CASE COMMENT

Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas* v. *Norris*

*Thomas Isaac**

I. INTRODUCTION

THE ISSUE OF THE group rights of Aboriginal people versus the individual rights of Aboriginal people has been, until recently, an issue which has received little attention. This situation has changed with the February 1992 decision of Hood J. of the British Columbia Supreme Court in *Thomas* v. *Norris*.[1] At the heart of the case is whether the group rights of an Aboriginal community can be used to supersede the common law rights of an individual Aboriginal person against battery, assault and unlawful imprisonment. The facts and reasons for judgment of the decision provide a superb opportunity to examine the issue of individual rights of Aboriginal people versus group Aboriginal rights. In addition, the application of the *Canadian Charter of Rights and Freedoms*[2] to Aboriginal peoples and their governments will be discussed briefly.

II. THE FACTS

ON FEBRUARY 14, 1988, the plaintiff, David Thomas, a member of the Lyackson Band of British Columbia and of the Coast Salish People, was "grabbed" from a friend's house and taken to the Somenos Long House by the defendants. He was imprisoned at the Somenos Long House for four days. While there he underwent an initiation ceremony for spirit dancing which included assault, battery and unlawful imprisonment. The plaintiff contended that at no time did he volun-

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[1] [1992] 2 C.N.L.R. 139 (B.C.S.C.) [hereinafter *Thomas*].

[2] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

tarily agree to the events which took place. He claimed non-pecuniary, aggravated, punitive and special damages for assault, battery and unlawful imprisonment.

III. THE ISSUES

THREE ISSUES WERE RAISED and considered by the court in the decision. They are (1) did the defendants assault, batter and falsely imprison the plaintiff, including the defenses asserted (lack of intent and consent on the part of the plaintiff), (2) is spirit dancing a protected "existing Aboriginal right" under s. 35 of the *Constitution Act, 1982*,[3] thus rendering inoperative the infringing common law of assault, battery and false imprisonment, and (3) if successful, to what damages is the plaintiff entitled?

On the issue of whether or not the plaintiff was battered, assaulted and unlawfully imprisoned, Hood J. had little difficulty in deciding in the affirmative to the common law offenses. He held that the plaintiff was seized by the defendants, carried into the Long House, and detained there for four or five days. All of this was done without the plaintiff's consent or acquiesence. Hood J. concluded that the plaintiff proved, "beyond any question, almost continuous assault, battery and wrongful or false imprisonment during his ordeal ..."[4]

Hood J. then discussed the second issue of whether or not spirit dancing is a protected Aboriginal right under s. 35 of the *Constitution Act, 1982*. He begins by adopting the plaintiff's submission that the defendants cannot use s. 25 of the *Charter* to protect the right to spirit dance from infringing upon the plaintiff's common law rights.[5] His Honour noted that while the *Charter* applies to the common law, it does not apply to actions between private parties unless government intervention, in some manner, is involved.[6] Section 32(1) of the *Charter* makes this clear in that the *Charter* applies only to the

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[3] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] *Supra* note 1 at 150.

[5] Section 25 of the *Charter* reads:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[6] See *RWDSU* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573.

federal, provincial and territorial governments and not to private litigation.[7] The defendants agreed with the plaintiff that s. 25 does not form part of the constitutional defense. In addition, the right to spirit dance was put forward by the defense not as a constitutional or common law freedom of religion but, rather, solely as an Aboriginal right under s. 35(1) and thus, outside of the application of the *Charter*.

On the issue of whether spirit dancing is an "existing Aboriginal right" under s. 35, Hood J. outlined the nature of spirit dancing and stated that

> ... it is common ground, and the evidence suggests, that spirit dancing has been performed or practised by Coast Salish people, ... for some time; that it is considered to be a tradition as well as a religion.[8]

However, Hood J. concluded that the evidence submitted was insufficient to establish that spirit dancing is an "existing Aboriginal right" under s. 35. It is noted that little anthropological evidence was submitted by the defendants to support the claim of a right, nor was it shown that spirit dancing was connected with an organized society over a long period of time and that it was an "integral part of native life up to this day."[9] He stated that even if he were to hold that specific dances fell within the category of existing Aboriginal rights, the evidence provided does not support the inclusion of "spirit dancing" as a protected right and one that was practised at the material times (namely, the mid-1800s when British sovereignty was asserted).

