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## Can the Federal Government Compel Provincial Authorities to Respect an Indigenous Right of Self-Government?

By: Robert Hamilton

**Case Commented on:** *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#)

The *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#) (*SCC Reference*) is one of the most significant Supreme Court of Canada (SCC) decisions concerning Indigenous Peoples of the past decade. I summarized the decision [here](#), Nigel Bankes and I commented on the Court’s treatment of UNDRIP [here](#), and Nigel Bankes commented on implications for the “lands reserved” head of power under s 91(24) [here](#).

To review briefly, the decision considered the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) (*Act*). The *Act* is part of the federal approach to implementing the [United Nations Declaration on the Rights of Indigenous Peoples](#) (“UNDRIP” or “the Declaration”) through legislation. The *Act* aims to do this by affirming that Indigenous peoples have an inherent right of self-government in relation to child and family services under s 35 of the [Constitution Act, 1982](#), by establishing national standards for the provision of child and family services to Indigenous peoples, and by developing concrete measures to give effect to Indigenous laws pertaining to those services. The latter measures include a process whereby Indigenous laws concerning child and family services may be referentially incorporated as federal law and thereby made paramount over inconsistent provincial law.

The Supreme Court deemed the *Act* constitutional in its entirety. The Court held that the pith and substance of the *Act* is to “protect the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, to advance the process of reconciliation with Indigenous peoples” (*SCC Reference* at para 135). This falls within federal jurisdiction under s 91(24).

This comment considers in some detail the impact of the decision on provincial authority.

The short version is this:

The national standards (ss 9-17) apply to the provinces and provinces must now ensure that their legislation meets the standards in the *Act*. The concrete implementation measures (ss 20-24) bind the provinces, meaning that an Indigenous law passed pursuant to a coordination agreement, or where one had been pursued in good faith for one year, would be paramount over inconsistent provincial law. What is not entirely clear is whether the affirmation in s 18 – which affirms that s

35 of the *Constitution Act, 1982* includes an inherent right of self-government – binds the Crown in right of the provinces. This leaves questions about whether provinces are bound by obligations relating to the implementation of Indigenous child and family services laws that are not specified in the *Act*, namely recognizing “non-coordination agreement” Indigenous laws passed under s 20(1), as well as questions about constraints on provincial negotiating positions. I argue below that the affirmation in s 18 does bind the Crown in right of the provinces, though not to the same extent as it binds the federal Crown: in respect of provinces, it does not preclude the Crown from challenging the existence of a right of self-government under s 35 in court. In all other respects the effect of the *Act* on federal and provincial Crowns is identical.

## **Context for Provincial Involvement**

To begin, a brief review of why provinces are involved may be helpful. Under the *Constitution Act, 1867*, provinces were assigned the power to make laws in relation to issues of local importance; matters such as health, education, property, and registration / licensing of marriage. Where Indigenous peoples are concerned, the power to make laws is somewhat more complicated. The federal government has jurisdiction in relation to Indigenous peoples (and lands reserved for the same) under s 91(24) of the *Constitution Act, 1867*. As Peter Hogg writes, this power has been understood broadly as including “matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians” (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 618). That is, where Indigenous peoples are concerned, the federal government can legislate in respect of matters which would otherwise be within provincial jurisdiction.

Yet, the federal government has often left a legislative void in these areas, and service delivery has often fallen to the provinces. As a result, in areas such as health, labour, and education federal and provincial governments have historically both been involved. With respect to child and family services specifically, Indigenous peoples have been subject to provincial statutory regimes. In the *Act* at issue here, the federal government stepped in to exercise law-making authority under s 91(24) and, in so doing, also carved out a space for Indigenous peoples to exercise their inherent jurisdiction.

Several provinces support the federal approach and have already either aligned, or began the process of aligning, their legislation with the federal *Act*. Yet, other provinces see the *Act*, in whole or in part, as running contrary to their interests. A review of the impact of the *Act* on provincial authority in light of the SCC’s decision may therefore be helpful. In particular, the degree to which the *Act* binds or otherwise circumscribes or guides provincial actions is a question of immediate practical importance.

## **What did the Court say About Provincial Authority?**

With the constitutionality of the *Act* confirmed, a starting point for any analysis of the question of the impact on provincial authority should be the *Act* itself. Section 7 reads: “This Act is binding on Her Majesty in right of Canada or of a province.” Given that this section, which the Court held to be constitutional, makes no qualifications and does not distinguish between

different parts of the *Act*, this should create a very strong presumption that all parts of the *Act* are binding on the Crown in right of the provinces.

