Citation: *R. v. Thomas*, 2015 YKTC 48

Date: 20151217
Docket: 13-05249A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

CLAYTON ROBERT THOMAS

Appearances:
Mark Radke — Counsel for the Crown
Clayton Robert Thomas — Appearing on his own behalf and assisted by Kusta

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): Clayton Thomas of Whitehorse, Yukon, appears before the Court on three charges under the *Wildlife Act,* RSY 2002, c.21. Mr. Thomas maintains that as a Tahla person, he has the right to hunt wolves at night in the Whitehorse area and to trade the fur commercially.

[2] The Agreed Statement of Facts was submitted as Exhibit 1. It consists of three pages of writing, four photographs, two maps, and reads as follows:

> Clayton THOMAS is a member of the Tahltan First Nation.
> His Tahltan name is Nengonath.

He obtained a Yukon resident hunting licence on April 11, 2013 which indicates that he is a Tahltan First Nations person.

On April 17, 2013, CO GRABOWSKI received a complaint from and spoke to Steve McGRATH who told him that wolves had killed his pet dog on April 14th at the bottom of his driveway at [redacted] in the Mount Sima Subdivision in Whitehorse, Yukon. A photo of Mr. McGrath's driveway is attached as Tab A.

An aerial map of his residence including marks made by Clayton THOMAS indicating where he later killed two wolves is attached as Tab B.

On April 24, 2013, Conservation Officer (CO) Ryan HENNINGS received information from a confidential informant that Clayton THOMAS who lives in the Mount Sima Subdivision had taken it upon himself to remove the wolves from the area.

The informant said that THOMAS shot and killed a black wolf at night at the end of the driveway where McGRATH's dog was killed. The informant said that Thomas had killed two wolves and had texted pictures of the two wolves.

Pictures of the two wolves obtained from Mr. THOMAS' cell phone and sent to others by him are found at Tab C.

Daniela MARTINSON, Client Services Representative with Environment Yukon, and a person who typically receives public complaints, advised that there had been no reports of other dogs being killed in Mount Sima Subdivision, nor had anyone reported killing any wolves in defence of life or property.

Although COs received calls from people asking about wolves in the Mount Sima area, COs did not receive any other reports of dogs being killed in the area or any further complaints with respect to wolves there.

On April 26,2013, CO KOSS-YOUNG and CO GIBSON met with a second confidential informant who stated that they had personally seen a picture of THOMAS holding a grey wolf carcass and that THOMAS had texted this photograph around. The informant stated that THOMAS shot one wolf on April 17, 2013 at the bottom of the driveway near where the dog was killed and at approximately 2300 hours on that

day five or six gun shots in close sequence were heard in that area. The informant advised that the second wolf was shot April 22, 2013 and that they heard from someone else that gunshots were heard at approximately 2400 hours that day by someone living near the end of Talus Drive. The informant stated that the wolves are in THOMAS' shop unless he had moved them.

On May 1, 2013, CO KOSS-YOUNG obtained a search warrant to search and seize evidence from THOMAS's residence, outbuildings and vehicle located at [redated] in the Mount Sima Subdivision. The warrant was signed by Judge Richard THOMPSON authorizing the search between May 3 and 7, 2013. The Information to obtain the warrant did not indicate anything with respect to Mr. THOMAS' aboriginal status.

On May 3, 2013 at 1400 hours CO KOSS-YOUNG, CO HENNINGS, CO BAKICA and CO KNUTSON attended THOMAS's residence and executed the search warrant.

Mr. THOMAS, his wife Mia and his mother Gerri THOMAS were present when the search happened and Mr. THOMAS and his wife were very upset by the way in which the search was conducted. Officers refused to remove their boots and searched in areas which Mr. THOMAS felt were private and not likely to reveal any evidence related to wolf kills.

Forty-seven items were seized by CO's including five wolf hides, one set of sheep horns, firearms, ammunition, cell phones and laptop computers. A number of other furbearer hides and wildlife parts were also seized.

Mr. THOMAS's wife Mia later went to Renewable Resources offices to retrieve some of the items seized from the home and was further upset when CO's read her her rights and attempted to question her.

