ONTARIO COURT OF JUSTICE

DATE: 2020-10-02
COURT FILE No.:

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Sherry Turtle, Audrey TURTLE, Loretta TURTLE, Cherilee TURTLE, Rocelyn R. MOOSE, Tracy STRANG

Before Justice D. Gibson

Heard on May 7, July 30, November 26, November 29, 2019, May 20, June 23, 2020

Reasons for Judgment released on October 2, 2020

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Gibson, D.:

1. Sherry Turtle, Audrey Turtle, Loretta Turtle, Cherilee Turtle, Rocelyn R Moose and Tracey Strang are all band members of the Pikangikum First Nation and each of them live, together with their young children, on the First Nation Territory of Pikangikum.

2. Each of these accused has pled guilty to a drinking and driving offense that, in their circumstances, carries with it a mandatory minimum jail sentence of not more than ninety days.

3. The parties to these proceedings agree it would be open to each of these accused, in the normal course, to request an order of this Court allowing them to serve their sentences intermittently. Indeed, the Crown has acknowledged they would not oppose such requests.

4. The challenge for these defendants is that the Pikangikum First Nation Territory is an isolated fly in community hundreds of kilometers from the nearest district jail in the City of Kenora and it is financially and logistically prohibitive for them to travel to and from there, from weekend to weekend, at their own expense, to serve out their sentences. These are agreed facts for the purposes of these proceedings.

5. Faced with this obstacle, the defendants each brought applications alleging that their inability to mitigate the effect of a mandatory jail sentence because of the practical unavailability of an intermittent sentence violates their right to equal protection under the law, constitutes cruel and unusual punishment and an abuse of the court's process.

6. Given the common ground of these applications, the desirability of using resources efficiently and with the consent of the parties, this Court has directed these applications be heard in one joined proceeding.

7. As the issues in this proceeding began to crystalize, counsel representing the Pikangikum First Nation and Aboriginal Legal Services requested and were granted, on consent, leave to intervene and assist the Court to receive evidence and submissions on the constitutional questions.

8. In preparation for the hearing of the Application, at the case management stage, counsel were asked to be prepared to assist the Court to understand how the position of the Applicants, as members of a First Nation community, differed, if at all, from the position of rural Canadians also located great distances from the closest correctional facility.

9. To respond to this request, counsel have provided me with voluminous materials and valuable viva voce evidence. That evidence includes, among much else, the testimony of then Chief of the Pikangikum First Nation, Amanda Sainnawap, affidavit evidence from the current Chief of Pikangikum, Dean Owen, Mr. Lloyd Comber the testimony of Denis Gauthier, Deputy Regional Director for Northern Institutions at the Ministry of the Solicitor General, testimony from Katherine Curkan, then the Superintendent of the Kenora District Jail, OPP Staff Sargent Matt Norlock, detachment commander in the Pikangikum First Nation community and Dr. Janet Armstrong, historian and expert in Crown-Indigenous history and treaty making.

10. I would like to thank counsel for their comprehensive presentations and through submissions. I have found them extremely helpful in navigating this very challenging litigation. I would also like to extend my gratitude to Chief Dean Owen and Mr. Lloyd Comber for agreeing to share personal details of their lives to assist the Court to understand the history of the Pikangikum First Nation.

11. The Crown opposes this Application, broadly speaking, on two grounds. The first is that the onus is on the Applicants to prove their claims and that they have not done so. The second is that offers they have made to accommodate the defendants that would allow them to serve intermittent sentences have rendered their claims moot and it is no longer necessary to consider them.

12. I have considered the Crown's arguments carefully. It is my view that the issues underlying the Applicants' claims are of significant public importance beyond the individual circumstances of these defendants and it is appropriate they be adjudicated in these proceedings.

13. 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.

14. In working my way toward an answer to that question, I considered it appropriate to begin with section 15 of the Charter and the relevant decisions of the Supreme Court of Canada concerning its proper interpretation.

Charter s. 15

15. Section 15 (1) of the Canadian Charter of Rights and Freedoms (Charter) provides that:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

16. The law as it has been developed in the Supreme Court is clear that in order to establish discrimination contrary to s.15 (1) of the Charter, the onus is on the Applicants to establish that:

1. A government action, either explicitly or in its effect, creates a distinction on the basis of a ground listed in the Charter or a ground analogous to those listed in the Charter; and
2. the distinction is substantively discriminatory because it imposes a burden or denies a benefit in a way that has the effect of continuing, extending or worsening arbitrary disadvantage.

17. The Crown contends the Applicants have failed to meet their onus on either part of this test.

18. In this Application there is no question that s. 732 of the Criminal Code, which authorizes intermittent sentences, treats everyone equally on its face. Intermittent sentences are available to any accused person facing a sentence of 90 days or less

regardless of their personal characteristics. The Applicants' position is rather that, because of where they live, the effect of the law, is to discriminate against them.

19. The case law is clear that not every law that creates distinctions between people or groups of people will be considered to create or perpetuate inequality. The Supreme Court in R v. Andrews [1989] 1 SCR 143 put it this way:

> "It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society."

20. For a legal regime to be questionable under Charter s. 15 it must be said to make a distinction based on an impermissible ground. An impermissible ground includes all those explicitly set out in s. 15 (1) as well as what the Court defined as 'analogous grounds.'

21. If a claimant does not fit within one or more of the characteristics specifically listed in s. 15 of the Charter, the Supreme Court left it open to Applicants to proceed if they could establish their situation was analogous to one of the enumerated grounds.

22. According to Justice Wilson in R v. Turpin [1989] 1 SCR 1296:

"... the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is "not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society" p. 1332.

Section 15 Stage One Test

Aboriginal Residency as Analogous Ground

23. In this case the Applicants claim they are unfairly discriminated against because their aboriginal residency makes it impossible for them to benefit from a law of general application.

24. Aboriginal residency as an analogous ground was considered by the Supreme Court in Corbiere v. Canada [1999] 2 SCR 203, a case which raised the issue whether the exclusion of off-reserve band members from the right to vote in band elections pursuant to s. 77 of the Indian Act, was inconsistent with s. 15 (1) of the Charter.

25. When discussing the position of off-reserve band members and their off-reserve status as an analogous ground, Justices Mclaughlin and Basterache, in concurring reasons, agreed with the conclusion of the majority that off-reserve aboriginal residency met the definition of an analogous ground, stating:

> "L'HeureuxDubé J. ultimately concludes that "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. We agree. L'HeureuxDubé J.'s discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.
>
> Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The reality of their situation is unique and complex. Thus, no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration. Para. 14-15.

26. They also took pains to point out such a finding was intended to be conclusive concerning its future status as an analogous ground, stating:

> If "Aboriginality-residence" is to be an analogous ground (and we agree with L'HeureuxDubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme." para. 10.

And clarifying further:

> ...To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case." para.8.

27. In this case, unlike Corbeire, the defendants' claim for analogous ground status is based on their on-reserve rather than off-reserve status. While language in Corbiere, like, "[t]he ordinary "residence" decisions faced by the average Canadians should not be confused with *the profound decisions Aboriginal band members make to live on or off their reserves*, assuming choice is possible." (italics added) might imply that the equally

unique decision to reside on-reserve as an indigenous person, obviously, ought to be treated in the same fashion as its opposite, the Supreme Court cast some doubt on the obviousness of that inference in its subsequent decision in Kahkewistahaw First Nation v. Taypotat [2015] 2 SCR 548.

28. In that case the Supreme Court considered an appeal from the Federal Court of Appeal and said the following:

> The Federal Court of Appeal's decision to raise the issue of residence on a reserve on its own initiative is particularly troubling because "residence on a reserve" has not been recognized as an analogous ground for the purposes of s. 15. *Corbiere* recognized *off-reserve* residence as an analogous ground, but declined to address whether residence on a reserve would similarly trigger the protection of s. 15: paras. 6 and 62. The Court's recognition of off-reserve residence as an analogous ground in *Corbiere* relied in part on the argument that First Nations people living off-reserve have experienced unique disadvantages relative to community members living on a reserve and that, for many, the decision to live off-reserve was either forced or heavily constrained. With respect, I would be reluctant to impose a simple mirror inference without argument or evidence from the parties.
>
> In this case, there was no factual record to support deciding the appeal as a violation of the s. 15 rights of community members who live on a reserve. Para. 26-27.

29. Considering that language, it is necessary, in my view, to conduct a full analysis of whether the Applicants' status as on-reserve band members of the Pikangikum First Nation qualifies as an analogous ground for s. 15 purposes. As Justice Wilson noted above in Andrews, "the determination of whether a group falls into an analogous category...." is to be made "...in the context of the place of the group in the entire social, political and legal fabric of our society" p. 152.

On-Reserve Status as an Analogous Ground

30. To consider properly the context of the defendants' claim for on-reserve status as an analogous ground, I turn to a review of the history of the Pikangikum First Nation and its place in Canadian confederation.

Early History of the Pikangikum First Nation

31. The traditional land use area of the Pikangikum First Nation is a landscape of rivers, lakes, wetlands and boreal forest located at the headwaters of the Berens, Bloodvein, Pigeon and Poplar rivers in north western Ontario.

