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

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# RESPONSE BRIEF OF THE PLAINTIFFS IN RESPECT OF MASTERS SPECIAL CHAMBERS APPLICATIONS SCHEDULED FOR DECEMBER 8 – 11, 2020

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**Dated:** November 25, 2020

**CODE HUNTER LLP**
850, 440 – 2 Avenue SW
Calgary, Alberta T2P 5E9

Christian J. Popowich [cpopowich@codehunterllp.com]
Dextin Zucchi [dextin.zucchi@codehunterllp.com]

Tel: 403-716-2378
Fax: 403-261-2054

Solicitors for the Plaintiffs

# TABLE OF CONTENTS

**PART I: INTRODUCTION**

1. 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.

2. 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.

3. 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.

4. 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 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.

5. 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 $190,000,000.

6. Binding authority of the Supreme Court of Canada recognizes a common law right to compensation in these circumstances, yet the defendants seek to strike or summarily dismiss the plaintiffs' Statement of Claim by the applications currently before the Court.

7. In response, the plaintiffs submit that their Claim has both a reasonable prospect of success and merit, and request that the defendants' applications be dismissed with costs awarded to the plaintiffs in any event of the cause.

## PART II: FACTS

### A. Parties

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

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

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

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

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

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

### B. The Genesee Mine and Power Plant

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

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1 Affidavit of Ben Lewis sworn September 28, 2020 at para 3.
2 Affidavit of Ben Lewis at para 4.
3 Affidavit of Ben Lewis at para 5.
4 Affidavit of Ben Lewis at para 6, Exhibit "A".
5 Affidavit of Ben Lewis at para 7.
6 Affidavit of Ben Lewis at para 8.

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

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

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

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

**Genesee Power Plant**

*Source: Affidavit of Ben Lewis, Exhibit "B"*

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7 Affidavit of Ben Lewis at para 9.
8 Affidavit of Ben Lewis at para 10, Exhibit "B".
9 Affidavit of Ben Lewis at para 10, Exhibit "B".
10 Affidavit of Ben Lewis at para 10, Exhibit "B".
11 Affidavit of Ben Lewis at para 10, Exhibit "B".

### C. The Federal Regulations

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

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

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

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

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

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

### D. Genesee LP Acquires the Royalty Interest

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

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12 Affidavit of Ben Lewis at para 12, Exhibit "C".
13 Affidavit of Ben Lewis at para 13, Exhibit "D".
14 Affidavit of Ben Lewis at para 15, Exhibit "E".
15 Affidavit of Ben Lewis at para 16, Exhibit "F".

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

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

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

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

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

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

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

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

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16 Affidavit of Ben Lewis at para 17, Exhibit "G".
17 Affidavit of Ben Lewis at para 19, Exhibit "H".
18 Affidavit of Ben Lewis at para 20, Exhibit "I".
19 Affidavit of Ben Lewis at para 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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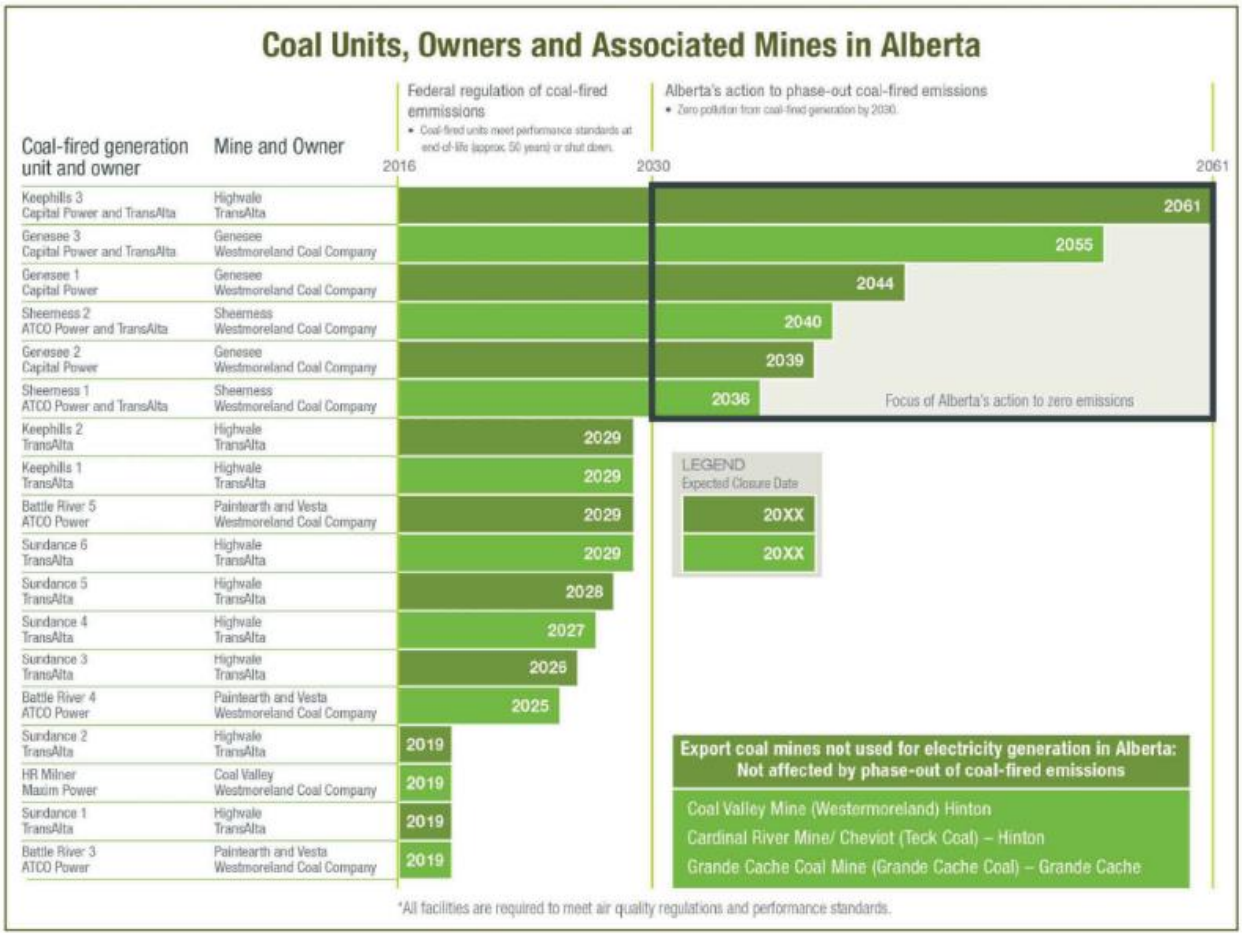
25 Affidavit of Ben Lewis at para 28, Exhibit "P".
26 Affidavit of Ben Lewis at para 29, Exhibit "Q".
27 Affidavit of Ben Lewis at para 30, Exhibit "Q".
28 Affidavit of Ben Lewis at para 31, Exhibit "R".
29 Affidavit of Ben Lewis at para 32, Exhibit "S".

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

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

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




*Source: Affidavit of Ben Lewis, Exhibit "U"*

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30 Affidavit of Ben Lewis at para 33, Exhibit "T".
31 Affidavit of Ben Lewis at para 34, Exhibit "U".

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

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

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

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

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

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

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32 Affidavit of Ben Lewis at para 35, Exhibit "V".
33 Affidavit of Ben Lewis at Exhibit "W".
34 Affidavit of Ben Lewis at para 37, Exhibit "X".
35 Affidavit of Ben Lewis at para 38, Exhibits "U", "Y".

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

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

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

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

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

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

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

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36 Affidavit of Ben Lewis at para 39, Exhibit "Z".
37 Affidavit of Ben Lewis at para 40(a), Exhibit "AA".
38 Affidavit of Ben Lewis at para 40(b), Exhibit "BB".
39 Affidavit of Ben Lewis at para 41, Exhibit "CC".
40 Affidavit of Ben Lewis at para 42, Exhibit "DD".

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

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

### G. Federal Actions to End Coal Power by 2030

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

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

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

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

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

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41 Affidavit of Ben Lewis at para 43, Exhibit "EE".
42 Affidavit of Ben Lewis at para 44.
43 Affidavit of Ben Lewis at para 45, Exhibit "FF".
44 Affidavit of Ben Lewis at para 46, Exhibit "GG".
45 Affidavit of Ben Lewis at para 47, Exhibit "HH".
46 Affidavit of Ben Lewis at Exhibit "HH" at pg 5.

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

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

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

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

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

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

### H. No Alternative Use for the Genesee Coal

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

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47 Affidavit of Ben Lewis at para 48, Exhibit "II".
48 Affidavit of Ben Lewis at para 49, Exhibit "JJ".
49 Affidavit of Ben Lewis at para 51.
50 Affidavit of Ben Lewis at para 52.
51 See Procedural Order filed September 28, 2020 at para 6.

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

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

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


**Genesee Mine Topography and Operations**

*Source: Affidavit of Ben Lewis, Exhibits "B" and "G"*

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

53 Alberta Application filed June 5, 2020 at para 12; Canada Application filed June 3, 2020 at para 6.

54 Affidavit of Ben Lewis at para 55, Exhibit "MM".

55 Affidavit of Ben Lewis at para 56.

## I. The Harm to the Plaintiffs

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

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

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

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

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

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

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56 Affidavit of Ben Lewis at para 57.
57 Affidavit of Ben Lewis at para 58.
58 Affidavit of Ben Lewis at para 59, Exhibit “NN”.
59 Affidavit of Ben Lewis at footnote 2, Exhibit “NN” at pgs 12-13.
60 Affidavit of Ben Lewis at footnote 2, Exhibits “Z”, “PP”.

