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Safe Drinking Water Act, Senate Committee: AFN, AMC, UBCIC, Chiefs of Ontario say "The issue is not water. It is this legislation."

A Four Arrows Report on Parliamentary News with a special essay on "How Much Consultation Is Enough?"

Ottawa, Ontario, 12 February 2011 – The Standing Senate Committee on Aboriginal Peoples heard five witnesses last week on Bill S-11, *An Act for Safe Drinking Water on First Nations Lands.* All five witnesses were in sharp contrast with the views of the Committee's first witnesses, officials from Indian Affairs with their solicitor from the Department of Justice.

AFN National Chief Shawn (a-in-chut) Atleo

AFN National Chief Atleo began by urging Committee to review Bill S-22 in the light of the standards set out in the United Nations Declaration on the Rights of Indigenous Peoples. "I think you will find that, regrettably, the proposed legislation is infected with the age-old paternalistic policies inherent in the *Indian Act."* This gave an opportunity to correct the flaws "and to chart a new path forward based on recognition, collaboration and implementation and focused on delivering real results."

The National Chief said safe drinking water was a "paramount concern", since ambitious priorities in education, job creation and economic development required that basic needs first be met. He noted that right now, there were 49 communities with high-risk drinking water systems, and 117 communities with drinking water advisories and the number was on the way up. A thousand homes in northern Manitoba were without running water. That shows, he said, "that current approaches are not addressing the very root problems."

Bill S-11 was "not acceptable". He circulated to the Senators a copy of Resolution 58 of the Special Chiefs Assembly held in December 2010 which, he said, "speaks for itself." There were three main concerns.

"The first is the financial aspect. The expert panel on Safe Drinking Water for First Nations said the federal government must close the resource gap, and identified this as a pre-condition," the National Chief said. "Most critically, it is not credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements." Attention and money to go into regulatory systems, he said, might be better invested in systems, operators, management and governance.

Thus the first major deficiency in Bill S-11 cited by the National Chief was this lack of financial provisions. Funds were needed for both new construction and upgrading of deficient facilities, as well as for operation and maintenance of existing equipment so as to ensure the longest possible life for facilities, training of operators and other staff such as Circuit Riders, and finally, paying adequate salaries to system operators.

The National Chief noted Indian Affairs officials had told the Committee they could not yet report on a national cost assessment of needs and deficiencies, saying the report would not be ready until Spring. He said it was his understanding that "all of the reports were completed as of January 31. . . First Nations are very anxious to see this information and do not understand why this information is not made public, or at least provided to this Committee.

National Chief Atleo also said he understood the Minister was introducing financial provisions when the Bill came before the House of Commons after it had been passed by the Senate. Curiously, the government chose to introduce the Bill in the Senate where a new bill cannot contain financial provisions.

"First Nations need clear assurance that the resources will be there to ensure that regulations and standards can be achieved. Without this assurance, First Nations have every reason to be fearful of and reject accepting the liability and responsibility, due to the current state of infrastructure and with no guarantee of resources to remedy current problems."

There was another issue. "We must ensure that first Nations jurisdiction is respected, that effective coordination is in place, and that the regime is sustainable, stable and accountable.

In addition to the financial aspect, the second area raised by the National Chief was the issue of consultation: "First Nations continue to feel that consultation has not been adequate. The Supreme Court has pointed to a requirement for meaningful consultation as in the *Haida* decision. Consultation always involves listening and being prepared to change your plans based on what you hear.

"The problem with Bill S-11 is that it does not reflect what INAC has heard from the expert panel or in the engagement sessions or from First Nations in any form. That is why First Nations say consultations have been a problem."

The third issue raised by the National Chief was the major issue of Aboriginal and treaty rights: "Canada appears to give itself the authority to determine the extent to which the Crown can abrogate and derogate Aboriginal and treaty rights in direct contradiction to section 35 of the Constitution."

He referred to the United Nations Declaration on the Rights of Indigenous Peoples: "As you know, one of the central principles of the declaration is free, prior and informed consent.

"In the statements by federal officials to this committee on February 2, there was continual reference to collaboration with First Nations with regard to the development and enactment of proposed regulations. However, if you look at the so-called enabling provisions, there is no reference to any collaboration with First Nations, let alone the standards set out in the declaration of free, prior and informed consent.

"In fact, if you look at those provisions, all of the power and sole discretion is granted to the minister or the Governor-in-Council. With all due respect, it looks to me to be more of the same paternalistic approaches contained in the *Indian Act*. This approach is also evident in subsection 6(1), which says that regulations may override First Nations laws and bylaws."

National Chief Atleo then set out a list of amendments that the Committee must consider: "First, the financial resource issues need to be addressed through clear assurances and an implementation plan. Second, the principle of free, prior and informed consent must be reflected in the Bill. . . Third, the infringements on Aboriginal and treaty rights must be completely eliminated from the Bill."

The National Chief then called on David Nahwegahbow, Senior Legal Counsel to the Assembly of First Nations to explain "constructive proposals that we are suggesting to the Government of Canada to advance our mutual interests of delivering safe drinking water for First Nations."

Mr. Nahwegahbow There are three areas with regard to the issues of Aboriginal and treaty rights that are problematic, potentially. The first is paragraph 4(1)(*r*), which allows the regulations to provide for the relationship between regulations and Aboriginal and treaty rights, including the extent to which the regulations may abrogate and derogate from those rights.

This appears to give fairly unfettered discretion to the minister to derogate from Aboriginal and treaty rights. There is jurisprudence which is referred to, the case of *R v. Adams*, which indicates that, in light of the Crown's fiduciary obligation, such discretionary regimes are not constitutional.

In fact, it occurred to me, as I was studying this, that I had not seen anything this blatant before, which allowed for the override of constitutional rights. The only thing that really occurred to me was the "notwithstanding" clause. Of course, we know the significance and the controversy surrounding that constitutional override, and it is specifically provided in the Constitution. In the case of section 35, there is no specific provision that allows for the override of constitutionally entrenched rights.

This is a serious potential breach. Not only is it a direct legislative breach, but it allows discretion to a subordinate body. Not the legislators, but to a subordinate administrative body or executive body to override constitutional rights which, according to section 52, are supreme.

The second area is the extent to which the bill allows regulations, in situations of conflicting interpretations, to prevail potentially over comprehensive land claims agreements and self-government agreements. Again, it is a bit overreaching, and according to section 35, such agreements, at least comprehensive land claims agreements, have constitutional effect.

The final area of Aboriginal and treaty rights that must be mentioned is the provision that allows regulations referentially to incorporate provincial statutory regimes, particularly in those provinces statutory regimes may provide for water rights or allocation of rights. You may be

unwittingly allowing the override of Aboriginal and treaty rights, again through regulations, where the provincial regimes may actually infringe water rights."

Mr. Nahwegahbow said the Committee should ensure that those provisions that allow for the override of aboriginal and treaty rights are eliminated, "because they are clearly unconstitutional."

To ensure there was free, prior and informed consent to the regulatory regime, Mr. Nahwegahbow said, this should be stipulated in the Bill itself: "the implementation or the enactment of regulations must be done with the free, prior and informed consent of the First Nation to which the regulations are to apply."

How Did This Problem Start to Fester?

What went wrong with an effort to improve the quality of drinking water on First Nation reserves?

In May 2006, Indian Affairs Minister James Prentice and then-AFN National Chief Phil Fontaine jointly announced the establishment of an Expert Panel that would examine and provide options on the establishment of a regulatory framework to ensure safe drinking water in First Nation communities. It was agreed the government would not impose a unilateral decision, but rather there would be discussions and joint consideration of the recommendations of the Expert Panel. A Joint Steering Committee would be established pursuant to the *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments.*

Then, early in 2007, out of the blue came a decision of Minister Prentice that Indian Affairs to proceed with legislation that would, by reference, incorporate provincial regulations . Further, Indian Affairs officials told the AFN that there would be no consultation on the matter – the only discussion would be one about adapting provincial law for on-reserve application.

When National Chief Fontaine heard about this, in a letter dated 26 March 2007 to Minister Prentice, he predicted exactly what would happen if Indian Affairs insisted on proceeding unilaterally: "This approach is fundamentally problematic because the proposed framework for the regulatory regime is pre-determined and is one that will likely be rejected by First Nations because it does not respect inherent Aboriginal and Treaty rights or First Nations' jurisdiction." Essentially, the First Nations participation as partners in developing solutions to the water crisis would be pre-empted by the government's decision.

The Fontaine letter also pointed out that the Expert Panel itself had acknowledged that existing provincial regimes were inadequate for First Nation situations. Also, the Expert Panel acknowledged that provincial regimes "may infringe upon First Nation self-government and other constitutionally protected rights. "The notion of inviting provincial regimes onto federal/First Nations lands is a very serious incursion of section 35(1) rights. . . First Nations [also] possess regulatory authority over waste and water management pursuant to the *Indian Act.* Accordingly, the federal duty to consult with every affected First Nation is certainly triggered. . . Surely we should work to avoid the unnecessary, protracted and potentially expensive litigation that is likely to arise from challenges to the constitutional validity of this approach . . . I am certain that we can collectively address this critical situation in a respectful, timely and cost-effective manner."

What happened? Why has Bill S-11 become so controversial? Because the federal government decided to ignore Phil Fontaine's invitation to work together, and proceeded to impose a unilateral approach which is not likely to withstand the legal challenges which are sure to follow.

Senator Larry Campbell, Liberal from British Columbia, asked, "What engagement process at this point would satisfy the First Nations' concerns in this bill? What would you advocate as a proper way of engaging?"

Mr. Nahwegahbow replied the government should be"holding back on moving forward with this legislation until there are some proper financial guarantees or fiscal plans." This would also have the benefit of allowing time "for constructive engagement with the Minister and First Nations."

Senator Campbell asked about the term "full engagement". "I have never had anyone be able to tell me exactly what that means. What would full engagement be?"

Mr. Nahwegahbow replied it would mean sitting down with officials from Indian Affairs who had "some willingness and intention that those engagements will be meaningful. That means being willing to rewrite some of the legislative proposals in a joint fashion, and then coming back here with those proposals with the assurance that it has the full support of the First Nation leadership."

Senator Campbell: My concern is that we have heard time and time again of First Nations communities with bad water or with no water, in a position that is simply disgraceful for a country like Canada. While we are in this process here of negotiations and discussions, what do we do to help those people in the interim? This could go on for years, and it is unacceptable. People are sick and could potentially die, while we sit around here discussing ideas . . . What can we do about that while we continue negotiations?"

Mr. Atleo: I think the situation that we have, the 1,000 homes in Northern Manitoba without clean drinking water right now, is as a result of a long history of policy development and isolation, not done jointly or in collaboration with First Nations. The system we have is built upon a system that is largely arbitrary in nature, without developing plans, certainly not developing plans jointly, based on the same data and the same information.

This is about breaking a pattern and moving away from this notion that unilateral, externally imposed solutions are the answer. . . We must fix this problem. That is the reason why the chiefs, to their great credit, have encouraged us to be a part of finding that solution with you today."

Mr. Nahwegahbow suggested that the Committee call back the officials who appeared before it the week before. "My understanding is that national assessment is completed and they are simply compiling the documents or the studies and perhaps analyzing it. I think it would make a lot of sense, if this committee is really concerned and wants to get to the bottom of it, to see those assessments. They will tell you exactly what the state of drinking water systems is across the country. I suggest you call those witnesses back, get a clear indication, get them to bring their studies with them, and have a detailed look at those studies.

"What needs to be done to solve those problems is to rectify those systems. Passing regulations or statutes, as the expert panel has said, will not solve the problem. It will solve part of the problem eventually, but only after the resource issue gets dealt with."

