(Following French — Ms. Cram contg after: ...ces incultudes.)

Some First Nations have raised concerns that the bill provides very broad authority to the federal government to delegate authority. Our intent was to ensure that the language included in the bill provided enough flexibility to allow for First Nation bodies or other agents to carry out their functions pursuant to the regulations.

Concerns have also been expressed that First Nation communities may not have the capacity to enforce and comply with the proposed regulatory regime. The government's intent is that the regulatory regime proposed in Bill S-11 would be rolled out in a phased approach over a number of years in order to ensure that its compliance component would not come into effect until such time as First Nations had the ability to comply.

With respect to concerns about the impact of Bill S-11 on Aboriginal and treaty rights, as with all legislation, section 35 of the Constitution Act, which protects Aboriginal and treaty rights, applies to Bill S-11.

Safe drinking water, the effective treatment of waste water and the protection of sources of drinking water in First Nation communities are critical to ensuring the health and safety of First Nation people. Bill S-11 is an essential part of this government's strategy to assess, invest and protect in order to ensure that First Nations have the same protections as other Canadians. The lack of federal legislation governing drinking water and waste water in First Nation communities means that there is no legislative basis for ensuring compliance with either INAC's water protocols or the Health Canada guidelines. This legislation will fill that regulatory gap. It will help protect the health and safety of First Nation communities and the substantial investments made in First Nation water and waste water infrastructure, and ensure comparability of water quality between on- and off-reserve communities.

We appreciate the opportunity to be part of these committee hearings and look forward to hearing from First Nations and other stakeholders in the review of Bill S-11. We would be pleased to answer any questions honourable senators may have.

The Chair: Ms. Cram, you said that the government's intent is that the regulatory regime proposed in Bill S-11 will be rolled out in a phased approach over a number of years in order to ensure that the compliance component would not come into effect until such time as First Nations had the ability to comply.

What will happen in the interim with regard to their water? If you have bad water, you want that fixed virtually instantaneously. You would not want to leave people exposed to improper drinking water. Can you explain to the committee how this would work so that we would not be exposing these people to unsafe drinking water?

Ms. Cram: Thank you for that question. Our plan is to work on the things in parallel. We currently have, as I said, our three-pronged strategy of invest, protect and assess, and we are continuing to work on that strategy.

As I mentioned, we have a national assessment under way. The communities have all been visited and the reports are starting to come in. Those reports need to be assessed, and we are looking to have

those released in the spring of this year. That assessment will allow us to develop an investment plan on water, focusing on the highest priority systems, because that assessment is looking not only at the infrastructure requirements but also at the capacity requirements, the training requirements and the operations and maintenance needed to support those systems.

We will continue to make improvements as we have been doing in the past. We will have the benefit of that national assessment to enable us to develop an investment plan. We will start making those investments based on what the findings are, and will also beef up the training and the operating side, which needs to be worked on.

The idea is that all this work will continue in parallel. It will take time to develop the regulatory frameworks. We expect those to be done on a province-by-province basis. We will start working on those. We are hoping that it will all come together with the regulations being ready, the investment plan being implemented, and the training and capacity support being in place.

Have I answered your question?

The Chair: Yes, you have. Thank you.

Senator Dyck: Thank you for your presentation. It was clear and concise.

I will start on the question of consultation. In your presentation you said that the government has been working with First Nations in the development of this legislation. What does that mean? You are saying that you have worked with some organizations that have contributed to this legislation, yet some of us have received letters from some First Nations organizations saying that they do not believe they have been consulted.

From your perspective, what was the extent of those consultations and what real input into the bill were these First Nations organizations able to provide?

Karl Carisse, Senior Director, Strategic Initiatives Directorate, Community Infrastructure Branch, Education and Social Development Programs and Partnerships, Indian and Northern Affairs Canada: We have carried out a process of continuous consultation which started in 2006 with a panel of experts going across the country. This expert panel was led by Harry Swain, a former deputy minister of INAC, and it talked to communities across the country about how to fill the regulatory gap. Over 500 representatives talked with the expert panel.

Once the expert panel had completed its work we had a meeting in Ottawa with First Nations technicians from across the country to talk about the results. We kept moving with that. We spent quite a number of weeks in the spring and summer of 2008 approaching different First Nations organizations. We attended their annual meetings and made presentations about water legislation and what framework legislation would look like, saying that we would be moving forward with more formal engagement sessions.

Those formal engagement sessions happened in February and March of 2009. There were 13 sessions across the country. We paid for someone from the leadership of each community in Canada, as well as a technician, to join us at those sessions to talk about a regulatory legislative regime. We

also invited representatives from the technical organizations and tribal councils to try to get a holistic view of the issues and to get their opinions.

We prepared a discussion paper at that time to help stimulate the discussion, and we also provided some funding to the regional organizations so that they could prepare an impact analysis. The government took a step back after the funding was provided in order to get a sense from the communities of how legislation regulation would impact communities in the provinces and regions.

Following that we received a lot of correspondence on the outcomes of the sessions and the impact analyses, and we went back and had discussions with the regional leadership across the country. We are still meeting with the leadership. Just before Christmas I made presentations to the Alberta association of treaty chiefs. We continue to engage. There was quite a bit of input from First Nations provided on the bill.

Senator Dyck: For clarification, you said that the meetings are continuing now. The bill is before us, so how can those meetings contribute to improvement of the bill?

Mr. Carisse: The meetings that we are currently having are more about how we will move to the next step and whether legislation should be passed and receive Royal Assent. There are different ways that we can do regulatory development. We received proposals from the FSIN in Saskatchewan and the AFNQL in Quebec/Labrador. We also received some proposals from the Atlantic Policy Congress in the Atlantic on how they think we could develop regulations in that area. The legislation itself was based a lot on what we heard at those sessions.

We heard a lot at the beginning from the AFN, which also attended some of the sessions. They were invited to all the national sessions.

Senator Dyck: You mentioned the FSIN, the Federation of Saskatchewan Indian Nations. The regulations that they submitted were submitted on their own, without having been done in collaboration with your offices. Is that correct?