Indeed, in respect of national standards (ss 9-17) and the concrete implementation measures (ss 20-24), the SCC had little trouble coming to that conclusion. Where national standards are concerned, the Court held: “The national standard and principles set out in ss. 9 to 17 of the *Act* establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. Under s. 7, this normative framework is binding on federal and provincial providers of such services” (*SCC Reference* at para 67) (emphasis added). The Court held that the national principles allow for considerable provincial discretion in the delivery of services and any impact on provincial jurisdiction is incidental.

The *Act*’s concrete implementation measures develop a process for recognizing and giving effect to Indigenous law and jurisdiction. These provisions establish a framework for giving effect to Indigenous laws. Where Indigenous peoples enter into a coordination agreement with federal and provincial government, or make reasonable efforts to do so for one year, their child and family services laws are given the effect of federal law. Such laws are then paramount over inconsistent provincial laws. In respect of this scheme, the Court held that “[b]oth the federal government and the provincial governments are bound by this legislative recognition (s. 7)” (*SCC Reference* at para 73) (emphasis added).

When considering the affirmations of an inherent right of self-government in ss 8 and 18 of the *Act*, however, the Court’s conclusions, and reasoning, are unclear. Their conclusion with respect to the impact of ss 8 and 18 on the *federal* Parliament and Crown is straightforward. The Court rejected arguments that the affirmations attempt to impermissibly amend the constitution by way of ordinary legislation. Rather, the affirmations are a statutory undertaking through which Parliament (the legislative branch) commits itself *to act as though* s 35 recognizes an inherent right of self-government in relation to child and family services. This also binds the Crown (the executive), at least in its federal iteration. The remaining question is: does it also bind the Crown in right of the provinces? Given the practical import of the outcome, one would expect a clear and unambiguous answer. Unfortunately, one was not on offer at the SCC.

Sorting through the Court’s sometimes contradictory statements on the issue, the most persuasive and consistent position is that through s 18 Parliament intended to bind the Crown in right of the provinces and that it had the legal authority to do so, subject to some qualification.

The source of the confusion is contradictory statements from the Court. These are worth quoting in full.

The Court held (in a section reviewing the effect of s 18):

[58] Here, s. 7 expressly makes the *Act* binding on the Crown in right of Canada or of a province.

...

[59] By enacting a binding affirmation, Parliament has bound the federal government to the position it has affirmed as a matter of statutory positive law (see, e.g., Wilkins, at pp. 184-85). This is because, as explained above, government actors are bound by laws that create, structure and limit their powers. The obligation imposed by s. 7 is a statutory one. It binds the Crown, both federal and provincial, because it “clearly lift[s]” Crown immunity in a statute that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867* (see *Thouin*, at para. 20).

...

[97] It is trite law that Parliament can bind the Crown in right of the provinces.  
(emphasis added)

To this point, then, there is little to suggest that s 18 would not bind the Crown in right of the provinces. The Court concluded that s 7 binds both federal and provincial Crowns. It also concluded that the entire *Act* is constitutional. There is nothing in the legislation, nor did the Court suggest there was, that indicates s 7 is meant to apply to some, but not other, parts of the *Act*. The clear intention of Parliament was to bind the Crown in right of the provinces. The Court also appears to accept that Parliament succeeded in giving this intention legal effect.

Yet, the Court introduced some ambiguity. The paragraph most directly responsible reads:

Although valid federal legislation may bind the provincial Crown (see, e.g., *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at p. 72; *The Queen in the Right of the Province of Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118, at p. 124; Wilkins, at p. 185), it is not clear on the face of ss. 7, 8(a) and 18(1) whether the affirmation is meant to bind the provincial governments. However, it is open to the courts to give a narrow meaning to legislation that would otherwise exceed the jurisdiction of the level of government that enacted it .... To the extent that binding the provinces to the position that Parliament has affirmed exceeds federal jurisdiction (a point not directly argued before this Court), it would accordingly be necessary to read down ss. 8(a) and 18(1). (*SCC Reference* at para 118)  
(emphasis added)

This is, on its face, very hard to square with the legislation itself. Section 7 expressly binds the Crown in right of the provinces, and nothing in the legislation suggests an intention for that to be applied selectively. If it is permissible for federal legislation to bind the provincial Crown, what more could Parliament have done to indicate its intention to do so? Nonetheless, the Court considered the matter unclear.