Senator Patrick Brazeau, Conservative from Quebec, then took on the questioning, and this dialogue followed:

Senator Brazeau: . . . As a First Nations person, I also have concerns about a few things I heard this morning. National Chief, you talked about this piece of legislation being paternalistic and having had no consultation. You talked about infringements on Aboriginal and treaty rights. The way I read this piece of legislation, I do not see it as paternalistic.

"If passed, this would give the opportunity for every First Nations community to develop regulations that would reflect their own customs and traditions with respect to safe drinking water. Perhaps some provincial regulations would be incorporated. Who knows, maybe it would be entirely First Nations.

"Therefore, I have to respectfully disagree that this bill is paternalistic.

"On the issue of consultation, I have heard too many times, in my experience, that whenever First Nations people are not in agreement with a piece of legislation,

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they cite lack of consultation. The reality and the fact is that between 2006 and 2012, next year, approximately $2.6-billion will have been spent consulting and discussing with First Nations how to improve water quality on reserves. I am sure you will agree that, although not everything has been fixed, a lot of progress has been made over the last couple of years.

"You talked about boil-water advisories. Sure, they may be high, but, to me, when I see those advisories, it shows at least that the water is being tested. The same applies to non-Aboriginal communities across the country as well; there are boil-water advisories all over the country. That is a positive sign that the water is being tested.

"On the aspect of the infringement of Aboriginal and treaty rights, if there were a derogation of those rights, would that be done by the First Nations communities themselves, first, and do you see that happening?

"My second question is, coming back to consultation, could you share with us the AFN position on what is adequate consultation? We often cite a lack of consultation or no consultation. What is enough?"

The reply to Senator Brazeau's questions was given by David Nahwegahbow. "The problem is, there is no provision in the regulations to allow for any input. There is nothing specific in the regulation, in the statute, that allows for a collaborative role, let alone free, prior and informed consent.

"If you look at the statute, it simply says "the minister may" or the "Governor-in-Council may." If the government is serious about allowing some adaptation of those regulations for First Nations, then put it in. Why does it have to come down from above that 'the minister says,' which is exactly how it is in the *Indian Act*? Why does it have to say 'the Governor-in-Council may'? Why does it not say, 'the Governor-in-Council may, with the consent of First Nations'? It is quite simple and an easy provision to add.

"The definition of "consultation" has been given numerous times by the Supreme Court of Canada. If you have a good look at the *Haida* decision, there are examples there as to what consultation means. It needs to be meaningful. If you put a plan before the person you consult with, it means you should be prepared to change your plan to accommodate what the other person is telling you. There is a bit of common sense involved in that.

"Certainly it should be more than the old-time paternalistic attitude of "I will talk to you and pretend this is consultation." It needs to be more than "pretend consultation". There needs to be a willingness to engage in a serious dialogue, which may eventually affect the outcome of the final product.

"I am not sure if that answers all your questions."

Senator Brazeau: "I guess, in part. Here is my concern: We talked about 1,000 homes in Manitoba, individuals who do not have access to safe and clean drinking water. This is what this bill is about. It is about First Nations having access to just that, safe and clean drinking water.

"I hear you talking about free, prior and informed consent. To me, that is procedural. However, how do we get to the point where First Nations people will actually have access to the safe and clean drinking water that they deserve? Again, if we are going to talk about lack of consultation, how long will it take before we get the consent of the 600-plus communities?

"To me, that is all procedural. It sounds good. It is a little bit of rhetoric. At the end of the day, we are talking about trying to give people access to safe clean drinking water, just as every other Canadian citizen enjoys across the country. To me, the position you are putting forward is that we are getting bogged down on procedural stuff, language and consultation when, in fact, there has been consultation.

"When I talk to First Nations people, grassroots people living in communities all across the country, they are asking, 'Why has that not happened yesterday?' We are hearing from different groups that they are ready to go with this legislation as it is. However, the position that seems to be put on the table is many changes need to be made. We can talk about resources, but the fact is very few pieces of legislation include resources moving forward.

"You talked about the Haida consultation. I have read that decision 20 times over. I would like to know from the AFN here this morning what constitutes enough consultation."

Senator Romeo Dallaire was the next on the list for questions. "We are continuously raising the point in documents that since 2003 and up to 2012 the Canadian government will invest $2.3 billion towards the improvement of water in Aboriginal communities. When you look at that, you sort of say, "That is a lot of money." If the requirement to make safe drinking water is $4 billion, then $2.3 billion is not getting near to solving the problem.

"This committee stated that we should not go into legislation until we make the resources available . . . Then, if legislation is required to guarantee that standard, we would do so.

"By introducing the legislation, have we proven to you that you will get the guarantee of the resources, that $1.7-billion, $2-billion or $5-billion or whatever it is? We are spending billions upon billions here in the south for our water. Do you feel this legislation will give you any better position in getting the resources to resolve the problem and implement the standards required for safe drinking water in your areas?"

National Chief Atleo replied to Senator Dallaire. "As was said by the Expert Panel, first and most critically, it is not credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements. . . While it is tempting to assume that putting a regulatory regime in place would reduce the dangers associated with water systems, exactly the opposite might happen. Creating and enforcing a regulatory regime would take time, attention and money that might be better invested in systems, operators, management and governance.

"As our presentation here has suggested, those need to arrive together, at the same time and the same place. The Assembly of First Nations is here willing, under the direction of the chiefs, to pursue fixes to the bill that would ensure that the regulations will respect Aboriginal treaty rights, Aboriginal title rights, and that the financial resources must match the need.

"Up until now, the history which we have collectively inherited is one of unilateral and external imposition of systems that are arbitrary, not based on sound planning and, certainly, nowhere near meeting the consultation that is expressed legally in common law or anywhere near the United Nations Declaration on the Rights of Indigenous Peoples' new standard of free, prior and informed consent. We are here, as I said, under the instruction of the chiefs, to seek solutions that would respond to the great urgency we are facing right now in our communities to do that."

Senator Dallaire then addressed the evidence of the officials, that having the legislation might put them in a better position to get funding for water. However, he noted that significant results had been obtained since 2007 – "this plan has been working and producing some significant positive effects in the field." Now officials are saying that plan is null and void, and the legislation will give you new money. Is that the way you think we should still be going with this legislation, hoping this new assessment brings you new money? Why not stay with the old plan and continue to improve and apply that one without this legislation necessarily?"

Mr. Nahwegahbow noted that the Health Canada witness had told the Committee that their present guidelines seem to be working quite well, and that they have had "tremendous" collaboration with First Nations."

"If you have a system that is at least working reasonably well in the interim and there is an outstanding study that is about to be completed . . . then what is the problem with waiting for that national assessment, studying it and developing a proper financial implementation plan around that assessment? It seems to me that makes abundant sense and ought to be something the committee considers."

Senator Dallaire noted that "legislation is a very big hammer – it is not a soft system. It is a big hammer by those who have the authority, in the legislation, to use that hammer." He wondered who or what had pushed the ministry to initiate this legislation at this time?

Mr. Nahwegahbow said he didn't have the answer "why they are so insistent on proceeding with the regulations ahead of the financial measures.

"Certainly, in the face of clear recommendations from an expert panel, and clear indications from consultations with First Nations, they seem to be insisting on rushing headlong into legislation when they do not have all their homework done on the financial or engineering issues. Why not get that done first?"

Senator Nick Sibbeston focussed on the issue of the non-derogation clause. "Ever since I have come to the Senate, the non-derogation clause has been an issue. Beginning in approximately 1982, in federal legislation, there was a very clearly stated non-derogation clause, and this act would not, in any way, take away from the rights of Aboriginal people.

"Through the years, we have seen a slight changing in the words. On the face of it, it does not look serious, but when you look at it closely, lawyers working for Aboriginal organizations are of the opinion that it has been a watering down of Aboriginal rights. This is a matter that we have concerned ourselves with. . . Now we see a situation where the non-derogation issue is placed in a regulation. It is like horror of all horrors, putting the matter of Aboriginal rights in the hands of Indian affairs officials. Can you imagine?

"Perhaps the most significant thing in any statute is the issue of Aboriginal rights. This legislation does not have it in the main body, but it will be dealt with in regulation by Indian affairs officials. I am concerned about that. . . Do you see a problem in giving Indian affairs control over the issue of Aboriginal rights, considering they do not have a great record of handling this issue in our country?

Mr. Nahwegahbow said he thought the clause in the bill "is actually a derogation clause. . . There is no constitutional authority in legislation, certainly not within the Constitution Act, that allows legislators to give permissions to ministers or the cabinet to override constitutionally protected rights."

Senator Caroline Stewart Olsen said that across Canada, public health and safety laws are primary. "They override everything. I do not see this as infringing on treaty rights in any way."

"I need to know how you suggest we get around this. We will quibble forever on Aboriginal treaty rights versus public health and safety, I think. What we need from you are suggestions about how to address this important principle, that primary is the health and safety of the citizens.

"I think it is shameful that we have not had this kind of legislation."

National Chief Atleo: "First Nations feel vulnerable and threatened every single day, from so many different directions. We need to come together and acknowledge that what we are looking to do is reconcile the existence of Aboriginal title and treaty rights that are entrenched in section 35, that the United Nations Declaration on the Rights of Indigenous Peoples has given us a new frame-work that says that we must now, together, address these urgent issues, like the need for safe drinking water, like the need to ensure that children have a proper education that is equitable and fair.You are absolutely right that together the leaders, as the chiefs are saying, are making water and safe drinking water a priority, and they have instructed us to come here and examine how, in short order, we might appropriately deal with this challenge."

Senator Gerry St. Germain, Chair: "With regard to the evidence we have heard to date, department documents suggest that the proposed regulatory regime would be rolled out in a phased approach over several years, to ensure that First Nations are in a position to comply with the regulatory regime. They have indicated that government funding levels would be there to allow for the improvements in the infrastructure and the technical capacity, if required.

Do you have any comments about the phased approach? Is this your understanding of how that will proceed, National Chief? . . . I would think that, if we do get legislation, a structured process in there, that governments could not ignore the need for funding on such a basic requirement as safe drinking water.

Mr. Nahwegahbow replied that it was the regulations which would be rolled out. "The problem with that is that the regulations can be enacted at the sole discretion of the minister or the Governor-in-Council, with no provision for First Nations to have any say in those regulations. . . no assurance that there will be any collaboration with First Nations. There is no assurance that those regulations will be rolled out without the financial assurances. That is a problem.

"The other point that was made earlier is that if the engineering assessment reports are done, then why do they not table those reports here? If they are in such a rush to implement the legislation, bring the reports here and let us see what the state of drinking water systems is across the country.

"If this committee is serious about addressing and redressing those, then insist on the financial plan first, or, at the very least, get both of them before this committee. I know the limitations are that you cannot put financial provisions into the bill, but you can certainly study what the financial implications are without necessarily putting those into the bill.

Senator St. Germain asked if this could be covered in a preamble "that would cover the collaborative aspect of establishing regulations. Would that meet up with the requirements with regard to collaboration regarding the establishment of regulations?"

Mr. Nahwegahbow: "Unfortunately, a preamble or provisions are useful as an interpretive tool for legislation, but it is not a substitute for a provision in the enabling provisions themselves that say collaboration is required or, even more importantly, that the free, prior and informed consent of the First Nation is a precondition to the implementation of the regulation.

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The Senators Ask: How Much is "Enough" When It Comes to Consultation ?

Several senators have asked, in effect, "Hasn't there already been enough consultation? Let's get on with the Bill."

The reason it is so difficult to get an answer to "how much is enough" is that it is the wrong question to ask. The issue is not the quantity of consultation, but rather the quality. "Consultation" has to be understood as just one element in the process of "reconciliation", and has to be seen as the objective of a process of "negotiation" through which "accommodation" is accomplished. To discuss consultation independently of reconciliation, negotiation and accommodation makes no sense at all.

