

# 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 transitional 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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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 new 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,<sup>3</sup> the community is situated on a land base of less than 11,888 acres,<sup>4</sup> with the land-claim negotiation of Seigneurie of Sault St. Louis potentially restoring significant area back to the Indigenous community.<sup>5</sup> The Kanien:keha’ka

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3 “Residents” (2013), online: Aboriginal Affairs and Northern Development Canada: Kahanawake Band <[http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile\\_kahnawake-eng.html](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](http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile_kahnawake-eng.html)>.

5 “Seigneurie of Sault St. Louis Historical Pamphlet” (2012), online: Mohawk Council of Kahnawà:ke <<http://www.kahnawake.com/council/seigneurie.asp>>.

laws of descent, funerals, and civil matters.<sup>10</sup> 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*,<sup>11</sup> 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 Karihwaterkwen, 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.<sup>12</sup>

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.

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: Irocrafts, 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 Tajiake 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).

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.<sup>15</sup> 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.<sup>16</sup>

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.

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.<sup>19</sup>

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 administering 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.<sup>20</sup>

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).

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.<sup>24</sup>

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>>.

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

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.*”<sup>28</sup> 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,<sup>29</sup> 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).

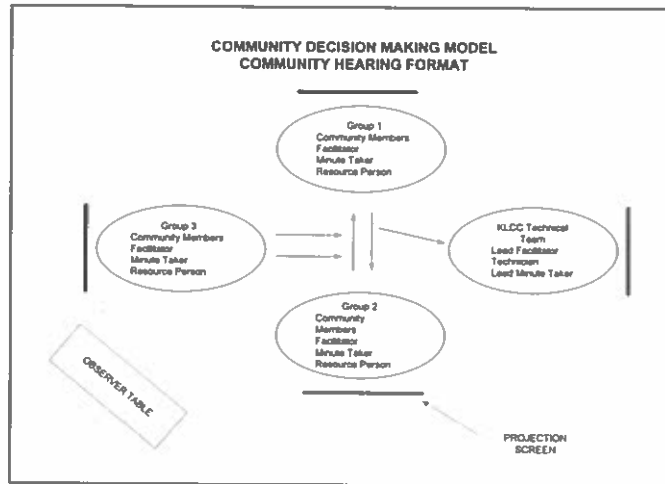
In the current CDMP, the Kahnawa'kehró:non Ratitsénhaienhs have distinct roles to play in the development of Type I, Type II, and Urgent legislation. In a Type I process, they are responsible to ensure consistency in the development of all aspects of potential legislation and its implementation within 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

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/letsénhaienhs 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.

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](http://www.kahnawakemakingdecisions.com) website.

### Consensus process

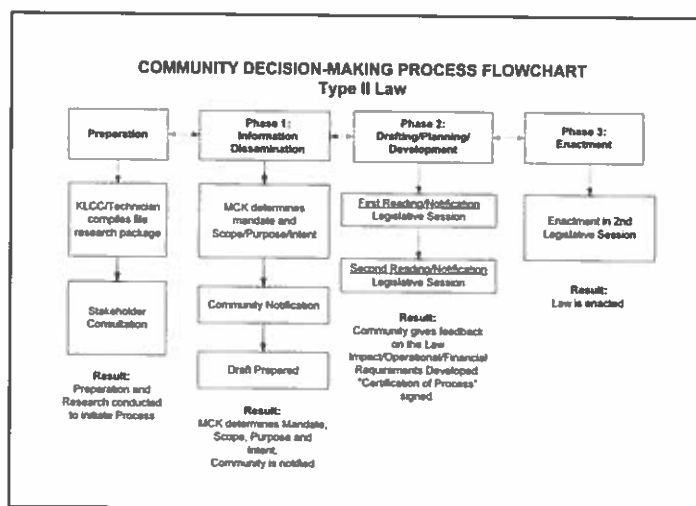


In this process, each group appoints a Speaker as representative. When consensus is reached, the first group's Speaker stands and states the group's position. The second group is then asked to discuss the first group's statement. When consensus is reached by the second group, their Speaker stands and 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



## 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 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 application of 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.<sup>30</sup>

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 (s1 Charter) and Québec Law (s9.1 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 co-exist. 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,

<sup>30</sup> 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*.

**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 at 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.