SUPREME COURT OF CANADA

CITATION: Saskatchewan (Environment) *v.* Métis Nation – Saskatchewan, 2025 SCC 4

APPEAL HEARD: November 6, 2024
JUDGMENT RENDERED: February 28, 2025
DOCKET: 40740

BETWEEN:

Government of Saskatchewan – Minister of Environment
Appellant

and

Métis Nation – Saskatchewan and
Métis Nation – Saskatchewan Secretariat Inc.
Respondents

- and -

Attorney General of Canada, Bearspaw First Nation, Chiniki First Nation, Goodstoney First Nation, Stó:lō Tribal Council, Congress of Aboriginal Peoples, Métis Nation of Alberta Association, Métis Nation Ontario Secretariat Inc. and Federation of Sovereign Indigenous Nations
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 63)	Rowe J. (Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

Government of Saskatchewan – Minister of Environment *Appellant*

v.

Métis Nation – Saskatchewan and
Métis Nation – Saskatchewan Secretariat Inc. *Respondents*

and

Attorney General of Canada,
Bearspaw First Nation, Chiniki First Nation,
Goodstoney First Nation, Stó:lō Tribal Council,
Congress of Aboriginal Peoples,
Métis Nation of Alberta Association,
Métis Nation Ontario Secretariat Inc. and
Federation of Sovereign Indigenous Nations *Interveners*

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2025 SCC 4

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2024: November 6; 2025: February 28.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Civil procedure — Abuse of process — Multiplicity of proceedings — Aboriginal claims — Province granting company uranium exploration permits within territory over which Métis group asserts Aboriginal title and rights — Métis group bringing application for judicial review of permits alleging breach of duty to consult by province — Province bringing motion to strike portions of application on basis that they constitute abuse of process in light of prior actions brought by Métis group against province — Whether impugned portions of judicial review application constitute abuse of process.

The Métis Nation – Saskatchewan ("MNS") represents the Métis in Saskatchewan. For over 20 years, MNS has been engaged in a series of legal proceedings with Saskatchewan. In 1994, MNS commenced an action seeking declarations of Aboriginal title and commercial harvesting rights over land in northwestern Saskatchewan ("1994 Action"). The action was stayed in 2005 on the basis of MNS's failure to disclose documents. In 2020, MNS commenced another action, seeking various declarations in relation to a consultation policy adopted by Saskatchewan, including a declaration that Saskatchewan has a duty to consult MNS regarding its asserted title and commercial harvesting rights ("2020 Action"). A decision on an application for summary determination brought under that action is pending.

In 2021, Saskatchewan issued three uranium exploration permits to a company within territory over which MNS asserts Aboriginal title and rights. MNS

applied for judicial review of the decision to issue the permits, challenging Saskatchewan's refusal to consult regarding Aboriginal title and commercial harvesting rights, and various aspects of Saskatchewan's conduct during the consultation process ("2021 Application"). It sought several declarations, including a declaration that Saskatchewan breached its duty to consult. In response, Saskatchewan sought to strike paragraphs in the 2021 Application which refer to the claims of Aboriginal title and commercial harvesting rights, arguing that such paragraphs constituted an abuse of process in light of the 1994 Action and the 2020 Action. The chambers judge held that, because in his view the 2021 Application raises the same issues as in the 1994 Action and the 2020 Action, it would be an abuse of process to allow it to proceed unchanged, and he struck the relevant paragraphs. The Court of Appeal reinstated the paragraphs, holding that the chambers judge erred in concluding that all three legal proceedings involved the same issue. It concluded that the continuation of the 2021 Application, including the paragraphs in question, did not give rise to an abuse of process.

Held: The appeal should be dismissed.

Although abuse of process is possible in proceedings involving Indigenous litigants, the unique context of Aboriginal rights litigation must always be borne in mind. In the circumstances of the instant case, there is no abuse of process relating to the 2021 Application, whether with regard to the 1994 Action or to the 2020 Action.

The doctrine of abuse of process is concerned with the administration of justice and fairness. It engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute. It is a broad concept that applies in various contexts, and it is characterized by its flexibility, as it is not encumbered by specific requirements.

A multiplicity of proceedings which engage the same issues can amount to an abuse of process; duplicative proceedings might waste the resources of the parties, courts and witnesses, or might risk inconsistent results and therefore undermine the credibility of the judicial process. However, the fact that there are two or more ongoing legal proceedings which involve the same, or similar, parties or legal issues, is in itself not sufficient for an abuse of process. There may be instances where multiple proceedings will enhance, rather than impeach, the integrity of the judicial system, or where parties have a valid reason for bringing separate, but related, proceedings. The analysis should focus on whether allowing the litigation to proceed would violate the principles of judicial economy, consistency, finality or the integrity of the administration of justice.

