Bearing Witness: Creating the Conditions of Justice for First Nations Children

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Abstract

In 2016, the Canadian Human Rights Tribunal found that Canada's management of child welfare discriminates against First Nations children. The First Nations Child and Family Caring Society, one of the complainants, maintains a web-based campaign called "I Am A Witness," providing details on the hearings and legal materials and asking visitors to act towards ending discrimination against First Nations children. What does it mean to bear witness to such discrimination? The concept of "witnessing" circulates through Indigenous oral traditions, communication and media theories, and the common law. This article explores the I Am A Witness campaign, arguing that as it evokes various theories of witnessing and builds public awareness of legal processes, it shifts spaces of and perspectives on legality beyond Western categories, creating a public that is enabled to bear witness to, and respond to, ongoing injustices against Indigenous peoples.

Keywords: Social justice campaign, human rights, First Nations children, Indigenous witnessing, media and legal witnessing.

Résumé

En 2016, le Tribunal canadien des droits de la personne a conclu que la gestion canadienne en matière de la protection de l'enfance était discriminatoire à l'égard des enfants des Premières Nations. La Société de soutien à l'enfance et à la famille des Premières nations du Canada, l'une des plaignantes dans ce dossier, avait alors tenu une campagne virtuelle intitulée « Je suis un témoin », qui fournissait des détails sur les audiences et les documents juridiques et qui demandait également aux visiteurs d'agir pour mettre fin à la discrimination contre les enfants des Premières Nations. Que signifie toutefois être *un témoin* d'une telle discrimination? On retrouve le concept de « témoignage » dans les traditions orales autochtones, les théories de la communication, les théories des médias et la common law. Dans cette

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foulée, cet article explore donc la campagne « Je suis un témoin » qui, en invoquant diverses théories du témoignage et en sensibilisant le public aux processus juridiques, a engendré un déplacement des espaces et des perspectives sur la légalité au-delà des catégories occidentales, créant de ce fait un public qui est en mesure de témoigner et de répondre aux injustices persistantes perpétrées à l'endroit des peuples autochtones.

Mots clés : Campagne pour la justice sociale, droits de la personne, enfants des premières nations, témoignage autochtone, témoignage médiatique et juridique.

In January 2016, the Canadian Human Rights Tribunal found that Canada's Ministry of Indian and Northern Affairs (INAC) is discriminating against First Nations children in its program management and funding methods of First Nations child and family service agencies.[1] The tribunal decision, *First Nations Child and Family Caring Society v Canada* emphasizes that the adverse effects of the program "perpetuate the historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential School system."[2] The Tribunal ordered INAC to cease discrimination and reform its funding formula and agreements, the main causes of the discriminatory effects, to reflect its findings, as well as to implement the full scope of Jordan's Principle. Jordan's Principle requires that when a First Nations child is in need of services, the government that is first contacted will respond to that need without concern for jurisdiction, and deal with reimbursement later.[3]

The decision vindicated a complaint brought to the Tribunal in 2007 by the First Nations Child and Family Caring Society of Canada (FNCFCS) and the Assembly of First Nations (AFN). The FNCFCS is a national, non-profit group established in 1998, "providing research, policy, professional development and networking" support to child and family services agencies mandated specifically to serve families in First Nations communities in Canada.[4] In 2019, it expanded its mandate to "[p]rovide reconciliation-based public education, research and support to promote the safety and wellbeing of First Nations children, young people, families and Nations."[5] One of its approaches to this work is to conduct specific issue-focused social justice campaigns.

The FNCFCS website hosts "I Am A Witness"—a campaign focusing on its human rights complaint, named to reflect Indigenous approaches to witnessing. The campaign provides a timeline of the case, which chronologically organizes and provides access to relevant legal documents, ranging from tribunal and court decisions to factums and affidavits to letters requesting delays in the hearing schedule. Other documents related to the case, including AFN resolutions,

1 *First Nations Child and Family Caring Society of Canada v A-G Canada (Indian Affairs and Northern Development)*, 2016 CHRT 2 (file # T1340/7008) [*FNCFCS v Canada 2016*].
2 Ibid., para 404.
3 Jordan's Principle, Background, https://fncaringsociety.com/jordans-principle (accessed September 15, 2017).
4 "First Nations Child & Family Caring Society," https://fncaringsociety.com/who-we-are (accessed August 10, 2017).
5 Ibid. (accessed August 23, 2020).

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auditor-general reports, and questions in the House of Commons, are included. The public is invited to attend hearings, several of which were broadcast live by the Aboriginal Peoples Television Network (APTN). The public is also invited to follow the case, to sign up as supporters, and to participate in other ways.

"Witness" is a powerful and evocative word. This word has "extraordinary moral and cultural force today" because of its connections with concepts of suffering, justice, and truth.[6] "Witnessing" is often seen as involving at least two parties—a witness, who testifies, and a secondary witness, who listens and, importantly, acknowledges what they have heard.[7] Such witnessing has become highly visible in the form of survivor testimony at inquiries and commissions addressing claims of historical and ongoing injustices and human rights abuses in settler-colonial and transitional societies.[8] Witnessing, particularly in the context of telling stories of human rights violations, often includes a request to the audience to become morally accountable for an event.[9]

The FNCFCS campaign is uniquely interesting in several ways: it consciously evokes Indigenous[10] theories of witnessing,[11] it highlights a human rights injustice, it pursues justice through both legal spaces and social settings, and it calls on the public, specifically including children and youth, to be active witnesses. Yet, while some personal stories are brought forward and the claim and decisions emphasize that "this is about kids," the legal claim is phrased, and the decision justified, primarily in terms of the systemic disparate impacts of funding formulae and federal–provincial agreements as discriminatory on the basis of race. Emphasizing the legal manifestation of human rights claims reflects a different approach than providing the testimony of survivors, such as the testimonies of Holocaust survivors, of those who attended residential schools, or those who escaped genocide in Darfur, as claims to justice and public acknowledgement. When the FNCFCS calls upon the concept of "witness" in its campaign to raise awareness and address an injustice challenged through law, what meanings, responses, and engagements are evoked? Particularly, how are law and legal processes, and their connections with justice and injustice, framed in a call to "witness" this legal dispute? Finally, what does this campaign do to create a "witnessing public" to injustices faced by Indigenous peoples in Canadian settler-colonial society?

This article begins by providing the background of the provision of child welfare to First Nations communities, explaining the process and outcomes of the human rights complaint, and giving a description of the I Am A Witness

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6 John Durham Peters, "Witnessing," *Media, Culture & Society* 23, no. 6 (2001): 707–23, 708.

7 Rosanne Kennedy, "The Affective Work of Stolen Generations Testimony: From the Archives to the Classroom," *Biography* 27, no. 1 (2004): 48–77, 49–50 [Kennedy, Affective]. Sue Tait, "Bearing Witness, Journalism and Moral Responsibility," *Media Culture & Society* 33, no. 8 (2011): 1220–35.

