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Aboriginal Rights, Legislative Reconciliation and Constitutionalism

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In 2019, Parliament passed two statutes that were unprecedented in Canada's history: the *Indigenous Languages Act* (*ILA*) and *An Act respecting First Nations, Inuit and Métis children, youth and families* (*FNMICYF Act*).[1] While Parliament has passed a handful of statutes about First Nations in the past,[2] these laws are unique because they are based on recognition that the subject of the legislation (Indigenous languages and the exercise of jurisdiction over child and family services, respectively) are Aboriginal (or 'inherent') rights, protected by s 35(1) of the *Constitution Act, 1982*, that all Indigenous peoples in Canada hold.[3] Unlike the *Indian Act* which has mainly served as a vehicle to infringe First Nations' peoples' inherent rights,[4] such legislation aims to facilitate the implementation and exercise of these rights by Indigenous peoples. While these are early and by no means perfect efforts,[5] they signify an important shift in approach by Canadian governments to using their legislative powers to recognize and protect Aboriginal and treaty rights. The use of legislation as a tool for reconciliation, alongside litigation and negotiation, is long overdue.

While recognition legislation is 'new' for Canada, this is not a new phenomenon. The United States has had a long and robust history of legislative reconciliation. Since the late 1960s, working closely with US tribes, Congress has passed over 40 significant pieces of national legislation accommodating US tribes' inherent rights, including in areas of essential services,

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[1] *Indigenous Languages Act*, SC 2019, c 23 [*ILA*]; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [*FNMICYF Act*].

[2] For well over a century, the *Indian Act*, RSC 1985, c I-5, was the only federal legislation passed pursuant to Canada's jurisdiction under s 91(24) of the *Constitution Act, 1867,* 30 & 31 Vict, c 3 [s 91(24)]. It was only after 1999 that Parliament would pass about 10 further general laws in respect of First Nations. These have not been about accommodating Aboriginal rights or implementing s 35 but attempting to facilitate economic development on reserve lands or addressing gaps in the *Indian Act*. For a discussion of these, see Janna Promislow and Naiomi Metallic, "Realizing Administrative Aboriginal Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017) at 95-96.

[3] Past laws have also only been in relation to a subset of Aboriginal/Indigenous peoples' (the terms are synonymous, but 'Indigenous' is most commonly used today) namely 'status' Indian/First Nations as defined under the *Indian Act, ibid*. *ILA, supra* note 1, and *FNMICYF Act, supra* note 1, are the first federal statutes to include the other subsets of Indigenous peoples, namely Métis, Inuit and non-status First Nations. *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK*), 1982, c 1, Part 2, s 35(1) [s 35].

[4] *Indian Act*, *supra* note 2. See, for example, Kent McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 Windsor YB Access Just 329.

[5] For critique of the *ILA, supra* note 1, see Lorena Sekwan Fontaine, David Leitch and Andrea Bear Nicholas, "How Canada's Proposed Indigenous Languages Act Fails to Deliver" Policy Brief for Yellowhead Institute, May 9, 2019, (online). For critique of *FNMICYF Act*, *supra* note 1, see Naiomi Metallic, Hadley Friedland, and Sarah Morales, "The Promise and Pitfalls of C-92: *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*" (2019) Yellowhead Institute (online).

protection of Indigenous cultures and communities, natural resource use and economic development.[6] Such legislation has had positive impacts on the quality of life of US tribes.[7]

The promise of legislative reconciliation is jeopardized in Canada, however, by a current constitutional challenge spearheaded by Quebec against the *FNMICYF Act*.[8] The province argues that the recognition and facilitation of an inherent right to self-government by Parliament amount to an unlawful, unilateral constitutional amendment since such a right was not the product of trilateral negotiations or a court decision. Thus, Quebec's argument threatens to largely preclude democratically elected officials from accommodating s 35 rights through their primary law-making function. If Quebec wins, the Supreme Court of Canada's ("SCC") statement in *Daniels* that "reconciliation with all of Canada's Aboriginal peoples is Parliament's goal,"[9] will be rendered hollow.

This paper explains the concept of legislative reconciliation and why it is needed and argues that, far from being unconstitutional, legislative reconciliation exemplifies the principle of constitutionalism, and ought to be robustly embraced by Parliament, as well as provincial and territorial legislatures, and encouraged by our courts.

1. What is legislative reconciliation?

This refers to the legislative branches of state governments in Canada passing 'reconciliation legislation' in relation to Indigenous peoples' inherent rights. The Royal Commission on Aboriginal Peoples called this "recognition legislation."[10] However, I believe 'reconciliation' is a more complete description of what such laws do. 'Recognition' connotes 'acceptance' of the existence of inherent rights by state governments, but such laws also seek to respect, promote, protect, and accommodate inherent rights through mechanisms or frameworks elaborated upon within the statute. Thus, 'reconciliation' is a better descriptor.

While some view the term 'reconciliation' with skepticism, especially meanings ascribed to it by some politicians,[11] and even the SCC,[12] the Truth and Reconciliation Commission ("TRC")

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[6] Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 474 [Borrows, "Legislation"] at 479, footnote 28.
[7] *Ibid*, and see also Peter Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill L.J. 607.
[8] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 on appeal to the Supreme Court of Canada [QCCA Decision].
[9] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 37.
[10] See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) [RCAP] at 298. See also Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 at 14-15.
[11] See Yellowhead Institute, Special Report, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* by Hayden King and Shiri Pasternak (Toronto: Yellowhead Institute, 2018).
[12] For example, see Aimée Craft, "Neither Infringement nor Justification: The Supreme Court of Canada's Mistaken Approach to Reconciliation" in Karen Drake & Brenda L Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) [*Renewing Relationships*], c3, at 59-82; and Kim Stanton,

provides one of the more helpful definitions of the concept. The TRC defines reconciliation as being about "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."[13] Further, the TRC calls on all governments in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration") as the framework for reconciliation.[14] The UN Declaration, while not a perfect document, is the product of over two decades of discussions between representatives of the UN and Indigenous peoples across the globe, resulting in a reference document on Indigenous rights of "unparalleled legitimacy."[15]

Both the executive and Parliament of the Canadian government have committed to implementing the UN Declaration, and the instrument has legal effect in Canadian law, meaning that domestic law (whether federal or provincial) must be interpreted to be consistent with the UN Declaration.[16] The 24 preambular provisions and 46 articles of the UN Declaration must, therefore, texture the meaning of reconciliation within Canada. Crucially, the UN Declaration mandates legislative reconciliation. Article 38 provides that "States, in consultation and cooperation with [I]ndigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."[17] The handbook for parliamentarians on implementing the UN Declaration, published by the Inter-Parliamentary Union and several UN agencies, cites the law-making role of parliamentarians as "particularly important in the implementation of the UN Declaration."[18] Both the *ILA* and *FNMICYF Act* state they are attempts by Parliament to directly incorporate the UN Declaration's norms into domestic law.[19]

"Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 J L & Soc Pol'y 21.

[13] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future - Summary of the Final Report of Truth and Reconciliation Commission of Canada* (2015) [TRC] at 6.

[14] *Ibid* at 189-191. The TRC said the UN Declaration "provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada," *ibid* at 21. *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 ["UN Declaration"].

[15] Clive Baldwin and Cynthia Morel, "Using the *United Nations Declaration on the Rights of Indigenous Peoples* in Litigation" in Stephen Allen and Alexandra Xanthaki, eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) at 122.

[16] For a discussion on this, see Naiomi Metallic "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act" (September 28, 2022), online: SSRN [Metallic, "Breathing Life"] at 6-22, 33-36.

[17] UN Declaration, *supra* note 14 at art 38. See also Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds. (Waterloo: Centre for International Governance Innovation, 2019) 21-28 [CIGI, *Braiding*], at 23.

[18] Inter-Parliamentary Union, UN Office of the High Commissioner for Human Rights, United Nations Development Programme & International Fund for Agricultural Development, *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23* (Geneva: Inter-Parliamentary Union, 2014) at 38.

[19] *ILA, supra* note 1, preambular clause 2 and s 5(g); *FNMICYF Act*, *supra* note 1 at preambular clause 1, s 8(c).

The meaning of inherent rights

Reconciliation legislation is about Indigenous peoples' inherent rights. In Canada, these have often been referred to as 'Aboriginal rights,' though I prefer 'inherent rights' as it is clearer and better aligns with terminology used in the UN Declaration.[20] Canadian Aboriginal rights doctrine sources these rights in the pre-existing societies of Indigenous peoples, which is why they are said to be 'inherent.'[21] The UN Declaration adds greater precision to this by describing such rights as those "which derive from [Indigenous peoples'] political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."[22] These rights are not created by state entities, be they governments or their courts, but, rather, are recognized under Canadian common law and the Constitution,[23] and are given protection from unjustified state limitations by the latter.[24] This includes both Aboriginal and treaty rights under s 35,[25] as well as the numerous rights of Indigenous peoples recognized within the UN Declaration, which represent "the minimum standards for the survival, dignity and well-being of the [I]ndigenous peoples of the world."[26]

Recognition legislation can be about recognizing and accommodating various inherent rights, including hunting and fishing rights, cultural and linguistic rights, land rights, as well as jurisdictional rights. By 'jurisdictional rights,' I mean rights of Indigenous peoples to exercise control and decision-making powers over several areas, based on their inherent right to self-determination.[27] The UN Declaration recognizes a wide range of areas in which Indigenous peoples ought to exercise control[28] and s 35 jurisprudence also recognizes jurisdictional powers under s 35 (though insufficiently, as will be discussed in the next section).[29] A form of legislation to distinguish from reconciliation legislation in the context of jurisdictional rights is 'devolution

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[20] UN Declaration, *supra* note 14 at preambular paragraph 7.
[21] *R. v Van der Peet*, [1996] 2 SCR 507 at para 36; *R. v Desautel*, 2021 SCC 17 at paras 28-30.
[22] UN Declaration, *supra* note 14 at preambular paragraph 7.
[23] *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313 at 328; *Van der Peet, supra* note 21 at 28.
[24] *Van der Peet, ibid*.
[25] *R. v Sparrow,* [1990] 1 SCR 1075; UN Declaration, *supra* note 14 at 46(2). Since treaties are negotiated based on Indigenous peoples' inherent political jurisdiction, they are also based on inherent rights. On this, see Joshua Nichols, "A Reconciliation without Recollection - Chief Mountain and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515. See also UN Declaration preambular paras 8, 37 regarding the recognition, observance and enforcement of "treaties, agreements and other constructive arrangements."
[26] UN Declaration, *supra* note 13 art 43. For a discussion on how the various rights in the UN Declaration transforms s 35 into a 'full box,' see Metallic, "Breathing Life," *supra* note 15 at 28-29, 38-44.
[27] See UN Declaration, *ibid* art 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." See also RCAP, *supra* note 9 at 2-3, 104-111.
[28] See Metallic, "Breathing Life," *supra* note 15 at 39-41.
[29] The leading case is *R v Pamajewon*, [1996] 2 SCR 821, but beyond this, the SCC has implied that self-government is an aspect of collective right holding: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115; *R. v Marshall*, [1999] 3 SCR 533 at para 17; *R. v Sappier; R. v Gray*, 2006 SCC 54 at para 26; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75. See also Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments", Research Paper for the National Center for First Nations Governance, Oct. 11, 2007, at 15-19; Grammond, *supra* note 9 at 18.

