What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process

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With the 1979 Community Mandate to move towards Traditional Government, the community of Kahnawà:ke has consistently requested more involvement in decision-making on issues that affect the community as a whole. The Kahnawà:ke Community Decision Making Process is a response to the community's call for a more culturally relevant and inclusive process for making community decisions and enacting community laws. The Process is a transitionary measure to assist and facilitate the legislative function of Kahnawà:ke governance. This paper examines the development of the process and how it functions in the modern setting of Kahnawà:ke with the goal of illustrating Indigenous participatory democracy in action.

Avec le mandat communautaire de 1979 de passer à un gouvernement traditionnel, la communauté de Kahnawà:ke a constamment demandé un engagement accru en matière de processus décisionnel par rapport aux questions touchant la communauté dans l'ensemble. Le Kahnawà:ke Community Decision Making Process est une réponse aux demandes de la communauté pour un processus qui convient mieux et qui est plus inclusif sur le plan culturel pour la prise de décisions touchant la communauté et l'adoption des lois de la communauté. Ce processus est une mesure de transition visant à aider et faciliter la fonction législative de la gouvernance de Kahnawà:ke. Dans cet article, l'auteure examine l'élaboration du processus et son fonctionnement dans le cadre moderne de Kahnawà:ke dans le but d'illustrer la démocratie participative indigène à l'oeuvre.

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We the people of Kahnawà:ke, as part of the Rotinonhsón:ni (Five Nations) Confederacy;

We are, and have always been a sovereign people; we have our own laws, government, culture and spirituality;

Our lives are governed by the principles of the Kaianere'kó:wa (Great Law of Peace); a covenant made in ancient times;

We respect the covenant, for it describes our right and responsibility to govern our own affairs in our own way;

We consider this covenant to be a precious inheritance of our children, and of future generations, with which no one can interfere.

-Kahnawà:ke Decision Making Process Preamble[1]

Introduction

Participation in a consensus-based decision making process is a unique experience and requires a change in thinking. Often, the initial feeling amongst participants is skepticism of the possibility that everyone present might be able to agree on something. However, participants involved in the consensus process often express feeling surprise and relief once a decision is reached. As a Kanien'kehá:ka (Mohawk) person I have had the opportunity to participate in this process, both in the traditional Longhouse[2] and in dealing with modern political issues in the community of Kahnawà:ke. In both settings the achievement of consensus on a question feels the same. This was a surprise to me, even though I understood the historical background of the process, its inner workings, and implications in the longhouse and modern political setting of the Kahnawà:ke Community. This said, the Community Decision Making Process is a form of participatory democracy that utilizes the same principles of respect for individual thinking and ideas and unanimity in decision making that were used by my ancestors. It is a living process in which theory is put into practice.

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1 The statement and preamble was developed by Kahnawà'kehro:non (people of Kahnawà:ke) at a Community Decision Process Information Session, and accepted through Mohawk Council Executive Decision 34-2008/09.

2 The longhouse was the original structure in which Haudenosaunee people lived. As people moved away from living communally to single family homes, the longhouse has taken on a symbolic meaning where it is now a space where political, social and spiritual life takes place outside of the wider community and individual homes. The Longhouse also serves as the organizing basis for the Kaienere'kó:wa political, social, and spiritual structure and is used as an all-encompassing term to describe the spiritual and intellectual traditions of the Haudenosaunee as a whole.

Through lived experiences and academic work I have built a knowledge base about the history and culture of the Haudenosaunee from which I inform both my work in the university classroom and in the modern world of Indigenous governance. Many of the principles that underlie the Process that this work describes are not expressed explicitly in journals and chapter articles to date. As a result, citations on the practical enactment of Haudenosaunee philosophical traditions are difficult to find, and those that exist usually come from an outsider perspective. This work is part of a larger effort to add to the body of literature on the practical applications of Indigenous philosophy. There are many Indigenous peoples and academics making the necessary connections between Indigenous philosophical traditions and their practical applications in the political, social, and spiritual realms of living communities. This work describes one effort taking place.

The Community Decision Making Process itself is a bridge between old practices and the modern world. The purpose of this work is to illustrate the principles that underlie the form of participatory democracy carried out by my ancestors, outline the development of the Process, and explain the issues and current adaptations to community needs and concerns. The importance of this work for the wider Indigenous and non-native communities lies in the fact that ancient Haudenosaunee democratic principles are still at play in the modern setting of Kahnawà:ke and also have a role to play in modern forms of Indigenous governance and law making. In doing so, old practices are made anew again.

Background/History

Kahnawà:ke — meaning "by the rapids" — is one of seven communities of the Kanien:keha'ka and is located on the south shore of the St. Lawrence River across from Montreal, Quebec, Canada. With an estimated resident population of approximately 7 719 and non-resident population of 2 617 in 2013,[3] the community is situated on a land base of less than 11 888 acres,[4] with the land-claim negotiation of Seigneury of Sault St. Louis potentially restoring significant area back to the Indigenous community.[5] The Kanien:keha'ka

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3 "Residents" (2013), online: Aboriginal Affairs and Northern Development Canada: Kahanwake Band <http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile_kahnawake-eng.html>.

4 "Surface" (2013), online: Aboriginal Affairs and Northern Development Canada: Kahnawake Band <http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile_kahnawake-eng.html>.