In the instant case, it is not an abuse of process to allow MNS to assert a breach of the duty to consult in the 2021 Application even though the 1994 Action has been stayed. To resolve the 2021 Application, a court must determine whether Saskatchewan is obliged to consult MNS regarding the impact of the exploration

permits on its asserted Aboriginal title and commercial harvesting rights. The duty to consult arises when the Crown has knowledge of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. The status of the 1994 Action is not dispositive of whether Saskatchewan was put on proper notice of MNS's asserted claim: the 1994 Action is not, in and of itself, MNS's asserted claim, but is rather the legal vehicle which MNS selected in order to vindicate its claim. It is clear that Saskatchewan has knowledge of MNS's claim for Aboriginal rights and title; however, what duties follow from this is not before the Court. As well, although inordinate delay can amount to an abuse of process in certain circumstances, the doctrine must focus on the integrity of the adjudicative functions of courts, which is not called into question in the instant case.

Furthermore, it cannot be said that the 2021 Application amounts to an abuse of process because of a duplication of issues with the 2020 Action. There is, clearly, overlap between the 2020 Action and the 2021 Application, as the 2021 Application is a specific instance of the general question about the duty to consult raised in the 2020 Action. However, such overlap does not give rise to concerns about the integrity of the adjudicative process or another fundamental principle, such as consistency, finality, or judicial economy. The 2021 Application is a proper mechanism for MNS to challenge the permits and for MNS to pursue an interim remedy for the potential breach of its claimed Aboriginal title and commercial harvesting rights. It would be a misuse of the doctrine of abuse of process to immunize from judicial review actions taken by Saskatchewan that might impact MNS's claims. Regarding the finality

of litigation, there is potential for inconsistent outcomes should the 2020 Action and the 2021 Application continue in parallel and yield different answers to the question of whether Saskatchewan has a duty to consult on Aboriginal title and commercial harvesting rights. However, the option of case management to avoid a potential inconsistency makes clear that this is not a case where the drastic remedy of striking pleadings would be appropriate.

Cases Cited

Referred to: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *McHenry v. Lewis* (1882), 22 Ch. D. 397; *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 284 D.L.R. (4th) 94; *Dixon v. Canada (Attorney General)*, 2015 ABQB 565; *Cashin Mortgages Inc. v. 2511311 Ontario Ltd.*, 2024 ONCA 103, 170 O.R. (3d) 107;

Birdseye Security Inc. v. Milosevic, 2020 ONCA 355; *Fillion v. Degen*, 2005 MBCA 58, 195 Man. R. (2d) 2; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

King's Bench Rules (Saskatchewan), rr. 1-4, 7-9.

Rules of the Supreme Court of Canada, SOR/2002-156, Sch. B.

Agreements

Framework Agreement for Advancing Reconciliation (2018).

Métis Government Recognition and Self-Government Agreement (2019).

Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement (2023).

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Saskatchewan. *First Nation and Métis Consultation Policy Framework*. Regina, 2010.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Richards C.J. and Leurer and Tholl JJ.A.), 2023 SKCA 35, 479 D.L.R. (4th) 345, 12 Admin. L.R. (7th) 23, [2023] S.J. No. 95 (Lexis), 2023 CarswellSask 121 (WL), setting aside the decision of Robertson J., 2022 SKQB 23, [2022] S.J. No. 43 (Lexis), 2022 CarswellSask 55 (WL). Appeal dismissed.

P. Mitch McAdam, *K.C.*, and *R. James Fyfe*, *K.C.*, for the appellant.

Thomas Isaac and *Arend Hoekstra*, for the respondents.

Dayna Anderson, for the intervener the Attorney General of Canada.

Brooke Barrett and *W. Tibor Osvath*, *K.C.*, for the interveners the Bearspaw First Nation, the Chiniki First Nation and the Goodstoney First Nation.

Tim Dickson and *Mary (Molly) Churchill*, for the intervener the Stó:lō Tribal Council.

Andrew Lokan and *Douglas Montgomery*, for the intervener the Congress of Aboriginal Peoples.

Jason Madden, *Keith Brown* and *Matthew Patterson*, for the interveners the Métis Nation of Alberta Association and the Métis Nation Ontario Secretariat Inc.

Bruce J. Slusar and *Evan Duffy*, for the intervener the Federation of Sovereign Indigenous Nations.

The judgment of the Court was delivered by

ROWE J. —

[1] For the past 20 years, the Métis Nation – Saskatchewan and the Métis Nation – Saskatchewan Secretariat Inc. (collectively, "MNS"), and the Government of Saskatchewan, have been engaged in a series of legal proceedings.

[2] The most recent proceeding, which led to the present appeal in this Court, commenced in 2021. That year, Saskatchewan granted uranium exploration permits to NexGen Energy Ltd. within territory over which MNS asserts Aboriginal title and rights. MNS brought an originating application seeking, *inter alia*, a declaration that Saskatchewan breached its duty to consult by failing to consult MNS about the impact of the exploration permits with respect to title and commercial harvesting rights. In response, Saskatchewan brought a motion to strike portions of MNS's application, based on abuse of process.