legislation.'[30] Devolution legislation, like the by-law making powers in the *Indian Act*, typically grant jurisdictional powers to First Nations Band Councils over certain areas.[31] The source of Indigenous peoples' jurisdiction under such legislation is not inherent, but rather is devolved from other governments, most often the federal government, but sometimes provincial governments.[32] As a result, the scope of, and any limits placed on, delegated jurisdiction is at the whim of the devolving government without any recourse by Indigenous groups.[33] By contrast, limitations placed on inherent jurisdiction, as a protected constitutional right, would have to be justified by the government, or else found unconstitutional.[34]

State governments' legislative jurisdiction in relation to Indigenous rights

Bracketing Quebec's specific arguments for the moment, on both a textual and doctrinal basis, the federal Parliament clearly has jurisdiction to legislate regarding Indigenous peoples' inherent rights under the power over "Indians, and Lands reserved for Indians" in s 91(24) of the *Constitution Act, 1867*. This power is broadly worded in its scope related to Indigenous peoples and has been interpreted as a plenary power enabling federal legislation "in just about every area of Aboriginal life,"[35] including in areas that would otherwise be regarded as being within provincial jurisdiction.[36] Some scholars have argued that reconciliation requires s 91(24) to have a more restrained and focused purpose (an issue I will return to in Part 4 in discussing how the courts can encourage legislative reconciliation).[37] Concerning inherent rights, s 91(24) has been specifically used as the basis for federal negotiation of treaties and legislation to

[30] On the difference between 'delegated' and 'inherent' jurisdiction, see McNeil, *ibid* at 3.
[31] *Indian Act, supra* note 3 ss 81-86. For a discussion of the by-law powers, see Naiomi Metallic, "*Indian Act* By-Laws: A Viable Means for First Nations to (Re) Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211 [Metallic, "*Indian Act* By-Laws"]. For a discussion of delegation statutes applying to First Nations, see Naiomi Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" in *Renewing Relationships*, *supra* note 11 at 243, 257-263 [Metallic, "Ending Piecemeal Recognition"].
[32] Provincial delegation schemes to First Nations can be found, for example, in Quebec: see *Police Act*, CQLR c P-13.1, ss 90-93 and *Youth Protection Act*, CQLR c P-34.1, s 37.5.
[33] While this is general true, the courts' approach to interpretation can impact both the scope and limits placed on these powers: "Indian Act By-Laws," *supra* note 30 at 222-224; see also *Ontario Lottery and Gaming Corporation v Mississaugas of Scugog Island First Nation,* 2019 FC 813 on the 'self-government' principle.
[34] QCCA Decision, *supra* note 7 at paras 518, 520, 528-529.
[35] QCCA Decision, *supra* note 7 at para 325, see more generally paras 321-329. Quebec also alleged that the *FNMICYF Act* unconstitutionally dictates to provincial public servants how they must carry out their functions. However, the QCCA found this to be merely incidental effects on a pith and substance analysis (see paras 313-333).
[36] See Peter Hogg and Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2020) at 28.2; and *Attorney General of Canada v Canard*, [1976] 1 SCR 170 at 191 (per Ritchie J) and 193 (per Pigeon J).
[37] See, for example, Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill LJ 308 at 314-320; see also Joshua Nichols, "Reconciling Constitutions: The Future of s. 91(24) and the right of Self-Government," (Presentation delivered to Department of Justice Canada (25 October, 2022) [unpublished].

implement treaties and self-government agreements,[38] to legislate protection of First Nation treaty rights,[39] as well as recognition of some customary rights.[40] Further, in *R v Sparrow*, the SCC specifically found that s 91(24) includes the power of Parliament to infringe Aboriginal rights, however, s 35 places limits on that power by requiring the Crown to justify infringements.[41] It follows that if Parliament has the power to restrict Aboriginal rights (subject to justification), it equally must have the power to recognize and protect such rights. Indeed, in a couple of decisions finding s 35 protected fishing rights, the SCC has suggested that the federal government ought to legislate to accommodate such rights in the federal *Fisheries Act* and regulations.[42]

While there are some inconsistent statements from the SCC on provincial jurisdiction over Indigenous peoples, the majority of cases suggest that provinces also have broad legislative jurisdiction in the area.[43] The SCC has long held that valid provincial laws of general application apply to Indigenous peoples and lands (except those touching on the 'core of Indianness' that could not be 're-invigorated by s 88 of the *Indian Act*).[44] More recently, in *Tsilqoht'in* and *Grassy Narrows,* the SCC clarified, after some case law to the contrary,[45] that s 35 Aboriginal and treaty rights are not at the 'core of Indianness,' meaning that provincial governments, including their legislatures, can infringe Aboriginal and treaty rights so long as such infringements are justified under s 35 according to the test in *Sparrow*.[46] In addition to this, there are SCC decisions that, contrary to older case law,[47] confirm and encourage provinces to specifically accommodate Indigenous peoples' interests in their laws.[48] It is not entirely clear whether this extends as far

[38] See Hogg and Wright, *supra* note 36 at 28.1. For some examples of treaty and self-government implementation legislation, see *Mi'kmaq Education Act,* SC 1998, c 24; *Westbank First Nation Self Government Act,* SC 2004, c 17; *Nisga'a Final Agreement Act,* SC 2000, c 7.

[39] See the opening phrase of s 88 of the *Indian Act*, *supra* note 3: "Subject to the terms of any treaty…. ." This provision has provided paramountcy to First Nation's treaty rights from provincial legislation for over 70 years: see Naiomi Metallic, "Extending Paramountcy to Indigenous Child Welfare Laws Does Not Offend our Constitutional Architecture or Jordan's Principle" (29 August 2022) ABlawg.ca (blog), online [Metallic, "Extending Paramountcy"], at 4.

[40] *Indian Act, ibid* at ss 2(1), 74-79. For a discussion of custom election and adoption powers, see "Ending Piecemeal Recognition…", *supra* note 30 at 258.

[41] *Sparrow, supra* note 24 at 1109-1110. At 1112, the SCC explains that an infringement can be an unreasonable limit on the right, a restriction that imposes undue hardship, or denies the rights-holder their preferred means of exercising the right.

[42] See *R. v Adams*, [1996] 3 SCR 101 at paras 53-54; *Marshall, supra* note 28 at para 64.

[43] Some provinces and territories have reconciliation legislation promoting and protecting Indigenous languages: see, for example, *Mi'kmaw Language Act,* SNS 2022, c 5; *Inuit Language Protection Act*, CSNu, c I-140. Some provinces and territories also have legislation to facilitate the exercise of custom adoptions: see Celeste Cuthbertson, "Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance Over Child Welfare" (2019) 28 Dal J Leg Stud 1.

[44] See *Dick v La Reine,* [1985] 2 SCR 309.

[45] See *Delgamuukw, supra* note 28 at paras 177-178; *R. v Morris,* 2006 SCC 59 at paras 83-100.

[46] *Tsilhqot'in, supra* note 28 at paras 131-152; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 50-53.

[47] See *The Queen v Sutherland et al.,* [1980] 2 SCR 451; *Delgamuukw, supra* note 28 at para 179.

[48] See *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31; Jean Leclair, "The Kitkatla Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters" (2003) 20

as s 35 rights. Some decisions from the SCC suggest it does.[49] However, in the 2020 *Uashaunnuat* case, the majority of the SCC categorically stated that "the provinces have no legislative jurisdiction over s. 35 rights…," but did not expand upon this statement or address how it is consistent with previous case law.[50] But, if general provincial legislation can restrict Aboriginal rights, which the SCC has clearly said they can in *Tshilqhot'in* (subject to justification), it follows that, like with Parliament, provincial governments must equally possess the power to recognize and protect such rights. Indeed, in its duty to consult jurisprudence, the SCC has suggested that provinces should legislate to provide a framework for government and third-party consultation with Indigenous groups in the province.[51]

The contents of reconciliation legislation

Having now established that both the federal and provincial governments can pass reconciliation legislation, I turn to give a sketch of the potential content of such laws. The underlying premise of such laws is that they are not required to give effect to inherent rights since these rights already exist. Nonetheless, a significant purpose of such laws is to provide clarity that such laws are recognized under Canadian law.[52] Reconciliation legislation can specify what rights are recognized and how, where and when they can be exercised. Such clarification is needed since there can be significant confusion and a lack of willingness to respect inherent rights by state actors when such rights are not explicitly spelled out in some official way by the state (despite their constitutional protection). For example, a former federal Department of Justice lawyer has written that, without explicit recognition of Indigenous peoples' jurisdiction in legislation, many of his colleagues are reticent to accept that s 35 provides a sufficiently firm legal foundation for inherent rights, and counsel their client against executive initiatives supporting the exercise of greater Indigenous control unless clearly authorized by a statute.[53] Failure to respect and implement rights can even occur after successful court decisions. For example, the Mi'kmaq of Nova Scotia are currently suing the government of Canada for failure

SCLR (2d) 1. See also *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 at para 44; *Daniels, supra* note 8 at para 51.

[49] See *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 51 (encourages provincial laws on the duty to consult); *Tshilhqot'in, supra* note 28 at para 116 (encourages provincial laws on Aboriginal title).

[50] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4 at para 65.

[51] See *Haida, supra* note 49 at para 51; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55-65. See also *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 21, regarding similar suggestions in the federal regulatory context.

[52] Indigenous peoples in Canada can and do exercise their inherent rights without official state sanction. In fact, there are some Indigenous scholars and advocates who are highly skeptical of 'reconciliation politics': see Glen Coulthard, *Red Skins White Masks – Rejecting the Colonial Politics of Recognition*, (Minneapolis: University of Minnesota Press, 2014). While it is appropriate to be cautious and critical of state actions, I agree with John Borrows that "communities could be strengthened and lives could be improved through legislation aimed at implementing international and domestic commitments and obligations regarding Aboriginal peoples,": see Borrows, "Legislation," *supra* note 5 at 475.

