COURT OF APPEAL FOR ONTARIO

CITATION: Lithium Royalty Corporation v. Orion Resource Partners, 2023 ONCA 697
DATE: 20231020
DOCKET: M54588 (COA-23-CV-1029)

Paciocco J.A. (Motion Judge)

BETWEEN

Lithium Royalty Corporation

Applicant (Respondent/Responding Party)

and

Orion Resource Partners, Orion Mine Finance Fund I, Alnitak Holdings, LLC, Orion Mine (Master) Fund I LLP, Bellatrix Ltd., Trident Royalties PLC, and Lithium Americas Corporation

Respondents (Appellants/Moving Parties/ Respondent/Responding Party)

Munaf Mohamed KC, Jonathan G. Bell, and Ian W. Thompson, for the appellants/moving parties Orion Resource Partners, Orion Mine Finance Fund I, Alnitak Holdings, LLC, Orion Mine Finance (Master) Fund I LLP, and Bellatrix Ltd.

Brendan F. Morrison and Katherine R. Costin, for the respondent/responding party Lithium Royalty Corporation

No one appearing for the respondent/responding party Lithium Americas Corporation

Heard: October 12, 2023, by videoconference

ENDORSEMENT

2023 ONCA 697 (CanLII)

OVERVIEW

[1] This is a motion brought by the moving parties for a stay pending appeal of a judgment secured by the plaintiff, Lithium Royalty Corporation ("LRC"), an Ontario corporation, after a bifurcated liability hearing.

[2] The liability hearing was conducted in an action in which LRC sued the moving parties for breach of contract for failing to honour an alleged agreement to sell LRC royalty interests in the "Thacker Pass" lithium mining project in Nevada (the "underlying action"). The trial judge issued "Reasons for Decision – Trial of an Issue" (the "judgment") arising from the liability hearing. The remedies hearing has not yet been conducted.

[3] For the reasons that follow, I am dismissing the moving parties' motion for a stay of the entire underlying action pending appeal, but I am granting a partial stay of proceedings against the respondents, Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, on terms that I find to be just. Those terms are intended to permit the action as a whole to continue to be litigated but will prevent enforcement action from being undertaken against Bellatrix Ltd. and Orion Mine Finance (Master) Fund I LP. These terms are in the interests of justice since they will enable the litigation to be concluded efficiently while insulating Bellatrix Ltd. and Orion Mine Finance (Master) Fund I LP from being prejudiced by enforcement action

2023 ONCA 697 (CanLII)

undertaken before an appeal in this matter can be heard, bearing in mind the apparent strength of their appeals.

[4] I am also ordering a stay of the appeal, COA-23-CV-1029, pending the conclusion of the underlying trial.

THE RELEVANT PLAYERS

[5] “Orion Resource Partners” is a trade name, used by three business organizations, (1) Orion Resource Partners (UK) LLP, (2) Orion Resource Partners (USA) LP, and (3) Orion Resource Partners (Aus) Pty Ltd., to carry on business sourcing and managing investments in the metal and mining sector. These three business organizations do not acquire or fund investments themselves but act as “advisers”. Their role is to “source” investments.

[6] These three business organizations use a complex business structure that includes subsidiary partnerships, incorporations, and unincorporated business funds to acquire and finance the investments they pursue. In this decision, I use the term, “Orion” to refer loosely to all of the partnerships, corporations and business mechanisms that operate in association to carry on the business initiated by Orion Resource Partners (UK) LLP, Orion Resource Partners (USA) LP, and/or Orion Resource Partners (Aus) Pty Ltd., under the trade name “Orion Resource Partners”.

2023 ONCA 697 (CanLII)

[7] In contrast, I use the term “Orion Respondents” to refer to the Orion partnerships, corporations and business mechanisms that are named as parties to the underlying action.[1] When I use the term “Orion Respondents” I include all named “Orion” respondents, including the unincorporated entities, whether or not they may have the legal capacity to sue or be sued.

[8] At the time of the negotiation by LRC for the purchase of the Thacker Pass royalty interests, those royalty interests were held in the name of Alnitak Holdings, LLC. In turn, Bellatrix Ltd. was the shareholder of Alnitak Holdings, LLC. In turn, Orion Mine Finance (Master) Fund I LP was the shareholder of Bellatrix Ltd. Each of these three business organizations, Alnitak Holdings, LLC, Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP[2], have been named as Orion Respondents.

[9] The trade name, “Orion Resource Partners”, is also named as an Orion Respondent. So, too, is the unincorporated investment fund, Orion Mine Finance Fund I, which is the Orion fund that was used for the acquisition of the royalty interests.

