DAVID THOMAS (Plaintiffs) v. DANIEL LOUIE NORRIS, WILLIAM CHARLES SEYMOUR, ERNIE RICE, LEONARD PETERS, ALFRED JOE, FRANK WILSON, ROBERT HARRY (Defendants)

[Indexed as: **Thomas v. Norris**]

British Columbia Supreme Court, Hood J., February 5, 1992

D. McLeod, for the plaintiff
V. Starr and C. Scotnicki, for the defendants, Norris, Seymour, Rice, Peters, Wilson and Harry
Alfred Joe for himself

In this civil action the plaintiff claimed damages against the defendants for assault, battery and false imprisonment when he was initiated into the Coast Salish Big House Tradition called the Spirit Dance. The defendants denied the allegations, and also asserted three alternative defences: (i) lack of intention to inflict harm on the plaintiff; (ii) consent on the part of the plaintiff; and (iii) that spirit dancing is an existing Aboriginal right within the meaning of s.35(1) of the *Constitution Act, 1982.* The defendants did not assert the Aboriginal right claimed as freedom of religion.

Held: Damages awarded to plaintiff.

1. The plaintiff has proven assault, battery and wrongful or false imprisonment, in which each of the defendants participated. There was no evidence to support the defences of the lack of intention to inflict harm or implied consent or acquiescence.

2. Section 25 of the *Canadian Charter of Rights and Freedoms* has no application, as the Charter does not apply between private parties. In any event, the defendants did not rely on s.25.

3. At the least an Aboriginal right must involve an organized society of very longstanding, and the exercise of the right claimed as an integral part of Native life up to this day. The evidence was insufficient to prove that spirit dancing was an Aboriginal right, or that it was in existence and practiced at all material times.

4. Assuming that spirit dancing was an Aboriginal right, and that it existed and was practised prior to the assertion of British sovereignty over Vancouver Island, and the imposition of English law, those aspects of it which were contrary to English common law, both criminal and civil, such as the use of force, assault, battery and wrongful imprisonment, did not survive the coming into force of that law.

5. If spirit dancing generally was still in existence when the *Constitution Act, 1982* came into force in April 1982, the impugned aspects of it had been expressly extinguished.

6. If the impugned aspects were practised as of April 1982, which appears to be the case, they were maintained contrary to law. No group of persons, Indian or non-Indian, has the collective right to subject an individual to assault, battery or false imprisonment. The assumed Aboriginal right was not absolute. Like most freedoms or rights it was limited by laws, both civil and criminal, which protect those who may be injured by the exercise of the practice. The honour of the Crown was not involved and no fiduciary relationship existed between the parties. Further, if some justification inquiry or reconciling process were necessary, the protection of the civil rights of the individual plaintiff from these wrongs would prevail.

7. The plaintiff was awarded $12,000 for nonpecuniary damages, including exemplary damages for such intangible elements as anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues and the like.

8. Punitive damages, the purpose of which would be to punish the defendants rather than compensate the plaintiff, were not awarded. The defendants honestly and sincerely believed in the Dancing Tradition, and that they were helping the plaintiff by initiating him into the Tradition.

*** * * * * ***

HOOD J.:

Introduction

In this action the plaintiff claims against the defendants for nonpecuniary, aggravated, punitive and special damages, for assault, battery and false imprisonment during the period February 14 to 18, 1988. The action proceeded only against the defendants Joe, Norris, Seymour, Rice, Peters, Wilson and Harry. The defendant Joe represented himself and was assisted during the trial by two elders, at first Mr. Tom Samson, and later Mr. Norman Joe. The other defendants were represented by Ms. Starr and Ms. Scotnicki, as co-counsel.

The 35 year old plaintiff is a longshoreman and at an times material to this action resided at 5804 Alice Place, in the town of Duncan, British Columbia. He is an "Indian" within the meaning of the *Indian Act,* R.S.C. 1985, c.I-5, and is of course a Canadian citizen. He is a member of the Lyackson Indian Band, but has never been a member of the Cowichan Indian Band No. 642, a former defendant.

The defendant Norris is an Indian within the meaning of the *Indian Act* and is a member of the Halalt Indian Band No. 645, a former defendant. Each of the defendants Seymour, Peters, Wilson and Joe is an Indian within the meaning of the *Indian Act* and a member of the Cowichan Indian Band No. 642. The defendant Harry is an Indian within the meaning of the *Indian Act* and is a member of the Malahat Indian Band. The defendant Rice is an Indian, but no longer within the meaning of the Act or a member of any band, having lost his status for some reason, according to his testimony.

The events giving rise to the action began late on the afternoon of February 14, 1988 in the home of David Louie, a friend of the plaintiff, whose residence is located in Duncan, British Columbia. The plaintiff alleges that at that time he was forcibly seized and taken from his friend's home by the defendants, and then transported to the Somenos Long House of the Cowichan Indian Band No. 642. The House is a community House located on Allenby Road, on the Cowichan Indian Band No. 642 Reserve, near Duncan , British Columbia. The plaintiff says that he was falsely imprisoned in the House for four days. During this time he was forced to go through the initiation ceremonies, or tradition, required in order to become a spirit dancer of the House. He was assaulted, battered and wrongfully confined, and as a result he suffered injuries and required hospitalization.

The defendants deny that they assaulted, battered or falsely imprisoned the plaintiff. They then assert three alternative defenses; first, lack of intention on their part to inflict harm on the plaintiff, second, consent or acquiescence on the part of the plaintiff, and third, a constitutional defense that they had the legal right to initiate the plaintiff into the Coast Salish Big House Tradition, pursuant to their constitutionally protected right to exercise an existing Aboriginal right within the meaning of s.35 of the *Constitution Act, 1982*. The Aboriginal right claimed by the defendants is their right to carry on and exercise the Tradition, which is called the Coast Salish Spirit Dance.

The Evidence

Mr. Adrian Sylvester, a member of the Cowichan Indian Band, but not a dancer, testified that late in the afternoon of February 14, 1988 he was driving by the residence of David Louie in Duncan, British Columbia. At that time he saw the plaintiff "being hauled" out of the Louie house by a number of men. They were carrying the plaintiff who was struggling and trying to get away. During this time he saw the plaintiff "clamp on to, hang on to something, a door, a rail or a post or something," but then eventually pulled away. He was put into a van which then departed. He was not going willingly. The witness could not see the faces of the men involved, it was semi-dark and their faces were covered.

On cross-examination by Ms. Starr, Sylvester indicated that when he said that he saw the plaintiff "getting hauled" he meant that he was picked up and being carried "feet first" by the men; that he was struggling "like any person would struggle." He reiterated that the plaintiff "didn't seem to want to go" and that he saw him grab on to a post. He acknowledged that he was aware of the ceremony or tradition which is called 'Syo-wen.' It is common ground that a rough translation is the song and dance performed during the ceremony, spirit dancing. On redirect, when asked again whether he knew what was happening he said that he did, saying "it's called grabbing, when someone is grabbed for the big house" and that "every winter people are grabbed and put in the big house for dancing."

The plaintiff testified that he is a member of the Lyackson Band and of the Coast Salish people. He is not a dancer. He is thirty-five years of age. At the time of the incident he was living with Kim Johnny in a common-law relationship. Since the incident they have been married. They have five children and live at 5804 Alice Place, Duncan, British Columbia. He does not, and did not, live on the reserve. He is a longshoreman.

