SENATE DEBATE ON BILL S-11

May 26, 2010

Safe Drinking Water for First Nations Bill

First Reading

Hon. Gerald J. Comeau (Deputy Leader of the Government) presented Bill S-11, An Act respecting the safety of drinking water on first nation lands.

(Bill read first time.)

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

(On motion of Senator Comeau, bill placed on the Orders of the Day for second reading two days hence.)

[*English*]

June 1, 2010

Safe Drinking Water for First Nations Bill

Second Reading—Debate Adjourned

Hon. Patrick Brazeau moved that Bill S-11, An Act respecting the safety of drinking water on first nation lands, be read the second time.

He said: Honourable senators, I am proud to speak here today and to show my support for Bill S-11, An Act respecting the safety of drinking water on first nation lands.

This bill is an essential part of a comprehensive approach that is already helping to resolve some long-standing, disturbing problems related to the quality of drinking water in many First Nations communities. Bill S-11 establishes a mechanism to protect health, safety and investments by creating a federal regulatory framework.

[*English*]

The roots of Bill S-11 lie in the Government of Canada's response to a series of reports and studies, including one completed by the Standing Senate Committee on Aboriginal Peoples. This research was inspired by the chronic problems related to the safety of drinking water in many

First Nations communities. Although each report and study recorded particular observations, they all identified the lack of a comprehensive regulatory regime as a significant contributing factor.

In March 2006 the Government of Canada and the Assembly of First Nations joined forces on a wide-ranging plan of action for drinking water in First Nations communities. The action plan called for the establishment of an effective federal regulatory regime and articulated a multifaceted plan to achieve this goal. The introduction of the safe drinking water for First Nations bill takes us one step closer. To realize the significance of Bill S-11, however, I believe colleagues must first appreciate the larger context.

(1500)

The collaborative Plan of Action for Drinking Water in First Nations Communities is designed to address each of the specific factors that conspire to hinder the consistent delivery of safe drinking water. Officials from Indian and Northern Affairs Canada and the Assembly of First Nations, in consultation with their counterparts from Environment Canada and Health Canada, carefully crafted each element of the action plan. This collaboration, a success in itself, has been essential to the progress made in the last few years.

The collaborative approach adopted by the parties focuses on three actions: assess, invest and protect. These actions are both interconnected and mutually reinforcing.

Impartial assessment of the quality of treatment systems and drinking water, for instance, provides the information needed to make appropriate decisions about investments of taxpayer dollars. So, too, does information about levels of operator expertise and adherence to water and waste water treatment protocols.

Targeted investments informed by accurate assessments will help sustain the infrastructure that provides access to safe drinking water in First Nation communities. Accurate assessment will also protect the investments of taxpayer dollars required to build and maintain drinking water infrastructure.

Honourable senators, let us consider a few key facts. At the outset of the action plan, First Nations suffered from a chronic shortage of qualified system operators. To address the issue, Indian and Northern Affairs Canada increased its investment in the Circuit Rider Training Program and nearly doubled the number of qualified instructors in the past four years. Today, operators with at least level 1 certification are in charge of more than 60 per cent of all First Nation treatment facilities.

Another example of the action plan's informed investment involves treatment protocols and technical support. Four years ago, stakeholders had little concrete guidance on what constituted adequate treatment practices and procedures, and operators were often left on their own to troubleshoot technical problems. The action plan saw the Government of Canada set up a 24-

hour toll-free hotline and publish the *Protocol for Safe Drinking Water in First Nations Communities*.

These actions have had direct impact. In 2006, the number of drinking water systems deemed at high risk of failure stood at 193. This number has fallen to 49 and continues to decline. Another statistical indication of progress is the number of First Nations communities with a combination of high-risk treatment systems and drinking water advisories. In 2006, 21 communities were in that precarious condition. Thanks to a series of remedial actions taken by partners, only three remain there today, with steps being undertaken to remedy the situations of these three communities.

[*Translation*]

Moreover, the Government of Canada has continued to monitor the success of the action plan in part to ensure that Canadians are aware of the impact of public investment on drinking water for First Nations. The plan calls for an annual progress report. At least four such reports have been submitted to Parliament to date.

[*English*]

Bill S-11 is the next step in protecting these public investments and safeguarding access to safe drinking water in First Nation communities by enabling the establishment of an effective federal regulatory regime.

