# Rights and Tragedy: A Look at Human Rights Discourse in the Context of Indigenous/Settler Relations In Canada

by

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Bachelor of Arts, University of Vancouver Island, 2007

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# Supervisory Committee

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# Abstract

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For many people across the world human rights are understood as a modern discourse of emancipated humanism. What is less understood is how human rights, in certain contexts, can be more useless than useful, more harmful than helpful. This thesis argues that human rights, in the context of Indigenous/Settler relations in Canada, are limited. Human rights in the context of Indigenous/Settler relations in Canada are often construed as a conflict between individual versus collective human rights. This binary framework distracts from the more important question of how rights operate in a colonial context and how they fail to address the material inequity and psychological dysfunction that stems from colonial domination and present day colonial processes. This thesis argues that in order to understand the symbiosis between rights and tragedy we must first look at the context in which human rights are being used and question the actual work they are doing, in this case, for Indigenous peoples living on reserve in Canada.

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# Dedication

To Mom, Dad, Kordell and Ava, all of whom took nothing and gave everything, this is for you.

# Introduction

*What is is not speech.*
*What is is the line*
*Between the unspeakable*
*And the already spoken.*

*-Robert Bringhurst*

A professor once said to me, "In finding a thesis always look for a point of ill feeling or tension." I took this to heart and began to think about what it was in the literature I was reading that was causing me difficulty or ill feeling. What was it that I could not "get over?" The liberal ideals of "freedom," "equality" and "neutrality" would usually invoke conflict within my being. I would sit stiff and arrow-like in my undergraduate chair, the confusion building to a boiling point; murkiness would set in between the "real" and the "ideal." What do you mean "freedom?" What do you mean "equality?" What do you mean "neutrality?" And then I would move on, seeking refuge in "stories" rather than "theories." But tension, conflict, or ill feeling is quite adroit at haunting; it does not easily remedy itself without demanding some form of acknowledgement and engagement. Thus, it is in returning that I engage this thesis. And, while I have let go of, for the purposes of this thesis, the classic liberal values of "freedom," "equality" and "neutrality" as a source of raw tension, I believe that I have found a new, perhaps more sophisticated source of ill feeling: contemporary Western political theories' unquestioned preoccupation with *rights*.

Rights discourse is the most recognizable in today's world through the language of *human rights*. For many people around the world, the language of human rights is understood and accepted as a universal "mode of moral communication." [1] Thus, when I say that contemporary Western political theories' unquestioned preoccupation with rights provides for me a source of ill feeling, the question is hastily begged: why? I believe this question is indicative of a common misunderstanding about the actual work rights do and where their benefits and drawbacks lie. In other words, my goal is to avoid arguing either 'for' or 'against' rights. To bifurcate the debate in this way would continue to ignore and distract from "an assessment of how [rights] operate politically [and] the political culture they create."[2] After all, as theorist Ulf Johansson Dahre articulates, "the definition of human rights is *politically* contested."[3] Thus, the finite question of this thesis asks: what work do human rights do for Indigenous peoples[4] in Canada? "Work" in this context is an assessment of how rights, in real historical and social circumstances, either help or hinder marginalized peoples. Human rights may be accepted as a universal mode of moral communication. The question is, what actual concrete role do rights play in addressing or

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[1] Bhikhu Parekh, "Finding a Proper Place for Human Rights," in Kate E. Tunstall ed. *Displacement, Asylum and Migration*, ed. Kate E. Tunstall (Oxford: Oxford University Press: 2004), 17.

[2] Wendy Brown, *States of Injury* (New Jersey: Princeton University Press: 1995), 124.

[3] Ulf Johansson Dahre, "The Politics of Human Rights: Indigenous Peoples and the Conflict on Collective Human Rights," *The International Journal of Human Rights* 12 (2008): 46.

[4] There is not unanimous agreement on who is regarded as "Indigenous." In this thesis I will adopt the meaning of Indigenous as defined by legal scholar James Anaya. He states the following:

> "The term Indigenous refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of forces of empire and conquest."

See S. James Anaya, *Indigenous Peoples and International Law*, 2nd Ed. (New York: Oxford University Press, 2004), 3. Moreover, through out this thesis, I will consider Indigenous and First Nations as interchangeable. Especially in the context of legal/political discussions, First Nations have become the dominant terminology in identifying Indigenous peoples in Canada. There is no doubt that, similar to universal human rights, naming the 'other' is also politically contested, especially in terms of Indigenous/Settler relations.

alleviating the historical, political and social role of colonialism, poverty, discrimination and racism in the Indigenous/Settler context? In other words, do human rights offer Indigenous peoples a potential tool of redress from their social and historical circumstances, or do they instead pay *lip service* to "modern emancipated humanism" while turning a blind-eye to the structural and historical injustices that stem from colonization and institutionalized racism? In this paper colonialism is understood not as an attempt by contemporary settlers to "eradicate the physical signs of Indigenous peoples as bodies, but trying to eradicate their existence as peoples through the erasure of their histories and geographies that provide the foundation for Indigenous cultural identities and sense of self."[5]

The theoretical underpinnings that have shaped this thesis focus on two elements. The first element is the problematic tendency of binary oppositions within the discourse of human rights. The second element is the way human rights distract from the historical and context-based reasons marginalized peoples adopt human rights based discourses in the first place. Human rights discourse tends to treat conflicts and claims as universally solvable, understandable and coherent. The difficulty arises when oppressed and marginalized peoples are made to believe, due to the limited nature of human rights discourse, that their problems, conflicts, tragic circumstances or even they themselves lie 'outside' of the discourse of human rights. This thesis argues that the discursive limitations of human rights, in the context of Indigenous/Settler relations in Canada,

[5] Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against contemporary colonialism," *Politics and Identity; Government and Opposition* Ltd, Blackwell Publishing, 2005. pg.598.

place *real limitations* on peoples who are trying to transcend the oppressive conditions in which they have been placed and spaced.[6] In other words, this thesis argues that the work human rights can do for Indigenous peoples in Canada is limited.

[6] It is important to qualify that my assessment and critique of human rights only applies to the colonial context in Canada. International human rights claims and the language of human rights at the international level are beyond the scope of this paper.

## Chapter Overview

This thesis begins as an exploration of how some political theorists, mostly in Canada, are thinking about human rights and Indigeneity. Exploring rights theory in terms of Indigenous/Setter relations in Canada finds that rights debates are often framed by theorists, politicians and courts (i.e. the dominant *sensus communis*[7]) as a 'stand-off' between "individual versus collective rights." Individual rights are construed as being "settler rights" and collective rights are construed as "aboriginal rights." This bifurcated debate raises flags on the positive worth this debate has for those peoples who are seeking redress from the material and structural inequities that stem from colonization, systemic racism and discrimination. The question thus becomes, if engaging in this type of rights discourse is theoretically and discursively limited, would the 'on the ground' solutions to the problems stemming from material and structural inequities generated by colonialism be limited as well?

The first chapter highlights four limitations of the human rights discourse regarding Indigenous/Settler relations in Canada. First, human rights discourse constructs binaries that generate mistaken categories which bifurcate people into two competing camps, either "individualists" or "collectivists" and therefore, mistakenly characterize them as either one or the other. Second, the binary opposition has a tendency to valorize

[7] *Sensus Communis* means common sense. This term was extrapolated from the work of Laura Hengehold in Laura Hengehold, *The Body Problematic: Political Imagination in Kant and Foucault* (University Park : Pennsylvania State University Press, 2007).

individual rights over and above collective rights; in other words, the binary opposition usually implies hierarchical relations. Third, it sets up the binary opposition in a way that forces people to make "tragic choices" which are constructed as either "your rights (individual rights) or your culture (collective rights)."[8] Fourth, it distracts from the more important question of how rights "operate politically [and] the political culture they create"[9] and from the material and psychological effects of colonial rule by decontextualizing and dehistorizing the debate about rights.

The second chapter examines practically, the passing of Bill C-21, an anti-discrimination law, which provides individuals living on reserve with the resources and language to bring human rights complaints against both the federal government and their band governments. Bill C-21 was enshrined by the federal government of Canada to help improve the life of Indigenous peoples living on reserve. This chapter explores how the four discursive limitations discussed in Chapter One could limit the work of Bill C-21 and argues that Bill C-21 may not do the positive work many believed that it would.

The third chapter examines two possible solutions that address the limited nature of human rights discourse. This chapter explores the proposed solutions and examines the possibilities and limitations of each approach. The first 'solution' is based on a model of divided jurisdiction called *transformative accomodation* developed by Ayelet Shachar which seeks to transcend the binary opposition of individual versus collective rights.

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[8] For a discussion of how rights discourse constructs choices as either/or , individual or collective, sexual equality or cultural autonomy see Avigail Eisenberg (2003) and Ayelet Shachar (2001).

[9] Brown, *States of Injury*, 124.

Shachar uses the idea of divided jurisdiction in an attempt to address the conflicts of both groups and individuals without falling into the problematic trap of binary opposition. The second ‘solution’ is drawn from a model developed by Balakrishnan Rajagopal, that showcases how a social movement’s approach can provide an alternative to the discursive limitations of human rights. My analysis concludes that there are very real limitations within the discourse of human rights and that those limitations enhance and reify, not dilute and dissolve, the also very real, structural limitations of peoples who live embodied as ‘the outside’ or the ‘incoherent’ and suffer the consequences of that embodiment in ‘lived experiences’ of poverty, racism, discrimination and colonialism.

# Chapter One: The Limits of Discourse

The goal of this chapter is to highlight the discursive limitations of human rights for Indigenous peoples in the Canadian context. These discursive limitations include the following: human rights have a tendency towards binary oppositions (individual versus collective), human rights structure the values in the binary as unequal with one value valorized over and above the other, and finally, human rights force an either or choice, whereby the individual is left to decide, in an all or nothing decision, if they will choose either their culture (collective rights) or their rights (individual rights). By highlighting the discursive limitations of human rights in the context of Indigenous/Settler relations in Canada, the goal is to showcase how debates over individual and collective rights distract from the more important question of how rights structure debate and from the psychological and material effects of colonialism on reserves.

This chapter will argue that human rights successfully distract from colonialism by structuring debates about human rights in the language of individual and collective rights while ignoring the historical, material and tangible causes of colonial dysfunction on reserve lands in Canada. This chapter looks at some of the people involved in structuring the debate about human rights in the Indigenous/Settler context.[10] The dominant discourse of human rights in Canada is driven by the idea that *all people must have* rights. If some peoples do not have rights, it is the job of liberal theorists, politicians and civil servants, to problematize how these people can *get* rights. One of the problems

[10] The people constructing discourse in the context of the Indigenous/Settler rights debate are taken, in this thesis, to be Canadian political theorists, Canadian politicians and civil servants working within the Canadian Human Rights Commission.

with this type of scholarship and political practice is that it distracts from the more important question of how rights "operate politically [and] the political culture they create."[11] In other words, instead of giving rights to peoples,[12] especially in the context of Indigenous/Settler relations in Canada, we should be asking, given the discursive tradition these rights are shaped in, how rights may be reproducing structures of colonial domination by distracting from the historical, material and physiological effects of colonial domination.

The first limitation of human rights discourse explored here is the problem of binary oppositions within the language of human rights in the context of Indigenous/Settler relations in Canada. In general, binary oppositions generate simplistic ways of understanding the world that bifurcate complicated events and ideas in misleading and insidious ways. One of the ways they do this is by viewing the world, in all its complexity, as either this or that, black or white, yes or no. This way of viewing the world makes not having any rights appear intolerable, yet encourages us to tolerate the "material inequities and asymmetries of power" [13] that underpin the colonial relations between Indigenous peoples and Settlers in Canada. What then happens, in practice as well as in discourse, is that debates about material inequities and asymmetries of power are wrongly characterized as debates about who is individual and who is collective, who

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[11] Brown, *States of Injury*, 124.

[12] For a discussion of White peoples "giving" anything to Indigenous peoples see: Richard Day, "Who is this we that gives the gift? Native American Political Theory and the Western Tradition," *Critical Horizons* 2:2.

[13] This insight is taken directly from Julia O'Connell Davidson and her insights into the discursive constructions of children in the global sex trade. See: Julia O'Connell Davidson, *Children in the Global Sex Trade* (Cambridge: Polity Press, 2005), 23-24.

'wins-out' in a clash of individual and collective rights, and individually, what value will you valorize at the expense of the other? Thus, this chapter sets out to discuss four discursive limitations within human rights and highlight how these limitations may unhelpfully squander the positive work human rights can do in the Indigenous/Settler context.

Surveying the literature on individual and collective rights in Canada we can extend back quite some time, and while this chapter will offer a survey of the more recent literature, a brief overview of earlier discussions will help qualify the relationship between individual and collective rights scholarship in Canada. In other words, these earlier works will showcase how theorists problematizing the individual versus collective rights debate, were *distracting* from "the racist origin of Canada's assumed sovereign authority over Indigenous peoples and their territories," and *helped* "the state, the courts, corporate interests, and policy makers . . . *preserve* the colonial *status quo*[14] by asking the question, what happens when individual and collective rights collide? Instead of asking, how do rights structure and reify colonial discourse and practice? Thus, the reason for re-hashing this debate is not to further distract from the "problem" of colonialism, but rather to showcase how Canadian law and Canadian political theorists are being 'distracted' from the more important question of how human rights can structure discourse in unhelpful, misleading and dominating ways.

[14] Glen S. Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" *Contemporary Political Theory* 6 (2007): 451.

