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REGISTRY OFFICE	**CALGARY**
PLAINTIFFS	**ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.**
STATUS ON APPEAL	**APPELLANTS**
DEFENDANTS	**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA**
STATUS ON APPEAL	**RESPONDENTS**
DOCUMENT	**FACTUM**

Appeal from the Order of
The Honourable Madam Justice J.C. Price
Pronounced the 8th day of April 2022
Filed the 8th day of June 2022

FACTUM OF THE APPELLANTS ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.

Code Hunter LLP
Christian J. Popowich /
Dextin A. Zucchi
850, 440 - 2 Avenue SW
Calgary, AB T2P 5E9
Tel: 403-234-9800
Fax: 403-261-2054

For the Appellants

Alberta Justice and Solicitor General
Cynthia R. Hykaway /
Melissa N. Burkett
1710, 639 - 5 Avenue SW
Calgary, AB T2P 0M9
Tel: 403-297-2001
Fax: 403-662-3824

For the Respondent, Her Majesty the Queen in Right of Alberta

Department of Justice Canada
Shane P. Martin / Jordan C. Milne /
Sydney A. McHugh
601, 606 - 4 Street SW
Calgary, AB T2P 1T1
Tel: 403-292-6813
Fax: 403-299-3507

For the Respondent, Attorney General of Canada

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PART 1. FACTS

A. Introduction

1. The plaintiffs' property has been confiscated by the defendant governments, without compensation.

2. This factum is provided by the plaintiffs in support of their appeal of Justice J.C. Price's decision upholding summary dismissal of their action.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. Binding authority of the Supreme Court of Canada recognizes a common law right to compensation in these circumstances, yet the plaintiffs' claim was summarily dismissed by an applications judge – which ruling was upheld by the chambers judge.

9. The plaintiffs appealed the chambers judge's decision upholding summary dismissal of their action, and all parties agreed to stay the appeal process pending issuance of the Supreme Court of Canada's judgment in another *de facto* expropriation case called *Annapolis Group Inc v Halifax Regional Municipality*.[1]

10. The Supreme Court issued its decision in *Annapolis* on 21 October 2022, in which the Court aimed to "illuminate" the test for *de facto* expropriation, commenting that many lower courts have not applied the test correctly.[2]

11. The lower court here failed to apply the test for *de facto* expropriation correctly (as *Annapolis* now makes clear), and the plaintiffs respectfully request that summary dismissal be set aside with costs against the defendants.

B. Facts

12. In this section, all in-line citations are to the Affidavit of Ben Lewis sworn 28 September 2020 and found within the appellants' Extracts of Key Evidence ("**AE**").

1. Parties

13. The plaintiff Genesee Royalty Limited Partnership ("**Genesee LP**") is a partnership formed and existing under Ontario law. (Para 3, AE at 3.)

14. 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. (Para 4, AE at 3.)

15. The plaintiff Altius Royalty Corporation ("**Altius Royalty**") is a corporation formed and existing under Alberta law. (Para 5, AE at 4.)

16. 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,

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1 Case Management Officer Administrative Direction dated September 7, 2022

2 2022 SCC 36 at para 41 ["*Annapolis*"] **[Appellants' Book of Authorities ("ABOA") at Tab 1]**

nickel, cobalt, iron ore, potash, and thermal (electrical) coal. (Para 6, Exhibit "A", AE at 4, 17.)

17. 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. (Para 7, AE at 4.)

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

2. The Genesee Mine and Power Plant

19. 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. (Para 8, AE at 4.)

20. 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. (Para 9, AE at 4.)

21. 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.

    a. Genesee 1 and Genesee 2 were commissioned in 1994 and 1989, respectively, and have a combined capacity of 860 megawatts.

    b. Genesee 3 was commissioned in 2005 and has a capacity of 516 megawatts. 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. (Para 10, Exhibit "B", AE at 4, 19.)

3. The Federal Regulations

22. 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**"). (Para 12, Exhibit "C", AE at 5, 42.)

23. 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. (Para 13, Exhibit "D", AE at 5, 45.)

24. 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. (Para 15, Exhibit "E", AE at 5, 57.)

4. Genesee LP Acquires the Royalty Interest

25. 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. (Para 16, Exhibit "F", AE at 6, 60.)

26. 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. (Para 17, Exhibit "G", AE at 6, 71.)

27. 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. (Para 19, Exhibit "H", AE at 6, 87.)

28. 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". (Para 20, Exhibit "I", AE at 6, 107.)

29. In September 2013, Altius proposed that it purchase the PMRL royalty interests for $460 million, which was accepted by Sherritt. 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;

    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. (Paras 21-22, Exhibits "J" and "K", AE at 7, 109, 116.)

30. 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. (Para 24, Exhibit "L", AE at 7, 150.)

31. 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. (Para 25, Exhibit "M", AE at 7, 208.)