The first step in the identification of feasible options for such a regime involves the expert panel. The panel gathered testimony from representatives of First Nations, the provinces and territories, along with various experts in water and engineering. The November 2006 expert panel's report identified three feasible regulatory options, one of which is federal incorporation by reference of provincial and territorial laws with adaptations to meet the needs of First Nations communities.

Rather than simply moving ahead with one of the options in the expert panel's report, the Government of Canada chose a more studied and cooperative route, having extensively analyzed the option and through continuous dialogue with First Nations leaders. To understand why this option offers the best hope for success, one must first consider several authoritative studies and reports.

The first is a report completed by the Commissioner of the Environment and Sustainable Development. The report details that nearly $4 billion was invested between 1995 and 2008 by the Government of Canada into First Nation water and waste water systems. The report also describes the First Nations Water Management Strategy, a joint initiative launched in 2003 by Health Canada and Indian and Northern Affairs Canada. According to the report, the initiative suffered from an inherent flaw: an absence of clear performance indicators and accountability mechanisms. This flaw helps explain why, three years into the First Nations Water Management Strategy, despite sizeable investments in infrastructure, water quality on-reserve did not improve. Page five of the commissioner's report states, in part:

It is it not clear who is ultimately accountable for the safety of drinking water.

A section on page 11 states:

There is no legislation requiring that drinking water quality and safety in First Nations communities be monitored.

Finally, this definitive statement appears later in the report:

Until a regulatory regime comparable with that in provinces is in place, INAC and Health Canada cannot ensure that First Nations people living on reserves have continuing access to safe drinking water.

The commissioner's report made a series of five recommendations: first, recreate a federal regulatory regime for drinking water on-reserve; second, clarify design codes and standards; third, ensure monitoring and follow-up; fourth, create institutions for capacity building; and, fifth, provide progress reports to Parliament.

As honourable senators likely appreciate, the action plan, initiated in collaboration with the Assembly of First Nations, addresses each one of these recommendations. Significant progress in improving water conditions on-reserve across Canada has been made. To build on this progress, Budget 2010 extended the First Nations Water and Wastewater Action Plan for two more years, for an additional $330 million. However, much work remains to be done, of course, and that is why the legislation before us is so important.

The Standing Senate Committee on Aboriginal Peoples prepared another relevant report to Bill S-11. After hearing from a series of witnesses, the committee published its report in 2007, approximately one year after the launch of the action plan. The report acknowledges both the underlying inequity of the current situation and the recent progress made to eliminate the inequity. An excerpt from the report states:

First Nations people in this country have a right to expect, as do all Canadians, that their drinking water is safe. Through sustained investment and dedicated efforts, there has been notable improvement in the quality of water delivered in First Nations communities.

The Senate committee's report goes on to make a key recommendation:

That the Department of Indian Affairs and Northern Development undertake a comprehensive consultation process with First Nations communities and organizations regarding legislative options, . . . with a view to collaboratively developing such legislation.

In response to this recommendation, the Government of Canada initiated an ongoing consultation process, which included engagement sessions. Indian and Northern Affairs Canada published a discussion paper and distributed it to interested parties in advance of a series of focused engagement sessions. Nearly 700 participants, including more than 500 representatives of First

Nations, were provided with the opportunity to make their comments and suggestions on the viable option proposed by the government of incorporation by reference of existing provincial and territorial regulations with adaptations to meet the needs of First Nations communities. No other viable option was put forward.

As we all recognize, engaging the very people in the creation of a regime to which they will be subject builds public support and inspires respect for new law. This legislation will enable the government to work together with First Nations in the development of federal regulations. To date, Canada has maintained an open dialogue with First Nations in addressing water issues in First Nations communities.

As part of the overall consultation process, our government has engaged with First Nations through numerous workshops, information-sharing sessions, engagement sessions, regional impact analysis, and continuous dialogue on legislation and a regulatory framework since the 2006 expert panel hearings until the most recent engagement with regional First Nations chiefs in 2010. We continue to work in close cooperation with regional First Nation organizations to try to address specific regional issues and concerns. The consultation process will continue into the future when we commence regulatory development.

(1510)

[*Translation*]

By creating regulations, Bill S-11 will help establish drinking water and wastewater standards that are similar to off-reserve standards.

What is more, this will provide new opportunities for First Nations communities and municipalities to work together in areas such as training and shared systems.

