

C O M M I S S I O N  
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I N S T I T U T I O N S

SUBMISSION OF MAKIVIK CORPORATION  
REGARDING THE MEECH LAKE ACCORD  
ON THE CONSTITUTION

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MAKIVIK CORPORATION  
May 21, 1987

## INTRODUCTION

Makivik Corporation welcomes the opportunity to express its views and concerns to the Commission des Institutions which is reviewing the Meech Lake Accord on the Constitution.

Makivik Corporation, created under the James Bay and Northern Quebec Agreement and incorporated by Chapter S-18.1, L.R.Q., was formed to promote and protect the rights and interests of Inuit of Quebec. In addition, Makivik has been involved for the past nine (9) years in constitutional issues and has been an active participant in the constitutional process concerning aboriginal peoples both at the national level and within Québec.

We are extremely concerned over the nature of the Meech Lake Accord and its possible implications not only for Northern Quebec Inuit, but for aboriginal peoples throughout Canada as a whole.

Northern Quebec Inuit are in a rather unique situation in that we achieved a comprehensive land claim settlement in 1975, James Bay and Northern Quebec Agreement (J.B.N.Q.A.) which, as a treaty, enjoys the protection of ~~Section 31 of the Constitution Act, 1982.~~ In addition, Northern Quebec Inuit have major unsettled aboriginal claim to the offshore area surrounding Québec. We believe that the Meech Lake Accord of April 30, 1987 has serious implications for our rights and interests both under our present treaty (the J.B.N.Q.A.) and our aboriginal rights to the offshore. In addition, Québécois, the nature and extent of the Meech Lake Accord has further implications for our ongoing relationship with the federal government and for our progress towards an adequate and effective self-government for Northern Quebec.

After preliminary comments on the process leading up to the Meech Lake Accord and that surrounding its public review and discussion, the Brief proceeds to examine some of our more major concerns over the Meech Lake Accord.

#### PRELIMINARY CONCERNS

Given the importance of any amendment to the Constitution, we are surprised by the lack of public consultation undertaken by Canada and Québec in regard to the Meech Lake Accord. Though we appreciate being able to table presentations before the Commission, comments by various Québec ministers have underlined the fact that the Meech Lake Accord will be adopted in a few weeks, irrespective of what is said or revealed in these hearings. This is both an unprecedented and astonishing attitude for a responsible government to take.

Aside from the lack of adequate consultation by governments on the Meech Lake Accord, the rapidity with which it was arrived at and with which it is being apparently adopted by governments has made it difficult for organizations such as Makivik to review it in detail and comment on it. Surely something as important and far-reaching as a major constitutional amendment deserves more time and thought.

Lack of draft text of proposed amendments also make it more difficult to comment intelligently and specifically upon the Meech Lake Accord. The only information available to the public is the text of an Agreement in Principle published as a Communiqué by Prime Minister's Office. This Agreement in Principle has been criticized. We are compelled to comment on a series of quite vague principles set out in the Accord rather than upon the detailed and tightly worded legal constitutional texts.

It is clear that there will be many interpretative problems associated with the draft which will be left to the courts to resolve. Even at this stage in the drafting, there are many contradictions within the present Accord.

BASIC CONCERNS REGARDING THE MEECH LAKE ACCORD:

The Meech Lake Accord contains an agreement in principle on six main subject-matters:

1. Québec's distinct society;
2. Immigration;
3. Supreme Court of Canada;
4. Spending power;
5. Amending formula;
6. Second Round (future F.M.C.s).

We will comment on five of these subject-matters: Québec's distinct society; immigration; spending power; amending formula; future F.M.C.s. Some of our particular concerns are raised under each of these subject-matters which will serve as headings. However, the concerns listed here are by no means exhaustive, especially in light of the short amount of time available to us to review and comment on the Meech Lake Accord. Nevertheless, the following will illustrate a number of factors not yet considered by either the federal government or the ten provinces in the preparation of the Meech Lake Accord. If they were considered but set aside, then the situation is even more alarming.

