SUPREME COURT OF YUKON

Citation: *R v Thomas*, 2016 YKSC 58

Date: 20161114
S.C. No. 16-AP001
Registry: Whitehorse

BETWEEN:

REGINA

Respondent

AND

CLAYTON ROBERT THOMAS

Appellant

Before Mr. Justice L.F. Gower

Appearances:

Clayton Robert Thomas	Appearing on his own behalf and assisted by Kusta
Lee Kirkpatrick and Marlaine Anderson-Lindsay	Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Clayton Thomas, who is a member of the Tahltan First Nation, and whose Aboriginal name is Nengonath. He was convicted and sentenced for three offences under the *Wildlife Act*, R.S.Y. 2002, c. 229, (the "*Act*") arising in 2013. The trial took place over eight days in 2014 and 2015, and the sentencing took place this year. The three offences were: hunting when not permitted; discharging a firearm without due care and attention; and trafficking in wildlife[1]. The

[1] ss. 6,10(1) and 102(1) of the *Wildlife Act*, respectively.

essential elements of all three offences were admitted by the appellant in an agreed statement of facts which was filed on the first day of the trial. In particular, the appellant admitted using a rifle to shoot and kill two wolves at night, on two separate occasions, in the Mount Sima residential subdivision south of Whitehorse. He further admitted that he subsequently attempted to give the wolf pelts to a friend for the purpose of obtaining a reward or bonus from the Yukon Outfitters' Association, which was then to be shared between the friend and the appellant. After the agreed statement of facts was tendered, the onus shifted to the appellant to establish his defence, which was that he had an Aboriginal right to act as he did. That defence occupied five days of trial. The respondent Crown then tendered rebuttal evidence through an expert ethnohistorian. The expert expressed opinions on the extent to which members of the Tahltan First Nation historically used and occupied a relatively large area of north-eastern British Columbia and a relatively small area of south-eastern Yukon, but not the Whitehorse area.

[2] The trial judge concluded that the appellant had not established on a balance of probabilities that hunting wolves and trading in wolf pelts in the Whitehorse area was an integral part of the distinctive culture of the Tahltan First Nation (which the judge referred to also as the Tahla people). Accordingly, the trial judge found that the appellant failed to meet the test for establishing an Aboriginal right pursuant to the leading case of *R v Van der Peet*, [1996] 2 S.C.R. 507. The trial judge then sentenced the appellant to pay fines totalling $6500, as well as ordering forfeiture of the wolf pelts (and other items seized during the investigation) and a two-year hunting restriction, with an exemption for subsistence hunting.

[3] The appellant was represented during the trial and this appeal by his uncle, who is a Tahltan elder, but not a lawyer. The uncle's Aboriginal name is Kusta.

[4] The notice of appeal filed by the appellant is difficult to understand. He purports to appeal both the three convictions and the sentence, however his grounds of appeal say only this:

> 1. No hunting season restriction on Indian/Aboriginal persons (hunting regulations)
> 2. Harvesting of wolves was done safely
>
> Attached

What was "attached" to the notice of appeal was an untitled 10-page document which refers separately to the three Counts for which the appellant was convicted, makes various references to the evidence, and purports to reargue issues relating to the appellant's asserted Aboriginal right to hunt wolves and trade in wolf pelts. A slightly amended version of this same document was produced as the appellant's argument on the appeal, and contains references to portions of the trial transcript. I regret to say that there were aspects of both documents that were simply unintelligible to me. This has made it difficult for both the respondent Crown and this Court to discern what the real issues are on this appeal. Further, this task has been made even more difficult because the appellant raised a new issue on the appeal which was not, so far as I can tell, argued before the trial judge. That issue is that the appellant is also of Kaska lineage and because he hunted the wolves in an area of overlap between the respective traditional territories of the Kwanlin Dün First Nation and the Ta'an Kwäch'än First Nation, he was not required to comply with the *Wildlife Act* and *Regulations* that apply to

all hunters, and also was not required to obtain the written consent of those two First Nations.

STANDARD OF REVIEW

[5] Before I attempt to state the issues on this appeal, it may be helpful to address the standard of review. Here, I agree with the Crown that unless the trial judge made an error of law, the test to be applied with respect to findings of fact on a summary conviction appeal is whether the evidence is reasonably capable of supporting the trial judge's conclusions.[2] If it is, this Court is not entitled to substitute its view of the evidence for that of the trial judge. What this means, is that this court must apply a high standard of deference to the trial judge's reasons, unless there has been a palpable and overriding error affecting his assessment of the facts.

