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Aboriginal Rights, Legislative Reconciliation and Constitutionalism

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This article sketches out the idea of legislative reconciliation: the concept of 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 section 35 of the Constitution Act, 1982*, 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.*

Parliament has only recently started to embrace legislative reconciliation by passing the Indigenous Languages Act *and* An Act respecting First Nations, Inuit and Métis children, youth and families *(*FNMICYF Act*) in 2019. However, a constitutional reference by Quebec places such initiatives in jeopardy. The province 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 section 35 by the Supreme Court of Canada 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 over interpreting them. Governments, particularly elected lawmakers, have an important*

Cet article dépeint l'idée d'une réconciliation législative : le concept des gouvernements au Canada utilisant leurs pouvoirs législatifs pour reconnaître et protéger les droits inhérents des peuples autochtones. La réconciliation législative est requise puisque les approches existantes de la mise en œuvre des droits inhérents – la négociation et le contentieux constitutionnel – ont été insuffisantes à elles seules à instaurer une relation de respect mutuel entre les peuples autochtones et non autochtones. Malgré la consécration de l'article 35 de la Loi constitutionnelle de 1982*, les gouvernements des États n'ont pas considéré qu'ils jouaient un rôle dans sa mise en œuvre de la même manière que c'était le cas pour la* Charte canadienne des droits et libertés. *En particulier, les gouvernements canadiens ne se sont pas sentis obligés de légiférer afin de promouvoir et de protéger les droits inhérents. Cela entre en contradiction avec le constitutionnalisme, l'idée que les gouvernements doivent respecter ses constitutions tout en respectant et promouvant les droits constitutionnels. Depuis trop longtemps les peuples autochtones n'ont pas bénéficié d'un respect et d'une promotion similaires de leurs droits inhérents, et cela leur a causé un préjudice important.*

Le Parlement n'a que récemment commencé à admettre la réconciliation législative en adoptant, en 2019, la Loi sur les langues autochtones *et la* Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis. *Cependant, un renvoi constitutionnel par le Québec met en péril de telles initiatives. La province soutient que la loi fédérale reconnaissant et promouvant les droits inhérents constitue une tentative illégale de modification constitutionnelle si les provinces n'y ont pas consentie ou si elle va au-delà de l'actuelle interprétation limitée donnée à l'article 35 par la Cour suprême du Canada. Ces arguments méconnaissent profondément la nature des droits inhérents et les rôles des tribunaux et*

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role to play in interpreting and implementing these rights as well, just as they do with Charter *rights.*

Here, I unpack the concept of legislative reconciliation and why it is needed and argue 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.

des gouvernements dans leur interprétation. Les tribunaux ne créent pas ces droits, et ne possèdent pas le monopole de leur interprétation. Les gouvernements, en particulier les législateurs élus, ont également un rôle important à jouer dans l'interprétation et la mise en œuvre de ces droits, tout comme c'est le cas avec la Charte canadienne des droits et libertés.

J'analyse ici le concept de réconciliation législative et les raisons de sa nécessité, et je soutiens que, loin d'être inconstitutionnelle, la réconciliation législative illustre le principe du constitutionnalisme, et doit être vigoureusement adoptée par le Parlement, mais également par les législatures provinciales et territoriales, et encouragée par nos tribunaux.

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> *Constitutional rights can be understood as creating a framework for governance. … If constitutional rights represent our basic values as a society, then it stands to reason that Parliament and the executive ought to "implement" rights in a meaningful way. Political actors can only claim to govern legitimately if they ensure that rights play a role in determining which policies they pursue and how those policies are structured.*[1]

I. Introduction

The above quote explains an important facet of the principle of constitutionalism. Essentially, this is the idea that a country's constitution ought to influence the day-to-day actions of its government. Since the passing of laws is the primary function of elected legislative bodies, we would thus expect to see the Canadian Parliament and provincial legislatures passing legislation to implement the Aboriginal and treaty rights "recognized and affirmed" by section 35(1) of the *Constitution Act, 1982*.[2] Oddly, while this regularly occurs in relation to the rights enshrined in the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*,[3] the same has not occurred for section 35 rights over the past 40 years. However, under mounting pressure to actualize reconciliation with Indigenous peoples within the past five years, some elected Canadian lawmakers have finally started to embrace this dimension of constitutionalism in relation to section 35 rights. Unfortunately, though, this promising development is at risk of being snuffed out by a court challenge initiated by the Quebec government.

The two leading examples of the recent embrace of section 35 constitutionalism can be seen in Parliament's passage of the *Indigenous Languages Act* ("*ILA*") and *An Act respecting First Nations, Inuit and Métis children, youth and families* ("*FNIMCYF Act*") in 2019.[4] While Parliament had passed a handful of statutes about First Nations in the past,[5] these new laws are unique because

1 Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Rev Const Stud 13 at 29 [footnotes omitted].

2 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35 [*Constitution Act, 1982*].

3 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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

5 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 section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1982, Appendix II, No 5 [section 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 section 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 & Naiomi Metallic, "Realizing Aboriginal Administrative Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Publishing, 2018) 87 at 95-96 [Promislow &

they are based on recognition that the subjects of the legislation (Indigenous languages and the exercise of jurisdiction over child and family services, respectively) are Aboriginal (or "inherent") rights protected by section 35 that all Indigenous peoples in Canada hold.[6] Unlike the *Indian Act*, which has served as a vehicle to infringe First Nations' peoples' inherent rights,[7] 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,[8] they signify an important shift in approach by Canadian governments to using their legislative powers to recognize and protect Aboriginal and treaty rights. This use of legislation as a tool for reconciliation, alongside litigation and negotiation, is long overdue.

While recognition legislation is "new" for Canada, it 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, protection of Indigenous cultures and communities, natural resource use, and economic development.[9] Such legislation has had positive impacts on the quality of life of US tribes.[10]

The promise of legislative reconciliation is jeopardized in Canada, however, by a current constitutional challenge spearheaded by Quebec against the

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Metallic, "Realizing"]. There has also been specific legislation implementing land claim agreements for the Inuit, First Nations, and Métis that have entered such agreements.

6 Past laws have also only been in relation to a subset of Aboriginal/Indigenous peoples (both are used as a term to collectively refer to First Nation, Métis and Inuit peoples), namely "status" Indian/First Nations as defined under the *Indian Act*, *supra* note 5. *ILA*, *supra* note 4 and *FNIMCYF Act*, *supra* note 4 are the first federal statutes to include the other subsets of Indigenous peoples, namely Métis, Inuit, and non-status First Nations.

7 See *Indian Act*, *supra* note 5. See also Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 Windsor YB Access Just 329.

8 For a critique of the *ILA*, *supra* note 4 see Lorena Sekwan Fontaine, David Leitch & Andrea Bear Nicholas, "How Canada's Proposed Indigenous Languages Act Fails to Deliver" Policy Brief for Yellowhead Institute, May 9, 2019, (online). For a critique of *FNIMCYF Act*, *supra* note 4, see Naiomi Metallic, Hadley Friedland, & Sarah Morales, "The Promise and Pitfalls of C-92: *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*" (2019), online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf> [perma.cc/EJH4-4NJP].

9 See John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 474 at 479, n 28 [Borrows, "Legislation"].

10 See *ibid*. See also Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58:3 McGill LJ 607.

FNIMCYF Act.[11] The province argues that the recognition and facilitation of an inherent right to self-government by Parliament amounts 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 section 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*"[12] will be rendered hollow.

