Six Nations of The Grand River Territory

Child Welfare Designation

A Discussion Paper

Prepared by the Child Welfare Designation Steering Committee

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INTRODUCTION

Six Nations of the Grand River Territory is, once again, considering taking responsibility for protecting those of our children and youth who are suffering from abuse or neglect.

Historically, we, as a Nation, looked after our own without outside involvement, and we never formally gave up the right to do so. However, for many years now, the responsibility for protecting our children has been exercised by the Brant County Children's Aid Society/Native Services Branch (CAS/NSB) under provincial and federal laws and agreements.

We do have a long-established Child and Family Services Prevention Program (1980's), funded by Ontario and Canada, which provides services to families and their children on a voluntary basis; but we do not hold legal responsibility for determining if any of our children are being abused or neglected, or for pro-actively providing the services needed by these children and their families in order to ensure the children's safety and well-being.

In 1994, after extensive community consultation, a decision was made by Six Nations to take back responsibility for the child protection function, and an agreement was signed with Ontario for the authority and funding required in 1995. However, for a variety of reasons, not the least of which was a unilateral decision by a new Ontario government to cut the funding that had been agreed to, we decided not to proceed at that time.

Fifteen years on, the question as to whether or not to take responsibility for the protection of our children is again before Council. However, before a decision is made on the question, Council wants to know, through a broad consultation process, whether or not there is sufficient community member interest in and support for such action.

This brief paper has been prepared to provide a basis for discussion of the question, and to help you come to an informed answer to the key question:

> "Do you think that Six Nations of the Grand River should act to create our own child protection service, rather than leaving responsibility for the protection of our children to Ontario and the Brant County CAS/NSB?"

WHAT IS CHILD PROTECTION?

The various governments in Canada have established provincial, public medical systems to ensure equal access to health care when needed; a federal employment insurance system to assist those temporarily out of work; provincial social assistance systems to ensure a person or family has at least a minimum income when unable to work or work is not available and a whole series of social services to assist those experiencing problems in daily life. Six Nations has also established and provides a wide variety of community support services (Child and Family Prevention Services Program, Mental Health, New Directions, Healthy Babies, etc.).

The same is true in respect to the safety and development of children and youth. In situations in which parents and their extended families for some reason cannot prevent the abuse and/or neglect of a child, provincial governments have enacted law (the Child and Family Services Act or CFSA) and "designated" and empowered certain organizations with the legal right and obligation to intervene and to act to ensure that the child is safe and able to continue their development. These organizations (Children's Aid Societies in Ontario) have the power:

- to intervene, involuntarily, with families "in the best interests of the child", when it is suspected that a child is being abused and/or neglected,

- to place the family under "supervision" (and provide remedial services), or

- to remove ("apprehend") the child from the situation if deemed necessary to ensure the child's safety, and place the child in another home temporarily (and provide remedial services), and

- to place the child for adoption with another family if the child's family situation cannot be changed for the better through the services provided so that s/he can safely be returned home.

These designated organizations are required by the law to investigate any report that a child may be in need of protection and to act to ensure the safety of that child should it be determined that the child is in need of protection. The circumstances in which a child may be in need of protection are defined in the Ontario Child and Family Services Act (CFSA) as follows:

- a child has suffered physical harm or is at risk of suffering physical harm inflicted by a person having charge of the child either through "failure to adequately care for, supervise or protect the child, or a pattern of neglect in caring for, providing for, supervising or protecting the child"

- a child has been sexually molested or exploited or is at risk of being sexually molested or exploited by a person having charge or the child or by another person where the person having charge should know of the possibility of sexual molestation or exploitation and fails to protect the child;

- the child requires medical treatment and the child's parent or person having charge does not provide, refuses or is unable or unavailable to provide consent;

- the child has suffered or is at risk of suffering serious emotional harm and there are "reasonable grounds" to believe that this results from the actions, failure to act or pattern of neglect on the part of the child's parent or person having charge of the child;

- the child is abandoned, the child parent has died or is unavailable and has not made adequate provisions for the child's care and custody, or the child is in a residential placement and the parent is unable, unwilling, or unavailable to resume the child's care and custody;

- a child under twelve years of age has killed or seriously injured another person or caused serious damage to another person's property, and the parent or person having custody does not provide, refuses or is unavailable or unable to consent to necessary services or treatment to prevent a reoccurrence;

- a child of less than twelve years old has, on more than one occasion, seriously injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately; and

- the child's parent is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is more than twelve years of age, with the child's consent.