There is another issue that introduces some ambiguity, albeit less directly. The Court emphasized that Parliament cannot bind the provinces “as regards the definitive interpretation to be given to s. 35” (at para 60). Further, “all actors in the system, including the provinces, can go to court to challenge Parliament’s understanding of the scope of the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*” (at para 60) (emphasis added). This latter point is important because the Court writes a couple of paragraphs later that: “one effect of s. 7 of the Act is that

the federal government can now no longer assert, in any proceedings or discussions, that there is no Indigenous right of self-government in relation to child and family services. ... Parliament has now established such a constraint through this statutory affirmation that is binding on His Majesty” (at para 62) (emphasis added). Questions remain: does “His Majesty” here include the federal and provincial branches of the Crown, *as s 7 explicitly states*, or are we to read it more narrowly? If so, on what basis?

These issues aside, the Court’s rationale here may be taken to exclude provinces from the s 18 affirmation. We are told that the affirmation requires the Crown to *act as though* s 35 recognizes a right of self-government in relation to child and family services. This precludes the “government” from asserting “in any proceedings or discussions” that no such right exists. Yet, we are told clearly that the provinces “can go to court to challenge Parliament’s understanding of the scope of the rights recognized and affirmed by s. 35” (at para 60).

What we’re left with is this:

- several clear statements that s 7 binds the Crowns in right of both the federal and provincial governments and that s 7 is constitutional,
- a paragraph (para 118) introducing ambiguity into the meaning of s 7 and suggesting that the section *may* need to be read down in order to be constitutional (though explicitly declining to say that it *has* been read down despite having deemed the entire *Act* constitutional), and
- statements to the effect that the affirmation in s 18 precludes the federal Crown from litigating the question of self-government in relation to child and family services under s 35 that sit alongside clear statements that the provinces may litigate the issue and cannot be bound by Parliament’s interpretation of the constitution.

Beyond this, in the Court’s discussion of the effect of s 7, it refers several times to “the Crown” or “His Majesty” without indicating whether it means federal, provincial, or both.

So, what do we make of all this?

First, it is worth clarifying again where the ambiguity arises. The Court is clear that s 7 binds the Crown in right of the provinces where the *Act*’s national standards and the concrete implementation measures are concerned. The only doctrinal ambiguity is whether, or to what extent, the affirmation in s 18 binds the Crown in right of the provinces and what the effect of that may be.

Several interpretations of what the Court has done here are possible.

Paragraph 118 might be understood as supporting the proposition that the affirmation in s18 does not bind the Crown in right of the provinces. Provinces are permitted to challenge Parliament’s conclusion that s 35 includes the right of self-government. Yet, the Court has indicated that the effect of the affirmation is to preclude those bound by it from asserting “in any proceeding” (presumably including litigation) that the affirmation is incorrect. Therefore, it would follow that the affirmation cannot apply to the Crown in right of the provinces: it is incoherent to hold that

parties bound by the affirmation cannot litigate, that the provinces can litigate, and that the provinces are bound by the affirmation. Put differently, if the provinces are bound by the affirmation, they cannot litigate. They can litigate; therefore, they must not be bound.

On this view, paragraph 118 requires that s 18 of the *Act* must be read down to exclude the provincial Crown for this section to be constitutional.

There are problems with this view. First, while the Court stated that “it is not clear on the face of ss. 7, 8(a) and 18(1) whether the affirmation is meant to bind the provincial governments”, this is very hard to square with the legislation itself and with the Court’s conclusions elsewhere in the decision. Section 7 of the legislation is not ambiguous: it binds both Crowns. Nowhere is there a suggestion that it applies only to some parts of the *Act*. While it is true that the national standards and concrete measures *explicitly* apply to provinces in a way that s 18 does not, s 7 would be entirely pointless if additional explicit words were required to give it effect. As an exercise of statutory interpretation, reading s 7 as applying to ss 9-17 and 21-24 of the *Act* but not to s 18 is highly questionable, especially without reference to external evidence suggesting that was the drafter’s intention.

