

PROTOCOL FOR THE TRANSFER OF CRIMINAL FILES FROM THE COURT OF KAHNAWÀ:KE TO SKÉN:NEN AONSÓN:TON

Approved by Kahnawà:ke Justice Commission Resolution No. 3-2022 on November 8, 2022

PART I - GENERAL

1. PURPOSE

- 1.1 The purpose of this Protocol for the Transfer of Files from the Court of Kahnawà:ke to Skén:nen Aonsón:ton (hereinafter the “Protocol”) is to establish the practices and procedures for transferring criminal files from the Court of Kahnawà:ke to Skén:nen Aonsón:ton for resolution using restorative justice. It is established pursuant to article 6.5 of the *Kahnawà:ke Justice Act*.

2. PRINCIPLES

- 2.1 This Protocol is based on the following principles:

- 1) Skén:nen Aonsón:ton and the use of restorative justice is the entry point for the Kahnawà:ke justice system;
- 2) In keeping with the principles of balance and harmony, efforts will be made to resolve offences using restorative justice in place of legal proceedings at the Court of Kahnawà:ke;
- 3) An accused whose file is transferred from the Court of Kahnawà:ke to Skén:nen Aonsón:ton in accordance with this Protocol will be held accountable for their offence through restorative justice; and
- 4) Prosecution of an offence is not in any way barred at law should the matter not be resolved using restorative justice.

3. DEFINITIONS

“**accused**” means the person charged with an offence.

“**alternative justice coordinator**” means the person responsible for the operational delivery of restorative justice services within the Mohawk Territory of Kahnawà:ke.

“**court clerk**” means the person responsible for providing coordination, administrative and procedural support for the Court of Kahnawà:ke.

“**justice**” means a justice of the peace of the Court of Kahnawà:ke, or any other judge appointed pursuant to the *Kahnawà:ke Justice Act* or its regulations but excludes an appeal judge appointed pursuant to that Act.

“**prosecutor**” means the person mandated by the Mohawk Council of Kahnawà:ke to institute proceedings to which the *Criminal Code* or Kahnawà:ke laws applies, and includes counsel acting on their behalf.

“**restorative justice**” means a way of thinking about and responding to crime as a violation of people and relationships. It is a process whereby parties with a stake in a particular offence deal with and cooperatively resolve the aftermath of an offence and its implications for the future. It seeks to repair the harm caused by crime and violence.

“**Skén:nen Aonsón:ton**” means “To become Peaceful Again”. It is the process within the Kahnawà:ke justice system that is used to resolve and rectify criminal and civil conflict in a peaceful, non-adversarial way.

“**victim**” means the person against whom the alleged offence was committed.

4. ELIGIBILITY OF OFFENCES

- 4.1 Offences prosecutable as summary conviction offences may be eligible for transfer to Skén:nen Aonsón:ton for resolution using restorative justice in accordance with this Protocol. These may include but are not limited to theft, mischief and simple assault.

Summary conviction offences are less serious offences that are punishable by shorter prison sentences, fines, probation or discharge.

- 4.2 For further clarity, offences prosecutable as indictable offences are ineligible for transfer to Skén:nen Aonsón:ton for resolution using restorative justice in accordance with this Protocol. These may include but are not limited to sexual assault, murder, offences against public order and any other offences for which a minimum sentence is specified.

Indictable offences are the most serious offences under the *Criminal Code* and come with punishments that are more serious. Maximum penalties for indictable offences vary and include life in prison. Some indictable offences have minimum penalties.

5. ADMISSIBILITY IN EVIDENCE

- 5.1 No admission, confession or statement accepting responsibility for an act or omission made by the accused as a condition for transfer to Skén:nen Aonsón:ton or during the restorative justice process will be admissible in evidence against them in any civil or criminal proceedings.

