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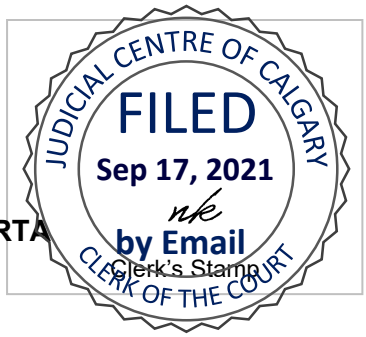

COURT FILE NUMBER	**1801 – 16746**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
PLAINTIFFS / APPELLANTS	**ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.**
DEFENDANTS / RESPONDENTS	**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY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

BRIEF OF THE PLAINTIFFS
RE: APPEAL OF SUMMARY DISMISSAL
JUSTICE SPECIAL CHAMBERS APPEARANCE
SCHEDULED FOR NOVEMBER 30 - DECEMBER 1, 2021

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PART I: INTRODUCTION

1. The plaintiffs provide this brief in support of their appeal of Master J.R. Farrington's decision to summarily dismiss their action.

2. The plaintiffs claim compensation against the defendant governments for the *de facto* expropriation of a significant royalty interest in thermal coal which comprises the Genesee Mine, located approximately 70 kilometers southwest of Edmonton, Alberta.

3. Since the Genesee Mine's inception in 1988, coal production from the mine has been entirely dedicated to fueling the adjacent Genesee Power Plant, long a major source of the province's electricity. The mine and power plant are integrated as a single operation, and neither one would have been developed without the other.

4. In 2014, the plaintiffs acquired a royalty interest in coal at the Genesee Mine, which royalty interest was expected to generate income from the production of coal until 2055 – the decommissioning year of the Genesee Power Plant as prescribed by federal regulations enacted at the time.

5. But since 2015 the defendants have acted, jointly and individually, to phase out coal-fired electrical generation by 2030, the effect of which is to shutter the Genesee Mine and lock the thermal coal in the ground. In particular:

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

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

6. By these actions, the defendants have rendered the royalty interest in coal which was to be used for electrical generation until 2055 of no value, in effect taking the plaintiffs' property. This has resulted in loss and damage in the approximate amount of $190 million.

7. Binding authority of the Supreme Court of Canada recognizes a common law right to compensation in these circumstances, yet the Master nevertheless chose to summarily dismiss the plaintiffs' claim.

8. The plaintiffs submit that decision was made in error, and respectfully request that summary dismissal be set aside with costs awarded to the plaintiffs.

PART II: FACTS

A. Parties

9. The plaintiff Genesee Royalty Limited Partnership ("**Genesee LP**") is a partnership formed and existing under Ontario law.[1]

10. The plaintiff Genesee Royalty GP Inc. ("**Genesee GP**") is a corporation formed and existing under Alberta law, and is the general partner of Genesee LP.[2]

11. The plaintiff Altius Royalty Corporation ("**Altius Royalty**") is a corporation formed and existing under Alberta law.[3]

12. The plaintiffs are part of the corporate family of Altius Minerals Corporation ("**Altius**"), which holds royalties in mines across Canada and elsewhere producing copper, zinc, nickel, cobalt, iron ore, potash, and thermal (electrical) and metallurgical coal.[4]

13. Altius was founded in 1997 and traded as a junior capital company on the Alberta Stock Exchange, and is now publicly listed on the Toronto Stock Exchange and headquartered in Newfoundland and Labrador. Many of Altius' shareholders are individual and institutional investors seeking long-term capital appreciation and dividend income.[5]

14. The defendants are Her Majesty the Queen in right of Alberta and the Attorney General of Canada, the Alberta and Canadian governments.

B. The Genesee Mine and Power Plant

15. The Genesee Mine is a thermal coal mine located approximately 70 kilometers southwest of Edmonton, Alberta. The open pit mine has been in operation since 1988, and each year produces roughly 5.5 million tonnes of coal to fuel the adjacent Genesee Power Plant, which in turn generates electricity for the City of Edmonton and elsewhere.[6]

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1 Affidavit of Ben Lewis sworn September 28, 2020 at para 3 **[Appeal Record Vol II at Tab 2]**.
2 Affidavit of Ben Lewis at para 4 **[Appeal Record Vol II at Tab 2]**.
3 Affidavit of Ben Lewis at para 5 **[Appeal Record Vol II at Tab 2]**.
4 Affidavit of Ben Lewis at para 6, Exhibit "A" **[Appeal Record Vol II at Tab 2]**.
5 Affidavit of Ben Lewis at para 7 **[Appeal Record Vol II at Tab 2]**.
6 Affidavit of Ben Lewis at para 8 **[Appeal Record Vol II at Tab 2]**.

16. The Genesee Mine is managed pursuant to a joint venture agreement between (i) Capital Power LP, a subsidiary of Alberta-based power generation company Capital Power Corporation, and (ii) Prairie Mines & Royalty ULC, a subsidiary of Colorado-based coal producer Westmoreland Mining Holdings LLC. Daily mining operations are handled by Westmoreland through Prairie Mines & Royalty ULC.[7]

17. The Genesee Power Plant has three coal-burning units, known as Genesee 1, Genesee 2, and Genesee 3, which are owned and operated by Capital Power.[8]

    (a) Genesee 1 and Genesee 2 were commissioned in 1994 and 1989, respectively, and have a combined capacity of 860 megawatts.[9]

    (b) Genesee 3 was commissioned in 2005 and has a capacity of 516 megawatts.[10] It is stated to be the first coal-fired power plant in Canada to use supercritical boiler technology (which consumes less coal to produce the same amount of power as a conventional boiler, thereby reducing carbon dioxide emissions), and uses clean air technologies which greatly reduce sulphur dioxide and nitrogen oxide emissions and stop 99.8% of particulate matter from reaching the atmosphere.[11]

Genesee Power Plant

Source: Affidavit of Ben Lewis, Exhibit "B"

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7 Affidavit of Ben Lewis at para 9 **[Appeal Record Vol II at Tab 2]**.
8 Affidavit of Ben Lewis at para 10, Exhibit "B" **[Appeal Record Vol II at Tab 2]**.
9 Affidavit of Ben Lewis at para 10, Exhibit "B" **[Appeal Record Vol II at Tab 2]**.
10 Affidavit of Ben Lewis at para 10, Exhibit "B" **[Appeal Record Vol II at Tab 2]**.
11 Affidavit of Ben Lewis at para 10, Exhibit "B" **[Appeal Record Vol II at Tab 2]**.

C. The Federal Regulations

18. In 2012, the Government of Canada unveiled regulations which would apply a "stringent performance standard" to coal-fired power plants – the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167 (the "**Regulations**").[12]

19. In its various coverage of the Regulations, the Government of Canada has stated that:

    (a) the Regulations impose an emissions limit of 420/tonnes per gigawatt-hour on "coal units", which were defined as a "unit that burns coal, exclusively or in combination with other fuels, for the purpose of producing electricity";

    (b) the emissions limit applied to new coal units built after 1 July 2015 and to existing coal units which had reached the "end of their useful life", generally being 50 years after their commissioning date; and

    (c) while coal units can meet the emissions limit by installing carbon capture and storage systems, most are expected to "shut down" or convert to run on natural gas.[13]

20. Prior to the Regulations being amended (discussed in greater detail below), it was widely understood that the emissions limit prescribed by the Regulations would not apply to the Genesee units until 2044 in the case of Genesee 1, 2039 in the case of Genesee 2, and 2055 in the case of Genesee 3, meaning that they could continue to burn coal from the Genesee Mine to generate electricity until then.[14]

D. Genesee LP Acquires the Royalty Interest

21. With a view to expanding its royalty business, in spring 2013 Altius commenced discussions with Sherritt International Corporation to purchase a portfolio of royalty interests at 11 coal and potash mines located in Alberta and Saskatchewan, including at the Genesee Mine.[15]

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12 Affidavit of Ben Lewis at para 12, Exhibit "C" **[Appeal Record Vol II at Tab 2]**.
13 Affidavit of Ben Lewis at para 13, Exhibit "D" **[Appeal Record Vol II at Tab 2]**.
14 Affidavit of Ben Lewis at para 15, Exhibit "E" **[Appeal Record Vol II at Tab 2]**.
15 Affidavit of Ben Lewis at para 16, Exhibit "F" **[Appeal Record Vol II at Tab 2]**.

22. The subject royalty interests were held by Sherritt's wholly owned subsidiary Prairie Mines and Royalty Limited ("**PMRL**"), and in a May 2013 presentation Sherritt advised Altius that:

    (a) the royalty interests provided "diversified royalty streams with stable cash flows" and were situated in a country of low "economic and political risk" which had by regulation "prescribed" the lifespans for its coal-fired power plants; and

    (b) the royalty interest at the Genesee Mine was governed by a Dedication & Unitization Agreement between Capital Power and PMRL, pursuant to which royalty payments were based on tonnages of coal produced from the mine to fuel the Genesee Power Plant until the facility's decommissioning in 2055 by operation of the Regulations.[16]

23. As part of its due diligence efforts, Altius reviewed the impact of the Regulations on the royalty interest at the Genesee Mine and its decision to acquire the royalty interest was based in significant part on the expectation that the Regulations would continue as enacted and that the Genesee Power Plant would generate electricity from coal until 2055.[17]

24. And as compared with the other royalty interests being acquired, Altius came to view the royalty interest at the Genesee Mine as the "crown jewel" of the portfolio, due in large part to the mine's "stability" and "long life".[18]

25. In September 2013, Altius proposed that it purchase the PMRL royalty interests for $460 million, which was accepted by Sherritt.[19]

26. The transaction was implemented through a court-approved plan of arrangement between Altius, Altius Royalty, Sherritt, PMRL, Westmoreland, and certain other parties, and in April 2014:

    (a) Genesee LP was formed as a limited partnership and Genesee GP formed as an Alberta corporation;

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16 Affidavit of Ben Lewis at para 17, Exhibit "G" **[Appeal Record Vol II at Tab 2]**.
17 Affidavit of Ben Lewis at para 19, Exhibit "H" **[Appeal Record Vol II at Tab 2]**.
18 Affidavit of Ben Lewis at para 20, Exhibit "I" **[Appeal Record Vol II at Tab 2]**.
19 Affidavit of Ben Lewis at para 21 **[Appeal Record Vol II at Tab 2]**.

(b) PMRL converted into Prairie Mines & Royalty ULC ("**PMRU**") and assigned its royalty interest in its coal rights at the Genesee Mine to Genesee LP; and

(c) Altius Royalty purchased Genesee GP and the limited partners of Genesee LP for approximately $251 million.[20]

27. Genesee LP, Capital Power, and PMRL (now PMRU, which Westmoreland acquired through the plan of arrangement to take over mining operations at the various mines) re-acknowledged the dedication of the Genesee Mine to the Genesee Power Plant and the parties' respective interests in the coal rights by a Second Amended and Restated Dedication and Unitization Agreement dated 24 April 2014.[21]

28. Like its predecessor, the new Dedication and Unitization Agreement sets out the formula for calculating the royalty payable to Genesee LP based on tonnages of coal produced from the Genesee Mine to fuel the Genesee Power Plant. By way of example, on average Genesee LP received approximately $11.3 million in royalty payments each year from 2017 to 2019.[22]

E. The Defendants Jointly Commit to End Coal Power by 2030

29. In December 2015, representatives of the Government of Canada and the Government of Alberta attended the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change, which was held in Paris, France.[23]

30. From this conference resulted the international Paris Agreement, the stated goal for which is to limit the rise in global temperatures at 1.5 to 2 °C above pre-industrial levels. In principle, this is to be achieved through nationally determined contributions and regular emissions-level reporting.[24]

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20 Affidavit of Ben Lewis at para 22, Exhibits "J" and "K" **[Appeal Record Vol II at Tab 2]**. The plaintiff Altius Royalty Corporation is the successor by amalgamation to Altius Prairie Royalties Corp., the party which originally purchased Genesee GP and the limited partners of Genesee LP.
21 Affidavit of Ben Lewis at para 24, Exhibit "L" **[Appeal Record Vol II at Tab 2]**.
22 Affidavit of Ben Lewis at para 25, Exhibit "M" **[Appeal Record Vol II at Tab 2]**.
23 Affidavit of Ben Lewis at para 26, Exhibit "N" **[Appeal Record Vol II at Tab 2]**.
24 Affidavit of Ben Lewis at para 27, Exhibit "O" **[Appeal Record Vol II at Tab 2]**.

