SCC File No.: 40740

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

GOVERNMENT OF SASKATCHEWAN – MINISTER OF ENVIRONMENT

APPELLANT
(Respondent)

– and –

MÉTIS NATION – SASKATCHEWAN AND MÉTIS NATION-SASKATCHEWAN SECRETARIATE INC.

RESPONDENTS
(Appellants)

FACTUM OF THE APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 27, [2004] 3 SCR 511 [*Haida Nation*], this Court held that the Crown's honour may require it to consult Indigenous peoples in relation to their asserted but unproven Aboriginal rights claims while they are in the process of proving those claims in negotiations or litigation.

2. This case concerns whether it is an abuse of process for a claimant to bring two duty to consult actions against the Crown that raise the same legal issue, and where its underlying claim to prove its rights has been stayed because it breached a court order.

3. The Métis Nation – Saskatchewan and the Métis Nation – Saskatchewan Secretariat Inc. ("MNS") have brought two actions against the Government of Saskatchewan ("Saskatchewan") in which they raise the same legal issue of whether a duty to consult is triggered by their bare assertions of Aboriginal title and commercial harvesting rights.

4. The MNS sought to prove the existence of those rights in a separate action that it initiated in 1994 ("the 1994 Action"). However, those proceedings were stayed in 2005 because the MNS breached a court order to disclose documents related to the proof of its asserted rights. Nineteen years later, the MNS has still not complied with that order.

5. It is an abuse of process for the MNS to proceed in this way. The MNS should not be allowed to raise the same duty to consult issue in this matter ("the 2021 Action") when it raised the same issue in a prior proceeding ("the 2020 Action"), particularly when it is in continuing breach of a Court order in the 1994 Action.

6. The Attorney General brought a successful motion to strike parts of the 2021 Action on the ground of abuse of process*: Métis Nation – Saskatchewan and Métis Nation – Saskatchewan Secretariat Inc. v Saskatchewan (Environment)*, 2022 SKQB 23.

7. In overturning that decision, the Court below unduly narrowed the abuse of process doctrine by requiring the 2021 and 2022 Actions to have identical "purposes" for the doctrine to apply. This was contrary to *Toronto (City) v C.U.P.E.*, Local 79, 2003 SCC 63 at para 37 [2003] 3 SCR 77 [*Toronto (City)*] and *Behn v Moulton Contracting Ltd*., 2013 SCC 26 at paras 39-40, [2013] 2 SCR 227 [*Behn*], in which this Court affirmed that the abuse of process doctrine is "flexible" and "unencumbered by specific requirements."

8. Properly understood, the pleadings in this matter and the 2020 Action raise the same legal issue. Requiring Saskatchewan to debate the same issue in two matters would waste resources, risk inconsistent results, and bring the administration of justice into disrepute. This is precisely what the abuse of process doctrine seeks to avoid.

9. Compounding the disrepute, the MNS brought these actions after abandoning the 1994 Action and while in continuing breach of a Court order in relation to it. The MNS should be expected to comply with the order and successfully apply to lift the stay in the 1994 Action before bringing duty to consult proceedings against the Crown.

B. Statement of Facts

a. The 1994 Action

10. The MNS and other Plaintiffs brought the 1994 Action against Canada and Saskatchewan seeking to prove Métis title and commercial harvesting rights in Northwest Saskatchewan. A copy of the Statement of Claim is found at Tab 5, Ex. A, p. 84, of the Appellant's Record. At para 71 of the Claim, the Plaintiffs seek a declaration that they have Aboriginal title and commercial harvesting rights (Appellant's Record at pgs. 108-109):

> 71. 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 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;

11. Appended to the Claim is a map of the Plaintiffs' Homeland over which they assert Aboriginal title and commercial harvesting rights. It is a large area covering most of Northwest Saskatchewan: Appellant's Record at p. 113.

12. Canada and Saskatchewan denied the existence of those rights in their respective Statements of Defence: Appellant's Record at Tab 5, Ex. B at paras 29 & 30; Ex. C at para 12. Saskatchewan takes the position that, at the relevant time, the lands at issue were occupied by Cree and Dene peoples, not the Métis. Aboriginal title to the lands was held by First Nations peoples who surrendered their title under Treaty.

13. In 2005, the Court of Queen's Bench stayed the 1994 Action because the Plaintiffs failed to comply with a previous Court order to disclose documents to Canada and Saskatchewan related to the asserted rights. The stay Order is found at the Appellant's Record at Tab 5, Ex. D, p. 136. The documents at issue were those that the MNS was to rely upon in support of proving their asserted rights: *Métis Nation – Saskatchewan v Saskatchewan (Environment)*, 2023 SKCA 35 at para 9.

14. The stay Order directed that the Plaintiffs "would not be entitled to apply to lift the stay until they are in a position to assure the immediate and full disclosure of documents and electronic materials, as previously ordered by the Court."

15. The Court's separate 2005 Judgment provides reasons for and factual background to the stay Order, and is included in the Appellant's authorities: *Morin et al v Canada and*

Saskatchewan (23 December 2005) Saskatoon, QBG No. 619/1994 (Sask QB) [*Morin*]. It outlines how Saskatchewan and Canada helped fund the MNS to research and acquire the documents at issue: para 2. At para 9, the Court found that the stay was needed to prevent the MNS's conduct from bringing the administration of justice into disrepute.

16. As the Court below noted at para 9, the MNS has not disclosed the documents or applied to lift the stay.

b. The 2020 Action

17. In the 2020 Action, the MNS impugns the validity of the section in Saskatchewan's 2010 *First Nation and Métis Consultation Policy Framework* ("2010 Policy") which states that the Province will not consult about asserted Aboriginal title or commercial rights. With respect to asserted but unproven rights, Saskatchewan's position is that a duty to consult is triggered only where those claims are credible and their proof is being actively pursued.

18. The Statement of Claim is found at Tab 6, Ex. A, p. 144, of the Appellant's Record. Various paragraphs of the Claim allege that the 2010 Policy breaches the duty to consult in relation to the MNS' asserted rights: paras 19, 20, 21(a), (b), (c); 22(a), (c), (f); 29(a) and 33.

19. The relief sought in the 2020 Action is found at para 36 and includes, *inter alia*, declarations that the 2010 Policy is invalid; that the Province's reliance on the 2010 Policy as a basis for not consulting in relation to the asserted rights breaches the honour of the Crown; and, at para 36(a)(iii), a general declaration that the Province's duty to consult includes "consulting on Métis claims to lands and resources."

20. The MNS' rights assertions are set out at para 6 of the Claim:

> 6. **<u>As a result of their unique history</u>**, Saskatchewan Métis assert Aboriginal rights including, *inter alia*, those:

a. to harvest animals, plants and natural resources for food, cultural, ceremonial, traditional, and religious use, for both personal and community purposes;

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 as commenced by MN-S and others on March 1, 1994**.

[Emphasis added]

21. The only fact pleaded in support of the asserted rights is the Métis' "unique history". At para 6(c), the MNS asserts rights to lands and resources as claimed in the 1994 Action, without acknowledging that it has been stayed.

22. At paras 26-30, the MNS impugns Saskatchewan's honour on the basis that it failed to consult the MNS in relation to permits granted to Denison Mines Corp. to conduct mineral exploration in Northwest Saskatchewan.

23. Saskatchewan's Statement of Defence is found in the Appellant's Record at Tab 6, Ex. B, p. 157. At para 8, Saskatchewan pleads that no credible claim to the asserted rights has been established that could give rise to a duty to consult. At paras 9-13, Saskatchewan pleads the history of the 1994 Action. Paragraph 13 states that the MNS's longstanding failure to comply with the disclosure order or to apply to lift the stay only undermined the credibility of their Aboriginal rights and title claims.

24. The Chambers judge found that the MNS had not taken any steps to advance the 2020 litigation: para 14.

25. However, in 2023, the MNS brought an application for summary determination of two questions of law in the 2020 Action: namely, whether a duty to consult is triggered by its rights assertions, and if so, whether the 2010 Policy is unconstitutional. The application was argued on October 23, 2023, and the Court's decision is pending.