In the early 1990's the onslaught of identity and cultural politics compelled liberal political theorists to problematize group rights. As mentioned above one of the central questions theorists engaged was how to resolve a possible clash between individual rights and collective rights in Canada. Theorists such as Michael Hartney, Jan Narveson, Amy Gutman, Brian Barry, Ian Shapiro, Stephen Macedo, Susan Okin and Will Kymlicka [15] all argued that when it came to a conflict between an individual and a collective right the individual rights should win out. On the flip side, scholars such as Michael McDonald and Chandran Kukathas argue, against the dominant view that individual rights should win out in a clash between individual and group rights. These scholars argued that the collective rights of the group should not be interfered with – "even if that minority community systematically violates certain members' basic citizenship rights."[16] The latter authors became characterized as the "collectivists" and the former authors became characterized as the "individualists."

The theorists who were characterized as the "individualists" attempted to solve a possible clash between individual and collective rights by arguing that individual rights should win out in a conflict between the two rights. For these authors, the 'needs', 'values' or 'rights' of the group or the collective are no more important, meaningful or enforceable than the 'needs', 'values' and 'rights' of the individuals that comprise any given group. As highlighted by Hartney in the case of Quebec, "the weight of the interest

[15] It has been pointed out to me that this literature is somewhat dated; however, I still think it has relevance to the topic of individual and collective rights, as it does a good job at showcasing how important individual rights are to a liberal democracy such as Canada. See e.g. Hartney 1991; Narveson 1991; Gutman 1993; Macedo 1998; Arneson and Shapiro 1996; Barry 2001; Kymlicka 1995.

[16] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: University of Cambridge, 2001), 65.

in the preservation of the French language is no greater than that of the individuals concerned."[17] Thus, using the language of "collective rights" is a "rhetorical device" that is used to give more weight to French interests than would be the case in using the language of "individual rights."[18] Moreover, these scholars argued that what "collective moral/positive rights" presuppose is that there is something above and beyond, a 'thickness' or 'strength', that serves the collective interest beyond the interests of its individual members and to this these theorists would say: "groups are worthy of our respect because their individual members are worth of respect."[19]

The theorists who were characterized as the 'collectivists' argued that collective rights were not reducible to individual rights. These theorists argued that collective rights functioned because a person in a group doesn't act alone, but in conjunction with and in support of, a normative "shared understanding" of group-life including quintessential aspects of group life such as membership and internal rule-making. McDonald stated that "shared understanding" is a matter of "social fact" and not legal or political "assignment" or "ascription."[20] Thus, it became the job of the 'collectivist' to search for ways liberal democratic societies could accept and even promote the legal/political language of collective rights. Thus, we can trace how the debate was initially bifurcated into a debate about individual versus collective rights. Eventually, however, liberal scholars began to

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[17] Michael Hartney, "Some Confusions Concerning Collective Rights," *Canadian Journal of Law and Jurisprudence* 4 (1991): 301.

[18] Ibid., 313.

[19] Jan Narveson, "Collective Rights?" *Canadian Journal of Law and Jurisprudence* 4 (1991): 345.

[20] Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" *Canadian Journal of Law and Jurisprudence* 4 (1991): 219.

see the problems associated with the way the individual and collective rights debate had been structured, especially in the context of Indigenous/Settler relations in Canada.

The problematic construction of individual versus collective rights allowed other theorists to understand the discursive limitations of rights discourse in the Indigenous/Settler context in Canada. The first limitation of the binary opposition was the unhelpful positioning of people as either "individualistic" or "collectivist." Avigail Eisenberg argues that the conflicts that plague Settler and Indigenous populations are often construed as though the settler populations are "committed to individualism and equality" and First Nations rights are committed to "rights that are special, rather than universal, and collective rather than individual."[21] Eisenberg argues that the false construction of Settlers as individualist and Indigenous people as collectivist is "mistaken" and "insidious." It is "mistaken" because the Canadian representative system can easily be shown to command strongly collectivist values[22] and it is "insidious" because binding the conflicts of Indigenous people and the Canadian state to the language of individualism and collectivism focuses on a "relatively innocent [and contestable] cultural difference," and means that discussions surrounding the "agenda of coercive assimilation and domination can only exist at the margins of explanation."[23] This claim ultimately strikes a cord with my argument that the language of individual and collective rights is *distracting* from the psychological and material inequality that is a result of colonialism and institutional and structural racism.

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[21] Avigail Eisenberg, "Domination and Political Representation in Canada" in *Painting the Maple: Essays on Race, Gender, and the Construction of Canada* (Vancouver: UBC Press, 1998), 40.

[22] Eisenberg, "Domination and Political Representation in Canada," 48.

[23] Ibid., 49.

The second problem that Eisenberg highlights is that policy reforms are issued in a way that "appear[s] to respect collectivist values" but end up being ones that "guarantee legislative seats", "draw electoral boundaries that favor community interests and values"[24] or add interpretive clauses that balance individual and collective rights.[25] Therefore, what these 'solutions' do not require is the systematic and honest "dismantling" of government policies and ideologies that have allowed domination, assimilation and cultural subordination of Indigenous people to occur since contact. Instead they cast each culture in a false light. The idea that, if that the Canadian government supports more "collectivist" values in our political system, First Nation peoples will be able to find the Canadian state legitimate and want to actively participate is more than misleading, it is false.[26] Thus, by focusing on the construction of individual versus collective as a binary opposition we can see how the categories of "individualists" and "collectivists" are symptomatic of a generally hollow and misleading discourse.

The second discursive limitation is that binary oppositions usually imply hierarchical relations. Will Kymlicka reinforces the argument that within the binary opposition of individual and collective rights, collective rights will have a tendency to be placed in a position of subordination to individual rights. Kymlicka identifies the bifurcation of individual and collective rights as problematic and thus, proceeds to think

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[24] Ibid., 50.

[25] See Bill C-21 which prescribes the balancing of individual and collective rights.

[26] Eisenberg, "Domination and Political Representation in Canada," 50-51. Eisenberg offers that these depictions as misleading, and it is I who read them as "false."

of a more productive way to view individual and collective rights. Oddly, Kymlicka's solution to the binary opposition of individual and collective rights includes the subsequent bifurcation of collective rights into two more categories: *internal dissent* where groups want collective rights over individual members and *external decisions* where the group is attempting to protect itself against the larger society.[27] What is most important to Kymlicka's argument is the idea that "liberals can and should endorse certain external protections, where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices."[28] To devolve from the work of John Bowen, what Kymlicka is arguing is principally that "group-differentiated rights can be justified on the grounds that they are required to produce sufficiently liberal individuals."[29] Thus what we can derive from Kymlicka, is that in times where individual and collective rights collide, individual rights will have a tendency to supersede collective rights.

Theorist Michael McDonald laments the ascendancy of individual over collective rights. McDonald's work looks for are ways that liberalism[30] can be supportive of collective rights. He argues that *classical* liberalism can be compatible with collective rights by way of transfer; one can give up their individual right by transferring it to a group right; however, the "transfer is subject to an important *procedural* condition: each

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[27] Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, 1995), 35.

[28] Ibid., 37.

[29] John Bowen, "Should We Have a Universal Concept of 'Indigenous peoples' Rights? Ethnicity and Essentialism in the Twenty-First Century," *Anthropology Today* 16 (2000): 14.

[30] McDonald employs two variations of liberals: classical liberals and welfare liberals.

of us must give our free and informed consent to the association."[31] This "free" and "informed" consent however, especially in terms of Indigenous people in Canada, is untenable. As McDonald points out, their claim to groupness is a natural extension of their history, culture, language and shared understanding of the world around them not an abstract form of consent that most classic liberals drew from the myth of the social contract.

McDonald's second hope for reconciling collective rights within liberal theory lies with the welfare liberals. However, this avenue is perhaps even more dissatisfactory than that of the classical view. As McDonald states, "the only groups to which the welfare liberal will extend collective rights are those whose cultures support the formation of autonomous individuals."[32] Thus, if your personhood is rooted in a collective way of life the welfare liberal will simply attempt to "encourage" you otherwise. The fear, for McDonald, is an "imperialist", interventionist version of welfare liberalism will, more actively than classical liberalism, attempt to endorse the values of individual autonomy over collective autonomy and in doing so, threaten the group in unacknowledged ways.[33] In sum, McDonald sees the conflict of individual and collective rights as a "tragic choice" to which he adds, that as "a Canadian nation [we] have the good fortune to avoid having too many tragic choices, but our history and especially our current situation incline me more to pessimism than optimism in this regard."[34] Two things become clear from McDonalds argument. First, in spite of McDonald's sympathies

[31] McDonald, "Should Communities Have Rights?" 233.

[32] Ibid., 235.

[33] Ibid., 235.

[34] Ibid., 237.

with the "collectivist" approach he still feels that liberalism, either the classical or welfare variety, cannot properly accommodate collective rights. And secondly, McDonald discusses the stand-off between individual and collective rights as a "tragic choice" between either individual rights or collective rights because it seems, liberal society, tragically, cannot have both.

The third discursive limitation is that the binary opposition, theoretically and practically, forces choice. This choice is a "tragic choice." The work of Susan Okin best explains the "tragedy" dimension of this choice. Okin sets up the dimensions of the tragic choice by stating that women in cultural groups must and should 'choose' individual rights over collective rights. Okin argues that the strengthening of minority group rights or "collective" rights is oppressive to women within minority groups and, at most, "group rights are potentially and in many cases actually anti-feminist."[35] For Okin, the state's legal norms and protection of gender equality should outweigh any and all attempts to preserve cultural groups from the dominant or hegemonic culture in which they are situated. Indeed, Okin states that some women may be "better off . . . if the culture into which they were born were . . . gradually to become extinct."[36] Okin advocates for a zero-sum politics which invites a "tragic choice": either your "rights" (read, individual rights) or your "culture" (read, collective rights). Thus, Okin perpetuates the insidiousness of the binary construction by arguing that there is only one way out of the binary: either your culture or your rights. Moreover, Okin reifies the hierarchy within the binary by

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[35] Susan Moller Okin, "Is Multiculturalism Bad for Women?" *Boston Review* 22 (1997): 26.

[36] Susan Moller Okin, "Feminism and Multiculturalism: some Tensions," *Ethics* 108 (1998): 661-684.

advocating that collective rights are not only 'bad,' but are actually oppressive for women and individual rights should always be valued above and beyond collective rights.

Feminist theorists have criticized Okin for reifying the conceptual problems of binary opposition. Ayelet Shachar argues that Okin's argument is problematic because it generalizes the contestable fact that all cultures are bad for women. Shachar insists that this type of generalization fails to recognize the complex and varied power relations that operate within all cultural groups.[37] Shachar also argues that Okin's account of oppressive group cultures ignores women's agency within those cultures. As often happens within binary constructions, Okin "draws [an] oversimplified picture, where cultural membership and its accommodation is either identified as either "good" or "bad."[38] What the false dichotomy refuses to consider is that cultural accommodation can be *both* good and bad. Eisenberg argues that the false dichotomizing of rights is guaranteed to force a choice between important values. Eisenberg argues that ultimately what Okin's dichotomized approach forces us to do is dismiss some values as "mere interests so that other values can enjoy their status as rights."[39] Thus, as the case study will outline, the idea of "tragic choices" stemming from the discursive binary, manifests *real* anguish amongst women who are forced, in *real* circumstances, to *choose* either their culture or their rights.

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[37] Shachar, *Multicultural Jurisdictions*, 65.

[38] Ibid., 67.

[39] Avigail Eisenberg, "Diversity and Equality: Three Approaches to Cultural and Sexual Difference," *The Journal of Political Philosophy* 11 (2003): 43.

The fourth discursive limitation is that the binary opposition distracts from the more important question of how rights "operate politically [and] the political culture they create"[40] and from adequately addressing the psychological and material inequalities generated by colonialism. At base, the story about distraction is largely tied up in what I will term the "double distraction." First, people, such as Canadian political theorists, politicians and civil servants working in the Canadian Human Rights Commission have been asking and continue to ask the wrong *question* about rights. The dominant question about rights was how will liberal democracies such as Canada accommodate both individual and collective rights? Ultimately, this oversimplified and bifurcated question forced people to choose sides. This forced choice displayed the uselessness of rights in the Indigenous/Settler context in Canada. The question is would this uselessness be so acute if we were to ask different, more complicated questions about rights? For example, if we asked different questions (How do rights operate? What limitations do rights have in a colonial context? What work do rights do to improve the material inequality and psychological dysfunction the stems from colonial domination?) then perhaps we could provide different, more complicated and helpful, answers. In sum, the first distraction is discursive: it asks a simple question and gets a simple answer.

The second distraction is interrelated with the first. The first distraction simplifies and delimits the discourse and the second distraction, decontexualizes and dehistorizes that same discourse. As stated earlier, the story about distraction is a "double distraction." First, we ask simplistic questions about rights and get simplistic and unhelpful answers.

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[40] Brown. *States of Injury*, 124.

Second, we claim that rights are universal and abiding, without even knowing or critically questioning, if the work rights are doing to address the material, historical and tangible causes of peoples *tragic* circumstances, is actually good work. Wendy Brown argues that rights "necessarily operate in and as an ahistorical, acultural, acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality."[41] In other words, what Brown suggests is that there will always be an estrangement between the discourse of rights and the actual work they do "in reality."

Rights, in other words, could be useful if we examined how they operate in particular contextual, historical and cultural locations. For example, as social stratifications and social powers change and are manipulated over time, different rights are needed to address different contexts. The fact that rights operate in an "ahistorical, acultural, acontextual idiom" means that as circumstances change over time, rights discourse will not change or adapt to changing circumstances or historical realities. As we have seen in the Indigenous/Settler context in Canada, human rights discourse has not changed to become more suited to addressing an atmosphere of colonial degradation and domination. Rights in the Indigenous/Settler context are structured as rights that attempt to address group rights or collective rights instead of addressing the contextualized, historized realities of colonialism, institutionalized racism, poverty and psychological dysfunction. Thus, the more Canadian political theorists, politicians and civil servants

[41] Ibid., 97.

attempt to re-work the individualist and collectivist bequest of rights with more robust formulations such as: "group rights", "internal restrictions" and "external protections," rights of "difference" or rights of "cultural minorities"[42] the more *distracted* the discourse becomes from addressing the actual historical fact of colonial domination and the tragic circumstances that extended from that history.