[53] See Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27 at 46-49.

to implement their moderate livelihood treaty right recognized in the 1999 *R v Marshall* case,[54] including for Canada's failure to specifically accommodate their rights in the *Fisheries Act* and regulations. The Mi'kmaq plead that Canada has failed to implement their rights and their community members continue to be charged for exercising their treaty rights, in violation of their constitutionally protected rights.[55]

Another crucial purpose of such laws is to set out a framework to facilitate the exercise of such rights. Importantly, such legislation can specify the obligations of state governments, as well as third parties, in relation to Indigenous rights, including funding responsibilities, processes for negotiations and resolving disagreements, reporting and other accountability measures, and coordinating overlapping jurisdiction. Meaningful reconciliation with Indigenous peoples' inherent rights requires attention to these issues. Except for a handful of modern treaties, there has been little systematic focus given to implementation issues despite various reports over decades calling for national legislative frameworks to increase state governments' accountability to Indigenous peoples.[56]

Next, like all governments, Indigenous governments need to be accountable and respect the fundamental rights of their citizens. In this regard, reconciliation legislation also permits state governments to impose requirements for Indigenous governments to adhere to *Charter* and human rights norms.[57] However, Indigenous governments should assume these responsibilities instead of being forced.[58] Indigenous legal orders have always had concepts of individual and collective rights, roles and responsibilities, and today's Indigenous governments should incorporate these concepts into their contemporary governance.[59] Should state governments feel the need to impose such protections in reconciliation legislation, however, the constitutionally protected nature of inherent rights necessitates taking a principled and flexible

[54] *R v Marshall, supra* note 28.
[55] Notice of Action in the Supreme Court of Nova Scotia, *Chief Wilbert Marshall and Potlotek First Nation v Attorney General of Canada*, Hfx. No. 506010 (2021). For an earlier case, alleging similar issues, *see Acadia First Nation v. Canada (Attorney General)*, 2013 NSSC 284.
[56] This includes the Penner Report and RCAP, both summarized in Metallic, "Ending Piecemeal Recognition," *supra* note 30 at 243-244, and numerous Auditor General of Canada [AGC] Reports: AGC, 1994 *Report of the Auditor General of Canada to the House of Commons*, vol 14, Chapter 23, "Indian and Northern Affairs Canada: Social Assistance" at para 23.29; AGC, *2006 Report of the Auditor General of Canada*, Chapter 5, "Management of Programs for First Nations" at 2-3, 9; AGC, *2011 Status Report of the Auditor General of Canada to the House of Commons*, Chapter 4, "Programs for First Nations on Reserves" at 4-5; AGC, *2013 Status Report of the Auditor General of Canada*, Chapter 6, "Emergency Management on Reserves" at 5.
[57] Such limits were imposed in the *FNMICYF Act, supra* note 1 at ss 19, 21(3).
[58] John Borrows has argued that Indigenous governments ought to voluntarily implement the UN Declaration to "ensure that their own people are both empowered by and protected from their own governments": see "Revitalizing Canada's Indigenous Constitution: Two Challenges," in CIGI *Braiding, supra* note 16 at 20-25.
[59]For a discussion of these, see Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) [MMIWG Report] at 129, 139-180.

approach to externally imposed legal norms that shows respect for Indigenous legal orders that include individual rights protection.[60]

While reconciliation legislation can relate to the inherent rights of a discrete Indigenous group, unlike negotiations and litigation, it can also recognize and accommodate the inherent rights of all Indigenous peoples in Canada at once. This is what the *ILA* and *FNMICYF Act* do in their respective areas of focus (language rights and jurisdiction over child and family services). As will be discussed below, a major barrier to the exercise of inherent rights by Indigenous peoples has been their piecemeal treatment in both negotiations and litigation, to be established one group at a time. By contrast, the UN Declaration presents the rights set out within the instrument as minimum, fundamental human rights possessed by all Indigenous peoples.[61] In other words, such rights are seen as 'general' or 'generic.'[62] Consistent with the UN Declaration, reconciliation legislation can treat Indigenous inherent rights as general, fundamental human rights and set out a framework for their exercise for all Indigenous peoples' within the legislating government's jurisdiction. In this way, legislation can be a much timelier and less costly mechanism for achieving reconciliation than negotiation or litigation.

Finally, the UN Declaration instructs that development of reconciliation legislation should occur "in consultation and cooperation" with Indigenous peoples "in order to obtain their free, prior and informed consent" ("FPIC").[63] This is also consistent with the SCC's statement that unilateral accommodation by government is "the antithesis of reconciliation and mutual respect."[64] The legislative drafting of both the *ILA* and *FNMICYF Act* was undertaken pursuant to a co-development approach with national Indigenous organizations.[65] While this co-development approach has yet to be fully analyzed for consistency with the UN Declaration, it is a promising step in the right direction. Scholars and communities also continue to examine other approaches to obtaining FPIC in relation to legislation.[66]

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[60] On this, see Naiomi Metallic, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments" (2022) 31:2 *Constitution Forum* 3, Special Issue on *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5.

[61] See UN Declaration, *supra* note 13 at art 43; and see Metallic, "Breathing Life…" *supra* note 15 at 37-38.

[62] For further discussion on inherent rights as generic rights, see Brian Slattery, "The Generative Structure of Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2016).

[63] See UN Declaration, *supra* note 13 at arts 38 and 19.

[64] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 49. While the SCC, in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, noted that remedies for breach of the duty to consult were not available during the legislative drafting process, all the judges agreed that failure to consult would be relevant to establishing a justified infringement of an inherent right.

[65] Government of Canada, "Co-development of a National *First Nations, Inuit and Métis Languages Act*" (2019-08-82), online; and Government of Canada, "Reducing the number of Indigenous children in care" (2022-01-17) online.

[66] See, for example, Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the *UN Declaration on the Rights of Indigenous Peoples*" (2017) 7:1 UWO J Leg Stud 4 (online); Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017)

2. Why do we need legislative reconciliation?

The short answer is that despite the entrenchment of s 35, there has been surprisingly little recognition and implementation of inherent rights in the ensuing 40 years. This is because the existing avenues for their recognition and protection, namely tripartite negotiations, and constitutional litigation, have been plagued by problems that render the exercise of inherent rights largely illusory for most Indigenous groups in Canada.

Ineffective negotiation processes

Existing tripartite negotiation processes have not proved a sufficient means to ensure meaningful implementation of inherent rights. There is the Comprehensive Claims Policy ("CCP"), setting up a process for the negotiations of land and resource rights, and the Inherent Rights Policy ("IRP"), setting up a process for the negotiation of self-government.[67] The IRP process has been critiqued as having "resulted in remarkably few agreements over the years,"[68] and the CCP has been similarly charged.[69] Reasons for this include that the processes do not allow for the unilateral exercise of any inherent rights by Indigenous peoples, particularly the right to self-government, even in uncontroversial areas of jurisdiction, but instead require a piecemeal process whereby talks must be initiated by individual Indigenous groups and negotiated on a group-by-group basis.[70] The vast majority of negotiations take over 15 years to conclude and cost millions on both the government and Indigenous sides.[71] Further, the negotiation process provides broad discretion to the federal and provincial governments to engage (or not) depending on political will.[72] Particularly because the process is not legislated, Indigenous groups have no mechanism to challenge government reluctance to negotiate, nor are there any oversight mechanisms for this process to challenge delay, denials, or unreasonable positions taken by state governments.[73] Some scholars have flagged this as a rule

50:1 UBCLR 95; and Kahente Horn-Miller, "What does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18 Rev Const Stud 111.

[67] Canada, *Renewing the Comprehensive Land Claim Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (2014); Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (1995). These two processes are often jointly negotiated. Since 1973, 25 comprehensive land claims and four self-government agreements have been signed. Of these, 18 including provisions related to self-government. According to the government of Canada, these agreements were reached with a total 97 Indigenous communities. To put this in context, there are over 600 land-based Indigenous communities across Canada representing between 50 to 70 nations.

[68] Promislow and Metallic, *supra* note 2 at 115; see also Metallic, "Ending Piecemeal," *supra* note 30 at 254.

[69] Canada, *A New Direction: Advancing Aboriginal and Treaty Rights*, by Douglas R Eyford, Catalogue No R3-221/2015E-PDF (Ottawa: Minister of Aboriginal Affairs and Northern Development Canada, 2015) at 3, 23.

[70] Metallic "Ending Piecemeal," *supra* note 30 at 253.

[71] *Ibid* at 256.

[72] *Ibid* at 255.

[73] Promislow & Metallic, *supra* note 68 at 115.

of law problem.[74] Others have highlighted the steep power imbalances Indigenous groups face in these processes.[75]

Jurisdictional wrangling between the federal and provincial governments also seriously impacts negotiations. George Erasmus, a former National Chief of the Assembly of First Nations, explains that federal negotiators use provincial intransigence as a bargaining strategy: "[t]he policy is seen by First Nations as an effort to set up a good guy-bad guy scenario, where the provinces play the bad guy … with the federal government as the good guy encouraging First Nations to take what they can get because of the regressive provincial stand."[76] Further, the CCP and IRP's general requirements of tripartite negotiations mean that the unwillingness of a province to participate or cooperate can doom negotiations from the outset.

Disputes over who, between the federal and provincial governments bears responsibility over Indigenous matters is a ubiquitous problem, not only concerning negotiations over land or self-government rights.[77] It is also well documented in almost every program and service area related to Indigenous peoples, and has, in recent years, led to findings of human rights violations against state governments.[78] The National Inquiry into Missing and Murdered Indigenous Women and Girls called this "interjurisdictional neglect" and linked the lack of cooperation between governments as a key contributor to the poverty experienced by Indigenous women and girls which, in turn, makes them vulnerable to becoming murdered and missing.[79] The National Inquiry went so far as to assert that the harms caused by interjurisdictional neglect violate the s 7 *Charter* rights to life, liberty, and security of the person of Indigenous women and girls.