[6] However, as noted by the Supreme Court in *R v Caron*, 2015 SCC 56, in Aboriginal rights cases there is a distinction between a trial judge's findings of fact on historical matters, which are entitled to deference, and the legal inferences or conclusions that a trial judge draws from such facts, which are not. Rather, the latter are questions of law, for which this Court can substitute its own conclusion to be drawn from the historical facts.[3]

ISSUES

[7] From what I can determine from the appellant's written and oral submissions, the following issues arise:

1) Did the trial judge make an error of fact in concluding that the appellant had failed to establish that the Tahltan First Nation members historically hunted wolves and

[2] *R v Kroeker*, 2015 YKSC 2, at para. 48.
[3] At para. 61.

traded wolf pelts in the Whitehorse area, in the era before Europeans made contact with that First Nation, to the extent that this practice was a central, significant and defining part of that First Nation's distinctive culture?

2) Did the trial judge make an error of law in concluding that the appellant had not established that he had an Aboriginal right to hunt wolves at night and trade in wolf pelts in the Whitehorse area?
3) Did the trial judge make an error of fact by disregarding evidence that the appellant had not hunted the wolves carelessly?
4) Did the appellant have the right to hunt wolves at night and trade in wolf pelts because this activity occurred in an area of overlap between the respective traditional territories of the Kwanlin Dün First Nation and the Ta'an Kwäch'än First Nation?
5) Did the trial judge make an error of law in sentencing the appellant?

ANALYSIS

1. Did the trial judge make an error of fact in concluding that the appellant had failed to establish that the Tahltan First Nation members historically hunted wolves and traded wolf pelts in the Whitehorse area, in the era before Europeans made contact with that First Nation, to the extent that this practice was a central, significant and defining part of that First Nation's distinctive culture?

[8] I conclude that the trial judge made no such error because there was simply no evidence led by the appellant or the Crown to prove that there was such an historical practice by the Tahltan First Nation.

[9] The trial judge properly set out the test for what the appellant had to prove in order to establish that he had an Aboriginal right to hunt wolves that night and trade in wolf pelts in the Whitehorse area:

> 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). (underlining by the trial judge, my bolding)

[10] It was not disputed before the trial judge that the relevant time period the Supreme Court was talking about in *Van der Peet* was prior to the arrival of the Europeans.[4] I refer to this here as the “pre-contact” era.

[4] [1996] 2 S.C.R. 507,at para. 45.

[11] The trial judge accepted the appellant's evidence that from time to time, members of the Tahltan First Nation travelled extensively throughout the North, including into British Columbia, Yukon, Northwest Territories and Alberta.[5] More particularly, he accepted the evidence that this travel was often part of a young man's rite of passage. The trial judge also accepted that, if such a young male was travelling in the Whitehorse area, he may well have had the need to hunt wolves from time to time. Nevertheless, he concluded that this practice would only have been "merely incidental or occasional" to the Tahltan society before it made contact with the first Europeans in about 1833[6]. In particular, the trial judge concluded on this point as follows:

> 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. (my emphasis)

[12] The Crown's expert ethnohistorian, Adrian Clark, gave no evidence about the members of the Tahltan First Nation hunting wolves in the Whitehorse area pre-contact. Mr. Clarke testified that his research did not reveal anything indicating that there was a claim of traditional territory by the Tahltan in the Whitehorse area.[7] The inference from that evidence is that, if members of the Tahltan First Nation had hunted wolves in the

[5] At para. 21.
[6] At para. 22.
[7] Trial Transcript, October 1, 2015, p. 29, lines 26 – 29.

Whitehorse area in the pre-contact era to an extent that such a practice was a central, significant and defining attribute of that first Nation's distinctive culture, then one would expect they might logically have asserted a claim that the Whitehorse area was part of their traditional territory, either as part of the Yukon land claims process or otherwise. However, that is clearly not the case.

[13] As for the issue of trading wolf pelts in the Whitehorse area, the appellant provided no evidence of this being an historical practice of the Tahltan First Nation. On the contrary, the Crown's expert, Mr. Clarke, did not find any evidence of Tahltan trade linkages into the Whitehorse area.[8] The trial judge did accept Mr. Clarke's evidence that the Tahltan historically traded with other First Nations west-to-east, and vice versa, including probable trade with the Kaska First Nation in the Rancheria River area of south east Yukon[9]. However, on the notion of north-south trade into the Whitehorse area, the trial judge accepted the evidence of the expert:

> 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.

