

## Potential through Paradox: Indigenous Rights as Human Rights

Prepared For Human Rights in the Age of Ambiguity Joint ISA Conference, NY June 2016  
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The language of human rights has been central to many of the major political movements of recent years: from the anti-austerity protests in the Eurozone following the 2008 recession, to the ‘Arab Spring’ uprisings, to the ‘Occupy Wall Street’ movement. It is clear that we have moved away from debating the theoretical merits of being *for* or *against* rights and are now testing the veracity of their claims at the level of grassroots social movements. In other words, what do human rights *do* when operationalized in political actions?

Scholars of various disciplines (Rajagopal 2003, Zivi 2012, Odysseos 2015) have pointed to the ‘paradoxes’ of human rights-- that they enforce state-centric projects (human rights as justification for projects of Western empire or colonization) while at the same time they identify individual inequality and oppression; that their universal ‘human’ protections can erode political or cultural group specificity while at the same time give international legitimacy to particular claims against the state. These tensions necessitate critical investigation as it is possible that ‘processes of claiming and agitating for human rights [can] occlude the persistence of rightlessness’ (Odysseos 2015 p 1042).

These two conflicting elements of human rights are increasingly salient when indigenous political demands are examined against the language of human rights. *Prima facie*, the two run against each other: human rights affirm a universal personhood while indigenous identity is based on the political and cultural specificity of a particular collectivity. As Speed and Collier (2000) aptly observe, many of the existing laws protecting the cultural rights of Indigenous peoples can be a ‘cruel hoax’. These laws maintain a colonial relationship by reinforcing the power of conquering states to determine which Indigenous cultural practices are acceptable (p 901). Yet, despite the historical tendency of rights to work against the political, economic and cultural autonomy of indigenous peoples, many indigenous social movements continue to use the language of human rights in pursuit of their demands for change (Merry 2006, Speed and Collier 2000)<sup>i</sup>.

The United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) is particularly interesting in light of this tension because it invokes the very quandary of extending a universal set of rights to peoples of cultural, political and/or economic specificity. The UNDRIP has been praised by some as an unprecedented recognition of the status of Indigenous peoples (Venne 2011; Henderson 2008; Donnelly 2003, p 215-217) and criticized by others (Lightfoot 2012; Kulchyski 2011; Newcomb 2011; Mansell 2011; Ward 2011; Watson 2011) for its failure to facilitate challenges to structures of oppression, domination and exploitation facing indigenous peoples. The dividing point between these two positions is the question of which rights the Declaration affirms and which rights will most aid Indigenous peoples in struggles against oppression. While a

thorough examination of the UNDRIP document is crucial in our understanding of the intricacies of this development in human rights, what is missing from the existing endorsements and critiques is an examination of the enactment of rights made possible by the document. We offer such an examination or, 'third option', to provide an analytical way out of the traditional rights binary through a discussion of a human rights case launched against the government of Canada by two Indigenous organizations. In so doing we join a growing number of scholars (May 2008, Bingham and Biesta 2010, Schaap 2011, Chambers 2013) who argue the merits of Rancière's work in contemplating who and what counts as political.

Our discussion also reveals the significance Rancière's work holds for Indigenous social movements; a significance that has been virtually unexplored in the scholarship with the notable exception of Todd May's work on the Zapatistas<sup>ii</sup>. This case, we argue, is revealing not only in its reference to the UNDRIP but also in that the actors involved are doing almost everything 'wrong' according to the dominant literature or 'common sense' regarding Indigenous politics. In pursuing the human rights case the actors demonstrate three main tactics that directly contradict many well-known intellectual prescriptions for Indigenous social movements which advocate turning away from the state, and a rejection of equality and/or human rights-based claims due to the potential for reinforcing assimilative policies and practices (Status of Women Canada 2000, Alfred and Corntassel, 2005, Coulthard 2007). In this case, however, the actors invoke an equality frame to talk about Indigenous rights; they ask the non-Indigenous government to intervene in Indigenous child welfare; and, they draw on a human rights framework to make their claim. Overall, we argue that this somewhat exceptional case is an example of the rare but significant 'politics' articulated by theorist Jacques Rancière. For Rancière, politics occurs only in rare but significant moments of collective action (scenes of dissensus) and is defined not by debate in certain 'political' institutions by preconceived categories of 'political' agents but rather by acts that reveal a heretofore hidden or invisible gap in our understanding of society. These scenes of dissensus allow for an approach to rights-based politics that moves beyond simply looking to confirm or deny whether a group has certain rights in order to examine the societal implications of what such a confirmation or denial means (Rancière 2010). We draw on this understanding of politics to move beyond the more conventional legal and political debates that take rights as self-evident starting points for research and to offer a contextual method of approaching rights and their potential utility for indigenous peoples' political struggles.

### **Assessing The UNDRIP: Debates and Disagreements**

The forces behind the development of the existing UNDRIP are complex and varied. Its history is one of contest, struggle, and determination to be heard. As Cree lawyer and participant of the Working Group on Indigenous Peoples, Sharon H. Venne, reminds us, 'The road to the United Nations and recognition of our rights was not an easy one for Indigenous Peoples' (2011, p 558). It is a struggle that goes back to the 1920s with the efforts of Deskeheh of the Haudenosaunee to speak at the League of Nations in Geneva and it continues today (p. 558)<sup>iii</sup>. Within this history are various moments of resistance as well as debate and disagreement about the impact of such as international document. As

Speed and Collier (2000) argue regarding the impact of human rights in Chiapas, human rights can become a tool of the state in perpetuating colonialism:

Just as colonial authorities in the past justified intervening in the affairs of colonized peoples by claiming to eradicate practices that were ‘repugnant’ to ‘civilized’ sensibilities, so government officials in Chiapas are justifying their right to arrest indigenous leaders who (the government claims) have violated the human and constitutional rights of community members (p 878).

