



JUDICIAL RECONCILIATION

Challenges and Opportunities

*Presented to the
International Forum on Indigenous Peoples Legal Aid*

Taipei, Taiwan

September 4, 2024

MADAM JUSTICE LORE MIRWALDT
(Court of King's Bench of Manitoba)

Manitoba - “Canada’s Heart”



Agriculture



Hydroelectricity



Mining



**Government
Services**



Tourism

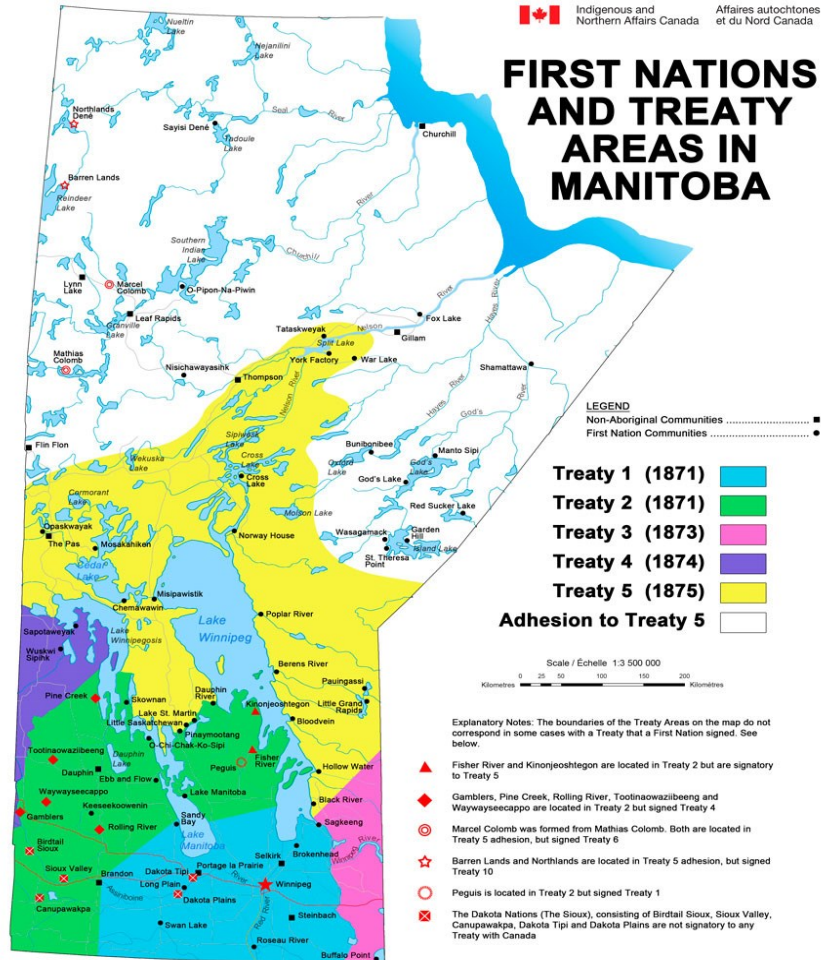


Forestry



Indigenous Peoples in Manitoba

- Manitoba is home to a large Indigenous population
 - Approximately **240,000** Indigenous (First Nation, Metis or Inuit) people in Manitoba
 - 18%** of Manitoba population identifies as Indigenous
 - Winnipeg has the largest urban Indigenous population in Canada – approximately 102,000 people, making up **14%** of Winnipeg's population
 - 63** First Nations communities
 - 57%** of First Nations live on reserves and one-half of those live in geographically isolated areas of Northern Manitoba
 - 7 Treaties in Manitoba
 - Approximately **97,000** Metis people – Red River Metis National Government headquartered in Winnipeg
 - Approximately 600 Inuit



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QS-N056-011-EE-A1
 Catalogue: R32-2702017E-PDF
 ISBN: 978-0-660-09066-5