This process would lay a common foundation for assessing the effectiveness of the operation, design and maintenance of wastewater treatment systems. In other words, this would make it easier to provide continuous assessments to protect the quality of drinking water in First Nations communities.

[*English*]

Under Bill S-11, the development of a federal regulatory regime would engage the people with the greatest knowledge of pertinent issues: Provincial and territorial officials and First Nations. These men and women set and enforce regulations. They operate and maintain water and wastewater treatment facilities in First Nations communities. They have the first-hand experience; they know what works, what does not work and how to make water and waste water treatment facilities work. This is precisely the kind of insight we need to craft a new federal regulatory regime.

Representatives of First Nations, Canada and the appropriate province or territory would work side-by-side to analyze the components of existing provincial and territorial regimes. They would identify which elements to incorporate into a federal regime and which to discard. They would also be free to adapt existing elements and create new ones, if necessary.

This approach to regulatory development will produce a federal regime that will encourage collaboration between First Nations and individual provinces and territories. Perhaps they would agree to share treatment and distribution facilities or hold joint training sessions for systems operators.

Another advantage of such an approach to regulation-making is that it would enable the parties to address the particular gaps of existing provincial and territorial regimes. For instance, few existing regimes address private wells and septic systems. In rural areas, many people rely on these for their drinking water, as do a large number of people in First Nation communities. Regional experts working together on the particular drinking water challenges that face First Nations in a single province or territory are ideally positioned to develop a practical, sustainable regime.

Honourable senators, the legislation before us today is an appropriate response to the numerous reports and studies into the issue. Allow me to quote again from the Standing Senate Committee on Aboriginal Peoples report, this time from the conclusion, which states:

Legislation to regulate water standards on reserve is required. No one, including this committee, argues differently. Regulations are, however, only part of the answer. Sustained investment in the capacity of First Nations community water systems and of those running the systems is absolutely essential to ensure First Nations people on reserve enjoy safe drinking water.

I believe that this quote sums up the issue perfectly, and Bill S-11 is a crucial component of a larger approach to address it. This approach includes significant and sustained investment in First Nations community water systems. It also includes training programs for systems operators and the development and dissemination of materials on how to design, operate and maintain treatment systems.

The approach has already begun to achieve measurable progress: Fewer treatment facilities at high risk of failure and more trained and certified operators are in place. Sustainable progress, however, cannot be achieved unless adequate accountability mechanisms are also in place. This is a key finding of the reports that I have cited today. Bill S-11 aims to establish these mechanisms. It aims to fill a regulatory void that contributes significantly to water problems in many First Nation communities.

Bill S-11 also proposes to extend the cooperation and goodwill that has begun to correct a fundamental wrong. No longer would First Nations be denied the legal protections afforded to other Canadians when it comes to drinking water.

Ultimately, the proposed legislation aims to restore a sense of justice and equality in this country. It aims to provide residents of First Nation communities with the regulatory certainty enjoyed by all other Canadians.

[*Translation*]

Bill S-11 is one critical element of a comprehensive solution to a complex problem. The bill proposes having a federal regulatory system corresponding to the specific needs and specific situation of the First Nations communities. It also supports the perfectly reasonable approach of assessment, investment and protection.

[*English*]

I believe that residents of First Nation communities have every right to expect, as do all Canadians, safe, clean drinking water. Their health and the safety of their communities depend on it. Any honourable senators who share my belief must, in good conscience, join me in supporting Bill S-11.

Hon. Gerry St. Germain: Would the Honourable Senator Brazeau accept a question?

Senator Brazeau: Yes.

Senator St. Germain: Honourable senators, due to the urgency of this particular situation, would the honourable senator be willing to talk to the government side as well as to the opposition about this proposed legislation?

It is such a basic need in our First Nation communities that they have fresh drinking water. With the time that will be required to draft regulations, unless there is a very good reason to delay this legislation or to hold it up — not that I am inferring it will be held up — is there a way of expediting this process?

As sponsor of the bill, would Senator Brazeau take it as his responsibility to speak to the leader on this side to ensure that we get this bill through as soon as possible? I think I see heads nodding on the other side in that some are in concurrence with this request.

Senator Brazeau: I thank the honourable senator for that important question. My community is one of three communities that are still in an emergency state in this country.