[3] The chambers judge concluded that it would constitute an abuse of process for MNS to proceed with its originating application in the original form; he struck parts of the application. The Court of Appeal overturned the chambers judge's decision; it held there was no abuse of process.

[4] For the reasons below, I would dismiss the appeal. In so doing, I would emphasize that the question to be decided is whether there is an abuse of process. What is not before this Court are questions regarding the substance of the actions and the application brought by MNS against Saskatchewan. Such questions are to be decided in proceedings currently before the Court of King's Bench of Saskatchewan.

I. Facts

[5] As this is an appeal on a motion to strike pleadings, there are no findings of fact. Rather, the facts are to be taken from the pleadings (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 5).

[6] The Métis Nation – Saskatchewan represents the Métis in Saskatchewan. For over 20 years, MNS has been engaged in a series of legal proceedings with the appellant, Saskatchewan, which are summarized below.

A. *The 1994 Action*

[7] In 1994, MNS commenced an action in what was then the Court of Queen's Bench against Saskatchewan and Canada seeking, *inter alia*, declarations of Aboriginal title and rights to lands in northern Saskatchewan ("1994 Action"). The following excerpt, from para. 71 of MNS's statement of claim for the 1994 Action, summarizes the claim:

> The Plaintiffs therefore claim:
>
> (a) A Declaration that the Plaintiffs have existing Aboriginal rights and title within the Plaintiffs' Homeland, which are recognized and affirmed in section 35 of the *Constitution Act, 1982*, and which have never been lawfully surrendered or extinguished, which rights and title include, *inter alia*:
>
> (i) Aboriginal title and rights to the possession, occupation, use and benefit of those lands and resources in the Plaintiffs' Homeland which they require to sustain them as a distinct Aboriginal people;
>
> (ii) harvesting rights, including rights to fish, hunt, trap and gather, for subsistence and commercial purposes;
>
> (R.R., vol. II, at pp. 229-30)

[8] In 2005, the 1994 Action was stayed on the basis of MNS's failure to comply with a court order requiring it to disclose to Saskatchewan and Canada documents relating to the claim for Aboriginal title and rights. These documents had been prepared with research funding provided by the Saskatchewan and Canadian governments.

[9] The stay order provided MNS was "not entitled to apply to lift the stay until they are in a position to assure the immediate and full disclosure" of the aforementioned documents (A.R., at p. 137). To date, MNS has not disclosed the documents, nor has it applied to lift the stay in the 1994 Action. At the hearing before this Court, counsel for MNS submitted that MNS has faced challenges that contributed to the non-disclosure, including "a period in the early 2010s where the [MNS] Legislature didn't meet and federal funding was cut off" (transcript, at p. 49).

[10] For its part, counsel for Saskatchewan stated at the hearing that "[i]t would have been open" for Saskatchewan to have moved to dismiss the 1994 Action as abandoned, but it has not done so (pp. 40-41).

[11] Following the stay order in 2005, negotiations continued between MNS and Canada; they entered into several agreements including the Framework Agreement for Advancing Reconciliation (2018), the Métis Government Recognition and Self-Government Agreement (2019), and the Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement (2023). Saskatchewan has not participated in these negotiations between MNS and Canada.

B. *The 2020 Action*

[12] In 2010, Saskatchewan adopted the *First Nation and Métis Consultation Policy Framework* ("2010 Policy") which stated that the provincial government does not recognize Aboriginal title or commercial harvesting rights, and accordingly, will not consult with First Nations or Métis regarding these matters:

> ***Aboriginal Title***
> The Government does not accept assertions by First Nations or Métis that Aboriginal title continues to exist with respect to either lands or resources in Saskatchewan. Accordingly, decisions claimed to adversely affect Aboriginal title are not subject to this policy.
>
> . . .
>
> ***Commercial Use of Resources***
> Commercial uses of resources by First Nations and Métis people, such as commercial trapping and fishing, are not subject to this policy. However,

> the importance of these pursuits is recognized by the Government and ministries will be guided by the Interest-Based Engagement section (see Section 5) when its decisions or actions have the potential to adversely impact commercial activities. [pp. 6-7]

[13] In 2020, MNS commenced an action against Saskatchewan with respect to the 2010 Policy ("2020 Action"). MNS sought declarations that: the 2010 Policy was invalid; reliance on the 2010 Policy breached the honour of the Crown; and Saskatchewan's duty to consult includes Métis claims to Aboriginal title and commercial harvesting rights.