32. In 2018, in part because of an earlier submission made by the Pikangikum First Nation and four other First Nations in 2013, much of this area was designated by UNESCO as a mixed Natural and Cultural World Heritage site, the first such designation in Canada.

33. Archaeological field research indicates continuous use of the land and resources in this area by Anishinaabe peoples for at least 3000 years with some estimates suggesting. Pimachiowin aki Cultural Landscape Atlas (Atlas), p. 47.

34. The evidence in this proceeding indicates that for thousands of years the people of Pikangikum have had a distinctive relationship with the land in their traditional territory. The words of elder Whitehead Moose describe the essence of that relationship. He said, "Everything that you see in me, it is the land that has mounded me. The fish have mounded me. The animals and everything that I have eaten from the land has mounded me, it has shaped me. I believe every Aboriginal person has been mounded in this way." Atlas, p. 47

35. Dean Owen, the current Chief of the Pikangikum First Nation, filed affidavit evidence in these proceeding and provided the Court with additional perspective on the connection between the land and the people of Pikangikum.

36. He told the Court that in Pikangikum knowledge and history is passed down by Elders in the form of stories. He himself was privileged to learn about his Nation's history from his Grandmother, Peggy Turtle-Hill, who passed away 12 years ago at the age of 104. His Grandmother was a Clan mother, meaning it was her responsibility to provide direction to the community's leadership on important issues.

37. Chief Owen received stories from his Grandmother that had been taught to her by her Mother and her Grandmother and advised me that he had been given permission by his Grandmother and other Elders to share information he knew with the Court.

38. Chief Owen testified:

> Land is very important to the people of Pikangikum. We got everything we needed from the land. We would hunt, trap, fish, gather medicine and grow wild rice. We were a nomadic people who moved with the animals and seasons. It took incredible skill and knowledge to live off the land in the hard winter months. But our people were able to do so for generations.
>
> Our people have always harvested in our traditional territory. In the fall, people would travel to their hunting, fishing and trapping areas and stay there till the spring. This seasonal tradition was about more than just feeding our families; this was how we taught our children our way of life.
>
> The Anishinaabe have our own laws for governing ourselves. These laws come from the Creator. They are not written down but taught. We have lived according to these laws since time immemorial.
>
> Our laws are rooted in our way of life and relationship to the land. They are about relationships and the obligations and the responsibilities which flow from them. For example, we are taught, even from a young age, to never take more than we need. We are taught not to over-harvest and preserve the land and animals for future

> generations. We try to live in accordance with those laws today. (Pikangikum Intervenor Application Record, p. 262.).

39. The record before me indicates that until recently, and for many, many generations before that, the people of Pikangikum followed a way of life that emphasized an internal order maintained through social practices closely related to spiritual beliefs and living off the land.

40. In 1932, one of the first anthropologists to visit Pikangikum, Irving Hallowell, noted that the Pikangikum Band and the Little Grand Rapids Band would split up in the winter into 32 winter hunting groups and at winter's end the groups came back to Pikangikum lake, to the place where the community stands today, to spend the summer together. There, the winter groups spent the summer fishing and engaging in religious and other activities together. He observed that while Pikangikum was clearly a single community, the winter groups retained some separation from one another, and the clan and family-based winter groups clustered together in what might be called a community of communities. (Genowin Disomin/Gunowen Disomin, Keeping Ourselves) p.12.

41. Describing Pikangikum in 1932, Hallowell wrote:

> The inland Indians were still living in birchbark-covered dwellings and except for their clothing, utensils, and canvas canoes, one could easily imagine oneself in an encampment of a century or more before. Women were mending nets, chopping and hauling wood (among their more traditional tasks) and stitching the birchbark covers for their dwellings with spruce roots. They could be seen scraping and tanning skins for making moccasins, for this article of clothing was used by everyone, although rubbers, purchased from the trading post, might be worn over them. Babies were still snugly strapped to their cradle boards, being carried on these useful devices on their mother's backs. Sphagnum moss, so intimately associated with them because the Indians had discovered its highly absorbent and deodorant properties, could be seen drying in the sun in almost every camp. Evidence of the importance of fish at this season was everywhere. Nets were in the water or being mended continually. One net I saw lifted in the middle of July at Lake Pikangikum comprised 30 whitefish, a dozen tullibees, several suckers, and a half dozen other fish of different varieties. Fish caught in the morning and scaled, gutted, and split length wise, could be seen being cured in the sun before being lightly smoked on a rack for longer preservation. Berries were being picked by the women and children. As for the men, they were relatively idle but some...were to be seen making snowshoe frames or canoe paddles. There was frequent dancing on specially prepared ground, sometimes a cage like superstructure such as that used for the Wabanowiwin, although the Grand Medicine Lodge had died out. At night the beat of a water drum often reverberated in one's ears. And when some serious problem demanded help of other than human persons the shaking tent swayed after nightfall as the moon rose behind the tall dark spruces. (Keeping Ourselves), p.11.

42. Hallowell observed that the object of day to day life was to pursue the 'good life'. Right conduct in hunting, fishing and trapping and in social relations would bring good fortune

and health. Inappropriate conduct would bring bad fortune. Spiritual leaders and the spirit were also, he observed, important in promoting the good life. (Keeping Ourselves), p.12.

43. Social order was maintained through the use of Circles. According to the Submission of the Independent First Nations Alliance, of which Pikangikum is a member, to the Royal Commission on Aboriginal Peoples in 1993, "in the summer community, the community leaders met in circles to review what had happened in the winter groups and to maintain order in the summer settlement. Circles were made up of representatives of the smaller winter groups along with the leaders of the summer community and the spiritual leaders... In addition, each of the winter groups had one or more 'designated keepers' whose role was to oversee the matters in the winter groups and report to the Circle upon the return to the summer gathering place." (Keeping Ourselves), p. 17.

44. Jeremiah McKay, a band member of Big Trout Lake First Nation, gave a description of how the Circles ran:

> "If anything went wrong in the little settlements in wintertime, the Keepers would be holding the meetings there. And his role was to keep things going well. If anything, not too serious happened, he would keep the incident to himself rather than try to resolve it immediately. And he would not discuss what he was doing. When the group went back to Big Trout Lake in June, the Chief of the Band would meet with the designated keepers to discuss what had happened over the winter. The Keeper would report to the Chief and that is how the Chief would find out what had happened in the other groups.
>
> The Chief would start working on the problems right away. They would call a circle to discuss the causes. The Chief would bring the person who had been reported into the circle and would say to him " what do you say? Is it true that you did this thing?"
>
> The person who was being asked would usually reply "Yes, it is true." And at that time the Chief would usually start talking to him. After the Chief had finished talking to him, the others would follow. The spiritual leader would be the last to talk to the person. The process worked when it was applied." (Keeping Ourselves), p.19.

45. The Circles were used not only to address wrongdoing but also to discuss sickness or any other matter that might affect the wellbeing of the people. This form of social organization, relying as it did on the practical and spiritual wisdom of elders to navigate a demanding and sometimes harsh environment, appears to have been all that was necessary to maintain peace and order among the people in Pikangikum for countless generations prior to contact with Europeans.

46. The first contact of that kind was made through the fur trade. In 1640, The Company of Adventurers, later to become known as the Hudson’s Bay Company, was granted a Royal Charter by the British Crown to carry on commercial operations in what they named ‘Rupert’s Land’, a territory that included the Pikangikum First Nation’s traditional territory as well as much of what is now northern Ontario, Manitoba, Saskatchewan and Alberta. From 1670 to 1870, other than the occasional missionary, men working in the service of

the Hudson's Bay Company were the only non-indigenous people to visit Pikangikum's traditional territory.

47. The Royal Charter granted to the Hudson's Bay Company gave them the power to pass laws governing their own officers, but it did not grant them the power to interfere with aboriginal title to the territory upon which it conducted its commercial operations. According to Chief Owen, "We had a good relationship with the Hudson's Bay Company premised on trade. In exchange for furs, we would receive tools and implements that were otherwise hard to come by (Intervenvor's Application Record, p. 263.).

48. Beginning in the mid-1800's the then Province of Canada began to exert pressure on the British Crown to assume control of Rupert's Land to encourage westward expansion for settlement and farming. Simultaneously, in the aftermath of the American civil war, the United States was also looking to aggressively expand to the west and north. Indeed, in 1866 a bill was introduced in the U.S. House of Representatives that proposed the purchase of Rupert's Land, including Pikangikum's traditional territory, for annexation.

49. Looking to secure the territory, at least in part, to fulfil its promise to British Columbia to connect it by rail to central Canada, the now Dominion of Canada purchased Rupert's Land in 1869 for 300,000 British pounds. Immediately, it began to negotiate treaties with the Indigenous peoples living there with a view to extinguishing their aboriginal title to the land. According to the Truth and Reconciliation Report:

> Canadian politicians intended to populate the newly acquired lands with settlers from Europe and Ontario. These settlers were expected to buy goods purchased in central Canada and ship their harvests by rail to western and eastern ports and then on to international markets. Setting the "Northwest" -as this territory came to be known- in this manner meant colonizing over 40,000 Indigenous people who lived there.
>
> The Rupert's Land Order of 1870, which transferred much of the Northwest to Canadian control, required that "the claims of the Indian tribes to compensation for lands required for the purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aboriginals." (p.51).