On May 10, 2013, THOMAS was interviewed by British Columbia (BC) CO Drew MILNE who was conducting an investigation into THOMAS's trapping activities in BC. THOMAS stated that the five wolves, four wolverine, one lynx and six marten that were seized from him by Yukon CO's were all taken in BC by him this past year under his subsistence rights. THOMAS stated that the elk and mule deer were also harvested by him in BC under his subsistence rights.

THOMAS provided a status card stating that he was a Tahltan beneficiary with Certificate of Indian Status card [redacted]. THOMAS signed an "Affidavit of Origin of Wildlife" form declaring that the furs seized (other than the five wolves) and the elk and mule deer parts seized were harvested under his subsistence rights in BC. These items were then returned to THOMAS.

Mr. THOMAS admits the additional following facts:

He shot two wolves in the Mount Sima Subdivision. This is a residential neighbourhood.

A map of the area is attached as Tab D. The circle represents a radius of one kilometer from Steve McGrath's driveway. On April 17th and 23rd, 2013, there were a number of occupied residences and also some unoccupied lots within this area.

Mr. Thomas did not have permission from the people living in the area shown to hunt within one kilometer of their homes.

Wolves were not in season at that time.

He shot the first wolf, which he described as a big black skinny one, on April 17th on Steve McGrath's driveway [redacted] at night when it was dark. He shot two or three times with one of his CZ rifles.

On April 23rd he went out late at night and shot the smaller grey wolf when it was dark against a bank above Steve McGrath's driveway. He shot four or five times with one of his CZ rifles. The area where he shot the wolves is shown at Tab E.

Mr. THOMAS advised COs that he was concerned that the presence of wolves posed a danger to his neighbourhood, although neither of the wolves was directly threatening the life or property of Mr. THOMAS or others at the time they were shot.

He was using both soft point and full metal jacket ammunition when shooting the wolves.

Mr. THOMAS recalled that even though it was dark, there was some light available when he was shooting the wolves, which may have come from his truck headlights and there

was an illuminated street light within 30 feet of where he shot the wolves.

He did not report the killing of the wolves to a Conservation Officer.

Mr. THOMAS had a total of seven wolves in his possession as of April 23rd 2013 including the two shot at Mount Sima and five taken under his subsistence rights in B.C.

Between April 6th and April 23rd 2013, Mr. THOMAS made a deal with a friend to have the five wolves taken under his subsistence rights and later the additional two wolves killed by him in Mount Sima claimed by the friend as having been trapped by the friend on his Yukon trapline so that the wolves could be sealed.

Once sealed, the friend would collect the bonus of $200.00 per hide paid out by the Yukon Outfitters' Association as part of an incentive programme they were running and this money would be split by the two friends 50-50.

The plan fell through in when the other individual found out that the seals required to collect the bonus on the wolves were no longer available for that year. Mr. THOMAS and his friend then agreed to obtain the seals and carry out the plan the following season. That transaction never occurred.

The friend was also charged with the offence of trafficking in wildlife.

On May 15, 2013, THOMAS attended 10 Burns and surrendered the dried black wolf hide and the frozen grey wolf hide from the animals he had killed in Mount Sima to CO KOSS-YOUNG. THOMAS also signed a "Consent to Search" form at this time authorizing the search of his phone which had been seized by COs during the search.

On May 24, 2013, CO KOSS-YOUNG sent the two CZ 858 Tactical-2V 7.62x39 rifles (Items 39 & 40), three detachable 7.62x39 magazines (Items 35 & 36), one empty 7.62x39 rifle cartridge (Item 50) and one spent full metal jacket bullet (Item 51) to the FAI Laboratory West for forensic examination and comparisons of the recovered bullet and casing with the two firearms.