26. Prior to the 2020 Action, the MNS had not brought any duty to consult proceedings against Saskatchewan, including duty to consult claims based on its asserted title or commercial harvesting rights.

c. The 2021 Action

27. The MNS initiated this matter in 2021. The Originating Application for Judicial Review is found in the Appellant's Record at Tab 2, p. 60.

28. The Application impugns the Minister of Environment's decision to grant a mineral exploration permit in Northwestern Saskatchewan to NexGen Energy Ltd. It sets out several heads of declaratory relief based on the Minister's alleged breach of the duty to consult. Paragraphs 2(e) and 3(f) specifically request declaratory relief in relation to the Minister's refusal to consult "in respect of potential impacts to asserted Aboriginal title and commercial harvesting rights."

29. The MNS's rights assertions are set out at para 16 and are identical to what is pleaded in the 2020 Action:

> 16. […] **As a result of their unique history**, Saskatchewan Métis assert Aboriginal rights including those:
>
> a. to harvest animals, plants and natural resources for food, cultural, ceremonial, traditional, and religious use, for both personal and community purposes;
>
> 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**.
>
> [Emphasis added]

30. Once again, the only fact pleaded in support of the asserted rights is the Métis' "unique history". The MNS again asserts rights to lands and resources as claimed in the 1994 Action, without acknowledging that it is stayed.

31. If the 2021 Action is allowed to proceed on the issue of whether Saskatchewan must consult in relation to the MNS's asserted rights, in defence Saskatchewan will argue that the MNS has failed to establish a credible claim.

32. It will also rely on the fact that the MNS abandoned proving those asserted rights in the 1994 Action and argue that its longstanding failure to comply with the disclosure order and to apply to lift the stay undermines the credibility of its rights assertions. This is also what Saskatchewan pleads in the 2020 Action. Again, with respect to asserted but unproven rights, Saskatchewan says that a duty to consult is triggered only where those claims are credible and their proof is being actively pursued.

d. Saskatchewan's Strike Application

33. In December of 2021, Saskatchewan brought a motion to strike those pleadings in the 2021 Action in which the MNS seeks declarations that Saskatchewan breached the duty to consult in relation to its asserted rights. This amounts to four paragraphs out of the entire Originating Application: paras 2(e), 3(f), 16(b) and (c).

34. Saskatchewan is prepared to proceed with the 2021 Action on the other grounds raised therein. Saskatchewan accepts that Métis people have Aboriginal rights to hunt, fish and trap for food in Northwestern Saskatchewan, and that a duty to consult was triggered in relation to those rights by the Minister's decision.

35. On its strike motion, Saskatchewan argued that it was an abuse of process for the MNS to raise the same issue in this action and in the 2020 Action, namely, whether the Crown has a duty to consult about their bare rights assertion, particularly when it abandoned the 1994 Action and breached a Court Order in the process.

36. Saskatchewan also argued that the issue of whether the asserted rights are credible, and may trigger a duty to consult, is too complex to be determined in a judicial review application. While Saskatchewan is not pursuing that issue before this Court, it takes the position that it would be preferable to address these issues in the trial of a regular action – namely, the 2020 Action.

37. The MNS filed evidence on the strike application but filed no evidence explaining why it has not complied with the disclosure order or applied to lift the stay in the 1994 Action.

38. The MNS filed affidavit evidence on the underlying judicial review application but filed no historical or other documents related to the credibility of its rights assertions.

e. The 2010 Policy

39. The 2010 Policy was before the courts below and forms part of the underlying Record of Proceedings for the present matter. For convenience, the Attorney General has appended the Policy to her Factum.

40. At pages 6 and 7, the Policy states that assertions of Aboriginal title or commercial harvesting rights are not subject to the Policy:

> **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.

41. At page 15 of the Policy, Saskatchewan acknowledges that it may have to consult in relation to credibly claimed rights where the claimant is actively pursuing their recognition in negotiations or litigation:

> **Asserted Rights**
>
> The Supreme Court recognized in *Haida Nation* that governments may be required to consult with First Nations and Métis communities when governments have knowledge, real or constructive, of asserted rights, even if governments do not recognize the rights being asserted. **In these cases, consultations may be required where the Government determines that there is a credible basis for the asserted right and the community is actively pursuing recognition of the right either through negotiations or litigation.** The degree of consultations required in these cases will depend on the strength of the claim supporting the asserted right as well as the extent of the potential adverse impact from the proposed government action.
>
> [Emphasis added]

42. These policy positions are at issue in the 2020 Action. If the present matter is allowed to proceed with respect to the MNS's asserted rights, they will also be at issue in this matter.

f. The Decisions Below

43. The Chambers judge granted Saskatchewan's strike motion. On the authority of the Saskatchewan Court of Appeal's decisions in *Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62, 284 DLR (4th) 94 [*Boehringer*] and *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 [*Onion Lake*], he held that it was an abuse of process for the MNS to raise the same issue in the present matter and the 2020 Action. The Court allowed the remainder of the MNS' Application to proceed.

44. The Court below overturned that decision. Citing its own jurisprudence and this Court's decision in *Toronto (City)*, it accepted that the abuse of process doctrine is flexible and is intended to prevent the administration of justice from being misused. It agreed that it may be abusive for a party to attempt to litigate the same issue in multiple proceedings, because doing so wastes "the resources of the parties, courts and witnesses alike, while risking inconsistent results and undermining the entire judicial process": para 46.

45. However, the Court did not agree that there is an abuse of process in this case. At paras 31, 40, 47 & 49, it relied on the principle from *Haida Nation*, reiterated in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 33, [2010] 2 SCR 650 [*Rio Tinto*], that the duty to consult derives from the need to protect Aboriginal interests while the process of proving asserted rights is ongoing. At paras 39, 40, 47-50, it distinguished the 1994 Action because it concerns proving rights, whereas in this matter the MNS seeks to protect the asserted rights pending proof.

46. The Court appears to have accepted that both this matter and the 2020 Action seek to protect the asserted rights pending proof. However, it distinguished the pleadings on the basis that they have different "purposes" or "aims", namely, that the 2020 Action concerns the validity of the 2010 Policy whereas this matter concerns the validity of a specific government permit. The Court stated at para 40:

> Saskatchewan's submission also ignores that the 2020 Action and the originating application **have different purposes**. While the 2020 Action calls into question the constitutionality of the 2010 Policy, it is not directed towards an individual government action as is the originating application. Therefore, while there is overlap, **the two proceedings have different aims**.
>
> [Emphasis added].

47. Based on this distinction, the Court went on to hold that allowing both matters to proceed would not lead to inconsistent results, at para 50:

> Likewise, the MNS could be unsuccessful in its attempt in the 2020 Action to have Saskatchewan's policy declared unconstitutional *in toto* with regards to consultation with the Métis, but nevertheless succeed in the current application if the Crown's actions are found to have breached the duty to consult in this specific instance.

48. The Court concluded that, even though the MNS's three actions have overlapping issues, allowing the present matter to proceed on the question of whether a duty is triggered by the MNS' asserted rights is not an abuse of process.

PART II: STATEMENT OF QUESTIONS AT ISSUE

49. The following questions are at issue:

    a. Did the Court below err in applying the abuse of process doctrine?

    b. Did the Court below err in applying *Haida Nation*?

PART III: STATEMENT OF ARGUMENT

A. The Court Below Erred in Applying the Abuse of Process Doctrine

50. In *Lax Kw'alaams Indian Band*, 2011 SCC 56 at paras 11 and 45, [2011] 3 SCR 535, this Court made it clear that the ordinary rules governing civil litigation apply to claims raising Aboriginal and Treaty rights issues. It is not contrary to the honour of the Crown to expect Indigenous litigants to follow the Rules of Court, and to not file pleadings that are an abuse of process: *Canada v Stoney Band*, 2005 FCA 15 at para 25, 249 DLR (4th) 274.

51. In *Toronto (City), supra* at para 37, Arbour J. for the majority adopted Gouge J.A.'s statements in *Canam Enterprises Inc. v Coles* (2000), 51 OR (3d) 481 (CA) at para 55, that the abuse of process doctrine "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute,"

and that it is a "flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel."

