Federal Court Cour fédérale

Date: 20251224

Docket: T-2409-93

Citation: 2025 FC 2025

Calgary, Alberta, December 24, 2025

PRESENT: Mr. Associate Judge Shannon
Case Management Judge

BETWEEN:

CHIEF JAMES L. O'WATCH, ART ADAMS, JOEL ASHDOHONK, JEFF EASHAPPIE, CLINT HAYWAHE, BERNICE SAULTEAUX, and PHYLLIS THOMSON

Plaintiffs

and

HIS MAJESTY IN RIGHT OF CANADA as represented by THE MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendant

ORDER AND REASONS

I. Overview

[1] In 2014, this Court issued an Order bifurcating this proceeding into two phases. The issue on this motion is whether that Order, properly interpreted, prevents the Defendant from bringing a motion for summary judgment. In the alternative, the Plaintiffs argue that the Defendant is

equally barred from filing a motion for summary judgment based on the doctrines of abuse of process and issue estoppel.

[2] For the reasons that follow, the motion is dismissed. The Bifurcation Order issued in 2014, read in light of its text, context and purpose, does not preclude summary judgment. On the contrary, it anticipates that the parties may use all available procedural steps up to and including a trial. Likewise, the doctrines of abuse of process and issue estoppel do not prevent the Defendant from exercising its right to seek summary judgment under Rule 213 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

II. Facts

[3] The underlying action was commenced in 1993. The Plaintiffs allege breaches of the Crown's fiduciary duty and treaty obligations arising from the Crown's disposition of reserve lands. In the 32 years since the action was filed, the proceeding has been held in abeyance for significant periods of time, including lengthy periods between 1993 and 2008, and again between 2016 and 2025. The matter only recently returned to active litigation.

[4] The most active period of litigation took place between 2008 and 2016, when the parties took significant steps to advance the proceeding: amendments to pleadings were filed; motions were adjudicated; and documentary and oral discovery took place.

[5] It was during this period that the Court granted the parties' joint request for a bifurcation order, dividing the proceeding into liability and quantification phases. Prothonotary Lafrenière (as he then was) issued the Bifurcation Order that is the subject of the current motion (the "Bifurcation Order" or the "Order") on August 14, 2014.

[6] Bifurcation orders are standard procedural tools used to simplify and focus complex litigation. Where the court is satisfied that bifurcation will result in the just, most expeditious and least expensive determination of the proceeding on the merits, bifurcation orders permit the division of a proceeding into distinct phases: a liability phase and a quantification of damages phase. In the normal course, these orders dictate that matters falling within the quantification of damages phase will not be addressed by the parties or the court until the conclusion of the liability phase. If a plaintiff is successful in proving liability, bifurcation results in two pleading stages, two discovery phases and two trials (*GE Renewable Energy Canada Inc v Camec Industriel Inc*, 2022 FC 1720 at para 23).

[7] On its face, the Order at issue here is no different. It includes standard language dividing the proceeding into liability and quantification phases. The liability phase is expressly defined as: "discovery and all other steps up to and including a trial, or other determination of all of the Liability Issues, including any appeals." The Order also enumerates the liability issues included in the liability phase. The issue of limitations, which is the subject of the current motion, is listed among the liability issues at subparagraph 1(a)(vi): "what, if any, impact does limitations legislation have on this action; and if they bar the claim, whether section 15 of the *Charter* has any application."

[8] The Order then defines the quantification phase as follows:

> The Quantification Issues in this action shall be determined separately from, and only after the Liability Phase, if necessary, depending upon the outcome of the Liability Phase. For greater certainty, during the Liability Phase, there shall be no documentary or other discovery on matters solely relating to Quantification Issues.

[9] After the release of the Bifurcation Order in 2014, the parties continued active efforts to advance the proceeding through the liability phase until settlement negotiations were initiated in 2016. The case then remained largely in abeyance, except for a special hearing conducted in October 2022, to collect Elder testimony and oral history evidence *de benne esse*.