An alternative to the argument that s 7 does not apply on its face to the entire *Act* is the argument that some part of the *Act* must be read down. In paragraph 118, the Court must be taken to be saying something like: “our determination that the entire *Act* is constitutional only holds if ss 8 and 18 are read narrowly as not applying to Crowns in right of the province.” But that’s not what the Court says. Rather, they muse about the potential of reading it down while nonetheless deeming the entire *Act* constitutional. If the Court has read down a section of the *Act*, we would expect them to do so explicitly.

A second interpretation is available. If the Court is not reading down s 18 in paragraph 118, then it must be saying that *if* subsequent litigation establishes that the federal interpretation of s 35 to include a right of self-government is wrong, the federal government could no longer bind the provincial executives to that mistaken constitutional interpretation. Doing so would exceed federal jurisdiction under s 91(24) and would amend the constitution by way of ordinary legislation. At that point, ss 8 and 18 would be read down. They would continue to bind Parliament (which can bind itself to whatever it would like subject only to later amendment), but they would no longer bind other actors (on whom Parliament cannot impose its own constitutional interpretation). When the Court writes that “it is open to the courts to give a narrow meaning to legislation that would otherwise exceed the jurisdiction of the level of government that enacted it” (at para 118), we should read that as meaning that if it is shown that the affirmations do not reflect the true content of s 35, the legislation will have to be read narrowly. The paramountcy scheme would still be constitutional, but Provincial Crowns could not be compelled to act as though s 35 protects a right of self-government. The benefit of this interpretation is that it allows us to make sense of the conclusion that the *Act* as a whole is constitutional and avoids the gymnastics required to claim that s 7 applies to some parts of the *Act* and not others.

A problem with this second interpretation is that it does not, at least initially, account for the problem outlined above – that is, that the combination of ss 7 and 18 seem to preclude litigation on the content of the affirmation, while the Court emphasized that provinces *can* litigate.

A response to this problem is to understand the Crown in right of the provinces as bound by the affirmation but not to exactly the same extent as the federal Crown. The Crown in right of the provinces is bound by the affirmation (thereby giving effect to s 7), meaning that they must *act as though* s 35 includes a right of self-government in relation to child and family services with the attendant obligations under the *Act*, the honour of the Crown, or s 35. This would include a duty of diligent implementation and preclude arguing against the existence of the right in negotiations. It would not, however, preclude litigation to challenge the basis of the affirmation.

Changing the facts slightly helps clarify. Section 35 rights are within the scope of s 91(24) (*Delgamuukw v British Columbia*, [1997 CanLII 302 \(SCC\)](#); *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020 SCC 4 \(CanLII\)](#)). Thus, the federal government can legislate in relation to those rights in a manner that precludes the provinces from interfering with them. This is the same authority that supported the constitutionality of the national standards and concrete implementation measures in the *Act*. Were we dealing with a proven s 35 right, then, s 7 and 18 would clearly bind the Crown in right of the provinces. The difference in the present case is that the right is not yet recognized, meaning Parliament is attempting to bind provincial Crowns to its own untested interpretation. In these circumstances, it would violate the separation of powers and/or be an impermissible constitutional amendment to preclude the provinces from litigating to ascertain whether the right exists as a matter of law.

In the meantime, both Crowns are bound by the entire *Act*, including the affirmation that Indigenous laws passed under the *Act* are based on s 35 rights. We must take the Court to be referring to both Crowns when it writes:

The fact that s. 7 of the Act requires the Crown to act as though the right of self-government described in s. 18(1) had been proved therefore implies that the Crown must take a broad approach to the interpretation of this right and must act diligently to implement it, as long as this affirmation is part of the law in force. (at para 66)

Why federal or provincial Crown is not specified here is unclear. But several of the paragraphs immediately preceding refer explicitly to binding both.

With this interpretation, we can find consistency in the varied statements of the Court and give them effect to the greatest extent possible. Surely, an interpretation that avoids internal contradiction should be preferred, especially in a decision of such importance that took over fourteen months to deliver. This interpretation makes it possible to say 1) s 7 binds the Crowns, plural, 2) the entire *Act* is constitutional, and 3) provinces are not precluded from subsequent litigation to challenge the basis of the affirmation.