## PART III: ISSUES

62. The issues to be determined on the defendants' applications are:

(a) should the Amended Statement of Claim be struck for failing to disclose a reasonable cause of action; and

(b) if any of the allegations as against the defendants disclose a reasonable cause of action, should any or all of the claims nevertheless be summarily dismissed.

## PART IV: SUBMISSIONS

### A. The Test for Striking Pleadings

63. Pursuant to Rule 3.68(2)(b), the Court may Order that all or any part of a claim be struck if the pleading "discloses no reasonable claim".[61]

64. An Order to strike is discretionary, and the moving party has a high burden as it must demonstrate there is "no reasonable prospect the claim will succeed."[62]

65. No evidence may be submitted on an application to strike brought under Rule 3.68(2)(b), and instead the Court must assume the allegations of fact as true.[63]

66. A liberal reading of the impugned pleading is to be taken,[64] and the Court is to err on the side of generosity in applying the test by permitting novel claims to proceed so long as they are arguable.[65] As stated by the Supreme Court of Canada in *R v Imperial Tobacco*:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed… The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and

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61 Alberta *Rules of Court*, AR 124/2010 r 3.68(2)(b) **[TAB 1]**.
62 *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 5 ("*Grenon*") **[TAB 2]**, leave to appeal to SCC ref'd 2017 CanLII 61800.
63 *Rules of Court*, *supra* note 61 r 3.68(3) **[TAB 1]**; *Grenon*, *supra* note 62 at para 6 **[TAB 2]**.
64 *Harun-ar-Rashid v Royal Canadian Mounted Police*, 2019 ABQB 54 at para 18 ("*Harun*") **[TAB 3]**.
65 *Grenon*, *supra* note 62 at para 6 **[TAB 2]**.

> err on the side of permitting a novel but arguable claim to proceed to trial. (Emphasis removed.)[66]

67. Therefore, and contrary to Alberta's submission at para 38 of its brief, the alleged facts need not be "examined in light of the existing law", a proposition from a 2000 decision by the Alberta Court of Appeal[67] which is inconsistent with subsequent authorities such as *R v Imperial Tobacco*, decided 11 years later.

### B. The Test for Summary Dismissal

68. 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.[68]

69. 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".[69]

70. 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".[70]

71. The responding party needs 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

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66 *R v Imperial Tobacco Canada Limited*, 2011 SCC 42, as cited in *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at para 26 ("*Goodswimmer*") **[TAB 4]**, leave to appeal to SCC ref'd 2018 CanLII 61050.

67 See *Tottrup v Lund*, 2000 ABCA 121 at para 9, as cited in *Harun*, *supra* note 64 at para 18 **[TAB 3]**.

68 *Rules of Court*, *supra* note 61 r 7.3 **[TAB 1]**.

69 *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 35, 47 ("*Wier Jones*") **[TAB 5]**.

70 *Ibid* at para 21 **[TAB 5]**.

(c) the law is sufficiently "unsettled or complex" that it is not possible to apply the law to the facts.[71]

72. 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.[72]

### C. The Claims against the Defendants

73. The plaintiffs pursue one claim against the defendants: a taking of the royalty interest.

74. As will be demonstrated below:

(a) the applications to strike should be dismissed, as the taking claim has a reasonable prospect of success; and

(b) the applications for summary dismissal should be dismissed, as the taking claim does not lack merit and there are genuine issues requiring a trial.

### D. The Nature of the Plaintiffs' Interest

75. Before addressing the taking claim (a cause of action which concerns the unlawful taking of property without compensation, as will be discussed later in this brief), the nature of the plaintiffs' royalty interest needs be explained.

76. In their briefs, both defendants inaccurately characterize the nature of the royalty interest held by Genesee LP in support of their positions that no taking of the plaintiffs' property has occurred. While Alberta characterizes the royalty interest as "a contractual right to payment when the Coal is extracted from [sic] mine and sold",[73] Canada states the plaintiffs "do not hold title to the Coal, but instead only hold a financial interest that is linked to the Coal for valuation purposes."[74]

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71 *Ibid* at paras 21, 32, 35, 43, 45, 47 **[TAB 5]**.
72 *Ibid* at paras 35, 47 **[TAB 5]**.
73 Brief of Her Majesty the Queen in Right of Alberta dated October 30, 2020 para 53 ("Alberta Brief").
74 Brief of the Attorney General of Canada dated October 30, 2020 at para 94 ("Canada Brief").

77. 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.[75]

78. 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.[76]

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

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

    (b) the interest, out of which the royalty is carved, is itself an interest in land.[77]

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

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

> **ROYALTY DESCRIPTION**
>
> **2.1 Retained Royalty**
>
> (a) Effective as of the date hereof, Royalty Owner hereby transfers, assigns and conveys to Transferee its entire right, title and interest in and to the Royalty Lands, other than the Royalty which is retained by Royalty Owner out of the Royalty Lands, as hereinafter more fully set forth.

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75 John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008) at 178 **[TAB 6]**.

76 Ben Lewis Affidavit at paras 22, 24-25, Exhibits "K", "L".

77 *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at para 21 ("*Dynex*") **[TAB 7]**. While *Dynex* considered royalty interests in the oil and gas industry, its principles equally apply to royalty interests in the mining industry: see e.g., *Third Eye Capital Corporation v Ressources Dianor Inc*, 2018 ONCA 253 **[TAB 8]**.

> (b) Transferee acknowledges that Royalty Owner has retained out of the Royalty Lands a royalty interest in the Coal forming part of the Royalty Lands (the "Royalty")...
>
> (c) The Parties acknowledge and agree that the Royalty constitutes an existing legal and beneficial interest in the Royalty Lands which is being retained by Royalty Owner and that the principal value of the Royalty is attributable to the Coal forming part of the Royalty Lands.
>
> …
>
> **2.3 Nature of Interest**
>
> (a) The Parties intend that the Royalty shall constitute a legal and beneficial interest in the Royalty Lands retained by Royalty Owner and, accordingly, agree that:
>
> (i) the Royalty will run with and form part of the Royalty Lands and shall be binding upon and represent a liability of any successors or assigns of, and an encumbrance on, the Royalty Lands or any portion thereof or interest therein;
>
> (ii) Royalty Owner may register or otherwise record against the certificates of title to the Royalty Lands, a caveat or notice as Royalty Owner may desire to give notice of the existence of the Royalty to third parties…[78]

82. And as to the second requirement of the test, the interest out of which the royalty is carved is itself an interest in land; namely, freehold coal.[79]

83. Canada appears to be of the view it is somehow legally significant that title to the subject coal is registered to PMRU,[80] but that is irrelevant. The test for whether a royalty interest constitutes an interest in land does not require that the royalty holder be the registered owner of the minerals, and in such circumstances the common practice is for the royalty holder to register a caveat against the owner's land title certificate to protect the royalty interest.[81]

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78 Ben Lewis Affidavit, Exhibit "K".
79 Ben Lewis Affidavit at para 22, Exhibits "K", "L".
80 Canada Brief, *supra* note 74 at paras 17, 94.
81 See e.g., *Dynex*, *supra* note 77 at paras 2, 16 **[TAB 7]**. In the resource industry, a royalty held by a party who does not own the minerals *in situ* (as is the case here) is called an "overriding royalty" or "gross overriding royalty".

84. Genesee GP (being the general partner of Genesee LP) has registered such caveats on the various certificates of title for the coal,[82] but the fact that title to the coal is registered to PMRU does not preclude the royalty interest from constituting a distinct land interest analogous to a rent charge.[83]

85. To use the oft-quoted expression of property being a "bundle of rights",[84] 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.

86. Therefore, and contrary to the defendants' submissions, the nature of the royalty interest at issue in these proceedings is an interest in land.

### E. The Concept of a Taking

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

88. A taking is said to arise when the state does not acquire legal title to property through actual, forcible appropriation under expropriation legislation (also known as a *de jure* taking), but nonetheless regulates the property's use such that the landowner is, to a legally significant measure, deprived of his or her rights of use and enjoyment.[85] 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.[86]

89. 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

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82 By way of example, see the Land Title Certificate enclosed with this Brief.
83 See *Dynex*, *supra* note 77 at paras 8, 11-12 **[TAB 7]**.
84 See e.g., *Tucows.Com Co v Lojas Renner SA*, 2011 ONCA 548 at para 57 **[TAB 9]**, leave to appeal to SCC ref'd 2012 CanLII 28261.
85 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") **[TAB 10]**.
86 *Ibid* at 321-22 **[TAB 10]**.

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.[87]

90. The Supreme Court of Canada has considered a taking claim on three occasions.

91. The first was its 1979 decision *Manitoba Fisheries v Canada*.[88] There, the federal government had passed legislation which granted a commercial monopoly in the export of fish from Manitoba to a government agency. The physical assets of the plaintiff fishing company were not seized, but the government's actions had the effect of putting the plaintiff out of business. Observing that there was nothing in the legislation providing for the taking of the plaintiff's goodwill without compensation, the Court ordered that the plaintiff was to be paid the fair market value of its business having regard to the recognized rule 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."[89]

92. The second taking case considered by the Supreme Court of Canada was *British Columbia v Tener*, a decision from 1985.[90] 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.