His Honour considered civil wrongs and torts, such as assault and false imprisonment, similar to criminal law. The criminal law, like tort law, protects citizens from the wrongful conduct of others, including those who engage in such conduct while purporting to be exercising their religious practises or other freedoms or rights.[10] Thus, with respect to issue number two, Hood J. concluded that spirit

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[7] Section 32(1) of the *Charter* reads:

> This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[8] *Supra* note 1 at 153.

[9] *Ibid.* at 155.

[10] *Ibid.* at 156.

dancing was not an Aboriginal right protected by ss. 35 and 52 of the *Constitution Act, 1982*.

Interestingly, Hood J. discussed issue number two in the alternative. That is, he assumed that spirit dancing is an Aboriginal right which survived the introduction of English law and is, therefore, protected under s. 35. Section 35(1) reads: The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Hood J. noted that based on the evidence presented, forcing an initiate to participate is not "an integral part of the ceremony or of the right."[11] In addition, the court stated that spirit dancing can be performed without difficulty so long as the initiates are consenting.

The defendants argued that the common law of tort infringes upon the Aboriginal right of the defendants to practise spirit dancing. Thus, the court had to determine whether or not such an infringement is justified within s. 35. Hood J. relied on the Supreme Court of Canada's May 1990 decision of *R.* v. *Sparrow*[12] wherein the court outlines a two part analysis of s. 35. First, a *prima facie* interference with the Aboriginal right must be found. Second, if an interference is found, can the interference be justified in the following manner? (1) Is there a valid legislative objective? (2) If a valid legislative objective is found, the analysis proceeds to the interpretive principle which notes that

> ... the honour of the Crown is at stake in dealings with aboriginal people. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[13]

The defendants submitted that no valid legislative objective is served by applying the common law of torts to the exercise of Aboriginal rights.[14] This argument was dismissed by Hood J. noting that the plaintiff was physically injured and that the plaintiff's "civil

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[11] *Ibid.* at 158.

[12] [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160 [hereinafter *Sparrow*, cited to D.L.R. (4th)]. For a commentary on *Sparrow*, see T. Isaac, "The Honor of the Crown" (1992) 13:1 Policy Options/Politiques 22.

[13] *Sparrow*, *ibid.* at 413, as cited in *Thomas*, *supra* note 1 at 159.

[14] *Thomas*, *ibid.* at 158.

rights is a more than adequate and valid objective"[15] served by the common law of tort.

The defendants argued that the honour of the Crown was at stake in that the principles in *Sparrow* apply to infringing common law, in addition to statutes. Counsel submitted that

> ... for this court to uphold the individual rights of the plaintiff based on a strict application of the common law, is to deny the collective aboriginal rights of the defendants, which are constitutionally protected pursuant to [sic] 35 of the *Constitution Act, 1982*. ... The defendants therefore submit that the most important issue before the court is: Are the individual rights of aboriginal persons subject to the collective rights of the aboriginal nation to which he belongs?[16]

Hood J. decided that s. 35 was not applicable to the case at bar. If spirit dancing was assumed to be an Aboriginal right which was practised prior to the assertion of British sovereignty and the introduction of English law, there are aspects of the right which were "contrary to English common law."[17] The use of force, assault, battery and wrongful imprisonment did not survive the introduction of English law.