2023 ONCA 697 (CanLII)

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[1] Lithium Americas Corporation is also named in the underlying lawsuit but is not part of the Orion business model.

[2] To be precise, Orion Mine Finance (Master) Fund I LP is misnamed in the pleadings as Orion Mine (Master) Fund I LLP. This misnomer was not raised in the proceedings below. I will treat this error as immaterial given the high probability that it will be found to be a remediable misnomer in the pleadings if a motion is brought.

[10] A final order from the remedies hearing has yet to be issued. I have been advised that there is a hearing currently underway to settle the final order.

[11] In her judgment, the trial judge did not state explicitly that she was finding liability against anyone. The Orion Respondents claim that she decided only that there was a valid contract but made no finding on whether it was breached or who breached it. On this view, the liability hearing has not yet been completed. LRC claims that in finding there was a valid contract when that was the only live issue at what she described as a liability hearing, the trial judge effectively found liability for breach of contract, without expressly saying so in her judgment.

[12] In addition, the trial judge did not specify whom the judgment was being given against. There appears to be a dispute between the parties as to who the findings in the judgment are made against. There may be uncertainty, for example, as to whether, in naming “Orion Resource Partners” as a party, LRC has secured a finding against Orion Resource Partners (UK) LLP, Orion Resource Partners (USA) LP, and Orion Resource Partners (Aus) Pty Ltd., which operate under that trade name. At times the trial judge spoke about “Orion”. The Orion Respondents apprehend that LRC is treating the judgment as having been made against all Orion entities, whether named as respondents or connected to the transactions that formed the subject-matter of the underlying action, which strikes me as an extravagant claim. Realistically, findings made by the trial judge would only have been made against named parties, but which named parties may be unclear.

2023 ONCA 697 (CanLII)

[13] Clarity on these questions – who is bound by the decision and the scope of the decision – may be added when the trial judge issues a formal judgment, which has yet to occur. I will address the effect of these remaining questions on my decision below when it is opportune to do so.

THE MATERIAL FACTS

The Contract Negotiations, The Royalty Interests, and the Rulings Made

[14] In 2019, a bid process to sell the Thacker Pass royalty interests was initiated. It was not promoted or conducted in the name of Alnitak Holdings, LLC, the direct holder of the royalty interests, but in the name of "Orion Resource Partners."

[15] During the bid process, LRC did not succeed in acquiring the royalty interests, but subsequently entered into direct negotiations to do so. Those negotiations, which led to the contract the trial judge found, were handled by Orion Resource Partners (UK) LLP's "Portfolio Manager", Philip Clegg. Ernie Ortiz negotiated on behalf of LRC.

[16] In his evidence, Philip Clegg spoke indiscriminately about "Orion" and affirmed the central management structure that operated within Orion. He testified that Orion utilized an "Investment Committee" to approve potential investments. He attested that before a potential investment could even go before Orion's Investment Committee, the blessing of Orion's founder, Oskar Lewnowski, who chaired the Investment Committee, was required. Philip Clegg testified that he

2023 ONCA 697 (CanLII)

consulted Oskar Lewnowski during the negotiations with LRC and had his blessing to discuss the royalty division, and that he also consulted with Orion's Deputy Legal Counsel, Dov Lader. Philip Clegg testified that all investments also require approval of Orion's conflict of interests committee, "LPAC". Based on this and other evidence, the trial judge found that Philip Clegg had the actual and ostensible authority to contract relating to the royalty interests.

[17] The most material communications in the negotiation occurred on January 20, 2021, when Ernie Ortiz sent Philip Clegg an email relating to a proposal to acquire 85 percent of the royalty interest, stating, "[w]e accept your offer". Ernie Ortiz indicated that a binding term sheet would follow. Philip Clegg responded, "Ok, sounds good". A term sheet was subsequently sent by LRC on January 22, 2021. It was "marked up" and ultimately returned to LRC on January 26, 2021. The term sheet included a term that the law of Ontario would govern. LRC relies upon this exchange as establishing a completed contract to acquire 85 percent of the Thacker Pass royalty interests. It took the position during the liability hearing that any terms still being negotiated were not essential to the formation of a valid contract.

[18] On January 26, 2021, "Orion" received an expression of interest in the Thacker Pass royalty interests from Trident Royalties PLC. Orion took the position that the negotiations with LRC had not led to a contract and that they were free to entertain other offers.

