

# SOCIAL MOVEMENTS AND THE LAW: ADDRESSING ENGRAINED GOVERNMENT-BASED RACIAL DISCRIMINATION AGAINST INDIGENOUS CHILDREN

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## I Introduction

Is the law enough to end longstanding racial discrimination perpetrated by a government against Indigenous children or do legal cases need to be situated in a social movement?<sup>1</sup> The Canadian Human Rights Tribunal ('Tribunal') retains jurisdiction in a case brought by the First Nations Child and Family Caring Society ('Caring Society'), and the Assembly of First Nations,<sup>2</sup> alleging the Canadian Government's provision of flawed and inequitable child welfare services on reserves is racially discriminatory contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6.<sup>3</sup> In January 2016, the Tribunal issued a landmark decision substantiating the complaint, and ordering Aboriginal Affairs and Northern Development Canada ('AANDC')<sup>4</sup> to remedy the discrimination.<sup>5</sup> However, a binding Tribunal order in the children's favor may not be enough to improve the children's lives as the Canadian government has vigorously fought this case using a plethora of legal,<sup>6</sup> and on three occasions illegal,<sup>7</sup> strategies to try to derail the case.

As Canada's pattern of discrimination against First Nations children is so long-standing and its efforts to defend the practice are so vigorous, the Caring Society has complimented the legal case with a public education and engagement campaign called *I Am a Witness*.<sup>8</sup> The campaign loads all of the legal submissions and evidence onto a user friendly website inviting individuals, particularly young Canadians, and organisations to watch the case and determine for themselves if they believe the Government of Canada is treating this generation of First Nations children fairly. Over 14,800 individuals and organisations have formally registered making it the most watched human rights case in Canadian history.

Using the Canadian Human Rights Tribunal on First Nations child welfare case and *I Am a Witness* campaign as a case study, this paper argues that sustainable redress of the Canadian Government's longstanding discrimination against First Nations children requires systemic legal challenges nested within a social movement that engages First Nations and non-Aboriginal children.<sup>9</sup> The paper begins by describing the entrenched racism toward Indigenous peoples in developed countries before specifically focusing on how the Government of Canada's long history of racial discrimination towards First Nations children manifests today. This provides context for the discussion of the Canadian Human Rights Tribunal on First Nations child welfare, the design and impacts of the *I Am a Witness* campaign and implications for other equity seeking efforts for Indigenous children.

## II The Entrenchment of Racial Discrimination Against Indigenous Peoples

Native American legal scholar, Robert Williams, argues that western civilisation is birthed from a racist dichotomy proclaiming the whites as 'civilised' and Indigenous peoples as 'savage' and thus unworthy of fundamental rights that the non-Aboriginal peoples afford themselves.<sup>10</sup> As respected Canadian First Nations philosopher and historian, Daniel Paul, argues a clear eyed examination of the relations between Indigenous peoples and non-Aboriginal governments reveals there was savagery, but that it was rarely perpetrated by the Indigenous peoples. Nonetheless, the labeling of Indigenous peoples as savage is pervasive, cutting across legislative, judicial and executive branches of many developed countries.<sup>11</sup>

For example, the phrase 'merciless Indian Savages' appears in the United States Declaration of Independence.<sup>12</sup>

Commenting on the birth of racism in American society, Dr Martin Luther King noted, '[O]ur nation was born in genocide when it embraced the doctrine that the original American, the Indian, was an inferior race'.<sup>13</sup> As Dr King notes, the racism against Native Americans is so engrained that attempts to decimate them are often exalted rather than condemned in American movies, folklore and narrative.<sup>14</sup>

Robert F Kennedy echoed King's sentiment in a speech to the National Congress of American Indians in 1963 saying:

[T]he Indian might technically be free, but he is the victim of social and political oppressions that hold him in bondage. He is all too likely to become the victim of his own proud anger, his own frustrations and—the most humiliating of all—the victim of racial discrimination in his own land.<sup>15</sup>

Kennedy asked if justice for American Indians would come in the future.<sup>16</sup> It is a good question. While Americans are making progress addressing racism against African-American and Hispanic persons, only passing attention is paid to the historic dislocation of Native American tribes, the forced sterilisation of Native American women,<sup>17</sup> and the forced placement of Native American children in assimilative, and often profoundly abusive, boarding schools.<sup>18</sup> In addition, little public attention is paid to Native American/Alaskan Native rights degradation and dire inequalities in basic public services on reservations.<sup>19</sup> Although there has been some progress, Native American child welfare expert, Terry Cross, notes that Native American children still only receive 56 cents on the dollar in child welfare funding compared to what other American children receive.<sup>20</sup> Even as the Confederate flag is lowered on the grounds of the State Legislature in South Carolina,<sup>21</sup> the *Washington Red Skins* sports franchise uses a name meaning the selling of a Native American scalp.<sup>22</sup>

Robert Williams cites a 2005 US Supreme Court decision denying Native American land rights as evidence of racial leakage into the judiciary. In the *City of Sherrill v Oneida Nation of NY*, the Supreme Court relied on a 15<sup>th</sup> century Papal Bull called the Doctrine of Discovery.<sup>23</sup> The Doctrine of Discovery is basically a mechanism to allow the 'civilised' whites to annul Indigenous property rights by rendering Indigenous peoples savage, and thus unworthy and ineligible for land ownership.<sup>24</sup> The Court's application of the Doctrine of Discovery drags US law into

a constrained, and discriminatory, view of humanity where some Americans are more human than others.