31. The Government of Canada ratified the Paris Agreement in October 2016, and committed Canada to reducing greenhouse gas emissions by 30% from 2005 levels by 2030.[25]

32. In March 2016, Canada's First Ministers, which included those of the defendants, issued the "Vancouver Declaration on Clean Growth and Climate Change" and resolved to develop a national framework to meet or exceed the emissions reduction goal contemplated by the Paris Agreement.[26]

33. Among other things, in the Vancouver Declaration the First Ministers directed that reports be developed by intergovernmental working groups to identify options for action in four areas: clean technology, innovation, and jobs; carbon pricing mechanisms; specific mitigation opportunities; and adaptation and climate resilience. Recommendations to the First Ministers were to be made by October 2016, and finalization of the framework by fall of that year.[27]

34. In its final report, the Working Group on Specific Mitigation Opportunities identified the phase out of traditional coal-fired power plants by 2030 as a potential policy option. The tool to implement that policy was a new regulatory requirement to "close" all coal units without carbon capture and storage systems by 31 December 2029 (or in the case of the Genesee Power Plant, 25 years earlier than the 2012 Regulations would have).[28]

35. In December 2016, the federal, territorial, and provincial governments, save for Saskatchewan and Manitoba, released the "Pan-Canadian Framework on Clean Growth and Climate Change", which among other things states that the participating governments will work together to accelerate the phase out of traditional coal-fired power plants across Canada by 2030.[29]

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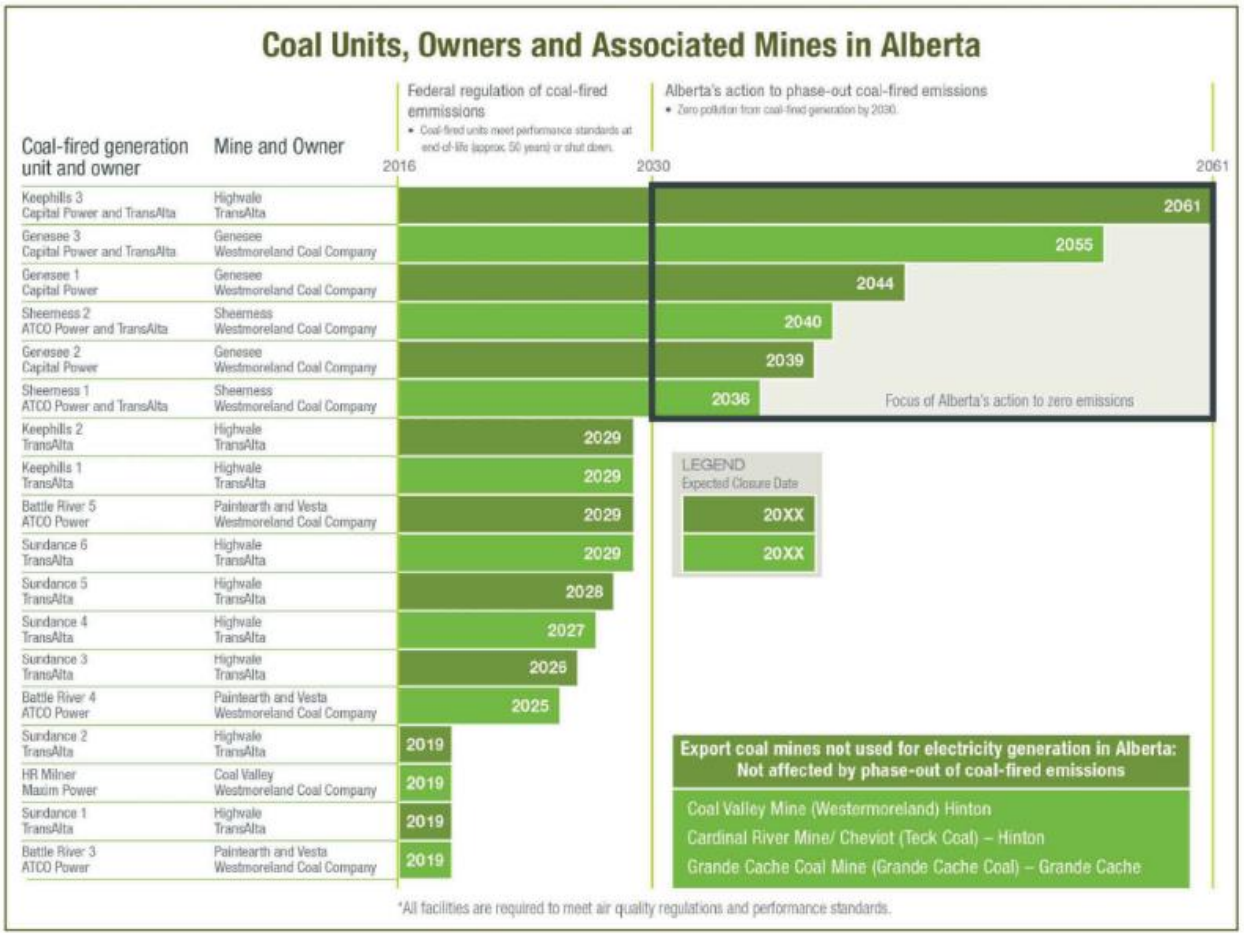
25 Affidavit of Ben Lewis at para 28, Exhibit "P" **[Appeal Record Vol II at Tab 2]**.
26 Affidavit of Ben Lewis at para 29, Exhibit "Q" **[Appeal Record Vol II at Tab 2]**.
27 Affidavit of Ben Lewis at para 30, Exhibit "Q" **[Appeal Record Vol II at Tab 2]**.
28 Affidavit of Ben Lewis at para 31, Exhibit "R" **[Appeal Record Vol II at Tab 2]**.
29 Affidavit of Ben Lewis at para 32, Exhibit "S" **[Appeal Record Vol II at Tab 2]**.

F. Alberta's Actions to End Coal Power by 2030

36. In November 2015, the Government of Alberta introduced its "Climate Leadership Plan", which among other things called for the "phase out [of] all pollution created by burning coal" by 2030.[30]

37. In its coverage of the phase out, the Government of Alberta stated that while 12 of the province's 18 coal units would retire by 2030 in accordance with the Regulations, without action the remaining 6 units (which included Genesee 1, Genesee 2, and Genesee 3) could continue to operate until well later.[31] That timeline was illustrated by the following chart issued by the Government of Alberta:



Source: Affidavit of Ben Lewis, Exhibit "U"

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30 Affidavit of Ben Lewis at para 33, Exhibit "T" **[Appeal Record Vol II at Tab 2]**.
31 Affidavit of Ben Lewis at para 34, Exhibit "U" **[Appeal Record Vol II at Tab 2]**.

38. The Government of Alberta pledged that companies and investors would be "treated fairly" throughout the transition and that it would strive to avoid "unnecessarily stranding capital", and in March 2016 appointed Terry Boston (the retired head of North America's largest power grid) to lead discussions with the three companies slated to operate their coal-fired units beyond 2030 (*i.e.*, Capital Power, TransAlta, and ATCO).[32]

39. Discussions between Capital Power and Mr Boston were reported in a press release dated 25 April 2016, in which the company's President and CEO stated that:

> We continue to be engaged with the Alberta government to ensure fair compensation is received for the proposed accelerated closure of coal-fired generating units by 2030 under the Alberta government's Climate Leadership Plan … Initial discussions with the government-appointed facilitator took place earlier this month. We continue to work collaboratively with the government and remain optimistic that a fair and appropriate outcome will be reached for our shareholders.[33]

40. In a letter dated 30 September 2016 to then Premier of Alberta Rachel Notley, Mr Boston confirmed that he had "worked with" the three companies to propose a framework that had "considered the interests of all parties involved". More specifically, Mr Boston recommended that voluntary payments be provided to the companies for their "post-2030 units", with said payments based on the net book value of the assets pro-rated by the years "stranded" by the policy decision.[34]

41. On 24 November 2016, the Government of Alberta announced that it had entered into agreements with Capital Power, TransAlta, and ATCO pursuant to which the companies would cease coal-fired emissions by 31 December 2030 in exchange for annual "transition payments". The payments totalled $1.1 billion, and were stated to represent the approximate "economic disruption to [the companies'] capital investments".[35]

42. The "Off-Coal Agreement" with Capital Power in particular requires that it cease coal-fired emissions from the Genesee Power Plant and another coal-fired power plant by 31 December 2030 in exchange for $733.8 million, to be paid by the Government of Alberta

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32 Affidavit of Ben Lewis at para 35, Exhibit "V" **[Appeal Record Vol II at Tab 2]**.
33 Affidavit of Ben Lewis at Exhibit "W" **[Appeal Record Vol II at Tab 2]**.
34 Affidavit of Ben Lewis at para 37, Exhibit "X" **[Appeal Record Vol II at Tab 2]**.
35 Affidavit of Ben Lewis at para 38, Exhibits "U", "Y" **[Appeal Record Vol II at Tab 2]**.

in fourteen annual installments of $52.4 million. Consistent with the methodology recommended by Mr Boston, the payments to Capital Power were said to be based on the "net book value" of the power plants "pro-rated by [their] percentage of life remaining after 2030".[36]

43. Aside from compensating the owners of affected coal-fired power plants, the Government of Alberta has taken steps to also support and compensate workers and communities affected by the phase out.

    (a) Through the Coal Workforce Transition Program, the Government of Alberta provides financial, employment, and retraining assistance to affected coal power plant and mine workers to support their transition to new jobs or retirement.[37]

    (b) Through the Coal Community Transition Fund, the Government of Alberta has awarded nearly $5 million to affected municipalities and First Nations to support economic development initiatives that enable their transition away from economic reliance on the coal power industry.[38]

44. On 13 January 2017, Altius wrote to then Alberta's Minister of Energy Margaret McCuaig-Boyd outlining its concerns regarding the "stranding" of its thermal coal royalty interests and requesting a meeting to find a mutually acceptable outcome to the issue.[39]

45. Having received no response, by letter dated 17 March 2017 Altius wrote again to Minister McCuaig-Boyd requesting a meeting to discuss the "significant negative impact" that the phase out has had on its investments in Alberta, particularly with respect to the royalty interest held by Genesee LP. Altius added that it would re-invest any compensation proceeds into royalty-type financing for replacement generating capacity that will be needed as the province transitions away from coal power.[40]

46. By letter dated 6 April 2017, Minister McCuaig-Boyd responded stating that her schedule did not permit a meeting and that the Government of Alberta recognizes coal has "non-

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36 Affidavit of Ben Lewis at para 39, Exhibit "Z" **[Appeal Record Vol II at Tab 2]**.
37 Affidavit of Ben Lewis at para 40(a), Exhibit "AA" **[Appeal Record Vol II at Tab 2]**.
38 Affidavit of Ben Lewis at para 40(b), Exhibit "BB" **[Appeal Record Vol II at Tab 2]**.
39 Affidavit of Ben Lewis at para 41, Exhibit "CC" **[Appeal Record Vol II at Tab 2]**.
40 Affidavit of Ben Lewis at para 42, Exhibit "DD" **[Appeal Record Vol II at Tab 2]**.

energy uses". The Minister's letter, however, did not indicate what "non-energy uses" are or may be available for thermal coal.[41]

47. Despite being a significant investor in Alberta's coal power industry, Altius was not invited to participate in any discussions with Mr Boston and the Government of Alberta has made no efforts to support or compensate Altius for the impact of its Climate Leadership Plan on the royalty interest held by Genesee LP.[42]

G. Federal Actions to End Coal Power by 2030

48. In November 2016, the Government of Canada announced that it would accelerate its plan to phase out traditional coal-fired electrical generation across Canada to 2030.[43]

49. A month later, the Government of Canada published a notice of intent in the Canada Gazette which confirmed that the Regulations would be amended to "phase out traditional coal-fired electrical generation by 2030" by requiring all coal units to meet the federal emissions limit by that date.[44]

50. The amendment to the Regulations came into force on 30 November 2018 by SOR/2018-263 (the "**Amended Regulations**"), and was accompanied by a Regulatory Impact Analysis Statement which sets out the rationale for the accelerated phase out and its expected benefits.[45]

51. On the benefits of expediting the phase out of traditional coal-fired electrical generation to 2030, the Regulatory Statement asserts that:

> The expected reduction in cumulative GHG emissions resulting from the Amendments is approximately 94 megatonnes (Mt CO2e) … The total expected benefit will be $4.7 billion, including $3.4 billion in climate change benefits and $1.3 billion in health and environmental benefits from air quality improvements.[46]

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41 Affidavit of Ben Lewis at para 43, Exhibit "EE" **[Appeal Record Vol II at Tab 2]**.
42 Affidavit of Ben Lewis at para 44 **[Appeal Record Vol II at Tab 2]**.
43 Affidavit of Ben Lewis at para 45, Exhibit "FF" **[Appeal Record Vol II at Tab 2]**.
44 Affidavit of Ben Lewis at para 46, Exhibit "GG" **[Appeal Record Vol II at Tab 2]**.
45 Affidavit of Ben Lewis at para 47, Exhibit "HH" **[Appeal Record Vol II at Tab 2]**.
46 Affidavit of Ben Lewis at Exhibit "HH" at pg 5 **[Appeal Record Vol II at Tab 2]**.

