COO Proposal on 1965 Reform

This proposal for 1965 Reform flows from the principles for reform discussed at the 1965 Agreement Symposium held among Ontario First Nations' Chiefs and their technical advisors in May, 2021. It was updated in early 2022 based on the AIP.

Briefly, what is the 1965 Agreement?

- The 1965 Indian Welfare Agreement is a cost-sharing agreement that Canada and Ontario made in 1965. First Nations are not parties to the agreement.
- The agreement says Ontario is to extend certain provincial programs to cover reserves (s. 2), and that Canada must reimburse Ontario for most of its costs on reserve for those programs (s. 3).
- Off reserve, Ontario covers all of the cost.
- On reserve, when eligible under the Agreement, Ontario is reimbursed about 92%, according to a formula. Because Canada does not consider all program aspects to be eligible, Ontario says it ends up covering more than 8% on reserve. However, in addition, since the *Caring Society* decision, Canada has been providing Ontario First Nations and their Agencies with some additional amounts in child and family services that flow directly to them, outside of the 1965 Agreement.
- In practice, the 1965 Agreement is considered today to cover parts of 4 programs: child and family services, Ontario Works, day care, and homemaking.

Reform of the 1965 Agreement is now required.

- In dozens of resolutions, over many decades, Ontario First Nations have repeatedly called for reform or replacement of the 1965 Agreement.
- Several Ontario government reports have recommended review or reform of the 1965 Agreement (e.g. reports about sectors affected by the 1965 Agreement).
- In the 2016 Merits decision in *Caring Society,* the Canadian Human Rights Tribunal found that Canada's under-funding of child and family services under the 1965 Agreement is discriminatory. It ordered Canada to reform the 1965 Agreement.
- On December 31, 2021, Canada, Chiefs of Ontario and other parties signed an Agreement-in-Principle on Long-Term Reform of child and family services. Ontario-specific provisions commit Canada to work with COO on reform of the 1965 Agreement and approach Ontario accordingly. It sets out certain shared principles for such reform.

Pillars to approaching 1965 reform:

- First Nations generally want to maintain a focus on First Nations jurisdiction, and on needs identified at the nation and community level. First Nations call on Canada and Ontario to maintain that focus too. This requires a nation-to-nation approach. Jurisdictional tables (including but not limited to C-92 processes) and consent-driven

agreements should be prioritized, operating on a nation-to-nation basis. These can, if the First Nation wishes, take those nations ***outside*** the 1965 Agreement within the topics they address, and into their own arrangements.

- There is, nevertheless, a worthwhile role for 1965 Agreement reform. The 1965 Agreement is the default while nation-specific processes are underway. Given that each nation moves at its own pace, it is important to improve that safety net and raise the common baseline.
- An update to the 1965 Agreement should therefore be addressed **efficiently**. We propose that Canada & Ontario should be the ones to sign reforms to their own agreement, but those amendments must have overall First Nations support indicated through Chiefs of Ontario. COO would then agree to take the position that 1965 Agreement reform has been accomplished, and that the CHRT's direction to reform the 1965 Agreement has been met. The reforms themselves would not have the sign-off of each First Nation, and COO would not become a party to the agreement. However, First Nation choices would be reflected *within* the updated Agreement and in options to *exit* (explored further below).

What changes should Canada & Ontario make to the 1965 Agreement?

Rather than replace the entire agreement, we propose 10 carefully targeted updates.

Because of how the 1965 Agreement is designed, the updates can be done efficiently – in fact, most efficiently – if they apply to all sectors covered by the Agreement. An amendment to any section of the 1965 Agreement applies automatically to all sectors it covers.

1. **Equity (non-discrimination) must be built into the agreement.** Under the 1965 Agreement, Ontario is responsible for making the listed services available to First Nations people including those living on reserve.

    - The agreement should require Ontario to ensure that those services are designed and funded in a manner that ensures substantive equality for First Nations children, families and communities, on and off reserve. This could be incorporated into section 2(1), or put in a new section.

    - The agreement should also require that Canada's reimbursement to Ontario enables and supports substantive equality. This could be incorporated into s. 3 or put in a new section.

    Further to these overall commitments against discrimination, there would be a need for work between COO, Ontario and Canada to put those commitments into reality. That work can occur outside of the Agreement itself, as a matter of implementation. There could be sector-specific workplans or other implementation mechanisms. We can discuss together what that would look like. While we can consider CFS funding on reserve to have met the standard of non-discrimination by virtue of the Final Settlement Agreement, this still leaves gaps in the quality and continuity of services off reserve, and gaps in the other program areas.

2. **Reimbursement formula: a high level of federal responsibility must be reflected.** The federal government holds a special obligation to First Nations, in a fiduciary relationship. That high level of federal responsibility should be reflected in their share of reimbursement. We ultimately leave it to Canada and Ontario whether they wish to leave or change the reimbursement formula, but COO's position is that it should reflect Canada's significant responsibility in this area. We would be supportive of a federal funding role off reserve as well as on reserve, for example. Changes on the reimbursement formula, if made, relate to ss. 3-6.

   The Agreement should also clarify that the federal reimbursement formula does not define the limit of provincial funding for the service itself.

   The Agreement should also clarify that reimbursement arrangements between Canada & Ontario cannot diminish bilateral funding of either Crown government to First Nations or their service providers.

3. **In child and family services, the substance of Canada's obligations in the AIP, Final Settlement Agreement and any remaining CHRT orders must be honoured, without resulting in jurisdictional gaps.** There will need to be clarity on whether such funding is to be continued as direct federal top-ups (as it is now) or will be flowed through Ontario under the amended Agreement.