Distracting from actual historical circumstances of peoples can be harmful. For example, when people seek redress from their specific oppressive circumstances, they do not expect that an abstract rights discourse will takes those concerns and simultaneously decontextualized and dehistorized them. As Brown explains,

> If contemporary rights claims are deployed to protect historically and contextually contingent identities, might the relationship of the universal idiom of rights to the contingency of the protected identities be such that the former operates inadvertently to resubordinate by renaturalizing that which it was intended to emancipate by articulating?[43]

What Brown seems to be articulating here is that, when the "universal" quality of rights is attached to peoples, it creates for them an abstracted identity that may or may not be helpful to them and their particular circumstances. Marx, whom Wendy Brown also draws upon, helpfully describes the way rights attach to abstract rather than concrete identities. According to Marx,

> "the ruse of power peculiar to liberal constitutionalism centers upon granting freedom, equality and representation to abstract rather than concrete subjects. The substitution of abstract political subjects for actual ones not only forfeits the project of emancipation but resubjugates us precisely by emancipating substitutes

[42] Ibid., 99.

[43] Ibid., 99.

> for us—by emancipating our abstracted representatives in the state and naming this process 'freedom.'"[44]

In other words, "the subject is thus *ideally emancipated* through its anointing as an abstract person, a formally free and equal human being, and is *practically resubordinated* through this idealist disavowal of the material constitutes of personhood, which constrain and contain our freedom."[45]

The key idea to be drawn out from Marx is that rights in *practice* are limited by a discourse that distracts from man's *particular* positioning. Marx's shows how the dominant classes, through the use of an abstract and limited discourse, claim universality, normalize oppression and naturalize abstractions of equality, neutrality, non-discrimination and freedom. Thus, it could be that in the face of real community poverty and dysfunction that the uselessness of rights is exposed. What Brown derives from Marx's discussion is that rights "pervasively configure a political culture (rather than merely occupying a niche within it) and discursively produce the political subject (rather than serving as the instrument of such a subject)."[46] Therefore, when it comes to the double distraction of rights discourse in Canada, all historically situated and non-abstracted peoples must be ever-aware of the simultaneous usefulness and uselessness of rights. As Brown articulates, rights struggles have "the power to naturalize identity and soften stigma attached to them, depoliticize subjects and simultaneously protect them, empower subjects while regulating them, free certain subjects while producing and re-

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[44] Ibid., 106.

[45] Ibid., 106.

[46] Ibid., 120.

subordinating others."[47] As Brown states, it is "in their emptiness, [that rights] function to encourage possibility through discursive denial of historically layered and institutionally secured bounds, by denying with words the effects of relatively wordless, politically invisible, yet potent material constraints."[48] Both of these insights showcase rights as discursively limited, either by distracting from more important questions and more complex debates, or by distracting from the limited work they can do to alter the historical, material and structural realities that are apart of all peoples lives.

It may be, that in using a limited rights discourse to address oppression or stigmatization, we simultaneously lose the ability to describe the character of the oppression that we *feel* and what it *is* about that oppression that is hurting us. Rights could only talk about domination and colonization if they "could bring into view the complex subject formation consequent to a history of violation, precisely the articulation they thwart in figuring desire as natural, intrinsic, and unhistorical."[49] In a liberal capitalist culture, rights can only cast issues related to colonization as either private or incommunicable matters. As Brown states, rights discourse "converts social problems into matters of individualized, dehistoricized injury and entitlement, into matters in which there is no harm if there is no agent and no tangibly violated subject."[50] The decontextualization of colonization and domination within rights discourse forces upon the right holder as well as the aggregate community of rights holders to mis-recognize *their* histories as hyper-abstractions; thus depriving them of a *political* consciousness.

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[47] Ibid., 121.

[48] Ibid., 134.

[49] Ibid., 126.

[50] Ibid., 124.

Therefore, "the recognition of the histories, relations and modalities of power that produce and situate us as human"[51] are misused and re-subordinated by the emptiness and double distraction of rights discourse.

In sum, the goal of this chapter was to highlight the discursive limitations of human rights for Indigenous peoples in the Canadian context. This chapter underscored the following: (1) the tendency of human rights discourse to become structured in terms of binary oppositions; (2) how human rights have a tendency to structure values in the binary as unequal with one value valorized over and above the other; (3) how human rights force an either or choice, whereby the individual is left to decide, in an all or nothing decision, which value they will have; (4) how human rights, in the context of Indigenous/settler relations in Canada, distracted from the more important question of how rights "operate politically [and] the political culture they create"[52] and from an analyzing the work rights are able to do in addressing the psychological and material affects of colonialism. Thus, after exploring the theoretical limitations of human rights discourse in the context of Indigenous/Settler relations in Canada, the goal of the next chapter is to highlight how a limited discourse has *real* limiting effects on human rights in practice.

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[51] Ibid., 127.

[52] Brown. *States of Injury*, 124.

# Chapter Two: The Application of a Limited Discourse

This chapter will highlight the practical limitations of human rights for Indigenous peoples in the Canadian context. This case study functions as a tangible example of how the limitations of human rights discourse are linked to limited practical results. This case study explores the outcomes of Bill C-21. Bill C-21 is an anti-discrimination human rights law which became active on reserve communities in Canada for the first time on June 18th, 2008. This chapter will first, offer a descriptive overview of the politics surrounding the issue. This overview will include a backgrounder of Canadian Human Rights laws and the way they have interacted with Indigenous communities in the past. Secondly, it will include a discussion of Bill C-21, how it came to pass, who was in favour of the bill and who was not. Thirdly, this chapter will analyze the case study using the four discursive limitations laid out in Chapter One. By using the four discursive limitations that are linked to human rights theory in Canada, we can juxtapose the practical outcomes of Bill C-21 with the theoretical critique of human rights discourse in the Indigenous/Settler context.

In the post-war period, the Canadian government established four mechanisms to protect human rights in Canada. These included: the Canadian Charter of Rights and Freedoms, provincial human rights laws and legislation, the Canadian Human Rights Act, and the Canadian Human Rights Commission. The Canadian Charter of Rights and Freedoms modified the Canadian constitution in 1982 to better reflect the changing

human rights norms at the international level. The Charter of Rights and Freedoms is a binding legal document that is meant to uphold the basic human rights of all Canadians.[53] In addition to the Charter of Rights and Freedoms, each province in Canada adopted a human rights Code or Act. The provincial Human Rights Acts were installed to protect human rights organizations and services that were not included under federal jurisdiction.

The Canadian Human Rights Act is said to be the most important human rights legislation in Canada. This is largely because the Canadian Human Rights Act "outlaws discrimination [at the federal level] in employment and in the delivery of goods and services on eleven different grounds."[54] The Canadian Human Rights Act states that

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.[55]

The institutions set up to protect human rights in Canada are Human Rights Commissions. These commissions operate at both the federal and provincial level. The

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53 The basic human right guarantees the charter outlines are: fundamental freedoms (such as freedom of thought, speech, and association), democratic rights (such as the right to vote), mobility rights (the right to enter, remain in, and leave Canada), legal rights, equality rights (equality before the law and protection against discrimination), language rights, as well as the rights of Canada's First Nations peoples.

54 *Canada and Human Rights* < http://www.unac.org/rights/actguide/canada.html#provincial> accessed July 2, 2009.

55 Department of Justice Canada. *Canadian Human Rights Act* < http://laws.justice.gc.ca/en/showdoc/cs/h-6///en?page=1> accessed on May 22, 2009.

mandate of the Canadian Human Rights Commission, as passed down from the Canadian Human Rights Act, is to promote public understanding of human rights and freedoms and "try by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices"[56] in Canada. This case study will focus specifically on two of the four human rights mechanisms: the Canadian Human Rights Act and the Canadian Human Rights Commission, both of which operate solely under federal jurisdiction.

From the inception of the CHRA, the CHRA and the *Indian Act* were in conflict. When the Canadian Human Rights Act was adopted in 1977 it came with a provision on Indigenous communities titled section 67. Section 67 exempted the "Indian *Act* or any provision made under or pursuant to that Act," from the application of the CHRA.[57] Therefore, section 67 prohibited Indigenous people living on reserve and operating under the *Indian Act* to file "complaints of discrimination if the discrimination they [were] complaining about [was] related to the *Indian Act*."[58] The minister at the time had justified section 67 because he stated that the government had made a commitment to

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Government of Canada, *The Canadian Human Rights Commission*, <www.chrc-ccdp.ca> accessed June 2, 2009

[57] "Submission on Bill C-44 Canadian Human Rights Act Amendments (application to Indian Act," *Aboriginal Law Section of the Canadian Bar Association* (Ottawa: April 2007) < http://www.cba.org/CBA/submissions/pdf/07-23-eng.pdf> (Oct 12, 2008), 1.

[58] "A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act" *Canadian Human Rights Commission*, (October 2005), 2.

The *Indian Act* is part of the *Constitution Act* of 1876. Section 91(24) of the *Constitution Act* of 1876 "assigns exclusive legislative authority over "Indians, and Lands reserved for the Indians" to the federal Parliament." The *Indian Act* has been amended over the years, but in spite of these amendments the *Indian Act* continues to "govern almost every aspect of Indian life and government on and off reserve." These quoted remarks come from Isaac Thomas, *Aboriginal Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatchewan: Purich Publishing, 2001), 37.

First Nation administrators that there would be no changes made to the *Indian Act* prior to consultation.[59] The then Minister believed that some provisions in the *Indian Act* might not pass human rights scrutiny (this probably included the sexually discriminatory way the Indian Act defined membership) and that if the CHRA were applied to the *Indian Act* it could easily abolish or significantly change it.[60] The results of this 'solution' were less than adequate, especially for Indigenous women living under the discriminatory legislation of the *Indian Act*.

One of the purposes of the *Indian Act* is to define who is an Indian. Prior to 1985 the *Indian Act* defined membership in a sexually discriminatory way. Section 12 (1)(b) of the *Indian Act* stated that if an Indigenous women married a non-Indigenous man she would lose her Indian status and the membership in her community would be revoked. On the other hand, if an Indigenous man was to marry and non-Indigenous women, the non-Indigenous women would gain full Indian status, even if she had no Indian ancestry. The appalling effect of this legislation was "the effective banishment of over one hundred thousand women, their spouses and their children from their communities and their traditional homelands."[61] In the pre-charter and pre-CHRA years, the Canadian courts

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[59] Government of Canada. *The Canadian Human Rights Commission: Overview, History of Section 67* <www.chrc-ccdp.ca> accessed May 22, 2009. The topic of getting rid of or amending the *Indian Act* is not something that Indigenous people or settlers take for granted in Canada (this is thanks largely to the White Paper of 1969 and the virulently opposed Red Paper). Even though the *Indian Act* is a paternalistic and draconian piece of legislation, the *Indian Act* is also *proof* of oppression and colonization. As imperialism becomes, as Taiaiake Alfred argues, more porous and invisible, the *Indian Act* is a blatant showcasing of Canada's imperialist past.

[60] Government of Canada. *The Canadian Human Rights Commission: Overview, History of Section 67* <www.chrc-ccdp.ca> accessed July 2, 2009.

[61] Ibid.

proved ineffective at addressing the sexual discrimination that devolved from the *Indian Act*. This ineffectiveness is highlighted most aptly in the Lavell Case of 1973.

In *Attorney-General of Canada v. Jeanette Lavell*,[62] the Supreme Court of Canada ruled that section 12(1)(b) of the *Indian Act* was fully operative and not discriminatory because all Indigenous women were subjected to section 12(1)(b) of the *Indian Act* equally.[63] This ruling forced advocates of sexual equality, like Sandra Lovelace, to bring her case against Canada to the *United Nations International Covenant on Civil and Political Rights* (which Lovelace did in December 1977).[64] It was not until 1985 that Canada amended the *Indian Act* so as to address sexual discrimination on reserve. The amendment addressing sexist practices stemming from the *Indian act* was Bill C-31. Bill C-31 permitted women who lost their status along with their children to regain membership through an application process. As of "July 1999, 234 of the 610 bands had assumed control of membership and nearly 133,000 persons had applied for status."[65]

In hindsight, Bill C-31 ended up have many "unintended consequences" for Indigenous women attempting to regain status on reserve. For example, Bill C-31 aided

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[62] To view the Laval case see: Judgments of the Supreme Court of Canada, *Attorney-General of Canada versus Lavell, (1974) S.C.R. 1349*< http://csc.lexum.umontreal.ca/en/1973/1974rcs0-1349/1974rcs0-1349.html > accessed July 2, 2009.

[63] Olena Hankivsky, *Social Policy and the Ethics of Care* (Vancouver: University of British Columbia Press, 2004): 46.

[64] U.N. Human Rights Committee, Lovelace v. Canada, ICCPR Communication No.R/24, U.N. Doc A/43/40, Annex 7(G).

[65] Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada," *Canadian Journal of Political Science* 34 (2001): 715-738

the creation of deep differentiations between status and "reinstated" status women.[66] The legislation "divided families" and will result in the extinction of some Aboriginal communities due to the second generation cut-off.[67] There is further evidence of Band discrimination against reinstated women and their families through withholding membership, prohibiting residency on reserve, refusing to provide housing, education and health care funding and creating a general atmosphere of exclusion and negative stereotyping.[68] There is also arguments put forward that the *Indian Act* and Bill C-31 are harmful not only to Indigenous women but also towards Indigenous men (i.e. sons of women who have lost their status). [69] It is argued by the Native Women's Association of Canada that both the *Indian Act* and Bill C-31 are discriminatory pieces of legislation that reaffirm and assert gender discrimination against Aboriginal women and their families.