The deeply entrenched pattern of systemic discrimination against Native Americans in the United States is echoed in other countries as well. The Australian Government followed its apology to Aboriginal peoples for the Stolen Generations,<sup>25</sup> which was the Australian equivalent of Canadian residential schools, with the highly criticised Northern Territory Emergency Response ('NTER'). Under the NTER, the Australian federal government lifted legal racial discrimination protections for Aboriginal peoples to implement an array of regressive measures with the alleged aim of preventing sexual abuse among Indigenous children. However, there was little evidence that the proposed measures had any relevance to child sexual abuse prevention and response. For example, the Australian Government forced Aboriginal communities to sign 40-year land leases in exchange for basic services like water and housing. James Anaya, United Nations Special Rapporteur on the Situation of Indigenous People, reviewed the NTER and found aspects of the regime were racially discriminatory, contrary to Australia's international human rights obligations.<sup>26</sup> More recently, the Australian Government introduced a wayward policy to 'close' over 100 Indigenous communities by cutting off water, power and other essential services, and suggested that living on their tribal lands was a lifestyle choice for Indigenous people, and not a cultural necessity.<sup>27</sup>

The Truth and Reconciliation Commission of Canada ('TRC') recently described the Government of Canada's Indian residential school system ('IRS') as 'cultural genocide'.<sup>28</sup> This sentiment was echoed by Canadian Supreme Court Chief Justice Beverley McLachlin in a 2015 speech.<sup>29</sup> The goal of the IRS system was to eliminate Aboriginal cultures, and, by extension, any claims to lands and resources through the forcible removal of Aboriginal children and placement in Christian run residential schools.<sup>30</sup> Once admitted to an IRS, Aboriginal children were separated by gender, given a Christian name or a number, and forbidden to speak their languages and practice their cultures.

Operating between the 1870s and 1996, at least 150 000 children attended IRS. At least 6,000 children died in the schools from preventable disease and maltreatment as government officials refused to pay for health care reforms costing a pittance of 10 000 to 15 000 dollars (approx. \$313 000 today) to save the children's lives.<sup>31</sup> The TRC estimates that

thousands of Aboriginal children died needlessly due to government penny pinching. For the children that survived, many experienced sexual, physical, and spiritual abuse and neglect.<sup>32</sup> As Canadian historian, John Milloy, noted, it is a mistake for Canadians to equate the residential schools to the boarding schools elite families sent their children to at the time. Elite schools reinforced the values of the parents, whereas residential schools cut 'the artery of culture' by expunging parental values—and telling children that their parents were savages.<sup>33</sup>

While most Canadians are horrified when they learn about residential schools, many still take false comfort in believing that the government's conduct was a reflection of the misguided moral standards of the time. However, John Milloy's detailed examination of government records shows that throughout the over 100 years of residential school operation people of the period spoke out about the dreadful maltreatment and needless deaths of children in residential schools, but were largely ignored by the Canadian government.<sup>34</sup>

In 2008, the Prime Minister of Canada issued a formal apology to Aboriginal peoples for the residential schools.<sup>35</sup> While the apology was welcomed, its meaningfulness would be revealed in Canada's future actions. As argued later in this paper, there is significant reason to believe Canada has not yielded its colonial cloak, even when it is aware of the injustice of its actions, and is unlikely to engage meaningfully in reconciliation until the Canadian public demands it.

As the collective histories of the United States, Australia and Canada show, profound historical and contemporary human rights abuses against Indigenous peoples in developed countries are emboldened by government educational systems that neuter public sensibility and outrage by reinforcing stereotypes of Indigenous peoples as unworthy 'savages' and non-Aboriginal peoples and governments as benevolent and 'civilised'.<sup>36</sup> In effect, the US, Australian and Canadian governments mute critiques of their human rights approaches to Indigenous peoples by rendering non-Aboriginal peoples ignorant and Indigenous peoples inhuman.

Ignorance is injustice's best friend, rendering racism invisible, or, even worse, benevolent. Over the long run, reliable public education is essential in changing the social psyche, so that discrimination towards Indigenous peoples

is no longer normalised or accepted.<sup>37</sup> Until then, Kennedy's question remains—what about the future?

