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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
DOCUMENT	**Brief of the Defendant (Respondent), Her Majesty the Queen in Right of Alberta** **(Special Chambers Application returnable November 29 – December 1, 2021 at 10:00 am in Justice Special Chambers)**

ADDRESS FOR SERVICE AND CONTRACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. LIT-10710

Table of Contents

PART I: Facts

1. Overview of the Application

[1] This brief is filed by the Defendant (Respondent), Her Majesty the Queen in Right of Alberta ("**Alberta**"), in response to the appeal by the Plaintiffs (Appellants), Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc. (collectively, the "**Plaintiffs**" or "**Altius**"), from a decision of Master Farrington on January 4, 2021.

[2] In the Court below, both Alberta and the Defendant (Respondent), Attorney General of Canada ("**Canada**") successfully applied for summary dismissal of the Plaintiffs' claim for *de facto* expropriation.

[3] The Master found that the record before him was sufficiently complete for a fair and just determination[1] and that the first branch of the *de facto* expropriation test had not been met, namely that Alberta acquired a beneficial interest in the subject property.[2]

[4] The Plaintiffs seek to have the Master's decision set aside. Alberta opposes this appeal.

[5] The evidence before the Court consists of admissions made by the Plaintiffs, as well as an affidavit of Ben Lewis (the "**Lewis Affidavit**")[3].

[6] While at first glance, the Lewis Affidavit appears to substantially respond to Alberta's summary judgment application, upon closer inspection, it is clear that the Lewis Affidavit is of little to no probative value.

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[1] Memorandum of Decision of Master J.R. Farrington dated January 4, 2021 (the "**Summary Judgment Decision**") at para. 47 **[Appeal Record, Vol. 1, Tab 22]**.

[2] Summary Judgment Decision at para. 40 **[Appeal Record, Vol. 1, Tab 22]**.

[3] Affidavit of Ben Lewis, sworn September 26, 2020 (the "**Lewis Affidavit**") **[Appeal Record, Vol. 2, Tab 2]**.

[7] As will be discussed in further detail below, the Plaintiffs have failed to put their best foot forward and cannot defeat Alberta's summary judgment application. The Appeal should be dismissed, with costs.

[8] Finally, while the Master's Summary Judgment Decision was correct and ought not be disturbed, the same cannot be said for the Master's decision with respect to Alberta's Application to Strike[4] or Altius' application for leave to amend its Statement of Claim[5].

[9] Contrary to the Master's very brief oral reasons, none of Altius' disputed amendments had any reasonable basis for success in light of the evidence and the law of *de facto* expropriation.

[10] Furthermore, on the face of the pleadings (which includes admissions from Altius' Reply to Notice to Admit Facts), the Plaintiffs' allegations against Alberta had no reasonable prospect of success, were bound to fail, and ought to have been struck.

[11] Consequently, Alberta has filed a Cross-Appeal with respect to the Amendment Application and its Striking Application. Alberta's Cross-Appeal should be granted, with costs.

2. Statement of Facts

[12] The facts set out below are relevant for the purposes of this Appeal.

(a) Corporate Relationships

[13] Altius Minerals Corporation ("**Altius Minerals**") is a public company headquartered in Newfoundland and Labrador and trades on the Toronto Stock Exchange.[6]

[4] Application to Strike by Alberta filed June 5, 2020, at paras. 21-23 (the "**Striking Application**") **[Appeal Record, Vol. 1, Tab 13]**.

[5] Cross-Application by Altius filed November 25, 2020 (the "**Amendment Application**") **[Appeal Record, Vol. 1, Tab 17]**.

[6] Amended Statement of Claim, filed December 19, 2018 (the "**Amended Claim**") at para. 10 **[Appeal Record, Vol. 1, Tab 1]**.

[14] Altius Minerals owns 100% of the voting shares in the Plaintiff, Altius Royalty Corporation ("**Altius Royalty**"), an Alberta corporation.[7]

[15] Altius Royalty owns 100% of the voting shares in the Plaintiff, Genesee Royalty GP Inc. ("**Genesee GP**"), an Alberta corporation.[8]

[16] Genesee GP is the general partner of Genesee LP, a partnership formed and existing under the laws of Ontario.[9]

(b) Genesee LP's Royalty Interest

[17] On April 28, 2014, pursuant to an Arrangement Agreement dated December 24, 2013, Genesee LP acquired a royalty interest from Prairie Mines & Royalty ULC ("**Prairie Mines**") in the coal underlying lands near and around Genesee, Alberta (the "**Coal**").[10] Genesee LP continues to hold this royalty interest in the Coal.[11]

[18] The Coal is mined at the Genesee Coal Mine, which is the subject of a joint venture between Capital Power LP ("**Capital Power**") and Prairie Mines (the "**Joint Venture**").[12]

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[7] Notice to Admit Facts issued by Alberta dated May 1, 2020 ("**Alberta NTAF**"), at para. 2 **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF issued by Altius dated May 21, 2020 ("**Reply to Alberta NTAF**"), at para. 2 **[Appeal Record, Vol. 1, Tab 11]**; Amended Claim, at para. 8 **[Appeal Record, Vol. 1, Tab 1]**.

[8] Alberta NTAF, at para. 3 [Appeal Record, Vol. 1, Tab 10]; Reply to Alberta NTAF, at para. 3 **[Appeal Record, Vol. 1, Tab 11]**; Amended Claim, at para. 7 **[Appeal Record, Vol. 1, Tab 1]**.

[9] Amended Claim, at paras. 6-7 **[Appeal Record, Vol. 1, Tab 1]**.

[10] Amended Claim, at para. 12(a) **[Appeal Record, Vol. 1, Tab 1]**; Response to Request for Particulars filed February 8, 2019 at para. 1 **[Appeal Record, Vol. 1, Tab 3]**; Response to Request for Particulars filed February 25, 2019, at para. 2 and Schedule "A" **[Appeal Record, Vol. 1, Tab 5]**.

[11] Alberta NTAF, at para. 23(g) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(g) **[Appeal Record, Vol. 1, Tab 11]**.

[12] Amended Claim, at para. 13 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 10 and Exhibit "B" **[Appeal Record, Vol. 2, Tab 2]**.

[19] The Coal is currently mined and used to fuel the Genesee 1 ("**G1**"), Genesee 2 ("**G2**"), and Genesee 3 ("**G3**") units (collectively, the "**Genesee Power Plant**") and generate coal-fired electricity, in particular for the City of Edmonton.[13]

[20] Genesee LP, Capital Power, Prairie Mines, and the Joint Venture are parties to a Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014 (the "**Unitization and Dedication Agreement**").[14]

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

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

[13] Amended Claim, at paras. 2, 13, 15-17, and 44 **[Appeal Record, Vol. 1, Tab 1]**.

[14] Amended Claim, at para. 15 **[Appeal Record, Vol. 1, Tab 1]**.

> This Agreement and all of the terms thereof including the dedication and unitization thereunder shall be terminated only in accordance with Section 7.1 of this Agreement or upon mutual agreement of Capital Power and PMRL. For certainty, the Parties acknowledge and agree that a termination of this Agreement does not constitute a termination of the Royalty Interest.[15]

[22] The Plaintiffs go through great pains in their brief to describe their royalty interest as an "interest in land".[16] Ultimately, it does not matter to this Court's analysis.

[23] As discussed in greater detail below, the law of *de facto* expropriation applies to both land and non-land interests. The test is the same. This Court must focus on the alleged loss to determine whether *de facto* expropriation has occurred in the circumstances.

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

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

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

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[15] Amended Claim, at para. 16 **[Appeal Record, Vol. 1, Tab 1]**; Reply to Alberta NTAF, at para. 16 **[Appeal Record, Vol. 1, Tab 11]**.

[16] Plaintiffs' Brief, at paras. 77-89.

[17] Amended Claim, at para. 20 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at paras. 12-14 and Exhibits "C", "D", and "E" **[Appeal Record, Vol. 2, Tab 2]**.