Jurisprudence that eludes meaningful reconciliation

Turning to constitutional litigation, since 1990, the SCC has decided over 30 decisions interpreting s 35 and this jurisprudence recognizes rights to hunt, fish and gather for food,

[74] *Ibid* at 112.
[75] See Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claim Agreements?" (2006) 22 WRLSI 29 at 69-70; Metallic, "Ending Piecemeal," *supra* note 30 at 254-257; Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1 at 19, 21.
[76] George Erasmus, "Introduction" in Boyce Richardson, ed., *Drum Beat – Anger and Renewal in Indian Country* (Summerhill Press – The Assembly of First Nations: Toronto, 1989) at 17.
[77] To quote Kent McNeil: "In other division of powers situations, the federal government and the provinces usually fight one another for jurisdiction, each trying to amass as much authority as possible. But when it comes to jurisdiction in relation to Aboriginal peoples, exactly the opposite phenomenon occurs." See "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples" in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 309.
[78] See Naiomi Metallic, "A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the Caring Society Case" (2019) 28:2 JLSP 1 [Metallic, "A Human Right to Self-Government"]. See also *Pruden v Manitoba,* 2020 MBHR 6; *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada,* 2022 CHRT 4.
[79] *MMIWG* Report*, supra* note 59 at 567.

social and ceremonial purposes,[80] and some rights to engage in commercial trade of fish and some other harvested items.[81] The SCC has also defined the nature and content of Aboriginal title and even declared it to exist for lands of the Tsilhqot'in Nation in the interior of British Columbia.[82] In addition, the SCC has found that governments must consult and accommodate when authorizing or engaging in activities that will impact these rights even if they have not been proven but are credibly asserted.[83]

Despite leading to positive developments for some Indigenous communities, there been several critiques of the s 35 case law. For example, the test for proving Aboriginal rights has been criticized as being unduly narrow and freezing Aboriginal rights by casting them as practices "integral and distinctive" to pre-contact cultures.[84] The tests for Aboriginal rights, treaty rights, and Aboriginal title have also been charged with placing a heavy onus of proof on Indigenous claimants, who must prove each right on a case-by-case basis[85] and depart significantly from how the SCC approaches *Charter* rights violations.[86] The Court has also been conservative in its approach to recognizing commercial Aboriginal rights associated with the harvest of natural resources.[87] Further, the SCC has been reluctant to recognize self-government as a right protected by s 35 and has said that, if it is indeed a s 35 right, the right cannot exist in general and must be linked to a pre-contact practice that was integral and distinctive to a pre-contact culture.[88] Such an approach to self-government has been criticized as far too restrictive.[89] Finally, the case law on the duty to consult and accommodate has been charged with leading to more litigation and uncertainty rather than encouraging meaningful negotiations and resolution,[90] since, while seeming to provide some procedural protections to Indigenous groups, the case law ultimately provides Canadian governments with the final say over development and other decisions.[91]

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[80] See *R. v Van der Peet*, *supra* note 20; and *R. v Powley*, [2003] 2 SCR 207.
[81] See *R. v Gladstone*, [1996] 2 SCR 723 and *R. v Marshall*, *supra* note 28.
[82] See *Delgamuukw, supra* note 28*; Tsilhqot'in, supra* note 28.
[83] See *Haida, supra* note 49.
[84] See, for example, John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Constitutional Forum Constitutionelle* 27; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 *McGill Law Journal* 993; Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law," in CIGI, *Braiding*, *supra* note 16 at 135-144.
[85] See Felix Hoehn, "Back to the Future: Reconciliation and Indigenous Sovereignty after Tshilqot'in" (2016) 67 UNBLJ.
[86] See Promislow & Metallic, *supra* note 68 at 109.
[87] Ian Keay and Cherie Metcals, "Aboriginal Rights, Customary Law and the Economics of Renewable Resource Exploitation," (2004) 30 Canadian Public Policy 1.
[88] *Pamajewon*, *supra* note 28.
[89] See, for example, Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*" (1997), 42 *McGill Law Journal* 1011; Vicaire *supra* note 6; Hogg and Wright, *supra* note 36 at 28.20; McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments," *supra* 28 at 13-14.
[90] See Robert Hamilton and Joshua Nichols, "Reconciliation and the Straightjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa LR 205 at 240-242.
[91] See Joshua Nichols and Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution," (2020) 70:3 U of Toronto LJ 341; Robert Hamilton, "Asserted vs. Established Rights and the Promise of UNDRIP" in CIGI, *Braiding*, *supra* note 16 at 103-109.

Some scholars have characterized the failure of s 35 jurisprudence to create meaningful reconciliation as a constitutional crisis.[92] The TRC has likewise raised problems with the s 35 case law. According to the TRC, the "reconciliation vision that lies behind Section 35 should not be seen as a means to subjugate Aboriginal peoples to an absolute sovereign Crown," implying this has been a problem with s 35 interpretation to date.[93] Problems raised by the TRC include s 35 case law's implicit acceptance of the doctrine of discovery that manifests in Indigenous peoples having to prove their rights under narrow and problematic legal tests,[94] and a reluctance to appropriately recognize and respect Indigenous peoples' jurisdiction and laws.[95]

Indigenous well-being not improving

Research establishes a positive correlation between the exercise of inherent rights and Indigenous communities' well-being.[96] In other words, the ability to exercise inherent rights makes a difference in Indigenous peoples' lives. But too few Indigenous peoples are experiencing such benefits due to the limitations of the existing processes for accessing such rights. The litigation and negotiation processes have become games of survival of the fittest. Those who have the resources and capacity and are savvy enough to negotiate or push through with litigation get some benefit from their inherent rights, but those who cannot, for a variety of reasons often linked to colonialism, do not. It is telling that, overall, the needle has barely moved in terms of Indigenous peoples' well-being since 1982. Indigenous peoples in Canada still factor at the bottom of virtually all socio-economic indicators in Canada.[97] Community well-being index scores, tracking back to the 1980s, show a wide and persistent gap between both First Nations and Inuit compared to non-Indigenous communities.[98] In a 2014 report, the Special Rapporteur on the Rights of Indigenous people stated that "the human rights problems faced by Indigenous peoples in Canada … have reached crisis proportions in many respect" and that "[t]he most jarring manifestation of these human rights problems is the distressing socio-economic conditions of [I]ndigenous peoples in a highly developed country."[99]

While this speaks to the need for reform of the current approaches to inherent right negotiation and constitutional litigation, this also harkens to the need for reconciliation

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[92] Hamilton and Nichols, *supra* note 90 at 240.
[93] TRC, *supra* note 12 at 203.
[94] *Ibid* at 194-195.
[95] *Ibid* at 202-207.
[96] For a discussion, see Metallic, "Ending Piecemeal," *supra* note 30 at 264-265.
[97] See Indigenous Services Canada, "Annual Report to Parliament 2021," online: https://www.sac-isc.gc.ca/eng/1640359767308/1640359909406#chp3
[98] Crown-Indigenous Relations and Northern Affairs Canada, "Ministerial Transition Book: November 2015" (online). The community well-being index is a composite index comparing results for education, employment, income and housing among non-Aboriginal communities, on-reserve First Nations and Inuit communities. It shows First Nations being 20 points, and Inuit people being 16 points, below non-Indigenous communities over a period of roughly 30 years.
[99] Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya—Addendum—The Situation of Indigenous Peoples in Canada (Advance Unedited Version), UNHRC, 27th Sess, A/HRC/27/52/Add.2 (2014) at 7.

legislation to make the exercise and enjoyment of inherent rights more broadly accessible for Indigenous peoples. Unfortunately, the approaches to s 35 rights over the last four decades have largely left elected lawmakers estranged from their role in implementing Indigenous peoples' inherent rights. Most politicians and bureaucrats have come to see the recognition and protection of Aboriginal rights as the primary, if not the sole, domain of the courts. In a 2020 decision, the SCC appeared to confirm this when it noted that "defining [s. 35] rights is a task that has fallen largely to the courts."[100] Lack of political will to recognize and implement inherent rights is a major part of this, but I have also argued that the open-ended language of s 35 that fails to specify government obligations in relation to Indigenous rights (itself a product of political foot-dragging in the Patriation and the constitutional amendment processes) contributes to the problem. This is a stumbling block that the comprehensiveness and specificity of the UN Declaration will help to mitigate.[101]

Reforming our approaches to litigation and negotiation is not enough

Some scholars argue that a major problem in Aboriginal law to date has been too much control exercised by the judiciary over s 35 through defining the substantive content of inherent rights. These scholars (often referred to as proponents of 'treaty federalism') argue that substantive rights and relationships should more properly be a subject of negotiations between governments (Indigenous and state) and that the role of the judiciary ought to be circumscribed to a procedural one of ensuring a more level playing field for negotiations.[102] While the judicial role has become lopsided vis-à-vis the executive and legislative branches of government, like with other constitutionally-protected rights, I believe there is value in the courts affirming substantive rights and providing effective remedies for their violation. Though the courts' performance in this regard has been insufficient to date, I do not see the problem as innate to the institution of the judiciary. Rather, they stem in large part (again) from the open-ended wording of s 35 and the fact that its creation was marked more by political neglect and struggle than any grand design, which has presented interpretive challenges for Canadian judges. I argue elsewhere that the preambular clauses and articles of the UN Declaration will go a long way to fixing these problems.[103]

Nonetheless, I agree with the treaty federalists that a lot more of the work of recognizing and protecting inherent rights needs to happen outside of the courtroom. Certainly, a good deal of this work will and should happen through negotiations. But there are shortcomings in the negotiation process that reconciliation legislation can address. First, not everything needs to be subject to long and expensive negotiations. For example, when it comes to jurisdictional rights, Canadian law already recognizes Indigenous peoples' ability to exercise control in several areas (mostly through delegation legislation), thus, to continue to require individual Indigenous groups to negotiate for control in these areas is a waste of time and resources and

[100] *Uashaunnuat, supra* note 50 at para 24.
[101] See Metallic, "Breathing Life," *supra* note 16, at 22-26, 41-44.
[102] See, for example, Hoehn, "The Duty to Negotiate," *supra* note 75; and Hamilton and Nichols, "Reconciliation and the Straightjacket," *supra* note 90.
[103] Metallic, "Breathing Life," *supra* note 16 at 22-44.

unnecessarily delays Indigenous peoples' enjoyment of such rights with attendant consequences on Indigenous well-being.[104] The fact that the UN Declaration now recognizes several inherent rights as minimum, fundamental human rights, underscores the point of not delaying their implementation.

