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PLAINTFFS/ APPELLANTS	ALTIUS ROYALTY CORPORATION GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.
DEFENDANTS/ CROSS-APPELLANTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA
DOCUMENT	**BRIEF OF THE ATTORNEY GENERAL OF CANADA IN RESPECT OF A SPECIAL CHAMBERS APPLICATION (APPEAL AND CROSS-APPEAL OF MASTER'S DECISION) SCHEDULED FOR NOVEMBER 30 AND DECEMBER 1, 2021 IN JUSTICE CHAMBERS**

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I. INTRODUCTION

1. On January 4, 2021, Master Farrington summarily dismissed the Plaintiffs' claim for *de facto* expropriation against Canada and Alberta. Master Farrington's decision was correct and his decision should be upheld in this appeal.

2. As a precaution, but without resiling from its primary position that summary dismissal was appropriate, Canada has cross appealed other portions of Master Farrington's decision. If this Honourable Court finds that summary dismissal should not have been awarded, the cross appeal should be allowed and the Plaintiffs' pleadings should be struck out for prematurity without leave to amend.

3. The Plaintiffs are a sophisticated corporate enterprise. In 2014, they decided to bet heavily on the coal industry and acquired a significant royalty interest in certain thermal coal that was, and remains, dedicated to the generation of electricity in Alberta.

4. Shortly before the Plaintiffs placed their investment, Canada promulgated regulations that set a performance standard (emissions intensity limit) to reduce carbon dioxide emissions from coal-fired generation of electricity. The Plaintiffs were well aware of the regulations when they invested, but contend that they "expected" the new regime to remain static for the next four decades, until 2055. However, Canada did not give any representations or statements in this regard and the Plaintiffs' own public disclosure reveals that they courted the risk of thermal coal despite:

   a. knowing their operations were subject to "extensive governmental regulations with respect to such matters as environmental protection…";

   b. recognizing that "the enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements … could have an adverse effect on the Corporation"; and

   c. contracting to have the underlying coal mine operated "in material compliance with applicable federal, provincial and local laws, statutes, rules, regulations, permits, ordinances, certificates, licences or other regulatory requirements".

5. In 2018, the federal regulations were amended so as to require the performance standard to be met no later than 2030.

6. In reaction to the amended federal regulations, not to mention a separate environmental initiative at the provincial level, the Plaintiffs commenced this litigation alleging that Canada and Alberta had "taken" (or expropriated) their property. Damages in the approximate amount of $190 million are claimed.

II. MATERIALS

7. This brief outlines Canada's submissions with respect to both the appeal and cross-appeal.

8. The complete record for the appeal and cross-appeal is contained in a two volume appeal record ("AR"), filed August 16, 2021. No new evidence has been adduced and the parties rely on the same record that was before Master Farrington.

III. FACTS

A. The Mine and Coal:

9. The Genesee mine is a coal mine located in Central Alberta (the "Mine").[1]

10. Capital Power LP ("Capital Power") and Prairie Mines Royalty ULC ("Prairie Mines") operate the Mine through a joint venture[2] and they each hold freehold and leasehold interests in the coal located within the Mine (the "Coal").[3]

B. Dedication of Coal:

11. The Coal has historically been dedicated to the Genesee Power Plant (the "Plant"), a coal-fired electricity generating station comprised of three generation units that were commissioned in

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[1] Amended Statement of Claim ("ASOC"), paras. 12(a) & 13 **[AR, Vol. 1, Tab 1]**. Affidavit of Ben Lewis, sworn September 28, 2020 ("Lewis Affidavit"), para. 8 **[AR, Vol. 2, Tab 2]**.
[2] ASOC, para. 14 **[AR, Vol. 1, Tab 1]**. Plaintiffs' Response to Request for Particulars, filed February 25, 2019 ("Response"), para. 3(a) **[AR, Vol. 1, Tab 5]**. Lewis Affidavit, para. 9 **[AR, Vol. 2, Tab 2]**.
[3] Response, paras. 2(a) & 3(b)-(c) **[AR, Vol. 1, Tab 5]**.

1989, 1994 and 2005 (collectively, the "Units"). The Plant is wholly owned and operated by Capital Power and generates electricity for the City of Edmonton and elsewhere in Alberta.[4]

12. The dedication of the Coal to the Plant is the subject of a Dedication and Unitization Agreement dated August 7, 1980, as amended. Pursuant to the terms of the Dedication and Unitization Agreement, the predecessors in interest to Capital Power and Prairie Mines dedicated their respective interests in the Coal to the Plant.[5]

C. SOR/2012-167:

13. In February 2012, the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*[6] ("SOR/2012-167") were published in the *Canada Gazette*, Part II, for the purpose of establishing a regime to reduce carbon dioxide emissions resulting from coal-fired generation of electricity.[7]

14. Subsection 3(1) of SOR/2012-167 imposes the following emissions intensity limit as of July 1, 2015:

> **Limit – 420t/GWh**
>
> 3(1) A responsible person for a new unit or an old unit must not, on average, emit with an intensity of more than 420 tonnes CO_2 emissions from the combustion of fossil fuels in the unit for each GWh of electricity produced by the unit during a calendar year.

(the "Limit").

15. The Limit in Subsection 3(1) applies only to "new units" and "old units" (as those terms are defined). Units that do not fit within either definition are exempt from the Limit until they reach the end of their "useful life", which is defined as follows in Section 2 of SOR/2012-167:

> **Useful life**, in respect of a unit, means the period that begins on the commissioning date and ends on

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[4] ASOC, paras. 13, 16 & 18-19 **[AR, Vol. 1, Tab 1]**.
[5] ASOC, para. 16 **[AR, Vol. 1, Tab 1]**.
[6] SOR/2012-167 as it appeared between 30 August 2012 and 29 November 2018 **[Canada's Authorities, Tab 1]**.
[7] Statement of Defence of the Attorney General of Canada ("Canada SOD"), para. 5 **[AR, Vol. 1, Tab 7]**.

> **(a)** for a unit other than a unit referred to in paragraph (a) of the definition **commissioning date**,
>
> (iii) in any other case, December 31 of the calendar year that is 50 years after the commissioning date.

16. The Units comprised within the Plant are neither "old units" nor "new units". Accordingly, by operation of SOR/2012-167, the Limit was scheduled to apply to the Units in 2039, 2044 and 2055, respectively.[8]

D. Arrangement Agreement:

17. On December 24, 2013, more than 1.5 years after SOR/2012-167 were published, Altius Minerals Corporation[9] ("Altius Minerals") and its wholly owned subsidiary, Altius Royalty Corporation ("Altius Royalty"), entered into an Arrangement Agreement with various counterparties, including a predecessor in interest to Prairie Mines.[10]

18. Pursuant to the Arrangement Agreement, the following transactions (among others) closed on or about April 28, 2014 (the "Effective Date"):

a. Genesee Royalty Limited Partnership ("Genesee LP") acquired a royalty interest in the Coal belonging to Prairie Mines (the "Royalty Interest"); and

b. Altius Royalty purchased the general partner of Genesee LP, Genesee Royalty GP Inc. ("Genesee GP"), and the limited partners of Genesee LP.[11]

19. The Arrangement Agreement did not effect a transfer of title to the Coal, which remained registered to Prairie Mines.[12]

20. Altius Royalty, Genesee GP and Genesee LP (collectively, the "Altius Entities") assert in this Action that they "expected" at the time of the Arrangement Agreement that SOR/2012-167

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[8] ASOC, para. 21 **[AR, Vol. 1, Tab 1]**.
[9] Altius Minerals is a public company which holds royalties in mines across Canada and in Brazil producing copper, zinc, nickel, cobalt, iron ore, potash and thermal (electrical) and metallurgical coal: ASOC, paras. 9-10. **[AR, Vol. 1, Tab 1]**.
[10] ASOC, para. 12 **[AR, Vol. 1, Tab 1]**. Response, para. 2(d) **[AR, Vol. 1, Tab 5]**.
[11] ASOC, paras. 6-9 & 12 **[AR, Vol. 1, Tab 1]**. Response, para. 2(a) **[AR, Vol. 1, Tab 5]**. Lewis Affidavit, para. 22 **[AR, Vol. 2, Tab 2]**.
[12] Response, paras. 2(a) & 3(c) **[AR, Vol. 1, Tab 5]**.

would "continue as enacted" for the next four decades, until 2055.[13] However, they can point to no statements or representations from Canada and instead rely on generalities and innuendo to assert an apparent "understanding" that Canada "had a settled regulatory framework for coal-fired electrical generation".[14] Moreover, as set out in greater detail below, the Altius Entities palpably appreciated the risk of regulatory change.

