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COURT OF APPEAL FILE NUMBER	**2201-0118AC**
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**
DEFENDANTS	**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and ATTORNEY GENERAL OF CANADA**
STATUS ON APPEAL	**RESPONDENTS**
DOCUMENT	**RESPONSE FACTUM**

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

RESPONSE FACTUM OF THE APPELLANTS TO THE INTERVENOR FACTUM OF ECOJUSTICE

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PART 1. FACTS

A. Introduction

1. This factum is provided by the appellants ("**Altius**") in response to the intervenor factum.

2. As described in its appeal factum, Altius claims $190 million in compensation against the defendant governments for the *de facto* expropriation of a royalty interest in thermal coal used solely to fuel the Genesee Power Plant. In particular:

   a. the Government of Alberta paid $733.8 million to the owner of the Genesee Power Plant which used the coal to cease generating coal-fired electricity by 2030; and

   b. the Government of Canada changed the regulatory framework to prohibit traditional coal-fired electrical generation by 2030.

3. These actions have rendered the royalty interest in coal that was to be used for electrical generation after 2030 of no value, in effect taking Altius' property.

4. The Supreme Court of Canada confirmed last year that "**regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test**" for a constructive taking.[1] In the present case:

   a. the applications judge agreed "the ability to develop and exploit the coal is arguably taken" as a result of the resource becoming "valueless";[2] and

   b. the chambers judge accepted Altius' evidence showing the sterilization of the royalty interest as "uncontroverted".[3]

5. Altius urges that the summary dismissal, made without the recent guidance of the Supreme Court, be set aside, as Altius' claim has merit and there are uncertainties in the facts and the record that reveal genuine issues requiring a trial.

   a. The defendants have acquired advantages from the impugned conduct: they have achieved their objective of locking the coal in the ground and will receive economic

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1 *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at para 45(c) ["*Annapolis*"] [Emphasis added]

2 Decision of AJ Farrington dated January 4, 2021 at para 33 ("Applications Judge Decision") **[Appeal Record ("AR") at 76]**

3 Reasons for Decision of Justice Price dated April 8, 2022 at para 35 ("Chambers Judge Decision") **[AR at 104]**

benefits.[4] Insofar as there is any dispute over those facts,[5] that is a genuine issue requiring discovery and trial. The intervenor wrongly ignores this critical part of the analysis.

b. Altius submits that all reasonable uses of the property have been removed, but Alberta argues the subject coal can still be mined and sold after 2030, and Canada argues the coal can be used for electrical generation after 2030 with carbon capture storage technology.[6] This issue is also critical to resolution of Altius' claim yet overlooked by the intervenor.

c. Intention of the public authority is a "material fact": an intention to take constructively, if proven by the claimant, may support a finding that the land owner has lost all reasonable uses of the land.[7] The record is insufficient to confirm to what extent the intent of the governments is to phase out thermal coal mining at Genesee (in addition to reducing greenhouse gas emissions from coal-fired power plants). Altius is entitled to discovery.

d. Notice to the owner of the restrictions at the time the property was acquired is relevant.[8] Canada, and now the intervenor, dispute the evidence of Altius that it did not reasonably foresee the taking of its property without compensation.[9]

6. The intervenor urges this Court to repeat the errors of the Nova Scotia Court of Appeal in *Annapolis*, "which misapplied *CPR* and summary judgment principles."[10]

B. Facts

7. The facts are recited in Altius' appeal factum.

PART 2. GROUNDS OF APPEAL

8. The grounds of appeal are set out in Altius' appeal factum.

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4 See Plaintiffs Factum at paras 113-127
5 See, e.g., Canada Factum at paras 51, 53; Alberta Factum at para 113
6 Plaintiffs Factum at paras 128-138; Alberta Factum at para 51; Canada Factum at para 65-66
7 *Annapolis* at para 53
8 *Annapolis* at para 45(a)
9 Plaintiffs Factum at paras 22-29; Canada Factum at para 2, 24, 76; Ecojustice Factum at paras 3, 16, 22
10 *Annapolis* at para 4

PART 3. STANDARD OF REVIEW

9. The standard of review is addressed in Altius' appeal factum.

PART 4. ARGUMENT

A. Intervenor Wrong: Environmental Regulations May Give Rise to Takings

10. The intervenor asserts that government action "to reduce GHG emissions from coal or any other source" cannot be considered an advantage to the state for the purposes of the constructive taking test, because it is "aimed at mitigating a serious threat to all Canadians."[11]

11. The intervenor mischaracterizes what Altius submits are the advantages that will flow to the defendant governments from their actions to phase out coal power by 2030. As elaborated in Altius' appeal factum at paragraphs 113 to 127:

    a. the 2030 phase out will result in policy and economic advantages flowing to the Alberta and Canadian governments estimated to be worth billions of dollars; and

    b. any uncertainty as to whether the phase out will result in advantages accruing to the state (considering neither defendant concedes economic advantages from the phase out[12]) is a genuine issue requiring discovery and trial.

