

# Healing Ourselves: Interrogating the underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*

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L E A H C O M B S \*

## ABSTRACT

A response to the severe over-representation of Aboriginal persons in federal penitentiaries, ss. 81 and 84 of the *Corrections and Conditional Release Act* (CCRA) sought to enhance Aboriginal community involvement in corrections with the ultimate goal of reducing this representation over time. Though it has been twenty-five years since the CCRA's inception, there has been scarce utilization of the agreements established under these provisions. As a result of their unique histories and positionalities, this underutilization disproportionately impacts federally sentenced Indigenous women. Correctional Service Canada (CSC) policies and practices have contributed to this by way of security overclassification and insufficient application of *Gladue* principles. This underutilization is further traced to the CSC's appropriation of funding ear-marked for these agreements through redirection to their own internal programs. These activities violate the CSC's codified commitment to responding to the needs of Aboriginal persons in custody and goes against the legislative intent. Whether through a claim of discrimination, Commissioner's Directives, a legislative response

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or a constitutional challenge, immediate and thoughtful change must take place so that federally incarcerated Indigenous women and their communities have the resources and tools to heal themselves.

**Keywords:** prisons; corrections; Indigenous; Aboriginal; women; justice; human rights; prisoners' rights; penal policy; incarceration; healing lodge; security classification; legislative intent

## I. INTRODUCTION

Twenty-five years ago, the *Corrections and Conditional Release Act*<sup>1</sup> (CCRA) came into force. Replacing the *Penitentiary and Parole Acts* that had been in use for over 120 years, the CCRA is a comprehensive code that governs federal prisons, parole and the Office of the Correctional Investigator.<sup>2</sup> The CCRA includes two sections specifically relating to the care, custody, and release of Aboriginal offenders. A response to the severe over-representation of Aboriginal persons in federal penitentiaries, ss. 81 and 84 seek to enhance Aboriginal community involvement in corrections with the ultimate goal of reducing this representation over time.<sup>3</sup> As affirmed in a 2012 Report by the Office of the Correctional Investigator, there has been scarce utilization of section 81 and 84 agreements since the CCRA's inception.<sup>4</sup> Indigenous women incarcerated in federal institutions have felt a disproportionate impact from this underutilization.<sup>5</sup> Contrary to legislative intent, the Correctional Services Canada (CSC) has impeded access to section 81 and 84 agreements through overclassification, insufficient *Gladue* application and misdirection of funds.<sup>6</sup> With particular attention to the case of Indigenous women incarcerated in federal

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<sup>1</sup> *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

<sup>2</sup> *Ibid.*

<sup>3</sup> Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Final Report) (Ottawa: Office of the Correctional Investigator, 2012) at 13 [*Spirit Matters*].

<sup>4</sup> *Ibid* at 13-15.

<sup>5</sup> *Ibid* at 31.

<sup>6</sup> *Ibid* at 15, 17-18, 28-29.

institutions, the resulting underutilization of these agreements calls for thoughtful and immediate remedy.<sup>7</sup>

This article begins by placing Indigenous women within the criminal justice and correctional systems through examining the legacy of chronic marginalization that has shaped many of their struggles. The failure of the CSC to administer effective correctional policies and programs are illuminated through an analysis of the unique needs of Indigenous women prisoners. The role of ss. 81 and 84 are summarized with focus on how agreements made under them can better meet the needs of federally sentenced Indigenous women. An analysis of the extent to which these sections have been underutilized follows, while directly linking this underutilization to actions taken by the CSC. The legislative intent of these provisions is examined using statutory interpretation and a summary of the *Hansard* evidence. This article concludes by outlining possible remedial approaches to increase the use of section 81 and 84 agreements and better satisfy the legislative intent.

## II. INDIGENOUS WOMEN IN CUSTODY

### A. Chronic Marginalization

Many Indigenous women's experience of state violence begins long "before the bars"<sup>8</sup> in the form of a complex set of life circumstances marked

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<sup>7</sup> I will use the terms "offender" and "inmate" only in cases where the piece of writing I am referencing uses these terms. There can be harmful stigmas attached to these terms, as they tend to fundamentalize and dehumanize the lives and experiences of incarcerated individuals. I will also be using the term "Indigenous" to refer to individuals identifying as members of the various Nations that existed on these lands before the assertion of European sovereignty. I recognize that this is an imperfect term, as the shared history of colonization experienced by Indigenous Peoples across Canada reveals only a categorical grouping. The term "Aboriginal" is an organizational term often described as having been imposed on Indigenous peoples by the state, so I will only use it when referring to documents and writings that already use it. I will use the citizenship descriptors Indigenous persons identify with where possible. Although my main arguments refer to a categorical grouping, I recognize that this is only an imagined concept and the diversity of individuals and Nations means that it is impossible for any term to apply generally.

<sup>8</sup> Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 *JL & Equality* 127 at 153.

with abject poverty and violence.<sup>9</sup> Since the first arrival of European settlers, political sovereignty has been violently asserted over Indigenous nations through policies rooted in patriarchy and white supremacy.<sup>10</sup> Indigenous persons were forced from the lands they inhabited for millennia and were relocated to reserve lands to live in unnatural, forced communities.<sup>11</sup> As Indigenous identity is inextricably linked to land, this dislocation resulted in a disconnection from identity.<sup>12</sup> Racist government policies aimed at ridding Canada of the “Indian problem” imposed a Euro-Christian worldview and further disconnected Indigenous peoples from their identities.<sup>13</sup>

The Residential School System was created to separate Indigenous children from their families and communities, denying entire generations experiences of community attachment and familial socialization.<sup>14</sup> The legacy of these schools and similar discriminatory policies have continued to affect not only those who attended the schools, but Survivors’ children, grandchildren, and their broader communities.<sup>15</sup> Woolford and Gacek discuss how residential schools used entangled modes of genocidal carcerality to destroy indigeneity in Canada.<sup>16</sup> Cycles of violence rooted in the residential school experience has become the reality for many Indigenous communities and has a strong intergenerational effect.<sup>17</sup> Indigenous women were specifically and adversely affected by these policies as women’s traditional roles and places within societies were uprooted.<sup>18</sup>

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<sup>9</sup> *Ibid.* See the Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Summary of the Final Report) (Ottawa: Truth and Reconciliation Commission, 2015) [*TRC Summary Report*].

<sup>10</sup> See *TRC Summary Report*, *supra* note 9.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Canada, Indigenous and Northern Affairs Canada, *The Historical Development of the Indian Act* (Report) (Ottawa: Treaties and Historical Research Centre, 1978) at 115.

<sup>14</sup> *TRC Summary Report*, *supra* note 9; Andrew Woolford & James Gacek, “Genocidal Carcerality in Indian Residential Schools in Canada” (2016) 18:4 *Punishment & Society* 400 at 404.