93. 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."[91] 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".[92]

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87 *Ibid* at 321 **[TAB 10]**.
88 [1979] 1 SCR 101 ("*Manitoba Fisheries*") **[TAB 11]**.
89 *Ibid* at para 36 **[TAB 11]**, citing *AG v De Keyser's Royal Hotel*, [1920] AC 508 (HL).
90 [1985] 1 SCR 533 ("*Tener*") **[TAB 12]**.
91 *Ibid* at para 65 **[TAB 12]**.
92 *Ibid* at paras 21, 68 **[TAB 12]**.

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

> The Supreme Court of Canada decided another "constructive taking" case in *The Queen (B.C.) v Tener* (1985). The provincial statue in issue essentially made it impossible for the plaintiffs to exploit their mineral rights in a provincial park. The statute said nothing about compensation. The Supreme Court of Canada followed the *Manitoba Fisheries* case to hold that the denial of access to the mineral rights was a taking of property that had to be compensated. This holding goes a step beyond *Manitoba Fisheries*. In that case, a Crown corporation had in effect acquired the business of exporting fish. In *Tener*, the Crown had acquired neither the plaintiffs' mineral rights nor the right to exploit them. The judges struggled with the question of whether the Crown had acquired anything for which it should pay compensation. Estey J. for the majority said that the prohibition of mineral operations in the park added "value" to the Crown's land. And Wilson J. for the concurring minority said that it "effectively removed" an encumbrance from the Crown's land, which was a "gain" to the Crown. In the end, both judges agreed that the plaintiffs' effective loss of their mineral rights was matched by the Crown's acquisition of an intangible but valuable benefit. Therefore, the statute effected a taking and the plaintiffs were entitled to compensation. (Emphasis added, footnotes removed.)[93]

95. The third and most recent taking case considered by the Supreme Court of Canada was its 2006 decision *Canadian Pacific Railway v Vancouver.*[94] There, the City of Vancouver passed a bylaw which designated a transportation corridor owned by CPR as a public thoroughfare for transportation and greenways, the effect of which the Court acknowledged was "to freeze the redevelopment potential of the corridor and confine CPR to uneconomic uses of the land."[95] 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.

96. 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…[96]

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93 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019) at 29.5(d) **[TAB 13]**.
94 2006 SCC 5 ("*CPR*") **[TAB 14]**.
95 *Ibid* at para 8 **[TAB 14]**.
96 *Ibid* at para 30 **[TAB 14]**.

97. The Chief Justice held that neither of these requirements were satisfied on the facts before it, though added in *obiter* 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.[97]

98. And while the two-part test for a taking articulated by McLachlin C.J. had not been stated by the Supreme Court of Canada in either *Manitoba Fisheries* or *Tener*, both of those earlier decisions were cited favourably in *CPR v Vancouver*.[98]

### F. A Taking has Occurred under *Tener*

99. The plaintiffs submit that *Tener* is binding authority and determines the case in their favour, with the result that the defendants' applications to summarily dismiss the taking claim should be dismissed.

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

(a) the royalty interest is in thermal coal which comprises the Genesee Mine;[99]

(b) the royalty interest generates income for the plaintiffs when coal is produced from the Genesee Mine to fuel the Genesee Power Plant;[100]

(c) the Genesee Power Plant is, and always has been, the only user of the coal;[101]

(d) as a result of Alberta's Off-Coal Agreement with Capital Power and Canada's Amended Regulations, the Genesee Power Plant will cease generating coal-fired electricity by 2030;[102] and

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97 *Ibid* at paras 31, 37 **[TAB 14]**.
98 *Ibid* at paras 30, 32 **[TAB 14]**.
99 Ben Lewis Affidavit at paras 8, 22.
100 Ben Lewis Affidavit at paras 8, 17, 22, 24-25.
101 Ben Lewis Affidavit at paras 52, 55.
102 Ben Lewis Affidavit at paras 13, 38-39, 45-47, 56.

(e) when the Genesee Power Plant ceases generating coal-fired electricity, the royalty interest will cease to have any value – as there is no use for the coal other than as a fuel source for the power plant.[103]

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

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

(a) phasing out coal pollution will "protect the health of Albertans … and save money in health-care costs and lost productivity";[104]

(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";[105] and

(c) permitting coal power plants to continue "emitting harmful pollution" after 2030 would reduce air quality and impact human health.[106]

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

> The cumulative benefit in Canada of the emission reductions from the Amendments is valued at about $4.7 billion (2019-2055).
>
> Benefits of the Amendments are from avoided global climate change damage and improved air quality due to reduced air pollutant emissions. Benefits from reduced air pollutants (calculated at the provincial level) include health benefits and environmental benefits. The Amendments will reduce GHG emissions from electricity generation by 94 Mt CO2e 27 between 2019 and 2055 versus the baseline scenario. The avoided climate change damage from these reductions is valued at $3.4 billion... The Amendments will also result in the reduction of emissions of many criteria air pollutants. The most significant reduction in emissions will be 555

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103 Ben Lewis Affidavit at paras 52-57.
104 Ben Lewis Affidavit at Exhibit "U".
105 Ben Lewis Affidavit at Exhibit "U".
106 Ben Lewis Affidavit at Exhibit "U".

> kilotons (kt) of sulphur oxides (SOx) and 206 kt of nitrogen oxides (NOx) between 2019 and 2055. These criteria air pollutants have been shown to adversely affect the health of Canadians, through direct exposure and through the creation of smog (including particulate matter and ground-level ozone). The health benefits from reduced air pollutant emissions and avoided human exposure to mercury are valued at $1.3 billion. Environmental benefits, such as increased crop yields, reduced surface soiling, and improvement in visibility, is valued at $40 million. (Emphasis added.)[107]

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

105. The first was *Casamiro Resources Corp v British Columbia*,[108] 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.[109] The trial judgement in *Casamiro* was upheld on appeal, where Southin J.A. for the British Columbia Court of Appeal agreed that the Order-in-Council had the effect of turning the mineral grants into "meaningless pieces of paper".[110]

106. The other parallel mineral case is *Rock Resources Inc v British Columbia*,[111] a 2003 decision by the British Columbia Court of Appeal. There, the plaintiff had acquired mineral claims on Crown land, but as a result of legislation creating new parks the plaintiff was effectively prevented from exploring and developing those claims which fell within the boundaries of a new park. In the result, the Court of Appeal found that the new legislation effected a "taking of a property right or interest held by the plaintiff".[112]

107. Like the mineral claimants in *Tener*, *Casamiro*, and *Rock Resources* whose land interests were effectively defeated as a result of government action in the pursuit of public policy

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107 Ben Lewis Affidavit at Exhibit "HH" at pgs 18-19.
108 (1990), 43 LCR 246 (BCSC) ("*Casamiro BCSC*") **[TAB 15]**.
109 *Ibid* at paras 11, 13 **[TAB 15]**.
110 (1991), 55 BCLR (2d) 346 (CA) at para 34 ("*Casamiro BCCA")* **[TAB 16]**.
111 2003 BCCA 324 ("*Rock Resources*") **[TAB 17]**.
112 *Ibid* at para 57 **[TAB 17]**.

goals, the plaintiffs here will see their royalty interest reduced to "meaningless pieces of paper" as a result of the defendants' actions to phase out coal power by 2030.

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

109. Both defendants argue no taking of the royalty interest has occurred because the Genesee Mine is still operational, the Genesee Power Plant is still consuming coal from the Mine, and the royalty interest is still generating income.[113]

110. The plaintiffs do not dispute those facts, but submit they are irrelevant to determining whether the taking claim has merit given it concerns the sterilization of the royalty interest as of 2030 (which, as will be discussed later in this brief, does not mean that the claim is premature).

111. And while the defendants also argue that there remain reasonable uses for the plaintiffs' property after 2030, those arguments are not tenable.

112. Alberta admits that in 2030 the Genesee Power Plant "will" be eliminated as a customer for the coal, yet asserts after that point in time:

    (a) the coal can still be mined;

    (b) the coal can still be sold; and

    (c) the plaintiffs can still receive payment from the sale of the coal.[114]

113. Leaving aside that such arguments essentially breach Alberta's agreement to refrain from arguing there is a reasonable use for the subject coal after 2029 (and so should not be considered as a matter of procedural fairness),[115] these arguments are not grounded in reality.

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113 Alberta Brief, *supra* note 73 at paras 54-56, 94; Canada Brief, *supra* note 74 at para 100.
114 Alberta Brief, *supra* note 73 at paras 55, 70.
115 See Procedural Order filed September 28, 2020 at para 6.

114. As to Alberta's argument that the coal can still be mined after 2030, Alberta's own documents lead to the conclusion that the Genesee Mine will close when the Genesee Power Plant ceases coal-fired operations.

(a) Alberta has classified the Genesee Mine as a thermal (as opposed to metallurgical) coal mine, and one which does not export coal.[116]

(b) Alberta excluded the Genesee Mine from its list of mines "[n]ot affected by phase-out of coal-fired emissions".[117]

(c) Alberta has 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."[118]

115. That the Genesee Mine will close by 2030 is also tacitly acknowledged by Alberta in its own 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.[119]

116. As to Alberta's argument that the coal can still be sold after 2030, there is no evidence of any other customer for the coal. To the contrary, the Genesee Mine does not have the necessary infrastructure (such as a rail export line and train load-out facility) to export its coal to other potential markets, and the Genesee Mine has always been a "mine-mouth" operation in which the coal extracted from the mine is transported directly to the adjacent power plant.[120]

117. As to Alberta's argument that the plaintiffs can still receive payment from the sale of the coal after 2030, that is obviously not so if the mine has closed and there are no other customers for the coal.

