IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

KATE SHETH

Appellant

- and -

MOHAWKS OF KAHNAWÀ:KE

Respondent

FACTUM OF THE RESPONDENT

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Kahnawà:ke has not, does not, and will not consent to the authority of the government of Flavelle. For generations, the Kanien'kehá:ka, the Mohawk people of Kahnawà:ke, have actively resisted Flavelle's authority. This case is about Flavelle once again attempting to impose its view of rights, criminal justice, and punishment upon Kahnawà:ke without its consent. Kahnawà:ke asserts its right to govern by its own laws and traditions. It has defended that right in arms and in practice. This case is no different.

2. Kate Sheth (**"Ms. Sheth"** or **"the Appellant"**) drove on Kahnawà:ke land with a blood alcohol level more than twice the legal limit. She devastated a community garden sacred to Kahnawà:ke for ceremonial and sustenance purposes**.** In response, Kahnawà:ke sought to heal and not punish. Anchored in the Great Law of Peace, its constitutional text, Kahnawà:ke invited the Appellant to participate in the Skén:nen Aonsón:ton process, guided by its values of community and restorative justice. She participated voluntarily. She helped to craft a slate of measures designed to bring her greater understanding of the community.

3. Now, the Appellant seeks to void the consequences she agreed to. In doing so, she wants to:

a. Apply the *Flavellian Charter of Rights and Freedoms* to Kahnawà:ke, a government totally independent of Flavellian authority;
b. Impose Flavelle's view of punishment upon Skén:nen Aonsón:ton, a system designed to differ from traditional Flavellian punishment;
c. Prevent Kahnawà:ke from regulating behaviour on its land when an accused has plead guilty to a *different Criminal Code* offence; and
d. Weigh the interests of Flavelle above the interests of Kahnawà:ke in protecting its members.

4. Each of these impositions is unacceptable. This Court must affirm the rights and dignity of Kahnawà:ke and reject the Appellant's calls to undermine Kahnawà:ke's authority.

B. STATEMENT OF FACTS

5. Ms. Sheth is a non-Indigenous resident of Chateauguay, Falconer.[1] She drove through Kahnawà:ke while impaired with double the legal limit of alcohol.[2] In doing so, she veered off the road and destroyed a Kahnawà:ke community garden.[3] She was apprehended by the police and subsequently plead guilty to impaired driving.[4] The Provincial Court of Falconer sentenced her to a 1-year driving ban and a $1000 fine.

6. After pleading guilty, Ms. Sheth was invited and voluntarily agreed to participate in Kahnawà:ke's Skén:nen Aonsón:ton process.[5] Skén:nen Aonsón:ton is a voluntary process which allows the offender, community members, and victims to collaborate in determining how an offender can repair the damage caused to the community.[6] It found that Ms. Sheth had breached the Haudenosaunee legal principle of Righteousness by putting the safety of others at risk and destroying the garden.[7]

7. Ms. Sheth was required by Skén:nen Aonsón:ton to spend four weekends learning about the garden and the community, help to replant the garden, pay for the repairs, and pay a $500 fine in recognition of the harm done to the community (the **"consequences"**).[8] Ms. Sheth has agreed to fulfil the consequences in the event that her appeal is rejected.[9] If she does not comply with the consequences she would be barred from returning to Kahnawà:ke.[10]

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[1] Official Problem at para. 17.
[2] Official Problem at para. 22.
[3] Official Problem at para. 20.
[4] Official Problem at para. 22.
[5] Official Problem at para. 29.
[6] Official Problem at paras. 15 and 29.
[7] Official Problem at para. 29.
[8] Official Problem at para. 30.
[9] Official Problem at para. 33.
[10] Official Problem at para. 30.

C. JUDICIAL HISTORY

8. The Respondent accepts the description of the judicial history of this case found in the Appellant's factum.[11]

PART II – STATEMENT OF ISSUES

9. This appeal raises the following issues:

Issue 1: Does s. 32(1) of the *Flavellian Charter of Rights and Freedoms* apply to Kahnawà:ke?

No. Section 32(1) does not apply to Kahnawà:ke. Kahnawà:ke is not a "government by nature" under the first branch of the *Eldridge* test. A purposive interpretation of s. 32(1) also confirms that Kahnawà:ke falls outside the *Charter*'s scope.

Issue 2: Do the consequences imposed on Ms. Sheth from Skén:nen Aonsón:ton trigger s. 11(h) of the *Charter*?

No. Ms. Sheth was not charged with an offence for the purposes of s. 11. The consequences are not punishments for the purposes of s. 11(h). The proceedings in Kahnawà:ke do not duplicate the *Criminal Code* proceedings during which Ms. Sheth plead guilty.

Issue 3: If the answer to Issue 2 is affirmative, does s. 25 of the *Charter* protect shield that infringement?

Yes. The right to govern over criminal matters is both an Aboriginal and other right that engages s. 25. Kahnawà:ke's right to govern over criminal matters conflicts with s. 11(h) of the *Charter*, and this conflict is irreconcilable.

[11] Appellant Factum at paras. 13-17.

PART III – ARGUMENT

A. SECTION 32(1) OF THE *CHARTER* DOES NOT APPLY TO KAHNAWÀ:KE

10. Kahnawà:ke does not qualify as "government" under s. 32(1) on the test from *Eldridge*.[12] Kahnawà:ke self-governs untethered from federal or provincial authority. By contrast, the Supreme Court of Canada (the "Supreme Court") has been clear that delegated authority from Parliament or the provinces is the most important factor in determining whether an entity falls within the scope of s. 32(1). This principle was affirmed in *Godbout* and treated as decisive in *Dickson*.[13]

11. Should this Court find that delegated authority is not a decisive factor in this case, the Appellant's claim still fails for two reasons. First, even if, as the Appellant suggests, the application of s. 32(1) did not hinge on the delegation of authority, Kahnawà:ke still does not qualify as "government" under what remains of the *Eldridge* test.[14] Second, a purposive interpretation of s. 32(1), reinforced by the principle of reconciliation, independently confirms that the *Charter* does not apply.

1) Kahnawà:ke is not a "government by nature" under the first branch of the *Eldridge* test

12. At issue here, in agreement with the Appellant, is whether Kahnawà:ke qualifies as "government by nature" under the first branch of *Eldridge* test.[15] From *Godbout,* four factors serve as indicia of government here: (1) a council that is democratically elected by public members; (2) general taxing power; (3) power to make, administer, and enforce coercive and binding laws; and (4) "most significantly, [the entity] derives its existence and lawmaking authority from the federal or provincial government."[16]

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[12] *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at para. 44 [*Eldridge*].
[13] *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC) at para. 51 [*Godbout*]; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para. 91 [*Dickson*].
[14] Appellant Factum at paras. 28-31.
[15] Appellant Factum at para. 20.
[16] *Godbout* at para. 51.