The need to correct for this possibility gained traction amongst some of the most dominant voices in the human rights scholarship. Human rights advocate Jack Donnelly, who does not generally support the notion of group rights, makes allowances for the distinct human rights of indigenous peoples. Donnelly argues, ‘special circumstances that justify recognizing indigenous peoples’ rights merit emphasis and that internationally-recognized human rights for indigenous peoples should be seen as ‘an exception [...] that proves the rule’ (2003, p 215). When the UNDRIP was adopted in 2007, James [Sakej] Youngblood Henderson, who was directly involved in its development, argued that it signaled ‘a new consensus’ that brings ‘to an end the nation states’ history of oppression of indigenous peoples’ (Henderson 2008, p 9). For Henderson:

A shift of consciousness is required to comprehend both the transformative politics involved in the Declaration and the new global consensus. The politics that surrounded the Declaration was a cognitive struggle, a challenge to existing ways of thinking about humanity. It was a manifestation of *shared persuasion*. The new, emergent consciousness displaces the old discriminatory models of imperialism and colonialism based on racism (p 10).<sup>iv</sup>

Cognizant of the history of colonization that has prevented indigenous peoples from ‘exercising, in particular, their right to development in accordance with their own needs and interests’ (UNDRIP, p 2), the articles comprising the UNDRIP asserts the individual and collective rights of indigenous peoples including the right to self-determination, autonomy or self-government (Article 4), the right to participate in distinct indigenous *and* state institutions (Article 5) and the right to traditional practices (Article 10). The UNDRIP also allocates responsibility to the state to ‘provide effective mechanisms for prevention of, and redress for’ actions that have deprived indigenous peoples of their values, identities, lands or resources or ‘any form of forced assimilation, integration or population transfer’ (Article 8).

The rhetorical effect of such Articles is to abolish any real or apparent opposition between Indigenous peoples and the state arising from competing claims over land, customary rights, existing treaty rights and the degree to which Indigenous peoples’ have the right to self-determination or self-government. The shift of consciousness Henderson cites is one in which histories of imperialism, state-sponsored racism or assimilationist policies become relics of an earlier age. The new consensus, it follows, is one between

Indigenous peoples and the state whereby a harmonious future has been agreed to and towards which the Declaration leads.

However, not all observers are optimistic that the Declaration will eliminate, or even reduce, the oppression faced by Indigenous peoples. Peter Kulchyski argues, 'The Declaration is a bifurcated world, with Indigenous people on one side as rights holders and the state on the other as duty bound' (2011, p 47). Article 46 makes it clear the Declaration does not 'encourage any action which would...impair...the territorial integrity or policy unity of sovereign and independent states or grant rights contrary to international human rights obligations' (2011, p 47). So, in those sections where Indigenous rights are asserted, they can only be acted upon to the extent that it does not confront the UN Declaration of Human Rights, state sovereignty, democratic norms or Western notions of individual rights.

The problem, for Kulchyski, is that according to the Declaration, 'indigenous peoples do not have a right to sovereignty' (2011, p 47). In this way, the Declaration continues a legacy where rights emerge from the liberal benevolence of the state rather than out of struggle, resistance and collective action. Human rights, then, seem to operate on one plateau, as Kulchyski argues, while Indigenous rights function on a separate one. Without a notion of the particularity of Indigenous rights we may not notice that universal human rights can provide the explicit justification for trumping Indigenous rights (2011, p 43).

UN member states were also wary of a document that asserts Indigenous peoples within nation states can be both citizens and entitled to autonomy. When the UNDRIP was adopted on 13 September 2007, Canada, the United States, Australia and New Zealand voted against the Declaration. All four holdout states eventually did sign on while at the same time emphasizing the aspirational (i.e. non-legally binding) nature of the declaration.<sup>v</sup>

The potential discrepancies between state recognition and state-specific realities of rights exemplifies what Sheryl Lightfoot describes as an emerging 'grey zone' between commitment and non-commitment in state behavior (2012, p 100). According to Lightfoot, when an international rights dilemma emerges such that the state interests directly compete with international human rights norms, states can resolve the dilemma through a practice of 'selective endorsement'. Occupying the space between commitment and non-commitment, the state is able to give the appearance of compliance with human rights norms while simultaneously 'writing down' the norms in such a way that state compliance is automatic thus making further efforts at implementation unnecessary. 'With selective endorsement, states effectively under-commit to international norms while, at the same time, avoiding the international and domestic political costs of under-commitment and preserving their identity as human rights supporting states' (2012, p 102).

In other words, instead of opening up new political space for indigenous social movements, the UNDRIP can be used by signatory states to protect and legitimate the status quo by maintaining the colonial positioning of indigenous peoples as the 'included-

excluded' (Watson 2011), particularly on the key issues of land and self-government (Mansell 2011; Watson 2011). A growing number of scholars support this view. In response to more celebratory reactions to the Declaration Steven T. Newcomb challenges:

Anyone who doubts this [failure of the UNDRIP to address the issue of domination of Indigenous Peoples] need only take a copy of the statement issued by the US Department of State on 16 December 2010 and compare it with the 13 September 2007 Statement made by the United States when it voted 'no' in the UN General Assembly on the adoption of The Rights of Indigenous Peoples. There is no appreciable difference between the two statements (2011, p 587).