Let's go to the heart of the issue. The situation we are dealing with is, as Supreme Court of Canada Chief Justice Beverly McLaughlin said in 2004 in *Haida,* "pre-existing Aboriginal sovereignty" and "assumed Crown sovereignty." In other words, First Nations have it, the Crown assumed it.

The *Haida* decision continues: section 35 of the Canadian Constitution is "a promise" that the Crown will recognize the rights which emerge from this pre-existing Aboriginal sovereignty. And, as the Court has said, it is "always assumed that the Crown intends to fulfil its promises." The "honour of the Crown" was to be understood "generously" (*Delgamuukw)*.

So how are the co-existence of these two sovereignties to be managed? "This promise is realized and sovereignty claims reconciled through the process of honourable negotiation." Negotiation was, the Supreme Court said in *Okanagan*, "the ultimate route to achieving reconciliation between aboriginal societies and the Crown."

This, the Supreme Court says, implies "a duty to consult" and, if appropriate, "accommodate." This requires, the Court said, "good faith efforts to understand each other's concerns and move to address them. . . Balance and compromise are inherent in the notion of reconciliation. . ."

Why, then, with that crystal clarity, does the question come up, in the Senate of Canada, no less, "Haven't we consulted enough?"

The question comes up because although the Supreme Court of Canada has repeatedly ordered that the federal government pursue negotiation to find accommodation that will reconcile the two co-existing sovereignties, the Government of Canada takes the position, as Justice Department lawyers have been heard to say, "The Supreme Court has its opinion, we have ours." The federal legal positions are as they were before the Constitution was patriated in 1982, when the supremacy of Parliament gave way to the stipulations of the Constitution. Now, Parliament is required to ensure that the negotiations on the stipulations of the Bill found enough accommodation of rights and interests that reconciliation of the sovereignties had been achieved.

Since 1982, reconciliation means that neither party can impose its will upon the other. Another Supreme Court of Canada case, *Sparrow,* in 1990 said that only in the rare cases where the issue involved a national interest, and only where negotiations could not find accommodations, then and only then could there be an imposition and that compensation would have to be paid.

Old presumptions must be set aside. Canada must come to terms with its history. The colonial rule of the *Indian Act* days has to be abandoned.

What does that mean for S-11? Essentially, that the First Nations and federal government go back to the drawing board they gathered around in 2006. There would be negotiations to resolve contentious issues. There would be accommodation of rights and interests. Agreement would be reached, legislation would be supported by all parties.

That is when the Senate would know that there had been "enough consultation".

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After the AFN presentation to the Committee, the next witness was Angus Toulouse, Regional Chief of Ontario, speaking for the Chiefs of Ontario. He was accompanied by Johanna Lazore, senior policy adviser.

Angus Toulouse, Regional Chief of Ontario, Chiefs of Ontario: "I am from Sagamok Anishinabek on the north shores of Lake Huron. I am here today on behalf of the Chiefs of Ontario. I am also here to urge you to reject wholly the legislation proposed by Bill S-11.

"First Nations are entitled to enjoy safe drinking water from the sacred water sources entrusted to us and to our care and stewardship by the Creator. This right cannot be separated from our right to manage the sacred resource and to apply our laws and values respecting water-resourced management.

"Our entitlement to enjoy safe drinking water is a fundamental human right and is an aspect of food security assured through the recognition and affirmation of our Aboriginal and treaty rights pursuant to section 35 of the *Constitution Act* of 1982, and further supported by the *United Nations Declaration on the Rights of Indigenous Peoples.*

"In light of these facts, it should also be mentioned that First Nations are not opposed to regulations in respect of water. "We have also repeatedly stated that prior to the development of legislation on our waters, our critical infrastructure needs must be addressed. The Chiefs of Ontario in Assembly have affirmed their commitment to achieving the highest possible drinking water standards on reserve. Again, however, to reach this goal, infrastructure needs must first be met.

"The reasons for unsafe drinking water are clear and have been stated by both the Royal Commission on Aboriginal Peoples and by the Expert Panel on Safe Drinking Water for First Nations. The Royal Commission urged Canada to address the shameful situation, but the recommendations regarding First Nations drinking water have been largely ignored.

"The expert panel was explicit about the main reason for Canada's failure. The federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable with that of off-reserve communities.

In addition to the most obvious problem of absent infrastructure, there are numerous other problems with Bill S-11. We have sent an extensive explanation on these concerns to your committee clerk for distribution. We are greatly concerned that the proposed legislation will violate many of our collectively held indigenous human rights.

"As recently affirmed by the UN Human Rights Council in September of last year, the right to water is a basic human right. It is a right that derives from the right to an adequate standard of living. In an international law context, our resource rights and our rights to self-determination cannot be extinguished, a point recognized internationally by the *United Nations Declaration on the Rights of Indigenous Peoples.*

"The Crown is therefore under an obligation to explore First Nations' options for the recognition of our customary laws as they relate to water. Federal and provincial governments should be striving to achieve the standards set by the *UN Declaration on the Rights of Indigenous Peoples.* Indeed, numerous articles of the *UN Declaration on the Rights of Indigenous Peoples* are implicated in any discussion on the issue of water in relation to indigenous peoples.

"Those include, but are not limited to the following: the right to self-determination; the right to maintain and strengthen distinct political, legal, economic and social cultural institutions; and the right not to be subjected to forced assimilation or destruction of their culture.

"They also include the right to approve the commercial use and development of water on their traditional territories; and the right to access financial and technical assistance from states and through international cooperation for the enjoyment of the rights contained in the declaration.

"Clearly, none of these rights have been achieved in the development of Bill S-11. The chiefs in Ontario also have numerous concerns implicating the Constitution and Aboriginal and treaty rights.

"First, the Crown failed to abide by laws respecting consultation in a combination of the lead-up to and drafting of Bill S-11. There was no comprehensive consultation process with First Nation communities and organizations regarding legislative options, including those found in the reports of the Expert Panel on Safe Drinking Water and the Standing Senate Committee on Aboriginal Peoples.

"The process employed by the Federal Crown in conducting the regional First Nations impact analysis contained a number of deficiencies. These flaws, outlined in our written submission, undoubtedly affect the extent to which this process could be characterized as consultation or as part of a consultation process.

"Bill S-11 will also potentially impact upon our Aboriginal and treaty rights. Any proposal for law making to ensure safe drinking water on reserve necessarily involves legislation in regard to the waters of First Nations in our reserve lands and our traditional lands, and necessarily implicates our inherent rights, jurisdiction and responsibilities to manage those waters.

"Our relationship to all water and especially the drinking water we rely on for our very survival is an important aspect of our customary laws. The customary law of each First Nation is integrally connected to our traditional spiritual beliefs. Consequently, Aboriginal rights in a broad cultural and spiritual context are affected by any legislative proposal directed at regulating water sources, quality and quantity.

"The first operative paragraph of Bill S-11 makes reference to the ability of the Government of Canada to make regulations relating to lands. There is no mention of treaties. There is no mention of water. The goal of this reference is clearly to assert the invalid jurisdiction of the federal government to make regulations on First Nation lands.

"The level of incursion into First Nations by this legislation becomes clear, particularly in section 4(6) of the bill. Under these sections, the authority is transferred away from First Nations and conferred on any legislative administrative, judicial or other power or body. Section 6(1) makes it clear that the regulations would prevail over any law or bylaw of First Nations.

"In conclusion, I will reiterate that the current prescriptive approach of incorporation by reference is not acceptable to First Nations. All three recommendations of the expert panel report must be fully explored in order to determine the best option for addressing First Nations on-reserve water issues.

"There are options First Nations are willing to explore with the Crown. These options are based on recognizing First Nations law and working with federal and provincial governments to foster a better understanding of our respective approaches, laws and values respecting water resource management, on which the assurance of safe drinking water depends.

"To date, the federal Crown has refused to explore such opportunities and has limited the discussion to its own preferred options.

"Meegwetch for listening to me this morning.

Senator Brazeau: "I have a couple of questions. You mentioned that if Bill S-11 would pass it may violate Aboriginal human rights. Can you enumerate what those may be?

Chief Toulouse: "Yes. There are a number of sections that are listed in the UN Declaration on the Rights of Indigenous Peoples that it violates. It certainly violates –

Senator Brazeau: "Sorry to interrupt at this point, but I think you will agree with me that the UN declaration is a non-binding agreement, even though it was endorsed by the government. We are talking about access to clean and safe drinking water here."

Chief Toulouse: "We are talking about the right to self-determination, which is certainly found in Article 3 of the UN declaration. It may be an aspirational document for government, but it certainly is a document that First Nations continue to exercise what they believe are the rights that have been recognized by the United Nations. Those rights, again, certainly include the right to self-determine what our laws are.

"Let me use the example of the water in many of our First Nation communities. I will use my example in my First Nation community. Back in the early 1980s, there was no legislation necessary. What we had was a sickness in our community, *E. coli*. It did not require legislation, but it required resources of government to change the system, to improve the system and to make a new system. That is what was required in our First Nation community back in the early 1980s. That is what First Nations are talking about.

"What we have right now in the First Nation community is probably what I heard, which is one of the three top water systems in Ontario. It is because we have good source water. We have an artesian source that we managed to find for our community. It required resources and the ability to get that artesian source distributed to each of the community households. That required resources, not legislation or regulations. That required money. That required the ability for the community to hire the consultants and the contractors to develop the system that provides now one of the best water qualities in Ontario.

"I say that because what is fundamental here -- and what I heard the national chief in his presentation talk about -- is the need to identify or at least to address the assessment that has been undertaken by the federal government to look at that assessment and to start implementing the kind of resources that the First Nation communities need to remediate the problems in their source water, and not just source water but certainly the systems that are currently failing to meet any standard that may be out there.

"Again, as I stated earlier, the First Nations are about wanting to provide the kind of quality and healthy communities, certainly in their communities, and water is a big part of that."

Senator Brazeau: "Mr. Toulouse, help me understand. You mentioned that if Bill S-11 were to be passed it might violate Aboriginal human rights. If passed, the First Nations across the country would jointly develop regulations with the federal government; regulations that would reflect traditions, customs, et cetera. You mentioned that that would violate the right to self-determination. How can providing access to safe, clean drinking water to our First Nation citizens violate our right to self-government?"

Chief Toulouse: "Bill S-11 does not provide any guarantee for those First Nations. I just gave you the example of my First Nation community. Without that resource, as much as there is the will and desire of the community and the leadership of that community to have clean water, without identification and having the guarantee of having the system that could meet that regulation and that standard, it will not happen.

"You can pass whatever kind of legislation or regulations, but without the resourcing that comes with that, without an implementation plan of the assessment, the national assessment that has been undertaken, again, it is not providing a guarantee. Bill S-11 does not provide a guarantee of clean drinking water without the resources."

Senator St. Germain (Chair): "I have a supplementary question to that. If Bill S-11 is not the answer, do you agree that a regulatory regime should be in place, or do you believe there should be no regulatory regime?

"Let us say that the funding is adequate. Let us leave the resource aspect out. What would your proposed water management system look like? If you say that Bill S-11 does not fill the bill, what would fill the bill as far as a regulatory system? Some of us believe that we all need regulatory systems. Do you have a suggestion that would replace Bill S-11?"

Chief Toulouse: "Yes. We have initiated some work with our First Nation communities for them to arrive at a regulation at the local level that, at a minimum, would meet the Ontario levels."

"Right now First Nations are signing off on contribution agreements that essentially say they will provide potable water to the level of the provincial regulations. They are signing those off, again, in receiving the resources they currently have, but the systems do not allow for it. There is recognition right now that there must be a standard of quality water that is met.

"Our Ontario First Nations Technical Services Corporation is developing toolkits for our communities to have the kind of legislation locally recognized in regulations that are endorsed by the nations in general to be able to assure the citizens that we need and we want to deliver the kind of water that is expected anywhere else, and to meet the minimum requirements. Our leadership is developing those regulations.

