JUDICIAL CENTRE OF CALGARY
FILED
APR 8, 2022
CLERK OF THE COURT

Court of Queen's Bench of Alberta

Citation: Altius Royalty Corporation v Her Majesty the Queen in Right of Alberta, 2022 ABQB 255

Date:
Docket: 1801 16746
Registry: Calgary

Between:

Altius Royalty Corporation, Genesee Royalty Limited Partnership and Genesee Royalty GP Inc.

Appellants/Counter-Respondents/Plaintiffs

- and -

Her Majesty the Queen in Right of Alberta and Attorney General of Canada

Respondents/Counter-Appellants/Defendants

Reasons for Decision of the Honourable Justice J.C. Price

I. Introduction

[1] This is an appeal and cross-appeal of Master J.R. Farrington's decision reported at: ***Altius Royalty Corporation v Alberta***, 2021 ABQB 3 ("***Altius***").

[2] Altius Royalty Corporation, Genesee Royalty Limited Partnership and Genesee Royalty GP Inc. (collectively, the "Plaintiffs") have a royalty interest in coal produced from the Genesee Coal Mine (the "Mine") located approximately 70 kilometers southwest of Edmonton, Alberta. The coal from the Mine has since its inception been dedicated to fueling the nearby Genesee Power Plant (the "Plant"). The Plant generates coal-fired electricity for the City of Edmonton and elsewhere. The Government of Canada has instituted regulations prohibiting coal-fired electrical generation by 2030. The owners of the Plant entered into an agreement with the Defendant, Her Majesty the Queen in Right of Alberta, to cease coal-fired emissions from the Plant by December 31, 2030. The result of this is that the Plaintiffs will no longer receive royalty payments from the supply of coal for use at the Plant after that date.

[3] The Plaintiffs say that, by virtue of the above, Her Majesty the Queen in Right of Alberta and the Attorney General of Canada (hereinafter referred to as "Alberta" and "Canada" and collectively as the "Defendants") have rendered their royalty interest in the coal at the Mine of no value.

[4] The Plaintiffs say that the Defendants' actions have "shuttered the Mine and have locked the coal in the ground, thereby sterilizing the Plaintiffs' royalty interest in the coal of all use and value". They seek compensation for the lost use and value of that royalty interest in the approximate amount of $190M. They also seek a declaration that their property, namely the royalty interest in the coal, has been or will be *de facto* expropriated.

[5] The Defendants applied to strike the Plaintiffs' Amended Statement of Claim or, in the alternative, to have the Plaintiffs' action summarily dismissed. Prior to the hearing of those applications before the Master, a procedural order was filed granting the Plaintiffs leave to file a cross-application to amend their pleading and directing that application to be heard at the same time as the Defendants' applications.

[6] Master Farrington heard the matter in December 2020. He concluded at the hearing that the Plaintiffs' amendments to withdraw two causes of action and to clarify the one remaining were appropriate. Therefore, he allowed all of the Plaintiffs' proposed amendments. Subsequently, he issued the written memorandum of decision in ***Altius***. Therein, he gave brief reasons for allowing the amendments and dismissing the Defendants' application to strike. He also set out his reasons for granting the Defendants' application for summary dismissal of the Plaintiffs' claim for *de facto* expropriation.

[7] The Plaintiffs appeal the decision to grant summary dismissal. The Defendants cross-appeal the Master's decision to allow the amendments and to dismiss the application to strike.

[8] The issues that I must decide in this appeal and cross-appeal are:

(a) Whether the Master erred in granting summary dismissal of the Plaintiffs' claim for *de facto* expropriation;

(b) Whether the Master erred in allowing the amendments to the Plaintiffs' pleading; and

(c) Whether the Master erred in refusing to strike the Plaintiffs' pleading.

[9] For reasons that follow, I dismiss the appeal and the cross-appeals.

II. Standard of Review

[10] The parties agree that the standard of review on an appeal of a master's decision is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 12.