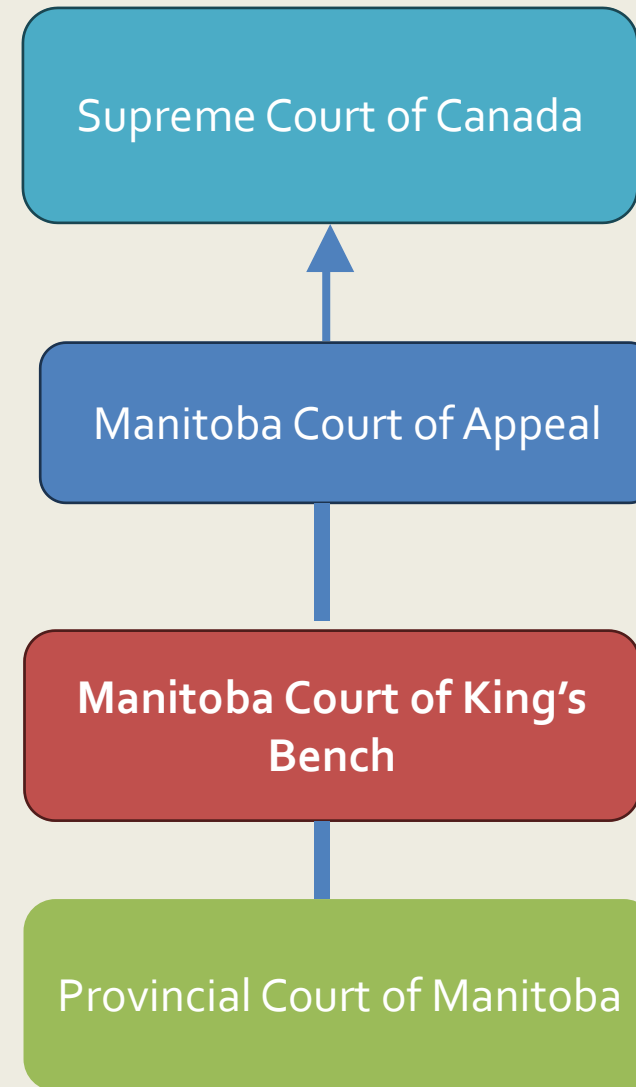
© Her Majesty the Queen in Right of Canada, represented by the Minister of Indigenous and Northern Affairs, 2017. This Publication is also available in French under the title Régions visées par des traités et emplacements des Premières Nations au Manitoba. This map is for informational purposes only. Markers and boundaries indicated are approximate and may be subject to revision.

[2021 Statistics Canada]

Manitoba's Court System

The Court of King's Bench of Manitoba is the highest trial court for the province. It is a court of general and inherent jurisdiction, meaning the judges of the court hear cases of all kinds and possess powers that go beyond what is conferred on them by statute. The judges are federally appointed pursuant to the *Judges Act*.

- A unitary court hierarchy



The Context and Need for Judicial Reconciliation in Manitoba

- There is a crisis of over-representation of Indigenous people in the justice system in criminal matters, child welfare and young offenders
 - 91% of the 10,000 children in care are Indigenous [2021, Government of Manitoba]
 - 81% of admissions into youth custody are Indigenous [2016-17 Statistics Canada]
 - Manitoba has the highest rate of incarceration of Indigenous women
 - Indigenous men are 8 times more likely to be jailed
 - Indigenous women are 15 times more likely to be jailed
- Court processes and delays exacerbate crisis
- Change is necessary to ensure Indigenous people that they will be heard and that their history, culture, way of life, legal tradition, laws and processes will be understood and respected by the Court

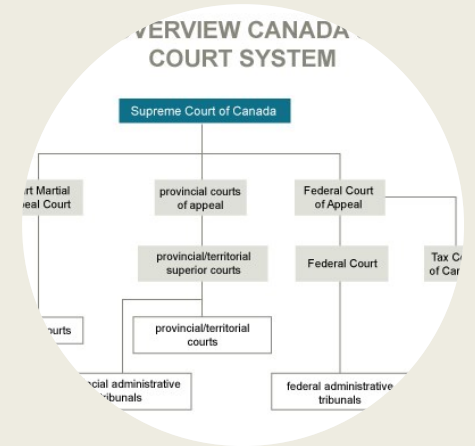
The Obligation to Reconcile

- Reconciliation is not new
- The Canadian legal system has addressed reconciliation since the 1960's [see "*Taking Indigenous Justice Seriously*" researchers (Ted Palys, Richelle Isaak & Jana Nuszdorfer, <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>)
- While the researchers ended their paper in 2012, it is evident we are now experiencing a new era – the Reconciliation Era
- This era began in earnest with the Calls to Action in the Truth and Reconciliation Report (2015) and with Canada's endorsement and subsequent enactment of the **United Nations Declaration on the Rights of Indigenous Peoples Act** (S.C. 2021, c. 14)
- Governments across the country (Federal, Provincial and Indigenous) are addressing justice issues affecting Indigenous peoples. The Canadian public is engaged in a broader way than previously. Canadians believe reconciliation is a good thing.