5 "Seigneury of Sault St. Louis Historical Pamphlet" (2012), online: Mohawk Council of Kahnawà:ke <http://www.kahnawake.com/council/seigneury.asp>.

are part of the Haudenosaunee or Iroquois Confederacy.[6] Brought together for the purposes of peace and mutual protection, the Confederacy encompasses six Indigenous nations: the original five nations comprising Kanien:keha'ka (The Mohawk Nation), Oneniote'á:ka (The Oneida Nation), Ononta'kehá:ka (The Onondaga Nation), Kaion'kehá:ka (The Cayuga Nation), Shotinontowane'á:ka (The Seneca Nation), as well as the final nation to join the fold in 1722, Tehatiskaró:ros (The Tuscarora Nation).[7] Each nation in the Confederacy joined with the common goal of maintaining peace and harmony, yet also remained independent nations responsible for their own affairs. This notion is depicted in the Hiawatha Belt, which portrays the original five nations as independent nations linked together by a common thread. This common thread, however, does not strip the nations of their independence.[8]

The earliest records indicate adherence to a way of life that encompassed principles of peace, power, and righteousness incorporated into a functioning Constitution called the Kaienere'kó:wa,[9] or the Great Law of Peace. This Constitution is documented using mnemonic devices known as wampum belts. Recited every four years, these belts reference political, social, and spiritual aspects of life encompassed in the Constitution. Narrativized as The Peacemaker's Journey, the story describes the formation of the Confederacy and the principles inherent in the Kaienere'kó:wa. The Wampums or Laws in the Kaienere'kó:wa are based on natural relationship between plants, animals, and humans and developed into a functioning Constitution that served to guide the six nations through difficult times into a peaceful relationship. The relationship deepened further between the nations and became one of mutual respect and survival as colonization arrived in North America.

The Kaienere'kó:wa is where the principles of justice are codified, with the fundamental principles of peace and harmony at its foundation. The Kaienere'kó:wa establishes rules for governing over matters such as adoption, emigration, relations with foreign nations, war, treason, succession, religion,

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6 Haudenosaunee, Rotinonhsón:ni are all terms used to describe the Iroquois Confederacy. Essentially they are variants on the same term and mean "people of the long house".

7 For further discussion on dating the formation of the Confederacy, see William A Starna, "Retrospecting the Origins of the League of the Iroquois" (2008) 152:3 American Philosophical Society 279.

8 Tom Porter, "The Great Law of Peace Part 1: The Birth of the Peacemaker" in *And Grandma Said…Iroquois Teachings As Passed Down Through the Oral Tradition* (Bloomington, IN: Xlibris, 2008) 272.

9 Extensive literature exists on the Kaienere'kó:wa. See Kahente Horn-Miller, *The emergence of the Mohawk warrior flag: a symbol of indigenous unification and impetus to assertion of identity and rights commencing in the Kanienkehaka community of Kahnawake* (MA Thesis, Concordia University, 2003) [unpublished].

laws of descent, funerals, and civil matters.[10] As a true democratic document, the Kaienere'kó:wa describes a process in which everyone has a voice. Law is based on achieving substantial agreement and consensus in decision making since the Constitution focuses on resolving community or national concerns rather than individualistic ideals. In this way of thinking, each individual is part of a greater collective body; every act that an individual performs has direct or indirect impact on the world around them. Known as the *Seven Generations Principle*,[11] this doctrine serves as the basis for understanding that a person's responsibilities are more far reaching than the individual. This philosophy is inherently about accountability and respect for oneself and the future seven generations. This important principle at the heart of the Kaienere'kó:wa is also reflected in the procedures surrounding the enactment of the Constitution. The Thanksgiving Address or Ohenton Karihwatekwen, held prior to any community gathering, is a recitation of thanks to all living things from the smallest creatures and plants in the earth all the way up to the clouds in the sky. The recitation reminds those gathered that they have a duty not only to uphold the Law, but also a responsibility to care for the natural world.[12]

The natural world is characteristically diverse. The idea that no two things are alike is also captured in the Kaienere'kó:wa and more specifically in the consensus process. The rules and procedures of Haudenosaunee governance are based on the philosophy that the power to govern flows directly from the people. At the Confederacy and national levels, substantial agreement amongst the chiefs of the particular nations is necessary, while at the community level, consensus must be reached amongst the clans. Decisions must be made that reflect the will of the people and be made with their welfare in mind. Thus the decision making process is not an adversarial one. It relies on calm deliberation, respect for diverse views, and substantial agreement. The main objectives are engagement, respect, and the peaceful resolution of all matters.

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10   Arthur C Parker, "The Constitution of the Five Nations or The Iroquois Book of the Great Law" in *The Constitution of the Five Nations or The Iroquois Book of the Great Law* (Ohsweken, ON: Iroqrafts, 1991). (Originally published by The University of the State of New York, 1916).

11   The Seven Generations Principle is a philosophy that is passed down orally. See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999) at xxii.

12   For a full recitation and discussion, see Tom Porter, "The Opening Address" in *And Grandma Said… Iroquois Teachings As Passed Down Through the Oral Tradition* (Bloomington, IN: Xlibris, 2008) 8; Haudenosaunee Environmental Task Force, *Words That Come Before All Else: Environmental Philosophies of the Haudenosaunee* (Akwesasne, ON and NY: Native North American Indian Travelling College, undated).

Consensus-Based Decision Making

Consensus decision making is an alternative to commonly practiced non-collaborative decision making processes. Robert's Rules of Order, for instance, is a process used by many groups. The goal of Robert's Rules is to structure the debate and passage of proposals that win approval through majority vote.[13] This process does not emphasize the goal of substantial agreement. Critics of Robert's Rules believe that such a process can create adversarial debate and the formation of competing factions. These dynamics may harm intra-group relationships and undermine the ability of a group to implement cooperatively what might turn out to be a contentious decision.[14]

Consensus is a process of collaborative discussion that respects both the group and the individual. In consensus, the whole group makes decisions instead of a majority or minority rule. Consensus is not simply a process of finding the sum of individual viewpoints and tallying up the assents and dissents. The goal is to discern what the best decision is for the group and take into consideration the needs of the collective. Through consensus, each individual's concerns and ideas are considered. Every participant must have equal access to the process for it to be true consensus decision making. The group works with and adjusts a proposal until all can consent to its final form.

