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R v. Turtle: Substantive Equality Touches Down in Treaty 5 Territory

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R v. Turtle: Substantive Equality Touches Down in Treaty 5 Territory

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Court comes to Pikangikum First Nation through the air. Judges, Crown attorneys, and defence lawyers fly into this Anishinaabe community, located 229 kilometres north of Kenora, Ontario, to hear bail, trial, and sentencing matters involving members of the community. And then they fly out. Many of those provincial court proceedings involve sentencing members of the community to jail in Kenora or to a penitentiary even further away. We suspect that s. 15 of the *Charter* is rarely discussed in the Pikangikum courtroom (which is sometimes a room in the business development centre and sometimes the Chinese restaurant), a reality that is not unique to this community or courthouse. The equality rights guaranteed by s. 15 of the *Charter*, in their 35-year history, have had relatively little impact on the many ways that inequality pervades Canadian sentencing law.[1] The promise of s. 15 has largely flown high above the daily machinations of criminal courts and places of punishment.

However, in *R. v. Turtle*,[2] a provincial court sentencing proceeding for impaired driving that involved a constitutional challenge brought by six

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[1] See, *e.g.*, Jennifer Koshan & Jonnette Watson Hamilton, "The Adverse Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights" (January 4, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/01/Blog_JK_JWH_Boudreault_Dec2018.pdf.

[2] *R. v. Turtle*, 2020 CarswellOnt 14248 (Ont. C.J.), reported *ante*, p. 382.

Indigenous women (Sherry Turtle, Audrey Turtle, Loretta Turtle, Cherilee Turtle, Rocelyn Moose and Tracey Strang), Canadian substantive equality touched down in Treaty 5 Territory. The women had all been convicted of a second impaired driving offence, and were facing mandatory minimum sentences of not more than 90 days. They were also eligible under the terms of s. 732 of the *Criminal Code* to serve these sentences intermittently. On October 2, 2020, Justice David Gibson held that "the unavailability of an intermittent sentence to on-reserve members of the Pikangikum First Nation, and those similarly situated, for violation of the mandatory minimum sentence provisions of s. 255 of the Code, violate[d] s. 15 of the Charter."[3] This infringement of substantive equality, based on the ground of "Aboriginality-residence" (in this case, living on-reserve) was not a reasonable limit under s. 1 of the *Charter* and, as such, the six applicants were entitled to *Charter* relief.[4] After the *Charter* claim was filed and before it was heard, the Crown had undertaken to make the temporary absence program available to the applicants (but not to others from the community or elsewhere who faced the same barriers) and they had also offered, quite extraordinarily, to fly the applicants back and forth to the Kenora jail, at the Crown's expense, if they were given intermittent sentences. Calling the Crown's undertakings "some questionable legal rope-a-dope,"[5] Justice Gibson decided the substantive *Charter* claim over the Crown's objection that it was moot.

The roots of the claim stretch back to a time before Canadian law was applied in Pikangikum. Early in his reasons, Justice Gibson wrote: "The question at the heart of this joint application, namely, whether particular Criminal Code provisions of general application have an unconstitutional impact on Pikangikum First Nation residents, requires a close look at the history of the people of Pikangikum, their place in Canadian confederation and what it means for them to be equal under the law."[6] In finding

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[3] *Turtle*, para. 153.

[4] As a provincial court judge, Gibson J. did not have jurisdiction to declare the *Code* provisions invalid pursuant to s. 52 of the *Constitution Act, 1982*. However provincial court judges do have the power to determine the constitutionality of a law where it is properly before them since no one can be convicted under an unconstitutional law: *R. v. Lloyd*, [2016] 1 S.C.R. 130, 27 C.R. (7th) 205 (S.C.C.), *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.).

[5] *Turtle*, para. 141.

[6] *Turtle*, para. 13.

that unconstitutional impact, the substance of Justice Gibson's analysis is worth a closer look, both to appreciate a rare victory of this kind and to consider the possible future of the sort of reasoning employed in this case for challenging the mass incarceration of Indigenous people through s. 15 of the *Charter*.

The judge was aided by counsel for the women being sentenced, intervenors with expertise, including the Pikangikum First Nation and Aboriginal Legal Services, as well as elders and other witnesses with deep knowledge of the community and the history of Crown-Indigenous relations in Treaty 5 Territory. Judge Gibson's decision refuses the doctrinally approved separation between Treaty and *Charter* issues. It challenges the usual foregrounding of individual responsibility in criminal matters, instead working to grapple with the Canadian state's past and present responsibility for the "corrosive effects of colonization" on the people of Pikangikum — a responsibility that goes beyond the criminal legal context of sentencing and incarceration.

