Court of King's Bench of Alberta

Citation: Croy v Alberta, 2026 ABKB 116

Date: 20260218
Docket: 2103 15956
Registry: Edmonton

Between:

Eileen Croy, Cameron Beaverbones and Kim Borle

Plaintiffs

- and -

His Majesty the King in Right of Alberta

Defendant

Memorandum of Decision
of the
Honourable Justice K.A. McLeod

I. Introduction

[1] The Defendant Alberta applies for summary dismissal or to strike the Plaintiffs' claims, which seek declaratory relief and damages for the Defendant's destruction of a cabin to which the Plaintiffs claim a Treaty and Indigenous right. The claim for damages is based on breach of Treaty, negligence, trespass, and breach of fiduciary duty.

[2] Alberta advances this application on several grounds which can be categorized into two broad assertions;

1) that the individual Plaintiffs cannot make out claims to Indigenous and Treaty rights at all, and those rights are communal and cannot be claimed by individuals; and,

2) any and all claims against Alberta are statute-barred.

[3] I find there are factual findings and legal arguments that cannot be disposed of in this application to strike or summarily dismiss, and therefore dismiss Alberta's application, for the following reasons.

II. Background

[4] These are some background facts that are pertinent to the issues in this application, but are not the complete facts on which the parties rely in either this application or a trial.

[5] Eileen Croy is a member of the O'Chiese First Nation, located northwest of Rocky Mountain House, AB, on lands that form part of Treaty 6 territory. When she married Albert Croy (not a party and not Indigenous), she moved with him to High Level, AB, where they still reside.

[6] Eileen Croy claims that she and her spouse, Albert Croy, built a cabin in 1988 near Bistcho Lake ("Lake") in Treaty 8 territory in northern Alberta close to the Northwest Territories, for the purposes of residential and Treaty fishing. She claims this was with the knowledge and approval of the nearby Dene Tha' First Nation at the time.

[7] In 1995, Alberta Forestry, Lands and Wildlife (which became Alberta Environment and Parks or "AEP") granted Mr. Croy a disposition allowing him to build and use a cabin near the Lake for commercial fishing. Ms. Croy claims that she and Mr. Croy moved their original cabin to the place near the Lake that fit within the disposition. Mr. Croy held a provincial licence permitting him to commercially fish on the Lake. As part of the disposition, Mr. Croy made a statutory declaration that he would not "use or allow this cabin to be used for any purpose other than that of commercial fishing." Alberta required this statutory declaration because other permit holders had used their shelters as private fishing lodges.

[8] Ms. Croy claims their original cabin was destroyed by fire in 2004, and she and Mr. Croy built another cabin (the "Cabin") with assistance from others. In March 2005, the 1995 disposition was replaced by a new disposition for the same purpose on public land near the Lake. The 2005 disposition did not include a statutory declaration from Mr. Croy regarding the Cabin. The disposition stated the disposition was for commercial fishing purposes. The disposition further stated that the affected lands were not to be used for a residence, guiding, or outfitting services.

[9] Ms. Croy claims that for years, Mr. Croy engaged in commercial fishing, and she engaged in fishing pursuant to her Indigenous heritage, culture, and Treaty rights, and that they both used the Cabin for these purposes. The other Plaintiffs are Ms. Croy's son, Mr. Beaverbones (a member of O'Chiese First Nation), and Ms. Croy's grand-niece, Ms. Borle (a member of the Beaver First Nation on Treaty 8 territory), and they also claim they used the Cabin as part of their Indigenous heritage, culture, and Treaty rights.

[10] In 2014, Alberta ceased all commercial fishing in the province. The Plaintiffs claim they continued to use the Cabin following this cessation as part of their Indigenous heritage, culture, and Treaty rights.

[11] In 2016, AEP wrote to Mr. Croy and three other persons who previously held commercial fishing dispositions near the Cabin, asking them all to submit plans for the removal and disposal of their cabins and associated items. Mr. Croy did not respond or submit a plan. In December, 2016, Alberta cancelled Mr. Croy's disposition. The letter notifying Mr. Croy of the cancellation asked again for a reclamation plan for the removal of the Cabin, and again Mr. Croy did not respond or submit a plan.