[11] Rule 6.14 of the Alberta *Rules of Court,* AR 124/2010, as amended, governs appeals from a master's decision. That rule provides that the appeal is on the record, but may include additional

relevant and material evidence. In this case, no additional evidence was filed, so the record before me is the same as that before the Master.

[12] Where an appeal from a master's decision involves the same record and the same submissions, the judge hearing the appeal may frame their reasons with reference to the master's decision where they agree: ***HOOPP Realty Inc v Emery Jamieson LLP***, 2020 ABCA 159 at para 41; ***Bahadar v Real Estate Council of Alberta***, 2021 ABQB 395 at paras 12-15.

III. Background Facts

[13] From my review of the record, I find that the Master accurately set out the relevant facts in his decision. Therefore, I restate the facts as set out by the Master and add as I think necessary.

[14] The Plaintiffs allege that actions of Canada and Alberta amounted to a constructive expropriation or "taking" of their royalty interest in the coal from the Mine that supplies the Plant.

[15] The Plant is owned and operated by Capital Power LP ("Capital Power"). The Plant consists of three different units (G1, G2 and G3). They were commissioned in 1989 (G1), 1994 (G2) and 2005 (G3).

[16] In 2012, the federal government of the time adopted the Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations, SOR/2012-167 (the "2012 Regulation"). Section 3(1) of the 2012 Regulation provided:

> 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 CO2 emissions from the combustion of fossil fuels in the unit for each GWh of electricity produced by the unit during a calendar year.

[17] The units at the Plant were neither "new units" or "old units" within the meaning of the *2012 Regulation*, so they were not bound by the new standard.

[18] Under the *2012 Regulation,* the units would be deemed to end their useful life in 2039 (G1), 2044 (G2) and 2055 (G3), respectively. An underlying premise of the Plaintiffs' action is that because the *2012 Regulation* permitted the units to operate as they were from an emissions perspective for 50 years from their commissioning dates, a reduction in that ability entitles the Plaintiffs to compensation.

[19] In 2014, the Plaintiffs were involved in a complex corporate arrangement affecting the coal royalty that forms the basis for this dispute. The Plaintiffs, specifically Genesee Royalty Limited Partnership ("Genesee LP"), hold a 9% royalty in the coal produced from the Mine and supplied for use by the Plant.

[20] The Plaintiffs are related as follows: the general partner of Genesee LP is Genesee Royalty GP Inc. ("Genesee GP") and Altius Royalty Corporation ("Altius Royalty") is the 100% voting shareholder of Genesee GP. Altius Minerals Corporation, a non-party to the action, owns 100% of

the voting shares of Altius Royalty and is a public company that trades on the Toronto Stock Exchange.

[21] The Mine is jointly operated by Capital Power and Prairie Mines & Royalty Ltd. ("PMRL"). It supplies geothermal coal solely to the Plant. This dedication of the coal to the Plant is set out in the Second Amended and Restated Genesee Coal Mine Dedication and Unitization Agreement made April 24, 2014 (the "Dedication Agreement"). Genesee LP is a party to the Dedication Agreement and is identified therein as the Royalty Owner. Other parties to the Dedication Agreement include Capital Power and PMRL.

[22] The Dedication Agreement states in part:

> 7.1 Term
>
> ...This Second Amended and Restated Dedication and Unitization Agreement shall be effective immediately after the closing of the Arrangement Agreement Transactions and shall continue in effect until all Recoverable Coal Reserves have been mined, or the Genesee Power Plant is permanently decommissioned or as terminated pursuant to this Agreement.
>
> 8.1 Termination of Agreement
>
> 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.
>
> [Emphasis added.]