<sup>15</sup> *TRC Summary Report*, *supra* note 9.

<sup>16</sup> Woolford & Gacek, *supra* note 14.

<sup>17</sup> Cynthia C Wesley-Esquimaux & Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004).

<sup>18</sup> Native Women’s Association of Canada, *Culturally Relevant Gender Based Models of*

Settler colonialist policies created gendered harms that disempowered Indigenous women and subjected them to catastrophic rates of exploitation and violence.<sup>19</sup> Violence against women and girls is continually accepted and embedded in Canadian social structures and has permeated relations in Indigenous communities.<sup>20</sup>

The result of this marginalization is the concentration of various criminogenic factors. Indigenous women's experiences of poverty and violence often shape their propensity for criminalization.<sup>21</sup> Stephanie Wellman writes that the "crisis of identity is often the force behind [Indigenous individuals'] criminal behaviour."<sup>22</sup> Indigenous women experience state violence at heightened levels and state violence affects the crimes Indigenous women commit.<sup>23</sup> Policies such as the war on drugs, gentrification, protection of private property and the criminalization of sex work often channel Indigenous women toward illegal activity from a very young age.<sup>24</sup> By the time Indigenous women arrive in the criminal justice system, they are more likely to have survived severe forms of personal violence and sexual abuse than any other demographic grouping.<sup>25</sup> Despite

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*Reconciliation* (March 2010) at 10–12, online: Native Women's Association of Canada <<https://www.nwac.ca/wp-content/uploads/2015/05/2010-NWAC-Culturally-Relevant-Gender-Based-Models-of-Reconciliation.pdf>>.

<sup>19</sup> *Ibid* at 12–13.

<sup>20</sup> *Ibid*.

<sup>21</sup> Stephanie Wellman, *Re(claiming) Indigenous Identity within Canada's Prison System* (MA Thesis, University of Ottawa Department of Criminology, 2017) [unpublished].

<sup>22</sup> *Ibid* at 6.

<sup>23</sup> Vicki Chartrand, "Landscapes of Violence: Women and Canadian Prisons" (2015) *Penal Field* 12, online: <<https://champpenal.revues.org/9158>>; see also Shoshana Pollack, "Taming the Shrew: Regulating Prisoners Through Women-Centered Mental Health Programming" (2005) 13:1 *Crit Criminol* 71.

<sup>24</sup> See e.g. Dean Space, "Intersectional Resistance and Law Reform" (2013) 38:4 *Intersectionality* 1031; Andrea Krüsi et al, "'They Won't Change It Back in Their Heads That We're Trash': the Intersection of Sex-Work Related Stigma and Evolving Police Strategies" 38:7 *Sociology Health & Illness* 1137; Colleen Anne Dell & Jennifer Kilty, "The Creation of the Expected Aboriginal Woman Drug Offender in Canada: Exploring Relations Between Victimization, Punishment, and Cultural Identity" (2012) 19:1 *Intl Rev Victimology* 51.

<sup>25</sup> See Canadian Association of Elizabeth Fry Societies, *Fact Sheet on Aboriginal Women Prisoners* (2013), online: <<http://www.caefs.ca/wp-content/uploads/2013/04/Aboriginal-Women.pdf>>.

these findings, Indigenous women are being increasingly criminalized and imprisoned regardless of conditions of endangerment.<sup>26</sup>

## B. Arriving in the Correctional System

Lower rates of education and literacy mean that Indigenous women are disproportionately impacted by the presumption that ignorance of the law is no excuse for criminal behaviour.<sup>27</sup> There is little effort by the Courts to accommodate Indigenous persons in their first languages or plain English, leading to misunderstandings of essential court directions and processes.<sup>28</sup> Indigenous women are often misunderstood by players of the legal system in return. Police, lawyers, judges and juries often misconstrue their words, demeanor and body language.<sup>29</sup> These challenges are compounded by disadvantages by virtue of location and legal resources available. The resulting effect is that Indigenous women are more likely to be charged with more than one offence, more likely to plead guilty and are more likely to be convicted of criminal activity than non-Indigenous women.<sup>30</sup> Accordingly, Indigenous women are vastly overrepresented in Canadian prison populations. While Indigenous women compose less than 2% of the general population in Canada, they compose an estimated 33% of women in adult sentenced custody.<sup>31</sup>

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<sup>26</sup> Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 *Feminist Criminology* 101 at 104.

<sup>27</sup> Canadian Association of Elizabeth Fry Societies, *Fact Sheet on Indigenous Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2015), online: <<http://www.caefs.ca/wp-content/uploads/2013/05/FINAL-2015-Fact-Sheet-Indigenous-Women.pdf>>.

<sup>28</sup> Manitoba, Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, Chapter 7 (Manitoba: Aboriginal Justice Implementation Commission, November 1999), online: <<http://www.ajic.mb.ca/volume1/chapter4.html>> [*Aboriginal Justice Inquiry*].

<sup>29</sup> Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 2002) at 195.

<sup>30</sup> See e.g. Office of the Auditor General, *Report 3 – Preparing Indigenous Offenders for Release: Correctional Service Canada* (Ottawa: Office of the Auditor General, 2016) [*Auditor General 2016*]; *Spirit Matters*, *supra* note 3 at 43–44; *Aboriginal Justice Inquiry*, *supra* note 28 at Chapter 4.

<sup>31</sup> Mandy Wesley, *Marginalized: The Aboriginal Experience in Federal Corrections* (Ottawa: The Correctional Service of Canada, 2011) at 1 [*Marginalized Report*].

## C. Indigenous Women in Custody – Distinctive Needs

### 1. Needs as Women

The 1990 Task Force on Federally Sentenced Women, *Creating Choices*, sought to examine the correctional management of federally sentenced women.<sup>32</sup> The Task Force recommendations ultimately resulted in the closure of Canada's only women's penitentiary at the time, the Prison for Women.<sup>33</sup> An evaluation of the therapeutic services available at the federal Prison for Women drew a series of conclusions on what kinds of programs are most effective in meeting the needs of incarcerated women.<sup>34</sup> It was found that programs focused on women as *victims who need therapy in order to recover from past traumas* deny women self-determination and the nuances of their experiences.<sup>35</sup> Programs operating within an "expert model" create power imbalances whereby women feel further disempowered and struggle to successfully rehabilitate.<sup>36</sup> The 1994 report explains that the most effective programs for women allow high levels of autonomy, emphasize group communication and expression, and prefer community alternatives to imprisonment.<sup>37</sup> While the Canadian correctional system is allowing more for such programming options with its new women-centred regime, many of the ideals embodied in *Creating Choices* have been cast aside by the CSC as too ambitious and "not easily operationalized."<sup>38</sup>

### 2. Needs as Indigenous Women

Within the chapter on Aboriginal women's critiques of the Task Force, the authors discuss the systemic racism that operates in prisons.<sup>39</sup> They argue that this racism creates a situation where federally sentenced

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<sup>32</sup> The Task Force on Federally Sentenced Women, "Creating Choices: The Report of the Task Force on Federally Sentenced Women" (April 1990) at 2 [*Creating Choices*].