These designated child protection or child welfare organizations do not, however, act alone. In the absence of the voluntary agreement of a family to a protection intervention and to a plan of corrective action, the protection organization must prove to a family court judge that the child is in fact in need of protection and that the plan of action proposed will serve the best interests of the child. In other words, the child protection system as a whole consists of both the designated child protection organizations themselves and the courts.

RESPONSIBILITY FOR CHILD PROTECTION ON RESERVE IN ONTARIO

In Ontario, the legal obligation (i.e. the child protection designation) to investigate and intervene if necessary to protect a child is delegated by the Ontario government (Minister of Child and Youth Services (MCYS)) to several Children's Aid Societies (CASs).

For many years, the CAS responsibility to protect children extended to all First Nation territories in Ontario (under federal and provincial law and agreements to which First Nations were and are not parties) – as it still does for Six Nations[1].

However, in 1984, under pressure from First Nations, the then new Ontario Child and Family Services Act (CFSA) included a number of First Nation-specific clauses that, for example, made it possible for First Nations to form their own child and family service organizations, to obtain the CAS designation to protect children and even to negotiate and secure "exemptions" from any objectionable CFSA requirements[2].

During the 1980's and 90's, a large number of First Nations created regional child and family service organizations (e.g. Tikinagan, Weechi-it-te-win, Payukotayno, Dilico, Nog-da-win-da-min, etc.) and several of these organizations have since been designated to handle child protection as well as prevention services. Most recently (September 2011), the Mohawk Council of Akwesasne's Child and Family Services Program was designated to handle child protection on that portion of their territory located in Ontario (Akwesasne has held the protection designation for the Québec portion of their territory for over 10 years). At this time, over 75% of the First Nations in Ontario receive child protection services not from CASs, but from their own organizations – albeit under provincial law and the provincial court system. At least five additional First Nation Prevention organizations are at various stages in the process of negotiating the child protection designation.

As noted above, Six Nations was in fact designated in 1995 (and was the first (and only) First Nation to request and to be granted significant exemptions from CFSA requirements) – but chose not to proceed.

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[1] The Constitution of Canada accords responsibility for social services, including the protection of children, to the Provinces. The Indian Act holds that "provincial laws of general application" on which federal law is silent, apply on reserve. Thus Ontario Child Welfare Law as a law of general application under provincial jurisdiction applies on reserves.

[2] The CFSA also included provision for First Nation participation on the Boards of CASs (as a means of influencing CAS operations on reserve), and provision for "Band Representation" – i.e. the participation of First Nations as full parties to protection court actions initiated by CASs with respect to their members living both on or off reserve. The CFSA also "directed" the courts to take into account the culture, language, etc. of First Nation children in deliberating on the need for protection intervention and the plan of action proposed by a CAS to deal with the identified protection issues.

WHY WOULD FIRST NATIONS WANT THE ONTARIO CHILD WELFARE PROTECTION DESIGNATION?

In our society it is a basic expectation that people will look after themselves; and that families, nuclear and/or extended (and, in our society, clans), will look after their own.

However, it is also a basic value that our various governments (federal, provincial or First Nation) have a responsibility to assist those who, for one reason or another, cannot adequately meet all their needs on their own.

In the 1960's, CASs removed many children from their families and placed a significant proportion of these children with non-native families in other parts of Canada and even the U.S. and other foreign countries (the so-called "60's scoop"). This resulted in considerable conflict between the First Nations, the CASs involved and the Ontario government[3].

In an initial response to the outcry over the significant loss of children, the Ontario government first offered funding to First Nations to establish "prevention" programs. Most First Nations developed programs of prevention services in the late 1970's and early 80's, as did Six Nations, in the hope that being able to support families with child-rearing and other issues (on a voluntary basis) would significantly reduce the need for involuntary protection intervention by non-native, off reserve, CAS organizations.

