COURT OF APPEAL OF ALBERTA

Appeal #:	2201-0118AC
Trial Court File #:	1801-16746
Registry Office:	CALGARY
Plaintiffs:	ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.
Status on Appeal:	Appellants
Respondents:	HIS MAJESTY THE KING IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA
Status on Appeal:	Respondents
Document:	**Factum of the Attorney General of Canada**

Registrar's Stamp

Appeal from the Decision of
The Honourable Madam Justice J.C. Price
Dated and filed the 8th day of April 2022

FACTUM OF THE ATTORNEY GENERAL OF CANADA (RESPONDENT)

Department of Justice Canada
Jordan Milne / Sydney McHugh
601 – 606 4th Street SW
Calgary, AB T2P 1T1
Phone: 403-463-0367 / 403-618-5106
Fax: 403-299-3507
Email: jordan.milne@justice.gc.ca / sydney.mchugh@justice.gc.ca

Counsel for the Respondent
(Attorney General of Canada)

Code Hunter LLP
Christian Popowich / Dextin Zucchi
850, 440 – 2 Avenue SW
Calgary, AB T2P 5E9
Phone: 403-234-9800
Fax: 403-261-2054
Email: christian.popowich@codehunterllp.com / dextin.zucchi@codehunterllp.com

Counsel for the Appellants

Alberta Justice and Solicitor General
Cynthia Hykaway / Melissa Burkett
1710, 639 – 5 Avenue SW
Calgary, AB T2P 0M9
Phone: 403-297-2001
Fax: 403-662-3824
Email: cynthia.hykaway@gov.ab.ca /
melissa.burkett@gov.ab.ca

Counsel for the Respondent
(His Majesty the King in Right of Alberta)

Table of Contents

PART I: Facts

1. Overview

[1] The Appellants carry on business as owners of royalty interests in mines. In 2014, they accepted the significant risk of future regulatory changes affecting the coal industry when they acquired a significant royalty interest in thermal coal that was and remains dedicated to the generation of electricity in Alberta.

[2] Shortly before the Appellants made 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 Appellants were aware of the regulations when they invested and 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 to this effect and the Appellants' own public disclosure reveals that they courted the growing 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".

[3] In 2018, the federal regulations were amended to require the performance standard to be met no later than 2030.

[4] In reaction to the amended federal regulations, as well as a separate environmental initiative at the provincial level, the Appellants commenced this proceeding alleging, among other things, that Canada and Alberta had "taken" (or constructively expropriated) their property. They seek compensation in the approximate amount of $190 million.

[5] An Applications Judge summarily dismissed the Appellants' claim in 2021 and a Chambers Justice dismissed the Appellants' subsequent appeal.

[6] The Supreme Court of Canada ("SCC") clarified the law of constructive takings (*de facto* expropriation) following the decision of the Chambers Justice, but summary dismissal remains appropriate in this case. Canada has not acquired any form of advantage, let alone an advantage in relation to the Appellants' property. Moreover, the amended federal regulations did not remove all reasonable uses of the Appellants' royalty interest, but instead indirectly diminished the aggregate value of the royalty interest. Canada and Alberta, and by extension the public, are not guarantors or insurers of the Appellants' royalty income streams.[1]

2. Statement of Facts

[7] The record for this appeal is uncontroverted. The Appellants' factum references many of the material facts, but it omits others. Canada therefore offers an independent statement of facts for accuracy and completeness.

A. The Mine and Coal

[8] The Genesee mine is a coal mine located in central Alberta (the "Mine").[2]

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

B. Dedication of Coal

[10] The Coal has historically been contractually dedicated to the Genesee Power Plant (the "Plant"), a nearby coal-fired electricity generating station comprised of three generation units that were commissioned in 1989, 1994 and 2005, respectively (collectively, the "Units"). The Plant is wholly owned and operated by Capital Power, and generates electricity for the City

---

[1] Decision of Chambers Justice, para. 38 **[Appeal Record ("AR"), Tab 16, p.0082]**.
[2] Amended Amended Statement of Claim ("AASOC"), paras. 12(a) & 13 **[AR, Tab 10, pp.0057-0058]**. Affidavit of Ben Lewis, sworn September 28, 2020 ("Lewis Affidavit"), para. 8 **[Appellants' Extracts of Key Evidence ("EKE"), p.4]**. Decision of Chambers Justice, para. 2 **[AR, Tab 16, p.0104]**.
[3] AASOC, para. 14 **[AR, Tab 10, p.0057]**. Response to Request for Particulars, filed February 25, 2019 ("Response"), para. 3(a) **[AR, Tab 5, p.0025]**. Lewis Affidavit, para. 9 **[Appellants' EKE, p.4]**. Decision of Chambers Justice, para. 21 **[AR, Tab 16, p.0107]**.

of Edmonton and elsewhere in Alberta.[4] The Appellants are not affiliated with Capital Power and do not hold an interest in the Units.