52. But recognizing that the phase out will have "direct and indirect impacts" on thousands of workers, nearly 50 communities, 12 generating stations, and 9 thermal coal mines, a task force established by the Government of Canada to "engage" affected workers and communities provided recommendations on achieving a "just transition plan" for them.[47]

53. In response to the task force's recommendations, in its 2019 budget the Government of Canada stated it intended to:

    (a) spend $35 million to create "worker transition centres" which will offer skills development initiatives and economic and community diversification activities in western and eastern Canada;

    (b) work with those affected to explore new ways to protect wages and pensions, given the "uncertainty" that the transition represents for workers in the sector; and

    (c) create a dedicated $150 million infrastructure fund to support priority projects and economic diversification in impacted communities.[48]

54. Altius was not invited to participate in any consultations with the Government of Canada regarding its plans to accelerate the phase out of coal power to 2030, and the Government of Canada has made no efforts to support or compensate Altius for the impact of the accelerated phase out on the royalty interest held by Genesee LP.[49]

H. No Alternative Use for the Genesee Coal

55. There is no use for the coal in which Genesee LP has its royalty interest other than as a fuel source for the Genesee Power Plant,[50] and for the purposes of this appeal the defendants have agreed to not argue that the subject coal can be put to a reasonable use after 2029.[51]

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47 Affidavit of Ben Lewis at para 48, Exhibit "II" **[Appeal Record Vol II at Tab 2]**.
48 Affidavit of Ben Lewis at para 49, Exhibit "JJ" **[Appeal Record Vol II at Tab 2]**.
49 Affidavit of Ben Lewis at para 51 **[Appeal Record Vol II at Tab 2]**.
50 Affidavit of Ben Lewis at para 52 **[Appeal Record Vol II at Tab 2]**.
51 See Consent Order of Justice K.M. Eidsvik filed July 22, 2021 at para 6 **[Appeal Record Vol I at Tab 28]**.

56. Alberta produces two types of coal: metallurgical coal which is exported for making steel and other metals, and thermal coal which is used for electricity generation.[52] As noted above, the Genesee Mine produces thermal coal which the defendants admit is entirely dedicated to the generation of electricity in Alberta.[53]

57. The Genesee Mine is not an export mine. To the contrary, the mine was developed for the sole purpose of fueling the Genesee Power Plant and insofar as is known the facility remains the only user of the subject coal. Furthermore, Genesee is a "mine-mouth" operation in which the coal extracted from the mine is transported directly to the adjacent power plant using enormous, off-highway haul trucks. Accordingly, the Genesee Mine does not have the necessary infrastructure (such as a rail export line and train load-out facility) to export its coal to other potential markets.[54]

58. Accordingly, the Genesee Mine will close when the Genesee Power Plant ceases generating coal-fired electricity (*i.e.*, by no later than 2030).[55]

Genesee Mine Topography and Operations
Source: Affidavit of Ben Lewis, Exhibits "B" and "G"

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52 Affidavit of Ben Lewis at para 53, Exhibit "KK" **[Appeal Record Vol II at Tab 2]**. As noted in the Affidavit of Ben Lewis at para 54, while there are two coal mines in Alberta which export thermal coal (the Coal Valley and Vista mines in the foothills region), the Genesee and other thermal coal mines in the plains region produce "lower ranked" coal which is used within the province for electricity generation.

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

54 Affidavit of Ben Lewis at para 55, Exhibit "MM" **[Appeal Record Vol II at Tab 2]**.

55 Affidavit of Ben Lewis at para 56 **[Appeal Record Vol II at Tab 2]**.

I. The Harm to the Plaintiffs

59. When the Genesee Power Plant ceases generating coal-fired electricity, the royalty interest held by Genesee LP will cease to have any value and Genesee LP will lose all revenue from it – as there is no use for the coal other than as a fuel source for the power plant.[56]

60. That eventuality has caused a present loss to Genesee LP, as the present value of the royalty interest in the coal is determined by its future economic benefit – and that benefit is now lost as a result of the government actions.[57]

61. Upon learning of the Off-Coal Agreement with Capital Power in November 2016, Genesee LP was required by applicable accounting standards to write down the present value of its royalty interest from $251 million to $114 million, which reflects a $137 million loss.[58] To explain:

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

    (b) the $137 million write down reflects the royalty income which Genesee LP will no longer earn from the production of thermal coal after 2030, when calculated as a present value using a 5% discount rate.[59]

62. The Statement of Claim seeks damages of $190 million, which is the present loss of value of the royalty interest calculated using a 3% discount rate – the same discount rate Alberta agreed to use for calculating the compensation payable to Capital Power for the post-2030 life of its coal-fired generating units under the Off-Coal Agreement.[60]

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56 Affidavit of Ben Lewis at para 57 **[Appeal Record Vol II at Tab 2]**.
57 Affidavit of Ben Lewis at para 58 **[Appeal Record Vol II at Tab 2]**.
58 Affidavit of Ben Lewis at para 59, Exhibit "NN" **[Appeal Record Vol II at Tab 2]**.
59 Affidavit of Ben Lewis at footnote 2, Exhibit "NN" at pgs 12-13 **[Appeal Record Vol II at Tab 2]**.
60 Affidavit of Ben Lewis at footnote 2, Exhibits "Z", "PP" **[Appeal Record Vol II at Tab 2]**.

J. Procedural History

63. On 23 November 2018, the plaintiffs filed their Statement of Claim alleging a taking of their royalty interest (a cause of action which concerns the unlawful taking of property without compensation, to be discussed later in this brief) as a result of the defendants' actions to phase out coal power by 2030, which Claim was later amended on 19 December 2018.[61]

64. Affidavits of Records were then exchanged, but before the matter proceeded to questioning both defendants applied to strike or summarily dismiss the plaintiffs' action,[62] and, in response, the plaintiffs cross-applied to further amend their Claim.[63]

65. All three applications were heard by Master Farrington in December 2020, who:

(a) granted the plaintiffs' cross-application to further amend;[64]

(b) dismissed the defendants' applications to strike the taking claim;[65] and

(c) granted the defendants' applications for summary dismissal not on the basis that the taking claim was premature (which was strenuously argued by both defendants), but rather on the stated basis that the defendants' actions did not amount to a taking.[66]

66. Then, on 15 March 2021:

(a) the plaintiffs filed their Notice of Appeal in respect of the Master's decision to grant summary dismissal; and

(b) the defendants filed their Notices of Appeal in respect of the Master's decisions to grant the amendment application and to not strike the taking claim.[67]

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61 Amended Statement of Claim filed on December 19, 2018 **[Appeal Record Vol I at Tab 1]**.
62 Alberta Application filed June 5, 2020 **[Appeal Record Vol I at Tab 13]**; Canada Application filed June 3, 2020 **[Appeal Record Vol I at Tab 12]**.
63 Plaintiffs' Cross-Application filed November 25, 2020 **[Appeal Record Vol I at Tab 17]**.
64 Memorandum of Decision of Master Farrington dated January 4, 2021 at para 1 ("Master's Reasons") **[Appeal Record Vol I at Tab 22]**; Order of Master Farrington dated December 11, 2020 **[Appeal Record Vol I at Tab 23]**.
65 Master's Reasons at para 18 **[Appeal Record Vol I at Tab 22]**.
66 Master's Reasons at paras 21-25, 47 **[Appeal Record Vol I at Tab 22]**; Order of Master Farrington dated January 4, 2021 **[Appeal Record Vol I at Tab 24]**.
67 Parties' Notices of Appeal filed March 15, 2021 **[Appeal Record Vol I at Tabs 25-27]**.

67. Pursuant to a procedural Order,[68] the plaintiffs provide this brief in support of their appeal of summary dismissal and reserve their submissions on the defendants' cross-appeals for their response brief.

PART III: ISSUE FOR DETERMINATION

68. The issue for determination on the plaintiffs' appeal is whether the Master erred by summarily dismissing their taking claim.

PART IV: SUBMISSIONS

A. Standard of Review

69. An appeal from a Master's decision is a hearing *de novo*, and the standard of review is correctness.[69]

B. The Test for Summary Dismissal

70. Rule 7.3 provides that the Court may grant summary judgment or dismissal if there is "no merit" to a claim or part of it.[70]

71. The moving party bears the burden of establishing (1) that it is entitled to summary judgment based on the merits of the case, and (2) that there is "no genuine issue requiring a trial".[71]

72. There is "no genuine issue requiring a trial" when the Court can make the necessary findings of fact and apply the law to those facts, and is satisfied that summary adjudication is a proportionate, more expeditious, and less expensive means to achieve a "just result".[72]

73. The responding party need not prove its own case to defeat summary judgment, and can resist the application on the merits or by showing that there is a genuine issue requiring a trial, which can arise when:

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68 Consent Order of Justice K.M. Eidsvik filed July 22, 2021 **[Appeal Record Vol I at Tab 28]**.
69 *Daytona Power Corp v Hydro Company Inc*, 2020 ABQB 723 at para 11, citing *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166 **[Pl Auth at Tab 1]**.
70 *Rules of Court*, AR 124/2010 r 7.3 **[Pl Auth at Tab 2]**.
71 *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 35, 47 ("*Weir Jones*") **[Pl Auth at Tab 3]**.
72 *Weir-Jones* at para 21 **[Pl Auth at Tab 3]**.

(a) there is a dispute on "material facts" such that the Court cannot make the necessary factual findings;

(b) there are otherwise "gaps or uncertainties" in the facts or in the law; or

(c) the law is sufficiently "unsettled or complex" that it is not possible to apply the law to the facts.[73]

74. The ultimate burden, however, rests with the moving party and the Court must be left with sufficient confidence in the state of the record such that it is prepared to exercise its discretion to summarily resolve the dispute.[74]

75. In the present case, the Master found that the record was "sufficiently complete … for a fair and just determination" and that the defendants had "proven their entitlement to dismissals on the requisite balance of probabilities."[75]

76. However, and for the reasons which follow, the Master erred in this regard as the defendants have not proven (1) their entitlement to summary dismissal on the merits of the taking claim, and (2) that there is no genuine issue requiring a trial.

C. The Nature of the Plaintiffs' Interest

77. Before addressing the merits of the taking claim, the nature of the plaintiffs' royalty interest needs be explained.

78. In their briefs for the Master, both defendants inaccurately characterized the nature of the royalty interest held by Genesee LP in support of their positions that no taking of the plaintiffs' property has occurred. While Alberta characterized the royalty interest as "a contractual right to payment when the Coal is extracted from [sic] mine and sold",[76]

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73 *Weir-Jones* at paras 21, 32, 35, 43, 45, 47 **[Pl Auth at Tab 3]**.
74 *Weir-Jones* at paras 35, 47 **[Pl Auth at Tab 3]**.
75 Master's Reasons at para 47 **[Appeal Record Vol I at Tab 22]**.
76 Brief of Her Majesty the Queen in Right of Alberta filed October 30, 2020 at para 53 ("Alberta Brief for Master") **[Appeal Record Vol I at Tab 14]**.

Canada stated the plaintiffs "do not hold title to the Coal, but instead only hold a financial interest that is linked to the Coal for valuation purposes."[77]

79. A royalty is the means by which a mineral owner shares in the production of the substance from his or her land, typically accomplished by way of a royalty agreement which specifies the percentage of production delivered or paid to the royalty holder.[78]

80. Genesee LP holds a royalty interest in freehold coal owned by PMRU, and the Dedication and Unitization Agreement sets out the formula for calculating the royalty payable to Genesee LP based on tonnages of coal produced from the Genesee Mine to fuel the Genesee Power Plant.[79]

81. It is settled law that a royalty interest constitutes an interest in land if:

    (a) the language used in the grant of the royalty is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, as opposed to a contractual right to a portion of the substances recovered from the land; and

    (b) the interest, out of which the royalty is carved, is itself an interest in land.[80]

82. The royalty interest held by Genesee LP satisfies both requirements such that it qualifies as an interest in land, as opposed to a mere "contractual right to payment" or "financial interest" as described by the defendants.

83. As to the first requirement, the royalty grant which PMRU assigned to Genesee LP (as Royalty Owner) clearly shows that the parties intended the royalty to be a grant of an interest in land:

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77 Brief of Attorney General of Canada filed October 30, 2020 at para 94 ("Canada Brief for Master") **[Appeal Record Vol I at Tab 15]**.