He said that on February 14, 1988 he was taking a shower at the home of his friend, David Louie. They had planned to go to a pool tournament. When he opened the bathroom door after showering, he saw a number of men in the hallway who then grabbed him. They lifted him up and carried him outside and placed him in a van. He was then driven to the Somenos Long House where he was imprisoned for four days, and forced to go through the spirit dancing initiation ceremony.

The plaintiff said that he did not willingly go to, or stay in, the Long House; that he did not consent to participate in the initiating ceremony or the assaults, batteries and confinements which he says occurred. He struggled and fought with the men but was unable to get away. He tried to hang on to anything he could to prevent them from taking him, both at the Louie house and in the van. When they entered the Long House he grabbed a pike pole, which was situate near to the door, "to hit someone." He was then struck on the hand with a kwitsmin, a ceremonial rattle approximately four feet long and surrounded with dried deer hooves. The pole was either knocked or pulled from his hand. The back of his hand was lacerated.

The plaintiffs identified the defendants as being some of the men who seized him, took him to the Long House, confined him and put him through the initiation. There were other men present, but at the time he did not know them. The defendants admit that they "grabbed" the plaintiff in order to initiate him into the Coast Salish Big House Tradition.

The plaintiff testified that after entering the Long House he was taken to the centre of the fioor area where "they started working on me." He was lifted up horizontally by eight men, who then took turns digging their fingers into his stomach area and biting him on his sides. This kind of ritual was repeated daily, four times each morning and four times each afternoon.

He was kept in the Long House for four days. He slept in a "blanket tent" in the house. He was at all times accompanied by a person called a "baby-sitter," whose duty it was to watch him. He was given "about a cup of water each day." He was never given any food.

He was dressed in a shirt and trousers. His glasses and shoes were taken from him. He cannot recall whether he was dressed when he was initially grabbed. He thinks he was. When asked how hard the men pushed their fingers into his sides and how hard they bit him, he replied respectively, hard enough to hurt and hard enough to make him scream. His skin was marked, but he does not believe that it was broken.

The plaintiff testified that he was allowed out the Long House on a couple of occasions, to go for a walk deep in the woods or to go to the bathroom. If he wanted to sleep during the day he had to sleep in the woods. His baby-sitter advised him of these requirements.

He was not allowed to wash or take a bath. At one point he was taken to a creek, stripped naked and forced to walk backwards into the water and "to go under three times." He was then whipped or beaten with cedar branches, hard enough to raise welts on his skin. He was returned to the Long House where warm and then cold water was thrown on him, and he was given clean clothes to wear.

The plaintiff testified that at the time he had an ulcer which began acting up. He was in pain, had passed some blood and he was also dehydrated. He said that because of this he was allowed to leave the House to go to the hospital. He was taken there by his brother. He said also that he was bruised and stiff on his sides at the time; that he was afraid that if the doctor released him he would be taken back to the Long House.

The plaintiff testified that all of the defendants were "around all four days" and participated in his ordeal, for example, the biting. He said that he did not agree to undergo the treatment he received at the hands of the men. He never consented to it being inflicted upon him. He never authorized anyone to have him initiated into the society, and he did not want to be a member of it. He knew very little about the religion of the Coast Somenos people. He was not, and is not, really interested

in learning about their culture. He was not brought up in it and lived off the reserve most of the time. What little exposure he had to it came through hearing his great grandmother talk about it.

On cross-examination by Ms. Starr, the plaintiff acknowledged that in direct examination he testified that at the time of the incident he was living with Kim Johnny. It was then pointed out that in one of his answers on interrogatories, he stated that at the time he and Kim Johnny were "not cohabiting, but were staying apart from each other for a short period, due to a disagreement." He also acknowledged that in direct examination he had said that while he was in the van he "just laid there." It was then pointed out that in an earlier affidavit, filed on an earlier motion, he had stated that he had "resisted, fighting, kicking and hitting, in an attempt to avoid being taken to the van" and "I kept up such resistance during the trip to the Somenos Big House"; that at examination for discovery he had said that his captors had held him down in the van.

The plaintiff was then examined on other suggested inconsistencies in his trial and previous evidence given, such as the pike pole incident, the sleeping arrangements (he said that his babysitter always slept nearby) the exact amount of water he had been given, whether the door to the house was locked at night, etc. The inconsistencies (assuming that label is accurate as to each point raised, and I am not satisfied that it is) like the examples I have just given, in my opinion, were of a trivial nature and in the main did not relate to crucial evidence. They did not cause me to disbelieve the plaintiff or to distrust his evidence. On the contrary, I accept his evidence. I am satisfied that he was taken from his friend's home, transported to the Long House, and there detained and "initiated," generally as he described it. In this regard his evidence as to what happened as he was being carried from the Louie house, is corroborated by the evidence of the independent witness Sylvester, whose evidence I also accept.

Dr. J.P. Griffin, a general practitioner, was on duty at the emergency ward of the Cowichan District Hospital when the plaintiff was admitted on February 18, 1988. After identifying his clinical notes and records pertaining to the admission, he testified that the plaintiff was admitted to the hospital because he was dehydrated, experiencing some epigastric pain, and because of concern for his safety. Apparently he complained of being beaten, of pain in his heels, and of pain on both sides of his torso where multiple contusions were noted.

It is stated in the doctors report, contained in the hospital records:

> In the emergency he was primarily upset over his treatment in the Long House and concerned that if he returned home, he would be dragged back there.

And

> Complains primarily of flank pain, right and left and bilateral heel pain. He has apparently been beaten with switches a bit and forced to dance on stones.

And

> IMPRESSION: This young native Indian male is suffering from dehydration and multiple contusions and has evidence of peptic ulcer disease. He states he has had some R "block streaking" in his stools and this will be followed. In addition he will be rehydrated and admitted for his safety.

In cross-examination by Ms. Starr, Dr. Griffin acknowledge that the plaintiff s multiple contusions were superficial. There was no bleeding and sutures were not required. When asked whether the skin had been broken, he replied that he could not recall any large gashes of the skin. When asked whether he observed any raised welts, he replied that he could not recall, that none were documented. He described the area where the multiple contusions were located as the plaintiffs "flank areas," the front, side and back areas of both sides of his torso. He was asked whether the contusions were consistent with a beating, and he said that they were consistent with being struck with an object. He said that there were three kinds of dehydration -mild, moderate and extreme; that the plaintiffs situation was mild to moderate, a situation which would take overnight to correct.

Dr. Griffin acknowledged that it would have been possible to treat the plaintiff for dehydration at home, if he was confident that the plaintiff could have been in a position to follow his instructions. He required the plaintiff to stay in hospital partly because he was not satisfied that this was the case. His impression of the plaintiffs emotional state was that he was distraught about his safety and welfare, very concerned that if he was treated and released he might be forced to go back to the Long House. On redirect, he confirmed that both he and the plaintiff were concerned about his

safety. He felt that if he was released from hospital at that time the plaintiff would not be able to follow his recommendations, while at the same time the plaintiff was concerned for his own safety.

The plaintiffs final witness was the defendant, Leonard Peters, who was called as an adverse party under Rule 40(17). He is a member of the Coast Salish People and of the Cowichan Band. He is an elder in the band, and a dancer in the Long House Tradition or Society. He testified that he was not one of the men who went to "grab" the plaintiff at the home of David Louie. However, he knew that the men were going to grab the plaintiff and bring him to the Long House for initiation, and as an elder he was responsible for the way in which it was carried out. He was there to oversee the men who were initiating the plaintiff. The defendant Ernie Rice is also an elder. He too was there to guide the men in the initiation of the plaintiff. He and Rice were in charge.