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116 Ben Lewis Affidavit at Exhibits "U", "KK", "LL".
117 Ben Lewis Affidavit of Exhibit "U".
118 Ben Lewis Affidavit at para 40, Exhibit "AA".
119 Application filed by Alberta on June 5, 2020 at paras 11-12.
120 Ben Lewis Affidavit at para 55, Exhibit "MM".

118. For its part, Canada submits that the relevant question is not whether the coal has any reasonable use after 2030, but rather whether the royalty interest itself has any reasonable use after 2030.[121] On this point, Canada states:

(a) the plaintiffs' assertion that the royalty interest will not generate any income after 2030 is a "matter of speculation"; and

(b) even if that outcome were to transpire, the plaintiffs would still hold the royalty interest and a royalty interest which does not generate income is a reasonable use of it since (like any investment) income is not a foregone conclusion.[122]

119. However, neither argument withstands scrutiny.

120. Regarding the first argument, it appears Canada considers the scenario of the royalty interest ceasing to generate income after 2030 as "speculative" because it involves a "hypothetical scenario" that has not come to fruition; namely, the decommissioning of the three coal-fired generating units at Genesee as a result of the Amended Regulations.[123]

121. While Canada admits that the Amended Regulations have the effect of requiring the Genesee Power Plant to meet the federal emissions limit by 2030, Canada inexplicably asserts the plaintiffs "speculate that this will have the effect of phasing out the Units as of 2030".[124]

122. Not only is this position defeated by Canada's own public statements which indicate it is a foregone conclusion that the Amended Regulations will have the effect of phasing out all traditional coal-fired power plants in Canada by 2030, but such an outcome is the *very objective* of the Amended Regulations.

123. For example, in its Notice of Intent from December 2016 Canada stated that the Regulations would be amended to "phase out traditional coal-fired electricity by 2030",[125]

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121 Canada Brief, *supra* note 74 at para 101.
122 *Ibid* at paras 102-104.
123 *Ibid* at para 85.
124 *Ibid* at para 31.
125 Ben Lewis Affidavit at Exhibit "GG" at pg 2.

and a federal-provincial working group recommended adopting a regulation to "close" all unabated coal-fired units by 31 December 2029.[126]

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

> The Amendments will require all coal-fired electricity generating units to comply with an emissions performance standard of 420 tonnes of carbon dioxide per gigawatt hour of electricity produced (t of C02/GWh) by 2030, at the latest. This performance standard is designed to phase out conventional coal by 2030.
>
> …
>
> The benefits and costs associated with the Amendments were assessed in accordance with the Treasury Board Secretariat … which includes identifying, quantifying and, where possible, monetizing the impacts associated with the policy. The incremental impacts of the Amendments are determined by comparing the electricity sector *without* the Amendments (the baseline scenario), and *with* the Amendments (the policy scenario).
>
> ….
>
> In the baseline scenario, coal-fired units in Alberta will be shut down by December 31, 2030, in response to Alberta's Climate Leadership Plan. In the policy scenario, all coal units in Alberta will shut down at the end of 2029.
>
> …
>
> There are significant upfront capital costs for compliance between 2026 and 2030 as replacement units are built and coal units are decommissioned.
>
> …
>
> The prospect of increasing exports of Canadian thermal coal is weak… Consequently, Canadian thermal coal exports are unlikely to increase and most Canadian thermal coal mines that supply domestic consumption are not expected to continue to operate after the Amendments come into effect.
>
> In 2016, up to 1 500 workers were directly employed at coal-fired electricity plants that will be affected by the Amendments. Many of these jobs could be at risk as a result of the Amendments… Employment transitions for

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[126] Ben Lewis Affidavit at Exhibit "R" at pg 166.

> thermal coal mines and coal-fired electricity plants will occur gradually as operations are closed over time. (Emphasis added.)[127]

125. 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**.
>
> …
>
> Phasing out coal-fired electricity, however, will have direct and indirect impacts on thousands of workers, dozens of communities, and four provinces, including:
>
> - Alberta, Saskatchewan, New Brunswick, and Nova Scotia;
> - Nearly 50 communities with nearby coal mines or generating stations;
> - 3,000 to 3,900 workers at coal-fired generating stations and domestic thermal coal mines;
> - Over a dozen generating stations, owned by six employers;
> - Nine mines, owned by three employers.
>
> …
>
> The Government of Canada's policy to accelerate the phase out of traditional coal-fired electricity by 2030 will affect only thermal coal production and use. Canada will continue to mine, use, and export coal for metallurgical processes.
>
> …
>
> In December 2018, the Government of Canada amended the 2012 regulations to accelerate the phase-out of traditional coal-fired electricity by 2030.
>
> …
>
> Based on the best available data, there are between 1,880 and 2,400 people working at coal-fired generating stations and between 1,200 and 1,500 working at thermal coal mines. It is anticipated that a significant number of these workers will lose their jobs by 2030 – and some already have. (Emphasis added.)[128]

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[127] Ben Lewis Affidavit at Exhibit "HH" at pgs 5, 14, 16, 24, 35.
[128] Ben Lewis Affidavit at Exhibit "LL" at pgs v, vii, 5, 10, 13.

126. 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.

127. As to Canada's second argument – that even if the royalty interest ceases to generate income after 2030, that is a reasonable use of the property as no investment is guaranteed to make money – this *non sequitur* is tantamount to saying the mineral claimants in *Tener*, *Casamiro*, and *Rock Resources* had nothing taken from them because a successful mining operation is never guaranteed and minerals left undisturbed in the ground is a reasonable use of them.

128. And the British Columbia Court of Appeal's decision in *Rock Resources* makes it clear that just because the property has an uncertain nature does not mean it is incapable of being taken by the government.

129. To explain, in *Rock Resources* the Crown argued that legislation which had the effect of preventing the plaintiff from exploiting its mineral claims in a newly created provincial park could not constitute a taking as the plaintiff's mineral claims were "contingent", in the sense that they were already subject to statutory provisions allowing the Crown to restrict a claimholder's surface rights and require a claimholder to obtain Crown authorization before exploring or developing the claims. New legislation which said henceforth no consent would be given to exploit the mineral claims within the park boundaries, as the Crown argued, "merely made certain what had previously been uncertain".[129]

130. That argument was expressly rejected by the majority at the British Columbia Court of Appeal, Finch C.J. finding that the plaintiff had provided "substantial consideration" for the mineral claims and that the contingent nature of the claims did not mean they were without any value such that "nothing was taken".[130]

131. Here, the plaintiffs likewise paid substantial consideration to acquire the royalty interest in the Genesee coal ($251 million, to wit) and simply because the royalty interest may have an "uncertain" nature as to its rate of return does not mean it is incapable of being taken.

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[129] *Rock Resources*, *supra* note 111 at para 44 **[TAB 17]**.
[130] *Ibid* at paras 48-50 **[TAB 17]**.

132. And as to Canada's submission that no royalty income after 2030 was "always within [the plaintiffs'] contemplation",[131] there is no evidence of that and the only evidence before the Court suggests the contrary. As stated in the Facts section above:

(a) as part of its due diligence efforts in 2013, Altius reviewed the impact of the *original* 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;[132]

(b) during the asset sale process, Sherritt advised Altius that the Genesee and other royalty interests provided "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;[133] and

(c) Altius came to view the royalty interest at the Genesee Mine as the "crown jewel" of Sherritt's asset portfolio, due in large part to the mine's "stability" and "long life".[134]

133. The two statements from Altius' public disclosure cited by Canada at para 103 of its brief do not support the contention that the plaintiffs contemplated the royalty interest would cease generating income after 2030.

(a) The first statement was made in spring 2014 when the *original* Regulations were enacted, pursuant to which the Genesee units were scheduled to continue generating electricity from coal until 2044 in the case of Genesee 1, 2039 in the case of Genesee 2, and 2055 in the case of Genesee 3.[135] It was not until November 2016 that Canada first announced it would amend the Regulations to accelerate the phase out coal power to 2030.

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131 Canada Brief, *supra* note 74 at para 103.
132 Ben Lewis Affidavit at para 19.
133 Ben Lewis Affidavit at para 17, Exhibit "G".
134 Ben Lewis Affidavit at para 20, Exhibit "I".
135 See Canada Brief, *supra* note 74 at paras 22-23.

(b) The second statement, as paraphrased by Canada, is misleading. The actual text from Altius' public disclosure reads, "The enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements may increase costs**,** which could have an adverse effect on the Corporation."[136] Therefore, the statement clearly concerns increased regulatory compliance costs and has nothing to do with what occurred here – a complete taking by the government of the royalty interest's ability to generate income.

134. Canada's attempts at para 94 of its brief to distinguish *Tener* from this case are also not persuasive.

(a) As demonstrated above, the characterization of the plaintiffs' property as a "financial interest that is linked to the Coal for valuation purposes" is inaccurate. The plaintiffs instead hold an interest in land in the form of the royalty interest. The fact that title to the coal happens to be registered to PMRU is irrelevant.

(b) That Capital Power and PMRU can still access and exploit the coal has no practical consequence, as there is no use for the coal other than as a fuel source for the Genesee Power Plant. After 2030, the coal and the royalty interest in it will cease to have any value and the entire land interest is effectively defeated, as was the outcome in *Tener*.