E. Related Agreements:

21. In order to give effect to the Arrangement Agreement, the Altius Entities entered into a number of new or amended agreements on or about the Effective Date, including: (i) Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014; and (ii) Assignment and Novation Agreement in respect of the Geneee Royalty Agreement dated April 28, 2014.

22. The Second Amended and Restated Dedication and Unitization Agreement confirms that Genesee LP's Royalty Interest in the Coal is dedicated for the purpose of fuelling the Plant.[15] It also contains the following term and termination clauses:

> **7.1 Term**
>
> … The Second Amended and Restated Dedication and Unitization Agreement shall be effective immediately after the closing of the [Arrangement Agreement] and shall continue in effect until all Recoverable Coal Reserves have been mined, or the Genesee Power Plant is permanently decommissioned or as terminated pursuant to this Agreement.
>
> **8.1 Termination of Agreement**
>
> This Agreement and all of the terms thereof including the dedication and unitization thereunder shall be terminated only in accordance with Section 7.1 of this Agreement or upon mutual agreement of Capital Power and PMRL. For certainty, the Parties acknowledge and agree that a termination of this Agreement does not constitute a termination of the Royalty Interest.[16]

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[13] ASOC, paras. 40-41 **[AR, Vol. 1, Tab 1]**. Lewis Affidavit, para. 19 **[AR, Vol. 2, Tab 2]**.
[14] Response, para. 1 **[AR, Vol. 1, Tab 5]**. The Lewis Affidavit **[AR, Vol. 2, Tab 2]** identifies a limited number of statements and representations from third parties, such as financial advisors and Sherritt, but does not describe or append anything from Canada.
[15] ASOC, para. 14 **[AR, Vol. 1, Tab 1]**. Plaintiffs' Reply to Notice to Admit Facts ("Reply to NA"), para. 15 **[AR, Vol. 1, Tab 9]**. Lewis Affidavit, para. 24 and Ex. L **[AR, Vol. 1, Tab 9]**.
[16] ASOC, para. 16 **[AR, Vol. 1, Tab 1]**. Reply to NA, para. 18 **[AR, Vol. 1, Tab 9]**. Lewis Affidavit, para. 24 and Ex. L **[AR, Vol. 2, Tab 2]**.

23. The Genesee Royalty Agreement, to which Genesee LP subscribed as "assignee", stipulates that Mine operations will be conducted "in material compliance with applicable federal, provincial and local laws, statutes, rules, regulations, permits, ordinances, certificates, licences or other regulatory requirements related to operations and activities on or with respect to the Royalty Lands".[17] [emphasis]

F. Knowledge of SOR/2012-167 and Recognition of Risk:

24. The Altius Entities and their parent company, Altius Minerals, were well aware of SOR/2012-167 at the time of the Arrangement Agreement and they anticipated the "risk" of future regulatory change affecting the company's operations.

2014 Equity Offering:

25. On April 28, 2014, the same day that the Arrangement Agreement took effect, Altius Minerals filed a preliminary short form prospectus (the "Prospectus").

26. The Prospectus contains the following statement at page 30:

> The Canadian federal government is not committed to legally binding targets for the reduction of greenhouse gas emissions ("GHG"), however, it has voluntarily proposed to reduce Canada's GHG by 17% below 2005 levels by 2020 as part of the Copenhagen Accord. Part of this reduction will be achieved through the implementation of regulations that would require significant reductions of GHG emissions by certain of Canada's largest industrial sectors. The regulations that the federal government has issued for the electricity sector will require, among other things, that new and certain refurbished coal-fired plants, commissioned after July 2015, achieve an annual emissions intensity performance standard of 420 tonnes of CO2 per GWh. The result of the regulations is expected to cause existing power plants to close down as, in the current environment, meeting the new regulations will be challenging.
>
> [emphasis][18]

[17] Lewis Affidavit, Ex. K **[AR, Vol. 2, Tab 2]**.
[18] Reply to NA, para. 8 **[AR, Vol. 1, Tab 9]**.

2014 Financial Reporting:

27. On July 2, 2014, Altius Minerals issued its financial reporting for the year ended April 30, 2014, including a Management's Discussion and Analysis (the "MD&A") and Annual Information Form (the "AIF").[19]

28. The MD&A contains the following statements at pages 22 and 25, which anticipate the investment risk associated with future changes in environmental legislation:

> **Risk Factors and Key Success Factors**
>
> An investment in securities of the Corporation involves a significant degree of risk that should be considered prior to making an investment decision. In addition to discussions of key success factors and business issues elsewhere in this MD&A, the investor should consider the following risk factors:
>
> …
>
> *Government Regulations*
>
> The Corporation's operations are subject to extensive governmental regulations with respect to such matters as environmental protection, health, safety and labour; mining law reform; restrictions on production or export, price controls and tax increases; aboriginal land claims; and expropriation of property in the jurisdictions in which it operates. Compliance with these and other laws and regulations may require the Corporation to make significant capital outlays which may slow its growth by diverting its financial resources. The enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements may increase costs, which could have an adverse effect on the Corporation. The Corporation cannot give assurances that it will be able to adapt to these regulatory developments on a timely or cost-effective basis. Violations of these regulations and regulatory requirements could lead to substantial fines, penalties or other sanctions.[20]
>
> [emphasis]

29. The AIF contains the following similar statements at pages 10 and 13, again recognizing the risk associated with future changes in environmental legislation:

> **6.2 Risk Factors**
>
> The following is a summary of significant business risks as they pertain to the outlook and conditions currently known to management which could have a material impact on the financial condition and results of the operations of the Corporation and its investments and royalty interests. The risks described are not the only ones faced by

[19] Reply to NA, para. 11 **[AR, Vol. 1, Tab 9]**.
[20] Reply to NA, para. 13 **[AR, Vol. 1, Tab 9]**.

> the Corporation and any risks in combination or individually could have a material adverse effect on the Corporation's financial condition and results of operations.
>
> …
>
> *Government Regulations*
>
> The Corporation's operations are subject to extensive governmental regulations with respect to such matters as environmental protection, health, safety and labour; mining law reform; restrictions on production or export, price controls and tax increases; aboriginal land claims; and expropriation of property in the jurisdictions in which it operates. Compliance with these and other laws and regulations may require the Corporation to make significant capital outlays which may slow its growth by diverting its financial resources. The enactment of new adverse regulations or regulatory requirements or more stringent enforcement of current regulations or regulatory requirements may increase costs, which could have an adverse effect on the Corporation. The Corporation cannot give assurances that it will be able to adapt to these regulatory developments on a timely or cost-effective basis. Violations of these regulations and regulatory requirements could lead to substantial fines, penalties or other sanctions.[21]
>
> [emphasis]

G. Alberta Off-Coal Agreement:

30. On November 24, 2016, Alberta entered into an Off-Coal Agreement with Capital Power to phase out emissions from coal-fired electricity generation, including emissions from the Plant, by December 31, 2030 (the "OC Agreement").[22] The OC Agreement included an obligation to make certain transition payments to Capital Power.[23]

31. In direct response to the OC Agreement, Altius Minerals recorded an impairment charge of $72,001,000.00 for the fiscal quarter ended January 31, 2017.[24]

H. Amendments to SOR/2012-167:

32. On December 17, 2016, the Government of Canada ("Canada") published a notice of intent in the *Canada Gazette*, Part I, that communicated its intention to amend SOR/2012-167 so as

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[21] Reply to NA, para. 14 **[AR, Vol. 1, Tab 9]**.
[22] Statement of Defence of Her Majesty the Queen in Right of Alberta, para. 4 **[AR, Vol. 1, Tab 6]**.
[23] ASOC, paras. 31-32 **[AR, Vol. 1, Tab 1]**.
[24] Reply to NA, paras. 19-22 **[AR, Vol. 1, Tab 9]**.

to require all coal-fired electricity generation units to meet the Limit no later than 2030. The Limit itself did not change.[25]

33. The amended *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*[26] ("SOR/2018-263") came into force on November 30, 2018[27] and modified the definition of "useful life" to provide as follows:

> **Useful life**, in respect of a unit, means the period that begins on the commissioning date and ends on
>
> **(a)** for a unit other than a unit referred to in paragraph (a) of the definition **commissioning date**,
>
> (ii) in the case of a unit whose commissioning date is after 1974, the earlier of
>
> (A) December 31 of the calendar year that is 50 years after the commissioning date, and
> (B) December 31, 2029…

34. In practical terms, SOR/2018-263 has the effect of requiring the Units comprised within the Plant to meet the Limit as of 2030.

IV. PROCEDURAL HISTORY

A. Litigation:

35. The Altius Entities commenced this Action on November 23, 2018 and filed an Amended Statement of Claim on December 19, 2018.

