

**A Brief Analysis of Bill S-11: *Safe Drinking Water for First Nations Act***

**By**

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**National Environment, Energy and Resource Law Summit**

**Banff, 2011**

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### **1. INTRODUCTION**

The lack of safe drinking water in First Nations communities is a long standing issue in Canada. A 1995 assessment of on reserve drinking water systems undertaken by Health Canada and the Department of Indian Affairs and Northern Development found that 25% of the systems posed potential health and safety concerns to the consuming populations. A follow-up study in 2001 found almost 75% of the systems posed significant risks.<sup>1</sup> As of January 31st, 2011, there remain 116 First Nations communities across Canada under a drinking water advisory.<sup>2</sup> This represents approximately 15.5% of the 740 community water systems on reserves assessed by the federal government. The statistic does not include those systems that were labeled at a high risk of tipping water quality to the point of requiring advisory status.

### **2. THE LAST 15 YEARS**

#### **a The Legal Regime**

The federal government has clear authority to construct a regulatory framework for drinking water and waste water on First Nations' lands by virtue of their constitutional authority over Indians and Indian reserves,<sup>3</sup> fisheries,<sup>4</sup> health,<sup>5</sup> criminal law,<sup>6</sup> trade and commerce,<sup>7</sup> POGG

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\*Note. All online sites were accessible as of March 19, 2011.

<sup>1</sup> Standing Senate Committee on Aboriginal Peoples, "Final Report. Safe Drinking Water for First Nations" (Ottawa: May 2007), available online at <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep08jun07-e.htm>> (Standing Committee Report 2007).

<sup>2</sup> Health Canada, "First Nations and Aboriginal Health: Drinking Water and Wastewater", available online at <<http://www.hc-sc.gc.ca/FNiah-spnia/promotion/public-publique/water-eau-eng.php>>.

<sup>3</sup> *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. Section 91(24).

<sup>4</sup> *Ibid.* Section 91(12).

<sup>5</sup> *Ibid.* Section 91 and 91(24). A full discussion of the extent of federal authority over health may be found at Commission on the Future of Health Care in Canada. "Constitutional Jurisdiction Over Health and Health

(environment),<sup>8</sup> and even navigation.<sup>9</sup> Prior to the introduction of Bill S-11, the legislative regime has been piecemeal with no statute to comprehensively regulate drinking and waste water management on First Nations lands. There are however, federal statutes that include provisions which may boot strap regulation to address specific First Nation water management needs.

For example, the *Canadian Environmental Protection Act* (CEPA),<sup>10</sup> mandates the control of toxins and nutrients in water sources which impact on the environment and/or human health. However, few standards have been established under the Act. In addition, pursuant to Part 9 of CEPA the Minister shall, after consultation,<sup>11</sup> establish objectives, guidelines and codes of practice<sup>12</sup> or may make regulations<sup>13</sup> which address environmental aspects of water management. The *Fisheries Act*<sup>14</sup> powers related to the protection of fish and fish habitat, a longtime source of water protection and waste water management, are also available on reserve. The *Canada Water Act*,<sup>15</sup> remains little used. The *Canadian Environmental Assessment Act*<sup>16</sup> process applies on reserve lands and is triggered by, among other events, oil and gas activities under the *Indian Oil and Gas Act*<sup>17</sup>—again a back door means of protection in limited circumstances. The *Department of Health Act*<sup>18</sup> states that “[t]he powers, duties and functions of the Minister extend to...the promotion and preservation of the health of the people of Canada not

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Care Services in Canada” Paper no.12 by Howard Leeson (Ottawa, 2002), available online at <<http://dsp-psd.pwgsc.gc.ca/Collection/CP32-79-12-2002E.pdf>>.

<sup>6</sup> *Ibid.* Section 91(27).

<sup>7</sup> *Ibid.* Section 91(2).

<sup>8</sup> *Ibid.* Section 91.

<sup>9</sup> *Ibid.* Section 91(10).

<sup>10</sup> *Canadian Environmental Protection Act, 1999*, S.C., 1999, c.33 (CEPA).

<sup>11</sup> *Ibid.* CEPA s. 208(2) and 209(3).

<sup>12</sup> *Ibid.* CEPA s. 208(1).

<sup>13</sup> *Ibid.* CEPA s. 209(1) & (2).

<sup>14</sup> R.S.C., 1985, c. F-14.

<sup>15</sup> R.S.C., 1985, c. C-11.

<sup>16</sup> S.C. 1992, c. 37.

<sup>17</sup> R.S.C. 1985, C.I-7. (Indian Oil and Gas Act).

<sup>18</sup> S.C. 1996, C.8. (Health Act).

by law assigned to any other department, board or agency of the Government of Canada.”<sup>19</sup> Health Canada has established “Guidelines Canadian Drinking Water Quality,”<sup>20</sup> however the department staunchly maintains an advisory role only: they will, for example, recommend a boil water advisory to a First Nation but the authority is left with the individual nation to issue the order.

“No law now requires the monitoring of drinking water quality or safety for First Nations communities. In practice, a duty is imposed on each individual First Nation to assure a certain level of water quality as terms of individual funding arrangements with specific First Nations as noted in the 2005 report from the Commissioner of Environment and Sustainable Development.”<sup>21</sup>

The 2006 Protocol for Safe Drinking Water in First Nations Communities<sup>22</sup> which outlines standards for design, construction, operation, maintenance, and monitoring of drinking water systems is often incorporated into funding documents. Developed by First Nations representatives, Indian & Northern Affairs Canada (INAC), Public Works, the First Nations and Inuit Health Branch (FNIHB) of Health Canada, and Environment Canada, the Protocol has a carrot and stick approach stating,

Any water system that produces drinking water destined for human consumption, that is funded in whole or in part by INAC, and that serves five or more households or a public facility must comply with the requirements of this protocol.<sup>23</sup>

Although INAC is not charged specifically with matters relating to water management, the broad based powers of the Minister under the Department of *Indian Affairs and Northern Development*

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<sup>19</sup> *Ibid.* Health Act, s. 4.

<sup>20</sup> Health Canada. Guidelines for Canadian Drinking Water Quality. Index available online at <<http://www.hc-sc.gc.ca/ewh-semt/water-eau/drink-potab/guide/index-eng.php>>.

<sup>21</sup> Linda Duncan & M.A. Bowden, “A Legal Guide to Aboriginal Drinking Water: a Prairie Province Perspective” (Alberta Law Foundation/Walter and Duncan Gordon Foundation: 2010) at 41 (Bowden & Duncan).