"Of course, they are struggling with the aspect that they are not sure when the implementation of the national assessment will provide the kind of resources to upgrade and to create new infrastructure or water in many of our First Nation communities."

Senator Brazeau: "That is good to hear. If the leadership is developing its own regulations to deliver clean water to their citizens, who is responsible and liable for the delivery of the clean drinking water right now if they are doing that?"

Chief Toulouse: "Right now I think there is an obligation by the federal government to meet its fiduciary obligation in providing the kind of infrastructure that should have been there years ago.

"To give you an example, my job as a youth all the way to the time I left to go to post-secondary was to bring water to my home. That was potable water I carried from the spring to my home. To this day, there are still many people who continue to do that to try to provide basic water deliver. I am not even talking about potable water, but basic water. It is a huge challenge that First Nations have.

"I think First Nations have recognized that through the recognition of our ceremonies and our spirituality. The women have continued to take ownership of their responsibility of ensuring potable water by educating people as to what their obligations are to the environment and to the source water and so on. There is much to be said about understanding each person's responsibility in terms of providing a healthy community and a healthy infrastructure for our community members.

"Right now, what First Nations are waiting on – the will is there – are the resources to improve the systems."

Senator Sibbeston: "I am a little naive in terms of the situation in Ontario. I appreciate what you say, but I do feel that your presentation today centres a lot on rights.
"You say you are not opposed to regulations. You say there has been no adequate consultative process and you are

concerned about this law affecting Aboriginal rights. I am just wondering, what is the alternative?

"I think you have been asked that. I am a bit concerned because as I see it, this bill is dealing with safe drinking water on First Nations reserves throughout our country. It is an admirable, laudable goal of the federal government to be doing this. However, basically, you say you reject this legislation.

"What is the alternative? If the Ontario chiefs were concerned, I would be interested to know what the alternative is in a clear way so that we know definitely that the Ontario chiefs are doing something about it; that they have their own plan and that this legislation will not be the means by which clean water can be achieved on reserves.

". . . What are you prepared to present to this committee so that we can come to the view that there is an alternative; that the First Nations have a better plan than this, so we should also reject this. Can you please comment on that?"

Chief Toulouse: "The First Nations in Ontario say we are the original peoples of Turtle Island and have the ability to have the self determination to govern ourselves. We are talking about recognition of our First Nations governments.

". . . We are not about not wanting to provide quality water; we want to have recognition of our First Nations governments and our abilities to enact the same kind of standards and regulations. The recognition is what First Nation leadership in Ontario has been seeking with both levels of government.

"Of course, there is still a huge requirement. Treaties have been signed and there are treaties yet being sought to be implemented in their fullest. A lot of it is resource benefit sharing. Sharing in the resources is the kind of discussion that First Nation leadership want to have, not wanting to have their hand out. . .

"These are challenging times, and many of our youth are recognizing the spirit and intent of what was intended in our treaties. In Ontario, we have come through an inquiry that Justice Linden had done that found treaties were foundational. That speaks to the relationship of recognition of our own ability and our inherent right to govern ourselves.

"All we need to do is to share in the resources in terms of implementing and recognizing the needs assessment that has been undertaken and the resources required to meet the conditions and challenges of First Nation communities. . ." in relation to water.

Senator St. Germain (Chair): "If I may, Senator Sibbeston and I asked the same question.

"Do you not believe there must be a regulatory structure? The federal government has responsibility for more than Ontario. If we are to disburse funding properly, efficiently and effectively, there has to be some structure.

"I live in British Columbia, and I know that there are different opinions in the region that I represent as a senator, which is comprised of British Columbia, Manitoba, Saskatchewan, Alberta, the Yukon and the Northwest Territories. However, safe drinking water is a basic requirement. We are trying to establish regulations for that. You say that the government has a fiduciary responsibility to provide safe drinking water, and we agree with that. However, we need a structure of some kind for that.

"On the issue of treaty rights, I do not think that any government wants to impinge on that. This committee has worked on specific claims in the past. We worked jointly with First Nations, and the government developed legislation jointly, which seems to have worked. This is what we are trying to do here. You are not really giving us a clear-cut alternative on dealing with safe drinking water specifically.

"I am not trying to be impossible, but we are looking for solutions and ways to proceed that will improve the plight of our First Nations people."

Chief Toulouse: "If we were to sit down and identify what collaboration means, we may identify priorities on which we could work. I am saying that First Nation leadership can identify priorities in relation to recognition. We are not opposed to collaboration; we just do not want an arbitrary approach to development of regulations. We want to be listened to and to have some input.

"We would like to talk collaboratively about what the agenda priorities of First Nations are. We do not want the priorities of First Nations communities imposed upon us without consultation and discussion. It is difficult for First Nations to jump into discussions on legislation that may not even be the priority of the community. Potable water is a priority in the community, but the legislation will not change that.

"The requirement is to have the resources associated with providing good water systems in our communities. I know that the commitment has been made that it will be there, but without seeing the assessment and how it will be implemented it is difficult for First Nations in Ontario to tell the federal government to pass whatever regulations they

want with confidence that they will take care of us as they always have.

"That is not the situation in our communities. We are impoverished. We have infrastructure that does not work. For many of our isolated communities, it is out of sight, out of mind. Some households struggle with 18 people in one house, which made it very difficult to recover from the H1N1 virus. There are so many overlapping issues as a result of the poor infrastructure in our First Nations communities that tie into the health of our members.

"We need our First Nations governments to be able to sit down with governments and prioritize our needs to address the issues in a more meaningful way, rather than having to oppose legislation. We should work on legislation collaboratively. That is the preferred approach of many First Nations leaders in Ontario.

Le sénateur Dallaire: (translation from the French language) "I really respect the fact that you testified before the committee in your language. What I find rather shocking is that Quebec has never tried to teach us the indigenous languages. I consider this as a glaring lack in the cultural evolution of our country.

"From your perspective, is INAC responsible for providing safe drinking water or is it INAC's responsibility to assist you in ensuring that it is available? In the initial part of your presentation you spoke of you and mother nature."

Chief Toulouse: ". . . We are talking about the honour of the Crown in terms of meeting its treaty obligations. We are talking about sharing the rich resources of the country. We are talking about the recognition of our own abilities in 2011. We have lawyers, doctors and water specialists. We are talking about the recognition that needs to be afforded to our First Nations governments by the Crown that signed treaties years ago, which are still relevant."

Senator Dallaire: "You have given me the grand strategic backdrop. Let us now bring it down to the water problem. You want safe drinking water so that your people can live. We are helping people in many developing countries to get safe drinking water.

"Your nation needs water. You have INAC. From your perspective, is INAC to support you in getting clean water for your people or is INAC responsible for ensuring that you get clean water for your people? . . . "

Chief Toulouse: "We believe that in Ontario it is the Crown's responsibility. That could mean Health Canada, Indian Affairs or any Crown agency. The point that First Nations leadership in Ontario continues to make is that we have treaties and it is the honour of the Crown we are talking about that needs to meet those treaty obligations. However, we can certainly co-develop through a meaningful consultation process that could be there.

To be caught in terms of saying that the Department of Indian Affairs has to provide the kind of quality water, I think it is our own inherent right to provide the kind of quality water to our citizens. What we need from the Department of Indian Affairs are the resources to do exactly that. We need recognition by the Crown government that we have the inherent ability to be self-determining and to create our own laws that will meet basic Ontario, Canada Charter standards, if you will. We can do that. That is something we continue to work on."

Senator Dallaire: "With that response, the question is then why do you feel the government must bring legislation in order to guarantee that you are actually doing that?"

Chief Toulouse: "I believe if the government was going to bring legislation it should be doing it collaboratively, not as an after-thought but as the discussion and as the idea was being talked about. It should have been at that point, not after the fact. Again, I am saying that has been problematic. It is not recognizing the First Nations governments and the kind of abilities they have had in 2011.

"Again, we want to be clear on the fact that the Department of Indian Affairs, which has been around since 1876, has failed First Nations communities in meeting basic infrastructure needs at the community level, be it roads, water or housing. We are talking now even the Internet broadband cable and those kinds of things. These are basic infrastructure things that we are still years behind in many of our First Nations communities.

"I believe there has been a problem with the Department of Indian Affairs not being able to provide the basic infrastructure, which is why First Nations communities are now saying that we need to stand up for ourselves; we cannot continue waiting for government to provide for these kinds of things. We need to find a way to ensure the treaties our ancestors signed are treaties that can be and should be implemented by the Crown government in this day and age.

"Again, it talks about sharing in the wealth of this country, and that is what our First Nations leadership in Ontario and its citizens keep talking about."

Senator Dallaire: ". . . I am trying to bring you down to specifics . . . to the specifics of this legislation right now.

Does the nature of this legislation not give you the impression that your nation and other Aboriginal nations have failed to bring clean water to their people and so the government must bring in legislation in order to sort you out and ensure that you will bring clean water to your people?

Chief Toulouse: "Again, I hate to go back to a situation that I am most familiar with. There is no chief and council in this province or in this country that wants to provide unhealthy water to its people. There is no one. Will the legislation guarantee good water? No, it will not. Resourcing that matches what the regulation calls for may do that."

Senator Dallaire: "Do you believe that you need to be brought on the carpet with this legislation --

Chief Toulouse: No. . .

"I believe the First Nations in Ontario would accept a guarantee of the kind of resourcing, remedial and infrastructure that must be attached to the legislation. I hear those things do not happen. How do we ensure, then, that the First Nations at the end of the day will have the kind of potable water that the legislation calls for? Again, it can only happen with the kind of collaboration and resourcing that the needs assessment, I believe, has identified."

Senator Dallaire: "You have indicated quite clearly that over the years the federal government, through INAC, has failed to provide resources or the capabilities needed in particular for ensuring safe drinking water and the distribution thereof. The position that many people will take who are not of your nations will say that maybe your nation and your leadership has failed also in trying to solve that problem internally.

"There have been these studies over the years, particularly the last one with the clean water plan of 2006, which have said, "Listen, here is a way maybe we can sort this out, here is a funding line, and let us get on with it," and this plan has been working for the last four to five years. From all the reports we have been getting, it has been advancing the situation quite significantly.

"My question is: Would this legislation enhance that ongoing evolution towards clean drinking water and guaranteeing the same into the future and bringing the resources to do it, or is this legislation there for some other reason than that?"

Chief Toulouse: "As I stated, in Ontario we are Anishinaabeg, we are Mushkegowuk people when we are out in the hallway, not *Indian Act* people. That is what we keep wanting to come back to, that recognition as nations that, yes, we have failed our citizens because it is only our citizens in large gatherings that we are reminded of how strong a nation we really are. We need to listen to our citizens as they talk about the need for the nation revitalization and a nation rebuilding, not 600 and some independent communities but larger nations, if you will, are what we have in this country.

"The other part of your question of whether there another purpose to this legislation. I would hope the only purpose to this legislation would be to ensure that there is potable water. Certainly when we went through our own processes in Ontario, we brought a lot of our elders and healers in. The worry is that there are other suggestions and there is an understanding that no one owns the water; it is a necessity of human life. We certainly do not want to see any legislation that suggests we are giving up our requirement to be good stewards of the land and that we are not interested in the water.

"Clearly, I am not certain if there is another purpose to this legislation. Certainly, the worry from our leadership implies that there may be. If we were just talking about potable water, why do we not just go there with the Department of Indian Affairs and adjust those contribution arrangements that I spoke about, which I had to deal with in the early 1980s and 1990s, in terms of our ability at the community level to provide potable water? It did not require legislation.

Senator Dallaire: "Thank you for a bit of a circuitous way to the response I was hoping for."

The Chair: "There are no further questions and our time has run out. I want to thank you, Chief Angus Toulouse and Johanna Lazore, for appearing before us.

"The meeting is adjourned until tomorrow."