36. The Amended Statement of Claim names Alberta and Canada as Defendants, jointly and severally, and asserts three causes of action against them: "foiling" of "legitimate expectations", "undue interference with economic relations" and "taking" (expropriation). The Altius Entities have since withdrawn the first two causes of action, thereby limiting this action to a claim for *de facto* expropriation.

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[25] ASOC, para. 36 **[AR, Vol. 1, Tab 1]**. Canada SOD, para. 8 **[AR, Vol. 1, Tab 7]**.
[26] SOR/2018-263 **[Canada's Authorities, Tab 2]**.
[27] ASOC, para. 39 **[AR, Vol. 1, Tab 1]**. Canada SOD, para. 9 **[AR, Vol. 1, Tab 7]**.

B. Applications and Cross-Application

37. In June 2020, Canada and Alberta applied to summarily dismiss this Action or alternatively, strike out the Amended Statement of Claim for prematurity.[28] The Altius Entities filed a cross-applicaton to further amend their pleadings to claim, among other things, a future-oriented declaration that the Defendants "will cause" *de facto* expropriation.[29]

38. The applications and cross-application were argued before Master Farrington in December 2020. On January 4, 2021, Master Farrington summarily dismissed this Action in its entirety. The accompanying Memorandum of Decision concluded (in part):

> The record is sufficiently complete in this case for a fair and just determination. … [T]he applications of Canada and Alberta are allowed. They have proven their entitlement to dismissals on the requisite balance of probabilities. The action of the plaintiffs is summarily dismissed against both of them. The environmental regulation by Canada was not a "taking".[30]

39. Master Farrington also allowed the amendments in their entirety[31] and declined to strike out the Amended Statement of Claim for prematurity[32].

C. Appeal and Cross-Appeal

40. Master Farrington's decisions are now the subject of an appeal and two cross-appeals. The Altius Entities appeal the granting of summary dismissal.[33] As a matter of precaution, but without resiling from their primary position that summary dismissal was appropriate, Canada and Alberta have cross-appealed Master Farrington's decisions to allow the amendments and to decline to strike out the Amended Statement of Claim.[34]

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[28] Applications of Canada & Alberta, filed June 3 and 5, 2020 **[AR, Vol. 1, Tabs 12 & 13]**.
[29] Cross-Application of Altius Entities, filed November 25, 2020 **[AR, Vol. 1, Tab 17]**.
[30] Memorandum of Decision of Master Farrington dated January 4, 2021 ("Memorandum of Decision"), para. 47 **[AR, Vol. 1, Tab 22]**.
[31] Memorandum of Decision, para. 1 **[AR, Vol. 1, Tab 22]**.
[32] Memorandum of Decision, para. 18, paras. 21-25 **[AR, Vol. 1, Tab 22]**.
[33] Notice of Appeal of Altius Entities, filed March 15, 2021 **[AR, Vol. 1, Tab 25]**. Transcript of Proceedings before Master Farrington dated December 11, 2020, p.24, l.25-38 **[AR, Vol. 1, Tab 21]**.
[34] Notices of Appeal of Canada and Alberta, filed March 15, 2021 **[AR, Vol. 1, Tabs 26-27]**.

V. ISSUES

41. Whether the Altius Entities' appeal should be denied and the summary dismissal decision upheld?

42. Alternatively, whether Canada's cross-appeal should be permitted with the result that:

a. The amendments should be disallowed; and

b. The Amended Statement of Claim should be struck out for prematurity?

VI. ARGUMENT

A. Standard of Review

43. A Master's decision is reviewable for correctness on all issues.[35] If no new evidence is adduced, as is the case here, the appeal is on the record and the Chambers Judge may "describe his or her analysis and conclusions with reference to the [M]aster's decision if he or she otherwise finds that it was correct in fact and law".[36]

B. Altius Entities' Appeal - Summary Dismissal

44. Master Farrington correctly resolved this dispute on a summary basis and his decision should be upheld on appeal. There is no merit in fact or law to the Altius Entities' claim for *de facto* expropriation and there is no genuine issue requiring a trial.

1. The Proportionality Principle and the Law of Summary Dismissal

45. The Alberta *Rules of Court*[37] gravitate around the proportionality principle. Rule 1.2 states:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

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[35] *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166 **[Canada's Authorities, Tab 3]** at para. 30.
[36] *Bahadar v Real Estate Council of Alberta*, 2021 ABQB 395 **[Canada's Authorities, Tab 4]** at paras. 12-15. *HOOPP Realty Inc v Emery Jamieson LLP*, 2020 ABCA 159 **[Canada's Authorities, Tab 5]** at para. 41.
[37] Alberta Rules of Court, Alta Reg 124/2010 **[Canada's Authorities, Tab 6]**.

46. The Supreme Court of Canada has interpreted the proportionality principle as a bedrock concept that permeates the litigation process and informs the Court's approach to dispute resolution. In *Hryniuk* v *Mauldin*[38] [*Hryniuk*], the Court unanimously stated:

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expenses and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[39]

47. The proportionality principle is reflected in Part 7, Division 2 of the Alberta *Rules of Court*, which provides for summary disposition of a claim.

48. Summary disposition may be granted on the basis of "admissions of fact … made in a pleading or otherwise"[40] (Rule 7.2) or when the evidence positively establishes that there is "no merit to a claim or part of it" (Rule 7.3). The "substantive test" applied on applications for summary disposition under Rules 7.2 and 7.3 is the same.[41]

49. In *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, the majority of the Alberta Court of Appeal articulated a four-part test for summary disposition. It wrote:

> The proper approach to summary dispositions, based on the [*Hryniuk*] test, should follow the core principles relating to summary dispositions, the standard of proof, the record and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and outcome must be just, appropriate, and reasonable. The key considerations are:

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[38] *Hryniuk v Mauldin*, 2014 SCC 7 **[Canada's Authorities, Tab 7]**.
[39] *Hryniuk* **[Canada's Authorities, Tab 7]**, paras. 27-28.
[40] "Admissions" are "concessions or voluntary acknowledgments made by a party of the existence of certain facts. More accurately regarded, they are statements by a party, or some one identified with him in his legal interest, of the existence of a fact which is relevant to the cause of his adversary…": *Admiral Canada Inc. v Freekick Ltd.*, 2006 ABQB 451 **[Canada's Authorities, Tab 8],** para. 14.
[41] *Craik v Alberta Treasury Branches*, 2012 ABQB 373 **[Canada's Authorities, Tab 9],** para. 4.

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> … the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.[42]

50. The majority in *Weir-Jones* concluded: summary disposition "should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be."[43]

51. More recently, in *Hannam v Medicine Hat School District No. 76*, the Alberta Court of Appeal explained that summary judgment should be an accessible, available and widely used process.[44]

2. *De Facto* Expropriation

52. *De facto* expropriation arises when the state takes for itself the full bundle of rights associated with private property ownership. Although title does not transfer absolutely, there is

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[42] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 [*Weir-Jones*] **[Canada's Authorities, Tab 10]**, para. 47.
[43] *Weir-Jones* **[Canada's Authorities, Tab 10]**, para. 48.
[44] *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 **[Canada's Authorities, Tab 11]**, see generally.

nonetheless an acquisition of a beneficial interest in the property or flowing from it, and removal of all reasonable uses of the property.[45]

53. *De facto* expropriation is very "rare"[46] and "exceptional"[47], and does not occur under most exercises of regulatory authority, which merely regulate and do not take. As explained by the Alberta Court of Appeal with reference to earlier case authority:

> A mere negative prohibition though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State.[48]

3. The Two Part Test

54. In *Canadian Pacific Railway Co.* v *Vancouver (City)*, the Supreme Court of Canada identified an "exacting"[49] two part test for *de facto* expropriation:

a. An acquisition of a beneficial interest in property or flowing from it; and

b. Removal of all reasonable uses of the property.[50]

55. The two part test has been applied in numerous cases without any difficulty or confusion. As noted by the Ontario Court, "the law in this area is [not] muddy".[51] The Nova Scotia Court of Appeal reached a similar conclusion in recent months, finding that "the authorities have clearly identified what qualifies as a *de facto* expropriation and what does not".[52]

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[45] *Canadian Pacific Railway Co. v Vancouver (City)*, 2006 SCC 5 [*CPR*] **[Canada's Authorities, Tab 17]**, para. 30. See also 64933 Manitoba Ltd v Manitoba, 2002 MBCA 96 **[Canada's Authorities, Tab 12]**, para. 13.

[46] *Mariner Real Estate Ltd. v Nova Scotia (Attorney General)*, 1999 NSCA 98 [*Mariner*] **[Canada's Authorities, Tab 13]** at paras. 37-38. *Genesis Land Development Corp v Alberta*, 2009 ABQB 221 **[Canada's Authorities, Tab 14]**, para. 133; aff'd 2010 ABCA 148.