To be clear, however, recognition legislation will not eliminate the need for negotiations. Even where there is recognition of an inherent right in legislation, given the diversity of Indigenous groups with different histories and legal orders, as well as the diversity of state actors interacting with the group, it is inevitable that accommodation and implementation may necessitate negotiating specific details that are impractical to legislate. This can include specifics on funding, coordination of overlapping services, providing for dispute resolution mechanisms, etc. Thus, reconciliation legislation can recognize and make immediate the enjoyment of some aspects of a right, leaving other aspects to be negotiated between government. This is what the 'coordination agreement' option in *FNMICYF Act* seeks to do—incentivize negotiation over areas of mutual concern between governments.[105] This approach also innovatively responds to the long history of government neglect and wrangling in negotiations since it prevents the failure to reach agreement from holding up the exercise of the inherent right over child and family services.[106]

This segues into the second shortcoming of the current negotiation process which reconciliation legislation can address. As discussed above, negotiations currently take place in a legislative vacuum, which serves to exacerbate the power imbalance between Indigenous groups and state governments. This context gives state governments extensive latitude to deny rights and obligations, take problematic positions and drag their feet, with little to no recourse for Indigenous parties. To date, courts have been reluctant to impose constitutional remedies requiring governments to negotiate with Indigenous groups based on s 35 alone.[107] Legislation can set out detailed processes for negotiation or dispute resolution aimed at levelling the playing field, including the creation of specialized administrative bodies.[108] But even short of

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[104] Metallic, "Ending Piecemeal Recognition," *supra* note 31 at 270.

[105] *FNMICYF Act, supra* note 1 at s 20(2)-(7), 21-22. According to s 22(2), coordination agreements can include the provision of emergency services to Indigenous children, support measures to enable Indigenous children to exercise their rights effectively; fiscal arrangements and any other coordinating measure related to the effective exercise of legislative authority.

[106] For a discussion on this, see Metallic, "Extending Paramountcy," *supra* note 39 at 4-6.

[107] See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed., (loose-leaf - online) (Toronto: Thomson Reuters Ltd., 2021-2022) at 15.32. This sits in tension with statements from the SCC that governments have a "legal duty to negotiate in good faith to resolve land claims" in *Haida, supra* note 49 at 25 and *Tsilhqot'in, supra* note 29 at 17. For authors who have sketched what a duty to negotiate under s 35 looks like, see Hoehn, "A Duty to Negotiate," *supra* note 75; and Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples" (2003) 40:4 Alta L Rev 841; Johanne Poirier & Sajeda Hedaraly, "Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who Can and Should Do What?" (2019) 24:2 Rev Const Stud 171 at 204-205.

[108] The Office of the Commission of Indigenous Languages, created by the *ILA, supra* note 1 at ss 12-22, is an example of such an administrative body. Its mandate includes facilitating resolution of disputes and reviewing complaints in relation to the purpose of the *Act*, which includes facilitating the provision of adequate, sustainable, and long-term funding for Indigenous languages revitalization: see ss 23(c) and 5(d). Another example is the *Aboriginal Lands and*

this, legislation provides helpful parameters to constrain problematic state actions adopted under a legislative scheme. The preamble, purpose and other provisions in the statute can be used to assess both substantive and procedural decision-making by governments under judicial review. Government obligations under the UN Declaration would also be relevant to such review. Finally, the constitutional dimension of such legislation adds an additional layer to the assessment of state obligations, bringing in the principle of the Honour of the Crown[109] for example, which should inspire the use of innovative constitutional remedies, such as structural injunctions or what Kent Roach calls 'declarations plus,' to promote fair and effective negotiations.[110]

My point in this Part has been to emphasize the need for reconciliation legislation which has long been overlooked as a tool for achieving reconciliation. To be clear, however, I am not arguing for legislation to replace negotiations or constitutional litigation. Litigation is important to push governments into action on inherent rights where there is intransigence. But litigation cannot provide detailed frameworks for the implementation of inherent rights. Both negotiation and legislation can be vehicles for this in different ways. Negotiation provides frameworks one group at a time, and while particularized approaches will sometimes be needed, legislation can set out general rights-affirming frameworks that either avoid the need for long and costly negotiations, or, when more targeted negotiations are required, facilitate the timely and fair conclusion of negotiations, and provides tools for government oversight and accountability that can be safeguarded by the courts. All three processes are necessary for reconciliation, and they are mutually enforcing of inherent rights.

3. Is legislative reconciliation unconstitutional?

Quebec is currently challenging the *FNMICYF Act* for recognizing that Indigenous peoples in Canada have the inherent right to self-government over child and family services. It argues this is an unlawful attempt to unilaterally amend the Constitution, claiming that the inclusion of self-government in s 35 was hotly contested at the time of the creation of the *Constitution Act, 1982*, and the efforts to specifically enshrine this right in the Constitution during the Charlottetown Accord failed.[111] This argument ignores that discussions at constitutional conferences do not dictate the content of the Constitution.[112] The SCC has already interpreted

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Treaties Tribunal suggested by RCAP to address land claims and disputes arising out of the treaty process: see RCAP, *supra* note 11 at 296-304.

[109] To illustrate, I have heard of instances of provinces ignoring or denying requests of Indigenous groups within the province to negotiate coordination agreements under the *FNMICYF Act, supra* note 1. While the *Act* does not mandate provincial cooperation, arguments can be made based on the Honour of the Crown for a duty to negotiate and cooperate, relying on some of the authors cited a note 107 above.

[110] Roach, *supra* note 107 at 15:31 and 15:32. Roach defines 'declarations plus' as declarations where "courts are more specific about the implications of constitutional entitlements and retain jurisdiction or establish other mechanisms for resolving disputes about the meaning of declarations… ."

[111] QCCA Decision *supra* note 8 (Factum of the Applicant at paras 84-141). Quebec is making similar arguments on appeal to the SCC.

[112] *Reference re Employment Insurance Act (Can.), ss 22 and 23*, 2005 SCC 56 at para 9.

both s 91(24) and s 35 to include matters that were the subject of earlier constitutional debates.[113]

Our Constitution doesn't insulate harmful processes from evolving

Quebec's argument also curiously sidesteps the fact that the inherent right to self-government has already been recognized as a right that can be exercised by Indigenous groups upon successful litigation or negotiation.[114] Thus, what brings this into constitutional amendment territory, according to Quebec, is not that this right is unknown to Canada's legal system, but Parliament never having previously legislated about this right.[115] To make this argument, Quebec draws on the decisions in *Reference re Secession* and the *Reference re Supreme Court Act*, where the SCC found that certain concepts and institutions had become part of Canada's constitutional architecture.[116] In *Reference re Supreme Court Act*, it was held that because the Supreme Court had become part of the constitutional architecture, federal legislation alone could not be used to make changes to the Court; rather, any changes had to follow the amending formula in Part V of the *Constitution Act, 1982*. Quebec argues that because the right to self-government has only been recognized through negotiations and litigation, this status quo has become frozen as part of the constitutional architecture, and Parliament is prevented from unilaterally legislating over it. To exercise their inherent rights, either each Indigenous group must prove this right in court or enter tripartite negotiation. The provinces' approval is needed for any more systemic recognition of inherent rights.

It does not seem that Quebec's concerns are limited to the inherent right to self-government over child and family services. In both written and oral submissions, it has raised floodgate arguments, citing current legislative projects being led by Canada concerning Indigenous health and policing.[117] Quebec suggests these are illustrative of the 'dangerous path' the federal government is on and also raises the prospects of future Aboriginal title legislation as a bogeyman.[118] While Quebec presents these as alarming threats to federalism, these are all areas that scholars and reports have urged the federal government to legislate under s

[113] The SCC confirmed title was protected by s 35 in *Delgamuukw, supra* note 29, despite this being a contested issue during the constitutional conferences in the 1980s: see Renée Dupuis, Le statut juridique des peuples autochtones en droit canadien (Carswell, Scarborough, 1999), p 128. In *Powley, supra* note 80, the Court also concluded that Métis fall within the jurisdiction of s 91(24), despite the fact this amendment was contemplated during the Charlottetown Accord talks: see Canada, Privy Council, Consensus Report on the Constitution: Final Text, Catalogue No CP22-45/1992E (Charlottetown: PC, 28 August 1992), s 55.

[114] This can occur through the IRP, *supra* note 67, as well as *Pamajewon, supra* note 29.

[115] This argument ignores that some community-specific self-government legislation passed by Canada, including the *Sechelt Indian Band Self-Government Act*, SC 1986, c 27 and the Westbank First Nation Self Government Act, *supra* note 38, were the product of bilateral negotiations between the respect First Nations and Canada without provincial involvement.

[116] *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference re Supreme Court Act*, *ss 5 and 6*, 2014 SCC 21.

[117] These arguments were raised by Quebec's counsel before the QCCA in oral argument on September 15, 2021. On these initiatives, see CBC News, "Trudeau says legislation to make First Nations policing an essential service coming soon," by Olivia Stefanovich, December 8, 2020; and Indigenous Services Canada website, "Co-developing distinctions-based Indigenous health legislation," August 25, 2022.

[118] Factum of the Applicant in the QCCA Decision, *supra* note 8 at para 96.

91(24),[119] some going so far as to suggest that the lack of legislation violates the rule of law.[120] These areas, like the inherent right to self-govern over child and family matters, have been long neglected by both federal and provincial governments, causing real harm to Indigenous peoples by failing to effectively recognize and implement their inherent rights.

This is where Quebec's analogies to *Reference re Secession* and the *Reference re Supreme Court Act* break down. Quebec wants decades of political neglect to be seen as analogous to constitutional principles that the SCC described as "impossible to conceive our constitutional structure without" and "its lifeblood,"[121] or the institution of the Supreme Court, described as "a foundational premise of the Constitution."[122] Such analogies are perverse. Neglect and harm by the legislative branches against Indigenous peoples are not a lauded part of our history worthy of recognition as part of our constitutional architecture. They are a shameful part of our past and present that must be remedied.

Misconstruing s 35 and the roles of the courts and legislatures

Quebec's argument also presents a construct of s 35 that deviates from what the SCC has said about the provision and treats it differently than other constitutional rights. At its simplest, Quebec's argument is that absent consent of the provinces to federal s 91(24) legislation on inherent rights, Parliament is limited to acting on the SCC's interpretation of the provision. First, the insistence on a provincial veto over federal legislation on Indigenous inherent rights departs from the general principle in division of powers cases that appeals to federalism or cooperative federalism cannot sterilize the clear exercise of a valid head of power.[123] Why should the approach to s 91(24) here be any different to other heads of power (e.g., s 91(2), 91(25)), especially considering long-standing provincial intransigence to accommodating Indigenous rights?[124]

Second, outside provincial consent, Quebec's argument equates to the courts, particularly the SCC, having a monopoly over s 35, giving short shrift to the role of democratically elected

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[119] See, for example, on health, see Constance MacIntosh, "Indigenous Mental Health: Imagining a Future Where Action Follows Obligations and Promises" (2017) 54:3 Alta L Rev 589; on policing, see Canadian Council of Academies, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities, Expert Panel on Policing in Indigenous Communities* (Ottawa, Ontario: Canadian Council of Academies, April 2019) [*CCA* Report], at c4 and c 7; on Indigenous lands, see Laura Bowman, in "Constitutional "Property" and Reserve Creation: *Seybold* Revisited" (2007) 32 Man LJ 1, and Kerry Wilkins, "The Road Not Taken: Reserving Lands for Exclusive Indigenous Use and Occupation" (2021) 53:3 UBC L Rev 881.

