**IN THE SUPREME COURT OF FLAVELLE**

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

**KATE SHETH**

Appellant

- and -

**MOHAWKS OF KAHNAWÀ:KE**

Respondent

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# FACTUM OF THE APPELLANT

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. OVERVIEW

1. Kahnawà:ke exists as a distinct community *within* Flavelle – and the people who live, work and pass through its borders carry obligations not only to Kahnawà:ke, but also to Flavelle at large. In the modern *Charter* context, we must strive to strike a balance between recognition of Kahnawà:ke's right to self-governance and recognition of the *Charter* rights that protect *all* people within Flavelle.

2. The *Flavellian Charter of Rights and Freedoms* (the "*Charter*") does and *should* apply to Kahnawà:ke. A straightforward application of the four *Godbout* factors illustrates that Kahnawà:ke is a government by nature under the first branch of the *Eldridge* framework. Furthermore, the purpose of the *Charter*—to hold the government to account—motivates a broad understanding of the entities it captures, which includes Kahnawà:ke. Arbitrarily limiting the *Charter*'s reach sanctions rights-free zones and fails to advance reconciliation with Indigenous communities.

3. Kate Sheth ("Ms. Sheth") has already been tried and punished for her impugned conduct. The Skén:nen Aonsón:ton process ("Skén:nen Aonsón:ton") amounts to a criminal or quasi-criminal proceeding that imposes a punishment upon her for an offence of the same nature as the one for which she was already tried and punished. Allowing an additional sentence to be imposed upon Ms. Sheth, when she has already been punished by the state, would violate her s. 11(h) right to be free from double jeopardy.

4. The breach of Ms. Sheth's s. 11(h) *Charter* right does not abrogate or derogate from Kahnawà:ke's claimed right to self-governance over criminal matters. The claimed right is not captured by s. 25 as it is not a treaty right, Aboriginal right, or "other" right that promotes "Indigenous difference." There is no evidence to suggest that Skén:nen Aonsón:ton was practiced

since time immemorial or comprised an integral part of Kahnawà:ke's culture. Even if it did, there is no "irreconcilable conflict" between the claimed right and s. 11(h). Accommodating for double jeopardy concerns simply affirms the choice to not participate in Skén:nen Aonsón:ton, which is an option explicitly provided for by Kahnawà:ke.

## B. STATEMENT OF FACTS

5. Ms. Sheth is a non-Indigenous resident of Chateauguay. Chateauguay sits near the Kahnawà:ke Mohawk Territory, a First Nations reserve located on the south shore of the Saint Lawrence River in Falconer, Flavelle. Ms. Sheth frequently travels into Kahnawà:ke, both to work events as a freelance photographer and to visit close friends.

6. Kahnawà:ke is governed by the Mohawk Council of Kahnawà:ke (the "MCK"), a band council elected pursuant to s. 11 of the *Indian Act*. While Kahnawà:ke does not have a self-governance agreement with the federal or provincial government, it does have framework agreements with Falconer. Currently, Kahnawà:ke has no formal constitutional legislation setting out individual rights and freedoms.

7. Kahnawà:ke also has its own community decision making process (the "CDMP"), a form of consensus-based decision-making. Certain laws, such as the *Kahnawà:ke Justice Act* (the "*Justice Act*"), were enacted through the CDMP. The *Justice Act* provides for the creation of a court system (currently in operation) that can try offences. Skén:nen Aonsón:ton is a restorative justice-based peacemaking process established in 2000 which serves as an "entry point" for the Kahnawà:ke Justice System, seeking to address "all situations of conflict," including criminal matters, covered by the *Justice Act*.

8. In October 2023, Ms. Sheth drove out of Kahnawà:ke while intoxicated. She veered off the road and drove through part of a community garden located just off the highway, damaging several

plants that were grown for both ceremonial and sustenance purposes. In Chateauguay, she was arrested under the suspicion of impaired driving.

9. Ms. Sheth has faced consequences for her recklessness. She plead guilty to impaired driving pursuant to s. 320.14(1)(b) of the *Criminal Code of Flavelle* (the "*Criminal Code*") and was sentenced in the Provincial Court of Falconer to a 1-year driving ban and a $1,000 fine.

10. In December 2023, Ms. Sheth received a notice to attend at the Kahnawà:ke courts in respect of her drunk driving. As she was initially unaware that s. 11(h) of the *Charter* existed, Ms. Sheth voluntarily participated in Skén:nen Aonsón:ton.

11. Ms. Sheth now faces further consequences for the same impugned conduct. Through Skén:nen Aonsón:ton, Ms. Sheth was found to have violated the Haudenosaunee legal principle of Righteousness as her conduct breached her obligation to be respectful of others and treat them as if they were her relations. For the harm she caused to the garden in Kahnawà:ke and those who rely on it, Ms. Sheth was ordered to pay a fine of $500 (the "$500 Fine"), spend four weekends learning about the garden and helping replant it, and pay for all supplies related to the replanting. Until Ms. Sheth completes these requirements, she is barred from entering the reserve.

12. Ms. Sheth challenges the constitutionality of the punishment imposed through Skén:nen Aonsón:ton, arguing that it violates her s. 11(h) *Charter* right to be free from double jeopardy.

## C. JUDICIAL HISTORY

### *i. The Falconer Superior Court*

13. Justice Hazra found in favour of Ms. Sheth. He held that the *Charter* applied to Kahnawà:ke because it is a government by nature and noted that the *Charter*'s applicability to an Indigenous self-governing entity should not turn on the source of its lawmaking power. He further held that a requirement to participate in Sken:nen Aonsón:ton violates s. 11(h) of the *Charter*, as

both proceedings are of fundamentally the same criminal nature and there are no separate and distinct duties to Kahnawà:ke and the public at large. He also found that the consequences determined by Sken:nen Aonsón:ton constitute punishment within the meaning of s. 11(h). Finally, Hazra J. held that s. 25 did not shield the breach of s. 11(h) because the collective right to self-governance over criminal matters does not fall within the ambit of s. 25 and, even if it did, there is no "irreconcilable conflict."

***ii. The Falconer Court of Appeal***

14. Kahnawà:ke appealed on all three issues (ss. 32, 11(h), and 25). While the judges of the Falconer Court of Appeal concluded that Kahnawà:ke can sentence Ms. Sheth, they split three ways on their reasons.

15. Justice Hajizadeh held that s. 32 was not engaged because there was no delegation of power from the federal or provincial government. Citing Rowe J.'s dissenting opinion in *Dickson*, Hajizadeh J. concluded that s. 32—properly interpreted—does not apply to Indigenous governments who are exercising self-government powers.

16. Justice Broun-Winsor found that, while s. 32 was engaged, the Sken:nen Aonsón:ton process does not violate s. 11(h) because Kahnawà:ke's restorative justice program does not impose a true penal consequence. Additionally, Broun-Winsor J. held that s. 11(h) cannot apply because the two offences charged against Ms. Sheth are not identical.

17. Justice Grewal-Birbrager held that the *Charter* applied and there was a violation of s. 11(h), but it was shielded by s. 25. He concluded that Kahnawà:ke's exercise of its self-governance jurisdiction over criminal law matters is protected by s. 25 as an Aboriginal right or, alternatively, as an "other" right that promotes "Indigenous difference." Furthermore, Grewal-Birbrager J. held that there is an "irreconcilable conflict" between the s. 25 right and the application of s. 11(h)

because giving effect to Ms. Sheth's double jeopardy claim derogates from Kahnawà:ke's right to adjudicate transgressions according to their own legal system.

## PART II – STATEMENT OF ISSUES

18. There are three issues on appeal:

**Issue 1:** Does the *Charter* apply to Kahnawà:ke?

**Yes.** Kahnawà:ke satisfies all four *Godbout* factors and is therefore a "government by nature" under the first branch of the *Eldridge* framework. Furthermore, a purposive reading of s. 32 demonstrates why the *Charter* should apply to Kahnawà:ke.

**Issue 2:** If so, does conviction in the Kahnawà:ke courts and participation in Skén:nen Aonsón:ton constitute double jeopardy and breach Ms. Sheth's s. 11(h) *Charter* right?

**Yes.** The conviction in the Kahnawà:ke courts and Skén:nen Aonsón:ton sanctions, imposed after Ms. Sheth had already served a criminal punishment imposed by the Provincial Court of Falconer, amount to being tried and punished twice for the same offence.

**Issue 3:** If so, is this breach shielded by s. 25 of the *Charter*?

**No.** The claimed right to self-governance over criminal matters is not protected by s. 25 – it does not fall within the ambit of the provision and there is no "irreconcilable conflict" between the claimed right and Ms. Sheth's s. 11(h) *Charter* right.

## PART III – ARGUMENT

### A. THE *CHARTER* APPLIES TO KAHNAWÀ:KE.

19. As held by both the Falconer Superior Court[1] and the Falconer Court of Appeal,[2] the *Charter* applies to Kahnawà:ke.

