

## RETROSPECTIVITY, ACQUIRED RIGHTS, EXISTING RIGHTS AND SECTION 35 OF THE FEDERAL INTERPRETATION ACT

Louis Côté

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[See table of contents](#)

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Article abstract

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Dans un premier temps, ces notions y sont envisagées sous l'angle de leurs origines de « common law »; ensuite, elles y sont étudiées dans leur rapport avec l'article 35 de la Loi d'interprétation fédérale, article qui énonce des dispositions générales de droit transitoire en matières fédérales.

En outre, lesdites notions sont définies et l'identité propre de chacune est illustrée à l'aide d'exemples jurisprudentiels caractéristiques de ces notions. Évidemment, les conséquences dérivées du fait que ces mêmes notions ont chacune leur identité propre sont également discutées. L'étude de ces conséquences est surtout axée sur les modalités et la force d'application des règles d'interprétation auxquelles chacune de ces notions donne lieu.

Finalement, l'ensemble de l'article est intégré sous forme de conclusions aux termes desquelles le lecteur peut dégager une idée d'ensemble sur un éventail assez large des règles applicables à ces trois notions.

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par Louis CÔTÉ\*

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*Finalement, l'ensemble de l'article est intégré sous forme de conclusions aux termes desquelles le lecteur peut dégager une idée d'ensemble sur un éventail assez large des règles applicables à ces trois notions.*

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\* L.L.L.; D.A.; LL.M. The author is a legislative counsel with the Federal Department of Justice. The ideas expressed in this paper are not necessarily shared by the Department of Justice.

## SUMMARY

<b>INTRODUCTION</b> .....	115
<b>A. THE COMMON LAW</b> .....	117
a) Retrospectivity .....	117
b) Acquired Rights .....	119
c) Existing Rights .....	127
d) The Operation in Time of Statutes at Common Law .....	131
<b>B. SECTION 35 OF THE FEDERAL INTERPRETATION ACT</b> .....	132
a) The General Scheme of Section 35 of the Federal Interpretation Act .....	133
b) Retrospectivity .....	135
c) Acquired Rights .....	137
d) Rights in the Enforcement Process Necessary to the Protection of a Right Otherwise Acquired .....	143
<b>CONCLUSION</b> .....	148

## INTRODUCTION

Retrospectivity, acquired rights and existing rights are concepts recognized by most as a very serious source of confusion in the science of law. Indeed, many have risked explanations and definitions; and still, confusion remains as strong as ever, if not stronger.<sup>1</sup>

Most of the confusion, it seems, stems from the fact that many virtually equate the concepts of retrospectivity and of acquired rights to one another while also equating acquired rights to existing rights, two concepts that hardly have anything in common.

As the following statements will show, neither the civil law nor the common law are spared from that state of confusion:

La rétroactivité est exceptionnelle tandis que l'atteinte aux droits "existants" est chose courante. Pour cette raison, la présomption de non-rétroactivité serait considérée comme plus forte que celle qui assure le respect des droits acquis, cette dernière n'étant applicable que "... lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations".<sup>2</sup>

And at common law, the confusion generally takes the following form:

The retrospective presumption is a prima facie presumption and applies unless it is rebutted. The vested rights presumption is not a prima facie one; it is but one factor that may be employed to ascertain intent in cases of doubt.<sup>3</sup>

At first glance, the latter statement does not lend itself to suspicion; the problem, however, arises when it is read in conjunction with the following dictum of Duff C.J., in *Spooner Oils Ltd. v.*

1. For further comments on the concepts see: E.A. DRIEDGER, "Statutes: Retroactive Retrospective Reflections", (1978) 56 *Can. Bar. Rev.* 264; L. DUCHARME, "Étude de l'application de la loi dans le temps en droit comparé"; Discussion des rapports, (1965) *Coll. Int. D. Comp.* 46; H.A. HUBBARD, "General Discussion of the Retrospective Operation of Law", (1965) *Coll. Int. D. Comp.* 42; J.A. KAVANAGH, "Retrospective Operation of Law", (1965) *Coll. Int. D. Comp.* 28; A. MANGANAS, "*R. v. Mustapha Ali et R. v. Johnston*: la rétroactivité d'une loi à caractère criminel", (1980) 21 *C. de D.* 189; R. LANDRY, "De l'application de la loi dans le temps", (1965) *Coll. Int. D. Comp.* 6; H. PITCH, "Limitation Periods and Retroactivity", (1977-78) 1 *Adv. Q.* 239.
2. P.A. CÔTÉ, *Interprétation des lois*, Cowansville, Les Éditions Yvon Blais Inc., 1982, p. 109.
3. E.A. DRIEDGER, *The Construction of Statutes*, Toronto, Butterworths, 2nd ed., 1983, p. 189.

*Turner*,<sup>4</sup> a dictum quoted in the immediate context of the said statement:

A legislative enactment is not to be read as prejudicially affecting accrued rights, or 'an existing status' unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.<sup>5</sup>

As one probably realized, several questions directly stem from what has been said thus far. Indeed, it is not at all clear from what precedes the extent to which the concept of acquired rights differs from that of existing rights. Also, it will certainly be admitted that the foregoing statements do not erase all doubts as to what exactly is the strength of the presumption for the preservation of acquired rights. But, there is more to the issue than just a few questions to find answers to; there is also about it a lot of confusion to be dissipated.

It is to the task of answering those questions and to that of dissipating as much of that confusion as possible that the present paper is addressed. This purpose, hopefully, will be achieved through a consideration of section 35 of the *Federal Interpretation Act*,<sup>6</sup> a provision expressly concerned with the concepts above referred to. Indeed, it is believed that a study of the cases that have dealt with the said section will substantially contribute in clarifying the entire issue; at least, it certainly cannot make the situation any worse than it already is.

However, before going any further in the pursuance of that intention, an exposition of the major common law rules of transitional law would appear to be necessary. As will be seen further, section 35 of the *Federal Interpretation Act* draws its origins from the common law and, hence, any scrutiny of that provision that would overlook those origins would most likely result in highly flawed conclusions. In order to avoid such undesirable results, the common law roots of section 35 of the *Canadian Interpretation Act* will first be considered.

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4. *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629.

5. *Id.*, 638 (Duff C.J.). See also E.A. DRIEDGER, *op. cit.*, note 3, 183.

6. *The Interpretation Act*, R.S.C., 1970, c. I-23, s. 35.

## A. THE COMMON LAW

Basically, this part of the present paper will be concerned with the common law in relation to three dimensions of the phenomenon of the operation in time of statutes: retrospectivity, acquired rights and existing rights. Hopefully, from this discussion of the common law a better understanding of the intent behind section 35 of the *Federal Interpretation Act* will emerge.<sup>7</sup>

### a) Retrospectivity

As was mentioned earlier, retrospectivity, though often defined, has always remained a nebulous concept. Why not, then, try to do away with some of the uncertainty? Retrospectivity, in most cases, can be defined as the application of an enactment in a manner such that it would operate to alter a previously fully closed crystallization of antecedent facts with some equally antecedent law, statute or common; and, this remains true whether the alteration is meant to affect the past or the future.<sup>8</sup>

The case of *Moon v. Durden*<sup>9</sup> is a good example of an unsuccessful effort to carry a new statute backward in the hope of altering a crystallization of past facts with the common law as it stood before the new statute was passed changing it. In the circumstances of the case, a new act was passed voiding wager agreements and prohibiting actions on their basis after the plaintiff

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7. Indeed, section 35 of the *Federal Interpretation Act*, R.S.C. 1970, c. 1-23, s. 35, was passed with the intention both of codifying some common law rules of transitional law and of abolishing other such rules.

8. See *R. v. Coles*, (1970) 1 O.R. 570 (Ont. C.A.), Laskin J.A. (as he then was), p. 574. See also, E.A. DRIEDGER, *loc. cit.*, note 1. From another angle, retrospectivity can also take the form of a new enactment interpreted so as to change, for the past or for the future, the nature of facts having taken place before that enactment was actually made and the nature of which attracted no direct legal consequences prior to the new enactment. Thus, at common law, a new statute would most likely not be applied so as to turn previously consequenceless facts into an offence. (See paragraph 11 (g) of the Canadian Charter of Rights and Freedoms.) In this respect, however, the line between retrospectivity and prospectivity may be a very thin one. Consider, for example, *In Re A Solicitor's Clerk*, (1957) 1 W.L.R. 1219 (C.A.), an instance where the appellant was barred from acting as a solicitor's clerk by reason of facts that had taken place before the enactment of the statute providing for the bar. See Goddard, C.J., for a consideration of that thin line, pp. 1222-1223.

9. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.).

had validly taken an action on a wager agreement that the common law allowed at the time the said wager was made.

Both the majority of the Bench and the defendant agreed that the new statute could not be used to void a contract valid at common law at the time it was entered into.<sup>10</sup> This would have been a retrospective application of the statute under scrutiny, an application which the majority was not ready to consider in the absence of clear and unambiguous words on the face of the statute expressing the intent of the legislature to the effect that the said enactment should be applied retrospectively.