Mr. Carisse: We have been receiving some proposals. The one I was referring to is something that we have been collaborating on with the vice chiefs at the FSIN to see how we can move forward.

Senator Patterson: Our committee has done work on this in the past. It is obviously an important issue to be improved on in First Nations communities. My question is about the concern I have heard expressed by First Nations that the legislation fails to acknowledge their jurisdiction over water, the issue of Aboriginal and treaty rights and I guess the inherent right to self-government. It seems to me that is a pretty key issue with the Aboriginal community. Can you tell us how the government approach has dealt with that issue or perhaps has not dealt with that issue? Is there an option to consider addressing these concerns on the part of First Nations?

Paul Salembier, General Counsel, Department of Justice Canada: I can address that, at least partially. The plan in developing regulations is to have the First Nations in the region to which the regulations will apply sit with Canada and develop the regulations line by line. The First Nations that will be affected by them will be involved in developing the rules that will govern their communities.

In terms of Aboriginal and treaty rights, normally, part of legislation that protects drinking water deals with the protection of sources of drinking water. In other words, it limits the use of land around sources of drinking water to ensure that the drinking water does not become contaminated. Everyone knows about the problems they had in Walkerton a few years ago. Those problems came from having livestock too close to the well from which the town's drinking water came.

To the extent that you deal with limiting the use of land, yes, it would probably be considered to affect the Aboriginal or treaty right related to the use of their own land. That is why we would want them to be involved, and we are hoping that everyone would recognize that minor limitations on the use of land in very small areas can be justified in terms of protecting the health and safety of the members of that community.

I think that is the government's approach regarding Aboriginal and treaty rights, and we are hoping that, at the end of the day, by the time the First Nations have worked with us and developed the rules together with us, that no one will question any impact that the rules will have on their rights, because they will see how any limitations are aimed at protecting their members.

Senator Patterson: I do hope you are right that it will work out that way. I do hear in some quarters that it is an issue of a matter of principle, even though the purposes of the legislation would seem to be in the public interest and in the interests of Aboriginal peoples. It seems to be an issue of principle, with at least some groups I have met with. I wish you well in that.

My other question is a bit technical. I am curious about the non-derogation clause in this bill. It provides for non-derogation from Aboriginal or treaty rights in the regulations rather than in the legislation, which I think is probably the more common way of dealing with it. I could be wrong, but is it not more common to have the non-derogation clause in the legislation as an interpretation clause to the statute? Can you explain why you focused on the regulations to discuss the non-derogation rather than legislation?

Mr. Salembier: I can address that as well.

In bills where you find a non-derogation clause, those are normally statutes where the rules that will affect the first nations are themselves in the statutes, so it makes sense to have the non-derogation clause in the same enactment as the rules.

This is what you call a framework act, and there are virtually no rules affecting First Nations directly in the bill itself. The bill simply provides authority to make regulations on a region-by-region basis, and it is in those regulations that you will find the rules. In that sense, it is appropriate to have the non-derogation clause in the same enactment where the rules will be. That is one aspect of it.

An added benefit to putting them in the regulations is that that that will allow First Nations who will be participating in the development of the regulations to craft a non-derogation clause that suits their own particular Aboriginal treaty rights so we are not forcing a single clause on all different groups across the country. They can customize a clause to suit their own purposes.

The third reason is a question of risk. The problem with non-derogation clauses, as I am sure the members here are well aware, is that the courts have never interpreted exactly what a non-derogation clause does. I know you have heard witnesses who have said, “I think its means this,” and other

witness who have said, “I think it means that,” or, “I would like the courts to say it means this or that.” Given the uncertainty about the actual effect of them, there is a risk that if we put the clause in the bill itself, that it will tie the government's hands in making the regulations and might in fact prevent the government from even making any regulations that might affect something like protection of sources of drinking water. That is a risk we would like to avoid.

Senator Patterson: Thank you for that answer. I have one more question, but I can wait until the second round.

Senator Poirier: Thank you for the presentation. I only have one question, unless something leads from that one question to something else. It is around the establishment of the offences. The bill says:

> Where a contravention of the regulations that is an offence under paragraph (1)(*f*) would be an offence under provincial law if it occurred outside first nation lands in the province in which the contravention occurs, the fine or term of imprisonment imposed for the contravention by the regulations may not exceed that imposed by provincial law for such a contravention.

I am curious how you will deal with that when you have a First Nation community that is actually divided by two different provinces and may have two different laws.

Mr. Salembier: The option would be to have two different sets of rules regarding portions of the community in each province or to simply have a single set of rules that adopts the limits in one province that are the lower limits, and that way you will comply with that requirement of the statute for both provinces. If there is a First Nation that spans Quebec and Ontario, and Ontario has a fine of $1,000 and Quebec has a fine of $2,000, you then adopt the lower fine, and that way you comply with the upper limit in both provinces.

Senator Poirier: Would that be negotiated on a one-to-one basis with different First Nations depending on where they are, or how do you plan to implement that?

Mr. Salembier: I would think you will want input from the particular First Nation whose lands span the two provinces, and I would assume they will be the ones who will raise this sort of issue. We would work it out together with them.

Senator Poirier: Thank you.

Senator Stewart Olsen: Thank you for your presentation.

There is no question that safe drinking water and the protection of the health and safety of First Nations are paramount and that is the reason for this legislation.

I just have a couple of questions. They are more technical than anything and they are on the regulations. My first one is on regulation 4(p), and it talks about requiring permits to be obtained as a condition of engaging in any activity on First Nation lands that could affect the quality of drinking water or any activity governed by the regulations.

My question is a clarification for me. It is probably clear to you. Who would issue the permits?

Mr. Salembier: If you have a permitting scheme the regulation will set out who will issue the permit. Therefore it might be that the regulations say you need a permit from the First Nation government itself. If there is an inspecting body, a water commission of sorts for that region, it might require a permit from the water commission. It will be decided on a case-by-case basis. The answer will come naturally once the permitting scheme is designed.