As the sponsor of the bill, I will absolutely do whatever I can to try to expedite this legislation. Let us face it: This piece of legislation is about a health and safety issue. If it was occurring in any non-Aboriginal community, it would be unacceptable. That is why it is so important that this bill passes immediately.

Hon. Tommy Banks: Will the honourable senator accept a further question?

Senator Brazeau: Yes.

Senator Banks: Honourable senators, sadly, there are other communities that are susceptible to the problems having to do with drinking water. I thank Senator Brazeau for his speech and obvious commitment to this bill; I am glad that he is its sponsor.

The honourable senator has referred to other reports by Senate committees. Does he have any familiarity with the reports having to do with the safety of drinking water and, in particular, with reference to drinking water on First Nations that have been made by the Standing Senate Committee on Energy, the Environment and Natural Resources? In particular, those bills that have to do with that matter that have been proposed over the past four years and changed by Senator Grafstein.

Senator Brazeau: I thank the honourable senator for that question. I was not aware of a report from the Standing Senate Committee on Energy, the Environment and Natural Resources. However, I became familiar with the report that was tabled by the Standing Senate Committee on Aboriginal Peoples in 2007, which focused on drinking water on reserves.

Hon. Sandra M. Lovelace Nicholas: Honourable senators, Senator Brazeau mentioned programs that will be in the communities. There was no mention as to whether these programs would present equal opportunities for both men and women.

Senator Brazeau: This is about clean, safe drinking water, and if one looks at the operators who will have to become certified to manage the systems, those jobs and opportunities are open to both men and women. In my own community, a woman manages the system, so that opportunity is there.

More importantly — and this needs to be mentioned — since 2006, broad consultations took place between the Government of Canada, First Nations organizations, regional organizations, people in the communities and technical experts, all of whom were both men and women. When we talk about consultation, it is important that both men and women are consulted. That is what happened in this case. This process has gone on for four years. We now have this bill, and hopefully we can move forward with it.

(1520)

Senator Banks: I understand the alacrity with which we must deal with the situation. Senator Brazeau is right that it is emergent. However, I would like to consider this in light of the sponsor's first speech. Therefore, I move the adjournment of the debate.

(On motion of Senator Banks, debate adjourned.)

June 8, 2010

Safe Drinking Water for First Nations Bill

Second Reading —Debate Continued

On the Order:

Resuming debate on the motion of the Honourable Senator Brazeau, seconded by the Honourable Senator Lang, for the second reading of Bill S-11, An Act respecting the safety of drinking water on first nation lands.

Hon. Tommy Banks: Honourable senators, I am rising today because I promised Senator Brazeau that I would speak today on this bill. I had intended simply to urge that we send it to committee for study. However, in the intervening days, I found out some things that I did not know before.

First, I wish to point out to honourable senators that while Senator Grafstein was a member of this place, he proposed, over the past seven years, time and again — and, I do not know how many times he proposed it, but I think the Senate passed it twice, at least — a bill respecting the safety of drinking water for Canadians. If it had been passed by Parliament, it would have obviated the necessity for this or for any other bill because it went much further than this bill before us with respect to protecting the safety of drinking water for all Canadians, very much including, as Senator Grafstein continually stated, First Nations.

I have no doubt of the good intent of this bill. However, with good intentions, there are sometimes slips between the cup and the lip. I have been informed that the Assembly of First Nations is opposed to this bill. Since this is a bill that deals with drinking water on First Nation lands, I think that attention must be paid — more attention than I have been able to pay so far — to the opposition by the Assembly of First Nations to the passage of this bill.

I am further informed that the Safe Drinking Water Foundation is opposed to the passage of this bill. The foundation is not some wacko, left wing, tree hugging activist group, honourable senators. The Chairman of the Safe Drinking Water Foundation is Dr. David Schindler. He is not merely an eminent scientist; he is a pre-eminent scientist, of whom most of us have heard. The foundation of which Dr. Schindler is the chair is opposed to this bill, for reasons that include the suggestion that "the proposed federal regulations" — I am quoting that foundation — "could actually put the communities themselves at risk; that First Nation communities, in order to be able to produce truly safe drinking water and meet these regulations, will require more funding, more training, and more effective water treatment processes than are currently available. . ."

Honourable senators, and with apologies to Senator Brazeau, I will ask for the adjournment of the debate for the remainder of my time. I will attend to it as early as I can possibly get the required information.

(On motion of Senator Banks, debate adjourned.)

