



RECONCILIATION IN THE COURTROOM – IT IS REQUIRED !

**JUDGE G. MORIN, PROVINCIAL COURT FOR
SASKATCHEWAN**

**ELEANORE SUNCHILD, SUNCHILD LAW,
POUNDMAKER II, BATTLEFORD**

What is Reconciliation?

- ▶ Reconciliation is the relationship between Indigenous and non-Indigenous and restoring the balance
- ▶ Helps us to come to terms with the past so that we can move forward
- ▶ It is in response to the Legacy of Colonization
- ▶ Reconciliation includes implementation of the 94 “Calls to Action”
- ▶ Reconciliation also includes education about the mechanisms of Colonization such as Indian Residential Schools and methods to alleviate the effects of Indian Residential School and inter-generational effects

TRC: Truth and Reconciliation Commission

- Was created June 1, 2008 as part of the Indian Residential Schools Settlement Agreement – IRSSA
- Promote awareness and public education to Canadians about the IRS system and its impacts;
- Created 94 “Calls to Action” as part of final report

“We are calling on you to open your mind, to be willing to learn these stories, to be willing to accept that these things happened. This is just not an Aboriginal issue. It’s a Canadian Issue.” Wilton Littlechild, TRC, June 2015

TRC Calls to Action

- ▶ 30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
- ▶ 31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
- ▶ 35. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.
- ▶ 36. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.
- ▶ 37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.
- ▶ 38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

Call to Action 27

- ▶ We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Colonization

1. The action or process of settling among and establishing control over the Indigenous peoples of an area.

1.1 The action of appropriating a place or domain for one's own use.

[Oxford English Dictionary]

State of Indigenous People Prior to Colonization

- ▶ Systems of Governance and Conflict Resolution
- ▶ Laws
- ▶ Cultures
- ▶ Religion/Spirituality
- ▶ Languages
- ▶ Traditions
- ▶ Family Units and Community Structures
- ▶ Sustainable Ways of Life Reflecting Knowledge of the Land

Colonial European Views

- ▶ Terra Nullius
- ▶ Doctrine of Discovery
- ▶ The Savage versus the Civilized
- ▶ Civilization as:
 - ▶ European Exceptionalism
 - ▶ Government
 - ▶ Law
 - ▶ Economics
 - ▶ Property
 - ▶ Land Use
 - ▶ Family
 - ▶ Language
 - ▶ Industry
 - ▶ Christian Moral Superiority

Segregation and Oppression

▶ Indian Act

Indigenous people alienated from traditional lands, family units, community structures, governance

Enfranchisement – loss of Indian status for those who became a doctor, lawyer, clergyman

Loss of Indian status of women who married out

▶ Reserves and Pass System

1885 -Special travel permits required to leave the reserve, remained for 60 years

▶ Separate Schools and Separate Health Care

Status Indians could also not receive a degree/diploma without losing status until 1961

Indian Residential Schools

Indian Hospitals

▶ Other forms of Oppression

Alienated Indigenous peoples from their own laws, forms of conflict resolution and traditions - Indians could not hire a lawyer until 1951

