First Nations Child & Family Caring Society of Canada

October 2020

# Briefing Note
# Bill S-210: An Act to establish the Office of the Commission for Children and Youth in Canada

## Purpose

The purpose of this briefing note is to identify important considerations for those in leadership, child and family service experts and legislators when assessing Bill S-210.

This briefing note was initially written in June 2020 in consideration of Bill S-217 tabled in June 2020. The briefing note was revised in October 2020 in keeping with the re-tabling and renaming to Bill S-210 in September 2020. The content of the briefing note remains unchanged.

## Background

For decades, First Nations have called for Canada to respect the sacredness of their children and youth by upholding the best interests of the child, substantive equality and cultural continuity. This call has been echoed in numerous reports including, but not limited to, the Royal Commission on Aboriginal Peoples (1996), the Joint National Policy Review (2000), the Wen: De Reports (2005), the Truth and Reconciliation Commission (2005) and the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019).

In 2007, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) filed a filed a human rights complaint under the *Canadian Human Rights Act* against Canada alleging its funding for First Nations child welfare and failure to properly implement Jordan's Principle was discriminatory. Before the Canadian Human Rights Tribunal (CHRT) issued its decision in 2016 substantiating the complaint, Canada brought eight failed motions to get the case dismissed and was found to have breached the law on three occasions. Since 2016, the Canadian Human Rights Tribunal (CHRT) has issued twelve non-compliance and remedial orders against Canada and more are possible as hearings continue. While there have been increases in funding for First Nations child and family services and Jordan's Principle over the past four years, these advances are directly tied to the CHRT orders.

This legislation appears to have no binding mechanisms and relies entirely on government good will to implement children's rights. As the CHRT case has shown, this is insufficient and opens the risk of the Commissioner being used as an official procedure to perpetuate child rights violations.

Moreover, there are no safeguards against political appointments or political interference to ensure the independence of the Commissioner and Assistant Commissioners.

The model presumes a single commissioner and specifies an assistant commissioner for Indigenous children and youth. The Bill does not foreclose the Commissioner from also being filled by a First Nations, Métis or Inuit person but it does not seem to contemplate a Co-Commissioner model. There is also no mechanism for First Nations, Métis and Inuit peoples to appoint one or more Indigenous Assistant Commissioner(s).

## Limitations

This briefing note is based on publicly available information and does not represent legal advice. Readers are encouraged to read Bill S-210 in full and seek legal advice where needed.

## Section by Section Review

### Preamble

While there is reference to First Nations, Métis and Inuit peoples, the text does not sufficiently acknowledge the distinct obligations Canada has to different First Nations, Métis and Inuit children, youth, governments and communities.

The text diminishes the right to cultural practices, spiritual and religious practices and languages free of discrimination by

simply acknowledging the "importance of traditions and cultural values for the protection of harmonious development of every child." The text fails to acknowledge Article 4 of the United Nations Convention on the Rights of the Child (the Convention) regarding non-discrimination and does not appear to fully capture the rights for Indigenous children set out in Article 30.

The text does not acknowledge the longstanding practices of First Nations, Métis and Inuit communities and families to safeguard the rights and best interests of their children using their own laws and practices. The existing text assumes that First Nations, Métis and Inuit children could only "benefit" from Canadian (be it federal or provincial/territorial) human rights laws. Indeed, Canada has a longstanding record of human rights abuse when it comes to First Nations, Métis and Inuit children and families as substantiated by the Canadian Human Rights Tribunal (2016 CHRT 2) which found Canada to be racially discriminating against First Nations children.

Recognizing just one Call to Justice from the National Inquiry into Missing and Murdered Indigenous Women and Girls diminishes the intersectionality of the multiple Calls to Justice pertaining to the best interests and rights of Indigenous girls and two-spirit children.

The text does not acknowledge the full extent of Call to Justice 12.9 which specifically calls for the establishment of Indigenous-specific mechanisms to promote the rights of Indigenous children in Canada. Call to Justice 12.9 calls for the establishment of a "Child and Youth Advocate in each jurisdiction with a specialized unit with the mandate of Indigenous children and youth." It further calls for the establishment of a "National Child and Youth Commissioner who would also serve as a special measure to strengthen the framework of accountability for the rights of Indigenous children in Canada." The preamble's text does not suggest any such measure by using language like "collaborate" and "encourage."

Further, the inclusion of an Indigenous Assistant Commissioner, rather than a Co-Commissioner, diminishes the full extent of Call to Justice 12.9 and perpetuates colonialism.

The text fails to recognize the thirteen Canadian Human Rights Tribunal (CHRT) orders against Canada which diminishes any mandate that the Commissioner would have to ensure that Canada complies with these orders. The Canadian Human Rights Tribunal found Canada to be racially discriminating against First Nations children by providing flawed and inequitable child welfare services and failing to implement Jordan's Principle. Canada has an obligation to ensure that it is fully compliant with these orders to ensure that the best interests of First Nations children are being safeguarded.

The text acknowledging the "historical practices that separated generations of children from their families and culture" is inconsistent with the inclusion of the Truth and Reconciliation Commission and the findings of the CHRT. The "historical" practices of separating children are not historical - they are ongoing. The last residential school closed in 1996. In 2016, Canada was found to be discriminating against First Nations children by providing flawed and inequitable child welfare funding which incentivized the removal of First Nations children rather than providing preventative or least disruptive measures. Further, the impact of separating children from their families and communized is well-document and is considered multi-generational trauma. In 2019, the CHRT found that Canada continues its "willful and reckless" discrimination in ways that unnecessarily separates First Nations children from their families and contributes to the deaths of some First Nations children.