### **III Reconciliation Means Not Saying Sorry Twice: The Canadian Human Rights Tribunal on First Nations Child Welfare**

The TRC's enumeration of the dark chapter of residential schools in Canadian history urges Canadians not to be lulled into thinking the crisis facing Aboriginal peoples, and children in particular, is over.<sup>38</sup> Research suggests that 13 percent of all substantiated child welfare investigations involving First Nations children resulted in court involvement compared to 6 percent for non-Aboriginal children.<sup>39</sup> This over-representation is driven by neglect fueled by poverty, poor housing and substance misuse linked to the multi-generational impacts of residential schools.<sup>40</sup> As the TRC notes, Aboriginal children are so dramatically over-represented among children in foster care that the number of children growing up in state care today is greater than during the residential school era.<sup>41</sup> Research is showing that the trauma of multi-generational removals of Aboriginal children from their families via the residential school and child welfare systems are having a harmful compounding effect on Aboriginal communities.<sup>42</sup> Thus, it is not surprising that the TRC's top recommendation is to stem the over-representation of Aboriginal children in foster care by redressing federal child welfare funding inequities and implementing reforms to reflect better the needs of Aboriginal families.<sup>43</sup>

The federal government continues to exercise significant control over First Nations child welfare on reserve today. It requires First Nations to accept provincial/territorial child welfare laws as a federal funding pre-condition. The funding regimes amplify colonialism as they limit the range and quality of services First Nations can provide, providing minimal funding for culturally based approaches. The imposition of provincial legislation without regard to Aboriginal laws coupled with the strict funding regimes constrains the ability of First Nations to offer culturally based services tailored to community needs. Off reserve, Canadians receive child welfare via provincial/territorial laws funded by provincial/territorial governments that are funded at higher levels.<sup>44</sup>

Despite the higher needs of First Nations children resulting from the historical trauma of residential schools, evidence

of federal child welfare funding inequalities on First Nations reserves is longstanding and compelling. As the Office of the Auditor General of Canada notes, the federal government has known about the funding inequities for many years, and yet has not taken sufficient measures to address the problem.<sup>45</sup>

The federal inaction exists despite available solutions that were developed in partnership by the government and First Nations. In fact the Government of Canada worked with First Nations to produce multi-disciplinary research reports in 2000 and 2005 to document the inequality and its related impacts on children and to propose solutions. The first report concluded that federal funding for First Nations child welfare on reserve was 22 percent less than that which non-Aboriginal child welfare received and proposed 17 funding and policy reforms.<sup>46</sup> The second report, known as the Wen:de report, engaged over 20 leading experts in economics, First Nations child welfare, law, community development and computer science. The Wen:de report found a 30 percent funding shortfall in the funding stream for prevention services and agency operations and proposed a detailed, and economically tested, funding formula for First Nations child and family services.<sup>47</sup> Both reports were lauded by the federal government at the time of their release, but were never implemented.

It is clear that the Canadian government knew that the funding deficits, particularly in child maltreatment prevention, were driving First Nations children unnecessarily into child welfare care. For example, the government posted a “Fact Sheet” on its website acknowledging that federal child welfare funding was not keeping pace with that provided by the provinces and contributed to growing numbers of First Nations children in foster care.<sup>48</sup> A brief prepared by senior government officials notes that the inadequate child welfare funding created “situations that are dire” for children.<sup>49</sup>

Given that Canada knew about the harms to children, agreed with the inequity, and yet still refused to implement available reforms, First Nations turned to the courts. In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint, pursuant to the *Canadian Human Rights Act*,<sup>50</sup> alleging that the Government of Canada’s provision of flawed and inequitable child welfare and failure to properly implement Jordan’s Principle (a measure to ensure First Nations children can access government services on the same terms as other children)

is discriminatory on the prohibited grounds of race and national ethnic origin.<sup>51</sup>

Instead of using this as an opportunity to embrace the evidence and address the shortcomings in its child welfare approach, the Canadian government went on the attack. Over the next six years, Canada would spend millions trying to get the complaint dismissed on technical grounds.<sup>52</sup> When those attempts did not succeed, the Canadian government broke on three occasions the law in apparent attempts to derail the case.<sup>53</sup> The Privacy Commissioner found that the Canadian government breached the *Privacy Act*,<sup>54</sup> by unlawfully collecting personal information on the complainant. According to internal government emails filed as evidence during the hearings officials were trying to find ‘other motives’ for the case.<sup>55</sup> A second breach occurred in 2013 when the Canadian Human Rights Tribunal found the Canadian Government illegally and knowingly withheld over 50 000 documents highly prejudicial to its case.<sup>56</sup> Finally, in June of 2015, the Canadian Human Rights Tribunal found the government illegally retaliated against the Executive Director of the First Nations Child and Family Caring Society for filing the complaint and awarded \$20,000 in damages.<sup>57</sup> The funds were donated to children’s causes and charities.