4. **Integrate mechanisms for First Nations control and flexibility.** Self-determination requires respect for First Nations who wish to exit the Agreement, to create their own arrangements. First Nations might pursue this as part of a transition to exercising their own jurisdiction or to otherwise address their own needs. And within the operation of the Agreement too, First Nations should have more flexibility to make choices.

   a. **Opt-out:** The agreement should explicitly recognize that any First Nation or group of First Nations may, with their consent, make different funding arrangements for themselves with respect to any services covered by the agreement. This has occurred in practice, but should be acknowledged within the agreement, as a sign of respect and to highlight the consent principle.

   b. **Subsection 2(2)** should be maintained, i.e. consultation with and concurrence of First Nations required for the extension of any program. Consultation and concurrence should also be required for removal of a program.

   c. **First Nation delivery:** Subsection 2(4) of the agreement should be modified to recognize that the delivery of provincial programs may be by First Nations or entities First Nations have created or authorized, with the consent of that First Nation. In doing so, it should also recognize that such First Nation delivery may be on or off reserve or both. Again, these realities are already occurring in practice, but are not reflected in the agreement. They should be reflected in the Agreement as a sign of respect and to highlight the major role of First Nations service delivery.

   d. **Flexibility:** The agreement should commit Ontario to support reasonable flexibility for First Nations in delivering provincial programs, in order to better

tailor those programs to First Nation needs, cultures and circumstances. This is an important interim measure for program improvement (i.e. interim in the sense that it improves the quality and cultural fit of programs pending the exercise of jurisdiction by those First Nations). Such flexibility also helps in alleviating discrimination, because many seemingly neutral rules have an adverse impact on First Nations in practice.

e. **Commitment to jurisdiction:** The agreement should contain a statement of principle reflecting Ontario and Canada's commitment to supporting First Nations in exercising their own jurisdiction, and to working in partnership with First Nations towards the coordination and implementation of such jurisdiction. This commitment recognizes that the updated agreement is not a final destination, and is not intended to detract from jurisdictional efforts on a nation-to-nation basis.

5. **Schedules are to be updated.** Legislative references must be updated to refer to modern legislation, to delete spent and repeated legislation, and to avoid gaps within a given program or service area.

    a. In Schedule A:

        - All qualifying language about specific service sub-types in Schedule A should be removed and avoided.
        - The *CYFSA, 2017* is to be included. Given the issues identified by the CHRT, a provision should specifically confirm eligibility under the updated agreement for elements that the CHRT noted as under-inclusive, such as band representative services, prevention / least disruptive measures, and child and youth mental health.
        - The *ODSP Act, 1997* is to be included. The original Appendix A of the 1965 Agreement included legislation reflective of financial support for people with disabilities. Today's exclusion of the ODSP Act, and of ODSP as a program, makes no sense. The exclusion is unfair and arbitrary, creates an awkward split in the administration of social assistance, and has disadvantaged First Nation clients. We note that including the ODSP Act in Appendix A does not mean that a First Nation would automatically take on their own delivery; this must be subject to consent, as per 4(c). Including the *ODSP Act* makes it eligible for reimbursement and would help support the transition to First Nation delivery for those interested.
        - Current legislation on child care and homemaking must be included.

    b. Schedules B, C, E and F should be updated in line with any updates Canada and Ontario may agree on with respect to the reimbursement formula. See 2, above.

    c. Given the passage of time, and for equity to remote communities, we think it is appropriate to remove Schedule D (areas of Ontario for progressive extension of services).

d. Section 7 of the Agreement should be updated to build in a process to regularly update the schedules. The agreement should provide for:

- an automatic process where legislation has an updated citation;
- automatic carry over to replacement legislation unless the parties determine otherwise with First Nation consultation; and
- 5-year reviews of the schedules to consider other updates. The 5-year review process must include requirements about First Nation consultation, and that changes have the support of COO at a minimum.

6. **Capital cost eligibility in support of eligible programs must be resumed.** Section 4 on capital cost eligibility expired in 1975. Its application should be resumed.

7. **Accountability is essential.** The existence and long road of the CHRT proceeding strongly emphasizes the vital importance of accountability. If substantive equality falls behind again, processes must be in place for efficient and timely response. Discrimination in services cannot be allowed to linger again for years (or decades). While the Final Settlement Agreement based on the Dec. 31, 2021 AIP in CFS will provide accountability measures, these only apply vis a vis Canada, on reserve for one program (CFS). There is still a need for accountability mechanisms in the 1965 Agreement.

   A clear and accessible dispute resolution process must be provided, including mediation followed by arbitration. The provision must explicitly confirm First Nations' rights to initiate dispute of an alleged breach, despite not being party to the agreement.

8. **Language should be updated.** For instance "First Nation" instead of "Indian Band". Other language points could be considered. An updated title for the agreement should be determined.

9. **All amendments should be consolidated.** Note that prior amendments are appended to the original Agreement, but have never been consolidated. The Agreement should require Canada to provide each First Nation, PTO and Chiefs of Ontario with a consolidated copy of the fully amended agreement, and all future updates. (For instance, distribution whenever schedules are updated, for example.)

10. **A partnership approach to review, amendment and any termination.** A review of the Agreement in partnership with First Nations should be required every decade. In other words, there would be 5-year reviews of the schedules, and 10-year full reviews. The Agreement should also build in a provision that requires full consultation with First Nations, and the support of COO at a minimum, before Canada & Ontario amend, or terminate, the Agreement.

If there is agreement in principle with this proposal for a targeted, efficient update, we believe exact language could be negotiated to implement these updates in short order and we are prepared to engage accordingly.