(c) The suggestion that the coal may have another use should "technologies improve or circumstances change in the future" is speculative and highly implausible given the only evidence before the Court is that thermal coal is used for electricity generation and the Genesee Mine has no export potential.[137]

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

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[136] See Canada Brief, *supra* note 74 at paras 24-25 (emphasis added).
[137] Ben Lewis Affidavit at paras 52-55.

### G. A Taking has Occurred under *CPR v Vancouver*

136. As noted, the plaintiffs submit they are entitled to compensation under the binding authority of *Tener*, which was cited favourably by the Supreme Court of Canada 21 years later in its decision of *CPR v Vancouver.*

137. But insofar as *CPR v Vancouver* sets out different requirements for when a taking occurs, the plaintiffs satisfy those requirements as well.

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

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

(b) the removal of all reasonable uses of the property.[138]

139. Alberta appears to take the position that the first branch of the test is satisfied only if the state acquires proprietary rights in the land at issue, and asserts that a general furtherance of government policy is not enough.[139] "To make out their claim", Alberta submits, "the Plaintiffs must show that Alberta has taken (expropriated) their property rights."[140]

140. Canada seems to agree with that, submitting that the plaintiffs seek compensation in respect of regulations "that do not take anything for the state" and that the first branch of the test requires the state "to acquire the property taken from the plaintiff either for its own use or for the purpose of destruction".[141]

141. However, and contrary to the defendants' submissions, two cases released this year indicate a general or intangible benefit accruing to the state or public can satisfy the first branch of the test.

142. The first case is *Kalmring v Alberta*,[142] a decision rendered by Master Mason of the Alberta Court of Queen's Bench in January 2020.

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138 *CPR*, *supra* note 94 at para 30 **[TAB 14]**.
139 Alberta Brief, *supra* note 73 at paras 87-91.
140 *Ibid* at para 52.
141 Canada Brief, *supra* note 74 at paras 82, 87.
142 2020 ABQB 81 ("*Kalmring*") **[TAB 18]**.

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

144. A group of private driver examiners licensed under the prior regime commenced proceedings against Alberta, alleging among other things that they had been deprived of all value and reasonable use of their licenses, shares, goodwill, tools, and equipment associated with their driver examiner businesses and that the Crown had "unlawfully taken [their] property without any compensation".[143]

145. With reference to the two-part test in *CPR v Vancouver*, the Crown applied to strike the claim specifically on the basis that it "did not acquire a beneficial interest in any of the property" and that it "did not acquire anything" when it phased out the private driver examiner industry.[144]

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

> That is a matter of evidence, which is not before the Court on this striking application. The government may generate revenue in providing the services itself, or perhaps it provides a subsidized service to its constituents. In view of the case law, either could arguably be characterized as the acquisition of an intangible benefit by the Crown. (Emphasis added.)[145]

147. The Court's conclusion that an "intangible benefit" could satisfy the first branch of the test was largely premised on *Tener* and the commentary of Professor Hogg reproduced above at para 94 of this brief, and in the result Master Mason held that the plaintiffs' taking claim was arguable and declined to Order it struck.[146]

148. The second case which indicates the state needs not acquire proprietary rights to satisfy the first branch of the test is *Compliance Coal Corporation v British Columbia*

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143 *Ibid* at para 66 **[TAB 18]**.
144 *Ibid* at paras 68, 71, 74 **[TAB 18]**.
145 *Ibid* at para 75 **[TAB 18]**.
146 *Ibid* at paras 72-73, 79 **[TAB 18]**.

*(Environmental Assessment Office)*,[147] a decision of the British Columbia Supreme Court released in April 2020.

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

150. While the taking claim was found untenable on the basis that the plaintiff could not demonstrate all prospects for the exploitation of the minerals were lost (unlike here), the Court held that the first branch of the test from *CPR v Vancouver* was satisfied on the basis that removing the possibility of mining "enhanced the value of surface lots owned by BC."[148] The Court characterized this benefit as "arguably equivalent to the benefit gained by the Province in *Tener* and *Casamiro.*"[149]

151. So, if the test in *CPR v Vancouver* requires the state to acquire a "beneficial interest" in the proprietary sense or an intangible benefit of the sort discussed in *Kalmring* and *Compliance Coal*, that requirement would be satisfied here.

152. When viewing the first branch of the test as involving the acquisition by the state of property rights, the defendants will acquire a beneficial interest in the coal related to the royalty interest from their actions to phase out coal power by 2030.

    (a) A freehold estate ultimately derives from a Crown grant,[150] and here the royalty interest held by Genesee LP is in freehold coal currently granted to PMRU.

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

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147 2020 BCSC 621 ("*Compliance Coal*") **[TAB 19]**.
148 *Ibid* at paras 92-94, 96 **[TAB 19]**.
149 *Ibid* at para 96 **[TAB 19]**.
150 See *Kalantzis v East Kootenay (Regional District)*, 2019 BCSC 1001 at para 100 **[TAB 20]**.

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

153. The present case is analogous to *Lynch v City of St John's*,[151] a 2016 decision by the Newfoundland Court of Appeal where a taking was found to have occurred as a result of watershed protection regulations that effectively precluded development of the plaintiff's land beyond its natural condition. On the question of whether there was an acquisition by the state, the Court unanimously agreed that the City of St. John's had acquired a beneficial interest in the plaintiff's land consisting of the right to a continuous flow of uncontaminated groundwater.[152]

154. And when alternatively viewing the first branch of the test as involving the acquisition by the state of an intangible benefit, there is ample evidence that the phase out of coal power by 2030 will result in financial benefits for the defendants and health and environmental benefits for the Alberta and Canadian public. See paras 102 and 103 above.

155. The second requirement of the test – the removal of all reasonable uses of the property – is also satisfied as the plaintiffs' royalty interest will cease to generate any income from the production of thermal coal after 2030 and will become valueless. This topic is extensively canvassed above at paras 100 and 104 to 134.

156. The plaintiffs' satisfaction of the second branch is even more apparent when considering McLachlin C.J.'s direction that the subject property is to be assessed "not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put."[153]

157. 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.[154] There are no other uses to which the coal has or can be put, and both defendants admit that the coal

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151 2016 NLCA 35 **[TAB 21]**, leave to appeal to SCC ref'd 2017 CanLII 4184.
152 *Ibid* at paras 54-61 **[TAB 21]**.
153 *CPR*, *supra* note 94 at para 34 **[TAB 14]**.
154 Ben Lewis Affidavit at paras 52, 55, Exhibit "MM".

produced from the Genesee Mine is entirely dedicated to the generation of electricity in Alberta.[155]

158. This case is thus fundamentally different from the facts of *CPR v Vancouver*, where the Court found that the City's bylaw did not remove all reasonable uses of CPR's property because it could still use the land to operate a railway, being "the only use to which the land had ever been put during the history of the City."[156]

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

### H. In the Alternative, a Beneficial Interest is not Required

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

161. In other words, the plaintiffs dispute the requirement of a beneficial interest imposed by the Supreme Court of Canada in *CPR v Vancouver* and submit the question of whether a taking has occurred depends solely on the second branch of the test (*i.e.*, the removal of all reasonable uses of the property). Insofar as a benefit is required, then a general benefit to the state or public suffices.

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

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[155] Alberta Application filed on June 5, 2020 at para 12; Canada Application filed on June 3, 2020 at para 6.

[156] *CPR*, *supra* note 94 at para 34 **[TAB 14]**.

163. As noted, the Supreme Court of Canada in *Tener* unanimously agreed that a taking had occurred, though the justices were divided on the nature of the benefit which had accrued to the Crown. While Wilson J. and Dickson C.J. (concurring) were of the view that the Crown had "effectively removed [an] encumbrance from its land" by depriving the plaintiffs of their right to go on to the land for the purpose of exploiting the mineral claims, Estey J. for the majority said the action by the government "was to enhance the value of the public park" and that the refusal to grant the permit "took value from the [plaintiffs] and added value to the park".[157]

164. The key, however, is that on either characterization the benefit obtained by the Crown fell well short of the requirement of a "beneficial interest" later imposed by the Supreme Court of Canada in *CPR v Vancouver*, and instead was more akin to an abstract or effective gain.[158]

165. A similar result occurred in *Casamiro*, where MacKinnon J. for the British Columbia Supreme Court found a taking had occurred as the Order-in-Council left the plaintiff "with land which was essentially worthless" and "took away the plaintiff's entire interest" in the land.[159] Significantly, he added that "[t]he fact that the Province does not gain the mineral rights does not alter the situation in any way."[160]

166. And on appeal where the trial judgment was upheld, Southin J.A for the British Columbia Court of Appeal framed the question not whether the province had acquired something but instead "whether the present holder has had all its rights under the grants effectively taken from it by the order in council."[161]

167. Likewise in *Rock Resources*,[162] the British Columbia Court of Appeal found a taking of the plaintiff's mineral claims had occurred as a result of new legislation effectively precluding exploitation of the minerals in a newly created park, notwithstanding the absence of a tangible benefit accruing to the Crown.

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157 *Tener*, *supra* note 90 at paras 21, 68 **[TAB 12]**.
158 Brown Article, *supra* note 85 at 330-31 **[TAB 10]**.
159 *Casamiro BCSC*, *supra* note 108 at paras 11, 13 **[TAB 15]**.
160 *Ibid* at para 12 **[TAB 15]**.
161 *Casamiro BCCA*, *supra* note 110 at para 31 **[TAB 16]**.
162 *Rock Resources*, *supra* note 111 at paras 1, 57 **[TAB 17]**.