[12] In June, 2017, Mr. Croy met with a representative of AEP, and they discussed the possibility that Ms. Croy, as a member of the O'Chiese First Nation with associated Treaty status who used the Cabin for fishing, may qualify as a claimant to the Cabin as a "Sundown cabin." Sundown cabins refer to the Supreme Court of Canada's decision in ***R v Sundown***, [1999] 1 SCR 393 ("***Sundown***"), which recognized the right to cabins or other shelters incidental to Treaty rights to hunt and fish where the traditional practices of a First Nation included expeditionary hunting and fishing and use of remote camps and structures.

[13] AEP established guidelines and a policy with criteria for Sundown cabins, which included contact between the relevant First Nation and AEP. AEP determined sometime prior to the Cabin's demolition that the Cabin did not qualify as a Sundown cabin. None of the guidelines, policy, or the determination that the Cabin did not fit within them were conveyed to the Croys at any time prior to this litigation being commenced. Additionally, the policy and guidelines were not publicly accessible.

[14] Alberta explored other options for the use of the cabins, but none went anywhere. The matter was referred to the AEP compliance department in June 2019.

[15] AEP issued an Order to Vacate in February, 2020, requiring Mr. Croy to vacate the land, Cabin, and all associated structures, debris, and personal items. That Order was paused due to COVID-19.

[16] In spring of 2020, Alberta says they tried to contact the Croys by phone three times in two days and left a message asking them to call back. Alberta claims they were trying to get more information on the Ms. Croy's Sundown claim, but there is no evidence that their question(s) were left in the voice message. There is also no evidence that AEP did anything to inform Ms. Croy about what, in Alberta's views or policy, can constitute a Sundown cabin.

[17] AEP issued a new Order to Vacate in July, 2020, requiring Mr. Croy to notify AEP of the removal of his structure and belongings by March 31, 2021 (timing that would have enabled the winter use of an ice road to effect the removals).

[18] In September, 2020, the Dene Tha' First Nation advised the Province that it was concerned about infringements on and interferences with its claimed Treaty rights resulting from cabins on the Lake.

[19] On April 21, 2021, the AEP's compliance division removed some contents from the Cabin and other structures, and destroyed the Cabin through controlled burning.

[20] At various times throughout this process starting in 2016, the Croys consistently informed Alberta and its representatives that Ms. Croy wanted to continue using the Cabin pursuant to her Treaty rights.

[21] Mr. Croy did not challenge the Order to Vacate the Cabin, the O'Chiese and the Beaver First Nations were not in contact with Alberta regarding the Cabin, and neither Cameron Beaverbones nor Kim Borle contacted Alberta regarding their interest in the Cabin.

III. Legislation

[22] The Rules at issue are R 3.68(1) and 7.3(1)(b) that allow claims to be struck from pleadings or summarily dismissed, respectively.

[23] Also related to the claims are provisions under the *Public Lands Act*, RSA 2000, c P-40 ("*PLA*"), including ss 47 and 47.1 that lead to the end of Mr. Croy's disposition and eventual destruction of the Cabin. Alberta also relies on s 59.22 of the *PLA* for its argument that the Plaintiffs' claims are statute-barred.

[24] The Plaintiffs rely on Alberta's ***Natural Resources Transfer Agreement*** (***NRTA***) which was signed between the federal and Alberta governments and given constitutional effect by the *Constitution Act, 1930*, 20–21 George V, c 26 (UK), reprinted in RSC 1985, App II, No 26, s 12. The Plaintiffs argue the ***NRTA*** provides an expanded interpretation of the territory on which they may exercise their Treaty rights.

IV. Analysis

[25] Alberta argues the Plaintiffs' claims are bound to fail, and as a result they should be struck under R 3.68(1) or summarily dismissed under R 7.3(1)(b).

A. Legal Test to Strike Claims under R 3.68(1)

[26] Under R 3.68(1), a pleading will be struck in whole or in part if, in reading it generously and assuming all facts to be true, it is plain and obvious that it discloses no valid claim: ***Anglin v Alberta (Chief Electoral Officer)***, 2024 ABCA 113 at paras 43-47.

[27] Courts must strike a balance to avoid impeding the law's development by strictly applying principles to novel claims, and sending every case to trial: ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140.

B. Legal Test to Summarily Dismiss under R 7.3(1)(b)

[28] This Rule allows parties to apply for summary judgment of all or part of a claim if there is no merit to any genuine issue requiring a trial.