The reasons in *Turtle* do not take refuge in doctrinally neat aspects of the complex and difficult context of the case. They are much longer, at 36 pages, than one might expect of a provincial court sentencing, and they contain so much worthy of close attention: the rare and resource-intensive intervention by a First Nation and an Indigenous justice organization in a provincial court criminal proceeding; the significance of rurality and remoteness in questions of access to justice; the decision to focus on s. 15 rather than s. 7 or 12 which are generally seen to have more purchase in the criminal legal context; the voluminous evidence given by current and former Chiefs of the First Nation, community members and Elders, various government officials, and a historian of Crown-Indigenous relations and treaty making to prove the s. 15 claim; and a further claim by the Pikangikum First Nation that they have a treaty right to work with the Crown to administer criminal justice in a manner consistent with their autonomy and laws, along with a corresponding governmental duty to consult with them, rooted in s. 35 of the *Constitution Act, 1982* and the honour of the Crown.

Our commentary focuses on the way the s. 15 claim is dealt with, through the doctrinal requirements of a ground of discrimination, a distinction made, and substantive discrimination, although this discussion engages tangentially with many of the issues raised above. This case reveals important connections between and among sentencing practice, the equality provisions of the *Charter*, and treaty relationships. We con-

clude that this case is important for the way it identifies ongoing Crown obligations in respect of criminal justice in First Nations communities, obligations that are not met by the quick fixes offered here, nor to a great extent by the regime set up by s. 718.2(e) of the *Criminal Code* and *Gladue*.[7]

Reversing the Gaze

Indigenous commentators have noted the appetite of settler audiences for narratives of Indigenous trauma and brokenness.[8] These approaches, writes Eve Tuck, work ". . . from a theory of change that establishes harm or injury in order to achieve reparation" — and "[i]n many ways, the underlying theory of change is borrowed from litigation discourse."[9] Tuck's antidote is "researching for desire,"[10] an approach which would both centre "wisdom and hope" in communities and insist on exposing not burying "ongoing structural inequity".[11] Cases like *Turtle* obviously engage in some of this damage discourse. For example, Justice Gibson cites the 2012 *Maclean's* article which named Pikangikum the "suicide capital of the world" in a story about the heartbreakingly high suicide rates and clusters of suicides, including amongst children under 13. Gibson J. uses the citation in support of his view that the government's failure to honour the Treaty provisions about alcohol have been a key part of the trauma that the community, families and people of Pikangikum have experienced since about the 1960s. Nevertheless, the level of harm and

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[7] For discussion of the way that *Gladue* sentencing practices may fail to advance the objective of decarceration of Indigenous people, see Marie-Eve Sylvestre & Marie-Andrée Denis-Boileau, "*Ipeelee* and the Duty to Resist" (2018) 51(2) *UBC Law Review* 548. The authors reviewed 655 post-*Ipeelee* sentencing decisions involving s. 718.2(e) and concluding that the section has had limited impact, largely due to a general "resistance by the legal system to pluralism and a challenge to the monopoly of the Canadian State in matters of punishment" at 553-554.

[8] Eve Tuck, "Suspending Damage: A Letter to Communities," (2009) 79 *Harvard Educational Review* 409. Online: http://pages.ucsd.edu/~rfrank/class_web/ES-114A/Week%204/TuckHEdR79-3.pdf

[9] Tuck, *ibid*, 413.

[10] Tuck, *ibid*, 416.

[11] Tuck, *ibid*, 417.

trauma in such a naming is so shockingly high that it may overshadow the way the information is used in support of an argument about structural inequity and the need to work in harmony with the considerable and unique strengths of this community.

On the whole, the reasons of Justice Gibson do better than many others in the sentencing realm, where a damage narrative dominates, and reasons never transcend a framework of individual responsibility, never really pursue the structural, settler-colonial context, and never attend to what community members think, believe, understand and want. Justice Gibson's insistence that the next phase be consultative, both in the micro (sentencing for the *Turtle* defendants involving the community's elders as well as Chief and Council) and macro (between the federal government and Treaty 5 nations about broken treaty promises and future governance of criminal justice), recognize the self-determination and laws of the community of Pikangikum. In a variety of ways, Justice Gibson was convinced by the community and the lawyering to move beyond a discourse of crisis around Indigenous mass incarceration.