50. Between 1871 and 1877, seven numbered treaties were signed with Indigenous people between Lake Superior and the Rocky Mountains, including Treaty #5 with the people of Pikangikum in 1875.

51. The numbered Treaties were central to Canada obtaining its current territorial integrity and, at the time they were signed, they were vital to its viability as a country. Their centrality to the Canadian identity was affirmed by their incorporation into the Canadian constitution via section 35 of the Constitution Act, 1982 which states:

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

52. The special significance of treaties was described by the Ontario Court of Appeal in Keewatin v. Ontario (Natural Resources), 2013 ONCA 158 (CanLII) in these terms:

> Treaties are solemn agreements and they are intended to last indefinitely. The rights they guarantee are not frozen in time:
> R. v. Marshall, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55; R. v. Bernard, [2005] 2 S.C.R. 220, [2005] S.C.J. No. 44, 2005 SCC 43, at para. 25. Treaties must be capable of adapting to the natural evolution of the Constitution, which evolves as a "living tree" to meet "the changing political and cultural realities of Canadian society": Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, 2007 SCC 22, at para. 23. [para 137]

53. Chief Owen described his perspective on the treaty process between Pikangikum and the Queen in these words:

> "In or around the 1870's, we entered into a Treaty relationship with the Queen. When our Elders speak about the Treaty they talk about a "relationship". Our Treaty relationship with the Queen was very special. My Grandmother told me that the Queen was a Mother to the Anishinaabe. A mother protects her children but also respects their autonomy. This relationship was to last as long as the sun shone, and the rivers flowed...".
>
> "The Treaty is a relationship to share the land and its gifts. In exchange for allowing settlers to live in our traditional territory, the Queen promised that the Anishinaabe way of life would continue "unhindered". Everything would continue as it had before. Our people would be able to hunt, trap, harvest, and fish as we had always done.
>
> We were told that the Treaty would not affect these rights. In fact, the Queen promised us certain goods, such as tools, twine and ammunition, to enhance our way of life. The reserves were meant to be exclusive places for our people to farm and go to school in order to supplement our traditional lifestyle.
>
> The Treaty relationship was intended to provide for a better future for our people and help us adapt to changing circumstances. The Treaty relationship is about mutual assistance. We promised to share our land with the settlers, and in return the Queen promised to respect our way of life and assist us.
> The Queen's representatives never told us that her law would be imposed upon us without our consent. To do so would have gone against the purpose of the Treaty which was to retain our way of life and our autonomy. Our laws are very different from the Queen's. They are inextricably connected to our way of life."

54. The courts have recognized that s. 35 of the Constitution Act, 1982 confers a unique status upon treaty aboriginals within Canadian confederation. Addressing the question, "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?", Justice Lamer wrote the following for the majority in R v. Van Der Peet, 1996 CanLII 216 (SCC):

> "[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." para.31.

55. The Court has also held that aboriginal rights are communal rights and arise from a member's place in an identifiable community. In R v. Powley, [2003] 2 SCR 207 the Supreme Court held:

> Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. (para 24).

56. There can be no doubt whatsoever that Pikangikum constitutes a historic community, indeed it may well be one of the oldest communities in North America. Addressing Pikangikum's current status as a community former Chief Amanda Sainnawap described her community in these terms:

> Pikangikum is a remote Anishinaabe community accessible only by boat or plane for the majority of the year. About 90 % of our band members speak Ojibwe as their primary language. While some speak English in our community, most members prefer and communicate best in our language.
> Our First Nation is unique- the overwhelming majority of our members do not move off-reserve. Instead, they chose to remain and live in our community. We have 3,800 members living on-reserve. I believe this is because of our strong connection to our territory, language and culture. In spite of the many challenges that we face- lack of housing, low employment, and food insecurity- people want to live in Pikangikum. This is their home." Intervenor's Application Record, p.

Analogous Ground Conclusion

57. The recognition that First Nations, like Pikangikum, lived in distinctive societies, that their members are described in s. 35(2) of the Constitution Act, 1982 as "peoples" who have been recognized by our highest Court as holders of community based rights, by virtue of their connection to their land, strongly suggests that the defendants, as on-reserve members of the Pikangikum First Nation, belong to a group enumerated in s. 15 of the Charter, namely, a nation. Considering the description of their home as a "First Nation", that should not be surprising.

58. The Applicants have not advanced the claim they fall within an enumerated group but rely rather on a more limited analogous ground claim for the purpose of this application. Because the enumerated group claim was not the subject of full argument before me, I will not make a definitive finding on the issue, but I am satisfied that, at a minimum, the Applicants have established they fall with an analogous ground category for the purposes of my current analysis.

59. I am further satisfied that 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. It also creates a distinction in law between themselves and other members of the general public. The question remains whether this distinction is discriminatory.

Section 15 Stage Two Test

60. Turning to the second stage of the s. 15 Charter analysis, the recent Ontario Court of Appeal decision in R v. Sharma, 2020 ONCA 478 (CanLII) has described the appropriate procedure for performing that analysis as follows:

> The second part of the analysis focuses on arbitrary or discriminatory disadvantage and asks whether the impugned law "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage": Taypotat, at para. 20; Centrale, at para. 22. The onus on the claimant is to "demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group": Taypotat, at para. 21. However, at this second stage of the analysis, the specific evidence required "will vary depending on the context of the claim" and "'evidence that goes to establishing a claimant's historical position of disadvantage' will be relevant": Taypotat, at para. 21, citing Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 38. In Quebec v. Alliance, the majority clarified that at the second step, "the focus is not on 'whether a discriminatory attitude exists', or on whether a distinction 'perpetuates negative attitudes' about a disadvantaged group, but rather on the discriminatory *impact* of the distinction" (emphasis in original): at para. 28. R.v. Sharma, supra, (para.65).

61. In Sharma, supra, the Court was asked to decide whether the unavailability of conditional sentences for certain categories of offenses had an unconstitutional impact on aboriginal offenders. In describing the evidentiary onus on the Applicant, Justice Feldman, for the majority, said:

> One of the reasons the sentencing judge rejected the s. 15 claim was that he observed, at para. 257, that the court had no statistical information, and found that the record before him did not identify "the real measure and likely or established impact" of any adverse effect in order to determine whether it would qualify as a distinction based on Aboriginal status. He also stated that restricting the availability of conditional sentences for crimes with a maximum sentence of 14 years or life and for certain drug offences would have a minimal impact on Aboriginal offenders, and that only in "a very few cases" would Aboriginal offenders be incarcerated where a conditional sentence would also have been appropriate: at para. 256. R v. Sharma, supra, para. 99.

In rejecting that conclusion, the Court said:

> First, with respect to the error of law, the Supreme Court instructed in Taypotat that while the onus remains on the claimant to establish disproportionate and discriminatory effect, "the specific evidence required will vary depending on the context of the claim, but 'evidence that goes to establishing a claimant's historical position of disadvantage' will be relevant": Taypotat, at para. 21, citing Withler, at para. 38. This principle follows the direction in Law v. Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, that if direct evidence is not available, courts may rely on logical inferences and judicial notice: at para. 77. In this case, it was not necessary to lead statistical evidence to establish that removing the conditional sentence option would disproportionately impact Aboriginal offenders. It was therefore an error of law to require that evidence. Para. 101.

62. The majority in R v. Sharma, supra, in performing its stage two analysis observed that:

> The Crown's position, which was accepted by the sentencing judge, is that the removal of the conditional sentence for the affected offences does not have the effect of exacerbating the condition of overincarceration of Indigenous offenders and therefore does not implicate substantive equality considerations, because sentencing judges retain the discretion to order other sentencing options such as a suspended sentence and probation. The Crown argues that judges are not prevented from giving effect to the remedial objective of s. 718.2(e) and their role as directed by Gladue and Ipeelee. To quote from the Crown's factum: "Judges are still perfectly able to take on that role. They simply have one less tool at their disposal in specified circumstances? Para. 106

63. The Crown takes a similar position in this case. Here the Crown says the Applicants have adduced evidence of general discrimination faced by Indigenous peoples in the criminal justice system and evidence of the socio-economic challenges faced by residents of Pikangikum First Nation. They acknowledge those challenges are real but, they say, they exist apart from the intermittent sentence regime. Further, they take the position there is no evidence before this Court that the intermittent sentence regime itself "wholly causes or contributes to" the disadvantage to members of Pikangikum First Nation convicted of a second drink drive offense.

64. In ultimately rejecting the Crown's position in Sharma, supra, the majority stated:

> The intent of the Act is to incarcerate offenders convicted of certain offences. The reality is that the Act will result in more Indigenous offenders serving their sentences in jail rather than in their communities. Thus, I conclude that ss. 742.1(c) and 742.1(e)(ii) deny the benefit of a conditional sentence in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage of Aboriginal offenders, and is therefore contrary to s. 15 of the Charter.

