COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2201-0118-AC
TRIAL COURT FILE NUMBER:	1801-16746
REGISTRY OFFICE:	CALGARY
PLAINTIFFS:	ALTIUS ROYALTY CORPORATION, GENESEE ROYALTY LIMITED PARTNERSHIP and GENESEE ROYALTY GP INC.
STATUS ON APPEAL:	APPELLANTS
DEFENDANT/RESPONDENT:	HIS MAJESTY THE KING IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**FACTUM**

Registrar's Stamp

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

FACTUM OF THE INTERVENER ECOJUSTICE CANADA SOCIETY

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PART 1 FACTS

A. Overview and Background

1. Ecojustice is Canada's leading environmental law organization and intervenes in this matter to emphasize the importance of protecting governments' ability to regulate matters of health, safety and the environment in the public interest in constructive takings claims.

2. When evaluating the merits of constructive takings claims following the Supreme Court's decision in *Annapolis*,[1] courts must be cautious to maintain a clear distinction between government obtaining a "beneficial interest" (characterized by the SCC as an "advantage") and simply regulating in the public interest. Ecojustice submits that regulating to prevent or mitigate activities that are broadly harmful to the public cannot, and should not, be characterized as obtaining an "advantage" for the purpose of the constructive takings test. This is of particular importance in the present case, where the impugned government measures are intended to address what the SCC has described as an "undisputed…threat to the future of humanity."[2]

3. Potential changes to the regulatory environment are simply risks of doing business in a heavily regulated sector, whether those changes are foreseeable or not. In the current case, there were clear indicators for decades preceding the Appellants' investment that measures to address climate change would be imposed and would increase in stringency over time. The Appellants' assertion that they were caught unawares by a strengthening of regulatory measures to address climate change is dubious and not grounds for compensation.

4. The Appellants advance a constructive takings claim that relies on a broad and unfounded interpretation of a well-established legal test that could have significant adverse policy consequences. In particular, allowing constructive takings claims based on increases in the stringency of environmental regulations could undermine the ability and willingness of governments to meaningfully regulate important environmental issues in the public interest. This Honourable Court should be cognizant of these critical policy implications when interpreting the newly clarified constructive takings test and assessing the merits of this appeal.

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[1] *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 ["***Annapolis***"].
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 167 ["***GGPPA Reference***"].

B. Facts

5. By order of Mr. Justice J.D.B. McDonald, Ecojustice Canada was granted leave to intervene in this appeal, including leave to file a factum not exceeding 10 pages and to make oral submissions not exceeding 15 minutes.

6. Ecojustice does not take a position on the facts related to this appeal and relies on the facts set out by the Respondents. Specific facts relevant to the submissions made below are noted herein.

PART 2 GROUNDS OF APPEAL

7. Amongst the grounds identified by the parties, Ecojustice's submissions will address whether the Chambers Judge erred in finding that the Respondents had proven there is no merit to the Appellants' claims.

PART 3 STANDARD OF REVIEW

8. Ecojustice does not take a position on the standard of review.

PART 4 ARGUMENT

A. The prevention or mitigation of known harms is not an "advantage"

9. In *Annapolis*, the majority engaged in a detailed discussion of the first part of the *CPR* test, which relates to obtaining a "beneficial interest", stating that it "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."[3] What it means for the regulating authority to acquire an 'advantage' for the purpose of the constructive takings test is a key issue before this Honourable Court on appeal.

10. This Court must be careful to maintain a clear line between constructive takings and ordinary regulations in the public interest. This is consistent with the Supreme Court's direction in *Annapolis.* The majority repeatedly distinguished between "mere regulations in the public interest and takings requiring compensation at common law." [4]

11. In the environmental realm, regulatory measures are often aimed at avoiding or mitigating known threats to the environment, to public health, and to the safety and security of

[3] *Annapolis, supra* at para 38
[4] *Ibid* at para 57.

Canadian communities. The SCC has long recognized government's critical role in environmental protection, which it describes as a "public purpose of superordinate importance."[5] In fact, in *Hydro-Québec,* Justice La Forest for the majority wrote that Parliament and the provincial legislatures have an "**all-important duty**…to make full use of the legislative powers respectively assigned to them in protecting the environment"[6] [emphasis added].