#### 1. Kahnawà:ke is a "government by nature" under the first branch of the *Eldridge* framework.

20. In determining whether an entity is a "government by nature" under the first branch of the *Eldridge* framework, courts often consider the following indicia of "government" (the "*Godbout* factors"): (1) the presence of a democratically elected council; (2) the power to levy taxes; (3) the ability to enforce laws; and (4) overlap with federal or provincial jurisdiction delegated by the relevant government.[3]

21. Kahnawà:ke readily satisfies the first three *Godbout* factors for the reasons articulated by Hazra J. of the Falconer Superior Court.[4]

22. While Kahnawà:ke's authority is not wholly delegated by the federal or provincial government,[5] it need not be. It is sufficient to derive a *source* of lawmaking authority from either level of government to satisfy this criterion.[6]

23. It is evidently clear that Kahnawà:ke derives a source of its lawmaking authority from the Government of Flavelle through the *Indian Act*. Indeed, "[o]ver the history of its imposition and application in Kahnawake [*sic*], Mohawks almost universally have come to integrate various

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[1] Falconer Superior Court at para 1; Official Problem at para 35.
[2] Official Problem at paras 42-43.
[3] *Godbout v. Longueuil (City)*, [1997] 3 SCR 844 at para 51 [*Godbout*], TOA Tab 1; *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 77 [*Dickson*], TOA Tab 2.
[4] Falconer Superior Court at paras 5-7; Official Problem at para 35.
[5] Falconer Superior Court at para 8; Official Problem at para 35.
[6] *Dickson*, *supra* note 3 at paras 82-83, TOA Tab 2.

elements of the *Indian Act* system into their political culture."[7] For instance, Kahnawà:ke is governed by the MCK, an *Indian Act* band council.[8] The MCK is "generally accepted by the community as a legitimate source of authority and represents the community in external relations."[9] It is the only body that the Government of Flavelle recognizes.[10] Canadian courts have consistently held that the *Charter* applies to band councils exercising powers pursuant to the *Indian Act*.[11] This would include s. 83 *Indian Act* taxing powers, which Kahnawà:ke possesses.[12]

24. Although Kahnawà:ke employs the CDMP to create laws, this process was established at the behest of the MCK.[13] Virtually all institutions have been created under the legal authority of the MCK[14] and the MCK continues to wield considerable power in the governance of Kahnawà:ke. For example, the MCK Chief is responsible for the consistency and implementation of laws, and acts as a representative of Kanien'kehá:ka not directly impacted by certain legislation passed pursuant to the CDMP.[15] Additionally, for sector-specific legislation, "it is the [MCK] Chief and Council who determine the mandate, scope, purpose, and intent of a law."[16] Finally, the MCK "provides and manages programs that were previously administered by higher levels of government under the *Indian Act*."[17]

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[7] Gerald Alfred, *The Meaning of Self-Government in Kahnawake* (Government of Canada: 1994) at 26 [*The Meaning of Self-Government*], TOA Tab 53.
[8] Official Problem at para 7.
[9] Alexandra Laham, "The Kahnawake Community Decision Making Process" (24 October 2021), online: <https://participedia.net/case/the-kahnawake-community-decision-making-process> [*The CDMP*], TOA Tab 54.
[10] Susan Haslip, "The (Re)Introduction of Restorative Justice in Kahnawake: "Beyond Indigenization" (2002) 9:1 Murdoch University Electronic Journal of Law, TOA Tab 55.
[11] *Dickson*, *supra* note 3 at para 57, TOA Tab 2, citing, *inter alia*, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*], TOA Tab 3; *Taypotat v. Taypotat*, 2013 FCA 192 at paras 36-39 [*Taypotat*], TOA Tab 4, rev'd on other grounds: 2015 SCC 30, TOA Tab 5; *McCarthy v. Whitefish Lake First Nation No. 128*, 2023 FC 220 at para 93 [*McCarthy*], TOA Tab 6; *Linklater v. Thunderchild First Nation*, 2020 FC 1065 at para 16, TOA Tab 7; *Horse Lake First Nation v. Horseman*, 2003 ABQB 152 at paras 14-29, TOA Tab 8.
[12] Official Problem at para 6.
[13] The Office of the Council of Chiefs (the "OCC"), which created the Kahnawake Legislative Coordinating Committee (the "KLCC"), receives its mandate from the MCK. See: *The CDMP*, *supra* note 9, TOA Tab 54.
[14] *The Meaning of Self-Government*, *supra* note 7 at 17, TOA Tab 53.
[15] *The CDMP*, *supra* note 9, TOA Tab 54.
[16] Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:Ke's Community Decision Making Process" (2013) 18:1 Rev of Constitutional Studies 111 at 131 [*Indigenous Participatory Democracy*], TOA Tab 56.
[17] *The CDMP*, *supra* note 9, TOA Tab 54.

25. It is also clear that Kahnawà:ke derives a source of its lawmaking authority from the Government of Falconer through various agreements.

26. Kahnawà:ke has signed several framework agreements with Falconer that relate to matters of provincial jurisdiction.[18] The Framework Agreement Between Falconer and the Mohawks of Kahnawà:ke provides for the negotiation of sectoral agreements in several areas of provincial jurisdiction, including fiscal policy, economic development, transportation, and labour.[19] If Kahnawà:ke did not require provincial permission to legislate in these areas, it is unclear why such agreements would be needed in the first place.

27. Furthermore, in a recently signed memorandum of agreement with the province that "took years of negotiation to achieve,"[20] the Director of Criminal and Penal Prosecutions (the "DCPP") of Falconer authorized the referral of certain criminal matters to Skén:nen Aonsón:ton.[21] MCK Chief Tonya Perron's acknowledgement that this agreement was a "way to take back some of our jurisdiction over our people"[22] indicates that provincial authorization is required, at least in part, to oversee restorative justice in Kahnawà:ke.

### *(a) The application of s. 32 should not hinge on the delegation of authority from the federal or provincial government.*

28. The foregoing analysis of the four *Godbout* factors is a complete answer to the question of *Charter* applicability. Even if this Court is unpersuaded by our analysis of the last *Godbout* factor,

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[18] Official Problem at para 6.
[19] Johnny Montour, Pierre Corbeil & Claude Béchard, "Framework Agreement Between Falconer and the Mohawks of Kahnawake" (2009) ss. 5.1-5.3, online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/secretariat-premieres-nations-inuit/publications/ententes/Mohawks/Kahnawake/en/2009-07-16-kahnawake-ententeCadre-en.pdf>, TOA Tab 57. See also: Mohawk Council of Kahnawà:ke & Government of Québec, "Statement of Understanding and Mutual Respect Between the Mohawks of Kahnawake and Falconer " (2025), online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/org/secretariat-premieres-nations-inuit/publications/ententes/Mohawks/Kahnawake/en/2025_kahnawake-respect-en.pdf>, TOA Tab 58.
[20] Miriam Lafontaine, "Taking back jurisdiction over justice" (4 October 2023), online: <https://easterndoor.com/article/taking-back-jurisdiction-over-justice> [*Taking Back Jurisdiction*], TOA Tab 59.
[21] Mohawk Council of Kahnawà:ke, "MCK Justice Services signs Alternative Measures Program Agreement" (21 September 2023), online: <https://kahnawake.com/news/pr/pr09212023a.pdf>, TOA Tab 60.
[22] *Taking Back Jurisdiction*, *supra* note 20, TOA Tab 59.

the *Charter* should still apply to Kahnawà:ke. *Charter* enforceability must not rest exclusively on the presence of delegated authority.[23]

29. The reference to Parliament and the provincial legislatures in s. 32 does not impose a condition that authority be delegated by these bodies for the *Charter* to apply. Instead, it "signals an intention that the full legislative field — 'all matters within the authority' of Parliament and the provincial legislatures — be covered by the *Charter*."[24] According to Professors Hogg and Wright, *Dickson* leaves "unresolved whether a sufficient connection to the federal or provincial level of government is required for the *Charter* to apply to 'entities or activities that are not part of the institutions of' those levels of government.[25] Indeed, in *Collins*, the Federal Court concluded that "[t]he *Charter* applies to decisions made by Indigenous nations regardless of the 'source' of their powers" because Indigenous nations "carry on functions of government."[26]

30. Furthermore, it must be remembered that the *Godbout* factors "are neither necessary nor determinative for an entity to be found to be government by nature;"[27] they do not "readily admit of any *a priori* elucidation."[28]

31. Therefore, attaching unnecessary weight to the last *Godbout* factor is misguided. If unpersuaded by our analysis of the *Godbout* factors, this Court should instead examine the purpose of the *Charter* (as discussed below) to determine whether it applies.

## 2. The *Charter* does not explicitly or implicitly exclude entities beyond those enumerated in s. 32.

[23] *Dickson*, *supra* note 3 at para 244, TOA Tab 2, Martin J. concurring.
[24] *Dickson*, *supra* note 3 at para 269, TOA Tab 2, Martin J. concurring.
[25] Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007), § 37:10, TOA Tab 61.
[26] *Collins v. Saddle Lake Cree Nation #462*, 2023 FC 1239, at paras 60, 80 [*Collins*], TOA Tab 9; *McCarthy*, *supra* note 11 at para 116, TOA Tab 6.
[27] *Dickson*, *supra* note 3 at para 77, TOA Tab 2.
[28] *Godbout*, *supra* note 3 at para 49, TOA Tab 1; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 42 [*Eldridge*], TOA Tab 10.