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

32. 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. (Para 26, Exhibit "N", AE at 8, 212.)

33. 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. (Para 27, Exhibit "O", AE at 8, 217.)

34. 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. (Para 28, Exhibit "P", AE at 8, 225.)

35. 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. (Para 29, Exhibit "Q", AE at 8, 230.)

36. 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. (Para 30, Exhibit "Q", AE at 8, 230.)

37. 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). (Para 31, Exhibit "R", AE at 8, 244.)

38. 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. (Para 32, Exhibit "S", AE at 8, 249.)

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

39. 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. (Para 33, Exhibit "T", AE at 9, 258.)

40. 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. (Para 34, Exhibit "U", AE at 9, 261.)

41. 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). (Para 35, Exhibit "V", AE at 9, 265.)

42. 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. [Exhibit "W", AE at 271.]

43. 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. (Para 37, Exhibit "X", AE at 9, 277.)

44. 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". (Para 38, Exhibits "U", "Y", AE at 10, 261, 282.)

45. 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 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". (Para 39, Exhibit "Z", AE at 10, 286.)

46. 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. (Para 40(a), Exhibit "AA", AE at 10, 302.)

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. (Para 40(b), Exhibit "BB", AE at 10, 313.)

47. 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. (Para 41, Exhibit "CC", AE at 11, 318.)

48. 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. (Para 42, Exhibit "DD", AE at 11, 322.)

49. 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-energy uses". The Minister's letter, however, did not indicate what "non-energy uses" are or may be available for thermal coal. (Para 43, Exhibit "EE", AE at 11, 325.)

50. 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. (Para 44, AE at 11.)

7. Federal Actions to End Coal Power by 2030

51. 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. (Para 45, Exhibit "FF", AE at 11, 328.)

52. 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. (Para 46, Exhibit "GG", AE at 11, 334.)

53. 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. (Para 47, Exhibit "HH", AE at 11, 338.)

54. 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. [Exhibit "HH" at pg 5, AE at 338.]

55. 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. (Para 48, Exhibit "II", AE at 12, 390.)

56. 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. (Para 49, Exhibit "JJ", AE at 12, 407.)

57. 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. (Para 51, AE at 12.)

8. No Alternative Use for the Genesee Coal

58. 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 (Para 52, AE at 12), and for the purposes of the application under appeal the defendants agreed to not argue that the subject coal can be put to a reasonable use after 2029.[3]

59. 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. (Para 53, Exhibit "KK", AE at 12, 412). As noted above, the Genesee Mine produces thermal coal which the defendants admit is entirely dedicated to the generation of electricity in Alberta.[4]

60. 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, and the 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. (Para 55, Exhibit "MM", AE at 13, 417.)

61. Accordingly, the Genesee Mine will close when the Genesee Power Plant ceases generating coal-fired electricity (*i.e.*, by no later than 2030). (Para 56, AE at 13.)

9. The Harm to the Plaintiffs

62. 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. (Para 57, AE at 13.)

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[3] See Consent Order of Justice K.M. Eidsvik filed July 22, 2021 at para 6 **[Appeal Record ("AR") at 100]**

[4] Alberta Application filed June 5, 2020 at para 12 **[AR at 51]**; Canada Application filed June 3, 2020 at para 6 **[AR at 47]**

63. 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. (Para 58, AE at 13.)

64. 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. 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. (Para 59, Footnote 2, Exhibit "NN", AE at 13-14, 421.)

65. 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. (Footnote 2, Exhibits "Z", "PP", AE at 14, 286, 441.)

10. Procedural History

66. On 23 November 2018, the plaintiffs filed their Statement of Claim alleging a *de facto* expropriation 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.[5]

67. Affidavits of Records were then exchanged, but before the matter proceeded to questioning both defendants applied to strike or summarily dismiss the plaintiffs' action,[6] and in response the plaintiffs cross-applied to further amend their Claim.

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5 Amended Statement of Claim filed on December 19, 2018 **[AR at 3]**

6 Alberta Application filed June 5, 2020 **[AR at 50]**; Canada Application filed June 3, 2020 **[AR at 46]**

68. All three applications were heard by an applications judge in December 2020, who:

    a. granted the plaintiffs' cross-application to further amend;

    b. dismissed the defendants' applications to strike the plaintiffs' claim; and

    c. granted the defendants' applications for summary dismissal on the basis that the plaintiffs could not satisfy the first branch of the test for *de facto* expropriation as stated in a 2006 decision of the Supreme Court of Canada known as *Canadian Pacific Railway v Vancouver* ("***CPR***"), which requires that the state acquire a "beneficial interest in the property or flowing from it."[7]

69. All parties appealed to a chambers judge (the plaintiffs on summary dismissal; the defendants on the amendments and the strike application), who on 8 April 2022 upheld the applications judge's decision in its entirety with the result that the plaintiffs' claim remains summarily dismissed – also for the sole reason that the defendants had not acquired a beneficial interest in property or flowing from it.[8]