[14] The conclusions of the trial judge that there was no evidence that members of the Tahltan First Nation historically hunted wolves or traded wolf pelts in the Whitehorse area in the pre-contact era are supported by the evidence. Therefore, he made no error of fact in this regard.

2. Did the trial judge make an error of law in concluding that the appellant had not established that he had an Aboriginal right to hunt wolves at night and trade in wolf pelts in the Whitehorse area?

[8] Trial Transcript, October 1, 2015, p. 28, lines 16 – 18.
[9] Reasons for Judgment, at paras. 23 and 28.

[15] The trial judge properly applied the *Van der Peet* "integral to a distinctive culture" test to the appellant's assertion that he had an Aboriginal right to hunt and trade in the Whitehorse area on the dates of the offences. He further concluded that the appellant had not met that test. That conclusion is supported by the evidence, or rather the lack thereof. Accordingly, the trial judge made no error of law in concluding that the appellant had failed to establish this Aboriginal right.

[16] The obvious consequence of this conclusion is that the appellant failed to establish a defence to either the charge of hunting while not permitted or the charge of trafficking in wildlife (trading in wolf pelts). Accordingly, the trial judge was also correct in convicting the appellant of both of these offences. The trial judge also correctly observed that, since the appellant had unlawfully hunted the wolves, he could not thereafter lawfully trade their pelts:

> 58 Quite obviously no one, Aboriginal or otherwise, is entitled to trade in goods or property unlawfully obtained.

3. Did the trial judge make an error of fact by disregarding evidence that the appellant had not hunted the wolves carelessly?

[17] The appellant relies heavily here upon the case of *R v Morris*, 2006 SCC 59. This case involved two Aboriginal persons who were members of the Saanich First Nation. They shot at a decoy deer set up by provincial conservation officers to trap illegal hunters. They were charged with several offences under the British Columbia *Wildlife Act*, including: (1) hunting wildlife with a firearm during prohibited hours; (2) hunting with an illuminating device (hunting with light); and (3) hunting without reasonable consideration for the lives, safety or property of other persons (unsafe hunting). At trial, the two accused raised the defence that they had a treaty right to hunt at night with light.

The trial judge convicted both accused of hunting during prohibited hours, however he conditionally stayed the charge of hunting with light as being contrary to the rule against multiple convictions arising from a single transaction. The trial judge acquitted the accused on the count of unsafe hunting.

[18] When *Morris* eventually came before the Supreme Court, the only provisions at issue were the offences of hunting during prohibited hours and hunting with light. The Court accepted that the accused had a treaty right to hunt at night with light.[10] Although the majority of the Court stated that there could be no treaty right to hunt dangerously[11], it concluded that the provisions respecting hunting after hours and hunting with light were overbroad and constituted a *prima facie* infringement of the treaty right of the accused. This was because the provisions applied throughout British Columbia without exception, and the majority stated that it would be possible to identify uninhabited areas where hunting after hours with light would not jeopardize public safety.[12] Accordingly, the Court acquitted the accused of those two charges.

[19] The appellant relies upon a portion of the Supreme Court majority decision which discussed the circumstances of how the deer decoy was positioned, and in particular that there was a hillside behind it which would stop any bullets passing through the decoy:

> 10 Morris and Olsen led evidence to the effect that night hunting is part of the Tsartlip tradition and has been carried on in safety for generations. They also introduced evidence that the particular night hunt for which they were charged was not dangerous. Morris and Olsen were caught by provincial conservation officers using a mechanical black-tailed deer decoy. The decoy was set up on unoccupied

[10]At para. 26.
[11]At para. 56.
[12]At paras. 58 and 59.