[11] 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

[12] 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]

[13] Subsection 3(1) of SOR/2012-167 imposed an emissions intensity limit of 420 tonnes of CO_2 emissions per calendar year from the combustion of fossil fuels for each GWh of electricity a unit produces and has available for sale to the electricity system, effective July 1, 2015 (the "Limit").

[14] SOR/2012-167 did not dictate how the Limit was to be met. Available options included decommissioning the unit, converting the unit to fuels with a lower carbon intensity than thermal coal (i.e., biomass, hydrogen, natural gas) or integrating the unit with a carbon capture and storage system in conjunction with the continued use of thermal coal.[8]

[15] The Limit applied only to "new units" and "old units" (as those terms are defined). Units that did not fit within either definition were exempt from the Limit until they reached the end of their "useful life" (as that term is defined).

---

[4] AASOC, paras. 13, 16 & 18-19 **[AR, Tab 10, pp.0057-0059]**. Decision of Chambers Justice, para. 15 **[AR, Tab 16, p.0106]**.
[5] AASOC, para. 16 **[AR, Tab 10, pp.0057-0059]**. Decision of Chambers Justice, para. 21 **[AR, Tab 16, p.0107]**.
[6] SOR/2012-167, as it appeared between 30 August 2012 and 29 November 2018.
[7] Canada's Statement of Defence, para. 5 **[AR, Tab 7, p.0042]**. Decision of Chambers Justice, para. 16 **[AR, Tab 16, p.0106]**.
[8] SOR/2012-167, ss.9-13.

[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.[9]

D. Arrangement agreement

[17] On December 24, 2013, after promulgation of SOR/2012-167, Altius Minerals Corporation[10] ("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.[11]

[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.[12]

[19] The Arrangement Agreement did not effect a transfer of title to the Coal, which remained registered to Prairie Mines.[13]

[20] The Appellants assert that they "expected" at the time of the Arrangement Agreement that SOR/2012-167 would "continue as enacted" for the next four decades, until 2055.[14] However, they can point to no statements or representations from Canada. Instead, they rely on a limited number of statements and representations from third parties, such as financial advisors,

---

[9] AASOC, para. 21 **[AR, Tab 10, p.0060]**. Decision of Chambers Justice, paras. 17-18 **[AR, Tab 16, p.0106]**.
[10] 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: AASOC, paras. 9-10. **[AR, Tab 10, p.0056]**.
[11] AASOC, para. 12 **[AR, Tab 10, pp.0056-0057]**. Response, para. 2(d) **[AR, Tab 5, p.0024]**. Decision of Chambers Justice, para. 19 **[AR, Tab 16, p.0106]**.
[12] AASOC, paras. 6-9 & 12 **[AR, Tab 10, pp.056-0057]**. Response, para. 2(a) **[AR, Tab 5, p.0024]**. Lewis Affidavit, para. 22 **[Appellants' EKE, p.7]**.
[13] Response, paras. 2(a) & 3(c) **[AR, Tab 5, pp.0024-0025]**.
[14] Lewis Affidavit, para. 19 **[Appellants' EKE, p.6]**.

to assert an apparent "understanding" that Canada "had a settled regulatory framework for coal-fired electrical generation".[15] In reality, as set out below, the Appellants palpably appreciated the risk of future regulatory change.

E. Related agreements

[21] In order to give effect to the Arrangement Agreement, the Appellants entered into a number of new or amended agreements on or about the Effective Date, including: (1) Second Amended and Restated Dedication and Unitization Agreement dated April 24, 2014; and (2) Assignment and Novation Agreement in respect of the Genesee 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.[16] 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

[15] Response, para. 1 **[AR, Tab 5]**. See also Lewis Affidavit **[Appellants' EKE, paras. 17-19 and Ex. G-H, pp.6, 71 & 87]**.
[16] AASOC, para. 14 **[AR, Tab 10, p.0057]**. Plaintiffs' Reply to Notice to Admit Facts ("Reply to NA"), para. 15 **[Canada's EKE, Tab 2, p.R16]**. Lewis Affidavit, para. 24 and Ex. L **[Appellants' EKE, pp.7 & 150]**.

> a termination of this Agreement does not constitute a termination of the Royalty Interest.[17]

[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".[18] [emphasis]

F. Knowledge of SOR/2012-167 and recognition of risk

[24] The Appellants 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 their business.

[25] On April 28, 2014, the same day that the Arrangement Agreement took effect, Altius Minerals filed a preliminary short form prospectus (the "Prospectus"). The Prospectus contains the following statement:

> 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. [19]
>
> [emphasis]

---

[17] AASOC, para. 16 **[AR, Tab 10, p.0057]**. Reply to NA, para. 18 **[Canada's EKE, Tab 2, p.R16]**. Lewis Affidavit, para. 24 and Ex. L **[Appellants' EKE, pp.7 & 150]**. Decision of Chambers Justice, para. 22-24 **[AR, Tab 16, p.0107]**.
[18] Lewis Affidavit, Ex. K **[Appellants' EKE, p.116]**.
[19] Reply to NA, para. 8 **[Canada's EKE, Tab 2, p.R15]**. Decision of Chambers Justice, para. 26 **[AR, Tab 16, p.0108]**.

