

**A Decade of Aboriginal Justice Reform Policy in Manitoba: The Intricacies of
Providing Equitable Justice**

By:

Rosie Parmar

A thesis submitted to the Faculty of Graduate Studies

in fulfilment of the requirements for the degree of

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A Decade of Aboriginal Justice Reform Policy in Manitoba:

The Intricacies of Providing Equitable Justice

BY

Rosie Parmar

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University

of Manitoba in partial fulfillment of the requirements of the degree

of

MASTER OF ARTS

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**The only form of injustice exists when our chambers of conscience seize to
function**

By:

Rosie Parmar

TABLE OF CONTENTS

ABSTRACT.....	2
ACKNOWLEDGEMENTS.....	3
INTRODUCTION.....	5
CHAPTER TWO: Aboriginal and Governmental Relations: A Poor Start.....	14
Canada's Indian Policy: Beginning With the Indian Act.....	17
The White Paper of 1969: Special Status or Equal Status?.....	26
Self-Government: Closer to Control?.....	34
An Era of Error: Where To Go Next?.....	43
CHAPTER THREE: Aboriginal People Within The Justice System: How.....	50
Harsh Is Harsh	
Overrepresentation Overload: Fundamental & Systemic Causes.....	57
Justice At Odds: Aboriginal versus Non-Aboriginal Concepts of Justice.....	74
CHAPTER FOUR: The Report of the Aboriginal Justice Inquiry of.....	80
Manitoba (AJI): What Went Wrong In Manitoba?	
CHAPTER FIVE: The Aboriginal Justice Implementation Commission.....	105
(AJIC): Eight Years Later	
CHAPTER SIX: The Upshot of the AJI & AJIC Reports: Was Justice.....	129
Really Served?	
CONCLUSION.....	152
APPENDICES	
Interview Script.....	158
Interview Request.....	159
AJI Recommendations.....	160
AJIC Recommendations.....	190
BIBLIOGRAPHY.....	200

Abstract

Aboriginal peoples' negative encounters with the criminal justice system have received increased political attention over the last 30 years now. The consistent manner in which the Canadian criminal justice system has failed Aboriginal peoples in Manitoba is well evidenced in the disproportionate and discriminative nature of the system. Justice reform policy strategies in Manitoba are well evident in the Aboriginal Justice Inquiry (AJI) which has been the most in-depth public inquiry regarding Aboriginal justice issues undertaken to date. Followed up with the Aboriginal Justice Implementation Commission (AJIC) eight years later, both of these reports' recommendations represent an attempt to reverse the negative trends and provide justice for Aboriginal peoples. An examination of both reports discloses that the fate of the reports has been both displeasing and unable to produce any significant changes. An in depth closer examination reveals the role of governments to be a key factor which must be surpassed in order for justice to be fully served for the Aboriginal peoples of Manitoba.

Acknowledgements

This is not the end. It is not even the beginning of the end. But, it is, perhaps, the end of the beginning.

- Sir Winston Churchill

This journey that I embarked upon in completing this rewarding milestone, contains chapters in which I have poured my heart and soul. Hard work, commitment, and self discipline have been the pillars that have driven me to the completion of what I honestly began to think was never going to end. No one walks alone in such a journey and how do you thank those that joined you, walked beside you, and helped you along the way. It is through their teachings, inspiration, and support that I have successfully finished.

I would like to begin by thanking those directly involved in my thesis work, my thesis committee members. Words alone are inadequate to express my thanks to Paul Thomas for his undue encouragement and guidance. I hope to lead others one day in the way you have led me. His gentle yet firm direction has re-affirmed the value of an education and an educator. My deep appreciation goes to Peter Kulchyski for his profound faith in me to take my knowledge at such a premature stage of my graduate studies, and distribute it by giving me an opportunity to teach. "You have to start somewhere" I clearly

recall him saying. I also need to thank Brenda O'Neill for maintaining her role even after her leave from the University of Manitoba to the University of Calgary. As well, all the individuals whom I interviewed for their valuable time and information.