On Wednesday, 9 February 2011, the Standing Senate Committee on Aboriginal Peoples met to hear from witnesses representing three organizations regarding Bill S-11, "An Act Respecting the Safety of Drinking Water on First Nation Lands". An excerpted version of the transcript follows.

The meeting was opened by the Committee's chairperson, Senator Gerry St. Germain.

Chief Robert Chamberlin, Vice-President, Union of British Columbia Indian Chiefs: I think it is appropriate to sing at times of discussions like today. It speaks of reaching to the Creator for help. It speaks of having a life of purpose and seeing a better future for our children. It captures many of the aspects of what we all pursue in leadership. It is a brief song.

[*The witness then sang.]*

Grand Chief Evans said the Assembly of Manitoba Chiefs did not support a legislative measure as an option to address safe drinking water needs for First Nations. Water is a fundamental and integral part of our inherent Aboriginal and treaty rights and must not be circumscribed by legislation.

He said decisions affecting our water rights must be done on a nation-to-nation basis and in accordance with free, prior and informed consent. "We have grave concerns with the intent of this bill and the overall lack of effective and meaningful consultation from the federal government. In our opinion, a one-day engagement session introducing a made-in-Manitoba approach was not sufficient opportunity to have a dialogue with the federal government on this issue."

Grand Chief Evans said the Assembly had passed a resolution laying out to the federal government recommendations to ensure meaningful consultation and accommodation processes, including developing a strategy that identifies and addresses impacts to inherent and treaty rights; opening the proposed legislative process to ensure the review of all three options provided by the expert water panel; to provide essential capacity and resources to participate in the process in a realistic time frame; and ensure ongoing effective communication and opportunity to provide recommendations throughout the process.

He said the Assembly also recommended that opportunity be provided to discuss whether the existing protocols are the appropriate avenue to ensure safe drinking water. "As the current bill stands, it offers no definite assurance for First Nations jurisdiction, authority or decision making. If the intent is to erode our inherent and treaty rights by assuming ownership and jurisdiction over our waters, while at the same time offering no significant investments to our communities, then we cannot accept legislation and the intentions of government.

"First Nations currently deal with the funding crisis every day. The 2 per cent cap since 1996 has resulted in financial hardship, while the cost of living has soared. First Nations, under the Interim Protocol for Safe Drinking Water in First Nations, are now considered the sole owners of water plants and thus are ultimately responsible for all liability. Where is Canada's fiduciary responsibility in this unilateral decision? Securing insurance to address liability is difficult when dealing with scarce funds for overall water management.

"The resource gap must be addressed to bring our communities up to standards first and new funding must be identified to address new water and wastewater infrastructure; upgrade deficient facilities; address operation and maintenance; and address increased Circuit Rider trainers and operators and their required administration.

"In communities where there is a water plant, there is only one water operator who is expected to be on call 24/7 every day of the year. This is a human and health risk for both the operator and the community.

"In Manitoba, we have real on-the-ground challenges that our First Nations face every day. The *Winnipeg Free Press* brought attention to the Third World conditions, particularly in the Island Lake First Nations, where many have no water or wastewater infrastructure in their homes. In this day, they use buckets to transport water and indoor pails lined with garbage bags as toilets is unacceptable. This situation is simply disgraceful for a country like Canada. This will not be remedied through a piece of legislation that is high on enforcement when First Nations cannot even meet the basic requirements for safe drinking water.

"This is a public health and safety issue that justifies the need to bring our First Nations up to standards comparable with the rest of Canada before considering a legislative route.

"The bill will not solve First Nations issues as they are greater than what the title eludes to. We call on Canada to uphold its fiduciary responsibility and duty to consult in a meaningful way by working with First Nations. We call on Canada to exercise its ratification and respect the United Nations Declaration on the Rights of Indigenous Peoples. Article 19 states:

> 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

In conclusion, we recommend to your committee that Bill S-11 die and that you join us to work together in addressing the Third World conditions in our communities by ensuring that infrastructure is in place within our communities so we have access to safe drinking water, and provide for an opportunity for true collaboration in the spirit of the United Nations Declaration on the Rights of Indigenous Peoples.

Ekosani. Meegwetch. Mahsee cho. Wopida. Merci. I thank you for the opportunity to present on behalf of the Assembly of Manitoba Chiefs.

Robert Chamberlin, Vice-President, Union of British Columbia Indian Chiefs:

[*The witness spoke in his own language*.]

"My traditional name is O'wadi. . . I have asked you to hear my words tonight. I am speaking them from my heart on behalf of all the tribes found within the Union of B.C. Indian Chiefs. We enjoy a membership of 99 of the 203 First Nations in British Columbia. We have a long history of standing up and advocating for First Nations title and rights, and we look to lobby the government at every opportunity we can to ensure that, in the activities of the Crown, the Supreme Court rulings and the Constitution of Canada are respected."

Chief Chamberlain said he wanted to speak about "the fundamental flaws" found within Bill S-11.

"I do not like Bill S-11, and I am speaking here on behalf of the Union of British Columbia Indian Chiefs. It appears to me when I have read the documents that looking to impose provincial law on reserve lands is a sneaking out of the back door of the Constitution. It does not address the real problem.

"The real problem has been spoken of. It is the resource activity in the watersheds and the groundwater allocations of the province. They conduct their business with an eye towards the bottom line revenue and profits for companies. I can tell you that in British Columbia it is difficult to find rulings where the provincial government has fully understood, embraced and accommodated Aboriginal rights, particularly when it comes to water, whether that is groundwater or what is happening in the watersheds. There needs to be adequate resourcing now. There needs to be proper and fulsome infrastructure, training and operational dollars.

"In addition to that, it is completely unacceptable that Canada looks to offload its liabilities on to First Nations. When the Crown holds in trust our reserve lands and we do not even own them, and Canada decides that we will own the water system so that we can hold on to the liability for you, we respectfully say, 'No, thank you. That is simply not good enough.'

"It is time that we develop new legislation. We need to put this in a dark corner of the room and leave it alone. We need to develop new legislation that is based on fulsome First Nation consultation and that addresses the root causes, which have already been clearly identified to Canada from the expert panel that went around the country, at great expense to Canada, by the way. It is those recommendations that need to be embraced in their fullest and broadest form. We must look to build on the good work that was done by civil servants, and certainly informed by First Nations across the country.

"The Union of British Columbia Indian Chiefs is operating here today on Resolution 2010-36, which calls for the abandonment of Bill S-11. We have sent a letter to Minister Duncan in November and we have yet to receive any kind of response.

"It must be understood that First Nations enjoy a spiritual relationship with water. I can tell you that when I talk of the shortcomings of the federal government's funding for infrastructure found on reserve, I am speaking first-hand. In our village in Gilford Island, we went ten years without drinking water, under a "do not consume" order. We enjoyed bottles of water being shipped in, and that was the solution INAC presented.

"After spending a number of dollars now to bring in an interim solution, they have left us stranded. That is as far as we are going for the next five years."

Chief Chamberlain called attention to Article 32 of the UN Declaration on the Rights of Indigenous Peoples, the same Article read by Grand Chief Evans.

"The regime proposed by Bill S-11 has serious constitutional consequences for the relationship between First Nations and the Crown, and represents an unwarranted level of intrusion and infringement on the constitutionally protected Aboriginal rights and treaty rights in Canada.

"Section 88 of the *Indian Act* incorporates provincial laws of general application to Indians but not to Indian lands. Think about that. Not to Indian lands. What you are about to bring forth is creating a way for that to occur, where provincial laws could apply to government activities on reserve lands. In my respectful opinion, honourable senators, that is not acceptable. It is not consistent with the Constitution of Canada.

"When we think about what must be done in terms of consultation and accommodation of First Nations interests, it is clearly defined in a myriad of Supreme Court of Canada rulings, whether it is the *Sparrow*, the *Delgamuukw*, the *Haida*, or the *Mikisew Cree* decisions. There is a long list of decisions that clearly define what Canada must do to consult and accommodate First Nations. It is not a *pro forma* obligation. The courts take this seriously and enforce this, and have made it abundantly clear to the government that their duty to consult must be meaningful.

"We are here today to tell you that what has gone on leading up to Bill S-11 is horribly falling short of what the Supreme Court of Canada has given direction to Canada to do to fulfill the honour of the Crown."

Chief Chamberlain said that UBCIC's position was that Bill S-11 must stop. "It must be abandoned. You must embrace the recommendations of the expert panel. You must get out and engage meaningfully with First Nations and adequately resource that activity. It is only then that Canada will be able to demonstrate to Canadians and First Nations alike that the rulings that govern this country are actually meaningful and that the UN Declaration on the Rights of Indigenous Peoples is embraced in a fulsome manner and not one that is just platitudes for the media.

"Section 4(1)(*r*) is the section in Bill S-11 that provides for the relationship between the regulation and Aboriginal and treaty rights referred to in section 35 of the Constitution Act, 1982, including the extent to which regulations may abrogate or derogate from those Aboriginal and treaty rights. There are many instances of legislation and other governing tools where there are non-derogation clauses to respect First Nation title and rights. This bill actually does the opposite; it ensures that that is guaranteed to happen.

"Section 6(1) provides that regulations made under this act prevail over any law or bylaws made by First Nations to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise. Effectively, the province can walk in and be in charge of what is going on on the reserve in relationship to water, and I say that is unacceptable. Bill S-11 contemplates a situation in which Canada can impose agreements with provincial and municipal governments or other third-party interests without First Nation consent. That is unacceptable.

"In summary, this bill must stop. I turn to you all with a good heart and a good conscience and knowing that with the positions you hold within this construct of democracy called Canada, you will do what is right. When I say that, what I am referring to is that it is only the Constitution of this country, it is only the Supreme Court of Canada rulings, and it is only calling Canada to task on its endorsement of the UN Declaration on the Rights of Indigenous Peoples. That declaration must hit the road at some point, and I say that it must come out during this exercise.

"I look forward to reading an announcement that says Bill S-11 is shelved and that meaningful consultation with First Nations will begin with fulsome and adequate resourcing so Canada can live up to and fulfill the honour of the Crown."

Chief Chamberlain said UBCIC stood waiting and ready. "We want to be a part of the solution. We will commit to work politically with the AFN and other First Nation organizations in Canada to design a meaningful consultation process.

"The last thing I want to mention is how can we move forward with Bill S-11 when the national assessment on the state of water on reserves has yet to be completed? Would that not be the road map for the financial obligations that we can anticipate afterwards? How can we move forward and design the legislation without fully understanding what the financial implications are? It is that very resourcing that we need to have to safeguard First Nations. It is not simply about a liability; it is about life and death for First Nations people.

Senator St. Germain (Chair): "From my information – and this could be skewed a little – apparently consultation has been going on for four years with regard to drafting this legislation. There will be some who will take issue with that, and I do not know to what intensity.

"My question is the following: Here we have a health and safety issue. As you pointed out, Mr. Chamberlin, the lives of Aboriginal people are at risk.

"How much consultation is enough? Do you think you can define this? I am not trying to be facetious or sarcastic. As you know, there are over 600 First Nations in this country. There are major organizations like yours

and Grand Chief Evans's, but how much consultation is enough? That is my question, put quite simply."

Grand Chief Evans asked to respond. "First, for us in Manitoba, contrary to what government officials have stated in their presentations perhaps, we are here to say that we were not properly consulted. A one-day engagement session in February 2009 does not qualify as meaningful consultation for us.

"In answer to your question, the concepts of consultation are found within the United Nations Declaration on the Rights of Indigenous Peoples as free, prior and informed consent. The National Chief stated yesterday that this is an opportunity for the federal government to put that into practice. Why would Canada ratify a document and not put it into practice?

"Consultation for us is providing all essential information to our First Nations and having time to review and respond, which we have not had. Consultation is having our recommendations realized. Consultation is having the ability to join the work on any drafting of policies and laws, et cetera. Consultation is providing necessary resources to participate at all levels of communication and decision-making.