On July 8,2013, David R. CANNING from FAI Laboratory (West) sent a Laboratory Report to CO KOSS-YOUNG

> advising that the requested forensic work had been completed and that the exhibits were being returned to CO KOSS-YOUNG. The report concluded that the empty 7.62x39 rifle cartridge (Item 50) and the spent full metal jacket bullet that were found at [redacted] by CO KOSS-YOUNG were fired from the CZ 858 Tactical-2V 7.62x39 rifle (Item 40).
>
> On October 21, 2013, CO KOSS-YOUNG completed and swore an Information against Clayton THOMAS for the charge of hunting when not permitted, contrary to Section 6 of the *Wildlife Act* as well as eight other counts under the *Wildlife Act* and one under the *Wildlife Regulations*.
>
> Clayton THOMAS, Nengonath, asserts that his actions with respect to both wolves were in accordance with his aboriginal rights as a Tahltan First Nations person.

[3] As mentioned, a 10 count Information was sworn on October 21, 2013. The 10 charges under the *Wildlife Act* or *Regulations* were ultimately reduced to three charges: counts 1, 2, and 9.

> COUNT 1: between April 17, 2013 and April 23, 2013, at or near Whitehorse, Yukon, hunt wildlife, to wit: wolf, when the hunting of that wildlife by him was not permitted, contrary to section 6 of the *Wildlife Act*.
>
> COUNT 2: between April 17, 2013 and April 23, 2013, at or near Whitehorse, Yukon, being a person who is in possession of a firearm for the purposes of hunting or trapping, did discharge or handle the firearm without due care and attention or without reasonable consideration of people or property, contrary to subsection 10(1) of the *Wildlife Act*.
>
> COUNT 9: between April 6, 2013 and April 23, 2013, at or near Whitehorse, Yukon, traffic in wildlife contrary to subsection 102(1) of the *Wildlife Act*.

[4] As to Count 2, it is important that both s. 10(1) and s. 10(2)(c) and (d) be considered.

[5] Section 10(1):

> A person who is in possession of a firearm for the purpose of hunting or trapping shall not discharge or handle the firearm, or cause it to be discharged or handled, without due care and attention or without reasonable consideration of people or property.

[6] Section 10(2):

> A person shall be considered to have acted without due care and attention or without reasonable consideration of people or property under subsection (1) if the person
>
> ...
>
> (c) discharges a firearm in the dark;
>
> ...
>
> (e) discharges a firearm within one kilometre of a building which is a residence, whether or not the occupants are present in the building at the time the firearm is discharged, unless the person has the permission of the occupants to do so.

[7] As to Count 1, s. 6 reads as follows:

> No person shall hunt or trap a species or type of wildlife at any time in any area of the Yukon unless the hunting or trapping by that person of that species or type of wildlife at that time in that area is permitted under this Act.

[8] As to Count 9, s. 102(1):

> A person shall not traffic in wildlife or possess wildlife for the purpose of trafficking, except under the authority of a licence or permit and in accordance with this Act.

[9] The *Wildlife Act* defines "traffic" as follows:

> …to buy, sell, trade or distribute for gain or consideration, or to offer to do so…

[10] I would also like to refer to Part 3 of the *Wildlife Act*, s. 86(1), under the title "Defence of life":

> Subject to subsection (2), a person may kill wildlife in defence of his or her life or the life of another person if
>
> > (a) there is imminent or immediate threat of grievous bodily harm; and
> >
> > (b) all other practical means of averting the threat of harm have been exhausted.

[11] Section 87(1), under the title "Defence of property":

> Subject to subsection (2), a person may kill wildlife in defence of property if
>
> > (a) there is imminent or immediate threat of irrecoverable and substantial damage to property; and
> >
> > (b) all other practical means of averting the threat of damage have been exhausted.

[12] Section 132, under the title "Dangerous wildlife":

> Despite any other provision of this Act, conservation officers or wildlife technicians may hunt or trap at any time and at any place wildlife that they believe, on reasonable grounds, is dangerous, destructive, wounded or diseased.

[13] That is the legislative framework.

[14] Clayton Thomas' great-grandfather was Shuyak. The defendant's Aboriginal name is Nengonath. His uncle, Kusta, represented him at this trial. Kusta is Yehass of his house, Tahlaglodena. "Yehass" means a leader who is the keeper of knowledge. He has been Yehass since 1995 and will teach those who want to learn.