Efrat Arbel has argued that using the language of "crisis" in cases like *Gladue* and *Ipeelee* fails to "meaningfully assign legal responsibility for the 'crisis,' and instead, disperse[s] responsibility for its production."[12] Drawing on the notion of constitutional ordering in Gordon Christie's scholarship,[13] Arbel contends that describing Indigenous mass incarceration as a crisis, without meaningfully identifying state responsibility for that state of affairs, results in "deepening and strengthening Canada's colonial narrative. The effect is to distance, and even disappear legal responsibility for ongoing colonial violence,"[14] thereby failing to disrupt the conditions and processes that produce Indigenous mass incarceration. Commenting on the *Turtle* decision, defence counsel John Bilton described the court's approach as "reversing the gaze on the justice system," noting that he borrowed the phrase from Cree artist Kent

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[12] Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34(3) *Canadian Journal of Law & Society* 437 at 439.

[13] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw, and Haida Nation," (2003) 23(1) *Windsor Y.B. Access Justice* 17.

[14] Arbel, *supra* note 12 at 439.

Monkman.[15] Bilton says that "[i]nstead of looking at the suffering [in Pikangikum] that we are attempting to solve and failing miserably, we should consider that what we are observing are the symptoms of our own disorder." The lengthy decision in *Turtle* succeeds in reversing, even momentarily, the colonial legal system's gaze, normally focused on individual responsibility or brokenness. In Justice Gibson's view, overincarceration of Indigenous people should not be the focus: "the issue is not overincarceration, per se, but rather the direct extension of the corrosive effects of colonialization."[16] Analyzing equality in this context requires engagement with the failure of government actors to fulfill treaty obligations to the people of Pikangikum while bringing the full force of the criminal law down on them, locking up community members in shocking numbers,[17] and denying them access to the intermittent sentence regime which mitigates some of that harshness for others subject to those punishments.

Section 15: Grounding the Claim

Turtle is superficially somewhat similar to *R. v. Sharma*,[18] a recent successful s. 15 claim at the Ontario Court of Appeal. Both use s. 15 of the

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[15] Jody Porter, "Duty to consult extends to administration of justice in First Nations, lawyer says," CBC News (9 October 2020), online: https://www.cbc.ca/news/canada/thunder-bay/pikangikum-court-ruling-1.5756075. See also Katherine Brooks, "Kent Monkman, Aka Miss Chief Eagle Testickle, Confronts Native American Myths," HuffPost US (21 May 2014), online: https://www.huffingtonpost.ca/entry/kent-monkman_n_5360583?ri18n=true (where Monkman describes how he inserts a fictional, gender-bending character, Miss Chief Testickle, in his paintings to "reverse the gaze. She looks back at European settlers.")

[16] *Turtle*, para. 100.

[17] Ninety-four percent of the people incarcerated in the Kenora District Jail are Indigenous people from communities such as Pikangikum. (*Turtle*, para. 102.) According to records of the Ontario Provincial Police, between January 1 and March 4, 2019, there were 600 individual lock-ups in Pikangikum and 1,450 calls for service from a population of 3,200 people. (*Turtle*, para. 87.)

[18] *R. v. Sharma*, 2020 ONCA 478, 65 C.R. (7th) 1 (Ont. C.A.). In *Sharma*, the successful challenge to ss. 742.1(c) and 7421(e)(ii) preclusions of conditional sentences was analysed as a case in which adverse effects were created on the basis of "race" for Aboriginal people thus "undermin[ing] the purpose and reme-

Charter against the grim requirements of sentencing and its impact on Indigenous peoples, and both are adverse impact cases, but the details of the claims are quite different, as are the decisions. The core of the claim in *Turtle* is about the authorization of intermittent sentences in s. 732 of the *Criminal Code*. Unlike *Sharma*, in which the adverse effects claim was built on the ground of race, the claim in *Turtle* is refers to a specific place, and a specific people.

To make out a violation of s. 15, claimants must demonstrate that the law or action "on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[19] *Turtle* is a claim about the disproportionate impact of "a seemingly neutral law . . . on members of groups protected on the basis of an enumerated or analogous ground."[20] Adverse effects discrimination has long been recognized under s. 15(1) of the *Charter*, but the most recent case from the Supreme Court, *Fraser* (released just 14 days after *Turtle*) provides some helpful clarity on the required evidentiary bases for such claims — and also reveals a rather nasty split on the Supreme Court on these precise questions.[21] If anything, *Fraser* bolsters the reasoning in *Turtle*, at least in terms of evidence and adverse impact claims.