[14] In 2023, MNS brought an application for summary determination under the 2020 Action as to whether Saskatchewan's "reliance on the [2010] Policy to strictly refuse to consult First Nations and Métis, including MN-S, on the basis of Aboriginal title and commercial rights is, *prima facie*, inconsistent with established Supreme Court of Canada jurisprudence on the duty to consult, and therefore unconstitutional" (Supp. R.R., at p. 2; MNS's motion to adduce further evidence, at p. 43). The application was argued before the Saskatchewan Court of King's Bench in October 2023. A decision is pending.

C. *The 2021 Originating Application*

[15] In July 2021, Saskatchewan issued three uranium exploration permits to NexGen to conduct mineral exploration near Patterson Lake in northwestern Saskatchewan.

[16] In March 2021, Saskatchewan had given notice to MNS of the NexGen permit application, expressing the provincial government's intention to consult with respect to the Aboriginal right to fish, trap, and hunt. MNS and Saskatchewan corresponded over the following months regarding the project. Saskatchewan refused to consult with respect to Aboriginal title and commercial harvesting rights.

[17] In August 2021, MNS made an originating application ("2021 Originating Application") seeking judicial review of Saskatchewan's decision to issue the exploration permits to NexGen. MNS took issue with Saskatchewan's refusal to consult regarding Aboriginal title and commercial harvesting rights, and with various aspects of Saskatchewan's conduct during the consultation process.

[18] In the 2021 Originating Application, MNS sought declarations that: the issuance of the permits was *ultra vires* Saskatchewan based on s. 35 of the *Constitution Act, 1982*; Saskatchewan breached its duty to consult by failing or refusing to engage in good faith consultations; and Saskatchewan failed to uphold the honour of the Crown. MNS also sought an order "in the nature of *certiorari* quashing and/or setting aside the Permits and an order in the nature of prohibition preventing Saskatchewan from issuing any further permit respecting NexGen's uranium exploration activities, or similar activities to be conducted in the same geographic area, without facilitating and funding MN-S's participation in a reasonable, honourable, and constitutionally valid consultation process" (R.F., at para. 31).

[19] In response, Saskatchewan filed a notice of application seeking to strike paragraphs in the 2021 Originating Application which refer to the claims regarding Aboriginal title and commercial harvesting rights (2021 Originating Application, at paras. 2e, 3f and 16b and c, reproduced in A.R., at pp. 61-62 and 64). Relying on rr. 1-4(3) and 7-9(2)(e) of the Saskatchewan *King's Bench Rules*, as they are now called, Saskatchewan argued that the impugned paragraphs constituted an abuse of process in light of the 1994 Action and the 2020 Action. The paragraphs in question are reproduced in an appendix to these reasons.

II. Judgments Below

A. *Court of Queen's Bench of Saskatchewan, 2022 SKQB 23 (Robertson J.)*

[20] Regarding abuse of process, the chambers judge determined that in order to judicially review Saskatchewan's decision to issue the permits to NexGen, it was necessary to evaluate the strength of MNS's underlying claim for Aboriginal title and commercial harvesting rights. This was based on *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, that "the extent of the duty to consult varies depending on the nature and strength of the claim" (chambers judge's reasons, at para. 48).

[21] The chambers judge noted that this issue had already been raised by MNS in its other legal proceedings against Saskatchewan, notably the 1994 Action. As the 1994 Action had been stayed in 2005, MNS was barred from raising the same claim in

a new action. As well, the chambers judge stated that the 2020 Action dealt with the same issues as the challenged paragraphs of MNS's 2021 Originating Application.

[22] The chambers judge held that because the 2021 Originating Application "raises the same issues as in the 1994 Action and 2020 Action", it would be an abuse of process to allow MNS to proceed with the 2021 Originating Application with the challenged paragraphs included (para. 65). Accordingly, he granted the order to strike the relevant paragraphs from the 2021 Originating Application.

B. *Court of Appeal of Saskatchewan, 2023 SKCA 35, 479 D.L.R. (4th) 345 (Leurer J.A., Richards C.J. and Tholl J.A. concurring)*

[23] The Court of Appeal unanimously allowed MNS's appeal and reinstated the paragraphs in question in the 2021 Originating Application.

[24] The Court of Appeal stated that the doctrine of abuse of process is a "flexible tool" that is "employed to prevent the administration of justice from being misused" (para. 46). It is often "necessary to consider all the relevant context and background of a matter" (para. 46). The court noted that a proceeding may be abusive where a party is "attempting to relitigate an issue that has already been decided, or is currently being decided, in another forum", as this would "waste the resources of the parties, courts and witnesses alike, while risking inconsistent results and undermining the credibility of the entire judicial process" (para. 46).

[25] The Court of Appeal stated that while the 1994 Action, the 2020 Action, and the 2021 Originating Application "[s]uperficially" relate to the same issue — the Métis claim of Aboriginal title and commercial harvesting rights — this did not make the proceedings identical (para. 47). The court stated that an application for judicial review may occur along with litigation, as the duty to consult arises from the need to protect Aboriginal interests "*while land and resource claims are ongoing*" (para. 47 (emphasis in original), quoting *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 33).