13. The fourth indicia, delegated authority, was intended to be the 'most significant' factor as affirmed by the Court in *Godbout*.[17] Delegated authority was also the *decisive* factor in *Dickson*, with the majority holding that the Vuntut Gwitchin First Nation (the "VGFN") were bound by s. 32(1) "only insofar as that requirement flows from an exercise of statutory power."[18]

(a) There is no delegated authority from statute

14. In accordance with *Godbout* and *Dickson*, because there is no delegated authority here, Kahnawà:ke cannot be considered a "government by nature" under the *Eldridge* test.[19]

15. While the Appellant claims that the framework agreements between Kahnawà:ke and Falconer connote a delegation of authority, this is false.[20] Each agreement is simply a memorandum of understanding, with none granting authority from Parliament or the provinces to Kahnawà:ke to govern as the Appellant claims. For example, the agreement the Appellant cites with the Director of Criminal and Penal Prosecutions merely allows Falconer to refer cases to Kahnawà:ke and does not *confer* the *right* to handle these cases.[21] Kahnawà:ke was not seeking "permission" from the province to govern over this area, as the Appellant claims. They have long administered their own form of justice, well before the memorandum was signed in 2023.[22]

16. Although the Appellant claims that the *Indian Act* provides a source of Kahnawà:ke's lawmaking authority, this argument must also be rejected for three reasons.[23]

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[17] *Godbout* at para. 51.
[18] *Dickson* at para. 91.
[19] *Godbout* at para. 51; *Dickson* at para. 91.
[20] Appellant Factum at paras. 26-27.
[21] Appellant Factum at para. 27; see also Mohawk Council of Kahnawà:ke, Press Release, "MCK Justice Services signs Alternative Measures Program Agreement" (21 September 2023).
[22] See e.g. *Kahnawà:ke Justice Act*, K.R.L. 2015, c., J-1, s. 1 [*Kahnawà:ke Justice Act*]; Official Problem at para. 11.
[23] Appellant Factum at para. 23.

17. First, Kahnawà:ke rejects the legitimacy of the *Indian Act* in matters of legislative and enforcement jurisdiction.[24] Like the creation of the *Charter*, Kahnawà:ke was not present during the making of the *Indian Act* and did not consent to its authority. To reinforce its rejection of any authority conferred by the *Indian Act*, Kahnawà:ke has *extended* its governance jurisdiction beyond the *Act*'s limits.[25] This includes passing laws without Ministerial approval and in areas such as criminal law through the *Justice Act*.[26]

18. Second, the Appellant cites cases where the *Charter* was narrowly applied to *Indian Act* band councils and the powers they exercised; these cases are not applicable here.[27] Unlike the councils from those cases, the MCK does not exercise comparable power. Instead, Kahnawà:ke's governance is based on consensus decision-making, with the MCK having no final say on any proposed or drafted law.[28] To argue otherwise, the Appellant relies on a quote taken out of context from Gerald R. Alfred's "The Meaning of Self-Government in Kahnawake."[29] Read in full, Alfred emphasizes that the MCK *rejects* the *Indian Act* as its source of authority, grounding its legitimacy in "the will of the people."[30] Governance thus flows from the Kanien'kehá:ka collective, not the MCK alone, and certainly not the *Indian Act*.

19. Finally, there is a real danger in treating the *Indian Act* as capable of conferring "delegated authority" for the purposes of s. 32(1). As the Supreme Court confirmed in *McKinney, Eldridge*,

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[24] See e.g. Gerald Alfred, *The Meaning of Self-Government in Kahnawake* (Government of Canada: 1994) at pp. 3 and 19; Alexandra Laham, "The Kahnawake Community Decision Making Process" (24 October 2021), online: https://participedia.net/case/the-kahnawake-community-decision-making-process.
[25] For these limits, see *Indian Act*, RSC 1985, c. I-5, ss. 81-85 [*Indian Act*].
[26] Official Problem at paras. 8-10; *Kahnawà:ke Justice Act*, s. 1; Alexandra Laham, "The Kahnawake Community Decision Making Process" (24 October 2021), online: https://participedia.net/case/the-kahnawake-community-decision-making-process.
[27] Appellant Factum at para. 23; for the cases the Appellant cites, see *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Taypotat v Taypotat*, 2013 FCA 192 at paras 36-39, rev'd 2015 SCC 30; *McCarthy v Whitefish Lake First Nation No. 128*, 2023 FC 220 at para. 93; *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para. 16; *Horse Lake First Nation v Horseman*, 2003 ABQB 152 at paras 14-29.
[28] Official Problem at para. 8.
[29] Appellant Factum at para. 23; see also Alfred, "The Meaning of Self-Government in Kahnawake" at p. 20.
[30] Alfred, "The Meaning of Self-Government in Kahnawake" at p. 19.

Godbout, and *Dickson*, the purpose of this factor is to ensure that Parliament and the provinces cannot evade *Charter* scrutiny by dispersing their powers through other entities.[31] To suggest that Kahnawà:ke, having rejected the *Indian Act* and exercising a completely different mode of governance built on its own culture and history, is merely an instrument of Parliament is a fundamental mischaracterization and does not reflect the true purpose of this factor.

2) Kahnawà:ke governance is still not "government by nature" under what remains of the Eldridge test

20. Should this Court find that the rest of the *Godbout* indicia can still be decisive in the absence of delegated authority, the Appellant has still failed to establish that Kahnawà:ke is a "government by nature." The Respondent concedes that Kahnawà:ke has taxing powers but maintains that it does not satisfy the remaining *Godbout* factors.

(a) The MCK is not analogous to Parliament and the provincial legislatures

21. In *Godbout* and re-affirmed in *Dickson*, the Supreme Court clarified that this first factor involves not just the existence of a democratically elected council, but one that "[is] accountable to [its] constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent."[32]

22. While Kahnawà:ke does elect MCK members, its accountability to the community is much more limited than that of the federal or provincial governments and cannot be treated as analogous for the purposes of s. 32(1). For example, unlike federal or provincial elected officials, or the VGFN's Council in *Dickson*, the MCK does not have equivalent law-making power.[33] While the

[31] *McKinney v University of Guelph*, 1990 CanLII 60 (SCC) at p. 265 [*McKinney 1*]; *Eldridge* at para. 40; *Godbout* at para. 47; *Dickson* at para. 69.
[32] *Godbout* at para. 51; *Dickson* at para. 77.
[33] The VGFN's Council makes, enacts, and implements all VGFN's laws pursuant to *Vuntut Gwitchin First Nation Constitution*, *1992,* Article IX [*VGFN Constitution*]. See also *Dickson* at para. 78.

MCK can help draft laws, these drafts are returned to the community through the CDMP who then have the final say.[34] Moreover, unlike the VGFN's Council, the MCK cannot make their own rules and procedures; this too, is left to the community through the CDMP.[35]

23. Accordingly, because the MCK wields reduced authority within a consensus-based system such that no power imbalance exists between the council and the community, the mere existence of an elected council cannot be said to provide a level of accountability analogous to that of federal, provincial, or even VGFN governments.

(b) Kahnawà:ke does not have the coercive authority that defines "government" under s. 32(1)

24. While Kahnawà:ke can make and enforce laws, it is so far removed from the power imbalance underpinning Flavelle, Falconer, and its citizens. This authority is exercised through the CDMP in a consensus-based system.[36] In fact, the *Justice Act* of Kahnawà:ke was passed through the CDMP, meaning the community retains ultimate control.[37] In criminal and civil matters, Skén:nen Aonsón:ton functions as the "entry point" to the Kahnawà:ke Justice System, where outcomes are reached through collaboration, further constraining any coercive authority.[38] No power imbalance exists, and the coercive authority that defines "government" under s. 32(1) is absent here.

