A BRIEF

FROM THE BRITISH COLUMBIA MEDICAL ASSOCIATION

TO THE JOINT COMMITTEE

OF THE SENATE AND OF THE HOUSE OF COMMONS

REGARDING THE CONSTITUTION OF CANADA

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"To waste, to destroy, our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we aught by right to hand down to them amplified and developed."

- T. Roosevelt, 1907

PREAMBLE

In this brief, the British Columbia Medical Association wishes to address an aspect of Constitutional reform which has received inadequate consideration up until now, but is of such importance as to obviate the significance of many other aspects of the Constitution if due consideration is not given in this area. We wish to address in a general way, the rights of future generations to clean air, water and land, and in a specific way, to discuss the Constitutional articles which are essential TO ENSURE THAT THESE RIGHTS ARE ADEQUATELY PROTECTED.

As we will establish in later portions of this brief, current programs of regulatory control at various levels of government have failed significantly to establish sufficient authority, expertise and, in some cases, even desire to establish these necessary protective functions. Thus, in the space of little more than a century, we have gone from a situation where virtually every river in Canada had readily drinkable water to a situation where the drinkability of untreated water from virtually every stream is questionable, and traces of man-made toxins, specifically 2,4-D, are found in every water sample taken from any river in western Canada in the late 1970's. Nor would we be reassured by more recent public consciousness of the significance of environmental protection. The whims of media attention will undoubtedly tire with this topic and, given our increasing obsession with economic matters, it is highly likely that society will soon convince itself that adequate environmental protection is an unaffordable luxury in our self-proclaimed "tough" economic times. Even in the absence of such an open admission of society's choice, it is quite possible that the thousands of individual actions which in sum, provide such environmental protection as we may hope to have, will be compromised by an overweening sense of responsibility to our current economic "crisis" and an underweening sense of responsibility to the countless generations which must succeed our own.

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We are thus in precisely those times which cry for a constitutional article to protect the rights of those who will suffer from actions and policies, the formulation of which they have had no part.

The purpose of a Constitution is to protect certain societal and individual rights from the caprices of political fortune and the whims of societal interest. Thus, to pick an odious recent example, the Constitution and its powers should be capable of preventing displacement of the Japanese Canadians as took place in British Columbia during the Second World War. That nefarious act had, without question, the majority support of contemporary political and societal prejudice. The action thus correctly represented the will of the contemporary majority, but it was nonetheless wrong.

Equally well, our contemporary society may decide, by choice or inadvertence, that we can compromise the health of future generations by giving inadequate consideration to their right to clean air and water and land. We believe that this issue is of such importance that it deserves very careful consideration of this most important committee. As we shall demonstrate in this brief, the political and legislative process does not have a distinguished record in initiating and implementing measures of protection in the area of occupational and environmental health. In the absence of a constitutional article preserving the rights not only of contemporary, but also of future citizens, it is unlikely that this undistinguished record will be improved. However, it is well within the power of those sitting on this committee, and perhaps only within the power of members of this committee, to ensure that important rights to clean air, clean water and clean land are preserved for all those Canadians who will follow our brief stay in this beautiful country.

It is the responsibility of the people in this room to ensure that the Constitution of Canada becomes an expression of the highest motives of our society - the desire to care for our children and their children in perpetuity.

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The British Columbia Medical Association has been intensely involved in the field of environmental health for a number of years. Initial efforts were directed towards the establishment of Ministries and Departments of the Environment without feeling at that time that such agencies would perform a useful function in ensuring that environmental protection was placed on a high priority in government policy planning, and that environmental contamination might be minimized by a branch of government that was specifically devoted to that task. We, like others, have been disappointed in our high expectations in this regard.

Several factors have worked together to bring about this disappointing result. Ministries of the Environment have tended to receive relatively low priority in both funding and participation in decision making regarding industrial development. The parliamentary tradition of Cabinet solidarity has effectively nullified any advocacy role that the Ministries of the Environment, Federal or Provincial, could play in bringing to bear environmental concerns on decisions in this area. This is not to say that individuals in various departments have not had very key roles to play in enhancing public involvement.[1] However, the very nature of Cabinet solidarity and the extremely restrictive nature of the Civil Service code conspire to emasculate effectively Ministries of the Environment and prevent them from playing a role as advocates for future generations.

In fact, cogent argument could be mounted that Ministries of the Environment may be increasingly counter productive since their existence is often used as an excuse to blunt criticisms that a knowledgeable public may have about particular industrial projects. Thus, companies and governments are wont to use the reassuring phrase that the project will "meet all the relevant government standards." The hollow nature of this claim, and the protection it affords future generations, has been detailed in the appended brief to the Uranium Mining Inquiry, and is certainly not specific to the uranium mining industry. We will not go into further detail here, but are prepared to expand upon our

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1. See appended Summary Argument to the Royal Commission on Uranium Mining.