[23] The term "Royalty Interest" is defined in the Dedication Agreement as:

> ...the rights, obligations and liabilities of the Royalty Owner pursuant to the Genesee Royalty Agreement dated April 24, 2014 between New PMRL and Genesee Royalty Limited Partnership, as amended, restated, supplemented or replaced from time to time, evidencing the legal and beneficial interest of the Royalty Owner in the PMRL Coal Rights;

[24] "PMRL Coal Rights" is defined in the Dedication agreement as:

> ...the Coal Rights of PMRL set forth in Part II of Schedule "A" as at the date of this Agreement;

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

[26] Concurrent with the corporate arrangement, Altius Minerals Corporation released financial disclosure documentation for its investors. In a prospectus released concurrent with the 2014 transaction, it stated 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 added.]

[27] In subsequent financial reporting Altius Minerals Corporation stated:

> 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.
>
> [Emphasis added.]

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

[29] On November 24, 2016, as part of the implementation of the Climate Leadership Plan, Alberta entered into an off-coal agreement with, among others, Capital Power (the "Off-Coal Agreement"). Under the Off-Coal Agreement, Capital Power agreed to end emission from coal-fired electricity generation by 2030 and Alberta agreed in return to pay certain transition payments.

[30] In 2016, with the Paris Agreement on climate change newly signed, a new federal government gave notice that it intended to pass further regulations pertaining to coal-fired emissions.

[31] The new regulation came into force in 2018 (SOR/2018-263) (the "*2018 Regulation*"). It affected existing plants such as the Plant and required that they meet the new emissions standard by December 31, 2029. Both the *2018 Regulation* and its predecessor the *2012 Regulation* are directed specifically at the coal-fired plants that create C02 emissions, rather than the coal mining operations themselves. The effects upon thermal coal mines are collateral.

[32] The Plaintiffs assert that, based on the *2012 Regulation*, they had counted upon the royalty stream being available to 2039, 2044 and 2055 in relation to the three units (G1, G2 and G3) at the Plant. They allege that the *2018 Regulation* amounts to a constructive expropriation or "taking" by Canada of its royalty interest in the coal after 2030. They also allege that Alberta engaged in conduct, such as entering into the Off-Coal Agreement, that compensates the Plant owners, but excludes the Plaintiffs. None of the Plaintiffs is a party to the Off-Coal Agreement.

[33] For purposes of the applications before the Master and the appeals before me, Canada and Alberta agreed not to argue that the subject coal can be put to a reasonable use after 2030. That notwithstanding, Alberta alleges that after 2030, the subject coal can "still be mined", "can still be sold" and that the Plaintiffs "can still receive payment from the sale of the coal". Canada argued in their brief that the "land underlying the Mine" can be used for land leasing and cattle grazing after 2030, though this argument was withdrawn at the oral hearing. The Defendants provided no evidence in support of these arguments and I have given them no weight.

[34] Neither of the Defendants submitted any affidavit evidence. They rely solely on the pleadings, the Plaintiffs' evidence and the responses to Notices to Admit Facts. Specifically, the Defendants rely on the following facts:

(a) The Mine is operational and has not been shut down.

(b) Coal is being extracted from the Mine.

(c) The Plant is operational and has not been decommissioned.

(d) The Plant is using the coal extracted from the Mine to generate electricity.

(e) Genesee LP continues to own the royalty interest in the subject coal.

(f) Genesee LP continues to receive royalty payments for the subject coal.

[35] The Plaintiffs' affiant was not cross-examined, so their affidavit evidence is uncontroverted, including the following facts:

(a) The coal in the Mine has been dedicated for use at the Plant.

(b) The Plant will cease generating coal-fired electricity on or before December 31, 2030.

(c) There is no evidence of what use can be made of the coal in the Mine after the Plant ceases generating coal-fired electricity.

(d) The Mine is not an export mine, but was developed for the purpose of fueling the Plant.

(e) The Mine does not have the necessary infrastructure (such as rail export line and train load-out facility) to export the coal to other potential markets.

(f) It is expected that the Mine will close when the Plant ceases generating coal-fired electricity (i.e., by no later than 2030).