For some First Nations, this prevention effort has and continues to work quite well; but for most First Nations it did not and has not worked well enough, and their children are still being lost to the child welfare system in significant numbers (despite the subsequent changes made to child welfare legislation in 1984 which gave First Nation much more influence over what happened to those of its children deemed in need of protection by CASs).

In large part, the fact that the establishment of prevention services and the increased ability to effectively influence CAS and Family Court decisions has not been sufficient for most First Nations, is a function of particular changes that have been made to the CFSA in the past 10 years, a failure of Ontario to ensure the CASs comply with the First Nation provisions in the CFSA, and of insufficient prevention services funding.

For example, specific changes to the Act brought into force in 2000 resulted in a huge increase in the number of children (both native and non-native) being apprehended and taken into care.

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[3] For example, Six Nations required the Brant CAS to remove its Native Services Branch Office from the community as an expression of its concern (a decision that was reversed some years later).

This "millennium scoop" brought more First Nation children into care than were placed in the infamous residential schools. As a result of this change, CASs received significant increases in funding to handle the increased rate of protection intervention with families; but virtually no additional funding was provided to increase the prevention service activity that might have reduced the need for that protection intervention.

In fact, because of the increased CAS protection activity on reserve, many First Nation "prevention" staff find themselves with less and less time to provide early intervention prevention services as a result of having to devote more and more of their time to the increasing number of families involved with the CAS.

A recent review of the Six Nations' Child and Family Services Prevention Program found that while the prevention services budget has not even kept pace with inflation since 1994 (and the Program has had to cut back on its services), the average number of children taken into care by the Brant County CAS, Native Services Branch grew by almost 300% from an average of 25 to an average of 106 and the number of staff grew by approximately 400% (from 7 to 23).

As a result of the continued loss of children and the continuing conflict between First Nations and CASs, many First Nations began taking advantage of the opportunity accorded in the CFSA to establish their own Child and Family Service agencies - as early as 1986 - and to assume responsibility for the protection function. It was thought by many, that if First Nations established their own community-based agencies and hired their own "protection" staff, they would be able to enhance their prevention services to reduce the need for protection intervention, and would be able to develop much more culturally sensitive and appropriate approaches to the protection of any children still being abused or neglected despite their prevention efforts.

The fact that assuming responsibility for protection means that First Nations continue to operate under provincial law and must (sometimes) take protection cases to the provincial courts has not deterred them taking the step.

- First, First Nation protection agencies find that there is considerable flexibility under the CFSA to deliver protection services in a more culturally appropriate manner than delivered by CASs, and that they can effectively use customary care arrangements (both short and long-term) when necessary to ensure the safety of a child.

- Second, the CFSA now provides for alternatives to court action to resolve protection disputes between families and the First Nation agency (locally defined mediation processes)[4] that are intended to reduce the need to use the provincial court system to resolve protection disputes.

The fact that assuming responsibility for protection carries a "liability" for the safety of children has also not deterred First Nations from taking the step. The CFSA makes it clear that the First Nation and the First Nation Program and its staff are not liable for anything negative that might happen to a child in need of protection provided that the staff members have acted in accord with the Act. While the First Nation may face an increase in the cost of its liability insurance, the cost is included in the protection services funding available.

In short, from the mid-80's to the present, over 75% of First Nations in Ontario have decided that they can do a better job, in a more culturally appropriate manner, of protecting their children - when and if it is necessary to do so - than can the CASs. Most of the remaining First Nations are now engaged in the process of securing designation.

All this being said, the preference of most First Nations is to protect their children under the terms of their own child and family services legislation[5]. Several First Nations and First Nation organizations are currently drafting a model for such legislation. However, it will take considerable time to complete the model to the satisfaction of all First Nations, and it will take time to negotiate the replacement of provincial law by First Nation law with the provincial and federal governments.