70. Before both levels of court the plaintiffs argued that an intangible or general benefit accruing to the state is sufficient to satisfy the "beneficial interest" requirement in *CPR* (as opposed to the state actually acquiring property rights), but the applications and chambers judges ruled otherwise.[9]

71. The plaintiffs appealed the chambers judge's decision upholding summary dismissal of their action,[10] and all parties agreed to stay the appeal process pending issuance of the Supreme Court of Canada's judgment in another *de facto* expropriation case called *Annapolis*.[11]

72. The Supreme Court issued its decision in *Annapolis* on 21 October 2022, in which the Court aimed to "illuminate" the test for *de facto* expropriation, commenting that many lower courts have not applied the test correctly.[12]

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7 Decision of AJ Farrington dated January 4, 2021 at paras 1, 18, 27, 40 ("Applications Judge Decision") **[AR at 76]**
8 Reasons for Decision of Justice Price dated April 8, 2022 at paras 76-77 ("Chambers Judge Decision") **[AR at 104]**
9 Applications Judge Decision at para 40 **[AR at 76]**; Chambers Judge Decision at paras 65-69 **[AR at 104]**
10 Civil Notice of Appeal filed May 5, 2022 **[AR at 121]**
11 Case Management Officer Administrative Direction dated September 7, 2022
12 *Annapolis* at para 41 **[ABOA at Tab 1]**

73. The lower court here failed to apply the test for *de facto* expropriation correctly (as *Annapolis* now makes clear), and the plaintiffs respectfully request that summary dismissal be set aside with costs against the defendants.

PART 2. GROUNDS OF APPEAL

74. The sole ground of appeal is whether the chambers judge erred by upholding summary dismissal of the plaintiffs' claim, which raises two issues:

a. did the chambers judge err by failing to correctly state the test for *de facto* expropriation; and

b. did the chambers judge err by finding that the defendants had proven there is no merit to the plaintiffs' claim by reason that the "beneficial interest" requirement in *CPR* could not be made out.

PART 3. STANDARD OF REVIEW

75. Whether the chambers judge erred by failing to correctly state the test for *de facto* expropriation is a question of law, reviewable on the standard of correctness.[13]

76. If the chambers judge failed to correctly state the test for *de facto* expropriation (which the plaintiffs submit occurred here), the chambers judge's application of an incorrect test to the facts amounts to a pure error of law also reviewable on the correctness standard.[14]

PART 4. ARGUMENT

A. The Test for Summary Dismissal

77. 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.[15]

78. 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".[16]

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[13] *Pederson v Allstate Insurance Company of Canada*, 2020 ABCA 65 at para 8 **[ABOA at Tab 2]**; *Rudichuk v Genesis Land Development Corp*, 2020 ABCA 42 at para 23 **[ABOA at Tab 3]**

[14] *Housen v Nikolaisen*, 2002 SCC 33 at para 27 **[ABOA at Tab 4]**

[15] *Rules of Court*, AR 124/2010 r 7.3 **[ABOA at Tab 5]**

[16] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 35, 47 ("*Weir Jones*") **[ABOA at Tab 6]**

79. 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".[17]

80. 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:

    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.[18]

81. 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.[19]

82. In the present case, the chambers judge found that the defendants had "proven on a balance of probabilities that there is no merit to the Plaintiffs' claim" on the basis that the beneficial interest requirement from *CPR* could not be made out.[20]

83. However, and for the reasons which follow, the chambers judge erred both in the articulation of the test from *CPR* and (by extension) its application.

B. The Nature of the Plaintiffs' Interest

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

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17 *Weir-Jones* at para 21 **[ABOA at Tab 6]**
18 *Weir-Jones* at paras 21, 32, 35, 43, 45, 47 **[ABOA at Tab 6]**
19 *Weir-Jones* at paras 35, 47 **[ABOA at Tab 6]**
20 Chambers Judge Decision at paras 76-77 **[AR at 104]**

85. 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.[21]

86. 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.[22]

87. At common law a royalty interest is capable of being a proprietary interest in land (as opposed to a mere contractual right) if certain requirements are met,[23] and in the present case the chambers judge found that the royalty interest of Genesee LP was an interest in freehold coal which comprises the mine, writing:

> For purposes of the proceedings before the Master and before me, it is not disputed that the Plaintiffs hold their royalty interest in the coal through Genesee LP and that that is a property right capable of being taken through *de facto* expropriation. The royalty interest is in freehold coal and constitutes an interest in land. Through the corporate arrangement, the Plaintiffs collectively paid $460 million for the royalty interest in the coal.[24] [Emphasis added.]

88. To use the oft-quoted expression of property being a "bundle of rights",[25] 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 royalty interest at issue in these proceedings is an interest in land.