Peters says he first saw the plaintiff when he was brought into the Long House. He did not see anything done to the plaintiff "in excess." He attended during the initiation because it was his job to oversee the initiators. He agreed that it was part of the initiation to see that the plaintiff was not allowed out of the Big House, which I took to mean leave, until the initiation was completed. He acknowledged that all of the defendants participated in the initiation of the plaintiff into the dancing tradition, except Rice who was there but did not actually participate. I took him to mean that Rice did not physically participate. The evidence is that Rice was there, as an elder, to guide the men in the initiation of the plaintiff.

Peters denied that it was a part of the initiation to deprive the person being initiated of food and water for a period. He did not see the plaintiff receive any food. He emphasized that he and Rice decided that the plaintiff would be "babied," and that he would "get what we didn't get," meaning his initiation would be easier. He acknowledged that during the initiation the plaintiff was held up in the air from time-to-time. When asked whether or not is was a part of the initiation for the person being initiated to have his sides pushed in with fingers or knuckles, he replied "it happens but not necessarily." He said that he spoke to the plaintiff while he was in the Long House. The plaintiff did not tell him that he consented to what was happening, and he did not ask for permission to leave.

Peters testified that the Long House was operated by the Cowichan People; that most bands followed the tradition or spirit dancer initiation. We was aware of the fact that a Mr. Gordie Goldsmith had died during such an initiation on February 12, 1988. However, while acknowledging that all initiations are pretty well the same, he said that the plaintiffs initiation was "maybe not quite the same." He reiterated that the plaintiff was "babied" in his initiation, that nothing was done to hurt him. Peters was not examined by Mr. Joe or Ms. Starr, who advised me that she proposed to call him as the first witness for the defense. I turn now to his evidence as a defense witness.

Peters testified that he, Raymond Peters, Joseph Charles and the defendant Ernie Rice are the leaders of the Somenos Long House. Members of the band come to them as leaders for counselling and various other reasons, for example, if someone is to be initiated into the Coast Salish Big House Dancer Tradition. He said "if they want someone grabbed they come to us first."

Peters testified that it was the plaintiffs then common-law wife, Kim Johnny, who requested that the plaintiff be initiated. He did not know who she was at the time. He said that she asked him to "grab Rocky" (the plaintiffs' nickname) and have him "put in the Big House." She told him that she wanted this to be done because of the plaintiffs marital and other problems. He said he told her that "before we could do anything she would have to get permission from someone in the family." He suggested that she obtain permission either from the plaintiffs brother Gordon, or from his aunt, Mrs. Helen Kamar. He said that she later came back and told them, through the other elder Ernie Rice, that she had obtained the necessary permission. He subsequently questioned her with regard to whether the plaintiff had any medical problems and learned that he had an ulcer. He asked her to obtain the plaintiffs medicine, which was subsequently provided to him.

Peters was asked to compare how the plaintiff was treated, to the treatment of other persons initiated into the dance. He said that the plaintiff had it a lot better than the others; that he had told the men to be careful, that he did not know what the plaintiff was like, and that he might not go along with the initiation. He told them "let's not do anything that might hurt him." He said that in fact he stood there and watched the initiation proceedings, to see that nothing was done that would hurt the plaintiff.

He was in the Long House when the plaintiff came through the door. He did not see the plaintiff grab the pike pole or witness the pike pole incident. He said that the plaintiff never told him that he did not want to be there; that the plaintiff eventually sang his song without any help from anyone.

Peters was asked about the plaintiffs allegation that he was bitten on both sides of his torso. He said that when the plaintiff was lifted up he stood by the plaintiffs head and looked from one side to the other, that the other men participating in the initiation "were nowhere near his chest or sides." He said it was his job to see that nothing was done to hurt the plaintiff, that he told "the boys" who had not done it before, what to do, i.e., he coached them. He said also that the doors to the Long House are locked at night from the inside, after they go to bed.

In cross-examination by counsel for the plaintiff, Peters acknowledged that he did not check to see whether or not Kim Johnny in fact had Mrs. Karnes consent. They relied on what Kim Johnny told them. When they "grabbed" the plaintiff no one asked whether or not he consented to the procedure. He said that this was not usually done with the person who was being initiated. It was put to him that he knew that the plaintiff did not want to be initiated, and he said "I guess I did." He did not enquire of the plaintiff. The Long House would have been locked from the inside by 12 or 1 a.m. He did not tell the plaintiff that the house was locked from the inside, or that he could leave.

It was put to him that it was a part of the tradition that the person being initiated would not receive any food, and very little water, in order to encourage an hallucinatory state. He said that he never thought of it as that, and that "a lot of us fast." When asked why the plaintiff was required to fast and be on a low dosage of water, he said that he could not really explain it, that we all go through it." He did not know whether it made it easier for the person being initiated "to hear the song of his guardian spirit."

On redirect he reiterated that they were there to help the person initiated if he was having a problem; that they were only concerned about him, "they want our help and we are there to help them." They felt that Kim Johnny needed help.

Mrs. Helen Kamar was called to give evidence on behalf of the defendants. The plaintiff is her nephew. She is 64 years of age. She testified that early on the Sunday morning of February 14, 1988, Kim Johnny, Kim's brother and one Dorothy Joe, came to see her at her home. She said they came to ask her if "we could put Rocky into the smoke house." She said that she told them that Rocky had a brother who was also a dancer, that they should ask the brother to give the necessary consent; that if he said yes "I'd stand behind him and help him out." She is also a dancer.

Mrs. Kamar testified that the plaintiffs brother did not give his consent to the initiation and, it follows, that she did not consent either. She was asked what effect the matter had on her family. She said that it was not too much, that she stayed at home most of the time, and did not really associate with the family. Neither Mr. Joe nor counsel for the plaintiff cross-examined the witness. I accept her evidence.

Kim Johnny, now the wife of the plaintiff (and whom I will hereafter refer to as Mrs. Thomas) was also called to give evidence on behalf of the defendants. She now is a member of the Lyackson Band, having married the plaintiff. She confirmed that she and the plaintiff live off the reservation, in Duncan.

Mrs. Thomas was asked whether she recalled events which occurred on February 13, 1988 at the Long House. She replied "no, I have to read my diary to refresh my memory." She was asked why she asked Rice to have the plaintiff grabbed and put in the Long House, and she replied that it was "for us, it was the right thing to do - I thought it would help our relationship." When asked whether it did help the relationship she replied that it had not, that it had made it worse.

Mrs. Thomas said that she could not testify as to what was said by her and Rice, because she had not looked at her diary to refresh her memory. When it was put to her that she must remember what was said, she replied that she did not really want to remember what was said. Rice had asked her why she wanted to have it done, and she said she told him that it was for the reasons she had already stated.

Mrs. Thomas was pressed as to when Rice had advised her that they would grab the plaintiff, i.e., right away when she asked him to do so, or sometime later. She said that she could not remember, that while she was sure that there was some, discussion she could not recall what it was, but that "they agreed to do it." When asked again when they agreed to do it, she replied that she did not know. She could not recall the discussion with Rice. She did recall discussing the matter with Dorothy Joe, that Dorothy Joe expressed the opinion that she did not think it was right for them to do it, but that she, Mrs. Thomas, thought that it was right. Neither Mr. Joe nor counsel

for the plaintiff cross-examined the witness. I had some difficulties with Mrs. Thomas' poor memory and her evidence relating to the obtaining of Mrs. Kamar's consent and what she told Rice and Peters. However, I need not deal with this aspect further, since even if the defendants had Mrs. Kamar's consent it would not be a defense.

