2025 Grand Moot

Charter Applicability and Double Jeopardy in Self-Governing Indigenous Communities

Kate Sheth v Mohawks of Kahnawà:ke

Official Problem by Kate Shackleton and Navya Sheth

I. FACTS

A. Kahnawà:ke

1. The Kahnawà:ke Mohawk Territory is a First Nations reserve located on the south shore of the Saint Lawrence River in Falconer, Flavelle, across from Tiohtià:ke (Montreal).
2. Kahnawà:ke is one of eight communities that make up the Kanien'kehá:ka (Mohawk) Nation, one of the six nations of the Haudenosaunee Confederacy.
3. The Kanien'kehá:ka (Mohawk people) of Kahnawà:ke are governed by Haudenosaunee law, which includes but is not limited to the Great Law of Peace, the Two-Row Wampum, and the Covenant Chain. Kahnawà:ke has governed themselves in accordance with these laws since time immemorial.
4. Most relevant for this appeal is the Great Law of Peace (Kayanerenkó:wa). This is a central constitutional text of the Kanien'kehá:ka. It lays out, among other legal principles, three central tenets: Peace, Power, and Righteousness (Good Message).
5. "Good Message" requires all people to respect each other as though they are one person; to acknowledge that everybody is related; and to repent for harms done to one another among all of the nations.

B. Kahnawà:ke Governance

6. Kahnawà:ke does not have a self-government agreement with either the federal (Flavelle) or provincial (Falconer) government. It does have framework agreements with Falconer expressing an intention to work together on a number of matters, including the administration of justice.
    a. One recent manifestation of this intention to work together is an agreement with Falconer, where offenders for minor crimes may be referred to the Skén:nen Aonsón:ton process, described further below. To date, this agreement has only been used for Kanien'kehá:ka.
7. Kahnawà:ke is governed by an *Indian Act* band council, called the Mohawk Council of Kahnawà:ke ("MCK"). Members of the MCK are elected to three-year terms according to an electoral system based on Section 11 of the *Indian Act*.
8. Kahnawà:ke also has its own community decision making process ("CDMP"). The CDMP permits Kanien'kehá:ka to involve themselves in a consensus-based development of laws, which are then passed and given force. The MCK is involved in the drafting, but does not have final say.
9. To date, Kahnawà:ke has not created formal constitutional legislation setting out individual rights, either through the CDMP or otherwise. The Kayanerenkó:wa is considered the "law of the land."
10. On June 15, 2015, the *Kahnawà:ke Justice Act* (the "*Justice Act*") was enacted through the CDMP. The *Justice Act*:

a. says that it "is paramount to and prevails over any other judicial system if there is any inconsistency between this Act and another, except as specifically provided for by particular Kahnawà:ke legislation" (preamble);
b. applies "to all matters and acts committed on or involving any persons within the Territory" (s. 3); and
c. provides for the creation of a Court of Kahnawà:ke with "original general jurisdiction within the Territory in all civil, criminal and penal matters" that can try matters under either the Canadian *Criminal Code* or Haudenosaunee law (ss. 9 and 16-17).

11. For the purposes of this problem, we assume that the *Justice Act* has been fully implemented and the criminal court is fully operational.

C. Restorative Justice in Kahnawà:ke

12. Skén:nen Aonsón:ton ("SA") is a peacemaking process in the community, which has been in operation since 2000. Skén:nen Aonsón:ton means "to become peaceful again" and invokes the concept of "Peace" from Kayanerenkó:wa.
13. The process has also been incorporated into the Justice Act. Section 6.2 provides that SA is the "entry point" for the Kahnawà:ke Justice System. Unless otherwise provided, SA will address "all situations of conflict" covered by the Justice Act.
14. Legal counsel is generally excluded from the process and agreement from all participants is required.
15. The SA process enables the community to resolve conflict in a way that reflects their traditions and teachings. The objectives of SA include encouraging responsibility, promoting understanding and education related to the harms caused by impugned conduct, and encouraging restitution or making amends. The Preamble to the Justice Act further explains that balance, particularly between individual and collective rights and responsibilities, and harmony are tenets of the SA process.
16. Matters can be referred to the SA from community members, the Kahnawà:ke courts, Canadian courts, or community organizations.