[26] The Court of Appeal held that the chambers judge erred in concluding that all three legal proceedings involved the same issue. The Court of Appeal explained that "the question as to the existence and scope of the duty to consult is tested very differently than whether the underlying asserted substantive right exists at all" (para. 51). In cases such as this, where an application for judicial review is made based on an alleged failure of the Crown to consult, the reviewing court is not asked to "determine the existence of Aboriginal rights or title" (para. 48). Rather, the court is to "review whether a constitutional duty has been fulfilled" (para. 48). As such, what is at issue in the 2021 Originating Application is not the existence of Aboriginal title or rights, but rather whether the Crown's conduct has been consistent with its duty to consult.

[27] The Court of Appeal stated that the remedies in each of the three legal proceedings between MNS and Saskatchewan were different, such that there was no risk of inconsistent outcomes.

[28] While there is "overlap" between "some aspects" of the 1994 Action, the 2020 Action, and the 2021 Originating Application, the Court of Appeal concluded that the key issues and the remedies were different (para. 53). As a result, the continuation of the 2021 Originating Application, including the paragraphs in question, did not give rise to an abuse of process.

III. Issue

[29] The merits of the 1994 Action, the 2020 Action, and the 2021 Originating Application are not at issue before this Court. Rather, the question before this Court is whether it is an abuse of process for MNS to pursue its 2021 Originating Application, in its original form, given the 1994 Action and the 2020 Action.

IV. Relevant Statutory Provisions

[30] The Saskatchewan *King's Bench Rules* provide:

> **1-4**(1) The Court may do either or both of the following:
>
> > (a) give any relief or remedy described or referred to in *The King's Bench Act*;
> >
> > (b) give any relief or remedy described or referred to in or under these rules or any enactment.
>
> (2) The Court may grant a remedy whether or not it is claimed or sought in an action on providing the parties with:
>
> > (a) a notice of its intention to grant a remedy; and

(b) an opportunity to respond.

(3) Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its inherent jurisdiction.

7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:

(a) that all or any part of a pleading or other document be struck out;

(b) that a pleading or other document be amended or set aside;

(c) that a judgment or an order be entered;

(d) that the proceeding be stayed or dismissed.

(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:

(a) discloses no reasonable claim or defence, as the case may be;

(b) is scandalous, frivolous or vexatious;

(c) is immaterial, redundant or unnecessarily lengthy;

(d) may prejudice or delay the fair trial or hearing of the proceeding; or

(e) is otherwise an abuse of process of the Court.

(3) No evidence is admissible on an application pursuant to clause (2)(a).

V. Analysis

A. *Standard of Review*

[31] Whether there is an abuse of process is a question of law (*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at para. 30). Thus, the

applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

[32] That said, I would add the following for clarity. Where an abuse of process has been established, a subsequent question arises: What remedy is to be granted? That decision is discretionary (see *King's Bench Rules*, r. 7-9(1)(a)). Being a discretionary decision, it is "generally entitled to deference" and "may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being 'so clearly wrong as to amount to an injustice')" (*Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 41, quoting *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15).

B. *The Abuse of Process Doctrine*

[33] The doctrine of abuse of process is concerned with the administration of justice and fairness (*Behn*, at para. 41). The doctrine engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37; *Behn*, at para. 39; *Abrametz*, at para. 33).

[34] In *Abrametz*, this Court reiterated that abuse of process is a broad concept that applies in various contexts (para. 34, citing *Toronto (City)*, at para. 36, and *Behn*, at para. 39). The Court noted that the doctrine of abuse of process is "characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel" (para. 35, citing *Behn*, at para. 40, and *Toronto (City)*, at paras. 37-38).

[35] One way in which an abuse of process can arise is by relitigation, that is, "where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined" (*Behn*, at para. 40, quoting *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 56, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; see also *Abrametz*, at para. 34; and D. J. Lange, *The Doctrine of Res Judicata in Canada* (5th ed. 2021), at pp. 1-5). Relitigation will be an abuse of process if it violates "such principles as judicial economy, consistency, finality and the integrity of the administration of justice" (*Toronto (City*), at para. 37; *Behn*, at para. 41). Where warranted, the doctrine of abuse of process can be relied on to strike pleadings so as to prevent relitigation of an issue (see *Behn*; *Canam Enterprises Inc.*).