[47] *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283 [*Nilsson*] **[Canada's Authorities, Tab 15]**, para. 62.

[48] *Nilsson* **[Canada's Authorities, Tab 15]**, para. 50. See also *Quality Plus Tickets c Québec (Procureur general)*, 2013 QCCS 3780 [*Quality Plus*] **[Canada's Authorities, Tab 16]**, para. 64.

[49] *Mariner* **[Canada's Authorities, Tab 13],** para. 47 & para. 50.

[50] *CPR* **[Canada's Authorities, Tab 17]**, para. 30.

[51] *Club Pro Adult Entertainment Inc. v Ontario (Attorney General)* (2006), 27 BLR (4th) 227 (ONSC) [*Club Pro*] **[Canada's Authorities, Tab 18]**, para. 74; aff'd 2008 ONCA 158; SCC leave refused.

[52] *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 [*Annapolis*] **[Canada's Authorities, Tab 19]**, para. 71; SCC leave granted.

56. Although the Supreme Court of Canada recently granted leave to appeal in a case involving a *de facto* expropriation claim, that development does not undermine the settled nature of the law or prevent summary dismissal at this time. As stated by the Ontario Court in refusing to adjourn a summary judgment motion pending a forthcoming decision by the Supreme Court: "Trial courts can only decide cases based on the existing state of the law and not in anticipation of what appellate courts may do to change the law".[53]

4. Relevant Case Law

57. Two leading decisions of the Supreme Court of Canada illustrate the rare situations where *de facto* expropriation can be found to occur.

58. In *Manitoba Fisheries Ltd.* v *The Queen*[54], federal legislation gave a Crown corporation a commercial monopoly over the export of fish and overtook the Appellant's longstanding fish export business. Ritchie J, writing for the unanimous Supreme Court of Canada, found that the legislation had the direct effect of taking the Appellant's goodwill (suppliers and customers cultivated over the years) and transferring it to the Crown corporation. As a result, the legislation was not merely regulatory in nature, but actually effected a "taking" of goodwill benefitting the Crown.

59. In *R v Tener*[55], the province of British Columbia declined to grant a permit for exploration work on the Respondent's mineral claims located within a provincial park. The effect of the declination was to preclude any exploration and neutralize the mineral claims. The majority decision, written by Estey J, found that the Crown had effectively "recovered" the minerals and "enhanced" the value of the park in the process.[56] The minority, concurring in the result, agreed that the Crown had taken back the minerals. Wilson J wrote:

> … the [Crown] has effectively removed the encumbrance from its land … Indeed, this case seems stronger than *Manitoba Fisheries* inasmuch as the doctrine of merger

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[53] *Reddock v Canada (Attorney General)*, 2019 ONSC 3196 [*Reddock*] **[Canada's Authorities, Tab 20],** para. 16.
[54] *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101 (SCC) [*Manitoba Fisheries*] **[Canada's Authorities, Tab 21]**.
[55] *R v Tener*, [1985] 1 SCR 533 (SCC) [*Tener*] **[Canada's Authorities, Tab 22].**
[56] *Tener* **[Canada's Authorities, Tab 22],** paras. 20-21.

> would appear to operate so as to make the [R]espondents' loss the [A]ppellant's gain. [57]

60. Since *Manitoba Fisheries* and *Tener*, Canadian Courts have faithfully and rigidly applied the two part test, and a clear body of jurisprudence has emerged.

61. The case law is clear that legislative and regulatory initiatives designed to protect human health or the environment very rarely amount to *de facto* expropriation. For instance, in *Club Pro*, the Province of Ontario regulated designated smoking rooms (DSRs), including the DSR in the Plaintiffs' establishment. The Plaintiffs in that case claimed that their DSR had been "taken". Spies J disagreed on the basis that the Crown had not acquired the requisite "beneficial interest":

> While the use of the DSRs for smoking has been "taken" from the plaintiffs, in no sense has this right been acquired by the Crown. The Crown transferred no property rights from the plaintiffs to itself by this legislation.[58]
>
> …
>
> The [Act] does not appropriate the plaintiff's business for the Crown's own use or benefit, or for the public's use or benefit. … It is too far fetched to suggest that the public gets a benefit from the elimination of the DSRs such that there has been a "taking" by the province.[59]

62. Most instances of land use regulation also fail to meet the two part test:

a. In *Mariner*, the Plaintiffs' lands were designated as a beach under the *Beaches Act*. The designation had the effect of preventing the Plaintiffs from building on the lands. Cromwell JA (as he then was) found that "the freezing of development and strict regulation of the designated lands did not, of itself, confer any interest in land on the Province".[60] He also noted that "all of the rights associated with the property holder's interest" had not been taken as the Plaintiffs still owned the lands and could use them for other purposes, such as beach enjoyment. [61]

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[57] *Tener* **[Canada's Authorities, Tab 22],** para. 68.
[58] *Club Pro* **[Canada's Authorities, Tab 18],** para. 71.
[59] *Club Pro* **[Canada's Authorities, Tab 18]**, para. 82.
[60] *Mariner* **[Canada's Authorities, Tab 13]**, para. 105.
[61] *Mariner* **[Canada's Authorities, Tab 13]**, paras. 48-54.

b. In *Nilsson*, the Plaintiff's application to construct a mobile home park on restricted land was denied. The Plaintiff claimed *de facto* expropriation, but was unsuccessful. Citing *Mariner*, the Alberta Court of Appeal noted that "extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation".[62] The Court went on to state:

> … it is obvious that not every interference with aspects of property ownership will amount to a *de facto* expropriation. In the context of restrictions on land use, it is clear that such restrictions, even down zoning or a development freeze, do not amount to expropriation. Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.[63]

c. In *CPR*, the Plaintiff owned a railway right-of-way that was designated under a municipal bylaw as a public thoroughfare. The effect of the bylaw was to prevent commercial redevelopment of the right-of-way and confine the Appellant to historical and current uses of the land. The Supreme Court of Canada found that the municipality had not acquired a beneficial interest related to the land. It "gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]"".[64]

d. Most recently, in *Annapolis*, a municipal government declined to allow the Plaintiff to develop its lands, which had been designated for possible future use as a park. The Nova Scotia Court of Appeal canvassed the law of *de facto* expropriation, including *Mariner*, *Nilsson* and *CPR*, and concluded that the Plaintiff's claim for *de facto* expropriation did not have a reasonable chance of success.[65] Summary dismissal was awarded.

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[62] *Nilsson* **[Canada's Authorities, Tab 15],** para. 58.
[63] *Nilsson* **[Canada's Authorities, Tab 15]**, para. 61.
[64] *CPR* **[Canada's Authorities, Tab 17],** para. 33.
[65] *Annapolis* **[Canada's Authorities, Tab 19]**, paras. 38-102.

63. A decline in the market (or economic) value of property does not, by itself, satisfy the two part test either. Cromwell JA made this point in *Mariner*, holding that "deprivation of economic value is not a taking"[66]. More recent decisions have reinforced that conclusion as well.[67]

5. The Altius Entities Fail Both Branches of the Two Part Test

a. Acquisition of a Beneficial Interest

64. Canada has not acquired a beneficial interest in the Altius Entities' royalty interest or anything flowing from it. SOR/2018-263 imposes an emissions intensity limit on the Units, none of which the Altius Entities own or control. SOR/2018-263 does not prohibit or restrict coal mining in any respect. At most, the Altius Entities could be indirectly impacted as of 2030.

65. This case is similar in many respects to *Club Pro*, which involved regulations to protect Ontario residents from the health hazards of environmental smoke. While the legislation at issue unquestionably affected the Plaintiffs' DSRs and financial interests, it did not follow that the state had acquired a beneficial interest in the DSRs. The same is true here, where Canada has chosen to regulate electricity generating units for environmental reasons and has not acquired anything for itself, actually or beneficially.

66. Land use regulation cases, such as *Mariner*, *Nilsson*, *CPR* and *Annapolis*, are equally apt and similarly point to the conclusion that Canada has not acquired a beneficial interest here. If the restrictive land use controls employed in those prior cases do not amount to *de facto* expropriation, this case surely misses the mark. SOR/2018-263 imposes an emissions intensity limit and does not prohibit or even restrict coal mining. Canada has not beneficially acquired anything.

67. The Altius Entities try to analogise this case with *Tener*, *Casamiro*[68] and *Rock*[69], and argue that those authorities "determine the case in their favour".[70] However, the Altius Entities ignore

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[66] *Mariner* **[Canada's Authorities, Tab 13]**, paras. 71-72, paras. 80-82 and para. 101.
[67] For example, see *Annapolis* **[Canada's Authorities, Tab 19]**, para. 71(iv).
[68] *Casamiro Resource Corp v British Columbia* (1991), 55 BCLR (2d) 346 (BCCA) [*Casamiro*] **[Canada's Authorities, Tab 23]**.
[69] *Rock Resources Inc v British Columbia*, 2003 BCCA 324 [*Rock*] **[Canada's Authorities, Tab 24]**.
[70] Altius Entities' Brief, para. 106.

critical distinctions that take this case out of the realm of *Tener*, *Casamiro* and *Rock* and undermine their argument in its entirety.