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[4] When Six Nations negotiated a protection designation in 1995, it asked for and was granted an "exemption" from the "5-day rule" under the CFSA in favour of a 30-day rule. The 5-day rule requires that when a CAS that determines that a child is in need of protection, it must apply to the courts within five days to schedule a hearing to determine that the child is in fact in need of protection, and that a particular course of action is warranted. At the time, Six Nations had argued that every effort must be made, to avoid the necessity of going to court; to resolve a protection issue with a family on a voluntary basis. Six Nations designed a process of mediation through this would be accomplished (in many if not all situations), but knew that the process would require more than 5 days. Thus, a request for an exemption from the 5-day rule in favour of a 30-day rule was made and was successful. In 2005, Ontario amended the CFSA to include what Six Nations had requested in 1994/5 – an alternative to court action. Specifically, all protection agencies are required to at least consider whether an "alternative dispute resolution process" (which includes a process designed by First Nations) might result in a voluntary agreement on the need for protection and on the course of action to be taken to correct protection issues.

[5] In the United States, many Tribes deliver child and family services under a single federal First Nations law that partially supplants State law on the reservations.

In the meantime, while this work is being carried out, valuable experience is being gained by these First Nations and First Nation organizations through their delivery of both prevention and protection services under provincial law.

HOW DOES A FIRST NATION OBTAIN CHILD PROTECTION DESIGNATION?

If it is decided to negotiate a protection services designation, this will take a period of time.

Under Part 10 of the CFSA, any First Nation or group of First Nations can designate an organization as its "child welfare authority".

If asked by this "authority" to negotiate Child and Family Services Agency status, the Minister of Child and Youth Services MCYS) "must" enter into negotiations. The Minister "may", as a result of these negotiations, accept the First Nation "Authority", first as an "Agency", and provide funding under the CFSA for a variety of non-protection services. The Minister "may" then designate this Agency to assume responsibility for the protection function.

Ontario has gradually formalized a process through which these negotiations take place, and has defined a number of conditions that must be met through a series of stages in order for a First Nation agency to demonstrate that it has the capacity to deliver protection services according to certain standards set out in the CFSA and regulations (see attached flow chart).

1. The first stage is reflected in this consultation process – First Nations must ensure that the community gains "...an understanding of what is involved in taking on the responsibility for child welfare [i.e. protection]...", and determine that there is "community interest, readiness and support to proceed with pursuing designation".

   If there is support for the move, this first stage also requires the First Nation to define the geographic area that it would assume protection responsibility for, to determine the likely size of the protection caseload that would be involved, to consider what local resources are available to support the initiative, to develop a service delivery model, etc.

   Most of the work involved in this first stage of the current process, was completed by Six Nations in the 1994 designation process; and much of the information that informed that development has been updated periodically through program reviews since that time.

2. The second stage is to develop and demonstrate "...the organizational and service delivery capacity to deliver child welfare [i.e. protection] services" consistent with provincial standards.

Assuming community support for the initiative, First Nations seeking designation are expected to prepare documentation setting out the policies and procedures that will govern the delivery of protection services in the areas of:

- governance and accountability
- financial management
- program design
- human resources
- service delivery
- protection staff orientation and training plan

Six Nations obviously has governance and accountability structures in place, as well as financial management and human resource (personnel) policies; policies that apply to all programs of service delivered in the community[6].

A Protection Services Program design was developed in 1994 - which was acceptable to MCYS at the time - and may only need to be updated in response to various changes and experience over the past 15 years.

In addition, protection service descriptions, service delivery policies and procedures and job descriptions were developed in 1994/95. These will require significant updating due to changes that have been made to the CFSA in the intervening years. However, there are now many models to work from in these areas given that there are now several designated First Nation agencies in operation.

Finally, the First Nation seeking designation must develop a “transition plan” under which, if designated (typically with conditions), it would begin implementation of the delivery of the protection service from a location within the community.

3. Once these documents have been completed, they are reviewed by a “Capacity Review Team” appointed by the Minister of MCYS to advise him or her and to recommend whether or not to proceed to the “transition stage” of the process, and, eventually, whether or not to designate (without conditions) based on demonstrated capacity to deliver.