> If spirit dancing generally was in existence in April of 1982 when the *Constitution Act, 1982* came into force, the impugned aspects of it, to which I have referred, had been expressly extinguished. ... It has never been the law of this Province that any person, or group of persons, Indians or non-Indians, had the right to subject another person to assault, battery or false imprisonment, and violate that person's original rights, with impunity. ... The assumed aboriginal right, ... is not absolute and the Supreme Court of Canada reaffirmed this in *Sparrow*. Like most freedoms or rights it is, and must be, limited by laws, both civil and criminal, which protect those who may be injured by the exercise of that practise.[18]

Hood J. did not accept defense counsel's submission that the interpretive principles set out in *Sparrow* applied to the case at bar. The "honour of the Crown" is not at issue in the case and no fiduciary relationship exists between the parties. He continued by stating that the individual rights of the plaintiff prevail over the communal rights of the defendants "for obvious reasons."[19]

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[15] *Ibid.* at 159.

[16] *Ibid.*

[17] *Ibid.* at 160.

[18] *Ibid.*

[19] *Ibid.* at 161.

In *Sparrow*, the Supreme Court of Canada stated that the rights guaranteed under s. 35 are not absolute.[20] In the context of the state versus the citizen, a justificatory requirement must be met in order for Aboriginal rights to be superseded by law. Hood J. indicated that Aboriginal rights protected under s. 35 are not absolute from another perspective; the governance of relationships between Canadian citizens "in a peaceful society to protect the rights and freedoms of all."[21] Thus, s. 35 rights are to be exercised in accordance with the criminal law (which prohibits certain kinds of conduct) and the civil law which protects persons who may be injured by the exercise, in this instance, of Aboriginal rights.

Assuming that spirit dancing is a protected Aboriginal right under s. 35, Hood J. concluded that the defendants cannot succeed. He stated:

> Placing the aboriginal right at its highest level it does not include civil immunity from coercion, force, assault, unlawful confinement, or any other unlawful tortious conduct on the part of the defendants, in forcing the plaintiff to participate in their tradition. While the plaintiff may have special rights and status in Canada as an Indian, the "original" rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practise, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing so. His freedoms and rights are not "subject to the collective rights of the aboriginal nation to which he belongs."[22]

IV. DAMAGES

NONPECUNIARY DAMAGES, INCLUDING EXEMPLARY damages, were awarded to the plaintiff in the amount of $12,000. The plaintiff also requested that an interim injunction preventing the defendants from seizing him again, granted before the trial began, be continued. Hood J. rejected the request for an injunction finding that the defendants are "law-abiding citizens."[23]

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[20] The Court noted *supra* note 12 at 409 that "[R]ights that are recognized and affirmed are not absolute."

[21] *Supra* note 1 at 161.

[22] *Ibid.* at 162.

[23] *Ibid.* at 163.

V. DISCUSSION

IT IS TRITE TO say that the facts and issues raised in this case are significant and raise important questions for consideration. At the heart of Hood J.'s discussion, in the alternative, is the nature of Aboriginal individual rights versus the nature of Aboriginal collective rights. The result is interesting and profound. Before examining the alternative scenario that Hood J. outlines, a brief discussion of the decision itself is in order.

With respect to issue one, the evidence supports Hood J.'s finding that the torts, in fact, took place. As stated earlier, the non-application of s. 25 of the *Charter* to the case at hand in issue two is well-founded. The evidence submitted simply did not support the defendant's claim that spirit dancing was an Aboriginal right under s. 35 of the *Constitution Act, 1982*. The defendants did not satisfy the evidentiary burden of proving such a right. Again, Hood J. is on solid ground in his factual finding. No expert testimony was called by the defendants with regard to spirit dancing.[24] Unlike *Sparrow*, where the existence of the Aboriginal right in question was "not the subject of serious dispute,"[25] the defendants simply did not meet the lowest standard of the evidentiary burden. As His Honour notes, even if certain Aboriginal forms of dancing were taken to be an existing Aboriginal right, little evidence was placed before the court that "spirit-dancing" should be included within this category.