Senator Stewart Olsen: In essence, this enabling legislation is really a step forward in negotiating these individually, province by province and First Nation by First Nation. This is just the enabling legislation that will allow for that and the development that goes on further.

Mr. Salembier: Exactly.

Senator Lang: I was on this committee as a member a year and a half ago and I recall that there were significant amounts of money, as enumerated by you earlier, had been committed by the government over the last four years, like $2.5 billion or $660 million a year.

Senator Banks: It was $660 million over four years.

Senator Lang: Perhaps you can correct that for me.

Ms. Cram: I gave two numbers actually. I said $2.5 billion. Between the period 2006 and 2012, the government will have spent $2.5 billion. Of that, the $660 million over four years is the First Nations water and waste water action plan. It is a particular four-year initiative and it works out to $165 million per year.

Senator Lang: I am trying to narrow this down to the success of the program and we have an idea of how many communities have been affected by the commitments that have been made by Parliament and in turn by you in meeting the demands that are out there.

My understanding is at the beginning there was identified some 193 high-risk drinking water systems when you began this program. Perhaps you can enlighten us as to the success of this program so we are aware of what they are, and I would say for the viewers out there to see what is being accomplished.

Ms. Cram: I am trying to remember how many high-risk systems there were and maybe I can find that for you.

The last time we produced a progress report, which was in March of 2010, that covered the period between April 2009 and March 2010, the high-risk systems had dropped to 49 water systems and 61 waste water systems. It is a significant drop from prior to that.

Also, I mentioned in my remarks about the circuit rider training program's increase and the coverage of circuit rider training programs and certified operators. The focus has been in trying to reduce the risk of the systems and as well to increase the capacity of operators and the assistance to operators as well. That has occurred.

Some of the infrastructure investments, we have not seen the benefit of those and will not see the benefit of those until the construction is completed. Under Canada's Economic Action Plan that are 18 more projects undertaken for $193 million over two years. That construction will be completed by March 31 of this year and we will see more beneficial impacts of that.

Senator Lang: Following that through, I understand there were also a number of communities identified for both high risk drinking water systems and also a requirement of drinking water advisories. I understand that you identified them and over this period of time you corrected a number of them. Perhaps you could enlighten us on that as well.

Ms. Cram: There were initially 21 priority communities and, as you indicated, these were communities that in 2006 were both high risk and had a drinking water advisory in place. In the last progress report, that was reduced to three communities that still had that in place. Work is under way in all three communities. They have different challenges in each community. Senator Brazeau knows one of those communities very well because it is Kitigan Zibi.

As more homes are connected to water treatment plants that is helping, but there will be some homes, for example, in Kitigan Zibi that are in outlying areas that will have a problem because of the high levels of uranium in the water. We have action plans for each of the three communities still on that list.

Senator Lang: This is in many ways a good story being told and unfolded here for all of us around this table, especially people like Senator Banks who have been here for quite some time.

Are you undertaking any public relations campaign to outline what the department is doing and letting people know what the Government of Canada is doing and the success of it?

Senator Banks: Only you.

Senator Lang: It is a start.

You could follow up.

The Chair: Senator Lang, you just started the campaign.

Senator Campbell: Thank you for the humour, Senator Lang, and thank you to the witnesses for coming before us.

We heard that Dr. Harry Swain was the chair of the expert panel on safe drinking water said that his personal conclusion is if we want to see the completion of what has been a fairly considerable national effort to get good water on Indian reserves then we should worry about the basic resources and then the regulatory regime.

I think that was good advice then and my question is: Have we addressed the basic resources? We are now moving into that regulatory regime.

Ms. Cram: When you ask whether we have addressed resources, I mentioned that we had undertaken, I would say largely in response to this committee's work, a national assessment, which is

coming to a conclusion. With information we will have from national assessment we will develop a national investment plan as to where we should put resources in terms of high risk and where capacity is needed. That is our plan.

If Dr. Swain was recommending that first you should make all your investments, I would say I do not think the investments ever stop. They are ongoing investments that will have to be made. Plants will need replacing at certain frequencies. Operators will turn over. It is an ongoing thing. You have to look at how much money you have and I have talked about how much money you have and then how do you direct that money to where it is needed so that the communities that need it will be able to build or get the capacity so they can meet the regulations.

We feel strongly we should do those things in parallel and that we should not wait on the regulatory development and the legislation until such time as everything is met because it does not stay static.

Senator Campbell: Everyone has dealt with the act but my questions are more to the subject of the water.

Does good science in good water trump ideology? I heard, I believe, that if somebody wanted to have livestock around the area that is their water source, you could get a variance in the regulation, depending on who it was.

Did I miss that or is that generally right?

Ms. Cram: I do not think we were saying that you could get a variance. We were saying that the regulations would be developed in consultation with First Nations. You need to have that conversation with them.

Many First Nations have land use plans in place. You would want to look at those plans and see what the results of those land use plans were in terms of where things were situated.

Part of it is information as well, to look at how to ensure there are land use plans, and that there is some control that the First Nation community will have over what its individual members do vis-à-vis where they locate things.

Senator Campbell: I do not want to get into rights or into the Constitution or the rest of it, but good science is good science. If it says you should not do this, I do not believe that somebody in the community — or, in fact, anyone else — has the right to jeopardize that.

We are going for good water. I think there should be consultation. I believe that is critical in this; but at the same time, you cannot trump good science. We know what creates good water. We know the circumstances surrounding where good water is.

I have a real difficulty with this, that we would allow somebody to say because we have the right, we will not follow that. I think that we are wasting money if we allow that to happen.

Ms. Cram: Senator, you get no argument from us. We agree with what you are suggesting. What there needs to be is a regulatory regime that empowers a chief and council to ensure that takes place.

Senator Campbell: I want to be clear. I do not think anybody wants bad water. I do not believe anybody would knowingly create bad water, but at some point we have to recognize good science.

Senator Brazeau: Thank you all for being here this evening. We have had many conversations about this in the last couple of years.