Consensus does not mean unanimity. With consensus there may not be a complete agreement in every decision, but there is always complete consent. This process gives voice to individuals with minority viewpoints. One member can express dissent to a decision if he or she feels it is against the best interest of the collective. However, they have the responsibility to provide an alternative idea or contribute to a resolution. When an individual disagrees, they are acknowledged and asked to provide a solution or additional information, which is then added to the deliberations. If the decision is still the same, their dissent is recorded and they are asked if they can consent to the group decision.

It is important to consider that community members are working actively to make a decision in the best interests of the community and not only themselves as individuals. In adherence to the Seven Generations Principle, involvement in this process requires a shift away from the individualism that

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13 See Tom Atlee and Rosa Zubizarreta, "Comparison of Roberts Rules of Order, Consensus Process and Dynamic Facilitation" (2013) online: *The Co-Intelligence Institute* <http://www.co-intelligence.org/I-comparisonRR-CC-DF.html> for elaboration on merits of Roberts Rules of Order [Atlee].

14 See Atlee, *ibid* for a comparison of processes.

characterizes many current societal structures in First Nations communities. As this process plays out, Indigenous peoples become cognizant of the strong influence of the colonial legacy on our everyday lives. Colonization has profoundly changed the way Indigenous peoples think and live as a community of people. In many instances, individualized thought is clearly in conflict with communal ideals. Finding solutions to issues proves to be difficult in this circumstance.

Consensus decision making is also an alternative to the "top-down" decision making commonly practiced in hierarchical groups. Top-down decision making occurs when leaders of a group make decisions in a way that does not include the participation of all interested stakeholders. Proposals are not developed collaboratively and full agreement is not a primary objective. Critics of top-down decision making believe the process fosters incidence of either complacency or rebellion among disempowered group members.[15] These effects have clearly been seen with the elected Band Council system currently used in First Nations communities across Canada in which community members are often left feeling voiceless and powerless. Additionally, the resulting decisions made by the Council sometimes overlook important concerns of those directly affected. Poor group dynamics and problems implementing decisions often result.

Consensus decision making attempts to address the problems of both Robert's Rules of Order and top-down models. Outcomes of the consensus process include:

> Improved decisions that include input from all stakeholders, with the resulting proposals better able to address all potential concerns.

> Better implementation processes that include and respect all participants and generate as much agreement as possible, thus setting the stage for greater cooperation in implementing the resulting decisions.

> Stronger group relationships in which cooperation and collaboration foster greater group cohesion and interpersonal connections.[16]

Consensus building is not simply making a compromise, nor is it a way of persuading others of the value of an idea or outcome. Value lies in the meth-

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15   See Michael T Seigel, "Consensus building revisited: lessons from a Japanese experience" (2012) 24:3 Global Change, Peace and Security (formerly Pacifica Review: Peace, Security & Global Change) 331, for full background and discussion on consensus building [Seigel].

16   See Seigel, ibid for further elaboration on these outcomes.

odologies of reaching consensus and finding solutions to problems. Toshio Kuwako argues that the same differences of opinion that can be a source of conflict can also be a resource for a more creative solution.[17] The varieties of opinions assist in everyone understanding all aspects of the issue. Thus, minority viewpoints are often the most valuable as they are often overlooked by the majority.

The Haudenosaunee process of participatory democracy has its foundation in the family and acknowledges all voices. Governance was rooted at the clan-family level and radiated outward to the larger confederacy level in concentric circles of clan-family, community, and then national participation. In this process, decisions were made by the clan-family and handed to their community leader who then brought it to the larger community and eventually to the nation. Leadership in this way was not top down; rather, leaders served as the holders of the stories and ancient knowledge and they were given the responsibility to enact a decision made by the people. Fundamental principles of this system made it effective for democracy. These principles include: everyone has a voice, the Seven Generations Principle, acute listening, and responsibility to participate.

Historical development of governance in Kahnawà:ke

Prior to the establishment of a band council system of governance in the late-19th century, Kahnawà:ke was governed by a council of seven chiefs. Each chief represented one of seven different clans in the community: Ratiniáhten ("Turtle"), Rotikwáho ("Wolf"), Rotiskerewakaká:ion ("Old Bear"), Rotiskerewakekó:wa ("Great Bear"), Rotinehsí:io ("Snipe"), Rotineniothró:non ("Rock"), and Rotihsennakéhte ("Deer").[18] The seven chiefs held their position for life. Historian Gerald Reid writes that a council of chiefs based on the clans system probably existed in the community since the late-17th century, but that the seven-chief council may date to only about 1840. Throughout the 1870s and into the early 1880s, there were several efforts to reorganize the council into a system more consistent with the model of governance that Canadian authorities were attempting to establish through the Indian Act system. When the Indian Advancement Act was applied to the reserve in 1889, the seven-chief system was only a half-century old but still

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17 Toshio Kuwako in Seigel, *ibid* at 335.