52. *Toronto (City)* was followed on this point in *Behn, supra* at paras 39-40, where Lebel J. for the Court held that the abuse of process doctrine "is characterized by its flexibility" and "is unencumbered by specific requirements." Courts from across Canada have followed these articulations of the doctrine: i.e., *Sood v Hans*, 2023 BCCA 138 at para 51; *402 Mulock Investments Inc. v Wheelhouse Coatings Inc.*, 2022 ONCA 718 at para 19; *Canada (National Revenue) v Sharp*, 2022 FCA 138 at para 49; *McLelland v McLelland*, 2021 ABCA 102 at para 17; *Walker v Mitchell*, 2020 SKCA 127 at para 24; and *National Bank Financial Ltd. v Barthe Estate*, 2015 NSCA 47 at paras 214-215 & 235.

53. The doctrine prevents plaintiffs from commencing multiple suits against the same defendant raising the same issue: *Boehringer, supra* at para 34; *Onion Lake, supra* at para 54; *Lacharity v University of Victoria Students' Society*, 2012 BCSC 1819 at paras 24-25; *Ewert v Canada (Attorney General)*, 2012 BCSC 621 at para 20; *British Columbia Native Women's Society v Canada* (Trial Div.), 2001 FCT 646 at para 17; and *Edmonton Northlands v Edmonton Oilers Hockey Club* (1993) 147 AR 113 (QB), 1993 CanLII 7234 at paras 26-27 [*Edmonton Northlands*].

54. In *Edmonton Northlands* at para 26, Moore C.J.Q.B. held that it is trite law that commencing a second action while one is currently pending is an abuse of process. While this Court's decision in *Toronto (City)* dealt with abuse of process by re-litigation, not abuse of process by multiple proceedings, the underlying principles and policy rationale for prohibiting both practices are the same: namely, to prevent wasting resources, risking inconsistent results, and bringing the administration of justice into disrepute.

55. There is no requirement that the respective pleadings be identical for the doctrine to apply. In *Boehringer, supra* at para 34, the Saskatchewan Court of Appeal articulated the doctrine in this context in far more general terms:

> It is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant **in relation to the same dispute or matter** is an abuse of process. As Sir George Jessel observed over one hundred years ago, "It is *prima facie* vexatious to bring two actions where one will do". See: *McHenry v. Lewis*, [1883] 22 Ch. D. 397.
>
> [Emphasis added]

56. Similarly, in *Onion Lake, supra* at para 54, the Court of Appeal stated that "it is an abuse of process to commence two lawsuits between the same parties that **effectively** deal with the **same subject matter**" (emphasis added).

57. In *Dixon v Canada (Attorney General)*, 2015 ABQB 565 at para 24 [*Dixon*], the plaintiff brought an action claiming Aboriginal title over a large tract of land, followed by a second action claiming title over only some of those lands. The Alberta Court of Queen's Bench struck the second action because it was an abuse of process. At paras 25 and 85, the Court held that it not necessary for pleadings to be identical to find an abuse of process. Rather, "the overall integrity of the administration of justice, including the principles of fairness, judicial economy, consistency, and finality are at the heart of the doctrine":

> [25] The Plaintiffs argue that to strike the claim in its entirety, the Defendants must show that the Dixon action is the same as or is a duplication of the previous actions or the Wesley action. **The case law above shows that the test is not so strict**. **Rather, the overall integrity of the administration of justice, including the principles of fairness, judicial economy, consistency, and finality are at the heart of the doctrine of abuse of process**.
>
> […]
>
> [85] A party is not entitled to bring a second action while the first is still pending. There is **no need for the pleadings to be identical to find an abuse of process**. Duplicative actions are a waste of court resources. I conclude from my review of the pleadings and replies to demands for particulars that the **Wesley action is a comprehensive claim that captures the more specific Dixon claim**. I take guidance from the foundational rule 1.2(1) that states "the purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way." **Fairness to the Defendants and to this Court**

> **require that the Plaintiffs bring one complete claim; the Wesley action is that claim**.
>
> [Emphasis added]

58. Contrary to this jurisprudence, the Court below refused to enforce the doctrine even though the MNS has raised the same legal issue here and in the 2020 Action. The common underlying issue in the two matters is whether a duty to consult is triggered by MNS's assertions of Aboriginal title and commercial harvesting rights in Northwest Saskatchewan. The Court applied the abuse of process doctrine restrictively, not flexibly, by requiring that the two actions have identical "purposes" or "aims" for it to apply.

59. In *Janssen Inc. v Apotex Inc.*, 2023 FCA 253, the Federal Court of Appeal held that the Federal Court erred by taking an overly rigid approach to the abuse of process doctrine. Janssen Inc. argued that it was an abuse of process for Apotex Inc. to raise an issue that it could have raised in a prior proceeding and thereby litigate "by instalments": para 5. The Federal Court rejected the argument, holding that it would have been an abuse of process only if Apotex Inc. had raised that issue in the first proceeding and then raised *a different ground* for that same issue in the second: para 8.

60. The Federal Court of Appeal held that this was "an overly rigid approach, which failed to recognize the flexibility of the doctrine of abuse of process": para 57. The Federal Court of Appeal accepted that Apotex Inc. should have raised the issue in the prior proceeding and that an abuse of process occurred on these facts: paras 60.

61. The same conclusion imposes itself here, where the Court below likewise took an overly rigid approach to the abuse of process doctrine by requiring that the present matter and the 2020 Action have identical purposes or aims for the doctrine to apply.

62. In comparing this matter and the 2020 Action, the Court below was also required to read the respective pleadings "holistically and practically without fastening onto matters of form," looking "beyond the words used" with a view to understanding their "real essence"

and "essential character": *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at para 14; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 at paras 49-50, [2014] 2 FCR 557; *Canada v Roitman*, 2006 FCA 266 at para 16, 353 NR 75.

63. Yet the Court distinguished the matters based on a superficial reading of the pleadings. There is no dispute that the MNS challenges a specific permit here, whereas it impugns the 2010 Policy in the 2020 Action.

64. However, in order to adjudicate those claims, the Court of King's Bench will have to answer the same underlying issue of whether the duty is triggered by the MNS's asserted rights. To borrow the Court of Appeal's words from *Onion Lake* at para 54, the two proceedings "**effectively** deal with the same subject matter" (emphasis added). Allowing both matters to proceed on the same issue would waste resources, risk inconsistent results, and bring the administration of justice into disrepute.

65. While the MNS does not expressly refer to the 2010 Policy in its pleadings in this matter, the question of whether Saskatchewan's policy of not consulting in relation to asserted title and commercial harvesting rights is at issue. The MNS impugns the Minister's refusal to consult in relation to the asserted rights, which is precisely what the Policy states the Province will not do. The MNS challenges the same policy position in the 2020 Action.

66. The arguments brought forth by the parties in both matters would be the same. The MNS will argue that a duty is triggered in relation to its bare rights assertions, and without the need for it to establish their credibility or to actively pursue their proof in litigation - namely, its 1994 Action. Paragraph 16 of its Originating Application and para 6 the 2020 Claim (both quoted above) show that the MNS relies on identical bare declarations of rights in both matters. In both matters the MNS refers to and relies on the 1994 Claim.

67. Saskatchewan would argue the same position in both matters. Indeed, that position is stated expressly at p. 15 of the 2010 Policy, quoted above, that "consultations may be required where the Government determines that there is a credible basis for the asserted right and

the community is actively pursuing recognition of the right either through negotiations or litigation." That position is also found in Saskatchewan's Defence in the 2020 Action, where it pleads at paras 8-13 that no credible claim to title or commercial harvesting rights has been established and the MNS's longstanding failure to pursue the 1994 Action undermines the credibility of its rights assertions.

68. Saskatchewan should not have to debate this same issue in two proceedings. In *Boehringer*, *supra*, at para 34, Richards C.J. adopted the principle from *McHenry v Lewis*, [1883] 22 Ch. D. 397 at p. 400, that it "is *prima facie* vexatious to bring two actions where one will do." See also: *Poulett v Hill*, 1893 1 Ch. 277 at pgs. 281-282.