You mentioned earlier that resources were provided for the consultations — I am stepping back a little bit — to allow potentially every First Nations community to participate in these consultations. If resources were provided, can you talk about what the participation rates were? We have a little over 600 communities across the country.

Second, what was the response rate with respect to those who did provide some impact assessments following their participation?

Mr. Carisse: For the impact assessments, there were some that were very good. For instance, in the Atlantic region, APC and others took the funds that were provided. We know how much funding was needed because we had done similar exercises before with third parties and consultants; they took the time to look at it and develop an impact analysis.

We had certain parameters of what you would see in regulations, Basically we took what exists in regulations across Canada, such as operator certification, the design of system, construction of a system, et cetera, and we said what exists within your own region and what would be the impact of having a regulatory enforcement regime?

We got responses from everyone but some took more time or a different bent. For instance, the impact analysis we received from Alberta was focused on a legal bent and others were more on a technical basis of what existed in different provinces already.

If memory serves me correctly, there were over 700 First Nation participants that came. It may be a small number compared to the fact that there are 600 communities and we invited 2 people per community, but we had a good representation of the folks that were there.

Some were bigger than others. The one in Saskatoon had over 100 representatives; others were a bit smaller. However, we had a good mix of leadership that showed up between chiefs or councillors, as well as technicians.

We got good responses from all the people that were there. It was nice to have the technicians there as well to really understand how this would impact them on a day-to-day basis. It worked out well.

Senator Brazeau: My second question was raised earlier. One concern that has been raised is this question of resources. Some people are saying it is jamming these regulations down people's throats when in fact it is not true. There will be joint participation from First Nations communities and the government.

If this legislation passes, how can INAC assure First Nations people that enough resources are going to be there to ensure that operators are certified and properly trained, that the infrastructure will

be built and developed and that the imposition of penalties, in the case of contraventions, will be respected?

Second, is there enough money in the past budgets now or will the monies have to be taken from somewhere else?

Ms. Cram: I talked about the national assessment. Until we see it and we see what it is suggesting, we do not necessarily know exactly how much money will be needed to make all the improvements that they are suggesting.

I will back up and say the national assessment is looking at what it would take today to upgrade the systems, to meet either the protocols or whatever the provincial standard is. It is also looking at what the growth projections are out for 10 years.

When you build a water plant, you are not necessarily looking at building it for today. You should not be. You need to be thinking about building it for the future.

We expect the costs that will come in out of the national assessment, particularly since they are looking at a 10-year forecast, will be high. We are not expecting that we would try to address all that in one year. We would look at the resources we have available and then approach the higher risk first.

We will have to develop a national investment plan that takes into account the resources we have, but also what the priorities and the needs are and then plan that out. We will plan that out also based on how we think the regulatory development will unfold.

We are not expecting that we would be able to do all the regulatory developments simultaneously across the country. We will work out a plan. Why we are saying we would not implement the regulations until such time as First Nations could comply is that we feel that does not make any sense. We know if we were to enforce them tomorrow, everyone would not be able to comply because we know there are gaps both on infrastructure and capacity.

The whole thing has to come together in a sensible plan that rolls out over time and is affordable. Building a water plant, even if you wanted to do it immediately, takes a long time to design, build and get operational. You need to have a sensible plan.

Senator Brazeau: To First Nations people out there who may not be in tune or much aware of the technicalities of this legislation — and some are listening to us this evening or will see this in a rebroadcast — what would you tell them about how important it is for this legislation to pass and how it will benefit them?

Ms. Cram: We are hearing all the time from First Nations that they should have the same quality of water as every other Canadian. I am sure people have seen stories in the media that suggest there are communities that do not have that. We strongly believe they are right; that every Canadian in this country, regardless of where they live, should have access to clean water. We believe that this legislation is a fundamental aspect of making that happen.

Senator Brazeau: I appreciate your responses.

The Chair: I have a supplementary. I am looking at what has been accomplished, which has been quite remarkable. However, my question is this: How many communities are still high risk? Is it three or four? If this were about non-Aboriginal people in any other town in Canada, it would be rectified immediately, such as in Walkerton and North Battleford. How are these people in high-risk areas operating? Are there emergency measures in these high-risk areas? Every community in Canada should be treated in the same way.

What has been accomplished and the money spent is remarkable. However, are there provisions in these high-risk areas to give people access to safe drinking water?

Sheilagh Jane Woods, Director General, Primary Health Care and Public Health, First Nations and Inuit Health Branch, Health Canada: I would like to ensure that everyone understands that we are not moving from nothing to a regulatory regime. What we have in place is as good as it can get without regulation enforcement and the ability to compel compliance. We actually have a good system. Ms. Cram outlined how we use the general Health Canada drinking water quality guidelines. We cannot compel anyone to follow those guidelines, but we have done really well. As one of the senators said: No one knowingly wants bad water. We get tremendous collaboration from First Nations. We must give them full credit. They understand how important safe drinking water is to public health and safety.

The regulations will help us, but no one should think that a high-risk community is just left to sit there because all kinds of emergency provisions go into place. Health Canada sends environmental health officers into a community when there is a problem. In some cases, they do the regular testing for water quality; and in other cases they supervise what we call the community-based water monitors. Much of the money that Health Canada has received through the First Nations Water and Wastewater Action Plan has gone to the training of community-based water monitors who do testing and inspections in their own communities.

Those inspections are done in exactly the same way as inspections done off-reserve and they follow the same quality guidelines. For example, we require that they send samples to accredited laboratories, et cetera. It is a tight regime. When there is a problem, our environmental health officers go in and talk with the chief and council. The chief and council will place a drinking water advisory on the advice of the environmental health officer.

In my 7.5 years at Health Canada, I have never heard of a First Nation community saying, no, we will not do that. In extreme cases when there is a prolonged drinking water advisory, other measures may be taken, such as shipping water into a community. Usually that is done by our partners at the Department of Indian Affairs. In no case should people think that communities are left on their own to deal with bad water for a long period of time.