I would like to also thank those not directly involved with my thesis: my friends and family. I would like to thank my best friend, Kerran Seth, who had the misfortune of living with me during this 'thesis era'! She spent many hours at the keyboard typing out my words as I have spent writing them. Your enlightenment and consistent confidence helped me surpass what you once called would be "an accomplishment worth the struggle" ... and indeed you were correct. An instrumental role played by my mother has superseded the role of parenthood which was carried out unconditionally on her own. She delicately defended the pursuit of self-determination and persistence which is evident in this piece of work. Each and every sacrifice of hers has been petals of a flower that I hoped to have returned.

I would like to say that as much as I try to reach the moon in my endeavours, I always keep in mind that if the struggles along the way leave me distant from that moon, my final landing will still be amidst the stars. On that note, a final quote that I would like to express that kept my focus, motivation, and drive intact:

"If you stand straight, do not fear a crooked shadow..."

- Chinese Proverb

Introduction

Aboriginal peoples are surely one of the most investigated people in the world. Canada's international image has suffered over the years because of its treatment of Aboriginal peoples. They have stimulated, amongst all ethnic categories in Canada, the most academic research to date. Amongst those stimulated, I myself am one. Most of my latter academic years have been engulfed in grappling myriads of information on the ongoing status of Aboriginal peoples. The negative tone of the language used in reference to Aboriginal peoples resounds in my memory continually. It has created an impulse in me to write. It is true that every writer is first a reader. I have read enough, and now I have decided to write ... to become a part of this ongoing debate, but with emphasis added, this is not the last word(s).

To say the least, it has been a struggle coming to terms with the way in which history has treated the Aboriginal peoples of Canada. The real struggle is the current situation, however. Among the various issues that confront Aboriginal communities today, this research tries to make sense of the complexities surrounding Aboriginal people and their involvement with the criminal justice system. Aboriginal communities have had a fierce battle in their demands for justice in all aspects of their lives. For myself, the area of 'criminal

justice' was a great place to begin. It is rare that we watch television and not come across programs on crime and punishment. For Aboriginal communities, their experiences with the criminal justice system are deplorable without any doubt.

The past two decades have witnessed Aboriginal peoples' experiences with the justice system as none other than deteriorating. This debate as it has developed since 'Aboriginal people and the criminal justice system' emerged as an identifiable topic of investigation during the 1970's.¹ Indeed, justice has emerged as a key element of the Aboriginal political agenda and Aboriginal justice has evolved into a distinct field of academic research. Aboriginal justice is now more strongly aligned with broader Aboriginal autonomy aspirations and political activity, than with criminology's critiques of the operation of criminal laws and the way justice is administered.² It is one of the primary aims of this thesis to assess the major developments in the field of 'Aboriginal justice' within Manitoba. The negative experience(s) of a discriminatory and disproportionate justice system is just one area amongst others that will enable Aboriginal peoples to lead a healthy life in Manitoba.

This research was designed, initially, to provide a review all across Canada. However, I soon realized that this was simply too large a project to realistically attempt. Consequently, given that I knew of "a large proportion of

¹ McNamara, Luke (1993) *Aboriginal Peoples, the Administration of Justice, and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada with Reference to the Prairie Region* Legal Research Institute of Manitoba @ 1.

² Cuneen, C. (1990) *Aborigines and Law and Order Regimes* 3, *Journal of Social Justice Studies* at 37.

Canada's Aboriginal population lives in the Prairie region"³ I decided to place my focus there. What drew myself towards Manitoba, in particular, was the fact that of the 10 provinces of Canada, Manitoba has the highest proportion of Aboriginal peoples in its population. As well, Manitoba had several disturbing events that triggered it as an attractive place to investigate. For example, there were the deaths of Helen Betty Osborne and J.J. Harper that sparked great outcry from Aboriginal communities, which later lead to reports attempting to understand why the justice system was failing Aboriginal peoples at such a large scale. These two reports, The Aboriginal Justice Inquiry (1991) and the Aboriginal Justice Implementation Commission (2001), have been identified as significant developments in the relationships of Canadian Aboriginal peoples with the criminal justice system. In offering an analysis of the context, content, and the impact of these two reports, this thesis seeks to answer the following main research question: "What factors have contributed to the fate of the reports in terms of their acceptance or lack of acceptance by the Government of Manitoba?" In answering this question, the thesis seeks to understand the policy impact of the reports and therefore, the status of Aboriginal justice reform within Manitoba.