[18] Amended Claim, at para. 29 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 33 and Exhibit "T" **[Appeal Record, Vol. 2, Tab 2]**.

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

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

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

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

(d) The Off-Coal Agreement

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

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

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[19] Amended Claim, at para. 22 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 26 and Exhibit "N" **[Appeal Record, Vol. 2, Tab 2]**.

[20] Amended Claim, at para. 25 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 29 and Exhibit "Q" **[Appeal Record, Vol. 2, Tab 2]**.

[21] Amended Claim, at para. 27 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 31 and Exhibit "R" **[Appeal Record, Vol. 2, Tab 2]**.

[22] Amended Claim, at para. 28 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at para. 32 and Exhibit "S" **[Appeal Record, Vol. 2, Tab 2]**.

[23] Amended Claim, at para. 31 **[Appeal Record, Vol. 1, Tab 1]**; Lewis Affidavit, at paras. 38-39 and Exhibits "Y" and "Z" **[Appeal Record, Vol. 2, Tab 2]**.

[24] Amended Claim, at para. 32 **[Appeal Record, Vol. 1, Tab 1]**.

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

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

[33] The Genesee Power Plant was planned and constructed to generate coal-fired electricity until 2044 (in the case of G1), 2039 (in the case of G2), and 2055 (in the case of G3).[25]

[34] The Genesee Coal Mine is operational and has not been shut down.[26]

[35] Coal is being extracted from the Genesee Coal Mine.[27]

[36] The Genesee Power Plant is operational and has not been decommissioned.[28]

[37] The Genesee Power Plant is using the Coal extracted from the Genesee Coal Mine to generate electricity.[29]

[38] Genesee LP continues to hold ownership of the royalty interest that is asserted in the Amended Claim.[30]

[39] Genesee LP continues to receive the payment of royalties on account of the royalty interest.[31]

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[25] Amended Claim, at para. 21 **[Appeal Record, Vol. 1, Tab 1]**.

[26] Alberta NTAF, at para. 23(a) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(a) **[Appeal Record, Vol. 1, Tab 11]**.

[27] Alberta NTAF, at para. 23(b) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(b) **[Appeal Record, Vol. 1, Tab 11]**.

[28] Alberta NTAF, at para. 23(c) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(c) **[Appeal Record, Vol. 1, Tab 11]**.

[29] Alberta NTAF, at para. 23(d) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(d) **[Appeal Record, Vol. 1, Tab 11]**.

[30] Alberta NTAF, at para. 23(g) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(g) **[Appeal Record, Vol. 1, Tab 11]**.

[31] Alberta NTAF, at para. 23(h) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(h) **[Appeal Record, Vol. 1, Tab 11]**.

(f) Procedural History

[40] On November 23, 2018, the Plaintiffs filed a Statement of Claim alleging, among other things, a "taking" by Alberta of Genesee LP's property. The Statement of Claim was subsequently amended on December 19, 2018.

[41] Alberta issued a Request for Particulars on February 1, 2019. The Plaintiffs provided particulars on February 8, 2019.

[42] Alberta filed its Statement of Defence on March 1, 2019.

[43] Affidavits of records were exchanged between the parties in the ordinary course.

[44] On May 1, 2020, Alberta issued a Notice to Admit Facts. The Plaintiffs provided their response to the Notice to Admit Facts on May 21, 2020.

[45] Alberta filed an application to strike and/or summarily dismiss the Amended Claim on June 5, 2020. Canada had previously filed its application to strike and/or summarily dismiss on June 3, 2020.

[46] Prior to the hearing of Alberta's and Canada's applications, the Plaintiffs filed their Amendment Application, seeking leave to further amend the Amended Claim. Alberta consented to certain amendments and opposed others, namely those proposed amendments relating to the allegations of *de facto* expropriation.

[47] All three applications were heard by Master Farrington in December 2020.

[48] The Master subsequently:

- granted the Plaintiffs' Amendment Application;
- dismissed Alberta's and Canada's Striking Applications; and
- granted Alberta's and Canada's application to summarily dismiss the Amended Claim.

[49] On March 15, 2021, the Plaintiffs filed their Notice of Appeal in respect of the applications for summary dismissal. Both Alberta and Canada cross-appealed in respect of the Amendment Application and their respective Striking Applications.

PART II: Issues

[50] The following issues arise in this Appeal and Cross-Appeal:

Issue #1: Did the Master err in granting summary judgment and dismissing the Amended Claim?

Issue #2: Did the Master err in granting leave to amend the disputed amendments?

Issue # 3: Did the Master err in refusing to strike the Amended Claim?

PART III: Standard of Review

[51] Alberta agrees with the Plaintiffs that the standard of review of an appeal from a Master's decision is correctness.[32] The hearing is conducted *de novo*.

PART IV: Argument

1. The allegation as against Alberta

[52] In light of the consented amendments and for the purposes of the hearing before the Master, the Plaintiffs made one sole allegation against Alberta: the alleged "taking" by Alberta of Genesee LP's property.[33]

[53] As addressed below, there is no merit to this allegation.

[32] *Daytona Power Corp v Hydro Company Inc*., 2020 ABQB 723 at para. 11, citing *Bahcheli v Yorkton Securities Inc*., 2012 ABCA 166 **[Plaintiffs' Authorities, Tab 1]**.

[33] Amended Claim, at paras. 43-45 **[Appeal Record, Vol. 1, Tab 1]**.

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

[54] A claim may be summarily dismissed under Rules 7.2 and 7.3.[34] The leading cases in this jurisdiction for summary judgment are:

a. The SCC's decision in *Hryniak*[35] where the SCC called for a "shift in culture", and strongly endorsed the merits of summary judgment where there is no genuine issue requiring trial.

b. The ABCA's decision in *Weir-Jones*[36] where a five-judge panel convened to establish the law of summary judgment in Alberta post-*Hryniak*. The Court found:

- "there has been a paradigm shift in the approach to summary judgment"[37] as a result of *Hryniak*;
- "Summary judgment procedures should be increasingly used, and the previous presumption of referring all matters to trial should end;"[38]
- **The test for summary judgment is**: if there is "**no merit**" to the claim and "**no genuine issue requiring a trial**", it should be summarily dismissed[39]; and
- The responding party must put their "best foot forward".[40]

[55] Recently, in *Hannam*[41] the ABCA took:

> … the opportunity to assess the practical significance of *Weir-Jones*, evaluate its place in historical evolution of summary judgment, and suggest other possible protocols that may allow courts to *increase the likelihood* that more disputes will

[34] *Alberta Rules of Court*, Rules 7.2-7.3 **[Alberta's Authorities, Tab 1]**.
[35] *Hryniak v Mauldin*, 2014 SCC 7 ("***Hryniak***"), at para. 2 **[Alberta's Authorities, Tab 6]**.
[36] *Weir-Jones Technical Services Inc. v Purolator Courier Ltd*., 2019 ABCA 49 ("***Weir-Jones***") **[Alberta's Authorities, Tab 7]**.
[37] *Weir-Jones*, at para. 13 **[Alberta's Authorities, Tab 7]**.
[38] *Weir-Jones*, at para. 15 **[Alberta's Authorities, Tab 7]**.
[39] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 7]**.
[40] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 7]**.
[41] *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 ("***Hannam***") **[Alberta's Authorities, Tab 8]**.

> be resolved as soon as possible at the least expense without sacrificing the quality of the adjudication and the fairness of the proceeding[42]
>
> [emphasis added]

[56] Regarding the requirement that there be "**no merit**" to the claim, the ABCA in *Hannam* confirmed and clarified:[43]

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

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

[57] Regarding the requirement that there be "**no genuine issue requiring a trial**", the ABCA in *Hannam* confirmed and clarified:[44]

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

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

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

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

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[42] *Hannam*, at para. 6 **[Alberta's Authorities, Tab 8]**.
[43] *Hannam*, at paras 147-148 **[Alberta's Authorities, Tab 8]**.
[44] *Hannam*, at paras 157-161 **[Alberta's Authorities, Tab 8]**.