2023 ONCA 697 (CanLII)

[19] LRC responded on February 11, 2021 by initiating a Notice of Application in Ontario to enforce the contract, naming “Orion Resource Partners” and Lithium Americas Corporation (“LAC”), the corporation that owns the Thacker Pass mine, as the two defendants.[3]

[20] No objection was made by anyone on behalf of Orion to LRC’s use of the trade name, Orion Resource Partners, in the pleadings, and affidavits of merit were filed disputing liability.

[21] On March 19, 2021, after the litigation was underway, Trident Royalties PLC announced it had acquired a 60 percent stake in the royalty interests. Upon learning that 60 percent of the royalty interests that were the subject of its claim had been disposed of, LRC sought an amendment to add Trident Royalties PLC as a party. It did not seek to enjoin the sale, which had already been consummated.

[22] The parties subsequently filed competing motions in the action. On November 22, 2021, the application judge ruled on some of those motions, ordering the action against Trident Royalties PLC to be stayed for want of jurisdiction, including because Trident Royalties PLC had not attorned to the jurisdiction. The application judge also converted the application into an action.

[3] LRC added LAC to ensure it would be bound by any orders made, and LAC has not taken a position in the litigation.

2023 ONCA 697 (CanLII)

[23] On August 10, 2022, the trial judge – the former application judge – issued an endorsement allowing the liability phase of the trial to proceed first to trial. This had the effect of bifurcating the liability and remedies issues. With the consent of the parties, she also directed that two further motions would be heard at the liability hearing.

[24] The first of those motions was brought by LRC to add as named respondents, Orion Finance Fund I; Alnitak Holdings, LLC; Bellatrix Ltd.; and "Orion Mine Finance (Master) Fund LLP". The trial judge collectively referred to these proposed respondents as the "proposed Orion respondents". I will do the same when speaking exclusively of these respondents. I will also refer to the motion to add them as parties as the "parties amendment motion".

[25] The second motion that the trial judge adjourned to be heard at the liability hearing was a jurisdiction motion brought in the name of Orion Resource Partners (the "jurisdiction motion").

[26] The liability hearing was held in December 2022. At the outset of that hearing the trial judge received arguments on both of these motions, followed by submissions relating to the validity of the alleged contract. She reserved her decision on all three issues.

[27] While the trial judge's decisions were under reserve, Orion Resource Partners commenced a new bid process to sell the remaining 40 percent of its

2023 ONCA 697 (CanLII)

royalty interests.[4] On August 15, 2023, before the bid process auction was complete, the trial judge released the reasons for decision under appeal.

[28] When the trial judge released her reasons for decision, she dealt with all of the issues that were argued during the liability hearing.

[29] First, she allowed LRC's "parties amendment motion" by granting LRC leave to add "the proposed Orion respondents [to the action] as misnomers [pursuant to r. 5.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194], or alternatively, under r. 26 by way of amendment".

[30] She held that the "litigating finger" test applicable to r. 5.04(2) applications was met as LRC had demonstrated that it had intended to name "the proposed Orion respondents" when it used the name "Orion Resource Partners" and had shown that "the proposed Orion respondents knew that they were the intended respondents in the application" that commenced the action. She found the misnomer in having identified only "Orion Resource Partners" and not the proposed Orion respondents when the action was commenced was reasonable given that "Orion Resource Partners" was the name used in the bid process and LRC was unaware, until the proceedings were commenced, of the corporate structure and the true holders of the royalty interests.

[4] It was asserted before me by the Orion Respondents that LRC offered a bid during this bidding process, but no suggestion was made that they had been consulted or agreed in advance to the sale of the royalty interests. I will address this further below.

2023 ONCA 697 (CanLII)

[31] In her alternative basis for adding the proposed Orion respondents as respondents, the trial judge held that this amendment could be made pursuant to r. 26, given the failure of the Orion Respondents to show non-compensable prejudice.

[32] In her judgment the trial judge also denied the challenge to jurisdiction that had been brought on behalf of the Orion Respondents. She held that although Ontario lacks jurisdiction *simpliciter* over the action, the proposed Orion Respondents had voluntarily attorned to the jurisdiction "through the action of its umbrella organization, [Orion Resource Partners]." The trial judge noted that the affidavit evidence "entirely applied to the position of the proposed Orion respondents" and inferred that even though the action was being defended in the name of "Orion Resource Partners", "instructions were being provided by a competent entity to fully defend this matter on the merits". She rejected the submission that only Orion Resource Partners, a non-legal entity, can be taken to have attorned, commenting that if this was so, a sham process was being conducted in response to LRC's actions. Although she did not put it this way, her concern was no doubt that by taking this position, the Orion Respondents were claiming the right to present a substantive defence that, if successful, would defeat the action, but avoiding any risk of consequence if it was not because no legal entities were within the jurisdiction of the court. The trial judge also noted that no evidence of prejudice was presented by the Orion Respondents as the result of

2023 ONCA 697 (CanLII)

the attornment of Orion Resource Partners, since no suggestion was made that they would have defended the action differently had they been named from the outset.

