

# **A Review of the Kahnawá:ke Membership Law**

## **EXECUTIVE SUMMARY**

The Kahnawá:ke Membership Law was enacted in 2003 with the hope of creating a new way of approaching Membership in our community. Since the law has been in existence for over three full years, it was time for a full review of the law to highlight issues and concerns in the law itself as well as its administration and implementation. This report provides an overview of the Membership situation, highlights specific issues and provides recommendations for improvement.

Many issues and concerns have surfaced regarding Membership and the Kahnawá:ke Membership Law. Some concern inefficiencies related to specific clauses or definitions in the law such as: enforcement; members who are not Status Indians; beneficiaries; and inconsistency between native communities' membership requirements. Other issues that were raised in the community related to the law included blood quantum requirements, border crossing, clan identification, the differences between identifying as Kahnawa'kehró:non vs. Kanien'kehá:ka, and the concept of citizenship vs. membership. Specific issues were also raised associated with the workings of the Council of Elders (COE) including the actions and decisions of the Council of Elders, the lack of redress regarding decisions of the Council of Elders, their legal representation, the lack of transparency and the working relationship between the COE and the Membership Department.

In general, it must be noted that many of the processes and institutions established through the current Membership Law have failed to live up to its preamble. Instead of developing a sense of community, they have led to disharmony and anger. Instead of respecting the principles of dignity and compassion, they have promoted accusations and resentment. Instead of replacing foreign laws such as the Indian Act, they are often still cited in the decision-making required.

It is recommended that a total reworking of the law must be considered including a revamping of the processes and institutions established as well as the definitions, roles and responsibilities identified. Specific recommendations were also made to address particular concerns and issues. One was that an independent review committee be formed to further investigate the processes, actions and authorities of the Council of Elders. Others involved recommending that working groups be formed of appropriate individuals to specifically address those sections and clauses within the Law that have proven to be unclear and develop those tools and processes necessary including new legislation. Others were directed at MCK operations and addressed areas of discussions with the Federal Government, establishing a formal network of communications, and proposing that the MCK set the example and ensure that its employees follow the law. Finally, a recommendation was made that the Election Law be consistent with the Membership Law.

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# **A Review Of the Kahnawá:ke Membership Law**

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October 2007

# **A Review of the Kahnawá:ke Membership Law**

## **1.0 Introduction**

The Kahnawá:ke Membership Law was enacted in 2003 with the hope of creating a new way of approaching Membership in our community. This was another step in Kahnawá:ke's evolution regarding membership. This evolution has not progressed rapidly, as proven by a passing of twenty-one years since the Moratorium of 1981, instead it has taken a slower approach to build understanding in our community. The Law was intended to focus less on blood quantum and address the eligibility of those who could be members and/or reside in the community through an increased emphasis on the rebuilding of their ancestry and family ties. It is a way of thinking that will develop our community for the future and, as the law is malleable, will be able to adjust to our changing needs.

In order to better serve the community, the Membership Department has drafted this review of the Kahnawá:ke Membership Law. Although amendments have already been made to the Law, it was felt by many that the Law should not be amended and only assessed after a period of a few years to allow it "some time to breathe". The need for the amendments was obvious and therefore did not require a full assessment of the Law before being drafted and passed. Since the law has been in existence for over three full years, it is time for a full review of the law to highlight issues and concerns in the law itself as well as its administration and implementation.

This report is Part 1 of the review. It provides an overview of the Membership situation, highlights specific issues and provides recommendations for improvement. It is divided into four major sections. Following this introductory section is a description of the environment surrounding Membership. This section provides an overview of Canada and Kahnawá:ke's membership structures including the administrative processes of the Membership Department. The third section highlights the major concerns and issues that have risen during the time period that this law has been in effect. The final section recommends future actions addressing these issues and concerns. There are also 3 appendices attached to this report. Appendix A provides a summary of key statistical information. Appendix B provides a detailed history of the membership issue in both Kahnawá:ke and Canada. Appendix C provides information on the Citizenship Initiative proposed by the Iroquois Caucus.

## **2.0 Membership Environment**

### **2.1 Overview**

There has always been confusion when it comes to the difference between Status Indians as defined by the Indian Act and administered by Indian and Northern Affairs Canada (INAC) and membership under Kahnawá:ke Law. Further, a misunderstanding of the difference between the Kahnawá:ke Kanien'kehá:ka Registry and the Indian Act Registry (INAC Listing) underscores this confusion. Individuals often do not know the difference between the two.

For example, many members assume that if a person is not on the Kahnawá:ke Kanien'kehá:ka Registry (formerly Mohawk Registry) then the individual must be a C-31 (one who received Indian Status under Bill C-31 of the Indian Act – which was passed in 1985 and addressed inequities in the Indian Act towards Native Women – see section 2.1.2). Or, when a member sees an individual they do not know using a band card at a shopping center for tax exemption they often assume that the person is non-Indian and should not have a card.

The following introduces to the environment surrounding membership and will help explain the difference between some of the processes, terms and activities associated with Indian Status and First Nation Membership in both Kahnawá:ke and Canada.

#### **2.1.1 The Indian Register and Indian Status**

The Indian Register is a confidential listing of all persons who are registered as Indians in Canada in accordance with the Indian Act (and classified as Status Indians). An individual must meet eligibility guidelines to be registered. Generally, before 1985, both parents were required to be Status Indians. Since then, one parent must hold full status.

Dates of marriage and gender play a large factor in the registration of individuals to the Indian Act. There are some instances where several generations of a family are able to register after having been away from the community, and after having married non-Indians during those generations. These families are the sons, grandsons and great-grandsons of men who left the community and were born prior to April 17, 1985. The non-native spouses of these men would acquire Indian Status, thus enabling their children to hold full status. An applicant in these circumstances is usually added to INAC's Kahnawá:ke listing as per INAC Policy, which attempts to place all Status Indians on a specific First Nation Community's listing. Although there is a "General" list under the INAC system, it is intended specifically for those enfranchised prior to 1951 for living away from the community for more than 5 years or those who have two community affiliations and are placed on the list until they make the decision of which community they would like to be registered.

