

# **Consulting No One: Is Democratic Administration the Answer for First Nations?**

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### **ABSTRACT**

In 1996, the Office of the Auditor General (OAG) of Canada released its report, *Study of Accountability Practices from the Perspective of First Nations*, which found that governments and First Nations have different understandings of what is meant by accountability. While the Department of Indian and Northern Affairs Canada (INAC) understood the department's mechanism of accountability to be concerned with the form of accountability for funding, First Nations believed accountability required increasingly open and transparent dialogue between the department and the people it affects; that is, accountability for performance which means that government action must achieve high results to cover citizens' expectations (Behn, 2001: 10). However, accountability for performance is not occurring in practice. Instead, the implementation of the New Public Management model in Canada since the 1980s has not fulfilled its mandate to be more effective and accountable because of the model's focus on treating citizens like consumers. This paper argues that accountability for performance can be achieved through greater consultation between First Nations and governments at the initial stages of policy making, as advanced in the democratic administration model. This model theorizes that greater public participation will lead to better policy outcomes. Furthermore, the paper argues that the lack of accountability for performance has created serious political, economic, and social implications that have denied First Nations groups rights and control over their communities (see Figure 1) (Shoucri, 2007: 04). This argument will be demonstrated through review of three recent Canadian Court cases: *Mikisew Cree v. Canada*(2005), *Ermineskin v. Canada*(2009) and *Pikangikum v. Canada* (2002).

**Keywords:** a-priori policy-making, consultation, New Public Management, democratic administration, accountability for performance

## Introduction

In 1996, the Office of the Auditor General (OAG) of Canada reported in the *Study of Accountability Practices from the Perspective of First Nations* that governments and First Nations have different understandings of what is meant by accountability. While the Department of Indian and Northern Affairs Canada (INAC) understood the department's mechanism of accountability to remain in the form of accountability for funding provided by the federal government, First Nations believed accountability required increasingly open and transparent dialogue between the department and the people it affects. That is, accountability for performance means that government action must achieve high results in terms of citizens' expectations (Behn, 2001: 10). In other words, First Nations expect to know how funds are being allocated and implemented, be part of the initial-stages of policy making and, more importantly, that program results meet First Nations' expectation. With this in mind, this paper has two focuses. First, this paper argues that accountability for performance can be achieved through greater consultation at the initial stages of policy making (a-priori policy). This type of engagement is advanced in the democratic administration model which ultimately stipulates that greater participation by citizens in government affairs will lead to greater citizen-centered policy outcomes.

Second, this paper argues that the focus on accountability for funding rather than the focus on accountability for performance has created serious political, economic, and social implications that have denied First Nations groups rights and control over their communities (Figure 1) (Shoucri, 2007:04). Given that the rights of First Nations groups derives from the *Indian Act, 1876* and Section 35 of the *Canadian Constitution Act, 1982*, and because the Canadian system entrusts the judiciary to be the guardians of the Constitution and mediator between state and society (Shoucri, 2007: 04), recent Canadian Court cases (*Mikisew Cree v. Canada*, 2009; *Ermineskin v. Canada*, 2009; and *Pikangikum v. Canada*, 2009) are the instrument of analysis.

It is common knowledge that First Nations groups are culturally different from other Canadian citizens and because of this the programs that First Nations groups depend on require greater culturally-specific attention. This attention is best provided by First Nations groups and not white-Canadian bureaucrats – a problem that is recognized by INAC (Turcotte & Zhao, 2004:11). However, First Nations continue to be excluded from the decision-making process. It is on this point that this essay theorizes that the model of democratic administration, with an emphasis on greater First Nations' participation will allow for greater accountability for performance to First Nations. But what is democratic administration? And why has the lack of implementation been detrimental to First Nations? This essay attempts to answer these questions below.

Public sector reform can often be situated along the political spectrum. The New Right and the New Left advocate greater public involvement in the policy-making process but differ on how and why the public is involved. What has materialized is a differing view on what governments should be doing for citizen. While the New Right, often associated with New Public Management (NPM), focuses on making governments effective and responsive to citizen demands, the New Left, often associated with democratic administration theory, focuses on

curving out a new space for citizens in the policy-making process. What has been the driving force behind these two ideologies?