One of the major accomplishments over the past few years of investments has been the reduction in the duration of drinking water advisories to half following the investments under the First Nations Water and Wastewater Action Plan. It is a sign that things continue to improve.

The Chair: Thank you, Ms. Woods. Senator Banks?

Senator Banks: Is Senator Dallaire not a member of the committee?

The Chair: Yes, he is.

Senator Dallaire: Should he not go first?

The Chair: This is a democracy, Senator Banks, in its purest form.

Senator Banks: Thank you. I should explain that I have a bias in this respect, not only with respect to this bill, which I oppose, but also with respect to the concept of enabling legislation or, as it is sometimes called, framework legislation. The chair will agree with me that we see much more of that today than we used to see, which was not that long ago, Senator Lang. We received enabling framework legislation much less frequently than we do now. It used to be the case that Parliament liked to say: How will this work? It would get an answer. We would then deliberate on the proposed legislation and pass it.

In this case and in the case of much enabling legislation, as the witnesses have told us in their answer to the questions, we wonder how this will work? The response seems to be: We will show you later when we get it figured out. Mr. Salembier said that First Nations will see how valuable this will be once we put those regulations into place. At his time, we have no idea what those regulations will be. That is one, but only one, reason that I oppose this bill.

I have a technical question about the bill. It has two lists in schedule 1. How does a First Nation become placed on list number one? What happens? Who decides that?

Mr. Salembier: It can be placed on lists in one of two ways. First, some First Nation communities in Yukon that do not have reserve lands technically but they want to benefit from the bill. Those First Nations would be placed on the list, together with a legal description of the lands, and then it would clarify that the protection of the bill can extend to those First Nations.

The second group would be First Nations that have entered already into self-government agreements with Canada. Among that group there are two types: Some are like Nisga'a or Tsawwassen.

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Senator Banks: Those are the only two, I believe.

Mr. Salembier: Yes. Their lands are under section 92 of provincial jurisdiction. This bill would not have impact on them. Anything they do vis-à-vis their lands and drinking water would be negotiated between them and the province. Others like West Bank First Nation and perhaps Cree-Naskapi are still under section 91. If they looked at the regulations and saw that they would give them a better level of protection than they currently have or that they can get it for free rather than spending $100,000 developing their own regime, they can simply request to be put on the list. Otherwise, the bill would not apply to them.

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Senator Banks: Some nations can request to be put on the list and other nations might be put on that list by the minister?

Mr. Salembier: That is right but only for First Nations that are not self-governing.

Senator Banks: Those that do not have a deal yet.

Mr. Salembier: Right.

Senator Banks: You addressed this before. When we are dealing with framework or enabling legislation, we cannot deal with policy. Many of the questions asked of you are on policy. How will you do this? The answers have to do with the policy of the government. We must deal with a piece of proposed legislation. At clause 6 the bill says in respect of those First Nations who are on list number one:

> (2) 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, in the event of a conflict or inconsistency between this Act and that agreement or Act.

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You addressed that earlier by saying that we are talking about land that is contiguous to a stream of water or a plant or other. Would the department be amenable to an amendment to that section that would somehow circumscribe the extent to which the extinguishment of rights, as stated in the bill, might occur by describing the kinds of land and incursions that might be made against those rights, rather than a blanket one, as set out in clause 6(2)?

Mr. Salembier: Do you want to address that, Ms. Cram?

Senator Banks: Is that not a Department of Justice question?

Ms. Cram: I guess I do not understand the extinguishment of rights aspect.

Senator Banks: Let me read it again:

> 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 in the event of a conflict or inconsistency between this act and that agreement or act.

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Comment: unconfirmed

Writ large, that is an extinguishment of rights, as I read it. The First Nation may have agreed to it; they may have looked at the regulations and said, "Yes, we can reach for that cherry that is being held out, but we agree that our self-government agreement will be abrogated by so doing." That is how I read this. Maybe I am wrong.

Ms. Cram: My learned counsel here will take that question.

Mr. Salembier: To start with, you are right. This clause would apply only in very rare cases where a self-governing First Nation has said, "Yes, we want to be part of the regime."

The reason you have a clause in there is so that you would not have a First Nation who says, "Okay, we will be part of the regime and comply with the rules" but as soon as something happens, they would then say, "Hold on, we will not comply with it any longer because we will assert our own self-government agreement, or our own act of Parliament negates the rules that we just agreed we want to be party to and to comply with in order to protect our citizens."

It is a clause that says that if as a self-governing First Nation you want to come under this — for example, perhaps they would be under the jurisdiction of a regional water authority who would be sending around inspectors that would say, "Yes, your plant operator must be certified," and for it to make any sense at all, you must ensure that once you are in, you do have to comply with it because if compliance is optional, then you have really achieved nothing.

Senator Banks: Would you be amenable to — I know it would be complicated — an amendment to this clause, clause 6 (2), which would, as I said earlier, somehow circumscribe the extent to which this would apply by a description such as the one you just gave rather than leaving it, as I see it, wide open?

Ms. Cram: Really, senator, you have raised a question about whether the government is prepared to contemplate amendments to the legislation. In answer to that, I would say the decision to amend the bill is for parliamentarians to decide and rests with this committee. We are expecting that this committee will consider if indeed they think there should be amendments to the legislation. I cannot speak on the part of the government as to what they would be prepared to contemplate. However, we are expecting that the committee could very well come up with some suggestions for improvements.

Senator Banks: Thank you. I will wait for the second round.

Senator Dallaire: As a follow-up to that, you have just argued that you need a hammer if someone does not want to play by the rules and things go bad. However, you also argued in this framework legislation that you will negotiate with every individual nation the regulations that will give them room to manoeuvre with regard to how they will be engaged in this. Is that not talking from both sides of your mouth on the same subject? If you are to work it out in the regulations, why do you need such a significant hammer in this legislation?

Ms. Cram: Self-governing First Nations only applies to those that are self-governing and have their own agreements and then choose to opt under this. Part of that is the status of their current legislation. All of those First Nations that are self-governing have legislation in place.