Was illegal to practice traditional ceremonies and culture until 1951

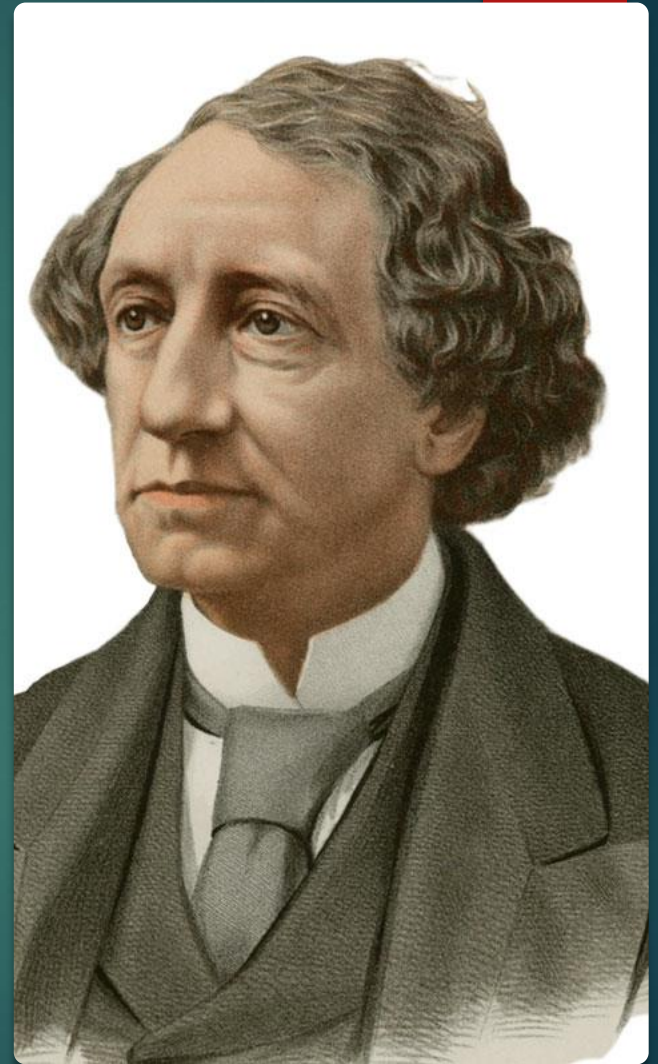
Assimilation Policies



- ▶ Indian Residential Schools
- ▶ Day Schools
- ▶ Sixties Scoop
- ▶ The above were mechanisms of abrupt and violent disintegration of traditional extended family units and communities through the widespread practice of removing indigenous children from their homes
- ▶ Attacked traditional family systems based on kinship and culture

Sir John A McDonald – “The Father of Confederation”

When the school is on reserve, the child lives with his parents, who are savages, and though he may learn to read and write, his habits and training mode of thought are Indian. He is simply a savage who can read and write. It has been strongly impressed upon myself, as head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men. 1897



THE INDIAN RESIDENTIAL SCHOOL ERA



“THE INDIAN PROBLEM”



- ▶ “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill”

Duncan Campbell Scott, 1920

HISTORY OF INDIAN RESIDENTIAL SCHOOLS

- ▶ Indian Residential Schools were created in 1884 under Canadian law, through **The Indian Advancement Act** to be operated by the government and the churches
- ▶ As part of Treaty negotiations to share the land and resources with Canada, the bands requested that a school house be provided on each reserve so that the children learn colonial education
- ▶ Residential Schools did not meet the Treaty terms

Realities of Indian Residential Schools

- ▶ Fundamentally dislocated Indigenous children from their families, communities, traditions, territories, cultures, spirituality and languages
- ▶ Imposed European and Christian values upon the premise that Indigenous people were inferior
- ▶ Defined by inadequate funding, poor quality of education, limited resources and staffing to provide the Indigenous children an equal education

Realities of Residential Schools

- ▶ Racism and discrimination – cutting of hair, racist acts, such as calling the children “savages”
- ▶ Exposing children to physical, sexual and emotional abuses and traumas
- ▶ Severe neglect, abuse example starvation
- ▶ Forced Labour, torture and experimentation