18 Gerald F Reid, "Kahnawake's Council of Chiefs: 1840-1889" (2012), online: *Haudenosaunee: Kahnawake branch of the Mohawk nation six nation confederacy* <http://www.Kahnawakelonghouse.com>.

rooted in the Haudenosaunee system of clans and consensus decision making. Reid describes this modified council format as not a traditional government but rather one based on two important principles at the heart of the Iroquois political organization — equal-voice government and decision making based on the clan system.[19]

In this early band council governance system, laws were handed to the Indian Agent. The band council had limited lawmaking authority. Legislation was developed at the federal level and handed over to the community to be enforced. Indian Agents were automatically appointed as Justices of the Peace under Section 107 of the Indian Act. These Justices, appointed by the Governor in Council of Canada, were authorized to hear offences under Section 81 of the same Act and could hear offenses under the Criminal Code of Canada relating to cruelty to animals, common assault, breaking and entering, and vagrancy in those cases in which the offense is committed by an Indian or relates to the person or property of an Indian. Section 81 of the Indian Act empowered Indian Bands to pass bylaws in relation to 18 areas including health, law and order, trespassing, zoning, land allotments, regulation of bee-keeping and poultry-raising, control and regulation of public games, preservation and protection of fur-bearing animals. Section 82 of the Indian Act also outlines the process of how bylaws are to be enacted. The Minister of Indian Affairs could arbitrarily approve or disallow a bylaw.

In 1940, with the appointment of Kahnawà:ke resident Frank McDonald Jacobs as Justice of the Peace, Kahnawà:ke began the process of administrating its own justice. Over the years various community Justices were appointed for the Court of Kahnawà:ke. The assumption made by the Canadian Government was that these Justices of the Peace would sit in a Provincial Court. Kahnawà:ke made a determination that it could create its own court. In 1979, Kahnawà:ke began expanding its activities to hear matters other than traffic offenses. The Court began hearing bylaws created under Section 81 of the Indian Act and the approval process contained in Section 82 of the Act, as well as summary conviction offenses contained in Part XXVII of the Criminal Code of Canada.[20]

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19   For further discussion on the evolution of Kahnawà:ke governance, see Gerald F Reid, *Kahnawà:ke: Factionalism, Traditionalism, and Nationalism in a Mohawk Community* (Lincoln, NE: University of Nebraska Press, 2004) at 56.

20   Tonya Perron, *Final Report on the Administration of Justice in Kahnawake* (Prepared for the Intergovernmental Relations Team, 2000).

In 1987, the Mohawk Council of Kahnawà:ke began moving closer toward the goal of judicial autonomy with the approval of the members of the Justice Committee and implementation of the Justice System. Shortly thereafter, the Mohawk Council of Kahnawà:ke formally decided not to submit any further bylaws to the Minister for approval, which was inconsistent with Section 81 of the Indian Act. Kahnawà:ke decided to legislate outside of Sections 81 and 82 and began to create its own communal laws. Throughout this time, Justices of the Peace continued to be appointed by the Governor in Council, although they could not hear Kahnawà:ke Communal Laws because they were answerable to the Crown. Until the 1996 signing of the Policing Agreement between Kahnawà:ke, Quebec, and Canada, the Kahnawà:ke Peacekeepers[21] could also not enforce Mohawk law. This created a void in community needs with regards to justice.[22]

History of Kahnawà:ke's community decision making process

During community consultations held in 1979, the People of Kahnawà:ke expressed the desire to return to a more traditional form of governance. A Mohawk Council Resolution was signed in 1982 to this effect and reaffirmed in 2000 by the elected chief and council. Despite these declarations, no resolution to this issue was found until 1995 when the Mohawk Council of Kahnawà:ke delegated the Kahnawà:ke Justice Commission to create laws for the community. However, there was conflict because the people who comprised the Commission were also responsible for the enforcement and interpretation of law in the community. Community members felt that there needed to be a separation of the legislative and judicial aspects of the Kahnawà:ke justice system. Added to this tension was the Kahnawà:ke community's dissatisfaction with the way decision making occurred as members wanted more involvement. To address this dissatisfaction, the Mohawk Council of Kahnawà:ke gave the mandate to the Office of the Council of Chiefs (OCC)[23] to research

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21 The Iroquois Police Force was created in 1976, and its members were appointed by the Royal Canadian Mounted Police. This Force was mandated to enforce Canadian and Band By-Laws. This force changed to the Amerindian Police Force from 1975 to 1979, and in 1980 the current Kahnawà:ke Peacekeeper Force was created. An agreement signed between Kahnawà:ke, Quebec and Canada in 1996 allows for the Peacekeepers to enforce Mohawk Law.

22 Much of this history was compiled and presented to the community during a series of Kahnawà:ke Justice Community Consultations that took place in January 2009. Kahnawake Justice Community Consultation. Powerpoint presentation.

23 The Office of the Council of Chiefs provides support services to the Mohawk Council of Kahnawá:ke Chiefs in the areas of politics and governance. The OCC first started as the Advisory Unit in 1999

and develop a community decision making process, one which would have community involvement in its development and direct participation in the resulting process.

The OCC researched the issue of consensus-based decision making by looking to past practices of the Kahnawà:ke community as well as present customs of other Indigenous communities. The OCC drafted the Community Decision Making Model that included principles and format similar to the Haudenosaunee traditional methods of making decisions. Its development is seen as an effort to move towards the 1979 expression of returning to a more traditional way of dealing with disputes.

The Mohawk Council of Kahnawà:ke established the Interim Legislative Coordinating Committee (ILCC) on 30 May 2005 as the body responsible for the legislative process. The ILCC was given the Community Decision Making Process Model as one of its administrative tools on 14 October 2005. The KLCC officially came into force 1 April 2007.[24]

In 2005, ILCC was given the task of further developing the Model which later became the Community Decision Making Process. Numerous community consultations were held between 2005 and 2007. Prior to 2005, the Process was seen as too cumbersome, with a 21-body legislative assembly comprised of community, governmental, and organizational representation. Throughout this development process, approximately nine community organizations were identified and nine participants from each were interviewed. The process was streamlined through further consultation during those two years. It evolved from a 14-phase Process into the 3-phase Process it is today with the intent and realization that it is up to the community to continue its development further. This was done through consultation with approximately 100 employees from the nine community organizations, various other organizations, specific interest groups, and government factions of the community, among them the Traditional Government Working Group. The evolution of the Process has been and continues to be at the grassroots level and is an ongoing process.