65. Justice Miller, in his dissenting opinion, would have required something more of the Applicant in R v. Sharma. He summarized the Applicant's claim as follows:

> No one suggests that the legislation discriminates directly. Race, in particular, plays no role in the proposal that Parliament intended to pursue through the legislation, nor in the legislative means chosen to pursue it. So the legislation does not "draw a distinction" in that sense. Instead, the claim is that the legislation has a differential impact on the interests of Aboriginal offenders, and because of this, it treats Aboriginal offenders differently. Para. 228

66. In the respect of being facially neutral but discriminatory in its impact, the Applicants' claim in this case is similar.

67. Justice Miller makes the following critique of the majority's reasoning in R v. Sharma:

> My colleague concludes that, "[b]y restricting the availability of the conditional sentence, the impugned amendments deprive the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction": at para. 130. The systemic discrimination in issue is said to be the overincarceration of Aboriginal persons.
>
> At the second stage of the Andrews test, something more is needed than a determination that a person or group has suffered a setback to their interests as a result of a government action. There must be a determination that the legislative decision, considered in context, is wrongful. Para. 233-34

And expands on his view about what is required at the second stage of the test at paragraph 244 as follows:

> As I argued above, for s. 15(1) doctrine to provide guidance to judges, it must not stop at the determination that a group has been simply disadvantaged, in the sense that there has been a setback to the interests of its members. The analysis must address the further question of whether a person or group has suffered wrongful discrimination, in the sense of not being treated with the concern and respect that is owed to equals. This is necessarily a contextual inquiry that must extend beyond the preliminary issue of whether anyone has been disadvantaged. This contextual analysis is central to the application of the principle of substantive equality – the concept of what it means to treat others as equals and not draw distinctions using irrelevant criteria.

68. In the event it is believed a such a contextual inquiry is, in fact, necessary, it is my view there is ample evidence before me upon which to perform this contextual inquiry in this case.

Contextual Inquiry into Discrimination

69. As described earlier, there is evidence that as late as 1932, people in the Pikangikum First Nation continued to pursue a largely traditional lifestyle, one they had lived for

centuries before entering Treaty #5 with the Crown. Picking up the history from there, I have before me the evidence of Mr. Lloyd Comber, a band member of Little Grand Rapids First Nation.

70. Mr. Comber was born in Pikangikum in 1955. He explained that his parents Maudina and Angus Comber came to Pikangikum in 1930 when his father worked as a freighter for the Hudson Bay Company paddling 1000-pound canoes from Little Grand Rapids to Pikangikum with goods brought by river boat from Selkirk, Manitoba.

71. Eventually, Mr. Comber's father was asked by the Hudson's Bay Company to live in Pikangikum and work as an assistant in the store and as Mr. Comber said, "that's what he did all his life that he was here". Mr. Comber's five oldest siblings were born in log cabins or canvas tents in Pikangikum and delivered by old women who were skilled mid-wives.

72. In those days the community remained rooted in an oral culture and women played an important role in sustaining it. Chief Dean Owen described how, in addition to being a Clan mother with responsibility for providing direction to leadership, his Grandmother, as a young woman, was tasked with traveling back and forth between Pikangikum and Little Grand Rapids to share and provide news.

73. Mr. Comber similarly described how, in the days of his youth, four or five women at a time would paddle across the lake to visit his mother and family and they would sit on the grass and talk about history and what people were doing. Everything was told through stories. He said, "that's how I learned a lot of who I am today, listening to those old women speaking and the old men also".

74. He described how as a younger woman his mother had practiced traditional Anishinaabe spirituality. With the slow, gradual growth of a centralized community, Christian missionaries arrived and eventually most of the families along the Berens River converted to Christianity. He described how as a youngster, "we used to sit on the shoreline in the evening when the water was all nice and glassy, it was calm. And on the north end there used to be an old couple there and I used to listen to their songs. They still practiced. They were one of the last. They never gave in they practiced the spirituality that the Anishinaabe followed Old time religion. And I used to listen to those old people singing, little old voices. Yeah. Some of them did. Some of them never gave in. They never converted to Christianity. But they were the last couple that I know of and that was a long time ago. That was probably back in the mid 60's, early 60's". (Application Record, Vol. 2, Tab 7, Testimony of Lloyd Comber, p.9)

75. That couple kept a drum that was very important in the old traditions of the community. It was one of four community drums held in each of the four related communities along the Berens River: Pikangikum, Poplar Hill, Little Grand Rapids and Pangaussi. Those drums embodied the spirit of each of the communities. They were, according to Mr. Comber, "the pounding, the heart. That's where everything centers. That centers them. That gives them the feeling of belonging. That feeling, that sound your mother's heartbeat, the earth's heartbeat". (Comber Testimony, Ibid p.11).

76. That drum was last seen in the summer of 1969 being taken onto an airplane by a departing principal at the local school. Mr. Comber recalls,

> "my father and I were sitting in the canoe right by the Hudson Bay dock and they were loading up all the teachers in these airplanes, Norseman's and Beavers and what not and my dad asked Mr. Collins, "what are you doing with that drum?" He says, "I bought it." And my dad says, "well, you can't buy those kinds of things. It has to be given to you". And he says, "who did you buy it from?" and he says, "I bought it from that old man's son". "I think he paid something like a hundred bucks or 90 bucks or something for it. At least that's what he told us at the time". (Comber Testimony, Ibid p.10)

77. In time, Mr. Comber's mother, too, became a Christian. He says he spoke to his mother about her memory of traditional practices, "I asked her on several occasions. She says 'I left that behind, I am now a Catholic. That's my religion now'. And she didn't want to talk about any more of the old Medeawin society religious beliefs" (Comber Testimony, Ibid p.11).

78. By the time Mr. Comber was a young man most people in the community had been converted to Roman Catholicism or became followers of the United or Mennonite Churches. He explained that missionaries had come to Pikangikum from Pennsylvania and brought with them skills that were very impressive to the locals, including masonry, carpentry, steel work and the ability to generate electricity. They taught those skills and spread their religion. He described their view of traditional ways,

> "that was the absolute end of, the end of the world. That was like these people, whoever practiced this kind of paganism is going to be ending up in hell for sure. They used to go back and forth, they used to have also have another compound in, they had a school actually, kind of a residential school in Poplar Hill on an island and they used to go back and forth all the time….. But going down about two or three sets of rapids from here, going down on the left hand side is a nice big smooth rock and up on top of this rock is what the locals and all the people up and down the Berens River called the grandfather rocks. And there's a beautiful round rock there and I remember that since I can remember even remembering. And around there used to be these little round, perfect little round rocks. They looked like little marbles, but they're about that big, maybe bigger. And this rock I remember only about that big and almost perfectly round. How and where these were formed, I have no idea. But that was a really respected spiritual place where all the Anishinaabe that went up and down that river. And we used to always stop there when we went down there, we used to always put down either cigarettes, bullets, used to be all kinds of beautiful artifacts there; bead work, there was fresh bullets, fresh food. And all the people still had a connection to that place. But every time the Mennonites would go by there, they would throw these rocks down the hill and into the river to destroy the connection between the native spirituality". (Comber Testimony, Ibid p.19).

He went on to describe a kind of competition where the Mennonites would roll the rocks into the river and the travelers would retrieve them and replace them and how this would happen over and over for many years.

79. Chief Dean Owen explained how settlers also began taking more than they needed and the impact that had on the community:

> For example, the people of Pikangikum use to fish wild sturgeon. We would take no more than a few fish per year for the whole community. We knew this was required in order to sustain the sturgeon population for future generations. The settlers did not respect this. They started coming with huge nets taking countless numbers of fish. To this day we are unable to fish for wild sturgeon."
>
> The regulation and over-harvesting in our traditional territory disrupted our way of life. We were no longer able to live in the way we use to. This affected everything, right down to our diet and physical health. The first case of diabetes in our community occurred in the 1980's, now, 1\3 of our people live with diabetes because we don't have access to our traditional foods. Many of our people have become dependent on the Government. Dependent on welfare just to survive. (Intervenors Application Record, Tab 1, p. 265)

80. A Pikangikum community health needs assessment summaries how the of dependency process began:

> The Hudson Bay trading post was established in Pikangikum in 1925, along with the first mission teachers and church influences. Starting in the 1940's, our community gradually shifted from a local subsistence-based economy to a wider and more cash-based economy.
>
> Around the 1950's and 1960's, the federal government became more directly involved with individual and community life, through such things as residential schools, delivery of Western-style health services, child welfare programs and social assistance payment.