[29] The test for summary dismissal or judgment is set out in ***Hryniak v Mauldin,*** 2014 SCC 7 (***Hryniak v Maudlin***) at para. 49 and cited and followed in ***Wesley v Alberta***, 2024 ABCA 276 ("***Wesley***") at para 128:

> (1) the judge must be able to make the necessary findings of fact;
>
> (2) the judge must be able to apply the law to the facts; and,
>
> (3) determine that summary dismissal or judgment is a proportionate, more expeditious and less expensive means to achieve a just result.

[30] ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 set out the principles for summary judgment. The Court said at para 47, with reference to the ***Hryniak v Maudlin*** test, the questions a Court must ask itself:

> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record, or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[31] The Court in ***Wesley*** at para 130, citing ***Canada (Attorney General) v Lameman,*** 2008 SCC 14 at para 11, reiterated the oft-cited rule that:

> [A]n application for summary dismissal must be based on the pleadings and record as they presently stand. The parties are required to "put their best foot forward", and not speculate about amendments and evidence that may emerge in the future.

[32] Courts interpreting the test must bear in mind that the law develops through hearing and deciding novel claims, and ambiguities must be resolved in favour of the respondents (***Hunt v Carey Canada Inc.***, [1990] 2 SCR 959 and ***Ernst v EnCanada Corp***, 2014 ABCA 285 at para 14). Below, I address Alberta's submissions that the Plaintiffs lack standing to bring their claim and that the claim is a collateral attack in a public lands matter. Then I examine each claim the Plaintiffs make in their action to determine if a genuine issue exists for trial.

C. Standing for Plaintiffs to Make Claim

[33] Alberta says the Plaintiffs impermissibly advance this claim as individual claimants as opposed to on behalf of the collective, and in the ***Sundown*** case the Supreme Court of Canada reiterated that Aboriginal rights to hunt and fish do not belong to individuals but to the collective in "keeping with the culture and existence of that group." Alberta says that a purely personal claim to the Cabin is not compatible with ***Sundown***. Alberta also argues that individuals do not have standing to advance claims of the government's failure to consult since those are also claims that must be made by the collective group that holds those rights as opposed to individuals.

[34] Alberta relies on ***Behn v Moulton Contracting***, 2013 SCC 26 ("***Behn***") to assert that the Plaintiffs lack standing and that their action is an abuse of process.

[35] In ***Behn***, a private logging company that held licences to harvest timber brought a tort action against a group of individuals that blocked access to the logging sites. In defence, the individuals claimed the licences were void because they had suffered breaches of their right to consultation and Treaty rights. The SCC found that raising a breach of the duty to consult and of Treaty rights as a defence in a tort claim against them by a private company was an abuse of process in the circumstances of that case. The SCC did not, however, find that no individual may claim Aboriginal or Treaty rights. They explicitly stated they could not make a definitive statement regarding when individuals may assert Aboriginal or Treaty rights, and that the ***Behn*** case was not the case in which to attempt to do so (see paras 33-36).

[36] Alberta relies on the descriptions in ***Sundown*** of the nature of the right to Sundown cabins, being interests of the collective and not individuals, derived from Treaty and traditional expeditionary hunting, fishing, or trapping (para 36). As an example, the SCC notes that an individual such as Mr. Sundown would not be able to exclude other members of his First Nation from his cabin (para 36). General descriptions of the collective nature of the rights at issue are also found in ***Behn***. However, the SCC does not expound on the limits of the collective rights when individuals are exercising them, or whether or how any kind of individual property right or interest may be protected or pursued when it is part of a collective right. The focus of the ***Behn*** decision was about the abuse of process in belatedly raising the issues in response to third party private companies which justified the dismissal of the defendants' claims.

[37] The Plaintiffs argue they are making claims as individuals exercising collective Treaty and Aboriginal rights, those rights can be brought by individuals in appropriate circumstances such as here, and that even if an assignment of First Nations' rights were necessary, assignment has been effected by the First Nations to which the Plaintiffs belong.

[38] In ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, the Supreme Court considered the standing of the Manitoba Métis Federation. The trial judge in that matter initially denied standing to the Federation since 17 named individuals were already pursuing claims under s 31 of the *Manitoba Act* which granted 1.4 million acres of land to Métis children. In evaluating the standing of the Federation, there was no suggestion that the initial individual claimants had no standing to advance the claim.