The argument has been made, therefore, that the passage of Bill C-21 will be a "great success" for Indigenous women living on reserve. One reason for this assertion is that previously Indigenous women could only obtain recourse against discrimination from either their band council or the federal government through expensive and lengthy

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[66] For a more in depth discussion of Bill C-31 and the implications for Indigenous peoples see Martin J Cannon, "Revisiting Histories of Gender Based Exclusion and the New Politics of Indian Identity," *National Center for First Nations Governmance* (2008) < http://www.oise.utoronto.ca > accessed (May 25, 2009).

[67] Mary Eberts, "Aboriginal Women's Rights are Human Rights" *Native Women's Association of Canada* (Department of Justice Canada: 10/10/2008) < http://justice.gc.ca/chra/eng/abor-auto.html > accessed (Oct 15, 2008):1; The second generation cut off that was instituted by Bill C-31 legislates that reinstated women can only pass their status down one generation. Now Indigenous peoples, both male and female, are restricted from passing their legal Indian status to their children. Thus, the 'extinction' Eberts refers too is the legal extinction of those Indigenous people who will no longer be recognized by the Canadian state as status Indians. For more discussion on this topic see:

Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004).

[68] Mary Eberts, "Aboriginal Women's Rights," accessed (Oct 15, 2008): 2.

[69] Martin J Cannon, "Revisiting Histories," accessed (May 25, 2009).

*Charter* cases.[70] Bill C-21 will allow Indigenous women to pursue recourse against gender discrimination through the Canadian Human Rights Commission and the Canadian Human Rights Tribunal.

Indeed, Indigenous women, reinstated under Bill C-31, complained to the CHRC about sexually discriminatory practices on reserve.[71] In *Courtois v. Canada* (1991) Courtois argued that Indigenous women and "their children were being discriminated against by the Department of Indian Affairs and Northern Development in that the department was not permitting their children to have access to the Pointe-Bleue band-controlled school."[72] The Canadian Human Rights Tribunal ruled that the Department of Indian Affairs and Northern Development should have ensured the children were able to attend the reserve school at Pointe-Bleue.[73] In *Jacobs v. Mohawk Council of Kahnawake* (1998), a case similar to the one above, the Canadian Human Rights Tribunal ruled that the "Mohawk Council of Kahnawake discriminated against a number of individuals and their children on the basis that they were registrants under Bill C-31."[74] While cases like this may have proved small victories for the women and children involved, Indigenous women have also stated that while the need to reconcile gender discrimination is foremost, without building the necessary "community capacity" the passing of Bill C-21

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[70] Mary Eberts, "Aboriginal Women's Rights," (Oct 15, 2008): 3.

[71] These women brought their cases to the CHRC before the passing of Bill C-21. These cases were seen as not falling under section 67 because these complaints did not concern, either expressly or inadvertently, the *Indian Act*. These cases illustrate some of the ways Indigenous women have used the CHRC in the past and therefore, provide insight as to how the CHRC may be utilized in the future.

[72] Thomas Issac, *Aboriginal law: cases, materials, and commentary* (Michigan: Purich Publications, 1999), 515.

[73] Ibid., 515

[74] Ibid., 515

could "lead to disaster."[75] In other words, if Indigenous women continue to seek redress for wrongs committed within their communities 'outside' of their communities (for example, at a Canadian Human Rights Tribunal) the level of stigma attached to women who have to seek justice 'outside' of their communities could lead to weaker, more vulnerable communities where individuals are stigmatized and women are often forced to choose between silencing their claims or 'going against' their cultural communities to seek redress.

Thus, thirty years after the inception of the Canadian Human Rights Act, both the real and perceived limitations set by section 67 of the CHRA on First Nation communities are no more. The passage of Bill C-21 on June 18th, 2008, ensures that the Canada's Human Rights Act (an anti-discrimination law) applies to Indigenous peoples living on reserves in Canada, *effective immediately*. Like the *Indian Act* and Bill C-31, Bill C-21 has a contradictory and complicated history of its own. Initially, it was argued by the Canadian government that Section 67 was necessary because the government had made a commitment to First Nation representatives that there would be no modifications to the Indian Act except after full consultations.[76] Over time, however, the Canadian government and the Canadian Human Rights Commission began to view section 67 as limiting Indigenous peoples living on reserve from having the same rights as all other

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[75] "Still a Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act" *Canadian Human Rights Commission*, (January, 2008): 4.
[76] Government of Canada. *The Canadian Human Rights Commission: Overview, History of Section 67* <www.chrc-ccdp.ca> accessed (May 22, 2009).

Canadians. The question is what were some of the factors that caused section 67 to be re-thought and subsequently removed?

It is no secret that the Canadian Human Rights Commission[77] has been a staunch supporter of the repeal of section 67 of the CHRA. As mentioned previously, the CHRC is "an independent, non-partisan, statutory agency [that] . . . holds no brief for any particular group or viewpoint" and operates with only one mandate: "to advance equality for all Canadians."[78] Since 1995 the CHRC has been actively vying for the repeal of section 67. True to their mandate, the CHRC has been strongly in favor of Bill C-21 and "celebrated" the royal ascent of Bill C-21 on June, 18th 2008. In a press release, CHRC chief commissioner Jennifer Lynch stated that "after more than 30 years, First Nations peoples in Canada finally have access to the same level of fundamental human rights protection that most Canadians take for granted. The passage of this bill is a milestone in

[77] In Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: University Cambridge Press, 2003): 225, Rajagopal describes Human Rights Commissions as quasi-governmental agencies that do not have any meaningful links to civil society. Thus, Rajagopal would view the Canadian Human Rights Commission as just one commission amongst a plethora of 'national human rights institutions' (both in the developed and developing world) attempting to "promote" and "protect" human rights across the world. The UNHCHR (United Nations High Commissioner for Human Rights) has a "special advisor on this topic, and has recently provided technical assistance to numerous countries for establishment of these national institutions"(pg.225). The concern about these 'national human rights institutions' has already been documented as criticism about their *distractionary* nature. For example, Rajagopal argues that these 'national institutions' distract in the following ways: (1) they distract from pre-existing state institutions that were dealing with human rights issues already, (2) they neglect economic, social and cultural rights and focus on a narrow set of civil and political rights (3) the workings of private corporations go unchallenged by 'national human rights institutions, and (4) finally, "they suffer from lack of coordination with other government agencies which often look at them with suspicion." Thus, certain critical scholars, such as Rajagopal, view these "national institutions" for human rights with suspicion.

[78] "Still a Matter of Rights," 1.

the development of human rights law in Canada."[79] Thus, the CHRC is undoubtedly in favor of this legislation because their mandate is based on liberal democratic values of anti-discrimination and equality.

A look that the Conservative government's involvement in the repeal of section 67 of the CHRA manifests a serpentine narrative, as it weaves in and out of support for the repeal. Initially, the Conservative government was "seeking the rushed passage of its legislation in spite of the testimony of 20 [A]boriginal groups who told the Committee that they disapprove[d] of the Bill in its current form."[80] Then in the first session of the 39th parliament the Standing Committee on Aboriginal affairs and Northern Development met in a summer session[81] to discuss the repeal of section 67 of the CHRA. There were two opposing positions that stemmed from this session. The first position asserted that "right now [F]irst [N]ations people in Canada can't file human rights complaints. This is why we're here today. It's a shameful reality in Canada today that [F]irst [N]ations people on reserve don't have human rights."[82] To reassert, this argument underscored the "shameful" nature of the non-extension of human rights on reserves.[83] The second position argued was not about "shame", but about "getting the bill right". The Honourable Caroline Bennett stated that

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[79] "Canadian Human Rights Commission Applauds Extension of Rights Laws to First Nations" *News Releases* (Ottawa, June 18, 2008). <www.chrc-ccdp.ca> accessed (May 22, 2009)

[80] "Human rights for First Nations, not political stunts" *New Democratic Party of Canada* <http://archive.ndp.ca/page/5546>.

[81] The meeting took place on Thursday, July 26, 2007.

[82] Rod Burinooge(Conservative MP Winnipeg South, Metis) "Standing Committee on Aboriginal affairs and Northern Development" *39th Parliament, First Session* (Thursday, July 26, 2007).

[83] To see more on the "first argument" see the full transcription of the first session of the 39th parliament. Also see the NDP and Green Party press releases on the proposed amendments to the CHRA. Moreover, the Congress of Aboriginal People, who represent off reserve Aboriginal people, also argues along these lines and calls for immediate action of human rights legislation: see "Still A Matter of Rights".

> "it is really not up to the chair to determine what [is] a timely fashion. This is about listening to our [A]boriginal people, particularly [A]boriginal women, and getting right this complexity between individual human rights and collective human rights. I am very concerned that for us to feel that it [is] up to us, in some sort of paternalistic way, to jam this forward, before our [A]boriginal people feel there has been proper consultation, will only mean that we will get it wrong."[84]

The lasting, most communicable and politically salient argument in favour of Bill C-21 was succinctly presented by Senator Di Nino in the second reading of the Bill to Amend. Senator Di Nino stated that "legally-sanctioned discrimination has a negative effect on a society: it devalues the rights of individuals, compromises our democracy, and robs us of our humanity and our dignity.[85] Therefore, in the words of that same Canadian senator, the reason why the Canadian government wanted the CHRA to apply on reserve was to capture a "key element" in their government's strategy: "improv[ing] the quality of life of Aboriginals" living on reserves.[86] Indeed, some Australian scholars have recently argued that government "attempts to move away from the racist "protection-segregation" relationship so typical of colonial countries are handicapped by the framing of the entire decolonization project in the legal and political context of a liberal democratic state."[87] Moreover, Taiaiake Alfred states that "without radical changes to the state itself, *all* proposed changes are assimilative."[88] What these positions attempt to explain is how even the most helpful government policies (such as ones that address discrimination on

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[84] Honorable Caroline Bennett (Liberal MP Ontario) "Standing Committee on Aboriginal affairs and Northern Development" *39th Parliament, First Session* (Thursday, July 26, 2007).

[85] Senator Di Nino. "Canadian Human Rights Act—Bill to Amend—Second Reading.

[86] Senator Di Nino. "Canadian Human Rights Act—Bill to Amend—Second Reading.

[87] See, Geoffrey Stokes, "Australian Democracy and Indigenous Self-Determination, 1901-2001," in *Australia Reshaped: Essays on Two Hundred Years of Institutional Transformation*, ed. G. Brennan and F. Castles (Cambridge, UK: Cambridge University Press, 2002): 181-219.

[88] Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press: 2005): 155.

reserve) can fall prey to "unintended consequences" for peoples who, for the most part, do not view their communities as extensions of the Canadian state.

The mainstream reactions of Indigenous peoples to the application of the CHRA on reserves showcase how Bill C-21 was viewed with caution and skepticism. The CHRC, in dialogue with First Nations, "discovered" four limitations of Bill C-21. These limitations included the history of colonialism, the sustained push by Indigenous peoples for self-government and nationhood, collective rights and matters of trust.[89] In the CHRC report "Still A Matter of Rights" the commission stated that many First Nations objected to the application of CHRA on reserves because it was a form of "colonialist oppression."[90] There was, however, no further elaboration on this point, it was taken as a criticism, but remained unaddressed within the report. Perhaps one reason the criticism of colonialism was 'made invisible' was because for the CHRC to take this claim seriously, it would have to examine its work as colonial practice. The second reason some First Nations leaders were wary of human rights was based on their claims of self-government and nationhood. Indeed, these leaders asserted they were not opposed to human rights, but opposed the legislation on the basis that "First Nations should be considered sovereign nations, with their own laws and customs, and that neither the CHRA nor other federal or provincial legislation has effect on First Nations territory."[91] The equivalent remedy for this claim came in the form of the predicted devolution of the application of human rights laws to the communities so that they could eventually "self-administer"

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89 "Still a Matter of Rights," 5-6.

90 "Still a Matter of Rights," 5-6.

91 "Still a Matter of Rights," 5-6.

these laws. The third point of opposition stemmed from the assertion of collective rights. First Nations argued that they have Aboriginal rights (self-government, hunting, and fishing) and treaty rights (land) that are held in common; whereas human rights law place the right on the individual. The problem here is not the treaty rights and anti-discrimination rights cannot co-exist, but rather that if there is a conflict between the two, individual discrimination rights will have a tendency to win-out over collective treaty rights. The way the Canadian jurisprudence works is that there is no room at the top for both. And finally, the fourth dispute regarding the application of the CHRA on reserves lies with "matters of trust." Indigenous communities reminded the commission of the historic injustices applied to their communities since colonization and also of their failure to sign on to initiatives such as the Kelowna Accord and the UN Declaration of the Rights of Indigenous People.[92] The air of mis-trust, Indigenous peoples assert, is not easily wiped away; issues of trust will likely be an on going and difficult problem in Indigenous/Settler relations in Canada for the foreseeable future.

As stated previously, the primary objective of, and the reason for the existence of the CHRA, when applied on Indigenous reserves, is to guarantee successful protection against discrimination. The CHRA works to prohibit and protect against discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.[93] This means that any action, policy, or law made by an employer or

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[92] "Still a Matter of Rights," 6.

[93] Government of Canada, *The Canadian Human Rights Commission*, <www.chrc-ccdp.ca> accessed June 2, 2009

service provider under the jurisdiction of the federal government can be subject to human rights complaints.[94] To reiterate, the CHRA applies only to *federally derived* actions, policies, legislations and organizations.[95] Thus, when there is a discrimination-based claim within federal jurisdiction, the CHRA provides a system for investigation and resolution of alleged claims of discrimination.[96] Thus, the Canadian Human Rights Act does not only entail the project of ending discrimination, but it also imposes a way of proceeding through dispute resolution that can stigmatize and further marginalize those individuals seeking redress through the CHRA.