> lands 20 metres off a gravel road. It was, one of the conservation officers testified, a spot chosen for its safety. Officer Gerald Brunham explained the choice of site as follows:
>
> Q Were there any residences in that vicinity?
>
> A Not within two kilometres.
>
> ...
>
> Q And you chose that particular hunting site because of safety aspects?
>
> A Yes.
>
> Q So would it be accurate to say that there were no private property, no campers, no dwellings within the range that a bullet would travel?
>
> A Yes.
>
> Q And you chose that specific hillside so that if a bullet did go through your decoy it would go into a hill and into the trees?
>
> A That's right.
>
> (my emphasis)

[20] The appellant submitted, through his representative Kusta, after the evidence had been presented at the trial, that he had also used a hillside as a backstop for any bullets going through or past the wolves. In this regard, he referred to Tabs B and E of the agreed statement of facts. However, the appellant himself gave no such evidence at his trial.

[21] In any event, the *Morris* case is distinguishable from the present appeal. First, the particular facts in *Morris* are different from those in the present appeal. There, the conservation officers had set the deer decoy up against a hillside to use as a backstop for ammunition passing through the decoy. However, the trial judge acquitted the accused of unsafe hunting. Therefore, the issue of the use of the hillside as a backstop for ammunition was not before the Supreme Court and the majority made no comment on the practice. Rather, the issue before the Court was whether it would be inherently dangerous in all circumstances to hunt after hours and at night with light. The Court

concluded that the accused had established a treaty right to hunt at night with light and that this could be done safely in uninhabited areas. Finally, the Supreme Court also cautioned that there could be no treaty right to hunt dangerously.

[22] In the case at bar, the appellant was not exercising a treaty right. Nor was the appellant entitled to hunt wolves at night in accordance with an Aboriginal right in the Mount Sima area. Finally, the appellant was hunting in an area where there were 75 residences within a 1 kilometre radius: see also *R v. Bernard*, 2002 NSCA 5, at paras. 49 and 52; and *R v Paul*, 2016 NSSC 99, at paras. 123 and 125.

[23] On the issue of hunting without due care and attention, the appellant further relied upon the evidence of Conservation Officer, Aaron Koss-Young (the "CO"), at the sentencing hearing. At one point, the CO testified about shooting a wolf at the Whitehorse Landfill about eight years ago, where the officers chose the site for the kill based on it having a good "backdrop for shooting".[13] Kusta then referred the CO in cross-examination to Tab E of the agreed statement of facts, which shows a treed hillside just beyond the driveway where the wolves were shot. Because there are no homes visible beyond the hillside in that photograph, Kusta was trying to get the CO to concede that the appellant was acting safely using the hillside as a backstop for his shots.[14]

[24] Of course, the initial problem with this argument is that this is not part of the evidence at the trial, but rather was part of the sentencing proceeding. Therefore, it could not have had any impact upon the conclusion of the trial judge that the appellant

[13] Sentencing transcript, April 18, 2016, p. 5, lines 17 – 25.
[14] Sentencing transcript, April 18, 2016, p. 12, lines 36 – 43; p. 13, lines 11 – 21.

had hunted in an unsafe manner. In any event, the argument also ignores the CO's other evidence about the appellant hunting in an unsafe manner:

> THE COURT: Okay, let's get the officer to explain that. Do you feel that the -- the locations, that is the nature of the locations and the aspect of safety were any different between the landfill and where Mr. Thomas shot?
> A Absolutely, Your Honour. There is --
> THE COURT: Okay, just explain that, please.
> A In my opinion there was a number of residences, whether they were occupied or -- or unoccupied at the time, within the immediate vicinity of where Mr. Thomas fired multiple rounds, anywhere from six to eight rounds, as admitted, and they were -- both by the evidence that I have collected they were full metal jacket as well as expanding ammunition that were fired. And there was -- I have no idea where Mr. Thomas in fact fired from or where in fact the bullet trajectory went, but in the evidence that I collected there was a -- a clear proceeding of evidence from a casing that was found near a driveway to a spent round, one spent round of a full metal jacket bullet that was found laying on the moss that was found just below the bank and beyond that was a tuft of what I believe was wolf hair at the time, just up the bank from there, which to me suggested that that would have been a trajectory which was a clear path through some trees there, and there was no trees as a backstop whatsoever beyond the top of that hill there to the residence.
> THE COURT: Okay.
> A And it was dark, so he wouldn't have been able to probably see clearly his backdrop.

[25] Later, the CO also testified that the full metal jacket ammunition used by the appellant (which is unauthorized by the *Wildlife Act*) could have had a trajectory of well over a kilometre from where the appellant took his shots. In the following exchange, the CO is answering a question from the Crown prosecutor:

> Q I just have one question. Now, you talked about the incident at the dump where the wolf was killed, it was lower to that site, and you -- you indicated that the officer was satisfied it was the same wolf. And you said that the wolf was killed with soft-pointed ammunition. Can you articulate the difference between full metal jacketed ammunition and soft-pointed ammunition?

