**Quebec Aboriginal Consultation Forum**
**Opening Address by Mme. Renée Dupuis, Forum Co-chair**
**February 28 - March 1, 2007, Montreal**

I wish to thank the organizers of the Quebec Aboriginal Consultation Forum for asking me to co-chair this meeting. Consultation of Aboriginal communities is an area of keen interest within legal circles and beyond. Since the end of the 19th century in Canada, consultation has shifted from the administrative sphere to the political and constitutional arena and is now being closely examined in the judicial forum. Aboriginal consultation has become one of the key concepts defined by the Supreme Court of Canada in the course of its decisions in the last 25 years interpreting the rights of Aboriginal peoples.

A quick look at the past reveals certain landmarks in the evolution of this phenomenon during the 20th century. We won't be considering the treaties signed between the Crown and Aboriginal peoples in Canada, whether they be the so-called treaties of peace and friendship or the treaties in which territorial rights were surrendered.

One of this period's defining moments goes back to the Indian policy proposed by the federal government in 1969, which would have seen Indian status and reserves, the *Indian Act*, and federal constitutional jurisdiction over Indians abolished, with a view to putting an end to the special legal status of Indians. After announcing its intention, the federal government began consulting Indian communities; however, the opposition to the policy was so strong that the government had to abandon the idea.

The government continued informal consultations with First Nations on various topics, including possible amendments to the *Indian Act*. For example, during the House of Commons debates on the adoption of the *Canadian Human Rights Act* in 1978, it was stated that since the government was in consultations with Indian bands to amend the *Indian Act*, an exemption covering all matters within the purview of the *Indian Act*, including government and band decisions, should be included in the federal human rights legislation, which is what was done.

In the early 1980s, the federal government and the provinces began to discuss the repatriation of the Canadian Constitution. Aboriginal peoples ultimately were consulted after expressing their opposition to the initial repatriation project and after initiating legal proceedings in the British courts. The results of these discussions were incorporated into the 1982 Constitution.

**1982: Amendments to the Canadian Constitution – A Series of Precedents**

The adoption of the *Constitution Act, 1982*, marked the repatriation of the Canadian Constitution. But above all, it signalled a fundamental change in the relationship between the Crown and Aboriginal peoples. The basis of the relationship was redefined in a way that brought major and lasting consequences to the status of Aboriginal peoples and the interpretation of their rights. The 1982 Constitution contained many precedents; not only were substantive rights of the Aboriginal peoples recognized and affirmed, but a process was instituted for the formal participation of Aboriginal representatives in constitutional discussions concerning Aboriginal peoples. The consultation of Aboriginal peoples

became an essential, formal component of all constitutional deliberations that could have an impact on their rights.

To begin with, the provision of substantive rights in the 1982 Constitution drew much attention from lawmakers: (1) the recognition for the first time of the existence of the Aboriginal peoples of Canada (Indians, Inuit and Métis); (2) the recognition and affirmation of their collective rights: Aboriginal and treaty rights, including rights under modern land claim agreements, based on the constitutional amendment of 1983; and (3) the clause preventing the *Canadian Charter of Rights and Freedoms* from being interpreted so as to infringe on the rights of Aboriginal peoples.

However, it appears that the effects of formal participation by Aboriginal peoples' representatives in the constitutional process (with the right to speak but not to vote), have not yet been fully appreciated. We must remember the importance of this precedent in the Canadian constitutional legal regime. Up to that point, direct participation in the constitutional process was the exclusive domain of the Prime Minister and provincial and territorial premiers. The 1982 legislation expanded the constitutional forum by ensuring the participation of Aboriginal peoples, in other words, by formalizing their consultation. This participation was originally intended for a single constitutional conference, designed to give substance to the definition of Aboriginal peoples' newly recognized constitutional rights.

When fundamental differences in the parties' positions became evident during the 1983 conference, it was agreed that section 37.1, which made allowances for at least two other conferences, would be added. What had started as the occasional participation of Aboriginal representatives in the constitutional process became a formal constitutional consultation process. Although the process came to an end without consensus on the definition and scope of the rights recognized and affirmed in section 35, the *Constitution Act, 1982* was nevertheless the origin of a constitutional convention pertaining to the consultation of Aboriginal peoples, as their representatives were subsequently invited to participate in the discussions surrounding the proposed Meech Lake (1987) and Charlottetown (1992) accords and the Kelowna Accord (2005), though in the end none of these federal-provincial-territorial accords was realized.