"The impact analysis where monies were provided to regions in 2009 to assess impacts of INAC's proposed option was not enough time, which was one month, to achieve a proper analysis. That is not proper consultation. There should have been funding for a proper legal analysis to look at all options and then to make a decision on what would work best for our communities. To us, that would be consultation."

Senator St. Germain (Chair): "There were resources put forward, were there not?"

Grand Chief Evans: "Not in our experience. In our opinion, we did not have adequate time. For us, there was no consultation. There was just not enough time."

Senator Brazeau: "Thank you for your presentations this evening. I appreciate the concerns that you have put forward, but let me be very blunt. Before I get to my bluntness, I am very passionate about this issue because my home community, my reserve community is one of three high-risk communities across the country with very poor drinking water.

"I heard both of you lay out your concerns. I have heard things like you do not support the legislative measures, that you have grave concerns with Bill S-11, that there was a lack of consultation and there is no money attached to this bill.

"I am glad on the one hand that you both said that you and your organizations represent the chiefs in your respective provinces because I talk a lot to grassroots First Nations people across the country, in your provinces as well. When I talk about the fact that Bill S-11 had been introduced in the Senate, I heard responses back, and I will quote you a few things I heard from grassroots Aboriginal people: "This is a no-brainer." "It is about time." "Do not let the chiefs oppose this." "Do not let the chiefs stall this process."

"You have outlined your concerns. I see this little postcard that was circulated to everyone: "Water is a human right. Do you have running water? I do not and I live in Canada; I need your help." As a First Nations person, Bill S-11 is a solution and a response to this postcard, and this postcard is fear-mongering. This is a solution. Like I said, I am very passionate about this because my community needs clean and safe drinking water just like the 600 plus First Nations communities across the country need the same. This, again, is a solution.

"With all due respect, Chief Evans and Chief Chamberlin, what are your solutions? If we scrap this, tear this apart, then what are the solutions and guarantees you need so that we will pass this and ensure that every First Nations citizen across this country has access to clean and safe drinking water? To me, like I said, this is the fourth time I say it, this is a solution. What is your solution?"

Grand Chief Evans: "Thank you, Senator Brazeau, for your comments. First, I need to ask the question, is what you are proposing about chiefs or about providing clean drinking water?"

Senator Brazeau: "It is about providing safe and clean drinking water to First Nations people."

Grand Chief Evans: "You say you are passionate. I appreciate and I note how passionate you are. I believe we too are very passionate, and that is why we are here.

"As far as fear-mongering, I believe the people for whom that card was created to get the support and awareness of the people in the Island Lake region, as has been revealed by the *Free Press*. I believe the legislation you are proposing will not help that community. The solution for us is to deal with the communities in a holistic way. Dealing with clean drinking water will not solve what you

are proposing. Your proposed legislation will not do that for us, certainly not in the Island Lake region and many of the First Nation communities in Manitoba.

"What we are proposing is that all the partners within the federal government need to work together to deal with our communities in a holistic way, looking at the health of our people and the conditions dealing with poverty and housing and deal with it in a holistic way. All of these things have been brought to your attention by way of articles in the *Free Press* and it just confirms the things we have been saying all along at other Senate committees, whether it is dealing with winter roads, isolation or good nutrition."

Senator Brazeau: "Thank you for that."

Chief Chamberlin: "I would like to respond. Senator, I am here speaking on behalf of the Union of British Columbia Indian Chiefs. We have a clear mandate and direction from 99 chiefs to be here. That is who I am representing today.

"When you mention being in British Columbia and speaking with First Nations people, I am curious to know where and when. I have never seen you at the Union of British Columbia Indian Chiefs assembly. I have never seen you at the First Nations Summit. I have never seen you at the BCAFN assemblies. I ask that you respect the fact that there are a number of people put forward to be the leaders of the communities, and those communities are based on bands that flow from origin stories, and that ties us to the land.

"This bill, if you will allow me to finish, is seriously flawed. You must look at it and understand that it does introduce a way to infringe upon Aboriginal title and rights that are guaranteed within the Constitution of Canada. That, my friend, is not a solution.

"If you want to talk about a solution to this, I would say that we need to come up with a meaningful mechanism for Canada to come out, province by province, by any way that the nations are organized, and sit down and have fulsome discussions to understand each region's perspective and relationship to water. Only when that is clearly understood can Canada really begin to develop something that is meaningful and accommodates Aboriginal rights, and that is the solution.

"Coming out for a one-off meeting in a province with a few people is not an answer. I would say to you all that it is time we put a stop to this. It is time we find the resources and come out and talk to the regions in a meaningful way, not a one-off session that my friend has talked about. That is inadequate. That is what I would say."

Senator Brazeau: "I will just make a comment. With all due respect, I do not need to be invited by the Union of British Columbia Indian Chiefs or the BCAFN or the summit to have the opportunity to speak to First Nations people. I wanted to respond to that. That is my right as a Canadian citizen and as a First Nations citizen."

"As well, I do not disagree. We are all here to improve the water quality on reserves. We are all here to work towards the same end. I am sure we can agree on that. I respect the fact that you have laid out on the table your concerns. I respect that. I will take a look at your concerns, as will other people around the table. However, what I want to hear are solutions, and I have not heard one. All I heard is, "Let us redesign the consultation process" and for Canada to do this and do that. While we do that, First Nations people still will not have access to clean and safe drinking water.

As my final point, I take exception to the fact that you say, on one hand, that this is flawed, when the fact of the matter is, if this is passed, First Nations people will jointly draft and develop the regulations that they, the First Nations people and communities, feel need to be developed. That may take, on the one hand, provincial regulations, or they may develop their own that will highlight their own traditions, customs, et cetera. Please tell me what is wrong with that. I have to hear solutions. What are the solutions?"

Grand Chief Evans: "The solutions are many, and they need to be dealt with in a holistic manner. In this particular case, the existing protocols are working, but they should also have been developed with First Nations to meet our required needs. This did not occur, as they were developed and put in place without a proper consultation period and First Nation awareness. The fact is they are in place and there is an opportunity to work collaboratively with government on how they can be further drafted to meet our needs. It is already there.

"We need to put the monies that would be spent on enabling legislation into consultation efforts with First Nations for better protocols and the required infrastructure demands for new and upgraded facilities, more water operators and more trainers. The expert water panel recommendation also supports this. Creating and enforcing a regulatory regime will take time, attention and money that might be better invested in systems, operators,

management and governance. Appropriate resourcing is the key.

"You heard from Regional Chief Toulouse yesterday and his explanation that we solved our water issue in the 1980s through existing contribution agreements and proper resourcing. Every region is different. I understand Ontario, through their technical services, is developing draft regulations that will meet their needs. We all should be provided the time, energy and resources to develop or modify existing protocols and regulations in our respective regions. That is one solution as to how we can provide communities with safe drinking water, working on protocols that are now in place."

Chief Chamberlin: "I want to draw your attention to what I presented. Section 6 (1) of Bill S-11 provides that regulations made under this act prevail over any laws or bylaws made by a First Nation to the extent of any conflict or inconsistency between them unless those regulations provide otherwise. Under this provision, any regulations made under the act will trump any First Nations laws or bylaws. I think that answers part of what you brought into this dialogue, because that clearly states that this bill will trump whatever it is we may want to have put forward.

"I have heard the phrase "source to tap" countless times from colleagues at Indian and Northern Affairs Canada. It is an interesting phrase. It sounds good. Gosh, it even looks better in print. The fact remains that INAC has no jurisdiction when it comes to activities that go on in a watershed or ground water. That is totally under provincial purview. They can say it, but they cannot affect change.

"What we have now is you turn to a provincial government that is more interested in jobs and revenues, important aspects of this country, but we must get back to the underlying title, and that is First Nations.

"To describe to you a very general framework for consultation, I know that we have three organizations in British Columbia. I invite INAC to come and meet with us, and I do not mean just for a couple of hours. Let us knock a few days together and get on with this. Then you can start to understand our concerns. We can express to you in a very succinct and clear way what it is we take issue with in Bill S-11, and then we can start to talk about what a solution could look like. Then we need to find the resourcing to make that solution real. Then we will be living up to what is in the declaration. I hope that answers the questions you have put forward."

Senator Dallaire: "I will speak in English to be clear. I have here a report on safe drinking water for First Nations. It was a final report of this committee dated May 2007. Have you ever seen this report?" . . .

Chief Chamberlin: "No."

Senator Dallaire: "It was published in May 2007. Since we will be talking about consultation, this committee received an answer from the minister in April of 2008. It took 11 months for the answer to make it from this room to a room somewhere else in this building and back.

"In this exercise, the committee extensively argues that extensive consultation is to happen not only with First Nations but also with the provinces and territories that are involved. In fact, the committee states:

> The Committee is left to wonder at the Department's intention to proceed with a legislative scheme that is not only incomplete, but that may also find little support among those who must apply, and comply with, the legislation.

"We strongly recommend, looking at the Assembly of First Nations and the expert panel, that necessary funds for all identified resource needs of First Nation communities in relation to the delivery of safe drinking water should be dedicated by INAC and should be a precondition to legislation.

"In 2007 the department also started a comprehensive engineering assessment that was supposed to provide its report in 2009. From that, the department was supposed to build its plan of investment into the infrastructure to support this. However, it did not just sit there; it concurrently created a safe water plan, which, interestingly enough, after significant investment, has been, by all accounts, doing a pretty good job.

"First, in the minister's response to our report we find out that discussions began with regional First Nations chiefs and First Nations organizations on specific regional issues regarding the proposed legislation initiative, which had been raised in the engagement sessions and within the impact analysis and correspondence. This was said in September 2009.

"It also says, coming particularly to British Columbia, that on January 29 discussions with regional First Nation chiefs and First Nation organizations concluded in British Columbia.

"The whole exercise starts in 2007. It says here that it ended in January 2010. The minister acknowledges that it demands extensive consultation, and you told us that you had one day of consultation.

"I have a military bent, so forgive me, but I would like to know the true nature of consultation. Has no one written to you, talked to you, sat down with you, debated with you, invited you or whatever, over this time frame, for more than one day of discussions with regard to bringing in a legislative regime to sort out the issue of safe water?"

Chief Chamberlin: "You mentioned January 29 for them coming to British Columbia."

Senator Dallaire: "That is when it ended."

Chief Chamberlin: "For 203 First Nations."

Senator Dallaire: "They say they have been at it since 2007."

Chief Chamberlin: "I would like to see the record of the meetings, because I do not think there will be that many. Consultation is not getting First Nations together in a room, handing out information and serving coffee. I have seen that from other departments of the federal government, be it DFO or INAC. It is not meaningful. It is one thing to sit down and have a conversation. It is another to roll up the sleeves and get on with developing, first, an agreement on what constitutes consultation.

"You would think the first step would be to agree on how to make this work. Then we can get on with what needs to be done in that framework. If we do not do that, we will wind up with the question you are asking now. If we do not have an agreed-upon framework for going into consultation, we will not be happy coming out."

Senator Dallaire: "I want to be specific. We are talking about what has happened in real life. What specifically has happened between INAC and the B.C. and Manitoba organizations with regard to consultations over the last nearly four years? Do you have a record of this? Do you have a record of decisions? Do you have a series of exercises you did together? What do you have?

"I am asking you, but I hope we will have the bureaucrats back, because I think they deserve a second round of discussions with us."

Chief Chamberlin: "I am hearing you propose that there has been adequate and thorough consultation for four years."

Senator Dallaire: "No, I am asking."

Chief Chamberlin: "The Union of British Columbia Indian Chiefs in assembly, which represents almost half of the First Nations in British Columbia, passed a resolution clearly stating that what has happened up until today is inadequate. I am here to speak to the mandate that I have been given. I can now take that hat off and speak to you as the chief of our tribe. We have had zero engagement.