8 Rosanne Kennedy, "Subversive Witnessing: Mediating Indigenous Testimony in Australian Cultural and Legal Institutions," *Women's Studies Quarterly*, 36, no. 1 & 2 (2008): 58–75, 58 [Kennedy, Subversive].

9 Tait, 1227.

10 I use Indigenous and Aboriginal (reflecting materials cited) to refer to Indigenous peoples. First Nations refers to communities where child welfare is administered through INAC.

11 Caring Society, pers. comm., October 2017. Cindy Blackstock, Executive Director, FNCFCS drew on her Gitxsan heritage in building this campaign.

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campaign. I then consider how the concept of witnessing, with its various social, political, historical, and ethical meanings,[12] circulates through diverse perspectives: Indigenous oral traditions, communication and media theories, and legal testimony.[13] I then demonstrate how the campaign echoes and combines these multiple meanings of "witness," suggesting that centring Indigenous approaches to witnessing shifts ideas and spaces of legality beyond dominant Western categories in this campaign. I argue that FNCFCS's I Am A Witness campaign, as it evokes various theories of witnessing and supports awareness of and connection to legal processes through its publicity around the dispute, reaches further than its immediate goals, providing a unique pathway to create a public that is enabled to bear witness to, and respond to, ongoing injustices against Indigenous peoples.

Child and Family Services and First Nations

The human rights complaint arose from the history of child and family services provision to First Nations peoples in Canada's federal system. Child welfare falls under provincial jurisdiction, while "Indians, and Lands reserved for the Indians," including all First Nations and Indigenous people with "Indian status" living on reserves, come within federal jurisdiction.[14]

Beginning in the 1850s, more and more First Nations children were forced to attend residential schools for the purpose of assimilation, cutting them off from their families, languages, and cultures.[15] Residential schools disrupted traditional child-rearing practices and community support for parents and children over several generations. As government provision of child and family services programs became a norm, both federal and provincial governments were very reluctant to provide any child and family services on reserve, each relying on the other's jurisdictional responsibilities, primarily to avoid the expense.[16] This meant that there were no preventive child welfare services provided in First Nations communities, many of which were traumatized by residential schooling as well as impoverished. So, in some cases, provincial child welfare authorities would be called on only in "life-threatening" situations, typically by the police, and would then more or less automatically remove children from their families.[17] Provincial authorities very

[12] Kennedy, Subversive, 59.

[13] The term "witness" is significant in religious worldviews, cultural and memory work, psychological and social work discourses, and political arenas: "Witness …can also signify a religiously inspired set of practices that African-Americans use to remember the legacy of slavery and fight against racist violence in the present," Carrie A. Rentschler, "Witnessing: US Citizenship and the Vicarious Experience of Suffering," *Media, Culture and Society* 26, no. 2 (2004): 296–304, 297. See also Kari Andén-Papadopoulos, "Citizen Camera-Witnessing: Embodied Political Dissent in the Age of 'Mediated Mass Self-Communication,'" *New Media & Society* 16, no. 5 (2014): 753–769, 757; Sarah E. Anderson, "The Value of 'Bearing Witness' to Desistance," *Probation Journal* 63, no. 4 (2016): 408–24; Kennedy, Affective; Kennedy, Subversive.

[14] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 91(24).

[15] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf [TRC Summary]

[16] Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations," *Canadian Journal of Women and the Law* 3 (1989): 1–17, 9–10.

[17] Ibid., 9.

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often adopted children out to non-Indigenous people without their families' consent, far from home, throughout Canada and the United States.[18] This is known as the Sixties and Seventies Scoop.

A significant push for change occurred when the Spallumcheen First Nation passed a by-law taking control of all child welfare on reserve in 1981.[19] The by-law gave the First Nation exclusive jurisdiction over all custody proceedings involving their children, gave legal guardianship over children taken into care to Chief and Council, emphasized family re-building, and prioritized fostering placements on reserve and with other First Nations families.[20]

In the 1980s and 1990s, First Nations child and family services agencies came into being across Canada. For the most part, these agencies administer provincial child and family services legislation, on reserve, in a way that is culturally relevant to First Nations communities. The INAC provides funding typically through tripartite agreements between First Nations, the province, and the federal government, or through federal–provincial agreements and the INAC's First Nations Child and Family Services Program.[21] These agreements are meant to address the lack of preventive services in First Nations communities, which was called "grossly inadequate" in a federal government report in 1982, and has not improved since.[22]

Funding, Legal Process, and Tribunal Decisions

This section explains funding approaches, and their problematic aspects in the provision of child and family services on First Nations, relying on facts found by the Tribunal, as well as the process of the complaint through the legal system. This explanation reveals how funding formulae and approaches are organized and discussed in ways that abstract them from the First Nations children and communities that they so seriously impact.

Funding and the ways in which funding formulae drove decision-making about how to provide services to children in need was the key issue in the discrimination complaint.[23] According to INAC's Directive 20-1, funding fulfills a commitment to "expanding First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances … in accordance with the applicable provincial child and family services legislation."[24] Funding is

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18 Ibid., 2–3.

19 150 children had been removed from the community since 1961. Naomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later," *University of New Brunswick Law Journal* 67 (2016): 211–34, paras 20–21.

20 The by-law remains in force. Ibid., paras 22–23.

21 Although space limits discussion of this history, some funding details are described, *infra.* Some provincial legislation now includes specific rights for First Nations communities and direction to keep First Nations children in community, where possible. See Monture, and Sarah Clarke, "Ending Discrimination and Protecting Equality: A Challenge to the INAC Funding Formula for First Nations Child and Family Service Agencies," *Indigenous Law Journal* 6 (2007): 79–100.

22 Monture, 9.

23 While the federal government has the right to decide how to spend resources, this right "…must be exercised according to law…[and]…cannot override a statute such as the Canadian Human Rights Act," *Kelso v The Queen*, [1981] 1 SCR 199, 207.

24 *FNCFCS v Canada 2016, supra* note 1, para 125, citing *2005 FNCFCS National Program Manual*, Appendix A, ss. 6.1, 6.6.