A. "Québec's Distinct Society"

The Meech Lake Accord provides in this regard as follows:

- "(1) the Constitution of Canada shall be interpreted in a manner consistent with:

- (a) the recognition that the existence of French-speaking Canada, centred in but not limited to Québec, and English-speaking Canada, concentrated outside Québec but also present in Québec, constitutes a fundamental characteristic of Canada; and,
  - (b) the recognition that Québec constitutes within Canada a distinct society.
- (2) Parliament and the provincial legislatures, in the exercise of their respective powers, are committed to preserving the fundamental characteristic of Canada referred to in paragraph (1) (a).
  - (3) The role of the legislature and government of Québec to preserve and promote the distinct identity of Québec referred to in paragraph (1) (b) is affirmed."
1. Relationship between "fundamental characteristic of Canada" and "Québec distinct society" and the aboriginal societies:

This provision will be a major interpretative clause for the Constitution. Moreover, it appears that this interpretative provision will apply to all the Constitution Acts, 1867-1982, including therefore the Canadian Charter of Rights and Freedoms. No one will certainly can say how such a major interpretative provision will be applied by the courts in future.

This proposed amendment suggests that there are the only two founding nations in Canada. The "two-nations theory" has never been accepted by aboriginal peoples in Canada since it ignores the reality of the history of this country. The aboriginal nations of Canada are an integral part of Canada, contributing to the distinct identity of Canada as a whole. This clause is an insult to aboriginal peoples because their contribution is

totally forgotten in the resurrection of a false historic myth on the founding of Canada.

2. Breadth and impact of "distinct society":

Some experts suggest that "distinct society" refers to only language and culture. However, as the debate evolves, it is certainly plausible to argue that "distinct society" goes well beyond language and culture and is intended to apply to all the powers listed in Section 92 of the B.N.A. Act, 1867. (Certainly, this will be Québec's position.) It could mean that Section 92 powers when applied in Québec will become "super-charged". How exactly these Section 92 powers will be enhanced is not yet known. It will remain for the courts to determine what is meant here. If the courts should determine that Section 92 powers mean something different in Québec from what they mean in other provinces, this will have implications for the native peoples within Québec. What may well result are different provincial powers being applied in Québec from those in other provinces. This may have serious implications for residents of Québec, including the native peoples in terms of laws, policies and programs to be applied in almost every area of provincial life. This may have implications for Northern Quebec Inuit on every subject-matter from housing and municipal infrastructure to language, culture and political evolution. The real danger of the Meech Lake Accord in this regard is the uncertainty as to what "distinct society" may mean: will it limit Québec powers or expand them?

3. Past conflicts between Inuit and Québec regarding language and cultural rights:

Past experiences of Inuit regarding language and cultural rights force them to be cautious over any constitutional recognition of Québec as a "distinct society". In particular, Northern Quebec Inuit in 1977 had to struggle with Québec to achieve even the simplest amendments to Bill 101 (Charter of the French Language). Such amendments resulted only after severe protest and confrontation by Northern Quebec Inuit and the sending of the Québec Police Force (Riot Squad) to Kuujuaq to quell Inuit protests. These protests related to potential threats of Bill 101 to Inuit language and cultural rights. Will such repressive measures as experienced in 1977 become commonplace with the recognition of Québec as a "distinct society" in the Constitution. Will Québec attempt to use this provision in the Constitution to denigrate language and cultural rights of the aboriginal peoples and minority groups?

4. Effect on the distinct nature of native societies:

Northern Quebec Inuit have always recognized the importance of language and culture for a society to survive and grow. But such recognition should never be at the expense of other societies in Québec, in particular aboriginal societies.

Certainly Québec is not the only "distinct society" in Canada. Each aboriginal society is distinct. Will this mean that only Québec is a "distinct society"? Will it mean that all

societies are distinct but only Québec society merits recognition in the Constitution? Will recognition of Québec's distinctive nature in the Constitution suggest that native societies are in some type of category other than distinct cultures and societies. Then, of course, there is the question of what view the courts will take of this situation. At the same time, it was most certainly in part the distinctive nature of aboriginal societies that justified a separate Part to the Constitution in affirmation and recognition thereof. It is not even clear to what extent explicit reference to Québec as a "distinct society" in the Constitution may affect the aboriginal peoples and their rights enshrined in Section 35? What will the courts say about this?