A Yes, full metal jacket by -- full metal jacket ammunition by design is designed not to expand upon contacting a -- a target. It -- which quite frequently means that it will pass completely through a target, it won't -- its velocity won't slow as much, which can cause great wounding and -- or -- or which can cause wounding and wounding loss in -- in game animals, which is one of the reasons that it is not permitted in hunting activities, as well as the -- the fact that the bullet is more likely to travel through an animal and carry on downrange, which can cause damage downrange. Whereas a soft-pointed bullet or expanding bullet, which is permitted for hunting, can expand up to twice the diameter of the bullet upon impact with a target. The velocity -- the kinetic energy is transferred to the target and the velocity is significantly decreased as it's penetrating the target, which creates larger wound channels and more efficient -- or humane killing of the -- of an animal. And the -- the bullet, if it does exit the animal, is less likely to carry as much velocity and energy as it -- as it passes through the animal.

Q Okay. And can you give -- I think you indicated that a full metal jacketed ammunition can travel for is it --

A Depending on the trajectory, well over a kilometre.

[26] The appellant's argument here also ignores that the trial judge was entitled to have regard to s.10(2) of the *Wildlife Act* to determine whether the appellant had hunted safely. This provision states:

> (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
>
> (a) hunts with a firearm that is in an unsafe condition;
>
> (b) hunts while his or her ability to do so is impaired by alcohol or a drug;
>
> (c) discharges a firearm in the dark;
>
> (d) discharges a firearm, or causes a projectile from a firearm to pass, on or across the travelled portion of a road that is normally used by the public, whether or not the safety of any person actually is endangered; or

> (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. S.Y. 2002, c.229, s.10

[27] The appellant submitted that the trial judge found him guilty under s. 10(2)(e) of the *Act*, and that this was an error because the appellant was actually charged under s. 10(1) of the *Act*. This submission has no merit. First, as stated above, it was entirely proper for the trial judge to have regard to s. 10(2) in order to determine whether the Crown had proven that the appellant was guilty under s. 10(1). Secondly, the record is clear that the appellant was convicted under s. 10(1) and not s. 10(2).

[28] Further, the trial judge's conclusion that the appellant hunted carelessly was well supported by the evidence. The appellant himself admitted in the agreed statement of facts that:

- he hunted at night;
- he hunted within 1 kilometre of buildings which were residences (indeed, there were over 75 residential lots within a 1 kilometre radius of where the appellant shot the wolves); and
- he hunted using unauthorized full metal jacket ammunition, which can easily pass through an animal and has an effective range of over a kilometre.

[29] Accordingly, I conclude that the trial judge made no error of fact or error of law in convicting the appellant of the charge of careless hunting.

4. Did the appellant have the right to hunt wolves at night and trade in wolf pelts because this activity occurred in an area of overlap between the respective traditional territories of the Kwanlin Dün First Nation and the Ta'an Kwäch'än First Nation?

[30] So far as I can tell, this argument was not raised before the trial judge. The argument is based entirely on the appellant's interpretation of certain passages in a booklet entitled "Regulations Summary, Yukon Hunting, 2012 – 2013". At page 22 of this document there are certain statements regarding rights and responsibilities of First Nation hunters, including the following:

> If you a member [as written] of Yukon First Nation WITHOUT a Final Agreement…
>
> **Your rights** - You have a right to hunt for food **outside** the Traditional Territories of First Nations with Final Agreements, without a Yukon hunting licence. In these areas you can harvest male or female animals… at any time of year…
>
> **Your responsibilities** - If you want to hunt **inside** the Traditional Territory of a First Nation with a Final Agreement:
>
> - you must have a valid Yukon hunting licence and you must comply with the *Wildlife Act* and the hunting regulations that apply to all hunters, OR
>
> - you must have written consent from a First Nation with a Final Agreement to hunt for food in part of its Traditional Territory that does not overlap with the Traditional Territory of another First Nation. In this area you can harvest male or female animals, at any time of year, with no bag limits, subject to regulation by that First Nation. You do not need a Yukon hunting licence to exercise your right at this time. (emphasis already added)