3) A purposive interpretation of s. 32(1) demonstrates that Kahnawà:ke is not captured under its scope

25. Mirroring the purposive approach to the interpretation of s. 25 done by the majority in *Dickson*, a purposive interpretation of s. 32(1) must engage with: (1) the text of the provision; (2)

[34] Official Problem at para. 8.
[35] *VGFN Constitution*, Article VIII, s. 6.
[36] Official Problem at para. 8.
[37] *Kahnawà:ke Justice Act*, s. 1.
[38] Official Problem at para. 12; *Kahnawà:ke Justice Act*, s. 6.2.

"the character and the larger objects of the *Charter* itself;" and (3) the historical and contextual origins of the advent of s. 32(1).[39] This interpretive exercise must also be guided by the principle of reconciliation, which the Appellant and several justices of the Supreme Court in *Dickson* recognized as important to considering the *Charter*'s reach with respect to Indigenous self-governance.[40]

26. Under this purposive approach, s. 32(1) was never intended to encompass Indigenous self-governments exercising their right to self-govern absent federal or provincial delegation of authority. On the contrary, as Rowe J. concluded in dissent in *Dickson*, the *Charter* is only meant to capture entities whose authority flows from Parliament or the provinces.[41] Extending the *Charter* to Kahnawà:ke would not advance reconciliation but undermine it, amounting to assimilation rather than true recognition and respect for its ability to govern in accordance with its culture and traditions.[42]

(a) Section 32(1)'s text plainly excludes Indigenous self-governments

27. A plain reading of s. 32(1) establishes that Kahnawà:ke is not subjected to the *Charter*. Section 32(1) explicitly provides that the *Charter* applies to Parliament and the government of Flavelle, and the provinces and their legislatures, "in respect of all matters within their authority."[43] Indigenous self-governments that exercise authority independent from federal or provincial authority, such as Kahnawà:ke, are therefore outside the scope of s. 32(1).

28. The Supreme Court has consistently endorsed this interpretation. In *Dolphin Delivery Ltd.* the Court held that that "the word 'government'" in s. 32(1) refers to "the executive government

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[39] *Dickson* at paras. 113-118.
[40] *Dickson* at paras. 245, 265 (Martin & O'Bonsawin JJ. dissent); 423, 497-507 (Rowe J. dissent).
[41] *Dickson* at paras. 438-441 (Rowe J. dissent).
[42] See *Dickson* at paras. 423, 497-507 (Rowe J. dissent).
[43] *Canadian Charter of Rights and Freedoms*, s 11, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 32(1).

of [Flavelle] and the Provinces."[44] The Court in *Mckinney* adopted this interpretation to hold that universities fall outside of *Charter*'s scope because they are autonomous entities over which "the government has no legal power to control."[45]

29. Most recently in *Dickson*, the Court accepted the interpretation of Professors Peter W. Hogg and Wade K. Wright that s. 32(1) "limits the application of the *Charter* to laws within the distribution-of-powers authority of the Parliament or the Legislature."[46] There, the Court further recognized that "the objective" of s. 32(1)'s wording "is to prevent Parliament, the legislatures, and the federal, provincial, and territorial governments from avoiding their *Charter* obligations" (emphasis added).[47]

30. Kahnawà:ke is an autonomous entity independent from provincial or federal legal control. Consistent with a plain reading of s. 32(1) and its related jurisprudence, Kahnawà:ke thus falls outside the *Charter'*s scope.

(b) The character and larger objects of the Charter demonstrate that Kahnawà:ke governance falls outside the scope of s. 32(1)

31. The *Charter* reflects the values and structures of Flavellian governance. It would thus be unreasonable, and in many cases, impractical, to apply this document designed by and for a *particular* form of governance to Kahnawà:ke.[48] Accordingly, it cannot be, as the Appellant contends, that s. 32(1) was ever intended to, or could, apply to Indigenous governments like Kahnawà:ke.

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[44] *RWDSU v Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC) at para. 33.
[45] *McKinney 1* at p. 273
[46] *Dickson* at para; 43, citing Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2023) at 15:2.
[47] *Dickson* at para. 44. See also *Eldridge* at para. 42; *Godbout* at para. 48; and *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 14, 22 [*Greater Vancouver Transportation*].
[48] See *Dickson* at paras. 438-441 (Rowe J. dissent).

(i) The Charter's underlying principles are incompatible with Kahnawà:ke governance

32. As Rowe J. noted in dissent in *Dickson* and Lamer C.J. stated for the majority in *Van Der Peet*, the *Charter* is grounded in a liberal enlightenment worldview, emphasizing individual rights against the state.[49] Dickson C.J. in *Oakes,* writing for the majority, further emphasized that "the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown."[50] Liberal enlightenment principles thus shape the *kind* of relationship between the state and the individual the *Charter* seeks to regulate, determining what rights are recognized and how they are defined and balanced.

33. These principles are not neutral; they are tied to the structure of liberal democratic governance, presupposing a relationship in which the state is the dominant power.[51] The *Charter*'s architecture reflects this. For example, McLachlin C.J., writing for the majority in *Sauvé*, confirmed that s. 3 (Democratic Rights) enshrines the right to vote as a safeguard against the state's inherent power and potential abuse.[52] Likewise, the case law consistently underscores how ss. 7-14 (Legal Rights) exist to protect individuals from the *significant* power the state and its actors hold over them.[53]

34. By contrast, there is *no* dominant state power in Kahnawà:ke, as governance is consensus-based. Community members collaborate in the law-making process through the CDMP.[54] Thus, while Kahnawà:ke is indeed a government, it does not exercise the *kind of governance*—one rooted

[49] *Dickson* at para. 498 (Rowe J. dissent); *R v Van Der Peet*, 1996 CanLII 216 (SCC) at para. 18 [*Van Der Peet*]. See also *McKinney 1* at p. 444 (Sopinka J. dissent).
[50] *R v Oakes*, 1986 CanLII 46 (SCC) at para. 64 [*Oakes*].
[51] See *Dickson* at para. 499 (Rowe J. dissent).
[52] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 32-34, 36, 43.
[53] See e.g. *R v Debot*, 1989 CanLII 13 (SCC) at pp. 1172-1173; *R v Grant*, 2009 SCC 32 (CanLII) at paras. 20-23.
[54] Official Problem at para. 8.

in a hierarchical relationship between the state and individual—the *Charter* was meant to constrain under s. 32(1).

35. The Appellant argues that the CDMP is ineffective, but these claims are irrelevant.[55] The question is whether the Kanien'kehá:ka retain the authority to govern and make laws, not whether the governance system works perfectly. The MCK does not have the final say on any law, and instead, the community itself continues to hold ultimate decision-making power.[56] Thus, no power imbalance exists that could justify equating Kahnawà:ke governance to Parliament or the provinces, and accordingly, the *Charter* does not apply.

36. These conflicting principles confirm that the *Charter* was never intended to apply to governments so philosophically distinct from Parliament or the provinces. To apply the *Charter* in this context would be to unduly expand its scope and strip Kahnawà:ke of their ability to govern on their own terms.

