Court of King's Bench of Alberta

Citation: Bacanora Minerals Ltd v Orr-Ewing (Estate), 2025 ABKB 579

Date: 20251006
Docket: 1701 15523
Registry: Calgary

Between:

Bacanora Minerals Ltd

Applicant

- and -

The Estate of Ian Colin Orr-Ewing

Respondent

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Bacanora Minerals Ltd ("Bacanora") asks the Court to stay this action, which it commenced against the Estate of Ian Colin Orr-Ewing (the "Estate"), on the grounds that it should not go ahead until the completion of a related arbitration proceeding. The Estate objects and submits that the parties should complete the remaining pre-trial steps and go to trial at the earliest available opportunity. This application was heard on an expedited basis at the direction of the Associate Chief Justice.

II. Background

[2] Bacanora is a mining company that, until 2022, owned lithium mining claims in Mexico. Bacanora's deponent, Osman Cherif, asserted that its Mexican lithium properties comprise "one of the largest lithium deposits in the world." He stated that Bacanora "has invested hundreds of millions of dollars to develop [the lithium properties]."

[3] This action was commenced in 2017. The action concerns the validity of a gross overriding royalty ("GORR") held by the Estate. The GORR is to be paid by Bacanora to the Estate on production from its lithium properties in Mexico. To date the GORR has not been paid because Bacanora has not realized any revenue from the lithium properties. The only relief that Bacanora seeks in this proceeding is a declaration that the Royalty Agreement that created the GORR is invalid. More background information on Bacanora and this action may be found in ***Bacanora Minerals Ltd v Orr-Ewing (Estate)***, 2023 ABCA 139 at paras 3-14.

[4] Mexican President López Obrador announced in April 2022 that the Mexican lithium industry would be nationalized. The nationalization process was implemented through legislative and administrative measures over the following months. Mr. Cherif deposed that "[a]s a result of the nationalization of the lithium industry by Mexico, as well as the cancellation of the concessions, Bacanora no longer has any right or entitlement to continue advancing the Project or seeking production from the lithium mines." The Estate does not dispute these facts.

[5] On May 22, 2024, Bacanora commenced an International Centre for Settlement of Investment Disputes arbitration against Mexico (the "ICSID Arbitration") seeking return of the lithium properties or damages. Bacanora expects the ICSID Arbitration to be heard in late 2026 or early 2027.

[6] On June 27, 2025, Justice Marion granted an order providing that this matter "shall proceed to a 10-day trial on a date to be scheduled by the trial coordinator." The Estate advised that they have recently asked the trial coordinator to set the trial for January 2027.

[7] Schedule A to Justice Marion's order is a litigation plan that provides deadlines for the completion of the remaining pre-trial steps including further questioning, exchange of expert reports, alternative dispute resolution, and interlocutory applications. Among the interlocutory applications specified in the litigation plan was the present application to stay the proceedings pending completion of the ICSID Arbitration.

III. Staying Duplicative Proceedings

[8] Both parties approached this application on the basis that the relevant question for the Court to decide was whether the issues in the present action and the ICSID Arbitration are sufficiently duplicative that this action should be stayed pending the outcome of the ICSID Arbitration. The parties agreed that the appropriate approach is set out in ***UCANU Manufacturing Corp v Calgary (City)***, 2015 ABCA 22 at para 7 where Paperny JA held:

> The factors to be considered are (i) whether the issues in the arbitration are substantially the same as the issues in the action, (ii) the defendant must satisfy the court that the continuance of the action would work an injustice, and (iii) the stay must not cause an injustice to the plaintiff.

[9] The parties identified other cases where these factors were used including, ***Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc***, 2006 ABQB 933 and ***Canadian Natural Resources Limited v Flatiron Constructors Canada Limited***, 2018 ABQB 613.

[10] The only similarity between the present case and the ICSID Arbitration is that they concern the same lithium properties in Mexico. This action concerns the validity of a GORR payable on lithium production whereas the ICSID Arbitration is about the validity of Mexico's expropriation of the lithium properties. The two proceedings present different legal issues that arise out of different factual contexts. The validity of the GORR will turn on facts preceding and surrounding the Royalty Agreement which was signed in 2010. The legitimacy of the expropriation of the lithium properties by Mexico concerns acts of the Mexican government that happened 12 years later.

[11] The proceedings are not duplicative, so a stay based on duplication is denied.

IV. The Problem of Mootness

[12] The real problem with the present action is not that it is duplicative but that it is moot unless and until Bacanora prevails in the ICSID Arbitration. So long as Bacanora does not own the lithium properties, it cannot mine them and no GORR is payable by Bacanora to the Estate. A judicial opinion on the validity of the GORR serves no purpose unless Bacanora can produce lithium from the properties to which the GORR pertains.

[13] A court may decline to decide a moot case: ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342. Though the parties did not provide any authorities on point, it follows that a court may stay a proceeding on the grounds that it is moot.

[14] The present case is unusual because there is a possibility that Bacanora will win the ICSID Arbitration and determination of the validity of the GORR may have practical value. Both parties have an interest in maintaining the action. Bacanora would prefer that the action be stayed pending the outcome of the ICSID Arbitration whereas the Estate wants to continue with the litigation plan endorsed by Justice Marion.

[15] A stay is an equitable remedy, so the usual principles of equity apply. Bacanora has been content to litigate this action for the last three years while the lithium properties were in the hands of Mexico. Only now, for some unexplained reason, has Bacanora asked the Court to stay the action. If Bacanora was content to spend its resources to advance this case for three years without owning the lithium properties, I see no reason to stay the action to prevent the parties from taking the final steps to get the case ready for trial. Refusing to stay this action is consistent with the equitable maxim "delay defeats equity": ***Pro Swing Inc v Elta Golf Inc***, 2006 SCC 52 at para 22. Further, if Bacanora succeeds in the ICSID Arbitration, continuing with the litigation plan will ensure that the case will be trial-ready which is an important consideration given the passage of time since the events relevant to this case took place.

[16] The remaining question is whether I should stay the trial (not the pre-trial steps) on the grounds that reserving two weeks of trial time for a moot case is not an appropriate use of scarce public resources. I am concerned that with the ICSID Arbitration being heard in late 2026 or early 2027 the result will not be known before this action goes to trial. Reserving two weeks of trial time for this case means that those two weeks are not available to others who have live cases, and it risks the trial judge declining to hear the case on the grounds of mootness. With

that said, I am not persuaded that a stay is the appropriate remedy as that could require continued judicial involvement and supervision. Instead, my view is that this is something that can be managed by the trial coordinator through her discretionary power over scheduling. A copy of these Reasons will be provided to the trial coordinator so that she may consider the facts discussed herein as she exercises her discretion with respect to scheduling or rescheduling the trial of this action. She may wish to consider, for example, whether the trial of this matter should be scheduled later in 2027 when it may reasonably be expected that the result of the ICSID Arbitration is known.

V. Conclusion

[17] Bacanora's application for a stay is denied. If the parties are unable to agree on costs, they may make written submissions of two pages or less.

Heard on the 26th day of September, 2025.
Dated at the City of Calgary, Alberta this 6th day of October, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Erin Runnalls and Kevin Pedersen, Gowlings WLG (Canada) LLP
for the Applicant

Laura M. Gill, Sean S. Smyth KC, and Kyle R. McMillan
for the Respondent