In *Turtle*, the basic s. 15 claim is that people like the claimants who live on the reserve at Pikangikum are disproportionately denied access to the benefits of s. 732 of the *Criminal Code* which authorizes intermittent sentences. It was agreed amongst the parties that "it is financially and logistically prohibitive" for these defendants "to travel to and from [Ke-

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dial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested in overincarceration within the criminal justice system. . . ." (para. 79). For commentary on *Sharma*, see Benjamin Ralston, "*R v. Sharma*: Addressing Systemic Discrimination in the Criminal Justice System" *ante*, p. 367; Patricia Barkaskas & Emma Cunliffe, "Too many Indigenous women are in prison — but sentencing flexibility will help (Opinion)" *Macleans (Online)* (June 7, 2018), online: <https://www.macleans.ca/opinion/too-many-indigenous-women-are-in-prison-but-sentencing-flexibility-will-help/>.

[19] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (S.C.C.) at para. 27.

[20] *Fraser*, *ibid*, para. 30, citations omitted.

[21] *Fraser*, *ibid*, paras. 56–75.

nora], from weekend to weekend, at their own expense, to serve out their sentence."[22]

The ground of discrimination analysis in *Turtle* is rather tricky. Rather than rely on race or engage in an effort to establish a new analogous ground, the claim rests on *Corbiere v. Canada (Minister of Indian & Northern Affairs)*,[23] in which the Supreme Court of Canada held that "whether an Aboriginal band member lives on or off the reserve" is an analogous ground. In *Corbiere*, the successful claimants were members of the Batchewana First Nation living off the reserve. They argued that s. 77(1) of the *Indian Act*, which required that band members be "ordinarily resident" on the reserve to vote in band elections, violated s. 15 of the *Charter*. The court held that "Aboriginality-residence" (in that case, off-reserve band member status) was a new analogous ground. As the grounds cases generally have concluded, analogous grounds will "always stand as a constant marker of potential legislative discrimination."[24]

The challenge for the *Turtle* defendants, of course, is that they are on the other side of "Aboriginality-residence" from the claimants in *Corbiere*. While *Corbiere* is silent on this issue (the leading reasons on grounds explicitly declined to decide whether being resident on reserve would also meet the grounds requirement),[25] the more recent Court decision in *Kahkewistahaw First Nation v. Taypotat*[26] suggested that evidence and argument would be required to establish on-reserve status as a ground.[27]

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[22] *Turtle*, para. 4.

[23] [1999] 2 S.C.R. 203 (S.C.C.).

[24] *Corbiere*, *ibid*, para. 10.

[25] *Corbiere*, *ibid*, para. 62 per L'Heureux-Dubé J., ("'off-reserve band member status' is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.").

[26] [2015] 2 S.C.R. 548 (S.C.C.).

[27] *Kahkewistahaw*, *ibid*, paras. 10–14, 26. The grounds analysis in *Kahkewistahaw*, which challenged an educational attainment requirement for election to Band Council positions, is quite complex, in part because of the way the case was argued. At trial, the claimant argued that "educational attainment" was analogous to race and age. He lost. On appeal, he argued that "residential school

Turtle takes up that challenge. Provided with considerable evidence about "the history of the Pikangikum First Nation and its place in Canadian Confederation,"[28] Justice Gibson decided that on-reserve residence" is also a "constant marker" of potential discrimination.[29]

After considering the evidence, Gibson J. speculated that Canadian constitutional text and the facts would support bringing the s. 15 claim on the enumerated ground, of "national . . . origin".[30] But because he had not heard "full argument" on that point, he decided he was "satisfied that, at a minimum, the Applicants have established they fall with [sic] an analogous ground category for the purposes of my current analysis."[31] Closer to the end of the decision, he seemed to use the Treaty to define the people affected: "The legal regime I have been asked to consider in this application, though neutral on its face, treats the people of Treaty #5 as second-class citizens."[32]

The distinction required to meet a second key part of the s. 15 test is relatively quickly dealt with ". . . being deprived of the opportunity to serve a jail sentence intermittently because of their status as on-reserve band members of the Pikangikum First Nation, constitutes the deprivation of a legal benefit . . . [and] creates a distinction in law between

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survivors without a Grade 12 education" were an analogous group, but the Federal Court of Appeal found that the relevant grounds were "age" and "residence on a reserve." At the Supreme Court, he argued that the group was "older community members who live on a reserve." The Supreme Court concluded there was "virtually no evidence" about the relationship between age, residency on a reserve and education levels in the particular community.

28 *Turtle*, para. 30.

29 *Corbiere*, *supra*, note 23, para. 8 ("The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination").

30 This confirms that there are highly undertheorized but important issues around the different ways that Indigenous identity and/or status is understood, experienced, and translated in anti-discrimination claims. See, *e.g., Sharma*, *supra*, note 18.