It is also not inconsistent to say that the affirmation could give rise to different duties for different actors or in different contexts. We know, for example, that Parliament is bound by the

affirmation (see para 115). Yet, Parliament could still repeal the legislation or amend the affirmation (at para 57), whereas the federal Crown is prohibited from asserting “that there is no Indigenous right of self-government in relation to child and family services” (at para 62). Section 18, then, binds Parliament and the federal Crown to different extents. Further, the honour of the Crown, which attaches to s 18 to prevent the Crown from arguing against the right of self-government in respect of child and family services, gives rise to different duties in different circumstances (*Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73 \(CanLII\)](#) at 37). The duty also applies to both federal and provincial Crowns – there is no case law I know of holding that the honour binds one Crown but not another. Indeed, the Court has emphasized that both levels of government are bound by the honour of the Crown and fiduciary duties whenever they engage with Indigenous peoples: “These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question” (*Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48 \(CanLII\)](#) at para 50) (emphasis in original).

In the *SCC Reference*, the SCC linked the affirmation explicitly to reconciliation with Indigenous peoples, writing that “in exercising its jurisdiction under s. 91(24), Parliament chose to affirm that the right of self-government with respect to this matter is directly tied to s. 35(1) of the *Constitution Act, 1982*. The Crown is also expressly bound by this affirmation along the path to reconciliation (Act, s 7)” (at para 115). The Court, unhelpfully it must be said, did not specify here *which* Crown (federal, provincial, both, or the indivisible Crown) is responsible for reconciliation. Yet, the Quebec Court of Appeal (QCCA), correctly in my view, wrote in its judgment:

...the purpose of s. 35 of the *Constitution Act, 1982* is to reconcile the interests of Aboriginal peoples and their prior occupation of the territory that became Canada with the interests of Canadian society as a whole and with the Crown’s sovereignty. Aboriginal peoples and the Crown as a whole—which, of course, includes not only the federal Crown, but the provincial Crowns as well—are responsible for achieving this objective. (*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 \(CanLII\)](#) at para 550 (*QCCA Reference*))

In short, the affirmations in s 18 should be understood as binding the provinces until such point as litigation suggests otherwise. And, while the honour of the Crown attaches to this affirmation to shape the conduct of the Crown in right of the provinces, the specific duties that flow from that differ somewhat between the federal and provincial Crowns.

### **What Are the Concrete Implications for the Provinces?**

What, then, are the practical implications of this analysis?

Here is what we know for sure. First, to the extent that the *Act* was validly enacted under a federal head of power (and, again, the Court has confirmed that the entire *Act* was), it is paramount over inconsistent provincial law and “binds” all actors, provincial or otherwise, to the



extent that it sets the legal parameters within which they operate. As the Court writes, “[t]hrough this power to bind the Crown, parliamentary sovereignty is thus exercised over government actors of all sorts. By imposing limits on these actors through legislation that is binding on the Crown, lawmakers can shape how public powers are exercised” (*SCC Reference* at para 57). A conventional division of powers analysis provides a baseline in this sense.

Second, the *Act* binds the Crown in right of the provinces, creating statutory obligations, in respect of the national standards outlined in ss 9-17 of the *Act* and the concrete implementation measures in ss 20-24. The Court was unambiguous on these points, holding “[t]he national standards and principles set out in ss 9 to 17 of the *Act* establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. Under s 7, this normative framework is binding on federal and provincial providers of such services” (at para 67) and that “[b]oth the federal government and the provincial governments are bound by this legislative recognition” (at para 73). The Court also affirmed Jordan’s Principle, requiring both levels of government to engage proactively to ensure timely and effective service delivery and funding (at para 99).

The only ambiguity arises in respect of s 18 and the consequences of that affirmation, in particular whether provinces are required to *act as though* there is a constitution right of self-government in relation to child and family services and what this would entail. This ambiguity extends to the effect of non-coordination agreement Indigenous law (s 20(1)), but not 20(3), that is, coordination agreement laws) and the question of whether provinces must recognize non-coordination agreement Indigenous laws and, if so, to what extent.

If the analysis above is correct (and the second interpretation is taken as persuasive), the provinces would be required to negotiate coordination agreements, including any possible implementation funding, in light of a recognition of Indigenous self-government. They would be precluded from arguing against the existence of such a right in negotiations and would have a duty of diligent implementation. In short, the provinces would have the same obligations as the federal Crown, subject to the one qualification that they would not be precluded from litigating the content of s 35 as a means of challenging the effect of the s 18 affirmation.