This article explains the concept of legislative reconciliation and why it is needed in Canada. It 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.

II. What is Legislative Reconciliation?

The phrase "legislative reconciliation" refers to the legislative branches of governments in Canada passing legislation to facilitate the exercise of Indigenous peoples' inherent rights. The Royal Commission on Aboriginal Peoples ("RCAP") called this "recognition legislation."[13] However, I believe "reconciliation" is a more complete description of what such laws do. "Recognition" connotes "acceptance" of the existence of inherent rights by Canadian 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 the meaning ascribed to it by politicians[14] and even the SCC,[15] the Truth and

11 See *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].

12 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 37 [emphasis added] [*Daniels*].

13 See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 298 [emphasis ommitted] [RCAP]. See also Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 at 14-15.

14 See Hayden King & Shiri Pasternak, "Canada's Emerging Indigenous Rights Framework: A Critical Analysis" (5 June 2018), online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf> [perma.cc/6G3K-7B5M].

15 See, for example, Aimée Craft, "Neither Infringement nor Justification: The Supreme Court of Canada's Mistaken Approach to Reconciliation" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) at 59-82 [Drake & B Gunn,

Reconciliation Commission ("TRC") 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."[16] Further, the TRC calls on all governments in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.[17] 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."[18]

Both the executive and legislative branches 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*.[19] 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."[20] 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

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Renewing Relationships]; Kim Stanton, "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.

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

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

18 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) 121 at 122.

19 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" (28 September 28 2022) at 6-22, 33-36, online: *SSRN* (forthcoming in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds, *Rewriting the Canadian Constitution*) [Metallic, "Breathing Life"].

20 *UN Declaration*, *supra* note 17 at art 38 [emphasis added]. See also Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 21 at 23.

as "particularly important in the implementation of the *UN Declaration*."[21] Both the *ILA* and *FNIMCYF Act* state that they are attempts by Parliament to directly incorporate the *UN Declaration*'s norms into domestic law.[22]

A. 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*.[23]

Canadian Aboriginal rights doctrine sources these rights in the pre-existing societies of Indigenous peoples, which is why they are said to be "inherent."[24] 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."[25] 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,[26] and are given *protection* from unjustified state limitations by the latter.[27] This applies to both Aboriginal and treaty rights under section 35,[28] 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."[29]

21 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.

22 See *ILA*, *supra* note 4, preambular clause 2, s 5(g); *FNIMCYF Act*, *supra* note 4 at preambular clause 1, s 8(c).

23 See *UN Declaration*, *supra* note 17 at preambular paragraph 7.

24 See *R v Van der Peet*, [1996] 2 SCR 507 at para 36, 137 DLR (4th) [*Van der Peet*]; *R v Desautel*, 2021 SCC 17 at paras 28-30.

25 *UN Declaration*, *supra* note 17 at preambular paragraph 7.

26 See *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 328, 34 DLR (3d) 145; *Van der Peet*, *supra* note 24 at 28.

27 See *Van der Peet*, *supra* note 24 at 28.

28 See *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]; *UN Declaration*, *supra* note 17, art 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*, *supra* note 17, preambular paras 8, 37 regarding the recognition, observance, and enforcement of "treaties, agreements and other constructive arrangements."

29 See *UN Declaration*, *supra* note 17, art 43. For a discussion on how the various rights in the *UN Declaration* transform section 35 into a "full box," see Metallic, "Breathing Life", *supra* note 19 at 28-29, 38-44.

Recognition legislation can be about recognizing and accommodating various inherent rights, including hunting and fishing rights, cultural and linguistic rights, land rights, and jurisdictional rights. By "jurisdictional rights," I mean the rights of Indigenous peoples to exercise control and decision-making powers over different dimensions of their collectives lives, based on their inherent right to self-determination.[30] The *UN Declaration* recognizes a wide range of areas in which Indigenous peoples ought to exercise such control,[31] and section 35 jurisprudence also recognizes certain jurisdictional powers (though insufficiently, as will be discussed in the next section).[32]

A form of legislation that should be distinguished from reconciliation legislation in the context of jurisdictional rights is "devolution legislation."[33] Devolution legislation, like the by-law making powers in the *Indian Act*, typically grants jurisdictional powers to First Nations Band Councils over certain areas.[34] The source of Indigenous peoples' jurisdiction under such legislation is not inherent, but is rather devolved from other governments, most often the federal government.[35] As a result, the typical view is that the scope of, and any limits placed on, delegated jurisdiction is at the whim of the devolving government, without any recourse by Indigenous groups.[36]

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30 See *UN Declaration*, *supra* note 17, 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 13 at 2-3, 104-111.

31 See Metallic, "Breathing Life", *supra* note 19 at 39-41.

32 The leading case is *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*], but beyond this, the SCC has implied that self-government is an aspect of collective rights holding: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115, 153 DLR (4th) 193 [*Delgamuukw*]; *R v Marshall*, [1999] 3 SCR 533 at para 17, 179 DLR (4th) 193 [*Marshall* #2 cited to SCR]; *R v Sappier; R v Gray*, 2006 SCC 54 at para 26 [*Sappier*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75 [*Tsilhquot'in*]. See also Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (11 October 2007) at 15-19, online (pdf): *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1260&context=all_papers> [perma.cc/Z4UH-Y2FJ] [McNeil, "Inherent Right"]; Grammond, *supra* note 13 at 18.

33 On the difference between "delegated" and "inherent" jurisdiction, see McNeil, "Inherent Right", *supra* note 32 at 3.

34 See *Indian Act*, *supra* note 5, 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 Drake & B Gunn, *Renewing Relationships*, *supra* note 15 at 243, 257-263 [Metallic, "Ending Piecemeal Recognition"].

35 Provincial delegation schemes to First Nations can be found, for example, in Quebec: see *Police Act*, CQLR c P-13.1, ss 90-93; *Youth Protection Act*, CQLR c P-34.1, s 37.5 as it appeared on 11 April 2022.

36 While this is generally true, the courts' approach to interpretation can impact both the scope and limits placed on these powers: Metallic, "*Indian Act* By-Laws", *supra* note 34 at 222-224; see also *Ontario*

By contrast, limitations placed on inherent jurisdiction, as a protected constitutional right, would have to be justified by the government, or else found unconstitutional.[37] This is similar to what occurs when legislation intended to implement *Charter* protections is nonetheless later found to constitute an unjustified infringement of the *Charter*.[38] This can also mean that attempts by future governments to amend or repeal such laws could be challenged as a violation of section 35. Again, such challenges can and do occur in the *Charter* context, where the SCC has refrained from adopting a categorical approach to such issues (for example, stating that such repeals or amendments are always constitutionally permissible or not), and instead has developed principled frameworks for considering these issues on a case-by-case basis.[39]

B. 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 section 91(24) of the *Constitution Act, 1867*. While some scholars have argued for a restrained reading of this power (an issue I return to below in discussing how the courts can encourage legislative reconciliation),[40] it is broadly worded in its scope and has been interpreted as a plenary power enabling federal legislation "in just about every area of Aboriginal life,"[41] including in areas that would otherwise be regarded as within provincial jurisdiction.[42] Concerning inherent rights, section 91(24) has been specifically

Lottery and Gaming Corporation v Mississaugas of Scugog Island First Nation, 2019 FC 813 on the "self-government" principle.

37 See QCCA Decision, *supra* note 11 at paras 518, 520, 528-529.

38 See, for example, *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

39 See, for example, *Dunmore v Ontario (Attorney General)*, 2001 SCC 94; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18.