69. Richards C.J. held that it "is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant in relation to the same dispute or matter is an abuse of process": para 34. Reading the pleadings "holistically and practically" and appreciating their "real essence" and "essential character" reveals that the same dispute arises in both this proceeding and the 2020 Action.

70. At para 40, the Court below distinguished the present matter from the 2020 Action on the basis that while "the 2020 Action calls into question the constitutionality of the 2010 Policy, it is not directed toward an individual government action as is the originating application."

71. This is incorrect. The 2020 Action *is* directed at specific government action. As in the present matter, in the 2020 Action the MNS impugns Saskatchewan's honour on the basis that it failed to consult about the asserted rights in relation to specific mineral exploration permits – in that case permits granted to Denison Mines Corp.: Appellant's Record, pgs. 151-152 at paras 26-30. Thus the 2020 Action is not *only* about the 2010 Policy. While the MNS does not seek a specific remedy in relation to the Denison permits, the question of whether Saskatchewan breached the duty to consult in relation to specific government action does arise in both matters.

72. At para 50, the Court below found that the issues in all three actions are different, and the remedies being claimed are not the same. While this is true of the 1994 Action and the present matter, it is not true of the 2020 Action and the present matter. Again, the underlying issue raised in these two actions concerning the asserted rights is the same.

73. The remedies are not identical because in the 2020 Action, the MNS is seeking a general declaration that Saskatchewan is obligated to consult about its asserted rights, while in the 2021 Action it is seeking a specific order that Saskatchewan breached the duty in connection with a permit issued to NexGen Energy. The remedies sought in the 2020 Action are forward-looking. The MNS seeks a declaration that would apply to future permits issued by Saskatchewan, like the permit issued to NexGen Energy.

74. And to be clear, contrary to the finding of the Court below at para 50, the 2020 Action does not only seek to invalidate the 2010 Policy. At para 36(a)(iii), the MNS also seeks a general declaration that the Province's duty to consult includes "consulting on Métis claims to lands and resources."

75. Thus if the MNS had diligently pursued the 2020 Action and obtained that remedy, there would have been no need for the 2021 Action. The issues would have been resolved. So, while it is true that in one case the MNS is seeking a general remedy and in the other case the MNS is seeking a specific remedy, the reality is that the specific remedy is subsumed in the general remedy. They are not different remedies. As was the case in *Dixon*, *supra* at para 85, the MNS should be required to pursue the comprehensive claim in the 2020 Action rather than pursue the same underlying issue in this matter.

76. Moreover, if the MNS felt the need to protect its asserted rights from a specific permit or licence while the 2020 Action was ongoing, it could have sought injunctive relief as part of that Action. It was not necessary to do so through another action.

77. Also at para 50, the Court held that allowing both the present matter and the 2020 Action to proceed would not risk inconsistent outcomes. This is because, in its view, the MNS

could be unsuccessful in its attempt in the 2020 Action to have the Policy declared unconstitutional but could still succeed in the 2021 Action.

78. This, too, was an error. Again, the Court's reasoning fails to recognize that the two matters raise the same underlying legal issue. If both matters are allowed to proceed, then there is a risk that the justices hearing the matters will decide that common underlying issue differently. There would indeed be a risk of inconsistent outcomes. This error tainted the Court's conclusion on abuse of process. The Court has permitted precisely what the abuse of process doctrine is intended to prevent.

79. However, allowing *only* the 2020 Action to proceed on the common issue – particularly since it is framed in that matter in general terms – would determine the question for both matters. Neither Saskatchewan nor the MNS would be entitled to re-litigate the issue. *Res judicata* would apply. If the Province prevails, then this would answer the question for this matter. If the MNS prevails, then the Province would have to concede in this matter that it failed to uphold its honour by not consulting in relation to the asserted rights.

80. In summary, the Court below has unduly narrowed the abuse of process doctrine. The Attorney General asks this Court to overturn that decision and reaffirm that the doctrine is to be applied flexibly and without specific requirements. If the doctrine is applied rigidly, based on superficial readings of the pleadings, and without proper consideration of the full litigation context, plaintiffs would be able to defeat the doctrine's purpose by simply repackaging the same underlying issues in multiple proceedings.

B. The Court Below Erred in Applying *Haida Nation*

81. The Court below based its decision on *Haida Nation* and other decisions of this Court in which it was held that a claimant may seek judicial review to protect asserted rights while pursuing the proof of those rights in other proceedings or in negotiations. At paras 31 and

47, the Court below cited these authorities and emphasized the role of the duty to consult in protecting Aboriginal interests while land and resource claims *are ongoing*:

> [31] Reflecting the points I have just mentioned, the Crown's knowledge "of a credible but unproven claim suffices to trigger a duty to consult and accommodate" (*Haida Nation* at para 37). This was the key point decided by *Haida Nation*. It is one that has been reaffirmed by the Supreme Court on many occasions since. By way of example only, McLachlin C.J.C. reiterated it in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 33, [2010] 11 WWR 577 [*Rio Tinto*], when she stated that the duty to consult "derives from the need to protect Aboriginal interests ***while land and resource claims are ongoing***" (emphasis added). See also: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 27, [2004] 3 SCR 550 [*Taku River Tlingit First Nation*]; and *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)*, 2017 SCC 54 at para 78, [2017] 2 SCR 386.
>
> […]
>
> [47] … Indeed, as I have already explained, since the duty to consult "derives from the need to protect Aboriginal interests ***while land and resource claims are ongoing***" (*Rio Tinto* at para 33, emphasis added), frequently, an application for judicial review of Crown action **will occur alongside simultaneously proceeding litigation**, and the application does not become an abuse of process by the fact alone.
>
> [Italics in original; bolding and underlining added]

82. The Court below correctly identified the guiding principles from the authorities. However, it erred in distinguishing the present matter from the 1994 and 2020 Actions on this basis. In the last sentence of para 49 the Court concluded that:

> [49] … The alleged existence of that [1994] underlying claim is necessary factual background to the [present] application but not duplicative of it, while the core issue in the latter relates to the preservation of land and resources **while the process of determining whether the rights exist is ongoing** […].
>
> [Emphasis added]

83. Yet there is no ongoing process to determine whether the MNS's asserted rights exist. The 1994 Action was stayed in 2005. When the Court below rendered its decision, eighteen years had passed since the stay without the MNS complying with the underlying disclosure order or applying to lift the stay.

84. The Court below ignored the fact that the 1994 Action is not ongoing. As a result, it failed to grapple with Saskatchewan's argument in relation to the 1994 Action: namely, that it is an abuse of process for the MNS to seek recognition of a duty to consult in relation to its asserted rights in multiple proceedings when it has not pursued proving its asserted rights in the 1994 Action. The MNS should be expected to comply with the disclosure order and successfully apply to lift the stay before suing Saskatchewan in multiple proceedings raising duty to consult issues.

85. The MNS's breach is particularly egregious because it has refused to disclose the very documents that Saskatchewan would use to assess the credibility of its asserted rights. Saskatchewan helped pay for the research. Yet the MNS persists in claiming that Saskatchewan has a duty to consult with respect to those rights assertions notwithstanding the factual vacuum they have created.

86. In his 2005 Judgment for staying the 1994 Action, Koch J. had already concluded that the MNS's breach of the disclosure order would bring the administration of justice into disrepute: *Morin*, *supra* at para 9. By bringing the 2020 and 2021 Actions and seeking recognition of a duty to consult with respect to the 1994 Claim, without having first remedied that transgression, the MNS is asking that Court to turn a blind eye to the transgression. For the Court to do so would only compound the disrepute.

87. The Court below failed to properly consider the two existing matters in the context of the 1994 Action. In *Dixon*, *supra* at para 23, the Court held that "a litigant's entire court history is relevant to the abuse of process analysis." In this matter and the 2020 action, the MNS is seeking relief based on asserted rights that it abandoned attempting to prove, and in relation to which it is in continuing breach of a Court order. Given that litigation context,

the MNS should not now be allowed to seek relief in relation to the asserted rights in two additional proceedings against Saskatchewan.