C. The Concept of a Taking

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

91. 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

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21 John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008) at 178 **[ABOA at Tab 7]**

22 Ben Lewis Affidavit at paras 22, 24-25, Exhibits "K", "L" **[AE at 7, 116, 150]**

23 See *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at paras 21-22 **[ABOA at Tab 8]**

24 Chambers Judge Decision at para 25 **[AR at 104]**

25 See e.g., *Tucows.Com Co v Lojas Renner SA*, 2011 ONCA 548 at para 57 **[ABOA at Tab 9]**, leave to appeal to SCC ref'd 2012 CanLII 28261

significant measure, deprived of his or her rights of use and enjoyment.[26] 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.[27]

92. 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.[28]

93. 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*.[29]

94. 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 of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him.[30]

95. Since *De Keyser's*, the Supreme Court of Canada has considered a taking claim on four occasions, with the most recent being in October 2022.

96. The first was its 1979 decision *Manitoba Fisheries v Canada*.[31] 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

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[26] 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") **[ABOA at Tab 10]**

[27] Brown Article at 321-22 **[ABOA at Tab 10]**

[28] Brown Article at 321 **[ABOA at Tab 10]**

[29] [1920] AC 508 ("*De Keyser's*) **[ABOA at Tab 11]**

[30] *De Keyser's* at 542 **[ABOA at Tab 11]**

[31] [1979] 1 SCR 101 ("*Manitoba Fisheries*") **[ABOA at Tab 12]**

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*.[32]

97. The second taking case considered by the Supreme Court of Canada was *British Columbia v Tener*, a decision from 1985.[33] 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.

98. 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."[34] 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".[35]

99. 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.[36] (Quotation omitted for space.)

100. The third taking case considered by the Supreme Court of Canada was its 2006 decision *Canadian Pacific Railway v Vancouver*.[37] 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

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32 *Manitoba Fisheries* at 118 **[ABOA at Tab 12]**
33 [1985] 1 SCR 533 ("*Tener*") **[ABOA at Tab 13]**
34 *Tener* at para 34 **[ABOA at Tab 13]**
35 *Tener* at paras 37, 60 **[ABOA at Tab 13]**
36 See Peter W. Hogg, Constitutional Law of Canada (Toronto: Thomson Reuters, 2019) at 29.5(d) **[ABOA at Tab 14]**
37 2006 SCC 5 ("*CPR*") **[ABOA at Tab 15]**

land."[38] 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.

101. 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…[39]

102. 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.[40]

103. The fourth and most recent taking case considered by the Supreme Court of Canada was in *Annapolis Group Inc v Halifax Regional Municipality*.[41] There, the plaintiff developer contended the Halifax Regional Municipality had effectively seized its property for use as a public park through stringent land use regulations and sued for compensation.[42]

104. Halifax's motion for summary dismissal was denied by a chambers judge (for material facts in dispute),[43] but granted by the Nova Scotia Court of Appeal on the basis that land "must actually be taken" to satisfy the beneficial interest requirement from *CPR* and that had not occurred on the facts before it.[44]

105. The plaintiff appealed summary dismissal of its claim to the Supreme Court of Canada, which rendered a split decision on 21 October 2022. The Majority allowed the plaintiff's appeal and directed that its claim may proceed to trial, in part on the basis that the Court of Appeal misapprehended the law by asserting that the beneficial interest branch of the test from *CPR* requires an *actual* acquisition of property rights by the state.[45]

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38 *CPR* at para 8 **[ABOA at Tab 15]**
39 *CPR* at para 30 **[ABOA at Tab 15]**
40 *CPR* at paras 31, 37 **[ABOA at Tab 15]**
41 *Annapolis* **[ABOA at Tab 1]**
42 *Annapolis* at para 9 **[ABOA at Tab 1]**
43 *Annapolis* at para 11 **[ABOA at Tab 1]**
44 *Annapolis* at para 14 **[ABOA at Tab 1]**
45 *Annapolis* at paras 4, 41, 80 **[ABOA at Tab 1]**

106. Reading *Manitoba Fisheries*, *Tener* and *CPR* harmoniously with each other, as the Supreme Court explained, signifies that the beneficial interest requirement is satisfied if a mere "advantage" flows to the state, writing:

> In our view, the foregoing jurisprudence — upon which the *CPR* test was expressly stated as resting — supports an understanding of "beneficial interest" as concerned with the effect of a regulatory measure on the landowner, and not with whether a proprietary interest was actually acquired by the government. Conversely, that same jurisprudence supports the view that "beneficial interest", as that term appears in the first part of the test stated in *CPR*, refers not to actual acquisition of the equity that rests with the beneficial owner of property connoting rights of use and enjoyment, but to an "advantage" flowing to the state. We say this for two reasons.
>
> First, to require actual acquisition would collapse the distinction between constructive (*de facto*) and *de jure* takings — a distinction which *CPR* explicitly preserves (paras. 30-37). Simply put, if a constructive taking requires an actual taking, then it is no longer constructive. It follows that the Court of Appeal's requirement of an actual acquisition of the Annapolis Lands cannot be necessary to satisfy the *CPR* test for a constructive taking.
>
> Secondly, interpreting "beneficial interest" broadly (as meaning a benefit or advantage accruing to the state) ensures *CPR*'s coherence to *Manitoba Fisheries* and *Tener*, neither of which understood "benefits" in the strict equitable sense of that term... [Emphasis added.][46]