This has caused confusion as Kahnawá:ke is in the unique position of never seeking approval from Canada for its membership law. This has created two disagreeing lists. For INAC, the guidelines of the Indian Act still apply in Kahnawá:ke. Therefore, Status Indians with affiliation to Kahnawá:ke are automatically placed on Kahnawá:ke's list.

### **2.1.2 Bill C-31**

Bill C-31 was an Act to amend the Indian Act. On June 28, 1985, Parliament passed Bill C-31 to assure equality in the treatment of Indian women and their children. Before Bill C-31, Indian women who married non-Indian men were removed from Canada's Registry while non-Indian women who married Indian men were registered as status Indians and given all services and benefits through Department of Indian Affairs and the community. There were a few fundamental Principles to Bill C-31. They were to ensure that:

- Indian women were reinstated to the INAC Registry as well as their children (first generation only).
- INAC stopped giving non-Indian women acquired status through marriage to Indian men.
- Membership rights be restored to persons who lost them through enfranchisement.
- Indian bands have the right to control their own membership, if the Minister of Indian Affairs approves their Membership Code, and if they accepted all those who previously held status with their community.

In addition, at this point, the same eligibility criteria were now used to determine if a person was eligible for status regardless whether that individual was from a male or female line of descent.

Recently, the British Columbia Supreme Court made a decision (McIvor) that decided that Bill C-31 did not go far enough in reinstating the rights of women. It agreed with the argument that the line of descent should also include that of the mother but faulted Bill C-31's lack of fully addressing this situation. They determined that when Bill C-31 was applied, the eligibility criteria still prejudiced women because when they were applied to the historical female lines of descent, they stopped after the first generation of a woman who had lost status. This was not done when applied to the historical male lines of descent in the same situation

The area of concern for membership will be the reaction of the Federal Government. It can be assumed that they will appeal this decision. But, if the decision holds, the question remains as to whether it invalidates the law (Bill C-31) and to what extent will corrective measures be taken. The date utilized in any corrective measures will determine the extent of the numbers that will be added as Status Indians.

### **2.1.3 Kahnawá:ke's Custom Code**

The Custom Code was developed within the community. It is unclear where the custom originated but it is very similar to the Indian Act's short-lived double mother clause. The

only real difference is that the Custom Code removes families from the community if there has been intermarriage to a non-Indian for two generations in a row. Gender does not play a role. The code identifies that individuals who were born of a native parent and a non-native parent could not be entitled to be a Kanien'kehá:ka at birth. It was only in their choice of a spouse, or their way of life that they may be able to be considered for membership. Their children may be born Kanien'kehá:ka but only if the child's other parent was born Kanien'kehá:ka. If both parents were half then the child would have to wait to see if they would want to be part of the community by marrying Onhkwehonwe. If there had been non-native lineage for two generations in a row then the person is no longer considered Kanien'kehá:ka, and a clan, if any, could be lost.

This code seems to have only applied to the women, as there is evidence in the community that this practice had little or no affect on the men's choices. In addition, this code had no impact upon an individual's rights to receive benefits under the Indian Act.

#### **2.1.4 Kahnawá:ke Moratorium and Mohawk Law**

On May 22, 1981, a moratorium was placed on all intermarriages to non-Indians and the adoption of non-Indians. Any Mohawk of Kahnawá:ke, male or female who married, co-habitated, or lived in a common-law relationship with a non-Indian, was deprived of benefits and privileges that derive from the Kahnawá:ke Mohawk Territory. After 1984's Mohawk Law, persons who were to be added to the Mohawk Registry had to meet the 50% blood quantum requirement to be considered. If individuals were not on the Mohawk Registry and wanted to be added they had to be accepted through a community meeting. Some children who did not meet the blood quantum but fell within a gray area of having a blood quantum between 45 to 49% were able to become Beneficiaries, thus entitling them to all services in the community until the age of eighteen. The authority of this moratorium was limited to denying those benefits and privileges that derive from the Mohawk Council of Kahnawá:ke such as receiving a land allotment and voting or running in community elections. An individual's rights to receive other benefits under the Indian Act such as medical services and education were only slightly affected by this moratorium. These services were still acquired from organizations independent of the MCK or located off-reserve. Often, such as with education, these individuals received more funding than those on the Mohawk Registry.

#### **2.1.5 Kahnawá:ke Membership Law**

The Kahnawá:ke Membership Law was enacted in 2003 and replaced the 1984 Mohawk Law. The Membership Law was intended to focus less on blood quantum and address the eligibility of those who could be members and/or reside in the community through an increased emphasis on the rebuilding of their ancestry and family ties. It was much more specific than the Moratorium with the inclusion of detailed clauses spelling out the requirements for memberships under different circumstances. It also included the formation of Council of Elders and a Membership Review Council to act as a decision board in weighing the eligibility of applicants for membership under the law. The

Council of Elders, and Membership Review Council, was selected on May 15, 2004 and work to educate the Elders on the Kahnawá:ke Membership Law began.

### **2.1.6 Kahnawá:ke Kanien'kehá:ka Registry**

The Mohawk Registry was renamed the Kahnawá:ke Kanien'kehá:ka Registry with the enactment of the Kahnawá:ke Membership Law. The Mohawk Registry was created in 1981 (as a working tool of the Moratorium) and held the names of all people who were registered with Canada at that time. After that point any person who married a non-native would be removed from the Registry once it was made known to the Membership Department. Additions to the Mohawk Registry had to meet a 50% blood quantum percentage requirement.