78 John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008) at 178 **[Pl Auth at Tab 4]**.

79 Ben Lewis Affidavit at paras 22, 24-25, Exhibits "K", "L" **[Appeal Record Vol II at Tab 2]**.

80 *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at para 21 ("*Dynex*") **[Pl Auth at Tab 5]**. While *Dynex* considered royalty interests in the oil and gas industry, its principles equally apply to royalty interests in the mining industry: see e.g., *Third Eye Capital Corporation v Ressources Dianor Inc*, 2018 ONCA 253 **[Pl Auth at Tab 6]**.

ROYALTY DESCRIPTION

2.1 Retained Royalty

(a) Effective as of the date hereof, Royalty Owner hereby transfers, assigns and conveys to Transferee its entire right, title and interest in and to the Royalty Lands, other than the Royalty which is retained by Royalty Owner out of the Royalty Lands, as hereinafter more fully set forth.

(b) Transferee acknowledges that Royalty Owner has retained out of the Royalty Lands a royalty interest in the Coal forming part of the Royalty Lands (the "Royalty")...

(c) The Parties acknowledge and agree that the Royalty constitutes an existing legal and beneficial interest in the Royalty Lands which is being retained by Royalty Owner and that the principal value of the Royalty is attributable to the Coal forming part of the Royalty Lands.

…

2.3 Nature of Interest

(a) The Parties intend that the Royalty shall constitute a legal and beneficial interest in the Royalty Lands retained by Royalty Owner and, accordingly, agree that:

(i) the Royalty will run with and form part of the Royalty Lands and shall be binding upon and represent a liability of any successors or assigns of, and an encumbrance on, the Royalty Lands or any portion thereof or interest therein;

(ii) Royalty Owner may register or otherwise record against the certificates of title to the Royalty Lands, a caveat or notice as Royalty Owner may desire to give notice of the existence of the Royalty to third parties… [Emphasis added.][81]

84. An intention to grant an interest in land is also evidenced by the fact that Genesee GP (being the general partner of Genesee LP) has registered caveats against PMRU's land title certificates for the subject coal to protect the royalty interest,[82] as is common practice in the resource industry.[83]

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81 Ben Lewis Affidavit, Exhibit "K" **[Appeal Record Vol II at Tab 2]**.

82 By way of example, see Land Title Certificate 142 140 855 **[Appeal Record Vol II at Tab 1]**.

83 See e.g., *Dynex* at paras 2, 16 **[Pl Auth at Tab 5]**. In the resource industry, a royalty held by a party who does not own the minerals in situ (as is the case here) is called an "overriding royalty" or "gross overriding royalty".

85. And as to the second requirement of the test, the interest out of which the royalty is carved is itself an interest in land; namely, freehold coal.[84]

86. The Master made no finding of whether the royalty interest is an interest in land, though acknowledged that "there is wording in the agreement to the effect that an interest in land was intended".[85]

87. The plaintiffs thus maintain, and the fact is, that the royalty interest held by Genesee LP is a distinct land interest analogous to a rent charge.[86]

88. To use the oft-quoted expression of property being a "bundle of rights",[87] the plaintiffs are entitled to the profits from the subject coal whenever it is severed from the land to fuel the power plant. While the mechanics of that entitlement are specified by contract, the entitlement itself arises from a legal and beneficial interest *in rem* the coal itself.

89. Therefore, the nature of the royalty interest at issue in these proceedings is an interest in land.

D. The Concept of a Taking

90. In 1765, Sir William Blackstone wrote in *Commentaries on the Laws of England*:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.
>
> …
>
> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community… In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[88]

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84 Ben Lewis Affidavit at para 22, Exhibits "K", "L" **[Appeal Record Vol II at Tab 2]**.
85 Master's Reasons at para 35 **[Appeal Record Vol I at Tab 22]**.
86 See *Dynex* at paras 8, 11-12 **[Pl Auth at Tab 5]**.
87 See e.g., *Tucows.Com Co v Lojas Renner SA*, 2011 ONCA 548 at para 57 **[Pl Auth at Tab 7]**, leave to appeal to SCC ref'd 2012 CanLII 28261.
88 Blackstone, *Commentaries on the Laws of England*, vol 1, ch 16 **[Pl Auth Tab 8]**.

91. The plaintiffs advance a "taking" claim, variously known as a *de facto* expropriation, a regulatory taking, or a constructive taking.

92. A taking is said to arise when the state does not acquire legal title to property through actual, forcible appropriation under expropriation legislation (also known as a *de jure* taking), but nonetheless regulates the property's use such that the landowner is, to a legally significant measure, deprived of his or her rights of use and enjoyment.[89] As Professor Bruce Ziff has explained:

> At some point, admittedly hard to locate, excessive regulation must be seen as equivalent to confiscation. If property is a bundle of rights, then state action that removes the ability to exercise those rights leaves merely the twine of the bundle (bare title), but little else.[90]

93. The law of takings is thus concerned with government restrictions which (whether by design or effect) control an owner's use of land but fall short of actually acquiring it, and upon crossing a requisite threshold conferring unto the landowner a right of compensation so long as there is no statutory protection immunizing the public authority from liability.[91]

94. The doctrine originated as a rule of statutory construction from a 1920 decision of the House of Lords known as *Attorney General v De Keyser's Royal Hotel Limited*.[92]

95. In that case, the British War Office took possession of a hotel to house the headquarters personnel of the Royal Flying Corps without compensating the owner. While there was nothing in the Defence of the Realm Regulations nor any statute which expressly required that compensation be paid, the House of Lords nevertheless held compensation was presumed at law, Lord Atkinson writing:

> The recognized rule for the construction of statutes is that unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. Bowen L.J. in *London and North Western Ry. Co. v. Evans* (1) said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit

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89 Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC Law Review at 315 ("Brown Article") **[Pl Auth at Tab 9]**.
90 Brown Article at 321-22 **[Pl Auth at Tab 9]**.
91 Brown Article at 321 **[Pl Auth at Tab 9]**.
92 [1920] AC 508 ("*De Keyser's*) **[Pl Auth at Tab 10]**.

> of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him.[93]

96. Since *De Keyser's*, the Supreme Court of Canada has considered a taking claim on three occasions and recently granted leave to appeal in respect of a fourth.

97. The first was its 1979 decision *Manitoba Fisheries v Canada*.[94] There, the federal government had passed legislation which granted a commercial monopoly in the export of fish from Manitoba to a government agency. The physical assets of the plaintiff fishing company were not seized, but the government's actions had the effect of putting the plaintiff out of business. Observing that there was nothing in the legislation providing for the taking of the plaintiff's goodwill without compensation, the Court ordered that the plaintiff was to be paid the fair market value of its business in accordance with the principle laid down in *De Keyser's*.[95]

98. The second taking case considered by the Supreme Court of Canada was *British Columbia v Tener*, a decision from 1985.[96] In that case, the plaintiffs owned mineral claims in lands which later became the Wells Grey Provincial Park. The Crown subsequently enacted legislation which prohibited the exploitation of mineral claims in provincial parks without a park use permit, and when the Crown refused to issue such a permit to the plaintiffs they sued for compensation.

99. The Supreme Court of Canada unanimously agreed that a taking had occurred as the refusal had the effect of "defeating the [plaintiffs'] entire interest in the land."[97] While Wilson J. and Dickson C.J. (concurring) were of the view that the Crown had "effectively removed [an] encumbrance from its land" by depriving the plaintiffs of their right to go on to the land for the purpose of exploiting the mineral claims, Estey J. for the majority said the action by the government "was to enhance the value of the public park" and that the refusal to grant the permit "took value from the [plaintiffs] and added value to the park".[98]

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93 *De Keyser's* at 542 **[Pl Auth at Tab 10]**.
94 [1979] 1 SCR 101 ("*Manitoba Fisheries*") **[Pl Auth at Tab 11]**.
95 *Manitoba Fisheries* at para 36 **[Pl Auth at Tab 11]**.
96 [1985] 1 SCR 533 ("*Tener*") **[Pl Auth at Tab 12]**.
97 *Tener* at para 65 **[Pl Auth at Tab 12]**.
98 *Tener* at paras 21, 68 **[Pl Auth at Tab 12]**.

100. On either characterization, *Tener* established that a taking may occur where the Crown acquires an intangible but valuable benefit, a point aptly made by the esteemed legal scholar Peter Hogg:

> The Supreme Court of Canada decided another "constructive taking" case in *The Queen (B.C.) v Tener* (1985). The provincial statue in issue essentially made it impossible for the plaintiffs to exploit their mineral rights in a provincial park. The statute said nothing about compensation. The Supreme Court of Canada followed the *Manitoba Fisheries* case to hold that the denial of access to the mineral rights was a taking of property that had to be compensated. This holding goes a step beyond *Manitoba Fisheries*. In that case, a Crown corporation had in effect acquired the business of exporting fish. In *Tener*, the Crown had acquired neither the plaintiffs' mineral rights nor the right to exploit them. The judges struggled with the question of whether the Crown had acquired anything for which it should pay compensation. Estey J. for the majority said that the prohibition of mineral operations in the park added "value" to the Crown's land. And Wilson J. for the concurring minority said that it "effectively removed" an encumbrance from the Crown's land, which was a "gain" to the Crown. In the end, both judges agreed that the plaintiffs' effective loss of their mineral rights was matched by the Crown's acquisition of an intangible but valuable benefit. Therefore, the statute effected a taking and the plaintiffs were entitled to compensation. [Emphasis added, footnotes removed.][99]

101. The third taking case considered by the Supreme Court of Canada was its 2006 decision *Canadian Pacific Railway v Vancouver.*[100] There, the City of Vancouver passed a bylaw which designated a transportation corridor owned by CPR as a public thoroughfare for transportation and greenways, the effect of which the Court acknowledged was "to freeze the redevelopment potential of the corridor and confine CPR to uneconomic uses of the land."[101] CPR sued the City, arguing that the bylaw constituted a constructive taking by turning the corridor into a *de facto* park and stripping it of any economically profitable use.

102. McLachlin C.J. outlined the following test for a common law taking:

> 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…[102]

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99 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019) at 29.5(d) **[Pl Auth at Tab 13]**.
100 2006 SCC 5 ("*CPR*") **[Pl Auth at Tab 14]**.
101 *CPR* at para 8 **[Pl Auth at Tab 14]**.
102 *CPR* at para 30 **[Pl Auth at Tab 14]**.

103. The Chief Justice held that neither of these requirements were satisfied on the facts before her, but added that even if matters were otherwise liability still would not attach to the City as the *Vancouver Charter* contained an explicit legislative exemption from compensation resulting from zoning bylaws.[103]

104. While the two-part test for a taking articulated by McLachlin C.J. had not been stated by the Supreme Court of Canada in *Manitoba Fisheries* (a license case) or *Tener* (a mineral case), neither of those earlier decisions were overturned and both were cited favourably in *CPR v Vancouver* (a land use case).[104]

105. And as will be discussed later in this brief, in June 2021 the Supreme Court of Canada granted leave to appeal in respect of another land use taking case,[105] with one of the issues before the Court being whether the two-part test from *CPR v Vancouver* should be revisited.[106]

E. A Taking has Occurred under *Tener*

106. The plaintiffs submit that *Tener* is binding authority and determines the case in their favour, with the result that the defendants' applications to summarily dismiss the taking claim ought not have been granted.

107. Like the claimants in *Tener* who could no longer access their minerals, the plaintiffs' entire interest in the royalty interest has been effectively defeated as a result of the defendants' actions to phase out coal power by 2030. In particular, the Affidavit of Ben Lewis (upon which no cross-examination was had) deposes that:

(a) the royalty interest is in thermal coal which comprises the Genesee Mine;[107]

(b) the royalty interest generates income for the plaintiffs when coal is produced from the Genesee Mine to fuel the Genesee Power Plant;[108]

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103 *CPR* at paras 31, 37 **[Pl Auth at Tab 14]**.
104 *CPR* at paras 30, 32 **[Pl Auth at Tab 14]**.
105 *Annapolis Group Inc v Halifax Regional Municipality*, 2021 CanLII 54464 (SCC**) [Pl Auth at Tab 15]**.
106 Factum of Annapolis Group Inc. (Appellant) in SCC File No. 39594 at para 32 **[Pl Auth at Tab 16]**.
107 Ben Lewis Affidavit at paras 8, 22 **[Appeal Record Vol II at Tab 2]**.
108 Ben Lewis Affidavit at paras 8, 17, 22, 24-25 **[Appeal Record Vol II at Tab 2]**.

(c) the Genesee Power Plant is, and always has been, the only user of the coal;[109]

(d) as a result of Alberta's Off-Coal Agreement with Capital Power and Canada's Amended Regulations, the Genesee Power Plant will cease generating coal-fired electricity by 2030;[110] and

(e) when the Genesee Power Plant ceases generating coal-fired electricity, the royalty interest will cease to have any value – as there is no use for the coal other than as a fuel source for the power plant.[111]

108. And insofar as *Tener* requires that an intangible but valuable benefit accrue to the Crown (such as in the form of a more valuable park or the effective removal of an encumbrance from the Crown's land), there is ample evidence that the phase out of coal power by 2030 will result in financial benefits for the defendants and health and environmental benefits for their constituents.