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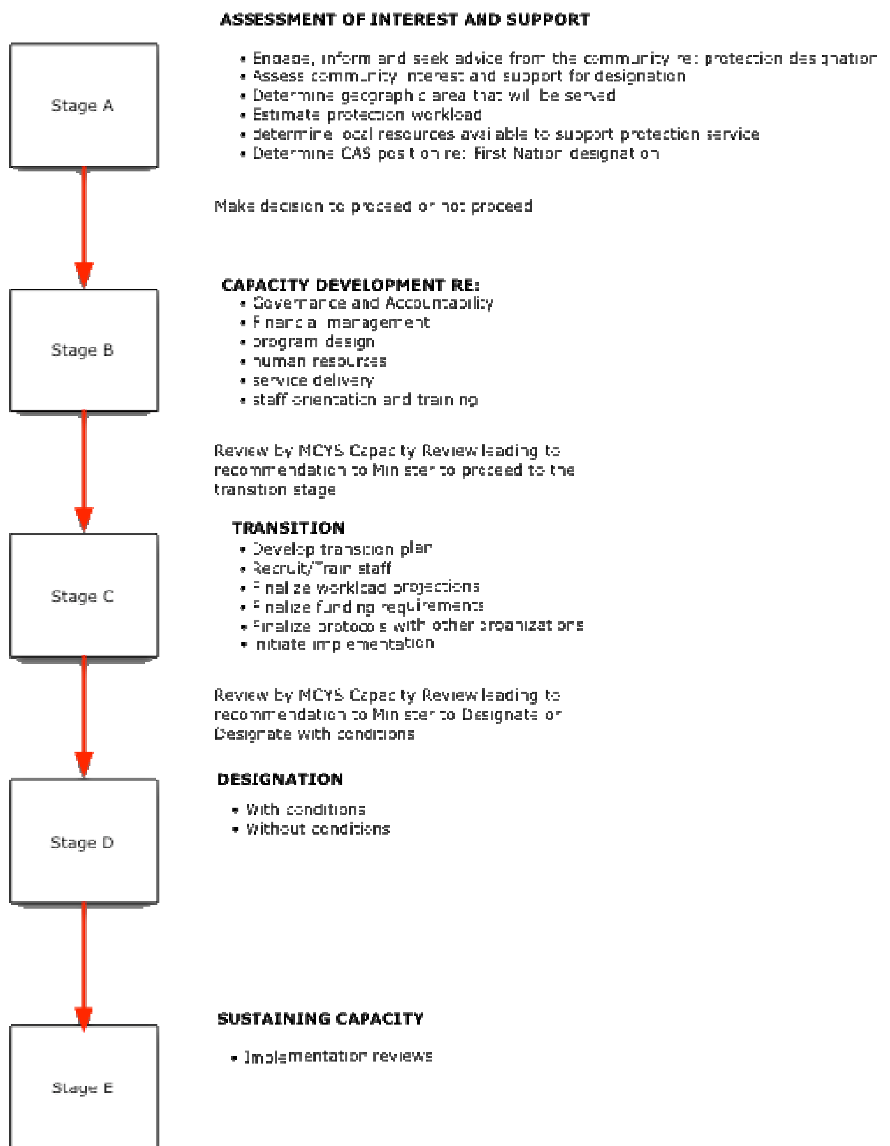
[6] There has been some concern that Six Nations would have to first establish a “corporation”, separate from Council, to manage and deliver the protection function. However, where groups of First Nations have created a regional, incorporated agency to deliver these services (like CASs), this is not necessary for a single First Nation which already has an accountable governance structure in place. In its original application for designation (1995), Six Nations asked for and received an exemption from the incorporation requirement under the Act. Most recently, Akwesasne, asked for and received this exemption. Therefore, while incorporation of a body (under provincial or federal law) to deliver protection service is an option; it is not a necessary requirement for individual First Nations.

Ontario provides funding to support each stage of the designation process.

Some individual First Nations and some groups of First Nations have found that the designation process takes several years. However, given that Six Nations has a well-established prevention services program in place and that much of the designation process work was completed in 94/95 and needs only be revised to take into account changes since that time, it is likely that designation to deliver protection services (in place of the CAS) could be achieved in one or possibly two years.

The following Diagram sets out the stages of the designation process in more detail.



WHAT IS YOUR POSITION?

Should Six Nations initiate the process of designing and establishing our own community-based protection program and negotiating a protection designation with Ontario?

YES ☐ NO ☐

COMMENTS: