Reconciliation: The kids are here!
Child participation and the Canadian Human Rights Tribunal on
First Nations child welfare

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Abstract

Consistent with the United Nations Convention on the Rights of the Child, this paper describes children's involvement in a historic human rights case that found the government of Canada guilty of racially discriminating against 163,000 First Nations children. Despite Canada's efforts to discourage and bar young people from participating, children and youth were among the first and most engaged followers of the case, debunking the myth that children "can't" or "shouldn't" participate in legal matters. Children and youth who participate in social change activities benefit greatly from the experience, as do their communities. The participation of children and youth in the First Nations child welfare case demonstrates that young people are truly leaders in reconciliation and social justice; they teach us about how change really happens. Adults have a responsibility to facilitate exciting and creative ways to involve children in the social and legal processes that impact their lives.

Key words: First Nations, participation, legal process, reconciliation

Introduction

As Indigenous and non-Indigenous child rights educators and researchers, we have no doubt that children are experts in love and fairness. Despite their innate expertise on matters of right and wrong, we have observed that children's capacity to understand, participate in and contribute to "legal" issues is often underestimated, and that there is reticence on the part of many adults to allow children to participate in the legal arena. The United Nations *Convention on the Rights of the Child* (UNCRC), to which Canada is party, guarantees the right of children to be heard in judicial and administrative proceedings that affect them—yet there remains a woeful lack of legislation and policy to ensure that the rights of children to participate are upheld in a meaningful way (Stein & Achmad, 2014). Consistent with the UNCRC, this paper describes children's involvement in a historic human rights case that found the government of Canada guilty of racially discriminating against 163,000 First Nations children. This paper chronicles the participation of children and youth in the case, demonstrating both their interest in and capacity for critical thought and engagement and debunking the myth that children "can't" or "shouldn't" participate in legal proceedings. We argue that professionals working with children, legal parties and adjudicators have a legal and proactive duty to accommodate children's participation in systemic child rights cases.

Background: The First Nations child welfare case

On February 14, 2016, hundreds of children gathered inside Canada's Parliament to celebrate a landmark ruling by the Canadian Human Rights Tribunal (Tribunal) for First Nations children. After nine years of legal proceedings, the Tribunal found the federal government's provision of child welfare services on reserve to be flawed and inequitable, resulting in adverse impacts for children and families (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2016). The Tribunal further ruled that Canada had failed to properly implement Jordan's Principle (www.jordansprinciple.ca), a child-first principle to ensure First Nations children can access public services on the same terms as other children (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2016). The complaint was filed in 2007 by the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations. The Canadian government spent millions of dollars trying, unsuccessfully, to get the case dismissed on legal technicalities before the matter was finally heard in 2013. Over the next year and a half, the Tribunal heard from 25 witnesses and reviewed over 500 documents, including many government documents confirming the inequalities in child welfare and related harms (Blackstock, 2015). Children and youth were among the first and most engaged followers of the case, despite Canada's objections to child participation in the hearings.

The First Nations child welfare complaint was filed as a last resort after the Canadian government (as represented by the Department of Indian and Northern Affairs Canada [INAC]) failed to correct a long-standing and well-documented shortfall in First Nations child welfare funding (Auditor General of Canada, 2008; Loxley, et al., 2005; MacDonald & Ladd, 2000). Studies commissioned by INAC showed that First Nations children were receiving about 70 cents on the dollar for child welfare services as compared to other children, despite their higher needs due to the multi-generational impacts of residential schools (Loxley et al., 2005; MacDonald & Ladd, 2000). The shortfall was particularly harsh in relation to the lack of culturally-based prevention services to support struggling families, resulting in First Nations children being 12 times more likely to be in foster care than other children (Sinha, Trocmé, Fallon, MacLaurin, Fast, Prokop, et al., 2011).

For the first two years following the filing of the complaint, media and public attention to the case was limited despite the importance of the complaint and its associated precedential value in addressing other inequitably funded public services on reserves. There were only a handful of people at the press conference announcing the case and the hearing rooms remained relatively empty as Canada made its first of eight attempts to get the case tossed out on legal technicalities (Blackstock, 2011). It was quickly apparent that public engagement would be needed to educate Canadians about the discriminations experienced by First Nations children and to raise the profile of the case.