On September 27<sup>th</sup>, 2004 the Kahnawá:ke Membership Law came into force and the Mohawk Registry was separated into different categories and renamed. Those who had native lineage and were on the Mohawk Registry became Members regardless of their meeting the criteria of a Member or not. Those who had Acquired Status were to be automatically placed on the Non-Member Resident list, but that only occurred after the passing of amendments in 2007. This applied to Acquired Status Women whose marriages were still intact or widows who still reside in the community. Beneficiaries were either confirmed as Members, if they met the criteria, or remain Beneficiaries until they reach the age of 18. If a beneficiary does not meet the criteria they will have to apply to the Council of Elders.

### **2.1.7 Amendments**

The amendment process is an integral part of the Kahnawá:ke Membership Law. It ensures that the community, the Elders or Chief and Council can invite change and if the community is willing, can implement that change. The problem with the past law was that there was no room to grow.

While orienting the Council of Elders to the Kahnawá:ke Membership Law it became apparent that the Elders wanted to amend sections of the law prior to it coming into force. The Council of Elders went line by line and could foresee that there would be problems with its application. Through great discussion and debate the Council of Elders proposed 12 amendments.

In addition to the amendments and providing support to the Council of Elders the Membership Department was concerned about the possible impacts to the community. It became obvious that what was needed was an Impact Analysis and User Fee Study. The planning and preparation for the Kahnawá:ke Membership Law had not gone so far as to plan for the inclusion of new community members or non-member residents. CESO (Canadian Executive Service Organization) was contacted and contracted to complete these studies so that the MCK, as well as the other organizations within our community, were properly prepared to meet increasing needs. It was always assumed that the entire listing of Non-Members would be applying to the Kahnawá:ke Kanien'kehá:ka Registry.

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With the listing as it was in 2003 it was estimated that there would be 9 years of 5 people per hearing and 2 hearings per week for a total of 77 meetings per year. The estimate has not met that realization and to date approximately 200 people have applied to the Council of Elders.

There are MCK policies that need to be amended to reflect changing Membership criteria. The Membership Law has been in place for two-years and there are conflicting requirements between Membership, Land Allotment, Housing services and Water and Sewer.

## **2.2 Administration**

### **2.2.1 History of the Kahnawá:ke Membership Department**

The Membership Department has been in existence since the early 1970's. At that time, there was one employee that administered an Indian Act process. This process shifted with the passing of the 1981 Moratorium. The passing of Mohawk Law in 1984 created the Membership Registry introducing blood quantum as a major criterion. In the late 1980's, the Registry was automated and a second employee was added. In 2003, another employee was added to alleviate the increased workload due to the development of the Membership Law. In 2004, the implementation of the Membership Law finalized the current composition of 4 employees by creating the position of Registrar.

### **2.2.2 Provision of Services**

According to the Indian Act, a registered or status Indian is entitled to all services and benefits provided by INAC. This includes, receiving status cards, housing, education, prescription medication, medical transportation and equipment, dental, social assistance, and economic development. For an individual to access these services, they must be obtained in Canada.

According to Kahnawá:ke Laws, only individuals on the Kahnawá:ke Kanien'kehá:ka Registry are entitled to receive all the services and benefits mentioned above along with other services such as land allotment, residency, water and sewer, ability to vote, and own and operate a business. Status cards are only issued from the Membership Department to Members on the Kahnawá:ke Kanien'kehá:ka Registry. Individuals who are on the INAC Registry and not on the Kahnawá:ke Kanien'kehá:ka Registry are not entitled to services such as housing, education, land allotment, water & sewer, or voting.

### **2.2.3 Status Cards**

There is a wide misconception when it comes to status cards. People believe that it is only Kahnawá:ke who obtains status cards, however, these cards are issued to over 500 Indian bands across Canada. The cards are all the same in color and size. INAC has recently begun issuing hard cards, which can only be obtained through INAC in Ottawa and at a few service centers. The Membership Department only issues cards to

individuals on the Kahnawá:ke Kanien'kehá:ka Registry. All other individuals receive their cards through INAC directly, at Lands and Estates, or the nearest service center to them.

#### **2.2.4 Affiliated Individuals Project**

A project was begun in the beginning of 2006, to contact all individuals who live off reserve and determine their affiliation with the community. This information would prove valuable if contact was required for consultation purposes. As well, it would enable the Membership Department to better calculate potential impacts on community membership statistics.

The Membership Department asked the community to contact our office and provide information in order to reach these individuals. We have been able to contact at least two thirds of these individuals and have found that for the first thousand people contacted there were a thousand more who were their descendants. Not all of these descendants are eligible as per Canada's requirements to be registered as Indians with status in Canada. Another interesting note was that when we contacted individuals with close contact with the community they were very suspicious of our motives. Those that were contacted with little or no contact with the community were more than happy to assist us in any way possible.

#### **2.2.5 Automated services**

The Membership Department works with Information Systems on the automation of the Kahnawá:ke Kanien'kehá:ka Registry. It is an ever-evolving database tailored to the needs of the Membership Department and the gathering of information for our community. All entries made onto this system strictly are entered according to the established documentation. With the importance of the information we are recording there is little room for error.

#### **2.2.6 Added Security Features**

There was a need to add security features to the documentation that the Membership Department provides. It was observed that some individuals were requiring letters of identification repeatedly and there was suspicion that the documents were being misused. Information Systems was requested to add a feature to the database and assisted on a moment's notice. It was requested that the photo of the individual be included on our records. This allows the Membership Department to know who an individual is in the event that the individual is unfamiliar. Their photo is embedded onto the letter being requested. After the incorporation of this security feature we noticed a sharp decrease in the suspicious activity and felt re-assured that we were protecting the integrity of our documents and credibility.