12. Ecojustice submits that regulatory measures aimed at mitigating a known harm and fulfilling an "all-important duty" to the public cannot constitute an "advantage" for the purpose of the constructive takings test. This critical distinction was noted by the Applications Judge, who wrote 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 polluting."[7] It is also reflected in case law cited by the Respondents, including the Ontario Superior Court's decision in *Club Pro.*[8]

13. The US Supreme Court has frequently held that a prohibition on harmful use, as an exercise of the "police power"[9] , does not require compensation. For example, in *Goldblatt v. Town of Hempstead*[10] the defendant town had expanded around an excavation used by a company for mining sand and gravel, following which the town enacted an ordinance that in effect terminated further mining at the site. The Court declared that no compensation was owed to the company running the mine, stating that:

> [a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful

[5] *R v Hydro-Québec,* [1997] 3 SCR 213 at para 85.
[6] *Ibid* at para 86.
[7] *Altius Royalty Corporation v Alberta,* 2021 ABQB 3 at para 45.
[8] *Club Pro Adult Entertainment Inc. v Ontario (Attorney General)* (2006), 2006 CanLII 42254 (ON SC), aff'd 2008 ONCA 158.
[9] In the US, the term "police power" is not limited to traditional criminal matters, but refers to broad governmental regulatory power. A 1954 U.S. Supreme Court case, stated that "[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional application of the police power"; while recognizing that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless." *Berman v. Parker,* 348 U.S. 26 (1954)
[10] 369 U.S. 590 (1962). See also, *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) and *Miller v. Schoene,* 276 U.S. 272 (1928).

> purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.[11]

14. Regulatory measures to address climate change, including the measures impugned by the Appellants, are a clear example of steps taken to address a known environmental harm. As the SCC has found, climate change is an existential threat to Canada and to the world. The impacts of climate change include "…increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life."[12] It is uncontroversial that climate change is caused by greenhouse gas (**GHG**) emissions, including those associated with burning coal.[13] Government action at any level to reduce GHG emissions from coal or any other source is therefore aimed at mitigating a serious threat to all Canadians. This cannot and should not be considered an "advantage" to government for the purpose of the constructive takings test.

B. Regulatory measures to mitigate climate change, including by reducing GHG emissions, have been reasonably foreseeable for decades

15. When assessing whether government action affecting private property rises to the level of a constructive taking, the majority in *Annapolis* directed courts to "…undertake a realistic appraisal of… whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectation."[14] Government measures are not required to be foreseeable in order to avoid triggering compensation, but the Court was clear that a property owner's reasonable expectations should be considered as part of the overall analysis.

16. With respect, the suggestion that someone purchasing a business in the coal-fired power generation sector in 2014 was unaware of the possibility of regulatory action to address

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[11] *Ibid* at para 7. In early US case law such as *Goldblatt*, a legitimate exercise of the police power defeated a claim for compensation. The law has evolved so that a takings inquiry now considers multiple factors when considering regulatory takings claims, including: (1) the character of the government action; (2) the regulation's economic effect on the landowner; and (3) the regulation's interference with the landowner's reasonable investment-backed expectations. See: *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) at paras 25-26.
[12] *GGPPA Reference*, *supra* at para 187.
[13] *Ibid* at paras 167, 187 & 189.
[14] *Annapolis*, *supra* at para 45.

climate change strains credibility. Climate change, and the critical importance of government action to reduce GHG emissions, had been on the national and international agenda for decades prior to the Appellants' investment.

17. A similar issue arose in a recent case out of the District Court of the Hague in the Netherlands. In November 2022, the Court decided that energy companies RWE and Uniper could not claim financial compensation for a mandatory phase-out of coal-fired electricity production. In 2019, the Dutch government had adopted the *Prohibition of Coal in Electricity Production Act* to help implement its obligations under international climate law. The law provides that coal-fired power stations may no longer use coal as a fuel to generate electricity in the long term (by 2030 at the latest) in order to reduce GHG emissions from power plants.[15]