(ii) The Charter is structurally incompatible with Kahnawà:ke's governance

37. As Rowe J. stated in *Dickson*: "The *Charter* — including s. 32(1) — was designed with [Parliament and provincial legislatures] in mind."[57] As such, not only is the *Charter* "replete with references to federal and provincial levels of government," but also presupposes the liberal democratic structures and powers characteristic of those specific governments.[58]

38. The *Charter*'s tailoring to Flavellian and provincial governments renders several provisions structurally inapplicable to Kahnawà:ke's governance system. Sections 3-5 (Democratic Rights) are irrelevant: the *Charter*'s protections of voting and candidacy assume a

[55] Appellant Factum at para. 41.
[56] Official Problem at para. 8.
[57] *Dickson* at para. 440 (Rowe J. dissent).
[58] *Dickson* at para. 440 (Rowe J. dissent) citing the *Charter* at ss. 3-6, 16-20, and 23.

parliamentary model of governance that does not exist in Kahnawà:ke.[59] Section 6 (Mobility Rights) is inapplicable, as Kahnawà:ke does not have the authority to restrict international or interprovincial movement.[60] Finally, ss. 16-23 (Official and Minority Language Rights) assume an obligation to promote the French language—an obligation historically undertaken by the Flavellian and provincial governments.[61]

(iii) The historical origins of s. 32(1) confirm that self-governance untethered from federal or provincial authority were purposely excluded from the Charter's scope

39. Two points arising from the historical context and origins of s. 32(1) confirm that Kahnawà:ke falls outside its scope.

40. First the drafters of the *Charter* were aware of the existence of Indigenous self-governance at the time yet did not include such governments within the ambit of s. 32(1). The first self-government agreement in Flavellian history occurred between the Cree, Inuit, and the governments of Falconer and Flavelle and was signed in 1975.[62] The Naskapi First Nation joined the agreement through a second self-government agreement signed in 1978.[63] These self-government agreements, signed well before the *Charter*'s enactment in 1982 with elected officials' participation, would thus have been known to the drafters at the time. It follows that Indigenous self-governance was deliberately excluded from the *Charte*r's scope.

41. Second, and as Rowe J. noted in dissent in *Dickson*, the creation of s. 35 underscores the **i**ntentional exclusion of Indigenous governments such as Kahnawà:ke from the *Charter*'s reach in

[59] *Charter*, ss. 3-5.
[60] *Charter*, s. 6.
[61] *Charter*, ss. 16-23.
[62] "James Bay and Northern Québec Agreement and Complementary Agreements" (1975), online: https://www.rcaanc-cirnac.gc.ca/eng/1100100030604/1542740089024.
[63] "The Northeastern Quebec Agreement" (1978), online: https://www.rcaanc-cirnac.gc.ca/eng/1100100030604/1542740089024

two ways.[64] First, questions of self-governance were being addressed in the 1970s through treaty-making.[65] Second, the collaborative process surrounding s. 35 also makes the intention to deal with Indigenous rights outside the *Charter* especially clear. As Rowe J. observed, "Indigenous peoples were not at the negotiating table, did not agree for the *Charte*r to apply to them, and were not included within the constitutional amending formula which was adopted alongside the *Charter*."[66] By contrast, the development of s. 35 involved constitutional conferences with the direct participation of Indigenous groups. These efforts underscore the drafters' intention to deal with Indigenous rights under s. 35.[67]

(c) Subjecting Kahnawà:ke to the Charter would be inconsistent with the principle of reconciliation

42. Finally, extending the *Charter* to Indigenous self-governments untethered from federal or provincial authority would not advance reconciliation but undermine it for three reasons. First, and as described above, it would undermine Kahnawà:ke's ability to govern itself as it chooses. The *Charter* is fundamentally incompatible with the principles and practices of Kahnawà:ke governance. Forcing the *Charter*'s applicability, rooted in liberal enlightenment principles and tailored to a specific form of governance, would amount to assimilation rather than reconciliation. This cannot, as the Appellant argues, be framed as respecting Kahnawà:ke's authority to govern.

43. Second, imposing the *Charter* disregards Kahnawà:ke's own conceptions of rights grounded in the Great Law of Peace. A '*Charter*-free zone' is not a rights-free zone. Kahnawà:ke has its own robust system of rights and responsibilities. To substitute the *Charter* for that system is paternalistic, denying the legitimacy of the Kanien'kehá:ka's own laws and values.

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[64] *Dickson* at paras. 444-445 (Rowe J. dissent).
[65] *Dickson* at para. 445 (Rowe J. dissent).
[66] *Dickson* at para. 444 (Rowe J. dissent).
[67] *Dickson* at para. 444 (Rowe J. dissent).

44. Third, the Kanien'kehá:ka are actively litigating to deny the *Charter*'*s* applicability, underscoring that forcing it upon them undermines reconciliation. Overriding their express rejection and having a Flavellian court impose the *Charter* would be assimilationist, far from the spirit of reconciliation.

B. SECTION 11(H) OF THE *CHARTER* DOES NOT PROTECT MS. SHETH

45. Section 11(h) of the *Charter* does not protect Ms. Sheth. First, the consequences do not trigger s. 11 since Ms. Sheth was not charged with an offence. Second, they do not trigger s. 11(h) in particular because the consequences are not "punishments." Finally, the consequences do not breach s. 11(h) because the Kahnawà:ke proceeding deals with a different offence than the Flavelle proceeding.

1) The proceeding is not criminal in nature and the consequence is not a true penal consequence

46. The consequences do not pass the threshold to trigger s. 11 rights. Section 11 rights only apply to those "charged with an offence."[68] Someone is "charged with an offence" when either the proceeding they face is "criminal in nature" or the consequence imposed is a "true penal consequence."[69] Neither apply to Ms. Sheth. This is a strict test, designed to limit the number of cases requiring s. 11 scrutiny.[70]

[68] *Charter*, s. 11.
[69] *R v Wigglesworth*, 1987 CanLII 41 (SCC), pp. 560–561 [*Wigglesworth*].
[70] *Guindon v Canada,* 2015 SCC 41 (CanLII) at para. 44 [*Guindon*].

(a) The Skén:nen Aonsón:ton proceeding was not "criminal in nature"

47. A proceeding is criminal in nature when it is aimed at promoting "public order and welfare within a public sphere of activity."[71] Courts are instructed to look at both the purpose of a system and its procedures to determine whether a consequence is criminal in nature.[72]

48. Skén:nen Aonsón:ton is a dispute resolution process not intended to be criminal in nature. First, it possesses none of the "traditional hallmarks of a criminal proceeding."[73] Skén:nen Aonsón:ton is entirely voluntary, unlike criminal courts. The offender, the victim, and the broader community all have a say in what sorts of consequences are imposed.[74] Skén:nen Aonsón:ton also excludes lawyers, a fundamental right in criminal proceedings. This is because the process is not designed to be criminal in nature. It coexists with existing courts to provide a constructive means of resolving disputes.

49. Skén:nen Aonsón:ton also lacks the facial indicia of a criminal process, including words such as guilt, acquittal, indictment, summary conviction, prosecution, and accused.[75] The Federal Court of Appeal found this to be a strong indicator that a proceeding is not criminal in nature.[76]

50. The Appellant claims that the proceeding is criminal in nature because Skén:nen Aonsón:ton is part of Kahnawà:ke's *Justice Act*, which has the purpose of maintaining order and protecting society. However, promoting public order does not make a proceeding criminal in nature. For example, Canadian Radio-Television and Telecommunications Commission or Securities Commission proceedings, both of which impose hefty fines in order to prevent future bad behaviour, are not criminal in nature.[77]

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[71] *Guindon* at para. 52.
[72] *Guindon* at para. 52.
[73] *Guindon* at para. 63.
[74] Official Problem at paras. 14–15.
[75] *Guindon* at para. 63.
[76] *3510395 Canada Inc. v Canada (Attorney General),* 2020 FCA 103 (CanLII) at para. 209 [*Canada Inc*.].
[77] *Canada Inc.* at para. 209; *R v Samji,* 2017 BCCA 415 at para. 77 [*Samji*].