[10] In September 2025, the parties jointly notified the Court that they had been unable to reach an agreement regarding a proposed timetable for next steps. The source of their procedural dispute was the proper interpretation of the Bifurcation Order. The Defendant announced its intention to file a motion for summary judgment to raise a limitations defence; however, the Plaintiffs claimed that the Bifurcation Order prevents the Defendant from filing any such motion and the issue of limitations could only be addressed at trial.

[11] Following a case management conference held on October 28, 2025, the Plaintiffs were directed to proceed by way of formal motion. The parties opted to proceed by motion in writing, pursuant to Rule 369 of the *Rules*. No oral hearing was requested or held.

III. Issues

[12] There are four issues to address on this motion:

A. Does the Court have the authority to refuse to schedule a motion for summary judgment?
B. Does the 2014 Bifurcation Order bar the Defendant from filing a motion for summary judgment on the issue of limitations?
C. Does the doctrine of abuse of process bar the Defendant from filing a motion for summary judgment on the issue of limitations?
D. Does the doctrine of issue estoppel bar the Defendant from filing a motion for summary judgment on the issue of limitations?

IV. Analysis

[13] To begin, I note the limited scope of this motion. There is no motion for summary judgment before me as no such motion has been filed. The Defendant has merely indicated its intention to seek summary judgment. The only question before me is whether, as case management judge, I should refuse to schedule a motion for summary judgment in light of the issues identified above.

A. *The Court's authority to refuse to schedule a motion for summary judgment*

[14] A party's right to bring a motion for summary judgment is set out at Rule 213(1):

Motion by a party	**Requête d'une partie**
213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213 (1)** Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

[15] In the current proceeding, the Defendant has filed a statement of defence and no trial date has been set. Accordingly, as a starting point, Rule 213(1) does not preclude the Defendant from bringing a motion for summary judgment.

[16] The Court nevertheless has the inherent power to control its own process and to prevent the abuse of its resources. Both the Federal Court and Federal Court of Appeal have previously ruled that this Court has the authority to pre-emptively block motions for summary judgment

from proceeding (see *ViiV Healthcare Company v Gilead Sciences Canada, Inc*, 2021 FCA 122 at paras 15-18; *Fabrikant v Canada*, 2018 FCA 171 at para 3; *Janssen Inc et al v Sandoz Canada Inc*, 2023 FC 1231 (CanLII) [*Janssen*] at paras 12-23). Upon review of this case law, I adopt as my own the statement made by Associate Judge Horne in *Janssen*:

> I conclude that a case management judge has the discretion to refuse to schedule a motion for summary trial, but that such discretion should be exercised sparingly, and only in rare circumstances. Provided there is compliance with subrule 213(1), a party has the right to move for summary trial. To deny that right requires compelling evidence and argument to demonstrate it is apparent that a motion for summary trial should not even be assigned a hearing date.

B. *The Bifurcation Order does not bar the Defendant from filing a motion for summary judgment*

[17] The central issue before me is the correct interpretation of the Bifurcation Order. I will therefore reproduce the key passages of the Order, for ease of reference:

> 1. In this Order:
>
> (a) **"Liability Issues"** means all of the issues in this action, other than the Quantification Issues. For greater certainty, the Liability Issues include:
>
> (i) whether a reserve was created within the meaning of Treaty No. 4 and the *Indian Act* in the Cypress Hills for the bands led by The-Man-Who-Took-the-Coat and/or Long Lodge, the predecessors to the Carry the Kettle band, and if so, whether the reserve was surrendered to the Defendant;
>
> (ii) whether the Defendant breached any fiduciary duty, if any, in relation to the alleged reserve in the Cypress Hills, and settlement of the Carry the Kettle band's predecessors in the Indian Head area;
>
> (iii) whether the Defendant had any fiduciary obligation under Treaty No. 4 to provide the necessaries of life in the 1880's, and whether the Plaintiffs are entitled to any declaration regarding necessaries;

(iv) whether the Plaintiffs are entitled to recover damages for any alleged breach of fiduciary duty regarding alleged duty to provide necessaries;

(v) what, if any, impact does the Treaty Land Entitlement Agreement have on this action;

(vi) what, if any, impact does limitations legislation have on this action; and if they bar the claim, whether section 15 of the *Charter* has any application;