The ILCC was instructed by the Mohawk Council of Kahnawà:ke to test the Community Decision Making Process by conducting three mock sessions held 12 September 2007, 21 November 2007, and 12 January 2008. The pur-

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and was formerly known as the Intergovernmental Relations Team. The OCC receives its primary direction from the elected Council, online: <http://www.kahnawake.com>.

24 The ILCC later became the Kahnawà:ke Legislative Coordinating Commission (KLCC).

pose of these sessions was to inform and educate the community on the new Process and to gain feedback regarding the community's insight into values and principles important to law making.[25]

Community participants of the mock sessions created a draft Preamble which was used to launch the discussions at the first Community Decision Making Process Phase I Community Hearing held 1 September 2009. Following the mock sessions on the Community Decision Making Process, the ILCC began Phase I of the Justice Act. This was the first piece of legislation to undergo Process. Throughout the sessions held to acquire the mandate of the proposed Justice Act, the ILCC received considerable feedback on the Process itself and worked at revising the Process to its current state.

The Kahnawà:ke legislative coordinating commission (KLCC)

The Kahnawà:ke Legislative Coordinating Commission oversees the activities of the Coordinator and ensures laws currently in process go through the CDMP in a timely manner. Its members provide expertise and input on aspects of the CDMP as they relate to laws that are currently on the Legislative Agenda.[26] The Commission is made up of representatives from the following areas of the Mohawk Council of Kahnawà:ke: Office of the Council of Chiefs Secretariat, Legal Services, Communications, Justice, the Community, and The KLCC Coordinator.[27] There is also a Community Representative who expresses the interests of the community to the Commission.

The community decision making process (CDMP) - Overview

Any Kahnawà:ke community member over the age of 18 years, Mohawk Council of Kahnawà:ke Unit, or Kahnawà:ke organization can submit a reasonable Request For Legislation or a request for revisions to a current piece of legislation. A letter is sent to the KLCC which then sends the request to Legal Services to be categorized as either a Type I or Type II piece of legislation. Type I process categorization applies to Kahnawà:ke Laws of General

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25 Mohawk Council of Kahnawà:ke, *Community Decision Making Summary Report*, 2008.

26 Laws currently in process are the Kahnawà:ke Justice System (Act), Matrimonial Real Interests Law, Kahnawà:ke Membership Law, Kahnawà:ke Land Code, and the Kahnawà:ke Elections Law.

27 Members of the Commission approved through the Mohawk Council of Kahnawà:ke Executive Directive (MCED) No. 51/2010-2011, and No. 74/2011-2012.

Application or laws that affect the entire community of Kahnawà:ke. A Type II process categorization applies to regulatory, financial, and/or administrative laws, or laws that affect a specific sector, interest group, or portion of the community. Those laws deemed urgent are given the recommended categorization of *Urgent* which is based on established criteria: "*The necessity for immediate legislative action due to issues which pose (or will soon pose) an internal or external imminent objective threat to the security and safety (environmental, fiscal, legal, social, cultural or political) of Kahnawà:ke Territory and the collective rights of its Peoples.*"[28] The community determines the level of urgency and the resulting time-frame is applied as they law goes through the Type I or Type II processes at an accelerated rate.

Contrary to the previous practice of law making in the community, Kahnawà:ke chiefs, or Kahnawa'kehró:non Ratitsénhaienhs,[29] must incorporate community input into laws that are developed or revised. Previously, laws were made by Canada and handed over to be enacted in the community; in the 1960s Kahnawà:ke took over its own law making and the chiefs began making laws for the community through a process called Mohawk Council Resolution (MCR).

In the current CDMP, the Kahnawa'kehró:non Ratitsénhaienhs have distinct roles to play in the development of Type I, Type II, and Urgent legislation. In a Type I process, they are responsible to ensure consistency in the development of all aspects of potential legislation and its implementation within the formal and duly convened legislative sessions; to participate at Community Hearings and Readings as a community member; to serve as a member of the Chiefs Advisory Committee; to ensure that the KLCC strictly adheres to the procedure for enacting laws in Kahnawà:ke; to attend regularly scheduled KLCC meetings, hearing, readings, and other activities; and to provide guidance to the KLCC members and ensure the health, safety, and well-being of the community of Kahnawà:ke. In a Type II process, they are responsible to ensure consistency in the development of all aspects of potential legislation and its implementation within the formal and duly convened legislative sessions; to participate at Community Readings as a Chief; to act

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28   On April 30, 2012 the KLCC was mandated to develop a third law-making process in response to the Matrimonial Real Interests legislation issue in order to address the need for urgent law making, laws that are time sensitive, affect jurisdiction, affect community security and safety. This process has been developed and put to the Kahnawà:ke community for their feedback.

29   Kahnawa'kehró:non Ratsénhaienhs/Ietsénhaienhs is the Kanien'kéha word for Mohawk Council of Kahnawà:ke Council Chief (singular). Note: Literal translation is "the Resident (singular) of Kahnawà:ke, he/she put a fire in place" – habitual tense.

as a member of the Chiefs Advisory Committee; to ensure that the KLCC strictly adheres to the procedure for enacting laws in Kahnawà:ke; to attend regularly scheduled KLCC meetings, hearing, readings, and other activities; and to provide guidance to the KLCC members and consider their well-being. The chiefs also act as the voice of the silent component of the community who may not be directly affected by the legislation. They act as counterweights to the special interest groups who are directly affected by the legislation. In the Urgent Law Making Process they are responsible for bringing the law or urgent issue to the attention of the KLCC and making the formal submission of the law to the Process.