51. Instead, Skén:nen Aonsón:ton is corrective in nature, seeking to reduce crime by resolving disputes in the community rather than through criminal punishment. Proceedings which are "corrective" in nature do not engage s. 11's protections according to *Wigglesworth*.[78] This recognizes that a process which does not treat people as criminals cannot be a criminal process. Justice in Kahnawà:ke looks fundamentally different from justice in Flavelle. Whereas justice in Flavelle is about criminal punishment and individual responsibility, justice under Skén:nen Aonsón:ton is positive and about mending the broken bonds within and between communities to decrease future crime.[79]

(b) The consequences are not "true penal consequences"

52. Skén:nen Aonsón:ton does not impose true penal consequences. A true penal consequence is "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."[80] Skén:nen Aonsón:ton did not impose a true penal consequence because it is not punitive "in purpose or effect."[81]

53. Skén:nen Aonsón:ton is not punitive in purpose. A consequence is not punitive in purpose when it has the objective of stopping the behaviour in question rather than punishing it.[82] The goal of Skén:nen Aonsón:ton is not to stigmatize the offender or do them harm proportionate to their action, hallmarks of a true penal consequence.[83] Instead, Skén:nen Aonsón:ton aims to achieve "Peace" between members of society.[84] It helps to rehabilitate offenders and prevent future crime

[78] *Wigglesworth*, p. 560.
[79] Official Problem at para. 15.
[80] *Guindon* at para. 46.
[81] *John Howard Society of Saskatchewan v Saskatchewan (Attorney General),* 2025 SCC 6 (CanLII) at para. 30 [*John Howard Society*].
[82] *John Howard Society* at para. 30.
[83] *Guindon* at para. 76.
[84] Official Problem at para. 11.

without punishing them.[85] The Supreme Court has consistently found that programs designed at preventing crime rather than punishing it do not give rise to penal consequences.[86]

54. The consequences are also not punitive in effect. A fine may or may not be a true penal consequence in effect depending on its magnitude.[87] A punitive consequence is one which is out of proportion to the purpose of the law.[88] The consequences imposed on Ms. Sheth are not out of proportion. Kahnawà:ke is dealing with serious harm to the community and imposed a relatively modest consequence, including a fine of only $500. This is far less than the $33 million fine the British Columbia Court of Appeal found to be proportionate to deal with the problem of fraud in *Samji*.[89] Impaired driving, the offending conduct here, is a similarly serious crime, putting lives and property at risk.

2) The consequences are not punishment

55. If the consequences meet the threshold for engaging s. 11, they are nonetheless not a "punishment" triggering s. 11(h)'s protection against double jeopardy. According to the Supreme Court in *KRJ* a punishment must:

I. Be a consequence of a conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and either

II. Be imposed in furtherance of the purposes and principles of sentencing; or

III. Have a significant impact on an offender's liberty or security interests.[90]

56. The Respondent accepts that the consequences are part of the arsenal of sanctions to which an accused may be liable, but the consequences were **[a]** not imposed in furtherance of the relevant

[85] Official Problem at para. 14.
[86] *Guindon* at para. 62.
[87] *Guindon* at para. 46.
[88] *Guindon* at para. 85.
[89] *Samji* at para. 77.
[90] *R. v K.R.J.*, 2016 SCC 31 (CanLII), at para. 41 [*KRJ*].

purposes and principles of sentencing and **[b]** did not have a significant impact on Ms. Sheth's liberty or security.

(a) The consequences are not imposed in furtherance of sentencing purposes and principles

57. The consequences were not imposed to further the punitive purposes of sentencing. First, the second step of the test for punishment from *KRJ* needs to be adapted to the context of restorative justice. Second, the consequences have a restorative rather than punitive purpose.

(i) The KRJ test does not fit with restorative consequences

58. The second stage of the *KRJ* test should only capture as punishment consequences imposed in furtherance of the *punitive* purposes of sentencing: denunciation, deterrence, and separation from society. Restorative justice, including rehabilitation, is not punishment because the effects and purpose of restorative justice are often incompatible with punishment.

59. First, restorative justice and punitive justice are often practically incompatible. Punitive consequences like prison often push offenders further into criminal behaviour.[91] As the Supreme Court found in *Gladue*, restorative justice does not "usually correlate with the use of prison as a sanction".[92] This is why courts across the country have consistently separated rehabilitation from punishment when discussing the concepts.[93]

60. Second, the purposes of restorative justice and punitive justice are incompatible. Punitive justice imposes consequences which are perceived as negative by the offender, the public or both. In order to deter or denounce, the offender and general public must associate bad behaviour with

[91] See, e.g. *R v Proulx*, 2000 SCC 5 (CanLII) at para. 20 [*Proulx*].
[92] *R v Gladue*, 1999 CanLII 679 (SCC) at para. 43 [*Gladue*].
[93] See, e.g. *Proulx* at para. 33; *R v Boudreault,* 2018 SCC 58 (CanLII) at para. 82 [*Boudreault*]; *R v Cope,* 2024 NSCA 59 (CanLII) at para. 117; *Her Majesty the Queen v Pond,* 2020 NBCA 54 (CanLII).

bad consequences.[94] Restorative justice, on the other hand, is meant to improve the lives of each party affected by crime: the offender, the victim, and the community.[95] It does not logically require negative consequences or restrictions to be imposed, and it seeks the consent of the offender when consequences are imposed.

61. This does not mean that restorative consequences always have the consent of the offender or that they never be perceived as negative. Sometimes, rehabilitative programs will require punitive restrictions on liberty in order to succeed. Here, for example, Ms. Sheth is *required* to learn about the garden to aid in her rehabilitation. This does not mean the purpose of the consequence is punitive. Instead, the effect of a consequence may be punitive if it leads to a significant restriction on liberty or security. This is already the third step of the *KRJ* test and is thus unnecessary to consider at the second step.[96]

62. Hence, the second stage of the *KRJ* test should be refined to only include as punishment those consequences imposed in furtherance of a punitive purpose of sentencing. The Supreme Court has been willing to modify the test for punishment to reflect the context of a particular case. In *Whaling*, the Supreme Court recognized that the two-part test from *Rodgers* was not well-suited to the novel situation where new sanctions were imposed post-sentencing.[97] Similarly, the Supreme Court has never been tasked with applying the definition of punishment to restorative consequences. Since the Supreme Court has defined punishment broadly and purposively, courts often need to adapt the test for punishment to the specific circumstances before them.

[94] *R v Lacasse*, 2015 SCC 64 (CanLII), at para. 73.
[95] *Proulx* at para. 20.
[96] *KRJ* at para. 41.
[97] *Canada (Attorney General) v Whaling,* 2014 SCC 20 (CanLII) at para. 49.

(ii) The consequences have a restorative rather than punitive purpose

63. Applying the modified second part of the *KRJ* test, the consequence was not imposed in furtherance of a punitive purpose of sentencing. The entire goal of Skén:nen Aonsón:ton is to help the offender "become peaceful again."[98] The consequences are geared towards showing Ms. Sheth the damage she caused and to push her to learn.