32. The list of entities subject to the *Charter* is not closed. Section 32 leaves open the possibility that Indigenous communities, like Kahnawà:ke, may face *Charter* scrutiny. The tacit recognition of an Indigenous order of government in s. 35(1) of the *Charter* fulfils that possibility.[29]

33. At the outset, the textual structure of s. 32(1) does not explicitly exclude the application of the *Charter* to laws enacted by bodies other than those expressly stated. The purpose of s. 32 is to draw the dividing line between private and governmental actors, not to conclusively demarcate the bounds of the *Charter*.[30] The provision contains no explicitly limiting language; s. 32 does not say, for instance, "the *Charter* only applies to …" In fact, while s. 32(1) does not explicitly mention municipalities, transit authorities, colleges, or school boards, these bodies are nevertheless subject to the *Charter*.[31] As Major J. contends in *Godbout*, "interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective."[32] To suggest otherwise would amount to an unacceptable triumph of form over substance.

34. If s. 32 does not explicitly exclude Indigenous communities, the argument for exclusion must rest on an implicit basis, one that relies on *expressio unius est exclusio alterius* ("*expressio unius*"), a canon of statutory interpretation. According to this statutory principle, the failure to explicitly mention Indigenous governments in s. 32(1) evinces an intention to deliberately exclude them from the *Charter*'s reach.

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[29] *Collins*, *supra* note 26 at para 99, TOA Tab 9, citing Canada, *Report of the Royal Commission on Aboriginal Peoples: Vol. 2, Restructuring the Relationship* (Ottawa: Minister of Supply and Services, 1996) at 216-217, TOA Tab 62.
[30] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 65, n 139, TOA Tab 63; see also: Brian Slattery, "First Nations and the Constitution: A Question of Trust", (1992) 71:2 *Can Bar Rev* 261-93 at 286, n 82 [*A Question of Trust*], TOA Tab 64.
[31] *Godbout, supra* note 3, TOA Tab 1; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 [*Greater Vancouver Transportation Authority*], TOA Tab 11; *Douglas/kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570, TOA Tab 12; *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York Region*], TOA Tab 13.
[32] *Godbout*, *supra* note 3 at para 48, TOA Tab 1.

35. There are several problems with this argument. First, courts have consistently treated *expressio unius* with caution, declaring the maxim an unreliable tool. While *expressio unius* "is often a valuable servant," it is a "dangerous master to follow in the construction of statutes or documents."[33] Courts have been even less enthusiastic about applying the maxim to constitutional texts. For instance, in *Thomson Newspapers*, Wilson J. (dissenting) noted that *expressio unius* "is ill-suited to meet the needs of *Charter* interpretation."[34] This proposition has been repeatedly upheld in Canadian jurisprudence.[35]

36. Second, the *Constitution* must be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[36] According to Martin and O'Bonsawin JJ. (concurring) in *Dickson*, "s. 32(1) was enacted when Parliament, provincial legislatures, and their subordinate entities represented the entire legislative universe[;] [t]hose bodies were the modalities for the exercise of all legislative power in Canada."[37] Section 32 must be understood in this context. "When properly placed in its context, section 32 of the Charter looks much more like the expression of a general principle of good governance in Canada than…a simple list that…limits the sphere of enforceability of constitutional rights and freedoms."[38]

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[33] *Turgeon v. Dominion Bank*, [1930] SCR 67 at 70-71, TOA Tab 14.
[34] *Thomson Newspapers Ltd v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 470, TOA Tab 15.
[35] See, for example: *R v S (RJ)*, [1995] 1 SCR 451 at para 117, TOA Tab 16.
[36] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145, at 155, [*Hunter*], TOA Tab 17.
[37] *Dickson*, *supra* note 3 at para 268, TOA Tab 2, Martin J. concurring [emphasis added].
[38] *Chisasibi Band (Chisasibi Eeyouch) c. Napash*, 2014 QCCQ 10367 at para 79 [*Chisasibi Band*], TOA Tab 18.

## 3. The *Charter*'s purpose must animate our interpretation of s. 32.

### *(a) The Charter's purpose is to hold the government to account.*

37. As indicated above, to determine whether the *Charter* applies to Kahnawà:ke, this Court must consider why the *Charter* was created in the first place.

38. The *Charter*'s purpose has always been clear – to hold the government to account.[39] Since 1982, Canadian courts have consistently affirmed the need to constrain government action to protect individual rights.[40] By mediating the relationship between citizens and the government, the *Charter* addresses "the power imbalance between the governed and those who govern."[41]

### *(b) The Charter's purpose motivates a broad understanding of the entities it captures, which includes Kahnawà:ke.*

39. Implicit in the *Charter*'s purpose is the acknowledgment that "[g]overnment is the body that can enact and enforce rules and authoritatively impinge on individual freedom."[42] Accordingly, s. 32 must be understood liberally enough to capture any entity capable of exercising this kind of power. This conclusion is buttressed by the fact that s. 32 ought to be "interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic."[43] Indeed, Wilson J. was clear in *Lavigne* that "the *Charter* applies to 'government' entities broadly construed."[44]

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[39] *Dickson*, *supra* note 3 at para 45, TOA Tab 2, citing *McKinney v. University of Guelph*, [1990] 3 SCR 229 at 261 [*McKinney*], TOA Tab 19. See also: *R v. McGregor*, 2023 SCC 4 at paras 54-55 [*McGregor*], TOA Tab 20; *Canada (AG) v Power*, 2024 SCC 26 at para 30, TOA Tab 21.
[40] *Dickson*, *supra* note 3 at paras 242, 248, TOA Tab 2; *Hunter, supra* note 36 at 156, TOA Tab 17; *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 SCR 573 at 593, 597, TOA Tab 22; *McKinney*, *supra* note 39, at 261-262, TOA Tab 19; *Spence v. BMO Trust Co*, 2016 ONCA 196, at para 125, TOA Tab 23.
[41] *Dickson*, *supra* note 3 at paras 234, 249, TOA Tab 2, Martin J. concurring.
[42] *McKinney*, *supra* note 39 at 262, TOA Tab 19.
[43] *Dickson*, *supra* note 3 at para 45, TOA Tab 2. See also: *Hunter*, *supra* note 36 at 156, TOA Tab 17; *R. v. Big M Drug Mart Ltd.,* [1985] 1 SCR 295, at 344, TOA Tab 24; *Reference re Senate Reform*, 2014 SCC 32 at para 25, TOA Tab 25; *McGregor*, *supra* note 39 at para 50, TOA Tab 20.
[44] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 240 [emphasis added], TOA Tab 26.

40. The *Charter*'s underlying purpose confirms that Kahnawà:ke falls squarely within the reach of s. 32. Kahnawà:ke can authoritatively impinge on individual freedom through the MCK[45] and the CDMP.

41. While one may argue that Kahnawà:ke's consensus-based model of decision-making cuts against the concerns the *Charter* intended to address, the CDMP's aspirations are rarely achieved in practice. For example, the self-selection process for the CDMP "skew[s] representation towards those with vested interests and those that are well-organized."[46] Furthermore, the CDMP suffers from low participation levels[47] and "[t]here does not appear to be any efforts made to include a diversity of voices in the process."[48] These realities, which are antithetical to the very definition of "consensus," highlight that power imbalances persist in Kahnawà:ke. Without true unanimity (which is practically impossible), there always exists the potential of compromising individual rights.

42. The Membership Law,[49] a law created through the CDMP, is a prime example of the power imbalance that persists in Kahnawà:ke. According to the Membership Law, a Mohawk family that adopts a non-Mohawk child loses their band membership.[50] The Membership Law illustrates one of the many ways in which laws enacted through the CDMP can erode individual rights and personal freedoms. In the case of the Membership Law, a collective interest (preserving Mohawk identity) arguably overrides an individual right (the right to retain one's citizenship).

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[45] As mentioned earlier, the MCK exercises *Indian Act* taxing powers, manages programs that were previously administered by higher levels of government under the *Indian Act*, and has the ability to enforce coercive laws.
[46] *The CDMP*, *supra* note 9, TOA Tab 54.
[47] *The CDMP*, *supra* note 9, TOA Tab 54, citing *Indigenous Participatory Democracy* at 130, TOA Tab 56.
[48] *The CDMP*, *supra* note 9, TOA Tab 54.
[49] *Kahnawá:ke Membership Law*, K.R.L. c. M-1(2003), online: <http://www.kahnawakemakingdecisions.com/promo/Membership%20Law%20&%20Regulations.pdf> [*Membership Law*], TOA Tab 65.
[50] *Membership Law, supra* note 49 at s 13.5, TOA Tab 65.