PART II - PROCESS FOR A TRANSFER OF FILE

6. REVIEW OF FILE BY PROSECUTOR

- 6.1 Following the reception of a file and upon approving the charge(s), the prosecutor will determine if it is appropriate to transfer the file to Skén:nen Aonsón:ton for resolution using restorative justice. The prosecutor will evaluate the following factors:

- 1) Whether the offence is eligible for transfer to Skén:nen Aonsón:ton pursuant to sections 4.1 and 4.2 of this Protocol;
 - 2) The circumstances in which the offence was committed;
 - 3) The accused's current situation, including their prior offences and steps undertaken to achieve rehabilitation;
 - 4) The fact that the offence and any other previous offence(s) by or involving the accused were linked to an underlying, and recently revealed problematic relationship with alcohol, drugs, gambling or mental health; and
 - 5) The victim's desire to take part in restorative justice.
- 6.2 If a transfer of the file is deemed appropriate, the prosecutor will confirm with Skén:nen Aonsón:ton the availability of appropriate restorative justice services.

7. REQUEST FOR CONSENT OF THE VICTIM

- 7.1 If the prosecutor is satisfied that it is appropriate to transfer the file to Skén:nen Aonsón:ton after reviewing the file in accordance with section 6.1 of this Protocol and confirming the availability of restorative justice services in accordance with section 6.2 of this Protocol, they will send a request for the consent of the victim to the alternative justice coordinator or designate.
- 7.2 After a preliminary review of the request for consent of the victim and of the file, the alternative justice coordinator or designate will determine if the file appears to be appropriate for resolution through restorative justice.
- In the affirmative, they will, within fifteen (15) days of receiving the request and file, confirm with the victim whether they consent to the transfer of the file from the Court of Kahnawà:ke to Skén:nen Aonsón:ton for resolution.
- In doing so, the alternative justice coordinator will provide all the required and relevant information necessary for the victim to provide, if they wish, their clear, free and informed consent.
- 7.3 Should the victim not consent, or if the file is not deemed appropriate for the transfer, the alternative justice coordinator or designate will inform the prosecutor that the file will be returned, and the prosecutor will proceed and prosecute the alleged offence at the Court of Kahnawà:ke.
- 7.4 If the victim consents to the transfer of the file, the alternative justice coordinator or designate will inform the prosecutor of this consent.

8. OFFER TO TRANSFER FILE BY PROSECUTOR

- 8.1 At the time of their appearance at the Court of Kahnawà:ke, and upon consent of the victim, the prosecutor will offer to the accused that their file be transferred to Skén:nen Aonsón:ton.

An appearance is the first time an accused presents themselves before a justice to be informed of the nature of the offense they are alleged to have committed.

- 8.2 Before consenting to the transfer of their file to Skén:nen Aonsón:ton, the accused will be informed by the prosecutor that they have the right to legal counsel. The prosecutor will further inform the accused that prosecution of the offence is not in any way barred at law should the file not be resolved using restorative justice. This will allow the accused to decide whether they wish to provide their clear, free and informed consent for the transfer of file.

The alternative justice coordinator or designate will be available either in person, telephone or other remote means during court sessions to answer any questions the accused may have.

9.0 CONSENT OF ACCUSED

- 9.1 Should the accused consent to have their file transferred to Skén:nen Aonsón:ton, they must complete and return the “Consent to Transfer of File to Skén:nen Aonsón:ton” form to the court clerk, a copy of which is attached to the present Protocol as Schedule “A”.

By completing and returning the form, the accused will:

- 1) Consent fully and freely to have the file transferred to Skén:nen A’onsonton;
 - 2) Consent fully and freely to participate in the restorative justice process;
 - 3) Acknowledge they have been advised of their right to consult with legal counsel before accepting the offer to transfer the file;
 - 4) Accept responsibility for the act or omission that forms the basis of the offence they are currently charged with;
 - 5) Confirm their understanding that there is, in the opinion of the prosecutor, sufficient evidence to proceed with the prosecution of the offence;
 - 6) Confirm their understanding that the prosecution of the offence is not in any way barred at law;
 - 7) Confirm that they have been informed and understand that no admission, confession or statement by which they accept responsibility for their action in the course of the restorative justice process is admissible in evidence against them in any civil or criminal proceedings; and
 - 8) Acknowledge that the use of restorative justice does not preclude proceedings against them should restorative justice measures fail.
- 9.2 The accused will have sixty (60) days from the date of the offer by the prosecutor to transfer the file to complete and return to the court clerk the “Consent to Transfer of File to Skén:nen Aonsón:ton”.