(g) When the Plant ceases generating coal-fired electricity, the Plaintiffs believe that the royalty interest held by Genesee LP will cease to have any value and Genesee LP will lose all revenue from it, as their evidence remains uncontroverted that there is no use for the coal from the Mine other than as a fuel source for the Plant.

(h) The Plaintiffs' royalty interest in the coal has a reduced value because the Plant will cease generating coal-fired electricity on or before December 31, 2030.

IV. Law and Analysis

A. Did the Master err in allowing the amendments to the Plaintiffs' claim?

[36] Rule 3.65 stipulates that the Court "may" give permission to amend a pleading. However, hopeless amendments will be refused: ***AARC Society v Canadian Broadcasting Corp***, 2019 ABCA 125 at para 65. Amendments are considered hopeless where the claim would be strikable or the evidentiary foundation is insufficient: ***Carbone v Burnett***, 2019 ABQB 98 at para 38.

[37] An application to amend requires a modest degree of evidence to support the proposed amendments: ***Attila Dogan Construction & Installation Co v AMEC Americas Ltd***, 2014 ABCA 74 at para 26.

[38] As recently stated by Justice Richardson in ***Lischuk v K-Jay Electric Ltd***, 2021 ABQB 280 at para 36:

> An application to amend pleadings is a procedural step and not an adjudication on the merits of the amendments sought. An application to amend pleadings is procedural and is a relatively easy bar to meet. The proposed amendments are viewed in isolation and the question asked is whether the proposed additional claim has arguable merit. There is a presumption in favour of a liberal application to amend pleadings. As long as there is some foundation and unless there is significant

prejudice or injustice, the order to allow amendments should be freely given: Kent at para 14.

[39] The amendments to which the Defendants object are as follows:

(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").

[40] The Defendants argue that the Disputed Amendments are hopeless and should be refused.

[41] In support of their application to amend, the Plaintiffs exhibited to their affidavit certain public statements made by Alberta and Canada. In a bulletin entitled "Phasing out coal pollution", Alberta announced that: "...The Canadian Association of Physicians for the Environment (CAPE) found that an accelerated Alberta coal phase out will... avoid nearly $3 billion in negative health outcomes." Canada announced in a statement that: "...The avoided climate change damage from these reductions is valued at $3.4 billion...".

[42] As noted above, the Master allowed the amendments at the hearing. He stated as follows:

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

[43] Subsequently, in ***Altius***, he stated as follows at para 1:

> ...given the nature of the amendments sought, the time available for argument, and the fact that one of the reasons for opposition to the amendments was the oft cited "hopeless" argument, I decided that it would be best to hear the submissions on the striking and dismissal applications first in order to avoid as much overlap as possible. During the course of hearing the amendment application, I concluded without hearing final reply submissions for the plaintiff that the amendments were appropriate and I allowed all of them.

[44] I find that the uncontroverted evidence before the Master and before me is sufficient to support the Plaintiffs' amendment application. I also find that the amendments are not hopeless. Accordingly, the Master did not err in allowing all of the amendments and the Defendants' appeal on this issue is dismissed.

B. Did the Master err in refusing to strike the Amended Statement of Claim?

[45] Rule 3.68 gives the Court discretionary authority to strike claims that have no reasonable prospect of success; see, for example, ***Rvachew v Alberta Transportation***, 2021 ABQB 665 at para 14 and ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 68, leave to appeal to SCC ref'd [2021] SCCA No 79.

[46] The onus is on the Defendants and no evidence may be submitted on an application to strike: *Rule* 3.68(1)(a), (2)(b) and (3). The facts pleaded are presumed to be true: ***Ernst v Alberta (Energy Resources Conservation Board)***, 2014 ABCA 285.

[47] Subsequent to the oral hearing before me, counsel for the Plaintiffs brought my attention to ***Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources),*** 2021 YKCA 6. In that case, the Yukon Court of Appeal upheld a chambers judge's decision dismissing the government's application to strike claims for *de facto* expropriation. The lower court reviewed the relevant cases setting out the test to strike pleadings and for finding *de facto* expropriation.