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divided into operational and maintenance categories.[25] Operational funding covers costs such as staff salary and benefits, staff training, travel costs, legal services, family support services, and expenses such as office needs and rent.[26] Operational funding is calculated using a population-based formula which assumes that 6% of all children are in care and that 20% of all families in a given catchment area will require services, including factors for remoteness and number of communities served by one agency.[27] The amounts set out in Directive 20-1 have changed very little since 1995–1996, even though an annual increase of 2% is allowed. The actual costs of keeping a First Nations child who usually lives on reserve, in care outside of the parental home, are funded as maintenance costs, at actual provincial or territorial rates.[28]

The tribunal decision provides a detailed explanation of problems found in the funding approaches, and the federal government's awareness of these problems. In 2000, the AFN and Aboriginal Affairs and Northern Development Canada (AANDC, as INAC was then titled) jointly conducted a National Policy Review (NPR), which pointed out numerous problems with the 1995 funding formula and recommended changes.[29] The inadequacies of the formula included limited funding for prevention work, inflexible funding that was unable to respond to changing conditions, problems with reimbursing maintenance costs due to regional variations in eligible expenses, and no funding for Agencies to make administrative adjustments to changes in provincial legislation, concluding that, "the average per capita per child in care expenditure was 22% lower than the average in the provinces."[30]

The Wen:de Reports, conducted by FNCFCS and a team of researchers, and accepted by the federal government, followed in 2004 and 2005.[31] Wen:de Report One confirmed the findings of the NPR on funding, and set out three potential new funding formulae.[32] Wen:de Report Two analyzed each proposed formula through detailed analyses of the reasons Aboriginal children end up in care, [33] resulting community needs, and the causes of underfunding. Through full case studies of agencies, Wen:de Report Two found that the lack of cost-of-living increases,[34] failure to fund for new computer-based technology, and increased insurance premiums[35] made significant contributions to underfunding. Finally, the Report found that "the present funding formula provides more incentives for taking

[25] This approach applied in the Yukon and all provinces but Ontario until 2007. *FNCFCS v Canada 2016,* para 124.
[26] Ibid., para. 126.
[27] Ibid., paras 126–27.
[28] Ibid., para 131.
[29] Ibid., paras 150–54.
[30] Ibid., paras 153.
[31] The team included twenty-six researchers and scholars. *Wen:de: We are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005), https://cwrp.ca/publications/wende-we-are-coming-light-day. Also see *FNCFCS v Canada 2016*, para 155.
[32] INAC's Operations Funding Formula Design Team developed potential formulae through interviews with FNCFCS Agencies. *FNCFCS v Canada 2016*, paras 156–159.
[33] *FNCFCS v Canada 2016*, para 161.
[34] Ibid., paras 163–164.
[35] Ibid., para 167.

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children into care than it provides support for preventive, early intervention and least intrusive measures."[36]

Wen:de Report Three recommended immediate reforms to Directive 20-1, including provision of funding for preventive work, retroactive cost-of-living adjustments, funding for capital costs, and a focus on communities. The report also recommended the development of a "new First Nations based funding formula that funds agencies on the basis of community needs and assets, along with the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve."[37] The federal government lauded the "evidence-based and affordable solution[s]" proposed in those reports.[38] Several roundtable discussions were held between the AANDC, the AFN, and the FNCFCS on implementing the recommendations made by the NPR through the 2000s. However, nothing changed.[39]

Thus, in 2007, the FNCFCS and the AFN filed the human rights complaint. Beginning in 2007, INAC made agreements with agencies in several provinces to enter the Enhanced Prevention Focused Approach (EPFA), an initial response to Wen:de Report Three.[40] The EPFA covers expenses for prevention-related services, including salaries for prevention workers, family support, child mentoring, counselling and home management services, meant to reduce the need to place children in care.[41] At the same time, annual maintenance under the EPFA is based on costs from the previous year—agencies are expected to absorb unpredicted cost increases by reallocating monies from prevention and operating budgets.[42]

While the EPFA increases operations funding, Auditor General Reports from 2008 and 2011 concluded that it does not actually address the inequities found in Directive 20-1.[43] The 2008 Report discusses the federal government's awareness of the funding shortfalls over time, confirms the inequities of Directive 20-1, and criticizes INAC's failure to implement the recommendations to address comparability of services and support development of culturally appropriate services.[44] The 2011 report finds that INAC has not addressed comparability of services, concluding that there are serious structural problems in the program. Change, according to the Report, requires "clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution

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36 Ibid., para 168.
37 Ibid., para 159.
38 Cindy Blackstock, "Residential Schools: Did They Really Close or Just Morph into Child Welfare?" *Indigenous Law Journal* 6, no. 1 (2007): 71–78, para 8.
39 Clarke, para 4.
40 *FNCFCS v Canada 2016,* paras 136 and 73, respectively. Provinces that moved to the EFPS, in response to INAC invitations, are: Alberta (2007), Saskatchewan (2007), Nova Scotia (2008), Quebec (2009), PEI (2009), and Manitoba (2010).
41 Ibid., paras 137–141. Annual adjustments in the EPFA are based on a population formula similar to that used in Directive 20-1.
42 Ibid., paras 146–147.
43 Ibid., paras 188, 207.
44 Ibid., para 187.

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agreements, and organizations that support service delivery by First Nations"[45] and can only come about through collaboration with First Nations and provinces.[46]

Despite its acknowledgment of these problems, Canada took a very adversarial stance on the human rights complaint, beginning with a preliminary motion to dismiss it. The Tribunal granted the motion, explaining that, as there was no similarly situated group with which to compare First Nations child welfare agencies, the *Canadian Human Rights Act*, which stated that it was a discriminatory practice "to differentiate adversely… on a prohibited ground" did not apply.[47] The complainants appealed to the Federal Court Trial Division (FCTD), which found the Tribunal decision "substantively unreasonable" in its inconsistency with the overall purpose of the Act, previous human rights jurisprudence, Canada's international obligations, and equality jurisprudence. The court also found procedural unfairness in that the Tribunal relied on evidence outside of the record to decide the motion. Despite this forceful decision, Canada appealed to the Federal Court of Appeal, which quickly dismissed the appeal, upholding the FCTD findings below.[48]

The hearing into the merits of the complaint began in February 2013. The federal government made repetitive requests for delays[49] and failed to disclose thousands of pages of documents, earning comments from the Tribunal that its conduct was "far from irreproachable" and "causing prejudice to the opposite parties."[50] Further, the Tribunal found that a special assistant to Minister of INAC had retaliated against the Executive Director of FNCFCS for filing the complaint, in contravention of the *Act*.[51]

The Tribunal's 2016 ruling is lengthy and complex. Details include interpretation of terms such as "services" and their relation to funding; the history of First Nations child welfare in Canada; summaries of several government reports, including Standing Committee on Public Accounts Reports; testimony from a Residential School Survivor, a District Manager of INAC's Social Policy and Programs Branch, three Regional Program Managers, a Branch Senior Policy Analyst and a Senior Policy Manager, several expert witnesses, the Executive Director of a First Nations Child and Family Services Agency, and the Executive Director of FNCFCS; and analyses of thousands of documents. The Tribunal expected that its order to implement Jordan's Principle fully would be straightforward, but, even with the extensive knowledge surrounding the problems and solutions already

