COURT OF APPEAL FOR ONTARIO

CITATION: Tacora Resources Inc. v. 1128349 B.C. Ltd., 2026 ONCA 306
DATE: 20260429
DOCKET: COA-26-CV-0298

George, Copeland and Gomery JJ.A.

BETWEEN

Tacora Resources Inc.

Applicant (Respondent)

and

1128349 B.C. Ltd.**, Scully Royalty Inc., Samuel Morrow, MILFAM LLC,* Jerrod Freund*, Mark Holliday*, Alan Howe*, Nimesh Patel* and Skyler Wichers*

Respondents (Appellants*/Respondent**)

Robert W. Staley, Nathan J. Shaheen and Meg Bennett, for the appellants

Kevin O'Brien and Tamara Kljakic, for the respondent, Tacora Resources Inc.

Colm St. Roch Seviour, K.C. and G. John Samms, for the respondent, 1128349 B.C. Ltd.

Heard: April 20, 2026

On appeal from the judgment of Justice R. Lee Akazaki of the Superior Court of Justice, dated March 16, 2026.

Gomery J.A.:

[1] This is an appeal from the dismissal of an interpleader application under r. 43 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] Tacora Resources Inc. (“Tacora”) is contractually obliged under a mining lease to pay quarterly royalties to 1128349 B.C. Ltd. (“112”). By mid January 2026, Tacora received competing instructions about the payment of the mining royalty due later that month from representatives of two groups, each claiming to speak for 112. In its interpleader application, Tacora sought an order allowing it to deposit the royalty funds of approximately $5.5 million into the Ontario Superior Court and a declaration that, if it did so, any liability it had with respect to the funds would be extinguished.

[3] The motion judge dismissed the interpleader application. He found that Tacora had not established that the royalty funds were subject to adverse claims as contemplated by r. 43. He further concluded that the Ontario court had no jurisdiction to make the order sought. Despite this, the application judge, on his own motion, issued an interim order directing Tacora to deposit the royalties owed to the trust account of the law firm representing one of the groups claiming to speak for 112. According to the application judge, this interim order would give Tacora time to bring an interpleader application in another forum without being deemed to have defaulted on its contractual obligations to 112.

[4] After hearing oral submissions, we granted the appeal, with reasons to follow. In short, the application judge misapprehended the “adverse claims” criteria for a successful interpleader application under r. 43. He also erred in finding that

he lacked jurisdiction to make the order sought. Finally, having dismissed the application, he erred in issuing an order not sought by any party without giving them any notice that he might do so.

Background

[5] Tacora is an Ontario company headquartered in Toronto. It operates the Scully Mine in Newfoundland pursuant to a mining lease with 112, known as the "Wabush Lease". 112 is a British Columbia company wholly owned by Scully Royalty Inc. ("Scully"). Scully is incorporated in the Cayman Islands but is a reporting issuer in Alberta, British Columbia, and Quebec.

The December 27, 2025 Annual General Meeting

[6] On November 10, 2025, Scully filed notice that its annual general meeting or AGM would take place on December 27, 2025 in Hong Kong. On November 25, 2025, MILFAM LLC ("MILFAM") delivered notice nominating a slate of candidates for election to Scully's board of directors at the AGM.

[7] After Scully's board challenged the timeliness of the nomination notice, MILFAM commenced a proceeding on December 10, 2025 in the Grand Court of the Cayman Islands seeking a declaration that the nomination notice was delivered in conformity with Scully's articles of association. Following a hearing, the Cayman Court granted the relief sought by MILFAM on December 23, 2025. Scully

served a notice of appeal of this judgment. This notice did not automatically stay the Cayman Court's decision and Scully took no steps to seek a stay.

[8] Although Scully issued a press release purporting to postpone the AGM, MILFAM took the position that the company's articles of association did not permit this postponement and proceeded with the AGM as scheduled on December 27, 2025 in Hong Kong.