43. The Seven Generations Principle, an underlying philosophy of the CDMP found within the Great Law of Peace,[51] is a broader manifestation of the concerns the *Charter* was designed to address. By acknowledging that "individual needs should not trump those of the collective,"[52] the Seven Generations Principle arguably permits the violation of individual rights when doing so promotes the common good. The *Charter* is a needed instrument to protect against this kind of rights erosion. It must be remembered that Indigenous peoples live in a state of heightened dependency on their governments because of their unique vulnerability, creating a relationship of power imbalance and dependency, which provides ripe opportunity for abuse.[53]

### *(c) The Charter applies to entities discharging inherently governmental functions, which includes Kahnawà:ke.*

44. Because governments are the actors that can authoritatively impinge on individual freedom, Canadian courts have confirmed that the *Charter* applies to entities discharging inherently governmental functions, irrespective of whether or not the entity in question facially resembles the bodies described in s. 32.[54] For example, in *York Region*, the SCC held that Ontario public school boards are subject to the *Charter* because they are "inherently governmental for the purposes of s. 32."[55] Similarly, in *McKinney*, the SCC held that "if the *Charter* covers municipalities, it is because municipalities perform a *quintessentially governmental function*."[56] As recognized in *Greater Vancouver Transportation Authority*, governmental action directed at matters within the authority of Parliament and the provincial legislatures (the heads of power under

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[51] *The CDMP*, *supra* note 9, TOA Tab 54.
[52] *The CDMP*, *supra* note 9, TOA Tab 54.
[53] Kerry Wilkins, "Take your Time and Do it Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 *Manitoba L Rev* 241 at 254-258, TOA Tab 66.
[54] *Eldridge*, *supra* note 28 at para 42, TOA Tab 10; *Godbout*, *supra* note 3 at paras 47-48, TOA Tab 1; *Chisasibi Band*, *supra* note 38 at para 52, TOA Tab 18.
[55] *York Region*, *supra* note 31 at para 4, TOA Tab 13.
[56] *McKinney*, *supra* note 39 at 270 [emphasis added], TOA Tab 19.

ss. 91 to 95 of the *Constitution Act, 1982*) fall within the ambit of s. 32.[57] Hence, the word "government" must take on a functional interpretation.[58]

45. 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, all of which create power imbalances and define governmental authority.[59] Furthermore, Kahnawà:ke's enactment and administration of Skén:nen Aonsón:ton, which is a form of criminal law enforcement, is a function that has long been fulfilled by government.[60] Indeed, s. 91(27) of the *Constitution Act, 1982* expressly authorizes the federal government to legislate on criminal law matters. Suggesting that Kahnawà:ke does not meet the expansive definition of "government" is therefore contrary to the tenor of s. 32.

### 4. Circumscribing the *Charter*'s scope creates rights-free zones.

46. As the contours of Indigenous self-government evolve, it is imperative that no rights-free zones be created. Immunizing Kahnawà:ke and other Indigenous nations from *Charter* scrutiny risks such a result.

47. Canadian courts have repeatedly emphasized that governments cannot circumvent their *Charter* obligations.[61] The same principle—protection against rights evasion—should hold true in the Indigenous context.[62] Insulating Kahnawà:ke from the *Charter* creates a vacuum in which Indigenous residents and non-Indigenous visitors (like Ms. Sheth) are afforded fewer legal

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[57] *Greater Vancouver Transportation Authority*, *supra* note 31 at para 14, TOA Tab 11. See also: *Dickson*, *supra* note 3 at para 242, TOA Tab 2, Martin J. concurring; *McGregor*, *supra* note 39 at para 52, TOA Tab 20, citing *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441, at 455, 463-464, TOA Tab 27.
[58] *Dickson*, *supra* note 3 at para 68, TOA Tab 2; *Chisasibi Band*, *supra* note 38 at para 57, TOA Tab 18.
[59] Falconer Superior Court at para 13; Official Problem at para 35.
[60] *McKinney*, *supra* note 39 at 366, TOA Tab 19, Wilson J., dissenting on different grounds.
[61] *Dickson*, *supra* note 3 at paras 44, 69, TOA Tab 2; *Eldridge*, *supra* note 28 at para 42, TOA Tab 10; *Godbout*, *supra* note 3, paras 48, 51, 56, TOA Tab 1; *Greater Vancouver Transportation Authority*, *supra* note 31 at paras 14, 22, TOA Tab 11; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 40, TOA Tab 28.
[62] *Dickson*, *supra* note 3 at para 234, TOA Tab 2, Martin J. concurring.

protections compared to those that exist in the rest of Flavelle.[63] As citizens of Flavelle, Kanien'kehá:ka and those travelling through Kahnawà:ke are just as much entitled to the benefits of the *Charter* as everyone else. This includes protection from rights violations by Kahnawà:ke's various forms of governance.[64]

48. While certain Indigenous communities, like the Vuntut Gwitchin First Nation (the "VGFN"), have developed constitutionally entrenched rights regimes,[65] Kahnawà:ke has no formal rights protections.[66] This strengthens the rationale for applying the *Charter* in the present appeal.

## 5. Section 25 of the *Charter* supports *Charter* application.

49. The fact that s. 25 was included in the *Charter* is strong evidence that the framers of the *Constitution* intended the *Charter* to apply to Indigenous governments, such as Kahnawà:ke. Section 25, which stands at the intersection of individual *Charter* rights and collective Indigenous rights, protects the distinctive cultures of Indigenous groups by "soften[ing] the impact of the *Charter*"[67] and guarding against its potentially "overzealous application."[68] As the majority in *Dickson* recognized, "s. 25, by providing protection for collective Indigenous interests as a social and constitutional good for all [Flavellians], acts as a counterweight [to s. 32]."[69]

50. The Respondents may argue that s. 25 actually immunizes Indigenous governments from *Charter* scrutiny, as it protects the very right to self-government. While we disagree that s. 25

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[63] *Taypotat*, *supra* note 11 at para 39, TOA Tab 4, rev'd on other grounds: [2015] 2 SCR 548.
[64] *Taypotat*, *supra* note 11 at paras 38-40, TOA Tab 4, rev'd on other grounds: [2015] 2 SCR 548; *R v. Ippak*, 2018 NUCA 3 at para. 3, TOA Tab 29; *Chisasibi Band*, *supra* note 38 at paras 32-34, 103, TOA Tab 18; *Cunningham v. Alberta (Aboriginal Affairs and Northern Development),* 2009 ABCA 239, at paras. 73-74 [*Cunningham*], TOA Tab 30, rev'd on other grounds: 2011 SCC 37; *R. v. Kapp*, 2008 SCC 41 at para. 99 [*Kapp*], TOA Tab 31, Basterache J. concurring.
[65] *Dickson*, *supra* note 3 at paras 1, 519, TOA Tab 2. See *Vuntut Gwitchin First Nation Constitution*, 1992, Article IV [*VGFN Constitution*], TOA Tab 67.
[66] Official Problem at para 9.
[67] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 209 [*Indigenous Difference and the Constitution*], TOA Tab 68.
[68] *Dickson*, *supra* note 3 at para 141, TOA Tab 2, Martin J. dissenting.
[69] *Dickson*, *supra* note 3 at para 5, TOA Tab 2.

protects such a right (for the reasons outlined in our s. 25 analysis), taking this proposition to its logical extension, s. 25 would shield *all* Indigenous laws from *Charter* scrutiny because applying the *Charter* derogates from the right to self-government itself.

51. Even if s. 25 protects the right to self-government proper (which we dispute), it fails to distinguish between the *right* to self-government and the *exercise* of powers flowing from that right (the latter of which would remain subject to the *Charter*). In *Kapp*, Bastarache J. (concurring) acknowledged that the s. 25 shield is not absolute[70] and "[t]here is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme."[71] Similarly, a number of scholars have concluded that s. 25 is unlikely to preclude wholesale *Charter* application.[72] Ultimately, "[a] blanket exemption from the Charter would enable Aboriginal governments to ride roughshod over interests associated with Charter rights without necessarily furthering interests associated with [I]ndigenous difference."[73] Applying the *Charter* "enables the judiciary to develop a much more calibrated approach."[74]

## 6. ***Charter* application advances reconciliation.**

52. Subjecting Kahnawà:ke to the *Charter* takes seriously the fact that they are, like other Indigenous nations, governments in their own right. Such an approach fortifies the legitimacy of Indigenous self-government by affirming the fact that "Aboriginal nations are *constitutional entities* rather than [merely] ethnic or racial groups."[75] It also advances reconciliation,[76] a concept

[70] *Kapp*, *supra* note 64 at para 97, TOA Tab 31.
[71] *Kapp*, *supra* note 64 at para 99, TOA Tab 31.
[72] See, for e.g.: Peter Hogg and Mary Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 214-215, TOA Tab 69.
[73] *Indigenous Difference and the Constitution*, *supra* note 67 at 209, TOA Tab 68.
[74] *Indigenous Difference and the Constitution*, *supra* note 67 at 209, TOA Tab 68.
[75] *A Question of Trust*, *supra* note 30 at 273, TOA Tab 64.
[76] *Dickson*, *supra* note 3 at paras 245, 265, TOA Tab 2, Martin J. concurring.

that lies at the heart of s. 35 of the *Constitution Act, 1982*.[77] Recognizing that "Indigenous self-government is an integral part of [Flavellian] governance, [Kahnawà:ke] should, like any other head of government, be required to respect constitutional constraints, including the rights and freedoms guaranteed under the *Charter*."[78]

53. By precluding *Charter* application at the very outset, rather than at the s. 25 stage, the Respondents create an arbitrary and unprincipled distinction between Indigenous and non-Indigenous governments.

## B. THE PUNISHMENT IMPOSED UPON MS. SHETH THROUGH SKÉN:NEN AONSÓN:TON IS A BREACH OF HER S. 11(H) RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

54. Ms. Sheth is being punished twice for a singular wrong. She drove while intoxicated, and was sentenced in the Provincial Court of Falconer to a 1-year driving ban and a $1,000 fine as a consequence for her actions. As further punishment for those same actions, Ms. Sheth faces the $500 Fine and a requirement to serve four weekends helping to replant the garden and learning about its role in the community. If she fails to comply with these sanctions, Ms. Sheth will be barred from entering the reserve.