45 Ibid., para 210, quoting Auditor General's Status Report 2011, 5–6.
46 Ibid.
47 *Canadian Human Rights Act*, RSC 1985, c H-6, s 5(b).
48 *First Nations Child and Family Caring Society of Canada v Canada (A-G)*, 2013 FCA 75.
49 October 5, 2012, Summary of the case management meeting held on September 26, 2012, October 5, 2012 https://fncaringsociety.com/sites/default/files/fnwitness/2012-10-05%20-%20September%2026%202012%20%20CMCC%20summary%20letter.pdf, and February 1, 2013, Canada proposes cancelling hearing dates for week of February 25, 2013 https://fncaringsociety.com/sites/default/files/Canada%20proposes%20cancelling%20hearing%20dates_Feb%202013.pdf.
50 *First Nations Child and Family Caring Society v INAC*, 2013 CHRT 16 (July 3, 2013), paras 53, 56.
51 Retaliation was found in the form of denying Dr. Cindy Blackstock entry to a meeting between the Chiefs of Ontario and a special assistant to the Minister. *FNCFCS v INAC*, 2015 CHRT 14 (June 5, 2015), paras 48–60, 120. https://fncaringsociety.com/sites/default/files/2015%20CHRT%2014.pdf. See also Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare," *McGill Law Journal* 62, no. 2 (2016): 285–328, Section VII.

proposed, implementation of the orders to reform funding formulae was expected to take time. Thus the Panel requested further input from the parties on implementation and retained jurisdiction.[52]

Since its decision in 2016, the Tribunal has issued ten compliance orders against INAC.[53] The early compliance orders note where Canada has made improvements, emphasize that immediate relief is necessary while longer term reforms are developed,[54] require that Canada implement a broad version of Jordan's Principle in line with the decisions,[55] and direct Canada to report its progress transparently and in detail.[56] In June 2017, Canada applied for judicial review of the third order, arguing that the Tribunal's directions to implement Jordan's Principle exceeded its jurisdiction and were beyond the scope of its original decision.[57] In November 2017, the Tribunal issued an amended order on Jordan's Principle, based on an agreement between Canada and the FNCFCS emphasizing that the implementation of Jordan's Principle meant that *administrative* case conferencing was not to precede provision of service, while *clinical* case conferencing to determine necessary and appropriate services could precede service.[58] Several more compliance orders followed in 2018 and 2019, including an order to Canada to discuss a compensation scheme with the FNCFCS and the AFN in September 2019. The Attorney General applied for judicial review, and their motion for a stay of the Tribunal's order while the judicial review proceeded was dismissed at the end of November.[59] An order providing guidance on eligibility criteria for compensation for First Nations children and families was issued in April 2020.[60] The most recent compliance order requires Canada to apply Jordan's Principle to First Nations children recognized by their communities as members, whether they have Indian status or not, as well as to First Nations children who become eligible for Indian status through the removal of remaining sex inequality in the registration provisions.[61]

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52 *FNCFCS v Canada 2016*, paras 481, 483 and 494.

53 *FNCFCS v Canada* 2016 CHRT 10 (April 26, 2016) [2016 CHRT 10]; *FNCFCS v Canada* 2016 CHRT 16 (September 14, 2016) [2016 CHRT 16]; *FNCFCS v Canada* 2017 CHRT 14 (May 26, 2017) [2017 CHRT 14].

54 2016 CHRT 10, para 21; 2016 CHRT 16, para 160; 2017 CHRT 14, paras 32–3.

55 2016 CHRT 10, para 33; 2016 CHRT 16, paras 118–9; 2017 CHRT 14, para 160. The Jordan's Principle Working Group reviewed documents, finding "…that since Bill 296 was passed, the internal legislative functions of the government have narrowed the definition to such an extent that the majority of applicants have been excluded." See Zahide Alaca, Christina Anglin, Krystal Jyl Thomas, and Adje van den Sande, *Reconciliation and Equity Movements for First Nations Children and Families* (Ottawa: First Nations Child and Family Caring Society, 2015), 6, https://books.scholarsportal.info/en/read?id=/ebooks/ebooks0/gibson_cppc/2016-01-25/1/247983.

56 2016 CHRT 10, paras 22–24; 2016 CHRT 16, para 160; 2017 CHRT 14, para 131 and 135 (4).

57 See *Canada v FNCFCS*, Notice of Application for Judicial Review, Federal Court, File T-19-817, June 23, 2017, https://fncaringsociety.com/sites/default/files/Notice%20of%20Application%20for%20Judicial%20Review%20-%20June%2023%202017.pdf.

58 *FNCFCS v Canada* 2017 CHRT 35 (November 2, 2017).

59 *Canada v FNCFCS*, 2019 FC 1529 (November 29, 2019).

60 *FNCFCS v Canada* 2020 CHRT 7 (April 20, 2020).

61 *FNCFCS v Canada* 2020 CHRT 20 (July 17, 2020). Some amendments to the *Indian Act* to remove sex inequality in registration are not yet in force – *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* (SC 2017, c 25).

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I Am A Witness Web Campaign

The FNCFCS website hosts campaigns related to First Nations' children's rights, as well as resources for First Nations child and family services agencies and workers. Each of the FNCFCS campaigns is inclusively aimed at children and youth as well as adults—Cindy Blackstock has stated that children are "experts in love and fairness" and recognize injustice when they see it, and she has emphasized the ability of children to make a difference.[62]

As there was little media and public attention given to the human rights complaint, the I Am A Witness campaign was created in 2008 to raise public awareness and provide access to updates and materials about the case.[63] One of its goals was to encourage public attendance at the hearings. The campaign was based on the idea that Canadians were "fundamentally good people and if they knew about the gravity of the discrimination they would act out against it" and that children needed to be involved in developmentally appropriate ways that "encouraged critical thinking and peaceful change actions."[64] Organizers note that although the campaign started slowly, its approach was eventually successful. Once a group of high school students began attending tribunal hearings in 2010, and sharing their reflections on the hearings on YouTube and with friends, awareness among students and teachers grew.[65] This resulted in increased engagement at the hearings and with the case, culminating in hundreds of children participating in a celebration of the tribunal's 2016 ruling. A survey of registered participants in all FNCFCS campaigns was conducted in March 2015, focusing on how people learned about and participated in the campaigns, and on campaign impacts. Although response rates were low, this survey found that about three-quarters of participants were non-Indigenous, about three-quarters were women and almost half were between the ages of thirty-four and fifty-nine.[66] Focus groups with Ottawa area youth were also conducted. Teachers, colleagues, and community organizations were most frequently cited as the ways in which participants had learned about the campaigns, reflecting, in some ways, the communities that organizers noticed attending hearings.

The focus on children bearing the brunt of discrimination, and on all children's rights to be informed about and involved in matters that affect them significantly shapes the I Am A Witness campaign.[67] The website includes age-appropriate information sheets, teacher guides and resources aimed at children and youth, and projects designed for classrooms and community groups. The website helps create a

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62 See Andrée Cazabon, "I Am A Witness – short film" (approx. 2013) https://www.youtube.com/watch?v=3lCktsccpeY.

63 Jennifer King, Jocelyn Wattam, and Cindy Blackstock, "Reconciliation: The Kids are Here! Child Participation and the Canadian Human Rights Tribunal on First Nations Child Welfare," *Canadian Journal of Children's Rights* 3, no. 1 (2016): 32–45, 34.

64 Ibid., 34.

65 Ibid., 35.

66 Zahide et al., 10–11.

67 King, Wattam, and Blackstock, 36. The *United Nations Convention on the Rights of the Child*, November 20 1989, Article 12, includes rights for children to be informed and heard in any judicial proceeding affecting them.