[33] Finally, in her judgment the trial judge found in favour of LRC's claim that a valid and enforceable contract was concluded, since agreement had been reached on the essential elements, and those terms were reasonably certain. This outcome turned, in large measure, on the trial judge's finding that Ernie Ortiz had provided credible, reliable evidence, but Philip Clegg had not done so.

Relevant Post-Decision Events

(1) Events Relevant to Attornment

[34] After the trial judge released her decision the Orion Respondents retained new counsel. In electronic communications up to and including September 10, 2023, the Orion Respondents sought LRC's agreement to an order permitting them to take any action in both the Superior Court and the Court of Appeal, without those actions constituting acts of attornment. LRC would not consent to the order and no such order was pursued.

[35] On September 22, 2023, counsel for LRC provided, in writing, a formal undertaking that "it will not assert that the participation of Orion" in the remedies phase of the action "constitutes a further act of attornment".

2023 ONCA 697 (CanLII)

(2) The Orion Respondent's Appeal

[36] On September 11, 2023, the Orion Respondents filed a Notice of Appeal, raising several alleged errors. As summarized in their factum for this motion, those grounds include: (1) finding that the Orion Respondents had attorned to the jurisdiction, thereby treating separate corporate legal entities as a single legal entity, and without clear identification of who the relevant parties were; (2) granting the "parties amendment motion"; (3) granting judgment in vague terms; and (4) finding a contract without clarifying the essential terms or identifying which entities comprise "Orion". In oral argument submissions were also made that the trial judge erred by embarking on the liability hearing without resolving jurisdiction. As I interpret the submissions before me, the Orion Respondents also argued that if the trial judge found liability against Alnitak Holdings, LLC; Bellatrix Ltd.; and Orion Mine Finance (Master) Fund I LP, she did so in error by failing to respect their separate corporate identities without analyzing whether the corporate veil should be pierced.

(3) The "Protective Orders"

[37] On August 22, 2023, after receiving the trial judge's decision, LRC served a Notice of Motion for what I will call "protective orders" to prevent the named respondents, which it collectively described as "Orion", from putting the Thacker Pass royalty interests out of reach or otherwise distributing or dissipating assets to

2023 ONCA 697 (CanLII)

avoid the judgment. In that motion, LRC seeks interim and interlocutory relief that would include a USD $300 million preservation order, an interim and interlocutory injunction compelling the removal of the remaining Thacker Pass royalty interests from the auction process; an interim and interlocutory injunction directing any proceeds of auction to a court-appointed trustee; and the appointment of a receiver over “Orion’s business and affairs”. An order for specific performance was later requested in an amended Notice of Motion on August 25, 2023. An order resolving this amended Notice of Motion is still outstanding.

[38] In support of the motion, LRC argues that the protective orders it is seeking are required because “Orion” has already engaged in conduct to dissipate assets, including selling 60 percent of the royalty interests to Trident Royalties PLC after the litigation was initiated, and attempting to sell the remaining 40 percent royalty interests through a new bid process. LRC alleges that these acts were undertaken by the Orion Respondents to dispose of the royalty interests that are the subject of the underlying action and to distribute the proceeds of sale to investors. They argue further that given the Orion Respondents are foreign entities that may not honour the pending damages award, these interim and interlocutory orders are required.

[39] In response, the Orion Respondents now bring this motion to stay the proceedings pending their appeal.

2023 ONCA 697 (CanLII)

THE ISSUES ON THE MOTION

A. Preliminary Issue: Did the Trial Judge Make a Liability Finding?

[40] As indicated, the Orion Respondents argued before me that the only substantive finding that the trial judge has so far made is that a valid and enforceable contract was concluded, and therefore the liability hearing is not yet finished. They claim the right to argue when the trial resumes over whether there was a breach of contract and if so, who was responsible for the breach.

[41] LRC argues to the contrary. It claims that the trial judge has already made a full liability finding.