40 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) 36 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] [Nichols, "Reconciling Constitutions"].

41 QCCA Decision, *supra* note 11 at para 325. See more generally *ibid* at paras 321-329. Quebec also alleged that the *FNIMCYF Act*, *supra* note 4 unconstitutionally dictates to provincial public servants how they must carry out their functions. However, the QCCA found this to be a merely incidental effect on a pith and substance analysis (see *ibid* at paras 313-333).

42 See Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2020) at 28.2 [Hogg & Wright, *Constitutional Law*]; *Attorney General of Canada v Canard*, (1975), [1976] 1 SCR 170 at 191 (per Ritchie J), 193 (per Pigeon J), 52 DLR (3d) 548.

used as the basis for federal negotiation of treaties and legislation to implement treaties and self-government agreements,[43] and to legislate protection of First Nation treaty rights[44] and some customary rights.[45] Further, in *R v Sparrow*, the SCC specifically found that section 91(24) includes the power of Parliament to infringe Aboriginal rights, but that section 35 places limits on that power by requiring the Crown to justify infringements.[46] 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 that section 35 protects fishing rights, the SCC has suggested that the federal government ought to legislate to accommodate such rights in the federal *Fisheries Act* and regulations.[47]

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.[48] 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 cannot be "re-invigorated" by section 88 of the *Indian Act*).[49] More recently, in *Tsilqoht'in* and *Grassy Narrows*, the SCC clarified, after some case law to the contrary,[50] that section 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

43 See Hogg & Wright, *Constitutional Law*, *ibid* 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.

44 See the opening phrase of section 88 of the *Indian Act*, *supra* note 5: "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) at 4, online (pdf): *ABlawg* < ablawg.ca/wp-content/uploads/2022/08/Blog_NWM_Paramountcy_Indigenous_Child_Law.pdf> [perma.cc/GCB9-5N7P] [Metallic, "Extending Paramountcy"].

45 See *Indian Act*, *supra* note 5 at ss 2(1), 74-79. For a discussion of custom election and adoption powers, see "Ending Piecemeal Recognition", *supra* note 34 at 258.

46 See *Sparrow*, *supra* note 28 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 a restriction that denies the rights-holder their preferred means of exercising the right.

47 See *R v Adams*, [1996] 3 SCR 101 at paras 53-54, 138 DLR (4th) 657; *R v Marshall*, [1999] 3 SCR 456 at para 64, 177 DLR (4th) 513 [*Marshall* #1].

48 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 29.

49 See *Dick v R*, [1985] 2 SCR 309, 23 DLR (4th) 33.

50 See *Delgamuukw*, *supra* note 32 at paras 177-178; *R v Morris,* 2006 SCC 59 at paras 83-100.

so long as such infringements are justified under section 35 according to the test in *Sparrow*.[51]

In addition to this, there are SCC decisions that, contrary to older case law,[52] confirm and encourage provinces to specifically accommodate Indigenous peoples' interests via legislation.[53] It is not entirely clear whether this extends as far as section 35 rights, although some decisions from the SCC suggest it does.[54] However, in the 2020 *Uashaunnuat* case, the majority of the SCC categorically stated that "the provinces have no legislative jurisdiction over s[ection] 35 rights," but did not expand upon this statement or address how it is consistent with previous case law.[55] But if general provincial legislation can restrict Aboriginal rights, which the SCC has clearly said it 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 their jurisdictions.[56]

C. The Contents of Reconciliation Legislation

Having established that both the federal and provincial governments can pass reconciliation legislation, I turn now to give a sketch of the potential content of

51 See *Tsilhqot'in*, *supra* note 32 at paras 131-152; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 50-53. For critiques of these decisions see: Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tstilhqot'in* and *Grassy Narrows*" (2017) 55:1 Alta L Rev 91 [Wilkins, "Ruins"]; 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) 17 [Borrows, "Colonial Constitution"]; Bruce McIvor & Kate Gunn, "Stepping Into Canada's Shoes: *Tshilhqot'in, Grassy Narrows* and the Division of Powers" (2016) 67 UNBLJ 146 [McIvor & Gunn, "Canada's Shoes"]; HW Roger Townshend, "What Changes did *Grassy Nations First Nation* Make to Federalism and Other Doctrines?" (2017) 95:2 Can Bar Rev 459.

52 See *R v Sutherland et al*, [1980] 2 SCR 451, 113 DLR (3d) 364; *Delgamuukw*, *supra* note 32 at para 179.

53 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 SCLR (2d) 1. See also *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 44; *Daniels*, *supra* note 12 at para 51.

54 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 51 [*Haida*] (encourages provincial laws on the duty to consult); *Tshilhqot'in*, *supra* note 32 at para 116 (encourages provincial laws on Aboriginal title).

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

56 See *Haida*, *supra* note 54 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.

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 *clarify* that such rights are recognized under Canadian law.[57] In this regard, reconciliation legislation can specify what rights are recognized and how, and 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 section 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.[58] The extent of this reticence is further illustrated by the fact that a failure to respect and implement rights can even occur *after* successful court decisions. For example, Mi'kmaq groups in Nova Scotia have initiated proceedings against the government of Canada for failure to implement their moderate livelihood treaty right recognized in the 1999 *R v Marshall* case,[59] 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 that their community members continue to be charged for exercising their treaty rights in violation of the Constitution.[60]

Another crucial purpose of reconciliation laws is to set out a framework to facilitate the exercise of inherent rights. Importantly, such legislation can specify the obligations of state governments and third parties in relation to Indigenous rights, including funding responsibilities, processes for negotiations and resolving disagreements, reporting and other accountability mea-

57 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 9 at 475.

58 See Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13:1 Indigenous LJ 27 at 46-49.

59 See *Marshall #*1, *supra* note 47.

60 See *Marshall v Canada (AG)* (2021), Halifax 506010 (NSSC) (Notice of Action); *Sack v Canada (AG)* (2021), Halifax 510920 (NSSC). For an earlier case, alleging similar issues, see *Acadia First Nation v Canada (Attorney General)*, 2013 NSSC 284. Another Maritime Aboriginal rights case that has not been implemented is *Sappier*, *supra* note 32.

sures, 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.[61]

Next, as a matter of good governance, Indigenous governments should be accountable to, and respect the fundamental rights of, their citizens. In this regard, reconciliation legislation allows state governments to prescribe requirements for Indigenous governments to adhere to *Charter* and human rights norms.[62] It is preferable, however, for Indigenous governments to assume these responsibilities instead of being forced.[63] Indigenous legal orders have always had concepts of individual and collective rights, roles, and responsibilities, and today's Indigenous governments can braid these concepts, as well the protections in the *UN Declaration*, into their contemporary governance as more culturally-appropriate alternatives to Canadian human rights protections.[64] 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 approach that shows respect for Indigenous legal orders that include individual rights protection.[65]

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61 This includes the Penner Report and *RCAP*, both summarized in Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 243-244, and numerous Auditor General of Canada [AGC] Reports: AGC, *Report of the Auditor General of Canada*, vol 14, "Indian and Northern Affairs Canada: Social Assistance" (Ottawa: Office of the Auditor General of Canada, 1994) at para 23.2; House of Commons, *Report of the Standing Committee on Public Accounts*, "Chapter 5, Management of Programs for First Nations of the May 2006 Report of the Auditor General of Canada" (June 2006) (Chair: Shawn Murphy) at 2-3, 9; AGC, *Status Report of the Auditor General of Canada to the House of Commons*, "Chapter 4: Programs for First Nations on Reserves" (Ottawa: Office of the Auditor General of Canada, 2011) at 4-5; AGC, *Report of the Auditor General of Canada*, "Chapter 6: Emergency Management on Reserves" (Ottawa: Office of the Auditor General of Canada, 2013) at 5.