<sup>22</sup> INAC, “Protocol for Safe Drinking Water in First Nations Communities”, available online at <<http://www.ainc-inac.gc.ca/enr/wtr/pubs/sdw/sdw-eng.asp>> (Protocol). The Protocol was developed as part of the First Nations Water Management Strategy. See discussion *infra*, in and around footnote 36.

<sup>23</sup> *Ibid.* Protocol at 2

*Act*<sup>24</sup> (now known as INAC) can arguably go beyond contractual options to support the administration of a First Nations water management statute.<sup>25</sup>

Within the *Indian Act*<sup>26</sup> sections 73(1)(f) and (k) state the regulations may be passed to prevent, mitigate, and control the spread of disease on reserves, and to provide for sanitary conditions in public and private residences, however no regulations have been passed pursuant to these sections. In the opinion of the Expert Panel on Safe Drinking Water for First Nations (Expert Panel),

.....the regulation-making power under the *Indian Act* cannot deal with the complexity of modern water and wastewater regimes:

- The Act does not provide for the inspection and investigation powers necessary for enforcement of a water regulatory framework on reserve.
- The regulations may only be enforced by insignificant fines (not exceeding \$100) or imprisonment for a term not exceeding three months.
- Although regulations could cover approval of a facility, the Act does not provide for the creation of an arm's-length body independent of INAC to issue the approval. As a result, either INAC would both fund facilities and issue the approvals, or INAC and a second federal department would assume those respective roles. Either situation would create a conflict because the same level of government funding a facility would potentially issue orders requiring further spending to correct problems.<sup>27</sup>

There is authority within section 81(1) of the *Indian Act* for First Nations councils to pass bylaws relating to the use of public wells, cistern, reservoirs and other water supplies to prevent the spread of infectious diseases. However the Expert Panel noted that inspection and investigative powers are not provided within the legislation and even if the Federal government were to develop a model by law, issues remain with a First Nation owning, operating and regulating a

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<sup>24</sup> R.S.C., 1985, c. I-6.

<sup>25</sup> INAC, "Report of the Expert Panel on Safe Drinking Water for First Nations". Vol. 1 and 2. (Ottawa: November 2006). Expert Panel Report 2 at 22. Both volumes are available online at <[http://www.sdw-eps.gc.ca/rprt/index\\_e.asp](http://www.sdw-eps.gc.ca/rprt/index_e.asp)>. (Expert Panel Report 1 and Expert Panel Report 2).

<sup>26</sup> R.S.C., 1985, c. I-5.

<sup>27</sup> *Supra* note 25. Expert Panel Report 2 at 24.

facility.<sup>28</sup>

Environmental protection and the provision of local services are within the purview of those First Nations who have established a land management code under the *First Nations Land Management Act*.<sup>29</sup> However, such legislation is required to meet the minimum standard set in any applicable federal legislation, and drinking water standards must similarly mimic or exceed the provincial law where the reserve is located.<sup>30</sup> As of August 2010, 29 First Nations are operating under land codes.<sup>31</sup> According to available data, no First Nation has a code based water regulation.<sup>32</sup>

## **b. Funding**

The Federal Government has invested millions in attempts to respond to the infrastructure issues. Between 1995 and 2001, \$560 million were dedicated to system upgrades plus annual funding and maintenance support of \$100-125 million. In 2003 an additional \$600 million were authorized over five years to implement the First Nations Water Management Strategy.<sup>33</sup> In spite of this, commitment incidents of unsafe drinking water continued: the most publicized example, the 2005 evacuation of the Kashechewan reserve in northern Ontario. After two years of boil water advisory status, residents were ordered to leave by the province when drinking water

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<sup>28</sup> *Ibid.* Expert Panel Report 2 at 27.

<sup>29</sup> 1999, S.C., 1999, c. 24.

<sup>30</sup> *Supra* note 22. Duncan & Bowden at 45.

<sup>31</sup> INAC “*First Nations Land Management Act*. Introduction”, available online at <<http://www.ainc-inac.gc.ca/br/mrp/ip/ipn8-eng.asp>>.

<sup>32</sup> *Supra* note 25. Expert Panel Report 2 at 27. Confirmed in conversation with FNL Mgr. March 18, 2011.

<sup>33</sup> INAC, “Summative Evaluation of the First Nations Water Management Strategy,” Project 06/13 (Ottawa: December 2007), available online at <<http://www.ainc-inac.gc.ca/ai/arp/aev/pubs/ev/eFNw08/eFNw08-eng.asp>>. According to INAC the \$484.1million allocated to the Department represented 25-30% of total INAC funding devoted to water and wastewater systems in First Nations communities.

showed elevated levels of E. coli.<sup>34</sup>

In the 2008 federal Budget an addition \$330 million were dedicated to improving access to safe drinking water on reserves over two years, a sum that was supported by a further two year commitment of \$330 million in 2010 as part of the renewed First Nation Water and Wastewater Action Plan. In addition \$165 million dollars were allocated in 2009 via the budget for on-reserve infrastructure upgrades for 18 designated projects.<sup>35</sup>

Although the commitment has been substantial, the results are far from heartening.

### **c. Capacity Building**

It is undisputable that residents of First Nations communities do not benefit from a level of protection of drinking water comparable to that of Canadians who live off reserve. Though undeniably dependent on infrastructure, the source of the water quality challenges goes beyond mere dollars and cents for waste and drinking water systems to failure in a number of areas including: source water protection, insufficient support for maintenance and upgrading initiatives, lack of technical support, the need for training and retention of licensed system operators, and problems with non-regulatory standards for monitoring, testing and measuring drinking water and wastewater—to name but a few issues.

In fairness, the federal government has repeatedly committed administrative resources to these

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<sup>34</sup> For a complete account of the Kashechewan saga see CBC “Toxic Water: the Kashechewan Story” *CBC News in Review* (December 2005) at 20.