## 2.3 Processes

### 2.3.1 INAC Status

Every individual who holds a Registry Number is listed on the INAC Registry. To obtain a number, a person must meet the criteria of the Indian Act to be registered and **only Department of Indian Affairs can authorize the issuance of a Registry Number and Status Card.** Once registered, an individual is considered a Status Indian with a registry number and is entitled to benefits covered by the Department of Indian Affairs or National Health & Welfare. An individual has three options to be registered by INAC. They can either be registered through the:

- Kahnawá:ke Membership Department, or the
- Kahnawá:ke Service Center (Lands & Estates), or by going directly through
- INAC in person or through mail.

If an individual is registered on the INAC Registry other than through our office, it is determined whether or not that individual will go on the Kahnawá:ke Kanien'kehá:ka Registry when we receive notification from INAC. This is determined by applying the rules and regulations of the Kahnawá:ke Membership Law to the individual.

### 2.3.2 Kahnawá:ke Kanien'kehá:ka Registry Status

When an individual brings their documentation to the Membership Department they are submitting requests to two different entities. They are requesting to be registered as an Indian in Canada as well as a Kanien'kehá:ka in Kahnawá:ke.

It is then determined whether or not they meet the criteria set in the Kahnawá:ke Membership Law be a Member through section 10 or if they will be a non-member. Once it is determined an individual meets the criteria that individual is put on the Kahnawá:ke Kanien'kehá:ka Registry and they are entitled to all services and benefits provided by the Mohawk Council of Kahnawá:ke. These additions are the responsibility of the Membership Registrar and all decisions made are subject to the review of the Council of Elders who maintains the inclusions or removals from the Kahnawá:ke Kanien'kehá:ka Registry.

Depending on age and circumstances, a person who does not meet the criteria to be automatically placed on the Kahnawá:ke Kanien'kehá:ka Registry may apply to the Council of Elders to become a member or non-member resident.

### 2.3.3 Options For Traditional Persons

Individuals who are eligible to be registered have three options. They can register only with Kahnawá:ke, or they can register with Kahnawá:ke and Canada or they can register with Kahnawá:ke and Health and Welfare.

Traditional people have the option of using a locally issued traditional birth certificate or Quebec birth certificate if they plan on registering with Kahnawá:ke and Health and Welfare. If they plan on registering with Canada for a status number, then the Traditional birth certificate must be issued from the Mohawk Nation Council of Chiefs who has an agreement for acceptance of their documentation.

#### **2.3.4 Instatement/Reinstatement**

When individuals talk about instatement and reinstatement, it is often assumed that it is with Kahnawá:ke at the community level. However, there are two levels of instatement and reinstatement. Women who lost their status upon their marriage to a non-Native are reinstated at the INAC level (to regain status) through Bill C-31. Their children, who never had status, are instated (gain status) through Bill C-31. These individuals must also apply under the Kahnawá:ke Membership Law if they wish to be instated on the Kahnawá:ke Kanien'kehá:ka Registry.

Many individuals tend to assume that when an individual is not on the Kahnawá:ke Kanien'kehá:ka Registry, they are automatically a "C-31". This is not the case, there are many reasons why a person is removed or not put on the Kahnawá:ke Kanien'kehá:ka Registry. A reason why a person would have been removed could be due to marrying a non-Indian, male or female after the Moratorium of 1981. Once a person is removed, children born of that union would also not be eligible to be put on the Kahnawá:ke Kanien'kehá:ka Registry. They would be classified as affected by the Moratorium. As mentioned earlier in the report, the children born of a common-law relationship between a member and a non-Indian would allow the child to become a Beneficiary and eligible to services until the age of eighteen.

There are also many individuals who simply do not meet the criteria of having four or more great grandparents. Others are individuals who are married to non-Indians after 1981 and their marriages are still intact, and children who were adopted (either they are non-Indian or do not meet the criteria of establishing Kanien'keha/Indigenous lineage).

Individuals who lost their status through marriage after the Moratorium, and have ceased their relationship, can apply for reinstatement to the Kahnawá:ke Kanien'kehá:ka Registry through the Council of Elders. As well, others who have never been on the Registry can apply for instatement.

## **3.0 Issues and Concerns**

The following section discusses some of the issues and concerns that have surfaced regarding Membership and the Kahnawá:ke Membership Law and is divided into four parts. The first part pertains to specific elements of the law. In other words, these are issues that arise from specific clauses or definitions in the law. The second part highlights issues associated with the workings of the Council of Elders. The third part identifies other issues that have arisen within the community related to the law. The fourth identifies issues that affect inter-community parameters and address the concept of citizenship as well as the area of membership.

### **3.1 SPECIFIC ELEMENTS OF THE LAW**

#### **3.1.1 Enforcement**

The Kahnawá:ke Membership Law currently cannot be fully implemented without addressing the enforcement issue. The Law clearly states that the Kahnawá:ke Peacekeepers are the sole authority to enforce this law and that the Court of Kahnawá:ke has the sole jurisdiction to hear and decide offences (Section 27). The main problem at this time is the lack of authority at the Court of Kahnawá:ke. Without this authority, the Peacekeepers have no venue where charges can be filed and heard. In the spring of 2004, a mandate was given to Legal Services to establish a stand alone Court of Kahnawá:ke. This is still in process and it is currently with the Justice Commission.

If this court were to be established, there would be a great deal more movement on the Membership file at Council and there would be a great deal of pressure placed on the Chiefs to defend the right of the community to have created such a Law, as well as all Mohawk Laws. Theoretically, individuals who live on the territory without being listed as a member, or a non-member resident, could be charged with an offence and face a fine and/or imprisonment.

In addition, Non-Member Residents are not permitted by the Law to hold property in their name, as they are eligible for the services of residency but nothing else. Again, theoretically, Non-Member Residents who own property would be in violation of the law and their permission to reside in the community could be revoked. Enforcement actions taken against these individuals could be of a legal nature such as eviction or arrest or of a financial nature such as the levying of fines. Also, theoretically, members who co-habitate with or rent accommodations to non-members would face suspensions from the Kahnawá:ke Kanien'kehá:ka Registry..