109. For example, on the benefits of the off-coal agreements with Capital Power, ATCO, and TransAlta, Alberta has announced that:

(a) phasing out coal pollution will "protect the health of Albertans … and save money in health-care costs and lost productivity";[112]

(b) an accelerated Alberta coal phase out will prevent hundreds of premature deaths and emergency room visits, and will avoid nearly $3 billion in "negative health outcomes";[113] and

(c) permitting coal power plants to continue "emitting harmful pollution" after 2030 would reduce air quality and impact human health.[114]

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109 Ben Lewis Affidavit at paras 52, 55 **[Appeal Record Vol II at Tab 2]**.
110 Ben Lewis Affidavit at paras 13, 38-39, 45-47, 56 **[Appeal Record Vol II at Tab 2]**.
111 Ben Lewis Affidavit at paras 52-57 **[Appeal Record Vol II at Tab 2]**.
112 Ben Lewis Affidavit at Exhibit "U" **[Appeal Record Vol II at Tab 2]**.
113 Ben Lewis Affidavit at Exhibit "U" **[Appeal Record Vol II at Tab 2]**.
114 Ben Lewis Affidavit at Exhibit "U" **[Appeal Record Vol II at Tab 2]**.

110. And on the benefits of the Amended Regulations, Canada has announced that:

> The cumulative benefit in Canada of the emission reductions from the Amendments is valued at about $4.7 billion (2019-2055).
>
> Benefits of the Amendments are from avoided global climate change damage and improved air quality due to reduced air pollutant emissions. Benefits from reduced air pollutants (calculated at the provincial level) include health benefits and environmental benefits. The Amendments will reduce GHG emissions from electricity generation by 94 Mt CO2e 27 between 2019 and 2055 versus the baseline scenario. The avoided climate change damage from these reductions is valued at $3.4 billion... The Amendments will also result in the reduction of emissions of many criteria air pollutants. The most significant reduction in emissions will be 555 kilotons (kt) of sulphur oxides (SOx) and 206 kt of nitrogen oxides (NOx) between 2019 and 2055. These criteria air pollutants have been shown to adversely affect the health of Canadians, through direct exposure and through the creation of smog (including particulate matter and ground-level ozone). The health benefits from reduced air pollutant emissions and avoided human exposure to mercury are valued at $1.3 billion. Environmental benefits, such as increased crop yields, reduced surface soiling, and improvement in visibility, is valued at $40 million. [Emphasis added.][115]

111. In addition to *Tener*, this case parallels two other mineral cases where government action was found to have resulted in compensation from a taking.

112. The first was *Casamiro Resources Corp v British Columbia*,[116] a 1990 decision by the British Columbia Supreme Court. In that case, the plaintiff alleged the Crown had constructively taken its mineral claims (situated in a provincial park) after an Order-in-Council indefinitely prohibited mineral exploration in the park. Following *Tener*, MacKinnon J. found that a taking had occurred as the Order-in-Council left the plaintiff "with land which was essentially worthless" and "took away the plaintiff's entire interest" in the land.[117] The trial judgement in *Casamiro* was upheld on appeal, where Southin J.A. for the British Columbia Court of Appeal agreed that the Order-in-Council had the effect of turning the mineral grants into "meaningless pieces of paper".[118]

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115 Ben Lewis Affidavit at Exhibit "HH" at pgs 18-19 **[Appeal Record Vol II at Tab 2]**.
116 (1990), 43 LCR 246 (BCSC) ("*Casamiro BCSC*") **[Pl Auth at Tab 17]**.
117 *Casamiro BCSC* at paras 11, 13 **[Pl Auth at Tab 17]**.
118 (1991), 55 BCLR (2d) 346 (CA) at para 34 ("*Casamiro BCCA")* **[Pl Auth at Tab 18]**.

113. The other parallel mineral case is *Rock Resources Inc v British Columbia*,[119] a 2003 decision by the British Columbia Court of Appeal. There, the plaintiff had acquired mineral claims on Crown land, but as a result of legislation creating new parks the plaintiff was effectively prevented from exploring and developing those claims which fell within the boundaries of a new park. In the result, the Court of Appeal found that the new legislation effected a "taking of a property right or interest held by the plaintiff".[120]

114. Like the mineral claimants in *Tener*, *Casamiro*, and *Rock Resources* whose interests were effectively defeated as a result of government action in the pursuit of public policy goals, the plaintiffs here will see their royalty interest reduced to "meaningless pieces of paper" as a result of the defendants' actions to phase out coal power by 2030.

115. And as the defendants have not raised legislation which permits the taking of coal-related interests without compensation to the owner (as is there no such legislation), by the common law the plaintiffs are entitled to compensation for the loss of their property.

116. The Master agreed that *Tener* was the Supreme Court of Canada case "arguably closest to the facts here",[121] and found or agreed that:

    (a) the Genesee Mine "supplies all of its geothermal coal to the plant alone" and that it "does not supply geothermal coal to anyone else";[122]

    (b) the Genesee Mine is "immediately adjacent to the plant and the mine does not have the infrastructure such as rail facilities to send the coal elsewhere";[123]

    (c) although "the coal itself is not actually taken here, the ability to develop and exploit the coal is arguably taken (albeit indirectly by making it valueless)";[124] and

    (d) there are benefits from the phase out of coal power "in terms of the potential health benefits to society and reduction in healthcare costs to the government."[125]

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119 2003 BCCA 324 ("*Rock Resources*") **[Pl Auth at Tab 19]**.
120 *Rock Resources* at para 57 **[Pl Auth at Tab 19]**.
121 Master's Reasons at para 30 **[Appeal Record Vol I at Tab 22]**.
122 Master's Reasons at para 6 **[Appeal Record Vol I at Tab 22]**.
123 Master's Reasons at para 36 **[Appeal Record Vol I at Tab 22]**.
124 Master's Reasons at para 33 **[Appeal Record Vol I at Tab 22]**.
125 Master's Reasons at para 40 **[Appeal Record Vol I at Tab 22]**.

117. Bearing in mind that the question is not whether the plaintiffs have proven their claim but instead whether the defendants have shown the claim is devoid of merit, on these findings alone summary dismissal ought to have been refused, since:

(a) like in *Tener* where the Supreme Court of Canada found that the mineral claimants' property interests had been effectively defeated from being denied access to their minerals, here the Master found that the ability to develop and exploit the coal has arguably been taken as a result of the resource becoming valueless; and

(b) like in *Tener* where the Crown had acquired a valuable but intangible benefit such as a superior park, here the Master agreed there would be potential health benefits to society and reduced government healthcare costs.

118. However, and despite the aforementioned findings, the Master went on to find that *Tener* was distinguishable but without explanation,[126] and then concluded there was no taking for reasons which reflect an incorrect understanding of the facts, the law, and the plaintiffs' position.

119. The Master recognized that land use cases are inapplicable here but nevertheless applied the two-part test from *CPR v Vancouver* (a land use case) on the supposition that "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."[127] This is unprecedented and unfounded, and in the case of Alberta could have no application as Alberta passed no regulations.

120. This is a mineral case, and minerals have no use unless they can be mined (as *Tener* makes clear). If the Master is going to disregard binding authority from the Supreme Court of Canada, principled reasoning is required. If the Master is going to extend the test from a land use case to a mineral case re-characterized as "environmental regulation", again principled reasoning is required.

121. The Master's key reasons, and why each are wrong, are as follow.

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126 Master's Reasons at para 37 **[Appeal Record Vol I at Tab 22]**.
127 Master's Reasons at para 44 **[Appeal Record Vol I at Tab 22]**.

Para	Master's Reasons	Plaintiffs' Response
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.	While the Master concluded that the facts of this case are distinguishable from *Tener*, no reasons were provided showing why that is the case, with the consequence that the reviewing judge must conduct his or her own assessment.[128] The plaintiffs accept that governments may change regulations, and in most instances without compensating affected property owners. Their position is simply that when government action renders property valueless (which is what the Master found here), fair compensation must be paid to the owner in accordance with the law of constructive takings. This is the same situation as in *Tener*, *Casamiro*, and *Rock Resources*, where mineral interests were acquired based on information known at the time, subsequent government action effectively defeated those interests, and compensation was ordered. In any event, Alberta passed no regulations but instead agreed to pay Capital Power $733,800,000 to cease coal-fired electrical generation.
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…	See the plaintiffs' response to para 37, above.

[128] See *Gronnerud (Litigation Guardians of) v Gronnerud Estate*, 2002 SCC 38 at para 33 **[Pl Auth Tab 20]**.

Para	Master's Reasons	Plaintiffs' Response
38 cont'd	…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.	The plaintiffs do not seek to make the defendants the "guarantors" of their business transaction. Rather, the plaintiffs seek compensation for the taking of their royalty interest, which compensation is measured by the royalty income that would have been earned from 2030 to 2055 but for the defendants' conduct. Contrary to the Master's statement, the Dedication & Unitization Agreement contemplated royalty income for the plaintiffs until 2055. In particular, section 7.1 specifies the Agreement would continue until either (i) all recoverable coal reserves have been mined, (ii) the Genesee Power Plant is permanently decommissioned, or (iii) the Agreement is terminated by the parties,[129] and: • in 2013, the mine had an expected lifespan of 61 years;[130] • when the plaintiffs acquired the royalty interest and entered into the Agreement, the Genesee Power Plant was scheduled to be decommissioned in 2055 pursuant to the original Regulations;[131] and • there is no evidence of an intention by the parties to terminate the Agreement prior to 2055.

[129] Affidavit of Ben Lewis at Exhibit "L" s 7.1 **[Appeal Record Vol II at Tab 2]**.
[130] Affidavit of Ben Lewis at Exhibit "H" at pg 10 **[Appeal Record Vol II at Tab 2]**.
[131] Affidavit of Ben Lewis at paras 15, 17, 19; Exhibit "F" at pg 15; Exhibit "G" at ALT000915; Exhibit "H" at pgs 10, 12 **[Appeal Record Vol II at Tab 2]**.

Para	Master's Reasons	Plaintiffs' Response
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.	It is reasonable to suggest that the 2030 phase out is a surprise. • When the plaintiffs decided to acquire the royalty interest in 2013, Canada had only in the year prior finalized regulations which prescribed lifespans for coal-fired power plants, and Alberta had no such policy, law or regulation;[132] • Canada proposed the 2030 phase out in November 2016, which was nearly 3 years after the plaintiffs decided to acquire the royalty interest;[133] and • Alberta proposed the 2030 phase out in November 2015, which was nearly 2 years after the plaintiffs decided to acquire the royalty interest.[134] Moreover, the 2030 phase out is not a routine regulatory change, but rather an unexpected and transformative one which upended the long planning of industry participants. The defendants' own recognition of this is reflected in their significant efforts to compensate and support affected coal plant owners, workers, and communities with a view to providing a "just and fair" transition for them.[135] The Master's reasoning is also inapplicable to Alberta, which did not amend existing regulations through the legislative process but instead entered into a private transaction with Capital Power to cease generating coal-fired electricity. There was no due process and the transaction was only revealed to the public after it was made.

[132] Affidavit of Ben Lewis at paras 12-15, Exhibits "C", "D" and "E" **[Appeal Record Vol II at Tab 2]**.
[133] Affidavit of Ben Lewis at Exhibits "J", "FF" **[Appeal Record Vol II at Tab 2]**.
[134] Affidavit of Ben Lewis at Exhibits "J", "T" **[Appeal Record Vol II at Tab 2]**.
[135] Affidavit of Ben Lewis at paras 38-40, 48-50, Exhibits "AA", "II", "JJ" **[Appeal Record Vol II at Tab 2]**.

Para	Master's Reasons	Plaintiffs' Response
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… 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.	Whether the defendants have acquired a "beneficial interest" in the property is irrelevant to determining whether the plaintiffs are entitled to compensation under *Tener*. A taking was found in *Tener* even though the Crown did not acquire a "beneficial interest" in the mineral rights; rather, the benefit gained by the Crown was an intangible one such as a more valuable park or the effective removal of an encumbrance from its lands. While the Supreme Court of Canada imposed the "beneficial interest" requirement in its subsequent decision of *CPR v Vancouver*, the Court did not overturn *Tener* and even cited it favourably. The Master's own recognition that *CPR v Vancouver* (a land use case) is inapplicable to mineral cases such as the one here and so needs be extended is apparent from para 44 of his reasons where he writes, "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."
44	…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.	See the plaintiffs' response to para 39, above.