<sup>35</sup> Parliamentary Information and Research Service, “Safe Drinking Water in First Nations Communities” by Tonina Simeone, Background Paper (Library of Parliament, May 28, 2010), available online at <<http://www2.parl.gc.ca/content/LOP/ResearchPublications/prb0843-e.htm>>.

concerns. When the 1995 and 2003 audits INAC and Health Canada revealed that notwithstanding \$1.9 billion worth of expenditures, efforts to improve drinking water quality on reserve were making little headway, the federal government approved the 2003 First Nations Water Management Strategy. In addition to financial commitments for the design and construction of water and waste water facilities the Strategy pledged to:

1. re-design pro-active water quality monitoring, reporting, and compliance programs
2. implement water quality management protocols consistent with federal standards, including emergency response provisions
3. design and implement an operation and maintenance program including expanded support for operator training (including mandatory certification)
4. initiate a multi-barrier approach and
5. institute a public awareness and education campaign directed at decision-makers, First Nation communities and households.<sup>36</sup>

In spite of efforts, two years later the Report of the Commissioner of the Environment and Sustainable Development (CESD Report) outlined continuing substandard levels of drinking water protection for First Nations communities relative to those off reserve, significant deficiencies in design, construction, maintenance, and operation of water systems, and fragmented institutional support to assist in capacity building.<sup>37</sup> In assessing the success of INAC and Health Canada, the Commissioner concluded,

“In our view, until a regulatory regime comparable with that in provinces is in place, INAC and Health Canada cannot ensure the First Nations people living on reserve have continuing access to safe drinking water...As a minimum, this regime should deal with roles and responsibilities, water quality requirements, technical requirement, certification of systems and operators, compliance and enforcement, and public reporting requirements.”<sup>38</sup>

INAC responded within the document stating that they would,

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<sup>36</sup> INAC, “Description of the Horizontal Initiative (including funding agreement),” First Nations Water management Strategy, available online at <<http://www.aic-inac.gc.ca/ai/arp/es/0708/FNwms/FNwms-eng.asp>>.

<sup>37</sup> Auditor General of Canada, “The 2005 Report of the Commission of the Environment and Sustainable Development. Chapter 5. Drinking Water in First Nations Communities” at 1-2 (Ottawa: 2005), available online at <<http://www.oag-bvg.gc.ca/internet/docs/c20050905ce.pdf>>. (CESD Report).

<sup>38</sup> *Ibid.* CESD 2005 at 12.

“together with Health Canada and in consultation with First Nations...fully explore the options and feasibility of a regulatory regime with all other stakeholders for drinking water on reserve....including establishing new legislation, regulations, and enforcement mechanisms.”<sup>39</sup>

Although the First Nations Water Management Strategy continued, the CESD Report, coupled with the publicity associated with Kashechewan, sparked INAC Minister Prentice, along with Assembly of First Nations Chief Phil Fontaine, to announce the Plan of Action for Drinking Water in First Nations Communities in March of 2006. The plan “added emphasis and action” to existing efforts, supported by an additional \$60 million infusion funding over 2 years.<sup>40</sup> Incorporating the recommendations of the CESD Report, the plan specifically undertook to: establish a protocol on water standards, ensure training and oversight of certified trainers, address high risk systems (beginning with a priority list of 21 communities, and provide on-going progress reports. Most notably from the legal perspective, government committed to the establishment of an expert panel to advise on a regulatory framework to ensure safe drinking water in First Nations communities.<sup>41</sup>

### **c. The Role of the Expert Panel on Safe Drinking Water for First Nations and the Senate Standing Committee on Aboriginal Peoples**

The three person Expert Panel,<sup>42</sup> (which included First Nations representation) was tasked to submit an options paper to the INAC Minister within three months. Understandably, the Panel

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<sup>39</sup> *Ibid.* CESD 2005 at 12.

<sup>40</sup> INAC, “Plan of Action for Drinking Water in First Nations Communities: Progress Report” (Ottawa: January 17, 2008) at 1-2, available online at <<http://www.ainc-inac.gc.ca/enr/wtr/pubs/prpf/pad08/pad08-eng.asp>>.

<sup>41</sup> *Ibid.* Plan of Action.

<sup>42</sup> Appointed by the INAC Minister, the National Chief of the Assembly of First Nations (AFN), the Minister of Health, and the and the Minister of Environment. INAC “Government Announces Expert Panel To Advise On A Regulatory Framework To Ensure Safe Drinking Water In First Nations Communities” News Release (May 31, 2006), available online at <<http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2006/2-02764-eng.asp>>.

was unable to meet the tight timeframe, particularly in light of the 9-stop cross country public hearing schedule undertaken during the summer and fall months of 2006.<sup>43</sup> Remarkably however, a report was completed, presented to an AFN Special Chiefs Assembly, and tabled in the House of Commons on December 7, 2006.<sup>44</sup>

The report recommended the creation of a new, “clear and unambiguous” legal basis for a regulatory regime for reserves across Canada.<sup>45</sup> The source of the regime was less clear—the Panel presenting 5 alternatives:

1. existing provincial regimes could be used, as “laws of general application;
2. regulations could be passed by Orders in Council under existing federal statutes;
3. Parliament could enact a new statute setting out uniform federal standards and requirements;
4. Parliament could enact a new statute referencing existing provincial regulatory regimes; or
5. First Nations could develop a basis of customary law that would then be enshrined in a new federal statute.<sup>46</sup>

The uncertainty associated with option one and the inadequacy of existing statutes upon which to base regulation under option two, removed them both from further consideration by the Panel.

Left with the alternatives for either a new federal statute, a federal statute referencing provincial regulatory regimes, or a federal statute based on customary law, the Expert Panel Report debated the advantages and disadvantages of each option. Although not specifically endorsing any one of the three, the Expert Panel noted that federal legislation referencing provincial statutes and

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<sup>43</sup> According to the Panel Report, *supra* note 25. Expert Panel Report 1 at 3 over 110 presentations were made to the panel including individual First Nation communities, First Nations organizations, federal and provincial departments with drinking and wastewater responsibilities, private sector organizations and NGOs. Copies of the submissions are available at <[http://www.eps-sdw.gc.ca/inlv/sbms\\_e.asp?uDscIm=1](http://www.eps-sdw.gc.ca/inlv/sbms_e.asp?uDscIm=1)>.

<sup>44</sup> *Supra* note 40. Plan of Action.

<sup>45</sup> *Supra* note 25. Expert Panel Report 1 at 47.

<sup>46</sup> *Ibid.* Expert Panel Report. Volume 2 of the Report was dedicated to the analysis of the options.

regulation “appears to be a weaker option owing to gaps and variations in those regimes, the complexity of involving another level of government, and lower acceptability to many First Nations.”<sup>47</sup> As between the remaining two options, attention was drawn to the time and methodological uncertainties associated with constructing a regime based on customary law. In contrast the Assembly of First Nations preliminary analysis and response to the Report was more supportive of the customary law regime option than was the expert Panel, believing it to be more consistent with Nation-building,<sup>48</sup> (though in their opinion, none of the panel’s options recognized the inherent jurisdiction of First Nations.)<sup>49</sup>

According to the Expert Panel the success of any of the regulatory options was predicated upon three conditions outlined in the report. First, no scheme could proceed without adequate capacity to meet the regulatory requirements—capital, operational, and maintenance funding plans were necessary. Second, whether by virtue of a legal duty to consult or simply to ensure that any approach would be “effective and responsive”, discussion with First Nations was essential. Finally, anticipating that implementation of any option would take up to several years, the Expert Panel called upon the government to immediately deal with high risk communities.<sup>50 51</sup>

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<sup>47</sup> *Ibid.* Expert Panel Report 1 at 59.