[42] As I have also indicated, at the time this motion was argued before me, a formal order had not yet been issued precisely expressing the trial judge's formal findings. I need not resolve any uncertainty that may remain in the absence of that formal order about the reach of the trial judge's decision because this question will not affect the outcome of this ruling. I have based the decision that follows, denying the motion for a stay of the entire underlying proceedings, on a consideration of all the grounds of appeal that the Orion Respondents are advancing. If no liability finding has yet been made, this would only weaken the motion further because all of the grounds of appeal being advanced, with the possible exception of the appeal of the trial judge's ruling on the Orion Respondents' jurisdiction motion, would likely be attempts by the Orion Respondents to appeal interlocutory orders, which would

2023 ONCA 697 (CanLII)

not fall within our jurisdiction. Any grounds of appeal not without our jurisdiction would have to be treated as having no merit, further weakening the motion for a stay: *Fontaine v. Canada,* 2021 ONCA 313, at para. 41. I need say no more on this issue.

The Remaining Issues

[43] Based on the positions and pleadings of the parties, I must decide two issues:

A. Should a stay of the underlying proceedings be granted?

B. Should a stay of the appeal be granted?

ANALYSIS

A. SHOULD A STAY OF THE UNDERLYING PROCEEDINGS BE GRANTED?

[44] I am not prepared to grant the stay of the underlying trial proceedings pending appeal that the Orion Respondents request, as I am not satisfied that the test adapted from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 warrants a stay of the entire action. I will, however, grant a partial stay of the proceedings pending appeal against Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, on terms I find to be just, outlined below.

2023 ONCA 697 (CanLII)

[45] In this context, the *RJR-MacDonald Inc.* test inquires whether the interests of justice call for a stay of proceedings pending appeal: *Dieffenbacher v. Dieffenbacher IV*, 2023 ONCA 189, at para. 10, citing *Zafar v. Saiyid,* 2017 ONCA 919, at paras. 17-18. This determination is to be informed by the consideration of three, non-exhaustive and potentially overlapping factors which can compensate for one another, including: (1) whether there is a serous question to be tried; (2) whether the moving party will suffer non-compensable harm if the stay is not granted, and (3) the balance of convenience: *Dieffenbacher*, at para. 10, citing *Zafar*, at paras. 17-18.

[46] The Orion Respondents argue that where an appeal is brought during an unfinished trial proceeding which raises questions that may affect the course of the trial, the underlying trial ought to be stayed absent “very special reasons”: *Popovich v. Financial Investment Centre Inc.*, 2017 ONSC 1514, at paras. 53-54, citing *Esquimalt & Nanaimo Railway Company v. Dunlop*, [1918] 3 W.W.R. 828 (B.C.C.A.). The fact that the resolution of issues on an appeal could render the completion of the trial moot is doubtlessly an important consideration, and I have given it full consideration.

2023 ONCA 697 (CanLII)

(1) Serious Question to be Tried

[47] The Orion Respondents argue that they meet the “low” serious issue to be tried threshold, as their grounds of appeal are not frivolous or vexatious. LRC submits that no serious issues to be tried have been identified.

[48] I am persuaded that some of the grounds of appeal are not frivolous or vexatious. The Orion Respondents have therefore established that this consideration favours the stay of proceeding pending appeal that they are seeking.

[49] Since the serious issue to be tried consideration can compensate for deficiencies in the other factors, see *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.) at p. 677, I must go further and make a preliminary assessment of how strong the grounds of appeal are. I have concluded that with respect to the Orion Respondents generally, the grounds of appeal are not so strong that they offset or compensate for the deficiencies in the other *RJR-Macdonald Inc.* factors, which I describe below. However, in my view there could be real merit in the grounds of appeal relating to Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, hence the partial stay being ordered relating to those entities.

[50] Since this assessment is being undertaken without the benefit of full evidence and argument and the litigation is ongoing, I will say as little as possible in explaining my conclusions, but I do need to provide some specificity.

2023 ONCA 697 (CanLII)

[51] It is convenient to begin with the proposed ground of appeal challenging the trial judge's decision to grant the "parties amendment motion". That decision was based on factual findings the trial judge made as to the intention and expectations of the parties, and on her assessment of the reasonableness of the misnomer and potential prejudice to the proposed Orion respondents. These findings, and her determinations of reasonableness, will be entitled to deference on appeal, and I have not been presented with allegations of clear errors of principle or law. For these reasons I do not consider this ground of appeal to be particularly strong.