18. The District Court's decision to deny compensation turned in part on its assessment of the foreseeability of the measures. The Court held that an industry proponent should reasonably be expected to be aware of national and international developments that could lead to government measures affecting its activities. This is especially the case when the company is involved in an industry that is socially controversial due to a perception that its activities cause harm to the environment or public health.[16] The Court drew on well-known international agreements, including the 1992 *United Nations Framework Convention on Climate Change* (**UNFCCC**), the 1997 Kyoto Protocol, and the 2007 Bali Road Map to inform its assessment of the proponent's reasonable expectations.[17] Given this international context, as well as relevant domestic developments, the Court found that when Uniper invested in a new coal-fired power station in 2006 and started construction in 2009 it should have expected that government measures to reduce GHG emissions would impact its operations during their lifetime.[18]

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[15] *RWE and Uniper v. the Netherlands (Ministry of Climate and Energy)* (2021) (District Court of the Hague). A summary of the decision may be found here: http://climatecasechart.com/non-us-case/rwe-and-uniper-v-state-of-the-netherlands-ministry-of-climate-and-energy/. An informal translation of the decision may be found here: https://uitspraken-rechtspraak-nl.translate.goog/?_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp&_x_tr_hist=true#!/details?id=ECLI:NL:RBDHA:2022:12635.

[16] *Ibid* at para 5.17.3.

[17] *Ibid* at paras 3.7, 3.8 & 3.11.

[18] *Ibid* at para 5.17.5.

19. Similarly, the expectations of any company investing in a GHG emissions intensive sector in Canada about potential government measures that could impact the value of its investment should be informed by the national and international discourse on climate change. Industries like coal mining and coal fired power generation are highly controversial and are at the core of the climate debate. Consequently, proponents in these sectors should be thoroughly attuned to the growing political push for increasingly stringent regulations to reduce GHG emissions.

20. Canada's participation in international efforts to mitigate climate change dates back to at least 1992, when Canada became a party to the UNFCCC. The Convention provides, among other things, that developed country Parties like Canada must take measures to limit "its anthropogenic emissions of greenhouse gases."[19] Subsequent agreements made pursuant to the UNFCCC, including the Kyoto Protocol[20] and the Bali Road Map[21] (both referenced by the District Court of the Hague in *RWE and Uniper*) further emphasized the need for significant and rapid cuts to global emissions driven by wealthy nations.

21. Between 1992 and 2014 (when the Appellants purchased their royalty interest), Canada consistently made it clear that deep cuts to the country's emissions would be required to meet its international commitments. For example, in 2005 Canada listed GHGs as a toxic substance under the *Canadian Environmental Protection Act, 1999.*[22] The Regulatory Impact Analysis Statement accompanying the listing stated that "…there is sufficient evidence to conclude that [GHGs] constitute or may constitute a danger to the environment on which life depends…" and noted that there had been a substantial rise in GHG emissions "…as a result of human activity, predominantly the combustion of fossil fuels."[23] Further, Canada's 2007 Climate Change Plan made under the *Kyoto Protocol Implementation Act* stated that Canada would have to achieve an average 33% reduction in emissions each year for five years to meet its international targets under the Kyoto

[19] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Article 4, s 2(a) (entered into force 21 March 1994).
[20] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 2303 UNTS 162.
[21] *Bali Action Plan*, December 2007, Decision 1/CP.13, UN Doc FCCC/CP/2007/L.7/Rev.1.
[22] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 at Schedule 1.
[23] Canada Gazette, Part II, Vol. 139, No. 24, (November 21, 2005), pp 2627, 2634.

Protocol.[24] In order to make the necessary cuts, Canada began to adopt various regulations targeting GHG emissions, including the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*,[25] the *Renewable Fuels Regulations*,[26] the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*,[27] and the 2012 *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*[28] discussed by the Parties to this appeal.

22. As a result, by the time the Appellants purchased their royalty interest in 2014, the expectations of any company investing in the sector should have been informed by the knowledge that deep emissions cuts were necessary to meet Canada's climate commitments, and that Canada had already begun to regulate heavily in the area. Any company investing in coal at that time could therefore reasonably expect the value of their investment to be impacted by GHG reduction measures.

23. Fundamentally, regulatory changes are simply a risk of doing business in a heavily regulated industrial sector. Absent an explicit contractual agreement with government, no industry proponent can reasonably assert an expectation that a regulatory regime will remain static for any period of time, much less over 40 years as argued by the Appellants.[29] At law, a government cannot fetter its own freedom, or the freedom of successive administrations, to change laws. Rather, it "…must be left free to change policy to reflect changing social needs; to permit otherwise would paralyze parliament, the legislature and ministerial powers…"[30]

24. Consequently, misplaced reliance on an unchanging regulatory regime cannot be considered a "reasonable expectation" for the purpose of the constructive takings test.