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national campaign around the tribunal and court hearings occurring in a specific geographic location, and thus I include a detailed description.

A soft teddy bear called Spirit Bear appears on the FNCFCS homepage and the I Am A Witness homepage, providing a specifically Indigenous model to witnessing. Spirit Bear is aimed at children and embraced by the adults involved in the case.

> A member of the Carrier Sekani Tribal Council, Spirit Bear represents the 165,000 First Nations children impacted by the First Nations child welfare case at the Canadian Human Rights Tribunal, as well as the thousands of other children who have committed to learning about the case and have taken part in peaceful and respectful actions in support of reconciliation and equity.
>
> Spirit Bear joined the Caring Society team in 2008 and immediately committed himself to witnessing all of the Tribunal hearings.[68]

Spirit Bear has attended all the hearings since 2008, and announces court and tribunal hearing dates as they arise. The presence of Spirit Bear is a reminder of the reasons why the FNCFCS does this work—"for the kids."[69]

The I Am A Witness page is accessible from the FNCFCS homepage using the "7 Free Ways to Make a Difference" link under "What You Can Do," along with campaigns for Jordan's Principle and Shannen's Dream, which focuses on equitable education in First Nations communities. Clicking on the I Am A Witness icon leads to the site and its resources. While webpage design has changed over time, the campaign retains its eye-shaped icon, evoking a cathode-ray television screen (Figure 1).

Visitors are invited "to learn about the case on First Nations child welfare and Jordan's Principle and to decide for themselves whether or not they think there is discrimination against First Nations children and youth"[70] by following a link to the "Tribunal Timelines and Documents" and to information sheets on models for First Nations child welfare delivery and funding changes to First Nations child welfare programs since the Tribunal decision. Next, there is a simple statement to the effect that, in 2016, the Tribunal found that Canada discriminates against First Nations children in its provision of child welfare services, and the site then lists "what you can do" including "read[ing] about the ruling to find out what it means," writing to the Prime Minister and MPs, and following and sharing news on the case through social media. Visitors to the webpage are asked to sign up, advised how to follow the case through the webpages, and, while hearings were proceeding, were invited to attend hearings in Ottawa or watch the live broadcasts on APTN.

A twenty-five-minute video entitled "It Takes all of us to Enforce the Law" updates viewers on the decision and compliance. Linked sections entitled "Background" and "Timeline & Documents" explain what led to the human rights complaint, providing users with various opportunities to get into the details of the

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68 "About Spirit Bear," https://fncaringsociety.com/about-spirit-bear (accessed January 2020).
69 Caring Society, pers. comm., October 2017.
70 "I Am A Witness," https://fncaringsociety.com/i-am-witness (last accessed September 2020). Until 2018, this invited "organizations and people of all ages to follow and learn about the case in person or online and to decide for themselves if First Nations children are being treated fairly."

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Figure 1 I am a witness tag and logo. Image courtesy of First Nations Child & Family Caring Society of Canada.

case or to jump directly to the tribunal decisions. Explanations and further evidence are provided under "Why is this case important?" and "About being a witness" in the Background section.

The timeline of the human rights case is where the campaign makes the legal process and materials accessible to users: "the issue—fairness for First Nations children—is not complicated, but the legal process *is* complicated."[71] The timeline organizes tribunal decisions, submissions, affidavits and reports from sources such as the Auditor General of Canada chronologically by month and year. This detailed and organized information provides the evidence on which a visitor could make a decision about whether Canada is discriminating against First Nations children. Simultaneously, the visual chronology and sheer amount of information reflects the complexity of the legal process of the complaint and compliance issues.

Under "About being a witness," the webpage answers the question, "What does it mean to be a witness?" with the following: "By being a witness you are making a commitment to follow the case by either coming to watch the tribunal in person or by following it in your local media." It reiterates the idea of witnesses making their own decisions: "As a caring Canadian, we invite you to follow this historic case and then decide for yourself whether or not you feel the federal government is treating First Nations children fairly today."[72]

Theories of Witnessing

Ideas of "witnessing" circulate in various ways, through Indigenous oral traditions, legal and religious testimony, and communication and media theory. Here, I explore how "witnessing" circulates in these various approaches before analyzing the ways in which the I Am A Witness campaign evokes these theories.

What is a witness? And what does a witness do?

Indigenous practices of witnessing are generally for the purposes of keeping, caring for, and sharing the history of important events through time. Witnesses are invited, as honoured and respected guests, to validate and legitimate the work that is undertaken or the event that occurs.[73] Details of witnessing vary among Indigenous peoples, and here, specific cultural perspectives are brought forward to illuminate this concept.

[71] Caring Society, pers. Comm., October, 2017.
[72] "About Being a Witness," https://fncaringsociety.com/i-am-witness-about-being-witness, (last accessed September 2020).
[73] TRC Summary, ff 32, page 24. I am responsible for any misinterpretations of works cited here.

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John Borrows explains that among Gitxsan peoples, witnesses play a significant role in governance through House Feasts, wherein

> chiefs pass on important histories, songs, crests, lands, ranks and property from one generation to the next. The transfer of these legal, political, social and economic entitlements is performed and witnessed through Feasts. Feasts substantiate the territories' relationships. A hosting House serves food, distributes gifts, announces the House's successors to the names of deceased chiefs, describes the territory, raises totem poles, and tells the oral history of the House. Chiefs from other Houses witness the actions of the Feast, and at the end of the proceedings, they validate the decisions and declarations of the Host House.[74]

Borrows expresses a direct connection between the role of witnesses and the maintenance of Gitxsan legal orders. The connection between witnessing, governance, and the *bah'lats* (formally expressed through the Feasts) is similar to other north-west coast Indigenous nations, including the Carrier.[75] Witnesses are expected to remember what happened at the Feasts and may be called upon in future to verify events.[76]

Dylan Robinson explains that the Stó:lō concept of listening, "xwélalà:m," is understood more fully as "witness attentiveness," which is expected in longhouse work: "In xwélalà:m, witnesses are asked to document the knowledge and history being shared in the equivalent amount of detail to a book, and through the detail of feeling beyond fact."[77] Robinson connects witnessing to an intentional listening that "does not isolate the ear."[78] This relationship between feeling and listening, Robinson explains, is also found in Gitxsan songs of law and history that connect people to the land—James Morrison (Txaaxwok) testified during the *Delgamuukw* trial that it is the feeling arising through the song that allows a person to understand that it is law.[79]

At honouring feasts held by Coast Salish peoples, specific individuals are chosen and called to witness the work of the feast. Witnesses have a "responsibility to hold the memory and retell the activities of the event."[80] This is the way in which "a public accounting of the work being done will live on in the oral history of the community."[81] Robina Thomas explains that, at her own naming ceremony, people were seated in the Big House in community groups, and one person from each group was selected to act as a witness: "Witnessing is a huge responsibility because you are asked to pay attention to all the details of the evening (what the name was,

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74 John Borrows, 2002, as cited by TRC Summary, 72.
75 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 95, 96.
76 Ibid., 96.
77 Dylan Robinson, *Hungry Listening: Resonant Theory for Indigenous Sound Studies* (Minneapolis: University of Minnesota Press, 2020), 52.
78 Ibid., 72.
79 Val Napoleon, "Ayook: Gitskan Legal Order, Law, and Legal Theory" (PhD diss, University of Victoria, 2001).
80 Maggie Kovachs et al., "Witnessing Wild Woman: Resistance and Resilience in Aboriginal Child Welfare," in *People, Politics and Child Welfare in British Columbia,* ed. Leslie T. Foster and Brian Wharf (Vancouver: UBC Press, 2011), 97–116, 98.
81 Ibid.