## Section 2: Definitions

The text defines children and youth as "persons who are under the age of 18 years." Age of majority for some provinces/territories is 19 years. Some First Nations, Métis and Inuit Nations consider you to be under the age of 24 or 29 years. This is backed by developmental science which has demonstrated that brain development does not typically reach "adulthood" until 25 years. The period between the age of majority and age 25 is known as "emerging childhood."

The text fails to define children and youth in a manner that upholds the Commissioner's mandate to particularly advocate for those children and youth who belong to a vulnerable group. There are unique challenges that children in care experience when they "age out" of care, no longer receive government support at age 18 and lack a familial, community and structural support system.

## Section 4: Purpose

The text does not have binding mechanisms, relying on government good will to implement children's rights.

The text affords primacy to the best interests of the child without considering how best interest is framed by western experience and law. It does not consider how First Nations, Métis and Inuit peoples consider and safeguard the best interests of their children according to their own laws and practices.

The text does not mention the *Act Respecting First Nations, Metis and Inuit children, youth and families* and it is unclear how this Bill will interface with the Act or First Nations laws affirmed via other processes.

The text places primacy on the best interests of the child per the Convention whilst not paying equal attention to the rights to non-discrimination, the right to life, survival and development, and participation.

The text fails to include substantive equality (including historic disadvantage) and cultural continuity as guiding principles. The CHRT ordered Canada to consider substantive equality, cultural continuity, in addition to best interests of the child, when addressing the rights of First Nations children. Cultural continuity is a key element in the *Act Respecting First Nations, Metis and Inuit children, youth and families.*

## Sections 5-10: Commissioner for Children and Youth in Canada

The text does not include protections against political appointments nor are there adequate protections against political interference. The Caring Society suggests that persons holding this office ought not to have held a political office or served as a senior advisor to a political office for a minimum of four years prior to appoint.

The text lacks conflict of interest provisions.

## Section 5: Appointment

The text appears to presuppose that one "Indigenous" Commissioner is the model that is suitable for First Nations but there is no resolution from the Chiefs in Assembly at the Assembly of First Nations supporting such a model. Many First Nations have their own Children's Bill of Rights and want to develop their own mechanisms to ensure those rights are upheld.

The binding text of the Bill is inconsistent with the Preamble's inclusion of UNDRIP by failing to affirm First Nations, Métis and Inuit peoples right to participate in the appointment. The text fails to consider approval from First Nations, Métis and Inuit Nations as a requirement for an appointment. The Caring Society suggests that candidates for appointment are recommended by an arm's length committee comprised of non-political First Nations, Métis and Inuit child and family experts.

## Section 11: Mandate

The text fails to include special measures for children in care or formerly in care, especially First Nations, Métis and Inuit children. This is inconsistent with the inclusion of the Convention in the Preamble and the best interests of the child. It also diminishes the Commissioner's mandate to particularly advocate for those children and youth who belong to a vulnerable group.

Sections (b) (p) (q): The text is inconsistent with the Preamble's inclusion of UNDRIP by failing to affirm First Nations, Métis and Inuit peoples right to self-determination. The text relies on "collaboration" and "encourage to" when referring to First Nations, Métis and Inuit governments. This severely diminishes Canada's existing legal obligations to First Nations, Métis and Inuit governments and perpetuates colonialism.

Section (b): The text fails to specifically address how First Nations, Métis and Inuit children and youth outside of political organizations will be included in meaningful ways to ensure their views, values and best interests are respected. This is inconsistent with the Bill's Preamble and Purpose's inclusion of the Convention.

Section (i): The text fails to acknowledge that programs must be adapted to the languages of First Nations, Métis and Inuit children and youth. This is inconsistent with the Preamble's inclusion of UNDRIP.

Section (j): The text should be expanded to include Jordan's Principle (named in memory of Jordan River Anderson) which ensures that First Nations children do not face jurisdictional disputes when accessing public services.

## Sections 14-16: Assistant Commissioner

The text suggests that the Assistant Commissioner will focus on matters relating to First Nations, Métis and Inuit children and youth. The assistant position of the Commissioner, rather than Co-Commissioner, is inconsistent with the Preamble's inclusion of UNDRIP, the Truth and Reconciliation Commission and National Inquiry into Missing and Murdered Indigenous

Women and Girls. The Assistant Commissioner does not uphold the self-determination of First Nations, Métis and Inuit Nations and perpetuates colonialism.

## Section 20: Reports

The Commissioner ought to publicly document and monitor Canada's implementation of recommendations from prior reports relating to the best interests of children including, but not limited to, the Royal Commission of Aboriginal Peoples, the Truth and Reconciliation Commission, the National Inquiry into Missing and Murdered Indigenous Women and Girls, the UN Convention on the Rights of the Child Concluding Observations, and Concluding Observations and Rapporteur reports from other UN bodies.

The text does not include measures if Canada fails to implement the Commissioner's recommendations.

## Section 28: Offences

The text is insufficient to deter reprisals. The text must include injunctive measures to stop alleged reprisal conduct prior to a summary judgement.

## Consequential Amendments

It is unclear how this Bill interfaces with the *Act Respecting First Nations, Métis and Inuit children, youth and families*.