107. The Supreme Court clarified the *CPR* test as follows:

> In sum, we affirm that the test to show a constructive taking is that stated by *CPR*, properly understood. The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property.[47]

108. When applying this test, the court is to "undertake a realistic appraisal of matters in the context of the specific case" and may consider additional factors such as the nature of the government action, the nature of the land and its historical or current uses, and the substance of the alleged advantage.[48] Significantly, the Supreme Court added that "**regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test**."[49]

D. A Taking has Occurred Under *Annapolis*

109. While *Annapolis* was not available at the time the chambers judge rendered her decision, the plaintiffs submit it is binding authority and determines the appeal in their favour, with the result that summary dismissal of their taking claim must be set aside.

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[46] *Annapolis* at paras 38-40 **[ABOA at Tab 1]**
[47] *Annapolis* at para 44 **[ABOA at Tab 1]**
[48] *Annapolis* at para 45 **[ABOA at Tab 1]**
[49] *Annapolis* at para 45(c) [Emphasis added] **[ABOA at Tab 1]**

110. As noted, the Supreme Court of Canada clarified that the test for a constructive taking involves deciding:

a. whether the public authority has acquired a beneficial interest in the property or flowing from it (*i.e.*, an advantage); and

b. whether the state action has removed all reasonable uses of the property.[50]

111. The chambers judge here upheld summary dismissal for the sole reason that the governments had not acquired a "right that might constitute a beneficial interest", and thus felt it was unnecessary to decide the second branch of the test.[51]

112. In the plaintiffs' submission, both branches of the test are satisfied and the chambers judge erred in law by interpreting *CPR* to require the acquisition of property rights by the state.

1. The Defendants have Acquired an Advantage

113. The first branch of the *CPR* test is satisfied, as the phase out of coal power will result in policy and economic advantages flowing to the Alberta and Canadian governments.

114. As noted above, the Supreme Court in *Annapolis* clarified that the "beneficial interest" requirement in *CPR* falls short of an actual acquisition by the state and that a mere "advantage" suffices.[52]

115. On the substance of the advantage, the Supreme Court wrote the following:

> The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking (*Sun Construction*, at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses such as parks, schools, or municipal buildings.[53] [Emphasis added.]

116. The governments here decided to end coal fired electricity by 2030, and Alberta's Off-Coal Agreement and Canada's Amended Regulations advance that policy objective – thereby conferring onto the defendants an advantage. This case is no different from:

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50 *Annapolis* at para 4, 44 **[ABOA at Tab 1]**
51 Chambers Judge Decision at paras 64, 77-80 **[AR at 104]**
52 *Annapolis* at para 25 **[ABOA at Tab 1]**
53 *Annapolis* at para 45(c) **[ABOA at Tab 1]**

a. *De Keyser's*, where the House of Lords declared the Crown must pay compensation when taking possession of land or buildings for "administrative purposes in connection with the defence of the realm";[54]

b. *Manitoba Fisheries*, where the federal government acquired an "economic advantage" from conferring onto itself a commercial monopoly in the export of fish, which had the effect of rendering the plaintiff's physical assets useless;[55] and

c. *Tener*, where the Province of British Columbia secured an advantage of preserving "qualities perceived as being desirable for public parks" by regulating away the plaintiffs' ability to exploit their mineral claims.[56]

117. And as the defendants' actions have effectively confined the use of the Genesee coal to the public purpose of conservation and left the plaintiffs with only notional use of their royalty interest deprived of all economic value (as discussed further in the next section of this factum), by the Supreme Court's ruling in *Annapolis* the test for a taking is satisfied.

118. The case law also demonstrates that the acquisition branch of the *CPR* test may be satisfied where economic or financial benefits flow to the state.

a. In its summary of *Manitoba Fisheries*, the Supreme Court in *Annapolis* wrote how the impugned legislation creating a government monopoly in the export of fish conferred an "economic advantage" upon the state.[57]

b. In *Kalmring v Alberta*, the Court of King's Bench of Alberta held that revenues the government could generate by providing road testing services itself could "arguably be characterized as the acquisition of an intangible benefit by the Crown" capable of satisfying the beneficial interest requirement in *CPR*.[58]

c. In *Compliance Coal v British Columbia*, the British Columbia Supreme Court held that the acquisition branch of the test from *CPR* was satisfied on the basis that

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54 *De Keyser's* at headnote **[ABOA at Tab 11]**
55 *Annapolis* at paras 28-29, 31 citing *Manitoba Fisheries* **[ABOA at Tab 1]**
56 *Annapolis* at para 34, citing *Tener* **[ABOA at Tab 1]**
57 *Annapolis* at para 29 **[ABOA at Tab 1]**
58 2020 ABQB 81 at paras 68, 71, 74-75 ("*Kalmring*") **[ABOA at Tab 16]**

denying the plaintiffs' mining operations "enhanced the value" of surface lots owned by the provincial Crown.[59]

119. In the present case, the phase out of coal power by 2030 results in additional advantages flowing to the Alberta and Canadian governments in the form of avoided healthcare and environmental expenses.