(vii) what, if any, impact do laches and acquiescence have on the action; and,

(viii) what, if any, impact does Crown immunity have in relation to alleged intentional torts that occurred before May 14, 1953 on this action;

(b) **"Liability Phase"** means discovery and all other steps up to and including a trial, or other determination of all of the Liability Issues, including any appeals;

(c) **"Quantification Issues"** means:

(i) the quantum of the Plaintiffs' damages, if any, arising from any breach of fiduciary duty in relation to the loss of the alleged reserve in the Cypress Hills including a claim for minerals;

(ii) the quantum of damages, if any, arising from any breach of fiduciary duty to provide the necessaries of life.

2. The Quantification Issues in this action shall be determined separately from, and only after the Liability Phase, if necessary, depending upon the outcome of the Liability Phase. For greater certainty, during the Liability Phase there shall be no documentary or other discovery on matters solely relating to the Quantification Issues.

3. If it is necessary, depending upon the outcome of the Liability Phase, to proceed to a determination of the Quantification Issues, the procedure to be followed for the determination of the Quantification Issues, including whether such determination shall be by way of further trial or reference, shall be as directed by the Liability Phase trial judge, and either party may bring a motion for

> such directions after judgment following the trial in the Liability Phase.
>
> [Emphasis added.]

[18] My analysis must be guided by the rules that govern the interpretation of court orders. In *Aizic v Natcan Trust Company*, 2025 ONCA 719 [*Aizic*], the Ontario Court of Appeal conducted a comprehensive review of the applicable case law. Writing for the Court, Justice Sossin confirmed that the interpretation of a court order is "'much like the interpretation of a statute' in the sense that it is an exercise of attending to the order's text, context, and purpose" (*Aizic* at para 25, citing *Fontaine v Canada (Attorney General)*, 2020 ONCA 688 at para 29 and *Auer v Auer*, 2024 SCC 36 at para 64). I therefore reiterate and will apply the test for statutory interpretation, adapted here for the purpose of interpreting a court order: "the words of [a court order] are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the [order], the object of the [order], and the intention of [the Court]" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 [*CISSS A*] at para 23).

[19] I take further guidance from paragraphs 27 to 29 of *Aizic*, where Justice Sossin articulated specific principles that may aid in the interpretation of a court order's text, context and purpose:

i. the express language of the order;

ii. the purpose of the terms of the order;

iii. the authority to make the order, including the statutory context and procedural rules;

iv. the broader context within which the order was granted;

v. resolving apparent inconsistencies between different terms by reaching an interpretation that can reasonably give meaning to each of the terms in question;

vi. applying accepted principles of statutory and contractual interpretation to ascertain the intent of the ordering judge using the text as the anchor[1] of the interpretive exercise; and

vii. where a holistic consideration of text, context and purpose nevertheless yields ambiguity, court orders, like statutes, should be interpreted in a manner that preserves a party's right to sue.

[20] I also accept that the Bifurcation Order must be given a large and liberal interpretation, using the text of the Order as the "anchor of the interpretive exercise" (*CISSS A* at para 24).

(1) The text

[21] The Plaintiffs argue that the specific wording of the Bifurcation Order is "ambiguous as to whether the issue of limitations may be determined before the full liability trial" [Plaintiffs' emphasis]. They claim that paragraph 1(b) of the Bifurcation Order – where the "Liability Phase" is defined – is silent as to the manner in which liability issues (including limitations issues) are to be determined as part of the liability phase.

[22] They further assert that the liability issues listed at paragraph 1(a) of the Order are set out in a logical sequence, which follows an "ordered progression showing that each issue informs the next." Limitations issues are listed late in the sequence, at subparagraph 1(a)(vi). According to the Plaintiffs, "if limitations were truly intended to be determined summarily on its own, the

[1] Specific reference here is made to the Supreme Court of Canada's decision in *CISSS A* at para 24.

Order would have been structured accordingly, positioning that issue as a 'threshold issue' among the listed liability matters."