**Figure 1: Accountability within the Democratic Administration Framework**



Source: Mai Nguyen

### ***Review of the Literature***

Beginning with the former, since the 1970s, NPM has been the management model of choice for bureaucratic reform in advanced industrial countries (Britain, United States, Canada, Australia, etc.). The shift from the bureaucratic organization to the post-bureaucratic organization of NPM stipulates that governments should operate more like a business by adopting private-sector characteristics. This has been inline with both the theories of “managerialism” and the public choice model deriving from the field of economics (Atreya and Armstrong, 2002). Some of these characteristics include a transition from: organization-centred to citizen-centred; rule-centred to people-centred; independent action to collective action; status-quo-oriented to change-oriented; process-oriented to results-oriented; centralized to decentralized; budget-driven to revenue-driven; and monopolistic to competitive (Kernaghan, et

al., 2000:03). The list is extensive, and numerous external factors (globalization, technological revolution, etc.) as well as internal factors (debt reduction, changing political culture, etc.) are the driving forces behind this form of public sector reform. Within this framework, the call for greater public participation (often described as participatory democracy) has led to the demand for greater accountability between governments and citizens (Kernaghan, et al., 2000:180). However, democratic administration proponents argue that (Ostrom, 1974; Albo, 1993, Lindquist) the shifting of the public sector towards the New Public Management model has not fulfilled its mandate to be more effective and accountable (Albo, 1993).

Since the ascendance of neo-liberalism, Canadian governments have taken up the New Right approach to public sector reform, which has restructured the bureaucracy to emphasize more choice for citizens/consumers in purchasing public goods and services, an increasingly decentralized bureaucracy, and a bureaucracy immune to the needs of the market (Sossin, 2002:87). Lorne Sossin notes that the restructuring of bureaucracy has returned public administration, especially in the fields of social welfare, to communities (via the downloading of responsibilities) (Sossin, 2002:86). However, Sossin is ultimately critical of this approach for which he states, “It may tend to improve the quality and lower the price of goods and services in question (at least at first), but it does not lead to substantive citizen influence over the decision-making process” (Sossin, 2002:86). In other words, within the New Right approach accountability is embodied in the ability to give citizens ‘choice’ rather than ‘voice’. Many argue (King, et al., 1998; Catt & Murphy, 2003; Turnball & Aucoin, 2006) this approach is problematic because citizen input is sought only after the important decisions have already been made and therefore, disguised by a veneer of legitimacy. Eric Otenyo (2006) correctly states that “NPM and its derivative policy outcomes, especially the shrinking state has not in any meaningful way translated into democratic enlargement or a greater sense of individualism” (12). Rather accountability to the citizenry is lacking as NPM tends to achieve accountability through the measurement of outcomes rather than a focus on input, specifically in the form of citizen input (Pfiffner, 2004: 4).

The New Left attempts to rectify this problem by focusing on mechanisms of accountability that are embedded in the ability to make the bureaucracy more open and democratic by allowing citizens a voice during the initial stages of policy making. This will allow for greater democratic governance and ultimately better policy outcomes. As Gregory Markus quite rightly states:

When citizens do more than merely provide “input” to professional decisions, when they instead possess sufficient information, resources, time, and space for deliberation, and power to transform input into action, then the planning, the implementation, and the results can be more insightful, more legitimate, and more effective than anything that officials and planners could have devised on their own. (2002, p. 42–43)

Thus, government accountability to the public cannot be fully realized without the participation of citizens.