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

a. phasing out coal pollution will "protect the health of Albertans … and save money in health-care costs and lost productivity";[60]

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";[61] and

c. permitting coal power plants to continue "emitting harmful pollution" after 2030 would reduce air quality and impact human health.[62]

121. While the total benefits from the Off-Coal Agreements with the three utility companies are not known, in order for those agreements to be justified Alberta must be of the view that the value of the benefits which will flow to the province exceeds the cost of the transition payments made to the utility companies ($1.1 billion).[63]

122. For its part, Canada announced the following benefits from the Amended Regulations:

> 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 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

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59 2020 BCSC 621 at paras 92, 96 **[ABOA at Tab 17]**
60 Ben Lewis Affidavit at Exhibit "U" **[AE at 261]**
61 Ben Lewis Affidavit at Exhibit "U" **[AE at 261]**
62 Ben Lewis Affidavit at Exhibit "U" **[AE at 261]**
63 Affidavit of Ben Lewis at para 38, Exhibits "U", "Y" **[AE at 10, 261, 282]**

> 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, footnote removed.][64]

123. The plaintiffs argued before the chambers judge that these types of benefits were sufficient to satisfy the first branch of the *CPR* test (as shown in *Kalmring* and *Compliance Coal*), but the chambers judge disagreed and as held there is a "distinction between a *benefit* and a *beneficial interest*."[65]

124. The chambers judge was apparently of the view that the "beneficial interest" branch requires that the state actually acquire property rights, having written the following in response to an alternative argument of the plaintiffs that the governments had acquired an interest in the subject coal by phasing out coal fired electricity:

> The Plaintiffs draw an analogy to ***Lynch v City of St John's***, 2016 NLCA 35. The Court in that case held that, by precluding development of the plaintiff's land beyond its natural condition, the City had acquired a beneficial interest in that land consisting of the right to a continuous flow of uncontaminated groundwater.
>
> I do not find this analogy persuasive. To the extent that the City in that case acquired some kind of water rights, that may come closer to the necessary beneficial interest than is at issue here. There is nothing in the record that satisfies me that the Defendants have acquired or will acquire some analogous right that might constitute a beneficial interest. [Emphasis added.][66]

125. Like the Nova Scotia Court of Appeal in *Annapolis* which was of the erroneous view that land "must actually be taken" for a *de facto* expropriation to occur,[67] the chambers judge misapprehended the law by interpreting *CPR* to require that the state actually obtain property rights in the land at issue. As sagely put by the Supreme Court in *Annapolis*:

> The key question is whether the lower courts have applied the *CPR* test correctly. In our respectful view, many of them have not. Indeed, the Court of Appeal itself misapprehended the law in this case, by asserting that *CPR* requires an actual expropriation to establish a constructive taking. As we have explained, and as the authorities confirm, *CPR* — properly understood — trains the court's eye on whether a public authority has derived an advantage, in effect, from private property, not on whether it has formally acquired a proprietary interest in the land. To hold otherwise would be to erase the long-standing distinction between *de jure* and *de facto* expropriation from Canadian law.[68]

126. The first branch of the test from *CPR* is thus satisfied based on the policy and economic advantages that will flow to the governments from phasing out coal power by 2030, and the chambers judge erred by ruling otherwise.

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64 Ben Lewis Affidavit at Exhibit "HH" at pgs 18-19 **[AE at 338]**
65 Chambers Judge Decision at paras 65-69 **[AR at 104]**
66 Chambers Judge Decision at paras 63-64 **[AR at 104]**
67 *Annapolis* at para 14 **[ABOA at Tab 1]**
68 *Annapolis* at para 41 **[ABOA at Tab 1]**

127. And insofar as this Court has any uncertainty of whether the defendants' actions to phase out coal power by 2030 will result in an advantage accruing to the state as expressed in *Annapolis* (noting neither defendant tendered an affidavit deposing they are not expected to obtain any benefits), the plaintiffs submit that is a genuine issue requiring a trial with the result that summary dismissal must be set aside.

2. All Reasonable Uses of the Royalty Interest Are Removed

128. While the chambers judge did not find it necessary to decide whether all reasonable uses of the royalty interest in the Genesee coal have been removed (the second branch of the test from *CPR*),[69] the record is sufficient for this Court to make that finding.