The Caring Society's "I am a witness" campaign (www.fnwitness.ca) was launched in 2008 in response to lack of public awareness about the case and to ensure supporters across the country had access to timely updates and information submitted by all parties to the complaint. The campaign was founded on two beliefs: 1) that Canadians are fundamentally good people and if they knew about the gravity of the discrimination they would act out against it; 2) that children needed to be involved in ways that respected their developmental status and encouraged critical thinking and peaceful change actions (Blackstock, 2011). This free on-line campaign invites members of the public, groups and organizations to register to follow the case and decide for themselves if Canada is treating First Nations children fairly. The on-line registration component was successful, but few people responded to the Caring Society's repeated invitations to attend the hearings. The hearing rooms remained mostly empty for the first two years, except for a handful of First Nations supporters who would attend from time to time. The low attendance was disappointing, but also understandable as Canada's litigation strategy invoked spurious, and frankly boring, legal technicalities that detracted from the public interest elements of the case—namely, state discrimination against children.

“We want to help”: Children and youth lead the “I am a witness” campaign

Poor attendance at the hearings began to change in 2010, when a group of high school students from Elizabeth Wyn Wood Alternate school in Ottawa, Ontario, came to watch Caring Society Executive Director, Dr. Cindy Blackstock, testify at a hearing where Canada was trying to get the case dismissed by arguing that the *Canadian Human Rights Act* did not have jurisdiction to hear the complaint. One of the young men introduced himself and explained that the group was from an alternative school, meaning that “they get into trouble a lot.” He admitted that while sometimes the “trouble” was warranted, it was often the *system* that caused the problem. “No one ever wants to take on the system,” he said. “But you are, and we want to help.” The students attended two days of hearings, listening intently. They were encouraged by their teachers to record their reflections and experiences of the case, which they shared with the Caring Society for posting on the “I am a witness” website. The students’ reflections showed not only the capacity to understand the core of the arguments being made in the case, but to assess their creditability and merit. As described by Shannara:

I attended the hearings in the morning on both days. My overall perception is that Canada has no platform to stand on and there were contradictions. I noticed that Canada was just dragging out the topic. I'm left assuming that that Canada has no justification for trying to get out of its responsibilities. I want to say that when I first started the process of "being a witness", I only learned about one side of the story...the First Nations' children's side. After witnessing both days of the Tribunal hearings, I realize that there IS NO OTHER SIDE OF THE STORY. (Witness reflections, 2016)

This small group of youth were among the first to witness the case, and their impact was profound. The group arrived at the next set of hearings wearing custom-made “I am a witness” t-shirts, designed by one of their classmates. Their numbers grew as they spread the word and invited friends and others to accompany them to the hearings. They even made a video, posted on YouTube, explaining why people should witness the case and attend the hearings (First Nations Child & Family Caring Society, 2010). The participation of students from Elizabeth Wyn Wood Alternate School spurred the engagement of other local schools, as word spread through the education community. By 2012, there were so many children in attendance that the hearings had to be relocated to the Supreme Court of Canada courthouse and classes had to be booked in shifts. Students were fascinated by the chance to observe a legal case *about kids*, and teachers recognized the Tribunal hearings as an important opportunity to uphold the UNCRC and promote learning in the areas of human rights and civic engagement.

Children's right to information and participation in child rights cases

Adults in the legal arena have a responsibility to inform and engage children and youth in matters that affect them. The *Convention on the Rights of the Child* (1989) states that children have the right to information about matters that affect their lives and must be given the opportunity to be heard in judicial and administrative proceedings that affect them. Although the child welfare case affects the rights of thousands of First Nations children and families across Canada, the location of the Tribunal in Ottawa meant that relatively few people were able to witness the hearings first hand. Accessibility of information was thus a key issue. As time went on, more and more people began contacting the Caring Society to ask about the Tribunal proceedings and whether the hearings would be broadcast so that they could witness what was happening. The creation of "I am a witness" website allowed people across the country to follow the progress of the complaint, so long as they had the ability to read about it online. However, the hearings were still not accessible to many children and families across Canada whose lives were directly impacted by the case.

In 2009, the Aboriginal Peoples Television Network (APTN) requested permission to film the Tribunal proceedings, which would allow a broader audience to follow the case through a format more accessible to young people, elders and those in remote communities. The Attorney General of Canada (the federal government) was the only Party to object to the broadcasting, arguing that filming the proceedings might influence witness testimony (*Aboriginal Peoples Television Network v. Canada*, Respondent's Record, 2010). Although the Attorney General brought no evidence to support its claims, the Tribunal nonetheless banned broadcasting of the proceedings. APTN then applied to the Federal Court for a judicial review of the Tribunal's decision. The Caring Society intervened in support of APTN. Consistent with the UNCRC, the Caring Society argued that the children most affected by the child welfare case were often poor and unable to travel to view the proceedings in person and thus broadcasting was the only way to reasonably ensure their participation.

