JERRY ALLEN WHYNOT and BRYSON JOSEPH WHYNOT (Appellants) V. THE QUEEN in right of NOVA SCOTIA (Respondent)

[Indexed as: **Whynot V. Nova Scotia**]

Nova Scotia Supreme Court, Appeal Division, Jones, Macdonald and Matthews JJ.A., April 7, 1988

D.B. Clarke, for the appellants
W.M. Wilson, for the respondent

The appellants, two Micmac Indians, shot and killed a deer. They had no licence or tags. The carcass was seized by the R.C.M.P. but no charges were laid. The appellants obtained an order for recovery of the carcass.

The appellants then sought an order against the province declaring that the restrictions on hunting contained in the *Crown Lands Act,* S.N.S. 1983, c.5 and the *Wildlife Act,* S.N.S. 1987, c.13 did not apply to them. They relied on their treaty rights. Neither piece of legislation had been in force when the game was seized.

The province applied for an order that the plaintiffs provide particulars with respect to the rights they claimed were being violated. Alternatively, the province sought an order dismissing the action.

The trial court dismissed the plaintiffs' action. They appealed.

Held: Appeal dismissed.

1. A declaration that provincial hunting laws do not apply to treaty Indians will not be granted where there are no charges pending or threatened under provincial law. The dispute in issue cannot be merely hypothetical, there must be a factual basis on which to base declaratory relief.

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JONES J.A.: This is an appeal from a decision of Mr. Justice Nunn striking out the appellants' statement of claim for failing to disclose a cause of action. The originating notice and statement of claim was issued on June 5, 1987, and was amended on July 21, 1987. The statement of claim alleged that the appellants are residents of Milton, Queens County and are Micmac Indians. It also states that the appellants went hunting on October 11, 1986, in the vicinity of Milton where they shot and killed a deer. When the appellants returned to Milton, they were questioned about the deer by an officer of the R.C.M. Police and they advised him that they did not have a licence or tags and were acting in reliance upon their Micmac hunting rights. They were advised that they were not being charged under the *Lands and Forests Act*, R.S.N.S. 1967, c.163, however, the carcass was seized. No charges were laid under the *Lands and Forests Act*.

On November 6, 1986, the appellants commenced an action in the Supreme Court for the return of the carcass. On November 10, 1986, they obtained a recovery order and the carcass was returned. Paragraphs 11 and 12 of the statement of claim provide:

> 11. The plaintiffs are members of the Micmac Nation, which has, from time immemorial, engaged in hunting in the Gespogoitnag district.
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> 12. The right of the plaintiffs to hunt in a safe manner on forested Crown land in the Gespogoitnag district has been contested by the Province of Nova Scotia. The plaintiffs, therefore, based upon existing treaties between the Micmac Nation and Her Majesty the Queen, request an Order from this Honourable Court declaring that the restrictions imposed on safe game hunting by the *Crown Lands Act,* S.N.S. 1987, *c.5,* as amended, including sections 2, 4, 5, 24, 25, 26 and 27 or by the *Wildlife Act,* S.N.S. 1987, c.13 as amended, do not apply to the plaintiffs while on forested Crown land in, at a minimum, the traditional Micmac district 'Gespogoitnag,' comprising at a minimum, the present day Counties of Annapolis, Digby, Yarmouth, Queens, Kings and the Municipal District of Lunenburg, in the Province of Nova Scotia, together with costs.

In reply for a demand for particulars the appellants stated:

> The plaintiffs rely upon all treaties entered into between the Micmacs, or their agents, with

> the British Crown including, but not so as to limit the generality of the foregoing, treaties entered into 1725, 1726, 1728, 1749, 1751, 1752, 1753, 1760 and 1761.

Apart from that, there was very little information in the reply. The respondent applied for an order pursuant to rule 14.24 of the *Civil Procedure Rules* requiring that the appellants comply with the demand for particulars or in the alternative an order under rule 14.25 dismissing the originating notice.

The matter was heard before Mr. Justice Nunn. He dismissed the action as the statement of claim did not show a cause of action. He concluded by saying:

> In any event, I am satisfied in this case that this is not one of those cases where the parties should be allowed to continue on for declaratory judgment where no individual rights of the plaintiffs have been violated.
>
> I do not think that I need say any more in the circumstances of this case. I realize the situation regarding treaty rights as a difficult one with many unanswered questions, but I think there has to be a proper factual basis upon which the action rests, in other words, a good cause of action, before a declaration can be made. As well, even if a cause of action did exist any declaration made would necessarily be tailored to suit the particular factual situation existing rather than be a broad general declaration attempting to define intangible rights which are the subject of concern right across this country. I dismiss the action for the reasons given.

With respect I agree with the learned trial judge. The appellants brought an action based on the particular facts and obtained relief. That apparently concluded the original action. In fact, the original seizure was under the *Lands and Forests Act.* The present action is for a declaration regarding the *Crown Lands Act,* S.N.S. 1987, c.5 and the *Wildlife Act,* S.N.S. 1987, c.13, which were not in force when the game was seized.

In *Operation Dismantle Inc. et al.* v. *Canada et al.* (1985), 59 N.R. 1, 18 D.L.R. (4th) 481, Dickson J., in delivering the majority judgment in the Supreme Court of Canada stated at p.492 [16 N.R.]:

> The reluctance of courts to provide remedies where the casual link between an action and future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Fager, *The Declaratory Judgment Action* (1971), at p.5:
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> > The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
> >
> > Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.
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> Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts" *(The Law of Declaratory Judgments* (1978), at p.179).
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> None of this is to deny the preventative role of the declaratory judgment. As Madam Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments,* 2nd ed. (1941), at p.27, states that:
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> > . . . no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty....
>
> Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this court stated in *Solosky* v. *The Queen* (1979), 105 D.L.R. (3d) 745, 50 C.C.C.(2d) 495, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative.
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> In *Solosky,* supra, one of the questions was whether an order by a director of a prison to

> censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The court made it clear (at p.754 D.L.R., p.832 S.C.R.), however, "that a declaration will not normally be granted when the dispute is over and has become academic, *or where the dispute has yet to arise and may not arise."*

Those comments apply in this case. In my opinion the pleadings do not contain sufficient precision or a factual basis on which to base declaratory relief. I would dismiss the appeal but, in the circumstances, without costs.