[31] Here, the appellant submits, through Kusta, that he is a member of the Kaska First Nation, which is a Yukon First Nation without a final agreement. Therefore, if he had been hunting in a part of the Traditional Territory of either the Kwanlin Dün First Nation or the Ta'an Kwäch'än First Nation that did not overlap with the Traditional Territory of another First Nation, then he would have been required to obtain the written

consent from the First Nation whose Traditional Territory he wanted to hunt in. However, the appellant argues that the corollary also applies, that is that if he wanted to hunt in the Traditional Territory of either First Nation, because the respective Traditional Territories of the Kwanlin Dün and the Ta'an Kwäch'än do overlap, he was not required to obtain the written consent of either First Nation and was authorized to harvest animals at any time of year.

[32] There are numerous flaws with this argument:

1) On the inside cover of the booklet relied upon by the appellant is a highlighted notice stating the following:

> **! Not a Legal Document**
>
> This booklet provides a summary of the current hunting regulations. It is your responsibility to know and obey the laws. If you are uncertain about a regulation, talk to your local Conservation Officer.

2) In any event, there is no evidence that the appellant relied upon the booklet when he shot the two wolves.

3) There is no evidence at the trial that the appellant is a member of the Kaska First Nation. The only reference to the appellant being Kaska was in an answer given by Conservation Officer Koss-Young when being examined in-chief by Kusta:

> KUSTA: …There is a -- a copy of Mr. Thomas' hunting license at the time and it is very clear it says Tahltan. And that is part of the evidence they had access to. It says Tahltan, band member 632, no charge. So, I would think as a person gathering evidence that you would look at this evidence and say, okay, this person is of Aboriginal status.
>
> THE COURT: Were you aware of that hunting license at the time?

> A Your Honour, I was -- I have seen multiple hunting licenses from Mr. Thomas in our database there. And if we refer to a previous one as well, he referred to himself as a Kaska beneficiary as well. (my emphasis)

The appellant did not testify at the trial. Therefore, this evidence is hearsay and is presumptively inadmissible.

4) The term “Yukon First Nation” is defined in Chapter 1 of the Umbrella Final Agreement, and s. 1 of the *Act Approving Yukon Land Claim Final Agreements*, R.S.Y. 2002, c. 240, where the 14 Yukon First Nations are identified, including the Liard First Nation and the Ross River Dena Council. While I can take judicial notice that these two First Nations are members of the larger umbrella group referred to as the Kaska Nation, strictly speaking the Kaska First Nation referred to by the appellant is not one of the enumerated Yukon First Nations. Further, there is no evidence that the appellant was a member of either the Liard First Nation or the Ross River Dena Council. Accordingly, there is no evidence that he was a member of a Yukon First Nation without a Final Agreement.

5) The appellant’s argument can be reduced to an absurdity, i.e. that whenever a member of the Yukon First Nation without a final agreement wants to hunt within an area of overlapping Traditional Territories of Yukon First Nations with final agreements, the prospective hunter does not require the consent of either First Nation. In other words, the overlap area is to be regarded as some kind of a “no man’s land”.

6) The proper interpretation of the laws which govern in overlap areas starts with s. 2.9.3 of the Final Agreements of the Kwanlin Dün and the Ta'an Kwäch'än First Nations:

> Prior to the ratification of a Yukon First Nation Final Agreement by the Yukon First Nation, any overlapping claim, right, title and interest, of other Yukon First Nations within its Traditional Territory as delineated pursuant to 2.9.1 or 2.9.2 [the sections regarding maps of the Traditional Territories] shall be resolved to the satisfaction of the parties to that Yukon First Nations Final Agreement.

Next, one must have regard to s. 2.9.3.1 of the respective Final Agreements:

> Provisions respecting the resolution of the overlapping claims, rights, titles and interests of other Yukon First Nations within the Traditional Territory of the Kwanlin Dün First Nation [or Ta'an Kwäch'än, as the case may be] pursuant to 2.9.3 are set out in Schedule B - Resolution of Overlapping Claims, attached to this chapter.

Next, one must consider Schedule B, referred to immediately above, which sets out the process for First Nations with the overlapping Traditional Territories to come to agreements about how to manage the lands within those overlapping areas. Section 4 of Schedule B in each of the respective Final Agreements provides that certain other provisions in the Final Agreements will not apply to overlapping areas, including provisions which would otherwise authorize the First Nation concerned to regulate fish and wildlife harvests.