88. In *Behn*, *supra*, this Court affirmed that the abuse of process doctrine is flexible and unencumbered by specific requirements: para 40. The case concerned a civil action brought by a forestry company against members of an Indigenous community for blockading the company's access to logging sites in relation to which it had obtained licences to log. The Court held that it was an abuse of process for the Indigenous party to plead in defence that the licences were issued in breach of the duty to consult, after failing to challenge the licences' legality when issued: para 42.

89. The same conclusion should be drawn here. The MNS has brought two duty to consult proceedings against Saskatchewan raising the same issue in relation to rights it abandoned proving in a third proceeding for which it is in continuing breach of a Court order. Allowing the MNS to proceed in this manner would bring the administration of justice into disrepute.

90. In *Haida Nation* at para 27 the Court articulated the underlying purpose of requiring pre-proof consultations, which was to protect asserted rights while the process of proving those rights in litigation or negotiations was ongoing:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests **where claims affecting those interests are being seriously pursued** in the process of treaty negotiation and proof… 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 or some or all of the benefit of the resource. That is not honourable.
>
> [Emphasis added]

91. In *Rio Tinto* at para 33 the Court held that the duty to consult "described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims **are ongoing**" (emphasis added).

92. In other words, pre-proof consultations are required because, without them, the potential success of an ongoing claim would be pyrrhic if in the meantime the Crown could dispose of the lands at issue without taking the claimant's interests into consideration. That would not be honourable.

93. Here, however, the MNS has not had an active claim since 2005, which it cannot pursue until it complies with the disclosure order and successfully applies to lift the stay.

94. The Chambers judge held at para 60 that the 1994 Action "may be presumed abandoned." While it was always *possible* that the MNS might comply with the Court's disclosure order and apply to re-activate the 1994 Action, after years of non-action it was reasonable for the Chambers judge to assume that the MNS had no intention of doing so.

95. Legal measures to preserve a party's interests pending the outcome of litigation are well-known to the law: i.e., interim injunctions, liens, preservation orders. However, such protections may imply a duty on the moving party to pursue the underlying litigation, and failure to do so may prejudice that party: i.e., *Barton v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 96 at para 31, 336 DLR (4th) 248 ("a plaintiff who obtains an interim injunction commits himself to establishing its necessity by proving his claim"); *Aqua Mechanical v Grascan Construction*, 2017 ONSC 1028 at para 22; *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22, s. 9(2)(a).

96. This case presents this Court with an opportunity to clarify that, with respect to the duty to consult, claimants must pursue the proof of their underlying rights assertions. Where a claimant has brought duty to consult proceedings after abandoning its underlying rights claim – or worse, where that claim has been stayed due to the claimant breaching a court order – those subsequent proceedings should be struck for abuse of process.

97. Without an obligation to pursue proof of claims, governments may be obligated to consult in perpetuity – and defend themselves in serial litigation - based on bare assertions of rights.

98. This would turn the duty to consult into something that was not intended in *Haida Nation*: it is no longer a shield that protects asserted rights while the process of proof is underway; rather, it becomes a sword that can be used to trigger government consultation obligations with mere rights assertions. Without an obligation to pursue proof of claims, the goal of reconciliation will not be advanced by the duty to consult.

99. The duty to consult is a "two-way street" and imposes reciprocal obligations on claimants: *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 80, [2017] 2 SCR 386; *Haida Nation* at para 42; *R v Douglas*, 2007 BCCA 265 at para 45, leave to SCC refused, 2007 CanLII 50084; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para 251, [2009] 1 CNLR 30; *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458 at para 104.

100. Claimants that impugn the Crown's honour based on rights assertions should have a reciprocal duty to actively pursue the proof of those asserted rights. The MNS should not expect constitutional obligations to flow from its asserted rights after abandoning any attempt to validate them, particularly when it breached a Court order in the process.

PART IV: SUBMISSIONS ON COSTS

101. Saskatchewan does not seek costs and asks that costs not be ordered against it.

PART V: ORDER SOUGHT

102. The Attorney General requests that the Court grant its appeal and reinstate the decision and order of the Chambers judge.

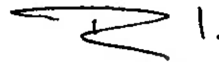
PART VI: SUBMISSIONS OF CONFIDENTIALITY INFORMATION

103. The Attorney General submits that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons, if any, in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 14th day of March, 2024.

P. Mitch McAdam, K.C.
Counsel for the Attorney General for Saskatchewan



R. James Fyfe, K.C.
Counsel for the Attorney General for Saskatchewan

PART VII: TABLE OF AUTHORITIES

CASE LAW:	Paragraphs References
402 Mulock Investments Inc. v Wheelhouse Coatings Inc., 2022 ONCA 718	52
Aqua Mechanical v Grascan Construction, 2017 ONSC 1028	95
Barton v Potash Corporation of Saskatchewan Inc, 2011 SKCA 96, 336 DLR (4th) 248	95
Behn v Moulton Contracting Ltd., 2013 SCC 26, [2013] 2 SCR 227	7, 88
Boehringer Ingelheim (Canada) Ltd. v Englund, 2007 SKCA 62, 284 DLR (4th) 94	43, 53, 55, 68, 69
British Columbia Native Women's Society v Canada (TD), 2001 FCT 646	53
Canada (National Revenue) v Sharp, 2022 FCA 138	52
Canada v Roitman, 2006 FCA 266, 353 NR 75	62
Canada v Stoney Band, 2005 FCA 15, 249 DLR (4th) 274	50
Canadian National Railway Company v Canada (Transportation Agency), 2023 FCA 245	62
Canam Enterprises Inc. v Coles (2000), 51 OR (3d) 481 (CA)	51
Dixon v Canada (Attorney General), 2015 ABQB 565	57, 75, 87
Edmonton Northlands v Edmonton Oilers Hockey Club (1993), 147 AR 113 (QB), 1993 CanLII 7234 (ABQB)	53, 54
Ewert v Canada (Attorney General), 2012 BCSC 621	53
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511	1, 45, 81, 90, 98, 99
Janssen Inc. v Apotex Inc., 2023 FCA 253	59
JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue), 2013 FCA 250	62

Katlodeeche First Nation v Canada (Attorney General), 2013 FC 458	99
Ke-Kin-Is-Uqs v British Columbia (Minister of Forests), 2008 BCSC 1505, [2009] 1 CNLR 30	99
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, [2017] 2 SCR 386	99
Lacharity v University of Victoria Students' Society, 2012 BCSC 1819	53
Lax Kw'alaams Indian Band, 2011 SCC 56, [2011] 3 SCR 535	50
McHenry v Lewis, [1883] 22 Ch. D. 397	68
McLelland v McLelland, 2021 ABCA 102	52
Morin et al v Canada and Saskatchewan (23 December 2005) Saskatoon, QBG No. 619/1994 (Sask QB)	15, 86
National Bank Financial Ltd. v Barthe Estate, 2015 NSCA 47	52
Onion Lake Cree Nation v Stick, 2018 SKCA 20	43, 53, 56, 64
Poulett v Hill, 1893 1 Ch. 277	68
R v Douglas, 2007 BCCA 265	99
Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650	45, 91
Sood v Hans, 2023 BCCA 138	52
Toronto (City) v C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 SCR 77	7, 44, 51, 54
Walker v Mitchell, 2020 SKCA 127	52

STATUTES:	Paragraphs References (to Factum)
The Enforcement of Money Judgments Act, SS 2010, c E-9.22, s. 9(2)(a)	95

Government of
Saskatchewan

First Nation and Métis Consultation Policy Framework

June 2010

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1. Introduction

The *Government of Saskatchewan First Nation and Métis Consultation Policy Framework* (Consultation Policy Framework) presents the Government of Saskatchewan's policy on consultation with First Nations and Métis communities for use by Government ministries, agencies, Crown corporations, First Nations, Métis and proponents. It includes the Duty to Consult Policy, a section on the policy's application to decisions affecting lands and resources, a policy context section and a section on interest-based engagement. The *Consultation Policy Framework* will also provide direction to Government ministries, agencies and Crown corporations to establish operational procedures to consistently implement the consultation policy across Government.