In addition, for Northern Quebec Inuit, the J.B.N.Q.A. and associated legislation also constitute a formal recognition of the special and distinctive nature of Inuit society. It is largely because of the distinctive nature of Inuit society that the J.B.N.Q.A. provides certain institutions benefits and rights to Northern Quebec Inuit.

Moreover, it is in part because Inuit are a native people and constitute a distinct culture and distinct society that they enjoy the federal trust responsibility provided for in Section 91(24) of the Constitution. This special relationship with the federal government is in fact confirmed in the legislation approving the J.B.N.Q.A. in the following terms:

"And whereas Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit".



There is uncertainty as to what effects there will be on the special and distinct nature of Inuit culture and society in light of confirmation of Québec's "distinct society" in the Meech Lake Accord and possible future judicial interpretations thereof.

One way of ensuring aboriginal peoples a place in Confederation could be the use of a non-derogation clause. Such a non-derogation clause would simply suggest that the use of the term "distinct society" in reference to Québec in no way derogates from the rights of the aboriginal peoples as "distinct societies". To do otherwise may well devalue or diminish Section 35 of the Constitution Act, 1982 and the special relationship recognized and affirmed in the J.B.N.Q.A. between Northern Quebec Inuit and the federal government. It may also prejudice the efforts of Northern Quebec Inuit to achieve full and effective self-government to Northern Quebec. Until it is known precisely what "distinct society" means in reference to Québec, all these above factors remain open questions of concern to us. And when the Courts do let us know, it will be too late.

B. "Immigration"

The Meech Lake Accord provides as follows in this regard:

"Provide under the Constitution that the government of Canada shall negotiate an immigration agreement appropriate to the needs and circumstances of a province that so requests and that, once concluded, the agreement may be entrenched at the request of the province;

Such agreements must recognize the federal government's power to set national standards and objectives relating to immigration, such as the ability to determine general categories of immigrants, to establish overall levels of immigration and prescribe categories of inadmissible persons;

Under the foregoing provisions, conclude in the first instance an agreement with Québec that would:

- incorporate the principles of the Cullen-Couture agreement on the selection abroad and in Canada of independent immigrants, visitors for medical treatment, students and temporary workers, and on the selection of refugees abroad and economic criteria for family reunification and assisted relatives;

- guarantee that Québec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by 5 per cent for demographic reasons; and

- provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Québec where services are to be provided by Québec, with such withdrawal to be accompanied by reasonable compensation;

Nothing in the foregoing should be construed as preventing the negotiation of similar agreements with other provinces.

Northern Quebec Inuit presently enjoy extensive relations with other Inuit of the circumpolar region. Inuit of this region have much in common in terms of language, culture, economic trade and exchange, environment and travel. Traditionally, Inuit have travelled freely throughout the circumpolar region long before immigration policies of governments and trade restrictions were enacted and applied. The sharing and exchanges between Inuit of the circumpolar region goes far beyond language and culture to that of economic and political development and evolution. An obvious question, therefore, is to what extent these historic relations amongst Inuit of the circumpolar region will be affected by changes in immigration policy which may result from formal agreements pursuant to the Meech Lake Accord.

Will our past and current pan-Arctic Inuit relations be restructured? Will new immigration definitions and policies require Inuit to break traditional and family ties with other Inuit outside of Québec? While the actual trend shows ever greater international cooperation with Inuit of Greenland, Alaska and Soviet Union, will new policies run counter to our objectives and hinder our development?

C. "Spending Power"

The Meech Lake Accord provides as follows in this regard:

"Stipulate that Canada must provide reasonable compensation to any province that does not participate in a future national shared-cost program in an area of exclusive provincial jurisdiction if that province undertakes its own initiatives or programs compatible with national objectives".

This proposed variation on the federal spending power could have serious implications for native peoples across Canada and for Northern Quebec Inuit in particular.

1. Effect on federal ties and federal spending:

The Meech Lake Accord will mean a significant shift of political power to the provinces. Native peoples, however, have historically enjoyed important ties with the federal government by way of the federal trust responsibility in Section 91(24) of the B.N.A. Act, 1867. These ties with the federal government may be weakened by this shift of power to the provinces since it appears as an effort by Canada to unload some of its responsibilities to the provinces.