Alongside, the multiple and deep-rooted causes of criminal behaviour among Aboriginal peoples will be examined. Also, the controversy that swirls around the issue of what constitutes justice for Aboriginal people and how this

³ McNamara (1993) @ X.

can be obtained from the mainstream justice system will be reviewed.

Accordingly, the thesis becomes more a process study rather than a substantive study. It will trace the flow of events, ideas, and institutional responses from the origins of the AJI down to the time of writing this thesis. Though the focus is on the process side, some content is studied for substance because it is difficult to ignore the contents of the reports, particularly the AJI Report. While this thesis has recognition of the countless number of reports, inquiries, and task forces that have tackled this issue, it will be shown that both the AJI and AJIC Reports go beyond the predictable repetitiveness of many of the findings and recommendations of those reports.

This research has drawn upon three main types of sources. Secondary literature, key documents including the AJI and AJIC and qualitative interviews with selective respondents involved with Aboriginal justice issues were conducted. The respondents interviewed through the usage of open-ended questions include the following: Commissioners of the AJI Report, Associate Chief Justice A.C. Hamilton & Associate Chief Judge C.M. Sinclair, Commissioner of the AJIC Report, Paul Chartrand, Justice Minister Gordon Mackintosh, and Harvey Bostrom from Department of Aboriginal and Northern Affairs who acted in an advisory capacity as the Executive Director for the AJIC Report. The interviews were 45 minutes to an hour in duration and were both

tape-recorded with permission from each interviewee, and note-taking was conducted as well.⁴

I believe we have a place for Aboriginals in our justice system, we live in a world where space is of no limitations. Aboriginal communities, have for long, demanded separate justice systems since the existing criminal justice system is not compatible with Aboriginal conceptions of justice. What exactly does 'justice' mean for Aboriginal peoples? This thesis will address this question and identify key areas of conflict between mainstream Canadian justice and traditional Aboriginal justice systems. The opening paragraphs of the Aboriginal Justice Inquiry of Manitoba stated:

The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers.⁵

These words electrify society. Many automatically, and shall I add ignorantly, believe that the Aboriginal community is themselves responsible for this situation. These words, however, represent a truth. They do not represent a distrust or rejection on the part of Aboriginal peoples. In order to combat preconceived notions that many non-Aboriginal people have of Aboriginal peoples, this research also examines the meaning of Aboriginality in the minds of

⁴ Refer to the appendix for the script read before the commencement of each interview, and for the interview request sent to each interviewee. Some interviews involved discussion towards the end where a few select interviewees, whom out of their own free will, provided additional information that they found would be useful in the thesis writing process.

⁵ Commissioners A.C. Hamilton & C.M. Sinclair (1991) Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry* (hereinafter "*AJI Report*"), vol.1: The Justice System and Aboriginal People Winnipeg: Province of Manitoba @ 1

society. In doing so, this research has aimed at opening up as many questions as it might answer.

I have gone through many states during my studies in Aboriginal politics – many different emotions, but as I write at this very moment I realize that besides other reason(s), as obvious as some may be, what I am now doing is simply making room for reality ... a reality that is not an illusion. That is, that the situation of Aboriginal peoples in relation to justice is in need of serious attention and no longer can we tolerate continued ignorance. It is my goal, one for that matter, for the readers to not only read my words but to identify and recognize the sound of my words. While this is my writing, my hope is to allow the voices of Aboriginals to be heard in these pages. The perspective contained within these pages is mine and so I take responsibility for the views expressed as my own.

Though I am an outsider to this study – being a non-Aboriginal woman, at the same moment I find myself considerably closer to the state of an insider. Through vigorous researching, interviews, and writing, I have become well acquainted with the materials that I have gathered. It is difficult to detach myself from what has already become embedded in me. This research is the product of not only a learning experience, but of a disturbance within myself that I have finally put into words. I hope that the idiosyncrasies of my outlook will provoke thoughts in others. Thoughts that will hopefully be able to finally rid of the injustice that plagues Aboriginal communities in relation to the legal system.