If such litigation determined that a given nation or community did not have a right of self-government in relation to child and family services, at that point the Crown in right of the provinces would no longer be bound by the affirmation and would, as a result, no longer have to act as though the right exists. They would be free, in other words, to assert that the right did not exist in negotiations. They would no longer be required to work toward diligent implementation of the right. And they would, likely, not be required to recognize the legal force of Indigenous laws made outside the coordination agreement process. But provinces would still have to ensure their laws were consistent with the national standards in the *Act* and would have to recognize the effect of any Indigenous laws passed after a coordination agreement was entered into (or efforts were made at entering one).

If I am incorrect about s18 binding the Crowns in right of the province, the situation is somewhat different, though not as much as one might imagine. In this case, the situation would be the same as that described above where provinces succeeded in litigating against a right of self-

government. That is, they would be bound by the *Act* in all ways except for the affirmation. National standards and Indigenous laws made pursuant to coordination agreements would apply and be paramount over inconsistent provincial law. Provinces would not be bound in negotiations and policy to act in recognition of the right, nor would they be held to a duty of diligent implementation. This would be inconsistent with the objectives of the *Act* and with Jordan's Principle, suggesting this is likely not the outcome the Court intended.

One final implication for the provinces concerns the ability to override Indigenous laws through justification of an infringement. After the *QCCA Reference*, which recognized a right of self-government but held the incorporation provisions of the *Act* were *ultra vires*, provinces would have been required to respect Indigenous child and family services laws unless they could justify infringing those laws. Indigenous laws pertaining to child and family services would have constitutional protection as against the provinces, that is, but not additional statutory protection. In other words, in the QCCA's view, the s 35 *Sparrow* framework was the default analytical framework for the interactions between Indigenous and provincial laws. It is not entirely clear what the impact of the *SCC Reference* is on this view. Indigenous laws are not protected by s 35 as they would have been had this part of the *QCCA Reference*, been upheld. But, while the Supreme Court declined to decide whether s 35 includes a right of self-government in relation to child and family services, it hinted strongly that Indigenous nations or communities may well be successful in litigating such a claim. The Court also held that governments must act as though the right is protected, which presumably means that they must act as though they are bound by the constraints on Crown authority established in *Sparrow* and *Haida Nation*. A failure to do so will be supervised by the courts in reliance on the principle of the honour of the Crown, though the Court is silent on what remedies may flow from that in such an instance and what procedural safeguards (e.g., consultation) may be available. In this sense, the constitutional protection available to Indigenous laws is unclear. Where the federal government is concerned, this applies to all Indigenous laws under the *Act*. Where the provinces are concerned, the question only arises in respect of non-coordination agreement laws. The statutory protection afforded such laws prevents provinces from encroaching, full stop. The question is what protection non-coordination agreement laws have in relation to provinces, in particular whether provinces are bound to act as though such laws have a constitutional basis in s 35 and, if so, what that means for infringement and justification.

The SCC held:

The Act affirms as well that the laws of Indigenous groups, communities or peoples have independent normative force in Canadian law. Section 21(1) states that these laws “also” have “the force of law” regardless of whether they are incorporated as federal law. In addition, it is confirmed by s. 20(1) and (2) that an Indigenous group, community or people may exercise its “legislative authority in relation to child . . . services” without having entered into a coordination agreement. Both the federal government and the provincial governments are bound by this legislative recognition (s. 7). (at para 73)

It is not clear what this means. Again, after the *QCCA Reference*, we would say that non-coordination agreement laws (s 20(1) laws) had s 35 protection against both federal and provincial intrusion. After the *SCC Reference*, this appears to still apply to the federal Crown and Parliament (insofar as the affirmation binds them to *act as though* the right exists), but it would seem only to

bind the provincial Crowns *if s 18* binds them. The concluding portion of paragraph 73 above, then, which states that “[b]oth the federal government and the provincial governments are bound by this legislative recognition” is of note and suggests that the affirmation is intended to bind the provinces along the lines I have outlined above.

As can be seen, the SCC appeared to leave some uncertainty about the impact of its decision on the provinces. The level of uncertainty, though, may not be so great as it seems at first glance. It is clear that the provinces are bound by the national standards in the *Act* and the scheme giving paramountcy to Indigenous laws passed pursuant to a coordination agreement. The only issues with any uncertainty are whether the Crowns in right of the provinces are bound to act as though s 35 protects an Aboriginal right of self-government in relation to the provision of child and family services, which would require them to accept such a right in negotiations and to treat non-coordination agreement laws as though they have constitutional protection. I have argued here that the answer to both questions is “yes.”

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