

THE COURT OF KAHNAWÀ:KE & KAHNAWÀ:KE JUSTICE SYSTEM

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Member of the Barreau du
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1. ORIGINS OF THE COURT OF KAHNAWÀ:KE

A. Section 107 of Indian Act

- Section 107 of *Indian Act* authorizes appointment of persons to be Justices of the Peace (“JP”).
- JPs can hear by-laws made under Section 81 of *Indian Act*.
- Kahnawà:ke currently has two (2) active JPs.

B. Brief History of JPs in Kahnawà:ke

- Records indicate that Kahnawà:ke began taking over control of justice matters as far back as the 1940s, with the appointment of Justices of the Peace (“JPs”) who were Mohawk.
- Indian Agents used to be automatically appointed as JP under Section 107.

B. Brief History of JPs in Kahnawà:ke (cont'd)

- Kahnawà:ke determined it could establish its own local court, resulting in creation of Court of Kahnawà:ke.
- Presumption by Canada that JPs would sit in Provincial Court.
- In 1979, Kahnawà:ke began expanding activities to hear matters other than traffic offenses, including gradually hearing aspects of Part XXVII of Criminal Code of Canada.

B. Brief History of JPs in Kahnawà:ke (cont'd)

- The Kahnawà:ke Justice Committee (now Kahnawà:ke Justice Commission) was mandated to oversee administration of justice in the territory.
- Kahnawà:ke's last two JPs were appointed by Governor in Council in 1993.

2. OPERATIONS OF THE COURT OF KAHNAWÀ:KE

A. Cases

- The Court currently hears:
 - Summary conviction offences (Part XXVII of the Criminal Code of Canada),
 - Contested traffic tickets, and
 - Most Kahnawà:ke laws.

B. Common charges

- Common charges include:
 - Assault
 - Mischief
 - Theft
 - Break & Entry
 - Assault with a weapon
 - Peacebond Request
 - Breach of Probation
 - Breach of Peacebond
 - Assault on a Peacekeeper
 - Obstruction
 - Uttering Threats
 - Fraud
 - Resisting arrest

C. Operations

- Court-generated revenue from fines submitted to MCK general fund for community benefit.
- Prosecutor and JPs appear on sessional basis.
- Criminal Court and traffic court sessions are held.
- Trials held in English. For anyone not speaking English an Interpreter is provided.

C. Operations (Cont'd)

- Court sessions are held approx. 3 times a month.
- Only summary conviction offences are heard. Indictable offences are forwarded to Longueuil.
- Bailiff firm serves our summons, subpoenas, & executes warrants.

D. Solemnization of Marriages

- Persons agreed to Kahnawà:ke and Quebec may be designated as officers able to solemnize, according to applicable laws, civil marriages in Kahnawà:ke.
- Four (4) designated officiants (the active JPs, and two retired JPs).
- Several marriages are solemnized each year.

E. Compensatory Works Program

- Main purposes of program:
 - Offer alternative to incarceration for individuals who do not pose threat to community,
 - Provide another recourse for those who unable to pay fine,
 - Allow for community service which will be more beneficial to individual and community.

E. Compensatory Works (cont'd)

- Main purposes of program (cont'd):
 - Encourage rehabilitation through participation in community services/operations,
 - Restore control and responsibility for addressing areas of conflict within our community.

F. Communal Arbitration Procedure

- Community members may choose to resolve disputes through Communal Arbitration Procedure.

3. DEVELOPMENT OF THE KAHNAWÀ:KE JUSTICE ACT

A. Need for a Kahnawà:ke Justice Act

- Moratorium on JPs by Canada after *Ell v. Alberta* ([2003] 1 S.C.R. 857).
- JPs could not be replaced if retired or unavailable to hear cases.
- All files would be transferred to provincial court. There would effectively no longer be a functioning Court of Kahnawà:ke.
- To ensure continuation of court it was determined that there was need for legislation to create a local justice system.

B. Community Decision-Making Process

- Submission by Kahnawà:ke Justice Commission to Community Decision-Making Process (“CDMP”) for development of a justice act.
- CDMP > Process by which community reaches consensus on community laws.
- CDMP a response to call for more culturally relevant and inclusive process for making community laws.

B. Community Decision-Making Process **(cont'd)**

- Essentially, community creates laws through consensus-based process with ratification by Council.
- The Kahnawà:ke Justice Act (“Act”) was formally enacted in 2015, after extensive communication and consultation with the community from 2007 to 2014.

B. Community Decision-Making Process **(cont'd)**

- Extract from CDMP Procedural Manual:

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 takes into consideration the needs of the collective. Through consensus, each individual's concerns and ideas are listened to and considered. Every participant must have equal access to the process for it to be true consensus decision-making.

Consensus does not mean unanimity. The group works with and adjusts a proposal until all can consent to its final form. With consensus there may not be a complete agreement in every decision, but there is always complete consent.