81. Mr. Comber described his experience as a young person caught up in the 60's residential schools and the impact it had on family structures:

> "and I think a lot of the disconnect that started to happen is what happened to me also is I went to the residential school for nine years. And a lot of these youngsters went there too, different ones one of the things that used to happen, and it still does to a certain degree, and like I said at the beginning of my talk, is they used to have this thing they called "tell me your story" in Ojibway. Now how do you tell your mother or your father, your grandmother, the people you love the most, how do you tell them after you've been gone for the winter, how do you tell them that you got buggered up the ass? How do you tell your mother that you got raped or you got beaten? You got starved. You got beaten for speaking your language. There you see it every year it gets worse and worse, the disconnect goes further and further and further because you cannot tell the story because they're not going

> to believe that ‘you’re serious? God’s agent on earth did that to you?’ These are next to God. These are priests. These are nuns. And here’s the fallout from that. That’s part of it. That’s just part of the equation. I know what I’m speaking about because it happened to me…”.
>
> “For me it’s two things. It’s difficult to talk about it. It hurts. But I also like it in that at least I get to tell a story that a lot of people have never heard, even the ones that are from here after me. They come from a very, very brave and a very strong people, the ones that I knew, masterful craftsmen and women… if these people were as minor as they are written about in history books they wouldn’t be here for 60,000 years. It takes great skill. I’ve seen that skill. I’ve seen the very last part of that. What it took to be here. How they mastered their dogs, their environment. There are people here, very few still alive now, that are just extraordinary hunters…. They were just amazing. The snowshoes they used to make them by hand. The weaving was so intricate it was just amazing. And those were the skills they had here and those were tools that they used. Now they are looked on as art. But those were commonplace. And I still have the old brass bells that used to be on the lead dog, my dad’s old lead dog. I still have them at home. And I can still hear that sound when those dogs coming in a cold winter night, coming back from wherever, can hear that ringing sound right across the lake as the dogs were running and that beautiful sound, crisp sound. These people here, they were self-sufficient”. (Comber Testimony, Ibid p.27).

82. By the late sixties a few people began making home brew alcohol out of raisins and sugar from the store and over time drinking alcohol began to spiral out of control. In the early 70’s, Mr. Comber remembered the first two brothers who used to come into the Hudson Bay store acting oddly and smelling of gas. No one knew what they were up to at the time, but it took off like wildfire. Sniffing gasoline has now become so commonplace in the community that many adults consider it a normal phase for children to go through as they pass into adulthood.

83. At the same time this was happening, family dynamics also began to change profoundly. Mr. Comber explained:

> “But, sometime around about the late to mid 60’s there was this thing that started to happen. These old women they used to come across to talk to my mom. They used to say things this is starting to happen a lot. And they used to call it an Ojibway word which means they’d literally discard each other with no sense of… that’s it. It’s over, like I discard you. Especially the men would leave the women. And the women would be left to raise the kids. And they move onto another relationship just like so. There are certain individuals here that I know of that had four or five different relationships. They got two or three kids from, maybe more, from each of these last three relationships. And they’d look at it in the long run, who’s going to pay for all this. See the old concept of looking after your kids and looking after yourself, that’s gone. Somewhere it went along side of the road. Before they used to take great pride in looking after their kids and teaching them all the different skills that they needed to know. And I think a lot of that kind of went sideways when these youngsters came back from these different schools”. (Ibid p.46).

84. Mr. Comber reflected on some the changes that occurred as drinking alcohol increased, and family structures broke down:

> I remember back in the day also the police were here, the police lived in the community. They had little cabins here. They were here with their wives and kids. And I used to see them going over the lake, wintertime, summertime, with the community members, going fishing, going camping. Same with the Hudson Bay managers. Same with the nurses. Same with the teachers. They used to get involved. Everybody got along. Court was happening maybe four, five times a year, if that. That was very rare. This was a big hit when court when held in the community. But now we're here twice a week. What happened? I can still remember Terry Armstrong, he's now the chief of police in the NAPS in Thunder Bay, he used to go fishing here, him and his wife and his kids, two boys, two tiny little things. Go fishing with the locals, sitting on the ice just chuckling away having a good old time. They were respected in the day. They respected the Hudson Bay store people, the nurses, the teachers. Now they got no respect for them. They don't even have respect for their elders. Two weeks ago I was sitting here talking for an Elder, an elder person, and the young ones were ridiculing him outside here, outside the courtroom. I said 'don't do that. Why are you talking about this old man?'. Back in the day when I was a youngster, that was not, that was unheard of. To lie, to tell a non-truth, you just didn't do that. You just did not do that to the Elders and stuff, the older people that asked you something. That was like, the feeling that I get when I came back from residential school and start lying to my mother about what happened, this… a feeling of despair. A feeling of distance. You're not supposed to lie to your parents. Not supposed to lie to the Elders. Supposed to be honest and truthful. That's one of the teachings they followed back in the day. I don't see that no more. They learnt that somewhere, somebody taught them that. I learned that in residential school. Yeah". (Ibid p. 38).

85. Asked to compare the role of women in the days prior to widespread government dependency and substance abuse to present times, Mr. Comber said:

> They don't have the voice like, that they used to have. They're not shown the respect they used to be shown. There were women there that had such a presence about them that when they walked into a place where there was a crowd, the crowd would actually part because they were revered, they were respected. What they had to say made so much sense. Because they've had their life experiences and it was a hard experience. No running water. No electricity. Everything is done the old traditional way. But the way they did it, they were such masters of their environment that they made it look easy. I tried some of these things. Even as a young man, a young 20-year-old, I can't even come close to it. The skills of their crafts was museum quality. (Ibid p.8).

86. Chief Owen, whose Grandmother was one of the women described by Mr. Comber, spoke to one aspect of how colonization has affected his community:

> The total disruption of our way of life has led to crime in our nation. Beginning in or around the 1970's, people from Pikangikum started to be incarcerated in large numbers. When people were living a traditional lifestyle there was little crime and problems were dealt with by the community.

87. Most of the offending behavior in Pikangikum, like the offenses the defendants have pled guilty to, is related to alcohol or solvent abuse. In 1954, there was one reported incident of an assault in Pikangikum. In 2018, according to Sgt. Norlock, OPP detachment commander for Pikangikum, there were 12,000 calls for service. Between January 1 and March 4, 2019, there were 600 individual lock ups and 1450 calls for service from a population of 3200 people.

88. All of this is notwithstanding the fact the Pikangikum First Nation reserve is, and always has been, an ostensibly dry community. Treaty #5, for instance, includes the following terms:

> Her Majesty further agrees with Her said Indians, that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and 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.

89. According to Sgt. Norlock's testimony, the Pikangikum OPP are aware of the community band by law that prohibits the purchase, sale and consumption of alcohol but he, himself, has not read it and it is not enforced. The position of the provincial Crown Attorney is that the prosecution of band laws is a matter for the Federal Crown prosecution service, and they would not prosecute those matters even if such charges were laid by someone other than the OPP. The Federal Crown, historically, does not attend in Pikangikum and, despite being properly served with the Charter materials in this Application, has not responded or chosen to participate in these proceedings.

90. The effects of alcohol abuse in Pikangikum are rampant and have become devastating. An article published in Maclean's magazine in 2012 was titled *Canada: Home to Pikangikum, suicide capital of the world.* The article quoting statistics from 2011 said, "the community of roughly 2,400 had a suicide rate equivalent to 250 per 100,000—nearly 20 times that of Canada, and far and away the highest in the world. It has been so for 20 nearly uninterrupted years." p.2.

91. The article also refers to findings made at a Coroner's Inquest established to examine the staggering number of youth suicides in Pikangikum:

> An Ontario "death review," undertaken by the province's coroner's office after 16 youth took their own lives between 2006 and 2008, noted similarities in these deaths. They happened in so-called "clusters"; most of the victims were under the age of 15; none had sought professional help in the month leading up to their deaths; most had family lives rife with substance and domestic abuse; few went to school.

91. Each of the defendants in this Application is the mother of children in this age range except for Cherilee Turtle, who is 22 yrs. old with a very young child.

93. Rocelyn Moose is the mother of nine children, eight of them still living including twins born in January 2020. She has lost three siblings to suicide.

94. Loretta Turtle is the mother of five children. After episodes of domestic violence, she now lives in her mother's home, along with her three youngest children and 10 additional family members.

95. Tracy Strang is currently the primary care giver for her five children and her sister's four children. They all live in a four-bedroom house, along with three of her siblings and her grandmother.

Stage Two Test Conclusion

96. It seems to this Court that, even if I accept Justice Miller's dissenting view in R v. Sharma, that the second stage of the s. 15 test "must not stop at the determination that a group has been simply disadvantaged, in the sense that there has been a set back to the interests of its members" and that "[t]he analysis must address the further question of whether the a person or group has suffered wrongful discrimination, in the sense of not being treated with the concern and respect that is owed to equals.", this test has been met in this case.

97. A treaty between peoples creates an enduring relationship based on solemn promises. Where, as here, there is a power imbalance between the parties, without due care and attention, the relationship is in constant danger of becoming badly distorted to the detriment of the more vulnerable party. In the case of Pikangikum and the Queen, an agreement for mutual assistance has become an exercise in the crudest form of colonization, with devastating consequences for the people of Pikangikum.

98. There can be no doubt that the ability to serve a mandatory jail sentence intermittently would be of great benefit to these defendants and their families and yet the record before me indicates that counsel have been unable to identify a single case, anywhere, at any time, where an on-reserve resident of Treaty #5 has been granted an intermittent sentence.