[59] More recently, in *P & C Lawfirm*, our Court of Appeal confirmed that unsupported bare assertions could not block a summary judgment application.[45]

(a) This case is appropriate for summary judgment

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

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

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

[61] While it is true that the Plaintiffs are not required to prove their own case to defeat summary judgment, they must nonetheless put their best foot forward.[46] Here, the facts and evidence that the Plaintiffs purport to rely upon to resist summary judgment (namely, those from the Lewis Affidavit) are unsupported bare assertions.

[62] The Master found that the record was "sufficiently complete… for a fair and just determination".[47] The Master made no error in reaching that conclusion.

3. *De facto* expropriation explained

[63] The Plaintiffs make a claim for *de facto* expropriation (sometimes called a constructive taking or a regulatory taking).

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

> "expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers[48]

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[45] *P & C Lawfirm Management Inc v Sabourin*, 2020 ABCA 449 ("**P&C Lawfirm**"). See, in particular paras. 41-49 **[Alberta's Authorities, Tab 20]**.
[46] *Weir-Jones*, at para. 47 **[Alberta's Authorities, Tab 7]**.
[47] Summary Judgment Decision, at para. 47 **[Appeal Record, Vol. 1, Tab 22]**.
[48] *Expropriation Act*, R.S.A. 2000, c. E-13, at s. 1(g) **[Alberta's Authorities, Tab 9]**.

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

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

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

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

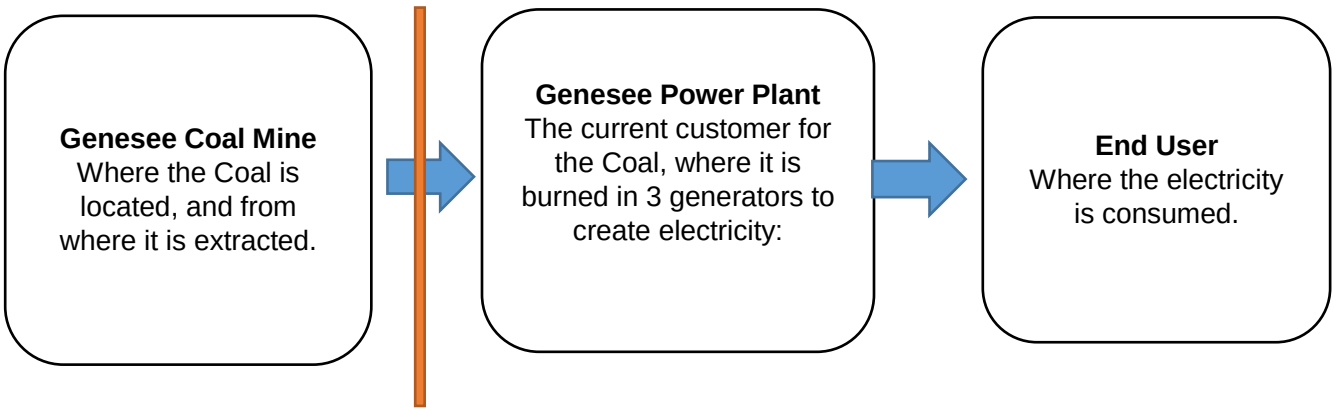
(a) The nature of the Plaintiffs' property rights

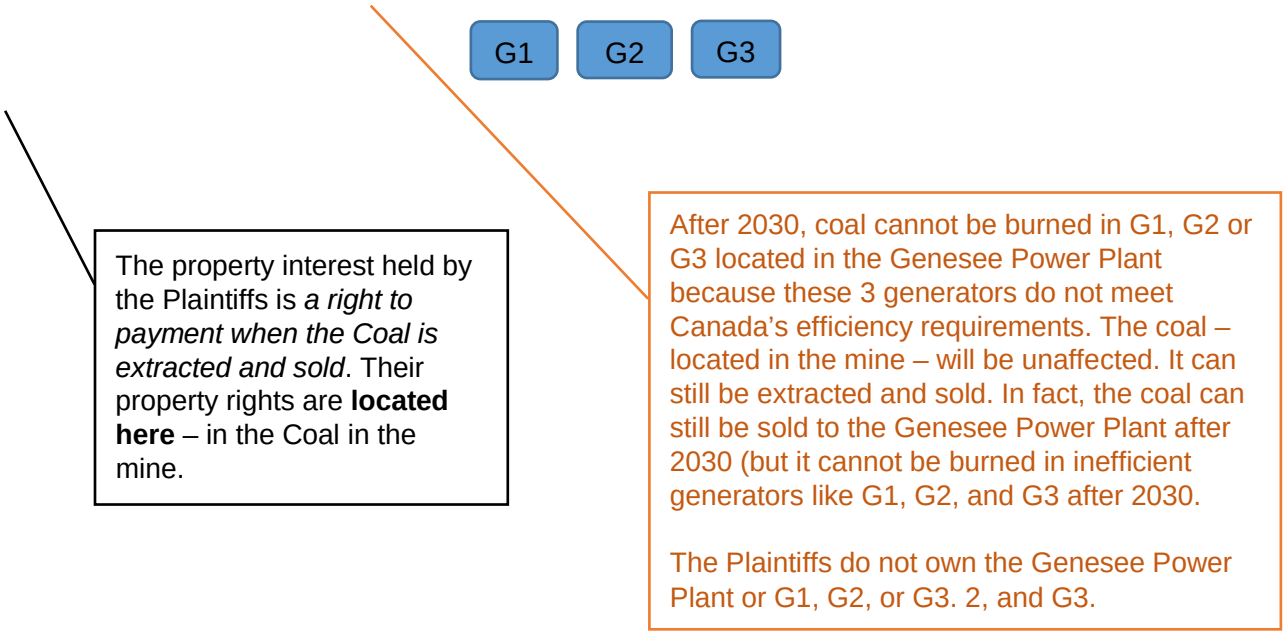
[69] It is trite to say that property is a "bundle of rights" (a collection of entitlements).

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

[71] The property interest held by the Plaintiffs is: *a right to payment when the Coal is extracted from the mine and sold*. These are the sticks in the bundle of rights – the property rights – held by the Plaintiffs.

[72] Alberta acknowledges that the Plaintiffs have a property right that is capable of being taken through *de facto* expropriation, but say that there has not been (and there will not be, even after 2030) a taking.





[73] Today:

a. The Genesee Coal Mine is operational.[49]

b. Coal is being extracted from the Genesee Coal Mine.[50]

c. The Genesee Power Plant is operational and has not been decommissioned.[51]

d. The Genesee Power Plant is using coal extracted from the Genesee Coal Mine.[52]

e. Genesee LP continues to hold ownership of the royalty interest.[53]

[49] Alberta NTAF, at para. 23(a) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(a) **[Appeal Record, Vol. 1, Tab 11]**.

[50] Alberta NTAF, at para. 23(b) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(b) **[Appeal Record, Vol. 1, Tab 11]**.

[51] Alberta NTAF, at para. 23(c) **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(c) **[Appeal Record, Vol. 1, Tab 11]**.

[52] Alberta NTAF, at para. 23(d), **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(d), **[Appeal Record, Vol. 1, Tab 11]**.

[53] Alberta NTAF, at para. 23(g), **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(g), **[Appeal Record, Vol. 1, Tab 11]**.

f. Genesee LP is receiving payment of royalties on account of the royalty interest.[54]

[74] In other words, today, the Plaintiffs continue to use and enjoy their property rights – the right to payment when the Coal is extracted and sold. Their property rights have not been taken.

[75] Even after 2030, the Coal can still be mined and sold, but it cannot be burned in G1, G2, and G3 (unless the owner of these generators – Capital Power – improves the generators to make them more efficient). Even after 2030, the Coal, and the Plaintiffs' interest in the Coal, will be unaffected.