Here, no doubt, the legislature were desirous of putting an end to gaming and wagers; but unless the words imperatively require it, we ought not to make their prohibition retrospective.<sup>11</sup>

The validity of the contract, therefore, was maintained and, for similar reasons, the contract was enforced.

A comparable decision was rendered in the case of *Gardner v. Lucas*,<sup>12</sup> an instance concerned with a past and closed operation of statute law. In the circumstances of the case, a new statute was passed providing for the form of certain kinds of agreements and, under its provisions, some agreements were valid that a previous statute would have made void. Also, an agreement had been entered into by the parties at a time when the older statute was still in force and was void by the very terms of that statute. In an action concerning the agreement, one of the parties claimed that the new enactment had validated the agreement.

The House of Lords rejected the argument; it refused to carry backward a new statute so as to affect the fully closed operation of a past enactment with equally past facts:

Now in order to determine whether the 38th and 39th sections are or are not retrospective, your Lordships must bear in mind that the effect of these sections is directly to bear on the Act of 1696.<sup>13</sup>

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10. See Lush in argument, *id.*, 390. Although there are indications in Platt's B., reasons to the effect that he thought the agreement submitted to the Court should not be declared void on the authority of the statute at issue in the case, his entire decision may leave some doubts on the point. The other members of the Court, however, clearly refused to apply the new enactment in that manner. Rolfe B., at p. 394, Alderson B., at p. 397 and Parke B., at p. 398.

11. *Id.*, 397 (Alderson B.).

12. *Gardner v. Lucas*, (1878) 3 A.C. 582 (H.L.).

13. *Id.*, 590 (Cairns L.J.); see also Hatherley L.J., at p. 598; O'Hagan L.J., at p. 601; Blackburn L.J., at p. 603.

Therefore, the theory must be that the whole of the subjects of Scotland... would be subject to have that instrument springing into validity and operating...<sup>14</sup>

The proposition only requires to be stated in that way to show that this is a construction which your Lordships would not arrive at unless compelled by the strongest and clearest words of the statute.<sup>15</sup>

Moreover, as the following dictum will show, there are, in the *Gardner* case, indications suggesting that a legislature's intention to see its enactments applied retrospectively should be expressed in terms that specifically refer to the notion of time:

No doubt there is, with regard to some of its sections, a very clear statement that they shall apply only to instruments written after the passing of the Act; and with regard to other sections, there is an equally clear statement that those sections shall apply to things done both before and after the passing of the Act; and there is a third class of cases, of which the 38th and 39th sections are examples, in which the Act contains no clear and explicit statements of whether it is to be retrospective or merely to be prospective.<sup>16</sup>

Thus far, things are relatively simple: at common law, past and closed operations of the law, statute or common, with equally past facts are protected from the interference of later enactments unless there are, in those enactments, clear and unambiguous words compelling courts, directly or by necessary implication, to apply them retrospectively.

Let's now consider the extent to which the concept of acquired rights can be clarified.

#### **b) Acquired Rights**

Acquired rights! Can the notion be conceptualized? Certainly. Rights acquired under the common law will first be considered and, then, attention will be paid to rights acquired under the terms of an enactment.

Generally, rights acquired under the common law take the form of a past but unclosed operation of some common law stipulation with equally past facts and their protection requires that the previous law be carried forward to the face of some new and incompatible law

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14. *Id.*, 593 (Cairns L.J.).

15. *Id.*, 593 (Cairns L.J.); see also Hatherley L.J., at pp. 597-598; O'Hagan L.J., at p. 602; Blackburn L.J., at p. 604.

16. *Id.*, 589-590 (Cairns L.J.). See also Hatherley L.J., at pp. 597-598; O'Hagan L.J., at p. 602; and Blackburn L.J., at p. 602. See also *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.), Buckley L.J., at p. 12.



so the unclosed operation of the common law is carried to its conclusion.<sup>17</sup>

The case of *Moon v. Durden*<sup>18</sup> will now exemplify the notion. In that case, as will be remembered, a new statute had been passed barring actions on wager agreements some time after the plaintiff had brought an action on such an agreement. Obviously, the earlier law had been put in motion before the new enactment was passed: a valid common law wager contract had been formed. Yet, the transaction was not fully closed before the passing of the new enactment: the proceeds of the wager had not been paid to the winner of the bet. The Court, in the instance, closed the transaction as it would have been closed had judgement been rendered before the new enactment was made. Here is how Parke B., put it:

The enactment "that all contracts or agreements, by way of gaming or wagering, shall be null and void," if it stood by itself, ought most clearly to be construed as applicable to future contracts and agreements only, by virtue of the rule of construction to which I have adverted, and the apparent injustice of putting an end to a vested right. So, if the next part stood alone, it would, I think, though not so clearly, be construed, for the same reason, to apply to future actions only; and the clause, to avoid the injustice which would otherwise be inflicted on a plaintiff, should be construed to mean, not that an action already brought should not be maintained, but that no action should afterwards be brought, or, if brought, maintained.<sup>19</sup>

The learned Baron's dictum, however, may lead to infer that the concept of retrospectivity and that of acquired rights are only two dimensions of one and the same reality; notwithstanding appearances, nothing of the sort should be inferred. Parke's B., statement should indeed be read in the light of the fact that, in *Moon v. Durden*, both concepts were at issue at the same time. Indeed, as was earlier mentioned, the new enactment under the scrutiny of the Court in the case was designed both to void wager agreements and to bar actions on the same. The former aspect of the new enactment involved, in relation to past agreements, a question of retrospectivity. The latter aspect of the new enactment, however, had implications that might have affected acquired rights insofar, of course, as the

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17. The definition, of course, is not of absolute application. For instance, in the *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629, the issue was not one concerning exclusively the closing of an unclosed transaction; it also had something to do with the preservation, until perfection, of the integrity of a transaction as originally formed by the parties to it.

18. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.); see also *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.).

19. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.), Parke B., at p. 398.

actions concerned were not closed at the time the new enactment was passed. Thus, to that extent, the *Moon* case was a hybrid case.

But, not all cases are hybrid ones. *Spooner Oils Ltd. v. Turner*<sup>20</sup> is a good example of an instance where the issue at bar concerned exclusively acquired rights.<sup>21</sup> In that case, the Supreme Court of Canada had to determine the question as to whether the provisions of a new enactment could alter, for the future, rights and obligations expressly dealt with by the terms of a contract already entered into and not yet fully performed at the time the new enactment was actually passed.

The Court left no doubt about the fact that the enactment under consideration in the case could not, as worded, effect the result. Moreover, as there was, in the circumstances of the case, no trace of retrospectivity whatsoever, the consequence follows that acquired rights are protected in their own right. The new enactment, indeed, did not purport to alter, for the past, the express provisions of an existing common law contract; nor, for that matter, did the parties to the instance ask the Court to apply the new enactment in that fashion. The stipulations of the contract there under consideration were to be altered for the future only. In other words, the *Spooner* case was a pure acquired rights case.

But, questions remain. For instance, what kinds of unclosed operations of the common law will attract the protection of courts? Judging by Duff's J., decision in *Upper Canada College v. Smith*,<sup>22</sup> courts will protect past and unclosed operations of the common law out of which something of value in money can be expected. Here is how he viewed the question:

The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value. It is not of any importance that the right of action had not accrued when the statute was passed...<sup>23</sup>

Obviously, it will eventually be necessary that a right of action of some kind accrues; otherwise, courts would more or less be without authority to pronounce the protection of the rights in question.

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20. *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629.

21. Rights arising for the most part under a common law contract.

22. *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.).

23. *Id.*, 651 (Duff J.).

Then, when some judicial protection is available, what form does it take? Basically, it takes the form of a presumption to the effect that new enactments should not be applied in frustration of acquired rights unless there are, on the face of those enactments, clear and unambiguous words that require, directly or by necessary implication, that they be applied in frustration of such rights:

The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main v. Stark*), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.<sup>24</sup>

As the foregoing statement clearly establishes, the legal foundation at the root of the presumption is Coke's rule 2 Inst. 292: *nova constitutio futuris formam imponere debet, non praeteritis*. The latter rule, however, had, years before, been applied in relation to the retrospectivity aspect of the case of *Moon v. Durden*.<sup>25</sup> Much can be said, therefore, for the proposition that the strength of the presumption for the preservation of acquired rights does not differ at all from that of the presumption against the retrospective operation of statutes. Indeed, how could two presumptions with the same legal foundation not apply with equal strength?

Equality of strength, however, does not entail that the two presumptions are fully identical presumptions. Indeed, suggestions were made earlier in this paper to the effect that the words required to rebut the presumption against the retrospective operation of statutes might have to refer specifically to the notion of time. Could such a requirement, if any, apply to the presumption for the preservation of acquired rights? There is plenty of room for doubt. Indeed, as is already known, a new enactment can interfere with acquired rights for the future only, without any need for the effects of that enactment to relate to a period of time antecedent to the point in time when the said enactment is passed into law. Under those circumstances, the issue is not the time as from which the new enactment is to be considered to have been law. Rather, the issue, then, becomes the identification of the rights that may be affected by the said

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24. *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629, Duff C.J., at p. 638.

25. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.).

enactment. The conclusion necessarily follows that, in all probability, the words that are necessary to rebut the presumption for the preservation of acquired rights should refer specifically to the kind of rights that are meant to be affected. That is not to say, however, that words relating to the notion of time and not to the concept of acquired rights would fall short of rebutting the presumption for the preservation of those rights; the effect of the speech used by the legislature concerned has to be weighed in each particular case.<sup>26</sup>

There is certainly some support for the foregoing in Duff's C.J., decision in the *Spooner Oils Ltd.* case:

We think there is nothing in the language of the Order in Council bringing into force this section 29 which requires us to hold that it was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the Regulations of 1910 and 1911.<sup>27</sup>

The differences and similarities between the two presumptions should now be apparent. The presumption against the retrospective operation of statutes exists to prevent new enactments from interfering, for the past or the future, with previously fully closed crystallizations of the earlier law, statute or common, with equally earlier facts. The presumption for the preservation of rights acquired under the common law most often takes the form of a mechanism through which past but unclosed operations of the common law with equally past facts are carried forward to the face of a new and incompatible enactment, so they can be closed as they would have been closed had it not been for the new enactment.

Both presumptions apply unless there are, on the face of the enactments against which they are set up, clear and unambiguous words that negate their application. In the case of retrospectivity, there are indications that those words should specifically relate to the notion of time whereas, in the case of acquired rights, the indications are that the object of those words should be the acquired rights themselves.

It should by now be easier to tell an acquired rights case from an instance of retrospectivity and, though the necessity for the distinction has lost most of its importance over the years, there may still be reasons to bear in mind that both concepts are different.<sup>28</sup>

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26. For instance, if a new enactment retrospectively deemed particular contracts to have never existed as of a point in time in the past, rights acquired under those contracts would go unprotected.

27. *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629, Duff C.J., at p. 639.

28. The presumption for the preservation of rights acquired under the terms of an

Indeed it was once of primary importance to be able to draw the line between the two concepts. The reason for this was simple: before stipulations of transitional law such as those of section 35 of the *Federal Interpretation Act*<sup>29</sup> were enacted, rights acquired under statute law were not protected.<sup>30</sup>

The case of *Surtees v. Ellison*<sup>31</sup> will make that point. In the circumstances of that case, the defendant, as a merchant, had contracted a debt at a time when the law of bankruptcy was dealt with by the statute 21 Jac. 1, c. 19. He stopped his trading activities for a few years and then committed an act of bankruptcy at a time when the pertinent law was dealt with by the statute 6 Geo. 4, c. 16, a statute which was more or less a re-enactment of the provisions of the previous one insofar as the issue at bar was concerned. Could, then, a commission of bankrupt be issued against the defendant, no longer a merchant, on the authority of a debt owing from the time he was a merchant?

It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed... We are therefore to look at the statute 6 G. 4, c. 16, as if it were the first that had ever been passed on the subject of bankruptcy; and so considering it, we cannot possibly say that there was any sufficient trading to support the commission.<sup>32</sup>

Tenterden's C.J., statement is clear: at common law only past and fully closed operations of a statute are protected from the operation of a later and incompatible statute, or, in other words, rights acquired under the terms of an enactment are not protected from the interference of a new and incompatible statute.

Thus far, the foregoing may seem quite clear and one may therefore wonder how the traditional confusion that characterizes the application of the concepts of retrospectivity and of acquired rights

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enactment might apply with less force than that for the preservation of rights acquired under the common law. More will be said about this later.

29. *The Interpretation Act*, R.S.C. 1970, c. 1-23, s. 35.

30. Before the enactment of the provisions of section 38 of the U.K. *Interpretation Act*, 1889, 52-53 Vict., c. 63, the British tradition was to introduce stipulations of transitional law in most statutes, as the circumstances required from time to time.

31. *Surtees v. Ellison*, (1829) 109 E.R. 278 (K.B.); *Kay v. Goodwin*, (1830) 130 E.R. 1403 (C.P.); *The Queen v. The Inhabitants of Denton*, (1852) 118 E.R. 287 (Q.B.); and *MacMillan v. Dent*, (1907) 1 Ch. 107 (C.A.).

32. *Id.*, 279 (Tenterden C.J.).

came into being. A large part of the answer probably resides in the fact that the concept of acquired rights is often equated to notions with which it has nothing in common.

Thus, it is often said, and written, that the presumption for the preservation of acquired rights is nothing but a guide in the interpretation of ambiguous enactments<sup>33</sup>; unambiguous enactments, it is often claimed, just escape its application. The notion is drawn from cases such as those of *A.G. for Canada v. Hallet Carrey Ltd.*<sup>34</sup> and of *West v. Gwynne*,<sup>35</sup> two cases that were not at all acquired rights cases.

In *A.G. for Canada v. Hallet Carey Ltd.*, the respondent was challenging an Order in Council, one of the objects of which was to vest in the Canada Wheat Board, for consideration, all barleys in commercial position in Canada. The compensation paid to the owners of the barley, however, was below the market value of the barley at the time.

The respondent objected to the expropriation on the ground, among others, that his right of ownership in the expropriated barley could not be interfered with by a generally worded Order in Council such as that which was at issue in the circumstances of the case. Radcliffe L.J., disagreed:

It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related. Nor can a court pause in doubt over the question whether this is an Act by which it is intended to authorize interference with private rights: such subjects as supplies, prices, rentals and wages cannot be

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33. E.A. DRIEDGER, *The Construction of Statutes*, *op. cit.*, note 3, 184-185 and 189; P.A. CÔTÉ, *op. cit.*, note 2, 109.

34. *A.G. for Canada v. Hallet Carey Ltd.*, (1952) A.C. 427 (P.C.).

35. *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.).

controlled without interference on the largest scale. If rights so historic as a man's right to sell his labour where and at what price he pleases or a man's right to use his own property in his own way are avowedly placed under the Governor in Council as subjects of control and regulation, what peculiar sanctity can the law give to the ownership of consumable goods, so that this particular form of private right is to be exempt from any action in pursuit of the authorized purposes? Certainly there is no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trespassed upon where express power is given to do so.<sup>36</sup>

Obviously, Radcliffe L.J., did not discuss the issue in terms of acquired rights. Rather, he viewed that particular aspect of the case in terms of civil liberties as such liberties were then known in Canada: Canadian subjects enjoyed all the rights and liberties that Parliament and the legislatures had not thought fit to curtail. Thus, the learned Justice went on to discuss rights such as the right of ownership and the right of a man to sell his labour. Those rights, in his opinion, could be interfered with by generally worded enactments. But, as he also pointed out, those rights were not without any protection at all; courts, he thought, would generally give ambiguous enactments a meaning that would, as far as possible, leave the said rights unaffected. Beyond that, however, he saw no available protection.<sup>37</sup>

As is realized, private rights and acquired rights respectively attract the application of totally different presumptions and, therefore, it is necessarily at the cost of significant confusion that the principles applicable to the former rights could be applied to the latter ones.

But, the misapplication of the presumption discussed in the *Hallet Carey Ltd.* case is not the only reason for the pervasive lack of clarity in the definitions that are generally given of the concept of acquired rights both in legal literature and in judicial pronouncements. The case of *West v. Gwynne*, or misinterpretation thereof, has done a lot in the way of further obscuring the concept of acquired rights. The problem, here, is not a confusion between private rights and acquired rights but, rather, a confusion between

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36. *A.G. for Canada v. Hallet Carey Ltd.*, (1952) A.C. 427 (P.C.), Radcliffe L.J., at pp. 450-451.

37. Today, of course, *The Canadian Charter of Rights and Freedoms*, and *The Canadian Bill of Rights* would be available within the limits of the rights and freedoms that they guarantee. In circumstances such as those that took place in the *Hallet Carey Ltd.* case, the provisions of paragraph 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 might be pertinent.

existing rights and acquired rights. Existing rights will next be discussed.

### c) Existing Rights

To what extent are acquired rights and existing rights so different? The cases of *West v. Gwynne*<sup>38</sup> and of *Abbott v. Minister of Lands*<sup>39</sup> answer the question.

Before anything else is said, however, existing rights should be defined. What is an existing right? An existing right is simply a right existing at the time when a new statute is passed in relation thereto, regardless of whether the right owes its origins to the silence of the law or to some specific stipulation of the law, statute or common.<sup>40</sup> Basically, therefore, the protection of an existing right more or less consists in the answer to the following question: is a particular new statute passed to simply codify or re-enact, as the case may be, the pre-existing law or is it passed to actually bring about new law? Depending on the circumstances, different solutions will be adopted.

But, before solutions are considered, perhaps it should be demonstrated that the concept of existing rights is one that is actually recognized in case law.