4. HIGHLIGHTS OF KAHNAWÀ:KE JUSTICE ACT

A. General

- Establishment of Kahnawà:ke Justice System, which includes administrative, criminal, civil and penal jurisdictions to redress, remedy and re-establish harmony.
- Purpose of Act is to establish judicial forums to adjudicate and interpret laws applicable to the Mohawk Territory of Kahnawà:ke in order to maintain peace, order and justice.

A. General (cont'd)

- Institution of judicial forums an exercise of sovereign rights of the People of Kahnawà:ke.
- Four (4) different forums for dispute resolution:
 1. Skén:nen Aonsón:ton (Alternative Dispute Resolution),
 2. Administrative Tribunal,
 3. Court of Kahnawà:ke, and
 4. Kahnawà:ke Court of Appeal.

A. General (cont'd)

- The Court of Kahnawà:ke set out in the Act has much broader authority than present-day court, which has a relatively limited scope.
- Article 1.1 (Jurisdiction):

We, the People, have the ultimate and exclusive power, right and jurisdiction, to maintain peace, order and justice. To this end, we hereby institute judicial forums within the Territory as an exercise of our sovereign rights.

B. Skén:nen Aonsón:ton ADR Program

- Extract of preamble:

In keeping with the principles of balance and harmony, the use of Skén:nen Aonsón:ton (Restorative Justice) shall be the first recourse to resolving conflict.

- Article 6.1:

Skén:nen Aonsón:ton Alternative Dispute Resolution (hereinafter SA/ADR) is a process within the Kahnawà:ke Justice System that is used to resolve conflict in a peaceful, non-adversarial way. The principles embodied in the process are a holistic approach to address conflict. This approach respects concepts historically used by Kanien'kehá:ka to resolve disputes and conflict.

B. Skén:nen Aonsón:ton ADR Program (cont'd)

- Provides a safe, secure, environment to effectively resolve issues of conflict using traditional restorative justice practices.
- Offers mediation, conflict resolution, restorative justice forums, and peace making circles to community members experiencing situations of conflict.
- Through its philosophy and actions, it initiates social responsibility and harmony in Kahnawà:ke.

C. Administrative Tribunals

- An adjudicator or panel of adjudicators charged with reviewing decisions of the administrative branch of government and where appropriate to correct an error or fault.
- It will review and determine whether due process was followed, whether laws of natural justice were adhered to, ensure absence of bias, ensure the decision was reasonable, determine whether there was absence of jurisdiction, or, if there was a mistake of law.

D. Court of Kahnawà:ke

- Article 8.1:

The Court of Kahnawà:ke is the court of original general jurisdiction within the Territory in all civil, criminal and penal matters. It hears in first instance every matter not assigned exclusively to another Kahnawà:ke court or administrative tribunal by Kahnawà:ke Law.

E. Kahnawà:ke Court of Appeal

- Jurisdiction to hear appeals in criminal, penal and civil matters.

F. Eligibility Criteria for Judges

- Kahnawake Justice Act Regulation 1: Eligibility for Judges:
 - Formal Legal Training;
 - Member of a recognized Bar Association in North America;
 - Have the requisite knowledge of law applicable to the Territory;
 - Minimum of five (5) years of experience as a practicing attorney;
 - Preference will be given to individuals of Onkwehón:we (the Original People of North America) descent;
 - Have knowledge of Kanien'kehá:ka culture and customs and/or be willing to acquire training to gain that knowledge;
 - Onkwehón:we means “Original people of North America.”

G. Selection Process for Judges

- Kahnawake Justice Act Regulation 2: Selection Process for Judges
 - Applications screened by Kahnawà:ke Justice Commission to ensure necessary requirements are met;
 - Names and backgrounds of eligible candidates published for public review (30 day period);
 - Within 60 days of publication, special community meeting to confirm selection of judges by consensus. Candidates must be present to answer questions.

G. Selection Process for Judges (cont'd)

- Kahnawake Justice Act Regulation 2: Selection Process for Judges (cont'd):
 - Upon confirmation by the community, Justice Portfolio Chief will swear in selected judges (by public pledge to the community) within 10 days at a public ceremony;
 - Each judge must, before taking up duties, make a solemn oath, that the powers conferred will be exercised impartially, independently, conscientiously, and judicially.

5. BENEFITS OF KAHNAWÀ:KE JUSTICE SYSTEM

A. Benefits

- Kahnawà:ke Justice Act fosters dispute resolution using traditional-based or homegrown adjudicative processes tailored to the needs of Kahnawà:ke.
- Strong aversion to petitioning Quebec courts, which is regarded as applying foreign laws and processes. These issues may contribute to lack of dispute resolution by community members and decrease access to justice.

A. Benefits (cont'd)

- Expense of court proceedings in Quebec courts is often cost prohibitive.
- Kahnawà:ke Justice System will resolve some of these issues by providing community members with forums of dispute resolution that are fair, impartial, efficient, cost-effective and specific to the needs of the community.

6. CHALLENGES/OBSTACLES

A. ISSUES

- Funding
- Jurisdiction
- Implementation

- Copies of all Kahnawà:ke laws can be found at:
<http://www.kahnawakemakingdecisions.com/legislation/>