When a human rights complaint is made, the dominant system of conflict resolution follows the standardized pattern of negotiation, mediation, arbitration and conciliation.[97] In the Canadian context, the "standardized" procedure looks something like this: the disputing parties are offered resolution services to successfully resolve the conflict before recording an official complaint; if the resolution services are inadequate, the case is assigned to a mediator or an investigator; and if this still doesn't satisfy the dispute, the Canadian Human Rights Tribunal will hear the case.[98] On reserves, the enforcement of the CHRA could mean that Indigenous communities will be subjected to "hands-on investigations", including "evidence seized" and persons involved being

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[94] "A Matter of Rights," 2.

[95] This includes Band Councils, because due to the *Indian Act* Band Councils are federally derived.

[96] "A Matter of Rights," 2.

[97] Victor Wenona, "Alternative Dispute Resolution in Aboriginal Contexts: A Critical Review" *Canadian Human Rights Commission* (April 2001), 5.

[98] "Resolving Disputes," *Canadian Human Rights Commission* < http://www.chrc-ccdp.ca/disputeresolution_reglementdifferends/default-en.asp> accessed (November 14, 2008).

forced to testify in a tribunal process.[99] Moreover, "federal investigators" will harness the authority to come on reserves and conduct full investigations.[100] If the dispute can only be resolved through a tribunal process, it is foretold that decisions can result in "large financial penalties against First Nations and binding orders to change or dismantle programs."[101] Thus, the Canadian Human Rights Act forces marginalized people to go 'outside' of their communities, which can stigmatize them and their claims, and disrupt sustainable forms of traditional, context-based and culturally sensitive forms of dispute resolution that could better nurture the needs of community.

In an attempt to address the concerns of stigmatization and marginalization that stem from individuals seeking redress 'outside' of their communities the Canadian Human Rights Commission has promised to "adjust" the nature of this *process* to better suit First Nations communities and their "specific needs".[102] The CHRC has explained that the "standardized" method of conflict resolution could and may look "different" for First Nation communities. The CHRC stated that

> While the commission is firmly committed to the fulfillment of the principles of the Act, the institutional mechanisms to ensure this may differ from what is currently in place and may evolve. This may mean a *diminished* role for the commission, as the direct administration of human rights resolution processes is *devolved* to First Nations [103]

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[99] "Background on Bill C-44 and the Federal Attempt to make the Canadian Human Rights Act Applicable On-reserve," *Chiefs of Ontario Information for All First Nations*< http://www.chiefs-of-ontario.org/news/docs/bill_c-44.doc.> accessed (October 15, 2008), 3.

[100] Ibid., 3.

[101] Ibid., 3.

[102] As laid out in the commissions latest report titled "Still a Matter of Rights" the "special needs" of the First Nations communities according to the application of the CHRA are: freedom from discrimination, respect for Aboriginal and treaty rights, respect for self government, adequate funding and discrimination prevention.

[103] "A Matter of Rights," 2.

One process the CHRC may adopt, or devolve to reserve communities is called Alternative Dispute Resolution (ADR). ADR is described as a "non-adversarial" way to resolve disputes.[104] The CHRC recommends, above all, that Indigenous peoples on reserve "determine what mechanisms they wish to implement to resolves disputes"[105] within their own communities. The future devolution of responsibility is significant. Positively, allowing Indigenous peoples to resolve their own human rights disputes in ways that are context-based and culturally sensitive could be a positive step forward for addressing human rights concerns on reserve. The downside of devolving human rights resolutions puts the onus and the pressure on Indigenous communities to self-administer human rights laws to their own peoples. If human rights were neutral and politically uncontested this may be a positive advancement; however, as this thesis has been arguing, human rights discourse tends to be limited in ways that are unhelpful and at worst insidious.

In Canada, reserve communities function within an oppressive colonial context; they have been repeatedly denied the resources necessary to operate outside of poverty and are subject to "higher rates of death due to violence, lower life expectancy, lower levels of education, poorer housing, poorer job prospects, higher rates of infant mortality,

[104] To see more about ADR see the CHRC website "resolving disputes" and Victor Wenona, "Alternative Dispute Resolution in Aboriginal Contexts: A Critical Review," *Canadian Human Rights Commission* (April 2001).

[105] "A Matter of Rights," 18.

[and] higher rates of suicide. Statistically, Aboriginal peoples belong to the dispossessed in Canadian society, the very poor."[106] Given the realities of life on reserve and the historical fact of colonization, Bill C-21 could be viewed as totalizing. Peter Kulchyski describes totalizing, in the context of Indigenous/Settler relations in Canada, as a process through which "dominant Canadian society demands to understand everything as a part of a process of shaping everything into a form that suits the basic principles upon which the established order is premised."[107] In other words, Bill C-21 applies the language of human rights (which are some of the basic principles of the established order) and demands that Indigenous communities adopt and use these processes as their own. The CHRC, also in a totalizing way, made *invisible* the dissenting voices who complained that Bill C-21 was a form of "colonialist oppression." Bill C-21 and the CHRC continued to institutionalize a liberal human rights regime within communities that have been attempting to *transcend* the limited spaces in which they have been 'placed' and 'spaced.' The CHRA could not *hear* dissenting voices because their existence depends on understanding and shaping 'everything' into a form that is coherent to and reinforces the dominant *sensus communis*.

Now that an overarching description of the Canadian Human Rights Act, the Canadian Human Rights Commission and the passing of Bill C-21 has been given, it is important to look specifically at that conversation that coalesced around the topic of

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[106]Peter Kulchyski ed. *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994), 14.

[107]Ibid., 13.

individual and collective rights within this case study. The Canadian Human Rights Commission printed two reports[108] that attempted to justify their reasons for passing Bill C-21. Both of these reports addressed the topic of individual versus collective rights. The first report stated that the most "valid question" that needs to be asked is "what will happen when an individual right and a collective right collide?"[109] The CHRC turned to the 1993 *Vienna Declaration of the World Conference on Human Rights* for a way to answer this question. The Declaration was interested in the "inherent dignity and the unique contribution of indigenous people to the development and plurality of society." As the declaration states,

> Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognized the value and diversity of their distinct identities, cultures and social organization. [110]

Thus, the CHRC found it in their best interest to "develop" the "plurality" of society by finding a way to eliminate the perceived tension between individual and collective rights by accommodating both.

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[108]The First Report was published in October 1995 and was titled "A Matter of Rights."

The second report was published in January 2008 and was titled "Still A Matter of Rights."

[109] "A Matter of Rights,"13.

[110] Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, A/Conf.157/23See:<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument>.

The second report stated that collective rights should be balanced with individual rights.[111] Interestingly, the report did not state how collective rights could be balanced with individual rights or what would happen if the two were to collide. When Bill C-21 was passed it included an "interpretive provision" that upheld the statement that collective rights should be balanced with individual rights. The interpretive provision reads: the CHRA cannot be "construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada;" when a complaint is filed against a First Nation's government or any authority or service functioning under the Indian Act, the act will be used in a way that "gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality;" and finally, there will be a three year transition period before First Nation governments can be subject to human rights claims. However, claims against the federal government and its services (this includes the *Indian Act*) are subject to human rights laws, effective immediately.[112] What is of interest here is how individual rights and interests will be balanced with collective rights and interests.

As we have learned from our earlier theoretical discussion of individual and collective rights, the passing of Bill C-21 could very easily prove to be problematic for

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[111]"Still a Matter of Rights."

[112]"Bill C-21: An Act to Amend the Canadian Human Rights Act" *Statutes of Canada 2008, Chapter 30*. Second Session, Thirty-ninth Parliament, 56-57 Elizabeth II, 2007-2008. <http://www.parl.gc.ca/legisinfo/index.asp?Language=E&query=5314&Session=15&List=toc>

four reasons. The first discursive limitation is the problem of binary opposition within human rights discourse. The discursive language of Bill C-21 "appear[s] to respect collectivist values"[113] by adding an interpretive clause that balances individual and collective rights; however, what this balancing of individual and collective rights provides is a 'solution' that does not require the systematic and honest dismantling of government policies and ideologies that have allowed domination, assimilation and cultural subordination of Indigenous people to occur since contact.[114] Eisenberg argues that it is false to suppose that if the Canadian government supported more "collectivist" values in the political system, Indigenous peoples would be able to find the Canadian state legitimate and want to actively participate is misleading and false. Thus, the problem with an interpretive provision balancing individual and collective rights is its inability to transcend the basic principles and values that define the dominant order, especially in the context of Indigenous/Settler relations in Canada. This assertion is pronounced in the second conceptualization of the tendency of the dominant order to valorize individual rights over collective rights.

The second conceptual problem of Bill C-21 stems from the tendency of the dominant order to valorize, in both practice and theory, individual rights over collective rights. Thus, rights in the dominant system, operate in a zero-sum game.[115] A good

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[113] Eisenberg, "Domination and Political Representation in Canada," 50.

[114] Eisenberg, "Domination and Political Representation in Canada," 50.

[115] Avigail Eisenberg does a good job of describing rights discourse as operating in a zero-sum game. She argues "given that rights are held to express fundamental values and commitments, conflicts between claims . . . are sometimes understood as conflicts between incommensurable values." (See Eisenberg 2003, pg. 42.) Eisenberg also argues that the "Canadian judiciary and national political leaders are often criticized for imposing, according to their cultural biases, individual rights on communities that favor collective

example of this is found in the Canadian legal case of *Thomas v. Norris*, where Hood J. of the British Columbia Supreme Court considered whether "a claimed Aboriginal right to participate in spirit dancing included the right of a group of Aboriginal people to assault, batter, and imprison an individual against their will."[116] Of course, this case was read as "interesting fact situation to analyze potential conflicts between individual and collective Aboriginal rights."[117] The judge ruled that

> 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 that 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 practice, 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.[118]

This case affirms that Indigenous people in Canada "can possess collective and individual rights" but that the justification for collective rights is questionable if it does not "protect the well-being of individual Aboriginal persons."[119] Thus, in a zero-sum contest between individual and collective rights, individual rights will usually have the upper hand.

Another way of viewing this case falls into the discourse of 'necessary suffering' and 'unnecessary suffering' as ratified by article 5 of the UDHR (Universal Declaration of Human Rights) and the Covenant against Torture and Other Inhuman or

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ones." (See Eisenberg 1994, pg. 5-8). The point is that rights are structured in a way that forces an either/or choice between rights.

[116] Thomas Issac, *Aboriginal law*, 387

[117] Ibid., 387

[118] Ibid., *supra* note 165, 162.

[119] Ibid., 388.

Degrading Treatment or Punishment.[120] Scholar Rajagopal points out that the UDHR's definition of torture highlights how the "concept is based on a colonial schizophrenia between the dual need to allow 'necessary suffering' and to outlaw 'unnecessary suffering."[121] It was these distinctions that allowed violence inflicted upon Indigenous people in the name of civilization and development to be coded as 'necessary suffering' while 'unnecessary suffering' including "local community practices . . . wherein individuals often inflicted mental or physical injuries upon themselves" were banned and made illegal.[122] Rajagopal argues that banning 'unnecessary suffering' "had a dual effect: on the one hand, it stigmatized local cultural practices as 'torture' and on the other hand, it reinforced the centrality of the modern state by counter-posing it to the local 'bad' practices."[123] This reinforcing of the centrality of the modern state is very clear in Thomas with the judge's assertion that he is not subject to the "collective rights of his Indigenous nation." To use the language of individual and collective rights in this case is to "ignore how constant colonial incursions into native space generate almost unimaginable levels of violence."[124] The case of *Thomas v. Norris* showed how the judiciary stigmatized collective cultural rights (because, in this case, collective rights condoned violence against an individual) and reified the dominant cultural commitment to more individually-based rights.

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[120] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), 182-183.

[121] Ibid., 183.

[122] Ibid., 183.

[123] Ibid., 183-184.

[124] Bonita Lawerence, "Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview," *Hypatia* 18 (2003), 5.

When Rajagopal discusses colonial schizophrenia as the dual need to allow some forms of violence and eliminate others, he showcases how the discourse shapes and defines what is communicable to the dominant *sensus communis* and what is not. In other words, it is not simply a matter of violence/non-violence, suffering/non-suffering, sexual discrimination/no sexual discrimination. Structuring rights discourse in terms of false dichotomies obscures *different* ways of knowing and being in the world. It also obscures the way liberal democratic societies have naturalized the discourse of rights and freedoms and positioned themselves as the "original" producer and enforcer of these rights and freedoms while discounting *different* conceptions of originality, authenticity, autonomy and freedom. In other words, the dominant *sensus communis* identifies difference as something that is and should be actively subordinated to dominant concepts and values. The tendency to valorize some rights and practices over others can lead, in the Indigenous/Settler context, to tragic choices for peoples who must frame their claims in terms of the dominant discourse of individual and collective rights.

The third conceptual problem of Bill C-21 stems from concept of tragic choices. Bill C-21 has framed the fundamental value for collective rights in a position submissive to gender equality. Therefore, when women on reserves decide to put forward a discrimination claim against their Band (perhaps to readdress the sexual inequality produced by Bill C-31 or the *Indian Act*) their choice will be framed as a choice between an individual right to sexual equality at the expense of a possible collective right to

cultural self-determination for her people. As Eisenberg points out, "rather than lending moral and political strength to the cause of enhancing sexual equality within fragile communities, the rights-based approach may weaken this cause because, unsurprisingly, some women will put their faith in their cultural community"[125] rather than in the liberal state. On the other hand, some women may adopt a more liberal stance to rights and find themselves polarized between two fundamental and incommensurable values.[126] These choices may end up being "tragic choices" not just for the individual women, but for their communities as well. They are tragic for their communities because women can be stigmatized and marginalized by their choices, which means that women as multiple identities (mothers, sisters, grandmothers, and wives) will be less able to contribute to their roles as empowered and interconnected members of a thriving and well community, thus the community itself suffers. In sum, the problem of tragic choices stems from a limited and limiting rights discourse, one that treats sexual discrimination and racial discrimination as existing 'outside' of the colonial context, which has included, but is by no means restricted to, sexist and racist oppression.[127]

The final conceptual problem of Bill C-21 is the way that it distracts from the more important question of how rights operate politically and the political culture they create and from the psychological and material inequalities generated by colonialism.