D. Kate Sheth

17. Kate is a non-Indigenous resident of Chateauguay, Falconer, a town near Kahnawà:ke.
18. On October 5th, 2023, she drove to Kahnawà:ke to visit her friend Rebecca. She and Rebecca live streamed the 2023 U of T Grand Moot for about 2 hours and then spent an hour debating the merits of the use of AI in academic integrity investigations. As they exercised their legal analysis, they were consuming significant amounts of alcohol. Kate consumed about 6-7 beers over the course of 3 hours.
19. Once they had run out of things to say about AI, Kate decided it was time to return home to Chateauguay. She got into her car and began the drive home.

20. As she drove out of Kahnawake, she veered off the road at one point and drove through part of a community garden located just off the highway. In doing so, she damaged several plants that were being grown for both ceremonial and sustenance purposes.
21. Subsequently, Kate got back on the highway and continued driving back to her home. About 10 minutes after crossing the reserve boundary, a police officer in Chateauguay noticed her car weaving. Suspecting that she may be impaired, they pulled her over.
22. During the stop, Kate exhibited clear signs of intoxication, prompting the officer to administer a breathalyzer test. Her BAC was 0.16%, meaning she was double the legal limit.
23. Kate was then immediately arrested for impaired driving and her car was impounded.

E. Canadian Proceedings

24. Kate was charged with impaired driving, pursuant to s 320.14(1)(b) of the *Criminal Code*.
25. On the advice of her counsel, she pled guilty to this offence on November 10, 2023.
26. Also in November 2023, Kate was sentenced in the Provincial Court of Falconer by Justice Hasnain to a 1-year driving ban and a $1000 fine.

F. Kahnawà:ke Proceedings

27. Community members in Kahnawà:ke complained about Kate's impaired driving and the damage she caused to the garden. These complaints led the matter to be referred to the Skén:nen Aonsón:ton process.
28. In December 2023, Kate received a notice to attend at the Kahnawà:ke courts in respect of her drunk driving.
29. Initially unaware that s. 11(h) of the Charter existed, Kate voluntarily participated in the Skén:nen Aonsón:ton process. It was agreed that her drunk driving and the resulting harm to the garden was a breach of the Haudenosaunee legal principle of Righteousness. It was found that by putting the safety of those on and off the road at risk, she failed to uphold the requirements to be respectful of other people and treat them as if they are her relations. This failure resulted in harm to the well-being of the people and other more-than-human life that relied on the garden in Kahnawà:ke.
30. Thus, it was determined that Kate would pay a fine of $500 in recognition of the harm done to the community. She would also spend four weekends learning about the garden and its role in the community, and helping to replant the garden, with the objective of helping her understand how she was connected to the broader community and how her actions put the members of that community at risk. She would also be required to pay for supplies related to the replanting. Until she completes these requirements, the community will bar her from entering the reserve.

31. Kate typically spends her weekends doing freelance work as a photographer, at events both in Chateauguay and in Kahnawà:ke. During the week, Kate works part-time at a day care centre. Either foregoing four weekends of photography work or being barred from photographing events on the reserve would therefore have a significant impact on her cash flow.
32. However, after running into the lawyer who helped her with the guilty plea by chance, she became aware that she had a *Charter* protected right against being punished twice for the same offence. She thought she could argue that SA constituted such a double punishment.
33. Thus, Kate challenged the constitutionality of the punishment imposed through SA in the Superior Court of Falconer. She seeks declaratory relief and has agreed to continue with the SA process and abide by its determinations if she is unsuccessful.
34. In response, Kahnawà:ke argued that the Charter did not apply to their governance activities, including the SA process. They also argued that the court had no jurisdiction to enjoin them from enforcing punishments within the community.

Note: Flavelle is legally equivalent to Canada, while Falconer is legally equivalent to Quebec.

II. PROCEDURAL HISTORY

A. Falconer Superior Court

35. In June 2024, Justice Evan Hazra of the Falconer Superior Court found in favour of Kate. He held that the *Charter* applied to Kahnawà:ke, that there was an infringement of s. 11(h), and that the infringement could not be shielded by s. 25. The relevant portions of the decision are excerpted below:

> [1] The *Charter* applies to Kahnawà:ke because it is a government by nature.
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> [2] Under the first branch of the *Eldridge* test, "an entity may be found to be 'government' for the purpose of s. 32(1) if it can be characterized as government by its very nature or because of the degree of governmental control exercised over it."
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> [3] In *Dickson*, the majority laid out four indicia of "government" for the purposes of s. 32(1): a democratically elected council; a taxing power; enforcement of laws; and overlap with federal/provincial jurisdiction delegated by the relevant government.
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> [4] The majority stressed that these features are neither necessary nor determinative. They also explicitly did not consider whether the *Charter* applied to inherently self-governing communities like Kahnawà:ke. I find that, while not every factor is met in this case, there is sufficient indication that Kahnawà:ke is a "government by nature."
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> [5] Kahnawà:ke has a democratically elected *Indian Act* band council that is accountable to the public that elects it. Moreover, the *Kahnawà:ke Justice Act* was passed through the Community Decision-Making Process, which is a form of direct

democracy allowing participation from every member of the community. This further supports its democratic status.