Despite the Government of Canada’s vigorous efforts to derail a hearing on the merits, the Canadian Human Rights Tribunal began hearing the case in 2013 with final arguments concluding in October of 2014. The Tribunal heard from 25 witnesses, including 4 experts, and over 500 documents were entered into the evidentiary record. The most damaging evidence for the Government of Canada came from its own witnesses and documents. For example, its own expert report found insignificant differences with the complainants’ calculations of the funding shortfall.<sup>58</sup> Further, secret documents authored by senior government officials confirmed the inequity and linked it to the over-representation of First Nations children and other harms, including risk of death.<sup>59</sup> Given the vast amount of evidence against it, Canada relied on technical arguments to defend the claim suggesting government documents that appeared to be admissions against interest should be given little weight because, at best, they reflected the personal opinions of their employees at given periods in time.<sup>60</sup> The government brought no evidence to support these claims.<sup>61</sup>

The Caring Society sought a three-phase remedy: 1) immediate provision of prevention services and removal

of discriminatory service barriers; 2) negotiations with agencies to meet needs unique to the clients they serve and; 3) establishment of an independent body to ensure the Canadian government does not lapse into discriminatory behavior in future.<sup>62</sup>

The Tribunal took the decision under reserve for 14 months before issuing a landmark decision on January 26, 2016.<sup>63</sup> The Tribunal substantiated the complaint and found Canada's provision of the First Nations Child and Family Services Program and Jordan's Principle to be discriminatory pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6. Overall the panel found the Government of Canada's arguments to be 'unreasonable, unconvincing and not supported by the preponderance of evidence in this case'.<sup>64</sup> The decision stated:

AANDC is ordered to cease its discriminatory practices and reform the FNCFCFS Program and 1965 Agreement to reflect the findings of the decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle.<sup>65</sup>

The Tribunal retained jurisdiction over the case and sought further submissions from the parties on issues of remedy and damages. The Tribunal agreed to the Caring Society's temporal organisation of remedies and will deal with matters of immediate relief, medium-term relief and long-term relief and damages separately.

While the Government of Canada chose to not judicially review the Tribunal decision, implementation of the order has been extremely slow. In fact it was so slow and incomplete that the Tribunal issued a subsequent compliance ruling requiring the federal government to confirm full and proper implementation of Jordan's Principle by 10 May 2016, and to provide detailed economic evidence of its compliance with the order to remedy the funding inequalities by 26 May 2016.<sup>66</sup> The Tribunal has made it clear that if the federal government's submissions fall short, further orders may follow.

To my knowledge, this case marks the first time in history that a developed country has been held accountable for its discriminatory treatment of a current generation of Indigenous children before a body that can make binding orders. It is expected to set an important legal precedent

to address inequality in other areas of federal service provision in Canada and inform Indigenous children's rights movements worldwide.

#### **IV It Takes a Community to Raise a Case: The *I Am a Witness* Campaign**

The Canadian Government's conduct in the First Nations Child and Family Caring Society et al v Attorney General of Canada, CHRT 1340/7008 dramatically failed to respect the best interests of First Nations children and their families. Therefore, child rights advocates and the Caring Society need to prepare for the possibility that Canada will deploy a variety of legal, and perhaps illegal, strategies to thwart the Canadian Human Rights Tribunal orders.<sup>67</sup> The Canadian government has unique powers to avoid implementing legal orders that are not available to other respondents. For example, the government could make jurisdictional arguments related to Parliamentary privilege or legislate itself out of an unfavorable decision. The Government of Canada's reaction to the Supreme Court of Canada's decision in *Canada (Attorney General) v Bedford* provides a cautionary example.<sup>68</sup> In this case, sex trade workers successfully argued that certain provisions of the *Criminal Code*, RSC, 1985 c C-46 ('*Criminal Code*') deterred prostitutes from instituting safety and security measures, and thus infringed their constitutional right to security of the person. The Canadian Government was running a tough on crime agenda and thus argued both legally and publically that all sex work is wrong, and should thus be criminalised. The Supreme Court ruled in favor of the sex trade workers declaring the *Criminal Code* provisions to be unconstitutional and giving the government a year to amend the code in compliance with the decision. Some argue that instead of embracing the spirit of the Supreme Court's decision, the government rewrote the *Criminal Code* in ways that further impugned the rights of sex trade workers.<sup>69</sup>

Another power that government can use to thwart legal decisions relates to its discretion to allocate public budgets. Evidence before the Tribunal has shown that the Government of Canada attempted to cover the shortfalls in the First Nations child and family service program by transferring money from other under-funded First Nations programs such as school construction, water and housing.<sup>70</sup> The government could potentially remedy the inequality in child welfare by simply transferring more funding from other First Nations programs, thus heightening hardship and deepening discrimination in those other areas.

In situations where a government respondent has a variety of tools available to thwart an unfavorable decision, it is important to nest the case in a social movement so that the Canadian Government's unbecoming behavior toward First Nations children is publically viewed and critically appraised. Prior to launching the *I Am a Witness* campaign, the Caring Society surveyed the literature on effective social movements.