The next witness called on behalf of the defendants was the defendant Ernie Rice. He is no longer a member of any band, having lost his status for some reason. He has been a dancer for twenty-six years. He confirmed that he, Raymond Peters, Joseph Charles and Leonard Peters are the leaders of the Somenos Big House.

Rice testified that he was at the Big House on Saturday, February 13, 1988 when he was called to a conversation between Peters and Mrs. Thomas. Initially Mrs. Thomas had asked Peters to grab the plaintiff. When he was called over Peters told him what Mrs. Thomas had told him, that she would like to have the plaintiff initiated in the Long House, "to put him in the House." He was told that the reason was because he was drinking, etc. He said at that time Mrs. Thomas was told that they would have to have "more reason than that," that they would have to have the consent of the plaintiffs family. He suggested that the consent of either his aunt, Mrs. Kamar, or the plaintiffs brother, Gordon be obtained.

Rice testified that at approximately 7 a.m. on the following morning, Mrs. Thomas and Dorothy Joe came to his home. He was told that Mrs. Thomas was going to see Mrs. Kamar, and that she would be back to him that morning to give him an answer "whether to go through with it or not." He said that Mrs. Thomas came back to his home around noon and told him that she had permission from Mrs. Kamar for the initiation. He told her that it would be carried out. I accept this evidence.

On cross-examination, Rice stated that he was one of the men who went to David Louie's house to grab the plaintiff. He drove the van and stayed in it while the others went into the house to grab the plaintiff. He did not see what happened while the men were in the house or while they were carrying the plaintiff to the van. Again, he testified that he did not see what happened when the plaintiff was carried from the van into the Long House, because he was parking the van at the time.

He was in the Long House during the four days that the plaintiff was there. His job was to see that there were "no difficulties" and "to oversee the conducting of the initiation." He was one of "the bosses" of the initiation. He never asked the plaintiff if he consented to what was happening to him. He did not check with Mrs. Kamar and ascertain whether she or the plaintiffs brother gave permission for the grabbing. He knew that the plaintiff did not want to be initiated but went ahead and initiated him anyway. He did not see the plaintiff receiving water or food. He believes that the plaintiff received four cups of water per day. He said that the Long House was never locked at all during initiations.

On redirect examination he said that normally the elders did not ask the persons being initiated if he or she agreed to be initiated. Nor do they double check to make sure that they have family consent. They usually "get the word from the one who asks them, I guess." It is normal for a wife to ask that the husband be "grabbed."

I turn now to the evidence of the defendants' final witness, the defendant William Seymour. He is a member of the band and a dancer at the Somenos Big House. He testified that around 3:30 p.m. on February 14, 1988 he went to the Long House to watch the initiation. When he arrived the defendant Rice told him that he needed help, and he agreed to help him.

Seymour said that he then went with the other men, in the van which was driven by Rice, to "grab Rocky," the plaintiff, at Dave Louie's home. On arrival they found that the door was locked. It was opened in response to their knock. They entered, and on being told that the plaintiff was in the shower, they waited in the hallway for five or ten minutes for him to exit the shower.

Seymour said that when the plaintiff opened the bathroom door, they grabbed him and lifted him up and that he did not struggle when they lifted him that the plaintiff said nothing although he had a surprised look on his face. They carried him to, and placed him on his back in, the van. He said that while in that position the plaintiff did not struggle, and they did not touch him, that "we were just kneeling around him." When asked whether the plaintiff struggled when they carried him into the Long House he said "I never seen the struggle at this point."

When asked whether he saw the plaintiff struggle after that, he confirmed that on being carried into the Long House the plaintiff grabbed a pike pole which was situate near the door. He

suggested that the pole was taken away from the plaintiff by "an old woman." After being brought into the Long House the plaintiff was then taken to the middle of the floor - "that's where we worked on him."

The witness said that the plaintiff was lifted into the air by the group of men who then "blew on him." He said the purpose was to "help him bring out his song." He denied putting his hands or mouth on the plaintiffs body, or biting while he was blowing on him. He said that while blowing his mouth was "close enough to keep him warm but not touching him." He did not see any of the other dancers touch the plaintiff, as they were blowing on him.

The blowing procedure he described was repeated five times that evening. He had been told of the plaintiff s ulcer problem and had been given his medication. He gave the plaintiff a pill and a warm glass of water in the evening, and again the next morning. He then gave the medicine to the bay-sitter as he was going to work.

Seymour testified that he was at the Long House for each of the four or five days the plaintiff was there. He was there in the mornings and in the evenings, as he worked during the day.

During this time, he did not see the plaintiff struggle to leave the Long House. He also saw the plaintiff sing his song, without assistance.

in cross-examination, Seymour said that normally "you have at least seven guys when you go and grab." He denied that this was so because the person being grabbed did not know that he was going to be grabbed, or that it was so that he could not escape. He suggested that the seven men were needed so that the person being initiated could be carried with his body parallel to the ground. He reiterated his direct examination evidence that the plaintiff said nothing before or after he was seized, that he did not struggle or do anything as they carried him to the van. He said that while in the van they did not hold him down, but agreed that had the plaintiff tried to get up "we probably would have held him down," and that there was no point in the plaintiff trying to get up.

When asked why the seven-foot pike pole was taken away from the plaintiff, he said that it was because the plaintiff had no use for it, and because they did not want him to hurt anyone. When it was suggested that they knew that the plaintiff did not want to be in the Long House or to be initiated, he said again that he did not know; that the plaintiff had not asked if he could leave during the five days. However, he acknowledged that had the plaintiff asked to be allowed to leave, they would not have let him go. During the time he was in the Long House he did not see the plaintiff given anything to drink, other than the water he gave him with his pill. He did not see him given any food. He acknowledged that usually the person being initiated is not given much, if any, food, and little water, although it may depend to some extent on "who's looking after him."

He was asked if he had any idea how the plaintiff became dehydrated and he said that he did not. He was asked if the plaintiffs multiple contusions resulted from his being grabbed and handled in the Long House. He said he did not know and later, that it could be. He agreed that the kwitsmin was used in the initiation, but denied that the plaintiff was struck with it.

When asked about the plaintiffs allegation about fingers and knuckles being dug into his sides, and that "this happens, doesn't it?", he said he did not know, that he did not do it; that he could not say what the others did. With regard to the plaintiffs assertion that he was bitten on the sides he said that he did not know. He denied that the Long House was ever locked from the inside or the outside. However, he reiterated that if the plaintiff had attempted to leave they would not have let him go. On redirect examination he reiterated his earlier evidence that the plaintiff did not struggle and that the kwitsmin did not touch the plaintiff's body. He also said that he had no idea why the plaintiff would have felt that he was being bitten or that whiskers were being rubbed on the sides of his torso.

Counsel for the defendants then read in portions of the plaintiffs discovery evidence, before closing the defendants' case. I have already dealt with suggested inconsistencies in the plaintiffs evidence, pointed out by counsel for the defendants. The discovery evidence read in, in my opinion, did not take away from the plaintiffs evidence, while some of it bolstered it.

Before turning to the issues I should say something about the question of credibility, which was addressed by counsel for the plaintiff, but not counsel for the defendants. As I have already stated, I accept the evidence of the plaintiff. I also accept the evidence of the independent witness Sylvester, whose evidence supports the evidence of the plaintiff, as does the hospital records and the evidence of Dr. Griffin.