62 Such limits were imposed in the *FNIMCYF Act*, *supra* note 4, ss 19, 21(3).

63 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 John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in Borrows et al, *supra* note 20, 29 at 34-35.

64 *Ibid.* 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 (Vancouver: Privy Council Office, 2019) (Chief Commissioner: Marion Buller) at 129, 139-180 [MMIWG Report].

65 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 Const Forum Const 3.

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 *FNIMCYF 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, being 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.[66] In other words, such rights are seen as "general" or "generic."[67] 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 the development of reconciliation legislation should occur "in consultation and cooperation" with Indigenous peoples "in order to obtain their free, prior and informed consent" ("FPIC").[68] This is also consistent with the SCC's statement that unilateral accommodation by government is "the antithesis of reconciliation and mutual respect."[69] The legislative drafting of both the *ILA* and *FNIMCYF Act* was undertaken pursuant to a co-development approach with national Indigenous organizations.[70] 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 direc-

66 See *UN Declaration*, *supra* note 17, art 43; and see Metallic, "Breathing Life", *supra* note 19 at 37-38.

67 For further discussion on inherent rights as generic rights, see Brian Slattery, "The Generative Structure of Aboriginal Rights" in Macklem & Sanderson, *supra* note 9, 100.

68 See *UN Declaration*, *supra* note 17, arts 38, 19.

69 *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. The decision is thus not a barrier to legislative reconciliation since it still requires consultation as part of the *Sparrow* justification doctrine, and, in any event, it does not prevent governments from developing more robust consultation procedures with Indigenous groups. The SCC has said its section 35 decisions merely set out minimum requirements and that governments are free to go beyond them: see *R v Côté*, [1996] 3 SCR 139 at para 83, 138 DLR (4th) 385 [*Côté*].

70 See "Co-Development of a National First Nations, Inuit and Métis Languages Act" (2 August 2019), online: *Government of Canada* <canada.ca/en/canadian-heritage/campaigns/indigenous-languages-legislation.html> [perma.cc/V8KZ-FVFP]; "Reducing the Number of Indigenous Children in Care" (15 February 2023), online: *Government of Canada* <sac-isc.gc.ca/eng/1541187352297/1541187392851> [perma.cc/4VAZ-X9TL].

tion. Scholars and communities also continue to examine other approaches to obtaining FPIC in relation to legislation.[71]

III. Why Do We Need Legislative Reconciliation?

The short answer to the question of why we need reconciliation legislation is that despite the entrenchment of section 35, there has been surprisingly little recognition and implementation of inherent rights in the ensuing 40 years. This is because the existing avenues for the recognition and protection of these rights, 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.

A. Ineffective Negotiation Processes

Existing tripartite negotiation processes have not proven to be a sufficient means to ensure meaningful implementation of inherent rights. Examples of such processes include the Comprehensive Claims Policy ("CCP"), setting up a process for the negotiation of land and resource rights, and the Inherent Rights Policy ("IRP"), setting up a process for the negotiation of self-government.[72] The IRP process has been critiqued as having "resulted in remarkably few agreements over the years,"[73] and the CCP has been similarly charged.[74] 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

71 See, for example, Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada" (2017) 7:1 Western JL Studies 1; 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) 50:1 UBC L Rev 95; Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18:1 Rev Const Stud 111.

72 See Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claim Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Interim Policy), Catalogue No R3-217/2014E-PDF (Ottawa: Aboriginal Affairs and Northern Development Canada, 2014) [AANDC, *Renewing*]; 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 included 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 and 70 nations.

73 Promislow & Metallic, "Realizing", *supra* note 5 at 115 [footnotes omitted]; see also Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 254.

74 See Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights*, Catalogue No R3-221/2015E-PDF (Gatineau: Aboriginal Affairs and Northern Development Canada, 2015) at 3, 23.

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.[75] The vast majority of negotiations take over 15 years to conclude and cost millions on both the government and Indigenous sides.[76] Further, the negotiation process provides broad discretion to federal and provincial governments to engage (or not) depending on political will.[77] Particularly because the process is not legislated, Indigenous groups have no mechanism to challenge government reluctance to negotiate, nor are there any oversight mechanisms to challenge delay, denials, or unreasonable positions taken by state governments.[78] Some scholars have flagged this as a rule of law problem.[79] Others have highlighted the steep power imbalances Indigenous groups face in these processes.[80]

Jurisdictional wrangling between the federal and provincial governments also seriously impacts negotiations. Georges 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."[81] 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.[82] It is also well docu-

75 See Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 253.

76 See *ibid* at 256.

77 See *ibid* at 255.

78 See Promislow & Metallic, "Realizing", *supra* note 5 at 115.

79 See *ibid* at 112.

80 See Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claim Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29 at 69-70; Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 254-257; Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1 at 19, 21 [Hoehn, "Duty to Negotiate"].

81 Georges Erasmus, "Twenty Years of Disappointed Hopes" in Boyce Richardson, ed, *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) at 18.

82 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 the Aboriginal peoples, exactly the opposite phenomenon occurs." See Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal

mented 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.[83] 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.[84] The National Inquiry went so far as to assert that the harms caused by interjurisdictional neglect violate the section 7 *Charter* rights to life, liberty, and security of the person of Indigenous women and girls.

B. Jurisprudence that Eludes Meaningful Reconciliation

Turning to constitutional litigation, since 1990, the SCC has decided over 30 decisions interpreting section 35 and this jurisprudence recognizes rights to hunt, fish, and gather for food, social, and ceremonial purposes,[85] and some rights to engage in commercial trade of fish and some harvested items.[86] 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.[87] 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.[88]

Despite leading to positive developments for some Indigenous communities, there been several critiques of the section 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.[89] The tests for Aboriginal rights, treaty rights,

Peoples" in Kent McNeil, ed, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) at 309.

83 See Naiomi Walqwan Metallic, "A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the *Caring Society* Case" (2018) 28:2 J L & Soc Pol'y 4 [Metallic, "A Human Right to Self-Government"]. See also *Sumner-Pruden v Manitoba*, 2020 MBHR 6; *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4.

84 MMIWG Report, *supra* note 64 at 561-567.

85 See *Van der Peet*, *supra* note 24; *R v Powley*, 2003 SCC 43; *Sappier*, *supra* note 32.

86 See *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648; *Marshall #1*, *supra* note 47.

87 See *Delgamuukw*, *supra* note 32; *Tsilhqot'in*, *supra* note 32.

88 See *Haida*, *supra* note 54.

89 See, for example, John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 Const Forum Const 27; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; Brenda Gunn,

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,[90] which depart significantly from how the SCC approaches *Charter* rights violations.[91] The Court has also been conservative in its approach to recognizing commercial Aboriginal rights associated with the harvest of natural resources.[92] Further, the SCC has been reluctant to recognize self-government as a right protected by section 35 and has said that, if it is indeed a section 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[93] — an approach that has been criticized as far too restrictive.[94] 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,[95] since, while seeming to provide some procedural protections to Indigenous groups, it ultimately provides Canadian governments with the final say over development and other decisions.[96]

More generally, some scholars have characterized the failure of section 35 jurisprudence to create meaningful reconciliation as a constitutional crisis.[97] The TRC has likewise raised problems with the section 35 case law. According to the TRC, the "reconciliation vision that lies behind [s]ection 35 should not be seen as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown," implying this has been a problem with section 35 interpretation to date.[98] The TRC also criticizes the section 35 case law's implicit acceptance of the doctrine of discovery that manifests in Indigenous peoples having to

"Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law" in Borrows et al, *supra* note 20 at 135-144.