Albo argues that accountability should operate horizontally and believes that the operations of the public sector should be held ultimately accountable to the people, the true users

of public services. Unlike the NPM theory, this approach views the people as a collectivity rather than a collection of individual “consumers”. For the New Left citizen participation in political decision-making is seen as a collective action strategy needed for furthering the interests of repressed, excluded and ignored individuals and groups (Nysten, 2003). Woolcock and Narayan (2000) notes that disadvantaged communities, by developing alliances with key state/civil society/market networks and institutions, can improve their social and economic development and enhance state-society relations. However, for these alliances to emerge there needs to be a shifting of power at the centre to bring all public servants inline with the reform agendas, and a level playing field for all participants, which allows everyone from frontline workers, to ministers, to interest groups, to be involved in the formation and implementation of policies (Albo, 1993:28). Specifically, the democratic administration model requires a working relationship and continuous dialogue (often in the form of consultation) between the producers and the users of government services.

Along similar lines, Sossin states that the premise is “simply that every bureaucratic setting can and should be evaluated according to how fully the goals of participation and accountability have been achieved” (Sossin, 2002:91). This is unlike NPM in which the bureaucratic settings are evaluated based on service delivery and cost-cutting mechanism (outcomes). Within the democratic administration model, accountability must occur from within the organizations to include mechanisms that equalizing power dynamics and allow for greater transparency (ie. public consultation, information to citizens). As Simone Chambers rightly points out, for the process of deliberation and accountability to work effectively, participants need to be on an equal footing (2003: 322). This means that the public sector is accountable to ensure the inclusion of citizens in the initial stages of policy formation and implementation. The ultimate goal according to Sossin, “is to transform administrative action into a shared enterprise between citizens and officials, in which each have a stake in the fairness and justness of bureaucratic decision-making, and each accountable to the other, and to the public, for holding up their end”(Sossin, 2002: 88). How does this form of accountability relate to the relationship between First Nations and the state?

According to First Nations groups, accountability should be based on the ability of INAC to provide greater mechanisms of accountability for performance to First Nations groups. This can be achieved in several ways, such as self-government arrangements, co-management boards, and creation of lands and reserves. More importantly, this can be achieved through the implementation of the democratic administration model specifically through the implementation of stronger methods of consultation a-priori policymaking. The rationale for this is historically justified since the state has imposed itself on Aboriginal affairs. This imposition has generally occurred without the input or participation of Aboriginal groups during the policy-making process and has adversely affected First Nations groups both historically and to date. More than ever, First Nations, dissatisfied with the workings of representative democracy, are actively staking their right to be consulted on matters that directly affect them and as a result, initiating a new political relationship between themselves and the Canadian state.

This changing relationship dates back to the drafting of the Trudeau *White Paper*, 1969, which was the beginning of Aboriginal mobilization, and continued with the affirmation of Aboriginal and Treaty rights in Section 35 of *The Constitution Act*, 1982, resulting in the “duty

to consult” stemming from legal cases such as, *Haida Nation v. British Columbia* (Minister of Forests -2004 SCC 73) and *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage -2005 SCC 69). Accountability for performance is important for First Nations because as a marginalized group they endeavour to remove the reigns of colonialism and work towards political inclusion (participation in the democratic process) for self-determination. Helen Catt (1999:8) states that,

Democratic decision making as a means of obtaining self-governance to fulfill the ideal that no person should be decided for another is an important strand of argument in justification for democracy ... The other strand to the argument of self-government is that all decisions should be made only after each person has had an opportunity to express their view. Only if the decision is made by all is it legitimate.

To this end, decision-making power through the consultation process is a step towards political inclusion and thus, self-determination for First Nations. As the Public Service 2000 Report states, “Effective consultation is about partnership. It implies a shared responsibility and ownership of the process and the outcome.” (Public Service 2000, 1990) Without a sharing of the enterprise, governments will continue to impose their agenda on participants through a veneer of legitimacy, or what they call consultation. Therefore, First Nations groups have staked their right to be consulted on matters that directly affect them.

First Nations groups recognize this problem and are taking their right to participation in policy making to the Supreme Court of Canada (SCC), whom over time has ruled in favour of First Nations groups. To date the SCC has clearly stated that the Crown must engage in a “distinct consultation process” (*Mikisew Cree First Nation v. Canada*, supra note 2 and 4) with First Nations. That is, First Nations cannot be treated as mere stakeholders rather; their concerns must be addressed in a distinct consultation process. Dwight Newman (2009: 63) states that legally acceptable and good consultation,

must be initiated at an appropriate stage, such that there is meaningful discussion about a particular strategy or plan. There must be an identification of the Aboriginal communities potentially affected and an identification of contact people in those communities. There must be appropriate forms of notice given and further information made available where necessary for meaningful consultation.