168. The irrelevance of an *acquisition* by the state of an interest in the property has also been affirmed, at least implicitly, by this province's own Court of Queen's Bench and Court of Appeal in *Alberta (Minister of Infrastructure) v Nilsson.*[163]

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

170. At the Court of Queen's Bench, Marceau J. concluded that a *de facto* expropriation occurs when the "government confiscates all, or virtually all, the incidents of ownership" and that the plaintiff had not demonstrated the imposition of the RDA amounted to a taking.[164]

171. And while Marceau J. agreed that cases such as *Manitoba Fisheries* and *Tener* show that a taking claim requires that the Crown receive a corresponding benefit, he added that those same cases also revealed "the benefit does not have to be in the form of the Crown making direct use of the owner's property in the same manner as the owner would have, but can be a <u>general benefit to the public.</u>" (Emphasis added.)[165]

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

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

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163 1999 ABQB 440 ("*Nilsson ABQB*") **[TAB 22]**, aff'd 2002 ABCA 283 ("*Nilsson ABCA*") **[TAB 23]**; See also Brown Article, *supra* note 85 at 324 **[TAB 10]**.

164 *Nilsson ABQB, supra* note 163 at paras 57, 64 **[TAB 22]**.

165 *Ibid* at paras 53-55 **[TAB 22]**.

…

> The question is: At what point does an interference with the freedom of a property owner and a reduction in the incidents of property ownership equate with a taking of property warranting compensation? (Emphasis added.)[166]

173. While the Court of Appeal held that the RDA and refusal of a development permit did not amount to a *de facto* expropriation, it added that "we do not exclude the possibility that in an exceptional case the nature or extent of restrictions imposed on land might be so significant that a *de facto* taking of the property has occurred."[167]

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

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

> The point to be implied from *Rock Resources* and *Nilsson* is, of course, the same as that which was expressly stated in *Casamiro*: the absence of a tangible benefit accruing to the public authority does not preclude characterization of its conduct as constituting a constructive taking. The focus instead is on the loss to the plaintiff derived from the derogation by the public authority of its grant, whether of mineral claims (as in *Casamiro* and *Rock Resources*) or of fee simple (as in *Nilsson*). Inasmuch as a benefit accruing to the public authority was even discussed (as it was by the trial judge in *Nilsson*), such benefit was not seen as having to be of a proprietary quality, but rather may constitute a mere advantage. (So, for example, in *CPR v. Vancouver* the City might be seen as having been advantaged by the indefinite reservation of CPR's lands to the City's purposes.) Moreover, such an advantage need not accrue to the public authority specifically, but to the public generally. (Emphasis added.)[168]

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166 *Nilsson ABCA*, *supra* note 163 at paras 41, 48-49 **[TAB 23]**.
167 *Ibid* at para 62 **[TAB 23]**.
168 Brown Article, *supra* note 85 at 326 **[TAB 10]**.

176. And as observed in the Brown Article,[169] none of the pronouncements in *Casamiro*, *Rock Resources*, or *Nilsson* were even considered or even cited by the Supreme Court of Canada in *CPR v Vancouver*, despite the Court having denied leave to appeal from two of them.[170]

177. Admittedly, McLachlin C.J.'s statement that the government needs acquire a "beneficial interest" in the subject property was not made without prior authority, but it appears to rest on a single decision – *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*.[171]

178. In *Mariner*, a group of landowners sued for compensation after their building construction applications were refused for having been incompatible with stringent regulations imposed to protect ocean beaches. For the Nova Scotia Court of Appeal, Cromwell J.A. found a taking had not occurred as the plaintiffs had not shown "virtually all incidents of ownership" had been effectively taken away,[172] but went further to state that a taking also requires an effective "acquisition of an interest in land" by the Crown and that the beach regulations did not confer any interest in land on the province.[173]

179. Unlike the Supreme Court of Canada in *CPR v Vancouver*, Cromwell J.A. also acknowledged *Casamiro* and in particular disagreed with the trial judge's conclusion that it was irrelevant that the Crown had not acquired an interest in the mineral claims at issue.[174]

180. But as sagely put in the Brown Article:

> McLachlin C.J.'s reference in *CPR v. Vancouver* to *Mariner Real Estate* was made without comment on, or analysis of, Cromwell J.A.'s reasons. This is unfortunate, since the rejection in those reasons of the trial judge's conclusions in *Casamiro* was accompanied by no explanation other than the peremptory conclusion that "there must be an acquisition as well as a deprivation".
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> …

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169 *Ibid* **[TAB 10]**.
170 *Alberta (Minister of Infrastructure) v Nilsson*, [2003] SCCA No 35; *Rock Resources Inc v British Columbia*, [2003] SCCA No 375.
171 1999 NSCA 98 ("*Mariner*") **[TAB 24]**; See also Brown Article, *supra* note 85 at 326-27 **[TAB 10]**.
172 *Mariner*, *supra* note 171 at paras 89-90 **[TAB 24]**.
173 *Ibid* at paras 98-99, 105-107 **[TAB 24]**.
174 *Ibid* at para 98 **[TAB 24]**; See also Brown Article, *supra* note 85 at 328 **[TAB 10]**.

> As such, the Supreme Court of Canada's first statement on the constructive taking in over 20 years leaves us guessing. Is the failure to address an entire line of contrary appellate authorities on the central issue in *CPR v. Vancouver* to be divined as reflecting judicial disapproval of all case authorities except *Mariner Real Estate*? That is, was the correct statement of law, that even a constructive taking requires both a landowner's loss and a public authority's gain, considered by the Court to be so obvious as to merit no explanation or accounting for those authorities? Or, alternatively, does it reveal the simple failure by the Court to appreciate that it had stumbled upon an issue of some dispute, as signified by the bifurcated jurisprudence?[175]

181. The Brown Article posits that the reason for such an "incomplete and ultimately unsatisfying" consideration in *CPR v Vancouver* of the question of whether a "gain" (in the sense of a proprietary interest) must flow to the public authority in order for a constructive taking to arise is that the Court failed to distinguish between a *de jure* taking (that is, the forcible and actual expropriation of land) and the regulation of land use.[176]

182. The Brown Article reminds that the Supreme Court of Canada previously recognized this very distinction in *Tener*, whereby a taking was found to have occurred even though the Crown did not acquire title to the mineral claims and instead only obtained abstract and intangible benefits such as "value" for a park.[177] Yet despite *Tener*'s carefully crafted reasoning, McLachlin C.J. gives *Tener* only "fleeting reference" in support of the statement that a beneficial interest is required for a taking to arise at common law.[178]

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

> The essential point of the constructive taking, then, is that the taking is just that: constructive. As such, it inherently contemplates that no gain, or at least no gain of an equitable or otherwise *in rem* quality, need be conferred upon the City in order for a taking to have occurred. The finding of a taking in circumstances of regulated land use is not drawn from the facts but is judicially imposed upon the facts, based upon a threshold denoting the stripping away from the property owner of all reasonable uses of the land.

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175 Brown Article, *supra* note 85 at 328 **[TAB 10]**.
176 *Ibid* at 329 **[TAB 10]**.
177 *Ibid* at 329-32 **[TAB 10]**.
178 *Ibid* at 329 **[TAB 10]**; See *CPR*, *supra* note 94 at para 32 **[TAB 14]**.

…

> When, therefore, McLachlin C.J. held that there was no constructive taking because "[t]he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision", she, with respect, missed the point of the constructive taking. While an "assurance", as the Chief Justice noted, falls short of being "the sort of benefit" that might support a finding of a *de jure* taking, no such benefit is required to demonstrate a constructive taking. The point is not that the public authority has acquired a benefit, but rather that the scope of the property owner's loss is such that we can say that the public authority's action effectively acquired a benefit, or was tantamount to having acquired a benefit.
>
> …
>
> Admittedly, *CPR v. Vancouver* appears to preserve a nominate distinction between the *de jure* taking and the constructive taking (since the Court refers throughout to a *de facto* taking). The problem, however, is that by imposing on the constructive taking a prerequisite of actual loss and gain that is characteristic of the *de jure* taking, the Court has simultaneously collapsed that distinction. While, therefore, Canadian law nominally retains two forms of taking, no distinctiveness subsists to demarcate one form from the other. (Emphasis added.)[179]

184. Like the Brown Article, the plaintiffs advocate for a test which focuses solely on whether the impugned government actions have removed all reasonable uses of the property, and submit that insofar as a benefit is required then a general benefit to the state or the public suffices.

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

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

187. Dispensing with the requirement of a "beneficial interest" would not hamper the operation of the modern state. Aggrieved property owners still need demonstrate "proof of virtual

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[179] Brown Article, *supra* note 85 at 333-34 **[TAB 10]**.

extinction of an identifiable interest in land",[180] a high bar which requires more than some loss of economic value of land. Elected officials also reserve the power to expressly immunize the state's liability for takings by statute, as the *Vancouver Charter* did in *CPR v Vancouver*.[181]

188. And since *CPR v Vancouver*, at least three recent cases suggest a taking may occur without the Crown acquiring any rights in the property at issue: *Lorraine (Ville) c 2646-8926 Quebec Inc*,[182] *Kalmring*,[183] and *Compliance Coal*.[184]

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

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

> The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity. In Quebec, the *Expropriation Act*, CQLR, c. E-24, limits the exercise of this power and lays down the procedure to be followed in this regard.
>
> …
>
> It is settled law that a "disguised" expropriation, insofar as it occurs in the guise of a zoning by-law, constitutes an abuse of the power of regulation conferred on the body in respect of such matters. Where a municipal government limits the enjoyment of the attributes of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is *de facto* expropriated

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180 *Mariner*, *supra* note 171 at para 83 **[TAB 24]**.
181 See *CPR*, *supra* note 94 at para 37 **[TAB 14]**.
182 2018 SCC 35 ("*Lorraine*") **[TAB 25]**.
183 *Kalmring*, *supra* note 142 **[TAB 18]**.
184 *Compliance Coal*, *supra* note 147 **[TAB 19]**.