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concerns about the inadequacies of the standard-setting and regulation-making process in Canada. The main point we wish to make, is that the existence of Ministries of the Environment is not a sufficient protection for the rights of future generations to enjoy clean environment, uncontaminated by significant threats to their health and well-being. Nor do we feel that, given present parliamentary traditions in Canada, Ministries of the Environment are capable of evolving into an effective protection. Thus, we feel very strongly that there must be constitutional guarantees that will require current action to prevent future problems. The inadequacies of the current system of regulatory control are underscored by an example with which House of Commons members of this Committee should be familiar. This relates to Order-in-Council S.O.R. 79-345, which overrides the usual provisions of the Federal Fisheries Act and allows for the dumping of mine tailings directly into the waters of Alice Arm off the coast of British Columbia.

These tailings are known to contain significant quantities of a number of heavy metals - not the least of which is Radium 226. We are very concerned about the lack of knowledge of the specific oceanography of this area, and even more concerned about inadequate studies of environmental pathways that could conceivably lead to unacceptable exposure of animal and human populations to these various contaminants. In its natural state, this ore body would not have this access to the biosphere; and we are unquestionably increasing risks of exposure to future generations. Let us remember that the acceptability of this increased risk is being accepted, judged not even by the present inhabitants of Alice Arm, nor their descendants, but by a group of people thousands of miles away, who on the surface at least, appear to have little concern for, or interest in, the hazards involved. Thus, we see that even established regulatory policy under the Fisheries Act is subject to rather capricious political whim.

This example is chosen for its currency and immediacy, but numerous other

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examples of even greater indifference to future generations can be found with even a cursory glance at the recent history of environmental protection in Canada. The list of such examples is truly intimidating, and a few will be selected in this brief to illustrate specific points in our contention that only in a carefully framed article of the Constitution will future generations find the protection they deserve from willful or inadvertent contamination of their environment by the generations which precede them. It seems evident to us that in the absence of such protection, justification will always be found for circumventing even minimal requirements of environmental protection because of war, unemployment, economics, difficulties, and such. The rational for such an amendment was succinctly outlined in another context over a century ago.

> *"The Constitution ... is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."*
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> - David Davis, 1866

This sets the theoretical and philosophical framework in which we wish to work. We would now like to go on and discuss specific, practical examples to underscore the importance of your consideration in this area.

OUR INDIFFERENCE

The first example is chosen to demonstrate our institutional and societal indifference to future generations when we contemplate the economic effects of a current project. This example is contained in the proposal for mine and mill tailings disposed in the AMOK uranium mine at Cluff Lake, Saskatchewan.

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Even after an extensive public inquiry, the following proposal was accepted by the Atomic Energy Control Board, the Government of Saskatchewan and their relevant regulatory bodies. The Committee may be aware, and as outlined in more detail in Appendices C and D, uranium mine and mill tailings by their very nature provide a significantly enhanced environmental and health risk as compared to the ore body in its natural state. For this reason there is general consensus that great effort must be expended to isolate these tailings over prolonged periods of time. Thus, for example, the radiation hazards of a typical tailings impoundment will not change over the period of 80,000 years. The Cluff Lake deposit by being one of the most concentrated ore bodies in the world presents a special hazard because of the concomitantly very high level of radiation hazard presented by its tailings.

The AMOK proposal, accepted by various government agencies, is to impound these tailings in concrete canisters with asphalt tops, somewhat above the water table in the area near the mine site. These canisters are specifically designed to hold leakage of hazardous material to within limits that are now considered "acceptable" by the Atomic Energy Control Board. It is conceded by the Company, the Government, and even the Chairman of the Cluff Lake Board of Inquiry, that these canisters are unlikely to maintain their integrity for much more than a century at the very most. Absolutely no provision has been made for ongoing care of these canisters and in fact such ongoing care if required is considered contrary to A.E.C.B. philosophy. (see Appendix A, pages 23 - 29). Thus, we are specifically inflicting upon future generations a hazard which we refuse to accept ourselves. Let us not forget that this decision was arrived at after consideration by various levels of government up to and including a public inquiry. We would submit that this situation is unacceptable and presents an unacceptable health risk to future generations and further that current institutions have demonstrated themselves as being incapable of dealing with this problem.