"You spoke of the precondition of getting us all on a level playing field with regard to drinking water. I applaud that. That makes absolute sense to me. However, I can tell you about our First Nations' experience. We are stuck on an interim solution. INAC has told me point blank that the only reason they had money was because of the economic stimulus package, and that money is gone now, sir. Now we are stuck with a plant that is not operating in the manner it is designed to, and they have told us that maybe in five years they will get around to getting a proper one.

"These are the issues. It is not lack of regulation that is preventing clean drinking water from being available on reserves. It is the lack of infrastructure; it is the lack of adequate resourcing and training to develop the capacity to do these things. That is what needs to be done first. Let us get everyone equal. We will have a good view of the land, and then you can enact legislation that is consistent across the country and not based on different interpretations from one province to the other, creating a patchwork."

Senator Dallaire: "Help me with this. We will get to resources if I am allowed a second question. We are still on consultation. You say it is inadequate. 'Inadequate' is not a very good technical term, particularly when you are working with bureaucrats who are bringing forward legislation because without it they will not be able to get finances. The term 'inadequate' is not good enough. You, however, have said that your tribe has not received any consultation."

Chief Chamberlin: "That is correct."

Senator Dallaire: "Mr. Evans said in his statement that there was one day of consultation. I do not want to put words in your mouth, but I gather that the whole consultation exercise that we were told about that was fundamental to bringing in legislation agreed to by the minister may not have happened."

Grand Chief Evans: "That is correct. As the provincial organization that represents the 64 First Nation communities in the province of Manitoba, we were the ones who facilitated the one-day engagement back in February of 2009. That is the only discussion of which we have a record, and it was stated for the record at the time that the leadership did not want it to be construed as consultation

because it was not introduced in that way when we were asked to facilitate.

"I cannot answer whether there were any engagement sessions in the communities themselves. However, I can only assume there would not have been any, because there was a resolution passed at the assembly that there was no support for this bill. That is my response to you."

Senator St. Germain (Chair): "We are running tight for time, but I want to get through the subject. Can you give Senator Dallaire a response, or do you have the information as to how much consultation took place in British Columbia?"

Chief Chamberlin: "I think we need to hear that from INAC; we need to look at their record. What is being discussed in a regional information session is different than consultation. When they come in and have a regional conversation, it is not consultation, sir.

"We need to get beyond just the passing of information and have an honest and fulsome dialogue. It must be informed with the experts on all sides of the table, and I mean from a First Nation traditional ecological knowledge and traditional use studies, perspective, what it means to us culturally, and what it is we want to see protected in relation to our views of water.

Senator St. Germain: "Colleagues, I will extend this session for another 20 minutes. Senator Dallaire, I would like to put you on the list for a second round."

Senator Banks: "I hope the matters that have been raised by Senator Brazeau, the Chair, Senator Dallaire and by our witnesses today will be followed up because we are at the present dealing with these people who have said, "We consulted with everyone" while other people are saying, "They did not consult with us." We need to get some numbers and have a record. We need to get it from everyone, I suggest, and INAC is good, but also from the people would be good, as well.

"So that you will know where I am coming from, Grand Chief and Chief Chamberlin: I am entirely in favour of a bill that will bring safe drinking water to First Nations people. The Senate has proposed several such bills in the past, all of which have been defeated for one reason or another, or have not proceeded in the other place. They did not specifically have to do with First Nations; they had to do with Canadians. There was no distinction in the previous legislation.

"However, I am adamantly opposed to the present legislation. I will vote against it if it comes before us at third reading in its present form. Prior to that, I will try to amend it in a couple of ways. We will see how that goes.

"You have both said this bill needs to be killed. I happen to agree that we have to go back with a clean sheet of paper and look at the object and start over again.

"Grand Chief Evans, you have said you think that legislation is not the way to go. I would like you to explain that to us, because I believe that legislation with teeth and enforceable regulations, once it comes out of the end of the pipe, however we get to the end of the pipe, is necessary in order to make this work and in order to do what needs to be done. What is your response to that idea?"

Grand Chief Evans: "My response is that this particular bill is not the answer at this time for our communities. First, their standards are not comparable to the rest of Canadians. Therefore, this bill becomes an issue of enforcement. We are not at that stage yet with our communities — it is not just possible.

"In order for that to happen, we need to ensure that our communities are brought up to standard in all other areas. Dealing with water, you have to look at the infrastructure in the communities. We have to look at the communities in a holistic way.

"Again, we cannot support any bill that will be introduced that will be an infringement on our rights, in breach of the Constitution and in breach of the UN declaration.

There needs to be a partnership and we need to work in collaboration. Right now, there are existing practices out there by other regions that are working towards that. We need to look at those practices and adopt the good practices that are out there. I do not think this particular bill will make life better for our First Nation people in their communities.

Chief Chamberlin: "The Union of British Columbia Indian Chiefs stands in support of legislation that will safeguard drinking water, but it has to be based on bringing everyone up to speed. It must have every bit of infrastructure dealt with and there must be adequate and fulsome resources to make it happen. Those must be in place as a precursor to anything.

I have been racking my brain trying to think and remember when we were invited to come speak to Bill S-11 in British Columbia, and I cannot think of one time. I can recall Environment Canada coming out and I helped

them design their consultation model for the Pacific region on wastewater. They came and spoke. They had one-day sessions in various places in B.C. It was one day with two representatives for each station that could attend, but that is the extent of consultation I can recall for you today.

"I would be interested in seeing what it is that INAC has ticked off as consultation in British Columbia, because I cannot for the life of me recall any."

Senator Banks: "As Senator Dallaire has said, this ommittee said that adequate funding should be a precondition to legislation, but that is not normally the way the government works. It is also not normally the case that legislation such as this that puts into place a regulatory regime has money attached to it. Financial stuff is done in budgets, not in bills. The fact that there is not any money in this bill is not a concern.

"We asked the government officials who were here about the shortfall between the requirements of First Nations, saying you have to jump through these hoops or else there are penalties and the capacity of the First Nations to be able to jump through those hoops, given the money availability. We were assured by those government officials that: "We would not do that. Of course, we would not take action against someone deficient in meeting those regulations if they did not have the money."

"Are you given some comfort by those assurances?"

Grand Chief Evans: "I want to respond to the earlier question about legislation. It is important for this committee to know our position on legislation and how good particular work we are doing in another area will be nefit the First Nations. We support legislation that benefits First Nations.

"We are working with the Minister of Indian Affairs and his department on electoral reform. That is a form of consultation. It is coming from the First Nations. That is becoming a national initiative that started in Manitoba. Now it is national. We want legislation that will bring about the kind of changes we need.

"We could use that model in this particular issue when it comes to safe drinking water. That is why we say, when you want to work with First Nations in partnership, yes, it can work. We can have legislation. Legislation would be good, as long as we are part of that and as long as we are part of developing it. I believe that is where we all need to go.

The Chair: Chief Chamberlin, I am sorry I did not call you "chief" before. I did not realize that you were a chief. My apologies, sir. Go ahead. Do you have a short response? I will ask you to keep your questions and answers as tight as possible so I can get everyone in.

Chief Chamberlin: When you ask if I take comfort in the words of commitment from INAC for adequate resourcing, no, I do not. I say that given our nation's experience. We are firmly on the fence. We are halfway to predictable operations for safe drinking water and they have abandoned us. That is what I can tell you. That is our experience. That is behaviour I see from Indian Affairs right now, today.

"I do not take comfort in their words. There is a difference between words and actual dollars and commitments.

"We need to move towards jointly developed legislation. By jointly developed I mean working with First Nations. We must have adequate resourcing so we can participate fully, have something that comes forward that fully respects title and rights that are defined in the Constitution, a consultation model that is described within the Supreme Court of Canada and something that is consistent with the UN Declaration on the Rights of Indigenous Peoples. These I understand are promises from Canada.

"We want to bring those words into action at a First Nation table across the country."

Senator Banks: "In other words, you wish to pursue the preferred recommendation the expert panel?"

Chief Chamberlin: "Yes."

Senator Sibbeston: "The question of water is a simple matter, but I find that I am a bit confused and uncertain as to whether this bill is good. I find it difficult to say anything that might contribute to the advancement of this issue.

"The reality is that First Nations need good, clean water and sewage disposal. That is the issue.

"This bill comes before us. Will that provide what we want? I find that AFN and the First Nations that appeared before us are into this rights. There is more of a discussion of Aboriginal rights and human rights and so forth than the question of dealing with how water will be provided.

"From my experience in the Northwest Territories, providing fresh water is one of the biggest challenges and difficulties that we have had as a government despite being a land of ice and snow. In some parts, it is a trial-

and-error type process. We have had pipelines in one of the communities in the Arctic as a way of bringing fresh water to the community. In the first winter or two, it froze. That approach did not work. Now we are into big reservoirs in places like Pangnirtung and so forth.

"I do not know the southern situation and the difficulties. However, in looking at the legislation, I have to agree with AFN and some of the chiefs who have appeared before us. If there were a bill that had the intent of providing fresh water for the First Nations of our country, and that there would be a process of consultation, it would be different.

"The provision of water is a very technical matter. It is not a simple matter. There are different systems of purifying our water. It might be a little pump station on the banks of a river that pumps water in, chlorinates it and holds water and sewage systems in the ground. The matter of water is a technical matter.

"If there were a bill that said water will be provided, there will be a system, a consultation, eventually a decision will be made with respect to provision of clean water and sewage, and something was said about the finances, then it would be fine. However, it seems to me that instead of water, we are into this whole discussion of rights, and that is where I am afraid things will become mired.

"I agree with AFN and others. When you look at this legislation, it is a very paternalistic type of legislation, where the federal government will do everything for the First Nations. What is the role of First Nations on the reserves and in the communities? I do not see any role in them. There has to be provisions for consultation and so forth.

"However, I am amazed by the fact that the federal government would think of putting something as important as a non-derogation clause in regulations. They have had it in legislation up front, basically saying that this act is not in any way to derogate from the Aboriginal rights of people. Here they are purporting to put it in regulations. Can you imagine INAC officials having their hands at that — how much it will be undermined?

"I am coming to a conclusion that this bill has become so complicated and mired down in a big discussion about rights. I am afraid that it will just not do the job. Aboriginal organizations and leaders will be upset across the country, and there will not be goodwill and cooperation between First Nations and the government.

"I am not too enthusiastic or hopeful about this bill, unfortunately. It is a matter of water; namely, let us provide good, clean water to First Nations. Maybe the government got us into this business of rights by virtue of the way they have written this. Every First Nations person who has come before us has spoken about rights and not so much the issue of how we will provide water and how it can be done.

"Now this bill is about rights, not about water. I am disappointed in that regard. Can government not get it right?"

Senator Banks: "No."

Senator Sibbeston: "Can Indian Affairs not get it right? This is the issue. It is frustrating."

Senator Patterson: "I will try to ask a question, Mr. Chair. It is about consultation. We are told by the departmental officials that ten First Nations regional organizations were provided funding by INAC to undertake a regional impact analysis of the regulatory regime based on the government's preferred legislative approach. I would like to ask you if your organizations get funding to do this work. Did you do the work? What were your findings?

Chief Chamberlin: "I recall there was an impact analysis accomplished in British Columbia, but that is not consultation. Having a look at the various structures and so forth on the reserves is not consultation — an impact analysis. It is just not.

"I think our previous senator did have a question; it is just that we all missed it. Why is it about rights and title rather than drinking water? I think the clear question is that this legislation sets up a mechanism to infringe on rights in a way that defies what is in the Constitution. That is where this argument must be spoken of in relationship to the legislation.

"The focus on drinking water is captured when we talk about the need to have the fulsome resourcing to bring the infrastructure up to speed for everyone. That is where we then come back to the focus of on-the-ground needs.