90 See Felix Hoehn, "Back to the Future: Reconciliation and Indigenous Sovereignty after *Tshilqot'in*" (2016) 67 UNBLJ 109.

91 See Promislow & Metallic, "Realizing", *supra* note 5 at 109.

92 See Ian Keay and Cherie Metcals, "Aboriginal Rights, Customary Law and the Economics of Renewable Resource Exploitation" (2004) 30:1 Can Pub Pol'y 1.

93 See *Pamajewon*, *supra* note 32.

94 See, for example, Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997), 42:4 McGill LJ 1011; Vicaire, *supra* note 10; Hogg & Wright, *Constitutional Law*, *supra* note 42 at 28.20; McNeil, "Inherent Right", *supra* 32 at 13-14.

95 See Robert Hamilton & Joshua Nichols, "Reconciliation and the Straightjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 205 at 240-242 [Hamilton & Nichols, "Reconciliation and the Straightjacket"].

96 See Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 UTLJ 341; Robert Hamilton, "Asserted vs. Established Rights and the Promise of UNDRIP" in Borrows et al, *supra* note 20 at 103-109.

97 See Hamilton & Nichols, "Reconciliation and the Straightjacket", *supra* note 95 at 240.

98 *TRC*, *supra* note 16 at 256.

prove their rights under narrow and problematic legal tests,[99] and its reluctance to appropriately recognize and respect Indigenous peoples' jurisdiction and laws.[100]

C. Indigenous Well-being not Improving

Research establishes a positive correlation between the exercise of inherent rights and Indigenous communities' well-being.[101] In other words, the ability to exercise inherent rights makes a difference in Indigenous peoples' lives. However, too few Indigenous peoples are experiencing such benefits due to the limitations of the existing processes for accessing their inherent rights. In this regard, 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 especially 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.[102] 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.[103] 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 respects" 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."[104]

99 See *ibid* at 194-195.

100 See *ibid* at 202-207.

101 For a discussion, see Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 264-265.

102 See Indigenous Services Canada, *Annual Report to Parliament*, Catalogue No R1-114E-PDF (Gatineau: Indigenous Services Canada, 2020).

103 See Crown-Indigenous Relations and Northern Affairs Canada, "Ministerial Transition Book: November 2015" (15 December 2015), online: *Government of Canada* <rcaanc-cirnac.gc.ca/eng/1450197908882/1621702150842> [perma.cc/K9KN-6KFE]. 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.

104 *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, UNHRCOR 27th Sess, Addendum, Agenda Item 3, UN Doc A/HRC/27/52/Add.2 (2014) at 6-7.

While this speaks to the need for reforms to the current approaches to inherent right negotiation and constitutional litigation, it also harkens to the need for reconciliation legislation to make the exercise and enjoyment of inherent rights more broadly accessible for Indigenous peoples. Unfortunately, the approaches to section 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. Indeed, in a 2020 decision, the SCC appeared to confirm this when it noted that "defining [section 35] rights is a task that has fallen largely to the courts."[105] 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 section 35, which fails to specify government obligations in relation to Indigenous rights (itself a product of political foot-dragging in the patriation process and in subsequent constitutional amendment processes), contributes to the problem.[106] This is a stumbling block that the comprehensiveness and specificity of the *UN Declaration* will help to mitigate.[107]

D. 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 section 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.[108] However, 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, the problem stems in large part (again) from the open-ended wording of section 35 and the fact that its creation was marked more by political neglect and struggle than any grand

105 *Uashaunnuat*, *supra* note 55 at para 24.

106 See Metallic, "Breathing Life", *supra* note 19, at 22-26, 41-44.

107 See *ibid*.

108 See, for example, Hoehn, "Duty to Negotiate", *supra* note 80; Hamilton & Nichols, "Reconciliation and the Straightjacket", *supra* note 95.

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.[109]

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). Requiring individual Indigenous groups to negotiate for control in these areas is therefore a waste of time and resources and unnecessarily delays Indigenous peoples' enjoyment of their rights with attendant consequences on Indigenous well-being.[110] 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, reconciliation 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. In fact, the expansive recognition of tribal jurisdiction in the US over the last 50 years appears to have exponentially increased the amount of agreements negotiated between tribes, states, and federal departments.[111] Such agreements 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 governments. This is what the "coordination agreement" option in *FNIMCYF Act* seeks to do — incentivize negotiation over areas of mutual concern between governments.[112] This approach also innovatively responds to

109 See Metallic, "Breathing Life", *supra* note 19 at 22-44.

110 See Metallic, "Ending Piecemeal Recognition", *supra* note 34 at 270.

111 See Martin Papillon, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2012) 42:2 Publius 289 at 296-299.

112 See *FNIMCYF Act*, *supra* note 4, ss 20(2)-(7), 21-22. According to section 22(2), coordination agreements can include the provision of emergency services to Indigenous children and 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.

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 of self-government over child and family services.[113]

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 section 35 alone.[114] Legislation, however, can set out detailed processes for negotiation or dispute resolution aimed at levelling the playing field, including the creation of specialized administrative bodies.[115] Even short of this, though, 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, and 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. For example, the applicability of the Honour of the Crown[116] should inspire the use of innovative constitutional remedies,

113 For a discussion on this, see Metallic, "Extending Paramountcy", *supra* note 44 at 4-6. This drafting technique is also used in US federal statues, encouraging negotiation between tribes and states, but recognizing the possibility of parties coming to an impasse and providing a backstop that ensures the exercise of tribal self-government is not stymied by state intransigence: see *Indian Gaming Regulation Act,* 25 USC § 2710(7)(B)(iv).

114 See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters Ltd, 2021-2022) (loose-leaf), s 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 *Tsilhqot'in*, *supra* note 32 at para 17 (citing *Haida*, *supra* note 54 at para 25). For authors who have sketched what a duty to negotiate under section 35 looks like, see: Hoehn, "Duty to Negotiate", *supra* note 80; 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?" (2019-2020) 24:2 Rev Const Stud 171 at 204-205.

115 The Office of the Commission of Indigenous Languages, created by the *ILA*, *supra* note 4, 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 *ILA*, which includes facilitating the provision of adequate, sustainable, and long-term funding for Indigenous languages revitalization: see *ibid*, ss 23, 5(d). Another example is the Aboriginal Lands and Treaties Tribunal suggested by RCAP to address land claims and disputes arising out of the treaty process: see RCAP, *supra* note 13 at 296-304.

116 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 *FNIMCYF Act, supra* note 4.

such as structural injunctions or what Kent Roach calls "declarations plus," to promote fair and effective negotiations.[117]

My point in this section has been to emphasize the need for reconciliation legislation, which has long been overlooked as a tool for achieving reconciliation in Canada. To be clear, I am not arguing for legislation to replace negotiations or constitutional litigation, the latter of which can push governments into action on inherent rights where there is intransigence. What litigation cannot provide, though, is a detailed framework 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 provide 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.