Hood J. stated that if spirit dancing includes criminal conduct, such as unlawful imprisonment or assault, then it could not be said to be an Aboriginal right that survived the introduction of English law into the colonies, such as the *Criminal Code*.[26] This however, may not be accurate. While the *Criminal Code* may have regulated and forbade certain conduct, it must be shown that there was a "clear and plain intention"[27] to extinguish the Aboriginal right. Thus, in order for Hood J. to conclude that the introduction of certain English law eliminated the survival of the "criminal" aspects of spirit dancing, he would have to undertake some sort of analysis that went to the intention of the Crown. This raises the larger question of whether or not the Crown can outlaw certain behaviour in general and by inference

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[24] *Ibid.* at 154.

[25] *Supra* note 12 at 398.

[26] *Supra* note 1 at 156.

[27] *Supra* note 12 at 401.

show a "clear and plain" intention to extinguish the Aboriginal right to that behaviour? Or, must the Crown show a "specific" intent to outlaw the use of Aboriginal customs that conflict with the criminal law? It is submitted that "clear and plain intention" requires an explicit extinguishment as opposed to one which must be inferred.

Notwithstanding the lack of analysis by the court as to whether or not the *Criminal Code* may have "extinguished" such conduct, the court's reasoning finds historical and legal support. For example, prior to Confederation, the Parliament of the Imperial government in Great Britain enacted legislation which shows a "clear and plain intention" to subject Aboriginal peoples to the criminal law at the expense, in certain instances, of their rights. An 1803 act,[28] and an 1821 act,[29] extended the jurisdiction of the colonial governments to include crimes and offences within "Indian territories." Thus, the criminal law was clearly applicable to Aboriginal people long before Confederation. Bruce Clark notes that this restricts any Aboriginal claims of an inherent right of self-government to "civil matters."[30]

Hood J. expands the notion that the Aboriginal rights in s. 35 are not absolute, as stated by the Supreme Court in *Sparrow*, by applying the non-absolute rule not only to relationships between government and Aboriginal people but also to relationships between other Canadian citizens and Aboriginal people. *Sparrow* could be read to support such an approach. In *Sparrow*, the Supreme Court adopted Professor Brian Slattery's comments on the term "existing" in s. 35, in that the term means that rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."[31]

As a result of living in a modern society, where restraints must be placed on certain types of behaviour that infringe upon an individual's freedom, and to maintain a peaceful society, all people must be willing to sacrifice some of their absolute freedom.This is to ensure the proper

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[28] *An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces* (U.K.), 43 Geo. 3, c. 138.

[29] *An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America* (U.K.), 1 & 2 Geo. 4, c. 66.

[30] *Native Liberty, Crown Sovereignty: The Existing Right of Aboriginal Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 125.

[31] "Understanding Aboriginal Rights" (1988) 66 Can. Bar Rev. 727 at 782 as cited in *supra* note 12 at 397.

and peaceful operation and maintenance of our society and historically is akin to the "social contract."

Aspects of the importance of individual rights are not new to s. 35. Section 35(4) reads: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

The most fascinating aspect of the decision is Hood J.'s argument in the alternative. He examines the case on the basis that spirit dancing is an existing Aboriginal right under s. 35. As outlined earlier, Hood J. decided in favour of the individual's right to security of the person over the group right to practice sprit dancing. This raises the issue of whether group rights should succumb to individual rights for Aboriginal peoples.

On the face of it, the limitation of group rights is legitimate when the personal safety of an individual is concerned (in the case of involuntary participation). A value judgment is made that certain individual rights ought not to be tampered with by any other rights, including the rights of Aboriginal people. Some Aboriginal groups have protested the decision, calling it "a complete denial of their constitutionally protected rights."[32]

At the heart of this conflict is the notion that group rights and individual rights are mutually exclusive. That is, one cannot have one set of rights and retain another set of rights. This is misleading. David Thomas, the plaintiff, is entitled to certain rights because he is a member of a group, namely Aboriginal people. In addition, David Thomas is also entitled to certain "individual" rights "within" the group to ensure his own personal security. Thus, his individual rights supersede the group rights when his personal security is threatened. Aboriginal people can practise their rights to the extent that they do not inflict harm upon other people, Aboriginal and non-Aboriginal alike. "Harm" is defined in this instance as being a threat to the security of a person. This type of rights application does not restrict the practise of spirit dancing except to the extent that it is practised upon involuntary participants.