From this perspective, the UNDRIP not only fails to improve the political terrain for Indigenous social movements it may actually create new challenges. Churchill Ward explains:

The only substantive result ensuing [from the Declaration] is that the very structure of relations Indigenous peoples sought to challenge through the processes of the United Nations have been legitimated in law, the terms of the law itself having been subverted to accommodate legitimation (2011, p 549).

Thus, while Henderson's assessment suggests that the declaration provides new discursive and political spaces, critics suggest that not only may the Declaration fail to transform the political process for Indigenous peoples, it may, in fact, create new barriers to achieving this end by shifting the political terrain in such a way as to restrict rather than open up the discursive space. This binary between advocates and critics is reflected in the rights debate more generally. As Karen Zivi observes:

If rights critics are correct, those engaged in a politics of rights claiming are committing serious philosophical and political errors. Not only are they failing to realize that rights are conceptually problematic, perhaps even 'nonsense upon stilts' as Jeremy Bentham once suggested, but they are also allowing rights based political efforts to undermine the democratic advances they seek to make. If, on the other hand, rights advocates are correct, then it is the critics who have made a mistake, overestimating the negative effects of rights claims or underestimating the compromises that the practical realities of politics necessitate (2012, p 5).

This binary does not, however, have to dictate the way we think about rights. As Zivi argues, 'there could, of course, be a third option' that emphasizes the '*performative practice* of rights claiming' (Emphasis added. 2013, p 6). The following section outlines such a 'third option' by developing an alternative analytical lens, informed by Rancière's notion of politics as dissensus, through which we can examine the possibilities of the UNDRIP.

## Politics as Dissensus

The understanding of rights and politics we are employing here is different from any notion of politics as a permanent order with pre-arranged political subjects and communities, with distinct political and social spheres (a la Arendt) and is also distinct from notions of a return of ‘the political’ (a la Mouffe) all of which, Rancière argues, assumes ‘that there is a way of life that is ‘specific’ to political existence’ (Rancière 2010, p. 28). Rancière endorses an interpretation of politics as moments of collective action. Equality is not a resource or opportunity distributed by the state but is rather taken through enactment(s) that create *dissensus*—that is, a disruption in the ‘normal’ order of things. Rancière explains:

The essence of politics is *dissensus*. Dissensus is not a confrontation between interests or opinions. It is the demonstration (*manifestation*) of a gap in the sensible itself. Political demonstration makes visible that which had no reason to be seen; it places one world in another [...] Politics, then, has not proper place nor any natural subjects. A demonstration is political not because it occurs in a particular place and bears upon a particular subject but rather because its form is that of a clash between two partitions of the sensible (2010, p 38-29).

Presupposing equality is rather different than the equality that is the aspiration of the UNDRIP and, at least ostensibly, the UN generally. The intended audience of the UNDRIP is not the subject of Indigenous rights but rather nation states, on whom the responsibility for recognizing, upholding and defending such rights falls. In other words, the intent of documents such as the UNDRIP, even from the most optimistic of approaches, is not so much to empower the actions of Indigenous peoples as it is to charge the nation state with a responsibility to respect and uphold the rights of Indigenous peoples. This understanding of rights does not meet the threshold of political activity for Rancière but is, rather, a function of policing. Rancière argues:

The police is not a social function but a symbolic constitution of the social. The essence of the police lies neither in repression nor even in control over the living. Its essence lies in a certain way of dividing up the sensible [...] the essence of the police lies in a partition of the sensible that is characterized by the absence of void and of supplement [...] The essence of politics consists in disturbing this arrangement by supplementing it with a part of those without part identified with the whole of community. Political dispute is that which brings politics into being by separating it from the police, which causes it to disappear continually either by purely or simply denying it or claiming political logic of its own. Politics, before all else, is an intervention in the visible and the sayable (2010 p 36-37).

Todd May’s discussion of rights and politics is further illustrative. Drawing on the philosophy of Rancière, he argues: ‘Inasmuch as we conceive our political space in terms

of rights...we conceive ourselves as passive' (2008, p 33). Rights, May tells us, are protected and/or distributed by the state. There is no active role for the citizenry at large. This is the model of rights consistent with all dominant distributive approaches to justice. From this perspective, rights of any kind are a part of the order of things and are therefore part of 'the police' rather than politics. But, May also tells us, we can understand the merits of rights in a different way, an understanding that may help rather than hinder the possibility of democratic politics:

Rights can be the result of a struggle for equality, or [...], a struggle from the supposition of equality. Political rights have histories. Many of them are the products of a politics of active equality [...] When rights become passive is not in the recognition or embrace of rights; it is when rights come to structure the field of politics. To think of politics centrally in terms of rights is to start at the end of the struggle, to neglect the political moment of struggle itself for the fruits that it has brought about. This is to turn equality from a matter of democratic politics to a matter of passive reciprocity (2008, p 34).

The value of the UNDRIP, and, for that matter, the UN Declaration of Human Rights, rests precisely on our interpretation of the political process by which these rights are enacted, upheld, defended and enforced by Indigenous peoples around the world. May's analysis reminds us of the politics behind the declaration as well as, we argue, the potential for future enactments of dissensus. In this vein, rather than focusing on a state-citizen dichotomy where ultimately all power lies with the state to grant rights out of liberal benevolence, our analysis focuses on the political process by which a subject enacts the rights that certain inscriptions accord to them. This necessarily requires disassociating any objective, singular, universal version of 'Human' or 'Man' as the natural bearer of rights. The contestability of the subject, meaning or application of human rights points to the central fallacy of the entire discourse, namely that 'we are supposed to assume the existence of a universally recognizable subject possessing 'rights' that are in some sense natural' (Badiou 2001, p 4), a subject synonymous with the particular interests, values and ideologies of the Western liberal democracies (Douzinas 2010, p 83-84). But this does not preclude rights-based politics from being strategically applicable to agents in the political struggle against the privileged subject of Western, liberal democratic values.