12. The intervenor assumes that the 2030 phase out is solely aimed at reducing greenhouse gas emissions and is not motivated by the objective of ending thermal coal mining.

13. However, *Annapolis* provides that the public authority's objective, its intention, is a "material fact" in the context of a constructive taking claim and may be "some evidence" of a taking.[13] In this case:

    a. Alberta entered into an Off-Coal Agreement that "requires [the owner of the Genesee Power Plant] to cease operations or businesses that produce coal-fired emissions";[14] and

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[11] Ecojustice Factum at para 14
[12] Canada Factum at paras 51, 53; Alberta Factum at para 113
[13] *Annapolis* at para 53
[14] Affidavit of Ben Lewis at Exhibit "Z" **[Appellants' Extracts of Key Evidence ("AE") at 286]**

b. Canada has stated that its amended regulations are "designed to phase out conventional coal by 2030."[15]

14. Any doubt that those two facts alone establish a constructive taking must be explored through the usual Part 5 questioning and trial.

15. Neither defendant tendered evidence of the motivation for the 2030 phase out. The present record is insufficient to determine whether the state action is solely aimed at reducing greenhouse gas emissions - as suggested by the intervenor - or as much at ending thermal coal mining.

16. The intervenor relies on the following comment of the applications judge as the legal basis for its submission that environmental regulations against "known harms" cannot give rise to takings, but it is not the law:

> 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. That is not to say that there has been a specific finding that there is or is not a health hazard at the emission levels set here. That issue is simply not before the Court from an evidentiary point of view, and the regulation has not been challenged as being arbitrary or capricious.[16]

17. Altius is not a polluter. Its royalty interest is in *in situ* coal – a natural resource. Moreover, the applications judge's conclusion about health and environmental regulations was not based on jurisprudence, but only a belief that "surely" there was no such right of compensation. The passage is not a substitute for judicial analysis.

18. The law of constructive takings protects property owners when the Crown is regulating in the name of the environment or public health, as demonstrated by nearly 40 years of jurisprudence from courts across Canada:

CASE & PIN-POINTS	TAKING
British Columbia v Tener, [1985] 1 SCR 533 at paras 34, 37, 60, 61	• **Plaintiff's Business:** Mining. • **State Action:** Prohibiting mineral operations to "preserve the qualities perceived as being desirable for public parks", which operations the Crown considered as a "threat to the park."

[15] Affidavit of Ben Lewis at Exhibit "HH" **[AE at 342]**
[16] Applications Judge Decision at para 45 **[AR at 76]**

CASE & PIN-POINTS	TAKING
	• **Result:** Crown found liable for a taking by "defeating the [plaintiffs'] entire interest in the land".
Casamiro Resource Corp v British Columbia (1990), 43 LCR 246 (BCSC) at paras 3, 13 **[Appellants' Book of Authorities at Tab 18]**; aff'd (1991), 55 BCLR (2d) (CA) at 18	• **Plaintiff's Business:** Mining. • **State Action:** Prohibiting mineral exploitation in a park "for the good of society". • **Result:** Crown found liable for a taking by reducing the mineral grants to "meaningless pieces of paper."
TFL Forest Ltd v British Columbia, 2002 BCSC 180 at paras 2, 3, 25	• **Plaintiff's Business:** Commercial Logging. • **State Action:** Prohibiting commercial logging in parks "dedicated to the preservation of their natural environment for the inspiration, use and enjoyment of the public". • **Result:** Crown found liable for a taking by preventing commercial harvesting of timber.
Rock Resources Inc v British Columbia, 2003 BCCA 324 at paras 1, 26, 57	• **Plaintiff's Business:** Mining. • **State Action:** Preventing mineral exploitation in newly created park. • **Result:** Crown found liable for a taking.
Lynch v St John's (City), 2016 NLCA 35 at paras 2, 60, 62-63, leave to appeal to SCC ref'd 2017 CanLII 4184 (SCC)	• **Plaintiff's Business:** Residential development. • **State Action:** Prohibiting development to acquire a "continuous flow of uncontaminated groundwater" for the City of St John's. • **Result:** Crown found liable for a taking by keeping the land "unused in its natural state".

19. Moreover, neither the Supreme Court's decisions in *CPR v Vancouver*[17] nor *Annapolis*[18] exempt environmental regulations from the law of takings – a carve out that would render the common law in this area unfair, uncertain, and arbitrary.