55. The additional punishments imposed upon Ms. Sheth for her singular criminal act infringe upon Ms. Sheth's right to be free from double jeopardy, guaranteed by s. 11(h) of the *Charter*.[79]

56. Three questions must be answered in the affirmative to establish that the protections of s. 11 apply to Ms. Sheth's proceedings in Skén:nen Aonsón:ton, and that the Skén:nen Aonsón:ton sanctions infringe upon those s. 11(h) rights. First, is Skén:nen Aonsón:ton a criminal or quasi-

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[77] *R. v. Van der Peet*, [1996] 2 SCR 507 at para 31 [*Van der Peet*], TOA Tab 32; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 186 [*Delgamuukw*], TOA Tab 33; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 32, 38, TOA Tab 34; *R. v. Desautel*, 2021 SCC 17 at para 22, TOA Tab 35.
[78] *Dickson*, *supra* note 3 at para 313, TOA Tab 2, Martin J. concurring.
[79] *Flavellian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Flavelle Act*, *1982* (UK), (1982), c 11 s 11(h) [*Charter*].

criminal, rather than administrative, proceeding?[80] Second, does the consequence imposed by Skén:nen Aonsón:ton constitute a punishment?[81] Third, if the first two questions are satisfied, is there sufficient proximity between the offences punished by the Provincial Court of Falconer and Skén:nen Aonsón:ton to infringe upon Ms. Sheth's 11(h) rights?[82]

57. The answer to each of these three questions is "yes."

## 1. Skén:nen Aonsón:ton amounts to a criminal or quasi-criminal proceeding.

58. Skén:nen Aonsón:ton meets the "indisputably high bar" set by *Wigglesworth* to be afforded s. 11's protections.[83] Section 11 provides protection to those charged with criminal or quasi-criminal offences – even those outside of the *Criminal Code*. Skén:nen Aonsón:ton will amount to a charge for a criminal or quasi-criminal offence if it is *criminal in nature* or if it provides for *true penal consequences*.[84] Skén:nen Aonsón:ton is both criminal in nature and provides for true penal consequences – though only one of these two conditions need be satisfied as a threshold condition for s. 11 of the *Charter* to apply.[85]

### *(a) Skén:nen Aonsón:ton is criminal in nature.*

59. As Skén:nen Aonsón:ton is aimed at promoting public order and welfare within a public sphere of activity, it is criminal by its nature.[86] Proceedings have a criminal purpose when they seek to bring the subject of the proceedings "to account to society" for conduct that violates "the public interest."[87] Courts typically look to three indicia when assessing whether a process bears

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[80] *R. v. Wigglesworth*, [1987] 2 SCR 541 [*Wigglesworth*], TOA Tab 36; *Guindon v. Canada*, 2015 SCC 41 [*Guindon*], TOA Tab 37; *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6 [*John Howard Society*], TOA Tab 38.
[81] *R. v. K.R.J.*, 2016 SCC 31 [*KRJ*], TOA Tab 39; *R. v. Boudreault*, 2018 SCC 58 [*Boudreault*], TOA Tab 40; *Canada (Attorney General) v. Whaling*, 2014 SCC 20 [*Whaling*], TOA Tab 41.
[82] *R. v. Prince*, [1986] 2 SCR 480 [*Prince*], TOA Tab 42.
[83] *John Howard Society*, *supra* note 80 at para 38, TOA Tab 38, citing *KRJ*, TOA Tab 39.
[84] *Guindon*, *supra* note 80 at para 41, TOA Tab 37.
[85] *Guindon*, *supra* note 80 at para 41, TOA Tab 37.
[86] *Guindon*, *supra* note 80 at para 45, TOA Tab 37.
[87] *Guindon, supra* note 80 at para 45, citing *R v Shubley,* [1990] 1 SCR 3 at 20 [*Shubley*], TOA Tab 43.

the hallmarks of a criminal proceeding, such that it is criminal in nature: the objective of the legislation, the objective of the sanction, and the process leading to the imposition of the sanction.[88] Skén:nen Aonsón:ton bears all three.

60. The objective of the *Justice Act*, which authorizes Skén:nen Aonsón:ton, is to create a court with "original general jurisdiction within [the Kahnawà:ke] Territory in all civil, criminal and penal matters" that can hear matters under either the *Criminal Code* or Haudenosaunee law.[89] The process is intended to be criminal in nature.

61. Similarly, the objective of the sanction seeks to bring Ms. Sheth to account to society. Ms. Sheth was ordered to pay a fine "in recognition of the harm done to the community." She was also ordered to spend four weekends learning about and replanting the garden in order to better understand how her actions impacted the broader community. Holding Ms. Sheth accountable for the harm done to the well-being of the people and other more-than-human life that rely upon the garden in Kahnawà:ke is a matter of public nature. By requiring Ms. Sheth to repair the harm done to the community *writ large*, the sanction is clearly intended to promote public order and welfare within a public sphere of activity.

62. Finally, the process leading to the imposition of the sanction "bears the traditional hallmarks of a criminal proceeding."[90] Skén:nen Aonsón is its own distinct legal process: it is not adversarial like the Flavellian legal system; it does not use lawyers like the Flavellian legal system; and it does not use the same language as the Flavellian legal system. However, it is still a criminal proceeding in its essence. Skén:nen Aonsón:ton began with a finding of guilt – Ms. Sheth was found to have breached the Haudenosaunee legal principle of Righteousness by driving while

[88] *Guindon*, *supra* note 80 at para 52, TOA Tab 37, citing *Martineau v. M.N.R.*, 2004 SCC 81 at para 24 [*Martineau*], TOA Tab 44.
[89] *Kahnawà:ke Justice Act*, KRL. 2015, c., J-1, ss. 9, 16-17, TOA Tab 70.
[90] *Guindon*, *supra* note 80 at para 63, TOA Tab 37.

intoxicated and putting the safety of those on and off the road at risk. Skén:nen Aonsón:ton resulted in a penalty that is both a typical penal punishment (a fine) and has a significant impact on Ms. Sheth's liberty interests (banning her from the reserve if she does not comply). The process followed in Skén:nen Aonsón:ton, as well as the imposition of a criminal penalty, bear the essential traditional hallmarks of a criminal proceeding.

***(b) Skén:nen Aonsón:ton imposed a true penal consequence.***

63. The protections of s. 11 also apply because a true penal consequence is at stake.[91] Skén:nen Aonsón:ton imposed a true penal consequence upon Ms. Sheth.[92] A "true penal consequence" has been repeatedly defined by the Supreme Court of Canada (the "SCC") as "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."[93] The consequence imposed by Skén:nen Aonsón:ton meets this definition.

64. A fine is a "paradigmatic form of punitive sanction."[94] The $500 Fine that Ms. Sheth was ordered to pay "in recognition of the harm done to the community"[95] is a punitive sanction and a true penal consequence. The quantum of the fine is not dispositive – even a fine of $33 million has been found not to be a true penal consequence when it was a penalty issued pursuant to an administrative proceeding operating within a defined statutory mandate.[96] Rather, it is the purpose and nature of the sanction that is relevant. A true penal consequence should intend to "redress a wrong done to society."[97] Unlike the additional payment that Ms. Sheth must make for the supplies

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[91] *Wigglesworth*, *supra* note 36 at 559, TOA Tab 36; *KRJ*, *supra* note 39 at para 38, TOA Tab 39.
[92] *Guindon*, *supra* note 80 at para 46, TOA Tab 37, citing *Wigglesworth* at 561, TOA Tab 36 and *Martineau* at para 57, TOA Tab 44.
[93] *Guindon*, *supra* note 80 at para 46, TOA Tab 37, citing *Wigglesworth* at 561, TOA Tab 36 and *Martineau* at para 57, TOA Tab 44.
[94] *Boudreault*, *supra* note 81 at para 41, TOA Tab 40, citing *Wigglesworth* at 561, TOA Tab 36.
[95] Official Problem at para 28.
[96] *R. v. Samji*, 2017 BCCA 415 at para 109, TOA Tab 45.
[97] *Martineau*, *supra* note 88 at para 65, TOA Tab 44.

to repair the garden, the $500 Fine is explicitly imposed for the purpose of redressing the wrong done to society, as it is charged "in recognition of the harm done to the community."[98]

65. While Skén:nen Aonsón:ton is not identical to the criminal proceedings that convicted Ms. Sheth in the Provincial Court of Falconer, they are still of a criminal or quasi-criminal nature. Even if this Court disagrees, Skén:nen Aonsón:ton nevertheless resulted in a true penal consequence. Ms. Sheth is entitled to the protections of s. 11.

### 2. Skén:nen Aonsón:ton imposed a punishment upon Ms. Sheth.

66. Section 11(h) rights are triggered because Ms. Sheth was dually punished.[99] The test for what constitutes a "punishment" is set out in *KRJ*.[100] A measure constitutes a 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.

67. There is no doubt that the criminal sanction imposed by the Provincial Court of Falconer was a punishment. The sanction imposed by Skén:nen Aonsón:ton is a punishment as well.