In accordance with this Policy Framework, the Government of Saskatchewan is responsible for determining whether a duty to consult is triggered and if so, the level of consultation required. In the case of asserted rights, the Government is also responsible for determining whether there is a credible basis for the claim. Government decision-makers requiring assistance interpreting this policy, undertaking pre-consultation assessments and developing consultation plans are encouraged to contact the Aboriginal Consultation Branch, Ministry of First Nations and Métis Relations by e-mailing Aboriginal.Consultation@gov.sk.ca or phoning toll-free, 1-877-879-7099.

Although the focus of this policy is on consultation as it applies to Treaty and Aboriginal rights associated with lands and renewable resources, it does not exclude application to other Treaty and Aboriginal rights.

This policy takes effect June 2010, replacing the *Government of Saskatchewan Interim Guide for Consultation with First Nations and Métis People*. It will be reviewed and updated when required to ensure consistency with case law, legislation and/or policy.

2. Duty to Consult Policy

Policy Statement

The Government of Saskatchewan will consult with and accommodate, as appropriate, First Nations and rights-bearing Métis communities in advance of decisions or actions which may adversely impact Treaty and Aboriginal rights.

Policy Goal

The goal of this policy is to facilitate mutually beneficial relationships among the Government of Saskatchewan, First Nations, Métis and industry that contribute to a growing provincial economy.

Objectives of the Duty to Consult

1. To respect and protect Treaty and Aboriginal rights by ensuring, through the consultation process and subsequent decisions, that negative impacts on these rights and uses are avoided, minimized or mitigated and rights are accommodated, as appropriate;

2. To advance the process of reconciliation between Aboriginal and non-Aboriginal peoples and their respective claims, interests and ambitions; and

3. To promote certainty, predictability and a stable, secure investment climate for the residents of Saskatchewan, including First Nation and Métis communities.

Guiding Principles

Integrity and Good Faith

The duty to consult is grounded in the honour of the Crown. The Government will approach consultations with an open mind, conduct itself with integrity during consultation processes and deal in good faith with First Nations and Métis people. The Government will listen to and respond to First Nations and Métis concerns respecting potential impacts on Treaty or Aboriginal rights and consider them when making decisions.

Respect

Consultations with First Nations and Métis communities will be undertaken in a spirit of mutual respect and trust. For example, cultural practices, such as opening prayers, will be respected and traditional knowledge will be taken into consideration. As the holders of Treaty and/or Aboriginal rights, the Government does not consider First Nations and Métis to be "stakeholders."

Government's Duty

On matters subject to provincial jurisdiction, the duty to consult lies with the Government of Saskatchewan. The Government will not delegate the duty to project proponents or other third parties, although proponents have an important role in the procedural aspects of consultation processes. Government retains final decision-making authority; First Nations and Métis do not have a veto over decisions.

Reciprocal Responsibility

There is a reciprocal responsibility on First Nation and Métis communities to participate in the consultation process in good faith, to make their concerns respecting potential impacts on Treaty and Aboriginal rights known and to respond to the Government's attempts to consult.

Transparency and Accountability

Consultation processes will be transparent, accountable, timely and results-based.

Communication

Successful consultation depends on clear, open and honest communication between the Government of Saskatchewan and First Nations and Métis communities with potentially impacted rights. For example, technical information should be in plain language and translation provided, if necessary.

3. The Duty to Consult as Applied to Lands and Resources

A. Application of the Duty to Consult

Policy Application

This policy applies to Government decisions and actions that have the potential to adversely impact the exercise of:

1. Treaty and Aboriginal rights, such as the right to hunt, fish and trap for food on unoccupied Crown lands and other lands to which First Nations and Métis have a right of access for these purposes; and
2. Traditional uses of lands and resources, such as the gathering of plants for food and medicinal purposes and the carrying out of ceremonial and spiritual observances and practices on unoccupied Crown lands and other lands to which First Nations and Métis have a right of access for these purposes.

Decisions Subject to the Duty to Consult Policy

The duty to consult may be triggered by Government decisions and actions that have the potential to adversely impact the exercise of Treaty and Aboriginal rights and pursuit of traditional uses. The decisions and actions that will be assessed by Government for potential consultation obligations include, but are not limited to, the following:

Legislation, Regulation, Policy and Strategic Plans

Creating a new or amended piece of legislation, regulation, policy or strategic plan that may have the effect of limiting or altering the use of Crown lands and renewable resources.

Fish and Wildlife Management

A decision that may limit or alter the quality and quantity of fish and wildlife or the right of access to these resources.

Resource Extraction

A decision related to the harvesting and processing of timber or the permitting and licensing of Crown surface lands for extraction and production of minerals.

Land Reservations

Any action that has the effect of restricting the use of unoccupied Crown lands and other lands to which there is a right of access.

Land Use Planning

Land use planning activities that provide a long-term framework for Government decisions.

Lease, Grant or Sale of Unoccupied Crown Land

Decisions related to the long-term lease, granting or sale of unoccupied Crown land.

Changes to Public Access

A decision that will have the effect of changing public access to Crown lands and renewable resources.

Environmental Approvals

A decision where an activity has the potential to negatively impact the environment.

Matters Not Subject to the Duty to Consult Policy

Matters that do not trigger the duty to consult include, but are not limited to, the following:

Past Actions

The Government does not consider the duty to consult to be retroactive and therefore will not consult on decisions it made in the past.

Private Land and Leased Crown Agricultural Land

Private land owners and lessees of Crown agricultural lands have the right to control access to their private or leased lands. Treaty and Aboriginal rights and traditional uses can only be exercised on these lands with the permission of the land owner or lessee. Accordingly, decisions related to projects occurring on private lands or leased Crown agricultural lands are not subject to consultation under this policy unless the project has the potential to adversely impact Treaty and Aboriginal rights and traditional uses on unoccupied Crown lands, occupied Crown lands where the Crown permits access or Indian reserve lands in the general vicinity.

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.

Mineral Dispositions

The issuance of mineral dispositions under *The Crown Minerals Act* is not subject to this policy. These dispositions do not provide the disposition holder with a right of access to lands for purposes of mineral exploration and development. This policy will, however, apply where the Government is contemplating surface land use decisions related to mineral exploration and development that may have an impact on Treaty and Aboriginal rights and traditional uses.

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.

Emergency Situations

In emergency situations, such as flooding and forest fires, or where public health and safety and/or infrastructure are at immediate risk and response time is of the essence, consultation on potential impacts on Treaty and Aboriginal rights and traditional uses may not be feasible. The first priority is to address public safety. First Nations and/or Métis communities will be consulted on impacts to rights if time permits.

Roles and Responsibilities

The Provincial Government

The Government of Saskatchewan has administration and control over land and natural resources that were transferred from Canada to Saskatchewan under the *Natural Resources Transfer Agreement, 1930*, and will exercise its authority in the interests of all residents of Saskatchewan.

The Government is responsible and ultimately accountable for managing and implementing the duty to consult. The Government's consultation obligations will not be delegated to project proponents. The Government however, may assign procedural aspects of the consultation process to proponents, such as hosting information-sharing meetings. The Government may also provide advice to proponents and First Nations and Métis leadership on this policy and its implementation.

The Saskatchewan ministries and/or agencies responsible for renewable resource management and for authorizing activity on the surface of the land generally have responsibility for implementing the duty to consult. Crown corporations are usually proponents who secure authorizations from provincial ministries and, as such, the Government may assign procedural aspects of the consultation process to them. In instances where Crown corporations have a duty to consult, they will abide by this policy.

The Federal Government

The federal government will have a duty to consult and accommodate, as appropriate, as a result of federal decisions and actions that have the potential to adversely impact Treaty and Aboriginal rights. In order to ensure consultations in Saskatchewan are effective and efficient where jurisdictions overlap or where there is a joint responsibility, provincial ministries will endeavor to work with their federal counterparts to develop and implement joint processes.