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[17] 2006 SCC 5

[18] *Annapolis*

20. What matters is not the nature of the regulation, but the *effect* of it. As stated by the Supreme Court in *Annapolis*:

> 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. Put simply, "in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with 'no reasonable use' of the property".[19] [Citations omitted, emphasis in original.]

21. That is what has happened here. Altius re-emphasizes that the applications judge agreed the subject coal is made "valueless",[20] and the chambers judge accepted Altius' evidence showing the sterilization of the royalty interest as "uncontroverted". [21]

22. While Altius submits that all reasonable uses of the property have been removed, Alberta argues the subject coal can still be mined and sold after 2030, and Canada argues the coal can be used for electrical generation after 2030 with carbon capture storage technology.[22]

23. Furthermore, as *Annapolis* directs at paragraph 45, determining whether a taking has occurred requires a "realistic appraisal of matters in the context of the specific case", such as the nature of the government action, notice to the owner, the reasonable expectations of the owner, the nature of the land, and its historical or current uses.

24. To the extent that the intervenor submits Altius should be disentitled to compensation for the sterilization of the royalty interest because of its connection with coal-fired electricity (a source of power used by Canadians for centuries), that unprincipled proposition is belied by the defendants' own compensation to industry participants for the 2030 phase out, such as the $1.1 billion paid by Alberta to the owners of affected coal-fired power plants.[23]

25. The decision of *Club Pro Adult Entertainment Inc v Ontario*[24] relied upon by the intervenor has no application. When the province of Ontario enacted new legislation prohibiting indoor smoking, the plaintiffs sued the Ontario government for having *de facto* expropriated their designated smoking rooms in adult entertainment businesses.

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19 *Annapolis* at para 19
20 Applications Judge Decision at para 33 **[AR at 76]**
21 Chambers Judge Decision at para 35 **[AR at 104]**
22 Plaintiffs Factum at paras 128-138; Alberta Factum at para 51; Canada Factum at para 65-66
23 Affidavit of Ben Lewis at para 38, Exhibit "Y" **[AE at 10, 282-83]**
24 2006 CanLII 42254 (ONSC) at para 82 ["*Club Pro*"], var'd 2008 ONCA 158

26. The Ontario Superior Court of Justice struck the taking claim ultimately on the basis that the new legislation did "not appropriate the plaintiffs' business for the Crown's use or benefit, or for the public's use or benefit."[25] In contrast, the actions here are expressly to cease operations or businesses that produce coal-fired emissions, rendering the coal useless.

27. The intervenor's citation of the 1962 US Supreme Court case *Goldblatt v Town of Hempstead* is of no assistance. The proposition that "a prohibition on harmful use … does not require compensation" was articulated in the context of a municipality's exercise of police powers (a US doctrine),[26] and even then the Supreme Court acknowledged the constitutional right to compensation for a taking of property when government regulation is sufficiently onerous.[27]

B. Altius Did Not Have Notice of the 2030 Phase Out

28. The intervenor appears to take issue with Altius' claim on the stated basis that "regulatory measures to mitigate climate change, including by reducing GHG emissions, have been reasonably foreseeable for decades".[28]

29. The question is not whether regulatory measures to mitigate climate change were foreseeable when Altius acquired the royalty interest, but whether Altius had notice of the state measures specifically at issue – the 2030 phase out of coal-fired electricity – when the royalty interest was acquired.[29]

30. Altius submits it did not have notice of the 2030 phase out of coal-fired electricity when it agreed to acquire the royalty interest in 2013.

    a. When Altius agreed to acquire the royalty interest in 2013, Canada had only the year prior unveiled regulations that permitted the Genesee Power Plant to operate until 2055 and Alberta had no such policy, law, or regulation.[30]

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[25] *Club Pro* at para 82
[26] Ecojustice Factum at para 13, citing 369 U.S. 590 (1962) ["*Goldblatt*"]
[27] *Goldblatt* at paras 9, 15
[28] Ecojustice Factum at page 7
[29] See *Annapolis* at para 45(a)
[30] Affidavit of Ben Lewis at paras 12-15, 21, Exhibits "C", "D" and "E" **[AE at 5, 7, 42, 45, 57]**

b. Alberta announced the 2030 phase out in November 2015, which was nearly 2 years after Altius agreed to acquire the royalty interest.[31]

c. Canada announced the 2030 phase out in November 2016, which was nearly 3 years after Altius agreed to acquire the royalty interest.[32]

31. While the risk of expropriation was identified in Altius' continuous disclosure to capital markets, the risk of expropriation without compensation was not.

32. Moreover, the 2030 phase out is not a routine regulatory change, but a transformative one that upended the long-term planning and livelihoods of industry participants. The defendants' own recognition of that is evident by their significant compensation and support for affected coal plant owners, workers, and communities with a view to providing a "just and fair" transition for them.[33]

33. To the extent there is any question as to whether the 2030 phase out was foreseeable to Altius when it agreed to acquire the royalty interest, that is a genuine issue requiring a trial.