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where it originated, and the protocol that was followed to ensure that I had the right to use this name, as well as other details)…. This way, the information is shared throughout Coast Salish territory."[82] Acting as a witness at such an event means that a person becomes a knowledge source: "If there were concerns or questions about what took place, what my name was, or where it was from, we could ask any of the witnesses. They will know this information because it was their responsibility to pay attention to all the details."[83] The connections between listening, learning and witnessing at community events in Musqueam territory is explained by Jordan Wilson: "Witnessing is one example in demonstrating how in our community (and in our neighbouring communities), knowledge, history, life narratives are dispersed amongst many."[84]

Coast Salish traditions of witnessing guided Thomas's approach to her research into survivors' experiences at Residential Schools. She had to allow the stories to remain those of the storytellers, while honouring and communicating them: "I was 'witness' to their stories, and as such was responsible for ensuring that the work done respected uy'skwuluwun—that is, that I had paid attention to their words, their lives…. This was the most important ethical responsibility that I had. I had to ensure that while I was storytelling, I simultaneously respected and honoured the storytellers."[85]

This shows how the concept of witnessing, the traditional oral approach to knowledge keeping and sharing, honours those stories, while engaging with (and challenging) a non-traditional way of organizing knowledge. As Thomas explains, witnessing, in remaining true to how the stories are told by the storytellers, is also an act of resistance to the way residential schools have been framed in Canadian history and resistance to the notion that such stories are insignificant to understanding residential schools.[86]

The Indian Residential School Truth and Reconciliation Commission of Canada (TRC) brought this concept of Aboriginal witnessing—a way to honour and offer respect to those telling their stories—to its hearings.[87] The Commission's work included encouraging survivors to come forward and listening to their stories, including individual testimonies about their experiences in residential schools. The telling of stories by survivors can be seen as an example of primary "witnessing"—witnessing that is closest to the event. The TRC invited honorary witnesses to engage in this listening process, to bear official witness to survivor testimonies. According to the TRC, "the act of witnessing comes with a great responsibility to remember all the details and be able to recount them accurately as the foundation of

[82] Robina Thomas, "Honouring the Oral Traditions of My Ancestors Through Storytelling," in *Research As Resistance: Critical, Indigenous and Anti-Oppressive Approaches,* ed. Leslie Brown and Susan Strega (Toronto: Canadian Scholars' Press, 2005), 237–254, 243–4. [Thomas, Honouring]

[83] Ibid., 244.

[84] Jordan Wilson, *c'əsnaʔəm, the city before the city*, Museum of Anthropology, Vancouver, BC, as cited in Robinson, 70.

[85] Thomas, Honouring, 249. *Uy'skwuluwun* means "a good mind and a good heart."

[86] Ibid., 241.

[87] Truth and Reconciliation Commission of Canada, "Schedule N of the Indian Residential Schools Settlement Agreement" (2015), https://wayback.archive-it.org/7494/20180827145941/http://www.trc.ca/websites/trcinstitution/index.php?p=7#one.

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oral histories."[88] The role of an honorary witness goes beyond the testimonial event: honorary witnesses "have pledged their commitment to the ongoing work of reconciliation between Aboriginal and non-Aboriginal peoples."[89] The TRC stated that the "truth of lived experiences" of residential schools, in direct testimony told by survivors and heard by witnesses, creates a "new oral history record."[90] The speaking and listening acts of witnessing are brought together. In reflecting the ongoing role of the witness, as someone who attended an important event, the TRC encourages all who attended National Events and community hearings to "see themselves as witnesses, with an obligation to find ways of making reconciliation a concrete reality in their own lives, communities, schools and workplaces."[91]

In the common law, a witness provides specific testimony—what the witness saw or experienced—for the purpose of a judge and jury to come to a decision about whether someone's action violated a law, and if so, what the consequences of that action should be. As decision-making is based in part on witness testimony, that testimony is expected to be truthful. Legal witnesses are expected to swear or affirm that they are telling the truth, and they are tested through cross-examination for their credibility. Here, 'truthful' is closely related to facticity and objectivity. It is the factual aspect of what the witness has to say—for example, what an eyewitness saw occur—that matters. The expectation of establishing objective facts from legal witnesses' testimony can be seen in judicial commentary that mechanical "witnesses," for example, photos or video recordings, are often seen as impartial and factual: "The video camera … is never subject to stress…. It continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness."[92] Importantly, legal witnessing is clearly separated from judgment—witnesses testify, and the judge or jury determines their credibility and decides what happened. A witness's testimony, then, is "A privileged source of information for judicial decisions."[93] Witnesses are important for judges and juries to render justice in the common law.

Much discussion of witnessing in media theory has been built on analyses of relations between print and visual media, the liberation of the concentration camps at the end of World War II, and Holocaust survivor testimony.[94] Recent scholarship in media and communication theory makes efforts to separate and understand "witnessing" and "bearing witness" framing much of this discussion in the context of reporting human rights violations and atrocities around the world. Witnessing is linked in journalistic norms to reporting on events at which journalists are present, from where those events occur, through seeing or hearing events directly, and then reporting what was seen to the public in a more-or-less objective way. As technology makes video-recording and internet broadcast more accessible, the separation between journalists, conceived as on-the-ground eye-witnesses, and the watching

88 TRC Summary, 24.
89 Ibid., 12.
90 Ibid.
91 Ibid.
92 *R v Nikolovski*, [1996] 3 SCR 1197 [QL], para 21 per Cory J.
93 Peters, 708.
94 Tait, 1225-26.

