

Public health and environmental benefit not an advantage for constructive expropriation

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In [*Altius Royalty Corporation v Alberta*, 2024 ABCA 105](#), the Alberta Court of Appeal ruled that a mere public benefit, such as health and environmental benefits resulting from the reduction of greenhouse gas emissions, is not an interest or advantage acquired by the Crown for the purposes of the common law test for constructive taking (also known as *de facto* expropriation).

Background

In 2012, the federal government established performance standard regulations for coal-fired power plants (the Regulations). Pursuant to the Regulations, the three coal-burning units at the power plant – located near Genesee, Alberta – would reach the end of their useful lives in 2039, 2044 and 2055.

In 2014, Altius Royalty Corporation (Altius) acquired a royalty interest in the nearby Genesee coal mine, which provided coal to the Genesee power plant.

In 2015, the federal government amended the Regulations to require the performance standard for coal-fired plants to be met no later than 2030. The Alberta government also introduced its [*Climate Leadership Plan*](#) to phase out coal-fired electricity generation emissions by 2030. Alberta subsequently entered into an off-coal agreement with the owners of the Genesee power plant and other coal powered plant owners, whereby the owners of electricity generation plants agreed to end emissions by 2030 in exchange for transition payments from the government.

Altius brought a claim against the Governments of Canada and Alberta, alleging that they had constructively expropriated Altius' royalty interest without compensation. Applications Judge Farrington summarily dismissed Altius' claim on the basis that the first prong of the two-part common law test for constructive taking was not satisfied; namely, that the Crown did not acquire a beneficial interest in the property. The decision was upheld by Justice Price of the Alberta Court of King's Bench.

Decision

As stated in [*Canadian Pacific Railway Co v Vancouver \(City\)*](#), and reaffirmed in [*Annapolis Group Inc v Halifax Regional Municipality*](#), *de facto* expropriation occurs where: (1) the Crown acquires a beneficial interest in the property or flowing from it; and (2) all reasonable uses of the property have been removed (the *Annapolis* test).

In its Regulatory Impact Analysis Statement that accompanied the *Regulations Amending the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity*, SOR 2018-263, the Canadian government predicted that the Regulations would result in \$1.3 billion in health and environmental benefits from air quality improvements. Altius claimed this reduction of “healthcare and environmental expenses” stemming from the Regulations constituted an advantage for the purposes of constructive expropriation.

The Court of Appeal dismissed Altius’ claim against Canada, holding that health and environmental benefits resulting from the reduction of greenhouse gas emissions are not an interest or advantage acquired by the Crown under the first branch of the *Annapolis* test. The Court held that although such benefits to the public may be quantifiable, they are not a proprietary interest that corresponds to the allegedly expropriated property interest, which is necessary for constructive expropriation.

The Court rejected Altius’ claims against Alberta for the same reason, with the added reasoning that Altius’ lost royalty payments did not stem from a legislative or regulatory scheme enacted by Alberta, but because the plant’s owner decided to cease operations.

Ultimately, the Court dismissed the appeal and granted summary judgment in favour of Canada and Alberta on the basis that they had demonstrated that there was no genuine issue requiring trial.

Takeaways

The Alberta Court of Appeal’s decision confirms that mere public benefits flowing from government regulations will not satisfy the first branch of the *Annapolis* test, which requires the Crown to have acquired some form of *proprietary* interest in the property (or flowing from it).

BLG has extensive experience in expropriation matters, including representing property owners against the Crown in expropriation hearings before the Land and Property Rights Tribunal and the Courts. For more information, please reach out to any of the key contacts below.

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