[9] The appellants assert that at the AGM, the slate nominated by MILFAM — Jerrod Freund, Mark Holliday, Alan Howe, Nimesh Patel, and Skyler Wichers (the "MILFAM Directors") — were elected as directors of Scully, replacing Samuel Morrow and Michael Smith, among others. The MILFAM Directors purported to terminate Mr. Morrow and Mr. Smith both as officers of Scully and officers and directors of its subsidiaries, including 112, and to appoint Mr. Wichers as President and Secretary of Scully and 112.

[10] Mr. Morrow and Mr. Smith have since refused to recognize the alleged result of the AGM and purport to continue to speak for Scully and 112.

[11] On January 5, 2026, MILFAM commenced another proceeding in the Cayman Court for declarations that the MILFAM Directors were properly elected as directors of Scully and that the former directors, including Mr. Morrow and Mr. Smith, no longer have seats on the board of Scully. This litigation is ongoing.

At the appeal hearing, the appellants advised that a trial date on the merits has been set for the end of May 2026.

Tacora's January 2026 royalty payment

[12] Tacora's royalty payment to 112 for the fourth quarter of 2025 was due on January 25, 2026.

[13] On December 13, 2025, after MILFAM filed its first proceeding in the Cayman Court to validate the form nominating the MILFAM Directors, Mr. Morrow sent an email to Tacora's Executive Vice President and Chief Financial Officer providing "updated bank information for [112] for all future royalty payments." Mr. Morrow has since provided an explanation for this change, but has refused to disclose the name or location of the financial institution associated with the account to the appellants.

[14] On January 22, 2026, Mr. Morrow sent another letter to Tacora's Executive Vice President and Chief Financial Officer. After noting that there was litigation before the Cayman Court with regard to 112's parent, Scully, he stated that nothing in connection with these proceedings altered Tacora's obligations to 112. He advised that: "Tacora's royalty payment to [112] is due on January 25, 2026. We expect this payment to be paid in full and on time in accordance with our instructions. Failure to do so will result in immediate Notice of Default under the Wabush Sublease."

[15] After Tacora failed to pay the royalty as Mr. Morrow had directed, 112's lawyers Stewart McKelvey served Tacora with a Notice of Default under the Wabush Lease on January 27, 2026. If lawfully authorized, the Notice initiated a process whereby 112 could seek to terminate the mining lease and enter Tacora's mining operations.

[16] On February 4, 2026, counsel to the MILFAM Directors, Bennett Jones, sent a letter to Tacora's counsel responding to the Notice of Default sent by Stewart McKelvey purportedly on behalf of 112. Bennett Jones' letter stated that:

> The January 27, 2026 letter was sent on the authority of the former board and management of Scully, and the accompanying Notice of Default was signed by Mr. Morrow. Mr. Morrow and other members of the former board and management of Scully were not and are not authorized to make any demand on behalf of 112, nor issue any Notice of Default. Mr. Morrow is not entitled to receive or direct the receipt of any amounts payable by Tacora to 112.
>
> On behalf of the newly elected board of Scully, we request that Tacora not remit any funds in response to the Notice of Default, or in accordance with any other instructions it may receive from the former board and management of Scully, from Stewart McKelvey, or from any other counsel purporting to act on behalf of [the] former board and management of Scully.

[17] Recognizing that the competing requests for payment by the two factions vying for control of Scully (and, by extension, 112) put Tacora in a difficult position, Bennett Jones' letter suggested that Tacora could either pay the royalty payment

into escrow or apply for interpleader relief, pending the outcome of the litigation in the Cayman Court:

> Tacora should not be in a position where it is facing competing demands for payment. On behalf of the newly elected board, we propose that any amounts due under the lease be paid into escrow pending the resolution of proceedings in the Cayman Islands to confirm the appointment of the new board, and pending any other proceedings necessary to confirm the authority of the new board over 112.
>
> In the event that the former board and management group is not prepared to agree to escrow arrangements without delay, the newly elected board requests that Tacora bring an interpleader application under Rule 43 of the Ontario Rules of Civil Procedure, so that claimed funds are preserved pending the resolution of disputes between the newly elected board and the former board and management group. As provided for by Rule 43.04(1)(c), Tacora's costs of the application should be paid out of the monies that would be the subject of the interpleader application.