[52] The Orion Respondents also intend to appeal the trial judge's ruling on the jurisdiction motion. I judge the argument presented before me, made during the oral hearing, that the trial judge erred by not determining jurisdiction before embarking on the liability hearing to be frivolous. I do not read the passage relied upon by the Orion Respondents in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 69, as requiring jurisdiction rulings to be rendered in all cases before argument on the merits is provided, although doing so would be advisable for obvious reasons. In that passage in *Van Breda,* Lebel J. was speaking about the order in which jurisdiction issues are to be resolved within a jurisdiction analysis. Courts have tremendous discretion over their processes, in the interests of efficiency, the avoidance of delay, and trial economy. The parties agreed before me that counsel representing the Orion Respondents consented to

2023 ONCA 697 (CanLII)

the trial judge proceeding as she did. If that is indeed the case, I do not believe there is any realistic prospect that this ground of appeal could succeed.

[53] Other arguments made in support of the appeal of the trial judge's decision in the jurisdiction motion are not frivolous or vexatious. However, based on the record and submissions made before me, I do not assess these grounds of appeal to be strong relating to all Orion Respondents. Whether or not a full admission of attornment was made before the trial judge as LRC submitted before me, the Orion Respondents will be hard-pressed to argue that no attornment occurred given that steps have been taken to defend the action on its merits. The Orion Respondents are also apt to be challenged in arguing persuasively that the trial judge erred in rejecting the submission that attornment was undertaken solely on behalf of a trade name, "Orion Resource Partners", a non-legal entity. In my view, arguments that may be made challenging the trial judge's finding that the action was being defended with the approval of and on behalf of Bellatrix Ltd., and the Orion Mine Finance (Master) Fund I LP, may have currency. By contrast, it is apt to be more difficult to argue, in the circumstances, that the action was not being defended on behalf of and with the approval of Alnitak Holdings, LLC, the registered holder of the disputed royalty interests, given that Alnitak Holdings, LLC's potential jeopardy would have been obvious to all from the outset, and given that the authority of Philip Clegg to negotiate on behalf of Alnitak Holdings, LLC, was heavily litigated during the proceedings. My preliminary assessment is that the prospect that the

2023 ONCA 697 (CanLII)

jurisdiction appeal will succeed in its entirety is not strong, but this ground of appeal may well succeed in the case of Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP.

[54] The ground of appeal relating to the trial judge's finding that there was a valid contract achieved by the parties is, again, a factual finding by her that will be entitled to deference. The Orion Respondents did not present arguments relating to errors of principle before me that affected her contract finding.

[55] The related ground of appeal, that the trial judge failed to clarify the essential terms, is not strong given my reading of the judgment. The associated claim that the trial judge erred by failing to identify whom she was finding to be bound by the contract or whom, if anyone, she was finding to be liable has not been shown to be strong either. Indeed, this ground of appeal may be somewhat premature given that the parties will be making submissions on this point when the formal order is being settled. That formal order could cause any concern by the Orion Respondents about the uncertainty and breadth of the judgment to disappear.

[56] If the trial judge does indicate in her final order that she is making findings against Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, this could give rise to a potentially meritorious ground of appeal, given that the trial judge did not address issues of corporate separateness or consider whether to lift the corporate

2023 ONCA 697 (CanLII)

veil.[5] LRC argues, to the contrary, that any such concerns are frivolous because of the evidence of the top-down management of Orion. LRC interprets the trial judge as having made her findings against all Orion Respondents on a footing that does not call for the corporate veil to be lifted. I do not agree. I do not have a full record of the evidence, but no suggestion was made before me of any acts done by or explicitly on behalf of Bellatrix Ltd., or Orion Mine Finance (Master) Fund I LP that would link them to the events, other than as shareholders of Alnitak Holdings, LLC. If that proves to be correct, in my view, there will be a significant question for appellate review as to whether there is a factual and legal basis for finding that those parties were bound by the contract, or liable for its beach.

[57] For these reasons, the Orion Respondents have raised serious issues to be tried but, with the exception of the respondents, Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, they have not persuaded me that their grounds of appeal are so strong that they offset the competing interests which I find, below, favour denying the motion.

2023 ONCA 697 (CanLII)

[5] Similar concerns do not arise in the case of Alnitak Holdings, LLC., given their ownership of the royalty interests and the trial judge's findings that Philip Clegg was authorized to negotiate on their behalf, and given their ownership of the royalty interests. No analysis of corporate separateness would be required in their case.

(2) Irreparable Harm

[58] I do not accept the primary submissions of the Orion Respondents relating to irreparable harm.

[59] First, the Orion Respondents argue that if the proceedings are not stayed, any step they take in these proceedings beyond challenging jurisdiction could constitute attornment, thereby rendering their attornment ground of appeal moot. They rely, in support of this submission, primarily on the decision in *M.J. Jones Inc. v. Kingsway General Insurance Company et al*., (2004) 72 O.R. (3d) 68, (C.A.) at para. 31.