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[125]Avigail Eisenberg, "Diversity and Equality: Three Approaches to Cultural and Sexual Difference," *The Journal of Political Philosophy* 11 (2003): 46.

[126]Ibid., 46.

[127] Bonita Lawerence, "Gender, Race and the Regulation of Native Identity in Canada and the United States," 5.

Bill C-21 falls prey to the "double distraction" discussed earlier in the chapter. Bill C-21 offers the *preservation* of the colonial status-quo, by refusing to ask more complicated questions (the most important question the CHRA asks is: do we/you have human rights?) and is a tactical *diversion* away from substantive questions of sovereign il/legitimacy and colonialism. The CHRC's mandate ensures that *all* Canadians *have* rights. The problems arise, however, when people feel that they *both* have rights and they do not. Human rights, in the context of Bill C-21 may help alleviate suffering born of discrimination of various kinds, but the ability of these rights to address the material inequity and psychological dysfunction that is born of a very specific contextualized history of colonization and imperialism will likely be limited.

According to Wendy Brown, rights "necessarily operate in and as an ahistorical, acultural, acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality."[128] The fact that the CHRC can act as an institution supplying human rights for *all* Canadians seems to allow them to operate wholly outside of the colonial context. It is no wonder that the discourse of rights has tendencies towards distracting and universalizing norms; it is at base, a discourse that obscures the actual historical and material contexts in which peoples operate. To reiterate, it is not simply a matter of rights/non-rights, sexual discrimination/no sexual discrimination, violence/non-violence; but rather, the argument holds that peoples have through time, culture, history, politics and stories manifested their own unique and

[128]Brown. *States of Injury*, 97.

nuanced ways of defining and prioritizing values that are important to them as peoples. Human rights discourse distracts from these epistemologies by bifurcating values (individual/collective, universal/particular) within the dominant discourse of universal human rights. In other words, what one has and has not, has been given and not given and has taken and not taken, in terms of rights, is politically complex and nuanced and should not be considered either theoretically or practically as a 'win' or 'lose' situation.

In sum, this chapter highlighted the practical limitations of human rights for Indigenous peoples in the Canadian context. The practical limitations of Bill C-21 were viewed in the following ways. Bill C-21 offered an accommodation of the binary opposition by adding an interpretive provision that called for the balancing of individual and collective rights as long this balancing did not infringe upon gender equality; however, the balancing of individual and collective rights could prove futile for two reasons. First, the balancing individual and collective rights does not transcend the binary, but instead accommodates it. The accommodation of the binary allows for the tendency of the valorization of individual over collective rights to remain the dominant mode of arbitration. Moreover, this discourse continues to invite tragic choices for women who are attempting to fight gender discrimination within their communities because it continues to frame their claims as either your "rights or your culture." The final problem that could manifest from Bill C-21 is its distraction away from questioning the actual work human rights can do to improve the material inequality and psychological dysfunction that stem from the real violence of colonial practice.

# Chapter Three: Models of Possibility

So far this thesis has brought together two sets of interrelated ideas. The first idea focused on a theoretical discussion of human rights in the context of Indigenous/Settler relations in Canada. The second idea harnessed the practical application of the Canadian Human Rights Act on reserve communities across Canada. The problem with a scholarship and political practice that focuses specifically on human rights is that it distracts from the more important question of how rights "operate politically [and] the political culture they create."[129] It also distracts from the historical and material consequences of colonization in the Canadian context. Therefore, this thesis has argued that instead of giving rights to peoples, especially in the context of Indigenous/Settler relations in Canada, we should be asking, given the discursive tradition these rights are shaped in, how rights may be reproducing structures of colonial domination, both discursively and practically, by distracting from the historical, material and physiological effects of colonial domination.

The problems that have arisen in both the specific context of the application of Bill C-21 on reserve and the more general discussion and critique of rights discourse in this paper have sprouted specific dilemmas that certain models of political engagement have attempted to solve. The goal of this chapter is to engage those models as possible solutions to the problematic tendencies of human rights discourse, especially in the

[129]Brown. *States of Injury*, 124.

context of Indigenous/Settler relations in Canada. Firstly, I will draw on the model of divided jurisdiction to address the specific problem of the individual versus collective rights discourse. Secondly, I will draw on the model that contests boundaries of human rights not in terms of jurisdiction but in terms of the more generalized problem of how human rights "operate politically [and] the political culture they create."[130] The question driving this chapter is, if human rights can be understood as imperfect and in some cases, problematic tools to use in times of conflict, then should not political theory, in the context of Indigenous/Settler relations in Canada, seek to understand, within both a practical and discursive framework, the limitations of human rights and how those limitations can effect the positive work human rights can actually do for marginalized peoples?

Some Canadian political theorists are engaging themselves in this, or something akin to, this question. One theorist who has worked through questions pertaining to rights in Canada is political theorist James Tully. In one of his works, Tully specifically addressed the individual versus collective debate in Canada. Tully cites a case in Quebec where a group of English-speaking shop owners argued that a law of "French only signs" violated their charter right of individual freedom of expression.[131] Tully states that almost immediately, the picture of the conflict was painted as a "great conflict between individual and group rights, or between individual and community."[132] In response to this problematic framing, Tully argued that the dominant *sensus communis* must "redescribe

[130] Ibid., 124.

[131] James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Great Britian: Cambridge University Press: 1995), 169.

[132] Ibid., 169.

these forms of reasoning on the common ground as the reconciliation of clashes between individual and collective rights, liberalism and nationalism, or, as Habermas reconstructs them, 'the individualistic design of the theory of rights' and the 'collective experiences of violated integrity."[133] Tully argued that what we need are substantive ways of "reasoning that actually bring peace to the conflict."[134] In other words, in order to dispel binary oppositions, 'tragic choices' and distractions, what we have to do is listen. In Tully's articulation, a form of accommodation that could avert tragic outcomes and do "justice to the conflicts that surround us" would involve *listening to* rather than constructing discourse in an all too simplistic and tragic manner. But, the question lingers, what does this mean, "doing justice to the conflicts that surround us?"

In answering this question this chapter will engage the argument of scholar Ayelet Shachar and her account of "doing justice to the conflicts that surround us." Shachar argues, similar to Tully that the dominant *sensus communis* must "break away from the binary opposition"[135] that plagues the individual versus group rights debate in Canada. In the context of Bill C-21, Shachar's work is useful in understanding how approaching individual versus collective rights, from the perspective of cultural accommodation, can focus more on points of interdependence and institutional imagination and growth rather than on the binary opposition of individual and collective

[133]Ibid., 173

[134]Ibid., 173.

[135]Shachar. *Multicultural Jurisdictions*, 65.

rights. Shachar's work attempts to 'move beyond' rights discourse and accommodate cultural difference without becoming problematically locked in a discourse or a practice that ends up looking and feeling diametrically opposed.

The problematic of individual versus collective rights is described by Shachar as the "paradox of multicultural vulnerability."[136] In its essence there is little to no difference between the academic debate on individual versus collective rights and the debate on "the paradox of multicultural vulnerability." In both cases, the scholarship splits reactions to the problem in a diametrically opposed way. Shachar points out that the "traditional" legal approach to the problematic relationship between church and state was seen as incommensurable and the debate was bifurcated between the "the *secular absolutist* model and the *religious particularist* model."[137] This "traditional" debate was then morphed into the two opposed positions of the "paradox of multicultural vulnerability": "the universalized citizenship option" versus the "unavoidable costs" option.[138] The former model "throws its weight behind the individual in any conflict between the individual and her minority group" and the latter model claims that the "multicultural state has little if any justification for intervening in a minority group's affairs."[139] Thus, one can see how a conflict between "individual versus collective rights" could play into the paradoxical construction of "multiculturalism."

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[136] Ibid., 65.

[137] Ibid., 87.

[138] Ibid., 87.

[139] Ibid., 87.

Shachar's project is an attempt to call forth an "institutional imagination that can appreciate the situational complexity faced by individuals who are culturally and legally tied to both the group and the state."[140] The goal for Shachar is ultimately to "strive for the reduction of injustices between groups as well as the enhancement of rights within them."[141] The solution for Shachar is a process of "joint governance" which she describes as a "repertoire of accommodation techniques which can be combined in creative ways in different social arenas."[142] In other words, we can avoid the dichotomizing language of individual and collective rights by allowing individuals to be "subject to input from both state law and her own group tradition."[143]

Shachar presents four different variants of joint governance which she argues overcome the oversimplified "either/or" debate that has dominated the dialogue between state and group in Western liberal democracies such as Canada. Shachar argues that the four accommodation techniques now on offer, including federal-style, temporal, consensual and contingent,[144] escape a rigid and artificially predetermined set of rights and instead, commit to a jurisdictional structure that opens the door to "newer, more complex, and more attractive possibilities for constructive dialogue between state and group."[145] Shachar presses us to let go of the absolutist notions of jurisdictional authority

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[140] Ibid., 87.

[141] Ibid., 87.

[142] Ibid., 89.

[143] Ibid., 89.

[144] For an in depth discussion of these four accommodation techniques see specifically Chapter 5 in Shachar's *Multicultural Jurisdictions*. Shachar spends the entire chapter outlining the pros and cons of each accommodation strategy.

[145] Ibid., 114.

and consider that both the state and the group can 'divide and share' jurisdictional authority between them. Shachar offers what she describes as a "rich panoply of measures" for overcoming the individual versus collective divide. The accommodation scheme that is most compelling in terms of the problem of individual and collective rights discourse in Canada is Shachar's assessment of a fifth variant of accommodation. Shachar considers this fifth variant to be "the most attractive variant of joint governance – *transformative accommodation*."[146]

Transformative accommodation is described as an overlapping of jurisdiction. It "seeks to adapt the power structures of both *nomoi* group and state in order to accommodate their most vulnerable constituents."[147] Shachar describes this intersection of jurisdictions as a chance for those in positions of authority to essentially "bid" for individuals support within their jurisdiction. An example of this dynamic is touted by what Shachar describes as the "positive dynamic" of the federal-style accommodation of French Canada, specifically Quebec, within the Canadian nation. The real "positive" of federal-style accommodation, Shachar argues, is that when the minority receives a share of public power, their "private" group traditions are thus, made public and exposed to public scrutiny from the "larger democratic state in which they dwell."[148] For Shachar, the only way to dissolve the binary opposition of individual versus group is to "identify and defend only those state accommodations which can be *coherently* combined with the

[146]Ibid., 117.

[147]Ibid., 117.

[148]Ibid., 118.

improvement of the position of traditionally subordinated classes of individuals within minority group cultures."[149] This is the first key point in Shachar's argument. Before inviting a critique of this central claim and others, a more robust explanation of transformative accommodation is necessary.

To reiterate, transformative accommodation is an attempt to establish a dialogue amongst different conceptions of authority. Transformative accommodation does not remove individuals from their groups nor does it suppress difference; it allows individuals, specifically, the most vulnerable group members, to improve their situations without dissolving or threatening their cultural group. The way transformative accommodation works in practice is by relying on three core principles. These include: "(1) the "sub-matter" allocation of authority (2) the "no-monopoly" rule and (3) the "establishment of clearly delineated choice options."[150] The first principle stems from the idea the individuals are attached to more than one identity and therefore, they should not be limited by the concept of absolute authority. Moreover, not only is individual identity multiple and divided, but the issues (such as education, immigration, resources and the environment) are also not homogenous but divisible into what Shachar describes as "sub-matters." Thus, sub-matter allocation divides authority along sub-matter lines and takes into account the multiple identities of the individual. Shachar states that "the fact that power can be divided along sub-matter lines *within* a single social arena makes it possible to have a more creative, nuanced and context-sensitive allocation of jurisdiction."[151]

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[149]Ibid., 118, (my emphasis).

[150]Ibid., 118

[151]Ibid., 119.

The second principle is the "no-monopoly rule". The no monopoly rule stems from the long history of democratic political theory that supports a division of powers in the public realm. This rule contends that neither the state nor the group can have exclusive control over a contested arena. The no-monopoly rule positions the group and the state as power 'sharers', where neither has exclusive jurisdiction over the other. Shachar describes this power-sharing as both competitive and cooperative. She states that while both the group and the state can exercise sufficient power and authority over specific sub-matters, their powers are by no means exclusive. The positive idea behind the no-monopoly rule is that transformative accommodation will "create incentives for both state and group to serve its citizenry better."[152]

The third and final principle is the establishment of clearly delineated choice options. This rule allows individuals to "choose" between the jurisdiction of either the state or their group. This choice includes the ability of the individual to either "opt-in" to a specific jurisdictional authority or, on the reverse, to "opt-out." The conception of individual choice then constructs the group and the state in a competitive relationship, each vying for the support of their constituents within the confines of their jurisdictional landscapes. Shachar believes this competitive atmosphere will encourage those with authority to address the concerns of even its most vulnerable members (because if they do not, the individual will simply choose the power of a different authority). These three foundational rules provide the backdrop for a second key point made by Shachar. Rather

[152]Ibid., 122.

than playing into the dichotomy of "forceful intervention" or "full immunity," transformative accommodation, in the words of Shachar, "seeks to create institutional conditions where the group recognizes that its own survival depends on its revoking certain discriminatory practices, in the interests of maintaining autonomy over sub-matters crucial to the group's distinct *nomos*."[153] In sum, transformative accommodation attempts to divide jurisdiction into "sub-matter" claims, to provide a competitive rivalry between power-holders in competing jurisdictions and finally, to allow individuals to self-select the authority that can best enhance and uphold their interests. Transformative accommodation raises two questions. The first question is how could transformative accommodation apply to the specific individual versus collective rights conundrum that has plagued Indigneous/Settler relations within the context of human rights discourse in Canada? The second question is, are the proposed recommendations effective?