In the case of *West v. Gwynne*, for example, the defendant had leased some property for a period of 99 years at a time when, the law being silent on the point, landlords were allowed to exact penalties from their lessees in the event that they wanted to sub-lease the leased property. After the lease was entered into, a new statute was passed making such penalties conditional to the existence of a clause to that effect in the leases concerned. There was no such clause in the defendant's lease but, upon application from his lessee to sub-lease part of the leased property, he purported to exact a penalty. The plaintiff objected on the basis of the new statute, objection which the defendant countered on the notion that such an application of the new statute would amount to a retrospective application of the said statute. The Court disagreed with the defendant's contention:

To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I

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38. *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.).

39. *Abbott v. Minister of Lands*, (1895) A.C. 425 (P.C.).

40. Thus, existing rights will often be synonymous with pre-existing law.



understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.<sup>41</sup>

And further:

As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights.<sup>42</sup>

For, in the words of Cozens-Hardy M.R.:

Almost every statute affects rights which would have been in existence but for the statute.<sup>43</sup>

The Court of Appeal, therefore, refused to protect a right that a new statute was clearly meant to alter; there was no ambiguity and existing rights were not protected.

Such is the case also in respect of rights owing their existence to the specific stipulations of an enactment. In *Abbott v. Minister of Lands*<sup>44</sup> the Judicial Committee of the Privy Council decided that the plaintiff could not take advantage of a statute providing for a land acquisition scheme after the said statute was repealed and replaced by a newer enactment that did not re-enact the provisions of the earlier scheme which the plaintiff meant to use.

They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.<sup>45</sup>

The foregoing statement clearly demonstrates the difference between the concept of acquired rights and that of existing rights. The protection of acquired rights consist in the carrying forward of an unclosed operation of some past law with equally past facts to the face of some later and incompatible enactment whereas the

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41. *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.), Buckley L.J., at pp. 11-12.

42. *Id.*, 12 (Buckley L.J.).

43. *Id.*, 11 (Cozens-Hardy M.R.). In that case, the common law allowed the exacting of a penalty in the sense that it did not prohibit it.

44. *Abbott v. Minister of Lands*, (1895) A.C. 425 (P.C.)

45. *Id.*, 431 (Lord Chancellor).

protection of existing rights merely consists in the resolution of an uncertainty as to whether or not a legislature intended to bring about new law through the passing of a new statute. To put it in a few words, an existing right is simply a right that is not already matched to facts when a new enactment is passed in relation to it.

Thus, in the case of *West v. Gwynne*,<sup>46</sup> had the plaintiff sought to sub-lease the leased property and the defendant exacted his penalty before the coming into force of the new enactment, a right would have accrued to the defendant; also, that right would probably have been protected.<sup>47</sup>

Likewise, in *Abbott v. Minister of Lands*<sup>48</sup> a valid application by the plaintiff under the old Act would have prevented the application of the new enactment under consideration in that case.<sup>49</sup>

One now understands why it is only reasonable that acquired rights enjoy a stronger protection than existing rights do. Were it not the case, it would become virtually impossible for a legislature to alter the law without continually expressly stating its intention to that effect<sup>50</sup>; the whole process would obviously evolve into an absolutely nerve racking one.

Does the common law ever protect existing rights then? The answer is fundamentally a matter of circumstances.

Indeed new statutes may be passed regulating that which was not previously regulated or they may be passed regulating that which was previously regulated by some specific stipulation of the law, statute or common.

In the first set of circumstances, the solution to the problem is found in cases such as *A.G. for Canada v. Hallet Carey Ltd.* and *West v. Gwynne*.<sup>51</sup>

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46. *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.).

47. At least to the extent that common law rights of action are protected. See *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.), and *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.). See, however, *Kluz v. Massey Ferguson*, (1972) 27 D.L.R. (3d) 496 (Sask. C.A.) aff. (1974) S.C.R. 474.

48. *Abbott v. Minister of Lands*, (1895) A.C. 425 (P.C.).

49. The protection of those acquired rights would have had to emerge from the saving clause in the statute at issue otherwise the common law would have applied and there would have been no protection of the acquired rights for they would have been acquired under statute law.

50. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.), Atkin L.J., at p. 431.

51. *A.G. for Canada v. Hallet Carey Ltd.*, (1952) A.C. 427 (P.C.). *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.).

In the second set of circumstances, the issue is whether or not the legislature concerned intended to alter the previous law and the solution of the problem differs depending on whether the previous law was a common law rule or a statute law stipulation.

In the first case, there is a rule of interpretation to the effect that new statutes are not presumed to be intended to depart from the common law. Hence, as far as possible, they are construed in a manner that will ensure the protection of pre-existing common law rights unless, of course, it appears that they were made to alter those rights, in which case the new statute prevails.<sup>52</sup> Thus, for example, in *Leach v. R.*,<sup>53</sup> the House of Lords had to determine whether or not section 4 of the *Criminal Law Evidence Act, 1898*, was sufficient an authority to compel a wife to appear as a witness against her husband in a prosecution against the husband, in contradiction of her common law right to refuse to give evidence in such proceedings. Loreburn L.C., maintained the wife's common law right in the following terms:

It seems to me that we must have a definite change of the law in this respect, definitely stated in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed...<sup>54</sup>

In the second case, at least two situations are possible: a new statute either repeals an earlier one and does nothing else or, it repeals and replaces another enactment.<sup>55</sup>

As the common law deems repealed enactments to have never existed, there is little to be said about existing rights in the case of a simple repeal: they are deemed to have never existed at all.<sup>56</sup>

But when a statute is passed repealing and replacing an earlier enactment the situation differs somewhat and it seems that the issue, then, is no longer death within terms of existing rights but, rather, in terms of presumptions as to what is the intent of the legislature concerned in actually bringing a change to the formulation of the law.<sup>57</sup>

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52. S.G.G. EDGAR, *Craies on Statute Law*, 7th Ed., London, Sweet and Maxwell, 1971, at pp. 338-340.

53. *Leach v. R.*, (1912) A.C. 305 (H.L.).

54. *Id.*, 310 (Loreburn L.C.).

55. Other situations are possible; for example, consider the case of implied repeals.

56. *Surtees v. Ellison*, (1829) 109 E.R. 278 (K.B.).

57. The concept of existing rights, therefore, relates much more to common law

Indeed, where changes in the wording of a specific provision of an enactment take place through the passing of an amending statute, the presumption is that the legislature intended to effect a change in the law; this presumption is a weak one and, of course, is a rebuttable one.<sup>58</sup>

Changes, however, may also be brought in a consolidating enactment. Then, the presumption is reversed. Indeed, in those cases, it is presumed that alterations in the substance of the law should not automatically be inferred from minor changes in the new formulation of the law because such an inference would interfere with the intention of the legislature to merely consolidate the pre-existing law as opposed to changing it.<sup>59</sup> The latter presumption, again, is a rebuttable one.<sup>60</sup>

As is realized from the foregoing comments, existing common law rights are better protected than rights existing under a statute, somewhat as was the case for acquired rights. Moreover, it should equally be remembered that the concept of existing rights, contrary to that of acquired rights, does not entail an operation of the previous law with equally previous facts; hence the quasi-absence of a presumption for their protection.

Three fundamental concepts have thus far been considered: retrospectivity, acquired rights and existing rights. Also, a fair number of rules have been expounded and, perhaps, they should now all be summed up and extended somewhat. To that, attention will next be paid.

#### **d) The Operation in Time of Statutes at Common Law**

As is now known, at common law, statutes cannot operate retrospectively so as to alter a fully past and closed operation of the earlier law, statute or common, with equally earlier facts; only express language appearing on the face of a new statute can, directly or by necessary implication, reverse this presumption.

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rights than it does to rights existing under statute law. Yet, as will be remembered from *Abbott v. Minister of Lands*, (1895) A.C. 425 (P.C.), the concept is sometimes discussed in relation to rights existing under statute law.

58. *The Corporation of the City of Ottawa v. Hunter*, (1902) 31 S.C.R. 7.

59. *The Governor and Company of the Bank of England v. Vagliano Brothers*, (1891) A.C. 107 (H.L.).

60. *Bradlaugh v. Clarke*, (1882-83) 8 A.C. 354 (H.L.).

Likewise, rights acquired under the common law are protected from the interference of new enactments; again, only express language on the face of a new enactment can, directly or by necessary implication, reverse the presumption. Conversely, rights acquired under a statute are deemed by the common law to have never existed from the moment the statute under which they were acquired is repealed or repealed and merely replaced.

Finally, rights existing at common law are protected from the invasion of statute law only to the extent that there is no indication, implied or expressed, in any particular enactment that it was passed with the intention of actually changing the common law. Rights existing under statute law, however, are not protected. Rather, in this regard, courts seem to favour mobility over continuity.

Thus far, at least one flaw of the common law is obvious: rights acquired under statute law are not protected at all.

But, this is unfortunately not the only problem with that aspect of the common law. Indeed, before the transitional law provisions of enactments like section 35 of the Federal *Interpretation Act*<sup>61</sup> were brought into effect, the repeal of a statute passed altering the common law had the effect of reviving the old common law, the repeal of a repealing enactment had the effect of reviving the statute that was repealed in the first place, the repeal of penal enactments frustrated on-going proceedings concerning offences to their provisions, and, finally, the repeal of statutes providing for the remedy or process necessary to the enforcement of an acquired right caused the frustration of the right concerned.<sup>62</sup>

The whole situation called for a rearrangement and the rearrangement took the form of provisions akin to section 35 of the Canadian *Interpretation Act*. That section will next be considered.