[39] Many collective constitutional rights such as Aboriginal, religious, and labour are exercised or expressed by individuals. In my view, the jurisprudence does not resolve the legal issues with respect to whether individual members of First Nations have standing to pursue claims against the government that are grounded in collective Treaty and/or Aboriginal rights, whether or when an assignment from a First Nation is necessary, or if necessary, how First Nations must assign those rights. Although the SCC has given direction on resisting the application of common law property rights to Aboriginal or Treaty concepts, they have nevertheless left unstated whether or how those rights may be pursued if an individual claims property loss when they are exercising their Treaty and/or Aboriginal rights.

[40] The SCC in ***Behn*** considered arguments on one hand that Treaty rights can only be brought by or on behalf of the Aboriginal community, and on the other hand that Aboriginal and Treaty rights should be classified into definitive categories identifying if they are collective, individual, or a mix. The SCC declined to accept any of those arguments, finding that "certain

rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them," and stating that "in appropriate circumstances, individual members can assert certain Aboriginal or Treaty rights" (para 33). The SCC acknowledged that "despite the critical importance of the collective aspect of Aboriginal and Treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour" (para 34).

[41] Alberta argues that an internal contradiction exists in the Plaintiffs' claims; in that if the Cabin qualifies as a Sundown cabin, the Plaintiffs have no standing to seek recompense because those interests are communal and cannot be pursued by individual members of the community. I do not read the jurisprudence as having reached the conclusion that claims founded in communal rights cannot be pursued by individuals exercising those communal rights. I find the effect of this conclusion would be an overly narrow interpretation of Aboriginal interests and rights that would result in individuals being able assert their Treaty and Aboriginal rights only when defending themselves when charged for exercising them (as Mr. Sundown was) but to be unable to be made whole by advancing claims as individual plaintiffs with or without an assignment or approval of their First Nations.

[42] Given there are legal issues that I find impossible to resolve on the basis of the submissions and authorities, I decline to strike or summarily dismiss the action on this basis.

D. Collateral Attack or Abuse of Process

[43] Alberta applies to strike or summarily dismiss on the basis that the claim is a collateral attack or an abuse of the process, since the Plaintiffs did not challenge the orders issued which required the Cabin to be removed or destroyed.

[44] Abuses of process are claims that are "unfair to the point that they are contrary to the interest of justice" (***R v Power***, [1994] 1 SCR 601 at p 616) and collateral attacks are themselves abuses of processes because they are actions that aim to reverse, vary, nullify an order or judgment in another proceeding (***Wilson v The Queen***, [1983] 2 SCR 594 at p 599).

[45] Alberta relies on ***Behn*** for this ground, since the SCC found in that case that the Behns had engaged in a collateral attack that amounted to an abuse of process.

[46] In ***Behn***, the claim was grounded in the Crown's duty to consult. But the SCC upheld the findings that the Crown had consulted with the affected First Nation, and that the Behns did not raise concerns while the logging licence issue was ongoing or challenge the authorizations to log after those licenses issued. The SCC found that to allow the Behns to belatedly raise their Treaty rights as a defence to a tort claim in these circumstances would be "tantamount to condoning self-help remedies and would bring the administration of justice into disrepute" (para 42).

[47] I do not find the circumstances here to be sufficiently parallel to the ***Behn*** case to rely on it for the proposition that the Plaintiffs are engaging in a collateral attack or abuse of process.

[48] I am also not persuaded by the argument that the Plaintiffs' action is a collateral attack on the cancellation of Mr. Croy's disposition and requirement for him to clear his cabin. Mr. Croy is not Indigenous, is not a Plaintiff, and asserts no Treaty right. Conversely, none of the Plaintiffs need a permit for a Sundown Cabin, they do not seek to restore any permit or the ability to fish commercially. There is therefore no obvious intent to reverse, vary, or nullify the orders to which Mr. Croy was subject.

[49] I dismiss this ground as a basis to strike or summarily dismiss the action.

E. Prevented Action Under *Public Lands Act*

[50] Alberta relies on s 59.22 of the *Public Lands Act*, RSA 2000, c P-40 ("*PLA*") to argue that this section bars the Plaintiffs' claims entirely, including under trespass or negligence. Section 59.22 of the *PLA* states:

> 59.22 No action lies and no proceeding may be brought against the Crown, the Minister, the director or an officer or any person acting under the direction of the Crown, the Minister, the director or an officer for damages resulting from any order or decision under this Act or the regulations made or taken in good faith by the Crown, the Minister, the director, the officer or the person.