Reconciliation

“... Reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be **awareness of the past**, an **acknowledgement of the harm** that has been inflicted, **atonement for the causes**, and **action to change behaviour**.”

[Truth and Reconciliation Commission
Summary Report -2015]



The
Obligation to
Reconcile

The
Opportunities
of
Reconciliation

The
Challenges of
Reconciliation



Sunrise Ceremony – Welcoming
Sacred Eagle Feather- September
2019 - Winnipeg

- “The project of reconciliation will begin with the trust that will come from acknowledging that we can do better. It will also come from accepting the harsh but objective fact that whether it be in the area of criminal law, child protection or in other difficult areas, Indigenous Canadians are over-represented in the justice system and that any related systemic delay inevitably has a disproportionate impact on them...Those who work in the justice system must realize that those unique problems and challenges typically transcend the traditional solutions associated with well-intentioned access to justice initiatives.
- *[Excerpt, Chief Justice Glenn D. Joyal, June 2017 Call to Bar Speech]*

***The Creation of
the
Trust,
Reconciliation
and
Access to Justice
Committee
(TRAC)***

- Announced at 2017 Call to Bar address as the Court's approach to reconciliation
- 5 puisne judges reporting directly to Chief Justice
- In 2023, 5 Indigenous community members joined TRAC
- Mandate:

To address the unique obligations, opportunities and challenges that currently surround the Court's relationship with Indigenous Manitobans in an era of reconciliation

The Four Principles of Judicial Reconciliation



Principle 1:

Building trust and understanding with Indigenous communities through outreach and engagement



Principle 2:

Enhancing judicial education and awareness of challenges and opportunities, both cultural and legal, connected to reconciliation



Principle 3:

Identifying specific reconciliation initiatives for implementation, aimed at producing real and meaningful change



Principle 4:

Normalizing the court's attentiveness and vigilance to the unique access to justice issues faced by Indigenous Manitobans

Principle 1

Building trust and understanding with Indigenous communities through outreach and engagement



It is not the duty nor responsibility of Indigenous peoples to reconcile with the Court

Court must reach out to communities to seek reconciliation in a humble and respectful manner

Court must hear from many voices to understand past and current experiences with the justice system, as well as communities' justice aspirations

Court's approach must be flexible . There is no "one-size-fits-all" approach

Engagement will differ for each Indigenous legal order and community

The aim is to establish a mutually respectful relationship between the Court and the community

Building Trust and Establishing Respectful Relationships



Principle 2

Enhancing judicial education and awareness of challenges and opportunities, both cultural and legal, connected to reconciliation

- Not “re-education” of judges
- Not an attempt to tell judges how to think or to impose a point of view that is “politically correct”
- Voluntary opportunities for judiciary to enhance its capacity for intercultural understanding, empathy and mutual respect
- Sharing of traditional knowledge is a gift and an act of reconciliation



Judicial Education Opportunities



- TRAC works with National Judicial Institute to provide educational opportunities to the judiciary
- TRAC members contributed to NJI Aboriginal Bench Book
- Local knowledge keepers and Indigenous legal scholars invited to present to judges
- Important to have a **distinctions-based approach** to judicial education in this area
- Focused, committed and ongoing learning is necessary for judges to engage meaningfully with Indigenous legal traditions