129. The defendants have agreed to not argue that the subject coal can be put to a reasonable use after 2029,[70] and the chambers judge accepted the plaintiffs' evidence on the sterilization of the royalty interest as "uncontroverted", writing the following:

> The Plaintiffs' affiant was not cross-examined, so their affidavit evidence is uncontroverted, including the following facts:
>
> (a) The coal in the Mine has been dedicated for use at the Plant.
>
> (b) The Plant will cease generating coal-fired electricity on or before December 31, 2030.
>
> (c) There is no evidence of what use can be made of the coal in the Mine after the Plant ceases generating coal-fired electricity.
>
> (d) The Mine is not an export mine, but was developed for the purpose of fueling the Plant.
>
> (e) The Mine does not have the necessary infrastructure (such as rail export line and train load-out facility) to export the coal to other potential markets.
>
> (f) It is expected that the Mine will close when the Plant ceases generating coal-fired electricity (i.e., by no later than 2030).
>
> (g) When the Plant ceases generating coal-fired electricity, the Plaintiffs believe that the royalty interest held by Genesee LP will cease to have any value and Genesee LP will lose all revenue from it, as their evidence remains uncontroverted that there is no use for the coal from the Mine other than as a fuel source for the Plant…[71]

130. That the coal and the royalty interest in it will be rendered valueless when the Genesee Power Plant ceases coal fired emissions by 2030 is also evidenced by statements and admissions made by the defendants. For example, Alberta has:

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69 Chambers Judge Decision at paras 78-79 **[AR at 104]**

70 See Consent Order of Justice K.M. Eidsvik filed July 22, 2021 at para 6 **[AR at 100]**

71 Chambers Judge Decision at para 35 **[AR at 104]**

a. classified the Genesee Mine as a thermal (as opposed to metallurgical) coal mine, and one which does not export coal;[72]

b. excluded the Genesee Mine from its list of mines "[n]ot affected by phase-out of coal-fired emissions";[73] 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."[74]

131. 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.[75]

132. Canada amended its Regulations to "phase out traditional coal-fired electricity by 2030",[76] and its Regulatory Impact Analysis Statement recognizes that thermal coal mines (such as the one at Genesee) will be phased out by consequence:

> 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, at the latest. This performance standard is designed to phase out conventional coal by 2030.
>
> …
>
> 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.][77]

133. 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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72 Ben Lewis Affidavit at Exhibits "U", "KK", "LL" **[AE at 261, 412, 414]**
73 Ben Lewis Affidavit of Exhibit "U" **[AE at 261]**
74 Ben Lewis Affidavit at para 40, Exhibit "AA" **[AE at 10, 302]**
75 Application filed by Alberta on June 5, 2020 at paras 11-12 **[AR at 50]**
76 Ben Lewis Affidavit at Exhibit "GG" at pg 2 **[AE at 334]**
77 Ben Lewis Affidavit at Exhibit "HH" at pgs 5, 14, 16, 24, 35 **[AE at 338]**

> 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.
>
> …
>
> 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.][78]

134. 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. Exactly 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.

135. This dispute also parallels two other mining cases where government action was found to have resulted in compensation from a taking.

136. The first was *Casamiro Resources Corp v British Columbia*,[79] 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.[80] 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 reducing the mineral grants to "meaningless pieces of paper".[81]

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78 Ben Lewis Affidavit at Exhibit "II" at pgs v, vii, 5, 10, 13 **[AE at 390]**
79 (1990), 43 LCR 246 (BCSC) ("*Casamiro BCSC*") **[ABOA at Tab 18]**
80 *Casamiro BCSC* at paras 11, 13 **[ABOA at Tab 18]**
81 (1991), 55 BCLR (2d) 346 (CA) at 18 **[ABOA at Tab 19]**

137. The other parallel mining case is *Rock Resources Inc v British Columbia*,[82] a 2003 decision of 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".[83]

138. The plaintiffs here will likewise see their royalty interest reduced to "meaningless pieces of paper" as a result of the defendants' actions to phase out coal power. And as the defendants have not raised legislation which permits the taking of coal-related interests without compensation to the owner (as there is no such legislation), by the common law the plaintiffs are entitled to compensation for the loss of their property.

3. The Additional Factors Weigh in the Plaintiffs' Favour

139. Not only do the plaintiffs satisfy both requirements of the *CPR* test, but the additional factors outlined by the Supreme Court in *Annapolis* which a court may consider when determining whether a taking has occurred weigh handily in the plaintiffs' favour.