The Caring Society filed a number of affidavits from elders, First Nations leaders and First Nations child and family service agencies. In order to demonstrate the impact of the case on those most affected, Verna Cowley, a former First Nations youth in care, also swore an affidavit. As Verna Cowley (cited in *Aboriginal Peoples Television Network v. Canada*, Respondent's Record, 2010) explains:

From the day I entered child protection, the inadequate funding of the services provided to me affected every aspect of my life. The injustices I experienced while under child

welfare protection continue to affect me in a way that is impossible for me to convey. I believe that viewing the proceedings will help validate the feelings of injustice I have experienced all my life. It is important for me to know that my story and those of other First Nations children is being heard. I am hopeful that if our stories are heard, things will change for First Nations children. I believe there can be a brighter future for them. (p. 10)

In 2012, the Federal Court ruled in favour of APTN and the Caring Society. In his ruling allowing the Tribunal hearings to be broadcast, Federal Court Chief Justice Lebel specifically notes Verna's affidavit and found that

the interests of people living on reserve in observing the proceedings at issue are more direct than those of the general public in observing a criminal trial. The proceedings will decide whether large numbers of geographically dispersed people have experienced discrimination. The proceedings directly implicate the human rights of APTN's intended audience. (*Aboriginal Peoples Television Network v. Canada*, 2011, para. 19)

The ruling allowed APTN, and later the National Film Board of Canada and a web-broadcasting company, to film the hearings from 2012-2016, including proceedings at the Canadian Human Rights Tribunal, Federal Court and Federal Court of Appeal. In this way, children, youth and families across Canada could view the evidence, legal arguments and decisions.

Thankfully, Canadian courts were willing to observe the UNCRC and uphold children's rights when the government would not; however, children and their supporters should not have to fight to ensure that young people, especially Indigenous children living in remote areas, are included in legal proceedings that affect them. As per the *Convention on the Rights of the Child* (1989), professionals working with children, as well as legal parties and adjudicators, have a duty to make sure that children can participate actively in legal proceedings that impact their lives. As in the example given by Verna Cowley, when legal proceedings directly impact a young person's well-being, it is essential that they are given the opportunity to be informed and involved. The child welfare case affects the rights and lives of thousands of children across Canada. Children have the right to know what is happening, form their own opinions and take part in peaceful change actions.

Unfortunately, there remain many obstacles to child participation in the legal arena, including a lack of clarity about what child participation is and a lack of capacity to support it—as well as outright resistance to its implementation (Stein & Achmad, 2014). Our experience as child rights researchers and educators has been that children and young people are not often included in spaces traditionally reserved for adults, such as legal hearings. Indeed, the Caring Society witnessed several instances throughout the case in which children were deliberately excluded from the legal process. In addition to arguing against broadcasting the Tribunal

hearings, Canada also objected to allowing the Caring Society to include in its opening statement a short video by children, entitled "Letters to Canada" (First Nations Child & Family Caring Society, 2013), saying it was "inappropriate," but providing no evidence to support this claim. Despite many attempts to block children's participation in the hearings, children and youth became, and remain, key supporters and witnesses to the case.

Standing with kids: The child rights context

What does "child participation" mean in the context of child rights legal cases, like the First Nations child welfare case? Child participation can be understood as an ongoing process between children and adults, which includes making sure that children are informed, ensuring mutual respect and sharing outcomes (Stein & Achmad, 2014). As a signatory to the *Convention on the Rights of the Child* (1989), Canada has committed to support the right of children to learn about and become involved in issues that affect their lives. Children have the right to express their views freely, pursuant to Article 12 of the UNCRC, and must be given the opportunity to be heard in judicial and administrative proceedings that affect them. The child welfare case may be about the rights of First Nations children, but its outcome affects *all* children and youth. Non-Indigenous children who have attended the hearings have been deeply affected by learning that Canada discriminates against other children (see, *Respect and Equity Through Reconciliation*, 2014; *Witness reflections*, 2016). As they have told us: a Canada good for First Nations kids makes a better country for all children. Young people do not want to grow up in a Canada with racial discrimination against children.