#### *(a) The sanction from Skén:nen Aonsón:ton 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.*

68. Ms. Sheth's possible ban from the Kahnawà:ke reserve, in addition to the $500 Fine she must pay and her required attendance in the restorative justice program, are consequences of her conviction for violating the Haudenosaunee legal principle of Righteousness by driving while

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[98] Official Problem at para 28.
[99] Hamish Stewart, "Punitive in Effect: Reflections on *Canada v. Whaling*" (2015) 71:10 Supreme Court L Rev 264 at 264 [*Punitive in Effect*], TOA Tab 71.
[100] *Boudreault*, *supra* note 81 at para 39, TOA Tab 40, citing *KRJ* at para 41, TOA Tab 39.

impaired. These consequences were determined based on the discretion of the judges at the Court of Kahnawà:ke.

69. The $500 Fine that Ms. Sheth must pay is meant to serve as a punishment – acting as a "paradigmatic form of punitive sanction."[101] Unlike the payment she must make to repair the garden, which we acknowledge is restitution and not considered a punishment,[102] the $500 Fine does not require Ms. Sheth to pay a specific victim or for a specific, focused purpose in proportion to the damage caused.[103] The $500 Fine is a pecuniary penalty that does not include restitution.

70. Further, the ban from the Kahnawà:ke reserve that Ms. Sheth may face if she does not pay the fine or complete the restorative justice planting program must be considered as part of the punishment. Even though Ms. Sheth may not be banned if she complies with the other elements of the sanction, the Supreme Court has considered the "knock-on" effects of sanctions when assessing whether a sanction is compliant with the Charter. In *Boudreault*, Martin J. considered the harms that offenders may suffer if they fail to pay the impugned sanction, a victim surcharge. She identified that the "knock-on effects" that offenders may face if they fail to pay the victim surcharge—namely, the threat of detention, imprisonment, and provincial collections efforts—are part of the punishment that comes along with that criminal sanction.[104] Similarly, the ban that Ms. Sheth may face from the Kahnawà:ke reserve, implicating her livelihood and her ability to visit friends on the reserve, should be considered part of the sanction she faces.

71. Courts have interpreted the terms "arsenal" and "may be imposed" from the *Rodgers/KRJ* test to imply that the sentencing judge has some discretion in imposing the consequence under consideration; automatic consequences are less likely to be seen as part of the judge's arsenal.[105]

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[101] *Boudreault*, *supra* note 81 at para 41, TOA Tab 40, citing *Wigglesworth* at 561, TOA Tab 36.
[102] *Punitive in Effect*, *supra* note 99 at 270, TOA Tab 71.
[103] *Boudreault*, *supra* note 81 at para 41, TOA Tab 40.
[104] *Boudreault*, *supra* note 81 at para 65, TOA Tab 40.
[105] *R. v. Wilson,* 2011 ONSC 89 at para 28, TOA Tab 46.

The flexibility of Skén:nen Aonsón:ton necessarily provides for discretion.[106] By focusing on repairing the relationship that offenders have with their community, Skén:nen Aonsón:ton provides a broad "arsenal" of sanctions to ensure sanctions and punishments are responsive to the needs of the offender and the community alike. The imposition of the $500 Fine and the possible ban from the reserve are discretionary consequences that the Judges at the Kahnawà:ke Court chose to impose from a range of possible consequences.

72. Accordingly, the first part of the test is satisfied.

***(b) The sanction from Skén:nen Aonsón:ton is imposed in furtherance of the purpose and principles of sentencing.***

73. The sanctions imposed upon Ms. Sheth further *both* the purpose and principles of sentencing within Skén:nen Aonsón:ton and the purpose and principles of sentencing that emerge from the *Criminal Code*.

74. The objectives of Skén:nen Aonsón:ton include "encouraging responsibility, promoting understanding and education related to the harms caused by [the] impugned conduct, and encouraging restitution or making amends."[107] The $500 Fine is ordered "in recognition of the harm done to the community." The fine encourages Ms. Sheth to take responsibility for the damage she caused, and to make amends.[108] Ms. Sheth's participation in the restorative justice program, spending four weeks learning about and helping to replant the garden, is designed to help her understand her obligations to the broader community and how her actions put the members of the community at risk. It encourages responsibility, restitution, and making amends, in addition to promoting understanding and education. Finally, the possible ban of Ms. Sheth from the reserve encourages responsibility by creating an impetus for participation.

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[106] Official Problem at para 12.
[107] Official Problem at para 14.
[108] Official Problem at para 28.

75. The sanctions imposed by Skén:nen Aonsón:ton similarly satisfy the purposes of sentencing laid out in s. 718 of the *Criminal Code*, including "(a) to denounce unlawful conduct; (b) to deter the offender and other persons from committing offences; … (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims and to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community."[109] Despite being restorative in nature, the sanctions impose hardship upon Ms. Sheth. Her livelihood will be impacted by having to spend four weekends replanting the garden, and the $500 Fine is not trivial. Most critically, the potential ban from the reserve Ms. Sheth faces if she fails to comply with the sanctions would have a significant impact on her livelihood and mobility. Taken together and individually, the severity of these sanctions serve to denounce Ms. Sheth's conduct and deter her and others from committing future offences.

76. The restorative nature of the consequences are not incompatible with the purposes and principles of sentencing, and so the test emerging from *KRJ* need not be modified. Restorative justice efforts can and do coexist, coincide and overlap with punitive sanctions. Requiring Ms. Sheth to spend her weekends replanting the garden, and banning her from the reserve if she does not comply with this requirement, serves this dual purpose. The restorative nature of the activity assists in Ms. Sheth's rehabilitation, providing reparations for the harm she caused, and promoting a sense of responsibility. However, the consequence is inextricably linked to the coercive constraint on Ms. Sheth's liberty that she faces if she does not participate – making the sanction both punitive and restorative. The sanction Ms. Sheth faces, taken as a whole, is imposed in furtherance of *both* the restorative *and* punitive principles of sentencing.

[109] *Criminal Code*, RSC 1985, c C-46, s 718.

### *(c) The sanction from Skén:nen Aonsón:ton has a significant impact on Ms. Sheth's liberty interests.*

77. The *Charter* does not protect against insignificant or "trivial" limitations of rights; the intrusion by state action subject to the *Charter* must be significant enough to warrant constitutional protection.[110] As such, for Skén:nen Aonsón:ton to warrant *Charter* scrutiny, it must have a significant impact on Ms. Sheth's constitutionally protected liberty or security interests before it will qualify as a punishment for the purposes of s. 11(h).[111] The Court in *KRJ* set out the test to satisfy this requirement: the consequence of conviction must significantly constrain Ms. Sheth's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public.[112] It includes a consequence that "significantly limits the lawful activities in which an accused can engage, where an accused can go, or with whom an accused can communicate and associate."[113]

78. Taken as a whole, the consequence imposed by Skén:nen Aonsón:ton satisfies this test. As elucidated above, it is appropriate to consider the "knock-on" impacts upon Ms. Sheth that may follow from her failure to pay the fine or engage in the restorative justice process. The ban that Ms. Sheth faces from the Kahnawà:ke reserve significantly impacts Ms. Sheth's liberty interests.

79. It is appropriate to consider the impact of the sanction on Ms. Sheth, beyond only the sanction's purpose.[114] Ms. Sheth is a photographer. Her livelihood depends on her ability to travel into and through Kahnawà:ke territory. Further, Ms. Sheth has friends like Rebecca that live in Kahnawà:ke. Her ability to visit them and maintain her social relationships would be impacted by

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[110] *Cunningham v Canada*, [1993] 2 SCR 143 at 151, TOA Tab 47.
[111] *KRJ*, *supra* note 81 at para 42, TOA Tab 39.
[112] *KRJ*, *supra* note 81 at para 42, TOA Tab 39.
[113] *KRJ, supra* note 81 at para 42, TOA Tab 39, citing *R. v. Hooyer*, 2016 ONCA 44 at para 45, TOA Tab 48 [emphasis added].
[114] *KRJ*, *supra* note 81 at para 37, TOA Tab 39.

this ban. The ban significantly limits where Ms. Sheth can go – implicating her liberty interests and satisfying this final branch of the test.

### 3. <u>There is sufficient proximity between the two offences punished to infringe upon Ms. Sheth's 11(h) rights.</u>

80. Justice Broun-Winsor at the Falconer Court of Appeal erred in her application of *Van Rassel*, as the offences are not based on duties of a different nature. She is correct that s. 320.14(1)(b) of the *Criminal Code* is not identical to the breach of the Haudenosaunee principle of Righteousness. However, both breaches stem from the same conduct, and unlike in *Van Rassel*, Ms. Sheth's identity or role holds no dual aspect that would otherwise make her accountable in two separate spheres.

81. The Court in *Van Rassel* relies on *Wigglesworth* for the proposition that the same act can give rise to two different offences.[115] However, *Wigglesworth* and *Van Rassel* apply this principle only where *the identity or role of the accused person gives rise to two separate duties*. In *Wigglesworth*, the accused was an RCMP officer whose conduct had a "double aspect," owing special duties to his profession and as a member of the public at large.[116] Similarly, in *Van Rassel*, the Court found that s. 11(h) did not apply because the accused's conduct had a "double aspect" in his role as a Canadian official with special duties to the Canadian public under s. 111 of the *Criminal Code* and as an American official or member of the American public, temporarily subject to American law.[117]

82. Ms. Sheth's conduct has no double aspect. Ms. Sheth is a non-Indigenous person, performing no special duty or role to the Kanien'kehá:ka community nor to the broader public.