31 *Turtle*, para. 58. We do not read this line as suggesting that Gibson J. was confining his "analogous ground" decision to this case only, although others may disagree. As *Corbiere* suggests, analogous grounds are permanent markers.

32 *Turtle*, para. 126

themselves and other members of the general public."[33] As in *Sharma*, the Crown had taken the position that there was no distinction created by the intermittent sentence regime. Rather, there was "general discrimination."[34] The Supreme Court has now, in *Fraser*, said more about what is required to illustrate a "distinction."[35]

The Treaty Context of Discrimination: "an enduring relationship based on solemn promises"

At least part of what makes the decision unique and important is the centrality of Treaty 5 to establishing this discrimination claim. The most obvious relationship between ss. 35 and 15 would be in the text of s. 25 of the *Charter,* a little-used section which guarantees that the *Charter* rights will not be "construed so as to abrogate or derogate from, [*inter alia*] . . ., treaty rights.[36] *Turtle* offers a new way of thinking about how treaties might play a role in *Charter* analyses. The attachment of the people of Pikangikum to their land, the content and meaning of Treaty 5, and the erosion of many social structures through deliberate interventions of settler peoples and the Canadian state, including those structures that deal with wrong-doing and harm in the community, are critical pieces of the legal and factual context of this discrimination claim.[37] This is especially so in the last stage of s. 15, the discrimination analysis.

The evidence of historical and ongoing disadvantage in this case is overwhelming. Indigenous people living on this remote reserve live lives marked by some of the most harmful effects of colonization, dispossession, deprivation, and criminalization. The litany of colonial harms experienced by Indigenous people are commonly cited in *Gladue* sentencing cases where the ultimate question is supposed to be a fit sentence for the individual before the court. Crucially, in *Turtle* the judge refuses to separate this context from the operation of the sentencing regime itself,

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[33] *Turtle*, para. 59.

[34] *Turtle*, para. 63.

[35] *Fraser*, *supra* note 19 at paras. 41–52.

[36] Among the relatively rare treatments of this provision is Justice Bastrarache's decision in *R. v. Kapp*, [2008] 2 S.C.R. 483, 58 C.R. (6th) 1 (S.C.C.) (concurring in the result but writing for himself on s. 25).

[37] *Turtle*, paras. 35–56.

despite the suggestion of the Crown.[38] The reasons rely substantially on the fact of a Treaty relationship between Canada and the people of Pikangikum. Justice Gibson interprets the responsibility of the Canadian state, therefore, not only through s. 15 and the *Criminal Code*, but also through the Treaty. He writes, based on the testimony of the Chief at Pikangikum, Dean Owen; Mr. Lloyd Comber (a band member from Little Grand Rapids First Nation); Dr. Janet Armstrong (an expert in Crown-Indigenous history and treaty making) and others that the Treaty was understood by the Anishinaabe signatories as "an agreement for mutual assistance." However, the Treaty relationship has deteriorated into "an exercise in the crudest form of colonization."[39] The refusal of the government to "fulfil its solemn treaty promise to assist"[40] is part of the finding of discrimination.

Gibson J.'s description of the effects of colonization focuses in two main areas. First is the replacement of traditional lifestyles with "dependency"[41] through deliberate efforts to replace Anishinaabe religious practices with Christianity,[42] resource competition and depletion through settler behaviours,[43] the removal of children to residential schools, "child welfare programs and social assistance payment."[44] Second is the development of widespread abuse of alcohol and other addictive substances on the reserve since the 1960s.[45]

Treaty 5 includes a promise from Canada that ". . . all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves, or living elsewhere within Her North-west Territories, from the evil influence of the use of intoxicating liquors, shall be strictly enforced."[46] The historical evidence presented in the case establishes that the Indigenous signatories were concerned that intoxicants posed harm to

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[38] *Turtle*, para. 63.

[39] *Turtle*, para. 97.

[40] *Turtle*, para. 99.

[41] This word is repeatedly used, see *Turtle*, paras. 80, 85, 99.

[42] *Turtle*, paras. 74–78.

[43] *Turtle*, paras. 79.

[44] *Turtle*, paras. 80, 99.

[45] Turtle 82.