99. In these circumstances, where the Pikangikum people's traditional lifestyle has been disrupted by over harvesting, the systematic separation of children from their parents in residential schools, upsetting delicate family structures and ancient oral traditions, causing widespread dependency, substance abuse, violence and an epidemic of youth suicides, 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.

100. In a community where 75 per cent of the population is under the age of 25, removing mothers from their children for extended periods of time will undoubtably exacerbate existing problems in this vulnerable and destabilized First Nation. In this case the issue

is not overincarceration, per se, but rather the direct extension of the corrosive effects of colonialization.

101. Moreover, when one considers the conditions at the Kenora District Jail, the loss, for Pikangikum residents, of the option to break up served time, has direct negative implications for the Applicants.

102. The Kenora District Jail was built in 1926. Ninety four percent of the inmates there are aboriginal. (Testimony of Steve Walker, April 12, 2017, p. 17). In an exchange with Mr. Bilton, counsel for the Applicants, Katherine Curkan, then the Superintendent at the Kenora District Jail, described some of the impact of overcrowding during the many lockdowns where prisoners are confined to their cells:

> Q. …[t]here are some instances given the numbers and overcapacity there are going to be some cells for which there are two bunks that actually have four prisoners in them on some occasions?
> A. They may.
> Q. They may. Right?
> A. Yes.
> Q. And what would be the dimensions of the cell?
> A. I honestly don't know.
> Q. But it's fair to say though, right, Ms. Curkan that when you have four people in a cell, if we imagine the jail cell, (indiscernible) jail cell in a range that when the cell door is locked and there's four people in it There's somebody that's going to be in the top bunk, somebody in the bottom bunk and the width of the space between the bunk and the wall is about the width of the bed?
> A. Yes.
> Q. So if every inmate when there's four in a cell is to have their own space, their own area equivalent to the size of a mattress to sleep, one would have to be in the top bunk, one in the bottom bunk, one underneath the bed and one beside the bed on the floor. Correct?
> A. Yes.
> Q. And that the person who is sleeping on the floor conceivably could have their head right near the toilet?
> A. They could.
> Q. And sometimes people are held in those conditions, correct, for hours?
> A. Yes.
> Q. And there have been occasions when you go through rotation on a full lockdown that individuals going through the cycle of letting one person out to go to the showers as His Honour was asking you about, could conceivably be there in that state for more than a day?
> A. Could be.

Q. That in fact some lockdowns last days, not just hours. Correct?
A. Yes.
Q. And you agree that there's a relationship between increased conflict in the jail, fighting that is, and these pressures of being in the cell locked up in those tight conditions for hours or days. Correct?
A. Yes.
Q. You would agree Ms. Curkan that that's not a healthy environment for any human being?
A. Not for anyone.
Q. Regardless of where they're from. Correct?
A. Absolutely.

(Testimony of Katherine Curkan, July 30, 2019, p. 61-62)

103. Steve Walker, who was the Superintendent of the Kenora District Jail in 2017, described some of the behavior this overcrowding leads to at the Jail:

A. When our count is too high, we have increased tensions within the building. We have more opportunities for altercations between offenders because they're housed in smaller quarters. So, there's certainly more fights, more inmates not getting along. And it's hard to...If our count is low the tension is low. That's historically, that's any place I've ever worked, if the count is low the tension is low. If the count is high the tension is going to be high.

THE COURT: And to what, I mean it's intuitive.

A. Mm-hmm.

THE COURT: To what do you attribute that specifically? Is that just the extra coming and going and the more people the more chances for negative interactions or what?

A. All of the above. So, we had an offender not long ago who was not from this area, was placed in a block and we had concerns whether or not he was actually going to live at the end of this fight. So, we figure that they beat him up. They put the boots to him. They used the cell door to smash his head off of. We didn't expect him to live. Had that guy been from Kenora it probably would have been a different story. But for whatever reason the other issue that we have is fight clubs and that's no secret within the walls of the jail. So, what they'll do is they'll put an inmate up against, you either fight this guy when you, or we're going to fight you type of thing. Right? So, when they fight it's not just one on one, it's usually three or four on one. In this particular case is was four on one. So that's a huge risk. (Testimony of Steve Walker, April 12, 2017. P. 40-41)

104. When one considers the impact such brutalizing experiences must have on inmates and what they must carry home with them to their First Nations 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. As I noted in R v. Morrisseau, 2017 ONCJ 307 (CanLII):

> There are very real dangers to failing to understand our history and our moment in time. It is easy with the benefit of hindsight to look back at the people who got caught up in the implementation of damaging policies and to judge their failings. It is less easy to take stock of the current moment and assess what role we are playing and how our grandchildren will assess our contributions to justice. Para. 80.

105. For all these reasons, I find the Applicants have established the practical unavailability of an intermittent sentence for a qualifying mandatory minimum punishment for on reserve band members of Pikangikum First Nation is a violation of Charter s. 15 (1).

Section 1 Analysis

106. The remaining question is whether the violation can be saved under section 1 of the Charter on the basis that it constitutes a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

107. At this stage of the analysis the onus shifts to the Crown to justify the discriminatory effect of the intermittent sentence regime. The test is set out in R v. Oakes [1986] 1 S.C.R.

108. I agree with the majority in R v. Sharma that any s. 1 justification must fail at the minimal impairment stage of the analysis given this Court is deprived of any other sentencing options for the defendants by virtue of their facing mandatory sentences. Also, like in R v. Sharma, I find the deleterious effects of this constitutional violation are egregious and cannot be outweighed by the salutary effect of a uniform sentencing regime.

Duty to Consult

109. Since the Supreme Court of Canada's landmark decision in R v. Gladue it has been clear that trial courts have an obligation to seek out and obtain information about the Indigenous background of individual offenders. In a sentencing context that information is vital to understanding the personal circumstances of the accused and provides the foundation for exploring restorative approaches to justice that can reconcile an offender with their community without resort to incarceration.

110. As discussed earlier in these reasons, Pikangikum and other Treaty #5 nations had traditional means of keeping the peace in their communities that pre-date contact with Europeans by thousands of years. In my view it is important for trial courts working in these communities to understand these means and to harmonize our approaches to sentencing with traditional understandings of justice.

111. At the conclusion of Chief Amanda Sainnawap's testimony in these proceedings, the following exchange took place between the Court and Chief Sainnawap:

> THE COURT: Chief Sainnawap I want to thank you for being here today. The issue that you've been asked to come to court for relates to a Charter application that six members of your community have advanced before this court, specifically the claim is that because of the practical unavailability of intermittent sentences for people in their positions, specifically as residents of a remote First Nation community, that the unavailability of an intermittent sentence is unfair to them. We are at the stage in this proceeding where I have to make a determination concerning that claim. If the applicants are successful, they will be asking me to make a constitutional exemption for them and to impose on them a different sentence than what the Criminal Code normally requires. If I ever find myself at that stage in these proceedings, the question that I will have to consider as it relates to each of the individual accused persons, all of whom have now acknowledges that they either operated a motor vehicle at a time that they were impaired, or when their blood alcohol level was higher than the legal limit. Some of them have also acknowledged that they were at the same time driving at a time when they were prohibited from driving. If I'm looking for a sentence that's different than an intermittent sentence and still looking for meaningful consequences for these individuals for what they've done, how do you recommend I go about that search?
>
> A.I feel this is where elders could be useful with their knowledge and their understanding of what justice, what governing justice practices they used before the current one was imposed on our community. And…because we use elders for everything here, we need their guidance, and we need the knowledge that they have and how we used to live before.
>
> THE COURT: What is the best way for this court to get access to the views of the elders concerning what I should do in this case, these cases?
>
> A. Invite the elders.
>
> THE COURT: If I were prepared to bring tobacco who would I approach? How would I start?
>
> A. Well you would need to find an interpreter. And tobacco is not something that we use recently. That practice is not very common here, although some elders do do that, not very many. I think just being courteous and just getting, just asking them.
>
> THE COURT: I have been coming to Pikangikum for a very long time. And I'm aware that a significant number of community members have either lost their lives or been severely injured as a result of incidents involving impaired driving. In May of 2017, I attended a court sitting here in Pikangikum. And on my docket, I counted 29 individual people who were facing charges involving drinking and driving. In a community of this size that amounts to almost one percent of the entire community

that was on that one docket charged with that offence. What can we do to make a difference here?

A. I think you would agree that there are a lot of reoffenders. And obviously the current system is not working because they're still reoffending. Right? And I'm aware of the numbers because I was a bail worker in Pikangikum for two years. And I feel that I believe that, this is why I believe that the elders could help us in this situation like this. And I know that they understand too much of our people are ending up in jail. And they come home, they're imposed with conditions and they're basically just being set up to fail with these conditions. So, they come back and what happens, they get charged, they end up back in jail just like a cycle and it's not working.

THE COURT: The Supreme Court in this country has directed courts like mine to focus less on punishing people and more on restorative approaches. In order to break the cycle that you've described and that I've seen myself, it seems to me that we need to do something different than what we're doing, something that strikes a balance between the need to keep people safe from the consequences of impaired driving and also supports the people who keep repeating the same criminal mistakes. I'll simply indicate that I'm looking for help from Chief and Council, the elders whoever can offer help in this community to find a way to help people live a good life and find some balance. If we reach a stage in this proceeding where I need the assistance of Chief and Council to arrive at a just result can I ask for your help?