68. The government action in *Tener*, *Casamiro* and *Rock* was specifically targeted at mining companies and directly barred the act of mining. Here, the impact on coal is at most indirect. SOR/2018-263 applies to electricity generating units, not the coal mines that feed those units. The Altius Entities, which hold a royalty interest in coal, are therefore one or even two layers removed from the Plaintiffs in *Tener, Casamiro* and *Rock*, all of whom were directly affected. The Altius Entities have not provided a single authority where an indirect (or trickle down) impact of this nature has resulted in a finding of *de facto* expropriation.

69. The government action in *Tener*, *Casamiro* and *Rock* precluded the mining companies from physically accessing the lands for mining or other purposes. The same is not true here. SOR/2018-263 does not preclude access to the Mine, whether now or as of 2030, and the underlying lands can be put to a large number of potential productive and non-productive purposes, such as agriculture and land leasing.[71] This is not unlike *Mariner*, where the beach lands remained available for use outside the context of development.

70. Finally, in *Tener*, *Casamiro* and *Rock*, the original grantor of the minerals, the regulating authority and the recipient of the "beneficial interest" were one and the same. In this case, however, there is a mismatch. Although Canada is the regulating authority, it neither granted the interest in the coal at first instance nor will anything ever revert to Canada, actually or constructively. This mismatch was significant in *Compliance Coal*, where the Court distinguished between Canada and British Columbia on the basis that it was the province of British Columbia, not Canada, that owned the land in question.[72]

71. The Altius Entities' interpretation and application of *Tener*, *Casamiro* and *Rock* would revolutionise the law of *de facto* expropriation, taking it from a "rare" and "exceptional"

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[71] Lewis Affidavit, Ex. B (pp.21-22) **[AR, Vol. 2, Tab 2]**.

[72] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 [*Compliance Coal*] **[Canada's Authorities, Tab 25]**, paras. 95-96. See also *Rock* **[Canada's Authorities, Tab 24]**, where the Court noted that the Crown in right of the Province generally owns all precious and base metals (para. 58).

cause of action to one that is widely available, including to parties only tangentially affected by government regulations.

b. Removal of All Reasonable Uses

72. The Royalty Interest remains intact and "all reasonable uses" have not and will not be removed. The Altius Entities continue to enjoy the full fruits of their property interest in the form originally intended. While coal-driven revenue could subside as of 2030, the Altius Entities foresaw such an outcome when they made their investment in 2014 and other reasonable uses of the land will still be available.

73. The second branch of the test is rigorous. The Plaintiff must prove that there has been a "confiscation of "…all reasonable private uses of the lands in question."[73] [emphasis]. In other words, "virtually all of the rights associated with the property holder's interest" must have been taken.[74]

74. The question of whether all "reasonable uses" of property have been removed is to be assessed "not only in relation to the land's 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".[75] It is not enough for a property owner to say, without more, that the economic value of the property has declined.[76]

75. The Mine is presently operational[77], the Coal extracted from the Mine is still feeding the Plant[78] and royalties are still accruing to the Altius Entities.[79] Accordingly, it is not the case that SOR/2018-263 has removed *any* reasonable uses of the Royalty Interest at this time.

76. The situation could change in 2030, but this does not mean that *all* reasonable uses of the Altius Entities' property will be removed. Regardless of whether the Royalty Interest is viewed as an

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[73] *Mariner* **[Canada's Authorities, Tab 13]**, para. 48.
[74] *Mariner* **[Canada's Authorities, Tab 13** para. 48.
[75] *CPR* **[Canada's Authorities, Tab 17]**, para. 34.
[76] *Mariner* **[Canada's Authorities, Tab 13],** para. 65, para. 71 & para. 81.
[77] Reply to NA, para. 23(a) **[AR, Vol. 1, Tab 9]**.
[78] Reply to NA, para. 23(d) **[AR, Vol. 1, Tab 9]**.
[79] Reply to NA, para. 23(g) **[AR, Vol. 1, Tab 9]**.

interest in land or a financial instrument, or both, reasonable uses will remain open to the Altius Entities as of 2030.

77. As an interest in land, the Royalty Interest confers the ability to use the land for a wide range of purposes. The Altius Entities focus exclusively on use of the land for coal mining, but ignore other "reasonable uses". As the Altius Entities' own records confirm, the land underlying the Mine has a wide range of productive purposes, including "land leasing, cattle grazing…"[80], and those uses will continue beyond 2030.

78. As a financial instrument, the Royalty Interest is a form of investment and like all forms of investment, is subject to risk. While a positive return is unquestionably the goal of any investor, including the Altius Entities, royalty interests can fail to generate royalties for a variety of reasons. A negative return is obviously less desirable, but it was always within the Altius Entities' contemplation when predicting possible outcomes (or "uses"). Indeed, the public disclosure of the Altius Entities contains the following statements (among others):

a. "the result of [SOR/2012-167] is expected to cause existing power plants to close down";

b. the enactment of new adverse regulations or regulatory requirements was a "significant business risk" that could adversely impact the financial condition of Altius Minerals or any of its royalty interests.

6. Master Farrington Correctly Granted Summary Dismissal

79. Master Farrington was correct to summarily dismiss the Altius Entities' claims against Canada. He properly understood and applied the law of *de facto* expropriation to a settled factual matrix and he reached the only conclusion possibly available to him: "the environmental regulation by Canada was not a taking".[81]

80. Master Farrington correctly identified the two part test for *de facto* expropriation[82] and he examined several leading cases to breathe meaning into each branch of the two part test.[83]

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[80] Lewis Affidavit, Ex. B (pp.21-22) **[AR, Vol. 2, Tab 2]**.
[81] Memorandum of Decision, para. 47 **[AR, Vol. 1, Tab 22]**.
[82] Memorandum of Decision, para. 27 **[AR, Vol. 1, Tab 22]**.
[83] Memorandum of Decision, paras. 27-34, paras. 41-42 **[AR, Vol. 1, Tab 22]**.

He specifically applied focus on *Tener*, as the Altius Entities had encouraged him to do, and he properly construed and distinguished that decision. Master Farrington wrote:

> While *Tener* is often cited for being a "taking" case without actual surrender of the mineral rights …, there are also non-derogation from the original mineral grant concepts that affected the result.
>
> While the coal itself is not actually "taken" here, the ability to develop and exploit the coal is arguably taken (albeit indirectly by making its valueless). Of additional note in *Tener* is that it distinguishes a taking from the ordinary injurious affection effects that result from land use regulation and zoning. That turns out to be an important distinction in some of the cases.

81. Master Farrington also drew a reasonable parallel between the environmental regulations in this case and the land use regulations in cases such as *Mariner* and *Nilsson*, noting that "the protections to environmental regulation that may eventually develop in the area from a common law perspective will likely be at least equal to those provided to land development regulation".[84]

82. Against the backdrop of his well developed understanding of the law, Master Farrington applied focus on the facts, none of which he misstated, and reached a correct conclusion on the law. Significantly, he found that "Canada did not acquire a beneficial interest in the coal or the royalty interest. Canada regulated the end user… That does not create a cause of action for others who were not compensated".[85]

83. Master Farrington also considered the "bigger picture", noting that the "law cannot be that a regulator purporting to regulate in the interests of public health and environmental preservation must pay the creator of a health or environmental hazard to stop pollution".[86] This proposition is sound and all the more so on the facts of this case, where the Altius Entities made their investment knowing entirely the risks that they were assuming.[87]

84. In their brief, the Altius Entities attribute several "errors" to Master Farrington. With respect, these complaints are without merit and do not fairly or accurately represent the decision. In particular:

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[84] Memorandum of Decision, para. 44 **[AR, Vol. 1, Tab 22]**.
[85] Memorandum of Decision, para. 40 **[AR, Vol. 1, Tab 22]**.
[86] Memorandum of Decision, para. 45 **[AR, Vol. 1, Tab 22]**.
[87] Memorandum of Decision, para. 38 and para. 45 **[AR, Vol. 1, Tab 22]**.

a. For the reasons noted above, *Tener*, *Casamiro* and *Rock* are all distinguishable;

b. The Altius Entities entered this industry in 2014 "knowing that emissions regulation is part of the landscape" and cannot therefore claim "surprise" with a change in emissions regulations. Some of the transaction documents speak directly to federal regulations[88] and the Altius Entities openly spoke to their shareholders about the risk of "new adverse regulations or regulatory requirements";[89]

c. The Altius Entities' legal position is predicated on their stated "expectation" that SOR/2012-167 would remain static for decades. This "expectation" is not only unsupported factually[90], but implicitly seeks, as Master Farrington found, to "make Canada … the guarantor of their business transaction and assure the opportunity to provide fifty years of coal" [91];

d. It is not controversial to say that government is entitled to regulate "in the interests of public health and environmental preservation".[92] The Altius Entities claim not to be "polluters", but simultaneously assert an interest in thermal coal that they themselves maintain can only be used for pollution-causing electricity generation. The Altius Entities cannot have it both ways.

