

REGINA (Appellant) v. ERNEST FRANCIS OMINAYAK (Respondent)

[Indexed as: R. v. Ominayak]

Alberta Court of Queen's Bench, Deyell J., November 12, 1988

M.A. Unsworth, for the Crown, appellant
L.T. Mandamin, for the accused, respondent

The accused treaty Indian was charged with hunting without a licence contrary to s.26(1) of the *Wildlife Act*, S.A. 1984, c.W-9.1. The accused shot and killed a cow moose and its calf on private land. The land which was cleared and farmed was neither posted nor fenced. The accused did not have the consent of the owner to hunt on the land. At trial the accused was acquitted on the basis that treaty Indians are entitled to hunt on private land. The Crown appealed.

Held: Appeal allowed.

1. Pursuant to the Alberta Natural Resources Transfer Agreement Indians have the right to hunt for food "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." There is, however, no law which permits Indians, or anyone else, the right to hunt on unposted private land. Indians do not have a right of access to private lands.

Editor's Note: An appeal by the accused was dismissed by the Alberta Court of Appeal, reported *infra* at p. 177.

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DEYELL J. (orally): This appeal from the judgment of His Honour Judge D.E. Patterson was heard in Grande Prairie on October 3, 1988.

The appeal was adjourned to Edmonton, November 21, 1988, at the request of counsel for the respondent.

On November 21, 1987, the respondent shot and killed a cow moose and its calf on private land. The field was cleared and farmed. The land was neither posted nor fenced. The respondent did not have the owner's consent to hunt on the land.

The respondent was charged with contravening s.26(1) of the *Wildlife Act*, S.A. 1984, c.W-9.1, that is, hunting wildlife without a licence.

On June 10, 1988, the court dismissed the violation. In essence the learned trial judge held that treaty Indians were entitled to hunt on private land.

Treaty Indians operate on an entirely different set of rules with relation to hunting and fishing than those governing other citizens of the community.

Under the terms of the *Natural Resources Transfer Agreement* the Indians of Alberta (I stress Alberta) have the right to hunt for food "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

There is no law which permits Indians, or anyone else, the right to hunt on unposted private land. Indians do not have the right of access to private lands.

I therefore grant the Crown's appeal.