However, it is this accountability which has been seriously lacking since INAC’s inception and has created serious political, economic, and social implications for First Nations groups.

### **Inferences from Data: The Political, Economic and Social Consequences**

According to INAC, the department is responsible for two mandates, *Indian and Inuit Affairs* and *Northern Development* (INAC, 2008). Combined, both mandates support Canada’s Aboriginal and northern peoples in the pursuit of healthy and sustainable communities and broader economic and social development through the provision of financial funds

(accountability for funding) (INAC, 2008). According to the *Indian and Inuit Affairs* mandate, INAC is empowered to, negotiate comprehensive and specific land claims and self-government agreements on behalf of the Government of Canada; oversee implementation of claim settlements; deliver provincial-type services such as education, housing, community infrastructure and social support to Status Indians on reserve; manage land; and execute other regulatory duties under the *Indian Act* (INAC, 2008). The *Northern Development* mandate stems from statutes including the *Department of Indian Affairs and Northern Development Act*, modern treaties north of 60 degrees, and from statutes dealing with environmental or resource management (INAC, 2008).

In this section of the paper three historical legal cases (*Mikisew Cree v. Canada*(2005; *Ermineskin v. Canada*(2009; and *Pikangikum v. Canada* (2002) are examined to highlight the lack of accountability for performance during policy making and its consequences on these specific First Nations groups. Court cases are the instrument of analysis because courts are mediator between state and society. As Liora Salter (1993) argues, those seeking democratic administration and accountability are facing a losing battle and, “greater reliance should be placed upon the courts to handle some of the responsibilities that regulators now assume in order to promote accountability” (89). First Nations recognize the importance of the Canadian legal system and have taken their battles straight to the courts. In this section, we examine the political, economic, and social implications that have arisen because of a lack of consultation a-priori policy making.

### **The Political Failures of Consultation**

Albo states that political power is “the ability to control and shape one’s life and community” (Albo, 1993: 31). This has been slow to bear fruit for First Nations groups. Recognizing this, the 2002 *Report of the Auditor General of Canada* criticized INAC for lack of consultation with First Nations groups and advocated for greater consultation which will lead to better programming and effective outcomes based on the concerns of First Nations. As the Report (OAG, 2002: 23) states,

Reporting, both financial and non-financial, is an essential element of the accountability relationship between the federal government and First Nations. The federal government needs to attest to effective spending of funds appropriated by the Parliament for the use of First Nations...The ideal is to strive for a system of information exchange that serves the interests of both parties...This work will also support First Nations in community planning, program evaluation and assist program service delivery.

However, since the release of this report not much has changed. More disconcerting is that the lack of consultation by Canadian governments breaches the Crown’s legal duty to consult with First Nations pursuant under section 35(1) of the *Canadian Constitutional Act of 1982*. This is illustrated through the *Mikisew Cree First Nation v. Canada* (2005) Supreme Court of Canada (SCC) case in which the group was not properly included in the policy-making process on an issue which directly affected them. This case was instrumental in setting the precedent for the legal “duty to consult”.



The Mikisew Cree First Nation case against the Minister of Canadian Heritage stemmed from a breach of the Treaty 8 agreement between the group and the Crown (*Mikisew Cree First Nation v. Canada*, 2005: 03). In 2000, the federal government approved a winter road which ran through the group's reserve. After protest from the Mikisew Cree the road was modified, without consultation, to be built around the reserve's outer boundary (*Mikisew Cree First Nation v. Canada*, 2005: 04). However, this decision was reached without any consultation with the First Nation. The Mikisew Cree held that the building of such a road would interfere with their rights to hunt, trap and fish which is protected under Treaty 8 (*Mikisew Cree First Nation v. Canada*, 2005: 03) and that this road would affect their traditional lifestyle because it crossed a number of trap lines and hunting grounds (Newman, 2009: 13). More importantly, the unilateral decision to build the road breached the Crown's duty to consult and accommodate Aboriginal peoples (*Mikisew Cree First Nation v. Canada*, 2005: 03). As the SCC judges state,

The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shift from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation (*Mikisew Cree First Nation v. Canada*, 2005: 06).