[15] This past year, we have learned and benefitted from Kusta and what he has taught us. Kusta, very capably and eloquently, gave a broad oral history of the Tahla right from “our root”. He explained to us about the Creator flooding the earth, his people building rafts and following a large eagle to a new land in north-central British Columbia, not all that far from Dease Lake.

[16] For the purposes of this hearing, I will not be reviewing all the details of his substantial historical evidence. I would state, though, that it is fascinating and any researcher in the future would be well advised to carefully review the transcript of the *viva voce* evidence of this entire trial.

[17] Kusta, an honourable gentlemen, put forward the history as best he could based on oral histories presented to him and what he has researched. Kusta sincerely and honestly addressed the Court from his heart and with good head knowledge. Kusta imparted considerable information about the spirituality, governance, lifestyle, hunting, trapping, fishing, culture, traditions, struggles, and, yes, wars of his people. The society was well-developed and organized.

[18] I am not persuaded, though, that there were 600,000 Tahla almost 200 years ago. This is an aside and it has no bearing on the case.

[19] Robert Campbell, an explorer and fur trader, wrote in his diary of what he observed on July 23, 1833:

> From the top of a hill we caught our first glimpse of the immense camp of which we had heard so much, and indeed the description given us was not exaggerated. Such a concourse of Indians I had never before seen assembled.

[20] It is highly likely that there were more nations there than just Tahla. In any event, it has not been proven that the six houses of the Tahla nation had a population there of over half a million people.

[21] Skookum Jim will be forever famous as a founder of the Klondike Gold Rush. He was the first cousin of Shuyak. In their matrilineal society, he was clearly a Tahla man. The Tahla leaders sent him up to Dawson City, Yukon, to at least help rid the Stikine River area of all those Americans who had been searching and finding gold in the Tahla territory. There is no question but that Skookum Jim and countless other Tahla men travelled extensively throughout the North, including B.C., Yukon, Northwest Territories, and Alberta.

[22] It is not outside the realm of possibility that despite his wealth from gold, Skookum Jim and his party would have hunted and fished. But this in no way substantiates any Tahla rights to hunt and fish throughout the Yukon. He was here primarily for gold and it was well after 1833, time of the first European contact with the Tahla people.

[23] I accept the evidence of Kusta and the Crown's expert, Adrian Clark, an ethnohistorian who has done extensive research into the Tahla First Nation, that they

were traders. Especially after the Russians arrived in the 1700s, there was a good, steady west to east trade, and vice versa, between the coastal Tlingit, the Tahltan, and the Kaska.

[24] While Kusta asserted that there was regular north-south trade as well, I am not satisfied of regular pre-contact trade, north-south, on a balance of probabilities. Even though there may have been occasional trading with the Kaska as far east and north as Frances Lake, Yukon, it was not a practice, custom, or tradition integral to the distinctive culture of the Tahla people.

[25] The *Royal Proclamation of 1763* by King George III is held very dear by First Nations. It is historically significant on the subjects of Aboriginal people living under "protection, not being molested or disturbed", on "*their* hunting grounds"; "free and open" trade; and the manner in which land is transferred only with a "special leave and licence for that purpose first obtained" from the Crown. Kusta pointed out that his people are not subjects or a defeated enemy, but were allies of King George III.

[26] Much has happened since 1763 -- some good; unfortunately, some atrocious: the Stikine and Cassiar gold rushes and other gold invasions on their territory; residential schools; smallpox; and the gross indignities of politicians in the late 1800s, especially those of Dr. Duncan Campbell Scott, Minister of Indian Affairs, and even Sir John A. Macdonald himself.

[27] There has existed since 1910 the Tahltan Declaration, which is found at Exhibit 3, Tab 6.2. It is described exactly as that; the "Declaration of the Tahltan Tribe". Nothing in the Tahltan Declaration, whose main signator is that of the last Nanok, i.e.,

Grand Chief of the Tahltans, and the great-great-great-grandfather of Kusta, references the Yukon. This Declaration was made in 1910, more than a decade after the Klondike Gold Rush. The Yukon, for this reason and for other important historical reasons before then, would have been well known to the Tahla people, yet no reference to the Yukon is contained in this Declaration.