64. Even the $500 fine is restorative rather than punitive in nature. It serves several non-punitive purposes the $500 fine serves. First, the 'fine' is properly viewed as restitution in response to damage done to the community.[99] Though Ms. Sheth is already paying for the replanting of the garden, the additional fine serves as restitution for the fear and risk that Ms. Sheth imposed on the community due to her impaired driving. Restitution supports the principles of restorative justice by improving the relationship between the community and the offender.[100]

65. Second, fines like the one imposed on Ms. Sheth are restorative by pushing the offender to understand the gravity of their behaviour. As the Appellant agrees, the fine "encourages Ms. Sheth to take responsibility for the damage she caused, and to make amends."[101] Courts have found that consequences like fines contribute to rehabilitation by helping the offender realize the error in their ways.[102] In order to begin the healing process for both the offender and the community, the offender must first recognize that there is a problem in their conduct.

66. Finally, the fine itself is modest. A modest fine, like one of $500, is less likely to be punitive than a larger fine.[103]

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[98] Official Problem at para. 12.
[99] Official Problem at para. 30.
[100] *Gladue* at para. 43.
[101] Appellant Factum at para. 74.
[102] *R v Smith*, [2025] O.J. No. 1309 at para. 61.
[103] *Guindon* at para. 76.

67. None of this means that the fines do not have a residual punitive effect. According to the Supreme Court in *Rodgers* and *KRJ*, a primarily non-punitive measure may nonetheless have residual punitive effects.[104] A fine may deter individuals like Ms. Sheth from driving while impaired. However, the primary purpose of the fine is to support Skén:nen Aonsón:ton's restorative principles.

68. Even if this Court found that the fine was punitive in purpose, the other consequences—paying for the damages to the garden, replanting the garden, and learning about the community—are not. The Appellant agrees with this position.[105] They are not punitive in nature because they have the purpose of improving the relationship between Ms. Sheth and the community and helping her to understand the damage she caused.

(b) The consequences do not significantly impact Ms. Sheth's liberty or security interests

69. The consequences only minimally constrain Ms. Sheth's liberty and security. She is required to pay a modest sum of money and attend the community for four weekends.

70. Ms. Sheth being unable to work as a freelancer in Kahnawà:ke for four weekends is not a significant impact on her liberty or security. Ms. Sheth works part time throughout the week, meaning she has alternative income.[106] Furthermore, she is able to work as a freelancer outside of Kahnawà:ke throughout the week. This is a far cry from the consequence found to be a significant restriction on liberty and security in *Hooyer*. There, the accused was barred from participating in any job in which he would take money.[107] Here, the consequence only restricts Ms. Sheth within a geographic area, within a short period of time, and does not prevent her from earning a livelihood.

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[104] *R v Rodgers,* 2006 SCC 15 (CanLII) at para. 64; *KRJ* at para. 53.
[105] Appellant Factum at para. 74.
[106] Official Problem at para. 31.
[107] *R v Hooyer,* 2016 ONCA 44 at para. 47.

This is more similar to *Duell*, where the judge found restrictions on participating in work were not "significant" since the offender was a retiree, so the restriction did not harm him.[108] If Ms. Sheth does not work, it is her choice.

71. The Appellant argues that this Court should consider the impact of the consequence on Ms. Sheth if she fails to comply—that she is barred from Kahnawà:ke land. This is not correct.

72. First, being subject to the ban on entering Kahnawà:ke land would be Ms. Sheth's choice. The Appellant cites *Boudreault* for the principle that courts should consider the "knock-on" effects of failing to abide by a consequence—in that case, failing to pay mandatory victim surcharges.[109] However, the Supreme Court only saw fit to consider the consequences of not paying the surcharge in that case because it was impossible for many low-income offenders to do so.[110] Here, no evidence suggests that Ms. Sheth will be unable to abide by the primary consequences and Ms. Sheth herself has indicated she will follow through with them if they are upheld.[111] Therefore, it is unnecessary to consider the "knock-on" consequences imposed upon Ms. Sheth.

73. Second, Ms. Sheth has no inherent right or entitlement to be on Kahnawà:ke land. In the same way that an individual may issue a trespass notice against another person, Kahnawà:ke may inform Ms. Sheth she is unable to return to its land for whatever reason.

(c) In the alternative, Ms. Sheth voluntarily accepted the alleged punishments by agreeing to the process

74. Ms. Sheth voluntarily agreed to Skén:nen Aonsón:ton, meaning its results should not be seen as punishment.

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[108] *R v Duell*, 2024 ONSC 6952 (CanLII), at para. 63.
[109] Appellant Factum at para. 78.
[110] *Boudreault* at paras. 72-73.
[111] Official Problem at para. 33.

75. Though not made explicit in the test from *KRJ*, involuntariness is a core part of punishment. For example, courts have found that payments under municipal law to avoid going to trial on a traffic infraction did not constitute punishment because they were "voluntary, consensual, self-imposed penalty."[112] This is consistent with language in and beyond *KRJ*. In *KRJ*, a punishment must be "imposed."[113] A consequence is not "imposed" if it is accepted by the offender. This is supported by *Basque*, which added the condition that the punishment must be "coercive" when describing the *KRJ* test.[114] A consequence is not coercive if the offender agrees to it.

76. Ms. Sheth voluntarily agreed to Skén:nen Aonsón:ton.[115] She accepted that consequences may be applied and fully participated in the collaborative process to determine what those consequences would be.[116] She cannot now take issue with the consequences she fully agreed may be imposed upon her.

3) In the alternative, the consequences do not violate s. 11(h)

77. The consequences do not violate s. 11(h) because the offence in Kahnawà:ke is different from the offence in Falconer. The question is whether Ms. Sheth could have been convicted at the first trial of the offence with which she was charged in Kahnawà:ke.[117] First, the Kahnawà:ke consequence is related to different aspects of the same conduct as the Flavelle offence. Second, the legal requirements of the offence in Kahnawà:ke are different from those in Flavelle.

(a) The consequences were imposed for different behaviour

78. The behaviour giving rise to the consequences in Kahnawà:ke and Flavelle are different. The Flavellian punishment is premised on intoxication while driving. The Kahnawà:ke punishment

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[112] *Re McCutcheon and City of Toronto et al.*, 1983 CanLII 1629 (ON SC) at p. 20 [*McCutcheon*].
[113] *KRJ* at para. 41.
[114] *R v Basque*, 2023 SCC 18 (CanLII), at para. 68 [*Basque*].
[115] Official Problem at para. 29.
[116] Official Problem at para. 29.
[117] *R v Van Rassel,* 1990 CanLII 124 (SCC) [*Van Rassel*].

is premised on harm to the community, including both the risk created by impaired driving and the real consequence—the destruction of the garden. This is evidenced by the general structure of the consequences in Kahnawà:ke. Nearly all are related to the damage done to the garden, not the impaired driving on its own.[118] This is similar to *McKinney*, where the Supreme Court found that the common law doctrine of double jeopardy did not apply to the separate offences of hunting out of season and hunting with lights even though the two offences were based on different but overlapping aspects of the same behaviour.[119]

79. In addition to the differences in conduct, the two consequences were imposed in response to Ms. Sheth failing two distinct legal duties. Proceedings are not duplicative when they involve distinct obligations to different groups.[120] The *Criminal Code* offence recognizes that Ms. Sheth owed and breached an obligation to road users and the rest of society. The Kahnawà:ke offence is based on a) the violation of the relationship between the offender and the specific community and b) the violation of the duty to respect more-than-human animals.