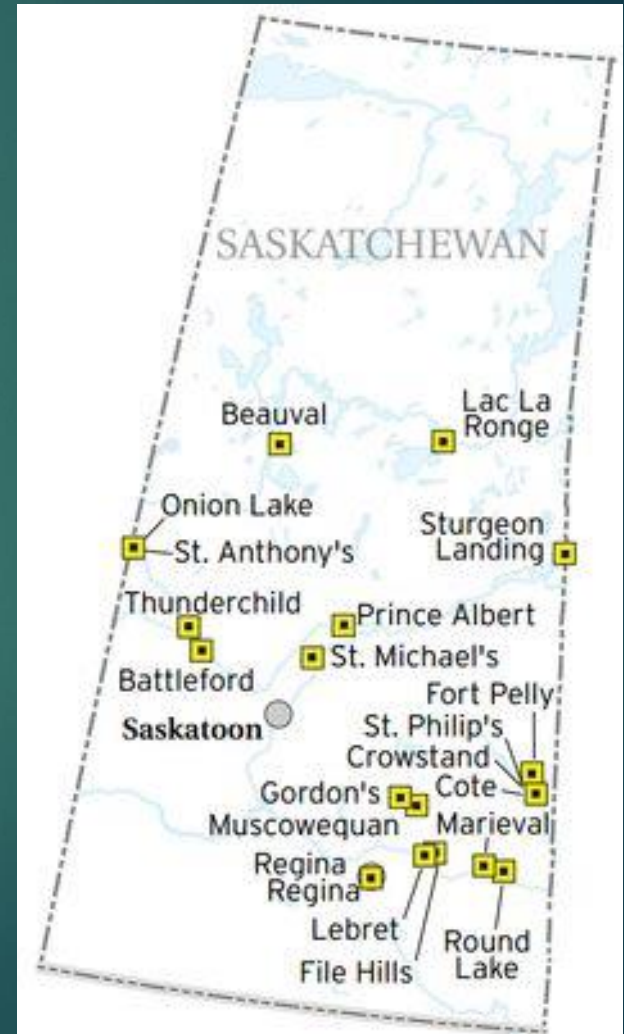
LASTING LEGACY OF THE IRS ERA

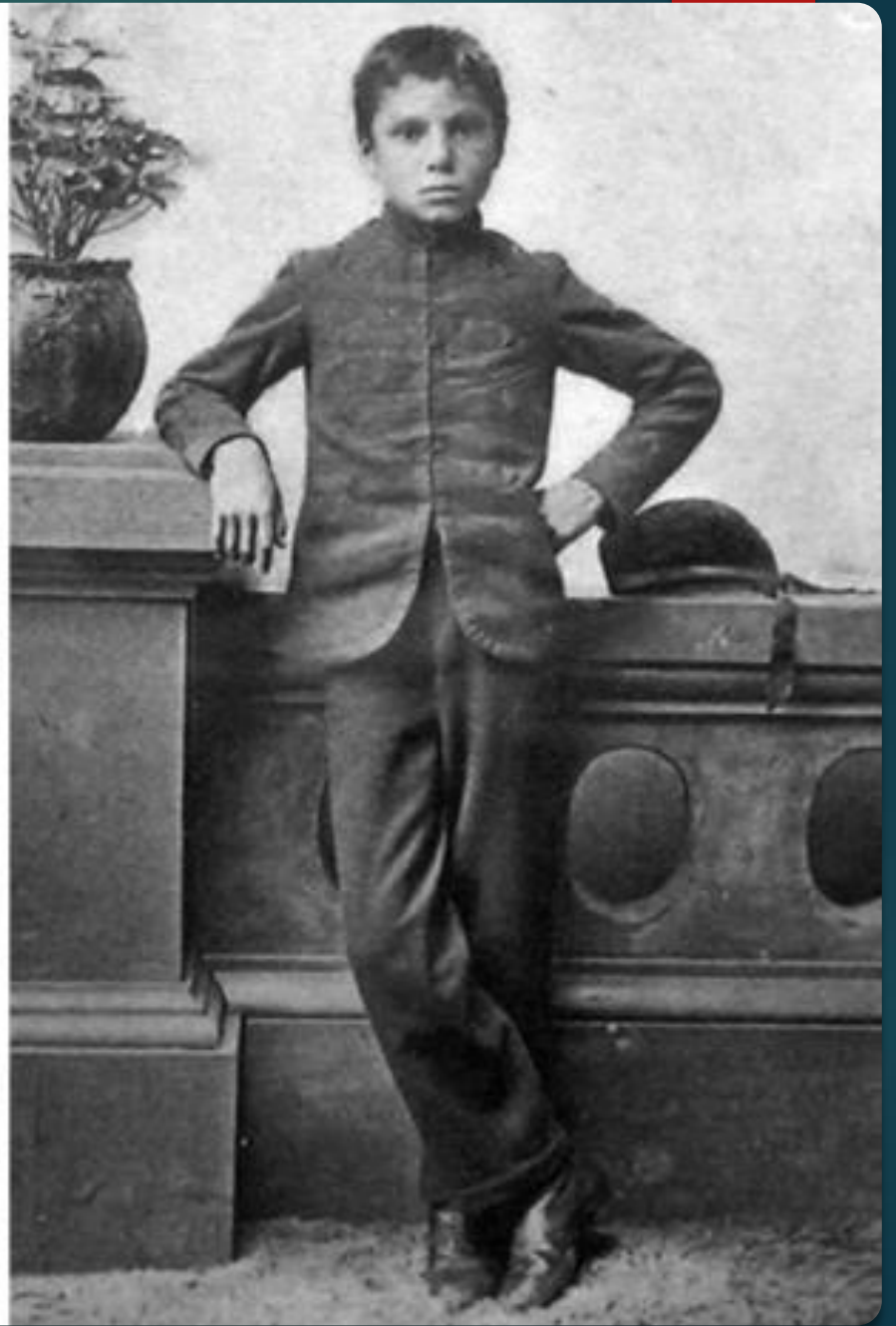
150,000 students attended
Indian Residential Schools