In order to address both of these questions, it is important to understand how the foundational rules of transformative accommodation can apply within the context of Indigenous/Settler relations in Canada. The first rule is the division of authority along "sub-matter" lines. In the context of the application of the Canadian Human Rights Act the division of authority along sub-matter lines in Shachar's words "will analyze the unique interrelated sub-matters involved in [a given social] arena, while taking into account the possibility that different actors may attach different values to specific sub-matters."[154] This means that in contested social areas, or in contested areas of human rights, the sub-matter rule would allow an accommodation claim to be made within its

[153]Ibid., 125.

[154] Ibid., 120.

"situational context."[155] The situational context could transform essentialist categorizations of individuals and collectives and allow one to view contested arenas (such as education, housing and membership rules) as part of a contextualized and historically specific arena that different peoples attach different values to. The fact that dividing contested arenas along sub-matter lines can take into account different values and allow communities or individuals to act on those values allows room to establish, in a context-sensitive way, a power-sharing that does not compromise cultural values.

The second rule is the no-monopoly rule. The no-monopoly rule in the context of Indigenous/Settler relations in Canada is "designed to create incentives for both state and group to serve their citizenry better."[156] The no-monopoly rule means that no authority has exclusive jurisdiction and that all authorities are essentially in competition with each other, all vying for the support of individual citizens. Shachar points out that "faced with an array of specific choices and possibilities, the individual group member is much better equipped to potentially influence the division of authority. Therefore, if the state or a group hopes to hold meaningful authority over a legal sub-matter, it will need the support of its constituents to do so."[157] This rule, in the context of Indigenous/Settler relations, could end up perpetuating another form of tragic choice. In this context, the individual is made to choose who holds "meaningful authority" over a given sub-matter. Individuals will be forced to choose to support either their community or the state along any given number of sub-matter lines. The no-monopoly rule places the onus on the individual to

[155] Ibid., 120.

[156] Ibid., 122.

[157] Ibid., 122.

choose the authority who best represents them without ever knowing for sure they chose the best one. This rule views the individual as a sovereign knower, the one who knows best what form of power is best for their circumstance. The no-monopoly rule, however, does not address the contingency of human knowledge and the fact that we cannot predict how our choices will play out in the future. The tragic element to the no-monopoly rule is that the power to choose a given authority could play out, in future actions or decisions, in ways that are detrimental to the individual. Thus, rather than being "faced with an array of specific choices and possibilities [where the] individual group member is much better equipped to potentially influence the division of authority"[158] the individual group member could just as easily feel overwhelmed and uncertain about the plethora of choices that lay in front of her, especially in the face of human finitude and fragility.

The third rule is the establishment of clearly delineated choice options. The rule of establishing clearly delineated choice options in the context of the Canadian Human Rights act applying on reserve could place individuals, specifically, vulnerable individuals living on reserve, such as the women re-instated through Bill C-31, in a consumer/producer relationship with both the state and their group. Under rule three, the individual agent is made to view her right to gender equality or her right to fight sexual discrimination as a 'product' in a 'consumer' choice. If the individual agent is unhappy with the redress she receives from one "producer" she will simply move on to the next hopefully, more "efficient" producer of that same right. Problems could arise when either the individual feels she made the 'wrong choice' or when the individual agent becomes

[158] Ibid., 122.

unhappy with both 'products.' This "discursive depoliticization of production . . . [creates] an order of sovereign, self-made, and privatized subjects who subjectively experience their own powerlessness as their own failure vis-à-vis other sovereign subjects."[159] In other words the agent will view her vulnerable position as resulting from her own ineptitude, rather than part of the "historically specific and traumatic social powers"[160] that have produced and perpetuated, among other things, sexual and colonial oppression. Thus, rule three discursively and practically positions the individual as a sovereign and 'power yielding' consumer.

In the context of the Canadian Human Rights act applying on reserves in Canada the concept of transformative accommodation seems to have definite practical limitations; but, what of the theoretical limitations? Can the proposed recommendations for the transformation of the individual/collective binary opposition be effective? The two key concepts pulled from Shachar in the earlier half of this chapter will provide the basis for an exploration of this question. The first key idea pulled from Shachar's argument was that her solution, to the binary state of individual/collective or as Shachar calls it the multiculturalism paradox, must "identify and defend only those state accommodations which can be *coherently* combined with the improvement of the position of traditionally subordinated classes of individuals within minority group cultures."[161] There are several implications of this solution when we apply it to the context of Indigenous/Settler relations in Canada. First, Shachar suggests that in order to

[159]Brown, *States of Injury*, 113-114.

[160] Ibid., 114.

[161]Shachar. *Multicultural Jurisdictions*, 118, (my emphasis).

solve the binary of individual/collective we have to provide human rights that *coherently* protect the classes of subordinated individuals within a given minority group. In other words, what we have to do is produce minority groups that coherently speak to the liberal democratic standards of the Canadian state.

By using coherence as a standard in her argument Shachar's approach begs the question: who decides in a colonial context what is coherent? At one point, Shachar describes sub-matters as "pieces of a larger jigsaw puzzle. Each piece of the puzzle has limited value when standing on its own, but when these pieces are properly aligned they offer a full and coherent picture, which is greater than the sum of its parts."[162] The fundamental assertion Shachar makes is that a "full and coherent picture" must not only allow "individuals to express their conformity with a norm, but also allow them to successfully communicate their *difference* from that norm to others without leaving the medium of communicability."[163] In other words, groups and individuals can be different so long as the standard of their difference is defined by the liberal mainstream and not by the minority group. In the context of Indigenous/Settler relations in Canada, transformative accommodation, allows Indigenous peoples to live differently, so long as their difference can be "properly aligned" with a vision of multicultural Canada that is "full and coherent" and thus, "greater than the sum of its parts." In the context of Bill C-21, transformative accommodation could ensure that human rights can be applied differently on reserve, so long as that difference is properly aligned with the views and

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[162] Ibid., 119.

[163] Laura Hengehold, *The Body Problematic: Political Imagination in Kant and Foucault* (University Park : Pennsylvania State University Press, 2007): 102.

sensibilities of the liberal mainstream. Thus, difference that goes 'outside' the limits of what is speakable in the public realm is therefore not accommodated and is even threatened by the retraction of the states' generosity.[164] In terms of Indigenous/Settler relations in Canada, the standard of coherence reifies the values of the dominant liberal mainstream and distracts from and renders incoherent not only discussions about colonialism but also *actual* peoples who, by way of racism and the psychological dimensions of colonial oppression, become the embodiment of incoherence to the dominant *sensus communis.*

At base, the question is, how can those (who physically represent the existence of an outside [165]) contest the dominant *sensus communis* if their contestation depends largely on asserting their difference by standards that are produced by the liberal mainstream? Also, how are communities supposed to know "what it *is* about that sphere of coherence that feels oppressive?" Indigenous scholar Taiaiake Alfred has recently argued that articulating what it *is* about that sphere of coherence that is oppressive is becoming "increasingly invisible; [it is] no longer constituted in conventional terms of military occupation, onerous taxation burdens, blatant land thefts, etc," but rather through "a fluid confluence of politics, economics, psychology and culture."[166] Therefore, what Shachar's solution may do for Indigenous peoples in Canada is allow them to *both* conform and assert difference while limiting that difference to something that is coherent with the

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[164] Shachar talks about the state being able to easily and quickly turn its back on transformative accommodation and could at most, criminalize any one of the group's practices it deems problematic. See Ayelet Shachar. *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: University of Cambridge, 2001), 130.

[165] Hengehold. *The Body Problematic*, 102

[166] Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* Peterborough: Broadview Press: 2005) , 58, 30.

liberal mainstream. Thus, contemporary liberal theorists, like Shachar, provide a "space" (i.e. the "multicultural" nation) where identities and differences can be accommodated and asserted without "throw[ing] into question the background legal, political, economic [and psycho-effective] framework of the colonial relationship itself."[167]

The second key conception Shachar produced as a way to transcend the individual/collective divide, or as she termed it, the binary opposition of full immunity/forceful intervention was a solution that "seeks to create institutional conditions where the group recognizes that its own survival depends on its revoking certain discriminatory practices, in the interests of maintaining autonomy over sub-matters crucial to the group's distinct *nomos*."[168] In the context of the Indigenous/Setter relations in Canada transformative accomodation appears to be dangerously limited. Whether Shachar realizes this or not, her solution, in the context of Indigenous peoples in Canada, invites a subtle shaping of Indigenous worldviews into epistemologies that look very similar to the views of the liberal mainstream. The idea that the "group survival depends on revoking certain discriminatory practices" means that those discriminatory practices will inevitably be defined in relation to the colonial state, its legal machinery and in all probability, the human rights norms adopted by the Canadian state. What transformative accommodation offers is a limited style of coherent difference. Coherent difference is the idea within liberal multicultural societies that individuals and groups can

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[167] E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

[168] Shachar, *Multicultural Jurisdictions,* 125.

be different, but not *too* different. In other words, they must continue to operate within contemporary notions of capitalism, mass-representative democracy, and legal/political systems that define justice in term of rights and duties. Within the framework of transformative accommodation, the worry is, Indigenous groups would be identified as just another piece of the liberal democratic puzzle; the edges created by Indigenous epistemologies and ways of knowing would be smoothed over and manipulated so as to properly align with the other puzzle pieces in order to create an aesthetically pleasing and coherent form.

The goal of this half of the chapter was to gauge Shachar's solution to the problematic tendencies of human rights discourse in the context of Indigenous/Settler relations in Canada. Shachar attempted to improve upon the problematic tendencies of rights discourse and more specifically, the individual versus collective binary, through her conception of transformative accommodation. In the context of Indigenous/Settler relations in Canada the conception of transformative accommodation is limited. While it did offer some rules to allow Indigenous peoples to have power over their own affairs, it also created hyper-individualistic ways of addressing conflict and power-sharing and transformative accommodation only allowed cultural difference so long as it was supported and in some cases was provided by the dominant liberal mainstream. The latter half of this chapter diverges from the problematic construction of individual and collective rights in the Indigenous/Settler context and looks instead to a model that contests boundaries of human rights not in terms of jurisdiction but in terms of the more generalized problem of how human rights "operate politically [and] the political culture

they create."[169] . As you will recall, Tully's articulated a form of accommodation that could avert tragic outcomes and do "justice to the conflicts that surround us" by *listening* to what was actually being said. The question that remained was what does "doing justice to the conflicts that surround us" actually mean? For Shachar, it meant stepping away from rights towards cultural accommodation in the form of transformative accommodation. Shachar sought to protect and empower both groups and individuals through the rubric of divided jurisdiction. For theorist Balakrishnan Rajagopal it means something very different. The goal of the latter half of this chapter is to engage with Rajagopal's worries about the problematic tendencies of human rights discourse and then attempt to apply his solution to these undesirable tendencies in the context of Indigneous/Settler relations in Canada and the application of Human Rights laws on reserve.

Rajagopal aims "to investigate and expose the risks of relying entirely on human rights as the next grand discourse of emancipation and liberation." [170] First, his investigation is important in understanding if there really are serious problems that stem from the Canadian government applying Human Rights laws on reserves in Canada. Second, this investigation also helps to understand if and how the problematic tendencies of human rights can or cannot be remedied within the context of Indigenous/Settler relations in Canada.

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[169]Brown. *States of Injury*, 124.

[170]Rajagopal, *International Law from Below*, 173.

Rajagopal, along with theorist Thandabantu Nhlaop, worries that the human rights paradigm is a paradigm that

> ceases to interrogate itself as to what makes for a *better* world: the assumption is simply made that the accumulated wisdom of 'civilized nations' has finally got it right – we *know* what a better world is; it is one that has attributes (a), (b) and (c), which are themselves uncontested. In multicultural contexts this 'cocksureness' is as much a threat to justice as is the rhetoric of despots who are genuine enemies of human rights.[171]

It is this cocksureness that Rajagopal takes issue with.

Rajagopal deals with several problematic tendencies the discourse of human rights elicits. A central worry for Rajagopal and the one this chapter will focus on, is the way in which human rights discourse remains "invisible to several forms of collective resistance that challenge received notions of modernity."[172] In other words, Rajagopal takes issue with the subservient nature of resistance discourses or practices to that of human rights discourses and practices.[173] The problem, as Rajagopal sees it, is that the discourse of human rights, in a "double move," actively co-opts people's resistance, liberation struggles and contestations of dominant power structures into the rubric of human rights, thus, enabling some parts of their struggle (i.e. the coherent parts) and distorting, distracting, and disintegrating others (i.e. the incoherent, ambiguous or incommunicable parts). The assessment of the co-optation of social movements or other forms of

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[171]Thandabantu Nhlaop "The African customary law of marriage and the rights conundrum" *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (New York: St. Martin's Press, 2000).

[172] Rajagopal. *International Law from Below*, 167.

[173] Rajagopal articulates other social movements as mobilizing constructions of resistance that defy the categories and standard paradigms of Western modernity and human rights. See pg, 166.

resistance into the human rights movement is articulated by Rajagopal as a consequence of the relational nature between human rights and colonialism.

Rajagopal argues that other forms of resistance or non-human rights based social movements, that defy the standard categories and paradigms of Western modernity or Western thought, are being "understood" and "identified" by international lawyers as something that can be equated to a 'human right.' He states that their strategy involves a "double move of appropriation and invisibility."[174] Rajagopal describes appropriation as the way in which human rights discourse uses the resistance of mass movements as the "empirical evidence" of the triumph of human rights and of the "western style democratic revolution that is sweeping the world."[175] Moreover, Rajagopal describes invisibility as how forms of contestation or protests that fall 'outside' of the discourse of human rights are viewed as invisible to the dominant *sensus communis.* In other words, if people are discontent with the established order, their only source of redress is through appealing to human rights, which, as we have argued, are a limited discourse to begin with.