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[24] *Friends of the Earth v Canada (Governor in Council),* 2008 FC 1183 at para 12.
[25] SOR/2010-201.
[26] SOR/2010-189.
[27] SOR/2013-24.
[28] SOR/2012-167.
[29] Appellants' factum at paras 5-7, 24, 27.
[30] *Ontario Black Bear/Ontario Sportsmen & Resources Users Assn v Ontario* (2000), 19 Admin LR (3d) 29 (ONSC) at para 59 ("***Ontario Black Bear**"),* citing *Reference re Canada Assistance Plan (Canada),* [1991] 2 SCR 525 at pp 557-560. See also *Langley Teachers' Association v School District 35 (Langley)* (1981), 33 BCLR 83 (BCCA) at para 42.

C. Allowing a constructive takings claim for an increase in the stringency of environmental law will have negative consequences on government's ability and willingness to regulate in the public interest

25. Broadening the scope of what constitutes a constructive taking to encompass environmental measures aimed at protecting the general public from harm will have significant impacts on government's ability and willingness to regulate to protect public interest values like environmental responsibility and sustainability. Even where regulations may be defensible, the threat of litigation could well function to chill necessary and desirable government actions.

26. Given SCC's recognition of the critical importance of government action to address environmental issues, including existential crises like climate change,[31] this Court must avoid creating unnecessary obstacles to the exercise of legitimate government authority in this area. In this case, the risks associated with the Appellants' claim are revealed by examining the Appellants' characterization of the supposed takings.

27. The impugned activity of the Alberta government was to enter into a private agreement to improve the environmental performance of a power plant with which the Appellants' had an indirect commercial relationship. Surely it cannot be the case that the government has effectuated a constructive taking where it negotiates a private contract with a commercial entity that results in an indirect financial loss to other actors that were in some way reliant on that entity's business. If this is sufficient to ground a takings claim, the potential scope of government liability could become unmanageably vast. The Appellants' claim is not analogous to previous constructive takings cases which concern, as the majority in *Annapolis* describes it, the "effective appropriation of private property by a public authority **exercising its regulatory powers**" [emphasis added].[32] The Off-Coal Agreement impugned by the Appellants appears to have been facilitated by a policy decision and is not truly 'regulatory' in the sense used in constructive takings jurisprudence. The Appellants

[31] *GGPPA Reference*, *supra* at paras 12 & 167; *Hydro-Québec*, *supra* at para 127.
[32] *Annapolis*, *supra* at para 18. See also para 19: "The line between a valid regulation and a constructive taking is crossed where the *effect* of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property. [Internal cites omitted]

have not cited any case law to support their apparent assertion that the law of constructive takings should be expanded to capture non-regulatory government actions.

28. The supposed taking by Canada was – as the Appellants themselves describe it – "to prohibit traditional coal-fired electrical generation"[33] (which simply means to require that "all coal units to meet the federal emissions limit" by a certain date).[34] This is tantamount to an argument that environmental standards, once enacted, cannot be strengthened without triggering governmental liability. Environmental standards can, and should, increase as the severity of environmental problems becomes better understood, as new technologies allow better performance at lower costs, or when superior alternatives emerge. Governments must have the ability to respond to changing circumstances with improved legislation and regulations without fear of liability,[35] especially where those improvements are necessary to meaningfully address an environmental crisis of unprecedented scale.

29. When weighing the merits of this appeal, this Court must therefore be mindful of the exceptional nature of the Appellants' constructive takings claim, and of the potential impacts of its decision on the ability and willingness of both the federal and provincial governments to address critical environmental issues for the benefit of the public.

PART 5 RELIEF SOUGHT

30. Ecojustice seeks a decision of this Court consistent with the submissions herein.

31. Ecojustice does not seek any costs and asks that no costs be awarded against it.

All of which is respectfully submitted this 21st day of April, 2023

Time Estimate – 15 Minutes

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[33] Appellants' factum, para 6(b).
[34] *Ibid*, para 52.
[35] *Ontario Black Bear*, *supra* at para 59.

Table of Authorities