<sup>48</sup> Assembly of First Nations, “Expert Panel Report On Safe Drinking Water For First Nations”, AFN Panel Position Paper (January 2007), available online at <<http://64.26.129.156/cmslib/general/water-panel-report.pdf>>.

<sup>49</sup> At the Standing Senate Committee on Aboriginal Peoples the AFN supported an interim federal regime of national standards which would ultimately be replaced when First Nation were in a position to exercise independent jurisdiction over water management. *Supra* note 1. Standing Committee Report 2007 at 6.

<sup>50</sup> *Supra* note 25. Expert Panel Report 1 at 49- 50.

<sup>51</sup> The immediate government response to the Report was guarded—the INAC Minister making no particular commitments past receipt of the report. See INAC, “Reporting Progress on Plan of Action for Drinking Water in First Nations Communities: Government Tables Expert Panel Report” Media Release (Ottawa: December 7, 2006). A website summary of the report, responding to the question of “next steps”, simply stated, “The Minister of Indian and Northern Affairs will review the report and in consultation with his colleagues, he will make a decision on the next steps”. INAC. “Frequently Asked Questions on the Final Report”, available at <[http://www.sdw-eps.gc.ca/rprt/qstn\\_e.asp](http://www.sdw-eps.gc.ca/rprt/qstn_e.asp)>.

The immediate response to the report was muted: INAC, Health Canada and Environment Canada committed only to an extensive analysis of the Expert Report. The AFN, recognized the importance of the three conditions, noting in particular,

The AFN continues to collaborate with the government .... The AFN expects that the Minister will consult with the National Chief prior to making a decision on which recommendation he will support. Following this announcement, the AFN will insist on an extensive consultation process, with involvement from AFN and the regional offices, on the Expert Panel report recommendations.<sup>52</sup>

Following the Expert Panel report, government policy makers were offered further input from the Standing Committee on Aboriginal Peoples<sup>53</sup> in May of 2007. Requested by fellow Senators to examine and report on “recent work completed in relation to drinking water” including the Expert Report, the Commissioner’s Report, and the Plan of Action, the Standing Committee acted expeditiously, delivering a report to the Senate two months after the Order of Reference.<sup>54</sup> Succinct and to the point it made only two recommendations. First, the Committee recommended a needs assessment (both physical and human resources) of First Nations water system facilities by DIAND (INAC) to ensure delivery of safe drinking water (along with a consequent dedication of resources to secure that end). Not surprisingly, the Standing Committee’s second recommendation was that DIAND (INAC) undertake comprehensive consultation with First Nations with an aim of “collaboratively developing”<sup>55</sup> legislation.

With regard to the legislative options set out in the Expert Panel report, after examining the evidence, the Standing Committee admitted it was “mystified”<sup>56</sup> by the testimony presented by

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<sup>52</sup> Assembly of First Nations, First Nations Water Initiative: Introduction, <http://64.26.129.156/article.asp?id=2844>.

<sup>53</sup> *Supra* note 1. Standing Committee Report 2007.

<sup>54</sup> Journals of the Senate, Order of Reference for 39<sup>th</sup> Parl. 1st Session, Thursday, March 29, 2007.

<sup>55</sup> *Supra* note 1. Standing Committee Report 2007 at 7.

<sup>56</sup> *Ibid.* Standing Committee Report 2007 at 6.

DIAND (INAC) officials who “indicated their intention to proceed with legislation to regulate safe drinking water on-reserve by incorporating provincial water laws in new federal legislation.”<sup>57</sup> In their report the Standing Committee stated,

The Committee is left to wonder at the Department’s intention to proceed with a legislative scheme that is not only incomplete, but that may also find little support among those who must apply, and comply with, the legislation.<sup>58</sup>

Nonetheless, in January of 2009 the government undertook consultation with First Nations, territorial and provincial governments on the scope and content of legislation for drinking and waste water management on reserve predicated on the preferred federal option of incorporation by reference.<sup>59</sup> According to INAC, 544 individual First Nations participated in one of 13 engagement sessions.<sup>60</sup> INAC indicated that post the engagement sessions recommendations would be made to the Minister and legislation drafted. Only when the legislation passed was further “engagement” with First Nations contemplated.<sup>61</sup>

### **3. BILL S-11: THE SAFE DRINKING WATER FOR FIRST NATIONS ACT<sup>62</sup>**

On May 26<sup>th</sup>, 2010 Bill S-11, *An Act respecting the safety of drinking water on First Nations lands (Safe Drinking Water for First Nations Act)* was introduced in the Senate. The Bill contains only 14 clauses plus a preamble. The latter simply states the justification for the statute: an effective regulatory regime is necessary to ensure that residents on First Nations’ lands have

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<sup>57</sup> *Ibid.* Standing Committee Report 2007 at 5.

<sup>58</sup> *Ibid.* Standing Committee Report 2007 at 6.

<sup>59</sup> INAC, “Drinking Water and Wastewater in First Nations Communities Discussion Paper: Engagement Sessions On The Development Of A Proposed Legislative Framework For Drinking Water And Wastewater In First Nations Communities.” Discussion Paper (Winter 2009), available online at <<http://www.ainc-inac.gc.ca/ent/wtr/h2o/dsp-eng.pdf>>. (INAC Engagement 2009).

<sup>60</sup> Parliamentary Information and Research Service, “Bill S-11: The Safe Drinking Water for First Nations Act” by Nicholas Auclair & Tonina Simeone, Legislative Summary (Library of Parliament, June 10, 2010) at 4, available online at <<http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/s11-e.pdf>>.

<sup>61</sup> *Supra* note 59. INAC Engagement 2009 at 4.

<sup>62</sup> Bill S-11, *An Act respecting the safety of drinking water on First Nations lands (Safe Drinking Water for First Nations Act)* 3rd Sess., 40<sup>th</sup> Parl. 2010 (Bill S-11). (seconding reading December 14<sup>th</sup>, 2010).

access to safe drinking water and, existing laws do not provide sufficient authority to establish a successful regulatory regime necessary to achieve this important end. Thus, the statute attempts to establish the necessary skeletal framework for drinking and wastewater management on First Nations' lands, placing high reliance on the flesh of regulation.