Professor Richard Simeon makes a similar point. He writes:

> ... it is clear that the assertion that there is a fundamental dichotomy between individual and group rights is false. In fact, it is by virtue of our membership in a larger com-

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[32] Robert Matas, "Native rite ruled subject to law" *The Globe and Mail* (8 February 1992) A6.

munity, and through the protection of its institutions, that we have rights at all. Community is implicit in rights. Conversely, the only justification for community is that its strength and vitality is essential to the well-being, indeed the rights, of each of its members.[33]

In this light, the decision affirms a number of crucial points. Aboriginal people can possess both group and individual rights. Indeed, the necessity for Aboriginal group rights can be found, to some degree, in the need to protect the "well-being" of individual Aboriginal persons. Therefore, if Aboriginal communities and Aboriginal rights are exercised in a manner that does not protect the well-being of their individual members, the very justification for the group rights is questionable. In particular, David Thomas' well-being was threatened and breached by assault, battery and unlawful imprisonment. This breach of his well-being cannot be justified by the community because the community is that which is deemed to protect his well-being.

Some may argue that the above simply does not take into account the nature of Aboriginal communities. That is, for some reason, the Aboriginal right to practise spirit dancing cannot be limited by threats to a person's well-being. However, such an approach does not consider the necessity of balancing rights within a community. The right itself is not threatened, only the extent to which it inflicts harm on others is. In this way, a test of "reasonableness" is necessary. Is it reasonable that the group can inflict physical harm on a person who does not agree to such harm? This situation, and the importance of the decision, is further evidence which supports the claims made by some Aboriginal women and their representative associations that any constitutional recognition of an inherent right of Aboriginal self-government must be subject to the *Charter* and its sexual equality provisions.

Some Aboriginal women's organizations have stated that the constitutionalization of an inherent right of Aboriginal self-government may have the effect of curtailing their individual rights as women.[34] In a

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[33] "Sharing Power: How Can First Nations Government Work?" in F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) 99 at 103.

[34] For example, see "Native women battle sexism" *The Toronto Star* (21 November 1991) G9; R. Platiel, "Aboriginal women divide on constitutional protection" *The [Toronto] Globe and Mail* (20 January 1992) A6; and S. Delacourt, "Natives divided over Charter" *The [Toronto] Globe and Mail* (14 March 1992) A7. However, the final draft legal text of the Charlottetown Accord provided for at least three clauses which ensured equal treatment for Aboriginal men and women in addition to those already existing in the Constitution [see ss. 2(g), 35.5(2) and 35.7].

presentation to the First Nations Constitutional Circle in Montreal in February 1992, the Quebec Native Women's Association stated:

> It must be clearly understood that we have never questioned the collective rights of our Nations, but we strongly believe that as citizens of these Nations, we are also entitled to protection. We maintain that the individual rights of Native Citizens can be recognized while reaffirming collective rights. This is why we would like to be in a position to rely on a Charter guaranteeing the rights and freedoms of all Native Citizens.[35]

Thus, the notion of reconciling individual rights with group rights is not without support and understanding within the Aboriginal community. The question remains, however, to what extent will individual rights be protected with regard to Aboriginal group rights either by the common law, the Canadian *Charter* or an Aboriginal charter? Whatever the result, the *Thomas* decision sets out a basic minimum level of protection for the individual Aboriginal person against threats to their personal security.

The 1992 Charlottetown Accord proposed that forms of Aboriginal self-government recognized in the Constitution, including the inherent right of self-government, would be immediately subject to the *Charter*.[36] The possible effects of such immediate application are noteworthy. In particular, what direct effect would *Charter* application have, especially in light of the decision at hand, on Aboriginal sovereignty and power over items such as culture, religious freedom and traditions? This decision also underscores the immense frustration that some Aboriginal peoples have over what they consider to be "outside" or "foreign" interference in their way of life. This decision subjects Aboriginal peoples to the status quo in Canada if, for example, a person's physical integrity (Aboriginal and non-Aboriginal alike) is in question.