One of the major issues that complicate the enforcement of the law is that many non-member residents are also Status Indians with Kahnawá:ke cited as their home community. Enforcement actions taken against these individuals could result in legal

actions taken against the MCK and potentially have financial consequences for the community.

### **3.1.2 Members Who Are Not Status Indians**

Under the Membership Law, it is possible to attain membership but not qualify as a Status Indian of Canada. Sections of the law require that the spouse be Onkwewehonwe regardless of which side of the border they come from. This situation, although minimal in number at present, could have negative repercussions in the future.

A prime example of the future is evidenced through one family's status. A woman who married an American Indian had a child with half rights because only one parent has status. Then the child marries a Native American and has their child who has no right under the Indian Act to gain Indian Status despite the possibility of having full lineage. This type of situation is only going to increase in the future. If the family in question chooses to reside in Kahnawá:ke they could be Members on the Kahnawá:ke Kanien'kehá:ka Registry and only have the rights of a regular Canadian citizen.

In the past there were agreements with local Service Canada (through letters from the Membership Department) so that individuals without status (for whatever reason) would be addressed such as the "B" list for access to Health Benefits. A similar arrangement had been made for services such as the Social Insurance Number or Driver's License. Today, due to the changes of government policy it would be impossible for a Native American or a "B" list individual born in the United States, who is a Member of Kahnawá:ke to access a SIN or Health Card without an immigration document or a Certificate of Indian Status (Status Card). In some cases, such as Health, holding the actual Status Card is not required but meeting the qualifications for status must still be shown.

### **3.1.3 Beneficiaries**

As indicated earlier in this report there was a status that was not provided for in the implementation of the Kahnawá:ke Membership Law. This applies to children who were designated with the status of beneficiary and are to receive the benefits of a Member until the age of 18. These children do not meet the current criteria to be a Member but their previous status will remain until they reach the age of majority. At such time they will have to make their application to the Council of Elders. The last child listed as beneficiary will reach the age of 18 in 2018.

The real problem in the Beneficiary designation is the result of differing opinions in the satisfying of criteria pertaining to lineage. Children who are seen as Beneficiaries and who meet the entitlements were placed as Members on the registry by the Registrar. Since the COE review all decisions, some of these children who met the requirements have had their decision overturned. Since originally these children were to be served as Members until the age of majority they have had to be brought back to the Beneficiary

list and will remain on that list until they reach the age of 18 and then they will have to apply to the COE table.

### **3.1.4 Inconsistency Between Native Communities' Membership Requirements**

When it comes to lineage it appears that we are the most difficult on our own people. Other communities send their lineage information to our attention for the purposes of registering children in our community. In these cases, their method of calculating lineage and/or membership is accepted at face value. Theoretically, the lineage may be decidedly weaker than that used in Kahnawá:ke but consideration can be assessed only on the information given. This provides for an inconsistency in the law.

## **3.2 COUNCIL OF ELDERS**

### **3.2.1 Issues with the Actions and Decisions of the Council of Elders**

One very sensitive issue that must be noted and addressed is the inconsistent treatment of applicants by the Council of Elders. Numerous complaints have been received by the Membership Department from community members regarding the decisions of the Council of Elders as well as their conduct during hearings. The type of inconsistencies displayed is best illustrated by those instances where siblings have seen conflicting results. For one sibling, the lineage is accepted as sufficient yet for another with the same lineage, it is not. This has led to allegations of bias and favoritism.

Complaints by community members regarding conduct include assertions of unnecessary prying into personal lives as well as dismissive treatment and harmful statements made during hearings.

In addition, many community members insist that the real reasons for unfavorable decisions are not publicly stated. For example, the published reason may state a reason such as "no connection to the community or culture" while the applicant insists that this is obviously untrue and that the unstated reason "is personal history such as troubles in their past.

The lack of enforcement of the Kahnawá:ke Membership Law has caused a breakdown of confidence from the Council of Elders. The Council of Elders is now hesitant to include new members since there is no possibility of removing the individuals from the Kahnawá:ke Kanien'kehá:ka Registry. The Council of Elders have been reminded that this is not within their mandate but they feel an obligation to the community not to allow further erosion of our culture and bloodlines.

As a result of the issues cited, community confidence in the Council of Elders seems to be at a low point. One of the problems with community confidence can be traced to the fact that the Council of Elders is answerable to the community but at no point have they responded to community pressure. As well, instructions given to them by the

Membership Review Council regarding specific decisions have not been taken into consideration in any tangible way.

### **3.2.2 Lack of Redress Regarding Decisions of the Council of Elders**

A follow-up issue that has surfaced regarding decisions by the Council of Elders is the lack of any meaningful redress mechanism in the Law regarding decisions made by the Council of Elders. Individuals are accustomed to having a venue for appeals to be made where a separate body has the authority to overturn decisions that the individual feels were made in error. This applies in most aspects of society from decisions made in Courts of Law to decisions made in the workplace by a supervisor. As indicated previously, the Membership Review Council is enacted by the Law to act as a redress mechanism but have no real authority to overturn decisions. They have the authority to provide instructions to the Council of Elders for re-consideration only.

When this situation is combined with the issues that the community members have had with decisions made by the Council of Elders, the level of frustration and dissatisfaction within the community has increased. It is possible that the Court of Kahnawá:ke could be a solution in this case. This must be explored in more detail considering the current limits of the Court of Kahnawake's authority.