[48] The Defendants argue that the Master should have struck the Plaintiffs' claim on the grounds that:

(a) the taking claim has no reasonable prospect of success; and

(b) even if there is a cause of action, it is premature.

[49] At para 18 of ***Altius***, the Master refused to strike the Plaintiffs' claim:

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

[50] Having found, as did the Master, that the Disputed Amendments were appropriate, I find that the Defendants have failed to establish that the Plaintiffs' claim for *de facto* expropriation has no reasonable prospect of success. The facts set out in the pleadings as amended are sufficient to resist the Defendants' striking application.

[51] In respect of the Defendants' argument that the claim is premature, the Master stated at paras 23-25 of ***Altius***:

> There was much argument about whether that provision was truly declaratory or not. In my view, and based upon the authorities, it is declaratory and not premature and it is capable of a present adjudication on existing facts.
>
> For example, one of the cases relied upon by Canada and Alberta to argue that the matter was not properly declaratory was the decision of Hall, J. in *British Columbia (Attorney General) v. Alberta (Attorney General)*, 2019 ABQB 550 (Alta. Q.B.). That was a case considering legislation which had not yet been proclaimed in force.

> Not surprisingly, that type of question was found to be hypothetical and not declaratory. Here, the Court is being asked to consider regulations that are in force based upon facts that have occurred.
>
> 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).

[52] I agree with the Master that the action is not premature. Although coal is still being mined and sold to the operators of the Plant, the Plaintiffs argue that the present value of their future royalty stream has been reduced. I am not satisfied that this claim has no reasonable prospect of success as required under *Rule* 3.68.

[53] Therefore, I find that the Master did not err in dismissing the application to strike and the Defendants' cross-appeal on this issue is also dismissed.

C. Did the Master err in granting summary dismissal of the Plaintiffs' claim for *de facto* expropriation?

[54] *Rules* 7.2 to 7.4 govern summary judgment. They provide that a party may apply for summary judgment or dismissal in respect of all or part of a claim if there is no defence or no merit to the claim or if the only real issue is the amount to be awarded.

[55] The Court of Appeal recently described the key principles for summary dismissal as follows in ***Perpetual Energy*** at para 69:

> Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is "no merit" to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 47, 86 Alta LR (6th) 240.

[56] As the moving parties, Canada and Alberta have the onus of proving on a balance of probabilities that there is no merit to the Plaintiffs' claim. If they meet this burden, then the Plaintiffs must put their best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. In their brief, the Plaintiffs cite ***Weir-Jones*** and assert that such an issue 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 the law; or

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

[57] The Plaintiffs' claim is for *de facto* expropriation. They allege that the Defendants have taken or effectively taken from them their property interest in the coal by virtue of their actions that will result in the Plaintiffs no longer receiving royalty payments for the supply of coal from the Mine to the Plant after 2030.

[58] The Master granted summary dismissal of the Plaintiffs' claim, saying at para 47 of ***Altius***:

> The record is sufficiently complete in this case for a fair and just determination. For all of the foregoing reasons, the 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". The actions of Alberta raised in the pleadings, including but not limited to entering into an "off coal" agreement compensating the power plant and other persons affected by the eventual loss of the plant do not amount to takings or actionable wrongs and do not create a cause of action in favour of the plaintiffs. Without a legal cause of action against either defendant, the action is dismissed.