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public, who can see directly what is occurring even though they are not present at the event, blurs, making us all "media witnesses." This is a complex role, where the public learns about human rights atrocities and feels they should be stopped, but often feels helpless to act in response to them, or even complicit in their occurrence.[95]

"Bearing witness" is where response comes in. Relying on Zelizer's work, Tait explains that the role of modern news media has been shaped by the exposure of the Holocaust at the end of World War II.[96] As journalists witnessed the liberation of the concentration camps, the role of photo journalism, to show what had really happened under Nazism in the camps, became imperative. While there were and are concerns that such photographs are voyeuristic, here, they were part of the proof of the horrors of the Holocaust, replacing journalists' inability to find the words to express what they had seen. Attaching moral and political purpose to viewing such representations of suffering reduces the risks of detaching it from ethical response. Where atrocities are portrayed through visual means, without a speaker or a context to support understanding such visuals, viewers do not learn anything useful about others' suffering: "without political mobilization, witnesses are left to 'feel' with little to no direction for how to act."[97] More importantly, survivors "bore witness"—primary witness—to these events, feeling compelled to give testimony and tell their stories, translating their suffering into words so as to respond to their own trauma and to ensure that those stories were known, in hopes that this would never occur again.[98]

For Tait, bearing witness specifically requires two parties, the witness and the audience, and the differences between witnessing and bearing witness centre on the roles and ability of each to respond to what is told and what is heard. Bearing witness is not just stating the facts—it includes "an appeal to the audience to share the responsibility for an event, and is thus a site for the *transmission of moral obligation*."[99] Andén-Papadopolous explains that contemporary discussions of who is a witness "turn[] on the imperative of speaking out against unjust power."[100] When survivors of human rights atrocities and violations speak of their experiences, they are bearing witness to something that cannot be seen—"the embodied knowledge of suffering," something that is almost beyond representation.[101] For survivors, those who were there, to bear witness is to risk the pain of memory, that one will not be heard, and that one's story may be co-opted and misused. Thus, those who receive this witnessing must be capable of "response-ability"—empathetic listening, followed by a response that verifies the listening.[102] There are many ways to verify that listening—bearing the story of suffering forward to others and calling for a public accounting.

95 John Ellis, as cited in Tait, 1223.
96 Tait, 1226.
97 Rentschler, 300.
98 Tait, 1227.
99 Ibid.
100 Andén-Papadopolous, 757.
101 Tait, 1227.
102 Ibid.

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Becoming A Witness for First Nations Children

The I Am A Witness campaign echoes these theories of witnessing in its presentation of the tribunal decision to the website visitor as well as in its positioning of that visitor. The webpage's invitation "to learn about the case" and "decide for themselves … whether or not they think there is discrimination against First Nations children and youth" evokes objectivity in providing information to support learning and personal decision-making. The campaign emphasizes facticity and objectivity in the information it provides for learning—extensive legal documents used in the hearings, factums from all parties, notices of motions, rulings on motions and substantive decisions, as well as reports from "independent and credible" sources. The website brings potential witnesses right into the hearing, by inviting participants to "witness" the entire proceeding, in person or through the APTN televised broadcast of the hearings, or, later, to learn about the case. Here, the campaign facilitates public access to the tribunal hearing—through attendance or access to documents or both. This aspect of the campaign resonates to some extent with the open court principle,[103] in that the public is encouraged to understand what is happening at the tribunal hearing and is presumed to be interested in justice. Witnesses, however, are not specifically asked to be justice "watchdogs" to these proceedings—there is no suggestion that the tribunal is biased or partial.

The website's invitation, and its focused eye-shaped icon, resonates with ideas of journalistic eye-witnessing, bringing the event "objectively" to the public, letting the public form an opinion of events reported. Here, the website reasonably assumes that the history and impacts of underfunding of First Nations child welfare on children are new knowledge for most visitors. Significantly, this story is, for the most part, neither told thorough personal testimonies, nor through historical photographs, differentiating it from the TRC hearings, at which residential school survivors spoke directly and through journalistic on-the-ground reporting. It is a story evidenced by policy manuals, provincial–federal agreements, statistics, accounting, comparisons, and records of fruitless meetings and vague promises.

There is, however, one exception to this. Cindy Blackstock told the story of Jordan River Anderson, a very ill little boy, who was not permitted to leave hospital and pass away at home with his family, due to a federal–provincial dispute over who would pay the costs.[104] This story exemplifies how the dreadful indifference to policy impacts deeply hurt an already suffering family. It is this story that gave rise to Jordan's Principle, adopted by Parliament in 2007 but not put into practice until after the tribunal's compliance decision in late 2017.

While Jordan's story, the presence of Spirit Bear and the campaign itself emphasize that the human rights claim is "all about the kids," for the most part, the story at the hearing and on the website is *not* told, as many human rights violations are, through direct survivor testimony or graphic photographs and

[103] Dana Adams, "Access denied? Inconsistent Jurisprudence on the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases," *Alberta Law Review* 49 (2011): 177–201, para 1.

[104] Cindy Blackstock refers to Jordan while addressing the tribunal on March 22, 2017. https://fncaringsociety.com/events/waiting4ucanada-10th-anniversary-first-nations-child-welfare-case.

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video. The underfunding is systemic[105] and bureaucratic—slow, wasteful, and stifling. Unearthing and understanding the evidence for the tribunal decision and the need for its repetitive compliance orders requires perseverance almost as much as empathy.

Thus, potential witnesses must also develop some understanding of law and legal processes, and the dry formulations of government programs, in order to understand the discrimination experienced by First Nations children receiving child welfare services. For the most part, the website presents the legal documents without much commentary—occasionally a "backgrounder," a specific report, press-release view of a ruling, or an age-appropriate information sheet on a specific ruling is interspersed in the timeline. The news sections are more explanatory and persuasive, and there are educational resources, including reports, video interviews, and news clips. The sheer length of the timeline sends its own message—justice delayed is clearly justice denied to the many children still experiencing the differential impacts of the federal First Nations child welfare programs while they grow up. Since the Tribunal's original ruling in January 2016 that the program discriminates against First Nations children, the issues have become more legalistic and difficult to follow. The 2018 video, "It Takes All of Us to Enforce the Law" is particularly helpful—it is persuasive, as it is told from the perspective of lawyers acting for the FNCFCS and its title is expressly inclusive of potential witnesses and their actions. This video makes the documentation more accessible, as viewers understand them through the personal experiences of those who worked with the legal documents, factums, arguments, and evidence posted on the timeline. The engagement of the lawyers in the core of the issue and their explanation of how the hearings wend their way through their personal milestones re-centres the purpose of the hearings in ending discrimination against Indigenous children and prevents that purpose from being lost in the legalities of compliance orders.

That video echoes the earlier invitation to attend the hearings which brought potential witnesses closest to their "reality"—the legally authoritative event that affects the future of First Nations children and child welfare, creating what Peters would argue are the strongest conditions for a moral connection to the event.[106] However, given the way the decisive event of the tribunal ruling spills over into the time lapse of compliance orders and judicial reviews, as well as the step-by-step changes (some clear improvements, some not so much) to the federal child welfare program, I suggest that the sharing of the legal documents themselves also provides an avenue to bring potential witnesses into the "reality" of these legal events. The ways in which these documents embody the expression of legal power provide a type of closeness to the events not available otherwise. Thus, the website contributes

[105] The AG argued that the tribunal's order for individual compensation was not appropriate because the complaint was framed as systemic discrimination. The Tribunal stated that the claim was always "about the kids," included individual compensation, and that, given its evidentiary rules, "it [was] unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it." *FNCFCS v Canada*, 2019 CHRT 39, para 144.