### **3.2.3 Legal Representation**

The Council of Elders has its own legal representation for drafting and assessing decisions. Yet, the MCK legal representatives are utilized for assisting in future development and drafting of amendments or interpretations of the law. This raises the question as to why there is separate representation from MCK. This is especially relevant when MCK must defend the Law and the Council of Elders in court actions. It would seem more appropriate to have the same representation (MCK Legal) for all activities.

### **3.2.4 Working Relationship Between the Council of Elders and the Membership Department**

The working relationship between the Council of Elders and the Membership Department has deteriorated as a result of many of the instances cited above as well as a lack of clarity within the law to their respective roles and responsibilities including that of the Registrar.

Process related questions are being asked by the Council of Elders as to how the Membership Department and the Registrar evaluate individuals and that all interpretations should be more in line with the Council of Elders' interpretations (for example, the definition of a Kanien'kehá:ka great-grandparent).

There is also a lack of clarity regarding the perceived role of the Membership Registrar relating to Section 10 Membership Entitlements. The COE is also questioning the rationale of having a Council of Elders with 15 individuals to decide on applications

when the additions of individuals per section 10 of the law (primarily children and those who are registering late) is decided upon by one individual (the Registrar).

Administrative questions are also being asked. The Council of Elders want to know what the scope of responsibilities is for the recording secretary in the drafting of key documents, the responsibilities of the Membership Registrar as well as the Director of the Social Development Unit.

### **3.2.5 Lack Of Transparency**

Through decisions made by the Council of Elders, a lack of transparency and accountability has become an issue at this table. The COE has decided to operate in a manner that leaves no record of their discussions regarding an individual's application. During these discussions, the recorder is turned off and the Membership Registrar and Recording Secretary are asked to leave the room. Once their discussion is ended, the Recording Secretary is asked to return to record their decision and reasons for Schedule "A" of the decision document. The discussion is lost for further reference by the Secretary to the Council of Elders and reasons taken into consideration during the discussion is not recorded.

This process along with the concern expressed by many community members that the real reasons for unfavorable decisions are not publicly stated has created an environment lacking in transparency and accountability.

## **3.3 COMMUNITY ISSUES**

### **3.3.1 Blood Quantum**

The issue of blood quantum has surfaced as part of the deliberations by the Council of Elders. Many of the clauses regarding Membership include in its criteria the following stipulation: "has four (4) or more Kanien'kehá:ka great-grandparents". While the Law does not specify blood quantum, there has been an insistence by the Council of Elders of inserting the word "full" when interpreting this clause. The insertion of this term has therefore dictated a blood quantum consideration, which has also led to much confusion, frustration and dissatisfaction within the community.

### **3.3.2 Kahnawa'kehró:non vs. Kanien'kehá:ka**

A confusing aspect that has surfaced in interpretations of the law by either community members or the Council of Elders is the concept of Kahnawa'kehró:non (someone from Kahnawá:ke) vs. Kanien'kehá:ka (someone from the Mohawk Nation). Theoretically, the law deals with Membership which many interpret as identifying someone who is Kahnawa'kehró:non. Technically, the law usually cites Kanien'kehá:ka which implies we are dealing with a member of the Mohawk Nation. Often, the two terms cannot be reconciled within one individual.

Historically, there were many people who were absorbed into our social fabric. As a community we always adopted and incorporated to keep our numbers up. We have to remember that today when there are issues with the lineage of their great grandchildren. People we adopted are no longer being considered Kanien'kehá:ka. They would, without a doubt, be considered Kahnawa'kehró:non but not Kanien'kehá:ka.

Therefore, some (either COE members, Chief and Council and/or community members) interpret a person as qualifying for membership because they are clearly Kahnawa'kehró:non or, in other words, someone from Kahnawá:ke. While others (from these same groups) interpret that same person as not qualifying because they are not Kanien'kehá:ka. This has led to further confusion in the administration of the law. This issue is further explored in the next section, which discusses the issue of citizenship vs. membership.

### **3.3.3 Clan Identification**

Clan identification has also been cited by many as a possible solution but taken within the historic origins of Kahnawá:ke, it presents new problems for membership especially when utilizing the criterion of being Kanien'kehá:ka. There are individuals that still carry a clan but have not been part of the community for generations. As well, there are people living in the community with excellent blood quantum and lineage but no clan affiliation.

As a community it must be acknowledged that we originate from many people. At the turn of the 1900's we were 22 different Indian Nations living in one community. Until the 1950's we were the Iroquois of Kahnawá:ke. At some point, the community's thinking changed to identifying ourselves as Kanien'kehá:ka. The traditional clans of the Kanien'kehá:ka (Mohawk) are turtle, bear and wolf. Yet, because of our origins, we have many community members born to a clan different from these. For example, the person responsible for the Haudenosaunee cards and passports has stated that the Snipes of Kahnawá:ke would be listed as Onondagas if ever applying for that identification.

## **3.4 INTER-COMMUNITY ISSUES**

### **3.4.1 Citizenship vs. Membership**

Citizenship is being discussed a great deal. It is viewed by many as the answer to the problems of the Membership Law. Usually, Citizenship is viewed as something different than Membership. Membership is about accessing services in the community. Citizenship is not necessarily tied to services.

A person who is not a Member could be a Mohawk affiliated with the community. Many insist that the Membership debate is a nation building exercise. The argument often cited is that it should be less about entitlement to services and more about identity and culture and survival. In this argument, the Mohawk affiliated to the community but not a member, could be perceived as a Citizen.

This has remained a divisive issue within the community. In fact, there has been political effort made towards reaching an agreement with our other sister communities as to who is a Mohawk (see Appendix C for an example). This is a citizenship debate. It is still something that must be defined by the communities of the Mohawk Nation and the Iroquois Confederacy. Yet, this effort further muddles the current membership debate.

It must also be noted that the previous discussed issue of clan identification would also be implicated in the Citizenship issue.

