulation, and in effect, they hope to bind subsequent governments to a prior regulatory regime. They seek to effectively make Canada and Alberta the guarantors of their business transaction and assure the opportunity to provide fifty years of coal supply when the underlying agreements to the transaction do not even appear to make that promise as between the parties.

[39] Reasonable people can disagree on the amount of regulation necessary with respect to emissions, but when a party enters an industry knowing that emissions regulation is part of the landscape, it cannot in any way suggest that a change in emissions regulations is a surprise.

[40] One of the other distinguishable points here with respect to the taking cases was whether the benefit accruing to the taking authority needed to amount to a tangible financial benefit in the context of the two part test. The plaintiffs argue that the benefit can be more general, but they argue that in any event, there is a financial benefit in terms of the potential health benefits to society and reduction in healthcare costs to the government. I agree, and I think that normally would have been sufficient to meet the normal second branch of the taking test here. Having said

that, however, in my view, the first branch of the traditional taking test is not met, namely that the taking parties acquire a beneficial interest in what was taken. On the facts of this case, Canada and Alberta did not acquire a beneficial interest in the coal or the royalty interest. Canada regulated the end user, and Alberta decided to compensate the plant owner and affected workers for the effects of the emission regulatory scheme. That does not create a cause of action for others who were not compensated.

[41] I conclude with two brief passages from our Court of Appeal in ***Alberta (Minister of Infrastructure) v. Nilsson***, 2002 ABCA 283. At paragraph 61 the Court quoted from paragraph 49 of ***Mariner Real Estate Ltd. v. Nova Scotia*** (1999), 1999 NSCA 98:

> Consideration of a claim of *de facto* expropriation must recognize that the effect of the particular regulation must be compared with reasonable use of the lands in modern Canada, not with their use as if they were in some imaginary state of nature unconstrained by regulation. In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation.

[42] And at paragraph 64 of ***Nilsson***:

> From these authorities, it is obvious that not every interference with aspects of property ownership will amount to a *de facto* expropriation. In the context of restrictions on land use, it is clear that such restrictions, even down zoning or a development freeze, do not amount to 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.

[43] The plaintiffs invested in a regulated industry with full knowledge that it was a regulated industry. Canada exercised its regulatory powers. While the regulation was directed specifically at power plant electricity producers, there was also an effect on coal suppliers. No challenge is made to the *vires* or validity of the regulation. In fact, the plaintiffs rely upon the regulation to form the basis for their lost $190,000,000 fifty year royalty.

[44] The "taking" cases draw clear distinctions and exceptions for regulation of land use. While no case law on environmental regulation and taking appears to have been cited, in my view, the protections to environmental regulation that may eventually develop in the area from a common law perspective will likely be at least equal to those provided to land development regulation. One reason is that the remedy sounds in tort, and as ***Nilsson*** and ***Mariner Real Estate Ltd.*** make clear, *"[I]n modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation*". Tort law necessarily draws lines for recovery. The royalty interest was acquired in by the plaintiffs in 2014, so on the facts of this case, it cannot be said that regulation of coal-fired electricity generation comes as a surprise. Different facts may lead to different results.

[45] Surely, and without more, the law cannot be that a regulator purporting to regulate in the interests of public health and environmental preservation must pay the creator of a health or environmental hazard to stop polluting. That is not to say that there has been a specific finding that there is or is not a health hazard at the emission levels set here. That issue is simply not before the Court from an evidentiary point of view, and the regulation has not been challenged as being arbitrary or capricious.

[46] Finally, the plaintiffs also argued that Alberta induced a breach of contract by entering into an agreement with the Genesee Power Plant operator with respect to ceasing coal fired emissions. The royalty arrangement does not guarantee that the mine is entitled to supply coal for fifty years, and there is no evidence that any contract between the plaintiffs and the plant was breached or was induced to be breached. There was no wrong on Alberta's part. It is Alberta's prerogative to decide whether it is appropriate to compensate the plant owner and employees (and perhaps others) affected by the changes as part of its policy considerations and initiatives. Many factors are likely considered in such a decision.

Conclusions

[47] The record is sufficiently complete in this case for a fair and just determination. For all of the foregoing reasons, the applications of Canada and Alberta are allowed. They have proven their entitlement to dismissals on the requisite balance of probabilities. The action of the plaintiffs is summarily dismissed against both of them. The environmental regulation by Canada was not a "taking". The actions of Alberta raised in the pleadings, including but not limited to entering into an "off coal" agreement compensating the power plant and other persons affected by the eventual loss of the plant do not amount to takings or actionable wrongs and do not create a cause of action in favour of the plaintiffs. Without a legal cause of action against either defendant, the action is dismissed.

[48] Thank you very much to all counsel for their most able participation in the hearing and their presentations. All materials and presentations were first-rate and their clients were well served. Counsel for the plaintiffs advanced their clients' case as effectively as it could be argued.

[49] If the parties cannot agree upon costs, including costs of the amendment application, please contact the Master's Coordinator within 90 days and a one hour session can be set up to discuss costs.

Heard by Webex on the 8th, 9th, 10th and 11th days of December, 2020.
Dated at the City of Calgary, Alberta this 4th day of January 2021.

J.R. Farrington
M.C.Q.B.A.

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