[46] Cited in *Turtle*, para. 88.

the community. Justice Gibson notes that "the effects of alcohol abuse in Pikangikum are rampant and have become devastating,"[47] notwithstanding attempts by the First Nation to keep alcohol out of the community. But the federal government has not provided assistance. Testimony in the case indicated that the local Ontario Provincial Police (OPP) did not know the details of the relevant bylaw about alcohol. The Federal Crown, who would have to prosecute any charges laid under the bylaw, did not participate at all in the proceedings. Justice Gibson's subsequent comments on this issue are sharp: ". . . the Crown very clearly is neglecting its treaty obligations by not to [sic] enforcing the laws restricting the use of alcohol in Pikangikum as it promised to do by the terms of Treaty #5. This neglect has had direct and catastrophic consequences for the people of Pikangikum."

Another link with the treaty context and state responsibility is made through recognizing that all of the women being sentenced in this case were mothers, primary caregivers to young children. The context here is stark. Seventy-five per cent of the population of Pikangikum is under 25. One of the women, Tracy Strang, was caring not only for her five children, but also her sister's four children. The s. 15 discrimination analysis incorporates an understanding of the profound and harmful impact of the incarceration of Indigenous women on their children, and the long history of family separation which has so defined the Canadian state's relationship to Indigenous peoples, and been the cause of so many different forms of loss.[48] After noting that "removing mothers from their children

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[47] *Turtle*, para. 90.

[48] The rights of children are not independently argued here but that is an additional layer and potential for future s. 15 or other *Charter* arguments. Canadian courts have, on the whole, paid little attention to the rights and well-being of children in sentencing their parents. See Canadian Friends Service Committee, *Considering the Best Interests of the Child When Sentencing Parents in Canada* (December 2018), online: https://quakerservice.ca/wp-content/uploads/2018/12/Considering-the-Best-Interests-of-the-Child-when-Sentencing-Parents-in-Canada.pdf. However, a recent British Columbia Court of Appeal decision provides a rare example of taking these interests seriously, particularly in the context of Indigenous families and the intergenerational impacts of colonial dispossession, residential schools, and child welfare interventions. In *Sheck v. Canada (Minister of Justice)*, 2019 BCCA 364 (B.C. C.A.) a majority of the British Columbia Court of Appeal allowed a judicial review application of an extradition decision made in respect of an Indigenous man. Justice Griffin held that, in con-

for extended periods of time will undoubtably exacerbate existing problems in this vulnerable and destabilized First Nation,"[49] Justice Gibson stated, "it is very hard not to notice the grotesque similarities between these kinds of 'correctional institutions' and residential schools that have caused such lasting damage to indigenous communities."[50]

The focus on the Treaty relationship limits the ways that *Turtle* raises the possibility of challenges on behalf of all "rural Canadians . . . located great distances from the closest correctional facility,"[51] or perhaps more narrowly rural mothers. This concern was clearly on the mind of the judge and hence the parties in argument.[52] However, the way the s. 15 claim is analyzed through particular attention to the Treaty history and contemporary realities of Pikangikum may eliminate any easy effort to analogize.[53] The reasoning in *Turtle* is based on much more than distance. Likewise, the way that Justice Gibson dealt with the s. 12 claim seems to foreclose using *Turtle* for such arguments. He states that "the discrimination against the Applicants is cruel, in the colloquial sense, but I am not satisfied it constitutes a stand-alone s. 12 violation in the sense that the punishment is grossly disproportionate. If that were so, independent of the inequality claim, this claim could be advanced by any rural Canadian unable to serve an intermittent sentence."[54] It seems that *Turtle*

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sidering the personal circumstances of Mr. Sheck and his children, the Minister failed to consider their Indigenous heritage and the context of the historical mistreatment by Canada of Indigenous families which forcibly separated children from their parents and culture, which were relevant factors in light of the much more severe sentence Mr. Sheck faced in the US if convicted.

[49] *Turtle*, para. 100.

[50] *Turtle*, para. 104.

[51] *Turtle*, para. 8.

[52] See especially *Turtle*, paras. 8, 151. The question of other rural Canadians in these arguments is raised at the beginning and the end of the written reasons.

[53] There is no s. 15 case law directly on point. The Supreme Court case law has either directly rejected these grounds as in "geographic residence" in *R. v. Turpin*, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97 (S.C.C.) or, at least, not accepted them yet as in "family status" which was part of the claim in *Fraser*.