The work of change expert, Marshall Ganz, was particularly influential. He notes that social movements 'emerge as a result of purposeful actors (individuals and organisations) to assert new public values, form new relationships rooted in those values and mobilise political, economic and cultural power to translate these values into action'.<sup>71</sup> This approach aligned nicely with the Caring Society's reconciliation approach to achieving equity for First Nations children and their families. From a campaign perspective, Ganz describes campaigns as public activation mechanisms within a social movement that builds and sustains momentum over time.<sup>72</sup> This concept broadened the *I Am a Witness* campaign from a strictly web-based campaign to a social movement engaging media, public education and participation. In order to operationalise Ganz's concept of embedding messages in values, the Caring Society turned to the writings of linguist and democratic strategist, George Lakoff. Lakoff notes that people form understanding through deep cognitive frames nested in national values, thus social movement messages evoking national values will attract more public sympathy and engagement.<sup>73</sup>

Discrimination cases against governments are implicitly legal and political in nature, but few lawyers or complainants in systemic discrimination claims leverage the power of the public to press the government for sustainable change.<sup>74</sup> Informed by the social movement literature, the Caring Society decided to embed the First Nations child welfare human rights case in a public education and engagement social movement campaign based on the *Mosquito Advocacy* model.<sup>75</sup> Mosquito advocacy is designed for small groups advocating for evidence-based change in change resistant environments against much larger opponents. Inspired by the mosquito, it engages multiple strategies to advance evidence based public policy change. More specifically, policy solutions are framed within deeply held public values to optimise their 'infectious nature' and nested within low cost public engagement strategies to create a 'swarm' of public dialogue and citizenship. The engagement strategy is

then nested in a public education campaign that promotes critical reflection and broad-based engagement. The final step is a non-voluntary peaceful and binding change strategy to compel action, which is known in the model as the 'bite'. In the case of the *I Am a Witness* campaign, the human rights case is the 'bite'.

When the Caring Society designed the *I Am a Witness* campaign, it was important to consider how the campaign would respect judicial independence, ensure respectful child participation, and be accessible and sustainable. Respecting judicial independence required that the campaign not attempt to influence the judicial process or pre-suppose the Tribunal's decision. This was accomplished by limiting public participation to an invitation to watch (or witness) the case leaving people free to make up their own minds about whether Canada is treating children fairly. This approach also respected the self-determination of citizens and promoted critical reflection as they processed the information on their own terms. Asking people to watch versus take a side in the case also engaged a wider range of stakeholders than would have been achieved if people were asked to take a position from the outset.

As children were at the center of the case, it was important that the campaign align with the Caring Society's observance of the *United Nations Convention on the Rights of the Child*.<sup>76</sup> Article 12 of the Convention recognises children's rights to participate in matters affecting them. There is growing literature supporting the positive short and long-term effects of children's engagement in active citizenship such as increased self-esteem, personal agency, compassion, critical thinking, volunteering and voting.<sup>77</sup>

From a child participation point of view, the Caring Society made a strategic decision to promote critical reflection, research and independent thinking among the children who witnessed the case. Volunteer teachers developed critical thinking learning tools to guide student learning as they followed the case in person or on line. Children were encouraged to listen to all sides of the story, conduct independent research, and speak to their parents and teachers before forming their own opinions about what was happening. They were also encouraged to reassess their position when new information emerged. While this approach arguably ran the risk of some children siding with the Canadian government, the Caring Society believes the ultimate success of the reconciliation movement depends

on equipping children with the critical thinking skills to reframe the relationship between Aboriginal peoples and challenge stereotypes.

Additional provisions were made to support the attendance of children at the hearings and they came in droves. For example, the Caring Society published a series of child friendly information sheets and reached out to its partners to fund school buses for children attending low-income schools. In fact, by 2012 so many children wanted to attend the hearings, particularly the days when the government presented its case, that the hearings had to be relocated to a larger hearing room and groups of children were booked in shifts.

Equipped with both the experience of critical research, thinking and the opportunity to witness the hearings first hand, the children wrote a book of letters sharing their concerns about the inequities First Nations children experience and submitted it to the United Nations Committee on the Rights of the Child during Canada's periodic review.<sup>78</sup> They also wrote letters to the Prime Minister, made information videos and wrote songs and poetry about the *I Am a Witness* campaign.

The Caring Society wanted to engage all citizens regardless of income, and thus it was important that mechanisms for public participation (in this case signing up as a witness) needed to be free.<sup>79</sup> The Caring Society was alive to the reality that Aboriginal families who have the greatest stake in this case are more likely to be poor and thus it was essential that engagement mechanisms be cost-free, quick and easy to do. Enabling access by all income groups was augmented by providing resources in a variety of languages, using audio and visual media to appeal to different learning styles and enabling various sign-up options to respect varying privacy interests. For example, individuals, informal groups and organisations could sign up to be a witness and all were afforded the option not to be listed publically. By creating the *I Am a Witness* registration mechanism, people of all ages, incomes and privacy comfort levels were able to join the movement in less than 2 minutes. While some limited their participation to signing up as a witness, many others used this positive experience to incentivise other contributions to the movement.

Finally, the *I Am a Witness* campaign needed to be sustainable. The Caring Society has very limited financial

and human resources compared to the significant size, wealth and influence of the Canadian Government. Put into context, the Caring Society has one full-time employee and three part-time employees versus over 257 000 federal civil servants.<sup>80</sup> Instead of viewing the size differential as a negative, the Caring Society recognised that there are a number of attributes synonymous with smallness that can be leveraged as assets. For example, small groups can act with spontaneity, creativity and passion and can move quickly. Ethically minded small groups backed by a just cause are also more likely to illicit public sympathy through the 'David and Goliath' narrative.<sup>81</sup> Embracing the organisation's small size was key to leveling the playing field against the Government of Canada. In the face of a tiny organisation surfacing convincing evidence of government wrongdoing towards kids, Canada's large size and wealth transitioned from assets to burdening markers of its bullying behavior.