## **B. SECTION 35 OF THE FEDERAL INTERPRETATION ACT**

Section 35 of the Canadian *Interpretation Act* will hereafter be dealt within its relation with the common law and hence the concepts that will be considered here will more or less be the same as those discussed above. To the extent, however, that section 35 largely departs from the common law this part of the present paper will not necessarily be repetitive. Indeed, that section bears many features that are worth an autonomous scrutiny.

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61. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

62. P.A. CÔTÉ, *op. cit.*, note 2, 84-86.

Also, though section 35 of the Federal *Interpretation Act* has in the past been used for the protection of substantive rights as well as for the protection of procedural rights, only the protection of substantive rights will be considered here.<sup>63</sup> However, two dimensions only of the concept of substantive rights will be paid attention to: substantive rights "per se" and rights in the enforcement process ancillary to the protection of substantive rights "per se".

Finally, the interface between section 35 and section 36 of the Canadian *Interpretation Act* will be discussed but only to the extent rendered necessary for the purposes of the present paper.<sup>64</sup>

Subject to the foregoing qualifications, here follows an exposition of how section 35 was applied by Canadian courts.

**a) The General Scheme of Section 35 of the Federal Interpretation Act**

Section 35 of the Canadian *Interpretation Act* reads as follows:

35. Where an enactment is repealed in whole or in part, the repeal does not
- (a) revive any enactment or anything not in force or existing at the time when the repeal takes effect;
  - (b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
  - (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;
  - (d) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or
  - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.<sup>65</sup>

As is realized from the language of that provision, paragraph (a) has done away with the old common law rule upon which was based

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63. *Canada Employment and Immigration Commission v. Dallaljian*, (1980) 2 S.C.R. 582, Estey J., at p. 595; *R. v. Ali*, (1980) 1 S.C.R. 221, Pratte J., at pp. 241 and 243.

64. An entire discussion of that interface would indeed justify an extensive autonomous study.

65. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

the revival of some previously abolished law, statute or common, consequent to the repeal of the enactment that had originally effected the disappearance of that abolished law.

Paragraph (b), in turn, serves to protect absolutely past and closed crystallizations of past enactments with equally past facts.<sup>66</sup>

Paragraph (c) affords protection for past but unclosed operations of past enactments with equally antecedent circumstances. In other words, the old common law rule that caused the frustration of rights acquired under a statute has been abolished by that paragraph. It seems, however, that the same paragraph has managed to effect its purpose without altering the common law rule for protection of rights acquired at common law.<sup>67</sup>

Paragraph (d) erases the old common law rule according to which offences committed under an enactment later repealed followed the faith of the said enactment.<sup>68</sup>

Finally, paragraph (e) and the concluding part of section 35 operate to maintain rights, privileges, obligations, liabilities, penalties, forfeitures or punishments owing their existence to a statute later repealed as well as to effect the protection of the enforcement process ancillary to the enforcement of such rights, etc.

Section 35 of the Federal *Interpretation Act*<sup>69</sup> thus, appears to afford no protection in respect of rights acquired at common law and, in such a case, it looks as though the repeal of the process necessary to the enforcement of a right acquired under the common law would more likely than otherwise entail the frustration of that right, assuming the repeal had taken place before the enforcement process could actually be brought to its conclusion in respect of the said right.

As was demonstrated above, section 35 has had at least two very broad effects: it either codified the common law or it modified it. All

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66. Although paragraph (b) seems to be designed to cover cases of pure retrospectivity only, the provision is often used in relation to cases of *acquired rights*. In the light of the remainder of the section, the practice appears to be an unnecessary one.

67. Indeed, section 1 of *The Interpretation Act*, R.S.O. 1914, c. 1, did not seem to influence the decision of the Supreme Court of Canada in *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.), a case where the Court protected a right acquired at common law. See, however, *Kluz v. Massey Ferguson*, (1972) 27 D.L.R. (3d) 496 (Sask. C.A.) aff'd. (1974) S.C.R. 474.

68. Repealed statutes were deemed to have never existed.

69. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

in all, therefore, the common law and section 35 of the Canadian *Interpretation Act* are at a constant interface, an interface which is further amplified by subsections 3(1) and 3(3) of the same Act; subsection 3(1) provides that the *Interpretation Act* applies:

... unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act (*Interpretation Act*).<sup>70</sup>

While subsection 3(3) stipulates that:

Nothing in this Act (*Interpretation Act*) excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.<sup>71</sup>

With all of the foregoing in mind, section 35 will now be considered in its relation to four features: retrospectivity, acquired rights, existing rights and the survival of the enforcement process necessary to effect the protection of an acquired right, etc.

#### b) Retrospectivity

Paragraph 35(b) of the Canadian *Interpretation Act* is virtually an enactment of the rule expounded in the case of *Gardner v. Lucas*.<sup>72</sup> By and large, that paragraph stipulates that a repeal does not affect the previous operation of the repealed enactment. In other words, that provision prevents a repealing statute from reaching behind so as to alter a crystallization of past circumstances with a previous enactment later repealed by the said repealing statute.

Canadian courts have used paragraph 35(b) for exactly that purpose. Thus, in *R. v. Ali*,<sup>73</sup> an instance where an accused was seeking the benefit of an amendment to the Criminal Code passed pending proceedings and requiring that at least two breath samples be taken not more than fifteen minutes apart from one another if their results were to constitute "prima facie" evidence against an accused, the Supreme Court of Canada maintained the operation of the earlier law that required the taking of only one such breath sample. Pratte J., stated the effect of paragraph 35(b) in the following words:

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70. *Id.*, subsec. 3(1).

71. *Id.*, subsec. 3(3).

72. *Gardner v. Lucas*, (1878) 3 A.C. 582 (H.L.).

73. *R. v. Ali*, (1980) 1 S.C.R. 221. In the circumstances of the case, only one sample was taken as was required by the law in force at the time of the offence.



Also, supara. (b) (paragraph 35(b)) serves to continue the effect of the certificate of analysis that was sought to be introduced into evidence by the Crown under old s. 237.<sup>74</sup>

Obviously, paragraph 35(b) generally has the same effect as the old common law rule against the retrospective operation of statutes; it prevents it.

Still, one question remains. What is the actual strength of paragraph 35(b)? Might something less than clear and unambiguous language urging, directly or by necessary implication, the retrospective operation of a new enactment be sufficient to negate its effect? Indeed, as will be remembered from subsection 3(1) of *The Interpretation Act*,<sup>75</sup> the rules contained in that Act apply to all federal enactments unless such enactments manifest a contrary intention. That intention, most will agree, can be implicit as well as explicit and hence, is not the direct consequence of that provision to hold the strength of paragraph 35(b) short of the strong rule propounded in the *Gardner* case. For at least two reasons, the answer must be in the negative: the practice of Canadian courts and subsection 3(3) of the *Federal Interpretation Act*.<sup>76</sup>

Indeed, in the 1977 case of *Gustavson Drilling (1964) Ltd. v. M.N.R.*,<sup>77</sup> Dickson J., of the Supreme Court of Canada dealt with retrospectivity in the following terms:

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.<sup>78</sup>

The foregoing statement seems to indicate that a given enactment would escape the application of paragraph 35(b) only after meeting a test much stronger than the one required in subsection 3(1) of the *Federal Interpretation Act*. In other words, an enactment might quite well be construed as being outside the reach of some of the provisions of the *Canadian Interpretation Act* on the authority of a highly implicit intention to that effect emerging from its entire context but it is doubtful that it would escape the grab of paragraph 35(b) without words in it clearly expressing the intention of the legislature to which it owes its existence that it should be applied

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74. *Id.*, 241 (Pratte J.).

75. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

76. *Id.*, subsec. 3(3).

77. *Gustavson Drilling (1964) Ltd. v. M.N.R.*, (1977) 1 S.C.R. 271.

78. *Id.*, 279 (Dickson J.).

retrospectively.<sup>79</sup> The Supreme Court of Canada would therefore appear to favour the strong common law test over the more lenient terms of subsection 3(1) of the Federal *Interpretation Act*. Yet, the Court has never really explained its attitude on that specific point but one may speculate that if it ever did so it would most likely resort to subsection 3(3) of the same Act, a subsection which stipulates that the *Interpretation Act* should not be read as exclusive of any other compatible rule of construction.

Subsection 3(3), for example, has at least on one occasion been used to justify the strict interpretation of a penal statute over the provisions of section 11 of the Federal *Interpretation Act*, a section directing that all enactments should receive a fair and liberal interpretation.<sup>80</sup>

As there seems to be nothing in the Federal *Interpretation Act* that is inconsistent with the stronger common law test, it is to be taken for virtually certain that courts will continue to require firm language in an enactment before giving it a retrospective application.