If the accused fails to do so, their file will not be transferred to Skén:nen Aonsón:ton and the prosecutor will then proceed and prosecute the alleged offence at the Court of Kahnawà:ke. For further clarity, if there is no response from the accused within the sixty (60) day period, the offer will be deemed to have been refused.

10. NO TRANSFER OF FILE

10.1 There will be no transfer of file to Skén:nen Aonsón:ton if:

- 1) The accused does not accept responsibility for the act or omission that forms the basis for the offence they are alleged to have committed;
- 2) The accused denies participation or involvement in the commission of the offence;
or
- 3) The accused expresses the wish to have any charge(s) against them dealt with by the Court of Kahnawà:ke.

10.2 If no offer is made to transfer the file to Skén:nen Aonsón:ton, the prosecutor will proceed and prosecute the alleged offence at the Court of Kahnawà:ke.

11. REQUEST BY ACCUSED FOR TRANSFER

11.1 The accused may request, at any time, that their file be transferred to Skén:nen Aonsón:ton for resolution using restorative justice.

11.2 Upon receipt of the request, the prosecutor will undertake the review set out at sections 6.1 and 6.2 of this Protocol. If, following this review, and upon the clear, free and informed consent of the victim as provided for under section 7 of this Protocol, the prosecutor is satisfied that it is appropriate to transfer the file to Skén:nen Aonsón:ton, the prosecutor will consent to the request.

The accused will be required to meet the requirements set out at sections 9.1 and 9.2 of this Protocol.

11.3 The prosecutor will enter into the record of the Court of Kahnawà:ke that the transfer of file was requested by the accused and that they thereby agree to the suspension of delays.

12. TRANSFER OF FILE

12.1 Upon completion and return of the "Consent to Transfer of File to Skén:nen Aonsón:ton", a copy of the file, if it has not yet been provided to Skén:nen Aonsón:ton, will be provided by the court clerk to the alternative justice coordinator or designate without undue delay.

12.2 The case will be postponed *pro-forma* at the Court of Kahnawà:ke for a period of sixty (60) days to facilitate resolution using restorative justice.

Pro-forma hearings are hearings at different stages of the legal process when both sides exchange information and complete their files.

PART III - PROCESS AT SKÉN:NEN AONSÓN:TON

13. INTAKE

- 13.1 The alternative justice coordinator or designate will commence the restorative justice process without undue delay if there is consent by the victim and the accused.
- 13.2 If, after completing its internal intake process, the alternative justice coordinator or designate determines that the file is not appropriate for resolution using restorative justice, the file will be returned to the prosecutor who will proceed and prosecute the alleged offence at the Court of Kahnawà:ke.

14. SERVICES

- 14.1 Restorative justice services provided by Skén:nen Aonsón:ton will be in accordance with applicable procedures, guidelines or best practices and may be adapted to fit specific situations, as needed.

15. CONFIDENTIALITY

- 15.1 Discussions and communications within the restorative justice process will be confidential.

16. PROGRESS REPORT

- 16.1 The alternative justice coordinator or designate will provide, within forty-five (45) days of receipt of the file pursuant to section 12.1, a progress report on the resolution of the file to the prosecutor and the court clerk.
- 16.2 The progress report will include:
- 1) The date and time of initial phone contact with the accused, victim and any other related parties;
 - 2) The dates of initial in-person meetings;
 - 3) An indication that an agreement was concluded and signed or that there is a need for continued meetings; and
 - 4) An update on the progress regarding the implementation of any agreement.

17. TIME LIMIT

- 17.1 Unless an extension is necessary, resolution using restorative justice services provided by Skén:nen Aonsón:ton must be completed within six (6) months from the date the Court of Kahnawà:ke is informed by the prosecutor that the file is transferred.
- 17.2 On behalf of the accused and the victim, the alternative justice coordinator will provide the prosecutor with a written request for extension if additional time is required. The request will include reasons for seeking additional time.