[26] 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 an Annual Information Form (the "AIF").[20] The MD&A and AIF both anticipate investment risk associated with future changes in environmental regulations:

> **Risk Factors and Key Success 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.[21]
>
> [emphasis]

G. Alberta off-coal agreement

[27] On November 24, 2016, Alberta entered into an Off-Coal Agreement with Capital Power. Pursuant to the Off-Coal Agreement, Capital Power agreed to cease emissions of coal from its plants, including from the Plant, by December 31, 2030 in exchange for certain payments.[22] Conversion of the Plant to natural gas was expected.[23]

---

[20] Reply to NA, para. 11 **[Canada's EKE, Tab 2, p.R.15]**.
[21] Reply to NA, paras. 13-14 **[Canada's EKE, Tab 2, p.R16]**. Decision of Chambers Justice, para. 27 **[AR, Tab 16, p.0108]**.
[22] Lewis Affidavit, Ex. Z, ss.2-3 **[Appellants' EKE, p.286]**. Decision of Chambers Justice, para. 28-29 **[AR, Tab 16, p.0109]**.
[23] Lewis Affidavit, Ex. Z, s.4 **[Appellants' EKE, p.289]**.

[28] In direct response to the Off-Coal 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

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

[30] 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 accelerate the time in which some units would reach the end of their useful life.

[31] In practical terms, SOR/2018-263 has the effect of requiring the Units comprised within the Plant to meet the Limit as of 2030.[28]

3. Procedural History

A. Action

[32] The Appellants commenced this Action on November 23, 2018 and filed an Amended Statement of Claim on December 19, 2018. The Amended Statement of Claim names Alberta and Canada as Defendants, jointly and severally, and asserts three causes of action against them: (1) "foiling" of legitimate expectations, (2) undue interference with economic relations, and (3) constructive taking (*de facto* expropriation). The Appellants subsequently withdrew the first two causes of action, thereby limiting this Action to a constructive takings claim.

---

[24] Reply to NA, paras. 19-22 **[Canada's EKE, Tab 2, p.R16-R17]**.
[25] AASOC, para. 36 **[AR, Tab 10, p0062]**. Canada's Statement of Defence, para. 8 **[AR, Tab 7, p.0043]**. Decision of Chambers Justice, para. 30 **[AR, Tab 16, p.109]**.
[26] SOR/2018-263.
[27] AASOC, para. 39 **[AR, Tab 10, p.0062]**. Canada SOD, para. 9 **[AR, Tab 7, p.0043]**. Decision of Chambers Justice, para. 31 **[AR, Tab 16, p.0109]**.
[28] Decision of Chambers Justice, para. 31 **[AR, Tab 16, p.0109]**.

B. Applications and cross-application

[33] In June 2020, Canada and Alberta applied to summarily dismiss this Action or, alternatively, strike out the Amended Statement of Claim for prematurity.[29] In response, the Appellants filed the Lewis Affidavit and advanced a cross-application to further amend their pleadings.

[34] The applications and cross-application were argued before an Applications Judge in December 2020. On January 4, 2021, the Applications Judge: (1) allowed the proposed amendments, (2) declined to strike out the Amended Statement of Claim for prematurity, and (3) summarily dismissed the Action in its entirety.[30] In granting summary dismissal, the Applications Judge relied on the first branch of the two-part test for constructive takings in *Canadian Pacific Railway Co. v Vancouver (City)*[31] [*CPR*], which requires the acquisition of a "beneficial interest in the property or flowing from it".[32] The Applications Judge did not accept the Appellants' argument that an "advantage" (or "benefit") will suffice under the first branch of the two-part test.[33]

[35] All parties appealed to a Chambers Justice of the Court of King's Bench of Alberta.[34] On April 8, 2021, the Chambers Justice dismissed all of the appeals,[35] thereby upholding the decision to summarily dismiss the Action. In reaching this conclusion, the Chambers Justice again emphasized the first branch of the two-part test described in *CPR*[36] and rejected the Appellants' argument regarding an advantage.[37]

[36] The Appellants now appeal to this Court. Canada and Alberta did not cross-appeal with the result that the amendments are now settled and the striking portions of the applications are no longer at issue.

---

[29] Applications of Canada & Alberta, filed June 3 & 5, 2020 **[AR, Tabs 8-9, pp.0046 & 0050]**.
[30] Decision of Applications Judge, paras. 18 & 21-25 **[AR, Tab 12, pp.0079-0080]**.
[31] *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 [*CPR*], para. 30.
[32] Decision of Applications Judge, paras. 1, 18, 27 & 40 **[AR, Tab 12, pp.0079-0080]**.
[33] Decision of Applications Judge, para. 40 **[AR, Tab 12, pp.0083-0084]**.
[34] Notices of Appeal, filed March 15, 2021 **[AR, Tab 11, p.0065]**.
[35] Decision of Chambers Justice, paras. 9 & 81 **[AR, Tab 16, pp.0105 & 0117]**.
[36] Decision of Chambers Justice, para. 62 **[AR, Tab 16, pp.0105 & 0117]**.
[37] Decision of Chambers Justice, paras. 65-69 **[AR, Tab 16, pp.0115-0116]**.