Northern Quebec Inuit are against any constitutional or other change that may have as a result a weakening of their ties to the federal government or of the federal trust responsibility under Section 91(24). Northern Quebec Inuit have already experienced numerous federal efforts to dump their responsibilities unto Québec. All such efforts have resulted in less services and less funding for Northern Quebec. For example, in February 1981, the federal government signed an agreement with Québec transferring certain administrative responsibilities for providing housing, electricity and municipal services to Inuit communities. This transfer was made without Inuit consent and without the consent of the Inuit parties contrary to the spirit and letter of Subsections 29.0.4. and 29.0.40 of the J.B.N.Q.A. At the time, Inuit would not consent to the transfer because Québec would not provide specific commitments in the transfer agreement itself to the effect that certain levels of services would be provided over the five years following the signature of that agreement. Also, this transfer agreement did not result in a more autonomous Inuit administration in Northern Quebec.

In addition, Northern Quebec Inuit, like other groups, native and non-native, are concerned that the spending power limitations of the Meech Lake Accord may have a "checkerboard" effect on rights to services and programs across Canada. This may mean that inequalities will arise (or be accentuated) in terms of programs and services available to residents of one province or another. The quality of life of residents of those provinces, including the relevant aboriginal peoples living therein, will also be affected.

As well, it is not clear what the phrase in the Accord "compatible with national objectives" means. Does it mean the same as "meet national standards set by Parliament?" Surely Québec would argue that it does not. Will Parliament be compelled to provide money for provincial plans that did not meet national standards it sets, but which the courts decided were "compatible with national objectives"? Confusion over the interpretation of this phrase can also lead to the above-described "checkerboard" effect. Being numerically marginal in Québec, we can reasonably assume that we will sit on the outside fringes of Québec's "objectives".

Because Northern Quebec Inuit have always rejected any changes in government policy or law which would serve to diminish the federal responsibilities (including financial) in Northern Quebec, they insisted that the J.B.N.Q.A. contain protections in this regard. As a result, particular provisions of the J.B.N.Q.A. are intended, both in letter and spirit, to ensure continued federal and provincial presences in Northern Quebec in the form of programs and services.

More particularly, subsection 2.11 of the J.B.N.Q.A. provides as follows:

"2.11 Nothing contained in this Agreement shall prejudice the rights of the native peoples as Canadian citizens of Québec, and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as those resulting from the Indian Act (as applicable) and from any other legislation applicable to them from time to time."

In addition, subsection 2.12 of the J.B.N.Q.A. provides as follows:

"2.12 Federal and provincial programs and funding, and the obligations of the federal and provincial governments, shall continue to apply to the James Bay Crees and the Inuit of Quebec on the same basis as to the other Indians and Inuit of Canada in the case of federal programs, and of Québec in the case of provincial programs, subject to the criteria established from time to time for the application of such programs."

As well, subsection 29.0.2 of the J.B.N.Q.A. provides as follows:

"29.0.2 Programs, funding and technical assistance presently provided by Canada and Québec, and the obligations of the said governments with respect to such programs and funding shall continue to apply to the Inuit of Quebec on the same basis as to other Indians and Inuit of Canada in the case of federal programs, and to other Indians in Québec in the case of provincial programs, subject to the criteria established from time to time for the application of such programs, and the general parliamentary approval of such programs and funding. The foregoing terms, conditions, obligations and criteria will apply to all federal programs referred to in this Section."

Overall, subsections 2.12 and 29.0.2 of the J.B.N.Q.A. were designed to ensure a continued presence of the federal government to Northern Quebec as well as a continuity of federal spending for aboriginal peoples, in particular Northern Quebec Inuit and Crees, both as an objective and as a reality. Subsection 2.11 of the J.B.N.Q.A. is to ensure that federal and provincial programs generally available to all citizens continue to be available to Inuit (and Crees). It is not clear what the impact on the above principles and

provisions of the J.B.N.Q.A. will be should Québec choose to limit federal spending in a particular national shared-cost program and to undertake its own initiatives in this regard.

Northern Quebec Inuit are already well aware of the historic and unjustified different treatment between themselves and the residents of N.W.T. (Inuit and others) in terms of overall federal programs and funding including basic infrastructure, health and social services, education and economic development (e.g. E.R.D.A.). The proposed amendment to the federal spending power in the Meech Lake Accord may well serve to perpetuate or accentuate these inequities.