[18] On February 5, 2026, again purportedly on behalf of 112, Stewart McKelvey advised Tacora and MILFAM that 112 would “not consent to any escrow conditions” and would “vigorously object to any interpleader application”.

[19] On February 11, 2026, Tacora issued an interpleader application in the Ontario Superior Court of Justice. On February 27, 2026, it deposited the royalty payment into the trust account of its counsel, Osler, Hoskin & Harcourt LLP. This anticipated the submission by 112, which is acting on instructions from Mr. Morrow,

that Tacora had deliberately failed to pay royalties and that its interpleader application was “a convenient pretext to defer what it owes 112”.

[20] On February 19, 2026, Mr. Wichers wrote to Stewart McKelvey, formally putting it on notice of the results of the December 2025 AGM and advising that Mr. Morrow and Mr. Smith no longer had any position with 112 or any authority to provide instructions on its behalf. Mr. Wichers instructed Stewart McKelvey to take no further steps in any legal proceedings or otherwise absent his written instructions on behalf of 112.

[21] The application was heard on an urgent basis on March 13, 2026. Notwithstanding the February 19, 2026 letter, Stewart McKelvey took the position that it represented 112, which contested the interpleader application.

The application judge’s decision

[22] The application judge dismissed the interpleader application on two grounds.

[23] First, the application judge concluded that Tacora’s royalty payment was not subject to adverse claims, as required for an application under r. 43. He stated that “[t]he fact that there is only one contractual creditor in the piece ostensibly takes the application out of the rule.” The application judge declined to apply two cases that the parties cited as correctly decided: *Savage v. First Canadian Financial Corp.* (1996), 27 B.C.L.R. (3d) 21 (S.C.), and *2823373 Ontario Inc. et. al. v.*

Dar et. al., 2024 ONSC 4313. The application judge instead relied on *Delahunty v. Dynacare Health Group Inc.* (1997), 75 A.C.W.S. (3d) 621 (Ont. C.A.). Based on *Delahunty*, the application judge concluded that r. 43 was unavailable in the context of the current dispute over corporate control.

[24] Second, the application judge held that he did not have the jurisdiction to grant the interpleader order. He held that "[t]he essential legal question of authority to receive the funds on behalf of 112 can only be litigated elsewhere" and that, if he granted the order, the court would be impermissibly holding the funds in escrow for another court.

[25] The application judge did not suggest that, in the absence of these findings, there was any other reason why Tacora would not have been entitled to interpleader relief.

[26] Despite his dismissal of Tacora's application, the application judge found that it should be allowed to bring an interpleader application in another forum. He accordingly directed that Tacora could satisfy its liability to 112 by paying the royalty into Stewart McKelvey's trust account or such other counsel as Stewart McKelvey might direct. The application judge imposed a 90-day sunset provision on this relief but did not provide for what would happen to the funds after that term expired. The application judge stated that "[t]he parties and the court can

rely on the Stewart McKelv[e]y firm to have taken appropriate steps to accept 112's retainer and to avoid being duped."

Issues

[27] The appellants contend that the application judge made three legal errors:

(1) He misapprehended the "adverse claims" criteria required for an interpleader order under r. 43;

(2) He erred in concluding that the Ontario Superior Court lacked jurisdiction to grant Tacora's interpleader application; and

(3) Having dismissed Tacora's application, he erred in granting an interim order directing Tacora to make the mining royalty payment in trust for 112 to Stewart McKelvey.

[28] The appellants contend that, given these errors, this court should grant the appeal, set aside the application judge's order, and issue the order that Tacora sought below.

[29] Tacora supports the appellants' position on the appeal.

[30] 112, represented by Stewart McKelvey, says that the application judge correctly dismissed Tacora's claim for an interpleader order but agrees that he should not have issued the interim order. It requests that this court instead order Tacora to pay the royalty payment to 112 "in accordance with the Wabush Lease".