[36] Abuse of process is not limited to relitigation. For example, in *Behn*, this Court found that "raising a breach of the duty to consult and of treaty rights as a defence", in circumstances where the defendants had a fair opportunity to initiate proceedings and raise such claims earlier, was abusive (para. 37). In that case, it was held that permitting this litigation tactic would lead courts to condone "self-help

remedies" pursued outside litigation, namely the creation of a blockade (para. 42; see also para. 1). This Court has held that an inordinate delay that causes serious prejudice can give rise to an abuse of process (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 115). In criminal proceedings, the doctrine can be used to preclude unfair or oppressive treatment of an accused (*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 59; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 25; *Abrametz*, at para. 34). This list is illustrative, not exhaustive.

[37] Before turning to the circumstances of this case, I will consider the doctrine of abuse of process in the context of a multiplicity of proceedings, as that is the primary ground upon which Saskatchewan seeks to have the paragraphs in question struck from the 2021 Originating Application.

[38] A multiplicity of proceedings which engage the same issues can amount to an abuse of process. In the foundational case of *McHenry v. Lewis* (1882), 22 Ch. D. 397, Sir George Jessel observed that: ". . . it is *prima facie* vexatious to bring two actions where one will do" (p. 400). Examples of where a multiplicity of proceedings has amounted to an abuse of process include: where two parallel class actions involving the same parties were brought in two different jurisdictions (*Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 284 D.L.R. (4th) 94, at paras. 38-40); where plaintiffs initiated multiple actions claiming Aboriginal and treaty rights over the same land and natural resources (*Dixon v. Canada (Attorney General)*, 2015 ABQB 565); and where the

plaintiffs provided "no viable explanation" for bringing a second action that duplicated the issue of ownership of a trade name which encapsulated the original defendants (*Cashin Mortgages Inc. v. 2511311 Ontario Ltd.*, 2024 ONCA 103, 170 O.R. (3d) 107, at para. 14).

[39] However, the fact that there are two or more ongoing legal proceedings which involve the same, or similar, parties or legal issues, is in itself not sufficient for an abuse of process. As this Court recognized in *Toronto (City)*, "[t]here may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system" (para. 52). Similarly, there may be instances where parties have a valid reason for bringing separate, but related, proceedings; in such cases, a multiplicity of proceedings can serve to enhance the administration of justice (see, e.g., *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at paras. 20-22). The inverse can also be true: pleadings do not need to be identical in order for a multiplicity of proceedings to amount to abuse of process (see, e.g., *Dixon*, at para. 85; *Fillion v. Degen*, 2005 MBCA 58, 195 Man. R. (2d) 2, at para. 23).

[40] Thus, the abuse of process analysis does not end when multiple or similar proceedings exist. Rather, the analysis needs to focus on whether allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice, as discussed above. Where, for example, having duplicative proceedings would waste the resources of the parties, courts and

witnesses, or risk inconsistent results and therefore undermine the credibility of the judicial process, this can amount to an abuse of process.

[41] I turn now to the circumstances of this case.

C. *Does the 2021 Originating Application Give Rise to an Abuse of Process?*

[42] To determine whether there is an abuse of process in the present appeal, I will proceed in three steps. First, I will identify the purposes of the legal proceedings between Saskatchewan and MNS, and the remedies sought by MNS. Second, I will address the issue of whether MNS's assertion of a breach of duty to consult in the 2021 Originating Application is an abuse of process in light of the 1994 Action being stayed. Third, I will address the issue of whether there is a duplication of issues between the 2021 Originating Application and the 2020 Action and, if so, whether this gives rise to an abuse of process.

(1) <u>What Each Legal Proceeding Deals With</u>

[43] I begin by identifying the purpose and remedies sought in the three proceedings.

[44] The 1994 Action sets out MNS's claim for, and seeks declarations of, Aboriginal title and commercial harvesting rights over land in northwestern Saskatchewan.

[45] The purpose of the 2020 Action is to delineate the scope of Saskatchewan's duty to consult in a general sense, and it seeks various declarations in relation to the 2010 Policy, including a declaration that Saskatchewan has a duty to consult the Métis regarding their asserted title and commercial harvesting rights.

[46] The 2021 Originating Application is an application seeking judicial review of Saskatchewan's decision to grant exploration permits to NexGen. The paragraphs from the 2021 Originating Application at issue in the present appeal seek several declarations, including a declaration that Saskatchewan has a duty to consult regarding the impact of the exploration permits on the Métis claim of Aboriginal title and commercial harvesting rights. The 2021 Originating Application also sought an order in the nature of *certiorari* quashing and/or setting aside the permits.

(2) Whether MNS's Assertion of Breach of Duty To Consult in the 2021 Originating Application Amounts to an Abuse of Process

[47] Saskatchewan submits that it would be an abuse of process to allow MNS to assert a breach of the duty to consult in the 2021 Originating Application given that MNS has not had an "active" underlying claim since 2005, when the 1994 Action was stayed (A.F., at para. 93). Saskatchewan relies on the chambers judge's finding that the 1994 Action "may be presumed abandoned" due to MNS's failure to comply with the disclosure order or apply to lift the stay (para. 94, quoting chambers judge's reasons, at para. 60).