In other words, what occurred was a lack of consultation resulting in the group's diminished capacity to affect policy in two ways. First, the group was not consulted at the initial stages of the policy-making process. As the trial judge stated, "Parks Canada did not consult directly with the First Nation about the road, or about means of mitigating impacts of the road on treaty rights, *until after important routing decisions had been made*" (Emphasis added, Lawson Lundell Aboriginal Law Group, 2005). Second, consultation after the fact was not sufficient to affect the policy outcome. As the trial judge illustrated,

the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns. Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights (*Mikisew Cree First Nation v. Canada*, 2005: 16).

That is, the building of a winter road, according to the Mikisew, would have had adverse effects on the group which were not known to Parks Canada due to a lack of consultation with the group.

In light of this SCC decision, in February of 2008 INAC created an *Action Plan on Consultation and Accommodation*. This action plan (INAC, 2007) is expected to achieve the following results:

Federal officials are equipped with the tools they need to discharge the legal duty to consult; Improved federal interdepartmental consistency and coordination; Creation of a federal policy on consultation that addresses policy and legal challenges and that reflects the participation of First Nations, Metis and Inuit groups in its development; and Better coordination of Canada's consultation approaches with related provincial, territorial and industry activities.

Though this appears to be a step forward, it is not clear at what stage of the decision-making process would First Nations be consulted. Consultation after the important decisions have been made would not result in greater accountability or political power because First Nations would not be given a voice a-priori policy design and, therefore, such public consultations would only be used to justify policy choices which have already been made (Sossin, 2002: 93).

### ***The Economic Failures of Consultation***

This section will examine the *Ermineskin Indian Band and Nation v. Canada* (1998) case in which monies was mismanaged by the Government of Canada. A lack of consultation between INAC and the Ermineskin Indian Band resulted in the mismanagement of funds derived from the Band's revenues. Though the Band did not win this case, this case does illustrate that the lack of consultation between INAC and the Ermineskin Band resulted in the lost of significant monetary interest which would have been gained through better investment of the Band's revenues.

The *Indian Act* of 1876 made First Nations ward of the state by empowering the Crown with a fiduciary obligation towards First Nations. In the *Ermineskin Indian Band and Nation v. Canada* case, the band, governed by Treaty 6, alleged the Crown failed to fulfill this duty when it failed to diversify, through investment, the band's oil and gas royalties and when it calculated and paid interest on such royalties (*Ermineskin Indian Band and Nation v. Canada*, 1998: 04). According to the SCC, Samson and Ermineskin filed statements of claim respectively in 1989 and in 1992 (*Ermineskin Indian Band and Nation v. Canada*, 1998: 05),

alleging that the Crown's fiduciary obligations required it to invest oil and gas royalties received on behalf of the bands as a prudent investor would, that is, to invest the royalties in a diversified portfolio. They submit that the refusal or neglect of the Crown to invest their royalties has deprived them of hundreds of millions of dollars since 1972.

However, the SCC did not rule in favour of the bands and held that the Crown did not have the obligation or authority to invest the bands' royalties pertaining to the Crown's fiduciary duty, as well as under section 35(1) of the *Constitution Act*, 1982, because there is no treaty right to

investment by the Crown (*Ermineskin Indian Band and Nation v. Canada*, 1998: 04). The SCC decision ruled in favour of the Crown and the band did not receive any additional money. However, the point of contention is the lack of consultation with the bands a-priori policy-making. According to the SCC (*Ermineskin Indian Band and Nation v. Canada*, 1998: 04) is that:

In 1969, the Crown decided to tie the rate of interest to the market yield of government bonds having terms to maturity of ten years or over. Discussions took place in the late 1970s and early 1980s between the Crown and leaders of various bands and a new Order in Council was enacted in 1981.