The evidence of the defense witnesses in the main supported generally the evidence of the plaintiff. However, I had some difficulty with the evidence of the defense witnesses in some areas, and where it is materially in conflict with that of the plaintiff I prefer the latter. I refer by way of example, to Peters' evidence that when the men lifted the plaintiff during the ceremony they were nowhere near the plaintiffs chest or side, if the witness is suggesting that there was no contact between the men and the plaintiffs body, which was subsequently found to have multiple contusions. Another example is the evidence of the witness Seymour that the plaintiff did not struggle or attempt to escape, said nothing and came with the men inferentially willingly; also his evidence to the effect that he had no idea how the multiple contusions on the plaintiffs torso might have happened. I reject such evidence, as I say, and prefer to accept that of the plaintiff and of the other witnesses who support his testimony.

The Issues

The issues are (1) whether the defendants assaulted, battered or falsely imprisoned the plaintiff, and this includes the defenses asserted, lack of intent, and consent or acquiescence on the part of the plaintiff, (2) is spirit dancing a protected Aboriginal right under ss.35 and 52 of the Constitution Act, 1982 thus rendering inoperative, as against the defendants, infringing common law of assault, battery and false imprisonment; (3) if successful, what damages is the plaintiff entitled to?

Issue No. 1

I do not propose to deal at length with issue No. 1, the tort issues. I am fully satisfied on the evidence that the plaintiff was seized or "grabbed" by the defendants, carried to the van and confined to it, carried into the Long House and there detained for four or five days, all forcibly and without his consent or acquiescence. He was assaulted immediately he left the bathroom and continually thereafter, because the threat or menace of violence or restraint, and the ability to make it stick, was always present; as, no doubt, was the plaintiffs fear which he subsequently expressed to Dr. Griffin. A battery was committed when he was grabbed and thereafter whenever he was touched or beaten. He was falsely or unlawfully imprisoned from the moment he was grabbed until his departure for the hospital. He would not have been permitted to leave the Long House, even had he made a strenuous attempt to do so. The threat of force and restraint, as well as the actual confinement, constituted the imprisonment.

There is simply no evidence before me which would support the assertion of lack of necessary intent, or the defense of justification, that is, implied consent or acquiescence. Nothing in the plaintiffs conduct would support a finding of consent or acquiescence. Nor can it be said that it is in the least bit equivocal. Further, the argument that their conduct did not injure the plaintiff mentally, as well as physically, simply is not open to the defendants. It is clear from the evidence that when he arrived at the hospital he was dehydrated, his peptic ulcer was activated, he was suffering from multiple contusions and he was frightened that "he would be dragged back there." Dr. Griffin admitted him to the hospital at least in part because he was concerned for the plaintiffs safety.

The plaintiff has proven, beyond any question, almost continuous assault, battery and wrongful or false imprisonment during his ordeal, in which each of the defendants participated.

He is entitled to recover damages from each of the defendants, unless the constitutional defense succeeds.

Issue No. 2

In making their submissions on this issue, neither counsel referred to the positions taken, or submissions made, by the other counsel. I am left with two separate approaches to the issue, each of which was unanswered. The plaintiff says that ever since English law was proclaimed to be the law on Vancouver Island in the mid-1800s, the defendants have been subject to the common law of the Province like any other citizens; that when participating in any Aboriginal tradition or religious practise, the defendants must abide by the common law, and in this case, the law of assault, battery and false imprisonment. On the other hand, the defendants say that their right to traditional practises is an Aboriginal right protected by s.35(1) of the *Constitution Act, 1982* and that accordingly they enjoy a form of civil immunity. In performing the Spirit Dance Tradition they are not bound by the common law, and the plaintiffs civil rights against assault, battery and false

imprisonment are subordinate, and must give way, to the collective right of the Aboriginal nation to which he belongs, and which is protected by s.35(1).

The Submissions

Counsel for the plaintiff submits that the dancing tradition, which he describes as the traditional religious practise of the defendants, is not protected by the *Canadian Charter of Rights and Freedoms;* that s.25 of the Charter has no application in the case at bar, citing *Retail, Wholesale and Department Store Union, Local 580, Peterson and Alexander v. Dolphin Delivery Ltd.,* [1987] 1 W.W.R. 577 (S.C.C.) and *McKinney v. Board of Governors of the University of Guelph et al.,* [1990] 76 D.L.R. (4th) 545 (S.C.C.). I agree. While the Charter applies to common law, it does not apply between private parties unless governmental intervention in some form is involved, and it is not involved in the case at bar. Section 32(1) of the *Constitution Act, 1982* makes it clear that the Charter is not applicable to private litigation. Hence, the defendants cannot defend the action on the basis of the Charter.

Plaintiffs counsel next argues that the dancing tradition is subject to the laws of general application in Canada, including the law of tort. The fact that the tradition is claimed to be religious is not a bar to seeking the assistance of the courts in the determination of either criminal or civil wrong. He cites *Re Church of Scientology et al. and The Queen* (1987), 31 C.C.C. (3d) 449 an 469 (Ont. C.A.) where it is said:

> Freedom of religious practise or conduct is not absolute, and is subject to the laws of general application established to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

In that case, at pp. 471-72, the court notes that in Canada there are many instances where the sincerely held beliefs of members of particular religious groups or sects have been held to be ineffectual defenses to alleged breaches of laws of this country; that the courts have not hesitated to interfere with religious practises when they run contrary to existing laws or even to acceptable practises. The court refers to a number of examples including the decision of our Court of Appeal in *R. v. Harrold* (1971), 3 C.C.C. (2d) 387. There the accused was a member of a religious group which had as its mandate the systematic propagation of spiritual knowledge to society at large. He was convicted of contravening the City of Vancouver's antinoise by-law. Tysoe J.A. speaking for the court, stated at p. 395:

> The right to freedom of religion does not permit anyone, acting under the umbrella of his religious teachings and practises, to violate the law of the land, whether that law be federal, provincial or municipal.

Another example cited is *R. v. Jack and Charlie,* [1985] 4 C.N.L.R. 88, [1986] 1 W.W.R. 21 (S.C.C.) where the accused was convicted of hunting deer out of season, despite his contention that he needed to use the meat in a religious ceremony.

I return to counsel's submission. He says that there can be only one law of the land, applicable to all; that whatever religious freedom is claimed by the defendants, it must yield to the freedom of the plaintiff not to be deliberately harried. The traditional activities of the Coast Salish People, if they are in conflict with the laws of the country, must yield to those laws. He submits that any rights of Aboriginal jurisdiction or sovereignty, which the defendants' ancestors may have had, did not survive the assertion of British sovereignty in the mid- 1800s; that no other form of government or law could exist in the Colonies of British Columbia and Vancouver Island after English law was imposed. Thus, the defendants and their ancestors have always been bound by or subject to the common law of the province, including the torts of assault, battery and false imprisonment.

Counsel relies on the landmark decision of McEachern C.J.B.C. in *Delgamuukw v. The Queen*, [1991] 5 C.N.L.R. 1, [1991] 3 W.W.R. 97. He referred in particular to pages 406 and 407 [pp. 225 and 226 C.N.L.R.] whereat Chief Justice McEachern states:

> I conclude that an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication ...