IV. Is Legislative Reconciliation Unconstitutional?

Quebec is currently challenging the *FNIMCYF 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 section 35 was hotly contested at the time of the creation of the *Constitution Act, 1982*, and noting that the efforts to specifically enshrine this right in the Constitution via the Charlottetown Accord failed.[118] However, this argument ignores the fact that discussions at constitutional conferences do not dictate the content of the Constitution.[119] The SCC has already interpreted both sections

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While the *FNIMCYF 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 at note 109 above.

117 See Roach, *supra* note 114, ss 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." For a recent decision applying the Honour of the Crown to find damages owing from chronic underfunding of a police services agreement between Canada, Quebec, and a First Nation, see *Takuhikan c Procureur général du Québec*, 2022 QCCA 1699.

118 See QCCA Decision, *supra* note 11 (Factum of the Applicant at paras 84-141). Quebec is making similar arguments on appeal to the SCC.

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

91(24) and 35 to include matters that were the subject of earlier constitutional debates.[120]

A. 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.[121] Thus, what brings this into constitutional amendment territory, according to Quebec, is not that this right is unknown to Canada's legal system, but the fact that Parliament has never legislated about this right.[122]

To make this argument, Quebec draws on the decisions in the *Reference re Secession of Quebec* and the *Reference re Supreme Court Act*, where the SCC found that certain concepts and institutions had become part of Canada's constitutional architecture.[123] In the *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 and successfully conclude tripartite negotiations. The provinces' approval is needed, Quebec claims, for any more comprehensive recognition of inherent rights.

120 The SCC confirmed title was protected by section 35 in *Delgamuukw*, *supra* note 32, 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* (Scarborough: Carswell, 1999) at 128. In *Powley*, *supra* note 85, the Court also concluded that Métis fall within the jurisdiction of section 91(24), despite the fact this amendment was contemplated during the Charlottetown Accord talks: see Canada, Privy Council, *Consensus Report on the Constitution: Charlottetown, August 28, 1992*, Catalogue No CP22-45/1992E (Ottawa: Privy Council, 1992), s 55.

121 This can occur through the IRP, AANDC, *Renewing*, supra note 72, as well as *Pamajewon*, *supra* note 32.

122 This argument ignores that some community-specific self-government legislation passed by Canada, including the *Shíshálh Nation Self-Government Act*, SC 1986, c 27 and the *Westbank First Nation Self Government Act*, *supra* note 43, were the product of bilateral negotiations between the respective First Nations and Canada without provincial involvement.

123 See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Reference re Secession* cited to DLR]; *Reference re Supreme Court Act*, *ss 5 and 6*, 2014 SCC 21.

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.[124] Quebec suggests these are illustrative of the dangerous path the federal government is on and also raises the prospect of future Aboriginal title legislation as a bogeyman.[125] While Quebec presents these as alarming threats to federalism, these are all areas that scholars and reports have urged the federal government to legislate within via section 91(24),[126] with some going so far as to suggest that the lack of legislation violates the rule of law.[127] 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 the *Reference re Secession of Quebec* 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 of our constitutional structure without" and "its lifeblood,"[128] or the institution of the Supreme Court, described as "a foundational premise of the Constitution."[129] 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

124 These arguments were raised by Quebec's counsel before the QCCA in oral argument on September 15, 2021. On these initiatives, see Olivia Stefanovich, "Trudeau Says Legislation to Make First Nations Policing an Essential Service Coming Soon", *CBC News* (8 December 2020), online: <cbc.ca/news/politics/first-nations-policing-trudeau-1.5833367> [perma.cc/DL6B-APJP]; Indigenous Services Canada, "Co-developing Distinctions-Based Indigenous Health Legislation" (31 January 2023), online: *Government of Canada* <sac-isc.gc.ca/eng/1611843547229/1611844047055> [perma.cc/Y4CD-Y9XJ].

125 See QCCA Decision, *supra* note 11 (Factum of the Applicant at para 96).

126 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: Canadian Council of Academies, 2019) at 45-60, 155-180 [*CCA* Report]; on Indigenous lands, see Laura Bowman, "'Constitutional Property' and Reserve Creation: *Seybold* Revisited" (2007) 32 Man LJ 1; Kerry Wilkins, "The Road Not Taken: Reserving Lands for Exclusive Indigenous Use and Occupation" (2021) 53:3 UBC L Rev 881 [Wilkins, "Road Not Taken"].

127 See Constance MacIntosh, "The Governance of Indigenous Health" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy* 5th ed (Toronto: LexisNexis Canada, 2017) 135 at 151; *CCA* Report, *supra* note 126 at 74; Promislow & Metallic, "Realizing", *supra* note 5 at 101-108; Borrows, "Legislation", *supra* note 9 at 484-485.

128 *Reference re Secession*, *supra* note 123 at para 51.

129 *Reference re Supreme Court Act*, *supra* note 123 at paras 84, 85, 87, 89.

our constitutional architecture. They are a shameful part of our past and present that must be remedied.

B. Misconstruing Section 35 and the Roles of the Courts and Legislatures

Quebec's argument also presents a construction of section 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 the consent of the provinces to federal section 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.[130] Why should the approach to section 91(24) here be any different to other heads of power (sections 91(2), 91(25), etc.), especially considering long-standing provincial intransigence to accommodating Indigenous rights?[131]

Second, outside provincial consent, Quebec's argument assumes that the courts, particularly the SCC, have a monopoly over section 35, giving short shrift to the role of democratically elected lawmakers. While "defining [section 35] rights is a task that has fallen largely to the courts,"[132] 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 the first section of the article, section 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.[133] The SCC is not creating or defining such rights for all time, and the Court has acknowledged that its interpretation of section 35 only provides "constitutional *minimums* that governments must meet

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

131 For a discussion of how provincial intransigence delayed the implementation of Crown commitments in the Numbered Treaties, see *Wilkins*, "Road Not Taken", *supra* note 126 at 883-917.

132 *Uashaunnuat*, *supra* note 55 at para 24.

133 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.

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 [section] 35(1)."[134] 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 floor (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 — along 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. … [T]he law of [I]ndigenous rights must lay beyond the control of any single writer or expounder of the law."[135]

C. Depriving Section 35 Rights of Court-Legislative "Dialogue"

The 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*.[136] On several occasions, Parliament has implemented its own interpretation of *Charter* rights before any court confirmed its 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.[137] The SCC has affirmed this theory, typically referred to as "dialogue" theory, as a legitimate part of lawmaking in the

134 See *Côté*, *supra* note 69 at para 83 [emphasis underlined in original]. In *United States v Lara*, 541 US 193 at 425, 433 (2004), the US Supreme Court went further to find that Congress has the jurisdiction to restore inherent rights that earlier court decisions held tribes to be divested of: "Congress, with this Court's approval, has interpreted the Constitutution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. … One can readily find examples in congressional decisions to recognize, or to terminate, the existence of individual tribes. … *[W]e do not read any [of our previous cases] as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation*" [emphasis added].

135 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* (Oxford: Hart Publishing, 2009) 21 at 49.

136 See MacDonnell, *supra* note 1 at 28-30, 35: "Parliament and the courts are 'partners' in a shared project of rights protection and promotion" [footnotes omitted].

137 Peter Hogg & Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35:1 Osgoode Hall LJ 75; Peter Hogg, Allison Bushell-Thornton & Wade Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1 [Hogg, Bushell-Thornton & Wright, "Charter Dialogue"]. See also MacDonnell, *supra* note 1.