<sup>33</sup> *Ibid* at 3.

<sup>34</sup> Kathleen Kendall, "Therapy Behind Prison Walls: A Contradiction in Terms?" (1994) 96 *Prison Service J.*

<sup>35</sup> *Creating Choices*, *supra* note 32 at 22.

<sup>36</sup> Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60 *McGill LJ* 43.

<sup>37</sup> *Creating Choices*, *supra* note 32 at 18.

<sup>38</sup> Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001) at 185.

<sup>39</sup> *Creating Choices*, *supra* note 32 at 18.

Aboriginal women can only be further harmed.<sup>40</sup> Programming for Aboriginal women must be tailored to their specific needs and provided in ways that are meaningful to them. Bearing in mind the diversity of Indigenous groups, Aboriginal women tend to not be accepting of hierarchies, value the collective interest over the individual and value the teachings of connection rather than separation.<sup>41</sup> Indigenous women often enter the correctional system with different understandings of family and history.<sup>42</sup> The Task Force authors insist that control over programs aiming to meet these needs must rest with Aboriginal women and communities in order to be effective.<sup>43</sup>

### 3. *Indigenous Women Rising*

It is unlikely that the needs of Federally Sentenced Indigenous women will be met through policies of *empowering prisons*. *Creating Choices* had a strong, seemingly feminist focus on empowering women prisoners while at the same time asserting that all Federally Sentenced Women have the same experiences of disempowerment. As Kelly Hannah-Moffatt writes, the lure of empowerment discourse allows those already in power the ability to “informally and subtly govern marginalized populations in ways that encourage the latter to participate in their own reform.”<sup>44</sup>

This article does not aim to illustrate the victimization of Indigenous women. Rather, I hope to draw attention to the policies and programs that affect Indigenous women’s freedom to pursue healing paths that they find relevant and effective.<sup>45</sup> A supplement to *Creating Choices* was a paper written by two Indigenous women who had previously been federally incarcerated. Fran Sugar and Lana Fox wrote about the unaltered truth of their experiences and made recommendations to the Task Force as they saw fit.<sup>46</sup> The concluding paragraph of this report summarizes their perspective

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<sup>40</sup> *Ibid* at 19.

<sup>41</sup> *Ibid* at 18.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at 19.

<sup>44</sup> Hannah-Moffatt, *supra* note 38 at 168–169.

<sup>45</sup> See Fran Sugar & Lana Fox, “Nistum Peyako Séht’wawin Iskewwak: Breaking Chains” (1989) 3:2 CJWL 465 at 481.

<sup>46</sup> *Ibid* at 465.



on the only way correctional programming for Indigenous persons should be carried out:

It is only Aboriginal people who can design and deliver programs that will address our needs and that we can trust. It is only Aboriginal people who can truly know and understand our experience. It is only Aboriginal people who can instill pride and self-esteem lost through the destructive experiences of racism. We cry out for a meaningful healing process that will have a real impact on our lives, but the objectives and implementation of this healing process must be premised on our need, the need to heal and walk in balance.<sup>47</sup>

### III. CORRECTIONAL SERVICE CANADA: POLICIES & PROGRAMS

#### A. Institutional Objectives

The purpose of the federal correctional system, as outlined in s. 3 of the *Corrections and Conditional Release Act*, is to contribute to the maintenance of a just, peaceful and safe society by:

- (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
- (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.<sup>48</sup>

The CSC's paramount consideration in the corrections process is the protection of society.<sup>49</sup> There are a series of guiding principles listed in the CCRA, one of particular importance is s. 4(g), which states:

correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples...<sup>50</sup>

The recent Supreme Court of Canada decision, *Ewert v Canada*, assessed the CSC's statutory objectives with an aim to illuminate the organization's responsibilities toward Indigenous individuals in their custody.<sup>51</sup> Section 4(g) of the CCRA was a key provision examined over the

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<sup>47</sup> *Ibid* at 482.

<sup>48</sup> CCRA, *supra* note 1, s 3.

<sup>49</sup> *Ibid*, s 3.1.

<sup>50</sup> *Ibid*, s 4(g).

<sup>51</sup> *Ewert v Canada*, 2018 SCC 30, [2018] SCJ No 30 [Ewert].

course of this exercise.<sup>52</sup> The majority's analysis of the provision's plain meaning was that it requires the CSC "to ensure that its practices, however neutral they may appear to be, do not discriminate against Indigenous persons."<sup>53</sup> The decision described the development of s. 4(g), citing a guiding principle similar to this that was among the proposals originally set out in *Directions for Reform*.<sup>54</sup> The majority described that the shortcomings of the correctional system were found in this report to be particularly acute for "women, Indigenous persons, racialized persons, persons with mental health issues and other distinct groups."<sup>55</sup> This report, written in the years leading up to the enactment of the CCRA, called for reforms to promote predictability and equity in decisions made about individual offenders. The *Ewert* majority described s. 4(g) as a provision to address the alienation experienced by Indigenous persons from the Canadian criminal justice system that is not limited to the sentencing process.<sup>56</sup> The majority asserted that the purpose of the correctional system cannot be achieved without giving full, meaningful effect to the principle set out in s. 4(g).<sup>57</sup> While the majority decision acknowledged that many factors contribute to the broader issues facing Indigenous peoples in the criminal justice system, there are many matters within the CSC's control that could mitigate harms caused.

## B. Programming

While there exists a diversity of programming offered across the range of institutions, the CSC aims to satisfy their statutory mandate through providing rehabilitative programs for eligible inmates. Some of these programs target equity-seeking groups such as women and Indigenous persons.

Though CSC policies aimed at female prisoners serving federal sentences have been regarded as progressive and even radical by

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<sup>52</sup> *Ibid* at para 59.

<sup>53</sup> *Ibid* at para 54.

<sup>54</sup> Canada, Department of Justice and Solicitor General, *A Framework for Sentencing, Corrections and Conditional Release – Directions for Reform in Sentencing* (Ottawa: Supply and Services Canada, 1990).

<sup>55</sup> *Ewert*, *supra* note 51 at para 55.

<sup>56</sup> *Ibid* at para 57.