[23] For its part, the Defendant argues that the Order is not ambiguous. The Order lists limitations as a liability issue and includes in the liability phase "…all other steps up to and including a trial, or other determination of all Liability Issues" [Defendant's emphasis]. Like the provisions of a statute, the provisions of a court order should be interpreted in a manner that gives them meaning. The Defendant argues that the interpretation proposed by the Plaintiffs would render portions of the text meaningless: the Order cannot both preclude a summary judgment motion and yet specifically allow the parties to proceed by way of "all steps up to and including" trial.

[24] Finally, the Defendant rejects the Plaintiffs' "logical sequencing" argument, arguing that limitations is a threshold issue no matter where it appears on a list.

[25] On a purely textual analysis, I find that the Bifurcation Order is unambiguous. It does not preclude a motion for summary judgment on a liability issue, so long as the proceeding remains in the liability phase (i.e., that matter has not moved beyond the conclusion of the liability phase and all appeals). In fact, the express language of the Order permits parties to address a liability issue by any procedural mechanism at any time prior to the conclusion of the liability phase, which is defined as "discovery and all other steps up to and including a trial, or other determination of all Liability Issues" [emphasis added]. The plain text of the Order therefore anticipates procedural steps like summary judgment, and includes no language that could be interpreted as requiring the Defendant to wait until a liability phase trial to raise a limitations defence.

[26] Had the Court intended to use the Bifurcation Order to deprive a party of the right to file a Rule 213 motion – a right established in the *Rules* – the Order would have included express language to this effect. No such language was included, and the Order's silence is insufficient to support the interpretation advanced by the Plaintiffs (*Kostic-Natioyiiputakki v Canada*, 2022 FC 1702 (CanLII) at para 24(c); *Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at para 38; *Deng v Canada (Citizenship and Immigration)*, 2008 FC 603 at para 16).

[27] Furthermore, I agree with the Defendant that the interpretation proposed by the Plaintiffs would render portions of the phrase "all other steps up to and including trial, or other determination" meaningless. I must interpret the Order in a manner "that can reasonably give meaning to each of the terms in question" (*Aizic* at para 27; see also *R v Hutchinson*, 2014 SCC 19 at para 16). The Order's plain text expressly contemplates access to the more expansive catalogue of procedural steps. Accepting the Plaintiffs' interpretation would amount to reading down the definition at paragraph 1(b) of the Order to exclude access to procedural steps that are clearly caught by the phrase "all other steps up to and including". Such an interpretation would not give meaning to each of the terms in question and must therefore be rejected.

[28] I am also not persuaded that the liability issues listed at paragraph 1(a) are set out in a logical sequence such that the positioning of limitations issues within the list impacts the interpretation of the Order. First, there is nothing in the text of the Order nor in any of the evidence before me to support the proposition that the liability issues are listed in a sequence whereby each issue informs the next. Second, there is no evidence before me that the parties intended to sequence these issues with a particular logic in mind when filing their draft order, nor that the Court intended to include that same logic in the Bifurcation Order.

[29] Finally, even if I were to accept that the liability issues were listed in a logical sequence, there is no indication in the Order (nor in the evidence before me) that this sequencing somehow modifies the plain text of paragraph 1(b), read in its grammatical and ordinary sense, which unambiguously defines the liability phase as including "all steps up to and including a trial, or other determination."

[30] Accordingly, I find that the text of the Bifurcation Order, read in its plain and grammatical sense, does not prevent the Defendant from filing a motion for summary judgment on limitations issues.

(2) The context

[31] Having found that the text of the Order is clear and unambiguous, I will consider the context and purpose of the Bifurcation Order, while ensuring that the text of the Order remains the anchor of the interpretive analysis (*CISSS A* at para 24).

[32] The Plaintiffs argue that any ambiguity in the Order is resolved by examining the surrounding litigation history and the procedural circumstances that necessitated the Bifurcation Order. On a full contextual reading, paragraph 1(b) of the Order – where the "Liability Phase" is defined – "merely describes the procedural scope of the Liability Phase, but it <u>does not</u> authorize the piecemeal adjudication of a discrete liability issue (e.g. limitations)" [Plaintiffs' emphasis].