I am probably not using the language that the Department of Justice would, but it is a relationship of laws issue; it must be clear what regime is applying.

Also, Senator Dallaire, we do not necessarily see the regulatory process being every individual First Nation by First Nation; rather, we see it occurring on more of a regional basis. When you look at what kind of enforcement regime, et cetera, you would have, you need to have a broader base.

In addition, the starting point is we would look at the provincial regime and what you have to do to modify it so it would work well for First Nation communities. I will give you an example.

Some provincial regimes do not deal with individual wells and septic tanks; they only deal with communal systems. To have it apply on reserve, you have to look at that and say, "Working with First Nations, how would we modify this so it would actually work in a First Nations community?"

Senator Dallaire: You are the ADM for education and social development programs and partnerships; do you have similar legislation to this on the education side in order to get people to follow the rules and work out arrangements with provincial governments?

Ms. Cram: That is a good question. That is one of the big gaps on the education front. On December 9, 2010, there was an announcement made by the Minister of Indian and Northern Affairs about launching a panel of experts to look into the need for legislation in the area of education.

Senator Dallaire: We have heard much about the problems in education, but I am finding —

The Chair: Senator —

Senator Dallaire: I am coming to my point.

The Chair: Okay. I would like to stay on subject.

Senator Dallaire: I am getting there. You have your plan of action for drinking water on First Nation communities, which has been evolving quite positively, yet you bring in this requirement for legislation in 2009 after your system seems to be working and evolving quite positively. Was this requirement for legislation initiated by you in the department? Was this a political decision or a sign that your plan maybe is not working as well as you are saying and that you needed something like legislation to achieve the ultimate aim of safe drinking water?

Ms. Cram: In 2006, when we started recognizing there were serious problems with water and there needed to be far more proactive action on the part of government, we had not come to the conclusion of what was completely needed. However, we looked across the country and we saw that on reserve was the only place there was no legislation governing water.

Also, the Office of the Auditor General had made comments and the Audit of Sustainable Development had made observations about it. Thus, the government thought that this was a big gap; we can probably get so far with making improvements, but we need this extra step. Indeed, then this committee looked at the issue and also recommended that we should be looking at the legislation.

Senator Dallaire: You used the auditor, which was a big reference. This committee looked at it, and I remember being part of that. The committee also said that necessary funds for all identified resource needs for First Nation communities in relation to the delivery of safe drinking water should be dedicated by INAC and should be a pre-condition to legislation.

You are using the Auditor General as saying maybe you do not have a good grip on how the funds are being expended and the control of that, yet you did not tell us that you actually had a well-laid-out cash line of either new money or within your budget to guarantee that you would provide the resources to make this thing happen. Then you give us a framework legislation in which you will be able to articulate all kinds of regulations as per what the department wants to do. To me, that seems to be a pretty one-sided exercise. Unless it is the Auditor General ultimately referencing this, I still do not see why you need this legislation if you have a plan that is working.

Ms. Cram: I would ask the question: Why do the provinces and territories feel they need legislation in this area?

I think it is because they recognize that you do not have all the levers at your disposal if you do not have legislation in place. This is an element that we think we need to have. We do not disagree that we need to be focused on investments as well, both for infrastructure and capacity. However, you

need to have a completely well rounded approach here or we will not get the results ultimately that we need.

Senator Dallaire: I think it is inappropriate that you bring forward legislation in which you do not have the dedicated demand of cash or the cash flow requirement to implement this thing identified and laid out. As you said, you are looking at a 10-year plan. You are bringing in legislation to implement it without that plan also having been had out. I worked from a department where you could not come forward with something like this unless you had a 15-year cash line, including the lifecycle management. Yet, you are not guaranteeing that all the money will be there to implement this thing in an appropriate fashion without it being a hammer over the First Nations having to comply but not necessarily having the resources to be able to do it.

Ms. Cram: I did mention that, by 2012, we will have spent $2.5 billion.

Senator Dallaire: That does not tell me that that is the actual requirement. That says what you have been able to put into it.

Ms. Cram: We do not know. I spoke about the national assessment. Until we see the assessment, we will not know what the full need is for the 10-year growth that I spoke of. We do have $197.5 million a year in our A base for water expenditures, and we have had additional monies above that in the past, and our hope would be in the future that that would be the case.

Senator Dallaire: Well, hope is not a method, so I think this legislation is premature until you actually have your ability to guarantee the resources to implement it.

Senator Brazeau: After the work started in 2006, this was following what essentially happened in Kashechewan; is that correct?

Ms. Cram: That is correct.

Senator Brazeau: Thank you. Along the lines of Senator Dallaire's question, hypothetically, let us say this legislation does not pass. How long would First Nations people, including those living in my community, have to wait for access to clean and safe drinking water?

Ms. Cram: That is a good question.

Senator Brazeau: That is why we need the legislation.

Ms. Cram: If there is legislation, it is another way to have resources focused on the implementation of it.

Senator Patterson: Right.

The Chair: We are on the second round now.

Senator Dyck: The question that I will pose to you concerns the legislative approach you have taken in this bill. The report of the expert panel on safe drinking water identified shortcomings to proceeding with the option that you have taken, incorporating provincial laws or adaptation of

provincial laws. They noted that it appears to be the weaker option, owing to gaps and variations in these regimes, the reluctance of First Nations to accept this approach and jurisdictional complexities of involving another level of government in water management.

Why is the government proceeding with this approach, despite substantive concerns expressed by the expert panel and by many First Nations? Why and on what basis did the government reject other options that were proposed by the expert panel, such as adopting a federal statute, creating a single regime or even using Aboriginal customary law? Why did they settle on the incorporation of provincial law?