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[115] *R. v. Van Rassel*, [1990] 1 SCR 225 at 239 [*Van Rassel*], TOA Tab 49; *Wigglesworth*, *supra* note 80 at p. *Van Rassel*, [1990] 1 SCR 225 at 239 [*Van Rassel*], TOA Tab 49; *Wigglesworth*, *supra* note 36 at 566, TOA Tab 36.
[116] *Wigglesworth*, *supra* note 80 at 566, TOA Tab 36.
[117] *Van Rassel*, *supra* note 115 at 240, TOA Tab 49.

Her singular criminal act—driving while intoxicated, and in doing so, causing risk to those around her—does not give rise to different offences in the criminal and administrative sphere. Ms. Sheth committed one criminal act, while acting in no special role giving rise to any duties beyond those of every member of the public. The duties Ms. Sheth owed to the Kanien'kehá:ka community and to the Canadian public *writ large* are the same in nature.

83. Further, restorative justice is not incompatible with punishment. The purpose of Skén:nen Aonsón:ton, to help Ms. Sheth "become peaceful again," does not preclude the sanction from serving the punitive purposes of denunciation, deterrence, and separation from society.[118] This Court should look to both the purposes and the effects of a law when considering its constitutionality.[119] The sanction imposed by Skén:nen Aonsón:ton serves multiple purposes: it helps Ms. Sheth "become peaceful again", but in the event that she does not fulfill the requirements of the restorative justice process, she will be separated from society by being banned from the Kahnawà:ke reserve. The sanction will have the further effect of denouncing her conduct and deterring others from engaging in similar conduct.

## C. THE BREACH OF MS. SHETH'S S. 11(H) *CHARTER* RIGHT IS NOT SHIELDED BY S. 25 OF THE *CHARTER*.

84. To satisfy this Court that the breach of Ms. Sheth's s. 11(h) *Charter* right is shielded by s. 25, the burden of proof is on the Respondents to demonstrate that (1) Kahnawà:ke's claimed right to self-governance over criminal matters falls within the scope of s. 25; and (2) there exists an "irreconcilable conflict" between s. 11(h) of the *Charter* and the claimed right.[120] While we concede that there are no applicable limits to the claimed right (the final step of the s. 25 test),[121]

[118] Official Problem at para 12.
[119] *Wigglesworth*, *supra* note 80 at 39, TOA Tab 36.
[120] *Dickson*, *supra* note 3 at paras 180-181, TOA Tab 2.
[121] *Dickson*, *supra* note 3 at para 182, TOA Tab 2.

both of the aforementioned criteria, individually and collectively, set a high bar for the Respondents.

## 1. Section 25 has limits.

85. Canadian jurisprudence is clear that s. 25 does not automatically and absolutely preclude the recognition of *Charter* rights in the Indigenous context.[122] Like other constitutional provisions, s. 25 is subject to constraints. For instance, as the majority in *Kapp* notes, "not every [A]boriginal interest or program falls within the provision's scope."[123]

86. Given the limited caselaw on s. 25, this Court must be mindful of the significant precedential weight its decision carries. While it is important to not unduly circumscribe the collective Indigenous rights protected by s. 25, it is equally important to not overshoot s. 25's intended purpose.[124] This Court must remain vigilant in ensuring that *Charter* rights are not unjustifiably diminished.

## 2. Kahnawà:ke's claimed right to self-governance over criminal matters is not protected by s. 25.

87. Section 25 protects treaty rights, Aboriginal rights, and "other rights…that pertain to the [A]boriginal peoples of Flavelle."[125] Kahnawà:ke's claimed right to self-governance over criminal matters does not fall into any of these three categories.

### *(a) The claimed right is not a treaty right.*

88. There is no dispute that the claimed right to self-governance over criminal matters is not a treaty right. This position was never advanced by the Respondents at the lower courts.

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[122] *Dickson*, *supra* note 3 at para 148, TOA Tab 2; *Kapp*, *supra* note 64 at para 97, TOA Tab 31, Bastarache J. concurring.
[123] *Kapp*, *supra* note 64 at para 63, TOA Tab 31. See also: *Corbiere*, *supra* note 11 at para 52, TOA Tab 3.
[124] *Quebec (Attorney General) v. 9147-0732 Québec Inc.,* 2020 SCC 32 at para 10, TOA Tab 50.
[125] *Charter*, *supra* note 79, s 25.

***(b) The claimed right is not an Aboriginal right.***

89. Justice Grewal-Birbrager of the Falconer Court of Appeal erred in concluding that the right to self-governance over criminal matters is an Aboriginal right protected under s. 35(1)[126] for two primary reasons.

90. First, an Aboriginal right to self-govern criminal matters has never been explicitly recognized by the SCC. In the *Bill C-92 Reference*, Flavelle's top court expressly declined to rule on whether s. 35(1) protects Indigenous peoples' inherent right of self-government in relation to child and family services.[127] The SCC's task in the *Bill C-92 Reference* was a narrow one: determining the *vires* of a federal statute.[128]

91. While the federal statute at issue in the *Bill C-92 Reference* indicated that s. 35(1) includes a limited right to self-government,[129] a legislative proclamation does not amount to a judicial endorsement of the same.[130] Furthermore, it is not insignificant that the Act, "somewhat in counterpoint" to its original intention, circumscribed the exercise of the limited right to self-government by enacting national standards to protect Indigenous children.[131]

92. Second, Kahnawà:ke's claimed right to self-governance over criminal matters does not meet the requisite standard established in *Van der Peet*. According to the *Bill C-92 Reference* and *Pamajewon*, to establish an Aboriginal right to self-government, the "integral to the distinctive culture" test in *Van der Peet* must be satisfied.[132] This test requires proof that (1) the right existed pre-contact;[133] and (2) the right was integral to the distinctive culture of Kahnawà:ke.[134] In

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[126] Falconer Court of Appeal at para 3; Official Problem at para 43.
[127] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, para 112 [*Reference re Bill C-92*], TOA Tab 51.
[128] *Reference re Bill C-92*, *supra* note 127 para 1, TOA Tab 51.
[129] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18(1).
[130] *Reference re Bill C-92*, *supra* note 127 at paras 9, 19, TOA Tab 51.
[131] *Reference re Bill C-92*, *supra* note 127 at paras 6, 25, TOA Tab 51.
[132] *Reference re Bill C-92*, *supra* note 127 at para 112, TOA Tab 51; *R. v. Pamajewon*, [1996] 2 SCR 821 at para 24, TOA Tab 52.
[133] *Van der Peet*, *supra* note 77 at paras 60-61, TOA Tab 32.
[134] *Van der Peet*, *supra* note 77 at para 46, TOA Tab 32.

applying this test to the case at bar, this Court must be satisfied that, *inter alia*, the right to self-governance over criminal matters was of "central significance" to Kahnawà:ke; it "was one of the things which made the culture of the society distinctive [and]…truly made the society what it was."[135] Importantly, this Court "cannot look at those aspects of [Kahnawà:ke] that are true of every human society."[136] Furthermore, while conclusive proof is not required, there must be *some* evidence that Kahnawà:ke exercised this right pre-contact.[137]

93. It is clear that the claimed right to self-governance over criminal matters is not distinctive. Arguably, *all* societies govern themselves, including over their criminal affairs. In this sense, the claimed right is "true of every human society." Furthermore, the factual record furnishes no specific evidence that Skén:nen Aonsón:ton—the primary way the community would assert their claimed right to self-governance over criminal matters—was (1) of "central significance" to Kahnawà:ke; and (2) exercised pre-contact. Together, these factors are dispositive.

94. Even if such proof was tendered, the *Van der Peet* test is still not satisfied. According to the *Bill C-92 Reference*, *Delgamuukw*, and *Pamajewon*, the right of self-government cannot be framed in excessively general terms.[138] In *Pamajewon*, the SCC held that "the right of self-government" and "a broad right to manage the use of…reserve lands" was too broad to satisfy the *Van der Peet* test.[139] Similarly, in *Napash*, the Court of Québec held that "the general right to govern and make by-laws applying on the territory" and "the right to regulate any subject having to do with the security and well-being of the Aboriginal community" was too general to attract ss. 25 and 35(1) protection.[140] The right to self-governance over criminal matters, which is also cast

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[135] *Van der Peet*, *supra* note 77 at para 55, TOA Tab 32.
[136] *Van der Peet*, *supra* note 77 at para 56, TOA Tab 32.
[137] *Van der Peet*, *supra* note 77 at para 62, TOA Tab 32.
[138] *Reference re Bill C-92*, *supra* note 127 at para 112, TOA Tab 51; *Delgamuukw*, *supra* note 77 at para 170, TOA Tab 33; *Pamajewon*, *supra* note 132 at para 27, TOA Tab 52.
[139] *Pamajewon*, *supra* note 132 at paras 24-27, TOA Tab 52.
[140] *Chisasibi Band*, *supra* note 38 at paras 169-173, TOA Tab 18.

at excessive generality, suffers the same flaw. Accordingly, the claimed right does not amount to an Aboriginal right under s. 35(1).