#### **a. The Regulatory Scope**

Section 3 of the Bill outlines the powers of the INAC Minister to make regulations respecting, source water protection, drinking water and waste water infrastructure (design, construction, maintenance, operation, and de-commissioning), waste water quality control (monitoring, sampling, testing, collection, treatment and reporting), distribution by truck,<sup>63</sup> and the training and certification of infrastructure operators.

The Minister of Health is empowered to make complimentary regulations respecting standards for water quality on First Nations' lands<sup>64</sup> along with the necessary authority regarding monitoring, sampling, and reporting of tested water.<sup>65</sup> In the case of water contamination, that same Minister retains the authority to regulate emergency measures.<sup>66</sup>

Section 4 of the Act provides an extensive list of powers that may be addressed through regulation including classification of systems, fee structures, establishment of summary offences for contravention of the regulations (including fines and terms of imprisonment), administrative

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<sup>63</sup> The regulation of water haulers off federal lands is far from comprehensive across the country. Federally there are no regulations governing water hauling. 25% of houses on prairie reserve lands use cisterns as their household water source. See *supra* note 22. Bowden & Duncan at 69-70.

<sup>64</sup> *Supra* note 62. Bill S-11, s. 3(2).

<sup>65</sup> *Ibid.* Bill S-11, s. 3(2).

<sup>66</sup> *Ibid.* Bill S-11, s. 3(3).

penalties, investigative provisions, permit requirements, environmental assessment requirement, and other administrative procedures found in similar provincial water management legislation.<sup>67</sup>

The regulations may prove to be identical, rather than similar, to provincial legislative regimes in that section 4(3), reflecting the stated preferred option of the federal government, provides that “the regulations may incorporate by reference laws of a province, as amended from time to time, with any adaptations that the Governor in Council considers necessary”. Further, section 4(4) allows for variance of the regulations from province to province and even within each province from First Nation to First Nation.

A precedent for incorporation by reference in the natural resources area is found in the federal Indian Oil and Gas Regulation<sup>68</sup> (passed pursuant to the act of the same name<sup>69</sup>) which governs exploration and development on reserves.

4. It is a condition of every contract that the operator will comply with

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(c) unless otherwise agreed to by the Minister and specified in the contract, all provincial laws applicable to non-Indian lands that relate to the environment or to the exploration for, or development, treatment, conservation or equitable production of, oil and gas and that are not in conflict with the Act or these Regulation

The positive side of incorporation by reference provisions is that they may expeditiously provide a long over-due regulatory basis for water and waste water management on First Nations lands. The opportunities for First Nations and neighbouring off-reserve communities to co-operate are enhanced by common operating procedures and standards. Arguably, provincial legislation is

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<sup>67</sup> For a detailed comparison of provincial and territorial water legislation in Canada see *supra* note 25. Expert Panel Report 2, Appendix C.

<sup>68</sup> *Indian Oil and Gas Regulations*, 1995, SOR/94-753.

<sup>69</sup> *Supra* note 17. *Indian Oil and Gas Act*.

more sensitive to regional requirements than a one size fits all federal statute and may better serve local needs and conditions. When coupled with section 5, which provides for administrative agreement between the Ministers (both Health and INAC) and any province, body or person regarding enforcement and administration of regulations, a legal and administrative basis to establish a provincially managed system is possible. Presuming that provinces are willing to undertake the task in a timely fashion (there is no public indication of such a willingness to date), the incorporation model offers a ready-made or at least readily adaptable basis for action. On the administrative front, if an agreement regarding administration and enforcement is penned, there is a civil service in place at the provincial level that understands the incorporated regulations and can assist as needed.

As important, the scope of section 4 expands the possible legislative content of drinking and waste water regulation beyond the current federal regime (e.g. source water protection and non-piped water systems) and, depending upon the strength of the incorporated laws of individual provinces, may address existing gaps in present management procedures.

On the flip side, the failure to adopt a legally binding national benchmark will undoubtedly lead to a patchwork of standards across the country, varying from province to province or even First Nation to First Nation. The permissive nature of the regulations also allows for continued gaps in the regime if there is only selective incorporation or if provincial regulation is inadequate in its own right.

However, scope of the regulation aside, there remain more fundamental issues with Bill S-11 that

warrant discussion.

## **b. Consultation**

Questions have been raised regarding whether the duty to consult has been triggered and if so, the degree to which the duty has been satisfied in the development of Bill S-11. In particular, the failure to complete an analysis of each of the three options presented by the Expert Panel ( recall the 2009 discussion paper was based on the “incorporation by reference” model only) has led to questions regarding the legitimacy of federal actions prior to drafting. Although the extent of First Nations rights vis a vis water per se is the subject of on-going debate,<sup>70</sup> Section 35 of the Constitution, Canada’s endorsement of the United Nations Declaration on the Rights of Indigenous People,<sup>71</sup> and the recently passed United Nations Resolution on The Human Right to Water and Sanitation,<sup>72</sup> all suggest (if not require) comprehensive consultation with First Nations on this issue. That the legislation will impact on First Nations reserve lands is indisputable. Whether passage of legislation amounts to conduct that might adversely affect either existing or

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<sup>70</sup> In the opinion of Merrell-Anne Phare, Executive Director and Legal Counsel, Centre for Indigenous Environmental Resources, a number of aboriginal rights might be impacted by the legislation: “water rights regarding domestic, commercial, navigation and other uses; rights to govern and make decisions regarding water decision making; cultural and spiritual rights to water; environmental protection rights; land use rights.” See testimony before the Standing Committee On Aboriginal Peoples. Issue 19. Evidence. March 2, 2011, available online at <[http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/19evb-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/19evb-e.htm?Language=E&Parl=40&Ses=3&comm_id=1)>.

<sup>71</sup> UN General Assembly Resolution, 61/295. September 2007. Section 32 states,

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Critics of Bill S-11 have cited section 32 in their arguments regarding consultation. See Council of Canadians, “The Safe Drinking Water for First Nations Act (Bill S-11) Standing Senate committee on Aboriginal Peoples”. Submission, February 18, 2011. Available online at <<http://canadians.org/water/documents/FN/Bill-S11.pdf>>.