[120] See Constance MacIntosh, "The Governance of Indigenous Health," in Joanna Erdman, Vanessa Gruben and Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto: Lexis Nexis Canada, 2017) c6 at 151; *CCA* Report, *ibid* at 74; Promislow & Metallic, *supra* note 68 at 101-108; and Borrows, "Legislation," supra note 6 at 484-485.

[121] *Reference re Secession of Quebec, supra* note 116 at para 51.

[122] *Reference re Supreme Court Act, supra* note 116 at paras 84, 85, 87, 89.

[123] See *Reference re Securities Act*, 2011 SCC 66 at para 62; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, paras 18-20.

[124] For a discussion of how provincial intransigence delayed the implementation of Crown commitments in the Numbered Treaties, see *Wilkins, supra* note 119 at 883-917.

lawmakers. While "defining [s. 35] rights is a task that has fallen largely to the courts,"[125] it is only because Canadian legislatures have been neglecting their role in recognizing and protecting inherent rights, not because the Constitution requires it. As explained in Part 1, s 35 does not create Aboriginal rights, but merely recognizes these common law rights and gives them constitutional protection. Thus, the SCC is only interpreting what it takes to be Aboriginal rights based on frameworks it developed for itself, which have been subject to criticism but are open to evolution.[126] The SCC is not creating or defining such rights for all time, and the Court has acknowledged that its interpretation of s 35 only provides minimum standards of content for the provision, which governments can choose to exceed in their laws and policies.[127] Thus, SCC jurisprudence is not intended to set a ceiling on the content of Indigenous inherent rights as Quebec argues but is only setting a baseline (which now must also be interpreted to be consistent with the UN Declaration).

Another way of looking at this is to see the SCC as one of many players (with other courts and tribunals, legislative and executive branches of governments, Indigenous governments, and international bodies) engaging in the exercise of interpreting Indigenous inherent rights. As stated by Mark Walters, "[j]udges play a critical role in th[e] process [of giving expression to Indigenous peoples' rights], but there are other participants too, and in the end the judicial contribution only serves to inform, not determine our understanding of the law itself. … the law of [I]ndigenous rights must lay beyond the control of any single writer or expounder of the law."[128]

Depriving s 35 rights of court-legislative 'dialogue'

This idea of various actors participating in a larger dialogic process of interpreting Indigenous inherent rights is consistent with how we approach the interpretation of the *Charter*.[129] On several occasions, Parliament has implemented its own interpretation of *Charter* rights before any court confirming this interpretation. The late Peter Hogg has called the legislated recognition of rights prior to court review part of the principle of "dialogue" between the courts and legislatures.[130] The SCC has affirmed the "dialogue" theory as a legitimate part of law-

[125] *Uashaunnuat, supra* note 50 at para 24.
[126] The SCC has held that courts may depart from previous constitutional interpretations in favour of new ones if there is a new legal issue raised that was not previously considered, or where there has been a change in circumstances or evidence that fundamentally shifts the parameters of the debate: see *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 38-47; *Carter v Canada (Attorney General),* 2015 SCC 5 at paras 42-48.
[127] See *R. v Côté,* [1996] 3 SCR 139 at para 83: "Section 35(1) only lays down the constitutional minimums that governments must meet in their relations with [A]boriginal peoples with respect to [A]boriginal and treaty rights. Subject to constitutional constraints, governments may choose to go beyond the standard set by s. 35(1)."
[128] Mark Walters, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law - Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) 21 at 49.
[129] See Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21(1) Rev Const Stud 13 at 28-30, 35: "Parliament and the courts are "partners" in a shared project of rights protection and promotion."
[130] Peter Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75; and Peter Hogg, Allison Bushell-Thornton and Wade Wright, "Charter Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1. See also MacDonnell, *ibid*.

making in the *Charter* context.[131] To take a different view of Parliament's ability to interpret and implement s 35 versus the *Charter* presents a troubling double standard.

While there could be justifiable reasons to depart from well-establish approaches to other constitutional rights when it comes to s 35 in some instances,[132] such reasons cannot be based on political neglect, bad faith, or perceptions that inherent rights are inconvenient to the majority,[133] especially where such deviations will continue to harm Indigenous peoples. Quebec's constitutional arguments against the *FNMICYF Act,* and other future reconciliation legislation, suffer from this problem. To move forward as a country beyond our colonial past (with its many tendrils still entwined in the present), all branches of state governments must embrace a similar spirit of constitutionalism as we do with other parts of our Constitution. Otherwise, if Quebec wins, the SCC's sentiment that "reconciliation with all of Canada's Aboriginal peoples is Parliament's goal," is a hollow one.[134]

4. Living our Constitution means normalizing legislative reconciliation

Far from being unconstitutional, legislative reconciliation embodies the principle of constitutionalism. This is the idea that "all government action comply with the Constitution."[135] But it means more than simply limits on government action. It includes the idea of governments manifesting their belief in the importance of constitutional rights through their actions. Stephen Cornell eloquently explains this notion of constitutionalism:

> … the heart of constitutionalism [is]: The idea that the process of governing is itself governed by a set of known, foundational laws or rules. … . In the constitutional world, government is held to a higher law than itself. …
>
> Critically … constitutionalism includes the idea that this higher law embodied in a constitution—written or unwritten—has real power. It shapes how government behaves and what government does. … A constitution compels compliance not through force but through the perhaps unspoken agreement—the cultural understandings—of those who live and act under its provisions. …

[131] *R. v Mills,* [1999] 3 SCR 668 at paras 20, 56-57; and *Sauvé v Canada (Chief Electoral Officer),* [2002] 3 SCR 519 at paras 8, 17. See also *MacDonnell*, *ibid* at 33-34.

[132] For example, Hamilton and Nichols suggests that when it comes to the justification of infringements of *Charter* versus s 35 rights, different approaches are necessary since the *Charter* is primarily about individual rights, while the s 35 is about collective, jurisdictional rights: see "Reconciliation and the Straightjacket," *supra* note 90 at 213-214, 216-218, 235, 242, 254.

[133] The SCC has stated that arguments that amount to saying Aboriginal and treaty rights should be recognized only to the extent such recognition would not occasion disruption or inconvenience to non-Indigenous peoples, "is not a legal principle. It is a political argument. What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the *Constitution Act, 1982*,": in *R. v Marshall,* [1999] 3 SCR 533 at para 45.

[134] *Daniels, supra* note 9 at para 37.

[135] *Reference re Secession, supra* note 116 at para 72.

> By constitutionalism, then, I mean not only the idea but also the fact: not only the idea that there is a higher law that governs government but the practical realization of that idea in how a nation, people, or community actually governs itself. …[136]

In other words, most simply, constitutionalism means that governments are expected to secure and promote constitutional rights.[137]

While by no means perfectly, we do see Canadian governments live constitutionalism when it comes to the *Charter*. Civil servants are expected to understand their obligations to respect human rights and the *Charter* in carrying out their functions.[138] Lawmakers also scrutinize whether new legislation conforms to the *Charter*. This is explicitly legislated as a responsibility of the federal minister of justice under s 4.1 of the *Department of Justice Act*.[139] Governments also tend to be proactive in responding to court decisions finding violations of the *Charter*. A prime example is the federal, *Civil Marriage Act*,[140] passed in response to court decisions finding the common law definition of marriage to violate s 15 of the *Charter*.[141] Sheryl Lightfoot also notes that governments in Canada have consistently taken a legislative approach when it comes to international human rights obligations.[142]

The time is long overdue for a culture of constitutionalism to take hold around Indigenous peoples' inherent rights in Canada. As discussed in Part 2, both the courts, through litigation, and the executive, through negotiations, necessarily have roles to play, but legislative reconciliation needs to become a significant part of the work of elected legislatures.

Legislative reconciliation is primarily about state governments taking seriously their obligations that are recognized under s 35 of the Constitution, meaning both historic Crown obligations going back to the Royal Proclamation of 1763, the Treaty of Niagara and other early treaties, as well as modern state obligations to Indigenous peoples, including those in the UN Declaration. But legislative reconciliation simultaneously advances several unwritten constitutional principles. For example, by implementing Indigenous peoples' inherent rights, particularly their jurisdictional rights, legislative reconciliation aligns with a broad conception of federalism, that seeks to balance power not just among the federal and provincial governments, but Indigenous governments as well. This is in line with the purpose of federalism enunciated in *Reference re Secession* to respond "to the underlying political and cultural realities that existed at

[136] Stephen Cornell, ""Wolves Have a Constitution:" Continuities in Indigenous Self-Government" (2015) 6(1) Int'l Indigenous Policy Journal Article 8 at 2-3.
[137] MacDonnell, *supra* note 129 at 15 and 28-29.
[138] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817.
[139] *Department of Justice Act,* RSC 1985, c J-2. For further discussion on this, see Promislow & Metallic, *supra* note 2 at 109.
[140] *Civil Marriage Act*, SC 2005, c 33.
[141] See *Halpern v Canada (AG),* [2003] O.J. No. 2268, 2003 CanLII 26403 (ON CA).
[142] Sheryl Lightfoot, "A Leopard Cannot Hide Its Spots: Unmasking Opposition to the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 UBC L Rev 1147 at 1173.

Confederation and continue to exist today,"[143] since Indigenous governments had inherent jurisdictional rights well before, at Confederation, and up to the present.

Clearly, legislative reconciliation manifests the rule of law. Here I intend rule of law as individuals' and groups' "entitlement to a positive order of laws that organizes society and protects it from harm."[144] The absence of legislation in so many areas of life for Indigenous peoples has been repeatedly raised as a violation of the rule of law, and the cause of significant harm to Indigenous peoples. The time is long overdue to remedy these violations. By remedying such violations through reconciliation legislation, legislatures are not only manifesting the rule of law, but also the unwritten principle of protection of minorities by taking active steps to protect minorities who face an imbalance of political power.[145]

Finally, legislative reconciliation is an expression of the principle of democracy. Democracy connotes "certain freely elected, representative, and democratic political institutions" through which "the sovereign will of the people" is expressed.[146] As the expression of the "will of the people," acts of legislative reconciliation are deserving of some deference from the courts when such laws are challenged,[147] including in the case of Quebec's Reference on the *FNMICYF Act*. With the *FNMICYF Act*, we have a democratically elected Parliament, which, based on public pressure, academic criticism, a finding of discrimination by the Canadian Human Rights Tribunal, TRC recommendations and the UN Declaration,[148] is finally seeking to use its legislative powers for good and not evil—to promote the well-being of Indigenous peoples rather than seeking to dominate or assimilate them. Respect for the choices of democratically elected decisions should mean that legislatures' efforts to promote constitutional rights and reconciliation, will not be lightly overturned by the courts. In the *Charter* context, the SCC has said that the principle of democracy strongly favours upholding legislation that conforms to the text of the Constitution.[149] There is no principled reason to deviate from this guidance in the s

[143] *Reference re Secession*, *supra* note 116 at para 43. See also Jean Leclair, "Zeus, Metis and Athena. The Path towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders," (June 28, 2022), online: SSRN at 3-4.