I have worked on more than a mere framework of understanding the current situation of Aboriginals and the criminal justice system. I have also provided a framework for change in this research. My whole-hearted belief is that this change will soon materialize. In that hope, I will walk away from this research with not an air of disappointment, but with one of victory. A victory that has contributed in reversing over 200 years of subordination and marginalization of Aboriginal peoples. In that respect, I am confident that I have been to a large degree, successful.

Having said that, this thesis examines the concerns that have arisen between Aboriginal peoples and the criminal justice system in Manitoba since the call for the creation of the AJI Report. While this assessment is undertaken in more general terms in chapters 2 and 3, chapters 4 through 6 take a considerable detailed approach. Chapter 2 examines the legacy of unpleasant relations between the governments and Aboriginal peoples. This chapter uncovers the relationship between historical influences and Aboriginal criminality. Chapter 3 presents a series of causes of Aboriginal criminal behaviour, and provides a comparison of the two competing justice models of Aboriginal and Western justice systems. Chapter 4 and 5 individually examine the AJI and AJIC Reports. The sixth and final chapter is designed to come to terms with the fate of both reports. In doing so, it looks at the factors that potentially could have influenced the fate of the reports in terms of immediate adoption by governments. It

concludes with where justice reform and Aboriginal policy-making stands in Manitoba.

My hope in this thesis is that it will make the journey of Aboriginal peoples in Manitoba easier. In addition, to the benefits Aboriginal communities will reap, as they are the obvious benefactors, both levels of government will hopefully also derive a sense of immediacy and commitment that could make this journey rewarding. I would also hope for many Canadians to be educated on the nature and importance of the issue(s). I trust that the reader(s), no matter how uninformed on justice matters pursuant to Aboriginal peoples, will take a moment and reflect on the undoubtedly increasing severity of the issues(s) presented. Aboriginal justice concerns will not dissipate over night, nor does this thesis seek to argue that. Likewise, this thesis does not seek to answer every problem raised. I firmly believe that the most viable answers will come from those affected being the Aboriginal peoples of Canada, the federal and provincial governments, and the public opinion of Canadians who will take, what I like to call a 'moment of humanity' and recognize the interconnectedness between many of the facts that lay within these pages.

Instead of progress in Aboriginal justice reform in Manitoba since the creation of such high profile reports, there has been further consideration followed by more discussion. The main recommendations of both the AJI and

AJIC reports remain untouched. By identifying the roadblock in progress, this thesis has at the very least, attempted to make a critical awareness of the factors that if handled wisely, could reverse the usual historical trend that Aboriginal policy-making has taken. This trend according to Alison Dubois, has been incremental in nature in which it has been built on previous policy, meaning that the government's objectives have remained the same since the 1969 White Paper (discussed in chapter 2) which guides current Aboriginal policy as well.⁶

A final thought to keep in mind while reading this thesis:

"The offender is not born in the Indian - the Indian is born into a system which offends."

- Chief Louis Stevenson, Assembly of Manitoba Chiefs

⁶ Dubois, Alison (2003) Instruments of Policy-Making: Canadian "Indian" and "Aboriginal" Policy in Oakes, Jill & Riewe, Rick & Wilde, Kimberly & Edmunds, Alison, and Dubois, Alison in Native Voices in Research Winnipeg: Aboriginal Issues Press @ 241.

Chapter Two: Aboriginal and Governmental Relations: A Poor Start

"I want to get rid of the Indian problem ...our objective is to continue until there is not a single Indian in Canada that has not been absorbed."

-Duncan Campbell Scott, Superintendent-General of Indian Affairs, 1920

The perception of Aboriginal peoples⁷ as a 'problem' to be solved has served as a central motive in the evolution of governmental policy towards Aboriginal peoples. Canada's 125-year old policies of attempting to assimilate Aboriginal peoples into mainstream society have been an open platform of failure. Moreover, the policies have had negative long-term consequences for Aboriginal peoples, the legacy of which is seen today in the deplorable conditions of many Aboriginal peoples and their communities. Paternalism, discrimination, neglect, manipulation, and dishonesty have characterized past policies towards Aboriginal peoples.