That was the retrospectivity dimension of the transitional law provisions of section 35 of the Federal *Interpretation Act*; at least, briefly. What now of acquired rights? This dimension of section 35 will immediately be considered.

### c) Acquired Rights

Paragraph 35(c) of the Canadian *Interpretation Act*<sup>81</sup> stipulates that the repeal of an enactment does not:

35(c). affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.<sup>82</sup>

That provision certainly suggests two questions: what is, for the purposes of that paragraph, a right? When, for the same purposes, is a right acquired?

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79. *R. v. Ali*, (1980) 1 S.C.R. 221.

80. *R. v. Philips Electronics Ltd.*, (1980) 55 C.C.C. (2d) 312 (Ont. C.A.), see Goodman J.A., at p. 322. The Supreme Court of Canada merely sealed the decision of the majority of the Court of Appeal; see (1981) 62 C.C.C. (2d) 384 (Sup. Ct. C.). Consider, however, *Central Mortgage and Housing Corporation v. Co-operative College Residences Inc.*, (1977) 13 O.R. 394 (Ont. C.A.), where Howland J.A., implies, at page 405, that the more lenient terms of subsection 3(1) might prevail. At least, he does not exclude the possibility.

81. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

82. *Id.*, par. 35(c).

The cases of *Director of Public Works v. Ho Po Sang*<sup>83</sup> and of *Hamilton Gell v. White*,<sup>84</sup> though not concerned with section 35 itself, can nevertheless offer valuable standards against which to formulate an answer to question number one.

In the *Ho Po Sang* case, one of the issues revolved around whether or not to allow the continuation of proceedings for the obtention of a rebuilding certificate in spite of the repeal of the enactment which provided for the application process. The repeal, however, had taken place only after the application process had actually been initiated.

The Court, among other questions, had to determine the extent to which the obtention of a rebuilding certificate was a "right" that allowed the continuation of a process the statutory existence of which had been removed from the statute book without being replaced.

The certificate at the origins of the proceedings could be issued or denied by the Director of Public Works, at his entire discretion. Also, on a possible appeal of the Director's decision to the Governor in Council, the latter authority was equally vested with full discretion regarding its own decision on the issue:

... the Governor in Council who may direct that a rebuilding certificate be given or be not given as he may think fit in his absolute discretion.<sup>85</sup>

Lord Morris of Borth-y-Gest dismissed the existence of a right:

But the Ordinance did not impose an obligation upon the director to give a certificate in accordance with his declared intention: it merely provided that he could not follow up his declared intention unless and until certain conditions were satisfied. Though, in the events that happened, this point does not call for decision, it would not seem that in any circumstances any right to a certificate could arise at least until, after notices given, the time for appeals by tenants and sub-tenants went by without there being any appeal.<sup>86</sup>

And, concerning the appeal to the Governor in Council, the Court went on to say:

He had no more than a hope that the Governor in Council would give a favourable decision.<sup>87</sup>

83. *Director of Public Works v. Ho Po Sang*, (1961) A.C. 901 (P.C.). See also *Free Lanka Insurance Co. v. Ranasinghe*, (1964) A.C. 541 (P.C.).

84. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.).

85. *Director of Public Works v. Ho Po Sang*, (1961) A.C. 901 (P.C.), see page 905.

86. *Id.*, see Lord Morris of Borth-y-Gest, at p. 920.

87. *Id.*, 920-921 (Lord Morris of Borth-y-Gest). See also, *Abell v. Comm'r of R.C.M.P.*, (1980) 49 C.C.C. (2d) 193 (Sask. C.A.), Bayda J.A., at pp. 205 and 208.

It did not matter that the Governor in Council eventually granted the certificate: no right had been acquired for the simple reason that the application process had been repealed before the Governor in Council made his decision. In other words, the repeal of the pertinent enactment had frustrated the entire process.

Long before the *Ho Po Sang* case, the British Court of Appeal had, in *Hamilton Gell v. White*,<sup>88</sup> offered precious guidelines toward the definition of what constitutes a right. In the instance, the *Agricultural Holdings Act, 1908*, (8 Edw. 7, c. 28, s. 11) provided that landlords giving their tenants a notice to quit the leased holdings for a wrongful cause would be liable to remit some compensation to the tenants concerned upon their leaving. Section 11 of that Act made the compensation conditional to the tenants giving their landlords, within two months after the notice to quit, a written notice of their own intention of seeking compensation. Also, tenants had to seek compensation within three months after actually quitting the leased holdings.

White was served with a notice to quit and, as was then required by section 11 of the *Agricultural Holdings Act, 1908*, the landlord was notified in writing of White's intention to claim compensation. Moreover, White initiated his claim within three months after his leaving the leased holdings. In the meantime, however, a new Act was passed requiring that tenants give the notice of their intention to claim compensation not less than one month before the termination of their tenancy; that, White did not do.

Had the tenant acquired a right sufficient to justify the carrying forward of the unclosed operation of the Act of 1908 to the face of the new Act? The Court of Appeal thought so.

Section 11 of the *Agricultural Holdings Act, 1908* read, in part, as follows:

11. Where the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit... the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements... be entitled to compensation for loss or expense directly attributable to his quitting the holding...<sup>89</sup>

Atkin L.J., described the situation in the following terms:

Here the necessary event has happened, because the landlord has, in view of a

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88. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.).

89. *Id.*, 423.

sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right", which would "accrue" when he has quitted his holding, to receive compensation.<sup>90</sup>

The concept of "right" should now be clearer. In the *Ho Po Sang* case, the rebuilding certificate had consequences attached to it that would have been of value to its holder. The Ordinance there at issue, however, provided for no objective criterion that, when met, would compel the Director of Public Works (or the Governor in Council) to issue the certificate; the decision was an absolutely discretionary one.

In the *Hamilton Gell* case, the situation was completely different. The pertinent provisions of the *Agricultural Holdings Act, 1908* precisely defined at least one instance where tenants were entitled to compensation for quitting leased holdings: 1) one had to be a tenant; 2) the tenant had to be served with a notice to quit; 3) the notice to quit had to be given without sufficient cause; 4) the tenant had to follow a given procedure; 5) and, assuming the fulfillment of all four of the foregoing conditions, the tenant was entitled to some compensation after actually quitting the leased holdings. Moreover, a competent judicial authority was, in such circumstances, under an obligation to order the payment of a compensation; no discretion was allowed in making the decision.

There lies the difference between the *Ho Po Sang* and the *Hamilton Gell* cases.

Canadian courts view the problem much through the same eyes. Thus, in *Canada Employment and Immigration Commission v. Dallialian*<sup>91</sup> the respondent, Dallialian, was already in receipt of unemployment insurance benefits when a new Act came into force shortening the length of the receipt period provided for by the previous law. By and large, Dallialian's contention was that he was entitled to his full insurance benefit notwithstanding the enactment brought in issue by the Commission. Estey J., of the Supreme Court of Canada agreed; the respondent had a right:

Here the respondent had, in such an analogy, already ceased working prior to the amendment. His rights to benefits had already arisen during a benefit period which commenced prior to the effective date of the amendment. He was in receipt of benefit payments at the effective date of the amendment. He therefore, on December 31, 1975, was enjoying a right or a privilege which had accrued under the repealed enactment and, for what it is worth, had accrued

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90. *Id.*, 431 (Atkin L.J.).

91. *Canada Employment and Immigration Commission v. Dallialian*, (1980) 2 S.C.R. 582.

by reason of his contribution which made him eligible to apply and to have a benefit period prescribed for him.<sup>92</sup>

In other words, the previous enactment provided for the payment of a premium to which, by law, was attached a benefit period, and, the fulfillment of the obligation to pay the premium entitled insured workers to an indemnity to be paid over a defined period of time in the event that they had to leave their jobs under given conditions, conditions which were met in Dallialian's case. In the circumstances, therefore, the competent authorities had no discretion in their decision to actually order the payment of the indemnity sought for.

There seems to be little risk, thus, in defining a "right" as a benefit, etc., fully circumscribed by an enactment and which judicial authorities are under an obligation to grant when all the conditions necessary to its existence have been met.<sup>93</sup>

Still, a further problem remains to be solved: what is an "acquired right"?

The answer to that question, it seems, is that a right is acquired when facts or circumstances have taken place that match all the conditions prescribed by an enactment as necessary for the existence of the said right;<sup>94</sup> this, at least, is the approach which courts took in the cases of *Abbott v. Minister of Lands*<sup>95</sup> and of *Hamilton Gell v. White*.<sup>96</sup>

Indeed, the Judicial Committee of the Privy Council answered that very question in the *Abbott* case; it did so through its Lord Chancellor:

But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.

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92. *Id.*, 594 (Estey J.).

93. This definition is not submitted as an absolute one and qualifications may be necessary. For instance rights acquired in the jurisdiction of courts only artificially meet the criteria of the suggested definition. Any consideration of that question, however, would be beyond the scope of the present essay.