7. The Altius Entities Otherwise Seek to Rewrite the Law

85. The Altius Entities conclude their brief with two alternative propositions. They first assert that the accrual of societal benefits is enough to satisfy the "beneficial interest" requirement under the two part test.[93] They further propose to remove the "beneficial interest" requirement altogether, collapsing the two part test into a single element and making *de facto* expropriation far easier to prove.[94]

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[88] Lewis Affidavit, Ex. K **[AR, Vol. 2, Tab 2]**.
[89] Reply to NA, paras. 13-14 **[AR, Vol. 1, Tab 9]**.
[90] The Altius Entities point to select portions of the Dedication Agreement, but fail to mention their own public disclosure demonstrating awareness of the risk of future regulatory change.
[91] Memorandum of Decision, para. 38 **[AR, Vol. 1, Tab 22]**.
[92] Memorandum of Decision, para. 45 **[AR, Vol. 1, Tab 22]**.
[93] Altius Entities' Brief, paras. 128-154.
[94] Altius Entities Brief, paras. 155-191.

86. With respect, the Altius Entities' alternative propositions are untenable at law and tacitly recognize that the facts of this case do not fit within the parameters of the two part test as it is actually understood and applied by Courts.

a. Societal Benefits

87. The Altius Entities are incorrect that "a general or intangible benefit accruing to the state or public suffices". This contention misconstrues *Tener* and the cases that have followed.

88. The Altius Entities rest their argument on *Tener*, where Estey J made passing reference to the fact that the Crown's actions had "enhanced" the value of the provincial park.[95] However, upon closer inspection, it is clear this was not the basis for the Supreme Court's decision. Rather, as noted earlier, the Supreme Court was driven to conclude as it did in *Tener* by the fact that the Crown had acquired for itself the very asset that had been surrendered.[96]

89. Subsequent cases confirm this interpretation of *Tener*. For instance, in *Mariner*, Cromwell JA urged a contextual reading of Estey J's comments in *Tener*. He wrote:

> The respondents place great weight on comments of Estey J in *Tener* to the effect that the action taken by the government was to enhance the value of the park. These comments, while on their face supportive of the respondents' position, must be read in the context of Estey J's statements in the case that an expropriation necessarily involves the acquisition of land and that the extinguishment of the Teners' mineral rights constituted, in effect, the re-acquisition of such rights by the Crown. I do not think, with respect, that his statements to the effect that the re-acquisition enhanced the value of the park takes away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition…[97]

90. *Club Pro* aptly demonstrates that societal benefits do not satisfy the "beneficial interest" requirement. In that case, the Plaintiff suggested that the elimination of DSRs created a

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[95] *Tener* **[Canada's Authorities, Tab 22]**, para. 21.
[96] In *Tener* **[Canada's Authorities, Tab 22]**, the Crown re-acquired the Respondent's mineral claims.
[97] *Mariner* **[Canada's Authorities, Tab 13],** para. 95. See also *BJ Games Inc. v Ontario*, 2007 CanLii 3483 (Ont SCJ) **[Canada's Authorities, Tab 26]**, where Frank J stated: "While it was acknowledged in *Tener* that the Crown's taking of the mineral interests had the result of adding value to the Crown park, that was not the basis for the finding that there was an acquisition by the Crown." (para. 34)

public benefit, presumably in the nature of cleaner air, and argued (as the Altius Entities do here) that this satisfied the "beneficial interest" requirement. Spies J rejected this argument:

> It is too far fetched to suggest that the public gets a benefit from the elimination of DSRs such that there has been a "taking" by the province.[98]

91. *CPR* also provides assistance on this issue. In that case, the Supreme Court of Canada held: "The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]"".[99] Phrased differently, the benefits associated with the creation of a non-commercialised right-of-way did not pass the applicable test.

92. Notwithstanding the clarity of the law on this issue, the Altius Entities argue that two recent cases stand for the contrary proposition.[100] However, a closer examination of those cases shows that the proposition is in error.

93. *Kalmring v Alberta*[101] involved a government decision to move from private driver examinations to government driver examinations, thereby putting private driver examiners out of business. A group of private driver examiners claimed for *de facto* expropriation and the government applied to strike out that claim. Master Mason correctly cited the two part test for *de facto* expropriation[102] and drew an analogy to *Manitoba Fisheries* where goodwill was taken[103]. Based on this analogy, Master Mason declined to strike the claim.

94. While Master Mason does refer to the acquisition of "an intangible benefit"[104], that statement must be put in context. Master Mason rested her analysis on *Manitoba Fisheries* and the reference to "an intangible benefit" must therefore be in reference to the acquisition of goodwill. She does not say anywhere that societal benefits, writ large, can satisfy the "beneficial interest" requirement.

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[98] *Club Pro* **[Canada's Authorities, Tab 18]**, para. 82.
[99] *CPR* **[Canada's Authorities, Tab 17],** para. 33.
[100] Altius Entities' Brief, paras. 128-138.
[101] *Kalmring v Alberta*, 2020 ABQB 81 [*Kalmring*] **[Canada's Authorities, Tab 27]**.
[102] *Kalmring* **[Canada's Authorities, Tab 27]**, para. 68.
[103] *Kalmring* **[Canada's Authorities, Tab 27]**, paras. 70-82.
[104] *Kalmring* **[Canada's Authorities, Tab 27]**, para. 75.

95. The second case cited by the Altius Entities, *Compliance Coal*, is entirely unhelpful to their position. The provincial government in that case rejected a certificate for a subsurface coal mining project on environmental grounds. The project proponent initiated a claim for *de facto* expropriation against the provincial government and Canada, and was met with a strike out application.

96. The project proponent first argued that the defendants "imposed such burdens on its property by their actions … as to deprive … its interest in the property".[105] The Court rejected this argument, finding that nothing had been taken. Guided by *Manitoba Fisheries*, *Tener* and *Casamiro*, the Court recognised that the government must acquire "a property interest in the property or flowing from it" and concluded that this standard had not been met[106] While the Court referred in the same sentence to the acquisition of an "identifiable benefit to the government", that statement must be understood in the broader context in which it appears.

97. The project proponent also argued that the defendants had benefitted by no longer having to "face criticism regarding coal mines". While the Court did not disagree that the defendants had benefitted in this way, it found that "this supposed benefit is … not part of any property gained by BC or Canada".[107] This finding dispels any lingering confusion as to what the Court meant by an "identifiable benefit to the government" and clearly demonstrates that societal benefits, writ large, do not pass the test.

b. Removal of "Beneficial Interest" Requirement

98. The Altius Entities' second proposition that the "beneficial interest" requirement should be removed altogether is even more astounding. It ignores binding Supreme Court of Canada case authority and rests almost entirely on speculation as to what the Supreme Court of Canada might do in the future.

99. The test for *de facto* expropriation has two parts, one of which requires the "acquisition of a beneficial interest in property or flowing from it". The law is clear on this point and is reinforced

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[105] *Compliance Coal* **[Canada's Authorities, Tab 25]**, para. 88.
[106] *Compliance Coal* **[Canada's Authorities, Tab 25]**, para. 93.
[107] *Compliance Coal* **[Canada's Authorities, Tab 25]**, para. 95.

by binding Supreme Court of Canada jurisprudence from 2006.[108] While the Altius Entities may "advocate"[109] for an entirely different and more relaxed test, they cannot change the law as it exists today.