Tacora's application meets the criteria for an interpleader order under r. 43

Governing legal principles

[31] Rule 43 falls within the section of the *Rules of Civil Procedure* governing the preservation of rights in pending litigation. The purpose of an interpleader proceeding "is to prevent a multiplicity of suits and double vexation, to assist applicants who want to discharge their legal obligations but do not know to whom they should pay the amounts to": *Devry Smith Frank LLP v. Fingold*, 2021 ONSC 2762, at para. 27.

[32] Rule 43.02(1) provides that:

> A person may seek an interpleader order (Form 43A) in respect of property if,
>
> (a) two or more other persons have made adverse claims in respect of the property; and
>
> (b) the first-named person,
>
> (i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and
>
> (ii) is willing to deposit the property with the court or dispose of it as the court directs.

[33] "Property" in r. 43.02 "means personal property and includes a debt": r. 43.01(1). A claimant includes "each person who makes a claim in respect of the property": r. 43.01(2). The procedural steps for obtaining an interpleader order contemplate a situation where "no proceeding has been commenced in respect of the property": r. 43.03(1)1.

[34] In *Canadian Imperial Bank of Commerce v. Costodian Inc. et al*, 2018 ONSC 6680, at para. 26, Hainey J. summarized the following principles that apply to an interpleader application:

> (a) The applicant is not required to prove competing claims have actually been filed against it;
>
> (b) The applicant is only required to demonstrate that there is a real foundation for the expectation of competing claims; and
>
> (c) The applicant is not required to establish that competing claims are valid or likely to succeed only that they are not frivolous.

[35] Rule 43 is accordingly not confined to situations in which formally articulated competing demands have been made. Even in the absence of such explicit demands, interpleader relief may be granted if surrounding circumstances give rise to a real risk and foundation of competing claims and corresponding liability: see for example, *The Toronto-Dominion Bank v. The Estate of Cheryl Anne Walker*, 2021 ONSC 4092, at paras. 14-18.

[36] Rule 43.04 sets out the orders that a court may make on an interpleader motion or application. Under r. 43.04(1), the court may,

> (a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;

> (b) declare that, on compliance with an order under clause (a), the liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and
>
> (c) order that the costs of the applicant or moving party be paid out of the property or its proceeds.

[37] Under r. 43.04(2), the court may make other orders in the context of an interpleader order. It may, for example, order that a claimant be made a party to a proceeding already commenced; order the trial of a defined issue between the claimants; decide questions of law where the facts are not in dispute; or determine the claimants' rights in a summary manner.

Application of r. 43 in this case

[38] The application judge misapprehended the legal principles relevant to the adverse claims requirement in r. 43. On an application of the correct legal principles, Tacora faces adverse claims and is entitled to interpleader relief.

[39] Tacora faces the very dilemma that the interpleader rule is designed to address. Mr. Morrow, purporting to speak for 112, demands that Tacora pay a $5.5 million royalty payment to a new account that he presumably controls, failing which he threatens to note Tacora in breach of its contractual obligations, which would ultimately allow 112 to take over the mining operations. The MILFAM Directors, likewise purporting to speak for 112, ask Tacora to ignore Mr. Morrow's instructions and to pay the funds into an escrow account or into court. Although the February 4, 2026 letter from Bennett Jones is framed as a request, it also put

Tacora on notice that Mr. Morrow and Mr. Smith may not be entitled to speak for 112, and alludes to “competing demands for payment”.

[40] There is no principled reason why, in the circumstances, the competing instructions given to Tacora with respect to the royalty payment would not constitute “adverse claims” in r. 43.02(1)(a).

[41] *Dar* and *Savage* support the conclusion that adverse claims may arise where there is a dispute over who has authority to speak for, and give instructions on behalf of, a corporation entitled to payment by an uninterested third party. In *Savage*, the British Columbia Supreme Court held that conflicting instructions from two shareholder groups could constitute competing claims against property, even though the property belonged to a single entity and not its shareholders. In *Dar*, the Ontario Superior Court applied the reasoning in *Savage* to hold that funds held in trust by a law firm from the resale of an investment property could be subject to competing claims, if the corporate seller’s shareholders did not agree about whether to release the proceeds or keep them in trust.