[144] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para 156. See also *Reference re Secession of Quebec, supra* note 116 at para 71.

[145] *Reference re Secession of Quebec*, *ibid* at paras 79-82.

[146] *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34 at para 76; *Reference re Secession of Quebec*, *ibid* at para 66.

[147] MacDonnell describes how democracy and the principle of Parliamentary Sovereignty are linked since democratic elections and systems are the framework within which the 'sovereign will' is ascertained and implemented. Consequently, acts of elected decision-makers that promote constitutional rights are entitled to respect by the courts: see MacDonnell, *supra* note 129 at 21-22, 31.

[148] See *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2; TRC, *supra* note 13, Calls to Action 1-5; UN Declaration, *supra* note 14 at arts 3, 4, 7(2), 8(1); Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62 McGill LJ 285; Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 JL & Soc Pol'y 132; and Metallic, "A Human Right to Self-Government," *supra* note 78.

[149] *Toronto (City), supra* note 146 at para 80; see also *British Columbia v Imperial Tobacco Canada Ltd.,* 2005 SCC 49 at para 66.

35 context. Based on the text and existing doctrine of s 91(24), Parliament has the jurisdiction to pass the *FNMICYF Act* and the courts ought to respect this based on the principle of democracy, as well as rule of law, constitutionalism, respect for minorities and federalism.

Building a culture of constitutionalism around Indigenous inherent rights requires normalizing legislative reconciliation. Assuming the SCC, like the QCCA, will find no merit in Quebec's constitutional amendment argument, more work can be done to help legislative reconciliation gain a greater foothold within Canadian legislatures. Legislative reconciliation does not solely come down to a matter of political will.[150] Legislatures can take steps to mandate procedures to encourage respect for constitutional rights. We have already seen an example of this with the *Department of Justice Act*, which legislates the responsibility of the federal minister of justice to assess new legislation for compliance with the *Charter*.[151] Canada and British Columbia have already taken such a step when it comes to the implementation of the UN Declaration. Both governments have passed UN Declaration implementation legislation that requires necessary measures to be taken to ensure the laws of government are consistent with the UN Declaration and prepare action plans to achieve the ends of the Declaration, and report on their efforts in this regard.[152] The remaining provinces and territories should follow suit.

Public pressure in the form of protests, report recommendations, academic criticism and news stories are also key drivers for legislative reconciliation. But so is legal pressure. While it is true that the power to legislate does not, on its own, create an obligation to legislate,[153] human rights legislation, the *Charter* and s 35 can place positive obligations on state governments to address rights violations, especially when interpreted through the lens of the UN Declaration, which contains detailed provisions outlining affirmative obligations on states in relation to Indigenous rights.[154] While judges have sometimes been reluctant to vindicate positive rights, this should be considered part of the reconciliation work that the judiciary must undertake.[155] Below I discuss two further areas where the judiciary can lend significant help to advance reconciliation by encouraging governments to legislate in relation to inherent rights.

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[150] For a contrary view, see Kerry Wilkins, "So You Want to Implement UNDRIP…" (2021) 53:4 UBC L Rev 1237 at 1240.

[151] *Department of Justice Act, supra* note 139 at s 4.1.

[152] *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14 at ss 5-7; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 at ss 3-5. For a discussion on the binding nature of such provisions, see Nigel Bankes, "Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act" (2021) 53:4 UBC L Rev 971 at 1001 to 1006.

[153] Poirier and Hedaraly, *supra* note 107 at 202; *Daniels, supra* note 9 at para 15.

[154] Judges should now be applying the UN Declaration to domestic law as a matter of the presumption of conformity: see Metallic, "Breathing Life," *supra* note 15 at 6-22, 33-36.

[155] For a discussion from members of the judiciary on their role in reconciliation, see Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) CLE BC Materials; Robert J. Bauman, "A Duty to Act" (delivered at CIAJ Annual Conference: Indigenous Peoples and the Law, 17 November 2021).

Rethinking remedies

Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency.[156] In general, broad remedial powers exist for addressing constitutional rights violations.[157] In the *Charter* context, the use of a declaration of invalidity, striking down unconstitutional legislative provisions (sometimes paired with a temporary suspension of invalidity) can operate as a strong incentive for governments to legislate.[158] According to Kent Roach, however, remedies in the Aboriginal rights context are relatively unexplored by courts and commentators.[159] To date, it does not appear that there has been even one case involving a violation of an Aboriginal or treaty right under s 35 where a declaration of invalidity of legislation was the chosen remedy.[160] I believe the failure to use declarations of invalidity when governments violate s 35 rights has likely contributed to the absence of a culture of constitutionalism regarding Indigenous rights.

Some of the most common remedies in the s 35 context include constitutional exemptions for the Indigenous party or claimant group from the legislative scheme, or 'reading down' the impugned statute to produce a similar exempting effect.[161] In *Ferguson*, the SCC expressed serious reservations about the use of constitutional exemptions as remedies, underscoring concerns related to the rule of law. The Court stated that "[a]llowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. … Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada."[162] While *Ferguson* occurred in the *Charter* context, there is no principled basis to distinguish the *Charter* context and s 35 when it comes to such concerns. A law that violates Indigenous peoples' inherent rights, just because it only affects a small minority of the population (which is also the case with s 15(1) and minority language *Charter* violations), is still 'bad law' since it violates the Constitution, and it is the role and responsibility of Parliament to address it.

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[156] *Constitution Act, supra* note 3 at s 52.

[157] See Roach, *supra* note 107 at c14. This can be further enhanced by the UN Declaration, which requires Indigenous groups to receive effective redress for violation of their rights: see UN Declaration, *supra* note 14 at arts 8(1), 11(2), 12(2), 27, 32(3).

[158] See Hogg et al., "The Charter Dialogue Between Courts and Legislatures," *supra* note 130.

[159] Roach, *supra* note 107 at 15.1.

[160] Note that this conclusion is based on my reading of the chapter, "Remedies and Aboriginal Rights," in Roach, *ibid*. I have not conducted an independent analysis of remedies in s 35 cases, but Roach has and his chapter does not identify a single case where the striking down of a part of a statute was ordered as a remedy.

[161] See *ibid* at 15.33 and 15.34. Roach also discusses how bare declarations of the existence of rights is a common remedy: see *ibid* at 15.2. But simple declarations can be ineffective when governments are intransigent. On this, Roach notes that at 15.31, "[d]eclarations of Aboriginal rights, like declarations of minority language rights, may require positive governmental action such as the provision of enabling legislation and resources." Therefore Roach recommends the development of what he calls "declarations plus." On this, see discussion above at note 110.

[162] *R. v Ferguson,* 2008 SCC 6 at para 73 [emphasis added]. The Court reinforced such principles in *Ontario (Attorney General) v G*, *supra* note 144 at 92-94, 109, 155-159, but suggested more flexibility for exemption for "an individual claimant who braved the storm of constitutional litigation," at paras 142-152.

While declarations of invalidity may not be appropriate in all cases,[163] their use in the Indigenous context, particularly to hold legislatures accountable to their obligations to recognize and implement inherent rights, deserves more attention and serious consideration.

Drawing clear jurisdictional lines

A final important aspect of normalizing legislative reconciliation in Canada is for our courts to promote—and state governments to embrace—clear jurisdictional lines between state governments concerning their obligations to recognize and protect Indigenous inherent rights. The problem here arises from the existence of broadly concurrent jurisdiction between the federal and provincial governments over Indigenous inherent rights, discussed in Part 1. For decades, and to the detriment of Indigenous peoples, as discussed in Part 2, jurisdictional wrangling over who is responsible for the well-being of Indigenous people, between the federal and provincial governments, has resulted in denials and delays in key government services for Indigenous peoples, and hampered successful negotiations over the recognition and accommodation of Indigenous peoples' rights.

While in theory, the prospect of two governments having roughly equal jurisdiction over Indigenous peoples sounds appealing (e.g., more responsibility, not less), history teaches otherwise. Broad concurrence in jurisdiction has long been used by both the federal and provincial governments to excuse and justify their own inaction, each saying Indigenous issues are the other's responsibility. Because of this, it is not sufficient for courts to simply confirm that both governments have jurisdiction and responsibilities to act as this will only serve to perpetuate interjurisdictional neglect.[164] Clearer direction and prioritization between governments are needed. In *Daniels*, the SCC emphasized the importance of drawing clear jurisdictional lines, especially where federal and provincial wrangling over responsibility to Indigenous peoples results in a "jurisdictional wasteland."[165] In addition, providing such direction is consistent with Jordan's Principle, a human rights and legal principle that, among other things, calls on courts to choose interpretations of the law that will avoid jurisdictional wrangling in the Indigenous context.[166]

The drawing of jurisdictional lines in this context must be driven by the fact that the federal government has a specific head of power in relation to Indigenous peoples and their lands (s 91(24)), while the provinces do not.[167] The provinces' power to legislate regarding Indigenous

[163] In some cases, particularly in the case of jurisdictional rights, Indigenous groups may not want to be accommodated within a legislative scheme, but rather be exempted from the regulatory scheme altogether. Nonetheless, I still see value in legislation in such cases. An express exemption in the law would provide clarity, and the law could also provide a framework for negotiation around issue like conflicts of law and funding.
[164] The QCCA Decision, *supra* note 8 at paras 530-563, suggests that absolute concurrence in jurisdiction between the federal and provincial governments in relation to Indigenous peoples is most consistent with our architecture. For a critique of the QCCA's reasoning, see Metallic, "Extending Paramountcy," *supra* note 39.
[165] *Daniels*, *supra* note 9, at para 14, see also para 12.
[166] See Metallic, "Extending Paramountcy," *supra* note 39 at 4-6.
[167] As emphasized by the SCC in *Toronto (City)*, *supra* note 146 at paras 14, 65, the text of the Constitution is of primordial importance when it comes to interpretation. Thus, s 91(24) must have meaning.

matters, including inherent rights, is incidental (i.e., must be tied to an otherwise valid provincial power (e.g., education, health, labour, lands and resources, etc.)). The provinces' obligation to recognize and protect inherent rights, as discussed in Part 1, derives from s 35. We could apply a similar approach to other areas of federal jurisdiction (e.g., fisheries, criminal law, immigration, etc.): legislating over Indigenous matters in these areas could be seen as incidental to these powers, and the obligation to recognize and protect inherent rights in these areas (again) derives from s 35. This would be the state of the law even if s 91(24) did not exist. Thus, to give meaningful content to s 91(24), the provision must enable Parliament to do something beyond what the federal government is already able to do under its other heads of jurisdiction.

