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Dissecting the Legislative Intent of Sections 81 and 84

This document addresses sections 81 and 84 of the Corrections and Conditional Release Act, (CCRA). Particularly, I try to outline the legislative intent behind sections 81 and 84. The purpose of this document is to assist interested parties in the prison review being done by the human rights Senate Committee.

A Note on Statutory Interpretation:

Justice Iacobucci in the Supreme court of Canada case called *Rizzo & Rizzo Shoes Ltd Reference* 1998 explains principles of statutory interpretation that I think we need to pay attention to. Regarding statutory interpretation, he quotes Elmer Driedger in the book *Construction of Statutes* stating: (quote)

today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (unquote)

Justice Iacobucci also mentions that the *Interpretation Act* mandates that every Act “shall be deemed to be remedial” and shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.” The court notes that although they recognize the frailties of Hansard evidence, it is nonetheless relevant to “both the background and the purpose of legislation.”

It is imperative to appreciate these principles when looking at any legislation, but for our purposes, the CCRA, and particularly sections 81 and 84. For these reasons, I have looked at some of the Hansard debates relating to the CCRA, or Bill C-36, as it was at the time.

Another reason to look at the Hansard was the fact that there has been very limited judicial interpretation of these sections to provide any guidance on how they should be applied. Based on my research, it seems it is solely the Correctional Service Canada, which I will refer to as the CSC, that has taken the task to interpret and create rules for the application of sections 81 and 84.

Looking at the Hansard, On May 21, 1992 the Honourable Senator Consiglio Di Nino did a second reading of Bill C-36. He mentions that the bill: (quote)

has benefited greatly from extensive public consultation and careful scrutiny in the other place. Over 1200 individuals were heard from during the consultations based on a discussion package entitled “directions for Reform” released in 1990. The bill also benefited from the report of the Canadian Sentencing Commission in 1987 and the report of the standing Parliamentary Committee on Justice and the Solicitor General which was called “Taking Responsibility.” (unquote).

In fact, when our research team contacted Kim Campbell, the Minister of Justice and Attorney General of Canada at the time, she also referred us to these reports when asked what were the goals for sections 81 and 84. She mentioned there was discussion about a completely

separate criminal justice system for Aboriginal people but it was decided to stick with our current system but allow for greater control by aboriginal communities.

It would be prudent to look at the reports mentioned in the Hansard that were consulted before the development of the CCRA.

I want to first direct attention to the “Directions for Reform” report

This report begins with mentioning that the over-representation of Aboriginal peoples within prisons is the federal government’s priority. The federal government wants to ensure that appropriate programs for Aboriginal prisoners exist. The report goes on to say that supervision and community support mechanisms are necessary to a successful reintegration into the community. It mentions that when developing the CCRA, the government was implementing correction programs that are specific to the needs of Aboriginal prisoners. Most importantly, similar to Kim Campbell’s remarks, the report comments on endorsing the government’s policy of greater aboriginal control over matters affecting them. It states: (quote)

[c]onsistent with the government’s policy of *endorsing greater aboriginal control over matters that affect them*, the proposed *Corrections Act* contains provisions for the establishment of agreements between federal corrections and aboriginal communities to permit such communities to assume varying degrees of responsibility for Aboriginal [prisoners].

Presumably, this is referring to is s.81.

This helps. We now know that at least one of the report the government looked at in developing the CCRA spoke about implementing the government’s policy in allowing for aboriginal communities greater control over matters that affect them in the context of prisons.

“Taking responsibility” report

Chapter fifteen in this report speaks about aboriginal prisoners. Similar to the previous report, it starts by highlighting the overrepresentation of aboriginal prisoners and other relevant statistics since the early 1980s.

It mentions that Native offenders are less likely to be released on parole than other groups, specifically highlighting a concern that led to the development of s.84. It states: quote

the serious disruption of the Native culture and economy that has taken place in this century has had a devastating effect on the personal and family life of Native inmates. They are often unemployed, and have low levels of education and vocational skills. Many of them come from broken families and have serious substance abuse problems. Some Native prisoners, especially Native women, are incarcerated at great distances from their home cities or towns, or their reserves.

So, this portion of the report speaks to the unique history and circumstances of Aboriginal peoples, and the potential adverse impact that has on them regarding their communal ties and parole considerations.