Charter context.[138] To take a different view of Parliament's ability to interpret and implement section 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 section 35 in some instances,[139] such reasons cannot be based on political neglect, bad faith, or perceptions that inherent rights are inconvenient to the majority,[140] especially where such deviations will continue to harm Indigenous peoples. Quebec's constitutional arguments against the *FNIMCYF 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.[141]

V. 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 [must] comply with the Constitution."[142] But it means more than simply limits on government action. Rather, it includes the broader 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. …

138 *Mills*, *supra* note 38 at paras 20, 56-57; *Sauvé v Canada (Chief Electoral Officer),* 2002 SCC 68 at paras 8, 17. See also *MacDonnell*, *supra* note 1 at 33-34.

139 For example, Hamilton and Nichols suggest that when it comes to the justification of infringements of *Charter* versus section 35 rights, different approaches are necessary since the *Charter* is primarily about individual rights, while section 35 is about collective, jurisdictional rights: see Hamilton & Nichols, "Reconciliation and the Straightjacket", *supra* note 95 at 213-214, 216-218, 235, 242, 254.

140 The SCC has stated that any argument that amounts 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[ection] 35 in the *Constitution Act, 1982*." See *Marshall #2*, *supra* note 32 at para 45.

141 *Daniels*, *supra* note 12 at para 37 [emphasis omitted].

142 *Reference re Secession*, *supra* note 123 at para 72.

> *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. …*
>
> 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.*[143]

In other words, most simply, constitutionalism means that governments are expected to secure and promote constitutional rights.[144]

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.[145] Lawmakers also scrutinize whether new legislation conforms to the *Charter*. This is explicitly legislated as a responsibility of the federal minister of justice under section 4.1 of the *Department of Justice Act*.[146] 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*,[147] passed in response to court decisions finding the common law definition of marriage to violate section 15 of the *Charter*.[148] Sheryl Lightfoot also notes that governments in Canada have consistently taken a proactive legislative approach when it comes to their international human rights obligations.[149]

The time is long overdue, then, for a culture of constitutionalism to take hold around Indigenous peoples' inherent rights in Canada. As discussed in the second section of the article, 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 too.

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143 Stephen Cornell, "'Wolves Have a Constitution': Continuities in Indigenous Self-Government" (2015) 6:1 Intl Indigenous Policy J 1 at 2-4.

144 See MacDonnell, *supra* note 1 at 15 and 28-29.

145 See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

146 RSC 1985, c J-2. For further discussion on this, see Promislow & Metallic, "Realizing", *supra* note 5 at 109.

147 *Civil Marriage Act*, SC 2005, c 33.

148 See *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 25 DLR (4th) 529 (ON CA).

149 See 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.

Legislative reconciliation is primarily about state governments taking seriously their obligations that are recognized under section 35 of the *Constitution Act, 1982*, meaning both historic Crown obligations going back to the Royal Proclamation of 1763, the Treaty of Niagara, and other early treaties,[150] as well as modern state obligations to Indigenous peoples, including those in the *UN Declaration*.

In addition, legislative reconciliation 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.[151] This is in line with the purpose of federalism enunciated in the *Reference re Secession of Quebec*, to respond "to the underlying political and cultural realities that existed at Confederation and continue to exist today,"[152] 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 mean the rule of law as individuals' and groups' "entitlement to a positive order of laws that organizes society and protects it from harm."[153] 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.[154]

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

150 See preambular clause 4 of the *UN Declaration*, *infra* note 182 and accompanying text.

151 See Papillon, *supra* note 111 at 292: "the recognition of distinct orders of sovereign authority is inherent to federalism."

152 *Reference re Secession*, *supra* note 123 at para 43. See also Jean Leclair, "Zeus, Metis and Athena. The Path towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders" (2022 June 28) at 3-4, online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4148715> [perma.cc/MH9D-WWPD].

153 *Ontario (Attorney General) v G*, 2020 SCC 38 at para 156. See also *Reference re Secession*, *supra* note 123 at para 71.

154 See *Reference re Secession*, *supra* note 123 at paras 79-82.

expressed.[155] 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,[156] including in the case of Quebec's Reference on the *FNIMCYF Act*. With the *FNIMCYF 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*,[157] 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-makers 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.[158] There is no principled reason to deviate from this guidance in the section 35 context. Based on the text and existing doctrine of section 91(24), Parliament has the jurisdiction to pass the *FNIMCYF Act* and the courts ought to respect this based on the principle of democracy, as well as the rule of law, constitutionalism, respect for minorities, and federalism principles.

Building a culture of constitutionalism around Indigenous inherent rights accordingly requires the normalization of legislative reconciliation. Assuming that 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. This does not solely come down to a matter of political will.[159] 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

155 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 76; *Reference re Secession*, *supra* note 123 at para 66 [*Toronto*].

156 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 1 at 21-22, 31.

157 See *First Nations Child and Family Caring Society of Canada v Minister of Indian and Northern Affairs Canada (AG)*, 2016 CHRT 2; *TRC*, *supra* note 16 at 187-192 (Calls to Action 1-5); *UN Declaration*, *supra* note 17, arts 3, 4, 7(2), 8(1); Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285; Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 JL & Soc Pol'y 132; Metallic, "A Human Right to Self-Government", *supra* note 83.

158 See *Toronto*, *supra* note 155 at para 80; see also *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 66.

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

the responsibility of the federal minister of justice to assess new legislation for compliance with the *Charter*.[160] 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, the preparation of action plans to achieve the ends of the Declaration, and reporting on their efforts in this regard.[161] 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,[162] human rights legislation, the *Charter*, and section 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.[163] While Canadian judges have sometimes been reluctant to vindicate positive rights, this should be considered part of the reconciliation work that the judiciary must undertake.[164] 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.

A. 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

160 *Department of Justice Act*, *supra* note 146, s 4.1.

161 See *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, ss 5-7; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, 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 1001-1006. British Columbia has also taken the added of step of amending its *Interpretation Act*, RSBC 1996, c 238, ss 8.1(2)-(3) so that every enactment of the province must be construed consistent with section 35 and the *UN Declaration*. Canada ought to do similarly.

162 See Poirier & Hedaraly, *supra* note 114 at 202; *Daniels*, *supra* note 12 at para 15.

163 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 19 at 6-22, 33-36.

164 For a discussion from members of the judiciary on their role in reconciliation, see: The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (November 2012), online (pdf): *CLE BC Materials* <cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf> [perma.cc/VM34-LK3X]; The Honourable Robert J Bauman, "A Duty to Act" (Delivered at Canadian Institute for the Administration of Justice Annual Conference: Indigenous Peoples and the Law, 17 November 2021) [unpublished].

inconsistency.[165] In general, broad remedial powers exist for addressing constitutional rights violations.[166] 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.[167] According to Kent Roach, however, remedies in the Aboriginal rights context are relatively unexplored by courts and commentators.[168] To date, it does not appear that there has been even one case involving a violation of an Aboriginal or treaty right under section 35 where a declaration of invalidity of legislation was the chosen remedy.[169] I believe the failure to use declarations of invalidity when governments violate section 35 rights has contributed to the absence of a culture of constitutionalism regarding Indigenous rights.

Some of the most common remedies in the section 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.[170] 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*.[171]

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165 *Constitution Act*, *supra* note 2, s 52.

166 See Roach, *supra* note 114, chapter 14. 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, arts 8(1), 11(2), 12(2), 27, 32(3).