100. The Altius Entities suggest that *Tener*, *Casamiro*, *Rock* and *Nillson* "all state or lead to the conclusion that a taking does not require a beneficial or other property interest flow to the public authority". All of these cases predate *CPR*. In any event, the Altius Entities have misconstrued these cases:

a. In *Tener*, Estey J noted that "the denial of access to these lands … amounts to a recovery by the Crown of the right granted to the respondents in 1937".[110] Wilson J concurred, writing that there was a "derogation by the Crown from its grant of the mineral claims"[111];

b. *Casamiro* and *Rock* were decided by analogy to *Tener*. In *Rock*, the British Columbia Court of Appeal specifically cited Estey J in *Tener* for the proposition that the Crown had "taken" the right granted[112]; and

c. While *Nilsson* does not articulate a test one way or another, it cites *Mariner* with approval[113] and that case is the modern foundation of the two part test adopted in *CPR*.[114]

101. The Altius Entities also argue that "three recent cases suggest a taking may occur without the Crown acquiring any rights in the property at issue".[115] For the reasons stated earlier, *Kalmring* and *Compliance Coal* say no such thing. The third case – *Lorraine (Ville) c 2646-8926 Quebec Inc*[116] – makes passing reference to *de facto* expropriation in *obiter*.[117] However, as explained earlier this year by the Nova Scotia Court of Appeal in *Annapolis*, nothing in *Lorraine* changes the two part test:

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[108] *CPR* **[Canada's Authorities, Tab 17]**, para. 30.
[109] Altius Entities' Brief, para. 180.
[110] *Tener* **[Canada's Authorities, Tab 22]**, para. 20.
[111] *Tener* **[Canada's Authorities, Tab 22]**, para. 68.
[112] *Rock* **[Canada's Authorities, Tab 24]**, para. 53.
[113] *Nilsson* **[Canada's Authorities, Tab 15]**, para. 57.
[114] *Mariner* **[Canada's Authorities, Tab 13]**, para. 50. *CPR* **[Canada's Authorities, Tab 17]**, para. 30.
[115] Altius Entities' Brief, para. 184.
[116] *Lorraine (Ville) c 2646-8926 Quebec*, 2018 SCC 35 [*Lorraine*] **[Altius Entities' Authorities, Tab 28]**
[117] *Lorraine* **[Altius Entities' Authorities, Tab 28]**, para. 27.

> With respect, *Lorraine (Ville)* does not expand the well-settled criteria for establishing *de facto* expropriation.[118]

102. The Altius Entities proceed to note that the Supreme Court of Canada has granted leave to appeal in *Annapolis* and seem to imply that the Court will consider and decide this issue in their favour.[119] To support this implication, the Altius Entities point to a 2007 academic article authored by Russell Brown (now of the Supreme Court of Canada) in which he argued for the removal of the "beneficial interest" requirement.[120]

103. Speculation about what the Supreme Court of Canada might do in the future is not a proper basis for legal decision-making. As noted earlier, "Trial courts can only decide cases based on the existing state of the law and not in anticipation of what appellate courts may do to change the law".[121]

104. The Brown article indicates the views of one person at a single point in time. Those views may have evolved or they may not reflect the majority of the Supreme Court of Canada. Speculation in this regard will not help this Honourable Court in deciding this case based on the two part test articulated in *CPR*.

C. Canada's Cross-Appeal - Amendments and Striking Out

105. Master Farrington erred in allowing the Altius Entities to amend their Statement of Claim and he further erred in declining to strike out the Statement of Claim against Canada. Accordingly, if the Altius Entities' appeal is allowed, this Honourable Court should proceed to consider and allow Canada's cross-appeal.

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[118] *Annapolis* **[Canada's Authorities, Tab 19]**, para. 82.
[119] Altius Entities' Brief, para. 190.
[120] Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC Law Review **[Altius Entities' Authorities, Tab 9]**.
[121] *Reddock* **[Canada's Authorities, Tab 20],** para. 16.

1. Amendments

a. Relevant Context

106. On November 25, 2020, the Altius Entities applied for leave to file an Amended Amended Statement of Claim. Canada consented to most of the application, but objected to two of the proposed amendments:

a. Paragraph 40 – "The Defendants' actions as aforesaid have resulted in a grave loss of value of Genesee LP's interests, financial benefits to the Defendants, and health and environmental benefits to the Alberta and Canadian public"; and

b. Paragraph 44(a) – The Plaintiffs claim … 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

(collectively, the "Disputed Amendments").

107. Master Farrington heard argument regarding the Disputed Amendments on December 11, 2020. During the course of argument, Master Farrington abruptly decided to allow all of the Disputed Amendments. He said:

> I'm allowing all of the amendments. I think our time is better served with reply on the overall application rather than spending further time debating the amendments.[122]

108. Master Farrington's Memorandum of Decision confirms that the Disputed Amendments were allowed, but does not amplify the reasoning behind that decision.[123] This is insufficient[124] and justifies greater scrutiny of the Disputed Amenments.

b. Test for Amendments

109. Rule 3.65 stipulates that the Court "may" give permission to amend a pleading.

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[122] Transcript of Proceedings before Master Farrington dated December 11, 2020, p.24, l.25-38 **[AR, Vol. 1, Tab 21]**.
[123] Memorandum of Decision, para. 1 **[AR, Vol. 1, Tab 22]**.
[124] *University of Alberta v Chang*, 2012 ABCA 324 **[Canada's Authorities, Tab 28]**, paras. 18-24.

110. The Court will refuse to permit "hopeless" amendments.[125] Amendments are "hopeless" where the claim would be strikable or the evidentiary foundation is insufficient.[126]

111. There must be a modest degree of evidence to support a proposed amendment.[127]

c. Disputed Amendment – Paragraph 40

112. Paragraph 40 of the Amended Amended Statement of Claim should have been refused for want of evidence and hopelessness.

113. There is no evidence that Canada will receive any "financial benefits" from SOR/2018-263. The Altius Entities point to an opening statement in the Regulatory Impact Analysis Statement ("RIAS") that the "total expected benefit [of SOR/2018-263] will be $4.7 billion"[128] and they seem to infer that the government will receive "financial benefits" in the same amount. However, a closer review of the RIAS as a whole demonstrates that the "benefit" in question will accrue to society as a whole, not to the government. $3.4 billion in "benefits" relate to avoided global climate change damage due to rising sea levels and erosion and $1.3 billion in "benefits" relate to improved air quality from reduced air pollutants.[129]

114. As previously stated and reinforced by existing case law, societal benefits, writ large, do not satisfy the "beneficial interest" requirement for *de facto* expropriation. As such, the allegation that SOR/2018-263 will cause "health and environmental benefits to the Alberta and Canadian public" is hopeless at law.

d. Disputed Amendment – Paragraph 44(a)

115. Paragraph 44(a) of the Amended Amended Statement of Claim should also have been refused for hopelessness.

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[125] *AARC Society v Canadian Broadcasting Corp*, 2019 ABCA 125 **[Canada's Authorities, Tab 29]**, para. 65.
[126] *Carbone v Burnett*, 2019 ABQB 98 **[Canada's Authorities, Tab 30]**, para. 38.
[127] *Attila Dogan Construction & Installation Co v AMEC Americas Ltd*, 2014 ABCA 74 **[Canada's Authorities, Tab 31]**, para. 26.
[128] Lewis Affidavit, Ex. HH **[AR, Vol. 2, Tab 2]**, p.5.
[129] Lewis Affidavit, Ex. HH **[AR, Vol. 2, Tab 2]**, pp. 18-23. While "health benefits" are anticipated, the RIAS is clear that the $1.3 billion figure relates to increased quality of life and decreased mortality, not health care savings.

116. *De facto* expropriation is a cause of action remunerable in damages; it is not a matter for declaratory relief.[130] Paragraph 44(a) of the Amended Amended Statement of Claim has no place in a claim such as this.

117. The future-oriented declaration sought by the Altius Entities is also unsupported by case law. For example, in *Anderson v Canada*[131], the applicants challenged the constitutionality of Canada's 2018 summer jobs program and also sought a declaration that the 2019 program would be unconstitutional. Tilleman J struck out the future-oriented declaration for the following reason:

> In short, when a court must assume that the legal regime in place at some future date is the same as that currently in operation, a court will not pronounce on the legal status of this "hypothetical future event".[132]

118. Hall J has also expressed reluctance to pronounce on a "hypothetical future event".[133] Guided by Supreme Court of Canada authority, he set out a stringent five part test that an applicant must meet for the Court to award declaratory relief of this nature, including:

- The dispute must be real and not theoretical; and
- The declaration will have practical utility (i.e., will settle a "live controversy").[134]

119. A dispute is theoretical when "'the dispute has yet to arise or may not arise', where the dispute is 'merely possible or remote' or where the dispute is contingent on 'some future event which may never take place'".[135]

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[130] *United Pentecostal Church of Nova Scotia v Nova Scotia Power Inc*, 2020 NSSC 286 **[Canada's Authorities, Tab 32]**, paras. 13-14.
[131] *Anderson v Canada*, 2018 ABQB 839 [*Anderson*] **[Canada's Authorities, Tab 33]**.
[132] *Anderson* **[Canada's Authorities, Tab 33]**, para. 12.
[133] *British Columbia v Alberta*, 2019 ABQB 121 [*British Columbia*] **[Canada's Authorities, Tab 34]**.
[134] *British Columbia* **[Canada's Authorities, Tab 34]**, paras. 17-18.
[135] *British Columbia* **[Canada's Authorities, Tab 34]**, para. 12.