And

> ... and I concluded that aboriginal sovereignty did not survive the assertion of British sovereignty. I do not find it necessary to consider or decide whether the establishment of the Colony of British Columbia, for example, should be classified as a displacement of one sovereignty by a different one which the law recognizes, or whether the legal arrangements which were put in place during the colonial period amounted to an extinguishment of the earlier sovereignty.
>
> I tend to think the former more correctly describes the historical reality, but if I am wrong in that regard, then it would be my judgment that the Crown clearly and plainly intended, in the sense I have mentioned, to extinguish any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty. This, of course, was accomplished by the governmental arrangements the Crown put in place during the colonial period, which were clearly intended to apply throughout the colony and to bind everyone who lived there. It is inconceivable, in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a governor with power to legislate, took tide to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown.
>
> In addition, in my view, the enactment of the *British North America Act, 1867,* and adherence to it by the colony of British Columbia in 1871*,* which was accomplished by Imperial, Canadian and colonial legislation, confirmed the establishment of a federal nation with all legislative powers divided only between Canada and the province. This also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period.

In conclusion counsel said that the rights of the defendants to exercise their Aboriginal religious practises are not protected by the Charter, or by any other provision of the *Constitution Act, 1982*, so as to permit the defendants to interfere with the common law rights and freedoms of another member of society. The actions of all citizens, including these defendants, are subject to the general laws of Canada and to the scrutiny of the courts, acting as independent arbiters. In the area of tort liability there is no system of justice for Aboriginal peoples, which is separated from the system that applies to all Canadians. He concludes:

> The fundamental rights and freedoms enjoyed by any citizen may not be abrogated or denied by any other group of citizens claiming the protection of a system of tradition or beliefs that predates the entry of British law to this jurisdiction.

I turn now to the submissions of counsel for the defendants. I will first deal with the Aboriginal right claimed by the defendants, that is, the right to carry on and exercise what their counsel described as "their ancient and sacred tradition called the Coast Salish Spirit Dance." I think it is common ground, and the evidence suggests, that spirit dancing has been performed or practised by Coast Salish people, including the Cowichan Indians, for some time; that it is considered to be a tradition as well as a religion.

The initiation process is commenced by the initiate being "grabbed," by his or her initiators, and taken to a Long House and there detained for a number of days, presumably the time it takes to complete the initiation. It is completed when the initiate has his or her vision experience, which is evidenced by the initiate dancing and singing his or her song. While in the Long House, the initiate undergoes a process which includes being lifted horizontally to shoulder or head height, by eight or so initiators who, among other things, blow on the body of the initiate to help the initiate "bring out" or sing his or her song. This ritual is repeated daily, four times each morning and four times each afternoon. The initiation is done under the guidance of elders who are in charge of the process, which takes a number of days. During the process the initiate participates in rituals including a ceremonial bath, dressing in clean clothes, fasting and sleeping in a blanket tent set up in the House. The initiate is always accompanied by an attendant who is called his or her "babysitter."

The initiate is captured or grabbed either with or without his or her consent. The only consent required is that of a senior member of the initiate's family. Apparently, it is not uncommon for a wife to ask the elders to have her husband initiated by the house dancers. It is said that in the end the initiate sings his or her song while dancing, and the song is said to be proof of a supernatural vision experience.

I must acknowledge that the above description is somewhat brief, and may not be entirely accurate. It is based on the evidence I have heard, and involves some inference, although I have

read with much interest the publication *Coast Salish Spirit Dancing, the Survival of an Ancestral Religion* by Pamela Amoss, printed by the University of Washington Press in 1978, tendered on behalf of the defendants. Counsel for the defendant submits that I should take judicial notice of this publication (and of a second one which I do not recall being referenced or receiving, and have not read) regarding the nature of the Aboriginal right which the defendants claim. She relies on the decision of Chief Justice McEachern, on motion, in *Delgamuukw v. The Queen* (1989), [1990] 1 C.N.L.R. 29 at 35, 38 B.C.L.R. (2d) 176 at 184. She submits that I should find the publication to be a learned treatise, admit it into evidence and treat the facts therein stated as *prima facie* true.

I decline to do so for a number of reasons, including the fact that it is not necessary that the issue be determined in order to meet what I understand to be counsel's sole purpose, that is, to demonstrate the nature of spirit dancing. Expert testimony was not called on behalf of the defendants with regard to spirit dancing. Again, I was only given portions of the publication referred to, and its author, Pamela Amoss, did not testify. However, there is sufficient evidence before me, gleened from the testimony of the defense witnesses (given I thought somewhat reluctantly, and for understandable reasons) to satisfy me, very generally, as to the nature of spirit dancing. While I need not consider further the admissibility of the publication, I note that the general outline of the dancing which I have given is similar in the main to the description of it contained in the publication.

I also wish to deal here with defense counsel's submission as to the proof of the Aboriginal right claimed, and of its existence at the material times. In this regard counsel relies on the decision of the Supreme Court of Canada in *R. v. Sparrow,* [1990] 2 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241 particularly at p. 395 [D.L.R., p. 169 C.N.L.R.] where the court commences to deal with the word "existing" contained in s.35(1) of the *Constitution Act, 1982*. I will have more to say about this section in a moment. But I will note here, that in *Sparrow* the existence of the Aboriginal right claimed was established through the evidence of an anthropologist, supported by that of a former administrator of the band; also that the existence of the right was "not the subject of serious dispute."

In the case at bar the evidence is insufficient to prove that spirit dancing is an Aboriginal right, or that it was in existence and practised at all the material times, even applying what I would call the "tempered onus" referred to by Selbie J. in *R. v. Vanderpeet,* [1991] 3 C.N.L.R. 161 (B.C.S.C.).

In *Sparrow* in the Court of Appeal [1987] 1 C.N.L.R. 145, [1987] 2 W.W.R. 577, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65 it is stated at p. 254 [D.L.R., p. 152 C.N.L.R.]:

> Because the aboriginal right asserted here is a relatively narrow one, the existence of which is not the subject of serious dispute, it is unnecessary to consider the anthropological facts at length. It is clear that the Musqueam have a history as an organized society going back long before the coming of the white man; and that the taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day.

The passage suggests that at the least an Aboriginal right must involve an organized society of very longstanding, and the exercise of the right claimed as an integral part of Native life up to this day. In the Supreme Court of Canada the court inferentially approved the establishment of the Aboriginal right in the main on the basis of the two factors. In this regard see also the conclusions of Chief Justice McEachern in the main judgment in *Delgamuukw, supra,* particularly at p. 390 [p. 214 C.N.L.R.] where he states:

> I have already discussed this generally, and I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contract or European influence and which were still being carried on at the date of sovereignty, although by then with modem techniques.

'Me evidence before me does not meet these tests, although I note that counsel for the plaintiff did concede, in his written argument, that the dancing tradition was "one of the winter dances of the Coast Salish People, which is part of the religious tradition of those people," citing a publication to which I was not referred.

In attempting to establish the Aboriginal right counsel says:

> To meet the burden of proving that the aboriginal right here claimed by the defendants is an 'existing aboriginal right' within the meaning of s.35, the defendants rely on the statutory

> provisions of the *Indian Act* dating back to 1884, when the prohibition against Indian dancing and the Potlach was first enacted.