[6] Kahnawà:ke does not have a general taxing power akin to Parliament. However, it does have *Indian Act* taxing powers.

[7] Kahnawà:ke has extensive powers to make, administer, and enforce coercive laws within the reserve. In addition to the legislative process through the band council and the CDMP, Kahnawà:ke has its own police force and court system, giving it a comprehensive legal and justice system.

[8] Kahnawà:ke's powers are not wholly delegated by the federal or provincial governments, except to the extent legislated by the *Indian Act*. It does not have a self-government agreement. However, its powers significantly overlap the jurisdiction of the federal and provincial governments on the reserve's territory, further suggesting that it is governmental in nature.

[9] Taking these factors together, I find there is sufficient indication that Kahnawà:ke is a "government by nature" under the first branch of the *Eldridge* test.

[10] In any event, it is my view that the *Charter*'s applicability to an Indigenous self-governing entity should not turn on the source of its lawmaking power.

[11] As Martin and O'Bonsawin JJ. observe in their concurring reasons in *Dickson*, "the purpose underlying the scope of the *Charter*'s applicability is thus to address the power imbalance between the governed and those who govern."

[12] In light of this rationale, the *Charter* should apply to Kahnawà:ke.

[13] A self-governing entity like Kahnawà:ke holds the power to make laws, impose consequences, regulate the distribution of wealth, and form councils to represent the community. These are activities that create power imbalances and define governmental authority.

[14] Thus, Kahnawà:ke exercises clear governmental authority and is government by nature. Therefore, we do not have to consider the second branch of the *Eldridge* framework. The *Charter* applies.

36. Justice Hazra then went on to consider s. 11(h). He held that there was a violation of Kate's s. 11(h) right, given that the Skén:nen Aonsón:ton process constituted a punishment in respect of the same offence.

[15] Ms. Sheth asserts that a requirement to participate in the Skén:nen Aonsón:ton process violates s. 11(h) of the *Charter*.

[16] I agree. Ms. Sheth has already pleaded guilty to impaired driving under s. 320.14(1)(b) of the *Criminal Code*. The Skén:nen Aonsón:ton process is a punishment in the relevant sense, for the same offence.

[17] Permitting Kahnawà:ke to try Ms. Sheth would result in a duplicate proceeding. She has been charged, convicted, and punished for the offence of impaired driving, and is now being tried in a second proceeding for the same conduct

(albeit under a different name). The criminal nature of both offenses is fundamentally the same: both offences are public in nature "intended to promote public order and welfare within a public sphere of activity" (*R. v. Wigglesworth,* 1987 CanLII 41 (SCC), [1987] 2 SCR 541).

[18] I do not accept Kahnawà:ke's argument that there are separate and distinct duties to Kahnawà:ke and to the Canadian public at large. Rather, Ms. Sheth has a single, consistent duty to all members of the public: to follow the law. By driving under the influence of alcohol, the applicant breached this common duty and is now being tried in a second proceeding for the same offence.

[19] The consequences determined by the Skén:nen Aonsón:ton process (the "Consequences") constitute punishment within the meaning of s. 11(h).

[20] The legal test for what constitutes punishment was set forth by the SCC in *R. v K.R.J.*: "a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests."

[21] The first criterion is clearly met here. The Skén:nen Aonsón:ton process is intended, per the *Kahnawà:ke Justice Act,* to be the "entry point" for the Kahnawà:ke justice system (*KJA*, s. 6.2). The process is therefore part of the "arsenal of sanctions" to which an accused may be liable when they commit an offence in Kahnawà:ke.

[22] The Consequences are also imposed in furtherance of the purposes and principles of sentencing. Importantly, the Consequences conform to sentencing goals shared by both the Kahnawà:ke and the *Criminal Code*.

[23] As s. 4 of the *KJA* sets out, the objectives of the Kahnawà:ke Justice System are to "redress, remedy and re-establish harmony." The Consequences are clearly directed at these objectives: they aim to restore the garden (both through replanting and financial contribution) and promote harmony by educating Ms. Sheth on its significance.