[28] The maps found in Exhibit 3, Tab 6.2 show that, at most, the traditional territory of the Tahla Nation extended into that area of the Rancheria River, a considerable distance to the east of Whitehorse.

[29] In his gentlemanly fashion, Kusta urged that cognitive dissonance be avoided. Throughout the trial Mr. Thomas was represented quite capably by Kusta, who is not a lawyer. If one were to carefully read the transcript it would be revealed that much flexibility and deference were shown to the defence. Considerable leeway was given as the Court sought the truth with a totally open mind, paying attention to the Supreme Court of Canada decision in *Mitchell v. Canada (Minister of Natural Resources),* 2001 SCC 33. I refer, in particular, to para. 34 on the aspect of admissibility and weight of evidence.

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, Delgamuukw cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to

> the judicial process, or are confined to the community whose history is being recounted.

[30] Kusta, like Grand Chief Mitchell, was especially useful because he was trained from an early age in the history of his community. Paragraph 39 addresses the aspect of the interpretation of evidence in Aboriginal rights' claims.

> ... Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

[31] As to an historical outline of the meaning of "balance of probabilities", I refer to *Whitehorse Condominium Corporation #2 v. Environmental Refuelling Systems Inc.*, 2015 YKSM 2, in which reference was made to several cases, including *Miller v. Minister of Pensions*, [1947] 2 All E. R. 372 at 374, a decision of Lord Denning:

> It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not.

[32] By virtue of the Agreed Statement of Facts, the Crown has proven beyond a reasonable doubt all the elements of the offences alleged. The burden then shifted to Mr. Thomas to prove on a balance of probabilities that as a Tahla man, he had the Aboriginal right to hunt wolves at night in the Whitehorse area, and thereafter to trade fur.

[33] The honour of the Crown, since 1763, culminated in s. 35 of the *Constitution Act,* 1982 and a significant number of rulings from the Supreme Court of Canada. Section 35(1) reads:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[34] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 43 sets out the balancing between Crown and Aboriginal nations.

> The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.
> …

[35] In addressing what the defence must establish on a balance of probabilities or on a preponderance of the evidence, *Van der Peet* gives substantial guidance. I refer to paras. 55 and 56.

> 55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
>
> 56 This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1) .

[36] The historical timeframe is set out as being prior to the arrival of the Europeans. The Court accepts the evidence of Kusta that the first significant direct contact with the Europeans was when Robert Campbell arrived in their lands in 1833. As to whether the Russians were Asians or Europeans, that burden of proof would rest on the defence.

[37] Very early on in this trial, I did bring the attention of the parties to Peter the Great sending a Danish explorer to the Pacific region in the early part of the 18th century, but it is not something of which I can take judicial notice.

[38] Mr. Clark referred to the Russians as Europeans. This was not seriously challenged, other than a reference to the Ural Mountains being a dividing line between Europe and Asia. It is a moot point, however, because there is no evidence that the Russians arrived in the traditional lands of the Tahla. It is well established, based on evidence presented, that there was significant trade west to east featuring Russian goods going to First Nations further inland with the Tahla serving as active middlemen. The Tahla did not deal with the Russians, but with the coastal Tlingit who developed a direct trading relationship with the Russians.

[39] The most important ruling to be made is on the issue of the Tahla people having an Aboriginal right to hunt in the general area of Whitehorse.

[40] The best evidence that has been put forward by the defence is that of a young man's rite of passage and how this was such an important part of becoming a man and developing spiritually. It was, yes, a key part of Tahla culture. Undoubtedly, many males wandered through parts of what is now known as B.C., Alberta, Northwest Territories, Yukon, and possibly Alaska. Shuyak, for example, made an impressive and extensive trip going as far as the Northwest Territories, travelling in Alberta and the Yukon as well.

[41] Clearly, not all males embarked on such a venture. Indeed, as Kusta told us, not everyone even went on a rite of passage journey; sometimes it would be spiritual or

involve another aspect of the culture or civilization. Kusta could offer no specific oral history that his people had hunted wolves in Whitehorse, other than the aspect of rights of passage. It is quite possible that some Tahla men, over the thousands and thousands of years that the society lived in British Columbia, may have hunted sporadically in the Whitehorse area, as they may have done in the Northwest Territories and Alberta. However, it does not come close to meeting the test as laid out in *Van der Peet*. If, indeed, any wolves were ever hunted in Whitehorse by the Tahla people, it was merely incidental or occasional to that society.