<sup>57</sup> *Ibid* at para 59.

international agencies,<sup>58</sup> the truth of women-centered programming options is that they continue to respond to criminality with an aim to responsabilize and correct women's individual behavior.<sup>59</sup> Shoshana Pollack argues that correctional mental health practices privilege a discourse that aims to regulate incarcerated women rather than empowering or supporting them.<sup>60</sup>

The CSC has developed a series of programming options that are designed around the specific needs and circumstances of Aboriginal offenders.<sup>61</sup> While their availability is inconsistent across institutions, the programs offered to some Indigenous women include the *Spirit of a Warrior* program, the *Circles of Change* program, and the *Family Life Improvement* program. Each program focuses to some extent on educating women on Aboriginal history and culture as well as the place of women in traditional Indigenous societies.<sup>62</sup> While it is important to not disregard the progress some women make through engaging in these programs, they have received criticism. Based on models of pan-Aboriginalism, these programs can emphasize a "manufactured hegemonic 'Aboriginal' culture"<sup>63</sup> that is dismissive of diversity and cultural difference.<sup>64</sup> Another common critique is the form these programs take in maintaining hierarchical structures and the "otherness of Aboriginal peoples."<sup>65</sup>

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<sup>58</sup> Pat Carlen, "Controlling Measures: The Repackaging of Common Sense Opposition to Women's Imprisonment in England and Canada" (2002) 2:2 *Criminal Justice* 155.

<sup>59</sup> Pollack, *supra* note 23.

<sup>60</sup> *Ibid.*

<sup>61</sup> Jennifer Dyck, *Stories from the Front: Realities of the Over-incarceration of Aboriginal Women in Canada* (LLM Thesis, University of British Columbia Faculty of Law, 2013) at 28 [unpublished]. The programs available to Aboriginal offenders are listed on the CSC website; see the CSC's strategic plan at Correctional Service Canada, *Strategic Plan for Aboriginal Corrections* (Ottawa: CSC, 2011), online: <<http://www.csc-scc.gc.ca/aboriginal/002003-1001-eng.shtml>>.

<sup>62</sup> Doris Fortin, *Program Strategy for Women Offenders* (Ottawa: CSC, 2004), online: <[http://www.csc-scc.gc.ca/publications/fsw/fsw18/fsw18\\_e.pdf](http://www.csc-scc.gc.ca/publications/fsw/fsw18/fsw18_e.pdf)>.

<sup>63</sup> Leanne Simpson, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) at 16.

<sup>64</sup> See discussion of "pan-Aboriginalism" and its effects in Wellman, *supra* note 21 at 27.

<sup>65</sup> Joane Martel & Renée Brassard, "Painting the Prison 'Red': Constructing and Experiencing Aboriginal Identities in Prison" (2008) 38:2 *British Journal of Social Work* 340 at 344; see also Dyck, *supra* note 61 at page 29.

The *Aboriginal Pathways* program is characterized by units contained within Federal Institutions that are meant for “offenders who have demonstrated on a continual basis their commitment to traditional healing.”<sup>66</sup> This program is framed as an alternative for inmates who do not have the option to transfer to a healing lodge due to “their location or their community.”<sup>67</sup> These initiatives provide Indigenous offenders with intensive one-on-one counselling with Elders, but remain within the typical correctional setting.<sup>68</sup>

### C. Section 81

Section 81 addresses the care and custody of Aboriginal offenders through the delivery of a wide variety of custodial services. While the statute does not specify the form of agreements, it has been found to include the transfer of Aboriginal offenders to an Aboriginal community by way of placement in Aboriginal “healing lodges” as well as more general release into the care and custody of Aboriginal communities.<sup>69</sup>

Developed in consultation with Indigenous members of the Task Force on Federally Sentenced Women, one of the recommendations listed in *Creating Choices* is the establishment of a healing lodge for Aboriginal women in one of the Prairie Provinces.<sup>70</sup> It was recommended that the lodge be premised on principles that promote a safe space for Aboriginal women prisoners, a caring attitude toward self, family and community, and an understanding of the transitory aspects of Aboriginal life.<sup>71</sup> The administration of the Lodge was to be through a non-hierarchical model based on an exchange of learning rather than a fixed structure of reporting relationships.<sup>72</sup>

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<sup>66</sup> Correctional Service Canada, *Establishment and Operation of Pathways Initiatives* (Ottawa: CSC, 2017), online: <[http://www.csc-cc.gc.ca/acts-and-regulations/702-1-gl-eng.shtml#E\\_Pathways\\_units\\_ranges](http://www.csc-cc.gc.ca/acts-and-regulations/702-1-gl-eng.shtml#E_Pathways_units_ranges)>.

<sup>67</sup> *Ibid.*

<sup>68</sup> See *Auditor General 2016*, *supra* note 30 at 3.43.

<sup>69</sup> Kyle Garnett, Christine A Walsh & Dorothy Badry “Section 84 – Corrections and Conditional Release Act: Recommendations for Reform” (2013) 11:2 *Pimatisiwin* 307.

<sup>70</sup> *Creating Choices*, *supra* note 32 at 148.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at 150.

Developed twenty-one years after these recommendations were made, the Buffalo Sage Wellness House (BSWH) is the only s. 81 Healing Lodge available for women across Canada and is located in Edmonton.<sup>73</sup> It is a sixteen-bed minimum/medium security facility for federally sentenced women.<sup>74</sup> The BSWH uses a unique model of case management that is based on a culturally informed and Elder-led approach.<sup>75</sup> Women are guided by the direction and vision of in-house Elders through the lens of an interconnected, Indigenous worldview.<sup>76</sup> Staff do not interfere with women's healing journeys but focus on providing access to ceremonies and individual guidance from Elders.<sup>77</sup>

#### D. Section 84

Section 84 of the *Corrections and Conditional Release Act* concerns the creation of focused reintegration plans for Aboriginal offenders.<sup>78</sup> Section 84 is legislation that places a positive duty on the Service to facilitate a form of consultation with Aboriginal communities with the aim to better meet the specific needs of Aboriginal offenders. The purpose is to collaborate with Aboriginal communities in the prerelease planning for Aboriginal offenders and is premised on the idea that adequate notice will allow communities to create a plan and provide a support network for offenders upon their release. It is meant to promote Aboriginal communities' abilities to successfully reintegrate offenders into the community by allowing for preparation and a strong community focus.<sup>79</sup>

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<sup>73</sup> Amy Pilon et al, "Buffalo Sage Wellness House (BSWH) Process Review" (Research Report R-371) (Ottawa: CSC, 2015) at 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at iii.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid* at 19–22.

<sup>78</sup> Garnett, *supra* note 69.

<sup>79</sup> *Ibid* at 309. See also Brown et al, "Housing for Aboriginal Ex-offenders in the Urban Core" (2008) 7:2 *Qualitative Social Work* 238.