[24] The Consequences also align with the goals of sentencing outlined in s. 718 of the *Criminal Code*. Namely, they "promote reparations" and "promote a sense of responsibility in offenders."

[25] Based on the above, the Consequences violate Ms. Sheth's s. 11(h) rights.

37. Finally, Justice Hazra held that s. 25 did not shield the breach of s. 11(h):

[23] Section 25 cannot shield the breach of s. 11(h) because there is no protected right under s. 25. Even if there was, there is no irreconcilable conflict.

[24] The collective right claimed by Kahnawà:ke is the right to self-governance over criminal matters.

[25] For a right to be shielded under s. 25, the right requires an element of Indigenous difference.

> [26] Governance over criminal matters does not possess the requisite level of Indigenous difference.
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> [27] In *Kapp*, the majority noted that the rights protected under this section are those that are unique to Indigenous peoples, something that is a part of their special status in Canada.
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> [28] The regulation of crime is not unique to Indigenous Peoples. Maintaining law and order is a universal feature of any sovereign nation and therefore cannot be characterized as possessing "Indigenous difference."
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> [29] Although my conclusion on Indigenous difference is sufficient to dispose of the s. 25 argument, I will nonetheless consider whether there is an irreconcilable conflict between the Kahnawà:ke's self-government rights and Ms. Sheth's s. 11(h) rights.
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> [30] In my view, there would be no irreconcilable conflict. Accommodating for double jeopardy concerns would not undermine the Kahnawà:ke's right to self-governance over criminal matters because all criminal powers have limits to accommodate for multijurisdictional overlap. For example, protections against double jeopardy are well-established in Canadian (and American) law and do not derogate from their abilities as sovereign nations to oversee their own criminal process.

38. At the close of his reasons, Justice Hazra declined to order an injunction against the Kahnawà:ke courts and invited further submissions on remedy.

B. Falconer Court of Appeal

39. Before the issue of remedy was heard, Kahnawà:ke appealed on the merits on all three issues (ss. 32, 11(h), and 25).
40. In February 2025, all three judges at the Court of Appeal agreed that the appeal should be allowed and the community permitted to sentence Kate. However, they split three ways on the reason for this.
41. Justice Jay Hajizadeh held that s. 32 was not engaged at all:

> [1] The trial judge erred in interpreting section 32(1) of the Charter as applying to Kahnawà:ke in this case because there is no delegation of power from the federal or provincial government.
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> [2] In *Dickson*, the applicability of the *Charter* turned on the delegation of power from the federal and provincial government. The majority expressly declined to decide whether Indigenous governmental powers untethered from federal legislation would be subject to the Charter.
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> [3] This appeal is therefore not governed by *Dickson*. We are tasked with deciding this issue afresh.
>
> [4] In my view, s. 32—properly interpreted—does not apply to Indigenous governments operating independently of federal legislation.

[5] As Rowe J. observed in *Dickson*, "Indigenous peoples were not at the [Charter] negotiating table, did not agree for the Charter to apply to them, and were not included within the constitutional amending formula which was adopted alongside the Charter."

[6] Therefore, there is no basis—in the absence of delegation which occurs by agreement between the federal or provincial governments and the Indigenous community—to apply the *Charter*.

[7] On this basis, I would allow the appeal.

42. Justice Broun-Winsor held that while s. 32 was engaged, there was no violation of s. 11(h):

[1] I substantially agree with the analysis of Justice Hazra at the court below on s. 32 of the *Charter*.

[2] However, I part company with Justice Hazra with respect to s. 11(h). In my view, the *Charter* protection against double jeopardy is not engaged in this case.

[3] The restorative justice approach sought after by the Kahnawà:ke is not a true penal consequence.

[4] Per *Guidon v Canada*, a true penal consequence is understood as an "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity." *Guidon* further clarifies that while imprisonment is always considered to be a true penal consequence, monetary or other sanctions may have penal consequences if their purpose and effect are punitive.

[5] The Kahnawà:ke's sanctions are restorative, rather than punitive, meaning there is no true penal consequence to be found.

[6] According to the *Kahnawà:ke Justice Act*, the Kahnawà:ke system focuses on Skén:nen Aonsón:ton, which means "become peaceful again". This approach is focused on restorative justice and addressing the specific needs and circumstances of the community, while more serious criminal offences and appeals are brought before other criminal courts in the area. This distinction is evidence for the fact that the aim of the community to impose restorative justice is not a "true penal consequence", but rather is directed towards the "maintenance of internal discipline within a limited sphere of activity" as it is specifically directed towards the activity that was committed on the Kahnawà:ke lands.