### **3.4.2 Blood Quantum and Border Crossing**

Border Crossing has been identified as a major concern of the community (as shown in a recent MCK Communications Survey). Within this context, the issue of blood quantum again needs to be addressed. The blood quantum requirements of the United States can be very difficult to achieve for families who have married non-Indians. The future of the community and its historic ties to the United States for work and military service is being threatened.

## **4.0 Conclusions and Recommendations**

### **4.1 SPECIFIC CONCLUSIONS**

#### **4.1.1 Enforcement**

It is clear that the Kahnawá:ke Membership Law can never be fully implemented without a firm legal base in the area of enforcement. Since the Law states that the Court of Kahnawá:ke has the sole jurisdiction to hear and decide offences, efforts must begin as soon as possible to develop the tools necessary that would enable the Court of Kahnawá:ke to assume its prescribed role.

#### **4.1.2 Members Who Are Not Status Indians**

This issue is extremely complicated in that, in many cases, we are dealing with United States-born Indians. Therefore, discussion with the Federal Government must be undertaken with the attempt to reach agreements so that we can continue as a people and not just as a “status”. As part of this discussion we must realize that INAC would bring in other departments such as Immigration and Justice because of the “Canadian citizenship” implications. An integral part of this negotiation will be the continued provision of services to this population.

#### **4.1.3 Council Of Elders**

Although this is a sensitive area, it must be stated that problems have arisen with the workings of the Council of Elders. This includes numerous complaints from community members over conduct, lack of clarity over roles and responsibilities, a breakdown in relations with the Membership Department, a lack of an appeal mechanism in the process and disagreements over interpretations of the law. As well, too many community members have expressed their anger and resentment towards the actions of the group. There seems to be a direct contradiction between the actions of the COE and the spirit of the preamble to the Law. Since this issue area involves the Council of Elders who are not a normal part of the MCK administrative structure, addressing this issue would have to be initiated through Chief and Council.

It is clear that decisions taken regarding a person’s membership need to be honest and transparent and the need for a more formal recognition of this in the process must be addressed. An effort must be made to review the sections of the Law regarding the processes and authorities of the Council of Elders with the intent of improving and clarifying the concerns cited above including the development of specific amendments. A process must be instituted that ensures that this function is more directly answerable to the community with a valid redress mechanism or appeal process. A complete review of the roles and responsibilities of the COE must be undertaken. This must include the processes and regulations of the Law. Considerations must include developing clearer

definitions of roles, improved processes and a review of the composition and selection process used in selecting members of the COE.

Since this issue area involves the Council of Elders who are not a normal part of the MCK administrative structure, addressing this issue would have to be initiated through Chief and Council.

#### **4.1.4 Interpretation Issues**

Interpretation of issues such as the great-grandparents criteria, blood quantum implications, whether a person is Kahnawá:ke (someone from Kahnawá:ke) vs. Kanien'kehá:ka (someone from the Mohawk Nation) has led to further confusion in the administration of the law. Plus, as previously cited, the difference in interpretation has also been a major component in some of the issues with the Council of Elders. It is apparent that an effort must be made to address those areas of the Law where a lack of clarity has led to different interpretations amongst those administering the Law and the community at-large.

#### **4.1.5 Citizenship Issues**

Since citizenship is often cited as a solution to our membership problems, this area must be more fully explored. The numerous undertakings through the Iroquois Caucus or through the Border Crossing Initiative must be reconciled with our membership discussion. There has to be a more clearly defined approach to Citizenship. There also has to be some consensus within the community as to what Citizenship is (especially when compared to Membership) and whether it is the answer to our Membership issue. There needs to be a community vision and education within the community so that discussion on the complex issues may occur and proper direction given.

Addressing the Border Crossing issue will have direct implications on the Blood Quantum and Citizenship areas. Future negotiations and meetings discussing this topic must be analyzed with a view to its impact on the Membership Issue.

## **4.2 GENERAL CONCLUSION**

When it comes to Membership, the Kahnawá:ke community has many conflicting opinions. Each family has its own idea of what being a member of the community really means. Few of our community would actually fit into the strictest mode of lineage calculation as evidenced by the application of strict blood quantum consideration, clan association and ties to the community. Our oral history and tradition often contradict the actions taken during the history of membership administration in that if the community were truly traditional, not many would be refused through the Council of Elders or Chief and Council's past methods.

There has been a regeneration of culture in our community. More have begun learning about our language and traditions. Efforts are being made to incorporate this in our

identity defining practices (i.e. the Membership Law). Yet, with the current Membership Law, we are stressing administrative processes as well as hard and fast rules based on blood quantum over tradition and culture. To continue to survive in the face of Canada's attempts to completely assimilate or extinguish the Indians of this country through the Indian Act and other "programs", we must find ways to better incorporate our traditional values and practices with the procedural requirements of a modern law.

As part of this general conclusion, it must be stated that the processes and institutions established through the current Membership Law have failed to live up to its preamble. Instead of developing a sense of community, they have led to disharmony and anger. Instead of respecting the principles of dignity and compassion, they have promoted accusations and resentment. Instead of replacing foreign laws such as the Indian Act, they are often still cited in the decision-making required. Therefore, a total reworking of the law must be considered including a revamping of the processes and institutions established as well as the definitions, roles and responsibilities identified.

### **4.3 Recommendations**

- It is recommended that Chief and Council commission an independent review committee to further investigate the processes, actions and authorities of the Council of Elders with the intent of substantiating the community claims identified in this report and develop amendments addressing its structure, selection and administration.
- It is recommended that a working group be formed of individuals from Membership, the Council of Elders, Justice, Legal Services, OCC and Chief and Council to specifically address those sections and clauses within the Law that have proven to be unclear and revise legislation for submission to the ILCC process. Such activities would include:
  - Development of clear definitions and roles and responsibilities
  - Revision of the process used to develop and enact Regulations
  - Development of a communal appointment process and terms of office through Regulation.
- It is recommended that a working group be formed of individuals from Membership, Justice, Legal and Chief and Council to specifically address the issue of enforcement and develop those tools and processes necessary including new legislation.
- It is recommended that discussions with the Federal Government be undertaken to reach agreement on and recognition of the jurisdiction of the Kahnawá:ke Membership Law.
- It is recommended that a formal network of communications be established for all efforts related to the issues of citizenship and Border Crossing that includes the Office of the Council of Chief and Membership.