A. Yes.

112. In this proceeding the intervenor, Pikangikum First Nation, has asked this Court to go further and 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. Specifically, they indicate in their Memorandum of Law:

> Pikangikum asserts a Treaty right to work with the Crown to administer criminal justice in a manner which is consistent with their autonomy. This Treaty right has not yet been proven. Where an Aboriginal or Treaty right is asserted (but unproven), the Crown has a duty to consult if it contemplates conduct which could adversely impact that right. This flows from the Crown's constitutional obligation to act honourably in all its dealings with Indigenous peoples. It would be dishonourable for the Crown to "cavalierly run roughshod over Aboriginal interests which are yet unproven."

113. To support its assertion of a Treaty right to 'deep consultation and accommodation' I have been provided with extensive evidence about the circumstances in which the treaty was made and the intentions of the parties thereto. I am grateful to have this information and consider it extremely valuable and of great assistance to me in my role as a trial judge who presides regularly in Pikangikum. However, it is my view that to make the formal declaration requested by Pikangikum is beyond my jurisdiction in this case. Precisely

because treaties are sacred agreements between peoples, any questions about their interpretation must be decided in the proper forum after full participation by all relevant parties.
114. Acknowledging that, I am prepared to express my view as a Judge who has been involved in the front line delivery of justice in Pikangikum since 1993, that regardless whether the Crown has a treaty obligation to consult deeply with the community about the administration of Justice in Pikangikum, it is in its best interest to do so.

115. As the Local Administrative Judge responsible for Pikangikum and other fly in communities in the northwest, I have first-hand knowledge of the unique place First Nations have in the Justice system as it is currently constituted.

116. For example, it is not unusual for Chiefs to contact me when there has been a sudden death in their community and request that Court be canceled. Nor is it unusual for me to be contacted and asked to move a Court date because it conflicts with a traditional community hunting time.

117. These requests have always been made with due respect for the Court's need to perform its statutory role and, to the best of my knowledge, such a request has never been denied. But there is no formal framework in place within which these discussions take place. Though, in my view, a respectful and informal protocol has developed over decades that informs these exchanges, it should be recognized by everyone that even these small respectful gestures, when they take place within the context of a Treaty relationship, arguably, by precedent, evolve and extend the treaty relationship.

118. Occasionally, members of Chief and Council will request meetings with the presiding Judge, in advance of Court, to discuss justice matters of importance to them. While it would, of course, never be appropriate to discuss individual cases in such a forum, what of a court's obligation to obtain community input about matters of general concern? Is such a meeting ever appropriate? If it is, what should be the protocol at such a meeting? Who should be present? How should the exchange of views be recorded, if at all? If Elders are approached for their views on appropriate sentences, how should this be done in a way that is respectful of the value of their contributions?

119. These questions arise, in my experience, because First Nations lack a consistent channel to exchange information with the Justice system writ large. Addressing these sometimes pressing systemic questions, when there is a Treaty relationship in place is, arguably, an exercise in nation building. One might legitimately question whether it ought to be left to front line judges, Crowns, police and probation officers to do it on an ad hoc basis.

120. Moreover, what the record before me shows is that the Crown very clearly is neglecting its treaty obligations by not to 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.

121. Colleen Estes, a teacher at the local school in Pikangikum for twenty years, in a Gladue report for Audrey Turtle described the current situation this way:

> "I've never seen alcohol so rampant as it is now. There used to be drinking on weekends, in houses. It's so rampant, and the support is so minimal... For example, cheques come out on Friday for the school, and we had 43 people missing from staff on Monday and 47 on Tuesday. The open intoxication is incredible. We've had kids passed out already in snow because of alcohol. We've had losses in September of mothers and grandmothers in their fifties who had weakened physical conditions, and that drank too much. We had a 13-yr-old girl who died of alcohol poisoning" p. 8.

122. To those who might say but "prohibition is an anachronism that doesn't work", I say, "you are missing the point." Treaties create relationships that are intended to last indefinitely. Those relationships are meant to adapt to social and cultural changes. The parties to Treaty #5 clearly foresaw, at the time the treaty was agreed, that alcohol presented a potential problem for the indigenous population with increasing contact between them and settlers. The Crown, in the tradition of the day, promised to enforce the applicable laws strictly. It should be obvious that the fact times have changed does not allow the Crown to walk away from its obligations.

123. If the Crown does not want to be in the prohibition enforcement business, and I can understand why it would not, it must recognize its obligation to consult with the community about how to address the causes of rampant alcoholism, most of which can be traced to its own colonizing actions, including in the area of the administration of justice.

124. It is common knowledge relations between indigenous and non-indigenous people in this country are complicated by the long shadow of systemic discrimination and historical injustices. As we, as a country, try to move toward reconciliation, I worry that the challenge of arriving at a common understanding of systemic discrimination, and its causes, can create a paralyzing inertia. There is a danger that some, overwhelmed by the enormity of the problem, may rationalize that the causes are so opaque or so buried in the distant past that knowing where to start to make positive change is too difficult and opt for incremental improvement. There is no excuse for believing that where Pikangikum is concerned.

125. In fact, Pikangikum's integration into Canadian confederation is a textbook example of the negative effects of colonialism on an isolated hunter-gatherer society. The people of Pikangikum were a healthy, self-sufficient band of families, who, in the lifetime of the current Chief's grandmother, became the suicide capital of the world.

126. 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. The Government is not fulfilling its treaty obligations and young indigenous people are taking their lives in shocking numbers. This is happening right now and not because of things that happened in the distant past but because of things that are being done and not being done as I am reading this judgement. Many non-indigenous Canadians are righteously angry and ashamed that their relationship with their indigenous fellow citizens has been allowed to evolve into such a state of disrepair and that frustration is not relieved by attempts to shift responsibility to mistakes made by our forefathers. If not in the name of treaty obligations,

then for its citizens, the government ought to consult with Treaty #5 First Nations about how to repair our sacred relationship between peoples.

127. Because it is so much easier to identify problems than address them, I offer this suggestion, by way of an analogy to those looking for a way to proceed.

128. As late as 1990, the Attorney General of Ontario was largely responsible for the administration of courts in this province. The judiciary in Ontario were effectively a branch of the Attorney General's office. At the same time Judges sat in judgement on matters where the Attorney General's actions were the subject of the dispute. In those circumstances, Judicial independence, while valued as an important constitutional principle, was always subject to the appearance of conflict, if not actual conflict.

129. To remedy this problem, in 1990, the Attorney General and the Chief Justice of the Ontario Court of Justice, in the first agreement of its kind in Canada, entered into a Memorandum of Understanding that clarified their respective roles and how to manage their relationship. The Preamble to the Memorandum of Understanding reads:

> The Attorney General and the Chief Justice acknowledge the mutual benefit of a collaborative, dynamic and productive relationship in the administration of justice in the Province of Ontario.
>
> Each recognizes that they both have important roles and responsibilities with respect to the administration of the courts and the promotion of public confidence in the court system in Ontario. The Attorney General and the Chief Justice are both committed to the principle of judicial independence and to providing the people of Ontario with an open, fair, and modern justice system.
>
> **1.1** Purpose of Memorandum of Understanding
>
> The purpose of the Memorandum is to set out areas of financial, operational and administrative responsibility and accountability between the Ministry of the Attorney General and the Ontario Court of Justice.

130. The result of the execution of the Memorandum of Understanding has been an improvement in the functioning of our Court system and, I dare say, a strengthening of its perceived legitimacy. In some ways the need to clarify constitutional responsibilities between First Nations and government and to create a process for navigating tensions arising from their overlap are similar. Accordingly, it may be useful to consider a process to arrive at a similar understanding between the Attorney General, the Chief Justice and Treaty peoples about the administration of justice in their territory. This is particularly true now, when the province is experiencing a Covid-19 pandemic and court parties are not traveling to fly in communities like Pikangikum for the foreseeable future. By necessity it is important that the community, the Chief Justice's Office and the Attorney General have a means of communicating effectively and respectfully, not only for the benefit of the people of Pikangikum but so the rest of the people in the province can have confidence that long standing agreements made in their name are being honoured.

Temporary Absence Program

131. After these applications were filed but before hearings began, the Crown made efforts to accommodate the unique circumstances of the Applicants. The law provides that every person who is sentenced to a period of incarceration in Ontario is entitled to apply for permission to be temporarily absent from the correctional facility to which they are assigned.