Learning Together

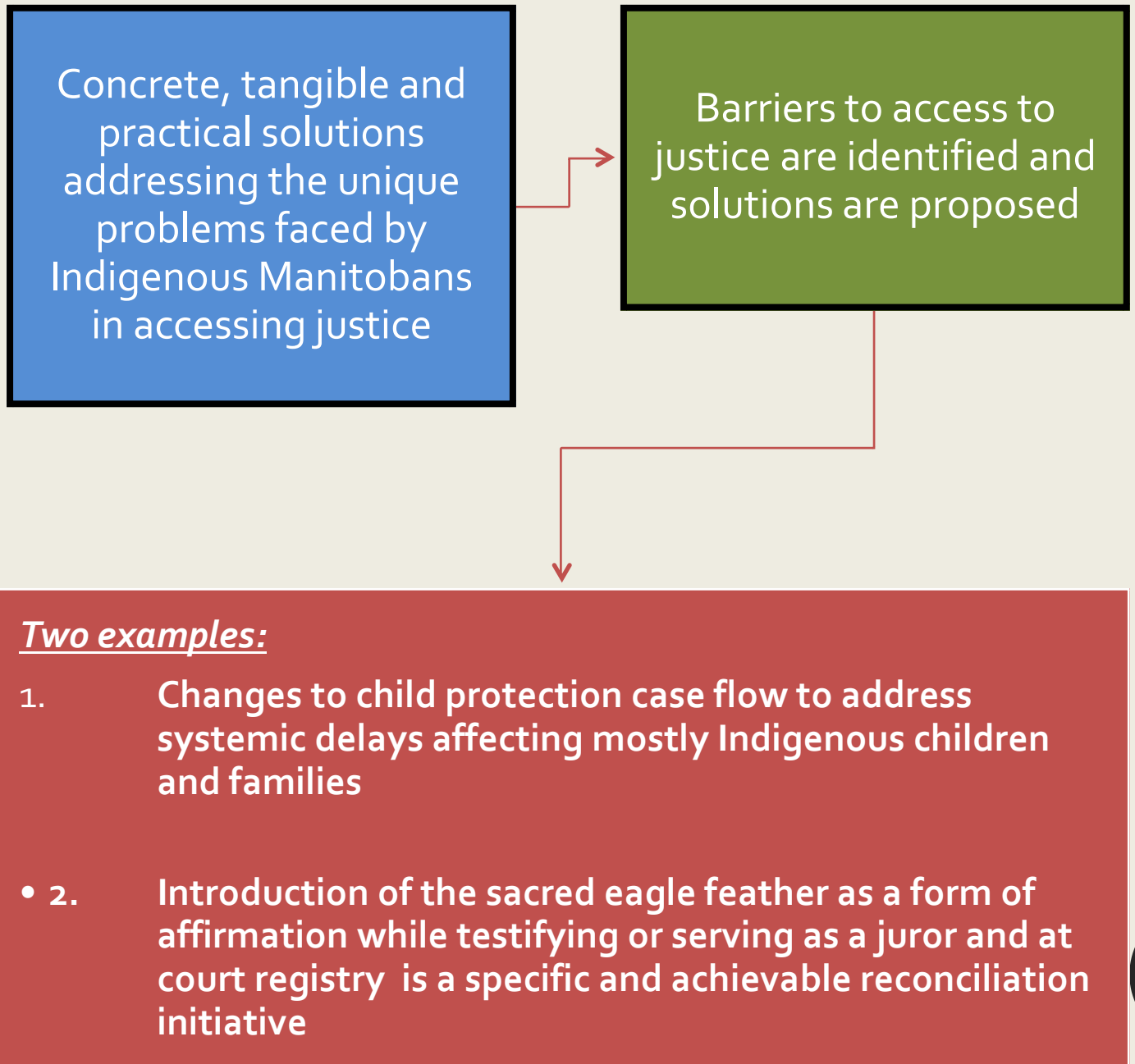


Judges and judicial assistants learning how to make tobacco ties to distribute at 40th Anniversary Symposium of Family Division



Principle 3

Identifying specific reconciliation initiatives for implementation, aimed at producing real and meaningful change



Child Protection Model

How many kids are in care?*

Authority	Families Annual Report	Self-Reported
The Northern Authority	2,928	3,341
Southern First Nations Network of Care	4,897	5,097
General Authority	1,359	1,528
Métis Authority	1,144	1,177
Total	10,328 +448 in 'non-paid care'** = 10,776	11,143

*Numbers reflect the number of children in care as of March 31, 2018.

**Non-paid care is a child reported to be living with their parent, guardian or a lifelong family member (e.g. adoption placement)



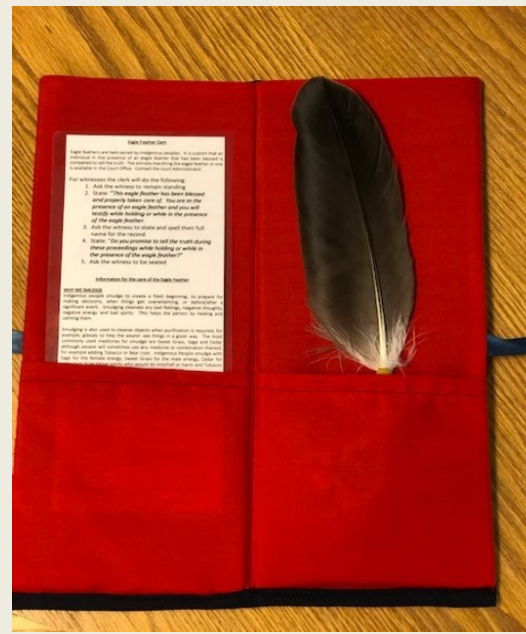
SOURCE: Families Annual report,
CFS-mandated authorities' annual report