(1540)

Safe Drinking Water for First Nations Bill Second Reading Debate Continued

June 15, 2010

Second Reading —Debate Continued

On the Order:

Resuming debate on the motion of the Honourable Senator Brazeau, seconded by the Honourable Senator Lang, for the second reading of Bill S-11, An Act respecting the safety of drinking water on first nation lands.

Hon. Tommy Banks: Honourable senators, I want to thank Senator Brazeau for sponsoring this bill and particularly for the recitation in his excellent speech of the urgent necessity of taking action on clean drinking water.

I hope that Senator Brazeau and all honourable senators will take note of the fact that committees of the Senate of Canada have been scathingly critical of this government for the state of affairs as regards water on First Nations reserves. We have been scathingly critical of this government. We were scathingly critical of Mr. Martin's government. We were scathingly critical of Mr. Chrétien's government, and we likely will be scathingly critical of the next government.

That criticism, and it was scathing criticism, was made by committees of the Liberal-dominated Senate of a Liberal government in a House of Commons in which an overwhelming majority of seats were held for three consecutive Parliaments by Liberals. Why did we do that? We did that because we are the Senate of Canada, and we, in this place, are not a function of government.

Now, senators, I will be scathingly critical of this bill.

It is difficult to be critical of proposed legislation that says it will bring clean drinking water to First Nations. The purport of the bill is unarguably good. There are two good things about this bill. The first is the title: "Safe Drinking Water for First Nations Act." How can anyone argue with that title? It is a terrific title.

The second good thing in this bill is the concept of universal, nation-wide regulations — not mere guidelines, senators, but regulations with teeth, with the possibility of real penalties for their contravention. That concept is good, but I cannot forebear to note, and to call to the attention of honourable senators, that it is a concept embodied in, and central to, legislation that has been passed twice by the Senate. It was legislation devised by Senator Grafstein, passed here and sent to the House of Commons. It was legislation that, had it been acted on properly in that

other place, under both Liberal and Conservative governments, it would have obviated the need for further legislation to protect the interests of First Nations, and everyone else to boot, when it comes to the provision of safe drinking water.

Now here is the legislation again, the concept of enforceable regulations with teeth, and this time in a government bill, wrongly reported in the national media to have been introduced in the Senate by ministers of the Crown whose seats are in the other place.

Those two things — the title and the concept of enforceable regulations — are good. It is also a good thing that the bill recognizes that, as we sometimes know, we have to begin at the beginning; that we sometimes have to look first not at the delivery system but at the source of drinking water. Again, that issue was addressed in great detail in legislation proposed here by Senator Grafstein, legislation that has three times died on the Order Paper.

In the main, senators, this bill is severely deficient. It proposes the possibility of all sorts of regulations, all sorts of punishment and significant penalties against First Nations if they fail to measure up to some as yet undefined standards, which are characterized as national standards, but which will not be national standards because they will vary from province to province to territory.

The idea of engaging the provinces — again, as previously proposed by Senator Grafstein — and incorporating provincial laws and regulations by reference into this bill is a good one. It might also be a good idea, though, to engage the First Nations directly in this process, not by consultation — I think we all understand the ephemeral nature of consultation — but by direct, hands-on participation, as proposed by everyone who has looked at how to solve this problem.

In his speech at second reading, Senator Brazeau referred to two significant precursors to this bill: first, the Report by the Expert Panel on Safe Drinking Water for First Nations, which panel was, I believe, created by this government; and second, the report by the Commissioner of the Environment and Sustainable Development in the Office of the Auditor General.

Senator Brazeau was wise to cite these two reports. He was correct in pointing out that both reports argued and proposed — as Senator Grafstein had argued and proposed, and in legislation that we have passed before and as the Standing Senate Committee on Energy, the Environment and Natural Resources and the Senate of Canada have proposed — that the issue can be addressed only by new legislation, by federal legislation that contemplates meaningful, enforceable regulatory powers. This bill proposes exactly that.

However, Senator Brazeau, the ministers, the government and the drafters of this bill should have read the whole of those reports, all of those reports, because they argued and proposed much more than merely making enforceable regulations. They all went on to say that new institutions had to be put in place, institutions in which the First Nations had direct, on-the-ground, meaningful, participating and proprietary interests.