While critiques that underline the threat of the universality of the Declaration along with the potential for Western-based human rights to trump the cultural and collective specificity of Indigenous peoples certainly has merit, presupposing equality encourages alternative methods of understanding how Indigenous peoples are enacting human rights. We draw on a current Canadian court case to offer our own assessment of the UNDRIP, not in terms of transformative power or the success of the pending ruling, but as one instance of dissensus whereby Indigenous peoples challenge the assumption of their inclusion in a rights-bearing community.

As evidenced by our case study, Indigenous groups are still deploying the human rights framework as a political tool to foster visible action, and one of the benefits of this framework as a political tool is precisely the reach afforded by its universality. In fact, in articulating their claim in the language of *equality* Indigenous peoples in this case are deploying a frame that is often viewed with deep suspicion amongst Indigenous activists and scholars due to its association with government tactics of assimilation. The choice of political frame is therefore quite rare itself. It becomes prescient then to analyze the political process by which this framework is deployed, to ask, can its universality be turned on its head to illuminate those not included among the universal subject of human rights and ask what such inclusion or exclusion means? If so, can a political demand be couched both in the universality of human rights and the particularity of cultural and collective specificity? Can such an approach turn the state against itself by appealing to the shared language of state-centric universal human rights?

Our case study will go on to clarify how a political demand can take such shape without being entirely paradoxical. For now, it is useful to start by disassociating citizenship, even global citizenship, to rights such as human rights, specifically the idea that rights are given to citizens by virtue of their membership in a particular society. Making this assumption forecloses the political process by which peoples can make rights-based claims in meaningful ways. If by human rights we really mean citizen, there is either little or no room to question who is included in the count as citizen and whether those who are not citizens have any such rights. Moreover, by assuming all citizens have human rights, debates become matters of consensus to be handled by administrators and not broader questions about the content of human rights and what it means to have or not have these rights. In response, we argue that a rights-based approach that sees potential in human rights must engage with a conception of politics as necessarily antagonistic. Below we offer a case that demonstrates how human rights can be used to create ‘a scene of politics where before there had been only a regime of order’ (Chambers 2013, p 9).

### **AFN & FNCFCS v Government of Canada**

In 2007 the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society (FNCFCS) filed a human rights complaint against the Government of Canada alleging the Government systematically discriminates against First Nations children by providing less funding for child welfare services to First Nations children on reserves than it provides to non-Aboriginal children. More specifically, the complaint alleges that the existing Indian and Northern Affairs funding directive (directive 20-1) is:

[I]n contravention of Article 3 of the *Human Rights Act* in that Registered First Nations children and families resident on reserve are provided with inequitable levels of child welfare services because of their race and national ethnic origin as compared to non-Aboriginal children. The discrimination is systemic and ongoing. INAC has been aware of this problem for a number of years and was presented with an evidence base of this discrimination in June of 2000 (AFN and FNCFCS 2007).

Upon filing the complaint, National Chief Phil Fontaine argued:

There are more than 27,000 First Nations children in state care. This is a national disgrace that requires the immediate and serious attention of all governments to resolve [...] Rational appeals to successive federal governments have been ignored. After years of research that confirm the growing numbers of our children in care, as well as the potential solutions to this crisis, we have no choice but to appeal to the Canadian Human Rights Commission [...] Our children must have an equal opportunity to grow up with their families, in their communities and in their culture (AFN 2007).

Submissions following the initial complaint drew heavily on the UNDRIP as reinforcing the Canadian Human Rights Act by providing a ‘contextual interpretation of the Act’.<sup>vi</sup> The Canadian government responded immediately to the invocation of the UNDRIP stating:

The Declaration is not a legally binding instrument. It was adopted by a non-legally binding resolution of the United Nations General Assembly. As a result of this status, it does not impose any international or domestic legal obligations upon Canada. As Canada noted in its public statement of support, the declaration does not change Canadian laws. *It represents an expression of political, not legal, commitments.* Canadian laws define the bounds of Canada’s engagement with the Declaration (Department of Justice Canada 2010. Emphasis added).

This response clearly falls within Lightfoot’s ‘grey zone’ of state commitment, where the gap between rhetoric and reality is most vast. One can certainly question the resolve of its political commitment to the UNDRIP but the government’s response is difficult to dispute on legal grounds. Since ratification, it has been clear that it conceptualizes the UNDRIP as an aspirational document that aligns with the government’s political commitments and not with its legal responsibilities. It is also, of course, not a legally binding document, which only makes this grey zone more appealing to states and their governments wanting to appear publically committed to the rights of Indigenous peoples without having to be held legally committed. The use of the UNDRIP in this case is then even more curious.

A central element in the government’s position is that child welfare on reserves is not a human rights issue. In other words, because of the ‘special’ relationship between Aboriginal peoples and the state human rights do not apply. And, initially, Tribunal Chair, Shirish Chotalia, agreed that the comparison was unlawful (AFN 2012).<sup>vii</sup> This ruling led to concerns from the AFN, the FNCFCSC and the Canadian Human Rights Commission that the outcome would ‘immunize Ottawa from any accountability for inequitable services on reserve’ (AFN 2012). Following the decision the Chiefs of Ontario (granted intervener status in the proceedings) stated:

As a continuous advocate for First Nations children, the Chiefs of Ontario are appalled by the Canadian Human Rights Tribunal decision on March 14, 2011, to

dismiss a complaint involving the inadequate funding of child welfare services on reserve by Indian and Northern Affairs Canada. The case has been dismissed on the basis of legal technicalities. [...] The Canadian government must be held accountable for the inequity faced by First Nations children. This shame must be brought to the attention of the general public and justice must be available to our children (Chiefs of Ontario 2011).