Para	Master's Reasons	Plaintiffs' Response
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.	The plaintiffs are not polluters. Instead, they hold a royalty interest within *in situ* coal – a natural resource. (If there is a "creator of a health or environmental hazard", it would be the owners of the coal power plants who are receiving $1.1 billion in compensation to cease coal-fired operations by 2030.) In any event: • The Master refrained from finding there was such a health hazard. • In both principle and practice, the law of constructive takings does not distinguish between plaintiffs whose business may adversely impact the environment and those who do not. This is confirmed by the outcomes in *Manitoba Fisheries* (which involved a commercial fishing company) and *Tener* (which involved a mining company). • If the legislature wishes to obviate a health or environmental hazard without compensating the creator of that hazard, it may immunize its liability for takings by statute (which did not occur here).
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 plaintiffs do <u>not</u> advance a claim for inducement of breach of contract against either defendant. Their sole claim against both defendants is for a taking of the royalty interest, which claim does not lack merit for the reasons stated in this brief.

122. The plaintiffs need not prove their case at this point in time, but do submit the foregoing is more than enough to show that their taking claim has sufficient merit such that the defendants' applications for summary dismissal ought to have been dismissed.

F. A Taking has Occurred under *CPR v Vancouver*

123. While the plaintiffs submit they are entitled to compensation under the binding authority of *Tener* (a mineral case), they are also entitled to compensation under the two-part test articulated in *CPR v Vancouver* (a land use case).

124. As noted, the Court in *CPR v Vancouver* outlined the following test for a taking:

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

(b) the removal of all reasonable uses of the property.[136]

125. The Master's application of this two-part test is set out in a single paragraph, which states:

> 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.[137]

126. As a preliminary comment, it appears the Master erred by failing to correctly articulate the test from *CPR v Vancouver*.

(a) The Master agreed with the plaintiffs that financial and health benefits from the coal phase out would accrue to the governments and society, and said that "normally would have been sufficient to meet the normal second branch of the taking test." However, the case law does not contemplate a "normal" second branch, and in any event the question of benefit goes only to the first branch (*i.e.*, the acquisition of a beneficial interest in the property or flowing from it).

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136 *CPR* at para 30 **[Pl Auth at Tab 14]**.
137 Master's Reasons at para 40 **[Appeal Record Vol I at Tab 22]**.

(b) The Master then concluded that the "first branch of the traditional taking test is not met", but does not explain what is meant by the "traditional" taking test.

127. But leaving the Master's articulation of the test aside, the Master erred in concluding that the first branch is not met.

128. While both defendants argued before the Master that the first branch of the test requires the state to acquire proprietary rights in the land at issue,[138] two cases released last year indicate a general or intangible benefit accruing to the state or public suffices.

129. The first case is *Kalmring v Alberta*,[139] a decision rendered by Master Mason of the Alberta Court of Queen's Bench in January 2020.

130. In *Kalmring*, the Government of Alberta changed the method of drivers' licence road testing from provincially licensed, privately employed driver examiners back to a system of using government employees to conduct road tests. In the result, the privately employed driver examiners were effectively put out of business.

131. A group of private driver examiners licensed under the prior regime commenced proceedings against Alberta, alleging among other things that they had been deprived of all value and reasonable use of their licenses, shares, goodwill, tools, and equipment associated with their driver examiner businesses and that the Crown had "unlawfully taken [their] property without any compensation".[140]

132. With reference to the two-part test in *CPR v Vancouver*, the Crown applied to strike the claim specifically on the basis that it "did not acquire a beneficial interest in any of the property" and that it "did not acquire anything" when it phased out the private driver examiner industry.[141]

133. Master Mason expressly rejected the argument that the record established the Crown had not acquired anything, stating:

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138 Alberta Brief for Master at paras 52, 87-91 **[Appeal Record Vol I at Tab 14]**; Canada Brief for Master at paras 82, 87 **[Appeal Record Vol I at Tab 15]**.
139 2020 ABQB 81 ("*Kalmring*") **[Pl Auth at Tab 21]**.
140 *Kalmring* at para 66 **[Pl Auth at Tab 21]**.
141 *Kalmring* at paras 68, 71, 74 **[Pl Auth at Tab 21]**.

> That is a matter of evidence, which is not before the Court on this striking application. The government may generate revenue in providing the services itself, or perhaps it provides a subsidized service to its constituents. In view of the case law, either could arguably be characterized as the acquisition of an intangible benefit by the Crown. [Emphasis added.][142]

134. The Court's conclusion that an "intangible benefit" could satisfy the first branch of the test was largely premised on *Tener* and the commentary of Professor Hogg reproduced above at para 100 of this brief, and in the result Master Mason held that the plaintiffs' taking claim was arguable and declined to Order it struck.[143]

135. The second case which indicates the state need not acquire proprietary rights to satisfy the first branch of the test is *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*,[144] a decision of the British Columbia Supreme Court released in April 2020.

136. In that case, the plaintiff proposed the development of a subsurface coal mining project which was subject to environmental approval by provincial and federal regulators. When the plaintiff was advised that its application for an environmental assessment certificate would be rejected, the plaintiff alleged the BC and federal governments had constructively taken its subsurface mineral rights.

137. While the taking claim was found untenable on the basis that the plaintiff could not demonstrate all prospects for the exploitation of the minerals were lost (unlike here), the Court held that the first branch of the test from *CPR v Vancouver* was satisfied on the basis that removing the possibility of mining "enhanced the value of surface lots owned by BC."[145] The Court characterized this benefit as "arguably equivalent to the benefit gained by the Province in *Tener* and *Casamiro.*"[146]

138. In the present case, the first branch of the test is thus met as there is ample evidence that the phase out of coal power by 2030 will result in financial benefits for the defendants and health and environmental benefits for the Alberta and Canadian public (see paras 109 and

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142 *Kalmring* at para 75 **[Pl Auth at Tab 21]**.
143 *Kalmring* at paras 72-73, 79 **[Pl Auth at Tab 21]**.
144 2020 BCSC 621 ("*Compliance Coal*") **[Pl Auth at Tab 22]**.
145 *Compliance Coal* at paras 92-94, 96 **[Pl Auth at Tab 22]**.
146 *Compliance Coal* at para 96 **[Pl Auth at Tab 22]**.

110 of this brief, above.) Again, even the Master agreed that as a result of the 2030 phase out "there is a financial benefit in terms of the potential health benefits to society and reduction in healthcare costs to the government."[147]

139. But the first branch is still met even if it requires the state to acquire property rights (apparently the view taken by the Master), as the defendants will acquire a beneficial interest in the coal related to the royalty interest from their actions to phase out coal power by 2030.

140. To explain:

(a) A freehold estate ultimately derives from a Crown grant,[148] and here the royalty interest held by Genesee LP is in freehold coal currently granted to PMRU.

(b) However, when coal-fired electrical generation at the Genesee Power Plant ceases the subject coal will no longer be mined and the Crown will effectively recover its grant of freehold interest in the coal.

(c) While legal title to the coal will nominally remain with PMRU, the Crown will acquire a beneficial interest in the form of a right to the coal being kept in its natural state.

141. The present case is analogous to *Lynch v City of St John's*,[149] a 2016 decision by the Newfoundland Court of Appeal where a taking was found to have occurred as a result of watershed protection regulations that effectively precluded development of the plaintiff's land beyond its natural condition. On the question of whether there was an acquisition by the state, the Court unanimously agreed that the City of St. John's had acquired a beneficial interest in the plaintiff's land consisting of the right to a continuous flow of uncontaminated groundwater.[150]

142. The second requirement of the test – the removal of all reasonable uses of the property – is also satisfied as the plaintiffs' royalty interest will cease to generate any income from the production of thermal coal after 2030 and will become worthless.

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147 Master's Reasons at para 40 **[Appeal Record Vol II at Tab 22]**.
148 See *Kalantzis v East Kootenay (Regional District)*, 2019 BCSC 1001 at para 100 **[Pl Auth at Tab 23]**.
149 2016 NLCA 35 **[Pl Auth at Tab 24]** ("*Lynch*"), leave to appeal to SCC ref'd 2017 CanLII 4184.
150 *Lynch* at paras 54-61 **[Pl Auth at Tab 24]**.

143. Not only did the Master agree that the subject coal will become "valueless",[151] but the defendants' own public statements inescapably lead to the conclusion that the Genesee Mine will close once the Genesee Power Plant ceases coal-fired emissions by 2030.

144. For example, Alberta has:

(a) classified the Genesee Mine as a thermal (as opposed to metallurgical) coal mine, and one which does not export coal;[152]

(b) excluded the Genesee Mine from its list of mines "[n]ot affected by phase-out of coal-fired emissions";[153] and

(c) made available a "bridge to re-employment relief grant" to workers at the Genesee Mine for the purpose of providing "financial assistance … as they search for a new job."[154]

145. That the Genesee Mine will close by 2030 is also tacitly acknowledged by Alberta in its notice of application, which alleges that the "Genesee Coal Mine … remains entirely dedicated to the generation of electricity in Alberta" and has not "yet" been shut down.[155]

146. For its part, Canada has stated that the Regulations would be amended to "phase out traditional coal-fired electricity by 2030",[156] and that a federal-provincial working group recommended adopting a regulation to "close" all unabated coal-fired units by 31 December 2029.[157]

147. That the Amended Regulations will phase out the Genesee units (and with it, the Genesee Mine) is also confirmed by Canada's Regulatory Impact Analysis Statement from December 2018, which states:

> The Amendments will require all coal-fired electricity generating units to comply with an emissions performance standard of 420 tonnes of carbon dioxide per gigawatt hour of electricity produced (t of C02/GWh) by 2030,

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151 Master's Reasons at para 33 **[Appeal Record Vol I at Tab 22]**.
152 Ben Lewis Affidavit at Exhibits "U", "KK", "LL" **[Appeal Record Vol II at Tab 2]**.
153 Ben Lewis Affidavit of Exhibit "U" **[Appeal Record Vol II at Tab 2]**.
154 Ben Lewis Affidavit at para 40, Exhibit "AA" **[Appeal Record Vol II at Tab 2]**.
155 Application filed by Alberta on June 5, 2020 at paras 11-12 **[Appeal Record Vol I at Tab 13]**.
156 Ben Lewis Affidavit at Exhibit "GG" at pg 2 **[Appeal Record Vol II at Tab 2]**.
157 Ben Lewis Affidavit at Exhibit "R" at pg 166 **[Appeal Record Vol II at Tab 2]**.

> at the latest. This performance standard is designed to phase out conventional coal by 2030.
>
> …
>
> The benefits and costs associated with the Amendments were assessed in accordance with the Treasury Board Secretariat … which includes identifying, quantifying and, where possible, monetizing the impacts associated with the policy. The incremental impacts of the Amendments are determined by comparing the electricity sector *without* the Amendments (the baseline scenario), and *with* the Amendments (the policy scenario).
>
> ….
>
> In the baseline scenario, coal-fired units in Alberta will be shut down by December 31, 2030, in response to Alberta's Climate Leadership Plan. In the policy scenario, all coal units in Alberta will shut down at the end of 2029.
>
> …
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> There are significant upfront capital costs for compliance between 2026 and 2030 as replacement units are built and coal units are decommissioned.
>
> …
>
> The prospect of increasing exports of Canadian thermal coal is weak… Consequently, Canadian thermal coal exports are unlikely to increase and most Canadian thermal coal mines that supply domestic consumption are not expected to continue to operate after the Amendments come into effect.
>
> In 2016, up to 1 500 workers were directly employed at coal-fired electricity plants that will be affected by the Amendments. Many of these jobs could be at risk as a result of the Amendments… Employment transitions for thermal coal mines and coal-fired electricity plants will occur gradually as operations are closed over time. [Emphasis added.][158]

148. Similar statements are found in the December 2018 report of the Federal Task Force on Just Transition for Canadian Coal Power Workers and Communities, which advised that:

> The Government of Canada's decision to phase out traditional coal-fired electricity by 2030 applies to the production and use of **thermal coal**.
>
> …

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[158] Ben Lewis Affidavit at Exhibit "HH" at pgs 5, 14, 16, 24, 35 **[Appeal Record Vol II at Tab 2]**.

> Phasing out coal-fired electricity, however, will have direct and indirect impacts on thousands of workers, dozens of communities, and four provinces, including:
>
> - Alberta, Saskatchewan, New Brunswick, and Nova Scotia;
> - Nearly 50 communities with nearby coal mines or generating stations;
> - 3,000 to 3,900 workers at coal-fired generating stations and domestic thermal coal mines;
> - Over a dozen generating stations, owned by six employers;
> - Nine mines, owned by three employers.
>
> …
>
> The Government of Canada's policy to accelerate the phase out of traditional coal-fired electricity by 2030 will affect only thermal coal production and use. Canada will continue to mine, use, and export coal for metallurgical processes.
>
> …
>
> In December 2018, the Government of Canada amended the 2012 regulations to accelerate the phase-out of traditional coal-fired electricity by 2030.
>
> …
>
> Based on the best available data, there are between 1,880 and 2,400 people working at coal-fired generating stations and between 1,200 and 1,500 working at thermal coal mines. It is anticipated that a significant number of these workers will lose their jobs by 2030 – and some already have. [Emphasis added.][159]

149. From these statements there is no doubt that the Amended Regulations will result in a phasing out of the coal-fired generating units at Genesee, and with them the Genesee Mine and the royalty interest.