94. Courts might accept to protect a right all the necessary conditions of which have not been met in cases where, for example, the situation results from the conduct of those obligated to the claiming party. This proposition is certainly supported by the existence of the expression "accruing" in paragraph 35(c) of the *Canadian Interpretation Act*. See also *In Re Kleitges and In Re Citizenship Act*, (1978) 1 F.C. 734 (Fed. C.T.D.), Walsh J., at p. 739.

95. *Abbott v. Minister of Lands*, (1895) A.C. 425 (P.C.).

96. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.).

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed". They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.<sup>97</sup>

Atkin L.J., made it even clearer in *Hamilton Gell v. White*.<sup>98</sup> Here is how he coined the effects of section 38 of the U.K. *Interpretation Act*<sup>99</sup> as that provision relates to acquired rights:

It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances, the tenant has "acquired a right", which would "accrue" when he has quitted his holding, to receive compensation.<sup>100</sup>

Thus, a right is not acquired until, at some point in time before the abolition of the said right, facts or circumstances have taken place that put the law on its way toward enforcement. This is the case whether the right considered was acquired under statute law or under the common law. In the latter case, however, section 35 of the Canadian *Interpretation Act*<sup>101</sup> will be of no avail to effect any protection for the only rights it is designed to cover are those acquired under an enactment.

Common law rights, therefore, draw their protection from the common law only and, in this regard, one should remember that some common law rights are protected even in cases where an action seeking their enforcement is actually brought after the statutory abolition of the said rights; the latter rule, at least, is certainly applicable to the right of action which can originate from an unperformed common law contract.<sup>102</sup>

97. *Abbott v. Minister of Lands*, (1895) A.C. 431 (P.C.).

98. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.).

99. *The Interpretation Act*, (1889) 52-53 Vict., c. 63, s. 38.

100. *Hamilton Gell v. White*, (1922) 2 K.B. 422 (C.A.), Atkin L.J., at p. 431; see also *Abell v. Comm'r of R.C.M.P.*, (1980) 49 C.C.C. (2d) 193 (Sask. C.A.), Bayda J.A., at p. 203.

101. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.

102. *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.).

At first glance the foregoing statement may lead one to believe that, all in all, there is not much of a difference between rights acquired at common law and those acquired under an enactment. It should not be so. Rights acquired at common law are frustrated by the repeal of the remedy or process necessary to their enforcement and those that were acquired under an enactment do survive such a repeal, for section 35 of the Federal *Interpretation Act* expressly provides for their protection.

Obviously, then, any consideration of the acquired rights dimension of section 35 that would ignore that particular type of protection would be an incomplete one and for this reason that specific question will next be discussed.

**d) Rights in the Enforcement Process Necessary to the Protection of a Right Otherwise Acquired**

Paragraphs (c), (e), and the concluding part of section 35 of the Canadian *Interpretation Act* of Canada read as follows:

35. Where an enactment is repealed in whole or in part, the repeal does not

- (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under an enactment so repealed;
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.<sup>103</sup>

As is realized from the foregoing clauses, the right to the survival of a repealed enforcement process is entirely subordinate to the existence of an antecedent acquired right, the protection of which renders that survival a necessary one. For that purpose, of course, a right as previously defined must be one that was acquired under an enactment in the meaning given to that latter expression by the *Interpretation Act*; otherwise, section 35 does not apply.

Here is how Lord Morris of Borth-y-Gest viewed the necessity of an antecedent acquired right in the *Ho Po Sang* case:

It may be therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction

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103. *The Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.



between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not.<sup>104</sup>

Two inferences emerge from the statement: 1) it is unnecessary that the entire extent of an acquired right be known before courts will allow an enforcement process to survive its own repeal; 2) and, courts will not keep an enforcement process alive so as to create a right.

The latter conclusion was specifically arrived at in *Bell Canada v. Palmer*,<sup>105</sup> an instance where the jurisdiction of a Referee with the power to order an employer to remit to his employees, retroactively to a maximum of six months, sums bridging the gap between differential levels of compensation actually paid as between the employer's female and male workers for work of similar description, was maintained in the face of an amending enactment the effect of which was to repeal the jurisdiction of the Referee. Here is Thurlow's J., opinion on the point:

Where there is no accrued right under paragraph (c) of section 35 there is, as I see it, no right under paragraph (e) to the procedure in order to create a right. But when there is, as I think there is here, an accrued right within the meaning of paragraph (c), the party entitled thereto also has the right to have the procedure carried to a conclusion as provided by paragraph (e) for the purpose of enforcing the accrued right.<sup>106</sup>

But, what is the extent of that right to the survival of a repealed enforcement process? It is a very broad one. Section 35 says that "an investigation, legal proceeding... may be instituted, continued... as if the enactment had not been so repealed." There is, then, no requirement to set the process in motion before its repeal unless, of course, setting the process in motion is the only thing that must be done in order to acquire a particular right.<sup>107</sup>

That right, however, has its limits. Actually, two sets of circumstances can be contemplated: 1) the absolute repeal of a pre-existing enforcement process or such a repeal coupled with the substitution of a new process that is incompatible either with the previous one or with the enforcement of the actual right sought to be brought to a conclusion; 2) or, the repeal of a pre-existing

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104. *Director of Public Works v. Ho Po Sang*, (1961) A.C. 901 (P.C.), see Lord Morris of Borth-y-Gest, at p. 922.

105. *Bell Canada v. Palmer*, (1974) 1 F.C. 186 (Fed. C.A.).

106. *Id.*, 193 (Thurlow J.).

107. *Haines v. A.G. for Canada*, (1979) 32 N.S.R. (2d) 271 (N.S. Sup. Ct. App. Div.), Carver J., at p. 283.

enforcement process coupled with the substitution of a new process the mechanisms of which are compatible with the enforcement of the acquired right sought to be brought to a conclusion.

In the first case, the pre-existing enforcement process is simply kept alive and the acquired right is brought to its conclusion through that process as though it had not been repealed.<sup>108</sup>

When a party faces the second set of circumstances, the acquired right at issue is brought to its conclusion under the terms of the new process, account being taken of the arrangements rendered necessary by the enactment of the new process.<sup>109</sup> The latter solution is provided for by paragraphs (c) and (d) of section 36 of the *Federal Interpretation Act*.<sup>110</sup> They read as follows:

36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
- (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;
  - (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal.<sup>111</sup>

The obvious purpose of the latter provisions is to make sure that the protection of acquired rights does not retard the actual operation of new enactments any longer than necessary.<sup>112</sup>

By and large, then, section 35 of the Canadian *Interpretation Act* almost recognizes an existing right in a repealed enforcement process insofar, of course, as such a recognition is ancillary to the protection of an acquired right of statutory origins; otherwise, the acquired right would be retrospectively frustrated by the repealing

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108. *Bell Canada v. Palmer*, (1974) 1 F.C. 186 (Fed. C.A.), see Thurlow J., at pp. 190-191. Whether or not the repealed enforcement process is put in motion before the enactment of the repealing statute would not seem to matter at all under those circumstances.

109. See *R. v. Coles*, (1970) 1 O.R. 570 (Ont. C.A.) for a consideration of circumstances of that kind.

110. *The Interpretation Act*, 1970 R.S.C., c. I-23.

111. *Id.*, subsect. 36(c) and (d). Note that subsection (d) speaks of existing rights.

112. They also have the practical effect of allowing parties to simply continue proceedings that they otherwise would have to start anew.

enactment.<sup>113</sup> Without that quasi-protection of an existing right, section 35 would not entirely achieve its purpose. Likewise, if it did generally protect existing rights, the section would be much too far-reaching and the legislative process would become all the more complex.<sup>114</sup>

But, there is something more that should be said about existing rights and the *Federal Interpretation Act*.<sup>115</sup> In the light of the following statement, however, not much will be added.

No one has a vested right in the continuance of the law as it stood in the past.<sup>116</sup>

Paragraph 36(f) and subsection 37(2) of the *Canadian Interpretation Act* more or less deal with the situation. They read as such:

36. Where an enactment (in this section called "the former enactment") is repealed and another enactment (in this section called "the new enactment") is substituted therefor,

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but, shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment.

And:

37. (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under such enactment was or was considered by Parliament or other body or person by whom the

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113. It recognizes the protection of an existing right in the sense that it carries forward the previous law itself, without any need for a previous operation thereof, to the face of some new and incompatible enactment.

114. Section 35 is also often used to support the protection of rights in the jurisdiction of courts. To the extent that section 35 can then operate to protect rights not yet put in motion, existing rights may again be said to find some kind of protection under the provision. Courts, however, attach the concept of jurisdiction to the right of action and, through that fiction, they turn an existing right into an acquired right. For instance, provisions such as section 35 can be used to keep a right of appeal alive even in situations where that right is taken away at a time when a case is still pending before the trial court. In other words, through that fiction, the entire judicial process is crystallized from the moment proceedings are initiated. See *Williams v. Irvine*, (1894) 22 S.C.R. 108, Fournier J., at p. 110; and, *Boyer v. The King*, (1948) 94 C.C.C. 259 (Sup. Ct. C.).

115. *The Interpretation Act*, R.S.C. 1970, c. I-23.