The design of *I Am a Witness* recognises the limited financial resources of the organisation by using a bilingual on-line platform buttressed by social media. We also developed a variety of tools that our partners, and new witnesses, could easily integrate into their existing events and conferences. This approach is low-cost, easily maintained, and allows for broad-base distribution. Another nuance was that the campaign did not take the form of a traditional petition, but rather invited people of all ages, informal and formal groups and organisations to sign up to be witnesses anonymously or at various levels of public detail. The *I Am a Witness* website then publishes the names of the consenting witnesses creating a very public community of supporters. As the diversity of supporters grew so did the government's attention to the campaign as it began to reflect citizen concern about a fundamental principle of fairness for kids rather than a 'special interest' concern.

Over time the *I Am a Witness* campaign increased its accessibility to various audiences by including more audio, visual and social media features in Indigenous languages as well as French and English. Among the most popular educational resources is a video featuring reflections by children who attended the preliminary hearings called *Letters to Canada*.<sup>82</sup> In the video, First Nations and non-Aboriginal children share what kids need to grow up healthy and proud, what discrimination is and why this case is important to the Canada they want to grow up in. The children were all unscripted, and the video was prepared as an opening statement to the evidentiary hearings before the Canadian

Human Rights Tribunal. The federal government called the video 'inappropriate' without explaining why and objected to it being shown at the hearings. Although the Tribunal panel never saw the video, tens of thousands of people across Canada and around the world have, and many viewers have joined the *I Am a Witness* campaign as a result.

Overall, the *I Am a Witness* campaign presumes that citizens will take action to stop discrimination when they are equipped with credible information, and peaceful, meaningful ways to stop it. The remaining question is 'does it work?'

#### **V Discrimination Does Not Like a Witness: Impacts of the *I Am a Witness* Campaign**

The impact of the *I Am a Witness* campaign was recently evaluated along with two of the Caring Society's other equity seeking campaigns in children's education and health. Evaluation results indicate that the campaign is an effective educational tool that promotes civic engagement in ways that redress the inequality for First Nations and improve Canadian society as a whole.<sup>83</sup> The evaluation also found that children, young people and adults participating in the campaigns felt their efforts were valued and contributed to positive change.<sup>84</sup>

There are other encouraging signs that the campaign has been very successful. For example, the number and diversity of witnesses signing up on-line and attending the hearings in person continues to increase even after the ruling was made. Growth in public attention has spurred increased national and international media coverage and discussion on social media.

#### **A Canadians Take Note: Attendance at the Tribunal Hearings**

The rooms were empty during the early days of the case when Canada was trying to get the case dismissed on technical grounds. The arguments were highly technical and far removed from the morally compelling story of racial discrimination against children. The bland nature of the arguments meant there was little to hold public attention, but in 2009 a group of teenagers changed that. They were students from an alternative school who had been following the case on the *I Am a Witness* website. Not only did they sit through two days of hearings, they made a video explaining why other people should show up. They

also designed *I Am a Witness* t-shirts and actively recruited people to attend future hearings. By 2012, so many children and young people wanted to attend that court officials relocated the hearings to the largest courtroom in Ottawa and webcasted proceedings to an over-flow room.

By 2013, the children had moved beyond witnessing the case to becoming an active part of it by contributing to the opening statement of the Caring Society at the Tribunal and singing honoring songs for all the children.<sup>85</sup> They also brought their parents, grandparents and friends and neighbors to the hearings and developed a children's speaker's bureau to educate other kids about the case and the *I Am a Witness* campaign.

When the closing arguments took place in 2014, dozens of children and young people attended the hearings in person along with First Nations leaders and concerned citizens. Others watched the proceedings by live webcast. Webcast viewer statistics show that the webcast was viewed at 194 locations throughout Canada and in countries such as the USA, Australia, England, Scotland, Spain, South Africa and Russia.<sup>86</sup> On average, web-cast viewers watched the broadcast for 1 hour and 41 minutes per session indicating a deep interest in the case.<sup>87</sup>

#### **B Getting to the Front Page: Media Interest**

Media interest in the case is a good indicator of public attention and support. Before the *I Am a Witness* campaign was launched, media coverage of the case was limited to Aboriginal journalists in Canada, and even that was irregular. However, by 2010 there was so much interest in the case from the Aboriginal community that Aboriginal Peoples Television Network ('APTN') brought an application to the Tribunal to broadcast the hearings. The federal government opposed broadcasting, arguing that the presence of cameras in the hearing rooms could intimidate some of its witnesses. The Caring Society supported APTN's application citing the right of all children to participate in the hearing and noting that many of the children affected by the case would be unable to attend in person. The Tribunal sided with the government and issued an order banning broadcasting in the hearing rooms. Aboriginal Peoples Television Network successfully sought judicial review at the Federal Court. In his decision, Chief Justice Lufty noted that the federal government had produced no direct evidence that its witnesses would be intimidated, and thus overturned the

Tribunal's order clearing the way for the entire set of hearings to be broadcast.<sup>88</sup> This was the first time that an entire hearing before the Canadian Human Rights Tribunal was televised making it possible for every person in Canada, and around the world, to meaningfully witness the case no matter where they lived. The broadcast coverage by Indigenous media sparked coverage by their mainstream counterparts resulting in a growing wave of broadcast, radio, print and social media interest. Another positive spin-off from the APTN coverage was that it provided a useful learning tool for students in a wide array of disciplines including law, social work, public policy and political science.