[42] The application judge relied on *Delahunty*, a decision not advanced by any party to the interpleader application. In *Delahunty*, the applicant, Dynacare Health Group Inc., was contractually required to make a monthly payment to Delahunty in relation to a medical centre. A group of medical doctors associated with the centre claimed that the money owing to Delahunty should flow through them. The medical

doctors did not claim, however, that they were parties to the contract between Dynacare and Delahunty nor did they claim to speak for Delahunty in relation to the contract. This court upheld the dismissal of Dynacare's interpleader application on the basis that the circumstances did not give rise to "adverse claims" as required under r. 43.

[43] Contrary to the application judge's finding, *Delahunty* is not dispositive of Tacora's application. *Delahunty* did not address whether the requirement for adverse claims in r. 43 is met when an obligation is owed to a corporate entity, and two or more groups purport to speak for that corporate entity and make competing demands in relation to the obligation it is owed. The reasoning in *Dar* and *Savage*, cases which involve situations more analogous to that here, supports Tacora's application.

[44] The application judge also rejected the interpleader application on the basis that the "only potential conflict to Tacora's payment obligation is … the temporary request by the [MILFAM Directors] not to pay the royalty." As already noted, an applicant need only show that there is a real foundation for the expectation of competing, non-frivolous claims. It does not have to prove that the competing claims have been filed or that such claims are likely to succeed.

[45] Pending the resolution of the corporate governance dispute in the Cayman Court, Tacora faces financial and legal jeopardy if it makes the royalty

payment that is now due, or one that will become due in every future quarter, on the direction of either one of the parties purporting to speak on behalf of 112. It likewise faces a risk if it makes no payment at all. Through its payment of the royalty currently due to a trust account with Osler, Hoskin & Harcourt, Tacora has shown that it is ready, willing and able to meet its contractual obligations to 112. As such it is the prototypical innocent third party debtor entitled to r. 43 relief.

[46] Tacora therefore meets the criteria for the interpleader order it sought.

Ontario courts have jurisdiction to make the order sought

[47] None of the parties to the interpleader application took the position that the Ontario Superior Court lacked the jurisdiction to grant the interpleader application. Despite this, and without undertaking the analysis set out in *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17, [2012] 1 S.C.R. 572, the application judge concluded that he lacked jurisdiction because the underlying disputes about control over Scully and who has authority to receive the funds on behalf of 112 would ultimately be decided by the courts of one or more other jurisdictions. He expressed the view that, if he granted the interpleader application, his order would trench on matters properly before such courts.

[48] There is no jurisdictional impediment to the interpleader application, and the application judge's reasons on this point reflect a misapprehension about the nature and purpose of r. 43.

[49] The Ontario courts have jurisdiction to hear and adjudicate Tacora's application. Tacora is an Ontario company, with a head office in Ontario, and the property at issue, the royalty payment, is situated in Ontario. Further, no respondent to the application argued that there was a more appropriate forum for the interpleader application: see *Van Breda*, at paras. 102-3. Instead,112 and the appellants responded to the application on the merits. In doing so, they attorned to the jurisdiction of the Superior Court of Justice: *Van Damme v. Gelber*, 2013 ONCA 388, 115 O.R. (3d) 470, at para. 22, leave to appeal refused, [2013] S.C.C.A. No. 342. The connections between the parties and other jurisdictions, and the pending proceedings in the Cayman Islands, do not inherently deprive an Ontario court of jurisdiction.

[50] Nothing in r. 43 suggests that it is unavailable because the underlying dispute will be resolved elsewhere. On the contrary, r. 43.03(1)1 expressly contemplates interpleader relief in circumstances where "no proceeding has been commenced in respect of the property" that is the subject of the application, without qualification as to where a proceeding may be commenced. Form 43A's invitation to parties to refer to "a proceeding in this court" cannot be read to contradict the clear language of r. 43.03(1)1.

