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ISSUES PAPER

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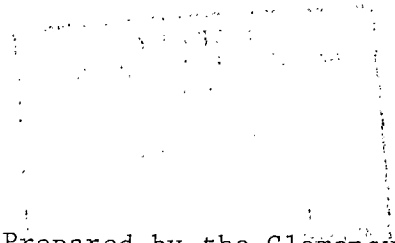

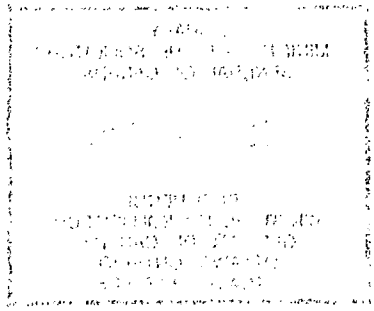

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CLEMENCY REVIEW -- ISSUES PAPER

The Solicitor General of Canada, the Honourable Bob Kaplan, P.C., M.P., has initiated a comprehensive review of the Federal Government's clemency powers -- the Royal Prerogative of Mercy, Sections 683 and 685 of the Criminal Code, and the Criminal Records Act. Ultimately, the Solicitor General will go to Parliament with a series of recommendations and amendments to the current legislation that will contribute to more effective and equitable systems of clemency in Canada.

Your participation is essential to the successful completion of this project. This Issues Paper has been prepared to encourage that participation and to facilitate a structured examination of the exercise of executive clemency. It describes the current clemency provisions and identifies the major issues that have arisen to date. Given your unique experience with the criminal justice process, your response to the questions contained in this paper will contribute significantly to the options and recommendations that will be formulated subsequently.

It would be greatly appreciated, therefore, if you would read the paper carefully and answer the questions therein. Should your association/organization wish to prepare a common brief, please send your reply to its headquarters. Should you wish to also submit an individual brief, mail it to:

Clemency Review
Room 614
Policy Branch
Ministry of the Solicitor General
340 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

The briefs should be mailed as soon as possible, but no later than August 15, 1981.

EXECUTIVE CLEMENCY - ISSUES PAPER

Every civilized legal system accepts, as a fundamental principle, that justice should be tempered with mercy. In Canada, three forms of executive clemency have been developed to safeguard that principle -- the Royal Prerogative of Mercy, Sections 683 and 685 of the Criminal Code (pardons and remissions), and the Criminal Records Act.

I. THE ROYAL PREROGATIVE AND THE CRIMINAL CODE PROVISIONS

Background

It has long been considered the prerogative of kings and queens to dispense mercy in deserving cases. Historically, the conceptual meaning of clemency has been tied to the idea of a monarch forgiving past rivals for their crimes or releasing convicts whose cases were felt to merit mercy due to the unjust application of a legal rule. In this country, similar powers of executive clemency have been vested in the Governor General who, as the Sovereign's representative, can exercise the Royal Prerogative of Mercy and in the Governor-in-Council, i.e., the Federal Cabinet, which can exercise clemency by virtue of Sections 683 and 685 of the Criminal Code.

Both the Royal Prerogative and the Criminal Code provisions are largely unfettered discretionary powers that permit exceptional remedies to be applied in extraordinary circumstances. Given their "exceptional" nature, these forms of executive clemency cannot realistically be exercised by strict adherence to rigid criteria. Nevertheless, general guidelines have been developed in order to structure decision-making.

1) Clemency is concerned solely with the person, i.e., it should be used to evaluate the merits of individual cases and not to judge the validity of certain statutory provisions or the criminal justice system.

2) Clemency cannot be used to make the condition of any persons worse, i.e., it cannot be used to increase penalties.

3) It should be applied in exceptional circumstances only, i.e., when no other remedy exists in law; when the available remedies would result in additional hardship; or, when other remedies cannot afford the appropriate measure of relief.

4) There must be evidence of inequity or hardship. Inequity exists when the consequences which flow from the sentence or conviction appear to be out of proportion to the nature of the offence and the consequences which would have resulted in the typical case. Hardship is suffering or privation (economic, mental, physical) which is out of proportion to the nature of the offence.

5) The independence of the judiciary must be maintained, i.e., it should not be used to "second-guess" the judiciary.

6) It should not frustrate the workings of the legislature or the agencies of the criminal justice system, i.e., it is to be used only in those rare cases where considerations of justice or humanity override the normal administration of law.