C. Annapolis

[37] On October 21, 2022, the SCC rendered its decision in *Annapolis Group Inc. v Halifax Regional Municipality*[38] [*Annapolis*], also a constructive takings case. While it did not overrule *CPR*, the majority clarified that the first branch of the two-part test refers "*not* to actual acquisition of the equity that rests with the beneficial owner of property connoting rights of use and enjoyment, but to an 'advantage' flowing to the state".[39]

[38] Although *Annapolis* has shifted the analytical lens from a beneficial interest to an advantage, it does not change the ultimate result in Canada's application. For the reasons set out in this factum, summary dismissal remains just as appropriate as before.

PART II: Grounds of Appeal

[39] Canada agrees with the Appellants that the sole ground of appeal is whether the Chambers Justice erred in upholding summary dismissal of the Action.[40] Canada also agrees with the Appellants that two issues need to be considered in addressing this ground of appeal: (1) did the Chambers Justice err by failing to correctly state the test for constructive takings; and (2) did the Chambers Justice err by finding that the defendants had proven there is no merit to the Appellants' claim. Canada adds that there is a third, equally important, issue: (3) can this Court decide the applications for summary dismissal based on the legal test for a constructive taking, as now framed by *Annapolis*, and the existing record?

PART III: Standard of Review

[40] Canada concurs with the Appellants' description of the standard of review. Errors of law are reviewable on the correctness standard and applications of an incorrect legal test to the facts are also reviewable on the correctness standard.[41]

---

[38] *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 [*Annapolis*].
[39] *Annapolis*, paras. 38.
[40] Appellants' factum, para. 74.
[41] Appellants' factum, paras. 75-76.

[41] Where an error results from a change in the law after the lower court's decision, appellate courts should not simply allow the appeal, but instead should decide the issue if the existing record is complete.[42] In other words, a change in the law does not automatically mean the appeal must be allowed without further analysis.[43]

[42] Canada acknowledges that the decision of the Chambers Justice does not consider the question of an advantage and therefore does not strictly accord with *Annapolis*. However, instead of simply allowing the appeal, this Court should decide the applications and confirm that this Action is summarily dismissed. As the Appellants have argued from the outset of these applications that an advantage is sufficient to establish a constructive taking under the two-part test, the existing record is already responsive to *Annapolis* and therefore complete.

PART IV: Argument

1. Constructive takings

[43] SOR/2018-263 has not caused a constructive taking.

[44] A constructive taking arises where "the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way".[44] Although no transfer of legal title or equitable interest need be established, there must nonetheless be an acquisition by the defendant of a beneficial interest in the property or flowing from it (advantage), and a removal of all reasonable uses of the property.[45]

[42] *Hudye Inc v Rosowsky*, 2022 ABCA 279, paras. 59-60. See also *Hollis v Dow Corning Corp*, [1995] 4 SCR 634 (SCC), para. 33.
[43] Contrast with Appellants' factum, paras. 109, 142-143, which assumes, without analysis, that the Chambers Justice's decision must be set aside.
[44] *Annapolis*, para. 19.
[45] *CPR*, para. 30.

[45] Constructive takings are very "rare"[46] and "exceptional",[47] and do not occur under most exercises of regulatory authority, which merely regulate and do not take. As this Court has explained 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]

2. The two-part test

[46] In *CPR*, the SCC identified an "exacting"[49] two-part test for constructive takings: (1) an acquisition of a beneficial interest in property or flowing from it, and (2) removal of all reasonable uses of the property.[50]

[47] The SCC did not disturb the two-part test in *Annapolis*[51], but the majority illuminated the manner in which the first branch is to be applied. The first branch of the two-part test refers "*not* to actual acquisition of the equity that rests with the beneficial owner of property connoting rights of use and enjoyment, but to an 'advantage' flowing to the state".[52]

[48] As set out in detail in sections 3 and 4 below, Canada has not gained an advantage within the meaning of *Annapolis*, nor has SOR/2018-263 removed all reasonable uses of the Appellants' royalty interest.

[49] The majority in *Annapolis* added that the two-part test should be analyzed through "a realistic appraisal of matters in the context of the specific case, including but not limited to":

---

[46] *Mariner Real Estate Ltd. v Nova Scotia (Attorney General)*, 1999 NSCA 98 [*Mariner*], paras. 37-38; *Genesis Land Development Corp v Alberta*, 2009 ABQB 221, para. 133; aff'd 2010 ABCA 148.
[47] *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283 [*Nilsson*], para. 62.
[48] *Nilsson*, para. 50. See also *Quality Plus Tickets c Québec (Procureur general)*, 2013 QCCS 3780 [*Quality Plus*], para. 64.
[49] *Mariner*, para. 47 & para. 50.
[50] *CPR*, para. 30.
[51] *Annapolis*, paras. 25 and 41.
[52] *Annapolis*, para. 38.

a. The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;

b. The nature of the land and its historical or current uses; and

c. The substance of the alleged advantage.[53]

[50] Here, the residual factors further weigh against a constructive taking.