<sup>72</sup> UN General Assembly Resolution, 64/292. It is noteworthy that Canada abstained from the vote at the UN: 122 countries voted in favour, 41 countries abstained.

potential rights or title so as to give rise to the duty to consult, has not yet been definitively determined.<sup>73</sup>

Arguably however, meaningful stakeholder consultation, be it constitutionally based or grounded in good public policy, is a prerequisite to effective legislative drafting, passage, and implementation. The federal government did engage in discussion with First Nations stakeholders regarding legislation in 2009.<sup>74</sup> However the paper which acted as the basis for that public discussion failed to raise many of provisions which now appear in Bill S-11 among the “possible elements of the legislative framework” described in the “engagement” paper.<sup>75</sup> Important issues including the limits of liability outlined in section 10, the relationship between the Act and Section 35 constitutional rights, third party management of works, and ownership of infrastructure<sup>76</sup> should have been the subject of comprehensive discussion in the engagement document. INAC has stated that further input will be sought post passage and prior to the development and implementation of federal regulations.<sup>77</sup>

### **c. Third Party Involvement**

Section 4(1)(b) of Bill S-11 states that the regulations may “confer any legislative, administrative, judicial or other power on any person or body”. Neither “person” nor “body” is

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<sup>73</sup> See Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009) at 31. See also *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137. The position of the AFN is that the duty to consult pursuant to s. 35 does arise. See AFN, “Bill S-11 Safe Drinking Water for First Nations Act” Briefing Note. (and attachment) October 26, 2010, available online at <http://64.26.129.156/misc/Bill-S-11.pdf>.

<sup>74</sup> See *supra* note 59. INAC Engagement 2009 and surrounding text.

<sup>75</sup> *Ibid.* INAC Engagement Document 2009 at 12-17.

<sup>76</sup> *Ibid.* INAC Engagement Document 2009. Some of the matters included in the Bill but not raised in the INAC Engagement Document are third party management of works, deeming First Nations ownership of works, conflict with First Nations laws etc. and discussion *infra*.

<sup>77</sup> *Ibid.* INAC Engagement Document 2009 at 4.

defined in the Act raising concern as to the purpose and scope of this clause, particularly in relation to First Nations governance institutions. In the opinion of the Canadian Environmental Law Association, “this represents a significant possible loss of First Nations ability to control and manage their lands and systems without knowing who could take over these powers (ie private companies).<sup>78</sup> In addition to this concern, section 4(1)(c) sets out specific regulatory powers that may be conferred on any body or person, exercisable in “specified circumstance and subject to specified conditions.” This includes the power to:

- (i) to make orders to cease any work, comply with any provision of the regulations or remedy the consequences of a failure to comply with the regulations;
- (ii) to do any work that the person or body considers necessary and to recover the costs of that work;
- (iii) to require a first nation to enter into an agreement for the management of its drinking water system or waste water system in cooperation with a third party, or;
- (iv) to appoint a manager independent of the first nation to operate a drinking water system or waste water system on its first nation lands;

Also included within section 4 are powers to fix fees for use of water systems,<sup>79</sup> require permits for activity on First Nations lands that may impact drinking water,<sup>80</sup> and to verify compliance with regulations, including the power to seize and detain things found in the exercise of that power.<sup>81</sup>

Outside management or privatization of water system operations, without First Nations consent and participation will inevitably detract from the indigenous capacity building on reserve lands.

Regulations “requiring” a First Nation to enter into an agreement for management “in co-operation with a third party” leaves the First Nation in a vulnerable bargaining position.

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<sup>78</sup> CELA, “Re: Bill S-11 FN Safe Drinking Water Act,” Briefing Note October 5, 2010 at 2, available online at <<http://www.aFN.ca/uploads/files/water/10-10-05.pdf>>.

<sup>79</sup> *Supra* note 6. Bill S-11, s. 4(1)(d).

<sup>80</sup> *Supra* note 6. Bill S-11, s. 4(1)(p).

<sup>81</sup> *Supra* note 6. Bill S-11, s. 4(1)(h).

Arguably in the case of off reserve water suppliers, co-operative efforts, particularly with nearby municipalities are often a reasonable, even desirable, alternative. However, as the AFN has noted,<sup>82</sup> there is no template for such partnerships and inequalities between parties and across First Nations may result, particularly if private (as opposed to provincial) persons or bodies are involved.

At the other end of the spectrum section 4(1)(q) foresees regulations which may “deem a first nation, for the purposes of this Act, to be the owner of a drinking water system or waste water system located on its first nation lands...” Provisions which permit "deeming" of ownership, unilateral determination of fees and forced third parties agreements are provocative and may not advance either First Nations independence or, arguably, safe drinking water objectives. Some First Nations, particularly in the more affluent southern communities, may be in a position to exercise a greater degree of autonomy. However, there exist many communities where there is a need for more active outside participation in water management, and prematurely deeming ownership in the First Nation may prove contrary to the stated purpose of the legislation which is public health and safety.

Capacity building is not about funding alone. While there are communities who are prepared to take ownership of their water supply systems immediately because they possess the infrastructure and the resources, training, skill and expertise to do so, there are many others communities who require some or all of these prerequisites before responsibility and associated liability can be assigned to them. There is a broad spectrum of possible relationships between absolute ownership of water and sewage systems by the First Nation and complete control by an

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<sup>82</sup> *Supra* note 73. AFN Briefing Note at 4.

outside person or body that should be cooperatively explored on a nation by nation basis. The AFN has suggested<sup>83</sup> that section 4(3) be replaced with a provision similar to the *First Nations Commercial and Industrial Development Act*<sup>84</sup>

3. (3) The regulations may incorporate by reference any laws of the *province, as amended from time to time, with any adaptations that the Governor in Council considers necessary.*

....

5. Regulations may not be made under section 3 in respect of undertakings on reserve lands of a first nation unless

(a) the Minister has received a resolution of the council of the first nation requesting that the Minister recommend to the Governor in Council the making of those regulations; and

(b) if the regulations specify a provincial official by whom, or body by which, a power may be exercised or a duty must be performed, an agreement has been concluded between the Minister, the province and the council of the first nation for the administration and enforcement of the regulations by that official or body. (emphasis added by AFN)

If adopted, individual arrangements could be made with a view to the local reality along with consideration of First Nation aspirations. Any and all alternatives should be premised not only on the fundamental concern for health and safety, which is common ground for all stakeholders, but also to build momentum and ensure success of all community run systems.

Simply put, third party outside management and operation of water systems may provide the necessary product but does nothing to promote First Nations development: build a water system and assign ownership to a First Nation and you may provide clean water for a few months. Build a system in cooperation with a community that incorporates a multi-barrier approach, training and ongoing support and then pass on ownership, and you will have clean water for many lifetimes.

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<sup>83</sup> *Ibid.* AFN Briefing Note at 5.