C. There is No Risk of Chilling Effects on Government

34. The intervenor submits that, "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."[34]

35. This fearmongering ignores that liability arises only in circumstances where the impugned state conduct removes all reasonable uses of the property.[35] The Supreme Court of Canada has put to rest such sophistry.

36. Any specter of a chilling effect on the government's ability or willingness to regulate in the public interest ignores that the Crown can be immunized of liability by statute. The Supreme Court reiterated that basic proposition of Parliamentary supremacy in *Annapolis*:

> It is important to stress that the rule contemplates that governments have the power to immunize themselves from liability to pay compensation for a taking. While, as we explain, we do not "expand" that liability but merely affirm it, the point is that governments may

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31 Affidavit of Ben Lewis at para 21, Exhibits "J", "T" **[AE at 7, 110, 258]**
32 Affidavit of Ben Lewis at para 21, Exhibits "J", "FF" **[AE at 7, 110, 328]**
33 Affidavit of Ben Lewis at paras 38-40, 48-50, Exhibits "AA", "II", "JJ" **[AE at 10, 12, 303, 390, 407]**
34 Ecojustice Factum at page 11
35 *Annapolis* at para 19

> effect takings without paying compensation, so long as the enabling statute clearly expresses that intention. Notably, in *CPR*, the legislation at issue – the *Vancouver Charter* – immunized the City from compensating landowners for any loss as a result of the restrictions on land development and use. From the standpoint of government, the exigencies of the rule are modest and easily satisfied.
>
> …
>
> Lastly, we reiterate that provincial legislatures remain free, as they always have been, to "alter the common law" in respect of constructive takings (*CPR*, at para. 37, referring to the immunity conferred by s. 569 of the *Vancouver Charter*) — by, in this case, immunizing Halifax by statute from the obligation to pay compensation for taking private property in the public interest. [Emphasis added, citations removed.] [36]

37. In light of that power, allowing this appeal cannot produce any sort of chilling effect on the government's willingness or ability to regulate in the public interest.

38. The intervenor's submission that the law of takings excludes "non-regulatory government actions" such as Alberta's Off-Coal Agreement[37] is baseless and hopeless.

39. Alberta has not argued the Off-Coal Agreement constitutes "non-regulatory government action", but asserted in its brief before the chambers judge that, "**The impugned government action was pursuant to *valid statutory authority***."[38] (The particulars of that statutory authority are not known to Altius, and therefore cannot be further addressed.)

40. In any event, the test for a taking is not limited to regulatory conduct but simply asks whether "state action" has removed all reasonable uses of the property.[39]

41. *A fortiori* state action that is unauthorized may amount to a taking. There is no principled or policy reason for takings doctrine to depend on the mode of government action. The Supreme Court's direction in *Annapolis* is that "the test focusses on *effects* and *advantages*, substance and not form is to prevail."[40]

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[36] *Annapolis* at paras 22, 78

[37] Ecojustice Factum at para 27

[38] Brief of Alberta filed October 15, 2021 at para 148 [Emphasis in original]

[39] *Annapolis* at para 44. See *Sun Construction Company v Conception Bay South*, 2019 NLSC 102 for an example of where non-regulatory state action amounted to a taking, and in particular para 14 where the Court concluded that the property was "not taken in furtherance of land use regulation, but constituted an unauthorized taking for the creation of roadworks."

[40] *Annapolis* at para 45

42. The intervenor's submission that the taking claim against Canada is "tantamount to an argument that environmental standards, once enacted, cannot be strengthened without triggering governmental liability"[41] mischaracterizes the submission of Altius.

43. Altius, of course, accepts that governments may change and strengthen laws, in many instances without compensating affected property owners. Its submission is simply that when government action renders property valueless, fair compensation must be paid to the owner in accordance with settled law.

44. The claim here is as in *Tener*, *Casamiro*, and *Rock Resources*, where mineral interests were acquired based on information known at the time, subsequent government action effectively defeated those interests, and compensation was ordered.

45. That line of authorities is consistent with the Supreme Court's statement in *Annapolis* that, **"regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test**".[42]

46. Altius' royalty interest has been deprived of all economic value as a result of the defendants' acts to eliminate coal mining to generate power. *Annapolis* is binding authority that compensation is owing.

PART 5. RELIEF SOUGHT

47. In addition to the relief sought by Altius in its appeal factum, Altius seeks an award of costs as against the intervenor payable on Column 5 as well as their reasonable disbursements arising from the intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2023.

Time for oral argument: 15 minutes

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[41] Ecojustice Factum at para 28
[42] *Annapolis* at para 45(c)

TABLE OF AUTHORITIES