2. Effect on the federal trust responsibility in 91(24):

By contemplating limitations on federal spending, the Accord may further serve to distance aboriginal peoples of a particular province from the federal government and, consequently, from its federal trust responsibility. It is well known that Québec has always opposed the use of the federal spending power when used to intervene in areas outside its jurisdiction, such as municipal affairs, health, education, culture and so on. Québec then has always felt that the federal government was in fact intruding in areas that are characteristic of Québec's distinctiveness. Hence, the relationship between Québec's "distinct society" and the need to limit the federal spending power.

All of this could well mean that cultural bodies and institutions in Québec, including Inuit ones such as Makivik, Avataq Cultural Institute and Anguwigak Wildlife Commission may have more difficulties securing federal grants unless they first get Québec's permission. This is exactly the situation in which the Kativik Regional Government presently finds itself any time it wishes to make any agreements with the federal government (i.e. it must first get Québec's permission). This runs counter to our self-government objectives.

In the past, Canada may well have spent monies on native peoples in jurisdictional matters of a clearly provincial nature out of its interpretation of its federal trust responsibilities for native peoples. This may prove more difficult now given the proposed amendments in the Accord.

Until the manner in which the amended spending power will operate in practice is fully known, and until it is known how the courts will interpret such a power, Northern Quebec Inuit will continue to view it as a potential threat to the federal role, presence, responsibilities and contributions in Northern Quebec.

3. Impacts on resourcing of self-government structures

With constant erosion of the federal trust responsibility for aboriginal peoples, and with the refusal of governments to entrench the right to self-government in the Constitution, how will aboriginal self-governments be categorized and who



will be responsible for resourcing them? Will these future self-government structures be seen as creatures of the province? As creatures of the federal government? Or as some other types of creatures? Unless we know the answers to these questions, it may well be that the provincial ability to opt out of the federal spending power in the area of certain national shared-cost programs may severely affect the resourcing of aboriginal self-government. Though nothing definitive is yet known in this area, caution is clearly advised when intending to amend the federal spending power.

However, it is not inconceivable that some aboriginal self-governments in the future may be left for their funding to the total discretion of a provincial government with little or no access to federal funding even when that particular province chooses to opt out of various national shared-cost programs. This whole area certainly merits further study and our organizations require more legal assurances.

4. Implications of changes to the spending power on taxation and self-government

Changes to the federal spending power will naturally result in changes to taxation powers. The proposed amendment to the spending power in the Accord, aside from giving the power to the provincial governments to limit federal spending by having them (the provinces) create their own programs, also gives Canada a broader spectrum of spending power in areas of provincial

jurisdiction. Even if the provinces choose to have their own programs as foreseen by the Accord, Canada will still require more monies to spend in areas of strictly provincial jurisdiction. Where will Canada get these additional monies? The most obvious answer is that Canada will raise these monies through taxation. Will Québec continue to tax on account of areas of provincial jurisdiction now entered by Canada or will it depend on agreed upon compensation transfers with Canada?

Canada has already given one answer to this type of question by indicating (Le Devoir, May 19, 1987, p. 1) that it wants to withdraw from all forms of direct intervention in regional economic spending. More particularly, Ottawa intends to augment cash transfers under regional and economic development agreements (ERDA) while at the same time leaving it entirely to the provinces exactly how they want to spend these monies locally and regionally. In other words, Ottawa intends in the future to give "block funding" to the provinces in these important areas of spending, thus giving a great amount of discretion to any particular province as to how those funds will be spent.

Inuit efforts towards self-government, which implies block funding to the self-government structures. These efforts and taxation powers for the self-government structures, may be greatly diminished because of the above shifts of power and responsibility from Canada to the provinces. Under the Accord, so much discretion will be left to the provinces in terms of how federal monies are to be spent regionally within each province

that the aboriginal self-governments and societies within each province will have very little say as to how much of these funds they should receive. Will Inuit that now qualify for federal spending continue to do so under Québec's compatible yet different "criteria"?