[42] Again, on the subject of rite of passage, Kusta, in his sincere and honest manner, admitted that other First Nations men would have had rites of passage and travelled extensively, living off the land and seeking spiritual fulfillment. A rite of passage by no means was limited to the Tahla, nor Aboriginal people in general. Without taking judicial notice, it seems to me that a general understanding of history of the Bible and other religious books would cause one to believe that rites of passage were widespread in terms of geography and time.

[43] Mr. Thomas (Nengonath) advised us that he has a yearning to travel and cited, as an example, his journey to the Himalayas. This sense of discovering the world is commendable but vastly different than the rite of passage outlined by Kusta as it existed prior to 1833. In this era, one arrives at the Himalayan Mountains by aircraft and some motorized ground transportation. Going up the mountains normally necessitates an experienced guide. The purposes of discovering the world may be similar but the methods are worlds apart.

[44] It must also be borne in mind that when the wolves were shot, Nengonath and his family were safe and warm inside their modern dwelling. There was no immediate or imminent danger, unlike the compelling account of how a Tahla mother saved herself and her 13-year-old daughter from a pack of about 30 wolves by bravely, patiently, and skilfully seeking out the alpha male, shooting him, and causing the others to flee. This brave woman was the grandmother of Dax Laa, whose English name is Marge Loverin.

[45] This heroic woman was born in October 1899 and was keeper of the songs and legends. Her name was Eva Carlick and she lived to the ripe old age of 95. She was born in Juneau, Alaska and, moving to Telegraph Creek, she was adopted into the Tahla nation upon marrying a Tahla man. Eva Carlick spoke at least four Aboriginal languages. Dax Laa spoke of the family spending a lot of time hunting and trapping in Sheslay, B.C., and Nahlin, B.C., both close to Telegraph Creek, the traditional homeland of the Tahla. Even Juneau, Alaska, is much closer to Telegraph Creek than to Whitehorse.

[46] Throughout the proceedings, the aspect of intermarriage between the various First Nations was discussed. The importance was to prevent inbreeding and develop stronger, healthier people. Also, it was to learn and facilitate better relations.

[47] Defence witness Leda Jules spoke about the northern peoples being nomadic, setting up shelter where they stayed, and travelling by boats and foot in the summer, and dog sleds and snowshoes in the winter. There was clearly much interaction between the Kaska and the Tahla people, which could best be described as welcoming, kind, sharing, and caring. There were considerable dealings between the Kaska, the

coastal Tlingit, and the Tahla people south into B.C. and northeast to as far, perhaps, as the Northwest Territories, and north, yes, even to Frances Lake, Yukon. Ms. Jules, as a Kaska lady, is more familiar with Kaska culture but is very well versed in Tahla traditions as well.

[48] I felt a sense of wonder and awe as I heard from the defence witnesses, particularly Mr. Fred Hasselberg -- who, as we heard earlier, is no longer with us on this earth -- whose mother was Kaska and father was a Norwegian. He was born, as he said, on the Liard River in 1930, if my math is correct. His father built a cabin for the family and his son, Fred, our witness, and spent less time living off the land because they tended to their garden, which was important to them. Nonetheless, he did some walkabouts but never hunted in the Whitehorse area. He would go to the traditional Tahla areas, met their people often in the areas of Teslin, Frances Lake, Dease River, and Lower Post. As to the pre-contact era, he relied on stories from his Kaska grandparents -- again, nothing specific or even general about Whitehorse, although it was clear that the Tahla people travelled a lot.

[49] Mr. Hasselberg was primarily helpful in terms of his expertise about nature and how there must be a balance. He spoke simply but profoundly about the control of the animal population, especially wolves, and how crucial it was for their numbers to be kept in check.

[50] I have much respect for Mr. Hasselberg and am grateful and honoured that he was so willing to share with us a year ago by telephone, despite extremely bad health.