In light of these concerns, the report's recommendation number 74 relates directly to what has now become section 84 in the CCRA. It recommends that:

the Correctional Service of Canada...enter into further contractual arrangements with Native organizations to assist Native [prisoners] in preparing release plans and applications for early release.

In the commentary for this recommendation, the report states that Native offenders feel the Parole Board is not sensitive to their specific needs or the environment to where they are released.

Often the board refuses on the grounds that the Aboriginal prisoner's release plan has no parole supervision capacity where he or she is to be conditionally released. But often the prisoner's reserve or remote village where the prisoner has come from is willing take him back and provide support and supervision.

The report even lists a suggested legislative provision by the Correctional Law Review stating:

With the [prisoner's] consent, and where he or she has expressed an interest in being released to his or her reserve, the correctional authority shall give adequate notice to the Aboriginal community of a band member's parole application or approaching date of release on mandatory supervision, and shall give the band the opportunity to present a plan for the return of the [prisoner] to the reserve, and his or her reintegration into the community.

The wording of this suggested provision is similar, although not identical, to section s. 84.

Note that there are no restrictions for this proposed provision to specific categories of prisoners. For instance, it does not state that it should be limited to low or medium risk prisoners. This will become important when discussion how CSC's policies have narrowed the application of s. 81 and 84.

To summarize the remarks in the taking responsibility report, the purpose of the recommendation and suggested provision is to address the issues Aboriginal prisoners have in obtaining parole and being released into their community due to their the unique and historical circumstances. It attempts to facilitate parole and community re-integration of aboriginal prisoners.

Remarks made in the House of Commons

During the House of Common debates on May 14, 1992, Mr. Russell MacLellan, after reading s.81 (or clause 81 at the time), says "that is important and I cannot stress this too much because we have not been successful in dealing with our aboriginal people with respect to corrections. Our correctional incarceration has not worked with respect to aboriginal people and we have to review that..."

Summary of Legislative Intent Research

The "taking responsibility" and the "Directions for responsibility" reports, along with the comments made in the House of Commons, read together with the principles of statutory

interpretation outlined earlier help provide some insight on the legislative intent for sections 81 and 84. They suggest that parliament's intent for sections 81 and 84 was to allow for greater control of aboriginals over matters that affect them, recognize their unique historical circumstances when remedying issues relating to community re-integration from prisons. Recall the passage from Justice Iacobucci, that these provisions should receive fair, large and liberal construction and interpretations to ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

So with keeping that in mind, the next section of this document will deal with what sections 81 and 84 have become on paper in the CCRA.

Closely Examining Sections 81 and 84 in the CCRA

The Legislative Framework of s.81 and 84

Introduction

In this section, I only look at the CCRA and the Corrections and Conditional Release Regulations (CCRR). Please note that there are other rules in play, specifically the Commissioner's Directives that also govern how sections 81 and 84 operate. However, I will specifically address those later.

Purpose of sections 81 as outlined on the CSC's website

The CCRA recognizes the unique needs and circumstances of Aboriginals in federal corrections. Sections 81 and 84 are intended to alleviate the over-representation of Aboriginal people in federal prisons. According to CSC's website, these sections are said to encourage the involvement of Aboriginal communities in the correctional process. These provisions are meant to provide an opportunity for aboriginal communities to directly participate in the care and custody of Aboriginal prisoners. Theoretically, these provisions allow CSC to work with Aboriginal communities who could then create innovative services that are not available within the CSC that are perhaps more culturally appropriate for aboriginal prisoners. In my view, the purpose stated on the website is not contrary to the legislative intent.

Section 81

Section 79 defines "Aboriginal" as meaning, Indian, Inuit or Metis. It defines "aboriginal community" as meaning a first nation, tribal council, band, community, organization or other group with a predominantly aboriginal leadership.

In my own words, this is what section 81 entails. It states that the Minister of Public Safety and Emergency Preparedness has the discretion to enter into an agreement with an aboriginal community to provide correctional services to aboriginal prisoners to be paid for by the Minister. Section 79 defines "correctional services" as services or programs for [prisoners], including their care and custody. S.81 (2) states that *non-Aboriginal* prisoners may use the services of such an agreement. S.81(3) gives the Commissioner of Corrections the discretion to transfer an Aboriginal prisoner to the care and custody of an Aboriginal community with the consent of the

Aboriginal prisoner and the Aboriginal community. A prisoner can be transferred to the care and custody of an Aboriginal community at any time during his or her sentence starting from date of the sentence to statutory release.