37,951 abuse claims filed in
the IAP

6,000 estimated number of
children who died

Highest no of IRS in Sask. –
22 schools, last one closed
in 1997





Effects of Indian Residential Schools on Survivors

- ▶ 37,000+ abuse claims filed in the Independent Assessment Process by 2012
- ▶ Harms and Effects: Anger, Aggression, Anxiety, PTSD, Depression, Fear, Lack of Trust, Problems with Authority, Long-term physical Injuries, Sexual Dysfunction, Guilt, Self-Blame, Humiliation, Loss of Self-Esteem, Loss of Parenting Skills, issues of abandonment and other
- ▶ Addictions to Alcohol, Drugs, Suicide and Self-Inflicted Injury, Disassociation
- ▶ Returned to families & communities and cycles of trauma continued

Immediate and Intergenerational Impacts from Indian Residential School:

Family and Community Effects:

- High rates of family dysfunction
- High Rates of poverty
- High addiction rates
- ▶ High rates of mental health issues
- ▶ Inadequate access to supports
- ▶ Continued sexual abuse and violence
- ▶ Changes to the traditional women's roles
- ▶ Interruption of transmission of Traditional and Cultural teachings
- ▶ Unobtainable ideals imposed on Indigenous families and survivors – by Social Srvs and Probation for example

Effects of Indian Residential School on Canadian Society

- ▶ 1600 Missing and Murdered Indigenous Women
- ▶ High suicide rates
- ▶ Overrepresentation of Indigenous people in the Justice System – high rates of addictions and violence
- ▶ Overrepresentation of Aboriginal people in custody
- ▶ Crisis levels of children in foster care

The Settler Myth

- ▶ The myth that settlement and establishment of Canada was peaceful and well-meaning
- ▶ Assumes and perpetuates mythical European Views of Indigenous Peoples (Terra Nullius, Doctrine of Discovery, European Exceptionalism and Christian Moral Superiority)
- ▶ In turn facilitates racism because it confirms view that Indigenous peoples are inferior and justifies the brutality that was used against Indigenous peoples to achieve assimilative and oppressive goals
- ▶ Removes blame from the Canadian state for Aboriginal people brought before it in criminal matters
- ▶ It upholds the legitimacy of the Justice System and its Principles and whether they reflect the appropriate treatment of Indigenous peoples or not

Other Myths About Indigenous Peoples

- ▶ Institutions “Must relinquish the persistent myth of themselves as peacemakers and acknowledge the destructive legacy of a society that has stubbornly ignored and devalued Indigenous experience.”
- ▶ The Drunken Indian Myth
- ▶ The Myth of Taxation and the Freeloading Indian
- ▶ The Historical Myth that these injustices are in the past

“Why Can’t You Just Get Over It?”

“Because this is about memorializing those people who have been victims of a great wrong. Why don’t you tell the United States to get over 9/11? Why don’t you tell this country to get over all of the veterans who dies in the Second World War, instead of honouring them once a year?”

“Why don’t you tell your families to stop thinking about all of your ancestors who died? Why don’t you turn down and burn all of those headstones that you put up for all of your relatives and friends over the years? It is because it’s important for us to remember. We learn from it.