3. No acquisition of a beneficial interest in property or flowing from it

[51] SOR/2018-263 is expected to create a cleaner environment and improve health outcomes for Canadians. However, as the record confirms, these beneficial outcomes will not accrue to the federal government, but instead will serve Canadians individually and collectively. In any event, the beneficial outcomes associated with SOR/2018-263 are too generalised and disconnected from the Appellants' royalty interest to qualify as advantages under the first branch of the two-part test.

A. Canada has not obtained an advantage

[52] The fact that Canada is pursuing or even achieving a valid public purpose[54] does not equate to an advantage within the meaning of *Annapolis*.

[53] The Appellants' argument[55] that Canada has obtained an advantage rests entirely on an introductory statement in the Regulatory Impact Analysis Statement ("RIAS") accompanying SOR/2018-263. While the RIAS does predict "reduce[d] GHG emissions", "health benefits" and "environmental benefits"[56], a more careful inspection reveals that Canada is not the intended or expected beneficiary. Rather:

---

[53] *Annapolis*, para. 45.
[54] The Appellants concede that the purpose behind SOR/2018-263 is valid: Appellants' Factum, para. 140.
[55] Appellants' factum, paras. 113-127.
[56] Lewis Affidavit, Ex. HH **[Appellants' EKE, p.338]**.

a. the environmental benefits, which consist of avoided "climate change damage", "increased crop yields, reduced surface soiling, and improvement in visibility"[57], are quantified based on their "social cost values" to Canadians, not their values to government itself;[58] and

b. the estimated health benefits "should not be interpreted as health care cost savings or changes in productivity. Rather, the values in the table are estimated measures of improvement in quality of life, resulting from better health."[59]

[54] As illustrated by *Club Pro*,[60] societal benefits that do not accrue to the government fail to meet the first branch of the two-part test. In that case, the *Smoke-Free Ontario Act* and the accompanying regulation eliminated designated smoking rooms ("DSRs") in licensed establishments within the Province of Ontario. The Plaintiff argued that this created a public benefit, presumably in the nature of cleaner air. The Court rejected this argument, holding that "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".[61] The Appellants' argument is no different.

[55] In effect, the Appellants are equating the concept of an advantage with the purpose behind SOR/2018-263.[62] However, as the Federal Court recently observed in *Magnum Machine*,[63] achievement of the public purpose behind a regulation "is not an asset the government acquired".[64]

B. Alternatively, any advantages associated with SOR/2018-263 do not qualify

[56] Alternatively, the environmental and health benefits associated with SOR/2018-263 are too generic in nature and remote from the Appellants' royalty interest to constitute an advantage.

---

[57] Lewis Affidavit, Ex. HH **[Appellants' EKE, p.356]**.
[58] Lewis Affidavit, Ex. HH **[Appellants' EKE, pp.356-357]**.
[59] Lewis Affidavit, Ex. HH **[Appellants' EKE, p.358]**.
[60] *Club Pro Adult Entertainment Inc. v Ontario (Attorney General)* (2006), 27 BLR (4th) 227 (ONSJ); aff'd 2008 ONCA 158**.**
[61] *Club Pro*, para. 82.
[62] Appellants' factum, para. 113.
[63] *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada*, 2021 FC 1112 [*Magnum Machine*].
[64] *Magnum Machine*, para. 39.

Regardless of the form it takes, an advantage will only satisfy the first branch of the two-part test if it is connected to the property at issue. A generalised advantage that is not connected with the property, like the advantage on which the Appellants rely, is insufficient.

[57] The majority was explicit on this point in *Annapolis*. In the context of that case, it explained that "the obtaining by [the state] of an *advantage* in respect of the Lands suffices".[65] [emphasis]

[58] Other leading SCC decisions also confirm that the advantage must be connected to the property at issue. In *Manitoba Fisheries*,[66] federal legislation gave a Crown corporation a commercial monopoly over the export of fish and overtook the Appellant's longstanding fish export business. The SCC unanimously 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.[67] As a result, the Crown received an advantage in the very property that had been constructively taken (goodwill).

[59] In *Tener*, 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 was to preclude any exploration and neutralize the mineral claims. The SCC majority found that the Crown had effectively "recovered" the minerals and "enhanced" the value of the park in the process.[68] The minority, concurring in the result, agreed that the Crown had taken back the minerals so as to "make the [R]espondents' loss the [A]ppellants' gain".[69] Viewed from the perspective of an advantage, the majority in *Annapolis* explained: "what the Province did acquire by preventing the Teners from exploiting their mineral rights was an advantage – specifically, preserving the land as a provincial park in the public interest".[70] In this way, the appellants in *Tener* gained an advantage connected to the same property that had been constructively taken.