80. The relationship between the offender and the community gives rise to distinct legal obligations. A distinct duty may exist even when one group seeking to prosecute is a subset of the other group. In *Wigglesworth*, the Supreme Court found that an accused could be held to account for the same behaviour by both general society and a professional body even though the members of the professional body are also part of general society.[121] In the same way that a professional body has an interest in policing its members, Kahnawà:ke has an interest in keeping its streets safe which is different from broader Canadian society's interest.

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[118] Official Problem at para. 30.
[119] *McKinney v The Queen*, 1980 CanLII 164 (SCC), [1980] 1 S.C.R. 401, aff'ing *R v McKinney*, 1979 CanLII 2926 (MB CA), p. 573 [*McKinney 2*].
[120] *Van Rassel*, p. 240.
[121] *Wigglesworth*, p. 565.

81. Furthermore, the relationship between the offender and more-than-human animals also gives rise to distinct legal obligations. The *Criminal Code* violation does not consider more-than-human animals. This is similar to *Van Rassel*, where the Supreme Court found that there was no breach of s. 11(h) because the offender owed duties of trust distinctly to both American and Canadian people.[122] Ms. Sheth owed obligations not just to society, as is contemplated by the *Criminal Code* offence, but also to more-than-human animals. The Kahnawà:ke offence is the only way to recognize that unique duty.

(b) The legal requirements of the two offences are different

82. The legal tests for satisfying the two offences are different, such that pleading guilty to one offence does not imply pleading guilty to the other. By pleading guilty to impaired driving, Ms. Sheth agreed that she was operating a conveyance, was impaired at the time of the operation, that the impairment was caused by alcohol or drugs, and that she voluntarily consumed the alcohol or drugs.[123] On the other hand, breaching the principle of Righteousness does not include operating a conveyance, consuming alcohol, or impairment of any kind.[124]

83. The Appellant agrees that the two offences are "not identical."[125] But the difference goes further than that. There is no single component of the Flavelle offence that is reproduced in the Kahnawà:ke offence. The principle of Righteousness has no direct analogue in Flavellian criminal law. It reflects the idea that people should treat others—including more-than-human animals—with respect and dignity. On one hand, this is broader than the *Criminal Code* offence,

[122] *Van Rassel*, p. 240.
[123] *R v Andrews*, 1996 ABCA 23 (CanLII), at para. 31.
[124] Official Problem at para. 29.
[125] Appellant Factum at para. 80.

encompassing behaviour beyond impaired driving.[126] On the other, it is narrower, adding the requirement that the behaviour risked or caused harm.[127]

84. There were fewer differences between the offences in *Lane,* where the Court of Appeal for Ontario found that s. 11(h) did not apply. In that case, the essential elements of an American offence related to the exploitation of children were different from the Canadian offence because the American offence required three or more individuals to be acting in concert and the Canadian offence required only knowledge of as opposed to active participation in distribution.[128]

C. ANY POTENTIAL SECTION 11(H) *CHARTER* INFRINGEMENT IS SHIELED UNDER SECTION 25

85. Should this Court find that the *Charter* applies and that s. 11(h) has been infringed, s. 25 operates to shield that infringement.

86. The Appellant agrees that there are no additional limits this Court must consider.

87. At issue here, and as *Dickson* laid out, s. 25 requires Kahnawà:ke to prove: (1) that the Appellant's outcomes from the Skén:nen Aonsón:ton process ("the impugned conduct") are an exercise of an Aboriginal right, treaty, or other right; and (2) that there is an irreconcilable conflict between the exercise of such rights and the *Charter* right.[129] Both are met here.

4) Indigenous self-governance over criminal law matters is an Aboriginal and "other" right

(a) Indigenous self-governance over criminal law matters is an Aboriginal right

88. As Grewal-Birbrager J.A. rightly held, Indigenous self-governance over criminal law matters is an Aboriginal right.[130] While the Appellant notes that the Supreme Court has yet to

[126] Official Problem at para. 29.
[127] Official Problem at para. 29.
[128] *United States v Lane*, 2017 ONCA 396 (CanLII), at para. 38.
[129] *Dickson* at paras. 179-183.
[130] Falconer Court of Appeal at para. 3; Official Problem at para. 43.

recognize this right under s. 35(1), this of course does not preclude its existence, nor does it prevent this Court from now affirming it.[131] In fact, the Supreme Court has expressly refrained from rejecting the possibility that Indigenous self-governance is an Aboriginal right, leaving the issue open to be decided at a later time.[132]

89. Indigenous self-governance over criminal law matters meets the standard for Aboriginal rights recognition under s. 35(1) established in *Van Der Peet*.[133] The right existed pre-contact, as its principles are rooted in the Great Law of Peace. The right is also integral and distinctive, as governance over criminal law is grounded in the unique philosophies, culture, and traditions of Kahnawà:ke.[134] Skén:nen Aonsón:ton as the entry point into the Kahnawà:ke Justice System ensures that justice is rooted specifically in the Good Message of Peace.[135]

90. Contrary to the Appellant's claim, there is evidence that self-governance over criminal law matters existed and was of "central significance" to Kahnawà:ke pre-contact.[136] As the Supreme Court held in *Delgamuukw*, oral histories can constitute evidence of historical facts.[137] The Kanien'kehá:ka maintain that, pre-contact, they governed themselves according to the Great Law of Peace, a system of central significance.[138] Governance under this system, as with all forms of governance, necessarily included criminal law matters. Further reinforcing this, the Kanien'kehá:ka have emphasized the need to "take justice back into its own hands," with Skén:nen Aonsón:ton representing an effort "to see a justice system returned to… Kanien'kehá:ka values"

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[131] Appellant Factum at para. 90.
[132] *Dickson* at para. 91.
[133] *Van Der Peet* at para. 180.
[134] Official Problem at para. 12; *Kahnawà:ke Justice Act*, s. 1; Alexandra Laham, "The Kahnawake Community Decision Making Process" (24 October 2021), online: https://participedia.net/case/the-kahnawake-community-decision-making-process.
[135] Official Problem at para. 13; *Justice Act*, s. 1.
[136] Appellant Factum at paras. 92-93.
[137] *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC) at paras. 101, 106-107.
[138] Alexandra Laham, "The Kahnawake Community Decision Making Process" (24 October 2021), online: https://participedia.net/case/the-kahnawake-community-decision-making-process; Official Problem at paras. 3-5.

(emphasis added).[139] It is also worth noting that neither of the lower courts in this proceeding raised or suggested any issue regarding a lack of evidence.

91. Finally, the Appellant's claim that the right claimed here is too general is incorrect.[140] They rely on cases such as *Pamajewon*, decided in 1996, and *Band (Eeyouch)* decided in 2014, to equate the right claimed here with the rights considered there, but this is flawed.[141] Jurisprudence has developed since those decisions. More recently, in 2024, the Supreme Court in *Dickson* left open the possibility that the proposed right of "Indigenous self-governance" could be recognized.[142] In 2022, the Court of Appeal of Quebec in the *Bill C-92 Reference* recognized this right to self-governance.[143] Since *Band (Eeyouch)* in 2014, Parliament has also formally recognized "Indigenous self-governance" as a right under s. 35(1) of the *Constitution Act, 1982*.[144] "Indigenous self-governance" is much broader than the right claimed here, which is restricted to criminal law matters. Accordingly, the right claimed here is not overly general.