Guarantees and undertakings in the J.B.N.Q.A. in favour of Northern Quebec Inuit regarding continued federal and provincial spending in important areas such as economic development are treaty rights protected by the Constitution. The Meech Lake Accord now suggests that Canada and Québec may have new constitutional powers that affect those obligations and guarantees they undertook in 1975 in favour of Northern Quebec Inuit.

D. "Amending Formula"

The Meech Lake Accord provides as follows in this regard:

"Maintain the current general amending formula set out in Section 38, which requires the consent of Parliament and at least two thirds of the provinces representing at least 50% of the population;

Guarantee reasonable compensation in all cases where a province opts out of an amendment transferring provincial jurisdiction to Parliament;

Because opting out of constitution amendments to matters set out in Section 42 of the Constitution Act, 1982, is not possible, require the consent of Parliament and all the provinces for such amendments."

Basically, this proposed amendment would make all the subject-matters in Section 42 of the Constitution Act, 1982 subject to the same unanimity amending rule that is found in Section 41 of the Constitution Act, 1982. That is, for example, in order to extend existing provincial boundaries into the territories or in order to establish new provinces, the unanimous consent of all provinces and the federal government would be required. This would not appear to affect Northern Quebec Inuit but would certainly have a negative impact on the N.W.T. and Yukon peoples who may aspire to provincehood for those territories. It would mean that a small province such as Prince Edward Island could effectively veto a provincial status for N.W.T. in the future. This was previously not the case when Section 42 subject-matters were only subject to the amending formula in Section 38 of the Constitution Act, 1982 (i.e. seven out of ten provinces and the federal government). This potential blocking of the political evolution of N.W.T. Inuit has related and prospective implications for political development and evolution of Northern Quebec and Labrador Inuit as well.

E. "Second Round (Future First Ministers' Conferences (F.M.C.s) on the Constitution)"

The Meech Lake Accord provides as follows in this regard:

"Require that a first ministers conference on the Constitution be held not less than once per year and that the first be held within twelve (12) months of the proclamation of this amendment, but not later than the end of 1988;

Entrench in the Constitution the following items on the agenda:

- (1) Senate reform including:

- The functions and role of the Senate;
- The powers of the Senate;
- The method of selection of senators;
- The distribution of Senate seats;

(2) Fisheries roles and responsibility; and

(3) Other agreed upon matters;

Entrench in the Constitution the annual first ministers conference on the economy now held under the terms of the February 1985, Memorandum of Agreement;

Until constitutional amendment regarding the Senate are accomplished, the federal government shall appoint persons from lists of candidates provided by provinces where vacancies occur and who were acceptable to the federal government."

Our concern here relates to the fact that there exists no more constitutional process for aboriginal peoples concerning aboriginal rights such as the right to self-government. All of this appears to have died at the March F.M.C. in 1987. Yet, curiously enough, here in the Meech Lake Accord appear detailed provisions for future F.M.C.'s (at least one a year) on matters other than aboriginal rights. Why the Senate issue has become so vital suddenly escapes us completely.

Have aboriginal peoples and the constitutional process related to them been totally forgotten?

We suggest that an amendment be made to the Constitution to reinstate constitutional conferences to deal with aboriginal peoples of Canada and the identification and definition of their rights on a regular basis. Because Section 37 was repealed (Section 54 of the Constitution) in April of 1987, an amendment to the Constitution to bring back such a constitutional process would be required.

Alternatively, an item dealing with aboriginal peoples could be added to the list of items on the agenda proposed for the F.M.C.'s referred to in the Meech Lake Accord.

#### CONCLUSION

If this Brief raises many more questions than it answers, then it has achieved its objective. Constitutional amendments cannot be rushed. Constitutional amendments have long term and far-reaching impacts on every aspect of Canadian life. Because the proposed amendments deal in part with the federal spending power, changes to the amending formula and future F.M.C.'s and the distinctiveness of Québec society, all of these have implications for aboriginal peoples, especially those living in Québec. Time must be taken now before such amendments are adopted to examine the implications of these proposals. The Constitution is the highest law of the land and is employed constantly to control and interpret all other laws. Lack of consultation and the speed with which the governments are moving towards adoption of the Meech Lake Accord do not do justice to our Constitution. The present Brief implores all governments to take the time now whether the Meech Lake Accord and the process by which it was arrived at, are appropriate in the circumstances.