Here, the Crown already made the most important decision which was to tie the rate of interest to the market yield of government bonds without consulting with the group. In addition, there was no further consultation with the band in regards to how the money would be managed post-1970s. In this case, the band was not given the ability to make important economic decisions a-priori factual through consultation. The Assembly of First Nations' (AFN) Regional Chief Littlechild (2009) responded to the SCC decision with the following statement:

We are obviously very disappointed in today's decision. It may point to the need for a mechanism through which First Nations that want control over their trust monies are able to take that control. We believe we can manage our monies and resources as good as - and very likely better than - the federal government.

In this case, it is evident there exist a tension between what the Crown believed its fiduciary duty to be and what the band expected of the Crown in regards to investment. This difference has meant some First Nations groups have limited economic control over their finances and this has resulted at times in a significant loss of funds.

### ***The Social Failures of Consultation***

INAC is responsible for providing social programs and services to First Nations groups in the areas of health, education, housing, community infrastructure and other poverty measurements. On this front First Nations have not made significant strides. The 2009 Assembly of First Nations' (AFN) report, *Federal Government Funding to First Nations: The Facts, the Myths and the Way Forward*, states that First Nations rights are accessed through federal funding and are categorized into three areas: comparable services; lawful obligations; and self-government (AFN, 2009). Comparable services consist of services of at least equal quality to those provided to other Canadians by federal, provincial, and municipal governments (AFN, 2009). However, AFN states that, "living conditions on many First Nations reserves are notoriously inadequate. In order to arrive at some equality of outcomes with the rest of Canada, existing policy must change." (AFN, 2009) This problem can be attributed to the downloading of programs and responsibilities from the federal government to First Nations groups, in which the capacity of First Nations to implement specific programs in their communities has been lacking leading to social inadequacies as was demonstrated in the, *Pikangikum First Nation vs. Canada* (2002), Federal Court case.

In 2000, the Pikangikum First Nation entered into a one-year (April 2000 to March 2001) Comprehensive Funding Agreement (CFA) with INAC (*Pikangikum First Nation vs. Canada*, 2002: 05). According to INAC, "CFA is a program-budgeted funding arrangement that DIAND

enters into with Recipients for a one year duration and which contains programs funded by means of Contribution, which is reimbursement of actual expenditures; Flexible Transfer Payment, which is formula funded and surpluses may be retained provided terms and conditions have been fulfilled; and/or Grant, which is unconditional” (INAC, 2007). CFAs allow First Nations groups to deliver social and economic programming directly, and in the case of the Pikangikum First Nation without external interference, to support First Nation groups in achieving self-government, economic educational, cultural, social needs and aspirations (*Pikangikum First Nation vs. Canada*, 2002: 03).

However, during the 2000-2001 fiscal year INAC became concerned about Pikangikum’s ability to properly administer projects and programs because the community continued to experience problems relating to infrastructure (*Pikangikum First Nation vs. Canada*, 2002: 04). For example, in late 2000 there was a significant flood at the water treatment plant due to older equipment that was never properly managed (*Pikangikum First Nation vs. Canada*, 2002: 04). Additionally, the Pikangikum School was closed for almost a year as a result of a fuel spill when the shut-off valve of the fuel tank was not turned off (*Pikangikum First Nation vs. Canada*, 2002: 04). Due to apparent mismanagement, on November 17 of 2000, INAC notified the Pikangikum First Nation that the department intended to appoint a third party manager to oversee the terms of the CFA and if the band did not cooperate funding would cease to commence (*Pikangikum First Nation vs. Canada*, 2002: 05). Upon notice, INAC went ahead with its decision and transferred the delivery of services and programs to A.D. Morrison and Associates Ltd. This decision was taken to trial for judicial review.