The CCRR provide some more guidance. Section 114 of the CCRR states that when a prisoner requests for a transfer to the care and custody of an aboriginal community pursuant to 81(3) of the CCRA, the Commissioner, or a staff member designated by the Commissioner, must consider the request, consult with the aboriginal community and give the prisoner notice in writing of the decision, within 60 days of the request being made. If the request is denied, reasons for denial must be provided.

An important phrase in section 81 is “the minister *may*, enter into agreements.” The word “may” is important as it suggests discretion. There is not much jurisprudence on this section, but I did find one case that provides some insights on how to interpret some of the language in section 81. In *Mountain Institution (Native Transfer Committee) v Canada* 1997, an action was brought on behalf of 1800 aboriginal prisoners for the transfer of prisoners into the care and custody of the aboriginal community under section 81. In rejecting the claim, the court stated that section 81 is a permissive provision in that it does not create a positive duty to authorize the application of section 81. The section states that the minister *may* enter into an agreement, not that he or she must.

Nonetheless, a plain reading of Sections 81(1) and (3) shows that it is capable of being interpreted broadly to allow Aboriginal communities to negotiate and enter into an agreement and specify the number and type of prisoners they will accept into their communities. Recall the discussion on statutory interpretation that every act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The only requirement, it seems on paper, is an approval from the Commissioner, an agreement with the Aboriginal community and the consent of the prisoner. As we will see, this seemingly broad provision has been narrowed down by the CSC’s Commissioner’s Directives.

Section 84

Unlike section 81, the Minister does not have discretion under section 84, in that it is not a permissive provision. Rather it imposes a positive duty on the Minister. If a prisoner asks to be released into an aboriginal community, the CSC must, with the prisoner’s consent, give the aboriginal community

- (a) notice of the prisoner’s parole review or statutory release date and
- (b) an opportunity to propose a plan for the prisoner’s release and integration into that community

The purpose of section 84 as stated on the CSC websites

The purpose of section 84 is to get the aboriginal community more involved in the parole of aboriginal prisoners at the early stages of their sentence. It is believed that Aboriginal

communities are better equipped in dealing with their values, strengths and ties in dealing with aboriginal prisoners. According to CSC's website, release planning is said to begin when the prisoner enters the CSC facility. Preparation and a strong community focus is believed to be an effective support network for successful integration of prisons into the community. Section 84 thus transfers some of CSC's responsibility to aboriginal communities themselves. Section 84 is not a type of release, rather it is supposed to be a consultation with aboriginal communities to best meet the unique needs of prisoners as they integrate into their communities. Similar with s.81, in my view the purpose of s.84 as stated on the CSC website does not contradict the legislative intent.

In the next section, I will discuss CSC's policy that has limited the application of these sections.

Looking at CSC's Policy Relating to Sections 81 and 84

Up to this point, I have looked at the things that led to the creation of sections 81 and 84. I looked at the Hansard, the historical reports that led to the development of the CCRA. I then examined these sections as they appear on the CCRA itself. Now, I will be determining how these sections are applied by focusing on the CSC and the policy they have created in applying these sections. I will examine whether these policies are harmonious with the CCRA and its legislative intent.

Where the CSC get's its authority to make rules

Section 97 of the CCRA empowers the Commissioner to make rules relating to CSC's management and for carrying out the purposes and provisions of Part 1 of the CCRA which includes sections 81 and 84. Further, section 98(1) gives the commissioner the discretion to designate any or all rules made under section 97 as Commissioner's Directives.

This is known as delegation. Parliament has a broad range of power to delegate and can delegate its authority and power to the executive branch by statute in order to create regulations or by-laws for example, as is the case here. This allows CSC to set norms, procedures, and directives to facilitate the orderly exercise of government's functions. Often referred to as quasi-legislation, these rules or Commissioner's Directives are written for the CSC's employees to direct them on how to carry on their duties. Although this allows the CSC to fill in some of the details related to sections 81 and 84, there are exceptions to what is and is not permissible. Most importantly, quasi-legislation as the Commissioner's Directives are not law. It is the CCRA and not the Commissioner's Directives that declare the law. If there is a conflict between the Commissioner's Directive and the CCRA, the CCRA prevails.

