Parliament and the Courts

A great deal has been said regarding reforms to the justice system to ensure that it is more equitable to First Nations and Métis people. The *Commission on First Nations and Métis People and Justice Reform* acknowledges that there is scepticism as to whether anything has changed or will change. The Commissioners are dedicated to approaching this task objectively and the Commissioners are motivated to see real positive change. The Commissioners believe that all of the people of Saskatchewan share this motivation to see positive change. A significant step has already been accomplished. Judges, lawyers and elected officials all acknowledge that there is a significant need for reform to the way justice is delivered.

On September 1, 1996 the Parliament of Canada enacted wide-sweeping sentencing reforms. This Commission takes particular notice of Section 718.2(e), which indicates that Judges must specifically take into consideration the circumstances of Aboriginal offenders:

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The Supreme Court's first opportunity to thoroughly canvass Section 718.2(e) was in *R*. v. *Gladue*, [1999] 1 S.C.R. 688. Mr. Justice Cory (as he then was) carefully reviewed the circumstances of Aboriginal people and wrote in *Gladue* in part as follows, at para. 67-68:

> The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably, discrimination towards them is so often rampant in penal institutions.

Saskatchewan Courts have repeatedly endorsed and applied *Gladue*. The Saskatchewan Court of Appeal gave the following guidance to all Courts in Saskatchewan in *R*. v. *Laliberte* (2000), 189 Sask. R. 190:

> In the case of aboriginal offenders, those factors will include the "unique background and systemic factors" which played a part in the offender's criminal behavior. If those factors played a significant role in the commission of the offence, the sentencing judge must consider them in determining whether a sentence of imprisonment would actually deter or denounce the crime in a meaningful way.

In *R*. v. *Fleury* (1998), 169 Sask. R.161 , Mr. Justice Barclay of the Saskatchewan Court of Queen's Bench reviewed numerous reports and studies from across Canada. In his 1998 Decision, Mr. Justice Barclay concluded:

> "This evidence of widespread racism has traveled into systemic discrimination of aboriginals in the criminal justice system."

Of particular importance to achieving real change is the need to prevent young Aboriginal people from becoming involved in the criminal justice system. The *Youth Criminal Justice Act* proposes a similar provision to Section 718.2(e). This Act was given Royal Assent on February 14, 2002 and is scheduled to come into force in April, 2003. A declaration of principle in the *Youth Criminal Justice Act* indicates that young persons who commit offences be treated in a manner that respects gender, ethnic, cultural and linguistic differences in response to the needs of Aboriginal young persons and of young persons with special requirements (Section 3(1)(c)(iv)). The inclusion of this language in the Act presents another exciting opportunity to change the system.

There is a clear recognition by the existing justice system that change is needed. This recognition and acknowledgment is an important first step. It creates an atmosphere and environment in which the Commission and the people of Saskatchewan working together can have optimism that real change can be achieved. The challenge for all of the people of Saskatchewan is put succinctly by Mr. Justice Vancise of the Saskatchewan Court of Appeal in the following conclusion to his November 1996 article, To Change or Not to Change: That is the Issue (1996) Canadian Criminal Law Review, Volume 1, No. 3, p 263:

> "Remember, these legislative changes are just opportunities. If the Judiciary does not react, if Justice and Corrections do not put the necessary programming in place, nothing will happen. The challenge that faces us is to make sure that something happens - that the system changes."