The decision was immediately appealed to federal court. The court found that the decision to dismiss was erred and returned the matter for a new hearing.<sup>viii</sup> In the subsequent decision the Federal Court confirmed that:

Aboriginal peoples should not be excluded from Canadian Human Rights mechanisms, and that they occupy a unique position within Canada's constitutional and legal structure. It further confirms that despite the disadvantage and marginalization experienced by many First Nations people, the appropriate applications of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of the Child are relevant, appropriate and can lead to significant application of justice (AFN 2012).

The case was again delayed in May 2012 due to yet another appeal from the Government of Canada, leading AFN Ontario Regional Chief Angus Toulouse to argue:

Canada's assurances to the international community are false when their conduct in Canada is completely adversarial, contrary to reconciliation and partnership and is a continuing and deliberate violation of the rights of the most vulnerable sector of the domestic population in Canada, First Nations children (FNCFCFS 2012).

Most recently, the Canadian government unsuccessfully attempted to postpone a week of hearings scheduled for February 2013 and attempted to overturn the Federal Court decision, which was ultimately dismissed by the Federal Court of Appeal in March 2013. The case, launched in 2007, has not yet been heard.<sup>ix</sup>

### **Dissensus and rights-based politics**

For our purposes, the invocation of the UNDRIP is interesting insofar as it demonstrates how the universal and particular reveal a paradox in the constitution of the Indigenous political subject. The UNDRIP, following the UN Declaration of Human Rights (UNDHR), seeks to inscribe rights of a universal category—Indigenous peoples. However, the premise of the AFN and FNCFCFS's allegations depends on a particular conceptualization of Indigenous peoples in Canada as a culturally, legally, and politically, specific group distinct from non-Indigenous peoples in Canada, and because of this distinction are systematically discriminated against by the government. Moreover, what happens when this universal category rubs against the universal category of humanity as described in the UN Declaration of Human Rights? Can both exist as simultaneously

universal? Can a person be a member of both universal categories? If so, whose rights take precedence—the Indigenous or the Human? Or are these Indigenous rights distinct from human rights? This case study is revealing precisely because the AFN and FNCFCS, using the UNDRIP as a partial frame, do not try to resolve this paradox by asking, ‘Whose rights apply in this instance—human, Indigenous or both?’ but rather presuppose an equality between Indigenous and non-Indigenous peoples in order to ask, ‘What does this denial of equality (in the amount of child welfare funds) mean?’

It is this question that opens up the political space where disputes about the ‘gap between abstract literalness of rights and the polemic about their verification’ (Rancière 2006, p 307) are played out—that is, where acts of dissensus occur. These disputes destabilize any ‘natural’ or permanent associations between rights and right-bearing subjects. Assuming a subject has or does not have rights forecloses the critical distance of politics whereby questions about what it means to have or not have rights are ignored. For Rancière, the rights-bearing subject comes into existence through a scene of dissensus whereby there is a division in a community according to a specific instance of the denial of equality. The subject exists as such only in a particular scene of dissensus; a community can be divided in other ways according to different scenes of dissensus. Of course, this collective subject can achieve some permanency if there is a systemic denial of equality whereby in each instance a particular community is divided in the same way. However, the crucial dimension of Rancière’s work is that the constitution of the collective subject and the particular right or rights whose confirmation is questioned is determined through a scene of dissensus. The allegation of inequitable child welfare funding creates a particular collective subject—those who do not receive equal child welfare funding—and creates a division within Canadian society (also a particular community contingent to a specific scene of dissensus) between those who belong to the rights-bearing community, and therefore receive equitable child welfare funding, and those who are ‘surplus’ to that community (what Rancière calls surplus subjects) and are denied the right to equal child welfare funding.

The subject of a scene of dissensus is always surplus to a particular count of a community in that they are not included among those who enjoy a particular right. As such, scenes of dissensus highlight where the lines of and between a particular community are drawn, which can function to reveal a gap in societal assumptions about those who do and do not enjoy certain rights. The process by which a subject comes into existence is particularly useful when analyzing Indigenous-state relations where a colonial past (and present) often informs prejudices, stereotypes and commonly-held beliefs over what rights Indigenous peoples appear to have and those they in reality do have. The value of analyzing the political process in this context is that it also destabilizes such prejudicial convictions thereby opening up a space to question the assumptions over the rights of Indigenous peoples and to consider what the confirmation or denial of the often inimical assumptions that inform public opinion, or in Rancière’s parlance, the ‘common sense’ actually means.

### **The Common Sense: The Canadian Government’s Commitment to Human Rights**

Regardless of the ongoing delay tactics of the Canadian government in this case, the AFN and FNCFCFS case exposes how the count of those accorded the right to equal child welfare funding does not include Indigenous children on reserves. The questioning of who is included in the count of the rights-bearing community is occurring at both the domestic level, as evidenced above, and the international level.<sup>x</sup> Additionally, this case disrupts commonly-held opinions regarding the Canadian government's treatment of indigenous peoples and also another important component of Canadian 'common sense' about its Indigenous population—that is, the well documented notion that Indigenous political action is 'criminal' and 'unlawful', even 'terrorist', as is commonly found in mainstream media portrayals (Wilkes et al. 2010, p 45). Any attempt to expose contemporary acts of oppression against Indigenous peoples in Canada invokes the subtext informing the 'common sense': that the Indian Act and the 'special' rights accorded to Indigenous peoples (rights many non-Indigenous peoples see as unjustly based on difference) position Indigenous peoples as already receiving special treatment in addition to rights enjoyed by all Canadians (Eisenberg 2004).<sup>xi</sup> Any subsequent demand that government recognize a breach of their rights, accord new rights, or increase funding for services to Indigenous peoples label them insatiable, ungrateful, or worse, undeserving. In other words, to ask for both equality and difference is illegitimate and unacceptable. By maintaining a rights-based frame, AFN and FNCFCFS are refusing to accept that Indigenous peoples be denied basic human rights on the basis of being Indigenous or that they must sacrifice the special rights accorded to Indigenous peoples in order to receive basic human rights.<sup>xiii</sup> In so doing, they are refusing to reinforce the binary of universal *or* particular so often associated with identity politics.