Further, through its recent adoption of the United Nations *Declaration on the Rights of Indigenous Peoples* (2007),ⁱ Canada has committed to take effective and special measures to ensure that Indigenous peoples have the right, without discrimination, to improved economic and social conditions, with particular attention paid to the rights and special needs of vulnerable populations such as children and youth. The need to include Indigenous children in legal processes that impact their lives is especially important, given their higher needs due to a colonial history and the current economic and social conditions that challenge Indigenous communities. Canada is obligated to take special measures to ensure that Indigenous children have the right to actively participate in matters that affect their lives.

Adults have a responsibility not only to stand up *for* kids, but to stand *with* kids by providing the opportunity for children to voice their opinions and participate actively in issues that are important to them. Adults have the obligation to support children's capabilities to become involved as active citizens and to address the challenges that they face in this world—and adults need to actively find ways to fulfill this obligation (Hayward, 2012). Pursuant to UNCRC Article 12, it is incumbent on Tribunals, Courts and legal parties to accommodate

children to ensure their right to participate is respected (*United Nations Convention on the Rights of the Child*, 1989). Despite this obligation, Canada made no effort to include or engage children in the First Nations child welfare case, choosing instead to discourage or bar young people from participating. It should not be a rare occurrence for children to participate in important issues that affect their lives; governments need to be proactive in creating legislation and policy to uphold children's right to participate. Adults need to set the bar high to ensure that children are involved every time, in a meaningful way.

“It made me feel important”: The benefits of child participation

International instruments like the UNCRC seek to protect and uphold child participation not just because it is the “right” thing to do, but because of the social, emotional, developmental and societal benefits. Children and youth who participate in social change benefit greatly from the experience. Active child participation, ensuring children's involvement in issues that impact their lives and communities, contributes to healthy child development and nurtures an active and engaged citizenry (Bennett & Auger, 2013). Child participation encourages robust child development, improves outcomes for children and leads to increased social inclusion and good governance (Stein & Achmad, 2014); in other words, child participation benefits not only the child, but the communities around them. Summer, one of the youth from Elizabeth Wyn Wood Alternate School who attended the early days of the Tribunal in 2010, describes the impact of the experience by saying:

I went to an alternative school which is usually for—well in my case, school wasn't my forte—and something like this, something as important as this, Aboriginal studies and fighting for Aboriginal rights, grounded me. It made me feel important and it made me just want to just stay involved, which meant I had to stay in school and I had to be the best me I could be for the people who don't have the chance to be the best version of themselves. (Summer, 2016)

Teachers have noted similar growth and benefit in students who participate in child and human rights issues (Howell, 2016). The Caring Society works alongside a strong network of educators who recognize the power of engaging children as active citizens and are committed to providing opportunities for their students to learn, engage and to make up their own minds about matters that affect them. Lisa Howell (2016), an elementary teacher in Quebec whose students have been active in the “I am a Witness” campaign, writes:

All children have power, but this work of social justice and reconciliation brings it out in kids who never thought they had it. Kids who have been marginalized for so long are no longer on the sidelines but on the stages. Kids who have felt disengaged from our

classrooms are now eagerly coming to school. And why? Because they feel that they are making change. They know that they are learning truth . . . They feel that their reading and writing and speaking skills now have a true purpose and they want to use it to voice their opinion, speak their truth and be heard. This work helps them find out who they are, find out what it means to be Canadian, and find out that they can change this country.

The kids are here! From a human rights complaint to a child rights movement

Our experience of engaging young people in the child welfare complaint demonstrates clearly the interest and capacity of children and youth to participate in child rights legal cases. In 2012, at the urging of local students and educators, the Caring Society expanded the "I am a witness" campaign to include a child-led event called "Have a Heart Day." Timed to coincide with Valentine's Day, supporters were asked to write Valentine cards to elected officials in support of equity for First Nations children; namely, the right of First Nations kids to grow up safely in their family home, get a good education, be healthy and proud of who they are. Approximately 500 children, supported and accompanied by their parents and teachers, took to the steps of Parliament Hill on February 14, 2012, to read their letters. Consistent with the principles of meaningful and genuine child participation, which denote that projects should be child-initiated and directed, with adults supporting their work and sharing the decision-making (Hart, 1992), only children and youth were permitted to speak at the event.

The children's letters demonstrated their acute sensibility to issues of love and fairness. The young people in attendance could see that it was clearly *unfair* for the government of Canada to give First Nations children less than other children in terms of child welfare funding and other social services. Christina and Ishmel's letter is just one example of the wise and honest words spoken on Parliament Hill that day:

Dear Prime Minister,

I have some rights to tell you [about]. Children have a right to play with their family. Children have the right to go to school and to have fun. Children have the right to be cared [for]. Children have a right to go to school so they can learn. Children have a right to be loved. These rights are important because protecting them will give the children a better life.