132. The Ministry of Correctional Services Act, RSO 1990, c M.22, s.27 provides:

> **Temporary absence**
> **27** (1) Where, in the opinion of a person, designated by the Lieutenant Governor in Council for the purpose, it is necessary or desirable that an inmate be temporarily absent from a correctional institution for medical or humanitarian reasons or to assist the inmate in his or her rehabilitation, the person may authorize the temporary absence of the inmate on such terms and conditions as the person may specify. R.S.O. 1990, c. M.22, s. 27 (1); 2000, c. 40, s. 7; 2002, c. 18, Sched. N, s. 29.
> **Idem**
> (2) Every inmate temporarily absent under subsection (1) shall comply with such terms and conditions as are specified and shall return to the correctional institution at the expiration of the period for which the inmate is authorized to be at large. R.S.O. 1990, c. M.22, s. 27 (2).
> **Offence**
> (3) Every inmate who contravenes subsection (2) without lawful excuse, the proof of which lies upon the inmate, is guilty of an offence and on conviction is liable to imprisonment for a term of not more than one year. R.S.O. 1990, c. M.22, s. 27 (3).
> **Custody**
> **27.1** An inmate shall be deemed to be in the custody of a correctional institution for the purposes of this Act even if he or she is not on the premises of the correctional institution, so long as he or she is in the custody of a correctional officer. 2002, c. 18, Sched. N, s. 30.

133. Typically, a person who receives an intermittent sentence is directed by the sentencing Judge to present themselves at a designated correctional facility at a particular time to begin serving their weekends. Once at the facility they can apply for a temporary absence.

134. In these cases, the Crown offered to undertake a unique remote assessment process to screen the Applicants eligibility for temporary absence permissions. According to the Crown proposal, the assessment would take place as follows:

> Step 1- in advance of sentencing (as close to sentencing as possible), the ministry would screen\assess, using remote technology, each of the Applicants for potential eligibility for temporary absence permission.

> Step 2- If the Applicants received an intermittent sentence, the Crown would ask the Court to direct the Applicants to report to the Kenora District Jail in a week to ten days. In the meantime, they would be re-assessed and, assuming no material change in circumstances since the pre-screening, be issued temporary absences in Pikangikum. The temporary absence permits would be renewed from time to time until their sentences were served in full without their ever having to attend the District Jail or leave Pikangikum.

135. The difficulty with this proposal, from the Court's perspective, is two-fold. First, section 732 (1) of the Code provides:

> Where the court imposes a sentence of imprisonment of ninety days or less on an offender convicted of an offence, whether in default of payment of a fine or otherwise, the court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to *ensure* compliance with the sentence, order
>
> (a) that the sentence be served intermittently at such times as are specified in the order and
>
> (b) that the offender comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served and, if the court so orders, on release from prison after completing the intermittent sentence (Emphasis added)

136. Before granting an intermittent sentence the Code requires a sentencing Judge to be sure an accused can comply with the sentence. This is understandable considering there are potential penal consequences for non-compliance. In this case, even though the Crown's proposal is tailored to provide the sentencing Judge with significant assurance that correctional authorities will use their discretion to allow the accused to comply with the sentence, it falls short of ensuring they will do so. Again, this is understandable. Correctional authorities cannot lawfully exercise their discretion to issue passes to an accused before they come into their custody.

137. Second, if the Code's sentencing regime is a violation of Charter s. 15, as I have found it to be, it cannot be saved by an exercise of discretion by an administrative authority. A temporary absence permit is a statutory privilege and as the Supreme Court pointed out in R v. Nur, 2015 SCC 15:

> Finally, the Attorney General of Canada, relying on *Morrisey*, argues that parole eligibility reduces the actual impact of the three-year mandatory minimum penalty for an offence. We simply cannot know whether that is in fact the case. Nur correctly argues that parole is a statutory privilege rather than a right. The discretionary decision of the parole board is no substitute for a constitutional law. Para. 98.

138. It should be noted that what is being proposed by the Crown is not a statutory accommodation that might save the Code provisions from having an unconstitutional effect on an identifiable group but rather an ad hoc, post sentencing possible accommodation only for the Applicants. The Crown was clear that the virtual pre and post sentencing screening assessments and Pikangikum based issuance of temporary absence permits protocol they propose would apply only to the Applicants and they could not undertake to make it available to others in similar circumstances.

139. While I understand and respect that the Crown has bent some effort to mitigate what it appears to have recognized as a baseline unfairness to the Applicants in this proceeding, the need for an ad hoc “work around”, in my view, is one of the hallmarks of an unconstitutional legal regime. Crown discretion can play an important role in avoiding individual injustices in unusual circumstances. But when the law relies on the exercise of Crown discretion in common, predictable situations, it risks unjustifiably different outcomes, and it turns rights holders into supplicants. That this should be so with indigenous accused, considering the history I have outlined, makes requiring every individual accused to ask for equal treatment as though asking for a favour from the Crown, offensive.

140. I consider these comments even more germane because after the intervenors joined these proceedings, no doubt at considerable expense, particularly to the First Nation, after the parties assembled and the Court reviewed thousands of pages of evidence and materials, after the court party traveled to Pikangikum to take evidence from the Chief, the Superintendent of the Kenora District Jail, the Deputy Director of Northern Institutions at the Ministry and Dr. Janet Armstrong, and after two days of submissions, the Crown announced it was undertaking to transport, at its expense, all the defendants back and forth to the jail until their sentences are served if they are given intermittent sentences.

141. In my view this undertaking has the effect of causing a material change to the personal circumstances of the Applicants. It is also, in my opinion, some questionable legal rope-a-dope from the Crown.

142. As with the temporary absence program, the Crown has limited its undertaking to these Applicants alone and does not commit to extending it to future accused in similar circumstances. It does, however, engage the honour of the Crown and thereby ensure that if this Court grants the Applicants intermittent sentences, they can comply with them.

143. Accordingly, since the Crown’s undertaking these Applications have become moot. The Supreme Court of Canada in R v. Borowski,1989 CanLII 123 (SCC) has directed that courts avoid deciding moot matters except in unusual circumstances. In my view, this case is such a situation. In Borowski the Court indicated:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present

> not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

144. The Court identified exceptions that might warrant the exercise of discretion to decide a moot case as follows:

> [A]n expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. ...
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.

145. The case before me is similar in some respects to R v. Lloyd, 2016 SCC 13 (CanLII), [2016] 1 SCR 130 where the Supreme Court confirmed this court's jurisdiction to consider constitutional questions, stating:

> The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power. However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them. As this Court stated in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 316, "it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute."
>
> [16] Just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute. Provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly from their statutory power to decide the cases before them. The rule of law demands no less.
>
> [17] In my view, the provincial court judge in this case did no more than this. Mr. Lloyd challenged the mandatory minimum that formed part of the sentencing regime that applied to him. As the Court of Appeal found, he was entitled to do so. The provincial court judge was entitled to consider the constitutionality of the mandatory minimum provision. He ultimately concluded that the mandatory

> minimum sentence was not grossly disproportionate as to Mr. Lloyd. The fact that he used the word “declare” does not convert his conclusion to a formal declaration that the law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*. Para 15-17.

146. Addressing the issue of mootness in the context of a constitutional challenge the Court said:

> [18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender’s sentence, as a condition precedent to considering the law’s constitutional validity, would place artificial constraints on the trial and decision-making process.
>
> [19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction. [emphasis added] para. 18-19.

147. In my view, the issue before the Court presents unique challenges for accused persons in communities like Pikangikum. Those challenges are important enough to the community they have chosen to direct scarce resources to intervene in these cases. To waste those resources considering the extent of their need, would, in my view, be unconscionable.

148. Moreover, there are already cases pending before this Court that will require an assessment of the same constitutional issues raised in this Application. In fact, some counsel have elected to adjourn sentencing for their clients until these reasons have been released.

149. In these circumstances, I consider it prudent to address briefly the Applicants’ claims for Charter relief under ss. 7 and 12.

150. As previously noted, the Applicants do not challenge the mandatory minimum sentences they face as cruel and unusual punishments, per se. Rather their claim is rooted in the same ground as their inequality claim, namely, being unfairly saddled with

the impossible burden of complying with an intermittent sentence is cruel and unusual because the burden itself is part of the punishment.

151. While I understand the claim, in my opinion, it makes intuitive sense because the equality breach itself is cruel. I agree, for the reasons I have outlined, the discrimination against the Applicants is cruel, in the colloquial sense, but I am not satisfied it constitutes a stand-alone s. 12 Charter 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.

152. Similarly, while it may make intuitive sense to label the failure of Crown prosecutors to exercise their discretion and avoid the manifest unfairness that results from the s. 15 discrimination, I have described above, as ‘abusive’, it doesn’t meet the test for a s. 7 abuse of process. In other words, the prosecutor’s failure to use their discretion to mitigate the effect of an unconstitutional law is a problem with the law not the prosecutor’s judgement.

Conclusion

153. In conclusion, I find 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 s. 15 of the Charter. I do not find the provisions constitute a violation of the Applicants’ ss. 7 and 12 Charter rights.

154. In the unusual circumstances of this case, I decline the Applicants’ requests for constitutional exemptions because of the Crown’s undertaking to be responsible for organizing and financing their ability to satisfy the conditions of an intermittent sentence. I would have, however, granted such an exemption to any other persons in the Applicants position at the time they brought their application who were not the beneficiary of a similar undertaking and engaged in the process I discussed with Chief Sainnawap, set out above, to arrive at a fit sentence.