(b) Indigenous self-governance over criminal law matters is an "other" right

92. Kahnawà:ke's right to govern over criminal law matters is also an "other" right as it exists to protect Indigenous difference, rooted in Aboriginal cultural difference.[145]

93. The Appellant relies on the lower court decisions in *Dickson* to focus on *when* Kahnawà:ke began to govern over criminal law matters, but that is not the test and is irrelevant to the recognition of an other right.[146] The Supreme Court in these proceedings clarified that an other right requires

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[139] Official Problem at para. 12.
[140] Appellant Factum at para. 94.
[141] Appellant Factum at para. 94; *R v Pamajewon*, 1996 CanLII 161 (SCC) at para. 27; *Chisasibi Band (Chisasibi Eeyouch) c* Napash, 2014 QCCQ 10367 at paras. 171-174.
[142] *Dickson* at para. 91.
[143] *Bill C-92 Reference*, 2022 QCCA 185 at para. 364 [*Bill C-92 Reference*].
[144] *Bill C-92 Reference* at para. 187; *Dickson* at para. 47;
[145] *Dickson* at para. 150.
[146] Appellant Factum at para. 100.

only two things: (1) the existence of the claimed right, and (2) that it protects or recognizes Indigenous difference. Both requirements are easily met here.[147]

94. Kahnawà:ke's *Justice Act* demonstrates that it exercises the right to govern over criminal matters.[148] In doing so, this right recognizes Indigenous difference, as restorative principles are rooted in the Great Law of Peace's tenet of Peace.[149] This right also protects Indigenous difference, for as the Kanien'kehá:ka observed in implementing Skén:nen Aonsón:ton, the further justice strays from restorative principles, "the further [they] stray from [their] values of collectivity, and community."[150]

(c) The Appellant's proposed approach to s. 25 should be rejected and, even if it is not, the right claimed here under this approach is still an other right

95. To be clear, the Supreme Court recently clarified the approach to an other right in *Dickson* as set out above, and any alternative approach should respectfully be rejected.

96. However, if this Court adopts the approach outlined by Martin and O'Bonsawin JJ. in dissent in *Dickson*, and endorsed by the Appellant, the right claimed here would still qualify as an other right.[151] This approach requires that other rights be "limited to those that are truly unique to Indigenous peoples because they are Indigenous."[152] That is precisely the case here.

97. The right to govern over criminal matters here, in accordance with restorative principles, is unique to the Kanien'kehá:ka *because* they are Indigenous. The *Justice Act* is rooted in the Great Law of Peace and is *itself* an expression of the Kanien'kehá:ka's values of community and collectiveness.[153] Thus, this is not merely a justification for why self-governing powers were

[147] *Dickson* at para. 150.
[148] *Kahnawà:ke Justice Act* at s. 1.
[149] Official Problem at para. 12.
[150] Official Problem at para. 12.
[151] Appellant Factum at para. 101; *Dickson* at paras. 334-337 (Martin & O'Bonsawin JJ. dissent).
[152] *Dickson* at para. 337 (Martin & O'Bonsawin JJ. dissent).
[153] Official Problem at para. 10.

exercised in a particular way, as was the concern raised by Martin and O'Bonsawin JJ. in dissent in *Dickson*.[154] Here, and unlike the searches of homes discussed in their dissent, the restorative justice system is genuinely Indigenous, grounded in the community's culture and values.[155]

98. Finally, the Appellant, despite advocating for this approach, misconstrues its application. The Appellant argues that because restorative principles appear in the *Criminal Code* and in other sovereign societies, they are not unique to Indigenous peoples, but this cannot be a correct application of the approach.[156] In *Van der Peet*, the Supreme Court recognized fishing for food as an Aboriginal right, even though non-Indigenous communities in Canada also fish for food.[157] Likewise, in *Sappier; Gray*, the Supreme Court recognized harvesting wood for domestic use as an Aboriginal right, despite this being a practice also carried out by non-Indigenous communities.[158]

99. Our s. 35(1) jurisprudence confirms that a practice need not be entirely different from non-Indigenous culture to be considered distinctive to Indigenous culture. Rather, it is enough that the practice is integral to and characteristic of the Indigenous culture, which is what we respectfully submit Martin and O'Bonsawin convey for s. 25 in *Dickson*.[159]

100. Under this approach, the right to govern over criminal law matters is still an other right. This is reflected in Kahnawà:ke's own description of the Skén:nen Aonsón:ton process: "Restorative practices share many similarities with our own culture, and [are] a philosophy rooted in our own values" (emphasis added).[160]

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[154] *Dickson* at para. 334 (Martin & O'Bonsawin JJ. dissent).
[155] *Dickson* at para. 335 (Martin & O'Bonsawin JJ. dissent).
[156] Appellant Factum at para. 102.
[157] *Van der Peet* at para. 221.
[158] *R v Sappier; R v Gray*, 2006 SCC 54 at para. 72.
[159] *Dickson* at paras. 334-337 (Martin & O'Bonsawin JJ. dissent).
[160] Official Problem at para. 12.

5) The conflict between Kahnawà:ke's exercise of restorative justice and s. 11(h) is irreconcilable

101. Section 11(h) is in fundamental conflict with Kahnawà:ke's exercise of restorative justice.[161] If the *Charter* were held to apply here, any individual tried in a Flavellian court who also participates in Kahnawà:ke's restorative justice process on the same matter could claim a s. 11(h) violation. Because of the overlap in conduct addressed by both systems, this conflict would arise frequently. In effect, the Appellant's s. 11(h) rights would operate to abrogate and derogate from the collective right of Kahnawà:ke under s. 25 to maintain and exercise their distinct system of justice.[162]

102. This conflict is neither minor nor incidental.[163] The Appellant argues that Kahnawà:ke's opt-in model allows s. 11(h) and the restorative system to co-exist.[164] This position undermines the very ability of Kahnawà:ke to exercise its right to govern over criminal law matters.

103. Consent is required under the restorative approach to ensure participants engage respectfully and fully in a process aimed at healing the community and repairing the harm. If s. 11(h) were permitted to co-exist alongside Kahnawà:ke's exercise of its right to practice restorative justice, there will always be a possibility that participants could invoke it after entering or even completing the process, as was the case here, thereby nullifying its outcomes. This possibility renders Kahnawà:ke's exercise of its s. 25 right deprived of force and illusory. The conflict is therefore irreconcilable, meeting the threshold for s. 25 protection.

104. Finally, while we agree with the Appellant that all criminal powers have jurisdictional limits, the key difference here is that double jeopardy *does* derogate from Kahnawà:ke's right to

[161] See *Dickson* at paras. 163-164.
[162] See *Dickson* at para. 160.
[163] See *Dickson* at para. 164.
[164] Appellant Factum at para. 107.

self-govern over its own criminal law matters.[165] This is not like a situation where an individual commits a crime in one sovereign country and cannot be punished for the same offence in another; in that scenario, the two jurisdictions are independent. Here, Flavelle is asserting criminal law authority *within* Kahnawà:ke's territory, creating ongoing overlap and conflict with Kahnawà:ke's ability to govern its own justice system.[166]

PART IV: ORDER SOUGHT

105. The Respondent respectfully requests that this appeal be dismissed.

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

Ikran Jama

Matthew Farrell

[165] Appellant Factum at para. 109.
[166] See *Kahnawà:ke Justice Act* at s.1.

PART V: TABLE OF AUTHORITIES

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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.

Criminal Code

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.