[51] A standard interpleader order under r. 43.04(1) does not resolve the underlying dispute between the claimants. It does not even require that a

proceeding be underway when it is made. Its purpose is simply to allow an "'uninterested person who has possession or control of property which is the subject matter of a dispute between two or more persons […] to extricate himself from the dispute so that he does not have to incur potential liability": *Savage*, at para. 11.

[52] A court may, pursuant to r. 43.04(2), make orders accessory to an interpleader order that may have the effect of resolving some of the underlying dispute over the property at issue. Nothing in r. 43, however, requires a court to make any such orders, nor were such orders sought by Tacora.

The application judge erred in making the interim order

[53] All parties agree that the interim order should be set aside.

[54] In dismissing the interpleader application, the application judge made a final order that disposed of the litigation: *1476335 Ontario Inc. v. Frezza*, 2021 ONCA 822, at para. 7, citing, *Ball v. Donais* (1993), 13 O.R. (3d) 322 (C.A.). Since the issues in the application had been finally determined, interim relief was unavailable and should not have been ordered by the application judge.

[55] The application judge was furthermore not entitled, on his own motion, to devise a remedy that was not requested by the parties to the dispute: *Aenos Food Services Inc. v. Tierney et al*, 2026 ONSC 1478, at para. 32, citing *Sobeski v.*

Mamo, 2012 ONCA 560, 112 O.R. (3d) 630, at para. 38. This manner of proceeding deprived the parties of a fair opportunity to address the issue.

[56] The application judge's rationale for the interim order is also questionable. He found that Tacora did not meet the requirements for an interpleader order but granted the interim order so that Tacora could seek an interpleader order in another forum. If, moreover, Tacora pays the mining royalty to Stewart McKelvey as directed in the interim order, it will no longer hold any property that could be subject to such an interpleader order from any court.

Disposition

[57] Even though he dismissed Tacora's application, the application judge held that it was entitled to its full indemnity costs, to be deducted from the royalty payment owed to 112. As an innocent third party in the dispute giving rise to these proceedings, Tacora is likewise entitled to its full indemnity costs on the appeal in the amount of $57,089.60.

[58] The appellants are entitled to recover reasonable partial indemnity costs of $40,000 on the appeal and on the motion to expedite the appeal.

[59] The appellants seek costs from Mr. Morrow personally. They point out that, had he not refused their proposal to hold the royalty payments in escrow, Tacora's application would have been unnecessary. They also contend that, since control of Scully and 112 is in dispute, Mr. Morrow should have retained and appeared

through his own counsel. They suggest that Mr. Morrow's representation through counsel for 112 was for the purpose of avoiding personal liability.

[60] Although there is merit to some of the appellants' submissions on this issue, they are to some degree premised on the assumption that their position in the proceedings underway in the Cayman Court will be vindicated. In these circumstances, it is appropriate that 112 pay the appellants' costs.

[61] The appeal is granted, with the order to go as follows:

(a) The application judge's judgment is set aside.

(b) Pursuant to r. 43.04(1)(a), the royalty payment due from Tacora to 112 under the mining lease in January 2026 shall be paid into court pending the final determination by the Grand Court of the Cayman Islands of the application commenced by MILFAM on January 5, 2026, or further order of the Ontario Superior Court.

(c) Pursuant to r. 43.04(1)(a), Tacora shall pay into court any future royalty payments due to 112 under its mining lease with 112 pending the final determination by the Grand Court of the Cayman Islands of the application commenced by MILFAM on January 5, 2026, or further order of the Ontario Superior Court.

(d) Pursuant to r. 43.04(1)(b), upon Tacora making royalty payments into court pursuant to this order, any liability of Tacora with respect to such royalty payments, including under the mining lease with 112, is extinguished.

(e) Tacora's full indemnity costs of $173,917.95 on the application and $57,089.60 on the appeal shall be deducted from the first royalty payment it pays into court.

(f) 112 shall pay the appellants partial indemnity costs of $40,000, inclusive of disbursements and HST.

Released: April 29, 2026 "J.G."

"S. Gomery J.A."
"I agree. J. George J.A."
"I agree. J. Copeland J.A."