In addition, the decision has introduced the possibility of limiting Aboriginal control over customs and traditions that goes beyond the threat of physical harm to an individual. Little in the decision lends direct support to the proposition that the decision is limited strictly to situations regarding direct physicial harm. Indeed, in the macroscopic sense, the decision is seen by some as being one which adversely

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[35] Quebec Native Women's Association, "Presentation to hearing of the First Nations Constitutional Circle" (Montreal: Q.N.W.A., 6 February 1992) 1.

[36] Section 32 of the *Charter* outlines the governments to which the *Charter* applies. The Charlottetown Accord proposed that s. 32 be amended to include "... all legislative bodies and governments of the Aboriginal peoples of Canda in respect of all matters within the authority of their respective legislative bodies."

affects the nature of Aboriginal rights. It is recognized that the individual versus collective rights debate, indeed the entire "rights" debate is outside the traditions of most Aboriginal cultures.[37] Nevertheless the language of "rights" assists in understanding the two perspectives presented in the *Thomas* decision and in dealing with Aboriginal peoples as a group with certain rights and Aboriginal peoples as individuals with certain rights.

This decision offers no easy answers to the question of individual versus collective Aboriginal rights. It offers suggestions though, of ways in which Aboriginal peoples can secure safely their Aboriginal rights in general and maintain at least a portion of their individual rights, especially those guaranteeing security of the person. The fundamental point is that regardless of what regimes Aboriginal governments and peoples chose to guide their relations, those regimes must not impose physical harm on unwilling persons. If such norms are imposed by Aboriginal governments, what recourse will those unwilling Aboriginal persons have?

As the quest for an entrenched constitutional right of inherent self-government nears its goal, all governments, Aboriginal and non-Aboriginal alike must examine closely the application of the Canadian *Charter* to Aboriginal governments and peoples and the application of an Aboriginal charter or charters to Aboriginal governments and peoples. This is especially true for criminal justice where the legacy of injustice to Aboriginal peoples is most apparent.

VI. Conclusion

Thomas v. *Norris* raises profound questions as to the nature and extent of Aboriginal collective rights and their effect on the individual rights of Aboriginal people. Needless to say, this decision is simply the beginning of what will be a complex debate. However, it is submitted that *Thomas* outlines certain parameters within which collective Aboriginal rights may be enjoyed. Although these parameters appear to be reasonable and justified, they do, nevertheless, represent a serious obstacle to the full recogntion of Aboriginal rights in this country. The proposition that Aboriginal rights cannot be used to legitimize harm, or the threat of harm, to unwilling participants may seem reasonable to some, with the exception that the route to this

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[37] M.E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989–90) 6 Can. Hum. Rts. Y.B. 3.

conclusion damages Aboriginal rights in their broad sense. Although the *Thomas* decision attempts to draw a balance between the group rights of Aboriginal people on the one hand, and the enjoyment of individual rights by Aboriginal people on the other hand, it may be fundamentally flawed. The decision and this discussion possess an inherent problem in relation to Aboriginal peoples and their many cultures. The Canadian legal system is based in part on the protection of rights, whereas many Aboriginal peoples conduct themselves according to duty or resposibility.[38] Further to the point, from an Aboriginal perspective, the fact that Hood J. held that s. 35(1) provided no protection to spririt dancing (practiced against unwilling participants) underscores the ethnocentricity inherent in the Canadian legal system. Individual rights are supreme. Spirit dancing violates individual rights and must therefore succumb to the rights of the individual. The result is that while *Thomas* appears to draw a balance between individual and collective rights, the very language it uses, and that used in this discussion of "rights," is culturally vulgar to Aboriginal peoples. A serious examination of the language and devices used in Canadian legal reasoning is necessary to ensure that Aboriginal peoples receive the full benefit of their position as First Peoples and the full benefit of their rights.

[38] The author bases this assertion on numerous conversations with a number of Blackfoot elders in Alberta.