[106] Peters, 720–21.

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to demystifying human rights law and procedures by highlighting the availability of the legal materials, while providing a summary and perspective to increase their accessibility. In its encouragement to "learn about" this case, the campaign suggests that such learning is possible for everyone, moving the work of the tribunal outside the realm of legal expertise. The early participation of teachers and students demonstrates that legal education, often seen as difficult or complex, need not be struggled through individually, and can instead be a community undertaking. Making such information available also provides a bridge—from the rarefied spaces of hearing rooms, the publicly lesser-known world of First Nations child welfare, and the complexities of government funding to individual learning, community engagement, and action that makes a difference. In other words, a space for caring is created in the midst of legality.

This factual and objective framing and the presentation of "evidence" of the arguments and tribunal proceedings require engagement with the materials of Canada's legal system, transfers participant witnesses into the position of judges or a jury, beyond their usual role in the common law. Typically, the exercises of judgment and witnessing are quite separate in legal proceedings. Here, however, the objective legal materials supplied to the potential witness help people "decide for themselves" whether or not First Nations children are being discriminated against.

Simultaneously with the request for witnesses to decide or judge, the site requests action. The campaign positions "witnesses" as more than objective observers, and more than impartial decision-makers, thus shifting "witnessing" far beyond a common law perspective. The website reaches out to "caring Canadians," addressing a moral community that has abiding concerns about treating First Nations children "fairly." Shaped as "caring," the community is recognized as feeling—and being prepared to take on a "transmission of moral obligations" that will occur once the community becomes familiar with the facts of the case and sees for itself the unfairness, to the point of racial discrimination, with which the government has treated First Nations children. The emphasis on caring clarifies the role of witnesses—their feelings of care are directed towards understanding the conditions that do harm to First Nations children through systemic underfunding and how they might participate in changing those conditions. This can be seen as a type of political mobilization in response to feelings—it directs witnesses to find ways to channel the feelings that arise on hearing about discrimination against First Nations children towards seeking accountability and change.[107] Further, it reflects the significance of feeling in Indigenous practices of witnessing, creating a record of events which "includes the feeling of that history's telling."[108]

In becoming witnesses, participants are asked to make a commitment to follow the case—simply to recognize and remember it, so it does not disappear. The campaign has a twofold purpose: to ask children and youth to make informed decisions about whether or not the government is discriminating, and to encourage

[107] Rentschler, 300.
[108] Robinson, 52.

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them to become witnesses able to act on injustice, through participating, for example, in Have a Heart Day and other events connected to the campaign.[109] This is similar to the request of the TRC that those hearing the stories of residential school survivors become active "witnesses" in working towards reconciliation.[110]

The I Am A Witness campaign was consciously built on Indigenous cultural approaches to witnessing—and in its descriptions of what witnesses do, it quietly offers an education in how to witness and work towards ending discrimination from an Indigenous perspective, while engaging closely with the materials of Western law. Reflecting Indigenous theories of witnessing, the campaign does not separate out bearing witness and witnessing. While there are different roles for those who speak and those who hear, every witness is seen as committed, as responsible to remember and validate the work of the hearings. The tribunal decisions and process are not a traditional ceremony or a naming. However, those who do speak—through the reports submitted as evidence, through affidavits and cross-examinations, are bearing witness for First Nations children to the tribunal. And those who listen and observe are witnessing the impacts of systems, and in some cases, of children's experiences, made available to the tribunal for it to decide. Thus, these legal events, while themselves not specifically or consciously conducted according to or reflecting Indigenous processes, are a place where important work is being done that affects the present and future of First Nations children and, as such, requires witnesses to pay attention to and remember the work. Significantly, then, the presence of committed witnesses at these events, and their subsequent actions, both "shows the kids that they are not alone,"[111] and emphasizes that the legal arena is not only for legal experts—this role is something that reaches far beyond the hearings. The information is offered to prevent passivity. Every witness can speak of what they read, see, and hear to validate the work.

As well as providing space for caring amidst legality, the campaign also provides space for action. The website provides a range of actions and resources, common to many social justice campaigns—such as raising awareness, signing up to the campaign, donating and buying buttons, sharing information and events on social media, writing letters—that facilitate the development of a public voice on this issue. These actions both embody the commitment to validate and remember that is asked of witnesses in terms of Indigenous witnessing and provide avenues for the work towards reconciliation that the TRC calls for and the "response-ability" that Tait argues is key to understanding what is required to "bear witness."

The I Am A Witness campaign is grounded in legality—it is about a specific human rights complaint. It asks people to decide for themselves when considering the complaint: "respect[ing] the judicial process, while educating and involving the public."[112] Yet it does not leave the complaint in a separate sphere of Western law—rather it harnesses legal touchstones of objectivity and observation and connects them to an imperative for action, drawing on the imperatives of "witnessing" in

[109] Caring Society, pers. comm., October 2017.
[110] TRC Summary, 24.
[111] Caring Society, pers. comm., October 2017.
[112] Blackstock, Complainant, 12 (of 29).

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Indigenous and media theory formulations of that term. This use of legality is not simply another form or sphere of familiar advocacy—neither traditional activism nor "clicktivism"—rather it provides access to law, and some legal education, openly and deliberately implicating those who learn about this injustice in taking action to end it. This approach to educating about the law in this situation reflects important elements of Indigenous pedagogy: that learning involves not only a mental component, but also the body, feelings, and heart. Connecting all of these aspects of learning will lead to the active responsibility of becoming a witness.[113]

The site's persuasive turn currently begins earlier than it originally did. Following the explanation of the ruling, the webpage explains: "The Tribunal ruling was a victory not only for First Nations kids, but for all people in Canada who believe in love and fairness. But kids still need your help—here's what you can do." Further persuasion is found under "About Being a Witness": "It is when caring citizens do not engage that the most horrible human rights abuses can happen. As a witness you are sending a message that you care about all children being treated fairly and equitably by governments."

Conclusion

Persistent underfunding of First Nations child welfare agencies is indeed a violation of the Canadian Human Rights Act, and it facilitates the ongoing violence of colonialism in Canada. The I Am A Witness campaign calls witnesses in ways that will support their ability to honour what they have learned from the campaign, drawing on various aspects of Indigenous witnessing, legal and journalistic objective approaches, and the moral obligation aspect of witnessing. Harnessing the pull of the term "witness" as it circulates through various theoretical perspectives, the campaign aims to make visible the lesser-known history of First Nations child and family services agencies, the truth of how policy, through funding decisions, delayed response to recognized problems, adversarial legal postures, and avoiding legal duties, continues to exclude and harm First Nations children and families. Significantly, the website posits hope, both in showing the complainants' dogged legal pressure for Canada to comply with the tribunal's rulings and in its encouragement for witnesses to connect law and legality with fairness and justice. In using the term "witness" while making this visible, the campaign encourages us all to validate and legitimate the work of the tribunal and become "response-able" for change.

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[113] Caring Society, pers. comm., October 2017.

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