Next, one must turn to the *Act Approving Yukon Land Claim Final Agreements*, cited above, and in particular s. 5(1), which provides:

> Subject to subsections (2) to (5), all enactments and municipal bylaws apply to all Yukon Indian Persons, Yukon First Nations, and Settlement Land.

Subsections (2) to (5) deal with potential inconsistencies between Final Agreements and other legislation or agreements. They generally provide that Final Agreements and related legislation are paramount.

Next, one must return to s. 2.6.2.1 of the respective Final Agreements of the two First Nations at issue, which provides that:

> Settlement Legislation [enacted by Canada or Yukon to give effect to the Final Agreements] shall provide that subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land…

Sections 2.6.2.2 to 2.6.2.5 are generally equivalent in wording and effect to ss. 5(2) to (5) in the *Act Approving Yukon Land Claim Final Agreements*, referred to immediately above.

Finally, the chapter of the Final Agreements respecting fish and wildlife, and in particular ss. 16.3.3 and 16.3.6, provide as follows:

> 16.3.3 The exercise of rights under this chapter is subject to limitations provided for elsewhere in Settlement Agreements and to limitations provided in Legislation enacted for purposes of Conservation, public health or public safety.
>
> …
>
> 16.3.6 Except as provided in this chapter and in Yukon First Nation Final Agreements, nothing shall prevent Yukon residents and others from Harvesting Fish and Wildlife in accordance with Legislation.

"Legislation" includes Acts, Regulations, orders-in-council and bylaws.

Thus, the *Wildlife Act*, as legislation enacted for purposes of conservation and public safety, applies in areas of overlapping Traditional Territories, except to the extent that the Final Agreements provide otherwise, which

> would include agreements between the neighbouring First Nations negotiated pursuant to Schedule B, as set out above. In the case at bar, there is no evidence of any agreement between the Kwanlin Dün and the Ta'an Kwäch'än respecting the area of overlap. Thus, the appellant was obliged to comply with the *Act* when he hunted the wolves in the Mount Sima subdivision.

[33] Therefore, the appellant's argument that he was not bound by the *Act* because he was hunting in an overlap area must fail.

5. Did the trial judge make an error of law in sentencing the appellant?

[34] The appellant made no submissions either in writing or orally contesting the sentence imposed by the trial judge.

[35] At the sentencing hearing, the Crown sought a fine of $2000 for each of the two wolves that were killed on two separate days under Count #1 for the offence of illegal hunting contrary to s. 6 of the *Act*. The Crown was entitled to treat each kill as a separate offence pursuant to s.163 of the *Act*. Therefore, the total fine sought for Count #1 was $4000.

[36] For the charge of careless hunting contrary to s. 10(1) of the *Act*, which was Count #2 on the Information, the Crown was seeking a further fine in the range of $2000 to $2500, again for each of the two separate days on which the accused was hunting. Accordingly, the total fine sought for Count #2 was $4000 to $5000. The maximum penalty for a first offence of careless hunting under the *Act* is $50,000.

[37] The Crown also sought a two-year hunting prohibition in the Yukon, with an exception for subsistence hunting.

[38] For Count #9, which was the offence of trafficking or trading in wildlife, the Crown was seeking a fine of $1000.

[39] Therefore, the Crown was asking the court to impose total fines ranging from $9000 to $10,000.

[40] The appellant had previous convictions, both from 2008. One was for wasting meat, for which he received a $750 fine, and the second was for making a false statement in a required report, for which the appellant received a $500 fine.

[41] The trial judge imposed the following sentence:

- Count #1 - $3000 fine;
- Count #2[15]- $2500 fine;
- Count #9 - $1000 fine;
- all fines payable to the “Turn in Poachers & Polluters” fund, as recommended by the Crown;
- forfeiture of all items seized, except for Exhibit 39[16]; and
- a two-year hunting prohibition in the Yukon, with an exception for subsistence hunting.

[42] Therefore, the total of the fines imposed by the trial judge was $6500, as compared with the $9000-$10,000 sought by the Crown. In my view, it cannot be said that this was an unfit sentence. Nor can it be said that the trial judge committed any error of fact or law in imposing the sentence.

[15] Incorrectly referred to as Count #10 by the trial judge.
[16] One of the two rifles used by the appellant in killing the wolves.

CONCLUSION

[43] The appeal is dismissed.

GOWER J.