Insofar as this case disrupts the mainstream belief in the government's commitment to human rights and Indigenous peoples, it is useful to understand how this 'common sense' is informed by the recent use of a transitional justice framework to reconcile the relationship between Indigenous peoples and the Canadian state. When considering the formal apology by former Canadian Prime Minister Harper to Indigenous peoples for the government-sponsored Residential Schools program, the subsequent striking of the Truth and Reconciliation Commission and of course, Canada's eventual signing of the UNDRIP, the Canadian government appears willing to formally recognize certain rights, especially the fundamental human rights, of Indigenous peoples. This willingness seems to be the result of two related phenomena: a necessary compensation for historical injustices Indigenous peoples in Canada have endured and the moral pressure for such recognition generated by a growing commitment among Canadians to the promotion of human rights domestically and internationally. For a Prime Minister to publically acknowledge the cultural genocide of a generation of Indigenous peoples through the Residential Schools program and apologize to all those who suffered, in the past and today, as a result of this program is significant. However, the value of these transitional justice measures hinge on whether they can be used as leverage in the critique of present policy or whether they 'draw a line through history and legitimate present policy' (Jung 2009, p 1).

While commentators have noted that state-centric apologies often reinforce 'the power imbalances that led to the act of violence in the first place' (Corntassel and Holder 2008,

p 468), other scholars have argued that Indigenous peoples ‘will have an interest in using apologies, compensation, and truth commissions to draw history into the present, and to draw connections between past policy, present policy, and present injustices’ (Jung 2009, p 13). Canada’s ratification of the UNDRIP may also be used to critique the present policy and actions of the government. Transitional justice measures then must be tested to determine whether they represent a bridge that draws on a history of oppression to critique present policy or whether these measures form a wall that separate past injustices and legitimate present policy (Jung 2009, p 13).

Of course, it is in the government’s interest to use apologies and other transitional justice measures to draw a line in history, restricting human rights abuses of Indigenous peoples to the past as it extols itself for the progress in Indigenous-state relations since. It is the case in the examples noted above that a past political action becomes the focal point of the apology, policy, or economic compensation. Residential schools, for instance, are relegated to Canadian history and along with it the idea of oppressive or racist government policies. This ‘common sense’ narrative of state wrongs against Indigenous peoples being a relic of the past occurs alongside other dominant societal narratives about Indigenous peoples political actions in the present.

### **The Common Sense: Indigenous Political Action**

As we noted earlier, the dominant framings of Indigenous political actions in mainstream Canadian media have constructed a common sense narrative that portrays Indigenous peoples as ‘undeserving’ or even anti-citizens. As Harding notes, the framing(s) of Indigenous issues and situations in Canada directly impacts the broader socio-political environment in which Indigenous claims are made and heard/ignored/reframed:

Media play a decisive role in promulgating racist ideology and in maintaining white dominance in Canada. While devoting considerable attention to reporting on the extreme circumstances in which many contemporary aboriginal people live – poverty, alcoholism, crime, and suicide – news media simultaneously eschew any analysis of the socio-political context of these living conditions and the impact of Canada’s long history of colonialism on aboriginal people. By *unhinging* the present from the past in its coverage of contemporary aboriginal issues, the news media perpetuate damaging stereotypes of aboriginal people and create a supportive environment for state structures and practices that reproduce material and social inequality between aboriginal and non-aboriginal people (Harding 2006, p 206).

Understanding dominant media frames is therefore an important part of understanding the current socio political context and dominant ‘common sense’.

Harding’s research indicates that media constructions of Indigenous peoples today are in fact remarkably similar to the portrayals that dominated the newspapers of the 19<sup>th</sup> Century. The frames that dominate news coverage in his analysis from 1860 onwards include: aboriginal peoples as inherently inferior and childlike, heroic white men saving

primitive aboriginal people, aboriginal people as more susceptible to corruption than white people/must be protected *for their own good*, aboriginal peoples as an obstacle to colonial expansion, and otherness – this binary of ‘us’ and ‘them’ often includes the notion that the ‘constitutional make-up of aboriginal peoples predisposes them to violent crime’ (214) and the notion that Aboriginal people are dominated by *emotions* whereas Euro-Canadians are dominated by *reason*. Both Harding and Furniss emphasize that the ‘old stereotype’ that aboriginal peoples are ‘lazy’ and ‘undeserving’, often associated with a belief that they ‘receive mass amounts of government funding’ for which they are ‘unappreciative’, is also very much alive in media coverage (Harding 2006, p 219; Furniss 2001, p 11).

These findings are reinforced by other scholars at the forefront of this area of analyses. Wilkes et al. collected data from three mainstream Canadian newspapers on the topic of Indigenous collective action in 1995. In all of the framing coded as part of their analysis, the framing of Indigenous collective action as ‘criminal’ and ‘unlawful’ appeared in 64%, as a ‘threat to race relations’ in 14%, and as an ‘economic cost’ in 5% of the total. Only 18% of the total framings included frames of social-justice and even then this frame was often preceded by a negative frame about criminality (2010, p 45).