Permit me to quote from the report of the expert panel. It proposed new legislation. The report called the legislation a bridge to self-government that would create a First Nations water commission comprising a majority of First Nations representatives to be given important roles. I quote from its report: "It would be important for the Commission to have the power to ensure that INAC" — Indian and Northern Affairs Canada — "provide adequate funding to meet the requirements of an Act."

The report said that the government should "base new federal laws on First Nations' customary laws. This task would start with, and be driven by First Nations across the country."

(1510)

The drafters of this bill forgot that part of the government's own expert panel's report and advice.

Permit me to further refer to Senator Brazeau's speech at second reading, in which he cited the report of the Commissioner of the Environment and Sustainable Development, and which speech correctly described the commissioner's report to have included five recommendations. First, create a federal regulatory regime. This bill does that. Second, clearly design codes and standards. This bill partly does that. Third, ensure monitoring and follow-up. This bill partly does that. Fourth, create institutions for capacity building. Oops, this bill does not do that. Fifth, provide progress reports to Parliament. Well, they forgot that one, too.

Honourable senators, three out of five is not good enough. Leaving the governed out of the design of governance is not good enough anymore. Actually, it has not been good enough since 1215.

In case this bill is sent to committee for further study, allow me to place on the record, having to this point paid attention to important considerations that are not in the bill, some things that are in the bill, some of which should give us pause and others of which should set off very loud alarms.

Clause 4 of the bill refers to included powers — powers of the Crown under the bill — and it states in paragraph 4(1)(b) that the regulations may "confer any legislative, administrative, judicial or other power on any person. . . ."

We used to have laws conferring enforcement powers on public officers, police officers, peace officers, wardens, fisheries officers, and constables of one kind or another, all of whom had demonstrable qualifications in the application of the powers that they were given. Then last year, in Bill C-6, it became inspectors, without reference to any qualifications on the part of those inspectors, whatever they are, of the application of constabulary powers, and now we have "any person," not merely for constabulary powers, but now for judicial powers and legislative powers.

What does that mean, to confer legislative power on a person? I hope that someone who knows the law will look at that. I find it a little frightening.

These persons on whom these powers are conferred, any person without any qualification, who are so empowered can — I hope that senators on the Aboriginal committee will listen to this — and I quote from the bill:

. . . require a first nation to enter into an agreement for the management of its drinking water or waste water system in cooperation with a third party. . . .

That sounds onerous to me, honourable senators, that a person appointed by the Crown can require a First Nation to enter into an agreement with some undefined, unqualified third party, the XYZ water company, perhaps, to manage their water and waste water systems. That is in this bill.

Clause 4(1)(h) says that the Crown may "confer on any person" — not a constable or an officer — ". . . the power to seize and detain things found in the exercise of that power."

What? They are going to empower any person with the authority to seize and detain things that they find in the exercise of that power, including the power to apply for a warrant to conduct a search of a place — your place or my place? If I were a member of a First Nation, I would be worried about that provision.

I do not have the honour of being such a member, and I am still worried about it.

Honourable senators, please listen to this language. I will quote directly from the bill. Paragraph 4(1)(r) states that the Crown can make regulations to:

provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights;

Senator Mitchell: Unbelievable.

Senator Moore: They cannot do that.

Senator Banks: What? Honourable senators, if you were to look at the body of federal legislation, the laws of Canada, you would find in many, many of those laws clauses called non-derogation clauses. They occur in trade acts and in many environmental acts. They were put there in the first place as a red flag. They did not do anything. They reminded the courts, with a little red flag:, that they must pay attention to the fact that nothing in this bill must derogate from the rights enshrined and protected in section 35 of the Constitution Act. That is what it said. That was its purpose. Every one of those non-derogation clauses begins with the words "nothing in this act shall be construed" and then it goes on.

If one lined up all those non-derogation clauses from all those acts of Parliament in a row, one would see that they all start with those words and then they get fuzzier and fuzzier, as one goes along, until they get to the point that they are not interpretable by anyone.

We finally got the Department of Justice to agree, in a meeting of the Standing Senate Committee on Energy, the Environment and Natural Resources, that the final wording, which in the vernacular of the trade seemed to try to swallow itself whole, that in fact one can derogate from those provisions and protections, because the Supreme Court of Canada has decided in a particular case that those rights are not inviolable. They are not absolute. They can, in the application of the concept of eminent domain, be abrogated in some larger interest. Therefore, the non-derogation clauses became fuzzier and fuzzier. However, this clause that I have just read to you, honourable senators, is not a non-derogation clause, but a derogation clause.