[59] The Supreme Court of Canada has addressed the issue of *de facto* expropriation in a number of cases: ***Manitoba Fisheries Limited v The Queen***, [1979] 1 SCR 101; ***R v Tener***, [1985] 1 SCR 533; and ***Canadian Pacific Railway v Vancouver (City)***, 2006 SCC 5 ("***CPR***"). The Supreme Court recently heard argument on this issue again in the appeal of ***Annapolis Group Inc v Halifax Regional Municipality***, 2021 NSCA 3 and reserved its decision on February 16, 2022. Naturally, that decision was not considered by the Master. I am satisfied that it is appropriate for me to render my decision, notwithstanding the pending judgment of the Supreme Court of Canada; see ***Reddock v Canada (Attorney General)***, 2019 ONSC 3196.

[60] In ***CPR*** at para 30, the Supreme Court held that two requirements must be met for a finding of a *de facto* taking requiring compensation at common law: 1) an acquisition of a beneficial interest in the property or flowing from it; and 2) removal of all reasonable uses of the property.

[61] The Plaintiffs argue in their brief that the first branch of the ***CPR*** test is met because 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." They offer the following explanation of their position:

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

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

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

[62] I do not accept this argument. There is no evidence before me that the Defendants will in some way "recover" a freehold interest in the coal. Neither is there any evidence that the Defendants have an "interest" in maintaining the coal in its "natural" state. The Defendants' interest, as manifested in the Paris Agreement and the revised regulatory scheme that followed, is in reducing Canada's production of GHG.

[63] The Plaintiffs draw an analogy to ***Lynch v City of St John's***, 2016 NLCA 35. The Court in that case held that, by precluding development of the plaintiff's land beyond its natural condition, the City had acquired a beneficial interest in that land consisting of the right to a continuous flow of uncontaminated groundwater.

[64] I do not find this analogy persuasive. To the extent that the City in that case acquired some kind of water rights, that may come closer to the necessary beneficial interest than is at issue here. There is nothing in the record that satisfies me that the Defendants have acquired or will acquire some analogous right that might constitute a beneficial interest.

[65] The Plaintiffs also argue that, notwithstanding the wording in ***CPR***, the first branch of the test may be satisfied without the Defendants acquiring a "beneficial interest" in the coal. They assert that it is sufficient if a general or intangible benefit accrues to the state or public. They cite several cases in support of their position.

[66] In ***Kalmring v Alberta***, 2020 ABQB 81, required drivers' licence road testing to be conducted by government employees, effectively putting provincially-licensed private examiners out of business. A group of those examiners brought a claim for unlawful taking; the Crown brought an application to strike. Master Mason refused to strike the claim, saying at para 75:

> 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.

[67] In my view, this case is distinguishable. I note the reference to the possibility of the government generating revenue from the examinations. While that "benefit" may not have been sufficient to withstand an application for summary dismissal, the application before Master Mason was to strike the claim and I do not find it surprising that she declined to do so.

[68] The Plaintiffs also cite ***Compliance Coal Corporation v British Columbia***, 2020 BCSC 621. There, the Court was satisfied at para 96 that the first branch of the ***CPR*** test was satisfied where eliminating mining "enhanced the value of surface lots owned by BC". The Court stated that this was "arguably equivalent to the benefit gained by the Province in ***Tener*** and ***Casamiro***".

[69] With respect to the Court in ***Compliance***, this still appears to me to overlook the distinction between a *benefit* and a *beneficial interest*. Further, as this is a British Columbia decision, I am not bound by it. I am bound by the Supreme Court of Canada.

[70] The Plaintiffs, however, argue that there is Supreme Court authority in support of their position. They rely in particular on ***Tener*** and they observe that the Court in ***CPR*** did not overturn either ***Manitoba Fisheries*** or ***Tener***.

[71] On that basis, the Plaintiffs assert in their brief that "Whether the [Defendants] have acquired a 'beneficial interest' in the property is irrelevant to determining whether the [Plaintiffs] are entitled to compensation under ***Tener***." They assert that "a taking may occur at common law absent any property rights flowing to the public authority" and they "dispute the requirement of a beneficial interest imposed by the Supreme Court of Canada in [***CPR***]."