The prosecutor will submit the request to the Court of Kahnawà:ke which will determine whether the request should be granted or not.

18. PARTIALLY COMPLETED OR UNSUCCESSFUL USE OF RESTORATIVE JUSTICE

18.1 If the accused or victim does not participate in good faith or voluntarily withdraws from the restorative justice process, Skén:nen Aonsón:ton will return the file to the prosecutor with a letter of explanation.

The prosecutor will then proceed and prosecute the alleged offence at the Court of Kahnawà:ke.

18.2 If the restorative justice process is only partially completed or is unsuccessful, Skén:nen Aonsón:ton will return the file to the prosecutor with a letter outlining the reason(s) for partial completion or unsuccessful use of restorative justice.

The prosecutor will proceed and prosecute the alleged offence at the Court of Kahnawà:ke.

18.3 Partially completed or unsuccessful use of restorative justice will not be used against the accused in subsequent criminal justice proceedings.

18.4 Once a file is returned by Skén:nen Aonsón:ton to the Court of Kahnawà:ke due to partial completion or unsuccessful use of restorative justice, the accused cannot request that the same file be transferred once again to Skén:nen Aonsón:ton at a later date.

19. RESOLUTION OF CONFLICT

19.1 If there has been successful resolution using restorative justice, the alternative justice coordinator or designate will provide written confirmation to this effect to the prosecutor.

PART IV - RESOLUTION OF FILE

20. SUCCESSFUL RESOLUTION

20.1 Upon receipt of written confirmation of successful resolution using restorative justice pursuant to section 19.1 of this Protocol, the prosecutor will inform the Court of the resolution and that the file is closed.

21. PARTIAL RESOLUTION

21.1 In the case of partial resolution, the file will be returned to the Court of Kahnawà:ke for the scheduling of a hearing on partial resolution.

21.2 In the event that the accused has partially complied with the terms and conditions of any agreement concluded using restorative justice, a hearing will be held to establish what was completed and to what degree.

The justice may choose to dismiss the charge(s) if they are satisfied on a balance of probabilities that the accused has partially complied with the terms and conditions of the

agreement and, in the opinion of the justice, prosecution would be unfair based on current circumstances and on the accused's partial performance of the terms and conditions.

- 21.3 In the event that the justice is not satisfied in accordance with the conditions provided for in section 21.2, a trial date will be scheduled.

PART V - FINAL

22. PUBLICATION

- 22.1 MCK Justice Services will make this Protocol publicly available. Copies will be available online, at court sessions and at the administrative offices of the Court of Kahnawà:ke.

23. AMENDMENT

- 23.1 The Kahnawà:ke Justice Commission may amend this Protocol by resolution.

24. REVIEW

- 24.1 MCK Justice Services, in conjunction with the prosecutor, will review this Protocol every three (3) years or when needed and submit any recommended amendments to the Kahnawà:ke Justice Commission.

SCHEDULE "A"

CONSENT TO TRANSFER OF FILE TO SKÉN:NEN AONSÓN:TON

I, _____ (name of accused), born _____ (date of birth), presently charged in file _____ (case number) acknowledge the following:

1. I consent fully and freely to the transfer of this file to Skén:nen Aonsón:ton for resolution using restorative justice;
2. I consent fully and freely to participate in the restorative justice process offered by Skén:nen Aonsón:ton;
3. I acknowledge being advised of my right to consult with legal counsel;
4. I accept responsibility for the act or omission that forms the basis for the offence I am currently charged with;
5. I understand that in the opinion of the prosecutor, there is sufficient evidence to proceed with the prosecution of the offence;
6. I understand that the prosecution of the offence is not in any way barred at law;
7. I have been informed and understand that no admission, confession or statement on my part accepting responsibility for my action(s) in the course of the restorative justice process will be admissible in evidence against me in any civil or criminal proceedings; and
8. I acknowledge that the use of restorative justice does not preclude proceedings against me should restorative justice measures fail.

Signed on the ____ day of _____, 20____ in _____,

Print name

Signature