As mentioned in Part 1, past approaches to s 91(24) have tended to treat it as a plenary power, enabling Parliament to legislate specifically about Indigenous peoples and their lands in virtually any area. Scholars have suggested this approach is too broad and unprincipled and should be narrowed.[168] Courts will often look to the text and history of a constitutional provision to give it a purposive interpretation.[169] Historical purposes ascribed to s 91(24) have included: (1) to honour the Crown's responsibilities to Indigenous peoples, including obligations under the *Royal Proclamation of 1763*; (2) to control Indigenous peoples and facilitate westward expansion of the country; and (3) to civilize and assimilate Indigenous peoples.[170] A problem with embracing these last two historical purposes today is their basis in racist and discriminatory ideologies (the notions that the state could claim control over Indigenous lands and people, and seek to assimilate them without their consent). These are inconsistent with Canada's commitments to substantive equality in s 15 of the *Charter.*[171] As much as possible, the provisions of the Constitution must be read to be in harmony with each other.[172] Reading s 91(24) harmoniously with s 15 by discarding these discriminatory and outdated purposes is also in line with the UN Declaration,[173] and with the SCC's directive that the interpretation of heads of power must take a progressive approach, recognizing that the meaning of the text of the Constitution must evolve as society changes.[174]

This leaves us with one valid historical purpose for s 91(24): to enable Canada to honour the Crown's responsibilities to Indigenous peoples. While this encapsulates all of the Crown's responsibilities, this specifically intends the historic commitments entered by the British in the early period of relations between Indigenous nations and the British Crown. This includes

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[168] See Ryder, *supra* note 37 and Nichols at *supra* note 37.
[169] *Toronto (City)*, *supra* note 146 at para 14.
[170] *Daniels v. Canada,* 2013 FC 6 at paras 353, 539, 566-567.
[171] Substantive equality in the Indigenous context means that systems and laws (including interpretations) that perpetuate historic disadvantage and assimilation must be discarded: see *Caring Society*, supra note 148 at paras 319-328, 399, 455, 465; and Metallic, "A Human Rights to Self-Government," *supra* note 78 at 30.
[172] This is known as the doctrine of mutual modification: see *Citizens Insurance Company v Parsons* (1881), 7 AC 96 (PC), aff'g (1880), 4 SCR 215. See Hogg and Wright, *supra* note 36 at 36.23.
[173] Preambular clause 4 of the UN Declaration, *supra* note 14, says: "all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust."
[174] *Reference re Employment Insurance, supra* note 112 at para 9.

obligations in early treaties, the *Royal Proclamation of 1763,* the Treaty of Niagara of 1764 and other acts of the British Crown in this period. Through these instruments, representations and actions, the British committed to recognize and protect not only Indigenous rights to their lands and resources, but their rights to exercise autonomy over their internal affairs and coexist peacefully with the newcomers. Specifically, the British committed to protecting Indigenous peoples' inherent rights from encroachment by settlers and their colonial governments. These commitments are well-documented [175] and became part of the common law.[176] In 1981, Lord Denning, of the Royal Courts of Justice, said these commitments had become the "equivalent to an entrenched provision in the Constitution of the colonies in North America."[177] In the post s 35 period, the SCC has affirmed that such obligations underlie the concept of the Honour of the Crown. [178]

At Confederation, the British Crown's Pre-Confederation commitments were inherited by the federal government[179] and influenced the creation of s 91(24). A report from the mid-1800s clearly evidences that the English House of Commons believed that provincial legislative assemblies were generally averse to Indigenous peoples and would be tempted to run roughshod over Aboriginal rights.[180] This was a significant driving force behind the inclusion of s 91(24) in the *Constitution Act, 1867,* according to Hogg and Wright: "[t]he idea was that the more distant level of government—the federal government—would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians…, and generally to protect the Indians against the interests of local majorities."[181] A related objective, noted by these authors, "was to maintain uniform national policies respecting Indians."[182] The federal government having the ability to provide national uniform legislation in relation to Indigenous peoples aligns with the primary purpose of preventing local interests of the provinces from

[175] See, for example, John Borrows, "Wampum at Niagara: the Royal Proclamation, Canadian Legal History and Self-Government," in Michael Ash, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver; UBC Press, 1997) c6; John Borrows, "Canada's Colonial Constitution," in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017).

[176] See Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 AM J Comp L at 373; Mark D Walters, "The Golden Thread of Continuity: Aboriginal Customs at Common Law and under the Constitution Act, 1982" (1999) 44:3 McGill LJ 711; Kent McNeil, "Shared Indigenous and Crown Sovereignty: Modifying the State Model" (2020 Osgoode Digital Commons, Articles & Book Chapters, 2815; and Hamilton & Nichols, "Reconciliation and the Straightjacket," *supra* note 90.

[177] *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte,* [1981] 4 CNLR 86 (Royal Crts of Justice) at 5.

[178] *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 66; *Wewaykum Indian Band v Canada,* [2003] 2 SCR 259 at para 79.

[179] *The Queen v The Secretary of State, supra* note 177 at 4-5.

[180] See Bruce McIvor and Kate Gunn, "Stepping Into Canada's Shoes: *Tshilhqot'in, Grassy Narrows* and the Division of Powers" (2016) 67 UNBLJ 146 at 147 quoting Great Britain, *Select Committee on Aborigines (British Settlement)* (House of Commons Parliamentary Papers no 425) (London : The Aborigines Protection Society, 1837).

[181] Hogg and Wright, *supra* note 36, ch 28:1. See also McIvor and Gunn, "Stepping Into Canada's Shoes" *ibid* at 147-148; Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tstilhqot'in* and *Grassy Narrows*," (2017) 55:1 Alta L Rev 3 91 at 95-97; Ryder, *supra* note 37 at 362-364.

[182] Hogg and Wright, *ibid*.

interfering with the Crown's commitment to recognize and protect Indigenous peoples inherent rights.[183] This must entail the power of the federal government to legislate in relation to Indigenous peoples and lands in areas otherwise reserved for provincial jurisdiction.[184]

To summarize the analysis here, both the provincial and federal governments have obligations arising from s 35 to recognize and protect inherent rights within their respective areas of jurisdiction, and their powers to legislate in this regard are incidental to the head of power they are otherwise acting under. In addition to this, s 91(24) specifically empowers the federal government to do more based on long-standing obligations to recognize and protect Indigenous inherent rights. The federal government can pass national legislation whose pith and substance is to recognize and promote the inherent rights of Indigenous peoples in any, or a multitude of areas at once. This necessarily includes the power to protect those rights from encroachment by provincial interests in areas typically regarded as provincial jurisdiction. To do this effectively, as has been argued elsewhere, Parliament is entitled to draw on the full panoply of drafting devices, including incorporation by reference and paramountcy.[185] Such drawing of jurisdictional lines in relation to Indigenous peoples' inherent rights gives important substance to the SCC's statement in *Daniels* that "reconciliation with all of Canada's Aboriginal peoples is Parliament's goal."[186]

Conclusion

This paper has attempted to sketch out the idea of 'legislative reconciliation' – governments in Canada using their legislative powers to recognize and protect the inherent rights of Indigenous peoples. Legislative reconciliation is needed because the existing approaches to the implementation of inherent rights—negotiation and constitutional litigation—have been insufficient on their own to bring about a mutually respectful relationship between Indigenous and non-Indigenous peoples. Despite the entrenchment of s 35, state governments have not seen themselves as having a role in its implementation in the same way they do for *Charter* rights. In particular, Canadian governments have not felt compelled to legislate to promote and protect inherent rights. This is in tension with constitutionalism, the idea that governments ought to live their constitutions by respecting and promoting constitutional rights. For too long, Indigenous peoples have not benefitted from similar respect and promotion of their inherent rights, and this has caused them significant harm. I have argued that legislative reconciliation is key to changing this. Only recently have governments in Canada started to embrace this concept.

[183] QCCA Decision, *supra* note 8, on appeal to the SCC (Factum of Respondent, Aseniwuche Winewak Nation of Canada, at para 48).
[184] Hogg and Wright, *supra* note 36 at 28.1(c): "If s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary."
[185] See Metallic, "Extending Paramountcy," *supra* note 39; Kerry Wilkins, "With a Little Help from the Feds: Incorporation by Reference and Bill C-92" (17 May 2022), *ABlawg.ca* (blog), online: https://ablawg.ca/author/kwilkins/
[186] *Daniels, supra* note 9 at 37.

A Reference initiated by the province of Quebec is attacking the constitutionality of legislative reconciliation. It argues that federal legislation recognizing and promoting inherent rights is an unlawful attempt at constitutional amendment if it is not consented to by the provinces or goes beyond the limited interpretation given to s 35 by the courts to date. These arguments deeply misconstrue the nature of inherent rights and the roles of courts and governments in interpreting them. Courts do not create these rights, nor do they have a monopoly in interpreting them. Governments, particularly elected lawmakers, have an important role to play in interpreting and implementing these rights as well, just like *Charter* rights.

The legislatures of both provincial and federal governments have important roles to play in recognizing and protecting s 35 in their respective fields of jurisdiction. Courts play an important role in incentivizing this by holding governments accountable to their constitutional obligations, read through the lens of the UN Declaration. They can also do this by assuring effective remedies for the violation of s 35 rights, including declaring legislative provisions to be invalid when appropriate. Courts should also promote clear jurisdictional lines in this area by recognizing that, despite broadly concurrent powers to respect Indigenous rights in the federal and provincial governments' respective fields of jurisdiction, the federal government possesses the additional power under s 91(24) to pass national laws that are in pith and substance about the protection and promotion of Indigenous inherent rights, including the power to protect those rights from the encroachment by provincial interests in areas typically regarded as provincial jurisdiction and to use the full arsenal of federal drafting tools to do this.