First Nations and Métis Rights-Bearing Communities

First Nations and Métis are responsible for participating in the consultation process in good faith and in a timely manner, making their concerns known about adverse impacts on Treaty and Aboriginal rights and traditional uses and responding to the Government's attempts to consult.

Project Proponents

Proponents, by virtue of their knowledge of and participation in project activities, have an important and direct role in the consultation process to ensure both success and certainty. Proponents are expected to collaborate with Government in the provision of project information to potentially impacted First Nations and Métis communities. The information must be clear, accurate and complete, and in plain language where possible. Proponents may also be expected to participate in Government meetings with potentially impacted First Nations and Métis communities to discuss potential impacts of the proposed activity. Where an adverse impact on Treaty or Aboriginal rights and/or traditional uses is identified, proponents will be expected to work with Government and the parties being consulted to develop and implement measures to address these impacts.

Proponents are responsible for the costs associated with their engagement in consultation processes and procedural aspects that may be assigned to them by Government, as well as any necessary adjustments or actions to project activities required to avoid, minimize or mitigate adverse impacts on Treaty and Aboriginal rights and traditional uses.

Successful consultation depends, in part, on early engagement of proponents with First Nations and Métis communities. Proponents are encouraged to engage and build relationships with the affected First Nations and Métis. Establishing relationships with First Nations and Métis communities in advance of pursuing development of specific projects has proven to be an effective management practice.

Municipalities

Municipalities are established by provincial legislation and exercise powers delegated by the Provincial Government. Municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights and/or traditional uses on unoccupied Crown land or other lands to which First Nations and Métis have a right of access. In cases where the municipality is the proponent of a development, the Government can assign procedural aspects of the consultation to the municipality, as it may with any other proponent.

Funding for Consultation

The Government recognizes that First Nations and Métis may require assistance to engage in meaningful consultations. The First Nations and Métis Consultation Participation Fund, administered by the Ministry of First Nations and Métis Relations, allows eligible First Nations and Métis entities to participate in consultations where the Provincial Government has determined that it has a duty to consult. More information can be found at: http://www.fnmr.gov.sk.ca/Consultation-Fund/.

Existing Processes for Consultation

Consultations undertaken in accordance with legislative requirements or regulatory processes, such as environmental assessment or land use planning, may be relied upon by the Crown to satisfy, in whole or in part, the duty to consult. In many cases, the duty to consult is carried out on a continuum from one decision-making stage to another, within ministries and across ministries.

B. Duty to Consult Guidelines

Purpose

The purpose of the Duty to Consult Guidelines is to provide consistent direction to all parties who are likely to use the Duty to Consult Policy, with the objective of having successful consultations. The Guidelines will also provide those ministries, agencies and Crown corporations that have consultation obligations with sufficient guidance to develop operational implementation procedures specific to their unique mandate and activities.

Consultation Process

Step 1: Pre-Consultation Assessment

Determining if consultation is required

The threshold for triggering the duty to consult is low. The courts have ruled that the nature, scope and intensity of the consultation required will vary along a spectrum according to the potential impact on rights arising from a Government activity or decision.

When determining if consultation is required, and the subsequent level of consultation activity that may be appropriate, Government will consider:

1. If the decision or action being contemplated has the potential to adversely impact a Treaty and/or Aboriginal right and/or traditional use;
2. The duration or length of time the potential adverse effect may persist; and
3. The magnitude or extent of the potential adverse impact.

The Consultation Matrix set out in Figure 1 will guide Government assessment on the level of consultation and time frames. If it is not clear whether an activity triggers a consultation requirement, Government ministries and agencies are advised to undertake a Level 2 Consultation as described in the Consultation Matrix.

Figure 1: Consultation Matrix

Potential Impact of Decisions or Actions on Treaty and Aboriginal Rights and Traditional Uses	Level of Consultation	Notification and Follow up	Timeline for response from First Nations/ Métis	Anticipated Timeline for Government Decision from Day of Notification
No impact.	**LEVEL 1**	No notification is required beyond what is typically provided to the public or is required by legislation.	N/A	N/A
Short-term disturbance to land and/or change in resource availability with potentially minor impact.	**LEVEL 2**	Written notice is provided.	Response requested within 21 days	Decision anticipated within 30 days
Short-term disturbance to land and/or a change in resource availability with a potentially significant impact. OR Long-term disturbance to land and/or change in resource availability and/or permanent uptake of land with a potentially minor impact.	**LEVEL 3**	Written notice is provided with offer to meet with community to discuss project and seek input. Follow up is not required, but may be appropriate.	Response requested within 30 days	Decision anticipated within 60 days Reporting back is not required but may be appropriate.
Long-term disturbance to land and/or change in resource availability with a potentially significant impact.	**LEVEL 4**	Contact First Nation and/or Métis community to advise of upcoming review and official notification to follow. Written notice is provided with offer to meet with community to discuss project and seek input. Follow up is required.	Response requested within 30 days	Decision anticipated within 90 days Reporting back is required.
Permanent disturbance to land and/or change in resource availability and/ or permanent uptake of land with a potentially significant impact.	**LEVEL 5**	Contact First Nation and/or Métis community to advise of upcoming review and official notification to follow. Written notice is provided with offer to meet with community to discuss project, develop a consultation plan and determine capacity needs. Follow up is required.	Response requested within 45 days	Decision anticipated to exceed 90 days Reporting back is required.

The Government recognizes that there is a duty to consult in connection with the "taking up" or sale of Crown land as a result of the Supreme Court's decision in *Mikisew Cree*. The Government will assess the level of consultation required in these cases by examining the potential adverse impacts on the exercise of Treaty and Aboriginal rights and traditional uses. Where it is contemplated that the adverse impact will be minor, consultations will be assessed at Level 3. Where the adverse impacts will be significant, consultations will be assessed at Level 5.

When the decision under consideration is the renewal, extension or transfer of an existing disposition, only potential new adverse impacts on Treaty and Aboriginal rights and traditional uses will be considered in determining if consultations are required and what level of consultation is required. Where the renewal or extension is provided for in the original disposition and no changes to the authorized activity are contemplated, consultations will be assessed at a Level 1.

Identifying Potentially Impacted First Nations and Métis

Consultation is required with First Nations and rights-bearing Métis communities whose traditional territories coincide with the geographic area where the adverse impact would occur. Traditional territory refers to the geographic area within which First Nations and Métis people historically exercised Treaty and Aboriginal rights and undertook traditional uses and continue to do so today. There may be circumstances in which more than one First Nation and/or Métis community must be consulted owing to overlapping traditional territories.

Treaty and Aboriginal rights are collective rights held by a community of people. Consultations must therefore be targeted to the elected leaders or representatives of First Nations and Métis communities. For the purpose of these guidelines, the Government recognizes the Chief and Council of a First Nation, the President of a Métis Nation - Saskatchewan Local or their authorized designates. Regional or provincial First Nations and Métis entities may be consulted only if the elected leadership has delegated this authority through its constitutional decision-making process, and the consulting ministry has a written, signed copy of the authorization.

When in doubt as to whom to consult, Tribal Councils or the Métis Nation - Saskatchewan provincial head office may be contacted for advice.

Step 2: Consultation

Providing Notice

Notification will be provided in writing to the leadership in the First Nations and Métis communities that may potentially be adversely affected by a Government decision or action, or their delegates as noted above. Notification must be as early as possible and in advance of the decision to be made and may require the active participation of the proponent.

Notification should provide clear, complete and understandable information and include the following:

- Description of the decision or action that Government is contemplating that could adversely impact Treaty or Aboriginal rights;
- The extent, and likely duration of the impact on rights and traditional uses;
- Specific questions about the information being requested on impacts to Treaty and Aboriginal rights and traditional uses;
- Identification of a timeline for response from the community and the anticipated timeline for a Government decision following notification;
- An assessment of likely impacts on the environment and/or renewable resources; and
- Identification of any mechanisms that will be applied to mitigate potential impacts.