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SINS OF COMMISSION

The Cluff Lake mine, as discussed above, represents an example of man shuffling his environment in such a way as to increase human exposure to naturally occurring substances. That represents a demonstrable hazard which is finally gaining some recognition in regulatory circles in Canada. However, present technological society abounds with examples of totally new man-made substances that have been introduced into the environment, at times in very significant quantities (DDT, PCB, Dioxine, nuclear waste, etc.). In these instances we are dealing with substances that natural biologic systems have never been previously exposed to and as such, the normal buffering and protective mechanisms of biological systems cannot be relied upon to work. We already have the example of DDT reverberating through the food chain to the extent that now virtually every sample of human breast milk tested shows at least traces of DDT.

Do our children not have the right to be at least initially free from exposure to these substances whose effects are at best inadequately understood? Should they choose, for whatever reason, to expose themselves later on, we cannot gainsay them that right, but surely our first obligation is to give them a choice as it is their obligation to give their children a choice.

An excellent example of institutional short-sightedness in this area relates to the development of the Canadian Nuclear Industry. This industry was, in essence, created and is currently being sustained solely by government support and financing. In fact, so tenuous is their existence that the Prime Minister has denied calls for a National Inquiry into the Nuclear Industry on the basis that such hesitation and investigation would lead to the demise of the industry. As is outlined in Appendix B, and detailed in Appendices C and D, the government and scientific institutions initiated and supported this large industry in the absence of any meaningful understanding of how to deal with the extremely toxic waste products created by the Industry. In fact, the Industry continues to be extensively deployed in the absence of a proven method of waste disposal. There is belated interest and preliminary

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progress on methods of waste disposal, but, as detailed elsewhere, we have grave reservations about the objectivity of the Chief Investigators (Atomic Energy of Canada Ltd.) and the effectiveness of independent review and regulation. (Atomic Energy Control Board.)

The nuclear industry in Canada has, by virtue of the strategic nature of fissionable material, always had a special status under Canadian law and a separate and special regulatory apparatus whose weaknesses are detailed to some extent in Appendix A. It is highly unlikely that anything short of a constitutional article will have a significant effect in ensuring that this and other industries do not continue the wholesale creation of both potentially and practically harmful substances into the environment of future generations. Simple containment, which requires ongoing care, is inadequate as a bequest to our descendants, since they must then bear at least the cost of maintenance, if not the health costs of inadequate maintenance.

SHORTSIGHTED SOLUTIONS

Our belated awareness of the toxicity of many substances used in our technological society has led to cries for immediate solution to a great number of problems, the most current ones being PCB's and dioxins. That this is an extensive problem is symbolized by the Love Canal and its very many counterparts throughout continental North America, all of which are quite aptly called "biological time bombs" which have the potential to reek incalculable damage on the health of our and future generations.

This widespread concern is starting to elicit some preliminary institutional response. However, the worrisome thing is that instead of standing back and taking a rational look at the continued introduction of new substances into the marketplace and ensuring adequate source control of the many substances already deemed hazardous, we seem to be taking faltering steps in the direction of creating central disposal facilities. If our past experience in

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the creation and regulation of disposal facilities was better than it is, we might have some faith that this is a reasonable direction to go. However, the importance of containment and the difficulty of achieving it (see Appendices B and C) lead us to very grave concerns about the nature of these facilities.

We are doubly concerned about the political response to this in the Province of Ontario where there is a move by the Minister of the Environment to circumvent the usual environmental assessment review process in order to facilitate the establishment of a waste management facility at South Cayuga. This is an extremely shortsighted view since extensive public hearings and involvement are essential if the public is to become aware of the consequences to itself and future generations of the multitude of industrial processes that we consider a worthwhile and at times, essential part of our style of living. Such a floundering response to the problem of waste disposal underscores again the necessity of establishing within a constitutional article the necessity of source control and waste disposal before the introduction of new substances into our air, water and land.

WHAT CAN BE DONE? - RECOMMENDATIONS

The above represents but a few examples of ways in which inadequate consideration by contemporary society may doom future societies to undeserved and unpredictable ill health. The examples are chosen to illustrate in a brief way the inadequacies of current regulation and our firm conviction that the right of future generations to clean air, water and land must be written into the Constitution of Canada if we are going to take seriously our responsibility to ensure that these rights are preserved.