[72] In support of their position, the Plaintiffs cite a number of cases, including ***Tener***, ***Manitoba Fisheries***, ***Casamiro Resource Corp v British Columbia*** (1990), 43 LCR 246 (BCSC), aff'd (1991), 55 BCLR (2d) 346 (CA), ***Rock Resources Inc v British Columbia***, 2003 BCCA 324 and ***Alberta (Minister of Public Works, Supply and Services) v Nilsson***, 1999 ABQB 440, aff'd 2002 ABCA 283, leave to appeal refused [2003] SCCA No 35. Based on these cases, the Plaintiffs argue that it is "sufficient if the impugned government actions result in a general benefit to the public." This type of benefit, they contend, is demonstrated by the Defendants' own statements, quoted above, in respect of health and environmental benefits.

[73] Further, the Plaintiffs argue that not even an intangible "benefit" is required. They rely on "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling", (2007) 40:1 UBC Law Review, an academic article published by then-Professor Russell Brown, now of the Supreme Court of Canada (the "Brown Article").

[74] The Plaintiffs point out that now-Justice Brown observed in the Brown Article that none of ***Casamiro***, ***Rock Resources*** or ***Nilsson*** was considered in ***CPR***. They cite the following statements from the Brown Article at 328 and 333-4:

> ...was the correct statement of law, that even a constructive takin 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?
>
> ...
>
> 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. [Emphasis in original.]

[75] The Plaintiffs state in their brief that "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."

[76] All of this makes for a very interesting debate and it is to be hoped that the Supreme Court of Canada will resolve the controversy with its upcoming decision in ***Annapolis***. None of it, however, alters the fact that ***CPR*** is the most recent Supreme Court of Canada authority on this issue and it expressly imposes the requirement that the public authority acquire a beneficial interest. While I can appreciate the Plaintiffs' point, I must apply the law as it is, not as it once was or may be in the future.

[77] Applying the principles of ***Weir-Jones*** to this case I find that:

(a) The state of the record and the issues allow me to resolve the dispute fairly on a summary basis, as there are few, if any, uncertainties as to the facts.

(b) The Defendants have proven on a balance of probabilities that there is no merit to the Plaintiffs' claim. The first requirement of the test for *de facto* expropriation has not been and cannot be made out as there has not been an acquisition of a beneficial interest in property or flowing from it.

(c) The Plaintiffs have not demonstrated that there is a genuine issue requiring a trial in respect of this issue.

(d) The state of the evidentiary record gives me confidence that summary dismissal is an appropriate disposition in the circumstances.

[78] In respect of the second branch of the test for *de facto* expropriation, the Plaintiffs argued forcefully that the Defendants' actions removed all reasonable uses of their property, being the royalty interest.

[79] However, even if the Plaintiffs are correct in their assertion that their royalty interest has been "effectively sterilized", that is sufficient to satisfy only the second branch of the test articulated in ***CPR***. The first branch, in my view, remains an insurmountable obstacle.

[80] Accordingly, the Plaintiffs' appeal of the Master's decision to grant summary dismissal is dismissed.

V. Conclusion

[81] In the result, the appeal and cross-appeals are dismissed.

[82] As there has been mixed success on these appeals, I make no award as to costs. The parties are directed to go back to the Master to settle the costs of the proceeding before him.

Heard on the 30th day of November and 1st day of December, 2021.
Dated at the City of Calgary, Alberta this 8th day of April, 2022.

J.C. Price
J.C.Q.B.A.

Appearances:

Christian J. Popowich and Dextin Zucchi
Code Hunter LLP
for the Appellants/Respondents by Counter Appeal/Plaintiffs

Melissa N. Burkett and Cynthia R. Hykaway
Alberta Justice and Solicitor General
for the Respondents/Appellant by Counter Appeal/Defendant Her Majesty the Queen in Right of Alberta

Shane Martin and Jordan Milne
Attorney General of Canada
for the Respondent/Appellant by Counter Appeal/Defendant Attorney General of Canada