Mr. Carisse: When we were doing the engagement sessions, we went out looking at the question of incorporation of provincial regulation but with adaptations. This is the big difference. The expert panel was looking at straight incorporation by reference, which is taking what exists in the province as regulations and applying that as is to communities. We had the opportunity, when we were going across the country and meeting the first nations and the first nation organizations, to meet with with the provinces as well. They told us, for instance, in Ontario, which has the most stringent regulations, that their regulations would not work in communities. It is not because of any cultural sensitivities; it is because communities across Canada are small communities. The average is about 500 people. The regulations you would have for cities like Toronto, Ottawa and London would not work well in small communities. We knew we had to adapt those regulations. That is the big difference. We could start with a blank page or we could look at what exists in the province and, based on that, make adaptations for the needs of communities.

When we were out there, we asked as well, if this does not work, what would you recommend? The other possibility was to look at a national approach. However, it did not come out at the engagement sessions. The leadership we met with and the technicians, because of the different situations with water across the country, which are different from British Columbia to New Brunswick to Nova Scotia, said we really need a regional approach. We need to look at this by province or region. That was the decision on that.

Senator Dyck: Thank you for that answer. I am still a little uncertain with respect to who has the authority, because I do believe that a number of First Nations organizations believe that the federal government should not be imposing legislation and that they, through the band councils, have authority over construction and maintenance and so on of water systems on their reserves. There may be an issue with respect to whether you are infringing upon Aboriginal self-government — not the modern self-government, but the inherent right to self-government, which goes back to the section 35 rights that were mentioned previously. I still believe, from what I have heard, that there is a conflict with what you are saying, namely that it is acceptable. I have heard from First Nations organizations that they feel as though their rights are being infringed upon.

Ms. Cram: Certainly we have heard that. I mentioned that there are First Nations that are concerned. A number of First Nations expressed a variety of concerns. One is infringement of Aboriginal and treaty rights.

Senator Patterson: This is a follow-up to my earlier question on the non-derogation clause and why you proceeded by regulation. This is a real nitpicking question, but I am curious about it.

There is a non-derogation clause relating to regulations and regulatory power in the First Nations Commercial and Industrial Development Act. I see Mr. Salembier is familiar with that. What has my attention is that that clause in that bill uses different words than the clause before us in Bill S-11. The differences of words is that the Commercial and Industrial Development Act talks about a non-derogation clause limiting the extent to which the regulations may abrogate or derogate from Aboriginal rights, whereas in Bill S-11, the clause talks about the extent to which the regulations may abrogate or derogate. One seems to be more permissive and one suggests defining the extent to which Aboriginal rights can be limited.

Was the first clause, on experience, found to have been inadequate or in need of improvement? Can you explain that difference, please?

Mr. Salembier: Yes. If you compare the French version of the two clauses in those bills, you will find that they are identical. The fact of the matter is, in the clause in this bill, I will frankly admit an error was made in one of the late stages of drafting the bill and the word “limiting” was, by accident, dropped out. It had never been the intention that this clause should differ at all from the clause in the First Nation Commercial and Industrial Development Act. As I said, the French version is identical to that and includes the phrase “limite.” In the French version it is there. Frankly, it was simply an error and there was never an intention that this was to mean anything different and the intention was always that that clause was intended to permit something to go in the regulations that would limit the extent that the regulations abrogate or derogate, not that the clause would expand the ability of the regulations in that respect at all.

Senator Patterson: Is this something that we should recommend being fixed?

Mr. Salembier: It is certainly open to this committee.

Senator Patterson: I am not asking you, but it is something that the department would be open to accepting a recommendation of that kind given what you have said?

Ms. Cram: Yes.

Mr. Salembier: Yes.

The Chair: Are you okay, Senator Patterson?

Senator Patterson: Yes, and I think Senator Dyck covered the other question I had on the provincial laws.

Could you generally describe the reception you are getting in the regions of Canada on this bill? I understand that there was a summary report prepared by the institute on governance on the engagement sessions that were held that you have described. According to that report, there was pretty strong criticism from the vast majority of participants in Alberta, Quebec, Nova Scotia, and Ontario, and even some refusal to engage on the issues presented by federal officials.

You talked tonight about an endorsement from an Atlantic group, which I presume might have included Nova Scotia, so maybe the concern about the legislation around engagement has diminished.

I did meet with the chiefs from Ontario and found some pretty strong opinions against this legislation on the jurisdictional grounds.

Where are we in terms of these regions: Alberta, Quebec, Ontario, and Nova Scotia now? Are you still recommending that we go ahead despite these concerns from some fairly big areas of the country, Quebec and Ontario? Could you give us an update on that please?

Mr. Carisse: Yes. To go back to the engagement sessions, there were some positive ones. We heard some good information from the leadership and the technicians. However, there were also others, let us say Alberta, where they had issues with the engagement session itself and the amount of consultation, et cetera. Consultation is a very loaded word and it is difficult to define at this point. We have done the utmost we could up to four years now of engaging.

Where we stand now, in the Atlantic we had two sessions during those engagement sessions, one just for the Nova Scotia chiefs and another one in Moncton, where we had representatives from the chiefs from New Brunswick, from Newfoundland and Labrador, and Prince Edward Island.

Working with the Atlantic Policy Congress, the APC, they have passed a resolution to look at where to go with legislation in working with us and that group includes the Nova Scotia chiefs. They are within that sphere.

With Quebec, with AFNQL, they also are willing to go forward and work with us. They passed a resolution. It is not necessarily full endorsement of the legislation — I do not want to mislead you — but they believe legislation of regulations is needed and how can we move forward to work with the regulations and if there are issues they have with the legislation.

We were going to present in November both to Treaty 6 in Alberta and then a presentation to the Association of Treaty Chiefs, so all three treaty areas were there. No one around that table, those chiefs, said they did not want legislation or regulations. They are all on board. However, there were some issues they had with the legislation itself and I am sure from the witnesses you are going to hear you will hear about some of those issues.

Everyone is committed — at least those chiefs — to see and to ensure they do have clean, safe drinking water in their communities and they acknowledge that having regulations will help make that happen.

Senator Banks: I do not think we would be able to find any representative of any First Nations, big or small, who would disagree with the concept that we need to have legislation. We need to have regulation — enforceable regulation in that legislation. I think no one would disagree with that. I do not disagree with that.