Of the two forms of executive clemency, the Royal Prerogative offers the broadest range of remedies:

a) free pardon - granted in cases where the person is shown to be innocent of the offence for which he/she was convicted,

b) conditional pardon - i) release subject to lawful conditions (during the serving of a sentence),

ii) pardon prior to eligibility under the Criminal Records Act (following completion of the sentence),

c) remission of sentence - erasure of all or part of the sentence imposed by the court,

d) remission of fines, estreated bail, forfeited goods,

e) respite - interruption of the execution of sentence for an interval of time, and

f) relief from driving prohibition - applies only to prohibitions imposed under section 238 of the Criminal Code before April 26, 1976 (other prohibitions fall under provincial responsibility).

All of the above, with the exception of respite and remission of sentence, can also be granted under Sections 683 and 685 of the Criminal Code. In fact, clemency requests are, as a rule, forwarded to Cabinet for decision rather than to the Governor General -- who only exercises his power in those circumstances where the remedy sought cannot be granted by recourse to the relevant sections of the Code. All of these remedies are subject to revocation if the request was approved on the basis of information later found to be fraudulent. Moreover, with reference to a conditional pardon or relief from driving prohibition, revocation can occur following conviction for a subsequent offence.

Applications for the exercise of clemency are made to the Solicitor General and are referred to the National Parole Board for consideration and recommendation. Ultimately, the Federal Cabinet can grant clemency acting on the information received from the Parole Board via the Solicitor General. Approximately 70 such applications are received annually.

1. **ARE THERE OTHER GENERAL PRINCIPLES OR CRITERIA THAT COULD BE INCLUDED AS JUSTIFIABLE GROUNDS FOR THE EXERCISE OF CLEMENCY?**

2. **ARE THERE OTHER REMEDIES THAT COULD BE GRANTED BY THE EXERCISE OF CLEMENCY? SHOULD SOME OF THE EXISTING REMEDIES BE EXCLUDED?**

3. **SHOULD AN ACT OF CLEMENCY EXERCISED UNDER EITHER THE ROYAL PREROGATIVE OF MERCY OR THE CRIMINAL CODE BE SUBJECT TO A REVOCATION?**

II. THE CRIMINAL RECORDS ACT

Background

The Criminal Records Act, given royal assent in 1970, is the vehicle by which the majority of pardons are granted in Canada. In 1980, for example, nearly 8,000 applications were submitted for consideration. It should be noted that "pardon" under this Act contains no semblance of a notion that the applicant did not commit the offence(s) in question. Rather, it is a formal recognition that the offender has satisfied the sentence imposed and has demonstrated subsequently that he/she is a responsible citizen. Thus, the pardon attempts to remove the stigma that often creates social, economic, and psychological problems for the convicted offender.

Briefly, the pardoning process is as follows:

A person convicted of a federal offence can apply to the Solicitor General for a pardon after a waiting period following completion of the sentence imposed. This eligibility period varies according to whether the offence was tried summarily or by indictment. There are different waiting periods for persons given absolute or conditional discharges. The matter is referred to the National Parole Board who make a recommendation after enquiries. The Federal Cabinet may grant the pardon acting on the information received from the Parole Board via the Solicitor General. A pardon "vacates" the conviction. Certain records of conviction are set apart after pardon on direction from the Solicitor General. The applicant's criminal record is "sealed", i.e., set apart if the pardon is granted and cannot be divulged without the written approval of the Solicitor General. The pardon is susceptible to revocation.

A. The Purpose of a Pardon

A crucial element in the successful development of any effective scheme of pardons is a clear delineation of its aim/purpose/objective. Obviously, the objective that is ultimately chosen will fundamentally alter the targets of the legislation as well as the specific elements contained therein. Some confusion exists with reference to the provisions of the current Act. It has been argued that a pardon implies that a past offence(s) is officially forgiven and should be forgotten. Others contend that a pardon should actively assist in the rehabilitative process. Most often, the notion of "earned reward" is advanced, i.e., the offender has

rehabilitated himself and the pardon is a formal recognition of his successful reintegration into society.