While the nature and extent of media interest grew in the case, the most startling aspect of the coverage was that it was almost universally supportive despite pervasive negative First Nations stereotypes in Canadian society and media. The ability to pierce through racial stereotypes was facilitated by nesting the highly credible evidentiary record in a compelling public narrative (fairness for kids) based on deeply held Canadian values (fairness, justice, freedom and equality). The Caring Society also facilitated media coverage by preparing short fact sheets on the case, maintaining a list of independent experts that could be interviewed on various topics and providing original source verification to support our claims.

One indicator of media interest is to see how much coverage occurs when newsworthy campaign events happen. For example, in 2012 when the Federal Court overturned a highly controversial ruling by the Chairperson of the Canadian Human Rights Tribunal to dismiss the First Nations child welfare case on a preliminary basis,<sup>89</sup> it was covered in 24 news articles, four national broadcasters, two opinions, 14 press releases and blogs,<sup>90</sup> as well as social media. Only a few hours after the highly critical Federal Court decision was released, the Tribunal chair announced she was going on sick leave and resigned several months later.<sup>91</sup>

This level of coverage has continued even when newsworthy Tribunal events emerge at times when media coverage is traditionally difficult to get (ie, on weekends/holidays and when in competition with high profile news stories). As an example, one of the worst times to get press coverage is on Friday evenings, when public attention shifts from current events to family and leisure. So when the Canadian Human Rights Tribunal released the retaliation decision at 8.10 pm on Friday June 6, 2015, the Caring Society was concerned

that it would not be widely covered. An Aboriginal Peoples Television Network journalist posted the story on-line around midnight on Friday and by Monday it had been shared over 5,000 times on Facebook and 700 times on Twitter.<sup>92</sup>

Coverage of the Tribunal's final decision in January of 2016 was extensive, garnering front line headlines on Canadian television, newspapers and magazines, and trending on Twitter. The decision was also featured in international media based in countries like China, the United Kingdom, the United States, New Zealand and Australia.

Parliamentarians and public scholars have frequently cited media coverage when posing questions to the government on its provision of First Nations child welfare, further increasing government accountability and public interest.<sup>93</sup>

Media is critical for shaping public opinion and the growing and diverse coverage of the child welfare case has helped draw public attention to the Government of Canada's actions in this case. It is hoped that this public accountability will buttress the Tribunal's ruling, making it more likely that the government will implement rather than thwart the orders.

### C The World is Watching

As famed anti-apartheid activist, Nelson Mandela, demonstrated, the efficacy of domestic activism against systemic racism can be catapulted by international attention and pressure.<sup>94</sup> An important part of the Caring Society's approach is to actively engage in periodic reviews of Canada before United Nations treaty bodies such as the United Nations Committee on the Rights of the Child and the Human Rights Council. Treaty body committee members often review thousands of pages of material during a country's periodic review, and thus it is important to keep written submissions short, factual and solution orientated. The downside of this approach is that you risk missing important information. The *I Am a Witness* website enabled the Caring Society to achieve a better balance between detail and efficacy as a short submission was augmented by referring Committee members to the resource rich website for further information. This approach contributed to the UNCRC's concluding observations for Canada specifically noting the inequities in First Nations child welfare and recommending full remediation of the discrimination.<sup>95</sup> The concluding observations provided a credible resource

for media and were filed as evidence of the discrimination with the Tribunal.

Widespread media coverage of the evidence relating to the retaliation complaint caught the attention of three United Nations Special Rapporteurs. Upon learning of the Privacy Commissioner's finding that Canada engaged in unlawful collection of private information in an effort to discredit the claims before the Tribunal, the Special Rapporteurs on the Rights of Indigenous Peoples, Freedom of Peaceful Assembly and Association, and Human Rights Defenders launched an investigation into the Government of Canada's conduct. When the matter was referred to the Tribunal to determine if government surveillance and attempts to block the Caring Society's executive director from participating in meetings was retaliation, the hearings were broadcast and made available on the *I Am a Witness* website. Public broadcasting of the testimony allowed the public, and presumably investigating officials, to hear the evidence first hand. The investigation by the three Special Rapporteurs is ongoing.<sup>96</sup>

The United States also took notice of the inequities in First Nations child welfare during Canada's universal periodic review (UPR) before the United Nations Human Rights Council in 2013. During the UPR, the United States Government made a formal recommendation to Canada to remediate the shortfalls in First Nations child welfare funding.<sup>97</sup> While a direct line cannot be drawn between the *I Am a Witness* campaign and the much-welcomed international support, it indicates widespread knowledge of child welfare inequities in the international arena.