<sup>84</sup> S.C. 2005 c. 53.

#### d. Erosion of First Nations Constitutional Rights

Section 4(1)(r) of Bill S-11 states,

The regulations may

...

(r) 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; and

The inclusion of this provision has been the subject of widespread criticism and discussion.<sup>85</sup>

While other government initiatives have promoted the merits of *non-derogation* clauses,<sup>86</sup> the text of Bill S-11 moves in a contrary direction, beyond derogation to contemplate abrogation of section 35 rights by *regulation*. As the Canadian Bar Association (Aboriginal Law Section) representative stated in reference to section 4(1)(r), "...while "derogate" means to impair, "abrogate" means to annul. The use of "abrogate" seems dangerously close to suggesting an "extinguishment" of rights."

Practically speaking, without specifics the clause will serve no immediate end other than provoking a response which will go well beyond issues of drinking water safety, while raising the spectre of expensive constitutional litigation. From a legal perspective, as Bradley Regehr, Chair of the National Aboriginal Law Section of the CBA admitted, it is difficult to fathom an

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<sup>85</sup> Full access to proceedings regarding Bill S-11 before the Standing Committee on Aboriginal Peoples is available at [http://www.parl.gc.ca/common/Committee\\_SenProceed.asp?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/common/Committee_SenProceed.asp?Language=E&Parl=40&Ses=3&comm_id=1)

<sup>86</sup> For a discussion of non-derogation clauses within federal legislation see Standing Senate Committee on Legal and Constitutional Affairs, "Taking Section 35 Rights Seriously: Non-derogation Clauses Relating to Aboriginal and Treaty Rights," Final Report. December 2007 available online at <http://www.parl.gc.ca/39/2/parlbus/commbus/senate/com-e/lega-e/rep-e/rep05dec07-e.pdf>.

explanation for the “unprecedented proposal.”<sup>87</sup> In speaking to Bill S-11 at the Senate Standing Committee, Christopher Devlin, responding to a question from the Chair regarding the relationship between s. 4(1)(r) and section 35 stated,

This provision is a new creature that we have not seen before. We have seen only non-derogation clauses. We have never seen abrogation clauses before. We are raising this caution with you. We have the existing common law tests for how to infringe these rights, tests that have been approved by the courts.

We have in existing legislation, albeit several different varieties, non-derogation clauses. We have yet to see a positive abrogation or positive derogation clause. We suggest that, given the intent of drafters of the bill, this clause should not go forward as it is written because that is not a creature that is necessary to remedy the mischief sought in the bill.<sup>88</sup>

The question arises as to why the federal government, which touts the desirability of a collaborative relationship with First Nations, would include such a provision in the first place?

As *R. v. Sparrow*<sup>89</sup> determined, although section 35 rights represent “a solemn commitment that must be given meaningful content” this obligation does “not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).” The test for justification articulated in *Sparrow* and supplemented in *R. v. Van der Peet*<sup>90</sup> was suitably placed within the context of the Crown’s fiduciary relationship with Aboriginal people and the associated honour of the Crown. As the Expert Panel suggested, there is need for

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<sup>87</sup> Correspondence From Bradley Regehr, on behalf of the CBA National Aboriginal Law Section to Hon. Gerry St. Germain, Chair, Standing Senate Committee on Aboriginal People, February 15<sup>th</sup>, 2011, available online at <<http://www.cba.org/CBA/submissions/pdf/11-09-eng.pdf>>.

<sup>88</sup> Christopher Devlin, Executive Member, National Aboriginal Law Section, Canadian Bar Association. Testimony at the Senate Standing Committee on Aboriginal Peoples. Committee Proceedings. Issue 18. Evidence. February 16<sup>th</sup>, 2011.

<sup>89</sup> [1990] 1 SCR 1075

<sup>90</sup> [1996] 2 SCR 507

strong leadership, especially within the federal government, to ensure the success of this act; but in order to be credible and successful, that leadership must respect constitutional limitations. Section 4(1)(r) should be removed from the Bill and replaced with a non-derogation clause to assist the courts in interpreting the legislation.<sup>91 92</sup>

#### **e. Capacity**

Waste water management and drinking water safety on reserve can be adequately addressed in federal legislation. However the primary requirement to ensure the safe drinking water for First Nations is “a firm government commitment to providing resources to address water quality resources on reserves, not necessarily new legislation”<sup>93</sup> The introduction of Bill S-11 did not include any further funding commitments by the federal government nor did it articulate funding roles of the various named departments currently responsible for waste and drinking water. Government witnesses before the Standing Senate Committee on Aboriginal Peoples stated that funding will be determined based on the results of a national assessment of system needs and growth projections which is presently underway.

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

We will have to develop a national investment plan that takes into account not only the resources we have, but also the priorities and needs. We will develop that plan also based on how we think the regulatory development will unfold.

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<sup>91</sup> Examples of the more recent iterations of such clauses may be found in the *The First Nations Oil and Gas and Moneys Management Act* S.C. 2005, c. 48 and the *First Nations Commercial and Industrial Development Act* S.C 2005. c.53.

<sup>92</sup> In addition, clause 6(2) of Bill S-11 stipulates that in the event of a conflict or inconsistency for an Aboriginal body named in column 1 of the schedule to the Act, provisions and the regulations made under the Act will prevail over any land claims or self-government agreement to which the Aboriginal body is a party. If modern treaties and land claims fall under section 35 a similar approach to justification may be argued.

<sup>93</sup> *Supra* note 87. Regehr correspondence.

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Until we see the assessment, we will not know what the full need is for the 10-year growth that I spoke of. We have \$197.5 million a year in our A-Base for water expenditures. We have had additional monies above that in the past, and our hope is that would be the case in the future.<sup>94</sup>

Monitoring, sampling, testing, training and certification of operators, construction and maintenance are all critical to achieving the desired goal. In spite of the investment to date, there has simply not been enough funding to ensure that the water systems on reserve are comparable to communities off reserve. To quote the Expert Panel,

For example, in the five-year capital plan covering 2002-07, INAC officials acknowledge that the federal government's initial estimates of the capital needed to invest in First Nations water and wastewater systems turned out to be one-third to one-half of what was actually needed. The estimates were not based on detailed engineering analysis. As well, they did not take into account increases in construction costs that were higher than expected and the impact of increasing water-quality standards over the five-year period.<sup>95</sup>

At present First Nations have limited capacity to fund their own systems even though independence and self-sufficiency<sup>96</sup> is the desired goal of all parties. Long term viability can only be achieved once the infrastructure is in place, sufficient numbers of certified operators are trained, and education of water systems governance is provided at the community level.<sup>97</sup>

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<sup>94</sup> Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships, INAC, Testimony at the Standing Senate Committee on Aboriginal Peoples. Committee Proceedings. Issue 17, Evidence. February 2, 2011, available online at [http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=1).