## E. Funding Misdirection

The CSC was provided with \$11.9M under Public Safety Canada's *Effective Corrections and Citizen Engagement Initiative* in 2001.<sup>80</sup> The purpose for this initiative was to address the over-representation of Aboriginal offenders in federal prisons through collaboration with Aboriginal communities.<sup>81</sup> To be provided over the course of five years, this funding was explicitly meant for the construction and operation of new community s. 81 Healing Lodges.<sup>82</sup> There was significant interest on the part of Indigenous communities to enter into s. 81 agreements at the time this funding was allocated.<sup>83</sup> In 2001, the CSC reported that two s. 81 agreements were in the final drafting stage, three were in negotiation and 17 others were in the preliminary discussion phase.<sup>84</sup> However, due to changes in policy direction, the Waseskun Healing Centre was the only new stand-alone s. 81 facility completed using the \$11.9M in funding.<sup>85</sup> The OCI's investigation found that beginning in 2001-02, the CSC re-profiled funds from the Healing Lodge development to institutional initiatives such as the *Aboriginal Pathways* program.<sup>86</sup> To explain the policy change toward institutional priorities, the CSC claims that it required those funds to create programs to help Aboriginal offenders "prepare for the healing lodge environment."<sup>87</sup> The OCI advises as part of the recommendations in *Spirit Matters* that the CSC should seek funding from the Treasury Board or reallocate funds internally to an amount no less than the \$11.6M designated

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<sup>80</sup> *Spirit Matters*, *supra* note 3 at 15. The ECI was originally funded at \$45M over five years, which was to be shared between the CSC (\$30M), the Parole Board (\$6.5M), and Public Safety Canada (\$8.5M). See Public Safety Canada, *Final Report of the 2010-2011 Evaluation of the Effective Corrections and Citizen Engagement Initiatives* (Ottawa: Public Safety Canada, 2011).

<sup>81</sup> *Spirit Matters*, *supra* note 3 at 15.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* See also Correctional Service Canada, *Aboriginal Issues Directorate: National Action Plan on Aboriginal Corrections* (Ottawa: CSC, 2001) at 3.

<sup>85</sup> *Spirit Matters*, *supra* note 3 at 15.

<sup>86</sup> Correctional Service Canada (Evaluation and Review Branch), *Final Report – Effective Corrections Initiative – Aboriginal Reintegration* (Ottawa: CSC, 2004).

<sup>87</sup> Correctional Service Canada (Aboriginal Initiatives Directorate), *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11* (Ottawa: CSC, 2011) at 7.

in 2001 and adjusted for inflation.<sup>88</sup> In the five years since this report there is no evidence that these funds have been granted.

## F. Security Classification

Indigenous persons incarcerated in federal institutions are more likely than their non-Indigenous counterparts to be classified at higher security levels and referred to correctional programs.<sup>89</sup> This matters because the initial security placement affects the individual's placement within the institution, the programs they may access and their potential for parole.<sup>90</sup> Those classified at minimum security are more likely to be granted parole by the time they are first eligible for release than those classified at higher levels.<sup>91</sup> When incarcerated persons are assigned correctional programs they are unlikely to be granted parole until they have successfully completed them.<sup>92</sup> The systemic over-classification of Indigenous persons in Federal Institutions is amplified in the case of Indigenous women.<sup>93</sup>

The CSC has developed a security classification tool specifically for women offenders: the Security Reclassification Scale for Women.<sup>94</sup> Though far from perfect, this tool considers a broader range of factors in women's classification including positive contact with family members and progress in correctional programs.<sup>95</sup> Nonetheless, the 2017 *Auditor General's Report* on women in corrections found that CSC staff frequently overrode the results indicated by the new classification system.<sup>96</sup> From the 2014-2015 and 2016-2017 years, staff overrode the recommendations in 37% of reviews,

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<sup>88</sup> *Spirit Matters*, *supra* note 3 at 34.

<sup>89</sup> *Auditor General 2016*, *supra* note 30 at 3.87.

<sup>90</sup> *Marginalized Report*, *supra* note 31 at 23.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 41.

<sup>93</sup> Cheryl Webster & Anthony Doob, "Classification Without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2005) 46 *Can J Corr* 395.

<sup>94</sup> Office of the Auditor General, *Report 5 – Preparing Women Offenders for Release: Correctional Service of Canada* (Ottawa: Office of the Auditor General, 2017) at 5.25 [*Auditor General 2017*].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* at 5.26.

which led “to twice as many [individuals] being placed at a higher level of security”<sup>97</sup> than the scale indicated.<sup>98</sup>

### G. Ewert v Canada

In a recent case decided in the Supreme Court of Canada the appellant Jeffrey Ewert, who is an Indigenous man who has spent more than thirty years in federal custody, argued that tools used by the CSC to determine security level in prisons were not valid when applied to Indigenous persons.<sup>99</sup> The impugned psychological and actuarial tools were used to assess an offender’s psychopathy and risk of recidivism and it was emphasized that these tools were developed and tested on predominately non-Indigenous populations.<sup>100</sup> Ewert argued that the CSC failed to meet their obligations under s. 24(1) of the CCRA as there was no research confirming they were valid when applied to Indigenous persons.<sup>101</sup> Section 24(1) requires the CSC to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible. The decision turned on whether the CSC breached its obligation under 24(1) by not taking all reasonable steps to ensure that they did not rely on inaccurate information. The majority decision confirmed the trial judge’s finding that the CSC failed to take any action to confirm the validity of these tools with respect to Indigenous offenders.

Much of the inquiry into what was required of the CSC focused on the backdrop of statutory principles that guide the Correctional Service.<sup>102</sup> The clear direction formed in s. 4(g) of the CCRA, coupled with the rationale for that direction were seen to require the CSC to do more to ensure the risk assessment instruments were valid when applied to Indigenous inmates.<sup>103</sup> The majority asserted that the use of assessment tools of unclear validity could contribute to “disparities in correctional outcomes in areas in

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ewert, supra* note 51 at para 12.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid* at para 62.

<sup>103</sup> *Ibid* at para 63.



which Indigenous offenders are already disadvantaged.”<sup>104</sup> Security overclassification was said to undermine the requirement of the CSC to promote substantive equality in correctional outcomes for Indigenous inmates. Overestimation of risk posed by Indigenous inmates would frustrate the legislated purpose of providing humane custody, assisting in the rehabilitation of offenders and reintegrating them into the community.<sup>105</sup>

## H. Applying Gladue

Section 4(g) of the CCRA is said to remedy the same issues addressed by the Gladue decision and s. 718.2(e) of the *Criminal Code*, which requires that courts to exercise restraint in imposing imprisonment as sentences for Aboriginal persons.<sup>106</sup> Courts are to pay attention to the unique circumstances of Aboriginal offenders and use “culturally appropriate sanctions”<sup>107</sup> where warranted. It has been reasonably interpreted that in the case of Aboriginal offenders, *Gladue* principles should be applied to all areas of the criminal justice system when liberty is at stake.<sup>108</sup> Commissioners Directive No. 702 recommends that all CSC staff turn to *Gladue* principles and consider an Aboriginal offender’s social history when making decisions that affect their liberty, including their security classification and conditional release.<sup>109</sup> The Correctional Investigator consulted with CSC and Healing Lodge staff to find that CD 702 has been misinterpreted and misunderstood leading to its impact being fundamentally limited.<sup>110</sup> Further, a 2016 Auditor General Report examined 44 Indigenous offender files and found that no consideration of their social histories were documented, concluding that that CSC staff had not received adequate guidance or training on how to consider Aboriginal

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<sup>104</sup> *Ibid* at para 65.