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

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

(b) The nature of Alberta's impugned actions

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

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

[54] Alberta NTAF, at para. 23(h), **[Appeal Record, Vol. 1, Tab 10]**; Reply to Alberta NTAF, at para. 23(h), **[Appeal Record, Vol. 1, Tab 11]**.

[79] As part of the implementation of the Climate Leadership Plan, Alberta entered into the Off-Coal Agreement with the owners of the Genesee Power Plant, Capital Power[55].

[80] Under the Off-Coal Agreement, Alberta agreed to make certain voluntary payments to Capital Power based on a formula. The formula is based on the capital investment made by Capital Power for three generators (G1, G2, and G3 in the graphic above), pro-rated by their percentage of the generators' remaining life after 2030. The Off-Coal Agreement is payment for *capital investment in the generators*. Capital Power received a voluntary payment under the Off-Coal Agreement *because it owns G1, G2, and G3*.

[81] Capital Power did not receive any compensation for any interest in coal in the Genesee Coal Mine. No party received compensation for any coal interest in the Genesee Coal Mine.

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

[83] The Plaintiffs were not impacted by the impugned conduct of either Canada or Alberta. Instead, it was the Plaintiffs' customer for the Coal (Capital Power) that was impacted:

a. Under Canada's impugned Regulations, plant owners like Capital Power cannot burn coal in inefficient generators like G1, G2, and G3 after 2030. *They can continue to burn coal after 2030, but not in inefficient generators like G1, G2, and G3*.

b. Under Alberta's impugned Off-Coal Agreement, Capital Power received a voluntary payment from Alberta for their capital investment in G1, G2, and G3.

[55] Lewis Affidavit at Exhibit "Z" **[Appeal Record, Vol. 2, Tab 2]**. Specifically, Alberta entered into the Off-Coal Agreement with Capital Power Corporation, Capital Power L.P., Capital Power (G3) Limited Partnership and Capital Power (K3) Limited Partnership.

[84] *Capital Power was faced with a business decision*: Would they improve G1, G2, and G3 to meet Canada's efficiency requirements? Would they use the money they received from Alberta to make those improvements? No. Capital Power has not improved G1, G2, or G3. Unless Capital Power improves these generators, the Plaintiffs will lose their customer after 2030.

[85] The Plaintiffs' loss flows from the business decision of their customer – Capital Power – and not from the impugned conduct of the Defendants.

So – even after 2030:
→ The Coal can still be mined.
→ The Coal can still be sold.
→ The Coal can still be sold to Capital Power.
(but Capital Power cannot burn the Coal in inefficient generators)

(c) The Two-Part *De facto Expropriation* Test

[86] First, we will describe the two-part test for *de facto* expropriation. Next, we will describe how there came to be a two-part test (because the Plaintiffs argue the test is, or should be, only one part). After that, we will explain the relevant *de facto* expropriation principles established by the case law. Last, we will apply the two-part *de facto* expropriation test to the facts of this case.

[87] The leading case on *de facto* expropriation in Canada is the SCC's decision in *Canadian Pacific Railway Co. v City of Vancouver* (after this "***CPR***")[56]. In *CPR*:

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

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

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

[56] *Canadian Pacific Railway Co. v City of Vancouver*, 2006 SCC 5, [2006] 1 SCR 227 ("***CPR***") **[Alberta's Authorities, Tab 10]**.

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

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

f. McLachlin, C.J., writing for the Court, confirmed that two requirements must be met for a *de facto* taking requiring compensation[57]:

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

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

(d) How there came to be a Two-Part Test for *de facto* expropriation

[88] The Plaintiffs argue that the two-part *de facto* expropriation test was created, for the first time, by the SCC in *CPR*. They argue that the Acquisition Branch of the test was added to the law of *de facto* expropriation in *CPR*. As set out below, this is incorrect.

[89] The Plaintiffs argue, in the alternative, that the Acquisition Branch should be eliminated. We submit that the Acquisition Branch is an essential element of the (binding) two part test.

[57] *CPR*, at para. 30 **[Alberta's Authorities, Tab 10]**.

[90] The SCC has considered the law of *de facto* expropriation three times: *Manitoba Fisheries* (1979), *Tener* (1985), and *CPR* (2006). On all three occasions, there was a two-part test. On all three occasions, there was an Acquisition Branch of the test.

[91] In *Manitoba Fisheries*[58] the SCC considered *de facto* expropriation for the first time:

a. Manitoba Fisheries was in the business of exporting fish.

b. Parliament passed legislation that created a Crown corporation to carry out the business of fish exportation. The legislation also said that no private business could export fish without a license.

c. The evidence was that *no* licenses were ever granted.

d. Importantly, the statute was not a mere prohibition of carrying on business. Instead, the government got into the very same business that they prohibited Manitoba Fisheries from carrying on.

e. As for the **Acquisition Branch** of the test, the SCC held that the government effectively acquired the plaintiffs business by *expropriating the goodwill of Manitoba Fisheries*.

f. As for the **Loss Branch** of the test. Manitoba Fisheries lost the goodwill of its business.

g. So – in *Manitoba Fisheries* the same goodwill that was lost by the claimant, was acquired by the government. This was a taking (expropriation) of property – the same property was lost as was gained.

h. To reach this conclusion, the SCC had to consider whether goodwill was a type of property that was capable of being expropriated. The SCC concluded that it was, even though goodwill is intangible property.

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

[58] *Manitoba Fisheries Limited v The Queen*, 1978 CanLII 22, [1979] 1 SCR 101 ("***Manitoba Fisheries***") **[Alberta's Authorities, Tab 19]**.

> **the appellant was deprived of property which was acquired by the Crown**.[59]
> [emphasis added]

i. Clearly, there was an Acquisition Branch to the test applied by the SCC in *Manitoba Fisheries* – the government acquired property.

j. *Manitoba Fisheries* **does not** stand for the proposition: where government action causes business losses, a claimant is entitled to compensation. Instead, there was a taking of property (a loss and a corresponding acquisition of goodwill).

[92] In ***Tener***[60]:

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

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

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

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

e. The SCC held that a *de facto* expropriation had occurred.

f. The claimants were denied access to the surface owned by the government. As such, it was *impossible* for the claimants to explore or work their mineral interest. Their proprietary interests were completely sterilized. All of their sticks in the bundle had been taken away. The **Loss Branch** of the test was satisfied because the claimant had no ability whatsoever to exercise its rights to explore and exploit the resource.

g. As for the **Acquisition Branch** in *Tener*:

(1) In *Manitoba Fisheries*, the very same property (goodwill) was acquired by government, as was lost by the claimant.

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[59] *Manitoba Fisheries*, at p. 110 **[Alberta's Authorities, Tab 19]**.

[60] *R v Tener*, [1985] 1 SCR 533, 1985 CanLII 76 (SCC) ("***Tener***") **[Alberta's Authorities, Tab 11]**.

(2) In *Tener*, the government argued that there was no expropriation because it had not acquired the right to explore and exploit the claimants' subsurface interests. In other words, the government did not acquire the same property that was lost by the claimants.

(3) The SCC considered: does the same property that was lost have to be acquired for there to be a *de facto* expropriation? The SCC said "no", it does not have to be the same property. What, then, did the government acquire in *Tener*?