---

[65] *Annapolis*, para. 27.
[66] *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101 (SCC) [*Manitoba Fisheries*].
[67] *Manitoba Fisheries*.
[68] *R v Tener*, [1985] 1 SCR 533 (SCC) [*Tener*].
[69] *Tener*, paras. 20-21.
[70] *Annapolis*, para. 35.

[60] The other two decisions[71] cited by the Appellants with respect to an advantage are equally demonstrative of the need for this connection. *Kalmring* involved a decision of the provincial government to transition from private driver examinations to government driver examinations, thereby putting private driver examiners out of business. Several private driver examiners advanced a constructive takings claim. In declining to strike the Statement of Claim at Alberta's request, the Applications Judge drew an analogy with *Manitoba Fisheries*[72] and found that the government's generation of revenue from providing the service itself "could arguably be characterized as the acquisition of an intangible benefit by the Crown".[73] Phrased differently, the advantage accruing to the state and the taking related to the same property (revenue derived from carrying out the business activities constructively taken from the Plaintiffs).

[61] *Compliance Coal* is no different. In that case, a project proponent was denied a certificate for a subsurface coal mining project on environmental grounds. The project proponent initiated a constructive takings claim against the provincial and federal governments and was met with an application to strike. With respect to the provincial government only, which held the surface rights, the Court accepted for the purpose of the application that "the removal of the possibility of mining enhanced the value of surface lots owned by BC" and was "arguably equivalent to the benefit gained … in *Tener*".[74] Again, the advantage related to the very same property that had been constructively taken.

[62] The project proponent in *Compliance Coal* also argued that both governments 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".[75] In effect, generalised benefits which are

---

[71] See Appellants' factum, para. 118, citing *Kalmring v Alberta*, 2020 ABQB 81 [*Kalmring*] and *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 [*Compliance Coal*].
[72] *Kalmring*, paras. 70-82.
[73] *Kalmring*, para. 75.
[74] *Compliance Coal*, para. 96.
[75] *Compliance Coal*, para. 95.

unrelated and unconnected to the property at issue do not pass the first branch of the two-part test.

[63] Contrary to the Appellants' argument,[76] this case is not analogous to *Manitoba Fisheries* or *Tener*, where the state received an advantage in the very property that was taken (goodwill and park preservation). This case is far more akin to *Compliance Coal*, *Club Pro* and *Magnum Machine*, all of which stand for the proposition that generalised advantages unrelated to the subject property do not pass the first branch of the two-part test. The Applications Judge was particularly alive to this distinction, noting that "surely, and without more, 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 polluting".[77] If Canada has gained any advantage, it is not from the Appellants' royalty interest.

[64] All regulations are presumptively beneficial (or remedial).[78] Accordingly, if the generalised benefits associated with SOR/2018-263 could meet the advantage requirement, practically any regulation would qualify as a constructive taking. This would make the first branch of the two-part test redundant whenever a regulation is involved, a result that is at odds with the "rare" and "exceptional" nature of a constructive takings claim.

4. No removal of all reasonable uses of property

[65] SOR/2018-263 regulates the generation of electricity, not the mining of thermal coal, and it does so in a manner that does not preclude continued use of thermal coal. If the Coal cannot be put to a reasonable use as of 2030, that outcome is attributable to Alberta's chosen measures in relation to the Plant, not to SOR/2018-263. Further, the net impact on the Appellants is not a loss of all reasonable uses of property, but rather an indirect diminution in the economic value of their royalty interest.

---

[76] Appellants' factum, para. 116.
[77] Decision of Applications Judge, para. 45 **[AR, Tab 12, p.0083]**.
[78] *Interpretation Act*, RSC 1985, c I-21, s.2(1) & 12. See also *Hamilton Beach Brands Canada, Inc v Ministry of the Environment and Climate Change*, 2018 ONSC 5010, para. 26; Ruth Sullivan, *The Construction of Statutes, 2nd Ed.*, s.9.02(1).

A. SOR/2018-263 has not removed any reasonable uses

[66] SOR/2018-263 does not prohibit the generation of coal-fired electricity in Canada. Instead, it imposes an emissions intensity limit on the Units, which can be achieved in a number of different ways. But for the Alberta Off-Coal Agreement, which implements a provincial policy decision in favour of phasing out coal-fired emissions and converting the Plant to natural gas, the Limit could be met through carbon capture storage with continued use of thermal coal. In these circumstances, SOR/2018-263 cannot be said to remove *any* reasonable uses of the Appellants' royalty interest.

B. Alternatively, the impact is collateral and partial

[67] Even if this Court finds that SOR/2018-263 has impacted the Appellants' royalty interest, the impact is at most "collateral".[79] This differs from all of the leading cases[80] where the impugned governmental measure *directly* impacted the property interest in question. In order to sustain a "rare" and "exceptional" constructive takings claim, the impact must be much more direct.