⁷ There is no one way of defining the Aboriginal population. Since there is no single or "correct" definition of the Aboriginal population, the choice of definition utilized usually depends on the purpose for which that definition is being used for. The term 'Aboriginal peoples' will be utilized throughout this thesis to encompass and include all people who trace to time immemorial their ancestry in Canada. As a result, 'Aboriginal peoples' includes all Indians (registered or non-registered), Metis, and the Inuit. This definition keeps in line with section 35(2) of the Constitution Act, 1982 which defines the term to include "the Indian, Inuit, and Metis peoples of Canada." It is crucial to point out that Aboriginal peoples are not a homogenous group. However, we can speak of them as a group that has experienced and still continues to experience similar treatment when compared to other groups in Canada.

This chapter will begin with a historical overview of governmental policies and actions from the time of the Indian Act (1876) to the present. Although presented in brief general terms, this historical overview is necessary to set the context for the remaining analysis presented in the thesis. A proper understanding of the contemporary situation of Aboriginal peoples is impossible without some understanding of the history of relations between them and the government, as an important set of factors contributing to the justice challenges facing Canadian governments in dealing with Aboriginal individuals and communities.

The history of Aboriginal-governmental relations will be examined by looking at significant events⁸ that have influenced relations between Aboriginal peoples and the governments. After a brief introduction of some of the events that have made up the history, each will be discussed in more detail and its significance for the overall study will be explained. First, we have the historical period that includes the introduction of the Indian Act of 1876 and the advent of residential schools. From the outset, the Indian Act treated Aboriginal peoples as dominated and subjugated peoples and was a control mechanism that was to say the least, extremely overbearing. Second, we have the emergence of what the

⁸ While this chapter looks at some of the events that shaped the relations between Aboriginal peoples and the government, it is important to realize that the legacy of relations between the two are very lengthy and complex for which dedicating a chapter is not sufficient and adequate in terms of space. However, for the purposes of the thesis as a whole, this chapter introduces and examines a few select moments to draw upon the point that there are enough historical injustices that can account for the problems that Aboriginal peoples have with the criminal justice system today.

federal government came forward with in 1969 called the "White Paper." Within this period, Aboriginal peoples were expected to give up everything and to convert to Canadian citizens. Implicit in this time was the argument that 'equality' and 'non-discrimination' should become the basis for addressing the problems of Aboriginal people. The final period we will examine involves debates and negotiations between Aboriginal organizations and governments over the concept of self-government. This began in the early 1970's until present in which Aboriginal leaders and organizations began seriously fighting for their rights.⁹

An analysis of all these historical moments reveals that the current issues facing Aboriginal people, particularly their too frequent encounters with the criminal justice system, are at least partly rooted in the historical government policies which created in many instances a dysfunctional way of life. One of the major consequences of governmental policies, for example, has been the destruction of Aboriginal communities and of the very foundations of Aboriginal

⁹ Prior to that time, Aboriginal peoples were held responsible for their own problems, as well, they were seen to lack the adequate skills and commitment necessary to address their problems in a constructive way. Post 1970's, a different set of theoretical assumptions emerged in relation to the personal and social problems Aboriginal peoples experienced. Now, not only were Aboriginal peoples ready to fight for past injustices, but the government was willing to look at the 'Aboriginal problem' in a different light. The government was finally ready and willing to bridge this gap of misunderstanding. This federal policy discourse shift now recognized Aboriginal rights over land, identity, and political voice.

culture and traditions.¹⁰ Let us now look into more detail revealing the many disturbing realities that have continued for several generations.

Canada's Indian Policy: Beginning With the Indian Act

"The Indian Act became a public embarrassment and a source of confusion."

-Sally Weaver, 1981

"If it is sickness you seek, look into the minds and hearts of the men who conceived, implemented and maintained residential schools, not at its victims."

-Dr. Roland Chrisjohn, 1993

Protection, civilization, and assimilation have always been the goals of Canada's Indian policy.¹¹ Since the 17th century Britain had employed men, referred to as Indian Agents to maintain relations with Aboriginal peoples. The Indian Agent, a field officer of the Department of Indian Affairs, "was a constant reminder of their wardship status, of their social inferiority, and subjection to government control."¹² Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs from 1913-1932, stated regarding the ultimate goal of Indian policy that "the government will in time reach the end of its responsibility as the Indians progress into civilization and finally disappear as a separate and distinct

¹⁰ Aboriginal communities have over the years mobilized as a group, and taken control over their affairs. Many such cultural and traditional events that were once outlawed, are joyously practiced today.