[60] The line of authority the Orion Respondents rely upon has been overtaken. It is now recognised that there is only a remote prospect that a finding of attornment will be based on litigation steps taken by a party after the opposing party has undertaken not to rely on such steps as acts of attornment: *Sakab Saudi Holding Company v. Al Jabri*, 2021 ONCA 548, at paras. 26-32; and see, *Yaiguaje v. Chevron Corporation*, 2014 ONCA 40, 315 O.A.C. 109, at para. 11; *Essar Steel Algoma Inc., Re*, 2016 ONCA 138, at para. 52.

[61] The risk that attornment will be found based on participation in the continuation of the underlying trial in the face of the undertaking provided in this case is further reduced given that the trial judge has already determined that the Orion Respondents have attorned, and the appeal from that finding is not strong.

2023 ONCA 697 (CanLII)

[62] Indeed, it is arguable that the proposed Orion respondents — Orion Mine Finance Fund I; Alnitak Holdings, LLC; Bellatrix Ltd., and Orion Mine Finance (Master) Fund LLP (*sic*) — attorned to jurisdiction in their own right when the counsel who represented them during the argument of the jurisdiction motion and during the parties amendment motion agreed to proceed with a liability hearing into the merits of the general action pending the determination of those motions. It is most unlikely that in doing so the lawyer expected that the liability hearing would have to be redone if the proposed Orion respondents were subsequently named respondents. It is far more likely that the lawyer intended to defend their interests on the merits during the liability hearing and that further acts of attornment have already occurred.

[63] In all of the circumstances, I am not persuaded that the Orion Respondents face irreparable harm by the risk of still further acts of attornment occurring in responding to the continuation of the underlying action.

[64] Second, the Orion Respondents argue that given the protective orders that are being sought by LRC, irreparable harm could be done to Orion entities and investors who have nothing to do with the contract. If I am understanding their submission correctly, I do not accept that LRC is attempting to enforce against all Orion entities, even those unconnected to the litigation. The application LRC brought for the protective orders, is clearly confined in its reach to the named Orion Respondents. Moreover, LRC's application for protective orders has yet to be

2023 ONCA 697 (CanLII)

adjudicated and its outcome is discretionary. The impact of those proposed protective orders on innocent associated parties will be considered and accounted for, in context, when those applications are argued. It would not be proper for me to make a finding of irremediable harm based on the assumption that if the orders were issued, they would not adequately safeguard innocent effected interests.

[65] However, I do recognize that, depending on the formal order that is made by the trial judge, the judgment under appeal could lead to the imposition of protective orders that will impose constraints on the financial dealings of the Orion Respondents, a point I will return to below.

(3) The Balance of Convenience

[66] In my view, the balance of convenience strongly favours rejecting the motion for a stay of proceedings pending appeal of the liability hearing judgment against all of the Orion Respondents. The Orion Respondents are foreign legal entities, and there is evidence that steps have been taken, including pending the release of the trial judge's decision, to dissipate the royalty interests that are the subject of the contract found by the trial judge.

[67] First, 60 percent of the royalty interests were sold after LRC's application was instituted. Whoever initiated that sale had the authority to do so and must have anticipated that LRC would be seeking an order of specific performance if they were successful. Although Orion may not have been legally constrained from

2023 ONCA 697 (CanLII)

selling royalty interests, the fact remains that successful efforts were taken within Orion to alienate assets that LRC would be looking to if their application succeeded.

[68] Even more problematic is that after the liability hearing was argued, efforts were taken to sell the remaining royalty interests through auction. In making this decision I am considering the information offered during the oral hearing that LRC attempted to buy some of those remaining royalty interests through the auction. Any such attempt would not, in my view, alter the fact that efforts were being made to dispose of those royalty interests, pending the trial judge's decision. In endeavouring to acquire the royalty interests through the auction, LRC may simply have made a tactical decision to mitigate their risk of loss by securing the remaining royalty interests when the opportunity presented itself. In my view, any such purchase attempt does not establish that LRC was complicit in the Orion attempt to dispose of assets that were the subject of the suit.

[69] As I have indicated, I can find no established irremediable prejudice that will befall the Orion Respondents if the underlying action is not stayed, other than the economic impact that any protective orders that may be made could have on their business interests. Given the evidence before me of attempts within Orion to alienate the Thacker Pass royalty interests, this risk is largely self-inflicted and does not tip the balance of convenience in favour of the Orion Respondents.