***Annapolis* Factor at para 45**	**Application**
(a) The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations… [Emphasis added.]	The 2030 phase out had not been announced when the plaintiffs acquired the royalty interest. • Alberta announced the 2030 phase out in November 2015, which was roughly 2 years after the plaintiffs decided to acquire the royalty interest.[84] • Canada announced the 2030 phase out in November 2016, which was roughly 3 years after the plaintiffs decided to acquire the royalty interest.[85] The 2030 phase out restricts the use of property in a manner not consistent with the plaintiffs' reasonable expectations. • The 2030 phase out renders the Genesee coal, and the royalty interest in it, valueless as there

82 2003 BCCA 324 ("*Rock Resources*") **[ABOA at Tab 20]**
83 *Rock Resources* at para 57 **[ABOA at Tab 20]**
84 Affidavit of Ben Lewis at para 21, Exhibits "J", "T" **[AE at 7, 109, 258]**
85 Affidavit of Ben Lewis at para 21, Exhibits "J", "FF" **[AE at 7, 109, 328]**

Annapolis Factor at para 45	Application
	is no use for the coal other than as a fuel for the Genesee Power Plant. • The 2030 phase out is not a routine regulatory change, but rather an unexpected and transformative one which upended the long term planning and livelihoods 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.[86]
(b) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all potential reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and [Emphasis added.]	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.[87] 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.[88]
(c) The substance of the alleged advantage. The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking (*Sun Construction*, at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses such as parks, schools, or municipal buildings. [Emphasis added.]	For the reasons already given, the 2030 phase out will leave the plaintiffs with only notional use of their royalty interest deprived of all economic value. It also bears emphasizing that: • the applications judge agreed the ability to develop and exploit the coal is arguably taken as a result of the resource becoming "valueless";[89] and • the chambers judge accepted the plaintiffs' evidence on the sterilization of the royalty interest as "uncontroverted".[90]

[86] Affidavit of Ben Lewis at paras 38-40, 48-50, Exhibits "AA", "II", "JJ" **[AE at 10, 12, 302, 390, 407]**

[87] Ben Lewis Affidavit at paras 52, 55, Exhibit "MM" **[AE at 12-13, 417]**

[88] Alberta Application filed June 5, 2020 at para 12 **[AR at 50]**; Canada Application filed June 3, 2020 at para 6 **[AR at 46]**

[89] Applications Judge Decision at para 33 **[AR at 76]**

[90] Chambers Judge Decision at para 35 **[AR at 104]**

PART 5. RELIEF SOUGHT

140. 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.

141. 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 wrote "[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."[91]

142. In summary, the test for *de facto* expropriation as stated in *CPR* is satisfied, the chambers judge erred in her articulation of same, and summary dismissal cannot stand.

    a. The first branch of the test is satisfied, as the phase out of coal power by 2030 will result in policy and economic advantages flowing to the Alberta and Canadian governments. The chambers judge erred in law by interpreting the "beneficial interest" branch of the test to require that the state actually acquire property rights.

    b. The second branch of the test is satisfied, as all reasonable uses of the royalty interest are removed as a result of the 2030 phase out and (as found by the chambers judge) the plaintiffs' evidence in that regard is "uncontroverted".

143. The plaintiffs therefore request that this Honourable Court set aside that portion of the chambers judge's decision which upheld summary dismissal and restore their action.

144. The plaintiffs seek costs payable on Column 5 as well as their reasonable disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2022.

Estimated time required for oral argument: 45 minutes

Code Hunter LLP

Christian J. Popowich
Counsel for the Appellants

Dextin Zucchi
Counsel for the Appellants

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[91] *Home Orderly Services v Manitoba* (1988), 49 Man R (2d) 246 (CA), as cited in *Kalmring* at para 77 **[ABOA at Tab 16]**

TABLE OF AUTHORITIES

TAB	AUTHORITY
1	*Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36
2	*Pederson v Allstate Insurance Company of Canada*, 2020 ABCA 65
3	*Rudichuk v Genesis Land Development Corp*, 2020 ABCA 42
4	*Housen v Nikolaisen*, 2002 SCC 33
5	*Rules of Court*, AR 124/2010
6	*Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49
7	John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008)
8	*Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7
9	*Tucows.Com Co v Lojas Renner SA*, 2011 ONCA 548, leave to appeal to SCC ref'd 2012 CanLII 28261
10	Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC Law Review
11	*Attorney General v De Keyser's Royal Hotel Limited*, [1920] AC 508
12	*Manitoba Fisheries v Canada*, [1979] 1 SCR 101
13	*British Columbia v Tener*, [1985] 1 SCR 533
14	Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019)
15	*Canadian Pacific Railway v Vancouver*, 2006 SCC 5
16	*Kalmring v Alberta*, 2020 ABQB 81
17	*Compliance Coal v British Columbia*, 2020 BCSC 621
18	*Casamiro Resources Corp v British Columbia* (1990), 43 LCR 246 (BCSC)
19	*Casamiro Resources Corp v British Columbia* (1991), 55 BCLR (2d) 346 (CA)
20	*Rock Resources Inc v British Columbia*, 2003 BCCA 324