I have some questions. Why are you doing this? How could you treat the children like this? Why are you taking rights away from other people? These questions have to be answered because you are doing it and it bothers me. And I want to stop this.
Sincerely, Christina and Ishmel

Have a Heart Day has become an annual child-led event that guides us in the movement for equity for First Nations children. Students are encouraged to think critically and research the inequities before writing their letters and often cite Auditor General (2008, 2011) reports, the UNCRC and *Declaration on the Rights of Indigenous Peoples*. Children across Canada have sent thousands of handwritten Valentine messages both to Members of Parliament and to the Prime Minister, asking leaders to “have a heart” and uphold what should be the most basic of rights for First Nations kids. The children’s requests are uncomplicated messages straight from the heart, often hand-written and including illustrations, colours and designs.ⁱⁱ These Valentine messages, letters, songs and poems demonstrate what children and young people have learned and what they can contribute through their own reflections and opinions. Children and young people confront us with the most fundamental of questions, simply by asking: *why?* Why are First Nations children not being given the same opportunities as everyone else and what are we going to do to make it better?

The involvement of children in the First Nations child welfare case has and continues make a difference. People are drawn in when young people speak passionately about issues that are important to them. When children see their peers speaking out for change it has a ripple effect. The young people who witnessed the case and who participate in “Have a Heart Day” follow in the footsteps of Shannen Koostachin, a young Cree girl whose determination to see a proper school built in her northern community of Attawapiskat Cree Nation sparked a national movement that included letter writing, YouTube videos and speaking to political leaders (About Shannen Koostachin, 2016). Shannen was a young person who spoke from the heart to demand “safe and comfy schools” and equitable education for First Nations students. Her efforts led thousands of Indigenous and non-Indigenous children to join the campaign, garnering the attention of Parliament, media and educators throughout Canada and around the world. Before her tragic death in a car accident in 2010, Shannen was one of 45 kids in the world to be nominated for the KidsRights prize given out by the Nobel Laureates. Upon her passing, children launched the Shannen’s Dream campaign (www.shannensdream.ca) to continue her work and by 2012 had convinced Parliament to pass a unanimous motion in support of equitable education (Education for First Nation children). Their efforts also led to the opening of a new school in Attawapiskat in 2014. The passionate efforts of Shannen Koostachin and the students from Elizabeth Wyn Alternate School are clear examples of how children and youth can lead social change movements by educating and engaging their peers and inspiring adults.

In 2015, the Truth and Reconciliation Commission of Canada released 94 Calls to Action to redress the legacy of residential schools and advance the process of reconciliation. The children and youth who have followed and continue to support the First Nations child welfare case are taking action for change and leading us in reconciliation. They have demonstrated their ability to guide us in the education and relationship-building that is so important to reconciliation, and they are also holding governments to account for their responsibilities in this process. These young people teach us about how change really happens. For them, it is about standing up for love and fairness, respecting others, speaking from the heart and having fun while doing it. They are an inspiration to their peers and to adults; we have much to learn from the way young people take action.

Conclusion

All adults, including those who work in government, professionals working with children, legal parties and adjudicators, have an obligation to facilitate the involvement of children in legal and administrative procedures that impact their lives. This is particularly important for Indigenous children, who are too often marginalized and left out of the processes and decisions that impact their everyday realities. The involvement of children and youth in the First Nations child welfare case should not be seen as exceptional circumstance; it should be the norm. Adults have a responsibility to facilitate exciting and creative ways to involve children in the social and legal processes that impact their lives. The Caring Society hopes that this story will act as a call to action to all adults, reminding them of their legal and moral obligations to recognize that children have the capabilities, and must be given opportunities, to actively engage as citizens and as ambassadors for reconciliation. Their actions will benefit us all, regardless of age, and lead us towards a better future.

Notes

ⁱ Canada officially adopted the *Declaration on the Rights of Indigenous Peoples* in 2016, almost a decade after it was passed by the United Nations (see Fontaine, 2016).

ⁱⁱ See for example, a special 2014 edition by children and youth of the *First Peoples Child & Family Review*, titled "Respect and Equity Through Reconciliation" available at: <http://journals.sfu.ca/fpcfr/index.php/FPCFR/issue/view/20>

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