(4) Estey J, writing for the majority, held that the denial of access to the surface lands was *a recovery by the government of a part of the mineral right granted*. In other words, **the government re-acquired a *property right* – the right to access the surface – that it previously granted to the claimants**:

> Here the government wished, for obvious reasons, to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the respondents under their 1937 grant as a threat to the park. **The notice of 1978 took value from the respondents and added value to the park**. The taker, the government of the province, clearly did so in exercise of its valid authority to govern. It clearly enhanced the value of its asset, the park. The respondents are left with only the hope of some future reversal of park policy and the burden of paying taxes on their minerals. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process.[61]
>
> [emphasis added]

(5) Wilson J. wrote concurring reasons and said:

> By depriving the holder of the profit of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee has **effectively removed the encumbrance from its land**.[62]
>
> [emphasis added]

(6) So – in *Tener* the Acquisition Branch was satisfied because the government re-acquired a property right it previously gave to the claimant – the right to access the surface. Although the same

[61] *Tener*, at pp. 564-565 **[Alberta's Authorities, Tab 11]**.
[62] *Tener*, at p. 552 **[Alberta's Authorities, Tab 11]**.

property was not acquired as was lost (unlike *Manitoba Fisheries*), *the government still acquired a property right*.

The two-part test in *CPR* is not a departure from *Manitoba Fisheries* and *Tener*. *CPR* is a re-statement of the same principles. There has always been a two-part test. There has always been an Acquisition Branch of the test.

[93] The facts of ***CPR*** are set out above. In *CPR*:

a. In relation to the **Loss Branch**, CPR's lands had lost virtually all of their economic value. Loss of value was insufficient to satisfy the Loss Branch of the test.

b. As for the **Acquisition Branch** in *CPR*:

c. The City restricted use of the lands to *public* uses – for things like a *public* heritage walks, *public* nature trails and *public* cyclist paths. CPR argued that the City had acquired a *de facto* park.

d. This general public benefit was insufficient to satisfy the Acquisition Branch of the test.

[94] *Manitoba Fisheries*, *Tener*, and *CPR* illustrate the vastly different types of property rights that might be *de facto* expropriated: intangible property like goodwill (*Manitoba Fisheries*), leasehold interests (*Tener*), and land (*CPR*).

[95] The Plaintiffs argue that there is (or should be) a separate *de facto* expropriation test for cases involving land. This is how the Plaintiffs attempt to distinguish *CPR* (and the *de facto* expropriation test they cannot meet). There is, however, only one test: the two-part test that has been applied by the SCC since *Manitoba Fisheries* in 1979.

(e) *De facto* expropriation is not a damages claim

[96] It is important to keep in mind that a claim for *de facto* expropriation (like this claim) is *not a claim for damages*.

[97] In a claim for damages, the plaintiff has to show they have suffered a loss (damages). They also have to show that their loss was caused by a legal wrong committed by the defendant (liability).

[98] In this case, the Plaintiffs say they have suffered damage because their royalty interest has lost value. That is probably true. For the purposes of this application, Alberta does not dispute that the Plaintiffs' royalty interest has lost value.

[99] The difficulty the Plaintiffs have, is that they cannot point to any tort or other legal wrong committed by Alberta. They have not sued Alberta in tort (they originally did, but have since amended down their claim). Because Alberta has committed no legal wrong, the Plaintiffs' claim is for a "taking" (a *de facto* expropriation) instead.

[100] A taking claim is different than a claim for damages. Showing you have suffered damage is not enough. A *de facto* expropriation claim is a claim that property has been taken from you. For there to be a taking of property, two things must happen:

a. First, the party alleged to have done the taking (the government) has to gain property rights. Something must be acquired by government. Since we are talking about property, the thing acquired must be a property right.

b. Second, for there to be a taking of property, the claimant must have lost property rights. The claimant must have lost all reasonable uses of the property (the sticks in the bundle they hold).

[101] Because expropriation is the taking of property, it makes sense that there is a two-part *de facto* expropriation test. For a taking to occur, property has to be gained (Acquisition Branch), and property has to be lost (Loss Branch). We submit this is precisely why there is a two-part *de facto* expropriation test.

[102] Without the Acquisition Branch, *de facto* expropriation collapses into a claim for damages where there is no tort – permitting a claim for damages even where government has committed no legal wrong.

(f) *De facto* expropriation principles established in the case law

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

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

[104] There are several cases that deal with the *de facto* expropriation of natural resources. This case law is clear: the ability to work and recover the resource must be completely sterilized for there to be a *de facto* expropriation.

[105] The SCC's decision in *Tener* confirms that a *de facto* expropriation requires a total barrier to the exercise of a proprietary interest in a natural resource. The claimants in *Tener* had no ability to access the surface and, as such, it was *impossible* for them to exercise their rights to explore and exploit the subsurface.

[106] In *Casamiro Resource Co. v British Columbia*[63]:

a. The claimants had mineral interests in Strathcona Park.

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

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

[107] In *Rock Resources Inc. v British Columbia*[64]:

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

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

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

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

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

d. Again, the BCCA held that a *de facto* expropriation had occurred because it was *impossible* for the claimants to enjoy their property rights. They were completely barred from exploring, working and recovering the resource. All their sticks in the bundle of rights had been taken away.

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

[109] Even in 2030, the Coal will not be sterilized. The Coal can still be explored, worked, recovered, and sold. The current customer for the Coal, Capital Power, will be unable to burn the coal in G1, G2, and G3 unless Capital Power improves them.

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

De facto Expropriation IS a confiscation of property rights.

[111] In *Genesis Land Development Corporation v Alberta,*[65] the Alberta Court of Appeal confirmed that property rights have to be taken for there to be a *de facto* expropriation:

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

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

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

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

> *De facto* expropriations are very rare in Canada and they require proof of *virtual extinction of an identifiable interest in land*.[66]

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

[66] *Genesis ABQB*, at para. 133 **[Alberta's Authorities, Tab 14]**.

> [emphasis added].

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

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

> *The appellants had no interest in land that was taken from them*. At best they had an opportunity that they might develop on land they might lease from the respondent Alberta.[67]
>
> [emphasis added]

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

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

De facto expropriation IS NOT a devaluation of property rights.

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

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

[116] In *CPR,* the City's Plan had an enormous negative impact on the value of the fee simple lands owned by CPR. Any development potential for the lands was eliminated. This significant devaluation of the lands was insufficient for a finding of *de facto* expropriation. CPR could still use and enjoy the lands, even if that use was uneconomic:

[67] *Genesis ABCA*, at para. 8 **[Alberta's Authorities, Tab 15]**.

> The effect of the by-law was to freeze the redevelopment potential of the corridor and to *confine CPR to uneconomic uses of the land*.[68]
>
> [Emphasis added]

[117] Another illustration of this point is *Mariner Real Estate Ltd. v Nova Scotia*[69]:

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

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

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

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

e. The NSCA held that:

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

  > "[b]oth the extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriating authority"[70].

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

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

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

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[68] *CPR*, at para. 8 **[Alberta's Authorities, Tab 10]**.

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

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

> The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the Expropriation Act. In my view, this distinct treatment supports the conclusion that *decline in value of land, even when drastic, is not the loss of an interest in land*.[71]
>
> [emphasis added]

- There was no *de facto* expropriation.

[118] The Alberta Court of Appeal came to a similar finding in *Alberta v Nilsson*[72]:

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

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

c. The ABCA held that:

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

> Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.[73]

- Even though "the land's value was reduced"[74], this is not sufficient for a *de facto* expropriation.

[119] The present case deals with the highly regulated coal industry. Valid regulations are an unavoidable aspect of ownership. The Plaintiffs argue that their interest in the Coal has been devalued, and that after 2030, virtually all of its economic value will be gone. This is not a *de facto* expropriation. Loss of economic value is not the same thing as loss of property.

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[71] *Mariner Real Estate*, at para. 72 **[Alberta's Authorities, Tab 16]**.
[72] *Alberta v Nilsson*, 2002 ABCA 283 ("***Nilsson***") **[Alberta's Authorities, Tab 17]**.
[73] *Nilsson*, at para. 61 (para. 64 in the PDF) **[Alberta's Authorities, Tab 17]**.
[74] *Nilsson*, at para. 62 (para. 65 in the PDF) **[Alberta's Authorities, Tab 17]**.

De facto expropriation IS NOT a business risk that did not work out.