In fact, even when the Indigenous actions in question were lawful and politically justified (i.e., even when it was the Canadian government that was acting illegally) the media perpetuated negative framings of Indigenous peoples by using terms such as ‘terrorists’, ‘rebels’, ‘guerilla base camp’ and ‘militants’ to describe events. These terms feed directly into the notion that Indigenous collective actors are ‘undeserving’.

To suggest, as the AFN/FNCFCS case does, that the government presently operates using the same discriminatory/colonialist logic that underpinned residential schools places a divide in the common sense of the country. Canadians, by witness of the Residential Schools Apology and signing of the Declaration, have accepted that the government denied human rights to certain peoples in the past, but with the proper apology or aspirational document we relegated this action to the past, foreclosing the possibility of a continuation of discrimination and oppression in the present. And, as the research by Wilkes et al. shows, dominant societal framings of Indigenous political actions as illegitimate and criminal further inhibits Indigenous peoples from exercising their political and social rights. Alleging that the government is currently denying Indigenous children fundamental human rights reveals a central divide that cuts across society: the count of those whose human rights are upheld does not include Indigenous children.

### **Can A Scene of Dissensus Occur in Court?**

The use of courts in rights-based politics, while central in this case, is a point of controversy. While at one point Rancière even calls surplus/political subjects ‘litigious names’, underscoring the prevalence of the courts in rights-based claims (2006, p 304), the ability to act politically is certainly hampered by participating in *the* mainstream avenue for dispute resolution. Of course, contemporary liberal democratic society is more than capable of responding to human rights complaints without jeopardizing its stability.

This is one of Douzinas' central critiques of rights-based politics when he argues, 'the evolution of rights from inscriptions of constituent power to central expressions of the established juridico-political order has all but removed their radical edge' (2010, p 95). Aside from possibly improving the lives of real living people – say, by forcing the government to properly fund child welfare services for Indigenous children or even provide adequate funding for post-secondary education to our country's fastest growing population – rights-based politics (even those that play out through our court system) can at least function to promote an alternative to consensus-based politics, an approach that ultimately seeks to reinforce the common sense and prematurely solve any conflict before conflict arises.

While advocates like Henderson argue that the political strength of the UNDRIP is the 'global consensus' it represents, we argue that the political strength of rights-based politics is not a presumed or constructed consensus on who *should* have such rights and, through inscription in UN declarations, who has such rights, but rather the ability of inscribed rights to be used to question what the confirmation or denial of such rights means, and in our case, to disrupt the common sense regarding the rights of Indigenous peoples – are the human rights of Indigenous peoples being upheld? Is the state still operating on a discriminatory logic that was supposedly abandoned with the apology for Residential Schools? Taking the case to court, the AFN and FNCFCFS have legitimated and forced a new discourse into the dominant sphere and have provided the basis for further questioning and de-centering of mainstream 'common sense'.

A consensus-based approach destroys the political process in which the political subject engages in scenes of dissensus by replacing the surplus subject as the subject of rights with 'real partners, social groups, identity groups and so on' (Rancière 2006, p 306). If group 1 has rights A, B, and C then conflicts over these rights becomes an issue about confirming whether or not group 1 has rights A, B or C – not what the confirmation or denial of these rights actually means, which is the task of politics. Problems in this case are solved by 'learned expertise and a negotiated adjustment of interests' (Rancière 2006, p 306), and politics becomes the art of expert administration, politics without politics. Consensus denies what is the fundamental task of politics and assumes, because group 1 has rights A, B, C and group 2 has rights B, D, and E that there cannot be disputes over the constitution of groups, the meaning of rights and the logic that underpins both.

By ruling out consensus-based politics, political action based on invoking scenes of dissensus redefines politics itself so that it becomes 'defined in its own terms as a specific mode of action that is enacted by a specific subject' (Rancière 2010, p 27). What is considered legitimate political action is widened to include those subjects and actions that challenge not only the common sense of, in our case, government treatment of Indigenous peoples in Canada, but also popular conceptions of the common itself, that is, of notions of inclusion or exclusion in a particular community and the confirmation or denial of the shared benefits of being included in the count of that community.

What is unique in the case of the AFN and FNCFCFS is that the human rights framework highlights the paradoxical circumstance of Indigenous peoples in Canada 'having the

rights they are denied and not having the rights they are said to have' (Rancière 2006, p 307). The risk of rights-based politics is the potential for the struggle to be co-opted by a consensus-based approach that seeks to extinguish dissenting action. As Kulchyski rightly points out, this may mean human rights coming at the cost of indigenous rights. Through our case analysis, however, we argue that in our current social and political context the act of arguing in the courts that indigenous children deserve the same rights as all other children, fundamentally questions the 'common sense' on which government relies to continue to oppress indigenous peoples. We acknowledge that this case alone cannot completely overturn the common sense for all peoples and for all times. But this is also not the goal of a politics of dissensus. The activity of politics, according to Rancière, is not a stable order of signifiers and signified. But this does not exclude change to the structured order of the police. It is through repeated scenes of dissensus that we can hope for a shift in the common sense and the sense of the common. Our case presented here is but one act of repositioning and rearticulation, but one enactment of dissensus among many that are taking place.

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<sup>i</sup> For example Indigenous advocates in Canada calling for a national public inquiry into missing and murdered aboriginal women including the Native Women's Association of Canada (NWAC) are repeatedly framing the issue as a human rights concern. They argue that failing to launch an inquiry into the large numbers of missing and murder women is a failure of Canadian governments to "meet its human rights obligations to the indigenous women". NWAC has also partnered with various human rights organizations to develop reports and apply international pressure for change in Canada.