[54] *Turtle*, para. 151.

does not directly advance s. 12 arguments based on difficulty of access to less burdensome sentencing options due to distance and cost of travel.[55]

In the conclusion of the s. 15 analysis, the way the Treaty has figured as a key part of the context in which discrimination is occurring is clear: "where the Pikangikum people's traditional lifestyle has been disrupted . . . while the government refuses to fulfil its solemn treaty promise to assist, any legal regime of that government that has the effect of extending the damaging effects of colonialization, will be wrongfully discriminatory."[56]

After establishing the violation of s. 15, (and as is quite common in these cases) Justice Gibson's s. 1 analysis is cursory at best, consisting of three paragraphs. He relies substantially on *Sharma* to find (*inter alia*) that the Crown cannot meet the minimal impairment requirement because of the way the mandatory minimum deprives the sentencing court of options.[57]

The way that the s. 15 analysis in *Turtle* is built around an understanding of Treaty 5 appears unique in s. 15. Much more familiar is the usual doctrinal siloing of the *Charter* and the provisions of s. 35 of the Constitution. But there is a doctrinal soundness to the way *Turtle* puts them together inside the substantive equality analysis at s. 15. In the same way that s. 15 equality "values", but not doctrinal requirements, have been influential in a number of cases involving *Criminal Code* provisions,[58]

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[55] See also *R. v. Black*, 2018 ONSC 1430 (Ont. S.C.J.) in which the lead lawyer for the first claimants in Turtle, John Bilton (joined by the Nishnawbe-Aski Legal Services Corporation as intervener) tried but failed to preserve the decision of a sentencing judge that a Pikangikum resident could serve his sentence in the local lockup. The appeal was allowed.

[56] *Turtle*, para. 99 (the use of the word "wrongfully" here seems designed to respond to Justice Miller's dissent in *Sharma*, in which he uses the word wrongful repeatedly and argues that the Supreme Court of Canada decision *Kahkewistahaw* is contrary to *Andrews* and wrong: *Sharma*, para. 189 (per Miller J., dissenting). Justice Miller's alarm about the implications of Canada's adverse effects doctrine is significantly echoed by the dissenting justices in *Fraser*. However, the split between the dissent and majority decision in *Fraser* could not be clearer. Justice Miller's views as expressed in *Sharma* have not carried the day in the Supreme Court's latest s. 15 case.

[57] *Turtle*, para. 108.

[58] Hogg, Peter W, "Equality As a Charter Value in Constitutional Interpretation" (2003) *The Supreme Court Law Review: Osgoode's Annual Constitutional*

this case reveals possibilities for the way that treaties between the Crown and First Nations create a particular relationship between the parties which become a critical part of the context of their other (legal) encounters.

Of Quick Fixes, Limits and Next Moves

The response of the provincial Crown to the *Turtle* claim demonstrates the energy and resources Canadian government actors will expend to avoid a finding of even partial state responsibility for Indigenous mass incarceration. The court refused to allow the Crown's quick fix for the *Turtle* claimants — one-off access to the temporary absence regime or shuttling these women back and forth to the Kenora jail at the Crown's expense — to derail a substantive inquiry into the merits of the claim, noting that "the need for an ad hoc 'work around', in my view, is one of the hallmarks of an unconstitutional legal regime."[59] The concrete result in *Turtle* was contained, in part due to the limited jurisdiction of the provincial court judge, but perhaps the Crown could see the potential impact of a successful s. 15 challenge based in these facts and reasoning. The spectre of a slippery slope to invalidating a whole range of sentencing (and other criminal) laws loomed large for Justice Miller in dissent in *Sharma* and seemingly for the Crown in *Turtle*. It is a common response to adverse impact claims. But rather than acceding to the Crown's "nothing to see here" approach, the decision in *Turtle* makes room for a meaningful substantive equality inquiry, locating significant responsibility for systemic discrimination (too often assigned to Indigenous individuals as "*Gladue* factors") with the state. The criminal law is so relentlessly individualizing. Constitutional claims like this one provide a wedge to crack those assumptions open, to momentarily reverse our gaze toward the systemic, the structural, and the community.

In *Turtle*, Justice Gibson decided that his obligation in sentencing the defendants was to "harmonize our approaches to sentencing with traditional understandings of justice."[60] He committed to a process of consultation with elders around a fit sentence. He declined the request of the

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Cases Conference 20, online: https://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/5.

[59] *Turtle*, para. 139.

[60] *Turtle*, para. 110.

intervener Pikangikum to "make a declaration that the Government of Canada has an obligation, pursuant to Treaty #5, to consult deeply with the community about the way justice generally is administered in its community"[61] (on the basis that issues about treaty interpretation require a proper forum and full participation by all parties). He nevertheless concluded that, obligation or not, it is in the Crown's best interests to consult deeply with the Pikangikum Nation.