After the law has been categorized, a technician or advisory team is assigned to the law. They guide the law through the CDMP and ensure that all necessary steps are taken from proposal to enactment. The first step is a lengthy information-gathering process. This information is then conveyed to the community to gauge opinion on the law or proposed amendments. General and specific-interest group-based community consultations consist of methods such as kiosks, questionnaires, focus groups, and radio talk shows. Minimum communications standards have been developed for this purpose. Once an opinion has been obtained, the technician posts a report on the preparation phase to the community for a minimum of 30 days.

Type I process

COMMUNITY DECISION-MAKING PROCESS FLOWCHART
Type I Law
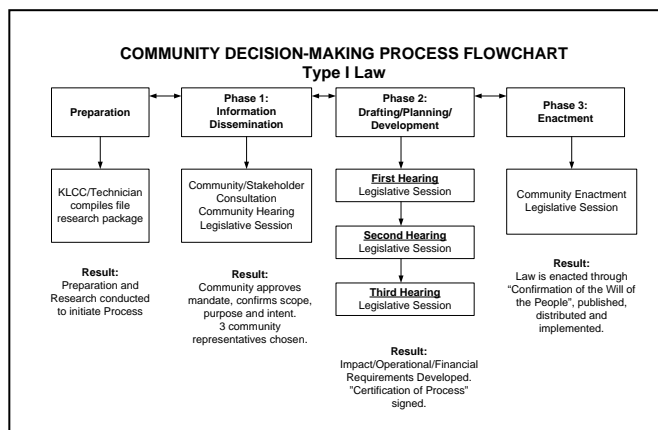
In the Type I process, after the preliminary community consultation, a date is set for the first community hearing in which the technician obtains the mandate, scope, purpose, and intent from community members. This is

done using the consensus-based decision making process. Divided into three groups, the community members deliberate and pass decisions back and forth from the first group to the second until consensus is reached. Each group is comprised of a Facilitator, a Resource Person, a Minute-Taker, and various community members. A Lead Facilitator and Lead Minute-Taker are also present. In the interest of transparency, all minutes and relevant documents are posted onto the www.kahnawakemakingdecisions.com website.

Consensus process
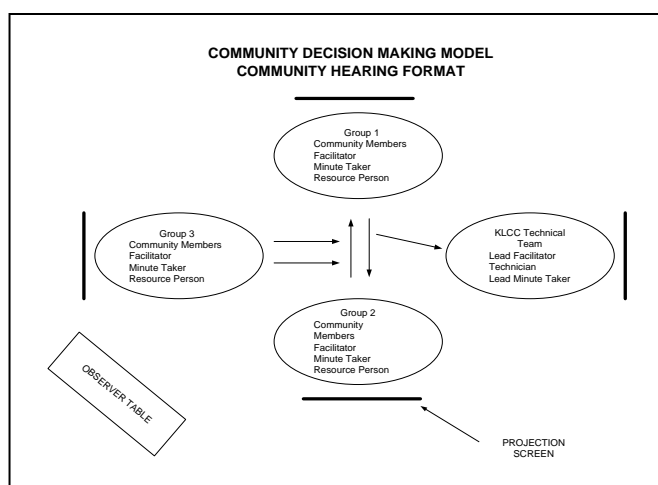
In this process, each group appoints a Speaker as representative. When consensus is reached, the first group's Speaker stands and states the group's position. The second group is then asked to discuss the first group's statement. When consensus is reached by the second group, their Speaker stand stands and states whether they agree, disagree, or have comments to add to the first group's position. In this way the two groups send the discussion back and forth until they reach consensus.

During this time, the third group watches and listens to the discussion taking place in the first and second groups and also discusses the issue amongst themselves. If the third group requires clarification or questions arise, this information is passed on to the Lead Facilitator. The Lead Facilitator then passes on the request to the three groups and all three respond. After the first and second groups reach consensus, the issue is then passed to the third group for their input. The Speaker for the third group stands and states whether the

group agrees, disagrees, or has suggestions to add to the decision of the first and second groups. If the third group has a different decision from those of the first and second groups, the process has to begin again with the issue sent back to the first group who has to consider all new information until consensus is reached. Consensus must be reached by all three groups to complete the process.

This process of deliberations between groups one and two and the ratification by group three provide the necessary checks and balances that make this process work and make all those present accountable for their decision. It does not allow for coalition building and "stacking" of meetings like band meetings in the past. There have been instances in which band meetings were stacked to get a desired result. The problem of coalition building has been addressed in recent revisions to the Type II process in which stakeholder consultations are to occur before the chief and council are asked for the mandate, scope, purpose, and intent. In this way, all points of view are considered.

The CDMP process follows community meeting Rules of Order that ensure everyone has a voice and that peace and calm are maintained throughout. Achieving the mandate, scope, purpose, and intent of the law or amendments may take more than one meeting. In the case of the Kahnawà:ke Justice Act currently in development, this part of the process took a period of five months and within that time six community hearings took place. All hearings are done during a two-and-a-half-hour time period and there are never two hearings in one week.

The decision by the community to draft or revise a law is presented to Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. After the mandate, scope, purpose, and intent are confirmed, Legal Services completes a first draft of the legislation. This draft is completed with the help of a drafting committee which includes community members selected at the time the mandate was given. This draft goes out to the community two weeks in advance of a community hearing. At the second and third hearings, the consensus process described above is used to get feedback on the drafts. In the third hearing, the law should be nearly complete. After every hearing, the law is redrafted by Legal Services and presented and confirmed by Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. It is at the third hearing that the final draft is approved by community members and the Certification of Process and Will of the People documents are signed. After this, the law is enacted by Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. It is then published, distributed, and implemented.