[51] Adrian Clark, to whom I referred before, testified that for the Tahla people there is no historical evidence of any claim of traditional territory here in Whitehorse, nor any evidence of trade here in Whitehorse. I agree with him. In addition, he stated that the Aboriginal peoples were familiar with concepts, such as permission and trespass, which varied depending on which other First Nations the Tahla were dealing with. Both sides -- that is prosecution and defence -- made reference to a major war between the inland Tlingit and the Tahla, and the fact that fortunately it was averted. Mr. Clark, however, was wrong on his discussion about wolves and that Skookum Jim was not Tahla.

[52] In its submission, as throughout, the Crown maintained that hunting rights are contextual and site-specific. The Crown relies, again, on *Van der Peet* at para. 74.

> ... In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. …

[53] *Van der Peet* was decided in 1996. *R. v. Adams*, [1996] 3 S.C.R. 101 was also decided in 1996, and at para. 30 of that decision from the Supreme Court of Canada:

> ... For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

[54] *Mitchell*, a 2001 case to which I have already spoken, says the following at para. 56:

> Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land. However, as Lamer C.J. observed in *Delgamuukw*, "aboriginal rights ... fall along a spectrum with respect to their degree of connection with the land" (para. 138). In this regard, I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to more free-ranging rights, such as a general right to trade, which fall on the opposite end of the spectrum.

[55] *Adams* makes it abundantly clear that there is not a general Aboriginal right to hunt anywhere. It is site-specific. The defence has failed to satisfy me on the balance of probabilities that the Tahla ever hunted in Whitehorse and if they did, that it was an integral part of their distinctive culture.

[56] I have reviewed my notes, reread the transcript, and can find no specific reference to the Whitehorse area involving Tahla explorers, hunters, or camps, except for Skookum Jim and a woman who was buried somewhere north along the Yukon River. We have some reference outside the traditional territory in B.C. to Frances Lake; Watson Lake; Rancheria River; Atlin, B.C.; Northwest Territories; Alberta; Ross River; and perhaps even others, but nothing specific to Whitehorse. While the Tahla nation was undoubtedly nomadic -- setting up camps, exploring, following the game to be hunted -- there is nothing that comes close to meeting the specific test in *Van der Peet*. Any trips or camping in the Frances Lake or Ross River areas were only incidental or

occasional to that society. Any time spent in Whitehorse was even less occasional, if it even existed at all.

[57] Without ruling on it and merely making an observation, the hunting and fishing practices in their traditional territory, carried out for perhaps 10,000 to 20,000 years, would more closely align with the *Charter of Rights and Freedoms*, and by necessary implication and reference to the *Royal Proclamation of 1763* and the numerous Supreme Court of Canada cases on Aboriginal rights.

[58] Quite obviously no one, Aboriginal or otherwise, is entitled to trade in goods or property unlawfully obtained. Our courts operate on the legal basis of *stare decisis*, all courts in Canada are legally bound to follow the Supreme Court of Canada.

[59] Consider this, if I were to in a somewhat artificial and overly clever manner skirt around and distinguish *Van der Peet* and the cases subsequent thereto, I would not be true to my oath of office as a territorial court judge. Furthermore, I would be inviting chaos in the overall scheme of Aboriginal rights. The law does not set out to create chaos. If courts were to accept hunting rights from numerous First Nations based on rites of passage, there would be much confusion, a totally unsatisfactory system put into place, which would likely create considerable friction between Aboriginal people, make enforcement nigh impossible, and ultimately pose a risk to sensible and lawful conservation.

[60] The honour of the Crown is maintained in this ruling by observance of the Supreme Court of Canada rulings, adherence to the *Charter of Rights and Freedoms*, and the proclamation of King George III from 1763.

[61] While Nengonath and Kusta will be disappointed with the ruling, this is not a judgment which affects the fiduciary duty of the Crown to care for the Tahla people. Their hunting grounds remain intact. They are free to enjoy their culture and traditions and trade as they did before 1833.

[62] Thus, the Court registers convictions on counts 1, 2, and 9.

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LUTHER T.C.J.