

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

[Indexed as: R. v. Ominayak]

Alberta Court of Appeal, McClung, Foisy and Irving JJ.A., September 7, 1990

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

The appellant treaty Indian appealed from the judgment of the Court of Queen's Bench (reported *supra* at p.175) allowing an appeal by the Crown from the decision of the trial judge acquitting the appellant on a charge of 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.

Held: Appeal dismissed.

- 1. Since the appellant did not have the owner's consent to enter his land to hunt, the lands were not those "to which he may have a right of access" pursuant to the Alberta Natural Resources Transfer Agreement. By the property laws of Alberta including the *Petty Trespass Act*, the appellant by not having obtained the owner's consent was trespassing.

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BY THE COURT: We regard this case as indistinguishable from *R. v. Cardinal* (1977), 36 C.C.C. (2d) 369 (C.A.).

The appellant has called in aid s.12 of the 1930 Alberta Natural Resources Transfer Agreement and contends that while he was hunting on unoccupied but private land he had, as an Indian, a right of access to those lands. But he did not have the owner's consent to enter his land to hunt. That being so the lands were not those "to which he may have a right of access" pursuant to the treaty's exceptions. That was the ratio of *Cardinal* and we are bound by it. While the offences differ, we see the issues in this case and those debated in *Cardinal* as inseparable.

In *Cardinal* Clement J.A., said at p.372:

But here again the provisions of para. 12 of the Alberta Natural Resources Transfer Act are invoked on behalf of Cardinal: for treaty Indians hunting for food, the test is not whether the place at which hunting occurred was prescribed by the Regulations, but rather was it a place to which treaty Indians may have had a right of access? Whether such a right exists must be determined in the light of the laws of the Province.

By the property laws of Alberta, including the *Petty Trespass Act*, Ominayak, without the consent of the owner, was in trespass. In our view *Cardinal* applies since the treaty defence does not engage. We must dismiss the appeal.