116. *Gustavson Drilling (1964) Ltd. v. M.N.R.*, (1977) 1 S.C.R. 271, Dickson J., at p. 282.

enactment was enacted to have been different from the law as it is under the enactment as amended.<sup>117</sup>

What is the actual effect of the foregoing provisions? They certainly look alike to a large extent but, they nevertheless embody two different rules.

Paragraph 36(f) is meant to codify the common law presumption to the effect that changes in the formulation of statute law within the framework of a consolidating enactment should not automatically be taken to have been meant to introduce a change in the substance of the pre-existing law. Subsection 37(2), however, is meant to reverse the common law presumption to the effect that changes in the formulation of statute law within the framework of an amending enactment should be read as indicative of a legislature's intention to bring about new law.

In practice, however, the two provisions more or less merge. Indeed, at least at the Federal level, the practice is to amend enactments by repealing and replacing the provisions of those enactments that are meant to be changed from time to time. Thus in most cases the drafting practice is covered by the opening words of section 36 with the result that paragraph 36(f) would seem to be applicable to consolidations and amendments as well. Yet, in most cases no harm is done because both provisions provide that the pre-existing law should not be deemed to have been changed unless the wording of the replacing or amending enactment is not substantially the same as that of the amended or replaced enactment.

Canadian courts have basically applied paragraph 36(f) along the foregoing lines. Thus, in *Côté v. R.*,<sup>118</sup> the Supreme Court of Canada opted for the new law solution in respect of a section of the Criminal Code which provided for only one offence where the section it repealed and replaced provided for three offences. Conversely, in *A.G. of Canada v. P.S.S.R.B.*,<sup>119</sup> the Federal Court of Appeal opted for the unaltered law solution. In the instance, the repealing and replacing enactment contained only minor changes due to other changes elsewhere in the new Act.

Thus far, retrospectivity, acquired rights and existing rights have been discussed; it seems, therefore, that the purpose of the present

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117. *The Interpretation Act*, R.S.C. 1970, c. I-23, paragraph 36(f) and subsection 37(2).

118. *Côté v. R.*, (1975) 1 S.C.R. 303. For a case on subsection 37(2), see *Rozon v. R.*, (1974) C.A. 348 (Que. C.A.).

119. *Att. Gen. of Canada v. P.S.S.R.B.*, (1977) 2 F.C. 663 (Fed. C.A.).

paper has been met. Yet, much was said and perhaps a brief review of the main conclusions of the entire paper would now be helpful. Such a review will therefore next follow.

## CONCLUSION

1. Past and fully closed operations of the common law are protected from the interference of new enactments. Those past operations of the common law draw their protection from the common law itself.<sup>120</sup>

2. Past and fully closed operations of enactments are protected from the interference of new statutes. That protection existed at common law and is codified in paragraph (b) of section 35 of the *Federal Interpretation Act*.<sup>121</sup>

3. Only clear and unambiguous language on the face of a new statute can, directly or by necessary implication, reverse the presumption against the retrospective operation of statutes. The presumption owes its strength to the common law rather than to *The Interpretation Act*, an Act the application of which can be avoided by a mere implicit intention to that effect in any particular statute that would otherwise be subject to its provisions.<sup>122</sup> The common law presumption, however, requires express language and it seems that it also requires that such language be specifically concerned with the notion of time; that is to say, the time as from which any given statute is to have effect.<sup>123</sup>

4. Rights acquired at common law are protected from the interference of new statutes, at least insofar as they are enforceable by way of a common law right of action in respect of which there is an enforcement process available. Moreover, the enforcement process must, in those particular circumstances, remain in existence until the

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120. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.).

121. *Gardner v. Lucas*, (1878) 3 A.C. 582 (H.L.); *R. v. Ali*, (1980) 1 S.C.R. 221.

122. *Gardner v. Lucas*, (1878) 3 A.C. 582 (H.L.), Cairns L.J., at p. 593; *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.), Buckley L.J., at p. 12; *The Interpretation Act*, R.S.C. 1970, c. I-23, sub. sect. 3(1) and par. 35(b).

123. *Gardner v. Lucas*, (1878) 3 A.C. 582 (H.L.), Cairns L.J., at pp. 589-590; *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.), Buckley L.J., at p. 12.

acquired rights are definitely dealt with. Indeed, the repeal of the enforcement process before a final judicial determination in respect of a common law right of action would most likely frustrate that right.<sup>124</sup>

Only clear and unambiguous language on the face of a new statute can, directly or by necessary implication, reverse that presumption. That language, it seems, should refer specifically to the rights that are meant to be affected.<sup>125</sup>

5. Rights acquired under an enactment did not enjoy any protection at all under the common law but, they are now covered by the carry-over provisions of section 35 of *The Interpretation Act*.<sup>126</sup> For this reason, much could be said for the proposition that such rights are protected only to the extent that there is not an implicit intention to the contrary within the context of the new statute against which they are set up.<sup>127</sup>

For two reasons, however, that may not necessarily be the case. In the first place, acquired rights often involve some elements of retrospectivity, elements the effect of which is to make the presumption against retrospectivity available for their protection. Also, it seems that courts view all cases of acquired rights through the lens of the common law; in other words, they are inclined to apply the express words test to rights acquired under the terms of an enactment, much as they do in the case of common law rights. Still, the latter statement should not be read as an absolute one; the possibility exists for a test of lesser force.<sup>128</sup>

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124. *Moon v. Durden*, (1848) 154 E.R. 389 (Ex.); *Upper Canada College v. Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.); to the extent that section 35 of *The Interpretation Act* applies only to rights acquired under statute law, the cases of *The Queen v. The Inhabitants of Denton*, (1852) 118 E.R. 287 (Q.B.), of *Kimbray v. Draper*, (1868) 3 Q.B. 160, of *Republic of Costa Rica v. Erlanger*, (1876) 3 Ch. 62 (C.A.) and of *Kluz v. Massey Ferguson*, (1971) 19 D.L.R. (3d) 742 (Sask. Q.B.), reversed (1972) 27 D.L.R. (3d) 496 (Sask. C.A.), (1974) S.C.R. 474, would probably combine to effect the frustration of the right.

125. *Spooner Oils Ltd. v. Turner*, (1933) S.C.R. 629, Duff C.J., at pp. 638-639.

126. *Surtees v. Ellison*, (1829) 109 E.R. 278 (K.B.); *The Interpretation Act*, R.S.C. 1970, c. I-23, sub. sect. 3(1) par. 35(c), (d), and (e) along with the concluding part of section 35.

127. See sub. sec. 3(1) of *The Interpretation Act*.

128. For support in favor of the express words test, see *Gustavson Drilling (1964) Ltd. v. M.N.R.*, (1977) 2 S.C.R. 271, Dickson J., at p. 282. In *Canada Employment and Immigration Commission v. Dallialian*, (1980) 2 S.C.R. 582, however, the Supreme Court of Canada certainly did not speak of an express words test.

6. Rights existing at common law are protected from the interference of statute law in the sense that statutes are presumed not to be intended to effect a departure from the common law, unless they contain indications to the contrary effect.<sup>129</sup>

7. Section 35 of the Canadian *Interpretation Act* virtually guarantees the protection of an existing right in a repealed enforcement process, insofar as it is necessary to protect a right otherwise acquired under an enactment covered by that Act.<sup>130</sup>

8. Rights existing under an enactment are not protected per se. In their case, it may be helpful to refer to paragraph 36(f) and to subsection 37(2) of the Federal *Interpretation Act*.<sup>131</sup>

9. The protection of existing rights is a question concerned with the meaning and scope of a new statute and not with the time as from which such a statute is to have effect.<sup>132</sup> Hence, a general intention appearing from the entire context of a new statute passed repealing and replacing an earlier one would be sufficient to defeat a claim to an existing right as contained in the replaced enactment.<sup>133</sup>

Of course, the foregoing conclusions hold only if the definitions previously given of retrospectivity, of acquired rights and of existing rights are sound in law. In this respect, the least that can be said is that those definitions certainly had the merits of matching the reality covered by the present paper. Quite likely also, they could match a much broader reality and, a deed not to be neglected, they do away with a lot of confusion.

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129. S.G.G. EDGAR, *Craies on Statute Law*, 7th Ed., London, Sweet and Maxwell, 1971, pp. 338-340; *Leach v. R.*, (1912) A.C. 305 (H.L.).

130. *Director of Public Works v. Ho Po Sang*, (1961) A.C. 901 (P.C.); *Bell Canada v. Palmer*, (1974) 1 F.C. 186 (Fed. C.A.).

131. S.G.G. EDGAR, *op. cit.*, note 129, 142-146; *Côté v. R.*, (1975) 1 S.C.R. 303; *Att. Gen. of Canada v. P.S.S.R.B.*, (1977) 2 F.C. 663 (Fed. C.A.); *Rozon v. R.*, (1974) C.A. 348 (Que. C.A.).

132. *West v. Gwynne*, (1911) 2 Ch. 1 (C.A.), Buckley L.J., at p. 12.

133. *The Interpretation Act*, R.S.C. 1970, c. I-23, sub. sec. 3(1) and par. 36(f).