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

[121] *De facto* expropriation is not a business risk that did not work out the way you hoped. This point is illustrated in *64933 Manitoba Ltd. v Manitoba*[75]:

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

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

c. The MBCA held that:

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

  > … if the effect of the government's action is to *essentially extinguish the claimant's interest in land or property*[76]
  >
  > [emphasis added]

- If there were a *de facto* expropriation in these circumstances, this would mean every "disappointed developer"[77] would be entitled to compensation.

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

- Instead, the land owner "took a commercial risk and lost"[78].

[75] *64933 Manitoba Ltd. v Manitoba*, 2002 MBCA 96 ("***64933 Manitoba***") **[Alberta's Authorities, Tab 18]**.
[76] *64933 Manitoba*, at para. 13 **[Alberta's Authorities, Tab 18]**.
[77] *64933 Manitoba*, at para. 15 **[Alberta's Authorities, Tab 18]**.
[78] *64933 Manitoba*, at para. 20 **[Alberta's Authorities, Tab 18]**.

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

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

[123] As stated, in *CPR* the SCC confirmed the long-established two-part test:

> (1) an acquisition of a beneficial interest in the property or flowing from it (Acquisition Branch), and
>
> (2) removal of all reasonable uses of the property (Loss Branch)

[124] The Plaintiffs cannot satisfy either branch. We will discuss them in reverse order.

Loss Branch is not satisfied in this case

[125] The Plaintiffs cannot satisfy the Loss Branch. They confuse the loss of economic value of property, with the loss of property. They admit:

> "… the royalty interest has presently sustained a significant **loss of value** with the balance to be lost by 2030 – **thereby depriving Genesee LP of all use and enjoyment of its property**"[79]
>
> [emphasis added]

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

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

[128] In *Tener*, *Casamiro Resources* and *Rock Resources*, by contrast, the claimants lost all ability to access, mine and sell the minerals. The claimants had no ability to

[79] Reply to Alberta NTAF, at para. 23(g) **[Appeal Record, Vol. 1, Tab 11]**.

access the subsurface, because they were denied access to the surface. Unlike the present case, their property rights were completely sterilized.

[129] No "taking has occurred under *Tener*" as the Plaintiffs claim at pages 24 to 34 of their brief.

Acquisition Branch is not satisfied in this case

[130] No property rights been acquired by Alberta through either the Climate Leadership Plan, or the Off-Coal Agreement. As stated several times, the Plaintiffs have not lost (and will not lose) any of their property rights. Alberta has not (and will not) acquire any property rights. The Acquisition Branch is not satisfied.

[131] In *CPR*, CPR argued that the City of Vancouver had acquired a "*de facto* park". The SCC rejected this argument and held that:

> The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]".[80]

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

> … benefits that Alberta will obtain are *of the sort* set out in the 'Regulatory Impact Analysis Statement' referenced at paragraph 39 of the Amended Statement of Claim.[81]

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

[80] *CPR*, at para 33 **[Alberta's Authorities, Tab 10]**.

[81] Plaintiffs' Response to Request for Particulars, filed February 8, 2019, at para. 4 **[Appeal Record, Vol. 1, Tab 3]**.

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

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

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

[135] The Plaintiffs claim the Acquisition Branch can be satisfied if they show government has received "an intangible but valuable benefit"[82]. **They cite *Tener* as authority, but this phrase does not come from *Tener***. In fact, this phrase does not come from any case. This is not the test for the Acquisition Branch.

[136] As described in detail above, **in *Tener* there was a *de facto* expropriation because the government acquired a property right**. Specifically, the government re-acquired from the claimant the right to access the surface (a right the government previously gave the claimant in the original grant of the mineral interest). The right to access the surface of lands *is a property right*.

[137] Expropriation is about property. Property rights have to be lost, and there has to be a corresponding acquisition of property rights.

[138] The Plaintiffs also cite *Kalmring* and *Compliance Coal* to support their argument (that we say is incorrect) that no property rights need to be acquired from the

[82] See, for example, paragraph 108 of the Plaintiffs' brief.

government to satisfy the Acquisition Branch.[83] Alberta submits the Plaintiffs have misread *Kalmring* and *Compliance Coal*, and that neither case assists them.

[139] In *Kalmring*[84]:

a. The Master was considering a striking application. The issue was whether the Statement of Claim disclosed a cause of action.

b. The case is similar factually to *Manitoba Fisheries* (where government expropriated goodwill): Alberta changed the method of drivers' license road tests. Privately employed driver examiners would no longer administer road tests. Instead, they would be administered by government employees. The claim was commenced by private driver examiners.

c. Alberta tried to distinguish *Manitoba Fisheries* and argued that road testing is a revenue neutral public service, and not a business enterprise with a view to profit.

d. The Master held that this is a matter of evidence, and the claim could not be struck.

e. The Master did not change test confirmed by the SCC in *CPR*, or the Acquisition Branch of the test.

[140] In *Compliance Coal*[85]:

a. This was another striking application. The issue was whether the claim disclosed a cause of action.

b. The government argued that the plaintiffs did not plead a benefit that would be acquired by the government. In this way, the same situation as the present case.

c. The Court stated:

> [95] The plaintiffs plead that BC and Canada *benefitted "in that they no longer had to face criticism from constituents* and other individuals who were opposed to the development of coal mines on Vancouver Island" (NOCC at para. 19). In my view, *this*

[83] See paragraph 128 of the Plaintiffs' brief.

[84] *Kalmring v Alberta*, 2020 ABQB 81 ("***Kalmring***") **[Plaintiffs' Authorities, Tab 21]**.

[85] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 ("***Compliance Coal***") **[Plaintiffs' Authorities, Tab 22]**.

> *supposed benefit is not equivalent to "the acquisition of a beneficial interest in the property or flowing from it"*. Unlike the goodwill in *Manitoba Fisheries*, *it is not a part of any property gained* by BC or Canada.[86]
> [emphasis added]

d. ***Compliance Coal* stands for the opposite proposition than the Plaintiffs cite this case for.** In *Compliance Coal* a general public benefit was *insufficient* to satisfy the Acquisition Branch. Instead, the acquisition of a property right is required. This case does not assist the Plaintiffs.

[141] The Plaintiffs also cite *Lynch*[87], but this case does not assist them either:

a. The Lynch family acquired land through a Crown grant. The grant included the right to appropriate and use the groundwater (this is a property right).

b. The land was on a watershed and the groundwater fed a lake that is the source of drinking water for the City of St. John's.

c. The Lynch family applied to build a residential development on their land. The application was denied and the Lynch family was required to keep the land in its natural state. The concern was that the development would contaminate the groundwater (and the drinking water for the City).

d. The Newfoundland Court of Appeal applied the two-part *de facto* expropriation test confirmed in *CPR* and held this was a *de facto* expropriation.

e. **In relation to the Acquisition Branch, the City acquired a continuous flow of uncontaminated groundwater. This is a property right.** The right to appropriate and use groundwater is a property right. It was previously granted to the Lynch family, but that right (a property right) was expropriated by the City.

[142] The Plaintiffs argue, in the alternative, that the Acquisition Branch should be eliminated. They cite the SCC's decision in *Lorraine*[88], but this case does not assist them:

a. *Lorraine* is not a *de facto* expropriation case. Instead, it is a case that considers Québec's civil law concept of a "disguised expropriation".