In keeping with the Consultation Matrix in Figure 1, adequate time should be allowed for the First Nations and/or Métis leadership to receive, consider and respond to the notification. Additional follow-up methods such as phone calls, registered letters or personal visits can be used as appropriate to ensure the First Nations and/or Métis communities are aware of the proposal.

Considering the Response

The First Nations and/or Métis response to Government's notification may confirm the Government's preliminary assessment of the potential impact of the proposed decision or action on Treaty and Aboriginal rights and traditional uses. In this case, a decision will be made to proceed, subject to appropriate mitigative measures.

Alternatively, the response may provide Government with a better understanding of potential impacts on Treaty and Aboriginal rights and traditional uses. Specific steps can then be taken to avoid, minimize or mitigate the impacts of its decisions or actions on those rights and uses. The Government response to concerns expressed by First Nations and/or Métis about potential impacts to the exercise of specific rights and/or traditional uses will be unique to the particular facts of the situation. Project proponents must be made aware that the content of the response(s) from First Nations and/or Métis community(ies) may affect the timelines for a decision.

Consultation may result in new information being identified. That information will then be applied to re-assess the impact or extent of the potential impact, and may elevate the level of consultation required. Such reassessment may result in new consultation activities and adjustments to associated timelines.

There may be circumstances where the First Nations or Métis response to the Government notification is an adverse impact to an asserted right not covered in this policy. In these cases, guidance should be sought from the Ministry of First Nations and Métis Relations.

Accommodating

An outcome of consultation could be actions to accommodate Treaty and/or Aboriginal rights and/or traditional uses. Accommodation means that the Government and the proponent will use what they have learned about impacts to rights and traditional uses during the consultation process to minimize or avert the adverse impacts by avoiding, changing, or amending the plan or action. In the event that a plan or development requires alteration, the proponent will be responsible for costs.

Accommodation may include one or more of the following:

- attaching certain conditions to approvals to undertake activities;
- requiring proponents to adjust the proposed activity or program;
- delaying making a decision or issuing an approval pending further consultations; or
- denying the application to conduct an activity.

In instances where a Government decision or action results in a significant, unavoidable infringement on Treaty and Aboriginal rights, financial compensation may be required for loss of use or access to exercise the right. Government will determine compensation on a case-by-case basis and will not address past actions.

Reporting Back

In keeping with guidance in the Consultation Matrix in Figure 1, the Government will report back to the First Nations and Métis leadership being consulted as to its decision. The report will explain the rationale for the decision, how First Nations and/or Métis concerns regarding impacts to Treaty and Aboriginal rights and traditional uses were taken into consideration and, where relevant, what form of accommodation was used to avoid or minimize impacts to those rights.

4. Context for the Duty to Consult

This section provides background information to assist the reader to understand the policy content and Government direction.

Treaty Context

Treaties are living, breathing documents that continue to bind us to promises made generations ago.[1] There are six different Treaties applicable in Saskatchewan – Treaty Nos. 2, 4, 5, 6, 8 and 10. The earliest of these Treaties, No. 2, was entered into in 1871. The purpose of the Treaties was to forge a new relationship between the Crown and First Nations and to open up the West for developments, like the construction of the transcontinental railway and agricultural settlement. The terms of each of these Treaties are similar. According to their written text, in exchange for giving up their title to the land, the First Nations received promises of reserve lands, guaranteed hunting, fishing and trapping rights, annual payments and other commitments. The oral histories of the First Nations offer a different view of the intent of the Treaties. It is not the purpose of this Policy to attempt to resolve these differences.

Treaty Rights Pertaining to the Duty to Consult

From the Province's perspective, the Treaty right that is most often engaged in connection with the duty to consult is the Treaty right to hunt, fish and trap for food. While the wording of this clause varies slightly from Treaty to Treaty, the clause in Treaty No. 6 is representative. It provides as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.[2]

These rights may be exercised on unoccupied Crown lands and other lands to which First Nations have a right of access for hunting, fishing and trapping throughout the Province by virtue of the provisions of paragraph 12 of the *Natural Resources Transfer Agreement* of 1930 which was the legal instrument that transferred administration and control of Crown lands from Canada to Saskatchewan. The duty to consult requires consultations with those First Nations whose traditional territories are potentially impacted by a proposed decision.

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[1] Speech from the Throne, 2007, Province of Saskatchewan, December 2007.
[2] Treaty 6, Indian Claims Commission: http://www.indianclaims.ca/publications/treaties-en.asp

Aboriginal Rights

While Treaty rights are enshrined in agreements between the Crown and First Nations, Aboriginal rights reflect the fact that Aboriginal communities existed in North America prior to the arrival of Europeans. Aboriginal rights encompass the customs, practices and traditions that were an integral part of the distinctive cultures of these communities prior to their first contact with Europeans and which continue to have this significance in their cultures today. Even though distinctive Métis communities did not arise until after contact between Europeans and First Nations, Métis also possess Aboriginal rights. These rights are determined by examining the customs, practices and traditions that were an integral part of the distinctive culture of Métis communities at the date when a European or Canadian government asserted effective control over the area and which continue to have this significance in the culture today. Aboriginal rights have always existed as part of the common law in Canada. Aboriginal rights were given constitutional status by section 35(1) of the *Constitution Act, 1982*. The courts have recognized that Métis Aboriginal rights to hunt, fish and trap for food exist in some parts of the Province, such as in Northern Saskatchewan.

Métis Aboriginal Rights Pertaining to the Duty to Consult

The Government recognizes that it has legal obligations to consult with rights-bearing Métis communities. The Métis Aboriginal right that is most often engaged in connection with the duty to consult is the Aboriginal right to hunt, fish and trap for food. One of the challenges associated with meeting the duty to consult for the Métis is the lack of consensus on the definition of a rights-bearing Métis community. To date, the courts suggest that these communities should be defined on a regional basis, as opposed to an individual community or a province-wide basis. The Government will consult with Métis leadership in communities or regions where Métis Aboriginal rights have already been recognized, such as in Northern Saskatchewan. Where Métis Aboriginal rights have not yet been recognized, the decision to consult will be made on a case-by-case basis. Government will take into account the strength of the claims supporting the asserted rights and the extent of the potential impact on the exercise of the asserted rights.

Asserted Rights

The Supreme Court recognized in *Haida Nation* that governments may be required to consult with First Nations and Métis communities when governments have knowledge, real or constructive, of asserted rights, even if governments do not recognize the rights being asserted. In these cases, consultations may be required where the Government determines that there is a credible basis for the asserted right and the community is actively pursuing recognition of the right either through negotiations or litigation. The degree of consultations required in these cases will depend upon the strength of the claim supporting the asserted right as well as the extent of the potential adverse impact from the proposed government action.

5. Interest-based Engagement

The Government of Saskatchewan recognizes the benefits of engaging First Nations and Métis when making decisions that affect their interests, people and communities.

There are important reasons to engage First Nations and Métis communities on issues that affect them, outside of any legal consultation obligations the Government may have. For many years, governments have been engaging citizens, stakeholders and First Nations and Métis communities and organizations as a matter of choice, in order to understand and integrate their interests into government decisions. This engagement is interest-based rather than rights-based.

The primary objective in undertaking interest-based engagement is to ensure that Government policies, plans and actions will effectively meet their intended goals and objectives. This is done by working with the particular group/s to better understand the nature of the policy problem and how it should be resolved. Engagement comes in many forms, such as information-sharing meetings, public hearings and meetings, advisory groups, surveys and polls and focus groups. In many cases, there is benefit in going beyond this kind of engagement to creating partnerships for joint action to solve a problem or take advantage of an opportunity.

Good interest-based engagement includes taking time to develop and maintain positive relations with First Nations and Métis communities. Both public and private sectors have realized that engaging Aboriginal people early, well before making policies or decisions, can avoid problems, delays and ultimately resources required to manage conflict.

Ministries will make best efforts to engage First Nations and Métis communities in the decision-making processes related to policies, programs and legislation that have the potential to directly impact them, where they have an interest or where First Nations have jurisdiction on-reserve. However, there may be situations where either the sensitive nature of a proposed policy change or its broad application may prevent the Government from consulting with any community in advance.