150. The plaintiffs' satisfaction of the second branch is even more apparent when considering McLachlin C.J.'s direction in *CPR v Vancouver* that the subject property is to be assessed "not only in relation to the land's potential 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."[160]

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[159] Ben Lewis Affidavit at Exhibit "LL" at pgs v, vii, 5, 10, 13 **[Appeal Record Vol II at Tab 2]**.
[160] *CPR* at para 34 **[Pl Auth at Tab 14]**.

151. The Genesee Mine was developed for the sole purpose of fueling the Genesee Power Plant and to this day the plant remains the only user of the subject coal.[161] There are no other uses to which the coal has or can be put, and both defendants admit that the coal produced from the Genesee Mine is entirely dedicated to the generation of electricity in Alberta.[162]

152. And it bears repeating that the Master likewise agreed that the Genesee Mine "supplies all of its geothermal coal to the plant alone" and that it "does not supply geothermal coal to anyone else."[163]

153. This case is thus fundamentally different from the facts of *CPR v Vancouver*, where the Court found that the City's bylaw did not remove all reasonable uses of CPR's property because it could still use the land to operate a railway, being "the only use to which the land had ever been put during the history of the City."[164]

154. Therefore, the plaintiffs submit that even though their claim is made out under the Supreme Court of Canada's pronouncement in *Tener*, it is also made out under the Court's pronouncement in *CPR v Vancouver* and regardless of whether the first branch of the test involves the acquisition of property rights or a general benefit to the state or public.

G. In the Alternative, a Beneficial Interest is not Required

155. If this Court is inclined to find that the plaintiffs cannot succeed on the basis that the defendants have not acquired a "beneficial interest" in the proprietary sense, then in the alternative the plaintiffs submit a taking may occur at common law absent any property rights flowing to the public authority – a view supported by multiple appellate authorities and strongly advocated by Russell Brown, now a sitting Justice of the Supreme Court of Canada.

156. In other words, the plaintiffs dispute the requirement of a beneficial interest imposed by the Supreme Court of Canada in *CPR v Vancouver* and submit the question of whether a

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161 Ben Lewis Affidavit at paras 52, 55, Exhibit "MM" **[Appeal Record Vol II at Tab 2]**.
162 Alberta Application filed June 5, 2020 at para 12 **[Appeal Record Vol I at Tab 13]**; Canada Application filed June 3, 2020 at para 6 **[Appeal Record Vol I at Tab 12]**.
163 Master's Reasons at para 6 **[Appeal Record Vol I at Tab 22]**.
164 *CPR* at para 34 **[Pl Auth at Tab 14]**.

taking has occurred depends solely on the second branch of the test (*i.e.*, the removal of all reasonable uses of the property). Insofar as a benefit is required, then a general benefit to the state or public suffices.

157. The Master failed to address this argument in his reasons even though it was extensively advanced in both the plaintiffs' written and oral submissions, and in the near future the Supreme Court of Canada is expected to consider a similar argument in *Annapolis v Halifax Regional Municipal Authority*, a taking case in the context of land use in which leave to appeal was recently granted.[165]

158. *Tener*, *Casamiro*, and *Rock Resources* all state or lead to the conclusion that a taking may occur without the public authority acquiring an interest (beneficial or otherwise) in the property alleged to have been confiscated.

159. As noted, the Supreme Court of Canada in *Tener* unanimously agreed that a taking had occurred, though the justices were divided on the nature of the benefit which had accrued to the Crown. While Wilson J. and Dickson C.J. (concurring) were of the view that the Crown had "effectively removed [an] encumbrance from its land" by depriving the plaintiffs of their right to go on to the land for the purpose of exploiting the mineral claims, Estey J. for the majority said the action by the government "was to enhance the value of the public park" and that the refusal to grant the permit "took value from the [plaintiffs] and added value to the park".[166]

160. The key, however, is that on either characterization the benefit obtained by the Crown fell well short of the requirement of a "beneficial interest" later imposed by the Supreme Court of Canada in *CPR v Vancouver*, and instead was more akin to an abstract or effective gain.[167]

161. A similar result occurred in *Casamiro*, where MacKinnon J. for the British Columbia Supreme Court found a taking had occurred as the Order-in-Council left the plaintiff "with land which was essentially worthless" and "took away the plaintiff's entire interest" in the

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165 *Annapolis* **[Pl Auth at Tab 15]**; Factum of Annapolis (Appellant) at paras 33-110 **[Pl Auth at Tab 16]**.
166 *Tener* at paras 21, 68 **[Pl Auth at Tab 12]**.
167 Brown Article at 330-31 **[Pl Auth at Tab 9]**.

land.[168] Significantly, he added that "[t]he fact that the Province does not gain the mineral rights does not alter the situation in any way."[169]

162. And on appeal where the trial judgment was upheld, Southin J.A for the British Columbia Court of Appeal framed the question not whether the province had acquired something but instead "whether the present holder has had all its rights under the grants effectively taken from it by the order in council."[170]

163. Likewise in *Rock Resources*,[171] the British Columbia Court of Appeal found a taking of the plaintiff's mineral claims had occurred as a result of new legislation effectively precluding exploitation of the minerals in a newly created park, notwithstanding the absence of a tangible benefit accruing to the Crown.

164. The irrelevance of an *acquisition* by the state of an interest in the property has also been affirmed, at least implicitly, by this province's own Court of Queen's Bench and Court of Appeal in *Alberta (Minister of Infrastructure) v Nilsson.*[172]

165. In *Nilsson*, the plaintiff owned land within the North Edmonton Restricted Development Area (the "**RDA**"), which required that landowners obtain permission from the Minister of Environment to develop their land. When the plaintiff's application to build a trailer park was denied, he alleged that his land had been constructively taken by the province.

166. At the Court of Queen's Bench, Marceau J. concluded that a *de facto* expropriation occurs when the "government confiscates all, or virtually all, the incidents of ownership" and that the plaintiff had not demonstrated the imposition of the RDA amounted to a taking.[173]

167. And while Marceau J. agreed that cases such as *Manitoba Fisheries* and *Tener* show that a taking claim requires that the Crown receive a corresponding benefit, he added that those same cases also revealed "the benefit does not have to be in the form of the Crown

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168 *Casamiro BCSC* at paras 11, 13 **[Pl Auth at Tab 17]**.
169 *Casamiro BCSC* at para 12 **[Pl Auth at Tab 17]**.
170 *Casamiro BCCA* at para 31 **[Pl Auth at Tab 18]**.
171 *Rock Resources* at paras 1, 57 **[Pl Auth at Tab 19]**.
172 1999 ABQB 440 ("*Nilsson ABQB*") **[Pl Auth at Tab 25]**, aff'd 2002 ABCA 283 ("*Nilsson ABCA*") **[Pl Auth at Tab 26]**; See also Brown Article at 324 **[Pl Auth at Tab 9]**.
173 *Nilsson ABQB* at paras 57, 64 **[Pl Auth at Tab 25]**.

making direct use of the owner's property in the same manner as the owner would have, but can be a general benefit to the public." [Emphasis added.][174]

168. The trial judge was upheld by the Alberta Court of Appeal, which in outlining the relevant principles focused on the "wrongful nature of Crown acts" *vis-a-vis* the property at issue, stating:

> Expropriation generally involves an absolute transfer of title. However, some cases have held that something less than an absolute taking may amount to *de facto* expropriation. In such cases, while title nominally rested with the original owner, the degree of interference with the owner's property rights mandated compensation for loss of the property. Such *de facto* expropriation was successfully argued in *Manitoba Fisheries Ltd. v. R.*, where legislation creating a commercial monopoly in a Crown corporation rendered the appellant's physical plant and goodwill worthless… Compensation was ordered. In *British Columbia v. Tener*, the denial of a permit to exercise mineral rights meant property interest in the minerals was effectively negated… Compensation was also ordered in *Casamiro Resource Corp. v. British Columbia (Attorney General)* on facts closely paralleling those in *Tener*…
>
> …
>
> The question is: At what point does an interference with the freedom of a property owner and a reduction in the incidents of property ownership equate with a taking of property warranting compensation? [Emphasis added.][175]

169. While the Court of Appeal held that the RDA and refusal of a development permit did not amount to a *de facto* expropriation, it added that "we do not exclude the possibility that in an exceptional case the nature or extent of restrictions imposed on land might be so significant that a *de facto* taking of the property has occurred."[176]

170. The Alberta Court of Appeal's above commentary strongly suggests the inquiry into whether a taking has occurred involves determining if the state has removed all reasonable uses of the property and not what, if anything, the state has acquired. Insofar as a benefit matters, it is (as Marceau J. pronounced) sufficient if the impugned government actions result in a general benefit to the public.

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174 *Nilsson ABQB* at paras 53-55 **[Pl Auth at Tab 25]**.
175 *Nilsson ABCA* at paras 41, 48-49 **[Pl Auth at Tab 26]**.
176 *Nilsson ABCA* at para 62 **[Pl Auth at Tab 26]**.

171. This is the same point advocated by Russell Brown (then a professor, now of the Supreme Court of Canada), who in a 2007 academic article (the "**Brown Article**") wrote:

> The point to be implied from *Rock Resources* and *Nilsson* is, of course, the same as that which was expressly stated in *Casamiro*: the absence of a tangible benefit accruing to the public authority does not preclude characterization of its conduct as constituting a constructive taking. The focus instead is on the loss to the plaintiff derived from the derogation by the public authority of its grant, whether of mineral claims (as in *Casamiro* and *Rock Resources*) or of fee simple (as in *Nilsson*). Inasmuch as a benefit accruing to the public authority was even discussed (as it was by the trial judge in *Nilsson*), such benefit was not seen as having to be of a proprietary quality, but rather may constitute a mere advantage. (So, for example, in *CPR v. Vancouver* the City might be seen as having been advantaged by the indefinite reservation of CPR's lands to the City's purposes.) Moreover, such an advantage need not accrue to the public authority specifically, but to the public generally. [Emphasis added.][177]

172. And as observed in the Brown Article,[178] none of the pronouncements in *Casamiro*, *Rock Resources*, or *Nilsson* were even considered or even cited by the Supreme Court of Canada in *CPR v Vancouver*, despite the Court having denied leave to appeal from two of them.[179]

173. Admittedly, McLachlin C.J.'s statement that the government needs to acquire a "beneficial interest" in the subject property was not made without prior authority, but it appears to rest on a single decision – *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*.[180]

174. In *Mariner*, a group of landowners sued for compensation after their building construction applications were refused for having been incompatible with stringent regulations imposed to protect ocean beaches. For the Nova Scotia Court of Appeal, Cromwell J.A. found a taking had not occurred as the plaintiffs had not shown "virtually all incidents of ownership" had been effectively taken away,[181] but went further to state that a taking also requires an effective "acquisition of an interest in land" by the Crown and that the beach regulations did not confer any interest in land on the province.[182]

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177 Brown Article at 326 **[Pl Auth at Tab 9]**.
178 Brown Article **[Pl Auth at Tab 9]**.
179 *Alberta (Minister of Infrastructure) v Nilsson*, [2003] SCCA No 35; *Rock Resources Inc v British Columbia*, [2003] SCCA No 375.
180 1999 NSCA 98 ("*Mariner*") **[Pl Auth at Tab 27]**; See also Brown Article at 326-27 **[Pl Auth at Tab 9]**.
181 *Mariner* at paras 89-90 **[Pl Auth at Tab 27]**.
182 *Mariner* at paras 98-99, 105-107 **[Pl Auth at Tab 27]**.