As identified in the case study of Bill C-21, the application of human rights on reserve was celebrated in the public arena by both the government of the day and in a press release from the Canadian Human Rights chief commissioner Jennifer Lynch as a positive step forward in improving the lives of Indigenous

[174] Ibid., 166.

[175]Ibid., 166. See also, Ronald Niezen (2003) for his account of human rights and Indigeneity.

peoples living on reserve in Canada. When the CHRC celebrated the passage of Bill C-21 and the application of human rights on reserves what they were celebrating was not necessarily the improved conditions human rights would bring to reserve communities but rather "the triumph of human rights and of the "western style democratic revolution that is sweeping the world."[176] Thus, by applying the CHRA to reserves the dominant *sensus communis* was assured that human rights are the sole discourse of freedom and democracy in the world. The problem of appropriation comes for those peoples who are fighting against the liberal mainstreams conception of freedom, democracy and human rights. Their contestations can only be recognized as " 'private,' or 'simply social' or just 'illegitimate.' "[177] As Rajagopal says, human rights appropriate all resistance struggles as human rights struggles; thus, the problem is that human rights cannot contest the dominant order: human rights are limited by it.

The second part of the 'double move' that Rajagopal discusses is 'invisibility.' The claim of invisibility stems from the assertion that "the substance of [peoples] democratic agitations is not taken seriously as constituting alternative conceptions of territory, autonomy, rights or identity."[178] Invisibility, like appropriation, was also highlighted in the case study. The CHRC did not take seriously the claim that the application of human rights laws on reserve was a form of "colonialist oppression." Moreover, the language of human rights within

[176]Ibid., 166.

[177] Ibid., 166-167.

[178]Ibid., 166.

Bill C-21 separated questions of political/legal discrimination from questions of material inequity, on reserve poverty, colonialism and how rights discourse is "made into a handmaiden of particular constellations and exercises of power."[179] By separating notions of discrimination and colonialism, human rights discourse, in the context of Indigenous peoples on reserve, makes 'invisible' the relational nature between discrimination and colonial violence. Making invisible the relational nature between discrimination and colonial violence allows human rights discourse, to practically and discursively, distract from the actual tragic socio-economic and psychological conditions that stem not from discrimination, but the relationships between discrimination, colonialism, racism, sexism and classism. By making 'invisible' the actual historical and economic realities that constitute the less than ideal circumstances on reserve, one also ignores alternatives way of talking about discrimination and colonialism that could actually bring healing and positive change to the ill-fitted situation.

Now that we understand the problem Rajagopal's describes as the "double move of appropriation and invisibility," it is the last job of this chapter to introduce and assess his proposed 'solution' to these problematic tendencies of human rights discourse and assess if they can be applied to Indigenous/Settler relations in Canada. Rajagopal constructs his solution around the ways in which social movements (i.e. environmentalist, indigenous, cultural revivalist, and green

[179] Ibid., 246.

movements) can "challenge the established order" of rights discourse. The challenging of the established order is articulated by Rajagopal as calling for a "contextual understanding of resistance, unlike the totalizing category of rights, which presumes that resistance is expressed only in the secular, rational and bureaucratic arenas of the modern state, especially through the judiciary."[180] What focusing on actual peoples struggles for survival allows us to do, according to Rajagopal, that the political and civil rights granted to us by the human rights rubric does not, is to effectively question the "structural or sociopolitical root causes of human-rights violations such as patterns of land ownership, militarization, local autonomy or control over natural resources."[181]

As Rajagopal puts it, the liberal theory of rights seeks to "mediate conflict, not nurture self-creation, sustenance and community building."[182] This argument is adequately highlighted by both the application of human rights on reserve and by Shachar's conception of transformative accommodation. Both paradigms, rights and accommodation, attempt to "mediate conflict" without allowing peoples living on reserves to develop alternative and sustainable ways of dealing with conflict that encourages "self-creation, sustenance and community building." Rajagopal's offers solutions to the shortfalls of human rights discourse by highlighting seven aspects of social movement's approach that attempts to develop an alternative to the dominant discourse of human rights.

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[180]Ibid., 199.

[181]Ibid., 247.

[182]Ibid., 264.

First, Rajagopal sees the social movement's approach as offering a fundamental critique of "the place of the expert," the myth of "progress (the catching-up syndrome)" and the "linear meta narrative" produced by both liberalism and Marxism.[183] Second, Rajagopal identifies that social movements focus their struggles at "material and symbolic levels, by enacting a cultural politics" that provides a way to accommodate and understand the psychological aspects of their social struggles.[184] Third, Rajagopal explains that social movements do not seek state power and are therefore not state-centered. In this sense, Rajagopal argues that the "social movements approach helps one to transcend the sovereignty-counter-sovereignty dualism of human rights." [185] Fourth, the social movement's approach rejects or is mostly ambivalent towards violence.[186] Fifth, the social movement's approach "exhibits a general frustration with liberal democracy and formal institutional politics."[187] This critique sets the social movement's approach apart from liberal mainstream views of rights and accommodation and from what is normally coherent to the dominant *sensus communis.* Sixth, the social movement's approach is local and does not wish to become transnational or international. Instead, the social movement's approach "adopt[s] an eclectic, strategic attitude towards in the international when it visits

[183] Ibid., 249.

[184] Ibid., 250.

[185] Ibid., 251.

[186] Ibid., 251.

[187] Ibid., 252

them in their villages, slums and forests."[188] Seventh, the social movement's approach distinguishes itself from human rights in that "*they result from the actual struggles of those peoples, and not from an abstract a priori conception*."[189] According to Rajagopal, the social movement's approach allows individuals and communities to "achieve their autonomy and self-realization by participating in shaping their own destiny without being constrained by theoretical boundaries."[190]

Rajagopal's proposed solution contextualizes how actual people's struggles are able to do what human rights cannot, which is among other things, contest the historical, material and structural causes of their own tragic circumstances. Rajagopal offers a remedy that attempts to move away from the dicotomizing, universalizing, homogenizing, distorting and distracting tendencies of human rights and towards the *human struggles of peoples* that have, up until now, been appropriated or made invisible by the dominant discourse. Now the question is, is the social movement's approach helpful in the context of Bill C-21 and the application of human rights laws on reserves in Canada?

First, the social movment's approach deals very broadly with the critique of political theory by contesting the appropriateness of political theories that draw from conceptions of teleology, progress, and the idea of the scientific expert. In the case of Bill

[188] Ibid., 252.

[189] Ibid., 253.

[190] Ibid., 253.

C-21, Indigenous communities may use the social movement's approach to criticize the presence of the "expert" in the form of the Canadian Human Rights Commissioners or the experts who form and make up the Canadian Human Rights Tribunals. They could also criticize the way human rights discourse actively shapes their ways of knowing and being in the world in ways that promote ideas of "catching-up" or being involved in a transition from 'traditional' 'backwards' communities toward 'modern' human rights touting societies. Second, reserve communities could adopt a cultural politics that deals with the psychological, material and structural effects of their struggles and largely ignore and abandon the discourse of human rights within their communities. This type of cultural politics has already been developed in Canada. Third, Indigenous communities could leave a state-centered discourse alone, and focus more pointedly on healing and reinvigorating local communities that does not reify or condemn the power of the Canadian state. Fourth, Indigenous communities could establish their criticisms of the dominant *sensus communis* within a discourse and practice of non-violence. Fifth, the social movement's approach could allow communities to assert their frustrations with the dominant liberal mainstream, their practices and institutions. Indigenous communities could set themselves apart from distracting and unhelpful liberal discourses such as human rights, accommodation schemes and the politics of recognition. Sixth, Indigenous communities could, and in some cases already have, retain local responsibilities and relationships with the land and use the international community strategically and imaginatively if need be. Seventh, Indigenous communities could define their own autonomous and sustainable communities without reasserting and reifying dominant liberal values of individual rights, sovereignty, or nationalism. Thus, the social

movement's approach would allow Indigenous communities not only the chance to re-direct the conversation towards the very real problems of material inequity and psychological dysfunction that stem from colonialism, but it would also allow communities and individuals to engage in nurturing the "real priorities [all peoples have] to our homelands, families, clans and communities."[191]

In sum, this chapter engaged two models proposed as possible solutions to the problematic tendencies of human rights discourse in the context of Indigenous/Settler relations in Canada. First, this chapter focused on the model of divided jurisdiction, articulated most accurately by Ayelet Shachar, to address the specific problem of the individual/collective rights debate within the Indigenous/Setter context in Canada. Within the model of divided jurisdiction the focus was placed on Shachar's proposal of transformative accommodation. In the context of Indigenous/Settler relations in Canada, transformative accommodation seemed more dangerous than helpful or transformative. The conception of transformative accommodation including the three foundational rules of sub-matter allocation, no-monopoly rule, and the establishment of clear choices all proved to introduce little or no change to Indigenous/Settler relations in Canada. In some cases, transformative accommodation actually reified dominant ideologies premised upon a dominant conception of Western liberal democratic ideals.

Second, this chapter focused on the model, presented most accurately by Balakrishnan Rajagopal, that contested the boundaries of human rights not in terms of

[191] Jeff Corntassel, "Towards Sustainable Self-Determination: Rethinking Contemporary Indigenous-Rights Discourse," *Alternatives* 33 (2008), 125.

jurisdiction but in terms of the more generalized problem of how human rights "operate politically [and] the political culture they create."[192] Rajagopal adequately highlighted two problematic tendencies of human rights discourse, including appropriation and invisibility. Rajagopal's proposed solution was to turn our attention away from the discourse and practice of human rights and towards social movements and the actual people on the ground that are empowered to change something about their tragic circumstances. Rajagopal's social movement's approach offered a way for Indigenous peoples to not only talk about colonialism, inequity and dysfunction, but also opened up a space for communities to define on their own terms, what their real priorities are in ways that respects and enhances Indigenous epistemologies and ways of being in the world. Thus, the concluding chapter of this thesis will attempt to bring together the three sets of interrelated ideas of this thesis, including: the focus on the theoretical discussion of human rights in the context of Indigenous/Settler relations in Canada, the focus on the practical application of the Canadian Human Rights Act on reserve communities across Canada and finally, the proposed solutions to the problematic tendencies of human rights outlined in the former two chapters.

[192] Brown. *States of Injury*, 124.

# Conclusion

All discourses are important and complex. This thesis has not viewed human rights discourse as either ‘good’ or ‘bad’ but, has attempted to show that, in certain contexts, they are limited. Important to this thesis was acknowledging that in Canada human rights may not be the best discourse to acknowledge and remedy the actual tragic circumstances of colonialism and colonial practice. In other words, the thesis underscored that human rights may offer a limited way of addressing the tragic circumstances of many people’s lives. It is with these limitations in mind that this thesis views human rights in Canada as having tragic dimensions. In our minds eye, human rights often appear to us as a helping hand, a savoir that reaches down from its moral high ground and pulls us up out of our tragic circumstances, our poverty and our unsightly histories; however, this thesis attempts to paint a different picture. This thesis argues that it may be the case that instead of rights taking the moral high ground and lending a helping hand in tragic circumstances, rights and tragedy may be viewed as walking hand in hand with one another, more similar than different and more connected than disconnected. The question is what exactly are the tragic dimensions of human rights in the context of Indigenous/Settler relations in Canada and how should we be thinking about this tragedy?

The tragedy dimension of human rights in the context of Indigenous/Settler relations in Canada is twofold. First, the discursive construction of human rights in the Indigenous/Settler context is often construed as a great conflict between individual and collective human rights. Human rights in this context insist upon a framework of binaries.

This framework not only outlines the debate, but delimits and bifurcates it in ways that are both unhelpful and insidious. These limitations include wrongly characterizing groups as committing themselves to either individual rights or collective rights and never viewing them as committed to both individual and collectivist values. Moreover, the binary opposition has a tendency to structure values hierarchically with one value valorized over and above the other. And finally, the binary of individual versus collective rights often forces an either or choice, where the individual, him or herself, is forced to choose between so called incommensurable values. The discursive framework is not only theoretically tragic, but has tragic effects in the lives of actual people attempting to use the language of human rights to aid them in their struggles. The best example of this is the tragic choice placed on Indigenous women whose claims are often framed as a choice between either their individual freedom or their communities cultural survival.

The second tragic implication of the binary opposition is the way in which it distracts from the more important question of how rights operate politically and also from the historical material and psychological effects of colonialism. Thus, when we view colonialism as not "attempting to eradicate the physical signs of Indigenous peoples as human bodies but trying to eradicate their existence as peoples through the erasure of their histories and geographies that provide the foundation for Indigenous cultural identities and sense of self,"[193] we must think of human rights as being implicated the

[193] Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against contemporary colonialism," *Politics and Identity; Government and Opposition* Ltd, Blackwell Publishing, 2005. pg.598.

present day processes of colonialism. One way this thesis views human rights as being implicated in the process of modern day colonialism is by distracting both Indigenous peoples and Settlers from understanding what it *is* about colonialism that is causing all the pain and suffering on reserve communities in Canada today. As we have seen in the case of Bill C-21, there is an attempt to make invisible the relationships between discrimination and colonial violence. This making invisible of the relational nature of discrimination, sexism and colonialism allows human rights discourse to distract from the tragic socio-economic and psychological conditions present on reserve by focusing specifically on discrimination and not on the relationships *between* discrimination, colonialism, sexism and racism. By separating questions of legal/political discrimination from questions of material inequality, poverty on reserve and colonialism is to *see* the limitations of human rights discourse in the colonial context. In sum, this thesis attempted to showcase how even the most well-intentioned discourse and practice can turn rights into tragedy and tragedy into rights without ever being able to articulate what it *is* about the nature of their relationship that makes their interplay so difficult to understand. And it is the unknown features of this relationship, between rights and tragedy, that will hopefully force scholars, such as myself, to incessantly question the nature of a discourse that has the potential to become the sole discourse of emancipation in the modern world.

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