4. WHAT DO YOU THINK THE PURPOSE OF A PARDON SHOULD BE?

B. The Legal Effect of a Pardon

Section 5 of the Criminal Records Act states that a pardon "vacates" a conviction. Unfortunately, the term is an ambiguous one and its scope has been the focus of considerable debate. As currently interpreted, a pardon removes any disqualification that flows from federal legislation as the result of a conviction but does not nullify the fact of conviction. Consequently, by way of illustration, a pardoned offender cannot deny that he/she has been convicted when asked during a job interview but may answer "Yes, but I have been pardoned".

5. ARE YOU SATISFIED WITH THE CURRENT EFFECT OF A PARDON?

6. IF NOT, SHOULD THE ACT BE AMENDED IN SUCH A WAY AS TO PERMIT THE OFFENDER TO DENY WITHOUT QUALIFICATION ANY PAST CONVICTION(S) FOR WHICH HE/SHE HAS BEEN PARDONED?

C. Pardon Eligibility

Section 4 of the Act stipulates that, following completion of the sentence imposed (fine, probation, or prison), an offender is eligible to apply for a pardon two (2) years after satisfaction of sentence if the offence was tried summarily and five (5) years after completion if the offence was tried by indictment. It is during this period of time that the ex-offender may demonstrate, by his conduct in the community, that he has become a responsible citizen.

7. ARE THE LENGTHS OF THESE ELIGIBILITY PERIODS SATISFACTORY -- TOO LONG, TOO SHORT?

It has also been argued that the criterion used to determine the length of the waiting period (summary conviction vs. indictable offence) is unsatisfactory in that many "serious" offences may be tried summarily or by indictment and, eventually, are proceeded against by way of summary conviction.

8. WOULD OTHER CRITERIA BE MORE APPROPRIATE IN FIXING THE LENGTH OF THE WAITING PERIOD?

D. Absolute and Conditional Discharges

The Act makes exceptions for absolute and conditional discharges. If a discharge was granted in respect of an offence punishable by summary conviction, the waiting period prior to pardon eligibility is one (1) year. The waiting period is three (3) years if the offence was punishable on indictment. Certain critics have argued that, while subsection 662.1(3) of the Criminal Code indicates that an offender receiving a discharge is "deemed not to have been convicted of an offence", the Criminal Records Act applies to him as if he had been convicted of an offence.

9. SHOULD THE ACT RETAIN PROVISIONS RESPECTING PERSONS WHO RECEIVE ABSOLUTE/CONDITIONAL DISCHARGES OR SHOULD THEY BE DELETED?

C. The Pardoning Process -- Investigation Procedure

As noted earlier, applications are referred by the Solicitor General to the National Parole Board for consideration and recommendation that a pardon be granted or denied. In order to properly fulfill its responsibilities, Section 4(2) of the Act mandates the

Parole Board to "cause proper inquiries to be made in order to ascertain the behaviour of the applicant since the date of his conviction".

Such investigations are carried out by the RCMP on behalf of the Board. The people listed as character witnesses on the pardon application may be contacted as well as past/present employers and local law enforcement agencies. In some cases, inquiries are also conducted in the applicant's neighbourhood and with local credit and business bureaus. Such investigations are carried out with as much discretion as possible and, as a rule, those persons contacted are not informed of the purpose of the investigation. In fact, the applicant may specify in writing those persons who should not be made aware of the purpose of the investigation. Nevertheless, it has been suggested that many ex-offenders do not apply for a pardon because they fear that an investigation may inadvertently reveal their criminal history to family, friends, employees, etc.

10. WHAT FACTORS SHOULD BE CONSIDERED WHEN INVESTIGATING THE BEHAVIOUR OF THE APPLICANT IN THE COMMUNITY?

11. SHOULD SUCH INVESTIGATIONS BE RESTRICTED SOLELY TO "LAW-ABIDING" BEHAVIOUR, I.E., SOME INDICATION FROM THE POLICE THAT THE APPLICANT HAS BEEN CONVICTED OF FURTHER OFFENCES; IS ASSOCIATING WITH KNOWN CRIMINALS; OR, HAS RESUMED CRIMINAL ACTIVITY?

12. ARE THERE CERTAIN OFFENCES OR CIRCUMSTANCES THAT SHOULD REQUIRE A MORE IN-DEPTH INVESTIGATION TO BE CARRIED OUT AT THE DISCRETION OF THE BOARD?