[33] As further context, the Plaintiffs point to a pattern of litigation leading up to 2014, which shows that "the 2014 Order endeavoured to impose a structure on an increasingly unwieldy litigation." The extensive litigation steps taken during this period, and the substantial investment of time and resources by both parties, are "inconsistent with any intention to seek summary

disposition." If the Defendant wished to seek summary judgment, "it could have done so… at any stage after pleadings closed or before the Order was issued, which would have prevented the procedural sprawl that warranted [the Order] in the first place."

[34] Finally, the Plaintiffs point to the parties' plan to collect Elder testimony and oral history evidence, which was contemplated even before the release of the Bifurcation Order. They assert that the collection of oral history is "trial-oriented" and that the evidence gathered has "limited relevance to the discoverability analysis underpinning a limitations defence." The Plaintiffs therefore assert that the intention to collect oral history evidence supports the conclusion that the limitations issue was not intended to be adjudicated "summarily on its own."

[35] The Defendant disagrees, arguing that there is nothing exceptional about the conduct of the parties in this proceeding. All steps taken were "typical steps in any litigation." There was no shared intention to preclude access to summary judgment on limitations. Rather, the evidentiary record that was gathered through the early steps in this proceeding informed litigation strategy throughout the entire process, including by "narrowing issues, informing potential settlement discussions, and supporting pretrial motions."

[36] I agree with the Defendant. I am not persuaded that the litigation context in this proceeding supports the Plaintiffs' interpretation of the Bifurcation Order. I have closely reviewed the procedural history as set out in the parties' materials and I find nothing remarkable about the litigation steps taken between 2008 and 2014. These steps are, as the Defendant argues, typical steps in litigation. The Plaintiffs have provided no evidence of the disorderly and unwieldy litigation they allege.

[37] Likewise, I find nothing remarkable in the parties' decision to collect oral history testimony via a *de benne esse* oral history hearing, particularly given the passage of time since the filing of the statement of claim (which included long periods where the file was held in abeyance). None of these steps support a conclusion that the Court intended to preclude access to summary judgment without inserting an explicit clause to that effect in the Order.

[38] As a matter of context, I recognize the significant time and resources spent by the parties in the lead-up to issuance of the Order, and the fact that additional resources were expended thereafter. The Plaintiffs may, as a result, justifiably express their frustration that the Defendant did not seek summary judgment earlier in the litigation process. While this delay may provide some support for the Plaintiffs' abuse of process argument, which I address below, the litigation context as set out in the evidence does not support a conclusion that the Court intended to limit the Defendant's right to file a motion for summary judgment on the issue of limitations.

[39] I also am not prepared to accept the Plaintiffs' unsubstantiated contention that the oral history evidence collected to date has no bearing on the limitations issue. The Defendant is entitled to craft its limitations defence using the evidence it considers relevant; that is not the Plaintiffs' prerogative. Moreover, I have no evidence before me as to the scope and content of the oral history evidence collected in 2022. It is not implausible that some of it may bear on discoverability.

[40] As part of the contextual analysis, I must also consider the Court's authority to issue the Bifurcation Order, which includes an examination of the applicable procedural rules (*Aizic* at para 27). In so doing, I find no merit in the Plaintiffs' argument that paragraph 1(b) of the Bifurcation Order "does not authorize the piecemeal adjudication" of limitations issues by way

of motion for summary judgment. The Order need not have provided any such authorization. It is Rule 213(1) – not the Bifurcation Order – that provides authorization. As a starting point, a party is authorized to bring a summary judgment motion if the conditions listed in the *Rules* are met (*Janssen* at paras 13-14).

[41] Reference to Rule 3 likewise does not assist the Plaintiffs. Rule 3 requires that the *Rules* are interpreted and applied in a manner that: (a) secures the most expeditious and least expensive outcome of every proceeding; and (b) considers the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amounts in dispute. Without pronouncing on the Defendant's chances of success on an eventual motion for summary judgment, I note that the Supreme Court of Canada has stated that summary judgment "is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial" (*Hryniak v Mauldin*, 2014 SCC 7 at para 34). Significant efficiencies can be achieved where all or part of a proceeding is adjudicated by way of summary judgment. Conversely, requiring the parties and the Court to prepare and conduct a full liability phase trial – a trial where threshold limitations issues remain in play – risks wasting significant resources.