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[86] *Compliance Coal*, at para. 95 **[Plaintiffs' Authorities, Tab 22]**.
[87] *Lynch v St. John's (City)*, 2016 NLCA 35 ("***Lynch***") **[Plaintiffs' Authorities, Tab 24]**.
[88] *Lorraine (Ville) c 2646-8926 Québec Inc.*, 2018 SCC 35 ("***Lorraine***") **[Plaintiffs' Authorities, Tab 28]**.

b. The lower court dismissed the claim as being out of time.

c. The Québec Court of Appeal concluded that the lower court erred by failing to consider whether the by-laws in question were a "disguised expropriation" (i.e. the substantive question in claim).

d. The SCC overturned the Court of Appeal's finding. The only issue before the Court of Appeal was whether the lower court properly dismissed the claim on the basis of the limitation period. The Court of Appeal erred by considering issues other than the limitation period.

e. ***Lorraine* does not overturn or modify *CPR***. *Lorraine* does not consider the common law of *de facto* expropriation. The SCC in *Lorraine* did not even conduct a fulsome analysis of the civil law relating to "disguised expropriation". Instead, the issue in *Lorraine* was the limitation period.

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

[143] At best, the Plaintiffs' claim for *de facto* expropriation is premature and will not crystalize until 2030. The Plaintiffs continue to receive payment for their interest in the Coal.

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

(i) The *de facto* expropriation test is appropriately stringent

[145] Only in extreme circumstances will government regulation be tantamount to the confiscation of property.

> A stringent test makes sense. The doctrine of *de facto* expropriation applies where government action is *lawful*, *reasonable*, and pursuant to *valid statutory authority*.

[146] As stated above, *de facto* expropriation is different from a claim for damages. Where government commits a legal wrong, a prospective claimant can sue for

damages. There is no claim for damages in the present case. **The impugned government action is *lawful***.

[147] Government decision making can also be challenged through judicial review. Where the regulation of property by government is unreasonable, administrative law provides a prospective claimant with remedies. There is no judicial review in this case. **The impugned government action is *reasonable***.

[148] Governments regulate through statutory powers. Various statutes empower the government to regulate property and its use (in this case we are dealing with the highly regulated coal industry). Where the statute itself is unlawful, it can be challenged as unconstitutional. In the present case, there is no challenge to any statute. **The impugned government action was pursuant to *valid statutory authority***.

[149] To sum up, where governments take lawful and reasonable action under valid statutory authority, claimants should only be entitled to compensation when the stringent *de facto* expropriation test is met. In the present case, the Plaintiffs cannot satisfy either branch of the test.

(j) The *de facto* expropriation claim should be summarily dismissed

[150] The claim for *de facto* expropriation should be summarily dismissed – there is no merit to the claim and no genuine issue for trial.

[151] Specifically:

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

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

[152] The genuine issues requiring trial identified by the Plaintiffs at para. 192 of their brief, are not genuine issues at all:

- Whether the interest is a "contractual right", a "financial interest", or an interest in land, the underlying facts are undisputed and are taken from the Plaintiffs' admissions. This "issue" is simply a red herring meant to distract the Court from the functional analysis required by the two-part test; and

- Alberta must only establish that either branch of the two-part branch has not been met. The underlying facts (taken from the Plaintiffs' admissions) establish that the first part of the *CPR* test (the Acquisition branch) has not been met. In any event, as noted above, the Plaintiffs cannot establish either branch of the test.

[153] There are no "gaps or uncertainties" in the record and this Court can fairly adjudicate the claim for *de facto* expropriation.

[154] The Court must look critically at the evidence that the Plaintiffs rely upon to resist summary judgment. While the Lewis Affidavit is voluminous and attaches many exhibits, it largely consists of speculation and unsupported bare assertions.

[155] The Plaintiffs have not put their best foot forward. The Master correctly summarily dismissed the Amended Claim.

4. The Master erred in allowing certain amendments to the Amended Claim

[156] Alberta opposed the Plaintiffs' amendments to the following paragraphs of the Amended Claim: 40 and 44(a):

> Paragraph 40 – The Defendants' actions as aforesaid have resulted in a grave loss of value of Genesee LP's interests, financial benefits to the Defendants, and health and environmental benefits to the Alberta and Canadian public
>
> Paragraph 44(a) – The Plaintiffs claim against the Defendants, jointly and severally… a declaration that the Defendants have caused or will cause a constructive taking of Genesee LP's royalty interest in the subject coal, without compensation

[157] In deciding the Amendment Application, the Master simply stated as follows:

> In my view, all of them have some reasonable basis for success. That is not to say that they will be successful in terms of the merits, but a reasonable argument could be made on all of them. There is at least some evidence to support every one of the amendments, in the particular the Supreme Court of Canada cases are a bit malleable in terms of what is seen as a taking in the circumstances of a particular case. Pleadings aren't the place to draw hard lines, and in my view, the application for the amendments is not particularly close. I'm allowing all of the amendments.[89]

[158] The Master erred in granting the disputed amendments and misapprehended the law in this province on amendments to pleadings.

[159] While amendments are generally permitted, there are four exceptions to the rule:

- Where the amendment would cause serious prejudice to the opposing party, which is not compensable in costs;
- Where the amendment requested is "hopeless";
- Where the amendment is barred by the expiry of a limitation period; and
- Where there is an element of bad faith associated with the failure to plead the amendment in the first instance.[90]

[160] While the standard to amend a pleading is low, it is not automatic. As a preliminary point, proposed amendments must be supported by evidence.[91]

(a) The disputed amendments are hopeless

[161] An amendment is hopeless if it is clear it cannot succeed.

[162] An obvious parallel can be drawn between a "hopeless amendment" and the law on striking pleadings. Justice Hollins described the concept of "hopelessness" in

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[89] Transcript of Proceedings, December 11, 2020, 24:25-38 **[Appeal Record, Vol. 1, Tab 21]**.

[90] *Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited*, 2014 ABCA 74 ("***Attila Dogan***"), at para. 25 **[Alberta's Authorities, Tab 21]**.

[91] *Attila Dogan*, at para. 26 **[Alberta's Authorities, Tab 21]**.

Carbone.[92] Hopelessness arises when the proposed amendments would be strikeable for not disclosing a cause of action.[93] There must also be an evidentiary foundation for the amendment.

[163] While only a modest degree of evidence will justify an amendment to pleadings, the amendment cannot be inconsistent with the record.[94]

Paragraph 40

[164] The Plaintiffs' wish to amend the Amended Claim to allege that Alberta has obtained "financial benefits" is problematic in two regards: (1) it is strikeable; and (2) it is unsupported by evidence.

[165] The amendment does not propose to allege that Alberta acquired financial interest in the royalty interest nor does it propose to allege that Alberta acquired a financial interest flowing from the royalty interest.

[166] The proposed amendment does not satisfy the *CPR* test and is hopeless because it is strikeable.

[167] The Plaintiffs point to Exhibit "U" of the Lewis Affidavit in support of this amendment.[95] Exhibit "U" is a screenshot of a Government of Alberta web page on climate change purportedly printed on September 4, 2018.

[168] In particular, the Plaintiffs point to the following statement:

> The Canadian Association of Physicians for the Environment (CAPE) found that an accelerated Alberta coal phase out will prevent 600 premature deaths, 500 emergency room visits, and will avoid nearly $3 billion in negative health outcomes.[96]

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[92] *Carbone v Burnett*, 2019 ABQB 98 ("***Carbone***") **[Alberta's Authorities, Tab 22]**.
[93] *Carbone*, at para. 38 **[Alberta's Authorities, Tab 22]**.
[94] *Attila Dogan*, at para. 27 **[Alberta's Authorities, Tab 21]**.
[95] Lewis Affidavit, Exhibit "U" **[Appeal Record, Vol. 2, Tab 2]**.
[96] Lewis Affidavit, Exhibit "U" **[Appeal Record, Vol. 2, Tab 2, PDF 269]**.

[169] The webpage is not evidence of any financial benefits that Alberta has acquired. At best, the webpage speaks to general benefits to Albertans at large – the very type of general benefits that the Supreme Court in *CPR* has held are not evidence of the acquisition of a beneficial interest.[97]

[170] The inclusion of "financial benefits" as it relates to Alberta is a hopeless amendment.