<sup>ii</sup> In his chapter, 'The Zapatistas: From Identity to Equality' (2010) May argues that that the Zapatista movement of Chiapas, Mexico is a movement that 'operates from the presupposition of equality' (p 76) rather than a movement defined by traditional identity politics as it has been dominantly understood.

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iii For a comprehensive overview of the events, processes and struggles that lead up to the UNDRIP see Venne's (2011) article 'The road to the united nations and rights of indigenous peoples'. *Griffith Law Review*, vol. 20, no. 3, pp. 557-577.

iv It is worth noting, however, that Henderson is quick to acknowledge that the endorsement of the declaration leaves the poverty and vulnerability of Indigenous peoples very much intact (2008, p 10).

v For links to each of these official statements of endorsement see:

<[http://www.fncaringsociety.ca/sites/default/files/fnwitness/2010\\_12\\_09\\_AFN\\_Submission\\_UNDRIP.pdf](http://www.fncaringsociety.ca/sites/default/files/fnwitness/2010_12_09_AFN_Submission_UNDRIP.pdf)>

vi To view the complete original submission referencing the UNDRIP see:

<[http://www.fncaringsociety.ca/sites/default/files/fnwitness/2010\\_12\\_09\\_AFN\\_Submission\\_UNDRIP.pdf](http://www.fncaringsociety.ca/sites/default/files/fnwitness/2010_12_09_AFN_Submission_UNDRIP.pdf)>

vii The Crown presented two principle questions to Chotalia in their motion to dismiss. First, 'Is INAC's funding program a 'service' within the meaning of s.5(b) of the *Act*?' And second, 'Can two different service providers be compared to each other to find adverse differentiation, or for that matter, is a comparison even required?' In her ruling Chotalia found that while on the first question 'the Crown has not met its onus of demonstrating that the facts are clear, complete and uncontroverted' and therefore no decision can be made the Crown has met its onus of the second question. According to Chotalia 'It has satisfied me that the 'comparator' question is a pure question of law. I can decide this question on the basis of the materials filed in this motion. I find that the [Canadian Human Rights Act (CHRA)] does require a comparison to be made, but not the one proposed by the complainants. Two different service providers cannot be compared to each other. Accordingly, even if I were to find that INAC is a service provider as asserted by the complainants, the CHRA does not allow INAC as a service provider to be compared to the provinces as service providers. The complaint could not succeed, even if a further hearing were held on the services question. Accordingly the complaint must be dismissed' (Canadian Human Rights Tribunal 2011).

viii The following is the official summary of the Federal Court's decision:

Three applications for judicial review were filed with respect to a decision of the Canadian Human Rights Tribunal to dismiss a complaint by the FNCFCFS and the AFN. The complaint alleged that the Government of Canada under-funds child welfare services for on-reserve First Nations children and that this amounts to discrimination. Upon review, the Court concluded that:

i) the process followed by the Tribunal was not fair as it considered a substantial volume of extrinsic material in arriving at its decision;

ii) the Tribunal erred in failing to provide any reasons as to why the complaint could not proceed under subsection 5(a) of the *Canadian Human Rights Act*;

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iii) the Tribunal erred in interpreting subsection 5(b) of the *Act* as requiring an identifiable comparator group in every case in order to establish adverse differential treatment in the provision of services; and

iv) in determining that no appropriate comparator group was available to assist in its discrimination analysis, the Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in its programming manual and funding policies.

As a result, the three applications for judicial review are granted.

<sup>ix</sup> The first of these efforts focused on questioning the applicability of the Human Rights Act, particularly section 5, to the area of INAC funding. Section 5 of the human rights act states: "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination". In December of 2009 the federal government filed a motion to dismiss the complaint of the basis that '[Indian and Northern Affairs Canada (INAC)] does not deliver child welfare services in or off reserve in Canada. INAC's role and actions are confined and directed solely to funding so that first Nations Service providers can provide child welfare services to Indian children and families on reserve in the provinces and so the Yukon Government to provide child welfare services to Indian Children and families residing in the Yukon [...] The funding provided by INAC is not a service within the meaning of the Canadian Human Rights Act s. 5, or at all' (Canadian Human Rights Tribunal 2011).

<sup>x</sup> In its 'Consideration of Reports submitted by States parties under article 44 of the Convention: Concluding Observations: Canada' the sixty-first session of the Committee on the Rights of the Child recommended that Canada: 'Ensure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs' (Committee on the Rights of the Child 2012). More recently, the Permanent Mission of Norway in Geneva recommended 'that Canada take steps to ensure that all Canadian children have equal access to government services, such as health services, education and welfare services, and address the disparities in access to these services for Indigenous children in particular, as recommended by the UN Committee on the Rights of the Child in 2012' (Permanent Mission of Norway in Geneva 2013).

<sup>xi</sup> Eisenberg's work on 'minority' issue referendums demonstrates this tension in Canada. Her work shows that the Canadian public generally views contemporary treaty settlements as issues that challenge the value of universal equality (i.e. giving Indigenous Canadians *more* rights than other Canadians, perhaps at the *cost* of other Canadians). This perception, she argues, helps to explain why so many citizens are not advocates of fulfilling treaty rights (Eisenberg 2004).

<sup>xii</sup> The significance of this framing should not be underestimated. For example, Matthews and Erickson's work on same-sex marriage demonstrates that framing the issue as an issue of

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‘universal equality’ (i.e. giving *all* Canadians the *same* right to marriage equally) as opposed to a special interest issue (i.e. special rights for gays and lesbians) was fundamental in garnering the public will to support this initiative (2005).