> from them, it therefore acts in a manner inconsistent with the purposes of being pursued by the legislature in delegating to it the power 'to specify, for each zone, the structures and uses that are authorized and those that are prohibited'.[185] (Emphasis added.)

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

192. But the common law's recognition that a taking may arise without the state acquiring a "beneficial interest" was demonstrated even more so in *Kalmring*, where as already discussed Master Mason suggested an "intangible benefit" such as greater revenues for the Crown or subsidized road testing services for the public was sufficient.[186]

193. And as noted above, in *Compliance Coal* the benefit requirement was satisfied on the basis that the removal of possible mining operations "enhanced the value" of surface properties owned by the provincial Crown.[187]

194. In light of the case authorities and academic literature cited above, and the powerfully expressed views of a sitting Justice of the Supreme Court of Canada, the plaintiffs respectfully submit that a common law taking:

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

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

(a) For the reasons given above at paras 100 and 104 to 134, the defendants will remove all reasonable uses of the royalty interest as a result of their actions to phase out coal power by 2030, as by that point in time the royalty interest will cease

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185 *Lorraine*, *supra* note 182 at paras 1, 27 **[TAB 25]**.
186 *Kalmring*, *supra* note 142 at para 75 **[TAB 18]**.
187 *Compliance Coal*, *supra* note 147 at para 96 **[TAB 19]**.

generating income from the production of thermal coal to fuel the Genesee Power Plant.

(b) For the reasons given above at paras 102 to 103, the defendants' actions to phase out coal power by 2030 will result in financial benefits to themselves and health and environmental benefits to the Alberta and Canadian public.

## I. The Taking Claim Should not be Struck

196. The plaintiffs' taking claim has a reasonable prospect of success and should not be struck.

197. On a strike application, the facts alleged are assumed to be true and here the plaintiffs have plead with sufficient detail the constituent elements of a taking. By way of example, the Amended Statement of Claim alleges that:

> 4. However, since 2015 the Defendants have acted, jointly and severally, to phase out traditional coal-fired electrical generation by 2030, with the result that the Plaintiffs have been deprived of their property.
>
> (a) the Government of Alberta paid the electrical generator which used the coal to cease generating coal-fired electricity; and
>
> (b) the Government of Canada changed the regulatory framework, upon which the Plaintiffs relied, to prohibit traditional coal-fired electrical generation.
>
> 5. The Defendants have rendered the royalty interest on coal that was to be used for electrical generation of no value, in effect taking the Plaintiffs' property. This has resulted in loss and damage in the approximate amount of $190,000,000.
>
> ...
>
> **The Royalty Interest and Dedication of Coal to the Genesee Power Plant**
>
> 12. Pursuant to an Arrangement Agreement dated 24 December 2013, on 28 April 2014:
>
> (a) Genesee LP acquired a royalty interest in the coal (thermal) underlying lands near and around Genesee, Alberta; and
>
> ...

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.

…

**Taking**

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

44. Genesee LP has been deprived of rights of use and enjoyment of its property. A taking of the property interests of Genesee LP has occurred. The coal which is mined and used to fuel the Genesee Power Plant has been sterilized and rendered of no value.

45. In the result, Genesee LP has lost the value of its property, the royalty from the coal that was to be used for electricity generation after 2030 – in the approximate amount of $190,000,000.

198. Paras 5, 12, and 45 of the Amended Claim plead the property at issue, being the "royalty interest in the coal … underlying lands near and around Genesee, Alberta" and the "royalty from the coal that was to be used for electricity generation after 2030".

199. The requirement that the defendants have removed all reasonable uses of the property is captured by paras 5 and 44, which allege that the royalty interest has been rendered of "no value", that "Genesee LP has been deprived of rights of use and enjoyment of its property", and that coal which is mined and used to fuel the Genesee Power Plant "has been sterilized and rendered of no value." (As Alberta states at page 14 of its brief, *de facto* expropriation is a "complete sterilization" of the ability to exploit a resource.)

200. And insofar as a general benefit is required, the Amended Claim pleads at paras 39 and 43 that the defendants' actions have resulted in "benefits to themselves" and health and environmental benefits from air quality improvements. All particular benefits gained need not be pled (being a matter of evidence), nor could they be pled given that information is within the defendants' knowledge.

201. And while the plaintiffs' Amended Statement of Claim does not expressly plead that the defendants have acquired a "beneficial interest" related to the royalty interest, on a liberal reading of the pleading that fact is captured within para 43 of the Claim which alleges that the defendants' actions have resulted in "benefits to themselves."

202. Bearing in mind that a liberal reading of the impugned pleading must be taken and that novel claims should be permitted to proceed so long as they are "arguable",[188] the applications to strike the taking claim should be dismissed.

### J. The Taking Claim is not Premature

203. In addition to arguing that the taking claim lacks merit, the defendants argue that the taking claim should be struck or summarily dismissed on the basis that it is premature.

204. Alberta states the claim is premature as the plaintiffs "continue to own and receive payment for their interest in the coal" and that no property rights will be lost until 2030, if at all.[189] No authority is cited in Alberta's section on prematurity.

205. Canada essentially makes the same point, submitting that any taking from the Amended Regulations "would not occur until 2030" and that the Amended Claim "fails to plead sufficient facts to support that an expropriating event has already occurred".[190]

206. Canada cites *Mariner* for the proposition that, in the context of a regulatory taking, the Court must consider the "*actual application* in the specific case… not the potential, but as yet unexploited, range of possible regulation which is authorized".[191]

207. That principle was articulated by Cromwell J.A. in support of his conclusion that the designation of the plaintiffs' land as a beach could not by itself constitute a taking, and that the crucial question was whether the designation together with its practical effects (*i.e.,* the government's refusal to permit construction of the dwellings) constitutes a taking.[192]

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188 *Harun*, *supra* note 64 at para 18 **[TAB 3]**; *Grenon*, *supra* note 65 at para 6 **[TAB 2]**.
189 Alberta Brief, *supra* note 73 at para 97.
190 Canada Brief, *supra* note 74 at para 85.
191 *Ibid* at para 84.
192 See *Mariner*, *supra* note 171 at paras 51, 53-54 **[TAB 24]**.

208. But the taking claim against Canada is consistent with that principle, as it is premised on the actual application or practical effects of the Amended Regulations; namely, the shuttering of the three Genesee units and the Genesee Mine which, in turn, render the royalty interest valueless. That eventuality is alleged in the Statement of Claim (see para 197 above) and substantiated by Canada's own public statements (see paras 123 to 125 above).

209. Canada also cites a 2003 decision by the British Columbia Expropriation Compensation Board for the proposition that "[e]xpropriation cannot be hypothetical or speculative, and a claimant cannot rely on 'what evidence in the future might or might not show.'"[193]

210. However, the decision cited does not say a claimant alleging expropriation cannot rely on "what evidence in the future might or might not show". Those words appear to be taken from the Supreme Court of Canada's decision *R v Imperial Tobacco*, and in particular from a paragraph which concerns how evidence is not to be considered on a motion to strike.[194] This is not a principle for expropriation or taking claims, but is a procedural rule.

211. And while the landowner's taking claim was found premature in the decision of the Expropriation Compensation Board cited by Canada, in that case it was unknown how a federally mandated 15-metre yard setback requirement designed to protect fisheries would affect the claimant's development of his land, as he had not applied for a building permit nor a relaxation of the setback requirement, there had been no formal imposition of the setback on his land or any evidence of the extent to which it would constrain development, and the plaintiff had not even confirmed whether the geotechnical conditions of the land potentially falling within the setback zone were suitable for development.[195]

212. That case is factually distinguishable from here where the impact of the defendants' actions on the royalty interest is certain, even if the impact is not fully manifested at present. In particular:

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193 Canada Brief, *supra* note 74 at para 84.
194 See *R v Imperial Tobacco*, 2011 SCC 42 at para 23 **[CANADA AUTHORITIES, TAB 7]**.
195 *Rawcliffe v British Columbia (Ministry of Environment, Lands & Parks)*, [2003] BCWLD 153 at paras 74-76, 78, 84, 86-87, 90, 104 **[CANADA AUTHORITIES, TAB 23]**.

(a) Alberta has executed a contract with Capital Power pursuant to which the utility is required to cease all coal-fired emissions from the Genesee Power Plant by 31 December 2030;[196]

(b) Alberta admits that in 2030 the Genesee Power Plant "will" be eliminated as a customer for the subject coal[197] and in its notice of application states the Genesee Mine has not "yet" been shut down;[198] and

(c) the Amended Regulations are in force, which Canada has confirmed in its own public statements will result in a phasing out of the Genesee coal plant and mine. See paras 123 to 125 above.