<sup>105</sup> *Ibid*.

<sup>106</sup> *R v Gladue*, [1999] 1 SCR 688; *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

<sup>107</sup> *Spirit Matters*, *supra* note 3 at 28.

<sup>108</sup> *Ibid*.

<sup>109</sup> Correctional Service Canada, “Aboriginal Offenders,” Commissioner’s Directive No 702 (Ottawa: CSC, 12 November 2013).

<sup>110</sup> *Spirit Matters*, *supra* note 3 at para 83–84.

social history in their assessments.<sup>111</sup> Nine years after the policy was originally published there has been limited evidence that *Gladue* has been properly implemented in sentencing let alone in other areas of the criminal justice system. The capacity for *Gladue* to affect the use of section 81 and 84 agreements is significant, which is principally rooted in its power to ensure inmates are placed an appropriate security level.

#### IV. SECTION 81 AND 84 UNDERUTILIZATION

##### A. Section 81 - Underutilization

While 41% of federally sentenced women in custody are Indigenous, in 2017 there were only sixteen s. 81 beds available for women in custody (all at BSWH in Edmonton).<sup>112</sup> The Okimaw Ohci Healing Lodge, though not a s. 81 lodge, accommodates 56 women. In each of the past three years these lodges have operated at 90 percent capacity, despite the increase of 16 beds.<sup>113</sup> As in CSC guideline number 710-2-1, inmates will only be eligible for transfers under s. 81 if they are classified as minimum security, or in rare cases medium security.<sup>114</sup> The resulting effect is that almost 90% of Aboriginal prisoners are not eligible for these transfers.<sup>115</sup>

Section 81 healing lodges are funded at much lower levels in comparison to healing lodges operated by the CSC, and at much lower levels than regular federal institutions. The re-direction of funding intended for s. 81 agreements is discussed earlier in this article. As a result of this funding gap, s. 81 healing lodges offer their employees lower wages and few or no benefits, resulting in higher staff turnover and the need to allocate more funds toward retraining employees.<sup>116</sup> This can result in less committed, less experienced and poorly trained employees, which in turn

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<sup>111</sup> Auditor General 2016, *supra* note 30 at 3.105.

<sup>112</sup> Office of the Correctional Investigator, "Backgrounder: Aboriginal Offenders - A Critical Situation" (Ottawa: Correctional Investigator, 2013), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>.

<sup>113</sup> Auditor General 2017, *supra* note 95 at 5.60.

<sup>114</sup> Correctional Service of Canada, "CCRA Section 81: Transfers," Commissioner's Directive No 710-2-1 (Ottawa: CSC, 15 May 2017).

<sup>115</sup> *Spirit Matters*, *supra* note 3 at 3-4, 18.

<sup>116</sup> *Spirit Matters*, *supra* note 3 at 4, 20-21.

impacts the lodges' abilities to administer programming safely and effectively.<sup>117</sup>

## B. Section 84 - Underutilization

A 2013 study examined the implementation of s. 84 agreements with a focus on Indigenous communities in Alberta.<sup>118</sup> Through a series of focus groups, researchers sought to identify barriers to successful s. 84 implementation. The study also examined trends where agreements have been successfully implemented so as to identify areas of possible improvement.

Lack of sufficient knowledge of s. 84 is widely cited as a source for the section's underutilization. Individuals at all levels of involvement have indicated a lack of awareness and understanding about these agreements. Inadequate education on s. 84 results in confusion on who is responsible for implementing these releases.<sup>119</sup> Even among those familiar with such releases there is a lack of consensus on whether it is the parole officers or the communities who are to provide the offender's supervision.<sup>120</sup>

Another significant barrier is the lack of resources available for communities to successfully implement s. 84. Financial and workforce resources are lacking while there is a need for addictions support, spiritual ceremonies, counseling, housing and employment. An anonymous participant in the 2013 study commented on this issue: "sometimes the services that they might need, we don't have in our communities."<sup>121</sup> As many Indigenous communities are already deficient in necessary resources, many Nations do not have the capacity to provide the services conditionally released individuals need to successfully reintegrate.<sup>122</sup>

Geography poses a significant barrier to successful s. 84 implementation where isolation and lack of transportation limit released individuals from accessing the officers and programs required for completing their

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<sup>117</sup> *Ibid.*

<sup>118</sup> Garnett, *supra* note 69 at 311.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* at 312.

<sup>122</sup> *Ibid.*

correctional plans.<sup>123</sup> Trauma and lateral violence also affect isolated communities' abilities to build the programs and infrastructure needed to facilitate these agreements, which can be aggravated by lack of resources.

Whereas section 81 and 84 agreements are critically underutilized, the 2016 and 2017 *Auditor General* Reports indicate that where agreements have been implemented they have been highly effective. In the 2015-2016 fiscal year 274 Aboriginal offenders were released with a s. 84 release plan, an increase of 143 releases from four years earlier.<sup>124</sup> Those with s. 84 release plans are more likely to successfully complete their supervision than Indigenous offenders without s. 84 agreements.<sup>125</sup> Furthermore, Indigenous offenders released from Healing Lodges are more likely to both be granted discretionary release<sup>126</sup> and successfully complete their supervision than those released from other minimum-security institutions.<sup>127</sup> The evidence shows that these agreements are more successful in their ability to reintegrate conditionally released individuals back into communities than those who do not have access to such agreements.

## V. LEGISLATIVE INTENT

### A. Leading up to the *CCRA*

#### 1. *Directions for Reform Report*

The culmination of the public consultation of over 1200 individuals across Canada, Bill C-36 arrived before Parliament in 1989 and eventually became the *Corrections and Conditional Release Act*. Bill C-36 was based on the discussion package *Directions for Reform*, which was assembled by the House of Commons Standing Committee on Justice and the Solicitor General at that time.<sup>128</sup> Some of the recommendations dealt specifically with the issue of Indigenous individuals in custody, arguing the critical

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Auditor General 2016*, *supra* note 30 at 3.70.

<sup>125</sup> *Ibid.*

<sup>126</sup> Correctional Service Canada, *The Strategic Plan for Aboriginal Corrections* (Ottawa: CSC, 2013) at Finding 9.