[42] In light of the foregoing, I find that the litigation and surrounding context further supports a finding that the Bifurcation Order does not bar the Defendant's access to summary judgment.

(3) The purpose

[43] The Plaintiffs argue that the Bifurcation Order in this case is not a mere procedural formality: there was "substantive intention behind the Order." The Order was tailored to the unique circumstances of the litigation "including by carefully structuring the eight liability issues

in a logical and interdependent progression." The Order's substantive purpose and effect was to organize the subsequent litigation steps and to impose structure on what had become a "procedurally cumbersome action." To permit the Defendant to file a motion for summary judgment would undermine the very purpose the Bifurcation Order was intended to address.

[44] Once again, the Defendant asserts that there was no shared intention to bar access to summary judgment. The purpose of the Order was to bifurcate the action into two phases. Based on the Court's model bifurcation order, which is available to all litigants, the parties tailored their draft order to address the specific claims at issue.

[45] To the extent that the parties' common intention behind the joint motion for a bifurcation order is relevant to the interpretive analysis, I find that there is insufficient evidence before me regarding those intentions. The correspondence and filings leading to the Court's issuance of the Bifurcation Order are entirely silent as to the parties' shared intentions, other than to confirm that the parties were indeed seeking a bifurcation order. I therefore cannot find a shared or common intention as between the parties that goes beyond the division of the proceeding into two distinct phases. I am also not persuaded that there was a common intention to bar access to summary judgment on liability issues.

[46] Turning to the Court's intended purpose, I note that bifurcation orders are standard procedural tools. Their purpose is to divide a proceeding into distinct phases "to avoid the delay and expense of a compensation phase if it becomes unnecessary, or else to focus the scope of that phase" (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 23). Such orders are granted where bifurcation is "more likely than not to

result in the just, expeditious and least expensive determination of the proceeding on its merits" (*Farmobile, LLC v Farmers Edge Inc*, 2022 FC 22 at para 111).

[47] The Plaintiffs are therefore partially correct: the Bifurcation Order at issue was carefully tailored to organize subsequent litigation steps and to impose structure on a complex piece of litigation. But this purpose remains entirely consistent with the interpretation that is advanced by the Defendant, which itself is anchored in the text of the Order. Given the potential efficiencies of adjudication by way of summary judgment, I cannot accept that permitting the Defendant to file its motion for summary judgment would undermine the efficiency-seeking purpose of the Order.

[48] Accordingly, having analyzed its text, context and purpose, I find that the Bifurcation Order does not prevent the Defendant from filing a motion for summary judgment on the issue of limitations.

C. *The doctrine of abuse of process does not bar the Defendant from filing a motion for summary judgment*

[49] The timeline of this proceeding is important when considering the Plaintiffs' abuse of process arguments. The statement of claim was filed in 1993. At the request of the parties, the matter remained in abeyance for the majority of the intervening 32 years. Active litigation was ongoing between 2008 and 2016, and then again in October 2022, when a special hearing took place to receive Elder testimony and oral history evidence *de benne esse*.

[50] The Plaintiffs' abuse of process arguments are twofold. First, the Plaintiffs argue that the Bifurcation Order, properly interpreted, prevents the Defendant from seeking summary judgment and it would therefore be an abuse of process to permit the Defendant to file its motion for

summary judgment without first seeking to vary the Bifurcation Order. As set out above, I do not accept the Plaintiffs' proposed interpretation of the Bifurcation Order. The Order, properly interpreted, does not prevent the Defendant from seeking summary judgment on limitations issues. Accordingly, the Defendant need not seek to vary the Order.

[51] Second, the Plaintiffs argue that allowing the Defendant to file its motion for summary judgment would:

> … permit a defendant to sit on a known procedural tool (i.e., summary motion) for decades while allowing the litigation to significantly progress through burdensome and expensive litigation steps, only to deploy it becomes strategically expedient. No principle of interpretation supports a reading that enables such procedural gamesmanship, and the abuse of process doctrine exists precisely to bar this type of conduct.