[68] Further, and in any event, SOR/2018-263 has not removed *all* reasonable uses of the Appellants' royalty interest. The Mine is presently operational, the Coal extracted from the Mine is still feeding the Plant and royalties are still accruing to the Altius Entities.[81]

[69] The economics will change in 2030, but this does not mean that *all* reasonable uses of the Altius Entities' property have been removed. Rather, as demonstrated by the Appellants' own evidence[82] and their arguments before the Chambers Justice,[83] there is only a reduction of economic value in the aggregate, reflective of the period following 2030. Economic losses of this nature are insufficient under the second branch of the two-part test.

---

[79] Decision of Chambers Justice, para. 31 **[AR, Tab 16, p.0109]**.
[80] For example, government measures *directly* targeted the Appellants' fish export business in *Manitoba Fisheries* and the Respondent's mineral claims in *Tener*.
[81] Reply to NA, paras. 23(a), (d) & (g) **[Canada's EKE, Tab 2, p.R17-R18]**. Decision of Chambers Justice, para. 34 **[AR, Tab 16, p.0109]**.
[82] Lewis Affidavit, paras. 57-65 **[Appellants' EKE, pp.13-15]**. Decision of Chambers Justice, para. 35 **[AR, Tab 16, pp.0109-0110]**.
[83] Decision of Chambers Justice, para. 52 **[AR, Tab 16, p.0113]**. The Appellants argued that "the present value of their future royalty stream has been reduced". [emphasis]

[70] As recently explained by the majority in *Annapolis*, "there must be something more 'beyond drastically limiting use or reducing the value of the owner's property… When this threshold is crossed – that is, when all reasonable uses have been removed – a regulation may be, 'in effect, confiscation'".[84] [emphasis]

[71] The Nova Scotia Court of Appeal discussed the distinction between economic loss and loss of all reasonable uses at length in *Mariner*. In that case, the *Beaches Act* designated the Plaintiffs' lands as a beach with the result that they could not build on the lands. The Court accepted that the designation had caused the Plaintiffs' lands to diminish in value. However, the Plaintiffs had not been deprived of "all of the rights associated with [their] interest" as they still owned the lands and could use them for other purposes, such as beach enjoyment.[85] The Court concluded: "deprivation of economic value is not a taking".[86]

[72] The SCC also drew a firm line between economic loss and loss of all reasonable uses in *CPR*. The Plaintiff owned a railway right-of-way that a municipal bylaw designated as a public thoroughfare. The effect of the bylaw was to prevent commercial redevelopment of the right-of-way and confine the Appellant to traditional uses of the land. While this diminished the economic value of the land and deprived the Plaintiff of potential profit, the SCC found that it did not "remove all reasonable uses of the property".[87]

[73] The Appellants' own conduct confirms that the value of their royalty interest has only been reduced, as opposed to obliterated. In 2020, almost two years after promulgation of SOR/2018-263, the Appellants purchased an additional royalty interest in the Mine at a "discounted price" because it still has value.[88] As the Lewis Affidavit explains, the discounted price "largely resulted from the fact that the royalty interest is presently reduced in value as it will no longer generate cash flow as of 2030".[89] [emphasis]

---

[84] *Annapolis*, para. 35.
[85] *Mariner*, paras. 48-54.
[86] *Mariner*, paras. 71-72, paras. 80-82 and para. 101.
[87] *CPR*, para. 34.
[88] Lewis Affidavit, para. 63 **[Appellants' EKE, p.14]**.
[89] Lewis Affidavit, para. 64 **[Appellants' EKE, p.14]**.

5. The residual Annapolis factors also weigh against a constructive taking

[74] Guided by the residual factors identified by the majority in *Annapolis*,[90] a realistic appraisal of this case demonstrates that the Appellants do not have a proper constructive takings claim. SOR/2018-263 generally advances an important public policy objective and does so in a manner consistent with the Appellants' own expectations. SOR/2018-263 creates benefits that are not connected to the Appellants' royalty interest and does not remove all reasonable uses of property.

[75] SOR/2018-263 is a regulation of general application that advances an important public policy objective - environmental protection[91] - for the benefit of all Canadians. It does not specifically target the Appellants or their royalty interest and does not even regulate coal mining.

[76] While the Appellants assert that they expected SOR/2012-167 would remain static for four decades,[92] this expectation is unfounded at law because no one has a vested right in the continuance of the law.[93] Additionally, the Appellants' own corporate disclosure reveals that they did not expect SOR/2012-167 to remain static for decades. They expressly acknowledged the potential for future adverse regulatory change.[94] The Applications Judge emphasized this factor in summarily dismissing the Appellants' claim, writing that "when a party enters an industry knowing that emissions regulation is part of the landscape, it cannot in any way suggest that a change in emissions regulation is a surprise".[95]

[77] Finally, SOR/2018-263 does not demonstrate the hallmarks of a constructive taking. As already noted, the generalised benefits associated with SOR/2018-263 do not accrue to the Crown and, in any event, are not connected to the Appellants' royalty interest. Furthermore, any deprivation of reasonable use is not absolute in nature, but instead takes the form of an indirect reduction in value.