Paragraph 44(a)

[171] Paragraph 44(a) seeks declaratory relief phrased in both the past tense and the future tense. This proposed amendment is also hopeless and strikeable for three reasons: (1) the Plaintiffs are not seeking a true declaration; (2) this is not an appropriate case for declaratory relief; (3) granting the amendment would require the Court to ignore the Plaintiffs' admissions.

This is not true declaratory relief

[172] The relief sought is not a true declaration. The Plaintiffs are truly seeking remedial relief, i.e., compensation, not a declaration of rights. Our Court of Appeal, in Yellowbird, held that if the relief sought is executory or coercive, it is not declaratory.[98]

[173] Justice Slatter, in *Yellowbird ABQB*, put it plainly:

> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff 'leave the court in peace' and enjoy the benefits of the declaration 'without further resort to the judicial process'?[99]

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[97] *CPR*, at para. 33 [Alberta's Authorities, Tab 10]. See also *Club Pro Adult Entertainment Inc. v Ontario (Attorney General)*, 2006 CanLII 42254 (Ont. SC) ("***Club Pro***"), at para. 82 **[Alberta's Authorities, Tab 23]**, aff'd 2008 ONCA 158, SCC leave denied.

[98] *Yellowbird v Samson Cree Nation No 444*, 2008 ABCA 350 ("***Yellowbird***"), at paras. 45-47 **[Alberta's Authorities, Tab 24]**.

[99] *Joarcam LLC v Plains Midstream Canada ULC*, 2013 ABCA 118 ("***Joarcam***"), at para. 5 **[Alberta's Authorities, Tab 25]** citing Slatter J. in *Yellowbird v Samson Cree Nation No 444*, 2006 ABQB 434 ("***Yellowbird ABQB***") at para. 35.

[174] Here, the answer is "no". The Plaintiffs could not leave the court in peace and enjoy the benefits of the declaration without further resort to the judicial process.

[175] The declaratory relief would require coercive action. The Plaintiffs would still require resort to the Court to obtain a money judgment. That is evident given that the Plaintiffs seek a judgment for compensation or damages in the approximate amount of $190 million in paragraph 44(b) of the Twice Amended Claim.[100]

[176] The true purpose of the Plaintiffs' claim for *de facto* expropriation is to seek damages, not declaratory relief.[101]

This is not an appropriate case for declaratory relief

[177] The inappropriateness of this proposed amendment becomes more evident when the "will cause" allegation is considered.

[178] The inclusion of "will cause" language in this case necessarily means that, if there is a *de facto* expropriation, it has not yet occurred.

[179] In *Anderson*, Justice Tilleman, citing the Supreme Court of Canada in *Daniels*, noted:

> [A] declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties.[102]

[180] Further, the Court stated:

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[100] See, for example, *United Pentecostal Church of Nova Scotia v Nova Scotia Power Inc.*, 2020 NSSC 286 ("***United Pentecostal Church***") at para 13 where the Court found that de facto expropriation is a claim, not declaratory relief **[Alberta's Authorities, Tab 26]**.

[101] See, for example, *Alberta Municipal Retired Police Officers' Mutual Benefit Society v Alberta*, 2010 ABQB 458 ("***Alberta Retired Police Officers***"), at paras. 101-103 where the Court held that the plaintiffs were seeking recovery of monies and, therefore, not declaratory relief **[Alberta's Authorities, Tab 27]**.

[102] *Anderson v Canada (Minister of Employment, Workforce and Labour)*, 2018 ABQB 839 ("***Anderson***"), at para. 11 **[Alberta's Authorities, Tab 28]**, citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11.

> In short, when a court must assume that the legal regime in place at some future date is the same as that currently in operation, a court will not pronounce on the legal status of this "hypothetical future event".[103]

[181] The relief sought is premature and the amendment is hopeless as it would have been struck had it been originally pleaded. There is no practical utility to the declaratory relief sought.

[182] It bears repeating: *de facto* expropriation is not a tort. There is no such thing as a "continuing" *de facto* expropriation. This would be incompatible with the two-part test from *CPR*.

The amendment is unsupported by evidence

[183] With respect to the amendment that Alberta "has caused" a *de facto* expropriation, it is not supported by the evidence and, in particular, the Plaintiffs' admissions.

[184] To grant the proposed amendment would require the Court to ignore the Plaintiffs' admissions in paragraph 23 of its Reply to Alberta's Notice to Admit Facts.

[185] In general, the admissions before the Court are that Genesee LP still retains its royalty interest and is still receiving payments of that royalty interest.

[186] As noted in our submissions with respect to summary judgment, there is no evidentiary foundation that can support a declaration that Alberta has caused (past tense) a *de facto* expropriation of Genesee's royalty interests.

5. The Master erred in not striking the Amended Claim

[187] In dismissing Alberta's striking application, the Master stated:

> I start by saying that I do not think that it would be appropriate to deal with these applications in a Rule 3.68 striking context. They are very fact driven and hundreds of pages of evidence were introduced and relied upon by all of the parties. The amendment application was found not to be hopeless.

[103] *Anderson*, at para. 12 **[Alberta's Authorities, Tab 28]**.

> If the applications are to succeed, they will need to do so on a summary judgment basis.[104]

[188] For the reasons noted above, the disputed amendments are hopeless and ought to have been refused.

[189] Rule 3.68 permits the Court to strike out all or any part of a pleading that does not disclose a reasonable claim.[105] No evidence may be considered[106].

[190] Nothing in the either the Amended or the Twice Amended Claim discloses a reasonable claim as against Alberta as it is **plain and obvious that the alleged claims against Alberta cannot succeed**[107] and **there is no reasonable prospect of success**.[108]

[191] While the Plaintiffs are entitled to a broad reading of the pleadings[109], the Court must apply the rule as intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck and needless litigation should be avoided.[110]

(a) If there is a cause of action, it is premature

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

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[104] Summary Judgment Decision, at para. 18 **[Appeal Record, Vol. 1, Tab 22]**.

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

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

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

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

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

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

[193] In his decision, the Master stated:

> In my view, parties who are affected by the regulation who feel aggrieved are entitled to an answer now as to whether the regulation amounts to a "taking" or not. I am satisfied that the action is not premature. It serves no useful purpose for anyone to wait until 2030 to commence litigation, as was suggested by Canada and Alberta in their argument. Present rights are affected. At the very least, the present value of the plaintiffs' future royalty stream is clearly affected in ways that can be adjudicated upon (with the possible assistance of expert evidence).[111]

[194] This statement ignores the record that was before the Court. By the Plaintiffs' own admission, Genesee LP still retains its royalty interest and is still receiving payments of that royalty interest.

[195] In other words, at present, Alberta has not acquired a beneficial interest in the Plaintiffs' royalty interest and any cause of action in *de facto* expropriation has not yet crystallized.

[196] A loss of value **does not** equal *de facto* expropriation. It is through a misapprehension of the law of de facto expropriation that the Master concluded that the present value of the plaintiffs' future royalty stream was relevant.

[197] As noted above, the Plaintiffs no longer allege that Alberta committed any tort. The only allegation against Alberta is de facto expropriation.

[198] It is plain and obvious that a claim of *de facto* expropriation cannot succeed against Alberta. The Master erred and Alberta's striking application ought to have been granted.

PART V: Conclusion and Relief Sought

[199] The Master made no error in summarily dismissing the claim against Alberta and Altius' appeal should be dismissed.

[111] Summary Judgment Decision, at para. 25 **[Appeal Record, Vol. 1, Tab 22]**.

[200] Alternatively, the Master erred in granting the disputed amendments to the Twice Amended Claim and in dismissing Alberta's Striking Application.

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

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

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

All of which is respectfully submitted this 15th day of October, 2021.

Alberta Justice and Solicitor General, Legal Services Division

Per: _____

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Table of Authorities

Tab 27. *Alberta Municipal Retired Police Officers' Mutual Benefit Society v Alberta*, 2010 ABQB 458

Tab 28. *Anderson v Canada (Minister of Employment, Workforce and Labour)*, 2018 ABQB 839