[51] I am unaware of any decisions that have considered this provision, and am unaware of a court's assessment of a statutory Crown immunity provision in the context of asserted s 35 related rights under the Constitution. There is authority for the proposition that provincial laws cannot (with some exceptions) interfere with Treaty rights (***R v Sparrow***, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075), and for the idea that Crown immunity provisions cannot prevent constitutional review (for example, ***Nelles v Ontario***, 1989 CanLII 77(SCC) and ***Prete v Ontario (Attorney-General)***, 1993 CanLII 3386 (ONCA)), leaving open the issue of whether the *PLA* can immunize Aberta from Treaty rights claims.

[52] There is dispute as to whether Alberta acted in good faith or not in destroying the Cabin, with Alberta pointing out that they provided ample notice to clear the Cabin and explored other options for the Cabin's use. The Plaintiffs argue that Alberta was well aware of at least Ms. Croy's claim of a Sundown cabin and Alberta's timing and efforts do not displace their failure to fully inquire into the Sundown claim. If the *PLA* can immunize Alberta from claims like those made here the assessment of Alberta's actions and whether they were in good faith should be part of a trial as opposed to affidavit evidence in a summary dismissal application.

[53] Given the lack of clarity in the law regarding the extent to which the Crown can claim immunity in the face of a Treaty and Aboriginal claim, and the factual determinations that cannot be made on the face of the materials, I do not find this is an appropriate basis on which to dismiss the Plaintiffs' claims.

F. Sundown Cabin

[54] The central issue in the claim is whether or not the Cabin was a Sundown cabin at all. For the dismissal application's success on this ground, I would need to find there is no genuine issue for trial regarding whether the Cabin could qualify as a Sundown cabin.

[55] Although the Plaintiffs claim that Alberta's argument is based on their own policy regarding Sundown cabins, which is reflected in Alberta's Amended Application, I do not agree. Alberta's arguments are largely based on the Supreme Court's findings in the ***Sundown*** case.

[56] Alberta argues that the Cabin is not a Sundown cabin because the Plaintiffs do not assert in their claim that their First Nations' traditional practices included expeditionary hunting or fishing which required the use of shelters incidental to that practice, because the Cabin's location was nowhere near the traditional hunting and fishing territories of the Plaintiffs' First Nations, because the Cabin was built and used as a commercial fishing and family cabin as opposed to a

Sundown cabin used by various members of the same First Nation, and because its structure does not conform to the appropriate shelter for a Sundown cabin as the SCC observed in ***Sundown***.

[57] I consider each of these arguments.

1. Traditional Practices including Expeditionary Hunting or Fishing Using Shelters

[58] Alberta argues that the Plaintiffs do not plead and there is no evidence to support the notions that the relevant First Nations were engaged in traditional practices of expeditionary hunting and fishing that used shelters.

[59] The Plaintiffs point to affidavits from two of the Plaintiffs (Ms. Croy and Mr. Beaverbones) and another person (Mr. Strawberry) to support their assertions that the practices of the O'Chiese First Nation included expeditionary fishing and having shelters to support those endeavours.

[60] Alberta accurately notes there is no evidence regarding the fishing and sheltering practices of the First Nations from the time the Treaties were agreed to. There is evidence regarding people's memories and practices during their lifetimes. The SCC in ***Sundown*** emphasized that, to determine what is reasonably incidental to a Treaty right to hunt, examine the "historical and contemporary practice of that specific Treaty right by the aboriginal group in question to see how the Treaty right has been and continues to be exercised" (para 30).

[61] However, the SCC is not overly prescriptive in ***Sundown*** regarding the quantity or quality of the evidence to establish historical practices. In the ***Sundown*** trial level decision, which is referred to in all three levels of appeal, the main historical information was provided through an elder of Mr. Sundown's First Nation, who testified regarding the practices that stretched back as far as he remembered (see, for example, ***R v Sundown***, 1997 CanLII 9743 (SK CA), paras 5-10). There was not an abundance of historical evidence to establish that Mr. Sundown's First Nation historically engaged in expeditionary hunting and fishing, and used shelters incidental to that practice that was also their Treaty right.

[62] It is true that respondents are expected to put their "best foot forward" in responding to summary dismissal applications, and the Plaintiffs may be criticized for not including more evidence of the traditions of their First Nations with respect to hunting, fishing, and shelters. However, I note that this specific allegation – that there was insufficient pleading and evidence regarding historical practice – was not part of the Amended Application for dismissal. Alberta advanced the application emphasizing other grounds, and made no mention of the absence of a historical record to ground the Treaty or Aboriginal right until argument. The Plaintiffs must put their best foot forward, but that is in response to the application. They are not required to lead all the evidence on which they would rely at trial.