120. A declaration will have practical utility when the plaintiff (or applicant) can "leave the court in peace and enjoy the benefits of the declaration without further resort to the judicial process".[136] This is not possible where damages are claimed.[137]

121. Based on the example of *Anderson* and the factors identified by Hall J in *British Columbia*, the future-oriented declaration sought by the Altius Entities is a hopeless attempt to plead around Canada's application to strike out the claim for prematurity. The declaration is predicated on the assumption that SOR/2018-263 will remain in the exact same form nine years from now. This assumption is contrary to the fact, acknowledged by the Altius Entities, that regulations are not static and is therefore improper for declaratory relief. The declaration will not have practical utility either; the Altius Entities claim damages and will still require further resort to the judicial process even if declaratory relief were to issue.

2. Striking Out

a. Applicable Law

122. Rule 3.68 of the *Rules of Court* allows the Court to strike out all or any part of a claim. It states:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out…
>
> (2) The conditions for the order are one or more of the following:
>
> …
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim …

123. The basic test for striking out pleadings is whether the pleadings disclose a "reasonable cause of action" or there is "reasonable prospect of success".[138]

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[136] *Yellowbird v Samson Cree Nation No 444*, 2008 ABCA 270 **[Canada's Authorities, Tab 35]**, paras. 45-47. Cited with approval in *Joarcam LLC v Plains Midstream Canada ULC*, 2013 ABCA 118 **[Canada's Authorities, Tab 36]**, para. 7.

[137] *Alberta Municipal Retired Police Officers Mutual Benefit Society v Alberta*, 2010 ABQB 458 **[Canada's Authorities, Tab 37]**, paras. 101-102.

[138] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*] **[Canada's Authorities, Tab 38]**, para. 17. *Al-Ghamdi v Alberta*, 2017 ABQB 684 [*Al-Ghamdi*] **[Canada's Authorities, Tab 39],** para. 104; aff'd 2020 ABCA 81.

124. In determining whether a pleading discloses a "reasonable cause of action" or has a "reasonable prospect of success", the Court may have regard to many factors. In *O'Connor Associates Environmental Inc. v MEC OP LLC*[139], the Alberta Court of Appeal noted:

> … many factors must be examined. The clarity of the factual pleadings is important. The existence of case law discussing the same or similar causes of action is relevant. As noted in *Imperial Tobacco*, the courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success…[140]

125. The Court's analysis will be guided by four basic parameters:

a. The facts pleaded are assumed to be true, unless they are manifestly incapable of being proven;

b. No evidence is admissible on the application;

c. The claimant must clearly plead the facts upon which it relies in making its claim, and cannot rely on the possibility that new facts may turn up as the case progresses; and

d. The claimant need not prove the facts pleaded at the time of the motion. However:

> … plead them [the claimant] must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.[141]

b. Prematurity

126. An action is premature and should be struck out as a nullity when there is no present cause of action.

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[139] *O'Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140 [*O'Connor*] **[Canada's Authorities, Tab 40].**

[140] *O'Connor* **[Canada's Authorities, Tab 40]**, para. 16.

[141] *Imperial Tobacco* **[Canada's Authorities, Tab 38]**, para. 22. *Al-Ghamdi* **[Canada's Authorities, Tab 39]**, para. 107.

127. In *Gevaert v Arbuckle*[142], the Court confirmed that a cause of action must presently exist. It said:

> A valid Statement of Claim must disclose a presently existing, legally recognized claim against the Defendant. It must say: ' I, Plaintiff, *have* a claim against you, Defendant.' What the Stateent of Claim says in this proceeding, however, is this: 'I, Plaintiff, *may have* a claim against you, Defendant…" This discloses no cause of action, but only the possibility of a cause of action accruing in the future.[143]

128. The British Columbia Expropriation Compensation Board has reached the same conclusion, holding that "an originating process or application is a nullity when there is no cause of action or enforceable right in existence at the time of filing".[144]

c. Prematurity and *De Facto* Expropriation

129. A claim for *de facto* expropriation does not arise until both elements of the cause of action have occurred.[145] The two part test for *de facto* expropriation is always framed in the present tense[146] and all prior cases have involved legislation and regulations that was immediately applicable.

130. *Tener* illustrates the distinction between a premature and present cause of action for *de facto* expropriation. In 1973, the provincial park in question was redesignated to preclude all mining unless the the Minister granted an exemption permit. The mining company applied for such a permit and was denied in 1978. Writing for the majority, Estey J found that the 1973 redesignation of the provincial park was a conditional decision predicated on a future event (i.e., the Minister's decision). *De facto* expropriation did not occur until 1978 when the Minister decided, thereby making the amendments "operative".[147]

131. *Mariner* is also revealing. In that case, Cromwell JA held that 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".[148] [*emphasis in original*]

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[142] *Gevaert v Arbuckle*, [1998] OJ No 3248 (Ont SCJ) [*Gevaert*] **[Canada's Authorities, Tab 41]**.
[143] Gevaert **[Canada's Authorities, Tab 41]**, para. 18.
[144] *Toole v British Columbia* (1996), 59 LCR 43 (BC ECB) **[Canada's Authorities, Tab 42]**, para. 11.
[145] The two elements are: 1) the acquisition of a beneficial interest in the property or flowing from it; and 2) the removal of all reasonable uses of the property.
[146] For example, see *CPR* **[Canada's Authorities, Tab 17]**, para. 30; *Kalmring* **[Canada's Authorities, Tab 27]**, para. 68; *BJ Games* **[Canada's Authorities, Tab 26]**, para. 25.
[147] *Tener* **[Canada's Authorities, Tab 22]**, para. 20.
[148] *Mariner* **[Canada's Authorities, Tab 13]**, paras. 51-52**.**

d. This Action is Premature

132. The Altius Entities' claim for *de facto* expropriation is premised on a set of facts that have not yet occurred. The claim is therefore premature and cannot proceed at this time; it should be struck out.

133. Both elements are presently missing in this case. Canada has not acquired anything and the royalty interest, while subject to a partial impairment[149], continues to hold value.[150] Quite simply, the Mine is still operational[151], the Coal extracted from the Mine is still feeding the Plant[152] and royalties are still accruing to the Altius Entities.

e. Master Farrington Erred

134. Despite the settled nature of the law on prematurity and a clear factual matrix showing that the two part test for *de facto* expropriation cannot be satisfied at this time, Master Farrington found that this claim was not premature and declined to strike it out. He distinguished *British Columbia*, which was was relied upon by Canada for the test it cites and not for its facts, and he seemed to think that he should not inconvenience the Altius Entities by making them wait nine more years. He wrote:

> In my view, parties who are affected by the regulation who feel aggrieved are entitled to an answer now as to whether the regulation amounts to a "taking" or not. I am satisfied that the action is not premature. It serves no useful purpose for anyone to wait until 2030 to commence litigation, as was suggested by Canada and Alberta in their argument. Present rights are affected. At the very least, the present value of the plaintiffs' future royalty stream is clearly affected in ways that can be adjudicated upon (with the possible assistance of expert evidence).[153]

135. With respect, the law of prematurity and the evidence in this case surrounding the extant nature of the Altius Entities' rights do not support this decision.

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[149] Reply to NA, paras. 19-22 **[AR, Vol. 1, Tab 9]**.
[150] Lewis Affidavit, para. 59 & Ex. NN **[AR, Vol. 2, Tab 2]**.
[151] Reply to NA, para. 23(a) **[AR, Vol. 1, Tab 9]**.
[152] Reply to NA, para. 23(d) **[AR, Vol. 1, Tab 9]**.
[153] Memorandum of Decision, para. 25.

VII. CONCLUSION

136. Master Farrington's decision to summarily dismiss this action against Canada was correct and his decision should be upheld on appeal.

137. Alternatively, the cross-appeal should be allowed. Master Farrington erred in allowing the Disputed Amendments and he compounded this error by declining to strike out the Amended Statement of Claim for prematurity.

138. Canada respectfully asks this Honourable Court to award costs in its favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF OCTOBER, 2021.

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13. *Mariner Real Estate Ltd.* v *Nova Scotia (Attorney General)*, 1999 NSCA 98
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19. *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3
20. *Reddock v Canada (Attorney General)*, 2019 ONSC 3196
21. *Manitoba Fisheries Ltd.* v *The Queen,* [1979] 1 SCR 101 (SCC)
22. *R v Tener*, [1985] 1 SCR 533 (SCC)
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27. *Kalmring v Alberta*, 2020 ABQB 81
28. *University of Alberta v Chang*, 2012 ABCA 324

29. *AARC Society v Canadian Broadcasting Corp*, 2019 ABCA 125
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