It is obvious that one cannot and should not write detailed environmental regulations into the Constitution. It will be equally apparent that we are neither constitutional nor legal experts and therefore we will not present to you a specifically worded article for inclusion. Instead, what we would like

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to do is to ensure that your considerations and the Constitution of Canada that arises therefrom, establish the following principles in the law:

a) The quality of waste, water, air and land resulting from a technological process shall be of a quality comparable to, or better than, the air, water or land at the start into that process. In a country as young as ours, we often lose sight of the fact that our land, water and air must sustain life for centuries and centuries to come. We have tended to set our waste effluent control standards in a very arbitrary way with little consideration for the cumulative effect of even seemingly minor changes in effluent quality. We must establish in law that our environment must not be degraded and then if exceptions are to be made to that, they must be made on an individual basis with some definable good and some definable future rectification of the problem. As it stands now, environmental degradation is allowed to proceed until it presents a problem of sufficient magnitude to obtain the consciousness of the public and/or the media.

b) No new substance in any significant quality should be allowed to leave containment and enter into the biosphere without prior thorough specific and independent assessment of its potential effects. In this article, provision must be made to establish the meaning of the word "significant" so that although this must vary from substance to substance it does not become a loophole to allow inadequate consideration being given to potential harmful effects. This limitation should not in itself prove an obstruction to innovation since if history teaches us anything, it teaches us that such restrictions foment inventiveness and creativity and that unrestrained squandering of resources and processes tend to blunt inventiveness.

c) No new substance should be allowed significant manufacture and dissemination until its full cycle from creation to disposal is fully established. Thousands of very poorly studied substances are introduced

..... /12

into the Canadian marketplace annually. We have tended to underfund our own regulatory agencies and to rely to an excessive extent upon various large regulatory agencies in the United States (NIOSH, EPA, etc.) The current uncritical and unintelligent anti-regulatory climate in that country augurs ill for the future of regulation in our own country. This will undoubtedly be aggravated by the current economic "crisis."

It is quite conceivable that current economic times may shift emphasis to job preservation and away from environmental protection so that we may have the (historically) unseemly sight of a generation compromising the environment of the future in an effort to preserve its own shortsighted concept of society. If we have any hope of regulating new substances, they must be regulated at source, and the full cost of their introduction, <u>including the cost in ill health that society may have to pay due to exposure to that substance</u>, must be established prior to introduction.

d) The costs of a technological process should be paid for by those who receive the benefits of that process. This is a restatement of the standard philosophical argument that those who receive the benefit would accept the risk. As we have demonstrated above, (Cluff Lake example), our society does not automatically take this approach when presented with an area of high technology where the costs and benefits are somewhat vague and separable. However, given the potential for great risk attached to many technological innovations, it is apparent <u>that all citizens present and future must have the constitutional right to be free of the risks associated with processes from which they receive no benefit</u>.

e) The Constitution must establish in some form an institutional watchdog to ensure adequate public scrutiny and facilitate public involvement

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in the regulation of technological innovation. This has been discussed in more detail in Appendix A, and can be discussed in more detail in our appearance before the Committee. Nonetheless, we must underline the point that current institutions are incapable of effectively protecting the rights of future generations in the area of environmental health.

f) The Constitution of Canada must be written in such a way as to allow the existence of "class action" lawsuits, since whatever the function of the above-noted "watchdog", the public must remain the final effective protector of his environment. Historically, it is the individual and collective citizenry that has provided such measures of environmental protection as exists today. We therefore should build upon strength by facilitating effective responsible action by the citizenry in order to preserve the environmental health of future generations.

g) To further facilitate responsible democratic action in this area, the Constitution must guarantee effective freedom of information so that informed decisions can be made in the area of environmental health.

If these principles are included in the Constitution of Canada, it will establish beyond question that we as a society care deeply about future generations and are willing to take reasonable precautions to protect their health, rather than to guarantee our own comfort at their expense. Conversely, to fail to include these principles will establish our indifference to their rights. There is no reason to suppose that these matters will be given adequate consideration in the absence of a Constitutional prod to ensure that action is taken.

This does not mean that we need to compromise our own economic existence and technological innovation. Indeed, as was established in the Royal Commission of Inquiry into Uranium Mining (Appendix A, pages 70 and following) having a

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goal towards which to design is often a great help and spur to designing engineers. However, if there is no Constitutional prod, we will always find economic reasons for not cleaning up and keeping clean our air, water and land. This has been true since the last century and shows no sign of changing soon. If we establish by statute what kind of air, water and land we will leave our descendants, then our industrial strategy can encompass these statutes and design processes to achieve these standards. It is evident that if this is left to the caprices of the market-place, and the political arena, this will simply not be done.

It is for this reason that the British Columbia Medical Association respectfully requests that this Committee give adequate and thorough consideration to including these matters in the Constitution of Canada. The principles are worthy of your consideration, and future generations are worthy of their implementation.

Respectfully submitted,

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