167 See Hogg, Bushell-Thornton & Wright, "Charter Dialogue", *supra* note 137.

168 Roach, *supra* note 114 at 15.1.

169 Note that this conclusion is based on my reading of the chapter, "Remedies and Aboriginal Rights," in Roach, *supra* note 114. I have not conducted an independent analysis of remedies in section 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.

170 See *ibid* at 15.33 and 15.34. Roach also discusses how bare declarations of the existence of rights are a common remedy: see *ibid* at 15.2. However, 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 in *Roach*, *supra* note 117.

171 *R v Ferguson,* 2008 SCC 6 at para 73 [emphasis added]. The Court reinforced such principles in *Ontario (Attorney General) v G*, *supra* note 153 at 92-94, 109, 155-159, but suggested more flexibility for exemption for "an individual claimant [who] braved the storm of constitutional litigation" (*ibid* at paras 142-152).

While *Ferguson* occurred in the *Charter* context, there is no principled basis on which to distinguish the *Charter* context and section 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 section 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. While declarations of invalidity may not be appropriate in all cases,[172] then, 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.

B. Drawing Clear Jurisdictional Lines

A final important aspect of normalizing legislative reconciliation in Canada is for 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 section one of this article. For decades, and to the detriment of Indigenous peoples, as discussed above, jurisdictional wrangling over who is responsible for the well-being of Indigenous people, as between the federal and provincial governments, has resulted in denials and delays in key government services for Indigenous peoples, and has 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. because it entails 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.[173] Clearer direc-

172 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 issues like conflicts of law and funding.

173 The QCCA Decision, *supra* note 11 at paras 530-563 suggests that absolute concurrence in jurisdiction between the federal and provincial governments in relation to Indigenous peoples is most consistent

tion and prioritization between governments are therefore needed. The SCC made this clear in *Daniels*, when it emphasized the importance of drawing clear jurisdictional lines, especially where federal and provincial wrangling over responsibility to Indigenous peoples results in a "jurisdictional wasteland."[174] 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.[175]

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 (section 91(24)), while the provinces do not.[176] The provinces' *power* to legislate regarding Indigenous 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, on the other hand, derives directly from section 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 section 35. This would be the state of the law even if section 91(24) did not exist. Thus, to give meaningful content to section 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 section one, past approaches to section 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, however, that this approach is too broad and unprincipled and should be narrowed.[177] To determine which of these approaches is appropriate, courts will often look to the text and history of a constitutional provision to give it a purposive interpretation.[178] Historical purposes ascribed to section 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

with our architecture. For a critique of the QCCA's reasoning, see Metallic, "Extending Paramountcy", *supra* note 44.

174 *Daniels*, *supra* note 12 at para 14. See also para 12.

175 See Metallic, "Extending Paramountcy", *supra* note 44 at 4-6.

176 As emphasized by the SCC in *Toronto*, *supra* note 155 at paras 14, 65, the text of the Constitution is of primordial importance when it comes to interpretation. Thus, section 91(24) must have meaning.

177 See Ryder, *supra* note 40; Nichols, "Reconciling Constitutions", *supra* note 40.

178 See *Toronto*, *supra* note 155 at para 14.

Indigenous peoples and facilitate westward expansion of the country; and (3) to civilize and assimilate Indigenous peoples.[179] 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 ideologies are plainly inconsistent with Canada's commitments to substantive equality in section 15 of the *Charter*,[180] which poses an obstacle to the requirement that provisions of the Constitution are read in harmony with each other.[181] Reading section 91(24) harmoniously with section 15 by discarding these discriminatory and outdated purposes is therefore necessary, and is in line with the *UN Declaration*,[182] 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.[183]

This leaves us with one valid historical purpose for section 91(24): to enable Canada to honour the Crown's responsibilities to Indigenous peoples. While this encapsulates all of the Crown's responsibilities, it especially connotes the historic commitments made by the British in the early period of relations between Indigenous nations and the British Crown. These include 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 recognizing and protecting not only Indigenous peoples' 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[184] and

179 See *Daniels v Canada (Indian Affairs and Northern Development)*, 2013 FC 6 at paras 353, 539, 566-567.

180 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 157 at paras 319-328, 399, 455, 465; Metallic, "A Human Rights to Self-Government", *supra* note 83 at 30.

181 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 also Hogg & Wright, *Constitutional Law*, *supra* note 42 at 36.23.

182 Preambular clause 4 of the *UN Declaration*, *supra* note 17, 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."

183 See *Employment Reference*, *supra* note 119 at para 9.

184 See, for example, John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law,*

have become part of the common law.[185] 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."[186] In the post-section 35 period, the SCC has affirmed that such obligations underlie the concept of the Honour of the Crown. [187]

At Confederation, the British Crown's pre-Confederation commitments were inherited by the federal government[188] and influenced the creation of section 91(24). A report from the mid-1800s clearly demonstrates 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 their rights.[189] This was a significant driving force behind the inclusion of section 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."[190] A related objective, noted by these authors, "was to maintain uniform national policies respecting Indians."[191] The federal government having the ability to provide national uniform legislation in relation to Indigenous peoples aligns with this primary purpose of preventing local interests of the provinces from interfering with the Crown's commitment to recognize and protect Indigenous peoples inherent rights.[192] This must

Equality, and Respect for Difference (Vancouver: UBC Press, 1997) 155; Borrows, "Colonial Constitution", *supra* note 51.

185 See Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 Am J Comp L 361 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" (November 2020), online (pdf): *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3815&context=scholarly_works> [perma.cc/D3BN-SX4Z]; Hamilton & Nichols, "Reconciliation and the Straightjacket", *supra* note 95.

186 *Ex parte R v Foreign and Commonwealth Affairs (Secretary of State)*, [1981] 4 CNLR 86 (UK CA (Civ Div)) at 5 [*Secretary of State*].

187 See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66; *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 79.

188 See *Secretary of State*, *supra* note 186 at 4-5.

189 See McIvor & Gunn, "Canada's Shoes", *supra* note 51 at 147 quoting UK, HC, *Select Committee on Aborigines (British Settlement)* (Cmnd 425, 1837).

190 Hogg & Wright, *Constitutional Law*, *supra* note 42, chapter 28:1. See also McIvor & Gunn, "Canada's Shoes", *supra* note 51 at 147-148; Wilkins, "Ruins", *supra* note 51 at 95-97; Ryder, *supra* note 40 at 362-364.

191 Hogg & Wright, *Constitutional Law*, *ibid*.

192 See QCCA Decision, *supra* note 11, appeal as of right to the SCC (Factum of Respondent, Aseniwuche Winewak Nation of Canada at para 48).

entail the power of the federal government to legislate in relation to Indigenous peoples and lands in areas otherwise reserved for provincial jurisdiction.[193]

To summarize the argument here, both the provincial and federal governments have obligations arising from section 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, section 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 area or in 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 being within 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.[194]

VI. Conclusion

This article 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 section 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 for 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.

193 See Hogg & Wright, *Constitutional Law*, *supra* note 42 at 28.2: "If s[ection] 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary."

194 *Daniels*, *supra* note 12 at 37 [emphasis omitted from all; emphasis added].

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 section 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 as they do with *Charter* rights.

The legislatures of both provincial and federal governments have important roles to play in recognizing and protecting section 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 section 35 rights, including declaring legislative provisions to be invalid when appropriate. In addition, courts should 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 section 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.