CALEDON
INSTITUTE OF SOCIAL POLICY

caledon
commentary

January 2016 ISBN #1-55382-659-0

Ensuring Real Accountability on First Nation Reserves

The Supreme Court of Canada often takes on important First Nations issues, such as aboriginal title, consultation and resource extraction issues. However, on October 22, 2015, the court squandered the chance to hear a case, *Chief Simon et al. v. Canada*, 2013 FC 1117, rev'd 2015 FCA 18, which presented an extremely pressing issue facing Indigenous peoples in Canada: the accountability gap in First Nations communities. Contrary to popular stereotypes, this gap has little to do with the activities of band chiefs and councils. It also has nothing to do with the *Indian Act*, which remains silent about social assistance, child welfare, child care, health, education, policing and emergency services – key services for individual and community well-being.

Non-indigenous Canadians receive these services from the provinces and territories. Provincial and territorial legislation sets out in detail the levels of service citizens may expect, ensuring accountability in program design and delivery. When, in the 1950s, the federal government realized the hardships that the lack of those services imposed on the Indigenous peoples, it tried to negotiate cost-sharing agreements with the provinces and territories, with little success. Then, as a temporary measure, Ottawa decided to provide social assistance on reserves at rates and standards comparable to those provided in the provinces and territories, on no other footing than a mere policy manual. Fifty years later, regulation through policy manuals has

Naiomi Metallic is a Mi'gmaq lawyer in Halifax and was lead counsel for the First Nations in Chief Simon et al. v. Canada.

Sébastien Grammond is a law professor at the University of Ottawa, Civil Law Section, who researches and teaches in the area of Aboriginal Peoples and the Law.

become the norm for all essential services on reserves.

This approach is highly problematic. Regulation by policy manual allows unelected bureaucrats to determine policy – here, what the most vulnerable citizens are entitled to from the state. MPs have never had a say about whether borrowing social policy designed by provincial lawmakers for different citizens in different circumstances adequately accommodates conditions of First Nations living on reserve and respects their right to self-government. For example, Cindy Blackstock has argued that the wholesale application of provincial child welfare laws is inappropriate and is contributing to the record numbers of First Nations children taken into permanent care.

The situation also gives little opportunity for Parliamentarians to have oversight of how government staff implement policies. Over the last two decades, at least five Auditor General reports have suggested that government staff do not know (and are not tracking) whether essential services on reserve are actually "comparable" to provincial and territorial programs. This observation is corroborated by several human rights complaints lodged by First Nations in the last five years alleging programs on reserve – including the areas of child welfare, education and policing – are significantly underfunded and not comparable to provincial/territorial services.

The *status quo* gives bureaucrats virtually untrammelled discretion in both making and interpreting policy, which creates the potential for abuse of power. For example, in the *Chief Simon* case, the Atlantic Regional Office of the Department of Aboriginal Affairs (now Indigenous Affairs) announced changes to social assistance on reserves that would significantly reduce First Nations recipients' basic welfare payments and render many more ineligible. Thirty First Nations from the Maritimes challenged the changes in court. The trial judge found the changes to be unfair because they were made without meaningful consultation with the First Nations, and also unreasonable because the government staff knew the changes would cause harm but proceeded "without any true comprehension of [the changes'] impacts." On appeal, however, the court simply accepted the bureaucrats' extremely narrow interpretation of "comparability" even though a broader interpretation had prevailed for decades under previous administrations. In this land of regulation by policy manual, the First Nations had no recourse.

The Supreme Court of Canada's refusal to hear the case puts responsibility for addressing this accountability gap squarely on the shoulders of the new federal government. The government spends close to $5 billion a year on First Nations social programs without any legislative framework. This failure to adhere to the rule of law affects policy outcomes. Indigenous peoples in Canada remain at the bottom of almost every

socioeconomic statistic and well-being indicator. The Auditor General has linked the lack of a legislative framework and appropriate funding mechanisms for programs on reserves to this problem, noting that these gaps "severely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserves." The UN Special Rapporteur on Indigenous Peoples has called this a human rights issue of "crisis proportions."

First Nations citizens in this country ought to be entitled to some basic measure of accountability from the federal government when it comes to key programs that affect some of the most vulnerable and marginalized citizens in this country. As a start, any attempts to fix this mess must be in partnership and full collaboration with the Indigenous peoples.

Naiomi Metallic and Sébastien Grammond

1356 Wellington Street West, 2nd Floor
Ottawa, ON K1Y 3C3
CANADA

Tel.: (613) 729-3340

E-mail: caledon@caledoninst.org
Website: *www.caledoninst.org*
Twitter: @CaledonINST