- It is recommended that the results of all future negotiations and meetings discussing the issues of Citizenship and Border Crossing be discussed with the Membership Department in order to assess its impact on the Membership Issue.
- It is recommended that the MCK set the example and ensure that its employees follow the law.
- It is recommended that the Election Law be consistent with the Membership Law.

## **Appendix A**

### **Statistics - (Spring 2007)**

#### **Canada's Statistics concerning Kahnawá:ke**

9531 individuals are registered with Kahnawá:ke under the Indian Act.

#### **Kahnawá:ke's Statistics**

6154 Members registered on the Kahnawá:ke Kanien'kehá:ka Registry

72 Non Member Residents \*9 through application

4 Members Suspended

3301 Non Members – this number will be further reduced with the implementation of the recently approved amended changes to the Kahnawá:ke Membership Law.

#### **Applications to the Kahnawá:ke Membership Law**

135 Member applications heard and accepted.

14 applications for either Member or Non-Member Resident denied.

4 individuals are Members who are Suspended.

There are 8 Non-Member Residents.

There has been 1 renunciation

There have been 4 transfers to another community.

There are 22 incomplete files.

#### **Section 10.1 Eligibility**

There have been 162 children, or newly registered individuals who have met the criteria to become members at birth.

**There have been 9 children who have had their decision overturned by the Council of Elders, 7 have yet to be determined.**

## Appendix B

The history of Kahnawá:ke and the Membership Issue is a long one.

### Canada's Indian Act History

In 1850 the Canadian Government attempted to define the term Indian. This definition was; any person who was by birth or blood, any person who was reputed to belong to a band or body of Indians or any person who married an Indian or was adopted by Indians. Both Indian men and women who married non natives passed acquired status to their non-native spouse and their children were given Indian status.

By 1857 the first legislation was passed regarding Enfranchisement. This meant that an Indian was voluntarily able to give up Indian status; their spouse and children were automatically included in this request.

In 1869 an Indian Woman who married a non-Indian man now lost status on marriage and the children of that marriage were not entitled. If an Indian woman married an Indian man of another band then her membership would be transferred to the band of her husband.

In 1876 if a person lived away from the community and was considered to have foreign residency for a period of five years they could then be enfranchised. As well being educated in a professional study could enfranchise an Indian.

In 1918 Indians who lived away from the community could be enfranchised, this would include a spouse and any children. The enfranchisement went on to include unmarried women and widows the children of unmarried women would not be included unless specifically on the enfranchisement order but minor children of widows were automatically included.

In 1951 the Indian Register was created. Every community had its band list posted. Community members were able to lodge protests against additions, deletions or omissions. After a protest the decision of the Registrar was final but could be appealed in the courts with the judge's decision final. If a person was added or deleted the names of his wife and children were also included.

It is also at this time that registration eligibility was further defined. These further definitions included the illegitimate male children of Indian men, the legitimate children of Indian Men, the illegitimate children of Indian Women were registered unless it could be proven that their father was non-Indian. And the wife or widow of an eligible Indian was also eligible to be registered.

1951 was also the year of the double –mother clause. An Indian born of a marriage entered into after September 4<sup>th</sup> 1951 lost entitlement to be registered at the age of 21 if his mother and paternal grandmother were not entitled to registration as Indians before their marriages.

## Kahnawá:ke's Membership History

Between 1940 and 1981 the community had declared that it had intentions of controlling its own membership. It asserted that the right to assert jurisdiction over Nationality and Membership were inherent. In 1981 the Moratorium and 1984's Mohawk Law were the first steps toward asserting that jurisdiction and the work to further define Membership was begun. In 1996 a task force was established to begin the process of community consultation.

The consultation process consisted of;

1. Meetings held between the task force and the community,
2. Information from the Task Force concerning the consultation,
3. Consultations with Kanien'kéha speaking elders of the community
4. A report on the custom of the community
5. A draft law for discussion
6. A process of three meetings in which comments and changes were made to the draft law incorporating the community's concerns.
7. Revised draft document from the Elders and MCK
8. February 1999 draft MCK has 30 day process for comments beginning on Oct 4 and ending on November 3, 1999
9. Law tabled on Dec 3, 1999
10. MCR 82-99/00 dated March 13, 2000 supported the draft Custom Code, Entsitewaharahne
11. As presented on November 29, 1999 and adopted the guiding principles and recommendations and directed the IRT to undertake drafting of a law and regulations and the development of recommendations for the purpose of the implementations.
12. The law was then sent to a Drafting Committee
13. Discussions were held between the drafting committee, community members and the elders.
14. The drafting committee submitted a draft Law and regulations number 1 to MCK in May 2002.

The enacting process involved;

1. An MCR in which requirements were set out that needed to be complete before the law was enacted. These requirements were to receive final comments from the community, draft the official version in Kanien'kéha, review the draft law with Kahnawá:ke Elders and present an implementation plan.

In August on 2002 the Law was sent to the Justice commission for review and recommendations, which were provided in February of 2003. Revisions were then made based on the recommendations and public notice was made on the final draft of the Law on February 25, 2003.

On the evening of February 25, 2003 a community meeting was held to request input from the community. This input was received along with other comment until March 27<sup>th</sup>. Another draft was released for 30 days notification for comments and questions and ended on September 10, 2003. There were minor changes and the law was enacted on October 28, 2003.