---

[90] *Annapolis*, para. 45.
[91] Lewis Affidavit, Ex. HH, pp.4-7 **[Appellants' EKE, pp.341-344]**.
[92] Lewis Affidavit, paras. 19-20 **[Appellants' EKE, p.6]**.
[93] *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 (SCC), pp.282-283; *Ontario Black Bear/Ontario Sportsmen & Resources Users Assn v Ontario*, 2000 CanLII 22815 (ONSC), paras. 58-59.
[94] Reply to NA, paras. 11-14 **[Canada's EKE, Tab 2, p.R15-R16]**. Decision of Chambers Justice, para. 27 **[AR, Tab 16, p.0108]**.
[95] Decision of Applications Judge, para. 40 **[AR, Tab 12, p.0082]**.

6. Summary dismissal remains appropriate

[78] Summary dismissal continues to be appropriate, applying the two-part test for constructive takings as clarified in *Annapolis*. With the benefit of an already complete application record and newfound clarity regarding the law of constructive takings, this Court can reach a conclusion that is just, appropriate and reasonable.

[79] The SCC has invited a "shift of culture" in favour of "simplified and proportionate procedures for adjudication", such as summary disposition.[96] In this spirit, this Court has recognised that summary disposition should be "an accessible, available and widely used process".[97]

[80] In Alberta, summary disposition may be granted on the basis of "admissions of fact … made in a pleading or otherwise"[98] (Rule 7.2) or when the evidence positively establishes that there is "no merit to a claim or part of it" (Rule 7.3).[99] The "substantive test" applied on applications for summary disposition under Rules 7.2 and 7.3 is the same.[100]

[81] A four-part test governs summary disposition applications in this province:

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.

---

[96] *Hryniuk v Mauldin*, 2014 SCC 7, paras. 27-28.
[97] *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343, see generally.
[98] *Admiral Canada Inc. v Freekick Ltd.*, 2006 ABQB 451, para. 14: "Admissions" are "concessions or voluntary acknowledgments made by a party of the existence of certain facts … 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…".
[99] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 7.2-7.3.
[100] *Craik v Alberta Treasury Branches*, 2012 ABQB 373, para. 4.

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.[101]

[82] The four-part test continues to require summary dismissal of the Appellants' constructive takings claim following the SCC's decision in *Annapolis*.

[83] The Appellants' claim can be fairly resolved on a summary basis. The law of constructive takings is clear in light of *CPR* and *Annapolis*. The record is uncontraverted and it will not improve through questioning or a trial.[102] Unlike *Annapolis*, where the evidence with respect to an advantage remained to be developed after the SCC's decision,[103] the Appellants have framed their argument in relation to an advantage from the outset of these applications and have already marshalled all available evidence on this point.[104]

[84] Canada has met its burden to show that there is "no merit" to the Appellants' constructive takings claim and there is no genuine issue requiring a trial. The existing record, including the Lewis Affidavit, proves the facts of this case on a balance of probabilities.

---

[101] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, para. 47.

[102] The Appellants tacitly acknowledged that questioning is not required when they elected to forego questioning prior to the hearing of the applications: Consent Order filed July 22, 2021, para. 7 **[AR, Tab 15, p.0101]**.

[103] *Annapolis*, para. 4.

[104] As SOR/2018-263 does not apply to the Units until 2030, the evidence about an advantage is confined to speculative statements in the RIAS. This offers the best and only available evidence on this point for several years, and will not improve through questioning or a trial.

[85] The Appellants have failed to identify a genuine issue requiring a trial. The record is clear that Canada will not acquire the requisite advantage and that, consistent with the Appellants' expectations and conduct, all reasonable uses of the Appellants' royalty interest have not been removed.

[86] Overall, the existing record is sufficient for this Court to summarily dismiss the Appellants' constructive takings claim.[105] On these facts, summary dismissal is just, appropriate and reasonable.

PART V: Relief Sought

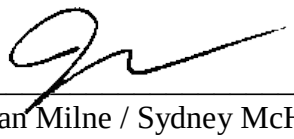
[87] Although the law of constructive takings has been clarified since the decision under appeal, the two-part test remains the same, as should the outcome of this claim. Under the two-part test for constructive takings, as clarified in *Annapolis*, Canada has not received an advantage and the Appellants have sustained a deprivation in value of their royalty interest. As the Appellants do not meet the two-part test, summary dismissal remains just as appropriate as before.

[88] Canada respectfully asks this Honourable Court to deny the appeal and uphold the summary dismissal of this Action.

[89] Canada seeks costs of the appeal.

All of which is respectfully submitted this 21st day of February 2023.

Time Estimate: 45 Minutes



Jordan Milne / Sydney McHugh
Counsel for the Attorney General of Canada
(Respondent)

[105] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, para. 47.

Table of Authorities

Appendix: Rules & Statutory Provisions

1. *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167
2. *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2018-263
3. *Interpretation Act*, RSC 1985, c I-21
4. *Alberta Rules of Court*, Alta Reg 124/2010