175. Unlike the Supreme Court of Canada in *CPR v Vancouver*, Cromwell J.A. also acknowledged *Casamiro* and in particular disagreed with the trial judge's conclusion that it was irrelevant that the Crown had not acquired an interest in the mineral claims at issue.[183]

176. But as sagely put in the Brown Article:

> McLachlin C.J.'s reference in *CPR v. Vancouver* to *Mariner Real Estate* was made without comment on, or analysis of, Cromwell J.A.'s reasons. This is unfortunate, since the rejection in those reasons of the trial judge's conclusions in *Casamiro* was accompanied by no explanation other than the peremptory conclusion that "there must be an acquisition as well as a deprivation".
>
> …
>
> As such, the Supreme Court of Canada's first statement on the constructive taking in over 20 years leaves us guessing. Is the failure to address an entire line of contrary appellate authorities on the central issue in *CPR v. Vancouver* to be divined as reflecting judicial disapproval of all case authorities except *Mariner Real Estate*? That is, was the correct statement of law, that even a constructive taking requires both a landowner's loss and a public authority's gain, considered by the Court to be so obvious as to merit no explanation or accounting for those authorities? Or, alternatively, does it reveal the simple failure by the Court to appreciate that it had stumbled upon an issue of some dispute, as signified by the bifurcated jurisprudence?[184]

177. The Brown Article posits that the reason for such an "incomplete and ultimately unsatisfying" consideration in *CPR v Vancouver* of the question of whether a "gain" (in the sense of a proprietary interest) must flow to the public authority in order for a constructive taking to arise is that the Court failed to distinguish between a *de jure* taking (that is, the forcible and actual expropriation of land) and the regulation of land use.[185]

178. The Brown Article reminds that the Supreme Court of Canada previously recognized this very distinction in *Tener*, whereby a taking was found to have occurred even though the Crown did not acquire title to the mineral claims and instead only obtained abstract and intangible benefits such as "value" for a park.[186] Yet despite *Tener*'s carefully crafted

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183 *Mariner* at para 98 **[Pl Auth at Tab 27]**; See also Brown Article at 328 **[Pl Auth at Tab 9]**.
184 Brown Article at 328 **[Pl Auth at Tab 9]**.
185 Brown Article at 329 **[Pl Auth at Tab 9]**.
186 Brown Article at 329-32 **[Pl Auth at Tab 9]**.

reasoning, McLachlin C.J. gives *Tener* only "fleeting reference" in support of the statement that a beneficial interest is required for a taking to arise at common law.[187]

179. The fact is, *Tener*, *Casamiro*, *Rock Resources*, and *Nilsson* all state or lead to the conclusion that a taking does not require a beneficial or other proprietary interest flow to the public authority, and as stated in the Brown Article imposing such a requirement collapses the distinction between a *constructive* taking and a *de jure* taking:

> The essential point of the constructive taking, then, is that the taking is just that: constructive. As such, it inherently contemplates that no gain, or at least no gain of an equitable or otherwise *in rem* quality, need be conferred upon the City in order for a taking to have occurred. The finding of a taking in circumstances of regulated land use is not drawn from the facts but is judicially imposed upon the facts, based upon a threshold denoting the stripping away from the property owner of all reasonable uses of the land.
>
> …
>
> When, therefore, McLachlin C.J. held that there was no constructive taking because "[t]he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision", she, with respect, missed the point of the constructive taking. While an "assurance", as the Chief Justice noted, falls short of being "the sort of benefit" that might support a finding of a *de jure* taking, no such benefit is required to demonstrate a constructive taking. <u>The point is not that the public authority has acquired a benefit, but rather that the scope of the property owner's loss is such that we can say that the public authority's action effectively acquired a benefit, or was tantamount to having acquired a benefit.</u>
>
> …
>
> Admittedly, *CPR v. Vancouver* appears to preserve a nominate distinction between the *de jure* taking and the constructive taking (since the Court refers throughout to a *de facto* taking). <u>The problem, however, is that by imposing on the constructive taking a prerequisite of actual loss and gain that is characteristic of the *de jure* taking, the Court has simultaneously collapsed that distinction.</u> While, therefore, Canadian law nominally retains two forms of taking, no distinctiveness subsists to demarcate one form from the other. [Emphasis added.][188]

180. Like the Brown Article, the plaintiffs advocate for a test which focuses solely on whether the impugned government actions have removed all reasonable uses of the property, and

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[187] Brown Article at 329 **[Pl Auth at Tab 9]**; See *CPR* at para 32 **[Pl Auth at Tab 14]**.
[188] Brown Article at 333-34 **[Pl Auth at Tab 9]**.

submit that insofar as a benefit is required then a general benefit to the state or the public suffices.

181. Such a test is not only faithful to *Tener*, *Casamiro*, *Rock Resources*, and *Nilsson*, but there are compelling reasons why it should carry the day.

182. If the Crown, by regulation or other action, deprives a landowner of all use and enjoyment of his or her property, should it be permitted to escape its duty to compensate simply because it does not acquire anything for itself? Such an outcome is not only patently unjust from a legal perspective, but also normatively out of step with Canadian society's value of property rights.

183. Dispensing with the requirement of a "beneficial interest" would not hamper operation of the modern state. Aggrieved property owners still need demonstrate "proof of virtual extinction of an identifiable interest in land",[189] a high bar which requires more than some loss of economic value of land. Elected officials also reserve the power to expressly immunize the state's liability for takings by statute, as the *Vancouver Charter* did in *CPR v Vancouver*.[190]

184. And since *CPR v Vancouver*, at least three recent cases suggest a taking may occur without the Crown acquiring any rights in the property at issue: *Lorraine (Ville) c 2646-8926 Quebec Inc*,[191] *Kalmring*,[192] and *Compliance Coal*.[193]

185. In *Lorraine*, a Quebec town passed a zoning bylaw which designated certain land owned by a developer as a recreational conservation zone, thereby preventing residential subdivision. The developer eventually brought a claim against the town, alleging that the bylaw constituted a "disguised expropriation", the civil law equivalent to the common law doctrine of constructive takings. At issue before the Supreme Court of Canada was whether the claim should be dismissed on the basis that the developer had failed to commence proceedings within a reasonable time.

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189 *Mariner* at para 83 **[Pl Auth at Tab 27]**.
190 See *CPR* at paras 36-37 **[Pl Auth at Tab 14]**.
191 2018 SCC 35 ("*Lorraine*") **[Pl Auth at Tab 28]**.
192 *Kalmring* **[Pl Auth at Tab 21]**.
193 *Compliance Coal* **[Pl Auth at Tab 22]**.

186. For the Court, Wagner C.J. ruled in the town's favour and dismissed the action in nullity, though on the subject of expropriation stated:

> The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity. In Quebec, the *Expropriation Act*, CQLR, c. E-24, limits the exercise of this power and lays down the procedure to be followed in this regard.
>
> …
>
> It is settled law that a "disguised" expropriation, insofar as it occurs in the guise of a zoning by-law, constitutes an abuse of the power of regulation conferred on the body in respect of such matters. Where a municipal government limits the enjoyment of the attributes of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is *de facto* expropriated from them, it therefore acts in a manner inconsistent with the purposes of being pursued by the legislature in delegating to it the power 'to specify, for each zone, the structures and uses that are authorized and those that are prohibited'.[194] [Emphasis added.]

187. While it is acknowledged these statements were *obiter*, they nevertheless show that as recent as 2018 the Supreme Court of Canada appears to imply that a *de facto* expropriation focuses on the limits of enjoyment of property and not whether the state has acquired anything from its actions.

188. But the common law's recognition that a taking may arise without the state acquiring a "beneficial interest" was demonstrated even more so in *Kalmring*, where as already discussed Master Mason suggested an "intangible benefit" such as greater revenues for the Crown or subsidized road testing services for the public was sufficient.[195]

189. And as noted above, in *Compliance Coal* the benefit requirement was satisfied on the basis that the removal of possible mining operations "enhanced the value" of surface properties owned by the provincial Crown.[196]

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194 *Lorraine* at paras 1, 27 **[Pl Auth at Tab 28]**.
195 *Kalmring* at para 75 **[Pl Auth at Tab 21]**.
196 *Compliance Coal* at para 96 **[Pl Auth at Tab 22]**.

190. While in the *Annapolis* case the Supreme Court of Canada has yet to hear argument on dispensing with the beneficial interest requirement from *CPR v Vancouver* (an argument which the plaintiffs understand was not made before either the chambers judge or the Nova Scotia Court of Appeal[197]), the plaintiffs respectfully submit that in light of the case authorities and academic literature cited above, and the powerfully expressed views of a sitting Justice of the Supreme Court of Canada, a common law taking:

- **does not require** that the state acquire a beneficial or other interest in the property at issue;
- **does require** that the state remove all reasonable uses of the property; and
- **insofar** as a benefit is required, a general benefit to the state or the public suffices.

191. This iteration of the test is satisfied on the facts of the present case.

(a) For the reasons given above at paras 107 and 142 to 153 of this brief, the defendants will remove all reasonable uses of the royalty interest as a result of their actions to phase out coal power by 2030, as by that point in time the royalty interest will cease generating income from the production of thermal coal to fuel the Genesee Power Plant.

(b) For the reasons given above at paras 109 to 110, the defendants' actions to phase out coal power by 2030 will result in financial benefits to themselves and health and environmental benefits to the Alberta and Canadian public.

H. In the Alternative, there are Genuine Issues Requiring a Trial

192. In the alternative, the plaintiffs submit that the Master erred in concluding that the record was "sufficiently complete … for a fair and just determination" of the taking claim,[198] given that:

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197 2019 NSSC 341 **[Pl Auth at Tab 29]**; 2021 NSCA 3 **[Pl Auth at Tab 30]**.
198 Master's Reasons at para 47 **[Appeal Record Vol I at Tab 22]**.

(a) the parties disagreed on the nature of the royalty interest, and whether it is a mere "contractual right" as asserted by Alberta,[199] a "financial Interest" as asserted by Canada,[200] or an interest in land as asserted by the plaintiffs;

(b) Alberta and the plaintiffs disagreed on whether the subject coal can be mined, sold, and used to generate funds for the royalty interest after 2030;[201] and

(c) Canada and the plaintiffs disagreed on whether the coal-fired generating units at Genesee (and by extension the Genesee Mine) will be phased out as a result of the Amended Regulations.[202]

193. These material facts need be decided in order for the Court to determine whether the defendants have by their actions removed all reasonable uses of the plaintiffs' property, and the positions taken by the defendants in their submissions created "gaps or uncertainties" in the record which precluded the Court from making the necessary factual findings to summarily adjudicate the taking claim.[203]

PART V: SUMMARY & REMEDY SOUGHT

194. The plaintiffs do not dispute that the defendants are entitled to carry out acts for the public good. However, when they do, compensation must be given for private property confiscated in pursuit of the government's objectives. Property owners should not be forced to shoulder a social burden that ought be borne generally by the public.

195. Here, the plaintiffs' property has been rendered valueless as a result of the defendants' campaign against coal power. The royalty interest has been constructively taken, and as the Manitoba Court of Appeal once pronounced "[c]ompensation must be paid by the state for a takeover or for the destruction of a private commercial venture or of a private economic interest."[204]

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199 Alberta Brief for Master at para 53 **[Appeal Record Vol I at Tab 14]**.
200 Canada Brief for Master at para 94 **[Appeal Record Vol I at Tab 15]**.
201 Alberta Brief for Master at paras 55, 70 **[Appeal Record Vol I at Tab 14]**.
202 Canada Brief for Master at para 31 **[Appeal Record Vol I at Tab 15]**.
203 See *Weir-Jones* at para 35 **[Pl Auth at Tab 3]**.
204 *Home Orderly Services v Manitoba* (1988), 49 Man R (2d) 246 (CA), as cited in *Kalmring* at para 77 **[Pl Auth at Tab 21]**.

196. In summary, the Master erred in concluding that the defendants had proven their entitlement to summary dismissal.

(a) The plaintiffs are entitled to compensation under the Supreme Court of Canada's binding authority of *Tener*. Like the claimants who could no longer access their minerals, the plaintiffs' entire interest in the royalty interest has been effectively defeated as a result of the defendants' actions to phase out coal power by 2030.

(b) The plaintiffs are also entitled to compensation under the test for land use cases as stated in the Supreme Court of Canada's decision of *CPR v Vancouver* (which the Master extended to "environmental regulation"), and regardless of whether the first branch of the test involves the acquisition of property rights or a general benefit to the state or public.

(c) The plaintiffs are also entitled to compensation under a different iteration of the common law test for a taking which focuses solely on the loss of all reasonable uses of the subject property, which is supported by multiple appellate authorities and the work of a sitting Justice of the Supreme Court of Canada.

(d) In the alternative, summary dismissal ought to have been refused as there were material facts in dispute which precluded a fair and just determination of the taking claim.

197. The plaintiffs therefore request that this Honourable Court set aside that portion of the Master's decision, restore their action, and award costs to the plaintiffs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of September, 2021.

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APPENDIX A: TABLE OF AUTHORITIES

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

23	*Kalantzis v East Kootenay (Regional District)*, 2019 BCSC 1001
24	*Lynch v St John's (City)*, 2016 NLCA 35
25	*Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440
26	*Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283
27	*Mariner Real Estate Ltd v Nova Scotia*, 1999 NSCA 98
28	*Lorraine (Ville) c 2646-8926 Quebec Inc*, 2018 SCC 35
29	*Annapolis Group Inc v Halifax Regional Municipality*, 2019 NSSC 341
30	*Halifax Regional Municipality v Annapolis*, 2021 NSCA 3