However, I think you will find chair, from witnesses that you will hear, that while there is endorsement of that concept, there is no that I have ever been able to find yet endorsement of this legislation as it exists before us.

One of the reasons is, as Ms. Cram mentioned, the results of the assessment will be available this spring. I think you said that.

Ms. Cram: Yes, I did.

Senator Banks: Here is the legislation. We are going ready, fire, aim and that just is not the right order of things, in my view.

I will ask a quick question or two. I am assuming that you have all read the expert panel's report. The expert panel's report did not say much about consultation. The report said it required legislation, regulations with teeth and required that that legislation be developed not in consultation with the First Nations but with the participation — quite a different matter — of the First Nations and it should be based on First Nations' concepts of First Nations' law. Am I recalling that correctly?

Ms. Cram: That was one of the options that the panel recommended. There were three options they recommended. What you have just described was an option they referred to as customary law.

Senator Banks: What were the other two options?

Ms. Cram: One would be federal legislation that was nationwide, and the other one was the approach that we are following here that would be federal framework but it would be provincial enabling of regulations.

Senator Banks: I suppose I had a different impression of the extent to which the expert panels wanted to ensure the involvement in the process of First Nations in the proprietary sense. I had better go back and read the panel report again.

I have one final comment, chair. Senator Patterson has referred to the non-derogation clause. I would suggest that the clause here, on page 6(1)(r) I think it is, is not a non-derogation clause. It is a derogation clause. I believe Mr. Salembier will agree if you took randomly 25 different sets of federal statutes that contain a form of non-derogation clause you could find 25 different versions of a non-derogation clause because the wording has never been consistent before, or anything remotely like this, it usually began with language along if lines of “nothing in this legislation shall” and then went on and got fuzzier and fuzzier as time went on after that.

This is a clause — and I am asking Mr. Salembier if he agrees with this — that actually contemplates and acknowledges that there will be derogation from the rights given under section 35.

Mr. Salembier: Technically it is not a non-derogation clause because it is in a list of enabling powering. It confirms that the regulation itself can include such a clause.

I would anticipate that if the regulations were to include a clause it would look very much like one of five or six different models out there over about 19 pieces of federal legislation, so I would assume it would look very much like one of those clauses when it is in the regulation.

Senator Banks: At the very least, chair, I hope we will do what Senator Patterson suggested, which is translate the French into English so that the word “limiting” is there.

The Chair: I think the witnesses have agreed that this is a possibility and we will deal with that I am sure.

Senator Dallaire: When you were in the process of bringing in this legislation, did you indicate to the different regional groups — or whichever groups, however the meetings were structured — that this legislation would actually give them a higher guarantee that funding would be made available to implement the infrastructure and the O&M of the water systems that they need to meet the standards?

Ms. Cram: No.

Senator Dallaire: Good. Therefore, that goes against what we said earlier. This has nothing to do with a guarantee of funding. This is one of the tools that hopefully the minister will consider when giving his cash line on the various priorities he has in putting funds into the safe water side.

How many signed documents do you already have from the provincial governments that they are prepared to implement clause 5, which is the enforcement of regulations? Do you have actual agreements that they are prepared to expend the funds and also become engaged in doing that regulatory work and policing?

Mr. Carisse: We had exploratory discussions with the provinces to see if there was any openness to do that or to just play a role in regulating water on reserve, which could be limited to providing training, for instance. We will know the role of the provinces as we roll out the regulations province by province.

We mentioned to chiefs and to leadership that there are different possibilities to do the enforcement and compliance. You can either have a federal body do this or you can have a First Nation aggregation do this, or a mixture. The legislation is enabling and it gives us that opportunity, once we go into each province. We want to do this in partnership with First Nations and with the organizations there, to decide what would be the best solution for enforcement in each province.

Senator Dallaire: The word "may" is your trigger word that you are hanging your hat on. If they do not want to play along, then do you have the capacity to do that job?

Mr. Carisse: To tell you the truth, there are some communities that will be opposed to having the province coming into their communities. We went up to the N.W.T. There are only two communities there on reserve: Salt River and Kadaladichi. The GNWT is already playing a role there now. They would maybe not have a big problem in having the territorial government there.

ngrindley 3/2/11 2:46 AM
Comment: cannot find reference

ngrindley 3/2/11 2:46 AM
Comment: http://www.daair.gov.nt.ca/_live/pages/wpPages/SaltRiverFirstNationONE.aspx

Be that as it may, when we do the regulations, we will see who would be best suited to do that. If it is not the province, we are left with two options, which will be the federal government or a First Nation aggregation. Talking with the Atlantic Policy Congress, they are contemplating in their proposal to see a First Nation body play a certain role in the Atlantic on what that can mean.

ngrindley 3/2/11 2:46 AM
Comment: http://www.apcfnc.ca/en/

The Chair: I have one quick question. You say you will consult with the First Nations on regulations and their development, which I believe. The provinces and territories, however, are at various stages of development.

Will you consult the affected First Nations each time a province or a territory introduces or amends their regulations with regard to that? How will that work?

Mr. Carisse: If we do straight incorporation by reference, it would be different. If the province would change their regulations, it would happen automatically. However, that is not what we are contemplating. We will still be looking at provincial regulations. We will amend them or change them as much as we think is necessary, working in partnership with First Nations to make something that works for First Nations.

If the province changes the regulations, it will still be up to the government, and working with the First Nations, to decide whether we should mimic those changes in their regulations into the federal regulations that we would be going forward with.

The Chair: On behalf of the committee, I would like to thank all of you from your various departments. Thank you for the excellent presentation, Ms. Cram, and for the straightforward, candid responses to the questions. I look forward to hearing future witnesses on this bill.

We will be working at this fairly aggressively, colleagues. The library will be supplying you with the information you need. If you need any help, let us know, because we would like to make this thing work sooner than later.

If there is no other business, the meeting is adjourned.

(The committee adjourned.)