***(c) The claimed right is not an "other" right.***

95. The final way in which the Respondents can rely on the protection afforded by s. 25 is by demonstrating that the right to self-governance over criminal matters is an "other" right that pertains to the "[A]boriginal peoples of Flavelle." To do so, the claimed right must possess the requisite degree of "Indigenous difference," understood as interests connected to Indigenous cultural difference, Indigenous prior occupancy, Indigenous prior sovereignty, or Indigenous participation in the treaty process.[141]

***(i) The claimed right does not possess the requisite degree of "Indigenous difference."***

96. We agree with Hazra J.'s conclusion that "[g]overnance over criminal matters does not possess the requisite degree of Indigenous difference"[142] and take issue with the Falconer Court of Appeal's ruling that suggests otherwise.[143]

97. A comparison with *Dickson* demonstrates why Kahnawà:ke's right to self-governance over criminal matters fails to meet the "Indigenous difference" threshold.

98. In *Dickson*, an Indigenous citizen of the VGFN challenged an electoral rule (the "residency requirement") stipulating that all Chiefs and Councillors must reside on the VGFN's settlement land or relocate there within 14 days of election. In determining that the right to set criteria for membership in the VGFN's governing body was protected under s. 25, specifically as an "other" right, the SCC relied on several observations made by the trial judge and the Court of Appeal for

[141] *Dickson*, *supra* note 3 at para 136, TOA Tab 2.
[142] Falconer Superior Court at para 26; Official Problem at para 37.
[143] Falconer Court of Appeal at para 4; Official Problem at para 43.

Yukon. These observations discussed the historical and cultural context of the residency requirement.

99. Several observations are worth repeating here. First, the trial judge found that the VGFN had governed themselves according to their traditional practices "*pre-dating the creation of Canada in 1867*."[144] Second, the trial judge found that all VGFN Chiefs and Councillors had been residents in the settlement land "*since time immemorial*."[145] Third, the Court of Appeal found that the very identity of the VGFN had always been "*deeply rooted*" in the land itself.[146]

100. In the case at bar, Skén:nen Aonsón:ton, which promotes Haudenosaunee values of restorative justice and rehabilitation, has only been in operation since December 2000 (less than 25 years).[147] Furthermore, it was only in 1999 that the Kahnawà:ke Justice Commission "began looking to develop a Community Based Justice program."[148] Before 1999, the criminal process was largely overseen by the "outside courts" (which presumably implies courts governed by Flavellian law).[149] This paints a dramatically different picture to the "deeply rooted" ties the VGFN had to their land. It is therefore unclear how the claimed right in the present appeal promotes Indigenous cultural difference, Indigenous prior occupancy, Indigenous prior sovereignty, or Indigenous participation in the treaty process. This alone is sufficient to end the analysis and conclude that s. 25 is not engaged on the facts of this case.

***(d) Although protecting "Indigenous difference" is an objective of s. 25, the provision's true purpose is to protect collective rights that pertain uniquely to Indigenous peoples because of their inherent Indigeneity.***

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[144] *Dickson*, *supra* note 3 at para 212, TOA Tab 2 [emphasis added].
[145] *Dickson*, *supra* note 3 at para 212, TOA Tab 2 [emphasis added].
[146] *Dickson*, *supra* note 3 at para 213, TOA Tab 2 [emphasis added].
[147] Official Problem at para 12.
[148] Official Problem at para 12.
[149] Official Problem at para 12.

101. While the majority in *Dickson* concluded that "Indigenous difference" was the appropriate criterion to determine whether an "other" right falls within the ambit of s. 25, this Court should instead adopt the approach proposed by Martin and O'Bonsawin JJ. (dissenting), as it more accurately reflects the provision's true purpose. This approach would restrict the application of s. 25 to situations where a party relying on the provision demonstrates that the collective right is one that pertains uniquely to Indigenous peoples because of their inherent Indigeneity and "special status," a point well supported in earlier caselaw.[150]

102. The "Indigenous difference" criterion advanced by the majority in *Dickson* does not serve a meaningful "filtering function" at the rights recognition stage; it risks broadening the scope of s. 25 to a degree that no longer strikes the appropriate balance between individual *Charter* rights and collective Indigenous rights.[151] Conversely, Martin and O'Bonsawin JJ.'s approach "serves to avoid situations where an insignificant incursion on a collective right within the scope of s. 25 takes primacy over a potentially significant *Charter* violation."[152] By doing so, it guards against the risk of significantly watering down *Charter* protections.

103. If Martin and O'Bonsawin JJ.'s suggested approach is adopted by this Court, it is clear that Kahnawà:ke's claimed right to self-governance over criminal matters would not be protected by s. 25. As Hazra J. recognizes, "[t]he regulation of crime is not unique to Indigenous Peoples[;]…[m]aintaining law and order is a universal feature of any sovereign nation."[153] Furthermore, Kahnawà:ke's emphasis on restorative justice and rehabilitation is not uniquely Indigenous. Many countries consider and incorporate restorative justice principles when determining appropriate responses to instances of misconduct. For instance, the Queensland

[150] *Kapp*, *supra* note 64 at para 103, TOA Tab 31. See also: Falconer Superior Court at para 27; Official Problem at para 37.
[151] *Dickson*, *supra* note 3 at paras 325, 334, 336, TOA Tab 2, Martin J. dissenting.
[152] *Dickson*, *supra* note 3 at para 342, TOA Tab 2, Martin J. dissenting.
[153] Falconer Superior Court of Justice at para 28; Official Problem at para 37.

Government in Australia allows police, prosecutors, and courts to refer matters to restorative justice conferencing, which is overseen by accredited mediators appointed under the *Dispute Resolution Centres Act 1990*.[154] Similarly, in Norway, the *Mediation Service Act* provides for mediation as an alternative to other penal consequences.[155] In Flavelle, s. 717 of the *Criminal Code* permits the use of "alternative measures" (including restorative justice) in certain situations. Additionally, ss. 718.2(e) of the *Criminal Code* mandates that courts consider all available sanctions other than imprisonment. As demonstrated, there are a vast number of countries that address crime through restorative justice.

104. Regardless of whether or not this Court accepts the more restrictive approach to s. 25 outlined above, Kahnawà:ke's claimed right fails to meet the existing standard of "Indigenous difference."

### 3. There is no "irreconcilable conflict" between s. 11(h) of the *Charter* and the claimed right.

105. Even if this Court finds that Kahnawà:ke's claimed right to self-governance over criminal matters is caught by s. 25, giving effect to Ms. Sheth's s. 11(h) *Charter* right does not abrogate or derogate from it. To show that there is an "irreconcilable conflict" between a *Charter* right and a collective Indigenous right, the Respondents must pass a high threshold – they must prove that the conflict is unavoidable and non-hypothetical, such that the *Charter* right undermines "Indigenous difference" in an "essential or non-incidental way."[156] If there are means, through fair and careful interpretation, to give effect to both rights, s. 25 plays no role in the analysis.[157]

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[154] Queensland Government, "About adult restorative justice" (2025), online: <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>, TOA Tab 72.
[155] *Lov om konfliktrådsbehandling* (konfliktrådsloven) (The Mediation Service Act), LOV-2021-06-18-127 (Nor.), TOA Tab 73; Government of Scotland, *Justice in Scotland: Rapid Evidence Review – Uses of Restorative Justice*, (Edinburgh: 2019) at 8, TOA Tab 74.
[156] *Dickson*, *supra* note 3 at paras 143, 161, 164, TOA Tab 2.
[157] *Dickson*, *supra* note 3 at para 162, TOA Tab 2.

106. There are two reasons why Kahnawà:ke's claimed right to self-governance over criminal matters and Ms. Sheth's s. 11(h) *Charter* right are, in fact, reconcilable.

### *(a) Because participation is voluntary, accommodating for double jeopardy concerns does not undermine Skén:nen Aonsón:ton.*

107. First, the ability to claim double jeopardy does not undermine Kahnawà:ke's administration of their restorative justice program, Skén:nen Aonsón:ton. Involvement in Skén:nen Aonsón:ton is voluntary and consent-based; the offender, along with all other parties, must agree to participate.[158] Thus, accommodating for double jeopardy concerns simply affirms the choice to not participate in Skén:nen Aonsón:ton – an option explicitly provided for and contemplated by Kahnawà:ke. To coerce offenders to participate would undermine the very purpose of the process itself.

108. Furthermore, it is unlikely that s. 11(h) claims will arise all that often. In the event that an individual is simultaneously charged by the Falconer government, prosecutors can recommend that the charges be dismissed if Skén:nen Aonsón:ton proves fruitful.[159] This mitigates the concern that accommodating for double jeopardy will dilute Kahnawà:ke's ability to govern their criminal affairs.

### *(b) All criminal powers have jurisdictional limits.*

109. Second, as Hazra J. contends, all criminal powers have limits to accommodate for multijurisdictional overlap.[160] Indeed, "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."[161] The same reasoning applies to the present appeal.

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[158] Official Problem at para 14.
[159] *Taking Back Jurisdiction*, *supra* note 20, TOA Tab 59.
[160] Falconer Superior Court of Justice at para 30; Official Problem at para 37.
[161] Falconer Superior Court of Justice at para 30; Official Problem at para 37.

## PART IV – ORDER SOUGHT

110. We respectfully request that the appeal be allowed, and the decision of the Superior Court of Falconer be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September 2025.

Akash Jain / Sarah Zaitlin

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## FLAVELLIAN LEGISLATION

### ***Flavellian Charter of Rights and Freedoms***

**Proceedings in criminal and penal matters**

11 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

**Aboriginal rights and freedoms not affected by Charter**

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

**Application of Charter**

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

**Recognition of existing aboriginal and treaty rights**

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

## ***Flavellian Criminal Code***

**Purpose**

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.