This bill contemplates the extent to which the regulations — not even laws or amendments — made by a minister of the Crown under this act may abrogate or derogate from those Aboriginal and treaty rights. That is what this bill says.

It sounds to me as though a minister of the Crown is being authorized legislatively in law, by this bill, to derogate and abrogate Aboriginal treaty rights in section 35 of the Constitution Act. That is what it says. I am only reading English, but I hope that attention will be paid to this provision by persons who understand the application and the practice of law, which is obviously a lot more complicated than the mere making of law that we do here.

Subclause 6(1) of this bill states:

Regulations made under this Act prevail over any laws or by-laws made by a first nation. . . .

Did someone not suggest that the idea of this act was to be a bridge to self-government? Clause 6 says, in effect, they can forget self-government because whatever they say will be overridden by whatever that minister of the Crown who happens to be in the office on that day says.

(1520)

Clause 6(2) reads:

In respect of an aboriginal body named in column 1 of the schedule, this Act and the regulations prevail over the land claims agreement or self-government agreement to which the aboriginal body is a party, and over any Act of Parliament giving effect to it . . .

I will read that to you again. This is clause 6(2) of this bill. It reads:

In respect of an aboriginal body named in column 1 of the schedule, this Act and the regulations prevail over the land claims agreement or self-government agreement to which the aboriginal body is a party, and over any Act of Parliament giving effect to it . . .

I am speechless, senators. This is not a bridge to self-government; this is a slap in the face. This is arrogance beyond belief. It is astonishing that anyone would dare to present such a bill to this place —

Some Hon. Senators: Hear, hear!

Senator Banks: Our history, the history of this place is the protection of environmental interests and Aboriginal interests. That is what we have done, better than anybody else.

I was not speaking to Senator Brazeau when I said that it was a travesty, because I know that he was speaking on behalf of the government.

The expert panel, the commissioner and everyone in sight have argued that the First Nations must be included in and must drive a new institution to address the problems of safe drinking water. They are right, and the Senate committees were right, and Senator Grafstein was right. What we have instead, in clause 6(2), unless I am completely misreading or misinterpreting it, is a return to heavy-handed 19th century paternalism: There, there; we know what is best.

I hope that someone who knows the law better than I will look seriously at this provision if the bill goes to committee.

One final point, which is picayune by comparison with all the others, has to do with clause 9, which says that monies collected as fines, fees and charges by a person:

. . . pursuant to the regulations are not Indian moneys for the purposes of the Indian Act or public money for the purposes of the Financial Administration Act.

Honourable senators, there is good reason for that provision. It is to ensure that when monies for these fines are collected, for example, by the provinces, they are not susceptible of federal laws. However, we should amend that provision to say that when monies are collected by a provincial or territorial body they are not susceptible of the Indian Act or the Financial Administration Act.

Honourable senators, this bill would, in my view, put into law an abdication of federal responsibility. It is as simple as that. We may not like the Constitution; we may not like the Indian Act, but until we change the Constitution and until we change the Indian Act, we must make laws that are consistent with them, and not only with the words actually contained in the Constitution and the Indian Act but also with the conventions and practices that have arisen from the application of those acts. This bill does not do that, and so I urge senators, and particularly the members of the committee to which this bill might be sent for study, to be assiduous in their deliberations, to ask witnesses from all sides to be straightforward, and either to substantially refute my observations here — and I would be happy to be corrected — or to urge the defeat, or at least the significant amendment, of this poorly-conceived bill.

Hon. Gerry St. Germain: Would the honourable senator take a question?

Senator Banks: Yes.

Senator St. Germain: Is it possible that this bill was designed in such a way as to focus responsibility on one individual in order to be able to expedite a process, if required?

Water is such an integral part of our existence as human beings that some of these decisions have to be made instantaneously. It is like a field marshal in a theatre of action, because it is basically a war against E. coli or germs.

Is it possible that the designers of this bill would have had that in mind in order that this could be acted upon expeditiously and immediately when the call arrives?

Senator Banks: Honourable senators, water is not only important to us; it is the only thing we cannot live without. We can live without anything else. We can live without oil, steel or wheat, but we cannot live for more than about three days without water.