In response to Aboriginal peoples' request for the right to veto constitutional amendments on issues concerning them, the 1982 Constitution was modified during the 1983 constitutional conference to include an agreement in principle on the part of government representatives to invite Aboriginal representatives to any constitutional conference dealing with changes to the federal government's constitutional jurisdiction over Indians and lands reserved for them (as set out in Class 24, section 91 of the *Constitution Act, 1867*) or to sections 25, 35, 35.1 and 37.1 of the *Constitution Act, 1982*. This was another consultation guarantee, though it did not create an obligation to convene such conferences. The wording indicating an agreement in principle thus made it possible to exclude subsection 35.1 from judicial interpretation, as was requested by the federal

government's representatives. The subsection nevertheless remains a constitutional convention, as the federal government's representatives recognized at the time.

Since then, discussions on the scope of constitutional rights have mainly been held in the courts, due to the absence of political consensus during the 1980s and a lack of political will to resume them. This is the context in which we must examine the Supreme Court of Canada's interpretation of Aboriginal constitutional rights since 1982. Its first ruling after 1982 fell within this new judicial framework, marking a complete change in the interpretation of federal authority in the exercise of its constitutional jurisdiction in the context of the *Indian Act.*

It is therefore not surprising that when called upon to rule in *Guerin* in 1984, the Supreme Court of Canada placed a fiduciary obligation on the federal government. Basing its ruling on the government's discretionary power to decide what is in the best interest of Indians (as set out in the *Indian Act),* it imposed a reporting requirement upon the Crown regarding property dealings and transactions surrounding the surrender of Indian rights to a reserve. In the Court's opinion, the federal government had failed in its fiduciary obligation when it signed, without consultation, a lease that was less advantageous than the one agreed to with the band, and therefore was required to compensate the band for its losses. The notion of consultation has therefore been a part of the Crown's fiduciary obligation since *Guerin*. This was the Court's first opportunity to rule on the degree of formality required in the relationship between the Crown and First Nations following the constitutional amendments of 1982.

It is also not surprising that a few years later, in the 1990 *Sparrow* decision, the Supreme Court of Canada made consultation the minimum requirement in the justification test that must be applied to any legislative and governmental initiative infringing upon a constitutional Aboriginal or treaty right. The recognition and affirmation of specific constitutional rights for Aboriginal peoples incorporate the fiduciary relationship and so imply a certain restriction on the exercise of sovereign power. Federal legislative powers must therefore be reconciled with federal obligations, and the best way of achieving this is to require the justification of any statutory measure that infringes upon the Aboriginal right of any member of a First Nation. When a breach of an Aboriginal fishing right (and of a treaty right, as specified in subsequent case law) occurred, the Court explicitly identified two required elements for determining whether the regulations were justified: at least some information regarding the determination of an appropriate scheme for the regulations under attack, as well as consultation of Aboriginal peoples on the establishment of conservation measures.

In 1997, the Supreme Court broadened its justification requirements regarding breaches of Aboriginal title, which it defined as a category of Aboriginal rights. It stated that the fiduciary relationship between the Crown and Aboriginal peoples required participation by the latter in the decision-making, and at the very least an obligation to consult, with the nature and scope varying from case to case. Here the Court established a gradation of governments' obligation to consult: in the rare cases involving only a minor breach, the obligation to consult would consist of a discussion of important decisions concerning the

lands over which title was claimed. However, in most cases the obligation would involve more than consultation and could require the consent of Aboriginal peoples, as in the adoption of provincial hunting and fishing regulations.

Moreover, in its 2004 *Haida Nation* decision, the Court specified that in addition to the fiduciary obligation, the honour of the Crown placed upon governments, not the third parties involved in the exploitation of natural resources, an obligation to consult affected First Nations. Here the Court reiterated that the substance of the obligation to consult varied according to the right in question and the planned activity's possible impact on the rights at issue. Such activity included the planning, management and use of lands and natural resources.

A review of the Supreme Court's decisions over the past 25 years suggests, with each case brought before it, an evolution of the Court's understanding of the circumstances that create an obligation to consult Aboriginal communities, and the formal procedures of consultation required under such circumstances. This is, in essence, the judicial authority's role – and what limits it – when dealing with such important aspects of public policy.

It is important to note, however, that in a number of the decisions it has made since 1982, the Supreme Court of Canada has asked both governments and Aboriginal peoples to settle these issues by negotiation. This is a task to which all of us are called, and in this Quebec Aboriginal Consultation Forum, you will hear the unique perspective of a

number of speakers: First Nations, local communities, the federal and Quebec governments and private developers.