2023 ONCA 697 (CanLII)

THE INTERESTS OF JUSTICE

[70] In light of the foregoing considerations, I am not persuaded that it is in the interests of justice to stay the underlying action pending the appeal in its entirety. To the contrary, I am persuaded that it is in the interests of justice for LRC to be permitted to attempt to take steps against most of the Orion Respondents to prevent the effect of the judgment from being defeated.

[71] However, in the case of Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP it is in the interests of justice to order a partial stay of the proceedings below, as authorized by r. 63.02(1) of the *Rules of Civil Procedure*, which permits stays of proceedings "on such terms as are just": *Circuit World Corp.*; *Longley v. Canada*, 2007 ONCA 149, 223 O.A.C. 103, at para. 15; *Sodhi v. Sodhi*, (2002), 158 O.A.C. 83 (C.A.).

[72] Pursuant to that partial stay, I order that proceedings will be stayed against the respondents Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, subject to the term that nothing in this order staying the proceeding against the respondents Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP pending the appeal is to prevent the continued litigation and disposition of any outstanding issues in the underlying action relating to Bellatrix Ltd. and Orion Mine Finance (Master) Fund I LP, provided that no enforcement actions (including applications for the appointment of a receiver, or for specific performance, or for interim and

2023 ONCA 697 (CanLII)

interlocutory injunctions to preserve funds or to prohibit the disposition of monies) shall be taken against Bellatrix Ltd. and/or Orion Mine Finance (Master) Fund I LP, without leave of this court.

[73] I am imposing the partial stay on these terms in the interests of justice to avoid interference with the efficient completion of the litigation, while at the same time preventing the potential irremediable prejudice to Bellatrix Ltd. and Orion Mine Finance (Master) Fund I LP that enforcement actions could cause, pending an appeal by them that carries a realistic chance of success.

[74] I recognize that the issuance of this partial stay could prove to be moot depending on the final order of the trial judge, but in the event it does not, the partial stay I have described should be in place.

B. SHOULD A STAY OF THE APPEAL BE GRANTED?

[75] In my view, the appeal brought by the Orion Respondents from the judgment of the trial judge — appeal COA-23-CV-1029 — should be stayed pending the outcome of the trial. LRC requested that I make this order, and it is in the interests of justice to do so.

[76] This court recognized in *Korea Data Systems (USA), Inc. v. Amazing Technologies Inc.*, 2012 ONCA 756, at para. 19, that the "public interest in the fair, well-ordered and timely disposition of litigation, and the effective use of scare public resources" is an appropriate consideration in identifying the interests of

2023 ONCA 697 (CanLII)

justice. Multiplicity of proceedings, including multiple appeals from bifurcated proceedings, should be avoided, where possible: *Korea Data Systems (USA)*, at para. 23; *Toronto (City) v. 1291547 Ontario Inc.*, (2001) 148 O.A.C. 212 (C.A.) at para. 13. In my view, it is in the interests of justice to have both the liability issues and any issues that may arise from the remedies hearing in one appeal. Doing so will avoid duplication of effort and expense, something to be avoided given that the factual framework for this case will require close examination on appeal and the business model utilized is complex. Two appeal panels should not have to undertake these tasks, and lower appeal costs will be incurred. Given these considerations and the fact that I see no compelling reason for hiving off the appeals on the issue of liability, I am ordering that the appeal be stayed.

2023 ONCA 697 (CanLII)

CONCLUSION

[77] The motion by the Orion Respondents for a stay of the entire underlying action — Ontario Superior Court proceeding CV-00656830 — is dismissed but an order partially staying the proceeding against the respondents Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP, is granted on the following terms:

> Nothing in this order staying the proceeding against the respondents Bellatrix Ltd., and Orion Mine Finance (Master) Fund I LP pending the appeal is to prevent the continued litigation and disposition of any outstanding issues in the underlying action relating to Bellatrix Ltd. and Orion Mine Finance (Master) Fund I LP, provided that no enforcement actions (including applications for the appointment of a receiver, or for specific

> performance, or for interim and interlocutory injunctions to preserve funds or to prohibit the disposition of monies) shall be taken against Bellatrix Ltd. and/or Orion Mine Finance (Master) Fund I LP, without leave of this court.

[78] Appeal COA-23-CV-1029 is stayed, pending the final determination of that action by the trial judge.

[79] Costs are payable by the Orion Respondents to LRC on this motion in the amount of $10,000, inclusive of applicable taxes and disbursements.[6]

"David M. Paciocco J.A."

2023 ONCA 697 (CanLII)

[6] This order for cost reflects proportionately the mixed success before me, based on the scale of costs agreed to by the parties.