[48] Saskatchewan further submits that the MNS's breach is "particularly egregious" because the documents that MNS refuses to disclose are the documents Saskatchewan needs to assess the credibility of its asserted Aboriginal title and rights (A.F., at para. 85). MNS responds that it maintains its underlying claim for Aboriginal title and commercial harvesting rights, and that Saskatchewan has taken no steps to have the 1994 Action declared abandoned (R.F., at paras. 101 and 104). MNS further submits that, regardless of the status of the 1994 Action, it can assert a breach of the duty to consult because Saskatchewan has knowledge of its claim (paras. 12, 127 and 133).

[49] I would not give effect to Saskatchewan's position. I agree that, to resolve the 2021 Originating Application, a court must determine whether Saskatchewan is obliged to consult the Métis regarding the impact of the exploration permits on their asserted rights to Aboriginal title and commercial harvesting rights. However, as I explain below, the status of the 1994 Action is not dispositive of this question.

[50] The duty to consult operates pending a final determination of claims (*Haida*, at para. 38; see also *Rio Tinto*, at para. 33). As such, any arguments that the duty to consult does not arise until after rights and title claims are resolved are inconsistent with this Court's jurisprudence. The duty to consult serves "to provide protection to Aboriginal and treaty rights" while land and resource claims are ongoing, and to further "the goals of reconciliation between Aboriginal peoples and the Crown" *(Rio Tinto*, at para. 34, citing *Haida*). As this Court explained in *Haida*, at para. 27:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[51] At all stages, both sides must be governed by the duty of mutual good faith (*Haida*, at para. 42; *Behn*, at para. 42; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 88). The Crown must possess "'the intention of substantially addressing [Aboriginal] concerns' as they are raised" (*Haida*, at para. 42, quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). On their end, Indigenous claimants "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached" (para. 42).

[52] The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida*, at para. 35; *Desautel*, at para. 72). In other words, three conditions must exist for the duty to consult to arise: (1) actual or constructive knowledge of the potential existence of the Aboriginal right or title; (2) contemplated Crown conduct; and (3) a potential adverse effect on the asserted right (*Haida*, at para. 35; *Rio Tinto*, at para. 51; *Desautel*, at para. 72).

[53] Consequently, the status of the 1994 Action is not dispositive of whether Saskatchewan was put on proper notice of MNS's *asserted claim*. The 1994 Action is not, in and of itself, MNS's asserted claim. Rather, it is the legal vehicle which MNS selected in order to *vindicate* its claim.

[54] In this case, it is clear that Saskatchewan has knowledge of MNS's claim for Aboriginal rights and title, and it is this knowledge which is relevant to the duty to consult analysis. However, what duties follow from this is not before this Court. That is in question in the 2020 Action (in a general sense) and in the 2021 Originating Application (as regards the NexGen permits). It is not for this Court, in dealing with a motion to strike a pleading based on abuse of process, to comment on the outcome of the 2020 Action which focuses on Saskatchewan's duty to consult. As noted above, a decision in the 2020 Action is pending.

[55] Finally, Saskatchewan submits that significant time has elapsed since the 1994 Action was stayed in 2005 (A.F., at para 83) and that this delay gives rise to an abuse of process. This Court has held that, in certain circumstances, inordinate delay can amount to an abuse of process (*Blencoe*, at para. 115; see also *Toronto (City*), at para. 36). However, in the circumstances of this case, the requirement to show abuse of process is not met, having regard to the 1994 Action. In all of its applications, the abuse of process doctrine focuses on "the integrity of the adjudicative functions of courts" (*Toronto (City)*, at para. 43); this is not called into question here.

(3) Whether MNS's 2021 Originating Application Amounts to an Abuse of Process Because of a Duplication of Issues With the 2020 Action

[56] Saskatchewan submits that the 2020 Action and the 2021 Originating Application address the same subject matter and require resolution of the same underlying issue: whether Saskatchewan has a duty to consult with respect to Aboriginal title and commercial harvesting rights (A.F., at para. 64). In Saskatchewan's submission, the Court of Appeal erred in concluding that the 2020 Action is not directed at a specific government action, that different relief is being sought in each proceeding, and that inconsistent outcomes between the proceedings would not pose a problem (paras. 70-78).

[57] In response, MNS submits that the 2020 Action and the 2021 Originating Application are materially different. MNS submits that there is no duplication of proceedings: the 2020 Action seeks to prevent Saskatchewan from using the 2010 Policy as the basis for avoiding its constitutional obligations, while the 2021 Originating Application seeks to require Saskatchewan to consult as regards the NexGen exploration permits (R.F., at paras. 65-68).