[52] For its part, the Defendant argues that it was not able to seek summary judgment until after examinations for discovery were complete. When discoverability of limitations is at issue, determining when the Plaintiffs knew or ought to have known the material facts requires "an evidentiary assessment that could only be undertaken once discoveries were complete." Any delay, therefore, does not amount to an abuse of process.

[53] Abuse of process is concerned with the administration of justice and fairness: "[t]he 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 CUPE, Local 79*, 2003 SCC 63 at para 37). The doctrine is flexible; there are no specific requirements for its application. Even where an abuse is found, the Court retains the discretion to allow the matter to proceed (*Jazz Air LP v Toronto Port Authority*, 2007 FC 114 at para 27).

[54] In the current case, the primary issue is delay and the resource implications of that delay. While it is true that the Defendant could have filed a motion for summary judgment at an earlier stage of this proceeding, I note that most of the delays in this file were the result of mutual consent. While the case began more than 32 years ago, the parties have jointly requested that it remain in abeyance for over 20 of those 32 years. Thus, much of the delay in the progress of this file can equally be attributed to both parties.

[55] When considering the delay that is attributable to the Defendant, I note that even a lengthy delay in exercising a procedural right does not necessarily amount to an abuse of process (*Zündel v Canada*, 2005 FC 1612 at para 33). Here, there is no evidence that the Defendant seeks summary judgment as a delay tactic, nor that the Defendant has engaged in other delay tactics during the life of the proceeding. While the Defendant has certainly frustrated the Plaintiffs by waiting until this stage of the proceeding to seek summary judgment, I am not persuaded that the length of the delay amounts to an abuse of process.

[56] Finally, it is telling that the Plaintiffs do not contest the Defendant's right to raise a limitations defence; rather, they claim it is the Defendant's decision to raise limitations by way of a summary judgment motion that amounts to an abuse of process. Once again, given the potential efficiencies that may be gained by proceeding by way of summary judgment, I cannot find that the Defendant's intention to file a motion for summary judgment amounts to an abuse of process.

D. *The doctrine of issue estoppel does not apply*

[57] The Plaintiffs' issue estoppel argument is premised on an incorrect interpretation of the Bifurcation Order. According to their argument, this Court addressed the issue of access to

summary judgment and released a final decision on the issue via the Bifurcation Order, barring such access.

[58] As I have already set out above, the Bifurcation Order does not bar access to summary judgment. Accordingly, the issue was not finally decided in the Plaintiffs' favour in 2014 and is therefore not being re-litigated now. Issue estoppel does not apply.

V. Conclusion

[59] The Plaintiffs' motion is dismissed. This is not one of those rare circumstances where the Court should exercise its discretion to deny a party the right to move for summary judgment.

[60] The outcome of this motion resolves only the question of whether the Defendant is permitted to file a motion for summary judgment and whether a hearing of that motion will be scheduled. It does not preclude the Plaintiffs from advancing arguments in opposition to the motion, once filed. I make no finding as to whether there is or will be sufficient evidence on the motion for summary judgment to adjudicate the matter, nor whether it would be unjust to decide the issues by way of summary judgment. The outcome of the current motion does not determine any claim or defence that may be raised on summary judgment, or at any trial. It is open to the Plaintiffs to respond to the summary judgment motion in any way they see fit.

ORDER in T-2409-93

THIS COURT ORDERS that:

1. The motion is dismissed.

2. By no later than January 13, 2026, the parties shall confer and shall jointly provide a proposed schedule for the motion for summary judgment along with their mutual availability for a case management conference, should the Court deem such a case conference to be necessary.

3. The Defendant does not seek its costs on this motion and therefore no costs shall be awarded.

"Kirk G. Shannon"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2409-93
STYLE OF CAUSE:	CHIEF JAMES L. O'WATCH ET AL. v HIS MAJESTY THE KING IN RIGHT OF CANADA

MOTION IN WRITING PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*, SOR/98-106, CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS:	ASSOCIATE JUDGE SHANNON
DATED:	DECEMBER 24, 2025

APPEARANCES:

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