213. No further action by the defendants is required for the taking to unfold, and given the significant financial resources the defendants have currently made available to coal power workers and communities reliant on the coal power industry,[199] it is reasonable to suggest that the defendants recognize the economic impacts associated with the phase out of coal power by 2030 will come to pass.

214. As to the defendants' argument that the taking claim is premature because the Genesee Power Plant and Mine are still operational and the royalty interest is still generating income, the taking claim is actionable now even though it is premised on sterilization of the royalty interest as of 2030.

215. As just noted, no further action by the defendants is required for the taking to unfold. While the lost royalty income does not begin to accumulate until 2030, the Court routinely awards damages for losses accruing in the future, such as future loss of income and future cost of care awards in personal injury cases.[200] There is no principled reason why this case should be any different.

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196 Ben Lewis Affidavit at Exhibit "Z".
197 Alberta Brief, *supra* note 73 at para 70.
198 Application filed by Alberta on June 5, 2020 at para 11.
199 Ben Lewis Affidavit at paras 40, 48-49, Exhibits "AA", "BB", "II", "JJ".
200 See e.g., *Warner v Calgary Regional Health Authority*, 2020 ABQB 172 at paras 66-67, 76-79, 80, 89 **[TAB 26]**.

216. As discussed in the Facts section of this brief, the plaintiffs are able to quantify their loss at this time. In particular:

(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;[201]

(b) upon learning of the Off-Coal Agreement with Capital Power in 2016, the plaintiffs used the discounted cash flow technique with a 5% discount rate to calculate $137 million as the present value of the royalty income that will no longer be earned between 2030 and 2055, which calculation was verified by an independent auditor;[202] and

(c) the Statement of Claim seeks damages of $190 million, which is the present loss of income from the royalty calculated using a 3% discount rate.[203]

217. And in *Tener*, the Supreme Court of Canada made it clear that the chance of a reversal in government policy which would avoid these losses is treated as a contingency which informs the quantum of the compensation payable, not liability.[204]

218. Further, matters which depend on future events need not wait for those events to transpire when declaratory relief is sought, noting the Alberta Court of Appeal has stated it is "trite law that one of the legitimate purposes for a declaration is to settle rights respecting something which has not yet happened, but is likely to happen."[205]

219. In light of that principle and the evidence discussed above at paras 114, 115, 123 to 125, 212 and 213, the plaintiffs' claim may proceed now as the sterilization of the royalty interest is likely to happen and the Statement of Claim seeks a declaration that the plaintiffs are entitled to file a claim for compensation under applicable expropriation legislation.[206]

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201 Ben Lewis Affidavit at footnote 2.
202 Ben Lewis Affidavit at para 59, Exhibit NN" at pgs 1, 12-13.
203 Ben Lewis Affidavit at footnote 2, Exhibit "PP".
204 See *Tener*, *supra* note 90 at para 20 **[TAB 12]**.
205 *Edmonton Telephones Corp v Stephenson* (1994), 26 Alta LR (3d) 33 (CA) at para 10 ("*Edmonton Telephones CA*") **[TAB 28]**; leave to appeal to SCC ref'd [1995] SCCA No 39.
206 Amended Statement of Claim filed on December 19, 2018 at para 47(b).

220. Additionally, on 25 November 2020 the plaintiffs filed a cross-application to further amend their Statement of Claim to seek 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", and as a matter of procedure the amendment application ought be considered before the defendants' applications to strike or dismiss the presently filed Claim given alleged defects in a pleading can be cured by amendment.[207]

221. Even though the plaintiffs' request for declaratory relief alone is enough for this case to proceed now, the Court also retains a discretion to hear cases which depend on future events if the circumstances warrant.[208] For example, in *Re Principal Investment Ltd and Gibson*[209] a party intending to sell its interest in a commercial lease applied for a declaration that the renewal provision was valid 7 years before the provision could take effect. The landlord made a preliminary objection that the motion was premature, but the Ontario Court of Appeal exercised its discretion to let the application proceed being satisfied the matter was of practical importance.[210]

222. In *Edmonton Telephones Corp v Stephenson*,[211] the Court of Queen's Bench of Alberta confirmed that the discretion to hear a matter which may await future events is informed by the same considerations relating to mootness (*i.e.,* where the controversy no longer exists). Those considerations are:

(a) whether an adversarial relationship exists between the parties, and will continue to exist;

(b) weighing the conservation of judicial resources against the societal cost of continued uncertainty in the law and the practical effect that a decision on the merits would have on the rights of the parties; and

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207 *Elbow River Marketing v Canada Clean Fuels Inc*, 2011 ABCA 258 at paras 3-4 **[TAB 32]**; *Goodswimmer*, *supra* note 66 at para 17 **[TAB 4]**.

208 *Edmonton Telephones Corp v Stephenson* (1994), 24 Alta LR (3d) 96 (QB) at paras 38-39, 41 ("*Edmonton Telephones QB*") **[TAB 27]**, aff'd *Edmonton Telephones CA*, *supra* note 205 **[TAB 28]**.

209 1963 CanLII 22 (ONCA) **[TAB 29]**, aff'd 1964 CanLII 9 (SCC).

210 *Ibid* at pgs 5-6 **[TAB 29]**.

211 *Edmonton Telephones QB*, *supra* note 208 at para 38 **[TAB 27]**.

(c) the need for the Court to not depart from its traditional role, such as non-interference in the political arena.[212]

223. The Court is also to consider the likelihood of the matter becoming ripe for consideration, and if there is a "significant or a likelihood near certainty" of the events occurring then the Court is more likely to exercise its discretion in favour of proceeding.[213]

224. Having regard to those principles, the plaintiffs submit this case is appropriate to proceed now even though the taking claim is premised on sterilization of the royalty interest as of 2030.

(a) By the within action, there is an adversarial relationship between the plaintiffs and the defendants, and that relationship will continue to exist.

(b) There is a public importance in clarifying both the scope and necessity of the "beneficial interest" requirement imposed by the Supreme Court of Canada in *CPR v Vancouver*, and permitting the action to proceed now will have a significant practical effect on the plaintiffs as they have already been required by applicable accounting standards to write down the present value of their royalty interest by $137 million. Having regard to the maxim "justice delayed is justice denied",[214] the plaintiffs should not have to wait 10 years to begin anew their claim for compensation to which they are lawfully entitled.

(c) Permitting the action to proceed keeps the Court in its traditional role and does result in an interference with the political arena.

225. Further, there is a significant or a likelihood near certainty of the events upon which the taking claim is premised coming to fruition. The defendants themselves recognize this (as shown above at paras 114 to 115 and 123 to 125), and their various programs which provide financial assistance to coal power workers and communities reliant on the coal power industry (as laudable as those programs may be) belie any argument that it is

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212 *Ibid* at paras 46, 48-49 **[TAB 27]**.
213 *Ibid* at para 51 **[TAB 27]**.
214 See *AF v Alberta*, 2020 ABQB 268 at para 86 **[TAB 30]**.

speculative that the royalty interest will cease to generate any income from thermal coal production after 2030.

226. Given the foregoing, the taking claim is not premature and the plaintiffs submit it may proceed now.

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

227. In the alternative, the plaintiffs submit there are genuine issues requiring a trial which preclude disposition of this matter on a summary basis. In particular:

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

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

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

228. These material facts need be decided in order for the Court to determine whether the defendants have by their actions removed all reasonable uses of the plaintiffs' property, and the positions taken by the defendants in their written submissions have created "gaps or uncertainties" in the record which preclude the Court from making the necessary factual findings to summarily adjudicate the taking claim.[215]

229. Further, should the Court be uncertain as to the requirement or nature of a benefit accruing to the state, the plaintiffs submit that the law of constructive takings is sufficiently unsettled or complex that it is not possible to apply the law to the facts and arrive at a "just result" through summary dismissal.[216]

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[215] See *Weir Jones*, *supra* note 69 at para 35 **[TAB 5]**.

[216] See *Weir Jones*, *supra* note 69 at paras 21, 45 **[TAB 5]**. A leading textbook on government liability in Canada has even described the law of takings as an "emergent branch of the law … characterized by inconsistent principles being inconsistently applied, and by a general uncertainty about the direction in

## PART V: REMEDY SOUGHT

230. 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.

231. Here, the plaintiffs' property has been rendered valueless as a result of the defendants' campaign against coal power. The royalty interest has been constructively taken, and as the Manitoba Court of Appeal once pronounced "[c]ompensation must be paid by the state for a takeover or for the destruction of a private commercial venture or of a private economic interest."[217]

232. For the foregoing reasons, the defendants have failed to demonstrate that the plaintiffs' Claim lacks a reasonable prospect of success and merit, and that there is no genuine issue requiring a trial.

233. The plaintiffs therefore request that this Honourable Court dismiss the defendants' applications to strike or summarily dismiss the Claim, and award costs to the plaintiffs in any event of the cause.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 25th day of November, 2020.

**CODE HUNTER LLP**

Per:  

Christian J. Popowich
Counsel for the Plaintiffs
Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc.

Dextin Zucchi
Counsel for the Plaintiffs
Altius Royalty Corporation, Genesee Royalty Limited Partnership, and Genesee Royalty GP Inc.

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which takings law ought to proceed." See Karen Horsman and Gareth Morley, *Government Liability Law and Practice*, loose-leaf (Toronto: Thomson Reuters, 2017) at 4-8.1 **[TAB 31]**.

217 *Home Orderly Services v Manitoba* (1988), 49 Man R (2d) 246 (CA), as cited in *Kalmring*, *supra* note 183 at para 77 **[TAB 18]**.