- Over-representation of Indigenous children in care was exacerbated by delays and outmoded court processes
- Constitutional rights of parents and children to a timely trial was in peril
- Time-limited and streamlined process
- Early engagement with specialist judge
- Adoption of Indigenous legal procedures (inquisitorial model, informality, group discussion)
- Practices are more in line with provincial, federal and Indigenous child welfare legislation
- Change in process has resulted in an 83% resolution rate at the initial intake court
- Dramatic decrease in number of contested hearings

Sacred Eagle Feather



https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.winnipegfreepress.com%2Fbreakingnews%2F2019%2F09%2F26%2F2Feagle-feathers-an-implement-of-justice-in-manitoba&psig=AOvVaw3rIQ5lX-RenhsDIL_hrHY_&ust=1722210598367000&source=images&cd=vfe&opi=89978449&ved=0CBQQjhqFwoTCJDE2gKoylcDFQAAAAAdAAAAABAm



Sacred eagle feather is available in all Manitoba Courts and at all court registries. Eagle feather is Indigenous law. Manitoba Courts undertook the responsibility for properly caring for and utilizing the feathers in the courts.

Broader Reconciliation Initiatives and Systemic Change



PEGUIS FIRST NATION

HONOURING OUR CHILDREN,
FAMILIES AND NATION ACT

COMING INTO EFFECT JANUARY 21, 2022



Transformation of Court processes and procedures will be necessary to effect broader systemic change



Participation of the Court in restorative justice initiatives as pilot projects will be pursued



Involvement of communities, government, other institutions may be required



As Indigenous legal orders re-emerge, Courts may be invited to act in advisory capacity or other role as defined by the Indigenous order



Takes longer to realize this reconciliation pillar

Principle 4

Normalizing the court's attentiveness and vigilance to the unique access to justice issues faced by Indigenous Manitobans



- Important to examine all aspects of the Court's provision of services through the **"reconciliation lens"**
- All Court initiatives must take into consideration the potential to enhance or to compromise the goal of reconciliation
- Processes for **accountability** must be developed to ensure that the Court is providing services in an open, culturally appropriate and respectful manner
- Use of technology, informal processes and diversion to local restorative justice programs, use of Indigenous languages in Courtrooms can help to ameliorate these challenges
- Adjusting current Court processes by the acceptance of traditional Indigenous legal processes (sentencing circles, use of storytelling, receiving recommendations from local Elders or justice committees) are some practices to be considered
- Advent of local Indigenous Courts will require adjustments to current court service models

Judicial Reconciliation and Legal Pluralism



- Canadian legal system is rooted in legal pluralism
- Canadian law historically grounded in common and civil law traditions,
- Indigenous legal traditions pre-date the development of Canadian common and civil law courts
- Indigenous laws and legal practises historically suppressed including within Canadian court system
- Growing re-emergence of Indigenous legal traditions requires Court to address incorporation of Indigenous law into judicial decision-making and the mechanism of doing so
- “Braiding” of Canadian, Indigenous and international law can establish a “single strong rope” (Supreme Court of Canada – Reference re Act respecting First Nations, Inuit and Metis children youth and families, 2024 SCC 5 (CanLii))
- Indigenous-led legal systems, which will consider the role of the judiciary, and superior trial courts, in particular, in support these systems

The Opportunities of Judicial Reconciliation



Enhanced
Access to Justice



Collaboration with
Justice Participants



Public Confidence in
the Legal System



Individual
Reconciliation



Judicial Education



Judicial Wellness

The Challenges of Judicial Reconciliation

“Reconciliation must become a way of life.”

[p.184, Truth and Reconciliation Commission , Summary Report]



**Judicial
Independence**



**Reconciliation
Reticence**



**Reconciliation
Resources**



**Measuring
Outcomes**



**Recruiting
Reconciliation Allies**



**Reconciliation
Fatigue**

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Judicial Independence and Reconciliation



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- The Court's efforts in reconciliation must never inhibit the operation of the rule of law
- Projects and initiatives undertaken by the Court cannot be seen in any way as compromising judicial independence or impartial decision-making
- Participation of judges in educational programs, outreach initiatives and reconciliation events is encouraged but **not** required
- The Court as an institution, not any individual judge, is the instrument of reconciliation
- ***Ethical Principles for Judges (2021) Introduction- Clause 8.***
 - Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to **enhance public confidence** and **to expand its own knowledge** of the diversity of human experiences in Canada today.



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