F. Criminal Records - Sealing and Access

Arrest and conviction initiate a process of information gathering that results in the creation of a criminal record. In fact, one might more accurately speak of a series of records dispersed in various locations -- police files, court records, newspaper morgues, etc. As a result, it is difficult to determine what range of information, a pardon is intended to "suppress". Although the Act makes reference to criminal record, judicial record, or record of conviction, it, unfortunately offers no explicit definition of these terms.

13. WHAT CONSTITUTES A "CRIMINAL RECORD" AND WHAT KINDS OF INFORMATION SHOULD BE EXPUNGED BY THE GRANTING OF A PARDON?

Should a pardon be granted, the criminal record is not physically destroyed but rather is sealed and kept separate and apart from other records. It cannot be disclosed to any person without the prior approval of the Solicitor General. The issue of record storage and access to the records of pardoned offenders has also been the subject of considerable debate. In particular, police officials have argued that police access to such records should be granted more readily because the information is a valuable tool in criminal investigations.

14. WHAT SHOULD BE DONE WITH THE RECORDS OF PARDONED OFFENDERS?

15. SHOULD POLICE FORCES AND COURTS HAVE GREATER ACCESS TO THESE RECORDS?

16. ARE THERE OTHER AGENCIES AND INDIVIDUALS WHO COULD BE GIVEN ACCESS TO THESE RECORDS?

G. Pardon Revocation

Section 7 of the Act provides that a pardon may be revoked if the person to whom it was granted is subsequently convicted of a further federal offence; if there is evidence that he is no longer of good conduct; or, if the pardon was obtained on the basis of knowingly false or knowingly concealed information.

17. SHOULD PARDONS BE REVOCABLE AND ON WHAT GROUNDS?

18. IF YOU FEEL THAT PARDONS SHOULD BE REVOCABLE, SHOULD THE REVOCATION BE AUTOMATIC UPON CONVICTION OF ANY SUBSEQUENT OFFENCE OR DISCRETIONARY?

H. Automatic and Discretionary Pardons

At present, all pardons are discretionary in the sense that they are initiated by an offender's application and are subject to review by the Parole Board who recommend that pardon be granted or denied. Critics of this process charge that it is costly both in terms of money and manpower; it often entails considerable delay because of the investigation/assessment requirements; and, it is unnecessary with reference to many "minor" violations.

Consequently, it has been suggested that many offences, if not all, should be subject to "automatic" pardon, i.e., without application, following a specified period of crime-free conduct in the community.

In response, it has been argued that investigations are necessary in order to ascertain whether the offender is still involved in criminal activity and that much of the "symbolic" value of a pardon stems from the fact that it is discretionary, i.e., subject to a formal "seal of approval".

19. SHOULD SERIOUS CONSIDERATION BE GIVEN TO A SCHEME OF "AUTOMATIC PARDONS", I.E., WITHOUT APPLICATION?

20. IF SO, SHOULD ALL OFFENCES BE SUBJECT TO "AUTOMATIC" PROVISIONS OR SHOULD CERTAIN OFFENCES STILL ENTAIL DISCRETIONARY PARDONS?.

21. ARE THERE CERTAIN OFFENCES WHICH SHOULD NEVER BE PARDONED?

I. Pardons - Federal/Provincial Issues

One of the major criticisms of the Act, as currently constituted, is that it is restricted, by and large, to the federal sphere. That is, pardons are only granted with reference to violations against federal statutes. In addition, the pardon removes disabilities resulting from federal statutes and regulations but not those arising from provincial or municipal legislation.

Finally, although most provinces and municipalities cooperate in not revealing information about persons who have been pardoned, there are records in some courts and police departments that remain more or less accessible.

22. SHOULD THE EFFECT OF A PARDON INCLUDE THE REMOVAL OF PROVINCIAL AND MUNICIPAL DISABILITIES?

23. SHOULD PROCEDURES BE DEVELOPED TO ENSURE A UNIFORM, NATIONAL SYSTEM OR PROCEDURE FOR THE STORAGE/SEALING OF THE RECORDS OF PARDONED OFFENDERS?

24. ARE THERE ANY ADDITIONAL COMMENTS/SUGGESTIONS THAT YOU WOULD LIKE TO OFFER WITH REFERENCE TO THE EXERCISE OF CLEMENCY IN CANADA?