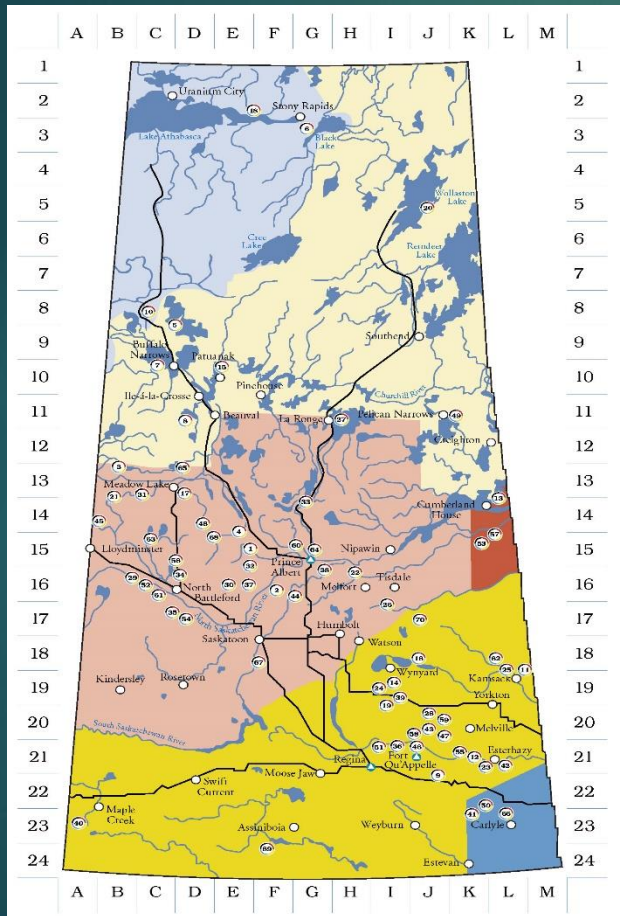
“And until people show that they have learned from this we will never forget. And we should never forget, even once they have learned from it, because this is a part of who we are. It’s not just a part of who we are as survivors and children of survivors, but its part of who we are as a nation. And this nation must never forget what it once did to its most vulnerable people.”

Senator Murray Sinclair, chair of the Truth and Reconciliation Commission

R v. Ipeelee

- ▶ Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. [Section 718.2](#) (e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process [*Ipeelee*, at para 75].
- ▶ Judges “must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel” [*Ipeelee* at para 59].

Saskatchewan Realities



The Criminal Code



718.2 A court that imposes a sentence shall also take into consideration the following principles:

(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.

R v *Slippery*

2015 SKCA 149 (CanLII)

- sentencing judges must recognize that different or alternative restorative justice-type sanctions may effectively achieve necessary sentencing objectives in a particular community
- Lawyers need to lay out a plan to incorporate these meaningful alternatives into an Order
- Know your client's history

R v Gladue

1999 CanLII 679 (SCC)

Section 718.2(e) requires “Sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.” [*Gladue*, at para 33]. This requires a sentencing judge to “pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders” [*Gladue*, at para 37].

Unique Circumstances of Aboriginal People

So what are the unique circumstances of Aboriginal people bringing them before the courts?

- ▶ (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection” [*Gladue*, at para 93].

Unique Circumstances that Bring Aboriginal People Before the Courts

- ▶ Residential School, Day schools and 60s scoop History and intergenerational effects
- ▶ Family Dysfunction
- ▶ Poverty
- ▶ Mental Health Issues
- ▶ Addictions
- ▶ Violence

R v Ipeelee

2012 SCC 13 (CanLII)

- ▶ Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. [Section 718.2 \(e\)](#) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process [*Ipeelee*, at para 75].

Crafting an Appropriate Sentence for Indigenous People

Considerations that reflect those circumstances

- ▶ Restorative Justice
 - ▶ Community sentencing based on traditional forms of conflict resolution, victim and perpetrator healing and reintegration into the community.
 - ▶ Alternative to incarceration which may further alienate indigenous people from family units, community, territory and way of life.
- ▶ Therapy and Counselling
 - ▶ Trauma therapy, grief and other counselling designed for residential school/sixties scoop/day school survivors and their family members

Crafting an Appropriate Sentence for Indigenous People

- ▶ Determine supports in the Community
 - ▶ Supports in the community that reflect the offender's distinct culture, traditions, language, ways of life.
- ▶ Various forms of Traditional Healing
 - ▶ Traditional means of healing that reflect the offender's distinct culture, traditions, language, ways of life.

Crafting an Appropriate Sentence for Your Client

1. *Which community is your client from?*
2. *Did they attend Indian Residential School? What is their family's history?*
3. *What is their programming history?*
4. *Do they have experience with foster care?*
5. *PUT A PLAN TOGETHER using their unique circumstances*

BALANCING SENTENCING PRINCIPALS

1. DENUNCIATION
2. DETERRENCE
3. PROTECTION OF THE PUBLIC
4. REHABILITATION AND PRINCIPLES OF RESTORATIVE JUSTICE

How to implement the TRC Calls of Action In the Courtroom

- ▶ Learn the true history of colonization
- ▶ Learn about the history, culture and circumstances of your Aboriginal client's family and community
- ▶ Learn about various supports and programming for Indigenous offenders and implement these into sentences
- ▶ COME TO COURT WITH A PLAN!!