Shortly after the decision, Grand Chief Alvin Fiddler, of Nishnawbe Aski Nation (an umbrella organization representing 49 First Nations in James Bay Treaty No. 9 and the Ontario portion of Treaty No. 5), said in a press release: "I urge the Crown to not waste time by seeking an appeal and seize this opportunity to transform the administration of justice."[62] He told a reporter: "I would ask that the province . . . acknowledge, recognize what this means and to reach out to communities like Pikangikum or NAN to begin the process on how we can fix this . . . We need to do it quickly."[63] The irony of the word quickly in this context will not have been lost on the Grand Chief.

Conclusion: Not a Crisis but a Failed System

The decision in *Turtle* was read out in the Kenora Courthouse on October 2, 2020. The 36-page opinion took almost all day to read out, in part because it was read in both English and Anishinaabemowin (a language fluently spoken by most Pikangikum residents). The claim in *Turtle*, and the decision which validates so much of it, represent yet another call to recognize the ongoing harms and injustices of colonialization, and to remedy these through greater recognition of Indigenous self-determination and the value of Indigenous legal orders. These calls are not new,

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61 *Turtle*, para. 112.

62 *Nishnawbe Aski Nation*, (Press Release) "Landmark Decision in Pikangikum Constitutional Challenge Shows Need for Justice Transformation," (October 5, 2020) online: <https://www.nan.ca/news/landmark-decision-in-pikangikum-constitutional-challenge-shows-need-for-justice-transformation/>.

63 Shari Narine, "Ruling on intermittent sentencing for remote First Nations members will have widespread implications", *thestar.com* (October 6, 2020), online: <https://www.thestar.com/news/canada/2020/10/06/ruling-on-intermittent-sentencing-for-remote-first-nations-members-will-have-widespread-implications.html>.

and they are not rare. What is meaningful about *Turtle* is the way that it places state failures and Indigenous nationhood at the heart of the issue. The state failures here take centre stage, and there are many, from broad policy decisions, to neglect, right down to the Crown's approach to the litigation. Through this framing, the decision avoids, as Arbel suggests we should, discourse about a crisis of overincarceration and it foregrounds, as Tuck indicates we must, broad state held responsibility for present structural conditions. Arguably, the focus on Indigenous self-determination as a route to justice has also mitigated some of the ways in which litigation demands narratives of community damage.

We do not wish to overstate the potential of this one decision to provide a meaningful remedy for the deep injustices at the heart of the claim. Another read of *Turtle* would see the decision as just one in a long line of recent efforts by settlers and their institutions to redeem *themselves* through telling these stories and making pronouncements. On this account, *Turtle* should not be seen as a shining example of how Canadian law can turn on itself, bringing transformative change in and through its own doctrines. Instead, it would be a reminder to maintain a critical eye on the claims made about Canadian law and the ways it continues to subordinate and pathologize Indigenous communities while glamourizing, comforting and centering non-Indigenous institutions and actors. Jody Porter and Hayden King have both written about this possibility in relation to the recent rediscovery of the story of Chanie Wenjack, an Anishinaabe boy who escaped from residential school and died attempting to make the long journey home.[64] Many will know this project, spearheaded by Gord Downie, the late lead singer of the popular band The Tragically Hip, under the title "The Secret Path."[65] This project, writes Dr. King, ". . .reflected a sense of self-importance, which betrayed the spirit of much that came before it. The decision to determine and articulate what is said and is not reconciliation belongs to survivors."[66]

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[64] Jody Porter, "Pathfinding" (October 20, 2020), online: Maisonneuve<https://maisonneuve.org/article/2020/10/20/pathfinding/>.

[65] See www.secretpath.ca.

[66] Hayden King, "The Secret Path, Reconciliation & Not-Reconciliation" (October 19, 2016), online: <https://biidwewidam.com/2016/10/19/the-secret-path-reconciliation-not-reconciliation/>.

Mindful of this caution, we think it is worth noticing a decision like *Turtle* and reflecting on the potential of its analysis and approach. The s. 15 analysis in *Turtle* is generally consistent with the most recent Supreme Court of Canada decision in *Fraser*. The use of the Treaty and the obligations it creates as part of the contextual analysis of discrimination is more novel but not contrary to existing doctrines. And it seems at least possible that this decision will not be appealed, so that beyond the sentencing outcome for the claimants, we are now waiting to see whether the Nishnawbe Aski Nation and Pikangikum will be consulted about how criminal justice could be meaningfully done in Treaty 5 communities. Cases like *Turtle* offer communities and lawyers new arguments. They remind Crown attorneys not to impede efforts to have important issues litigated. They raise important questions about the forms of equality provided in our criminal justice system. By bringing legal logics to specific places, people and histories, cases like this force these abstractions into new configurations capable of mapping onto the particular contours of the spaces in which they land.