Counsel relies on an indexed collection of *Indian Acts and Amendments* [Sharon Venne, *Indian Acts and Amendments 1868-1975, An Indexed Collection* (Saskatoon: Native Law Centre, 1981)] prepared in 1981, commencing in 1884, when the *Indian Act* of 1880 was amended to prohibit Indians from engaging or celebrating in "the Indian Festival known as the 'Potlach' or in the Indian dance known as the 'ramanawas'. " She traced the relevant sections of the Act to 1951 when they were repealed. A description of the conduct prohibited, contained in the 1886 Act, is as follows:

> 114. ... any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature ... or... who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal form a part or is a feature,

Counsel submits that the repeal of the Act in 1951 requires me "to conclude by necessary inference that Indian dancing again became lawful" and that spirit dancing was in existence in April of 1982 when the *Constitution Act* came into force. Counsel did not address the effect of the fact that the specified dancing had been prohibited for some 67 years, or the effect of the repeal of the Act, other than to suggest that at that point they became lawful again. I am not satisfied that that is the case.

It seems to me that the very prohibition of the specified dancing is some evidence of the early existence of those dances. However, even assuming that the specified dances fall within the definition of "Aboriginal rights" (and I am not satisfied that they do) I am not satisfied that I can lump spirit dancing with them, and then conclude that spirit dancing is an Aboriginal right and that it existed and was practised at the material times, particularly in the mid-1800s when British sovereignty was asserted, and the law of England proclaimed to be in force, in the Colonies of Vancouver Island and British Columbia. It is a question of proof, and as I have already said, I am not satisfied on the evidence before me, or perhaps I should say the lack of it, that such has been proven by the defendants.

Further, I am not satisfied that even an ancient tradition or activity carried on by the defendants and their ancestors, which involves force, assault, injury and confinement, all against the will of the initiate, can be said to be a continuing Aboriginal right. If spirit dancing includes criminal conduct as an integral part of it, it could not be said to be an Aboriginal right which survived the introduction of English law into the colonies. In this regard I note that under the *Criminal Code* both assault and confinement of a person are criminal offenses in certain circumstances. I will assume, for the purposes of this case, that the conduct of the defendants, the acts complained of, are not criminal. However, the question remains whether conduct amounting to civil wrongs or "crimes" should be considered in the same light.

Civil rights against such torts as assault and false imprisonment protect the freedoms and rights of Aboriginal and non-Aboriginal citizens of this country, from infringement, and punish offenders just as the criminal law does. They protect 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. In my opinion, conduct amounting to civil wrongs (rights from the point of view of the person wronged) should stand on the same footing as criminal conduct. If such conduct cannot be separated from the spirit dancing, and thus is an integral part of it, then in my opinion spirit dancing is not an Aboriginal right recognized or protected by the law.

Notwithstanding having reached these conclusions, I have decided that in the circumstances of this case I should still deal with all of the submissions of counsel for the defendants but, of course, on an alternative basis. For the sole purposes of such task, that is, when dealing with defendants' counsel's submissions, I will assume that spirit dancing is an Aboriginal right which somehow survived the introduction of English law in the mid-1800s, was continuously practised, and was in existence in 1982 when the *Constitution Act* came into force.

Counsel for the defendants commences her written submission as follows:

> In the further alternative, the defendants say that even if the court finds that the defendants intended to assault, batter or falsely imprison the plaintiff, or that the plaintiff did not impliedly consent or acquiesce to his initiation, then the defendants claim that they had the *legal right to* initiate the plaintiff into the Coast Salish Big House Tradition pursuant to their

> constitutionally protected right to exercise *an existing aboriginal right* within the meaning of s.35 of the *Constitution Act, 1982.*
>
> (My emphasis)

I will set out here s.35(1) of the *Constitution Act, 1982.*

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

In oral argument counsel said that she agreed with counsel for the plaintiff that s.25 of the Act does not form part of the constitutional defense, and that s.35 is not affected by s.25. Her argument is based solely on s.35. The Aboriginal right claimed is the right to carry on and exercise the ancient and sacred tradition called the Coast Salish Spirit Dance.

Counsel also advised me that the defendants do not assert the Aboriginal right claimed as freedom of religion. She did not elaborate and I am not satisfied that I fully understand her position. While the Charter does not apply to private litigation, the defendants still enjoy their common law right of freedom of religion, as do all Canadian citizens. However, the defendants have chosen to rely solely on the constitutional protection afforded by s.35(1). That section is not limited or qualified by s. 1 of the Charter, and does not appear to be affected by s.32 of the Charter. I assume that it is thought that s.35(1) provides a greater protection to spirit dancing than the common law does. In any event I confine my reasons to the constitutional defense.

Counsel says:

> It is submitted that the oral testimony of the defendants as to the effect of this lawsuit on their ability to practise their aboriginal right will show that the application of the common law approach to their activity has had a profound negative affect on the whole of the Coast Salish Nation.

To my recollection, no such testimony was given. Further, it seems to me that it is questionable whether in fact the common law does necessarily infringe on the Aboriginal rig4t.

it is clear on the evidence before me that the spirit dancing is carried on with initiates who consent to participate in it, as well as with those, such as the plaintiff, who do not consent. However, whether spirit dancing is looked upon as a religious ceremony or solely as a protected Aboriginal right under s.35(1), the evidence does not make it clear whether forcing an initiate to participate (and the attendant assault, injury and confinement without the consent of the initiate) is an integral part of the ceremony or of the right, such that it can necessarily be said that it is infringed by the common law of tort. I think it important to note that spirit dancing can be performed without infringement with consenting initiates, provided of course that the initiators in their exuberance do not exceed the consent given.

Defendants' counsel argues that the court should find that the common law of tort infringes on the Aboriginal right of Coast Salish Spirit Dancing; that having found such to be the case, the court must then consider whether or not such an infringement is justified. In making this submission counsel follows the reasoning of the Supreme Court of Canada in *Sparrow* at 412 [D.L.R., p. 183 C.N.L.R.], where the court deals with the situation where a *prima facie* interference with an existing Aboriginal right, protected under s.35(1), has been proved. She quotes from the decision as follows:

> If a *prima facie* interference is found, the *analysis moves to the issue of justification.* This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is *there a valid legislative objective?* Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35(1) rights by conserving and managing a national resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> (My emphasis)

Counsel submits:

> It is submitted that there is no valid objective served by the application of the common law of torts to the activities of the defendants in their exercise of their aboriginal right. The law of torts is intended, among other things, to promote security of the person. At no time during the course of the events leading to this cause of action was the plaintiffs personal safety ever put into jeopardy. Rather, the evidence has shown that inquiries were made and precautions were taken for the very purpose of safeguarding the plaintiffs health and personal safety. Indeed, the primary reason for a Coast Salish family to request that one of their members be initiated is to enhance the quality of the life of the initiate and to honour him.

It seems to me that this submission misses the mark in a number of respects; for example, the plaintiff was in fact injured and the motives of the defendants are irrelevant. Further, and most importantly, it seems to me that the protection of the plaintiffs civil rights is a more than adequate and valid objective served by the application of the common law of tort to the defendants' activities.

Counsel then refers to *Sparrow* at p. 413 [D.L.R., pp. 183-84 C.N.L.R.].

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and* Williams and *Guerin, supra.* That is, *the honour of the Crown is at stake* in dealings with aboriginal people. The special *trust relationship and the responsibility of the government vis-d-vis aboriginals must be the first consideration* in determining whether the legislation or action in question can be justified.
>
> (My emphasis)

She then argued that in the case at bar the honour of the Crown is at stake in dealing with the defendants; that the principles which flow from the fiduciary relationship between the Crown and the Aboriginal people, including the interpretation of statutes and documents favourably to them, should be invoked in favour of the defendants.