Type II process
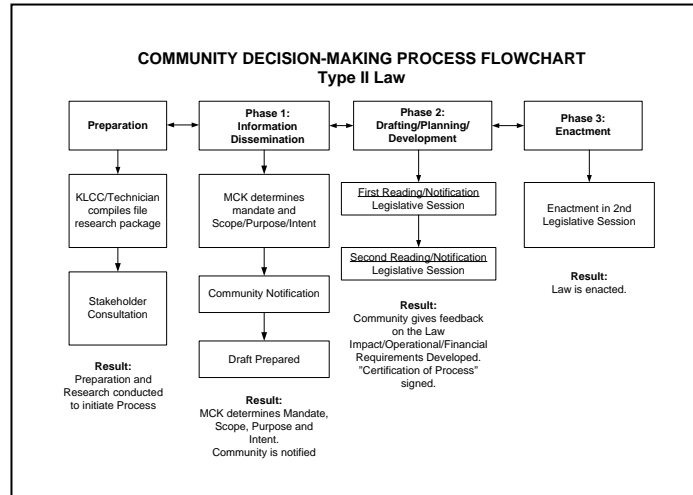
The Type II process is utilized when addressing laws that affect only a portion of the population or a specific interest group. These laws are usually regulatory, financial, and/or administrative in nature. The Type II process can be initiated by any community organization, entity, or individual by submitting a Request for Legislation. As the Government of the day, the Kahnawá'kehró:non Ratitsénhaienhs have the responsibility to ensure the health and safety of their population and are required to determine/confirm the mandate, including the scope, purpose, and intent for the development of Type II Requests for Legislation. This requirement is the major difference between the Community Decision Making Type I and Type II processes and provides a proper check-and-balance mechanism that deters any one specific interest group from influencing the process and passing legislation in their favor.

The Unit/Chief submits request for legislation or amendment to legislation. The KLCC Technical Team submits an RFD to the Kahnawá'kehró:non Ratitsénhaienhs requesting approval for the Legislative Mandate, including the scope, purpose and intent for said legislation. After the mandate is determined, the Technician conducts further community and stakeholder consultations to determine the impacts of the law or proposed amendments.

Information is distributed to the community and posted for a minimum of 30 days. The verbal and written feedback is outlined in a Feedback Report. This community feedback is incorporated into a draft of the law by

the Technical Team assigned for this process. This Team is comprised of the Technician, members of the Mohawk Council of Kahnawà:ke Units affected by the Law, a Legal Services representative and three community members. The Draft is sent to Legal Services for verification and to ensure proper legal formatting. A community reading is scheduled in which the draft is read out loud and community members provide further feedback. The draft is then brought to a Legislative Session of Council in which further input is obtained from the Kahnawá'kehró:non Ratitsénhaienhs who approve the draft. Then the process begins again.

This same process of information dissemination, the incorporation of feedback, and community reading occurs for a second time and is approved by the Kahnawá'kehró:non Ratitsénhaienhs. After this second process, the law should be in its final format. At the second and final reading, the Chief responsible for the area over which the law governs, such as Lands, reads the law in its entirety into the record. After the second reading, the law is presented to Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session where it is enacted.

Urgent law making process
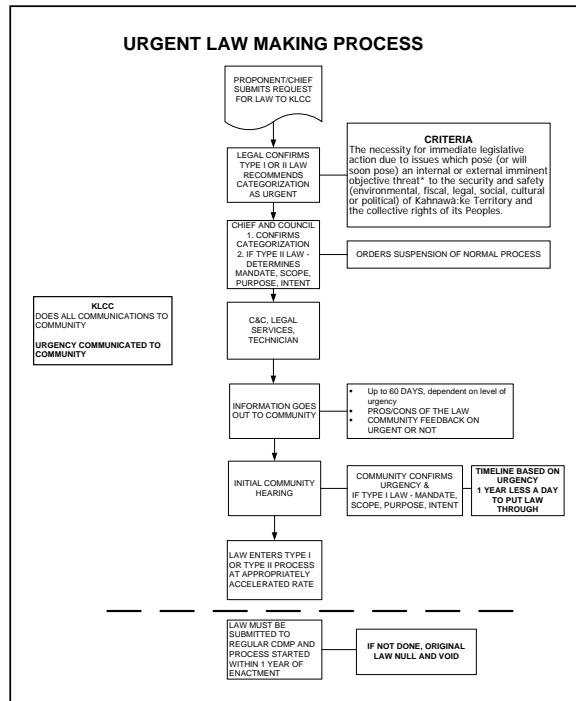
The Urgent Law Making Process is applied at the beginning of the regular Type I and Type II processes which are appropriately accelerated based on the input by the community members who determine the level of urgency. This process deals with the issue of categorization and applying an appropriate level of urgency to the law as it goes through the CDMP. When the law has completed this accelerated process, it must be reviewed within one year in order to address any further concerns that may have been overlooked while it went through the CDMP at the accelerated rate. If the review is not done, the law becomes null and void.

Issues

A number of issues have come to the attention of the Commission regarding the CDMP process. By no means is the process perfect; rather, it is a work in progress. Each issue illustrated here is currently being examined and solutions are being sought.[30]

Application of Laws in relation to Canada – The interrelation between laws of different jurisdictions is governed by "conflict of law" rules. An example of these types of rules is in the Civil Code of Québec starting at Article 3083. These rules determine which jurisdiction's laws apply to a particular situation. Eventually Kahnawà:ke will be required to develop their own set of conflict of law rules much like other jurisdictions have. In the interim, agreements with Québec and Canada may be required.

How are individual and collective rights respected? — In Canadian Law (s.1 Charter) and Québec Law (s.9.1 Charter) the courts seek to strike a balance between individual rights and collective rights through the process of seeking a reasonable accommodation in which conflicting rights can coexist. The Legal Service Department representative on the KLCC points to the balancing of rights inherent in the Kaienere'kó:wa when individual rights conflict with collective rights. This issue deserves further discussion but is not the focus here.