<sup>127</sup> *Auditor General 2016*, *supra* note 30 at 3.65.

<sup>128</sup> *Debates of the Senate*, 42nd Parl, 1st Sess, No 161 (23 Nov 2017) at 4221 (Hon Frances Lankin).

importance of meeting Aboriginal offenders' needs both during and after their period of incarceration.<sup>129</sup>

The first part of the report focused on what was wrong with sentencing, corrections, and conditional release systems at the time and focused on the overreliance on incarceration as a source of concern. Referring to a report of the House of Commons Standing Committee, *Taking Responsibility*,<sup>130</sup> the report explained that a lack of focus on reintegration and alternatives to incarceration resulted in a correctional program that was ineffective in meeting the goals of the criminal justice system.<sup>131</sup> Another source for concern was the need for greater integration among components of the criminal law and its agencies. Whereas judges, prosecuting attorneys, corrections officials and the police all maintain their own priorities, these components were described to operate in too much isolation from each other. Under the section on *Principles for Corrections*, recommendation 2(f) resembles s. 4(g) of the 1992 Act, which requires the CSC to respect and respond to the needs of women and Aboriginal persons among other groups.<sup>132</sup> This resemblance was discussed by the majority in the *Ewert* decision where the court used the legislative history of the CCRA to interpret s. 4(g) in terms of its direction to the CSC. The majority described that the discussion in *Directions for Reform* supports the view that this provision mandates the CSC to pursue substantive equality in correctional outcomes by respecting the unique needs of certain groups, in particular Indigenous persons<sup>133</sup>

## B. Hansard

Sections 81 and 84 were created as a result of years of effort among governmental, public interest and Indigenous organizations.<sup>134</sup> The extensive effort associated with putting together Bill C-36 is repeatedly

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<sup>129</sup> Correctional Service of Canada, *Directions for Reform: A Framework for Sentencing, Corrections, and Conditional Release* (Ottawa: CSC, 1990) at 8 [*Directions for Reform*].

<sup>130</sup> Canada, Standing Committee on Justice and Solicitor General, *Taking Responsibility* (Report) (Ottawa: CSC, 1988) at 233.

<sup>131</sup> *Directions for Reform*, *supra* note 129 at 4, 12.

<sup>132</sup> *Ibid* at 18.

<sup>133</sup> *Ewert*, *supra* note 51 at 55.

<sup>134</sup> *Ibid* at 8-13.

acknowledged in the House of Commons Debates in 1991 and 1992.<sup>135</sup> There was a strong focus of the rights and recognition of victims and the Bill was praised for its potential to give victims' voices more legitimacy.<sup>136</sup> Accordingly, there was much discussion on how the Bill's provisions will affect public protection and safety.

Mr. Tom Wappel for Scarborough West considered the focus on public protection and anticipated how this will be interpreted.<sup>137</sup> He acknowledged that for some Canadians the "protection of society" could only mean that criminalized individuals are incarcerated and then corrections "throw away the key."<sup>138</sup> Alternatively, he recognized that for some Canadians the only way to protect society would be the total abolition of prisons.<sup>139</sup> He asserts that the definition of protecting society should fall somewhere in the middle, or that it would be "a combination of deterrence and rehabilitation."<sup>140</sup>

There is also some discussion on security classifications and the capacity of Bill C-36 to revise the model by which inmates receive rehabilitative treatment.<sup>141</sup> Members criticize how instead of classifying inmates as maximum, medium, or minimum security institutions themselves have been classified this way.<sup>142</sup> There is hope that Bill C-36 can allow for more individualized treatment in offender rehabilitation.<sup>143</sup>

There was limited discussion on the Aboriginal-specific sections in the Debate record. Some Members generally acknowledged the special recognition of the needs of women and aboriginal offenders.<sup>144</sup> One referred to women and aboriginal offenders as "having great difficulty

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<sup>135</sup> *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 8 (12 May 1992) at 10556 (Hon Doug Lewis). Further discussion of the efforts in assembling C-36 are found at pages 10557, 10560, and 10696 [*House of Commons 1992*].

<sup>136</sup> *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 4 (4 Nov 1991) at 4434 (Hon Doug Lewis) [*House of Commons 1991*].

<sup>137</sup> *House of Commons 1992*, *supra* note 135 at 10558-10559 (Tom Wappel).

<sup>138</sup> *Ibid* at 10559.

<sup>139</sup> *Ibid*.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid* at 10560.

<sup>142</sup> *House of Commons 1991*, *supra* note 136 at 4434.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* at 4435.

coping”<sup>145</sup> in the correctional system. Mr. George Rideout argued that initiatives concerning Indigenous persons in prisons were having some success, and they were having success because they were “involving native people in the process.”<sup>146</sup> He also stressed the importance of looking to the causes of crime endemic to society in order to more effectively address correctional programming.<sup>147</sup>

As remedial legislation, the CCRA should be interpreted in a fair, large and liberal manner to ensure that its objective is attained according to its true meaning, spirit and intent.<sup>148</sup> The *Hansard* evidence is an important tool for interpreting legislative intent. In no part of the *Hansard*, task forces or recommendations that preceded the Act is there any suggestion that ss. 81 and 84 were only meant to apply to individuals classified as minimum or (in few cases) medium security. There is criticism of the security classification regime and where rehabilitative efforts are focused. The *Hansard* shows a strong focus on maintaining a balanced approach to ensuring public safety that values rehabilitative programming.

The *Directions for Reform* report stressed the importance of providing correctional programming that addressed the specific needs of Aboriginal persons and women. Some guidance for interpreting ss. 81 and 84 may come from looking to the surrounding provisions. Sections 78, 80, 82, 83, and 84.1 of the CCRA also concern Aboriginal persons in custody. Each of these sections work with 81 and 84 with the aim to regularly consult and take advice from aboriginal communities on the provision of services to Aboriginal offenders. These provisions do not imply that any offenders should be outright barred from accessing these services, though some CSC policies create such an effect.

Taking into account the history of the Act, the Commissions that led to it, the *Hansard* and statutory interpretation, it is clear that the intent of Sections 81 and 84 was not followed. These sections were meant to address the over-incarceration of Aboriginal persons. They were constructed in response to feedback that Aboriginal people need more control over their correctional programming. While the CSC has made efforts to strengthen Aboriginal programming that is CSC-controlled, there have been

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<sup>145</sup> *House of Commons* 1992, *supra* note 135 at 10560 (Tom Wappel).

<sup>146</sup> *Ibid* at 10594 (George S Rideout).

<sup>147</sup> *Ibid* at 10593-10594.

<sup>148</sup> *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 1 SCR 27 at para 8.

inadequate efforts in accommodating agreements under ss. 81 and 84. Though the process of remedying these harms will likely be complex, an appropriate legal solution may be arrived at through Commissioner's Directives, a claim of discrimination, legislative response or a Constitutional challenge.

