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## Why Aboriginal Self-Government?

### Why Self-Government?

As part of the BC treaty process, the governments of Canada and British Columbia are negotiating self-government arrangements with Aboriginal people. In 1998, the federal and provincial government entered into a treaty with the Nisga'a Nation, which includes numerous self-government provisions. Why are Canada and British Columbia negotiating self-government with Aboriginal people?

### Aboriginal Rights Constitutionally Protected

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples. If self-government is an existing Aboriginal right, then Canada and British Columbia would be required to engage in negotiations with Aboriginal people to give effect to the constitutional protection afforded by section 35(1).

### Is Self-Government an Existing Aboriginal Right?

At the centre of the current debate about whether governments should be negotiating self-government with Aboriginal people is the question of whether Aboriginal self-government and Aboriginal law-making powers are among the Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

### What the Courts Say

While the Supreme Court of Canada has not yet made any determinative rulings on the question of whether self-government is an existing right recognized and affirmed by section 35(1), in 2000 the British Columbia Supreme Court made the following pronouncements on this question in the *Campbell* case:

1. Self- Government is an existing Aboriginal Right.
2. The court concluded that Nisga'a law-making powers were in existence in 1982 and thereby protected as an existing Aboriginal right under section 35(1) of the *Constitution Act, 1982*. However, the Court also concluded that Nisga'a law-

making powers guaranteed by section 35(1) were not absolute or sovereign and that section 35(1) only protected a limited form of Nisga'a law making powers.

3. Aboriginal Self-Government survived the assertion of British Sovereignty and Confederation. The court held that Nisga'a law making powers survived the assertion of sovereignty by the British Crown and Confederation, evidenced in part by enforcement of Aboriginal laws by the courts since 1867.
4. Aboriginal Self-Government was not extinguished by constitutional division of powers.
5. The court concluded that the division of powers at section 91 and 92 of the *British North America Act, 1867* did not exhaustively divide law-making power in Canada between the federal and provincial governments, thereby leaving room for the continued existence of Aboriginal law-making power.

### **Negotiation or Litigation**

While the BC Supreme Court offers considerable guidance on the question of whether self-government is an existing Aboriginal right, the Supreme Court of Canada has yet to have a final say on this question. In the meantime, unless and until this decision is appealed or overturned, the *Campbell* case represents the current state of the law on Aboriginal self-government in the province of British Columbia. With no clear direction from the Supreme Court of Canada, public opinion remains divided on the question of whether public governments should be negotiating self-government arrangements with Aboriginal people.

We can continue to resolve the scope of First Nation governance powers through the courts, on a case-by-case basis, or we can do so through negotiations. A negotiated resolution, which takes into account the interests of all the parties, rather than a solution imposed by the courts, is obviously the preferred approach. The courts have consistently encouraged the parties to resolve this question through negotiation rather than litigation.

### **Historical Imperatives**

There are certainly compelling historical reasons for Canada, British Columbia and Aboriginal people to negotiate governance as part of treaty negotiations. First Nations were self-governing before the arrival of European and other nations in Canada and continually expressed their desire to govern themselves according to their own

traditions. Furthermore, Aboriginal people were denied the right to vote provincially until 1949 and federally until 1960, which limited their opportunities for advancing their interests within the Canadian political system. Canada, British Columbia and Aboriginal people undoubtedly want to turn the page on this chapter of history and build a new relationship based on mutual respect and recognition.

### **About the Scow Institute**

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at [www.scowinstitute.ca](http://www.scowinstitute.ca).