Time – There has been considerable criticism from Chiefs, MCK Staff, and community members that the process takes too long. Initially, the process was much longer and contained more procedures. Over time, it has been pared down to what it is today. With our modern conception and use of time,

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30 Lawrence Susskind discusses many similar difficulties related to implementing consensus as the basis for deliberative democracy instead of using top-down approaches. See Lawrence Susskind, "Deliberative Democracy and Dispute Resolution" (2009) 24:3 Ohio State Journal on Dispute Resolution.

this criticism comes as no surprise. Even now, the Commission is working towards ensuring that the process is streamlined even more without losing any of its intrinsic principles of participatory democracy. Recently, the Type II process was revised to reflect the desire for a shortened process. In this revision, the number of Community Hearings was reduced from three to two.

Community participation – One of the main challenges is getting community to participate in the CDMP. There are different areas in which community participation is required. First, members have the opportunity to submit a proposal for a law or amendments to a law. Second, their participation is required for feedback on proposed laws or amendments. Third, they are required at all community hearings and readings. This issue relates to community members' trust in and knowledge of the process. Implementation of the process also asks the community to change its way of thinking, that is, to go from thinking only of individual needs to considering the needs of the collective and the impacts of those decisions seven generations into the future. The Commission is working to address this issue by educating the community on the process through kiosks, kitchen table discussions, YouTube videos, presentations, television, radio, and print. The pulse of the community is taken on an ongoing basis to gauge people's perception and knowledge of the process. The Commission members are finding an increasing knowledge of the process and its value as the only means of passing or amending laws. This is evident in the recent submission to the process by 38 community members who signed a submission letter for a new law — the Karihwakwenienhtshera or "Respect" Law — to be passed for the community in the area of land management.

Trust – There is a faction of the community that maintains that only the present "traditionalists" are eligible to control the politics and political systems of the community, but another group also claims the right. Others believe that no group, not even the elected council, is qualified to take the responsibility for governance. Many Kahnawà:ke community members argue that the biggest obstacle is ignorance and fear of the unknown. Governance is made out to be scary and difficult, yet we are already implementing it. There is mistrust in the leadership of the community because they are put in place by a system that is not of our choosing. Therefore, any initiative driven by the Mohawk Council of Kahnawà:ke is not trusted by part of the population, which has direct effect on the number of participants in the process.[31]

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31   For discussion on this, see Organizational Development Services, "Final Report Tekariho'tahrhon (Of the Dispute at hand): Community Consultation Project" Organizational Development Services and Resolution Alliance Inc. (1999) at 11.

Abolishment of Type II Process – In the Type II Process, it is the Chief and Council who determine the mandate, scope, purpose, and intent of a law or an amendment to a law. This fact creates mistrust for the Type II Process for the reasons illustrated by the previous issue. There have been numerous requests by community members for the removal of this categorization process and that all laws should go through a Type I Process in which there is full community input on all aspects of a law from inception to ratification.

Workload – Technicians assigned to champion a law through the CDMP, members of the Technical Team and KLCC, and community members themselves find it difficult to keep up with the level of work required to put a law through the process. Technicians are responsible for different laws as well as issues related to governance of the community. The Technical Team, recruited to draft a law or draft amendments to a law, also have other responsibilities related to their full-time work. Community members themselves have difficulty in finding the time to participate in the hearings and readings as they too have work and family responsibilities to consider. This illustrates the fact that participatory democracy takes a lot of personal commitment. One has to consider if the process fits today's society or how to make it fit.

Resources – There are limited financial and manpower resources to support the process. Currently, the KLCC is housed within the Mohawk Council of Kahnawà:ke Office of the Council of Chiefs (OCC). The OCC provides the necessary infrastructure and support needed to maintain the Commission and CDMP as a whole.

Implications/Conclusions

There is a natural fear of the unknown, especially in terms of the practical meaning of traditional government and the Community Decision Making Process. For Kahnawà:ke community members not only is there a fear of change, but questions also arise as to the implications of the CDMP on the Mohawk Council of Kahnawà:ke as an institution. The process is a clear step away from the long-held paternalistic relationship between the community of Kahnawà:ke and Canada. The process could be viewed as a form of self-determination. Stepping out and taking ownership of one's actions is scary in the best of times. At the least, this form of participatory democracy requires individuals to bring their knowledge, expertise, and love for their community to the table. The decisions they make will have far reaching implications, seven generations into the future.

On a related note, by taking away the ability of Canada to make laws for the community, a certain sense of ownership and responsibility comes with making laws that regulate a community's actions. Yet we are not completely secure about our right to govern over our own affairs. This comes from insecurity about our relationship with Canada regarding economic, legal, and political issues. In the time since we signed political treaties with the colonizers, our trust in the non-native signatories has truly been tested. Time and time again we have been made to acquiesce our land, rights, and lives to the colonizers. Added to this is a certain fear of our own culture as a consequence of the efforts of Canada and the Church to assimilate our people.

Indigenous peoples have been taught to fear our own ancient traditions and language. The well-documented effects of this are seen in the loss of language, culture, and traditional knowledge. Since 1492, we have moved away from social, political, and spiritual processes that worked and kept us alive. Yet all is not lost. Part of this has been kept alive and we see the effect of this in the revitalization of participatory democracy in the form of the Community Decision Making Process.

As more cutbacks to funding occur, we will see more instances in which we will have to take ownership of our own future. Canada no longer has the money to uphold its treaty obligations to Indigenous peoples. As a result, we are the masters of our own domain. The Community Decision Making Process should be seen as a self-empowered, controlled, and gradual step towards a form of traditional governance. It is taking a step in the right direction.