Counsel says that while the court in *Sparrow* was dealing with legislative interference rather than with the common law, the principles laid down in *Sparrow* apply to infringing common law as well as to infringing statutes. The infringing law here is the common law of assault, battery and false imprisonment. On the court finding that the common law infringes the protected s.35 Aboriginal right, the only question remaining is whether the upholding of the individual's common law rights, over the constitutionally protected collective rights of the band, can be justified. In her written argument she put it this way:

> It is 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 35 of the *Constitution Act* 1982.
>
> It is further submitted that individual rights and freedoms of the plaintiff are subject to s.52 of the *Constitution Act,* 1982. Section 52 provides that:
>
> > 52. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> 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?

Section 35(1), it is said, was intended to finally give recognition to the residue of existing Aboriginal rights that survived as of 1982. The onus is on the plaintiff to show a valid objective to be served by infringing the Aboriginal right. The only possible valid objective is to protect one member of a group of people whose rights are constitutionally projected. There is little valid objective to be served by applying the common law of torts to the defendants in the exercise of their Aboriginal rights. The rights of the individual must be subject to the collective rights of the nation to which he belongs. To hold otherwise, the constitutional protection of the defendants' Aboriginal rights under s.35 are a hollow protection.

Disposition

I agree generally with the submissions of counsel for the plaintiff. In my opinion s.35(1) is not applicable in the case at bar. Assuming that spirit dancing was an Aboriginal right, and that it existed and was practised prior to the assertion of British sovereignty over Vancouver Island, and the imposition of English law, in my opinion those aspects of it which were contrary to English common law, such as the use of force, assault, battery and wrongful imprisonment, did not survive the coming into force of that law, which occurred on Vancouver Island in 1846 or, at the latest, in 1866, when the two colonies of Vancouver Island and British Columbia were merged.

While I appreciate that in *Delgamuukw* Chief Justice McEachern was dealing in the main with Aboriginal rights as they relate to land, in my opinion, what he had to say with regard to the extinguishment of those rights, and the supremacy of English law to the exclusion of all other, applies to all Aboriginal rights. 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. If those aspects were practised as of April 1982, which appears to be the case, they were maintained contrary to the law. 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. This is so whether or not it is done under the umbrella of religion or some other tradition of long-standing or an Aboriginal right. The assumed Aboriginal right, which I perceive to be more a freedom than a 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.

I find it most difficult to accept counsel's submissions as to the applicability of the principles laid down in Sparrow to the case at bar-, that in the contest between them the individual rights of the plaintiff must automatically give way to the communal rights of the defendants. The honour of the Crown is not involved and no fiduciary relationship exists between the parties. I see no reason why there should be any onus on the plaintiff to justify the paramountcy of the common law to the alleged Aboriginal right, or to justify his enjoyment of his civil rights to be free from assault and wrongful imprisonment. Further, if some justification inquiry or reconciling process were necessary, the protection of the rights of the individual plaintiff from these wrongs would prevail, and for obvious reasons.

In *Sparrow* the court made it clear that even in the context of state versus citizen, just as rights guaranteed under the Charter are not absolute, those guaranteed under s.35 are not absolute. The court specifically stated that because s.35(1) is not subject to s.1 of the Charter, it does not follow that any law or regulation affecting Aboriginal rights would automatically be of no force or effect. A law that affects the exercise of Aboriginal rights will nonetheless be valid "if it meets the test for justifying an interference with a right recognized and affirmed under s.35(1)."

In my opinion the Aboriginal right guaranteed by s.35(1) is not absolute as well from another perspective. It seems to me that in determining the nature and scope of the right protected, reference must be made to both the criminal and civil laws which govern the relationships between Canadian citizens in a peaceful society in order to protect the freedoms and rights of all. Freedoms or rights, including constitutionally protected rights under s.35(1), if any, are not absolute and may be limited by criminal and civil law. They can only be exercised in accordance with those laws, which prohibit certain kinds of conduct and, on the civil side, create civil rights in persons who may be injured by their exercise.

Whatever the freedoms or rights guaranteed under s.35(1) are, they do not include freedom from compliance with the *Criminal Code* or provide civil immunity for these kinds of tortious conduct. In terms of civil rights, the guaranteed Aboriginal right, instead of being absolute, is the residue of the right remaining after the civil rights of the persons who may be injured by its exercise are recognized. Rand J. put it this way in his classic statement in *Saumur v. City of Quebec,* [1953] 2 S.C.R. 299 at 329:

> Strictly speaking, civil rights arise from positive law; but *freedom of speech, religion and the inviolability of the person,* are *original freedoms* which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. *It is the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.* Their significant relation to our law lies in this, that under its principles to which there are

> only minor exceptions, there is no prior or antecedent restraint placed upon them: The penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So *we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law;* but the sanction of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.
>
> (My emphasis)

In *Saumur*, Rand J. was dealing with freedom of expression and of religion, in the context of the division of legislative powers, where there is some overlap in the case of civil matters. But what he had to say in my opinion applies to the Aboriginal right claimed, whether it be viewed as a freedom or a right. It is the residue within the periphery of the civil rights against "assault, false imprisonment and the like" which is guaranteed. Put another way, the guaranteed right is limited by the common law and by the *Criminal Code,* although here we are not concerned with the latter.

In summary, making all the necessary assumptions with regard to the Aboriginal right claimed, it is my opinion that the defendants still cannot succeed. Placing the Aboriginal right at its highest level it does not include civil immunity for 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."

Damages

The plaintiff claims punitive, exemplary and nonpecuniary damages. During the trial I concluded that the defendants honestly and sincerely believe in the Dancing Tradition, and that they were helping the plaintiff by initiating him into the Dancing Tradition; that they are otherwise law-abiding citizens. That being the case, I am not prepared to award punitive damages to the plaintiff since their purpose would be to punish the defendants rather than to compensate the plaintiff.

On the other hand, I am of the opinion that in law the plaintiff is entitled to recover exemplary or aggravated damages, which are compensatory in nature and are awarded for nonpecuniary losses. They are designed to compensate a plaintiff for such intangible elements as anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues and the like. In the case at bar I am satisfied that the plaintiff suffered damages under this head during his ordeal and for sometime thereafter. I will include the award for them in the award for nonpecuniary damages to which I now turn.

I need not review the evidence before me as to the condition of the plaintiff at the time he arrived at the hospital, after his four or five-day ordeal. While it is true that his injuries were not serious, I am satisfied that he did in fact suffer injuries, both physical and mental, as a result of the conduct of the defendants. While it may be said that his injuries were not serious, he did experience pain and suffering during his ordeal and for sometime thereafter. In my opinion an award of $12,000 for nonpecuniary damages, including exemplary damages, would be appropriate.

Counsel for the plaintiff suggested in argument that the plaintiff continues to fear that the defendants will again seize him and force him to participate in the Tradition; that threats have been made that this may occur. He sought an order that the interim injunction, which was granted long before the trial commenced, be continued. As I have already indicated, I am of the view that the defendants are law-abiding citizens. Hence, I see no reason for the injunction being continued. If I am wrong in the conclusion I have reached, there is nothing to prevent the plaintiff from bringing on a motion for a further restraining order.

The plaintiff is entitled to pre-judgment interest pursuant to the *Court Order Interest Act* and to special damages proven. He is also entitled to his costs of, and incidental to, these proceedings. During argument counsel suggested that there was a dispute over costs involving a number of matters, including the dismissal of the action as against the two bands, and the dismissal of third party proceedings against Mrs. Thomas. They requested leave to address the issues in the event

that agreement cannot be reached. I see no reason why costs which follow the event cannot be agreed to, but leave to apply is granted.