[63] Accordingly, though I agree with Alberta that the assertions and evidence to establish that expeditionary hunting and fishing were parts of the historical practices of the Plaintiffs' First Nations at the time Treaties were made are not readily apparent, I cannot conclude that it would not be possible to establish this at trial. I am treating the evidence lead by the Plaintiffs in this regard generously, and conclude that I cannot make the necessary findings of fact on which to conclude that the Plaintiffs could not establish their right to have a Sundown cabin on the basis of historical expeditionary hunting and fishing.

2. Location of the Cabin outside First Nations' Territory

[64] In ***Sundown***, the evidence established that the relevant First Nation had historically engaged in expeditionary hunting and fishing on the same lands on which Mr. Sundown built a cabin.

[65] In this case, there is no evidence that the Plaintiffs' First Nations historically hunted or fished on the same lands as where the Cabin was near Bistcho Lake. The Plaintiffs' First Nations are nowhere near Bistcho Lake.

[66] Alberta's argument rests in part on the suggestion that the SCC set out a test for Sundown cabins requiring that it be communal and incidental to protected rights to hunt and fish on lands where a First Nation traditionally engaged in expeditionary hunting and fishing.

[67] In response, the Plaintiffs note that while the ***Sundown*** decision stressed that Treaty rights are specific in nature and courts must consider where and how hunting and fishing was done by the First Nation historically, the SCC did not require Sundown cabins to be built or used only in a First Nation's traditional and ongoing territory.

[68] The Plaintiffs also note that Sundown cabins and cases involving Treaty rights account for the historical and traditional modes of hunting and fishing, while allowing for modern developments and unforeseen alterations in the right.

[69] The Plaintiffs argue a Sundown cabin can be built and used on unoccupied Crown lands, in a manner that has been modified by the NRTA and where the First Nations and members have the right to hunt and fish. They argue the NRTA modified Treaty 6 by extinguishing the right to hunt commercially and by expanding the geographical area from the Treaty area to within the provincial boundaries of Alberta.

[70] Some cases have concluded that it is possible for a NRTA Treaty rights holder to exercise those rights in a different Treaty area, sometimes even in a different NRTA province. In ***R v Pierone***, 2018 SKCA 30, leave to appeal to SCC refused, 38182 (8 November 2018), the Saskatchewan Court of Appeal reinstated an acquittal for an illegal hunting charge. The Court held that, pursuant to the NRTA, Mr. Pierone could not be convicted for exercising his Treaty 5 hunting rights on Treaty 4 lands, if the lands in question were not being put to visible use that was incompatible with hunting (citing ***R v Badger***, 1996 CanLII 236 (SCC), [1996] 1 SCR 771).

[71] I conclude there is a triable issue with respect to whether or not the Plaintiffs can exercise their Treaty rights outside their traditional hunting and fishing locations including in a different Treaty territory.

3. Reason for Cabin's Establishment

[72] Alberta argues that the Cabin was built for a commercial fishing operation, its structure and contents reflected that purpose, and after commercial fishing ended in the province, the Cabin was a family cabin available only to friends and family of the Croys.

[73] The Plaintiffs argue that the ***Sundown*** decision does not require exclusivity of use, or alternatively that those asserting Treaty rights must only ensure that the exercise of the Treaty right is not incompatible with the Crown's use of the Cabin as a commercial fishing cabin. Further, the Plaintiffs argue that, although the initial disposition required Mr. Croy to statutorily declare not to use the Cabin for anything other than commercial fishing, no such declaration was subsequently required and Mr. Croy engaged in none of the forbidden uses in the disposition.

[74] Interestingly, in the first appeal decision of ***Sundown***, in ***R v Sundown***, 1995 CanLII 6057 (SKQB), the Court noted that, originally, the Sundown family used an abandoned cabin that was built by a third party. When that cabin fell into disrepair after 17 years of use by the Sundowns, several members of the Sundown family built the cabin that was the subject of Mr. Sundown's charge because he cut down a large number of trees in a provincial park to build the cabin. Nothing was noted about the use or origin of the original cabin. Additionally, there is little in the way of evidence in ***Sundown*** regarding how many people from Mr. Sundown's First Nation used or were aware of the cabin. The evidence was that it was mostly used by Mr. Sundown and his family.