¹¹ Tobias, John L. (1983) Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy in Getty, Ian A.L. & Lussier, Antoine S. (Eds) As Long As The Sun Shines and Water Flows: A Reader in Canadian Native Studies Vancouver: University of British Columbia Press at 39.

¹² Brownlie, Robin Jarvis (2003) A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, 1918-1939 Ontario: Oxford University Press @ 30.

people, not by race extinction but by gradual assimilation with their fellow citizens."¹³

In 1876 the first Indian Act¹⁴ was enacted by the Parliament of Canada consolidating existing laws regarding Indians. The Indian Act of 1876 has been of great importance because it has touched virtually every aspect of Aboriginal lives. More specifically, the very purpose of the Act was the assimilation of Aboriginal peoples into mainstream society.¹⁵ This piece of legislation served as an important tool in controlling First Nations¹⁶ peoples and their resources. Under the Indian Act of 1876, an 'Indian' became "any male person of Indian blood reputed to belong to a particular band, any child of such person, and any woman who is or was lawfully married to such a person."¹⁷ Excluded from Aboriginal status were persons living continuously five years or more in another country, and Aboriginal women marrying non-Aboriginal men. As a result of the Indian Act the First Nation's population in Canada became legally distinct peoples having a set of different rights, restrictions, and obligations.

¹³ Duncan Campbell Scott, in Proceedings of the Fourth Conference of the Institute of Pacific Relations (Canadian Institute of International Affairs, 1931) quoted in Bowles et al, eds, *The Indian* @ 112.

¹⁴ Prior to the Indian Act, The Enfranchisement Act of 1869 was tabled to assimilate Indians, later discussed in this chapter. In subsequent legislation, the Indian Act of 1876 was another method of assimilation and/or the erasure of the distinct status of Indians.

¹⁵ Wotherspoon, Terry & Satzewich, Vic (2000) *First Nations: Race, Class, and Gender Relations* Saskatchewan: Canadian Plains Research Center at 31.

¹⁶ The Act only affected First Nations, as Metis and Inuit were excluded.

¹⁷ Gibbins, Roger (1997) *Historical Overview and Background: Part I* in *First Nations in Ponting*, Rick J. Canada, Perspectives on Opportunity, Empowerment, and Self-Determination (1997) Toronto: McGraw-Hill Ryerson Limited at 21.

In retrospect, the most disturbing aspect of the Indian Act was the power it gave to the federal government.¹⁸ The Act extended the reach of the government into every corner of Aboriginal life. The Act was administered by Indian agents having extraordinary administrative and discretionary powers. New non-Aboriginal chiefs displaced traditional Aboriginal leaders in order to bring in a new way of living which would support the government's plans of assimilation. Harold Cardinal argued that "instead of implementing the treaties and offering much needed protection to Indian rights, the Indian Act subjugated to colonial rule the very people whose rights it was to protect."¹⁹ As a result, three facts became clear. Jamieson (1978:38) notes that federal officials held three convictions that determined the content of the legislation - one, Aboriginals and their lands were to be assimilated, secondly, that Aboriginals were not capable of making rational decisions for their own welfare so this had to be done by the officials for protection. Finally, Aboriginal women should be subject to their husbands as were other women.²⁰ It is evident that protection was only a temporary goal of the government until all Aboriginal peoples were assimilated into white mainstream society.

In 1857, legislation provided for the process of enfranchisement whereby Indians could acquire full Canadian citizenship by relinquishing their ties to the

¹⁸ It should be noted that the Constitution Act of 1867 confirmed state responsibility for Aboriginal peoples by conferring federal jurisdiction over Aboriginal lands and affairs.

¹⁹ Cardinal, Harold (1969) *The Unjust Society The Tragedy of Canada's Indian's* Edmonton: Hurtig at 43-44.

²⁰ Jamieson, K. (1978) *Indian Women and the Law in Canada: Citizens Minus* Ottawa: Minister of Supply and Services at 38.