Indigenous peoples in the United States, Australia and New Zealand have followed the case closely to inform domestic efforts to redress discrimination against Indigenous children. The *I Am a Witness* campaign reached out to international Indigenous children's rights experts to provide independent commentary on the case to media and the public. For example, Terry Cross, former Executive Director of the National Indian Child Welfare Association, attended the opening statements of the Canadian Human Rights Tribunal and made an appearance on the Canadian Broadcasting Company's (CBC) 'Power and Politics'.<sup>98</sup> As a recognised international expert on Indigenous children, Mr Cross's views were given significant weight by the Canadian media and the public.

International monitoring also helps in critical appraisal of government claims that it is taking all reasonable measures

to observe the rights of First Nations children. The Kidsrights Foundation produces an annual index measuring country compliance with the United Nations Convention on the Rights of the Child proportionate to national wealth. In the 2015 index, which was coincidentally released on Canada's 148<sup>th</sup> birthday, Canada ranked an abysmal 79<sup>th</sup> in the world,<sup>99</sup> despite the World Bank listing Canada 11<sup>th</sup> in the world in Gross Domestic Product.<sup>100</sup> The index has several sub-indexes including one on child rights environment that measures the degree to which countries reflect child rights in their legislative works and budgetary allocations. This sub-index, known as the 'enabling environment for child rights', hones in on the core functions of government (budgets and legislation) and Canada's ranking is an atrocious 137<sup>th</sup> in the world.<sup>101</sup> The Caring Society frequently cites this index to exemplify the lack luster efforts of Canada and its obligations and capacity to do much better.

Taken together, international monitoring of Canada's observation of children's rights and of the case puts more pressure on the Canadian Government to act in ways consistent with its international human rights obligations.

#### D Still More to Be Done

While the *I Am a Witness* campaign has been a marked success, it needs to continue to secure public participation to yield widespread and sustained public pressure on the government to end the discrimination. In particular, a recent evaluation suggests that the Caring Society should build on its successful child education and engagement activities by developing more resources and engagement opportunities for youth and Elders.<sup>102</sup> Another goal of the Caring Society is to extend the reach of the campaign by preparing a formal network of speakers and activists across Canada who can ensure a reciprocal cycle of community-Caring Society learning and engagement, and better contextualise the national work of the Caring Society into a local context.

Another area of growth for the campaign is to develop a longitudinal index to evaluate its public education and engagement. In order to move towards this goal, the Caring Society is forming partnerships with researchers across Canada and the world to determine efficacy measures.

Ultimately, the efficacy of the *I Am a Witness* campaign needs to be measured in terms of whether the campaign, and the Tribunal's decision, are able to end the longstanding

discrimination against First Nations children in child welfare and other domains. This would include redressing the inequality and removing discriminatory barriers to federal funding policies that fetter First Nations child well-being laws and practices.

## VI Conclusion

Respected First Nations education scholar, Marie Battiste, sums up the challenge presented by longstanding systemic discrimination by governments toward First Nations peoples saying:

[C]onfronting systemic discrimination against Aboriginal peoples is this issue's key theme. Systemic discrimination dominates political and policymaking spheres, creating massive discriminations against Aboriginal persons, whether as groups or as individuals. Systemic discrimination compounds familiar sources of individual discrimination. It operates through inaction, silence, neglect, and indifference to the aboriginal, human, and treaty rights, stifling the talents and opportunities of individuals while sustaining poverty and malaise and affecting diverse social, cultural, political, economic, spiritual, and physical outcomes among Aboriginal peoples.<sup>103</sup>

This paper concurs with Dr Battiste's argument that Canada's longstanding discrimination against First Nations children is embedded in the social, political and legal conscience of the nation, thus requiring a social movement approach leveraged by strategic legal cases to achieve sustainable change. While the teachings of social movement scholars and exemplars have been critical to informing the Caring Society's approach, the *I Am a Witness* campaign itself is an important innovation. Designed to respect judicial independence, it avoids asking the public to take a side in the case.

The campaign has also publically positioned the over-representation of First Nations children in child welfare care as a systemic issue requiring structural government reform. Identifying the public service inequalities that First Nations families face focuses remedial efforts and helps the public understand that if they faced similar disadvantage they would be struggling to care for their children too. This enables the public to view the over-representation of children as a symptom of colonial injustice versus cultural or parental failure.

Given the colonial undertows affecting Indigenous peoples in Canada, the United States and Australia,<sup>104</sup> the Canadian Human Rights Tribunal case and *I Am a Witness* movement are harbingers to inform the ongoing efforts by Indigenous peoples to address state discrimination against children worldwide. The Caring Society hopes that other Indigenous peoples and human rights allies will build on this experience to finally realise Robert F Kennedy's vision of 'the time when the very sources of hunger and pain will be forever cast out. It is the time when no more promises will be needed because no more injustice will exist. ...'.<sup>105</sup>

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**SOCIAL MOVEMENTS AND THE LAW: ADDRESSING ENGRAINED GOVERNMENT-BASED  
RACIAL DISCRIMINATION AGAINST INDIGENOUS CHILDREN**

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