<sup>95</sup> *Supra* note 25. Expert Panel Report 1 at 22. See also Council of Canadians Submission on Bill S-11 to the Standing Committee on Aboriginal Peoples. (February 18, 2011) at 2, available online at <http://canadians.org/water/documents/FN/Bill-S11.pdf>.

<sup>96</sup> That is, local responsibility for on-going funding and system operations through water rates, etc .

<sup>97</sup> First Nation communities are not alone in this struggle. In the recently released CD Howe Institute Commentary, author Stephen Hruddy commented on safe drinking water outside of larger Canadian urban centres. "On the face of it, Canadians should be asking why Canada appears to be out of step with the international leaders in assuring safe drinking water. If it is not practical to replace our current system of downloading responsibility for safe drinking water to the lowest level of public authority, we at least need to provide appropriate oversight and guidance systems. Regulatory systems should not only hold those public authorities accountable for the provision of safe drinking water, but also assist them in understanding the full nature of the challenge they have been dealt and provide the appropriate and effective support to help them deliver on their responsibility. See C.D. Howe Institute, "Safe Drinking

Without the necessary investment, the regulatory regime outlined in Bill S-11 may well burden communities and does little to help First Nations to meet legislated standard.

#### **4. MOVING FORWARD**

In 2006, the Expert Panel described 7 primary actors presently involved in First Nations drinking water and waste water management: INAC, Health Canada, Public Works and Government Services, Environment Canada, Chief and Council, Regional Councils and technical services advisory groups. In addition varying degrees of participation can be expected from provincial, territorial and municipal governments.<sup>98</sup> With our increased concern for ecosystem protection, watershed organizations are also stakeholders, particularly at the front end of a multi-barriered approach to water management (e.g. source water protection and water allocation). If one adds the provisions of Bill S-11 to the mix, the possibilities associated with the implementation of any new legislation expand to include private water management companies, contracted provincial bodies and/or a re-alignment of federal department responsibilities. The permutations are myriad. Moreover, the administrative structure of the regulatory scheme remains to be determined—an unfortunate result, particularly since no implementation plan has been unveiled.

How exactly it is all to ‘fit together’ and who is to oversee the implementation of the legislation and its various components beyond the section 4(1)(b), regulatory power to confer "legislative, administrative, judicial or other powers on any person or body" remains open to determination. As Senator Banks noted at the recent Senate Standing Committee on Aboriginal Peoples proceedings,

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Water Policy for Canada—turning hindsight into foresight.” Commentary, No 323 February 2011, available online at <[http://www.cdhowe.org/pdf/Commentary\\_323.pdf](http://www.cdhowe.org/pdf/Commentary_323.pdf)>.

<sup>98</sup> *Supra* note 25. Expert Panel Report 1 at 20-21.

‘...we wonder how this will work. The response seems to be: We will show you later when we figure it out. Mr. Salembier said that First Nations will see how valuable this legislation will be once we put those regulations into place. At this time, we have no idea what those regulations will be. That is one, but only one, reason that I oppose this bill.’<sup>99</sup>

It is little wonder that First Nations are reluctant to support the legislation. As noted by the Canadian Environmental Law Association (CELA), “[t]here were many possibilities discussed by the first witnesses before this committee, who were the officials from the relevant departments, but they are all just possibilities and it could be from one extreme to another: It could be an extreme situation of interference with Aboriginal management of their own drinking water systems or it could be, in theory, that they could have a lot of autonomy. However, we do not see that in the bill as it is drafted.”<sup>100</sup>

The underlying problem with Bill S-11 is a lack of trust between the government and First Nations that is exacerbated by two things: the inclusion of several rather ham-fisted and inflammatory provisions (discussed above), and the failure to venture beyond mere regulation to provide, what a number of parties have referred to as a “vision” for the legislation.

Speaking to Bill S-11, former member of the Expert Panel, Stephan Hrudehy stated,

A framework is fine because that is often how things are moved forward. However, this framework is lacking the direction that will solve the problem. This framework reflects minimalist thinking to simply pass a bill to say we have a regulatory framework for First Nations. It does not set any direction for the civil servants who will implement this through regulations. If you do not give them that

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<sup>99</sup> Standing Senate Committee on Aboriginal Peoples, Issue 17, Committee Proceedings, February 2, 2011, available online at <[http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=1)>.

<sup>100</sup> Theresa McClenaghan, Executive Director and Legal Counsel, CELA. Testimony at the Standing Senate Committee on Aboriginal Peoples. Committee Proceedings. Issue 18. Evidence, February 15<sup>th</sup>, 2011, available online at <[http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/18eva-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/18eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=1)>.

direction, I guarantee you will not get the result that we are talking about.<sup>101</sup>

Drinking water statutes should be about health and safety. Legislating safe drinking water on First Nations lands offers an opportunity to compliment that objective by addressing not only the technical issues, but by placing safe drinking water within the realities of First Nations relations in order to ensure success and long term viability.

In summary, we have a lot of work to do moving forward, and I urge Canada not to do it alone. Time and time again in the expert panel report, in other reports and in presentations that you have heard and will hear, we have said that we want to be part of that process. It is a simple premise in life, but often government has a difficult time understanding what that means or they cannot do it; their vision is too narrow. When it comes to regulations and laws that directly impact a group of people, in this case native people, government needs to work with them and sit with them to design something that will be mutually acceptable. Perhaps that is your attempt with this bill. Let us work on it a little harder and better so that we are part of the solution not one side telling us, whether we like it or not, what it will do after consulting with us a little bit. It is 2011; let us have a different attitude about the relationship our elders envisioned in 1905 when they made a treaty with the government.<sup>102</sup>

Co-operative efforts can lead to devolution of responsibility to the community predicated on mutually agreed upon timing, good systems and good practice. Hopefully a redrafted *Safe Drinking Water for First Nations Act* can respond to that vision.

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<sup>101</sup> Stephan Hrudehy, *Testimony at the Standing Senate Committee on Aboriginal Peoples Issue 17*, Committee Proceedings, March 1, 2011, available online at [http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=1).

<sup>102</sup> Grand Chief Stan Louttit Testimony at Standing Senate Committee on Aboriginal Peoples, Issue 17, Committee Proceedings, March 1, 2011, available online at [http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm\\_id=1](http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/17eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=1).