"Regarding the impact analysis, that is one piece. We are at odds with one another with the Department in that we did not sit down and agree as to what kind of framework we will conduct consultation in. If we had sat down and designed that framework before we started to have discussions, we could all know where we were in the process.

"However, if we just sit down, do an impact analysis, have a coffee and maybe a sandwich, and the department walks away and say, "We have done that ten times. That is consultation," they can have the authority to move forward in their world. However, we are here to say that you must develop this with us. That way we can know where we are at any given time in the process.

"I think that is the most strategic use of scarce resources I know we all are faced with. Why not be strategic with it and go in with predictability rather than looking to do just enough and then have all this tension and conflict later because the foundation for a goodwill and cooperation is founded in adequate and fulsome consultation?"

Grand Chief Evans: "I would like to give a brief response as well.

"The bill is a delegation of powers to the provinces, and perhaps some other third party, that would impose and enforce laws on our communities. That is an infringement of rights.

"We are saying that the reality is that the bill itself will not address the issue of safe drinking water in many of the communities. The bill will not become legislation, become law. That is an issue and a concern, obviously, for many people.

"We also have a shortage of homes across the country. Will someone be prepared to bring a bill that will deal with that issue as well? That gives you a comparison of what this bill would do and what another bill dealing with the shortage of homes would do. It does not really deal with the issue itself. It will not provide what is being proposed here.

Senator Patterson: "Indian and Northern Affairs Canada — and I know you do not trust them; you have made that very clear – have told us that they will ensure that before a water system is funded in a First Nations community, they want to be satisfied that the First Nations community is in a position to meet standards. They will roll out the proposed regulatory regime in a phased approach. They will provide a fully costed multi-year regulatory and compliance plan once the standards have been set up.

"My question for you is the following: You made it clear that you want the bill trashed as far as B.C. and Manitoba are concerned. We had an indication that New Brunswick had recently moved a resolution quite the opposite of yours. If there are First Nations communities in the country that are willing to take a leap of faith and trust the government – and I do believe that legislation can be a tool for guaranteeing funding, which I fully understand is a problem – if there are regions of this country that want to take what you would consider a leap of faith, would you be opposed to having the bill applied to regions that want to hold their noses and work with the federal government? We have had an indication that there are some regions that are willing to move forward within this regime."

Chief Chamberlin: "What you described is a good example of the diversity of First Nations in Canada. In that description of diversity, it also comments on the different stages First Nations will be at in terms of capacity and also in terms of infrastructure. I am not about to comment on another region's aspirations; I am here to speak for B.C. Within the 203 First Nations of British Columbia, there is a huge disparity in terms of water. We need to have a stronger look at this in B.C. and we need to have this constructed in a way that involves a fulsome embracing of Aboriginal title and rights."

Senator Raine: "Thank you. This discussion has been very interesting.

"I know that when people get together and are trying to deal with a complex topic, especially one that covers such a broad area, including rights and title land, the need for safe drinking water, and the diverse situations across Canada from different regions and different capacities, sometimes it actually helps to start with a piece of paper that you can look at, pick apart and put back together so that it works.

"I am wondering if it would not be wise for all the different groups to take this bill as it is now, take a good hard look at it with your legal counsel and technical experts, and see if this cannot be somehow made to work. It is meant to be a bill that is a framework, where, right down to the individual First Nation, it can be adopted by regulation.

"It is not meant to be a one-size-fits-all type of legislation. There are some very good elements in here, and I can see that if there is goodwill on both sides, there can be the opportunity to add the clauses that are needed to protect your rights and title and to perhaps make it work so we can get on with the job.

"My question to you is the following: Is there any interest at all in taking this and trying to make it work?"

Grand Chief Evans: "Perhaps I will address my response to both Senator Raine and Senator Patterson. You asked the

question of whether we would have any problem with another region moving forward, free to pass the bill, and then that is okay.

"We are saying that we have not been consulted. The other regions have not been consulted, and for sure Manitoba. Whether in the Senate or the House of Commons, however the process works, for government to pass legislation without the consultation of all the stakeholders, especially ourselves, would go against our constitutional rights. Our position in Manitoba is that you would need to look at it that way, that it would be in contravention to what is out there.

"If you want to go ahead and move forward on legislation, I think you should seriously consider revisiting how we can actually move together on legislation. I agree with legislation, but it must be done in partnership."

Senator Raine: "If we took this piece of paper and said, 'Okay, let us work together to change it,' I am worried because I would not want everyone to go back and start over in designing the consultative process, although that would probably be a useful exercise for many other reasons. Water is a critical issue right now. It would be nice to get on with getting the infrastructure in place and getting the job done."

Grand Chief Evans: "I think the government is in a position to be able to do that without the legislation, without this bill. However, in order to do it right, we need to go back and start over and do it together."

Chief Chamberlin: Thank you for your questions. Today there was a teleconference with INAC. They said they are willing to listen to comments, but there is no description as to how far they will take those comments in terms of altering the Bill. This is built on a poor track record from the department, so there is not a lot of comfort expressed.

"When you talk about perhaps having a legal comment, our legal counsel has given us comment. It is, after fulsome analysis, is to get rid of it and start again, to keep the "Dear Sir/Madam" and "Yours truly" and replace everything in between; that is how flawed this is.

"I agree with Grand Chief here that the critical issue is the resourcing. We can accomplish that by working on the infrastructure and capacity we need. The legislation can be developed properly. In the meantime, the government can make good on making water systems safe and getting on with providing safe and clean drinking water for First Nations.

Senator Brazeau: "I have two quick comments and one question.

"Chief Evans, you mentioned earlier that the standards in this bill are not the same as others across Canada. For clarification, and to put it on the record, I am not quite sure why you said that, given the fact that the regulations are not even developed yet, regulations that would allow First Nations to develop those standards themselves.

"You also mentioned that this piece of legislation would be a breach of First Nations rights. You do not have to answer this now, maybe you can write to the clerk, but I would like to know exactly how affording clean and safe drinking water to First Nations people across Canada, like every other Canadian citizen in this country, would be breaching First Nations rights.

"My main question is the following: You both mentioned there was a lack of consultation. Perhaps you are right; I do not know. Hopefully you will enlighten me.

"Having said that, if you do not have the figures, if you could send them to the clerk so we can all have them later on, but exactly how much money you received from INAC for that one-day consultation, throughout the last four years and how much did each and every community that you represent in your respective provinces received, including the regional impact assessments, if you have received any and if you have provided that. If you can forward that information to the clerk or if you have the answer now, that would be great."

Grand Chief Evans: "For sure we will do that. I think you misunderstood the question when I talked about standards. In the Island Lake region when it comes to safe drinking water, the standards are not the same as the people in the city of Winnipeg who are stonewalled. That is what I am saying. As far as the information, we will forward our response to the clerk."

The Chair: "Would you do the same, Chief Chamberlin, if you are so disposed?"

Chief Chamberlin: "Yes. I want to answer the question briefly. Providing safe water is fully supported by the Union of British Columbia Indian Chiefs. We want that. We need that for our people. This bill does not do that. This bill unloads the liability onto councils that do not have the resourcing to adequately provide water. That is what we are getting at here. That is what we need to do."

Grand Chief Evans: "I have one question. I want to pose this question to this committee. Why was Bill S-11 introduced in the Senate and not in the House of Commons? If INAC says there will be investments tied to the bill, then should it not have been first introduced in the House of Commons, as most money bills are?"

Senator Brazeau: "I will respond to that question, given I am the sponsor of this Bill.

"It is the privilege of both the House of Commons and the Senate to introduce bills. This bill was introduced here because other bills are in the House, so it is the privilege of both houses to introduce bills as they please.

"Here is my final question. We are dealing with a hypothetical, but here is the $2.3 billion question. If tomorrow miraculously Indian and Northern Affairs Canada would say, "If this bill is passed, you will have the guarantee and the necessary resources for the infra-structure needed to deliver clean and safe drinking water on every First Nations community across Canada," would you support it?"

Grand Chief Evans: "A hypothetical question deserves a hypothetical response."

Chief Chamberlin: "The Union of British Columbia Indian Chiefs has a resolution directing us as the executive to inform the government that this needs to be scrapped. You are taking a piece of it and not looking at the whole parts we have described here today. When there is a clause that contemplates derogating Aboriginal title and rights, then it is flawed, period. That has nothing to do with drinking water; it has to do with the legislation. That needs to be addressed.

"I am here to say that I have been directed by the chiefs and assembly to say this must stop. Bill S-11 needs to be recreated with fulsome consultation, taking in title and rights perspectives and inform it all the way through. Let us get on with it.

"I know we are getting close. I want to thank everyone here. I really appreciate your questions, and it is only through meaningful dialogue like this that we can move forward."

Senator Dallaire: "In 2006, we introduced a protocol for safe drinking water for First Nation communities, and the protocol included clear and measurable standards for design, construction, maintenance, operation and monitoring of drinking water systems. The protocol requires annual inspections by a qualified person.

"Then Indian and Northern Affairs Canada said they would commence a detailed engineering assessment, which will involve on-site inspections of First Nation community water systems and to examine capital operations, maintenance and human resource needs. This is what was articulated by the Minister in April 2008.

"He also said that the engineering assessment will be completed by the fall of 2009 with an investment plan subsequently developed to coincide with the proposed renewal of the authorities of Indian and Northern Affairs Canada's capital facilities.

"Have you seen in any way, shape or form any feedback from INAC on the infrastructure assessments as well as the potential capital program required to bring it all up to whatever is needed to be functional as yet? Have either of you seen anything of that nature?"

Grand Chief Evans: "No, we have not seen anything like that. Thank you for your question.

"With regard to Senator Brazeau's question, I wanted to finish it. The issues we bring here are not hypothetical; they are real. That is our response to that.

"No, we have not seen any document because, like I said, there was no consultation, there was nothing. Therefore, we could not produce or see copies of anything."

Senator Dallaire: "We have legislation. We do not have the plan or the results of the assessment, but we will still bring in legislation. The 2006 implementation plan has been functioning well because out of the $2.3 million, they have burned up $1.7 million and people are saying it is going well. No one has scrapped that plan; it is going well. In the plan, it says it is supposed to have all these great references of measurable standards of design, construction and operation. What do you need more than that?

"My question is the following: The First Nations say they advocate the application of a federal regime as an interim measure for the application of national standards for safe drinking water on reserve until such time as First Nations community governments are ready to exercise their own jurisdiction over water management. They are saying that maybe some interim tool might be useful.

"Obviously, they have gone away from that and want a permanent tool. Is there some reason why they do not believe that First Nation communities can exercise your own jurisdiction over water management?"

Grand Chief Evans: There is probably a reason they believe we cannot because there is a 2% cap on pretty much everything, whether it is education or training, to train our people so we can build the capacity needed to manage and govern our communities.

"Again, I go back to the holistic approach. If you put systems in place and modernize your infrastructure, you have to bring in the capacity to do so and you have to educate and train your people. We are capped right now where we are. They know that, and that is why they would believe that. We will believe with them as long as they keep us suppressed in that way."

Chief Chamberlin: "Your question about the investment plan from INAC and the dollars, I can only draw your attention to the Kwicksutaineuk Ah-kwa-mish First Nation; they brought us so far and left us. That is what I know about that investment plan. That is the behaviour we have to report today.

"I want to find out about the dollars INAC said they spent in British Columbia outside of that assessment. I know the Union of British Columbia Indian Chiefs did not get a dollar, and we represent half the tribes. You would think we would be a reasonable organization to approach to help facilitate the dialogue."

Senator St. Germain (Chair): "I thank both of you. There is no question that you are passionate about the issue, and the senators have passion as well. This is good because the dialogue that taking place here may benefit everyone. We all have something to learn, and we all have something to contribute."

The Committee continued with a second panel of witnesses, John Graham and Jane Fulford from the Institute on Governance. Their evidence will be reported in the next issue of <e-notes>.