To use Senator St. Germain's analogy, if that were the intent of the framers of this bill, then their intent is to have the field marshal empowered to send the army out to battle with no ammunition, no knowledge, no understanding, no equipment, no facilities, no training, no capacity to do what they are sent out to do.

That having been said, we must recognize that the government has earmarked a total of $660 million to do good things with respect to First Nations drinking water, and some of it has been done very well. The Circuit Rider Training Program, through which people are sent around to help First Nations deal with those issues, is a good program, and some upgrades have been good too. However, if you divide the number of First Nations that need upgrading, training and assistance into the $660 million, which is over two years, I believe, it does not even come close to doing what needs to be done.

The problem, honourable senators, is that if this bill were to be passed as it stands, and if it were to be brought into force at the pleasure of the Governor-in-Council at some point within the next couple of months, people who have been contracted by First Nations to operate water and waste water systems would be susceptible of quite severe penalties without having been given the necessary training and resources to permit them to meet the standards that might be set by the imposition upon them of whatever those standards will be. We do not know what they will be. The minister of the Crown will say what the regulations will be, but I do not know how quickly the minister will do so. I can only tell you that it is not reasonable, realistic or possible for First Nations to respond to the requirements of this bill from a standing start from where they are now. It cannot be done.

I will immodestly tell you, honourable senators, that I have the advantage of knowing a little bit about water and about the problems of water on First Nations lands and elsewhere because I have been a member of the Standing Senate Committee on Energy, the Environment and Natural Resources since I came to the Senate and we have done many studies of that subject.

Honourable senators, quite aside from the constitutionally questionable items I described to you in terms of overriding the protections of First Nations, with the resources that they have and the time they might have, it is totally unrealistic to assume that the First Nations can rise to meet the requirements of this act. It is quite unrealistic and, if they fail to do so, they will be subject to severe penalties.

I hope I have answered the honourable senator's question.

(1530)

Senator St. Germain: I do not view this issue as a partisan one. Unfortunately, I had to go to a steering committee, but it is as the honourable senator said in his speech. He is right that government after government has failed to deal with this issue.

Now, this government is trying to deal with it. We are down to about three or four priority situations in the country. Even that number is unacceptable, though the number was close to 100 not long ago. We completed the study on safe drinking water in the Senate.

Does the honourable senator not think that common sense will prevail in the enforcement of any regulation, and that any regulation will be designed in such a way as to take into consideration that more circuit-rider training or whatever training required will be the norm of the day?

Though I am not accusing the honourable senator of this, I am afraid we are taking an extreme position as far as enforcement is concerned. I do not think this problem will happen in this particular instance. Does the honourable senator have reason to believe it will?

Senator Banks: I do not ascribe ill will to anyone, senator. The honourable senator is right: This issue is about as far from a partisan one as we can get, because this issue affects everyone in this room; every Canadian and everyone in the world.

I am not criticizing the intent of the government. I know the intent of the government is right. However, I also know we are being asked to pass a bill, and it is before us.

It does not say, "By the way, we will not do this for a while." It does not, and bills cannot, say that we will be careful and we will not assiduously enforce the provisions of the bill for a while. It does not say there is a grace period. It does not say any of those things.

We have to deal with the bill that is given to us. The intent of the bill is terrific. The concepts to which the honourable senator refers — enforceable regulations with teeth, and punishment for those who do not live up to them — are things we have been arguing for, and which we have been in favour of and urging upon successive governments since long before I arrived here. Those parts the honourable senator refers to are good. We have to get to the pointy end of the stick at some point and say, "You must do this."

However, this bill says that, if you do not, you are susceptible to significant penalties, and rightly so. My point is that there is a gap in the ability of the First Nations to meet these standards, and that ability has not been developed yet.

We must figure out how to meet those standards. The expert panel told us how to meet them. The Standing Senate Committee on Energy, the Environment and Natural Resources, and I suspect the honourable senator's committee's report, told us how to meet them, as well.

However, the part that explains how to meet them is left out of this bill. That is the problem.

The concept is good, the object is good and the enforceable regulations are good, but the other stuff has been omitted. That is why I suggested nothing other than that we seriously look at and defeat this bill, or amend it by adding the things that need to be added. This bill is a government bill, so if things need to be done which require money, the royal recommendation can be obtained by the time the bill reaches the House of Commons. I hope the committee to which this bill will be sent will take all those things into account.

(On motion of Senator Watt, debate adjourned.)