[7] It is well established that section 11(h) of the *Charter* only applies when the two offences with which an accused is charged are the same. On this point, I must disagree with the learned trial judge and my learned colleagues' analysis. In this case, there is no violation of s. 11(h), as the two offences charged against the respondent are not identical. Following the Court's reasoning in *R. v. Van Rassel*, I am persuaded

that the offences are based on duties of a different nature. The respondent must answer for his conduct both to the Kanien'kehá:ka and to the Canadian public. In my view, ruling that these are the same offence would be a significant departure from *Van Rassel* and the subsequent handling of provincial driving offences and charges under the *Code*.

[8] Although this court is not bound by the jurisprudence of the Supreme Court of the United States, its approach to questions of double jeopardy, if applied here, would similarly conclude that the respondent's conduct could be prosecuted successively in the Canadian court system and through the Sken:nen Aonsón:ton process. The dual sovereignty doctrine permits successive prosecutions by tribal and federal (or state) authorities for the same conduct without violating the double jeopardy clause of the Fifth Amendment, as long as each prosecution enforces a law of a different sovereign.

[9] That the respondent is not Indigenous remains untested in U.S. courts; however, the Court in *United States v. Lara* acknowledged that "[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians," overturning the earlier ruling that Indian tribes lacked sovereign authority to criminally prosecute non-member Indians in *Duro v. Reina*. Nonetheless, adopting a similar "dual sovereignty" doctrine exception to s. 11(h) would not expand Indigenous sovereignty without limits. Rather, it would enable Indigenous communities, such as the Mohawks of Kahnawà:ke, to prosecute the same conduct as long as the offences violate each sovereign's laws.

43. Justice Grewal-Birbrager held that the *Charter* applied and there was a violation of s. 11(h), but it was shielded by s. 25:

[1] I substantially agree with the analysis of Justice Hazra at the court below on ss. 32 and 11(h) of the *Charter*.

[2] However, Kahnawà:ke's exercise of its self-governance jurisdiction over criminal law matters is protected by s. 25 of the *Charter*.

[3] First, this is an Aboriginal right. In the *Bill C-92 Reference*, the Quebec Court of Appeal recognized that Indigenous communities could have a right to self-government on matters of cultural significance. The existence and application of law is just such a matter. This is especially true for the criminal law, which often conveys the moral values of a society. I find that Haudenosaunee law clearly demonstrates a historical and ongoing engagement in applying law on Kahnawà:ke's territory that meets the requirement for an Aboriginal right.

[4] In the alternative, this is an "other right" that protects Indigenous difference. Kahnawà:ke criminal justice is distinct from Canadian criminal justice—there are different laws and different objectives. Imposing consequences in

> Kahnawà:ke using Haudenosaunee law is an essential tool to maintain the distinctive culture and traditions of the people of Kahnawà:ke.
>
> [5] At the third step of the *Dickson* analysis, there is an irreconcilable conflict between the s. 25 right and the application of s. 11(h) in this circumstance. Giving effect to the appellant's s. 11(h) Charter right derogates from Kahnawà:ke's right to adjudicate transgressions according to their legal system. Applying s. 11(h) would effectively give the federal law priority over the Indigenous right to exercise judicial power. In circumstances like Ms. Sheth's, this would mean that the Indigenous community would lose the ability to enforce its own laws and values if the Canadian government were to act first. As such, the appellant's Charter right is inconsistent with the s. 25 right, constituting a real and irreconcilable conflict.
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> [6] Finally, no party has raised the possibility of additional limits. Thus, I conclude that s. 25 shields the breach of s. 11(h).

III. ISSUES ON APPEAL

44. Kate is now appealing to the Supreme Court of Flavelle. She raises three questions of law:
    a. Does the *Charter* apply to Kahnawà:ke under the "government by nature" branch of the *Eldridge* test?
    b. If so, does conviction in the Kahnawà:ke courts and participation in the Skén:nen Aonsón:ton process constitute double jeopardy and breach her s. 11(h) rights?
    c. If so, can this breach be given effect, or is it shielded by s. 25 of the *Charter*?
45. Kahnawà:ke has conceded that if s. 25 does not apply, s. 1 does not justify the breach.
46. Kate seeks declaratory relief stating that participating in SA would be a breach of her *Charter* rights.
47. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.