## VI. LOOKING FORWARD

### A. Commissioner's Directives

The simplest way to address the underutilization of ss. 81 and 84 is through clear and specific Commissioner's Directives (CDs). While there are already CDs addressing implementation of these sections, they only set out the process on how these agreements are carried out.<sup>149</sup> While there is a duty on the CSC to be pro-active in efforts to inform communities of the CSC's mandate and agenda, there is no direction on the CSC to be pro-active in *ensuring* these agreements unfold where there is interest.<sup>150</sup> Even though many CDs recognize Indigenous culture and beliefs and acknowledge the importance of meeting specific needs, it is clear that these guidelines are not being followed. Particularly for Indigenous women in maximum security units, the CSC is not adhering to its own policies and guidelines concerning essential programs and services.<sup>151</sup>

### B. Discrimination

In detrimentally limiting opportunities to access culturally relevant, rehabilitative programming, Aboriginal women have been unjustifiably deprived on the grounds of race and religion. While 'Aboriginality' may not plainly fit into either of these classifications, both race and religion are prohibited grounds under s. 3 of the *Canadian Human Rights Act*.<sup>152</sup> Section

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<sup>149</sup> Canada, Correctional Service of Canada, "CCRA Section 84 Application Process," Commissioner's Directive No 712-1-1 (Ottawa: CSC, 19 August 2010); Correctional Service of Canada, "Negotiation, Implementation and Management of CCRA Section 81 Agreements," Commissioner's Directive No 541-2 (Ottawa: CSC, 14 July 2010) [*Directive 541-2*].

<sup>150</sup> *Directive 541-2*, *supra* note 149 at 13.

<sup>151</sup> See e.g. SkyBlue Morin "Federally Sentenced Aboriginal Women in Maximum Security: What Happened to the Promises of 'Creating Choices?'" (Ottawa: CSC, 1999) at 22.

<sup>152</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.



5 of the Act states that to deny access to any good, service, facility or accommodation to any individual on a prohibited ground is a discriminatory practice.<sup>153</sup> The issue in arguing that Indigenous women have been discriminated against under s. 5 is that it is restricted to opportunities customarily available to the general public.<sup>154</sup> Still, the failure to take positive steps to ensure that groups benefit equally from correctional services may be a successful ground for claiming discrimination.<sup>155</sup> The CSC has been given the capacity to implement the programming that suits the needs of federally sentenced Indigenous women but internal policies and programs vastly limit these women's access to it. Various agencies have given specific instructions on how the CSC can address the underutilization of ss. 81 and 84 but despite these efforts, they have not taken sufficient steps to ensure this happens.

### C. Legislative Response

A possible remedy for this underutilization could come in the form of a legislative response. Sections 81 and 84 could be amended to create a positive duty on the CSC to facilitate these agreements and ensure that no Indigenous person is barred from accessing an agreement where there is interest and capacity. While a legislative response could on its face encourage better access to these agreements, for decades those who study prison law have known that a lack of law is not the problem.<sup>156</sup> Louise Arbour remarked in her famous report over twenty years ago, “[t]he Rule of Law is absent, although rules are everywhere.”<sup>157</sup> We might reasonably expect that such a response will include limiting terms that discharge the CSC's responsibility and allow exceptions to be made to the prejudice of those who need the agreements most.

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<sup>153</sup> *Ibid*, s 5.

<sup>154</sup> *Ibid*.

<sup>155</sup> See e.g. *Eldridge v Canada*, [1997] 3 SCR 624 at para 78.

<sup>156</sup> Debra Parkes, “Imprisonment and the Rule of Law” in Janine L’Esperance et al, eds, *Canada and the Rule of Law: 150 Years after Confederation* (Ottawa: International Commission of Jurists, 2017) [Parkes, “Imprisonment”].

<sup>157</sup> The Honorary Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services, 1996), as discussed in Parkes, “Imprisonment,” *supra* note 156 at 129.

## D. Constitutional Challenges

In preventing access to rehabilitative programs that better suit the needs of federally sentenced Indigenous women, the CSC's policies contravene s. 4(g) of the CCRA. Section 4(g) imposes a statutory direction on the CSC to ensure that correctional policies, programs and practices respect the differences and respond to the needs of Aboriginal persons in custody.<sup>158</sup> While in *Ewert* it was found that the appellant's *Charter* rights were not violated by the CSC's use of the impugned psychological and actuarial tools, the majority affirmed that the purpose of the correctional system set out in the CCRA cannot be achieved without giving meaningful effect to the guiding principle set out in s. 4(g).<sup>159</sup> The majority held that the CSC must ensure that its policies and programs are responsive to Indigenous offenders' needs and circumstances, including when they differ from non-Indigenous offender populations.<sup>160</sup> The majority urged the CSC to "abandon the assumption that all offenders can be treated fairly by being treated the same way."<sup>161</sup>

While a *Charter* breach was not made out on the facts in *Ewert*, courts have found that a contravention of s. 4(g) can give rise to breach in inmate's s. 7 rights. In *Chambers*,<sup>162</sup> the Yukon Court of Appeal held that the infringement of s. 4(g), an express statutory direction, constituted a breach of fundamental justice.<sup>163</sup> Another possible route to a successful constitutional challenge could be by claiming that the CSC's limiting of ss. 81 and 84 through internal policies are unconstitutional as they are inconsistent with the legislative intent.<sup>164</sup>

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<sup>158</sup> CCRA, *supra* note 51.

<sup>159</sup> *Ewert*, *supra* note 51 at 59.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *R v Chambers*, 2014 YKCA 13, 116 WCB (2d) 555.

<sup>163</sup> *Ibid* at para 74, cited in *Ewert*, *supra* note 51 at para 95.

<sup>164</sup> Senator Kim Pate, "Remedying Criminal Injustice: Advocating for Decarceration and Substantive Equality" (Presented by the Centre for Feminist Legal Studies at the Peter A Allard School of Law, 17 Nov 2017).

## VII. CONCLUSION

It has been nearly thirty years since Fran Sugar and Lana Fox asserted to those in power that Indigenous people need to be in control of their own correctional programming. CSC policies and practices are marked by overclassification of Indigenous women and the insufficient application of *Gladue* principles. This has resulted in impeded access to section 81 and 84 agreements. Funding ear-marked for these agreements has been redirected by the CSC to their own programs, violating their statutory commitment to respond to the needs of Aboriginal persons in custody. As a result of their unique histories and positionalities, Indigenous women suffer a disproportionate impact from this underutilization. Whether through a claim of discrimination, Commissioner's Directives, a legislative response or a constitutional challenge, immediate and thoughtful change must take place so that federally incarcerated Indigenous women and their communities have the resources and tools to heal themselves.