The Pikangikum First Nation submitted that INAC unilaterally breached the terms of the CFA without adequately specifying what conditions led the department to be concerned (*Pikangikum First Nation vs. Canada*, 2002: 07). In addition, the band argued that INAC knew the water treatment plant was never completed and was vulnerable to accidental flooding and many of the infrastructural deficiencies preceded the band’s control over the services and actually were a direct result of previous planning by INAC (*Pikangikum First Nation vs. Canada*, 2002: 07). More importantly, the lack of consultation between INAC and the band, resulting in co-management, led to: “The program and service infrastructure at Pikangikum First Nation is not operating normally; The First Nation has been removed from any input into the development of its major capital infrastructure; The First Nation does not have the funds to deliver department services...” (*Pikangikum First Nation vs. Canada*, 2002: 08). With this evidence presented to the court, the Federal Court ruled in favour of the band noting that Indian Affairs Minister, Robert Nault, breached the duty of procedural fairness. However, for the purposes of this paper the ruling is less important than the circumstances under which the ruling took place.

In this case, INAC allowed market empowerment to be equated with political empowerment without providing mechanisms of accountability for performance. Accountability for performance would entail INAC to ensure that services and programs were comparable to those services of other Canadian residents (*Pikangikum First Nation vs. Canada*, 2002: 02). However, the Pikangikum First Nation was not equipped with the necessary tools and capacity to fulfill the terms of the CFA. In addition, when INAC became concerned with the band’s performance the department reneged on its commitment and unilaterally imposed external

control over the band's affair. The lack of consultation resulting in the department's unilateral decision created serious social service problems for the band as mentioned above. Though INAC was essentially following its mandate the department did so without providing the band the capacity necessary to succeed.

## **Conclusion**

Over the past several decades INAC has provided First Nations groups with substantial financial funding which has not been largely contested. However, this form of accountability has not guaranteed accountability for performance. The lack of accountability for performance to First Nations groups has created political, economic, and social implications which have prevented First Nations from gaining control over their communities and consequently, their destinies. Ultimately, this has inhibited democratization and First Nations' self-determination and

therefore, the next logical step for First Nations groups is to demand greater participation in consultation during the initial stages of policy formation. Involvement a-priori policy formation will lead to greater First Nations specific and appropriate programs. The clear lack of consultation between INAC and First Nations groups has created tensions between the two players resulting in a relationship based on a lack of trust. This lack of trust has not led to effective policies and/or meaningful compromises. Therefore, a renewed relationship must be based on an equal partnership between the two which can be achieved through the New Left perspective of democratic administration, where INAC is accountable to First Nations for results and First Nations are responsible to INAC for participating in consultation and ultimately, responsible to its members for results. Newman (2009: 64) is optimistic that,

Consultation embodies the possibility of genuinely hearing one another and seeking reconciliations that work in the shorter-term while opening the door for negotiations of longer-term solutions to unsolved legal problems. Those potentially engaged with consultations, whether governments, Aboriginal communities, or corporate stakeholders, ought to bear in mind not only their doctrinal legal position but the longer-term prospects for trust and reconciliation that will enable all to live together in the years ahead.

Some headway has been made on this front. In November of 2008, INAC (2008) stated that it will implement a plan to improve the way Aboriginal individuals and communities are supported and will enhance program effectiveness and accountability through:

innovation in priority areas like education and housing; renovation of core program authorities to improve responsiveness to changing conditions and needs; development of legislative frameworks that will empower Aboriginal Canadians and Northerners to make their own decisions, manage their own resources and support their community's development; and special attention to ensuring that those Aboriginal people who are most vulnerable are protected and empowered, for example, by establishing family violence shelters and tabling legislation designed to protect the property rights of First Nations women in cases where relationships fail.

In addition, INAC stated it would focus on creating effective partnerships between governments, First Nations, and other third parties. (INAC, 2008) However, a framework for empowering First Nations with the ability to be effective partners has been yet to be established. Therefore, until First Nations groups are provided with the tools necessary to control and manage their communities, through greater consultations, increased funding, better self-government arrangements, etc., many of the action plans put forth by governments pay little more than lip-service to the issue of accountability for performance.

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