CSC's Rules Relating Sections 81 and 84

CSC's Guideline number 710-2-1 sets out the criteria a prisoner must meet before being transferred to the community pursuant to section 81. When looking at these guidelines, compare them with the legislative intent discussion earlier as well as the section of this document that closely looked at sections 81 and 84 as they appear in the CCRA. The criteria for a section 81

transfer is listed in section 10 of the guidelines. Here are some of the relevant guidelines. It states:

CRITERIA FOR TRANSFERS FROM FEDERAL CUSTODY TO ABORIGINAL CARE AND CUSTODY

10. The following are valid criteria for a section 81 transfer, consistent with the principle that the transfer is primarily aimed at benefiting the rehabilitation gains of an Aboriginal offender and is consistent with public safety:
 - a. be able to be classified as minimum security or in rare cases, be classified as medium security;
 - b. the offender must present a low risk to public safety in the event of an escape;
 - c. the offender must require a low degree of supervision and control of his or her activities within the Healing Lodge setting;
 - d. the offender must be committed to the Healing Lodge's philosophy and his or her Healing Plan;
 - e. the offender must be willing to continue with his or her healing journey;
 - f. the offender must be willing to abide by all rules and procedures as prescribed by the Healing Lodge;
 - g. the section 81 Healing Lodge Director must provide written confirmation of acceptance for transfer of the offender to the CSC institution;
 - h. the offender consents to the transfer to the section 81 Healing Lodge;
 - i. the offender's rights and opportunities must not be diminished by virtue of the external delivery of services;
 - j. notwithstanding the external delivery of community correctional services, CSC retains its general responsibility to ensure the best possible correctional services to offenders under its mandate.

The most significant limitation placed on section 81 is guideline 10(a) requiring that the prisoner be classified as minimum security or in rare circumstances medium security. The Office of the Correctional Investigator in its report *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* noted that in 2010-2011 only 11.3% (that's 337 individuals) of aboriginal prisoners were in minimum-security institutions. The result of guideline 10(a) restricted the application of section 81 to only 11.3% of aboriginals. Put alternatively, it excludes the application of section 81 to almost 90% of Aboriginal prisoners.

Guideline 10(b) further places restrictions in requiring the prisoner to be low risk in the event of an escape. Similarly, guideline 10(b) mandates the prisoner require low degree of supervision and control. The standard to measure such risk is not mentioned and it is impossible to tell just by reading these guidelines how they would apply to individual prisoners.

Additionally, the *Spirit Matters* study found that in 2012, there were only 68 section 81 bed spaces in all of Canada and no section 81 agreements in British Columbia, Ontario, and Atlantic Canada or in the North. As of April 28, 2017, 5 section 81 healing lodges are listed on the CSC website. Collectively, they only have 146 bed spaces. This would not fit all of the 11.3% of aboriginals who pass the requirement of guideline 10(a).

Recall the discussion on statutory interpretation; words of the act should be read in their entire context, in their grammatical and ordinary sense with should be harmonious with the intention of Parliament.

In both the reports that were consulted prior to the development of the CCRA mentioned concerns of over-representation and allowing aboriginal communities more control over matters that affect them. Only 146 bed spaces available for section 81 healing lodges will not curb over-

representation of aboriginal prisoners. Even if more bed spaces were available, the restriction of the availability of section 81 healing lodges to low security prisoners will not curb overrepresentation of aboriginals.

Furthermore, the principle that every act shall be deemed remedial and receive fair, large and liberal construction is violated with the restrictive section 81 guidelines in section 10. These guidelines are in contravention of section 81 as they conflict with the plain language of the provision. Nowhere in the act, explicitly or implicitly or even the legislative intent, suggests the provision should be restricted to only low risk prisoners.

The intent of section 84 was in part to create communal ties with aboriginal communities and the parole board to enhance community integration of aboriginal prisoners. The *Spirit Matters* report notes that CSC has created a long lengthy process for the CSC and the community, contrary to the legislative intent. CSC first only applies it to First Nation and Inuit communities failing to recognize that a majority of aboriginal prisoners come from urban areas.

Mary Campbell posed a very important question during our research team's communications with her. She questions whether it is time to re-think whether sections 81 and 84 are the best options rather just saying we need more agreements. The law on paper allows for the legislative intent to be realized, but the limitation of this intent by the CSC policy (which should be subordinate to the CCRA) has prevented such measures. There needs to be a fundamental re-evaluation of the CSC policies mentioned by an independent body to ensure their compliance with the CCRA.