[75] I conclude that the origin of the Cabin does not determine whether the Plaintiffs could establish their right to safeguard the Cabin as incidental to their Treaty rights to hunt and fish.

4. Appropriate Structure for a Sundown Cabin

[76] Alberta claims that the Cabin and storage shed with aluminum boats, skidoo, ladder, jerry cans, and other commercial fishing equipment demonstrate this is not the kind of Sundown structure sanctioned as incidental to the Treaty right to hunt and fish. In ***Sundown*** there is a brief reference to the evolution of shelters starting from a moss-covered lean-to, and the SCC finds that the log cabin is appropriate. However, I do not consider this brief description of an appropriate shelter in ***Sundown*** to create a particular requirement for the structure of other Sundown cabins. I conclude this is not a basis on which to dismiss the Plaintiffs' claim.

G. Honour of the Crown, Fiduciary Duty, and Duty to Consult

[77] The Plaintiffs' claim for damages rests in part on their assertion that Alberta was under obligations to conduct itself as a fiduciary and with honour with respect to the Plaintiffs' Treaty claims, and that the Crown breached those obligations. They assert on the basis of authorities interpreting Aboriginal rights and claims that the honour of the Crown is a guiding principle of reconciliation, and though not a cause of action itself, can be engaged when the Crown is discharging its obligations.

[78] Alberta argues that the honour of the Crown is not engaged because there is no established Treaty interest in the Cabin, the honour of the Crown is not a stand alone cause of action, and individuals asserting personal interests do not engage the honour of the Crown. They also argue that fiduciary duties may arise when the honour of the Crown is engaged, and without that engagement there is no fiduciary obligation.

[79] Given my findings with respect to triable issues on whether or not the Cabin is a Sundown cabin, it would be problematic to dismiss on the basis of these arguments. If the Cabin is established as a Sundown cabin, it may be that its destruction was a breach of the Crown's obligations.

[80] Additionally, while I accept Alberta's position that they are not relying only on their own Sundown policy to argue that the Plaintiffs' claims do not qualify, if the Plaintiffs are able to establish that the Cabin was, in fact, a Sundown cabin, there may be additional issues at trial regarding Alberta's implementation of the policy with respect to Ms. Croy.

[81] Accordingly, I am not prepared to accept in a summary dismissal action that no individuals or group of individuals are capable of raising these arguments, or that the Plaintiffs have no viable claims under these principles.

H. Damages and Declarations

[82] Alberta characterizes the Plaintiffs' claims as being purely personal claims for damages resulting from the destruction of the Cabin. However, no where before me is there an assertion that the Plaintiffs, including Ms. Croy, sought monies from Alberta prior to the Cabin's destruction. Ms. Croy sought the continuation of the Cabin and the use of it. Although the claim seeks amounts for the value of the Cabin and related materials (some of which are still in storage with Alberta), the Plaintiffs also seek declaratory relief so the relief claimed cannot be characterized as for personal damages only.

[83] In ***Wesley***, the Court of Appeal considered an appeal and cross-appeal of the mixed results of a dismissal application. The chambers judge was upheld in the continuation of declaratory relief in a case where the Plaintiffs sought extensive declarations alleging breaches of treaty, unextinguished Aboriginal title, and other Aboriginal rights. In the split decision, the majority upheld the continuation of the claim seeking declaratory relief (see paras 213-234).

[84] I therefore reject the suggestion from Alberta that this matter is solely about damages sought personally.

[85] Given my findings above about the outstanding issues on whether and how individuals, with or without the approval or assignment of their First Nation, may advance Treaty claims, there are also outstanding issues regarding the kinds of remedies available if any claim were to succeed.

V. Conclusion

[86] Alberta's application to strike or dismiss the Plaintiff's claims is dismissed. Costs are payable to the Plaintiffs. If the parties cannot agree on costs, they can submit argument on costs not exceeding five pages within 60 days.

[87] I thank counsel for their thorough and excellent submissions.

Heard on the 25th day of June, 2025.
Dated at the City of Edmonton, Alberta this 18th day of February, 2026.

K.A. McLeod
J.C.K.B.A.

Appearances:

P. Jonathan Faulds, K.C. and Elisa Carbonaro
for the Applicant

Glenn K. Epp, Inez Agovic and Philippe Johnson
for the Respondent