[58] There is, clearly, overlap between the 2020 Action and the 2021 Originating Application. As noted above, the 2020 Action deals generally with the duty to consult and the 2021 Originating Application deals with a specific instance of the duty to consult. Put another way, the 2021 Originating Application is a specific instance of the general question at issue in the 2020 Action.

[59] Does this amount to an abuse of process? I would say no. As I explained earlier, an abuse of process requires more than some overlap of issue; it must threaten the integrity of the adjudicative process or another fundamental principle, such as consistency, finality, or judicial economy (*Toronto (City)*, at para. 37). At present, the overlap between the 2020 Action and the 2021 Originating Application does not give rise to these concerns. The 2021 Originating Application is a proper mechanism for MNS to challenge Saskatchewan's issuance of the NexGen permits and for MNS to pursue an interim remedy for the potential breach of its claimed Aboriginal title and commercial harvesting rights. It would be a misuse of the doctrine of abuse of process, in effect, to immunize from judicial review actions taken by Saskatchewan that might impact MNS's claimed Aboriginal title and commercial harvesting rights. I note that a decision on an application for summary determination in the 2020 Action is pending; when that decision is rendered, it will inform the resolution of the questions in the 2021 Originating Application.

[60] Regarding the finality of litigation, there is *potential* for inconsistent outcomes should the 2020 Action and the 2021 Originating Application continue in parallel and yield different answers to the question of whether Saskatchewan has a duty to consult on Aboriginal title and commercial harvesting rights. However, this potential inconsistency might be better addressed through case management. Before this Court, counsel for Saskatchewan agreed that adjournment of the 2021 Originating Application could have addressed its concerns both with respect to having to argue similar issues in two proceedings and the possibility of inconsistent judgments (transcript, at pp. 11-

12). This Court has stated its support for active case management to "ensur[e] . . . efficient use of court resources" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 110). Striking pleadings for abuse of process is a drastic remedy that "should be granted only in the 'clearest of cases', when the abuse falls at the high end of the spectrum" (*Abrametz*, at para. 83, quoting *Blencoe*, at para. 120). The option of case management to avoid a potential inconsistency of decisions makes clear that this is not a case where such a "drastic remedy" is to be contemplated.

[61] There is therefore no basis for finding an abuse of process, having regard to the 2020 Action and the 2021 Originating Application.

VI. Conclusion and Disposition

[62] Having concluded that there is no abuse of process relating to the proceedings at issue in this case, I would add that abuse of process is possible in proceedings involving Indigenous litigants, as it is for others. That said, the unique context of litigation to vindicate Aboriginal rights must always be borne in mind, both as to whether an abuse of process exists and, if so, what follows from that — i.e., what order would be appropriate. Court procedures should facilitate, not impede, the just resolution of Aboriginal claims. As this Court stated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, "[t]he fundamental objective of the modern law of [A]boriginal and treaty rights is the

reconciliation of [A]boriginal peoples and non-[A]boriginal peoples and their respective claims, interests and ambitions" (para. 1).

[63] I would dismiss the appeal, with costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

APPENDIX

These are the paragraphs from the 2021 Originating Application that Saskatchewan is seeking to strike:

2. A declaration that the Minister has breached the Crown's constitutional duty to consult the Applicant, Métis Nation – Saskatchewan ("**MN-S**"), by failing or refusing to engage in good faith consultations respecting the issuance of the Permit and the underlying Uranium Exploration Activities, including but not limited to the following breaches of the duty to consult:

. . .

   e. Refusing to consult with MN-S in respect of potential impacts to asserted Aboriginal title and commercial harvesting rights;

3. A declaration that the Minister has failed to uphold the honour of the Crown while engaging with MN-S in respect of the Uranium Exploration Activities by:

. . .

   f. Refusing to consider or consult in respect of potential impacts to asserted Aboriginal title and commercial harvesting rights;

16. The rights of the Métis are recognized in section 35 of the *Constitution Act, 1982*. As a result of their unique history, Saskatchewan Métis assert Aboriginal rights including those:

. . .

b. to harvest animals, plants, and natural resources for commercial purposes; and

c. to lands, and their resources, including as set out in the Northwest Saskatchewan Land Claim.

Appeal dismissed with costs.

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Solicitors for the respondents: Cassels Brock & Blackwell, Calgary.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Winnipeg.

Solicitors for the interveners the Bearspaw First Nation, the Chiniki First Nation and the Goodstoney First Nation: Rae and Company, Calgary.

Solicitors for the intervener the Stó:lō Tribal Council: JFK Law, Vancouver.

Solicitors for the intervener the Congress of Aboriginal Peoples: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Métis Nation of Alberta Association and the Métis Nation Ontario Secretariat Inc.: Aird & Berlis, Toronto.

Solicitors for the intervener the Federation of Sovereign Indigenous Nations: Slusar Law Office, Saskatoon; Bailey Wadden & Duffy, Edmonton.